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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, Cross-Appellant,

v

CORA LADANE LYMON,

Defendant-Appellant, Cross-Appellee.

_____/

Supreme Court No. 164685

Court of Appeals No. 327355

Wayne Circuit Court
No. 14-010811-FC

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

AMICUS BRIEF OF THE MICHIGAN STATE POLICE IN SUPPORT OF THE WAYNE COUNTY PROSECUTOR'S OFFICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTION PRESENTED

In its January 11, 2023 order, the Court asked "the parties [to] address whether requiring a defendant to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., as amended by 2020 PA 295, effective March 24, 2021 (the 2021 SORA), for a non-sexual crime, such as unlawful imprisonment of a minor, constitutes cruel or unusual punishment under Const 1963, art 1, § 16 or cruel and unusual punishment under US Const, Am VIII." The Michigan State Police addresses the following threshold question relevant to the Court's question:

> In 2021, in response to federal litigation challenging the constitutionality of Michigan's Sex Offender Registration Act, the Michigan Legislature revised SORA and eliminated the three primary ways it exceeded the obligations of the federal Sex Offender Registration and Notification Act (SORNA). Despite contrary federal court decisions reviewing the SORNA, the Court of Appeals determined that the new SORA was punitive in evaluating a claim by Cora Lymon under Michigan's constitution that his sentence was cruel or unusual. Did the Court of Appeals err in ruling that the new SORA is punitive?

Wayne County Prosecutor's answer:	Yes.
The Michigan State Police answer:	Yes.
Lymon's answer:	No.
Court of Appeals' answer:	No.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan State Police is currently defending a federal lawsuit challenging the constitutionality of Michigan's Sex Offender Registration Act as amended by the Legislature effective March 24, 2021 (new Michigan SORA or the Act). Under the Act, the MSP maintains the database of registrants. There are currently more than 40,000 offenders listed on Michigan's registry.

The issue here arises under Michigan's constitution, in which Cora Lymon has challenged the validity of the requirement that he register for 15 years under the Act based on the fact that his conviction for unlawful imprisonment did not include a sexual component. The Court of Appeals ruled that this was cruel or unusual punishment where there "are no facts in this case supporting an inference that there was any sexual component to the offenses he committed." Slip op, p 19. This is a significant issue by itself, because there are approximately 260 other offenders on the registry convicted of one of three listed offenses that might not include a sexual element, i.e., child enticement, kidnapping, and unlawful imprisonment.

In reaching its decision, the Court of Appeals applied the standard from federal constitutional law – established by *Kennedy v Mendoza-Martinez*, 372 US 144 (1963) – in determining that Michigan's new SORA is facially punitive. The federal courts have applied that same test and uniformly rejected the conclusion that federal SORNA is punitive, and SORNA is now virtually the same substantively as Michigan's SORA. The Court of Appeals did not consider the overwhelming weight of contrary federal precedent in reaching its conclusion that Michigan's new SORA is punishment.

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INTRODUCTION

Michigan's new SORA is not punishment. It is not designed to punish, and its overall effect is not punitive. It is a civil regulatory law. That was the central point of the Michigan Legislature's amendments to the law in Public Act 295 of 2020. This is the primary issue that the Michigan State Police address in this brief.

This amicus presses three points.

First, the Michigan SORA as amended effective March 24, 2021, is now virtually the same substantively as federal SORNA. The federal courts have applied the *Mendoza* test and uniformly ruled that the federal SORNA is not punitive, both in rejecting claims that the federal SORNA constitutes cruel and unusual punishment under the Eighth Amendment and in rejecting claims that it violates the Ex Post Facto Clause. That same reasoning is persuasive here in reviewing Michigan's new SORA under Michigan's constitution prohibition on cruel or unusual punishment.

Second, a comparison of Michigan's new SORA and the Alaska law at issue in *Smith v Doe*, 538 US 84, 89 (2003), which the U.S. Supreme Court ruled was not punitive, shows that that the two laws are very similar. A side-by-side analysis demonstrates that the same conclusion that prevailed in *Smith* should prevail here.

Third, there is a lot at stake on the issue whether Michigan's SORA is punitive as a facial matter. If the Court of Appeals' analysis below were employed in response to an ex post facto challenge to Michigan's new SORA, this would be a second round of *People v Betts,* 507 Mich 527 (2021), possibly invalidating the enforcement of Michigan SORA for more than two-thirds of SORA offenders (those who committed their registrable offenses before July 1, 2011). To be clear, that is not the claim in this case.

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Rather, any decision here implicates the class of offenses that might not include a sexual component as a necessary element of the crime, i.e., child enticement, certain kidnapping offenses, and unlawful imprisonment. But any ruling that Michigan's new SORA is punitive for purposes of Michigan's constitutional prohibition on cruel or unusual punishment would set the stage for a later ex post facto challenge to the new SORA. And a facial ruling finding Michigan SORA punitive would also call into question the validity of guilty pleas in which the trial court failed to note the SORA implications of the plea. See, e.g., *People v Watkins,* an unpublished per curiam opinion of the Court of Appeals, No. 356380 (Oct 13, 2022) (Att 1). Finally, the Court of Appeals has relied in part on *Lymon's* ruling that Michigan's SORA is punitive to find that a sentencing court's failure to impose the duty to register in the judgment of sentence for a defendant convicted of a sexual offense absolves the offender of the duty to register. See *People v Nunez,* ___ Mich App ___ (2022), slip op, p 6.

In contrast, if this Court only ruled that Michigan's SORA were punitive *as applied* for an offender whose crime did not include a sexual component, that would narrow the significance of this case dramatically. It is one thing to argue that a man who terrorizes his family should not be identified as a sexual offender where that crime included no sexual component whatsoever, and quite another to assert that it is punitive to regulate sexual offenders with registration obligations. But even for an as-applied challenge, Lymon is not entitled to relief because the obligations remain regulatory in nature and are not punitive as applied to him. Regardless, on the threshold issue, Michigan's new SORA is not punitive for sexual offenders.

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One further introductory point. While the new Michigan SORA includes a penalty provision for its willful violation, see MCL 28.729, it is not a criminal law. It is not in the Criminal Code, but it is included with Michigan's law for the Michigan State Police. The law is designed to provide information to the public about sexual offenders and other offenders who prey on children so that the public may protect themselves and protect their children. The law requires sexual offenders to provide information to the Michigan State Police, and update that information, so that the police may publish accurate information about their convictions and their home address among other things. The public relies on the registry. It is a civil regulatory law. And Michigan's new SORA is now virtually on all fours with SORNA and very similar to the Alaska law upheld in 2003 by the U.S. Supreme Court in *Smith v Doe*. It is telling that both laws have been found by the federal courts to be civil and regulatory and not punishment. This is the paramount issue in the case.

Also, as a caveat, the Michigan State Police note that the U.S. Attorney General issued supplemental guidelines in 2021, effective January 7, 2022, which appeared for the first time to require under federal SORNA that sex offenders update the state registries with minor changes, such as changes to their vehicles. Thus, the overwhelming weight of federal precedent that finds SORNA not to be punitive – all before 2022 – has not addressed this aspect of SORNA. Even so, this addition does not undermine the force of the analysis. It remains overwhelming.

In short, the Court of Appeals erred in ruling that Michigan's new SORA constitutes punishment. This Court should reverse.

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STATEMENT OF FACTS AND PROCEEDINGS

Since its enactment in 1994, the Michigan SORA has been amended many times, but the key revisions occurred in three different years: (1) in 2006, when the student safety zones were added; (2) in 2011, when the Legislature revised the law to add obligations consistent with the federal Sex Offender Registration and Notification Program (SORNA), 34 USC 20901 *et seq.*; and (3) in 2021, when the Legislature revised the law to ensure that it was not punitive, removing the ways in which Michigan's SORA extended beyond SORNA, including the student safety zones.

In 1994, Michigan enacts SORA, which goes into effect in October 1995.

The Legislature first enacted its Sex Offenders Registration Act (SORA) in 1994. 1994 PA 295. That same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which as amended "conditions certain federal law enforcement funding on the States' adoption of sex offender registration laws and sets minimum standards for state programs." *Smith v Doe*, 538 US 84, 89 (2003).

Because Lymon was convicted in 2015 for a listed offense, i.e., unlawful imprisonment, he was required to register as a sex offender. See MCL 28.724(5). SORA requires Lymon to report annually, and it also requires him to notify law enforcement of certain changes, such as changes to his name and residential address, and to register for 15 years as a Tier I offender. MCL 28.725(11).

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In the years since it was first enacted, SORA has undergone a series of amendments.[1] In 1996, Michigan amended SORA to require law-enforcement agencies to make offender information available to the public. 1996 PA 494. Certain information on Michigan's registry is now available to the public on the internet. See MCL 28.728(2).

In 2006, Michigan adds student safety zones to the SORA.

The Legislature amended SORA in 2006 to create "student safety zones," which generally prohibited offenders from residing, working, or loitering within 1,000 feet of school property. See MCL 28.733–736 (2006); 2005 PA 127. Effective March 24, 2021, the Legislature repealed these provisions. See 2020 PA 295.

In 2006, Congress enacts SORNA and conditions federal funding for states on substantial compliance with its minimum standards for the state registries.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) to strengthen the nationwide network of sex-offender registration and notification programs. 34 USC 20901 *et seq*. The federal SORNA established minimum standards for state registries in order to qualify for funding, and it also created its own substantive obligations for sex offenders under federal law. See, e.g., *Willman v Attorney General of United States*, 972 F3d 819, 821 (CA 6, 2020) ("a sex offender's obligations under SORNA are independent of any duties under state law"). See also *United States v Navarro*, 54 F4th 268, 276 (CA 5, 2022) ("SORNA sets its own rules for when sex offenders must register with state authorities.")

[1] See, e.g., 1994 PA 295; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 240; 2005 PA 121; 2005 PA 127; 2005 PA 132; 2006 PA 46; 2011 PA 17; 2011 PA 18; 2020 PA 295.

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To avoid a reduction in federal funding, states must "substantially implement" SORNA's requirements. 34 USC 20927(a) & (d). In 2008 the U.S. Attorney General issued guidelines that describe the minimum standards a state must meet to achieve substantial compliance. See National Guidelines for Sex Offender Registration and Notification 10 (July 2008) (Guidelines).[2] SORNA and the Guidelines "set[] a floor, not a ceiling," for state registry programs. 73 Fed Reg at 38032. By establishing its own substantive obligations, the SORNA also "directly prescribes registration requirements that sex offenders must comply with." *Id.* at 38034.

In 2011, Michigan amends its registry law to comply with federal standards.

