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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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INTRODUCTION

In August 2016, more than four years ago, the Sixth Circuit Court of Appeals held that Michigan's Sex Offenders Registration Act (SORA) imposes punishment in violation of the Ex Post Facto Clause of the United States Constitution, and that retroactive application of SORA's 2006 and 2011 amendment must cease.[1] See *Does #1-5 v Snyder* ("*Does I*"), 834 F3d 696, 705-706 (CA 6, 2016), cert denied 138 S Ct 55; 199 L Ed 2d 18 (2017). Michigan, however, has continued to impose unconstitutional retroactive punishment on tens of thousands of registrants, as if the Sixth Circuit had never ruled. As a result, registrants filed a class action. See *Does #1-6 v Snyder* ("*Does II*"), Eastern District of Michigan, Docket No. 2:16-cv-13137 (Cleland, J.).

The appellant here, Paul Betts, is a class member in *Does II*. In May 2019, the federal district court entered a stipulated class-wide declaratory judgment, holding, consistent with *Does I*, that retroactive application of SORA's 2006 and 2011 amendments violates the Ex Post Facto Clause. *Does II* Stipulated Declaratory Judgment, Exhibit A. On February 14, 2020—after almost another year of legislative inaction—the court permanently enjoined application of SORA to pre-2011 registrants, effective 60 days after entry of judgment. *Does II*, __ F Supp 3d __, 2020 WL 758232 (ED Mich, Feb 14, 2020). Before the judgment entered, however, the pandemic hit. On April 6, 2020, the court entered an interim order delaying entry of judgment and suspending enforcement of registration, verification, exclusion zones, and fee violations of SORA that occurred from February 14, 2020, until the pandemic has ended, and thereafter until registrants are notified of what duties, if any, they have under SORA going forward. *Does II* Interim Order,

[1] This brief was not authored in whole or in part by counsel for a party, nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief.

Exhibit B. As of this writing, that interim order remains in effect.[2] Amicus submits this brief to explain the implications of the *Does I* and *Does II* decisions for this case.

The People here spend almost their entire brief arguing why they think the Sixth Circuit's decision in *Does I* is wrong. Oddly, the People never mention *Does II*, or the class-wide relief entered there. The People's argument attempts to manufacture a conflict between this Court and the federal courts about whether SORA violates the constitutional prohibition on ex post facto laws. While the consequence of such conflicting holdings would be incredible confusion, if not chaos, for registrants and law enforcement alike, the People are right on the basic point that this Court is free to make its own determinations about what the law requires, and is not bound by the decisions of the lower federal courts. See *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

What the People ignore, however, is that the State of Michigan, unlike this Court, is bound by federal court decisions. Here, the State is bound in two ways. First, the United States District Court for the Eastern District of Michigan in the *Does II* class action held that the State of Michigan cannot enforce SORA against pre-2011 registrants. Mr. Betts is a class member in *Does II*, and the Muskegon County Prosecutor is an agent of the defendants and is thus bound by that decision. Second, the State must also comply with the Sixth Circuit's decision in *Does I*. While Mr. Betts was not a litigant in *Does I*, the state was. Under the circumstances here, where the constitutionality of SORA was extensively litigated to a full, fair and final judgment, nonmutual collateral estoppel against the State is appropriate. Moreover, the State itself has acknowledged in prior litigation before this Court that the *Does I* decision is entitled to precedential weight and

[2] The federal district court has been requiring monthly updates from the parties on the status of legislative negotiations and steps to implement the judgment. The court recently scheduled a status conference for September 8, 2020.

has previously waived the argument that it may retroactively apply the 2006 and 2011 amendments to SORA. *See* Exhibit C, October 10, 2017 Letter of Aaron Lindstrom, filed in *People v Temelkoski*, 498 Mich 942; 872 NW2d 219 (2015). As discussed in more detail below, Michigan cannot enforce SORA in violation of federal court decisions, and therefore cannot enforce it against Mr. Betts.

At a more practical level, the federal class action has answered the question of whether SORA is punishment for other registrants, even if somehow the State is not bound by the *Does I* and *Does II* decisions in Mr. Betts' individual case. After *Does I*, law enforcement agencies that seek to enforce SORA in violation of that decision face Section 1983 liability. Moreover, once the *Does II* final injunction goes into effect, Michigan cannot apply SORA retroactively to pre-2011 registrants, absent a legislative rewrite. Thus, even if this Court were to find that the State is not bound by the *Does* decisions in Mr. Betts' individual case, Michigan would still be bound to follow *Does I* and would still be enjoined on a class-wide basis in *Does II* from imposing retroactive punishment against other registrants. Similarly, any legislative rewrite of the statute will need to conform to the federal courts' decisions.

The fact that the State cannot enforce SORA as written and will have to reform the registry in response to the federal decisions if it wants a registry for pre-2011 registrants does not mean that this Court's decision here is unimportant. To the contrary, this Court's decision could have a tremendous impact on the future of Michigan's registry. But the practical reality on the ground should shape how this Court approaches Mr. Betts' case. There are two areas where this Court's decision could be particularly important, and on which the Court should focus its ruling.

First, this Court's decision will provide critical guidance to the lower courts and prosecutors on how to handle criminal prosecutions for SORA violations that are inconsistent with

Does I and *II.* As a result of the *Does II* orders, it is now absolutely clear that law enforcement officials and prosecutors will not be able enforce SORA against pre-2011 registrants going forward unless or until a new law is passed.[3] Prosecutors are currently barred from prosecuting any registration, verification, exclusion zone, and fee violations that occurred after February 14, 2020, until further order of the federal court. See Exhibit B, *Does II* Interim Order. In addition, the *Does II* court held that certain provisions of SORA are unconstitutionally vague or violate the First Amendment, and cannot be enforced against any registrant, regardless of when the registrant was convicted. *Does II*, 2020 WL 758232 at *13-14.

Unfortunately, and perhaps due to the unfamiliarity many local police officers and state prosecutors have with federal law, there is considerable confusion about the binding effect of *Does II*, with some police and prosecutors believing that they can still continue to enforce SORA retroactively. Given this Court's preeminent role in clarifying the law for state law enforcement, it would be helpful for the Court to reinforce that state officials must abide by federal court decisions.

Mr. Betts' case also provides an opportunity to clarify what should happen in *pending* criminal prosecutions for SORA violations that are inconsistent with *Does I* and *II.* That question is likely to affect hundreds of people. See Exhibit D, Michigan Department of Corrections 2018 Statistical Report (showing hundreds of SORA violation cases in 2018 alone). Because the *Does I* and *Does II* decisions prohibit the State from retroactively enforcing SORA against pre-2011 registrants, this Court should hold that people with pending criminal appeals for SORA violations

[3] As discussed below, the final judgment, which entirely bars application of SORA to pre-2011 registrants, has not yet entered. See *Does II*, 2020 WL 758232 at *14. The currently operative *Does II* injunction is an interim order suspending enforcement of SORA's registration, verification, exclusion zones, and fee violations of SORA during the pandemic. See Exhibit B, *Does II* Interim Order.

that conflict with *Does I* or *Does II* must have their convictions vacated.

The second way in which this Court's decision could be useful is in shaping any future legislative reform since any new law will need to comply not just with the federal court decisions, but also with the decision of this Court. To be clear, this Court could simply decide it need not reach the merits and simply resolve Mr. Betts' case based on the fact that the State is bound by the federal court decisions. If, however, this Court does reach the merits and goes further than the Sixth Circuit in interpreting either the federal or Michigan Ex Post Facto Clauses, any legislative rewrite would have to conform to this Court's decision, in addition to the federal court decisions. For example, if this Court expanded on *Does I* and *II* by holding that individualized assessments are necessary to impose SORA's burdens retroactively, or by holding that, in light of the evolution of the Internet, lifelong public registration without such individualized assessment is punitive, those decisions would dramatically impact any legislative rewrite. By contrast, no useful purpose would be served by this Court concluding, contrary to the Sixth Circuit, that SORA is not punishment under the federal Constitution, since the State must still comply with the federal decisions.

