STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

PAUL J. BETTS, JR.,

Defendant-Appellant.

Supreme Court No. 148981
Court of Appeals No. 319642
Muskegon Cir. Ct. No. 12-062665-FH

FRIEND OF THE COURT BRIEF
IN SUPPORT OF DEFENDANT-APPELLANT

On behalf of

- **SAFE & JUST MICHIGAN;**
- **MICHIGAN CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS;**
- **MICHIGAN YOUTH JUSTICE CENTER;**
- **NORTHWEST INITIATIVE (ADVOCACY, RE-ENTRY, RESOURCES, OUTREACH PROGRAM);**
- **PROFESSIONAL ADVISORY BOARD TO THE COALITION FOR A USEFUL REGISTRY; AND**
- **MICHIGAN COLLABORATIVE TO END MASS INCARCERATION**

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IDENTITY AND INTERESTS OF THE AMICI CURIAE[1]

Safe & Just Michigan (S&JM) (formerly the Citizens Alliance on Prisons and Public Spending) is a nonprofit, nonpartisan policy and advocacy organization that works to reduce the social and economic costs of mass incarceration. Because policy choices, not crime rates, determine corrections spending, S&JM seeks to re-examine those policies and to shift resources to services proven to prevent crime, reduce recidivism, support victims, and improve the quality of life for all Michigan residents. S&JM advocates for evidence-based strategies for reducing Michigan's prisoner population and for using resources cost-effectively at all levels of the criminal justice system.

The **Michigan Chapter of the National Association of Social Workers** (NASW-MI) is an affiliate of the national NASW office, with over 6,000 members who live and work in the State of Michigan. NASW-MI advocates for professional social work practices and practitioners. The chapter teams with allied organizations to promote causes and services that improve society, and to help shape legislation that affects the health, welfare, and education of Michigan residents. Its members serve as experts in many areas of social work, including ones that may be affected by this case. NASW-MI believes the safety of survivors of sexual assault is paramount. The social work profession and NASW have a strong commitment to social justice. NASW-MI supports evidence-based practices and the efficient use of resources that will promote both the safety of vulnerable people and the successful reentry of sex offenders. NASW-MI is persuaded that the current SORA lacks

[1] No party or party's counsel authored this brief or contributed money for its submission.

empirical support for making the public safer or for reducing sex offender recidivism.

The **Michigan Center for Youth Justice (MCYJ)** (formerly the Michigan Council on Crime and Delinquency) is a non-profit working to advance policies and practices in Michigan that create a fair and effective justice system for Michigan's children, youth, and young adults. MCYJ believes that true justice for youth maximizes opportunities for young people to learn, grow, and thrive rather than defining them by their mistakes. Founded in 1956, MCJY focuses on improving outcomes in the state's youth justice system, while recognizing that such a system must be part of a more comprehensive and robust framework of support. Many young adults who have a sex offense conviction are just transitioning into adulthood. Despite their low risk to reoffend, they start adulthood with all the barriers to housing, education, and employment that come with sex offender registration. MCYJ is committed to managing people convicted of sex offenses according to policies that reflect current academic research, not politics.

The **NorthWest Initiative** (NWI) is a non-profit organization working to strengthen and sustain healthy communities in certain Lansing neighborhoods. Its Advocacy, Reentry, Resources, Outreach (ARRO) program assists probationers and parolees, as well as former offenders who are no longer under supervision. ARRO provides direct assistance to people living in Ingham, Eaton, and Clinton counties, including efforts to find housing and employment for people convicted of sex offenses. ARRO provides a supportive atmosphere for prisoners, ex-offenders, their families, and local residents to address issues of common concern. NWI-ARRO works to improve safety through activities that encourage ex-offenders to participate in the community as full-fledged citizens providing for them-

selves and their families. ARRO places equal importance on the welfare of all individuals, including both ex-offenders and victims.

The **Professional Advisory Board to the Coalition for a Useful Registry** (PAB) is an organization that promotes public safety and constructive changes to sex offender laws in Michigan, to reduce the over-inclusion of juvenile and low-risk offenders. PAB strives to make the Michigan sex offender registry more meaningful and useful to everyone, while promoting the ability of low-risk offenders to achieve their potential as constructive members of society. PAB is a multidisciplinary group of professionals that includes prosecutors, defense attorneys, judges, probation officers, and professionals involved in the treatment of victims and offenders. The PAB also undertakes research and advocacy. *See* List of Professional Advisory Board Members, attached as Exhibit 1.

The **Michigan Collaborative to End Mass Incarceration** (MI-CEMI) is a broad-based, statewide, non-partisan collaboration united to end mass incarceration in Michigan. Its objectives are to achieve a major reduction in the number of persons entering jail and prison, reduce the length of stay when people are imprisoned, ensure conditions of confinement that are conducive to genuine rehabilitation and training, and increase the number of persons who are safely released from jails and prisons. MI-CEMI believes the sex offender registry complicates successful reentry for registrants. If there has to be a registry, it should only include individuals for whom there is evidence of a high risk of reoffending. MI-CEMI does not believe there is any evidence that geographical restrictions reduce recidivism. In fact, in most cases, these restrictions make reentry more challenging. A list of organizations that are members of MI-CEMI is attached as Exhibit 2.

Introduction

This Court has assigned itself a tough task: to decide the constitutionality of a complex state statute in a criminal appeal, with little or no factual record. What distinguishes *People v Betts* from *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016) (*Does I*), is that *Does I* was a civil action brought under 42 USC § 1983. The parties spent upwards of two years in discovery, taking some two dozen depositions and gathering thousands of pages of documents. The parties distilled the evidence into a 269-page joint statement of facts, which was supported by seven expert reports (included as part of 128 exhibits). *Does I*, ED Mich No 2:12-cv-11194, Joint Statement of Facts, ECF 90; Index of Exhibits, ECF 90-1.

In the end, it was the facts as much as the law that persuaded the federal district court (Judge Robert Cleland) to rule in the plaintiffs' favor on several of their non-ex post facto constitutional claims, and it was the facts as much as the law that persuaded the Sixth Circuit panel, in a decision by Judge Alice Batchelder, to rule in the plaintiffs' favor on their ex post facto claim.[2]

The district court concluded that Michigan's second-generation SORA had become so complex that registrants could not be expected to obey it and law enforcement could not be expected to enforce it uniformly.[3] Judge Cleland grafted a "knowledge" requirement

[2] *See Does #1-5 v Snyder*, 101 F Supp 3d 672 (ED Mich 2015) and 834 F3d 696 (CA 6 2016).

[3] For example, an important exhibit in the case was a phone survey of local police, prosecutors, and the Michigan State Police, conducted by volunteers. The callers asked simple questions (culled from registrants' experience) like, "At work there is a fleet of trucks that I am sometimes assigned to drive. Must I report those vehicles when I register?" Or, "If I am shoveling snow for money and the walkway to a house turns out to be within 1,000 feet of a school, am I violating SORA?" The answers were all over the map and conflicted; a common response was that the caller should call one of the other agencies for the answer. *See Does I*, *supra*, ECF 91-8 & 91-9, Declarations of Timothy Poxson & Joseph Granzotto (reporting survey results).

onto the statute to ensure that registrants would not be prosecuted for mistakes, confusion, or other unintentional failures to comply with the law.[4] The district court also held parts of the statute to be unconstitutionally vague under the Due Process Clause, and held other parts of SORA to be violations of the plaintiffs' First Amendment rights.[5]

The Sixth Circuit held that Michigan's second-generation SORA was so onerous, and inflicted so much harm on registrants, that it rose to the level of punishment in violation of the Ex Post Facto Clause. Although that alone was sufficient for the plaintiffs to prevail, the court included in its calculation – again as a *factual* matter – the social scientific evidence that Michigan's conviction-based public on-line registry does little or nothing to make people safer (and may actually make communities less safe).[6] The court said that the state does not have a "blank check" when it comes to imposing *punishment* on 44,000 people for little or no discernable public benefit.[7]

The Prosecutor's Argument

The prosecutor's brief in *Betts* takes a different tack from what the state took in *Does I*. At bottom the prosecutor argues that the Michigan legislature *can* write a blank check because the harm it seeks to protect us from is not reoffending or increased sexual assaults, but rather the *potential* for such harms. Pros Brief, at 17-18. This argument is stunning in its implications, and should be labeled for what it is: the *Korematsu* defense.

[4] *Does I*, 101 F Supp 3d at 693-94.
[5] *Id.* at 686-90 and 704.
[6] *Does I*, 834 F3d at 704-06.
[7] *Id.* at 705.

In *Korematsu v United States*, 323 US 214 (1944),[8] the Court upheld the justification for the summary forced relocation and internment of West Coast Japanese Americans. Today *Korematsu* is universally viewed as an odious artifact of popular bigotry. It was explicitly repudiated by Chief Justice Roberts in *Trump v. Hawaii*, 138 S Ct 2392, 2423, 201 L Ed 2d 775 (2018).

In *Korematsu*, the Court couched the decision as if it were an extraordinary remedy for extraordinary times. But today we all understand that what motivated the actions against Japanese Americans was not any real "potential threat" to national security, but rampant fear and hostility against an easy-to-hate minority (especially on the heels of the Pearl Harbor attack). We can say with assurance that the internment of Japanese Americans was rooted in popular bigotry because in the 1940s there was a "control group" that made that point clear. East Coast German Americans were *not* detained and interned *en masse* even though the risk of attack or invasion by Germany was likely higher than the risk from Japan.[9] But we didn't intern German Americans *em masse*, no doubt because they looked like most of the rest of the American wartime population, and were better assimilated.[10] In

[8] 65 S Ct 193, 89 L Ed 194 (1944).

[9] Emden (Germany's western-most port) to Boston is about 3,400 nautical miles, while Tokyo to San Francisco is about 4,500 nautical miles; German U-boats were sighted and sank U.S. ships off the Atlantic coast throughout the war.

[10] We moved to inland detention centers about 120,000 West Coast Japanese Americans, treating all of them as if they presented the same grave "potential threat" to our national security. But we interned only about 11,000 German Americans (out of a much larger pool). As Justice Frank Murphy (of Michigan) said, dissenting in *Korematsu*, "No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry." *Korematsu*, 323 US at 241.

a word, the German Americans were much harder to "demonize" than the Japanese Americans.

In *Trump v Hawaii, supra*, the state challenged the President's "anti-Muslim" travel ban. By the time the case got to the U.S. Supreme Court, the original broad ban had been amended several times; the final ban was narrower, and permitted many more exceptions, than the earlier categorical bans. The Court upheld the ban by the expected 5-4 vote. Justice Sotomayor, writing for herself and Justice Ginsberg, looked closely at the factual record. They noted that despite the legion of possible exceptions – which could in theory greatly reduce the adverse effects of the ban – in fact few if any exceptions had been granted. In their view, the changes were not to dilute the harm, but only to provide window-dressing:

> By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

Trump v Hawaii, 138 S Ct at 2448 (dissenting from the Court's decision to uphold the watered-down travel ban on national security grounds).

In citing *Korematsu*, Sotomayor and Ginsberg stressed that when government action targets a feared and easily demonized group, it is incumbent upon the courts to remember the errors of the past, and to ensure that they are not repeated. They thought that if the original purpose of the anti-Muslim ban was to treat *all* Muslims as if they presented an equally dire threat to our national security, and if – based on the record in the case – despite the window-dressing nearly all Muslims were still being prevented from traveling to the U.S., then *Korematsu* was an apt analogy. *Id.* at 2440-45, 2447.

You might think that the comparison between interned Japanese Americans in 1942 and registered sex offenders today is a stretch, but the prosecutor's legal argument is the same, making the comparison fitting. In each case a vilified group, based not on facts but rather on fear, myth, and prejudice (stoked for political gain) is targeted with punishing treatment. In *Korematsu* the punishment was allowed to go unchecked by the executive and the legislative branches, and ultimately by the courts as well.[11] *Trump v Hawaii* is a reminder of the danger; *Does I* is a beacon in the darkness.

ARGUMENT

I. MOST SEX OFFENDERS DO NOT POSE A "POTENTIAL HARM" TO PUBLIC SAFETY

In 1942, at least one could argue that the degree of risk posed by the vilified group was unknown, so that drastic measures might have been justified. But the opposite is true of sex offenders today. Sex offenders have been studied by social science researchers for decades, so that unlike Japanese Americans during WWII, we know a lot about the "potential harm" (or risk) that such offenders pose to public safety.

A. Re-Offense Rates for Those Convicted of Sex Offenses Are Very Low.

High recidivism rates for sex offenders are often cited in support of stringent restrictions. The belief that sexual offending is compulsive and incurable is so strongly ingrained that research findings to the contrary are often rejected out of hand. As Table 1 shows,

[11] Of course a key distinction is that people on the registry committed sexual offenses, including some very serious felonies. But by the time the registry is actually being applied to them, they have completed their sentences and been paroled, and most will discharge off their sentences within a year or two. If the registry is punishment for their crimes, it cannot be applied retroactively, so the *only* thing that matters for any civil purpose of the registry is the actual risk people pose to the public going forward – which is exactly what was at stake in *Korematsu*.

however, the body of research demonstrating that sex offender recidivism rates are low has been remarkably consistent over time.[12] Most of these studies concentrate on the first 3-5 years after release from prison, when reoffense rates are at their highest. *See Does v Snyder, supra,* Joint Statement of Facts, ¶¶ 341-48, ECF 90, PgID# 3799-3801. Many studies have also noted that reoffense rates for sex offenders are the lowest of any offense group.[13]

[Table 1 appears below so that it can be viewed on one page.]

[12] The sources for the table, in the order in which the jurisdictions are listed, are: Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994,* U.S. Department of Justice (DOJ), Bureau of Justice Statistics (Washington, D.C., 2003); California Sex Offender Management Board, *Recidivism of Paroled Sex Offenders – A Ten(10)Year Study* (2008); California Sex Offender Management Board, *Recidivism of Paroled Sex Offenders – A Five (5) Year Study* (2008); State of Connecticut, Office of Policy and Management, Criminal Justice Policy & Planning Division, *Recidivism Among Sex Offenders in Connecticut* (Feb. 15, 2012); Levenson and Shields, *Sex Offender Risk and Recidivism in Florida* (2012); Indiana Department of Correction, *Recidivism Rates Compared: 2005-2007* (2009) plus data for 2005 releases provided by research analyst Aaron Garner; Maine Statistical Analysis Center, USM Muskie School of Public Service, *Sexual Assault Trends and Sex Offender Recidivism in Maine* (2010); Citizens Alliance on Prisons & Public Spending, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy? A study of prisoner release and recidivism in Michigan* (2009) [releases from 1986-1999]; Minnesota Department of Corrections, *Sex Offender Recidivism in Minnesota* (2007); State of New York, Department of Corrections and Community Supervision, *2010 Inmate Releases: Three Year Post Release Follow-up* [releases from 1985-2010]*;* Ohio Department of Rehabilitation and Correction, Bureau of Planning and Evaluation, *Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases* (2001); Barnoski, *Sex Offender Sentencing in Washington State: Recidivism Rates* (Washington State Institute for Public Policy (2005).