To comply with SORNA's minimum standards, Michigan again amended its registry law in 2011. See 2011 PA 17; 2011 PA 18. Among other changes, the law imposed additional requirements not previously present in Michigan's SORA law:

(1) classified offenders into three tiers according to their underlying offenses, MCL 28.722(r)–(w) (2011), see also 2011 PA 17 and 2011 PA 18;

(2) required periodic in-person reporting, as well as in-person reporting within three business days of certain changes, including changes in vehicle use or ownership, name, and e-mail address or other designations used in Internet postings, MCL 28.725(1) (2011), MCL 28.725a(3)(c) (2011), see also 2011 PA 17 and 2011 PA 18; and

(3) required tier-III offenders to register for life, MCL 28.725(10)–(12) (2011) and MCL 28.725a(3) (2011); see also 2011 PA 17, 2011 PA 18.

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[2] These guidelines may be found at the following web address:

https://www.federalregister.gov/documents/2008/07/02/E8-14656/office-of-the-attorney-general-the-national-guidelines-for-sex-offender-registration-and

(Last accessed June 12, 2023.) There have been five other final guidelines provided by the U.S. Attorney General: 86 Fed Reg 69856–69887 (Dec 8, 2021), 81 Fed Reg 50552–50558 (Aug 1, 2016), 76 Fed Reg 1630–1640 (Jan 11, 2011), 75 Fed Reg 81849–81853 (Dec 29, 2010), and 72 Fed Reg 8894–8897 (Feb 28, 2007).

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In 2016 and 2020, the federal courts rule that Michigan's old SORA law violates the Ex Post Facto Clause based on the 2006 and 2011 amendments.

In 2016, the Sixth Circuit reviewed an ex post facto challenge brought by six plaintiffs who committed their registerable offenses before 2006, and they argued that Michigan's SORA – as it existed pre-2021 – constituted punishment and therefore was unconstitutional. *Does 1–5 v Snyder*, 834 F3d 696, 703–706 (CA 6, 2016), cert den 138 S Ct 55 (2017). The Sixth Circuit agreed and it emphasized three statutory features that it found rendered the old SORA statute punitive: (1) the student safety zones; (2) the public classification of offenders into tiers without an individual assessment; and (3) the requirements on offenders to appear in person to report even minor changes. See *Does 1–5*, 834 F3d at 702–703, 705. It summarized its ruling in its final concluding paragraph as follows related to these three points:

> A regulatory regime
>
> [1] that severely restricts where people can live, work, and "loiter,"
>
> [2] that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and
>
> [3] that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law.
>
> SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
>
> We conclude that Michigan's SORA imposes punishment. [*Id.* 834 F3d at 705 (paragraph break added; numbered brackets added).]

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In 2016, the State sought a petition for certiorari from this decision, and the U.S. Supreme Court called for the views of the U.S. Solicitor General, who recommended that the Court deny certiorari, noting that Michigan's old SORA was different from the federal SORNA's requirements because it extended the duties of an offender beyond the federal SORNA in three significant respects. (See Ex A, U.S. Solicitor General's Amicus (2017), pp 14–15, 18 ("The court of appeals explained that SORA is punitive because of the cumulative effect of three statutory features: the school-safety zones in which a sex offender is not permitted to live, work, or loiter; the requirement that an offender be categorized into a tier based on his underlying offense without an individualized assessment and that his assigned tier be made public; and the requirement that sex offenders appear in person 'to report even minor changes to their information.' ").) The U.S. Supreme Court denied the petition. 138 S Ct 55 (2017).

In 2020, the federal district court then ruled that the Sixth Circuit decision in *Does* rendering the old SORA unconstitutional on ex post facto grounds applied to all the pre-2011 sex offenders and was prepared to enjoin the law, but it provided a window of time in which the Legislature could act to remedy Michigan law. *Doe v Snyder*, 449 F Supp 3d 719, 729, 737 (ED Mich, 2020). ("To be clear: SORA will not become unenforceable as of the date of this order. Rather, the holdings in this opinion will become effective and enforceable only after the entry of a final judgment, at the time specified in that final judgment.")

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In 2020, the Michigan Legislature revises the SORA to eliminate the ways in which it extends beyond the federal SORNA by eliminating student safety zones, the public tiering, and the requirement for in-person reporting for minor changes.

In December 2020, the Legislature revised Michigan's SORA laws to address the federal court rulings that found Michigan's SORA laws unconstitutional. (See Ex B, Legislative Analysis of HB 5679 (12-9-20), pp 7–8.) The Legislature did so by repealing the student safety zones, MCL 28.733 through 736, removing the public nature of the tiering in MCL 28.728(2), and allowing for the Michigan State Police to provide another means to update information rather than doing so in person for minor changes such as a new motor vehicle under MCL 28.725(2) ("in the manner prescribed by the department"). They took effect on March 24, 2021.[3] Consistent with the MSP's duty to notify registrants of changes to the law, see MCL 28.725a(1), the MSP provided notice to the registrants that they would be able to update their minor changes under MCL 28.725(2) by mail. (See Ex C, MSP Notice, p 2.)

Significantly, with the changes to Michigan law, the substantive obligations under state law and under federal SORNA are now virtually the same. (See Ex D, Comparative Chart for the new Michigan SORA and the federal SORNA.)[4]

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[3] One of the other significant legislative changes in Public Act 295 of 2020 addressed the different provisions that the federal district court found unconstitutionally vague, violative of due process, or violative of the First Amendment. See *Doe v Snyder*, 2021 WL 2525436, at *3 (ED Mich, June 21, 2021) ("the new SORA removes or modifies all provisions that this court found to be unconstitutional in its February 14, 202[0] opinion in *Does II*.").

[4] The Wayne County Prosecutor's Office also attached a comparative chart, see App'x 29a–90a, which has been employed by the State defendants as well in their federal litigation. The attached version of the comparative chart has a couple of technical, minor corrections.

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In 2021, this Court rules in People v Betts *that the 2011 SORA law is an ex post facto violation by finding that the old Michigan SORA is punitive.*

In July 2021, this Court ruled that Michigan's 2011 SORA violated the prohibition against ex post facto laws, when reviewed in aggregate, finding that its obligations were punishment and applying this ruling to offenders who committed their offenses before July 1, 2011. See *People v Betts,* 507 Mich 527, 574 (2021). This ruling was predicated on three points.

First, the Court ruled that the law was different in character from the Alaska law, which was reviewed by the U.S. Supreme Court in *Smith v Doe,* 538 US 84 (2003). *Betts,* 507 Mich at 547 ("Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in *Smith*"). The Michigan SORA before 2006 did not include an individual assessment, but it imposed a duration of registration obligations based on the crime. This was also true of Alaska's registry law. *Smith,* 538 US at 90 ("If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years"). Before *Betts,* in 2007 the Court of Appeals ruled that "compliance with SORA is not a punishment." *People v Golba*, 273 Mich App 603, 616 (2007). See *id.* at 620 ("SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public; it was not designed to punish sex offenders.").

Second, this Court then reviewed the five factors that the U.S. Supreme Court examined in *Smith* to determine whether Michigan's 2011 SORA was punitive: "whether, in its necessary operation, the regulatory scheme" in relation to the five *Mendoza* factors:

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> [1] has been regarded in our history and traditions as a punishment;
>
> [2] imposes an affirmative disability or restraint;
>
> [3] promotes the traditional aims of punishment;
>
> [4] has a rational connection to a nonpunitive purpose; or
>
> [5] is excessive with respect to this purpose. [*Betts,* 507 Mich at 545 (numbered brackets added), citing *Smith,* 538 US at 93–96.]

After examining those five factors, this Court summarized its analysis that the 2011 SORA law was excessive, identifying the lack of individual assessment, the student safety zones, and the in-person reporting, including for even "minor life changes," in finding it punitive in "aggregate":

> Over 40,000 registrants were subject to the 2011 SORA's requirements *without any individualized assessment of their risk of recidivism*. The duration of an offender's reporting requirement was based solely on the offender's conviction and not the danger he individually posed to the community. Registrants remained subject to SORA—including the stigma of having been branded a potentially violent menace by the state—long after they had completed their sentence, probation, and any required treatment.
>
> *All registrants were excluded from residing, working, and loitering within 1,000 feet of a school, even those whose offenses did not involve children and even though most sex offenses involving children are perpetrated by a person already known to the child. As described, this restriction placed significant burdens on registrants' ability to find affordable housing, obtain employment, and participate as a member of the community.*
>
> *Registrants were also required to make frequent in-person reports to law enforcement upon* ***minor life changes*** *and regular in-person reports—sometimes multiple times a year—even when no information had changed.* These demanding and intrusive requirements, imposed uniformly on all registrants regardless of an individual's risk of recidivism, were excessive in comparison to SORA's asserted public-safety purpose.

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> Considering the *Mendoza-Martinez* factors cumulatively, the 2011 SORA's aggregate punitive effects negate the state's intention to deem it a civil regulation. Accordingly, the retroactive imposition of the 2011 SORA increases registrants' punishment for their committed offenses in violation of federal and state constitutional prohibitions on ex post facto laws.
>
> [*Betts*, 507 Mich at 561–562 (paragraph breaks added; citation and footnote omitted; emphasis added).]

Third, this Court then rejected the severance arguments advanced by the prosecution. In doing so, it explained that a "a majority of the former SORA provisions underlying *our conclusion that the 2011 SORA constitutes punishment* ***were added by its 2006 and 2011 amendments***." *Betts,* 507 Mich at 564 (emphasis added). It then listed these duties added by the amendments as follows:

> See, e.g., MCL 28.733 to MCL 28.736, as amended by 2005 PA 121 (creating the student-safety zones excluding registrants from living, working, or loitering within 1,000 feet of a school);
>
> MCL 28.727, as amended by 2011 PA 18, and MCL 28.725(1), as amended by 2011 PA 17 (adding events triggering an in-person reporting requirement and decreasing the reporting period to three days);
>
> MCL 28.722, as amended by 2011 PA 17 (creating the tiered classification system and basing SORA's requirements on those tiers).
>
> [*Id.* at 564.]

In 2022, a new federal lawsuit is filed challenging the new Michigan SORA on ex post facto grounds among other claims.

The Michigan State Police and the Governor are defending the constitutionality of Michigan's new SORA in federal court, a challenge that was filed in 2022 and is currently in discovery. See *Does v Whitmer* (ED Mich, 22-cv-10209). The complaint runs almost 200 pages and brings ten claims or counts against Michigan's new SORA, as the MSP summarize here:

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Count I: The new Michigan SORA imposes "retroactive" "punishment" on the pre-2011 offenders in violation of the Ex Post Facto Clause.

