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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee/Cross-Appellant,

v.

Cora Ladane Lymon

Defendant-Appellant/Cross-Appellee.

MSC No. 164685

COA No. 327355

Wayne County Circuit Court
Case No. 14-010811-01-FC

Cora Ladane Lymon's Brief on Appeal

Oral Argument Requested

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Counter-Statement of the Questions Presented

First Question

Is requiring Mr. Lymon to register as a sex offender even though he has never committed a sex offense a disproportionate sentence and cruel or unusual punishment in violation of Michigan's Constitution?

Cora Ladane Lymon answers: Yes.

The trial court did not answer.

Second Question

Does registration under SORA violate the Federal Constitution's prohibition on cruel and unusual punishment?

Cora Ladane Lymon answers: Yes.

The trial court did not answer.

Third Question

Is 2021 SORA punishment because nearly all the punitive portions this Court discussed in *Betts* remain?

Cora Ladane Lymon answers: Yes.

The trial court did not answer.

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Introduction

Cora Lymon has never committed a sex offense at any point in his life. Yet, Michigan has branded him as a sex offender. He must comply with the provisions of the Sex Offenders Registration Act (SORA), a statute designed to monitor sex offenders and publicize their status online, or face incarceration:

- He is labeled on Michigan's online sex offender registry as a "convicted sex offender." See generally *Michigan Sex Offender Registry* <https://mspsor.com/Home/Search> (accessed November 14, 2023).

- He must register for 15 years after his term of incarceration ends. MCL 28.725(11).

- He must report in-person to local law enforcement every one of those 15 years and must report in-person when certain information changes. MCL 28.724a; MCL 28.725a(3); MCL 28.725(1), (3), (7)-(8).

- He must report in-person or by mail when certain other information changes. MCL 28.725(2).

- He must pay an annual fee. MCL 28.725a(5)-(6).

- A vast amount of his personal information appears online on the sex offender registry. MCL 28.728(2).

- The public can track him. See generally *Michigan Sex Offender Registry* <https://mspsor.com/Home/Search> (accessed November 14, 2023).

- He is not allowed to petition to be removed from the registry by demonstrating that he is not at risk of reoffending sexually (or offending sexually in the first place). MCL 28.728c.

If Mr. Lymon fails to meet any of these obligations, he can be found guilty of a felony and may be sent to jail or prison. MCL 28.729.

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Requiring Mr. Lymon to register as a sex offender and meet all these onerous obligations when he did not commit a sex offense is cruel or unusual punishment under Michigan's Constitution.

This Court's precedent involving the cruel or unusual punishment clause and the constitutionality of SORA controls its decision here.

Michigan's Constitution provides broad protections from mandatory, disproportionate sentences. *People v Bullock*, 440 Mich 15 (1992); *People v Lorentzen,* 387 Mich 167 (1972); *People v Parks*, 510 Mich 225 (2022); *People v Stovall*, 510 Mich 301 (2022). There can be no serious argument that requiring a person who has not committed a sex offense to register as a sex offender – and to comply with SORA's onerous requirements while facing social stigma – constitutes a proportionate punishment. SORA registration is severe for people who have not committed a sex offense, it is rare in Michigan, it is rare across the country, and it in no way fosters Mr. Lymon's rehabilitation.

This Court's decision in *People v Betts*, 507 Mich 527 (2021) answers the question of whether 2021 SORA is punishment. Like 2011 SORA, 2021 SORA remains offense-based; it requires registration and state monitoring for long periods, up to life, after state supervision has ended; it has in-person reporting requirements; and it is online, which opens registrants to shame, ostracism, and harassment. People cannot petition to be removed from the registry by demonstrating they are not at risk of reoffending sexually.

It is cruel or unusual for the State to tell the public that a person is a sex offender when they are not. Doing so does not protect the public, nor does it advance the Legislature's intent in enacting SORA. This Court should hold that it violates the Michigan Constitution to require Mr. Lymon—and others like him who have not committed a sex offense—to register under SORA.

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Counter-Statement of Facts

September 5, 2014, was a very bad day for Mr. Lymon and his family. Mr. Lymon believed his wife Jacqueline was having an affair. *Lymon Appendix*, 112, 153, 182, 212-213. They had a tumultuous marriage, and their house was being foreclosed on. *Lymon Appendix*, 139-140, 222. During an argument, Mr. Lymon got an unloaded gun and waived it around, while his teenaged sons IL (age 16) and SL (age 15) were close by. *Lymon Appendix*, 115-116, 152-154, 183, 208, 217, 230. Mr. Lymon told his family to move to the couch, and at one point he had them kneel by the fireplace. *Lymon Appendix*, 117, 119. His family was praying, screaming, and crying. *Lymon Appendix*, 118-119, 157. Mr. Lymon was threatening to kill them. *Lymon Appendix*, 120-121, 156-157, 185. Mr. Lymon hit his wife in the back of the head and threatened to kill himself. *Lymon Appendix*, 122, 158, 160, 186-187.

At one point, IL ran out of the house and Jacqueline left to get him. *Lymon Appendix*, 122-123, 160, 187. Eventually everyone calmed down and Mr. Lymon put the gun down. *Lymon Appendix*, 123. The argument started at around 7:00 p.m. and Mr. Lymon had calmed down by midnight. *Lymon Appendix*, 125. Around midnight, IL was able to use his phone and go upstairs, but he did not call the police. *Lymon Appendix*, 165, 168, 171. They slept together as a family in their family room, and someone turned the television on. *Lymon Appendix*, 125-126, 162-163, 188-189, 227.

Jacqueline called the police the next day. *Lymon Appendix*, 126-126. Mr. Lymon did not intend to frighten his sons or his wife, nor did he intend to threaten them with the gun. *Lymon Appendix*, 221, 226. It is undisputed that Mr. Lymon never engaged in (during this incident or at any point in time) criminal sexual misconduct.

The trial court said at sentencing that the guidelines were "harsh." *Lymon Appendix*, 329. On the torture convictions, Mr. Lymon was sentenced to 126 months to 240 months in prison, consecutive to two years for the felony firearm convictions. *Lymon Appendix*, 329-330. Mr. Lymon received lesser terms for the unlawful imprisonment convictions and the felonious assault conviction. *Lymon Appendix*, 329-330.

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Procedural History[1]

Mr. Lymon's Brief on Appeal in the Court of Appeals was filed on November 5, 2015, and challenged the sufficiency of the evidence underlying his torture conviction and the constitutionality of requiring him to register under SORA when he was not convicted of a sex offense. The court heard oral argument on August 3, 2016, and held the appeal in abeyance pending this Court's decision in *People v Bosca*.

During the abeyance period, Mr. Lymon's prior appellate counsel passed away and SADO was appointed. Mr. Lymon, with the support of his sons and ex-wife, was granted an appellate bond in November 2020 and remains out of prison and in compliance with the terms of bond.

After this Court issued an order in *Bosca*, undersigned counsel filed a supplemental Brief on Appeal for Mr. Lymon. On June 16, 2022, the Court of Appeals affirmed Mr. Lymon's convictions and prison sentence but determined that it was cruel or unusual punishment to require him to register as a sex offender when he was not convicted of a sex offense. *Plaintiff-Appellant's Appendix*, 2a-23a. Both the prosecutor and Mr. Lymon appealed, and this Court granted the prosecutor's application and asked the following questions:

> The parties shall 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. [*Plaintiff-Appellant's Appendix*, 1a.]

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[1] See Michigan Courts One Court of Justice, Case Information <https://www.courts.michigan.gov/c/courts/coa/case/327355> (accessed November 14, 2023) for the procedural history.

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Arguments

I. Requiring Mr. Lymon to register as a sex offender even though he has never committed a sex offense is a disproportionate sentence and cruel or unusual punishment in violation of Michigan's Constitution.

Standard of Review

Issues of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court is "the ultimate authority with regard to the meaning and application of Michigan law." *People v Bullock*, 440 Mich 15, 27 (1992).

Issue Preservation

Counsel preserved challenges to Mr. Lymon's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Discussion

This Court did not ask the parties to address whether the 2021 Sex Offenders Registration Act (SORA) is punishment, as it has in prior orders involving challenges to SORA. See *People v Betts*, 504 Mich 893 (2019) ("The parties shall include among the issues to be briefed: (1) whether the requirements of the Sex Offenders Registration Act (SORA) . . . taken as a whole, amount to 'punishment' for purposes of the Ex Post Facto Clauses of the Michigan and Untied States Constitutions . . . .") (internal citations omitted); *People v Temelkoski*, 498 Mich 942 (2015) ("The parties shall include among the issues to be briefed: (1) whether the requirements of the Sex Offenders Registration Act (SORA) . . . amount to 'punishment' . . . .") (internal citations omitted).

Therefore, Mr. Lymon begins with the premise that 2021 SORA is punishment, which makes sense, given that most of what this Court

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found to be punitive in 2011 SORA remains. See *People v Betts*, 507 Mich 527 (2011).[2]

Mr. Lymon is required to register under the Sex Offenders Registration Act as a Tier I offender because he was convicted of unlawful imprisonment of a minor.[3] MCL 28.722(r)(iii). It is undisputed that there was no sexual component to any of the offenses Mr. Lymon was convicted of.

By requiring Mr. Lymon to register, the state has transformed him into a sex offender. But he is not. This is cruel. This is unusual.

A. Many of the punitive features of 2011 SORA remain in 2021 SORA. It is an online database where the public can track registrants. There are numerous reporting requirements, including in-person reporting. People must register for lengthy terms, up to life. There are limited ways to petition for removal. It is offense-based and not based on a person's individual risk of reoffending sexually.

The history of SORA is instructive as to its cruelty and its unusualness. In *Betts*, this Court traced the development of SORA from a private database used only for law enforcement to the public-facing behemoth it is today: it started as a "confidential database accessible only to law enforcement," and morphed through a series of amendments into a "publicly accessible database that imposed significant restrictions on the lives of registrants." *Betts*, 507 Mich 527, 533-536 (2021). Based on the factors from *Kennedy v Mendoza-Martinez*, 372 US 144 (1963), this Court held that the 2011 version of SORA was punishment, which

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[2] Because the prosecutor and the Michigan State Police devote substantial time to arguing against the idea that 2021 SORA is punishment, Mr. Lymon responds by analyzing the relevant factors from *Kennedy v Mendoza-Martinez*, 372 US 144 (1963), in Issue III, *infra*.

[3] MCL 750.349b.

violated the ex post facto clauses of the federal and Michigan Constitutions. *Betts*, 507 Mich at 562.[4]

In 2020,[5] the Legislature again amended SORA, creating the statute we have today and under which Mr. Lymon is required to register. This Court acknowledged that the amendments "include[d] both additional ameliorative changes and *more restrictive* changes." *Betts*, 507 Mich at 567-568 (emphasis added). Below are features of 2021 SORA, which remain disproportionately onerous for people who did not commit a sex offense:

- Registration is based solely on committing a listed offense. MCL 28.723.

- Registrants must report in-person to local law enforcement to verify their address. That is done annually (Tier 1), semi-annually (Tier 2), or quarterly (Tier 3), based on a person's offense. MCL 28.725a(3).

- Registrants must report in-person to local law enforcement within three business days if there is a change to their residence, their employment status, a legal name change, enrollment/discontinuation at an institution of higher learning, moving to another state or country, or travelling internationally for more than 7 days. MCL 28.724a, MCL 28.725(1), (3), (7)-(8).

- Registrants must report either in-person or by mail within three business days if they are travelling domestically for more than seven days, their vehicle information, email address or internet identifiers, and any new telephone numbers. The email/internet identifier requirement only applies if the registerable offense occurred after July 1, 2011. MCL 28.725(2).

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[4] The Sixth Circuit also held that Michigan's 2011 SORA was punishment, and that retroactive application of it violated the federal Ex Post Facto Clause. *Does #1-5 v Snyder*, 834 F3d 696, 705 (2014).

[5] The amendments were effective March 24, 2021, which is why Mr. Lymon refers to it as 2021 SORA.

