IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-2523

BRIAN HOPE, *et al.*,

Plaintiffs/Appellees,

v.

COMMISSIONER OF INDIANA
DEPARTMENT OF CORRECTION, *et al.*,

Defendants/Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:16-cv-02865-RLY-TAB,
The Honorable Richard L. Young, Judge

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANTS COMMISSIONER OF INDIANA DEPARTMENT OF CORRECTION, *et al.*

CURTIS T. HILL, JR.
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

KIAN J. HUDSON
Deputy Solicitor General

JULIA C. PAYNE
COURTNEY L. ABSHIRE
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-0709
Kian.Hudson@atg.in.gov

Counsel for Appellants Commissioner of Indiana Department of Correction, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CASES [CONT'D]

STATUTES

STATUTES [CONT'D]

STATUTES [CONT'D]

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

JURISDICTIONAL STATEMENT

On October 21, 2016, Brian Hope and Gary Snider filed a complaint alleging that, as applied to them, Indiana's Sex Offender Registration Act is unconstitutional under the Fourteenth Amendment and the Ex Post Facto Clause of Article I, section 10. ECF 1. On November 6, 2016, Hope and Snider filed an amended complaint that named additional defendants and added Joseph Standish as a plaintiff. ECF 12. And on February 9, 2018, by agreement of the parties, the district court consolidated Hope, Snider, and Standish's case with a second case involving the same constitutional claims brought by Patrick Rice, Adam Bash, and Scott Rush. ECF 74. These six plaintiffs sought injunctive and declaratory relief against the Commissioner of the Indiana Department of Correction, the Marion County Prosecutor, the Huntington County Prosecutor, the Allen County Prosecutor, the Delaware County Prosecutor, and the Pulaski County Prosecutor (collectively, the State Defendants), as well as several Indiana county sheriffs; all of the defendants were sued in their official capacities. ECF 100.

The district court had subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 because the case raises the question whether the federal constitution bars the defendants from applying Indiana's Sex Offender Registration Act to Plaintiffs.

On July 9, 2019, the district court entered final judgment in favor of Plaintiffs "permanently enjoin[ing]" the defendants "from registering Plaintiffs under Indiana's Sex Offender Registration Act." Short App. 38–39.

The State Defendants timely filed a notice of appeal of the district court's final judgment on August 6, 2019. ECF 124. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291 because this is an appeal from a final judgment as to all claims and all parties.

STATEMENT OF THE ISSUES

Under the Ex Post Facto Clause of the Indiana Constitution, the State may not apply its Sex Offender Registry Act (SORA) to an offender who committed a registrable offense before the Act was adopted if the marginal effects of such application render it punitive. Against that background, the issues presented are:

1. Whether the Fourteenth Amendment's Privileges Or Immunities Clause permits Indiana to apply SORA to sex offenders who committed their offenses before the law was enacted but were required to register in other States before moving to Indiana.

2. Whether the Fourteenth Amendment's Equal Protection Clause permits Indiana to apply SORA to sex offenders who committed their offenses before the law was enacted but were required to register in other States before moving to Indiana.

3. Whether the Ex Post Facto Clause of Article I, section 10 permits Indiana to apply SORA to sex offenders who committed their offenses before the law was enacted but were required to register in other States before moving to Indiana.

INTRODUCTION

Due to a series of high-profile sex crimes against children and a growing recognition of the high recidivism risk among sex offenders, over the course of the early-to-mid-1990s many States began requiring sex offenders to register with authorities and began providing information about those offenders to the public. These registration-and-notification systems quickly became ubiquitous, and by 1996 every State had one. *Smith v. Doe*, 538 U.S. 84, 90 (2003). And by the end of the decade, more than 40 States applied their registration-and-notification requirements to individuals whose registrable offenses predate the enactment of these requirements. *See* Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999), https://www.csom.org/pubs/sexreg.html.

The application of registration requirements to offenders whose offenses predate the requirements' enactment prompted a wave of largely unsuccessful Ex Post Facto Clause challenges, and in *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court effectively foreclosed further challenges under the federal constitution. Noting that the Ex Post Facto Clause prohibits only retroactive *punishment*, the Court concluded that Alaska's registry law was "nonpunitive"—and thus outside the Clause's scope—because it had "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 102–03 (internal brackets, quotation marks, and citation omitted);

see also id. at 103 (observing that "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism").

Smith did not, however, foreclose challenges under *state* constitutions. And in *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), the Indiana Supreme Court held that the Indiana Constitution's Ex Post Facto Clause has a slightly broader scope than the corresponding federal provision. Though it used the framework of *Smith*'s "intent-effects test" and acknowledged the system *Smith* upheld was "very similar" to Indiana's, *id.* at 378, the Court held that Indiana's Sex Offender Registration Act (SORA) was punitive and unconstitutionally retroactive as applied to a defendant whose criminal conduct predated SORA's enactment. *Id.* at 384.

The same day it decided *Wallace*, however, the Indiana Supreme Court separately held that a different application of SORA was *not* punitive, explaining that whether the effects of applying SORA are punitive under Indiana's Ex Post Facto Clause depends on the law's *marginal* effects, which will vary from case to case. *See Jensen v. State*, 905 N.E.2d 384, 394 (2009).

Next, in a trio of 2016 decisions the Indiana Supreme Court employed its marginal-effects approach to distinguish *Wallace* and uphold application of SORA to all offenders required to register in other States—including offenders whose criminal conduct predates SORA's enactment. *See Tyson v. State*, 51 N.E.3d 88 (2016); *State v. Zerbe*, 50 N.E.3d 368 (2016); *Ammons v. State*, 50 N.E.3d 143 (2016). The Court observed that "unlike *Wallace*, where the offender had no obligation to register anywhere before the Act was passed," other States *already* required these offenders

to register "before [Indiana's] statutory definition was amended to include [them]." *Tyson*, 51 N.E.3d at 96. It held that because SORA required an offender "merely [to] maintain[] his sex offender status across state lines," it was not punitive and therefore did not violate Indiana's Ex Post Facto Clause. *Id.*

Accordingly, as limited by the Indiana Supreme Court, Indiana's sex offender registration-and-notification requirements generally do not apply to offenders whose offenses occurred prior to SORA's adoption, but *do* apply to offenders required to register in another State—such as those with out-of-state convictions or those convicted in Indiana who work in another State. The question this case raises is whether these rules, products of the Indiana Supreme Court's interpretation of the Indiana Constitution, violate the *federal* constitution—in particular, the Fourteenth Amendment's Privileges Or Immunities and Equal Protection Clauses, or the Ex Post Facto Clause of Article I, section 10.

They do not. These rules do not violate the Privileges Or Immunities Clause because they do not infringe "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Saenz v. Roe*, 526 U.S. 489, 502 (1999). They apply the same way to new Indiana residents as to long-time Hoosiers: A lifelong Indiana resident who would otherwise fall within the *Wallace* rule *will* be required to register if he works in another State that requires him to register; at the same time, an offender whose offense predates SORA and who recently moved to Indiana from a State that did not require him to register will *not* be required to register in Indiana.

Because these rules do not implicate the Privileges Or Immunities Clause, they are merely subject to rational-basis scrutiny under the Equal Protection Clause. And they easily survive such scrutiny, for they reflect the rational balance Indiana's Ex Post Facto Clause strikes between providing fair warning of criminal penalties on the one hand and protecting Hoosiers from high-recidivism-risk offenders on the other.

Finally, these rules do not run afoul of the Ex Post Facto Clause, for they are neither retroactive nor punitive. They are not retroactive because, like the federal sex offender registry law, SORA applies "only to conduct occurring *after* the law's enactment—that is, a sex offender's failure to register or update his registration following interstate travel." *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018). And they are not punitive because, following *Smith*, "whether a comprehensive registration regime targeting only sex offenders is penal . . . is not an open question," and nothing "distinguish[es] this case from *Smith*." *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011).

The rules the Indiana Supreme Court has adopted in the course of applying Indiana's Ex Post Facto Clause to SORA are entirely consistent with the federal constitution. The district court's contrary decision should be reversed.

STATEMENT OF THE CASE

I. History of Sex Offender Registry Laws

State registration-and-notification laws are both widespread and longstanding, and Indiana's SORA is one of many such laws. Criminal registration laws date back to the early 1930s, when concerns with rising levels of organized crime

led Los Angeles to adopt the first such law in the United States; the law required individuals convicted of any of a number of serious felonies to register within 48 hours of arriving to Los Angeles. *See* Wayne A. Logan, *Knowledge As Power: Criminal Registration and Community Notification Laws in America* 25–26 (2009). Similar laws quickly spread to hundreds of other localities as lawmakers sought "to aid law enforcement agencies in the prevention and detection of the individual's recidivistic behavior." Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. Pa. L. Rev. 60, 60 (1954).

In 1947 California's legislature unanimously adopted the first statewide registration law. *See* Logan*, supra*, at 30; Cal. Stats. 1947, ch. 1124, § 1. This law, like most subsequent registration laws, focused specifically on sex offenders due to the particularly high risk—and particularly grave consequences—of recidivism among such offenders. *Id.* The law also prefigured subsequent sex offender registration laws in making both new and prior sex-offense convictions trigger the registration requirement. *Id*. Other States gradually followed with similar laws of their own: Four States had adopted sex offender registration laws by the end of the 1960s, and by 1989 nine States had such laws. *See* Logan*, supra*, at 31.

Sex offender registration laws began to spread more rapidly in the early 1990s in the wake of a series of horrific crimes against children, many committed by previously convicted offenders. These crimes, as well as research demonstrating high recidivism rates among sex offenders, led legislators and the public to push for registration and notification systems. *See, e.g., id.* at 49–54; *Smith v. Doe*, 538 U.S.

84, 89 (2003). Minnesota Congressman Jim Ramstad, for example, introduced the first federal law to address sex offender registration in January 1993. H.R. Rep. 103-392 (1993). His bill, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, was named in remembrance of an eleven-year-old Minnesota boy who was "abducted at gunpoint by a masked man as he was returning home from a convenience store." *Id.*[1] In addition to telling Jacob's story, the bill's committee report noted that "Jacob's fate is not that uncommon in the United States," for "as many as 4,600 children like Jacob disappear each year." *Id.* The committee report also pointed out that "[e]vidence suggests that child sex offenders are generally serial offenders," identifying one study that concluded that such "'behavior is highly repetitive, to the point of compulsion,'" and found "that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child." *Id.* (quoting A. Nicholas Groth *et al.*, *A Study of the Child Molester: Myths and Realities*, 41 LAE J. Am. Crim. Just. Ass'n 17 (1978)).

By 1993 twenty-four States had enacted sex offender registration statutes, and the purpose of the Wetterling Act was to encourage more States to adopt such laws. *Id.* As a condition of certain federal grant funding, the Act obligated States to require

[1] Jacob's body was finally found in September 2016, nearly 27 years after his kidnapping: As part of a federal plea agreement, Jacob's murderer, Danny Heinrich, directed authorities to the body and confessed in open court to abducting, sexually assaulting, and executing the boy. Pam Louwagie and Jennifer Brooks, *Danny Heinrich confesses to abducting and killing Jacob Wetterling*, Star Tribune, Sept. 7, 2016, http://www.startribune.com/danny-heinrich-confesses-to-abducting-and-killing-jacob-wetterling/392438361. Under the plea deal, Heinrich evaded prosecution not only for his crimes against Jacob but also for an earlier abduction and sexual assault of another Minnesota boy; Heinrich ultimately pleaded guilty to a single count of receiving child pornography. *Id.*

anyone convicted of any of a number of sex crimes or crimes against children to provide authorities with his address, fingerprints, and photograph; it also required States to transmit each registered offender's conviction data and fingerprints to the federal government for inclusion in a nationwide sex offender database. P.L. 103-322, tit. XVII, § 170101, 108 Stat. 1796 (1994). Notably, the Act also permitted—but did not require—States to release information about registered offenders if that information "is necessary to protect the public." *Id.*

President Clinton signed the Wetterling Act into law on September 13, 1994, *id.*, and within two years every State had enacted a sex offender registration law. *Smith*, 538 U.S. at 90. Several States, including Indiana, required public notification in addition to mandatory registration, and to encourage such notification requirements further, in 1996 Congress adopted "Megan's Law"—named after Megan Kanka, a seven-year-old New Jersey girl who was sexually assaulted and murdered by a neighbor with multiple prior convictions for sex offenses against children, convictions of which her family was tragically unaware. *See id.* at 89; H.R. Rep. 104-555 (1996) (reproducing a Department of Justice letter that noted that "[a] number of States already provide for community notification or other forms of disclosure in appropriate circumstances" and that the law "would encourage additional States to adopt such measures"). Megan's Law amended the Wetterling Act to *require* States to "release relevant information that is necessary to protect the public." P.L. 104-145, 110 Stat. 1345 (1996).

By the end of the decade, all States had adopted community-notification requirements, and more than 40 had adopted laws applying their registration-and-notification systems to all individuals convicted of particular crimes, including those whose offenses predate the adoption of those requirements. *See* Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999), https://www.csom.org/pubs/sexreg.html.

In 2006, ten years after enacting Megan's Law, Congress took its last major step in this area with the passage of the Sex Offender Registration and Notification Act (SORNA). *See* 34 U.S.C. § 20911 *et seq*. SORNA requires States, as a condition of federal grants, to make certain registration information—including the offender's name, aliases, photograph, physical description, home and work addresses, and license plate number—publicly available on a State-maintained website. *See* 34 U.S.C. §§ 20914, 20920; Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,059 (Jul. 2, 2008).[2] SORNA also imposes on sex offenders an independent federal-law requirement to register and to keep their registrations current in the jurisdictions where they live, work, and study. *See* 34 U.S.C. § 20913. SORNA enforces this requirement by making federal funds contingent on States criminalizing the failure

[2] SORNA also requires the Department of Justice to create and maintain the National Sex Offender Public Website, which collates and displays the information included on the States' websites. *See* 34 U.S.C. § 20922. Beyond the information that must be made available to the public via the sex-offender websites, States are also required to collect other additional information, including each offender's DNA sample, Social Security number, and "all designations used . . . for purposes of routing or self-identification in Internet communications or postings." Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,055–57 (Jul. 2, 2008).

to register, *see* 34 U.S.C. § 20927, and by imposing criminal penalties on offenders who travel in interstate commerce and fail to register, *see* 18 U.S.C. § 2250. It also creates a three-tier classification system based on the nature and severity of each offender's offense history, which determines the length of time the offender must remain registered and the frequency with which the offender must appear in-person to verify the information in the sex offender registry. *See* 34 U.S.C. §§ 20911, 20915, 20918.

II. Indiana's Sex Offender Registration Act

While the Wetterling Act was under consideration, but several months before it was adopted, the Indiana General Assembly enacted the initial version of SORA—"Zachary's Law," named after a 10–year–old Hoosier boy who was molested and murdered by a neighbor who had been previously convicted of child molesting. *See* Allen County Sheriff, *Overview of Zachary's Law*, http://www.allencountysheriff.org/overview-of-zacharys-law/; 1994 Ind. Acts P.L. 11 § 7. Zachary's Law required individuals convicted of any of eight different sex crimes "to take affirmative steps to notify law enforcement authorities of their whereabouts" and mandated public disclosure of certain information pertaining to registered offenders. *Id.*; *Wallace v. State*, 905 N.E.2d 371, 375 (2009).

