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 Circuit Court
No 12-062665-FH

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL DANA NESSEL

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STATEMENT OF QUESTIONS PRESENTED

1. Do the extensive obligations and requirements brought about by the 2006 and 2011 amendments to Michigan's Sex Offender Registry Act (SORA), MCL 28.721 *et seq*, constitute punishment?

   Trial court answered: No

   Court of Appeals answered: No

   Plaintiff-Appellee answers: No

   Defendant-Appellant answers: Yes

   Amicus Curiae answers: Yes

2. If so, does requiring a sex offender to register based on a conviction or plea entered before the 2006 and 2011 amendments to SORA were enacted violate the Ex Post Facto Clause of the federal and state constitutions?

   Trial court answered: No

   Court of Appeals answered: No

   Plaintiff-Appellee answers: No

   Defendant-Appellant answers: Yes

   Amicus Curiae answers: Yes

INTEREST OF AMICUS CURIAE

The Attorney General is the constitutionally established officer who serves as the chief law enforcement officer for the State. The Attorney General is charged with defending not only state laws but also the state constitution. The Legislature has also authorized the Attorney General to participate in any action in any state court when, in her own judgment, she deems it necessary to participate to protect any right or interest of the State or the People of the State. MCL 14.28; MCL 14.101.

INTRODUCTION

The tide is changing. For years, federal and state courts consistently held that sex offender registration and notification requirements were not punishments and therefore did not violate the Ex Post Facto Clause. Their conclusions relied heavily on the U.S. Supreme Court's analysis in *Smith v Doe*, 538 US 84 (2003), and its conclusion that Alaska's Sex Offender Registration Act was nonpunitive. But more recently, both state and federal courts have been rethinking the issue in light of the significant additional burdens that have been added to these statutes since *Smith* upheld a "first generation" registration statute. State Supreme Courts in Alaska, California, Indiana, Kentucky, Maine, Maryland, Ohio, Oklahoma, and Pennsylvania have concluded that their registries constitute punishment and their retroactive application an ex post facto violation—either by distinguishing *Smith* or by relying on their state Ex Post Facto Clause. In 2015 the Sixth Circuit reviewed

Michigan's Sex Offender Registry Act (SORA), determining that SORA was "something altogether different from and more troubling than Alaska's first-generation registry law" and holding that its 2006 and 2011 amendments were punishment and that their retroactive application violated the federal Ex Post Facto Clause. *Does #1–5 v Snyder*, 834 F3d 696, 703, 705 (CA 6, 2016), reh den (September 15, 2016), cert den *Snyder v John Does* #1–5, 138 S Ct 55 (2017). The Sixth Circuit cautioned that *Smith* was not "a blank check to states to do whatever they please in this arena." *Id*. at 705.

Smith's rationale, which was premised on the limited nature of Alaska's registration scheme, seems outdated with respect to modern registration schemes. It surely is with respect to Michigan's sex offender registry, which has changed greatly since its initial character as a tool to help law enforcement keep Michigan citizens safe from dangerous sexual predators and far exceeds the baseline federal requirements for such registries. It has become a bloated statute whose recent amendments are out of touch with the practical ramifications of its geographic restrictions and in-person reporting requirements, with society's evolving relationship with the Internet, with the needs of law enforcement, and with a more balanced and researched understanding of recidivism.

There are dangerous sexual predators, to be sure, and the public needs to be protected from them. But the current SORA it is not the way to achieve that goal because it places people on the registry without an individualized assessment of their risk to public safety and with little differentiation between a violent rapist or

reoffender and an individual who has committed a single, nonaggravated offense. The 2006 and 2011 amendments are punishment, and their retroactive application violates both federal and state Ex Post Facto Clauses.

STATEMENT OF FACTS AND PROCEEDINGS

This case arises out of Paul Betts's 1993 guilty plea to criminal sexual conduct in the second degree and the retroactive application of SORA to his conviction. But the issue of whether SORA is punishment affects many other citizens—certainly other registrants, but also their families, employers, and the community members who are lulled into a false sense of security, believing that the registry is keeping them safe from the most dangerous sexual predators when research shows indiscriminate registration is ineffective or even counterproductive.

The parties in this case have briefed in detail the progression of amendments to SORA, and the Attorney General need not repeat that progression. Nor does she opine at this time on whether this Court should take the application for leave in this case, although she notes that our state courts are continuing to retroactively apply SORA even after the Sixth Circuit's 2016 opinion. As to severability, she comments on the issue only to say that severability of the 2011 amendments is a complex issue because they are fairly embedded in the SORA. If this Court is inclined to strike down the 2006 and 2011 amendments to SORA, supplemental briefing on the severability issue is advisable.

ARGUMENT

I. The extensive obligations and requirements imposed by SORA's 2006 and 2011 amendments constitute punishment.

Even where sex offender registry laws are aimed at protecting the community, a critical inquiry is whether, notwithstanding the deference afforded legislative enactments, *Lambert v California*, 355 US 225, 228 (1957), a registration and notification scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil," *Kansas v Hendricks*, 521 US 346, 361 (1997) (internal quotations omitted). See also *People v Earl*, 495 Mich 33, 43 (2014).

In determining if the effects of a statute are punitive, courts generally consider the non-exhaustive guideposts set forth in *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963)—referred to as the "intent-effects" test. These guideposts include whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of *scienter*; whether its operation will promote the traditional aims of punishment—retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned. *Id.*

Applying the intent-effects framework, the Sixth Circuit held that Michigan's scheme "require[es] much more from registrants that did the statute in *Smith*" and is punitive in nature. *Does #1–5*, 834 F3d at 703. Indeed, unlike Michigan's SORA,

there was no evidence in *Smith* that registrants were restricted in where they wished to live or work. 538 US at 100–101.

The U.S. Solicitor General's office, when giving its views on the then-pending petition for certiorari in the *Does #1–5* case, similarly concluded that Michigan's sex-offender-registration scheme had "a variety of features that go beyond the baseline requirements set forth in federal law," and that it "differs from those of most other States." *Snyder v John Does*, #1–5 *et al* (*Does I*), No 16-768, Brief of United States as Amicus Curie, 2017 WL 2929534 at 9 (July 7, 2017). And like the Sixth Circuit, the U.S. Solicitor General opined that the Sixth Circuit's opinion did not conflict with *Smith*'s holding. *Id*. at 17.

A number of state supreme courts have applied the intents-effect test and concluded that their registries constitute punishment and their retroactive application violates the Ex Post Facto Clause. See *State v Williams*, 952 NE2d 1108, 1112–14 (Ohio, 2011); *In re C.P.*, 967 NE2d 729, 733–750 (Ohio, 2012); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *Doe v State*, 111 A3d 1077, 1100–1102 (NH, 2015); *In re Taylor*, 343 P3d 867, 869 (Cal, 2015); *Commonwealth v Baker,* 295 SW3d 437, 447 (Ky, 2009); *State v Pollard*, 908 NE2d 1145, 1147–1148 (Ind, 2009); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004, 1029–1030 (Okla, 2013); *Commonwealth v Muniz*, 164 A3d 1189, 1213 (Pa, 2017), cert den *Pennsylvania v Muniz*, 138 S Ct 925 (2018); *Doe v Dep't of Public Safety & Corr Servs*, 62 A3d 123, 124, 143 (Md, 2013); *State v Letalien*, 985 A2d 4, 26 (ME, 2009); *Doe v State*, 189 P3d 999, 1017 (Alaska, 2008). See also *State v Petersen-Beard*, 377

P3d 1127, 1145–49 (Kan, 2016) (Johnson, J., dissenting) (concluding that Kansas' sex offender registry is punitive); *Riley v NJ State Parole Bd*, 32 A3d 190, 244 (NJ Super Ct App Div, 2011) (holding that the affirmative disabilities and restrains imposed by New Jersey's sex offender monitoring act were sufficient, by themselves, to hold that their retroactive application violated the Ex Post Facto Clause, with other factors providing additional support); *Commonwealth v Cory*, 911 NE2d 187, 197 (Mass, 2009) (concluding that Massachusetts' sex offender monitoring statute is punitive in effect and its application to the defendant "impermissible under ex post facto provisions of the United States and Massachusetts Constitutions"); *State v Strickland*, 2009-Ohio-5242, No 2008-L-034, 2009 WL 3255305, at 9 (Oct. 9, 2009) (holding that Ohio's sex offender classification system is "clearly punitive in nature"); *United States v Juvenile Male*, 590 F3d 924, 932 (CA 9, 2009), vacated as moot, 131 S Ct 2860 (2011) (concluding that SORNA's juvenile registration and reporting requirements were different both in nature and degree than Alaska's statute to adult offenders).

