

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE LEE SMITH,

Defendant-Appellant.

Supreme Court No.	168200
Court of Appeals No.	366923
Kent Circuit Court Nos.	10-012837-FC; 10-012838-FC

**AMICUS CURIAE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN**

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QUESTIONS PRESENTED

- I. If the Court determines that requiring the defendant to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2020 PA 295, effective March 24, 2021 (SORA 2021), is an ex post facto punishment in violation of US Const, art I, § 10 or Const 1963, art 1, § 10 for either or both of his offenses, whether the remedy for such a violation would be the same as the one employed in *People v Betts*, 507 Mich 527, 573-574; 968 NW2d 497 (2021)?

Amicus answers: Yes.

Mr. Smith answers: Yes.

The prosecutor answers: No.

The Court of Appeals answers: Did not consider.

The Circuit Court answers: Did not consider.

INTEREST OF AMICUS¹

The American Civil Liberties Union of Michigan (“ACLU”) is the Michigan affiliate of a nationwide, nonpartisan organization dedicated to protecting core constitutional liberties. The ACLU or its attorneys have been involved in numerous cases involving the constitutional rights of people convicted of sexual offenses, including representing the plaintiffs in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), cert den 583 US 814 (2017) (“*Does I*”), and a class of all Michigan registrants in *Does v Snyder*, 449 F Supp 3d 719 (ED Mich, 2020) (“*Does II*”)—two cases that struck significant portions of Michigan’s 2011 version of SORA as unconstitutional. ACLU counsel currently represent a class of all Michigan registrants in *Does v Whitmer*, 751 F Supp 3d 761 (ED Mich, 2024); 773 F Supp 3d 380 (ED Mich, 2025) (“*Does III*”), a case where the district court held, *inter alia*, that the 2021 version of SORA violates the federal Ex Post Facto Clause.

The ACLU counsel have represented registrants and filed amicus briefs on registration issues before this Court, including in *People v Ellis* (Docket No. 166766); *People v Kardasz*, ___ Mich __; ___ NW3d ___ (2025) (Docket No. 165008); *People v Lymon*, 515 Mich 145; 29 NW3d 58 (2024); *People v Betts*, 507 Mich 527; 968 NW2d 497 (2021); *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (2018); and *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012).

INTRODUCTION

In *People v Kardasz*, this Court held that Michigan’s 2021 Sex Offenders Registration Act (SORA 2021) constitutes punishment. ___ Mich __; ___ NW3d ___ (2025); (Docket No. 165008); 2025 WL 3691966 (issued December 19, 2025). That punishment has been

¹ This brief was not authored in whole or part by counsel for a party, nor did such counsel or a party make a monetary contribution intended to fund the brief’s preparation or submission.

retroactively applied to the defendant here, in violation of the U.S. and Michigan Constitutions' Ex Post Facto Clauses. Const 1963, art 1, § 10; US Const, art I, § 10. This Court has asked whether, if it finds that imposition of SORA 2021 on Mr. Smith is an ex post facto punishment, the remedy for such a violation is the same as the one in *People v Betts*, 507 Mich 527, 573-574; 968 NW2d 497 (2021).

The short answer is yes. Just as in *Betts*, the unconstitutional provisions are embedded in the statute. Moreover, in *Kardasz*, this Court analyzed SORA 2021's burdens in the aggregate, which is exactly what this Court did for SORA 2011 in *Betts*. That means the Court cannot just lop off a provision here or there to fix the problem. And as in *Betts*, revival is not an option, especially given SORA's complicated legislative history.

The longer answer to this Court's question is twofold. First, a decision by this Court holding that SORA 2021's burdens cannot be retroactively imposed does not stop Michigan from having a registry or from imposing restrictions on people with older convictions, *if* they currently pose a risk to public safety. A scheme that is risk- rather than conviction-based could be designed as a *regulatory* measure. While retroactive *punishment* is impermissible, imposing *regulatory* restrictions on people based on an individualized determination of present dangerousness is not. Alternatively, if the state wants a conviction-based system, it will need to make SORA much less burdensome and apply it for much shorter terms to far fewer people. This Court should make that clear.

Second, while it is the Legislature's responsibility to rewrite the law, after a decade-and-a-half of exhaustive SORA litigation, it is critical for the Legislature to have guidance from this Court. This case presents an important opportunity for this Court to clarify for the Legislature what the Legislature *cannot* do.

FACTS

I. The History of SORA and SORA Litigation

Michigan did not have a sex offender registration law until October 1, 1995. See 1994 PA 295, § 11. Under the original statute, registration information was available only to law enforcement, and registrants merely needed to notify law enforcement within 10 days of a change of address. 1994 PA 295, § 5(1). Over the last three decades, the Legislature has repeatedly amended SORA to impose more burdens on more people for longer periods of time. SORA “has grown into a byzantine code governing in minute detail the lives of” Michigan’s registrants. *Does I*, 834 F3d at 697.

