CASE NO. 15-1536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES, #1-5; MARY DOE,

Plaintiffs – Appellees,

-vs-

RICHARD SNYDER, Governor of the State of Michigan; COL. KRISTE ETUE, Director of the Michigan State Police, in their official capacities,

Defendants – Appellants.

On appeal from the United States District Court
for the Eastern District of Michigan

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Case Number: 15-1536 Case Name: *Does v. Snyder*

Name of counsel: Miriam Aukerman, Michael Steinberg, Kary Moss, Paul Reingold, William W. Swor

Pursuant to 6th Cir. R. 26.1, John Does 1-5 and Mary Doe
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 23, 2015 the foregoing document was served on all parties or their counsel of record through the MC/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Miriam J. Aukerman

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees request oral argument because Michigan's Sex Offender Registration Act affects tens of thousands of state residents, making a ruling on its constitutionality of significant interest to registrants, law enforcement, and the public. Oral argument will also be useful to the Court given the extensive record compiled by the parties below.

JURISDICTIONAL STATEMENT

Under 28 U.S.C. §1292(a)(1), this Court has jurisdiction to review the district court's interlocutory order granting an injunction to Plaintiffs.

STATEMENT OF ISSUES

1. Did the district court correctly hold that Michigan's Sex Offender Registration Act (SORA)[1] is unconstitutionally vague with respect to:

    a. SORA's geographic exclusion zones, which bar registrants from living, working or "loitering" within extensive unmarked areas, where the boundaries of those areas are unknown?

    b. SORA's criminalization of "loitering," where neither registrants nor law enforcement know what conduct constitutes "loitering"?

    c. SORA's reporting requirements that turn on the meaning of "regularly" or "routinely," where neither registrants nor law enforcement know how frequent activity must be to trigger reporting?

2. Did the district court correctly hold that registrants cannot be held strictly liable for non-intentional violations of SORA given that these violations do not involve inherently criminal acts, SORA imposes significant penalties, and SORA's provisions are so numerous, vague, and complex that even well-intentioned registrants cannot understand their obligations?

    Plaintiffs-Appellees say "yes."

    Defendants-Appellants say "no."

[1] The most recent iteration of SORA is attached as Exhibit A.

STATEMENT OF THE CASE

I. Overview of SORA

In 1994, when Michigan first created its sex offender registry, the registry was a private law-enforcement-only database. There were no regular reporting requirements. Most registrants were listed in the database for twenty-five years. Joint Statement of Facts (JSOF) ¶¶4-7, Doc. 90, Pg.ID# 3730.

Between 1994 and 2010, the legislature repeatedly amended SORA, transforming it into a system of supervision that affects almost every aspect of registrants' lives. Registrants were required to report an ever-expanding list of information and to appear in person quarterly. Photographs and personal information were posted to the internet. Geographic exclusion zones were added that severely restricted where registrants could live, work, or "loiter." In 2011, SORA was extensively amended to conform to the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §16901. Those amendments retroactively classified registrants into three tiers, with tier classification determining the frequency of reporting and the length of time a person must register. Additional in-person and "immediate" reporting requirements were also imposed. JSOF ¶¶9-26, Doc. 90, Pg.ID# 3731-35.

Plaintiffs were all classified as Tier III registrants and retroactively subjected to registration for life. Before 2011, almost three-quarters of those on the registry

were twenty-five-year registrants. After 2011, almost three-quarters were lifetime registrants. *Id.* ¶¶21, 285-93, Pg.ID# 3734, 3784-86.

Michigan has an offense-based, rather than a risk-based, registry. Everyone convicted of a "listed offense" must register. M.C.L. §§28.722-23. Plaintiffs cannot get off the registry, or have their tier level reduced, even if they prove they present no danger to anyone. JSOF ¶¶27-29, Doc. 90, Pg.ID# 3735-36.

Michigan's registry, which is the fourth largest in the country, has had between 40,000 and 49,000 registrants in recent years. Approximately 2,000 registrants are added yearly. *Id.* ¶¶213-15, Pg.ID# 3769.

II. The Plaintiffs

A. John Doe #1

In 1990, when Doe #1 was twenty, he attempted to rob a McDonald's, his former employer. His charges included kidnapping because he struck and threatened the manager's fourteen-year-old son who was in the restaurant. Doe #1 never engaged in any sexual conduct during the attempted robbery. He has not been convicted of any crime since, nor has he ever been accused of sexual misconduct. *Id.* ¶¶35-50, Pg.ID# 3737-39.

Twenty-five years ago when Doe #1 was convicted, Michigan did not have a sex offender registry. Today, however, his kidnapping conviction requires registration. M.C.L. §28.722(w)(ii). In 2011, Doe #1 was retroactively classified as a

Tier III registrant, subject to supervision for life. JSOF ¶¶51-55, Doc. 90, Pg.ID# 3739-40.

Because of the exclusion zones, Doe #1 could not live with his family when he was released from prison. He was repeatedly denied jobs, including garbage collection, because he is a registrant. He tried to set up a home renovation business but was forced to close it because many contracting jobs are in exclusion zones. *Id.* ¶¶912, 938-40, Pg.ID# 3944, 3949-50.

Doe #1 now works as a vocational services coach for disabled adults. He has two adult children and a toddler, and co-parents his fiancé's daughter. *Id.* ¶¶48-49, 941, Pg.ID# 3739, 3950.

B. John Doe #2

In 1996, when Doe #2 was eighteen, he had a sexual and romantic relationship with a fourteen-year-old girl. He pled guilty under the Holmes Youthful Trainee Act (HYTA), M.C.L. §762.11, a record-sealing statute for youthful offenders, to criminal sexual conduct III, which prohibits sex with a person under the age of sixteen. Doe #2's plea was based on the prosecutor's promise that his case would be dismissed and his records sealed. JSOF ¶¶60-71, Doc. 90, Pg.ID# 3741-43.

Doe #2 served in the active-duty military twice, suffered a traumatic brain injury in a grenade explosion, and receives disability benefits. He earned two

honorable discharges. He has a teenage daughter. *Id.* ¶¶79-81, 93, Pg.ID# 3744-45, 3747.

For nearly fifteen years Doe #2 lived without the burdens of sex offender registration. Around 2010, Doe #2 learned that he had retroactively become subject to SORA. In 2011, he was classified as a Tier III registrant, subject to supervision for life. Doe #2 was four years and one month older than his underage partner. Had the age difference been less than four years, he would not be subject to registration under SORA's "Romeo and Juliet" exceptions. *Id.* ¶¶76, 82-86, Pg.ID# 3744-46; M.C.L. §§28.722(w)(iv); 28.728(c)(14).

Doe #2's HYTA adjudication is not a conviction and does not appear on a background check. He has no other criminal history. But for the fact that he is listed on the registry, employers, landlords, and the public would be unaware of his sealed, youthful offense. JSOF ¶¶87-89, Doc. 90, Pg.ID# 3746. Even though Doe #2 has no criminal history, landlords, employers, and educational programs reject him because of the registry. As a disabled military veteran, Doe #2 would qualify for subsidized housing but is barred because he is a lifetime registrant. *Id.* ¶¶914-17, 942-43, 981-82, Pg.ID# 3944-45, 3950, 3960-61.

C. John Doe #3

In 1998, when John Doe #3 was nineteen years old, he had a romantic and sexual relationship with a fourteen-year-old girl, whom he believed was older. He

pled guilty under HYTA, pursuant to which his record was to be sealed. During his last year of probation, Doe #3 was one day late in completing his quarterly registration because he was on vacation and the police station was closed when he returned. As a result, his HYTA status was revoked and a conviction entered. *Id.* ¶¶98-99, 111-115, Pg.ID# 3748-51.

At the time of Doe #3's conviction, Michigan did not have a public, internet-based registry. In 2011, he was retroactively classified as a Tier III offender, and his registration period was extended from twenty-five years to life. Had the age difference between Doe #3 and his underage partner been less than four years, he would not be subject to registration under SORA's "Romeo and Juliet" exceptions. *Id.* ¶¶112-13, 120-21, Pg.ID# 3750, 3752; M.C.L. §§28.722(w)(iv); 28.728(c)(14).

Doe #3 works at his family's auto repair business. He and his wife, a schoolteacher, have three young sons. JSOF ¶¶117-19, Doc. 90, Pg.ID# 3751-52.

D. John Doe #4

In 2005, when Doe #4 was twenty-three, he had a sexual and romantic relationship with I.G., whom he met at an eighteen-and-over nightclub. He and I.G. married in June 2015. *Id.* ¶¶123-25, Pg.ID# 3752; Doe #4 Second Declaration, Doc. 116, Pg.ID# 6012.

When they first met, Doe #4 did not know that I.G. was 15. He assumed she was of-age because they met at an eighteen-and-over nightclub. After I.G. became

pregnant, Doe #4 was prosecuted. He first learned that I.G. was underage when he was questioned by police. He pled guilty to criminal sexual conduct III. JSOF ¶¶126-31, Doc. 90, Pg.ID# 3753.

Doe #4 has been fired repeatedly when employers learned he was on the registry, once due to an anonymous call and once when his sex offender registry photograph appeared in a newspaper that republishes such information. After losing his job, he lost his home to foreclosure and became homeless. When he was offered a different job, he could not accept because the new job was in an exclusion zone. *Id.* ¶¶919, 945-50, Pg.ID# 3945, 3951-52.

Doe #4 and his wife, I.G., are raising two children together, the daughter whose conception resulted in the criminal case, and a new baby. Even though I.G. works as a leasing agent, she could not find a home where the family could live together because many properties are in exclusion zones and others would not accept registrants. Doe #4 has been homeless, while I.G. and the children lived with her parents. Their house is near a school, and Doe #4 could not risk living there because he could not tell if it was inside the exclusion zone. Doe #4 also could not live with his mother or sister, both of whom were threatened with eviction when he stayed with them. *Id.* ¶¶134, 562-70, 921-26, Pg.ID# 3754, 3862-66, 3945-47.

Doe #4 received an anonymous death threat by mail – a print-out of his sex offender registry page with his eyes blacked out on the photo, and the handwritten message "You will die." *Id.* ¶997, Pg.ID# 3964-65.

Doe #4 was initially required to register for twenty-five years. In 2011, he was retroactively classified as a Tier III registrant, subject to supervision for life. *Id.* ¶¶132-33, Pg.ID# 3753-54.

E. John Doe #5

In 1979, when Doe #5 was twenty-one years old, he had sex with a seventeen-year-old woman. He said the sex was consensual, but she said it was not. He took the case to trial and lost. At that time Michigan did not have a sex offender registry. *Id.* ¶¶145-54, Pg.ID# 3756-57.

For over thirty years, Doe #5 was not required to register or comply with SORA. He could live where he wanted and was not required to report to the police. He was never charged with or convicted of a new sex offense. In 2011, after being convicted of illegally removing sheet metal from an abandoned building, Doe #5 was retroactively required to register for life as a Tier III offender pursuant to SORA's "recapture" provisions. M.C.L. §28.723(1)(e). He initially did not register, believing he should not be required to register for something that occurred in 1979. As a result, he was jailed for ninety days. JSOF ¶¶157-70, Doc. 90, Pg.ID# 3758-60.

After Doe #5 was added to the registry, he became subject to the exclusion zones and was forced to move out of his apartment, which was within 1,000 feet of a school. *Id.* ¶172, Pg.ID# 3761.

Doe #5 has a girlfriend, children, and grandchildren. *Id.* ¶174, Pg.ID# 3761.

F. Mary Doe

In 2003, while living in Ohio, Mary Doe had a sexual affair with a fifteen-year-old boy and was convicted of unlawful sexual conduct with a minor. At that time, Ohio's registration statute was risk-based rather than offense-based. As a result of a psychological evaluation, Ms. Doe was assigned the lowest risk level, which made her subject to annual address verification for ten years. Although Ohio has since moved to an offense-based registration scheme, the Ohio Supreme Court held that people like Ms. Doe, who received individualized risk-based assessments, cannot be retroactively reclassified under an offense-based scheme. In Ohio, Ms. Doe could not be required to register for more than ten years, nor be subjected to restrictions beyond those imposed in her initial registration order. *Id.* ¶¶177-90, Pg.ID# 3761-64.

In 2004, Ms. Doe moved to Michigan because her elderly parents, step-children, and grandchildren all live there. She was subject to twenty-five-year registration. In 2011, she was retroactively re-classified as a Tier III offender,

subject to lifetime registration. She lives with her daughter and husband. *Id.* ¶¶193-99, Pg.ID# 3765-66.

G. Risk Assessments Show That the Plaintiffs Are Unlikely to Reoffend.

Plaintiffs submitted unrefuted expert reports showing that, contrary to popular misperception, most people convicted of sex offenses do not recidivate. Fay-Dumaine and Levenson Expert Reports, Docs. 90-24, 90-25, Pg.ID# 4641-96; JSOF ¶¶301-371, Doc. 90, Pg.ID# 3787-3808. Sex offenders determined to be low risk through validated actuarial instruments are actually *less likely* to commit a new sex offense than a baseline comparison group of non-sex offenders are to commit an "out-of-the-blue" sex offense. Even for high-risk sex offenders, the likelihood of re-offending drops below the baseline risk of non-sex offenders over time. The risk for sexual offending is around three percent in the general male population. JSOF ¶¶305-11; 319; 347-57, Doc. 90, Pg.ID# 3789-90, 3792-93; 3800-04.

