IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Kirsten Frank Kelly, P.J., Cynthia Diane Stephens and Michael J. Riordan, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

PAUL J. BETTS,

Defendant-Appellant.
__________________________________/

Supreme Court No. 148981

Court of Appeals No. 319642

Circuit Court No. 12-62665 FH

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Paul Betts was convicted in the Muskegon County Circuit Court by plea of no contest and was sentenced on July 2, 2013. The trial court appointed counsel on August 14, 2013. The offenses occurred after the effective date of the November 1994 ballot Proposal B that eliminated the right to file a claim of appeal from plea-based convictions. The Court of Appeals had jurisdiction to consider Mr. Betts' application for leave to appeal as it was filed within six months of judgment. MCR 7.203(B); MCR 7.205. The Court of Appeals denied leave to appeal on February 27, 2014. This Court granted leave to appeal on June 19, 2019.

STATEMENT OF QUESTIONS PRESENTED

I. Do SORA's numerous obligations, disabilities, and restraints amount to punishment? Has it been punishment since the advent of the modern Internet age, compounded by unconstitutional amendments in 2006 and 2011? Does requiring Mr. Betts to register as a sex offender because of a plea entered before SORA was enacted violate the Ex Post Facto Clause?

Court of Appeals answers, "No."

Paul Betts answers, "Yes."

II. Can unconstitutional portions of SORA not be severed because (a) the remaining language would make no sense and be inoperable and (b) attempts at severance would result in this Court legislating? Is reviving an older version of SORA impractical and against the Legislature's stated anti-revival preference?

Court of Appeals made no answer.

Paul Betts answers, "Yes."

III. Must Mr. Betts' unconstitutional conviction be reversed?

Court of Appeals answers, "No."

Paul Betts answers, "Yes."

SUMMARY OF THE ARGUMENT

"[T]he Cyber Age is a revolution of historic proportions." *Packingham v North Carolina*, __ US __; 137 S Ct 1730, 1736; 198 L Ed 2d 273 (2017). The advances in technology over the last sixteen years since the United States Supreme Court decided *Smith v Doe,* 538 US 84, 92; 123 S Ct 1140; 15 L Ed 2d 164 (2003) have changed the impact of already burdensome public Internet sex offender registrations.

The Cyber Age, combined with various amendments, have transformed Michigan's Sex Offenders Registration Act (SORA) into "a byzantine code governing in minute detail the lives of" registrants. *Does #1-5 v Snyder*, 834 F3d 696, 697 (CA 6, 2016), reh den (Sept. 15, 2016), *cert den Snyder v John Does* #1-5, 138 S Ct 55; 199 L Ed 2d 18 (2017). As a result, SORA is punishment.

The widespread reach of the Internet has compounded the disabilities Paul Betts faces under SORA. He experiences public shaming, branding, and vigilantism because his private information is distributed on the Internet. He is banished from living, working, or loitering in large areas of Michigan. The State has told the public Mr. Betts is dangerous, even though his risk has never been individually assessed. He must register for the rest of his life, without the possibility of petitioning for removal. Mr. Betts must comply with burdensome immediate in-person reporting requirements for even the most mundane, and temporary, of changes to his personal information.

None of this was foreseeable when Mr. Betts pled guilty to a felony twenty-six years ago, two years before SORA existed in any form. Even though Mr. Betts has

completed his sentence for that felony and has not committed another sex offense in the last 26 years, he must comply with SORA for the rest of his life.

The Ex Post Facto Clause prohibits retroactive punishment, and because SORA has been transformed over the last two decades into a punitive statute, it cannot be retroactively imposed on Mr. Betts. Because there is no way to sever unconstitutional portions from SORA and leave an operable statute and because the Legislature has adopted an anti-revival stance, this Court must hold that SORA as a whole is unconstitutional, vacate Mr. Betts' conviction, and remand this case to the trial court so Mr. Betts can be removed from the registry.

STATEMENT OF FACTS

Twenty-six years ago, on December 16, 1993, Paul Betts pled guilty to criminal sexual conduct in the second degree. *Appendix*, 26a, 37a. He was sentenced to a prison term and was paroled in 1999. *Appendix*, 18a.

On May 30, 2013, Mr. Betts pled no contest to failure to register as a sex offender. MCL 28.729(1)(a). *Appendix*, 37a-39a. Mr. Betts did not believe he had to register in Michigan, as he was previously living in Indiana and did not have to register there. *Appendix*, 47a.

The trial court sentenced Mr. Betts to a three-year term of probation, with the first year to be served in the county jail, suspended for the pendency of his appeal. *Appendix*, 52a. The plea was conditional, allowing Mr. Betts to raise challenges to the constitutionality of the Sex Offenders Registration Act, which were raised in the trial court and might otherwise have been forfeited by a plea. *Appendix*, 53a. Mr. Betts filed a delayed application for leave to appeal in the Court of Appeals. *Appendix*, 64a-91a. The Court of Appeals denied leave on February 27, 2014. *Appendix*, 92a. Mr. Betts filed an application for leave to appeal in this Court, and on June 27, 2018, this Court ordered oral argument on the application. *Appendix*, 98a-99a. Following oral argument, this Court granted leave to appeal. Briefing and argument on six questions follows. *Appendix*, 100a-101a.

Mr. Betts is now 71-years-old. *Appendix*, 55a.

I. SORA's numerous obligations, disabilities, and restraints amount to punishment. It has been punishment since the advent of the modern Internet age, compounded by unconstitutional amendments in 2006 and 2011. Requiring Mr. Betts to register as a sex offender because of a plea entered before SORA was enacted violates the Ex Post Facto Clause.

Issue Preservation

Mr. Betts challenged the application of the Sex Offenders Registration Act (SORA) to him on Ex Post Facto grounds in the trial court and the Court of Appeals. *Appendix*, 1a-29a and 64a-91a.

Standard of Review

This Court reviews constitutional issues de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). "Whether a statutory scheme is civil or criminal is ... a question of statutory construction." *Smith v Doe,* 538 US 84, 92; 123 S Ct 1140; 15 L Ed 2d 164 (2003) (citation and quotation marks omitted). Statutory interpretation is a question of law that this Court also reviews de novo. *Hall*, 499 Mich at 452.

Discussion

Questions 1 and 2 in this Court's order granting leave ask whether SORA is punishment and if so, *when* it became punitive. *Appendix*, 100a. It is punishment, and first became so with the advent of the modern Internet age. It has become more punitive as the Legislature has amended it, most notably in 2006 and 2011. The public nature of SORA on the Internet, the lack of an individualized risk assessment, the geographic exclusion zones, the longer registration periods with no ability to

petition for removal, and the burdensome immediate in-person reporting requirements are punishment.

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the Legislature from retroactively inflicting greater punishment than that allowed at the time of the crime. US Const, art I, § 10, cl 1; Const 1963, Art I,[1] § 10; *Collins v Youngblood*, 497 US 37, 42-43; 110 S Ct 2715; 111 L Ed 2d 30 (1990); *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014). SORA violates this rule for those convicted prior to its enactment, like Mr. Betts.

The harm caused by retroactive imposition of SORA is precisely the kind of harm that the Ex Post Facto Clause was adopted to prevent. The Sixth Circuit acknowledged this in holding that Michigan's SORA is punishment. *Does #1-5 v Snyder*, 834 F3d 696, 706 (CA 6, 2016), reh den (Sept. 15, 2016), *cert den Snyder v John Does* #1-5, 138 S Ct 55; 199 L Ed 2d 18 (2017).[2] The Ex Post Facto Clause "provide[s] a powerful check on states when they have sought to punish socially disfavored persons without prior notice." *Does #1-5*, 834 F3d at 699. The Sixth Circuit

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[1] The language contained in the Michigan Constitution's Ex Post Facto Clause is very similar to that contained in the United States' Constitution, and the Court of Appeals has held that Michigan's Ex Post Facto Clause is not more expansive than the federal Ex Post Facto Clause. *In re Contempt of Henry*, 282 Mich App 656, 682; 765 NW2d 44 (2009).

[2] The United States Supreme Court denied certiorari and thus, regardless of how this Court decides this case, the holding in *Does #1-5* is binding on the State of Michigan and is persuasive authority for this Court to consider. State actors face section 1983 liability for retroactive enforcement of portions of SORA following the *Does* opinion.

discussed the importance of the Ex Post Facto Clause protecting people like Mr. Betts and other registrants from being punished without notice:

> [T]he fact that sex offenders are so widely feared and disdained by the general public implicates the core-counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice. *Id.* at 705-706.