Most relevant here, in 2011, Michigan completely restructured SORA, adding extensive new reporting requirements and mandating in-person (and in some cases) immediate reporting of vast amounts of personal information. 2011 PA 17-18. Those new requirements applied retroactively. The 2011 amendments also retroactively categorized registrants into tiers, with tier classifications determining the length of time a person must register and the frequency of reporting. See *id.*, codified as MCL 28.722(q)-(v); MCL 28.725(10)-(13). As a result, some 17,000 people had their registration terms retroactively extended to life. *Does v Whitmer*, 22-cv-10209 (ED Mich), Plaintiffs’ Statement of Material Facts (“*Does III* SOMF”), ECF 123-1, PageID #3719-3723. In addition, the 2011 amendments changed how registration terms are calculated, which significantly lengthened the registration terms of many other registrants. Compare 2004 PA 240, § 5(6) (generally requiring registration for “25 years after the date of initially registering or, if the individual is in a state correctional facility, for 10 years after release from the state correctional facility, whichever is longer”) with 2011 PA 17, § 5(13), now codified

as MCL 28.725(14) (“The registration periods under this section exclude any period of incarceration . . .”).²

In 2021, this Court held that SORA 2011 constituted punishment, and that its retroactive application violated the constitutional prohibitions on ex post facto laws. *Betts*, 507 Mich 527. The Sixth Circuit had reached the same conclusion in 2016, several years earlier. *Does I*, 834 F3d 696. But even after the *Does I* decision, Michigan continued to enforce SORA 2011. To compel Michigan to stop applying an unconstitutional law, registrants filed a class action. *Does v Whitmer (Does II)*, 16-cv-13137 (ED Mich). In 2020, the district court granted class-wide injunctive relief that, *inter alia*, barred retroactive application of SORA 2011; it gave the Legislature 60 days to fix SORA’s deficiencies. *Does II*, 449 F Supp 3d 719 (ED Mich, 2020). After COVID hit, the court enjoined SORA’s enforcement and gave the Legislature additional time to correct the constitutional violations. *Does II*, No. 16-cv-13137, ECF No. 91. That injunction remained in effect from February 2020 to March 2021. *Id.*, ECF No. 126. There is no evidence that the year-long bar on SORA’s enforcement had any impact on public safety whatsoever.

When Michigan finally revised SORA in 2021, it made minimal changes and retained virtually all of the 2011 amendments. See SORA 2021 with Highlighted Changes (Exh A). As before, the conviction alone determines whether one must register for 15 years (Tier I), 25 years (Tier II), or life (Tier III). MCL 28.725(11)-(13). SORA 2021 retains the 2011 amendments’ retroactive extension of registration terms to life, as well as the retroactive changes to how registration terms are calculated. MCL 28.725(14). Registrants continue to be publicly branded as dangerous on the online registry, which displays recent photos and extensive personal details

² For example, under the prior statute, a person convicted of an offense with a 25-year registration term who began registering in 2010, and was released from imprisonment in 2020, would have had to register until 2035. Under current law, that person has to register until 2045.

alongside information about past offenses. MCL 28.728(2). The legislature did eliminate the geographic exclusion zones, but registrants must still comply with a dizzying array of duties that are virtually unchanged from SORA 2011.³ And the slightest misstep can still trigger up to ten years in prison and *mandatory* revocation of probation/parole or youthful trainee status. MCL 28.729. As before, there is no individual review and (with rare exceptions) no path off the registry, regardless of mitigating circumstances, passage of time, incapacity, or proven rehabilitation.

In *People v Kardasz*, this Court held that SORA 2021, like SORA 2011, is punishment. ___ Mich __; 2025 WL 3691966. See also *People v Lymon*, 515 Mich 145; 29 NW3d 58 (2024) (holding SORA 2021 is cruel/unusual punishment for people with non-sex offenses); *People v Klinesmith*, 28 NW3d 697 (Mich, 2025) (Mem) (holding that because SORA is punishment, it must appear on the judgment of sentence).

Meanwhile, in *Does III*—a class action challenging the constitutionality of SORA 2021 on multiple grounds—the federal district court likewise found that SORA 2021 is punishment. 751 F Supp 3d at 795. The court further held that severance was not possible. *Does III*, 773 F Supp 3d at 389-393. The district court permanently enjoined SORA’s retroactive application to registrants who committed the offense requiring registration before July 1, 2011, but gave the Legislature 90 days to revise the statute. *Does v Whitmer*, No. 22-cv-10209 (ED Mich), am judg, ECF No. 177 (April 22, 2025). Both parties appealed parts of the decision.