Whether there will be legislative reform on SORA is unclear. Despite the widespread private recognition among lawmakers that Michigan's registration law is fundamentally broken, despite the modern research showing registries are ineffective or even counterproductive,[4] and despite multiple judicial rulings finding SORA unconstitutional, lawmakers have not reformed the registry. While one would have hoped, given the *Does II* class decision, that legislators would

[4] See Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161 (2011). This peer-reviewed study, which analyzed data from 15 states (including Michigan) over approximately ten years, concludes that rather than reducing recidivism, notification laws may well have increased the frequency of sex crimes. See also Model Penal Code: Sexual Assault and Related Offenses, § 213 at 225-228 (Am Law Inst Tentative Draft No. 10, 2019), available at http://www.thealiadviser.org/sexual-assault/registration-and-notification/ (surveying research).

at long last have amended SORA to address the problems identified by the courts, unfortunately the most recent bill to be introduced is patently unconstitutional, repeating many of the features of SORA that the Sixth Circuit and federal district court held unconstitutional. See 2020 HB 5679. Indeed, both the Attorney General and the Michigan State Police submitted comments noting the constitutional deficiencies. See Exhibit E, Attorney General Comments on HB 5679; Exhibit F, Michigan State Police Comments on HB 5679.

Of course, it is up to legislators, not courts, to make policy decisions within the legal constraints set by the courts. Going forward, legislators might prefer to invest scarce tax dollars into more effective programs focused on prevention, or might adopt a risk-based system, shorten registration terms, choose to de-register children, or make other changes. Still, to the extent that this Court believes that SORA is punitive in ways beyond those identified in the *Does* opinions, it would be helpful for the legislature to know that before, rather than after, it passes a new law.

In sum, there are multiple paths this Court could take in deciding Mr. Betts' case. Whatever path the Court chooses should reflect the practical and legal realities on the ground.

INTEREST OF AMICUS

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide, nonpartisan organization with over 1.5 million members dedicated to protecting fundamental liberties guaranteed by the United States Constitution. The ACLU is committed to protecting the constitutional rights of all people, including people convicted of sex offenses. ACLU counsel, along with others, represented the plaintiffs in *Does I*, where the Sixth Circuit held that SORA violates the federal constitutional prohibition on ex post facto laws. ACLU counsel currently represent the certified class in *Does II*, where the United States Court for the Eastern District of Michigan ordered class-wide relief on all issues in which the *Does I* plaintiffs

prevailed either before the district court or the Sixth Circuit, including a class-wide prohibition on retroactive application of SORA's 2006 and 2011 amendments.[5]

The issues litigated before the federal court in *Does I* and *Does II* are directly relevant here. This Court, in granting leave, specifically invited the ACLU to file an amicus brief. The Court also previously permitted the ACLU to file an amicus brief with respect to the application for leave to appeal, and granted oral argument at that stage of the litigation. In addition, this Court previously invited the ACLU to file an amicus curiae brief in *People v Snyder* (Docket No. 153696) and in *People v Tucker* (Docket No. 152798), which raised similar issues.

BACKGROUND

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

[5] The ACLU has also been involved in numerous other cases, both providing direct representation and as amicus, on issues relating to the conditions imposed on people convicted of sex offenses. Recent cases include *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (2018) (retroactive registration of youth who pled under Holmes Youthful Trainee Act violated due process); *Roe v Snyder*, 240 F Supp 3d 697 (ED Mich, 2017) (enjoining prosecution of Michigan registrant for SORA violations that conflict with holding of *Does I*); *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012) (holding courts must inform defendant if he or she would be subject to lifetime electronic monitoring) (amicus); *Poe v Snyder*, 834 F Supp 2d 721 (WD Mich, 2011) (holding registrants may use homeless shelters that are located within 1000 feet of a school); *Doe v Sturdivant*, 490 F3d 491 (CA 6, 2007) (equal protection challenge to registration of youth as sex offenders) (amicus); *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009) (holding that registration of certain youthful offenders violated the prohibition on cruel and unusual punishment in the Michigan Constitution) (amicus); *Akella v Michigan State Police*, 67 F Supp 2d 716 (ED Mich, 1999) (arguing for hearing on dangerousness before individuals are placed on the registry).

person. 1994 PA 295, § 5(1). Since that time, the legislature has repeatedly amended the statute, imposing an ever stricter regime with new burdens, covering more people and more conduct.

Notably, in 1999 the information on the registry was made available on the Internet. 1999 PA 85. In 2004, registrants' photos were posted on the website. 2004 PA 237. Amendments in 2006 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.

Amendments in 2011 (effective April 12, 2011) 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 a registrant poses any risk to the public.

The result of these multiple amendments is a complex web of restrictions that now govern virtually every facet of registrants' lives.

The Does I Litigation

In 2012, five 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 F3d 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:

> 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.

Snyder v Does #1-5, 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).

The Does II Litigation

Despite the Sixth Circuit's and district court's decisions in *Does I*, Michigan continued to subject tens of thousands of registrants to SORA, simply ignoring those rulings. The legislature did not amend the statute, and law enforcement agencies continued to enforce the unconstitutional provisions. See, e.g., *Roe v Snyder*, 240 F Supp 3d 697 (ED Mich, 2017) (granting injunction to plaintiff threatened with prosecution under a provision held unconstitutional in *Does I*); *Doe v Curran*, No 18-11935, 2020 WL 127951, at *8 (ED Mich, Jan 10, 2020) (same); Exhibit G, VanderGelden Declaration (describing prosecutions); Exhibit H, Farkas Declaration (same). And the Michigan State Police continued to inform registrants that they had to comply with provisions that the courts had ruled were unconstitutional. See Exhibit I, Sample Explanation of Duties Provided to Registrants.

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.[6] See *Does II*, Eastern District of Michigan, Docket No. 2:16-cv-13137. 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:

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 I,* 101 F Supp 3d at 681-690.

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 I*, 101 F Supp 3d 722, 722-730.

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 could not 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.

In September 2018, the State stipulated to class certification. Exhibit J, *Does II* Stipulated Class Certification Order. The order certified a "primary class" defined as all people who are or will be subject to registration under Michigan's Sex Offenders Registration Act." *Id.* at ¶ 2. There are an estimated 44,000 people subject to registration under SORA who are members of the primary class. *Does II*, Eastern District of Michigan, Docket No. 2:16-cv-13137, Second Amended Complaint, R. 34, ¶ 180.

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

[6] The complaint was initially filed by private counsel in 2016 and stayed pending resolution of the then-pending *Does I* cert petition. Counsel here filed appearances and an amended complaint in June 2018.

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.

Exhibit J, *Does II* Certification Order, ¶ 3. There are tens of thousands of people in each subclass. *Does II*, Eastern District of Michigan, Docket No. 2:16-cv-13137, Second Amended Complaint, R. 34, ¶ 181.

In September 2018, the *Does II* plaintiffs filed a motion for partial summary judgment on behalf of the ex post facto subclasses. By agreement of the parties, the court repeatedly deferred decision in order to allow time for legislative negotiations. In May 2019, the court entered a stipulated class-wide declaratory judgment holding, consistent with *Does I*, that retroactive application of SORA's 2006 and 2011 amendments violates the Ex Post Facto Clause. Exhibit A, *Does II* Stipulated Declaratory Judgment. The court delayed decision on severability and on injunctive relief in order to allow time for the legislature to pass a new statute. *Id.* By September 2019, a year after the *Does II* plaintiffs first moved for relief on the ex post facto claim, it had become clear that the legislature would not act absent further judicial decisions. Plaintiffs then moved for a decision on severability, as well as for class-wide injunctive relief.