Over the next several years, as Congress continued to strengthen and broaden federal law's registration-and-notification requirements, the Indiana legislature similarly amended SORA to bolster Indiana's registration-and-notification system—and to comply with federal law. In the quarter-century since SORA was initially

enacted, the Indiana General Assembly has, for example, continued to adjust what circumstances trigger SORA's registration-and-notification requirements. It has expanded the set of crimes that trigger these requirements, *see Wallace*, 905 N.E.2d at 375, and it has amended SORA to require offenders to register if convicted in another jurisdiction of an offense that is "substantially equivalent" to an Indiana registerable offense. *See* 1998 Ind. Acts P.L. 56 Sec. 6; 2001 Ind. Acts P.L. 238 Sec. 4 (now codified at Indiana Code §§ 11-8-8-4.5(a)(22), 11-8-8-5(a)(24)). These amendments ensure SORA's registration-and-notification requirements apply to those particularly likely to recidivate and ensure that Indiana remains in compliance with SORNA, which requires registration for a similarly broad spectrum of offenses. *See* 34 U.S.C. § 20911 (defining "sex offense" to include criminal offenses that have "an element involving a sexual act or sexual contact with another" and a variety of offenses committed against minors, such as kidnapping, false imprisonment, solicitation, and possession, production, or distribution of child pornography).

Finally, especially relevant here are the General Assembly's 2006 amendments to SORA, which apply the law's registration-and-notification requirements to any "person who is required to register as a sex offender in any jurisdiction." *See* 2001 Ind. Acts P.L. 140 Sec. 13; 2007 Ind. Acts P.L. 216 Sec. 12; (now codified at Indiana Code §§ 11-8-8-4.5(b)(1), 11-8-8-5(b)(1)). Prior to the adoption of this provision, offenders who were required to register in another State could evade that State's registration requirement by moving to Indiana if the offense that triggered their registration requirement happened not to be included on Indiana's list. This 2006

amendment, like SORNA itself, was adopted to close this loophole. *See* Matthew S. Miner, *The Adam Walsh Act's Sex Offender Registration and Notification Requirements and the Commerce Clause: A Defense of Congress's Power to Check the Interstate Movement of Unregistered Sex Offenders*, 56 Vill. L. Rev. 51, 89 (2011) (canvassing SORNA's legislative history and concluding that "in the debates immediately preceding votes on the bill, member after member cited the need to fill the gap in the then-existing state-by-state registry system to prevent sex offenders from slipping through the cracks in the system by relocation or interstate travel").

In sum, today SORA requires anyone who lives, works, or studies in Indiana to register if they have been convicted in Indiana of one of approximately twenty sexual or violent crimes, have been convicted of a substantially similar crime in a different State, or are required to register by another State. *See* Ind. Code §§ 11-8-8-5, 11-8-8-7. Those required to register must report in person to their local sheriff's office, *see* Ind. Code § 11-8-8-7, which is charged with collecting categories of information that largely mirror SORNA's information requirements, *compare* Ind. Code § 11-8-8-8 *with* Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,055 (Jul. 2, 2008). And offenders must regularly update their registration information. *See* Ind. Code § 11-8-8-7(c). Finally, Indiana law prohibits repeat sex offenders and those convicted of the most serious registrable crimes—such as rape, child molesting, and vicarious sexual gratification with a minor—from entering schools or living within 1,000 feet of schools, parks, or daycares. *See* Ind. Code §§ 35-38-1-7.5, 35-42-4-11, 35-42-4-14.

III. The U.S. Supreme Court Upholds Sex Offender Registry Laws As Applied to Offenders Whose Conduct Predates the Laws' Enactment

As sex offender registry laws spread across the United States, challenges to their constitutionality soon followed. Most of these challenges argued that the application of these laws to offenders whose conduct predates the laws' enactment violated state and federal constitutional prohibitions on *ex post facto* laws, and the vast majority were unsuccessful. U.S. Department of Justice, *Sex Offender Registration and Notification in the United States: Retroactive Application & Ex Post Facto Considerations* (March 2019) at 1–2, n.6, https://www.smart.gov/caselaw/5-Retroactive-Application.pdf.

In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court settled the federal constitutional question by upholding Alaska's sex offender registry law. Alaska's law required anyone physically present in Alaska who had been convicted of a "sex offense"—a term encompassing sexual assault, sexual abuse, recidivist indecent exposure to a minor, distribution or possession of child pornography, recidivist sexual harassment, and similar offenses under other jurisdictions' laws, *see* Alaska Stat. § 12.63.100(7) (2000)—to register with local law enforcement authorities within a working day of the conviction or of entering the State, *see id.* § 12.63.010(a). And under the law an offender "convicted of an aggravated sex offense or of two or more sex offenses . . . must register for life and verify the information quarterly. *Smith*, 538 U.S. at 90. The Court observed that Alaska's law required the offender to "provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which

he has access, and postconviction treatment history," and required the offender to "permit the authorities to photograph and fingerprint him" as well. *Id*. It also noted that Alaska made most of this information available to the public—exempting only fingerprints, driver's license number, and treatment history—via the State's sex offender registry website. *Id.* at 90–91.

The Court considered these provisions in light of the "well established" framework for determining whether a law imposes the "retroactive punishment forbidden by the *Ex Post Facto* Clause." *Id.* at 92. It began by determining whether the Alaska legislature's "intention was to enact a regulatory scheme that is civil and nonpunitive," and, after concluding the legislature had such an intent, proceeded to consider whether the plaintiffs had established "the clearest proof" necessary "to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92 (internal quotation marks and citations omitted). The Court conducted this second, "effects" stage of its analysis by considering "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id.* at 97.

The Court concluded that none of these factors weighed in favor of viewing Alaska's law as punitive. The law was not similar to punishments historically used to shame because "the stigma of Alaska'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. Regarding whether the law imposed an affirmative disability or restraint, the Court noted that its "obligations are less harsh than the sanctions of occupational debarment," which the Court had long "held to be nonpunitive." *Id.* at 100. And as to whether the law promoted the traditional aims of punishment, the Court rejected the idea that the law's deterrent value automatically rendered it punitive: "Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' would severely undermine the Government's ability to engage in effective regulation." *Id.* at 102 (internal quotation marks, citations, and ellipsis omitted).

Finally, the Court determined that Alaska's law was not excessive with respect to its purpose. It was not excessive for the law to apply to all convicted sex offenders without regard to their future dangerousness, because "[t]he risk of recidivism posed by sex offenders is 'frightening and high'" and "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)). Nor were the duration of the reporting requirements excessive, because "[e]mpirical research on child molesters, for instance, has shown that, 'contrary 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.'" *Id.* at 104 (quoting National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, *Child Sexual Molestation: Research Issues*

14 (1997) (internal brackets omitted)). The Court concluded by noting that "[t]he excessiveness inquiry of [the Court's] *ex post facto* jurisprudence" asks "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* at 105. Alaska's law met "this standard." *Id.*

IV. The Indiana Supreme Court's Limitations on the Application of SORA

As a matter of federal constitutional law, the Supreme Court's decision in *Smith* "effectively put the last nails in the coffin of constitutional challenges to registration and notification laws." Andrew R. Hodges, *Balancing Evils: State Sex Offender Registration and Notification Laws*, 10 J. L. Society 134, 149 (2008). Yet challenges brought under *state* ex post facto clauses continued apace, and in *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), the Indiana Supreme Court held that the Indiana Constitution's Ex Post Facto Clause *does* limit the application of Indiana's SORA.

The Indiana Supreme Court began by "agree[ing] that the intent-effects test [used in *Smith*] provides an appropriate analytical framework for analyzing ex post facto claims under the Indiana Constitution." *Id.* at 378. It went on to depart from *Smith*, however, and did so not because it considered SORA meaningfully different from the Alaska statute *Smith* upheld—it declined to distinguish the two laws and even observed that they were "very similar," *id.*—but because it applied the intent-effects test differently. In particular, the Court concluded—contrary to *Smith*—that SORA "resembles the punishment of shaming," *id.* at 380 (internal quotation marks and citation omitted) (citing *Smith*, 538 U.S. at 115–16 (Ginsburg, J., dissenting)), and is excessive in relation to its regulatory purpose because it applies "without regard to whether the individual poses any particular future risk." *Id.* at 384. The

Court thus held that Indiana's Ex Post Facto Clause prohibited applying SORA to the offender in that case, who "was charged, convicted, and served the sentence for his crime before" SORA was enacted. *Id.*

Notably, the same day it decided *Wallace* the Indiana Supreme Court issued its decision in *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009), which held that Indiana's Ex Post Facto Clause *permitted* applying SORA to Todd Jensen, who had pleaded guilty to a sex offense *after* the General Assembly enacted SORA's public-disclosure provisions but *before* it amended the law to require lifetime—rather than ten years'—registration for him and other similarly high-risk offenders. *See id.* at 388–89, 394. The Court explained that Indiana's Ex Post Facto Clause produced a different result for Jensen than it did in *Wallace* because "the effects of [SORA] apply to Jensen much differently than they applied to . . . Wallace." *Id.* at 394; *see also id.* at 393 (explaining that because Jensen was "in no different position now than he was before the Act was amended in 2006" with respect to SORA's deterrent effects, the "traditional aims of punishment" factor "favor[ed] treating the effects of the Act as non-punitive when applied to Jensen"). SORA was not excessive as applied to Jensen, the Court reasoned, because by the time he pleaded guilty SORA *already* imposed significant requirements: Because the amendments adopted after Jensen's guilty plea had relatively minor *marginal* effects, the circumstances "favor[ed] treating the effects of the Act as non-punitive when applied to Jensen." *Id.*

The Indiana Supreme Court's decisions in *Wallace* and *Jensen* together construe Indiana's Ex Post Facto Clause as careful balancing competing interests:

With these decisions the Indiana Supreme Court interpreted Indiana's Ex Post Facto Clause to go beyond what the federal Ex Post Facto Clause requires in order to further what it described as the "underlying purpose" of Indiana's Clause—"the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties." *Wallace*, 905 N.E.2d at 377 (citing *Armstrong v. State*, 848 N.E.2d 1088, 1093 (Ind. 2006)). Yet it also recognized that "registration systems are a legitimate way to protect the public from sex offenders" and that "the risk of recidivism posed by sex offenders is frightening and high." *Id.* at 383 (internal brackets, quotation marks, and citations omitted); *see also Jensen*, 905 N.E.2d at 393 (quoting *Wallace*). It thus concluded that, as applied to SORA, Indiana's Ex Post Facto Clause requires considering the *marginal* effects of applying the law: If the marginal effects are excessive, the fundamental principle underlying Indiana's Ex Post Facto Clause precludes applying the law retroactively; but if the marginal effects are relatively minor, the State may apply the law to vindicate its interest in preventing recidivism.

Following *Wallace* and *Jensen*, the Court has continued to focus on SORA's marginal effects in evaluating Ex Post Facto Clause challenges to the statute. *See, e.g., Lemmon v. Harris*, 949 N.E.2d 803, 812–13 (Ind. 2011) (upholding the application of an amendment that enhanced an offender's registration requirement because "[l]ike Jensen, many of the Act's registration and disclosure requirements were in place and applied to [the offender] at the time he committed his offense . . . . [His] claim fails for the same reasons Jensen's claim failed"). And of particular

relevance here, in 2016 the Court issued three decisions that applied its marginal-effects framework to uphold SORA as applied to individuals whom *other* jurisdictions require to register, including offenders whose criminal conduct predates the initial enactment of SORA. *See Tyson v. State*, 51 N.E.3d 88 (Ind. 2016); *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016); and *Ammons v. State*, 50 N.E.3d 143 (Ind. 2016).

In *Tyson* the Court confronted a challenge to SORA brought by an offender who had been adjudicated delinquent in Texas in 2002 and who moved to Indiana in 2009 (three years after SORA was amended to apply to offenders required to register in other jurisdictions). 51 N.E.3d at 90. It held that applying SORA to this offender was not punitive because applying the law had essentially no marginal punitive effect: The offender "had to register as a sex offender in Texas until 2014" and after his move "had to register as a sex offender in Indiana until 2014." *Id.* at 96. The Court concluded that [m]aintaining that obligation across state lines is far from excessive, especially relative to the significant public safety purpose our sex offender registry serves." *Id.*

In *Zerbe* the Court employed this analysis to uphold the application of SORA to an offender who, as in *Tyson*, had been required to register in Michigan before moving to Indiana, but, unlike in *Tyson*, had committed his crime before either Michigan or Indiana passed a sex-offender registry law. *Zerbe*, 50 N.E.3d at 370. The Court held that the date the offender committed the initial sex offense was irrelevant because it was not the offender's "*crime* that trigger[ed] his obligation to register as a sex offender in Indiana; rather, it is his *Michigan registry requirement* that d[id]

so." *Id.* Because Michigan courts had held that Michigan's sex offender registry law applied to offenders whose offenses predate the law's enactment, he had been required to register in Michigan. *Id.* For this reason, applying SORA to this offender did not impose "a punitive burden . . . beyond that which the State of Michigan has already imposed"; instead, the offender's registration obligations were "merely maintained across state lines, to be fulfilled where he currently lives and works." *Id.* at 370–71.

Finally, in *Ammons* the Court applied *Tyson* and *Zerbe* to reject an Indiana Ex Post Facto Clause claim brought by an offender who committed and was convicted of child molesting in Indiana prior to SORA's enactment but who later moved to Iowa, where he was required to register as a sex offender. 50 N.E.3d at 144. The Court concluded that applying SORA to this offender after he returned to Indiana did not violate Indiana's Ex Post Facto Clause because he "was *already* under an obligation to register" in Iowa, and SORA therefore did "not impose any *additional* punishment on him." *Id.* at 145 (emphasis added).

To summarize, the Indiana Supreme Court has construed Indiana's Ex Post Facto Clause to prohibit applying SORA to individuals whose criminal conduct predates the law's enactment if the *marginal* effects of applying the law render it punitive. Accordingly, an offender who committed his registrable offense prior to the adoption of SORA and who would not have any registration obligations but for SORA cannot be required to register; under *Wallace*, the marginal effects of such an application would be punitive. *Tyson*, *Zerbe*, and *Ammons*, meanwhile, hold that the

marginal effects of applying SORA to offenders who already have registration obligations in other States are minimal and non-punitive; Indiana's Ex Post Facto Clause therefore does not prohibit applying SORA to these offenders.

V. The Plaintiffs

Less than a year after the Indiana Supreme Court issued its decisions in *Tyson*, *Zerbe*, and *Ammons*, Brian Hope and Gary Snider launched this proceeding by filing a complaint claiming that SORA is unconstitutional as applied to them. ECF 1. Hope and Snider were subsequently joined by three other plaintiffs: Hope and Snider filed an amended complaint adding Joseph Standish as a plaintiff, ECF 12, and the district court added Patrick Rice, Adam Bash, and Scott Rush as plaintiffs by consolidating their case with Hope, Snider, and Standish's, ECF 74.

SORA requires each of these six plaintiffs to register as sex offenders. All of them have been convicted of a crime that is either a registrable offense in Indiana or is "substantially equivalent" to such an offense. Indiana Code § 11-8-8-5(a)(24). In addition, all of them have been subject to registration requirements in other States, which means they are required to register pursuant to Indiana Code § 11-8-8-5(b)(1), which applies SORA's registration-and-notification requirements to anyone "who is required to register as a sex or violent offender in any jurisdiction." Importantly, this also means that under *Tyson*, *Zerbe*, and *Ammons* none of the plaintiffs can challenge their registration-and-notification obligations under Indiana's Ex Post Facto Clause.

