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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Kristen Frank Kelly, PJ, Cynthia Diane Stephens and Michael Riordan]

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL J. BETTS,

Defendant-Appellant,
_______________________________________/

Supreme Court No. 148981

Court of Appeals No. 319642

Muskegon Circuit Court
No. 12-62665 FH

GRATIOT COUNTY PROSECUTOR'S AMICUS BRIEF IN SUPPORT OF THE PEOPLE

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QUESTIONS PRESENTED

In its June 19, 2019 order, the Court asked the parties to address six questions:

I. Whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., taken as a whole, amount to "punishment" for purposes of the Ex Post Facto Clauses of the Michigan and United States Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10; see *People v Earl*, 495 Mich 33 (2014), see also *Does #1-5 v Snyder*, 834 F3d 696, 703–706 (CA 6, 2016), cert den sub nom *Snyder v John Does #1-5*, 138 S Ct 55 (Oct 2, 2017);

II. If SORA, as a whole, constitutes punishment, whether it became punitive only upon the enactment of a certain provision or group of provisions added after the initial version of SORA was enacted;

III. If SORA only became punitive after a particular enactment, whether a resulting ex post facto violation would be remedied by applying the version of SORA in effect before it transformed into a punishment or whether a different remedy applies, see *Weaver v Graham*, 450 US 24, 36 n 22 (1981) ("the proper relief . . . is to remand to permit the state court to apply, if possible, the law in place when his crime occurred.");

IV. If one or more discrete provisions of SORA, or groups of provisions, are found to be ex post facto punishments, whether the remaining provisions can be given effect retroactively without applying the ex post facto provisions, see MCL 8.5;

V. What consequences would arise if the remaining provisions could not be given retroactive effect; and

VI. Whether the answers to these questions require the reversal of the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA.

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INTEREST OF AMICUS CURIAE

The Gratiot County Prosecutor is seeking to affirm the conviction of David Snyder for his violation of the Sex Offenders Registration Act (SORA) by failing to update his employment address as required by law. This case is being held in abeyance, pending the resolution of the appeal of Paul Betts. See June 19, 2019 order.

The Department of Attorney General serves as the appellate prosecution counsel for the 56 counties in Michigan that have a population of 75,000 or fewer people. The Department has served as counsel for the Gratiot County on this case throughout the appellate proceedings. Consistent with the arguments in March of 2019, the Department continues to serve as counsel for the People *in Snyder*, but it also notes that the Department has established a conflict wall in *Snyder* within the office from the Attorney General herself. See Ex A. Also, consistent with this filing, the Department has established a conflict wall for *Betts*. See Ex B.

The below attorneys are not only serving as counsel for the People of the State in *People v Snyder*, but are also serving as counsel for the Governor and the Michigan State Police in the pending federal case, *Does v Snyder*, in which the district court has issued an opinion and order and is preparing to enter its final judgment. The State defendants in that case have been (1) defending the constitutionality of the SORA and (2) also contending that any unconstitutionality may be severed based on the Sixth Circuit's decision that found its retroactive application a violation of ex post facto. The amicus and the State defendants argue that the SORA remains valid even if found unconstitutional.

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INTRODUCTION

As this matter wends its way through the state and federal courts, this Court stands in the perfect position to address these claims and vindicate the registry's constitutionality and – perhaps more importantly at this juncture – to address its remaining validity even if found unconstitutional.

The People have long been defending the constitutionality of the SORA in response to the claim that it constitutes punishment. The amicus here agrees with the position outlined by the Muskegon County Prosecutor on behalf of the People, but the State defendants in federal court have lost that issue in the Sixth Circuit in 2016, and the U.S. Supreme Court denied its petition for certiorari in 2017.

Thus, the emphasis of this brief is on the issue of remedy. The Court asked five questions related to the question of remedy based on the contingency *if* the SORA is found unconstitutional. This brief addresses the "if" questions. And while the questions themselves make the issue seem complex, the answer is simple.

If the SORA is unconstitutional as punishment, that occurred in 2011 when the weight of the obligations established by the Legislature to comply with the federal Sex Offender Registration and Notification Act (SORNA) pushed the needle from regulation to punishment. The fact that the Legislature sought to make the SORA compliant with federal law, to achieve the certification of the U.S. Government, and to receive funding is not really in dispute. And the solution is equally simple: to sever those applications of the law that extend the Michigan law *beyond* the SORNA, because the SORNA has been upheld and found *not* to be punishment by the federal courts.

