

2025 OK 9

**KELLY PATRICK DONALDSON,
Plaintiff/Appellee,**

v.

**CITY OF EL RENO, a political subdivision of
the State of Oklahoma,
Defendant/Appellant,**

**and STATE OF OKLAHOMA, Intervening
Appellant.**

No. 120617

Supreme Court of Oklahoma

February 4, 2025

THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION. UNTIL
RELEASED, IT IS SUBJECT TO REVISION OR
WITHDRAWAL.

ON APPEAL FROM THE DISTRICT
COURT OF CANADIAN COUNTY, STATE OF
OKLAHOMA HONORABLE JACK D. McCURDY
II, DISTRICT JUDGE

Alan M. Taylor, William Blocker, Keenan
P. Haught, Palmer Law, Ada, Oklahoma, for
Plaintiff/Appellee.

Jana L. Knott, Bass Law, P.C., Oklahoma
City, Oklahoma, for Defendant/Appellant.

Zach West, William Flanagan, Office of the
Attorney General of the State of Oklahoma, for
Intervenor State of Oklahoma.

Daniel McClure, Christian Rinehart,
Oklahoma City, Oklahoma, for amicus curiae The
Oklahoma Municipal League.

KANE, J.

¶0 When Plaintiff/Appellee Kelly Patrick
Donaldson was convicted of second degree rape
and became subject to the Sex Offenders
Registration Act (SORA) in 2005, SORA did not
prohibit sex offenders from residing near parks.

The Oklahoma Legislature subsequently
amended 57 O.S., § 590 to prohibit sex offenders
from residing within 2,000 feet of a city park.
Defendant/Appellant City of El Reno appeals
from the trial court's entry of a declaratory
judgment that applying the current residency
restrictions in 57 O.S.Supp.2019, § 590 (A) to
Donaldson violates the ex post facto clause of
the federal and state constitutions and that the
version of SORA in effect on the date of his
conviction applies. We hold that the residency
restrictions do not amount to punishment;
therefore, applying the current residency
restrictions to Donaldson does not violate the ex
post facto clause.

¶1 Title 57, § 590 of the Sex Offenders
Registration Act (SORA) prohibits sex offenders
from residing within a 2,000-foot radius of a city
park and certain other locations. The issue
presented is whether applying the current
residency restrictions to a sex offender who
became subject to SORA prior to the enactment
or amendment of the law violates the ex post
facto clause of either the United States
Constitution or the Oklahoma Constitution. We
hold it does not. The current residency
restrictions in 57 O.S.Supp.2019, § 590 (A) apply
to all sex offenders, regardless of when they
became subject to the provisions of SORA.

FACTS AND PROCEDURAL HISTORY

¶2 Plaintiff/Appellee Kelly Patrick
Donaldson was charged with first degree rape,
in violation of 21 O.S.2001, § 1114 (A)(1), in
CF-2005-59, in Woodward County District Court.
At the time of the commission of the crime,
Donaldson was 25 years-old and the victim was
under the age of 14. On April 20, 2005,
Donaldson pled guilty to second degree rape, in
violation of 21 O.S.2001, § 1114 (B). Donaldson
was sentenced to fifteen years in prison with all
but the first six years suspended. As a result of
his conviction, he became subject to the
provisions of SORA. ^[1] Donaldson was designated
as an aggravated sex offender and is required to
register and comply with the provisions of SORA
for life. ^[2]

¶3 Donaldson was initially released from

prison and began registering as a sex offender in December 2007. He was arrested again on June 15, 2009 and charged with plotting to murder his probation officer in CF-2009-329, in Bryan County District Court. In September 2012, Donaldson pled no contest and was sentenced to ten years in prison to run concurrently with the sentence on the rape conviction. The District Court of Woodward County revoked Donaldson's suspended sentence on the rape conviction on December 12, 2012. Donaldson was released from prison on or around December 31, 2015, at which time he registered as a sex offender and moved into an apartment in Oklahoma City.

¶4 On December 17, 2021, Donaldson inquired with the El Reno Police Department whether he could live at a residence in El Reno, Oklahoma. The El Reno Police Department advised him that he could not reside on the property, because 57 O.S.Supp.2019, § 590 (A) prohibited registered sex offenders from residing within a 2,000-foot radius of a city park, and the property was located 310 feet from Lake El Reno, which Defendant/Appellee City of El Reno contends is a park owned, operated, and maintained by the City.

¶5 Despite the El Reno Police Department's admonition, Donaldson purchased the property. He then filed the underlying action against the City seeking a declaratory judgment that applying the 2019 version of the residency restrictions to him violated the ex post facto clauses in Article 1, § 10 of the United States Constitution and Article 2, § 15 of the Oklahoma Constitution.

¶6 The parties filed competing motions for summary judgment. Donaldson argued that the law in effect on the date of his conviction applied, and, on April 20, 2005, SORA did not prohibit registered sex offenders from residing within 2,000 feet of a park. See 57 O.S.Supp.2004, § 590 (only prohibited living within a 2,000-foot radius of any public or private school site or educational institution). The Oklahoma Legislature amended SORA one year later to prohibit sex offenders from residing within 2,000 feet of a park. See 2006 Okla. Sess. Laws, ch. 284, § 11 (eff. June 7, 2006) (codified

as 57 O.S.Supp.2006, § 590). Donaldson's position was that because the Oklahoma Supreme Court, in *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004, determined SORA's effects were punitive, subsequent amendments to the residency restrictions retroactively imposed or increased his punishment in violation of the ban on ex post facto laws. City argued *Starkey* did not decide the constitutionality of the residency restrictions. City contended that the residency restrictions were nonpunitive, civil regulations, and, therefore, applying the current law to persons who became subject to SORA before the effective date of the amendments did not violate the ex post facto clause of either the federal or state Constitution.

¶7 Donaldson further argued that, even if the court found the current residency restrictions applied to him, Lake El Reno is not a "park" for purposes of 57 O.S.Supp.2019, § 590 (A). The City argued that it was undisputed that Donaldson's property was located approximately 310 feet of the nearest property line of Lake El Reno and that Lake El Reno constitutes a "park" for purposes of 57 O.S.Supp.2019, § 590 (A).

¶8 The trial court granted summary judgment to Donaldson. The trial court concluded the residency restrictions were so punitive in nature that applying the 2019 version of 57 O.S., § 590 to Donaldson would violate both the federal and state prohibitions against ex post facto laws. See U.S. Const. art. 1, § 10; Okla. Const. art. 2, § 15. Relying on *Starkey and Graham v. Carrington Place Property Owners Ass'n*, 2019 OK CIV APP 33, 456 P.3d 1137, the trial court found the version of the law in effect at the time of Donaldson's conviction controlled and, on April 20, 2005, SORA did not prohibit sex offenders from residing within 2,000 feet of a city park. The trial court found that, because the residency restrictions did not apply to Donaldson, the issue of whether Lake El Reno was a park was moot.

¶9 City appeals. This Court granted Donaldson's motion to retain the appeal and ordered additional briefing. The Oklahoma Attorney General intervened in the appeal, and

the Oklahoma Municipal League was permitted to file a brief as amicus curiae. Oral arguments were heard by the Court en banc on November 30, 2023.

STANDARD OF REVIEW

¶10 The constitutionality, construction, and application of a statute are questions of law to be reviewed de novo. *See Lee v. Bueno*, 2016 OK 97, ¶ 6, 381 P.3d 736, 739. In exercising *de novo* review, "this Court possesses plenary, independent, and non-deferential authority to examine the issues presented." *Id.* ¶ 6, 381 P.3d at 740. When determining the constitutionality of a statute, "courts are guided by well-established principles, and a heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality." *Id.* ¶ 7, 381 P.3d at 740. Legislative enactments are presumed to be constitutional. *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 18, 148 P.3d 842, 848. The party seeking a ruling that a statute is unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution. *See Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188.

ANALYSIS

I. Ex Post Facto Laws

¶11 Article I, § 10 of the United States Constitution provides, in pertinent part: "No State shall... pass any Bill of Attainder, ex post facto Law..." ^[3]/sup> Likewise, Article 2, § 15 of the Oklahoma Constitution provides, in pertinent part: "No bill of attainder, ex post facto law... shall ever be passed."

¶12 The prohibitions on ex post facto laws bar the enactment of any law which (1) retroactively imposes punishment for an act that was not punishable when committed; (2) retroactively increases the punishment for a crime after its commission; or (3) deprives one charged with a crime of a defense that was available at the time the crime was committed.

See Collins v. Youngblood, 497 U.S. 37, 42 (1990) (citing *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)); *Starkey*, 2013 OK 43, ¶ 37, 305 P.3d at 1018 (citing definitions from *Collins* and *Beazell*). "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins*, 497 U.S. at 43.

II. The Legislature Intended for the Residency Restrictions to Apply Retroactively

¶13 The Oklahoma Legislature first adopted residency restrictions for sex offenders in 2003. The first rendition prohibited registered sex offenders from residing within a 2,000-foot radius of a public or private school or educational institution. *See* 2003 Okla. Sess. Laws, ch. 223, § 1 (eff. Nov. 1, 2003) (codified as 57 O.S.Supp.2003, § 590). ^[4] When Donaldson was convicted of second degree rape, that was the law. *See* 57 O.S.Supp.2004, § 590. Section 590 did not prohibit registered sex offenders from living within 2,000 feet of a park until the Legislature expanded the residency restrictions in June 2006. ^[5] The residency restrictions have since been amended numerous times. ^[6] Title 57, § 590(A) currently provides:

It is unlawful for any person registered pursuant to the Sex Offenders Registration Act to reside, either temporarily or permanently, within a two-thousand-foot radius of any public or private school site, educational institution, property or campsite used by an organization whose primary purpose is working with children, a playground or *park that is established, operated or supported in whole or in part by a homeowners' association or a city, town, county, state, federal or tribal*

government, a licensed child care center or family child care home as defined in the Oklahoma Child Care Facilities Licensing Act or the residence of his or her victim. Establishment of a licensed child care center, family child care home or park in the vicinity of the residence of a registered sex offender will not require the relocation of the sex offender or the sale of the property. On June 7, 2006, the distance indicated in this section shall be measured from the nearest property line of the residence of the person to the nearest property line of the public or private school site, educational institution, property or campsite used by an organization whose primary purpose is working with children, playground, park, licensed child care center, family child care home or residence of his or her victim; provided, any nonprofit organization established and housing sex offenders prior to the effective date of this provision shall be allowed to continue its operation.

Nothing in this provision shall require any person to sell or otherwise dispose of any real estate or home acquired or owned prior to the conviction of the person as a sex offender.

57 O.S.Supp.2019, § 590 (A) (eff. Nov. 1, 2019) (emphasis added).

¶14 The issue is whether the current version of 57 O.S., § 590 (A) applies to Donaldson, a person who was convicted and

required to register under SORA prior to the Legislature amending the statute to prohibit sex offenders from living within a 2,000-foot radius of a park. We begin by looking at the statutory language to determine whether the Legislature even intended for the amendments to apply retroactively to persons required to register prior to the new restrictions going into effect. If it did not, the analysis ends there. The ex post facto clause prohibits retroactively imposing or increasing punishment. If the Legislature intended for the amended residency restrictions to apply only prospectively to sex offenders required to register on or after the amendment's effective date, there can be no ex post facto issue.^[7] But, if the Legislature intended that the new residency restrictions also apply to sex offenders who were required to register prior to the effective date of the amendment, an ex post facto analysis is warranted.

¶15 Amendments to the law are generally presumed to operate prospectively unless the Legislature's intent to give it retrospective effect is expressly declared or it is necessarily implied from the language in the statute. *See Dolese Bros. Co. v. State ex rel. Okla. Tax Comm'n*, 2003 OK 4, ¶ 8, 64 P.3d 1093, 1097; *Wickham v. Gulf Oil Corp.*, 1981 OK 8, ¶ 13, 623 P.2d 613, 615-616; *Good v. Keel*, 1911 OK 264, ¶ 4, 116 P. 777, 777. "If there is any doubt, it must be resolved against retroactivity." *Dolese*, 2003 OK 4, ¶ 8, 64 P.3d at 1097 (citations omitted); *see Good*, 1911 OK 264, ¶ 4, 116 P. at 777.

¶16 We find the Legislature intended for the residency restrictions, as amended, to apply retroactively to sex offenders who were already required to register prior to the effective date of the amendment.^[8] The Legislature did not make an express declaration. However, the legislative intent to give the statute retroactive effect is necessarily implied by the language used: "It is unlawful for *any person registered* pursuant to the Sex Offenders Registration Act to reside...."

57 O.S.Supp.2019, § 590 (A) (emphasis added). This language was included when the residency restrictions were originally enacted in 2003, when the Legislature first added a park restriction in 2006, and in every version through the most recent amendments in 2019. The language "any person registered" clearly indicates the residency restrictions apply to all sex offenders required to register under SORA. That includes persons already registered when the law goes into effect and persons who will be required to register after the effective date of the amendments. The legislative intent is that all sex offenders, regardless of when they first become subject to the provisions of SORA, are to comply with the amended residency restrictions.

¶17 The pertinent question then becomes: are the residency restrictions punitive? If the residency restrictions are punitive, the amendment cannot be applied retroactively, because the ex post facto clause prohibits retroactively imposing or increasing punishment for a crime. But if the residency restrictions are not punitive, the ex post facto clause is not implicated, and it is within the Legislature's discretion to give the provisions retroactive effect.

III. Intent-Effects Test

¶18 In the seminal case *Smith v. Doe*, 538 U.S. 84 (2003), the United States Supreme Court set forth what has become known as the "intent-effects" test for determining whether the retroactive application of sex offender registration laws violates the ex post facto clause of the United States Constitution. We adopted this test in *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, ¶ 41, 305 P.3d 1004, 1019.

¶19 The ex post facto clause applies only to criminal or penal laws. Therefore, the initial inquiry is whether the legislature intended for

the provision to be civil or criminal. *Smith*, 538 U.S. at 92-93; *Starkey*, 2013 OK 43, ¶ 41, 305 P.3d at 1019-20. If the legislature intended to impose punishment, it is criminal, and the ex post facto clause prohibits its retroactive application. *Id.* But, if the legislature intended for the provision to be part of a civil, non-punitive regulatory scheme, we apply the intent-effects test to determine whether the civil, regulatory provision is so punitive, either in purpose or effect, as to negate that intent. See *Smith*, 538 U.S. at 92 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)); *Starkey*, 2013 OK 43, ¶ 41, 305 P.3d at 1020. In evaluating the punitive effects of the law, both the United States Supreme Court and the Oklahoma Supreme Court consider five of the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963):

(1) whether the law imposes an affirmative disability or restraint;

(2) whether it has been historically regarded as a punishment;

(3) whether its operation promotes the traditional aims of punishment--retribution and deterrence;

(4) whether it has a rational connection to a non-punitive purpose; and

(5) whether it is excessive in relation to this purpose.

Smith, 538 U.S. at 97; *Starkey*, 2013 OK 43, ¶

46, 305 P.3d at 1021. For challenges based on the Oklahoma Constitution, this Court considers two additional factors ^[9] from *Mendoza-Martinez*:

(6) whether it is incumbent only on a finding of scienter; and

(7) whether the behavior to which it applies is already a crime.

Starkey, 2013 OK 43, ¶ 46, 305 P.3d at 1021. The factors listed are "neither exhaustive nor dispositive." *Smith*, 538 U.S. at 97 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)); see *Starkey*, 2013 OK 43, ¶ 46, 305 P.3d at 1021. In weighing the *Mendoza-Martinez* factors, the United States Supreme Court has said: "Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (internal quotations and citations omitted); see *Starkey*, 2013 OK 43, ¶ 77, 305 P.3d at 1030. ^[10] If the punitive effects do not clearly outweigh the non-punitive intent, the law is civil, and the ex post facto clause does not prohibit the retroactive application of civil laws.

IV. *Starkey v. Oklahoma Department of Corrections*

¶20 We agree with City that *Starkey* is not dispositive of the issue presented in this case. Mr. Starkey pled nolo contendere to sexual assault of a minor child and received a deferred judgment in Texas in 1998. See *Starkey*, 2013 OK 43, ¶ 1, 305 P.3d at 1008-09. Mr. Starkey entered and intended to remain in Oklahoma in 1998, at which time he became subject to the provisions of SORA. *Id.* ¶¶ 2-3, at 1009 (citing 57

O.S.Supp.1997 & Supp.1998, § 582; 57 O.S.Supp.1997, § 583). When Mr. Starkey first became subject to SORA in 1998, he was required to register for ten years. See 57 O.S.Supp.1997, § 583(C)-(D). In 2004, amendments to 57 O.S., § 583 effectively extended Starkey's registration period to twenty years. See 57 O.S.Supp.2004, § 583(C)-(D), (F); *Starkey*, 2013 OK 43, ¶ 33, 305 P.3d at 1017. Then, in 2007 and 2008, the Oklahoma Legislature amended SORA by adopting a risk level assignment system that applied to sex offenders convicted in Oklahoma and sex offenders with convictions in other jurisdictions who move to Oklahoma, respectively. See 57 O.S.Supp.2007 & Supp.2008 §§ 582.1-582.5; *Starkey*, 2013 OK 43, ¶¶ 4-5, 305 P.3d at 1010. Just before Mr. Starkey's ten-year registration period was set to expire, the Oklahoma Department of Corrections (DOC) assigned him level 3, which required him to register for life. See *Starkey*, 2013 OK 43, ¶ 8, 305 P.3d at 1010; see also 57 O.S.Supp.2008, § 583 (B)-(D). The issue in *Starkey* was whether applying these amendments, which had the effect of extending Starkey's registration period from ten years to life, retroactively increased his punishment.

¶21 In *Starkey*, we adopted *Smith's* analytical framework for evaluating ex post facto challenges under the Oklahoma Constitution. See *Starkey*, 2013 OK 43, ¶ 41, 305 P.3d at 1019. However, our analysis of SORA under the ex post facto clause of the Oklahoma Constitution reached the opposite conclusion of the United States Supreme Court in its analysis of Alaska's act under the federal ex post facto clause in *Smith*. ^[11] The *Starkey* Court determined that the cumulative effects of SORA's requirements and restrictions were punitive and outweighed SORA's nonpunitive purpose. *Id.* ¶ 77, at 1030. Therefore, applying amendments that *extended a sex offender's registration period* retroactively increased the

sanctions imposed in violation of the ex post facto clause of the Oklahoma Constitution. *Id.* ¶¶ 78-79, at 1030. In the simplest terms, *Starkey* says the State can't keep moving the finish line.

¶22 The issue presented in *Starkey* is not presented in this appeal. Donaldson admits that at the time of his conviction, the law provided he was to be designated as an aggravated sex offender and that he is required to register for life. Donaldson does not contend that subsequent amendments to the residency restrictions in 57 O.S., § 590 extended his registration period. Rather, the issue currently before this Court is whether the retroactive application of subsequent amendments to 57 O.S., § 590, which prohibit sex offenders from living within 2,000 feet of a city park, are punitive.

¶23 We did not determine, in *Starkey*, that the residency restrictions in 57 O.S.Supp.2012, § 590 (A) or any of the other individual requirements imposed by SORA were punitive and violated the ex post facto clause of the Oklahoma Constitution. The *Starkey* Court emphasized that "[o]ur scope is focused on the constitutionality of retroactively extending SORA registration.... Having found SORA's effects to be punitive, we find the retroactive extension of its registration period violates the prohibition on ex post facto laws provided in Article 2, § 15 of the Oklahoma Constitution." *Starkey*, 2013 OK 43, ¶ 79, 305 P.3d at 1030 (emphasis in original). In applying the intent-effects test, the court looked at SORA's various requirements--including residency restrictions--and their cumulative effects to determine if extending the registration period was punitive. The residency restrictions in 57 O.S., § 590 were taken into account when the Court evaluated three of the seven *Mendoza-Martinez* factors--affirmative disability or restraint,^[12] sanctions that have been historically considered punishment,^[13] and deterrence and retribution as traditional aims of

punishment.^[14] However, while observing that these factors weighed in favor of a punitive effect, the Court was careful to state that it was not determining the constitutionality of the residency restrictions or any of the other individual requirements assessed as part of the intent-effects analysis. *See Starkey*, 2013 OK 43, ¶ 57, 305 P.3d at 1025 ("We do not make any determination of the constitutionality of any of the individual registration requirements but have reviewed the requirements in their totality to address the cumulative effect on the issue of the first *Mendoza-Martinez* factor and the punitive effect of the act in its totality."); *id.* ¶ 61, 305 P.3d at 1026 ("Again, we are not making a determination of the constitutionality of any of these individual registration requirements but for purposes of analyzing the second *Mendoza-Martinez* factor we find the totality of these requirements weigh in favor of punishment."); *see also Fry v. State ex rel. Dep't of Corr.*, 2017 OK 77, ¶ 5, 404 P.3d 38, 40 ("The *Starkey* case did not purport to prohibit the retroactive effect of every provision in the Sex Offenders Registration Act.").

¶24 We reject Donaldson's argument and the trial court's conclusion that *Starkey* says--for every provision of SORA--the version in effect on the date of his conviction applies. This conclusion is beyond the scope of *Starkey* and its progeny. The so-called "date of conviction" rule was born out of *Starkey*. The *Starkey* Court concluded that, because the ex post facto clause prohibited the Legislature from giving retroactive effect to amendments having the effect of extending the registration period, the version of SORA in effect when Mr. *Starkey* became subject to SORA determined the length of his registration period. *See Starkey*, 2013 OK 43, ¶ 82, 305 P.3d at 1031. If, as in *Starkey*, the conviction is in a foreign jurisdiction, the offender becomes subject to the provisions of SORA when he or she voluntarily enters and

intends to remain in Oklahoma after the conviction. *Id.* If the conviction is in Oklahoma, the offender becomes subject to the provisions of SORA on the date of his or her conviction. See *Cerniglia v. Okla. Dep't of Corrs.*, 2013 OK 81, ¶ 6, 349 P.3d 542, 544 (clarifying *Starkey*). This is commonly referred to as the "date of conviction" rule even when an offender becomes subject to SORA by entering the state. The date of conviction rule has been applied to determine whether a person is required to register, the length of the registration period, whether the level assignment system applies, and how frequently the offender must verify his or her registration information. ^[15]

¶25 *Starkey* and the date of conviction rule tell us that the law in effect on April 20, 2005--the date of Donaldson's conviction--determines if and for how long Donaldson is subject to SORA. And, as discussed above, that is not in dispute.

¶26 *Starkey* is not dispositive of the issue presented in this case: whether the statute prohibiting a registered sex offender from residing within a 2,000-foot radius of a city park is punitive. A separate analysis of this specific provision is required.

V. Step One of the Intent-Effects Test: Did the Legislature Intend for the Residency Restrictions to be Civil or Criminal?

¶27 We will now apply the analytical framework established in *Smith* and adopted by this Court in *Starkey* to determine whether the residency restrictions in 57 O.S.Supp.2019, § 590 (A) are punitive and constitute retroactive punishment in violation of the ex post facto clause of the Oklahoma Constitution.

¶28 Our initial inquiry in the intent-effects test is whether the legislature intended for the provision to be civil or criminal. See *Smith*, 538 U.S. at 92-93; *Starkey*, 2013 OK 43, ¶ 41, 305

P.3d at 1019. Section 581 of SORA provides:

The Legislature finds that sex offenders who commit other predatory acts against children and persons who prey on others as a result of mental illness pose a high risk of re-offending after release from custody. The Legislature further finds that the privacy interest of persons adjudicated guilty of these crimes is less important than the state's interest in public safety. The Legislature additionally finds that a system of registration will permit law enforcement officials to identify and alert the public when necessary for protecting the public safety.

57 O.S.Supp.1997, § 581 (B). In *Starkey*, this Court recognized "[t]he non-punitive objective revealed in § 581 is to protect the public from sex offenders re-offending after release from custody." 2013 OK 43, ¶ 70, 305 P.3d at 1028. The Legislature did not label SORA as "civil." However, we find the legislative intent of SORA is not to punish. Rather, 57 O.S., § 590 and amendments thereto, which prohibit sex offenders from living near areas where children congregate, are part of the civil, regulatory system intended to reduce recidivism and protect the public, specifically children. ^[16]

VI. Step Two of the Intent-Effects Test: Are the Residency Restrictions So Punitive, Either in Purpose or Effect, as to Negate that Civil Intent?

¶29 Next, we must weigh whether the effects of the residency restrictions are so punitive as to negate the civil intent. See *Smith*, 538 U.S. at 92; *Starkey*, 2013 OK 43, ¶¶ 41, 46, 305 P.3d at 1020-21. "[O]nly the 'clearest proof'

will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92; *see Starkey*, 2013 OK 43, ¶ 77, 305 P.3d at 1030. We evaluate the punitive effects of § 590(A) by applying the *Mendoza-Martinez* factors.

(1) Whether the law imposes an affirmative disability or restraint

¶30 Unlike imprisonment,--"the paradigmatic affirmative disability or restraint"--the residency restrictions do not impose any physical restraints. *Smith*, 538 U.S. at 100. The residency restrictions in 57 O.S., § 590 limit where Donaldson can live, but they do not limit where he can go. Nonetheless, limiting where sex offenders can live imposes a disability or restraint. While minor and indirect restraints are unlikely to have a punitive effect, *see Starkey*, 2013 OK 43, ¶ 47, 305 P.3d at 1021 (citing *Smith*, 538 U.S. at 100), we agree with Donaldson that restraints on where a person may reside are significant and direct. We do not reach this conclusion based on evidence that Donaldson and other sex offenders cannot procure appropriate housing due to a large geographic area being restricted by 57 O.S.Supp.2019, § 590 (A). Donaldson produced no such evidence. Donaldson claims a 50% reduction in housing and that the residency restrictions "freeze out" offenders from large swaths of communities. However, he has failed to cite any authority or evidence in the record to support his arguments. Rather, we find restraints on where one may reside are significant and direct because a person spends a substantial amount of time at his or her residence. Furthermore, a home is not simply a shelter; it is deeply personal and the center of daily living. Personal preference, affordability, and the specific needs of the household determine the type, size, price, style, and location of one's residence.

¶31 We find the residency restrictions impose some degree of affirmative disability or restraint on Donaldson and other sex offenders, which weighs in favor of a punitive effect. ^[17] However, this factor, alone, does not make the statute punitive. "[T]he imposition of an affirmative restraint 'does not inexorably lead to the conclusion that the government has imposed punishment.'" *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997))." After all, many civil regulations impose an affirmative disability or restraint. For instance, zoning regulations impose similar restraints upon citizens. The degree of restraint must be balanced against the Oklahoma Legislature's countervailing non-punitive purpose. *See id.*

(2) Whether it has been historically considered punishment

¶32 Donaldson points to this Court's acknowledgment in *Starkey* that the residency restrictions are analogous to the traditional punishment of banishment. *See Starkey*, 2013 OK 43, ¶ 60, 305 P.3d at 1025-26. Persuaded by a Kentucky Supreme Court's decision with respect to this single factor, we concluded:

In analyzing this *Mendoza-Martinez* factor, the Supreme Court of Kentucky determined a similar residency restriction was "regarded in our history and traditions as punishment." The court found the restriction expels registrants from their homes even if they resided there prior to the statute's enactment. The Oklahoma version of SORA is even more restrictive than the Kentucky law because the restrictive distance is twice as large as Kentucky's one-thousand-foot distance.

The expulsion from one's residence is likewise analogous to the traditional punishment of banishment. Again, we are not making a determination of the constitutionality of any of these individual registration requirements but for purposes of analyzing the second *Mendoza-Martinez* factor we find the totality of these requirements weigh in favor of punishment.

