

No. 25-1413 / 25-1414

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MARY DOE; JOHN DOE A; JOHN DOE B; JOHN DOE C; JOHN DOE D;
JOHN DOE E; JOHN DOE G; JOHN DOE H; and MARY ROE,
Plaintiffs - Appellants Cross-Appellees

v.

GRETCHEN WHITMER, Governor of the State of Michigan;
JAMES GRADY, II, Colonel,
Defendants - Appellees Cross-Appellants

On Appeal from the United States District Court
for the Eastern District of Michigan,
Case No. 2:22-cv-10209 (The Honorable Mark A. Goldsmith)

**PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF MOTION TO
REMAND COUNTS I AND II FOR POTENTIAL DISMISSAL BASED ON
MOOTNESS**

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
INTRODUCTION	1
I. A Remand Is Necessary for the District Court to Resolve Factual Questions.	1
II. This Court Should Not Issue an Advisory Opinion.	4
III. Defendants’ Notice Argument Fails.	7
CONCLUSION	9
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE	12

INDEX OF AUTHORITIES

Cases

<i>Ashwander v. Tenn. Valley Auth.</i> , 297 U.S. 288 (1936).....	4
<i>Barnett v. Memphis City Schs.</i> , 50 F. App’x 219 (6th Cir. 2002)	3
<i>Bos. Firefighters Union, Loc. 718 v. Bos. Chapter NAACP</i> , 461 U.S. 477 (1983).....	3
<i>Bunnell Hill Dev. Co. v. Bay Cnty. Rd. Comm’n</i> , 123 F. App’x 684 (6th Cir. 2005)	3
<i>Burton v. United States</i> , 196 U.S. 283 (1905)	4
<i>Byrd v Tennessee Wine & Spirits Retailers Ass’n</i> , 883 F.3d 608 (6th Cir. 2018).....	5
<i>Calderon v. Moore</i> , 518 U.S. 149 (1996)	6
<i>Christopher v. Harbury</i> , 536 U.S. 403 (2002).....	4
<i>Church of Scientology of Cal. v. United States</i> , 506 U.S. 9 (1992).....	7
<i>FemHealth USA, Inc. v. Williams</i> , 83 F.4th 551 (6th Cir. 2023).....	3
<i>Hadix v. Caruso</i> , 248 F. App’x 678 (6th Cir. 2007).....	3
<i>Lyng v. Nw. Indian Cemetery Protective Ass’n</i> , 485 U.S. 439 (1988)	4
<i>Maryville Baptist Church, Inc. v. Beshear</i> , 977 F.3d 561 (6th Cir. 2020)	2
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	5
<i>People v. Betts</i> , 968 N.W.2d 497 (Mich. 2021).....	5
<i>People v. Jennings</i> , No. 165764, 2026 WL 2140256 (Mich. July 24, 2026)	6
<i>People v. Kardasz</i> , No. 165008, 2025 WL 3691966 (Mich. Dec. 19, 2025)	5
<i>People v. Smith</i> , Nos. 168200 & (69), 2026 WL 2658449 (Mich. Sept. 9, 2026) 1, 5	
<i>People v. Tanner</i> , 853 N.W.2d 653 (2014).....	6
<i>Ramsek v. Beshear</i> , 989 F.3d 494 (6th Cir. 2021).....	7

Constitutional Provisions

Mich. Const. 1963, art. 1, § 16.....	5
--------------------------------------	---

Rules

Fed. R. Civ. P. 23	8
Mich. Ct. R. 7.311	5

Other Authorities

13B <i>Wright & Miller's Federal Practice & Procedure</i> § 3533.2.2 (3d ed. Apr. 2026 update).....	6
---	---

INTRODUCTION

Since this appeal was filed, the facts on the ground have completely changed. Defendants have recognized that under the Michigan Supreme Court’s decision in *People v. Smith*, --- N.W.3d ---, Nos. 168200 & (69), 2026 WL 2658449 (Mich. Sept. 9, 2026), registrants with pre-2011 offenses “have no further duty to register, report, or verify as a sex offender in Michigan.” Michigan State Police (MSP) Legal Update No. 172, at 1 (Exhibit A). The MSP has announced that every registrant who committed their “registerable offense . . . before July 1, 2011, will be *permanently removed* from Michigan’s Sex Offender Registry.” *Id.* (emphasis added). As of September 11, 2026, Defendants had removed more than 20,000 people. *See* MSP Official Statement, Doc. 92-2. According to the MSP, registrants’ information is not merely being deleted from the public registry website, but will also “be *permanently removed* and inaccessible to officers and registering authorities in the SOR law enforcement database.” Exhibit A at 1 (emphasis added).