Dr. Fay-Dumaine conducted an actuarial risk assessment of Does #2-4, finding they currently have a five percent risk of recidivating, which, when they reach the age of thirty-five, will decrease to between three and four percent, and decrease further over time. Doe #1 could not be scored because he did not commit a sex offense. Doe #5 was not scored, as he intervened late in the litigation, and Mary Doe was not scored because the risk assessment tool used has not been validated for women. Ms. Doe was found to be low risk based on a clinical

assessment in Ohio. JSOF ¶¶188, 332-39, Doc. 90, Pg.ID# 3763-64, 3796-98; Fay-Dumaine Report, Doc. 90-25, Pg. ID# 4682-88.

III. Evidence on Geographic Exclusion Zones

Plaintiffs are prohibited from residing, working, or "loitering" within a "student safety zone," defined as "the area that lies 1000 feet or less from school property." M.C.L. §§28.733(f), 28.734, 28.735. "School property" means:

> a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:
>
> (i) It is used to impart educational instruction.
> (ii) It is for use by students not more than 19 years of age for sports or other recreational activities.

M.C.L. §28.733(e). "School" means "a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school." M.C.L. §28.733(d).

A first-time violation is a misdemeanor punishable by a year's imprisonment, and subsequent violations are felonies punishable by two years' imprisonment. M.C.L. §§28.734(2); 28.735(2).

A. Exclusion Zones Severely Limit Registrants But Do Not Decrease Recidivism.

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. JSOF ¶¶380-88, 911, Doc. 90, Pg.ID# 3810-14, 3943. For example, expert Peter Wagner produced a map showing that in Grand Rapids, Michigan, 46% of property parcels are off limits:

"School safety zones" in the city of Grand Rapids

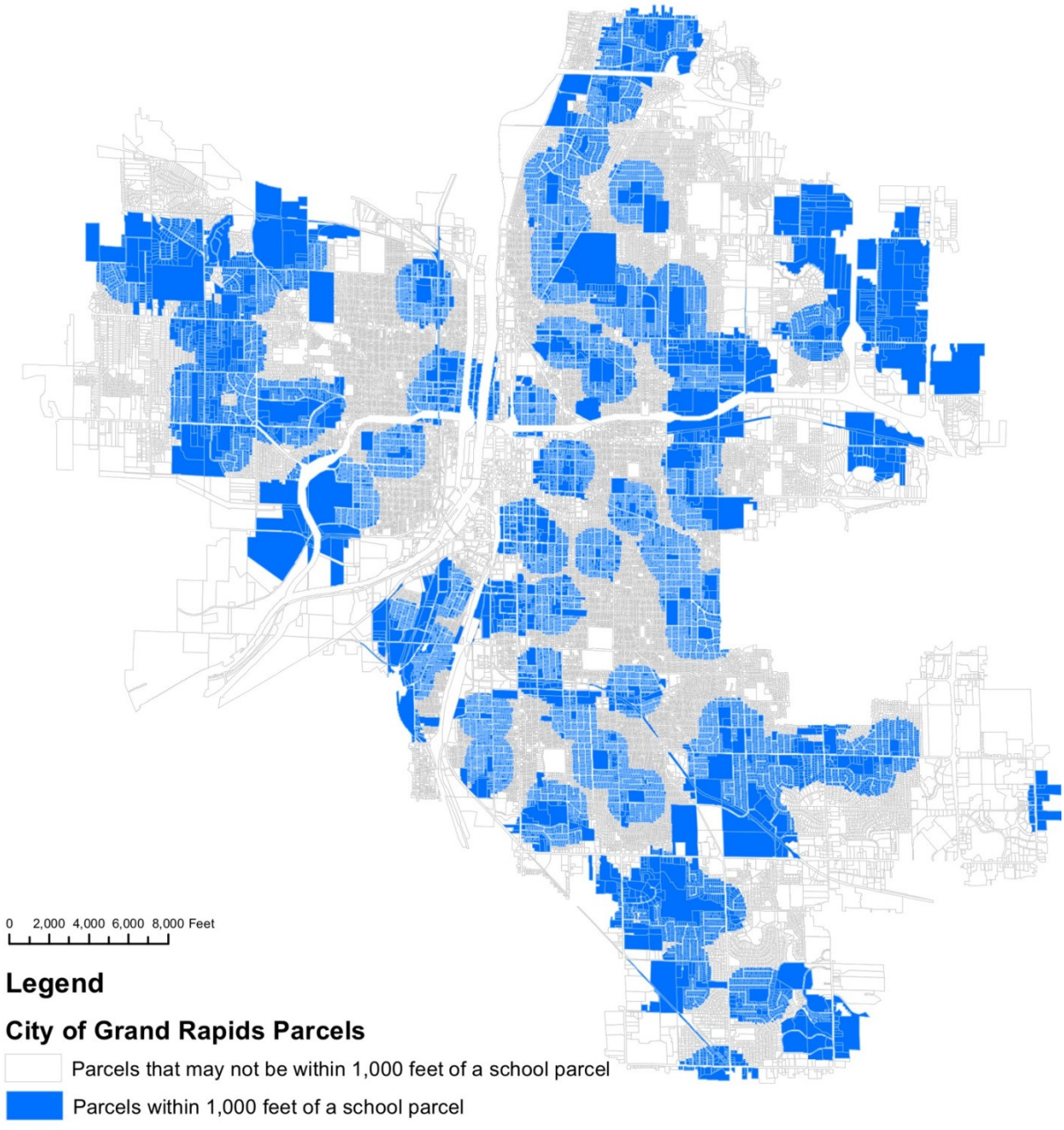


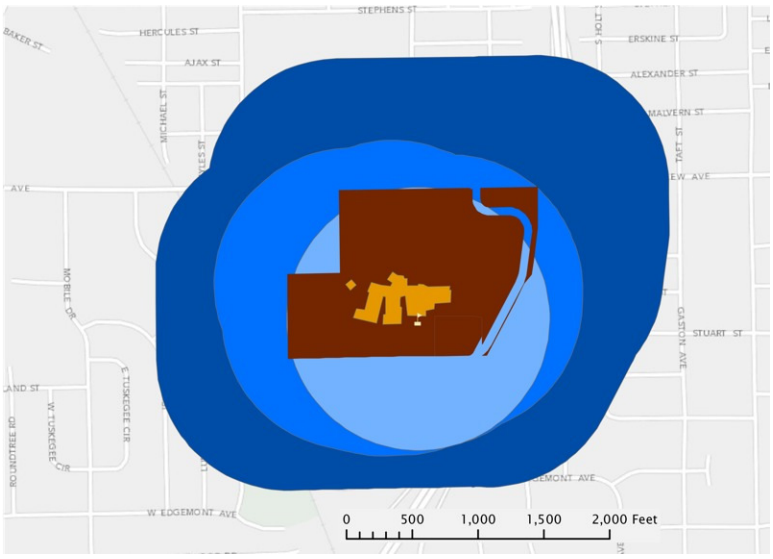
Figure 10.

JSOF ¶83, Doc. 90, Pg.ID# 3811, Wagner 2nd Report, Doc. 91-2, Pg.ID# 4756.

A 2013 Department of Justice study found that geographic restrictions in Michigan did not decrease but rather may have *increased* recidivism. Exclusion zones force many registrants to relocate, prevent them from living with family, and make it difficult to find work. Experts Jill Levenson and J.J. Prescott similarly report that residency restrictions lead to housing instability and are likely to *increase* recidivism. JSOF ¶¶497-507, Doc. 90, Pg.ID# 3846-49; Levenson Report, Doc. 90-24; Pg.ID# 4643-54; Prescott Report, Doc. 90-23; Pg.ID# 4613-24.

B. Exclusion Zone Boundaries Depend on Measurement Methods.

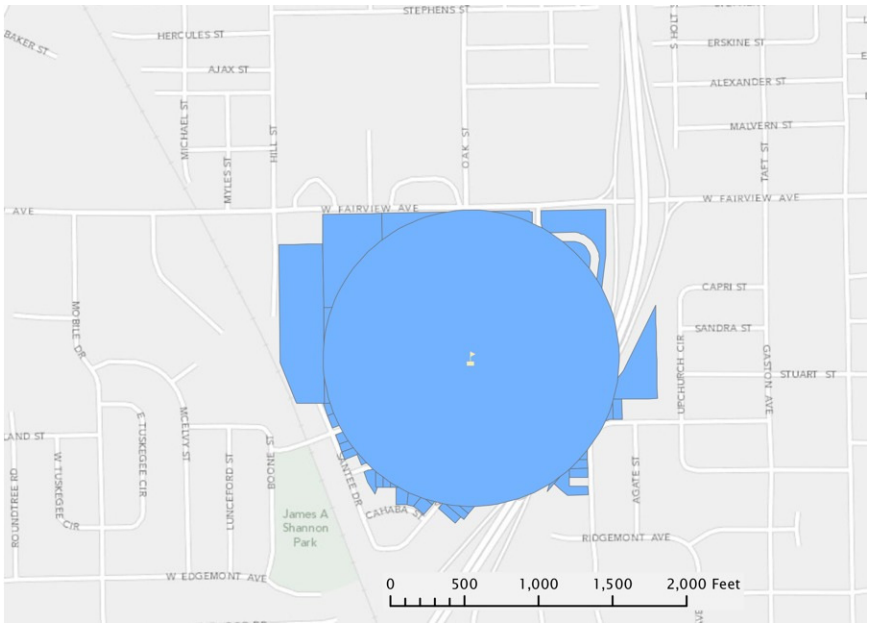
Wagner's expert report shows how different measurement methods dramatically affect the size and shape of exclusion zones. A 1,000-foot zone measured from a school property line is much larger than a zone measured from a single point at the school. The differential was 3.5 times larger in this example:



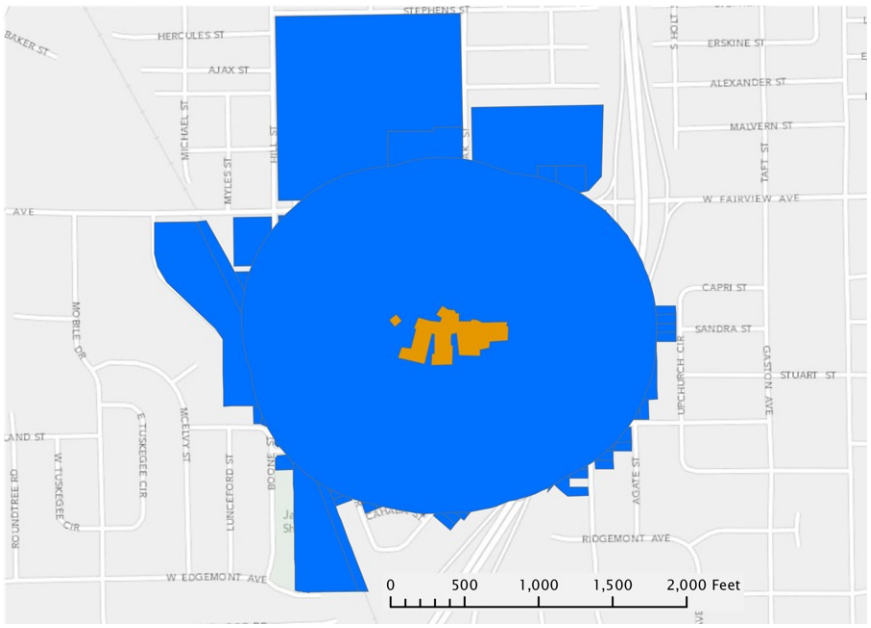
1,000-foot zones drawn around each of three nested protected areas: the school's entrance (school symbol), the school building (orange) and the school property (brown).

JSOF ¶¶389-97, Doc. 90, Pg.ID# 3815-19.

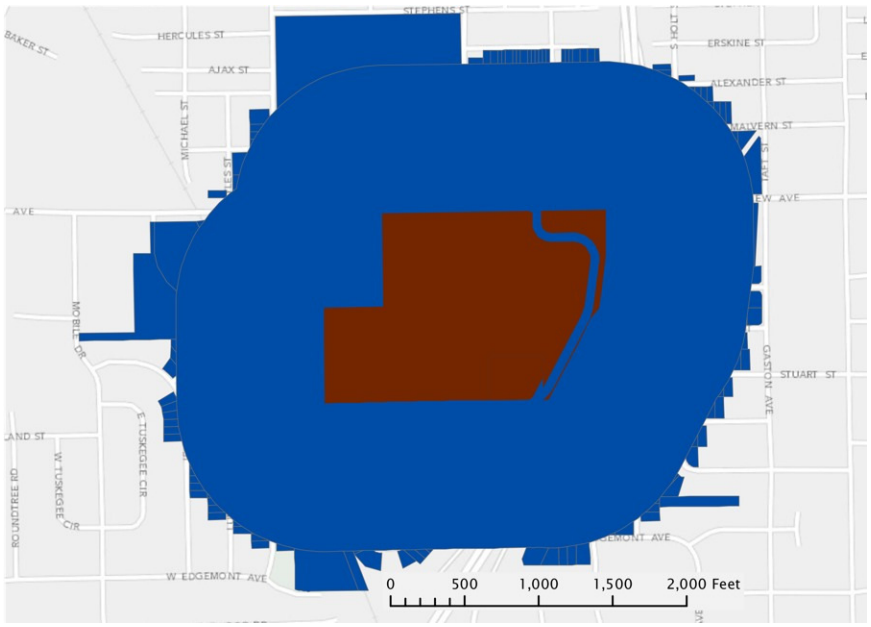
Exclusion zones are not necessarily shaped like simple circles. Measuring 1,000 feet from a single point produces a circle, but measuring 1,000 feet from/to a parcel boundary produces an irregular shape. As the figures below show, using parcel property lines creates oddly shaped exclusion zones, since the entire parcel becomes off limits if any part is within 1,000 feet of school property. The size of intersecting parcels affects the zone's total size. *Id.* ¶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. ¶398, Pg.ID# 3820-21.

