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

# REPLY BRIEF OF APPELLANTS COMMISSIONER OF INDIANA DEPARTMENT OF CORRECTION, *et al.*

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## SUMMARY OF THE ARGUMENT

Indiana, like every other State in the Union, imposes comprehensive registration-and-notification requirements on individuals convicted of sex offenses. *See* Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999), https://www.csom.org/pubs/sexreg.html. And Indiana's Sex Offender Registration Act (SORA) provides two independently sufficient statutory grounds for imposing these requirements on each of the six Plaintiffs in this case: They have each been (1) convicted of an Indiana registrable offense, Ind. Code § 11-8-8-5(a)(3), or an out-of-state offense "substantially equivalent" to such an offense, *id.* § 11-8-8-5(a)(24), and (2) "required to register" in another State, *id.* § 11-8-8-5(b)(1). *See* Appellants Br. 22–25. They therefore must register unless some constitutional provision bars the State from requiring them to do so.

The Indiana Constitution raises no such bar: The Indiana Supreme Court has held that Indiana's Ex Post Facto Clause does not apply to sex offenders who, like Plaintiffs, have been required to register in other States; for such offenders the marginal effects of applying SORA are insufficient to render the law punitive. *Id.* at 21–22. Accordingly, the only question this case raises is whether the federal Constitution's Privileges Or Immunities, Equal Protection, or Ex Post Facto Clauses preclude the State from applying SORA to Plaintiffs. They do not.

With respect to the Privileges Or Immunities Clause, the parties' only dispute is whether, in not exempting Plaintiffs from SORA under the State's Ex Post Facto Clause, the Indiana Supreme Court's decisions discriminate against Plaintiffs based

on the duration of their Indiana residency. These decisions do not do so. They articulate one simple rule: Because the punitiveness of a law depends on the *marginal* effects of applying it, and because applying SORA to an offender who "was *already* under an obligation to register . . . do[es] not impose any *additional punishment*," applying SORA to offenders who have had to register in other States creates "no ex post facto violation." *Ammons v. State*, 50 N.E.3d 143, 145 (2016) (emphasis added). This rule is plainly unconcerned with the duration of any offender's residency.

The arguments Plaintiffs make in response to this straightforward conclusion misunderstand both Indiana law and the State's point. They argue that the Indiana Supreme Court's marginal-effects test cannot explain why SORA requires an offender with a "substantially equivalent" offense to register, *see* Appellees Br. 24–26, but this confuses SORA's *statutory* requirements with the *constitutional* test used to evaluate claims under the State's Ex Post Facto Clause. The marginal-effects test does not explain why SORA requires Plaintiffs to register in the first instance; it explains why Indiana's Constitution does not prevent the State from applying SORA to them.

Plaintiffs also incorrectly assume that the State has discussed the marginal-effects test in order to *justify* what would otherwise be an unconstitutional durational-residency requirement. Appellees Br. 27–29. The Indiana Supreme Court's marginal-effects test, however, is *the reason why no such discrimination has occurred in the first place*. The Indiana Supreme Court's decisions applying Indiana's Ex Post Facto Clause to SORA do not impose any durational-residency requirement. The Privileges Or Immunities Clause is thus simply not implicated.

Because the rule the Indiana Supreme Court has adopted to reconcile SORA with the requirements of the State's Ex Post Facto Clause do not implicate the Privileges Or Immunities Clause, the Equal Protection Clause requires only that the rule have a rational basis. It clearly does. It strikes a sensible balance between furthering the value of fair notice and protecting Indiana's citizens from offenders who are especially likely to reoffend. There is nothing unreasonable—much less unconstitutionally irrational—about extending state ex post facto protections only to those applications of state law that have the most significant marginal consequences.

Finally, applying SORA to Plaintiffs does not violate the federal Ex Post Facto Clause. "[A] statute is not an impermissible ex post facto law unless it is *both* retroactive *and* penal," and this Court has repeatedly held that sex offender registry laws like SORA are neither. *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018); *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011); *United States v. Meadows*, 772 F. App'x. 368, 369-370 (7th Cir. 2019). Indeed, in *Smith v. Doe*, 538 U.S. 84, 92 (2003), the Supreme Court upheld an Alaska registry law that is similar to SORA in all material respects. Plaintiffs scarcely attempt to distinguish their suit from *Smith* or this Court's decisions. For good reason: It cannot be done. Applying SORA to Plaintiffs is not retroactive because SORA "merely creates new, prospective legal obligations based on the person's prior history." *Leach*, 639 F.3d at 773. Nor is it punitive, because Plaintiffs have "not identified any aspects" of the law "that distinguish this case from *Smith*" or this Court's own cases. *Id.* Precedent thus doubly forecloses Plaintiffs' Ex Post Facto Clause claim.