On February 14, 2020, the district court concluded that the 2011 SORA amendments are not severable, permanently enjoined enforcement of SORA against pre-2011 registrants, and permanently enjoined enforcement of SORA's geographic exclusion zones, strict liability provisions, and certain reporting requirements against all registrants. *Does II*, 2020 WL 758232, *13-14. The court ordered the parties to submit a proposed judgment providing that the injunctions become effective sixty days from entry of the judgment in order "to allow time for

the legislature to craft and enact a new statute." *Id.* at *13. The injunctions were to become operative around mid-May.

Then came the COVID-19 pandemic, which hampered the legislature's ability to revise SORA, created logistical obstacles to the state's ability to implement the judgment (particularly the notice requirements), and made it dangerous for registrants to report frequently in person, as SORA requires. The district court entered an interim order on April 6, 2020, that suspended entry of judgment "for the duration of the current COVID-19 crisis," which the Court "considered ended: (a) when there is no longer an operative federal or state executive order or legislative act declaring a state of emergency, or b) when the Court determines that the conditions giving rise to the need for this Interim Order no longer apply." Exhibit B, *Does II* Interim Order, at 3-4. The order suspends enforcement of registration, verification, exclusion zones, and fee violations of SORA during the pandemic, and bars prosecution of any such violation from February 14, 2020, until the pandemic has ended, and thereafter until registrants are notified of what duties they have under SORA going forward. *Id.* at 4.

The People v Temelkoski Case

In 2015, this Court granted leave in *People v Temelkoski*, 498 Mich 942; 872 NW2d 219 (2015), and ordered briefing on the question of whether SORA constitutes punishment. 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 in *Temelkoski*, 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.

Exhibit C, October 10, 2017 Letter of Aaron Lindstrom. While *Temelkoski* was ultimately decided on due process grounds, *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (2018), the State's acknowledgement that federal law prohibits retroactive application of SORA's 2006 and 2011 amendments is important here.

SUMMARY OF ARGUMENT

This brief discusses three distinct issues. First, amicus addresses the relationship between this case and the *Does I* and *Does II* litigation. While this Court is not bound by the decisions of the lower federal courts, the State of Michigan, represented here by the Muskegon prosecutor, is bound in two ways. The State is bound by *Does II*—a certified class action on behalf of all Michigan registrants—which held that the 2006 and 2011 SORA amendments are punitive and that their retroactive application violates the federal constitutional prohibition on ex post facto laws. The state is also collaterally estopped from relitigating the Sixth Circuit's decision in *Does I* that retroactive application of the 2006 and 2011 SORA amendments is unconstitutional. The ultimate issue of whether SORA is punishment was actually and necessarily litigated to final judgment in *Does I*, the State had a full and fair opportunity to litigate that question, and mutuality of estoppel is not required because estoppel is being asserted defensively.

Second, because SORA is punishment, and because the 2011 amendments are not severable, SORA cannot be retroactively applied to pre-2011 registrants. The 2011 amendments are deeply embedded in the statute and cannot simply be excised. Nor can the judiciary rewrite the statute to make it constitutional. That is quintessentially legislative work. "Revival" of an earlier version of SORA is also not an option. It is unclear what former version of SORA would apply. Moreover, old versions of the statute no longer exist in any readily consultable form, making it

impossible for registrants or law enforcement to know what the law requires. Revival would also contravene the legislature's intent: it would not just eliminate the aspects of the registry that are punitive, but would also reverse perfectly constitutional modifications to SORA that the legislature has made over the last two decades.

Finally, amicus highlights four issues that the Court should consider if it reaches the question of whether SORA violates the prohibition on ex post facto laws: (1) the prohibition on ex post facto laws was intended to address two problems—lack of fair notice and vindictive lawmaking—that are the very harms SORA has created; (2) under *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the determination of whether SORA is impermissibly punitive requires review of the entire statutory scheme; (3) the fact that SORA is based on the federal Sex Offender Registration and Notification Act (SORNA) does not insulate it from constitutional scrutiny; and (4) in light of the evolution of the Internet, public registration must be based on an individualized assessment.

Amicus' core argument is that, however this Court resolves the instant appeal, the Court should be guided by the practical and legal reality that the State of Michigan is bound by both *Does I* and *Does II*. The Court's decision can provide critical guidance to the legislature, which has so far failed to bring SORA into compliance with the Constitution.

ARGUMENT

I. *The People Are Bound by the Does I and Does II Federal Court Decisions.*

A. The People Are Bound by *Does II* Because It Is a Class Action.

One of the main purposes of the *Does II* class action was to stop the ongoing prosecutions holding registrants criminally liable in state court under a law that had been found unconstitutional by the Sixth Circuit in *Does I*. Under the *Does II* decision, the State of Michigan is barred from enforcing SORA against pre-2011 registrants, effective 60 days from entry of judgment:

> Michigan's SORA is DECLARED NULL AND VOID as applied to members of the ex post facto subclasses (any registrant whose offense requiring them to register, and who has not committed a subsequent offense, occurred prior to April 12, 2011). Defendants and their agents will be ENJOINED from enforcing ANY provision of SORA against members of the ex post facto subclasses.

Does II, 2020 WL 758232, at *13. That decision is binding on the parties here.

1. *The Federal Class Action Decision Precludes Relitigation of the Same Issues.*

Decisions in class actions are, of course, binding on the litigants. The purpose of class action litigation is to decide common legal issues for the class as a whole and avoid inconsistent judgments. That is why, once a class is certified, class members can no longer pursue their cases individually. Litigation of an issue in a certified class action precludes litigation of the same issue in an individual case.

Here the State stipulated to class certification in *Does II* in part on the grounds that "prosecuting separate actions by or against individual class members would create a risk of 'inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.' Fed R Civ P 23(b)(1)(A)." Exhibit J, Stipulated Class Certification Order, ¶ 7. Thus, the state has already recognized the need for uniformity in application of the *Does I* decision, given the tens of thousands of people affected.

The state here has also repeatedly asserted that claims by individual registrants based on the *Does I* decisions can **only** be pursued through the class action. Numerous individual registrants have sought to protect themselves from prosecution by suing to ensure that they are not held criminally responsible for noncompliance with SORA provisions that were held unconstitutional in *Does I*. In those cases, the State has repeatedly and successfully asserted (once

the class was certified) that the question of whether retroactive application of SORA violates the Ex Post Facto Clause must be litigated in the class action.[7]

In *Doe v Curran*, No. 18-11935, 2020 WL 127951, at *2 (ED Mich, Jan 10, 2020), for example, the plaintiff purchased a home, after allegedly being informed by the Otsego County Sheriff's Office that he did not need to comply with SORA's geographic exclusion zones as those zones had been ruled unconstitutionally vague in *Does I*. However, the Otsego County Prosecutor threatened the registrant with prosecution if he continued to live in his home. The registrant then filed suit and obtained a preliminary injunction (which occurred prior to class certification in *Does II*). *Id.* at *3-4. After the *Does II* class was certified, the state defendants moved for summary judgment arguing that the plaintiff, as a member of the class, was precluded from pursuing individual relief to prevent his prosecution. The state argued that deciding in such an individual action whether class members could be prosecuted "would be inconsistent with the structure of Rule 23(b) and could lead to inconsistent results." *Curran,* No. 18-11935, State Mot for Sum Judg, R. 65, PgID#407. The Otsego County Prosecutor likewise moved for summary judgment, arguing that the plaintiff's effort to prevent his prosecution "represents an invalid attempt to litigate the claims at issued in the certified [*Does II*] class action." *Id.*, Otsego Mot for Sum Judg, R. 68, PgID#603. The parties ultimately agreed to a stipulated order extending the injunction until resolution of the *Does II* case. *Curran*, 2020 WL 127951 at *4.

