IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 19-2523

BRIAN HOPE, et al.,	)
	) Appeal from the United States District Court
Plaintiffs / Appellees,	) for the Southern District of Indiana
	)
v.	) Cause No. 1:16-cv-02865-RLY-TAB
	)
COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, et al.,	) The Honorable Richard L. Young, Judge
	)
	)
	)
Defendants / Appellants.	)

BRIEF OF APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Cause No: No. 19-2523

Short Caption: Brian Hope, et al. v. Commissioner of the Indiana Dep't of Correction, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3): **Brian Hope, Gary Snider, Joseph Standish, Patrick Rice, Adam Bash, and Scott Rush**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: **ACLU of Indiana (Gavin M. Rose, Jan P. Mensz, and Stevie J. Pactor)**

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Gavin M. Rose Date: November 15, 2019

Attorney's Printed Name: **Gavin M. Rose**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(c): Yes **X**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The jurisdictional statement of the appellants is complete and correct.

STATEMENT OF THE ISSUES

The plaintiffs are all Indiana residents who were convicted in the distant past of offenses that qualify as sex offenses under Indiana law; they have long since completed any sentence imposed as a result of their criminal convictions, as well as any term of supervised release. Given this, it is undisputed that, had they been convicted of their offenses in Indiana and thereafter remained in the state, they would not be subject to sex offender registration requirements by virtue of the *ex post facto* clause of the Indiana Constitution as interpreted in *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009). The plaintiffs, however all relocated to Indiana from other states after the enactment of Indiana's Sex Offender Registration Act ("SORA"), and their registration therefore does not offend the *state* constitution. *See Tyson v. State*, 51 N.E.3d 88 (Ind. 2016); *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016). But, as the district court held, imposing onerous, lifelong restrictions against a recently arrived Hoosier that are not imposed against a long-standing resident who was convicted of the exact same offense at the exact same time is uniquely problematic under the federal Constitution.

The issues presented for review are as follows:

1. Whether the district court correctly concluded that Indiana's application of SORA to the plaintiffs—which differs from durational-residency requirements that have been

repeatedly invalidated by the U.S. Supreme Court only insofar as Indiana *never* allows the plaintiffs to be treated the same as long-standing Hoosiers—violates the right to travel protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

2. Whether the district court correctly concluded, in keeping with the Sixth Circuit's decision in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), that, given the proliferation of sex-offender restrictions and obligations since the U.S. Supreme Court upheld an early registration statute in *Smith v. Doe*, 538 U.S. 84 (2003), the application of Indiana's SORA to the plaintiffs as a result of decades-old offenses violates the *ex post facto* clause of the U.S. Constitution.

STATEMENT OF THE CASE[1]

I. The Indiana Sex and Violent Offender Registry

The Indiana Sex and Violent Offender Registry is jointly maintained by the Indiana Department of Correction ("DOC") and local sheriffs, *see* Ind. Code §§ 11-8-2-12.4, 11-8-2-13(b), § 36-2-13-5.5, although the DOC is responsible for determining who is required to register and the length of the registration period (Dkt. 100-1 at 6; Dkt. 100-2 at 7). "Placement on the registry comes with a variety of obligations and restrictions; failure to comply can have criminal consequences." *Schepers v. Commissioner*, 691 F.3d 909, 911 (7th

[1] As Indiana notes, this appeal arises from two separate actions that were consolidated by the district court. Citations to filings in cause number 1:16-cv-02865-RLY-TAB are made simply to "Dkt."; citations to filings in cause number 1:17-cv-04524-RLY-TAB are made to "*Rice* Dkt." All record citations are made to the page numbers assigned by the district court's electronic filing system.

Cir. 2012). A person required to register under Indiana's Sex Offender Registration Act ("SORA") must report in person at least annually to the local sheriff's office where he resides (although, if he is employed or attends school in a different county, he must report to the sheriff's office in that county as well) in order to register and be photographed. *See* Ind. Code § 11-8-8-14(a). However, if the person qualifies under Indiana law as a "sexually violent predator"—a defined term that includes persons convicted of nine specified offenses as well as other persons, *see* Ind. Code § 35-38-1-7.5—then he must report to the local sheriff's office every ninety days. *See* Ind. Code § 11-8-8-14(b). And, if the person lives in transitional or temporary housing, or lacks a residence altogether, he must appear in person at least once every seven days. *See* Ind. Code § 11-8-8-12.

In addition to his photograph, a person required to register must provide a wide array of information, including but not limited to the following: his 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 and license plate number, principal address, the name and address of any employer or educational institutional that the person 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). Most of this information is published on the public registry, although some information (such as individuals' e-mail addresses) is maintained privately by the DOC. (Dkt. 100-1 at 12). If any of this

information changes, an individual must report that change—in person—within seventy-two hours of the change. Ind. Code § 11-8-8-8(c). In order to verify an individual's residence, local law enforcement must personally visit each offender at least annually (at least once every ninety days if the offender is a sexually violent predator). Ind. Code § 11-8-8-13(a). Various other obligations or restrictions are also imposed on all persons required to register as sex or violent offenders. *See, e.g.*, Ind. Code § 11-8-8-15 (requirement to have a valid driver's license or identification card); Ind. Code § 11-8-8-16 (prohibition on seeking a name change).

In addition to these restrictions that apply to all sex or violent offenders, specific categories of offenders are subject to additional restrictions. (Dkt. 100-1 at 6-7; Dkt. 100-2 at 7-8). A "sexually violent predator" must inform law enforcement whenever he plans to be absent from his home for more than 72 hours—including, of course, even a short vacation. Ind. Code § 11-8-8-18. A person who qualifies as 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, 11.[2] A person who qualifies as a "serious sex offender" may not even *enter* school property. Ind. Code § 35-42-4-14.[3]

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[2] An "offender against children" is defined to include any "sexually violent predator"—which includes persons convicted of certain crimes, such as rape or attempted rape, against an adult, *see* Ind. Code § 35-38-1-7.5(b)(1)—as well as persons convicted of specified crimes against children. Ind. Code § 35-42-4-11(a).

[3] A "serious sex offender" is defined to include any "sexually violent predator," as well as persons convicted of specified crimes, although the list of crimes is more expansive that those

As of March 16, 2018, there were 9,867 persons required to register as sex or violent offenders in Indiana. (Dkt. 100-2 at 9). Of those, 2,787 were designated as "sexually violent predators," and 3,146 were designated as "offenders against children." (*Id.* at 9-10). The DOC does not track the number of persons designated as "serious sex offenders." (*Id.* at 10).

II. *Wallace v. State*, its progeny, and Indiana's registration policies

In *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), the Indiana Supreme Court held that the *ex post facto* clause of the Indiana Constitution prohibited the application of SORA to an individual whose offense predated the enactment of that statute. *Id.* at 384. In compliance with that decision, therefore, Indiana does not require persons to register whose offenses occurred at a time when they did not require registration and who thereafter remained in the state. (Dkt. 100-1 at 18-19, 27; Dkt. 100-2 at 13).

However, even after *Wallace*, if a person is convicted of his sex offense in another state or if he relocates temporarily to another state following an Indiana conviction, under certain circumstances the DOC requires that person to register as a sex or violent offender upon moving (or returning) to Indiana, even if his offense pre-dated SORA such that he would not be required to register had he never left Indiana. (Dkt. 100-1 at 33-35; Dkt. 100-2 at 14). It requires registration under two (often overlapping) circumstances (Dkt. 100-2 at 14-17):

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within the ambit of an "offender against children." Ind. Code § 35-42-4-14(a).

- First, if the individual relocates to Indiana after the offense of which he was convicted (or its out-of-state equivalent) became a registerable offense, the DOC requires that individual to register based on its determination that, at the time that the individual relocated to Indiana, he was "on notice" that the offense required registration. (Dkt. 100-1 at 25; Dkt. 100-2 at 15-16). Under this so-called "substantial equivalency" determination, Indiana requires registration *whether or not an individual had an out-of-state registration obligation*. (*E.g.*, Dkt. 100-1 at 25).

- And second, if the individual is required to register in another jurisdiction and relocates to Indiana after July 1, 2006, the DOC requires that individual to register pursuant to Indiana Code § 11-8-8-5(b)(1), which defines a "sex or violent offender" to include an individual "required to register . . . in any jurisdiction." (Dkt. 100-1 at 24-25, 39; Dkt. 100-2 at 16-17). This is referenced as the "other jurisdiction" requirement.[4]

In *Tyson v. State*, 51 N.E.3d 88 (Ind. 2016), and *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016), the Indiana Supreme Court held that the DOC's registration requirement does not violate the *ex post facto* clause of the Indiana Constitution, at least when the registration obligation results from the "other jurisdiction" requirement.