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- Registrants must pay an initial $50 registration fee and an annual $50 registration fee and provide a valid driver's license or personal identification card. MCL 28.725a(5)-(6).

- The registry is online. MCL 28.728(2). The statute requires the following information to appear on the online registry:

    - Name and any names the person has ever used
    - Date of birth
    - Physical description (race, gender, hair color, height, weight, eye color)
    - Home address
    - Employment information, including employment address
    - Campus/school information
    - License plate number
    - Vehicle description (color, make, model, year)
    - Offense information
    - Physical characteristics, including scars, marks, and tattoos
    - Photo (usually a headshot/mugshot in color)
    - Registration details [MCL 28.728(2).]

- Through the public registry, the public can do the following:

    - Register for email alerts to learn if *any* registrant moves within a certain radius of a person's home. A person will be notified by email if any registrant moves, enrolls in school, or works within the specified radius of the person's home.

    - Track a specific registrant's movements. A person will be notified by email if the specific registrant moves, changes employment, or enrolls in school.

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  - View a neighborhood map using GPS that identifies precisely where registrants live.
  - Browse a list of all published registrants.
  - Browse a list of all incarcerated registrants.
  - Browse a list of all non-compliant registrants.
  - Obtain a map of a specific registrant's home or place of employment. [*Michigan Sex Offender Registry* <https://mspsor.com/Home/Search> (accessed November 12, 2023].

- Long registration periods:
  - Tier 1: 15 years. MCL 28.725(11).
  - Tier 2: 25 years. MCL 28.725(12).
  - Tier 3: Lifetime. MCL 28.725(13).
  - These periods do not include time spent incarcerated or under civil commitment. MCL 28.725(14).

- There are limited to no mechanisms to petition for removal[6]:
  - Tier 1: a person can petition for removal after 10 years in limited circumstances. MCL 28.728c(1), (12).
  - Tier 2: a person cannot petition for removal. MCL 28.278c.
  - Tier 3: a person cannot petition for removal unless the person is a juvenile and if a juvenile, they can petition only after 25 years and subject to additional criteria.

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[6] A person does not have to register if the complaining witness was between 13 and 15 years old and the registrant was no more than four years older; there is a petition process if anyone is required to register in error. MCL 28.728c(3), (14)-(15). Similarly, if a registerable conviction is set aside, registration is no longer required. MCL 28.725(16).

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- If a person willfully fails to register, the person may be found guilty of a felony. MCL 28.729.

- Willful failure to register results in the mandatory revocation of probation, youthful trainee status, or parole. MCL 28.729(5)-(7).

Even though Mr. Lymon did not commit a sex offense, he must comply with all the above requirements, or face another felony and additional incarceration.

B. The Michigan Constitution's protection from cruel or unusual punishment is broad and based on proportionality.

The Michigan Constitution's "cruel *or* unusual punishment" clause is broader than the United States Constitution's protection from "cruel *and* unusual punishment." *Parks*, 510 Mich at 241; *Bullock*, 440 Mich at 30; *People v Lorentzen,* 387 Mich 167, 172 n 3 (1972). The weight of Michigan case law provides a "compelling reason not to reflexively follow the . . . United States Supreme Court's Eighth Amendment analysis." *Bullock*, 440 Mich at 35.

For example, the United States Supreme Court held that Michigan's mandatory sentence of life imprisonment without the possibility of parole for possessing more than 650 grams of cocaine was not cruel and unusual punishment. *Harmelin v Michigan,* 501 US 957, 994 (1991). This Court declined to follow, holding less than a year later that the same sentence under the same statute for the same crime violated the Michigan Constitution as cruel or unusual punishment. *Bullock*, 440 Mich at 30.

So too with the allowable remedy for young people sentenced to life without parole. The United States Supreme Court believed allowing for the opportunity of parole would satisfy the Eighth Amendment when remedying the constitutional violation of sentencing young people to mandatory life without parole. *People v Stovall*, 510 Mich 301, 313 (2022), citing *Montgomery v Louisiana*, 577 US 190, 212 (2016). However, this Court reasoned that because of Michigan's broader protections, life with the possibility of parole was cruel or unusual punishment for young people convicted of murder. *Id.* at 313-314, 322.

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Michigan's cruel or unusual punishment "standard is informed by 'evolving standards of decency that mark the progress of a maturing society.'" *Parks*, 510 Mich at 241, quoting *Lorentzen*, 387 Mich at 179. "[T]his standard is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice.'" *Id.*, quoting *Lorentzen*, 387 Mich at 178.

Sentences in Michigan must be proportional. *Parks*, 510 Mich at 241. Michigan has developed a four-prong test to determine if a sentence is proportional under the cruel or unusual punishment clause: "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions . . . .'" *Id.* at 242, quoting *Bullock*, 440 Mich at 33-34.

Parks is instructive. This Court reasoned that "an automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel." *Parks*, 510 Mich at 259-260. SORA is such an unconstitutionally excessive and cruel punishment, given that it is mandatory with numerous harsh requirements, there is no individualized assessment of risk of reoffending sexually, there is no way for most people to petition for removal, and the public nature of the registry is harmful in and of itself. All these punishments are mandatorily imposed even if the person, like Mr. Lymon, did not commit a sex offense.

If the Legislature wants an effective registry, the only people who should have to register are people who may actually pose a risk[7] of

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[7] Assessments exist to determine the likelihood of a person reoffending sexually. See *In re McBrayer*, 511 Mich 403, 410, 417 (2023). And, a person will not be paroled without a psychological or psychiatric evaluation if that person was convicted of a predatory or assaultive sexual offense. Mich Admin Code, R 791.7715(5). The MDOC routinely uses various risk assessments. See Michigan Department of Corrections, *Policy Directive 04.01.05*

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reoffending sexually, which is the stated purpose of the statute. MCL 28.721a.[8] Such individualized assessments of risk would provide for more proportionate punishments.

C. Online registration for long terms, with in-person reporting requirements and no individualized assessment of risk, for a person who did not commit a sex offense is an excessively harsh penalty.

The first prong weighs the gravity of the offense against the severity of the punishment. *Parks*, 510 Mich at 242.

While Mr. Lymon was convicted of serious offenses, SORA registration is a disproportionately severe punishment. This is because (1) Mr. Lymon was not convicted of a sex offense, yet he is labeled as a sex offender online, (2) there was no assessment as to Mr. Lymon's risk of committing a sex offense, and (3) he must publicly register for 15 years. 27.725(11). The stated purpose of SORA is to deter people who have committed sex offenses from committing additional sex offenses. MCL 28.721a. Because this purpose is in no way met by requiring Mr. Lymon to register, it is excessively harsh.

Mr. Lymon must report, often in-person and quickly, if any of his registration information changes. MCL 28.724a, MCL 28.725a, MCL 28.725(1), (3), (7)-(8). This is a burdensome punishment. See Part III.B., *infra*. The Court of Appeals acknowledged that the 2021 SORA "reporting obligations still impose an onerous restriction on registrants."

<https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-04-Institutional-Operations/PD-0401-General-Provisions/04-01-105-Reception-Facility-Services-effective-10-01-19.pdf?rev=1f8b02488447437e9fdc028277384f9a> (accessed November 12, 2023).

[8] See also *Parks*, 510 Mich at 260 ("Life without parole is the harshest available punishment in Michigan and is seldom mandatorily imposed. It stands to reason that such a harsh sentence should be reserved for those whose criminal culpability mandates automatic, permanent removal from society.")

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People v Lymon, 342 Mich App 46, 75-76 (2023). The court cited as especially burdensome the continued three-day reporting requirement for certain changes in personal information, in-person periodic reporting even if no information has changed, and the internet identifiers reporting being burdensome in light of "the ubiquity of the Internet in daily life." *Id.* at 76, quoting *Betts*, 507 Mich at 555. The court concluded:

> [N]otwithstanding the removal of the student-safety-zone restrictions and the loosening of the in-person reporting requirements, we conclude that the 2021 SORA imposes significant affirmative obligations on registrants by mandating upon pain of imprisonment that they report common life changes within a short period of time, sometimes in person and sometimes in a manner not specified in the statute. [*Id.* at 76-77.]

The harshness of this penalty is intensified because Mr. Lymon cannot petition for removal if he could show he is not a risk for reoffending sexually (or offending sexually in the first place). MCL 28.728c. Since Mr. Lymon has never committed a sex offense, there is no question about his likelihood to reoffend sexually.

These requirements are compounded by the fact that Mr. Lymon will be branded as a sex offender online and face the social stigma and ostracism that is part-and-parcel of registration. *Betts*, 507 Mich at 551-552; see also Part III.A.2., *infra*. Like in 2011, the public registry continues to brand people as "a potentially violent menace." *Betts*, 507 Mich at 561; see MCL 28.728(2).

This Court listed the publicly available information[9] in 2011 SORA. The only thing that was removed from that list in 2021 SORA was the tier classification. MCL 28.728(2). This Court acknowledged that while:

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[9] This included: "information regarding a registrant's criminal conviction . . . registrant's home address, place of employment, sex, race, age, height, weight, hair and eye color, discernible features, and tier classification." *Betts*, 507 Mich at 551.

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> the initial version of SORA might have been "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality," its 2011 iteration contained more personal information and required less effort to access that information. [*Id.*, quoting *Smith v Doe*, 538 US 84, 99 (2003).]

Because of the notification provision, the public could be provided information about a registrant with no "active effort on their behalf," which was very different than physically going to a courthouse to obtain old court records. *Id.* Because this information could "precede [a registrant] into a community," it would be more likely that person could face ostracism. *Id.* All those features remain available to the public in 2021 SORA and flow directly from the registry itself.[10]

This is all true even if Mr. Lymon successfully completes his prison sentence, his parole term, and can demonstrate he is low risk for offending sexually. The social stigma of being labeled a sex offender will follow Mr. Lymon. Registration will impact where he can live, where he can work, how he interacts with coworkers, neighbors, a potential future spouse, other members of the public, and his mental health. See Meyer, I.H., Bouton, L., Maszak-Prato, S., Semple, L. & Lave, T.R. (2022). LGBTQ People on Sex Offender Registries in the US. Los Angeles, CA: The Williams Institute, UCLA School of Law.[11] (Showing 56% of all registrants lost a job due to being on the registry, and 30% of registrants changed jobs once, twice, or more in two years; 50% of all registrants were refused a rental because of being on a registry, and 31% of registrants moved once or twice in two years; Tables 11 and 12).

This is a grave sentence when balanced against the offense because it is mandatory and cannot be individualized. Listed offenses cover a

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[10] "[T]he ignominy under SORA flows not only from the past offense, but also from the statute itself." *Does #1-5*, 834 F3d at 703.

[11] Available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf> (accessed November 12, 2023).

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broad range of conduct, including, like here, offenses that have no sexual component. Yet everyone must follow the same obligations, regardless of their actual risk of reoffending sexually. Because the punishment is never tailored to the person and the offense, it can be disproportionate and cruel. It is cruel to continue to punish a person – after they have been incarcerated, completed probation, parole, or treatment – without assessing whether they specifically are at risk for committing "future criminal sexual acts." MCL 28.721a. Even when Mr. Lymon is removed from the registry after 15 years, the community stigma will likely remain in perpetuity.

Mr. Lymon's risk was never analyzed by the trial court because registration was mandatory. This Court has struck down mandatory penalties where the circumstances of the offender and the offense were not able to be considered. See *Parks*, 510 Mich at 268; *Bullock*, 440 Mich at 37-38; *Lorentzen*, 387 Mich at 176.

Individualized punishment has been the cornerstone of Michigan sentencing jurisprudence for over fifty years:

> The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential. . . . A judge needs complete information to set a proper individualized sentence. [*People v McFarlin*, 389 Mich 557, 574 (1973)].