A. History and Development of the Sex Offenders Registration Act

SORA, MCL 28.721 et seq, took effect October 1, 1995, after Mr. Betts pled guilty to CSC-second. When SORA was first created it was a private law enforcement database of convictions. *People v Dipiazza,* 286 Mich App 137, 142-143; 778 NW2d 264 (2009); *People v Tucker*, 213 Mich App 645, 656; 879 NW2d 906 (2015). Over the last two decades SORA has been amended twenty-one times,[3] transforming registration from a confidential law enforcement database to an Internet-based public regime of stigmatization, banishment, reporting, monitoring, and control.

Initially, registration was confidential except for "law enforcement purposes," and was not subject to the Freedom of Information Act. *Appendix*, 102a-105a. At the time, there was opposition to the registry remaining confidential but a consensus emerged that "[a] sex offender registry should be used as a law enforcement tool, not as a mechanism to brand or ostracize particular members of a community." *Id.*

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[3] 1995 PA 10; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 237; 2004 PA 238; 2004 PA 240; 2005 PA 121; 2005 PA 123; 2005 PA 127; 2005 PA 132; 2005 PA 301; 2005 PA 322; 2006 PA 46; 2006 PA 402; 2011 PA 17; 2011 PA 18; 2013 PA 2; 2013 PA 149; 2014 PA 328; 2019 PA 82.

In 1999, the registry became available to the public on the Internet. *Tucker*, 213 Mich App at 656. This led to Mr. Betts' personal information being available on the Internet including his address, license plate number, and date of birth. 1999 PA 85. *Appendix*, 106a-111a. There was objection to the 1999 amendments, based on the ostracism and branding registrants were sure to face, and the ways SORA was becoming punitive:

> It seems that the law is rapidly increasing in its coverage and no longer includes just those offenders who, because of recidivism rates, pose a potential threat to the public. . . . The sex offender registry should be used as a law enforcement tool, not as a mechanism to brand or ostracize particular members of the community. The more details about the persons included in the registry, the more the act becomes a modern form of the stocks – more about harassing and continuing to punish the offender. [*Appendix*, 106a-111a.]

In 2004, the Legislature amended SORA to require that the public Internet registry include a photograph of the registrant. Again, there was opposition, and the observation that such an action may increase the risk of recidivism:

> House Bill 5195 would do little in reality to increase public safety but much to increase vigilantism and harassment against registrants. . . . [It] would apply to every registered sex offender, many of whom pose no risk of reoffending and probably shouldn't be on the list to begin with. Adding their pictures would do little more than subject them to increased humiliation and punishment. . . . Placing their pictures on the Internet may do little more than doom them to homelessness and unemployment – two factors known to greatly increase the likelihood of reoffending. [*Appendix*, 112a-115a.]

In 2006, geographic exclusion zones took effect, retroactively banning registrants from living, working, or loitering within 1,000 feet of a school. MCL 28.733-735. Loitering was defined as "to remain for a period of time and under

circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." MCL 28.733(b).

In 2011, the Legislature rewrote SORA. Changes included:

- Categorized registrants into one of three tiers based solely on their offense of conviction: Tier I, Tier II, or Tier III. Tier III are the most serious offenses. MCL 28.722.

- Registration periods were lengthened, up to life. MCL 28.725.

- Published the new tier classifications on the Internet, ostensibly corresponding to dangerousness, but not actually based on any individualized risk assessment. MCL 28.722(r)-(w).

- Added extensive in-person reporting requirements. 2011 PA 17 and 18; MCL 28.725.

    - Regular in-person reporting requirements to verify residence and other information: once a year for Tier I, twice a year for Tier II, and four times a year for Tier III.

    - Immediate in-person reporting requirements when a registrant changes the following information:
        1. address
        2. changing or discontinuing employment
        3. enrolling or discontinuing in higher education
        4. name changes
        5. temporarily residing at other than registered address for more than seven days
        6. email address change
        7. purchase or regular operation of any vehicle.

"Immediate" means that any change in this listed information requires in-person reporting within three business days; there is no exception. MCL 28.725(1); MCL 28.722(g). There was opposition to rewriting SORA, including the fact that "[t]he bills require much more personal information to be included on the public website." *Appendix*, 116a-126a.

Despite repeatedly amending the statute to impose additional onerous obligations on registrants and publicly branding them as dangerous predators, there are limited provisions for removal, only available to a very small percentage of registrants. See MCL 28.728c. Mr. Betts cannot petition for removal from SORA.

Even if the Legislature originally enacted SORA to aid law enforcement and to protect the public, the frequent and sweeping amendments transformed SORA into a statute that punishes registrants. The affirmative obligations, disabilities, and restraints touch nearly every aspect of Mr. Betts' life. *Appendix*, 1a-29a.

- Mr. Betts' personal information is widely disseminated for any member of the public to view and act upon.

- The Internet registry includes a "submit a tip" function and the option to receive email updates on any registrant in a selected zipcode, which promotes citizen monitoring of Mr. Betts.

- Mr. Betts cannot live, work, or loiter in large portions of the State. MCL 28.733-28.735.

- Mr. Betts must register for **life**, regardless of his risk of reoffending. MCL 28.725.

- Mr. Betts must report in-person at specified intervals and immediately following routine life events, regardless of his prior record of reporting or his individual risk. MCL 28.725; MCL 28.725a.

- The penalties for violating SORA include felony charges, as evidenced by Mr. Betts' conviction. MCL 28.729.

The Sixth Circuit held that Michigan's SORA is punishment and that retroactive application of SORA violates the Ex Post Facto Clause. *Does #1-5*, 834 F3d at 705. The Sixth Circuit analyzed several of the most punitive portions of SORA:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins…It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information. We conclude that Michigan's SORA imposes punishment. [*Id.*]

Many of Michigan's amendments were enacted between 2006 and 2011, subsequent to the United States Supreme Court's 2003 decision in *Smith v Doe*, which upheld Alaska's much more limited registration statute. *Smith*, 538 US at 105-106.

Since 2003, Michigan's SORA has transformed from a registry like what was at issue in *Smith* into a super registry. See Carpenter & Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings LJ 1071, 1073 (2011) (discussing the "perfect storm of intersecting legislative action and judicial inaction that has produced ever-escalating registration burdens" and "a new breed of . . . super-registration schemes.") While the United States Supreme Court has not yet ruled on the constitutionality of such a registry, many lower courts have found expansive registries like SORA are unconstitutional. *See e.g. Does #1-5, supra*; *United States v Juvenile Male*, 590 F3d 924, 932 (CA 9, 2009), *vacated as moot*, 131 S Ct 2860 (2011); *Commonwealth v Muniz*, 640 Pa 699; 164 A3d 1189 (2017), *cert den Pennsylvania v Muniz*, 138 S Ct 925; 200 L Ed 2d 213 (2018); *Doe v State*, 167 NH

382; 111 A3d 1077 (2015); *State v Williams*, 129 Ohio St 3d 344; 952 NE 2d 1108 (Ohio 2011); *State v Letalien*, 985 A2d 4 (Me 2009); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004 (Okla 2013); *Commonwealth v Baker*, 295 SW3d 437 (Ky 2009); *State v Pollard,* 908 NE2d 1145, 1147-1148 (Ind 2009); *Doe v State*, 189 P3d 999 (Alaska 2008); *Doe v Dep't of Pub. Safety and Corr. Servs.*, 430 Md 535; 62 A3d 123 (Md Ct App 2013). These cases will be discussed in detail throughout this brief.