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There are three significant ways in which SORA extends beyond SORNA, consistent with the arguments of Betts here:

1. The in-person reporting requirements for temporary residence, electronic or instant messages, or regular use of a vehicle, see MCL 28.725(e), (f), (g);
2. The public nature of the tiering, see MCL 28.728(2)(l); and
3. The student safety zones. See MCL 28.733, 28.734, 28.735, and 28.736.

In order to make Michigan law substantially parallel with federal law, this Court must only do two things: excise 64 words from four discrete sections and strike the four sections related to the student safety zones. See Ex C, redlined statute. This is what is contemplated by Michigan's severance statute, MCL 8.5, i.e., excising unconstitutional applications but giving effect to the constitutional ones. This conclusion comports with the legislative history of the enactment in 2011, and also comports with common sense, as no one can seriously contend that the Legislature would prefer to see the entire statute fall for those who committed their offenses before the enacting date of Public Act 17 in 2011.

The main argument of Betts (and the Attorney General) starts with a fundamentally flawed premise, that all of the amendments from 2011 would have to fall, rather than just discrete unconstitutional applications. The federal district court's severance analysis was based on the same point, although it was bound to follow the Sixth Circuit's decision, which ruled that all of the 2011 and 2006 amendments in toto cannot be applied. This is not so. Unlike that court, this Court is the final arbiter of Michigan law and may sever the unconstitutional parts. Ironically, the district court's analysis on the prospective challenges – declaring ten sections invalid but that SORA otherwise is applicable – is a template for severance.

ARGUMENT

I. The Michigan Sex Offenders Registration Act does not violate the Ex Post Facto Clause because it does not constitute punishment.

The Gratiot County Prosecutor does not wish to reiterate the arguments advanced by the Muskegon County Prosecutor, who has briefed this issue at length. See Muskegon County Br, pp 13–47. In fact, the Gratiot County Prosecutor addressed that issue in his supplemental filing in the *Snyder* case and does not plan to reiterate those arguments here. See Ex D, Snyder Supplement Br, pp 11–40.

The only additional point that the amicus wishes to make is that the original decision of the federal district court *rejected* the ex post facto challenge, working through the factors under *Kennedy v Mendoza-Martinez,* 372 US 144 (1963). See *Does 1-4 v Snyder,* 932 F Supp 803, 809–814 (ED Mich 2013), rev'd by *Does 1-5 v Snyder,* 834 F3d 696, 703–706 (CA 6, 2016). The amicus contends that the district court's decision is the bettered reasoned of the opinions, is persuasive, and should be followed.

The amicus also notes that there are additional constitutional challenges that have been advanced by the plaintiffs in the federal district court case in *Does*, raising issues of the constitutionality of the Act with regard to all registrants on the grounds of vagueness, the First Amendment, and due process. The district court declared the Act unconstitutional in ten distinct respects. See Supplemental Filing, Feb 14, 2020 opinion, pp 25–27. The amicus does not address these issues as they are not presented in this case.

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II. If found unconstitutional, this Court should sever the three ways – all distinct sections – that Michigan's SORA law substantially extends beyond the federal SORNA law.

Michigan law favors severance if a statute has unconstitutional applications. See MCL 8.5. It is common practice for a court to sever the infirm sections of a statute when those sections cause a statute's unconstitutionality. This has been done before for this very statute by the federal district court *three separate times.* The contrary position advanced here – that the statute may not be successfully severed – is premised on the mistaken idea that if some aspects of the 2011 amendments transformed SORA's regulatory scheme into a punitive one, then all the 2011 amendments as a whole cannot be applied. That is what the Sixth Circuit stated, and the federal district then did.

But it does not follow from the conclusion that SORA became punishment after the 2011 amendments, that all the 2011 amendments fall for the ex post facto registrants. The Legislature sought a SORNA-compliant statute in 2011. That was its manifest intent. Thus, consistent with this design, the Court may sever the unconstitutional applications that extended the SORA beyond the SORNA. Consistent with the arguments here, there are three basic ones: namely, (1) the in-person reporting for temporary residences, vehicles, and new email addresses; (2) the public nature of the tiering; and (3) the student safety zones. For Betts and Snyder, severing these sections has no bearing on their convictions. And the district court in *Does* has taken similar actions in severing other unconstitutional applications. If this Court finds the SORA to be punishment, it should sever these three sections for offenders who committed their offenses before its effective date in 2011.

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A. Michigan law provides for the severance of unconstitutional applications of statutes under MCL 8.5.