The upshot of Indiana's registration policies, therefore, is that, if two persons are convicted of an identical offense at a time when that offense did not require registration under Indiana law, and one of those persons thereafter relocates to Indiana from another state but the other remains in Indiana permanently, only one of these persons is required to register by the DOC—the individual who moved between states. (Dkt. 100-2 at 14-17). The DOC has no understanding of any interest served by this differential treatment (*id.* at 31-32), and agrees that sex offenders, like anyone else, might travel between states for

[4] The July 1, 2006 date was chosen because that is the date that the "other jurisdiction" requirement first took effect. (Dkt. 100-1 at 39).

any number of reasons (*id.* at 33).

III. The plaintiffs

Prior to the enactment of Indiana's SORA each of the plaintiffs was convicted of an offense that qualifies as a sex offense under Indiana law, and after his conviction changed residence between states: Brian Hope was convicted in Indiana and moved temporarily out-of-state before returning to Indiana, and the remaining five plaintiffs were convicted out-of-state before moving to Indiana for the first time. The DOC has determined that all six plaintiffs must register as sex offenders, even though they would not be required to register if they were convicted in Indiana and thereafter never left the state. (Dkt. 100-1 at 24-26; Dkt. 100-2 at 25-27). Because Gary Snider relocated to Indiana before July 1, 2006, his registration obligation results exclusively from a "substantial equivalency" determination (Dkt. 100-1 at 25); the other five plaintiffs have been required to register as a result of both a "substantial equivalency" determination and the "other jurisdiction" requirement (*id.* at 24-26; Dkt. 100-2 at 25-27).

A. The plaintiffs' convictions and their interstate travel

Each of the plaintiffs was convicted of a sex offense committed prior to the enactment of Indiana's SORA. Brian Hope (1993), Joseph Standish (1995), and Scott Rush (1992) were all convicted of offenses that were committed in the early 1990s. (Dkt. 100-3 at 1; Dkt. 100-5 at 1; Dkt. 100-10 at 1-2). Patrick Rice's offense took place in 1989. (Dkt. 100-8 at 1). Gary Snider continues to deny liability for his offense; at trial, his alleged

victim did not have a precise recollection of when the offense took place, but Mr. Snider believes that she testified that it occurred during the first half of 1988. (Dkt. 100-4 at 1). And Adam Bash's offense occurred in the mid-1980s, when he was in his early teens or even younger (even though he was charged as an adult). (Dkt. 100-9 at 1-2). With the exception of Brian Hope—who was convicted of an Indiana offense (Dkt. 100-3 at 1)—each of the plaintiffs' convictions took place out of state. (Dkt. 100-4 at 1 [Michigan]; Dkt. 100-5 at 1 [Michigan]; Dkt. 100-8 at 1 [Illinois]; Dkt. 100-9 at 1-2 [Kentucky]; Dkt. 100-10 at 1-2 [Florida]). And, all six plaintiffs have fully served their sentences resulting from their convictions for a sex offense, which ranged from a period of probation to imprisonment. (Dkt. 100-3 at 1-2 [probation only]; Dkt. 100-4 at 2 [incarceration until 2003]; Dkt. 100-5 at 1-2 [less than a year in jail followed by a period of probation]; Dkt. 100-8 at 1-2 [incarceration until 2017]; Dkt. 100-9 at 2 [incarceration until 1998]; Dkt. 100-10 at 1-2 [incarceration until 1995]).

Since their convictions, all of the plaintiffs have changed residences between states. Mr. Hope, for his part, decided that he wanted to explore the world and therefore, in 2004, moved first to California and then to Texas before returning to Indiana in 2013 to help care for a sick grandfather. (Dkt. 40-1 at 8; Dkt. 100-3 at 2). Mr. Snider married his wife while he was incarcerated in Michigan, and the day that he was released from prison—on July 3, 2003—he moved to Huntington County, Indiana, where his wife lived because of her work; he has resided continuously in Huntington County since that date.

(Dkt. 100-4 at 2). Mr. Standish continued to live in Michigan for some time after his release from the county jail, until in May 2013 he and his wife moved to Allen County, Indiana—where they continue to reside—because his wife obtained a job there. (Dkt. 100-5 at 1-2). When Mr. Rice was released from prison in Illinois in 2017, he had virtually no resources and no place to live in Illinois; he therefore moved in with his sister in Madison County, Indiana before eventually relocating to Delaware County, Indiana after he met and decided to move in with his partner. (Dkt. 100-8 at 2-4). Mr. Bash had no strong connections to Kentucky after he was released from prison there and felt that a change in scenery would help him get back on his feet: following a short period where he lived with his parents, he moved first to Cincinnati and then to Indiana. (Dkt. 100-9 at 2). And Mr. Rush relocated to Indiana when his long-time employer decided to close the Florida office where he worked; he was therefore offered and accepted a transfer to the company's office in Pulaski County, Indiana, where he and his family moved in 2017. (Dkt. 100-10 at 2).

B. The burdens resulting from the plaintiffs' required registration

All six plaintiffs qualify as an "offender against children" and as a "serious sex offender" under Indiana law; four of the plaintiffs—Mr. Snider, Mr. Standish, Mr. Rice, and Mr. Rush—also qualify as a "sexually violent predator." (Dkt. 100-3 at 4; Dkt. 100-4 at 3; Dkt. 100-5 at 3; Dkt. 100-8 at 5; Dkt. 100-9 at 3; Dkt. 100-10 at 2-3). Prior to the issuance of a preliminary injunction in their favor, the plaintiffs registered as sex offenders and

were subjected to the numerous obligations and restrictions that result from that status.

1. The process of registration. As a result of their status as "sexually violent predators," Mr. Snider, Mr. Standish, Mr. Rice, and Mr. Rush were all required to register with their county sheriff's office at least every 90 days. *See* Ind. Code § 11-8-8-14(b). Mr. Bash registered only annually. *See* Ind. Code § 11-8-8-14(a). And Mr. Hope was, as a result of his homelessness, required to register at least once every seven days. *See* Ind. Code § 11-8-8-12(b)(2).[5]

The registration process itself is time-intensive. (Dkt. 100-3 at 3; Dkt. 100-4 at 3; Dkt. 100-5 at 3; Dkt. 100-8 at 5; Dkt. 100-10 at 3). In Marion County, where Mr. Hope resides, this weekly process required him to walk, even in inclement weather, a mile or two in each direction to the county sheriff's office. (Dkt. 100-3 at 3). Once there, only one employee would be present to register offenders at any time such that, given that each registration takes between twenty and forty minutes, the process could easily take several hours if there was a line. (*Id.*). Even though Mr. Rice was not required to register weekly,

[5] These time-frames established by Indiana law represent the bare minimum frequency with which the plaintiffs are required to visit their county sheriff's office. If any of the information provided at registration changes, the plaintiffs must report that change to the sheriff within 72 hours of the change. *See* Ind. Code § 11-8-8-8(c). Thus, shortly after his release from prison and his move to Indiana, Mr. Rice was required to visit the sheriff's office at least eight or ten times in a matter of a couple months: to register initially, then to provide a copy of his government-issued identification (once obtained), then to provide a copy of his social security card (once obtained), then to provide his telephone number (once obtained), then to provide his e-mail address (once obtained), and then to provide information concerning his Facebook account (once obtained). (Dkt. 100-8 at 2-4). Mr. Bash likewise has been required to make additional trips to the county sheriff's office when he changed residences within the county, when he got a new car, and even when it was determined that he needed to have a new photograph taken. (Dkt. 100-9 at 3).

he lives in Yorktown while the county sheriff's office is located in Muncie. (Dkt. 100-8 at 5). While the municipalities are only six or seven miles away, he does not own reliable transportation but instead must rely on his ability to find a ride to Muncie, a process that can be difficult as it depends on other people's schedules. (*Id.*). And, once there, he would frequently be required to sit in a waiting area for an hour or more before the process of registering him even began. (*Id.*).

Similarly, Mr. Rush lives perhaps six miles from the office where he is required to register, and so the process will generally take more than an hour. (Dkt. 100-10 at 3). This is uniquely burdensome to him: because his job is such that any time away from work is disruptive to other people's schedules and routines, he cannot simply take an hour or two off of work to register but must instead take an entire day off of work every time he registers. (*Id.*).

2. The prohibition on entering school property. Each of the plaintiffs is subject to Indiana's ban on even *entering* school property. Ind. Code § 35-42-4-14. This has dramatically affected the plaintiffs' abilities to support their children and other family members.

Mr. Snider and his wife, for instance, have five grandchildren and great-grandchildren who either attend school or will soon attend school. (Dkt. 100-4 at 3). Mr. Standish and his wife have two school-age children (Dkt. 100-5 at 3), Mr. Bash has full legal custody of his young son (Dkt. 100-9 at 5), and Mr. Rush has two daughters (Dkt.