[13] Langan et al., Maine Statistical Analysis Center; Citizens Alliance on Prisons & Public Spending; State of New York; Barnoski, all at note 3, *supra*; Iowa Department of Corrections, Iowa Recidivism Report: *Prison Return Rates FY 2013* (March 2014); Kohl et al, *Massachusetts Recidivism Study:A Closer Look at Releases and Returns to Prison,* Urban Institute, Justice Policy Center (Washington, D.C., 2008); Sample and Bray, *Are Sex Offenders Dangerous?* 3 Criminology and Public Policy*,* No. 1, 59-82 (2003); Flaherty, *Recidivism in Pennsylvania State Correctional Institutions, 1997-2003,* Penn Department of Corrections (2005); Holley and Ensley, *Recidivism Report: Inmates Released from Florida Prisons, July 1995 to June 2001,* Florida Department of Corrections (2003).

Table 1: Sex Offender Recidivism Rates

Study	Total Cases	New Sex Crime	Any New Offense	Years of Follow-up	Recidivism Measure
Bur of Just. Stats	9,691	3.5%	24.0%	3	Reconviction*
California	3,577	3.4%	7.2%	10	Return to prison
California	4,204	3.2%	7.9%	5	Return to prison
Connecticut	746	2.7%	------	5	Reconviction
		1.7%			Return to prison
Florida	250	13.7%	------	10	Re-arrest
	250	5.2%	------	5	Re-arrest
Indiana	3,615	1.9%	11.2%	3	Return to prison
Maine	341	3.8%	7.0%	3	Return to prison
Michigan	6,673	3.1%	7.5%	4	Return to prison
Minnesota	3,166	5.7%	25.4%	3	Reconviction*
		3.2%	8.6%	3	Return to prison
New York	21,946	1.7%	7.5%	3	Return to prison
Ohio	879	8.0%**	14.3%	10	Return to prison
Washington	4,091	2.7%	13.0%	5	Reconviction

*includes misdemeanors; **also found that 1.4% had parole violations for behavior constituting a sex offense.

The justification for singling out former sex offenders for extraordinarily burdensome requirements and prohibitions – that they will inevitably commit new sex offenses – is thus fundamentally flawed. Not only do decades of data from multiple jurisdictions fail to support this belief, the data emphatically *disprove* it.

The reason why sex offenders are so unlikely to reoffend is not altogether clear. For many people it may well be a combination of non-recurring circumstances, guilt or shame, treatment success, aging, prison programming, and the deterrent effect on offenders of even a short prison term or public humiliation. As one research team noted,

> Like the rest of us, sexual offenders are able to do things that are contrary to their values and moral beliefs, acts for which they feel ashamed and deeply regret.

Ruth E. Mann, Karl Hanson, and David Thornton, *Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors,* Sexual Abuse: A Journal of Research and Treatment, 1-27 at 10 (2010). Notably, much of the research covers people who were released before registries were introduced, or before they became onerous, public, on-line, registries, so it is not the registry itself that makes a difference.

Indeed, the data on recidivism rates for those who commit sexual offenses – which is the only scientific evidence pertinent to any "potential threat" – have been remarkably consistent for years. The most recent DOJ study,[14] which came out in 2019, followed up on a previous DOJ study from 2014.[15] Except for people previously convicted of murder, people who committed sex offenses are less likely than any other category of felons to be rearrested for a new crime of the same type for which they had previously been convicted.

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[14] *See* Alper & Durose, Special Report, Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-up (2005-14), DOJ, Office of Justice Programs, Bureau of Justice Statistics (May 2019).

[15] *See* Durose, Cooper, et al., DOJ, Bureau of Justice Statistics, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010 (April 2014). The study was based on *c.* 68,000 randomly selected released prisoners from 30 states. The 2019 DOJ-BJS study updates the 2014 study. Both studies confirm what previous studies have shown (though in these studies DOJ/BJS defines "recidivism" as *rearrest* rates, not *reconviction* rates [which is what many other studies use] – so the recidivism rates in the DOJ studies will be somewhat *higher* than studies that use reconviction or reimprisonment as the measure of recidivism).

Specifically, the new DOJ study confirms that:

- Sex offenders have a *significantly* lower recidivism rate for a subsequent crime similar to the one for which they were incarcerated than every other discrete group of offenders except murderers;
- Sex offenders have the lowest recidivism rate for any post-release violent crime of all discrete groups of offenders including murderers;
- Sex offenders have a lower recidivism rate for *any* subsequent crime than every other discrete group of offenders except murderers.[16]

Within the period studied, again using the DOJ's definition of recidivism as a rearrest as opposed to a reconviction:

- sex offenders' recidivism rate for a new sex offense was 7.7%
- robbers' recidivism rate for a new robbery was 16.8%
- non-sexual assailants' recidivism rate for a new non-sexual assault was 44.2%
- drug offenders' recidivism rate for a new drug offense was 60.4%
- property offenders' recidivism rate for a new property offense was 63.5%
- public order offenders' recidivism rate for a new public order offense was 70.1%
- and murderers' recidivism rate for a new murder was 2.7%

Put another way, the 2019 DOJ study finds that, for example, (non-sexual) assaultive offenders were rearrested for a new (non-sexual) assaultive crime at *six times* the rate that sex offenders were rearrested for a new sex offense, and drug offenders were about *nine times* more likely to be rearrested for a drug crime than sex offenders were to be rearrested for a sex crime. These results could not be further from the popular conception

[16] Sex offenders' rearrest rate *for all crimes* is necessarily inflated, because only sex offenders have to register, and therefore only they are subject to rearrest for registration violations. Given that Michigan arrested 17,000 people for SORA compliance violations from 1994-2013, *see* Part III, below, and given that no other group of felons could be arrested for such crimes, one would expect that the rearrest rate for sex offenders for any crime would be higher than for other categories of offenders. Yet despite the skewed comparison, the sex offenders' rearrest rate for any crime is *still* lower than every other category of felons except murderers. *Id.,* DOJ Study, Alper & Durose, Table 2, at p 4.

of sex offenders: that they are unable to control their sexual impulses and will reoffend (and pose a clear and present danger) forever into the future.

These are the facts. The bottom line is that the DOJ study confirms what the data on sex offenders have shown for years: the great majority of people who commit a sex offense will never commit another sex offense. If (after Justice Roberts' renunciation of *Korematsu* in *Trump v Hawaii*)[17] it is now black-letter law that the government in wartime could not round up 120,000 Japanese Americans and intern them in camps absent evidence that more than a small minority of them posed a demonstrable risk to public safety, then it follows that the government cannot label 44,000 Michigan registrants as dangerous and impose a punitive regime upon them (most for life) absent evidence that more than a small minority of them will ever commit another sex offense.

But the prosecutor's brief goes even further. The prosecutor notes that such laws were enacted in part as a "response to the vicious attacks by violent predators" against child victims (citing the abduction, rape, and murder of a seven-year-old girl). Pros Brief, at 22. On this point the prosecutor is right: legislatures across the country (and Congress itself) capitalized on the public's fear and loathing of sex offenders, often on the heels of some horrific crime, in order to appear tough on crime – in the process throwing modern social science research out the window. The result is today's "second-generation" SOR laws that

[17] Although Justice Roberts wrote the opinion upholding the modified Muslim ban, he addressed the dissent's reference to *Korematsu*, explicitly renouncing the case: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution.' 323 US, at 248, 65 S Ct 193 (Jackson, J, dissenting)." *Trump v Hawaii,* 138 S Ct at 2423.

treat every person on the registry as if he or she were as dangerous as the perpetrators of the most horrific crimes.[18]

Again, having a *record* helps set the record straight. In *Does I*, a psychologist (who had worked with and treated sex offenders in several states' forensic centers or corrections departments for nearly 20 years) was asked about the most dangerous offenders, like serial rapists. She answered, "I can tell you in my career how many I have seen *on one hand*."

> It's extremely contrary to our cultural assumptions about sex offenders. It's hard for people to get their head around it. Yes, there is a group of sex offenders that are at high risk for recidivating, but that's a very small number of sex offenders. *Most sex offenders do not recidivate.* And this is a pretty robust finding in the literature. It's been persistent now for a number of years, and our culture has not caught up to that conceptualization of sex offenders. We don't see them that way.

Does I, *supra*, Fay-Dumaine Dep, ECF 90-13, PgID 4340 (emphasis added).

At bottom, the most important lesson to be drawn from *Korematsu* is that even if a small minority of Japanese Americans posed an immediate serious threat and needed to be closely monitored (if not sequestered) to protect our national security, that didn't justify treating the entire subset of non-dangerous Japanese Americans as if they presented the same risk. But that is exactly what second-generation SORAs (like Michigan's) do.

B. The Claim of "Frightening and High" Recidivism Rates Is a Myth

The myth of "frightening and high" sex offense recidivism rates was fueled in large part by the U.S. judiciary. In *McKune v Lile*, 536 US 24 (2002),[19] Justice Kennedy wrote

[18] Offenses in which young children are abducted, raped, and murdered are as exceedingly rare as they are notorious and terrifying. The prosecutor's brief goes out of its way to describe these crimes in detail for one purpose only: to provoke fear, anger, and a thirst for vengeance in the reader. Pros Brief, at 20, n 15. It is probably a safe bet to say that when a law is named after the child victim of an atrocious crime, social science research – or adherence to facts – is not the legislature's priority.
[19] 122 S Ct 2017, 153 L Ed 2d 47 (2002).

in a plurality opinion that the recidivism rate "of untreated [sex] offenders has been estimated to be as high as 80%." *Id.* at 33. The next year, in *Smith v Doe*, 538 US 84 (2003),[20] which upheld Alaska's first-generation SORA,[21] he wrote that:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v Lile*, 536 US 24, 34 (2002)."

Smith, at 538 U.S. at 103. By 2015 the (alleged) "frightening and high" reoffense rates of sex offenders had been repeated in more than 90 judicial opinions and formed the central justification (cited or not) for ever more draconian registration laws (after *Smith* in 2003).

In a 2015 article, two legal scholars finally demolished the "frightening and high" myth. *See* Ira and Tara Ellman, "Frightening and High": The Supreme Court's Crucial Mistake about Sex Crimes Statistics, 30 CONST'L COMMENTARY 419 (2015).[22] Rather than repeat what others have already briefed about that article, amici here refer the Court to the

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[20] 123 S Ct 1140, 155 L Ed 2d 164 (2003).

[21] Given the posture of *Betts* – coming after the Sixth Circuit's decision in *Does I* for which cert was denied – it is worth noting that after *Smith v Doe* was decided in 2003, Mr. Doe brought an identical challenge under the Alaska ex post facto clause. Using the same legal test that the U.S. Supreme Court had used, and applying it to the same statute, the Alaska Supreme Court held that Alaska's (first-generation) ASORA was unconstitutional: "Because ASORA compels (under threat of conviction) intrusive affirmative conduct, because this conduct is equivalent to that required by criminal judgments, because ASORA makes the disclosed information public and requires its broad dissemination without limitation, because ASORA applies only to those convicted of crime, and because ASORA neither meaningfully distinguishes between classes of sex offenses on the basis of risk nor gives offenders any opportunity to demonstrate their lack of risk, ASORA's effects are punitive. We therefore conclude that the statute violates Alaska's ex post facto clause." *Doe v State of Alaska*, 169 P3d 999, 1019 (2008).

[22] The authors tracked down the source of the "80%" claim and showed it to be specious. If the Court is going to read one article that gets at the root of second-generation sex offender registration acts, this is the article to read: it is short, pithy, and rooted in social science research.

dissent written by Justice Johnson of the Kansas Supreme Court in *State v Peterson-Beard,* 304 Kansas 192, 377 P3d 1127 (2016).[23] Justice Johnson posed the question presented in that case (regarding the constitutionality of the Kansas SORA under the federal Ex Post Facto Clause) as whether the U.S. Supreme Court would rule differently as to the 2016 Kansas statute than it had ruled as to the 2003 Alaska statute in *Smith*. He believed that the Court *would* rule differently, in light of the revelations about the true rates of sex offense recidivism, the changes in the composition of the Court, and what the Justices (and the world) had learned in the intervening years about the pervasiveness, power, and perils of the internet. *Peterson-Beard*, 377 P3d at 1144-49.[24] Instead of summarizing Justice Johnson's excellent arguments, amici attach his opinion as Exhibit 3, and recommend that the Court read it.

C. Risk Assessment Instruments Are the Best Measures of Recidivism Risk

Social scientists who study people who have committed sexual crimes have devised actuarial-based instruments to assess the statistical risk of reoffending (in much the same way that life insurance companies use actuarial data to assess the statistical risk of when people will die). The social scientists want to figure out what factors are the best predictors of reoffending (as the life insurance companies want to figure out what factors are the best

[23] The Kansas Supreme Court had ruled 4-3 in three pending cases that KSORA violated the Ex Post Facto Clause. When the composition of the court changed, a new 4-3 majority delayed the release of the three completed opinions, and then reversed the holdings (but not the judgments) of those opinions, in the *Peterson-Beard* case, with all four opinions released on the same day. Justice Johnson, who had written opinions in the reversed cases, wrote a trenchant dissent.

[24] Justice Johnson focused on the last two of the seven factors set forth in *Kennedy v Mendoza–Martinez*, 372 U.S. 144, 168–69 (1963), "whether the statutory scheme is rationally connected to a non-punitive purpose; and whether the statutory scheme is excessive in relation to the identified non-punitive purpose." *Peterson-Beard*, at 1146.

predictors of age-at-death). The models get better over time because each new data set or study allows the researchers to tweak the weight assigned to a given variable (to "re-norm" their algorithms) to better reflect the historical reality revealed by the new data or study. These are backward-looking models: in neither field can researchers claim to know which individuals will reoffend (or die early/late). The purpose is to produce categories of low, moderate, and high risk groups derived from the data, which can then be used to inform and guide smart social policy (or to optimize rate structures for life insurance policies).

The most commonly used such instrument (normed for men[25] who committed sexual offenses in modern western countries) is the Static-99R, which was developed by the world's leading sex-offense researcher (Canadian government researcher Karl Hanson).[26] Much like sentencing and parole guidelines, the Static-99R and similar instruments "score" offenders based on a series of (mostly static) variables, like prior non-sexual violence/convictions; age at release; unrelated victims; stranger victims, and so on. The result places offenders within one of several (typically 3-5) risk categories.

What matters for purposes of the *Betts* case is that when you look at any study of a broad population of male offenders who were so scored, the *distribution* of people into the risk categories (however they are defined) is much the same. Roughly three-quarters of the population will fall into the low or moderately-low risk range. Less than one-quarter will

[25] There are too few female offenders for social scientists to be produce a similar instrument that would be statistically reliable.

[26] Examples of other such instruments include the Vermont Assessment of Sex Offender Risk (VASOR), and the Iowa Sex Offender Risk Assessment (ISORA). All of these are constantly being revised by their development teams (sometimes to be more accurate based on state-specific data.)

will fall into the moderately-high risk range, and only about five percent will fall into the high-risk range.[27] This makes perfect sense, because we already know from the data on reoffending that most sex offenders never recidivate: rather it is the much smaller number of people in the higher-risk categories who are responsible for most of the repeat offenses.