[7] Cases brought by individual registrants challenging SORA which were (re)assigned to Judge Cleland and dismissed or stayed pending *Does II* include *Cain v The People of the State of Michigan*, 19-cv-10243 (ED Mich); *Hann v Whitmer*, 19-cv-11688 (ED Mich); *Doe v State of Michigan*, 19-cv-10364 (ED Mich); *Abner v Whitmer*, 19-cv-12471 (ED Mich); *Ingram v Whitmer*, 19-cv-11791 (ED Mich); *Barnes v Whitmer*, 19-cv-12390 (ED Mich); *Doe v Whitmer*, 19-cv-10977 (ED Mich); *Doe v Curran*, 18-cv-11935 (ED Mich); *Dentry v Snyder*, 17-cv-10643 (ED Mich).

Other registrants seeking assurance that they will not be prosecuted have faced similar problems even *after* Judge Cleland entered a class-wide declaratory judgment holding that the 2006 and 2011 amendments cannot be retroactively applied. Thus, when a registrant convicted in 1997 asked the Michigan State Police "to enforce *Does I*, as made applicable by the declaratory judgment in *Does II*, and to ensure that he does not continue to suffer ongoing retroactive punishment under the current (unchanged) SORA regime" by applying pre-2006 law, the state refused. Exhibit K, Fabian Correspondence. The Michigan State Police responded that "because *Does II* is an ongoing class action …, it would be inappropriate for the MSP to grant individual relief to a specific class member in the absence of further direction from Judge Cleland as to the entire class." *Id.*

The class has now obtained that relief. Concededly, the decision in *Does II* is not final because the pandemic has slowed entry of the judgment. But the State—having repeatedly argued prior to the *Does II* decision that registrants cannot litigate individual cases to protect themselves from prosecution because that issue was the subject of the *Does II* litigation—cannot now argue that *Does II* does not protect registrants from prosecution.

To be clear, the *Does II* decision does not bar litigation on issues that were not at issue in the class action:

> [I]n a class action, not all claims that each class member may have will necessarily be common to the whole class. These individualized claims are not made part of the class action and, accordingly, are generally not precluded by the class action judgment.

6 Newberg on Class Actions § 18:17 (5th ed). Here, the class action is binding against the state on the issues decided there, but not on other undecided questions. As Judge Cleland observed in declining to certify the severability question, Mr. Betts' case presents constitutional issues which the Sixth Circuit has already answered on the federal level, but which this Court might decide

differently as a matter of state constitutional law. *Does II*, 2020 WL 758232 at *7. This Court might, for example, decide that under the Michigan Constitution's Ex Post Facto Clause, SORA became punitive as a result of earlier amendments requiring registrants' personal information and photographs to be publicly posted on the Internet. *Id.* There is no class decision on that issue. But on the question of whether the 2006 and 2011 amendments are punitive under federal law, there is a class decision against the State. Because the State is bound here by that decision, this Court could simply decide not to reach the individual issues in Mr. Betts' case that go beyond what was decided in the class action.

2. *The People Are Bound by Decisions Against the Governor in Her Official Capacity.*

The People cannot avoid the effect of the *Does II* decision by claiming that because the State of Michigan is represented here by the Muskegon County Prosecutor, the State is not bound. The plaintiff in Mr. Betts' case, the State of Michigan, is substantially the same, and certainly in privity with, the defendants in *Does II*, who include the governor and Michigan State Police director in their official capacities. [8] And of course Mr. Betts is a *Does II* class member.

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*,

[8] A party in privity is "so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v State*, 470 Mich 105, 122; 680 NW2d 386, 396 (2004) (citing *Baraga Co v State Tax Comm* 466 Mich 264, 269–270; 645 NW2d 13 (2002)). At its outer limit, privity "traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id.*; accord *People v Lee*, 314 Mich App 266, 279 n 8; 886 NW2d 185 (2016). A perfect identity of the parties is not required to establish privity. *Adair*, 470 Mich at 122; 680 NW2d at 397. "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).

574 F3d 334, 343 (CA 6, 2009) (citing MCL 49.153); *Pusey v City of Youngstown*, 11 F3d 652, 657-658 (CA 6, 1993); *Gavitt v Ionia Cty*, 67 F Supp 3d 838, 859 (ED Mich, 2014), *aff'd on other grounds sub nom Gavitt v Born*, 835 F3d 623 (CA 6, 2016). 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. See *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013). Thus, the plaintiff in this case—the state, through its county prosecutors—is in privity with the defendant bound by the judgment in *Does II*—the governor in her official capacity as chief executive.

In addition, Federal Rule 65(d)(2) provides that an injunction binds

> the following who receive actual notice of it by personal service or otherwise:
> (A) the parties;
> (B) the parties' officers, agents, servants, employees, and attorneys; and
> (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Here the *Does II* Court ordered notice to prosecutors[9] and law enforcement.[10] *Does II*, 2020 WL 758232, at *14. See also Exhibit B, *Does II* Interim Order, at 5 (ordering notice to prosecutors and law enforcement of interim order).

B. The People Are Bound by *Does I* Through Collateral Estoppel.

Not only is the State bound by the class-wide decision in *Does II*, the State is collaterally estopped from relitigating the issues it lost in *Does I*. "The doctrine of collateral estoppel generally

[9] There can be no serious argument about whether the Muskegon County Prosecutor is aware of the *Does II* decision, particularly given that it was filed as supplemental authority in this case.

[10] Local law enforcement agencies are likewise bound by the injunction. They have responsibility for enforcing SORA, MCL 28.722(n), and are thus "in active concert or participation" with the *Does II* defendants. Fed R Civ Proc 65(d)(2)(C).

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, 44; 922 NW2d 696 (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 privity, had a full and fair opportunity to litigate the issue. *Id*. 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 under the federal Constitution.

First, the ultimate issue of whether SORA is punishment was actually and necessarily litigated to final judgment 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 reach a different answer on the very question that was fully litigated and determined by a valid and final judgment. The State is thus requesting an impermissible second bite at the apple. In the circumstances here, the litigant's persistence must give way to preservation of resources and judicial economy. See *Monat*, 469 Mich at 693.

Second, there can be little question that the State had a full and fair opportunity to litigate the issue of whether SORA is punishment in *Does I*. 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. (That extraordinarily comprehensive record provided a better factual basis to decide weighty constitutional questions than the thin record available in the instant criminal appeal.) 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).

Third, here mutuality of estoppel is not required because it is being asserted defensively. In some cases, collateral estoppel requires satisfaction "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). Accordingly, 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.

This Court has yet to set a standard for evaluating claims of non-mutual collateral estoppel against the state. In *Does v Mich Dept of Correction*s, 499 Mich 886; 876 NW 2d 570 (2016), the Court vacated that part of the Court of Appeals' decision considering whether the state defendant was precluded under principles of collateral estoppel from arguing about the constitutionality of an amendment to the Elliot Larsen Civil Rights Act that had been found unconstitutional in a separate federal action. There the Court of Appeals, relying on *United States v Mendoza*, 464 US 154; 104 SCt 568; 78 L Ed 2d 379 (1984), seemed categorically to exempt state government from

ordinary preclusion principles on the ground that, "[l]ike the federal government, state governments are subject to suit at a frequency that even the most litigious private entity does not come close to reaching," such that "applying non-mutual collateral estoppel against a state government would thwart the development of important questions of law." *Doe v Dept of Corrections*, 312 Mich App 97; 878 NW 2d 293, 312 (2015). In effect, the Court of Appeals announced a sweeping blanket exemption for state government from offensive non-mutual collateral estoppel that rested on an analogy between state and federal governments. This Court recognized that the issue is not so simple, and vacated that portion of the Court of Appeals' decision.