## 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

1. As the State observed in its opening brief, the Supreme Court has only rarely invalidated state laws for infringing the purported "right to travel" under the Privileges Or Immunities Clause; each time it has done so, the law at issue allotted welfare benefits, tax exemptions, or voter eligibility in a manner that "discriminate[d] against some . . . citizens" based on how long "they have been domiciled in the State." *Saenz v. Roe*, 526 U.S. 489, 504 (1999); *see also Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 614–15 (1985); *Zobel v. Williams*, 457 U.S. 55, 56 (1982); *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250, 251 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 622 (1969); *see generally* Appellants Br. 33–34.

It is unclear whether or how far the Privileges Or Immunities Clause may extend beyond these narrow contexts, but it is unnecessary for this Court to answer that question here: The Clause clearly goes no further than prohibiting durational-residency requirements in general, and the State's application of SORA to Plaintiffs has nothing to do with the duration of their residency. That alone is sufficient to bar Plaintiffs' Privileges Or Immunities Clause claim.

Indeed, Plaintiffs acknowledge that that the Clause merely prohibits "discrimination based on duration of residency." *See* Appellees Br. 20; *see also id.* at 21

("[D]urational-residency requirements implicate the right to travel and are untenable."); *id.* at 32 (explaining that the Clause "requires a comparison between how *newer residents* of one state are treated vis-à-vis *older residents* of the same state") (emphasis added). Accordingly, the parties' only dispute on this issue is whether, in applying SORA to Plaintiffs, the State has in fact discriminated against them based on the duration of their Indiana residency.

The State has not done so. Two separate provisions of SORA trigger Plaintiffs' registration requirement. *See generally* Appellants Br. 22–25. First, what Plaintiffs call SORA's "other jurisdiction" provision, Appellees Br. 6, requires each of the six Plaintiffs to register in Indiana because they were "required to register as a sex or violent offender in any jurisdiction." Ind. Code § 11-8-8-5(b)(1). Second, SORA's "substantially equivalent" provision, *id.* § 11-8-8-5(a)(24), requires five of the six Plaintiffs to register because they were convicted in other States of offenses that are similar to Indiana registrable offenses (the sixth, Brian Hope, must register because he was convicted of an Indiana registrable offense, *see id.* § 11-8-8-5(a)(3)). Plaintiffs do not argue that any of these provisions are unconstitutional. Understandably so: These provisions, which Indiana shares with many other States, treat all offenders equally without respect to the length of their residence. *See, e.g.,* Ark. Code §§ 12-12-903(13)(A)(v), 12-12-906(a)(2)(A)–(C); Ky. Rev. Stat. §§ 17.500(8)(c), 17.510(7); Me. Rev. Stat. tit. 34-A, §§ 11273(14), 11283; Md. Code. Crim. Proc. §§ 11-701(j)(3), 11-704(a)(4); Neb. Rev. Stat. § 29-4003(1)(a)(ii), (1)(a)(iv); N.Y. Correct. Law § 168-

a(2)(d); Tenn. Code §§ 40-39-202(1), 40-39-203(a)(2); Utah Code § 77-41-102(17)(b), (c); W. Va. Code §§ 15-12-2(i), 15-12-9(b)–(c).

Because SORA itself plainly does not impose a durational-residency requirement, Plaintiffs merely object to the rule the Indiana Supreme Court has adopted in the course of applying the State's Ex Post Facto Clause to this statute. Yet the Indiana Supreme Court's rule is equally unrelated to residency duration. As the State explained in its opening brief, Appellants Br. 17–22, the Indiana Supreme Court has repeatedly held that the application of a law violates the State's Ex Post Facto Clause only where its *marginal* effects are punitive; as applied to SORA, this marginal-effects test means that requiring registration by an offender who "was *already* under an obligation to register" in another State "do[es] not impose any *additional punishment*" and thus does not constitute an "ex post facto violation." *Ammons v. State*, 50 N.E.3d 143, 145 (2016) (emphasis added); *see Tyson v. State*, 51 N.E.3d 88, 96 (2016); *State v. Zerbe*, 50 N.E.3d 368, 370 (2016).