If the ratio of lower-risk offenders to higher-risk offenders is roughly three to one (75% to 25%), then you might expect that three-quarters of the people on the registry would be Tier I (15-year) registrants or Tier II (25-year) registrants, and one-quarter would be Tier III (lifetime) registrants. But you would be wrong. Because Michigan uses the *offense of conviction* (and nothing else) to determine a person's SORA tier-level assignment, the tiers bear little relationship to actual recidivism data or to any science-based actuarial risk.

Michigan's 2011 SORA amendments tagged most people as Tier III registrants. The distribution of people into the SORA tiers was as follows: Tier I = 6 percent; Tier II = 22 percent; and Tier III = 72 percent. *Does I*, *supra,* Mich State Police – Offenders by Tier (2013), ECF 92-4, PgID 4962. In short, Michigan's SORA doesn't just ignore the scientific data on recidivism rates, it actually turns that data upside down: the percentages are the *opposite* of what the risk data show (and have shown for decades).

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[27] *See e.g.,* Statistical Validation of the Iowa Sex Offender Risk Assessment (ISORA-8), Final Report, Iowa Dept. of Corrections, January 2010 (comparing the Iowa risk assessment instrument with the original Static-99 and the revised Static-99R, and recommending adjustments to the ISORA-8 scoring to raise the low and low-moderate categories from 47% of the total to 73% of the total, which approximates the Static-99 figure of 73% and the Static-99R figure of 70%), at https://www.legis.iowa.gov/docs/publications/SD/12256.pdf ; *and* McGrath, Robert, *et al.*, Development of Vermont Assessment of Sex Offender Risk-2 (VASOR-2) Reoffense Risk Scale, SEXUAL ABUSE – A JOURNAL OF RESEARCH AND TREATMENT 26(3) (April 2013), at 284 (chart showing low- and moderately-low risk-scored offenders comprise 76% of the pool of offenders, moderately-high risk comprise 16%, and high-risk comprise 8%).

Sex offenders are most accurately assessed by empirically-based tools, not by the legal definition or seriousness of their conviction. Zgoba, et al., *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act* (research report submitted to the National Institute of Justice, 2012). Statutes that use the crime as a proxy for risk or dangerousness miss the mark. Registry schemes that group people by offense (to determine for how long they must report) ignore fact-based distinctions among offenders. Criminal justice experts and victims' rights advocates alike agree that the management and treatment of offenders should be based on their individual risk and needs, with more restrictions and more intensive services being assigned to those with the highest risk. J. Bonta & D.A. Andrews, Public Safety Canada, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* (2007); Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis,* 36 Criminal Justice and Behavior 865-891 (2009); National Alliance to End Sexual Violence, *Community Management of Sex Offenders, http://endsexualviolence.org/where-we-stand/community-management-of-sex-offenders*.[28] And as noted above, assigning lower-risk registrants to the highest risk category (Tier III) on the *public* registry, based solely on the offense of conviction, falsely brands them (in most cases) as being "dangerous" when they are not.

[28] Some 15 states, including such large jurisdictions as California, Texas, and Georgia, have recognized the importance of individualized assessment and have made their registries risk-based rather than offense-based. *Doe v Sex Offender Registry Brd*, 473 Mass 297, 41 NE3d 1058, 1068 n 20 (Mass 2015). Such systems also avoid "overdosing" people with unneeded oversight or treatment, which research shows can actually increase the risk of reoffending. Hanson, et al, *supra*.

Returning to the *Korematsu* analogy, Michigan's SORA adopts *both* elements that made *Korematsu* a landmark example of law gone awry: (1) it fails to distinguish between the relatively small minority of people who pose a demonstrable risk to the public and the relatively large majority who do not; and (2) it subjects the low-risk majority to the same extreme regime that was created to cabin and to monitor not just the higher-risk minority but the *highest*-risk minority. In sum, SORA is one-size-fits-all system that fosters the myth that *all* registrants are incorrigible and dangerous. The only major distinction among the three tier levels is the *duration* – the amount of time that one must remain on the registry.

D. The Duration of Registration Bears No Relation to the Actual Risk

In *Korematsu*, Japanese Americans were interned for the duration of the war. But imagine if they were held indefinitely for years *after* the war, on the theory that they continued to pose a "potential risk" (however slight) to national security – surely that would be even more outrageous than their initial detention. Yet that is precisely what Michigan's SORA does – 94 percent of registrants are on the registry for 25 years or for life, with no path off the registry (for most people), and without regard to the *actual risk* they pose.

So the next logical question is, what does social science research tell us about how long allegedly "risky" people *remain* a risk once they are released back into the community. That question, too, has been well-studied. A declaration from researcher Karl Hanson, used in the *Does I* case, summarized his research as follows:

a. Recidivism rates are not uniform across all sex offenders. Risk of reoffending varies based on well-known factors and can be reliably predicted by widely used risk assessment tools…which are used to classify offenders into various risk levels.

b. Once convicted, most sexual offenders are never re-convicted of another sexual offence.

c. First-time sexual offenders are significantly less likely to sexually reoffend than are those with previous sexual convictions.

d. Contrary to the popular notion that sexual offenders remain at risk of reoffending through their lifespan, the longer the offender remains offence-free in the community, the less likely they are to reoffend sexually. Eventually, they are less likely to reoffend than a non-sexual offender is to commit an "out of the blue" sexual offence.

Does I, supra, Hanson Declaration, ECF 93-2, PgID 5210. Hanson found that offenders in the study's low-risk category pose no more risk of recidivism – from the moment they are released – than people who have "never been arrested for a sex-related offence but have been arrested for some other crime." *Id*.[29]

In 2014, while *Does I* was being litigated, Hanson and his team released a study that surprised even the authors (who had *assumed* that very high-risk offenders might remain high-risk indefinitely). *See* Hanson, et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J OF INTERPERSONAL VIOLENCE, No. 15 (Oct. 2014). The study did a 20-year follow-up of more than 7,700 people. As noted above, people who scored low-risk started

[29] This finding suggests that if low-risk sex offenders are to be placed on the registry for 25 years or life, then (given the logic that underpins SORA) *all* released felons should be placed on the registry for 25 years or life, because both groups pose the same risk of committing a sex offense after release. Indeed, the low-risk sex offender recidivism rate (for those who remain offense-free in the community after five years) is so low (under 2%) that the same logic would suggest that all Michigan males should be put on the registry for 25 years or life. *Does I, supra,* Hanson Decl, ECF 93-2, PgID 5218 (noting that the ambient rate in western countries for any male to commit a sexual offense by age 40 is about 2%. To ensure the most accurate comparison, however, Hanson used the "previously arrested for a non-sexual crime" rate of <3%). *Id.* Large-sample studies have shown that the out-of-the-blue risk is about 3% after 4.5 years, Hanson, ECF 93-1, PgID 5200, and the 2019 DOJ study put that number (using rearrests) at 2.3% after nine years. Alper & Durose, *supra*, Table 2 at p 4.

very low-risk upon release and remained so forever. People who scored moderate or high risk, if they reoffended, were most likely to do so in the early years after release – but the surprising results were the sharp declines thereafter. In the moderate risk group, of the people who remained offense-free to year ten, only two out of a hundred reoffended between years 10 and 15. And even for the high-risk group, of those who remained offense-free to year ten, only four in a hundred reoffended between years 10 and 15, and none thereafter.[30] To sum up, Hanson's study found that:

- the risk that low-risk sex offenders will reoffend upon release is 2.2% in years 1-5, then falls under 2% for those remaining in the pool for years 5-10, then stays under 2% for those remaining in the pool for years 10-15; in other words, each cohort that survives each 5-year period retains a lower risk of reoffending than the risk that all other offenders (never arrested for a sexual offense) will commit a sexual offense after release (*c.* 3%);

- the risk that moderate-risk sex offenders will reoffend upon release is 6.7% in years 1-5, then falls to 4% for those remaining in the pool for years 5-10, then falls to 2.4% for those remaining in the pool for years 10-15, with the crossover point (when they fall below 3%) occurring at around year 13;

- the risk that high-risk sex offenders will reoffend upon release is 22% in years 1-5, then falls to 8.6% for those remaining in the pool for years 5-10, then falls to 4.2% for those remaining in the pool for years 10-15, with the crossover point (when they fall below 3%) occurring at around year 17.

Does I, supra, Hanson Decl, ECF 93-2, PgID 5218*;* Hanson, et al., *High Risk Offenders, supra,* at pp 5-16.[31] But for the first five years for the high-risk offenders, not only are these

[30] The decrease in risk over time is true for all offenders, not just sex offenders: the longer any offenders remain offense-free in the community, the lower their chances of coming into contact with the justice system again. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?,* 5 Criminology & Pub Pol 483 (2006) (finding that after 6 or 7 crime-free years, the risk of committing a new offense begins to approximate the risk of new offenses among people with no criminal record – sometimes referred to as the "ambient risk" within the general population).

[31] This information is also summarized in a one-page chart. *See Does I, supra,* Hanson, Sex Offender Sexual Recidivism Risk Levels Over Time (Chart), ECF 93-3, PgID 5225, attached as Exh. 4.

figures not "frightening and high" – they are startling low compared to all other sets of felons. And the pace of the drop-off over time for high-risk sex offenders surprised even the experts.[32]

Despite the data, the persistent justification for the registry is the worst possible case – the pathological stranger who preys on children. This image is used to justify registering everyone who has ever been convicted of a sex offense, excluding them from areas where children congregate, creating a public pariah class on the web, and monitoring the ordinary activities (like renting a car on vacation) of most registrants for their entire lives.

Michigan's SORA is predicated on the idea that 94 percent of all sex offenders remain dangerous (for committing another sex offense) for 25 years or for life. But that is untrue. Legislatures may have some leeway in drawing lines when they pass laws, but as *Korematsu* teaches, they cannot turn reality on its head (even for cases brought under the Due Process or Equal Protection Clauses, let alone for cases brought under the Ex Post Facto Clause). The state cannot treat a class of people as dangerous for decades – let alone *for life* – if most of the class will never commit another sex offense. Nor can the state pretend that even the small minority of registrants who may be dangerous in the early years after their release remain dangerous *forever* – when in fact they pose no greater risk (after

[32] The *cumulative* risk for each group in the study is of course somewhat higher, but what Hanson wanted to focus on here is what is most pertinent to the key question presented in the *Betts* case: for how long do people *who do not reoffend* remain a risk once they return to the community? The answer to that question is: a *lot* shorter time than the 15-year, 25-year, or lifetime periods built into SORA. It is also important to understand that people who commit a new sex offense drop out of the "in-the-community" cohort – they return to prison (most likely for a long time as repeat offenders), and when they are released again they will likely be in a higher-risk Static-99R category by virtue of having reoffended. For the great majority of registrants who do not reoffend, however, their risk starts low or, for the moderate-risk and higher-risk groups, drops far faster than expected.

17 years offense-free in the community) than the ambient risk of males in the general population.

E. Tier III Offenders Include Some of the Least Dangerous Registrants

Again, the *record* in *Does I* brings home what happens when legislatures cater to what Justice Sotomayor called the public's "animosity toward a disfavored group." The joint statement of facts, the verified complaints, the depositions, and the declarations are a catalogue of the human misery and harm inflicted by conviction-based on-line public registries – as well as a catalogue of the proofs that such registries do zero (or less than zero) to increase public safety. A few examples illustrate why the record moved the federal district court and the Sixth Circuit to rule in the plaintiffs' favor. We start with who are included among Tier III registrants, to put a human face on the lunacy that permeates SORA.

1. In 1990, John Doe #1 (then 19 years old) robbed a McDonald's at gunpoint. He was apprehended at the scene. He did not contest the charges against him and was sentenced to 22-40 years. A model prisoner, he was paroled in 2009, discharged in 2011, and has had no criminal history since.

You may be thinking, how can a person be put on the registry for armed robbery? Turns out that the manager's young teenage son was at the McDonald's awaiting a ride home. So when Doe #1 forced both the manager *and* his son into the back room to open the safe, he committed kidnapping *and* child kidnapping. MCL 28.722(w)(ii). There was no registry in 1990, so no one could have advised Doe #1 of the consequences of pleading to what would become a registrable offense. Although Doe #1 has never been convicted of any sexual crime, SORA was applied to him retroactively. Every amendment to SORA

since was applied to him retroactively as well. Under the 2011 amendments, he became a Tier III offender, which conveyed to the public that he was among the most dangerous of "convicted sex offenders," and which meant lifetime registration with no path off the registry. But for the decision in *Does I*, he would be subject to a lifetime of exactly the same rules and restrictions designed for the man who abducted, raped, and murdered a seven-year-old girl. *Does I*, ED Mich No 2:12-cv-11194, First Amended (Verified) Compl, ECF #46, PgID 843-45.

2. John Doe #4 was 23 years old in 2006 when he had a sexual relationship with a woman he met at an over-18 club (that required ID for entry). He didn't learn her real age (15) until after she got pregnant and he was arrested. He pled guilty to attempted CSC III. Because she had other sexual partners at the same time, the plea agreement said the charges would be dismissed if a DNA test ruled him out as the child's father. The test showed he *was* the father; the court sentenced him to five years of probation, and placed him on the registry for 25 years. He successfully completed probation, but by then, under the 2011 amendments, he was classified as a Tier III offender and put on the registry for life. *Id*., at PgID 850-51. Doe #4 married his "victim" in 2015 and fathered two more children with her; they live together in western Michigan. But for *Does I*, he, too, would be subject to all of SORA's burdens and restraints forever, as if he were a violent serial predator or someone who had abducted, raped, and murdered a child.

3. In 2003, Mary Doe was in an unhappy marriage with an Ohio clergyman. The couple took in teens who needed shelter. She and a 15-year-old boy became close, and she allowed the relationship to become sexual. She pled guilty to unlawful sex with a minor and was

sentenced to three years. Ohio's SORA was risk-based rather than offense-based, with the length and frequency of reporting determined by an individualized adjudication of risk. The court concluded that she was not a "sexual predator" and assigned her to the lowest risk level, which meant reporting her address once a year for ten years.

Ms. Doe was granted judicial release after just eight months, and her sentence was changed to four years' probation, which she completed. Although Ohio has since moved to an offense-based registration scheme (like Michigan's SORA 2011) to comply with the federal SORNA, the Ohio Supreme Court has held that people like Ms. Doe (who had individualized risk-based hearings) cannot be retroactively reclassified under the offense-based scheme on separation of powers grounds, and that the SORNA-compliant amendments cannot be applied retroactively on ex post facto grounds.[33]

Under the terms of her probation Ms. Doe moved to Michigan, where she lived with her parents. She remarried in 2010. She and her husband live in Michigan, where all their extended family reside. Under the 2011 amendments to Michigan's SORA (unlike Ohio's) Ms. Doe was retroactively reclassified as a Tier III offender, extending her registration to life. *Id.* at Pg ID 851-53. But for *Does I*, she, too, would be subject for life to all of the requirements of the 2011 amendments, which (as the prosecutor admits) were passed in "response to the vicious attacks by violent predators" against child victims. Pros Brf, at 22.

Modern research shows that people who offend sexually cross educational, gender, class, and cultural lines. Hanson & Morton-Bourgon, *Predictors of Sexual Recidivism: An*

[33] See *State v Williams*, 952 NE2d 1103 (Ohio 2011), and *State v Bodyke*, 933 NE2d 753 (Ohio 2010).

