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Nos. 25-1413 / 25-1414

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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MARY DOE; JOHN DOE A; JOHN DOE B; JOHN DOE C; JOHN DOE  
D; JOHN DOE E; JOHN DOE G; JOHN DOE H; MARY ROE,

Plaintiffs-Appellants Cross-Appellees,

v.

GRETCHEN WHITMER, Governor of the State of Michigan; JAMES  
GRADY, II, Colonel,

Defendants-Appellees Cross-Appellants.

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Appeal from the United States District Court  
Eastern District of Michigan, Southern Division  
Honorable Mark A. Goldsmith

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**DEFENDANTS-APPELLEES' AND CROSS-APPELLANTS'  
RESPONSE TO MOTION TO REMAND BASED ON  
PLAINTIFFS' CLAIM OF MOOTNESS OF COUNTS I AND II**

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Dated: September 25, 2026

## INTRODUCTION

Plaintiffs ask this Court to remand Counts I and II of the State defendants’ cross-appeal based on grounds of possible mootness. This Court should deny the motion for two reasons.

To begin, the motion is premature. The Michigan Supreme Court issued its decision in *People v. Smith* on September 9, 2026. The Kent County Prosecutor has 90 days from that date to seek a petition for certiorari, i.e., until December 7, 2026. While there have been no public comments from the county on a possible petition, the Michigan Supreme Court’s decision may not be the last word on the subject.

Even if *Smith* were final, Counts I and II would not be moot. The district court ordered relief to the class members – requiring written notification – if they prevail on Counts I and II, relief not required by *Smith*. Plaintiffs’ motion underscores the point because it requests that this Court remand the matter to the district court so that it may “consider whether and how to address any implementation issues.” (Pls’ Motion to Remand, dated September 18, 2026, Doc. 92-1, p 3.) Only if Plaintiffs prevail here would such relief be warranted.

If this Court nonetheless concludes that Counts I and II are moot, the proper action would be to remand to vacate the lower court's decision insofar as it ruled on ex post facto grounds, *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and dismiss the two counts. But the State defendants ask this Court to deny the motion for the reasons here provided.

## ARGUMENT

**I. The pending appeal from the State defendants is not moot both (1) because the *Smith* decision is still subject to further appeal and (2) because Plaintiffs have sought relief that can only be provided if they prevail here.**

Because “mootness is a jurisdictional issue,” it is a threshold issue that this Court addresses to ensure that there is an Article III case or controversy. *Taylor v. Hooven*, 184 F.4th 485, 491 (6th Cir. 2026). A case becomes moot when the issues presented are no longer live or “the parties lack a legally cognizable interest in the outcome.” *Id.*

This Court has recognized that a claim is mooted where an intervening state court decision has provided the relief sought by the plaintiff. *See Davis v. Colerain Twp.*, 51 F.4th 164, 175 (6th Cir. 2022)

(“We have repeatedly held, for example, that federal challenges to a governor’s stay-at-home orders were mooted by the governor’s rescission of the orders when that rescission arose from a separate state supreme court opinion finding the orders invalid (rather than from the plaintiffs’ suits).”) That principle does not apply here for two independent reasons.

**A. *Smith* is not a final, non-appealable decision.**

This Court has found mootness based on a controlling state court decision where that decision was “final” and “non-appealable.” *See WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906, 910–12 (6th Cir. 1989) (“Upon reviewing the injunctive relief afforded by the federal district court, this circuit concluded that the ***final, non-appealable*** decision of a state appellate courts, which had conclusively adjudicated the factual dispute by applying state law, ‘rendered [the injunctive relief ordered by the federal district court] moot and ma[d]e it unnecessary ... to decide the difficult constitutional issues presented’ on appeal.” (emphasis added) (quoting *Detroit Fire Fighters Ass’n v. Dixon*, 572 F.2d 557, 559 (6th Cir. 1978)). *Smith* is neither final nor non-appealable.

It is not yet final even within the state court system. A party may move for reconsideration within 21 days after the Michigan Supreme Court files its opinion, MCL 7.311(G), which here is September 30, 2026 (the court's seven-sentence order<sup>1</sup> was entered on September 9, 2026). In resolving the ex post facto issue, the Michigan Supreme Court also expressly relied on the federal Constitution. *People v. Smith*, \_\_\_ N.W.2d \_\_\_; 2026 WL 2658449, at \*1 (Mich. Sept. 9, 2026) (“Requiring him to register under the 2021 SORA is therefore an ex post facto punishment, in violation of US Const, art I, § 10; Const 1963, art 1, § 10.”).<sup>2</sup>

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<sup>1</sup> Despite its brevity, the *Smith* decision is binding on the lower state courts and has precedential effect. *See, e.g., People v. Giovannini*, 722 N.W.2d 237, 240 (Mich. Ct. App. 2006) (“[Michigan State] Supreme Court orders that include a decision with an understandable rationale establish binding precedent.”)