100-10 at 3-4). These children participate in any number of activities or events at the school—ranging from school plays and choral concerts to simple parent-teacher conferences—that the plaintiffs wish to attend in order to support their children (or, in the case of Mr. Snider, his grandchildren and great-grandchildren) and to watch them grow up. (Dkt. 100-4 at 3; Dkt. 100-5 at 3; Dkt. 100-9 at 5; Dkt. 100-10 at 3). Indeed, Mr. Bash simply wants to be able to take his son to school and to pick him up from school without fear of repercussions as the school does not have a bus that comes near their house. (Dkt. 100-9 at 5). Mr. Standish would also like to be able to transport his children back and forth to school. (Dkt. 100-5 at 3).

The prohibition on entering school property has been felt particularly acutely by Mr. Rush. His daughter was diagnosed with a learning disability when she was young, and she therefore has an individualized education program through her school. (Dkt. 100-10 at 3-4). Every two or three months, Mr. Rush will therefore receive a phone call from someone with the school to invite him to a scheduled meeting at the school to discuss his daughter's needs and her education. (*Id.*). However, he has been unable to participate in those meetings, which invariably take place in his absence. (*Id.*).

3. Indiana's residency restriction. Each of the plaintiffs is also subject to Indiana's prohibition on residing within 1,000 feet of certain facilities. Ind. Code § 35-42-4-11.

In the past, when he lived in a different county in Indiana, the sheriff's deputy in

charge of registering offenders gave Mr. Hope the address of a homeless shelter to stay because he was homeless at the time. (Dkt. 100-3 at 4). He only stayed at that location for a short period of time, however, for he was subsequently informed by the same deputy that the shelter happened to be 800 feet away from a park "as the crow flies" and that he therefore could not live there. (*Id.*). Mr. Snider was at one point required to move away from his wife—a requirement that was obviously devastating—because their house was located within 1,000 feet of a daycare. (Dkt. 100-4 at 3). And when Mr. Rice and Mr. Bash moved to Delaware County their options for housing were limited because of this restriction. (Dkt. 100-8 at 5-6; Dkt. 100-9 at 5). While they were able to find a permissible residence, they continue to live in constant fear that a daycare might open near their residences and they will be required to move again. (Dkt. 100-8 at 5-6; Dkt. 100-9 at 5).

4. Registration fees. Indiana law authorizes counties to adopt an ordinance requiring sex offenders to pay "an annual sex or violent offender registration fee" of no more than $50.00 as well as an "address change fee" of up to $5.00. Ind. Code § 36-2-13-5.6. Each of the plaintiffs' counties of residence has adopted such an ordinance. (Dkt. 100-6 at 1-2; Dkt. 100-7 at 2; Dkt. 100-8 at 4; Dkt. 100-9 at 3; Dkt. 100-10 at 3). Although each county may assess the annual fee no more than once a year, an individual who changes residences between counties may have to pay this fee more often. (*See* Dkt. 100-8 at 2-4). Moreover, although Indiana law describes the additional $5.00 fee as an "address change fee," some plaintiffs have been required to pay this additional amount

for reasons other than a change in their address: Mr. Bash has been assessed this fee in the past when *any* of his registration information changed (such as when he got a new car or a new haircut) (Dkt. 100-9 at 3), and Mr. Rush has been assessed this fee simply when he registers every 90 days (Dkt. 100-10 at 3).

These registration fees, while not insubstantial to anyone, are particularly onerous to Mr. Bash, whose only income is SSDI and SSI. (Dkt. 100-9 at 4-5). Because he is on a fixed income and is raising a young child without financial assistance from the child's mother, he has been unable to make some payments to the sheriff. (*Id.*). He has in the past therefore been placed on a payment plan where he is required to make payments in installments, although even this has proven difficult. (*Id.*). When Mr. Rice moved to Indiana immediately after his release from prison in Illinois, he also had virtually no resources, and his sister therefore paid the registration fee for him. (Dkt. 100-8 at 2-3).

5. Other burdens. The plaintiffs also experience harassment and a variety of other burdens occasioned by the requirement that they register as sex offenders.

For example, after he was informed that he must begin registering again, Mr. Snider was forced to close a handyman business into which he had devoted substantial time and energy because he knew that no one would hire a handyman listed on the registry. (Dkt. 100-4 at 3-4). The harassment experienced by Mr. Standish is more pervasive: laser pointers have been shined through his family's living room windows; he

has been denied employment for which he was qualified; neighbors have repeatedly urged him to move; and he was prohibited by his son's scout leader from dropping his son at the same location where other children are dropped (a requirement that his son was forced to explain to friends). (Dkt. 100-5 at 3-4). Mr. Rice has also been denied employment simply because he is a registered sex offender (Dkt. 100-8 at 6), and Mr. Bash believes that his son is not invited to birthday parties and other similar events because other parents are aware that he is a registered sex offender (Dkt. 100-9 at 5-6).

And, if all this were not enough, Mr. Bash—who lives on a fixed income—was deemed ineligible for public housing, public housing assistance, or even housing through Habitat for Humanity simply because he is required to register as a sex offender. (*Id.* at 5).

IV. Procedural history

On October 21, 2016, Brian Hope and Gary Snider filed their Complaint for Declaratory and Injunctive Relief and Challenging the Constitutionality of State Statute (Dkt. 1); an amended complaint adding Joseph Standish as a plaintiff was filed on November 6, 2016 (Dkt. 12). Following briefing and a hearing, the district court entered a preliminary injunction on April 6, 2017, enjoining Indiana's enforcement of SORA against all three plaintiffs. (Dkt. 51). Separately, Patrick Rice, Adam Bash, and Scott Rush filed their Complaint for Declaratory and Injunctive Relief on December 6, 2017. (*Rice* Dkt. 1). By agreement the two cases were consolidated with one another (Dkt. 74; *Rice*

Dkt. 25), and the parties agreed to extend the preliminary injunction to the new plaintiffs as well (Dkts. 82 & 106).

The district court issued its Entry on Cross-Motions for Summary Judgment on July 9, 2019. (Dkt. 118). Relying on *Saenz v. Roe*, 526 U.S. 489 (1999), and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the court rejected Indiana's argument that the right to travel was not implicated merely because the plaintiffs were required to register in other jurisdictions before they relocated to Indiana: "[T]his ignores the fact that the DOC does not require registration for similarly situated sex offenders in Indiana." (Dkt. 118 at 16). The district court thus concluded that the application of SORA to the plaintiffs does not satisfy the requisite strict scrutiny. (*Id.* at 17-22). Turning to the plaintiffs' *ex post facto* claim, the court held that registration requirements had been retroactively applied to the plaintiffs as a result of convictions that pre-dated SORA (*id.* at 23-24)—any argument to the contrary, the court noted, is incompatible with *Smith v. Doe*, 538 U.S. 84 (2003) (Dkt. 118 at 24-25 n.7)—and that SORA's effects are punitive (*id.* at 25-35). Final judgment was accordingly entered in favor of the plaintiffs. (Dkt. 119).

SUMMARY OF THE ARGUMENT

1. "[T]he 'constitutional right to travel from one State to another' is firmly embedded in [Supreme Court] jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citation omitted). One component of that right, protected by the Privileges or Immunities Clause of the Fourteenth Amendment, requires that "travelers who elect to

become permanent residents" of a state possess "the right to be treated like other citizens of that State." *Id.* at 500. On its face, Indiana's application of SORA thus implicates the right to travel: the plaintiffs must register as sex offenders due to their migration to Indiana after SORA's enactment, even though the statute would not be applied to them if they had committed the exact same offenses at the exact same time and thereafter remained Indiana residents.

Indiana nonetheless argues that it is not discriminating based on the plaintiffs' migration between states but that it is discriminating based on the "minimal effects" of requiring the registration of persons who were required to register in other jurisdictions. Because the plaintiffs' states of origin required registration, Indiana says, so can we. This argument does not even attempt to explain the application of SORA to either Gary Snider (who Indiana acknowledges is not required to register based on an out-of-state registration requirement) or Brian Hope (who was required to register out of state only because Indiana required his registration pre-*Wallace*). In any event, the Supreme Court's jurisprudence is clear that the proper comparison for a residency-discrimination claim is not between an individual's treatment in his current state and the state where he previously resided; it is between the same state's treatment of newer and older residents. *See, e.g., Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 (1986). Indeed, the *Saenz* Court explicitly rejected precisely the argument that Indiana is advancing here. *See* 526 U.S. at 505.

Because the constitutional right to travel is implicated, the application of SORA to the plaintiffs must pass muster under strict scrutiny. Indiana does not even attempt to argue that it satisfies this standard. The application of SORA to the plaintiffs also does not satisfy rational-basis review. Indiana advances two interests to justify the statute. The first, public safety, is clearly a compelling interest; however, it is not one that remotely justifies the differential treatment of newer Hoosiers. And the second interest, providing "fair notice" to persons of their registration obligations, simply cannot be squared with *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), or *Zobel v. Williams*, 457 U.S. 55 (1982), both of which invalidated residency-based classifications under low-level scrutiny.

