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

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

Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy St. SE, Ste. 260
Grand Rapids, MI 49506

Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

Amicus agrees with the parties that this Court has jurisdiction over this appeal.

STATEMENT OF QUESTIONS PRESENTED

1. If Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., under which Mr. Betts was prosecuted is constitutionally infirm, can the constitutional infirmity be remedied through the application of the recently enacted 2020 PA 295?

Appellant's answer:	No.
Appellee's answer:	Yes.
Trial court's answer:	Was not presented with the issue.
Court of Appeals' answer:	Was not presented with the issue.
Amicus Curiae's answer:	No.

2. Assuming that the constitutional infirmities of the version of SORA under which Mr. Betts was prosecuted cannot be remedied by 2020 PA 295, does the new SORA have any effect on the potential remedy?

Appellant's answer:	No.
Appellee's answer:	Does not address.
Trial court's answer:	Was not presented with the issue.
Court of Appeals' answer:	Was not presented with the issue.
Amicus Curiae's answer:	No, although passage of the new SORA has implications for which issues presented are most jurisprudentially significant.

3. If this Court evaluates Mr. Betts' conviction based on the statute in effect at the time of the offense and concludes that the new SORA has no effect on the remedy, how should this Court decide Mr. Betts' case?

Appellant's answer:	The Court should vacate Mr. Betts' conviction either: (a) because the prior SORA is unconstitutional. (b) because the state is estopped under *Does I* and *Does II* from relitigating whether the prior version of SORA violates the federal Ex Post Facto Clause.

Appellee's answer:	Does not address.
Trial court's answer:	Was not presented with the issue.
Court of Appeals' answer:	Was not presented with the issue.
Amicus Curiae's answer:	The Court should vacate Mr. Betts' conviction either: (c) because the prior SORA is unconstitutional. (d) because the state is estopped under *Does I* and *Does II* from relitigating whether the prior version of SORA violates the federal Ex Post Facto Clause.

INTEREST OF AMICUS CURIAE[1]

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 and basic civil rights guaranteed by the United States Constitution. The ACLU is firmly committed to protecting the constitutional rights of all people in this country, including the rights of individuals convicted of sex offenses.

The ACLU has previously been involved in numerous legal cases on issues relating to the conditions imposed on people convicted of sex offenses, including *Does #1-5 v Snyder* ("*Does I*"), 834 F3d 696 (CA 6, 2016) (holding that the retroactive application of SORA's 2006 and 2011 amendments is unconstitutional), *cert denied* 138 S Ct 55; 199 L Ed 2d 18 (2017). Undersigned ACLU counsel currently represents the certified class in *Does #1-6 v Snyder* ("*Does II*"), Eastern District of Michigan Docket No. 2:16-cv-13137 (Cleland, J.). Mr. Betts is a member of that class. The *Does II* court held that the pre-2021 version of SORA violates the federal Ex Post Facto Clause. *Doe v Snyder*, 449 F Supp 3d 719, 737–38 (ED Mich, 2020). A motion for final judgment, which was delayed due to the pandemic, is pending.

The ACLU has previously been granted permission by this Court to file amicus briefs in this case, as well as to participate in the two oral arguments.

INTRODUCTION

The Muskegon and Gratiot County Prosecutors (collectively "prosecutors") glom onto the passage of Public Act 295 of 2020 in the hopes that the Court, instead of holding that the prior version of Michigan's Sex SORA is unconstitutional, will uphold Paul Betts' conviction under a

[1] No party authored this brief in whole or in part, nor contributed financially to support the submission of this brief.

new version of SORA that did not exist when he was prosecuted and whose constitutionality has not been briefed. The constitutionality of the amended SORA—which is more punitive than the prior statute in some ways and less punitive in others—will have to be resolved in future challenges to the new statute. But the new SORA, which became effective on March 24, 2021, has no bearing on Mr. Betts' case, which arose out of a 2012 violation of the version of SORA in effect at the time. (That version will hereinafter be referred to as "old SORA" or "SORA 2011", as SORA had been most recently amended in 2011.)