This Court has continued to recognize the necessity of individualized punishment, finding that the advisory guideline regime "maintain[s] flexibility sufficient to individualize sentences when necessary." *People v Lockridge*, 498 Mich 358, 391 (2015). "[T]his Court has consistently required sentencing decisions to be based on the principle of proportionality across different sentencing regimes." *People v Posey*, __ Mich __, __ (2023) (Docket No. 162373); slip op at 29. Punishment must be proportionate to the "seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636 (1990). See also *People v Steanhouse*, 500 Mich 453, 474-475 (2017)

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(returning to the *Milbourn* test for proportionality after the guidelines became advisory in *Lockridge*).

In *Parks*, this Court recognized the problems with mandatory, across-the-board sentences with no individualization. Mandatorily sentencing 18-year-olds to die in prison ran contrary to Michigan's sentencing principles and this Court's interpretation of the cruel or unusual punishment clause, given that "for a punishment to be 'constitutionally proportionate' it 'must be tailored to a [person's] personal responsibility and moral guilt.'" *Parks*, 510 Mich at 259, quoting *Bullock*, 440 Mich at 39. Requiring Mr. Lymon to register is not at all tailored to either his "personal responsibility" or his "moral guilt" because he was not convicted of a sex offense, and even if he was, there was no individualized assessment of his risk of reoffending by committing a sex offense.

The prosecutor asserts that requiring people to register who have not committed a sex offense is not cruel or unusual because the Legislature intended for people like Mr. Lymon to register and "the Legislature's inclusion of unlawful imprisonment of a minor as an offense requiring SORA registration is not grossly disproportionate, but presumptively proportional and valid." *Prosecutor's Brief*, 45.

But, it is this Court's job to determine the constitutionality of legislatively enacted sentences:

> [W]e are duty-bound to interpret the Constitution, no matter the outcome. Contrary to what the dissent argues, determining whether the Legislature's chosen sentence runs afoul of our Constitution's protections is well within the purview of this Court and does not violate any separation-of-power principles. We cannot shirk our duty and defer to the Legislature's choice of punishment when its choice is offensive to our Constitution. [*Parks*, 510 Mich at 255].

The Court of Appeals correctly noted that requiring a person who had not committed an offense with a sexual component to register is "grossly disproportionate to the offense." *Lymon*, 342 Mich App at 85. The court

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specifically noted that Mr. Lymon "must meet the onerous reporting requirements, he must suffer the social stigma of being placed on a sex offender registry despite having not committed an offense with a sexual component, and he is subject to additional convictions and incarceration should he fail to comply." *Id.* at 86

Requiring Mr. Lymon to register as a sex offender and mandating he meet all its obligations under the threat of incarceration is excessively harsh. In fact, requiring any registrant to register is excessively harsh without an individualized assessment of risk of reoffending sexually.

D. Lifetime and long periods of online registration with in-person reporting requirements and no individualized assessment of risk for people not convicted of a sex offense are disproportionate punishments in Michigan.

The second prong compares the sentence with other sentences in the same jurisdiction. *Parks*, 510 Mich at 242.

Besides Lifetime Electronic Monitoring, there are no other mandatory post-incarceration punishments in Michigan that last for the life of the offender, or even for an automatic 15 years like Mr. Lymon's.[12] There is no longer any provision in Michigan law for lifetime probation or parole.[13] Even in cases of commutation, where a life-in-prison

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[12] For aggravated stalking convictions, the length of a probation term for stalking can be for any number of years over 5 years. MCL 750.411i(4). However, it appears the length of a probation term is subject to proportionality review. See *People v Drallette*, unpublished per curiam opinion of the Court of Appeals (Docket No. 184591), issued March 25, 1997, citing *People v Milbourn*, 435 Mich 630 (1990). *Lymon Appendix*, 333-334. If a person is found guilty but mentally ill, there is a mandatory minimum term of probation of 5 years, but the person can move to discontinue probation. MCL 768.36(4).

[13] Lifetime probation for drug offenses was eliminated in 2002 PA 666. See House Fiscal Agency, *Drug Sentencing Revisions Enrolled Analysis* <http://www.legislature.mi.gov/documents/2001-

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sentence has been commuted, the person on parole serves a four-year term of parole (in contrast with the more typical parole term of two years). MCL 791.234(8)(d); Michigan Department of Corrections Policy Directive 06.05.104.HH.[14] Additionally, for the person who paroled off of a life sentence, there are no other attendant responsibilities for reporting or otherwise being monitored by law enforcement, except for those imposed at the discretion of the Parole Board and the parole agent, which would only last the length of the parole term. This can include parole for murder. State monitoring for such lengthy terms is a unique punishment and one rarely applied in Michigan.

While Mr. Lymon does not face lifetime registration when he is released from prison, he must register for 15 years, while others must register for 25 years or for the rest of their lives. Lifetime and long public registration periods with in-person reporting requirements, no individualized assessment of risk, and no means of petitioning for removal is a disproportionate sentence compared to other sentences in Michigan.

As the Court of Appeals pointed out, there are two other ways this punishment is more severe than other punishments in Michigan. First, most offenses that are not sexual in nature do not result in registration. *Lymon*, 342 Mich App at 86. Second, Mr. Lymon was convicted of three counts of unlawful imprisonment but only the ones involving his children (even though it was the exact same conduct), resulted in registration. *Id.* While not mentioned by the Court of Appeals, Mr. Lymon received less protection than someone who may be required to register under the catchall provision. MCL 28.722(r)(vii) (A Tier I offense includes "[a]ny other violation of law of this state or a local

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2002/billanalysis/House/pdf/2002-HFA-5394-x5.pdf> (accessed November 12, 2023).

[14] Available at <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3> (accessed November 12, 2023).

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ordinance of a municipality . . . that by its nature constitutes a sexual offense against an individual who is a minor.") People falling under the catchall provision have additional protections at sentencing, as the trial court must "determine whether the crime of conviction requires registration" and "articulate its determination on the record." *People v Nunez*, 342 Mich App 322 (2022). These lessened protections for people like Mr. Lymon are another way his punishment is severe compared to other punishments in Michigan.

E. Lifetime and long periods of online registration with in-person reporting requirements and no individualized assessment of risk for people who have not committed a sex offense are disproportionate punishments compared to other jurisdictions.

The third prong compares the sentence with the sentences for the same crime in other jurisdictions. *Parks*, 510 Mich at 242.

This Court must analyze how other states punish people convicted of non-sexual offenses. Specifically, this Court must determine whether there are other jurisdictions with the exact same registry requirements that also require people to register who have not been convicted of a sex offense.

The prosecutor asserts that 25% of states require registration for a person convicted of unlawful imprisonment of a minor. *Prosecutor's Brief*, 52. The prosecutor then lists 13 states that allegedly require registration for the same offense Mr. Lymon was convicted of. *Prosecutor's Brief*, 52-53, n 145. However, every single one of the states cited either does not actually require registration for the same or a similar offense *or* has different registration requirements, meaning people are not being punished in the same way as they are in Michigan. Some of the distinctions between Michigan's SORA and the state registries cited by the prosecutor include:

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- Maryland: registrants are allowed to report in writing and failure to comply with registry requirements is a misdemeanor.[15]

- Minnesota: assesses registrants' risk of reoffending, which registrants can ask to be reviewed; only higher risk people are subject to "broad public disclosure," which at the time of this writing was 438 people.[16]

- Mississippi: false or unlawful imprisonment is not a listed offense, although kidnapping is. Miss Code Ann § 45-33-23(h).

- Missouri: people do not have to register if the "felonious restraint" or kidnapping involved the person's own child. Mo Ann Stat § 589.400 1.(2), 8.

- New Hampshire: broader ability to petition for removal from the public list, including the use of a risk assessment. NH Rev Stat Ann § 651-B:6.

- Ohio: if it is a parent-child relationship, unlawful restraint is not a registerable offense; changes in address, school, or employment may be done by writing.[17]

- Pennsylvania: people do not have to register if the unlawful restraint or false imprisonment was of one's own child; there

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[15] *Maryland Sex Offender Registry Frequently Asked Questions* <https://www.dpscs.state.md.us/onlineservs/socem/documents/faq.pdf> (accessed November 12, 2023).

[16] *Minnesota Department of Corrections Community Notification Act Fact Sheet* <https://mn.gov/doc/assets/Community%20Notification%20Act_tcm1089-301295.pdf> (accessed November 14, 2023).

[17] *Guide to Ohio's Sex Offender Registration and Notification Laws "SORN"* <https://www.ohioattorneygeneral.gov/Files/Law-Enforcement/Law-Enforcement-Gateway/2018-Guide-to-Ohio-SORN-Laws.aspx> (accessed November 12, 2023).

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are options for online reporting if a person's offense was committed before a certain date.[18] (Pennsylvania also has a Sexual Offenders Assessment Board that is comprised of experts to determine if a person meets the legal criteria to be designated a sexually violent predator.[19] The Michigan Legislature could create something similar to meet its own statutory goal.)

- Rhode Island: uses individualized risk assessments to determine level of community notification.[20]

- South Dakota: address verification done by mail; can petition for removal from the geographic exclusion zones. SD Codified Laws § 22-24B-5; § 22-24B-12; § 22-24B-26-28.

- Texas: uses individualized risk assessments that may allow for a person to move for early termination of registration.[21]

- Vermont: the kidnapping statute the prosecutor cites to as a registerable offense must have a sexual component to require registration; 13 VSA § 5401(10)(B)(ii); 13 VSA § 2405(a)(1)(D); court determination whether a person is a sexually violent

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[18] *PA Megan's Law* <https://www.meganslaw.psp.pa.gov/InformationalPages/Registration> (accessed November 12, 2023).

[19] SOAB, *Process Overview* <https://www.soab.pa.gov/AboutSOAB/ProcessOverview/Pages/default.aspx> (accessed November 12, 2023).

[20] Rhode Island Parole Board, *Sexual Offender Community Notification* <https://paroleboard.ri.gov/sexual-offender-community-notification> (accessed November 12, 2023).

[21] *Criminal History Records and Texas Sex Offender Registration Program FAQ*, <https://www.dps.texas.gov/section/crime-records/faq/criminal-history-records-and-texas-sex-offender-registration-program-faq#Sex-offender> (accessed November 12, 2023).

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predator and subject to increased registration and community notification. 13 VSA § 5405.

- Virginia: periodic verification can be done through a form available for download. VA Code Ann § 9.1-904. Tier III registrants may petition to have their reporting obligations changed. VA Code Ann § 9.1-909.

- Wyoming: includes geographic exclusion zones. Wyo Stat Ann § 6-2-320.

Like several other states cited by the prosecutor, not even the federal Sex Offenders Registration and Notification Act (SORNA) requires parents to register who have unlawfully imprisoned their own children.[22]

There are also distinctions with the cases cited by the prosecutor regarding the constitutionality of requiring people to register as sex offenders who did not commit a sex offense. See *Prosecutor's Brief*, 53-56. For example, in *Rainer v State*, 286 Ga 675, 675-676 (2010), the Georgia Supreme Court summarily dismissed the challenge to registration as cruel and unusual punishment under the Eighth Amendment by relying on the Supreme Court's decision in *Smith v Doe* that registries are not punishment. As discussed in Issue III, *infra*, this Court should not rely on *Smith* when determining whether Michigan's current SORA is punishment. In addition, Michigan's Constitution is broader than the Eighth Amendment. The Illinois Supreme Court challenge involved a substantive due process challenge. *People v Johnson*, 225 Ill2d 573, 584-592 (2007). The arguments in *Thomas v Mississippi Department of Corrections*, 248 So3d 786, 791 (Miss 2018) involved whether Mr. Thomas was being improperly denied trusty time or merit time and did not include a challenge to the registry as punishment. *State v Smith*, 323 Wis2d 377, 381-382 (2010), involved a substantive due process and equal protection challenge. None of the cases cited by the prosecutor involved a challenge to the proportionality

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[22] *SORNA* <https://smart.ojp.gov/sorna/current-law#SPECIFIEDOFFENSESAGAINSTMINORS_SUBGROUP> (accessed November 12, 2023).

