No. 16-768

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

SUPPLEMENTAL BRIEF

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INTRODUCTION

In its amicus brief, the federal government agrees with Michigan on many significant points. It agrees that "most state sex-offender-registry schemes share similar features." U.S. Br. 10. It admits that this uniformity is due "in part to the influence of SORNA" and its accompanying guidelines. *Id.* at 14. Importantly, it agrees that "lower courts have reached different conclusions in analyzing particular features of various state sex-offender-registration schemes." *Id.* at 9, 13. And it agrees that a state that does not "substantially implement" SORNA risks losing federal funds and that Michigan now faces that risk, *id.* at 3, 10, 17–20.

Given its agreement that courts have reached different conclusions on basic features of sex-offender-registration laws, the federal government's objection is really quite narrow: it does not think certiorari is warranted because this case involves a multi-factor balancing test, and sex-offender-registration laws have some variations. But the Sixth Circuit did not strike down retroactive application of Michigan's law, as the federal government suggests, because of minor ways SORA differs from SORNA (such as by requiring in-person reporting for a change to vehicle ownership) or even because SORA contains (like laws in 20 other States) a residency restriction; the court struck the law down because it concluded that offense-based sex-offender registries are irrational and amount to the punishment of shaming—they "brand registrants as moral lepers solely on the basis of a prior conviction." Pet. App. 26a. In short, courts disagree about basic principles of ex post facto law, not about statutory or factual nuances, and those disagreements matter.

The federal government also confirms Michigan's fears about the loss of funding by candidly refusing to say that Michigan's federal funding is safe, perhaps recognizing the difficulty Michigan faces in trying to thread the needle between SORNA's requirements and the Sixth Circuit's decision. Given this, and because the differences in how lower courts are treating sex-offender-registration laws is an important national issue, this Court's guidance is necessary.

ARGUMENT

I. The Sixth Circuit's decision condemns offense-based registration and therefore implicates the federal SORNA and other state SORAs.

The federal government argues that the decision below turns on unique aspects of Michigan law and thus does not conflict with federal law or decisions of other circuits. U.S. Br. 10–13. But the decision itself reveals that the Sixth Circuit disagreed with offense-based registration as a general matter, not because of specific nuances in Michigan law. The Sixth Circuit's decision calls into question not only Michigan's SORA, but the whole of modern SORA requirements, concluding that three basic features of such laws are irrational.

First, the Sixth Circuit concluded that offense-based registration is irrational. The court doubted the legislature's judgment about the public-safety value of offense-based sex-offender registration, concluding that "the record before us provides scant support for the proposition that SORA in fact accomplishes its

professed goals," Pet. App. 24a, and describing SORA's efficacy as "at best unclear," Pet. App. 25a. The court of appeals posited that "recent empirical studies" have cast "significant doubt" on this Court's acknowledgement in *Smith* that "[t]he risk of recidivism posed by sex offenders is frightening and high." Pet. App. 24a (quoting *Smith* v. *Doe*, 538 U.S. 84, 103 (2003)). The court noted studies purporting to show that sex offenders are "actually *less* likely to recidivate than other sorts of criminals," and evidence that "offense-based public registration has, at best, no impact on recidivism" and may "actually *increase* the risk of recidivism[.]" Pet. App. 24a. In other words, the court thought that offense-based registration may *harm* public safety more than it *helps*. Indeed, the court asserted that no record evidence suggested that SORA's burdens are "counterbalanced by *any* positive effects," *id*. 25a (emphasis added)—not even one. Under this reasoning, *all* offense-based SORA laws—including the federal SORNA—are in the cross-hairs, not just Michigan's.

Second, the Sixth Circuit concluded that residential restrictions are overbroad and irrational. With respect to school safety zones, the court made clear that its objection was to the basic concept of residential restrictions, not to any Michigan-specific feature, such as a ban on loitering near schools. Contra U.S. Br. 16. The Sixth Circuit stated that "nothing . . . in the record suggests that the *residential restrictions* have any beneficial effect on recidivism rates," and the court suggested that it is irrational and overbroad to apply *any* such restrictions to sex offenders other than pedophiles (determined following an individualized risk assessment). Pet. App. 24a–25a (emphasis added).