Under Michigan law, “the general rules favor severability” because the alternative is “to strike down the entire act as unconstitutional.” *Blank v Dep’t of Corrections*, 462 Mich 103, 122–123 (2000) (Kelly, J., lead opinion). The law governing severance is controlled by Michigan’s severance statute, which seeks to sustain “the remaining portions or applications of the act which can be given effect without the invalid portions”:

> In the construction of the statutes of this state the following rules shall be observed, *unless such construction would be inconsistent with the manifest intent of the legislature*, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, *such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application*, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable. [MCL 8.5 (emphasis added).]

It is worth emphasizing the language here that requires the actions severing the statute accord with the Legislature’s “manifest intent.”

This severance analysis comprises a two-step process. *Id.* at 123. First, the Court examines whether the statutory provision ruled unconstitutional is “independent of the remainder” of the Act. *Id.,* citing *Maki v East Tawas,* 385 Mich 151, 159 (1971). Second, the remainder of the Act must be “otherwise complete in itself and capable of being carried out without reference” to the unconstitutional sections. *Id.* at 123, citing *Maki,* 385 Mich at 159. The question is whether the operable provisions may be “[dis]entangled” from the unconstitutional ones. *Id.*

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At the heart of this analysis is whether the remaining applicable parts of the Act "enables the Legislature to realize its stated objectives." *In re Request for Advisory Opinion Re Constitutionality of 2011 PA 38*, 490 Mich 295, 346 (2011). The issue is whether it is clear that "the Legislature would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act." *Id.* at 346, citing *Pletz v Sec'y of State*, 125 Mich App 335, 375 (1983). See also *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72 (1949) ("It is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.").

B. The legislative history is clear that the Legislature intended to enact a law that was compliant with the federal SORNA, and this Court may sever the ways SORA extends beyond it.

In 2011, the Michigan Legislature amended the SORA to bring Michigan law into compliance with the federal SORNA. Earlier, the Congress enacted the SORNA to strengthen the nationwide network of sex-offender registration and notification programs. 34 USC 20901 *et seq.* In addition to updating the federal registry law, SORNA established minimum standards for state registries. In order to avoid a reduction in federal funding, states must "substantially implement" SORNA's requirements. 34 USC 20927(a) & (d).[1] The additions that the Michigan Legislature introduced into the SORA may be digested into four categories:

[1] Michigan is one of 22 jurisdictions that meets the minimum requirements of SORNA. See https://smart.gov/sorna.htm (last accessed April 1, 2020).

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(1) classify offenders into three tiers according to their underlying offenses, MCL 28.722(r)–(w);

(2) require periodic in-person reporting, as well as in-person reporting within three business days of certain changes, including changes in residence, employment, educational enrollment, vehicle use or ownership, name, and e-mail address or other designations used in internet postings, MCL 28.725(1), 28.722(g), & 28.725a(3)(c);

(3) require publication on the internet of the offender's name and aliases, date of birth, residential, business, and school addresses, and other information, including tier classification, MCL 28.728(2); and

(4) require tier-II offenders to register for 25 years and require tier-III offenders to register for life, MCL 28.725(10)–(12) & 725a(3).

1. The Legislature passed the 2011 amendments to make SORA comport with the federal SORNA.

The legislative bill analysis for Public Act 17 of 2011, originally SBs 188 and 189, confirmed that the Legislature sought to revise SORA to "conform" to SORNA:

> Together, Senate Bills 188 and 189 would revise the Sex Offenders Registration Act *to conform* to mandates under the federal Sex Offenders Registration and Notification Act, part of the Adam Walsh Act. [House Fiscal Agency, Legislative Analysis (3-22-11), p 1 (emphasis added).][2]

In meeting the requirements of SORNA, the statute ensures that Michigan would not forfeit any federal funding, as the analysis describes in "the apparent problem":

> Failure to comply with SORNA will result in a state losing 10 percent of Byrne Justice Grant funding used to support law enforcement efforts. Numerous provisions of the federal act (SORNA) are different from those in the state Sex Offenders Registration Act; *therefore, legislation is needed to revise the statute* ***to conform to the requirements of SORNA***. Though SORNA allows states some latitude, the legislation must conform substantially to SORNA in order to continue to receive the full grant amount. [*Id.* (emphasis added).]

[2] This bill analysis is available on online:

https://www.legislature.mi.gov/(S(2jf30l3evxmc4a4rvo2ch1kg))/mileg.aspx?page=getObject&objectName=2011-SB-0188 (last accessed March 20, 2020).