Michigan law makes plain that the new SORA cannot be retroactive for the purposes of creating or eliminating criminal *liability* for offenses that pre-date the new law. Moreover, the new SORA would violate the Ex Post Facto Clause if it were retroactively applied in that way. The Court should therefore reject the prosecutors' invitation to apply an inapplicable law, and instead vacate Mr. Betts' conviction either (1) on the grounds that the prior SORA was unconstitutional, or (2) on the ground that the state may not (a) relitigate the question of SORA's constitutionality under the federal Ex Post Facto Clause because the state litigated and lost that issue in *Does I*, or (b) separately litigate the federal Ex Post Facto issue in this individual action when the same question is being litigated in the *Does II* class action of which Mr. Betts is a member. Either resolution would be of tremendous significance for the state's 44,000 registrants.

ARGUMENT

I. The Constitutional Infirmity Cannot Be Remedied Through the Retroactive Application of the New SORA.

A. Under Michigan Law, the Old SORA Governs.

Though the prosecutors wish otherwise, black-letter law holds that a criminal law in effect when a violation occurs is the law under which the offense is charged. "The general rule of statutory construction in Michigan is that a new or amended statute applies prospectively" absent clear

intent to give it retrospective effect. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). "This rule applies equally to criminal statutes." *Id.* In the criminal context, retroactive legislation raises ex post facto concerns because it is constitutionally impermissible to retroactively define new crimes, redefine existing crimes, increase punishments, or alter the evidence needed to convict. *Calder v Bull*, 3 US 386, 390; 3 Dall 386; 1 L Ed 648 (1798); see also *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014) (same under the Michigan Constitution).

As this Court has observed, at common law due to the prospective orientation of criminal laws, absent a savings clause, the repeal or amendment of a criminal statute bars prosecution of pending or subsequent cases under the repealed or amended statute. *People v Lowell*, 250 Mich 349, 352–56; 230 NW 202 (1930). Thus, the defendant in *Lowell* could not be prosecuted under any law, because the old statute was no longer operative, and the new law was prospective. *Id.* at 352–54. The *Lowell* Court therefore "invited the legislature to enact a general saving statute." *People v Schultz*, 435 Mich 517, 528; 460 NW2d 505 (1990) (plurality). The legislature then enacted MCL 8.4a, which "was specifically adopted to abrogate an anomaly resulting from the interplay between the common law abatement doctrine and the constitutional Ex Post Facto Clause." *Id.* at 527. In effect, MCL 8.4a undoes "the common law abatement doctrine" by allowing offenders who violated laws that have since been repealed/amended to still be prosecuted under the prior statutes.

The language of MCL 8.4a, like its history, makes clear that after enactment of a new statute, liability for offenses that occurred under the old statute arises under the old statute, and must be prosecuted under it:

> The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or *liability* incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and *such statute and part thereof shall be treated as still remaining in force for the purpose of instituting*

> *or sustaining any proper action or prosecution* for the enforcement of such penalty, forfeiture or *liability*. (Emphasis added.)

Thus, Mr. Betts' SORA compliance offenses—a failure to report his address, vehicle, and email back in 2012—occurred long before the effective date of the new SORA, and are governed by SORA 2011.

The prosecutors resist the straightforward application of MCL 8.4a by pointing to the "amelioration" doctrine, which in Michigan holds that where a new/amended law reduces the punishment for an offense, the lesser punishment applies to pre-enactment offenses. However, *People v Schultz*, the principal case on which they rely, makes abundantly clear that although a lesser *punishment* can be retroactively imposed, the law in effect at the time of the offense remains the exclusive source of *criminal liability*. 435 Mich at 525–31. In *Schultz*, the legislature amended the governing law mid-prosecution to reduce the minimum term of imprisonment. *Id.* at 522–24. In finding that the amendment applied retroactively, the plurality highlighted the difference between criminal liability, which was determined under the old statute, and criminal punishment, which was determined under the new one:

> By enacting § 8.4a, the Legislature has expressed its intent that conduct remains subject to punishment whenever a statute imposing criminal liability is either repealed outright or reenacted with modification, even though a specific saving clause has not been adopted. While § 8.4a does indicate that conduct remains subject to punishment, it does not indicate that the Legislature intended the statute prior to amendment to provide the *terms of punishment* where an amendatory act mitigates the authorized terms of punishment but continues to proscribe the same conduct.

Id. at 528–29 (emphasis added). The plurality thus drew a distinction between the conduct that was forbidden at the time of the offense, which is measured under the old law, and the punishment, which can be ameliorated by a new or amended law.