Count II: The new Michigan SORA imposes retroactive punishment by extending the registration period from 25 years to lifetime for a segment of registrants in violation of the Ex Post Facto Clause and due process.

Count III: The new Michigan SORA does not include an "individualized review" and therefore violates due process and equal protection.

Count IV: The new Michigan SORA includes an "unequal opportunity" for removal from the registry in violation of equal protection.

Count V: The new Michigan SORA's mandatory reporting requirements constitute "[c]ompelled [s]peech" in violation of the First Amendment.

Count VI: The new Michigan SORA violates due process for a class of registrants for whom their plea bargains were inconsistent with the new terms of the registry.

Count VII: The new Michigan SORA violates due process and equal protection by requiring registration for those registrants "[w]ho [d]id [n]ot [c]ommit [s]exual [o]ffenses."

Count VIII: The new Michigan SORA is unconstitutionally vague in certain ways.

Count IX: The new Michigan SORA violates the First Amendment by compelling registrants to admit that "they understand their duties" as part of the notification process.

Count X: The new Michigan SORA violates the First Amendment by requiring the post-2011 registrants to update information about email addresses and internet identifiers.

(See *Doe,* 22-cv-10209, Complaint, pp 166–188.)

While the seventh count challenges the new Michigan SORA on due process and equal protection grounds, the gravamen of the claim dovetails the issue raised here.

STANDARD OF REVIEW

This Court reviews constitutional questions of law de novo. See *People v Beck*, 504 Mich 605, 618 (2019).

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ARGUMENT

I. The new Michigan SORA is not punishment.

The threshold issue on the question whether Cora Lymon was subject to cruel or unusual punishment under Michigan's new SORA is whether the Act, as revised, is punitive. The brief of the Wayne County Prosecutor's Office persuasively explains why the new SORA is not punitive in applying the five *Mendoza* factors. See Wayne County's Br, pp 22–43. The State Police here seek to support this argument by making three further points.

First, the new SORA, which took effect on March 24, 2021, is now virtually the same substantively as the federal SORNA is now. This is significant because every court, apparently without exception, has found federal SORNA *not* to be punitive. While this analysis generally addressed both federal ex post facto and Eighth Amendment challenges and addressed SORNA before 2022, the Court of Appeals below applies the same *Mendoza* factors and thus the federal case law should be persuasive to the Court in examining the claim here under state constitutional law.

In particular, the specific examination of the *Mendoza* factors by the federal appellate courts have persuasively refuted the conclusion reached below that the current obligations are effectively punitive. They are not. They are regulatory. That same answer should govern here for the analysis under Michigan's constitution in determining whether the new SORA is punitive as a threshold question in addressing whether Lymon's sentence was cruel or unusual punishment. Because SORNA is not punitive, so Michigan's SORA is also not punitive.

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Second, Michigan's new SORA is quite similar to the Alaska law found not to be punitive in *Smith v Doe*. Just as that law was found not to be punitive, Michigan's new SORA is also not punitive.

Third, the narrow issue before this Court is whether Lymon's duty to register as a sexual offender under SORA for 15 years constitutes cruel or unusual punishment under Michigan's constitution where his conviction for unlawful imprisonment did not include a sexual component. But any resolution that Michigan's new SORA is facially punitive – for all offenders irrespective whether their crime included a sexual component – may have implications in later cases for ex post facto claims, guilty pleas, and for sentencing courts. Indeed, any ruling here that Michigan's new SORA is punitive in this case would invite a new challenge on ex post facto grounds like the one brought in *Betts*. Yet, the question whether the new SORA is punitive for someone who commits a crime that includes no sexual component, like Cora Lymon, is a very different one from the one the U.S. Supreme Court addressed in *Smith* in ruling that Alaska's sexual offender registry was not punishment. Like Wayne County, the MSP argue that the new SORA is constitutional *even as applied* to Lymon, due to the regulatory nature of the registration duties. But if this Court ruled otherwise on that narrow issue for an offender, as here, whose crime was not a sexual crime in any way, such a ruling may then be only relevant for approximately 260 offenders – out of more than 40,000 registrants – whose crime was one of three categories of crimes, i.e., child enticement, kidnapping of a minor, and unlawful imprisonment of a minor. Regardless, it is clear that Michigan's new SORA is not punishment for sexual offenders.

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A. The new SORA in Michigan and the federal SORNA are almost substantively identical, and thus Michigan's new SORA, like SORNA, is not punitive.

While the new SORA in Michigan had not been subject to review in the appellate courts about whether it constitutes punishment before the decision below, the federal SORNA has repeatedly been challenged as punitive. Thus, the analysis of the federal appellate courts should be relevant to this Court on the threshold question here if the two laws are pretty much the same. They are.

The federal SORNA and Michigan SORA may be digested into four basic components: (1) the duty to register based on the commission of certain criminal offenses, the vast majority of which are criminal sexual offenses, and the duty to report periodically depending on the nature or seriousness of the offense, known as tiering, including the duration that a person must appear on the registry; (2) the duty to update the registry based on different changes to the registrant's status, which may be further digested into two categories, i.e., significant changes and more minor changes, which also includes the time and method by which a registrant may update this information; (3) the severity of punishment for a violation; and (4) the information included on the public registry. For all four categories, there are virtually no significant substantive distinctions between Michigan and federal law other than for the specific conviction here, unlawful imprisonment under MCL 750.349b, which is a tier I offense subject to the Michigan registry for fifteen years, see MCL 28.722(r)(iii), as contrasted with federal SORNA, which excludes "a parent or guardian" for "false imprisonment" as a specified offense against a minor, see 34 USC 20911(7)(B). Cf. Ex D, pp 3 (SORNA) and 8 (SORA).

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The duty to register and the duty to report

The primary focus of the new Michigan SORA are sex offenses such as the four degrees of criminal sexual conduct, see MCL 28.722(v)(*iv*), (*v*), (*vi*), for which the comparable offenses under federal law are "aggravated sexual abuse," "sexual abuse," and "abusive sexual contact," see 34 USC 20911(4). See MCL 28.724 (registration procedure); 34 USC 20913 (registry procedure). And they both identify three tiers, the most serious of which is tier III, and the least serious of which is tier I. MCL 28.722(r) through (v); 34 USC 20911(2), (3), (4). A tier I offender must register for 15 years, a tier II offender for 25 years, and a tier III offender must register for a lifetime. MCL 28.725(11), (12), and (13); 34 USC 20915(a)(1), (2), (3). The tier I offenders must report yearly, the tier II offenders biannually, and the tier III offenders quarterly. MCL 28.725a(3)(a), (b), (c); 34 USC 20918(1), (2), (3). The durations are also the same.

The duty to update the registry

For changes to a registrant's status, both SORNA and Michigan's new SORA separate the more significant changes, i.e., residence, employer, student status, and changes to name, see MCL 28.725(1); 34 USC 20913(c), from other more minor changes, i.e., vehicle information, electronic email addresses and internet identifiers, telephone numbers, and temporary residence, see MCL 28.725(2); 28 CFR 72.7(e). The more serious changes require in-person reporting within three business days, see MCL 28.725(1), 34 USC 20913(c), while minor ones may be changed by some other means within three business days, see MCL 78.725(2), Ex C (by mail); 28 CFR 72.7(e) ("by whatever means the jurisdiction allows"), as required by the U.S. Attorney General

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effective January 7, 2022.[5] In short, the duties here are pretty much the same too, given the changes to Michigan's new SORA and to the federal SORNA.

The severity of the punishment for a violation

For Michigan's SORA, a failure to register is a four-year felony for a first offense, seven-year for a second offense, and a ten-year felony thereafter. MCL 28.729(1). For the federal SORNA, the failure to register is a ten-year felony. 18 USC 2250(a)(3).

The information included on the public website

Michigan's website includes the following information: name, date of birth picture, home address, address of employer, school address, license number, vehicle description, summary of convictions, description, text of crime, and registration status. See MCL 28.728(2)(a) through (i). The federal SORNA maintains a "National Sex Offender Public Website" in requiring offenders to register in state jurisdictions, which includes "relevant information" that is obtained from the state websites. 34 USC 20920(a), 20922(a), (b). The federal website includes name, age, picture, aliases, home address, and employer's address, and it links to the State's registry. See, e.g., entry for Paul J. Betts, who is required to register under SORNA (and under new SORA).[6]

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[5] Regarding the federal SORNA's requirement that registrants update minor changes such as for vehicles, see 28 CFR 72.7(e), it appears that the SORNA itself only substantively required registrants to update these changes when the U.S. Attorney General issued supplemental guidelines on December 8, 2021, which became effective January 7, 2022. See 86 Fed Reg 69856–69887, 69880 (Dec 8, 2021). But this does not change the analysis. See p 36 below.

[6] See https://www.nsopw.gov/en/Search/Results (Last accessed June 12, 2023.)

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As noted above, the significant ways in which Michigan had imposed obligations under the old SORA that extended beyond federal SORNA were removed by the Legislature for the new SORA, effective on March 24, 2021. The three removed components were inserted by the 2006 and 2011 amendments to SORA:

1. The in-person reporting requirements for temporary residence, electronic mail or instant messages, or regular use of a vehicle, see MCL 28.725(1)(e), (f), (g) (2011);
2. The public nature of the tiering, see MCL 28.728(2)(l) (2011); and
3. The student safety zones. See MCL 28.733, 28.734, 28.735, 28.736 (2006).

Among other changes to the old SORA, Public Act 295 of 2020 remedied all three of these areas, aligning the Michigan SORA with federal SORNA. See Ex E, HB 5679, passed by both houses on December 16, 2020 (redline version) (allowing for reporting "in the manner prescribed by the department [of state police]" for minor changes, p 19, removing the public nature of the tiering, p 36, and repealing the school safety zones, p 41). In doing so, the Michigan Legislature matched the Michigan SORA to the federal SORNA. This is significant because the federal SORNA has been found not to be punitive, i.e., the federal appellate courts have rebuffed challenges to the federal substantive obligations to report for sexual offenders who committed their registrable crimes before the enactment of the SORNA in 2006. See, e.g., *Willman v Attorney General of United States,* 972 F3d 819, 825 (CA 6, 2020) (for an offender whose sexual offense was committed in 1993) ("SORNA is not punishment for purposes of the Eighth Amendment").

The remaining differences between the new Michigan SORA and the federal SORNA are minor in nature, and they do not merit a difference in substantive

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analysis on the issue of whether they constitute punishment. This Court identified some of those differences in its analysis of the old SORA and whether the unconstitutional elements could be severed from the law. See *Betts*, 507 Mich at 570–571, n 27 (noting that the new Michigan SORA (1) imposes a $50 registration fee, (2) requires a registrant to maintain more specific information for a driver's license, (3) requires notification of a new residence before rather than after moving, and (4) requires the registry to include the original charge and not just the convicted charge).[7] These are all minor differences, which would not merit a difference in evaluation. about whether the federal SORNA is punitive in contrast to Michigan SORA.