AG Nessel has organized her brief by type of effect, rather than by the *Mendoza-Martinez* guideposts, as the parties have already briefed these guideposts, there is often crossover among the guideposts, and there are additional factors that should be considered.

This Court should look at the aggregate effects of Michigan's SORA, as the Court did in *Smith*, 538 US at 92, 94, 96–97, 99, 104–105, as the Sixth Circuit did in *Does #1–5 v Snyder*, 834 F3d at 706, and as the United States Solicitor General did

when it filed its amicus in *Does I,* WL 2929534 at 11 n 2. Examining the effects in the aggregate, the registry's 2006 and 2011 amendments constitute punishment. Most importantly, people are placed on the registry without an individualized assessment of their risk to the public and, generally speaking, without a way to lessen their registration period based on their circumstances and rehabilitation. And once on the registry, its burdens are extensive. Its geographic restrictions and in-person reporting requirements make it difficult for registrants to engage in community and family life; the public aspect of the registry has not taken into account society's evolving relationship with the Internet, the registry no longer adequately meets the needs of law enforcement, and its onerous restrictions are not supported by evolving research and best practices related to recidivism, rehabilitation, and community safety.

A. SORA's geographic exclusion zones make it difficult for registrants to work, find housing, or engage in community and family life.

Michigan's SORA places significant restrictions on residency, work, and travel. In upholding Alaska's sex offender registry, *Smith* specifically noted that the record contained no evidence that the State's scheme led to "substantial occupational or housing disadvantages." 538 US at 100.[1] In determining that Michigan's registration scheme is punishment, the Sixth Circuit held, "Most

[1] Justice Stevens argued in his dissent that sex offender registration statutes severely deprived registrants of their liberty, imposing restraints on only particular class. *Smith*, 538 US at 113 (Stevens, J., dissenting).

significant is its regulation of where registrants may live, work, and loiter." *Does* #1–5, 834 F3d at 703. Indeed, SORA's 1,000-foot exclusion zone often banishes registrants by pushing them out of communities for purposes of living, working, and even moving around—all too frequently causing homelessness, transiency, or unemployment.

Registrants are not free to live where they wish or where they can afford to live. Nor are registrants free to live near to their children's school. (As an example of this, the Sixth Circuit in its *Does #1–5* opinion reprinted a map of exclusion zones in the Grand Rapids area that vividly shows the extent to which SORA criminalizes living in vast areas, severely limiting registrants' housing and employment options. *Does #1–5*, 834 F3d at 702.) They are also not free to take their desired job or work in a location convenient to home.[2] Thus, registration can limit employment opportunities or make travel to a job prohibitive. And in today's mobile and global economy, many jobs require on-the-job travel. In many lines of work—manufacturing, construction, sales, handyman services, and delivery are some examples—the registrant's main place of work might be outside of the exclusion zone but the job might nevertheless require the registrant to travel within or through an exclusion zone.[3] Yet, because registrants are barred from "loitering"

[2] There is an exception for individuals who were working within a student safety zone on January 1, 2006, and for situations where a school is relocated or is initially established 1,000 feet or less from the individual's place of employment. MCL 28.734(3)(a), (b).

[3] There is an exception for an individual who "only intermittently or sporadically enters a student safety zone for the purpose of work." MCL 28.734(c). But

within 1,000 feet of a school, they must err on the side of nonattendance, even if refusing to perform necessary travel might cost them advancement or the job itself. Likewise, the exclusion zones may prevent a registrant who wants to open a business from maneuvering for business meetings or sales calls.

Even those with employment in a fixed area can be penalized or "let go" when an employer discovers they are on the registry. The 2011 amendments require posting of employer addresses on the Internet, which is a major disincentive to employers, since they understandably do not want their business locations listed on the sex offender registry. Sometimes the employer finds out about an employee's placement on the registry because law enforcement shows up at the registrant's place of employment to check for SORA compliance.

Problematically, despite their best efforts, registrants may be unaware or unsure of their presence within exclusion zones. The inability to discern what falls within an exclusion zone leaves well-meaning registrants vulnerable to penalties for noncompliance, including fines and imprisonment. MCL 28.734(2)(a), (b); see also *Doe v Snyder*, 101 F Supp 3d 672, 684 (ED MI, 2015) (concluding that SORA "does not provide sufficiently definite guidelines for registrants and law enforcement to determine where to measure the 1,000 feet distance used to determine exclusion zones," and thus, registrants would be unable to reasonably determine the boundaries of the exclusion zones, resulting in "over-policing.") And because

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registrants must determine whether their work is intermittent or sporadic, and must err on the side of caution.

exclusion zones are typically measured "as the crow flies," not as people actually travel between two points, a registrant whose 1,000-foot exclusion zone includes a highway or body of water may be required to travel a far greater distance in order to comply. This effectively extends the zone and may place additional burdens on travel to work or a child's school. Thus, Michigan's large exclusion zone freezes out registrants from many communities and jobs, and subjects them to stiff penalties even for inadvertent noncompliance.

Restrictions on living and "loitering," which often force registrants to live far from central areas and leave them confused about where they can and cannot go, can also prevent registrants from getting the best possible counseling. Counseling individuals with sex offense convictions is recognized as a specialized area of counseling, and research supports group therapy whenever possible. See Michael Hubbard, *Sex offender therapy: A battle on multiple fronts*, Counseling Today (A publication of the American Counseling Association), at p 2, March 31, 2014. But exclusion zones may prevent them from access to appropriate counseling or the group counseling that would reduce recidivism (see infra, pp 33–35) and help them be productive members of society.

It is not just registrants themselves who are affected by these burdens. Their spouses, children, and extended families are affected as well. Limitations on where one can live and work place additional logistical burdens on the entire family, not the least of which is more time driving and less quality time spent together.

Also, the registry's vague definition of "loiter" ("to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors," MCL 28.733(b)) might make a registrant with school-age children hesitant to show up at parent-teacher conferences, attend his own child's football game or choir concert, or accompany her child to a school carnival. That hesitancy is not unfounded. A 2006 Attorney General letter opinion opined that it "would be prohibited by the Act for registered offenders to attend a school play or sporting event" as these activities fall within the definition of "loiter," and that the Act "makes no accommodation for school events that may involve a child of the offender. . ." Letter Opinion of the Attorney General to Representative Jacob W. Hoogendyk, Jr. & Isabella County Prosecuting Attorney Larry J. Burdick, dated July 14, 2006; see also *Doe*, 101 F Supp 3d at 685 (noting that SORA's definition of "loiter" is sufficiently vague as to prevent ordinary people using common sense from being able to determine whether they must refrain from certain conduct, and that "it remains ambiguous whether a registrant may attend a school movie night where he intends only to watch the screen, or a parent-teacher conference where students may be present"). Even a registrant who rents or purchases a home outside of the school safety zone may be reluctant to attend family gatherings, visit an elderly parent in a nursing or medical facility, or attend therapy sessions located within the zone—all limitations that burden family ties and affect the stability of family structures.

The Kentucky Supreme Court noted similar "significant collateral consequences" with its registry, such as "where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender." *Baker*, 295 SW3d at 445. Similarly, the Pennsylvania Supreme Court agreed that its state registry imposed extraordinary secondary disabilities in finding and keeping housing, employment, and schooling. *Muniz*, 164 A3d at 1210.