Turning briefly to each of the plaintiffs in turn, Hope molested a child in Indiana in 1993 and pleaded guilty to the crime in 1996. ECF 100-3 at 1. That

conviction triggered a registration requirement under SORA. *See* 1994 Ind. Acts P.L. 11 § 7; Ind. Code § 35-42-4-3. In 2004 Hope left Indiana and moved to Texas, where he was required to register as a sex offender. ECF 100-3 at 2; Short App. 7. Hope claims he was told that "the only reason [he] was required to register in Texas was that [he] had been required to register in Indiana," ECF 100-3 at 2, but, unlike Indiana's SORA, Texas's registry law does not appear to require registration for all individuals required to register in other States. *See* Tex. Code Crim. Proc. Ann. art. 62.001. It appears, rather, that Hope was required to register because his child molesting offense is "substantially similar" to the Texas registrable offense of indecency with a child. *See id.* 62.001(5)(A), (5)(H); Tex. Penal Code Ann. § 21.11. Hope moved back to Indiana in 2013, ECF 100-3 at 2, and he was required to register under SORA both because his child molesting conviction is a registrable offense and because he was required to register in Texas, *see* Ind. Code § 11-8-8-5(a)(3), § 11-8-8-5(b)(1).

Snider committed criminal sexual conduct in the first degree—that is, raped his victim, using force or coercion to sexually penetrate and injure the victim—in Michigan in 1988. *See* ECF 100-4 at 1, 8; Mich. Comp. Laws § 750.520b(1)(f). He was convicted in 1994 and was thereafter required to register as a sex offender pursuant to Michigan's sex offender registry law. *See* Short App. 7; 1994 Mich. Legis. Serv. P.A. 295, § 2(d)(iv) (West) (now codified at Mich. Comp. Laws § 28.722(w)(iv)). He completed his Michigan sentence in 2003 and moved to Indiana that year. Short App. 7–8. SORA applies to Snider both because his Michigan crime is "substantially

equivalent" to the registrable Indiana crime of rape, *see* Ind. Code §§ 11-8-8-5(a)(1), 35-42-4-1, and because he was required to register in another State, *see* Ind. Code § 11-8-8-5(b)(1).

Standish attempted criminal sexual conduct in the second degree—that is, attempted to engage in sexual contact with a child under 13—in Michigan in 1995. ECF 100-5 at 1, 7; Mich. Comp. Laws § 750.520c(1)(a). He pleaded no contest to the crime the following year and was therefore required to register in Michigan. *See* 1994 Mich. Legis. Serv. P.A. 295, § 2(d)(iv) (now codified at Mich. Comp. Laws § 28.722(w)(v)). Standish moved to Indiana in 2013, ECF 100-5 at 2, and is required to register under SORA because his Michigan crime is "substantially equivalent" to the registrable Indiana crime of child molesting, *see* Ind. Code §§ 11-8-8-5(a)(3), 35-42-4-3, and because he was required to register in another State, *see id.* § 11-8-8-5(b)(1).

In 1989 Illinois convicted Rice of aggravated criminal sexual assault—that is, aggravated rape, *see* 720 Ill. Comp. Stat. 5/11-1.20; 720 Ill. Comp. Stat. 5/11-1.30—and his Illinois prison sentence concluded on June 26, 2017, at which time authorities informed him of his obligation to register as a sex offender under Illinois law. ECF 100-8 at 1–2; 730 Ill. Comp. Stat. 150/2(B)(1). Rice left Illinois for Indiana the day he was released from prison and promptly registered as a sex offender. ECF 100-8 at 2. SORA applies to Rice because his Illinois crime is "substantially equivalent" to the registrable Indiana crime of rape, *see* Ind. Code §§ 11-8-8-5(a)(1), 35-42-4-1, and because he was required to register in another State, *see id.* § 11-8-8-5(b)(1).

Bash pleaded guilty but mentally ill to the Kentucky crimes of rape in the first degree and sodomy in the first degree in 1990, crimes he says he committed in the mid-1980s. *See* ECF 100-9 at 1, 8–9; (1) Ky. Rev. Stat. §§ 510.040, 510.070. He completed his prison sentence in 1998 and was required to register in Kentucky, Ky. Rev. Stat. § 17.500(8), but soon moved to Ohio, where he was also required to register, *see* ECF 100-9 at 2. Bash moved to Indiana sometime in the two years after his release from prison, *see id.*, and is required to register under SORA because his Kentucky crimes are "substantially equivalent" to the registrable Indiana crimes of rape and child molesting, *see* Ind. Code §§ 11-8-8-5(a)(1), 11-8-8-5(a)(3), 35-42-4-1, 35-42-4-3, and because he was required to register in another State, *see* Ind. Code § 11-8-8-5(b)(1).

Lastly, in 1992 Florida convicted Rush of sexual battery of a child less than 12 years of age. *See* ECF 100-10 at 6; Fla. Stat. § 794.011(2). His prison sentence ended in 1995, after which he registered as a sex offender as required by Florida law. *See* ECF 100-10 at 2; Fla. Stat. § 943.0435(h)(1)(a)(I). He moved to Indiana in 2017, *see* ECF 100-10 at 2, and became subject to SORA because his Florida crime is "substantially equivalent" to the registrable Indiana crime of child molesting, *see* Ind. Code §§ 11-8-8-5(a)(1), 11-8-8-5(a)(3), 35-42-4-1, 35-42-4-3, and because he was required to register in another State, *see id.* § 11-8-8-5(b)(1).

VI. The Current Proceeding

These six plaintiffs sued the Commissioner of the Indiana Department of Correction, the Marion County Prosecutor, the Huntington County Prosecutor, the

Allen County Prosecutor, the Delaware County Prosecutor, and the Pulaski County Prosecutor, as well as the corresponding county sheriffs, all in their official capacities. ECF 100. Plaintiffs sought injunctive and declaratory relief prohibiting the defendants from applying SORA to them; they contend that such application is barred by the constitutional "right to travel," the Fourteenth Amendment's Equal Protection Clause, and the Ex Post Facto Clause of Article I, section 10. *See id.*; ECF 101 at 15–35.

The parties filed cross-motions for summary judgment in spring 2018. *See* ECF 100; ECF 104. And on July 9, 2019 the district court granted summary judgment to Plaintiffs on all three of their claims, concluding that "right to travel," the Equal Protection Clause, and the Ex Post Facto Clause prohibit applying SORA to Plaintiffs. Short App. 14–36, 38-39.

The district court began its analysis of Plaintiffs' right to travel and Equal Protection Clause claims by noting that the Supreme Court has identified "three different components" of the "right to travel." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). It encompasses "(1) the right to enter and leave another state; (2) the right to be treated as a welcome visitor when temporarily present in another state; and (3) for those who elected to become permanent residents, the right to be treated like other citizens of that state." Short App. 14–15 (citing *Saenz*, 526 U.S. at 500). Plaintiffs argue that the third component (which arises from the Fourteenth Amendment's Privileges Or Immunities Clause, *Saenz*, 526 U.S. at 503) precludes applying SORA to them, ECF 101 at 16. The district court agreed, concluding that "SORA implicates

Plaintiffs' right to travel because it treats them differently than sex offenders who are residents of Indiana and have never left." Short App. 15. The district court therefore applied strict scrutiny to the rules—which it acknowledged were articulated by the Indiana Supreme Court—that Indiana uses to determine to which offenders SORA applies. *Id.* at 17–18. It concluded that these rules do not satisfy strict scrutiny and that the right to travel therefore prohibits applying SORA to Plaintiffs. *Id.* And it cited these same reasons in its brief explanation for granting Plaintiffs relief on their Equal Protection Clause claim as well. *Id.* at 20–22.

The district court also agreed with Plaintiffs that the federal Ex Post Facto Clause bars applying SORA to them. *Id.* at 35. It started its analysis by correctly observing that "[a] law must be both retroactive and punishment to be characterized as an *ex post facto* law." *Id.* at 22. With respect to retroactivity, the district court acknowledged that this Court "included language in the opinion [in *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011)] that the registration requirements under the Federal Act were not retrospective." *Id.* at 23. Indeed, in *Leach* this Court noted that SORNA required an offender to, for example, "register in every jurisdiction where he lives, works, or goes to school" and "notify government officials within three business days of changing his residence"; this Court then explained that while "*[a]ll of these requirements* are triggered without respect to the date of the convictions[,] . . . *that does not make them retrospective*: SORNA merely creates new, prospective legal obligations based on the person's prior history." 639 F.3d at 773 (emphasis added). The district court, however, reversed this Court's instructions, asserting that *Leach*

stands for the proposition that SORNA's—and by extension SORA's—"*registration requirements*, themselves, are retroactive because they apply to an offender based on his past conduct." Short App. 24. The district court conceded that it reached this interpretation of *Leach* "notwithstanding some language to the contrary." *Id.*

Regarding the "punitive" prong of the Ex Post Facto Clause analysis, the district court acknowledged that the "Plaintiffs only argue that the statute is punitive in effect," and for that reason it "assume[d] without deciding that the legislature did not intend to impose punishment and skip to the second step." *Id.* at 25. Though the district court failed to mention the Supreme Court's instruction in *Smith* that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," 538 U.S. 84, 92 (2003) (internal quotation marks and citations omitted), it followed *Smith* in structuring its assessment around the five factors *Smith* considered: "(1) whether the law inflicts what historically and traditionally has been considered punishment; (2) whether the law imposes an affirmative disability or restraint; (3) whether the law promotes the traditional aims of punishment; (4) whether the law has a rational connection to a non-punitive purpose; and (5) whether the law is excessive with respect to its purpose." Short App. 25.

With respect to the first, "traditional punishment," factor, the district court confronted this Court's decision in *Vasquez v. Foxx*, 895 F.3d 515, 521 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 797 (2019), which upheld Illinois's sex-offender residency restrictions and concluded the requirements neither shame sex offenders in the

manner of traditional shaming punishments "nor . . . resemble banishment." And in spite of the clear holding of *Vasquez*, it concluded that this factor weighs *against* SORA, distinguishing this case from *Vasquez* on the ground that the law in *Vasquez* "restricted an offender from residing within 500 feet of a school, playground, or child-center," while Indiana "prevents Plaintiffs from *entering* school property . . . [and] restricts them from living within *1000 feet* of school property, a youth program center, or a public park." Short App. 28–29.

After bypassing *Vasquez*, the district court next concluded that the "affirmative disability or restraint" factor counts against SORA, citing several aspects of Indiana law that are either common among States or relatively minor—such as the residency restrictions, an in-person reporting requirement, a travel reporting requirement, and a $50.00 annual registration fee. *See id.* at 29–31. The district court then contradicted *Smith* itself, concluding that "SORA serves the traditional goal of retribution" because it is triggered by "a past criminal offense," rather than an evaluation of "present dangerousness." *Id.* at 31 (citing *Smith*, 538 U.S. at 113 (Stevens, J. dissenting)). *Compare Smith*, 538 U.S. at 104 ("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."). Finally, concerning the last two *Smith* factors—whether SORA has a rational connection to a non-punitive purpose and whether it is excessive with respect to that purpose—the district court again noted the elements of SORA it cited before and concluded that these provisions "simply go too far." Short App. 33.

SUMMARY OF THE ARGUMENT

All fifty States and the federal government impose comprehensive registration-and-notification requirements on individuals convicted of sex offenses, and the vast majority of these jurisdictions apply these requirements to at least some individuals whose registrable offenses predate the adoption of these requirements. *See* Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999), https://www.csom.org/pubs/sexreg.html. Though the U.S. Supreme Court has upheld this aspect of sex offender registry laws as a matter of federal constitutional law, the Indiana Supreme Court has held that the Indiana Constitution goes further and limits the State's ability to apply SORA to individuals whose offense predates the law's enactment. The Indiana Supreme Court has not *categorically* barred the State from applying SORA to these offenders, however; it has extended Indiana's Ex Post Facto Clause beyond the scope of the federal Ex Post Facto Clause only where the *marginal* effects of applying SORA render the law's application punitive. Accordingly, offenders who committed their registrable offenses prior to SORA's enactment and who would not have any registration obligations but for the law cannot be required to register; offenders who already have registration obligations in other States, however, face fewer marginal consequences from SORA, and Indiana's Ex Post Facto Clause thus does not prohibit applying the law to this latter class of offenders.

The district court held that these rules—the result of the Indiana Supreme Court's efforts to balance important constitutional values against the equally

important interest in preventing sex-offender recidivism—run afoul of the federal constitution. That decision fails to respect the teaching of this Court's and the Supreme Court's precedents. It should be reversed.

The Indiana rules do not violate the constitutional right to travel—that is, "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State," *Saenz v. Roe*, 526 U.S. 489, 502 (1999)—and indeed do not implicate the right at all. Whether SORA applies to a pre-SORA offender turns *only* on whether the offender has had registration obligations in another State, *not* whether he is a "newly arrived citizen."

Because these rules do not implicate the fundamental right to travel under the Equal Protection Clause, they must only survive rational-basis scrutiny. These rules easily survive such scrutiny. The Indiana Supreme Court has held that these rules are necessary to comply with Indiana's Ex Post Facto Clause, which, as applied to SORA, strikes a sensible balance between furthering the value of fair notice and protecting Indiana's citizens from high-recidivism-risk offenders.

Finally, these rules do not violate the Ex Post Facto Clause, for they are neither retroactive nor punitive. They are not retroactive because SORA "merely creates new, prospective legal obligations based on the person's prior history." *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). Like the federal sex offender registry law, SORA applies "only to conduct occurring *after* the law's enactment—that is, a sex offender's failure to register or update his registration following interstate travel." *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018). Furthermore, the SORA's

registration-and-notification requirements are not punitive because, under *Smith*, "whether a comprehensive registration regime targeting only sex offenders is penal . . . is not an open question." *Leach*, 639 F.3d at 773. Because no aspect of SORA's requirements "distinguish[es] this case from *Smith*," Plaintiffs Ex Post Facto Clause claim fails for this reason as well. *Id.*

ARGUMENT

I. Neither the Privileges Or Immunities Clause Nor the Equal Protection Clause Prohibit Applying SORA to Plaintiffs

A. Because Indiana's registration system does not discriminate based on the length of offenders' residency, it does not violate the Privileges Or Immunities Clause

Although Plaintiffs and the district court described Plaintiffs' first claim as arising under a purported "right to travel," this phrase is somewhat misleading: As the Supreme Court observed in its most recent decision on this issue, the Constitution does not expressly recognize such a "right to travel," and indeed "[t]he word 'travel' is not found in the text of the Constitution." *Saenz v. Roe*, 526 U.S. 489, 498 (1999). Instead, the "right to travel" mentioned in the Court's cases refers to three distinct and specific components. *See id.* at 500. First, it includes "the right of a citizen of one State to enter and to leave another State." *Id.* "[T]he source of that particular right in the text of the Constitution" is not entirely clear, but the "right to go from one place to another" was "expressly mentioned in the text of the Articles of Confederation" and it "may simply have been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.* at 500–01 (internal quotation marks and citations omitted). The second component includes "the right to be treated

as a welcome visitor rather than an unfriendly alien when temporarily present in a State, *id.* at 500, a right "expressly protected" by the Privileges And Immunities Clause of Article IV, section 2, *id.* at 501. The third component arises from the Fourteenth Amendment's Privileges Or Immunities Clause, *id.* at 503, and protects, "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State," *id.* at 500.

The first two components of the "right to travel" are plainly inapplicable here. The first is inapposite because SORA does not "does not directly impair the exercise of the right to free interstate movement." *Id.* at 501; *see also Chavez v. Illinois State Police*, 251 F.3d 612, 649 (7th Cir. 2001) (holding that the Illinois State Police's allegedly racially discriminatory drug interdiction efforts did not violate this component of the right to travel because they did not effect "direct impairment" of the plaintiffs ability to enter or leave Illinois). And the second is inapposite because all of the plaintiffs here are full-fledged Indiana residents, not temporary visitors; Plaintiffs argue that the Indiana Supreme Court's rules for applying SORA unconstitutionally discriminate *among* Indiana residents, not between residents and non-residents. For these reasons, Plaintiffs acknowledge that "[a]t issue in this case is the third component of the right to travel." ECF 101 at 16; *see also* Short App. 15 (concluding that "SORA violates the third component of the right to travel").