Updated Meta-Analysis (2004). They engage in different behaviors with different victims for which they have different motivations and widely disparate levels of risk of reoffending. *Id.* But because in Michigan tier levels are based solely on the offense of conviction, most registrants – like the plaintiffs in *Does I* and countless other low-risk people – are treated as if they are criminals for life.

II. MICHIGAN'S SORA CAUSES EXTREME HARM FOR LITTLE OR NO PUBLIC BENEFIT

A non-public off-line registry that allows law enforcement to keep tabs on people who have threatened public safety in the past might have value for investigating crime. But Michigan's registry treats all 44,000 registrants as if they are equally dangerous: all are subjected to the same regime, all are barred from school exclusion zones, and all are listed publicly on the internet (most of them for life). In *Does I* the Sixth Circuit concluded that the cumulative harm that SORA inflicts on registrants rises to the level of punishment, and that there is "scant evidence" that Michigan's conviction-based public registry does *anything* to protect the public. *Does I, supra,* at 705. We will focus on two features of Michigan's SORA: the school exclusion zones, and the public internet part of the registry.

A. Exclusion Zones Do Not Reduce Sex Offenses Against Children Because Most Such Offenses Are Committed in Homes by Family, Friends, and Other Caretakers.

Prohibiting people convicted of sex offenses from residing, working, or loitering within specified distances of schools does nothing to serve the state's goal of protecting children because schools are not the places where children are victimized. We have known for years that the overwhelming majority of offenses occur in residences, typically in the child's own home. Twenty years ago the Department of Justice found that 93 percent of

child sexual abuse victims were abused by a family member or well-known acquaintance. Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, 10 (2000).

Michigan State Police statistics show that 5,473 incidents of first-degree criminal sexual conduct (which requires some form of sexual penetration) were reported to law enforcement in 2018 (the most recent year for which data are available). Michigan Incident Crime Reporting (MICR), 2018 CSC - First Degree.[34] The Court should note that one of the key elements that can elevate an offense involving any form of sexual penetration to first-degree is the age of the victim, so it is not surprising that 44 percent of the reported victims were younger than 15. Nearly three quarters of the reported incidents (72 percent) occurred in a residence or home. Only 1.7 percent of the reported incidents occurred at an elementary or secondary school. (Less than 1 percent occurred at a park or playground.)

Moreover, research has consistently shown that reoffending is *unrelated* to the proximity of an offender's residence or work to schools, parks, or other youth centers. To the contrary, offenses correlate not to places where children congregate but to places where perpetrators form a relationship with them – which is why such a high percentage of child sex offenses occur in the child's own home, or in the residence of a relative or friend or sitter, or in a place where the child is close to others who spend private time with them.

For example, a study that focused on Michigan and Missouri was unable to reliably examine the relationship between residency restrictions and sexual reoffending because the

[34] *See* https://www.michigan.gov/documents/msp/d_Rape_661291_7.pdf

recurrence rate was so low that the results did not meet the requirements of statistical reliability. The study found, however, that any relationship that *might* exist between residency restrictions and overall reoffending by sex offenders is small: the effect of residency restrictions in Michigan was actually a slight *increase* in recidivism, while in Missouri it was a slight decrease. Huebner et al., *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (2013), NIJ Document #242952, at 9-10 (July 2013).

Numerous other studies corroborate that the location of a sex offender's residence does not influence where a crime occurs and that residency restrictions do not reduce recidivism. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J L & ECON 207-239 (2011). *See also*, Nobles et al., *Effectiveness of Residence Restrictions in Preventing Sex Offense Recidivism*, 58 Crime & Delinquency 612-642 (2012) (finding that implementing residency restrictions did not achieve its intended goal of reducing arrests or recidivism"); Zandbergen et al., *Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism*, 37 Criminal Justice and Behavior 482-502 (2010) (finding no significant relationship between reoffending and proximity to schools or daycares); Minnesota Dep't of Corr, *Residential Proximity & Sex Offense Recidivism in Minnesota* 2 (2007) (none of the 224 recidivist sex offenses studied could be linked to residency); Colorado Dep't of Public Safety, Division of Criminal Justice, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community* (2004) (finding no evidence that residence restrictions prevent repeat sexual crimes and or linking crime location to residency).

Even before "second-generation" registries took hold, there was no evidence that

proximity to schools/playgrounds played a role in reoffending. Minnesota Dep't of Corrections, *Level Three Sex Offenders Residential Placement Issues* (2003). Even prosecutors agreed: the Iowa County Attorneys Association reported that (as to residency restrictions) "there is no demonstrated protective effect … that justifies the huge draining of scarce law enforcement resources in the effort to enforce the[m]." ICAA, *Statement on Sex Offender Residency Restrictions in Iowa* (December 11, 2006). Lastly, even DOJ-sponsored research has warned that, "While these laws are popular, there has been very little evidence of their effectiveness in reducing crime." Sex Offender Registration, Notification and Residency Restrictions (August 2014), at nij.ojp.gov:https://nij.ojp.gov/topics/articles/sex-offender-registration-notification-and-residency-restrictions.

Moreover, the overwhelming majority of sexual offenses are committed by first-time sexual offenders. A New York study found that 95.8 percent of all such arrests involve first-time sex offenders, "casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending." Sandler et al., *A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOLOGY, PUBLIC POL AND LAW 284–302 (2008) **(**also finding that 96% of rapes and 94% of child molestations are committed by first-time sex offenders).[35]

To sum up the data, only 98 of the 5,473 *reported incidents* of CSC I in Michigan (1.8%) occurred at a primary or secondary school in 2018. And if 95 percent of all sex

[35] This, too, makes sense, as those who commit the most serious sex offenses typically go to prison for the longest time. By the time they are released, the age factor alone may make them far less likely to reoffend sexually.

offenses are committed by *first-time* sex offenders (who by definition cannot be on the registry), then in 2018 only five people (5% x 98 = 4.9) out of the 44,000 people on the registry would be expected to have committed a CSC I offense at a school. To be clear, that means SORA is banning *all* 44,000 people on the registry from living, working, or loitering within 1,000 feet of a school because five of them (.011 percent) might commit such an offense. (Can you say *Korematsu*?)

B. Public On-Line Registration Does Not Reduce Sexual Offending Because Most Sex Offenses Are Committed by First-Time Offenders Known to Their Victims.

The fear that drives SORA's public registration (as well as SORA's email notifications when registrants move into a given zip code) is "stranger danger" – the image of children being abducted and assaulted by unknown predators. Scary as such crimes are, they are incredibly rare. Finkelhor, et al., National Center for Missing and Exploited Children, *Nonfamily Abducted Children: National Estimates and Characteristics* (2002). *See also* Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration,* 19 Criminal Justice Studies 193–208 (2006) (finding that none of the recidivistic offenses in the sample involved predatory sex crimes by strangers). Yet such crimes, trumpeted by the media, provoke public alarm and strong emotional responses, driving legislation that causes immense harm but has little or no meaningful impact. Levenson, et al., *Public Perceptions about Sex Offenders and Community Notification Policies,* 7 Analyses of Social Issues and Public Policy, 1–25 (2007).

Michigan State Police 2018 data on reported first-degree criminal sexual conduct incidents show that about 30 percent of the offenders were family members. Many others

were acquaintances, neighbors, friends, boyfriends/girlfriends, etc. In only about six percent of the cases (where the information was recorded) were the perpetrators strangers. Michigan Incident Crime Reporting, *supra*. Although the data are not broken down by age of the victim, it is apparent that a very small minority of children are assaulted by strangers.

The Michigan State Police data for third-degree criminal sexual conduct incident reports (involving penetration – also a Tier III SORA offense) show that more than two-thirds of the victims were 15 or older. Where the relationship of the perpetrator to the victim was entered or known, only about seven percent were strangers. Thus the great majority of these CSC-III sexual assault victims were *not* young children and were *not* victimized by strangers.

Multiple studies have found that public on-line registration and notification requirements create no statistically significant reduction in recidivism. In the 1990s, when some states were switching from private law-enforcement-only registries to public registries, a Washington state study found no statistically significant difference in recidivism rates between offenders who were subjected to community notification and those who were not. Matson & Lieb, Washington State Institute for Public Policy, *Community Notification in Washington State: A 1996 Survey of Law Enforcement* (1996). Likewise, research on New York State's sex offender registration and notification laws revealed no evidence that those laws reduced sexual offending by rapists, child molesters, sexual recidivists, or first-time sex offenders. Sandler, et al., *A Time-Series Analysis, supra.* Researchers found that increasing public notification did not decrease rearrest and re-incarceration, undermining the claimed usefulness of these provisions. Zevitz, *Sex Offender Community Notification*,

supra. In short, these features of the law simply do not promote the government's intended goal of preventing or reducing sexual abuse. While registries created to assist law enforcement in investigating or solving sexual crimes might have been helpful back in the day, modern research shows that the switch to public and then on-line registries (to make offenders more "visible") do not promote public safety, and may well reduce it. Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 J L & ECON at 192 (2011).[36]

Yet the public on-line registry is what most cultivates the groundless fears that tens of thousands of dangerous predators live among us, and it is what creates a state-defined class of social pariahs whose treatment can never be too harsh. Indeed, in Justice Johnson's dissent in *Peterson-Beard,* discussed above, he was most concerned about the pernicious effects of the public on-line provisions of the Kansas registry law. He concluded by saying, "The whole purpose of the [KSORA] registry is to provide easy access to information that most people would not [otherwise] know. It is the wide dissemination of the information that causes the punitive effect." *Id.* at 1145.[37]

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[36] The authors found some evidence that private registration requirements (without any public notification component) may reduce sex crimes slightly, and therefore limited private law enforcement registries may be beneficial to local authorities for monitoring and apprehension purposes. *Id.* at 161-206. But the authors suggested that the harms attending the imposition of community notification on convicted offenders *ex post* – job losses, housing insecurity, failed reintegration, etc. – may make such offenders more likely to recidivate and communities *less* safe. *Id.* at 192.

[37] The Kansas Supreme Court had held that the disclosure provisions of a much earlier version of its registration law (pre-internet) were punitive in effect, precluding their retroactive application under the Ex Post Facto Clause. *See State v Myers*, 260 Kan 669, 699, 923 P2d 1024 (1996), cert denied 521 US 1118, 117 S Ct 2508, 138 L Ed 2d 1012 (1997). In recent years the U.S. Supreme Court has acknowledged the cultural change wrought by the internet. See e.g., *Riley v. California*, 573 US 373, 134 S Ct 2473, 189 L Ed 2d 430 (2014) (noting the central role of cell phones for data access, and holding that a warrant is required to search cell phone data); and *Packingham v*

C. SORA's Requirements Have Damaging Collateral Consequences for Former Offenders, Their Families, and the Community.

Stability is important to preventing crime, whether by first-offenders or by those previously convicted. Having a home and a job and consistent social support reduces the likelihood that anyone will offend. For SORA registrants, reoffending may include a new sex offense, a new non-sexual offense, a failure to register or to comply with other SORA requirements, or (if they remain under MDOC supervision) a technical violation of probation or parole.

Sex offenders who get support through stable housing, family relationships, strong friendships, access to treatment, and good jobs or job prospects have significantly fewer probation violations and reoffenses than those with no support or negative support. *See,* Colorado Dep't of Public Safety, *Report on Safety*, *supra*; Zevitz & Farkas, U.S. Department of Justice, Office of Justice Programs, *Sex Offender Community Notification: Assessing the Impact in Wisconsin* (2000). Public policies that impede these sources of stability and support can have the unintended consequence of undermining public safety. *Id.* This is exactly what has occurred with SORA.

Research suggests that risk factors such as unemployment, isolation, depression, and housing instability correlate with increased recidivism for sex offenders. Sex Offender Management Board, *White Paper on Use of Residence Restrictions as a Sex Offender Management Strategy* (2009); Levenson & Cotter, *The Impact of Sex Offender Residency*

North Carolina, __ US __, 137 S Ct 1730, 198 L Ed 2d 273 (2017) (noting that social networking websites are now the dominant public forum, and holding (8-0) that broad restrictions on web access imposed upon all sex offenders violate the First Amendment).

Restrictions: 1000 Feet from Danger or One Step from the Absurd? 49 INT'L J OF OFFENDER THERAPY AND COMP CRIMINOLOGY168 (2005); Colorado Dep't of Public Safety, *Report on Safety*, *supra;* Hanson & Morton-Bourgon, *Predictors of Sexual Recidivism, supra*; Krutt-schnitt, et al., *Predictions of Desistance Among Sex Offenders: The Interactions of Formal and Informal Social Controls,* 17 Just Quarter, No. 1, 67-87 (2000).

Publication of a sex offender's identity, home address, place of work, and other identifying information can impede the offender's ability to remain offense-free in the community due to stressors (like homelessness, unemployment, shame, isolation, anxiety, and depression) that can trigger recidivism. Levenson & Cotter, *The Effects of Megan's Law on Sex Offender Reintegration,* 21 J CONTEMP CRIM JUST, 298-300 (2005); Tewksbury, *Collateral Consequences of Sex Offender Registration,* 21 J CONTEMP CRIM JUST 67-81 (2005); Human Rights Watch, *No Easy Answers, Sex Offender Laws in the U.S.,* vol. 19, no. 4(G), 62 (September 2007).

SORA's public on-line registry shatters these sources of stability, harming former offenders and their families, complicating the work of corrections and law enforcement, and damaging the community at large without any proof of compensating benefits. *See e.g.,* Levenson & Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am J of Crim Justice 54-68, 65-66 (2009); Horowitz, *Protecting Our Kids? How Sex Offender Laws Are Failing Us* (2015). The public is encouraged to fear and ostra-cize tens of thousands of people who present little or no risk, instead of being taught to focus on the small number people who may actually be dangerous.

Housing. The ability of offenders to find stable housing is enormously reduced by exclusion zones that make large areas of most communities off-limits to registrants. Such prohibitions are further complicated by the vagueness of the laws that impose them, leaving registrants unsure where the boundaries of school property are and how to measure the required distance from them.

Exclusion zones cover vast areas, severely restricting access to employment and housing, increasing transience and homelessness, and limiting registrants' ability to engage in normal human activity. In *Does I*, the plaintiffs' expert produced a map showing that in Grand Rapids, MI, 46 percent of all property parcels are off limits to registrants:

[Map appears on the following page.]