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of punishment based on a broader state constitutional provision protecting against cruel or unusual punishment.

The Court of Appeals did not find this factor persuasive given the variances in registries from state to state and that some states have found their registries to be punishment, and some have not. *Lymon*, 342 Mich App at 86-87. Michigan's specific registration requirements in conjunction with the specific non-sex offenses that trigger registration are unique to Michigan.

But, even if every state had a registry exactly like Michigan's and required people to register who been convicted of unlawfully imprisoning their children, this factor would not be dispositive. This Court said in *Parks* (where 17 states – more states than the states that the prosecutor points to here – and the federal government allowed for mandatory life without parole for people convicted of first-degree murder) that even if "Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*," the fact remains that our Constitution does not allow for excessively harsh punishment. *Parks*, 510 Mich at 263-264 (internal citations omitted).

Because of the mandatory nature of Michigan's SORA for certain non-sex offenses and the number of obligations under the statute, all without an individualized assessment of risk or means of petitioning for removal, it is different than the sentences in other states.

F. Mandatory lifetime and long periods of public registration do not serve the goal of rehabilitation, and in fact registration may hinder rehabilitation.

The fourth factor is the relationship to the penological goal of rehabilitation. *Parks*, 510 Mich at 255; *Lorentzen*, 387 Mich at 179; *Bullock*, 440 Mich at 34.

For the reasons explained by the Court of Appeals, Mr. Lymon's rehabilitation is in no way fostered by 15 years of public registration, which forecloses any chance for Mr. Lymon to demonstrate he is not at risk for committing a sex offense. The stigmatizing effect stems directly from the registry, not the conviction itself. This is especially true for Mr. Lymon and people like him who were not convicted of a sex offense.

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Because of the registry, he is publicly labeled as a sex offender, even though he was not convicted of a sex offense, and he could demonstrate he is not at risk of committing a sex offense. Because of the registry, he must report in-person frequently. Because of the registry, he could be convicted of a felony if he fails to meet SORA's numerous obligations. All these factors hinder Mr. Lymon's ability to rehabilitate.

Registration does not promote rehabilitation. SORA's punishment pervades every aspect of daily living for registrants like Mr. Lymon, stifling their efforts to reintegrate into society and condemning them to live out their days as social outcasts. Such effects do not promote rehabilitation, especially if a person has not committed a sex offense.

Registration requirements run contrary to rehabilitation. As a result of being on the public registry, registrants have difficulty finding housing and employment, and often suffer a unique stigma and can be the victims of vigilantism. See Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 Am J Crim L 263, 267-274 (2011). Such effects do not promote rehabilitation.

This Court held that "even the most compelling interests . . . should not be permitted to overwhelm 'the equally important belief that only the rarest individual is wholly bereft of the capacity for redemption.'" *Bullock,* 440 Mich at 39-40, n23, quoting *People v Schultz,* 435 Mich 517, 533-534 (1990). Mr. Lymon is not wholly bereft of the capacity for redemption. He unlawfully imprisoned his children for one evening during a crisis after having confronted his wife about an affair. His conduct does not warrant his branding as a sex offender for 15 years beyond his time in MDOC custody, and likely for even longer as the stigma lingers.

The Court of Appeals relied on *People v Dipiazza*, 286 Mich App 137 (2009) to state the obvious: Mr. Lymon "is not a sexual predator."[23]

[23] "[I]t is abundantly clear that there is no goal of rehabilitation in this case. Defendant never posed a danger to the public or a danger of reoffending. Defendant is not a sexual predator, nor did the trial court

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Lymon, 342 Mich App at 88. And, if he does need rehabilitation services to address his behavior that night, "labeling him as a sex offender does not serve any rehabilitation goals related to his actual offense." *Id.*

Registration for one who is not shown to be a danger to the public will work in opposition to rehabilitation by preventing employment, preventing travel, and preventing the pursuit of happiness. *Dipiazza*, 286 Mich App at 156.

The prosecutor asserted that while the rehabilitative effects of SORA are uncertain, SORA "is not unjustifiably disproportionate because it may have a deterrent effect on him." *Prosecutor's Brief*, 56. This point, however, ignores that this factor specifically focuses on rehabilitation, "which is a criterion specifically 'rooted in Michigan's legal traditions . . .'" *Parks*, 510 Mich at 242, quoting *Bullock*, 440 Mich at 33-34. The prosecutor's argument also begs the question, what are we trying to deter Mr. Lymon from doing? The stated purpose of the statute is to deter people who have committed sex offenses from committing additional sex offenses, MCL 28.721a. Since Mr. Lymon has never committed a sex offense, deterrence as a goal becomes utterly irrelevant.

Rehabilitation is what matters. SORA does not foster rehabilitation, and may actively work against it, especially for people like Mr. Lymon who have not committed a sex offense.

The mandatory statutory scheme mandating public registration under SORA for people who have not committed a sex offense violates the Michigan Constitution's greater protections against cruel or unusual punishment. *Parks*, 510 Mich at 243; *Stovall*, 510 Mich at 313-314; *Lorentzen*, 387 Mich at 172; *Bullock*, 440 Mich at 30. The lack of an individualized assessment of risk, the unique lifetime and long periods

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deem him to be. Further, even if defendant needed rehabilitation, SORA's labeling him to be a convicted sex offender works at an opposite purpose, preventing defendant from securing employment and otherwise moving forward with his life plans." *People v Dipiazza*, 286 Mich App 137, 156 (2009).

of online registration, and the lack of a penological justification all describe a disproportionate and excessive sentencing scheme for people who have not been convicted of a sex offense, which violates the Michigan Constitution.

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II. Registration under SORA violates the Federal Constitution's prohibition on cruel and unusual punishment.

Standard of Review

Issues of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022).

Issue Preservation

Counsel preserved challenges to Mr. Lymon's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Discussion

Under the federal constitution, the United States Supreme Court frequently employs an "as applied" analysis because the Eighth Amendment embodies a theory of proportionality. The "right not to be subject to excessive sanctions" necessarily "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Roper v Simmons,* 543 US 551, 560 (2005).

Certain punishments may not violate the Eighth Amendment per se but are found to be a violation when applied to a certain class of people or when applied in a mandatory fashion. See, e.g., *Kennedy v Louisiana,* 554 US 407 (2008) and *Atkins v Virginia,* 536 US 304 (2002) (the death penalty is not cruel and unusual punishment per se, but is when applied to individuals who have committed non-homicide crimes or to intellectually challenged people); *Roper, supra* (Eighth Amendment bars the death penalty when applied to children); *Woodson v North Carolina,* 428 US 280 (1976) (plurality opinion) and *Lockett v Ohio,* 438 US 586 (1978) (Eighth Amendment bars mandatory imposition of the death penalty); *Graham v Florida*, 560 US 48 (2010) (life without possibility of parole is not cruel and unusual per se, but is when applied to children who have committed non-homicide offenses); *Miller v Alabama*, 567 US 460 (2012) (life without possibility of parole violates the Eighth Amendment when mandatorily applied to children).

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At its heart, the Eighth Amendment prohibition against cruel and unusual punishment is proportionality. *Weems v United* States, 217 US 349, 367 (1910). "[T]the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive" and employs a test:

> A court must begin by comparing the gravity of the offense and the severity of the sentence. [I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [*Graham*, 560 US at 59-60 (internal citations omitted).]

This test is the same as the first three factors in Michigan's test. As such, Mr. Lymon asserts that based on all the circumstances of his case, the sentence is "grossly disproportionate" and unconstitutional under the Eighth Amendment. See Parts I.C-E, *supra.*

This Court should impose a categorical rule holding that mandatory registration under SORA for people who have not committed a sex offense violates the Eighth Amendment, as "[t]his case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Graham*, 560 US at 61.

In addressing categorical bars, the Court follows a two-part test and considers:

> "[O]bjective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in

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> question violates the Constitution. [*Id.*, quoting *Roper*, 543 US at 572 and *Kennedy*, 554 US at 421 (internal citations omitted)].

A reviewing court "must look beyond historical conceptions 'to the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 58, quoting *Estelle v Gamble*, 429 US 97, 102 (1976). Determining cruelty "embodies a moral judgment," and while "[t]he standard itself remains the same . . . its applicability must change as the basic mores of society change." *Kennedy*, 554 US at 419.

Research about the efficacy of registries has evolved over time, which informs the unconstitutionality of punishment. See Elmann, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015) (tracing how an unsubstantiated claim in *Smith v Doe* about the high rate of recidivism of people who have committed a sex offense has been debunked by current scientific research). At best, SORA's efficacy in preventing a person who has committed a sex offense of committing another is "unclear." *Betts*, 507 Mich at 561. Society's standards, especially with the explosion of the Internet as the new town square, see Part III.A.2., *infra*, are changing when it comes to public, online registries.

This Court must next consider, in its own independent judgment, whether mandatory SORA registration for a person who has not committed a sex offense violates the Constitution. *Graham,* 560 US at 61.

Mr. Lymon is subject to mandatory, online registration for 15 years even though he did not commit a sex offense. SORA provides no discretion to the sentencing judge, and the sentencing judge cannot consider individual characteristics of the offense or the offender. And the punishment is onerous: Mr. Lymon is subject to in-person reporting requirements for long after state supervision ends and will be subject to another felony if he does not comply with the nuanced requirements of SORA. He is subject to the stigma of online registration and the State branding him as a sex offender when he has not committed a sex offense.

He cannot petition for removal by showing that he is not at risk of offending sexually.

Mr. Lymon's sentence under SORA is cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. US Const, Am VIII.

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III. 2021 SORA is punishment because nearly all the punitive portions this Court discussed in *Betts* remain.

Standard of Review

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Issue Preservation

Counsel preserved challenges to Mr. Lymon's sentence by filing a motion to remand in the Court of Appeals, which the court denied. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Discussion

The current version of SORA is punishment, for the same reasons this Court held 2011 SORA was punishment.

- It is a public Internet registry.
- It is offense-based, with no individualized assessment of risk of reoffending sexually.
- Most people cannot petition to be removed.
- There are long periods, up to life, of registration after state supervision has ended.
- It imposes burdensome reporting requirements, including in-person reporting requirements.
- If a person violates it, they can be guilty of a felony and sentenced to jail or prison.

This Court already found these features to be punishment in *People v Betts*, 507 Mich 527, 549-562 (2021), and it should do so again here.

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Federal case law interpreting a different statute (the federal Sex Offender Registration and Notification Act (SORNA)) is not controlling. Yet, the prosecutor and amicus Michigan State Police argue that it is, and that this Court should follow nonbinding federal case law rather than this Court's own precedent. See *Prosecutor's Brief*, 22, 26-27, 32, 37, 39; *MSP Amicus*, 14-36.

This Court has already addressed that 2021 SORA is not the federal SORNA. In drafting and enacting 2021 SORA, the Legislature "again created a statutory scheme containing several deviations from its federal counterpart." *Betts*, 507 at 570 n 27.

The prosecutor and the Michigan State Police also spend a significant amount of time comparing the statute at issue in *Smith v Doe*, 538 US 84 (2003), to Michigan's SORA. *Prosecutor's Brief*, 30-31; *MSP Amicus*, 37-47. *Smith* was decided twenty years ago, when the Internet was a very different place. Fundamental differences between the two statutes remain, including that the Alaska statute did not require any in-person reporting. *Smith*, 538 US at 101. Of relevance to this Court, the Alaska Supreme Court found punitive the same statute that the United States Supreme Court found to be non-punitive under its own state constitution.

The prosecutor and Michigan State Police ask this Court to rely on federal cases (many of which were decided decades ago) and largely ignore this Court's holding in *Betts*. That makes sense strategically for the appellant and their amicus, given that much of this Court's analysis in *Betts* remains applicable to 2021 SORA and applying it will result in this Court finding 2021 SORA to be punishment. While the geographic exclusion zones were removed, if those were the only punitive portions of 2011 SORA, this Court could have severed them from the statute. But, this Court did not do that because of the other punitive portions, which by and large remain. *Betts*, 507 Mich at 562-569. As with the 2011 version, after evaluating SORA as a whole, these provisions have a cumulative effect that is punitive.