Defendants ask this Court to pretend nothing has changed, to make decisions in the absence of relevant facts, and to decide difficult constitutional questions that there is now no reason to reach. It should not do so.

I. A Remand Is Necessary for the District Court to Resolve Factual Questions.

Every indication from the MSP’s public statements is that they are removing or have already removed all registrants with offenses before July 1, 2011—a group

that is coextensive with the pre-2011 ex post facto subclass here. *See* Stipulated Order Granting Class Certification, R. 35, PageID #1117. Nothing in Defendants’ response suggests otherwise.

Nevertheless, neither Class Counsel nor this Court currently has the facts necessary to justify dismissing Counts I and II as moot outright, as Defendants suggest. *See* Response, Doc. 94, at 7–8. For example, Class Counsel do not know how many people have been removed or even whether the named Plaintiffs (who are no longer on the public registry) are still listed in the law enforcement database that is used to monitor registrants’ compliance with SORA.¹ Only Defendants have that information. While Plaintiffs believe it is highly likely that the named Plaintiffs and pre-2011 ex post facto subclass have been removed from both the public registry and the law enforcement database, Class Counsel cannot—consistent with their Rule 23(g)(4) duties to the class—consent to dismissal or vacatur on those claims without first confirming such basic information.

Factual questions such as these that affect whether or how an appeal should proceed are most appropriately resolved by the district court in the first instance. As this Court explained in *Maryville Baptist Church, Inc. v. Beshear*, “discretion is the

¹ For the reasons stated in Plaintiffs’ July 1, 2026, notice, the removal of the named Plaintiffs from Michigan’s registry would not affect the other claims on appeal, which remain live. *See* Doc. 84. The named Plaintiffs wish to continue serving as class representatives, and they remain suitable for that role. *See id.*

better part of judgment when it comes to a potentially premature (and unnecessary) ruling about a moving target.” 977 F.3d 561, 566 (6th Cir. 2020); *id.* at 565–66 (declining to decide constitutional questions where state’s position was evolving in response to other litigation and where different features of mootness doctrine “appear to run in different directions,” and instead remanding for “resolution of the mootness question in the first instance”); *see also Bos. Firefighters Union, Loc. 718 v. Bos. Chapter NAACP*, 461 U.S. 477, 479 (1983) (remanding for consideration of mootness in light of changed circumstances); *FemHealth USA, Inc. v. Williams*, 83 F.4th 551, 557–58 (6th Cir. 2023) (“Given that the dispute now before us arose after appellate briefing was completed and implicates unsettled facts and law that were not addressed by the district court below, we conclude that a remand to the district court is appropriate.”); *Hadix v. Caruso*, 248 F. App’x 678, 682 (6th Cir. 2007) (per curiam) (remanding to the district court where, as a result of intervening events, “rulings by us on the constitutional and other questions . . . could become unnecessary or, at a minimum, could concern a dispute of a different magnitude”); *Barnett v. Memphis City Schs.*, 50 F. App’x 219, 220 (6th Cir. 2002) (remanding with instructions to “consider whatever additional evidence is necessary to determine [if case is moot]”); *Bunnell Hill Dev. Co. v. Bay Cnty. Rd. Comm’n*, 123 F. App’x 684, 685 (6th Cir. 2005) (remanding with instructions to determine effect of new rule and proceed accordingly).

Here, if the district court confirms, after necessary fact-finding, that Counts I and II are moot, it can dismiss those claims and amend its judgment accordingly.

II. This Court Should Not Issue an Advisory Opinion.

Defendants urge this Court to issue a merits decision because the window to petition for certiorari in *Smith* has not expired. This Court, however, is “oblig[ed] . . . to avoid deciding constitutional issues needlessly.” *Christopher v. Harbury*, 536 U.S. 403, 417 (2002). Deciding “the constitutionality of legislation . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy.” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (citation modified); *see also Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”); *Burton v. United States*, 196 U.S. 283, 295 (1905) (“It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”).