While conforming to the requirements of SORNA, Public Act 17 of 2011 (SB 188) retained its goals of the SORA to "require persons convicted of certain offenses to register" as its first priority:

> AN ACT to amend 1994 PA 295, entitled "An act *to require persons convicted of certain offenses to register*; to prohibit certain individuals from engaging in certain activities within a student safety zone; to prescribe the powers and duties of certain departments and agencies in connection with that registration; and to prescribe fees, penalties, and sanctions," by amending sections [listing of amended sections]. [17 PA 2011, p 1.][3]

Thus, it is clear that the Legislature would not have wanted the entire act to fall, but to remain SORNA-compliant, if possible.

For the five questions this Court has asked about the remedy, they are conditioned on "if" this Court concludes that Michigan's SORA law is found unconstitutional as punishment that is imposed ex post facto. The arguments of Betts accord with the conclusion of the Sixth Circuit, which is that the Michigan's SORA law – with its 2006 and 2011 amendments – is in aggregate, punishment. See *Does #1-5 v Snyder*, 834 F3d 696, 706 (CA 6, 2016) ("The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease"). To answer the five remedy questions, the amicus will accept this premise for the purpose of addressing them.

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[3] The public act is available on the Legislature's website:

https://www.legislature.mi.gov/(S(4vjp0iemsmcegknowj2ri2u5))/mileg.aspx?page=getObject&objectName=2011-SB-0188 (last accessed March 20, 2020).

The Public Act 17 of 2011 identifies its effective date as April 12, 2011, and states its enacting section as taking immediately effective, while other sections became effective July 1, 2011. See 17 PA 2011, p 10.

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Thus, in response to questions 2 and 5, it was the 2011 amendment – as the last significantly substantive amendment in time – which marks the divide between the classes of registrants, as identified by the offense date, before and after the enactment date of Public Act 17 in 2011. In other words, according to the above reasoning, the 2011 amendments were the final obligations that transformed the SORA into punishment. And the class of offenders are divided into two groups, those who offenses occurred pre- and post-enactment of the 2011 amendments.

2. The unconstitutional parts of SORA may be severed.

The next question is whether the unconstitutional applications of SORA may be severed and whether the prior regime may be revived. The Michigan legislative actions here provide the roadmap to severance.[4]

In specific, the Sixth Circuit emphasized three statutory features that rendered the SORA statute punitive: (1) the student safety zones; (2) the public classification of offenders into tiers; and (3) the requirements on offenders to appear in person to report even minor changes to certain information. See *Does #1-5*, 834 F3d at 702–703, 705. And this analysis corresponds to the ways in which Michigan's SORA law substantially extends *beyond* the federal SORNA even if the legislative intent was to only conform SORA with federal law.[5] The Sixth Circuit summed it up in its final concluding paragraph, leading with these three attributes:

---

[4] For question 3, the amicus agrees with the Muskegon County Prosecutor on the issue of revival, see pp 47–48, but does not believe this Court needs to reach that issue because the unconstitutional applications of the statute may be severed.

[5] See Ex E, U.S. Solicitor General Brief, filed July 7, 2017, *Snyder v Does,* No. 16-768, pp 14–15, 18–20 (identifying these three characteristics).

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> A regulatory regime [1] that severely restricts where people can live, work, and "loiter," [2] that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and [3] that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law.
>
> SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
>
> We conclude that Michigan's SORA imposes punishment. [*Id.* at 705 (first paragraph break added; brackets added).]

As Betts recognizes in his brief, p 46, Michigan's SORA goes beyond the baseline requirements of SORNA in three significant ways:

First, SORA goes beyond SORNA's in-person reporting requirements. SORNA requires jurisdictions to require periodic in-person appearances to verify registration information and take a photograph and further requires an offender to appear in person to update a registration within three business days after any change of name, residence, employment, or student status. 34 USC 20913(c). While not required by SORNA, Michigan's law further requires an offender to appear in person to update when the offender temporarily resides at a new residence for more than seven days, establishes a new email address, and regularly operates a new vehicle. Compare MCL 28.725(1)(e)-(g) with 34 USC 20913(c), 34 USC 20914(a).

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Second, although SORNA (through its implementation guidelines, 73 Fed Reg 38,030, at 38,059 (July 2, 2008)) requires a jurisdiction to make public the sex offense for which an offender is registered, SORNA does not require a State to make the tier classification viewable on the public website. Michigan's law makes this public, as is provided in SORA. MCL 28.728(2)(l).

Third, and finally, SORNA does not require a jurisdiction to create any geographic exclusions or "student safety zones." Michigan, on the other hand, has done exactly that. See MCL 28.733 to 28.736.

