No. ________

In the Supreme Court of the United States

RICHARD SNYDER, GOVERNOR OF THE STATE OF MICHIGAN; COL. KRISTE ETUE, DIRECTOR OF THE MICHIGAN STATE POLICE, PETITIONERS

v.

JOHN DOES #1–5; MARY DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for Petitioners

QUESTION PRESENTED

The question presented, on which the Sixth Circuit adopted the minority view in four separate circuit splits, is:

Does retroactively applying a sex-offender-registry law that classifies offenders into tiers based on crime of conviction, requires certain offenders to register for life, requires offenders to report in person periodically and within days of certain changes to registry information, and restricts offenders' activities within school zones impose "punishment" in violation of the Ex Post Facto Clause?

PARTIES TO THE PROCEEDING

The petitioners are Richard Snyder, Governor of the State of Michigan, and Colonel Kriste Etue, Director of the Michigan State Police.

The respondents are John Does #1–5 and Mary Doe, registered tier-III offenders.

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JURISDICTION

The order of the court of appeals was entered on August 25, 2016. The order denying the State's petition for rehearing was entered on September 15, 2016. (App. 182a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article I, section 10, clause 1 of the United States Constitution provides:

> No State shall . . . pass any . . . ex post facto Law . . . .

The relevant provisions of Michigan's sex-offender-registry law are set forth in the appendix to this petition. (App. 183a–221a.) These include Michigan Compiled Laws §§ 28.721a; 28.722(g), (r)–(w); 28.725; 28.725a(3)–(10); 28.727; 28.728; 28.733(b), (d)–(f); and 28.734–36.

INTRODUCTION

Since this Court upheld Alaska's sex-offender registry in 2003 in *Smith* v. *Doe*, both the States and the Federal Government have revised their sex-offender-registry laws to address the very real risk that those who have committed criminal sexual conduct in the past will offend again. 538 U.S. 84 (2003). That risk remains " 'frightening and high,' " *id*. at 103; a 2014 Department of Justice report, for example, observed that over a 20-year period following release, a full 27% of sex-offenders offend again.

To address this risk, Michigan took an additional step in 2006 to reduce recidivism: it established safety zones that bar sex offenders from residing, working, or loitering in close proximity (within 1,000 feet) of a school. That same year, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to set minimum standards for both the federal and state registries. The federal standards require lifetime registration for some offenders, classify offenders based on their offense, and require in-person reporting (both periodically and when triggered by specific events, such as when a registrant moves). States that fail to comply with these federal standards will lose 10% of law-enforcement funds they would otherwise receive. Michigan implemented these standards in 2011.

In this case, the Sixth Circuit concluded that these requirements amounted to punishment and so could not be applied to those who committed sex offenses before the 2006 and 2011 statutes. This decision created multiple circuit splits and threatens not just similar state statutes within the Sixth Circuit's jurisdiction, but also SORNA, which has many of the same rules.

The circuits are split on whether periodic in-person reporting requirements are punishment. Five circuits (the First, Second, Ninth, Tenth, and Eleventh Circuits) and one state supreme court (Wyoming's) all agree that such requirements may be applied retroactively because they are not punitive. But the Sixth Circuit and Maine's high court think in-person reporting is punitive. As a result, the 21 States in the five circuits listed above are free to comply with SORNA—and thus retain federal funding—by requiring in-person reporting, while the 5 States in minority jurisdictions face a different rule of federal law.

A similar problem exists for school safety zones. Although two circuits (the Eighth and Tenth) and the Iowa Supreme Court have upheld safety zones against federal ex post facto challenges, the Sixth Circuit sided with the Kentucky Supreme Court in concluding they are punitive. This split means the 13 States in the Eighth and Tenth Circuits are free to protect children by establishing safety zones around their schools (and 6 of those States have already done so), while 4 States in the Sixth Circuit cannot because of a flawed view of federal law. In fact, this question has even broader implications, as 21 States have safety zones restricting offenders from living near schools.

The Sixth Circuit's decision also widens two other splits in federal ex post facto law. Two circuits and two state high courts have upheld lifetime registration requirements, while the Sixth Circuit and the Maine Supreme Court have held them punitive. And five circuits have upheld classifications that do not include individual risk assessments, while the Sixth Circuit and the Kentucky Supreme Court have not.

As these splits suggest, the Sixth Circuit's decision also conflicts in principle with this Court's decision in *Smith*.

Because the application of the Ex Post Facto Clause to sex-offender registries is an important question of constitutional law that affects every State and the Federal Government and that is the subject of multiple splits of authority, certiorari is warranted.

STATEMENT OF THE CASE

A. Michigan enacts and amends the Sex Offenders Registration Act.

Michigan first enacted its Sex Offenders Registration Act (SORA) in 1994. 1994 Mich. Pub. Acts 1522. That same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which "conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for state programs." *Smith*, 538 U.S. at 89–90.

In 1996, Michigan amended SORA to require law-enforcement agencies to make offender information available to the public. 1996 Mich. Pub. Acts 2283. This followed a national wave of "Megan's Laws," named after Megan Kanka, a 7-year-old New Jersey girl "who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." *Smith*, 538 U.S. at 89.

