No. _____

In the Supreme Court of the United States

RICHARD SNYDER, GOVERNOR OF THE STATE OF MICHIGAN; COL. KRISTE ETUE, DIRECTOR OF THE MICHIGAN STATE POLICE, PETITIONERS

V.

JOHN DOES, #1–5; MARY DOE, RESPONDENTS

PETITIONER'S EMERGENCY MOTION SEEKING TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING THE STATE OF MICHIGAN'S PETITION FOR A WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

INTRODUCTION

Michigan moves under Rule 23 to stay the mandate of the Sixth Circuit's decision holding that retroactive application of certain provisions of Michigan's Sex Offenders Registration Act (SORA) violates the Ex Post Facto Clause of the U.S. Constitution. This stay is needed so that Michigan will not be forced to alter its sex-offender registry and enforcement protocols—an extensive and costly undertaking—to create multiple enforcement categories for offenders, based on the date of the underlying offense, before Michigan has had an opportunity to seek review by this Court. The Sixth Circuit denied the State's stay motion despite the State having shown that a petition for certiorari will present a substantial question regarding whether its SORA requirements constitute "punishment"—a question on which the federal courts of appeals and state courts of last resort are split—and having shown that there is good cause for a stay. Absent a stay from this Court, the Sixth Circuit's mandate will be issued and take effect on Monday, November 14, 2016.

JURISDICTION

The Sixth Circuit's order (App. A) denied Michigan's request for a stay on November 7, 2016. The Sixth Circuit held (App. B) that retroactive application to the plaintiffs of the State's 2006 and 2011 SORA amendments violates the Ex Post Facto Clause, and it denied rehearing of that decision on September 15, 2016 (App. C). *Does #1-5* v. *Snyder*, 834 F.3d 696 (6th Cir. 2016), reh'g denied (Sept. 15, 2016). This Court has jurisdiction under Supreme Court Rule 23.2 and 28 U.S.C. § 2101(f), and the Court can issue a stay of the mandate under Supreme Court Rule 23.

STANDARDS FOR GRANTING RELIEF

A stay of a mandate is warranted when a petition for a writ of certiorari will present a substantial question and when there is good cause for a stay. Fed. R. App. P. 41(d)(2)(A).

THIS COURT SHOULD IMMEDIATELY GRANT THE STATE'S MOTION TO STAY THE MANDATE

I. The State of Michigan's petition for a writ of certiorari will raise a substantial question.

Michigan's petition for a writ of certiorari will present the question whether applying certain provisions in Michigan's Sex Offenders Registration Act (SORA) retroactively constitutes "punishment" under the Ex Post Facto Clause of the U.S. Constitution. As relevant here, these provisions, added as amendments to SORA in 2006 and 2011, (1) require offenders to comply with "student safety zones," which generally prohibit offenders from residing, working, or loitering within 1,000 feet from school property, Mich. Comp. Laws § 28.733–35; (2) classify offenders into tiers according to their underlying offenses, § 28.722(r)–(w); (3) require tier-III offenders

to register for life, § 28.725(10)–(12) & § 725a(3); and (4) 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, § 28.725(1) & § 28.725a(3)(c).

The question whether these requirements constitute "punishment" is substantial and likely to be of interest to this Court for two reasons. First, there is a circuit split on the question, as well as a split on this federal question among the state courts of last resort. Second, the Sixth Circuit's decision is in tension with this Court's decision in *Smith* v. *Doe*, 538 U.S. 84 (2003). S. Ct. Rule 10(a) & (c).

A. The federal courts of appeals and state courts of last resort are split on whether SORA requirements like Michigan's constitute "punishment."