Given the manifest legislative intent to "conform" Michigan's law to SORNA and to receive the corresponding federal funding, the act of severing these three applications achieves this very end without disrupting the other SORA provisions. Such an act would enable the Legislature to "realize its stated objectives." *In re 2011 PA 38*, 490 Mich at 346. It is clear that the unconstitutional provisions may be separated from the rest of the Act, which would leave an otherwise complete Act, consistent with the two-step analysis from *Blank*. 462 Mich at 122–123. The act of severing would require the four sections for the student safety zones to be struck for the pre-enactment offenders, MCL 28.733–736, along with these four provisions:

> MCL 28.725 (e) ~~The individual intends to temporarily reside at any place other than his or her residence for more than 7 days~~.
>
> MCL 28.725 (f) ~~The individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.~~
>
> MCL 28.725 (g) ~~The individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.~~
>
> MCL 28.728 (2)(l) ~~The individual's tier classification.~~ [See Ex C.]

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Other than the four student safety zone sections, such an act of severance would strike only 64 words from the SORA as applied to pre-enactment offenders.

The framing of the arguments by Betts confirms the practical wisdom of severing these three sections. (See Betts' Br, p 15) ("SORA's multiple requirements and obligations, including [1] public Internet registry, [2] immediate in-person reporting requirements, and [3] geographic restrictions on residence, work, and travel, create an affirmative disability and restraint") (brackets added). The lion's share of Betts' arguments center on these three features, with the remaining points primarily focusing on aspects of Michigan law imported from the federal SORNA.

With respect to the student safety zones, the brief for Betts emphasizes the problematic nature throughout his brief, as prominently displayed in its table, (see pp 16–17), when it compares Michigan law to "banishment," (p 24), constitutes punishment, (p 28), and operates irrationally, (pp 32–35). The argument's pervasive nature demonstrates its importance to the claim that Michigan's law constitutes punishment, and thus its corresponding significance in any severance analysis. All these arguments fall if these sections are severed from Michigan law.

With respect to the public nature of the tiering, the same applies. This argument also figures prominently in Betts' brief, which asserts that Betts' purported threat has been communicated to the community – Tier III – without an individualized determination. (See pp 14, 16, 23, 25–26, 29–30, 32, 33, 34, 35–37.) While he contested the tiering itself, much of the argument emphasized the public nature of this non-individualized assessment, which would become inapposite if severed.

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With respect to the in-person reporting, Betts emphasizes this point without identifying whether this obligation arises from a temporary residence, new email address, or a new vehicle, or one of the other obligations in Michigan's SORA for the sex offender to register that corresponds to the SORNA. But like the other arguments, this point is ubiquitous in Betts' brief, (see pp 14, 15–20, 21, 22–23, 29, 33, 35–37), and its significance is substantially blunted once the three sections that require in-person reporting for even minor changes are struck from the statute. And, for the remaining sections of the in-person reporting, these arise from the SORNA itself, in the same way as the public nature of the registry corresponds to the SORNA and the durations of the obligations of the offenders to register. This was the very design of the revision to Michigan's SORA in 2011, expanding durations for registry and reporting obligations, as required by the federal SORNA. See House Fiscal Agency, Legislative Analysis (3-22-11), pp 2–4.

The federal district court's February 14, 2020 opinion demonstrates the workability of such a severance in the part of its order addressing all registrants, finding the student safety zones and certain reporting obligations void for vagueness:

> (1) the prohibition on working within a student safety zone, MCL 28.733–734;
>
> (2) the prohibition on loitering within a student safety zone, MCL 28.733–734;
>
> (3) the prohibition on residing within a student safety zone, MCL 28.733, 28.735;
>
> (4) the requirement to report "[a]ll telephone numbers ... routinely used by the individual," MCL 28.727(1)(h);
>
> (5) the requirement to report "[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel ... regularly operated by the individual," MCL 28.727(1)(j).

[Supplemental Filing, Feb 14, 2020 opinion, p 26.][6]

The opinion also declares an additional four provisions void for violating the First Amendment. *Id.* at 27, voiding MCL 28.725(1)(f) (electronic mail); MCL 28.727(1)(h) (reporting of telephone numbers); MCL 28.727(1)(l) (electronic mail; and MCL 28.727(1)(i) (retroactive incorporation of electronic mail reporting). While this opinion is not a final judgment and has not been given effect, the injunctive relief would effectively render the school safety zones unenforceable and strike five other sections. But there is no suggestion in that opinion that an injunction on these provisions requires the entire Act to fall. The same considerations apply here.