³ As before, registrants must report within three days any changes to addresses, employment (plus temporary jobs and routes for non-fixed employment), phone numbers, vehicles, schools, etc. MCL 28.724a, 28.725, 28.727. SORA still requires registrants to report if they travel for more than seven days, with 21 days’ notice for foreign travel. MCL 28.725(2)(b), (8). SORA mandates in-person, three-day reporting for some updates; for others, the Michigan State Police decides the manner of reporting. MCL 28.724a, 28.725, 28.727. Additionally, registrants must periodically report in person to the police—typically every three months—to provide the same vast array of personal information as under SORA 2011. MCL 28.725a(3), 28.727. Registrants still pay an annual fee. MCL 28.725a(6).

The Legislature did nothing in response to the district court’s ruling until the district court denied a stay. *Id.*, Op, ECF No. 192 (May 19, 2025). Then, the Legislature suddenly bypassed its normal procedures and tried to pass legislation within days, without any hearings.⁴ That bill made minimal changes to SORA and was completely untethered from over a decade of court rulings. 2025 SB 424. Once the Sixth Circuit granted a stay,⁵ legislative activity ceased.

The state’s appeal in *Does III* involves two separate ex post facto counts: one regarding the retroactive application of SORA to pre-2011 registrants, and a second regarding the retroactive extension of registration terms.⁶ Because severability is a question of state law, *Memphis Planned Parenthood, Inc v Sundquist*, 175 F3d 456, 466 (CA 6, 1999), a decision by this Court on remedy in this case may affect remedy in the *Does III* litigation as well. Argument in the Sixth Circuit is scheduled for July 21, 2026.

II. Michigan’s Registry

To understand the potential impact of a decision here, it is important to understand some basic facts about Michigan’s registry. First, the registry is huge. It has nearly tripled, from about 17,000 people in 1997 to more than 45,000 in 2023. *Does III* SOMF, PageID #3733.

Second, because a wide range of convictions automatically trigger SORA, the registry includes people with widely varying levels of culpability. For example, the *Does III* plaintiffs who are subject to automatic lifetime registration with no opportunity for removal include Doe

⁴ 2025 Senate Journal 721-723 (discharging bill from committee without hearing and suspending rules for SB 424), available at <www.legislature.mi.gov/documents/2025-2026/Journal/Senate/pdf/2025-SJ-0617-056.pdf>.

⁵ *Does v Whitmer*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued June 20, 2025 (Docket Nos. 25-1413 and 25-1414).

⁶ The *Does III* plaintiffs also separately challenged the retroactive extension of registration terms as a violation of their plea agreements, but the district court did not decide that claim. *Does III*, 751 F Supp 3d at 814.

C, who at age 23 had a sexual relationship with his now-wife, who was then 15; Doe E, who was born with Fetal Alcohol Syndrome, has the developmental age of nine or ten, and is registered for an offense from 1994 (before the registry existed); and Mary Roe, who at age 19 in 2002 had sex with a 14-year-old boy, and has since earned a master's in counseling and now works as a trauma therapist, including for sexual-assault survivors. *Id.*, PageID #3703-3704, 3710-3711, 3706-3708.

Third, recidivism rates are much lower than commonly believed: 93% of registrants in the community have never been convicted of a subsequent registrable offense. *Does III*, 22-cv-10209 (ED Mich), Data Report (“*Does III* Data Rept”) (Exh B),⁷ ECF No. 123-6, PageID #3952-3953. Moreover, the recidivism risk of individuals on the registry varies widely. Some people convicted of sex offenses present a heightened risk. Others do not. *Does III* SOMF, PageID #3750-3752. Expert analysis of Michigan’s registry data established that SORA’s conviction-based tiers are actually *backward*: people in Tier I (15-year registration) have the highest risk (based on empirically-validated risk instruments) and Tier III (lifetime registration) have the lowest. *Does III* SOMF, PageID #3768-3769; see also *Kardasz*, 2025 WL 3691966, at *12 (noting “‘inverse correlation’ between tier and risk on a validated assessment tool” (quotation omitted)).

Fourth, recidivism risk declines dramatically with time offense-free in the community. *Does III* SOMF, PageID #3749-3750. “Thousands of Michigan’s registrants have been living in the community for more than 20 years since their release without a new sexual conviction.” *Kardasz*, 2025 WL 3691966, at *14. And tens of thousands of registrants—over 22,000 people,

⁷ This report was prepared by experts during the *Does III* litigation who analyzed Michigan’s registry data as of January 24, 2023.

or 64% of Michigan’s non-incarcerated registrants—have lived offense-free in the community for 10 years or more. *Does III* Data Rept, PageID #3969. Experts who analyzed Michigan’s registry determined that 17,000-19,000 Michigan registrants—about half of those in the community—are just as safe as non-registrants, and thousands more present only a slightly higher risk. *Does III* Data Rept, PageID #3952, 3967-3973.