While geographic exclusions impose enormous burdens on registrants, research casts significant doubt on countervailing public safety benefits, demonstrating that such restrictions may not keep the community safe. In a study of sex offenders released from Minnesota prisons, the Minnesota Department of Corrections concluded that residency bans would not have prevented re-offenses against children. *Vasquez v Foxx*, USSC No 18-386, Brief of Eighteen Scholars as *Amicus Curiae* in Support of Petitioners, pp 7– 11, citing Minnesota Dep't of Corrections, Residential, Proximity & Sex Offense Recidivism in Minnesota (April 2007), available at https://mn.gov/doc/data-publications/research/publications /?id=1089-272960 (last visited 2/4/2019). That study found *not one case* in which a residency ban would have prevented contact with a juvenile victim, noting, among other things, that the victims and perpetrators were often biologically related or made contact with the victim through another adult; that in a number of cases the offender first contacted the victim too far from the victim's residence for a ban to

matter; and that none of the remaining cases involved a school, park, daycare, or other place where children congregated. *Vasquez* amicus brief at 9–11, discussing citing Minnesota Report at 23–24. A similar study by Colorado's Sex Offender Management Board found " 'no research indicating that residence restrictions re correlated with reduced recidivism or increased community safety," and concluded that "limiting where a sex offender sleeps at night . . . seems ineffective.' " *Id*. at 11, citing Colorado Sex Offender Mgmt Bd, White Paper on the Use of Residence Restrictions As a Sex Offender Management Strategy 4–5 (2009), available at https://www.scribd.com/document/340731677/Colorado-Sex-Offender-Management-Board-2009-Study (last visited 1/30/2019). Both studies noted that residency requirements can be counterproductive because barriers to stable housing undermine efforts to reintegrate offenders into the community, making recidivism more likely. *Vasquez* amicus brief at 12.

Likewise, an analysis of crime rates in Washington D.C. suggested that " 'knowing where a sex offender lives does not reveal much about where sex crimes, or other crimes will take place.' " Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 NYU Rev L & Soc Change 727, 751 (2013), citing Amanda Y. Agan, *Sex Offender Registries*: *Fear Without Function?*, 54 J L & Econ 207, 234 (2011). Other studies have similarly shown that there is "no relationship between sex offending and residential proximity to locations where children congregate." *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 751 (citing studies). Accord Alex Duncan, *Calling a*

Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post-Starkey, 67 Okla L Rev 323, 351 (Winter 2015), citing Cassie Dallas, Comment*, Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 Tex Tech L Rev 1235, 1268–1270 (2009) & Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws, in Sex Offender Laws: Failed Policies, New Directions* 64 (Richard Wright ed, 2009) (citing various studies concluding that residency restrictions may be counterproductive).

In short, SORA's geographic exclusion zones are affirmative disabilities and restraints, are excessive in relation to the expressed purpose of public health and safety, can lead to banishment of both the registrant and his or her family, and are contrary to the desired goals of rehabilitation, stability, and re-integration into community life.

B. SORA's in-person reporting requirements are comparable to parole or probation and are excessive in relation to any non-punitive purpose.

Michigan's SORA requires that every registrant appear in person within three business days when they change address or employment, enroll or disenroll in higher education, change their name, reside at an address other than their registered address for more than seven days, change their email address, or purchase or begin or cease regular operation of a vehicle. MCL 28.725(1)(a)–(g). Failure to immediately report in person for the many—often minor—life changes could result in police investigation and possible felony conviction and imprisonment.

Juveniles are subject to the same penalties as adults for failing to follow report in-person reporting requirements—despite their emotional and developmental immaturity. See *Belloti v Baird*, 443 US 622, 635 (1979) (noting children's "vulnerability" and their needs for concern and sympathy).

These in-person reporting requirement are burdensome in many ways. Because registrants must report travel in person in advance, they may not be able to accompany a child or relative to an out-of-town event or medical appointment. And if they travel out of town and rent a car, they would have to return home to report that vehicle. The vehicle registration requirement causes further confusion if registrants have to occasionally drive a company vehicle or temporarily use a family member's car as an emergency vehicle. And restrictions on travel and in-person notification requirements can burden or inhibit more extensive travel that is necessary in today's global economy.

SORA's requirement that registrants must report within three days whenever they establish electronic email or instant message addresses may prevent registrants from performing simple, routine tasks such as making online purchases, submitting tax payments, or signing up for work- or school-related advisory, support, or chat groups. It is no wonder the Oklahoma Supreme Court likened its similar in-person reporting requirements to the post-incarceration supervision of parolees, *Starkey*, 305 P3d at 1022–1023, or why the Sixth Circuit in *Does #1–5* held that SORA resembles the punishment of parole/probation, because registrants are subject to numerous restrictions on where they can live and work; like parolees,

they must report in person rather than by phone or mail; and they can be punishment by imprisonment for failing to comply, "not unlike a revocation of parole." 834 F3d at 703. Accord *Smith*, 538 US at 111 (Stevens J., dissenting).

In a similar vein, Maine's Supreme Court held that the provisions of its registry, "which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.' " *Letalien*, 985 A2d at 18 (internal quotation omitted).

The registry's in-person reporting requirements are affirmative disabilities, and restraints, are comparable to the duties imposed on other convicted criminals while they are under supervised release or on parole, and are excessive in relation to the expressed purpose of public health and safety.

C. The evolving role of the Internet in society has made amendments to the SORA more burdensome for registrants and their families.

When the U.S. Supreme Court concluded in *Smith* in 2003 that Alaska's registry was not punishment, it also concluded that the registry was not akin to face-to-face public shaming. 538 at 98, 101. The Court's reasoning was premised on its understanding of the Internet as it then existed. Registration, the *Smith* majority said, is "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id.* at 99.

Whether the Justices understood the impact the Internet revolution was already having in 2003 is questionable. A dissenting justice of the Kansas Supreme Court queried whether a court more technologically savvy than the *Smith* Court might have viewed Internet notification differently, and noted that younger justices might be more attuned to the digital age. *Petersen-Beard*, 377 P3d at 1144 (Johnson, J., dissenting). In what appears to have been both a recognition of the Internet's significance in 2003 and prescience about the future explosion of the Internet, Justice Ginsburg wrote in her dissent in *Smith* that public labels such as registered sex offender "call[ ] to mind shaming punishments once used to mark an offender as someone to be shunned." *Id.* at 115–116 (Ginsburg, J., dissenting); accord *id.* at 109 (Souter, J., concurring) (noting that Alaska's widespread dissemination of offenders' names, photographs, addresses, and criminal history serves to "humiliate and ostracize the convicts") and *id.* at 112 (Stevens, J., dissenting in No 01-729 and concurring in judgment in No 01-1231) (noting that widespread public access to "personal and constantly updated information has a severe stigmatizing effect.") (citing examples of threats, assaults, loss of housing, and loss of jobs).

Regardless of whether the Justices correctly understood the Internet in 2003, the landscape has changed dramatically in the past 15 years. Computers are a much more integral part of daily life than they were in 2003. Too, smartphones, a class of mobile phones that facilitate wider internet functionality, are commonplace.

Through this evolving technology, the Internet now reaches into every nook and cranny of American life, shaping human behavior.

A recent U.S. Supreme Court case, *Packingham v North Carolina*, is instructive in demonstrating how far the Court has evolved in its understanding of the role of the Internet. 137 S Ct 1730 (2017). There, the Court characterized social networking sites such as Facebook, LinkedIn and Twitter as "commonplace." *Id.* at 1736. And it acknowledged that the Internet is, for many, "the principle source[ ] for knowing current events, checking ads for employment, speaking and *listening in the modern public square*, and otherwise exploring the vast realms of human thought and knowledge." *Id.* at 1737, emphasis added.

The Court also noted in *Packingham* that "[s]even in ten American adults use at least one Internet social networking service" *Id.* at 1735. Indeed, Justice Kennedy, writing for the Court, described the Cyber Age as "a revolution of historic proportions," the dimensions of which "we cannot appreciate yet," noting that it has "vast potential to alter how we think, express ourselves, and define who we want to be." *Id.* at 1736. A person with an Internet connection can, Justice Kennedy said, "become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 1737, citing *Reno v ACLU*, 521 US 844, 870 (1997).