In light of this distinction, the Michigan Court of Appeals has correctly concluded that "*Schultz* only addresses the applicability of *sentence* alterations the Legislature interposes between the crime and sentencing." *People v Muniz*, 259 Mich App 176, 180; 675 NW2d 597 (2003). The court has therefore refused to retroactively apply amendments that change the scope of prohibited conduct. See, e.g., *People v Doxey*, 263 Mich App 115; 687 NW2d 360 (2004). For instance, amendments that have changed what constitutes a criminal violation or have added new crimes have been found to apply only prospectively. *Id.* at 120–21.

Because these cases make clear the exception set forth in *Schultz* applies only to changes in criminal *punishment*, and not to criminal *liability*, the new SORA cannot apply retroactively to govern Mr. Betts' offense. The new SORA does not change the sentences for violations of SORA: the prison, jail, or probation terms imposed for SORA compliance violations are identical under the old and the new laws. Compare MCL 28.729, as amended by 2020 PA 295, with MCL 28.729 (both authorizing penalties up to ten years imprisonment).

B. Applying the New SORA Retroactively Would Create Ex Post Facto Problems.

Under the Ex Post Facto Clause, "Legislatures may not retroactively [1] alter the definition of crimes or [2] increase the punishment for criminal acts." *Collins v Youngblood*, 497 US 37, 43; 110 S Ct 2715; 111 L Ed 2d 30 (1990). Briefing in this case has thus far focused on whether SORA's restrictions and requirements are so onerous that they constitute additional *punishment* retroactively imposed for Mr. Betts' underlying *sex offense* conviction from 1993. But the question here is whether Mr. Betts *failure to comply with SORA* in 2012 should be prosecuted based on how SORA compliance violation were *defined* in 2012 versus in 2021. See *Cal Dep't of Corrections v Morales*, 514 US 499, 505; 115 S Ct 1597; 131 L Ed 2d 588 (1995) (the Ex Post Facto Clause prohibits retroactive changes that "effect[] [a] change in the definition of [the] crime"); *People v Wilson*, 500 Mich 521 n 3; 902 NW2d 378 (2017) (same).

The chart below summarizes these differences:

Offense	Offense Definition	Sentence Imposed at Time of Conviction	Retroactive Punishment
Sex offense	Crime defined by the version of the criminal law in effect in 1993 when the offense occurred.	Prison term of 6-15 years	Retroactively required to comply with SORA's extensive burdens and restrictions for life without any individualized consideration. If the version of SORA in effect in 2012 constituted unconstitutional retroactive punishment, it violates the Ex Post Facto Clause to retro-actively require Mr. Betts to comply with it, or further punish him for failing to do so.
SORA compli-ance violations (failure to register address, vehicle, and email)	Crime defined by the version of SORA in effect in 2012 when the offense occurred	Three years' probation, with one year jail suspended pending appeals	Under MCL 8.4a, the new SORA cannot be applied retroactively to prosecute a SORA violations from 2012; nor would retroactivity be consistent with the Ex Post Facto Clause.

If, as the prosecutors argue, the new SORA governs pre-3/24/2021 conduct, then even a cursory review of the new statute reveals ex post facto problems that would undoubtedly arise because in many instances the offense definitions in the old and new SORA differ. Indeed, the very provisions governing Mr. Betts' offense conduct (the registration of addresses, vehicles, and email addresses) have been amended by the new statute.[2] Accordingly, the new SORA cannot be

[2] The old and new SORA, as shown by the strike-out and emphasis, have different requirements for:

- Reporting of electronic identifiers: "~~All~~ **Except as otherwise provided in this subdivision, all** electronic mail addresses and ~~instant message addresses assigned to the individual or routinely~~ **internet identifiers register to or** used by the individual ~~and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system~~." MCL 28.727(1)(i). The new SORA broadens the definition of which IDs must be reported to include "all designations used for self-identification or routing in internet communications or postings." MCL 28.722(g). Moreover, the three-day reporting of such IDs

applied retroactively to create new substantive SORA compliance requirements without violating the Ex Post Facto Clause.

The prosecutors confuse the issue by arguing that if the new SORA "ameliorates" the ex post facto violation of the old SORA by no longer rising to the level of punishment, then SORA compliance offenses committed before March 24, 2021, can be retroactively governed by the new SORA.[3] This argument is based on an analytical error: Defendants conflate the punishment for the SORA compliance violation with the punishment for the underlying sex offense.

