IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2011

No. 125

JOHN DOE,

Petitioner,

v.

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This civil action involves a challenge by a former public high school teacher to the statutory requirement that he register as a Tier III offender, as the result of his 2006 conviction of sexual child abuse of a student. In 2009, petitioner "John Doe"[1] filed a

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[1] After the petitioner filed his complaint (E. 66) in the Circuit Court for Anne Arundel County, that court entered an order permitting him to proceed pseudonymously, ordering the redaction of identifying information from all papers filed in the case, and requiring the use of the pseudonym in any hearing in the case. (E. 157.) Subsequently, the court granted the defendant's motion to transfer the action to the Circuit Court for

complaint for declaratory judgment in which he raised three claims: (1) that his 2006 conviction for "custodial" sexual child abuse under former Md. Ann. Code, art. 27 § 35A did not require him to register as a sex offender under the Maryland Sex Offender Registration Act (the "Maryland Act") (E. 70-72); (2) that a November 1, 2006 order modifying Mr. Doe's sentence prevented the State from requiring him to register as a sex offender (E. 72-73); and (3) that his guilty plea was invalid, because he did not enter it knowingly, intelligently, and voluntarily (E. 73-75). Mr. Doe requested the circuit court to order the Department of Public Safety and Correctional Services (the "Department") to remove his name from the Maryland Sex Offender Registry. (E. 75.)

In a decision filed on July 23, 2010, the Circuit Court for Washington County declared the rights of the parties and rejected all the claims that Mr. Doe raised in his complaint for declaratory judgment. (E. 157.) The court declared (1) that Mr. Doe's conviction of sexual child abuse required him to register as a sex offender (E. 160); (2) that the November 1, 2006 order correcting Mr. Doe's sentence to reflect the law then in effect did not preclude the application of the current mandatory registration requirements to Mr. Doe (E. 161); and(3) that Mr. Doe's guilty plea is valid, because registration is not a direct consequence of his plea, and therefore the court was not required to inform him of the registration requirement (E. 161-63). Accordingly, the circuit court denied Mr. Doe's request that it order the Department to remove his name from the sex offender registry. (E. 163.)

Washington County, the location of Mr. Doe's conviction for sexually abusing a 13-year-old female student. (E. 77, 89.)

Mr. Doe appealed the circuit court's decision to the Court of Special Appeals, which affirmed the judgment of the circuit court in an unreported decision filed on November 15, 2011. *John Doe v. Dep't of Public Safety & Corr. Servs.*, No. 1326, Sept. Term 2010. (E. 167.) In the intermediate appellate court, Mr. Doe raised different claims for relief than those he raised in his complaint for declaratory judgment. On appeal, Mr. Doe claimed that the Maryland Act: (1) as applied to him, is an impermissible ex post facto law; (2) violates the equal protection clause; and (3) violates the due process clause. Mr. Doe also faulted the circuit court for failing to "enforce" his plea agreement. The Court of Special Appeals held that it could address Mr. Doe's ex post facto and due process claims, even though Mr. Doe had not included them in his complaint for declaratory relief and the trial court had not decided them. (E. 176-81.) The intermediate appellate court rejected these claims on the merits. (E. 182-91.) The court refused, however, to address Mr. Doe's equal protection and bill of attainder claims because Mr. Doe's counsel did not even mention them in the circuit court. (E. 181-82.) Finally, the Court of Special Appeals rejected Mr. Doe's claims that his conviction under the predecessor version of the child sexual abuse statute did not subject him to the requirements of the Maryland Act and that he should not be required to register under the Act because registration was not a condition of his plea agreement. (E. 194-95.) This Court granted Mr. Doe's petition for a writ of certiorari. 425 Md. 277 (2012).

QUESTIONS PRESENTED

1. Does Mr. Doe fail to raise cognizable ex post facto and due process claims, because, in his complaint for declaratory judgment, he neither made those claims nor requested a declaration of the parties' rights on those claims, and the claims were not decided by the trial court?

2. Does federal law preclude the Maryland courts from granting Mr. Doe the relief he seeks, because federal law imposes on child sex offenders like Mr. Doe the independent obligation to register as a Tier III sex offender?

3. Did the Court of Special Appeals correctly conclude that Maryland's sex offender registration requirements are not punishment within the meaning of the ex post facto clause and that their application to Mr. Doe did not violate his rights to procedural due process?

4. Did the Court of Special Appeals properly reject Mr. Doe's claim that the lower court should have enforced his plea agreement, where Mr. Doe impermissibly made that claim in a civil action for a declaratory judgment and the plea agreement did not preclude a requirement of registration?

STATEMENT OF FACTS

Mr. Doe's 2006 Criminal Conviction as a Child Sexual Offender

The June 2006 Guilty Plea and September 2006 Sentencing

John Doe is a former public school teacher in the Washington County public school system and taught for only one school year—the 1983 to 1984 school year.

(E. 24.[2]) Mr. Doe resigned his position after eighth-grader Shawn A.B. and other middle school students alleged that Mr. Doe had sexually abused them during that school year. (E. 25.) The school administrators did not, however, notify the police or any other law enforcement officials. (E. 40.) According to Mr. Doe, this was because the parties involved, including "all of the parents" and the Board of Education, had agreed on a "corrective course of action." (E. 54.) Shawn, however, suffered lasting emotional trauma from the abuse and, in July 2005, she reported Mr. Doe's sexual abuse to the police; in September 2005, the State charged Mr. Doe with multiple counts, including second–degree rape, third-degree sexual offense, and sexual child abuse of Shawn; the State also filed charges relating to Mr. Doe's sexual abuse of another student. (E. 26-27.)

During the guilty-plea proceedings on June 19, 2006, Mr. Doe admitted that, while employed as a school teacher at the Boonsboro, Maryland Middle School, he had sexually abused Shawn. (E. 23, 27.) Shawn was a student in Mr. Doe's social studies class during the 1983-84 school year, and she recalled that Mr. Doe's sexually abusive behavior began in October of that school year. (E. 24.) On that first occasion, Mr. Doe asked Shawn whether she was "developing," asked her whether she had pubic hair, asked her to lift her shirt, and told her that if she did so, he would "[ejaculate] from where he was, or she was, to a plant across the room." (E. 24.) Mr. Doe then offered to give her a candy bar if she would just show him her belly button. After Shawn complied, Mr. Doe took her to his office to get the candy bar; before Shawn left the office, Mr. Doe rubbed

[2] The State presented these facts in support of Mr. Doe's guilty plea to sexual child abuse. (E. 25-27.)

his erection against her buttocks. (E. 25.) On another day, Mr. Doe approached Shawn while she was in the school library. (E. 25.) Again, Mr. Doe asked Shawn whether she had public hair, and he then put his hand inside her pants and her underwear. (E. 25.) Mr. Doe also molested Shawn in his classroom, when she was assisting him in grading papers, by putting his hand between her legs, outside of her clothing. (E. 25.)

Shawn reported Mr. Doe's sexual abuse to school administrators on March 9, 1984, after Mr. Doe exposed himself to her in the social studies office. (E. 25.) Shawn needed a book for an independent project and went to the office to retrieve it; Mr. Doe followed her into the office. He blocked the door and told Shawn to look at him. Mr. Doe had an exposed erection, and he touched Shawn's vagina. (E. 25.) Shawn became extremely upset and went to the rest room, but Mr. Doe sent someone to retrieve her. (E. 25-26.) A teacher in the next-door classroom heard Shawn sobbing loudly and came to investigate, but Mr. Doe sent the teacher away. Mr. Doe claimed that Shawn was crying because she had been fighting with another girl. (E. 26.) Because of Shawn's extreme distress, an investigation ensued, and the school permitted Mr. Doe to resign. (E. 26.)

At the hearing on June 19, 2006, after ascertaining that Mr. Doe's plea was entered knowingly and voluntarily, the court asked him whether there had been any other promises as part of the plea agreement:

> THE COURT: Besides the State's agreement to nol pros or dismiss all the other charges against you in case number x7-2-3-4, all the charges against you in case number xxxx, I believe not pursue any uncharged alleged crimes against you, to recommend a five-year cap with of course a

> suspended period of time as well and probation, . . . PSI would not be objected to and no objection to you remaining on bond pending the completion of the pre-sentence investigation, besides all of that, have there been any other promises made to you to influence you to plead guilty?
>
> DEFENDANT: No sir.

(E. 20.)

At the sentencing proceeding in 2006, counsel for Mr. Doe spoke on Mr. Doe's behalf. (E. 45-49.) Counsel noted that as a result of the charges, Mr. Doe was "losing his career, he's losing his home, he's losing a lot." (E. 45.) During his allocution, Mr. Doe admitted again that he had sexually abused Shawn. (E. 53.) Mr. Doe told the court that he had "suffered tremendously over this past year." (E. 55.) Echoing his counsel's earlier remarks, Mr. Doe stated that, as a result of the 2005 charges, "I lost my home, I lost my career. I've basically lost my ability to ever get back into the career that I've had for almost sixteen years." (E. 55.) This was compounded, Mr. Doe noted, "by the fact that for the rest of my life, I have to go through life with the stigma of a felony conviction that's going to haunt me all the rest of my days." (E. 56.)

In imposing sentence, the court acknowledged that Mr. Doe "appear[ed] to have rehabilitated [him]self" (E. 58), but the court noted that it must consider other things, including punishment, deterrence, and the "heinous" nature of the crime. (E. 58) As the court noted, Mr. Doe, a teacher, had sexually abused this young student (E. 58); he had "abused a position of trust" (E. 58) by taking advantage of a young girl, "groom[ing] her for molestation" (E. 58), and "having actual sexual intercourse with her in the school itself." (E. 59.) Although the offense to which Mr. Doe pleaded guilty carried a maximum sentence of fifteen years' incarceration (E. 20), the binding plea agreement

limited the court to a sentence of no more than five years' active imprisonment. (E. 23.) The court imposed a sentence of ten years' imprisonment, with all but four and one-half years suspended, and three years' supervised probation upon release. (E. 59-60.) The court informed Mr. Doe that his sentence required that he register as a child sexual offender (E. 60), and the probation order, which Mr. Doe signed, noted that registration was required. (E. 123, 138.) Mr. Doe was still on probation when he filed his complaint for a declaratory judgment and on July 23, 2010, when the circuit court issued its declaratory judgment. (E. 152.)

