STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL J. BETTS, JR.,

Defendant-Appellant.
_____/

Supreme Court No. 148981
Court of Appeals No. 319642
Muskegon Cir. Ct. No. 12-062665-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN SNYDER,

Defendant-Appellant.
_____/

Supreme Court No. 153696
Court of Appeals No. 325449
Gratiot Cir. Ct. No. 14-007061-FH

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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SUMMARY OF ARGUMENT

This Court should deny leave to appeal for four reasons. First, in August 2016, the Sixth Circuit Court of Appeals held that Michigan's Sex Offenders Registration Act (SORA), MCL 28.721, *et seq.*, imposes punishment in violation of the Ex Post Facto Clause of the United States Constitution, and that retroactive application of its 2006 and 2011 amendments must cease. See *Does #1-5 v Snyder* ("*Does I*"), 834 F3d 696, 705-706 (CA 6, 2016), reh den (2016), cert denied 138 S Ct 55; 199 L Ed 2d 18 (2017). While this Court is not bound by that decision, the State of Michigan ***is*** bound, meaning that it must amend SORA to conform to the *Does I* decision, irrespective of any decision by this Court.

Second, Michigan registrants have filed a federal class action lawsuit to ensure that the Sixth Circuit decision in *Does I* is applied to all eligible registrants. See *Does #1-6 v Snyder* ("*Does II*"), Eastern District of Michigan Docket No. 2:16-cv-13137 (Cleland, J.). With the consent of the state, that class has been certified and a motion for partial summary judgment on the ex post facto claim is pending. Because the ex post facto issues raised here are being addressed on a class-wide basis in the federal litigation, this Court should deny leave to appeal.

Third, in response to the *Does II* litigation, serious legislative reform efforts are underway for comprehensive SORA reform that would not only remedy the constitutional flaws in the statute, but would reflect modern social science and best practices. The *Does II* litigation is being held in abeyance to give the legislature time to revise the statute. Like the federal district court, this Court should give the legislature the opportunity to rework the statute, and should therefore deny leave to appeal.

Fourth, the 2006 and 2011 SORA amendments cannot be retroactively applied under the Sixth Circuit's decision, but the 2011 amendments are not severable, meaning that the entire statute is in jeopardy as applied to pre-2011 registrants. Because a ruling voiding the statute in

toto could lead to a rushed, ill-considered legislative revision, the severability problems provide another reason to let the ongoing legislative process play out.

For these reasons, this Court should deny leave to appeal, and should instead vacate the lower courts' decisions and remand both Mr. Snyder's and Mr. Betts' cases for reconsideration in light of *Does II*. This Court should instruct the lower courts on remand to consider whether the state is collaterally estopped from relitigating the issue of whether SORA is punishment, and whether the prosecutors here, who are in privity with the state, are therefore bound by the *Does I* decision.

Finally, if the Court does grant leave and reaches the ex post facto question itself, it must look at the cumulative impact of the statute, just at the United States Supreme Court did in *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). Any leave grant should be accompanied by further briefing, particularly as to severability and collateral estoppel—important issues which merit full briefing if they are to be decided by this Court.

I. BACKGROUND

A. The Legislative History of SORA

When Michigan first passed a sex offender registration law in 1994, it was a very different statute than it is today. 1994 PA 295. Under the 1994 statute, registration information was available only to law enforcement, and was exempt from public disclosure. After the initial registration was completed, the only additional obligation was to notify local law enforcement within 10 days of a change of address. The registrant did not need to notify law enforcement in person. 1994 PA 295, § 5(1). Since that time, the legislature has repeatedly amended the statute, imposing an ever stricter regime with new burdens on registrants, covering more people and more conduct. The result of these multiple amendments is a complex web of restrictions that govern virtually every facet of registrants' lives.

As the Sixth Circuit explained in *Does I*, "[o]ver the first decade or so of SORA's existence, most of the changes centered on the role played by the registry itself.... [But] Michigan began taking a more aggressive tack in 2006…." *Does I*, 834 F3d at 697-698. The 2006 amendments (effective 1/1/06) retroactively barred registrants (with limited exceptions) from working, residing, or loitering within 1,000 feet of school property, and imposed criminal penalties for noncompliance. 2005 PA 121; 2005 PA 127. Penalties for registration-related offenses were also increased. 2005 PA 132. Another amendment, which was also applied retroactively, gave subscribing members of the public electronic notification when people registered or moved into a particular zip code. 2006 PA 46.

The 2011 amendments (effective 4/12/11) retroactively imposed extensive new reporting requirements, mandating in-person (and in some cases) immediate reporting of vast amounts of personal information. 2011 PA 17-18. The 2011 amendments also retroactively categorized registrants into tiers, with tier classifications determining the length of time a person must register and the frequency of reporting. See *id.*, codified as MCL 28.722(r)-(w); MCL 28.725(10)-(13). Tier classifications are based solely on the offense of conviction. *Id*. They are not based on a registrant's actual risk of re-offending and there is no individualized determination of whether the registrant poses any risk to the public.

B. The *Does I* Litigation

In 2012, six Michigan registrants challenged the constitutionality of SORA. The United States District Court for the Eastern District of Michigan (Cleland, J.) granted the defendants' motion to dismiss the ex post facto claim, but denied the motion with respect to various other claims. *Does #1-4 v Snyder*, 932 F Supp 2d 803 (ED Mich, 2013). After extensive discovery, the court held a Rule 52 bench trial on a voluminous record, which included seven expert reports, 21 depositions, and extensive documentary evidence about the functioning of the registry. The

parties' stipulated joint statement of facts alone was 262 pages. The district court held that some parts of SORA are unconstitutionally vague or violate the First Amendment, and that registrants cannot be held strictly liable for unintentionally violating SORA. *Does #1-5 v Snyder*, 101 F Supp 3d 672, 713-714 (ED Mich, 2015). In a supplemental opinion, the Court held that retroactively extending the duration of certain internet reporting requirements violates the First Amendment. *Does #1-5 v Snyder*, 101 F Supp 3d 722, 730 (ED Mich, 2015).

On appeal, the Sixth Circuit held that SORA is punishment. The court said that successive amendments had made the law so onerous that it could no longer be described as regulatory. See *Does I*, 834 F 3d at 705-706. Accordingly, the court held that "[t]he retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease." *Id.* at 706. The court decided the case solely on ex post facto grounds, declining to reach the district court's rulings that other aspects of SORA are unconstitutional, but noted: "[T]his case involves far more than an Ex Post Facto challenge. And as the district court's detailed opinions make evident, Plaintiffs' arguments on these other issues are far from frivolous and involve matters of great public importance." *Id.*

The state petitioned for certiorari, and the United States Supreme Court sought the views of the United States Solicitor General. *Snyder v Does #1-5*, __ US __; 137 S Ct 1395; 197 L Ed 2d 552 (2017). The Solicitor General advised that the petition did not warrant review, explaining:

> Michigan's sex-offender-registration scheme contains a variety of features that go beyond the baseline requirements set forth in federal law and differ from those of most other States. After applying the multifactor framework set out in *Smith* v *Doe*, 538 US 84 (2003), the court of appeals concluded that the cumulative effect of SORA's challenged provisions is punitive for ex post facto purposes. While lower courts have reached different conclusions in analyzing particular features of various state sex-offender-registration schemes, the court of appeals' analysis of the distinctive features of Michigan's law does not conflict with any of those decisions, nor does it conflict with this Court's holding in *Smith*. Every court of appeals that has considered an ex post facto challenge to a sex offender-registry

> statutory scheme has applied the same *Smith* framework to determine whether the aggregate effects of the challenged aspects of that scheme are punitive. And although most state sex offender-registry schemes share similar features, they vary widely in their form and combination of those features. Accordingly, to the extent the courts of appeals have reached different outcomes in state sex offender-registry cases, those outcomes reflect differences in the statutory schemes rather than any divergence in the legal framework. Finally, petitioners' concern [] that the court of appeals' decision will prevent the State from receiving some federal funding does not warrant review. That concern is premature, as it may well be the case that Michigan can continue to receive federal funds notwithstanding this decision. And the decision does not prevent the State from implementing a sex-offender-registration scheme that is consistent with federal law. Further review is therefore not warranted.