Yet the third component of the right to travel is just as inapplicable as the first two, for the Supreme Court has applied it only to a narrow subset of laws that (1) impose durational residency requirements on (2) public benefits, tax exemptions, or

voting rights. *See Saenz*, 526 U.S. at 492 (invalidating a California statute that "limit[ed] the maximum welfare benefits available to *newly arrived residents*" (emphasis added)); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 614 (1985) (invalidating "a New Mexico statute that grant[ed] a tax exemption limited to those Vietnam veterans *who resided in the State before May 8, 1976* (emphasis added)); *Zobel v. Williams*, 457 U.S. 55, 56 (1982) (invalidating an Alaska law that "distribute[d] income derived from its natural resources to the adult citizens of the State in varying amounts, *based on the length of each citizen's residence*" (emphasis added)); *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250, 251 (1974) (invalidating an Arizona law that "*require[ed] a year's residence* in a county as a condition to receiving nonemergency hospitalization or medical care at the county's expense" (emphasis added)); *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972) (invalidating "Tennessee's *durational residence requirements* for voting (emphasis added)); *Shapiro v. Thompson*, 394 U.S. 618, 622 (1969) (invalidating laws that denied welfare assistance to individuals "who have *not resided within their jurisdictions for at least one year*" (emphasis added)). These two requirements are plainly absent here, which forecloses Plaintiffs' Privileges Or Immunities Clause claim at the outset.

Moreover, the Supreme Court has limited the Privileges Or Immunities Clause to these contexts because this component of the right to travel is simply an application of the Fourteenth Amendment's Privileges Or Immunities Clause, which the Court has long narrowly interpreted: It protects merely the right to "become a citizen of any State of the Union by a *bonâ fide* residence therein, *with the same rights as other*

citizens of that State." *Saenz*, 526 U.S. at 503 (quoting *Slaughter-House Cases*, 16 U.S. 36, 80 (1872)) (emphasis added). *Saenz* is thus quite clear about the scope of the Privileges Or Immunities Clause: It simply prohibits a State from "discriminat[ing] against some of its citizens" on the basis of how long "they have been domiciled in the State." 526 U.S. at 504. *See also id.* at 515 (Rehnquist, C.J., dissenting) (noting that the Court had adopted an "analytical framework" under which "a State, outside certain ill-defined circumstances, *cannot classify its citizens by the length of their residence in the State* without offending the Privileges or Immunities Clause of the Fourteenth Amendment" (emphasis added)).

Because this component of the right to travel is limited to barring durational residency requirements, Plaintiffs' claim fails: The Indiana Supreme Court's limitations on the application of SORA do not discriminate on the basis of duration of residency. The Indiana Supreme Court has held that whether SORA can apply to a pre-SORA offender depends on the *marginal effects*—in particular whether an offender is *required to register in another State*—not the duration of Indiana residence. *See Jensen v. State*, 905 N.E.2d 384, 394 (Ind. 2009); *Lemmon v. Harris*, 949 N.E.2d 803, 812–13 (Ind. 2011); *Tyson v. State*, 51 N.E.3d 88, 96 (2016); *State v. Zerbe*, 50 N.E.3d 368, 370 (2016); *Ammons v. State*, 50 N.E.3d 143, 145 (2016).

Under these decisions, a lifelong Hoosier whose criminal conduct predates SORA will nevertheless be required to register if, for example, he has a job in Illinois that triggers *Illinois's* registration requirement. *See* 730 Ill. Comp. Stat. 150/3(a-5) ("An out-of-state student or out-of-state employee shall, within 3 days after beginning

school or employment in this State, register in person and provide accurate information as required by the Department of State Police."). At the same time, a pre-SORA offender who recently moved to Indiana from a State that did *not* require registration—whether because the crime was not a registrable offense or because courts had prohibited application of its registry law to pre-enactment offenders—will *not* be required to register. *See Zerbe*, 50 N.E.3d at 370 (rejecting an Indiana Ex Post Facto Clause claim brought by an offender who had moved from Michigan because "Michigan courts have determined its Act can apply retroactively to offenders like [him]").[3] The Indiana rules thus treat all Indiana residents the same without regard to length of residence and do not implicate the Privileges Or Immunities Clause.

The district court's contrary conclusion rests on its mistaken assumption that the Indiana's SORA rules turn on length of Indiana residency rather than prior registration status in another State. For example, it claimed that the Indiana Supreme Court's SORA rules have "treated residents more favorably," Short App. 16; *see also* ECF 51 at 11 (granting motion for preliminary injunction because plaintiffs "have been subjected to differential treatment due exclusively to the fact that they migrated between states"). Plaintiffs, however, acknowledge that the SORA rules "apply to offenders (like all of the plaintiffs) who have long since established

[3] "Eight state supreme courts in recent years have held that the retroactive application of their sex offender registration and notification laws violate their respective state constitutions." U.S. Department of Justice, *Sex Offender Registration and Notification in the United States: Retroactive Application & Ex Post Facto Considerations* (March 2019) at 1 & n.9, https://www.smart.gov/caselaw/5-Retroactive-Application.pdf (collecting cases). The Alaska Supreme Court, for example, has imposed strict limits on the application of its State's sex offender registry law. *See, e.g., Doe v. State*, 189 P.3d 999 (Alaska 2008); *Doe v. Dep't of Pub. Safety*, 444 P.3d 116 (Alaska 2019).

permanent residence in the state," ECF 101 at 15, and that SORA "even appl[ies] to offenders who always were permanent residents of Indiana but who, by virtue of having a job, attending school, or travelling temporarily out of state have been required to register in another jurisdiction." *Id.*

Rather than rely on a durational-residency discrimination theory, Plaintiffs have argued that the Privileges Or Immunities Clause encompasses "the right to be treated similarly to other sex offenders in Indiana *that have not traveled to outside jurisdictions*." *Id.* at 16 (emphasis). Yet, Plaintiffs cite only the Court's durational residency cases and identify *no* cases involving laws that drew distinctions among residents depending on whether they engaged in interstate travel. *Id.* at 16–18.

In addition to lacking precedential support, Plaintiffs' view of the Privileges Or Immunities Clause—that it prohibits States from treating residents differently "because they have engaged in interstate travel," *id.* at 19 n.10—is inconsistent with many *federal* criminal laws that apply on precisely that basis. While the Privileges Or Immunities Clause does not by its terms directly apply to the federal government, the Supreme Court has strongly suggested that the principles underlying the Clause bind the States and the federal government with equal force. *See Saenz*, 526 U.S. at 507–08 (holding that Congress could not authorize California's durational residency requirements because "the protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as the States"). And many federal laws impose criminal penalties solely on the condition of interstate travel: The Mann Act's prohibition on transporting

individuals across state lines to engage in any criminal sexual activity is one notable example. *See* 18 U.S.C. § 2421. And SORNA itself imposes criminal penalties for failure to register only if the offender "travels in interstate or foreign commerce." 18 U.S.C. § 2250. Plaintiffs' theory would call into question these and many other longstanding federal laws.

Finally, Plaintiffs' claim fails even if the Court were to accept their expansive rule. The Indiana Supreme Court's rules do not treat offenders differently on the basis of interstate travel as such, but permit different requirements only on the basis of whether other States require them to register. As noted, a pre-SORA offender who moves to Indiana from a State where he was not required to register will also not be required to register in Indiana.

To prevail Plaintiffs would need to stretch the Privileges Or Immunities Clause to prohibit States from imposing different treatment on the basis of characteristics that are merely *correlated* with interstate travel. Such a rule would require invalidation of countless state laws. People who use more fuel or who stay at hotels, for example, are more likely to travel across state lines; under this theory, that fact alone would require invalidating the many state laws that impose tax taxes on purchases of fuel and hotel rooms. *See generally* National Conference of State Legislatures, *State Lodging Taxes* (Jan. 28, 2019), http://www.ncsl.org/research/fiscal-policy/state-lodging-taxes.aspx; Kevin Pula, National Conference of State Legislatures, *Recalibrating the Motor Fuel Tax* (Oct. 2017), http://www.ncsl.org/research/transportation/recalibrating-the-motor-fuel-tax.aspx. Such a radical

outcome surely requires *some* precedential support, which Plaintiffs have entirely failed to provide.

B. Indiana's registration system passes the rational-basis test

Because the Indiana Supreme Court's rules limiting the application of SORA under Indiana's Ex Post Facto Clause do not implicate the right to travel, they are merely subject to rational-basis scrutiny under the Equal Protection Clause. "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

As Plaintiffs acknowledge, ECF 101 at 24, there is no doubt that the purpose of SORA, like other sex offender registry laws, is legitimate: Policymakers have reasonably concluded that "sex offenders pose a high risk of reoffending," and "that release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Smith v. Doe*, 538 U.S. 84, 93 (2003) (internal quotation marks and citations omitted).

The Indiana Supreme Court has in turn held that the State's Ex Post Facto Clause limits how the State may apply SORA. In *Wallace* it extended Indiana's Ex Post Facto Clause further than what the federal Ex Post Facto Clause requires. 905 N.E.2d 371, 377–78 (Ind. 2009). And in *Jensen*, *Tyson*, *Zerbe*, and *Ammons* it carefully limited that extension to only those offenders for whom the *marginal* effects of applying SORA are punitive—in particular, those offenders who are not required to register by any other State. Indiana's Ex Post Facto Clause, as applied to SORA, thus

strikes a reasonable balance between the State's compelling interest in protecting Hoosiers from high-recidivism-risk offenders on the one hand and the important constitutional principles of fair notice on the other. The Indiana Supreme Court's application of the State's Ex Post Facto Clause to SORA has produced a set of rules that are well within the bounds of reasonableness set by the Equal Protection Clause.

II. The Ex Post Facto Clause Does Not Prohibit Applying SORA to Plaintiffs

Section 10 of Article I of the U.S. Constitution prohibits States from passing any "ex post facto Law." U.S. Const. Art. I, § 10. This provision bars any law that "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Carmell v. Texas*, 529 U.S.513, 540 (2000) (citing *Cummings v. Missouri*, 71 U.S. 277, 325-326 (1867)). A law is not "an impermissible ex post facto law unless it is *both* retroactive *and* penal." *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018). A law is retroactive if it applies to events occurring prior to the law's enactment. *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011) (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)). A law is "penal"— punitive, in other words—if it satisfies the intent-effects test set forth in *Smith*: In passing the law the legislature must have either intended to impose punishment by enacting the law; or if the legislature did not intend to do so, the effect of the law must be so punitive that it negates the legislature's non-punitive intent. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

A. Precedent forecloses Plaintiffs' Ex Post Facto Clause claim

As the Supreme Court has noted, by the time Congress passed the Wetterling Act in 1994, registration laws were not "particularly novel, for by then States had implemented similar requirements for close to half a century." *United States v. Kebodeaux*, 570 U.S. 387, 397 (2013). In fact, by 1996, *every* State had adopted a sex offender registry law. *Smith*, 538 U.S. at 90. These laws have a clear non-punitive purpose—to advance public safety by "alerting the public to the risk of sex offenders in their community." *Id.* at 102–103. Indeed, "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals." *Kebodeaux*, 570 U.S. at 395–96 (2013) (citing Dept. of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose, Recidivism of Sex Offenders Released in 1994 1 (Nov. 2003), and noting that the study found that "compared to non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime").

Accordingly, the Supreme Court, this Court, and several other circuit courts have routinely upheld the constitutionality of States' registration laws. *See, e.g., Smith v. Doe*, 538 U.S. at 92; *Doe v. Pataki*, 120 F.3d 1263 (2nd Cir. 1997); *Artway v. Attorney Gen.*, 81 F.3d 1235 (3rd Cir. 1996); *Ballard v. FBI,* 102 F. App'x 828, 829 (4th Cir. 2004) (holding in an unpublished, *per curiam* opinion that Virginia's Sex Offender and Crimes Against Minors Registry Act did not violate the Ex Post Facto Clause); *King v. McGraw*, 559 F. App'x 278, 282 (5th Cir. 2014) (noting that while all of their decisions upholding the constitutionality of Texas's Sex Offender Registration

Act were unpublished, they all rely on the holding in *Smith*); *Clark v. Ryan*, 836 F.3d 1013 (9th Cir. 2016); *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016).

When this Court has considered Ex Post Facto Clause challenges to sex offender registry laws—as it did in *Leach* and *Vasquez*—it has held that the laws were neither retroactive nor punitive. Indeed, as recently as July of this year, this Court held, in granting an appointed counsel's motion to withdraw, that even arguing that SORNA's registration requirement violates the Ex Post Facto Clause would be frivolous, observing that "the obligation to register is a civil burden, not additional punishment" and that failing to register following interstate travel is a new offense, not a retroactive one, because it only targets current conduct. *United States v. Meadows*, 772 F. App'x. 368, 369-370 (7th Cir. 2019). The district court's decision failed to heed these precedents. It should be reversed.

B. SORA imposes prospective obligations, not retroactive consequences

This Court's decisions conclusively establish that laws that impose registration-and-notification requirements on convicted sex offenders are not retroactive but instead operate *prospectively* by merely creating "new, prospective legal obligations based on the person's prior history." *Vasquez,* 895 F.3d at 520 (citing *Leach*, 639 F.3d at 773). Nothing distinguishes SORA from the laws this Court upheld in these cases.

Take *Leach*, the first case confronting this Court with an Ex Post Facto Clause challenge to a sex offender registry law. The Court noted that there are two ways the offender could "argue that an *ex post facto* violation arises under SORNA: either [he]

could contend that the criminal penalties under 18 U.S.C. § 2250(a) are retroactive, or he could assert that the registration requirements under 42 U.S.C. § 16913 constitute punishment." 639 F.3d at 772. The Court concluded that the offender was "not actually arguing that § 2250(a) retrospectively targets conduct that was lawful before the statute was enacted," but was instead adopting the second argument—"that obliging him to comply with the registration requirements imposed by 42 U.S.C. § 16913 effectively increases the punishment for his 1990 conviction." *Id.* at 773. The Court rejected that argument. It "recognize[d] that SORNA imposes significant burdens on sex offenders who . . . may have committed their crimes and completed their prison terms long before the statute went into effect." *Id.* It noted that SORNA requires an offender "register in every jurisdiction where he lives, works, or goes to school," to "notify government officials within three business days of changing his residence," and to provide "the government with fingerprints, a photograph, a physical description of himself, vehicle identification information, and any other materials required by the Attorney General." *Id.* (citing 42 U.S.C. §§ 16913, 16914). And it acknowledged that "[a]ll of these requirements are triggered without respect to the date of the convictions" and apply even to "an offender who was convicted before SORNA was enacted." *Id.* (citing 28 C.F.R. § 72.3). It held, however, that this "*does not make them retrospective*: SORNA merely creates new, prospective legal obligations based on the person's prior history." *Id.* (emphasis added).