The October 2006 Motion to Correct an Illegal Sentence

One month after sentencing, Mr. Doe filed a motion to correct an illegal sentence. (E. 63.) In the motion, Mr. Doe claimed that the court had imposed an illegal requirement that he register as a child sex offender, because the offense took place in 1983 and the Maryland Act did "not provide for the Defendant to register as a child sex offender." (E. 64.) Mr. Doe argued that the Maryland Act limited its retroactive effect to "a child sexual offender who committed the sexual offense on or before October 1, 1995 and who was under the custody or supervision of the supervising authority on October 1, 1995." (*Id.*) Mr. Doe correctly informed the court that he was not in custody or under supervision on October 1, 1995. (*Id.*) Mr. Doe also claimed that the court had illegally imposed a $500 fine. (*Id.*) Mr. Doe did not, however, claim that the imposition of the registration requirement violated the terms of his plea agreement. (*Id.*) The trial court granted Mr. Doe's motion and struck both the registration requirement and the $500 fine.

The Federal and State Sexual Offender Registration Acts

The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program

"Sex offenders are a serious threat in this Nation." *Connecticut Dep't of Public Safety v. Doe,* 538 U.S. 1, 4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion)). "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, 536 U.S. at 32-33.

In the mid-1990s, after the abductions and murders of eleven-year-old Jacob Wetterling and seven-year-old Megan Kanka at the hands of recidivist child sex offenders, Congress took action to require the states to adopt measures to protect children and society from the unique and very serious dangers of these offenders. *See Smith v. Doe*, 538 U.S. 84, 90 (2003); *Graves v. State*, 364 Md. 329, 336 n.10 (2001). In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (the "Wetterling Act"), as part of the Violent Crime Control and Law Enforcement Act of 1994. *See* 103 Pub. Law 322, 108 Stat. 1796 (1994). The Wetterling Act required that States enact legislation that provide for registration of sex offenders and notification "for persons convicted of sexually violent offenses or criminal offenses against minors, or who were determined to be sexually violent predators." *Graves*, 364 Md. at 336 n.10.

Megan's Law

As initially enacted, the Wetterling Act gave the states discretion "as to whether disclosure of registrant information to the public was warranted." *Id.* After a child sex offender sexually assaulted and murdered his seven-year-old neighbor Megan Kanka, "Congress responded by amending the Wetterling Act in May 1996 [and] renaming it Megan's Law." *Graves*, 364 Md. at 336 n.10. The 1996 amendments required the States "to add language to their statutes mandating the release of relevant sex offender registrant information necessary to protect the public." *Id.*; *see also Smith v. Doe*, 538 U.S. at 90.

The Adam Walsh Child Protection and Safety Act of 2006

In 2006, Congress acted again to enhance protections for children, by enacting the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"). The purpose of the Adam Walsh Act is to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh [a six-year old boy abducted from a shopping mall and murdered] and other child crime victims." *See* 109 Pub. Law 248, 120 Stat. 587 (2006).

In furtherance of its intent to protect children and the public, Congress created a national sex offender registry. *See United States v. Hann*, 574 F. Supp. 2d 827, 830-31 (M.D. Tenn. 2008) (citing 42 U.S.C. § 16912). Title I of the Adam Walsh Act—the Sex Offender Registration and Notification Act ("SORNA")—imposes an independent obligation on sex offenders to register, regardless of the date of their conviction and

regardless of the requirements of the state where they reside. *See* 42 U.S.C. § 16913(a) ("A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student."); *see also Hann*, 574 F. Supp. 2d at 833 (citing 42 U.S.C. § 16913).

SORNA "reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems." *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012). Congress enacted SORNA because it "found that the patchwork of standards that resulted from the various state programs and piecemeal amendments had left loopholes and gaps that allowed for numerous heinous crimes." *United States v. Gould*, 568 F.3d 459, 473 (4th Cir. 2009). Congress also found that "crimes committed by previously convicted sexual offenders were increasing in number, and those required to register under state laws were 'disappearing.'" *Id.* As the Fourth Circuit observed, the United States Attorney General, in adopting national guidelines for the retroactive application of SORNA to preexisting convictions, determined that the effectiveness of sexual offender registration and notification "'depends on having effective arrangements for tracking of registrants as they move among jurisdictions and some national baseline of registration and notification standards.'" *United States v. Gould*, 568 F.3d at 473 (quoting 73 Fed. Reg. 38030 at 38045). Because of this country's federal system and mobile population, "'sex offender registration could not be effective if registered sex offenders could simply disappear from the purview of the registration authorities by moving from one jurisdiction to another, or if registration and notification requirements could be evaded by moving from a jurisdiction with an effective program to

a nearby jurisdiction that required little or nothing in terms of registration and notification.'" *Id.* The Attorney General's observations, noted the court, are well-supported in SORNA's legislative history, which contains criticisms of states' "'loopholes,' 'disparities,' and 'deficiencies,' which allowed in excess of 100,000 registrants to become 'lost.'" *United States v. Gould*, 568 F.3d at 473 (citations omitted). In addition, legislators noted that predators forum-shop for states with lax requirements and move from state to state to escape more stringent registry requirements. *See id.* at 474.

SORNA "seeks to make [federal and state registry] systems more uniform and effective." *Reynolds*, 132 S. Ct. at 978. It does so by (1) " setting forth comprehensive registration-system standards"; (2) "making federal funding contingent on States' bringing their systems into compliance with those standards"; (3) "requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)"; and (4) "creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Id.* (citing 18 U.S.C. § 2250(a) (criminal provision); 42 U.S.C. §§ 16911(10), 16913—16916 (2006 ed. and Supp. III) (registration requirements), § 16925 (federal funding); 120 Stat. 600, § 129 (repeal of earlier laws)).

The Adam Walsh Act also requires each state to (1) use the same criteria for posting offender information on the internet, (2) create three tiers of sexual offenders, and (3) require the most serious offenders—child sex offenders like Mr. Doe—to resister in

person every three months for life. *See ACLU v. Masto*, 670 F.3d 1046, 1050-51 (9th Cir. 2012).

Maryland's Sexual Offender Registration Act

In 1995, the Maryland General Assembly implemented the requirements of the Wetterling Act by enacting a sex offender registration law. *See* 1995 Md. Laws, ch. 142 (enacting Md. Ann. Code, art. 27 § 792 ("Registration of Offenders")). The 1995 act required certain types of sexual offenders, upon their release from prison, to notify local law enforcement of their presence in the county in which they intended to reside. *See Graves*, 364 Md. at 336-42. In 1997, the General Assembly acted again, *see* 1997 Md. Laws, ch. 754, and established a sex offender registry, in accordance with the 1996 amendment to the Wetterling Act "mandating the release of relevant sex offender registrant information necessary to protect the public." *Graves*, 364 Md. at 336 n.10 (citing H.R. 2137, 104th Cong., 110 Stat. 1345 (1996)). The Act is now codified in Title 11, Subtitle 7 of the Criminal Procedure Article. Since 1997, the General Assembly has further amended the Act to require the Department to better protect the public by making child sex offender information more accessible, by making available to the public copies of the offender's registration statements (or information about those registration statements) and authorizing the Department to "post on the Internet a current listing of each registrant's name, crime, and other identifying information." Md. Code Ann., Crim. Proc. ("CP") § 11-717(a), (b). The registration statement now must include such information as the registrant's name and address, place of employment, description of the

crime for which the individual was convicted, date of conviction, jurisdiction in which the registrant was convicted, and any aliases used by the registrant. *See* CP § 11-706(a).

Sex offender recidivism poses a unique challenge to law enforcement officers, because "'[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release but may occur 'as late as 20 years following release.'" *Smith v. Doe*, 538 U.S. at 104 (quoting R. Prentky, R. Knight, & A. Lee, Nat'l Inst. of Justice, U.S. Dep't of Justice, Child Sexual Molestation: Research Issues 14 (1997)). Consistent with this understanding, the Maryland General Assembly acted in 2001 to better protect children and the public from recidivist child sex offenders, by amending the Act to require registration of child sexual offenders convicted of offenses committed before October 1, 1995, who were in custody or under supervision on October 1, 2001. *See* 2001 Md. Laws ch. 221; *see also* CP § 11-702.1. In 2009, the General Assembly enhanced the scope of these protective provisions by requiring child sex offenders to register if convicted on or after October 1, 1995 of offenses committed before October 1, 1995. *See* 2009 Md. Laws ch. 541. This legislation required Mr. Doe and other similarly situated child sex offenders to register as child sex offenders. *See id.*

In 2009 and 2010, the General Assembly enacted legislation to bring Maryland into compliance with the requirements of the Adam Walsh Act. *See* 2010 Md. Laws, chs. 174, 175; *see also* Maryland Dep't of Legislative Servs., Fiscal and Policy Note Revised, Senate Bill 854 (2010 Md. Laws ch. 174) at 1 ("This Administration bill makes changes to notification and registration provisions of Maryland's sexual offender laws to conform to the federal Sex Offender Registration and Notification Act (SORNA), which is Title I

of the Adam Walsh Child Protection and Safety Act of 2006."); Maryland Dep't of Legislative Servs., Fiscal and Policy Note Revised, House Bill 936 (2010 Md. Laws ch. 175) at 1 (same); Maryland Dep't of Legislative Servs., Fiscal and Policy Note Revised, Senate Bill 425 (2009 Md. Laws ch. 541) at 3 ("SORNA applies to all sexual offenders, including those offenders convicted prior to the enactment of SORNA (July 27, 2006) or prior to a particular jurisdiction's implementation of the SORNA requirements.") As relevant here, the 2009 amendments applied Maryland's offender registry provisions retroactively to include a person convicted on or after October 1, 1995, of an offense committed before that date, for which registration as a child sexual offender is required. *See* 2009 Md. Laws ch. 541. Among other changes, the 2010 amendments abolished the term "child sex offender" and, in accordance with the requirements of the Adam Walsh Act, designated those convicted of sexual child abuse as Tier III offenders—the category reserved for those offenders that Congress considers most dangerous and most likely to reoffend. *See* 2010 Md. Laws, chs. 174, 175.