Does I, Br of United States as Amicus Curiae, 2017 WL 2929534, at *9-10 (July 7, 2017). On October 2, 2017, the state's petition for writ of certiorari was denied. See *Snyder v Does #1-5*, __US __; 138 S Ct 55; 199 L Ed 18 (2017).

C. The *Does II* Litigation

Despite the Sixth Circuit's and district court's decisions in *Does I*, tens of thousands of other registrants are still being subjected to SORA provisions that those courts held were unconstitutional. The legislature has not yet amended the statute, and some law enforcement agencies are attempting to enforce the unconstitutional provisions. See, e.g., *Roe v Snyder*, 240 F Supp 3d 697 (ED Mich, 2017).

On June 28, 2018, six registrants filed a class action complaint seeking to ensure that the *Does I* decisions were applied to all Michigan registrants.[1] See *Does II*. The complaint sought class-wide relief on four counts, all issues on which the *Does I* plaintiffs had prevailed either before the district court or the Sixth Circuit. Those four counts are:

[1] The complaint was initially filed on August 30, 2016, several days after the Sixth Circuit's decision in *Does I*, and the case was designated a "companion case" to *Does I* and was transferred to Judge Cleland. The case was then stayed pending resolution of the then-pending cert petition in *Does I*.

1. Vagueness. The district court in *Does I* had found SORA's geographic exclusion zones and some of SORA's reporting requirements to be unconstitutionally vague. *Does #1-5 v Snyder*, 101 F Supp 3d 672, 681-690 (ED Mich, 2015).

2. Strict Liability. The district court had held that "[a]mbiguity in the Act, combined with the numerosity and length of the Act's provisions make it difficult for a well-intentioned registrant to understand all of his or her obligations," and concluded that a knowledge requirement is necessary "to ensure due process of law." *Id.* at 693.

3. First Amendment. The district court had invalidated various SORA provisions as violating the constitutional right to freedom of speech. *Id.* at 704; *Does v Snyder*, 101 F Supp 3d 722, 722-730 (ED Mich, 2015).

4. Ex Post Facto. This claim sought implementation of the Sixth Circuit's decision barring retroactive application of the 2006 and 2011 SORA amendments. The plaintiffs further alleged that the 2011 SORA amendments cannot be severed from SORA because the unconstitutional portions are so entangled with the other sections that they cannot be removed without adversely affecting the operation of the act. As a result, the plaintiffs alleged that there is no statute in effect that lawfully imposes restrictions and obligations based on conduct occurring before April 12, 2011.

The plaintiffs then filed two motions. The first sought class certification. The state defendants, recognizing that a class-wide resolution was needed to address implementation of *Does I*, agreed to class certification. The resulting stipulated class certification order certified a "primary class" defined as all people who are or will be subject to registration under Michigan's Sex Offenders Registration Act." Ex A, *Does II* Certification Order. There are an estimated 44,000 people subject to registration under SORA who are members of the primary class. *Does II* Second Amended Complaint, ¶ 180. Approximately 2,000 people are added to the registry each year. *Id.*

The court also certified two "ex post facto" sub-classes, defined as follows:

a. The "pre-2006 ex post facto subclass" is defined as members of the primary class who committed their offense or offenses requiring registration before January 1, 2006, and who have committed no registrable offense since.

b. The "2006-2011 ex post facto subclass" is defined as members of the primary class who committed their offense or offenses requiring registration on or after January 1, 2006, but before April 12, 2011, and who have committed no registrable offense since.

Ex A, *Does II* Certification Order. There are tens of thousands of people in each subclass, although the exact number is not known. *Does II* Second Amended Complaint, ¶ 181.

The *Does II* plaintiffs also filed a motion for partial summary judgment on behalf of the ex post facto subclasses. The motion asked the court to declare, consistent with *Does I*, that the 2006 and 2011 SORA amendments constitute punishment and cannot be applied retroactively to registrants who committed their registrable offense before the effective dates of those amendments, and to permanently enjoin the defendants from retroactively enforcing the 2006 and 2011 SORA amendments.[2]

The plaintiffs then sent a letter to the defendants, suggesting that the parties seek to settle the *Does II* litigation by focusing their discussions on developing proposed legislation that they could jointly send to the legislature. Ex B, Oct 10, 2018 Aukerman Correspondence. The letter noted that there has been long-standing legislative interest in addressing the systemic problems with Michigan's registry, but that those problems have been difficult to address for political reasons. *Id.* The letter further noted that not only does the *Does II* class action provide an important opportunity to reform the law, but the legislature *must* pass a new statute in order to resolve the litigation:

> [B]ecause the 2011 SORA amendments likely are not severable, and because SORA is incomprehensible in their absence, the chances are high that SORA must be rewritten. The only questions are: 1) how much litigation will have to occur before that occurs; and 2) what will the new statute look like.

Id. at 3.

The parties' representatives then met, along with legislative staff, and have been working towards comprehensive SORA reform. Experts at the University of Michigan have agreed to

[2] The motion asked, in the alternative, for a preliminary injunction.

analyze relevant state data to ensure the new statute will be evidence-based. The federal district court agreed to hold the case in abeyance while legislative negotiations are ongoing, but is requiring monthly status reports and has orally informed the parties that, absent sufficient progress on a legislative solution, the case will be returned to the active docket.

D. The *People v Temelkoski* Case

When this Court granted leave in *People v Temelkoski*, 498 Mich 942; 872 NW2d 219 (2015), it ordered briefing on the question of whether SORA constitutes punishment. (The case was ultimately decided on due process grounds, *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (2018).) Relevant here is that while *Temelkoski* was pending, the Sixth Circuit decided *Does I*, the state filed a petition for certiorari in the United States Supreme Court, and the petition was denied. The day before oral argument, the State of Michigan submitted a letter to this Court stating:

> Last week, the United States Supreme Court denied Michigan's petition for certiorari in *Snyder v Does #1–5*, No. 16-768. As a result, the Sixth Circuit's decision in *Does #1–5 v Snyder*, 834 F3d 696 (2016), is final and entitled to precedential weight. Thus, while this Court is not bound by the decision of an intermediate federal appellate court, the State, after further consideration and out of concern for actions brought under 42 USC § 1983, waives the argument that it may retroactively apply the 2006 and 2011 amendments to Michigan's Sex Offender Registry Act.

Ex C, Oct. 10, 2017 Letter of Aaron Lindstrom.

E. The *People v Betts* and *People v Snyder* Cases

On February 27, 2014, the Michigan Court of Appeals denied leave on Mr. Betts' delayed application for leave to appeal. *Betts* Appendix 93a. On February 18, 2016, the Court of Appeals issued an unpublished opinion in Mr. Snyder's case holding that SORA did not constitute punishment. *Snyder* Appendix 12a-13a. Both cases were decided prior to the Sixth

Circuit's August 25, 2016, decision in *Does I*, meaning that the Court of Appeals did not have the benefit of that decision in making its own.