To determine whether a statute is punishment, this Court first looks to determine whether the Legislature intended the regulation as

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criminal punishment or a civil remedy. *Betts*, 507 Mich at 548.[24] This Court determined that because of the Legislature's statement of intent indicated the promotion of public safety as a goal, SORA was intended as a nonpunitive statute. *Id.* at 548-549, citing MCL 28.721a.[25]

Because of this stated purpose, this Court next examines "whether the statutory scheme [is] so punitive either in purpose or effect as to negate" a state's intention to deem it civil. *United States v Ward*, 448 US 242, 248-249 (1980); *Betts*, 507 Mich at 549. To determine if the effects of a statute are punitive, this Court analyzes the seven factors outlined in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be

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24 Mr. Lymon questions whether this test is the appropriate test to use when determining whether a punishment is cruel or unusual. Whether a particular sanction is labeled as civil or criminal becomes less relevant when reviewing it under the cruel of unusual punishment clause, the purpose of which is to prevent excessively harsh and disproportionate sanctions. This Court could order further briefing on this issue, but because the Court of Appeals applied the same test this Court applied in *Betts*, counsel will apply it also.

25 Although the legislative history of SORA indicates there may be reason to doubt the legislative intent was truly civil, see *Betts*, 507 Mich at 548-549, given that the statute contains an express provision claiming a non-punitive intent, MCL 28.721a, and given this Court's holding in *Betts*, Mr. Lymon does not argue here that the Legislature's professed intent was punitive. One caveat: because there is evidence that points to a punitive intent and because of SORA's codependence with the criminal legal system, the question remains whether the intents-effects test is the proper test when evaluating whether a sanction imposed because of a criminal conviction is the proper test. See n 24, *supra*.

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> connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

The most relevant factors are: history and tradition, affirmative disability or restraint, traditional aims of punishment, rational relation to a non-punitive purpose, and excessiveness. *Smith*, 538 US at 97; *Betts*, 507 Mich at 550-562. SORA is so punitive in effect that any intention to label it as civil is negated.

A. Because of the intense state supervision for long periods of time, reporting requirements, and public nature of the registry, SORA registration is like probation, parole, and the historical punishment of shaming.

This Court held that 2011 SORA resembled shaming and parole. *Betts*, 507 Mich at 551-553. Because nothing much changed between the two versions of the statutes as to these points, the Court of Appeals correctly found that 2021 SORA resembles "the traditional punishments of shaming and parole." *People v Lymon*, 342 Mich App 46, 71 (2022).

1. As this Court has already determined, registration resembles parole.

This Court reasoned that SORA registration was like parole because registrants must report to law enforcement, pay a registration fee, and failure to comply could result in imprisonment. *Betts*, 507 Mich at 553. Also like parole, law enforcement could investigate a person's registration status. *Id.* Registration "imposed a significant amount of supervision by the state on registrants." *Id.*

These same obligations remain in 2021 SORA. *Lymon*, 342 Mich App at 74-75. Registration is like parole and probation, even without the geographic exclusion zones, for multiple reasons:

- For the life of their supervision term, parolees, probationers, and registrants are all given conditions that must be followed. See MCL 791.236 (parole); MCL 771.3 (probation); See Explanation of Duties. *Lymon Appendix*, 336-339 (SORA).

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- Parolees, probationers, and registrants all must pay supervision fees. See MCL 791.236a (parole); MCL 771.3(1)(d); 771.3c (probation); MCL 28.725a(5)-(6) (SORA).

- Parolees, probationers, and registrants are all subject to penalties for violating a term of probation or parole, including incarceration. MCL 791.238, MCL 791.239, MCL 791.239a, MCL 791.240a (parole); MCL 771.4, MCL 771.4b, MCL 771.5, MCL 771.7 (probation); MCL 28.729 (SORA).

- Parolees, probationers, and registrants generally must report regularly in person, with some options for virtual and written reporting. MCL 791.236 (parole); MCL 771.3(1)(c) (probation); MCL 28.724a, MCL 28.725(1), (3), (7)-(8), MCL 28.725a(3), MCL 28.725(2) (SORA).

SORA is like other established forms of criminal punishment. In fact, some of the features these punishments share (term length, conditions, public nature) are more onerous under SORA than if a person was on probation or parole:

1. Length of term:

    a. Subject to limited exceptions, probationary terms cannot exceed three years. MCL 771.2(1). It can be extended twice (for one year each time), but only if the trial court makes a specific, individualized finding that "there is a specific rehabilitation goal that has not yet been achieved, or a specific, articulable, and ongoing risk of harm to a victim that can be mitigated only with continued probation supervision." *Id.* Most probationers can petition to be discharged from probation early after serving half their probationary term. MCL 771.2(2).

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b. Parole terms are generally two years, but rarely, if ever, exceed four years. MCL 791.234(8)(d); Michigan Department of Corrections, *Policy Directive 06.05.104*.[26]

c. SORA registration lasts 15 years at a minimum, and in a majority of cases, for a person's lifetime. MCL 28.725.

2. Individualized conditions:

a. Conditions for parole and probation are imposed based on an individualized assessment. They often loosen over time, based on the person's adjustment, and an agent can allow for phone or electronic reporting, neither of which are available to registrants.

i. Parole: "The conditions of the parole must be individualized, must specifically address the assessed risks and needs of the parolee, must be designed to reduce recidivism, and must consider the needs of the victim, if applicable, including, but not limited to, the safety needs of the victim or a request by the victim for protective conditions." MCL 791.236(4).

ii. Probation: While some conditions are uniformly mandated, there is a requirement that most conditions be individualized: "The conditions of probation imposed by the court under subsections (2) and (3) must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the

[26] Available at <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3> (accessed November 12, 2023).

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court determines adjustments are appropriate." MCL 771.3(11).

b. SORA's requirements are based solely on the offense of conviction, with no room for individualization or a personalized risk assessment.

3. Public posting:

a. There is no public website like SORA for probationers or parolees. The Offender Tracking Information System[27] is searchable by name and has only a fraction of the information that is included on SORA.

b. OTIS does not allow for tracking of specific people.

For the same reasons this Court outlined in *Betts*, the Supreme Court of Pennsylvania also likened registration to probation, given the mandatory requirements placed upon registrants. *Commonwealth v Muniz*, 640 Pa 699, 738 (2017). Periodic in-person reporting was like periodic meetings with probation officers, both had mandatory conditions, and people on probation or registering faced the threat of incarceration if a person violated the conditions. *Id.* at 739-740.

The prosecutor argues that "[t]he 2021 SORA obligations fall short of the sort of active law-enforcement supervision typical of probation and parole." *Prosecutor's Brief*, 32. But, this factor asks whether SORA *resembles* a traditional form of punishment. "Resemble" is defined as "to be like or similar to." *Webster's College Dictionary*. There are, of course, differences between registration, parole, and probation. Some probation and parole conditions are more onerous than registration requirements. Some registration requirements are more onerous than parole and probation conditions, as outlined above. It does not have to be a one-to-one match or a perfect resemblance to satisfy this factor. *Betts*, 507 Mich at 550-553. See also *Doe v State*, 167 NH 382, 406 (2015) ("Although the act's requirements do not exactly replicate the historical form of

[27] <https://mdocweb.state.mi.us/OTIS2/otis2.html> (accessed November 13, 2023).

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shaming, this factor inquires only whether the act is *analogous* to a historical punishment, not whether it is an exact replica.")

The bottom line is that parolees, probationers, and registrants are monitored by the government and have mandatory conditions they must satisfy, or possibly be incarcerated. In these ways, they are all similar to each other.

2. Because of the prevalence of the Internet in every facet of our daily lives, registration is like shaming.

This Court recognized that 2011 SORA was like shaming. *Betts*, 507 Mich at 551-552. This was because of the "breadth of information available to the public" and "the option for subscription-based notification of the movement of registrants into a particular zip code" as reasons a registrant may face "social ostracism based on registration." *Id*. at 551.[28]

Both the prosecutor and the Michigan State Police rely on *Smith* to argue that publicity and stigma are not integral to the statute. *Prosecutor's Brief*, at 31; *MSP Amicus*, 25. However, this Court in *Betts* reasoned that the Legislature's stated purpose says otherwise: "MCL 28.721a . . . refers to providing the public, not just law enforcement, with the means to monitor persons with sex-offense convictions, encouraging public participation and engagement with the registry and further the stigma of registration." *Betts*, 507 Mich at 551.

Further, this Court should not rely on *Smith* when determining whether 2021 SORA resembles shaming because the Internet is a very different place than it was twenty years ago when *Smith* was decided. The prevalence of the Internet and social media has increased the shame that flows from the registry.

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[28] In analyzing a prior version of SORA, the Court of Appeals in 1999 noted that "[a] law designed to punish a sex offender would not contain these strict limitations on public dissemination." *In re Ayres*, 239 Mich App 8, 17 (1999). Because of the many amendments over the last twenty years, the strict limitations noted by the court in *Ayres* no longer exist.

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When the United States Supreme Court decided *Smith*, Facebook did not exist. It wasn't until three years later that it was released to the public.[29] Now, 70% of Facebook users visit the site daily.[30] In fact, of the most popular social media apps tracked by the Pew Center, only one – LinkedIn – existed when *Smith* was decided.[31] In 2005 (two years *after Smith*), just 5% of Americans were on social media; by 2021 that number had increased to 72%.[32]

Exponentially more people use the Internet today than in 2003. As of 2021, 93% of adults in America use the Internet.[33] In 2021, the Pew Research Center found that 85% of Americans go on the Internet at least daily and 31% of Americans are online "almost constantly."[34]

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[29] Britannica, *Facebook* <https://www.britannica.com/topic/Facebook> (accessed November 12, 2023).

[30] Pew Research Center, *Social Media Fact Sheet* <https://www.pewresearch.org/internet/fact-sheet/social-media/> (accessed November 12, 2023).

[31] LinkedIn was launched in 2002. Britannica, *LinkedIn* <https://www.britannica.com/topic/LinkedIn> (accessed November 10, 2023); Reddit was launched 2005; Twitter/X in 2006; Pinterest in 2010; Instagram in 2010; Snapchat in 2011; and TikTok in 2018. See Maryville University, *The Evolution of Social Media: How did it Begin, and Where Could it Go Next?* <https://online.maryville.edu/blog/evolution-social-media/> (accessed November 10, 2023).

[32] Pew Research Center, *Social Media Fact Sheet* <https://www.pewresearch.org/internet/fact-sheet/social-media/> (accessed November 10, 2021).

[33] Pew Research Center, *Internet/Broadband Fact Sheet* <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> (accessed November 12, 2023).

[34] Perrin and Atske, *About three-in-ten U.S. adults say they are 'almost constantly' online* <https://www.pewresearch.org/short-reads/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/> (accessed November 12, 2023)

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In 2000, about 1% of households had broadband internet at home; in 2005, that number had increased to about 25%[35]. So, when *Smith* was decided, there were between zero to one-quarter of households with broadband in their homes. But, in 2021, 77% of households had broadband home access.[36]

These numbers boil down to one fact: the Internet is the new town square. People are shamed (or celebrated) through viral videos and cancel culture online. The United States Supreme Court acknowledged this when it struck down a North Carolina statute that prohibited registrants from accessing "commercial social networking Web site[s]." *Packingham v North Carolina*, 582 US 98, 101 (2017). The Court found that it violated the First Amendment, due largely in part to the ubiquity of the Internet: "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* at 104, quoting *Reno v ACLU*, 521 US 844, 868 (1997) (internal citations omitted). The Court said, "the Cyber Age is a revolution of historic proportions" and that "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Id.* at 105.

Several state supreme courts, in addition to this Court in *Betts*, have acknowledged the power of the Internet and the harm its influence can cause to registrants.

