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

SUPPLEMENTAL AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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INTRODUCTION

Amicus Gratiot County Prosecutor has filed a rather unusual motion, asking this Court to allow it to respond to the ACLU's amicus brief. That filing is not so much about the interests of the Gratiot County Prosecutor, but rather reflects the fact that counsel for the Gratiot County Prosecutor also represent the state defendants in the *Does II* class action. The very fact of the prosecutor's filing highlights once again the interplay between this case and the *Does I* and *Does II* litigation. Because the Gratiot County Prosecutor's brief fails to correctly frame that interplay, amicus ACLU of Michigan seeks permission to address the prosecutor's argument.

I. The State Is Bound in the Class Action With Respect to the Claims Being Litigated There.

The case before this Court involves one registrant, Paul Betts, whose is defending against a criminal prosecution for a failure to register by arguing that Michigan's Sex Offenders Registration Act (SORA) is punishment in violation of the Ex Post Facto Clauses of the state and federal constitutions. Mr. Betts is also a class member in the *Does II* class action. There is no question that the State—which itself stipulated to class certification—is bound with respect to decisions in the class action on the claims of the other 44,000 registrants in the certified class. The Gratiot County Prosecutor quibbles, however, over whether the State is also bound with respect to Mr. Betts, even though the stipulated class definition clearly includes Mr. Betts. What the prosecutor misses is that questions unique to Mr. Betts are properly before this Court, while questions being litigated in the class action are not.

Mr. Betts' claim that retroactive application of SORA violates the Michigan Ex Post Facto Clause is not at issue in *Does II*. Thus, to the extent that Mr. Betts' case raises state constitutional questions—question of considerable significance—there is nothing about the federal litigation that prevents this Court from addressing them. Indeed, this Court is the final

arbiter of the State Constitution, and any decisions it issues will surely guide the legislature if or when it revises SORA. This Court can, of course, also decide federal constitutional questions, and it is not bound by the decisions of the lower federal courts. But here Mr. Betts' claim that retroactive application of SORA violates the *federal* Ex Post Facto Clause is the *same claim* being litigated in the *Does II* class action. And while this Court can decide federal constitutional questions as it wishes, the practical reality is that the State of Michigan – unlike this Court – **is** bound by the decision in *Does I*. Moreover, now the federal district court has now applied that decision in *Does II* to a class that includes Mr. Betts. The state here is trying to litigate the same question in two places at once: in the class action and in this case. The state is free, of course, to appeal the *Does II* decision. But it cannot litigate the same issue in both a class action and an individual case.

Amicus Gratiot County Prosecutor argues that this Court should ignore the fact that Mr. Betts is a class member in a certified class action. First the prosecutor argues that the *Does II* decision is not final. But that is beside the point. **Once a class is certified, that precludes individual litigation of the same issue.** It is certification, not a final decision, that prevents an issue from being litigated in an individual case. Indeed, that was exactly the argument that the State successfully made—after certification but before there was even a decision in *Does II*—to halt individual actions by registrants trying to protect themselves from prosecution.

Second, the prosecutor argues that Mr. Betts is in a "different posture" than other registrants. That is true: this case is very old, and there are not likely to be many registrants facing a prosecution that began before the *Does II* class was certified in September 2018 (much less before the *Does I* Sixth Circuit decision in August 2016). But that "different posture" means that – even if the state could somehow litigate the same federal constitutional question

both in the class action and in Mr. Betts' individual case – for the vast majority of the 44,000 registrants in the class, the resolution of the federal question will still come from the class action.

II. How this Court Analyzes the Punishment Question Will Determine Whether and What Kind of Severability Analysis Is Needed.

Severability is, of course, as question of state law, and this Court is the final arbiter of that question. The Gratiot County Prosecutor points to a footnote in Judge Cleland's opinion that recognizes the primacy of this Court on that question. But the prosecutor fails to provide the relevant context.