Under these decisions, whether SORA can be applied to an offender whose criminal conduct predates the statute turns on whether he has already been required to register, not whether he is a recent Indiana resident; these decisions would thus *permit* applying SORA if he were a lifelong Hoosier whose out-of-state travel triggered another State's registration requirement, while they would *prohibit* applying SORA if he were a recent resident whose prior State did not require registration. *See generally* Appellants Br. 35–36. It could not be clearer that under these decisions the

State applies SORA to Plaintiffs solely because they have been required to register in other States—not because of how long they have lived in Indiana.

2. Plaintiffs do not attempt to challenge the State's interpretation of the Indiana Supreme Court's decisions. *Tyson*, *Zerbe*, and *Ammons* are not quoted at all in Plaintiffs' brief, and the decisions are hardly even cited, with *Zerbe* mentioned just three times, *Tyson* twice, and *Ammons* not at all. *See* Appellees Br. 1, 6, 34.

Instead, Plaintiffs have simply confused the issue. In attempting to dispute the straightforward conclusion that the State applies SORA without regard to the duration of an offender's residency, Plaintiffs have profoundly misunderstood both Indiana law and the point the State is making.

Plaintiffs first misconstrue the significance of the Indiana Supreme Court's marginal-effects test. They contend that it "only attempts to address [the State's] 'other jurisdiction' requirement" because "under the 'substantial equivalency' requirement a person who relocates to Indiana after the enactment of SORA is required to register *even if he was never subject to a registration requirement in any other jurisdiction* . . . ." Appellees Br. 25–26 (emphasis in original). This argument confuses the *statutory* provisions of SORA with the *constitutional* test used to evaluate claims under the State's Ex Post Facto Clause. It is true—considered only as a matter of Indiana *statutory* law— that the "substantial equivalency" provision applies whether or not an offender has been required to register. But this is only half the story. Once

SORA's statutory provisions are triggered, the question becomes whether—as a matter of Indiana *constitutional* law—the State's Ex Post Facto Clause prevents the State from applying SORA to Plaintiffs.

Plaintiffs have never contended SORA's provisions themselves violate the Privileges Or Immunities Clause; they object only to the fact that Indiana's Ex Post Facto Clause does not withdraw them from SORA's reach. The marginal-effects test explains why: They have each been required to register in another State. Because that rule does not discriminate against Plaintiffs on the basis of the duration of their Indiana residency, it does not violate the Privileges Or Immunities Clause.

Plaintiffs' confusion between statutory provisions and constitutional tests also underlies their mistaken assertion that the marginal-effects test "does not even attempt to explain the registration requirement of two of the plaintiffs" (i.e., Gary Snider and Brian Hope). Appellees Br. 24. Plaintiffs' argument seems to be that (1) the marginal-effect's test can "explain" only SORA's "other jurisdiction" provision and (2) this provision cannot apply to Snider and Hope—not to Snider because he moved to Indiana after this provision was added to SORA and not to Hope because "the only reason that he was required to register in Texas was that he had been required to register in Indiana." *Id.* at 26. As explained above, this argument's first premise is incorrect: The marginal-effects test does not "explain" SORA's "substantial equivalency" *or* "other jurisdiction" provision; it instead explains why the State's Ex Post Facto Clause permits these provisions to be applied to Plaintiffs. The argument's second premise is wrong as well. By its terms, SORA's "other jurisdiction" provision *does*

apply to Snider; whether the Ex Post Facto Clause prohibits the State from applying it to Snider is a question answered by the marginal-effects test.[1] And although Hope claims he was told his Indiana registration was the only reason Texas required him to register, he is likely mistaken: Unlike SORA, Texas's registry law is apparently *not* triggered by out-of-state registration, *see* Tex. Code Crim. Proc. Ann. art. 62.001, and Hope was instead likely required to register because his offense is "substantially similar" to a Texas registrable offense, s*ee id.* 62.001(5)(H).[2]

Similarly, Plaintiffs' mistaken conflation of statutory and constitutional rules explains why they are wrong to claim that the description of the marginal-effects test—provided here by the State's chief legal officer, s*ee* Ind. Code § 4-6-2-1; *State ex rel. Sendak v. Marion Cty. Superior Court, Room No. 2.*, 373 N.E.2d 145, 149 (Ind. 1978)—is "directly contrary" to a single statement agreed to by an Indiana Depart-