The Supreme Court of Maryland held that disseminating personal information on the Internet "is tantamount to the historical punishment of shaming." *Doe v Dep't of Pub Safety and Corr Servs.*, 430 Md 535, 564 (Md Ct App 2013). This is because the public internet registry had "the effect of 'label[ing a registrant] as a sexual offender within the community [which] can be highly stigmatizing and can carry the potential for social ostracism'" and that it threatened "'widespread

[35] See n 33 *supra*.

[36] *Id.*

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disclosure of highly personal data and may implicate social ostracism, loss of employment opportunities, and possibly verbal and physical harassment.'" *Id.* at 565, quoting *Young v State*, 370 Md 686, 713, 718 n 13 (2002). The court further pointed to studies demonstrating the threats and harassment registrants face, the fact that even for employers who hire people who have committed felonies, they may not hire registrants given the listing of their business on the registry, and reported incidents of registrants dying by suicide and vigilantism. *Id.* at 567-568. The court concluded:

> In the present case, the statute places a registrant's information, including his or her address, on the Internet for anyone with Internet access to see, and allows members of the public, who live in the county where a registrant will live, work, or attend school, by request, to receive email notifications of the registrant's release from incarceration and "the registration information of the [registrant]." Examining dissemination in the context of whether it violates the prohibition against *ex post facto* laws, we, therefore, conclude that the dissemination provisions of the Maryland sex offender registration statute have an effect upon Petitioner that is tantamount to shaming. *Id.* at 568 (internal citations omitted).

Those same things are required in Michigan and the public has even more power to track registrants than in Maryland.

The Supreme Court of New Hampshire noted that "the internet is our town square," and that registries are like the historical punishment of shaming, because "[p]lacing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame and shun." *Doe v State*, 167 NH 382, 406 (2015). If all the registry did was make records available to the public, "then all such records would be available." *Id.* However, "only certain offenders are listed on the website" and "the mere fact that certain individuals are on the list signals that they are worthy of such recognition." *Id.* And, of course, registries make "the information readily and instantly accessible to anyone who wants it, which is not often the case for other public information and records." *Id.*

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The Supreme Court of Pennsylvania declined to rely on *Smith*'s shaming analysis, nothing that it "was decided in an earlier technological environment." *Muniz*, 640 Pa at 738. The court elaborated:

> "The environment has changed significantly with the advancements in technology since the Supreme Court's 2003 decision in *Smith*. As of the most recent report by the United States Census Bureau, approximately 75 percent of households in the United States have internet access. Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent. The public internet website utilized by the Pennsylvania State Police broadcasts worldwide, for an extended period of time, the personal identification information of individuals who have served their "sentences." This exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation—even through the clearest proof. In my opinion, the extended registration period and the worldwide dissemination of registrants' information authorized by SORNA now outweighs the public safety interest of the government so as to disallow a finding that it is merely regulatory." *Id.*, quoting *Commonwealth v Perez,* 97 A3d 747, 765-766 (PA Super, 2014) (Donohue, J., concurring).

The Court concluded that "when viewed in the context of our current internet-based world," Pennsylvania's registry was like shaming. *Id.* at 740.

In *Betts*, while realizing that registration was like shaming, this Court also noted it was not a perfect resemblance "because there was not "a conduit for the public to directly criticize and shame registrants," like in an online forum or public comment space. *Betts*, 507 Mich at 552. While SORA itself may not have an online forum or public comment space, the public can use the information from the registry to create their own public square, and has done so. See, e.g., Michigan Predator

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Files (Exposing the Darkness) Facebook group.[37] This Michigan-focused Facebook group has 5.8 thousand members, and the moderators pull directly from the registry website to create some of the posts.

The Michigan State Police argued that there was no face-to-face shaming like in colonial times, nor did SORA "affirmatively publicize, like a public service announcement, who is on the registry and does not seek the public's ridicule." *MSP Amicus*, 25-26. This is not accurate. First, internet shaming and cancel culture are the modern equivalents of face-to-face colonial shaming. Second, the various functions for the public on SORA do serve as PSAs and actively seek out the ridicule of the public. Through the online registry, the public can do the following:

- Register for email alerts to learn if a registrant moves, enrolls in school, or works within a certain radius of a person's home.
- Track a specific person's movements.
- See a neighborhood map that identifies where registrants live.
- Obtain a map of a specific registrant's home or employment location. [See generally *Michigan Sex Offender Registry* <https://mspsor.com/Home/Search>].

It belies reason to argue that SORA is anything like going to a courthouse to search for a physical file about a person's offense. The breadth of information on the public registry, the ease with which a person can obtain information, and the impact of the Internet to inform societal beliefs, in the very least make SORA resemble shaming, if not outright serve as the modern equivalent. If calling a person a "sick b***h [who] doesn't deserve to be free" and should be "spayed" in a public forum after posting screen shots of their SORA page does not constitute shaming, undersigned counsel can think of little else that would.[38]

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[37] Available at <https://www.facebook.com/groups/1476930155790767/> (accessed November 13, 2023).

[38] See June 21, 2021 post on Michigan Predator Files (Exposing the Darkness) Facebook group

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B. SORA's multiple requirements and obligations, including the public Internet registry and in-person reporting requirements, create affirmative disabilities and restraints.

This factor considers how the effects of the Act are felt by those required to register. *Betts*, 507 Mich at 554.

The Court of Appeals acknowledged that while 2021 SORA does not include geographic exclusion zones and removes some immediate in-person reporting that existed in 2011 SORA, the 2021 SORA "reporting obligations still impose an onerous restriction on registrants." *Lymon*, 342 Mich App at 75-76. The court cited as especially burdensome the continued three-day reporting requirement for certain changes in personal information, in-person periodic reporting even if no information has changed, and the internet identifiers reporting being burdensome in light of "the ubiquity of the Internet in daily life." *Id.* at 76, quoting *Betts*, 507 Mich at 555. The court concluded:

> [N]otwithstanding the removal of the student-safety-zone restrictions and the loosening of the in-person reporting requirements, we conclude that the 2021 SORA imposes significant affirmative obligations on registrants by mandating upon pain of imprisonment that they report common life changes within a short period of time, sometimes in person and sometimes in a manner not specified in the statute. [*Id.* at 76-77.]

The Court of Appeals was right. SORA continues to impose immediate in-person reporting requirements for changes to a person's address, employment status, legal name change, enrollment changes at an educational institution, international travel more than 7 days, and annual in-person reporting for Tier 1 registrants like Mr. Lymon (more frequent for Tiers 2 and 3). MCL 28.725a(3); MCL 28.724a; MCL 28.725(1), (3), (7)-(8).

<https://www.facebook.com/groups/1476930155790767/> (accessed November 12, 2023).

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These in-person reporting requirements were not present in the Alaska scheme at issue in *Smith*, and the lack of in-person reporting was one of the reasons the Court found there was no disability or restraint. *Smith*, 538 US at 101. Likewise, Justice Viviano, in his partial concurrence and partial dissent in *Betts*, acknowledged the punitive aspect of in-person reporting and would have severed all in-person requirements. See *Betts*, 507 Mich at 581-585 (Viviano, J, concurring in part, dissenting in part).

This Court acknowledged the burden of in-person reporting, especially for people with physical and material needs:

> Frequent in-person reports imposed a burden on registrants, especially for those who might have had difficult traveling to make the reports—such as those who did not have access to public transportation, did not have the financial resources necessary for private or public transportation, or had health or accessibility issues that would have impeded transportation. [*Betts*, 507 Mich at 556.]

The Sixth Circuit described 2011 SORA's in-person reporting requirements as "direct restraints on personal conduct." *Does #1-5 v Snyder*, 834 F3d 696, 703 (2014). In response to the state's assertion that the effects were "minor and indirect," the Sixth Circuit reasoned: "But surely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment." *Id.*

This Court acknowledged the same: "Imprisonment is the 'paradigmatic' affirmative restraint . . . and the 2011 SORA ensured adherence to its many requirements on the potential for imposition of imprisonment. Although SORA has always contained such a penalty provision, the conditions that a registrant must satisfy to avoid incarceration have increased." *Betts*, 507 Mich at 554 (internal citations omitted).

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The prosecutor argues that because the immediate[39] in-person reporting requirements were removed from 2021 SORA (which they were not) and because some information can be reported in another way as chosen by the Michigan State Police, the reporting burdens this Court addressed in *Betts* are no longer burdens. *Prosecutor's Brief*, 35. But, this ignores the plethora of reporting requirements that still exist. There are still substantial requirements for people to report in-person, within three business days. This is in addition to mandatory in-person reporting dates, regardless of whether any information has changed. MCL 28.725a(3).[40]

To suggest that in-person updates for changed information might be infrequent ignores the reality of registrants and people of low-to-middle income statuses who experience frequent job and housing changes, if a registrant is lucky enough to find a job and a place to live. See Meyer, I.H., Bouton, L., Maszak-Prato, S., Semple, L. & Lave, T.R. (2022). LGBTQ People on Sex Offender Registries in the US. Los Angeles, CA: The Williams Institute, UCLA School of Law.[41] (Showing 56% of all registrants lost a job due to being on the registry, and 30% of registrants changed jobs once, twice, or more in two years; 50% of all registrants were refused a rental because of being on a registry, and 31% of registrants moved once or twice in two years; Tables 11 and 12).

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[39] The change from "immediate" reporting (2011 SORA) to reporting within three business days (2021 SORA) is not substantive because "immediately" was previously defined to be within three business days. MCL 28.722(g) (2020).

[40] The prosecutor grossly misstated the opinion of the Sixth Circuit by asserting that "[t]he Court of Appeals also ignored the determination of the Sixth Circuit that SORA's periodic reporting requirements do not offend the Constitution." *Prosecutor's Brief*, 36. The Sixth Circuit explicitly mentioned in-person reporting as part of the basis for finding SORA to be excessive. *Does #1-5*, 834 F3d at 705.

[41] Available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf> (accessed November 12, 2023).

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Even though the Michigan State Police allows for reporting some changes by mail, the tens of thousands of people on the registry will still need to report in-person either quarterly, biannually, or annually. They will also need to report in-person within three days if, for example, they lose their housing or job, or take a college class. And they will have to report in-person or travel to a post office box to report within three business days if they travel domestically for more than seven days, or if there is a change in vehicle information, email address or internet identifiers, and any new telephone numbers. Further, the difficulty with mail reporting is that a person has no way to prove they mailed something within the three required days, or that the Michigan State Police received it and entered it. While a person could use certified mail, given the socioeconomic situations of many registrants and the need to physically go to a post office to exercise this option, this does not look much different than in-person reporting.

And, this is all provided a registrant understands which items require in-person reporting and which items allow for mail reporting. Some may choose to play it safe and always report in-person. That is the reality of living under the dictates of a statute that is confusing for lawyers and judges, let alone lay people who face the threat of incarceration if they assume incorrectly.[42]

Numerous other jurisdictions have recognized the disability and restraint imposed by in-person reporting requirements.

The Supreme Court of Montana found that "[r]equiring such regular in-person contact with law enforcement upon any change in address, work, school, or travel is akin to being placed on permanent probation, and the Court concludes that these provisions have an effect like punishment." *Montana v Hinman*, 12 Mont 434, 444 (2023).

The Supreme Court of Pennsylvania found that the state's in-person reporting requirements "to be a direct restraint," and that the existence

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[42] While any violation of SORA must be willful, MCL 28.729, it is likely that a prosecutor will argue every violation is willful if the registrant signs the explanation of duties form, which they are forced to do. See *Explanation of Duties*. *Lymon Appendix*, 336-339.

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of the in-person reporting requirements was an important distinction from the registry at issue in *Smith v Doe*. *Muniz*, 640 Pa at 735-736. Because of mandatory verification reporting, a registrant must, at a minimum, appear in person four times per year for 25 years, totaling 100 times. *Id.* at 735. And, of course, that number would increase dramatically if other information changed. *Id.* at 735-736.