Not only is Michigan's SORA fundamentally different and more punitive than the simpler registry at issue in *Smith*, but the Internet is a very different place than it was in 2003 when *Smith* was decided. See generally *Packingham v North Carolina*, __ US __; 137 S Ct 1730; 198 L Ed 2d 273 (2017).[4] The United States Supreme Court observed the widespread prevalence of the Internet in 1997 in *Reno v ACLU*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997). At that time, "the Internet had approximately 9.4 million host computers, 40 million users, and 'thousands' of newsgroups where '100,000 new messages are posted each day.'" Amicus Curiae *Brief of Electronic Frontier Foundation, Public Knowledge, and Center for Democracy & Technology*, *Packingham v North Carolina*, US No. 15-1194, 2016 WL 7449172 (filed December 22, 2016), quoting *Reno*, 521 US at 851-852. In 2016, those numbers had "grown to over 1 billion hosts, over 3.5 billion users, and over 216 billion e-mail messages sent every day." *Id.*

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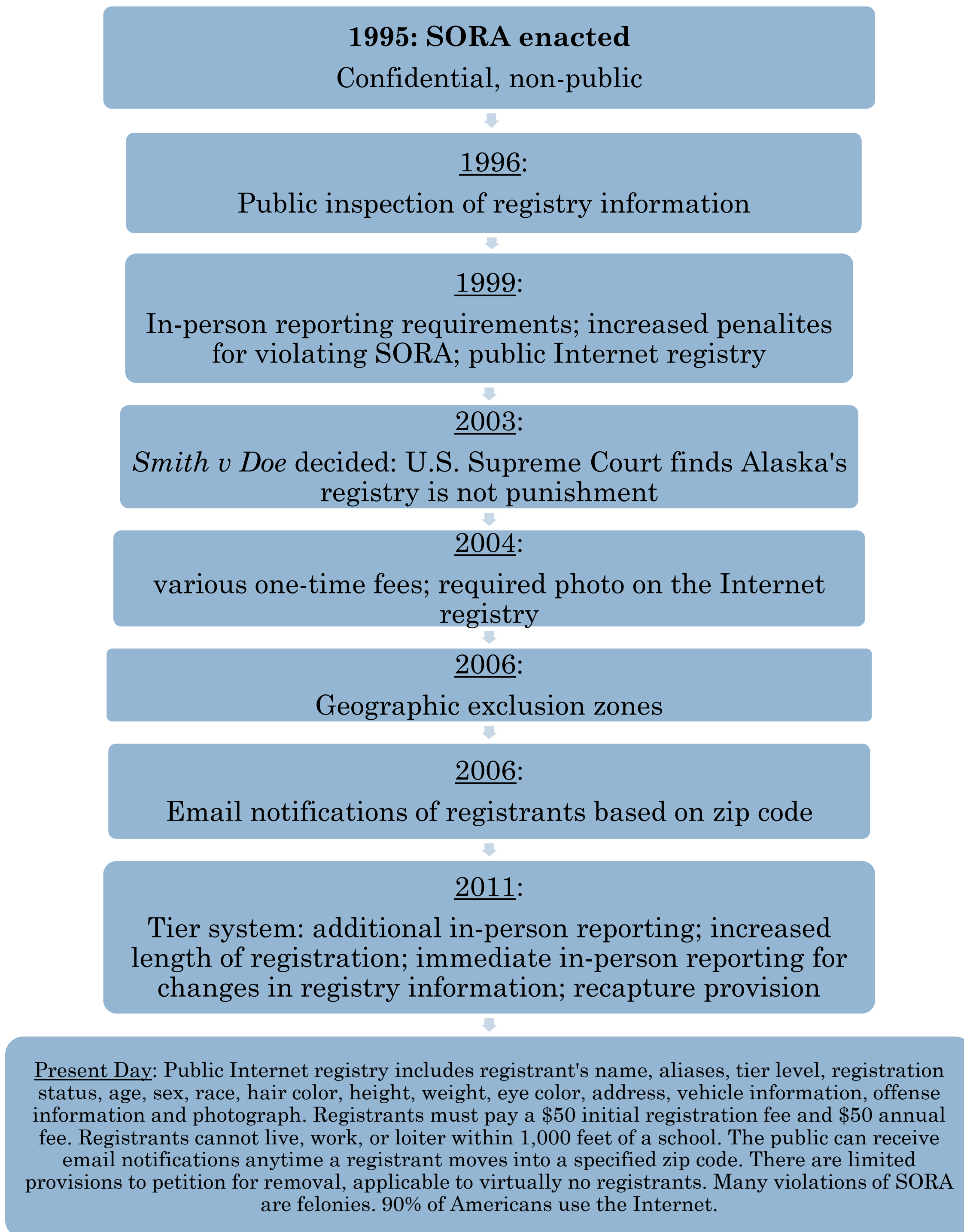
[4] See also *State v Petersen-Beard*, 304 Kan 192, 215-218; 377 P3d 1127 (2016) (JOHNSON, J., dissenting) (noting that changes in technology since *Smith* was decided makes the "punitive effect on offenders . . . even greater.")

In 2019, the Pew Research Center found that 81% of Americans go on the Internet at least daily and 28% of Americans are online "almost constantly." Perrin & Kumar, *About three-in-ten U.S. adults say they are 'almost constantly' online* (July 25, 2019), available at <https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/> (accessed December 17, 2019). The Pew Research Center began tracking Internet usage in early 2000, when about half of Americans were online; as of 2019, 90% of adults in America use the Internet. Pew Research Center, *Internet/Broadband Fact Sheet* (June 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> (accessed December 17, 2019).

When discussing Alaska's Internet-based registry in *Smith*, the Court noted that because a person had to affirmatively go to a website and look up information, it was "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Smith*, 538 US at 99. Sixteen years later, the same comparison cannot be made. The prevalence of the Internet, society's dependence on it, and the vast amount of personal information that can be obtained passively by the public make SORA punitive. See *The Evolution of Unconstitutionality in Sex Offender Registration Laws* (2011), 63 Hastings LJ at 1093-1094 (tracing the changes from a paper-based, public conviction-centered registry to an Internet-based, private information-centered registry).

The chart that follows documents the dramatic changes that have transformed SORA into the punitive statute that it is today, and all that has been added to SORA since the Court's decision in *Smith*.



Standing alone, several individual provisions of Michigan's SORA violate the Ex Post Facto Clause, including: the public Internet registry; the geographic exclusion zones; the lack of an individualized risk assessment; lifetime registration; and the immediate in-person reporting requirements. And, after evaluating SORA as a whole, which is the proper analysis for Ex Post Facto claims, these provisions have a cumulative effect that is punitive, as recognized by the Sixth Circuit. See Does #1-5, 834 F3d at 705.[5]

B. SORA's Accumulative Effect is Punitive.

A court must examine "whether the statutory scheme [is] so punitive either in purpose or effect as to negate" a State's intention to deem it civil. *United States v Ward*, 448 US 242, 248-249; 100 S Ct 2636; 65 L Ed 2d 742 (1980); *People v Earl*, 495 Mich 33, 43; 845 NW2d 721 (2014).[6] To determine if the effects of a statute are punitive, courts look to seven factors outlined in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963):

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[5] The Michigan Court of Appeals, relying on *Smith v Doe*, found that SORA's requirement that registrants report their phone numbers and email addresses was not an Ex Post Facto violation. *People v Patton*, 325 Mich App 425; 925 NW2d 901 (2018). Mr. Patton, unlike Mr. Betts, was convicted of a listed offense once SORA was in effect. Unlike Mr. Betts who is challenging the registry as a whole, Mr. Patton limited his challenge to the reporting requirements in MCL 28.727(1)(h) and (i). *Patton*, 325 Mich App at 428. So, while Mr. Betts contends that *Patton* was wrongly decided, his case is nonetheless distinguishable.

[6] Although the legislative history of SORA indicates there may be reason to doubt the legislative intent was truly civil, see *Does #1-5*, 834 F3d at 700, given that the statute contains an express provision claiming a non-punitive intent, Mr. Betts does not argue here that the Legislature's professed intent was punitive.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

The most relevant factors in examining sex offender registry laws are: affirmative disability or restraint, history and tradition, traditional aims of punishment, rational relation to a non-punitive purpose, and excessiveness. *Smith*, 538 US at 97.

1. SORA's multiple requirements and obligations, including the public Internet registry, immediate in-person reporting requirements, and geographic restrictions on residency, work, and travel, create an affirmative disability and restraint.

This factor considers how the effects of the Act are felt by those subject to it. The Michigan Court of Appeals reasoned that the geographic exclusion zones and the onerous in-person reporting requirements differentiated SORA from the statute at issue in *Smith* and that SORA was "an affirmative disability or restraint." *Tucker*, 213 Mich App at 668-672. The Sixth Circuit stated that the obligations under SORA were "greater than those imposed by the Alaska statute by an order of magnitude" *Does #1-5*, 834 F3d at 703.

The *Smith* Court had reasoned that the 2002 Alaska SORA did not impose a disability or restraint, primarily because there was no restriction of movement, registrants could live and work where they wished, and there was no in-person reporting. *Smith*, 538 US at 100-101.

In contrast, Michigan's SORA requires and prohibits much more than the Alaska registry at issue in *Smith*, as the Sixth Circuit acknowledged and the table below shows.