III. The Case of Mr. Smith

On March 28, 2011, Mr. Smith pleaded guilty to two offenses: a charge of first-degree criminal sexual conduct (CSC I) (MCL 750.520b(1)(b)) for an offense that occurred on April 1, 1995, and a charge of second-degree criminal sexual conduct (CSC II) (MCL 750.520c(1)(b)) for an offense that occurred on June 1, 2010.⁸ At the time of the 1995 offense, SORA did not yet exist.⁹ At the time of the 2010 offense, an earlier version of SORA was in effect. Under the 2021 SORA, the 1995 offense results in lifetime registration (MCL 28.722(v)(iv); 28.725(13)), and the 2010 offense results in 25-year registration, with incarceration time excluded from the calculation. MCL 28.722(t)(x); 28.725(12), (14).

ARGUMENT

I. As in *Betts*, Severance Is Not Possible

A. The Legal Standard for Severability

When confronted with an unconstitutional statute, a court must balance two competing concerns. The court must restrain itself from “rewriting state law to conform it to constitutional requirements” and must avoid “quintessentially legislative work[.]” *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 329; 126 S Ct 961; 163 L Ed 2d 812 (2006)

⁸ The facts about Mr. Smith are drawn from the Defendant-Appellant’s brief.

⁹ The earliest version of SORA came into effect on October 1, 1995. 1994 PA 295, § 11.

(citations omitted). At the same time, the court should “try not to nullify more of a legislature’s work than is necessary,” and should therefore sever problematic portions of a statute if possible. *Id.*

Whether a law can be salvaged by severing unconstitutional provisions, or whether instead the court would be involved in impermissible legislative rewriting, depends on how deeply embedded the unconstitutional provisions are in the statutory fabric. Thus, when a statute has been found unconstitutional, the court must “consider whether ‘the remaining portions or applications of the act . . . can be given effect without the invalid . . . application.’” *Betts*, 507 Mich at 563 (quoting MCL 8.5). See also *Blank v Dep’t of Corrections*, 462 Mich 103, 123; 611 NW2d 530 (2000) (holding that if the “unconstitutional portions [of a statute] are so entangled with the others that they cannot be removed without adversely affecting the operation of the act,” then the court must find that the act as a whole is unconstitutional).

B. *Betts* Found the Ex Post Facto Problems with SORA 2011 Could Not Be Remedied Through Severance

In *Betts*, this Court, after concluding that SORA 2011 was punishment, held that severance was not possible, and therefore the statute *as a whole* could not be retroactively applied:

[E]ven assuming that the retroactive application of the 2011 SORA without the specific provisions added by the 2006 and 2011 amendments would not violate constitutional ex post facto protections, the 2006 and 2011 amendments, in whole, cannot be excised from retroactive application because doing so renders the statute unworkable. [*Betts*, 507 Mich at 564.]

The Court further explained that even if certain provisions could be excised without affecting the statute’s workability, and even if the retroactive application of SORA without these discrete provisions were constitutional,

that application would require this Court to engage in essentially legislative choices We decline to encroach on the Legislature’s plenary authority to create law or on its role in shaping and articulating policy by choosing among the plethora of possibilities. [*Id.* at 565.]

The federal court likewise concluded that the 2011 amendments were not severable because they “permeate nearly every section of the statute” and “almost entirely rewrote” SORA. *Does II*, 449 F Supp 3d at 732, 738. The court therefore enjoined retroactive application of SORA 2011 in toto. *Id.*

C. Just as in *Betts*, the Ex Post Facto Problems with SORA 2021 Cannot Be Remedied Through Severance.

Betts’s reasoning about SORA 2011 applies equally to SORA 2021. Importantly, the Court’s analytical approach to the underlying question of whether SORA is punishment was the same for both versions of the statute. In *Betts*, this Court did “not examine individual provisions of SORA in isolation but instead assess[ed] SORA’s punitive effect in light of all the act’s provisions when viewed as a whole.”¹⁰ 507 Mich at 549. This focus on the entire statutory scheme makes sense because registrants experience the cumulative effects of the whole statute, not just one provision or another. Likewise, in *Kardasz*, this Court did not artificially disaggregate SORA 2021’s many obligations to assess only whether a specific provision, standing in isolation, constitutes punishment. Rather, this Court looked at SORA holistically, finding that it:

approximates the traditional punishments of shaming and parole, burdens registrants with onerous requirements under the threat of imprisonment for noncompliance, and serves the penological goal of retribution. It is excessive in relation to its stated purpose because it imposes various duties based on unscientific groupings rather than individualized risk profiles, includes a publication requirement that may diminish its overall effectiveness in reducing recidivism, and remains operative beyond any plausible point of utility for thousands of registrants. [*Kardasz*, 2025 WL 3691966, at *14.]