II. ARGUMENT

A. This Court Should Not Grant Leave Because the Federal Courts and Legislature Are Already Resolving the Ex Post Facto Issues at a Systemic Level.

This Court should not grant leave to appeal because the questions presented here are already being addressed at a systemic level both in the federal court system and in the legislature. First, the Sixth Circuit has already rendered a decision on the ex post facto issue. This Court, of course, is not bound by the Sixth Circuit's *Does I* decision. *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). But that decision ***is*** binding on the State of Michigan, as the State itself acknowledged when it informed this Court in *Temelkoski* that it waived any argument that it may retroactively apply SORA's 2006 and 2011 amendments. Ex C, Oct. 10, 2017 Letter of Aaron Lindstrom. Moreover, the *Does I* decision reflected years of litigation on an extraordinarily comprehensive record, including extensive expert evidence. That record provided a better factual basis to decide weighty constitutional questions than the thin records available in the instant criminal appeals.

Second, the Sixth Circuit decision ***is also*** binding on United States District Court for the Eastern District of Michigan, which is adjudicating the *Does II* class action. That Court has, with the consent of all parties, already certified a class comprised of all Michigan registrants, and two sub-classes that specifically seek to have the *Does I* ex post facto decision applied to them. A motion for partial summary judgment on the ex post facto claim is pending. If legislative reform efforts fail, the federal court will necessarily be deciding the ex post facto issues presented here.

Third, in response to the *Does II* litigation, the legislature is working on a major rewrite of SORA, meaning that the version of the statute currently before this Court is unlikely to remain in existence. Moreover, as the Gratiot County Prosecutor so aptly said:

> Setting public-safety policy is a task entrusted to the Legislature, not the courts, and the Legislature has the institutional competence to study relevant statistics, to draw conclusions from those statistics, and to enact policy accordingly.

Snyder Prosecutor Br 33. Yet the Gratiot County Prosecutor nevertheless asks this Court to short-circuit that very process, which is currently underway. The major stakeholders are at the table and are actively reviewing reforms that would not only remedy the constitutional flaws that the Sixth Circuit and federal district court identified in SORA, but would also reflect current evidence-based best practices, which have shown that many of SORA's features are counter-productive and actually decrease public safety.

This Court's primary role is to decide questions of great legal import that have implications for the state's jurisprudence overall, not just the rights of individual litigants. See MCR 7.305(B). The questions presented here are indisputably significant. However, given that (absent a legislative solution) the federal court will be deciding the ex post facto question for the certified class in accordance with *Does I*, it is unclear whether a decision by this Court would directly affect anyone other than the litigants themselves. (Even the extent to which it would ultimately affect Mr. Betts' and Mr. Snyder's future registration requirements is questionable.[3]) Certainly if this Court went further than the Sixth Circuit, that could impact the federal district court's decision in *Does II* or the legislature's rewrite of the statute, since both entities would

[3] It is not necessary to resolve the complex legal questions regarding whether a class-wide injunction in *Does II* would apply to Mr. Betts and Mr. Snyder in order to recognize that, as a practical matter, if SORA is substantially revised, the legislature is unlikely to create a separate registration statute that applies to Mr. Betts and Mr. Snyder. Nor is the Michigan State Police likely to develop separate procedures or internet interfaces for two individuals that differ from those used for other registrants, even assuming it could legally do so.

then want to respect not just the Sixth Circuit but this Court. If this Court were to disagree with the Sixth Circuit, however, the federal district court would still be bound to follow *Does I*. Similarly, any legislative rewrite of the statute—whether voluntary or in response to a federal injunction—would need to conform to *Does II*. In other words, while a decision by this Court expanding on *Does I* would have an impact, no useful purpose would be served by this Court weighing in to disagree with the Sixth Circuit.

The prosecutors here appear to be trying to manufacture a conflict between this Court and the Sixth Circuit. But the consequence of such conflicting interpretations would be incredible confusion, if not chaos, for registrants and law enforcement alike. And, inevitably, more litigation. Police officers who make arrests in reliance on a state law that is unconstitutional under clearly established Sixth Circuit law could find themselves defendants in lawsuits for damages under 42 USC 1983. Registrants would rush to federal court to obtain injunctions there against state-court prosecutions. And courts would try to sort out who is civilly or criminally liable for what based on abstention and comity doctrines that are far too complicated to guide the behavior of either registrants or law enforcement. One of the main reasons that the *Does II* class action was brought, and that the state consented to class certification, is that all parties recognized the importance of clear, uniform legal standards that can be applied across the board.

Even now, some state prosecutors have threatened or are bringing SORA prosecutions for conduct that is protected under *Does I*, a problem the *Does II* class action is intended to address. A good example is *Roe v Snyder*, 240 F Supp 3d 697 (ED Mich, 2017), where a registrant, who was convicted in 2003 for an offense involving consensual sex with a younger teen, was told by police that she could not continue her employment as the clinical director of a residential drug treatment center because her job was located within 1,000 feet of a school. Because *Does I*

barred retroactive application of SORA's exclusion zones to the plaintiff, the federal district court enjoined the Wayne and Oakland County prosecutors from prosecuting her under SORA.[4] Such litigation would multiply if there were conflicting decisions between the Sixth Circuit and this Court, since registrants would preemptively seek out the protection of the federal courts in advance of any possible state-court prosecutions, so as to avoid the complicated federal abstention and preclusion doctrines that would limit registrants' ability to secure relief in federal court once state-court prosecutions are underway or result in convictions.

In sum, this Court should deny leave because the questions presented here are already being systemically addressed by the federal courts and the Michigan legislature.

B. The Severability Issues Present a Further Reason to Allow the Legislature to Respond to *Does I*.

The Gratiot County Prosecutor argues that this Court should grant leave to decide the severability issues that are likely to arise if there is not a legislative solution in *Does II*, namely whether the 2006 and 2011 amendments can be severed from SORA. *Snyder* Prosecutor Br 41. To the contrary, the severability issues militate in favor of not granting leave. As set out below, the 2011 SORA amendments are not severable, meaning that if this Court decides severability it would be voiding the entire statute as applied to pre-2011 registrants. In response to such a decision, the legislature would, almost inevitably, rewrite SORA. But the resulting statute would likely be a hasty, ill-thought-out one, rather than one developed through the considered, evidence-based legislative discussions currently underway.

In sum, the fact that constitutional problems are enmeshed in the very fabric of SORA militates in favor of allowing the legislature time to revise the statute. If the Court does grant

[4] The district court later vacated the injunction against the Wayne County Prosecutor after it agreed to be bound by *Does I*. *Roe v Snyder*, 2018 WL 4352687 (ED Mich 2018). The Oakland County Prosecutor agreed to a stipulated judgment that it would not enforce SORA violations barred under *Does I*.

leave, however, it should order further briefing on severability.

1. The Legal Standard for Severability

When confronted with an unconstitutional statute, a court must balance two competing concerns. The court must restrain itself from "rewriting state law to conform it to constitutional requirements" and must avoid "quintessentially legislative work[.]" *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 329; 126 S Ct 961; 163 L Ed 2d 812 (2006) (citations omitted). At the same time, the Court should "try not to nullify more of a legislature's work than is necessary," and should therefore sever problematic portions of a statute if possible. *Id.* Whether a law can be salvaged by severing unconstitutional provisions, or whether instead the court would be involved in impermissible legislative rewriting depends on how deeply embedded the unconstitutional provisions are in the statutory fabric.