The old SORA imposed a broad regime of restrictions and requirements on people who

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previously only applied when "[t]he individual establishes any electronic mail or instant message address, or any other designation used in internet communication or posting." MCL 28.725(1)(f), as amended by 2020 PA 295. Under the new SORA there is no such limit. Post-2011 registrants must report within three days of "any change" in email addresses and internet IDs "registered to or used by the individual." MCL 28.725(2)(a).

- Reporting of vehicles: "The license plate~~, registration number,~~ and description of any ~~motor~~ vehicle~~, aircraft, or vessel~~ owned or ~~regularly~~ operated by the individual**.** ~~and the location as which the motor vehicle, aircraft, or vessel is habitually stored or kept.~~" MCL 28.727(1)(j). Moreover, under the old SORA, a registrant had to report in person within three days if "[t]he individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued." MCL 28.727(1)(g), as amended by 2020 PA 295. Under the new SORA, a registrant must report in a manner prescribed by the department within three days of "any change in vehicle information." MCL 28.727(2)(a).
- Address reporting: a registrant "shall report in person**, or in another manner as prescribed by the department,** and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately **not more than 3 business days** after [changing or vacating a residence]." MCL 28.725(1)(a).

Recognizing the change in offense definition for email addresses and vehicles (but not for addresses), the Muskegon County Prosecutor proposes amending the information to remove any allegations involving email addresses or vehicles. See Muskegon County Supp Brf at 10–11. However, because Mr. Betts has already been sentenced, "the judgment is the final record of [his] conviction," *People v Williams*, 208 Mich App 60, 64; 526 NW2d 614 (1994).

[3] The ACLU disputes the contention that the new SORA—which continues to impose a little-changed regime of extensive restrictions and requirements without any individualized assessment, continues to apply most of the 2011 amendments retroactively despite the Sixth Circuit's *Does I* decision, and is more burdensome than the old SORA in some ways, though less burdensome in others—is constitutional. But the constitutionality of the new SORA is simply not at issue here.

committed a registrable sex offense—a regime that the Sixth Circuit found rose to the level of punishment that could not be retroactively applied. *Does I*, 834 F3d at 705. But that "punishment" was not imposed for non-compliance with SORA itself, but rather as a consequence of the underlying sex offense. It was additional punishment on top of whatever prison/jail/probation sentence the offender received—not for having failed to comply with SORA's many restrictions and requirements, but for having committed the registrable sex offense itself.

By contrast, the punishment imposed for a SORA compliance violation is prison, jail, or probation, and the new SORA continues to impose the exact same harsh penalties as the previous statute, as noted above. So nothing related to the sentence for the SORA compliance violation has been "ameliorated." In that regard SORA has not changed one whit, and any change to the regime of restrictions and requirements imposed on registrants for their underlying offense cannot be bootstrapped to make the new SORA retroactive in terms of defining SORA compliance violations.

In sum, because the validity of Mr. Betts' conviction must be measured under the SORA in effect at the time of his offense, the amended SORA cannot be applied retroactively to cure the constitutional infirmities.

II. The Passage of a New SORA Does Not Affect the Remedy, Which Should be Vacatur, But Does Affect Which Questions Here Are of Greatest Jurisprudential Significance.

The Court's question on remedy is a practical one: how should the Court resolve a case challenging the constitutionality of statute that is no longer on the books? The Court must decide whether Mr. Betts will go to prison for violating the former unconstitutional SORA, and the remedy here should be to vacate his conviction. But *how* the Court does so matters. While the passage of a new SORA has no bearing on Mr. Betts' individual case, it does change how this Court's decision will apply more broadly, as well as which legal questions are of greatest

importance.

First, because this Court's decision must address the old SORA, its decision will not prevent implementation of the new SORA. For example, if this Court agrees with the federal courts that the 2011 amendments cannot be retroactively applied and are not severable, pre-2011 registrants would still have to comply with the new SORA (pending challenges to that statute). The registry would not "go dark."

Second, because the old SORA governs criminal liability for any registry violations committed when the statute was operative, its unconstitutionality is an issue of continuing importance to Michigan registrants. The statute of limitations for SORA offenses is six years. See MCL 767.24(10). Thus, registrants who violated unconstitutional provisions of the old statute between 2015 and 2021 continue to face criminally liability absent a decision from this Court protecting them from such unconstitutional prosecutions.