¹⁰ See also *Smith v Doe*, 538 US 84, 92, 94, 96-97, 99, 104-105; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (analyzing registry statute as a whole by asking whether “the statutory scheme,” the “regulatory scheme,” or “the Act” imposed punishment, in toto).

The Court emphasized that, as with the 2011 law, “registration requirements are still linked solely to the crime of conviction rather than to an individualized risk assessment.” *Id.* at *11. “SORA continues to impose significant obligations on registrants by requiring the immediate disclosure of extensive personal information, annual (or more-frequent) in-person visits to law enforcement, and the payment of fees,” and ensures compliance through imprisonment. *Id.* at *9 (quoting *Lymon*, 515 Mich at 166-167). The Court explained that “the proliferation of internet usage . . . adds more weight to the shaming and restraints aspects of the punishment analysis” and emphasized that earlier decisions upholding registries had “reli[ed] on sex-offender-recidivism data, which has since been called into question.” *Id.* at *7. In short, this Court did not identify one or two offending provisions as punitive, but rather held that the statutory scheme as a whole—which puts people on the online registry for decades or life and imposes extensive burdens based solely on criminal convictions and on unfounded recidivism assumptions—is punishment.

In *Does III*, the federal district court applied *Betts* to SORA 2021 and found the statute was not severable:

SORA 2021 maintained the same provisions that *Betts* held could not be severed from the entirety of the statute being considered, i.e. SORA 2011. In reaching its conclusion that severability would make the statute “inoperable,” the court emphasized the three-tier system introduced in SORA 2011, which remains unchanged in SORA 2021:

The 2011 amendments completely restructured SORA through the imposition of a tiered classification system, and the duties and requirements of each registrant were based on that registrant’s tier classification. Removing the 2011 amendments from SORA would render unclear who was required to comply with the act . . . how long each registrant must comply ... how many times annually each registrant must report to law enforcement . . . and what a registrant must show to petition for removal from registration.

Betts, 968 NW2d at 516. This same reasoning applies equally to SORA 2021. [*Does III*, 773 F Supp 3d at 391.]

In sum, severance is not possible because unconstitutionality is embedded in the very structure of the statute. That unconstitutional structure is “not like a collection of bricks, some of which may be taken away without disturbing the [provisions as they existed before], but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole.” *Carter v Carter Coal Co*, 298 US 238, 315-316; 56 S Ct 855; 80 L Ed 1160 (1936).

II. As in *Betts*, Revival Is Not Possible.

This Court held that revival of some earlier version of SORA was not an option to address the ex post facto problem with SORA 2011, explaining that “[r]evival presents special challenges in the context of an ex post facto challenge to a statute with as complicated a legislative history as SORA.” *Betts*, 507 Mich at 572. Revival would raise “the same concerns of legislative infringement.” *Id.* And given “the sheer volume of past versions of SORA[,] [revival] poses significant administrative difficulties for the Michigan State Police in attempting to define and enforce multiple different registry schemes and for registrants in attempting to adhere to the requirements of an out-of-date registry scheme.” *Id.* at 573. See also *Does II*, 449 F Supp 3d at 733-735 (rejecting revival as a cure for SORA 2011’s ex post facto violations).

The problems with revival have only gotten worse, as SORA has been amended multiple times even since 2011. See 2013 PA 2; 2013 PA 149; 2014 PA 328; 2019 PA 82; 2020 PA 202; 2020 PA 295; 2022 PA 272; 2024 PA 66. The problem is compounded by the fact that old versions of the statute no longer exist in a form that can be located or consulted.¹¹ Without the text of a

¹¹ To piece together the version of SORA in effect at any given time, one can—if one has the relevant Public Act numbers and years of enactment—go to the Michigan Legislature’s website, <http://www.legislature.mi.gov/>, and pull up those Public Acts. But even that will not produce a copy of the law in effect. One cannot get the pre-2006 law by looking at the Public Acts adopted in 2006. Instead, one has to work backward. The immediately prior SORA revision, 2004 PA 238, contains the then-operative § 8, but not the rest of the statute. One can find §§ 4, 4a, 5a, 5b,

law to look at, no one—not registrants, law enforcement, prosecutors, defense lawyers, or judges—will know what people’s obligations are.

An example may help illustrate the problem. SORA today requires registrants to report based on their birth month, MCL 28.725a(3), but prior versions required many registrants to report in January, April, July, and October. See, e.g., 2004 PA 240, § 5a(4). Thus, a registrant born in February would, under current law, be required to report in February, May, August and November, but under the older “revived” versions of the statute would be required to report in January, April, July, and October. A registrant who guessed wrong about when to report—which seems inevitable when there is no copy of the law for the person to look at—could face felony charges and prison.