Starkey, 2013 OK 43, ¶¶ 60-61, 305 P.3d at 1026 (citing *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009)).

¶33 First, it is important to note that Donaldson is not being forced to move from his residence. Donaldson was convicted and became subject to SORA in 2005. When SORA was first amended to prohibit residing within 2,000 feet of a park in 2006, Donaldson did not own or live on the subject property. Nor did he own or live on the subject property at any time when 57 O.S., § 590 was subsequently amended through the most recent amendment in 2019. Donaldson did not seek to live in the restricted area until 2021--sixteen years after his conviction and fifteen years after the Oklahoma Legislature amended the statute to prohibit sex offenders from living within a 2,000-foot radius of a park. Consequently, the Kentucky case, which found residency restrictions that expelled sex offenders from their homes *even if they lived there prior to the statute's enactment* were punitive, is not persuasive here.

¶34 Second, the residency restrictions in 57 O.S.Supp.2019, § 590 (A) do not amount to banishment. The Tenth Circuit discussed the history of banishment at length in *Shaw v. Patton*, 823 F.3d 556, 566-568 (10th Cir. 2016). See also *McGuire v. Marshall*, 50 F.4th 986,

1008-09 (11th Cir. 2022). The cornerstones of banishment are the "complete expulsion from a community" and "prohibiting offenders from even being present in the restricted area." *Shaw*, 823 F.3d at 567-68. With this deeper understanding of the historic punishment of banishment, we find that SORA's residency restrictions do not amount to banishment. Section 590(A) does not expel sex offenders from entire communities or ban them from being present in city parks or playgrounds or visiting a home within the restricted area. The *Starkey* Court recognized as much when it noted that "the offender is prohibited from residing on the property (ostensibly allowing a registered offender the ability to be at the residence, but not "reside" on the property)." *Starkey*, 2013 OK 43, ¶ 60, 305 P.3d at 1026. As the City points out, 57 O.S., § 590 (A) does not prohibit Donaldson from recreating or accessing the facilities at Lake El Reno. The statute only prevents him from establishing a residence in the restricted areas. Furthermore, Donaldson has not put forth any evidence that the scope of the residency restrictions would, effectively, prevent him from residing anywhere within the community of El Reno. We find that, upon closer inspection, this factor does not support a punitive effect.

(3) Whether it is incumbent only on a finding of scienter

¶35 Most, but not all, of the enumerated offenses triggering SORA require scienter. See 57 O.S., § 582; *Starkey*, 2013 OK 43, ¶ 62, 305 P.3d at 1026-27. This factor is given little weight and does not support a finding that the statute is punitive. See *id.*; *Smith*, 58 U.S. at 105.

(4) Whether its operation promotes the traditional aims of punishment-- retribution and deterrence

¶36 The *Starkey* opinion alludes to § 590

for a third and final time when the Court observes that SORA promotes deterrence through the threat of negative consequences, such as eviction and living restrictions. See *Starkey*, 2013 OK 43, ¶ 63, 305 P.3d at 1027. But the Court also warns that "[m]erely because a statute may deter future crimes does not in and of itself impose a punishment." *Id.* (citing *Smith*, 538 U.S. at 102). We agree with this sentiment and several federal appellate courts which have found such an indirect promotion of deterrence does not weigh strongly in favor of a punitive effect. See *Shaw*, 823 F.3d at 571; *Miller*, 405 F.3d at 720; *Hatton v. Bonner*, 356 F.3d 955, 965 (9th Cir. 2004). After all, many civil laws deter crime without imposing punishment. See *Smith*, 538 U.S. at 102. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal'... would severely undermine the Government's ability to engage in effective regulation." *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 105 (1997)). We find any deterrent purpose is merely incidental. The purpose of the residency restrictions is not so much to deter the commission of the original sex offense that triggered SORA as it is to deter or, more accurately, prevent the sex offender from committing another sex offense in the future. It is the threat of being imprisoned (if caught and convicted) that is intended to deter the original sex crime--not restrictions on where you can live after being released.

¶37 "A statute is retributive if it is intended to express condemnation for a crime and to restore moral balance." *Shaw*, 823 F.3d at 571 (citing *Graham v. Florida*, 560 U.S. 48, 71 (2010)). Parroting *Starkey* and the Kentucky Supreme Court, *Donaldson* argues that, because the residency restrictions apply across the board without any consideration given to what danger a registrant poses to children, it begins to look like retribution for past crimes rather than a

regulation intended to prevent future ones. See *Starkey*, 2013 OK 43, ¶¶ 65-67, 305 P.3d at 1027-28 (citing *Baker*, 295 S.W.2d at 444). Again, the Court's conclusion in *Starkey* was that extending the number of years one is subject to all of SORA's obligations--not just the residency restrictions--was retributive and weighed in favor of a punitive effect. While it is conceivable that the residency restrictions reflect some degree of societal condemnation, we agree with the Tenth Circuit that prohibiting sex offenders from living within 2,000 feet of certain locations where children are often present is not an expression of condemnation that is sufficiently clear or strong enough to negate the legislature's non-punitive intent. See *Shaw*, 823 F.3d at 571.

(5) Whether the behavior to which it applies is already a crime

¶38 The residency restrictions--like all provisions of SORA--only apply to people convicted of certain crimes. See 57 O.S.Supp.2020, § 582. We recognized in *Starkey* "the fact that SORA applies only to behavior that is already a crime supports the conclusion this *Mendoza-Martinez* factor has a punitive effect." *Starkey*, 2013 OK 43, ¶ 68, 305 P.3d at 1028. However, this factor should be given little weight. As the United States Supreme Court said "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation." *Smith*, 538 U.S. at 105. The Supreme Court of Iowa astutely observed:

The Iowa sex offender registry statute hinges upon a criminal conviction, and thus applies to conduct that is already a crime.

However, we find Smith reasoning persuasive. When reducing recidivism is the nonpunitive goal, using a conviction of a sexual offense is a natural and nonsuspect means of achieving that goal. Thus, while this factor weighs in favor of finding the scheme punitive, it does so only slightly.

In Interest of T.H., 913 N.W.2d 578, 594 (Iowa 2018).

(6) Whether it has a rational connection to a nonpunitive purpose

¶39 SORA's rational connection to its nonpunitive regulatory purpose is "a most significant factor" in the intent-effects test. *Smith*, 538 U.S. at 102 (citing *United States v. Ursery*, 518 U.S. 267, 290 (1996)) (emphasis added). In *Starkey*, the Court said: "The protection of its citizens is a basic obligation of state government. Our evaluation of the sixth *Mendoza-Martinez* factor concludes SORA does advance a non-punitive purpose of public safety." *Starkey*, 2013 OK 43, ¶ 69, 305 P.3d at 1028. As the *Shaw* court observed, the Oklahoma legislature's strategy is to reduce sex offenders' temptations and opportunities to re-offend through residency restrictions. See *Shaw*, 823 F.3d at 574. Donaldson concedes that the residency restrictions have a rational connection to the provision's non-punitive objectives of protecting the public by reducing recidivism. This factor weighs heavily in favor of a finding that the residency restriction's effects are not punitive.

(7) Whether it is excessive in relation to this purpose

¶40 Donaldson argues that because there is no individualized assessment of a sex offender's risk for re-offending or propensity for

harming children, the residency restrictions are excessive. Donaldson points out that even sex offenders whose victims were adults are prohibited from living near certain areas where children congregate. Donaldson presses this argument despite the fact his victim was a child under the age of 14 and he was designated as an aggravated sex offender.

¶41 "Our inquiry examines the means chosen to carry out this legitimate purpose and determine whether such means are excessive." *Starkey*, 2013 OK 43, ¶ 71, 305 P.3d at 1029. In *Smith*, the United States Supreme Court explained that "[t]he excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* ¶ 70, at 1028 (quoting *Smith*, 538 U.S. at 105) (emphasis added).

¶42 There is one class of sex offenders with respect to the residency requirements. The residency restrictions apply to all persons subject to SORA for as long as they are required to register. There are not different residency restrictions based on a person's risk level, status as an aggravated or habitual sex offender, or the age of the victim. Restricting sex offenders from residing near areas where children congregate may be excessive when applied to persons previously convicted of crimes against adults. However, the Oklahoma Legislature is permitted to make a reasonable categorical judgment that being convicted of certain crimes--even sex crimes against adults--poses some risk to minors. The majority in *Smith* said:

The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments

that conviction of specified crimes should entail particular regulatory consequences.... The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause.

Smith, 538 U.S. at 103-104. The Oklahoma Legislature made a policy decision that all persons convicted of the sexual offenses enumerated in 57 O.S., § 582 are at risk of re-offending and pose a threat to children. A categorical rule that restricts where sex offenders can live could reasonably further this nonpunitive purpose and is not excessive. See Shaw, 823 F.3d at 576-77; Miller, 405 F.3d at 721-22. As one court said, "the residency restrictions of Jessica's Law are not overbroad, and thus punitive, simply because they do not narrow the affected class to those registered sex offenders who are most likely to attack children." *People v. Mosley*, 344 P.3d 788, 804 (Cal. 2015). One must bear in mind that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Smith, 538 U.S. at 103. It need only be reasonable in light of the nonpunitive objectives. See *id.* Prohibiting sex offenders from residing within 2,000 feet of a park to carry out the legitimate purpose of protecting the public, specifically, protecting children, is not so excessive it is unreasonable. This factor provides little support for punitive effect.

The punitive effects of the residency restrictions do not clearly outweigh SORA's non-punitive purposes

¶43 Considering these factors, we

conclude that Donaldson has not presented clear proof that the punitive effects of the residency restriction negates the civil, regulatory purposes of preventing sex offenders from re-offending and protecting the public, specifically children. A law that restricts sex offenders from residing near places where children congregate, such as a park, furthers these non-punitive purposes. The only factor with significant weight in support of punitive effect is that any limitation on where a person may live^e imposes an affirmative disability or restraint. However, this factor alone does not transform a civil regulation into criminal punishment.

¶44 We hold that prohibiting sex offenders from residing within a 2,000-foot radius of a city park does not impose or increase punishment. ^[18] Therefore, the Oklahoma Constitution's ex post facto clause is not implicated, and the Legislature may give retroactive effect to 57 O.S., § 590 (A). The current residency restrictions apply to "any person registered pursuant to the Sex Offenders Registration Act." 57 O.S.Supp.2019, § 590 (A). This includes persons who became subject to SORA prior to the enactment or amendment of the residency restrictions. All sex offenders must comply with the residency restrictions in the current version of 57 O.S., § 590 (A), regardless of when they became subject to the provisions of SORA. The Court of Civil Appeals's decision in *Graham v. Carrington Place Property Owners Ass'n*, 2019 OK CIV APP 33, 456 P.3d 1137, is expressly overruled.

¶45 This case does not present facts where a registered sex offender lives in an unrestricted area at the time a law is enacted or amended that prohibits the sex offender from living in the area within which his residence is located. Nor is Donaldson challenging the constitutionality of 57 O.S.Supp.2007, § 583 (I), which provides:

"The duty to register as a sex offender in this state shall not be prevented if, at the time of registration, it is determined that the person owns or leases a residence that is located within a restricted area provided for in Section 590 of this title." However, we recognize that there are likely some sex offenders who are not in compliance with the current residency restrictions and will need to move. Whether 57 O.S., § 590 (A) should contain a grandfather clause providing that the residency restrictions do not apply if the sex offender's residency predates the enactment or amendment of the law is a policy decision for the Oklahoma Legislature. ^[19]

VII. United States Constitution

¶46 We also reverse the trial court's conclusion that the retroactive application of 57 O.S.Supp.2019, § 590 (A) to Donaldson violates Article 1, § 10 of the United States Constitution. The Tenth Circuit Court of Appeals addressed this issue in *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016), and held that the residency restrictions ^[20] did not constitute retroactive punishment in violation of the *ex post facto* clause of the United States Constitution. See *id.* at 559-60. *Shaw* is persuasive. For the reasons stated in *Shaw* and by this Court in our analysis under the Oklahoma Constitution, we hold that applying the residency restrictions in 57 O.S.Supp.2019, § 590 (A) to Donaldson does not violate the *ex post facto* clause of the United States Constitution.

VIII. Whether Lake El Reno is a "Park" for Purposes of 57 O.S.Supp.2019, § 590 (A)

¶47 Because the trial court concluded that the 2019 residency restrictions could not be applied to Donaldson, it did not determine whether material facts, such as whether the subject property was located within a 2,000-foot radius of a city park, were in dispute. The trial

court found the issues were moot. As a result of this Court's holding, these issues are no longer moot. However, an appellate court does not make first-instance determinations of disputed issues of either law or fact in the exercise of our appellate jurisdiction. In *re Guardianship of Stanfield*, 2012 OK 8, ¶ 27, 276 P.3d 989, 1001. On remand, the trial court is to determine whether a dispute of material fact exists as to whether Lake El Reno is a "park" for purposes of 57 O.S.Supp.2019, § 590 (A) and, if so, whether the subject property is located within a 2,000-foot radius of the property line of the park.

CONCLUSION

¶48 The law prohibiting registered sex offenders from residing within 2,000 feet of a city park, 57 O.S.Supp.2019, § 590 (A), does not amount to punishment and applies retroactively to persons who became subject to the provisions of SORA prior to the law's enactment or amendment without violating the *ex post facto* clauses of the federal or state Constitution.

ORDER OF THE DISTRICT COURT IS REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CONCUR: ROWE, C.J., GURICH, DARBY, KANE, JJ., and HUBER, S.J.

DISQUALIFIED: WINCHESTER, J.

KUEHN, V.C.J., CONCURRING IN PART and DISSENTING IN PART:

¶1 I agree that Donaldson is subject to the current residency requirements of the Oklahoma Sex Offender Registration Act (SORA). 57 O.S.Supp.2019, § 590 (A). However, I take a different path to reach that conclusion.

¶2 The United States Supreme Court provides the framework for our SORA analysis. *Smith v. Doe*, 538 U.S. 84 (2003). First, we must

determine whether the Legislature intended the statutory scheme to be civil or punitive in nature -- whether it was meant to impose punishment. *Smith*, 538 U.S. at 92. I believe that SORA is, on its face, a civil Act; its stated aim is to protect public safety and aid law enforcement. 57 O.S. § 581 (B). That doesn't end the inquiry; we must next determine whether the Act or any particular provision is so punitive in purpose or effect that it ceases to be civil. *Id.* *Smith* provided that only the "clearest proof" would "transform...a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92.

¶3 In *Starkey*, this Court determined that a revised sex offender risk level assignment system, extending the registration period, was punitive and could not be retroactively applied. *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, ¶ 79, 305 P.3d 1104, 1030. The opinion was explicitly restricted to the risk level assignment issue. *Id.* However, *Starkey's* broad language has been read to suggest that SORA was punitive in its entirety; indeed that interpretation is argued by Donaldson and the dissent. Even the limited ruling in *Starkey*, and certainly its supposed broader application, make it an outlier. In *Smith* itself, the United States Supreme Court concluded that the Alaska sex offender registration act was not punitive and could be applied retroactively. *Smith*, 538 U.S. at 105-06. And while acknowledging *Starkey*, even the Oklahoma Court of Criminal Appeals has found explicitly that sex offender registration is neither part of a range of criminal punishment nor a material consequence of sentencing and, thus, not a matter for jury consideration. *Reed v. State*, 2016 OK CR 10, ¶¶ 17-18, 373 P.3d 118, 123.

¶4 *Starkey* is unworkable and must be overturned. As this case shows, *Starkey* is taken both as a narrow ruling affecting only a single, isolated part of SORA and as a broad ruling barring any application of SORA retroactively.

This is in large part because the *Starkey* language encourages both interpretations. The dissent suggests that Donaldson and the trial court were correct in applying *Starkey* broadly, while the Majority insists it is limited to its facts. Both these things cannot be true.

¶5 I cannot join the dissent. Justice Combs authored both *Starkey* and the dissent in this case. In dissent here he argues that *Starkey* focused on SORA's punitive effect (the second half of the SORA analysis) rather than its punitive intent. However, he rejects the Majority's suggestion that *Starkey* supports a conclusion that SORA is civil in nature and only punitive in effect. Justice Combs makes clear that, had the *Starkey* Majority analyzed the Legislature's intent, it would have concluded SORA was intended to be punitive. I cannot agree either that the SORA requirements here increase Donaldson's punishment, or that the Legislature intended SORA to be punitive in part or as a whole. After reviewing its language, history and effect I would find SORA is a civil statute in its entirety.

¶6 But I cannot join the Majority either, because of how it handles *Starkey*. The first question in analyzing SORA is whether it is civil or punitive in intent. The *Starkey* parties wanted an answer to that question one way or the other, but this Court didn't give them one. Instead of following the United States Supreme Court's example in *Smith*, we refused to consider SORA as a whole. I believe we should have done so. If we find SORA is civil once, we don't have to find it again in every case. Going forward the burden will always be on the sex offender to show that a specific SORA provision is punitive as applied to him. That is, if we once find that SORA as a whole is civil, the presumption is that its provisions may always apply retroactively; only if a court finds that a provision is punitive in effect must it be applied prospectively. This would reduce the litigation surrounding SORA and

simplify SORA claims. The Majority recognizes that Starkey itself limited its finding that SORA was punitive to the registration requirement -- that it refused to consider SORA as a whole. And then the Majority does the same thing. The Majority reviews only the residency requirement, leaving the rest for another day. So there is still no finality, no initial presumption that the SORA statutory provisions apply to every sex offender. Consequently, the State will have to prove that SORA is civil over and over again, in every case, before the sex offender must show a particular provision is punitive in effect.

¶7 Future trial and appellate courts will have to decide, for every SORA requirement and amendment the Legislature imposes, whether it was initially intended to be civil or criminal. I do not believe this piecemeal approach to the entirety of SORA helps anyone affected by it or represents a wise use of judicial resources. This will lead to more uncertainty for both trial courts and the sex offenders subject to SORA. Our simplest and most prudent course is to follow the example set by Smith and determine that SORA was intended to be a civil statute. The rights of all parties remain protected, because a court can still determine whether a particular requirement may be so punitive in effect that it cannot be applied retroactively. Thus, I would overrule Starkey insofar as it may hold that any portion of SORA is punitive. ^[1]

¶8 I do not reach this conclusion lightly. Normally, stare decisis would compel us to somehow reconcile the Starkey analysis and holding with other case law and the statutory provisions at issue here. The Majority attempts to do just that. But, particularly where constitutional rights are concerned, our focus must be not just on respecting precedent but

also on making sure that the precedent is right; we must be willing to correct bad law. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022). Mere disagreement is not enough; this requires more than a belief that the decision was wrong. *Allen v. Cooper*, 389 U.S. 248, 259 (2020). Justice Kavanaugh summarized the factors used by the United States Supreme Court when deciding whether to overturn a prior decision: (1) the quality of the precedent's reasoning; (2) its consistency and coherence with earlier or later decisions; (3) whether facts or law have changed since the prior decision; (4) whether it is still workable; (5) the reliance interests of those who have relied on the precedent; and (6) its age. *Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part). This Court, with different language, has broadly articulated very similar factors: (1) whether the rule is unworkable; (2) whether persons relying on it would be subject to hardship were it overruled; and (3) whether the law or facts have changed to the point that the old rule is abandoned, cannot be justified or applied. *Rodgers v. Higgins*, 1993 OK 45, ¶ 29, 871 P.2d 398, 412.

¶9 Taken together these factors support my conclusion. First, age; this 2013 decision is too recent to have resulted in decades of reliance that would weigh against overturning the ruling. And second, consistency: while Starkey isn't long-standing, it is certainly inconsistent with decisions from other jurisdictions and Oklahoma. ^[2] Most important for this factor is internal consistency. As I describe above, Starkey's reasoning is so uncertain that even this Court can't agree on what it says, much less what it means. As this case shows, lower courts have even less certainty. Because of this, the constituency which must effect the SORA statutory requirements -- law enforcement, courts, probation and parole officers, victims, and sex

offenders themselves -- have been confused as to what provisions apply to whom, when, and what date must be used to determine that. No single section of the Starkey ruling clearly answers those questions, and the numerous amendments to SORA make them ever more difficult to answer under the Starkey formulation. Each individual case may need numerous calculations with different results based on each individual requirement.

¶10 If the Starkey process was ever workable, it isn't now, on either an individual or systemwide level. What a sex offender must do may, in practice, depend on how courts and law enforcement in his county interpret SORA in light of Starkey. Multiply this by each registered sex offender, over time, and the system is unworkable. Sex offenders and law enforcement have been constrained to follow Starkey for the past twelve years but given the confusion the decision has caused one cannot say they relied on it. An overarching decision that SORA is a civil statute would clarify the law and simplify the process, benefiting all the stakeholders. Overruling Starkey would allow courts to give effect to every Legislative provision -- for instance, some are given retroactive effect while others are not -- and provide a framework that would serve interested parties better than the uncertainty surrounding Starkey. They would be helped, not subject to hardship, should this rule be abandoned. The full Latin phrase is "stare decisis et non quieta movere -- stand by the thing decided and do not disturb the calm..." James C. Rehnquist, Note, The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court, 66 B.U. L. Rev., 345, 347 (1986). Starkey has brought a decade of confusion, not calm, and I would no longer stand by its decision that SORA, or any portion of it, is punitive in intent.

¶11 Because I find that SORA is civil in nature, I would narrow our analysis to the

requirement before us: is the residency requirement in Section 590(A) so punitive in effect that it cannot be applied retroactively to Donaldson? If not, then the overall civil nature of the statute controls and it applies to him.

¶12 The Supreme Court set out the appropriate review using seven factors:

Whether 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....

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

¶13 I believe the record is inadequate to show by the clearest proof that Section 590(A) is punitive in effect. I agree with the Majority that based on common sense and ordinary principles of statutory interpretation, the factors looking at scienter, deterrence, and already criminalized behavior do not support a finding of punitive effect. But other factors are more difficult to evaluate. Because Donaldson chose to immediately file for summary judgment, and the trial court made its decision based on that motion, there was no factual record compiled below. Without facts, we cannot fully apply the factors. For instance, on its face, Section 590(A) allows Donaldson freedom of movement throughout the state. But given the scope of the

statute's residency prohibitions, does it effectively banish him from living in El Reno? We don't know. We have no evidence to consider. Looking at other factors, do the Section 590(A) residency restrictions advance the purpose of public safety, and are they excessive, as applied, related to that purpose? Other jurisdictions have answered those questions for their statutes based on facts particular to those cases. But those decisions can be persuasive only insofar as they compare to the facts and application of Oklahoma's statute. There's no evidence we can use to make that comparison.

¶14 I would find that SORA is a civil statute and overrule Starkey. Applying the clearest proof standard, I would further find that, on the record in this case, the residency requirements of Section 590(A) are not so punitive in effect that they cannot be applied retroactively. Donaldson is subject to the residency requirements. For this reason I agree with the Majority's conclusion that the trial court's decision must be reversed and the case remanded for further proceedings.

COMBS, J., with whom EDMONDSON, J., joins, dissenting:

¶ 1 I respectfully dissent from the majority's reversal of the trial court's summary judgment in favor of Mr. Donaldson and against the City of El Reno. When Mr. Donaldson was convicted by guilty plea on April 20, 2005, § 590 of Oklahoma's Sex Offender Registration Act (SORA) restricted him only from "resid[ing] within a two thousand-foot radius of any public or private school site or educational institution." See 57 O.S.Supp.2004, § 590 (amended 2006) (emphasis added). Nevertheless, the City of El Reno wishes to enforce against Mr. Donaldson the current version of § 590 enacted fourteen years later (i.e., in 2019), which adds restrictions to prevent him from "resid[ing], either temporarily or permanently, within a two-

thousand-foot radius of any... property or campsite used by an organization whose primary purpose is working with children, a playground or park that is established, operated or supported in whole or in part by a homeowners' association or a city, town, county, state, federal or tribal government, a license^d child care center or family child care home as defined in the Oklahoma Child Care Facilities Licensing Act or the residence of his or her victim," 57 O.S.2021, § 590 (A). See, e.g., City's Br. 1, 3; ROAA, Doc. 5, City's Combined Resp. to Pl.'s Mot. Summ. J. & Countermot. Summ. J. & Br. in Supp. 2, 4. These additional residency restrictions serve to retroactively increase the punishment for Mr. Donaldson's 2005 conviction in violation of the ex post facto clause in Article II, § 15 of the Oklahoma Constitution. The trial court correctly determined "that the version [of § 590] in effect at the time of Plaintiff's conviction controls his registration requirements" and that "[a]pplying the November 1, 2019 version of 57 O.S.Supp. 2019 § 590 would be a retroactive application... of such a punitive nature" as to "violate the ban on ex post factor [sic] laws in Article 2, § 15 of the Oklahoma Constitution." ROAA, Doc. 11, Journal Entry of J. ¶¶ 2, 4, at 1-2. This Court should therefore affirm the trial court's summary judgment.

¶2 I reach this conclusion because I disagree with the majority on three major points in their application of the "intent-effects" test that this Court adopted in Starkey v. Oklahoma Department of Corrections, 2013 OK 43, ¶ 41, 305 P.3d 1004, 1019. First, I take issue with the majority's finding that "the legislative intent of

SORA is not to punish." Majority Op. ¶ 28. Second, I object to the majority's adoption and application of the "clearest proof" burden in weighing whether the seven Mendoza-Martinez ^[1] factors demonstrate the punitive effects of the statute. See *id.* ¶¶ 19, 37, 43 & n.10. Third, I disagree with the majority's conclusion that the seven Mendoza-Martinez factors fail to demonstrate that the overall effects of the statute are so punitive as to negate any legislative intent to create a civil regulatory scheme. See *id.* ¶¶ 43-44.

A. Legislative Intent

¶3 The first prong of the "intent-effects" test requires us to analyze whether the Oklahoma Legislature expressed an "intent to make SORA and/or its amendments punitive." *Starkey*, 2013 OK 43, ¶ 41, 305 P.3d at 1019. It is an established "principle that determining the civil or punitive nature of an Act must begin with reference to its text and legislative history." *Seling v. Young*, 531 U.S. 250, 262 (2001) (citing *Hudson v. United States*, 522 U.S. 93 (1997)); accord *In re W.M.*, 851 A.2d 431, 441 (D.C. 2004) (citing *Seling*); *State v. Langdon*, 472 P.3d 31, 36 (Haw. Ct. App. 2020) (quoting *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 159 P.3d 143, 152 (Haw. 2007)); *State v. Meredith*, 399 P.3d 859, 863 (Kan. 2017) (looking at text and legislative history); *State v. Burr*, 1999 ND 143, ¶ 13, 598 N.W.2d 147, 153 (same); *State v. Hamann*, 422 P.3d 193, 197 (Or. 2018); *In re Commitment of Fisher*, 164 S.W.3d 637, 646-47 (Tex. 2005) (citing *Seling*). We look at the text of the legislative enactment and its overall structure to ascertain whether "the legislature indicate[d] a preference either expressly or impliedly for a civil label or a criminal label." *Starkey*, 2013 OK 43, ¶ 41, 305 P.3d at 1019 (citing *United States v. Ward*, 338 U.S. 242, 248 (1980)). That said, simply labeling a law as "civil" or "procedural" will not immunize it from scrutiny under the *ex post facto* clauses

because subtle violations are no more permissible than overt ones. *Id.* ¶ 41, 305 P.3d at 1019-20 (citing *Collins v. Youngblood*, 497 U.S. 37, 46 (1990)). Secondly, this Court also takes note of other formal attributes of the legislative enactment such as the manner of its codification within a certain statutory title and the enforcement procedures it establishes. See *Smith v. Doe*, 238 U.S. 84, 92, 94 (2003).