The necessity of a decision from this Court is not simply an academic issue. The continued enforcement of these provisions will consume law enforcement resources while also imposing serious consequences for registrants. Some 12,460 registrants were convicted of SORA compliance violations in the eight-year period from 2006 to 2013. *See Does #1-5 v Snyder*, No. 12-11194 (ED Mich), Michigan State Police SORA Conviction Data, R 91-22, PgID.4906–08. Of those, 4,832 individuals were convicted of felonies and 7,628 were convicted of misdemeanors. *Id.* More recent data confirm that prosecutions have not significantly abated since. In 2018, there were 664 convictions for SORA compliance violations with only 253 being misdemeanors; these numbers remained virtually the same in 2019 when there were 648 convictions for SORA compliance

violations with only 243 being misdemeanors.[4] While data are not available on how many SORA prosecutions are pending or on direct appeal, and it is impossible to know how many more cases might be filed under the old SORA before the statute of limitations runs, the Court's decision will likely affect hundreds or even thousands of prosecutions.

Third, Mr. Betts' case presents a number of questions whose resolution here will aid the lower courts in deciding the many cases for pre-3/24/2021 violations. They include:

- What version of SORA applies? See Section I.

- Does the old SORA violate the Ex Post Facto Clause, and if so, in what ways? (For example, a decision that the old SORA is unconstitutional because it imposes extensive burdens without any individualized determinations would have different implications than a decision that retroactive application of SORA's 2011 amendments was unconstitutional for the reasons cited by the Sixth Circuit.)

- Is the State of Michigan collaterally estopped from litigating whether the old SORA violates the federal Ex Post Facto Clause, where it previously litigated and lost that exact issue in *Does I*? See ACLU Amicus Brf (9/22/2020) at 20–26; ACLU Supp Amicus Brf (10/6/2020) at 5–6. (If so, the Court can simply vacate Mr. Betts' conviction without reaching the constitutional questions.)

- Is the State of Michigan barred from litigating whether the old SORA violates the federal Ex Post Facto Clause in this individual action where the same issue has been litigated in *Does II*, a certified class action and Mr. Betts is a member of the class? See ACLU Amicus Brf (9/22/2020) at 15–20; ACLU Supp Amicus Brf (10/6/2020) at 1–3. (If so, again the Court can simply vacate Mr. Betts' conviction without reaching the constitutional questions.)

As the points above suggest, this Court has many paths to vacate Mr. Betts' conviction and prevent his unjust incarceration. And as these points also suggest, this case continues to present important questions that impact many people other than Mr. Betts.

[4] See Michigan Department of Corrections, *2018 Statistical Report* (November 14, 2019), p A-12, available at <https://perma.cc/S75T-TY6E>; Michigan Department of Corrections, *2019 Statistical Report* (February 9, 2021), p A-12, available at <https://perma.cc/QZ5B-PH5N>.

III. Should this Court Reach Severability, the Severability Analysis Is Not Affected by Passage of the New SORA.

Counsel for the Gratiot County Prosecutor, who also represented the state in *Does I* and *Does II*, would like to use this case to forestall constitutional challenges to the new SORA by inviting the Court to pronounce the amended statute constitutional even though the constitutionality of the new SORA is not before the Court. The argument is essentially that (1) the new statute is constitutional, and (2) therefore any constitutional infirmities in the old statute can be cured by severing the same provisions that the legislature excised in the new statute. Gratiot County Pros Supp Brf at 7–9. As previously briefed, the Gratiot County Prosecutor's severability analysis is fundamentally flawed because it fails to recognize that (1) how this Court analyzes the punishment question will determine whether and what kind of severability analysis is needed; and (2) *if* the Court analyzes the ex post facto question in terms of the 2011 amendments *and* reaches severability, those amendments are not severable because they are deeply embedded in the fabric of the statute. See ACLU Amicus Brf (9/2/2020) at 26–34; ACLU Supp Amicus Brf (10/6/2020) at 3–4; Appellant Brf (12/18/2019) at 38–49; CDAM Amicus (9/18/2020), at 21–26. Those issues will not be rebriefed here. But the Gratiot County Prosecutor's latest argument does deserve a brief response.

First, the intent of a prior legislature cannot be determined by looking at the actions of a subsequent one. When this Court looks to legislative intent, "the 'intent' referred to is the one entertained by the legislature at the time of the passage of the act, and not the intent expressed by a subsequent amendment. In the instant case, to interpret the subsequent amendment as an indication of the legislature's original intent would be mere speculation, not judicial construction." *Iron Street Corp v Mich Unemployment Compensation Comm*, 305 Mich 643, 655; 9 NW2d 874 (1943). See also *United States v Price*, 361 US 304, 313; 80 S Ct 326; 4 L Ed 2d 334 (1960)

("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 177 n 33; 615 NW2d 702 (2000) (citing *Price*).