Relevant to the applicability of *Smith*, Justice Kennedy described "[t]he forces and directions of the Internet" as "so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Id.* Indeed, although the issue was not before the Court, Justice

Kennedy acknowledged in *Packingham* that the fact that the law at issue imposed severe restrictions on persons who had already served their sentence and were no longer subject to the supervision of the criminal justice system, was a "troubling fact." 127 S Ct at 1737.

In *Riley v California,* a majority of the U.S. Supreme Court noted that ordinary citizens with smartphones can easily access vast amounts of data and that "a cell phone [can be] used to access data located elsewhere, at the tap of a screen." 134 S Ct 2473, 2491 (2014). A dissenting justice of the Kansas Supreme Court similarly noted that the data that can be accessed by a smartphone "includes push notifications of sex offender registries and indiscriminate sharing of social media" and that "ubiquitous tweeting and other social media have changed the landscape of information sharing." *Petersen-Beard*, 377 P3d at 1144–45 (Johnson, J., dissenting) (noting also that Twitter did not exist until 3 years after *Smith* was decided). See also *Detroit Free Press v United States Dep't of Justice*, 829 F3d 478, 482 (CA 6, 2016) (noting that "modern technology only heightens the consequences of disclosure" of criminal record information and that "in today's society the computer can accumulate and store information that would otherwise have surely been forgotten") (internal citation omitted).

This dramatic growth in the Internet and the dissemination of its information has several consequences for a registrant. First, the registry's reach is now widespread in the registrant's community. And that widespread message is that all sex offenders are dangerous and should be shunned ("not in our town").

Second, registrants are no longer simply shamed in the public square of one's own community; they are shamed in the eyes of their county, their state, their nation—and in our global economy, the world.

In the midst of these rapid developments, the context of the registry is hardly neutral and strictly factual. The inaccurate message is that *all* registrants are dangerous—because they have been singled out from other types of offenders. Indeed, by including individuals on a list of registered sex offenders, the registry "does more than merely disseminate information." *Doe*, 111 A3d at 1097. As the New Hampshire Supreme Court observed, "If the registry were truly just about making criminal records more easily available to the public, then all such records would be available. Instead, only certain offenders are listed on the website." *Id.* And as Justice Souter stated in his concurrence in *Smith*, "Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm." 538 US at 109 (Souter, J., concurring).

In Michigan, the message that all registrants are dangerous and that they somehow have immutable character defects and compulsions, has been fueled by a tiered system, a part of the 2011 amendments. While the tiers might have been a step in the right direction in terms of safety had they actually classified registrants based on dangerousness to the community, they are devoid of individualized risk assessment, corresponding only to the type of conviction. So registrants are subject

to humiliation and ostracization without assessment of their dangerousness to the community.

Accordingly, the registry is no longer—if it ever was—similar to accessing public records, as the Supreme Court characterized it in *Smith*. 538 US at 99. Now, with the ease of search engines, smartphones, and Michigan's 2006 amendment that allows subscribing members of the public to receive electronic notification when a person registers or moves into a particular zip code (Mich Pub Act 46 (2006)), shaming can take place with little effort. See *Doe*, 111 A3d at 1097 (noting that Internet access "makes the information readily and instantly available, which is not often the case for other public information and records"). Also, this expansive audience has ready access to a wide variety information—including the registrant's address, vehicle description and license plate number, physical descriptions, and current photograph—that they would not otherwise be able to access, even in other public records. See *Muniz*, 164 A3d at 1215–1216 (noting that the information in its registry went "beyond otherwise publicly accessible conviction data" by including photograph, physical description, vehicle license plate number, and description of vehicles).

Other courts have echoed the sentiment that registries are akin to shaming. The Sixth Circuit concluded that Michigan's SORA "resemble[s] traditional shaming punishments," "brand[ing] registrants as moral lepers solely on the basis of a prior conviction." *Does #1–5*, 834 F3d at 702, 705. The New Hampshire Supreme Court likewise stated, "[I]n many ways the internet is our town square";

"[p]lacing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame and shun." *Doe*, 111 A3d at 1097. A Pennsylvania Supreme Court Justice noted that "[y]esterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent." *Commonwealth v Perez*, 97 A3d 747, 765–66 (Pa, 2014) (Donahue, J., concurring).

Similarly, Maryland's Court of Appeals recognized that "[b]eing labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism." *Young v State*, 806 A2d 233, 249 (Md, 2002). Accord *Dep't of Pub Safety & Corr Serv*, 62 A3d at 140 (holding that dissemination of personal information via the internet is "tantamount to the historical punishment of shaming."); *Doe*, 189 P3d at 1012 (footnotes omitted); *Wallace*, 905 NE2d at 380. See also *Petersen-Beard*, 377 P3d at 1145 (Johnson J., dissenting) (stating that "despite the spin the majority would put on it, today's dissemination of sex offender registry information does resemble traditional forms of punishment."); *Millard v Rankin*, 265 F Supp 3d 1211, 1226 (D Colo, 2017) (stating that "Justice Kennedy's words [in *Smith*] ring hollow that the state's website does not provide the public with means to shame the offender," and noting that the Justices "did not foresee the development of private, commercial websites exploiting the information made available to them," "the opportunities for 'investigative journalism,' " or "the ubiquitous influence of social media.")

The negative effect of shaming is not limited to the registrants themselves. Sadly, the families of registrants also "face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public"—regardless of whether the offender or his or her family is a threat to public safety. *Millard*, 265 F Supp 3d at 1222–1223.

Registration also jeopardizes sex offenders' support systems. They are often released back into society needing to enter or re-enter the work force or rent an apartment or a home, only to face a reluctant employer or landlord. And they can be subject to ostracization and bullying.

This lack of peer and community support is particularly detrimental for juveniles. "Otherwise supportive networks, such as schools, neighborhoods, and workplaces that 'can and often help a juvenile's rehabilitation and socialization' are instead transformed into 'hostile environments' that further ostracize the juvenile offender and enhance the likelihood of recidivism." Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 VA J Soc Pol'y & L 167, 192 (2014), citing Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 Dev Mental Health L 34, 51 (2008).

Juveniles face even greater challenges than lack of socialization. Their " 'developmental stage makes them highly susceptible to peer influence and judgment.' " *Branded for Life,* 21 VA J Soc Pol'y & L at 191, quoting Elizabeth S. Scott & Lawrence Steinberg, *Blaming Youth*, 81 Tex L Rev 799, 813–14 (2003). Too,

difficulties with employment are often enhanced for juveniles, who often have not yet developed job skills and have no experience to fall back on. And renting an apartment might be doubly difficult if a landlord discovers the juvenile's registration status. (Children of registrants can face these same challenges).

Some juveniles must bear this ostracization for life—even if they do not pose a danger to society. Consider a youth between the ages of 17 and 24 assigned to Michigan's youthful trainee program who has had his or her conviction erased yet must report for life because his underlying offense is classified as a tier III offender. Consider also a young man in his early 20's who pleads guilty to CSC 4 even though he maintains that he had sex with his girlfriend *after* she turned 16 years old, yet must now register for life. These individuals do not pose a serious danger to the health and safety of Michigan citizens. But because their particular offenses and the ages allegedly involved placed them in tier III—with no individualized risk assessment—they will forever be hampered from fully participating in their community.

It is estimated that, on average, between 10% and 20% of a state's sex offender registry are children who have committed sex offenses. Catherine L. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 Sw L Rev 1, 13 (2017). These juveniles can end up on the registry for acts they do not truly understand, misguided pranks, sexual exploration (which is common

among children and adolescents),[4] or ill-considered decisions such as sexting (which is epidemic among teens now). They will be subject to the registry's life-changing burdens even though they do not necessarily pose a danger to the public. True, juveniles under the age of 14 years old at the time of the offense are no longer required to register. And Michigan does have a "Romeo & Juliet" exception, allowing some youthful sex offenders to be exempt from registration if they were involved in a consensual sexual act with a minor.[5] But juveniles age 14 and older will end up as lifetime registrants if they are tier III offenders, with no way to shorten the term, regardless of their circumstances or rehabilitation.