[1] Plaintiffs claim that the State—via the deposition testimony of an Indiana Department of Correction official—has "acknowledge[d] that [Snider']s registration requirement exists *solely* because he relocated to Indiana after the enactment of SORA and has absolutely nothing to do with an out-of-state registration." Appellees Br. 26 (emphasis in original) (citing ECF 100-1 at 25). This is incorrect. The Department official simply explained that—as a matter of Indiana *statutory* law—Snider was required to register under SORA's "substantial equivalency" provision because he "committed an offense that is equivalent to an Indiana code offense." ECF 100-1 at 25. That is a correct statement of what SORA requires. The official was not asked why—as a matter of Indiana *constitutional* law—SORA can be applied to Snider in spite of the State's Ex Post Facto Clause. He repeatedly noted that he was answering the Plaintiffs' questions simply from the perspective of Indiana's *statutory* requirements. *See, e.g., id.* at 38, 40 (specifically referring to the Indiana Code). When it comes to the Indiana *Constitution*, the Department does "not take affirmative steps" to identify individuals who might be able to assert an Ex Post Facto Clause defense against registration. *Id.* at 21; *see also* ECF 100-2 at 8 (explaining that the Department's determinations are "all based on Indiana Code").

[2] The State made this point in its opening brief, Appellants Br. 23, and Plaintiffs have failed to respond to it.

ment of Correction official. Plaintiffs note that this official—a non-lawyer who repeatedly referred to the regular need to seek legal advice regarding the details of Indiana law, ECF 100-2 at 41, 44, 50—agreed when presented with the following statement: When a person convicted of a "pre-SORA" offense moves to Indiana "one thing the DOC will look to is whether at the time that person [relocated] to Indiana the offense of which the person was convicted or its out of state equivalent was listed as a registerable offense under Indiana law." Appellees Br. 25 (brackets in original) (quoting ECF 100-2 at 15). This statement, however, accurately describes Indiana law. Plaintiffs misinterpret it because they have persistently conflated Indiana's statutory and constitutional rules: Though the *statutory* "substantial equivalency" provision does not consider out-of-state registration, Indiana *constitutional* law does.

This official explained exactly this point later in the deposition. He was asked: "If someone was convicted in Indiana of a sex offense before the enactment of SORA and thereafter travels out of state for a short period of time . . . does that person have to register in Indiana upon their return to the state?" ECF 100-2 at 21–22. He answered that he could not answer without knowing whether "they have an obligation to register in the other jurisdiction," explaining that "[i]f there was a requirement to register in another jurisdiction, then likely that individual would be required to register in the state as well." *Id.* at 22. That is a precisely correct statement of the test articulated in the Indiana Supreme Court's decisions.

3. Finally, Plaintiffs' last argument goes beyond confusing the State's statutory and constitutional rules to misconstrue the very argument the State is making. Plaintiffs contend that the State's reliance on the marginal-effects test "cannot be squared with *Saenz*," Appellees Br. 24, because "the statute at issue in *Saenz* implicated the right to travel regardless of the requirements imposed in a person's state of origin," *id.* at 29. This argument, however, mistakenly understands the State to be offering the marginal-effects test as a *justification* for durational-residency discrimination. It is not; the marginal-effects test is instead *the reason why no such discrimination has occurred* in the first place.

In *Saenz*, the statute at issue contained an express durational residency requirement, which meant that it implicated the Privileges Or Immunities Clause and required California to provide an adequate justification. As Plaintiffs point out, California argued that "because the [benefit] for new California residents 'remains the same as it was in their state of prior residence . . . they suffer no harm cognizable by this Court.'" *Roe v. Anderson*, 134 F.3d 1400, 1405 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999) (ellipsis in original) (quoted in Appellees Br. 29 n.7). That is not the case here: Neither SORA nor the Indiana Supreme Court's Ex Post Facto Clause jurisprudence impose any durational-residency requirement, which means the Privileges Or Immunities Clause is not implicated here at all.

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

Because the rule articulated in the Indiana Supreme Court's decisions does not implicate the Privileges Or Immunities Clause, it is merely subject to rational-basis scrutiny under the Equal Protection Clause. The rational-basis "standard of review

is a paradigm of judicial restraint" and requires deferring to the State "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, 314 (1993).