Revival would not only require identification of which of the many versions of SORA should apply to a given registrant, but also a decision on whether that version is constitutional. For example, here, if the 2010 version of SORA were “revived” for Mr. Smith’s 2010 offense, that would result in a 25-year registration term with the then-operative reporting requirements. But which version of SORA would apply to the 1995 offense? In order to apply the 2010 law to the 1995 offense, the Court would need to determine if that version of the statute imposes unconstitutional retroactive punishment. Multiply the complexity of the analysis in Mr. Smith’s case by 45,000 registrants, and one gets the result of a revival approach.

5c, and 9 in 2004 PA 237. For §§ 11, 13, and 14, one can go to 2004 PA 239. Sections 2, 4, 5, 5a, 8, 8c, 8d, and 10 are found in 2004 PA 240. For other sections, one must go even further back. Searching through these acts to determine which provisions were in effect at any given time is challenging, even for counsel who have spent years working on this statute. Neither registrants nor police officers will have any idea where to look.

III. The Court Should Give the State Options for Remediating the Ex Post Facto Violation.

A. For SORA to Be Regulatory Rather Than Punitive, Either Its Burdens Must Be Drastically Reduced or It Must Be Based on Individual Review.

Several things are clear: (a) this Court has found SORA 2021 to be punishment, *Kardasz*, 2025 WL 3691966; (b) SORA 2021 is being applied retroactively but retroactive punishment is unconstitutional, US Const, art I, § 10; Const 1963, art 1, § 10; (c) the ex post facto problem cannot be solved through severance, *Betts*, 507 Mich at 564; and (d) the Michigan Legislature would like to have a registry despite the evidence that “overinclusive registries may actually increase recidivism rates.” *Kardasz*, 2025 WL 3691966, at * 13.

The state can punish registrants prospectively, but it must address the ex post facto problem if it wants to apply SORA retroactively. There are two ways for Michigan to do so. First, the legislature could amend SORA to make it non-punitive. A math analogy illustrates the issue. Imagine SORA as tipping the scales from permissible regulation to impermissible punishment when it hits 100 points, with each harsh feature adding to the point total (e.g., 50 points for public shaming, 50 points for long registration terms, 40 points for no opportunities for removal, 30 points for in-person reporting, 20 points for reporting of extensive information, 30 points for serious criminal penalties, etc.).

To get back under 100 points, the legislature can choose which provisions or combination of provisions to eliminate. For example, it could create a non-public registry and leave in place in-person reporting. Or it could adopt registration terms that are consistent with the risk and recidivism science and limit reporting to phone or email notification of address changes. The point here is not that these particular combinations would necessarily be constitutional, but that there are many options for what to subtract in order to make SORA non-punitive.

The second path to constitutionality is for the state to convert the current punitive regime into a regulatory one by limiting its application to people who actually present a danger. Indeed, a key reason that this Court in *Kardasz* found SORA to be punishment is that “registration requirements are still linked solely to the crime of conviction rather than to an individualized risk assessment.” 2025 WL 3691966, at *11. The current conviction-based system does “not predict or match the actuarial risk of recidivism” and “does not sufficiently align with the legislative intent to protect the public and reduce future sex crimes.” *Id.* at *12. See also *Does I*, 834 F3d at 705 (highlighting fact, in finding SORA punitive, that “the statute makes no provision for individualized assessments of proclivities or dangerousness” and “categorizes [people] into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof”). One way to ensure SORA applies only to people who pose a present danger is to provide individual review.¹²

In *Kansas v Hendricks*, 521 US 346, 368-371; 117 S Ct 2072; 138 L Ed 2d 501 (1997), the U.S. Supreme Court held that civil commitment of certain people who committed sex offenses did not violate the Ex Post Facto Clause because commitment was based on *individualized* determinations of *current* dangerousness. The challenged statute was not punitive because it “unambiguously requires a finding of dangerousness,” not just a past conviction. *Id.* at 357. Civil commitment was deemed regulatory because it was imposed through a regularly reviewed, procedurally safeguarded finding that the individual was likely to reoffend, and because the state “permitted immediate release upon a showing that the individual is no longer dangerous.” *Id.* at 368-369. The regulatory, non-punitive nature of the scheme was demonstrated by the fact that

¹² Of course, such a system would need to be designed to ensure the accuracy of risk determinations. Further, the state would also need to comply with other constitutional limits on SORA.

the state had “taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards.” *Id.* at 364. While imposing such restraints based solely on past convictions would have violated the Ex Post Facto Clause, limiting the statute to people individually determined to be dangerous made the law non-punitive. As in *Hendricks*, here individual review can ensure that SORA serves a regulatory public protection goal, rather than being punitive. Imposing restrictions on people who in fact pose a danger is a legitimate form of civil regulation. Individual review helps address the ex post facto problem because registration is no longer the unreviewable, automatic result of conviction.