¶4 Nothing in *Starkey* answered this initial inquiry of the "intent-effects" test. The reason we didn't address this first prong is because of our conclusion that "[t] he second part of the test, whether SORA's effects are punitive, is dispositive." *Starkey*, 2013 OK 43, ¶ 43, 305 P.3d at 1020 (emphasis added). We therefore specifically reserved judgment on the issue: "Even if we assume the act as amended was intended to be a civil regulatory scheme[,] that fact does not dispose of the issue." *Id.* (emphasis added). Such assumptions are not out of the ordinary, but are regularly employed by courts utilizing the intent-effects test. *E.g.*, *Shaw v. Patton*, 823 F.3d 556, 562 (10th Cir. 2016) ("We ordinarily start with the legislature's stated intent. But Mr. Shaw has not argued that the Oklahoma legislature's stated intent is punitive. See Appellant's Opening Br. at 20 ("In the present case, Mr. Shaw has not attempted to prove that [the Oklahoma statute's] stated legislative intention was punitive, due to ambivalent evidence."). Thus, we express no view on the Oklahoma legislature's intent in enacting the sex-offender requirements." (emphasis added)); *Doe v. State*, 189 P.3d 999, 1007 (Alaska 2008) (" It is not necessary to address the first step of the test --whether the legislature intended [the] A[laska] SORA to punish convicted sex offenders-- because the second part of the test --whether ASORA's effects are punitive-- resolves the dispute before us. Assuming without deciding that the legislature intended ASORA to be non-punitive,

we therefore focus on the statute's effects to determine whether they are punitive." (footnotes omitted) (emphasis added)).

¶5 Nevertheless, the majority has selected statements from Starkey favoring its conclusion that "the legislative intent of SORA is not to punish" while ignoring other statements from Starkey disfavoring that conclusion. For instance, the majority asserts: "In Starkey, this Court recognized '[t]he non-punitive objective revealed in § 581 is to protect the public from sex offenders re-offending after release from custody.'" Majority Op. ¶ 28 (quoting Starkey, 2013 OK 43, ¶ 70, 305 P.3d at 1028). Similarly, the majority asserts that Starkey's "analysis in step one is somewhat ambivalent" but that "the Starkey Court ultimately determined SORA was intended to be a civil, regulatory scheme to help prevent sex offenders from re-offending." *Id.* ¶ 28 n.16 (citing Starkey, 2013 OK 43, ¶ 43, 305 P.3d at 1020).

¶6 All these references seem to suggest that Starkey reached a result that, in actuality, it never did. Just read the entire paragraph cited by the majority for yourself:

¶43 The legislative purpose appears to be the creation of a system to help prevent sex offenders from re-offending by permitting law enforcement to identify sex offenders and alert the public of such sex offenders when necessary. The stated intent seems to apply to sex offenders who commit "other predatory acts against children" and persons who prey on others because of "mental illness." The provisions of SORA, however, are not just geared towards repeat sex offenders or offenders with mental illness. SORA also applies to first time offenders

and persons who have not been determined to suffer from a mental illness. This subsection is the only overt attempt to establish a purpose for SORA and has not been amended since its creation in 1997. This subsection does not expressly designate SORA's requirements as "civil." Justice Souter noted in his concurring opinion in Smith that other United States Supreme Court cases relied heavily on the legislature's stated label in finding a civil intent. [238 U.S. at 107--08 (Souter, J., concurring in judgment).] Although there is evidence pointing to a civil intent, there is considerable evidence of a punitive effect. Even if we assume the act as amended was intended to be a civil regulatory scheme that fact does not dispose of the issue. The second part of the test, whether SORA's effects are punitive, is dispositive.

Starkey, 2013 OK 43, ¶ 43, 305 P.3d at 1020 (footnote citation omitted). As this language demonstrates, the Starkey Court did not characterize the "system to help prevent sex offenders from re-offending" as a "civil, regulatory scheme." Instead, relying upon Justice Souter's separate writing from Smith v. Doe, the Starkey Court observed that a finding of civil intent ordinarily depends heavily upon the existence of an explicit label that the law is "civil" or "regulatory"--something that was lacking in § 581 of SORA. ^[2] See *id.* Justice Souter's separate writing from Smith rightly determined that, although "[t]hese formal facts do not force a criminal characterization,... they stand in the way of asserting that the statute's intended character is clearly civil." Smith, 238 U.S. at 108 (Souter, J., concurring in judgment) (emphasis added). That's why the Starkey Court

concluded in the very next paragraph that "there is no clear legislative categorization that SORA is a civil law" and why any determination of legislative intent was abandoned in favor of deciding the appeal based solely on the second prong. *Starkey*, 2013 OK 43, ¶¶ 43--44, 305 P.3d at 1020. Although certainly not authoritative, one student's case note in the *Oklahoma Law Review* read *Starkey* this way, observing "[t]he court determined that the Oklahoma legislature's intent in enacting the original registration act was unclear" and "the court concluded the legislative intent was not clearly established." Alex Duncan, Note, *Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post- Starkey*, 67 *Okla. L. Rev.* 323, 341 (2015). But today's majority ignores *Starkey*'s endorsement of Justice Souter's wise counsel, recharacterizes *Starkey*'s conclusion on this first prong, and proceeds to conclude without much analysis that the residency restrictions "prohibit[ing] sex offenders from living near areas where children congregate[] are part of the civil, regulatory system intended to reduce recidivism and protect the public, specifically children." Majority Op. ¶ 28.

¶7 A better analysis of legislative intent would include a discussion of the history of sex offender legislation in Oklahoma. Oklahoma's sex offender registration scheme has been codified in various titles of the Oklahoma Statutes; it has not been confined to the provisions we refer to as SORA (i.e., 57 O.S.2021, §§ 581 --590.2) or even to the title that contains SORA (i.e., Title 57). In fact, since the

beginning SORA has been contained in more than one statutory title. See *Sex Offenders Registration Act (SORA)*, ch. 212, §§1--7, 1989 Okla. Sess. Laws 556, 556--58 (codified at 57 O.S.Supp.1989, §§ 581 --587); *id.* § 8, 1989 Okla. Sess. Laws at 558--59 (codified at 51 O.S.Supp.1989, § 24A.8). Provisions governing the day-to-day lives of registered sex offenders are found in Title 57, which governs "Prisons & Reformatories"; in Title 51, which governs "Officers"; in Title 21, which governs "Crimes & Punishment"; in Title 10, which governs "Children"; in Title 47, which governs "Motor Vehicles"; in Title 63, which governs "Public Health"; and in Title 70, which governs "Schools." By taking a more holistic view of Oklahoma's sex offender registration scheme and by refusing to limit our review to the specific provision(s) at issue in any given lawsuit (e.g., the 3-tier risk level assignment system that was at issue in *Starkey* or the residency restrictions at issue in Mr. Donaldson's case), we can better assess both (1) whether the Oklahoma Legislature intended for Oklahoma's sex offender registration scheme to be punitive or civil and (2) whether the effects of the specific provisions challenged by Mr. Donaldson, in particular, and of Oklahoma's sex offender registration scheme, in general, are so punitive as to negate any intention to deem them civil. This holistic approach is more in tune with the *Starkey* Court's consideration of "SORA's various requirements--including residency restrictions--and their cumulative effects [in] determin[ing] if [the specific provisions at issue in the case] w[ere] punitive." Majority Op. ¶ 23; see also *id.* ¶ 21 (emphasizing that "[t]he *Starkey* Court determined that the cumulative effects of SORA's requirements and restrictions were punitive" (citing *Starkey*, 2013 OK 43, ¶ 77, 305 P.3d at 1030)). Thus, I will now engage in a review of Oklahoma legislation concerning sex offender registration.

1. History of Oklahoma's Sex Offender Legislation

a. 1989 Enactment of SORA

¶8 SORA was originally enacted on May 9, 1989, when Governor Henry Bellmon signed House Bill 1136 into law.^[3] At that point, Oklahoma was the tenth State in the nation to enact such a law.^[4] SORA's title described the act as follows:

AN ACT RELATING TO PRISONS AND REFORMATORIES; ESTABLISHING THE SEX OFFENDERS REGISTRATION ACT; PROVIDING SHORT TITLE; REQUIRING THE REGISTRATION OF CERTAIN PERSONS; PROVIDING FORM OF REGISTRATION; PROVIDING FOR MAINTENANCE OF REGISTRATION FILE; RESTRICTING ACCESS TO FILE INFORMATION; REQUIRING CERTAIN NOTIFICATION; PROHIBITING CERTAIN ACTS AND PROVIDING PENALTIES THEREFOR; AMENDING SECTION 8, CHAPTER 255, O.S.L. 1985 (51 O.S. SUPP. 1988, SECTION 24A.8), WHICH RELATES TO THE OKLAHOMA OPEN RECORDS ACT; PROVIDING THAT CERTAIN FILES SHALL NOT BE AVAILABLE FOR PUBLIC INSPECTION; PROVIDING FOR CODIFICATION; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

^[5]

Section 1 of H.B. 1136 gave SORA its name.^[6] Section 2 specified that SORA applied to "any person who, after November 1, 1989, has

been convicted of, or received a suspended sentence for" the commission or attempted commission of certain sex crimes, as well as to anyone "who enters this state after November 1, 1989, and who has been convicted or received a suspended sentence for" the commission or attempted commission of the same sex crimes.^[7] Section 3 required such a person to register with the Oklahoma Department of Corrections (DOC) within ten (10) days of a suspended sentence or a conviction for which there would be no incarceration, or within ten (10) days of release from incarceration, or within thirty (30) days of moving into Oklahoma from another jurisdiction; section 3 also imposed a duty upon the offender to maintain registration for a period of ten (10) years unless he or she successfully completed a sex offender treatment program offered by the DOC, in which case the registration period was only two (2) years.^[8] Section 4 required the DOC to approve a registration form containing certain specified fields of information and to maintain a file that would "be made available to state, county and municipal law enforcement agencies" but would "not be made available for public inspection"; section 4 also imposed a duty upon registered offenders to provide notice of an address change within 10 business days.^[9] Section 5 required the sentencing judge and the releasing correctional facility to inform Oklahoma offenders of their duty to register, and it required the Department of Public Safety to issue written notification to out-of-state applicants for driver licenses about sex offender registration requirements.^[10] Section 6 forbade the provision of false or misleading information during registration under SORA.^[11] Under section 7, the violation of any provision of SORA was deemed a misdemeanor punishable by incarceration for not more than one (1) year, a fine of not more than \$1,000.00, or both such fine and imprisonment.^[12] Finally, section 8 of SORA amended § 24A.8 of the Oklahoma Open Records Act to specify that "[r]egistration files

maintained by the Department of Corrections pursuant to the provisions of the Sex Offenders Registration Act shall not be made available for public inspection." ^[13] All but one of SORA's provisions were codified in Title 57 of the Oklahoma Statutes pertaining to "Prisons & Reformatories"; the remaining provision was codified with the Open Records Act in Title 51 pertaining to "Officers." In its original enactment, none of SORA was codified in Title 21 pertaining to "Crimes & Punishments."

¶9 During that same session, Oklahoma legislators created a sex offender treatment program. Going into session, officials at the DOC requested \$500,000 to implement a proposed psychological treatment "program developed in Oregon that use[d] aversion therapy--electrical shocks and ammonia vapors--to discourage deviant fantasies." ^[14] Representative Jeff Hamilton of Midwest City, who had also authored SORA, and Senator Dave Herbert of Midwest City introduced and passed House Joint Resolution 1004, which directed the DOC to create the Sexual Offender Treatment Program for sex offenders in prison. ^[15] In conjunction with that measure, the Legislature also appropriated "the sum of Three Hundred Eighty Thousand Dollars (\$380,000.00) or so much thereof as may be necessary to promulgate the sex offender treatment program and to expend for other operating expenses of the Department of Corrections." ^[16] By September 1, 1989, the DOC had hired a local psychologist to direct its program. ^[17] By all accounts, it appears the program was up and running by November 1, 1989. ^[18] Although the new director "had some concerns about" aversion therapy "mainly because it doesn't transfer to the real world," DOC officials reportedly adopted a program that included aversion therapy, group therapy, and "chemical therapy that can reduce sex drive." ^[19]

b. 1995 Sex Offender Legislation:

Public Inspection of SORA Records and the Start of Job Restrictions[>]

¶10 In 1994, Congress had passed the **Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in the wake of the high-profile abduction of the bill's eleven-year-old namesake in Minnesota in late 1989.** ^[20] **The Wetterling Act conditioned each State's receipt of federal grant funds for law enforcement assistance on that State's adoption of established guidelines for state sex offender registration programs.** ^[21] **In particular, the Wetterling Act mandated registration with local law enforcement agencies.** ^[22]

¶11 In light of the Wetterling Act, the Oklahoma Legislature needed to revamp SORA to require registration with local law enforcement agencies instead of, or in addition to, the DOC. In House Bill 1207, lawmakers amended SORA to require registration both with DOC for ten (10) years and "[w]ith the local law enforcement authority having jurisdiction in the area where the person resides or intends to reside for more than seven (7) days" for five (5) years. ^[23] But lawmakers also took the opportunity to amend SORA so that local law enforcement agencies were required to "make [their] sex offender registr[ies] available" to "all public and private elementary schools within the jurisdiction;... all childcare facilities licensed by the state within the jurisdiction;... any state agency that licenses individuals to work with children;... the State Office of Personnel Management to screen persons who may work with children; and... other entities that provide services to children and request the registry." ^[24] Senator Jerry Smith of Tulsa, an author of

the bill, explained that H.B. 1207 "lets the community find out when a convicted child molester or rapist has moved into their area."^[25]

¶12 But H.B. 1207 went one step further than amending SORA. It also amended § 404.1 of the Oklahoma Child Care Facilities Licensing Act to make it unlawful for any sex offenders "to work with or provide services to children and for any employer who offers or provides services to children to knowingly and willfully employ or allow continued employment of" a sex offender, with violations subjecting both the sex offender and the daycare facility to a civil fine of \$1,000 and civil liability in court.^[26] This provision was codified in Title 10 of the Oklahoma Statutes pertaining to "Children." This 1995 bill marked the first time the Oklahoma Legislature restricted sex offenders' non-criminal activities.

c. 1997 Sex Offender Legislation: Public Notification, Expansion of Qualifying Crimes, Making SORA Violations a Felony, and Interfering with Sex Offenders' Ability to Maintain Child Custody

¶13 Two years later, the Oklahoma Legislature further amended SORA after another high-profile sex crime and related federal legislation. In Hamilton Township, New Jersey, seven-year-old Megan Kanka had been abducted, raped, and murdered in 1994 by her neighbor who had two prior convictions for sex crimes against young children.^[27] Megan's parents asserted she would still be alive had New Jersey maintained a sex offender registry and notified them about their neighbor's lurid past, leading them to lobby for such laws across the country.^[28] Their efforts led Congress to enact Megan's Law in 1996,

which amended the Wetterling Act to strike language deeming "information collected under a State registration program" as "private" and to add language permitting States to "disclose[] for any purpose permitted under the laws of the State" such information.^[29]

¶14 Oklahoma lawmakers followed suit shortly thereafter on May 27, 1997, passing several amendments to SORA in House Bill 1729.^[30] H.B. 1729 amended § 581 of SORA to add a "findings" subsection:

The Legislature finds that sex offenders who commit other predatory acts against children and persons who prey on others as a result of mental illness pose a high risk of re-offending after release from custody. The Legislature further finds that the privacy interest of persons adjudicated guilty of these crimes is less important than the state's interest in public safety. The Legislature additionally finds that a system of registration will permit law enforcement officials to identify and alert the public when necessary for protecting the public safety.^[31]

H.B. 1729 also amended § 584 of SORA to implement the notification requirements in Megan's Law. The DOC could promulgate rules to make information contained in its registry "available for public inspection."^[32] Moreover, if the registrant qualified as a "predatory sex offender" as defined in the amendment, a local law enforcement agency would be required to send a detailed notification--i.e.,

a notice containing the predatory sex offender's name, address, physical description, vehicle description, conditions and restrictions upon his probation, a description of his primary and secondary targets to victimize, a description of his method of offense, a current photograph, and the contact information for his probation officer--to "anyone that the local law enforcement authority determines appropriate, including, but not limited to: a. the family of the predatory sex offender, b. any prior victim of the predatory sex offender, and c. residential neighbors and churches, community parks, schools, convenience stores, businesses and other places that children or other potential victims may frequent." ^[33] The author of H.B. 1729, Representative Bill Paulk of Oklahoma City, told newspapers that sex offenders' privacy rights "have to give way for the good of the many, in this case, for the good of our children." ^[34]

¶15 But H.B. 1729 went farther than Megan's Law. It amended § 582 of SORA to include new crimes that would serve as the basis for sex offender registration--including some crimes against children that did not entail sexual misconduct at all. ^[35] H.B. 1729 also amended § 583 of SORA to shorten the deadlines for initial registration, to remove the incentive of a shorter registration period for sex offenders who successfully complete the sex offender treatment program, and to require notification of address changes so many days" before the offender establishes residence" ^[36] --a provision that seemingly conflicted with § 584(D) of SORA that required notification of address changes within so many days" after the change of address." ^[37] Section 584 of SORA was also amended to require the DOC to conduct

annual address verifications of all registered sex offenders. ^[38] H.B. 1729 also amended § 587 of SORA to increase the penalty for violating SORA from a misdemeanor to a felony punishable by incarceration up to five (5) years, a fine of up to \$5,000, or both such fine and imprisonment. ^[39]

¶16 But like its 1995 predecessor, H.B. 1729 went farther than just amending SORA. Yet again § 404.1 of the Oklahoma Child Care Facilities Licensing Act was amended to impose criminal liability on top of the existing civil fine and civil liability; thenceforth, going to work as a sex offender for a childcare facility would constitute a felony punishable by incarceration up to five (5) years, a fine of up to \$5,000, or both such fine and imprisonment. ^[40]

¶17 During that same session, Oklahoma legislators enacted House Bill 1927, part of which significantly impacted sex offenders and their families. The first section of that bill amended the statute governing the preference order for child custody and guardianship. ^[41] The amendment required the trial court to "determine whether any individual seeking custody of, guardianship of or visitation with a child is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state" and then created "a rebuttable presumption that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted" to such a person. ^[42] The rebuttable presumption applied regardless of what the underlying offense involved; it applied the same to drunks caught urinating in public as it did to child molesters. H.B. 1927 did not specify h^{ow}

the presumption could be overcome or what factors might militate against using the presumption.

d. 1998 Sex Offender Legislation: Lifetime Registration for Habitual Offenders and More Job Restrictions

¶18 *The very next year, the Oklahoma Legislature amended SORA again. House Bill 3144 amended § 584 of SORA to relabel "predatory" sex offenders as "habitual" sex offenders and to impose lifetime registration upon such habitual offenders.* ^[43] *Section 584 of SORA was also amended to require the DOC to notify the local sheriff and DA about any sex offender whose address could not be verified during the annual audit.* ^[44]

¶19 *That same session, Oklahoma legislators enacted Senate Bill 1394 to prevent sex offenders from working on school premises. S.B. 1394 enacted a new provision of law in SORA, § 589, which made it "unlawful for any person registered pursuant to the Sex Offenders Registration Act to work with or provide services to children or to work on school premises" and for anyone to employ a registered sex offender for purposes of providing services to children or performing work on school premises.* ^[45] *A violation would subject both the sex offender and the employer to a civil fine of \$1,000 and civil liability in court.* ^[46] *S.B. 1394 also amended various provisions in Title 70 concerning "Schools" to require the dismissal or non-renewal of employment of any registered sex offenders serving as school administrators, teachers, or school support staff.* ^[47] *This 1998 bill marked the second time the Oklahoma Legislature restricted sex offenders' employment*

opportunities.

e. 2001 and 2002 Sex Offender Legislation: Juvenile Registration, More Job Restrictions, and the Specter of Chemical Castration

¶20 *Each year, the Legislature continued to tweak sex offender registration. In 2001, the biggest development was the enactment of the Juvenile Sex Offender Registration Act.* ^[48] *In 2002, Senate Bill 1536 amended SORA to prevent sex offenders from working as law enforcement officers.* ^[49] *Also in 2002, lawmakers nearly enacted Senate Bill 987 authored by Senator Frank Shurden of Henryetta to permit the chemical castration of a subset of sex offenders convicted in Oklahoma,* ^[50] *which didn't become law because of a veto from Governor Frank Keating who believed the measure violated the constitutional protection against cruel and unusual punishment and made Oklahoma "look silly."* ^[51]

f. 2003 Sex Offender Legislation: Creation of SORA's Residency Restrictions and of the Penal Code's "Zones of Safety"

¶21 *Leading up to the 2003 session, local newspapers reported on a sex offender who lived across the street from Pleasant Hill Elementary School in the Mid-Del School District.* ^[52] *Under SORA's notification provisions adopted in the wake of Megan's Law, the local police chief notified the school principal, who in turn notified more than half of the students' parents.* ^[53] *The newspaper article caught the eye of Representative Kevin Cox of Oklahoma City and led him to author House Bill 1501,* ^[54] *which as introduced would have prohibited registered sex offenders from "resid[ing] within one (1) mile of any*

public or private school site or educational institution." ^[55] Days later, Senator Jonathan Nichols of Norman introduced Senate Bill 554, which created a "zone of safety" around elementary and junior high schools, day care centers, and playgrounds. ^[56] Rep. Cox and Sen. Nichols subsequently joined forces and got their bills passed. ^[57]

¶22 The title of Rep. Cox's H.B. 1501 was "An Act relating to the Sex Offenders Registration Act; restricting residency of persons required to register, providing an exception; providing penalty; providing for codification; and providing an effective date." ^[58] The enacted version made it unlawful for a registered sex offender to reside within a 2,000-foot radius of any school. ^[59] The "exception" referenced in the title said "[n]othing in this provision shall require any person to sell or otherwise dispose of any real estate or home acquired or owned prior to the conviction of the person as a sex offender," but this language failed to specify whether the person would or would not be permitted to reside in the home. ^[60] Under H.B. 1501, a first-time violation of the residency restriction would be a misdemeanor offense punishable by a fine of no more than \$3,000, and any subsequent violation would be a misdemeanor offense punishable by incarceration for one year in addition to such fine. ^[61] H.B. 1501 was codified in Title 57 as a new section under SORA.

¶23 The title of Sen. Nichols's S.B. 554 was "An Act relating to crimes and punishments; creating certain safety zone against certain offenders on certain property; stating distance for safety zone property; providing penalties for violation; excepting certain offenders from safety zone for certain purpose; constructing

certain provision; providing exception to prosecution as habitual offender; providing for codification; and declaring an emergency." ^[62] S.B. 554 created a 300-foot safety zone around elementary and junior high schools, daycares, and playgrounds for sex offenders who committed certain sex crimes and whose victim was under the age of 13. ^[63] An exception to the rule was made where the sex offender (a) was the custodial parent or legal guardian of an enrolled student at the school or daycare and (b) was enrolling, delivering, or retrieving said student at the facility during normal hours or for sanctioned extracurricular activities. ^[64] Under S.B. 554, a first-time violation would be a misdemeanor offense punishable by a fine of no more than \$2,500, and a subsequent violation would be a felony offense. ^[65] S.B. 554 was codified in Title 21 of the Oklahoma Statutes pertaining to "Crimes & Punishments."

g. 2004 and 2005 Sex Offender Legislation: Lengthening the Registration Period, Electronic Monitoring, and More Job Restrictions

¶24 Legislation affecting sex offenders continued to be a perennial favorite. In 2004, Oklahoma lawmakers passed Senate Bill 1191 amending § 583 of SORA to expand the registration period for non-habitual and non-aggravated offenders to "ten (10) years from the date of completion of the sentence," which they defined as "mean[ing] the day an offender completes all incarceration, probation and parole pertaining to the sentence" ^[66] --effectively lengthening the registration period well beyond the start-date for registration tied to "release... from a correctional institution" that is specified earlier in the very same section of SORA. ^[67] Following another high-

profile sex crime in February 2005 in which nine-year-old Jessica Lunsford was kidnapped, raped, and murdered by a convicted sex offender living in her neighborhood in Homosassa, Florida,^[68] Oklahoma lawmakers passed Senate Bill 631 entitled "Jessica Lunsford's Law."^[69] It amended existing provisions in Titles 22 and 57 of the Oklahoma Statutes pertaining to "Criminal Procedure" and "Prisons & Reformatories" to require both electronic monitoring of any sex offender on parole or transitioning out of prison through a community work center or halfway house and electronic monitoring of all habitual and aggravated sex offenders for the duration of their lifetime registration through use of a global position monitoring device.^[70] Also in 2005, after a year-long campaign by an advocacy group,^[71] lawmakers passed House Bill 1963, which amended § 584 of SORA to require notification of nursing homes about certain registered sex offenders living in or around their facility,^[72] amended § 1-1909 of the Nursing Home Care Act to require nursing homes to post such notices,^[73] and enacted the Long-term Care Security Act requiring nursing homes to conduct background checks of employees, volunteers, and contractors.^[74]

h. 2006 Sex Offender Legislation: Expansion of SORA's Residency Restrictions and of the Penal Code's Safety Zones, and Beyond

¶25 Moving ahead to 2006, both chambers of the Legislature were busy with initiatives, agendas, and bills targeting sex offenders. In the House, four sex offender bills were introduced--i.e., House Bills 2381,

2569, 2830, and 2839--but none were passed. Concurrently in the Senate, seven sex offender bills were introduced--i.e., Senate Bills 1426, 1707, 1708, 1747 (eventually incorporated into 1800), 1754, 1755, and 1964--and four were enacted. To get the full picture of legislative intent concerning sex offenders, all the bills are discussed below.