For both juveniles and adults, rehabilitation can be hampered by the shaming aspect of the public registry. Registrants often carry so much shame that fear of being judged can either keep them from engaging in treatment or create a setback. *Sex offender therapy: A battle on multiple fronts*, Counseling Today (A publication of the American Counseling Association), March 31, 2014. Particularly

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[4] One scholar stated that "sexual experimentation" is not indicia of pedophilia, a diagnosis that is not recognized in younger teens by the Diagnostic and Statistical Manual of Mental Disorders, but [is] more often a combination of hormones and opportunity.' " Parker, *Branded for Life*, 21 VA J Soc Pol'y & L at 186 , citing Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is there a Better Way to Tailor the Sentences of Juvenile Sex Offenders*?, 57 Cath U L Rev at 839. " 'For those children, very low recidivism would be expected as they grow out of this developmental stage.' " *Id*., citing Tracy Petznick, *Only Young Once, But a Registered Sex Offender for Life: A Case for Reforming California's Juvenile Sex Offender Registry System Through the Use of Risk Assessments*, 16 Berkeley J Crim L 228, 244 (2011).

[5] The Romeo and Juliet exception applies if the victim was 13–15 years old and the offending minor not more than four years older than the minor, or if the victim was 16 or 17 and the minor was not under the custodial authority of the offender at the time of the conduct. A court must determine that the exception applies.

with respect to juveniles, this is contrary to the primary goal of the juvenile justice system, which is rehabilitation rather than deterrence or retribution *McKeier v Pennsylvania*, 403 US 528, 544–545 n 5 (1971); *In re Gault*, 387 US 1, 15–16 (1967).

In addition to the shaming aspects of registry on the Internet, the registry also allows the public to submit an anonymous tip on the registry website. See *People v Snyder*, Supreme Court No 153696, Defendant-Appellant's Supp Br, filed 10/23/2018, SORA Offender Detail for David Snyder, Appendix 221a. This encourages the public to act as vigilantes and opens up the possibility for classmates, work colleagues, and community members to be vindictive and retaliatory.[6] A registrant may be hard-pressed to refute a tip, and the mere investigation of the tip could cause humiliation and the loss of employment.

An altogether different aspect of Internet developments is the extent to which registrants are hampered by their own restrictions on computer and Internet use. The Internet is now used routinely for education and employment-related activities, yet many Internet functions require usernames and passwords, all of which registrants must communicate to local law enforcement immediately and in person. Albeit in a slightly different context, the Michigan Court of Appeals in *People v Wilson* recognized that restrictions on computer use "pose a significant barrier to a

[6] The fact that the registry warns users that there are penalties for harassment of offenders, http://www.communitynotification.com/cap_main.php?office=55242 is likely to do little to prevent harassment through false tips, especially since the tips are anonymous.

defendant's transition back into society." No 330799, 2017 WL 3197681 (July 27, 2017).

In short, given the ubiquity of the Internet in human life, the public Internet registry is now, more than ever, an affirmative disability, akin to public shaming, a source of retribution and deterrence, and excessive in relation to the alternative purpose assigned.

D. The registry no longer effectively serves the needs of law enforcement.

SORA has changed considerably from its early days as a private law enforcement database. 1994 PA 295. But it cannot necessarily be said that those changes have been an "evolution." ("a gradual process in which something changes into a different and usually more complex *or better* form." New Heritage Dictionary (1982).) That is particularly true with respect to its usefulness to law enforcement.

At SORA's inception in 1994, registration was confidential, except for "law enforcement purposes." It was not accessible by the public even through the Freedom of Information Act. *People v Snyder*, Supreme Court No 153696, Defendant-Appellant's Supp Br, filed 10/23, 2018, SORA Legislative History, Appendix 223a–226a. But a 1996 amendment made the registry available to the public, giving the public access to considerable information about the registrant, including address, vehicle description and license plate number, physical descriptions, sex offenses for which convicted, and current photograph. 1996 PA 494; see also MCL 28.728(2) (making extensive information about the registrant

available on the Internet). At the time, some expressed concern that this public accessibility converted a law enforcement tool into a "modern form of the stocks" that "continu[ed to punish the offender" even after he or she had paid their debt to society. *People v Snyder*, SORA Legislative History, at Appendix 227a–232a.

Michigan's registry is the fourth largest state registry in the country. The registry currently has some 44,000 registrants, with approximately 2,000 added each year. Homefacts, available at https://www.homefacts.com/offenders/Michigan.html (last visited 1/28/2019). To illustrate its rapid growth, Michigan had only 17,356 in 1997 and 31,045 in 2003. Michigan State Police Data, collected in *Does #1–5 v Snyder* (*Does 1*), ED Mich, Case No 2:12-cv-11194, Ex 53, Doc 92-3. To be sure, some of the 44,000 are dangerous sex offenders. But many are not. One of the reasons for these staggering numbers is that, regardless of behavior patterns or rehabilitation, for most registrants the only path to removal from the registry is by coming to the end of the term designated by the tier in which they are placed. For those in tier III, that time is never.

As the registry's size has swelled without any commensurate focus on a registrant's level of dangerousness, it has simultaneously become more difficult for law enforcement officers to know which offenders to focus their efforts on. (The sheer size also makes it more difficult for the public to discern which individuals present a danger). Thus, it has became a far *less* effective tool in keeping the community safe. Recent studies have found that registries are "at best only minimally effective to the public and law enforcement." *Gangsters to Greyhounds*,

37 NYU Rev L & Soc Change at 749. As one police detective explained, more nuanced risk assessments of offenders is needed to "put precious public safety resources where they are needed the most"—"monitoring the highest-risk offenders." *Id.* at 753, citing Statement of Robert Shilling, Seattle Police Dep't Sex & Kidnapping Offender Detail, Sexual Assault & Child Abuse Unit, Seattle Washington, in hearing before Subcomm on Crime, Terrorism & Homeland Sec of the H Comm on the Judiciary, 11th Cong 89 (2009).

The registry's questionable effectiveness as a law enforcement tool shows that its public aspect and the extensive information that must be disclosed are excessive in relation to the State's asserted purposes.

E. SORA's burdens are out of touch with reasoned views about recidivism, rehabilitation, and community safety.

Modern social science research has shown that SORA's extensive burdens are excessive in relation to SORA's purported public safety goals. There are two salient points: 1) research refutes common assumptions about recidivism rates that supposedly justify SORA's extreme burdens; and 2) regardless of what one believes about recidivism rates, registries are not good tools to protect the public.

On the first point, recent empirical studies, the Sixth Circuit said, cast "significant doubt" on *Smith*'s pronouncement that recidivism is "frightening and high." *Id.* at 704. The Sixth Circuit cited a study suggesting that sex offenders are less likely to recidivate than other sorts of criminals. *Id.*, citing Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003).

Significantly, Michigan has never analyzed recidivism among its registrants. See *Does #1–5*, 834 F3d at 704. Perhaps it has just assumed, based on *Smith*, that the recidivism rate for all sex offenders is "frightening and high." *Smith*, 538 US at 103. But according to Professor Ira Ellman and his wife Tara Ellman, *Smith* relied on a "study" that was not a study at all but merely an "informal review by a therapist that was cited in a pop psychology journal." *A Sign of Hope*, 47 Sw L Rev at 17, citing Ira Mark Ellman & Tara Ellman, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const Comment 495 (2015) (uncovering the origin of the Court's reliance on the term "frightening and high" as it relates to recidivism of those who commit sex offenses, and why that phrase is inaccurate). According to the Ellmans, the study was devoid of any scientific foundation. *Id*. Regardless, its impact has lingered, so much so that one scholar says it is "difficult to rebut, even with statistical evidence to the contrary." *A Sign of Hope*, 47 Sw L Rev at 18. Indeed, that phrase has been repeated by over one hundred courts, even though it was not based on any real research. See *Vasquez v Foxx*, No 18-836, Brief of Eighteen Scholars as *Amicus Curiae* in Support of Petitioners, p 4 n 7 (citing Ellman, *Frightening and High* at 497), available at https://www.supremecourt.gov/DocketPDF/18/18386/67891/20181024143847779_18-386%20Amici%20Brief%20Scholars.pdf (last visited 2/4/2019).