Like other states, Michigan has refined its registry law multiple times since its initial adoption. For

example, Michigan amended SORA in 2006 to create "student safety zones," which generally prohibit offenders from residing, working, or loitering within 1,000 feet from school property. Mich. Comp. Laws § 28.733–35. These zones impose a physical buffer zone between children and a group of offenders that have high rates of sexual recidivism.

B. Congress enacts SORNA and conditions federal funding for states on substantial compliance with minimum standards.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to strengthen the nationwide network of sex-offender registration and notification programs. 42 U.S.C. § 16901 *et seq*. In addition to updating the federal registry law, SORNA established minimum standards for state registries.

To avoid a reduction in federal funding, states must "substantially implement" SORNA's requirements. 42 U.S.C. §§ 16925(a) & (d). To assist the states in their implementation efforts, the Attorney General issued guidelines that describe the minimum standards a state must meet to achieve substantial compliance. See National Guidelines for Sex Offender Registration and Notification 10 (July 2008) (Guidelines), http://www.smart.gov/guidelines.htm. SORNA and the Guidelines "set[] a floor, not a ceiling," for state registry programs. Guidelines 6.

Of relevance here, a state's registry program must include the following components for the state to be in minimum compliance:

Classification of offenders. SORNA classifies offenders into one of three "tiers" based on their offenses of conviction; the frequency and duration of an offender's reporting requirement is then determined by his tier level. 42 U.S.C. § 16911(1)–(4). A state need not assign or label its offenders as "tier 1," "tier 2," and "tier 3," but it must ensure that an offender who would qualify for a particular tier under SORNA is subject to the minimum SORNA requirements for that tier. A state could meet this requirement by subjecting all offenders to SORNA's "tier III" requirements. Guidelines 21–22.

Required information for registry. SORNA requires states to include, at a minimum, the following offender information in their registries: names and aliases; internet identifiers and addresses (including "all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings"); telephone numbers; social security number; residence, lodging, and travel information (including any place in which the sex offender is staying for seven or more days); employment information and professional licenses; school information; vehicle information (including for any vehicle that the offender "regularly drives"); birthdate; physical description; text of registration offense; criminal history; current photograph; fingerprints and palm prints; DNA sample; and driver's license or identification card. 42 U.S.C. § 16914; Guidelines 26–33.

Required information for website. In addition to information that must be available to law enforcement through the registry, SORNA requires states to publish on the Internet offenders' names, addresses or

locations, vehicle descriptions and license plate numbers, physical descriptions, sex offenses for which convicted, and current photographs. 42 U.S.C. § 16918; Guidelines 33–34. States' online registries must be field searchable by zip code or geographic radius set by the user, as well as by name, county, and city or town. 42 U.S.C. § 16918; Guidelines 34.

Community notification. SORNA also requires community notification and targeted disclosures. Within three business days of an offender registering or updating his registration, the information must be provided to specified entities and individuals, including schools and social services in the area, volunteer organizations in which contact with minors may occur, or any other organization or individual who requests notification. 42 U.S.C. § 16921; Guidelines 38.

In-person reporting of changes to registry information. States must require an offender to report in person within three business days of changes in name, residence, employment, or school attendance. 42 U.S.C. § 16913(c); Guidelines 50. Offenders must also inform the jurisdiction if the offender intends to commence residence, employment, or school attendance in another jurisdiction. *Id.* States must also require offenders to report within three business days any changes in vehicle information, temporary lodging information, or Internet identifiers, though an offender need not report these changes in person and the manner of reporting is left to the states' discretion. *Id.* at 52, 54. States must also require offenders to report international travel 21 days in advance. Supplemental Guidelines for Registration and Notification

1631, 1637 (Jan. 2011) (Supplemental Guidelines), http://www.smart.gov/guidelines.htm.

Periodic in-person verification. States must also require in-person verification of registry information at periodic intervals based on the offender's tier level, including quarterly in-person verification for tier III offenders. 42 U.S.C. § 16916; Guidelines 54–55. Like other requirements, "the in-person appearance requirements . . . are only minimum standards" and "are not meant to discourage" states from adopting more extensive verification measures. *Id.* at 56.

Duration of registration. SORNA requires registration for set time periods depending on the offender's tier level, including lifetime registration for tier-III offenders. 42 U.S.C. § 16915; Guidelines 56–57.

Retroactive application. Finally, SORNA requires states to apply the registration and reporting requirements retroactively to certain categories of offenders, listed in the Guidelines, for which such application is feasible. Guidelines 7–8, 45–47; see also Supplemental Guidelines 1639.