Mr. Doe's Civil Action for a Declaratory Judgment

Mr. Doe filed his complaint seeking a declaratory judgment in the Circuit Court for Anne Arundel County, and that court transferred it to the Circuit Court for Washington County in December 2009. (E. 157.) Mr. Doe raised only three claims in support of his request that the trial court order the Department to remove his name from the registry. (E. 157.) Mr. Doe claimed that: (1) his conviction for sexual child abuse under former Md. Ann. Code, art. 27 § 35A did not qualify under the Maryland Act and

the Act therefore did not require him to register as a sex offender (E. 70-72); (2) the November 1, 2006 order modifying Mr. Doe's sentence prevented the State from requiring Mr. Doe to register as a sex offender (E. 72-73); and (3) his guilty plea was not entered knowingly, intelligently, and voluntarily—and is therefore invalid—because the court did not, at the time Mr. Doe entered his guilty plea to sexual child abuse, inform him of the registration requirement. (E. 73-75.) Mr. Doe also requested the circuit court to order the Department to remove his name from the Maryland Sex Offender Registry. (E. 75.)

The Circuit Court for Washington County held a hearing on July 23, 2010. (E. 8, 109.) Mr. Doe's attorney claimed in her opening statement that she would demonstrate the following bases for the court to order Mr. Doe's name removed from the registry: (1) that Mr. Doe had entered the plea "with the idea that he would not have to register" (E. 133); (2) that his conviction of "custodial child abuse" was not a qualifying offense; (3) that he had suffered "collateral consequences" as a result of his registration as a child sex offender, alluding to the "stigma-plus" test (E. 114, 117)[3] and (4) that the court should exercise discretion to excuse the requirement that Mr. Doe register, because he "is not your typical individual who is on the sex offender registry" (E. 115). Mr. Doe's attorney claimed that, aside from the multiple allegations of sexual abuse of students and his resulting conviction of felony child sexual abuse, Mr. Doe had a "stellar background"

[3] *See Dawson v. State*, 172 Md. App. 633, 646 (2007) (citing *Young v. State*, 370 Md. 686, 718 n.3 (2002) (suggesting that registration might meet federal "stigma-plus" test"); *but see Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003) (rejecting that proposition in a challenge to Connecticut's sexual offender registration act).

and an "excellent resume." (E. 116.) Alternatively, Mr. Doe's attorney requested that Mr. Doe be permitted to withdraw his guilty plea, because at the time he entered it he did not believe that he would have to register as a sex offender. (E. 116.)

During the hearing, Mr. Doe claimed that, based on his discussions with his defense attorneys in the criminal case, Mr. Doe had hoped to receive probation before judgment as the result of his guilty plea or, at the very worst to "be home before [his] next birthday." (E. 129.) Mr. Doe also claimed that his defense attorneys told him that "there was absolutely no registration required under the statute." (E. 129.) Mr. Doe's defense attorneys did not testify.

The prosecutor did testify, however, and she disputed Mr. Doe's assertion that registration was not contemplated by the plea agreement. (E. 143-44.) The prosecutor noted that Mr. Doe, who committed these offenses while a school teacher, was "the exact person we would want registered so he would not be able to get employment in that field again." (E. 144.) In addition, after resigning from his position at the school, Mr. Doe had applied to be a Maryland State Police Officer, and the State "did not want this person to be in any kind of law enforcement capacity where he could have authority over other people." (E. 144.) Because registration was important to the State, the prosecutor had discussed it with defense counsel. (E. 144, 147.) It was not included in the plea agreement, because the parties understood that Mr. Doe would be required to register due to his conviction of child sexual abuse. (E. 146.) The prosecutor also observed that neither defense counsel nor Mr. Doe had objected at sentencing when the court announced the registration requirement. (E. 145.)

During the declaratory judgment hearing, Mr. Doe's attorney offered evidence of the result of pre-sentencing psycho-sexual evaluations of Mr. Doe, which had been done at the request of the defense attorneys in the criminal case. In support of admissibility, Mr. Doe's attorney claimed that Mr. Doe "is not your typical individual who registers for a sex offense" (E. 132) and, therefore, he should be exempt from the requirement that he register as a sex offender. (E. 132.) The court ruled that evidence of this type was irrelevant, however, and refused to admit it. (E. 133.) Mr. Doe's attorney also offered evidence of claimed collateral consequences to Mr. Doe from the requirement that he register as a sex offender, and the court also excluded that evidence as irrelevant to the issues raised in the complaint. (E. 132.) The court explained that collateral consequences "deals with, as indicated, either a post conviction or a coram nobis issue, . . . not what we're dealing with here today." (E. 132.) Accordingly, the court excluded as irrelevant the evidence of the "sort of losses" that Mr. Doe had "sustained as the result of having to register." (E. 134-35.)

During closing argument, Mr. Doe's attorney admitted that "[t]here's some ambivalence [sic] about whether or not he understood that he was supposed to register," and "we don't know what his attorneys actually told him." (E. 151.) She also said that Mr. Doe had asked her

> to point out that this is definitely a punishment in addition to punishment that he's already served, so it is punitive in his mind and that he suffered the collateral consequences as a result of being required without due process, . . . being required to now all of [a] sudden years later sign up for when he entered the plea and something that he, as he mentioned, did not remember seeing when he signed the form.

(E. 151.)

At the conclusion of the hearing, the court stated that it found "very credible" the prosecutor's testimony that she had direct discussions with defense counsel about the requirement that Mr. Doe register as a sex offender (E. 153) and that there were other victims whose cases were being dismissed in return for the plea in this case (E. 154). The court stated, however, that because Mr. Doe was still on probation in the criminal case, this was an issue for either post-conviction or *coram nobis* proceedings. (E. 154.)

After the hearing, the court filed a memorandum opinion and declaratory judgment, declaring the rights of the parties and denying all of Mr. Doe's claims for relief. (E. 157.) The court held that: (1) Mr. Doe's conviction of sexual child abuse required him to register as a sex offender (E. 160); (2) the November 1, 2006 order correcting Mr. Doe's sentence to reflect the law in effect at that time did not preclude the application of the current mandatory registration requirements to Mr. Doe (E. 161); and (3) Mr. Doe's guilty plea is still valid, because registration is not a direct consequence of his plea (E. 161-63). Accordingly, the court denied Mr. Doe's request that it order the Department to remove his name from the sex offender registry. (E. 163.)

Mr. Doe appealed the judgment to the Court of Special Appeals, which affirmed the circuit court's judgment. *John Doe v. Dep't of Public Safety & Corr. Servs.*, No. 1326, Sept. Term 2010. (E. 167.) In the intermediate appellate court, Mr. Doe raised different claims for relief than those he raised in the complaint for declaratory judgment. On appeal, Mr. Doe claimed that the Maryland Act: (1) as applied to him, is an impermissible ex post facto law; (2) violates the equal protection clause; and (3) violates

an offender's right to procedural due process. Mr. Doe also faulted the circuit court for failing to enforce his plea agreement.[4] The Court of Special Appeals agreed to address Mr. Doe's ex post facto and due process claims, even though he had not included them in his complaint for declaratory relief and the trial court had not decided them. (E. 176-81.) It nevertheless rejected these claims on the merits. (E. 182-91.) The Court of Special Appeals refused, however, to address Mr. Doe's equal protection and bill of attender claims because Mr. Doe's counsel did not even mention them in the trial court. (E. 181-82.) Finally, the Court of Special Appeals rejected Mr. Doe's claims that his conviction under the predecessor version of the child sexual abuse statute did not subject him to the requirements of the Maryland Act and that he should not be required to register under the Maryland Act because registration was not a condition of his plea agreement. (E. 194-95.)

SUMMARY OF ARGUMENT

A circuit court lacks authority to enter an order outside the issues framed and the relief prayed in the complaint. Because Mr. Doe failed to plead a violation of any of his constitutional rights, the circuit court lacked subject matter jurisdiction over any of these claims, and the Court of Special Appeals had no discretionary authority to excuse Mr. Doe's failure to plead them in his complaint.

As the circuit court correctly held, Mr. Doe cannot challenge, in a civil declaratory judgment action, the validity of his guilty plea to sexual child abuse and he cannot sue to

[4] Mr. Doe did not challenge any of the circuit court's rulings excluding his proffered evidence of collateral consequences or of his likelihood of reoffending.

enforce his plea agreement in a civil declaratory judgment action. Instead, Mr. Doe must proceed either under the Uniform Post Conviction Act or by petitioning for a writ of *coram nobis.*

The Maryland Act enjoys a "strong presumption of constitutionality." The General Assembly enacted the 2010 provisions in order to comply with the 2006 Adam Walsh Act, which Congress enacted to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims." The Court of Special Appeals correctly concluded that the Maryland Act does not violate either the federal or State due process clauses or prohibitions on ex post facto laws. The decisions of the Supreme Court of the United States preclude such a finding, and the Maryland right is interpreted *in pari materia.* Moreover, the decisions of this Court foreclose such a holding, because, like the federal act, the Maryland Act has the non-punitive purpose of protecting children and the public from recidivist sex offenders.

Independent of the requirements of Maryland law, the federal law imposes a federal obligation on Mr. Doe to register as a Tier III offender and makes failure to register a felony under federal law. Accordingly, even if this Court were to grant Mr. Doe relief from the requirements of the Maryland Act, he would still have to register as a Tier III offender under the requirements of federal law, and the Maryland Act therefore cannot be said to impose any cognizable burden on Mr. Doe's constitutional rights.

In any case, the record does not support most of the factual assertions that Mr. Doe makes in support of his appellate claims. Because the circuit court lacked subject matter

jurisdiction over the constitutional claims, it appropriately excluded most of Mr. Doe's proffered evidence on collateral consequences; it also excluded a defense expert's pre-sentencing psycho-sexual evaluation. Mr. Doe did not challenge those evidentiary rulings in the Court of Special Appeals or in his petition for a writ of certiorari. Moreover, the record of the guilty plea proceedings contains Mr. Doe's admissions that he suffered these alleged collateral consequences as a result of the underlying 2005 charges, not the requirement that he register as a sex offender. Accordingly, even if this Court had jurisdiction to review Mr. Doe's constitutional claims, the record does not contain a factual basis for them.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the declaratory judgment of a circuit court, issued after a bench trial, an appellate court applies the standard set forth in Rule 8-131(c). In such cases, "the appellate court will review the case on both the law and the evidence, . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *600 N. Frederick Rd., LLC v. Burlington Coat Factory of Md., LLC*, 419 Md. 413, 432 (2011) (quoting Rule 8-131(a)).