Thus, the Court should give the state more remedial options by holding that (1) SORA 2021’s retroactive application *is* an ex post facto violation if it automatically results from conviction, but (2) it might *not* be an ex post facto violation if premised on an individualized finding of current dangerousness. Such a holding neither mandates individual assessment nor infringes on legislative choices. Rather, it allows the state to either (1) amend SORA so that it is no longer punitive; or (2) keep the existing law but limit its retroactive application to those who are individually determined to currently present a significant risk. In other words, Michigan can either reduce “[t]he magnitude of the restraint” so that SORA only imposes “minor” consequences based on “categorical [conviction-based] judgments” that are “reasonable,” *Smith*, 538 US at 103-104, or Michigan can impose SORA 2021 based on individual proof of dangerousness. *Hendricks*, 521 US at 357. What Michigan *cannot* do—as this Court should make clear—is automatically impose a draconian regime of stigmatization and monitoring for decades/life with no individual review.

B. Rendering SORA Non-Punitive Through Individual Review Is Feasible.

The state may argue that individual review is too costly given the number of people affected. That argument fails for three reasons. First and most fundamentally, if the state wants

to impose SORA retroactively, it will need to spend the money to do so in a constitutionally compliant manner. Moreover, this Court would simply be giving the Legislature choices, not telling it that it must adopt individual review to solve the ex post facto problem. If the state does not want to pay for individual review (which may well be cheaper than maintaining the current bloated registry, which is estimated to cost \$10 to \$17 million annually¹³), it could revise SORA to be non-punitive (e.g., impose short terms of non-public registration with limited reporting requirements that could be handled online or by mail).

Second, the number of individuals to be assessed is entirely within the state's control. For example, the state could limit retroactive registration (and, therefore, individual review) to cases where a prosecutor requests registration. Or, given that SORA captures a huge range of offenses, ranging from grave crimes like first-degree criminal sexual conduct to lower-level offenses like sexual contact with an underage teen by an older teen partner, the state might decide that retroactive registration—and hence individual review—is only necessary for the more serious ones.¹⁴ Or, given that recidivism rates drop off dramatically over time,¹⁵ the state might decide that retroactive registration is not necessary for the tens of thousands of registrants who have been living successfully in the community for years. See *Does III* Data Rept, PageID #3969. Indeed, many are long past their original registration term (typically 25 years from the date of initial registration, 2004 PA 240, § 5). Because extending registration terms is so clearly

¹³ *Does III* SOMF, PageID #3839-3841.

¹⁴ Most registrants have not committed the most serious offenses. *Does III* Data Rept, PageID #3954 (only 16% of in-community registrants were convicted of CSC I).

¹⁵ The longer people live in the community without recidivating, the lower their risk. *Does III* SOMF, PageID #3749. Michigan data shows that registrants' recidivism rates were between 3-5% during the first five years in the community and dropped to 1.4% after 20 years. *Does III* Data Rept, PageID #3967.

impermissible retroactive punishment,¹⁶ the state might well conclude that it is simpler to remove registrants who have completed their original registration terms rather than do individual review.

Third, individual assessment is practicable, and in fact, many states consider risk in determining registration requirements.¹⁷ Moreover, as this Court noted, “The Michigan Department of Corrections has used [individualized risk assessments] for more than a decade to assess sex-offender-recidivism risk and determine programming and treatment needs for prisoners, probationers, and parolees.” *Kardasz*, 2025 WL 3691966, at *12. As a result, many registrants

¹⁶ The ex post facto doctrine is grounded in the understanding that law may not “inflict[] a greater punishment, than the law annexed to the crime, *when committed*.” *Collins v Youngblood*, 497 US 37, 42; 110 S Ct 2715; 111 L Ed 2d 30 (1990) (emphasis altered). See also *Weaver v Graham*, 450 US 24, 30; 101 S Ct 960; 67 L Ed 2d 17 (1981) (legislature may not increase punishment “beyond what was prescribed when the crime was consummated”). Numerous courts have found that extending registration terms violates that principle. See, e.g., *Does III*, 751 F Supp 3d at 784 (“retroactively . . . extending registration terms violates the Ex Post Facto Clause”); *Doe v Rausch*, 461 F Supp 3d 747, 767, 769 (ED Tenn, 2020) (“Defendants have not shown that the public is safer or that Plaintiff has been saved from recidivism by a lifetime of restrictions, as opposed to just ten years.”); *Gonzalez v State*, 980 NE2d 312, 317 (Ind, 2013) (extending registration to life is an “important additional restraint which leans in favor of treating the effects of the Act as punitive”); *Quispe del Pino v Maryland Dep’t of Pub Safety & Correctional Servs*, 222 Md App 44, 45; 112 A3d 522 (2015) (extending registration from 10 to 25 years is ex post facto violation); *Doe v Dep’t of Pub Safety & Correctional Servs*, 430 Md 535, 564; 62 A3d 123 (2013) (invalidating retroactive lifetime registration as “the equivalent of . . . probation for life”); *Doe v State*, 167 NH 382, 410; 111 A3d 1077 (2015) (lifetime registration “without regard to whether [registrants] pose a current risk to the public” is “wholly punitive”); *State v Letalien*, 985 A2d 4, 26; 2009 ME 130 (2009); *Starkey v Oklahoma Dep’t of Corrections*, 305 P3d 1004, 1030; 2013 OK 43 (2013). Similarly, courts have held that retroactively imposing longer probation/parole terms than permissible at the time of an offense is an ex post facto violation. See, e.g., *People v Williams*, 200 Cal App 3d Supp 1, 6; 246 Cal Rptr 464 (1988); *State v Mendivil*, 121 Ariz 600, 602; 592 P2d 1256 (1979).