C. Law Enforcement Does Not Know How to Measure Exclusion Zones.

The Michigan State Police (MSP) Registry Coordinator testified that Sex Offender Registration (SOR) staff "don't know if the registry is supposed to be from one parcel to a point or a parcel to a parcel or point to point." *Id.* ¶406, Pg.ID# 3824. The Enforcement Coordinator affirmed that "it would be the local law enforcement decision whether to measure from the building to the property line or whether to measure from the property line to property line" and that "there's so many law enforcement agencies in the state of Michigan you would have to individually contact every one to see what they are specifically doing." *Id.* ¶¶418-19, Pg.ID# 3827-28.

Plaintiffs' survey of law enforcement agencies showed these agencies were unable to answer, or provided varying answers to, questions about the zones, such as whether school sports fields are included or under what circumstances registrants may pass through zones. The SOR Enforcement Coordinator gave incorrect answers when asked whether the zones apply to universities or whether homeless people can access shelters within zones. *Id.* ¶¶701-07, Pg.ID# 3895-96.

MSP SOR staff "tried but [] could not find" a list of properties that qualify as "school properties," as defined by SORA. *Id.* ¶450, Pg.ID# 3835-36.

D. Zone Boundaries Are Effectively Unknowable.

Neither the boundaries of exclusion zones nor the property boundaries of schools or other parcels are marked by signs. Maps identifying exclusion zone boundaries are not available. Nor is there any available information explaining how to determine those boundaries. The SOR Enforcement Coordinator testified that he did not know how a registrant would know where school property lines are. *Id.* ¶¶440-43, 455-58, Pg.ID# 3833, 3836-37.

If exclusion zones are measured property line to property line, one must obtain parcel data to accurately map the zones, because as expert Wagner testified:

> [A]ssuming, and in Michigan this is a big assumption, assuming that... the statute is measured on a property line to property line basis, you have to know where property lines actually are.

Id. ¶¶444, Pg.ID# 3834.

The MSP SOR Unit has tried but failed to obtain parcel data needed for property-line to property-line measurement. *Id.* ¶¶431-33, Pg.ID# 3831. Expert Wagner tried repeatedly and unsuccessfully to obtain parcel data. Many jurisdictions did not have it and in others the cost of the data ran as high as six figures. After "several years and many pages [of correspondence]," Wagner was "eventually able to find parcel data for parts of just one county in Michigan." Despite having specialized software and mapping expertise, it took Wagner sixteen hours to map exclusion zones in one city. *Id.* ¶¶446, 462-68, Pg.ID# 3834-65, 3838-40. Wagner concluded:

> Exclusion zones in Michigan are not only unknowable for the average person on the street. They are also unknowable to trained geographers with special software, access to specialized data and expertise in criminal justice mapping.

Id. ¶469, Pg.ID# 3840.

Unlike police, who can work backwards from a given spot to decide if it is within an exclusion zone, registrants must comply with the zones in all their daily activities, whether going to a new work site or walking through a neighborhood with children in tow. *Id.* ¶¶470-71, Pg.ID# 3840-41.

IV. Evidence on "Loitering"

"Loiter" is defined as "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." M.C.L. §28.733(b). A first-time loitering

offense is a misdemeanor punishable by a year's imprisonment, and subsequent violations are felonies punishable by two years' imprisonment. M.C.L. §28.734(2).

The statutory definition of "loitering" contains no exception for observing one's own children. Defendants-Appellants "neither admit nor deny that plaintiffs' contacting or observing their own children constitutes 'loitering'." JSOF ¶587, Doc. 90, Pg.ID# 3869. Some MSP SOR staff testified that observing one's own child within an exclusion zone is "loitering," while others did not know. A survey of local law enforcement revealed that different agencies gave different answers when asked whether registrants can pick up their children at school, attend parent-teacher conferences, go to their children's sporting events, or take their children to school playgrounds on the weekend. When asked whether a registrant could attend his/her child's football games, the MSP Coordinator testified: "[S]ome prosecutors might say that's fine and others might say it's a violation." *Id.* ¶¶591-97, Pg.ID# 3870-72.

Plaintiffs, as well as Doe #3's wife, S.F., and Doe #4's wife, I.G., explain how the uncertainty about what "loitering" means affects registrants' parenting, especially involvement in their children's education. *Id.* ¶¶516-86, Pg.ID# 3851-69. For example, S.F. testified that Doe #3 does not attend parent-teacher conferences because that is a "gray area" in the law. "[C]an he be arrested for that?

I don't know." *Id.* ¶551, Pg.ID# 3859. Doe #3 fears prosecution if he attends his sons' football games. S.F. testified about the impact on their family:

> [M]y oldest son…plays football, he starts in all the games, and he sees dads there and he always asks me [why his dad is not there], and he gets emotional and he cries and he thinks his dad doesn't care. Then I have to see my husband crying…. I know nothing about football, but I'm learning because I have to live with this for the rest of my life.

Id. ¶¶554-55, Pg.ID# 3860-61. Similarly, Mary Doe testified that because of the "loitering" prohibition, she could not attend her daughter's eighth grade graduation or school plays, and that, despite repeated inquiries to law enforcement, "there has never been a clear answer" on whether she can drop off and pick up her child at school. *Id.* ¶¶576-86, Pg.ID# 3866-69.

Expert Richard Stapleton, the former Michigan Department of Corrections (MDOC) Legal Affairs Administrator, described situations where parole agents approved registrants to be in particular areas, but other law enforcement agencies said the registrants were illegally "loitering." *Id.* ¶849, Pg.ID# 3928.

V. Evidence on Reporting Requirements

SORA's reporting requirements, which are too extensive to be detailed here, are set out in the Summary of Obligations, Disabilities, and Restraints, Doc. 91-10, Pg.ID# 4822-4836. Willful violation of SORA's reporting requirements is a felony

punishable by up to ten years' imprisonment. Non-willful violation is a misdemeanor punishable by up to two years' imprisonment. M.C.L. §28.729.

Registrants must report "immediately" (within three days) when they engage in a wide range of activities, such as setting up a new email account, establishing any other "designations used in internet communications or postings," beginning or discontinuing to "regularly operate any vehicle," moving, beginning/discontinuing employment, traveling away from home for more than seven days, enrolling/ending enrollment as a student, or changing their appearance. Summary of Obligations §13, Doc. 91-10, Pg.ID# 4832-33; M.C.L. §§28.724a; 28.725(1); 28.725a(8).

Registrants must also report in person every three months on an even wider range of information, including all nicknames, telephone numbers "routinely used," any place of temporary lodging used for more than seven days, the license plate and registration of any vehicle "regularly operated" and its storage location, and the name and address of any person who has agreed to hire/contract with the registrant for services. Summary of Obligations, §§2, 12, Doc. 91-10, Pg.ID# 4824-26, 4831-32; M.C.L. §§28.725a; 28.727.

Plaintiffs stated that SORA's reporting requirements are more onerous than those they experienced on probation/parole, an observation confirmed by former MDOC Legal Affairs Administrator Stapleton. Registrants must report in person

within three days when certain information changes, must report more information than parolees/probationers, and must do so for life rather than for a set term of parole/probation. While parole/probation conditions are frequently relaxed over time and can be administratively challenged, SORA's requirements have increased over time and cannot be contested. JSOF ¶¶976-80, Doc. 90, Pg.ID# 3958-60.

A survey of law enforcement agencies and prosecutors' offices found that those surveyed often could not answer, or provided conflicting answers to, questions like when registrants must report an address change or whether registrants must report self-employment, online education, or travel. When asked how often a registrant could use a vehicle before having to report it, some respondents did not know, and others provided answers ranging from once or twice, to six or seven times, to "whatever is reasonable." *Id.* ¶¶700-03, 854-860, Pg.ID# 3894-95, 3930-33; Poxson and Granzotto Declarations, Docs. 91-8, 91-9; Pg.ID# 4799-4821.

MSP SOR staff similarly did not know how often registrants can "regularly use" an item before being required to report. The SOR Enforcement Coordinator testified that "each law enforcement agency might come to a different conclusion about what regular use means." JSOF ¶ 859, Doc. 90, Pg.ID# 3933. The SOR State Coordinator testified:

> Q: [I]f you don't know the answer to those questions, is there any information that is given to registrants that would allow them to know the answer to those questions?
>
> A: Not that I know of.

Id. ¶¶ 857, Pg.ID# 3932. SOR staff also could not answer questions about whether registrants must report volunteering at a church fundraiser, snow-shoveling for pay, or being assigned to a different job site for a week. *Id.* ¶856, Pg.ID# 3931-32.

Plaintiffs do not understand what they have to report. *Id.* ¶¶861-883, Pg.ID# 3933-37. For example, Doe #1, who drives vehicles from his employer's fleet, testified that he did not know whether "to register 36 vehicles [in the fleet] because there may come a time I may get van 27." *Id.* ¶861, Pg.ID# 3933.

Plaintiffs testified that they did not use the internet or limited their use because they were unsure what to report and could not get clear answers from law enforcement. *Id.* ¶¶640-93, Pg.ID# 3883-93. While ninety-two percent of adult Americans use email, less than half of all non-incarcerated Michigan registrants report having an email address or other internet identifier. Theoretically internet information could be used to identify a person contacting a minor online. However, In the years since internet reporting has been required, no police department has ever asked the MSP to do so. *Id.* ¶¶614-15, 638-39, Pg.ID# 3876-77, 3882.

VI. Evidence Relevant to Strict Liability and Vagueness

It is impossible to set out here all the terms Plaintiffs find confusing. They are listed in Plaintiffs' Response to Defendants' Interrogatory 11, Doc. 91-11, Pg.ID# 4839-44.

Plaintiffs testified that they do not understand their SORA obligations, cannot get answers, or get incorrect answers, from law enforcement, and severely limit their activities out of fear of inadvertently violating SORA. They cannot decipher the statute, and have difficulty keeping up with SORA's amendments, which have frequently changed and added to their obligations. Doe #3 stated:

> It seems like the state is more concerned with getting us on the list than telling us what the rules are. There is not [sic] manual or rulebook that we can look at to figure out what we can and cannot do. There aren't any public maps about where the student safety zones are either. It seems like if they want us to follow the rules, they should tell us what the rules are.

His wife stated that, as a result of this uncertainty, "we avoid anything that could potentially get him in trouble or arrested." Doe #4 explained, "[T]he consequence[] of making a mistake" about what SORA requires is "[p]rison, and I don't want to go to prison." JSOF ¶¶810-47, Doc. 90, Pg.ID# 3919-27.

When asked how registrants could determine whether activities like attending a child's football game, volunteering at a church picnic, or taking a job would violate SORA, the SOR Unit Manager testified that because different law enforcement agencies interpret SORA differently, registrants should contact their

local agency before engaging in such activities. This would, for example, require a registrant who applies for fifty jobs to contact multiple police departments to determine for each of the fifty jobs if the local police believe the job site is in an exclusion zone. Doe #3's wife explained that "anything we want to do we have to think of [the registry] first" to see whether that activity is permitted. *Id.* ¶¶798-800, Pg.ID# 3915-17.

MSP SOR staff testified that they refer questions about SORA to local law enforcement or local prosecutors, in part because "prosecutors make different decisions from county to county." During Plaintiffs' survey of law enforcement agencies, however, only twenty of fifty-two police agencies and only five of twenty-nine prosecutors' offices answered the surveyor's questions. Many local agencies did not know the answers, did not respond to repeat calls, or told the surveyors to contact the MSP for answers. *Id.* ¶¶787-802, Pg.ID# 3913-17.

Former MDOC Legal Affairs Administrator Stapleton testified that although he is an attorney and was professionally responsible for providing guidance to the MDOC on SORA, "[t]here's so many requirements within SORA it's hard to remember them all." He received many questions about SORA, but found that many "could not be appropriately answered because of the lack of adequate definition or guidance within SORA itself." He testified that there is "very much inconsistency" and a "great deal of disparity" in how SORA is applied across the

state. Although the MDOC has "sex offender specific" caseloads and agents who specialize in SORA's technical requirements, "even with intensive supervision, SORA's complexity and vagueness all but guarantee that parolees and probationers will still be unsure about what they can and cannot do." Registrants who are not under MDOC supervision do not have access to parole/probation officers to answer questions. *Id.* ¶¶709-24, Pg.ID# 3896-3901.

The only document provided to registrants that describes what information they must report is the "Explanation of Duties" Form, which is providing during initial registration. The MSP SOR manager testified that "[t]he statute has things in it that are not in this explanation of duties." *Id.* ¶¶765-75, Pg.ID# 3909-10. After the 2011 statutory changes, the SOR Unit sent a mass mailing notifying registrants of their tier level. The SOR Unit manager testified that the letters "weren't intended to be comprehensive about what the requirements were." *Id.* ¶¶783-86, Pg.ID# 3912-13.