As this Court's vacatur suggests, a more nuanced inquiry is needed. A categorical exemption for state government from ordinary preclusion principles is overbroad because the analogy to federal agencies is flawed.[11] State governments are fundamentally different from the federal government. Because the precedents of one federal court of appeals do not bind federal courts in other circuits, federal agencies have developed the practice of refusing to apply the precedent of one circuit to claims that will be reviewed by another circuit, thereby promoting an inter-circuit dialogue and developing the law by creating a circuit split that could be the basis for certiorari review by the U.S. Supreme Court. Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L J 679, 735-737 (1989). *Mendoza* cited precisely this need to develop the law in multiple circuits as a justification for suspending normal principles of preclusion. *Mendoza,* 464 US at 160-161. By contrast, state agencies litigating in a unified state court system such as Michigan's cannot develop the law by re-litigating the same legal issue before different

[11] Even in the federal system, *Mendoza* has "sparked intense controversies in practice that reveal the problems inherent in categorically prohibiting the application of issue preclusion against the government," because such categorical prohibitions "have forced federal circuits to endure repeated relitigation of points already settled within each circuit." Note*, Nonmutual Issue Preclusion Against States*, 109 Harv L Rev 792, 795 (1995).

Courts of Appeals, because "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis," MCR 7.215(C)(2), thereby binding the entire state judiciary until overruled by the Michigan Supreme Court. See *State v United Cook Inlet Drift Ass'n*, 895 P2d 947, 951-952 (Alaska, 1995) (limiting *Mendoza* on ground that state courts' statewide jurisdiction suggested less of a need for legal issues to percolate through multiple state courts).

Given the differences between state and federal agencies, the better approach is to base state governments' exemption from preclusion on a nuanced and multi-factored inquiry. The state's need to revisit a legal question in light of changing circumstances or to promote full deliberation about an open legal question should be part of this inquiry, but such a need must be demonstrated rather than presumed. *Hercules Carriers, Inc v Claimant State of Florida, Dep't of Transp*, 768 F2d 1558, 1580 (CA 11, 1985), engaged in precisely such a nuanced inquiry. Citing *Parklane Hosiery Co v Shore*, 439 US 322 (1979), the court examined multiple factors in determining whether to apply *Mendoza,* concluding that "the most significant consideration … is whether the party had a full and fair opportunity to litigate the issue to be estopped." *Hercules Carriers,* 768 F2d at 1580.

Applying *Hercules Carriers'* approach to collateral estoppel of the state, "the most significant consideration" for this Court in determining the preclusive effect of *Does I* "is whether the party had a full and fair opportunity to litigate" the question of whether SORA is punishment. *Id.* Under that test, the case against conferring an exemption from preclusion on the State here is exceptionally weak. It cannot be disputed that the state "had every incentive to litigate the [*Does I*] lawsuit fully and vigorously," *Parklane Hosiery*, 439 US at 332, and in fact vigorously litigated that case. To the extent that the State here seeks to relitigate the question of whether SORA violates the federal Constitution's prohibition on ex post facto laws (as opposed to the question

of whether it violates the state constitution's ex post facto prohibition), the question is identical to that in *Does I*. The People here (represented by the Muskegon County Prosecutor) were not disadvantaged in the earlier proceeding in *Does I* by having the governor and Michigan State Police (represented by the Attorney General's office) litigate the constitutionality of SORA, which they did most capably and vigorously. Nor are there "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*, 439 US at 332. See also *Benjamin v Coughlin*, 905 F 2d 571, 576 (CA 2, 1990) (state agency precluded from relitigating prisoners' free exercise of religion claim where "defendants had a strong incentive, as well as a fair opportunity, to contest the … issue fully in the New York State courts").

Here federal-state comity principles further support barring the state from relitigating the question it lost in *Does I*. The State should not be allowed to relitigate the identical question in the hopes of obtaining conflicting federal/state judgments just because it is dissatisfied with the outcome in the earlier federal litigation. That is a recipe for chaos. 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 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.[12] 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.

In sum, mutuality is not required because the State has already had a full and fair opportunity to litigate whether SORA is punishment. Estoppel may be applied defensively against the State even though Mr. Betts was not a party in *Does I*.

II. ***SORA Cannot Be Retroactively Applied to Pre-2011 Registrants.***

Having set out above the relationship of Mr. Betts' case to the federal litigation, and the fact that the State is bound by the federal decisions holding that SORA is punishment, amicus turns now to the question of whether the unconstitutional portions of SORA can be severed or an earlier version of SORA revived, such that pre-2011 registrants like Mr. Betts can still be

[12] 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*.

prosecuted for SORA violations.

A. The 2011 SORA Amendments Are Not Severable.

In *Does II*, the federal district court enjoined enforcement of SORA against all pre-2011 registrants because the Sixth Circuit had held that retroactive application of the 2011 amendments is punishment, and those amendments are not severable.[13] The court explained that "the 2011 amendments permeate nearly every section of the statute" such that "[r]emoving the deeply ingrained 2011 amendments renders the statute . . . a 'nonsensical alphabet soup' of sentence fragments." *Does II*, 2020 WL 758232, *9. Moreover, "[w]ithout the 2011 amendments, SORA registrants and law enforcement officials have no guidance for *who* must register, *what* events must be reported, *where* registrants must report, *how* often registrants must report, or *when* registrants become eligible for removal from the registry." *Id.* The court explained that it could not sever the unconstitutional portions of the law without rewriting the statute, and that the responsibility for revision is with the legislature. *Id.* at *10. The court concluded that "because the 2011 amendments cannot be severed from the statute, … SORA *in toto* cannot be applied to any members of the ex post facto subclasses [registrants whose offenses pre-date April 12, 2011]." *Id*.

That decision was correct. 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[.]"

[13] The Sixth Circuit in *Does I* held that both 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 are self-contained as separate sections in the code, see MCL 28.733-.736; MCL 28.730(3), it is a relatively easy to sever them: those sections simply cannot be applied to registrants whose offenses predate the enactment of those sections.

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).

SORA does not contain a severability clause.[14] 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.

[14] 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.

MCL 8.5 (emphasis added). Therefore, MCL 8.5 instructs courts to determine whether, if the invalid portions of SORA are stricken from the statute, the remaining portions can function on their own. Importantly, the severability question is not whether the legislature could pass some registration statute that would pass constitutional muster, but rather whether SORA, as written today, can operate in the absence of the offending provisions without the Court engaging in statutory redrafting to make what is left of the law constitutional.

As the attached highlighted version of the law shows, the 2011 amendments make up nearly half of the current statute. See Exhibit L, SORA with 2006 and 2011 Amendments Highlighted. 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 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 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), or whether the legislature will instead want to pass a law imposing different restrictions based on offense date (since the legal constraints differ for pre- versus post-2011 registrants).

In cases where, as here, the unconstitutional provisions are embedded in the statute, this Court has found that such provisions are not severable. See *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). See also *Associated Builders & Contractors v Perry*, 869 F Supp 1239, 1254 (ED Mich, 1994), rev'd on other grounds 115 F3d 386 (CA 6, 1997) (holding that impermissible sections of a statute were so interwoven with the permissible provisions that they were not severable, and therefore that the statue was unenforceable in its entirety).