In the *Does II* class action, Judge Cleland had to decide whether, in light of the Sixth Circuit's decision that "[t]he retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease," *Does #1-5 v Snyder*, 834 F3d 696, 706 (CA6, 2016), the statute could be salvaged without legislative redrafting. Following *Smith v. Doe*, 538 US 84; 123 S Ct 1140; 155 L Ed 2d 165 (2003) – which requires review of whether "the statutory scheme" in toto imposes punishment – the Sixth Circuit looked to the totality and interplay of the many requirements of SORA and found the statute punitive. Judge Cleland found the severability question easy because the responsibility for rewriting the statute clearly is a legislative one. That is why he did not certify the severability question to this Court.

An example may clarify the point. Imagine that the legislature may impose up to 50 pounds of burden on a person before it becomes punishment. When one looks at the cumulative burdens of SORA one adds up all the different burdens: one could say lifetime registration is 30 pounds, exclusion zones are 25, public registration is 25, in-person reporting is 20, the severity of the penalties is 20, the amount of information required to be reported is 15, and so on. The punishment question is: are we cumulatively over 50 pounds? The severability question is:

how do we get down to 50 and who decides which of the burdens should be eliminated? There are many different ways to get down to 50 pounds, but it is up to the legislature, not the Court, to decide how to get there.

Judge Cleland recognized that this Court may address severability, but he also recognized that the severability questions before this Court might well be different from those before him:

> To the extent Defendants argue that the severability of SORA's 2011 amendments is a novel question of state law because the Michigan Supreme Court granted leave to appeal in *Betts*, such argument misses the mark because the issues in *Betts* are not identical to the remaining questions of law in this case. Before the *Betts* court can reach the topic of severability, it must first address threshold issues of state constitutional law which the Sixth Circuit has already answered at the federal level, namely whether SORA amounts to punishment and can be applied retroactively. *Does I*, 834 F.3d at 705–06. The Michigan Supreme Court is not bound by the Sixth Circuit's rulings in *Does I* and may come to different conclusions based on Michigan's constitution. For example, as Plaintiffs observe, 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.

Doe v. Snyder, 449 F Supp 3d 719, 730 (ED Mich, 2020).

In other words, this Court must **first** decide whether SORA is punishment. This Court's analysis could differ from the Sixth Circuit's. For example, this Court might decide that the problem with SORA is the lack of any individualized risk analysis: burdens such as those listed above are punishment if imposed irrespective of risk, but might be permissible civil regulation if imposed only on registrants who pose a serious current danger based on an assessment of risk. That would present a very different severability question from the one confronting Judge Cleland, who was working off the Sixth Circuit's decision that retroactive application of the 2006 and 2011 amendments are punishment and must cease.

III. A State Court Decision Is Final Only After All Appeals Are Exhausted.

The Gratiot County Prosecutor argues that the state is not collaterally estopped from relitigating the issues it lost in *Does I* because the trial court's decision in Mr. Betts' case preceded the final decision in *Does I*. That analysis is based on an incorrect understanding of when a state court judgment is final.

State law determines when a state court judgment is final and federal law determines the same for a federal judgment. *See Sosa v. DIRECTV, Inc*, 437 F3d 923, 928 (CA 9, 2006). To hold otherwise would produce a strange result because Michigan law would define when a Michigan judgment is final in federal court, but federal law would decide when a Michigan judgment would be final in state court. *See Marrese v American Academy of Orthopaedic Surgeons*, 470 US 373, 381; 105 S Ct 1327; 84 L Ed 2d 274 (1985) ("[S]tate law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts.").