2. The application of SORA to the plaintiffs also violates the *ex post facto* clause. While *Smith v. Doe*, 538 U.S. 84, 92 (2003), upheld an early registration statute, "[o]ver time, Indiana's registry has greatly expanded in scope, in terms of both who is required to register and what registration entails," *Schepers v. Commissioner*, 691 F.3d 909, 911 (7th Cir. 2012). The distinctions between the registration statute at issue in *Smith* and registration schemes as they currently exist caused the Sixth Circuit to invalidate Michigan's scheme on *ex post facto* grounds. *See Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017). The same result must issue here.

Indiana argues first that SORA is not even applied retroactively, notwithstanding the fact that the plaintiffs all committed their offenses long before the statute's enactment.

While the plaintiffs acknowledge that language in *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 797 (2019), and *United States v. Meadows*, 772 Fed. App'x 368 (7th Cir. 2019), implies this result, Indiana's argument cannot be squared with *Smith* itself, with *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014), or with numerous other cases on which it relies. *Vasquez* and *Meadows* must be read as concluding that the specific restrictions at issue in those cases are not *punitive* even though they are *retroactive*.

The question, then, is whether Indiana's SORA is "punitive in effect," which requires evaluation of the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Although this Court in *Meadows*, *Vasquez*, and *Mueller*—as well as in *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011), which is identical in all relevant respects to *Meadows*—upheld against *ex post facto* challenges various individual restrictions and obligations associated with sex-offender registration, *Vasquez* specifically distinguished that case from the Sixth Circuit's decision in *Snyder*, where a "package of civil regulatory restrictions," considered collectively, were deemed "punitive in effect" given that they "governed in minute detail the lives of the state's sex offenders." 895 F.3d at 522 n.4. The case at bar presents the question left open in *Vasquez*, and this Court should follow *Snyder*'s lead in holding SORA "punitive in effect."

ARGUMENT

In order to determine whether a person with a decades-old conviction for a sex offense must register under state law, Indiana asks a single question: when did that

person relocate to Indiana? If the answer is "recently," registration is required; if the answer is "prior to the enactment of Indiana's SORA," it is not. Indiana's arguments to the contrary notwithstanding, this is paradigmatic discrimination based on duration of residency, and precedent establishes that this discrimination runs afoul of individuals' right to engage in interstate travel. Given this, this Court need not address the plaintiffs' *ex post facto* claim. If it chooses to do so, however, the application of Indiana's SORA to the plaintiffs is both retroactive and punitive.

I. The application of SORA to the plaintiffs violates their constitutional right to travel

A. Introduction to the right to travel

"The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (citation omitted). The textual support for this right is nonetheless open to some debate: while some decisions invoking the right rely largely on the Equal Protection Clause, *see, e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338-43 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634-38 (1969), other cases rely instead on the Privileges or Immunities Clause, *see, e.g.*, *Saenz*, 526 U.S. at 502-03; *Zobel v. Williams*, 457 U.S. 55, 75-76 (1982) (O'Connor, J., concurring in the judgment). Regardless of its precise source, what is clear is that the right "embraces at least three different components": (a) "[i]t protects the right of a citizen of one State to enter and to leave another State"; (b) it protects "the

right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"; and, (c) "for those travelers who elect to become permanent residents," it protects "the right to be treated like other citizens of that State." *Saenz*, 526 U.S. at 500.

At issue in this case is the third component of the right to travel, that is, the right to be treated similarly to sex offenders in Indiana that have not moved between jurisdictions. Precedent from the U.S. Supreme Court makes clear that durational-residency requirements implicate the right to travel and are untenable. In *Zobel*, for instance, the Court addressed the constitutionality of "a statutory scheme by which a State [there, Alaska] 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." 457 U.S. at 56. Concluding that it was unnecessary to determine whether heightened scrutiny applied to this scheme, eight justices held it impermissible as a matter of equal protection:

> If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would clearly be impermissible.

Id. at 64. A majority of the Court—five justices—concurred separately to indicate that the

classification also ran afoul of the right to engage in interstate travel. *See id.* at 66-67 (Brennan, J., joined by Marshall, Blackmun, and Powell, JJ., concurring); *id.* at 74-78 (O'Connor, J., concurring in the judgment). This right—"or, more precisely, the federal interest in free interstate migration"—was "clearly, though indirectly, affected by the Alaska dividend distribution law, and this threat to free interstate migration provide[d] an independent rationale for holding that law unconstitutional." *Id.* at 66 (Brennan, J.). Continued Justice Brennan:

> [W]hile duration of residence has minimal utility as a measure of things that are, in fact, constitutionally relevant, resort to duration of residence as the basis for a distribution of state largesse does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor. . . . [I]t is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence, when we adopted the Equal Protection Clause.

Id. at 71. Justice O'Connor was even more explicit in her adoption of a right-to-travel rationale: "Alaska's statute burdens those residents who choose to settle in the State. It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State." *Id.* at 76-77 (O'Connor, J.). *Zobel* was subsequently applied to invalidate a state statute that gave preferential tax treatment to Vietnam veterans residing in the state before a specific date. *See Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 622-23 (1985).

And in *Saenz* the Court invalidated, on right-to-travel grounds, a durational-

residency requirement limiting new residents' access to TANF benefits. *See* 526 U.S. at 503-07. Said the Court, quoting the varying opinions in the *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1874):

> Writing for the majority . . . Justice Miller explained that one of the privileges conferred by [the Privileges or Immunities Clause of the Fourteenth Amendment] "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." Justice Bradley, in dissent, used even stronger language to make the same point:
>
> > The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.

Saenz, 526 U.S. at 503-04 (internal citations omitted). The Court thus explicitly disclaimed the notion that the "right to travel" concerns itself solely "with actual deterrence to migration," holding instead that it also "embraces the citizen's right to be treated equally in her new State of residence" such that "the discriminatory classification itself is a penalty." *Id.* at 504-05. *See also, e.g.*, *Maricopa Cty.*, 415 U.S. at 257-61 (invalidating a durational-residency requirement to obtain free medical care); *Dunn*, 405 U.S. at 341-42 (invalidating a durational-residency requirement to vote); *Shapiro*, 394 U.S. at 627-33

(invalidating a durational-residency statute to receive public benefits).[6]

B. The application of SORA to the plaintiffs constitutes discrimination based on duration of residency

As in *Zobel*, *Hooper*, and *Saenz*, the plaintiffs here have been subjected to differential treatment, and to burdensome registration requirements, due exclusively to the fact that they have recently migrated between states. Indiana contends, however, that their registration obligations result not from their interstate migration but from the fact that they were required to register in other jurisdictions—and that their differential treatment is therefore based on the "marginal effects" of requiring Indiana registration rather than on their actual change in residences. This "marginal effects" theory does not even attempt to explain the registration requirement of two of the plaintiffs; in any event, it has no basis in the law—it cannot be squared with *Saenz* itself—and Indiana's argument is without merit.

1. Indiana's "marginal effects" theory is entirely inapplicable to Gary Snider and Brian Hope

As its own Rule 30(b)(6) designate made clear, and as described above, Indiana

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[6] In passing, Indiana suggests that the Privileges or Immunities Clause only applies to a "narrow subset of laws that (1) impose durational residency requirements on (2) public benefits, tax exemptions, or voting rights." (Br. of Appellants 33-34). The erroneous assertion that the case at bar is not comparable to the durational-residency cases is addressed immediately below. No support whatsoever exists for Indiana's assertion that the third component of the right to travel is only implicated when "public benefits, tax exemptions, or voting rights" are limited. While these certainly represent the right-to-travel cases that the Supreme Court has resolved, nothing in these cases suggests that the right to travel is not implicated by other forms of discrimination against newly arrived residents. Indiana does not elaborate on this portion of its argument.

requires registration of persons whose convictions pre-dated SORA under two (sometimes overlapping) circumstances:

- If they relocated to the state after their crime of conviction became a registerable offense (the "substantial equivalency" requirement) (Dkt. 100-2 at 15-16; *see also* Dkt. 100-1 at 38-39); or

- If they were required to register in another jurisdiction and relocated to Indiana after July 1, 2006 (the "other jurisdiction" requirement") (Dkt. 100-2 at 16-17; *see also* Dkt. 100-1 at 24-25).

In its briefing, Indiana insists that "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." (*E.g.*, Br. of Appellants 38). This statement, however, ignores its own "substantial equivalency" requirement and is directly contrary to its description of its own policies:

> Q: If a person is convicted of a [pre-SORA] offense and [relocates] to Indiana . . . after the enactment of SORA, 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?
>
> A: That is correct.
>
> Q: For instance, if you were convicted out of state of the out of state equivalent of sexual misconduct with a minor . . . when that person moves to Indiana, the DOC will ask at the time that person moved was sexual misconduct . . . a registerable offense?
>
> A: That is correct.