¶26 After a constituent notified Representative Lance Cargill of Harrah "about the daily trauma her 14-year-old daughter was experiencing by having to attend the same school as her rapist, who was a minor-aged classmate," Rep. Cargill introduced H.B. 2381, which would prevent student-aged sex offenders from attending the same school or riding the same bus as their victim or their victim's sibling(s).^[75] H.B. 2381 was referred to the House Committee on Common Education, which removed a provision that discussed the possibility of the student-aged sex offender not being able to find another school to reinforce the notion that the sex offender must find a different school.^[76] The House engrossed H.B. 2381 to the Senate.^[77] The Senate referred H.B. 2381 to the Senate Committee on Education, where the bill died.^[78] Despite Rep. Cargill's failure to enact the policy in 2006, it would be enacted after he assumed the speakership in 2007.^[79]

¶27 Representative Ryan Kiesel of Seminole introduced H.B. 2569, which would add new sections to SORA requiring sex offenders to be assessed and assigned a risk level to determine what degree of community notification was needed.^[80] H.B. 2569 was referred to the House Committee on Corrections and Criminal Justice, which made minor revisions to the bill; but the full

House never engrossed the bill to the Senate. ^[81] Despite Rep. Kiesel's failure to enact the policy in 2006, a risk-level assignment system for sex offenders would be enacted in 2007. ^[82]

¶28 "The fight against sex offenders continue[d]" with H.B. 2830, authored by Representative Lisa Billy of Purcell. ^[83] In her press release, Rep. Billy disclosed that she was committed to "take whatever measures necessary to wage the war against sex crimes." ^[84] H.B. 2830 would require registered sex offenders to renew their driver licenses or ID cards each year instead of every four years, so as to provide local law enforcement agencies with more up-to-date addresses and photographs for the registry. ^[85] H.B. 2830 was referred to the House Committee on Corrections and Criminal Justice, which amended the proposed bill to include a price reduction for annual renewals. ^[86] The House then engrossed H.B. 2830 to the Senate, where the bill died in committee. ^[87] The policy-- albeit without the conciliatory price reduction--was eventually incorporated into one of the Senate's surviving sex offender bills, S.B. 1964, and signed into law by Governor Brad Henry. ^[88]

¶29 Speaker Todd Hiatt of Kellyville introduced the "Keeping Oklahoma Kids Safe" initiative, which was touted as "a key goal of the House Republican caucus of the 2006 legislative session." ^[89] Of the initiative's three planks, only the second plank is relevant here. Found in H.B. 2839 authored by Representative Susan Winchester of Chickasha, it "focuse[d] on three areas of reform to crack down on sex offenders": (a) it "would prohibit registered sex offenders from living within 2,000 feet of parks and playgrounds," (b) "strengthen

punishments.... [and] narrow the range of penalties available in sex offender cases involving children," and (c) "expand the current 'two strikes' provision, which sentences repeat sex offenders to life without parole." ^[90] Rep. Winchester believed her bill was needed "to put these demented criminals behind bars and keep[] them there for as long as possible." ^[91] Early on, Representative Randy Terrill of Moore expressed his desire, "[w]ith Winchester's consent,... to offer an amendment to [her] bill that would... prevent defense attorneys, district attorneys, and judges from entering into or approving plea agreements that exempt a criminal from sex-offender registration" because he thought "[r]apists must not be allowed to skirt the requirements of our sex offender registry." ^[92] Rep. Terrill's amendment was added to H.B. 2839 by committee substitute. ^[93] H.B. 2839 cleared the House committee referrals and was engrossed to the Senate, ^[94] but Senate Democrats let H.B. 2839 die in committee. ^[95] But House Republicans weren't ready to see the policies die with H.B. 2839. ^[96]

¶30 Senator Brian Crain of Tulsa introduced S.B. 1426, which would require registered sex offenders to obtain new driver licenses bearing the words "Sex Offender." ^[97] Sen. Crain touted S.B. 1426 as "another opportunity for us to protect the very young and very old here in Oklahoma" by allowing vendors at nursing homes, day care centers, and schools to verify "that individuals they are placing in those same facilities are not on the sex offender registry." ^[98] After being kicked back and forth between the two chambers, S.B. 1426 was referred to a conference committee, where the bill died. ^[99] Despite his failure to enact the policy in 2006, Sen. Crain would

reintroduce and enact an identical measure during the 2007 legislative session--i.e., Senate Bill 35--in an effort "to use every resource available to protect children from molesters and rapists."^[100]

¶31 As "another step in the legislature's fight to protect the public from sexual predators," Senator David Myers of Ponca City introduced S.B. 1707 to "ensur[e] that more governmental agencies have access to the registry."^[101] S.B. 1707 amended § 584 of SORA both to make the sex offender registry available to the Oklahoma Commissioner of Health and to authorize the Commissioner to forward the registry to nursing homes and long-term care facilities.^[102] The Legislature unanimously passed S.B. 1707, and Governor Henry signed the bill into law on May 9, 2006.^[103]

¶32 Senator Jonathan Nichols of Norman introduced S.B. 1708, which originally was intended to amend the residency restrictions in § 590 of SORA both to include daycare facilities and to expand the restricted radius from 2,000 feet to ½ mile.^[104] The measure was referred to the Senate Committee on Education, which removed the ½-mile radius from the bill.^[105] On the Senate floor, the measure was again amended to include a new provision prohibiting sex offenders from sharing a residence with their victim until the victim reached 18 years of age.^[106] Upon engrossment, House leadership--still reeling from the Senate's decision to kill H.B. 2839^[107]--referred S.B. 1708 to the House Committee on Corrections and Criminal Justice for substantial alterations. The House's committee substitute incorporated H.B. 2839's provision that

narrowed the range of penalties available in sex offender cases involving children, as well as numerous other irrelevant provisions.^[108] The bill died before going to the House floor for a vote,^[109] probably because both chambers began negotiating a compromise that coalesced into S.B. 1755 and S.B. 1964.^[110]

¶33 Senator Jay Paul Gumm of Durant introduced S.B. 1747, which sought to add the death penalty as a punishment option for repeat sex offenders whose victims were minor children.^[111] After being engrossed to the House, S.B. 1747 was denied a hearing in the House Committee on Corrections and Criminal Justice.^[112] Sen. Gumm eventually tried incorporating his policy into another House bill, but the House eventually rejected those efforts in late April.^[113] The House attempted to put the death penalty provision in S.B. 1708, but that bill also died as discussed above.^[114] Ultimately, the death penalty provision would be incorporated into S.B. 1800 authored by Sen. Nichols of Norman--which otherwise concerned the creation of a Child Abuse Response Team (CART) within the Oklahoma State Bureau of Investigation (OSBI)--as a means to "send[] a clear message to child predators in our state... [that] [w]e will find you, we will prosecute you, and we will put you to death."^[115]

¶34 Senator Glenn Coffee of Oklahoma City introduced S.B. 1754, which would require businesses whose employees enter individual residences both to verify whether its employees are registered sex offenders and to notify residents about the sex offender status of any employee who will be

sent to the home.^[116] The Senate engrossed H.B. 1754 to the House, but the bill died in committee there.^[117]

¶35 Senator Nancy Riley of Tulsa introduced S.B. 1755, which originally was intended to clean up some language in § 583 of SORA concerning who was required to register.^[118] Similar to S.B. 1708,^[119] after engrossment House leadership referred S.B. 1755 to its Committee on Corrections and Criminal Justice to revive portions of their Keeping Oklahoma Kids Safe initiative that the Senate had just killed. The House's committee substitute incorporated (a) the provision of Rep. Terrill's amendment to H.B. 2839 that would prohibit plea deals exempting sex offenders from SORA requirements^[120]; (b) a provision not only adding Rep. Winchester's playgrounds and parks to the residency restrictions in § 590 of SORA,^[121] but also adding "licensed daycare centers" to the residency restrictions, specifying that "[t]he distance indicated in this section shall be measured from the nearest property line" of the sex offender's residence "to the nearest property line" of the forbidden facility, and increasing the penalty for first-time violations to a felony; (c) a provision adding high schools, parks, school bus stops, and "other place[s] where persons under eighteen (18) years of age regularly congregate" to the safety zones that sex offenders cannot breach in § 1125 of the Penal Code and increasing the penalty for first-time violations to a felony, but also creating an exception to the safety-zone rule for registered sex offenders who have legal custody of a child so that they can attend school activities so long as they are accompanied by a 21-year-old adult who is not a sex offender; (d) a provision amending § 584 of SORA to include on the

registry information about "all occupants residing with the person registering including, but not limited to, name, date of birth, gender, relation to the person registering, and how long the occupant has resided there"; and (e) other provisions that are too numerous to detail here.^[122] The Senate rejected the House amendments and requested a conference committee.^[123] The enrolled legislation that came out of the conference committee and was signed into law by Governor Henry included all of the provisions from the House committee substitute,^[124] as well as a new provision of law that made it unlawful for two or more registered sex offenders to reside together in an individual dwelling unless a group home has been authorized by the proper zoning authorities.^[125] The relevant portion of S.B. 1755's title was:

An Act relating to sex offenders and children;... amending Section 1, Chapter 209, O.S.L. 2003 (21 O.S.Supp. 2005, Section 1125), which relates to safety zone; adding locations to certain safety zone; prohibiting sex offenders from being within certain distance of safety zone; increasing penalties; adding certain exemption;... amending Section 1, Chapter 223, O.S.L. 2003 (57 O.S.Supp. 2005, Section 590), which relates to prohibition for sex offenders to live within certain radius of certain places; adding prohibited places; determining calculation of certain distance; exempting certain nonprofit from certain distance prohibition; increasing penalty for certain violation;

setting penalty for second or subsequent violation; prohibiting sex offenders from residing in certain dwelling; setting penalties; construing certain provisions; prohibiting certain contracts for housing sex offenders; prohibiting certain housing of sex offenders in certain locations; defining terms; providing for codification; and declaring an emergency. ^[126]

S.B. 1755's amendments to the residency restrictions and safety zone provisions in S.B. 1755 were codified in Title 21 of the Oklahoma Statutes concerning "Crimes & Punishment" and in Title 57 concerning "Prisons & Reformatories."

¶36 Lastly, Senator Kenneth Corn of Poteau introduced S.B. 1964, which was originally intended only to require three years of community supervision for convicted sex offenders after their release from prison. ^[127] *S.B. 1964 was referred to the Senate Committee on Appropriations, which amended the bill to include a requirement that sex offenders participate in a treatment program for at least six months that would ensure compliance using polygraph examinations.* ^[128] *Similar to S.B. 1708 and S.B. 1755,* ^[129] *after engrossment House leadership referred S.B. 1964 to the Committee on Corrections and Criminal Justice to revive portions of their Keeping Oklahoma Kids Safe initiative that the Senate had just killed.* ^[130] *The House's committee substitute incorporated (a) the provision of Rep. Terrill's amendment to H.B. 2839 that would prohibit plea deals exempting sex offenders from SORA*

requirements ^[131]; *(b) a provision adding school bus stops to the safety zones that sex offenders cannot breach in § 1125 of the Penal Code; (c) a provision from Rep. Billy's H.B. 2830 to require registered sex offenders to renew their driver licenses or ID cards each year instead of every four years* ^[132]; *(d) a provision not only adding Rep. Winchester's playgrounds and parks to the residency restrictions in § 590 of SORA,* ^[133] *but also specifying that "[t]he distance indicated in this section shall be measured from the nearest property line" of the sex offender's residence "to the nearest property line" of the forbidden facility and increasing the penalty for second and subsequent violations; (e) provisions from Rep. Kiesel's H.B. 2569 adding new sections to SORA that would require sex offenders to be assessed and assigned a risk level to determine what degree of community notification was needed* ^[134]; *and (f) other provisions that are too numerous to detail here.* ^[135] *The Senate rejected the House amendments and requested a conference committee.* ^[136] *The enrolled legislation that came out of the conference committee and was signed into law by Governor Henry included Sen. Corn's supervision and treatment program, the driver license renewal policy from H.B. 2830, residency restrictions identical to those in S.B. 1755, and other irrelevant provisions t^hat had not previously been part of the bill.* ^[137] *The relevant portion of S.B. 1964's title was:*

An Act relating to corrections;... amending Section 4, Chapter 457, O.S.L. 2005 (47 O.S. 2005, Section 6-105.3), which relates to identification cards; requiring sex offenders to have limited

term for identification cards; providing annual renewal; setting cost the same as other identification cards; amending 47 O.S. 2001, Section 6-115, as last amended by Section 40, Chapter 5, O.S.L. 2004 (47 O.S.Supp. 2005, Section 6-115), which relates to driver licenses; making certain driver licenses valid for limited period of time; providing for application, renewal and cost of certain driver licenses for certain persons;... amending Section 1, Chapter 223, O.S.L. 2003 (57 O.S.Supp. 2005, Section 590), which relates to residential restrictions for sex offenders; including additional locations in certain prohibition; clarifying measurement; construing effect of prohibition; increasing penalty; providing penalty for second or subsequent offense; providing an effective date; and declaring an emergency. ^[138]

S.B. 1964's amendments to the residency restrictions were codified in Title 57 concerning "Prisons & Reformatories," but the provisions regarding community supervision and driver license renewals were codified in Title 22 concerning "Criminal Procedure" and in Title 47 concerning "Motor Vehicles."

i. 2007 Sex Offender Legislation: A 3-Tiered Risk Level Assessment System, Lengthened Registration Periods for Non-Aggravated Offenders, Clarification of Residency Restrictions and Safety Zones, Driver's License Labels, and Beyond

*¶37 In 2007, both chambers were again busy with platforms and bills targeting sex offenders. In the House, eight sex offender bills were introduced--i.e., House Bills 1051, 1381, 1529, 1714, 1760, 1816, 1825, and 1993--and four were enacted. Concurrently in the Senate, seven sex offender bills were introduced--i.e., Senate Bills 35, 109, 431, 490, 680, 877, and 891--and two were enacted. As background, sex offenders filed at least two federal lawsuits in 2006 seeking to prevent enforcement of SORA's residency restrictions against them--i.e., *Doe v. Lane et al.*, No. 5:06-cv-00074-HE (W.D. Okla. filed Jan. 23, 2006), and *Doe et al. v. Parish et al.*, No. 4:06-cv-00457-CVE-FHM (N.D. Okla. filed Sept. 1, 2006). Both lawsuits ended with settlements wherein the government officials agreed to refrain from enforcing the residency restrictions so long as the sex offenders remained at their current residences. ^[139] But the state officials who had been sued also prompted the Legislature to amend the residency restriction during the 2007 legislative session, so as to "provide[] more discretion to the defendants in enforcement." ^[140] Thus, one bill contained provisions that were conciliatory towards sex offenders, but only because such provisions were foisted upon the Legislature to avoid future litigation. Otherwise, 2007's sex offender legislation punished sex offenders with increased sentences for qualifying crimes, lengthened registration periods, restrictions upon driver's licenses, and restrictions upon school attendance.*

¶38 Under new leadership, the House GOP introduced its "Safe Families" initiative to "help restore... [a] sense of safety and demonstrate that as a state, we will keep working to reduce sexually violent crime."

^[141] The initiative included a slate of three measures, two of which concerned sex offenders: H.B. 1816 and H.B. 1051. ^[142] Representative David Dank of Oklahoma City introduced H.B. 1816, which would impose a minimum sentence of 25 years imprisonment on any sex offenses against children under 12 years of age. ^[143] Speaker Cargill of Harrah reintroduced his bill to prevent student-aged sex offenders from attending the same school or riding the same bus as their victim or their victim's sibling(s) as H.B. 1051. ^[144] Although both bills faced committee substitutes in the House and Senate and were referred to conference, the original versions of both bills were restored and enacted when Governor Brad Henry signed them into law. ^[145] H.B. 1816 was codified in Title 21 of the Oklahoma Statutes concerning "Crimes & Punishment," and H.B. 1051 was codified in Title 70 concerning "Schools."

¶39 Representative Terry Ingmire of Stillwater introduced H.B. 1381, which would expand electronic monitoring of certain types of offenders to cover all sex offenders. ^[146] H.B. 1381 was referred to the House Committee on the Judiciary and Public Safety, which gutted the substance of the bill in favor of a committee substitute that would give the DOC discretion to electronically monitor habitual and aggravated sex offenders based upon risk level assignments that were being considered in another bill. ^[147] The House engrossed the committee substitute for H.B. 1381, but the bill never advanced to a committee in the Senate. ^[148]

¶40 Representative Al Lindley of Oklahoma City introduced H.B. 1529, which would implement a risk level assignment system for juvenile sex offenders. ^[149] H.B.

1529 was assigned to the House Committee on Human Services, where it died. ^[150]

¶41 Representative Paul Wesselhoft of Moore introduced H.B. 1714, which would allow a sentencing court to require registration of any sex offender's e-mail addresses and login credentials for messaging platforms and chat rooms and to restrict access to social networking websites that minor children utilize. ^[151] The House engrossed H.B. 1714 to the Senate, where it was assigned to the Senate Committee on Criminal Jurisprudence. ^[152] A committee substitute was adopted in the Senate and engrossed to the House, where it was rejected. ^[153] Ultimately, conference was granted, and the original version of H.B. 1714 was enacted when Governor Henry signed it into law on May 31, 2007. ^[154] H.B. 1714 was codified in Title 22 concerning "Criminal Procedure."

¶42 Representative Anastasia Pittman of Oklahoma City introduced H.B. 1993, which would expand the class of registered sex offenders to include those who were convicted of a qualifying crime prior to SORA's 1989 effective date and who were later convicted of any other crime in Oklahoma after SORA's 1989 effective date. ^[155] H.B. 1993 was referred to the House Committee on the Judiciary and Public Safety, where it died. ^[156]

¶43 In H.B. 1825 Rep. Kiesel reintroduced his bill adding new sections to SORA that would require sex offenders to be assessed and assigned a risk level to determine what degree of community notification was needed. ^[157] H.B. 1825 was referred to the House Committee on the Judiciary and Public Safety, where it died. ^[158] Nevertheless, the entirety of its content

had also been incorporated into H.B. 1760 authored by Representative Gus Blackwell of Goodwell. ^[159] But when H.B. 1760 was enacted, the provision concerning different degrees of public notification had been removed. ^[160]

¶44 That brings us to the last of the House Bills, Rep. Blackwell's H.B. 1760. As just mentioned, sections 23 through 29 of H.B. 1760 (as introduced) contained provisions identical to Representative Kiesel's 3-tiered risk level assignment system. ^[161] But H.B. 1760 did much more: (1) sections 1 through 19 and sections 21 and 22 of H.B. 1760 would impose at least 3 years of post-imprisonment supervision upon any sex offender who had been sentenced to 2 years of imprisonment, ^[162] despite the fact that such supervision had previously been imposed only upon sex offenders who had received a suspended sentence (i.e., no imprisonment) ^[163]; (2) sections 20 and 30 of H.B. 1760 contained the conciliatory measures that were necessitated by settlement of the federal lawsuits challenging SORA's residency restriction and the Penal Code's zones-of-safety statute ^[164]; and (3) sections 31 through 50 would enact new law creating an involuntary civil commitment procedure for long-term care and treatment of sexually violent predators, despite their lack of any diagnosis of a mental disease or defect that would otherwise allow for civil commitment. ^[165] H.B. 1760 received minor revisions in committee substitutes from the House and Senate and was referred to conference. ^[166] The Legislature ultimately enrolled a

version of H.B. 1760 that removed both the civil-commitment provisions and Rep. Kiesel's provision regarding different degrees of public notification for different risk-level tiers and that added one provision creating the Oklahoma Statewide Gang Intervention Steering Committee to coordinate the State's response to gang activity and violence. ^[167] Governor Henry signed H.B. 1760 into law on June 4, 2007. ^[168] The relevant portion of H.B. 1760's title was:

An Act relating to public safety;... amending [numerous provisions defining crimes in Titles 10 and 21 of the Oklahoma Statutes by] adding post-imprisonment supervision requirement for certain crimes;... clarifying zone of safety requirements; adding exception for persons receiving medical services at certain facilities; authorizing certain persons to attend religious services under specified circumstances; amending 22 O.S. 2001, Section 991a,... which relates to sentencing powers of the court; modifying supervision and probation provisions relating to sex offenders; amending 57 O.S. 2001, Section 582,... 583,... 584,... which relate to the Sex Offenders Registration Act; requiring determination of numeric risk level prior to release; directing certain information and numeric risk

level be forwarded to certain entities; directing court to assign numeric risk level and provide certain notification; requiring verification of numeric risk level under certain circumstances; providing for establishment of risk assessment review committee; stating membership; stating function of committee; providing guidelines for selection of screening tool; providing for override of numeric risk level under certain circumstances; providing for the release of certain records and files; exempting risk assessment review committee meeting from certain act; clarifying registration requirements; increasing registration time periods; authorizing certain persons to petition the court for removal from registration requirements; requiring registration regardless of residency location; modifying address verification requirements; authorizing address verification by local law enforcement; requiring notification to local law enforcement of change in status; clarifying scope of liability; clarifying residency restriction requirements; providing an exception; providing exception to certain residency restriction for married persons and relatives....

[\[169\]](#)

H.B. 1760's provisions were codified in Title 10 concerning "Children," in Title 21

concerning "Crimes & Punishments," and in Title 57 concerning "Prisons & Reformatories."

¶45 In the Senate, Sen. Crain of Tulsa reintroduced his bill to require new driver licenses bearing the words "Sex Offender" in S.B. 35. [\[170\]](#) This time around, his bill was enacted, with Governor Henry signing S.B. 35 into law on June 4, 2007. [\[171\]](#) The relevant portion of S.B. 35's title was:

An Act relating to motor vehicles; amending 47 O.S.2001, Section 6-105... and 6-111,... which relate to issuance of driver license and identification cards; modifying qualifications for issuance of intermediate Class D licenses to certain persons;... directing the Department of Public Safety to issue distinctive driver license or identification card to persons required to register pursuant to the Sex Offenders Registration Act and who have been designated an aggravated or habitual offender; directing the Department to provide notification of certain requirements; requiring the surrender of driver license or identification care within a certain period of time; authorizing application for replacement driver license or identification card; providing for certain action by the Department for failure to comply; authorizing application for reissuance of certain driver license or identification card; providing penalty for certain act.... [\[172\]](#)

S.B. 35's provisions were codified in Title 47 concerning "Motor Vehicles."

¶46 Sen. Nichols of Norman introduced S.B. 109, which would repeal the school-activities exception in the Penal Code's safety zone law that had been enacted the previous year.^[173] S.B. 109 sailed through both chambers without amendment and was enacted, with Governor Henry signing S.B. 109 into law on April 18, 2007.^[174] The relevant portion of S.B. 109's title was:

An Act relating to sex offenders: amending... 21 O.S.Supp. 2006, Section 1125..., which relates to safety zone; removing certain exception for certain person to be on school property; and declaring an emergency.^[175]

S.B. 109's provisions were codified in Title 21 concerning "Crimes & Punishments."

¶47 Closely related, Senator Charlie Laster of Shawnee introduced S.B. 490, which would require registered sex offenders attending their child's school activities to provide advance written notice to school administrators, allow administrators to assign a designee to accompany any sex offender while on school property, authorize administrators to deny attendance under certain conditions, and make violations of the new rule a felony.^[176] S.B. 490 was referred to the Senate Judiciary Committee.^[177] The title was stricken in committee, and the bill never got a vote on the floor of the Senate.^[178]

¶48 Sen. Nichols also introduced S.B.

431, which would prevent registered sex offenders from participating in holiday events involving minor children--including "such holidays as Halloween, Christmas, and Easter"--unless the event involves only their child(ren) and would make violations punishable as a misdemeanor.^[179] S.B. 431 was referred to the Senate Rules Committee, where it died.^[180]

¶49 Senator Kenneth Corn of Poteau introduced S.B. 680, which would create a Sex Offender Management Team within the DOC to "develop[] effective policies and practices for supervision and treatment of sex offenders."^[181] S.B. 680 was referred to the Senate Appropriations Committee's Subcommittee on Public Safety and the Judiciary, where it died.^[182]

¶50 Senator Debbe Leftwich of Oklahoma City introduced S.B. 877, which was merely intended to clean up language in Oklahoma's Juvenile SORA.^[183] S.B. 877 was referred to the Senate Rules Committee, where it died.^[184]

¶51 Finally, Sen. Laster also introduced S.B. 891, which would have defined the terms "predator," "sexually violent predator," and "nonaggressive offender" for purposes of SORA.^[185] S.B. 891 was referred to the Senate Committee on Criminal Jurisprudence, where it died.^[186]

j. Relevant Amendments Since 2007 to SORA's Residency Restrictions and the Penal Code's Zones of Safety

¶52 Since 2007, the residency restrictions in § 590 of SORA and the zones of safety established in § 1125 of the Penal Code have only become more restrictive. In the following years, residency restrictions

were expanded to include any" property or campsite used by an organization whose primary purpose is working with children "; any "playground or park that is established, operated or supported in whole or in part by a homeowners' association or a city, town, county, state, federal or tribal government"; any" family child care home as defined in the Oklahoma Child Care Facilities Licensing Act"; and" the residence of his or her victim" regardless of the victim's age. ^[187] Moreover, the residency restriction has been expanded to forbid a registered sex offender whose victim was a minor or child from "resid[ing] with a minor child" regardless of whether that child was the victim, with an exception only being made where the child was not the victim and is the child, step-child, or grandchild of the sex offender. ^[188] In 2010, the zones of safety were expanded from 300 feet to 500 feet. ^[189] In 2014, the scope of sex offenders to whom the zones of safety applied was increased insofar as all habitual and aggravated sex offenders--regardless of the age of their victim--were prevented from entering any park and insofar as sex offenders whose victims were over 13 years of age and under 16 years of age would also be prohibited from going within 500 feet of the statutory safety zones. ^[190] In 2018, a new safety zone of 1,000 feet was created around the residence of the sex offender's victim. ^[191]

2. What This History Tells Us about Legislative Intent

¶ 53 Although the 1989 sex offender legislation may have been civil and regulatory, the amendments since then demonstrate a punitive intent in several ways.

¶54 First, the "findings" subsection added to section 581 of SORA in 1997 expresses a punitive intent. Therein, "[t]he Legislature f[ou]nd[ed] that sex offenders who commit other predatory acts against children and persons who prey on others as a result of mental illness pose a high risk of re-offending after release from custody." ^[192] Such finding served as the basis for enacting the Oklahoma version of Megan's Law, H.B. 1729, which would permit law enforcement agencies to make a sex offender's registry file available for public inspection and to notify the community about the presence of a sex offender. ^[193] It also served as the basis for the remainder of H.B. 1729, which expanded the scope of sex offenders subject to SORA, shortened their deadline for registering, removed the incentive of a shorter registration period for successfully completing the sex offender treatment program, increased the penalty for SORA violations from a misdemeanor to a felony, and imposed criminal liability upon any sex offender who worked for a daycare. ^[194] These provisions would hinder sex offenders' ability to rehabilitate and reintegrate into the community and would further increase their odds of being thrown back in jail for infractions that thenceforth were felony crimes. Looking at the overall scheme of H.B. 1729 from the 1997 legislative session, it becomes apparent that the goal of the bill was both deterrence of future sex crimes and retribution against an unpopular class of convicts. As recognized in *Starkey*, both of these goals are traditional aims of punishment. *Starkey*,

2013 OK 43, ¶ 63, 305 P.3d at 1027.

¶55 Second, turning to something that the majority opinion omits, the 2003 and 2006 amendments concerning residency restrictions in section 590 of SORA were always passed in tandem with the safety zone laws in section 1125 of the Penal Code and with numerous other sex offender provisions that clearly demonstrate the Legislature's punitive intent. In 2003, H.B. 1501 enacted SORA's first residency restriction that prohibited sex offenders from living within 2,000 feet of any school, and S.B. 554 enacted the Penal Code's first "zone of safety" law that prohibited sex offenders who committed certain sex crimes against victims under the age of 13 from breaching a 300-foot safety zone around elementary and junior high schools.^[195] Both bills made violations a criminal offense, but only the safety zone laws were codified in the "Crimes and Punishments" title.^[196] Similarly, the 2006 amendment to SORA's residency restrictions that added playgrounds, parks, and licensed daycare centers and specified the harshest means for measuring distances was enacted in the same bill--i.e., S.B. 1755--as the amendment to the Penal Code's safety zone law that created safety zones around high schools, parks, school bus stops, and "other place[s] where persons under eighteen (18) years of age regularly congregate."^[197] Also, for both the safety zone law and residency restrictions, the criminal penalties for first-time violations were increased to a felony under S.B. 1755.^[198] Moreover, S.B. 1755 also amended, among other things, section 991a of the code of criminal procedure (to prohibit plea deals that waive or exempt sex offenders from SORA requirements) and section 584 of SORA (to require registry information about occupants residing with

sex offenders) and enacted a new section of SORA--i.e., section 590.1--that generally made it unlawful for multiple sex offenders to live together.^[199] Add to that the other sex offender legislation from 2006--like S.B. 1800 that made the death penalty an option for repeat sex offenders whose victims were minor children,^[200] and S.B. 1964 that required sex offenders to renew their driver licenses and ID cards four times more frequently than other citizens,^[201] and S.B. 1707 that amended section 584 of SORA to make the sex offender registry available to the State Commissioner of Health^[202]--and the sex offender legislation from the two years on either side of 2006--including Jessica Lunsford's Law from 2005 that required electronic monitoring of all sex offenders during parole and of all habitual and aggravated sex offenders for life,^[203] and S.B. 35 from 2007 that would require driver licenses to include the label "Sex Offender,"^[204] and H.B. 1760 from 2007 that created a risk-level assignment system for sex offenders and lengthened the amount of time each tier of sex offenders would be required to register^[205]--and one gets the sense that Oklahoma legislators were out to score political points by enacting laws that would punish sex offenders. A review of the legislators' press releases and quips for the newspapers only confirms that notion, as one reads about "the legislature's fight to protect the public from sexual predators"^[206]; "wag[ing] the war against sex crimes"^[207]; "send[ing] a clear message to child predators in our state... [that] [w]e will find you, we will prosecute you, and we will put you to death"^[208]; the need "to put these demented criminals behind bars and keep[] them there for as long as possible"^[209]; and the belief that "[r]apists must not be allowed to skirt the requirements of our sex

offender registry." ^[210] Reviewing SORA's residency restrictions in their full context should lead everyone to conclude that the Legislature's intent was retributive and punitive.