For severance to work, "the valid portion of the statue must be independent of the invalid sections, forming a complete act within itself." *Pletz v Sec'y of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983). When the objective of the act can be achieved without the invalid part, the act should be upheld. *Republic Airlines, Inc v Dep't of Treasury*, 169 Mich App 674; 427 NW2d 182 (1988). If, however, the "unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation of the act," then the court must find that the act as a whole is unconstitutional. *Blank v Dep't of Corrections*, 462 Mich 103, 123; 611 NW2d 530 (2000).

When passing a statute, the legislature can opt to include a severability clause that "provides a rule of construction which may sometimes aid in determining legislative intent." *Dorchy v Kansas*, 264 US 286, 290; 44 S Ct 323; 68 L Ed 686(1924). Such a clause "has the effect of reversing the presumption which would otherwise be indulged, of an intent that, unless the act operates as an entirety, it shall be wholly ineffective." *R Retirement Bd v Alton Co*, 295

US 330, 362; 55 S Ct 758; 79 L Ed 1468(1935). SORA does not contain its own severability clause.[5] The Michigan legislature, however, has enacted a general severability provision, which states:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or application, *provided such remaining portions are not determined by the court to be inoperable*, and to this end acts are declared to be severable.

MCL 8.5 (emphasis added). Therefore, MCL 8.5 instructs the Court to determine whether, if the invalid portions of SORA are stricken from the statute, the remaining portions can function on their own.

Importantly, the question is not, as the Gratiot County Prosecutor suggests, whether an earlier version of SORA (e.g., a basic address reporting requirement) would be constitutional, or whether the legislature could again pass such a law. Rather, the severability inquiry asks whether, given how the statute is written today, the reviewing court must engage in statutory redrafting in order to make the law constitutional in the absence of the offending provisions.

2. The 2011 SORA Amendments Are Not Severable.

The Sixth Circuit in *Does I* held that SORA's 2006 and 2011 amendments cannot be retroactively applied. *Does I*, 834 F3d at 706. The 2006 SORA amendments imposed geographic exclusion zones barring registrants from living, working or "loitering" within 1,000 feet of a school, and provided for public email notification about registrants. Because these amendments

[5] MCL 28.728(8) does provide that if public availability of SORA information is unconstitutional, the Michigan State Police must revise the website so that it does not contain that information.

are self-contained as separate sections in the code,[6] it is a relatively easy to sever them: those sections simply cannot be applied to registrants whose offenses predate the enactment of those sections.

The 2011 amendments, by contrast, are not severable. SORA was entirely rewritten that year, and the 2011 amendments are deeply embedded in the statute. Indeed, as the attached highlighted version of the law shows, the 2011 amendments make up nearly half of the current statute. See SORA with 2006 and 2011 Amendments Highlighted, attachment to Ex B, Aukerman Correspondence, at 10-30. Because, in the absence of the 2011 amendments, SORA's remaining provisions are not "otherwise complete in [themselves] and [are not] capable of being carried out without reference to the unconstitutional [sections]," *Blank*, 462 Mich at 123, any attempt to sever the 2011 amendments leaves the statute inoperable within the meaning of MCL 8.5.

The 2011 amendments created a three-tier system that classifies registrants based on their offenses. Key definitional terms, which are used throughout the statute and trigger SORA's obligations, were added or rewritten. For example, 2011 PA 17, § 3, codified as MCL 28.723, specifies who must register (namely those convicted of "listed offenses"). Section (2)(k) of the Act, codified as MCL 28.722(k), defines "listed offense" to mean "a tier I, tier II, or tier II offense." Similarly, Section 5(10)-(12), codified as MCL 28.725(10)-(12), keys the length of registration to a registrant's tier classification, and Section 5a(3), codified as MCL 28.725a(3), keys the frequency of registration to a registrant's tier classification. As a result, if every piece of SORA that was added in 2011 is excised, the remaining statute is an incomprehensible amalgam

[6] The 2006 amendments adding geographic exclusion zones were codified as MCL 28.733-.736. The amendment allowing subscription email notification when a person registers or moves into a specified zip code was codified as MCL 28.730(3).

of procedural provisions referencing the excised sections.

Because the 2011 amendments are so deeply embedded in the statute, there is no way to excise them and leave behind a statute that can be given effect without the stricken language. For example, the basic verification requirements set out in MCL 28.725a require tier I registrants to report once a year, tier II registrants to report twice a year, and tier III registrants to report quarterly. If one removes the language about tiering, the statute does not specify how often a registrant must report or when. Similarly, because the duration of registration is keyed to a person's tier level, MCL 28.725(10)-(12), if one excises the tiering language, the of statute does not state how many years a person is subject to SORA. In other words, the statute is incomprehensible without the tier structure. Yet that tier structure was one of the features SORA that the Sixth Circuit found to be punitive. *Does I*, 834 F3d at 705 (unlike Alaska's first-generation registration statute, SORA "categorizes [registrants] into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof").

The situation is even more complicated by the fact that under the Sixth Circuit's decision in *Does I*, the 2011 amendments are not unconstitutional for all registrants—but only for registrants whose offenses predate the amendments. By contrast, the constitutional flaws found by the district court in *Does I*—including vagueness, strict liability and First Amendment violations—make those aspects of the statute unconstitutional for both pre- and post-2011 registrants. Until the legislature acts, it is impossible to know whether the legislature will want one unified *Does I*-compliant statute for all registrants (which has the advantage of administrative simplicity and allows the legislature to cure not just the ex post facto problems but the other constitutional violations), or whether the legislature will instead want to pass a law imposing different restrictions based on offense date (since post-2011 registrants are not affected

by the Sixth Circuit's decision but only by the district court's rulings).

In cases where, as here, the unconstitutional provisions are embedded in the statute, courts regularly find that such provisions are not severable. For example, in *Associated Builders & Contractors v Perry*, 869 F Supp 1239, 1254 (ED Mich, 1994) (Cleland, J.), rev'd on other grounds 115 F3d 386 (CA 6, 1997), the court held that the impermissible sections of a statute were so interwoven with the permissible provisions that they were not severable, that what would be left of the statute after severance of the preempted provisions would not comport with the intent of the Michigan legislature, and therefore that the statue was unenforceable in its entirety. See also *In re Apportionment of State Legislature-1982*, 413 Mich 96, 138; 321 NW2d 565(1982) (holding that once the state apportionment formula was declared to be illegal, "all the apportionment rules fell because they are inextricably related," and therefore not severable).

The argument against severability here is even stronger because the 2011 SORA amendments were a total rewrite of the law, so that excising them would leave a nonsensical alphabet soup of a law, incomprehensible to registrants and police agencies alike. The amendments "are not like a collection of bricks, some of which may be taken away without disturbing the [provisions as they existed before], but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." *Carter v Carter Coal Co*, 298 US 238, 315; 56 S Ct 855; 80 L Ed 1160 (1936).

Because SORA here is "inoperable" under MCL 8.5, the statute "cannot be judicially enforced because doing so requires the Court to impose its own prerogative on an act of the Legislature." *Stone v Williamson*, 482 Mich 144, 161; 753 NW2d 106 (2008). Given how sweeping the changes introduced by the 2011 amendments were, it is simply impossible to know whether the legislature would have passed the law without the amendments that the Sixth Circuit

ultimately declared to be unconstitutional, or what the legislature will do now that the Sixth Circuit has held that those amendments cannot be retroactively enforced. In sum, the 2011 amendments cannot be severed from SORA without making the statute inoperable, and the Court cannot redraft the statute without presuming to know what the legislature would want done.