Moreover, that analysis in *Betts* does not account for the way in which Michigan's new SORA imposes fewer obligations than SORNA. For example, Michigan's SORA does not require advance notice of international travel, and it only requires a notification where a person will be in another country for "more than 7 days." MCL 28.725(8). In contrast, SORNA imposes a requirement to provide advance notice, and it does not limit its application for stays longer than seven days. See 34 USC 20914(a)(7). Nor did this Court address the fact that Michigan's SORA applies to those sexual offenders who were convicted on or after October 1, 1995, or were subject to the jurisdiction of the Department of Corrections for a listed offense on that date.

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[7] This Court further noted that the new SORA imposed a maximum of punishment of 4, 7, or 10 years, while SORNA merely required a complying state registry to include a maximum punishment that "is greater than 1 year." *Id.* at 571, n 27, citing 34 USC 20913(e). But this analysis fails to account for the fact that the federal SORNA makes it a ten-year felony for failing to register or update the registry. See 18 USC 2250(a)(3). Also, while the new Michigan SORA does provide for a subscription for notifications for members of the public, see MCL 28.730(3), federal SORNA does not.

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See MCL 28.723(1). In contrast, the federal SORNA does not appear to have any beginning date, indicating that an offender must register regardless of the date of the registrable offense. See 28 CFR 72.3 ("sex offenders must comply with all requirements of that Act, regardless of when the conviction of the offense for which registration is required occurred").[8]

In the federal challenge to the new SORA on constitutional grounds, *Does v Whitmer* (ED Mich, 22-cv-10209), the plaintiffs and the State defendants (the MSP and Governor) have briefed this issue about whether there are significant differences between the federal SORNA and the Michigan SORA. See Exhibits F and G (State's Motion, May 31, 2022, pp 8–10 and Pls' Response, July 18, 2022, pp 23–31). The Michigan State Police contends that a review of this briefing only further supports the conclusion that the SORNA and new SORA are substantively nearly the same, with only small differences remaining. Thus, the federal courts' analysis on SORNA about whether it constitutes punishment should be relevant to the inquiry here.[9]

As outlined above, it is worth reiterating the fact that the federal SORNA has a dual character, both establishing its own requirements as a substantive matter as well as creating minimum requirements for compliant state jurisdictions. See 38 Fed Reg 38034. See also *Carr v United States*, 560 US 438, 453 (2010) ("Congress in § 2250 exposed to federal criminal liability" those who "threaten the efficacy of the statutory scheme by traveling in interstate commerce"). The duty under the federal

[8] It is a defense to a failure to comply with SORNA if the offender cannot register under the state registry. See 18 USC 2250(c).

[9] But see n 5 above and see analysis on page 36 below.

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SORNA to register requires the offender to register with the state jurisdiction's registry. See 34 USC 20913(C). Accordingly, in that sense, the federal government does not maintain its own public registry,[10] but the substantive obligations it creates are built on the state registries, like Michigan's. Likewise, the SORNA's website of offenders is derived from the state websites. See 34 USC 20920(a) (requiring states to "include in the design of its Internet site all field search capabilities needed for full participation" in the national website).

But the duties to comply with federal SORNA are not stripped of their independent and substantive nature as a consequence. The federal appellate courts have expressly reaffirmed the point, as noted by the Fifth Circuit in explaining how the SORNA obligations are "independent" of the state laws:

> SORNA's registration requirements are independent of state law registration requirements, so SORNA requires sex offenders to register in states whose own laws do not require registration by those offenders. [*Navarro*, 54 F4th at 277 (cleaned up), citing 86 Fed Reg at 69866.]

This is the reason that the federal courts have entertained challenges to the federal SORNA both from federal convictions, *Felts*, 674 F3d at 602, as well as from actions for declaratory judgment, see *Willman,* 972 F3d at 822. This reality confirms the significance of the fact that the SORNA and SORA are substantively aligned.

The test under Michigan law for whether a sentence constitutes cruel or unusual punishment begins with (1) whether the Legislature intended the law to be "a criminal punishment or a civil remedy," and if intended as a civil remedy, (2) whether the law is "so punitive either in purpose or effect as to negate the State's intention to deem it civil."

[10] But SORNA maintains a national registry for law enforcement. See 34 USC 20921.

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People v Earl, 495 Mich 33, 38 (2014) (cleaned up). The court below correctly ruled that the new SORA was intended to be a civil remedy. Slip op, p 12.

On the issue of its effect, the MSP agree with Wayne County's analysis that Michigan's new SORA is not punitive, and this amicus intends to supplement it, by emphasizing federal case law, which supports this conclusion based on its review of SORNA, and by comparing Michigan SORA to the Alaska law evaluated by the U.S. Supreme Court in *Smith v Doe*.

As a starting point, other than a case addressing juveniles it is worth noting that the federal SORNA has unanimously been determined by the federal appellate courts not to be punishment under the Eighth Amendment and the Ex Post Facto Clause. See *United States v Felts*, 674 F3d 599, 606 (CA 6, 2012) ("[T]he *unanimous consensus* among the circuits [is] that SORNA does not violate the Ex Post Facto Clause. SORNA . . . *does not increase the punishment for the past conviction*.") (Emphasis added.) See also, e.g., *United States v Parks*, 698 F3d 1, 5–6 (CA 1, 2012); *United States v Wass*, 954 F3d 184, 193 (CA 4, 2020); *United States v Young*, 585 F3d 199, 204–205 (CA 5, 2009); *United States v Meadows*, 772 Fed App'x 368, 369–370 (CA 7, 2019); *United States v Elk Shoulder,* 738 F3d 948, 958 (CA 9, 2013); *United States v Lawrance*, 548 F3d 1329, 1333 (CA 10, 2008); *United States v WBH*, 664 F3d 848, 855–860 (CA 11, 2011).[11] This Court should rule likewise here.

[11] The only contrary result, *U.S. v Juvenile Male,* 590 F3d 924, 942 (CA 9, 2009), addressing juvenile offenders, was vacated as lacking a case or controversy, 564 US 932, 933 (2011). And related to this point, the new Michigan SORA no longer requires juveniles who are adjudicated as juveniles in cases brought on or after January 1, 2021, in Probate Court to register. See MCL 28.722(a)(iii); MCL 712A.28(3).

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In analyzing whether a regulatory law has the effect of being punitive, this Court considers whether: (1) it has been regarded in our history and traditions as a punishment; (2) it imposes an affirmative disability or restraint; (3) it promotes the traditional aims of punishment; (4) it has a rational connection to a non-punitive purpose; or (5) is excessive with respect to this purpose. *Betts,* 507 Mich at 545; *Smith*, 538 US at 97, citing *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963). These factors are "neither exhaustive nor dispositive," but are "useful guideposts." *Smith*, 538 US at 97. And it is worth noting that the Court ordinarily defers to the Legislature, and thus "*only the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Earl*, 495 Mich at 44 (emphasis added). The party objecting bears the burden of proving it. *Id.*

1. Like SORNA, the new Michigan SORA has not historically been regarded as punishment.

When first reviewed in 2003, the U.S. Supreme Court noted that SORA laws are " 'of fairly recent origin,' " which suggests they have not historically been regarded as punishment. *Smith*, 538 US at 98. In evaluating the federal SORNA under this first *Mendoza* factor, the Fourth Circuit quoted *Smith*, reasoning that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013). In other words, contrary to the finding of the court below in its review of SORA, see slip op, p 14, the federal courts have determined the first factor weighs in favor of the constitutionality of SORNA in that it is not designed to shame people and does not resemble probation or parole.

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Not shaming

While offenders listed on a sex-offender registry may feel shame, the federal SORNA does not resemble the traditional punishment of shaming. "Like Hester Prynne with her scarlet 'A,' " the colonial chastisement of shaming "required criminals to stand in public or bear brands displaying their crimes for 'face-to-face' public shaming[.]" *United States v WBH*, 664 F3d 848, 855 (CA 11, 2011), citing *Smith*, 538 US at 98. The federal SORNA "does not subject sex offenders to 'face-to-face' public shaming or banishment to any greater degree than the Alaska statute in [*Smith v Doe*]." *WBH,* 664 F3d at 856. "Sex offenders are not forced to stand in pillories in the middle of town to face a barrage of bad-mouthing from the town's browbeaters and blowhards." *Id.* The same is true of the new Michigan SORA.

On this point, the U.S. Supreme Court has correctly distinguished sex-offender registration from traditional shaming. The Court acknowledged that publicity from Alaska's SORA "may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." *Smith,* 538 US at 98–99. But it held that, "[i]n contrast to the colonial shaming punishments," Alaska's SORA did not "make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id.* Publication on the Internet does not alter the analysis, even though "the humiliation" to the offender "increas[es] in proportion to the extent of the publicity." *Id.* at 99. The *Smith* Court focused on the key factor that "the purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.* The same is true here.

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Indeed, if publication alone rendered SORA punitive, then having a public trial in any criminal case would be punitive, rather than part of our commitment to transparency in the criminal process. See *Smith*, 538 US at 99 ("[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence."). That is why the federal courts have held that the federal SORNA is not punitive in directing the state registry to disseminate truthful information about juvenile sex offenders. See, e.g., *Under Seal*, 709 F3d at 262, 265 (not punitive for SORNA to require state registry to publish previously non-public youthful offender information); *WBH*, 664 F3d at 855 (same). And, as Wayne County notes, any sense of disgrace arises not from the website, but from the crime itself. See Wayne Co's Brief, p 30.

The new Michigan SORA is also unlike shaming because it does not affirmatively publicize, like a public service announcement, who is on the registry and does not seek the public's ridicule. Related to this point, the Michigan Court of Appeals here relied on a change of law in 2020, see 2020 PA 295, in which the new SORA no longer forecloses the public posting of "electronic mail addresses and instant message addresses" on the public registry. See slip op, p 13. Specifically, the court reasoned that while the changes were otherwise "ameliorative," this change supported the conclusion that the new SORA "continues to resemble the traditional punishment of shaming":

> *Because a registrant's Internet-based identifiers are no longer prevented from being included on the public website, the registrant is subjected to both ostracization in his or her community as well as while he or she interreacts with individuals using Internet-based communications and interactions.* As a result, we conclude that the 2021 SORA continues to resemble the traditional punishment of shaming. [Slip op, p 13 (emphasis added).]