C. Michigan amends its registry law to comply with federal standards.

To comply with SORNA's minimum standards, Michigan again amended its registry law in 2011. Most pertinent here, these amendments: (1) classify offenders into three tiers according to their underlying offenses, Mich. Comp. Laws § 28.722(r)–(w); (2) require periodic in-person reporting as well as in-person

reporting within three business days of certain changes, including changes in residence, employment, educational enrollment, vehicle use or ownership, name, and e-mail address or other designations used in Internet postings, § 28.725(1), § 28.722(g), & § 28.725a(3)(c); (3) require publication on the Internet of the offender's name and aliases, date of birth, residential, business, and school addresses, license plate and vehicle description, listed offenses of conviction, physical description, photograph, registration status, and tier classification, § 28.728(2); and (4) require tier-III offenders to register for life, § 28.725(10)–(12) & § 725a(3).

D. The district court dismisses the plaintiffs' ex post facto claim.

In 2012 and 2013, Doe plaintiffs—all registered tier III sex offenders—brought two suits challenging the 2011 version of SORA on federal constitutional grounds, seeking declaratory and injunctive relief. In addition to a state-law claim not relevant here, the plaintiffs claimed that SORA violates the Ex Post Facto and Due Process Clauses when applied retroactively (counts I, VI, IX), violates their due-process rights to travel, work, and direct the education and upbringing of their children (counts II, III, IV), violates the First Amendment by abridging the freedom of speech (count V), and is unconstitutionally vague (count VII).

In March 2013, the district court dismissed with prejudice the ex post facto, due-process–travel, and due-process–work counts (counts I, II, and III), and

dismissed without prejudice the due-process–retroactivity count (count VI) as it applied to Does #1 and #2. (App. 181.)

In deciding the ex post facto claim, the district court applied this Court's intents-effects test as articulated in *Smith* v. *Doe*, 538 U.S. at 92–93, to determine whether the challenged portions of SORA constitute "punishment" such that they cannot be applied retroactively. The court concluded that "SORA, as amended in 2011, is a regulatory, not criminal statute," and thus that applying it retroactively posed no ex post facto problem. (App. 158a.) First, the court held that "[t]he text, structure, and manner of codification all support" that the legislature intended SORA to be a civil, and not a penal, statute. (App. 151a.)

Second, the court concluded—using the *Kennedy* v. *Mendoza-Martinez* seven-factor test, 372 U.S. 144, 168–69 (1963)—that SORA's effects are not so punitive that they constitute punishment. The court reasoned that SORA does not impose any physical restraint, and that any restraints imposed are less harsh than occupational debarment, which this Court has held to be non-punitive. (App. 152a–153a.) With respect to student safety zones, the court reasoned that the zones imposed "no more than minor and indirect" restraints. (App. 153a.)

The court rejected Plaintiffs' arguments that SORA is akin to the traditional punishments of shaming and banishment, explaining that SORA provides no means "for the public to humiliate or shame the offender" and that the student safety zones are "not equivalent to running [offenders] out of town." (App.

154a–155a.) The court also rejected Plaintiffs' argument that SORA is retributive because it applies to all offenders based on offense without consideration of each offender's individual risk. Citing *Smith*, the court reasoned that "it is permissible for Michigan to rely on broad, offense-based categories in applying SORA" without making individualized risk determinations. (App. 155a.)

The court further held that SORA is rationally connected to a non-punitive purpose, reasoning that "[t]here is a clear and obvious connection between the proffered purpose of public safety and community notification and the requirements of SORA." (App. 156a–157a (quotations omitted).) Noting this Court's statement in *Smith* that the risk of recidivism posed by sex offenders is " 'frightening and high,' " 538 U.S. at 103, the court emphasized that "SORA is intended to assist law enforcement and members of the community in identifying and monitoring a group of offenders who[m] the legislature has found to have extremely high recidivism rates and whose offenses are uniquely harmful to some of the most vulnerable members of our community." (App. 156a–157a.) The court rejected Plaintiffs' argument—based on Plaintiffs' allegation that sex-offender registries do not reduce recidivism rates—that SORA is not rationally related to a non-punitive purpose, cautioning that "[i]n our constitutional structure, where both separation of powers and federalism are paramount . . . , it is not for a federal court to tell a state legislature whether a particular law is effective or not." (*Id.*)

Applying the last factor of the *Mendoza-Martinez* analysis, the court held that SORA is not excessive in

relation to its non-punitive purpose. In particular, the court held that lifetime registration for Tier III offenders and the inability to obtain removal from the registry upon a showing of low individual risk do not render SORA excessive. (App. 157a–158a.) As support for this conclusion, the court cited "the high recidivism rates of sex offenders" and "the length of time that often passes between offenses." (*Id.*)

Two years later, in 2015, the district court ruled on Plaintiffs' remaining claims, holding that Michigan's school safety zones and various reporting requirements are unconstitutional for vagueness and other reasons. (App. 50a–143a; 32a–49a.)

E. The Sixth Circuit holds that retroactive application of SORA violates the Ex Post Facto Clause.

Following appeal by both parties, the Sixth Circuit held that Michigan's SORA imposes punishment and that retroactive application of the 2006 and 2011 amendments to the Plaintiffs violates the Ex Post Facto Clause. (App. 27a.) Because the decision precludes applying the contested SORA provisions to the six named plaintiffs, the court declined to address Plaintiffs' other claims. (*Id.*)

Like the district court, the Sixth Circuit saw "no warrant for concluding" that the legislature intended SORA to be punitive. (App. 17a.) Nevertheless, applying the five *Mendoza-Martinez* factors under the "effects" prong of *Smith*'s intent-effects test, the court concluded that SORA imposes punitive effects.