Here, Defendants’ argument that this Court should decide the constitutional questions hinges on a highly speculative chain of events.² First, even though

² Defendants claim that the order in *Smith* “is not yet final even within the state court system.” Response, Doc. 94, at 4. But the deadline for Defendants to file a motion for reconsideration in *Smith* has now passed and none was filed. *See People v. Smith*, Mich. Sup. Ct., <https://www.courts.michigan.gov/c/courts/coa/case/366923> (last

Michigan has complied with *Smith* by removing registrants, the prosecutor—who has not publicly stated any intent to seek certiorari, *see* Response, Doc. 94, at 1—would need to do so. Second, the U.S. Supreme Court would need to grant certiorari, even though one of the holdings in *Smith* rests entirely on the *state* Constitution, and the order cites only *state* decisions.³ *See Smith*, 2026 WL 2658449, at *1; *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Third, the Supreme Court would need to reverse *Smith*’s federal holding. And finally, because the Supreme Court has no jurisdiction over state constitutional holdings, Defendants’ theory assumes that the Michigan Supreme Court would overhaul its interpretation of the Michigan Constitution on remand—even though Michigan’s high court rejects any “presumption that a United States Supreme Court interpretation of a federal consti-

visited Oct. 2, 2026) (docket); Mich. Ct. R. 7.311(G) (imposing 21-day deadline on motions for reconsideration).

³ *Smith* rested on two prior Michigan Supreme Court cases to hold that SORA 2021 is punishment and thus violates the prohibition on ex post facto laws. It relied on *People v. Kardasz*, --- N.W.3d ---, No. 165008, 2025 WL 3691966 (Mich. Dec. 19, 2025)—which held, *solely* on state constitutional grounds, *id.* at *2—that SORA 2021 is punishment under the Michigan Constitution’s prohibition on cruel or unusual punishment. Mich. Const. 1963, art. 1, § 16; *Kardasz*, 2025 WL 3691966, at *2. *Smith* also rested on *People v. Betts*, 968 N.W.2d 497, 515–21 (Mich. 2021), which held that neither severance nor revival was an available remedy where a prior version of SORA had imposed impermissible retroactive punishment. Severability and revival are of course questions of state law. *See Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 626 (6th Cir. 2018). The order in *Smith* contains just one solitary citation to the federal Ex Post Facto Clause, which by no means suggests that the state-law holding “fairly appears to rest primarily on federal law.” *Long*, 463 U.S. at 1040.

tutional provision constitutes the proper interpretation of a similar or identical state constitutional provision.” *People v. Jennings*, --- N.W.3d ---, No. 165764, 2026 WL 2140256, at *17 (Mich. July 24, 2026) (quoting *People v. Tanner*, 853 N.W.2d 653, 222 n.16 (2014)).

Except in the highly unlikely event that all the above events come to pass, anything this Court might say on Counts I and II would be academic.

Moreover, regardless of whether an appeal is taken in *Smith*, a court should not “give opinions . . . when, by virtue of an intervening event, [it] cannot grant any effective relief whatever in favor of the appellant.” *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (citation modified). Compliance with a court order can moot an appeal if the “court[] [is] unable or unwilling to undo the effects of compliance and a decision is not likely to affect future events.” 13B *Wright & Miller’s Federal Practice & Procedure* § 3533.2.2 (3d ed. Apr. 2026 update).

Here, the fact that Defendants have removed tens of thousands of people from the registry raises serious questions about whether a decision from this Court on Counts I and II could have any real-world effect. According to Defendants’ public statements, their measures to comply with *Smith* are “permanent.” Exhibit A at 1. Neither of Defendants’ public statements suggests that they would ever attempt to re-register the tens of thousands of class members removed under *Smith*, regardless of this case’s outcome. *See id.*; MSP Official Statement, Doc. 92-2; *cf. Ramsek v.*

Beshear, 989 F.3d 494, 500 (6th Cir. 2021) (where the state had rescinded challenged order and there was “no reasonable possibility” that it would be reinstated, appeal of preliminary injunction enjoining that order was moot). Whether it is even possible to undo that relief would be a factual question for the district court. This Court cannot “grant [Defendants] any effectual relief” if the mass removals are indeed permanent. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citation modified). These facts all counsel against deciding Counts I and II.