¶56 Third, the majority's conclusion that SORA's residency restrictions "are part of the civil regulatory system intended to reduce recidivism and protect the public, specifically children" is questionable insofar as numerous exceptions to the restrictions have been made, both in the statutory provisions and in selective enforcement of the law. For instance, the current version of section 590 that the City of El Reno wishes to enforce against Mr. Donaldson purportedly restricts him from residing "within a two-thousand-foot radius of... a park that is established, operated or supported in whole or in part by a homeowner's association or a city, town, county, state, federal or tribal government, [or of] a licensed child care center or family child care home as defined in the Oklahoma Child Care Facilities Licensing Act." 57 O.S.Supp.2019, § 590 (A). But the statute proceeds to say: "Establishment of a licensed child care center, family child care home or park in the vicinity of the residence of a registered sex offender will not require the relocation of the sex offender or the sale of the property." *Id.* In other words, it would appear the Legislature cares about the safety of the public and, in particular, children unless the sex offender already lived there first. If the law was purely civil and regulatory, there wouldn't be any need for such an exemption; but the existence of the exemption seems to acknowledge the Legislature's belief that the residency restriction is punitive and that its retroactive application to a sex offender who lived in the neighborhood first might

violate the constitutional prohibition of ex post facto laws. Moreover, sex offenders have filed at least two federal lawsuits seeking to prevent enforcement of SORA's residency restrictions against them--i.e., *Doe v. Lane et al.*, No. 5:06-cv-00074-HE (W.D. Okla. filed Jan. 23, 2006), and *Doe et al. v. Parish et al.*, No. 4:06-cv-00457-CVE-FHM (N.D. Okla. filed Sept. 1, 2006)--and both lawsuits ended with settlements wherein the government officials agreed to refrain from enforcing the residency restrictions so long as the sex offenders remained at their current residences. ^[211] Again, if the real concern was protecting the public, then concessions shouldn't be made; and the enforcers' agreements to make exceptions reveal their appreciation of the residency restriction's punitive nature and the resulting ex post facto problem. The exceptions that have been made via lawsuit settlements and statutory exemptions demonstrate that the Legislature's true goal wasn't protection of the public through a uniformly applied civil, regulatory scheme.

¶57 For all these reasons, I believe the Oklahoma Legislature intended to make the residency restrictions in § 590 of SORA punitive.

B. Starkey Rejected the "Clearest Proof" Burden

¶58 Before proceeding to a discussion

of the second prong of the "intent-effects" test, I must address the majority's adoption and application of the "clearest proof" burden to that second prong. Without discussion, the majority invokes the "clearest proof" burden with a quotation from Smith v. Doe, 538 U.S. 84, 92 (2003), and a citation that signals us to "see" Starkey at ¶ 77. See Majority Op. ¶ 19. As the majority notes, in that paragraph the Starkey Court "[f]ound there is clear proof that the effect of the retroactive application of SORA's registration is punitive and outweighs its non-punitive purpose." Id. ¶ 19 n.10 (citing Starkey, 2013 OK 43, ¶ 77, 305 P.3d at 1030 (emphasis added)). Interestingly, the majority acknowledges that "[t]he City stresses that the majority in Starkey rejected the clearest proof standard and adopted an alternative standard set forth in Justice Ginsburg's dissent in Smith v. Doe" and that "the Starkey opinion does include some discussion of Justice Souter and Justice Ginsburg's dissatisfaction with the clearest proof standard." Id. Nevertheless, the majority chooses to ignore such information because of its determination that the Starkey Court's finding of clear proof is equivalent to application of the clearest proof burden. Id.

¶59 This is nothing more than a veiled attempt to overrule one aspect of the Starkey precedent that the majority dislikes and to revert back to the U.S. Supreme Court's higher burden of proof from Smith v. Doe that Starkey rejected. In ¶¶ 44 and 45 of the Starkey opinion, this Court adopted a less stringent burden of proof:

¶44 In Smith v. Doe, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), the Supreme Court found "that 'only the clearest

proof' that a law is punitive based on substantial factors will be able to overcome the legislative categorization." In his concurring opinion, Justice Souter stated the standard of "clearest proof" made sense "only when the evidence of legislative intent clearly points in the civil direction." He believed there was considerable evidence that the act in Smith had criminal characterizations as well as civil. Justice Ginsburg also stated in her dissent that she would not demand "the clearest proof" be used to determine if a statute is in effect criminal rather than civil. In her opinion, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) guides one to use a neutral evaluation of the act's purpose and effects. As stated, there is no clear legislative categorization that SORA is a civil law. In Oklahoma, legislative enactments are presumed constitutional. Where feasible this Court will construe statutes in a manner to uphold their constitutionality. The constitutionality of a statute will be upheld unless it is clearly inconsistent with the constitution. The factors in the second part of the inquiry will help determine SORA's nature and provide a neutral framework for determining SORA's purpose and effects.

¶45 Smith dealt with an

interpretation of the Federal Constitution's prohibition on ex post facto laws. Although Oklahoma's ex post facto clause is nearly identical to the Federal Constitution's provisions we are not limited in our interpretation of Oklahoma's constitution. How we apply the "intent-effects" test is not governed by how the federal courts have independently applied the same test under the United States Constitution as long as our interpretation is at least as protective as the federal interpretation. This Court has previously held:

The people of this state are governed by the Oklahoma Constitution, and when it grants a right or provides a principle of law or procedure beyond the protections supplied by the federal constitution, it is the final authority. This is so even if the state constitutional provision is similar to the federal constitution. The United States Constitution provides a floor of constitutional rights--state constitutions provide the ceiling.

Daffin v. State, 2011 OK 22, n.20, 251 P.3d 741, n.20 (citing Alva State Bank & Trust Co. v. Dayton, 1988 OK 44, 755 P.2d 635) (Kauger, J., specially concurring).

Starkey, 2013 Ok 43, ¶¶ 44--45, 305 P.3d 1020--21 (footnotes omitted) (emphasis added). These paragraphs make it readily apparent that Starkey did adopt a lower burden of proof to provide "a neutral framework for determining SORA's purpose and effects" because "there [wa]s no clear legislative characterization that SORA is a civil law" and that the reason for adopting a neutral framework was to provide ex post facto protections beyond those afforded by the federal constitution. Had SORA included a clear statement of legislative intent that it was not punitive, there would have been no reason to quote Justice Souter's concurrence or Justice Ginsburg's dissent. Similarly, had we adopted the clearest-proof burden, there would have been no need to discuss our State Constitution's ability to provide more protection at "the ceiling" than what the federal constitution provides at the "floor." In fact, everything after the first sentence in ¶ 44 of Starkey would have been superfluous unless we were adopting a lower, more "neutral" burden of proof.

¶60 The majority's attempt to confuse the matter by referencing Starkey 's ultimate finding of "clear proof that the effect of the retroactive application of SORA's registration is punitive" is misguided. See Majority Op. ¶ 19 n.10 (quoting Starkey, 2013 OK 43, ¶ 77, 305 P.3d at 1030). The fact that Starkey subsequently found "clear proof" does not undermine our adoption of a neutral framework; it merely speaks to the one-sidedness of the evidence in Starkey. A finding of clear proof is not the same as a statement that clearest proof must be found or that the clearest-proof burden applies.

¶61 Moreover, the appealing parties concede that the Starkey Court did not

adopt the clearest proof burden. In his brief, the Attorney General stated: "Importantly, the [U.S.] Supreme Court held 'that only the clearest proof that a law is punitive based on substantial factors will be able to overcome the legislative categorization' of the statute as civil. Smith, 538 U.S. at 92 (emphasis added). Instead of embracing the U.S. Supreme Court's standard, Starkey cited Justice Souter's concurring opinion and Justice Ginsburg's dissenting opinion from Smith that each disputed applying the 'clearest proof approach...." State's Br. 6. Similarly, the City of El Reno's attorney admitted at oral argument that "[t]he [Starkey] Court did not adopt the clearest proof standard that the U.S. Supreme Court adopted in Smith v. Doe" and that "under Starkey" we would "stick with the neutral evaluation standard" is certainly not authoritative. Okla. Sup. Ct. Oral Argument Case No. 120,617 at 15:50--:56, 1:18:16--:21, available at <https://vimeo.com/908699917/c4ef035ab9?share=copy>. Although their concessions are not authoritative, they do lend support to my reading of Starkey at the same time that they disparage the majority's reading.

¶62 For these reasons, I dissent to the majority's adoption and application of the "clearest proof" burden. I would apply the neutral burden of proof that this Court adopted in Starkey for determining whether the effects of the sex offender legislation at issue are punitive.

¶63 Before I move on, however, I would be remiss not to address the City of El Reno's arguments raised at oral argument that Starkey fails to explain how or why Oklahoma's ex post facto clause could provide greater protection than the

nearly identical federal clause. See Majority Op. ¶ 21 n.11. My response is twofold. First, there is an explanation within Starkey's quotations from Justice Souter's concurrence and Justice Ginsburg's dissent to demonstrate that there is no real consensus on why the federal constitution should require clearest proof and thus provide less protection. Second, this argument is recycled from the Starkey dissents, see Starkey, 2013 OK 43, ¶ 7 n.7, 305 P.3d at 1034 n.7 (Winchester, J., dissenting), and was flatly rejected. The Oklahoma Constitution provides more protection because six Justices on this Court looked at the debate between the Smith v. Doe majority and Justices Souter and Ginsburg and decided to go with a more robust ex post facto clause that didn't require "clearest proof." In other words, the Oklahoma Constitution provides more protection because six Justices on this Court said so. See generally Okla. Sup. Ct. Oral Argument Case No. 120,617 at 31:07-32:07 (wherein City's counsel said she wasn't sure Starkey's interpretation of Oklahoma's ex post facto clause as providing more protection than its federal counterpart was justified, and Justice Kauger responded: "Well, right now it is because we said so"), available at <https://vimeo.com/908699917/c4ef035ab9?share=copy>.

C. Punitive Effects

¶64 Finally, even if I assumed the Oklahoma Legislature's intent in enacting SORA's residency restrictions was civil in nature--much as Starkey did--I would ultimately strike down as unconstitutional the residency restrictions as applied retroactively to Mr. Donaldson due to their punitive effects. Looking at the majority's assessment of the seven Mendoza-Martinez factors, I only agree with their conclusions that the first factor "weighs in favor of a punitive effect" and that the third factor should be "given little weight." See Majority Op. ¶¶ 31, 35.

¶65 As a preliminary matter, I take issue with the majority's heavy reliance upon *Smith v. Doe* and several other federal appellate court cases decided since, and therefore constrained by the outcome in, *Smith*. See, e.g., Majority Op. ¶¶ 34, 36--39, 42 (citing *Smith*, 538 U.S. at 102--05; *McGuire v. Marshall*, 50 F.4th 986, 1008--09 (11th Cir. 2022); *Shaw v. Patton*, 823 F.3d 556, 566--68, 571, 574, 576--77 (10th Cir. 2016); *Doe v. Miller*, 405 F.3d 700, 720--22 (8th Cir. 2005); *Hatton v. Bonner*, 356 F.3d 955, 965 (9th Cir. 2004)). Such reliance is misplaced because the Starkey Court knew it was reaching a different conclusion than *Smith*. My majority opinion referenced *Smith* twenty-two times. *Starkey*, 2013 OK 43, ¶¶ 40--41, 43--45, 47, 49, 55, 58--59, 65, 70, 74--75, 305 P.3d at 1019--22, 1024--25, 1027--30. We also acknowledged (unlike today's majority) that the outcome of *Smith* was later undone when the Alaska Supreme Court found that Alaska's Sex Offender Registration Act did violate the Alaska Constitution's *ex post facto* clause. *Id.* ¶ 40, 305 P.3d at 1019 (taking issue with cases cited by the DOC because those cases did

not mention *Doe v. State*, 189 P.3d 999 (Alaska 2008)). We then went through the seven Mendoza-Martinez factors, but we repeatedly found ourselves persuaded more by the concurrence and dissents in *Smith*, by the Alaska Supreme Court's *Doe v. State* opinion, and by other courts that disagreed with *Smith*. *Id.* ¶¶ 49, 55--56, 59--60, 65, 74--75, 305 P.3d at 1022, 1024--30 (citing *Smith*, 538 U.S. at 111 (Stevens, J., dissenting); *Smith*, 538 U.S. at 109 (Souter, J., concurring in judgment); *Smith*, 538 U.S. at 116--17 (Ginsburg, J., dissenting); *Doe*, 189 P.3d at 1012; *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009); *Wallace v. State*, 905 N.E.2d 371, 380 (Ind. 2009)). In a drive-by concurrence, Justice Gurich explicitly stated that "[t]he dissenters' reliance on *Smith v. Doe*, 538 U.S. 84 is misplaced because the Alaska registration system reviewed in that case did not have the constitutional infirmities present in this case." *Id.* ¶ 85, 305 P.3d at 1031 (Gurich, J., concurring). Justice Taylor's drive-by dissent cited *Smith* in support of his conclusion that SORA "is a civil, nonpunitive, noncriminal regulatory program that does not violate any *ex post facto* concerns when applied retroactively. *Smith v. Doe*, 538 U.S. 84." *Id.* ¶ 88, 305 P.3d at 1032 (Taylor, J., dissenting). And Justice Winchester's dissent was replete with references to *Smith* (thirty-six in the body of the writing), criticizing the majority in its opening paragraph because "[t]he majority opinion also conflicts with the opinion of the United States Supreme Court in *Smith v. Doe*..." *Id.* ¶ 1, 305 P.3d at 1032 (Winchester, J., dissenting). We duly considered *Smith*'s outcome, but a six-member majority decided to spurn a similar outcome with respect to SORA in light of Oklahoma's *ex post facto* clause.

¶66 Similarly, the majority utilizes opinions from lower federal courts to stack its deck in declaring that it is "join[ing] the majority of courts from other jurisdictions having assessed the constitutionality of similar residency restrictions." Majority Op. ¶ 44 n.18. The majority cites cases from four U.S. Courts of Appeals, one U.S. District Court, and four state appellate courts. See *id.* (citing *McGuire*, 50 F.3d 986 (Eleventh Circuit); *Shaw*, 823 F.3d at 577 (Tenth Circuit); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006); *Miller*, 405 F.3d at 720 (also Eighth Circuit); *Hatton*, 356 F.3d at 965 (Ninth Circuit); *Doe 1 v. City of Apple Valley*, 487 F.Supp.3d 761, 774 (D. Minn. 2020); *People v. Mosley*, 344 P.3d 788, 804 (Cal. 2005); *People v. Leroy*, 828 N.E.2d 769, 782 (Ill.App.Ct. 2005); *Standley v. Town of Woodfin*, 650 S.E.2d 618, 622--23 (N.C. Ct. App. 2007), *aff'd*, 661 S.E.2d 728 (N.C. 2008); *City of South Milwaukee v. Kester*, 2013 WIApp. 50, ¶ 31, 830 N.W.2d 710, 721). The majority does acknowledge two state appellate courts in the minority. *Id.* (citing *State v. Pollard*, 908 N.E.2d 1145, 1152 (Ind. 2009); *Baker*, 295 S.W.3d at 444 (Kentucky)). The federal case law should be completely discounted, as *Smith v. Doe* controlled and compelled the outcomes in those cases. Moreover, even though the California Supreme Court found that residency restrictions didn't violate the *ex post facto* clause in the *Mosley* case, that court later found that "blanket enforcement of the mandatory residency restrictions of Jessica's Law, as applied to registered sex offenders on parole in San Diego County,... has imposed harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while producing conditions that hamper, rather than foster, efforts to monitor,

supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has infringed the affected parolees' basic constitutional [due process] right to be free of official action that is unreasonable arbitrary, and oppressive." *In re Taylor*, 343 P.3d 867, 879 (Cal. 2015). Thus, California's commitment to the majority's cause appears to be in question. That leaves three or four state appellate decisions in favor of today's majority versus two against--hardly enough of a sampling to constitute a meaningful "majority of courts from other jurisdictions."

¶67 With those preliminary matters out of the way, I will now address the second, fourth, fifth, sixth, and seventh *Mendoza-Martinez* factors.

1. Residency Restrictions Resemble Sanctions that Have Been Historically Considered Punishment.

¶68 Regarding the second factor--i.e., whether residency restrictions "ha[ve] historically been regarded as a punishment"--the majority's conclusion that "this factor does not support a punitive effect" should be precluded by *Starkey*. In *Starkey*, this Court specifically invoked the residency restrictions in its analysis of this second factor and reached the opposite conclusion:

In addition, SORA's residency restrictions are similar to the traditional punishment of banishment.... If a person owns a home within a prohibited area and becomes subject to SORA

registration, they must vacate the property. The offender does not have to dispose of the property, however, the offender is prohibited from residing on the property (ostensibly allowing a registered offender the ability to be at the residence, but not "reside" on the property). In analyzing this Mendoza-Martinez factor, the Supreme Court of Kentucky determined a similar residency restriction was "regarded in our history and traditions as punishment." The court found the restriction expels registrants from their homes even if they resided there prior to the statute's enactment. The Oklahoma version of SORA is even more restrictive than the Kentucky law because the restrictive distance is twice as large as Kentucky's one-thousand-foot distance.

... The expulsion from one's residence is likewise analogous to the traditional punishment of banishment. Again, we are not making a determination of the constitutionality of any of these individual registration requirements but for purposes of analyzing the second Mendoza-Martinez factor we find the totality of these requirements weigh in favor of punishment.

Starkey, 2013 OK 43, ¶¶ 60--61, 305 P.3d at 1025--26 (footnotes omitted) (citing Baker,

295 S.W.3d at 444).

*¶69 Nevertheless, today's majority takes a different path. First, it presents an ad hominem attack against Mr. Donaldson. See Majority Op. ¶ 33. Essentially, they discredit the notion that SORA's residency restrictions are analogous to banishment because Mr. Donaldson isn't being kicked out of a house in which he already lives but is trying to live in a house he purchased after police told him he couldn't live there. Second, the majority rejects the Baker case as unpersuasive because of its discussion of "expel[ling] registrants from their homes," which is not Mr. Donaldson's scenario. Majority Op. ¶ 33. Finally, the majority relies upon federal precedent defining "[t]he cornerstones of banishment" as "complete expulsion from a community" and "prohibiting offenders from even being present in the restricted area" coupled with their acceptance of the City of El Reno's assertion that "57 O.S., § 590 does not prohibit Donaldson from recreating or accessing the facilities at Lake El Reno" to conclude that the residency restrictions don't rise to the level of banishment. *Id.* ¶ 34 (quoting *Shaw*, 823 F.3d at 566--68).*

¶70 The majority's "deeper understanding of the historic punishment of banishment" in light of federal case law is incorrect. Shaw 's first description of banishment as "complete expulsion from a community" is nothing new. Smith itself described banishment as "expel[ling] [a person] from the community," Smith, 538 U.S. at 98; and Starkey explicitly acknowledged Smith 's description of banishment as "expulsion from the community," Starkey, 2013 OK 43, ¶ 58 & n.83, 305 P.3d at 1025 & n.83 (citing Smith, 538 U.S. at 98). The Starkey Court knew

what banishment was. It didn't need a "deeper understanding." Although the majority acknowledges in a later part of their opinion "that there are likely some sex offenders who are not in compliance with the current residency restrictions and will need to move," Majority Op. ¶ 45, the majority fails to appreciate that such sex offenders are being "expel[led]... from their homes," Starkey, 2013 OK 43, ¶ 60, 305 P.3d at 1026. ^[212] Shaw 's second description leads the majority to endorse the City of El Reno's point that the residency restrictions in "§ 590(A) [of SORA] do[] not prohibit Donaldson from recreating or accessing the facilities at Lake El Reno." Majority Op. ¶ 34 (referencing City's Br. 14). While it may be true that § 590(A) of SORA doesn't restrict him in this manner, the safety zone laws in § 1125 of the Penal Code do. I brought this up at oral argument. Okla. Sup. Ct. Oral Argument Case No. 120,617 at 8:40--9:51, available at <https://vimeo.com/908699917/c4ef035ab9?share=copy>. Nevertheless, the majority continues to ignore the import of the safety zone laws in § 1125 that were enacted in conjunction with SORA's residency restrictions. See supra ¶ 55. Under § 1125, as currently drafted, Mr. Donaldson is forbidden from "entering any park" and from "loitering within five hundred (500) feet of any... park." To the extent Lake El Reno may be a park, ^[213] Mr. Donaldson cannot engage in "recreat[ion] or access[] the facilities" there. Thus, he is "prohibit[ed]... from even being present in the restricted area." Said another way, he meets Shaw 's second definition for banishment. Thus, the majority's reliance upon Shaw to conclude that this second Mendoza-Martinez factor does not support a punitive effect is erroneous.

¶71 Beyond that, however, the majority and the federal cases upon which they rely ignore the unspoken motivation behind residency restrictions and safety zone laws, which is to force sex offenders out of town. ^[214] That motivation only becomes clearer considering other sex offender laws that make finding employment tougher. See supra ¶¶ 55, 62-63, 67 (discussing the enactment of bills that restricted sex offenders from working at daycare facilities, at schools, at nursing homes, and as law enforcement officers). That motivation becomes crystal clear considering the fact that legislators have made Mr. Donaldson's sex offender status the predicate for new crimes. Residing near a park is only a crime for sex offenders like Mr. Donaldson, and any violation of that law can result in his complete removal from society for one to three years upon the first violation and for no less than three years upon a subsequent violation. 57 O.S.Supp.2019, § 590 (A), (D). In other words, even if sex offenders can't be forced to move out of town, maybe town officials and residents can make it so difficult for them to find a place to live that they will violate the law and be removed from town for years at a time through further incarceration for conduct that isn't criminal for anyone else but them. The motivation behind these laws demonstrates the desire to effect complete expulsion from a community.

¶72 The main disagreement between today's majority and the Starkey Court arises primarily from a difference in opinion over whether SORA must be identical to historical punishments or whether it must merely resemble them or be similar to them. Therein lies a major problem with characterizing sex offender registration

laws in terms of "historical punishment," as such laws "are of fairly recent origin." *Smith*, 538 U.S. at 97 (quoting *Doe I*, 259 F.3d at 989). That is why we cannot look for an exact match. In *Starkey*, a six-member majority deliberately decided to spurn *Smith*'s analysis of this factor in favor of more persuasive reasoning they found in the Alaska Supreme Court's *Doe v. State* opinion and in the Kentucky Supreme Court's *Baker* case. See *Starkey*, 2013 OK 43, ¶¶ 58--60 & nn.82--84, 88--89, 305 P.3d at 1025--26 & nn.82--84, 88--89 (citing *Smith*, 538 U.S. at 97--98; *Doe*, 189 P.3d at 1012; *Baker*, 295 S.W.3d at 444). The majority would obviously prefer to sideline *Starkey*'s conclusion that the residency restrictions help demonstrate SORA's punitive effects, as it seems like binding precedent in Mr. Donaldson's case. Nothing about SORA's residency restrictions has gotten less restrictive since *Starkey*; rather, the restrictions have only gotten worse. See *supra* notes 187--191 and accompanying text.

¶73 For all the reasons already discussed, I believe this second *Mendoza-Martinez* factor weighs in favor of characterizing SORA's residency restrictions as punitive in effect.

2. Residency Restrictions Promote the Traditional Aims of Punishment.

¶74 Regarding the fourth factor, the majority's determination that residency restrictions don't promote the traditional aims of retribution and deterrence is a foregone conclusion based upon their errant adoption of the "clearest proof" burden and mistaken determination that the legislative intent was non-punitive. See *Majority Op.* ¶ 37 ("[P]rohibiting sex offenders from living within 2,000 feet of

certain locations where children are often present is not an expression of condemnation that is sufficiently clear or strong enough to negate the legislature's non-punitive intent."). The majority apparently agrees with *Starkey*'s finding that, while "SORA promotes deterrence through threat of negative consequences, such as eviction and living restrictions," such determination "does not in and of itself impose a punishment." *Id.* ¶ 36 (citing *Starkey*, 2013 OK 43, ¶ 63, 305 P.3d at 1027). The majority then takes the opportunity to cite *Smith* and several other federal appellate court cases decided since *Smith* (and therefore falling in line with it) that discuss how a civil, regulatory law's indirect promotion of deterrence does not weigh strongly in favor of a punitive effect. *Id.* (citing *Smith*, 538 U.S. at 102; *Shaw*, 823 F.3d at 571; *Miller*, 405 F.3d at 720; *Hatton*, 356 F.3d at 965). The majority concludes that "any deterrent purpose is merely incidental" because "the purpose of the residency restrictions is not so much to deter the commission of the original sex offense that triggered SORA as it is to deter or, more accurately, prevent the sex offender from committing another sex offense in the future." *Id.* With confidence, the majority asserts that "[i]t is the threat of being imprisoned (if caught and convicted) that is intended to deter the original sex crime--not restrictions on where you can live after being released." *Id.*

¶75 I disagree with most of the majority's reasoning on deterrence. A six-member majority in *Starkey* deliberately rejected *Smith*'s analysis of this factor in favor of more persuasive reasoning they found in Justice Souter's concurrence and in the Kentucky Supreme Court's case. See *Starkey*, 2013 OK 43, ¶¶ 63, 65 & nn.93, 96,

305 P.3d at 1027--28 & nn.93, 96 (quoting *Smith*, 538 U.S. at 108--09 (Souter, J., concurring in judgment); *Baker*, 295 S.W.3d at 444; citing *Smith*, 538 U.S. at 102). The majority's reliance upon *Smith* and *Smith*'s reliance upon *Hudson v. United States*, 522 U.S. 93, 99 (1997), seems misplaced.