The Court reaffirmed this conclusion in *Vasquez*, which involved a challenge to the residency restrictions Illinois imposes on child sex offenders. *See* 895 F.3d at

517–18. The Court explained that in *Leach* it had held "SORNA's registration duty and the criminal penalty for failure to comply are plainly *prospective* in operation" and "appl[y] only to conduct occurring *after* the law's enactment—that is, a sex offender's failure to register or update his registration following interstate travel." *Id.* at 520. The Court then concluded that nothing distinguished SORNA from the Illinois residency statute: Although the Illinois law applied to offenders "who were convicted of child sex offenses before the amendment was adopted, its requirements and any criminal penalty apply only to conduct occurring *after* its enactment—i.e., knowingly maintaining a residence within 500 feet of a child day-care home or group day-care home." *Id.*

This reasoning applies with equal force here. It is irrelevant that the conduct leading to each of the plaintiffs' sex-offense convictions predates SORA's enactment, because SORA, like SORNA, "applies only to conduct occurring *after* the law's enactment—that is, a sex offender's failure to register or update his registration." *Id.* Neither Plaintiffs nor the district court have even attempted to distinguish SORA from SORNA on this score. Instead, the district court puzzlingly concluded that *Leach* "explicitly authorized an offender to challenge sex offender registration requirements as punishment," citing as support *Leach*'s observation that an offender hypothetically could challenge SORNA by "assert[ing] that the registration requirements . . . constitute punishment. Short App. 24 (ellipsis in original; emphasis removed). But, as noted above, *Leach rejected* precisely this argument, in part because SORNA's registration requirements are not retroactive—they are merely "prospective legal

obligations based on the person's prior history" (as noted below, it also rejected this argument because SORNA registration requirements are not punitive either). *Leach*, 639 F.3d at 773. *Leach* and *Vasquez* thus confirm that SORA's registration requirements are not retroactive. They are therefore not subject to the Ex Post Facto Clause.

C. SORA creates a civil, nonpunitive registration system

In addition to confirming that SORA is not retroactive, *Leach* and *Vasquez* establish with equal certainty that SORA is not punitive. There are no material distinctions between SORA and the laws these decisions upheld. *Leach* and *Vasquez* thus preclude Plaintiffs' Ex Post Facto claim twice over.

The plaintiffs contend that "the effect of Indiana's SORA is sufficiently punitive so as to negate the State's intention to deem it civil." ECF 101 at 27 (internal quotation marks and citation omitted). To evaluate such claims courts generally consult the factors the Supreme Court considered in *Smith*: whether the registration-and-notification system "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97; *see also Vasquez*, 895 F.3d at 521. When this Court held in *Leach* that "whether a comprehensive registration regime targeting only sex offenders is penal. . . is not an open question," it declined to evaluate SORNA's registration provisions under the intent-effects test because there were no aspects of SORNA's registration provisions that were

distinguishable from Alaska's equivalent registration law in *Smith*. *Leach*, 639 F.3d at 773. The same logic should hold here.

The district court, however, directly contradicted this Court's holding in *Leach*. Attempting to distinguish SORA from Alaska's and Illinois's sex offender registry laws, the district court suggested that the following characteristics of SORA distinguish it from the laws upheld in *Smith* and *Leach*: SORA categorizes offenders using the name of their offense rather than using generic labels; it includes details of the crime on the registry website; it prohibits offenders from residing within 1,000 feet—rather than Illinois's 500 feet—of schools, youth centers, and parks; it prohibits offenders from entering school property; and it requires offenders to periodically report in person. Short App. 26–33. None of these differences, however, are sufficient to "distinguish this case from *Smith*" or from *Vasquez*. *Leach*, 639 F.3d at 773.

In evaluating the first *Smith* factor, whether SORA has a punitive effect like that of traditional punishment, the district court noted that Indiana's registry website includes the name of the offense and some details of the crime. Short App. 26–27. However, this information is all a matter of public record. And the Supreme Court has already decided that when already-public information about a conviction is posted on a sex offender registry website, it may make the information more accessible, but it does not constitute or resemble traditional shaming punishments. *Smith*, 538 U.S.at 98–99. The district court also claimed that SORA resembles banishment more closely than the equivalent Illinois law at issue in *Vasquez*, because the Illinois law restricted certain offenders from residing within 500 feet of schools,

playgrounds, or child centers, whereas SORA extends that distance to 1000 feet for similar locations and prevents serious sex offenders from entering school property. Short App. 27–29. Illinois, however, *also* prohibits sex offenders from entering school property, with some exceptions. 720 Ill. Comp. Stat. 5/11-9.3(a). And a mere 500 feet cannot be the difference between constitutional civil regulation and unconstitutional punishment.

The district court continued to dismiss the holdings of *Smith* and *Leach* in discussing the second *Smith* factor by claiming that common aspects of SORA, like registration fees, residency restrictions, and in-person reporting requirements, all constitute affirmative disabilities or restraints. Short App. 29–31. The district court attempted to distinguish SORA from Alaska's law by noting that it did not require periodic updates to be made in person like SORA. Short App. 31. Yet the district court disregarded Illinois law, which requires particularly dangerous offenders to report in person to local police every 90 days. 730 Ill. Comp. Stat. 150/6. The district court also highlighted the $50 annual registration fee for offenders must pay to the county in which they reside, the $50 fee paid to any other counties in which the offender is required to register, and the $5 address change fee. Short App. 30. But again the district court disregarded the provisions of the Illinois sex offender registry law, which requires offenders to pay a $100 initial registration fee and a $100 annual renewal fee to the registering law enforcement agency. 730 Ill. Comp. Stat. 150/3. As this Court noted in *Vasquez*, to constitute affirmative disability or restraint, a rule must "resemble the punishment of imprisonment, which is the paradigmatic

affirmative disability or restraint." 895 F.3d at 522 (quoting *Smith*, 538 U.S. at 100). Registration fees, in-person reporting requirements, and prohibitions on residing near a school, youth center, or public park hardly resemble imprisonment.

For the third *Smith* factor—whether the law serves the traditional goal of retribution—the district court again contradicted *Smith* and *Vasquez*, concluding that SORA is retributive because its provisions are triggered by a past criminal offense, rather than an evaluation of "present dangerousness." Short App. 31 (citing *Smith*, 538 U.S. at 113 (Stevens, J. dissenting)). *Vasquez* directly repudiates this conclusion: It points out that residency restrictions "are so clearly *not* retributive" and that the obvious goal of sex offender registry laws is to "protect children from the danger of recidivism by convicted child sex offenders. *Vasquez*, 895 F.3d at 522.

Finally, concerning the last two *Smith* factors—whether SORA has a rational connection to a non-punitive purpose and whether it is excessive with respect to that purpose—the district court failed to distinguish SORA from the equivalent laws at issue in *Smith* and *Vasquez*, merely reiterating the provisions of SORA and stating that they "simply go too far." Short App. 33.

The district court's decision fails to heed clear Seventh Circuit precedent holding that sex offender registration laws are both prospective in operation and regulatory regimes that are not punitive in effect. It further failed to identify any material distinctions between SORA and the registration laws that have been upheld by this Court and the Supreme Court. The district court's determination that SORA

violates the Ex Post Facto Clause is directly contrary to Seventh Circuit and Supreme Court jurisprudence. It should be overturned.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

CURTIS T. HILL, Jr.
Attorney General of Indiana

/s/Kian J. Hudson
KIAN J. HUDSON
Deputy Solicitor General

THOMAS M. FISHER
Solicitor General

JULIA C. PAYNE
COURTNEY L. ABSHIRE
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-0709
Kian.Hudson@atg.in.gov

CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 13,093 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: */s/ Kian J. Hudson*
Kian J. Hudson
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

/s/ Kian J. Hudson
Kian J. Hudson
Deputy Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-0709
Facsimile: (317) 232-7979
Kian.Hudson@atg.in.gov

REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Required Short Appendix contains all of the materials required under Circuit Rule 30(a) and 30(b).

/s/ Kian J. Hudson
Kian J. Hudson
Deputy Solicitor General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN HOPE, GARY SNIDER, and JOSEPH STANDISH Plaintiffs, v. COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, *et al.* Defendants.	)	1:16-cv-02865-RLY-TAB
PATRICK RICE, ADAM BASH, and SCOTT RUSH Plaintiffs, COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, *et al.* Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

As a matter of state constitutional law, Indiana does not impose mandatory sex offender registration on those who committed their offense prior to the enactment of Indiana's Sex Offender Registration Act ("SORA") and who have never left the state. However, the state does impose registration requirements on those who committed their sex offense *prior to* SORA's enactment but then left the state and returned *after* its enactment. It likewise imposes these requirements on those who committed their offense in another state prior to SORA's enactment and then moved to Indiana after SORA's

enactment. The effect of this practice is that a person who committed a sex offense prior to SORA's enactment within Indiana's borders and never left *does not* have to register while a person who committed the same offense at the same time and then moved into Indiana—either for the first time or to return—*does* have to register.

Plaintiffs are all sex offenders who are required to register because they committed their offenses prior to SORA's enactment but then moved to Indiana after its enactment. They allege SORA—as applied by the Commissioner of the Indiana Department of Correction ("DOC"), the respective county prosecutors' offices, and the respective county sheriffs (collectively the "State" or "Indiana")—violates the Constitution. The court agrees. Indiana's rule that those moving into the state must register while similarly situated residents do not have to register violates Plaintiffs' fundamental right to travel and guarantee to equal protection of the laws. The application of SORA's requirements retroactively also violates the Constitution's prohibition against retroactive punishment. That means the registration requirements as applied here cannot stand.

I. Background

Before beginning, the court starts with a few housekeeping issues. First, the court accepts Plaintiffs' version of the facts as true because Defendants have neither specifically controverted Plaintiffs' version with their own evidence nor have they specifically shown that Plaintiffs' facts are not, themselves, supported by admissible evidence. *See* S.D. Ind. L.R. 56-1(f) and (e); *see also Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 648 (7th Cir. 2011). Defendants have objected to many of the facts contained in Plaintiffs' affidavits. (*See* Filing No. 105, Defendant's Brief in

Support of Summary Judgment at 2 – 3). But their objection is not specific, and so it is overruled. *See e.g. BKCAP, LLC v. Captec Franchise Trust 2000-1*, No. 3:07–cv–00637, 2010 WL 3219303, at *8 n. 4 (N.D. Ind. Aug. 12, 2010) (overruling objections to an affidavit because they were not made with specificity). And statements made by Defendants are not hearsay. *See* Fed. R. Evid. 801(d)(2).

Second, the court highlights what this case is *not* about. This case does not affect sex offenders who have committed their offense after 2006 and then moved into Indiana.[1] The court understands the parties to agree that if a person is convicted now, SORA would apply. This case only involves Plaintiffs whose offenses predated the enactment of SORA (or relevant amendment). Additionally, this case also does not involve the *federal* sex offender requirement(s), if any, that apply to Plaintiffs. (*See* Filing No. 109, Plaintiffs Response in Opposition at 9 – 12). The court makes no comment on those requirements and understands this to be only a challenge to SORA—as applied—to the Plaintiffs. With that out of the way, the court now turns to the background of this case.

A. Indiana's Sex Offender Registration Act

Sex offender registration regimes emerged in the mid-1990s. New Jersey enacted the first sex offender registration statute in 1994 after a child was abducted, raped, and murdered by a known child molester who had moved across the street from the child's family. *Wallace v. State*, 905 N.E.2d 371, 374 (Ind. 2009); *E.B. v. Verniero*, 119 F.3d

[1] 2006 is when Indiana adopted the requirement that an offender must register in Indiana if he was required to register in any other jurisdiction. *See* Ind. Code § 11-8-8-5(b)(1). It is also the same year Indiana adopted the restrictions against sexually violent predators and offenders against children. *See Wallace v. State,* 905 N.E.2d 371, 376 – 77 (Ind. 2009)

1077, 1081 (3d Cir. 1997). Other states followed suit, and eventually, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act—a law conditioning the receipt of federal funds on the enactment of state-sponsored sex offender legislation. *Wallace*, 905 N.E.2d at 374; *Verniero*, 119 F.3d at 1081. By 1996, almost every state had adopted some form of mandatory sex offender registration legislation. *Verniero*, 119 F.3d at 1081.

Indiana enacted SORA in 1994 and has frequently amended it since then. *Wallace*, 905 N.E.2d at 374 – 77 (discussing the history of amendments to the Act). The original version of the Act covered eight enumerated crimes and required offenders to provide location information to law enforcement. *Id.* at 375. The Act did not require offenders to register once they were no longer on parole or probation. *Id.* However, the original version pales in comparison to the present-day version. *See Schepers v. Com., Indiana Dep't of Correction*, 691 F.3d 909, 911 (7th Cir. 2012) ("Over time, Indiana's registry has greatly expanded in scope, in terms of both who is required to register and what registration entails."); *see also Wallace*, 905 N.E.2d at 375 – 77. Now, SORA covers twenty-two crimes, and an offender who is obligated to register must navigate a considerable list of requirements. *See* Ind. Code §§ 11-8-8-5(a)(1) – (22); 11-8-8-7; 11-8-8-8. The DOC and local county sheriff's offices jointly maintain SORA. Ind. Code §§ 11-8-2-12.4, 11-8-2-13(b), 36-2-13-5.5. The DOC makes the final determination as to who is required to register and how long each offender must register. (Filing No. 100-1, First Deposition of Brent Myers ("First Meyers' Dep.") at 6).

SORA demands a lot from offenders. Offenders must annually register—in person—at the local county sheriff's office. Ind. Code § 11-8-8-14. If the offender qualifies as a "sexually violent predator," he must report to the local sheriff's office at least once every ninety days. Ind. Code §§ 35-38-1-7.5, 11-8-8-14(b). Homeless offenders or those who live in transitional housing must report at least once every seven days. Ind. Code § 11-8-8-12. Offenders must also register in every county where they work or attend school. Ind. Code § 11-8-8-7.

Registration entails getting photographed and providing the state with identifying information: full name, date of birth, sex, race, height, weight, hair color, eye color, identifying features, social security number, driver's license or state identification card number, vehicle description, license plate number, principal address, the name and address of any employer or educational institutional that he attends, any electronic mail address, any instant messaging username, any social networking web site username, and "[a]ny other information required by the [DOC]." Ind. Code § 11-8-8-8(a). If any of this information changes, the offender must report such change, in person, within seventy-two hours. Ind. Code § 11-8-8-8(c). SORA also imposes corresponding requirements on law enforcement: local law enforcement must contact each offender at least once per year (at least once every ninety days if the offender is a "sexually violent predator") and must personally visit each offender at least annually (again, at least once every ninety days if the offender is a "sexually violent predator"). Ind. Code § 11-8-8-13(a).

On top of those requirements, SORA imposes additional burdens on specific categories of offenders: "sexually violent predators," "offenders against children," and

"serious sex offenders." Ind. Code §§ 35-38-1-7.5, 35-42-4-11(a), 35-42-4-14(a). These classifications stem from the commission of particular offenses. *See id.* A "sexually violent predator" must inform law enforcement whenever he plans to be absent from his home for more than 72 hours. Ind. Code § 11-8-8-18. An "offender against children" may not work or volunteer at, or reside within 1,000 feet of, school property, a youth program center, or a public park. Ind. Code §§ 35-42-4-10(c), 35-42-4-11(c). A "serious sex offender" may not enter school property. Ind. Code § 35-42-4-14(b).

C. The Plaintiffs in this Case

Plaintiffs all committed a sex offense that, at the time when committed, did not trigger registration under SORA.[2] All, except Brian Hope, committed an offense in another state and then moved to Indiana. Hope committed his offense in Indiana, moved out of the state temporarily, and then returned to live in Indiana. The DOC has determined that all six Plaintiffs must register even though they would not be required to register had they lived and committed their offenses in Indiana. (First Myers Dep. at 24 – 27; *see also* Filing No. 100-2, Second Deposition of Brian Meyers at 25 – 27). Now, a little more about each Plaintiff.