It is important to return to the central point that Michigan's law prefers severance. Where part of the statute is found to be invalid, "such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application." MCL 8.5. See also *People v McMurchy*, 249 Mich 147, 158 (1930) (giving effect of "wholly independent" sections where "in accordance with "apparent legislative intent"). And on the question whether "the Legislature would have passed the statute" like this as against allowing the entire Act to fall for pre-enactment offenders, leaving *nothing in place*, it is manifest that the Legislature would want the other provisions to remain in place. See *In re 2011 PA 38*, 490 Mich at 346. This is the first and primary purpose of SORA, to require sex offenders to register. 2011 PA 17, p 1.

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[6] The federal district court had issued the same basic opinion on March 31,2015, see 101 F Supp 3d 672 (ED Mich, 2015) as well as a subsequent opinion on September 3, 2015, see 101 F Supp 3d 722 (ED Mich, 2015), addressing other provisions.

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The remaining Michigan SORA law would then be in substantially the same position as the federal SORNA, which has almost unanimously been found by federal appellate courts to be constitutional and not a violation of the Ex Post Facto Clause. See, e.g., *United States v Parks*, 698 F3d 1, 5–6 (CA 1, 2012); *United States v Young*, 585 F3d 199, 204–205 (CA 5, 2009); *United States v Felts,* 674 F3d 599, 605–606 (CA 6, 2012) (citing cases and referring to as "unanimous consensus"); *United States v Meadows*, 772 Fed Appx 368, 369–370 (CA 7, 2019) (Memorandum); *United States v Shoulder,* 738 F3d 948, 958 (CA 9, 2013); *United States v Lawrance*, 548 F3d 1329, 1333 (CA 10, 2008); *United States v WBH*, 664 F3d 848, 855–860 (CA 11, 2011).[7]

To be sure there are other provisions of the SORA that create obligations not required by the federal SORNA, but they play no significant role in the challenges to the SORA here or in the federal case. This amicus brief identifies additional ones, but they are relatively minor things:

- SORA requires registration *before* sentencing or assignment to the registry for certain offenses, including "an individual convicted of a listed offense on or before October 1, 1995[.]" Cf. MCL 28.724(3)(a) with § 20913(b)(2).

- SORA requires that a resident offender notify the registering authority of a new residence address in another state *before* the change whereas SORNA allows for three days after the change. Cf. MCL 28.725(6) with § 20913(c).

- SORA requires payment of a $50 registration fee. See MCL 28.725a(6).

- SORA requires offenders to maintain a valid operator's or chauffeur's license *that includes the offender's address*. Cf. MCL 28.725a(7) with § 20914(7).

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[7] See also Muskegon County Prosecutor's Brief, p 14 n 9 (listing circuits). The only contrary result, *United States v Juvenile Male,* 590 F3d 924, 942 (CA 9, 2009), addressing juvenile offenders, was vacated as lacking a case or controversy, 564 US 932, 933 (2011) ("[T]he Court of Appeals had no authority to enter that judgment").

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- SORA requires that the registry's "brief summary" of the offense to include the original charge. Cf. MCL 28.728(1)(n) with § 20914(b)(3).

- SORA requires the public website of the registry to contain the offender's date of birth. Cf. MCL 28.728(2)(b) with 73 Fed Reg at 38,059 (July 2, 2008).

- SORA requires the law enforcement database and the public website of the registry to contain the schools that the offender plans to attend. Cf. MCL 28.728(1)(g), 28.728(2)(e) with § 20914(a)(5).

- SORA makes it a four-year, seven-year, or ten-year felony for failing to register depending on prior convictions, whereas SORNA only requires jurisdictions to provide a criminal penalty that includes a maximum term of imprisonment greater than one year. Cf. MCL 28.729(1) with § 20913(e).

While not an exhaustive list, other that the fees Betts does not raise these differences and they did not figure into the Sixth Circuit's analysis. That is not surprising given the inconsequential nature of these added burdens. In fact, these obligations are really not substantive in nature, but instead are generally procedural, by requiring the offender to inform the authorities of information earlier in time, e.g., informing the authorities of a new out-of-state residence before the event, or in providing additional information, e.g., the offender's date of birth.

Betts did raise an issue that "anonymous tips" enable residents to submit allegations, see p 20, and raised the point about the $50 fee, p 16, and it is true that Michigan's SORA does not include a "warning" about harassing registrants,[8] and does include a $50 fee. See MCL 28.725a(6). But these additional burdens do not transform an otherwise SORNA-compliant law into punishment.