SORA provides that law enforcement agencies "[s]eek a warrant for the individual's arrest if the legal requirements for obtaining a warrant are satisfied." M.C.L. §28.728a(1)(d). MSP training materials state: "[E]very non-compliant offender shall have a warrant." JSOF ¶899, Doc. 90, Pg.ID# 3941. The MSP does not provide guidance to local police on how to handle situations where registrants cannot comply due to age, disability, or other factors. *Id.* ¶890, Pg.ID# 3938-39.

Even when registrants do get advice from law enforcement about their obligations, reliance on that advice does not protect them from prosecution. For example, Stapleton testified about cases where parole agents approved registrants' activities, only to see prosecutors charge those registrants with SORA violations. *Id.* ¶¶847-49, Pg.ID# 3927-28; *id.* ¶848 (prosecution even though registrant was "doing exactly what [he] had been told to do by local law enforcement").

Between 1996 and 2013, over 10,000 felony and almost 7,000 misdemeanor charges were brought against Michigan registrants. SORA Charging Data, Doc. 91-21, Pg.ID# 4903-05. Since 2000, almost 8,000 people have been convicted of violating M.C.L. §28.729(2) (strict liability for reporting violations). Another 450 were convicted of violating M.C.L. §§28.734(2), 735(2) (strict liability for exclusion zones) between 2006, when the exclusion zones were enacted, and 2013. SORA Conviction Data, Doc. 91-22, Pg.ID# 4906-08.

Eighty-three different county prosecutors' offices prosecute SORA violations. Approximately 600 law enforcement agencies can access the SORA database. JSOF ¶¶696-98, Doc. 90, Pg.ID# 3894.

VII. Procedural History

Plaintiffs-Appellees concur in Defendants-Appellants' description of the proceedings below.

SUMMARY OF ARGUMENT

Defendants appeal the district court's holdings with regard to four parts of SORA: (1) the geographic exclusion zones; (2) "loitering"; (3) reporting provisions triggered by "regular" or "routine" use; and (4) strict liability. The court enjoined Defendants from enforcing these provisions against Plaintiffs, and ordered that SORA be construed consistently with the court's opinion.

The central question linking these four issues is whether registrants can be held criminally responsible when they do not know whether their conduct is illegal. Can the state constitutionally punish even inadvertent non-compliance with a statute that pervasively regulates almost every aspect of registrants' lives, but does not provide clear notice to either registrants or law enforcement of what actions or inactions are required or forbidden? The district court said no, holding that each of these four aspects of SORA is unconstitutional for essentially the same reason: the Constitution demands, but SORA fails to ensure, that people have fair notice of what conduct is a crime.

The district court should be affirmed because the Constitution limits criminalizing behavior that people cannot know is illegal or that is not inherently wrongful. Neither registrants nor law enforcement know what conduct is prohibited/required. Therefore, SORA's exclusion zones, "loitering" prohibition, and certain reporting requirements are unconstitutionally vague both on their face

and as applied. Finally, because SORA criminalizes a wide range of innocuous behavior and imposes serious penalties, holding registrants strictly liable for violations is unconstitutional.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 52, the district court's findings of fact "must not be set aside unless clearly erroneous." Fed.R.Civ.P. 52(a)(6). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous…even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985). Legal conclusions are reviewed *de novo*. *Pressman v. Franklin Nat'l Bank,* 384 F.3d 182, 185 (6th Cir. 2004).

ARGUMENT

I. The Constitution Requires People to Know, or Have Reason to Know, That Their Conduct is Illegal Before Criminal Liability May be Imposed.

A. The Constitution Requires Fair Notice Before Imposing Criminal Responsibility.

"Engrained in our concept of due process is the requirement of notice." *Lambert v. California*, 355 U.S. 225, 228 (1957). "Historically, our substantive criminal law…postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) (citation omitted). Because a person must be "free to

steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "[S]o far as possible the line [between criminal and non-criminal conduct] should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Notice is central to the void-for-vagueness doctrine. That doctrine reflects the principle that crimes must be sufficiently defined for both ordinary people and law enforcement to "understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The constitutional limits on strict liability likewise stem from our constitutional commitment to ensuring notice before imposing criminal responsibility: "the [notice] principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." *Lambert*, 355 U.S. at 228.

B. SORA Must Meet a Heightened Standard for Clarity and Notice.

The Supreme Court has explained that "[t]he degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement" depends on several factors: the severity of the sanction, the mental culpability required, and whether the prohibition affects constitutional rights. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

First, the Constitution has "greater tolerance of enactments with civil rather

than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99. "When criminal penalties are at stake…a relatively strict test is warranted." *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994). M.C.L. §§28.729, 28.734(2), 28.735(2).

Second, "[t]he constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea*." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). A "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499. But "in the absence of a scienter requirement…a statute is little more than a trap for those who act in good faith." *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998) (citations omitted). The SORA provisions enjoined by the district court are all strict liability offenses. M.C.L. §§28.725a, 28.729(2), 28.734-735.

Third, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Hoffman Estates*, 455 U.S. at 499. "An enactment imposing criminal sanctions or reaching a substantial amount of constitutionally protected conduct may withstand facial constitutional scrutiny only if it incorporates a high level of definiteness." *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999). SORA affects Plaintiffs'

constitutional rights, including free speech, parenting, travel, and occupation. JSOF §§XII, XIV, XIX, Doc. 90, Pg.ID# 3854-94, 3943-67.

Finally, a statute which is unclear in multiple respects is reviewed more stringently than one with a single defect: "Each of the uncertainties in the [statute] may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork." *Johnson v. United States*, 135 S.Ct. 2551, 2560 (2015).

C. Statutes That Do Not Provide Clear Guidance to the Public or Law Enforcement Are Void for Vagueness.

Three of the State's four claims on appeal concern vagueness. A statute is unconstitutionally vague if it (1) does not provide a person of ordinary intelligence notice of what conduct is prohibited, and (2) does not provide clear guidance for those who enforce its prohibitions. *Kolender*, 461 U.S. at 357. These requirements reflect the two primary goals of the void for vagueness doctrine: first, "to ensure fair notice to the citizenry," and second, "to provide standards of enforcement by the police, judges, and juries." *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995).

With respect to the first goal – notice to the citizenry – "a statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

> The dividing line between what is lawful and unlawful cannot be left to conjecture…The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

Id. at 393. Among the most fundamental protections of due process is that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961).

With respect to the second goal – clear law enforcement standards – the danger of unclear laws is that they give "law enforcement officers, courts and jurors unfettered freedom to act on nothing but their own preferences and beliefs." *United States v. Salisbury*, 983 F.2d 1369, 1378 (6th Cir. 1993). Thus, "the more important aspect of the vagueness doctrine is…the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quotation omitted). In the absence of "explicit standards," those who enforce the law are vested with the power to make decisions on an *ad hoc* and subjective basis "with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09.

II. The District Court Correctly Held that the Exclusion Zones Are Unconstitutionally Vague.

SORA criminalizes a wide range of otherwise innocent conduct (e.g., working, living, watching one's children) if registrants engage in that activity within the exclusion zones. M.C.L. §§28.734-28.735. Because such conduct is entirely legal outside the zones, both registrants and law enforcement must know where the zones are to know if the conduct is a crime.

Judge Cleland relied on the following facts to find that SORA's exclusion zone provisions fail to provide adequate notice of what conduct is criminal:

- Zones are not physically marked and registrants are not provided with maps demarking the zone boundaries.
- Michigan has not provided a list of school properties or parcel data to registrants or law enforcement.
- Registrants are unable to identify the zones because they lack the necessary software and data to map the zones.
- Tools such as Google Maps or phone books do not provide registrants with the necessary detail to accurately identify exclusion zones.
- Law enforcement itself does not have the means to calculate the exclusion zones, even if a uniform measurement method were adopted.
- "Because plaintiffs cannot know where the zones are, they must 'over-police' themselves, erring on the side of caution."

Opinion, Doc. 103, Pg.ID# 5887-90. Appellants have not shown these findings are clearly erroneous.

Judge Cleland held that the exclusion zones are unconstitutionally vague in

two ways: (1) "SORA does not provide sufficiently definite guidelines for registrants and law enforcement to determine from where to measure the 1,000 feet distance used to determine the exclusion zones"; and (2) "neither the registrants nor law enforcement have the necessary data to determine the zones even if there were a consensus about how they should be measured." *Id.* at Pg.ID# 5890. Both holdings are firmly grounded in the factual record and should be affirmed.

A. SORA Does Not Provide Clear Notice to Registrants or Adequate Guidance to Law Enforcement About How to Measure Exclusion Zones.

The size, shape and boundaries of exclusion zones depend entirely on how the 1,000-foot distance is measured. Different methods result in zones of different sizes and dimensions. A straight property-line to property-line measurement will result in an irregularly shaped zone that is much larger than the circular zone created by a straight point-to-point measurement. JSOF ¶¶389-402, Doc. 90, Pg.ID# 3815-24; Wagner Reports, Docs. 91-1, 91-2, Pg.ID# 4703-4771.

SORA does not specify how the zones should be measured, but simply defines the exclusion zones as the "area that lies 1,000 feet or less from school property." M.C.L. §28.733(f). "School property" can be a "building, facility, [or] structure," but can also be "real property." M.C.L. §28.733(e).

MSP SOR Unit staff testified that they have no idea whether the zones should be measured point to point or property-line to property-line; it is up to local

law enforcement to decide how to measure, and every local agency could measure differently.[2] The State provides absolutely no guidance to law enforcement, much less to registrants, on how to measure the zones. JSOF ¶¶403-424, 455-61, Doc. 90, Pg.ID# 3824-29, 3836-38. Criminal liability thus depends entirely on the measurement methods adopted by different officers, departments, or prosecutors.

Laws that provide inadequate guidance on distance are unconstitutionally vague. In *Belle Maer Harbor*, 170 F.3d 553, this Court struck down an ordinance imposing a "reasonable radius" requirement for certain marine devices. The Court found this language unclear, holding "due process requires at least sufficient exactness to prevent arbitrary enforcement and give notice of what an individual must do to comply." *Id.* at 559. "[N]either the enforcement officer nor the [marine] operator can ascertain by examining the language of the ordinance alone whether criminal sanctions will result from [different distances] around a protected object." *Id.*

Likewise, in *Cunney v. Board of Trustees*, 660 F.3d 612, 620-21 (2d Cir.

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[2] As Judge Cleland noted, the question may be even more complicated than determining whether to measure from the building or parcel boundary. Given that "school property" is defined as a "building, facility, structure or real property" used "to impart educational instruction" or "for sports and other recreational activities," it is unclear whether portions of school-owned property used for other purposes (e.g., school parking lots) should be excluded when identifying the starting point for measurement. M.C.L. § 28.733(e); Opinion, Doc. 103, Pg.ID# 5888-89.

2011), the court overturned a zoning ordinance that prohibited structures rising more than 4.5 feet above a river road. Although 4.5 feet is a measurable distance, the court found that it was "remarkably unclear" from what elevation the building height was to be measured. *Id.* The ordinance failed to give specific notice of how to design a compliant building and failed to provide objective standards for enforcement. *Id.* The village had multiple interpretations of how to measure height, allowing inconsistent, arbitrary enforcement. *Id.* at 622. SORA's 1,000-foot distance, like the 4.5 feet at issue in *Cunney*, may be numerically precise, but it is unconstitutionally vague because neither registrants nor police know from where to measure.

B. Neither Registrants Nor Law Enforcement Have the Data and Tools Needed to Identify Exclusion Zones.

One cannot eliminate the constitutional problem by adopting the State's preferred statutory interpretation, namely property-line to property-line measurement.[3] Such a measurement method is premised on knowing where parcel boundaries are for both schools and nearby properties. But neither law enforcement nor registrants know those boundaries.

Parcel boundaries, like exclusion zones, are not marked with signs. Parcel data are simply not available. Indeed, although the State claims that most

[3] *See* Opinion, Doc. 103, Pg.ID# 5889 (discussing problems with State's interpretation).

prosecutors measure property-line to property-line, the MSP's own computer program measures point-to-point because even Michigan's Geographic Information Systems Office has been unable to secure parcel data necessary for property-line to property-line mapping. JSOF ¶¶426-54, Doc. 90, Pg.ID# 3830-36. Moreover, even if registrants could somehow access parcel data, few, if any, have the necessary technical skills and specialized software to accurately map the areas that are off limits.[4] *Id.* ¶¶462-69, Pg.ID# 3838-40.

The State, local police, and registrants all lack a list of "school properties" covered by SORA. While it is sometimes obvious that a particular building is "school property," in many cases it is not. Mr. Poxson testified that he "never was able to get an answer" about whether a school bus garage triggers an exclusion zone. *Id.* ¶803, Pg.ID# 3917. Similarly, a registrant playing catch with his son may not know whether the ball field he is using is owned by the city or the school district. And even MSP SOR staff, when asked about a particular Grand Rapids educational program, did not know whether it would qualify as "school property" or "how a registrant could figure out if it's a school." *Id.* ¶¶412, 449, Pg.ID# 3826,

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[4] A statute can be vague even when precisely drafted if it is "written in a language foreign to persons of ordinary intelligence" and is so "technical or obscure that that it threatens to ensnare individuals engaged in apparently innocent conduct." *United States v. Caseer*, 399 F.3d 830, 836-37 (6th Cir. 2005). The complicated language of geographic mapping is a language which few registrants understand.

3835.