Alaska Registry at issue in *Smith v Doe*	**Michigan SORA**
No limitations on movement	Barred from "loitering" within 1,000 feet of a school
No limitations on work; no evidence of occupational disadvantage	Barred from working within 1,000 feet of a school; evidence of severe occupational consequences
No limitations on housing; no evidence of housing disadvantages	Barred from living within 1,000 feet of a school; evidence of severe housing consequences
No in-person reporting	Extensive immediate in-person reporting requirements
No state assertion of dangerousness	Classification into tiers that appear to reflect dangerousness despite lack of individualized assessment of risk
No limitations on travel	Must report travel in person in advance
No "submit a tip" function	Encourages public vigilantism by the "submit a tip" function on the Internet registry
No fees	$50 annual fee

Mr. Betts, like all registrants, is not free to move, live, or work as other citizens. He is prohibited from living, working, or loitering within 1,000 feet of a school. MCL 28.733-735. In many urban areas, this may result in a registrant being barred from living or working in most of the city. *Does #1-5*, 834 F3d at 702-703 (portraying a map of the city of Grand Rapids, MI showing the portions of the city off-limits to registrants). The Court of Appeals noted that beyond being a restraint, the geographic exclusion zones "may *expel* offenders in certain circumstances." *Tucker*, 312 Mich App at 669 (emphasis added).

The Sixth Circuit described SORA's in-person reporting requirements and geographic exclusion zones as "direct restraints on personal conduct." *Does #1-5*, 834 F3d at 703. In response to the state's assertion that the effects were "minor and indirect," the Sixth Circuit reasoned: "But surely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment." *Id.* Mr. Betts will go to jail if his convictions are not vacated because the inability or failure to comply with the restraints imposed by SORA can and do result in imprisonment. MCL 28.729.

Other states have recognized the disability and restraint imposed by residency restrictions. The Supreme Court of Kentucky noted that it was "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint." *Baker*, 295 SW3d at 445. And Kentucky's residency restrictions did not include limits on where registrants can loiter or work, like those in place under Michigan's SORA. *Id.* at 440-441. The Supreme Court of Indiana held that "[t]he disability or restraint imposed by the residency restriction statute is neither minor nor indirect." *Pollard*, 908 NE2d at 1150.

Michigan's SORA also includes reporting requirements, both immediate in-person reporting for numerous life events, and quarterly, lifetime in-person reporting for Tier III registrants like Mr. Betts. MCL 28.725; MCL 28.725a. These in-person reporting requirements were not present in the Alaska scheme at issue in *Smith*, and

the lack of in-person reporting was one of the reasons the Court found there was no disability or restraint. *Smith*, 538 US at 101.

Several other jurisdictions have recognized the disability and restraint imposed by in-person reporting requirements.

The Supreme Court of Pennsylvania found that the state's in-person reporting requirements "to be a direct restraint," and that the existence of the in-person reporting requirements was an important distinction from the registry at issue in *Smith v Doe*. *Muniz*, 640 Pa at 735-736

The Supreme Court of Oklahoma, in finding that its registry violated the Ex Post Facto Clause, held that "the affirmative 'in person' registration and verification requirements alone cannot be said to be 'minor and indirect' especially when failure to comply is a felony." *Starkey*, 305 P3d at 1022.

The Supreme Court of Maine held similarly: "[Q]uarterly, in-person verification of identity and location of home, school, and employment at a local police station, including fingerprinting and the submission of a photograph, for the remainder of one's life, is undoubtedly a form of significant supervision by the state . . . that is neither minor nor indirect." *Letalien*, 985 A2d at 18. "These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.'" *Id.*, quoting *Doe v District Attorney*, 932 A2d 552, 562 (Me 2009). The Maine statute did not

require the same immediate in-person reporting for changes to multiple pieces of personal information like Michigan's statute.[7]

The Supreme Court of New Hampshire noted that the frequent reporting and checks by law enforcement "exceed simply burdening or disadvantaging" the registrant. *Doe v State*, 167 NH at 405.

The Supreme Court of Indiana held that Indiana's registry "imposes significant affirmative obligations" on registrants, which included the need to register, re-register, and update one's information, while failure to do so could lead to a felony. *Wallace v State*, 905 NE2d 371, 379 (Ind 2009).

Considering the effect registration may have on a person's ability to obtain employment, the Court in *Smith* noted that employers could discover the same information that was on the public registry through a "routine background check." *Smith*, 538 US at 100. This is not true in Michigan. People without a criminal record can remain on the registry. For example, some individuals with convictions under the Holmes Youthful Trainee Act are required to register. MCL 28.722(b). Individuals who have had their convictions expunged are required to register. MCL 28.722(b). Furthermore, the information available to the public on the Internet registry far exceeds what would be available by a background check, including a registrant's

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[7] After the court decided *Letalien*, the Maryland Legislature amended its registry to require verification by *writing*, and in-person verification only *once every five years* for lifetime registrants. *Doe I v Williams*, 61 A3d 718, 727 (Me 2013). The court determined the registry as amended was not punishment. *Id.* at 734.

picture, listing of scars/tattoos, tier classification allegedly corresponding to dangerousness, vehicle information, etc.

Even without the geographic exclusion zones and the immediate in-person reporting requirements, SORA imposes an affirmative disability and restraint because SORA brands people as dangerous sexual predators and encourages the public to monitor registrants in ways that a criminal record alone does not. The Supreme Court of Oklahoma noted that the Internet had "increased the unrestricted dissemination of personal information of sex offenders." *Starkey*, 305 P3d at 1023-1024. That court cited to Justice Stevens' dissent and Justice Souter's concurrence in *Smith*, both of which addressed the stigma registrants faced, even in 2003. *Smith*, 538 US at 111 (Stevens, J., dissenting); *Smith*, 538 US at 109 (Souter, J., concurring). And, of course, *Smith* was decided long before the Supreme Court called the Internet the "modern public square." *Packingham*, 137 S Ct at 1737.

Michigan's SORA allows the public to submit an anonymous tip on the Internet. This may lead the Michigan State Police to show up at a registrant's house, school, or work, even if that person is fully compliant, just to investigate the anonymous allegations of someone filling out a form on the Internet. SORA certainly allows "a person with an Internet connection to 'become a town crier with a voice that resonates father than it could from any soapbox.'" *Id.*, quoting *Reno v ACLU*, 521 US 844, 870; 117 S Ct 2329; 138 L Ed 2d 874 (1997). And in this case, that "person with an Internet connection" could cause someone to lose his or her job or home, or even go to prison.

In *Does*, the state asserted SORA was not as debilitating as total occupational disbarment, which the Supreme Court has held is non-punitive. *Does #1-5*, 834 F3d at 703-704. However, while noting this was a "stronger point," the Sixth Circuit reasoned that "no disbarment case we are aware of has confronted a law with such sweeping conditions or approved of disbarment without some nexus between the regulatory purpose and the job at issue." *Id.* at 703-704.

Mr. Betts told the trial court about his experience with the disabilities he experienced as a result of his registration, including that he was precluded from buying a house that he wanted because it was within 1,000 feet of a school. *Appendix*, 14a. When he goes to Staples to make copies relative to this case, only male employees provide service to him, while women "have to go stand in the back." *Appendix*, 15a. He had his house broken into, and the perpetrators stated that they were somehow less culpable because he was a registrant. *Appendix*, 15a. He had his business destroyed in Indiana after his sex offender registration information was distributed to the public. *Appendix*, 15a. These experiences detail the punitive effect SORA, applied retroactively, has had on Mr. Betts.

SORA's myriad conditions and requirements, including the public Internet registry, immediate in-person reporting requirements, and restrictions on where residents can live, work, and loiter, impose an affirmative disability and restraint.

2. **SORA compliance is like probation, parole, and the historical punishments of shaming and banishment.**

Probation and parole

In-person reporting requirements and law enforcement monitoring imposed by SORA resemble probation and parole. The Alaska Supreme Court, in a decision post-*Smith*, held that Alaska's updated registry violated the Ex Post Facto Clause, in part because its "registration reporting provisions are comparable to supervised release or parole." *Doe v State*, 189 P3d at 1019. The United States Supreme Court previously rejected this argument because unlike parolees, registrants under Alaska's 2002 registry were "free to move where they wish and live and work as other citizens, with no supervision." 538 US at 101. However, Mr. Betts is not free to move, live, or work where he wishes. Registrants are closely monitored by law enforcement for SORA compliance, to the point where law enforcement arrived at a restaurant to investigate Mr. Betts' registration status. *Appendix*, 22a.

Registrants, parolees, and probationers have a lot in common, including:

- For the life of their supervision term, they are all given conditions that must be followed. See MCL 791.236; MCL 771.2.
- They all must pay supervision fees. See MCL 791.236a; MCL 771.1.
- They are all are subject to penalties for violating each term of probation or parole. MCL 791.236; MCL 771.1 et seq.
- They all generally must report regularly in person. MCL 28.725; MCL 28.725a; *Does #1-5*, 834 F3d at 703.