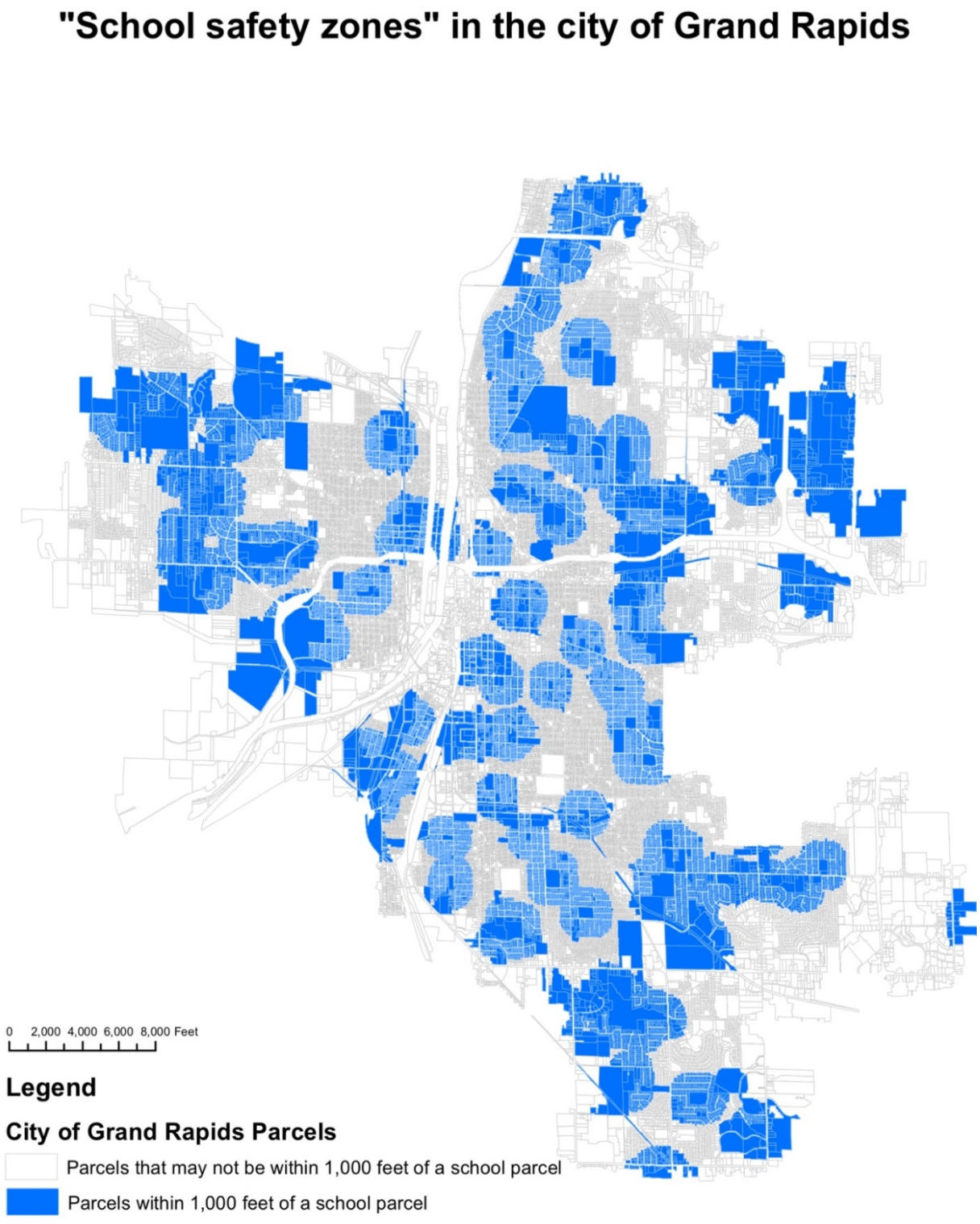
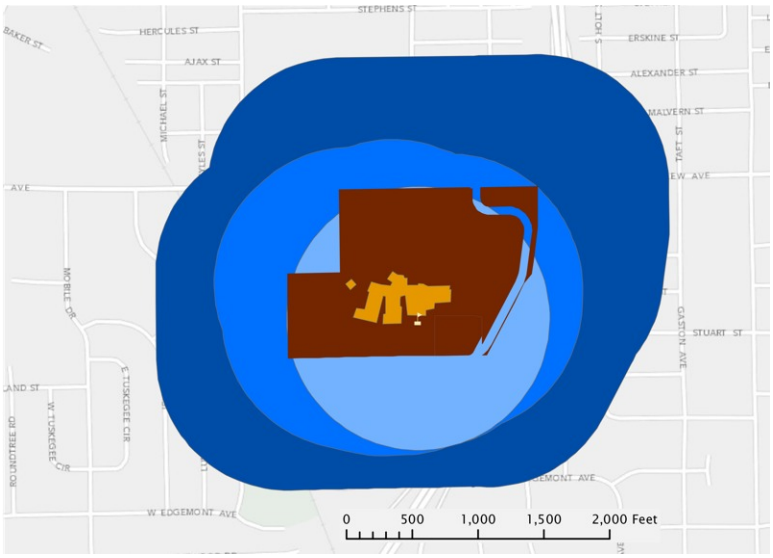


Figure 10.

Does, *supra*, ECF 91-2, Wagner 2nd Report, PgID#4756.

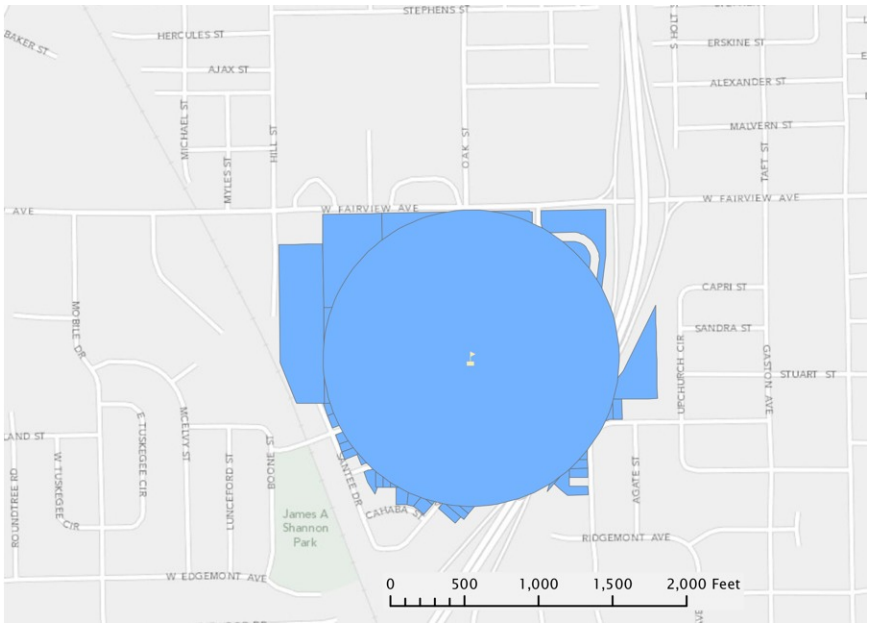
The expert's report shows how different measurement methods dramatically affect the shape and size of exclusion zones. A 1,000-foot zone measured from a school property line is much larger than a zone measured from a single point at the school. The differential was 3.5 times larger for the example used in the report:



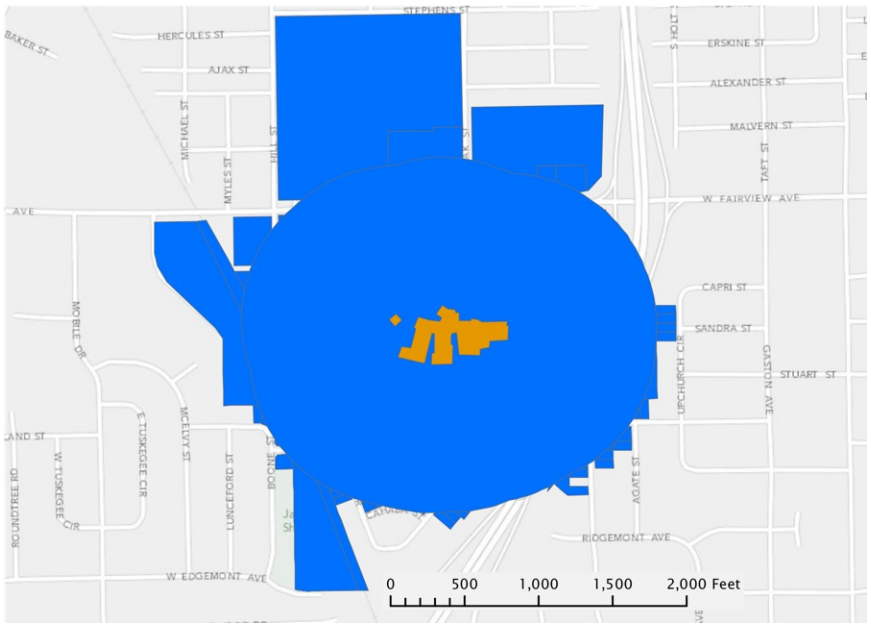
1,000-foot geographic zones drawn around each of three nested protected areas: the school's entrance (school symbol), the school building (orange) and the school property (brown)

Id., ECF 90, JSOF ¶¶ 389-97, PgID# 3815-19.

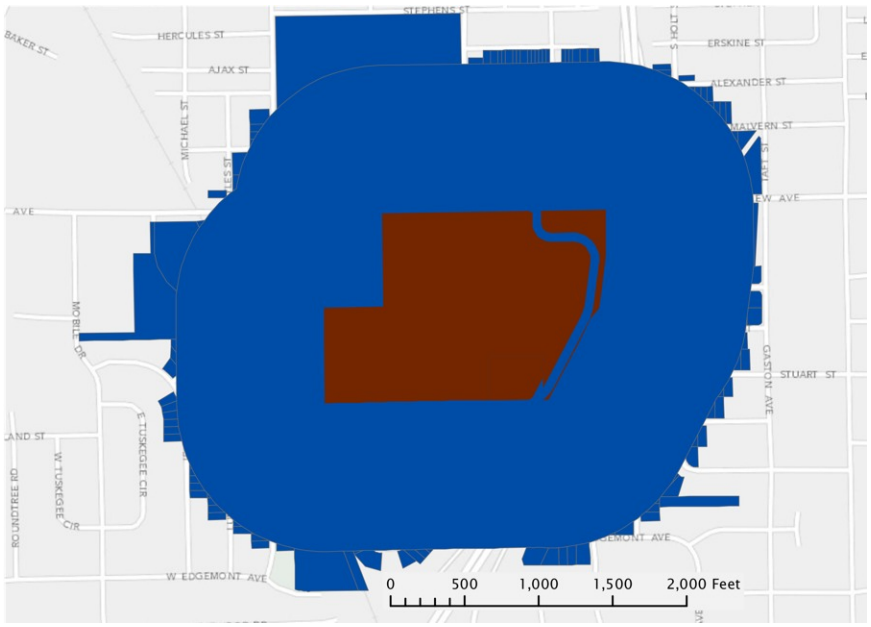
Exclusion zones are not necessarily shaped like simple circles. While measuring 1,000 feet from a single point produces a circle, measuring 1,000 feet from a parcel boundary produces an irregular shape. Moreover, as the figures below show, measuring to the parcel property line will create oddly shaped exclusion zones, since the entire parcel becomes off limits if any part of the parcel is within 1,000 feet of a school. The size of the intersecting parcels affects the total size of the geographic zones. *Id.*, JSOF ¶ 398, Pg ID# 3820.



Geographic zone measured from
school entrance to home property line.



Geographic zone measured from
school building perimeter to home property line.



Geographic zone measured from school property line to home property line.

Id., JSOF ¶398, PgID#3820-21.

Add to this the facts (1) that much of the land outside the exclusion zones may be zoned commercial as opposed to residential, and (2) that the public on-line registry reduces the availability of potential housing even outside the exclusion zones because landlords are reluctant to rent to registrants, and the enormity of the impact on registrants becomes clear. Registrants have even been denied access to homeless shelters. *See Poe v Snyder*, 834 F Supp 2d 721 (WD Mich 2011). The difficulty of finding suitable housing, the need to move repeatedly, and the fear of discovery by landlords and neighbors, create instability, stress, and isolation not just for registrants but also for their family members and supporters.

Residency restrictions and the vagueness with which they are defined also cause problems for corrections and law enforcement. Those charged with enforcing the registry cannot explain how to determine the boundaries of school exclusion zones. The discretion

to interpret SORA's meaning is ultimately left to local prosecutors. *See Does I,* 101 F Supp 3d at 683-684 (ED Mich 2015). Probation and parole officers cannot be sure when or if specific housing violates supervision conditions, which may incorporate SORA.

The American Correctional Association, the world's largest professional organization of corrections practitioners, has concluded that residence restrictions are "contrary to good public policy" because they create "unintended consequences" that actually undermine public safety. Am Corr Ass'n, *Resolution on Neighborhood Exclusion of Predatory Sex Offenders* (Jan. 24, 2007).

Employment. The SORA requirements that prohibit working in exclusion zones, and the public e-mail notification provisions, have a similar effect on the ability of registrants to find and keep jobs. No matter how well-qualified, hard-working, and unlikely they are to reoffend, registrants are excluded from work because of the business location or the attitudes of employers. Even willing employers are understandably reluctant to have their business address posted on the sex offender registry. Stunted employment opportunities mean that registrants' ability to support themselves and their families is reduced. Employers lose good employees. The community as a whole sees the wage-earning and tax-paying capacity of 44,000+ people reduced, the great majority of them for life.

Social support. The public nature of the registry makes it difficult for registrants to develop and maintain personal relationships. The families of registrants must share the residential instability, financial impact, and public hostility. Children of registrants are especially vulnerable to these consequences. They may have to change schools more often or live in undesirable locations. Registrant-parents are prohibited from attending their

children's school activities and sporting events. Classmates may bully registrants' children, and even friendly classmates may be forbidden to visit registrants' homes. Vacations may be impossible or curtailed by SORA travel restrictions. Regardless of the nature or circumstances of the original offense, how long ago it occurred, or how low the likelihood a registrant will reoffend, registrants' families live in a constant state of anxiety and hopelessness, with no end in sight. (A constant refrain is that being on the registry is far worse than being on parole.)

If the damaging consequences of SORA were an unavoidable by-product of protecting children from sexual assault, they would at least arguably be justified. But since SORA's complex requirements and prohibitions have been shown to be ineffectual and are indiscriminately applied without regard to the actual dangerousness of registrants, that justification is lacking. The significant harm imposed on one class of citizens by the state without any proven countervailing benefit to the community is public policy at its worst.[38]

III. MICHIGAN'S SORA WASTES TAXPAYER DOLLARS AND POLICE RESOURCES, AND IS INEFFECTIVE

SORA not only fails the human cost/benefit analysis, it fails the fiscal one as well. Michigan expends significant resources to enforce its vague and broad SORA terms even

[38] When you talk to legislators one-on-one, they easily concede that SORA may not do anything to reduce recidivism or to make the public safer. But, they say, how can they vote against it when their constituents want it? Doesn't the public have the right to know where "those people" live and work? *Korematsu* makes the answer easy: no. Unless people present a clear and present danger to the community, the public (other than victims of a discrete crime) have no right to view an on-line registry that falsely brands most people on the list as dangerous for life. Only people who have been found by an individualized assessment to pose a current risk can be placed onto a public on-line registry like SORA's. *See Does I*, 834 F3d at 705.

though most registrants are at low risk for reoffending from the start, and nearly all registrants will become very low risk over time. SORA thus fails yet another measure of public policy: it is not cost-effective.