The Gratiot County Prosecutor argues as amicus that the Court should simply sever certain provisions of SORA that go beyond those in SORNA. Gratiot Amicus Brf, at 10-18. The *Does II* court rejected that exact same argument:

> Defendants argue that the Sixth Circuit declared unconstitutional only certain portions of the amendments of SORA, specifically those portions of the amendments which sweep more broadly than SORA's federal analog, the Sex Offender Registration and Notification Act ("SORNA"). Defendants' position, implying as it does that the Sixth Circuit tailored its ruling to coincide with SORNA, relies heavily on the supposed intent of the Michigan legislature to bring SORA into compliance with SORNA in passing the 2011 amendments. A large problem with Defendants' argument, however, is that the Sixth Circuit does not so much as mention SORNA in its opinion.
>
> The Sixth Circuit's expansive ruling in *Does I* declared that "[t]he retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease." *Does I*, 834 F.3d at 706. Defendants contend that the Sixth Circuit's finding of unconstitutionality should be limited to SORA's exclusion zones, in-person reporting requirements, and maintenance of a public registration website because these provisions of SORA extend beyond the requirements of SORNA. But the court is confident that the Sixth Circuit would have at least mentioned SORNA and referenced specific provisions of the act if it had meant to limit its holding in the manner described by Defendants. Instead, it addressed the aggregate impact of the 2006 and 2011 amendments, making no distinction between particular provisions. In fact, the court specifically declined to address the plaintiffs' remaining constitutional challenges to SORA because "none of the contested provisions may now be applied to the plaintiffs in this lawsuit,

and anything [the court] would say on those other matters would be dicta." *Does I*, 834 F.3d at 706.

Does II, 2020 WL 758232, *6.

The Gratiot County Prosecutor also argues that this Court is not bound by the Sixth Circuit's holding that the 2011 amendments cannot be retroactively applied. True enough. But, as discussed above, the State of Michigan **is** bound both by *Does I* and by the *Does II* class action. A severability decision by this Court that does not account for the Sixth Circuit decision would, as a practical matter, provide little guidance to the state. Judge Cleland anticipated that this Court might—depending on how it resolves the open state law constitutional issues—potentially reach severability. *Does II*, 2020 WL 758232 at *7 ("For example, … the Michigan Supreme Court may reach a narrower decision than the Sixth Circuit and decide that SORA became punishment after the 1997 amendments. In that case, the court would then address whether the 1997 amendments are severable."). However, this Court's severability decision would not lead to modification of the *Does II* severability decision, Judge Cleland said, unless "the *Betts* court reach[es] the issue of the severability of the 2011 amendments *and* that ruling runs somehow contrary to this court's determination." *Id.* at *7, n 6. Because Judge Cleland, like the state, is bound by the Sixth Circuit decision, analyzing the severability of the 2011 amendments without reference to the *Does I* decision makes little practical sense.

The Gratiot County Prosecutor also tries to recast *Does I* as limiting only (1) exclusion zones; (2) publication of tier information, and (3) requirements to appear in person to report on travel, electronic identifiers, and vehicles.[15] Gratiot Co Brf, at 10-12. But the Sixth Circuit identified many other aspects of SORA as punitive, including its lifetime reach, its lack of

[15] Notably the State (represented by the same counsel as the Gratiot County Prosecutor here) read *Does I* very differently when it sought certiorari, arguing that "the Sixth Circuit's decision

individualized assessments, its application to registrants without convictions for sex offenses, the serious sanctions for even inadvertent violations, and the lack of relationship to public safety. Moreover, the Court did not just question publication of tier information, but also the fact that tier classifications are both unappealable and offense-based rather than risk-based. *Does I*, 834 F 3d at 698, 702, 704-05. Nor were the Court's concerns about reporting limited to the in-person requirement for travel, electronic identifiers, and vehicle reporting. Rather the Court found it punitive that registrants must frequently and immediately report a vast array of trivial information. *Id.* at 698, 703, 705.

Finally, the Gratiot County Prosecutor emphasizes that the legislature in 2011 intended to implement SORNA. But the question is not what the legislature wanted a decade ago, but what it wants **now** that the Sixth Circuit has held that those amendments cannot be retroactively enforced. Choices, such as a whether to have a unified registry for all registrants or different registries based on offense date, are quintessentially legislative choices, not judicial ones. The point is not that every word added in 2011 is unconstitutional; there may be provisions that the legislature could retain without their cumulative impact being punitive. But it is up to the *legislature* to decide whether, in making SORA less punitive, it wants shorter non-public registration or longer public registration based on individual assessments. Similarly, reporting could be made less punitive by decreasing its frequency or by substituting on-line/mail reporting for in-person reporting. But those are legislative, not judicial, decisions. The responsibilities of the judicial and legislative branches do not change just because the legislature fails to act.

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prevents Michigan wholesale from applying SORA's 2006 and 2011 amendments retroactively." Cert Pet, *Snyder v Does*, US S Ct 16-768, at 15. The State identified the Sixth Circuit's central concerns as lifetime registration, classification without individualized assessments, geographic exclusion zones, and frequent in-person reporting—a different and longer list than argued now. *Id.* at 16-24.

When confronted with an unconstitutional statute, the judiciary's role is a limited one. As the United States Supreme Court has said, "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)). The judiciary cannot "assume the task of making such choices for the state legislature," but rather must allow the legislature to "pursue its own policy choices in fashioning new legislation," while ensuring that those individuals implicated by the legislation to "remain[] free of undue burden while the legislature redesigns its statute." *Eubanks v Wilkinson*, 937 F3d 1118, 1127 (CA 6, 1991),

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. 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).

B. "Reviving" Earlier Versions of SORA Would Make It Impossible for Registrants or Law Enforcement to Know What SORA Requires and Would Contravene the Legislature's Intent.

The Muskegon County Prosecutor, citing *Weaver v Graham*, 450 US 24, 36 n 22; 101 S Ct 960; 67 L Ed 2d 17 (1981), suggests that if SORA is punishment, then an earlier version of SORA should revive. But *Weaver* actually supports a finding that Mr. Betts cannot be subject to SORA.

The underlying reason why SORA violates the Ex Post Facto Clause is because it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v Bull*, 3 Dall 36, 390; 1 L Ed 648 (1798). *Weaver* explains that in such situations, the Ex Post Facto Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." 450 US at 30. Thus, a court "is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." *Id.* at 31 n. 13. If a law imposes greater punishment, then "the proper relief … is … to apply, if possible, the law in place when his crime occurred." *Id.* at 36 n 2. Here, Mr. Betts' offense occurred in 1993. At the time, Michigan did not have a sex offender registration statute: "the law in place when the crime occurred" was no registry at all. So that is the law that applies.

To be sure, Mr. Betts can be subject to valid civil regulation. If Michigan had a statute that simply required updating law enforcement of address changes for a reasonable number of years, that would likely be regulatory. But that is not the law Michigan has. What Michigan has is a law that imposes punishment. The fact that some aspects of the law—if they stood alone—might be constitutional does not change the fact that here, because the law is punitive, under *Weaver* one must look back to the law in place at the time of the offense—no registration—rather than some hypothetical regulatory law that the legislature might pass in the future.

The Muskegon County Prosecutor argues that "a former version of SORA" can be applied here, but does not say which version should apply. Muskegon Co Brf, at 48. The statute has been amended 21 times. See Betts Brf, at 6 n 3 (collecting amendments). 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.[16] 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.[17] 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.[18]

In *Does II*, Judge Cleland made short work of the revival theory, explaining that determining "which version of SORA should apply to which group of registrants … invites pure speculation on the part of the court and could result in a system in which different versions of

[16] 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. 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).

[17] 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.

[18] An example 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 reporting schedule would revive as well. Thus a registrant born in February would under "current" law, be required to report in February, May, August and November, but 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.