For registrants the task of identifying exclusion zones is made even more difficult because, unlike police who need only prove a zone violation at one specific moment in time, registrants must continuously know where zones are as they move about their daily lives. Every time registrants apply for a job, search for an apartment, or take their children to a playground, they must first determine if their activities will potentially take place in exclusion zones. As expert Wagner explained:

> Realistically the only way to [move about town without violating an exclusion zone] would be to map the entire city or county before you left the house and consult it constantly, or make your own smart phone app, but you really have to map everything in advance…For enforcement purposes the police can measure back from one point and it's very easy for them. For a person who's going about…daily life without having a map in advance it's impossible.

Id. ¶471, Pg.ID# 3841.

C. Appellants' Counter-Arguments Are Unavailing.

Faced with overwhelming evidence that both registrants and law enforcement do not know, and cannot figure out, where the exclusion zones are, Appellants offer a string of internally inconsistent arguments why this Court should countenance such confusion.

First, Appellants argue that SORA should be read to require property-line to property-line measurement because one trainer for the Prosecuting Attorneys

Association of Michigan believes prosecutors generally charge on that basis. At the same time, Appellants argue that the inability of registrants or law enforcement to do property-line to property-line measurement is immaterial, since zones can be identified through point-to-point measurement, e.g., by finding school addresses in a telephone book or Google Maps and then measuring a 1,000-foot radius. Appellants' Br. 30-33. If police or registrants measure zones using Defendants' proposed tools, however, the zones will not reflect Defendants' proposed legal standard.

Next, Appellants argue that Plaintiffs cannot complain about lacking maps or lists of school properties because "law enforcement itself does not have a map or list of [school] property." *Id.* at 32. In essence, Appellants argue that SORA is clear because it fails both parts of the vagueness test: the public has no notice of what is prohibited and the police have no standards for enforcement. The State cannot claim the law is clear because *neither* the public nor law enforcement know what the law means.

Appellants also seek to turn the rule of lenity into a sword, seeming to concede that SORA is vague, but suggesting that the remedy is to ignore that

vagueness until someone is prosecuted.[5] The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). Appellants interpret the rule not as limiting ambiguity, but as allowing it. In their view, ambiguous laws are permissible because once a person is prosecuted, the ambiguity can be resolved in the defendant's favor. But "[t]he Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999).

Appellants' argument that other states have SORA exclusion zones, Appellants' Br. 34, does not make Michigan's vague definition of Michigan's zones constitutional. *See Smith v. Goguen*, 415 U.S. 566, 582 n.31 (1974) (flag discretion statute unconstitutionally vague despite "the universal adoption" of similar statutes in all fifty states). While some courts have upheld exclusion zones, in none of those cases was there (1) a question about the starting point for measurement; (2) a factual record establishing that neither law enforcement nor

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[5] Appellants simultaneously reject Judge Cleland's invocation of that very rule, which he found supported a limited reading of "school property," so that zones are measured not from parcel boundaries, but from specific property used for instruction, sports, or recreation. Appellants' Brief at 31-34; Opinion, Doc. 103, Pg.ID# 5889.

registrants have the means to identify the zones; or (3) a prohibition on working or "loitering," which requires even greater day-to-day knowledge of zone boundaries than a prohibition on residing.

In *Doe v. Miller*, 405 F.3d 700, 708 (8th Cir. 2005), the court, while rejecting a facial challenge[6] to Iowa's exclusion zones, explained "[t]here is no argument…that the words of the statute are unconstitutionally vague." Here, by contrast, the record clearly demonstrates and the trial court found that SORA fails to provide sufficient guidance to either registrants or police. In any event, the Eighth Circuit's tolerance for "varied enforcement," *Miller*, 405 F.3d at 708, directly conflicts with the Supreme Court's admonition that clear guidelines for law enforcement to prevent inconsistent enforcement are the most important aspect of the vagueness doctrine. *Kolender*, 461 U.S. at 358.

In *United States v. Nieves-Casano*, 480 F.3d 597, 603 (1st Cir. 2007), a possession-of-a-firearm-in-a-school-zone statute survived a vagueness challenge because it required the defendant to *know* she was in a prohibited area "and this scienter requirement ameliorates any vagueness concerns." SORA, by contrast,

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[6] The *Miller* court explicitly noted the possibility of an "as applied" challenge by registrants who, despite the fact that many jurisdictions in Iowa provide maps, are unable to identify Iowa's zones. 405 F.3d at 706-08. *Miller* thus does not conflict with the district court's as-applied injunction in the case at bar. Opinion, Doc. 103, Pg.ID# 5945.

makes Plaintiffs strictly liable. The *Nieves-Casano* court also held that precise measurement was unnecessary to uphold the criminal conviction in that case because the defendant's offense was committed approximately 330 feet from a school, well inside the 1,000-foot zone. *Id.* at 604. Here, by contrast, Plaintiffs seek clarity in the form of prospective relief so they can go about their daily lives. Without knowing where the zones are, Plaintiffs face criminal prosecution – whether they are 330 feet or 999 feet from an undefined starting point – for engaging in utterly ordinary activities like taking their children to a playground, renting an apartment, or accepting a temporary assignment at a new job site.

Klein v. San Diego County, 463 F.3d 1029, 1039 (9th Cir. 2006), which concerned an ordinance prohibiting picketing less than 300 feet from a home, actually supports Plaintiffs' case. There the court explained "the language of the statute itself is not ambiguous" because (unlike here) the ordinance clearly required measuring from the dwelling, not the property line. *Id.* Moreover,

> the ordinance might nonetheless be unconstitutionally vague if it were impossible for the picketers to determine the 300-foot boundary with any precision and if the lack of a scienter element left picketers strictly liable for any violation. A law that requires a person to steer far wider of the unlawful boundary zone because of doubt about the boundary cannot stand.

Id. (citation omitted). Unlike *Klein*, where the district court made factual findings that picketers could estimate zones based on publicly-available maps, *id.*, the district court here found that maps, parcel data, and lists of school properties were

unavailable, and that neither Google Maps nor phone books "provide a registrant with the necessary detail" to measure zones. Opinion, Doc. 103, Pg.ID# 5889-90. Moreover, while it may be possible to estimate 300 feet, "1,000 feet is not a distance that the average person can accurately approximate visually," nor is it possible to measure 1,000 feet "with ordinary consumer tools." Wagner Expert Reports, Docs. 91-1, 91-2, Pg.ID# 4709-10, 4744-45.[7]

In sum, SORA's geographic exclusion zones are unconstitutionally vague because neither registrants nor law enforcement know where the zones are.

III. The District Court Correctly Held that the "Loitering" Prohibition is Unconstitutionally Vague.

SORA defines "loiter" as "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." M.C.L. §28.733(b). Judge Cleland found the provision unconstitutionally vague: one cannot know "whether a registrant may attend a school movie night where he intends only to watch the screen, or a parent-teacher conference where students may be present." Opinion, Doc. 103, Pg.ID# 5893. The law's ambiguity has led Plaintiffs to extensively curtail their conduct,

[7] Appellants' state-court cases are even less on point. Neither *People v. Conti*, 27 Misc.3d 453, 454-55 (N.Y. City Ct. 2010), nor *Mann v. State*, 603 S.E.2d 283 (Ga. 2004), concerned a vagueness challenge to distance/measurement requirements, but instead discussed, respectively, whether an ordinance prohibiting registrants from entering a school was sufficiently specific, and whether Georgia's SORA statute adequately defined the term "child care facility."

even avoiding activities like waiting for their children at school or talking to a niece or nephew. *Id.* at 5891.

In *Morales*, a plurality found the definition of "loiter" in an anti-gang ordinance unconstitutionally vague. 527 U.S. 41. "[T]he term 'loiter' may have a common and accepted meaning, but the definition of that term in this ordinance…does not."[8] *Id.* at 56. The Chicago ordinance criminalized remaining in a place "with no apparent purpose," and the Court asked how a person could know if she has "an apparent purpose." *Id.* at 56-57. Similarly here, a registrant cannot know what a "reasonable person" would conclude is the registrant's "primary purpose." M.C.L. §28.733(b). Plaintiffs' surveys show that "loitering" means different things in different jurisdictions. Even MSP staff disagree about what activities are illegal. JSOF ¶¶591-97, Doc. 90, Pg.ID# 3870-72.

The district court's decision is also supported by *Elonis v. United States*, 135 S.Ct. 2001, 2011 (2015), where the Supreme Court emphasized that criminal liability cannot be defined under a "reasonable person" standard. The Court reversed a conviction (for making threats) which was premised on how the

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[8] The Explanation of Duties Form simply says registrants may not "loiter," without any clarification or even recitation of the statutory definition. The Form does not explain that "loitering" under SORA is entirely different from "loitering" as commonly understood. Explanation of Duties, Doc. 92-12, Pg.ID# 5077.

defendant's web postings would be understood by a reasonable person: "Such a 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct – *awareness* of some wrongdoing." *Id.* (original emphasis). *See* Section V., *infra*.

A law that affects constitutionally protected conduct "may withstand facial constitutional scrutiny only if it incorporates a high level of definiteness." *Belle Maer Harbor*, 170 F.3d at 557. Appellants concede that they themselves do not know whether the statute prohibits registrant-parents from observing/contacting their *own* children within an exclusion zone (i.e., walking past a school with one's child in tow). JSOF ¶587, Doc. 90, Pg.ID# 3869. The district court was "unable to determine to what extent SORA infringes on Plaintiffs' right to participate in the upbringing and education of their children" because it is so unclear what the "loitering" ban prohibits. Opinion, Doc. 103, Pg.ID# 5918.

IV. The District Court Correctly Held that Certain Reporting Provisions Are Unconstitutional.

The district court enjoined reporting and "immediate" reporting requirements triggered by:

- "regularly" operating a vehicle, M.C.L. §§28.725(1)(g), 28.727(1)(j) (as-applied injunction on vagueness grounds), or "routinely" using a telephone, M.C.L. §28.727(1)(h) (facial injunction on vagueness and First Amendment grounds); and

- "routinely" using or establishing electronic accounts or designations, M.C.L. §§28.727(1)(f), (i) (facial injunction on vagueness and First Amendment grounds).

Opinion, Doc. 103, Pg.ID# 5945-46. Appellants appear to concede the validity of the internet-related injunctions. This Court should treat them as abandoned.

Judge Cleland's thorough analysis – which finds that neither MSP SOR staff nor local police know what "regularly" and "routinely" mean, and which explains why the enjoined provisions are unconstitutional under this Court's standards in *Belle Maer Harbor*,[9] – need not be repeated here. Opinion, Doc. 103, Pg.ID# 5894-5900.

Appellants' efforts to refute that analysis are unconvincing. Appellants claim registrants know using a car every day is regular use, while using a car only once is not. Appellants' Br. 40. That may be true, but registrants cannot know where, between these two extremes, they have crossed the line between non-reportable and reportable conduct, between permitted acts and criminal offenses. How often

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[9] In *Belle Maer Harbor*, 170 F.3d at 558, the government's position was "substantially undercut" by the enforcing officer's testimony that "[o]ne person's idea of a reasonable radius would vary from another's." *Id.* at 558. Here, too, the record shows, with respect to SORA enforcement, "every county's different." JSOF ¶795, Doc. 90, Pg.ID# 3915. *See also Forbes v. Napolitano*, 236 F.3d 1009, 1012 (9th Cir. 2000) ("dearth of notice and standards for enforcement arising from the ambiguity of the word[]…'routine'" rendered statute – which criminalized fetal tissue use except when necessary for "routine pathological examination" – unconstitutionally vague).

must Doe #1 drive each of the 36 vans in his employer's fleet before that van is reportable? JSOF ¶¶861, Doc. 90, Pg.ID# 3933.

Appellants cite *Déjà Vu of Nashville, Inc. v. Metro. Government of Nashville & Davidson County*, 466 F.3d 391 (6th Cir. 2006), but that was a First Amendment, not a vagueness, case, and the term "regularly depict" was never challenged. Appellants' reliance on *84 Video/Newsstand, Inc. v. Sartini*, No. 1:07-cv-3190, 2007 WL 3047207 (N.D. Ohio Oct. 18, 2007), is even more misleading. The statute there was not overbroad because it contained a definition of "regularly" that clarified the term. *84 Video/Newsstand, Inc. v. Sartini*, 455 Fed. App'x 541, 560-61 (6th Cir. 2011). Moreover, that statute had a *scienter* requirement, which "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Sartini*, 2007 WL 3047207, at *8.

Finally, Appellants simply fail to apply First Amendment scrutiny to M.C.L. §28.727(1)(h), despite the relationship of telephone use to protected communication. Opinion, Doc. 21-1, Pg.ID# 5894.

V. The District Court Correctly Held that SORA Cannot Make Registrants Strictly Liable for Innocent Conduct.

A. Because Appellants Failed to Address Strict Liability Below, They Cannot Do So Now.

Appellants did not address strict liability in the court below. Opinion, Dkt.103, Pg.ID 5907. This Court's function is "to review the case presented to the district court, rather than a better case fashioned after a district court's unfavorable order." *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005). An argument not made below is "forfeited on appeal." *Legg v. Chopra*, 286 F.3d 286, 294 (6th Cir. 2002). Issues "raised for the first time on appeal are not properly before the court." *J.C. Wyckoff & Associates, Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1488 (6th Cir. 1991).

B. SORA's Strict Liability Provisions Violate Due Process Because They Impose Harsh Penalties for Innocent Conduct.

> The contention that an injury can amount to a crime only when inflicted by intention…is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.'….It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention.