(Dkt. 100-2 at 15-16). Indiana's "marginal effects" theory only attempts to address its "other jurisdiction" requirement; after all, 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* and even though his crime of conviction pre-dated SORA (such that a long-time Hoosier who committed the exact same offense at the exact same time would have no registration obligation). This is clearly discrimination based on duration of residency.

The distinction between Indiana's "substantial equivalency" requirement and its "other jurisdiction" requirement is not a hypothetical one. In fact, Mr. Snider relocated to Indiana in 2003, prior to the enactment of the "other jurisdiction" requirement, and so Indiana acknowledges that his 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. (Dkt. 100-1 at 25). To be sure, Mr. Snider was required to register during his Michigan incarceration (Dkt. 100-4 at 2), but insofar as this incarceration long pre-dated the enactment of the "other jurisdiction" requirement, Indiana is clear that his Michigan registration played no role in the determination that he must register in Indiana. (Dkt. 100-1 at 25). And, while Mr. Hope returned to Indiana after the "other jurisdiction" requirement became effective, the only reason that he was required to register in Texas was that he had been required to register in Indiana pre-*Wallace* (Dkt. 100-3 at 2)—a circular trap that traces its origins to Indiana's requirements and not Texas's.

In other words, Indiana's "marginal effects" argument cannot justify the

requirements that have been imposed against Mr. Snider or Mr. Hope, and the district court's decision in their favor must be affirmed on this basis alone. And, while Indiana has applied its "other jurisdiction" requirement to the other four plaintiffs, it would require their registration *even if they had never registered out-of-state* insofar as it has determined that they are also subject to the "substantial equivalency" requirement.

2. Indiana's "marginal effects" theory has no basis in the law

In any event, Indiana insists that it is not discriminating based on the duration of the plaintiffs' residency in the state but is instead discriminating based on the "marginal effects" of requiring sex-offender registration: it is requiring registration only of persons who were already required to register out of state. (Br. of Appellants 35). Under this theory, a state could offer less favorable tax treatment to newly arrived residents (*Hooper*), limit the voting rights of newly arrived residents (*Dunn*), or provide newly arrived residents with fewer public benefits (*Saenz*, *Maricopa County*, and *Shapiro*) if the state of origin similarly restricted their rights or limited their benefits. The Supreme Court's right-to-travel jurisprudence, however, makes clear that this is improper: the appropriate comparison is not between a person's treatment by her state of residence and her treatment by her state of origin; it is between a state's treatment of newer residents and *the same state's* treatment of established residents. *See, e.g.*, *Saenz*, 526 U.S. at 502 (describing "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State"); *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S.

898, 904 (1986) (emphasizing "the distinction drawn by the State between older and newer residents"); *Hooper*, 472 U.S. at 623 (reiterating that "[t]he State may not favor established residents over new residents"). Indeed, *Saenz* itself rejected precisely the argument that Indiana is advancing here.

The California statute at issue in *Saenz* did not merely require persons to reside in the state for twelve months before receiving full benefits; it limited benefits during this period to the level that would have been received in their previous state. *See* 526 U.S. at 493. The Court described the classifications occasioned by the statute at issue in that case:

> The classifications challenged in this case—and there are many—are defined entirely by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members. The favored class of beneficiaries includes all eligible California citizens who have resided there for at least one year, plus those new arrivals who last resided in another country or in a State that provides benefits at least as generous as California's. Thus, within the broad category of citizens who resided in California for less than a year, there are many who are treated like lifetime residents. And within the broad subcategory of new arrivals who are treated less favorably, there are many smaller classes whose benefit levels are determined by the law of the States from whence they came.

Id. at 505. *Saenz* is on all fours with this case: putting to the side the fact that Indiana's argument ignores the undisputed fact that it would require the plaintiffs' registration even if they had never registered out of state, the "favored class of beneficiaries" includes both long-term residents of Indiana and newer Hoosiers who are relieved from a registration obligation because they were not required to register in their previous state, whereas the class of persons "who are treated less favorably" includes persons whose

registration obligations "are determined by the law of the States from whence they came."

To be sure, *Saenz* concerned a durational-residency requirement that is lacking here: after the required twelve-month period, newly arrived residents were permitted to be treated like any other resident of California. Indiana attempts to highlight this distinction, suggesting that the third component of the right to travel "is limited to barring durational residency requirements." (Br. of Appellants 35). The distinction between the durational-residency cases and the case at bar, however, does not inure to Indiana's benefit—for it *never* permits newly arrived residents to establish *bona fide* residency such that they are treated the same as long-standing Hoosiers. What *Saenz* does not permit a state to do temporarily, Indiana is certainly not allowed to do permanently. Just as the statute at issue in *Saenz* implicated the right to travel regardless of the requirements imposed in a person's state of origin—a person whose previous state offered nearly the same level of benefits as did California could be said to have suffered only "marginal effects" from the discriminatory statute—Indiana's requirements implicate this right by virtue of the mere fact that newer residents are treated differently than long-standing residents. The argument to the contrary is off-base.[7]

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[7] The Ninth Circuit's decision in *Saenz*, which was affirmed by the Supreme Court, addresses even more explicitly the illusory distinction that Indiana seeks to draw:

> California argues 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." As such, California suggests that the proper comparison is between the "position of newcomers before and after travel to California," rather than between "recent arrivals"

3. Indiana's attempt to compare the present case to circumstances not involving a change of residence between states is inapt

Not satisfied with any of this, Indiana attempts to find support for its "marginal effects" theory in two facts: the fact that registration requirements might be imposed against residents required to register elsewhere (for instance, due to out-of-state employment) who have not changed residency between states, and the fact that numerous federal criminal statutes require interstate travel as an element of the offense. (Br. of Appellants 36-38).

Indiana, however, does not explain the relevance of these facts. Each of the plaintiffs has relocated from another state and has been required to register on that basis; this implicates the third component of the right to travel, which "embraces the citizen's

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and "longer-term California residents."

However, as noted by the district court, in case after case the Supreme Court has determined that the appropriate comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states.

Roe v. Anderson, 134 F.3d 1400, 1405 (9th Cir. 1998) (citing *Soto-Lopez*, 476 U.S. at 904, *Hooper*, 472 U.S. at 623, and *Zobel*, 457 U.S. at 58-59), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999).

As a final matter, it appears that Indiana's "marginal effects" theory would allow for a registration requirement to be imposed even against many lifelong Hoosiers who are not required to register. After all, the Indiana Constitution is not offended by a requirement that persons register as a sex offender during any period of supervised release. *See, e.g.*, *Whitener v. State*, 982 N.E.2d 439, 446-48 (Ind. Ct. App. 2013), *trans. denied*. Under Indiana's theory, any continued registration requirement after this period would possess only a "marginal effect" on this person, even though he never left the state and even though such a requirement is plainly incompatible with *Wallace*. In other words, the "marginal effects" theory itself is applied differently based on whether an individual is a lifelong Hoosier or a newly arrived resident.

right to be treated equally in her new State of residence." *Saenz*, 526 U.S. at 505. Suppose, for instance, that *Saenz* limited persons' TANF benefits to the level received in a previous state of residence *or* in a state of employment. That statute does not become constitutional as applied to someone who changed residences between states simply because there are other (inapplicable) reasons that California limits benefits to other persons. This Court might in the future be called upon to determine whether Indiana may constitutionally require an Indiana resident to register based on employment in Cook County (Illinois) when he would not be required to register if he was employed in Lake County (Indiana)—either under a different component of the right to travel or under rational-basis review—but that issue is simply not presented here.[8] Nor does the fact that federal criminal liability often depends on a person's interstate travel, as is necessary to bring a statute within Congress's Commerce Clause authority, salvage Indiana's argument. Suffice it to say that whatever impact these statutes might have on persons' right to travel, they do not discriminate based on length of residency in a particular state.[9]

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[8] As Indiana notes (Br. of Appellants 36-37), the plaintiffs argued in the district court that SORA applies to persons "who have long since established permanent residence in the state" and "even applies 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." (Dkt. 101 at 25). They did so, however, in arguing that Indiana's classification cannot be supported, even under rational-basis review, by any state interest in public safety; they did not do so in arguing that the constitutional right to travel is implicated in the first instance. Indiana takes these arguments out of context.

[9] Indiana acknowledges that the Privileges or Immunities Clause "does not by its terms directly apply to the federal government" but it nonetheless cites *Saenz* as "strongly suggest[ing] that the principles underlying the Clause bind the States and the federal government with equal

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Ultimately, Indiana's argument is simple: if another state requires registration, it says, so can we. But the Supreme Court has made clear—repeatedly—that the third component of the right to engage in interstate travel requires a comparison between how newer residents of one state are treated vis-à-vis older residents of the same state, not how migrants to that state were treated in their previous state of residency. Indiana's classification implicates the right to travel.