The court likewise highlighted the residency aspect of Michigan's restrictions in summarizing why Michigan's SORA is punitive: "[SORA] consigns [offenders] to years, if not a lifetime, of existence on the margins, not only of society, but often . . . from their own families, with whom, due to school zone restrictions, they *may not even live*." Pet. 26a (emphasis added). That decision cannot be reconciled with other decisions that have upheld retroactive application of offense-based residency restrictions. Pet. 19–21. Further, even if this concern does not implicate SORNA, it implicates much of the country: 20 other states have residency restrictions, Pet. 20—a fact the federal government does not deny.

Third, the Sixth Circuit thought that frequent in-person reporting is irrational. The court made no reference to the Michigan-specific features of SORA's in-person reporting requirements when it posited that "[t]he requirement that registrants make frequent, in-person appearances before law enforcement . . . appears to have *no relationship to public safety at all*." Pet. App. 25a (emphasis added). Contra U.S. Br. 14–15, 19 (distinguishing SORNA from Michigan's requirements to report—in person—changes to motor vehicle information and internet identifiers).

Beyond these assertions of irrationality, the Sixth Circuit—in its final summation of why SORA is punitive—concluded that "SORA brands registrants as moral lepers solely on the basis of a prior conviction." Pet. App. 26a. That concern applies, of course, to all offense-based registration, including SORNA.

The Sixth Circuit's statements cannot be reconciled with the limited reading the federal government

seeks to give that decision. The decision indicts the whole of offense-based registration, reporting, and residency restrictions.

The Sixth Circuit further made clear that it did not view Michigan's SORA as flawed because of any unique features in the law when it expressed agreement with decisions from five other states holding "similar laws" punitive. Pet. 25a–26a ("So, is SORA's actual effect punitive? Many states confronting similar laws have said 'yes.' . . . And we agree."). The Sixth Circuit described these laws as similar even though some did not contain the elements that the federal government argues make Michigan's SORA uniquely problematic, U.S. Br. 15–16, 18–19, or other elements that would explain their unique punitiveness.

The Sixth Circuit's reliance on *Doe* v. *State*, 189 P.3d 999 (Alaska 2008), proves this point. *Doe* involved the same law this Court held was non-punitive in *Smith* (and even the same sex-offender), but *Doe* precluded retroactive application of Alaska's SORA based on Alaska's state constitution. *Id.* at 1002. *Doe* thus involved a law that did not include in-person reporting or school safety zones (the features of Michigan's law the federal government argues are unique, U.S. Br. 15–16, 18–19), yet the Sixth Circuit deemed it a similar law to Michigan's for the purpose of its federal ex post facto analysis. Pet. App. 25a–26a.

The Sixth Circuit also agreed with the New Hampshire Supreme Court's treatment of that state's SORA. Pet. App. 25a. In this *Doe* v. *State*, the New Hampshire Supreme Court held the law punitive based on the combined effect of lifetime registration and the fact that each offender's SORA requirements

were determined based on offense with no individualized risk determinations. 111 A.3d 1077 (N.H. 2015). New Hampshire's law did not include school safety zones, nor did the court cite any requirement to report in-person changes to motor vehicle information or internet identifiers. Cf. U.S. Br., p. 14–15 (citing these aspects of Michigan's law as potentially grounding the Sixth Circuit's decision).

The Sixth Circuit also made no attempt to distinguish Michigan's SORA from other SORAs that have been held non-punitive, as one would expect if its decision truly hinged on unique aspects of Michigan's law, as the federal government argues. Instead, the Sixth Circuit left unqualified its broad rejection of offense-based registration and expressly aligned itself with multiple other decisions so holding. The decision cannot reasonably be read as a unique decision based on peculiarities of Michigan law.