[8] See 34 USC 20920(F) ("The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.").

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But even if this Court disagreed, or if it identified other differences that it believes are significant,[9] the proper response would be to sever these as well if they make Michigan's scheme punitive in a way that SORNA is not. That is the proper endeavor under Michigan law. And once severed, it cannot be that the SORA – shorn of provisions that expand beyond SORNA – constitutes punishment, unless the federal appellate courts were all wrong in their analysis. See *Parks,* 698 F3d at 6 ("we join every circuit to consider the issue and reject the [ex post facto] claim"). Once the unconstitutional applications are severed under MCL 8.5, retroactive application of the remainder of SORA is valid against the pre-enactment offenders.

C. Betts' arguments are based on the mistaken assumption that all the 2011 amendments must fall, and that this Court cannot sever those sections of SORA that he argues make it punitive.

On this issue of severance, Betts (and the Attorney General) start from the premise that all of the 2011 amendments, without differentiation, would have to be struck to salvage the statute and that the 2011 amendments cannot be disentangled. See Betts Br, p 41 ("The unconstitutional portions of the 2011 amendments cannot be removed and leave a functioning statute"); AG Amicus Br, p 49 ("[T]he unconstitutional 2011 amendments cannot be cleanly excised. . . . It is within the province of the Legislature, not this Court, to decide how it will make SORA nonpunitive."). This amicus disagrees.

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[9] See Ex F. The amicus has prepared a comparative chart, listing the provisions of Michigan SORA with the corresponding statutory provisions of federal SORNA. The chart does not include the SORNA obligations that arise from the federal regulations, 28 CFR 72.1 *et seq*. (2007), or from the U.S. Attorney General's guidelines (2008, 2011, 2016). See 73 Fed Reg at 38030–38070 (July 2, 2008); 76 Fed Reg at 1630–1640 (Jan 11, 2011); 81 Fed Reg at 50552–50558 (Aug 1, 2016).

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Neither Betts (nor the Attorney General) really contest the conclusion that the 2011 amendments were an indispensable part of the SORA obligations, which they claim makes the statute punishment. The further point that Betts makes (pp 45–48), however – that we do not know the Legislature's preferences here – is mistaken, because the legislative purpose of the 2011 amendments is unambiguous, i.e., to bring the SORA into compliance with the federal SORNA and to require sex offenders to register. See HFA, Legislative Analysis (3-22-11), p 1;[10] 17 PA 2011, p 1. This Court need not guess at which provisions of the law – consistent with the Legislature's actions – must fall if the SORA is punishment. Based on this manifest intent, this Court may sever the parts of SORA that do not comport with SORNA, leaving an operable law to apply retroactively to the pre-enactment offenders. The Legislature would not otherwise want the SORA to fall entirely for those offenders.

D. The federal district's court analysis on severance is also not persuasive because it likewise relies on the Sixth Circuit's assumption that the entirety of the 2011 amendments fall.

The federal district court's analysis suffers from the same basic infirmity. But that court was bound to follow the Sixth Circuit's ruling, which had already stated that the totality of the 2006 and 2011 amendments to SORA would fall:

> The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and *it must therefore cease*. [*Does #1-5,* 834 F3d at 706 (emphasis added).]

And the Sixth Circuit reiterated the point, stating that "*none of the contested provisions may now be applied*." *Id.* (emphasis added).

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[10] See n 2 above.

It is worth pointing out that the Sixth Circuit's opinion in *Does* did not purport to resolve the issue of remedy or severance. That matter was neither briefed nor addressed by the Sixth Circuit in *Does*. The only question before the Court regarding ex post facto was whether Michigan's SORA constituted punishment. *Does,* 834 F3d at 699 ("We begin our analysis with the Ex Post Facto issue"). After concluding that "Michigan's SORA imposes punishment," that court immediately then stated the entirety of the 2006 and 2011 amendments have to "cease," with no intervening analysis. *Id.* at 705–706. Thus, it really says nothing about remedy or severance.

Even so, based on this ruling, the district court rejected the State's arguments on the issue of severability from the start because the Sixth Circuit "invalid[ated] all portions of the 2006 and 2011 amendments." Supplemental Filing, Feb 14, 2020 opinion, pp 12–13. While that may have been a fair reading of the Sixth Circuit's ruling, that decision does not bind this Court. See *Abela v General Motors,* 469 Mich 603, 607 (2004) ("Although lower federal court decisions may be persuasive, they are not binding on state courts."). And, of course, this Court is the final arbiter of Michigan law, see *Montana v Wyoming*, 563 US 368, 377 n 5 (2011) ("The highest court of each State, of course, remains 'the final arbiter of what is state law'"), and it is in a unique position to apply the state's severance jurisprudence under MCL 8.5. The district court acknowledged the point. Feb 14, 2020 opinion, p 16 n 6 (stating that it could "modify its judgment to conform with *Betts*" if this Court ruled to the contrary on severability). This Court should now exercise its unique authority.