"'[T]he question of subject matter jurisdiction may be raised at any time and thus may be raised properly for the first time on appeal.'" *GMC v. Seay*, 388 Md. 341, 362 (2005) (quoting *Jones v. State*, 379 Md. 704, 712 (2004)). "Under Rule 8-131(a), "an

appellate court has discretion to excuse a waiver or procedural default and to consider an issue [other than subject matter jurisdiction] even though it was not properly raised or preserved by a party." *Jones*, 379 Md. at 713; *see also Garrett v. State*, 394 Md. 217, 224 (2006).

This Court reviews the legal conclusions of both a circuit court and the intermediate appellate court under a non-deferential standard of review. *See Anderson v. Burson*, 424 Md. 232, 243 (2011). Where the intermediate appellate court has the legal authority to exercise its discretion to review an unpreserved argument, this Court reviews that court's exercise of its discretion under a deferential standard of review. *See Jones*, 379 at 715; *Garrett*, 394 Md. at 224.

II. MR. DOE FAILS TO RAISE COGNIZABLE EX POST FACTO AND DUE PROCESS CLAIMS BECAUSE, IN HIS COMPLAINT FOR DECLARATORY JUDGMENT, HE NEITHER MADE THOSE CLAIMS NOR REQUESTED A DECLARATION OF THE PARTIES' RIGHTS ON THOSE CLAIMS, AND THE CLAIMS WERE NOT DECIDED BY THE TRIAL COURT.

Even where a court has "jurisdiction of the parties and of the subject matter, the authority of the court to act in any case is still limited by the issues framed by the pleadings." *Gatuso v. Gatuso,* 16 Md. App. 632, 636 (1973). Accordingly, a circuit court lacks authority to enter an order "on issues outside the relief prayed or the issues framed in the pleadings." *Ledvinka v. Ledvinka*, 154 Md. App. 420, 424, 429 (2003) (quoting *Gatuso*, 16 Md. App. at 632); *see also Scott v. Jenkins*, 345 Md. 21, 27-28 (1997) (holding that the circuit court erred in submitting issue of punitive damages to the jury, where plaintiff did not plead specific facts supporting punitive damages and did not

include in complaint specific demand for that relief); *see also Early v. Early*, 338 Md. 639, 658, 661-62 (1995) (holding that a "'[court] has no authority, discretionary or otherwise, to rule upon a question not raised by the pleadings, and of which the parties therefore had neither notice nor an opportunity to be heard'" and that the lower court erred in deciding "matters not placed before the court by the pleadings" (quoting *Gatuso*, 16 Md. App. at 633)).

"Pleading serves four important purposes: (1) it provides notice to the parties as to the nature of the claim or defense; (2) it states the facts upon which the claim or defense allegedly exists; (3) it defines the boundaries of litigation; and (4) it provides for the speedy resolution of frivolous claims and defenses." *Ledvinka*, 154 Md. App. at 420 (citing *Liberty Mut. Ins. Co. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc.*, 121 Md. App. 467, 475 (1998); *Scott v. Jenkins,* 345 Md. 21, 27-28 (1997)). In this case, Mr. Doe did not raise either his ex post facto claim or his due process claim in his declaratory judgment complaint. Indeed, he did not request that the circuit court declare that his registration as a child sex offender violated his rights under *any* constitutional provision, federal or State. Because Mr. Doe failed to plead a violation of any of his constitutional rights, the circuit court lacked subject matter jurisdiction over any of these claims, including those he argues in this Court, and the circuit court had "no authority, discretionary or otherwise," to rule on them. *Early*, 338 Md. at 658 (citations omitted). The circuit court did not overstep its authority and instead appropriately entered judgment only on the claims that Mr. Doe properly presented in his complaint.

Because the circuit court would have had no authority to rule on claims that Mr. Doe had not presented, the intermediate appellate court lacked authority to excuse Mr. Doe's failure to preserve the issues for appellate review. *See* Rule 8-131(a); *see also Derry v. State*, 358 Md. 325, 334 (2000) (holding that subject matter jurisdiction of the Court of Special Appeals may be raised at any time). The circuit court could not have erred or abused its discretion in declining to address issues over which it lacked subject matter jurisdiction, and the Court of Special Appeals therefore could not have reversed the circuit court's judgment on that basis. Mr. Doe presses his constitutional claims in this Court, but this Court also lacks subject matter jurisdiction to consider them. *See Early*, 338 Md. at 658.

III. FEDERAL LAW PRECLUDES THE MARYLAND COURTS FROM GRANTING MR. DOE THE RELIEF HE SEEKS, BECAUSE FEDERAL LAW IMPOSES ON CHILD SEX OFFENDERS LIKE MR. DOE THE INDEPENDENT OBLIGATION TO REGISTER AS A TIER III SEX OFFENDER.

"SORNA's purpose is 'to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators.'" *United States v. Gould*, 526 F. Supp. 2d 538, 549 (D. Md. 2007) (citing 42 U.S.C. § 16901)), *aff'd*, 568 F.3d 459 (4th Cir. 2009). In establishing SORNA's registry system, Congress intended to implement "a nationwide public safety system." *Gould*, 526 F. Supp. 2d at 549. For that reason, SORNA requires *all* sex offenders to register, whether convicted under state or federal law, provided they are residing in the United States. *See id.*

Sex offenders who fail to register in accordance with the requirements of federal law are guilty of a felony under federal law that is punishable by up to ten years'

imprisonment. *See* 18 U.S.C. § 2250; *see also United States v. Smith*, 481 F. Supp. 2d 846, 849 (E.D. Mich. 2007) (citing 18 U.S.C. § 2250). Section 112(b) of SORNA directs the Attorney General of the United States to issue guidelines to interpret and implement SORNA. *See* 42 U.S.C. § 16912(b). SORNA provides that "[t]he Attorney General shall have the authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before the enactment of this chapter . . . ." *Reynolds*, 132 S. Ct. at 978 (quoting § 16913(d) (emphasis omitted)). In accordance with the requirements of § 112(b) of SORNA, the Attorney General has adopted regulations that provide that "SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs." 73 Fed. Reg. 38030, 38063 (2008); *see also* 42 U.S.C. § 16913(a).

A state's failure or refusal to implement the requirements of SORNA, including the requirement that Tier III offenders like Mr. Doe register in person every three months for life, does not affect the independent obligation of an offender like Mr. Doe to register. *See Gould*, 568 F.3d at 464-65; *see also United States v. Trent*, 654 F.3d 574, 591 (6th Cir. 2011) (stating that a sex offender convicted under state law has an independent duty to register under SORNA); *United States v. Stock*, 2012 U.S. App. LEXIS 14102, at *3, No. 10-5348 (6th Cir. July 11, 2012) (same); *United States v. Lesure*, 2012 U.S. Dist. LEXIS 99906, at *16-*17, Criminal No. 11-30227 (S.D. Ill. July 19, 2012) (same); *United States v. Leach*, 2009 U.S. Dist. LEXIS 104703, at *9-*10, No. 09-CR-00070(01) (N.D. Ind. Nov. 6, 2009) (stating that even if a state does not implement the requirements

of SORNA," an individual sex offender has no option to flout his federal obligation"). As the Missouri Supreme Court has observed, "The independent registration requirement under SORNA operates irrespective of any allegedly retrospective state law that has been enacted and maybe subject to the [State constitutional] ban on the enactment of retrospective state laws." *Doe I v. Keathley*, 290 S.W.3d 719, 720 (Mo. 2009) (reversing lower court judgment invalidating state registration requirements under the state constitutional ban on ex post facto laws), *reh'g denied*, 2009 Mo. LEXIS 445 (Mo. September 1, 2009).

In *United States v. Gould*, the Fourth Circuit upheld the conviction of a Maryland resident sex offender who was required under SORNA to register in Maryland but failed do so. *See* 585 F.3d at 464-66. The court rejected Gould's contention that he was not required to register because Maryland had not yet implemented the requirements of SORNA. First, the court noted that SORNA's "requirements to register and maintain registration are not expressly conditioned on a State's implementation of the Act, which is consistent with SORNA's purpose to 'strengthen and increase the effectiveness of [preexisting] sex offender registration and notification." *Id.* at 463-64. The court concluded, first, that, "under the plain reading of SORNA, Gould's failure to register in Maryland was a federal crime under 18 U.S.C. § 2250(a), subject to federal punishment—a result consistent with SORNA's purpose of strengthening and increasing the effectiveness of sex offender registration laws." *Id.* at 464. Second, the court found that "the structure of SORNA's requirements indicates a separateness of the sex offenders' individual duty to register and the State's duty to enhance its registries and

standards as mandated by the Act." *Id.* Finally, the court relied on the Attorney General's regulations, "which have the force of law" and provide that "'SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA or prior to particular jurisdictions' incorporation of the SORNA requirements into their programs.'" *Id.*, at 465 (quoting 73 Fed. Reg. at 38063).

Federal courts have upheld Congress's authority to enact SORNA under the Necessary and Proper Clause[5] and the Commerce Clause[6] and have rejected challenges under the Ex Post Facto Clause[7] and the Due Process Clause.[8] *See, e.g., United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012) (recognizing "unanimous consensus among the circuits" that SORNA does not violate the ex post facto clause," and rejecting challenges to SORNA under the ex post facto clause; also upholding statute under the commerce clause); *United States v. Carel*, 668 F.3d 1211, 1212 (10th Cir. 2011) (upholding SORNA as a valid exercise of Congress' powers under the necessary and proper clause and commerce clause and collecting cases); *United States v. Pendleton*, 658 F.3d 299, 310 (3d Cir. 2011) (upholding SORNA as a valid exercise of Congress' powers under the foreign commerce clause); *United States v. DiTomasso*, 621 F.3d 17, 26 (1st Cir. 2010) (upholding SORNA as a valid exercise of Congress' powers under the commerce clause and the necessary and proper clause); *United States v. Young*, 585 F.3d 199, 204-05 (5th

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[5] U.S. Const. art. I, § 8, cl. 18.

[6] U.S. Const. art. I, § 8, cl. 3.

[7] U.S. Const. art. I, § 9, cl. 3.