Hudson is a double jeopardy case. Both double jeopardy jurisprudence and *ex post facto* jurisprudence utilize the intent-effects test and the *Mendoza-Martinez* factors. But the idea of incidental deterrence seems to have more force and effect in double jeopardy cases where an individual who was not a criminal was deterred from conduct because such conduct could simultaneously result in both regulatory discipline and criminal prosecution. Thus, the criminal statutes deter the individual from committing certain criminal conduct, and the civil regulations "incidentally" deter the individual from committing the same conduct. That doesn't render the civil regulations punitive such that a person who has been disciplined pursuant to the civil regulations can later avoid criminal prosecution under the constitutional right against double jeopardy. The logic of this double jeopardy scenario doesn't carry over, however, when we try to apply it in *Mr. Donaldson's ex post facto* case. That's because we now have two criminal statutes in play and one so-called "civil regulation." The first criminal statute is the one

forbidding the sex offense, which was first-degree rape in *Mr. Donaldson's* case. The so-called "civil regulation"--which is the residency restriction in *Mr. Donaldson's* case--doesn't come into play until after he becomes a convicted sex offender and completes his sentence (including probation) under the first criminal statute. Thus, in one sense there's no way the "civil, regulatory" residency restriction can deter commission of the original sex offense because the residency restriction doesn't even apply until after the commission of the original sex offense. That makes this *ex post facto* case completely different from a double jeopardy case. But in another sense, the majority shouldn't be so confident in asserting that "the purpose of the residency restrictions... is to deter or, more accurately, prevent the sex offender from committing another sex offense in the future," Majority Op. ¶ 36, because some legislators apparently intend for the residency restrictions to deter the original crime. See *Coppernoll et al.*, *supra* note 212, at 1A (wherein an Oklahoma legislator suggests that residency restrictions should be a deterrent for the original crime: "'My heart bleeds for them very little,' said state Rep. Randy Terrill, R-Moore. Terrill is a co-sponsor of several bills that included the residency restriction. 'The solution is real simple... don't commit the crime.'" (ellipses

in original)). The logic breaks down yet again because a second criminal statute comes into play--i.e., the statute making it a crime for him to violate the residency restrictions--at the same time the civil, regulatory rule comes into play. That's because the second criminal statute and the civil, regulatory rule are contained in the very same statute. See 57 O.S.Supp.2019, § 590 (A) (forbidding Mr. Donaldson from living within 2,000 of a city park); id. § 590(D) (making "[a]ny person willfully violating the provision of this section by: 1. [i]ntentionally moving into any neighborhood or to any real estate or home within the prohibited distance... guilty of a felony"). In the Hudson double-jeopardy case, the civil regulations weren't contained in the same title as the criminal statute. If the sex offender violates the new "civil, regulatory" rules governing where he can live, work, or "loiter," he can be prosecuted for committing a new felony crime that's not related to the original sex offense or another sex offense. The logic just falls apart. Moreover, unlike the average citizen, the sex offender can be prosecuted for working where he shouldn't have worked, living where he shouldn't have lived, or lingering where he shouldn't have lingered. I wouldn't characterize this sort of deterrence as "merely incidental."

¶76 At this juncture, it should be apparent that the residency restrictions' creation of new crimes for sex offenders only tends to demonstrate a retributive effect. As in Starkey, I am still persuaded by Justice Souter's concurrence in Smith:

Ensuring public safety is, of course, a fundamental regulatory goal, and this objective should be given serious weight in the analyses. But at the same time, it would be naïve to look no further, given the pervasive attitudes toward sex offenders. The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Smith, 538 U.S. at 108--09 (Souter, J., concurring in judgment) (citations omitted) (emphasis added). The 2003 and 2006 amendments concerning residency restrictions in § 590 of SORA were always passed in tandem with the safety zone laws in § 1125 of the Penal Code, and they always carried a criminal sanction for violations. See supra ¶ 55. Add to that the other sex offender legislation from 2005 to 2007, and one gets the sense that Oklahoma legislators were out to score political points

by enacting laws that would punish sex offenders. *Id.*

¶77 Suffice it to say, SORA's residency restrictions promote both deterrence and retribution, which are traditional aims of punishment; and this fourth Mendoza-Martinez factor weighs in favor of characterizing the residency restrictions as punitive in effect.

3. Residency Restrictions Are Only Applied to Behavior that Is Already a Crime.

¶78 With regard to the fifth factor, the majority recognizes Starkey's determination that "SORA applies only to behavior that is already a crime" such that "this Mendoza-Martinez factor has a punitive effect," yet they conclude "this factor should be given little weight." Majority Op. ¶ 36 (quoting Starkey, 2013 OK 43, ¶ 68, 305 P.3d at 1028). In support of this decision, the majority quotes *Smith v. Doe* for the proposition that the "past conduct, which was, and is, a crime... is a necessary beginning point [for the regulatory scheme], for recidivism is the statutory concern." *Id.* (quoting *Smith*, 538 U.S. at 105). The majority then cites an Iowa Supreme Court case in support of their conclusion that, "while this factor weighs in favor of finding the scheme punitive, it does so only slightly." *Id.* (quoting *In re Interest of T.H.*, 913 N.W.2d 578, 594 (Iowa 2018)).

¶79 Regarding the majority's assertion that recidivism is the statutory concern, I doubt that. "[I]f recidivism were the only concern, the statute would apply not only to convicted sex offenders, but also to other defendants who might pose a threat to society even if they are not convicted," such as sex offenders "charged with sex offenses but found incompetent to stand trial,

[those] found not guilty by reason of insanity, and those committed to mental health facilities as sexual psychopaths." Wallace, 905 N.E.2d at 382 (citing *Doe*, 189 P.3d at 1014). But the risk level assignments at issue in Starkey apply only to convicted sex offenders. It is the determination of guilt for one of these sex offenses that triggers the registration requirement and residency restrictions, not merely the fact of the conduct or the potential for recidivism. See *Letalien*, 985 A.2d at 22 ("Because registration under SORNA of 1999 only applies to offenders who were convicted of specified crimes, does not arise based on individualized assessment of an offender's risk of recidivism, and cannot be waived based on proof that an offender poses little or no risk, SORNA of 1999 applies exclusively to behavior that is already a crime."). Because the criminal conviction itself triggers application of the residency restrictions, such restrictions appear to be further retribution based on the original criminal conduct. *Smith*, 538 U.S. at 109 (Souter, J., concurring in judgment).

¶80 Thus, the residency restrictions apply exclusively to behavior that is already a crime for purposes of retribution, and this factor should weigh heavily in favor of characterizing them as punitive in effect.

4. Residency Restrictions Have No Rational Connection to a Non-Punitive Purpose.

¶81 With regard to the sixth Mendoza-Martinez factor, the majority seems comfortable concluding that "the residency restrictions have a rational connection to the provision's non-punitive objectives of protecting the public and reducing recidivism," pointing to Mr. Donaldson's

concession on this point and Starkey's previous conclusion that this factor weighs in favor of characterizing SORA's registration requirements as non-punitive in effect. Majority Op. ¶ 39 (quoting Starkey, 2013 OK 43, ¶ 69, 305 P.3d at 1028). But the majority apparently wants this factor to be outcome-determinative, relying upon Smith v. Doe 's characterization of this factor as "a most significant factor" even though Mendoza-Martinez itself emphasized that "no one factor should be considered controlling." Hudson, 522 U.S. at 101 (citing Mendoza-Martinez, 372 U.S. at 169).

¶82 For reasons I previously discussed, however, I question whether the residency restrictions are rationally connected to the purported nonpunitive goals of public safety or the prevention of recidivism. In *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), the Kentucky Supreme Court concluded that the sex offender statute "d[id] not have a rational connection to a nonpunitive purpose." *Id.* at 445--46. I think the same could be said for Oklahoma's residency restrictions and safety zone laws.

¶83 Numerous exceptions to the restrictions exist, both in the statutory provisions and in selective enforcement of the law. If protecting the public was the real goal, then the Legislature wouldn't make exceptions to the residency restrictions that "grandfather in" any sex offenders living in proximity to a park or playground, and law enforcement agencies wouldn't be creating exceptions for the enforcement of residency restrictions in their lawsuit settlements. See *supra* ¶ 56.

¶84 Additionally, there is a growing sentiment that suggests residency restrictions put the public in more danger because they encourage sex offenders to live off the grid. See *Coppernoll et al.*, *supra* note 212, at 1A ("Some say the law may put Oklahoma's children in more danger.... Instead of leaving city limits, many offenders will simply fall off the registry, said [police Sgt. John] Adams, who heads the child exploitation unit for the Tulsa police. That appears to be happening already. Adams said 40 sex offenders dropped off Tulsa's registry in the first month the new [residency restriction] law was in effect."); *Mock & Dean*, *supra* note 159, at 6A ("Police and corrections officials who track offenders said the residency restrictions, tightened last year, are driving more offenders off the registry list, making it difficult to track them and increasing the likelihood they will reoffend."). If the real concern was recidivism, then the Legislature would have targeted only those convicted sex offenders who pose the greatest risk of recidivism, only those convicted sex offenders whose crimes involved children that can be found at the restricted playgrounds and parks, or--on the flip side--everyone whose underlying conduct constitutes a sex offense and not just those convicted of a sex offense. See *Wallace*, 905 N.E.2d at 382.

¶85 There is also a growing body of research indicating that residency restrictions actually increase the risk of recidivism. See *People ex rel. T.B.*, 2021 CO 59, ¶ 57, 489 P.3d 752, 768 (citing Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 *La. L. Rev.* 509, 523 & n.93 (2013)); *People v. Betts*, 968 N.W.2d 497, 514 (Mich. 2021) (citing Mariel Alper & Matthew R. Durose,

Bureau of Justice Statistics, U.S. Dep't of Justice, Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005--2014) (May 2019), available at <https://www.bjs.ojp.gov/content/pub/pdf/rorsp9yfu0514.pdf>; Beth Huebner et al., An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri (July 1, 2013), available at <https://www.ojp.gov/pdffiles1/nij/grants/242952.pdf>; J.J. Prescott & Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?, 54 J.L. & Econ. 161 (2011)); State v. Hinman, 530 P.3d 1271, 1278 (Mont. 2023); see also Coppernoll et al., supra note 212, at 1A ("There is no doubt in my mind that what the legislators have done has put the community at risk," said Mark Pursley, a parole officer who supervises sex offenders. 'Residential restrictions actually increase recidivism.' Pursley said his research shows that removing sex offenders from the conveniences of urban areas--housing, jobs, treatment, and public transportation--makes them more likely to reoffend."); Mock & Dean, supra note 159, at 6A.

¶86 With no rational connection to the purported nonpunitive purposes of public safety and the prevention of recidivism, this sixth Mendoza-Martinez factor weighs in favor of characterizing the residency restrictions as punitive in effect.

5. Residency Restrictions Are Excessive with Respect to the Proffered Non-Punitive Purposes.

¶87 Concerning the last Mendoza-Martinez factor, the majority prefers to give deference to the Oklahoma Legislature's "policy decision that all persons convicted of the sexual offenses enumerated in 57

O.S., § 582 are at risk of re-offending and pose a threat to children" and to rely upon Smith v. Doe, other federal case law, and one California case that would permit such an overbroad rule. Majority Op. ¶ 42 (quoting Smith, 538 U.S. at 103--04; People v. Mosley, 344 P.3d 788, 804 (Cal. 2015); citing Shaw, 823 F.3d at 576--77; Miller, 405 P.3d at 721--22).

¶88 In Starkey, a six-member majority of this Court made the deliberate decision to reject Smith's analysis of this seventh factor and to adopt reasoning they found more persuasive that appeared in Justice Ginsburg's dissent in Smith and in the Alaska Supreme Court's case that effectively undid Smith. See Starkey, 2013 OK 43, ¶¶ 70, 74 & n.100, 305 P.3d at 1028--30 & n.100 (citing Smith, 538 U.S. at 105; Smith, 538 U.S. at 116--17 (Ginsburg, J., dissenting); Doe, 189 P.3d at 1016).

¶89 Furthermore, it should be plain that the residency restrictions are excessive--particularly with respect to the illegitimate nonpunitive purposes proffered by the City of El Reno, see supra ¶¶ 81--86 (discussing how there is no rational connection to the stated goals of public safety and reduced recidivism). Section 590 of SORA does not make any type of individualized assessment as to whether a particular offender is a threat to public safety. ^[213] Residency restrictions are imposed on every registered sex offender, whether they be repeat child molesters, one-time flashers, or drunken college students caught urinating in public. ^[216] The restrictions that keep sex offenders away from locales that children frequent applies to all sex offenders regardless of whether their crimes involved a child. The restrictions apply to sex offenders from all

risk levels under the tier system enacted in 2007, including those given a level assignment of "1" because they "pose[] a low danger to the community and will not likely engage in criminal sexual conduct" and those formerly classified as "habitual or aggravated sex offender[s]" who are given a level assignment of "3" because they "pose[] a serious danger to the community and will continue to engage in criminal sexual conduct." 57 O.S.Supp.2019, §§ 583 (C)(3), 582.5(C)(1), (3). How can that be if the goal truly is to protect the public? Wouldn't that goal require different treatment of level 1 and level 3 offenders, because either the level 1 offenders are being treated harshly or the level 3 offenders aren't being treated harsh enough? The residency restrictions impose severe restraints on sex offenders' liberty without a determination of the threat a particular registrant poses to public safety. The scope of the residency restrictions exceeds the stated purposes of protecting the public and reducing recidivism. Consequently, this seventh Mendoza-Martinez factor also weighs in favor of characterizing the residency restrictions as punitive in effect.

6. The Mendoza-Martinez Factors Show the Residency Restrictions Are Punitive in Effect.

¶90 Looking at my review of the Mendoza-Martinez factors under the neutral framework adopted by Starkey, six factors favor a finding that the residency restrictions are punitive in effect, and the seventh should be given little weight. The residency restrictions don't bear any rational connection to the nonpunitive purpose proffered by the majority and the City of El Reno. Therefore, the residency restrictions are extremely excessive in view

of those nonpunitive purposes. Moreover, the residency restrictions impose an affirmative disability and restraint upon sex offenders, bear a strong resemblance to the historical punishment of banishment, only apply to conduct that is already criminal, and further the traditional aims of punishment. Although clear proof isn't necessary, there seems to be clear proof here that the effects of retroactively applying SORA's residency restrictions are punitive and would outweigh any nonpunitive purposes.

D. Conclusion

¶91 This dissent is not intended to be a defense of Mr. Donaldson, whose past crimes are reprehensible, or of sex offenders at large. Instead, my aim is to see the ex post facto prohibition in the Oklahoma Constitution upheld and enforced. Sex offenders should be punished in accordance with the law in effect at the time their sex offense was committed, and their registration requirements should be set using the law in effect at the time of their conviction. Thereafter, the government shouldn't be allowed to repeatedly move the goalposts through amendments to the laws defining punishments and registration requirements. Said another way, you can throw the book at them as it existed at the time of their offense, but you can't keep adding chapters or trying to change the ending. They would still be a registered sex offender.

¶92 Oklahoma's ex post facto clause forbids the Legislature from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal

acts." *Starkey*, 2013 OK 43, ¶ 37, 305 P.3d at 1018 (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). Through this prohibition the framers of our state constitution, like their federal counterparts, "sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28--29 (1981); see also *The Federalist No. 44*, at 282 (James Madison) (stating that "ex post facto laws... are contrary to the first principles of the social compact and to every principle of sound Legislation"); *The Federalist No. 84*, at 511-12 (Alexander Hamilton) (observing that "the prohibition of ex post facto laws, and TITLES OF NOBILITY... are perhaps greater securities to liberty and republicanism than any it [i.e., the Constitution] contains. The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been in all ages the favorite and most formidable instruments of tyranny"). Sex offenders are entitled to fair warning, the same as anyone else.

¶93 The City of El Reno's retroactive application of the residency restrictions to Mr. Donaldson is inconsistent with the ex post facto clause in the Oklahoma Constitution. I agree with the result of the trial court's summary judgment, which found the residency restrictions in the current version of § 590 of SORA should not be retroactively applied to Mr. Donaldson. This Court should apply the date-of-conviction rule adopted in *Cerniglia v. Oklahoma Department of Corrections*, 2013 OK 81, 349 P.3d 542, such that Mr. Donaldson would continue to be prohibited

from "resid[ing] within a two thousand-foot radius of any public or private school site or educational institution." 57 O.S.Supp.2004, § 590.

¶94 For all these reasons, I respectfully dissent.

Notes:

^[1] The Sex Offender Registration Act (SORA) provided:

The provisions of the Sex Offenders Registration Act, Section 581 et seq. of this title, shall apply to any person residing, working or attending school within the State of Oklahoma who, after November 1, 1989, has been convicted, whether upon a verdict or plea of guilty or upon a plea of nolo contendere, or received a suspended sentence or any probationary term for a crime or an attempt to commit a crime provided for in Section 7115 of Title 10 of the Oklahoma Statutes if the offense involved sexual abuse or sexual exploitation as those terms are defined in Section 7102 of Title 10 of the Oklahoma Statutes, Section 681, if the offense involved sexual assault, 741, if the offense involved sexual abuse or sexual exploitation, Section 843.1, if the offense involved sexual abuse or sexual exploitation, 865 et seq., 885, 886, 888, 891, 1021, 1021.2,

1021.3, 1040.13a, 1040.51, 1087, 1088, 1111.1, 1114 or 1123 of Title 21 of the Oklahoma Statutes.

57 O.S.Supp.2002, § 582 (A).

^[2] Donaldson does not contest the aggravated designation or that he is required to register for life. At the time of his conviction, SORA provided:

On or after November 1, 1999, any person who has been convicted of a crime or an attempt to commit a crime, received a suspended sentence or any probationary term, including a deferred sentence imposed in violation of subsection G of Section 991c of Title 22 of the Oklahoma Statutes, for a crime provided for in Section 7115 of Title 10 of the Oklahoma Statutes, if the offense involved sexual abuse or sexual exploitation as these terms are defined in Section 7102 of Title 10 of the Oklahoma Statutes, Section 885, 888, 1111.1, 1114 or 1123 of Title 21 of the Oklahoma Statutes shall be subject to all the registration requirements of this act and shall be designated by the Department of Corrections as an aggravated sex offender. An aggravated sex offender shall be required to register for the lifetime of the aggravated sex offender.

57 O.S.Supp.2004, § 584 (H)(2).

^[3] Additionally, with respect to federal laws, Article I, § 9 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

^[4] SORA provided: "It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution." 57 O.S.Supp.2003, § 590 (emphasis added).

^[5] In June 2006, SORA was amended to provide:

It is unlawful for any person registered pursuant to the Sex Offenders Registration Act to reside, either temporarily or permanently, within a two-thousand-foot radius of any public or private school site, educational institution, playground, park, or licensed child care facility. On the effective date of this act, the distance indicated in this section shall be measured from the nearest property line of the residence of the person to the nearest property line of the public or private school site, educational institution, playground, park, or licensed child care facility; provided, any nonprofit organization established and housing sex offenders prior to the effective date of this provision shall be allowed to continue its operation.

57 O.S.Supp.2006, § 590 (A) (as amended by

2006 Okla. Sess. Laws, ch. 284, § 11 (eff. June 7, 2006)).

^[6] **In 2007, 57 O.S., § 590 was amended to specify "a playground or park that is zoned by city, county, state, federal or tribal government...." 2007 Okla. Sess. Laws, ch. 261, § 29 (eff. Nov. 1, 2007) (emphasis added).**

In 2008, § 590 was amended as follows: "a playground or park that is established, operated or supported in whole or in part by city, county, state, federal or tribal government...." 2008 Okla. Sess. Laws, ch. 347, § 2 (eff. Nov. 1, 2008) (emphasis added).

The residency restriction was expanded again in 2010 to "public or private school site, educational institution, property or campsite used by an organization whose primary purpose is working with children, a playground or park that is established, operated or supported in whole or in part by city, county, state, federal or tribal government, or licensed child care center as defined by the Department of Human Services." 2010 Okla. Sess. Laws, ch. 136, § 2 (eff. Nov. 1, 2010) (emphasis added).

In 2015, the restrictions were again expanded to include parks supported and operated by homeowners' associations: "within a two-thousand-foot radius of any public or private school site, educational institution, property or campsite used by an organization whose primary purpose is working with children, a playground or park that is established, operated or supported in whole or in part by a homeowners' association or a city, town, county, state, federal or tribal government, or a licensed child care center as defined by the Department of Human Services." 2015 Okla.

Sess. Laws, ch. 270, § 2 (eff. Nov. 1, 2015) (emphasis added).

In 2018, the residency restriction was expanded once again to include in-home day cares and the victim's residence: "within a two-thousand-foot radius of any public or private school site, educational institution, property or campsite used by an organization whose primary purpose is working with children, a playground or park that is established, operated or supported in whole or in part by a homeowners' association or a city, town, county, state, federal or tribal government, a licensed child care center or family child care home as defined in the Oklahoma Child Care Facilities Licensing Act or the residence of his or her victim." 2018 Okla. Sess. Laws, ch. 145, § 1 (eff. Nov. 1, 2018) (emphasis added).

^[7] **In *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004, the Court found the 2007 amendments creating the level assignment system, 57 O.S., §§ 582.1 -582.5, were intended to be applied only prospectively but went on to conduct an *ex post facto* analysis. See *id.*, ¶¶ 28-32, at 1015-16. The Court noted that, because the Department of Corrections (DOC), regardless of legislative intent, had been applying the level assignments retroactively and because the legislative intent was to apply the 2004 amendments to 57 O.S., § 583 retroactively, it was incumbent to address whether or not these extensions to the registration period violated the prohibition of *ex post facto* laws. *Id.* ¶¶ 28, 35-36, at 1015, 1017-18.**

^[8] **However, amendments to 57 O.S., § 590 are to be given only prospective effect in the**

*sense that the amended residency restrictions apply to where sex offenders can live after the effective date. One cannot be found in violation of 57 O.S., § 590 for living within a newly restricted area for any time period prior to the effective date of the relevant residency restriction. A sex offender is in violation of § 590 only if he or she lives within a restricted area after the new legislation or amendment goes into effect. For example, a registered sex offender lived next door to a school from 1999 to 2001. During the entire time he lived next door to the school, nothing in SORA prohibited him from living there. Then, in 2003, the Legislature enacts 57 O.S., § 590, which prohibits registered sex offenders from living within a 2,000-foot radius of a school. Section 590 cannot be retroactively enforced against the sex offender for living in the newly-restricted area from 1999 to 2001. It was not a crime for a sex offender to live next door to a school during the time he lived there. This is a classic example of an ex post facto law. The ex post facto clause prohibits retroactively imposing punishment for an act that was not criminal at the time it was committed. See *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990).*

^[9] In *Smith*, the United States Supreme Court said:

The two remaining Mendoza-Martinez factors--whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime--are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

Smith v. Doe, 538 U.S. 84, 105 (2003).

^[10] The City stresses that the majority in *Starkey* rejected the clearest proof standard and adopted an alternative standard set forth in Justice Ginsburg's dissent in *Smith v. Doe*. While the *Starkey* opinion does include some discussion of Justice Souter and Justice Ginsburg's dissatisfaction with the clearest proof standard, this Court ultimately applied the clearest proof standard in *Starkey*. See *Starkey*, 2013 OK 43, ¶ 77, 305 P.3d at 1030 ("We find there is clear proof that the effect of the retroactive application of SORA's registration is punitive and outweighs its non-punitive purpose.") (emphasis added).

^[11] In *Smith*, the United States Supreme Court applied the intent-effects test to Alaska's Sex Offender Registry Act. Prior to the passage of the Alaska Sex Offender Registry Act in 1994, the respondents had been convicted of sexual abuse of a minor, an aggravated sex offense under the Act. See *Smith*, 538 U.S. at 89-91. The Act

required the respondents to register for life and verify their information quarterly. Id. at 91. The United States Supreme Court determined the Act was not punitive; therefore, requiring the respondents to register was not a retroactive punishment prohibited by the ex post facto clause of the United States Constitution. Id. at 105-06.

We decline City and the Attorney General's invitation to revisit and overrule Starkey today. They assert that the Starkey Court wrongly deviated from the United States Supreme Court's decision in Smith v. Doe. Furthermore, they criticize the opinion for failing to provide an explanation of how the ex post facto clause in the Oklahoma Constitution provides greater protection than the ex post facto clauses in the United States Constitution and complain that Starkey has proven to be difficult to implement and enforce.

^[12] *The Court, in weighing the disabilities and restraints imposed on sex offenders, discussed in-person registration, public notification, and the publication of the registrant's personal information at length and only briefly mentioned restrictions on where and with whom sex offenders can live and work. See Starkey, 2013 OK 43, ¶¶ 47-57, 305 P.3d at 1021-25.*

^[13] *The Court found the residency restrictions were analogous to banishment, a historical form of punishment. Id. ¶¶ 60-61, at 1025-26.*

^[14] *The Court mentioned the deterrent effect of the threat of negative consequences, such as eviction and living restrictions, but focused on the retributive aspect of SORA. Id. ¶ 63, at 1027.*

^[15] *See Luster v. State ex rel. Dep't of Corr.,*

2013 OK 97, ¶ 13, ¶ 16, 315 P.3d 386, 390-91 (frequency of information verification required when sex offender entered Oklahoma); Osburn v. Okla. Dep't of Corr., 2013 OK 89, ¶ 11, 313 P.3d 926, 929-30 (not registerable offense on date of conviction); Cerniglia v. Okla. Dep't of Corr., 2013 OK 81, ¶ 6, 349 P.3d 542, 544-45 (level assignments not in effect on date of conviction); Burk v. State ex rel. Dep't of Corr., 2013 OK 80, ¶¶ 10-11, 349 P.3d 545, 548 (level assignments not in effect when sex offender entered Oklahoma); Bollin v. Jones, 2013 OK 72, ¶¶ 12-16, 349 P.3d 537, 541-42 (holding that the 2005 and 2006 amendments requiring a person convicted in another jurisdiction prior to November 1, 1989 to register if they entered Oklahoma on or after November 1, 1989 did not apply to sex offender who was convicted of a sex offense in Missouri in 1987 and entered Oklahoma in 2004); Ransdell v. State ex rel. Oklahoma Department of Corrections, 2013 OK 106, 322 P.3d 1064 (level assignments not in effect when sex offender entered Oklahoma); but see Fry v. Oklahoma Department of Corrections, 2017 OK 77, ¶18, 404 P.3d 38, 40 (retroactively applying the level assignment system and level override mechanism that did not exist when the sex offender was convicted in 2002).

^[16] *Although the Starkey Court's analysis in step one is somewhat ambivalent, it ultimately determined SORA was intended to be a civil, regulatory scheme to help prevent sex offenders from re-offending. See 2013 OK 43, ¶ 43, 305 P.3d at 1020. The Court then moved on to the second step of the intent-effects test: whether SORA's effects are so punitive as to negate that civil, regulatory intent.*

^[17] *Our conclusion is contrary to the Tenth*

Circuit's assessment in Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016). The Tenth Circuit concluded: "In our view, Oklahoma's residency restrictions are not sufficiently harsh to constitute an affirmative disability or restraint that has a punitive effect." Id. at 571. The Shaw court focused on the burden or inconvenience of needing to verify that a prospective residence is not within 2,000 feet of a restricted area, not the disability or restraint imposed by limiting one's housing options. See id. at 570. We do, however, agree with the Tenth Circuit that the additional effort necessary to ensure compliance with the law when relocating is minor and indirect. Id.

The Shaw court noted that 57 O.S., § 590 is less disabling than some other state laws, because it does not require a sex offender to move if a new child care center, child care home, or park is established within 2,000 feet of the sex offender's residence. See 57 O.S.Supp.2008, § 590 (A) ("Establishment of a day care center or park in the vicinity of the residence of a registered sex offender will not require the relocation of the sex offender or the sale of the property."); Shaw, 823 F.3d at 570. The Shaw court further observed that there is no exception if the sex offender's residency predates a newly established school, educational institution, property or campsite used by an organization whose primary purpose is working with children, playground, or his or her victim moves within 2,000 feet of the sex offender's residence. The lack of exceptions for these new establishments is not before the Court today.