C. Under any level of scrutiny, the application of SORA to the plaintiffs is unconstitutional

Because the right to travel is implicated, the application of SORA to the plaintiffs must satisfy heightened scrutiny. *See, e.g.*, *Maricopa Cty.*, 415 U.S. at 261-62. Indiana does not contend that it passes muster under this standard, and that should be the end of the inquiry. But even if only rational-basis review is applied, the statute fails.[10]

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force." (Br. of Appellants 37). *Saenz* concerned congressional authorization for *states* to create durational residency requirements, *see* 526 U.S. at 495, and so is not on point. Regardless, "[t]he citizen's right to travel is subordinate to the Congressional right to regulate interstate commerce when the travel involves the use of an interstate facility for illicit purposes." *United States v. Burton*, 475 F.2d 469, 471 (8th Cir. 1973) (citation omitted); *see also, e.g.*, *United States v. Tykarsky*, 446 F.3d 458, 472 (3d Cir. 2006).

[10] Before the district court, Indiana advanced an interest in "keep[ing] sex offenders from evading registration requirements by the simple act of moving out of the state of conviction." (Dkt. 105 at 19). Perhaps recognizing that this interest only highlights the fact that it is discriminating against newly arrived residents, Indiana does not reiterate this argument on appeal. In any event, the Supreme Court's right-to-travel jurisprudence has repeatedly rejected this argument. Held the Court in *Shapiro*:

> [T]he class of barred newcomers is all-inclusive, lumping the great majority who come to

In attempting to justify the application of SORA to the plaintiffs, Indiana advances two interests—an interest in "protecting Hoosiers from high-recidivism-risk offenders" and an interest in "the important constitutional principles of fair notice"—and argues that its application of SORA to the plaintiffs "strikes a reasonable balance" between these two interests. (Br. of Appellants 39-40). But "balance" is a method, and is not itself a state interest; and neither of the interests it articulates is remotely advanced by its discriminatory treatment of recent migrants to Indiana. Certainly Indiana has a compelling interest in promoting public safety. However, as in any equal-protection challenge, the state interest must actually justify the differential treatment, *see, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Smith v. Pachmayr*, 776 Fed. App'x 362, 363-64 (7th Cir. 2019): there is no reason to suspect that a recent migrant to Indiana poses a greater threat to public safety than does a long-term Hoosier who was convicted of the exact same offense at the exact same time. Indiana rightfully does not contend to the contrary.

Indiana is left then with its asserted interest in providing persons with "fair notice"

> the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the [statutes at issue] enact what in effect are non-rebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever . . . supplies any basis in fact for such a presumption.

394 U.S. at 631-32. Fundamentally identical arguments were also rejected in *Saenz*, 526 U.S. at 506, and *Maricopa County*, 415 U.S. at 264. As noted, Indiana does not advance any interest in determining its own residents.

of their registration obligations. If this were a permissible interest, however, states could *always* justify discrimination against newly arrived residents on the grounds that they were aware of the receiving state's laws when they decided to relocate. By way of example only, the veteran-taxpayers in *Hooper* relocated to New Mexico in 1981, even though residency restrictions had been an aspect of that state's statutory scheme since 1923. *See Hooper v. Bernalillo Cty. Assessor*, 679 P.2d 840, 842-43 (N.M. Ct. App. 1984), *rev'd*, 472 U.S. 612 (1985).[11] The Supreme Court nonetheless concluded that the discriminatory classification could not satisfy "even the minimum rationality test," despite the fact that the taxpayers were "on notice" of New Mexico's statutory requirements for the tax exemption at the time that they decided to relocate to that state. *See* 472 U.S. at 618. And, while the plaintiffs in *Zobel* relocated to Alaska shortly prior to the enactment of that state's dividend-distribution program, clearly that fact played no role in the Court's invalidation—under low-level scrutiny—of that program. *See* 457 U.S. at 57-58, 60-71.[12]

Indiana would doubtless prefer to require the registration of all sex offenders,

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[11] To be sure, the challenged statute in *Hooper* was amended in 1983, after the taxpayers had relocated to New Mexico. But that amendment merely changed the cut-off date to establish residency from 1975 to 1976, and so did not affect the taxpayers' claims in that case. *See* 679 P.2d at 844.

[12] There is significant irony in Indiana's "fair notice" argument. At least at the time that Mr. Hope and Mr. Standish relocated to Indiana (both in 2013), precedent established that registration requirements could *not* be enforced against them without running afoul of state constitution's *ex post facto* clause. *See State v. Hough*, 978 N.E.2d 505, 508-10 (Ind. Ct. App. 2012), *trans. denied*; *Burton v. State*, 977 N.E.2d 1004, 1007-09 (Ind. Ct. App. 2012), *trans. denied*. *Hough* and *Burton*, of course, were both subsequently abrogated by *State v. Zerbe*, 50 N.E.3d 368 (Ind. 2016).

regardless of when they entered the state, although it is prohibited from doing so by the Indiana Constitution as interpreted in *Wallace*. But state policies must comport with the U.S. Constitution whether or not they are dictated in part by state-constitutional requirements. The requirement that the plaintiffs register as sex offenders when they would not be obliged to do so had they been convicted in Indiana and thereafter remained in the state does not pass muster under even the most deferential review. It certainly fails under the requisite strict scrutiny.

II. The application of SORA to the plaintiffs violates the federal *ex post facto* clause

A. Introduction to *ex post facto* analysis

The application of SORA to the plaintiffs also violates the *ex post facto* clause, which prohibits states from imposing "retroactive punishment" on persons that could not have been imposed at the time of his or her offense. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 92 (2003). The framework for the *ex post facto* inquiry is "well established":

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, [courts] must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.

Id. at 92 (internal quotations, citations, and alterations omitted). The plaintiffs do not contend that SORA has a punitive intent, and so their *ex post facto* argument raises two questions: whether SORA has been applied retroactively and, if so, whether it is "punitive in effect."

The plaintiffs acknowledge that the Court in *Smith* upheld against an *ex post facto* challenge an early registration statute. And certainly the Alaska statute at issue in that case shares several core provisions with Indiana's SORA: in both instances, statutorily defined "sex offenders" are required to submit to annual or quarterly registration and provide certain information (including physical descriptions, license numbers, places of employment, conviction information, photograph, and fingerprints). *See id.* at 90. But *Smith* is no longer dispositive: "[o]ver time, Indiana's registry has greatly expanded in scope, in terms of both who is required to register and what registration entails." *Schepers v. Commissioner*, 691 F.3d 909, 911 (7th Cir. 2012); *see also Wallace v. State*, 905 N.E.2d 371, 375 (Ind. 2009) ("Since its inception in 1994 [SORA] has been amended several times. What began as a measure to give communities notification necessary to protect children from sex offenders, [SORA] has expanded in both breadth and scope."). The distinctions between the registration statute at issue in *Smith* and registration schemes as they currently exist caused the Sixth Circuit to invalidate Michigan's scheme on *ex post facto* grounds, *see Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017); other courts have also concluded that these schemes are so punitive as to be unconstitutional, *see Doe v. Rausch*, 382 F. Supp. 3d 783 (E.D. Tenn. 2019) (federal *ex post facto* clause); *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017) (Eighth Amendment), *appeal pending*, No. 17-1333 (10th Cir.); *Doe v. State*, 189 P.3d 999 (Alaska 2008) (state *ex post facto* clause); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (state *ex post facto* clause);

State v. Letalien, 985 A.2d 4 (Me. 2009) (state and federal *ex post facto* clauses); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (state *ex post facto* clause); *Starkey v. Okla. Dep't of Corrections*, 305 P.3d 1004 (Okla. 2013) (state *ex post facto* clause). So too here.

B. The requirements of SORA apply retroactively

Indiana argues first that the plaintiffs' claim does not even implicate the *ex post facto* clause—even though their convictions long pre-dated SORA—because SORA imposes "prospective obligations" rather than "retroactive consequences." If this were the case, not only was *Smith* itself wrongly decided, for the Court specifically described the "retroactive application" of registration requirements, *see* 538 U.S. at 106, but a wide array of constitutionally infirm legislation would be rendered entirely permissible. Take, for instance, a statute forbidding all persons with a past felony conviction from inhabiting a state, or requiring these persons to pay a thousand-dollar fine annually. Under Indiana's formulation, neither of these statutes would even implicate *ex post facto* concerns, for the actions that run afoul of these hypothetical statutes—continuing to reside in the state or failing to pay the required fee—do not occur until after the statutes' enactment. Not surprisingly, Indiana errs.