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

Cir. 2009) (rejecting challenge to SORNA under the ex post facto clause); *Gould*, 568 F.3d at 472-73 (upholding SORNA as a valid exercise of Congress' powers under the commerce clause); *United States v. Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009) (rejecting challenges to SORNA under the ex post facto clause and upholding statute under the commerce clause); *United States v. Lawrance*, 548 F.3d 1329, 1332-36 (10th Cir. 2008) (rejecting challenges to SORNA under the ex post facto clause and due process clause and upholding statute under the commerce clause); *United States v. Benevento*, 633 F. Supp. 2d 1170, 1179, 1181, 1184 (D. Nev. 2009) (rejecting challenges to SORNA under the due process and ex post facto clauses and upholding statute under the commerce clause); *United States v. May*, 535 F.3d 912, 922 (8th Cir. 2008) (rejecting challenge to SORNA under ex post facto clause and upholding statute under the commerce clause); *Gould*, 526 F. Supp. 2d at 542-43, 547-48 (same).

An individual's obligation to register under SORNA "is independent of the requirement imposed on the States to implement the enhanced registration and notification standards of SORNA." *Gould*, 568 F.3d at 465. Because federal law imposes the same obligations, even if the Maryland Act imposed no such requirements, Mr. Doe would be still be required under SORNA to register in Maryland as a Tier III offender and to keep his registration current; if he failed to do so, he would be criminally liable under federal law. *See id.* at 463-65. Accordingly, the Maryland courts cannot grant Mr. Doe the relief he seeks—an order exempting him from an obligation to register as a Tier III sex offender.

IV. THE COURT OF SPECIAL APPEALS CORRECTLY CONCLUDED THAT MARYLAND'S SEX OFFENDER REGISTRATION REQUIREMENTS ARE NOT PUNISHMENT WITHIN THE MEANING OF THE FEDERAL OR STATE EX POST FACTO CLAUSES, BECAUSE THE MARYLAND ACT IS NOT PUNITIVE IN EITHER PURPOSE OR EFFECT.

A. The Maryland Act Is Not Unconstitutional under the Federal Ex Post Facto Clause.

The Maryland Act enjoys "a strong presumption of constitutionality." *Burruss v. Board of County Comm'rs*, ___ Md. ___, No. 99, Sept. Term, 2011, 2012 Md. LEXIS 380, at *53 (June 25, 2012) (citing *Koshko v. Haining*, 398 Md. 404, 426 (2007)). In determining whether a sex offender registration statute is an unconstitutional ex post facto law, both the Supreme Court and this Court apply a two-part test, the "intent/effects" test.[9] *See Smith v. Doe*, 538 U.S. at 92; *Young v. State*, 370 Md. at 707. Using this test, a reviewing court first examines whether the legislature intended to enact a penal statute. Second, if the purpose is non-punitive, the court examines the effect of the statute to see whether "it is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Smith v. Doe*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *see also Young*, 370 Md. at 711-12. "'[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 v. Doe*, 538 U.S. at 92

[9] This precedent forecloses the "application and effects" test favored by the dissent in *Smith v. Doe* and which amici urge this Court to employ. *See* Brief of Amici Curiae at 28 (citing *Smith v. Doe*, 538 U.S. at 110-14 (Stevens, J., dissenting)). Amici's proposed test dispenses with an examination of legislative intent. Amici claim that this Court took the same approach in *Anderson v. Department of Health & Mental Hygiene*, 310 Md. 217 (1987), but that approach is based on *Kring v. Missouri*, 107 U.S. 221 (1883), which the Supreme Court overruled three years after this Court decided *Anderson*. *See Collins v. Youngblood*, 497 U.S. 37, 50 (1990).

(quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)); *see also Hendricks*, 521 U.S. at 361; *United States v. Ursery*, 518 U.S. 267, 290 (1996); *Young*, 370 Md. at 711-12.

In *Smith v Doe,* the Supreme Court applied the intent/effects test and upheld the Alaska sex offender registration statute against a sex offender's claim that the statute had a punitive effect and therefore violated the Ex Post Facto Clause. *See* 538 U.S. at 102-06. The Court rejected the offenders' contentions that the following attributes of the Alaska law rendered it punitive in purpose: (1) the act's stated purpose of protecting the public; (2) the location of the registration provisions in the state's criminal code; and (3) the requirement that an individual pleading guilty be informed of the registration requirement. *See id.* at 94-96.

The Court also rejected the offenders' contentions that the statute's provisions rendered the registration act punitive in effect. First, the Court rejected the contention that the notification provisions were a "shaming" punishment that made the statutory scheme punitive. The Court observed that "the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public," *id.* at 98, and rejected the notion that the "dissemination of truthful information in furtherance of a legitimate governmental objective" is punishment, *id.* Instead, the Court declared that "[t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Id.* at 99. The fact that "publicity may cause adverse consequences for the convicted defendant" does not make dissemination of public information the equivalent of the colonial shaming punishments.

Id. And, the Court stated, "The fact that Alaska posts the information on the Internet does not alter our conclusion" because "[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* The Court noted that the Alaska scheme placed limits on the dissemination and use of information contained in registration statements, *see id.* [at 90-91__], feature shared by the Maryland Act,[10] *see* CP § 11-717.

The Supreme Court also rejected the contention that the Alaska statute subjected registrants to an affirmative disability or restraint. Like Maryland's Act, the Alaska scheme imposed no physical restraints. *See id.* at 100. Rather, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must provide certain information to authorities, they are not required to obtain permission before altering their appearance, employment, residence, or anything else. *See id.* As the Court observed, any occupational or housing disadvantages are the result of the offender's criminal conviction, which is publicly-available information, even in the absence of a registry. *See id.* The requirement of lifetime registration does not make the scheme punitive, either, because the "broad categories . . . and the corresponding length of the reporting

[10] The internet notice includes a warning that use of the information "to unlawfully injure, harass, or commit a crime against [a registrant] . . . could result in civil or criminal penalties." *See* http://www.dpscs.state.md.us/onlineservs/sor/disclaimer.shtml (last viewed July 14, 2012). Additionally, access to other information contained on the registration statement is limited to persons who are identified by statute, *i.e.* victims and, in some cases, witnesses and persons who request the information and provide a reason for the request. *See* CP § 11-715.

requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.* at 102. The Maryland Act imposes the additional restraint that child sexual offenders do not have unfettered access to schools and daycare centers, *see* CP § 11-722, but given the interests at stake, the limitations on access to schools and daycare centers are eminently reasonable. Given the nature of his conviction—for child sexual abuse committed on the grounds of a public school—Mr. Doe lacks any reasonable basis to complain that he does not have unfettered access to schools and daycare centers.

The "most significant factor" in the Supreme Court's analysis was the "Act's rational connection to a nonpunitive purpose." 538 U.S. at 102. As with SORNA and the Maryland Act, the purpose of the Alaska Act was promoting "public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 102-03. Because of the substantial risk that sex offenders will reoffend, a State may make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* at 103. Accordingly, the Court held that 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." *Id.* at 104. The Court also upheld the Act's durational requirement, including that of lifetime registration for the most serious offenses, emphasizing that empirical evidence demonstrates that many reoffenses occur as late as 20 years following release. *Id.* (citation omitted). The Court found that the two remaining 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") carried little weight when applied to a sex offender registration act. "The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation." *Id.* at 105.

After examining both the intent and effect of the Alaska Act, the Supreme Court held that "respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme" and that the Alaska Act is "nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause."

SORNA was enacted after *Smith v. Doe*, and it tracks the Alaska scheme upheld in *Smith*. *See Gould*, 526 F. Supp. 2d at 549 (upholding SORNA against ex post facto challenge (citing *Smith v. Doe*, 538 U.S. at 92)). "Relying on *Smith*, circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause." *Felts*, 674 F.3d at 606. Indeed, the federal courts of appeal have reached the "unanimous consensus" that SORNA, which is modeled after the Alaska statute, does not violate the federal Ex Post Facto Clause. *See Felts*, 674 F.3d at 606. The federal courts have also rejected the contention that SORNA's requirement of in-person registration, absent from the Alaska scheme, permits a different result, because "'[a]ppearing in person may be more inconvenient, but requiring it is not punitive.'" *ACLU v. Masto*, 670 F.3d at 1056 (quoting *United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011)); *see also United States v. Elkins*, 2012 U.S. App. LEXIS 12065, at *26-*27, No. 11-30135 (9th Cir. June 14, 2012); *United States v. Hinckley*, 550 F.3d 926, 936-38 (10th Cir. 2008) (rejecting

argument that SORNA's requirements of in-person registration violated ex post facto clause); *United States v. Cotton*, 760 F. Supp. 2d 116, 137 (D.D.C. 2011) (fact that SORNA's penalty provision and reporting requirements "may be more onerous" than the Alaska statute "cannot establish by 'clearest proof' that SORNA's overall regulatory scheme is punitive").

The purpose of the Maryland Act is also remedial and its effects are non-punitive. As this Court has recognized, the General Assembly acted with a remedial purpose in 1995 when it enacted the Maryland Act because the legislative "intent was not to stigmatize or shame sex offenders" and "the registration provisions are tailored to protect the public." *Young*, 370 Md. at 712. In 1997, Maryland adopted the requirement that child sex offenders register in person. *See* 1997 Md. Laws, ch. 754. Despite the presence of that requirement, the Court in *Young* found that the statute was not punitive. *See* 370 Md. at 715-16. The General Assembly enacted the 2009 and 2010 amendments to implement the remedial requirements of SORNA, and the Maryland Act therefore shares SORNA's remedial purpose and its non-punitive effects. *See* 2010 Md. Laws ch. 174-75; *see also* Maryland Dep't of Legislative Servs., Fiscal and Policy Note Revised, Senate Bill 854 (2010 Md. Laws ch. 174) ("This Administration bill makes changes to notification and registration provisions of Maryland's sexual offender laws to conform to the federal Sex Offender Registration and Notification Act (SORNA), which is Title I of the Adam Walsh Child Protection and Safety Act of 2006."); Maryland Dep't of Legislative Servs., Fiscal and Policy Note Revised, House Bill 936 (2010 Md. Laws ch. 175) (same); Maryland Dep't of Legislative Servs., Fiscal and Policy Note Revised,

Senate Bill 425 (2009 Md. Laws ch. 541) at 3 ("SORNA applies to all sexual offenders, including those offenders convicted prior to the enactment of SORNA (July 27, 2006) or prior to a particular jurisdiction's implementation of the SORNA requirements.").