Morissette, 342 U.S. at 250-51, 274 (citations omitted). "While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements…, [t]he existence of a *mens rea* is the rule [], rather

than the exception." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435, 437 (1978) (citations omitted). Without a scienter requirement, laws – particularly vague laws – may be "little more than a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395.

To determine whether strict liability violates due process, courts must consider: (1) does "the offense involve[] conduct for which one would not ordinarily be blamed," *Stanley v. Turner*, 6 F.3d 399, 404 (6th Cir. 1993), and (2) is the penalty "relatively small"? *United States v. Wulff*, 758 F.2d 1121, 1124 (6th Cir. 1985).

1. SORA Criminalizes Innocent Activity.

"[T]he term 'strict liability' is really a misnomer," because even when allowing strict liability for so-called "public welfare offenses," the Supreme Court has "require[d] at least that the defendant know that he is dealing with some dangerous or deleterious substance." *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994). Thus while "strict liability" is sometimes permissible when regulating conduct that inherently presents a serious risk to public safety, the state cannot dispense with *mens rea* when criminalizing otherwise innocent behavior. *Compare, e.g.*, *United States v. Freed*, 401 U.S. 601, 609 (1971) (upholding strict liability for possession of unregistered grenades because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act"), *with Liparota v.*

United States, 471 U.S. 419, 426, 431 (1985) (unauthorized possession of food stamps could not be strict-liability offense because a "food stamp can hardly be compared to a hand grenade" and dispensing with *mens rea* would "criminalize a broad range of apparently innocent conduct").

In *Lambert v. California*, 355 U.S. 225 (1957), the Court held that a law requiring felons to register violated due process. Strict liability was unconstitutional because the law "punished conduct which would not be blameworthy in the average member of the community." *Id*. at 229. Because the defendant received no notice, she could not and did not know the otherwise innocent act of being in Los Angeles was a crime, and she was given no opportunity to comply upon learning of the registration requirement. *Id.* at 227-29.

This Court has likewise held:

> [W]here a criminal statute prohibits and punishes seemingly innocent and innocuous conduct that does not in itself furnish grounds to allow the presumption that the defendant knew his actions must be wrongful, conviction without some other, extraneous proof of blameworthiness or culpable mental state is forbidden by the Due Process Clause.

Stanley, 6 F.3d at 404; *see also United States v. Apollo Energies, Inc.*, 611 F.3d 679, 687 (10th Cir. 2010) (strict liability "constitutionally suspect" when applied to conduct that is "commonly and ordinarily not criminal"). Here, registrants cannot be held strictly liable for entirely innocent conduct without notice that this conduct is a crime.

Just recently the Supreme Court reemphasized that *mens rea* is required for "*each* of the statutory elements that criminalize otherwise innocent conduct." *Elonis*, 135 S.Ct. at 2011 (citation omitted) (original emphasis). In *Elonis*, which concerned a conviction for communicating threats, the "crucial element separating legal innocence from wrongful conduct" was whether the communication was threatening. *Id.* Therefore the defendant could only be guilty if there was some proof that he knew he was making threats. *Id.* Likewise, registrants must know that they are acting illegally – e.g., that they are in an exclusion zone – to be criminally liable.

SORA's exclusion zones make registrants strictly liable for the most innocuous conduct – being employed, living with one's wife and children, attending a child's graduation or birthday party, or even talking to one's nephew on school grounds. JSOF ¶¶523, 554-555, 560, 563, 577, 849, Doc. 90, Pg.ID# 3952-53, 3860-61, 3861-63, 3867, 3928; M.C.L. §§28.734, 28.735. Similarly, under SORA's reporting requirements, registrants are strictly liable if they fail to report (often immediately and in person) on an enormous range of ordinary activities – borrowing a telephone, joining a fantasy football league, establishing an on-line account for a child's homework, or traveling for more than seven days. JSOF ¶¶825, 867, 877, 659, Doc. 90, Pg.ID# 3922, 3934, 3936, 3887; M.C.L. §§28.724a, 28.725, 28.725a, 28.727, 28.729(2); *see* Obligations, Disabilities, and

Restraints Imposed by SORA, Doc. 91-10, Pg.ID# 4822-36. Many of these ordinary activities are also constitutionally protected because they involve free speech, parenting, travel, and work. "Persons do not harbor settled expectations that [constitutionally protected activities] are generally subject to stringent public regulation." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994) (scienter required because of statute's impact on constitutionally-protected rights); *see also Smith v. California*, 361 U.S. 147 (1959) (strict liability unconstitutional where "timidity in the face of [] absolute criminal liability" keeps people from exercising constitutionally-protected rights).

Judge Cleland found that SORA-criminalized activities, like "taking one's children to a park…or failing to report a new e-mail account are…not inherently blameworthy," nor are they "so obviously against the public interest that a reasonable person should be expected to know" they are regulated. Opinion, Doc. 103, Pg.ID# 5907-08 (*citing Liparota*, 471 U.S. at 433). Not only does SORA criminalize entirely innocent activities, but – as discussed above – it does so through provisions that are extraordinarily vague. Registrants can easily make mistakes in trying to comply, even with requirements that at first glance seem clear, such as quarterly, in-person registration. For example, the MSP SOR manager testified that because recent SORA amendments changed the months

when registrants must report, "there are going to be [registrants who] are confused." JSOF ¶844, Doc. 90, Pg.ID# 3926.

Finally, as Judge Cleland explained, "SORA imposes myriad restrictions and…requirements that affect many aspects of registrants' lives." These requirements are so ambiguous and numerous that it is "difficult for a well-intentioned registrant" to comply. Moreover, SORA's frequent amendments "make a knowledge requirement even more important to ensure due process of law." Opinion, Doc. 103, Pg.ID# 5908. The comprehensiveness of SORA's strict liability regime, which touches almost every aspect of registrants' lives, is unparalleled, except perhaps in the business world where corporations employ a phalanx of lawyers to achieve compliance. *Cf. Goguen*, 415 U.S. at 574 ("in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language"); *Hoffman Estates*, 455 U.S. at 498.

2. SORA Imposes Significant Penalties.

"[T]he penalty imposed under a statute has been a significant consideration" in determining whether strict liability is permissible. *Staples*, 511 U.S. at 616-17 ("'Crimes punishable with prison sentences...ordinarily require proof of guilty intent.'") (quoting Sayre, *Public Welfare Offenses*, 33 Colum.L.Rev. 55, 70 (1933)); *see also Morissette*, 342 U.S. at 256 (for strict liability offenses, "penalties commonly are relatively small").

In *Wulff*, this Court held that as a matter of constitutional due process a defendant could not be strictly liable for selling migratory bird parts because the penalty – two years' imprisonment or $2,000 – "is not, in this Court's mind, a relatively small penalty." 758 F.2d at 1125. SORA imposes that exact penalty. *See* M.C.L. §28.729(2) (two years or $2,000); §§ 28.734(2), 735(2) (second offense is felony, two years or $2,000).[10]

C. Appellants' Counter-Arguments Are Unavailing.

Appellants raise several arguments why SORA should fall within the "limited circumstances" where the Constitution allows an exception to the scienter rule.

First, Appellants complain that requiring willfulness makes it more difficult to convict, without explaining why it should be easy to punish people for innocent conduct. Appellants' Br. 19. Strict liability

> radically [] change[s] the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from

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[10] Appellants may try to distinguish *Wulff* as involving a felony. Exclusion zone violations can be felonies. M.C.L. §§28.734(2), 28.735(2). Moreover, the strict liability provision for reporting violations, M.C.L. § 28.729(2), is a "high court misdemeanor," an offense category under Michigan law that functions like a felony. *See People v. Delong*, 128 Mich. App. 1, 4 (1983) (offense labeled "misdemeanor" is treated like a felony because M.C.L. § 761.1(g) defines "felony" as offense punishable by more than one year of imprisonment).

> innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

Morissette, 342 U.S. at 263. Slam-dunk convictions are not a civic good, but rather "a manifest impairment of the immunities of the individual." *Id.*

Second, Appellants suggest that courts have rejected strict liability only as a matter of statutory construction, not constitutional law, and that this Court cannot read scienter into SORA because one Michigan court has interpreted one of SORA's penalty provisions as imposing strict liability.[11] Appellants' Br. 20-22. However, *Lambert* squarely held that a felon-registration ordinance, which California courts had read as imposing strict liability, "violate[s] the Due Process requirement of the Fourteenth Amendment" because it criminalized "conduct that is wholly passive." 355 U.S. at 227-28. Similarly, in *Wulff*, this Court held that a strict liability provision of the Migratory Bird Treaty Act "den[ied] a defendant his right to due process." 758 F.2d at 1124. Because the Sixth Circuit had previously held that "Congress did not intend for scienter to be an element of the offense," the *Wulff* court decided the question on constitutional, not statutory, grounds. *Id.* Moreover, the fact that courts routinely invoke the doctrine of constitutional

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[11] *People v. McFall*, __ N.W.2d __, 2015 WL 966039 (Mich. Ct. App. 2015), on which Appellants rely, is a statutory interpretation case, and does not address whether strict liability is constitutional. Moreover, *McFall* concerns only M.C.L. §28.729(2), and does not address whether the legislature intended M.C.L. §§28.734-35 (exclusion zones) to impose strict liability.

avoidance and interpret statutes as requiring *mens rea* only reinforces the constitutional rule. *See, e.g.*, *X-Citement Video*, 513 U.S. at 71 (1994); *Elonis*, 135 S.Ct. at 2009-10.; *Liparota*, 471 U.S. at 426.

Third, Appellants object to a "knowledge" requirement while at the same time claiming that registrants "know" their obligations because registrants get an "Explanation of Duties" Form and because one state witness said that SOR trainers recommend bringing registrants into compliance voluntarily before prosecuting them. Appellants' Br. 19.[12] But if all registrants know their duties and all law enforcement agencies seek voluntary compliance before bringing charges, then a *mens rea* requirement would never impede prosecution. A *mens rea* requirement does not prevent conviction when defendants know their obligations, but only when they do not.

That is precisely why strict liability is inappropriate. Not only has the state failed to notify registrants of all their obligations,[13] but the statute is so sweeping

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[12] Appellants' discussion of the record is misleading. MSP SOR staff testified that registrants must comply with SORA regardless of whether they receive an Explanation of Duties Form, and SOR training materials state: "Every non-compliant offender shall have a warrant." JSOF ¶¶771, 899, Doc. 90, Pg.ID# 3909, 3941. Thousands of people have been convicted under SORA's strict liability provisions. SORA Conviction Data, Doc. 91-22, Pg.ID# 4906-08.

[13] As the state's own witnesses concede, the Explanation of Duties does not cover all of SORA's requirements, nor does the state provide any information on

and so vague that it is likely impossible for the state to craft a comprehensible notice that would cover the thousands of actions and inactions that trigger criminal liability under SORA. Moreover, the state concedes that it does not have the data necessary to accurately map the thousands of exclusion zones.

Finally, Appellants point to several state court decisions allowing strict liability for failure-to-register offenses. Appellants' Br. 21. In fact, state courts are split on whether SORA statutes can dispense with *mens rea*. *See, e.g.*, *State v. Giorgetti*, 868 So. 2d 512, 518-19 (Fla. 2004) ("public welfare offense rationale did not apply" to SORA because "harsh penalties apply [and] there is the potential to punish otherwise law-abiding, well-intentioned citizens for reasonable behavior," in contravention of *Lambert*); *People v. Lopez*, 140 P.3d 106, 110-13 (Colo. App. 2005) (given gravity of penalty, strict liability cannot be imposed for registration violations); *State v. Young*, 535 S.E.2d 380 (N.C. App. 2000) (incompetent defendant could not be strictly liable for registration violation because due process requires ability to comply); *State v. Garcia*, 752 P.2d 34, 36 (Ariz. Ct. App. Div. 1 1987) (under *Lambert* criminal intent is necessary for

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exclusion zones. JSOF ¶¶455-69, 775-778, 781, Doc. 90, Pg.ID# 3836-40, 3910-11. *Compare* Explanation of Duties, Doc. 92-12, Pg.ID# 5075-77, *with* Summary of Obligations, Doc. 91-10, Pg.ID# 4822-36, *with* Grand Rapids Exclusion Zone Map, *supra*.

registration violation); *State v. Knowels* 643 N.W.2d 20 (N.D. 2002) (interpreting North Dakota registration statute as having *mens rea* requirement).

To the extent Appellants' cases suggest that the exception for so-called "public welfare offenses" applies because registrants are presumed dangerous,[14] that argument misunderstands the Supreme Court's strict liability jurisprudence. The "public welfare" exception is about inherently dangerous *conduct* (*e.g.*, handling hand grenades or firearms), not inherently dangerous *people*. *Liparota*, 471 U.S. at 433 (strict liability can only apply to offenses that involve "a type of *conduct* that a reasonable person should know is subject to stringent public regulation") (emphasis added). The fact that the defendant in *Lambert*, had a felony record did not somehow make her so dangerous that she could be prosecuted without clear notice that her otherwise innocent conduct was illegal. 355 U.S. 225.