1. Brian Hope

Hope lives in Marion County, Indiana and has been homeless since 2016. (Filing No. 100-3, Affidavit of Brian Hope ("Hope Aff.") at ¶ 1). In 1993, prosecutors charged

[2] All of the Plaintiffs except Joseph Standish committed their offense prior to the enactment of SORA in 1994. Standish committed his offense in 1995, but the 1994 version of SORA did not cover his offense. The parties consider Standish to be similarly situated to the rest of the Plaintiffs, and so the court does too.

him with child molesting; in 1996, he pled guilty; and in 2000, he completed probation. (*Id.* ¶¶ 2, 3).

In 2004, Hope left Indiana and moved to Texas. (*Id.* ¶ 4). Texas officials required him to register as a sex offender in Texas due to the fact he was required to register in Indiana. (*Id.* ¶ 5). When Hope returned to Indiana in 2013, the state required him to register for the rest of his life because he qualified as an "offender against children." (*Id.* ¶ 7). He appealed that determination twice, but both the Marion County Sheriff's Department and the Indiana Department of Correction rejected his plea. (*Id.*, Attachment A., Letter from Marion County Sheriff's Department; *id.*, Attachment B, Letter from DOC).

Because Hope lacks a permanent residence and qualifies as an "offender against children," he must register once every seven days—in person—at the county sheriff's office, and this process can be time consuming. (*Id.* ¶ 13). Hope also cannot live within 1,000 feet of a park, daycare, or certain other facilities. (*Id.* ¶ 15). On at least one occasion, this requirement forced Hope to relocate from a homeless shelter because it was located within 800 feet of a park. (*Id.*).

2. Gary Snider

Snider resides in Huntington County, Indiana with his wife and adult child. (Filing No. 100-4, Affidavit of Gary Snider ("Snider Aff.") at ¶ 1). In 1994, a Michigan jury convicted Snider of criminal sexual conduct in the first degree for an offense committed in 1988; he completed his prison term in 2003. (*Id.* ¶¶ 2, 3).

That same year, he and his wife moved from Michigan to Huntington County, Indiana. (*Id.* ¶ 4). Snider registered as a sex offender until 2010 when the Huntington County Sheriff's Department informed Snider that he was no longer required to register under the Indiana Supreme Court's decision in *Wallace*. (*Id.* ¶ 6). However, he re-registered as a "sexually violent predator" in 2016 after the DOC told him *Wallace* no longer applied. (*See id.* ¶¶ 7, 8; Attachment A, 2016 Letter).

Snider must register in person every ninety-days for the rest of his life. (*Id.* ¶ 11). Like Hope, Snider cannot live within one-thousand feet of a park, daycare, or certain other facilities. (*Id.* ¶ 12). In 2006, he moved away from his wife because their house was located within 1000 feet of a daycare. (*Id.*). He cannot enter school property, which means he cannot see his grandchildren or great-grandchildren perform in school activities. (*Id.* at ¶ 13).

3. Joseph Standish

Standish resides in Allen County, Indiana with his wife and kids. (Filing No. 100-5, Affidavit of Joseph Standish ("Standish Aff.") at ¶ 1). Michigan prosecutors charged him with attempted criminal sexual conduct in the second degree in 1995; he pled no contest and was convicted in 1996; he completed probation in 2001. (*Id.* ¶¶ 2, 3).

Standish moved from Michigan to Allen County, Indiana in 2013. (*Id.* ¶ 5). After not being required to initially register by the DOC, Standish registered in 2016. (*Id.* ¶¶ 6, 7). Now registered, Standish faces the same requirements as Hope and Snider since he too is an "offender against children" and a "sexually violent predator." (*Id.* ¶ 10). And like Snider, the registration burdens have carried over to his personal life. (*See id.* ¶¶ 12

– 14). For example, Standish's son dropped out of Boy Scouts because of embarrassment when the other kids found out about Standish's status. (*Id.* ¶ 14). Standish lives constantly in a state of fear since new requirements can be added any time. (*Id.* ¶ 15).

4. Patrick Rice

Rice lives in Delaware County, Indiana. (Filing No. 100-8, Affidavit of Patrick Rice ("Rice Aff.") at ¶ 1). In 1989, Illinois prosecutors charged and convicted him of aggravated criminal sexual assault. (*Id.* ¶ 2). He completed his incarceration term in 2017. (*Id.* ¶ 5). Upon his release, Rice registered as a sex offender in Illinois. (*Id.* ¶ 7).

Rice moved to Madison County, Indiana in June of 2017 to live with his sister. (*Id.* ¶ 8). Even though Illinois required Rice to register for a period of ten years, Indiana required Rice to register for the rest of his life because he qualified as a sexually violent predator. (*Id.*).

The registration process for Madison County was tedious—to say the least. (*See id.* ¶ 10 – 12). Rice had to pay an an initial registration fee of fifty dollars and had to make multiple trips within a seventy-two-hour period to the Bureau of Motor Vehicles to obtain identification. (*Id.*). These burdens continued whenever he updated his information. He ended up making multiple trips due to changes in telephone number, e-mail address, and social media accounts. (*Id.*). These updates present a challenge because Rice does not have reliable transportation. (*Id.* ¶ 20). A few months later, Rice moved to Delaware County, where he currently resides, and had to do it all again. (*Id.* ¶

14). Like the others, Rice fears having to move again due to SORA's residency restriction. (*Id.* ¶ 22).

5. Adam Bash

Bash lives in Delaware County, Indiana. (Filing No. 100-9, Affidavit of Adam Bash ("Bash Aff.") at ¶ 1). In 1990, he pled guilty but mentally ill in Kentucky to an offense that occurred in the mid-1980s. (*Id.* ¶ 2). He was released from incarceration in 1998 and was not required to serve any term of parole or probation. (*Id.* ¶ 3).[3] After being released, Bash moved from Kentucky to Indiana around 2000. (*Id.* ¶ 5).

SORA's requirements burden Bash's financial situation, ability to travel, and ability to raise his six-year-old son. (*Id.* ¶¶ 12 – 16). SORA requires Bash to pay registration fees and change of address fees—which is difficult to do because Bash's only income comes from social security benefits. (*Id.* ¶ 13). SORA also prevents Bash from obtaining public assistance for housing due to his sex offender status. (*Id.* ¶ 14). When Bash leaves the county, he must inform the sheriff's office of his plans and must register in any county where he may stay. (*Id.* ¶ 12). In 2015, Bash and his family visited the Grand Canyon. (*Id.*). The sheriff's office required Bash to provide a list of accommodations where he would be staying and a detailed itinerary to go on the vacation. (*Id.*). And like the others, the prohibition on entering school property severely burdens Bash. (*Id.* ¶ 16). He has full legal custody of his six-year-old son but cannot

[3] Bash recently completed probation for a separate, non-sex offense. (*Id.* ¶ 6).

participate in any of his son's activities including school plays and parent-teacher conferences. (*Id.*).

6. Scott Rush

Rush resides in Pulaski County, Indiana. (Filing No. 100-10, Affidavit of Scott Rush ("Rush Aff.") at ¶ 1). In 1992, he was charged and convicted of a sex offense in Florida. (*Id.* ¶ 2). He completed his term of incarceration in 1995, and he completed his term of probation in 2005. (*Id.*). In 2017, he relocated to Indiana because of work. (*Id.* ¶ 5).

Rush qualifies as a sexually violent predator, an offender against children, and a serious sex offender. (*Id.* ¶ 10). SORA requires that he pay the yearly registration fees in addition to the change of address fees. These in-person requirements generally take more than an hour, and as a result, Rush must take an entire day off from work to register because his job is not flexible. (*Id.* ¶ 12).

Rush cannot participate in any school activities either. (*Id.* ¶¶ 13, 14). He missed all of his eighteen-year old daughter's choir concerts because he cannot show up at school functions. (*Id.*). On top of that, his daughter also has a learning disability, and he cannot attend any meetings regarding her individualized educational program held on school grounds. (*Id.* ¶ 14).

D. Procedural Posture

Plaintiffs Hope and Snider filed their joint complaint on October 21, 2016 alleging that SORA violated their right to travel, equal protection and the federal *ex post facto* clause; they also sought a preliminary injunction. (Filing No. 1). Standish joined the

case on November 6, 2016, prompting an amended complaint and a renewed motion for a preliminary injunction. (Filing Nos. 12, 14). The court heard argument on that preliminary injunction motion on February 9, 2017. (Filing No. 42). The court ultimately granted Plaintiffs' motion on April 6, 2017. (Filing No. 51).

Plaintiffs Rice, Bash, and Rush filed a complaint on December 6, 2017. The court consolidated the cases, and the parties agreed that the consolidated case would likely be resolved at summary judgment, and so, the court set a briefing schedule. (Filing No. 74). The parties then filed cross-motions for summary judgment—where the case stands today. (Filing Nos. 100, 104).

II. Legal Standard

Rule 56 authorizes the court to grant summary judgment when there is no genuine dispute as to any of the material facts and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *United States v. Z Investment Properties, LLC*, 921 F.3d 696, 699 – 700 (7th Cir. 2019) (internal quotations and citations omitted). Ordinarily on cross-motions for summary judgment, the court considers each motion separately, construing the facts and drawing all reasonable inferences from them, in the light most favorable to the nonmoving party. *Calumet River Fleeting, Inc. v. International Union of Operating Engineers, Local 150, AFL-CIO*, 824 F.3d 645, 647 – 48 (7th Cir. 2016) (internal quotations and citations omitted). Here, however, the court has accepted Plaintiffs' version of the facts as true. When this happens, the court only determines which party, if either, is entitled to judgment as a matter of law. *See Crawford v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 648 (7th Cir. 2011).

III. Discussion

Plaintiffs argue that SORA—as applied—violates their fundamental right to travel, their right to equal protection of the laws, and their right to be free from retroactive punishment.[4] The court will discuss two important cases that apply to all the issues and then take each individual challenge up in turn.

A. The *Smith* and *Wallace* Decisions

Before going any further, the court must discuss two important decisions as they relate to this case, one from the United States Supreme Court and one from the Indiana Supreme Court: *Smith v. Doe*, 538 U.S. 84 (2003) and *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009).

In *Smith*, the Supreme Court considered a constitutional challenge to the State of Alaska's sex offender registration act from convicted sex offenders. *Smith*, 538 U.S. at 105 – 06. The plaintiffs—who had been convicted prior to the enactment of the Alaska act—argued that the act violated the *Ex Post Facto* clause of the Federal Constitution because the intent of the act was to punish sex offenders and its effects were punitive in nature. *Id.* at 92. The Supreme Court disagreed. The Court concluded that the Alaska Legislature intended to create a civil, nonpunitive regime. *Id.* at 96. As to the effects of the act, the Court concluded that the act did not impose punishment because it merely placed reasonable requirements on sex offenders and any additional burdens suffered by

[4] The parties spend some time arguing over whether DOC has a "policy" of registering sex offenders or whether registration is triggered by operation of law. This is unnecessary. Plaintiffs are simply challenging SORA as applied to them by the DOC and local law enforcement.

the offender stemmed from the conviction itself. *See id.* at 98 – 105. *Smith* is particularly important here because the state defends SORA—especially against the *ex post facto* challenge—as a valid, civil regulatory scheme just like the state of Alaska did before the Supreme Court.

In *Wallace*, the second case important here, the Indiana Supreme Court considered a challenge to SORA under the Indiana Constitution. *Wallace*, 905 N.E.2d at 384. The offender committed a sex offense in 1988, pled guilty in 1989, and completed probation in 1992. *Id.* at 373. After he failed to register in 2003, a jury found the defendant guilty. *Id.* He appealed, arguing SORA violated the *ex post facto* prohibitions of the Indiana Constitution when applied to him because everything occurred prior to the Act's enactment. *Id.* The Indiana Supreme Court agreed. *Id.* at 384. It held SORA imposed punishment when applied to an offender who was charged, was convicted, and had served the sentence before the act was enacted. *Id.* Plaintiffs' claims stem from *Wallace* because that is the decision that prevents the state from registering resident sex offenders who have never left the state.

With those decisions in mind, the court now turns to Plaintiffs' challenges.

B. Right to Travel

The Constitution protects an individual's fundamental right to travel. *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003); *see also Selevan v. New York Thruway Authority*, 584 F.3d 82, 99 – 100 (2d. Cir. 2009). That right guarantees a citizen of one state (1) the right to enter and leave another state; (2) the right to be treated as a welcome visitor when temporarily present in another state;

and (3) for those who elected to become permanent residents, the right to be treated like other citizens of that state. *Saenz*, 526 U.S. at 500; *Chavez v. Illinois State Police*, 251 F.3d 612, 648 (7th Cir. 2001). A law that implicates the right to travel must survive strict scrutiny: it must be narrowly tailored to further a compelling governmental interest. *See Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 942 (7th Cir. 2016); *United States v. Holcombe*, 883 F.3d 12, 17 (2d Cir. 2018).

The court previously held, at the preliminary injunction stage, that Hope, Snider, and Standish were likely to succeed at showing SORA's registration requirement implicated their fundamental right to travel and failed strict scrutiny. (Filing No. 51, Preliminary Injunction Order at 13). The court sees no reason to reverse course with the rest of the Plaintiffs: SORA's registration requirement violates all six Plaintiffs' fundamental right to travel. More specifically, SORA violates the third component of the right to travel—the right to be treated like citizens of Indiana.

1. SORA Implicates the Right to Travel

SORA implicates Plaintiffs' right to travel because it treats them differently than sex offenders who are residents of Indiana and have never left. *See Saenz*, 526 U.S. at 500 (statute limiting welfare benefits to new residents implicated right to travel); *see also Shapiro v. Thompson*, 394 U.S. 618, 629 – 30 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) (statute denying welfare assistance to new residents implicated right to travel); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909 (1986) (plurality opinion) (statute granting benefits only to veterans who were residents of New York when they entered military service implicated right to

travel).[5] In fact, Defendants' position is that an offender "waives" the protection afforded to him by *Wallace* when he leaves the state. (Filing No. 105, Defendants' Motion for Summary Judgment at 23). That shows that an offender's right to travel is implicated.

Defendants also argue that Plaintiffs are not subjected to any *additional burdens* because their previous states of residency required them to register, but this ignores the fact that the DOC does not require registration for similarly situated sex offenders in Indiana. *See Saenz*, 526 U.S. at 502 – 504 (discussing the right to travel encompasses the right of a citizen to enjoy the same privileges and immunities enjoyed by other citizens of the same state); *see also Soto-Lopez*, 476 U.S. at 905 – 906 (plurality opinion) (favoring "prior" residents over "newer" residents implicates the right to travel).

Defendants also cite to a line of cases holding sex offender registration requirements neither offend the right to travel nor implicate it. *See e.g. Doe v. Moore*, 410 F.3d 1337, 1348 – 49 (11th Cir. 2005) (state sex offender registration requirements do not unreasonably burden sex offender's right to travel); *Holcombe*, 883 F.3d at 17 – 18 (federal sex offender registration requirements do not even implicate the right to travel). But the plaintiffs in those cases simply challenged the requirements as being too burdensome generally; they did not allege a state treated residents more favorably. *See e.g. Doe*, 410 F.3d at 1348 ("Here, however, the Appellants do not argue that they were treated differently because they were a new or temporary resident to Florida . . . .); *see*

[5] In *Soto-Lopez*, four justices held the statute violated both the right to travel and equal protection. 476 U.S. at 911. Chief Justice Burger and Justice White agreed with respect to equal protection, but not with respect to the right to travel. *Id.* at 912 (Berger, C.J., concurring in the judgment); 916 (White, J. concurring in the judgment).

also e.g. Holcombe, 883 F.3d at 17 – 18 (challenging generally the requirements of the federal sex offender registration act). Indiana makes Plaintiffs register; it does not make similarly situated residents register. That is why this case is different.