3. "Reviving" Earlier Versions of SORA Would Make It Impossible for Registrants to Know What Their Obligations Are and Would Contravene the Legislature's Intent.

The Gratiot County Prosecutor, apparently recognizing that severing the 2011 amendments would be unworkable, suggests that some earlier version of the statute—although it is unclear which one—should be "revived." *Snyder* Prosecutor Br 40. The Prosecutor himself does not know whether the pre-2006 or pre-2011 statute is the one that allegedly is in effect. *Id.* The argument is an odd one for the Gratiot County Prosecutor to make, since the revival theory is entirely inapplicable to Mr. Snyder: the provision of SORA that Mr. Snyder violated—failing to report in person within three days after changing his employment, MCL 28.725(1)(b)—was added in 2011, and was not part of any earlier statute that could theoretically be revived.[7]

To the extent that the Gratiot County Prosecutor is arguing more broadly for revival, it is unclear not only what version of the statute the Gratiot County Prosecutor proposes to "revive," but to whom the "revived" statute would apply. Does the prior statute (whichever version it is) "revive" only for pre-2011 registrants who are affected by the *Does I* decision or for all registrants? If only for the pre-2011 registrants, are there now simultaneously two versions of the statute in effect: one version for pre-2011 registrants and one for post-2011 registrants? If the

[7] Mr. Betts failed to register his address, his vehicle, and his email address. (05/30/2013 Plea Tr 10-11, *Betts* Appendix 40a-41a.) The vehicle and email reporting requirements were added in 2011. Prior versions of SORA did contain an address reporting requirement, but the timeframe for reporting such information has changed over time. Revival of some undetermined earlier version of the statute would create vagueness problems as applied to Mr. Betts, since when he had to report his change of address would depend on which version of the statute is operative.

current version applies to some registrants and the revived version to others, will all pre-2011 registrants be covered by the same "revived" statute? Or will the 2005 version apply to pre-2006 registrants, the 2010 version to pre-2011 registrants, and the 2019 version to everyone else, so that there are actually three versions of the statute simultaneously in effect? The Gratiot County Prosecutor has not said. How registrants can know what law to follow, or how law enforcement can know what statute to enforce, is a mystery.

The problem is compounded by the fact that old versions of the statute no longer exist in a form that can be located or consulted.[8] Without the text of a law to look at, no one—not registrants, law enforcement, prosecutors, defense lawyers, or judges—will know what people's obligations are.

Some examples may help illustrate the problem. A previous version of SORA required registrants to report in January, April, July, and October. See, e.g., 2004 PA 240, § 5a(4). Today, the statute requires registrants to report based on their birth month—a change adopted to spread out reporting in order to solve the problem of long lines at registry sites. MCL 28.725a. If either the 2005 or 2010 versions of SORA "revive," then surely the old time schedule would revive as well. Thus a registrant born in February would, under the Gratiot County Prosecutor's interpretation of "current" law, be required to report in February, May, August and November, but

[8] To piece together the version of SORA in effect at any given time, one can—if one has the relevant Public Act numbers and years of enactment—go to the Michigan Legislature's website, http://www.legislature.mi.gov/, and pull up those Public Acts. But, even that will not produce a copy of the law in effect. One cannot get the pre-2006 law by looking at the Public Acts adopted in 2006. Instead, one has to work backward. The immediately prior SORA revision, 2004 PA 238, contains the then-operative § 8, but not the rest of the statute. One can find §§ 4, 4a, 5a, 5b and 5c and § 9 in 2004 PA 237. For §§ 11, 13 and 14, one can go to 2004 PA 239. Sections 2, 4, 5, 5a, 8, 8c, 8d, and 10 are found in 2004 PA 240. For other sections, one must go even further back. Searching through these acts to determine which provisions were in effect at any given time is challenging, even for counsel who have spent years working on this statute. Neither registrants nor police officers will have any idea where to look.

under the older "revived" versions of the statute would be required to report in January, April, July, and October. A registrant who guessed wrong about when to report—which seems inevitable when there is no copy of the law for the person to look at—could face felony charges and prison.

A similar problem exists with reporting a change of address. Under the existing statute, address changes must be reported "immediately," MCL 28.725(1)(a), a term defined under the 2011 amendments to mean "within three business days." MCL 28.722(g). Earlier versions of the statute, however, provided ten days to update address information. See, e.g., 2006 PA 132, § 5(1). If a registrant reports on day seven, is that a crime?

As these scenarios illustrate, because the 2011 amendments were a total rewrite of SORA, it is not possible to simply "revive" some earlier version. Indeed, Michigan law has adopted an anti-revival approach: "Whenever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute." MCL 8.4. Here, the legislature effectively repealed large portions of the earlier SORA statute with the 2011 amendments. Now that those amendments cannot be retroactively applied, MCL 8.4 suggests that this "judicial repeal" should not result in a revival of the previous law.

An instructive case is *McGuire v Strange*, 83 F Supp 3d 1231 (MD Ala, 2015), where Alabama made an implicit "revival" argument after registrant-plaintiffs prevailed on several constitutional challenges to that state's SORA. The state argued that the relief granted by the court should be limited to those convicted before 1996, because the more recent 2011 changes (challenged in the lawsuit) were "a mere reconfiguration or re-enactment of Alabama's prior sex-offender regulatory scheme." *Id.* at 1271. The court rejected that argument, stating that "such an

argument is disingenuous in that [the 2011] revisions to the [older version of Alabama's SORA] were so extensive and far-reaching as to relegate the prior statute to mere irrelevance. For numerous reasons scattered throughout this opinion, [the 2011 SORA] is far more than a mere reconfiguration of the prior scheme." *Id.* So too here. The 2011 Michigan statutory changes were not a mere reconfiguration or re-enactment of Michigan's earlier sex-offender regulatory scheme, but rather were "so extensive and far-reaching as to relegate the prior statute to mere irrelevance." *Id.*

Not only is revival unworkable in practice, it contravenes legislative intent. There is no evidence that the legislature today would want the 2005 or 2010 laws to be enforced as written. And that is not just because the state would prefer to retain registry reporting by birthday. The legislature has made many changes over the last decade, including removing "Romeo and Juliet" offenders and children under the age of 14, making registration for older youth non-public, and altering the offenses that result in registration. See, e.g., 2004 PA 239, 240; 2011 PA 17, 18. A wholesale "revival" of an earlier statute would not just remove provisions that the Sixth Circuit found to be punitive. It would recreate some of the worst, most punitive aspects of the registry, leading not just to further litigation but reversing (constitutional) legislative modifications to the statute and undermining the legislature's intent.

4. This Court Should Allow the Legislature Time to Revise SORA Rather Than Ruling on Severability Now.

The United States Supreme Court has said that, "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it." *Ayotte*, 546 US at 329 (quoting *Virginia v American Booksellers Ass'n, Inc*, 484 US 383, 397; 108 S Ct 636; 98 L Ed 2d 782 (1988)). Further, "making distinctions in a murky constitutional context, or where line-

drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." *Id*. (quoting *United States v Treasury Emps*, 513 US 454, 479 n26; 115 S Ct 1003; 130 L Ed 2d 964 (1995)). These concerns are strongest and judicial deference is most appropriate where, as here, the legislature is already contemplating a comprehensive re-write of the statute. In such a situation, "a federal court, on reviewing a state statute, does not assume the task of making such choices for the state legislature." *Eubanks v Wilkinson*, 937 F3d 1118, 1127 (CA 6, 1991). Rather, the reviewing federal court should allow the "State [to] pursue its own policy choices in fashioning new legislation," permitting those individuals implicated by the legislation to "remain[] free of undue burden while the legislature redesigns its statute." *Id*.