In *United States v. Leach*, 639 F.3d 769 (7th Cir. 2011), the criminal defendant—who was convicted of a sex offense before the enactment of the federal SORNA—travelled in interstate commerce after the enactment of that statute and was prosecuted for a violation of 18 U.S.C. § 2250(a). *Id.* at 771. In general terms, a person violates that statute when (a)

he fails to register as required by SORNA and (b) he travels in interstate or foreign commerce. *See* 18 U.S.C. § 2250(a). This Court described two *different* types of *ex post facto* claims that might arise under SORNA: "either Leach could contend that the criminal penalties under 18 U.S.C. § 2250(a) are retroactive, *or* he could assert that the registration requirements under [SORNA] constitute punishment." 639 F.3d at 772. Under the first type of violation, a defendant who traveled in interstate commerce and failed to register clearly could not be prosecuted if both of those events took place before they were made criminal, although a person required to register could be prosecuted if he traveled in interstate commerce after the criminal statute was enacted. In other words, an *ex post facto* challenge to a criminal prosecution focuses on the date that the last element of the crime takes place. The law is clear in this regard. *See, e.g.*, *United States v. Mueller*, 661 F.3d 338, 345 (8th Cir. 2011); *United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001). And it is the portion of *Leach* that addresses *this* type of *ex post facto* violation—targeted at the penal statute itself—on which Indiana relies in arguing that it has not applied SORA retroactively.

But the plaintiffs here are raising a challenge under the *second* type of *ex post facto* violation recognized in *Leach*: they are arguing "that the registration requirements under [Indiana law] constitute punishment." 639 F.3d at 772. In addressing this challenge to the federal SORNA, this Court treated the issue as "not an open question" given both *Smith* and *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008); *Leach* did not, however,

doubt that the registration requirements were being retroactively applied. *See* 639 F.3d at 773. As addressed at greater length immediately below, given significant distinctions between the statutes, the fact that the federal SORNA is not "punitive in effect" does not answer the question of whether Indiana's SORA nonetheless *is* "punitive in effect." After all, not all registration statutes are the same. While *Leach* (and a series of cases cited by *Leach*) appropriately treated the Supreme Court's decision in *Smith* as dispositive of the *ex post facto* question there at issue, neither *Smith* nor *Leach* is dispositive of the *ex post facto* question presented by this case.

To be sure, *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 797 (2019), and *United States v. Meadows*, 772 Fed. App'x 368 (7th Cir. 2019), both appear to treat restrictions that post-date individuals' sex offenses as non-retroactive. *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014), which Indiana does not cite, takes the opposite approach: it treats sex-offender restrictions as retroactive although it concludes that the specific restrictions at issue in that case were not punitive. *See id.* at 1133-34. Neither *Vasquez* nor *Meadows*, of course, can contravene the Supreme Court's holding in *Smith* that sex-offender restrictions *are* retroactive (even though they may not be punitive); nor can they contravene *Leach*'s explicit recognition that persons challenging sex-offender restrictions may demonstrate an *ex post facto* violation by establishing "that the registration requirements . . . constitute punishment." *See* 639 F.3d at 772. Despite verbiage supporting Indiana's argument, *Vasquez* and *Meadows* must be read as holding

simply that the restrictions challenged in those cases are not *punitive* even though they are *retroactive*. After all, this Court in *Vasquez* distinguished that case from the Sixth Circuit's decision in *Snyder* by noting that the plaintiffs in *Snyder* challenged statutory amendments that imposed "a byzantine code governing in minute detail the lives of the state's sex offenders" and that, considered collectively, were punitive in effect. *See* 895 F.3d at 522 n.4 (quoting *Snyder*, 834 F.3d at 697). Although this Court concluded that a challenge to a single statute imposing residency restrictions on sex offenders "does not remotely compare" to the constitutional challenge levied in *Snyder*, *id.*, the onerousness of a challenged restriction bears on whether that restriction is *punitive*; it does not bear on whether that restriction is *retroactive*.

The bottom line is that, due exclusively to criminal convictions that long pre-dated the enactment of SORA, the plaintiffs are subject to a host of requirements and restrictions that infect virtually every aspect of their lives. Insofar as their challenge is to the "application of a law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed," *Johnson v. United States*, 529 U.S. 694, 699 (2000), it is clear that SORA has been retroactively applied and that the *ex post facto* clause is therefore implicated. The question is simply whether SORA constitutes punishment.[13]

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[13] At least one of the post-*Smith* cases that Indiana relies upon in arguing that SORA is not punitive (*see* Br. of Appellants 41-42) concludes that registration requirements are retroactive. *See Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016). The others assume the same thing. *See Clark v. Ryan*, 836 F.3d 1013, 1016 (9th Cir. 2016); *King v. McCraw*, 559 Fed. App'x 278, 281-82 (5th Cir. 2014); *Ballard v. FBI*, 102 Fed. App'x 828, 829 (4th Cir. 2004).

C. As the Sixth Circuit recognized in *Does #1-5 v. Snyder*, proper application of *ex post facto* principles establishes that the requirements imposed by SORA are punitive in effect

1. As noted, the plaintiffs do not contend that Indiana's SORA has a punitive intent; the question, therefore, is whether its effects are so punitive that it nonetheless constitutes punishment.

Indiana insists initially that *Leach* and *Vasquez* are dispositive of the *ex post facto* question, and that this Court therefore need proceed no further. But the statutes addressed in those cases—the federal SORNA in *Leach* and a residency restriction in *Vasquez*—were limited in a way that Indiana's all-encompassing registration scheme is not. So too with *Mueller*, not cited by Indiana, which simply applied *Smith* to uphold a "requirement[] of continual updating of information" before upholding a $100 annual registration fee (the latter apparently under a "punitive intent" theory rather than a "punitive effects" theory). *See* 740 F.3d at 1133-35. As noted, however, this Court in *Vasquez* specifically distinguished that case from the Sixth Circuit's decision in *Snyder*, where a "package of civil regulatory restrictions," considered collectively, were deemed "punitive in effect." 895 F.3d at 522 n.4. The plaintiffs here are raising a challenge akin to *Snyder* and, as such, their argument is not precluded by this Court's precedents. *Cf. Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997) ("[S]ome conditions, which taken singly do not constitute cruel and unusual punishment, may in cumulative effect violate the Eighth Amendment."); *Bruscino v. Carlson*, 854 F.2d 162, 166 (7th Cir. 1988) ("The whole

is sometimes greater than the sum of the parts: the cumulative effect of the indignities, deprivations, and constraints to which inmates are subjected determines whether they are receiving cruel and unusual punishment.").[14]

2. Given that *Leach* and *Vasquez* are not dispositive, the *ex post facto* inquiry necessitates an evaluation of the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See Smith*, 538 U.S. at 97 (describing these factors as "neither exhaustive nor dispositive" but as "useful guideposts"). This analysis compels the conclusion that Indiana's SORA is punitive in effect.

a. First, SORA resembles traditional punishment: it resembles, "in some respects at least, the ancient punishment of banishment." *Snyder*, 834 F.3d at 701. Certainly this Court in *Vasquez* distinguished a 500-foot residency restriction from banishment, given that banishment traditionally meant that persons "could neither return to their original community nor . . . be admitted easily into a new one." 895 F.3d at 521 (citation and quotation omitted). While traditional banishment and Indiana's 1,000-foot residency restriction may not be identical, the extensive limitations imposed by SORA are nonetheless comparable to banishment: although persons are not absolutely

[14] Indiana cites a series of cases holding certain registration states to be non-punitive under the *ex post facto* clause. (Br. of Appellants 41-42). Of the post-*Smith* cases it cites, only *Shaw v. Patton* does not treat *Smith* as entirely dispositive of the issue. *See* 823 F.3d at 563-77. Cases that have considered *Shaw* in recent years have reached different conclusions with respect to distinguishable statutes. *See Rausch*, 382 F. Supp. 3d at 799 (registration act); *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951, 958-61 (E.D. Wis. 2017) (residency restriction).

barred from society, their movement is nonetheless greatly restricted and their employment and living prospects are severely limited.[15] Indeed, they *are* completely barred from school property. *See Rausch*, 382 F. Supp. 3d at 796 (banishment from park). But of course the burden felt by the plaintiffs is not limited to pre-existing facilities, for every residence that they select—for the rest of their lives—might suddenly become off-limits once a new child care opens nearby. The similarity of SORA's effect to this form of traditional punishment is undeniable.[16]

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[15] In addition to schools and parks, sex offenders are prohibited from residing within 1,000 feet of a "youth program center," defined as any building or structure "that on a regular basis provides recreational, vocational, academic, social, or other programs or services" for minors (including child care facilities). Ind. Code §§ 35-31.5-2-357, 35-42-4-11(c). Indiana maintains a listing of the child cares, which reveals the sheer number of such facilities in Indiana. *See* Ind. Family & Soc. Servs. Admin., *Child Care Finder*, *at* https://secure.in.gov/apps/fssa/provider search/#/home/category/ch (select "Search") (last visited Nov. 4, 2019). Hundreds if not thousands of these facilities are located in cities such as Indianapolis, Fort Wayne, and Muncie, such that sex offenders are prohibited from residing in entire areas of these cities. *See id.* (after selecting "Search," select "Your Location" and enter city name) (last visited Nov. 4, 2019).