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The problem with this analysis is that the Michigan State Police do not post this information on the public registry. In this respect, there has not been a change to the Michigan SORA. In other words, the public registry contains no information about a registrant's email addresses or Internet identifiers. The opinion below also fails to note that the new Michigan SORA does not include email addresses or Internet identifiers as information that the public registry must include. See MCL 28.728(2)(a) thru (k).

And the contrast to the federal SORNA is notable, as Michigan's new SORA is more purely informative than SORNA. In fact, the new Michigan SORA merely makes offender information available for the public to search. See MCL 28.728(6). By contrast, the federal SORNA provides that officials distribute notice of an offender's status to "each school and public housing agency" in the area where the offender resides. See 34 USC 20923(b)(2). Further, Michigan's registry allows the public to search by area and by non-compliant status, not just by name, which is consistent with its purpose of promoting public safety, as opposed to shaming individuals. It does not allow users to post comments for public view.

Not resemble probation or parole

The new Michigan SORA also is not akin to probation or parole. Indeed, the U.S. Supreme Court rejected this analogy in *Smith*. 538 US at 101. In applying *Smith* in its review of Oklahoma's SORA law, the Eighth Circuit noted that "no specific officer with the Department of Corrections is assigned," noted an "absence of supervision," and a lack of conditions "beyond regular reporting," for the SORA law at issue there. *Shaw v Patton,* 823 F3d 556, 564–566 (CA 10, 2016).

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The same is true of Michigan offenders under the new SORA, who must report information for a database but are not under supervision. See MCL 28.725(1), (2); MCL 28.725a(3)(a) (tier I). No specific officer was assigned to supervise Lymon, nor did SORA subject him to the stringent requirements that would occur for probation or parole.

In summary, on the first factor the federal appellate courts support the conclusion that Michigan's new SORA is not punishment.

2. Like SORNA, the new Michigan SORA imposes no affirmative disabilities or restraints, but only requires registration and reporting.

Nor does Michigan's new SORA impose a substantial disability or restraint akin to punishment, contrary to the ruling of the Court of Appeals below. See slip op, pp 14–15. The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects" of the Act "are felt by those subject to it." *Betts*, 507 Mich at 554, quoting *Smith*, 538 US at 99–100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* Just like the federal SORNA, that is the case here.

With the elimination of the student safety zones, like SORNA the new Michigan SORA imposes no restraints. At the outset, SORA compliance does not resemble the "infamous punishment" of imprisonment, which is "the paradigmatic affirmative disability or restraint." See *Earl*, 495 Mich at 44–45. SORA's requirements of in-person or mail-in reporting "impose no physical restraint[.]" See *Smith*, 538 US at 100.

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As noted by the First Circuit in reviewing federal SORNA, it found that while reporting in person is "doubtless more inconvenient than doing so by telephone, mail or web entry," it "serves the remedial purpose of establishing that the individual is in the vicinity," "confirms identity by fingerprints," and "records the individual's current appearance." *Parks*, 698 F3d at 6. In that way, the inconvenience of in-person reporting is minor "compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." *Id.*

And while the *Smith* Court noted that Alaska's statute did not require in-person reporting, 538 US at 87, the Court's decision did not depend on that fact, as evidenced by the fact that the federal courts have determined that in-person reporting under SORNA are not punitive under *Smith*. See *Parks*, 698 F3d at 5–6 (CA 1) (upholding quarterly in-person reporting); *Under Seal*, 709 F3d at 265 (CA 4) ("Although Appellant is required under SORNA to appear periodically in person to verify his information and submit to a photograph, see [34 USC § 20916], this is not an affirmative disability or restraint."); *United States v Young*, 585 F3d 199, 206 (CA 5, 2009) ("there is no reason for us to come to a different conclusion with SORNA"); *WBH*, 664 F3d at 852, 855, 857–858 (CA 11) ("Appearing in person may be more inconvenient, but requiring it is not punitive."). See also *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) (ruling that SORNA is "a civil, rather than penal, statute"), overruled on its statement of the standard for ex post facto analysis, *Koch v Village of Hartland*, 43 F4th 747, 749 (CA 7, 2022).

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Notably, in upholding Alaska's SORA law, the U.S. Supreme Court found compelling that SORA's obligations in Alaska are "less harsh than the sanctions of occupational debarment," which the Court has previously held to be non-punitive. *Smith*, 538 US at 99, citing *Hudson v United States*, 522 US 93, 118 (1997) (indefinitely barring participation in the banking industry); *De Veau v Braisted*, 363 US 144 (1960) (forbidding work as union official). That contrast remains compelling.

3. Like SORNA, the new Michigan SORA does not promote the traditional aims of punishment.

The next factor asks whether the law promotes the traditional goals of punishment: deterrence and retribution. *Smith*, 538 US at 102. Because SORA's deterrence and retributive effects are minimal and incidental to the goal of protecting the public from potentially dangerous offenders, see *Earl*, 495 Mich at 45–47, this factor does not favor a determination that SORA is punishment, contrary to the ruling of the court below. See slip op, p 16.

The federal courts have accorded this factor less emphasis in the intent-effects analysis under SORNA, given *Smith*'s admonition that "[a]ny number of governmental programs might deter crime without imposing punishment." *Id*. Nonetheless, in reviewing the *Mendoza* factors for whether SORNA is punitive, the federal appellate courts have weighed this factor in favor of the government. See, e.g., *Under Seal*, 709 F3d at 265 (CA 4) ("SORNA does not promote the traditional aims of punishment"); *U.S. v Shannon*, 511 Fed App'x 487, 492 (CA 6, 2013) (same); *WBH*, 664 F3d at 858–859 (CA 11) ("Regarding the traditional aims of punishment, SORNA is no different from the Alaska registration statute upheld in *Doe*.") The same applies here.

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4. Like SORNA, the new Michigan SORA rationally advances a non-punitive purpose.

A statute's rational connection to a non-punitive purpose is "a most significant factor" in the determining whether the statute's effects are punitive. *Smith*, 538 US at 102. And here, as in *Smith*, Michigan's SORA rationally furthers the "legitimate and non-punitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.*

The Michigan Legislature enacted SORA pursuant to its police power "to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. The Legislature determined that "a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." *Id.* SORA's registration requirements "are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger." *Id.*

Smith recognized that these non-punitive purposes are important. 528 US at 102–103. The Court cited "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," describing it as "frightening and high," citing statistics from the U.S. Department of Justice. *Id.* at 103. Michigan's new SORA requirements rationally advance those purposes. Registration assists authorities in keeping track of offenders, alerts the public to their presence, and helps parents make informed decisions regarding child-care and victimization prevention. *Id.*

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The Court of Appeals below quoted *Betts'* reference to studies that contend that the "dangerousness of sex offenders has been historically overblown." Slip op, p 17, quoting *Betts,* 507 Mich at 560. The findings of these studies are unwarranted.

In a July 2015 report, the U.S. Department of Justice's Office of Justice Programs has cited a large study of sex-offender recidivism showing that, while sex offenders had a lower overall rearrest rate than non-sex offenders within three years of release, their *sex crime* rearrest rate was *four times higher* than the rate of non-sex offenders. *Sex Offender Management and Assessment Initiative* (July 2015), "Recidivism of Adult Sexual Offenders," p 2, citing Langan, Schmitt, and Durose (2003).[12] And the same report cited a large 2004 study by Harris and Hanson finding an even higher recidivism rate: it found that the 15-year sexual recidivism rates for the sex offenders in the study was 24%. *Id.* at 3. A rational legislator could think that a one-in-four chance that the offender will commit another sexual offense is a public-safety issue. And even if true that "sex offenders are actually less likely to recidivate than other offenders," *Betts,* 507 Mich at 560, the unique injury imposed by sexual offenses is different in kind. This factor weighs in favor of the government, consistent with the rulings of the federal courts. See, e.g., *Under Seal*, 709 F3d at 265 (CA 4) ("SORNA has a rational connection to a legitimate, non-punitive purpose—public safety—which is advanced by notifying the public to the risk of sex offenders in their community"); *Shannon*, 511 Fed App'x at 492 (CA 6) (same).

[12] Available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/recidivismofadultsexualoffenders.pdf (Last accessed June 12, 2023.)

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The issue of recidivism and the most effective method of ensuring the safety of the community would appear to be the paradigm of an executive function, particularly where the actual recidivism rate of sexual offenders is difficult to measure. As the Office of Justice Programs explained in its July 2015 report, at 4, "there is universal agreement in the scientific community that the observed recidivism rates of sex offenders are underestimates of actual reoffending." Related to this kind of factual analysis, the federal courts have deferred to the judgment of Congress on the efficacy of the SORNA. See, e.g., *United States v Gould*, 568 F3d 459, 473 (CA 4, 2009) ("When the high incidence of recidivism is coupled with the interstate movement of sex offenders intending to avoid state registration or to seek more lax registration requirements, Congress could rationally perceive a need to create national standards for sex-offender registration and notification."); *United States v Ambert*, 561 F3d 1202, 1209 (CA 11, 2009) ("the restrictions contained in the federal statute, similarly, are rationally related to Congress' legitimate goal in protecting the public from recidivist sex offenders").

It is also rational to classify offenders based on the severity of their offense of conviction, rather than conducting individualized risk determinations. Indeed, the U.S. Supreme Court has squarely held that the constitution "does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 US at 103. The test is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 US at 105.

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A regulatory regime is not punitive "simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 102–103. That is why the federal appellate courts have upheld classification of offenders under SORNA based on offense in the absence of an individualized determination of dangerousness. See, e.g., *WBH*, 664 F3d at 859–860 (CA 11) ("Both statutory regimes [i.e., SORNA and Alaska's SORA] group the offenders in categories instead of making individual determinations of dangerousness. Because *Doe* held that the regulatory scheme of the Alaska statute is not excessive in relation to its non-punitive purpose, it necessarily follows that SORNA's is not either"). Lymon has not shown that SORA's non-punitive purpose is a "sham or mere pretext." See *Smith,* 538 US at 103. The Michigan Legislature's decision to provide information about this population is rational, and this factor weighs in favor of Michigan's new SORA.

5. Like SORNA, the new Michigan SORA is not excessive in relation to its regulatory purpose.

Nor is SORA excessive in relation to its regulatory purpose. The requirements of the new SORA help achieve the Legislature's important purpose of informing the public. The burdens of it are not excessive in light of this benefit, just as the federal courts have ruled in reviewing the federal SORNA.

The duration of registration – be it 15 years, 25 years, or for life as required by SORNA (see 34 USC 20915(a)) – is not excessive. As shown by the data cited in the Office of Justice Program's July 2015 report, "[s]tudies employing longer follow-up periods consistently report higher rates of recidivism." *Sex Offender Management and Assessment Initiative* (July 2015), p 4. See also *Smith*, 538 US at 104 ("most reoffenses

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do not occur within the first several years after release," but may occur "as late as 20 years following release").