This Court should give the legislature the time and space it needs to write a new statute, rather than presuming what statute the legislature would have written had it known the 2011 amendments violated the Ex Post Facto Clause. That is the approach that the federal district court, at the joint request of the plaintiffs and state defendants, is taking in *Does II*. The *Does II* complaint specifically sought declaratory and injunctive relief based on the fact that the 2011 amendments are not severable, and therefore SORA is null and void as applied to people who are subject to registration based on offenses committed before April 12, 2011. *Does II* Compl, Relief ¶ G. In their motion for partial summary judgment, however, the plaintiffs argued:

> Nevertheless, for now the plaintiffs ask the Court to defer any relief on severability []. That will give the parties time to see whether, as part of the negotiations on the consent judgment for []declaratory and injunctive relief on non-retroactivity of 2006 and 2011 amendments[], the parties can negotiate class-wide relief that would obviate the need to decide the severability issues. Deferring a ruling on [severability] relief would also give the legislature more time to revise the statute….
>
> Moreover, an early ruling on severability favorable to the plaintiffs would have significant implications for the state's ability to require any form of registration of

> pre-2011 registrants while the legislature is deciding what it wants to do. Although the plaintiffs are entitled to the benefits of the Sixth Circuit's decision while the legislative process plays out, the last thing the plaintiffs or the state defendants (or the Court) should want is for the legislature to rush through a hastily-drafted statute due to a judicial ruling that SORA is entirely inoperable. Indeed, the legislature, faced not only with an unconstitutional statute but mounting evidence that SORA is ineffective, may take the opportunity for another total rewrite of the statute that reflects current evidence-based social science research on the ineffectiveness of public registries. *See Does #1-5*, 834 F.3d at 704 ("the record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals"). All parties will benefit if the legislature has sufficient time to draft a new, evidence-based SORA.

Does II Plaintiffs' Mot for Partial Summ J 22-23. While the *Does II* plaintiffs reserve the right to seek relief on severability, "they are willing, in the interests of judicial economy and careful legislative reform" to first see if the legislative reform is possible within a reasonable time frame. *Id.*

The fact that both the plaintiffs and state defendants in *Does II*, with the court's blessing, have deferred a decision on severability also reflects a very practical reality: the result of a ruling that the 2011 amendments are not severable is that the statute will need to be rewritten. There is no point wasting the resources of the parties or the courts on further litigation only to end up in exactly the same place we are now, namely negotiations over what a new SORA statute should look like. This Court, like the federal district court, should wait to see if the legislative reform efforts are successful. If those negotiations fail, and a decision on severability becomes necessary, the federal district court could always decide to certify the severability issue to this Court, since severability is ultimately a question of state law. *Leavitt v Jane L*, 518 US 137, 139; 116 S Ct 2068; 135 L Ed 2d 443 (1996).

C. The State Is Collaterally Estopped From Relitigating the Issue of Whether SORA Is Punishment.

This Court need not independently reach the merits of the ex post facto question because the State is collaterally estopped from relitigating the issues it lost in *Does I*. "The doctrine of

collateral estoppel generally precludes relitigation of an issue in a subsequent proceeding when that issue has previously been the subject of a final judgment in an earlier proceeding." *People v Zitka*, 325 Mich App 38; __ NW2d __; 2018 WL 3130600, at *2 (2018). Collateral estoppel applies when (1) an ultimate issue essential to the judgment was actually and necessarily litigated and determined in the previous action, and (2) the same parties, or parties in privy, had a full and fair opportunity to litigate the issue. *Id*. at *2–3. In Michigan, when collateral estoppel "is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit," there is no "mutuality of estoppel" requirement; the party asserting estoppel need not have been a party, or privy to a party, in the previous action. *Monat v State Farm Ins Co*, 469 Mich 679, 691-692, 695; 677 NW2d 843 (2004).

Applying the doctrine here, the State is estopped from relitigating whether SORA is punishment. Because the collateral estoppel issue has not been considered by the lower courts, this Court should vacate the decisions in these two appeals and remand.

1. The Ultimate Issue of Whether SORA Is Punishment Was Actually and Necessarily Litigated to Final Judgment in *Does I*.

In *Does I*, the Sixth Circuit held that SORA imposes punishment, and therefore its retroactive application violates the Ex Post Facto Clause of the United States Constitution. Now, the State is asking this Court to consider the very question that was fully litigated and determined by a valid and final judgment, thus requesting an impermissible second bite at the apple. The issue presented here is not just merely similar to the issue previously litigated, it is identical because it raises nothing more than a determination of whether SORA is punishment. Without a material nuance or novel issue to be decided by this Court, the litigant's persistence must give way to preservation of resources and judicial economy. See *Monat*, 469 Mich at 693.

2. Plaintiff Is in Privity With the Parties Who Had a Full and Fair Opportunity to Litigate the Issue in *Does I*.

The plaintiff in these cases, the State of Michigan, is substantially the same, and certainly in privity with, the defendants in *Does I*, which included the governor in his official capacity as chief executive of the State. "Privity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are represented and protected by the party in the litigation." *People v Lee*, 314 Mich App 266, 279 n 8; 886 NW2d 185 (2016) (internal quotation marks omitted). "While there is no general prevailing definition of privity, it has been described as including a person so identified in interest with another that he or she represents the same legal right. Examples include the relationship of principal and agent, master and servant, or indemnitor and indemnitee." *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270 (1988).

The principal-agent relationship establishes privity here. When a county prosecutor brings criminal charges in the name of "the People of the State of Michigan," the prosecutor necessarily acts as an agent of that State. See *Cady v Arenac Co*, 574 F3d 334, 343 (CA 6, 2009); *Pusey v City of Youngstown*, 11 F3d 652, 657-658 (CA 6, 1993). Similarly, when a civil action proceeds against the governor in his or her official capacity to enjoin the enforcement of state criminal laws, the lawsuit is treated as one against the State. See *Kentucky v Graham*, 473 US 159, 165; 105 S Ct 3099; 87 L Ed 2d 114 (1985). In such civil suits, when the governor is an official-capacity defendant, the resulting judgment is binding on county prosecutors enforcing state law. *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013); see also Fed R Civ P 65(d) (injunctions binding on agents). Thus, the plaintiff in this case—the State, through its county prosecutors—is in privity with the defendant bound by the judgment in *Does I*—the governor in his official capacity as chief executive.

Further, there can be little question that the State had a full and fair opportunity to litigate the issue in *Does I* of whether SORA is punishment. The attorney general's office vigorously defended the constitutionality of SORA in the trial court, on appeal in the Sixth Circuit, and through an unsuccessful petition for writ of certiorari to the United States Supreme Court. The record, following extensive discovery, included seven expert reports, 21 depositions, extensive documentary evidence about the functioning of the registry, and a stipulated joint statement of facts that numbered 262 pages. Moreover, there are no "procedural opportunities" in Michigan state court to defend the constitutionality of SORA "that were unavailable in the first action of a kind that might be likely to cause a different result." *Parklane Hosiery Co v Shore*, 439 US 322, 332; 99 S Ct 645; 58 L Ed 2d 552 (1979).