III. Defendants’ Notice Argument Fails.

Defendants contend that, in any event, they have a stake in Counts I and II because the *Does III* amended judgment requires notice, whereas *Smith* does not. That argument fails for three reasons.

First, the complained-of notice provision would only be triggered if court-ordered relief for Counts I and II takes effect. *See* R. 177, PageID #9379 (Section B(5)); Doc. Nos. 28-1, 36. If the district court dismisses Counts I and II as moot, the notice provision associated with those claims would not survive.⁴

Second, the notice issue is not even before this Court. Defendants appealed

⁴ The district court not only explicitly tied the notice requirement to relief going into effect, *see* Am. Judg., R. 177, PageID #9379, but also anticipated that the judgment might well be modified before relief goes into effect. *Id.*, PageID #9391 (providing for amendment of the judgment). Here, none of the relief on Counts I and II—including notice—will ever go into effect if the district court dismisses those claims and amends the judgment on remand.

only the merits of the district court’s rulings on Counts I and II, not its decision to require notice. *See* Defs.’ Civil Appeal Statement, Doc. 5. There is no freestanding appeal of the notice requirement that could keep the dispute on Counts I and II alive if the claims are otherwise moot.

Third, regardless of what happens with this appeal—whether this Court remands, affirms, or reverses on Counts I and II—the district court will need to consider whether class notice is necessary under Rule 23. Rule 23(d)(1)(B) authorizes the court to require notice of “any step in the action” or “the proposed extent of the judgment” where necessary “to protect class members and fairly conduct the action.”⁵ Here, the prior court-ordered notice informed pre-2011 registrants that they must continue to register while the case is on appeal. *See* Registrant Notice, R. 208-1, PageID #9706. No matter the outcome here, the district court might well conclude that class members should know both what has happened in the case and that pre-2011 registrants are no longer required to register under *Smith*.⁶

⁵ Rule 23(e)(1)—which requires the court to consider the appropriateness of notice where the claims of a certified class are voluntarily dismissed—could also be at issue if this Court remands and Plaintiffs, upon being satisfied that Counts I and II are indeed moot, seek to dismiss those Counts.

⁶ Defendants’ own Operating Procedures also require notice to registrants when they are removed. *See* R. 127-8, SOR Op. Proc. 313, PageID #6526; R. 127-6, SOR Op. Proc. 308, PageID #6518, #6520.

Whether notice would be appropriate under Rule 23 is a question for the district court to decide in the first instance. While any such order could be appealed, Defendants cannot justify continuation of the *current* appeal on Counts I and II based on an order that does not yet exist.

CONCLUSION

Given the sea change in circumstances, Plaintiffs respectfully request that this Court remand Counts I and II to the district court to determine, after any necessary factfinding, whether the claims are moot, and to take any further action as appropriate.

Respectfully submitted,

s/ Miriam Aukerman (P63165)
s/ Marty Berger (PA 335300)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy SE, Suite 260
Grand Rapids, MI 49506
(616) 301-0930
maukerman@aclumich.org
mberger@aclumich.org

s/ Bonsitu Kitaba-Gaviglio (P78822)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824
bkitaba@aclumich.org

s/ Allison Frankel (NY 5621834)
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
afrankel@aclu.org

s/ Paul D. Reingold (P27594)
Cooperating Counsel,
American Civil Liberties Union
Fund of Michigan
Univ. of Michigan Law School
802 Legal Research Building
801 Monroe Street
Ann Arbor, MI 48109-1215
(734) 355-0319
pdr@umich.edu

Attorneys for Plaintiffs-Appellants/Cross-Appellees

Dated: October 2, 2026

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because the word counting feature of counsel's word processing programs shows that this brief contains 2,230 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(A)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

CERTIFICATE OF SERVICE

This document will be served on October 2, 2026, on all counsel of record via the Court's ECF system.

s/ Miriam J. Aukerman
Miriam J. Aukerman (P63165)
Attorneys for Plaintiffs
Appellants/Cross-Appellees