Under the first factor, the court concluded that Michigan's 2006 and 2011 SORA amendments resemble the traditional punishments of banishment and shaming. (App. 18a–21a.) While the court acknowledged that SORA's student safety zones "do[] not prohibit the registrant from setting foot in the school zones" and would not constitute "banishment" as that punishment is described in Blackstone's *Commentaries*, the court concluded that SORA's "geographical restrictions are nevertheless very burdensome" and cause offenders "great difficulty in finding a place where they may legally live or work." (*Id.*)

The court also likened SORA's tier classification system to shaming. (App. 20a.) Without discussing what shaming consisted of historically, the court emphasized that SORA: (1) ascribes "tiers" to offenders based solely on the offense "without providing for any individualized assessment"; (2) "appl[ies] even to those whose offenses would not ordinarily be considered sex offenses" (i.e., Doe #1's non-sexual kidnapping offense); and (3) "discloses otherwise non-public information," in the case of offenders whose records had been sealed under Michigan's youthful diversion statute. (*Id.*) For these reasons, the court concluded that "the ignominy under SORA flows not only from the past offense, but also from [SORA] itself." (*Id.*)

The court also decided that SORA "resembles the punishment of parole/probation." (App. 21a.) While conceding that "the level of individual supervision is less than is typical of parole or probation," the court nevertheless concluded that, like parolees, "registrants are subject to numerous restrictions on where

they can live and work," "must report in person," and may be imprisoned for failure to comply. (*Id.*)

Addressing the second factor, the court also concluded that SORA imposes an affirmative disability or restraint. The court noted that SORA's student safety zones limit where registrants "may live, work, and 'loiter' " and "put significant restraints on how registrants may live their lives." (App. 21a–23a.) Also, requiring registrants to appear in person, and for life if they are tier-III offenders, were "direct restraints on personal conduct." (App. 22a.) The court concluded that these requirements are "far more onerous than those considered in *Smith*." (App. 22a–23a.)

Applying the third factor, the court concluded that SORA advances traditional aims of punishment. But like this Court in *Smith*, the court accorded this factor little weight. (App. 23a.)

Turning to the fourth factor—whether SORA bears a rational connection to a non-punitive purpose—the court offered conflicting thoughts. On one hand, the court acknowledged that "the legislative reasoning behind SORA is readily discernible": "recidivism rates of sex offenders, according to both the Michigan legislature and *Smith*, are 'frightening and high' "; informing the public of registry information provides a mechanism to "keep tabs on" offenders "with a view to preventing some of the most disturbing and destructive criminal activity"; and "school zones keep sex offenders away from the most vulnerable." (App. 23a–24a.) On the other hand, the court questioned whether SORA "in fact accomplishes its professed goals." (App. 24a–25a.) As grounds for its skepticism, the court cited a 2003 study suggesting that

sex offenders are less likely to recidivate than other sorts of criminals; it also cited as "troubling" evidence in the record "supporting a finding" that offense-based registration has no impact on recidivism and may even increase the risk of recidivism. (*Id.*)

Analyzing the final factor that this Court deemed relevant in *Smith*, the Sixth Circuit concluded that the record reflected "no evidence" that the difficulties SORA imposes on registrants are counterbalanced by "any" positive effects. (App. 25a.) In particular, the court determined that "[t]he requirement that registrants make frequent, in-person appearances before law enforcement . . . appears to have no relationship to public safety at all." (*Id.*) Accordingly, the court viewed SORA as excessive.

Following the above analysis, the Sixth Circuit held that SORA's actual effects are punitive. The court explained that SORA "brands registrants as moral lepers solely on the basis of a prior conviction" and "consigns them to years, if not a lifetime, of existence on the margins . . . ." (App. 26a.)

And while Michigan law requires a court to sever any portion of SORA that the court finds unconstitutional when applied retroactively, Mich. Comp. Laws § 8.5, the Sixth Circuit's decision prevents Michigan wholesale from applying SORA's 2006 and 2011 amendments retroactively.

Because the decision created an intra-circuit conflict, as well as a substantial inter-circuit split, Michigan petitioned the court of appeals for a panel rehearing. The court denied that petition in a one-sentence order on September 15, 2016. (App. 182a.)

REASONS FOR GRANTING THE PETITION

I. The federal courts of appeals and state courts of last resort are split on the federal question whether SORA requirements like Michigan's constitute "punishment."

Although modern SORA laws share similar core features, the question whether States may enforce those laws currently depends on which federal circuit the State happens to be in. The state and federal courts have splintered in recent years over whether common requirements that extend beyond basic registration—including residency and more-detailed reporting requirements—are punitive such that they cannot be applied retroactively. This widespread disagreement over common features of modern registry laws warrants this Court's review.

What is more, many of the challenged SORA features are also included in SORNA, the federal registry law, and indeed SORNA *requires* States to adopt these features to avoid a decrease in federal funding. This means that the split in authority over registry requirements threatens inconsistent outcomes not only for state SORA laws, but also for the federal registry.