3. Mutuality of Estoppel Is Not Required Because It Is Being Asserted Defensively.

In some cases, collateral estoppel requires satisfaction of a third element, "mutuality of estoppel." *Monat*, 469 Mich at 683-684. When it applies, the mutuality requirement means that "in order for a party to estop an adversary from relitigating an issue that party must have also been a party, or privy to a party, in the previous action." *Id.* at 696 (Cavanagh, J., dissenting) (internal quotation marks omitted). But the "trend in modern law [is] to abolish the requirement of mutuality," *Lichon v Am Universal Ins Co*, 435 Mich 408, 427; 459 NW2d 288 (1990), and in *Monat*, this Court held that "where collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Monat*, 469 Mich at 680-681.

Here, mutuality is not required because the State has already had a full and fair opportunity to litigate whether SORA is punishment, and the parties in whose favor collateral estoppel operates are the defendants in these criminal prosecutions. Estoppel may be applied

defensively against the State even though the defendants were not parties in *Does I*. *Monat*, *supra*.

D. *Smith v Doe* Requires Review of the Entire Statutory Scheme.

If this Court does grant leave and ultimately reaches the merits of the ex post facto question, it must analyze SORA as whole, rather than—as the prosecutors here suggest—artificially disaggregating SORA's many obligations to assess only whether a specific provision, standing in isolation, constitutes punishment. As the Sixth Circuit recognized, SORA "has grown into a byzantine code governing in minute detail the lives of the state's sex offenders." *Does I*, 834 F3d at 697. To adopt a piecemeal approach to analyzing that byzantine code of obligations would directly contradict *Smith v Doe*, 538 US at 92, which requires courts to determine whether the "statutory scheme" is punitive, not whether each individual provision, standing alone, is punishment.

In *Smith*, the United States Supreme Court considered the Alaska statute as a whole, asking whether "the statutory scheme," the "regulatory scheme," or "the Act" imposed punishment, in toto. *Smith*, 538 US at 92, 94, 96-97, 99, 104-105. To determine legislative intent the Court looked at "the statute's text and its structure." *Id.* at 92. Similarly, the Court applied the factors of *Kennedy v Mendoza-Martinez*, 372 US 144; 83 S Ct 554; 9 L Ed 2d 644 (1963), to the "regulatory scheme." *Smith*, 583 US at 97. Thus, the Court considered the entirety of the Alaska statute and "how the effects of the *Act* are felt by those subject to it." *Id.* at 99-100 (emphasis added). The Court did not ask whether any one provision was punitive, but whether the statute in its entirety imposed punishment.

The importance of a holistic analysis can be seen by comparing *Smith* with the US Supreme Court's earlier ex post facto decision in *Kansas v Hendricks*, 521 US 346; 117 S Ct 2072; 138 L Ed 2d 501 (1997). There, this Court held that civil commitment was not punishment

because it "unambiguously requires a finding of dangerousness," not just a past conviction, and because the state had "taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards." *Id.* at 357, 364. In *Smith*, the Court held that Alaska's registration scheme was regulatory, even though it was triggered solely by past convictions without individualized evidence of current risk, because the law imposed only the "minor condition of registration" and simply "allow[ed] the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions." *Smith*, 538 US at 104. Thus, whether a statute is punitive or regulatory depends both on the "magnitude of the restraint" and whether any "categorical [conviction-based] judgments" are "reasonable." *Id*. at 103-104.

In *Does I*, the Sixth Circuit analyzed SORA as a whole to conclude it is punishment. As the United States Solicitor General told the Supreme Court in opposing cert in *Does I*: "The court of appeals correctly focused on the cumulative effects of the challenged aspects of SORA to decide if it is punitive, just as this Court had done in *Smith*."[9] *Does I*, Br of United States as

[9] To the extent that the Gratiot County Prosecutor argues that *Hudson v United States*, 522 US 93; 118 S Ct 488; 139 L Ed 2d 450 (1997), and *Weaver v Graham*, 450 US 24, 36 n 22; 101 S Ct 960; 67 L Ed 2d 17 (1981), suggest the ex post facto analysis should focus on individual components of the statutory scheme, rather than the statutory scheme as a whole, see *Snyder* Prosecutor Br 39, the United States Solicitor General disposed of that theory:

> In *Hudson*, the Court concluded that neither of the challenged statutory requirements indicated that the scheme had a punitive effect under *any* of the relevant factors identified in *Kennedy* v *Mendoza-Martinez*, 372 US 144, 168-169 (1963). *Hudson*, 522 US at 103-105. The *Hudson* Court therefore had no need to consider the cumulative effect of such factors. In *Weaver*, when the Court analyzed changes to a state law governing the accrual of prison good-time credits, it expressly considered the aspects of the new law that reduced the availability of good-time credits *in conjunction with* other aspects of the law that expanded opportunities to obtain a reduction in sentence through means other than good behavior. 450 US at 26-28, 34-36. Thus, the *Weaver* Court considered the cumulative effects of the new statutory scheme, just as the court of appeals did here.

Amicus Curiae, 2017 WL 2929534, at *11 (July 7, 2017). This focus on the entire "statutory scheme" also makes sense because registrants experience the cumulative effects of the whole statute, not just one provision or another. Registrants do not compartmentalize their lives into the effects of the exclusion zones, the immediate and in-person reporting requirements, and the stigma of being branded as a dangerous offenders—restrictions that are imposed for decades or, in most cases, for life without any individualized review. Registrants experience all these effects all at once all the time.

The prosecutors here urge this Court to disregard *Smith*'s holistic test, and isolate specific subsections of Michigan's law—such as the immediate in-person employment reporting requirement. But even if one were to look at just one provision, one cannot do so without context. For example, it matters whether the immediate in-person employment reporting requirement is imposed on all registrants irrespective of actual risk, for how many years the requirement lasts, and whether registrants face lengthy prison sentences for even inadvertent noncompliance. See, e.g., *Doe v State*, 111 A3d 1077, 1101 (NH, 2015) ("Absent the lifetime-registration-without-review provision, we would not find the other effects of the act sufficiently punitive to overcome the presumption of its constitutionality.").

The prosecutors also argue that this Court should ignore the Sixth Circuit's opinion about the *Michigan* statute, citing instead to decisions by other courts about *other* statutes that are quite different from SORA. All the cases prosecutors cite, however, involved either more limited statutes or instances were individuals chose to challenge only certain statutory provisions, rather

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Does I, Br of United States as Amicus Curiae, 2017 WL 2929534, at *11 n 2 (July 7, 2017).

than the statute as a whole.[10] As the United States Solicitor General told the Supreme Court, in explaining why *Does I* does not create a circuit split:

> In light of the variation among jurisdictions' sex offender-registration laws, courts may reach different ex post facto results without creating conflicts over legal principles. That is true even when the two laws share common features when described at a relatively high level of generality. The details matter.

Does I, Br of United States as Amicus Curiae, 2017 WL 2929534, at *15 (July 7, 2017).