2. SORA does not Satisfy Strict Scrutiny

SORA fails strict scrutiny because Indiana has not narrowly tailored SORA to fit a compelling government interest. Indiana presses that SORA advances public safety by giving communities notice necessary to protect children from sex offenders. *See McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion) (noting sex offenders are a serious threat in the United States); *Wallace*, 905 N.E.2d at 383 (noting SORA's purpose is to give the community notice necessary to protect children from offenders). If that is so, then Indiana should require *all* sex offenders who committed their offense before SORA's enactment to register—not just new residents or prior residents who left the state and returned. The state has offered no evidence that out-of-state sex offenders or those that leave and return are inherently more dangerous than resident sex offenders, and the court can think of none. SORA is vastly underinclusive because Indiana does not make similarly situated, resident sex offenders register.

To be fair, the state wishes to register *all* sex offenders. The problem is that it cannot do so because of *Wallace*. The court recognizes this is a difficult position, but it makes no difference whether Indiana passes a discriminatory statute that says "resident sex offenders who committed their offense prior to SORA and never left the state thereafter do not have to register, but those sex offenders who migrate to Indiana or those who leave and then return do have to register" or whether Indiana passes a facially

neutral statute that says "all sex offenders must register" but then—as a matter of state constitutional law—applies it only to new or returning residents. The result is the same: Indiana is favoring its own citizens over those who migrate into the state. It is treating sex offenders who committed their crimes prior to SORA's enactment differently based solely on the travel of the offender: if he never left the state—no registration; if he left the state and returned after the enactment of SORA, or if he moved into the state after the enactment of SORA—registration. Indiana cannot deny Plaintiffs the protection of Indiana's constitution while they are in Indiana simply because they moved to the state after SORA's enactment. *Soto-Lopez*, 476 U.S. at 911 (plurality opinion) (noting once non-residents become residents of a state, they become "the State's own" and cannot be discriminated against solely based on their arrival date) (citations omitted); *see also Burton v. State*, 977 N.E.2d 1004, 1010 (Ind. Ct. App. 2012) ("The fact that [the offender's] crime was committed in Illinois does not deprive him of the protection of Indiana's constitution while he is in Indiana."), *abrogated by State v. Zerbe*, 50 N.E.3d 368, 370 n. 2 (Ind. 2016).

Defendants argue that the state also has a compelling interest in preventing the Hoosier heartland from becoming a sanctuary destination for sex offenders. But that is no different from a state limiting benefits to new residents because it does not want the state to become a sanctuary city for welfare recipients. *See Shapiro*, 394 U.S. at 631 – 33. And, as the court stated in its Preliminary Injunction Order, the statute is overbroad with respect to this purpose because the statute treats every sex offender as if he came to Indiana to avoid registering. It fails to distinguish between those migrating to avoid

registering in another state and those migrating for other reasons, such as family or work. (Preliminary Injunction Order at 15); *see also Memorial Hospital v. Maricopa County*, 415 U.S. 250, 264 (1974) (striking down state statute requiring county residency for at least a year before receiving certain medical benefits because, in part, it treated every person as if he came to the jurisdiction solely to obtain free medical care).

Defendants also liken this case to *Doe v. Neer*, 649 F.Supp.2d 952 (E.D. Mo. 2009), but the court does not find it persuasive. There, a sex offender was convicted of an out-of-state offense prior to the enactment of Missouri's sex offender act but moved to Missouri after its enactment—like Plaintiffs in this case. *Id.* at 956. The court rejected the offender's right to travel challenge even though the act did not apply to Missouri residents who committed an in-state offense prior to the enactment of the sex offender act but never left the state. *Id.* at 956 – 57.

Putting aside the fact that *Neer* has no applicability to Hope, who was convicted in Indiana, left, and then returned, the court disagrees with *Neer's* reasoning:

> Subsection (7) of Mo.Rev.Stat. § 589.400 requires all Missouri residents who were convicted of an offense in another state after July 1, 1979 to register under SORA if the same crime, if committed in Missouri, would require registration. This subsection applies regardless of the offender's residence at the time of the offense. *For example, a Missouri resident who traveled to another state and was convicted of an offense that, if committed in Missouri, would require registration would be required to register under subsection (7). Similarly, a non-resident who was convicted of the same offense would be required to register upon moving to Missouri.*

Id. at 956 (emphasis added). That, respectfully, inverts the analysis. The question here is not whether an *Indiana resident* who traveled to another state and was convicted of an offense that would be registerable in Indiana is treated the same as Plaintiffs. The

question is whether *Plaintiffs* are treated the same as a resident who committed the same offense in Indiana and then never left. To say otherwise is to say there is no right to travel violation when a state passes a statute denying welfare assistance to new residents for one year because a non-resident who moves into the state and a resident of that state who leaves and then returns are both subject to the same one-year moratorium in welfare assistance. *See Shapiro*, 394 U.S. at 642. That cannot be the case, and as such, the court finds *Neer* distinguishable.

For those reasons, Indiana's failure to provide the same benefit to Plaintiffs as it does to similarly situated residents violates Plaintiffs fundamental right to travel.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This means that states must treat similarly situated people alike. *St. Joan Antida High School Inc. v. Milwaukee Public School District*, 919 F.3d 1003, 1008 (7th Cir. 2019) (citation omitted); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006). Where, as here, a state statute burdens a person's fundamental right to travel, the state must overcome strict scrutiny. *See St. Joan Antida*, 919 F.3d at 1008; *see also Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003). Just to reiterate, strict scrutiny requires that the state show that the law is narrowly tailored to serve a compelling government interest. *Midwest Fence Corp.*, 840 F.3d at 941.

For the reasons already described under the right to travel, SORA fails strict scrutiny. SORA, as applied to Plaintiffs, differentiates between (1) out-of-state sex

offenders and resident sex offenders who leave the state and then return and (2) in-state sex offenders who never leave the state. The state offers two interests to try and justify this treatment—public safety and the fear of becoming a sanctuary for sex offenders—but as explained above, neither justification saves SORA. With respect to public safety, the means the state chooses are wholly underinclusive: it does not register resident offenders who committed their crimes in Indiana and never left the state, even though they have committed the *exact same crimes* at the *exact same point in time* as the others. *Soto-Lopez*, 476 U.S. at 905 (striking down benefits statute that favored veterans who were New York residents over those similarly situated veterans who were not New York residents at the same point in their lives). With respect to becoming a sanctuary state, the Supreme Court has rejected the notion that a state can provide a benefit to current residents and not to new ones so as not to become a sanctuary state. *Saenz*, 526 U.S. at 504. And, even if Indiana did have a compelling interest in preventing sex offenders from fleeing their home states, its measure is drastically overinclusive because it fails to account for those sex offenders who come to Indiana for other reasons like work or family.

The state advances a separate argument with respect to equal protection. Defendants argue that Indiana requires Plaintiffs to register not because of their out-of-state *conviction* in another state, but because of their out of state *registration* requirement. *See Ammons v. State*, 50 N.E.3d 143, 144 – 45 (Ind. 2016) (holding SORA does not violate *ex post facto* clause of state constitution when applied to offender who was convicted in Indiana, left the state, and then relocated back to Indiana after SORA's

enactment); *State v. Zerbe*, 50 N.E.3d 368, 370 (Ind. 2016) (holding SORA does not violate *ex post facto* clause of state constitution when applied to offender who was convicted in another state and then relocated to Indiana after SORA's enactment). But those cases prove the point under an *equal protection* analysis: the state applies a different rule to residents than it does non-residents who have engaged in the same conduct at the same time. There is no need to engage in a similarly situated analysis because everyone agrees the DOC applies SORA differently to residents than it does to Plaintiffs. *See St. Joan Antida*, 919 F.3d at 1010. And for reasons already explained, Indiana cannot satisfy the appropriate scrutiny for that differential treatment.

Indiana's application of SORA to Plaintiffs, thus, violates the equal protection clause of the Constitution.

D. Ex Post Facto

The *ex post facto* guarantees in the Constitution prohibit retroactive punishment. *See* U.S. Const., Art. I, § 9, cl. 3; Art. 1, § 10, cl. 1; *Weaver v. Graham*, 450 U.S. 24, 28 (1981). That means neither Congress nor any state can enact a law that increases the punishment for an offense already committed. *Weaver*, 450 U.S. at 28; *see also Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018). A law must be both retroactive and punishment to be characterized as an *ex post facto* law. *Vasquez*, 895 F.3d at 520.[6]

[6] Although both "retrospective" and "retroactive" have been used to describe a law that applies to past conduct, *compare Smith v. Doe*, 538 U.S. 84, 92 (2003) (retroactive), *with Weaver*, 450 U.S. at 29 (retrospective), they mean the same thing. Black's Law Dictionary (10th ed. 2014), *available at* Westlaw (defining "Retrospective" as "See Retroactive" and "Retrospective Law" as "See Retroactive Law").

1. SORA's Registration Requirements are Retroactive

A law is retroactive if it applies to events occurring before its enactment. *See Weaver*, 450 U.S. at 29; *see also Smith*, 538 U.S. at 89 – 91; *Does #1-5 v. Snyder*, 834 F.3d 696, 697 – 98 (6th Cir. 2016).

Here, SORA applies retroactively to Plaintiffs. It is undisputed that Hope, Snider, Rice, Bash, and Rush all committed their offenses prior to the SORA's enactment, and Standish committed his offense after SORA's enactment but before his specific offense was covered. Because SORA's registration requirements apply to Plaintiffs' conduct occurring before its enactment, SORA operates retroactively. *See Weaver*, 450 U.S. at 29; *Smith*, 538 U.S. at 89 – 91 (Alaska Act's registration and notification requirements were "retroactive" and covered offenders whose conduct occurred before the Act's enactment); *see also Snyder*, 834 F.3d at 697 – 98 (undisputed that 2006 and 2011 Michigan's Sex Offender Registry Act amendments applied retroactively to plaintiffs whose offenses predated those amendments).

Defendants argue that the Seventh Circuit has foreclosed this conclusion. *See United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011), *cited with approval in Vasquez*, 895 F.3d at 520. In *Leach*, the Seventh Circuit upheld an *ex post facto* challenge to the Federal Sex Offender Registration Act by an Indiana sex offender. *Leach*, 639 F.3d at 773. In doing so, the Seventh Circuit included language in the opinion that the registration requirements under the Federal Act were not retrospective. *Id.* ("[F]ederal guidelines say that an offender who was convicted before [the Federal Act] was enacted must comply with them . . . But that does not make them retrospective:

[the Federal Act] merely creates new, prospective legal obligations based on the person's prior history.").

But *Leach* does not categorically bar challenges to state sex offender legislation. The Seventh Circuit explicitly authorized an offender to challenge sex offender registration requirements as punishment:

> Logically there are only two conceivable ways in which one might argue that an *ex post facto* violation arises under [the Federal Act]: either [the offender] could contend that the criminal penalties . . . are retroactive, or *he could assert that the registration requirements . . . constitute punishment*.

Id. (emphasis added). In the first challenge, the criminal penalties for failing to register are punishment; the only question is whether they apply retroactively. The opposite is true with respect to the second type of challenge: the registration requirements apply retroactively; the only question is whether they constitute punishment. That is the point of *Leach* notwithstanding some language to the contrary: the *registration requirements*, themselves, are retroactive because they apply to an offender based on his *past* conduct; the *criminal penalties* for failing to register are not retroactive because they are based on his *future* conduct. This makes sense too because the Seventh Circuit explicitly left the door open for a future challenge to *Indiana's sex offender registration* statute. *Id.* at 772 ("And even if Indiana's system were flawed (a point on which we express no opinion . . . ."). Since Plaintiffs challenge the *registration requirements*, there is no retroactivity problem.[7]

[7] To the extent that *Leach* holds otherwise, that conclusion cannot be squared with *Smith*. In *Smith*, the Supreme Court stated the registration requirements at issue were retroactive:

2. The Effects of SORA's Registration Requirements Constitute Punishment

In addition to being retroactive, an *ex post facto* law must also punish the offender. *See Smith*, 538 U.S at 92; *Vasquez*, 895 F.3d at 520. To determine whether a law imposes punishment, the court must look to whether (1) the "legislature intended to impose punishment," and if not, (2) whether the "regulatory scheme is 'so punitive either in purpose or effect as to negate' the legislature's nonpunitive intent." *Vasquez*, 895 F.3d at 521 (quoting *Smith*, 538 U.S. at 92). Plaintiffs only argue that the statute is punitive in effect, and so the court will assume without deciding that the legislature did not intend to impose punishment and skip to the second step.

Following the Supreme Court's lead in *Smith*, the court considers five factors in determining whether SORA imposes punishment: (1) whether the law inflicts what historically and traditionally has been considered punishment; (2) whether the law imposes an affirmative disability or restraint; (3) whether the law promotes the traditional aims of punishment; (4) whether the law has a rational connection to a non-punitive purpose; and (5) whether the law is excessive with respect to its purpose. *Vasquez*, 895

> The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system. *Both are retroactive.*

Smith, 538 U.S. at 90. To be sure, the Supreme Court ultimately decided that Alaska's Act did not amount to punishment. But it was never really disputed whether the requirements were retroactive. The challenge there was the same as the challenge here: SORA's requirements constitute punishment. Accordingly, if there is any tension, *Smith* controls the outcome here.

F.3d at 521 (citing *Smith*, 538 U.S. at 97); *see also Snyder*, 834 F.3d at 701. The court turns to each now.

History and Tradition

Two important historical concepts are important here: shaming and banishment. Punishments involving shaming inflicted public disgrace and resulted in permanent stigmas. *Vasquez*, 895 F.3d at 521 (citing *Smith*, 538 U.S. at 97 – 98). SORA does just that. The Act does more than identify the offender and his conviction; it assigns them a label *based solely on the offense*—without any consideration of present dangerousness. SORA categorizes some offenders as a "serious sex offender" (all Plaintiffs in this case); some as an "offender against children" (all Plaintiffs); and some as a "sexually violent predator" (Snider, Standish, Rice, Rush). These lifelong labels shame Plaintiffs and result in a permanent stigma attached to their name for the rest of their lives. *See Snyder*, 834 F.3d at 702 – 703 (holding Michigan's Act resembled shaming because it "ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness without providing for any individualized assessment"). And SORA is even more gratuitous than the Act in *Snyder*. For example, SORA uses "sexually violent predator" instead of "tier III" offender. This is particularly disgraceful for offenders who committed their offense a long time ago such as Snider (mid-1980s) and Bash (early 1980s). Just like the Act in *Snyder*, SORA shames offenders by ascribing these lifelong labels. *Id.* at 702; *see also Schepers v. Com., Indiana Dep't of Correction*, 691 F.3d 909, 912 (7th Cir. 2012) (discussing the extra burdens sexually violent predators face). On top of that, SORA shames some offenders by including the details of the offense on the

registry. The DOC posts the details of the crime for some offenders—like Snider—on the internet:

> Details: CRIMINAL SEXUAL CONDUCT – 1ST DEGREE WITH PERSONAL INJURY – ENGAGED IN SEXUAL PENETRATION TO-WIT: ENTERED VICTIM'S VAGINA WITH PENIS CAUSING PERSONAL INJURY TO SAID CITIM [sic] AND USING FORCE OR COERCION TO ACCOMPLISH SEXUAL PENETRATION, BRUISING VICTIM'S THIGHTS [sic] HIPS, BUTTOCKS AND ARMS. VICTIM WAS A FRIEND OF THE FAMILY FOR EIGHT YEARS.

(Snider Aff., Attachment B). It is one thing to publish the offense and the conviction itself—information that did not pose a problem under *Smith*. It is quite another, on top of that, to publish the graphic details of the crime itself. These details and the permanent labels serve only to add an additional stigma above and beyond what naturally flows from the offense, and they resemble the historical practice of shaming.