The Supreme Court of Oklahoma, in finding that its registry violated the Ex Post Facto Clause, held that "the affirmative 'in person' registration and verification requirements alone cannot be said to be 'minor and indirect' especially when failure to comply is a felony." *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004, 1022 (Okla 2013). The court also acknowledged that the Alaska statute at issue in *Smith v Doe* did not require in-person reporting, which made their registry "very different" from what was reviewed in *Smith*. *Id.* at 1021-1022.

The Supreme Court of Maine held similarly: "[Q]uarterly, in-person verification of identity and location of home, school, and employment at a local police station, including fingerprinting and the submission of a photograph, for the remainder of one's life, is undoubtedly a form of significant supervision by the state . . . that is neither minor nor indirect." *State v Letalien*, 985 A2d 4, 18 (Me 2009). "These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.'" *Id.*, quoting *Doe v District Attorney*, 932 A2d 552, 562 (Me 2009).[43]

The Supreme Court of New Hampshire noted that the in-person reporting requirements were burdensome, especially given that what a person must report was not included in their public criminal record and a registrant had no ability to petition to be removed from these

[43] After the court decided *Letalien*, the Maine Legislature amended its registry to require verification by *writing*, and in-person verification only *once every five years* for lifetime registrants. *Doe I v Williams*, 61 A3d 718, 727 (Me 2013).

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requirements. *Doe v State*, 167 NH at 404-405. The fact that the registry was online, "increase[d] these [negative] effects exponentially." *Id.* at 404.

The Supreme Court of Indiana held that Indiana's registry "imposes significant affirmative obligations and a severe stigma on every person to whom it applies." *Wallace v State*, 905 NE2d 371, 379 (Ind 2009). Some of those the court mentioned were the mandatory obligations to register, re-register, update one's information, and the public disclosure of information, while failure to do so could lead to a felony. *Id.* These duties were "significant and intrusive," as were the time periods of mandatory registration, which included lifetime registration. *Id.* at 379-380. Indiana's registry also "expose[d] registrants to profound humiliation and community-wide ostracism," which could lead to vigilantism and lost jobs, lost homes, threats, and violence. *Id.* at 380.

Even if this Court found in-person reporting requirements were not affirmative disabilities or restraints, SORA imposes an affirmative disability and restraint because SORA brands people as dangerous sexual predators and encourages the public to monitor registrants in ways that a criminal record alone does not. See Part III.A.2., *supra*; see also July 29, 2021 post on Michigan Predator Files (Exposing the Darkness) Facebook group, posting information from a registrant's SORA page and telling the 5.8 thousand members of the Facebook group where the registrant was going to be (at a fair) and warning people to "[b]e aware." [44]

In 2007, the Supreme Court of Montana held its registry was not punishment. Just a few months ago, the court held differently, based on how much had changed in technology in the sixteen years between opinions:

> But the analogy to public criminal records simply no longer holds true. It is undeniable that today, there is a fundamental difference between SVORA's widespread online dissemination of information and the possibility of a

[44] Available at <https://www.facebook.com/groups/1476930155790767/> (accessed November 12, 2023).

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> neighbor or employer looking up an individual criminal record. For one thing, much of the information now provided by SVORA is not part of a criminal record . . . . Furthermore, although an employer might have researched a prospective employee's criminal background in the absence of SVORA, with the Act, employers are now aware that any registrant they hire will be required to continually apprise law enforcement of their affiliation; the long-term surveillance scheme now incorporated into SVORA certainly sweeps up more than the mere fact of a conviction and certainly exacerbates the stigma and collateral social consequences of being convicted of a sexual offense. *Hinman*, 412 Mont at 444-445.

The Supreme Court of Oklahoma noted that the Internet had "increased the unrestricted dissemination of personal information of sex offenders." *Starkey*, 305 P3d at 1023-1024. That court cited to Justice Stevens' dissent and Justice Souter's concurrence in *Smith*, both of which addressed the stigma registrants faced, even in 2003. *Smith*, 538 US at 111 (Stevens, J., dissenting); *Smith*, 538 US at 109 (Souter, J., concurring). And, of course, *Smith* was decided long before the Supreme Court called the Internet the "modern public square." *Packingham*, 582 US at 107.

Michigan's SORA allows the public to submit an anonymous tip on the Internet. This may lead the police to show up at a registrant's house, school, or work, even if that person is fully compliant, just to investigate the anonymous allegations of someone clicking a button or two on the Internet. SORA allows "a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.*, quoting *Reno v ACLU*, 521 US 844, 870 (1997). And in this case, that "person with an Internet connection" could cause someone to lose his or her job or home, or even go to prison.

The Michigan State Police repeat the twenty-year-old argument that it "remains compelling," that the United States Supreme Court found the Alaska SORA obligations, "less harsh than the sanctions of occupational debarment." *MSP Amicus*, 30, quoting *Smith*, 538 US at 99. The Sixth Circuit responded to this very argument: "no disbarment

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case we are aware of has confronted a law with such sweeping conditions or approved of disbarment without some nexus between the regulatory purpose and the job at issue." *Does #1-5*, 834 F3d at 704.

The sweeping conditions that still exist in 2021 SORA include the in-person reporting requirements, and the public stigma that flows from the public Internet registry. These are affirmative disabilities and restraints.

C. SORA advances the traditional aims of punishment.

The prosecutor concedes this factor. *Prosecutor's Brief*, 37-38.

This Court held that 2011 SORA promoted deterrence and retribution. *Betts*, 507 Mich at 556-558. Deterrence was "necessarily encompassed by SORA's stated [legislative] purpose." *Id.* at 556. Retribution was evident because registration was required based on offense alone and no individualized determination of the risk of sexually reoffending. *Id.* at 557.[45]

Because the legislative purpose did not change for 2021 SORA and because registration remains based on offense alone, this Court should also find that 2021 SORA promotes the traditional aims of punishment. The Court of Appeals did so. *Lymon*, 342 Mich App at 77-78.

Other jurisdictions have reasoned similarly. The Supreme Court of Alaska held post-*Smith* that its registry was retributive and served as a

[45] The Sixth Circuit also held that Michigan's "SORA advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence." *Does #1-5*, 834 F3d at 704. SORA's "very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend. It is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community." *Id.*

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deterrent, based primarily on the lack of distinction between the risk posed by certain registrants:

> [A]pplication to a broad spectrum of crimes regardless of their inherent or comparative seriousness refutes the state's argument and suggest that such retributive and deterrent effects are not merely incidental to the statute's regulatory purpose. . . . But at any given moment the registration list does not distinguish those individuals the state considers to pose a high risk to society from those it views as posing a low risk." [*Doe v State*, 189 P3d 999, 1013-1014 (Alaska 2008).]

The Supreme Court of Oklahoma held that its registry "promotes deterrence through the threat of negative consequences, for example, eviction, living restrictions, and humiliation." *Starkey*, 305 P3d at 1027. The "retributive portion" was the most compelling, based on the lengthened registration periods, the lack of an individualized determination of risk, and the inability to petition for removal from the registry. *Id.* at 1027-1028.

The Supreme Court of Pennsylvania reasoned "the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect." *Muniz*, 640 Pa at 742. Its registry was much more retributive than the statute at issue in *Smith*, based on increases to the "length of registration . . . mandatory in-person reporting requirements, and . . . more private information . . . displayed online." *Id.* at 744.

The Supreme Court of New Hampshire reasoned that because offenders are required to register based only upon their offense, and "not on any individualized assessment of current risk or level of dangerousness," the registration law appeared like retribution. *Doe v State*, 167 NH at 407-408. See also *Commonwealth v Baker*, 295 SW3d 437, 444 (Ky 2009) (holding there was a retributive effect based on the lack of an "individualized determination of the dangerousness of a particular registrant.").

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D. SORA's obligations, disabilities, and restraints are not rationally connected to its non-punitive purpose of preventing people convicted of a sex offense from committing another sex offense.

The Legislature's stated purpose is to "prevent[] and [protect[] against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. This is a very specific goal. But, SORA's restrictions are not rationally related to this goal, as there is no evidence that SORA works to prevent people convicted of a sex offense from committing a future sex offense. This is especially true for people like Mr. Lymon who did not commit a sex offense in the first place.

The Michigan State Police repeated the now debunked statement from *Smith* that the recidivism rate of people convicted of a sex offense is "frightening and high," which justified the Legislature's decision to create a burdensome registry. *MSP Amicus*, 31.

The Court's statement in *Smith* has been traced back to an unsubstantiated assertion in the mass market magazine *Psychology Today*. Elmann, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015). There was a single sentence in this article about the recidivism rate of people who commit a sex offense: "Most untreated sex offenders released to prison go on to commit more offenses—indeed, as many as 80% do." *Id.* at 498, quoting Robert E. Freeman-Longo & R. Wall, *Changing a Lifetime of Sexual Crime*, PSYCHOLOGY TODAY, Mar. 1986, at 64. This single line was not supported by data or any reference. *Id.*

Twenty years and countless research studies later, we know that this assertion is not true. This Court has already acknowledged this: "[a] growing body of research supports" that "the dangerousness of sex offenders has been historically overblown and that, in fact, sex offenders are actually less likely to recidivate than other offenders." *Betts*, 507 Mich at 560.

The Sixth Circuit similarly noted the "significant doubt cast by recent empirical studies" on the statement in *Smith* that registrants had

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a "frightening and high" recidivism rate. *Does #1-5*, 834 F3d at 704. Registrants are actually "*less* likely to recidivate than other sorts of criminals," registration has "no impact on recidivism," and registration may "actually *increase* the risk of recidivism." *Does #1-5*, 834 F3d at 704-705 (emphasis in original).

SORA remains based on three primary misconceptions: all registrants are the same, all are likely to reoffend sexually, and registries will reduce sexual offending. These are misconceptions because:

- risk varies among people who have been convicted of sex offenses
- offense of conviction does not correlate to risk
- risk decreases the longer a person has been offense free and as a person ages
- People with sex offense convictions recidivate at much lower rates than those convicted of other types of crimes
- the risk of stranger danger is overstated
- registries do not decrease but in fact may increase sexual offending.

Based on various studies, this Court concluded that the efficacy of registries are unclear. See *Betts*, 507 Mich at 560-561. Those studies tell us that risk of reoffending depends on a person's actual risk assessment, and that for all registrants, risk declines over time. Hanson et al, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychol Pub Pol'y & L 48, 49 (2018).[46]

[46] While it is true that sex offenses can be underreported, see *Betts*, 507 Mich at 582-582 (Viviano, J., concurring in part and dissenting in part), both offenses by registrants and by non-registrants are underreported, meaning the fact of underreporting does not change the overall scientific

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By failing to use an individualized risk assessment, SORA does not distinguish between people who may actually be at risk of reoffending by committing another sex offense. There are risk assessments that could accomplish this task, such as the STATIC-99. *Id.* See also n 7, *supra*. The Michigan Department of Corrections already uses this risk assessment tool. See, e.g., Report to the Legislature (noting that STATIC-99Rs are completed upon entrance to the MDOC).[47] But, right now, SORA publicly brands individuals as dangerous sexual predators regardless of the actual risk of reoffending sexually, if any, that they pose. This governmental branding can last the rest of someone's life.

Yet, SORA requires low risk people to register, as well as people like Mr. Lymon who have not committed a sex offense. There are likely thousands of people on SORA who present no more of a threat of committing a new sex offense than any random person who has never been convicted of a sex offense. A registry that fails to distinguish between people who are likely or unlikely to reoffend sexually is not a useful tool to protect against people recommitting sex offenses.

As to whether SORA actually works to keep the public safe from registrants committing another sex offense, this Court said that from a public-safety perspective, it can be said at a minimum that efficacy of SORA is "unclear." *Betts*, 507 Mich at 561. The Sixth Circuit concluded, "the record before us provides scant support for the position that SORA in fact accomplishes it professed goals." *Does #1-5*, 834 F3d at 704. Empirical research demonstrates that SORA is counterproductive to public safety because it exacerbates risk factors for recidivism such as unemployment and housing instability, and it impedes successful reintegration into society. Prescott & Rockoff, *Do Sex Offender*

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research establishing that recidivism rates are low, and registries are not effective in combating recidivism.