The Michigan Court of Appeals recognized that the in-person reporting requirements are like probation or parole. *Tucker*, 213 Mich App at 674. SORA's reporting requirements are "far more intrusive" than those from *Smith*, and "impose[] a great amount of supervision by the state." *Id.* The Sixth Circuit stated that SORA "has a number of similarities to parole/probation." *Does #1-5*, 834 F3d at 703. The Supreme Court of Pennsylvania also likened registration to probation, given the mandatory requirements placed upon registrants. *Muniz*, 640 Pa at 738-740.

The length of registration, coupled with uniform requirements and no individualization, make SORA more onerous than probation or parole.

1. Length of term:

    a. Probationary terms cannot exceed **five years**. MCL 771.2a.

    b. Parole terms are generally **two years**, but rarely, if ever exceed four years. MCL 791.234(7)(d); Michigan Department of Corrections, *Policy Directive 06.05.104*, available at <https://www.michigan.gov/documents/corrections/06_05_104_Final_618816_7.pdf> (accessed December 12, 2019).

    c. SORA registration can last for a lifetime, and **15 years** at a minimum.

2. Individualized conditions:

    a. Conditions for parole and probation are imposed based on an individualized assessment. MCL 791.236; MCL 771.2.

    b. SORA's requirements are based solely on the offense of conviction, with no room for individualization or a personalized risk assessment.

Some of the plaintiffs in *Does* had stated that "SORA's requirements are more intrusive and more difficult to comply with that those they faced when on probation."

Does #1-5, 834 F3d at 703.

Banishment

SORA is also comparable to the historical punishments of banishment. White, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 Case W Res L Rev 161 (2008). The Sixth Circuit explained how SORA's geographic exclusion zones create social banishment by forcing registrants to "tailor much of the lives around these school zones…[creating] difficulty in finding a place where they may legally live or work. Some jobs that require traveling from jobsite to jobsite are rendered basically unavailable." *Does #1-5*, 834 F3d at 702. The Michigan Court of Appeals reasoned that the geographic exclusion zones are like banishment because unlike *Smith*, "SORA registrants are affirmatively barred from living in certain areas." *Tucker*, 213 Mich App at 673.

The Supreme Court of Kentucky defined banishment as "'punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life.'" *Baker,* 295 SW3d at 444, quoting *United States v Ju Toy*, 198 US 253, 269–70; 25 S Ct 644; 49 L Ed 1040 (1905). Residency restrictions are like banishment because they "prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes*." Id.*[8]

[8] As mentioned earlier, Mr. Betts told the trial court about a house he wished to purchase but was prohibited from buying because of SORA's geographic exclusion zones. *Appendix*, 14a.

This is not functionally different from this Court determining, in 1930, that banishment from the State of Michigan for a five-year probationary period was "not authorized by state, and is impliedly prohibited by public policy." *People v Baum*, 251 Mich 187, 189; 231 NW 95 (1930). Mr. Betts may not have been banished from the entire State, but there are certainly large portions of this State where he cannot live, work, or even travel.

Shaming

Registration is also like the historical punishment of shaming. The Sixth Circuit contrasted the Court's rationale in *Smith* that Alaska's registry simply published information that was already publicly available by noting that SORA "ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness without providing any individualized assessment" and that registrants cannot appeal the tier labels. *Does #1-5*, 834 F3d at 702-703. Unlike *Smith*, "the ignominy under SORA flows not only from the past offense, but also from the statute itself." *Id.* at 703.

The Court of Appeals reasoned in *Dipiazza* that the public labeling of a person as dangerous who is not, in fact, dangerous, is branding. *Dipiazza*, 286 Mich App at 151-152. The court considered such branding to be punishment. *Id.* at 152.

The explosion of the Internet has changed the impact of registries. See discussion Part I.A., *supra* at pp 11-12. The Supreme Court of Maryland held that disseminating personal information on the Internet "is tantamount to the historical punishment of shaming." *Doe v Dep't of Pub Safety and Corr Servs*, 430 Md at 564.

The Supreme Court of New Hampshire noted that "the internet is our town square," and that registries are like the historical punishment of shaming, because "[p]lacing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame and shun." *Doe v State*, 167 NH at 406. The Supreme Court of Pennsylvania noted that the information its state's registry allowed on the Internet went "beyond otherwise publicly accessible conviction data and includes: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description of vehicles." *Muniz*, 640 Pa at 744.

Michigan's registry is not only publicly available on the Internet, but it also classifies registrants into tiers that purport to reflect their level of dangerousness, distinguishing it from the dissemination of accurate, publicly available information concerning convictions at issue in *Smith*, 538 US at 98. SORA's tier classification system is not based on empirical research or an individualized assessment of risk of reoffending. Despite having the ability to analyze recidivism among registrants, Michigan has never done so. *Does #1-5*, 834 F3d at 704. Michigan brands people, because it publicly labels someone as dangerous who may not actually be dangerous. See *Dipiazza*, 286 Mich App at 151-152.

The legislative history of Michigan's SORA repeatedly indicates the public nature of the registry was a concern, and why SORA was originally limited to law enforcement. See Part I.A., *supra*. Every amendment that broadened public accessibility to the registry or increased the amount of private information made

public faced opposition in the Legislature. See Part I.A., *supra*. In analyzing a prior version of SORA, the Court of Appeals in 1999 noted that "[a] law designed to punish a sex offender would not contain these strict limitations on public dissemination." *In re Ayres*, 239 Mich App 8, 17; 608 NW2d 132 (1999). Because of the many amendments over the last twenty years, the strict limitations noted by the court in *Ayres* no longer exist.

Mr. Betts told the trial court about how he has felt shamed and ostracized. Mr. Betts was approached by officers in a public eating establishment, and as the officer "stood there in Verdonis and looked at me he had pleasure broadcasting to the room my humiliation." *Appendix*, 22a-23a. He continued:

> The studies that are there from virtually all the things show that, in fact, it [registration] doesn't even lower recidivism. It doesn't do anything. It is an absolutely neutral thing other than the fact that it makes it so that a whole class of people are unemployable. A whole class of people are ostracized. A whole class of people have to live in hovels. I don't wanna live in a single wide trailer three miles outside of town because that's the only place people are gonna let me live. The more you poke a man the more likely he's gonna do something and, and I'm not. I swear I'm working really, really hard to do this. I've done it for almost 14 years now regardless of the outcome, truly. I'm still gonna stand up and do the best that I can but this is punishment. There is no question.
>
> Constitutionally, the evolution from the 12 points that they have to the 43 points that are listed on the sex offender registration and with serious impositions (sic) to my freedom with serious reductions into what I can do as a person. That's punishment. [*Appendix*, 22a-23a].

SORA mirrors established forms of punishment: probation, parole, banishment, and public shaming.

3. SORA advances the traditional aims of punishment.

The Sixth Circuit held that Michigan's "SORA advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence." *Does #1-5*, 834 F3d at 704. SORA's "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." *Id.*

Similarly, the Michigan Court of Appeals held that "the foremost purpose of the student safety zones is deterrence." *Tucker*, 213 Mich App at 676. The Supreme Court of Indiana reasoned that its registry's residency restrictions were "designed to reduce the likelihood of future crimes by depriving the offender of the opportunity to commit those crimes" and was "an even more direct deterrent to sex offenders than the Act's registration and notification regime." *Pollard*, 908 NE2d at 1152. Our Court of Appeals agreed with the Indiana court's rationale. *Tucker*, 213 Mich App at 676.

The Supreme Court of Alaska reasoned post-*Smith* that its registry was retributive and served as a deterrent, based primarily on the lack of distinction between the risk posed by certain registrants:

> [A]pplication to a broad spectrum of crimes regardless of their inherent or comparative seriousness refutes the state's argument and suggest that such retributive and deterrent effects are not merely incidental to the statute's regulatory purpose. Every person convicted of a sex offense must provide the same information, and the state publishes that information in the same manner, whether the person was convicted of a class A misdemeanor or an unclassified felony. ASORA's only differentiation is in the frequency and duration of a person's duty to register and disclose. But at any given moment the registration list does

> not distinguish those individuals the state considers to pose a high risk to society from those it views as posing a low risk." [*Doe v State*, 189 P3d at 1013-1014.]

Other jurisdictions have reasoned similarly. The Supreme Court of Oklahoma held that its registry "promotes deterrence through the threat of negative consequences, for example, eviction, living restrictions, and humiliation." *Starkey*, 305 P3d at 1027. The "retributive portion" was the most compelling, based on the lengthened registration periods, the lack of an individualized determination of risk, and the inability to petition for removal from the registry. *Id.* at 1027-1028. See also *Baker*, 295 SW3d at 444 (holding there was a retributive effect based on the lack of an "individualized determination of the dangerousness of a particular registrant.") The Supreme Court of Pennsylvania reasoned that "the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect." *Muniz*, 640 Pa at 742.