A. Courts are split on reporting requirements.

The courts are split on the extent and frequency of reporting requirements. In Michigan, offenders who have been categorized as "tier III" offenders based on their crimes of conviction must report to law enforcement in person every 90 days, and within three business days of certain changes, including changes in residence, employment, educational enrollment, vehicle

use or ownership, name, and e-mail address or other designations used in Internet postings. Mich. Comp. Laws § 28.725(1), § 28.722(g), & § 28.725a(3)(c). The federal SORNA imposes similar requirements, which means that this issue affects every State's ability to comply with SORNA and to receive law-enforcement funding. 42 U.S.C. § 16913(c) (requiring in-person reporting within "3 business days after each change of name, residence, employment, or student status") & § 16916 (requiring quarterly in-person reporting for tier III offenders).

Multiple courts have upheld reporting requirements, including those that are frequent and in-person, against challenges that they violate the Ex Post Facto Clause because they are punitive. Specifically, five circuits have rejected ex post facto challenges by holding that reporting requirements are not punitive. E.g., *Shaw* v. *Patton*, 823 F.3d 556, 571–72 (10th Cir. 2016) (Oklahoma SORA) (upholding *weekly* in-person reporting); *Doe* v. *Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014) (New York SORA) (upholding triennial in-person reporting for level-one offenders); *Litmon* v. *Harris*, 768 F.3d 1237, 1243 (9th Cir. 2014) (California SORA) (upholding in-person quarterly reporting for offenders adjudicated to be sexually violent predators); *United States* v. *Parks*, 698 F.3d 1, 5–6 (1st Cir. 2012) (federal SORNA) (upholding quarterly in-person reporting); *ACLU of Nevada* v. *Masto*, 670 F.3d 1046, 1050, 1056–57 (9th Cir. 2012) (Nevada SORA) (upholding quarterly in-person reporting); *United States* v. *WBH*, 664 F.3d 848, 852, 855, 857–58 (11th Cir. 2011) (federal SORNA) (upholding quarterly in-person reporting and within 3 days of changing name, residence, employment, or student status); *Hatton* v.

Bonner, 356 F.3d 955, 964 (9th Cir. 2003) (California SORA) (upholding in-person reporting for all offenders); *Doe* v. *Pataki*, 120 F.3d 1263, 1267, 1285 (2d Cir. 1997) (New York SORA) (upholding quarterly in-person reporting for offenders deemed sexually violent predators); see also *United States* v. *Leach*, 639 F.3d 769, 773 (7th Cir. 2011) (federal SORNA) (upholding requirements, which included reporting within 3 days of change in residence or employment, as "regulatory" under *Smith*, though not focusing specifically on this aspect of SORNA).

In addition to these five circuits, an ex post facto claim would also likely fail in the Fourth Circuit, because that circuit has similarly concluded, albeit while analyzing the Eighth Amendment, that a reporting requirement is not punitive. *United States* v. *Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013) (federal SORNA) (upholding, against Eighth Amendment challenge, in-person reporting as non-punitive). It would likely recognize, as other courts have, that "[t]he common inquiry across the Court's Eighth Amendment, ex post facto, and double jeopardy jurisprudence is determining whether the government's sanction is punitive in nature and intended to serve as punishment." *Hinds* v. *Lynch*, 790 F.3d 259, 264 n.5 (1st Cir. 2015); see also *State* v. *Petersen-Beard*, 377 P.3d 1127, 1130 (Kan. 2016) ("[T]here exists no analytical distinction between or among the different constitutional contexts in which the question of punishment versus a civil regulatory scheme can arise.") (citing supporting cases).

Not only does the Sixth Circuit's decision conflict with these other circuits, its decision regarding reporting requirements also conflicts directly with the Wyoming Supreme Court's rejection of an ex post facto challenge. *Kammerer* v. *State*, 322 P.3d 827, 836 (Wyo. 2014) (upholding quarterly in-person reporting and within 3 days of change in residence, vehicle, or employment status). This case also would very likely have come out differently in Nevada, as that state's supreme court has held, when analyzing whether a guilty plea was knowing and voluntary, that Nevada's SORA requirements—which include in-person reporting in any community in which the offender is present for more than 48 hours—are not punitive. See *Nollette* v. *State*, 46 P.3d 87, 90 (Nev. 2002).

The Sixth Circuit's decision here, App. 26a (highlighting Michigan's "time-consuming and cumbersome in-person reporting" requirements), places it in conflict with all six of the federal circuits to consider this issue. It thus joins a minority that consists of one state supreme court (Maine's) that has held that modern SORA laws are punitive in violation of the federal Ex Post Facto Clause based in part on the extent and frequency of reporting requirements. *State* v. *Letalien*, 985 A.2d 4, 12, 18, 24–25 (Me. 2009) (quarterly in-person reporting and within 5 days of receipt of verification request).