None of the cases the prosecutors cite involves a statute like Michigan's that combines blanket restrictions on housing and employment, limitations on "loitering" (which encompasses many basic parenting activities), advance notice for travel, lifetime in-person and "immediate" reporting of minor status changes, and public stigmatization based on "tiered" levels of alleged

[10] See, e.g., *United States v Parks*, 698 F3d 1 (CA 1, 2012) (challenging only in-person reporting); *Doe v Cuomo*, 755 F3d 105 (CA 2, 2014) (challenging only extension of registration requirements and elimination of ability of certain registrants to petition for relief from registration); *Doe v Pataki*, 120 F3d 1263, 1268-1269, 1285 (CA 2, 1997) (challenging only registration requirement and community notification provisions for certain registrants); *Moore v Avoyelles Corr Ctr*, 253 F3d 870 (CA 5, 2001) (challenging only community/neighborhood notification); *United States v Leach*, 639 F3d 769 (CA 7, 2011) (challenging only registration requirements); *Weems v Little Rock Police Dep't*, 453 F3d 1010, 1013-1014 (CA 8, 2006) (challenging classification procedures and residency restriction based on individualized assessment of high risk); *Doe v Miller*, 405 F3d 700 (CA 8, 2005) (challenging only residency restriction for offenses against minors); *Litmon v Harris*, 768 F3d 1237 (CA 9, 2014) (challenging only in-person reporting); *Shaw v Patton*, 823 F3d 556 (CA 10, 2016) (considering only in-person reporting and residency restrictions); *State v Worm*, 680 NW2d 151 (Neb, 2004) (challenging only registration and community notification); *State v Peterson-Beard*, 377 P3d 1127 (Kan, 2016) (challenging only in-person quarterly reporting, lifetime registration and drivers' license marker); *State v Seering*, 701 NW2d 655 (Iowa, 2005) (challenging only residency restriction).

Only one of the cases the prosecutors cite, *Shaw v Patton*, even concerned a challenge to the combined effects of residential exclusion zones and ongoing reporting. But that statute did not limit where registrants can work and the plaintiff failed to preserve a challenge to a loitering prohibition. Nor was there any challenge to offense-based tiering. Moreover, the plaintiff had put forward no evidence to counter the state's asserted public safety rationales, *Shaw*, 823 F3d at 574. In *Does #1-5* the plaintiffs produced a wealth of supportive modern social science research.

dangerousness without any individualized assessment of dangerousness.[11] Indeed, many of the cases the prosecutors cite emphasize the *absence* of provisions found in Michigan's law in concluding that the law in question is not punitive.[12] By contrast, courts finding ex post facto violations, like the Sixth Circuit, have focused on the cumulative impact of statutes that impose multiple, intersecting restrictions.[13] Even the same courts can reach different conclusions over

[11] Even in discussing particular sub-sections, the prosecutors conflate statutes with quite different effects. For example, Michigan's exclusion zones bar not simply living, but also working or "loitering" (including spending time with one's own children) within 1,000 feet of a school. The exclusion zone cases cited by the prosecutors involve only residency limitations, not barriers to employment, or "loitering."

[12] See, e.g., *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013) (statute "'does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences'" (quoting *Smith*, 538 US at 100)); *ACLU of Nevada v Masto*, 670 F3d 1046, 1056 (CA 9, 2012) (noting that registration law "does not limit the activities that registrants may pursue or limit registrants' ability to change jobs or residences"); *Hatton v Bonner*, 356 F3d 955, 964 (CA 9, 2003) (in-person registration requirement while "important" was "not enough" to make law punitive "when balanced against" other aspects of statute, such as fact that registration information was not disseminated on the internet); *United States v WBH*, 664 F3d 848, 855, 858 (CA 11, 2011) (in-person reporting alone "not enough" to prove punishment where regulatory regime does not "directly restrict [registrants'] mobility, their employment, or how they spend their time"); *Kammerer v State*, 322 P3d 827, 837 (Wyo, 2014) (examining "statute in its entirety" and concluding that 21-day-advance notice requirement for international travel was not enough to make entire statute punitive); *RW v Sanders*, 168 SW3d 65, 70 (Mo, 2005) (where statute did not restrict housing, work, or travel, reporting requirement was not punitive).

[13] See, e.g., *Doe v State*, 111 A3d 1077, 1084-1087, 1094 (NH, 2015) (citing combined effect of publication of registrants' "victim profiles" and "methods of approach," as well as extensive reporting requirements including advance reporting of on-line identifiers); *Doe v Dept of Public Safety and Corr Serv*, 62 A3d 123, 139-142, 148 (Md, 2013) (combined effects of prohibition on entering specified areas, extensive in-person reporting including advance travel notification, and active email notification of public) ("[T]he cumulative effect of 2009 and 2010 amendments of the State's sex offender registration law took that law across the line from civil regulation to an element of the punishment of offenders."); *State v Williams*, 952 NE2d 1108, 1111-1113 (Ohio, 2011) (combined effects of residential exclusion zones, designation of some registrants as "sexual predators," frequent in-person reporting in multiple jurisdictions, and elimination of individualized review) ("When we consider all the changes [to the Act] in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of [the current Act] is punitive."); *Wallace v State*, 905 NE2d 371, 375-377, 380 (Ind, 2009) (combined effects of residential exclusion zones, internet designation of some registrants as "sex predators," ID requirement, expansive reporting requirements, and prior notification of travel) ("Considered as a whole … [the Act] impose[s]

time as statutes evolve. Courts that have found modern "super-registration" laws to be punitive have almost invariably upheld earlier less onerous versions of those same laws as remedial.[14]

The flexible nature of the *Mendoza-Martinez* factors shows that there is a sliding scale between remedial and punitive statutes, so that changes to the same law over time can, in the aggregate, tip the balance from remedial to punitive. *Mendoza-Martinez*, 372 US at 168-169. In weighing the *Mendoza-Martinez* factors, it matters whether the challenged statute is a simple first-generation registry law similar to the Alaska statute in *Smith*, or (as here) is a modern super-registration statute that resembles lifelong probation, labels some registrants as the most dangerous, and severely restricts where registrants can live, work, or spend time. If the Court does grant leave, it must, as *Smith* instructs, apply the *Mendoza-Martinez* factors to the statute as a whole. The Court should not miss the forest by looking at the trees.

CONCLUSION

For the reasons set forth above, this Court should deny leave to appeal. Because it would be unjust to allow Mr. Betts' and Mr. Snyder's convictions to stand when the statute they violated has been held unconstitutional by the Sixth Circuit, this Court should vacate the lower court decisions and remand both cases for further consideration in light of *Does I*. On remand, the lower courts should be instructed to consider whether the prosecutors are collaterally

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substantial disabilities on registrants."); *State v Letalien*, 985 A2d 4, 10, 12, 23 (Me, 2009) (finding punitive cumulative effect of 24-hour reporting window, prohibition on contact with children with enhanced penalties in exclusion zones, in-person reporting, and extension of registration from 15 years to life without possibility of waiver).

[14] See, e.g., *Doe v State*, 111 A3d at 1100 ("No one amendment or provision is determinative, but the *aggregate effects* of the statute lead us to our decision ... [that] the punitive effects clearly outweigh the regulatory intent of the act." (emphasis added)); *State v Williams*, 952 NE2d at 1113 ("No one change compels our conclusion that [the statute] is punitive. It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional."); *Wallace*, 905 NE2d at 374-77, 384; *Starkey v Oklahoma Dep't of Corr.*, 305 P3d 1004, 1025 (Okla, 2013). The Sixth Circuit itself has twice upheld simple first-generation registration statutes. See *Doe v Bredesen*, 507 F3d 998 (CA 6, 2007); *Cutshall v Sundquist*, 193 F3d 466 (CA 6, 1999).

estopped from relitigating whether SORA is punishment. If the Court does grant leave to appeal, it should order further briefing, particularly with respect to severability and collateral estoppel.

Respectfully submitted,

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