In accordance with these statistics, the federal courts have upheld SORNA. See, e.g., *Parks*, 698 F3d at 5–6 (CA 1) (on issue of whether SORNA is excessive, the First Circuit ruled that "we join every circuit to consider the issue and reject the main claim made by Parks") (citing four other circuits); *WBH*, 664 F3d at 852, 859–860 (CA 11) (finding SORNA not excessive in light of its non-punitive purpose). Consistent with the holdings of the federal courts, like SORNA Michigan's new SORA requirements do not constitute punishment.

* * *

One final point. The Sixth Circuit in 2020 reaffirmed the fact that the federal SORNA is not punitive in a challenge brought by a Michigan offender, convicted in 1993 of a listed offense. See *Willman,* 972 F3d at 825. Willman argued that he should not have to comply with federal SORNA where he was not required to register under Michigan SORA based on a 2019 judgment. *Id.* at 822. In reviewing the claim, the Sixth Circuit noted the independent nature of the federal SORNA obligations and that these duties – generally the same obligations at issue here as a facial matter – did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. It ruled that way because "SORNA is not punishment for purposes of the Eighth Amendment." *Id.* at 825.

This analysis is significant for a couple of reasons.

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First, the Sixth Circuit in its background analysis noted the decision of *Does 1–5 v Snyder,* 834 F3d 696 finding Michigan's old SORA unconstitutional, describing "its stringent restrictions (such as severe limits on where sex offenders were allowed to live and work)," *Willman,* 972 F3d at 822 n 1, which are not present in SORNA, nor in the new Michigan SORA, i.e., the student safety zones. This effectively identified the core difference between the old Michigan SORA and SORNA. While the duty to report minor changes such as changes to a vehicle appears to have been added by the Attorney General's supplemental guidelines effective on January 7, 2022 for SORNA, see 28 CFR 72.7(e), and thus would not have factored into the analysis about its regulatory nature, even so, the SORNA already had required compliant state jurisdictions to include this obligation, see 73 Fed Reg at 38066 (2008) (stating that each jurisdiction "must require" the sex offender to report minor changes). And no court has identified this aspect of the SORNA in place now, or of the new Michigan SORA, as a dispositive feature of the law that would require a different analysis.

Second, the Sixth Circuit analysis emphasized the duties of the federal SORNA in aggregate as Willman was not challenging any specific provision of the federal law where he filed a declaratory action challenging the federal SORNA as a whole. See *Willman*, 972 F3d at 822 ("Willman sought a declaration that SORNA was unconstitutional, and therefore he was not required to comply with it.") The court rejected both an ex post facto challenge and Eighth Amendment challenge. *Id.* at 824–825 (ex post facto) and 825 (Eighth Amendment). The nub of the analysis for each point is that SORNA is not punishment. *Id.* That is true of Michigan's new SORA.

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B. Michigan's new SORA is very much like the Alaska registration law that the U.S. Supreme Court found not to be punitive.

While the comparison to SORNA makes clear that Michigan's new SORA is not punitive, a comparison of the new Michigan SORA to the Alaska law reviewed by the U.S. Supreme Court in *Smith* is similarly powerful in supporting the conclusion that it is not punishment. Like Alaska's law, Michigan's new SORA is not punitive.[13]

A walk through the U.S. Supreme Court's description of the Alaska law at issue there in comparison to Michigan's new SORA demonstrates the substantive parallel between the two laws:

Registration and notification

ALASKA	MICHIGAN
"The Alaska law . . . contains two components: a registration requirement and a notification system." *Smith*, 538 US at 90.	The new Michigan SORA also requires a registration component, see MCL 28.724, and a notification component, see MCL 28.728(2).

Application to offenders whose crimes have already been committed

ALASKA	MICHIGAN
"Both [the registration requirement and notification system] are retroactive. 1994 Alaska Sess. Laws ch. 41, § 12(a). The Act requires any 'sex offender or child kidnapper who is physically present in the state' to register, either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty). Alaska Stat. §§ 12.63.010(a), (b) (2000)." *Smith*, 538 US at 90.	The new Michigan SORA – in both its registration and notification duties – applies to an offender generally whose crime was committed on or after October 1, 1995 or otherwise was under the jurisdiction of the Department of Corrections for a listed offense on that date. See generally MCL 28.724(2), (3).

[13] The Alaska Supreme Court found the Alaska registry to be punitive under Alaska's Constitution. *Doe v State*, 189 P3d 999, 1007 (Alaska 2008).

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Must register within short time-period

ALASKA	MICHIGAN
"Prompt registration is mandated. If still in prison, a covered sex offender must register within 30 days before release; otherwise he must do so within a working day of his conviction or of entering the State. § 12.63.010(a)." *Smith*, 538 US at 90.	Under the new Michigan SORA, an offender is generally registered at sentencing or otherwise within three business days of arriving in Michigan. See MCL 28.724(5), (6).

Must provide similar kinds of information

ALASKA	MICHIGAN
"The sex offender must provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and postconviction treatment history. § 12.63.010(b)(1). He must permit the authorities to photograph and fingerprint him. § 12.63.010(b)(2)." *Smith*, 538 US at 90.	Under the new Michigan SORA, the offender must provide the same information as listed for Alaska, except for "treatment history," but also requires the offender to provide his Social Security number, his place of "temporary lodging," the name and address of school attended, telephone numbers, electronic mail addresses, internet identifiers, passport and immigration documents, professional licensing information, and physical description. See MCL 28.727(1)(a) thru (1)(r).

Must register for either 15 years or life

ALASKA	MICHIGAN
"If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. §§ 12.63.010(d)(1), 12.63.020(a)(2). If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. §§ 12.63.010(d)(2), 12.63.020(a)(1)." *Smith*, 538 US at 90.	Under the new Michigan SORA, the time periods are 15 years (Tier I), 25 years (Tier II), or lifetime registration (Tier III). See MCL 28.725(11), (12), (13).

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Must notify authorities of changes to address

ALASKA	MICHIGAN
"The offender must notify his local police department if he moves. § 12.63.010(c)." *Smith*, 538 US at 90.	Under new Michigan SORA law, an offender must also notify the authorities of a new address, and that obligation also attaches to changes to employment, student status, change to name, as well as vehicle information, electronic mail addresses, internet identifiers, telephone numbers, or temporary residence. See MCL 28.725(1), (2).

Offender's registration information is made public on internet

ALASKA	MICHIGAN
"The information is forwarded to the Alaska Department of Public Safety, which maintains a central registry of sex offenders. § 18.65.087(a). . . . The following information is made available to the public: "the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located." § 18.65.087(b). The Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet." *Smith*, 538 US at 90–91.	Under new Michigan SORA, the same basic information is collected by the law enforcement authorities and the following information is listed on the public website: name, date of birth, address, employer addresses, school address, license plate number and description of any vehicle, summary of convictions, physical description, photograph, text of registerable criminal offense, and registration status. See MCL 28.728(2)(a) thru (k).

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Provides for criminal penalties for failure to comply

ALASKA	MICHIGAN
"A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution. §§ 11.56.835, 11.56.840." *Smith*, 538 US at 90.	Under new Michigan SORA, the willful failure to comply with the Act is subject to criminal prosecution, beginning as a four-year felony. See MCL 28.729(1)(a).

Thus, in summary for the eight characteristics of the two laws highlighted above, the Michigan law is substantively similar in most respects, except for the notifications of updates where the Alaska law only required updates for an address, while Michigan's new SORA requires more reporting of updates, some of which is in person. Nonetheless, a review of this Court's application of the *Mendoza* factors in *Betts* examining whether Michigan's old SORA was punitive in response to an ex post facto challenge confirms that the characteristics that made Michigan's old SORA law punitive have been purged, making the new SORA much like Alaska's law, just as the original Michigan SORA was before the 2006 and 2011 amendments. See 507 Mich at 547 ("Michigan's SORA as initially enacted was similar to the Alaska sex-offender registry at issue in *Smith*"); *id.* at 564 ("[A] majority of the former SORA provisions underlying our conclusion that the 2011 SORA constitutes punishment were added by its 2006 and 2011 amendments.").

To begin, as to the first *Mendoza* factor this Court in *Betts* examined the "**history and tradition**." 507 Mich at 550. This Court found this factor to weigh against the old SORA, but largely based on the student safety zones, which were added in 2011 and repealed in 2021, in finding that it bore similarities to banishment and parole. The highlights below flag the analysis that tracks the old SORA's now-repealed safety zones:

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> [T]he 2011 SORA does resemble, in some respects, the traditional punishments of banishment, shaming, and parole.
>
> In regard to banishment, *the 2011 SORA's student-safety zones excluded registrants from working, living, or loitering within 1,000 feet of school property. See MCL 28.733 to MCL 28.736, as amended by 2005 PA 121. Unlike traditional banishment, these exclusion zones did not explicitly exile a registrant from the community. But they might have effectively banished a registrant from living within the community. For example, in urban areas that host several schools within their geographic borders, the 1,000-foot restriction emanating from each school might have eliminated access to affordable housing. Or, in rural areas with fewer schools but concentrated community areas, the 1,000-foot restriction might have eliminated a registrant's access to employment and resources within the town or city center. And available homeless shelters might have also been encompassed by the 1,000-foot residency restriction.*
>
> * * *
>
> Finally, the 2011 SORA also resembles parole. *Although registrants need not have sought permission to make life changes, they were not free to live and work where they desired because of the student-safety zones. Registrants, like parolees, were required to periodically report in person to law enforcement. See MCL 28.725a(3), as amended by 2011 PA 17; MCL 28.725(1), as amended by 2011 PA 17.* They were also required to pay registration fees. See MCL 28.725a(6), as amended by 2011 PA 17. Failure to comply with SORA's requirements, like the failure to comply with parole conditions, potentially subjects the offender to imprisonment. See MCL 28.729(1), as amended by 2011 PA 18. Further, as with parole, a law enforcement officer at any time could have investigated a registrant's status based on an anonymous tip. The 2011 SORA thus imposed a significant amount of supervision by the state on registrants. *This amount of supervision differentiates the 2011 SORA from the 2003 Alaska sex-offender registry, which the United States Supreme Court held did not resemble parole because registrants were "free to move where they wish and to live and work as other citizens"* and because registrants were not required to make periodic updates to law enforcement in person. *Smith*, 538 US at 101–102 []. Neither of these characteristics is true of the 2011 SORA.
>
> [*Betts,* 507 Mich at 550–551, 553 (citations omitted; emphasis added).]