^[18] *In concluding that the residency restrictions are not punitive, we join the majority of courts from other jurisdictions having assessed the constitutionality of*

*similar residency restrictions. See, e.g., McGuire v. Marshall, 50 F.4th 986, 1008 (11th Cir. 2022) (Alabama law); Shaw, 823 F.3d at 577 (Oklahoma law); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1017 (8th Cir. 2006) (Arkansas law); Doe v. Miller, 405 F.3d 700, 720 (8th Cir.2005) (Iowa law); Hatton v. Bonner, 356 F.3d 955, 965 (9th Cir.2003) (California law); Doe 1 v. City of Apple Valley, 487 F.Supp.3d 761, 774 (D. Minn. 2020) (Minnesota law); People v. Mosley, 344 P.3d 788, 804 (Cal. 2015) (California law); People v. Leroy, 828 N.E.2d 769, 782 (Ill. App. 2005) (Illinois law since repealed); Standley v. Town of Woodfin, 650 S.E.2d 618, 622-23 (N.C. App. 2007), *aff'd* by Standley v. Town of Woodfin' 661 S.E.2d 728 (N.C. 2008) (city ordinance); City of S. Milwaukee v. Kester, 2013 WI.App. 50, ¶ 31, 830 N.W.2d 710, 721 (city ordinance); but see, e.g., State v. Pollard, 908 N.E.2d 1145, 1152 (Ind. 2009) (finding residency restrictions were punitive as applied to sex offender because he already owned and lived in the house when the law was enacted); Commonwealth v. Baker, 295 S.W.3d 437, 444 (Ky. 2009) (finding KRS 17.545, which forced sex offenders to move even if their residency predated the statute or establishment of a new school, day care, or playground, to be punitive).*

^[19] *A 2005 opinion from the Attorney General of the State of Oklahoma suggests 57 O.S., § 590 may be applied retroactively to sex offenders who lived there before the law went into effect without violating the ex post facto clause . See Question Submitted by: Honorable Brian A. Crain, State Senator,*

District 39, 2005 OK AG 11 (March 31, 2005)). That part of the Attorney General's opinion is consistent with today's holding that SORA's residency restrictions may be applied retroactively to persons who became subject to the provisions of SORA prior to the law's enactment or amendment without violating the ex post facto clauses of the federal or state Constitution.

Furthermore, nothing in today's Opinion affects a registered sex offender's right to own property after the date of conviction or the enactment or amendment of a law, which prohibits a sex offender from residing in the area within which the subject property is located. Since the Legislature first enacted residency restrictions in 2003, the following statutory language has remained unchanged: "Nothing in this provision shall require any person to sell or otherwise dispose of any real estate or home acquired or owned prior to the conviction of the person as a sex offender." Compare 57 O.S.Supp.2003, § 590 with 57 O.S.Supp.2019, § 590 (A). Today's decision merely concerns sex offenders residing on or occupying property located within a restricted area.

^[20] *Shaw concerned the 2009 version of the statute, which included a similar park restriction. See 57 O.S.Supp.2008, § 590 (A).*

^[1] *While I appreciate Justice Combs' explanation that Starkey held the registration requirement was punitive in effect, not intent, that distinction does not change my analysis. I disagree with either or both findings. I would, however, leave undisturbed the results of prior cases decided in reliance on Starkey and my ruling would be prospective only.*

^[2] *See, e.g., Reed v. State, 2016 OK CR 10,*

373 P.3d 118; People ex rel. Rivera v. Superintendent, Woodbourne Corr. Facility, 221 N.E.3d 1, 7 (N.Y. 2023); State v. Eighth Jud. Dist. Ct. (Logan D.), 306 P.3d 369, 376 (2013); State v. Trosclair, 2011-2302 (La. 5/8/12), 89 So.3d 340, 350. Other jurisdictions have found similar statutes to be civil in nature. Georgia Dept. of Human Servs. v. Steiner, 303 Ga. 890, 815 S.E.2d 883, 900 (2018) (child abuse registry); In re Commitment of Fisher, 164 S.W.3d 637, 653 (Tex. 2005) (commitment of sexually violent predators). The Tenth Circuit declined to follow Starkey in determining that reporting and residency restrictions were civil rather than punitive; that Court noted that Starkey was decided on Oklahoma constitutional grounds and that this Court "disavowed" any obligation to follow federal precedent, including Smith. Shaw v. Patton, 823 F.3d 556, 563 (10th Cir. 2016)

^[1] *As the majority points out, these factors were first set forth in the U.S. Supreme Court case of Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168--69 (1963). See Majority Op. ¶ 15.*

^[2] *Indeed, today's majority acknowledges that "[t]he Legislature did not label SORA as 'civil.'" Majority Op. ¶ 28.*

^[3] *Sex Offenders Registration Act (SORA), ch. 212, 1989 Okla. Sess. Laws 556, 559; H.B. 1136, 42d Leg., 1st Reg. Sess. (Okla. 1989) (enacted).*

^[4] *The other States with sex offender registration laws--in chronological order of enactment--were California (1947), Arizona (1951), Nevada (1961), Ohio (1963), Alabama (1967), Utah (1983), Illinois (1986), Arkansas (1987), and Montana (March 1989). See Act of Sept. 7, 1967, No. 507, §§ 1--4, 1967 Ala. Laws 1222, 1222--24*

(codified at Ala. Code §§ 13-10-20 to 13-10-23 (1975)); Act of Mar. 28, 1951, ch. 105, § 1, 1951 Ariz. Sess. Laws 252, 252--53 (codified at Ariz. Code 1939 § 43-6117 (Supp. 1951)); Habitual Child Sex Offender Registration Act, Act 587, 1987 Ark. Acts 1286 (codified at Ark. Code Ann. §§ 12-12-091 et seq. (1987)); Act of July 7, 1947, ch. 1124, § 1, 1947 Cal. Stat. 2562, 2562--63 (codified at Cal. Penal Code § 290 (Deering 1949)); Habitual Child Sex Offender Registration Act, Pub. Act 84-1279, 1986 Ill. Laws 1467 (codified at Ill. Rev. Stat. 1987 ch. 38, pars. 221--230); Sexual Offender Registration Act, ch. 293, 1989 Mont. Laws 631 (codified at Mont. Code Ann. §§ 46-23-501 to 46-23-507 (1989)); Act of Mar. 24, 1961, ch. 147, 1961 Nev. Stat. 197, 197--98 (codified at Nev. Rev. Stat. §§ 207.151--207.157); Act of July 5, 1963, 130 Ohio Laws 669 (codified at Ohio Rev. Code §§ 2950.01 et seq.); Act of Mar. 30, 1983, ch. 88, § 42, 1983 Utah Laws 403, 427--29 (codified at Utah Code Ann. 1953 § 77-27-21.5 (Supp. 1983)).

^[5] 1989 Okla. Sess. Laws at 556.

^[6] Id. § 1, 1989 Okla. Sess. Laws at 556 (codified at 57 O.S.Supp.1989, § 581).

^[7] Id. § 2, 1989 Okla. Sess. Laws at 556 (codified at 57 O.S.Supp.1989, § 582). The crimes for which a person must register under the 1989 version of SORA were: (a) incest in violation of 21 O.S.1981, § 885; (b) forcible sodomy in violation of 21 O.S.Supp.1989, § 888; (c) indecent exposure, indecent exhibitions, the production or possession of obscenity or child pornography, or involving a child in the same in violation of 21 O.S.Supp.1989, §§ 1021 and 1021.2; (d) being a parent or guardian who permits a child to be in

pornography in violation of 21 O.S.Supp.1989, § 1021.3; (e) offering or transporting a child for purposes of prostitution in violation of 21 O.S.Supp.1989, § 1087; (f) child prostitution in violation of 21 O.S.Supp.1989, § 1088; (g) first or second degree rape in violation of 21 O.S.Supp.1989, § 1114; and (h) lewd or indecent proposals or acts with a child under 16 in violation of 21 O.S.Supp.1989, § 1123.

^[8] Ch. 212, § 3, 1989 Okla. Sess. Laws at 556--57 (codified at 57 O.S.Supp.1989, § 583).

^[9] Id. § 4, 1989 Okla. Sess. Laws at 557 (codified at 57 O.S.Supp.1989, § 584).

^[10] Id. § 5, 1989 Okla. Sess. Laws at 557--58 (codified at 57 O.S.Supp.1989, § 585).

^[11] Id. § 6, 1989 Okla. Sess. Laws at 558 (codified at 57 O.S.Supp.1989, § 586).

^[12] Id. § 7, 1989 Okla. Sess. Laws at 558 (codified at 57 O.S.Supp.1989, § 587).

^[13] Id. § 8, 1989 Okla. Sess. Laws at 558--59 (codified at 51 O.S.Supp.1989, § 24A.8).

^[14] Chris Casteel, *House Endorses Sex Offender Treatment Plan, Oklahoman*, Feb 3, 1989, at 7, available at <https://www.oklahoman.com/story/news/1989/02/03/house-endorses-sex-offender-treatment-plan/62625027007/>; see also Letter from Jerry G. Johnson, Deputy Dir., Okla. Dep't Corr., to Rep. Jeff Hamilton, Okla. H.R. (Aug. 26, 1988) (attaching an "Interim Study on Therapeutic Programs for Convicted Sex Offenders" and "A Proposal for a Sex Offender Treatment Program" with numerous appendices that discussed programs implemented in Oregon, Missouri,

New Jersey, Washington, Florida, Minnesota, and Connecticut); Anthony Thornton, *State Proposal Targets Sex Offenders: 150-Bed Treatment Unit Suggested*, *Oklahoman*, Dec. 26, 1988, at 11 (discussing the Oregon treatment program developed by Robert Freeman-Longo, who reportedly consulted with the Oklahoma DOC), available at <https://www.oklahoman.com/story/news/1988/12/26/state-proposal-targets-sex-offenders-150-bed-treatment-unit-suggested/62628944007/>.

^[15] See H.J.R. 1004, 42d Leg., 1st Reg. Sess. (Okla. 1989); see also John Greiner, *Treatment Plan Approved*, *Oklahoman*, Apr. 25, 1989, at 25, available at <https://www.oklahoman.com/story/news/1989/04/25/treatment-plan-approved/62615967007/>.

^[16] Appropriations Bill for Department of Corrections, ch. 303, § 2, 1989 Okla. Sess. Laws 1022, 1022--23.

^[17] Kim Alyce Marks, *New Treatment Offered Sex Offenders*, *Tulsa World*, Sept. 1, 1989, https://tulsaworld.com/archive/new-treatment-offered-sex-offenders/article_a88a415af4a2-5b10-a871-ce48fa6e37c5.html; Prison Official Has Doubts About Aversion Therapy, *Oklahoman*, Sept. 2, 1989, at 31, available at <https://www.oklahoman.com/story/news/1989/09/02/prison-official-has-doubts-about-aversion-therapy/62602691007/>.

^[18] See Don Mecoy, *Prison No Deterrent, Official Says*, *Oklahoman*, Oct. 29, 1989, at 2 ("No sexual offender treatment has been available in Oklahoma's prisons before this program, which will begin Wednesday [i.e.,

November 1st]."), available at <https://www.oklahoman.com/story/news/1989/10/29/prison-no-deterrent-official-says-treatment-program-targets-prevention-not-punishment/62592272007/>.

^[19] Marks, *supra* note 17; Prison Official Has Doubts About Aversion Therapy, *supra* note 17, at 31.

^[20] Pub. L. No. 103-322, tit. XVII, § 170101, 108 Stat. 2038 (1994) (codified at 42 U.S.C. § 14071 (1994) (repealed effective 2009)).

^[21] *Id.* § 170101(f)(2)(A), 108 Stat. at 2042 (codified at § 14071(f)(2)(A) (repealed effective 2009)) ("A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3765)."); see also Starkey, 2013 OK 43, ¶ 2, 305 P.3d at 1032 (Winchester, J., dissenting).

^[22] See § 170101(a)(1)(A), (b)(1)--(2), 108 Stat. at 2038--40 (codified at § 14071(a)(1)(A), (b)(1)--(2) (repealed effective 2009)) (directing the U.S. Attorney General to "establish guidelines for State programs that require--(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency" and imposing a duty upon State prison officers and sentencing courts to collect certain information about such offenders and to "forward it to a designated State law enforcement agency" responsible for entering the information into a registry (*emphasis added*)).

^[23] Act of May 2, 1995, ch. 142, § 3, 1995

Okla. Sess. Laws 485, 486 (codified at 57 O.S.Supp.1995, § 583(A)--(D)).

^[24] *Id.* § 5, 1995 Okla. Sess. Laws at 488 (codified at 57 O.S.Supp.1995, § 584(E)).

^[25] *John Greiner, Senate Restores Funds Request for Veterans, Oklahoman, Apr. 26, 1995, at 14, available at <https://www.oklahoman.com/story/news/1995/04/26/senate-restores-funds-request-for-veterans/62392885007/>.*

^[26] *Ch. 142, § 8, 1995 Okla. Sess. Laws at 489 (codified at 10 O.S.Supp.1995, § 404.1(F)), further amended by Act of May 23, 1995, ch. 222, § 1, 1995 Okla. Sess. Laws 876, 877.*

^[27] *James Barron, Vigil for Slain Girl, 7, Backs a Law on Offenders, New York Times, Aug. 3, 1994, at B4, available at <https://www.nytimes.com/1994/08/03/nyregion/vigil-for-slain-girl-7-backs-a-law-on-offenders.html>.*

^[28] *William Glaberson, Stranger on the Block--A Special Report: At Center of 'Megan's Law' Case, a Man No One Could Reach, New York Times, May 28, 1996, at A1, available at <https://www.nytimes.com/1996/05/28/nyregion/stranger-block-special-report-center-megan-s-law-case-man-no-one-could-reach.html>; Andy Newman, Megan, Her Law and What It Spawned, New York Times, Feb. 25, 1996, at 13, available at <https://www.nytimes.com/1996/02/25/nyregion/megan-her-law-and-what-it-spawned.html>.*

^[29] *Compare Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) (codified at 42 U.S.C. § 14071(d) (Supp. 1996) (repealed effective 2009)), with*

Wetterling Act, supra note 20, § 170101(d), 108 Stat. at 2041--42.

^[30] *Act of May 27, 1997, ch. 260, 1997 Okla. Sess. Laws 1420.*

^[31] *Id.* § 2, 1997 Okla. Sess. Laws at 1422 (codified at 57 O.S.Supp.1997, § 581(B)).

^[32] *Id.* § 5, 1997 Okla. Sess. Laws at 1425 (codified at 57 O.S.Supp.1997, § 584(E)).

^[33] *Id.* § 5, 1997 Okla. Sess. Laws at 1425--26 (codified at 57 O.S.Supp.1997, § 584(H)).

^[34] *Libby Quaid, House OKs Sex Offender Bill: Police Would Warn Citizens of 'Predators', Oklahoman, May 21, 1997, at 28, available at <https://www.oklahoman.com/story/news/1997/05/21/house-oks-sex-offender-bill-police-would-warn-citizens-of-predators/62313631007/>.*

^[35] *Ch. 260, § 3, 1997 Okla. Sess. Laws at 1422 (codified at 57 O.S.Supp.1997, § 582). The new crimes for which a person must register, counting from where the old list left off, were: (i) child abuse involving sexual abuse or sexual exploitation in violation of 10 O.S.Supp.1997, § 7115 (renumbered 2009 as 21 O.S. § 843.5); (j) kidnapping involving sexual abuse or exploitation in violation of 21 O.S.Supp.1997, § 741; (k) trafficking in children in violation of 21 O.S.1991 & Supp.1997, §§ 865 et seq.; (l) kidnapping a child in violation of 21 O.S.Supp.1997, § 891; (m) using a computer to instigate sexual contact with a minor in violation of 21 O.S.Supp.1997, § 1040.13a; (n) buying, selling, bartering, trafficking in, or delivering a depiction of persons or animals in an act of sexual intercourse in violation of 21 O.S.Supp.1997, § 1040.51 (repealed 2000); and (o) rape by instrumentation in*

violation of 21 O.S.1991, § 1111.1. The crimes of (k) trafficking a child and (l) kidnapping a child do not require proof of any element that a sexual act was committed, attempted, or even intended.

^[36] Ch. 260, § 4, 1997 Okla. Sess. Laws at 1423 (codified at 57 O.S.Supp.1997, § 583).

^[37] Id. § 5, 1997 Okla. Sess. Laws at 1425 (codified at 57 O.S.Supp.1997, § 584(D)).

^[38] Id. (codified at 57 O.S.Supp.1997, § 584(A)(5)).

^[39] Id. § 7, 1997 Okla. Sess. Laws at 1427 (codified at 57 O.S.Supp.1997, § 587).

^[40] Id. § 1, 1997 Okla. Sess. Laws at 1421--22 (codified at 10 O.S.Supp.1997, § 404.1), further amended by Act of June 10, 1997, ch. 389, § 20, 1997 Okla. Sess. Laws 2404, 2430--32.

^[41] Act of June 10, 1997, ch. 386, § 1, 1997 Okla. Sess. Laws 2357, 2358--59 (codified at 10 O.S.Supp.1997, § 21.1 (renumbered 2009 as 43 O.S. § 112.5)).

^[42] Id. § 1, 1997 Okla. Sess. Laws at 2359 (codified at 10 O.S.Supp.1997, § 21.1(E)).

^[43] Act of June 5, 1998, ch. 347, § 2, 1998 Okla. Sess. Laws 1453, 1456 (codified at 57 O.S.Supp.1998, § 584(H)).

^[44] Id. § 2, 1998 Okla. Sess. Laws at 1455 (codified at 57 O.S.Supp.1998, § 584(A)(5)).

^[45] Act of June 10, 1998, ch. 411, § 5, 1998 Okla. Sess. Laws 2021, 2023 (codified at 57 O.S.Supp.1998, § 589).

^[46] Id.

^[47] Id. §§ 1--3, 1998 Okla. Sess. Laws at 2021--23 (codified at 70 O.S.Supp.1998, §§

6-101.15, 6-101.22, 6-101.41).

^[48] Juvenile Sex Offender Registration Act, ch. 341, §§ 1--13, 2001 Okla. Sess. Laws 2619, 2619--23 (codified at 10 O.S.2001, §§ 7308-1.1 to 7308-1.13 (renumbered 2009 as 10A O.S. §§ 2-8-101 to 2-8-112)).

^[49] Act of June 5, 2002, ch. 460, § 35, 2002 Okla. Sess. Laws 1948, 1983 (codified at 57 O.S.Supp.2002, § 589).

^[50] S.B. 987, 48th Leg., 2d Reg. Sess. (Okla. 2002) (enrolled).

^[N73">51] Keating Considers Fate of Sex Offender Bill, Oklahoman, June 5, 2002, at 3-A, available at <https://www.oklahoman.com/story/news/2002/06/05/keating-considers-fate-of-sex-offender-bill/62092241007/>; Chuck Ervin, Castration Bill: Governor Vetoes Measure, Tulsa World, June 6, 2002, at 1, available at https://tulsaworld.com/archive/castration-bill-governor-vetoes-measure/article_c15846c6-83f1-56cf-831a-67067c68f444.html; see also Press Release, Okla. Senate, Sen. Shurden Calls Governors [sic] Veto of Castration Bill Dishonest (June 5, 2002), available at <https://oksenate.gov/press-releases/sen-shurden-calls-governors-veto-castration-bill-dishonest>.

^[52] Ann Kelley, Sex Offender Says Not to Worry, Oklahoman, Oct. 24, 2002, at III-1 to III-2, available at <https://www.oklahoman.com/story/news/2002/10/24/sex-offender-says-not-to-worry/62074238007/>.

^[53] Id. at III-1.

^[54] Carmel Perez Snyder, Sex Offenders Barred from Living Near Schools,

Oklahoman, May 22, 2003, at 4-A, available at <https://www.oklahoman.com/story/news/2003/05/22/sex-offenders-barred-from-living-near-schools/62042569007/>.

^[55] H.B. 1501, 49th Leg., 1st Reg. Sess. (Okla. 2003) (introduced).

^[56] S.B. 554, 49th Leg., 1st Reg. Sess. (Okla. 2003) (introduced).

^[57] John Greiner, Jack Money & Carmel Perez Snyder, *Capitol Week: House Bill Addresses Seminude Salons*, *Oklahoman*, Mar. 2, 2003, at A6, available at <https://www.oklahoman.com/story/news/2003/03/02/house-bill-addresses-seminude-salons/62055256007/>.

^[58] Act of May 20, 2003, ch. 223, § 1, 2003 Okla. Sess. Laws 948, 948 (codified at 57 O.S.Supp.2003, § 590).

^[59] *Id.*

^[60] *Id.* § 1, 2003 Okla. Sess. Laws at 949. Later amendments in 2007 to the residency restrictions would create exceptions for residences that were established prior to the creation of a park or daycare center, specifically stating that the creation of a park or daycare center "w[ould] not require the relocation of the sex offender," see *infra* notes 139--140, 164 and accompanying text--unambiguous verbiage that is lacking in the 2003 exception.

^[61] Ch. 223, § 1, 2003 Okla. Sess. Laws at 949.

^[62] Act of May 12, 2003, ch. 209, § 1, 2003 Okla. Sess. Laws 867, 867 (codified at 21 O.S.Supp.2003, § 1125).

^[63] *Id.*

^[64] *Id.* § 1, 2003 Okla. Sess. Laws at 868.

^[65] *Id.* § 1, 2003 Okla. Sess. Laws at 867.

^[66] Act of April 26, 2004, ch. 162, § 1, 2004 Okla. Sess. Laws 738, 739--40 (codified at 57 O.S.2004, § 583(C)--(D), (F)) (emphasis added).

^[67] *Id.* § 1, 2004 Okla. Sess. Laws at 738 (codified at 57 O.S.2004, § 583(A)(1)). This seeming contradiction between when the obligation to register begins and when the ten-year period for registration begins still exists in the current version of SORA. Compare 57 O.S.2021, § 583(A)(1), with *id.* § 583(C)--(D), (G).

^[68] Justin George, *So Near Home, Body Found*, *Tampa Bay Times*, Mar. 20, 2005, at 1, available at <https://www.tampabay.com/archive/2005/03/20/so-near-home-body-found/>.

^[69] *Jessica Lunsford's Law*, ch. 188, § 1, 2005 Okla. Sess. Laws 882, 882 (not codified).

^[70] *Id.* §§ 2--3, 2005 Okla. Sess. Laws at 888, 891 (codified at 22 O.S.Supp.2005, § 991a(A)(13) and 57 O.S.Supp.2005, § 510.10(C)). These requirements for electronic monitoring still exist under current law. See 22 O.S.Supp.2023, § 991a(A)(13); 57 O.S.2021, § 510.10(C).

^[71] See Susan Parrott & John Sutter, *Care Centers House Sex Offenders*, *Oklahoman*, July 12, 2004, at 1A, available at <https://www.oklahoman.com/story/news/2004/07/12/care-centers-house-sex-offenders/61982447007/>; Wes Bledsoe, *Opinion, Violence in Nursing Homes*, *Oklahoman*, Feb. 9, 2005, at 15A, available at <https://www.oklahoman.com/story/news/2005/02/09>

/violence-in-nursing-homes/6195562 2007/.

^[72] Act of June 9, 2005, § 9, 2005 Okla. Sess. Laws 2106, 2113 (codified at 57 O.S.Supp.2005, § 584(H)(3)(d)).

^[73] *Id.* § 1, 2005 Okla. Sess. Laws at 2107 (codified at 63 O.S.Supp.2005, § 1-1909(4)).

^[74] *Id.* §§ 2--6, 2005 Okla. Sess. Laws at 2107--09 (codified at 63 O.S.Supp.2005, §§ 1-1944 to 1-1948); see also John Greiner, Henry-Backed Issues Sail Through Senate, *Oklahoman*, Mar. 4, 2005, at 8A, available at <https://www.oklahoman.com/story/news/2005/03/04/henry-backed-issues-sail-through-senate/61952515007/>.

^[75] H.B. 2381, § 1, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced); Press Release, Okla. H.R., Measure Separating Student Sex Offenders from Victims Passes Committee (Feb. 23, 2006), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=453.

^[76] See H.B. 2381, § 1, 50th Leg., 2d Reg. Sess. (Okla. 2006) (House committee substitute) (removing what had been subsection D in the introduced version of H.B. 2381); Okla. State Leg., Bill Information for H.B. 2381, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2381&Session=0600> (last visited Nov. 12, 2024).

^[77] Bill Information for H.B. 2381, *supra* note 76.

^[78] *Id.*

^[79] See *infra* ¶ 38.

^[80] H.B. 2569, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced); Press Release, Okla. H.R., Gov. Henry Backs Rep. Kiesel's

Stronger Penalties for Sex Offenders (Feb. 3, 2006), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=358.

^[81] Compare H.B. 2569 (introduced), with H.B. 2569, 50th Leg., 2d Reg. Sess. (Okla. 2006) (committee substitute); Tracking Bills Move to House, *Oklahoman*, Mar. 1, 2006, at 6A, available at <https://www.oklahoman.com/story/news/2006/03/01/legislationbroubreak-protection-plan-okd/61898643007/>; Okla. State Leg., Bill Information for H.B. 2569, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2569&Session=0600> (last visited Nov. 12, 2024).

^[82] See *infra* ¶¶ 43--44; see also Starkey, 2013 OK 43, ¶ 28 & n.24, 305 P.3d at 1015 & n.24 (citing Act of June 4, 2007, ch. 261, §§ 23--26, 2007 Okla. Sess. Laws 1173, 1199--1200 (codified at 57 O.S.Supp.2007, §§ 582.1--582.5)).

^[83] Press Release, Okla. H.R., Lawmaker Seeks Better Tracking of Sex Offenders (Jan. 31, 2006) (emphasis added), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=343.

^[84] *Id.* (emphasis added).

^[85] *Id.*; H.B. 2830, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced).

^[86] Compare H.B. 2830 (introduced), with H.B. 2830, 50th Leg., 2d Reg. Sess. (Okla. 2006) (committee substitute).

^[87] Okla. State Leg., Bill Information for H.B. 2830, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2830&Session=0600> (last visited Nov. 12, 2024).

^[88] See Act of June 7, 2006, ch. 294, §§ 2--3,

2006 Okla. Sess. Laws 1580, 1590--91 (codified at 47 O.S.Supp.2006, §§ 6-105.3(E), 6-115(F)); see also *infra* ¶ 36 (discussing S.B. 1964).

^[89] Susan Winchester, Opinion, *Keeping Oklahoma Kids Safe*, *Oklahoman*, Jan. 15, 2006, at 17A, available at <https://www.oklahoman.com/story/news/2006/01/15/keeping-oklahoma-kids-safe/61905993007/>; Press Release, Okla. H.R., First Plank of House GOP "Keeping Oklahoma Kids Safe" Initiative Clears Committee (Feb. 7, 2006), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=363.

^[90] Press Release, Okla. H.R., *supra* note 89; Winchester, *supra* note 89, at 17A.

^[91] Winchester, *supra* note 89, at 17A (emphasis added).

^[92] Press Release, Okla. H.R., Terrill Wants Sex Offender Registration Mandatory (Jan. 31, 2006), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=337. Rep. Terrill's proposed amendment would arguably codify a recent Attorney General Opinion that concluded sex offender registration was not up for negotiation in plea deals. See Question Submitted by: The Honorable Virginia D. Sanders, McCurtain County District Attorney, 2003 OK AG 24, ¶ 7, 2003 Op. Att'y Gen. 133, 135 ("Thus, a judgment and sentence may not lawfully state that a defendant who meets the requirements for Title 57 registration is not required to register.").

^[93] H.B. 2839, sec. 5, § 991a(K), 50th Leg., 2d Reg. Sess. (Okla. 2006) (committee substitute).

^[94] Press Release, Okla. H.R., *supra* note 89; Press Release, Okla. H.R., Measure to Crack Down on Sex Offenders Clears Committee, Feb. 14, 2006, available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=411.

^[95] Press Release, Okla. H.R., Senate Democrats Kill Legislation that Would Crack Down on Sex Offenders, Keep Oklahoma Kids Safe, Apr. 5, 2006, available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=672.

^[96] See *infra* ¶¶ 35--36 (discussing S.B. 1755 and S.B. 1964).