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E. The convictions of Betts and Snyder for SORA violations remain valid under the severed SORA law.

Along this same line, by noting that the State defendants in *Does* could file a motion under the federal rules to set aside its judgment if this Court ruled differently (Fed R Civ Pro 60(b)) here, the district court also recognized that that this appeal for Betts should move forward.

Thus, once this Court severs the unconstitutional applications of the SORA statute, it may then apply the statute and affirm the convictions of both Paul Betts and David Snyder (whose case is being held in abeyance). Betts failed to update his address under the registry, MCL 28.725(1)(a), and Snyder failed to update his place of employment, MCL 28.725(1)(b). Neither provision would be ensnared if this Court severed the three previously identified infirm set of sections. These obligations under SORA are the same for the federal SORNA. See 34 USC 20913(c). As a result, these convictions would stand. This Court should affirm them.

In reply, Betts argues that the district court's opinion rejecting severance has preclusive effect. See Betts' Reply, pp 9–11. The amicus disagrees for two reasons.

First, as Betts himself notes, that opinion is not a final judgment and therefore the decision is not given preclusive effect as a matter of federal law on collateral estoppel. See *Arkansas Coals v Lawson*, 739 F.3d 309, 320–321 (CA 6, 2014) (including that "the prior proceedings must have resulted in a final judgment on the merits" as part of the test for collateral estoppel). See also *Pierson Sand v Keeler*, 460 Mich 372, 380–381 (1999) ("The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment.").

Second, and more importantly, in denying the request for certification the *Does* opinion itself expressly acknowledges this pending appeal and invites this case to move forward, and for *the decision in Betts* to displace that court's analysis if this Court disagrees on the question of remedy. See Feb 14 opinion, p 15 ("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 [on the ex post facto issue]"); *id.* at 16 n 6 ("Should the *Betts* court reach the issue [] of severability of the 2011 amendments and that ruling runs somehow contrary to this court's determination, this court can modify its judgment to conform with *Betts*."). The point of the doctrine of collateral estoppel (issue preclusion) is to vindicate the federal judgment. Cf. *Pierson,* 460 Mich at 383 (the "goal of res judicata is to promote fairness"). The federal court did not expect its order to be preclusive.

That is consistent with the earlier stipulated orders of that court. See Aug 27, 2019 order in *Does* (Case No. 16-13137), p 3 ¶ 2 (deferring briefing on the question whether relief would apply to all class members) and May 23, 2019 order, p 4 ¶ 2 (deferring for 90 days the question whether declaratory relief would apply to Betts and Snyder). It is also consistent with the fact that the criminal final judgments at issue here (Betts in 2013 and Snyder in 2014) *preceded* any of the judgments in the corresponding federal court case, and with Michigan's law on collateral estoppel. See *In Re Kramer,* 543 BR 551, 559 (ED Mich 2015) ("under Michigan law, collateral estoppel/issue preclusion applies to a final judgment even when the judgment is pending on appeal or the time for appeal has not expired").

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And, finally, it is consistent with the federal law on collateral estoppel that preclusion does not attach to unmixed questions of law, such as the one at issue here, nor to ones in which the state is a party. See *Doe v Dep't of Corrections,* 312 Mich App 97, ___ ; 878 NW2d 293, 310–313 (2015) (vacated on other grounds 499 Mich 886 (2016)),[11] citing *Montana v United States*, 440 US 147, 162 (1979) and *United States v Mendoza*, 464 US 154, 158, 162 (1984).

These are questions of law that are properly resolved by this Court. As the federal district court invites, this Court should reach the question. And the amicus asks this Court to sever any unconstitutional applications if it finds SORA to be punishment.

[11] The jump cites are not available on Westlaw, so the amicus lists the jump cites from the Northwest Reporter.

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CONCLUSION AND RELIEF REQUESTED

This Court should either affirm the constitutionality of Michigan's Sex Offenders Registration Act (SORA) because it is not punishment, or it should find that its unconstitutional applications may be severed, and the remaining Act may stand. Either way, it should affirm the convictions of Paul Betts and David Snyder.

Respectfully submitted,

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