The rule Plaintiffs challenge generally bars the State from applying SORA to offenders whose criminal conduct predates the statute's enactment, but permits the State to do so if the offender has already been required to register by another State. This state-constitutional-law rule plainly passes muster under the federal Constitution, for it merely limits the reach of SORA, a statute that serves what Plaintiffs concede is the State's "compelling interest in promoting public safety." Appellees Br. 33. And "it is by now clear that under rational basis scrutiny a legislature may attack a problem one step at a time; it need not pursue the most comprehensive approach to the presented goal, only one that rationally furthers that goal." *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1303 n.5 (7th Cir. 1990); *see also id.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981), for the proposition that "underinclusiveness not fatal in rational basis review"); *Johnson v. Daley*, 339 F.3d 582, 596 (7th Cir. 2003) (en banc) ("The ability to take one step at a time, to alter the rules for one subset (to see what happens) without changing the rules for everyone, is one of the most important legislative powers protected by the rational-basis standard.").

The rational-basis test thus permits the State to apply SORA to Plaintiffs while, for the sake of the fair-notice principles underling the State's Ex Post Facto Clause, not applying it to offenders for whom the *marginal* effects would be punitive—namely, those who have never been required to register by any other State.

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

Sex offender registry laws are neither new nor uncommon. They have existed for well over half a century, and for at least the last twenty-three years every State has had one. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). And neither the Supreme Court nor this Court has ever invalidated such a law under the Ex Post Facto Clause. In *Smith* the Supreme Court rejected an Ex Post Facto challenge to Alaska's sex offender registry law, and over the course of several decisions this Court has rejected such challenges to sex offender registry laws adopted by the federal government, Illinois, and Wisconsin. *See United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011) (upholding federal Sex Offender Registration and Notification Act); *United States v. Meadows*, 772 F. App'x. 368, 369-370 (7th Cir. 2019) (same); *Vasquez v. Foxx*, 895 F.3d 515, 522 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 797 (2019) (upholding provision of Illinois sex offender registry law that imposed residency restrictions on child sex offenders); *Mueller v. Raemisch*, 740 F.3d 1128, 1133 (7th Cir. 2014) (upholding Wisconsin's requirement that sex offender registry information be continually kept up-to-date).

This Court has rebuffed these challenges because a law violates the federal Ex Post Facto Clause only if "it is *both* retroactive *and* penal," and the sex offender registry laws this Court has previously considered fulfill neither of these conditions. *Vasquez*, 895 F.3d at 520. And because Plaintiffs have failed to distinguish SORA from the laws this Court has already upheld, their Ex Post Facto Clause claim fails.

### A. SORA imposes prospective obligations, not retroactive consequences

With respect to retroactivity, Plaintiffs concede that this Court's decisions in *Vasquez* and *Meadows* "both appear to treat restrictions that post-date individuals' sex offenses as non-retroactive." Appellees Br. 39. And SORA, like the laws at issue in these cases, is not retroactive because it "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*, 895 F.3d at 520. That dooms Plaintiffs' claim at the outset.

Plaintiffs attempt to salvage their claim by suggesting that the holdings of *Vasquez* and *Meadows* are contradicted by decisions—such as the Supreme Court's decision in *Smith* and this Court's decision in *Mueller*—that instead reject Ex Post Facto Clause claims on the ground that the statutes are not punitive. Appellees Br. 38–40. But because failing to satisfy either the retroactivity or the punitiveness prong is sufficient to foreclose an Ex Post Facto Clause claim, any discussion of retroactivity in these decisions is dicta: Any discussion of retroactivity is by definition unnecessary to a holding that such a claim fails on the punitiveness prong. *See Holloway v. J.C. Penney Life Ins. Co.*, 190 F.3d 838, 842 n.1 (7th Cir. 1999) (explaining that discussion in a decision that is not necessary to the holding is dicta and therefore not binding); *Bae v. Peters*, 950 F.2d 469, 478 (7th Cir. 1991) (same).

Moreover, to support their retroactivity argument Plaintiffs principally rely on *Leach*, a decision whose holding is precisely the opposite of what Plaintiffs claim. *See*

Appellees Br. 38–39 ("*Leach* did not, however, doubt that the registration requirements were being retroactively applied."). Contrary to Plaintiffs' suggestion, this Court has read *Leach* to hold that sex offender registry laws are *not* retroactive. *See Vasquez*, 895 F.3d at 520 (noting that "*Leach* is conclusive on the retroactivity question" and then holding the law at issue was not retroactive).