Bureau of Justice Statistics for the same time period do not support the conclusion that sex offenders recidivate more than non-sex offenders. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have*

Swept the Country, 58 Buff L Rev 1, 57–58 (2010). In a large follow-up study of convicted sex offenders following discharge from prison, the BJS shows that sex offenders were *less likely* than other offenders to be arrested for another offense. *Id.*, citing Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994, November 16, 2003, available at https://www.bjs.gov/content/pub/pdf/rsorp94.pdf (last visited 2/4/2019). And although sex offenders were four times more likely than non-sex offenders to be arrested for a sex crime, even that percentage was relatively low—only 5.3% of sex offenders. *Id.* Of the almost 9,700 sex offenders released in 1994, nearly 4,300 were identified as child molesters—but only about 3.3% of those were rearrested for another sex crime against a child within three years. *Id.* Significantly, although 70% of all men in prison for a sex crime were men whose victim was a child, in almost all of the child-victim cases, the child was *the prisoner's child or a relative. Id.* Thus, although the registry's focus is on possible dangerousness of strangers, that scenario is rare. And according to the Bureau of Justice, "[r]ecidivism studies typically find that the older the prisoner when released[,], the lower the rate of recidivism," *id.*, counseling against lifetime registration.

More recent, peer-reviewed studies likewise cast doubt on *Smith*'s conclusion regarding recidivism. For example, a 2012 longitudinal study by social scientist Karl Hanson indicates that only 5 to 15% of adult sex offenders, and only 1 to 5% of juveniles, will recidivate. *A Sign of Hope*, 47 SW L Rev at 18, discussing Declaration of R. Karl Hanson in *Doe v Harris*, No 3:12-cv-05713-THE, 2013 WL

144048 (ND Ca, Nov 7, 2012), available at https://www.eff.org/document/declaration-r-karl-hanson (last visited 2/4/2019). Hanson says that re-offense rates for sex offenders substantially reduce over time, and that once an offender has reached 16.5 years without reoffending, incidents of re-offense "are no more likely than with any other offender." *Id.* Scholar Catherine Carpenter says that the risk of a juvenile offender reoffending "drops off dramatically as the child sex offender enters adulthood." Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 Sw L Rev 461, 493 (2016).

There is also skepticism among experts about whether registries (and especially geographic restrictions) reduce crime; some evidence suggests they might actually *increase* crime. Catherine Carpenter describes a cycle where, "[w]ithout secure prospects for employment, housing, or education, both adult and child registrants often spiral down…." *A Sign of Hope,* 47 Sw L Rev at 6. Those concerns, added to the barriers a registrant faces in being able to be fully involved in family life and community, are detrimental to society's goal of rehabilitating offenders. Also, the more burdensome the registry, the more likely it is that sex offenders fail to comply—a serious problem if the whereabouts of truly dangerous sexual predators are unknown to law enforcement.

Counselors, too, recognize that society is often responsible for erecting barriers that stand in the way of a sex offender's recovery. See Michael Hubbard, *Sex offender therapy*: *A battle on multiple fronts*, Counseling Today (A publication of the American Counseling Association), "Society's perception (March 31, 2014),

available at https://ct.counseling.org/2014/03/sex-offender-therapy-a-battle-on-multiple-fronts/ (last visited 2/4/2019). Echoing the views of scholars, counselors say that "punitive barriers such as limited jobs, housing restrictions, and sex offender registration raise significant risk factors for recidivism," often negating the efforts of sex offender therapists and sex offenders who truly desire to be productive members of society. *Id*.

While the effectiveness of treatment for sex offenders has been the subject of much debate, some studies show that recidivism rates are much lower for treated sex offenders. Roger Przybylski, *Effectiveness of Treatment for Adult Sexual* Offenders, SOMAPI (Sex Offender Management Assessment and Planning Initiative (2015), U.S. Dept of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, available at https://smart.gov/SOMAPI/sec1/ch7_treatment.html (last visited 2/4/2019). In one of the largest meta-analyses of studies of the effectiveness of sex offender treatment, researchers concluded that cognitive-behavioral treatments and behavior therapy had significant effects, noting that treatment effects were "greater for sex offenders who completed treatment" and that the odds of recidivating doubled for sex offenders who dropped out of treatment. *Id*., "Findings from Synthesis Research" (discussing research of Lösel and Schmucker).

Barriers to recovery affect not only registrants but the community as well. One counselor theorized that by buying into the common myths that most sex offenders are predators, that they will reoffend, and that treatment for sex offenders

does not work, society "may be contributing to future victimization." *Sex offender therapy*, Counseling Today, "Society's perception." Restricting employment, housing and access to family—which are important stabilizers for sex offenders—might actually make communities less safe. See *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 765.

Residency restrictions can prevent offenders from accessing treatment, without which "offenders are more likely to commit new crimes." *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 751–752, citing Ron Wilson, *Geographic Research Suggests Sex Offender Residency Laws May Not Work*, 2 Geography & Pub Safety 11 (2009). Conversely, factors such as meaningful employment "can provide a stabilizing influence by involving offenders in pro-social activities and assisting them in structuring their time, improving their self esteem, and meeting their financial obligations.' " *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 760, citing Center for Sex Offender Mgmt, *US Dept of Justice, Time to Work: Managing the Employment of Sex Offenders Under Community Supervision* 1 (2002).

Stabilizing forces are particularly important for juvenile sex offenders. See Amy E. Halbrook, *Juvenile Pariahs*, Hastings L J 1, 4 (December 2013) (opining that society is less safe when juvenile registrants "are effectively prohibited from any chance at successfully progressing from youth to young adult to productive member of adult society."). Considerations such as decreased culpability and increased capacity for change have led the U.S. Supreme Court to distinguish

juveniles from adults in other contexts. See *Roper v Simmons*, 543 US 551, 578 (2005) (juvenile death penalty); *Graham v Florida*, 560 US 48, 78–79 (2010) (juvenile life without parole); *Miller v Alabama*, 567 US 460, 489 (2012) (mandatory life imprisonment without the possibility of parole). A plethora of research—now well-accepted—instructs that adolescents are not as mentally or emotionally developed as adults, that they have increased levels of dopamine in their prefrontal cortex (which increases the likelihood of engaging in risky or "novelty-seeking" behavior), that the white matter in their brains is not fully developed, and that they are vulnerable to risky behavior. *Juvenile Pariahs*, 65 Hastings L J at 9 (citing various research). Juveniles are also not "fully developed in the psychosocial realm." *Id.*

With respect to sex crimes, research shows that juvenile sex offenders present low recidivism risk. *Id.* at 13. They "generally engage in less serious sexual offenses than adults" and "have fewer victims than adult sex offenders." *Id.* at 11 (citing research). As a group, "juveniles who are adjudicated delinquent have low rates of sexual re-offense and an even lower likelihood of sexually offending as adults, especially if they receive appropriate treatment." *Id.* (citing research). In longitudinal studies by Franklin Zimring and his colleagues, they found minimal correlation between committing a sex offense as a juvenile and committing a sex offense as an adult. *Juvenile Pariahs*, 65 Hastings L J at 13–14, citing Franklin E. Zimring et al, *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood*?, 6 Criminology & Pub Pol'y

507, 511 (2007) & Franklin E. Zimring et al, *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study,* 26 Just Q 58, 59–62 (2009).

This idea of low recidivism for juvenile offenders is not isolated to the theoretical or research realm. There is a consensus among experienced practitioners who work with juvenile sexual abuse intervention that juvenile sex offenders have a low rate of recidivism—between 2 and 14%—and are unlikely to become adult sex offenders. *Branded for Life*, 21 Va J Soc Pol'y & L at 188, citing Britney M. Bowater, *Comment, Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders*?, 57 Cath U L Rev 817, 840–41 (2008) (discussing studies).

Research also suggests that juvenile sex offenders respond particularly well to treatment. See Franklin E. Zimring, *An American Travesty: Legal Responses to Adolescent Sexual Offending* 27, 62 (2004) (noting that a study of 1,025 juveniles who had completed some sort of treatment showed that "[t]he recidivism rates of treated juveniles were 56% of the recidivism rates of similarly treated adult offenders.") Given this research, lifetime registration for juveniles is excessively burdensome.