Retribution is advanced by SORA. The Supreme Court of Pennsylvania reasoned its sex offender registry was much more retributive than the statute at issue in *Smith*, based on increases to the "length of registration . . . mandatory in-person reporting requirements, and . . . more private information . . . displayed online." *Muniz*, 640 Pa at 744. The Supreme Court of New Hampshire reasoned that because offenders are required to register based only upon their offense, and "not on any individualized assessment of current risk or level of dangerousness," the registration law appeared like retribution. *Doe v State*, 167 NH at 407-408.

For these reasons, SORA advances the traditional aims of punishment. The 2011 amendments increased the reporting period for many individuals, including Mr. Betts. These extended periods are not related to negative conduct or a triggering event attributable to the registrant. SORA's tier designations and corresponding lengths of registration are not related to anything other than the underlying offense. There is no opportunity to show that the registrant is no longer a danger. There is no individualized risk assessment. There is no opportunity to petition for removal based on one's diminished risk. Mr. Betts has not committed a sex offense in 26 years, yet he is still publicly branded, for the rest of his life, as a dangerous sex offender.

4. SORA's obligations, disabilities, and restraints are not rationally connected to its non-punitive purpose.

This Court must consider whether SORA has a rational connection to the purported non-punitive purpose of public safety. *Smith*, 538 US at 102. SORA's restrictions are not rationally related to public safety, as there is no evidence that SORA works to (1) reduce recidivism or (2) make the public safer.

As to recidivism, the Sixth Circuit noted the "significant doubt cast by recent empirical studies" on the statement in *Smith*[9] that sex offenders had a "frightening and high" recidivism rate. *Does #1-5*, 834 F3d at 704. Despite often repeated myths, sex offenders do not reoffend at higher rates than other groups of offenders. In fact,

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[9] The Court's statement in *Smith* has been traced back to an unsubstantiated assertion in the mass market magazine *Psychology Today*. Elmann, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015).

sex offenders are "*less* likely to recidivate than other sorts of criminals," registration has "no impact on recidivism," and registration may "actually *increase* the risk of recidivism." *Does #1-5*, 834 F3d at 704-705 (emphasis in original).

SORA is based on two primary misconceptions: all registrants are the same and all are likely to reoffend. These are misconceptions because:

- risk varies among people who have been convicted of sex offenses;
- offense of conviction does not correlate to risk;
- risk decreases the longer a person has been offense free and as a person ages;
- sex offenders recidivate at much lower rates than those convicted of other types of crimes; and
- the risk of stranger danger is overstated.

See Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J Crim L & Criminology 317, 331 (2006); Elmann, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015); White, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 Case W Res L Rev 161 (2008); Hanson et al, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychol Pub Pol'y & L 48 (2018).

In the over 26 years since his conviction, Mr. Betts has not committed a new sex offense. Statistically his odds of committing a new sex offense are no greater than someone who is not on the registry.[10] See Karl Hanson, et al. *High-Risk Sex Offenders*

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[10] At the time of release from incarceration, individuals determined to be low risk using a risk assessment tool present below a two percent chance of reoffending

May Not Be High Risk Forever, 29 J of Interpersonal Violence 2792 (2014), *Appendix* 127a-148a. By failing to use an individualized risk assessment, SORA does not distinguish between individuals like Mr. Betts and those who pose a high risk of reoffending. SORA retroactively—and publicly—brands individuals as dangerous sexual predators regardless of the actual risk they pose. This governmental branding can last the rest of someone's life, as it will for Mr. Betts.

Yet, SORA requires low risk individuals to register. There are a large number of people on SORA, including Mr. Betts, now 71-years old, who present no more of a threat of committing a new sex offense than any random person who has never been convicted of a sex offense. A registry that fails to distinguish between people who are likely or unlikely to reoffend is not a useful public safety tool.

As to whether SORA actually works, the Sixth Circuit concluded, "the record before us provides scant support for the position that SORA in fact accomplishes it professed goals." *Does #1-5*, 834 F3d at 704. Empirical research demonstrates that SORA is counterproductive to public safety because it exacerbates risk factors for recidivism such as unemployment and housing instability, and it impedes successful reintegration into society. Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 JL & Econ 161 (2011). A study of Michigan's residency restrictions, funded by the Department of Justice, found that if

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sexually and they pose the same or potentially less of a risk than someone who has never been convicted of a sex offense. *Reductions in Risk Based on Time Offense-Free in the Community*, 24 Psychol Pub Pol'y & L at 49.

anything, the restrictions have increased rather than decreased recidivism. Huebner et al., *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (2013), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf> (accessed December 11, 2019).

It is irrational to keep every single registrant from living, working, or loitering within 1,000 feet of a school without any assessment of that registrant's risk to children. Many registrants are not convicted of an offense against a child, but the geographic exclusion zones do not distinguish. It is irrational to require every single registrant to report in-person without any consideration of the registrant's reporting or compliance history. It is irrational to require people to register for such long periods of time—including for a person's whole life—with no individualized assessment of their risk or ability to be removed.

Even though Mr. Betts has not committed a sex offense in 26 years, he is publicly labeled by the state as a Tier III offender for the rest of his life, and his ability to meet his basic needs, such as housing and employment, is restricted. SORA does not advance its professed non-punitive purpose.

Even if this Court finds that there is a rational relationship to a non-punitive purpose, the inquiry does not end as this factor is not dispositive. The Supreme Courts of Indiana, Maine, New Hampshire, Oklahoma, and Pennsylvania all found that their registries had rational relationships to non-punitive purposes yet still held their registries were unconstitutional Ex Post Facto punishment. See *Wallace*, 905 NE2d

at 382-384; *Letalien*, 985 A2d at 22, 26; *Doe*, 167 NH at 409-411; *Starkey*, 305 P3d at 1028, 1030; *Muniz*, 640 Pa at 745-746, 749.

5. SORA is excessive in relation to its purported non-punitive purpose.

SORA places individuals on a public Internet registry for lengthy periods of time and labels them as dangerous predators, without any regard to the actual risk a given individual poses of reoffending sexually. The Legislature's professed non-punitive purpose is to protect public safety. But, the lack of individualized risk assessments makes SORA over-inclusive and excessive. The public will not be safer if the state cannot determine who may actually pose a threat.

The Sixth Circuit found SORA to be excessive:

> [W]hile the statute's efficacy is at best unclear, its negative effects are plain on the law's face….SORA puts significant restrictions on where registrants can live, work, and "loiter," but the parties point to no evidence in the record that the difficulties the statute imposes on registrants are counterbalanced by any positive effects….The requirement that registrants make frequent, in-person appearances before law enforcement, moreover, appears to have no relationship to public safety at all. The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects. [*Does #1-5*, 834 F3d at 705.]

Several jurisdictions have found registries to be excessive.

The Supreme Court of Kentucky held that its state's residency restrictions were excessive, based primarily on the lack of an "individualized assessment as to whether a particular offender is a threat to public safety." *Baker*, 295 SW3d at 446. The regulations were "more onerous" than those at issue in *Smith*. *Id.* Michigan's

SORA is even more restrictive than that of Kentucky—not only are registrants barred from living within 1,000 feet of a school, they cannot work or "loiter" there.

The Supreme Court of Oklahoma detailed its registry's obligations that were excessive: a longer registration period than originally imposed; the elimination of the ability to petition for removal; in-person reporting; public dissemination of personal information and the lack of an individualized determination of risk. *Starkey,* 305 3Pd at 1029. *See also Doe v State*, 189 P3d at 1016-1017 (holding for similar reasons that "the statute's chosen means are excessive in relation to the statute's purpose"). SORA possess all the same features that rendered Oklahoma's registry excessive.

The Supreme Court of Indiana specifically addressed residency restrictions as being excessive: "The statute does not consider the seriousness of the crime. . . . Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes." *Pollard*, 908 NE2d at 1153.

The Supreme Court of New Hampshire found its registry's excessive, given that most offenders had to register for their entire lives, "without regard to whether they pose a current risk to the public." *Doe v State*, 167 NH at 410. This is because "[i]f in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive." *Id.*

In *Smith*, the Supreme Court noted that the individual assessment required in *Hendricks v Kansas*, 521 US 346; 117 S Ct 2702; 138 L Ed 2d 501 (1997) for

involuntary civil commitment was not required in the context of a sex offender registry because for registries the "State [could] dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions." *Smith*, 538 US at 104. However, as discussed above, SORA reveals much more about a registrant than his or her public conviction. SORA publicly assigns purported levels of dangerousness with no individualized or scientific justification. The Internet registry reveals inaccurate and otherwise private information.