Second, and more importantly, while it is likely true that the 2011 legislature might have preferred that a narrower, constitutional version of SORA be applied to pre-2011 registrants rather than that the unconstitutional version of SORA be entirely void, that only raises a further question: how do you revise SORA to make it constitutional? The Gratiot County Prosecutor argues that because the legislature amended SORA in response to court decisions holding the statute to be unconstitutional, the new statute is now necessarily constitutional and hence can be used as a guide to severance. But the fact that the legislature amended the statute does not mean that it solved the constitutional problems.

In *Does II*, the Defendants there offered the exact same argument that the Gratiot County Prosecutor offers here, namely that a few provisions could be shaved off to save the statute. Judge Cleland rightly rejected that argument, explaining that defense counsel's proposed tweaks would not resolve the Sixth Circuit's concern. *Does I*, 449 F Supp 3d at 729. Judge Cleland explained that the Sixth Court had "addressed the aggregate impact" of the amendments and had noted that plaintiffs' other challenges—including to provisions like those retroactively extending registration terms to life—were moot because those provisions could no longer be applied. *Id.* The statutory tweaks Defendants offered for severance in *Does II* would have approached the statute piecemeal. Moreover, if only those provisions were severed, that would have allowed the state to apply provisions whose constitutionality the Sixth Circuit had declined to reach because those provisions could no longer be applied. Judge Cleland concluded that "this court cannot now impose additional limits to the Sixth Circuit's decision and must read *Does I* as broadly—and

quite clearly—invalidating all portions of the 2006 and 2011 amendments as applied to the members of the ex post facto subclasses." *Id.*

The legislature has now adopted the exact same statutory tweaks that defense counsel in *Does II* unsuccessfully argued would save the statute (presumably because that counsel advised the legislature that those tweaks would be sufficient). And the Gratiot County Prosecutor (represented by the same counsel) now points to that legislative action to argue that the Court need only sever those few provisions, rather than looking at the statute at a whole. But that ignores the fact that the Supreme Court has made clear that one must analyze the cumulative impact of the *entire* registration statute. See *Smith v Doe*, 538 US 84, 92, 94, 96–97, 99, 104–05; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (repeatedly analyzing "the statutory scheme," "the regulatory scheme," or "the Act").

If this Court merely severs a few provisions from SORA 2011 so that it resembles SORA 2021, that would leave intact many of SORA's most punitive features (including many of the very features that the federal courts have held to be punitive). The 2021 statute still imposes lifetime registration and stigmatization as a sex offender without any individualized assessment. For the vast majority of registrants, there is no opportunity for removal regardless of the circumstances of the offense or demonstrated rehabilitation. SORA continues to impose extensive supervision and reporting requirements, and registrants must still report with great frequency in person, and report many even minor information changes within three days and in person. And all of these burdens are imposed without any evidence "that the difficulties the statute imposes on registrants are counterbalanced by any positive effects," a key consideration in determining whether an ostensibly regulatory statute is in fact punitive. *Does I*, 834 F3d at 705 (finding SORA excessive in relation to its avowed regulatory purposes). In other words, if the Court were to adopt the

Gratiot County Prosecutor's proposal for severance of the old SORA, it would effectively be endorsing the new SORA, despite the fact that it has a devastating impact on 44,000 people without any corresponding public safety benefit, and despite the fact that the constitutionality of the new SORA is not before the Court. The Court should decline the prosecutor's invitation to do so.

CONCLUSION

This case continues to present critical legal and constitutional questions about whether the prior version of SORA can be applied retroactively. There are multiple paths this Court can take to vacate Mr. Betts' conviction, including holding that the old SORA is unconstitutional or finding the prosecution barred under either *Does I* or *Does II*.

Respectfully submitted,

/s/ Miriam J. Aukerman
Miriam J. Aukerman (P63165)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy SE, Suite 260
Grand Rapids, MI 49506
(616) 301-0930

Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824

Attorneys for Amicus Curiae[5]

Dated: March 26, 2021

[5] Substantial assistance on this brief was provided by ACLU of Michigan legal fellow Rohit Rajan.