For both juveniles and adults, policies that emphasize and encourage reintegration and rehabilitation are the best hope for avoiding recidivism and keeping communities safer. And community safety is, after all, the rationale for Michigan's SORA. MCL 28.721a.

The second and perhaps even more important conclusion from the research is that registries do not promote, and may even undermine, public safety. In determining that Michigan's SORA is punishment and violates the Ex Post Facto Clause, the Sixth Circuit found evidence supporting the view that "offense-based public registration has, at best, no impact on recidivism" and conversely found nothing in the record to "suggest[] that the residential restrictions have any beneficial effect on recidivism rates." *Does* #1–5, 834 F3d at 705.

While registries may give the community a sense of security, that sense is false. See *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 749 (citing numerous studies opining that registries make offenders more likely to recidivate). Research shows that they do not actually protect the public. A study commissioned by the Texas Senate Committee on Criminal Justice in 2010 concluded that "[b]ased on the research [and] the testimony provided during the hearing, it is clear registries do not provide the public safety, definitely not the way it is now." Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws,* Hastings LJ 1071, 1073 quoting S Comm on Crim Justice, Interim Report to 82nd Leg, S Rep No 81, at 4 (Tex 2010), available at https://senate.texas.gov/cmtes/85/c590/c590. InterimReport2016.pdf (last visited 2/4/2019).

Similarly, two studies in the University of Chicago Journal of Law & Economics revealed that sex offender registries may have little effect on, or may even increase, sex offenses. *Id.* at 750. The first study analyzed data from the National Incident-Based Reporting System, finding that while reporting may deter

those not already on the registries (i.e. deterred by the threat of registration), the ex post imposition of those sanctions actually increases recidivism among those already registered. *Id*., citing J.J. Prescott & Johah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*?, 54 J L & Econ 161, 181 (2011). The second study looked at three separate data sets, none of which suggested that sex offender registries deter sex crimes. *Id.* at 750, citing Amanda Y. Agan, *Sex Offender Registries: Fear Without Function*?, 54 J L & Econ 207 (2011). One of the data sets was used to compare national crime statistics with the state of registry implementation in 48 states; researchers found no significant decrease in the rate of rape or the arrest rate for sexual abuse following registration or notification mandates. *Id*. at 219–225.

A study that looked at sex offenders in New York over a 21-year period concluded that approximately 96% were committed by first-time offenders who would not have been registered. Jeffrey C. Sandler, et al, *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol Pub Pol'y & L 284, 296 Table 1 (2008). During this extensive time period, just about 4% were recidivisms. *Id.* Although a broad study at the Medical University of South Carolina performed on South Carolina's sex offender registry law had somewhat different results—showing that registries had *some* deterrent effect, at least on first-time offenders—it nevertheless concluded that registries have *no effect on recidivism*. *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 751, citing Letourneau, Levenson, Bandyopadhyay, Sinha &

Armstrong, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women* 4, 19 (2010), available at https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf (last visited 2/4/2019).

Even a study that touted registration and notification registries as decreasing recidivism conceded that "evidence on balance supports the existence of a relative utility effect in which convicted sex offenders become more likely to commit crimes when their information is made public because the associated psychological, social, or financial costs make crime-free life relatively less attractive." J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, J L & Econ 161, 165 (2011). And again, data shows that about 90% of sex crimes are committed by persons known to the victims—often family members (about 30%) but also known and trusted individuals such as family friends, babysitters, and neighbors (about 60%). *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 757, citing *Child Sexual Abuse: What Parents Should Know,* American Psychological Association, available at https://abolitionistmom.org /wp-content/uploads/2014/05/Child-sexual-abuse-What-parents-should-know.pdf (last visited 2/4/2019.) These considerations lessen the likelihood that registries are keeping our communities safe from sexual predators.

Finally, there can be unintended consequences to offender registries. Registries may create incentives for judges and prosecutors to alter charges, and for

victims to underreport. *Gangsters to Greyhounds*, 37 NYU Rev L & Soc Change at 749. For example, a study of South Carolina's registry law found that, after implementation of the state registry law, defendants were more likely to have charges reduced from sex to non-sex crimes over time, with greater predicted probability corresponding to the implementation of Internet notification. *Id.* at 750, citing Letourneau, et al, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies* at 4. The same study found that an increased number of defendants were allowed to plead to non-sex-offense charges. *Id.*

Inadequately supported and narrow views of recidivism, along with the possibility that registration might discourage rehabilitation and encourage future crimes, show that SORA's burdens are an affirmative disability or restraint, promote retribution not rehabilitation, are not rationally connected to the Legislature's asserted nonpunitive purpose, and potentially endanger the safety of the community.

In sum, the 2006 and 2011 amendments to Michigan's SORA constitute punishment. Because Michigan's law is "altogether different from and more troubling than Alaska's first-generation registry law," *Does #1–5*, 834 F3d at 705, this Court can so hold without being in conflict with *Smith*.

II. Application of SORA's 2006 and 2011 amendments to sex offenders who were convicted prior to 2006 violates the Ex Post Facto Clause of both the federal and Michigan constitutions.

The Ex Post Facto Clause of the United States and Michigan constitutions bars legislatures from retroactively inflicting greater punishment than that allowed

at the time a crime was committed. US Const, art I, § 10, cl 1; Const 1963, art I, § 10; *People v Earl*, 495 Mich 33, 37 (2014). In *Earl*, this Court noted that Michigan Court of Appeals decisions have treated Michigan's Ex Post Facto Clause as co-extensive with its federal counterpart. *Id.* at 37–38.

Writing for the Court in *Landgraf v USI Film Products*, Justice Stevens explained that legislatures have "unmatched powers" to "sweep away settled expectations suddenly and without individualized consideration." 511 US 244, 266 (1994). In the federalist papers, Alexander Hamilton characterized ex post facto laws as "the favorite and most formidable instruments of tyranny." The Federalist No 84, p. 512. And the Sixth Circuit, in analyzing Michigan's sex offender registry, noted, "As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under the guise of civil regulation to punish people without prior notice." *Does #1–5*, 834 F3d at 706.

The Ex Post Facto Clause seeks to prevent (1) lack of fair notice and interference with settled expectations; and (2) vindictive legislation. *Landgraf,* 511 US at 266–267. Mr. Betts is a perfect example of the problems associated with retroactive application of a statute that inflicts punishment without prior notice. He pleaded to CSC 2 in 1993, two years before a sex offender registry even existed, and was sentenced to prison and paroled in 1999. Mr. Betts has said that he would not have taken that plea had he known he was going to have to register. 10/15/2018 Aff'd of Betts in Muskegon County Circuit Court, filed in this case. Yet SORA has been retroactively imposed on him.

If this Court determines that Michigan's SORA is punishment, it is a short step to seeing that its retroactive application does not give fair notice. Many current registrants committed their offenses when the registry was just a confidential law enforcement database, and many more before the sweeping changes that were introduced in 2006 and 2011. They certainly did not expect to be subjected to a burdensome and public scheme of reporting and monitoring, or to being subject to imprisonment if they work, live, or spend time with their children within geographic exclusion zones that bar them from many parts of their towns or cities. And many pleaded guilty—some to crimes they did not believe they committed—without being able to weigh registration (often lifetime registration) into the equation.

As to whether Michigan's registry is vindictive, Justice Kennedy, in a discussion particularly poignant to sex offender registries, noted in *Landgraf* that legislative bodies are responsive to political pressures and therefore "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." 511 US at 266. Similarly, Justice Souter noted in his concurrence in *Smith* that "when a legislature uses prior convictions to impose burdens that outpace the law's stated aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." 538 US at 109 (Souter, J., concurring).