The federal and Maryland acts reflect the legislative recognition that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Smith v. Doe*, 538 U.S. at 103 (quoting *McKune*, 536 U.S. at 34). There is no evidence that the General Assembly had any intent to punish sex offenders when it enacted either the original legislation or any of the subsequent amendments, including the 2009 amendments that required Mr. Doe to register as a child sex offender and the 2010 amendments that require him to register as a Tier III offender. Instead, the General Assembly—like Congress—acted to protect children and the public from the well-documented threats posed by child sex offenders. *See Reynolds,* 132 S. Ct. at 978 (describing Congress's intent to adopt a uniform national registry in order to make registry systems more effective); *Gould*, 568 F.3d at 464 (describing SORNA's purpose to strengthen and increase the effectiveness of preexisting sex offender registration programs); *DiTomasso*, 621 F.3d at 29 (describing the purpose of SORNA's retroactive registration requirement—to prevent further crimes—as "manifestly remedial in purpose—not punitive"); *Gould*, 526 F. Supp. 2d at 549 (citing 42 U.S.C. § 16901). Accordingly, the Maryland Act, which implements SORNA, does not violate the federal Ex Post Facto Clause.

B. The Maryland Act Is Not an Unconstitutional Ex Post Facto Law Under Article 17 of the Maryland Declaration of Rights.

This Court has consistently interpreted Maryland's prohibition on ex post fact laws in Article 17 of the Maryland Declaration of Rights *in pari materia* with the federal Ex Post Facto Clause. *See, e.g., Khalifa v. State*, 382 Md. 400, 425 (2004) ("The Ex Post Facto Clauses of the United States Constitution and Maryland Declaration of Rights have been viewed generally to have the 'same meaning' and are thus to be construed *in pari materia*."); *Watkins v. Secretary, Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 48 (2003) ("Maryland's ex post facto clause has been viewed generally to have the 'same meaning' as its federal counterpart."); *Elliott v. Elliott*, 38 Md. 357 (1873) (stating that "laws are valid and operative, unless they are obnoxious to the objection, that they impair the obligation of a contract; or are ex post facto laws, within the meaning of the Constitution of the United States, and the provisions of our Declaration of Rights, which impose restrictions upon the Legislative power." (citations omitted)). Neither Mr. Doe nor the amici have provided any principled basis for this Court to overrule precedent and join the Supreme Court of Alaska as the only highest state court to reject the remedial provisions required by SORNA and to thereby place both the welfare of children and the public in jeopardy. *Compare Doe v. State*, 189 P.3d 999 (Alaska 2008) (addressing the registration statute upheld by the Supreme Court) *with Wallace v. State*, 905 N.E.2d 371, 376 (Ind. 2009) (invalidating statutory provisions permitting law enforcement officers to visit a registrant's residence at least once a year, and to search and monitor the registrant's personal computer and other devices used to access the internet);

Commonwealth v. Baker, 295 S.W.3rd 437 (Ky. 2009) (invalidating imposition of residency restrictions on individuals already in the registry); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (invalidating statute that increased provisions that were imposed as part of the defendant's sentence); *Commonwealth v. Cory*, 911 N.E.2d 187 (Mass. 2009) (holding that requiring a probationer to wear a GPS tracking device placed a "substantial burden" on the probationer's liberty and, therefore, was penal); *Riley v. New Jersey State Parole Bd.*, 32 A.3d 190, 202 (N.J. App. Div. 2011) (holding that GPS monitoring, in addition to enhanced reporting requirements, was a penalty); *State v. Williams*, 951 N.E.2d 1108 (Ohio 2011) (same; statute also required frequent in-person reporting at multiple locations). Unlike these jurisdictions, the Maryland Act does not require a registrant to do anything other than keep law enforcement authorities updated on information that serves to keep the public safe. For instance, unlike in Indiana, registrants in Maryland are not required to permit access to their homes. *See Wallace*, 905 N.E.2d at 379-84. Nor are Maryland registrants required to subject themselves to GPS monitoring, as in Massachusetts or New Jersey.. *See Cory*, 911 N.E.2d at 189; *Riley*, 32 A.3d at 202. And, with the exception of unfettered access to schools, a Maryland registrant not otherwise subject to conditions of parole or probation, may associate freely with members of the community. Moreover, as the Supreme Court of Missouri recognized in 2009, under the Supremacy Clause, a state constitutional provision must yield to the requirements of SORNA, a federal law. *See Doe I v. Keathley I*, 290 S.W.3d at 720 (reversing lower court judgment invalidating state registration requirements under the state constitutional ban on ex post facto laws).

Both Mr. Doe and the amici unpersuasively urge this Court to depart from its established precedent, by resorting to emotional descriptions of requirements that the federal courts, most state courts, and this Court have already determined to be non-punitive. As described above, the few state courts that have held sex offender registry laws unconstitutional under their state constitutions have almost uniformly done so because of provisions that do not appear in either SORNA or the Maryland Act. Equally unpersuasive is the suggestion of amici that this Court should depart from the settled intent/effects test and instead employ a test urged by only one of the three dissenting justices in *Smith v. Doe*. *See* Brief of Amici at 28.

Mr. Doe has retreated from his contention, made in his petition for a writ of certiorari, that the Court should depart from its longstanding interpretation of Article 17 as being *in pari material* with its federal counterpart because Article 17 predates the Fifth Amendment. He now recognizes that the language of Article 17 on which his argument relies—its reference to "retrospective oath[s] or restriction[s]"—first appeared in the 1867 Constitution, *see* Philip B. Perlman, *Debates of the Maryland Constitutional Convention of 1867* 141, not the 1776 Constitution, and that it was the product of a resurgence in the political power of former Confederate sympathizers. ("And then a remarkable, possibly unprecedented, thing happened: the pariahs came to power." Brief of Amici at 20.) Mr. Doe and his amici now seize on this history to argue that a restrictive voter-registration law spurred the 1867 amendment to Article 17 and that registration requirements with a retrospective element were thus made constitutional anathema. Mr. Doe disregards the preamble of Article 17, which, unlike its federal

counterpart, expressly declares its aim to restrict "Laws, punishing acts . . . declared criminal." And he offers no limiting principle for his expansive interpretation of Article 17, which would extend the provision to cover civil, non-punitive laws, as no court construing Article 17 has ever done., The "iron-clad" loyalty oaths targeted by the 1867 amendment were declared unconstitutional under the federal *ex post facto* prohibition, *see Cummings v. Missouri,* 71 U.S. (4 Wall.) 277 (1867); *Ex parte Garland,* 71 U.S. (4 Wall.) 333 (1867), and there is thus no cause to stretch the meaning of Article 17 to cover non-punitive civil laws and no reason to depart from the established practice of interpreting the state and federal provisions *in pari materia.*

Mr. Doe's complaints about the duration of the registration period and the lack of individualized assessment of risk are meritless, as is his claim that the threat of recidivism is overblown. Indeed, with the exception of increasing the length of time a registrant must register, post-*Young*, the statute operates no differently than the statute this Court examined in 2002. When *Young* was decided there was also no individualized assessment of risk. Moreover, the increase in the duration of the registration requirement is consistent with research that shows the window for recidivism of sex offenders far exceeds the ten-year registration requirement at issue in *Young*. *See* Lin Song and Roxanne Lieb, *Adult Sex Offender Recidivism: A Review of Studies, Washington State Institute for Public Policy* 10 (1994) (discussing a study conducted in 1992, Song and Lieb note that "in regards to the time of reoffense, the authors [of the study Hanson, Steffy and Gauthier] concluded that the greatest risk period (of reoffense) appears to be the first five to ten years, but child molesters appear to be at significant risk for

reoffending throughout their life" and that "[i]n this study, 23 percent of the sample were reconvicted more than 10 years after release") (available at http://www.wsipp.wa.gov/rptfiles/Soff_recid.pdf) (last viewed July 14, 2012).

Neither Congress nor the General Assembly is required to accept the conclusions of Mr. Doe's preferred experts in assessing the risk of recidivism. Reports of recidivism rates vary considerably and, contrary to the reports favored by Mr. Doe and his amici, other studies indicate that recidivism rates may be as high as 80% for offenders who do not receive treatment. *See McKune*, 536 U.S. 24, 33 (2002) (citations omitted). Other "studies show a high rate of recidivism among pedophilic sex offenders generally, ranging from 10 percent to 50 percent." *United States v. Garthus*, 652 F.3d 715, 720 (7th Cir. 2011) (citing Ryan C.W. Hall & Richard C.W. Hall, "*A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues,*" 82 Mayo Clinic Proceedings 457, 467 (2007)). Given the above, there should be no doubt that the recent changes to Maryland's registration statutes, increasing the duration of the registration period for some offenders, do not alter their fundamental character as laws intended to protect public safety, not to inflict punishment.

Nor is it excessive to require a Maryland registrant to provide additional information on a registration statement. The information required is directly related to important public safety objectives, and none of the information requested is confidential. Further, the type of information that must be provided allows members of the community to protect themselves; the fact that it would otherwise not be readily accessible to the public does not change that fact. For instance, it is beyond dispute that sexual offenders

use internet chatrooms and social media to contact their victims, *see Taylor v. State*, 407 Md. 137, 145 (2009) (child sexual offender met minor on internet); *Tribbitt v. State*, 403 Md. 638, 642 (2008) (child sexual offender engaged in multiple inappropriate conversations with minor victim on internet); *Moore v. State*, 388 Md. 623, 627-30 (2005) (child sexual offender contacted undercover officer posing as minor on internet); *Young v. State*, 388 Md. 99, 101 (2005) (child sexual offender conversed with thirteen-year-old victim in chatroom), and, as this Court has recognized, reliable means for verifying the accuracy or validity of email or chatroom identifiers are lacking, *see Independent Newspapers, Inc. v. Brodie*, 407 Md. 415, 425-27 (2009).

Under the Maryland Act, the information a registrant is required to provide is not confidential and is related to the objective of community notification. A Maryland registrant may live wherever he or she chooses, may associate with whomever he or she chooses, and may travel to and from wherever he or she chooses and, with minor exceptions that are also narrowly tailored to the purpose of the statute, may enter into any building and seek any employment of his or her choice. Accordingly, the Court should reject the claims of Mr. Doe and amici and hold that Mr. Doe is required to comply with Maryland and federal law by registering as a sex offender as required under Title 11, Subtitle 7 of the Criminal Procedure Article.