B. Courts are split on school safety zones.

Federal and state courts are also split on whether "student safety zones" are a punitive restraint. Such zones generally limit where an offender may live and work. In Michigan, for example, offenders may not re-

side, work, or loiter within 1,000 feet of school property. Mich. Comp. Laws § 28.733–35. And 20 other States prohibit sex offenders from residing near schools. Ala. Code § 15-20A-11 (2000 ft.); Ark. Code Ann. § 5-14-128 (2,000 ft. for two tiers of offender); Cal. Penal Code § 3003.5(b) (2,000 ft.); Fla. Stat. Ann. § 775.215(2)(a) (1,000 ft.); Ga. Code Ann. § 42-1-15(b) (1,000 ft.); Idaho Code Ann. § 18-8329 (500 ft.); 730 Ill. Comp. Stat. Ann. 150/8 (500 ft. for certain offenders); Iowa Code Ann. § 692A.114 (2,000 ft.); Ky. Rev. Stat. Ann. § 17.545(1) (1,000 ft.); La. Stat. Ann. § 14:91.2(A)(2) (1,000 ft.); Miss. Code. Ann. § 45-33-25(4)(a) (3,000 ft.); Mo. Ann. Stat. § 566.147 (1,000 ft.); N.C. Gen. Stat. Ann. § 14-208.16 (1,000 ft.); Ohio Rev. Code Ann. § 2950.034(A) (1,000 ft.); Okla. Stat. Ann. tit. 57, § 590 (2,000 ft.); S.C. Code Ann. § 23-3-535(B) (1,000 ft.); S.D. Codified Laws § 2-24B-23 (500 ft.); Tenn. Code Ann. § 40-39-211(a)(1) (1,000 ft.); Va. Code Ann. § 18.2-370.3(A) (500 ft. for certain offenders); Wyo. Stat. Ann. § 6-2-320(a)(iv) (1,000 ft.).

Two circuits and one state supreme court have rejected ex post facto challenges and upheld as non-punitive student safety zones similar to Michigan's—or even twice as large. E.g., *Shaw*, 823 F.3d at 570–71 (10th Cir.) (Oklahoma residency restriction of 2,000 feet from school, playground, park, or child care center); *Weems* v. *Little Rock Police Dep't*, 453 F.3d 1010, 1013–14, 1017 (8th Cir. 2006) (Arkansas residency restriction of 2,000 feet from school or daycare facilities for "high-risk" offenders); *Doe* v. *Miller*, 405 F.3d 700, 719–23 (8th Cir. 2005) (Iowa residency restriction of 2,000 feet from school or child care facility); *State* v. *Seering*, 701 N.W.2d 655, 667–68 (Iowa 2005) (Iowa

residency restriction of 2,000 feet from school or day-care center). And the California Supreme Court likely would also have rejected this type of ex post facto challenge, as it has already concluded, albeit in a Sixth Amendment case, that a similar residency restriction was not punitive. *People* v. *Mosley*, 344 P.3d 788, 790, 799, 802 (Cal. 2015) (holding non-punitive, in facial challenge, California residency restriction of 2,000 feet of school or "park where children regularly gather"). But see *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (holding punitive, in as-applied challenge, blanket enforcement of residency restrictions against sex offender parolees in San Diego given scarcity of housing in that county).

The Sixth Circuit joined the minority side of this circuit split too. *Does #1-5*, 834 F.3d at 697, 701–03, 705 (likening student safety zones to banishment). Like the Kentucky Supreme Court, it held that SORA laws are punitive based in part on school safety zones. *Commonwealth* v. *Baker*, 295 S.W.3d 437, 440, 444–45 (Ky. 2009).

C. Courts are split on lifetime registration.

Lifetime registration is another issue that has divided the courts. In Michigan, tier-III offenders must register for life, Mich. Comp. Laws § 28.725(10)–(12) & § 725a(3), though offenders convicted as juveniles may petition for removal under certain circumstances after 25 years. §§ 28.725(12) & 28.728c(2), (13). The federal SORNA imposes similar requirements, which means that every State is required to impose lifetime registration on some offenders. 42 U.S.C. § 16915.

Two circuits and two state supreme courts have, when confronted with claims based on the federal Ex Post Facto Clause, upheld SORA laws that require lifetime registration by holding that they are non-punitive. E.g., *Parks*, 698 F.3d at 5–6 (1st Cir.); *WBH*, 664 F.3d at 852, 859–60 (11th Cir.); *RW* v. *Sanders*, 168 S.W.3d 65, 67, 70 (Mo. 2005); *State* v. *Worm*, 680 N.W.2d 151, 162 (Neb. 2004); see also *State* v. *Boche*, 885 N.W.2d 523, 531–32 (Neb. 2016) (lifetime registration not punishment under Eighth Amendment); *State* v. *Petersen-Beard*, 377 P.3d 1127, 1129 (Kan. 2016) (same); *Commonwealth* v. *Leidig*, 956 A.2d 399, 401, 404–06 (Pa. 2008) (holding lifetime registration non-punitive in context of whether plea was knowing and voluntary). In fact, the Sixth Circuit itself had previously reached that same conclusion. *Doe* v. *Bredesen*, 507 F.3d 998, 1000, 1005–06 (6th Cir. 2007).