SORA also resembles banishment—at least to a certain degree—because its geographical restrictions are intrusive and significant. *See Snyder*, 834 F.3d at 703. As "offenders against children," Plaintiffs cannot reside within 1000 feet of any school property, youth program center, or a public park. Ind. Code § 35-42-4-11(c). And as "serious sex offenders," they cannot enter school property. Ind. Code § 35-42-4-14(b). These prohibitions severely impact Plaintiffs. Snider once had to move away and live separately from his wife because of this requirement, and presently, he cannot participate in any of his grandchildren's or great-grandchildren's school events and activities. (Snider Aff ¶¶ 12, 13). Rice struggled to find a residence when he moved back to Indiana and lives in constant fear that a daycare may open at any time near his residence. (Rice Aff. ¶ 22). Rush cannot attend his daughter's choir concerts, and he cannot attend her

individualized education program meetings. (Rush Aff. ¶¶ 13, 14). Hope, Standish, and Bash are impacted even more so because they live in major cities (Indianapolis, Fort Wayne, and Muncie) where there are a countless number of schools and parks. Hope was required to leave a homeless shelter because it was within 800 feet of a park (Hope Aff. ¶ 15). Standish purchased a home within 1000 feet of a daycare when he was not originally required to register. (Standish Aff. ¶ 12). He also cannot participate in any school activities for his 10-year-old and 13-year-old children, including parent-teacher conferences. (*Id.*). And Bash may be impacted the worst. He has full, legal custody of his six-year old son, who attends elementary school in Muncie. (Bash Aff. ¶ 16). However, he cannot attend plays or parent-teacher conferences, and he cannot drop his son off at school. (*Id.*). While these restrictions do not force Plaintiffs to leave their communities, they significantly limit where they can live and go freely.

It is true that the Supreme Court found that Alaska's Act did not amount to shaming or banishment, and the Seventh Circuit likewise found the same with respect to the Illinois Act. *Smith*, 538 U.S. at 97 – 99; *Vasquez*, 895 F.3d at 521. However, those Acts differed considerably from SORA. The Act in *Smith* merely published already public information on the internet about the offense and did not classify or label the offender. *Smith*, 538 U.S. at 99 – 101. Nor did it restrict where offenders could move or live. *Id.* Here, SORA includes the details of the offense and permanently stigmatizes the offender. It also significantly impacts where Plaintiffs can reside and see their children. With respect to the Act in *Vazquez*, that Act restricted an offender from residing within 500 feet of a school, playground, or child-center. *Id.* at 518. Here, SORA prevents

Plaintiffs from *entering* school property, and it restricts them from living within *1000 feet* of school property, a youth program center, or a public park. SORA simply sweeps much more broadly.

Accordingly, SORA resembles the traditional forms of shaming and banishment. This factor weighs in favor of treating SORA as punishment.

Affirmative Disability or Restraint

The next factor in the analysis is whether SORA imposes an affirmative disability or restraint on Plaintiffs. A regulation that imposes only minor restraints is unlikely to be considered punishment. *See Smith*, 538 U.S. at 100 ("If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.").

SORA, however, severely restricts Plaintiffs' liberty. In addition to the residency restrictions and the school property prohibition, SORA imposes demanding registration and reporting requirements. SORA requires all Plaintiffs to report *in person* at least once annually and Snider, Standish, Rice, and Rush to report in person every 90 days. Ind. Code §§ 11-8-8-14, 11-8-8-14(b). SORA requires homeless offenders, like Hope, to report in person every seven days. Ind. Code § 11-8-8-12. These encounters can take anywhere from twenty to forty minutes, and when factoring other variables such as travel and having to wait in line, they can take one to two hours. (Hope Aff. ¶ 13). If any of their information changes, Plaintiffs must report that change to the sheriff's office within 72 hours. Ind. Code § 11-8-8-8(c). If a "sexually violent predator" travels anywhere away from his residence for more than 72 hours, he must inform law enforcement—which can sometimes entail providing a detailed itinerary of where they will be. Ind.

Code § 11-8-8-18; (*see also* Bash Aff. ¶ 12). Moreover, these reporting requirements go both ways: local law enforcement must contact and visit all offenders yearly—every 90 days if the offender is a sexually violent predator. Ind. Code § 11-8-8-13(a).

Registration and reporting cost money too. Each Plaintiff must pay a $50.00 annual registration fee in the county where he resides. (*See e.g.* Rice Aff. ¶¶ 9, 15). If required to register in another county, he must also pay the $50.00 fee for that county too. (*Id.*). Indiana law authorizes charging a $5.00 "address change" fee; however, some Plaintiffs have paid this fee for other changes such as buying a new car or getting a new haircut. (*See e.g.* Bash Aff. ¶ 10). These fees particularly burden Bash, whose only income comes from disability and social security benefits and who is raising a child without financial support from the child's mother. (*Id.* ¶ 13). SORA also indirectly costs offenders. Rush must take an entire day of work off every 90 days to register because he lives six miles from the sheriff's office and the process takes longer than an hour. (Rush Aff. ¶ 12). Rush is also ineligible for housing assistance—either from non-profits like Habitat for Humanity or from the federal government. (Bash Aff. ¶ 14); *see also* 24 C.F.R. § 982.553(a)(2)(i) (prohibiting admission to HUD's Housing Choice Voucher program if any member is subject to a lifetime registration requirement under a State sex offender registration program). Even though no one is "actually being lugged off in cold irons bound," these requirements are far from minor or indirect. *See Snyder*, 834 F.3d at 703; *cf. Vasquez*, 895 F.3d at 521 ("Although the Illinois residency restrictions limit where sex offenders may live, the statute does not control any other aspect of their lives and thus does not resemble the comprehensive control of probation and supervised

release."); *cf. Smith*, 538 U.S. at 101 ("The Alaska Statute . . . does not require [periodic] updates to be made in person."); *id.* ("[O]ffenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision.").

Because SORA imposes severe restraints on Plaintiffs, this factor weighs in favor of treating the Act as punishment.

Traditional Aims of Punishment

The third consideration is the extent that SORA advances the traditional aims of punishment. *Vasquez*, 895 F.3d at 522 (citing *Smith*, 538 U.S. at 102); *see also Snyder*, 834 F.3d at 704. This inquiry focuses on whether the act is retributive. *Vasquez*, 895 F.3d at 522.

SORA serves the traditional goal of retribution. As did the Act in *Snyder*, SORA imposes severe restrictions and a community stigma on an offender based *solely* on a past criminal offense. *Snyder*, 834 F.3d at 704. Others who engage in similar conduct but who are not convicted of an offense do not have to register. This suggests the state is seeking punishment for the offender's past conduct—not present dangerousness. *See Smith*, 538 U.S. at 113 (Stevens, J. dissenting) ("No matter how often the Court may repeat and manipulate multifactor tests . . . it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment.") (emphasis in original). Labeling offenders as sexually violent predators and including the details of an offender's crimes only reinforces the conclusion that SORA seeks to punish the offenders for their past offenses. *Snyder*, 834 F.3d at 704 (holding Michigan's Act advances all the

traditional aims of punishment including retribution); *Wallace*, 905 N.E.2d at 382 (treating the effects of SORA as punitive).

As such, the court finds that this factor weighs in favor of treating SORA as punishment.

Rational Connection to a Non-punitive Purpose and *Excessiveness*

The fourth and fifth factor concern whether SORA is rationally connected to a nonpunitive purpose, and whether its requirements are excessive. *Smith*, 538 U.S. at 102; *Vasquez*, 895 F.3d at 523.

As already discussed, Indiana has an interest in protecting children—few can argue with that as a general proposition. *Vasquez*, 895 F.3d at 522. But the evidence before the court suggests that Indiana has overstated the dangerousness posed by sex offenders relative to the other criminal population. (*See* Filing No. 100-12, Indiana DOC Recidivism Rates 2005 – 2007 at 18 – 22). According to the DOC's research, the recidivism rates for sex offenders were only marginally higher than that of all other offenders. (*Id.* at 18) (about three percent for 2005, about two percent for 2006, and about five percent for 2007). Moreover, the majority of sex offenders recidivate because of technical violations—violations of parole or probation—not because of new charges. (*Id.* at 21) (about 80% rate for technical violations in 2005, about 74% rate for technical violations in 2006, and about 70% rate for technical violations in 2007). The recidivism rate for sex offenders committing a new *sex offense* is very low. (*Id.* at 22) (between five and six percent for all three years). All of this shows that sex offenders pose no more of a risk than regular offenders. *Cf. Smith*, 538 U.S. at 103 (noting the legislature in Alaska

had grave concerns over the high rate of recidivism among convicted sex offenders). If anything, the evidence suggests that SORA may increase recidivism since most sex offenders recidivate due to a technical violation. *See also* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 192 (2011) (noting sex offender notification requirements may encourage recidivism among registered offenders).

Even giving deference to Indiana's decision to target sex offenders, SORA's requirements simply go too far. The three-tier classification system with stigmatizing labels; the in-person registration and change of information requirements; the fees; the residency restrictions; the school property prohibition; and the vacation reporting requirements—when considered as a whole—resemble less of a calculated policy judgment and more of a type of "byzantine code governing in minute detail the lives of the state's sex offenders." *See Snyder*, 834 F.3d at 697 (citation omitted). The state imposes these requirements on many offenders *for life*—without any assessment as to their present dangerousness.[8] While SORA conceivably keeps "the stereotypical playground-watching pedophile" away from schools, *Snyder*¸ 834 F.3d at 705, it also keeps away parents who simply wish to parent their children and attend their activities.

[8] The statute does permit offenders to challenge their registration requirement. However, as the record here indicates, this route seems futile. Hope challenged his registration requirement in this case and simply received a letter in response saying he was required to register for life because he was an Offender against Children. (Hope Aff., Attachment A, Letter from Marion County Sheriff). He appealed that determination and received an even shorter letter saying the decision was correct *because of his past offense*. (Hope Aff., Attachment B) (emphasis added). There was no inquiry into Hope's present dangerousness (almost 20 years later). The state has not offered any evidence that it has removed offenders based on a challenge under this section.

(Rush Aff. ¶ 13); (Bash Aff. ¶ 16). The state has not offered *any* evidence as to how SORA's requirements accomplish its goals. *See Hoffman v. Village of Pleasant Prairie*, 249 F.Supp.3d 951, 960 (E.D. Wis. 2017) (village ordinance restricting sex offenders not rationally connected to its purpose where village presented no evidence that the ordinance furthered the village's goals). And while the state is not required to demonstrate a tight fit between its policy and its goals, it must tailor the policy in *some* way: the state cannot use a sledgehammer to swat a bee. *Smith*, 538 U.S. at 105 (regulatory means must be reasonable); *Snyder*, 834 F.3d at 705 (finding Michigan's Act excessive because the punitive effects of the restrictions far outweighed its salutary effects). Accordingly, SORA's requirements cannot be said to be rationally related to its purpose because the requirements are far too excessive.

Defendants argue that Plaintiffs are not punished because although they committed their offenses *before* SORA's enactment, they moved into the state *after* the enactment of the relevant amendments, and so they were on notice of the requirements when they moved to the state. *State v. Zerbe*, 50 N.E.3d 368, 370 – 71 (Ind. 2016) (holding SORA did not violate *ex post facto* clause of the State Constitution as applied to an offender who moved into Indiana because the offender's other state registry requirement triggered SORA's obligations, not his past crime); *Ammons v. State*, 50 N.E.3d 143, 144 – 45 (Ind. 2016) (same). But the reason an offender is registered in another state is because of his sex *offense*: but for an offender's conviction, he would not be subject to *any* registration requirements. *See also Burton v. State*, 977 N.E.2d 1004, 1009 (Ind. Ct. App. 2012) (noting an offender's registration requirement is imposed by virtue of the conviction),

abrogated by Zerbe, 50 N.E.3d 368, 370 n. 2 (Ind. 2016). SORA, itself, reinforces this point because the requirements in the statute are tailored to an offender's offense—not the state of conviction. For example, the state classifies offenders as "sexually violent predators" or "offenders against children" or "serious sex offenders" because of the offender's offense, not the state from which he came. Defendants even state in their brief that the purpose of the statutes is to govern sex offenders:

> The applicable Indiana statutes govern sex offenders, not non-residents. Indiana treats the plaintiffs the way it does because they are convicted of sex offenses and are present in Indiana and thus pose a threat to their potential Indiana victims. Registration is not based on being non-residents or new residents or visitors but is based on plaintiffs' status as sex offenders.

(Filing No. 105, Defendants Motion for Summary Judgment at 20). That "status"—whether imposed by Indiana or another state—comes from the offense itself. Simply put, the relevant date for Plaintiffs' *ex post facto* challenge is the date of the commission of their crime, not the date they moved to Indiana. *See Snyder*, 834 F.3d at 697 – 98.

When considered as a whole, SORA's effects are punitive as applied to Plaintiffs, and these punitive effects outweigh the Act's non-punitive, regulatory purpose. SORA restricts where Plaintiffs live and where they can go; it places time-consuming registration burdens on them; and, among other things, it subjects them to a lifetime status of being stigmatized—in some cases as a "sexually violent predator." Because SORA imposes retroactive punishment, it violates the Constitution's prohibition of *ex post facto* laws. *Snyder*, 834 F.3d at 705 – 06 (holding Michigan's Act violated the *ex post facto* clause of the Constitution).

IV. Conclusion

For the reasons above, SORA violates Plaintiffs' fundamental right to travel, Plaintiffs' right to equal protection of the laws, and the Constitution's prohibition against retroactive punishment. Defendants' Motion for Summary Judgment (Filing No. 104) is therefore **DENIED**. Plaintiffs' Motion for Summary Judgment (Filing No. 100) is **GRANTED**.

IT IS THEREFORE ORDERED that:

The Commissioner of the Indiana Department of Correction, as well as his officers, agents, servants, employees, and attorneys, is hereby **PERMANENTLY ENJOINED** from enforcing the Indiana Sex Offender Registration Act, Ind. Code § 11-8-8-1, *et seq.*, against Plaintiffs, or from requiring their registration as sex or violent offenders in any manner.

The Sheriffs of Marion County, Huntington County, Allen County, Delaware County, and Pulaski County as well as their officers, agents, servants, employees, and attorneys, are hereby **PERMANENTLY ENJOINED** from enforcing the Indiana Sex Offender Registration Act, Ind. Code § 11-8-8-1, *et seq.*, against Plaintiffs, or from taking any other action against Plaintiffs as a result of their failure to register as sex or violent offenders.

The Prosecutors of Marion County, Huntington County, Allen County, Delaware County, and Pulaski County as well as their officers, agents, servants, employees, and attorneys, are hereby **PERMANENTLY ENJOINED** from taking any action against Plaintiffs as a result of their failure to register as sex or violent offenders.

Final judgment will issue by separate order.

SO ORDERED this 9th day of July 2019.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN HOPE, GARY SNIDER, and JOSEPH STANDISH Plaintiffs, v. COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, *et al.* Defendants.	)	1:16-cv-02865-RLY-TAB
PATRICK RICE, ADAM BASH, and SCOTT RUSH Plaintiffs, COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, *et al.* Defendants.	)	

FINAL JUDGMENT

Today, the court granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Motion for Summary Judgment. The court now enters final judgment in favor of the Plaintiffs and against Defendants. As fully explained in the Summary Judgment Entry, Defendants are permanently enjoined from registering Plaintiffs under

Indiana's Sex Offender Registration Act.

SO ORDERED this 9th day of July 2019.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk
United States District Court

By: Deputy Clerk

Distributed Electronically to Registered Counsel of Record.