¹⁷ To Plaintiffs’ knowledge, only 14 other states mandate lifetime registration based solely on conviction, absent individualized assessment or opportunity for removal. Even among those states, some have individualized review of aspects of registration. See Restoration of Rights Project, *50-State Comparison: Relief from Sex Offense Registration Obligations* (October 2022), <<https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>>.

have already been risk assessed, and the MDOC's budget already includes funding for further risk assessments.¹⁸ Assessments typically take 15-60 minutes to complete¹⁹ and are low cost.²⁰

In sum, the state has many options for remedying the ex post facto problem it has created by once again applying the latest iteration of SORA retroactively.

IV. The Court Should Clarify the Constitutional Limits on Retroactive Registration.

Because Michigan's registry has such devastating consequences and is vastly over-inclusive, there has been exhaustive litigation concerning SORA's retroactive reach. Yet after 15 years of lawsuits and repeated judicial rulings holding SORA violates the constitutional prohibition on ex post facto laws, little has changed. Indeed, the very same plaintiffs who won relief in *Does I* against SORA 2011 are still plaintiffs in *Does III*, now challenging SORA 2021, a law with the same core defects as the prior version.

Amicus fears that the legislature will respond to a ruling by this Court that SORA 2021's retroactive application is unconstitutional by again simply tweaking the statute and forcing registrants to start over litigating once more. In fact, that is exactly what happened when the *Does III* district court enjoined SORA 2021's retroactive application. The Legislature tried to rush through a bill (after the district court denied the stay and before the Sixth Circuit granted it)

¹⁸ *Does III* SOME, PageID #3770-3774.

¹⁹ *Does III* SOME, PageID #3770-3777; *Does III* Pls' Resp to Defs' SOME, ECF 131-1, PageID #8014-8015.

²⁰ The *Does III* district court—which thought the cost of individual review was high—was misled by speculative cost evidence for entirely different types of hearings; the admissibility of that evidence was challenged, but puzzlingly, the court never decided whether it was admissible. *Does III*, 751 F Supp 3d at 797; *Does v Whitmer*, No 25-1513/25-1414 (CA 6), Plaintiffs-Appellants' First Brief, ECF No. 67, Page 51-52.

that once again would automatically impose extensive burdens retroactively for decades or life without any individual review.²¹ 2025 SB 424.

Enough is enough. Registrants should not have to spend years establishing the unconstitutionality of the latest iteration of SORA, nor taxpayers pay millions in attorneys fees, only for the legislature to tweak the law without fixing the constitutional defects and the cycle to start all over again. This litigation whack-a-mole needs to end. For that to happen, the Legislature needs guidance in drafting a new law, which this Court can provide by clarifying the constitutional limits on retroactive registration.

Specifically, the Court should explain that SORA cannot retroactively:

- Impose stigmatizing public registration and onerous in-person reporting requirements automatically for decades or life based solely on a criminal conviction without individual review;
- Lengthen registration terms, either by extending a person's registration term or by changing how terms are calculated; and
- Deny *any* opportunity for removal, even for people who are rehabilitated, old, or infirm.

In short, the Court should remind Michigan that while it can have a registry, it must respect constitutional limits.

CONCLUSION

Amicus respectfully asks this Court to grant Mr. Smith's application for leave to appeal and (1) hold that retroactive application of SORA 2021 to Mr. Smith is an ex post facto punishment in violation of US Const, art I, § 10 or Const 1963, art 1, § 10, for both of his offenses; (2) hold that, as in *Betts*, neither severance nor revival can salvage the statute, and accordingly, SORA cannot be retroactively applied to Mr. Smith absent an individualized

²¹ Another pending bill would *increase* restrictions on registrants, making it a crime for them to work in many (ill-defined) areas of employment. 2025 HB 5425.

determination of present dangerousness or a major revision of the statute to render its retroactive application non-punitive; and (3) clarify the constitutional limits on retroactive registration. In the alternative, the Court should grant leave and order additional briefing as needed.

Respectfully submitted,

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