The exact cost of operating Michigan's sex offender registry is unknown. Neither the legislature nor the State Police has studied the cost of setting up and operating the registry. *Does I, supra,* ECF 90-20, Hawkins Dep, PgID# 4551. While *Does I* was being litigated, the State Police SOR unit's annual budget was about $1.2 million, of which $600,000 was for database support and $600,000 was for staff, supplies, and training. *Id.,* ECF 90-16, Johnson Dep Pg ID#4389.

These figures do not include any of the costs imposed on local law enforcement, the court system, county jails, or the MDOC. In the eight-year period from 2006-2013, some 17,000 registrants were arrested, and almost 12,500 registrants were convicted of SORA violations. Of these, 4,800+ were convicted of felonies and 7,600+ were convicted of misdemeanors.[39] *Id.,* State Police SORA Conviction Data, ECF 91-22, PgID#4906-08. Each conviction required law enforcement resources to investigate, arrest, and prosecute. Each required judicial resources to adjudicate. Each involved punishment that used the resources of county probation offices and/or county jails and/or the MDOC.

[39] The arrest and conviction data show that the one thing SORA is supremely good at is tracking and punishing registrants who fail to comply with the myriad of the law's complex reporting requirements. Yet modern social science research also shows that there is no correlation between those registrants who fail to comply and those who reoffend. *See* E. Letourneau, et al., Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women, Final Report for DOJ/National Institute of Justice Grant Award # 2006-WG-BX-0002 (2010) (failure to register did not predict sexual recidivism, and survival analyses revealed no significant difference in time to recidivism when comparing those who failed to register (M = 2.9 years) with compliant registrants (M = 2.8 years)).

While the number of jail beds used is unknown, in 2013 there were 257 people in prison with new felony sentences for SORA violations. MDOC, *2013 Statistical Report.*[40] This number did not include probationers who were sentenced to prison, or parolees who were returned to prison as "technical violators" for missing a SORA requirement. (MDOC statistical reports do not identify technical violators by the type of violation.) But MCL 28.729(5)-(7) *requires* courts to revoke the probation or HYTA status – and the parole board to revoke the parole – of registrants who "willfully" violate SORA. These mandates apply no matter how minor the violations are and regardless of whether the courts or parole board would impose incarceration on their own.[41]

The MDOC estimated in 2015 that 160 prison beds equates to a housing unit costing more than $2.6 million annually. Citizens Alliance on Prisons and Public Spending, *10,000 Fewer Michigan Prisoners: Strategies to Reach the Goal* (2015), n 8. SORA also contributes to the difficulty and expense of providing housing stability to sex offenders re-entering the community. In sum, while the cost of SORA enforcement to cities and counties is not known, it is apparent that the total cost runs well into the millions.

The cost of maintaining Michigan's sex offender registry will only increase over time, as new registrants are added annually. *Does I, supra,* ECF 92, Legislative Services Bureau Report on SORA 2013, PgID#5326-5337, and ECF 53, Total Number on SOR by

[40] *https://www.michigan.gov/documents/corrections/2014-04-04_-MDOC_2013_Statistical-_Report_-_Vers_1_0_452815_7.pdf.*

[41] In *Does I* the state cited no studies showing that people who do not comply with SORA are any more likely to reoffend sexually than those who do comply. SORA is like an industrial mill, generating thousands of enforcement actions, at vast public expense, without any evidence that noncompliance correlates with reoffending. *See* n 39, *supra.*

Year, PgID#4959-60. Almost three-quarters of all registrants are required to register for life. *Id.,* ECF 92-4, Total Number of Offenders by Tier, PgID#4961-62. As the registered population ages, more and more law enforcement resources will be spent monitoring people who are further and further away from their criminal past, and lower and lower risk.

If Michigan had elected not to become federal SORNA-compliant, it would have lost ten percent of its Byrne Judicial Access Grant – federal money that comes to states for use by prosecutors and local law enforcement. The grant reduction would have been roughly $1 million, based on 2011 estimates. *Id.,* ECF 90-20, Hawkins Dep, PgID# 4551.

Other state legislatures have studied the projected cost of SORNA compliance – including the cost to local law enforcement – and determined that the loss of ten percent of Byrne Grant funds is dwarfed by the cost of complying with the federal SORNA. The California Sex Offender Management Board determined that the cost of compliance would exceed $32 million. It issued a statement that the "California State Legislature, Governor, and citizens should elect not to come into compliance with [SORNA]." *Id.,* ECF 92-23, California Adam Walsh Act Position Statement, PgID#5131-35. Similarly, Texas determined that the real costs of implementing SORNA would range from $14 million to $25.9 million a year, which was far more than any lost Byrne Grant funds. *Id.,* ECF 92-25, Texas Study, PgID#5159-69. According to an analysis by the Justice Policy Institute, the costs of implementing SORNA-compliant laws would far exceed the loss of 10 percent of Byrne Grant funds in all 50 states. The Michigan estimate was $16 million in costs against a loss of *c.* $700,000. Justice Policy Institute. *What Will It Cost States to Comply with the Sex*

Offender Registration and Notification Act? (2008) http://www.justicepolicy .org/images/ upload/ 08-08_FAC_SORNACosts_JJ.pdf.

Currently, only 18 states have implemented SORNA. DOJ Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART): http://www.smart.gov/sorna.htm#SMARToffice. In a survey of 27 non-implementing jurisdictions, 23 reported the cost as a factor. U.S. Government Accountability Office, *Report to the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects* 19 (2013). Additional concerns expressed were that SORNA creates increased workload, conviction-based tiers are not a good indicator of risk, and SORNA causes "difficulties in sex offenders' ability to reintegrate into the community." *Id.* at 26.

The operation of the registry comes at great public expense. Local law enforcement officials must collect and process information, monitor registrants, and prosecute those who are not in compliance. Local courts must adjudicate the charges. Local jails and state prisons must house those who are incarcerated for registry violations. The Michigan State Police must dedicate staff solely to the maintenance of the public registry. There is no proof that this investment has done *anything* to increase public safety.

And unlike short-term (typically two-year) parole conditions, SORA's requirements do not decrease over time as people successfully reintegrate into the community. Nor can registrants petition for a change of conditions or for an exception, or for early discharge or removal (but for a few exceptions). As a result, low/moderate risk registrants are falsely

presented to the public as if they pose the same risk as the most dangerous offenders, and are subjected to more oversight than is practical or necessary. Registrants have far more trouble finding stable housing and employment. In short, the goals of reunifying families and building pro-social community support networks are harder to achieve because of SORA. *Id.*

CONCLUSION

Amici share the goal of policymakers to protect Michigan's residents, especially the youngest and most vulnerable, from sexual abuse. But massive social control and branding of former sex offenders is not a policy, it is a reaction based on unwarranted fears, myths, and misconceptions. To pile on lifetime reporting requirements, on-line public notification, geographic exclusion zones, etc., without regard to their efficacy or to the collateral harm they cause, is not only pointless, but goes to the heart of what *Korematsu* teaches us that governments cannot do: treat an entire demonized group as if they are currently dangerous, when we know that most of them are not. As in 1944, "The reasons appear, instead, to be largely an accumulation of … misinformation, half-truths and insinuations that for years have been directed against [the disfavored group]…." *Id.*, at 239 (Murphy, J, dissenting).

Respectfully submitted,

s/ Paul D. Reingold (P27594)
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ACLU-MI Cooperating Attorney
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Dated: May 4, 2020

Proof of Service

On this date the above *amicus* brief, together with a motion for leave to file the brief, as well as the appearance of Paul D. Reingold, were served using the Court's ECF system, which provides same-day e-mail service to all counsel of record.

s/ Paul D. Reingold (P27594)
Co-counsel for *Amici Curiae*

Dated: May 4, 2020

INDEX OF EXHIBITS

1. Professional Advisory Board to the Coalition for a Useful Registry, List of Members (2020)

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3. Justice Johnson's Dissent in *State v Peterson-Beard*, 304 Kansas 192, 377 P3d 1127 (2016)

4. Karl Hanson, One Page Chart (showing low, medium, and high risk sex offenders' recidivism drop-off rates over time)

EXHIBIT 1

Professional Advisory Board to
the Coalition for a Useful Registry,
List of Members (2020)

Professional Advisory Board to the Coalition for a Useful Registry

Chair: William C. Buhl, J.D., 36th Judicial Circuit Court Judge, Van Buren County; Retired (For more information email mecklenberg@msn.com or call 269-716-0318)

Beth Berman, Psy.D., Licensed Psychologist; Child, Adolescent, Adult Psychotherapy; Relationship Therapy; Oakland County

Nic Bottomley, LMSW, Supervisor, Adolescent Sexual Offender Treatment Program (ATSOP) and Crisis Intervention Program (CIP), 17th Circuit Court, Kent County

Cheryl Carpenter, J.D., Adjunct Law Professor, Cooley Law School; Juvenile and Adult Defense Attorney; Wayne, Oakland, and Macomb Counties

***Charles Clapp, J.D.**, Juvenile Defense Attorney; Kent and Ottawa Counties

Cojanu, Kathleen, B.A. Psychology, Juvenile Probation Officer; Oakland County; Retired

Erin Comartin, MSW, Associate Professor of Social Work and Data Director at the Center for Behavioral Health and Justice Wayne State University School of Social Work; Oakland and Wayne Counties

***Lynn D'Orio, J.D., LPC,** Juvenile and Adult Defense Attorney, Former Board Member of the Criminal Defense Attorney's Association of Michigan; Washtenaw County

Anthony Flores J.D., Professor of Law, Cooley Law School; Former Criminal Sexual Conduct Unit Chief, Ingham County Prosecuting Attorney's Office; Ingham County

Stuart Friedman, J.D., Criminal Appellate Attorney; Past Chair Prison & Corrections Section of the State Bar; Board Member Criminal Defense Attorneys of Michigan; Metro Detroit Co-chair Amicus Committee, Criminal Defense Attorneys of Michigan; Former Board Member State Bar Appellate Practice Section; Contributing Author, Michigan Appellate Handbook

***Honorable Patricia Gardner, J.D.**, Juvenile and Family Court Judge, 17th Circuit Court, Kent County

David Griep, M.A. Counseling and Guidance, Workforce Development Program Manager, Kandu Inc. (Prisoner Re-entry Agency and Michigan Works! Service Provider); Ottawa County; Retired

Ronald Grooters, LMSW, ACSW, Juvenile and Adult Assessment and Treatment Provider; Owner and Director of Clinical Services, Homeward Bound Therapeutic Services; Past President of Michigan Chapter of the Association for the Treatment of Sexual Abusers, 2009-2018 (MI-ATSA); Past Senior Clinician and Team Leader, Wedgewood Christian Services; Kent County

Dr. James Henry, MSW, Ph.D., Victim Advocacy; Director of the Children's Trauma and Assessment Clinic (an interdisciplinary assessment clinic for abused/ traumatized children at Western Michigan University); Professor of Social Work, Western Michigan University, teaching

courses in child sexual abuse; Former Co-Chair of Kalamazoo Community Mental Health Board; formerly with Child Protective Services for many years; Former FIA caseworker; Kalamazoo County

Blair Johnson, J.D., Defense Attorney, Berrien County

Dr. Poco Kernsmith, MSW, Ph.D., Researcher and Professor of Family and Sexual Violence, Wayne State University School of Social Work; Wayne County

***Dr. Roger Kernsmith Ph.D**., Researcher and Professor of Criminology, Eastern Michigan University; Wayne and Washtenaw County

Doug Lewis, B.A., Family Studies; Program Director of New Dawn Homeless Shelter, Gladwin, MI; Former Youth in Transition Coordinator, State of Michigan, Department of Human Services, Bay and Arenac County

Jennifer Lynn, J.D., Defense Attorney, Ottawa County

Laura Marsh, LMSW, Visiting Professor and Criminal Justice Internship Coordinator, School of Criminal Justice, Grand Value State University; Retired Supervisor, Adolescent Sexual Offender Treatment Program (ATSOP) and Crisis Intervention Program (CIP), 17th Circuit Court, Kent County

Dr. Barry Mintzes, Ph.D., Psychologist; Adolescent and Adult Assessment and Treatment Provider; former Warden of Jackson and Kinross Prisons; former Chief of Psychiatric Clinic at Jackson Prison; Ingham County

Judi New, J.D., Educational Advocate for foster and delinquent youth with Michigan Children's Law Center; Guardian Ad Litem for foster children; Family Law Attorney; Past President of Learning Disabilities Association (LDA) of Washtenaw County

Jill Norbury-Jaranson, PsyD. LLP, Clinical Psychologist; Assessment and Treatment Provider, Private Practice in Oakland and Wayne County

***Brian Prain, PLLC,** Criminal Defense Attorney, Wayne County

***Dr. Gary Rasmussen, Ph.D.**, Clinical and Forensic Psychology; Juvenile and Adult Assessment and Treatment Provider; Founder and Past President of Macomb County Care House; Oakland and Macomb County

Susan Rogers, LMSW, , Director, Parare Counseling and Consulting, PLC. Providing counseling and consulting pertaining to health education, safety and vulnerability reduction for people with disabilities; Retired School Social Worker, Birmingham Public Schools; Developed and Implemented Health and Sexual Education Curriculum for Students with Special Needs; Oakland and Wayne County

Matthew Rosenberg, LMSW, Clinical Director, Rosenberg and Associates; Adult and Juvenile Assessment and Treatment Provider; Wayne, Oakland, Macomb, Livingston and Washtenaw Counties

Glenn Rutgers, M.A. Executive Development, Michigan Works! (Work Force Development Agency); Ottawa County; Retired

John Shafer, Ph.D. Behavioral Psychology and Doctorate of Divinity; Former Federal Law Enforcement Officer; Assessment/Treatment Provider for Juvenile and Adult Sex Offenders; Outpatient/ Inpatient Treatment (Dickerson Jail, Ryan Prison); Retired

Shannon Smith, J.D., Juvenile and Adult Defense Attorney, Wayne, Macomb, and Oakland County

***Ronald VanderBeck, Ph.D.** Forensic Psychologist, Human Resource Associates; Assessment and Treatment Provider; Kent County

Steven Vitale, J.D., Criminal Defense Attorney, Former Oakland County High Crimes Prosecutor, Oakland County

Karen Wickline, Ed.D., LLP, Forensic Psychological Assessment and Treatment for adult and juvenile sexual offenders at the Center for Assessment; Professor of Psychology at Macomb Community College; National Trainer for Correctional Counselors; Certified Juvenile Sexual Offender Counselor; MRT Group Therapy for Offenders; Former Clinical Supervisor at Oakland County Children's Village, supervising the juvenile sex offender treatment program

Jennifer Zoltowski, MS, LLP, Director, Center for Assessment; Conducts assessments for individuals involved with Child Protective Services; Former Clinical Supervisor at Oakland County Children's Village; Oakland County

* Consulting Members

Dated: April 3, 2020

EXHIBIT 2

Michigan Collaboration to End Mass Incarceration,
List of Member Organizations

The Following Organizations Are Members of MI-CEMI

American Civil Liberties Union (ACLU-MI)
ACTION of Greater Lansing
Advocacy, Re-Entry, Resource, Outreach
American Friends Service Committee
Ann Arbor Friends Meeting
Avalon Housing
A Brighter Way
Black Lives Matter - Lansing
Church of the Good Shepherd, United Church of Christ
Citizens for Prison Reform
Family Participation Program
Covenant V of the Episcopal Diocese of MI CRE
Episcopal Church of the Incarnation
Fair Chance
Friends of Restorative Justice of Washtenaw County
Healing Communities of Washtenaw County
Humanity for Prisoners
Interfaith Council for Peace and Justice
Just Leadership USA
League of Women Voters of Michigan
Living Water Ministries of West Michigan
McPherson & Heinen Associates
Metro Detroit Out 4 Life Coalition
Micah Center Beyond Prisons Advocacy Group
Michigan Chapter of Citizens United for Rehabilitation of Errants (MI-CURE)
Michigan Center for Youth Justice (MCYJ)
Michigan Citizens for Justice
Michigan League for Public Policy
Michigan Lifers Association
Michigan Prosperity Network
Michigan United
Michigan Women's Justice and Clemency Project
Moorish Science Temple of America #4
Mothers & Conscious Kings – Alger
NAACP #3218 Kinross
Nation Outside
National Association of Social Workers - Michigan Chapter
National Lifers of America – Chippewa

EXHIBIT 3

Justice Johnson's Dissent in *State v Peterson-Beard*,
304 Kansas 192, 377 P3d 1127 (2016)

Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
Henry PETERSEN–BEARD, Appellant.