Although modern SORA laws, both state and federal, share similar core features, the question whether states may enforce those laws currently depends on which federal circuit the state is in. While every regional federal circuit and a multitude of state courts have upheld basic SORA registration against ex post facto challenges, the state and federal courts have splintered deeply in recent years over whether common requirements that extend beyond basic registration—including residency and more-detailed reporting requirements—are punitive such that they cannot be applied retroactively. The current split in authority means that similar state SORA laws have been treated inconsistently under federal law. Not only that, the Sixth Circuit's reasoning threatens the validity of the federal Sex Offender

Registration and Notification Act (SORNA), which imposes requirements similar to Michigan's and other states' laws.

This widespread disagreement over common features of modern state and federal SORA laws requires this Court's review.

1. Courts are split on reporting requirements.

One aspect of modern SORA laws over which the courts are split is the extent and frequency of reporting requirements. In Michigan, offenders who have been categorized as "tier III" offenders based on their crimes of conviction must report to law enforcement in person every 90 days, and 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. Mich. Comp. Laws § 28.725(1) & § 28.725a(3)(c). The federal SORNA imposes similar requirements. 42 U.S.C. § 16913(c) (requiring in-person reporting within "3 business days after each change of name, residence, employment, or student status") & § 16916 (requiring quarterly in-person reporting for tier III offenders).

Multiple courts have upheld these reporting requirements, including those that are frequent and in-person, against challenges that they violate the Ex Post Facto Clause because they are punitive. Specifically, six circuits have rejected ex post facto challenges by holding that reporting requirements are not punitive. E.g., *Shaw* v. *Patton*, 823 F.3d 556, 571–72 (10th Cir. 2016) (Oklahoma SORA) (upholding *weekly* in-person reporting); *Doe* v. *Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014) (New York SORA) (upholding triennial in-person reporting for level-one

offenders); *Litmon* v. *Harris*, 768 F.3d 1237, 1243 (9th Cir. 2014) (California SORA) (upholding in-person quarterly reporting for offenders adjudicated to be sexually violent predators); *United States* v. *Parks*, 698 F.3d 1, 5–6 (1st Cir. 2012) (federal SORNA) (upholding quarterly in-person reporting); *ACLU of Nevada* v. *Masto*, 670 F.3d 1046, 1050, 1056–57 (9th Cir. 2012) (Nevada SORA) (upholding quarterly in-person reporting); *United States* v. *Leach*, 639 F.3d 769, 773 (7th Cir. 2011) (federal SORNA) (upholding requirements, which included in-person reporting within 3 days of change in residence or employment, as "regulatory" under *Smith*); *United States* v. *WBH*, 664 F.3d 848, 852, 855, 857–58 (11th Cir. 2011) (federal SORNA) (upholding quarterly in-person reporting and within 3 days of changing name, residence, employment, or student status); *Hatton* v. *Bonner*, 356 F.3d 955, 964 (9th Cir. 2003) (California SORA) (upholding in-person reporting for all offenders); *Doe* v. *Pataki*, 120 F.3d 1263, 1267, 1285 (2d Cir. 1997) (New York SORA) (upholding quarterly in-person reporting for offenders deemed sexually violent predators).

In addition to these six circuits, an ex post facto claim would also likely fail in the Fourth Circuit, because that circuit has similarly concluded, albeit while analyzing the Eighth Amendment, that a reporting requirement is not punitive. *United States* v. *Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013) (federal SORNA) (upholding, against 8th Amendment challenge, in-person reporting as non-punitive; while court did not specify frequency, SORNA provided for up to quarterly in-person reporting). It would likely recognize, as other courts have, that "[t]he common inquiry across the Court's Eighth Amendment, ex post facto, and double jeopardy jurisprudence is determining whether the government's sanction is punitive in

nature and intended to serve as punishment." *Hinds* v. *Lynch*, 790 F.3d 259, 264 n.5 (1st Cir. 2015); see also *State* v. *Petersen-Beard*, 377 P.3d 1127, 1130 (Kan. 2016) ("[T]here exists no analytical distinction between or among the different constitutional contexts in which the question of punishment versus a civil regulatory scheme can arise.") (citing supporting cases).