For the analysis regarding this factor, this Court also evaluated "shaming" and noted how Michigan's old SORA included a significant amount of "personal information" on the registry and ease of access to that information on the Internet.

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Id. at 551 ("its 2011 iteration contained more personal information and required less effort to access that information" than the "initial version of SORA"). While these same points may be applied to Michigan's new SORA, it seems like the same could be said for the Alaska law, for which "most of the nonconfidential information [was] available on the Internet." *Smith*, 538 US at 91.

As the to the second *Mendoza* factor of "**affirmative disability or restraint**," 507 Mich at 554, *Betts* relied on two facets of the old SORA, the student safety zones and the in-person reporting, both of which have changed.

On this first facet, this Court explained the affirmative disability that had arisen from the now-repealed student safety zones, as indicated by the highlights:

> *The application of these exclusionary zones also had substantial collateral consequences, including limiting access to public transportation, employment opportunities, educational opportunities, resources like counseling and mental-health treatment, and medical care such as residential nursing homes. The 2011 SORA's 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), as amended by 2005 PA 121—was also arguably broad enough to encompass parenting activities such as attending parent-teacher conferences, attending student sporting events, or transporting children to school. Further, the student-safety zones also risked preventing registrants from establishing a permanent home, given that registrants were not excepted from the residency ban if a school opened within 1,000 feet of their established home. See MCL 28.735, as amended by 2005 PA 322.*
>
> [*Betts,* 507 Mich at 554–555 (emphasis added).]

Regarding the "in-person reporting requirement," the significance of these were largely blunted by the fact that Legislature eliminated the need to appear in person for minor changes, such as a change to a vehicle or temporary residence. See MCL 28.725(2). See also Ex C, MSP Notice (reporting by mail).

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In particular for this second facet, for the list of "life events," half of them no longer require "in-person reporting," i.e., those designated in highlights:

> The in-person reporting requirements imposed by former MCL 28.725(1) also imposed affirmative disabilities on registrants. Upon numerous life events, including
>
> [1] moving residences,
>
> [2] changing employment,
>
> [3] changing educational status,
>
> [4] changing names,
>
> [5] *making plans to reside outside of the home for more than 7 days, and*
>
> [6] *changing vehicles,*
>
> registrants were required to provide an in-person update to law enforcement within three days. MCL 28.725(1), as amended by 2011 PA 17.
>
> ***Particularly onerous*** was the requirement in former MCL 28.725(1)(f) of immediate in-person reporting when a registrant
>
> [7] *established "any electronic mail or instant message address, or*
>
> [8] *any other designations used in internet communications or postings."*
>
> Given the ubiquity of the Internet in daily life, this requirement might have been triggered dozens of times within a year.
>
> [*Betts,* 507 Mich at 556 (emphasis and numbered brackets added).]

With the elimination of the student safety zones and the duty to report certain information in person, the new SORA has only in-person reporting obligations for changes to address, employment, education status, and name, which has some similarities and some differences with the Alaska law, for which the U.S. Supreme Court found this factor to weigh in the law's favor. See *Betts,* 507 Mich at 546 ("[T]he Court [in *Smith*] concluded that the registry did not do so because it did not impose any physical restraint. It specifically observed that the registry allowed registrants to change jobs or residences as they desired and imposed no requirement to appear in person.") There is no "physical restraint" here.

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As to the third *Mendoza* factor, this Court in *Betts* examined the "**traditional aims of punishment**," 507 Mich at 556, which were "retribution" and "deterrence." *Id.* For the review of this factor, this Court's analysis was more abbreviated, noting the "extensive requirements" and the lack of "individualized determination of the dangerousness of each registrant." *Id.* at 557. But as noted, the old SORA's "extensive requirements" were radically altered by the elimination of the student safety zones and the "particularly onerous" in-person reporting for minor changes. And, significantly, the U.S. Supreme Court also rejected the claim based on a lack of individualized determination, as noted by this Court, as "[t]he [U.S. Supreme] Court also held that the registry's lack of individualized risk assessment did not render it retributive." *Betts,* 507 Mich at 546, citing *Smith,* 538 US 102–103. As in *Smith,* this factor weighs in favor of the new Michigan SORA.

As to the fourth *Mendoza* factor, this Court evaluated the old SORA's "**connection to [a] nonpunitive purpose**." *Betts,* 507 Mich at 558. On this point, the Court ruled that "the 2011 SORA is connected to a nonpunitive purpose." *Id.* That remains true here. This is "a most significant" factor. *Smith,* 538 US at 102.

And finally, as to the fifth *Mendoza* factor, which is "**excessiveness**," 507 Mich at 559, this Court ruled that it weighed in favor of a finding of the old SORA to be punishment, but this analysis was predicated on four elements: (1) a questionable determination of the lack of efficacy of the SORA generally; (2) a lack of individual determination (just like Alaska's law); (3) the student safety zones (now repealed) and (4) onerous in-person reporting for minor changes (significantly revised):

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> [1] For our limited purpose in examining the potential excessiveness of the 2011 SORA in regard to its public-safety purpose, these studies demonstrate that, at minimum, the 2011 SORA's efficacy is unclear.
>
> Given the uncertainty of the 2011 SORA's efficacy, the restraints it imposed were excessive.
>
> [2] Over 40,000 registrants were subject to the 2011 SORA's requirements without any individualized assessment of their risk of recidivism. The duration of an offender's reporting requirement was based solely on the offender's conviction and not the danger he individually posed to the community. Registrants remained subject to SORA—including the stigma of having been branded a potentially violent menace by the state—long after they had completed their sentence, probation, and any required treatment.
>
> [3] All registrants were excluded from residing, working, and loitering within 1,000 feet of a school, even those whose offenses did not involve children and even though most sex offenses involving children are perpetrated by a person already known to the child. As described, this restriction placed significant burdens on registrants' ability to find affordable housing, obtain employment, and participate as a member of the community.
>
> [4] Registrants were also required to make frequent in-person reports to law enforcement upon minor life changes and regular in-person reports—sometimes multiple times a year—even when no information had changed. These demanding and intrusive requirements, imposed uniformly on all registrants regardless of an individual's risk of recidivism, were excessive in comparison to SORA's asserted public-safety purpose.
>
> [*Betts,* 507 Mich at 561–562.]

A review of these four elements again reveals that the change in Michigan law alters the calculus here. As noted, the student safety zones have been repealed, and the in-person reporting requirements have changed significantly. And the lack of individual determination, as also noted above, did not weigh in favor of a finding of punishment in *Smith*. *Betts,* 507 Mich at 546.

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And that leaves the question of the registry's efficacy. There is no record here on this issue. The Michigan State Police identified the federal courts' reliance on data in support of the non-punitive purpose of the new Michigan SORA of reducing recidivism and providing information to the public about sex offenders. See pp 31–33 above. Even that information confirms the statements in *Smith* by the U.S. Supreme Court about "their dangerousness as a class," as the "risk of recidivism posed by sex offenders is frightening and high." 538 US at 103 (cleaned up). See *Sex Offender Management*, "Recidivism of Adult Sexual Offenders," p 3, citing Harris and Hanson (2004) (a study reporting 24% recidivism rate over 15 years relying from estimates based on new charges or convictions). Yet, the evidentiary data is clear that relying on an offender's subsequent criminal history of either arrest or conviction *understates* the true level of reoffending:

> Researchers have long acknowledged that recidivism rates based on criminal justice data underestimate actual rates of reoffending. [Criminal Justice Review, Georgia State University, "Sex Offender Recidivism: Some Lessons Learned From Over 70 Years of Research," p 15.][14]

The problem with relying on criminal convictions, or even just arrests, is the radical underreporting that occurs for sexual offenses. The National Crime Victimization Survey (NCVS) indicates that less than 25% of sexual assault victims report their crimes to police. See Criminal Victimization, 2016 (Dec 2017), p 7 (23%).[15]

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[14] Available at https://journals.sagepub.com/doi/full/10.1177/07340168231157385 (Last accessed June 13, 2023.)

[15] Available at https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv16_old.pdf (Last accessed June 13, 2023.)

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And when you take these points and apply them to Michigan's new SORA, it confirms the important regulatory function that this law performs for the residents of the State. As of March 10, 2023, there were 44,110 registrants on the public and non-public registry. See Ex I, Second Affidavit of Sharon Jegla, MSP Analyst, March 15, 2023, p 1. For these offenders, more than 80% of the registrants committed sexual offenses against children under the age of 18. See Ex H, Affidavit of Sharon Jegla, February 7, 2023, p 2. In fact, 38% were against children under the age of 13, reflecting 16,793 victims. *Id.* at 2. Here is the graph of the known victims out of a registry of approximately 44,000:

Age Range of Victims	Results
Victims under the age of 13	16,793
Victims between 13 and 17	14,745
[Total victims under 18]	[36,545]
Adult victims	4,657

[See Ex H, Affidavit of Sharon Jegla, February 7, 2023, p 2.]

And of the approximately 44,000 registrants, more than 10% or 5,268, had a subsequent registrable offense. *Id.* at 1. Any suggestion that the risk posed by this cohort of sexual offenders does not pose a threat to the safety of the children of Michigan is not well taken.

One further point here. The number of offenders who were like Cora Lymon, whose offense did not necessarily include a sexual component is a relatively small percentage, less than 1%, or approximately 260 registrants, i.e., those who were convicted of child enticement, kidnapping of a minor, or unlawful imprisonment of a minor. They are not indicative of the other offenders on this list.

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C. Any ruling that Michigan's new SORA is punitive as a facial matter may have broad implications for the law, whereas a narrow ruling as applied for Cora Lymon would not, but he is not entitled even to that relief.

As noted earlier, the Court of Appeals applied a facial analysis here in determining that Michigan's new SORA law was punitive. See slip op, pp 11–18. That analysis was not as applied. That is significant here for three class of claims.

First, as explained earlier in this brief, the same test that governs the threshold question whether a law is cruel or unusual in Michigan, i.e., whether it is punitive, governs the federal question evaluating whether a law constitutes punishment under the Ex Post Facto Clause. To be clear, even if this Court ruled that Michigan's new SORA was punitive under Michigan constitution's prohibition on cruel or unusual punishment as a facial matter, that does not answer the question for ex post facto purposes until that issue arose. But they are the same test, and for this reason this Court should find the federal case law persuasive. For any later challenge on ex post facto grounds that may occur, it is important to note that more than 30,000 of the offenders committed their offenses before July 1, 2011.[16] The claim that Michigan's new SORA law violates the Ex Post Facto Clause is one of the central issues in the challenge to the constitutionality of Michigan law pending in federal court. The discovery in that case is set to close in June 2023. See *Does v Whitmer* (ED Mich, 22-cv-10209), Stipulated Order, April 11, 2023.