SORA apply to different classes of registrants, which would create an administrative nightmare for law enforcement and registrants alike." *Does II*, 2020 WL 758232, at *11. Moreover, revival would force registrants to engage in "legal archeology" to find earlier versions of the statute that is not easily locatable, violating "the fair notice requirement under which laws must be 'clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.'" *Id.* (quoting *Connally v Gen Constr Co*, 269 US 385, 393, 46 S Ct 126, 70 L Ed 322 (1926)). Furthermore, law enforcement "would be saddled with the burden of locating and understanding outdated statutes and, depending on the configuration of the revived version of SORA, be required to find each offenders' offense date—which is often buried deep in court documents—to determine which version of SORA to enforce against a particular registrant." *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. 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 are punitive. It would recreate some of the worst, most punitive aspects of the registry, leading not just to further litigation but reversing (perfectly constitutional) legislative modifications to the statute and undermining the legislature's intent.

III. *SORA Is Punishment and Its Retroactive Application Violates the Prohibition on Ex Post Facto Laws.*

As the ex post facto issues have been extensively briefed elsewhere, amicus will only address a few points that the Court should consider if it reaches the ex post facto question: (1) the Ex Post Facto Clause was designed to prevent the very harms SORA has created; (2) *Smith v Doe*,

538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003), requires review of the entire statutory scheme; (3) the fact that SORA is based on SORNA does not insulate it from constitutional scrutiny; and (4) in light of the evolution of the Internet, public registration must be based on an individualized assessment.

A. The Ex Post Facto Clause Was Designed to Prevent the Very Harms SORA Has Created.

The Ex Post Facto Clauses of the United States and Michigan Constitutions prohibit the legislature from retroactively inflicting greater punishment than that permitted at the time of the crime. US Const, art I, § 10, cl 1; Const 1963, art 1, § 10; *Collins v Youngblood*, 497 US 37, 42-43; 110 S Ct 2715; 111 L Ed 2d 30 (1990). "[T]he ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." *Burgess v Salmon*, 97 US 381, 385; 24 L Ed 1104 (1878). SORA violates this basic rule.

The "proper scope" of a constitutional provision "must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate." *United States v Brown*, 381 US 437, 442; 85 S Ct 1707; 14 L Ed 2d 484 (1965). The prohibition on ex post facto laws is intended to address two problems with retroactive laws: lack of fair notice and vindictive lawmaking. *Weaver*, 450 US at 28-29.

First, retroactivity is dangerous because it gives the legislature "unmatched powers … to sweep away settled expectations suddenly and without individualized consideration." *Landgraf v USI Film Products*, 511 US 244, 266; 114 S Ct 148; 128 L Ed 2d 229 (1994). The prohibition on ex post facto laws "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 US at 28-29. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond

what was prescribed when the crime was consummated." *Id*. at 30. Second, the prohibition on ex post facto laws "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 US at 266. The Framers "viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment," and adopted the Ex Post Facto Clause to shield against "those sudden and strong passions to which men are exposed." *Fletcher v Peck*, 10 US 87, 137-38; 3 L Ed 162 (1810) (MARSHALL, CJ). See also *People v McRunels*, 237 Mich App 168, 175; 603 NW 2d 95 (1999) (Ex Post Facto Clause was intended in part "to secure substantial personal rights against arbitrary and oppressive legislation").

The dangers that motivated adoption of the federal and Michigan Ex Post Facto Clauses are exactly the dangers presented by SORA's retroactivity. Mr. Betts, who was convicted almost three decades ago, could not have imagined back in 1993 that he would become subject to an all-encompassing lifetime registration regime. Moreover, antipathy toward sex offenders is "of the moment." There is no more despised group today, and hence no group more at risk of retributive legislation fueled by the "sudden and strong passions" which follow rare, highly-publicized crimes—crimes that are not representative of the fact that the vast majority of sexual offending is committed not by strangers, but within families and by people who are well-known to the victim.[19]

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

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. As this Court recognized in setting out the questions on

[19] See, e.g., Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforce-ment: Victim, Incident, and Offender Characteristics*, 10 (2000) (finding that 93% of child abuse victims were abused by a family member or well-known acquaintance).

which it granted leave, ex post facto analysis requires consideration of whether SORA as whole is punitive, rather than whether any specific provision, standing in isolation, constitutes punishment. To adopt a piecemeal approach to analyzing SORA's 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. Accordingly, it is important to understand how that holistic analysis applies here.

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, the 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*." *Does I,* Br of United States as 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 dangerous offenders—restrictions that are imposed for decades or, in most cases, for life without any individualized review. Registrants experience these effects all at once, all the time. Moreover, no single SORA provision operates in isolation. For example, an immediate in-person employment reporting requirement is more punitive if it is imposed on all registrants (rather than those individually determined to be a risk), if it lasts for life (rather than a few years), and if even inadvertent violations are punishable by lengthy prison sentences 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 Muskegon County prosecutor argues that this Court should disregard 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. The cases cited, however, involved either more limited statutes or instances where individuals chose to challenge only certain statutory provisions, rather than the statute as a whole.[20] 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).

Michigan's statute 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 dangerousness without any individualized assessment of risk.[21]

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[20] See, e.g., *United States v Parks*, 698 F3d 1 (CA 1, 2012) (challenging only in-person reporting); *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); *Doe v Miller*, 405 F3d 700 (CA 8, 2005) (challenging only residency restriction for offenses against minors); *Shaw v Patton*, 823 F3d 556 (CA 10, 2016) (considering only in-person reporting and residency restrictions); *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 I*, by contrast, the plaintiffs produced a wealth of supportive modern social science research.

[21] Even in discussing particular subsections, the prosecutor conflates 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 prosecutor involve residency limitations, not bars on employment and "loitering."

Indeed, many of the cases the prosecutor cites emphasize the *absence* of provisions found in Michigan's law in concluding that the law in question is not punitive.[22] 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.[23] Even the same courts can reach different conclusions over time as statutes evolve. Numerous courts that upheld early first-generation registration statutes (laws that imposed simple reporting requirements) have gone on to find modern super-registration statutes (laws that impose much more onerous restrictions) to be punitive.[24]

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[22] See, e.g., *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"); *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").

[23] 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] 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).

[24] See, e.g., *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."); *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

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. Thus 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. Thus, as *Smith* instructs, this Court should apply the *Mendoza-Martinez* factors to the statute as a whole. The Court should not miss the forest by looking at the trees.

C. The Fact that SORA Is Based on SORNA Does Not Insulate It From Constitutional Scrutiny.

The prosecutor here argues that because SORA was amended in 2011 to adopt standards set out in the federal Sex Offender Notification and Registration Act (SORNA), 34 USC 20901 *et seq.*, SORA cannot violate the Ex Post Facto Clause of either the United States or Michigan Constitutions. To understand why that argument is wrong, one must first understand the relationship between state registration laws and federal SORNA.

While all states have registries, they vary greatly in terms of who must register, for how long, what registration requirements apply, and whether registration is based on individualized assessments. See *Model Penal Code: Sexual Assault and Related Offenses*, § 213, at 221 (Am Law Inst Tentative Draft No 10, 2019)[25] (discussing existing state registrations schemes). In 2006,

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punitive effects clearly outweigh the regulatory intent of the act." (emphasis added)); *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).

[25] Available at http://www.thealiadviser.org/sexual-assault/registration-and-notification/.

Congress adopted SORNA hoping to "use[] Spending Clause grants to encourage States to adopt . . . uniform definitions and requirements" for state registries. *United States v Kebodeaux*, 570 US 387, 398; 133 S Ct 2496; 186 L Ed 540 (2013). But Congress "did not"—and indeed in our federal system could not—"insist that the States do so." *Id.*

Congress' effort to incentivize states to adopt SORNA-based laws largely failed. Thirty-two states have rejected SORNA, even though they lose ten percent of their Byrne Grant funds. 34 USC 20927(a). As of August 2020 (fourteen years after SORNA was passed), the Department of Justice considered only eighteen states to be "substantially compliant"—the level necessary to receive Byrne Grant funding.[26] Even among the "substantially compliant" states that receive federal funding, at least thirteen deviate from SORNA's retroactivity guidelines.[27]

As the draft of the American Law Institute's model registration law explains, states have rejected SORNA for two reasons. See *Model Penal Code*, § 213, at 234-35. First, many states elected not to implement SORNA because the cost of compliance dwarfs the ten-percent reduction in Byrne Grant funds.[28] For example, California estimated that complying with SORNA would cost the state at least $38 million, against a loss of just $2.1 million in federal funds.[29] For

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[26] See Department of Justice Substantial Implementation Reviews, SMART, https://www.smart.gov/sorna-map.htm.