<sup>2</sup> While the *Smith* order also references the Michigan constitution (Const 1963, art 1, § 10), the Michigan Supreme Court has not previously interpreted the Michigan Ex Post Facto Clause to be more expansive than the federal one. *See People v. Betts*, 968 N.W.2d 497, 504 (Mich. 2021) (“Defendant has not argued any basis in this case for finding greater protection under the state Constitution than under the federal Constitution for this constitutional claim.”) *See also People v. Earl*, 495 Mich 33, 37, n 1 (Mich. 2014) (“decisions of our Court of Appeals indicate that ‘Michigan's Ex Post Facto Clause is not interpreted more expansively than its federal counterpart,’ ” (quoting *In re Contempt of Henry*, 765 N.W.2d 44 (Mich. Ct. App. 2009).)

The Kent County Prosecutor may therefore petition for certiorari within 90 days after entry of judgment, i.e., until December 7, 2026. So, until the reconsideration and certiorari periods expire or any petition is denied, *Smith* remains subject to appeal and this Court should wait to see what happens.

**B. The amended judgment imposes obligations that *Smith* does not.**

As a separate point apart from the pendency of the *Smith* decision, even if it were non-appealable, Counts I and II would still not be moot. Before this Court granted a stay of the district court's April 22, 2026 amended judgment, the district court ordered State defendants to provide notice to all members of the pre-2011 class:

Within 60 days following the effective date of this Judgment, Defendants shall provide written notice to all members of the pre-2011 ex post facto subclass that informs them that they are no longer subject to SORA and have been removed from the registry.

(Amended Order, dated April 22, 2025, R. 177, Page ID #9379.)

In their motion for entry of judgment below, Plaintiffs argued that such required notification is “standard because all class members who will be bound are entitled to know what the Court decided and what/when relief will take effect, which here includes the primary class.”

(Pls’ Mot. to Enter J., R. 167, Page ID #9026) (citing *Gooch v. Life Investors*, 672 F.3d 402, 422 (6th Cir. 2012), for the proposition that “due process requires notice to class members who are bound”).)

Plaintiffs’ motion to remand confirms that they still seek relief of this kind. They ask that the district court “address any implementation issues” on remand, which they describe as “what procedures may be needed to ensure that both registrants and law enforcement understand that SORA may no longer be enforced against pre-2011 registrants.” (Pls’ Mot. to Remand, dated September 18, 2026, Doc. 92-1, pp 3–4.) *Smith* requires none of this.

Whether the State defendants remain bound by these obligations depends on this Court’s decision. The State defendants maintain that Michigan’s 2021 SORA does not violate the U.S. Constitution’s Ex Post Facto Clause. And it is blackletter law that this Court is not bound by a state court’s interpretation of the federal Constitution. *Cf. Planned Parenthood v. DeWine*, 696 F.3d 490, 503 (6th Cir. 2012) (state’s highest court is the “final arbiter” of *state* law). Thus, only if *this Court* affirmed the district court on Counts I and II would the relief sought by Plaintiffs of written notification to all pre-2011 class members apply.

**II. If Counts I and II are moot, this Court should vacate the judgment as to those counts and remand with instructions to dismiss.**

If this Court somehow were persuaded that a remand to dismiss on mootness grounds was necessary for Counts I and II, the proper resolution is to remand to dismiss the claims, not remanding with instructions to grant further relief. If this Court ruled that the intervening decision mooted the matter, then the issue would be governed by *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Where this Court has ruled that the appeal has been mooted by a state court decision, it has remanded with instruction to the district court to vacate the lower court opinion and dismiss the case. Here is the concluding analysis from *WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906, 911 (6th Cir. 1989), in which this Court remanded a matter to the district court, directing it to dismiss the case on mootness grounds based on an intervening-state-court ruling:

In the instant case, WJW News had alleged three counts in its complaint, two of which were anchored in state and municipal law. As in *Detroit Fire Fighters Ass'n* [572 F.2d at 559], the resolution of identical controversies by the Ohio Supreme Court pursuant to state and municipal law has avoided the necessity for an appellant review by this court to decide the federal constitutional question.

\* \* \*

Finally, established precedent indicates that the appropriate remedy “[u]nder circumstances where a controversy has become moot before final appellate adjudication” is to remand the decision of the lower court with “instructions to vacate the judgment below and dismiss the complaint.” *Constangy, Brooks & Smith*, 851 F.2d at 842; *see also Deakins*, 484 U.S. at —, 108 S.Ct. at 528–29; *Hall v. Beals*, 396 U.S. 45, 50, 90 S.Ct. 200, 202, 24 L.Ed.2d 214 (1969); *compare Detroit Fire Fighters Ass’n, Local 344*, 572 F.2d at 560. “That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance ... [and] is commonly utilized ... to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.” *Constangy, Brooks & Smith*, 851 F.2d at 842 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41, 71 S.Ct. 104, 107, 95 L.Ed. 36 (1950)). Accordingly, ***the judgment of the United States District Court for the Northern District of Ohio is VACATED and REMANDED with instructions to dismiss the complaint.***

*Id.* (emphasis added). If this Court disagrees with the State defendants above, this would be the proper resolution here, too.

## CONCLUSION AND RELIEF REQUESTED

This Court should deny the motion to remand or hold it in abeyance until the time for reconsideration and certiorari review of *Smith* has expired. Alternatively, if the Court concludes that Counts I and II are moot, it should remand as to those counts with instructions to dismiss them.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

### **Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements**

1. This response to Plaintiffs' motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this answer contains no more than 5200 words. This document contains 1,763 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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## CERTIFICATE OF SERVICE

I certify that on September 25, 2026, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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