Michigan's SORA requirements are excessive. There is no individualized assessment to determine length of registration, whether geographic exclusion zones should apply, or if immediate in-person reporting is necessary. These extreme requirements are imposed with absolutely no showing of particularized risk. There is no mechanism for rebutting the registration requirements or for petitioning for removal for most offenders. Mr. Betts has gone 26 years without committing another sex offense, demonstrating that he is no longer a sexual danger to the public. Requiring Mr. Betts to register as a sex offender is excessive.

Because of its lack of individualization, most registrants' inability to petition for removal, and the complete lack of evidence that SORA makes Michigan any safer, SORA is excessive in relation to its professed regulatory purpose.

Conclusion

The *Kennedy* factors lead to the inescapable conclusion that SORA is punishment and has been so since the advent of the modern Internet age. If SORA is

punishment, it necessarily violates the Ex Post Facto Clause and cannot be retroactively applied to Mr. Betts. This Court should hold, in accordance with the high courts of Pennsylvania, New Hampshire, Alaska, Indiana, Kentucky, Maine, Maryland, Ohio, and Oklahoma and the Ninth and Sixth Circuit Courts, that Michigan's registry is unconstitutional Ex Post Facto punishment. The burden in Michigan of increased immediate in-person reporting requirements, geographic exclusion zones, longer registration periods, increased fees, the public nature of the registry on the Internet, no individualized assessment of risk, and no mechanism to petition for removal from SROA meet the "clearest proof" test of *Smith v Doe.*

II. SORA cannot be severed in a way that leaves an operable registry because (a) the remaining language would make no sense and (b) attempts at severance would result in this Court legislating. Reviving an older version of SORA is impractical and against the Legislature's stated anti-revival preference.

Questions 3, 4, and 5 in this Court's order granting leave address whether unconstitutional amendments can be severed from SORA and whether an older version of SORA can be revived. *Appendix*, 100a-101a. In answering these questions, this Court needs to address three primary series of amendments: those in 1999 making the registry publicly available on the Internet, those in 2006 creating the geographic exclusion zones, and the 2011 rewrite of the statute.

The Michigan Constitution divides the powers of government into three separate and coequal branches. Const 1963, art III, § 2. The power to enact statutes is vested in the Legislature. Const 1963, art IV, § 1. The Constitution specifically states that "No person exercising powers of one branch shall exercise powers properly belonging to another branch. . ." Const 1963, art III, § 2.

A. While the public nature of SORA and the geographic exclusion zones may be severed from SORA, the unconstitutional portions of the 2011 amendments cannot.

While some severance of SORA is theoretically possible, this Court should exercise caution in doing so, given the United States Supreme Court instructs courts to review statutes for Ex Post Facto violations by reviewing the statute as a whole. *Smith*, 538 US at 92, 94, 96-97, 99, 104-105. The piling on of amendments and obligations under a statute can turn something into punishment, where the amendments standing alone may not be punitive. The Sixth Circuit acknowledged

the same—its finding that SORA was punishment was based on the impact as a whole of a "byzantine code governing in minute detail the lives of the state's sex offenders." *Does #1-5*, 834 F3d at 697.

But, according to MCL 8.5 the judiciary may sever unconstitutional language from a statute:

> 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 applications of the act which can be given effect without the invalid portion 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].

"[I]f invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand." *Eastwood Park Amusement Co v Stark,* 325 Mich 60, 72; 38 NW2d 77 (1949). Courts sever language when "what remains is complete in and of itself, logical in its formulation and organization, and clearly in furtherance of the Legislature's stated goal . . . ." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 347; 806 NW2d 683 (2011). When severing language from a statute courts must always consider "whether the remainder of the act is otherwise complete in itself and capable of being carried out without reference to the unconstitutional section," and whether "the unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation the act." *Blank v Dep't of Corr*, 462 Mich 103, 122-

123; 611 NW2d 530 (2000). Prior to determining the level of entanglement, this Court must determine whether the Legislature explicitly stated that portions are not to be severed. *Id.*

1999 amendments:

If this Court determines that SORA being publicly available on the Internet is the only punitive portion of the statute, the public nature of the registry can be severed. MCL 28.728(8) requires the Michigan State Police to remove information from the public registry if any court determines the public nature of the registry is unconstitutional.

2006 amendments:

If this Court determines that SORA is punishment only as to the geographic exclusion zones, this Court can sever the zones (MCL 28.733 through MCL 28.736) from SORA and still leave a functioning statute.

2011 amendments:

The unconstitutional portions of the 2011 amendments—which amounted to a rewrite of SORA—cannot be severed and leave an operable statute. The registry that would result from severing the unconstitutional portions of the 2011 amendments would in no way be "complete in and of itself, logical in its formulation and organization, and clearly in furtherance of the Legislature's stated goal." *In re Request for Advisory Opinion*, 490 Mich at 347.

With the 2011 amendments, the Legislature completely rewrote SORA. It retroactively imposed the tier-based classification system, lengthened registration

periods, and imposed numerous immediate in-person reporting requirements. Key definitional terms, used throughout SORA and triggering its obligations, were added or rewritten. 2011 PA 17; See Part I.A., *supra*. The unconstitutional portions of the 2011 amendments cannot be removed and leave a functioning statute. If language added in 2011 was removed, the statute would leave open the following questions:

1. ***Who*** must register?
2. ***How long*** do people have to register?
3. ***When*** do people have to register?
4. ***How*** do people report changes if not immediately or in-person?

These are all questions the Legislature must answer. The "Legislature's intent is controlling," when determining whether a court can sever portions of a statute. *In re Request for Advisory Opinion*, 490 Mich at 349, n 56.

Absent the unconstitutional portions, SORA would be an unenforceable law, incomprehensible to law enforcement and registrants. The statute would be inoperable.

While severance is theoretically permissible by this Court under MCL 8.5, writing language into a statute is beyond the judiciary's authority. See *Robinson v City of Lansing*, 486 Mich 1, 15 (2010) ("[I]t is well established that we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute.") (internal quotation omitted); *Joseph v A.C.I.A.*¸ 491 Mich 200, 214 (2011); *Am Fedn of State, Co & Muni Employees v City of Detroit*, 468 Mich 388, 400 (2003); *Omne Fin, Inc v Shacks, Inc,* 460 Mich 305, 311 (1999).

Writing language into SORA is exactly what would be required if this Court severed the unconstitutional portions of the 2011 amendments. Severance would require this Court to add additional language to create a functioning statute.

Recently, after finding that Michigan's sentencing guidelines were unconstitutional, this Court declined the adoption of a remedy that would have required "a significant rewrite of the statutory language" and chose instead the remedy that "require[d] the least judicial rewriting of the statute." *People v Lockridge*, 498 Mich 358, 390-391; 870 NW2d 502 (2015). To get to that remedy, this Court changed "shall" to "may," severed approximately twelve words from the statute, and left behind an operable statute. *Id.* at 391.

In reviewing its decision on the *Lockridge* remedy, this Court determined that MCL 8.5 did not demand a different remedy, because the remedy sought by the parties—a bifurcated system of mandatory guidelines and non-mandatory guidelines—would not be operable. *People v Steanhouse*, 500 Mich 453, 467-468; 902 NW2d 327 (2017). Part of that resulting inoperability, this Court predicted, would be "endless litigation and perpetual uncertainty." *Id.* at 469. This Court raised a series of questions that would be unanswered had a bifurcated guidelines system been adopted. *Id.* at 468-469. Even though both parties asserted that MCL 8.5 required a bifurcated system, this Court held that such a system would be inoperable and therefore its remedy in *Lockridge* did not violate MCL 8.5.

The same would be true here. If this Court severed the unconstitutional portions of SORA and added language to create a functioning registry, there would

be a bifurcated registry system, or perhaps even three or four registries, depending on the date of offense. If this happened, there would no doubt be "endless litigation and perpetual uncertainty." *Steanhouse*, 500 Mich at 469.

B. No prior version of SORA can be revived.

The Legislature is anti-revival: "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.[11]

While some unconstitutional portions of SORA can be successfully severed, all unconstitutional portions cannot be severed without requiring this Court to engage is legislative activity. The question then is whether revival is an appropriate remedy? Because the Legislature essentially repealed the prior versions of SORA with the 2011 amendments, according to MCL 8.4, any prior version cannot be revived.