^[97] S.B. 1426, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced); Press Release, Okla. Senate, Senate Approves Bill to Require Sex Offender Info on Driver's License (Feb. 28, 2006), available at <https://oksenate.gov/press-releases/senate-approves-bill-require-sex-offender-info-drivers-license>.

^[98] Press Release, Okla. Senate, *supra* note 97.

^[99] Okla. State Leg., Bill Information for S.B. 1426, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1426&Session=0600> (last visited Nov. 12, 2024).

^[100] See *infra* ¶ 45; Press Release, Okla. Senate, Senate Approves Bill to Require Sex Offender Info on Driver License (Mar. 5, 2007), available at <https://oksenate.gov/press-releases/senate-approves-bill-require-sex-offender-info-driver-license>.

^[101] Press Release, Okla. Senate, Bill to Provide Sex Offender Registry to Health

Commissioner Heads to Governor (May 2, 2006), available at <https://oksenate.gov/press-releases/bill-provide-sex-offender-registry-health-commissioner-heads-governor?back=/press-releases/2006-05%3Fpage%3D3>.

^[102] S.B. 1707, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced); John Greiner, *Registry Sought on Sex Offenders*, *Oklahoman*, May 3, 2006, at 5A, available at <https://www.oklahoman.com/story/news/2006/05/03/legislation-br-bill-meant-to-bolster-bail-laws/61886670007/>.

^[103] Act of May 9, 2006, ch. 133, § 1, 2006 Okla. Sess. Laws 540, 541--44 (codified at 57 O.S.Supp.2006, § 584(E), (G)); Okla. State Leg., *Bill Information for S.B. 1707*, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1707&Session=0600> (last visited Nov. 12, 2024); *LEGISLATION: Henry Signs Bills*, *Oklahoman*, May 10, 2006, at 9A, available at <https://www.oklahoman.com/story/news/2006/05/10/budget-br-energy-taxes-fuel-economy/61885455007/>.

^[104] S.B. 1708, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced).

^[105] S.B. 1708, 50th Leg., 2d Reg. Sess. (Okla. 2006) (committee substitute); Okla. State Leg., *Bill Information for S.B. 1708*, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1708&Session=0600> (last visited Nov. 12, 2024).

^[106] S.B. 1708, 50th Leg., 2d Reg. Sess. (Okla. 2006) (engrossed); *Bill Information for S.B. 1708*, *supra* note 105.

^[107] See *supra* notes 89--95 and accompanying text.

^[108] S.B. 1708, 50th Leg., 2d Reg. Sess. (Okla. 2006) (House committee substitute for Senate bill); *Bill Information for S.B. 1708*, *supra* note 105; Jennifer Mock, *Sex Offenders Bill Aims to Increase Punishment*, *Oklahoman*, Apr. 12, 2006, at 3A, available at <https://www.oklahoman.com/story/news/2006/04/12/sex-offender-bill-aims-to-increase-punishment/61891011007/>.

^[109] *Bill Information for S.B. 1708*, *supra* note 105.

^[110] See *infra* ¶¶ 35--36.

^[111] S.B. 1747, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced).

^[112] *Press Release, Okla. Senate, House Rejects Death Penalty for Child Molesters (Apr. 28, 2006)*, available at [https://oksenate.gov/press-releases/house-rejects-death-penalty-child-molesters?back=/press-releases/2006-04; Okla. State Leg., Bill Information for S.B. 1747, http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1747 &Session=0600](https://oksenate.gov/press-releases/house-rejects-death-penalty-child-molesters?back=/press-releases/2006-04;Okla.StateLeg.,BillInformationforS.B.1747,http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1747&Session=0600) (last visited Nov. 12, 2024).

^[113] *Press Release, Okla. Senate*, *supra* note 112.

^[114] *Id.*; Jennifer Mock, *Bill Seeks Death Option for Sex Offenders*, *Oklahoman*, Apr. 16, 2006, at 8A, available at <https://www.oklahoman.com/story/news/2006/04/16/bill-seeks-death-option-for-sex-offenders/61890034007/>; see *supra* notes 104--110 and accompanying text (discussing S.B. 1708).

^[115] *Press Release, Okla. Senate, Senator Nichols Targets Child Predators with Death*

Penalty, Child Abuse Response Team (May 26, 2006) (emphasis added), available at <https://oksenate.gov/press-releases/senator-nichols-targets-child-predators-death-penalty-child-abuse-response-team?back=/press-releases/2006-05>. See generally Act of June 9, 2006, ch. 326, § 1, 2006 Okla. Sess. Laws 1792, 1794 (codified at 10 O.S.Supp.2007, § 7115 (renumbered 2009 as 21 O.S. § 843.5)).

^[116] *S.B. 1754, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced); Sex Offender Info May Be Required, Oklahoman, Feb. 15, 2006, at 4A, available at <https://www.oklahoman.com/story/news/2006/02/15/legislation-br-committee-oks-measure-for-tax-relief/61900902007/>.*

^[117] *Okla. State Leg., Bill Information for S.B. 1754, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1754&Session=0600> (last visited Nov. 12, 2024).*

^[118] *S.B. 1755, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced).*

^[119] *See supra* ¶ 32.

^[120] *See supra* notes 92-93 and accompanying text (discussing Rep. Terrill's amendment to H.B. 2839).

^[121] *See supra* note 90 and accompanying text (discussing Rep. Winchester's H.B. 2839).

^[122] *S.B. 1755, §§ 5, 8, 11--12, 50th Leg., 2d Reg. Sess. (Okla. 2006) (House committee substitute for Senate bill); LEGISLATION: Sex Offender Bill Passes House, Oklahoman, Apr. 21, 2006, at 6A, available at <https://www.oklahoman.com/story/news/2006/04/21/legislation-br-sex-offender-bill-passes-house/61889152007/>.*

^[123] *Okla. State Leg., Bill Information for S.B. 1755, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1755&Session=0600> (last visited Nov. 12, 2024).*

^[124] *Act of June 7, 2006, ch. 284, §§ 3, 6, 9, 11, 2006 Okla. Sess. Laws 1475, 1480, 1493, 1497, 1501 (codified at 21 O.S.Supp.2006, § 1125(A)--(B); 22 O.S.Supp.2006, § 991a(K); 57 O.S.Supp.2006, §§ 584(A)(7), 590); see also Press Release, Okla. Senate, Bill to Reform Sex Offender Registry Passes Senate (May 26, 2006), available at <https://oksenate.gov/press-releases/bill-reform-sex-offender-registry-passes-senate?back=/press-releases/2006-05>; Michael McNutt, Governor Signs 54 Bills into Law, Oklahoman, June 8, 2006, at 5A, available at <https://www.oklahoman.com/story/news/2006/06/08/governor-signs-54-bills-into-law/61878835007/>.*

^[125] *Ch. 284, § 12, 2006 Okla. Sess. Laws at 1501 (codified at 57 O.S.Supp.2006, § 590.1).*

^[126] *Id.*, 2006 Okla. Sess. Laws at 1476.

^[127] *S.B. 1964, 50th Leg., 2d Reg. Sess. (Okla. 2006) (introduced).*

^[128] *S.B. 1964, 50th Leg., 2d Reg. Sess. (Okla. 2006) (committee substitute).*

^[129] *See supra* ¶¶ 32, 35.

^[130] *Press Release, Okla. H.R., House Revives Sex Offender Measures (Apr. 24, 2006), available at*

https://former.okhouse.gov/Media/News_Story.aspx?NewsID=724; Jennifer Mock, *House Amends, Passes Sex Offender Legislation*, *Oklahoman*, Apr. 25, 2006, at 3A, available at <https://www.oklahoman.com/story/news/2006/04/25/house-amends-passes-sex-offender-legislation/61888399007/>.

^[131] See *supra* notes 92-93 and accompanying text (discussing Rep. Terrill's amendment to H.B. 2839).

^[132] See *supra* notes 85 and accompanying text (discussing Rep. Billy's H.B. 2830).

^[133] See *supra* note 90 and accompanying text for a discussion of Rep. Winchester's H.B. 2839.

^[134] See *supra* note 80 and accompanying text (discussing Rep. Kiesel's H.B. 2569).

^[135] S.B. 1964, §§ 4, 7--10, 12--17, 50th Leg., 2d Reg. Sess. (Okla. 2006) (House committee substitute for Senate bill).

^[136] Okla. State Leg., Bill Information for S.B. 1964, <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1964&Session=0600> (last visited Nov. 12, 2024).

^[137] Act of June 7, 2006, ch. 294, §§ 1--3, 13, 2006 Okla. Sess. Laws 1580, 1581--92, 1608 (codified at 22 O.S.Supp.2006, § 991a(A)(1)(f), (ee); 47 O.S.Supp.2006, §§ 6-105.3, 6-115; 57 O.S.Supp.2006, § 590).

^[138] *Id.*, 2006 Okla. Sess. Laws at 1580--81.

^[139] See Jay F. Marks, *Courts: Lawsuit Questions Legality of Housing Restriction*, *Oklahoman*, Feb. 4, 2006, at 1A, available at [https://www.oklahoman.com/story/news/2006/02/04/courts-lawsuit-questions-legality-of-housing-restrictionbrman-](https://www.oklahoman.com/story/news/2006/02/04/courts-lawsuit-questions-legality-of-housing-restrictionbrman-challenges-sex-offender-law/61902731007/)

[challenges-sex-offender-law/61902731007/](https://www.oklahoman.com/story/news/2006/02/16/offender-drops-challenge-to-law/61902731007/); Jay F. Marks, *Offender Drops Challenge to Law*, *Oklahoman*, Feb. 16, 2006, at 5A, available at <https://www.oklahoman.com/story/news/2006/02/16/offender-drops-challenge-to-law/61900740007/>; Settlement Agreement & Stip. by the Parties ¶¶ 3--4, at 2, *Doe v. Lane*, No. 5:06-cv-00074-HE (W.D. Okla. Feb. 13, 2006); David Harper, *Sex Offenders Challenge Laws Concerning Where They May Live*, *Tulsa World*, Sept. 2, 2006, at 1, available at https://tulsa-world.com/archive/sex-offenders-challenge-laws-concerning-where-they-may-live/article_16ea0a76-ae30-5d41-a094-92dc188efbd4.html; David Harper, *Sex Offenders Drop Lawsuit*, *Tulsa World*, Feb. 16, 2008, at 11, available at https://tulsa-world.com/archive/sex-offenders-drop-lawsuit/article_5eed6ddf-d875-52d9-bc9a-2d824e329676.html; Press Release, ACLU of Okla., *Sex Offender Residency and Travel Restriction Case Dismissed* (June 26, 2008), available at <https://www.acluok.org/en/press-releases/sex-offender-residency-and-travel-restriction-case-dismissed>; *Jt. Stip. of Dismissal Without Prejudice 1*, *Doe v. Parish*, No. 4:06-cv-00457-GKF-FHM (N.D. Okla. Feb. 13, 2008) (disclosing settlement but not detailing the terms).

^[140] Press Release, ACLU of Okla., *supra* note 139.

^[141] Press Release, Okla. H.R., *Measures Against Sex Offenders Approved by Bipartisan House* (Mar. 15, 2007), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=1114.

^[142] *Id.*

^[143] *Id.*; H.B. 1816, 51st Leg., 1st Reg. Sess.

(Okla. 2007) (introduced).

^[144] Press Release, Okla. H.R., *supra* note 145; H.B. 1051, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced); see also *supra* ¶ 69.

^[145] See Okla. State Leg., Bill Information for H.B. 1816, <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1816&Session=0700> (last visited Nov. 12, 2024); Act of June 4, 2007, ch. 325, §§ 1--3, 2007 Okla. Sess. Laws 1381, 1381--85 (codified at 10 O.S.Supp.2007, § 7115(F), (I) (renumbered 2009 as 21 O.S. § 843.5)); 21 O.S.Supp.2007, §§ 1021(B)(2), 1123(A)(5)); Okla. State Leg., Bill Information for H.B. 1051, <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1051&Session=0700> (last visited Nov. 12, 2024); Act of May 31, 2007, ch. 164, § 1, 2007 Okla. Sess. Laws 841, 842--43 (codified at 70 O.S.Supp.2007, § 24-100.6). H.B. 1051 did have additional provisions tacked onto it regarding the Diabetes Management in Schools Act, 70 O.S.Supp.2007, §§ 1210.196.2--1210.196.8; but the sex offender provision was unaltered.

^[146] H.B. 1381, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[147] Compare *id.*, with H.B. 1381, 51st Leg., 1st Reg. Sess. (Okla. 2007) (committee substitute); Okla. State Leg., Bill Information for H.B. 1381, <http://www.oklegislature.gov/BillInfo.aspx?Bill=H1381&Session=0700> (last visited Nov. 12, 2024).

^[148] Bill Information for H.B. 1381, *supra* note 147.

^[149] H.B. 1529, 51st Leg., 1st Reg. Sess.

(Okla. 2007) (introduced).

^[150] Okla. State Leg., Bill Information for H.B. 1529, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1529&Session=0700> (last visited Nov. 12, 2024).

^[151] H.B. 1714, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[152] Okla. State Leg., Bill Information for H.B. 1714, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1714&Session=0700> (last visited Nov. 12, 2024).

^[153] *Id.*

^[154] *Id.*; Act of May 31, 2007, ch. 182, § 1, 2007 Okla. Sess. Laws 900, 907 (codified at 22 O.S.Supp.2007, § 991a(A)(14)--(15)).

^[155] H.B. 1993, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[156] Okla. State Leg., Bill Information for H.B. 1993, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1993&Session=0700> (last visited Nov. 12, 2024).

^[157] H.B. 1825, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced); Press Release, Okla. H.R., Kiesel Bill Would Improve Sex Offender Registry (Feb. 13, 2007), available at https://former.okhouse.gov/Media/News_Story.aspx?NewsID=991.

^[158] Okla. State Leg., Bill Information for H.B. 1825, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1825&Session=0700> (last visited Nov. 12, 2024).

^[159] Compare H.B. 1825, §§ 1--7 (introduced), with H.B. 1760, §§ 23--29, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced); see also Jennifer Mock & Bryan Dean, *Tiered System Viewed for Sex Offender Law*, *Oklahoman*, Apr. 22, 2007, at 6A, available at <https://www.oklahoman.com/story/news/2007/04/22/tiered-system-viewed-for-sex-offender-law/61788478007/>.

^[160] Compare H.B. 1825, § 5 (introduced) (to be codified at 57 O.S.Supp.2007, § 582.3); H.B. 1760, § 25 (introduced) (to be codified at 57 O.S.Supp.2007, § 582.3); with Act of June 4, 2007, ch. 261, §§ 24--25, 2007 Okla. Sess. Laws 1173, 1199 (missing the provision that would have been codified at 57 O.S.Supp.2007, § 582.3).

^[161] H.B. 1760, §§ 23--29 (introduced); see also *supra* note 159 and accompanying text.

^[162] H.B. 1760, §§ 1--19, 21--22 (introduced).

^[163] 22 O.S.Supp.2006, § 991a(A)(1)(f).

^[164] See *supra* notes 139--140 and accompanying text. More specifically, in the enacted provisions of the bill, the Legislature clarified that the existing residency restrictions only applied to parks if they had been "zoned by city, county, state, federal or tribal government" and to day care facilities if they were a "licensed child care center as defined by the Department of Human Services." ch. 261, § 29, 2007 Okla. Sess. Laws at 1208 (codified at 57 O.S.Supp.2007, § 590(A)). They also clarified that the "[e]stablishment of a day care center or park in the vicinity of a residence of a registered sex offender will not require the relocation of the sex offender or the sale of the property" and

that the residency restrictions would "not apply to any registered sex offender residing in a hospital or other facility... [that] provide[s] medical services." *Id.*, § 29, 2007 Okla. Sess. Laws at 1208--09 (codified at 57 O.S.Supp.2007, § 590(A), (C)). Similar clarifications were made regarding zones of safety, and the Legislature also clarified that "[n]othing in this section shall prohibit" a registered sex offender "from attending a recognized church or religious denomination for worship; provided the person has notified the religious leader of his or her status... and the person has been granted written permission by the religious leader." *Id.* § 20, 2007 Okla. Sess. Laws at 1188--89 (codified at 21 O.S.Supp.2007, § 1125(A), (D)--(E)).

^[165] H.B. 1760, §§ 31--50 (introduced).

^[166] H.B. 1760, 51st Leg., 1st Reg. Sess. (Okla. 2007) (House committee substitute); H.B. 1760, 51st Leg., 1st Reg. Sess. (Okla. 2007) (floor (Senate)); Okla. State Leg., Bill Information for H.B. 1760, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1760&Session=0700> (last visited Nov. 12, 2024).

^[167] H.B. 1760, 51st Leg., 1st Reg. Sess. (Okla. 2007) (enrolled).

^[168] Ch. 261, 2007 Okla. Sess. Laws at 1210.

^[169] *Id.*, 2007 Okla. Sess. Laws at 1173--74.

^[170] S.B. 35, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[171] Act of June 4, 2007, ch. 328, §§ 1--2, 2007 Okla. Sess. Laws 1424, 1425--29 (codified at 47 O.S.Supp.2007, §§ 6-105, 6-111).

^[172] *Id.*, 2007 Okla. Sess. Laws at 1424.

^[173] S.B. 109, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced); see also *supra* note 122 and accompanying text (discussing the exception that was enacted in 2006 as part of H.B. 1755).

^[174] Okla. State Leg., Bill Information for S.B. 109, <http://www.oklegislature.gov/BillInfo.aspx?Bill=S B109&Session=0700> (last visited Nov. 12, 2024); Act of Apr. 18, 2007, ch. 32, § 1, 2007 Okla. Sess. Laws 260, 260--61 (codified at 21 O.S.Supp.2007, § 1125).

^[175] *Id.*, 2007 Okla. Sess. Laws at 260.

^[176] S.B. 490, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[177] Okla. State Leg., Bill Information for S.B. 490, <http://www.oklegislature.gov/BillInfo.aspx?Bill=S B490&Session=0700> (last visited Nov. 12, 2024); S.B. 490, 51st Leg., 1st Reg. Sess. (Okla. 2007) (Senate floor).

^[178] Bill Information for S.B. 490, *supra* note 177.

^[179] S.B. 431, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[180] Okla. State Leg., Bill Information for S.B. 431, <http://www.oklegislature.gov/BillInfo.aspx?Bill=S B%20431&Session=0700> (last visited Nov. 12, 2024).

^[181] S.B. 690, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[182] Okla. State Leg., Bill Information for S.B. 680, <http://www.oklegislature.gov/BillInfo.aspx?Bill=S B680&Session=0700> (last visited Nov. 12, 2024).

^[183] S.B. 877, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[184] Okla. State Leg., Bill Information for S.B. 877, <http://www.oklegislature.gov/BillInfo.aspx?Bill=S B877&Session=0700> (last visited Nov. 12, 2024).

^[185] S.B. 891, 51st Leg., 1st Reg. Sess. (Okla. 2007) (introduced).

^[186] Okla. State Leg., Bill Information for S.B. 891, <http://www.oklegislature.gov/BillInfo.aspx?Bill=S B891&Session=0700> (last visited Nov. 12, 2024).

^[187] 57 O.S.Supp.2019, § 590(A) (*emphasis added*).

^[188] *Id.* § 590(B).

^[189] Act of April 19, 2010, ch. 147, § 1, 2010 Okla. Sess. Laws 528, 529 (codified at 21 O.S.Supp.2010, § 1125(A)).

^[190] Act of May 9, 2014, ch. 250, § 1, 2014 Okla. Sess. Laws 837, 837--38 (codified at 21 O.S.Supp.2014, § 1125(A)(1)--(2)).

^[191] Act of April 17, 2018, ch. 38, § 2, 2018 Okla. Sess. Laws 345, 345--46 (codified at 21 O.S.Supp.2018, § 1125(A)(3)).

^[192] See *supra* note 31 and accompanying text (*emphasis added*) (quoting 57 O.S.Supp.1997, § 581(B)).

^[193] See *supra* notes 31--33 and accompanying text.

^[194] See *supra* notes 35--40 and accompanying text.

^[195] See *supra* notes 48--65 and accompanying text.

^[196] See supra notes 61, 65 and accompanying text.

^[197] See supra notes 121--122, 124 and accompanying text.

^[198] Id.

^[199] See supra notes 120, 122, 124--125 and accompanying text.

^[200] See supra note 115 and accompanying text.

^[201] See supra notes 132, 137 and accompanying text.

^[202] See supra notes 102--103 and accompanying text.

^[203] See supra notes 68--70 and accompanying text.

^[204] See supra notes 170--171 and accompanying text.

^[205] See supra notes 161--168 and accompanying text.

^[206] See supra note 101 and accompanying text.

^[207] See supra note 84 and accompanying text.

^[208] See supra note 115 and accompanying text.

^[209] See supra note 91 and accompanying text.

^[210] See supra note 92 and accompanying text.

^[211] See supra notes 139--140, 164 and accompanying text.

^[212] The majority does note that "[t]his case does not present facts where a registered sex offender lives in an unrestricted area at the time a law is enacted or amended to prohibit the sex offender from living in the area within which his residence is located." Majority Op. ¶ 45. They specifically point out that "Donaldson is not being forced to move from his residence.... When SORA was first amended to prohibit residing within 2,000 feet of a park in 2006, Donaldson did not own or live on the subject property. Nor did he own or live on the subject property at any time when 57 O.S., § 590 was subsequently amended through 2019. Donaldson did not seek to live in the restricted area until 2021...." Id. ¶ 33. Essentially, they discredit the notion that SORA's residency restrictions are analogous to banishment as to Mr. Donaldson, because he isn't being kicked out of a house in which he already lives but is trying to live in a house he purchased after police told him he couldn't live there. As already stated, this constitutes an ad hominem attack against Mr. Donaldson. Although he may not be the most sympathetic registered sex offender in this regard (or other regards, for that matter), we shouldn't discount the argument wholesale. Other sex offenders have been and will be forced out of their homes because of newly amended residency restrictions. Newspaper articles from 2006 and 2007--i.e., when parks and playgrounds were added to the residency restrictions--are replete with references to sex offenders being forced out of their homes. Carrie Coppernoll et al., *Sex Offenders Exiled: A New Law Is Forcing Many Registered Sex Offenders Out of Cities and into Rural Areas to Find Legal Housing*, *Oklahoman*, Aug. 20, 2006, at 1A ("Even in small towns, there's often nowhere for sex offenders to live. In Gans, population of 200 or so near the

Arkansas border, there isn't much housing period. There certainly wasn't any for Jack Gandy. Police Chief Sam Hill Jr. said he had no choice but to make sex offender Gandy move after the law passed in late May.... He felt harassed when the Gans police chief made him move."), available at <https://www.oklahoman.com/story/news/2006/08/20/sex-offenders-exiled/61864913007/>; Dawn Marks, *Some Ex-Inmates May Have to Leave: Residence May Violate Sex Offender Law*, *Oklahoman*, Sept. 24, 2005, at 6Norman ("A residence for former inmates may need to find a new location for some of its residents because they may be in violation of a law regulating the distance sex offenders can live from a school. Officials at the Oklahoma County District Attorney's office are preparing to notify the registered sex offenders living at Hand Up Ministries, 1142 N Broadway Drive, that they are living within 2,000 feet of the Oklahoma School of Science and Mathematics and have 30 days to move."), available at <https://www.oklahoman.com/story/news/2005/09/24/ex-inmates-may-have-to-leavebrresidence-location-may-violate-sex-offender-law/61923557007/>; Greg Elwell, *Boundaries Tighten for Sex Offenders*, *Oklahoman*, July 23, 2005, at 4East ("The growing number of day care centers and schools is forcing some sex offenders out of their homes, police said.... At least two sex offenders will be forced to move because of the updated information, [Detective Chris] Cook said."), available at <https://www.oklahoman.com/story/news/2005/07/23/boundaries-tighten-for-sex-offendersbroptions-limited-by-day-care-schools/61933520007/>.

^[213] See Majority Op. ¶ 65 (remanding the case back to the trial court for a first-

instance determination of the factual issue of "whether Lake El Reno is a 'park' for purposes of 57 O.S.Supp.2019, § 590(A)").

^[214] See, e.g., Carrie Coppernoll et al., *supra* note 212, at 1A ("While officials figure out how to enforce the law, sex offenders still must find a legal place to live. Few urban areas are an option. In Tulsa, only 8 percent of the city's land lies outside 2,000-foot halos, police Sgt. John Adams said. And that 8 percent includes industrial zones. In Oklahoma City, only 16 percent of addresses are outside the halos. Offenders in other cities, such as Lawton and Enid, also are having trouble finding places to live.... Wayne, who spoke on condition that his full name not be revealed,... spent weeks looking for a house, apartment, anything that would meet the state's requirements. He started in Norman but quickly found nothing was available in the city. He asked law enforcement for help but was given none. He said Norman police told him the law was meant to keep him out of town, so he would have to turn in a list of potential homes, which police then would check for compliance."); Greg Elwell, *Map Expands Edmond Areas Off-Limits to Sex Offenders*, *Oklahoman*, Oct. 13, 2006, at 1A ("A new map released Thursday by Edmond police shows the areas where registered sex offenders are banned from living has more than doubled.... Neighborhoods seeking to keep sex offenders from moving in can build parks and playgrounds to extend the restricted area boundaries, [Detective Chris Cook] said."), available at <https://www.oklahoman.com/story/news/crime/2006/10/13/map-expands-edmond-areas-off-limits-to-sex-offenders/61852945007/>; Penny Owen, *State's Sex Offenders Find It Tougher to Hide*, *Oklahoman*, Aug. 4, 2002, at 15-A (describing a sex offender in

Ardmore who only had to deal with disclosure provisions in SORA, not its residency restrictions that were yet to be enacted: "Whatever the residents of Wildewood Addition legally can do to 'embarrass this guy out of town,' they will do.... Ardmore resident and parent Christi Hawkins has a bigger goal than running Barry Eugene Farmer out of her neighborhood. She wants sex offenders to know they are not welcome in Ardmore, period. 'We don't want Ardmore to become the safe nesting ground for you,' Hawkins said at Tuesday's meeting. 'It's not just about this one guy.'"), available at <https://www.oklahoman.com/story/news/2002/08/04/states-sex-offenders-find-it-tougher-to-hide/62085409007/>.

^[215] *When the 2007 amendments of SORA added the risk level assessment system, there were discussions about applying the residency restrictions differently based upon risk level assignments. See Mock & Dean, supra note 159, at 6A ("Lawmakers are working this year to... put[] in place a tiered system that would evaluate each case individually to determine the level of risk a sex offender poses to the community. The change would allow law enforcement to focus their efforts and resources on those who are the biggest threat, supporters say.*

'The key component is supervision,' said Rep. Gus Blackwell, R-Goodwell. 'When you hear the word "sex offender," you immediately think of a child rapist. There are so many other people caught within that; this makes the system more fair.' It also may mean only the tightest living restrictions would be applied to the sex offenders who remain a risk.... Details of the legislation are being worked out in the Legislature. The proposal would set up a risk assessment review committee at the Corrections Department. The committee would look at each case before a sex offender's release from prison and give each person a risk level ranking. That ranking would be tied to how long offenders must register and eventually could determine where they can live."). Alas, the Legislature ultimately only used the risk levels to assign different lengths of time for registration, with 15 years of registration for level 1 offenders, 25 years of registration for level 2 offenders, and life registration for level 3 offenders. Act of June 4, 2007, ch. 261, §§ 26--27, 2007 Okla. Sess. Laws 1173, 1200--02 (codified at 57 O.S.Supp.2007, §§ 582.5, 583).

^[216] *See Coppernoll et al., supra note 212, at 1A; Mock & Dean, supra note 159, at 6A.*