Dispensing with *mens rea* for a class of people, rather than a type of conduct, eliminates the notice that is implicitly part of engaging in dangerous activities. It is that implicit notice that provides the analytical justification for finding that strict liability can comport with due process where inherently

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[14] The record below refutes the assumption that all registrants are dangerous. JSOF ¶¶301-71, Doc. 90, Pg.ID# 3787-808. *See also* Ira Ellman, *The Supreme Court's Crucial Mistake About Sex Crimes Statistics*, Casetext (July 28, 2015) (Exhibit B).

dangerous conduct is involved. In Appellants' view, however, registrants are strictly liable for a limitless range of acts and omissions because of who registrants are, not because those acts and omissions (*e.g.*, working, creating an email account, traveling) involve inherently dangerous conduct. There is no implicit notice that such activities are crimes. The logical extension of person-based rather than conduct-based strict liability is that the legislature could dispense with *mens rea* for any group the legislature considers potentially dangerous or unsavory: the young, the poor, or the mentally ill.

In any event, Appellants' cases simply concern the duty to report after being informed of that obligation. The question here, however, is whether registrants are strictly liable for SORA's much wider range of criminal acts and omissions. The State has not taken any steps to inform registrants of the exclusion zone boundaries, registrants cannot get accurate information about their obligations, and even reliance on the advice of police or correctional officials cannot insulate them from criminal liability. JSOF ¶¶765-850, Doc. 90, Pg.ID# 3909-29.

States have considerable latitude in defining offenses, but "there are obviously constitutional limits beyond which the States may not go." *Patterson v. New York*, 432 U.S. 197, 210 (1977); *see Liparota*, 471 U.S. at 424 n.6 (legislature must "act within any applicable constitutional constraints in defining criminal offenses"). Those constitutional limits have been exceeded here.

VI. SORA's Unconstitutionally Vague Provisions Are Facially Invalid.

The district court was correct in holding that the exclusion zones, the "loitering" prohibition, and the specified reporting requirements are unconstitutionally vague. Indeed, they are unconstitutional not simply as applied, they are unconstitutional on their face.[15]

The district court implicitly found the enjoined provisions unconstitutional with respect to all registrants, not just Plaintiffs. *See* Opinion, Doc. 103, Pg.ID# 5890 ("SORA does not provide sufficiently definite guidelines for *registrants*" to identify exclusion zones); Pg.ID# 5894 ("'loiter' is sufficiently vague as to prevent

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[15] In affirming the district court's holding that these provisions are unconstitutionally vague, this Court should address whether they are facially invalid. In *Springfield Armory v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994), when the district court had held that an ordinance banning assault weapons was unconstitutional as applied, on appeal this Court held that the proper analysis was to hold the ordinance unconstitutional on its face. Because "[n]othing in the ordinance provide[d] sufficient information to enable a person of average intelligence to determine" whether a possible gun purchase is illegal, the ordinance was facially invalid, not merely "vague as applied to a number of specific weapons." *Id.* at 254. Here, as with the gun purchases in *Springfield Armory*, SORA does not enable people of average intelligence to know the boundaries of exclusion zones, what constitutes "loitering," or which "regularly" or "routinely" used items they must report. Accordingly, a facial review – not merely "as applied" analysis – is required.

A separate question is whether, given that the provisions are facially unconstitutional, the district court should have enjoined the state from enforcing them under any circumstances, rather than merely as applied to Plaintiffs. Because Plaintiffs are not appellants here, this Court may choose to defer considering whether the actual injunction should have been broader until the Plaintiffs appeal after final judgment.

ordinary people using common sense" from knowing what conduct is covered); Pg.ID# 5900 (SORA "leaves *registrants of ordinary intelligence* unable to determine when the reporting requirements are triggered") (emphasis added).

As Judge Cleland recognized, courts have issued somewhat inconsistent statements regarding when unconstitutionally vague laws should be held invalid on their face rather than as applied. Opinion, Doc. 103, Pg.ID# 5885. *See also Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252-53 (6th Cir. 1994) ("At times the [Supreme] Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application.") (citations omitted).

However, the Supreme Court recently clarified that vague criminal laws should be facially invalidated. *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015). The Court struck down a sentencing enhancement provision triggered by conduct involving "serious potential risk of physical injury to another." The fact that some conduct clearly falls within the statute's ambit did not save the statute from facial invalidation. *Id.* at 2560-61. "[A]lthough statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some

conduct that clearly falls within the provision's grasp." *Id.* (original emphasis). The Court explained that making a facial challenge dependent on whether a statute is "vague in all its applications" is a "tautology: If we hold a statute to be vague, it is vague in all its applications[.]" *Id.* at 2561. Likewise here, because SORA is unconstitutionally vague, it is unconstitutionally vague for all registrants, not merely the named Plaintiffs in this case.[16]

Even without *Johnson*'s clarification, facial invalidation would be appropriate because SORA has three features that have long allowed for facial challenges: (1) it is a criminal law; (2) there is no *mens rea* requirement; and (3) it covers constitutionally protected conduct.[17] *See Morales*, 527 U.S. at 55 (facial attack permissible for criminal law containing no *mens rea* requirement that

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[16] Some pre-*Johnson* cases reject facial challenges on the grounds that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 494-95. But that line of cases would not apply here, even absent *Johnson*, because Plaintiffs have "establish[ed] that the statute is vague as applied to [their] particular case, not merely that the statute could be construed as vague in some hypothetical situation." *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2002).

[17] *See* Opinion, Doc. 103, Pg.ID# 5884 (applying exacting scrutiny because SORA affects fundamental right to parent). Plaintiffs contend that SORA also implicates registrants' fundamental right to travel and work. First Amended Complaint, Doc. 46, Pg.ID# 870-73, 874-77, 896-97. Facial invalidation does not turn, however, on this Court's conclusions about SORA's impact on constitutional rights. While impact on constitutionally protected rights is a sufficient criterion for facial invalidation, it is not a necessary one. *Springfield Armory*, 29 F.3d at 254.

infringes on constitutionally protected rights); *Kolender*, 461 U.S. at 358 n.8 (facial challenge is permitted if law imposes criminal penalties, and reaches a substantial amount of constitutionally protected conduct); *Belle Maer Harbor*, 170 F.3d at 557 ("even in cases not involving First Amendment rights, we have recognized that courts may engage in facial analysis where the enactment imposes criminal sanctions"); *Peoples Rights Org.*, 152 F.3d at 533-34 (in deciding whether a vague law is subject to facial invalidation, court should look to nature of enactment, including whether "criminal penalties are at stake" and "whether the statute contains a scienter requirement"); *Springfield Armory*, 29 F.3d at 252 ("a criminal statute may be facially invalid even if it has some conceivable application").

Accordingly, the district court's decision should be affirmed not only on the basis that those provisions are unconstitutional as applied, but also because they are unconstitutional on their face.

CONCLUSION

The district court's injunctions should be affirmed, and this Court should hold that the SORA provisions at issue are facially invalid.

Respectfully submitted,

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Dated: September 23, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word counting feature of counsel's word processing programs shows that this brief contains 13,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(A)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on September 23, 2015, I served this brief on all counsel of record via the Court's ECF system.

s/ Miriam Aukerman
Miriam Aukerman (P63165)
Attorney for Appellees

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EXHIBIT A

Michigan Sex Offender Registry Act
MCL 28.721 *et. seq.*

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.721 Short title.

Sec. 1. This act shall be known and may be cited as the “sex offenders registration act”.

History: 1994, Act 295, Eff. Oct. 1, 1995.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.721a Legislative declarations; determination; intent.

Sec. 1a. The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

History: Add. 2002, Act 542, Eff. Oct. 1, 2002.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.722 Definitions.

Sec. 2. As used in this act:

(a) "Aircraft" means that term as defined in section 2 of the aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.2.

(b) "Convicted" means 1 of the following:

(*i*) Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses, including, but not limited to, a tribal court or a military court, and including a conviction subsequently set aside under 1965 PA 213, MCL 780.621 to 780.624.

(*ii*) Either of the following:

(A) Being assigned to youthful trainee status under sections 11 to 15 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11 to 762.15, before October 1, 2004. This sub-subparagraph does not apply if a petition was granted under section 8c at any time allowing the individual to discontinue registration under this act, including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on and after that date.

(B) Being assigned to youthful trainee status under sections 11 to 15 of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.11 to 762.15, before October 1, 2004 if the individual is convicted of any other felony on or after July 1, 2011.

(*iii*) Having an order of disposition entered under section 18 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18, that is open to the general public under section 28 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.28, if both of the following apply:

(A) The individual was 14 years of age or older at the time of the offense.

(B) The order of disposition is for the commission of an offense that would classify the individual as a tier III offender.

(*iv*) Having an order of disposition or other adjudication in a juvenile matter in another state or country if both of the following apply:

(A) The individual is 14 years of age or older at the time of the offense.

(B) The order of disposition or other adjudication is for the commission of an offense that would classify the individual as a tier III offender.

(c) "Custodial authority" means 1 or more of the following apply:

(*i*) The actor was a member of the same household as the victim.

(*ii*) The actor was related to the victim by blood or affinity to the fourth degree.

(*iii*) The actor was in a position of authority over the victim and used this authority to coerce the victim to submit.

(*iv*) The actor was a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person was enrolled.

(*v*) The actor was an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person was enrolled, or was a volunteer who was not a student in any public school or nonpublic school, or was an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor used his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(*vi*) That other person was under the jurisdiction of the department of corrections and the actor was an employee or a contractual employee of, or a volunteer with, the department of corrections who knew that the other person was under the jurisdiction of the department of corrections and used his or her position of authority over the victim to gain access to or to coerce or otherwise encourage the victim to engage in sexual contact.

(*vii*) That other person was under the jurisdiction of the department of corrections and the actor was an employee or a contractual employee of, or a volunteer with, a private vendor that operated a youth correctional facility under section 20g of the corrections code of 1953, 1953 PA 232, MCL 791.220g, who knew that the other person was under the jurisdiction of the department of corrections.

(*viii*) That other person was a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor was an employee or a contractual employee of, or a volunteer with, the county or the department of corrections who knew that the other person was under the county's jurisdiction and used his or her position of authority over the victim to gain access to or to coerce or otherwise encourage the victim to engage in sexual contact.

(*ix*) The actor knew or had reason to know that a court had detained the victim in a facility while the victim was awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor was an employee or contractual employee of, or a volunteer with, the facility in which the victim was detained or to which the victim was committed.

(d) "Department" means the department of state police.

(e) "Employee" means an individual who is self-employed or works for any other entity as a full-time or part-time employee, contractual provider, or volunteer, regardless of whether he or she is financially compensated.

(f) "Felony" means that term as defined in section 1 of chapter I of the code of criminal procedure, 1927 PA 174, MCL 761.1.

(g) "Immediately" means within 3 business days.

(h) "Indigent" means an individual to whom 1 or more of the following apply:

(*i*) He or she has been found by a court to be indigent within the last 6 months.

(*ii*) He or she qualifies for and receives assistance from the department of human services food assistance program.

(*iii*) He or she demonstrates an annual income below the current federal poverty guidelines.

(i) "Institution of higher education" means 1 or more of the following:

(*i*) A public or private community college, college, or university.

(*ii*) A public or private trade, vocational, or occupational school.

(j) "Listed offense" means a tier I, tier II, or tier III offense.

(k) "Local law enforcement agency" means the police department of a municipality.

(*l*) "Minor" means a victim of a listed offense who was less than 18 years of age at the time the offense was committed.

(m) "Municipality" means a city, village, or township of this state.

(n) "Registering authority" means the local law enforcement agency or sheriff's office having jurisdiction over the individual's residence, place of employment, or institution of higher learning, or the nearest department post designated to receive or enter sex offender registration information within a registration jurisdiction.

(o) "Registration jurisdiction" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the United States Virgin Islands, American Samoa, and the Indian tribes within the United States that elect to function as a registration jurisdiction.

(p) "Residence", as used in this act, for registration and voting purposes means that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. If a person is homeless or otherwise lacks a fixed or temporary residence, residence means the village, city, or township where the person spends a majority of his or her time. This section shall not be construed to affect existing judicial interpretation of the term residence for purposes other than the purposes of this act.

(q) "Student" means an individual enrolled on a full- or part-time basis in a public or private educational institution, including, but not limited to, a secondary school, trade school, professional institution, or institution of higher education.

(r) "Tier I offender" means an individual convicted of a tier I offense who is not a tier II or tier III offender.

(s) "Tier I offense" means 1 or more of the following:

(*i*) A violation of section 145c(4) of the Michigan penal code, 1931 PA 328, MCL 750.145c.

(*ii*) A violation of section 335a(2)(b) of the Michigan penal code, 1931 PA 328, MCL 750.335a, if a victim is a minor.

(*iii*) A violation of section 349b of the Michigan penal code, 1931 PA 328, MCL 750.349b, if the victim is a minor.

(*iv*) A violation of section 449a(2) of the Michigan penal code, 1931 PA 328, MCL 750.449a.

(*v*) A violation of section 520e or 520g(2) of the Michigan penal code, 1931 PA 328, MCL 750.520e and 750.520g, if the victim is 18 years or older.

(*vi*) A violation of section 539j of the Michigan penal code, 1931 PA 328, MCL 750.539j, if a victim is a minor.

(*vii*) Any other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor.

(*viii*) An offense committed by a person who was, at the time of the offense, a sexually delinquent person as defined in section 10a of the Michigan penal code, 1931 PA 328, MCL 750.10a.

(*ix*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*viii*).

(*x*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*ix*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law.

(t) "Tier II offender" means either of the following:

(*i*) A tier I offender who is subsequently convicted of another offense that is a tier I offense.

(*ii*) An individual convicted of a tier II offense who is not a tier III offender.