II. The deep jurisprudential splits on SORA laws are not attributable to case-specific differences.

A. The splits among the lower courts are not attributable to statutory differences.

The federal government suggests that the various splits that permeate the lower courts are attributable to statutory differences. U.S. Br. 15–16. But that conclusion is untenable. As illustrated by Michigan's chart (Reply Br. 5–8), courts disagree starkly on the basic ingredients of modern SORA laws. One court concludes that publication of previously non-public information constitutes shaming; another concludes the

opposite. One concludes that quarterly in-person reporting imposes a disability or restraint; another concludes the opposite. One concludes that in-person reporting serves no rational purpose; another concludes the opposite. And the list goes on. Reply Br. 5–8. It is difficult to examine these contradictions and conclude, as the federal government does, that the lower courts' "different outcomes . . . reflect differences in the statutory schemes rather than any divergence in the legal framework." U.S. Br. 10.

Indeed, despite arguing that there is no split, the federal government discusses—and indeed cites—only one lower-court case besides the decision below. U.S. Br. at III, 16. (And its attempt to distinguish that case—*Shaw* v. *Patton*, 823 F.3d 556 (10th Cir. 2016)—ignores that the Sixth Circuit split with *Shaw* on multiple grounds, Reply Br. 6, 8, and that the Tenth Circuit made clear that the quarterly in-person reporting requirements were reasonable as to both transient *and non-transient* individuals, *Shaw*, 823 F.3d at 576 ("Mr. Shaw must report . . . in person—either weekly or quarterly, depending on whether he remains transient—as long as he lives in Oklahoma. These reporting requirements are reasonable in light of the statute's non-punitive purpose of protecting public safety.") (citation omitted).) Faced with the task of reconciling diametric conclusions on the same basic SORA requirements, the federal government appears to have decided that "less is more."

In the same vein, even if SORA laws are analyzed for their cumulative or aggregate effect, it is implausible that wholly contradictory rulings on the *same* individual SORA ingredients pose no jurisprudential

problem. How is a court or legislature operating in today's legal landscape to decide whether a combination of SORA requirements is "punitive" in the aggregate when courts cannot agree even on whether the basic ingredients are punitive? And how can one add up punitive effects when one does not know if a given effect is punitive? There can be no consistency on the macro level when the micro level is riddled with contradiction.

That presumably is why this Court has recognized the importance of consistency on individual factors of multi-factor or aggregate tests by routinely granting certiorari to resolve disputes about individual factors. In *Vermont* v. *Brillon*, for example, this Court granted certiorari to resolve a dispute about how to apply individual factors of the balancing test used to determine whether a speedy-trial violation occurred. 556 U.S. 81, 89–92 (2009). While this Court acknowledged that the balancing test "compels courts to approach speedy trial cases on an ad hoc basis" and that "the balance arrived at in close cases ordinarily would not prompt this Court's review," *id*. at 91, it nevertheless recognized the need to resolve a dispute about how to apply individual factors of the test—namely, how to weigh delays caused by the defendant's assigned counsel and how to weigh the defendant's disruptive behavior. *Id*. at 91–92.

This Court similarly granted certiorari in *Kirtsaeng* v. *John Wiley & Sons*, *Inc*. to resolve a dispute among the lower courts about how to apply one factor in the multi-factor balancing test for awarding attorney's fees in Copyright Act cases. 136 S. Ct. 1979, 1983 (2016). While this Court had already articulated

guideposts and the lower courts had all applied the same multi-factor test, this Court nevertheless agreed that there was "a need for some additional guidance," noting that "utterly freewheeling inquiries often deprive litigants of the basic principle of justice that like cases should be decided alike—as when, for example, one judge thinks the parties' motivation determinative and another believes the need for compensation trumps all else." *Id*. at 1985–96 (citations and quotations omitted); see also *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013) (granting certiorari to resolve a discrete type of exigency for Fourth Amendment purposes even though the test examines the totality of the circumstances); *Peugh* v. *United States*, 133 S. Ct. 2072 (2013).

The same is true here. The lower courts have not treated like sex-offender-registration components alike—a fact the federal government acknowledges. U.S. Br. 9, 13. It is no answer that the lower courts all apply the same *Smith* test, U.S. Br. 9–10, when they apply it in a contradictory fashion, Reply Br. 5–8. And the Sixth Circuit's application contradicts numerous courts, which is unsurprising given its belief that "offense-based public registration" is irrational and has no positive effects. See Pet. 24a–25a. This Court's guidance is needed to resolve these inconsistencies.