[16] The Michigan State Police analyst stated that 13,174 of the registrants committed their offense after July 1, 2011, including incarcerated registrants. See Ex I, Second Affidavit, p 1. That leaves more than 30,000 offenders who committed their registrable offense before July 1, 2011.

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Second, a finding that the new Michigan SORA is punitive as a facial matter also has implications for the validity of pleas where the trial court fails to inform the criminal defendant of the SORA implications of a plea. That is because the trial court has an obligation to inform a defendant of the "direct consequences" of the plea, which includes "the penalty to be imposed." *People v White*, 337 Mich App 558, 571 (2021). This issue arose in a case in the Court of Appeals, in which that court remanded the plea for further proceedings based on the failure of the court to inform the defendant of the SORA implications relying in part on *Lymon*:

> Defendant also asserts that he was entitled to withdraw his plea because he was not informed of his obligations under SORA, and therefore, not apprised of the maximum possible punishment, rendering his plea involuntary. We vacate the judgment of sentence and remand for a determination whether defendant received due process of law with regard to the notice and registration provisions of SORA. [*People v Watkins,* an unpublished per curiam opinion of the Court of Appeals, No. 356380 (Oct 13, 2022), slip op, p 5 (Attachment 1).]

The Court of Appeals noted that the court had previously ruled that the new Michigan SORA had an "aggregate punitive effect." *Id.* A ruling on narrower grounds, i.e., on as-applied grounds, would leave this issue for another day.

Third, the Court of Appeals relied on *Lymon* in part to find that the failure of the trial court to place the registration obligations on the criminal defendant's judgment of sentence after a conviction for a sexual offense obviated the duty of the criminal defendant to register. See *Nunez,* ___ Mich App at ___; 2022 WL 2885402, at *5. In that case, the Court of Appeals was addressing the failure of a sentencing court to meet its duty under the new SORA to ensure that the sexual offender was registered before sentencing as provided by law under MCL 28.724(5). *Id.* at *2.

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Specifically, the Court of Appeals noted the duty of the trial court to inform a criminal defendant who was pleading guilty to the sentencing implications of the plea and that the failure to meet its statutory duty under SORA, see MCL 28.724(5), prevents the subsequent application of SORA to the offender:

> Because SORA is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea. For the same reason, the registration requirement must be included in the judgment of sentence. Accordingly, the failure of the trial court to adhere to the statutory notice requirement and to include SORA registration in the judgment of sentence prevents any belated application of SORA to Nunez. [*Nunez*, ___ Mich App at ___; 2022 WL 2885402, at *5.]

Again, a narrower ruling in *Lymon* would remove the predicate for this decision and leave this question presented there for another day.

Finally, the issue may be in play here on the narrower question whether the new Michigan SORA *as applied to Cora Lymon* constituted cruel or unusual punishment under the facts of his case. As noted, there are approximately 260 offenders currently on the registry who did not have a sexual component as an element of the registrable offense they committed, i.e., child enticement, kidnapping of a minor, and unlawful imprisonment of a minor.[17] As found by the court below, the offense here did not include any sexual component whatsoever. The question whether the new SORA operates rationally here for a non-sexual offender is a different one from the question whether it is punitive for a sexual offender. Even on this former question, Lymon would not be entitled to relief given the regulatory nature of the obligations.

[17] Wayne County's brief lists five other offenses, see p 51, identified as "non-sexual offenses" requiring registration under SORA. But these other five registrable offenses listed in Wayne County's brief, e.g., accosting a minor, have a sexual element.

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On the issue of an as-applied challenge, the Michigan State Police offer a few considerations for the Court on this issue. The U.S. Supreme Court has suggested that the question whether a statute is punitive, at least for an ex post facto challenge, is not amenable to an as-applied analysis. See *Seling v Young*, 531 US 250, 263 (2001) ("We agree with petitioner that an 'as-applied' analysis would prove unworkable."). See also *Conover v Main*, 601 F App'x 112, 114 (CA 3, 2015) ("[T]he District Court correctly held that the Supreme Court's decision in *Seling* [ ] bars him from arguing that the statute is unconstitutionally punitive 'as applied' to him."). But the claim here is not one of ex post facto, nor does it arise from the federal constitution. See slip op, p 22, n 21. On this point, the Michigan Court of Appeals has entertained as-applied state constitutional challenges to SORA, granting relief in a case based on the issue identified as the "Romeo and Juliet" question for the old SORA, and denying relief last year for a claim about lifetime registration. See *People v Dipiazza*, 286 Mich App 137, 156 (2009) ("Because defendant's registration is not tied to a finding that the safety of the public is threatened, the registration requirement, as applied to defendant, is excessive. Hence, the registration requirement, as applied to defendant, is punitive."); *People v Jarrell*, ___ Mich App ___; 2022 WL 17365039, at *1, No. 356070 (2022) (rejecting the as-applied challenge to the lifetime registration requirement).

In fact, in addressing the ex post facto issue before *Betts,* this Court invited questions predicated on an as-applied challenge to class of offenders under the old SORA:

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> (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, amount to "punishment," see *People v Earl*, 495 Mich 33 [ ](2014);
>
> (2) whether the answer to that question is different *when applied to the class of individuals* who have successfully completed probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*
>
> [*People v Temelkoski,* 498 Mich 942 (2015) (emphasis added).]

Similarly, regarding the Eighth Amendment, the U.S. Supreme Court appears to still believe there may be an as-applied challenge. See, e.g., *Nance v Ward*, 142 S Ct 2214, 2219 (2022) ("A death row inmate may attempt to show that a State's planned method of execution, either on its face or *as applied to him*, violates the Eighth Amendment's prohibition on 'cruel and unusual' punishment.") (Emphasis added).

Thus, on first blush, Michigan law would appear to permit an as-applied challenge for a state constitutional claim, applying the *Mendoza* factors for an offender, as here, where there was no sexual component to his crime. As noted, this is not a case in which the federal SORNA would apparently apply either. See 34 USC 20911(7)(B). And this is not a circumstance, as with many other crimes for child enticement, kidnapping of a minor, and unlawful imprisonment of a minor, where the underlying motive for the crime was sexual in nature. [18] In this way, there are three classes of offenders within this group of approximately 260 offenders: (1) those who committed their crime with a sexual motive; (2) those who sought to abduct a child from their parents; and (3) those, like Lymon, who neither sought to commit a sexual crime, nor sought to abduct a child.

[18] Some kidnapping offenses contain a sexual element. See, e.g., MCL 750.349(c), (f).

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For the first group, Lymon's case may well be very different from the other 260 offenders convicted of one of these three offenses. The sexual component is not an element generally for these crimes, but it often plays a role. It did not here.

For the second group, Lymon's case is also different from the specific threat addressed by the crime of detaining or concealing a child from a parent, or any other person having lawful charge of a child, by a non-parent. 34 USC 20911(7)(A), (B); MCL 750.350 (child enticement).[19] In that situation, which does not apply to Lymon's case, federal and Michigan law recognize the unique and severe threat to the safety and welfare of children, regardless of the eventual intent of their captors. 34 USC 20911(7)(A), (B) (including "kidnapping" and "false imprisonment" as a "specified offense against a minor" but excluding a "parent or guardian"); MCL 28.721a ("a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state."). These are Tier III offenses. 34 USC 20911(4)(B); MCL 28.722 (v)(iii) (referencing child enticement, MCL 750.350). Like the crime of kidnapping of a minor and unlawful imprisonment of a minor when committed by a stranger to the child, these crimes present a unique danger to children – a danger that may not be sexual in nature – which nonetheless may warrant placement on the registry.

[19] As a matter of law, a natural parent cannot be charged with the crime of child enticement, unless the person's parental rights have been terminated. MCL 750.350(2); see *People v Wambar,* 300 Mich App 121, 129 (2013).

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In this way, for the third group where there is no sexual motive and no attempt by a stranger to abduct a child, the central justification of the new Michigan SORA – providing information to the public about sex offenders – would not apply to Lymon and those situated like him. In other words, the new Michigan SORA would not further the end of "preventing and protecting against the commission of future criminal sexual acts by *convicted sex offenders*." MCL 28.721a (emphasis added). But it is fair to conclude that Lymon presents a "potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." *Id*. This case might raise the question whether it is fair to place Lymon on a list that is titled a "Sex Offenders Registr[y]," see MCL 28.721, when, in fact, the offender has done nothing sexual in nature. Such a fact may be relevant under the *Mendoza* factors concerning the law's purpose and its relation to that purpose in an as-applied analysis. But the true gravamen of such a claim would sound in substantive due process, not in the protection against cruel or unusual punishment. That is because the nature of the duties in the new Michigan SORA, just like the federal SORNA and the Alaska SORA law, are regulatory in nature. They are not punitive. The character of Lymon's criminal acts cannot transform SORA's obligations as amended in 2021 into punishment.

And regardless of the ruling on that narrower issue, i.e., the as-applied question, the threshold question is one for which the answer is straightforward. The new Michigan SORA is not punitive. In the end, the Court of Appeals erred in ruling on facial grounds that the new SORA was punishment. This Court should reverse.

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CONCLUSION AND RELIEF REQUESTED

This Court should reverse and rule that Michigan's new SORA, as amended to match the federal Sex Offender Registration and Notification Program (SORNA), is a civil regulatory law and does not constitute punishment.

Respectfully submitted,

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WORD COUNT STATEMENT

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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 164685
Plaintiff-Appellee, Cross-Appellant,	Court of Appeals No. 327355
v	Wayne Circuit Court No. 14-010811-FC
CORA LADANE LYMON,	
Defendant-Appellant, Cross-Appellee.	

_____/

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

ATTACHMENT AND EXHIBIT LIST
FOR AMICUS BRIEF OF THE MICHIGAN STATE POLICE IN SUPPORT OF THE WAYNE COUNTY PROSECUTOR'S OFFICE

Attachment

Attachment 1 = *People v Watkins,* an unpublished per curiam opinion of the Court of Appeals, No. 356380 (Oct 13, 2022).

Exhibits

Exhibit A = U.S. Solicitor General's Amicus (July 2017)

Exhibit B = Legislative Analysis of HB 5679 (12-9-20)

Exhibit C = MSP Notice

Exhibit D = Comparative Chart (Amended SORA and SORNA) (6-20-23)

Exhibit E = HB 5679 (12-16-20) (With Changes)

Exhibit F = Does v Whitmer – State's Motion to Dismiss (5-31-22)

Exhibit G = Does v Whitmer – Plaintiffs' Response (7-18-22)

Exhibit H = Affidavit of Sharon Jegla (Feb 7, 2023)

Exhibit I = Second Affidavit of Sharon Jegla (March 15, 2023)