No. 108,061.
|
April 22, 2016.

Synopsis

Background: Following guilty plea, defendant was convicted in the District Court, Saline County, Rene S. Young, J., of rape for having sexual intercourse with a 13–year–old girl when he was 19 years old and, after request was denied to find Kansas Offender Registration Act's (KORA) lifetime registration requirement unconstitutional, defendant was sentenced to 78 months' imprisonment with lifetime postrelease supervision and lifetime registration as a sex offender. Defendant appealed. The Court of Appeals, 2013 WL 4046444, affirmed. Defendant petitioned for review, which was granted.

Holdings: The Supreme Court, Stegall, J., held that:

lifetime registration requirement under KORA did not constitute punishment for purposes of applying Eighth Amendment prohibition against cruel and unusual punishment, overruling *State v. Redmond,* 304 Kan. 283, 371 P.3d 900, *State v. Buser,* 304 Kan. 181, 371 P.3d 886, and *Doe v. Thompson,* 304 Kan. 291, 373 P.3d 750, 2016 WL 1612872, and

lifetime registration requirement did not constitute punishment for purposes of state constitutional prohibition against cruel and unusual punishment.

Affirmed.

Johnson, J., filed dissenting opinion with which Beier and Rosen, JJ., joined as to the result.

****1142 JOHNSON, J., dissenting:**

I dissent from the majority's decision in this case and from the majority's declaration that it is overruling the decisions in *State v. Redmond,* 304 Kan. 283, 371 P.3d 900 (this day decided), *State v. Buser,* 304 Kan. 181, 371 P.3d 886 (this day decided), and *Doe v. Thompson,* 304 Kan. 291, 373 P.3d 750 (No. 110,318, this day decided), which I will hereafter collectively refer to as "Ex Post Facto cases."

The majority does not explain the unusual circumstance whereby the opinions in the September 2014 Ex Post Facto cases are being filed on the same day as the opinion in this September 2015 case that purports to overrule their holdings. I firmly believe that some explanation is warranted in the interests of clarity and transparency. Moreover, I want to assure that the defendants in the Ex Post Facto cases obtain the relief to which they are entitled.

The "overruled" Ex Post Facto cases dealt with the question of whether article I, § 10 of the United States Constitution—the Ex Post Facto Clause—prohibited the retroactive application of the 2011 amendments to the Kansas Offender Registration Act (KORA), K.S.A. 22–4901 *et seq.* An initial consideration was whether KORA was even subject to the Ex Post Facto Clause. The three cases were set together and heard on this court's docket on September 11, 2014.

At that time, and for some 3 months thereafter, a position on this court was open due to the appointment of our colleague, Nancy Moritz, to the United States 10th Circuit Court of Appeals. Consequently, the Chief Justice utilized his constitutional and/or statutory authority to assign a senior district court judge as the seventh member of this court to hear and decide cases coming before the court during the vacancy period, which included the September 2014 docket. See K.S.A. 20–2616(b) ("A retired justice or judge so designated and assigned to perform judicial service or duties shall ***212** have the power and authority to hear and determine all matters covered by the assignment."); see also Kan. Const. art. 3, § 6(f) ("The supreme court may assign a district court judge to serve temporarily on the supreme court."). Notably, our constitution does not restrict or limit the power and authority of a temporarily assigned justice nor does it restrict or limit the precedential effect of the decisions issued by a supreme court that includes a justice that is temporarily assigned. Indeed, the Chief Justice often announces at oral argument that a temporarily assigned jurist will be fully participating in the decision of the court.

As evidenced by the opinions that are now being publicly filed, a majority of the constitutionally constituted court hearing the Ex Post Facto cases voted to hold that KORA's statutory scheme, after the 2011 amendments, was so punitive in effect as to negate any implied legislative intent to deem it civil, so that it was subject to the Ex Post Facto Clause's prohibition on retroactive application. The decision specifically left intact all provisions of the 2011 iteration of KORA for any person who committed a qualifying offense after

July 1, 2011, the effective date of the 2011 amendments. In other words, the majority opinion in the Ex Post Facto cases did not hold KORA unconstitutional, but rather it held that the retroactive application of KORA's amendments was unconstitutional. The prohibitions against cruel and/or unusual punishment in our federal and state constitutions were neither raised as issues nor discussed by this court in the Ex Post Facto cases.

By August 2015, the opinion in *Thompson,* the lead Ex Post Facto case, was ready to be filed with the Clerk of the Appellate Court. By that time, the vacancy on this court had been filled and this case had been set on a docket to be heard by the newly constituted court the following month, September 16, 2015, *i.e.,* a year after the arguments in *Thompson.* Thereupon, notwithstanding that the outcome for the Ex Post Facto litigants would be unaffected by any subsequent ruling in another case, a majority of the Ex Post Facto court ordered that the opinions in those cases were to be held in abeyance pending the newly constituted court's hearing and resolution of Petersen–Beard's cruel and unusual punishment case.

Then, after a majority of the court in this case determined that ***213** it could overrule the holdings in the Ex Post Facto cases for all ****1143** future litigants—as disclosed in the majority opinion above—a majority of the Ex Post Facto court ordered that the release of the Ex Post Facto cases was to be further delayed until this *Petersen–Beard* opinion was ready to be filed. The apparent rationale for the delay was to make the holding in the Ex Post Facto cases applicable solely to the parties in those cases.

To be clear, this *Petersen–Beard* opinion does not change the result for the Ex Post Facto defendants, *i.e.,* John Doe in *Doe v. Thompson,* No. 110,318, 304 Kan. at 292, 373 P.3d 750; Joseph M. Buser in No. 105,982; and Promise Delon Redmond in No. 110,280. Likewise, Leonard D. Charles, whose case No. 105,148 was heard on the same docket as the Ex Post Facto cases, will be governed by the holding in his case. Plainly stated, all of those litigants won on appeal, and the KORA amendments cannot be applied to them. But they had to wait for many months—unnecessarily in my view—to reap the benefits of their respective wins. I find that to be a denial of justice.

Turning to the merits of this case, I begin by clarifying what is before us to be decided. The issue presented here was whether the KORA provision requiring Petersen–Beard to register as a sex offender for the rest of his life was unconstitutionally cruel and unusual punishment under the Eighth Amendment to the United States Constitution or unconstitutionally cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights. The Ex Post Facto Clause of article I, § 10 of the United States Constitution was not in play here. Moreover, the issue is not limited to retroactivity, but rather Petersen–Beard seeks to nullify KORA's lifetime registration provision for all offenders, both past and future. In other words, the issue in this case is not the same issue presented in the cases it purports to overrule, notwithstanding the possibility that the analyses might overlap in some respects.

Further, the question of whether KORA is subject to the cruel and unusual constraint of the Eighth Amendment to the United States Constitution was not presented to or decided in the Ex Post Facto cases. Consequently, the majority's assertion that its determination that KORA is not punitive for Eighth Amendment purposes ***214** requires the reversal of the prior Ex Post Facto cases is dictum. See *Law v. Law Company Building Assocs.,* 295 Kan. 551, 564, 289 P.3d 1066 (2012) (nobody bound by dictum, not even the court that issued it). If this case is to provide authority for the proposition that the Ex Post Facto Clause does not apply to KORA because the act is nonpunitive for both Eighth Amendment and Ex Post Facto purposes, then a subsequent case that presents that precise issue can make that determination. Accordingly, the litigants of that subsequent case could challenge the applicability of the federal circuit courts of appeal cases addressing the constitutionality of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* (2012), upon which the majority in this case relies to conflate the two types of cases.

Likewise, the *Thompson* dissent, adopted as the majority's rationale, presents string cites to federal circuit courts of appeal decisions that analyze the constitutionality of SORNA or other states' registration acts in light of those federal circuit courts' mandatory authority from the United States Supreme Court. While perhaps interesting, those citations are only tangentially connected to the issue before this court. Our task, as the *Kansas* Supreme Court, is to rule on the constitutionality of the *Kansas* registration act. A federal court's determination that a federal act is constitutional might be used as an analog to inform a state court's decision on its own laws, but state courts are not bound by any lower federal court decision, even on matters of federal constitutional law. As stated by a member of the United States Supreme Court:

> "The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Lockhart v. Fretwell,* 506 U.S. 364, 376, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (Thomas, J., concurring).

****1144** Ordinarily, any analysis of a Kansas legislative act would not begin with a consideration of merely persuasive federal authority when there are decisions of this court on point. If there is direct authority in this State, it is binding on the lower State courts and is ***215** entitled to the benefit of the doctrine of stare decisis in this court. In *Thompson,* the majority opinion began its analysis by discussing the direct authority of *State v. Myers,* 260 Kan. 669, 699, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118, 117 S.Ct. 2508, 138 L.Ed.2d 1012 (1997), which held that the disclosure provisions of a prior registration law—the Kansas Sex Offender Registration Act (KSORA)—were punitive in effect, precluding their retroactive application under the Ex Post Facto Clause. The State in *Thompson* had argued that *Myers* was overruled by the United States Supreme Court's decision in *Smith v. Doe,* 538 U.S. 84, 103–04, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). But that was not accurate, because *Smith* did not review the *Myers* decision and did not even consider the Kansas registration act. Rather, the *Smith* court held that the Alaska Sex Offender Registration Act (ASORA) was nonpunitive and not subject to the Ex Post Facto Clause. Accordingly, *Smith* is important only as a guide as to how the United States Supreme Court might view KORA for federal constitutional purposes; it is not direct, mandatory authority that KORA is nonpunitive.

The *Thompson* dissent obliquely recognized that *Smith* was not directly binding in that Ex Post Facto case when it stated that "the real question presented" was: "Are there convincing reasons to believe the United States Supreme Court would view KORA differently than it viewed the Alaska law in 2003 when it decided *Smith?* " *Thompson,* op. at 773, 304 Kan. at 331, 373 P.3d 750 (Biles, J., concurring in part and dissenting in part). Of course, the majority's recitation of that issue statement presents an incomplete picture in Petersen–Beard's case because of the State constitutional provision in play here. The United States Supreme Court does not have authority to interpret § 9 of the Kansas Constitution Bill of Rights. It is this court's view of KORA that will decide that issue, even if this court chooses to adopt a rationale consistent with the *Smith* majority. The majority must own that decision; it cannot hide behind federal decisions.

Setting aside for a moment the State constitutional question, the answer to the question posed by the *Thompson* dissent is *yes,* there are convincing reasons to believe that the United States Supreme Court, in 2016, would view the current version of KORA differently than it viewed ASORA in 2003, when it decided *Smith.* ***216** The majority in *Thompson* attempted to explain those reasons, and I will reiterate some of them here, albeit I do not intend to clip and paste the entire majority opinion into this dissent. In addition, I will present some points that were not explicitly made in *Thompson.*

March 5, 2016, marked 13 years since *Smith* was decided, and there are new justices now. Five of the justices involved in the *Smith* decision, *i.e.,* 55.56% of the Court, are no longer on the Court. Three of the five justices (60%) joining the majority opinion in *Smith,* upon which the *Thompson* dissent heavily relies, are no longer on the Court. Surely, the majority here, especially the *Thompson* dissenters, can appreciate the impact of a change in Court composition.

And not only are the new justices different, but they are younger, which might well make them more attuned to the digital age. For instance, the youngest member of the current court was about 21 years old when IBM introduced the PC (personal computer) in 1981, as compared to Chief Justice Rehnquist—a member of the *Smith* majority—who was approaching 60 years old when the personal computer revolution began to go mainstream. The *Smith* majority, authored by Justice Kennedy, who was 67 years old at the time, described Alaska's posting of registration information on the Internet as a passive system, akin to physically visiting "an official archive of criminal records," 538 U.S. at 99, 123 S.Ct. 1140.

In contrast, in *Riley v. California,* 573 U.S. ——, 134 S.Ct. 2473, 2491, 189 L.Ed.2d 430 (2014), a majority of the 2013 Term Supreme Court noted that ordinary citizens with smartphones can easily access vast amounts of data and that "a cell phone [can be] used to access data located elsewhere, at ****1145** the tap of a screen." 573 U.S. at ——, 134 S.Ct. at 2491. That data includes push notifications of sex offender registries and indiscriminate sharing of social

media. Certainly, if nothing else, a majority of the Court must now recognize that ubiquitous tweeting and other social media have changed the landscape of information sharing. Pointedly, Twitter did not exist until 3 years after *Smith* was decided. In short, I believe a majority of the current Supreme Court would be more attuned to the repercussions of Internet dissemination of a sex offender registry.

***217** In this State, *Myers* displayed a great deal of prescience. It held that despite how one might try to justify the disclosure provisions of KSORA, the repercussions visited upon Myers were "great enough ... to be considered punishment. The unrestricted public access given to the sex offender registry is excessive and goes beyond that necessary to promote public safety." 260 Kan. at 699, 923 P.2d 1024. *Myers* fretted that "[t]he print or broadcast media could make it a practice of publishing the list [of sex offenders] as often as they chose." 260 Kan. at 697, 923 P.2d 1024. Not only has that circumstance come to pass, but the unnecessary digital distribution of the sex offender registry has gone far beyond that imagined by the *Myers* court. In other words, the punitive effect on offenders is even greater now.

The explanation that the repercussions to which *Myers* referred arise from the fact that the offender was convicted in a public proceeding and the records of that conviction are public information is nonsensical. The whole purpose of the registry is to provide easy access to information that most people would not know. It is the wide dissemination of the information that causes the punitive effect. Moreover, the public record of conviction does not provide the wealth of current information about the offender that he or she must provide for the sex offender registry and keep updated. Public shaming is much more effective if the public knows where the offender lives, works, and/or attends school, as well as the make, model, and license number of the vehicle he or she drives.