On the other side of this split, the Sixth Circuit's decision here, *Does #1-5*, 834 F.3d at 703, 705, and at least one state supreme court (Maine's) have held that registration and reporting requirements are punitive based in part on their duration. *Letalien*, 985 A.2d at 18, 22–26 (Me.).

D. Courts are split on classification of offenders without individualized risk determinations.

The courts are also split on whether it is punitive to categorize offenders based on their offense of conviction without an individualized determination of dangerousness. Michigan, for example, categorizes offenders into "tiers" based on their crimes of conviction and tailors the duration and frequency of reporting requirements to those tiers. Mich. Comp. Laws

§ 28.725(1) & § 28.725a(3)(c). The federal SORNA likewise creates classes of offenders based on offense of conviction, and requires States to so classify too. 42 U.S.C. §§ 16911(1)–(4) & 16916; Guidelines 10. In other words, this issue also could affect every State.

Five federal circuits have upheld classification of offenders based on offense in the absence of an individualized determination of dangerousness. E.g., *Shaw*, 823 F.3d at 571–72 (10th Cir.); *Masto*, 670 F.3d at 1057 (9th Cir.); *WBH*, 664 F.3d at 859 (11th Cir.); *Miller*, 405 F.3d at 721 (8th Cir.); *Moore* v. *Avoyelles Corr. Ctr.*, 253 F.3d 870, 872–73 (5th Cir. 2001) (Louisiana SORA).

On the other side of this split, the Sixth Circuit joins Kentucky's highest court in holding that modern SORA laws are punitive based in part on the laws' categorization of offenders without individualized risk determinations. E.g., *Does #1-5*, 834 F.3d at 702–03, 705; *Baker*, 295 S.W.3d at 444–46 (Ky.); see also *Letalien*, 985 A.2d at 15, 23–24 (Me.) (left "uncertain" whether lack of individualized risk determination renders SORA excessive).

The Sixth Circuit could have avoided creating most of these splits simply by obeying its own precedent. In *Doe* v. *Bredesen*, 507 F.3d 998 (6th Cir. 2007), the Sixth Circuit upheld *lifetime*, *continuous* GPS monitoring as not punitive for those convicted of a violent sexual offense. *Id*. at 1000. Had the Sixth Circuit followed that decision, it would have recognized that lifetime registration is not punitive, that even continuous reporting is not punitive, and that classifying offenders based on their offense (not an individualized risk assessment) is not punitive. But because it did

not, States within the Sixth Circuit have no way to know which precedent should govern and so no guidance in the allowable scope of future registry laws.

* * *

As the foregoing shows, the federal questions here are important not just to Michigan; rather, they are important to every State that has acted to protect the public and to comply with SORNA's mandates. The Sixth Circuit's decision—which adopts the minority view on four separate circuit splits—warrants this Court's review. See, e.g., *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957) ("Since the case raised important questions, not only to California but to other States which have similar laws, we granted certiorari."); *New York* v. *O'Neill*, 359 U.S. 1, 3 (1959) (granting certiorari "as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico"); *Smith* v. *Doe*, 538 U.S. at 89–90, 92 (2003) (granting certiorari to hear ex post facto challenge to Alaska's sex-offender-registry law, where "every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law").

II. The Sixth Circuit's decision conflicts in principle with this Court's decision in *Smith* v. *Doe*.

The Sixth Circuit's decision warrants this Court's review for a second reason: it fails to adhere to this Court's decision in *Smith* v. *Doe*, 538 U.S. 84 (2003).

In *Smith*, this Court rejected the argument that reporting requirements—even of lifetime duration—are punitive when they are based on the crime of conviction and not an individualized assessment of dangerousness. *Id*. at 90, 102–04. This Court held that categorization based on offense is "reasonably related to the danger of recidivism," *id*. at 102, a danger it recognized as " 'frightening and high,' " *id*. at 103, and that lack of individualized assessment does not render regulatory burdens punitive, *id*. at 104. This Court has also squarely held that due process does not require individualized determinations of dangerousness before an offender is included in a sex-offender registry. *Connecticut Dep't of Public Safety* v. *Doe*, 538 U.S. 1, 6–8 (2003). Further, current studies confirm that sex offenders are dangerous as a categorical matter. For example, a report by the Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, shows that the 5-year rate of sexual recidivism for all sex offenders is 14%, and the 20-year rate of the same is 27%. *Sex Offender Management and Assessment Initiative* 93–94 (Oct. 2014), http://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

In contrast to *Smith*'s rejection of individualized determinations, the Sixth Circuit believed that classification of offenders into tiers, without individualized assessment, and publication of such extra-conviction information resembles the traditional punishment of shaming. (App. 20a, 26a ("SORA brands registrants as moral lepers solely on the basis of a prior conviction.").) It also, contrary to *Smith*, found fault in the lifetime duration of Michigan's reporting requirements for tier III offenders. (App. 21a–22a.)