[47] *Report to the Legislature* <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-Reports/2023/Assaultive-Offender-and-Sex-Offender-Programming-3rd-Quarter.pdf?rev=e8ca68d1f5e249f79cb0a61eae89e04a&hash=34CEA64C30502BAC42262D9DE02A0B9A> (accessed November 12, 2023).

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Registration and Notification Laws Affect Criminal Behavior? 54 JL & Econ 161 (2011).

It is irrational to require every single registrant to report in-person without any consideration of the registrant's reporting or compliance history. It is irrational to require people to register for such long periods of time—including for a person's whole life—with no individualized assessment of their risk. It is irrational to not allow people to petition for removal based on a demonstrated lack of risk. It is irrational to publicly brand every single registrant as a dangerous sexual predator when that is not actually true. It is irrational to subject registrants to ostracism, harassment, and public shaming based on potentially inaccurate information. The irrationality of the statute is amplified when people like Mr. Lymon are forced to register without having committed a sex offense. See, e.g., *ACLU of NM v City of Albuquerque*, 139 NM 761, 772 (2006) ("The inclusion of kidnaping and false imprisonment as convictions requiring registration as a sex offender is not rationally related to the legitimate interest of the City in protecting victims or potential victims of sex offenders. . . The City's stated purpose . . . is not further by the inclusion of crimes that are not sexually motivated.")

SORA does not advance its professed non-punitive purpose. But even if this Court finds that there is a rational relationship to a non-punitive purpose, the inquiry does not end as this factor is not dispositive, given this Court found a rational connection in *Betts* but still found SORA punitive.[48]

[48] The Supreme Courts of Indiana, Maine, New Hampshire, Oklahoma, and Pennsylvania all found that their registries had rational relationships to non-punitive purposes yet still held their registries were unconstitutional Ex Post Facto punishment. See *Wallace*, 905 NE2d at 382-384; *Letalien*, 985 A2d at 22, 26; *Doe*, 167 NH at 409-411; *Starkey*, 305 P3d at 1028, 1030; *Muniz*, 640 Pa at 745-746, 749.

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E. Requiring tens of thousands of people to register without an understanding of their level of risk is excessive in relation to the purported non-punitive purpose of preventing people convicted of a sex offense from committing another sex offense.

It bears repeating the very specific purpose of 2021 SORA. It is to "prevent[] and [protect[] against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. SORA is so bloated that this goal cannot possibly be met.

This Court found 2011 SORA to be excessive given the "uncertainty of the 2011 SORA's efficacy." *Betts*, 507 Mich at 561-562.[49] This Court found excessive:

- that "[o]ver 40,000 registrants were subject to the 2011 SORA's requirements without any individualized assessment of their risk of recidivism." *Id.* at 561.
- That the duration of registration "was based solely on the offender's conviction and not the danger he individually posed to the community." *Id.*
- "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." *Id.*
- In-person reporting. *Id.* at 562.

In sum, "[t]hese 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." *Id.*

[49] The Sixth Circuit found SORA to be excessive: "The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects." *Does #1-5*, 834 F3d at 705.

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The same bullet points from *Betts* with regards to 2011 SORA still exist in 2021 SORA, making it excessive, too:

- Registration is based on offense alone. MCL 28.723. As of this writing, 39,871 people are on the public registry.[50]
- The length of registration is based on the offense alone and extends past a person's sentence. MCL 28.725.
- The public registry continues to brand people as "a potentially violent menace." *Betts*, 507 Mich at 561; see MCL 28.728(2).
- There are in-person reporting requirements. MCL 28.725a(3); MCL 28.724a, MCL 28.725(1), (3), (7)-(8).

Here, the Court of Appeals acknowledged the continued, excessive burdens: "[i]n light of the uncertainty of the 2021 SORA's efficacy at decreasing recidivism, we conclude that the restraints it imposed were excessive, even though there were fewer restraints in the 2021 SORA than in the 2011 SORA." *Lymon*, 342 Mich App at 80.

SORA places individuals on a public Internet registry for lengthy periods of time and labels them as dangerous sexual predators, without any regard to the actual risk a given person poses of reoffending (or offending in the first place) sexually. The Legislature's professed non-punitive purpose is "preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. But, the lack of individualized risk assessments, lengthy registration terms, and the sheer number of listed offenses makes SORA over-inclusive and excessive. The public will not be safer if the state cannot determine who may actually pose a threat of reoffending sexually.

There is no individualized assessment to determine length of registration or if immediate in-person reporting is necessary. These extreme requirements are imposed with absolutely no showing of

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[50] *Michigan Sex Offender Registry* <https://mspsor.com/Home/RegistrySearch?searchtype=all> (accessed November 14, 2023).

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particularized risk. For most people, there is no mechanism for rebutting the registration requirements or for petitioning for removal.

The excessiveness of SORA is especially obvious for people like Mr. Lymon, who have never committed a sex offense. Because registration is mandatory and there is no individualized assessment of risk, Mr. Lymon is not allowed to demonstrate to the courts that he is not a sexual risk, yet the State has publicly branded him as a dangerous sexual predator.

Because of its lack of individualization, most registrants' inability to petition for removal, and the complete lack of evidence that SORA makes Michigan any safer, SORA is excessive in relation to its professed regulatory purpose.

Numerous jurisdictions have found registries like SORA to be excessive. The Supreme Court of Montana recently found like this Court did in *Betts*:

> First, a growing body of research into the effectiveness of sex offender registries has cast significant doubt on their capacity to prevent recidivism. Second, the burdens and intrusiveness of SVORA have increased substantially through the subsequent amendments. . . . The effect is a considerable sacrifice of privacy and a permanent system of state surveillance. On balance, faced with the unclear efficacy of the registry at achieving its aims and the greatly broadened scope of its burdens, we can no longer conclude that SVORA's expanded collection and dissemination of information is narrowly tailored to the scheme's public protective purpose. The present SVORA structure clearly points toward recognizing the Act as punitive in effect. *Hinman*, 412 Mont at 446 (internal citations omitted).

The Supreme Court of Oklahoma detailed its registry's obligations that were excessive: a longer registration period than originally imposed; the elimination of the ability to petition for removal; in-person reporting; public dissemination of personal information, and the lack of an individualized determination of risk. *Starkey,* 305 3Pd at 1029. *See*

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also Doe v State, 189 P3d at 1016-1017 (holding for similar reasons that "the statute's chosen means are excessive in relation to the statute's purpose").

The Supreme Court of New Hampshire found its registry excessive, given that most offenders had to register for their entire lives, "without regard to whether they pose a current risk to the public." *Doe v State*, 167 NH at 410. This is because "[i]f in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive." *Id.*

In *Smith*, the Supreme Court noted that the individual assessment required in *Hendricks v Kansas*, 521 US 346 (1997) for involuntary civil commitment was not required in the context of a sex offender registry because "[t]he magnitude of the restraint made individual assessment appropriate. The Act, by contrast, imposes the more minor condition of registration." *Smith*, 538 US at 104.

However, as this Court made clear in *Betts* and as argued throughout this brief, registration today is not "minor." Given the lengthy periods of registration, the inability to petition for removal, the magnitude of reporting requirements including in-person reporting, and the public branding and shaming that flows from the Internet registry, 2021 SORA is excessive. People must be individually assessed to determine whether they actually pose a risk of reoffending by committing a sexual offense.

The *Mendoza-Martinez* factors lead to the inescapable conclusion that 2021 SORA is punishment. Its "aggregate punitive effects negate the state's intention to deem it a civil regulation." *Betts*, 507 Mich at 562. Those punitive effects include things already deemed so in *Betts*.

The Michigan State Police argue that if this Court finds 2021 SORA is punishment, it will have broad implications for other groups of people. *MSP Amicus*, 48-50. That may be true. But broad implications are not a reason for this Court to deny Mr. Lymon relief.

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First, the MSP asserts that because the same test[51] is used to determine whether punishment is cruel or unusual as is used to determine if punishment is ex post facto, over 30,000 people currently on the registry for pre-2011 offenses may not have to register if this Court finds 2021 SORA is punishment. *MSP Amicus*, 48. It is true that if SORA is punishment, it cannot be imposed retroactively. The idea of the registry "going dark" came up during the second oral argument in *Betts*.[52] As was true then, the Legislature can act and act quickly to enact a new, constitutional registry, especially with yet more guidance from this Court about what that should look like (i.e. non-public, risk-based, online reporting, and the ability to petition for removal).

Second, the MSP asserts that there may be implications for pleas if the trial court fails to inform a person of their registration obligations. *MSP Amicus*, 49. The responsibility to inform a person of SORA consequences already rests with trial counsel. *People v Fonville*, 291 Mich App 363 (2011). It should now rest with the trial court judge. A person must be advised of the punishment they will receive when entering a plea; if they are not, they should be entitled to withdraw their plea. *People v Cole*, 491 Mich 325 (2012). But, the number of people who appeal plea convictions and would seek plea withdrawal would likely be limited.[53]

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[51] See n 24 *supra*, questioning whether it should be the same test.

[52] Available at <https://www.youtube.com/watch?v=ZJo6FX8DEQw> (accessed November 8, 2023).

[53] In 2021, there were just over 35,000 guilty pleas entered. *Statewide Circuit Court Summary 2021 Court Caseload Report* <https://www.courts.michigan.gov/4a8ef2/siteassets/reports/statistics/caseload/2021/statewide.pdf> (accessed November 12, 2023). In that same time period, about 1,300 people requested counsel to appeal their pleas. *State Appellate Defender Office 2021 Annual Report* <https://www.sado.org/content/commission/annual_report/11578_2021-SADOMAACS-Annual-Report.pdf> (accessed November 12, 2023). Of those people, likely a very small number sought plea withdrawal, given the risk that can come with trying to disrupt a bargain.

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Third, the Michigan State Police, citing *People v Nunez*, 342 Mich App 322 (2022), argues that holding that registration is punishment could impact whether people can be required to register if registration obligations are not placed on the judgment of sentence. *MSP Amicus*, 49-50. As the Court of Appeals explained, SORA requires that the trial court must follow certain procedures before sentencing a person and including registration on the judgment of sentence. *Nunez*, 342 Mich App at 329-331. Regardless of what this Court holds regarding punishment, trial courts already must follow these statutory requirements. *Id.* at 330. The Court of Appeals acknowledged and relied in part upon this Court's holdings in *Cole* and *Betts*, and the protections those holdings provide to people convicted of sex offenses. *Id.* at 331-335. Importantly, like with Lifetime Electronic Monitoring, any omission of SORA on the judgment of sentence could be corrected by a timely motion from the prosecutor. *People v Comer*, 500 Mich 278 (2017).

The MSP seeks to avoid such implications by suggesting this Court review Mr. Lymon's claim as an as-applied challenge, which they argue would still fail because SORA is regulatory. *MSP Amicus*, 50-52.

This Court could hold that 2021 SORA – as applied only to people who have not been convicted of a sex offense – is punishment.[54] Michigan's Constitution demands at least this result. This Court has never allowed disproportionate sentences to stand. It is disproportionate under decades of sentencing jurisprudence and disproportionate under the cruel or unusual punishment clause of the Michigan Constitution to require Mr. Lymon – and people like him – to register under SORA because he has never committed a sex offense. Such a mandatory sanction does not serve Mr. Lymon and his rehabilitation, it does not serve the public, nor does it serve the intent of the Legislature.

This Court should hold that it is cruel or unusual punishment to require people who have not committed a sex offense from registering under SORA.

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[54] Such a holding may suggest that the intents-effects test is not the proper test when considering whether a sanction is punishment under the cruel or unusual punishment clause. See n 24, *supra*.

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Conclusion and Relief Requested

For the reasons stated above, Cora Lymon respectfully requests that this Honorable Court find that it is cruel or unusual punishment that he register as a sex offender and order that he be removed from the registry.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this document contains 18,165 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

State Appellate Defender Office

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