B. Judicial disagreement over legislative facts does not erase the conflicts.

In addition to purported statutory differences, the federal government argues that the decision below "turned on record-specific evidence of the actual and aggregate effects of the challenged aspects of SORA."

U.S. Br. 12. That argument fails because the facts the Sixth Circuit relied on were largely legislative facts about the efficacy of the law, not adjudicative facts specific to one case. Reply Br. 12–13.

It is one thing to hold that a residency restriction may be punitive in one city but not another, based on adjudicative facts. U.S. Br. 12. The California courts have confronted this exact scenario, holding in one case that a residency restriction was facially non-punitive (under the Sixth Amendment), *People* v. *Mosley*, 344 P.3d 788, 790, 799, 802 (Cal. 2015), while holding in another that blanket enforcement of residency restrictions was punitive as applied, given the scarcity of housing in San Diego County, *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015). This type of *adjudicative* fact may affect the analysis of whether a SORA requirement is punitive under particular circumstances.

But it is not acceptable to allow one circuit to decide that, empirically, "offense-based public registration" *on the whole* does not reduce recidivism and therefore has no rational purpose, while other circuits conclude just the opposite. Contra U.S. Br. 12. Whether offense-based public registration reduces recidivism is not an adjudicative fact that varies from case to case, and circuit to circuit; rather, it is a *legislative* fact, to be weighed and decided by the legislature.

Indeed, the Sixth Circuit's re-weighing of these legislative facts is in tension with this Court's decision in *United States* v. *Kebodeaux*, 133 S. Ct. 2496 (2013). In that case, which concerned Congress's power under the Necessary and Proper Clause to enact SORNA and apply it retroactively, this Court described as

"eminently reasonable" Congress's conclusion that SORNA would reduce recidivism. *Id*. at 2503. While the Court noted that there is conflicting evidence on the recidivism rates of sex offenders and the benefits of registration, this Court emphasized that Congress has "the power to weigh the evidence and to reach a rational conclusion, for example, that safety needs justify postrelease registration rules." *Id*.

In contrast, the Sixth Circuit re-weighed these legislative facts itself and concluded that "offense-based public registration" does not reduce recidivism and is irrational. Pet. 23a–26a. That is not "record-specific evidence" that distinguishes the Sixth Circuit's decision from—and reconciles it with—the decisions of other circuits. Contra U.S. Br. 12. It is a *split* with other circuits, and on the fundamental premise of offense-based sex-offender registration.

III. The federal government declines to say that Michigan's federal funding is not at risk.

The federal government notably declines to say that Michigan's federal funding is safe. Instead, it hedges, saying that it "may well be the case" that Michigan can continue to receive federal funds, that Michigan "may" be able to "reenact in modified form a subset of the requirements" held punitive and enforce them retroactively, that elimination of Michigan-unique SORA features "may" be sufficient to eliminate the Sixth Circuit's concerns, and—tellingly—that "even if the State chooses not to" (cannot?) reinstate "the retroactive application of the few relevant fea-

tures in SORA that are required by SORNA," Michigan would "not necessarily" lose federal funding. U.S. Br. 10, 13, 19–20 (emphasis added).

The reason for the hedging is simple: by rejecting SORNA's fundamental premises—that sex offenders pose a high recidivism risk and that it is rational to apply offense-based registration and reporting requirements—the Sixth Circuit left no virtually room for Michigan to comply with SORNA, which requires retroactive application of offense-based requirements. 28 C.F.R. § 72.3.

The federal government's inability to say that removal of any unique features of Michigan's SORA will satisfy the Sixth Circuit—after arguing that the decision below is attributable solely to those features—speaks volumes.

* * *

The Sixth Circuit rejected the basic premises of modern, offense-based sex-offender registration. The decision below not only threatens the federal SORNA, but also conflicts with decisions that have upheld retroactive application of offense-based requirements. This case is a good vehicle for resolving whether basic components of modern SORA laws are punitive for ex post facto purposes because Michigan's SORA includes many of the components over which the lower courts have disagreed.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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Dated: JULY 2017