Further, this Court held in *Smith* that widespread public dissemination of truthful information is not punitive, even when the publicity may cause "personal embarrassment" and "social ostracism" for the offender. 538 U.S. at 98–99. While this Court noted that an offender's conviction is already a matter of public record, it did not suggest that dissemination of *previously non-public* information would necessarily be punitive; to the contrary, it noted in upholding Alaska's SORA law that "*most*" of the information disseminated by that law was already public. *Id.* (emphasis added). In contrast, the Sixth Circuit concluded that publication of previously non-public youthful-offender information resembles the traditional punishment of shaming. (App. 20a.)

III. The decision below prevents Michigan from complying with federal requirements and thereby puts the State at risk of losing federal funding.

Review is also warranted because complying with the Sixth Circuit's decision would take Michigan out of minimum compliance with federal requirements for state registries. And if Michigan is not able to achieve minimum compliance, it risks losing federal law enforcement funding. 42 U.S.C. § 16925(a) (a state that fails to "substantially implement" SORNA requirements "shall not receive 10 percent of the funds" that would otherwise be allocated annually under the Omnibus Crime Control and Safe Streets Act of 1968).

The Sixth Circuit's decision prevents Michigan from applying requirements enacted in 2006 and 2011 retroactively to the plaintiffs, whose offenses occurred

before those amendments. But federal registry law *requires* Michigan to apply many of those requirements, and it requires Michigan to apply them *retroactively*. See *supra* Statement of the Case, Section B. Indeed, Michigan enacted the 2011 SORA amendments *specifically to comply with federal law*.

Not only will the Sixth Circuit's decision bring Michigan below the threshold for "substantial compliance" under the SORNA Guidelines, the Guidelines affirmatively and expressly preclude some of the actions the Sixth Circuit would have Michigan take.

For example, the Sixth Circuit objected to classifying offenders to "tiers" "without providing for any individualized assessment." (App. 20a, 26a.) But not only does SORNA contemplate that offenders will be categorized based solely on their offenses, 42 U.S.C. § 16911(1)–(4), the Guidelines specifically caution that a state will *not* be in substantial compliance if it uses individualized risk assessment to determine who must register and for how long. The Guidelines warn that state programs "cannot be approved as substantially implementing" SORNA's requirements "if they substitute some basically different approach to sex offender registration" that "does not incorporate SORNA's baseline requirements." Guidelines 10. As an example of a "different approach" that would not be acceptable, the Guidelines cite "a 'risk assessment' approach that broadly authorizes the waiver of registration or notification requirements or their reduction below the minima specified in SORNA" based on "factors that SORNA does not authorize as grounds for waiving or limiting registration or notification." *Id*.

The Sixth Circuit also found fault with the frequency of Michigan's reporting requirements and the requirement that tier III offenders register for life. (App. 21a–22a.) But if Michigan lessens reporting periods for changes in registration information, prescribes less frequent appearances for verification, or shortens the duration of registration periods, the Guidelines specifically provide that the State will no longer be in substantial compliance. The Guidelines caution that state programs cannot be approved if they "dispense wholesale with categorical requirements set forth in SORNA"—for example, if the State "set[s] regular reporting periods for changes in registration information that are longer than those specified in SORNA," or "prescribe[s] less frequent appearances for verification or shorter registration periods than SORNA requires." See Guidelines 10.

The Sixth Circuit also objected to Michigan's requirement that offenders report in person (App. 22a, 26a), but the Guidelines permit states to discard the in-person verification requirement only in narrow circumstances—e.g., if the offender is "hospitalized and unconscious because of an injury at the time of the scheduled appearance," "is in a persistent vegetative state," or has a family emergency. Guidelines 10.

The federal Guidelines also reject the Sixth Circuit's concern with publication of previously non-public information. (App. 20a.) The Guidelines specifically provide that registration may not be avoided by state youth diversion programs that refer to youthful convictions as something other than "convictions," or that "vacate" or "set aside" such convictions after the offender "serve[s] what amounts to a criminal sentence

for the offense." Guidelines 15. Likewise, "the sealing of a criminal record or other action that limits the publicity or availability of a conviction" does not change its status as a registrable "conviction" under the SORNA Guidelines. *Id.*

The Guidelines also require registration for specified offenses against minors, including kidnapping, regardless of whether the offense was non-sexual, Guidelines 18–19, in contrast to the Sixth Circuit's concern that requiring Doe #1 to register for kidnapping constitutes shaming. (App. 20a.) Indeed, the Guidelines suggest that a state SORA program cannot be approved if it "do[es] not require registration for offenses included in SORNA's offense coverage provisions . . . ." Guidelines 10.

Importantly, while SORNA accommodates states that are unable to comply with minimum standards if compliance "would place the [state] in violation of its constitution, as determined by a ruling of the [state's] highest court," 42 U.S.C. § 16925(b), Michigan does not qualify for this exception—the only exception listed in either the statute or the federal Guidelines. See Guidelines 11. Thus, without this Court's intervention, Michigan will be unable to comply with SORNA's minimum standards and will be at risk of losing critical federal funding for law enforcement.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Kathryn M. Dalzell
Assistant Solicitor General

Attorneys for Petitioners

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