Even if that did not happen in Michigan, legislation that is not intended to be vindictive can become so based on its harsh effects. "[T]he fact that sex offenders

are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto Clause." *Does #1–5*, 834 F3d at 705–706. Michigan's provisions for removal from the registry are also very limited. See MCL 28.728c. Finally, the registry can allow for and even encourage vindictive responses, such as the firing of a registrant, a landlord's refusal to rent an apartment or house, the shunning of an offender's spouse or extended family, the bullying of a sex offender's children at school, or the use of Michigan's anonymous tip vehicle to harass and retaliate against sex offenders and their families. See *Wallace*, 905 NE2d at 380 (noting that the practical effect of the dissemination of sex offender information is that it "often subjects offenders to 'vigilante justice' which may include lost employment opportunities, housing discrimination, threats, and violence") (internal citations omitted).

Accordingly, Michigan's current SORA violates the Ex Post Facto Clause of both the United States and Michigan constitutions.

If this Court agrees, where does this leave Michigan? Among the possible long-term solutions are legislative changes that incorporate an individual risk assessment into the statute and that dial back some of the more burdensome requirements for those sex offenders who pose little threat to the community. The U.S. Solicitor General's Office opined on this issue with respect to the petition for certiorari filed and denied in *Does #1–5*. In the Solicitor General's view, Michigan (1) remains free to enforce the pre-2006 version of SORA retroactively and to enforce the current version of SORA prospectively; (2) may also be able to reenact in

modified form a subset of the requirements in the 2006 and 2011 amendments, since the Sixth Circuit did not categorically bar the retroactive enforcement of exclusion zones or in-person registration requirements; and (3) may be able to retroactively enforce amended versions of those requirements that are less onerous or far-reaching. *Snyder v John Does*, #1–5 et al, cert pet, Brief of US SG, p 13.

The Solicitor General summarized how Michigan went beyond the requirements of the Sex Offender Registration and Notification Act (SORNA) (Title I of the Adam Walsh Child Protection and Safety Act), 42 USC 16901 (2006), Congress's effort at increasing national management of sex offenders: by making public the tier classification assigned to a registrant (MCL 28.728(2)(1)); by requiring a registrant to appear in person to update a registration after changes in motor vehicle and internet identifiers (MCL 28.725(1)(e)–(g)); and by requiring exclusion or school-safety zones (MCL 28.734). *Id.* at 18–19. While the Legislature has many options, it is not clear whether this Court could, by removing the unconstitutional portions, construe the statute to be constitutional without leaving the statute incomprehensible. That would likely require additional briefing.

If the State wants, as a regulatory matter, to impose restrictions on people who represent a risk to public safety, it can do so but it should then do individualized risk assessments rather than imposing extensive burdens based solely on past convictions. But as it stands now SORA's burdensome requirements and their devastating consequences for noncompliance are untethered to the purpose of protecting the health and safety of the public. In her dissent in *Smith*,

Justice Ginsburg cited the lack of individualized risk assessment as a reason why Alaska's scheme was excessive in relation to its nonpunitive purpose. 538 US at 116–117 (Ginsburg, J., dissenting). She noted that registration was based on past crimes, not present risk, the fact that the duration of reporting was "keyed not to any determination of a particular offender's risk of reoffending,[7] but to whether the offense of conviction qualified as aggravated," and that the act made "no provision whatever for the possibility of rehabilitation." *Id.*

Another question that arises is whether, if this Court were to determine that Michigan's 2006 and 2011 amendments are punishment and an Ex Post Facto violation, Michigan will lose funding based on noncompliance with SORNA. A SORNA jurisdiction that fails to "substantially implement" SORNA's requirements risks losing ten percent of the funds otherwise available under the Omnibus Crime Control and Safe Streets Act of 1968, Pub L No 90-351, 82 Stat 197. See 42 U.S.C. 16925(a). Congress established the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) to administer SORNA's standards and to provide technical assistance to covered jurisdictions. See 42 USC 16945.

It is unlikely that Michigan would lose its SORNA-contingent funding. 24 USC 20927 makes special provisions for the circumstance where a state's

[7] Scholars note that there are reasonably accurate ways to estimate an individual's re-offense risk, such as the Static-99R, a 10-item actuarial scale that assesses the sexual re-offense risk of adult males that is used widely worldwide. *Vasquez*, amicus brief at 18.

highest court of jurisdiction finds the state sex offender registry law unconstitutional:

> Beyond the general standard of substantial implementation, SORNA § 125(b) includes *special provisions* for cases in which the highest court of a jurisdiction has held that the jurisdiction's constitution is in some respect in conflict with the SORNA requirements. If a jurisdiction believes that it faces such a situation, it should inform the SMART Office. The SMART Office will then *work with the jurisdiction* to see whether the problem can be overcome, as the statute provides. If it is not possible to overcome the problem, then the SMART Office may approve the jurisdiction's adoption of reasonable alternative measures that are consistent with the purposes of SORNA.

The National Guidelines for Sex Offender Registration and Notification, p 11, emphasis added, available at https://ojp.gov/smart/pdfs/final_sornaguidelines.pdf (last visited 2/4/2019). Given that the Supreme Court denied cert in *Does #1–5*, the funding penalty would not appear to apply.

If the provision somehow did apply, it seems likely that the SMART Office would "work with" Michigan. Of the seventeen states that receive SORNA-contingent funding, thirteen—Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming—are not fully compliant with SORNA's retroactivity guidelines, yet the federal government has deemed them "substantially compliant" and eligible for funding. See SORNA implementation status, available at https://www.smart.gov/sorna-map.htm (last visited 2/4/2019). See also National Guidelines at 75–78 (explaining substantial compliance).

The U.S. Solicitor General reached a similar conclusion in *Does #1–5*, noting that "[b]ecause SORNA does not require States to enact statutory provisions

paralleling those the court of appeals identified as problematic, it is doubtful that complying with the court of appeals' decision will imperil Michigan's eligibility for SORNA-related funds—particularly if the legislature amends the relevant provisions of SORA to address the court of appeals' concerns while satisfying the floor imposed by SORNA." *Snyder v John Does*, #1–5 et al, cert pet, Br of US SG, p 18, citing Guidelines, 73 Fed Reg at 38,046 (explaining that SORNA creates "a floor, not a ceiling").

Even if SORNA funding was jeopardized, Michigan could decide not to implement SORNA, in part because the costs of SORNA implementation exceed the grant funds potentially lost. Michigan could decide to take the 10% reduction in Byrne Judicial Access Grant funds rather than implement SORNA. (In 2016, Michigan's Byrne grant allocation was around $5.2 million, so the 10% reduction would be approximately $520,000).

Indeed, a majority of States (33) have done just that. See Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, SORNA Implementation Status, available at https://www.smart.gov/sorna-map.htm (last visited 2/4/2019). Some of those States determined it would be cheaper to take the financial hit than to implement the policy. Dylan Scott, *Governing Magazine*, *States Find SORNA Non-Compliance Cheaper,* November 7, 2011, available at http://www.governing.com/blogs/fedwatch/States-Find-SORNA-Non-Compliance-Cheaper.html (last visited 2/4/2019). New York was one such state. New York's Office of Sex Offender Management advised the director of the

U.S. Justice Department's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking that "[t]he costs would be far greater than the loss of federal funding." *Id*. Michigan's SORA costs approximately $1.2–1.5 million each year, and that figure does not account for costs associated with local police, the Department of Corrections, or the court system. See Todd Spangler, *Treatment of sex offenders depends on whether they've challenged rules*, Detroit Free Press, June 7, 2018, available at https://www.freep.com/story/news/local/michigan/2018/06/07/ sex-offender-registry-michigan/607982002/ (last visited 2/4/2019).

In short, retroactive application of the 2006 and 2011 amendments to Michigan's SORA violates the Ex Post Facto Clauses of the United States and Michigan constitutions.

CONCLUSION AND RELIEF REQUESTED

The 2006 and 2011 amendments to Michigan's sex offender registry—notably the geographic exclusion zones and in-person reporting requirements—impose burdens that are so punitive in their effect that they negate the State's public safety justifications. Accordingly, if this Court grants the application for leave in this case, Amicus Curiae Dana Nessel asks this Court to hold that the amendments are punishment and that their retroactive application violates the Ex Post Facto Clauses of the United States and Michigan constitutions.

Respectfully submitted,

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