[16] Indiana attempts to minimize the effects of SORA by noting that this Court upheld a 500-foot residency restriction in *Vasquez* and insisting that "a mere 500 feet" cannot determine a statute's constitutionality. (Br. of Appellants 47). Of course, this distinction is not meaningless: it translates to a prohibited area *four times greater* around *each and every* of the thousands of parks, schools, and child cares in even moderately sized Indiana towns and cities. (A prohibited zone with a radius of 500 feet is 785,398 square feet in area; a prohibited zone with a radius of 1,000 feet is 3,141,592 square feet in area.)

Indiana also notes in passing that, in addition to limiting where sex offenders may reside, Illinois law also prohibits sex offenders from entering school property. (Br. of Appellants 47). The relevance of this observation is not clear, for that provision was not cited, let alone challenged, in *Vasquez*. In any event, Illinois law allows parents or guardians of students to visit their child's school for a variety of purposes, 720 Ill. Comp. Stat. 5/11-9.3(a), an exception that dramatically limits the burden occasioned by the prohibition. By way of example only, while Mr. Rush is unable to attend conferences pertaining to his disabled daughter's education, he would be permitted to do so in Illinois.

SORA also resembles both "shaming" and supervised release. "Unlike the law in *Smith*, which republished information that was already publically available," *Snyder*, 834 F.3d at 702, Indiana's SORA classifies persons using terms designed to outrage—"sexually violent predator" or "offender against children"—without any individualized assessment regarding present dangerousness. These lifelong labels, which are prominently displayed on the publicly available registry, are felt particularly acutely by a person such as Mr. Snider (whose offense took place in the 1980s and who is now in his mid-60s) or Mr. Bash (whose offense occurred in the 1980s when he was in his early teens or even younger). Mr. Standish, Mr. Rice, and Mr. Rush, like Mr. Snider, are all over fifty years old, with families of their own, and Mr. Hope's offense took place when he was nineteen.

And SORA's resemblance to probation or parole is likewise clear. The *Smith* Court determined that Alaska's early registration statute (which did not require registration updates to be made in person) was dissimilar to these forms of supervised release because offenders remained "free to move where they wish and to live and work as citizens, with no supervision." 538 U.S. at 101. Not so under SORA. As in *Snyder*, "registrants are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail." 834 F.3d at 703. The Indiana Supreme Court in *Wallace* was likewise clear that registration under SORA is "comparable to conditions of supervised probation or parole" in Indiana, 905 N.E.2d at

380; *see also id.* at 380-81 nn.9-10, and the district courts in *Rausch*, 382 F. Supp. 3d at 796-97, and *Millard*, 265 F. Supp. 3d at 1227, reached the same conclusion.

b. Second, SORA clearly imposes numerous affirmative disabilities or restraints: it "requires much more from registrants than did the statute in *Smith*." *Snyder*, 834 F.3d at 703. Certainly "imprisonment" represents "the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. But this inquiry is not as limited as Indiana insists, for "other restraints, such as probation or occupational disbarment, also can impose some restriction on a person's activities." *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005) (citing *Smith*, 538 U.S. at 100-01). Ultimately, although "minor and indirect" restraints are unlikely to be deemed punitive, this Court must inquire as to "how the effects of [SORA] are felt by those subject to it." *Smith*, 538 U.S. at 99-100. "[S]urely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound." *Snyder*, 834 F.3d at 703.

Not only does Indiana's SORA limit where registrants may live, work, and visit, but it imposes on them the obligation to carry valid photo identification at all times, to allow for in-home visitation for verification of their address, and to notify law enforcement if they plan to travel even for a long weekend. *Wallace*, 905 N.E.2d at 379. On top of this, unlike the statute at issue in *Smith*, Indiana's SORA requires in-person registration. *Cf. Smith*, 538 U.S. at 101. This process can take several hours and must be repeated regularly—annually for Mr. Bash, quarterly for four of the plaintiffs, and weekly

for Mr. Hope (and more frequently if any registration information must be updated in the interim)—for the rest of their lives. As the district court noted in *Millard*:

> Having to report to law enforcement every time one moves, as well as at regular time intervals, is hardly a "minor or indirect" restraint, especially when failure to do so is punishable as a crime and also may subject the registrant to in-person home visits and public humiliation by over-zealous, malicious, or at least insensitive law enforcement personnel.

265 F. Supp. 3d at 1229. "These restraints are greater than those imposed by the Alaska statute [at issue in *Smith*] by an order of magnitude." *Snyder*, 834 F.3d at 703.

Indiana's response to all this is to note that Illinois, too, requires in-person registration and the payment of registration fees. True enough, but these requirements were simply not at issue in *Vasquez* and the relevance of Indiana's observation is not clear.

c. Third, Indiana's SORA clearly promotes the traditional aims of punishment: "incapacitation, retribution, and specific and general deterrence." *Snyder*, 834 F.3d at 704.

> Its very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend. It is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community. . . . Finally, its professed purpose is to deter recidivism . . . and it doubtless serves the purpose of general deterrence.

Id. (citation omitted). To be sure, "many of these goals can also rightly be described as civil and regulatory," *id.*—that was the conclusion of the *Smith* Court, *see* 538 U.S. at 102—and so both the Sixth Circuit in *Snyder* and the Indiana Supreme Court in *Wallace* afforded this factor little weight. *See Snyder*, 834 F.3d at 704; *Wallace*, 905 N.E.2d at 382. The district

court in *Millard* appears to have afforded this factor greater weight, concluding that the fact that sex offenders must register based on past convictions rather than based on "an individualized assessment of [their] level of dangerousness" means that the "scheme begins to look far more like retribution for past offenses than a public safety regulation." 265 F. Supp. 3d at 1229-30 (internal quotation omitted).

d. Finally, as the *Smith* Court noted, a statute's "rational connection to a nonpunitive purpose is a most significant factor in [the] determination that the statute's effects are not punitive." 538 U.S. at 102 (quotation and alteration omitted). And, while this factor does not demand that a statute possess a "perfect fit with the nonpunitive aims it seeks to advance," *id.*, it is most usefully analyzed in conjunction with the last *Mendoza-Martinez* factor—that is, whether the burdens imposed by a statute are "excessive in relation to its regulatory purpose," *id.* at 103. To be sure, the *Smith* Court relied on legislative findings "that a conviction for a sex offense provides evidence of substantial risk of recidivism" to conclude that Alaska's early registration scheme was appropriately tailored to its nonpunitive aim. *Id.* at 103. But those are findings, not present in Indiana's non-existent legislative history, *see, e.g.*, *Robinson v. State*, 56 N.E.3d 652, 660 n.5 (Ind. Ct. App. 2016), *trans. denied*, that have not stood the test of time.

The *Snyder* court, for instance, traced recent studies and found "scant support for the proposition that SORA in fact accomplishes its professed goals." 834 F.3d at 704. Indeed, the DOC's own report concerning recidivism rates indicates that recidivism rates

for sex offenders are only marginally greater than the DOC-wide rate, and that the vast majority of the sex offenders who are categorized as recidivists are reincarcerated for "technical" violations of probation or parole; less than 6% of sex offenders are reincarcerated for a new sex offense within three years of their release. (Dkt. 100-12 at 18, 21-22). The same report indicates that sex offenders have a lower recidivism rate than do persons convicted of weapons-related offenses or property crimes. (*Id.* at 14). But this excessiveness inquiry is even more clear here, where SORA is being applied to persons who committed their offenses decades in the past, and are therefore the least likely to reoffend. On top of all this, it is significant that Indiana's SORA "provides no mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure. Offenders cannot shorten their registration or notification period, even on the clearest proof of rehabilitation." *Wallace*, 905 N.E.2d at 384; *see also Rausch*, 382 F. Supp. 3d at 797-99; *Millard*, 265 F. Supp. 3d at 1230.

* * *

Numerous courts evaluating the proliferation of sex offender restrictions since *Smith* have concluded that statutes such as Indiana's SORA serve to effect punishment. *Snyder* did so recently under the federal *ex post facto* clause; several state courts, in addition to the Indiana Supreme Court in *Wallace*, have done so under various provisions of their state constitutions. A re-evaluation of the *Mendoza-Martinez* factors in light of the amendments to these statutes, as well as the practical experience with these requirements,

necessitates a different result: Indiana's SORA violates the federal *ex post facto* clause. Nothing in this Court's precedents compels a contrary conclusion.

CONCLUSION

For the foregoing reasons, the district court must be affirmed.

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 32(c) insofar as it contains 13,979 words, excluding the parts of the brief exempted by Appellate Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Service will be made on all ECF-registered counsel by operation of the Court's electronic system.

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