The Michigan Court of Appeals has consistently held that a state court decision is final only "when all appeals have been exhausted or when the time available for an appeal has passed."[1] *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006); *see Johnston v Sterling Mortg & Investment Co*, 315 Mich App 724, 756; 894 NW2d 121 (2016); *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 716; 848 NW2d 482 (2014); *Cantwell v City of Southfield*, 105 Mich App 425, 429–30; 306 NW2d 538 (1981); *see also Southfield Ed Ass'n v Southfield Bd of Ed*, 570 F Appx 485, 489 (CA 6, 2014). This principle stems from the purposes of res judicata, which are "to relieve parties of the cost and vexation of multiple

[1] By contrast, under federal law, "a final judgment retains all of its preclusive effect pending appeal." *Erebia v Chrysler Plastic Products Corp*, 891 F2d 1212, 1215 n 1 (CA 6, 1989); *see also Orion Tire Corp v Goodyear Tire & Rubber Co*, 268 F3d 1133, 1135 n 2 (CA 9, 2001) ("In federal courts, a district court judgment is 'final' for purposes of res judicata.").

lawsuits, conserve judicial resources, and encourage reliance on adjudication . . . ." *Bryan*, 304 Mich App at 715 (citation omitted). It also derives from the requirement that the plaintiff has had a full and fair opportunity to litigate, which "encompasses the opportunity to both litigate and appeal." *Monat v State Farm Ins Co*, 469 Mich 679, 685; 677 NW2d 843 (2004).

Thus, here the first final judgment is the one reached in *Does I*. Furthermore, even if the state were not collaterally estopped in Mr. Betts' case, for the vast majority of registrants being prosecuted for (more recent) SORA violations, those prosecutions are occurring after the *Does I* decision, meaning that the State is estopped from relitigating the issue in other prosecutions.

IV. The Court Can Consider the Issues Raised by the ACLU as Amicus.

As the Gratiot County Prosecutor acknowledges, the *Does II* decision was issued after Mr. Betts filed his principal brief, and therefore Mr. Betts could only address it in his reply. But even if this Court were to consider the issues unpreserved, this Court still "may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented."[2] *Bisio v City of Village of Clarkston*, ___ Mich ___; ___ NW2d ___ (2020); slip op

[2] Several courts have emphasized the various values preclusion serves in addressing the issue sua sponte. *See* 18 Wright & Miller, Federal Practice and Procedure (3d ed), § 4405 (collecting cases raising preclusion sua sponte). For instance, the Court of Appeals for the Ninth Circuit has emphasized that "[p]reclusion doctrine . . . shield[s] litigants from the burden of re-litigating identical issues with the same party, and vindicating private parties' interest in repose. The public interests served include avoiding inconsistent results and preserving judicial economy." *Clements v Airport Auth of Washoe Co*, 69 F3d 321, 330 (CA 9, 1995); *see also Rodriguez v City of San Jose*, 930 F3d 1123, 1130 (CA 9, 2019) (addressing preclusion for the first time on appeal "for reasons of comity"); *Akanthos Capital Mgt, LLC v Atlanticus Holdings Corp*, 734 F3d 1269, 1272 (CA 11, 2013) (per curiam) ("And if the Court were to fail to raise the issue of res judicata, then we would threaten the public interest in avoiding judicial waste and inconsistent judgments."); *Hutcherson v. Lauderdale Co, Tennessee*, 326 F3d 747, 757 (CA 6, 2003) (noting that raising preclusion sua sponte serves the important interest of avoiding judicial waste)); *Bechtold v City of Rosemount*, 104 F3d 1062, 1068 (CA 8, 1997) (Res judicata "also involve[s] the right of the appellate court to protect itself from litigation by a party who has already had his right finally determined in the district court . . . ." (citation omitted)).

at 14 n 12 (quoting *McNeil v Charlevoix Co*, 484 Mich 69, 79 n 8; 772 NW2d 18 (2009)). The effect of the certified class action in *Does II* and of the prior judgment in *Does I* are legal questions and do not turn on disputed questions of fact. *See Gooch v Life Investors Ins Co of America*, 672 F3d 402, 419 (CA 6, 2012) (noting that res judicata presents a purely legal issue); *see also Hutcherson*, 326 F3d at 756–57 (same). The Court can also review an issue raised for the first time on appeal if "its consideration is necessary to a proper determination of a case." *Bisio,* ___ Mich at ___; slip op at 14 n 12 (quoting *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 239 n 5; 615 NW2d 241 (2000)). Here, understanding the intersection of the federal and state cases is necessary to a proper analysis.

Respectfully submitted,

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