V. THE COURT OF SPECIAL APPEALS CORRECTLY CONCLUDED THAT THE APPLICATION OF MARYLAND'S SEX OFFENDER REGISTRATION REQUIREMENTS TO MR. DOE DID NOT VIOLATE HIS RIGHTS TO PROCEDURAL DUE PROCESS.

A. Maryland's Sex Offender Registration Act Does Not Deprive Convicted Child Sex Offenders of Due Process.

The decision of the Supreme Court in *Smith v. Doe*, upholding Alaska's sex offender registration law, forecloses Mr. Doe's claim that the Maryland Act, which implements SORNA, violates the federal Due Process Clause. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). "SORNA tracks the Alaska scheme and its enactment postdates the *Smith* decision." *Gould*, 526 F. Supp. 2d at 549 (upholding SORNA against ex post facto challenge) (citing *Smith v. Doe*, 538 U.S. at 92).

Moreover, Mr. Doe fails to identify the nature of any hearing to which he might be entitled under the Due Process Clause, leaving this Court to guess at the nature of his appellate claim. The Court of Special Appeals addressed Mr. Doe's due process argument as one limited to a violation of procedural due process, because Mr. Doe did not raise substantive due process in his opening brief. (E. 193.) Mr. Doe's procedural due process claim is meritless, because the Supreme Court has recognized that "mere injury to reputation," which is the type of injury Doe claims here, "does not constitute the deprivation of a liberty interest" subject to the protections of procedural due process. *Connecticut Dep't of Public Safety v. Doe,* 538 U.S. at 7-8; *see also Paul v. Davis*, 424 U.S. 693, 712 (1976) (an "interest in reputation" is "quite different from the 'liberty' or 'property' interests" recognized in Supreme Court decisions and "is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law")).

The Due Process Clause "protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). If a protected interest can be established, then procedural due process generally requires that a deprivation of the interest "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted).

Where a liberty interest is at stake, procedural due process has "required the government to accord the plaintiff a hearing to prove or disprove a particular fact or set of facts," but only if "the fact in question" is "relevant to the inquiry at hand." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S at 7 (citations omitted). The Supreme Court's decision in *Connecticut Department of Public Safety v. Doe* forecloses any argument that due process requires a hearing on the question of Mr. Doe's present or future dangerousness. In that case, the Court squarely rejected the same proposition in a challenge to a statute that is materially identical to Maryland's.[11] *See* 538 U.S. at 6-8.

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[11] Compare *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. at 4-5 (describing provisions of Conn. Gen. Stat. §§ 54-251—54-258a) *with* CP §§ 11-701—11-727. Like Maryland's statute, the Connecticut sex offender registry law required offenders to submit personal information and to periodically provide an updated photograph. *See Connecticut Dep't of Pub. Safety*, 538 U.S. at 4-5. Also like Maryland, Connecticut required those convicted of sexually violent offenses to register for life, and maintained a website that allowed anyone with access to the internet to obtain the name, address, photograph, and description of any registered sex offender by entering a zip code or town name. *See id.* The Connecticut website did not purport to make a judgment as to the dangerousness of any particular registrant and, like Maryland's website, simply included those who were convicted of a qualifying crime. *See id.* at 5.

Applying these principles to the plaintiff sex offender's insistence on a hearing to determine his current dangerousness, the Supreme Court concluded that no such hearing was required. The Court held that "[p]laintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant to the statutory scheme," and the statutory criteria for registration in Connecticut, like those in Maryland, render the question of current dangerousness "of no consequence under [the] Law." *Id.* at 7. That is true in Connecticut, as in Maryland, because "the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.*

As in the Connecticut law, Maryland's registration requirement for a child sexual offender is triggered by "conviction alone," rather than a determination of dangerousness, because § 11-704(a)(1) of the Criminal Procedure Article mandates registration "if the person is a child sexual offender," a term that is defined to include "a person who . . . has been convicted of § 3-602 of the Criminal Law Article." CP § 11-701(c)(1). The registration requirement imposed by § 11-704(a)(1) applies equally to all people convicted of specified sexual offenses and does not purport to make any distinction based on which registrants may or may not pose a continuing threat to public safety.

For these reasons, Mr. Doe's due process challenge is no more valid than the similar challenge that the Supreme Court has already rejected. In fact, a number of other courts from around the country have concluded that "[p]rocedural due process challenges to state sex-offender registry statutes that mandate the registration of all convicted sex offenders have been foreclosed by the Supreme Court's decision in [*Connecticut*] *Dept.*

of Public Safety." *Doe v. Michigan Dep't of State Police*, 490 F.3d 491, 498 (6th Cir. Mich. 2007); *see also Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005) (rejecting procedural due process challenge to Florida's sex offender registration statute because "that path has been foreclosed by the Supreme Court's decision in *Connecticut Department of Public Safety*"); *Doe v. Miller*, 405 F.3d 708, 709-10 (8th Cir. 2005) (holding that the residency restriction in Iowa's sex offender registration statute "does not contravene principles of procedural due process under the Constitution"); *Fullmer v. Michigan Dep't of State Police*, 360 F.3d 579, 582-83 (6th Cir. 2004) ("In light of the Supreme Court's intervening decision in *Connecticut Department of Public Safety v. Doe*, and given the similarity between Connecticut's and Michigan's statutes, we conclude that the district court's decision invalidating the Michigan statute under the Fourteenth Amendment to the United States Constitution cannot be sustained."); *Milks v. State*, 894 So.2d 924, 926 (Fla. 2005) (rejecting similar challenge to Florida's statute under both state and federal constitutions) ("The United States Supreme Court rejected an identical challenge to Connecticut's sex offender law in *Connecticut Department of Public Safety v. Doe* . . . and we see no reason why the same result is not mandated here."); *People v. Stanley*, 860 N.E.2d 343 (Ill. App. 2006) (rejecting procedural due process challenge to Illinois's sex offender registration statutes under both state and federal constitutions).

B. The Record Does Not Support Mr. Doe's Factual Assertions and the Circuit Court Therefore Appropriately Denied Him Relief.

Mr. Doe's reliance on the "stigma-plus test" is similarly misplaced, because he has

failed to demonstrate that he has been harmed by the requirement that he register as a sex offender. None of the claims he makes are supported by the record in this case, and he does not identify any constitutional right that is conceivably implicated by these facts.

The record does not support the factual assertions that Mr. Doe makes in support of his claims—that he is not a "typical sex offender" and that he has suffered "collateral consequences" from registration as a sex offender. Because the circuit court lacked subject matter jurisdiction over the constitutional claims, it appropriately excluded most of Mr. Doe's proffered evidence on these claims, and Mr. Doe did not challenge those evidentiary rulings in the Court of Special Appeals. In any case, the record of the guilty plea proceedings contains Mr. Doe's admissions that he suffered these collateral consequences as a result of the 2005 charges, not the requirement that he register as a sex offender. Before he was sentenced, Mr. Doe stated, "I lost my home, I lost my career. I've basically lost my ability to ever get back into the career that I've had for almost sixteen years." (E. 55.) Mr. Doe also noted that "for the rest of my life, I have to go through life with the stigma of a felony conviction that's going to haunt me all the rest of my days." (E. 56.) These statements directly contradict his appellate claims that "[a]fter the State's belated imposition of sex offender registration, Mr. Doe lost his position as a financial advisor, was ostracized by his church and lost his own housing." Petitioner's Brief at 30. By his own admission, Mr. Doe suffered these consequences as the result of his commission of sexual child abuse. (E. 55-56.)

There is likewise no evidence in the record to support most of Mr. Doe's other appellate claims of collateral consequences from the requirements of the Maryland Act.

He presented no evidence that he "was offered a job with the Merchant Marines, but due to the requirement that he register in person every three months, he is unable to take the job." Brief at 30. Similarly, there is no evidence in the record to support his appellate claims that, before registration, "he was an honored member of his church" but has since been "ostracized by his church." *Id.* Similarly, Mr. Doe presented no evidence in the circuit court to support the claims made in his brief that, "[a]fter registration, he has been turned down for almost every employment and housing application he has turned in" and that he "has also only been able to rent housing at 200% of its market value, which puts him in constant financial straits." *Id.*

VI. THE COURT OF SPECIAL APPEALS PROPERLY REJECTED MR. DOE'S CLAIM THAT THE LOWER COURT SHOULD HAVE ENFORCED HIS PLEA AGREEMENT, WHERE MR. DOE IMPERMISSIBLY MADE THAT CLAIM IN A CIVIL ACTION FOR A DECLARATORY JUDGMENT, THE PLEA AGREEMENT DID NOT PRECLUDE A REQUIREMENT OF REGISTRATION, AND REGISTRATION IS REQUIRED BY LAW.

The record of Mr. Doe's plea hearing is silent on the issue of registration. Nevertheless, and despite the lack of any record support, Mr. Doe asserts that non-registration was a term of his plea agreement. *See* Brief of Petitioner at 32-33. Alternatively, Mr. Doe argues that he is entitled in this civil declaratory judgment action to an order absolving him of the statutory requirement that he register as a Tier III sex offender because his defense attorneys allegedly told him he would not have to register if he pleaded guilty. *Id.* at 34. Mr. Doe's claims are meritless for at least four reasons: (1) the terms of his plea agreement are determined by the record of the criminal case, which cannot be supplemented with extrinsic evidence, allegations, or suppositions; (2) he

makes his claims in a civil declaratory proceeding instead of in his criminal case; (3) Maryland law mandates that Mr. Doe register as a Tier III offender; and (4) if Mr. Doe claims that his guilty plea was involuntary, he must prove that claim in either a post-conviction or *coram nobis* proceeding, whichever is appropriate.[12]

Whether the terms of the plea agreement have been violated is a question of law subject to non-deferential review. *Cuffley v. State*, 416 Md. 568, 581 (2010). If the terms of a plea agreement have been violated, "contract principles should generally guide the determination of the proper remedy of a broken plea agreement." *Solorzano v. State*, 397 Md. 661, 668 (2007). Thus, "[w]hen a defendant's guilty plea rests in part on a promise concerning disposition, and the State or the court violates that promise, 'the accused may obtain redress by electing either to have his guilty plea vacated or to leave it standing and have the agreement enforced at resentencing.'" *Cuffley*, 416 Md. at 581-81 (quoting *State v. Brockman*, 277 Md. 687, 694 (1976)). In determining the terms of the plea agreement, the court is confined to the record of the guilty plea hearing. *Id.* at 582.