Not only does the Sixth Circuit's decision conflict with these other circuits, its decision regarding reporting requirements also conflicts directly with the Wyoming Supreme Court's rejection of an ex post facto challenge. *Kammerer* v. *State*, 322 P.3d 827, 836 (Wyo. 2014) (upholding quarterly in-person reporting and within 3 days of change in residence, vehicle, or employment status). This case also would very likely have come out differently in Nevada, as that state's supreme court has held, when analyzing whether a guilty plea was knowing and voluntary, that Nevada's SORA requirements—which include in-person reporting in any community in which the offender is present for more than 48 hours—are not punitive. See *Nollette* v. *State*, 46 P.3d 87, 90 (Nev. 2002).

The Sixth Circuit's decision here, *Does #1-5* v. *Snyder*, 834 F.3d 696, 703, 705 (6th Cir. 2016) (highlighting Michigan's "time-consuming and cumbersome in-person reporting" requirements), places it in conflict with all six of the federal circuits to consider this issue. It thus joins a minority that consists of one state supreme court (Maine's) that has held that modern SORA laws are punitive in violation of the federal Ex Post Facto Clause based in part on the extent and frequency of reporting requirements. *State* v. *Letalien*, 985 A.2d 4, 12, 18, 24–25

(Me. 2009) (quarterly in-person reporting and within 5 days of receipt of verification request).

2. Courts are split on school safety zones.

Federal and state courts are also split on whether "student safety zones" are a punitive restraint. Such zones generally limit where an offender may live and work. In Michigan, for example, offenders may not reside, work, or loiter within 1,000 feet of school property. Mich. Comp. Laws § 28.733–35.

Two circuits and one state supreme court have rejected ex post facto challenges and upheld as non-punitive student safety zones similar to Michigan's—or even twice as large. E.g., *Shaw*, 823 F.3d at 570–71 (10th Cir.) (Oklahoma residency restriction of 2,000 feet from school, playground, park, or child care center); *Weems* v. *Little Rock Police Dep't*, 453 F.3d 1010, 1013–14, 1017 (8th Cir. 2006) (Arkansas residency restriction of 2,000 feet from school or daycare facilities for "high-risk" offenders); *Doe* v. *Miller*, 405 F.3d 700, 719–23 (8th Cir. 2005) (Iowa residency restriction of 2,000 feet from school or child care facility); *State* v. *Seering*, 701 N.W.2d 655, 667–68 (Iowa 2005) (Iowa residency restriction of 2,000 feet from school or daycare center). And the California Supreme Court likely would also have rejected this type of ex post facto challenge, as it has already concluded, albeit in a Sixth Amendment case, that a similar residency restriction was not punitive. *People* v. *Mosley*, 344 P.3d 788, 790, 799, 802 (Cal. 2015) (California residency restriction of 2,000 feet of school or "park where children regularly gather").

The Sixth Circuit joined the minority side of this circuit split too. *Does #1-5*, 834 F.3d at 697, 701–03, 705 (likening student safety zones to banishment). Like

the Kentucky Supreme Court, it held that SORA laws are punitive based in part on school safety zones. *Commonwealth* v. *Baker*, 295 S.W.3d 437, 440, 444–45 (Ky. 2009). Cf. *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (violates due process to apply school safety zones to all offenders without individualized risk determinations).