Likewise, the attempted rationale that an Internet-based registry is merely the dissemination of accurate information is unpersuasive. An example of traditional public shaming referred to in *Myers* came from Nathaniel Hawthorne's *The Scarlet Letter* (Random House 1950) (1850), in which Hester Prynne's punishment for adultery required her to wear a scarlet "A" upon her dress. One could describe the information being conveyed by that scarlet letter as "accurate information." Yet, Hawthorne described its punitive effect as follows: " 'There can be no outrage ... against our common nature,—whatever be the delinquencies of the individual,—no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do.' " ***218** *Artway v. Attorney General of State of N.J.,* 81 F.3d 1235, 1265 (3d Cir.1996) (quoting *The Scarlet Letter,* 63–64). Further, one has to challenge the accuracy of the disseminated information when it does not differentiate between the extremely low-risk offenders and the extremely dangerous high-risk offenders. Ultimately, however, the point is that, despite the spin the majority would put on it, today's dissemination of sex offender registry information does resemble traditional forms of punishment.

In *Thompson,* we set forth KORA's onerous requirements and differentiated them from both *Smith* 's ASORA and the dissent's SORNA. It is unfathomable to me that any rational person could say with a straight face that being forced to comply with those Draconian terms and conditions of registration for the rest of one's life, under penalty of going to prison for a new felony, is not an affirmative disability or restraint on the offender. The majority quibbles over whether the required monetary payments due each quarterly reporting date is a fine or fee. But *Smith* described the intent-effects test as being in two parts, whereby the second step examines the "punitive ... purpose or effect." 538 U.S. at 92, 123 S.Ct. 1140. I submit that a substantial fee, even if its *intent* is to cover the government's cost of the registry, can have a punitive *effect* on the offender who might be living hand-to-mouth because of problems getting and maintaining employment.

Moreover, although the majority compares individual provisions of KORA to corresponding ****1146** provisions in SORNA, in the *Thompson* majority we cautioned that

> "it is important to keep in mind that it is the entire 'statutory scheme' that must be examined for its punitive effect. See *Smith,* 538 U.S. at 92 [123 S.Ct. 1140] (effects analysis requires the appellate court to 'examine ... the *statutory scheme'* [emphasis added]); *Myers,* 260 Kan. at 681 [923 P.2d 1024] (quoting *United States v. Ward,* 448 U.S. 242, 248–49, 100 S.Ct. 2636, 65 L.Ed.2d 742 [1980]) ('ask whether the "*statutory scheme* was so punitive either in purpose or effect" ' [emphasis added]). For instance, a particular registration requirement may not have the same punitive effect in a statutory scheme that permits a reduction in registration time for proven rehabilitation, as it does in a statutory scheme that precludes any individualized modifications."

Thompson, op. at 767, 304 Kan. at 320, 373 P.3d 750.

That distinction is particularly compelling when considering that SORNA allows an offender the opportunity to reduce his or her registration time, whereas under KORA there is no opportunity for ***219** relief from lifetime registration even for a completely rehabilitated offender. The punitive effect of being required to register in person quarterly might be mitigated if the requirement could be terminated when it was no longer necessary, rather than mandatorily continuing for a lifetime.

Perhaps the most compelling reason for the current Supreme Court to view KORA differently than the *Smith* Court viewed ASORA involves the last two factors discussed by the majority: whether the statutory scheme is rationally connected to a nonpunitive purpose; and whether the statutory scheme is excessive in relation to the identified nonpunitive purpose.

Smith analyzed ASORA against the nonpunitive purpose of public safety. The Court opined that a registration act need not be " 'narrowly drawn to accomplish the stated purpose,' " so long as "the Act's nonpunitive purpose is [not] a 'sham or mere pretext.' *Hendricks,* 521 U.S., at 371 [117 S.Ct. 2072] (KENNEDY, J., concurring)." *Smith,* 538 U.S. at 103, 123 S.Ct. 1140. *Smith* then determined that "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." 538 U.S. at 103, 123 S.Ct. 1140. The *Smith* majority then supported that ruling as follows:

> "The risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v. Lile,* 536 U.S. 24, 34[, 122 S.Ct. 2017, 153 L.Ed.2d 47] (2002), see also *id.,* at 33 [122 S.Ct. 2017] ('When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault' (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))." 538 U.S. at 103, 123 S.Ct. 1140.

The Court then determined that "[t]he duration of the reporting requirements is not excessive," because research on child molesters had shown that most of them do not reoffend within the first several years after release, but rather a reoffense may occur " 'as late as 20 years following release.' National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997)." 538 U.S. at 104, 123 S.Ct. 1140. But a recent investigation into the source of *Smith* 's seemingly compelling statistics calls into question their bona fides.

In *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const. Comment. 495 (2015), ***220** the authors Ira and Tara Ellman point out that Justice Kennedy, the author of the *Smith* majority, was also the author of a four-person plurality decision in *McKune,* which is *Smith* 's cited source for the "frightening and high" statistic. In *McKune,* Justice Kennedy wrote that the recidivism rate of untreated sex offenders " 'has been estimated to be as high as 80%,' " which he later referred to as " 'a frightening and high risk of recidivism.' " 30 Const. Comment. at 495–96 (quoting *McKune,* 536 U.S. at 33–34, 122 S.Ct. 2017). The source of the 80% statement—apparently taken from a reference in an *amicus* brief filed by the Solicitor General—was cited as the U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's* ****1147** *Guide to Treating the Incarcerated Male Sex Offender,* xiii (1988). Although that Practitioner's Guide was published by the Justice Department, its "Preface notes that its contents present the views 'of the authors and do[es] not necessarily represent the official position or policies of the U.S. Department of Justice.' " 30 Const. Comment. at 498 n. 11. The Practitioner's Guide cited a 1986 article in Psychology Today as the source of its claim. That mass-marketed magazine article—designed for a lay audience—contained the following bare assertion, without attribution or supporting reference: " 'Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do.' " 30 Const. Comment. at 498 (quoting Freeman–Longo & Wall, *Changing a Lifetime of Sexual Crime,* Psychology Today, March 1986, at 64). The author of the magazine article was a counselor who was touting his prison counseling program for sex offenders and whose "unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with [the counselor's] equally unsupported assertion about the lower recidivism rate for those who complete [the counselor's] program." 30 Const. Comment. at 498.

The article did not stop at challenging the factual support for *McKune's* "frightening and high" finding. It cited to studies utilizing accepted methodologies to support the proposition that the purported 80% risk of reoffending was way off base, both as a stand-alone

statistic for sex offenders and as a comparison to other offenders. "One recent study found that about 3% of felons with *no* known history of sex offenses commit one within 4.5 years of ***221** their release," whereas "[a]bout 97.5% of the low-risk offenders were offense-free after five years." 30 Const. Comment. at 502–04. In other words, the risk of recidivism within 5 years of release from prison for a low-risk sex offender (about 2.5%) is virtually identical to that of a released prisoner who was not convicted of a sex offense (about 3.0%).

Further, the sample group of the study *Smith* used to declare that reoffenses do not occur within the first several years of release, but rather "may occur 'as late as 20 years following release,' " 538 U.S. at 104, 123 S.Ct. 1140, consisted of "rapists and child molesters released from the Massachusetts Treatment Center for Sexually Dangerous Persons, established in 1959 'for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses.' " 30 Const. Comment. at 503 n. 29 (citing Prentky, Lee, Knight, & Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis,* 21 L. & Hum. Behav. 635, 637 [1997]). While the public might assume that everyone on the sex registry is a forcible rapist or molester of young children, that is simply not the reality, as evidenced by the facts of this case. But even for the offenders initially assessed as high-risk, the likelihood of reoffending decreases over time. "Those who haven't re-offended after fifteen years are not high-risk for doing so, regardless of their offense or their initial risk assessment." 30 Const. Comment. at 503.

The article recognized that human nature is such that, when faced with an immeasurable fear and strongly held belief, a person will tend to ignore or discount quantifiable facts. "The label 'sex offender' triggers fear, and disgust as well. Both responses breed beliefs that do not yield easily to facts." 30 Const. Comment. at 508. Yet, I must cling to the belief that the persons who have been privileged to serve on our nation's highest Court will yield to the facts and give a closer look at whether our statutory scheme is rationally connected to the nonpunitive purpose of public safety and whether its terms and conditions are excessive in relation to that public safety purpose. If they do, I submit that an objective analysis will disclose that, in the current version of KORA, public safety has crossed over the line and is now a "sham or mere pretext" for imposing additional punishment on the offender.

***222** The *Thompson* majority pointed out that KORA does not differentiate between the young immature adult whose indiscretion with a consenting and encouraging teenager has led to a qualifying conviction and the middle-aged confirmed and incorrigible rapist and pedophile. We said that mixing in low-or-no-risk offenders with the high-risk offenders created an overinclusive system where "[t]oo much [was] too little." *Thompson,* ****1148** op. at 770, 304 Kan. at 326, 737 P.3d 750. In other words, "[i]f the registry's main purpose is to let us monitor and warn people about those who committed violent, coercive, or exploitative contact sex offenses, we dilute its potential usefulness when we fill it up with people who never did any of those things." 30 Const. Comment. at 504.

We also pointed out in the *Thompson* majority that KORA's statutory scheme was also too underinclusive to be rationally related to the nonpunitive purpose of public safety. *Thompson,* op. at 770, 304 Kan. at 326, 373 P.3d 750. For the registry to provide effective public safety, it should notify the public of all persons known to have committed acts considered to be sex offenses. Yet, only persons *convicted* of a qualifying crime are required to register.

It is not uncommon for a prosecutor to entice a plea agreement from a defendant charged with a registration-qualifying sex offense by offering to amend the charge to a crime that will not require the defendant to register. Certainly, that circumstance dilutes the State's argument that nullifying KORA in any respect will leave the young children of this State defenseless—the State effects the same result through a plea agreement. But more importantly for our purposes, one would think that, if the legislature's true intended purpose for the registry was public safety, it would have prohibited prosecutors and courts from circumventing the public's safety through a plea bargain. The legislature has demonstrated that it knows how to do that for driving under the influence (DUI): "No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with [DUI] ... to avoid the mandatory penalties established by this section...." K.S.A. 2015 Supp. 8–1567(m).

Likewise, the registry would not include a person who has committed ***223** a qualifying sex offense but who avoided being convicted of the crime on some legal basis. For instance, an acquittal could follow the court's suppression of illegally obtained evidence. While the exclusionary rule will entice proper police

conduct in the future, the exclusion of the sex offender from the registry does not further its purpose of public safety. In another area deemed to be a civil regulatory statutory scheme, the Sexually Violent Predator Act, K.S.A. 2015 Supp. 59–29a01 *et seq.,* the legislature made a provision for the civil commitment of a qualifying person, even where that person was deemed incompetent to stand trial in his or her criminal case. K.S.A. 2015 Supp. 59–29a07(g). No similar procedure is in place under KORA, further rendering its public safety purpose suspect.

Given the foregoing, together with the other points made in the *Thompson* majority, I have every confidence that the United States Supreme Court would find that the current "statutory scheme [of KORA] ' "is so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." ' " See *Smith,* 538 U.S. at 92, 123 S.Ct. 1140. Accordingly, even under the issue framed by the *Thompson* dissent and adopted by the majority here, Petersen–Beard should prevail.

But even though that was the end of the analysis in *Thompson,* we have more to discuss in this case. The Kansas Constitution was not involved in *Redmond, Buser*, or *Thompson,* because our state constitution does not contain an ex post facto provision. It is involved here, however, because, in addition to the Eighth Amendment's prohibition against cruel and unusual punishment, our own constitution—in § 9 of the Kansas Constitution Bill of Rights—prohibits "cruel or unusual punishment." The majority recognizes that this court can independently interpret our own State constitution in a manner that extends greater protection to our Kansas citizens than the United States Supreme Court has provided under its interpretation of the United States Constitution. Then, it dismisses that proposition with the superficial rationale that "we generally have not done so" and "[w]e can find no ... reason to depart from our general practice." Op. at 1140–41.

I will not prolong this dissent with a discussion of the historical development of this court's practice of simply adopting federal constitutional ***224** interpretation for similar State constitutional provisions, or my opposition to such a practice. Suffice it to say that it has not always been that way. See Monnat & ****1149** Nichols, *The Loneliness of the Kansas Constitution,* 34 J. Kan. Ass'n Just. 10, 11 (September 2010) ("In its early opinions, the Kansas Supreme Court routinely interpreted the Kansas constitution as an independent document with force of its own.").

More importantly, even if we adopt the federal analytical model, we need not apply it to Kansas' statute in the same manner as the United States Supreme Court applied it to Alaska's statute. Indeed, after *Smith,* the Alaska Supreme Court considered the same statute in the same case with the same defendants, utilizing the same intent-effects test and *Mendoza–Martinez* factors to determine the same ex post facto issue, albeit under the Alaska state constitution. The state court found that its statute, ASORA, violated the Ex Post Facto Clause of the Alaska state constitution, concluding:

> "Because ASORA compels (under threat of conviction) intrusive affirmative conduct, because this conduct is equivalent to that required by criminal judgments, because ASORA makes the disclosed information public and requires its broad dissemination without limitation, because ASORA applies only to those convicted of crime, and because ASORA neither meaningfully distinguishes between classes of sex offenses on the basis of risk nor gives offenders any opportunity to demonstrate their lack of risk, ASORA's effects are punitive. We therefore conclude that the statute violates Alaska's ex post facto clause." *Doe v. State,* 189 P.3d 999, 1019 (Alaska 2008).

In the *Thompson* majority, we found it interesting that the Alaska court had cited with approval to *Myers,* even after the *Smith* decision. See *Doe,* 189 P.3d at 1017. We also noted that other states have found their sex offender registration statutes constrained by their state constitutions. See, *e.g., Wallace v. State,* 905 N.E.2d 371, 377–78 (Ind.2009); *Doe v. Dept. of Public Safety and Correctional Services,* 430 Md. 535, 547–48, 62 A.3d 123 (2013); *State v. Williams,* 129 Ohio St.3d 344, 347–49, 952 N.E.2d 1108 (2011); *Starkey v. Oklahoma Dept. of Corrections,* 2013 OK 43, ¶¶ 76–79, 305 P.3d 1004 (2013).

In short, even if we were not convinced that the United States Supreme Court would find KORA punitive, we can and should still find that it is so punitive in effect as to negate any pretended civil ***225** regulatory purpose under our State constitution. The citizens of this State are entitled to have their own Supreme Court interpret their own constitution in a logical, rational manner that is consistent with actual, not made-up, facts. Consequently, I would find that this matter should proceed to a determination of the cruel or unusual analysis.

* * *

BEIER and ROSEN, JJ., join Justice JOHNSON'S dissent as to the result.

See *Doe v. Thompson,* 304 Kan. 291, 373 P.3d 750 (No. 110,318, this day decided); *State v. Buser,* 304 Kan. 181, 371 P.3d 886 (this day decided); and *State v. Redmond,* 304 Kan. 283, 371 P.3d 900 (this day decided); see also *State v. Charles,* 304 Kan. 158, 372 P.3d 1109, 2016 WL 1612843 (2016) (No. 105,148, this day decided) (following *Doe, Buser, Redmond*; imposition of registration requirement for violent offender qualifies as punishment, entitling defendant to relief under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [2000]).

All Citations
304 Kan. 192, 377 P.3d 1127

EXHIBIT 4

Karl Hanson, One Page Chart
(showing low-, medium-, and high-risk
sex offenders' recidivism drop-off rates over time)