[27] DOJ has determined that the following states "substantially implemented SORNA" despite deviating from retroactivity requirements: Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee and Wyoming. See Department of Justice Substantial Implementation Reviews, SMART, https://www.smart.gov/sorna-map.htm.

[28] See Dylan Scott, States Find SORNA Non-Compliance Cheaper, Nov 7, 2011, http://www.governing.com/blogs/fedwatch/States-Find-SORNA-Non-Compliance-Cheaper.html. In Michigan, the 2019 state Byrne Grant allocation was around $5.6 million, making the 10% penalty about $560,000. See Bureau of Justice Assistance Michigan's FY 2019 Byrne Justice Assistance Grant: https://bja.ojp.gov/funding/awards/2019-mu-bx-0061.

[29] California Sex Offender Management Board, Adam Walsh Act Statement of Position 3–4, http://www.opd.ohio.gov/AWA_Information/AWA_CA_SOMB_SORNA_Position_Paper.pdf.

Texas, comparable figures were assessed at a cost of $39 million for SORNA compliance, against a loss of just $1.4 million in federal funds.[30]

Second, other states expressed concerns over "the potential public safety impacts of supplanting established risk-based classification systems with a less discriminating system linked exclusively to conviction offense."[31] Harris et al, *Widening the Net: The Effects of Transitioning to Adam Walsh Act's Federally Mandated Sex Offender Classification Scheme*, 37 Crim Just & Beh 503, 504 (2010). Research shows that using risk assessment instruments is far better at predicting recidivism than using only the offense of conviction (as SORNA does).[32] Moreover, while some "law enforcement only" registries may slightly reduce recidivism, public offense-based registries do not—and instead may actually *increase* recidivism.[33] Indeed, in developing a model registration statute, the American Law Institute has rejected the "broad, inflexible sweep

[30] Senate Criminal Justice Committee [Texas], Interim Report 14 (Dec. 15, 2010), http://www.senate.state.tx.us/75r/Senate/commit/c590/c590.Interim Report 81.pdf.

[31] States using risk-based assessments include Arizona, Arkansas, California, Georgia, Massachusetts, Minnesota, Montana, New Jersey, New York, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington. See, e.g., Ariz Rev Stat Ann § 13-3825 (2016); Ark Code Ann § 12-12-917 (2016); Cal Penal Code § 290.04 (West 2017); Ga Code Ann § 42-1-14 (2016); Mass Gen Laws ch 6, §§ 178C-178Q (2015); Minn Stat Ann § 244.052 (2017); Mont Code Ann § 46-23-509 (2015); NJ Stat Ann § 2C:7-8 (West 2016); NY Correct Law § 168-l (McKinney 2017); ND Cent Code § 12.1-32-15 (2015); Or Rev Stat §§ 163A.100, 163A.105 (2015); RI Gen Laws § 11-37.1-6 (2016); Tex Code Crim Proc Ann art 62.007 (West 2016); Vt Stat Ann tit 13, § 5411b (2016); Wash Rev Code §§ 72.09.345, 4.24.550 (2017).

[32] See Zgoba *et al.*, *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act*, (research report submitted to the National Institute of Justice, 2012); Freeman & Sandler (2009), *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM J POL REV 31 (2009).

[33] See Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161 (2011). This peer-reviewed study, which analyzed data from 15 states (including Michigan) over approximately ten years, concludes that rather than reducing recidivism, notification laws may well have increased the frequency of sex crimes. See also *Model Penal Code*, § 213 at 225-28 (surveying research).

of collateral-consequence sanctions under federal SORNA" as "unjust and counterproductive" based on an exhaustive analysis of the research. *Model Penal Code*, § 213, at 235.

Finally, as in Michigan, registrants have successfully challenged SORNA-based registration schemes in court, limiting states' abilities to apply SORNA's onerous requirements retroactively, and raising questions about why they should be used at all. See, e.g., *State v Williams*, 952 NE2d 1108 (Ohio, 2011).

In sum, because states have declined to implement SORNA out of concerns for its cost and effectiveness, or because of legal challenges, most registrants are covered by state registration schemes that either are not modeled on SORNA, or that diverge from it. SORNA cannot and does not require Michigan to adopt particular standards.

Going forward, Michigan must comply with the Sixth Circuit's prohibition on retroactive application of SORA's 2011 (and 2006) amendments, as well as any further limits set by this Court. To be clear, Michigan can still, if it chooses, have a SORNA-compliant registry; it just cannot impose certain SORNA features *retroactively*. Nor will Michigan lose funds. As noted above, of the eighteen states that receive SORNA-contingent funding, at least thirteen deviate from SORNA's retroactivity guidelines.[34] SORNA also specifically provides for continued funding if noncompliance is based on judicial decisions. 34 USC 20927(b)(1).[35]

[34] The Department of Justice has determined that the following states "substantially implemented SORNA" despite deviating from retroactivity requirements: Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee and Wyoming. See Department of Justice Substantial Implementation Reviews, SMART, https://www.smart.gov/sorna-map.htm.

[35] Under the DOJ's National Guidelines for Sex Offender Registration and Notification, 11 (July 2008), the federal government "will consider on a case-by-case basis whether jurisdictions' rules or procedures that do not exactly follow the provisions of SORNA or these Guidelines 'substantially' implement SORNA." See SMART, www.smart.gov/guidelines.htm.

D. Due to the Evolution of the Technology, Internet Branding of Registrants Is Now Punitive.

Smith v Doe was decided in the early days of the Internet, and the Court described Alaska's Internet registry as a passive system, akin to physically visiting "an official archive of criminal records." 538 US at 99. That analogy "is antiquated in today's world of pushed notifications to listservs and indiscriminate social media sharing." *Doe v Thompson*, 373 P3d 750; 304 Kan 291 (2016), overruled by *State v Peterson-Beard*, 304 Kan 192; 377 P3d 1127 (2016). Indeed, Michigan's website encourages such public shaming, prompting users to "Tell a Friend" or sign up to track particular registrants. The consequences of such Internet notoriety are entirely different from the consequences of having a court file in an archive. As the *en banc* Sixth Circuit explained, in overruling an earlier decision holding that people have no privacy interest in their mugshots, twenty years ago:

> booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have requires a trip to the local library's microfiche collection . . . . In 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades . . . Experience has taught us otherwise.

Detroit Free Press Inc v United States Dept of Justice, 829 F3d 478, 482, 485 (CA 6, 2016). See also *Peterson-Beard*, 304 Kan at 216 (JOHNSON, J., dissenting) (arguing that *Smith* would now come out differently because the "current Supreme Court would be more attuned to the repercussions of Internet dissemination of a sex offender registry," and citing *Riley v California*, 573 US 373; 134 S Ct 2473, 2491; 189 L Ed 2d 430 (2014), for the Court's understanding that vast amounts of data are now accessible "at the tap of a screen").

CONCLUSION

There are multiple paths this Court could take in resolving this appeal. Whatever path this Court takes should be guided by the practical and legal reality that the State of Michigan is bound

by both *Does I* and *Does II*, as well as by the fact that the legislature has failed in its responsibility to bring SORA into compliance with the Constitution.

Respectfully submitted,

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