This Court was right to do so. In *Leach* the Court observed that an offender might challenge the federal Sex Offender Registration and Notification Act (SORNA) under one of two theories—"that the criminal penalties under 18 U.S.C. § 2250(a) are retroactive, or . . . that the registration requirements under 42 U.S.C. § 16913 constitute punishment." 639 F.3d at 772. It then noted that the offender was not making the first argument, "that § 2250(a) retrospectively targets conduct that was lawful before the statute was enacted"; he was instead making 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. After clarifying which argument the offender was making, the Court held that while section 16913's 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." *Id.* (emphasis added). It thus held that SORNA is not retrospective and that the offender's Ex Post Facto Clause claim failed for that independently sufficient reason. *See id.* (beginning its discussion of the punitiveness prong by noting that "[t]o violate the Ex Post Facto Clause, *moreover*, a law must be both retrospective *and* penal" (first emphasis added)).

In response, Plaintiffs assert that *Leach*'s discussion of retroactivity is irrelevant here because it addresses "the first type of violation" under the Ex Post Facto Clause—*i.e.*, the argument "'that the criminal penalties under 18 U.S.C. § 2250(a) are retroactive.'" Appellees Br. 38 (quoting *Leach*, 639 F.3d at 772). This is incorrect. *Leach* discusses retroactivity only *after* determining that the offender was "*not* actually arguing that § 2250(a) retrospectively targets conduct that was lawful before the statute was enacted." 639 F.3d at 773 (emphasis added). Once the Court concluded that the offender was making the "second" sort of Ex Post Facto Clause argument, it rejected it on the ground that SORNA is not retroactive. Plaintiffs say they are making the same sort of argument raised in *Leach*. Appellees Br. 38. This Court rejected that argument in *Leach* and should reject it here as well.

**B. SORA creates a civil, nonpunitive registration system**

That this Court's decisions establish that SORA is prospective rather than retroactive is sufficient to reject Plaintiffs Ex Post Facto Clause claim. But these decisions also establish that Indiana's law is not punitive either, and they thereby provide a second, independently sufficient to reject Plaintiffs' claim. As this Court noted in *Leach*, in light of the Supreme Court's decision in *Smith*, "whether a comprehensive registration regime targeting only sex offenders is penal. . . is not an open question." 639 F.3d at 773. Indeed, Plaintiffs themselves recognize that many of the decisions considering Ex Post Facto Clause challenges to sex offender registry laws "treat *Smith* as entirely dispositive of the issue." Appellees Br. 42 n.14. And because Plaintiffs make no effort to identify any provisions of SORA "that distinguish this case

from *Smith*"—or from the laws this Court upheld in *Leach*, *Vasquez*, *Mueller*, and *Meadows*—their claim fails. *Leach*, 639 F.3d at 773.

Rather than confront these precedents, Plaintiffs attempt to sidestep them by asking the Court to adopt wholesale the Sixth Circuit's decision in *Does #1–5 v. Snyder*, which held that residency and continuous-updating requirements of Michigan's sex offender registry law could not be applied to offenders whose convictions predate the law's adoption. 834 F.3d 696, 698, 706 (6th Cir. 2016). That is, Plaintiffs claim they "are raising a challenge akin to *Snyder* and, as such, their argument is not precluded by this Court's precedents." Appellees Br. 41. But this Court's decisions cannot be evaded so easily. Adopting the Sixth Circuit's decision would be inconsistent with this Court's decisions upholding similar provisions of Illinois's and Wisconsin's sex offender registry laws. *See Vasquez*, 895 F.3d at 520–22; *Mueller*, 740 F.3d at 1133. Indeed, Plaintiffs seem to acknowledge that it would be inconsistent with *Smith* itself, which they argue is based on findings "that have not stood the test of time." Appellees Br. 47.

Plaintiffs have provided no grounds for distinguishing or reconsidering this Court's precedents. SORA "is similar enough to the sex-offender registration statutes" this Court has already upheld that this Court can simply apply its previous decisions "and reject the plaintiffs' challenge without further ado." *Vasquez*, 895 F.3d at 521. That is precisely what it should do.

## CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 4,711 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 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.

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