Under the objective standard that this Court applies, *see Cuffley* at 582, the terms of Mr. Doe's plea agreement did not include an agreement that he would never be required to register as a sex offender. (E. 15-17, 20, 60.) As Mr. Doe admits, the record

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[12] Mr. Doe may file a post-conviction petition if he is still on probation; otherwise, the appropriate method of proceeding is by filing a writ of error *coram nobis*. *See Barnes v. State*, 423 Md. 75, 86 n.4 (2011) (explaining that the "purpose of the writ is to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which, if known by the court, would have prevented the judgment" and stating that "one of the issues which [can] be raised [is] the voluntariness of a plea in a criminal case" (citations omitted)).

of his guilty plea proceeding does not contain any promise that he will not have to register as a sex offender. *See* Brief of Petitioner at 32-33. On the contrary, the record contains the court's statement informing Mr. Doe that he *is* required to register as a sex offender (E. 60); additionally, Mr. Doe's written acknowledgment of the requirement of registration appears in the probation order (E. 123, 138.) Accordingly, Mr. Doe's request for specific performance to enforce the non-existent agreement is meritless. Moreover, Mr. Doe impermissibly makes his request for specific performance in a civil declaratory judgment action, instead of in his criminal case, where, if appropriate, the court could grant him relief. *See, e.g., Solorzano*, 397 Md. at 673-74 (2007) (reversing denial of defendant's motion, in his criminal case, to correct his illegal sentence, which violated the terms of his plea agreement); *Cuffley*, 416 Md. at 582-83 (same); *Tweedy v. State*, 380 Md. 475, 488 (2004) (reversing criminal conviction and remanding for sentencing in accordance with the terms of the plea agreement); *State v. Brockman*, 277 Md. 687 (1976) (affirming reversal of defendant's criminal conviction and remanding to permit defendant to elect between withdrawal of guilty plea and enforcement of plea agreement).

In any event, the record supports the trial court's factual finding that the prosecutor never promised Mr. Doe he would not have to register as a sex offender, because the prosecutor testified that registration was contemplated by both the State and the defense. Because the prosecutor made no promises, there is nothing to enforce. *See State v. Parker*, 334 Md. 576, 604-05 (1994) (noting split of authority between jurisdictions that refuse to enforce illegal promises and those that enforce them). Even if Mr. Doe believed that he would not have to register, a condition of non-registration

would be unenforceable under both State and federal law, because Mr. Doe is required by both State and federal law to register as a Tier III offender. Accordingly, under this Court's precedent, the only possible remedy available would be to permit Mr. Doe to elect between leaving the guilty plea intact or withdrawing the plea and standing trial. *See State v. Parker*, 334 Md. at 604-05.

CONCLUSION

The judgment of the Court of Special Appeals should be affirmed.

Respectfully submitted,

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Rule 8-504(a)(8) Certification: This brief has been printed with proportionally spaced type: Times New Roman - 13 point.

TEXT OF PERTINENT PROVISIONS
(Rule 8-504(a)(8))

United States Code

§ 2250. Failure to register

(a) In general. Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice [10 USCS §§ 801 et seq.]), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense. In a prosecution for a violation under subsection (a), it is an affirmative defense that--

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(c) Crime of violence.

(1) In general. An individual described in subsection (a) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice [10 USCS §§ 801 et seq.]), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) Additional punishment. The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

§ 16901. Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders:

(1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.

(2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.

(3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.

(4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.

(5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

(6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.

(7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.

(8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.

(9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.

(10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.

(11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.

(12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.

(13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.

(14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.

(15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.

(16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.

(17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

§ 16911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this title the following definitions apply:

(1) Sex offender. The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender. The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender. The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18, United States Code [18 USCS § 1591]);

(ii) coercion and enticement (as described in section 2422(b) of title 18, United States Code [18 USCS § 2422(b)]);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)[)] of title 18, United States Code [18 USCS § 2423(a)][)];

(iv) abusive sexual contact (as described in section 2244 of title 18, United States Code [18 USCS § 2244]);

(B) involves--

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender. The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code [18 USCS §§ 2241 and 2242]); or

(ii) abusive sexual contact (as described in section 2244 of title 18, United States Code [18 USCS § 2244]) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition.

(A) Generally. Except as limited by subparagraph (B) or (C), the term "sex offense" means--

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code [18 USCS § 1152 or 1153]) under section 1591 [18 USCS § 1591], or chapter 109A [18 USCS §§ 2241 et seq.], 110 [18 USCS §§ 2251 et seq.] (other than section 2257, 2257A, or 2258 [18 USCS § 2257, 227A, or 2258]), or 117 [18 USCS §§ 2421 et seq.], of title 18, United States Code;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions. A foreign conviction is not a sex offense for the purposes of this title if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 112 [42 USCS § 16912].

(C) Offenses involving consensual sexual conduct. An offense involving consensual sexual conduct is not a sex offense for the purposes of this title if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense. The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators. The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18, United States Code [18 USCS § 1801].

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications. The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code [18 USCS § 2241]), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry. The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction. The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 127 [42 USCS § 16927], a federally recognized Indian tribe.

(11) Student. The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee. The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides. The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor. The term "minor" means an individual who has not attained the age of 18 years.

§ 16912. Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry. Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this title.

(b) Guidelines and regulations. The Attorney General shall issue guidelines and regulations to interpret and implement this title.

§ 16913. Registry requirements for sex offenders

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b). The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the

registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.

§ 16916. Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than--

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

Annotated Code of Maryland, Criminal Procedure Article (Lexis 2012)

§ 11-702. Elements of conviction

For the purposes of this subtitle, a person is convicted when the person:

(1) is found guilty of a crime by a jury or judicial officer;

(2) enters a plea of guilty or nolo contendere;

(3) is granted a probation before judgment after a finding of guilt for a crime if the court, as a condition of probation, orders compliance with the requirements of this subtitle; or

(4) is found not criminally responsible for a crime.

§ 11-704. Registration required

(a) In general. -- A person shall register with the person's supervising authority if the person is:

(1) a tier I sex offender;

(2) a tier II sex offender;

(3) a tier III sex offender; or

(4) a sex offender who is required to register by another jurisdiction, a federal, military, or tribal court, or a foreign government, and who is not a resident of this State, and who enters this State:

(i) to begin residing or to habitually live;

(ii) to carry on employment;

(iii) to attend a public or private educational institution, including a secondary school, trade or professional institution, or institution of higher education, as a full-time or part-time student; or

(iv) as a transient.

(b) No longer subject to registration. -- Notwithstanding any other provision of law, a person is no longer subject to registration under this subtitle if:

(1) the underlying conviction requiring registration is reversed, vacated, or set aside; or

(2) the registrant is pardoned for the underlying conviction.

(c) Registration by person who was adjudicated delinquent at time of act. -- (1) A person who has been adjudicated delinquent for an act that, if committed by an adult, would constitute a violation of § 3-303, § 3-304, § 3-305, or § 3-306 of the Criminal Law Article, or § 3-307(a)(1) or (2) or § 3-308(b)(1) of the Criminal Law Article involving conduct described in § 3-301(f)(2) of the Criminal Law Article, shall register with the person's supervising authority if:

(i) the person was a minor who was at least 13 years old at the time the delinquent act was committed;

(ii) the State's Attorney or the Department of Juvenile Services requests that the person be required to register;

(iii) 90 days prior to the time the juvenile court's jurisdiction over the person terminates under § 3-8A-07 of the Courts Article, the court, after a hearing, determines under a clear and convincing evidence standard that the person is at significant risk of committing a sexually violent offense

or an offense for which registration as a tier II sex offender or tier III sex offender is required; and

(iv) the person is at least 18 years old.

(2) If the person has committed a delinquent act that would cause the court to make a determination regarding registration under paragraph (1) of this subsection:

(i) the State's Attorney shall serve written notice to the person or the person's counsel at least 30 days before a hearing to determine if the person is required to register under this section; and

(ii) the Department of Juvenile Services shall:

1. provide the court with any information necessary to make the determination; and

2. conduct any follow-up the court requires.

(3) The form of petitions and all other pleadings under this subsection and, except as otherwise provided under Title 3 of the Courts and Judicial Proceedings Article, the procedures to be followed by the court under this subsection shall be specified in the Maryland Rules.

(4) The court may order an evaluation of the person in making the determination under paragraph (1) of this subsection.

§ 11-715. Providing registration statements -- Supervising authority

(a) Copies to be sent on written request. --

(1) On request for a copy of a registration statement about a specific person, the supervising authority shall send a copy to:

(i) each witness who testified against the registrant in a court proceeding involving the crime; and

(ii) each person specified in writing by the State's Attorney.

(2) Subject to paragraph (3) of this subsection, the supervising authority shall send a copy of a registration statement to each:

(i) victim of the crime for which the registrant was convicted; or

(ii) if the victim is a minor, the parents or legal guardian of the victim.

(3) A copy of the registration statement shall be sent if:

(i) a request is made in writing about a specific registrant; or

(ii) a notification request form has been filed under § 11-104 of this title.

(b) Confidentiality of information. -- Information about a person who receives a copy of a registration statement under this section is confidential and may not be disclosed to the registrant or any other person.

(c) Address for notice. -- A supervising authority shall send a notice required under subsection (a)(2) of this section or § 11-712(a)(2) or (b)(2) of this subtitle to the last address given to the supervising authority.

Maryland Rules of Procedure

Rule 8-131

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) In Court of Appeals -- Additional limitations.

(1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) No prior appellate decision. Except as otherwise provided in Rule 8-304 (c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has

been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

(c) Action tried without a jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

JOHN DOE,	*	
		IN THE
Petitioner,	*	
		COURT OF APPEALS
v.	*	
		OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,	*	
		September Term, 2011
	*	
		No. 126
Respondent.	*	

* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I certify that, on this 3rd day of August, 2012, three copies of the Brief and Appendix of Respondent in the captioned case were delivered to

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—and—

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Stuart M. Nathan