3. Courts are split on lifetime registration.

Lifetime registration is another issue that has divided the courts. In Michigan, tier-III offenders must register for life, Mich. Comp. Laws § 28.725(10)–(12) & § 725a(3). Two circuits and three state supreme courts have, when confronted with claims based on the federal Ex Post Facto Clause, upheld SORA laws that require lifetime registration by holding that they are non-punitive. E.g., *Parks*, 698 F.3d at 5 (1st Cir.); *WBH*, 664 F.3d at 855, 852 (11th Cir.); *State* v. *Boche*, 885 N.W.2d 523, 531–32 (Neb. 2016); *State* v. *Petersen-Beard*, 377 P.3d 1127, 1129 (Kan. 2016); *RW* v. *Sanders*, 168 S.W.3d 65, 67, 70 (Mo. 2005); see also *Commonwealth* v. *Leidig*, 956 A.2d 399, 401, 404–06 (Pa. 2008) (holding lifetime registration non-punitive in context of whether plea was knowing and voluntary). In fact, the Sixth Circuit itself had previously reached that same conclusion. *Doe* v. *Bredesen*, 507 F.3d 998, 1000 (6th Cir. 2007).

On the other side of this split, the Sixth Circuit's decision here, *Does #1-5*, 834 F.3d at 703, 705, and at least one state supreme court (Maine's) have held that registration and reporting requirements are punitive based in part on their duration. *Letalien*, 985 A.2d at 18, 22–26 (Me.).

4. Courts are split on classification of offenders without individualized risk determinations.

The courts are also split on whether it is punitive to categorize offenders based on their offense of conviction without an individualized determination of dangerousness. Michigan, for example, categorizes offenders into "tiers" based on their crimes of conviction and tailors the duration and frequency of reporting requirements to those tiers. Mich. Comp. Laws § 28.725(1) & § 28.725a(3)(c). The federal SORNA likewise creates classes of offenders based on offense of conviction. 42 U.S.C. §§ 16911(1)–(4) & 16916. This means that the split in authority over such classification threatens inconsistent outcomes not only for state SORA laws, but also for the federal registry.

Five federal circuits have upheld classification of offenders based on offense in the absence of an individualized determination of dangerousness. E.g., *Shaw*, 823 F.3d at 571–72 (10th Cir.); *Masto*, 670 F.3d at 1057 (9th Cir.); *WBH*, 664 F.3d at 859 (11th Cir.); *Miller*, 405 F.3d at 721 (8th Cir.); *Moore* v. *Avoyelles Corr. Ctr.*, 253 F.3d 870, 872–73 (5th Cir. 2001) (Louisiana SORA).

On the other side of this split, the Sixth Circuit joins the Kentucky Supreme Court in holding that modern SORA laws are punitive based in part on the laws' categorization of offenders without individualized risk determinations. E.g., *Does #1-5*, 834 F.3d at 702–03, 705; *Baker*, 295 S.W.3d at 444–46 (Ky.); see also *Letalien*, 985 A.2d at 15, 23–24 (Me.) (left "uncertain" whether lack of individualized risk determination renders SORA excessive).

Given the wide disagreement across jurisdictions over these basic features of modern SORA laws, this Court's guidance is needed.

B. The Sixth Circuit's decision conflicts in principle with this Court's decision in *Smith* v. *Doe*, 538 U.S. 84 (2003).

The Sixth Circuit's decision warrants this Court's review for a second reason: it fails to adhere to this Court's decision in *Smith* v. *Doe*, 538 U.S. 84 (2003).

In *Smith*, this Court rejected the argument that reporting requirements—even of lifetime duration—are punitive when they are based on the crime of conviction and not an individualized assessment of dangerousness. *Id.* at 90, 102–04. This Court held that categorization based on offense is "reasonably related to the danger of recidivism," *id.* at 103, and that lack of individualized assessment does not render regulatory burdens punitive, *id.* at 104. This Court has also squarely held that due process does not require individualized determinations of dangerousness before an offender is included in a sex-offender registry. *Connecticut Dep't of Public Safety* v. *Doe*, 538 U.S. 1, 6–8 (2003).

In contrast, the Sixth Circuit reasoned that classification of offenders according to tiers, without individualized assessment, and publication of such extra-conviction information resembles the traditional punishment of shaming. *Does #1-5*, 834 F.3d at 702–03, 705 ("SORA brands registrants as moral lepers solely on the basis of a prior conviction."). It also, contrary to *Smith*, found fault in the lifetime duration of Michigan's reporting requirements for tier III offenders. *Id.* at 703, 705.