Even if the Legislature had not expressed its clear intention against revival, much like severance, revival would be unworkable. Revival would create different registries for different individuals based on the years of their offenses. For example, there could be the following registries if this Court adopts revival based on the date of one's offense: (1) Pre-1999; (2) 1999-2006; (3) 2006-2011; (4) Post-2011.

There is no indication that the Legislature would want multiple registries. Revival would open up a host of unanswerable questions for this Court:

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[11] The question and the quotation from *Weaver v Graham*, 450 US 24, 36 n 22 (1981) in this Court's order granting leave implies there was a version of SORA in effect at the time of Mr. Betts' offense. See *Appendix*, 100a. There was not. Nor did it exist at the time of his underlying plea or sentence.

- Would the Legislature want the pre-1999 version to be revived? Pre-2006? Pre-2011?

- It appears, at least in part, that the Legislature amended SORA in order to secure funding under the Byrne Grant. *Appendix*, 116a-126a. Would the Legislature want a version of SORA revived if it meant possibly losing funding? [12]

- Would the Legislature want some of the positive 2011 amendments (i.e. the Romeo and Juliet petition for removal section; non-public registry for youth) to be disposed of by reviving an older statute?

- What would happen to the portions of SORA found unconstitutional on due process and First Amendment grounds in the federal litigation? Would the Legislature want those to remain? See *Doe v Snyder*, 101 F Supp 3d 672, 682-686 (2015) and *Doe v Snyder*, 101 F Supp 3d 722, 725 (2015).

Because this Court cannot know the answers to such questions, and in light of the anti-revival statute found in MCL 8.4, revival is not an appropriate remedy. Revival, like severance, would lead this Court into legislative activity.

SORA, as it is today, is already confusing and complex, as the Eastern District of Michigan noted when reading a knowledge requirement into SORA:

> SORA imposes myriad restrictions and reporting requirements that affect many aspects of registrants' lives. Ambiguity 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. Moreover, law enforcement officers' disparate answers to survey and deposition questions about what SORA's reporting requirements and prohibitions [are] highlight SORA's imperfect ability to provide fair notice to all persons who it covers. The frequency with which SORA is amended, as well as today's highly mobile population,

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[12] Some states have intentionally chosen not to comply with SORNA, due to the high cost of implementation and maintenance. See Stephanie Buntin, *The High Price of Misguided Legislation: Nevada's Need for Practical Sex Offender Laws*, 11 Nev L J 770 (2011).

> make a knowledge requirement even more important to ensure due process of law. *Doe v Snyder*, 101 F Supp 3d at 693.

This confusion would be compounded if there were multiple registries. Such a scheme would be incomprehensible for registrants and law enforcement alike. Like this Court's forecasting in *Steanhouse*, multiple registries could create endless litigation and uncertainty. There would be significant due process concerns for registrants. The statute could be void for vagueness. Law enforcement officers could face liability under section 1983 if they applied the wrong registry. Revival is not the Legislature's preference and revival is unworkable.

C. There is no other proper remedy aside from finding SORA unconstitutional as a whole.

Besides being able to sever the public availability of the registry on the Internet and being able to sever the geographic exclusion zones, there is no other proper remedy.

It would not be proper for this Court to sever the portions of the 2011 amendments that go beyond the federal Sex Offender Registration and Notification Act (SORNA) as a potential remedy. The Legislature rewrote SORA in 2011 to become compliant with SORNA, or risk losing a certain percentage of federal grant money. Appendix 116a-126a. Even though many federal circuits have found SORNA not to be punishment, including the Sixth Circuit in *United States v Felts*, 674 F3d 599 (CA 6, 2012), this Court cannot rewrite SORA by engaging in the targeted severing of the portions of SORA that go beyond SORNA. This is because (a) there is no indication the Legislature would want that and (b) SORA must be reviewed as a whole.

First, SORA is very different than SORNA and there is no indication the Michigan Legislature wants SORNA to apply in Michigan. The Legislature had the text of SORNA to consult when considering the 2011 amendments, see *Appendix*, 116a-126a, and it specifically chose to enact additional regulations, including:

- SORA makes public the tier classification, which is not required under SORNA.
- SORA prohibits registrants from living, working, or loitering within 1,000 feet of a school, which is not required under SORNA.
- SORA requires immediate (within three business days) in-person reporting when a registrant temporarily resides at other than their registered address, establishes a new email address or screenname, or regularly uses or purchase a non-registered vehicle. This reporting is not required under SORNA.

See *Brief for the United States as Amicus Curiae*, *Snyder v Does*, US No. 16-768, 2017 WL 2929534 (filed July 7, 2017) (discussing the ways SORA is different from SORNA and arguing against the Supreme Court granting certiorari in *Does #1-5*). This Court would be engaging in the function of the Legislature if it severed discreet pieces of SORA that exceeded SORNA.

Second, the proper framework for an Ex Post Facto analysis is not a piecemeal one, but rather a court must evaluate the entire statutory scheme at issue, on its face. See *Smith*, 538 US at 92; *Kennedy*, 372 US at 168-169; *Hudson v United States*, 522 US 93, 100; 118 S Ct 488; 139 L Ed 2d 450 (1997). The Sixth Circuit focused on SORA as a whole to determine that SORA had a punitive effect. *Smith*, 834 F3d at 705-706; see also *Brief for the United States as Amicus Curiae*, *Snyder v Does*, US No. 16-768,

2017 WL 2929534 (filed July 7, 2017) at 11-12, 16 (acknowledging it was proper for the Sixth Circuit to focus on the cumulative effects of the registry).

Several states have followed the Court's guidance on how to evaluate Ex Post Facto claims.

The Supreme Court of Ohio traced amendments to its sex offender registry, which were similar to Michigan's series of amendments, and found that while the registry was not initially intended as punishment, the amendments transformed the statute into punishment and violated the Ex Post Facto Clause. *Williams*, 129 Ohio St 3d at 350. The transformative amendments included: the permanency of registration, the demanding registration duties, in-person reporting, expanded community notification, residency restrictions, and the stigma, ostracism and harassment of registrants, all of which applied without an individualized assessment of risk. *Id.* at 347-349. The registry as a whole was punitive. *Id.* at 349. The Supreme Court of Indiana reasoned similarly. *Wallace*, 905 NE2d at 379-380.

The Supreme Court of New Hampshire evaluated a registrant's challenge to its registry as a facial challenge, even though the registrant brought the challenge as an as-applied challenge. *Doe*, 167 NH at 402. The court did so because as "all the act's requirements applicable to the petitioner impose mandatory requirements upon him," the court would consider all such requirements, even if those provisions had not had an effect on him. *Id.*

The Supreme Court of Maryland reasoned similarly. A review of Maryland's registry on its face was the proper analysis under *Kennedy*. *Letalien*, 985 A2d at 17.

An as-applied challenge was improper because such a review would "result in inconsistent outcomes and unnecessarily invite individuals to challenge the constitutionality of the statute based on their personal circumstances." *Id.* To reach this conclusion, the court looked to the purpose behind the prohibition on Ex Post Facto laws: it "is intended to act as a check on the exercise of legislative authority as it affects broad categories of persons, and is not intended to create an individual right to challenge a retroactive law based on the effect that the law has on each person's circumstances." *Id.*

As a whole, SORA constitutes Ex Post Facto punishment and is unconstitutional.

III. Mr. Betts' unconstitutional conviction must be reversed.

Question 6 in this Court's order granting leave asks whether the answers to the other questions require the reversal of Mr. Betts' conviction for failure to register. *Appendix*, 100a-101a. The answer is yes. As a whole, which is the proper framework under which to analyze Ex Post Facto claims, SORA is unconstitutional punishment and his conviction must be reversed.

If this Court determines that the geographic exclusion zones are the only punitive portions of the statute, then Mr. Betts may be out of luck and have to serve his year in jail and term of probation, given that he pled no contest for failing to "register his address, vehicle and email address contrary to MCL 28.729(1)(a)."

But, this Court should follow the Sixth Circuit and a multitude of other courts, and review the effects of SORA as an aggregate. This is because even though Mr. Betts was not convicted of violating the geographic exclusion zones, he theoretically could have been, as the Supreme Court of New Hampshire noted when reviewing a challenge to the registry as a facial challenge. *Doe*, 167 NH at 402.

Because all of SORA's requirements are mandatory as to Mr. Betts and when looking at the statute as a whole, this Court should find that SORA is unconstitutional punishment and reverse Mr. Betts' conviction.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Mr. Betts asks that this Honorable Court find SORA to be unconstitutional punishment, vacate his conviction, remand to the trial court with instructions to remove Mr. Betts from the sex offender registry, or any other relief which it deems appropriate.

Respectfully submitted,

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Dated: December 18, 2019