Further, this Court held in *Smith* that widespread public dissemination of truthful information is not punitive, even when the publicity may cause "personal embarrassment" and "social ostracism" for the offender. *Id.* at 98–99. While this Court noted that an offender's conviction is already a matter of public record, it did not suggest that dissemination of *previously non-public* information would

necessarily be punitive; to the contrary, it noted in upholding Alaska's SORA law that "*most*" of the information disseminated by that law was already public. *Id.* (emphasis added). In contrast, the Sixth Circuit concluded that publication of previously non-public youthful-offender information resembles the traditional punishment of shaming. *Does #1-5*, 834 F.3d at 703.

For all these reasons, the State has demonstrated a substantial and important question requiring this Court's resolution.

II. Good cause exists to stay the mandate.

There is also good cause to stay the Court of Appeals' mandate. Fed. R. App. P. 41(d)(2)(A). Before this Court has even had a chance to consider Michigan's petition for certiorari, the Sixth Circuit's decision will require Michigan to change its registry and enforcement protocols to create multiple temporal enforcement categories for offenders—namely, categories for: (1) offenders whose crimes occurred before the 2006 SORA amendments; (2) offenders whose crimes occurred between the 2006 and 2011 amendments; and (3) offenders whose crimes occurred after the 2011 amendments. This undertaking would not only be administratively costly and time-consuming, it would also create complexity and confusion for law enforcement and offenders alike. And if the mandate is not stayed, confusion would persist even if this Court granted certiorari and reversed, because Michigan would *again* have to change its registry and protocols back to the old system.

What is more, the Sixth Circuit's decision leaves the State with virtually no way to enact one uniform registry law applicable to all offenders, short of reverting to the lowest common denominator of the pre-2006 SORA requirements.

In fact, Michigan will be irreparably harmed without a stay of the mandate because the Sixth Circuit's decision prevents the State from effectuating a statutory scheme enacted by representatives of its people. *Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Id.* (quotations omitted).

While the plaintiffs have disputed below that the Court of Appeals' decision requires these broad-scale changes to Michigan's sex offender registry, given that only six named plaintiffs are parties to the suit, they are mistaken. The district court has in its prior orders entered blanket injunctions enjoining enforcement of certain SORA requirements against *all* offenders, not just the six named plaintiffs in this case. *Doe* v. *Snyder*, 101 F. Supp. 3d 672, 713 (E.D. Mich. 2015); *Doe* v. *Snyder*, 101 F. Supp. 3d 722, 730 (E.D. Mich. 2015). The same is likely to happen again on remand, see *Does #1-5*, 834 F.3d at 706 (remanding "for entry of judgment consistent with this opinion"), absent a stay of the mandate, which would also stay the jurisdiction of the district court.

In sum, it is in the interest of all to stay the issuance of the Court of Appeals' mandate until the appellate process has fully concluded. Good cause exists for a stay. Fed. R. App. P. 41(d)(2)(A).

CONCLUSION

The State has met its burden under Supreme Court Rule 23 and Federal Rule of Appellate Procedure 41(d)(2)(A) of demonstrating that (1) a petition for a writ of certiorari will present a substantial question, and (2) good cause exists, such that a

stay of the mandate of the Sixth Circuit Court of Appeals is appropriate and warranted. Accordingly, the State respectfully asks for immediate consideration of this motion and an order staying the mandate. Michigan does not ask this Court to pre-judge the merits, but it does seek an opportunity to present its petition for certiorari without being forced to make costly, time-consuming, and complex changes to its sex-offender registry and enforcement protocols that may prove unnecessary should this Court decide to grant review.

Respectfully submitted,

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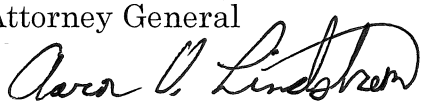

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