(u) "Tier II offense" means 1 or more of the following:

(*i*) A violation of section 145a of the Michigan penal code, 1931 PA 328, MCL 750.145a.

(*ii*) A violation of section 145b of the Michigan penal code, 1931 PA 328, MCL 750.145b.

(*iii*) A violation of section 145c(2) or (3) of the Michigan penal code, 1931 PA 328, MCL 750.145c.

(*iv*) A violation of section 145d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.145d, except for a violation arising out of a violation of section 157c of the Michigan penal code, 1931 PA 328, MCL 750.157c.

(*v*) A violation of section 158 of the Michigan penal code, 1931 PA 328, MCL 750.158, committed against a minor unless either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vi*) A violation of section 338, 338a, or 338b of the Michigan penal code, 1931 PA 328, MCL 750.338, 750.338a, and 750.338b, committed against an individual 13 years of age or older but less than 18 years of age. This subparagraph does not apply if the court determines that either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vii*) A violation of section 462e(a) of the Michigan penal code, 1931 PA 328, MCL 750.462e.

(*viii*) A violation of section 448 of the Michigan penal code, 1931 PA 328, MCL 750.448, if the victim is a minor.

(*ix*) A violation of section 455 of the Michigan penal code, 1931 PA 328, MCL 750.455.

(*x*) A violation of section 520c, 520e, or 520g(2) of the Michigan penal code, 1931 PA 328, MCL 750.520c, 750.520e, and 750.520g, committed against an individual 13 years of age or older but less than 18 years of age.

(*xi*) A violation of section 520c committed against an individual 18 years of age or older.

(*xii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*xi*).

(*xiii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*xii*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law.

(v) "Tier III offender" means either of the following:

(*i*) A tier II offender subsequently convicted of a tier I or II offense.

(*ii*) An individual convicted of a tier III offense.

(w) "Tier III offense" means 1 or more of the following:

(*i*) A violation of section 338, 338a, or 338b of the Michigan penal code, 1931 PA 328, MCL 750.338, 750.338a, and 750.338b, committed against an individual less than 13 years of age.

(*ii*) A violation of section 349 of the Michigan penal code, 1931 PA 328, MCL 750.349, committed against a minor.

(*iii*) A violation of section 350 of the Michigan penal code, 1931 PA 328, MCL 750.350.

(*iv*) A violation of section 520b, 520d, or 520g(1) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520d, and 750.520g. This subparagraph does not apply if the court determines that the victim

consented to the conduct constituting the violation, that the victim was at least 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim.

(*v*) A violation of section 520c or 520g(2) of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520g, committed against an individual less than 13 years of age.

(*vi*) A violation of section 520e of the Michigan penal code, 1931 PA 328, MCL 750.520e, committed by an individual 17 years of age or older against an individual less than 13 years of age.

(*vii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*vi*).

(*viii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*vii*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law.

(x) "Vehicle" means that term as defined in section 79 of the Michigan vehicle code, 1949 PA 300, MCL 257.79.

(y) "Vessel" means that term as defined in section 44501 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.44501.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2005, Act 301, Eff. Feb. 1, 2006;—Am. 2011, Act 17, Eff. July 1, 2011;—Am. 2014, Act 328, Eff. Jan. 14, 2015.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.723 Individuals required to be registered.

Sec. 3. (1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act:

(a) An individual who is convicted of a listed offense after October 1, 1995.

(b) An individual convicted of a listed offense on or before October 1, 1995 if on October 1, 1995 he or she is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, or under the jurisdiction of the juvenile division of the probate court or the department of human services for that offense or is placed on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, placed under the jurisdiction of the juvenile division of the probate court or family division of circuit court, or committed to the department of human services after October 1, 1995 for that offense.

(c) An individual convicted on or before October 1, 1995 of an offense described in section 2(d)(*vi*) as added by 1994 PA 295 if on October 1, 1995 he or she is on probation or parole that has been transferred to this state for that offense or his or her probation or parole is transferred to this state after October 1, 1995 for that offense.

(d) An individual from another state who is required to register or otherwise be identified as a sex or child offender or predator under a comparable statute of that state.

(e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.

(2) An individual convicted of an offense added on September 1, 1999 to the definition of listed offense is not required to be registered solely because of that listed offense unless 1 of the following applies:

(a) The individual is convicted of that listed offense on or after September 1, 1999.

(b) On September 1, 1999, the individual is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, under the jurisdiction of the family division of circuit court, or committed to the department of human services for that offense or the individual is placed on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, placed under the jurisdiction of the family division of circuit court, or committed to the department of human services on or after September 1, 1999 for that offense.

(c) On September 1, 1999, the individual is on probation or parole for that offense which has been transferred to this state or the individual's probation or parole for that offense is transferred to this state after September 1, 1999.

(d) On September 1, 1999, in another state or country the individual is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections or a similar type of state agency, under the jurisdiction of a court that handles matters similar to those handled by the family division of circuit court in this state, or committed to an agency with the same authority as the department of human services for that offense.

(3) A nonresident who is convicted in this state on or after July 1, 2011 of committing a listed offense who is not otherwise described in subsection (1) shall nevertheless register under this act. However, the continued reporting requirements of this act do not apply to the individual while he or she remains a nonresident and is not otherwise required to report under this act. The individual shall have his or her photograph taken under section 5a.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1995, Act 10, Eff. Oct. 1, 1995;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2011, Act 17, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.723a Hearing to determine if individual exempt from registration.

Sec. 3a. (1) If an individual pleads guilty to or is found guilty of a listed offense or is adjudicated as a juvenile as being responsible for a listed offense but alleges that he or she is not required to register under this act because section 2(u)(*v*) or (*vi*) applies or section 2(w)(*iv*) applies, and the prosecuting attorney disputes that allegation, the court shall conduct a hearing on the matter before sentencing or disposition to determine whether the individual is required to register under this act.

(2) The individual has the burden of proving by a preponderance of the evidence in a hearing under this section that his or her conduct falls within the exceptions described in subsection (1) and that he or she is therefore not required to register under this act.

(3) The rules of evidence, except for those pertaining to privileges and protections set forth in section 520j of the Michigan penal code, 1931 PA 328, MCL 750.520j, do not apply to a hearing under this section.

(4) The prosecuting attorney shall give the victim notice of the date, time, and place of the hearing.

(5) The victim of the offense has the following rights in a hearing under this section:

(a) To submit a written statement to the court.

(b) To attend the hearing and to make a written or oral statement to the court.

(c) To refuse to attend the hearing.

(d) To attend the hearing but refuse to testify or make a statement at the hearing.

(6) The court's decision excusing or requiring the individual to register is a final order of the court and may be appealed by the prosecuting attorney or the individual as a matter of right.

(7) This section applies to criminal and juvenile cases pending on July 1, 2011 and to criminal and juvenile cases brought on and after that date.

History: Add. 2011, Act 17, Imd. Eff. Apr. 12, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.724 Registration; procedures.

Sec. 4. (1) Registration of an individual under this act shall proceed as provided in this section.

(2) For an individual convicted of a listed offense on or before October 1, 1995 who on or before October 1, 1995 is sentenced for that offense, has a disposition entered for that offense, or is assigned to youthful trainee status for that offense, the following shall register the individual by December 31, 1995:

(a) If the individual is on probation for the listed offense, the individual's probation agent.

(b) If the individual is committed to jail for the listed offense, the sheriff or his or her designee.

(c) If the individual is under the jurisdiction of the department of corrections for the listed offense, the department of corrections.

(d) If the individual is on parole for the listed offense, the individual's parole agent.

(e) If the individual is within the jurisdiction of the juvenile division of the probate court or the department of social services under an order of disposition for the listed offense, the juvenile division of the probate court or the department of social services.

(3) Except as provided in subsection (4), for an individual convicted of a listed offense on or before October 1, 1995:

(a) If the individual is sentenced for that offense after October 1, 1995 or assigned to youthful trainee status after October 1, 1995, the probation agent shall register the individual before sentencing or assignment.

(b) If the individual's probation or parole is transferred to this state after October 1, 1995, the probation or parole agent shall register the individual immediately after the transfer.

(c) If the individual is placed within the jurisdiction of the juvenile division of the probate court or family division of circuit court or committed to the department of social services or family independence agency under an order of disposition entered after October 1, 1995, the juvenile division of the probate court or family division of circuit court shall register the individual before the order of disposition is entered.

(4) For an individual convicted on or before September 1, 1999 of an offense that was added on September 1, 1999 to the definition of listed offense, the following shall register the individual:

(a) If the individual is on probation or parole on September 1, 1999 for the listed offense, the individual's probation or parole agent not later than September 12, 1999.

(b) If the individual is committed to jail on September 1, 1999 for the listed offense, the sheriff or his or her designee not later than September 12, 1999.

(c) If the individual is under the jurisdiction of the department of corrections on September 1, 1999 for the listed offense, the department of corrections not later than November 30, 1999.

(d) If the individual is within the jurisdiction of the family division of circuit court or committed to the family independence agency or county juvenile agency on September 1, 1999 under an order of disposition for the listed offense, the family division of circuit court, the family independence agency, or the county juvenile agency not later than November 30, 1999.

(e) If the individual is sentenced or assigned to youthful trainee status for that offense after September 1, 1999, the probation agent shall register the individual before sentencing or assignment.

(f) If the individual's probation or parole for the listed offense is transferred to this state after September 1, 1999, the probation or parole agent shall register the individual within 14 days after the transfer.

(g) If the individual is placed within the jurisdiction of the family division of circuit court or committed to the family independence agency for the listed offense after September 1, 1999, the family division of circuit court shall register the individual before the order of disposition is entered.

(5) Subject to section 3, an individual convicted of a listed offense in this state after October 1, 1995 and an individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011, shall register before sentencing, entry of the order of disposition, or assignment to youthful trainee status for that listed offense or that other felony. The probation agent or the family division of circuit court shall give the individual the registration form after the individual is convicted, explain the duty to register and accept the completed registration for processing under section 6. The court shall not impose sentence, enter the order of disposition, or assign the individual to youthful trainee status, until it determines that the individual's registration was forwarded to the department as required under section 6.

(6) All of the following shall register with the local law enforcement agency, sheriff's department, or the department immediately after becoming domiciled or temporarily residing, working, or being a student in this state:

(a) Subject to section 3(1), an individual convicted in another state or country on or after October 1, 1995

of a listed offense as defined before September 1, 1999.

(b) Subject to section 3(2), an individual convicted in another state or country of an offense added on September 1, 1999 to the definition of listed offenses.

(c) Subject to section 3(1), an individual convicted in another state or country of a listed offense before October 1, 1995 and, subject to section 3(2), an individual convicted in another state or country of an offense added on September 1, 1999 to the definition of listed offenses, who is convicted of any other felony on or after July 1, 2011.

(d) An individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered.

(7) If a prosecution or juvenile proceeding is pending on July 1, 2011, whether the defendant in a criminal case or the minor in a juvenile proceeding is required to register under this act shall be determined on the basis of the law in effect on July 1, 2011.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2004, Act 237, Eff. Oct. 16, 2004;—Am. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2011, Act 17, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.724a Status report to registering authority; requirements; reports; written documentation; exception.

Sec. 4a. (1) An individual required to be registered under this act who is not a resident of this state shall report his or her status in person to the registering authority having jurisdiction over a campus of an institution of higher education if either of the following occurs:

(a) The individual is or enrolls as a student with that institution of higher education or the individual discontinues that enrollment.

(b) As part of his or her course of studies at an institution of higher education in this state, the individual is present at any other location in this state, another state, a territory or possession of the United States, or the individual discontinues his or her studies at that location.

(2) An individual required to be registered under this act who is a resident of this state shall report his or her status in person to the registering authority having jurisdiction where his or her new residence or domicile is located if any of the events described under subsection (1) occur.

(3) The report required under subsections (1) and (2) shall be made as follows:

(a) For an individual registered under this act before October 1, 2002 who is required to make his or her first report under subsections (1) and (2), not later than January 15, 2003.

(b) Immediately after he or she enrolls or discontinues his or her enrollment as a student on that campus including study in this state or another state, a territory or possession of the United States, or another country.

(4) The additional registration reports required under this section shall be made in the time periods described in section 5a(2)(a) to (c) for reports under that section.

(5) The local law enforcement agency, sheriff's department, or department post to which an individual reports under this section shall require the individual to pay the registration fee required under section 5a or section 7(1) and to present written documentation of employment status, contractual relationship, volunteer status, or student status. Written documentation under this subsection may include, but need not be limited to, any of the following:

(a) A W-2 form, pay stub, or written statement by an employer.

(b) A contract.

(c) A student identification card or student transcript.

(6) This section does not apply to an individual whose enrollment and participation at an institution of higher education is solely through the mail or the internet from a remote location.

History: Add. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 237, Eff. Oct. 16, 2004;—Am. 2011, Act 17, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.725 Conditions requiring individual to report in person and provide notice to registering authority; release of incarcerated individual; notice; compliance.

Sec. 5. (1) An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately after any of the following occur:

(a) The individual changes or vacates his or her residence or domicile.

(b) The individual changes his or her place of employment, or employment is discontinued.

(c) The individual enrolls as a student with an institution of higher education, or enrollment is discontinued.

(d) The individual changes his or her name.

(e) The individual intends to temporarily reside at any place other than his or her residence for more than 7 days.

(f) The individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.

(g) The individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

(h) Any change required to be reported under section 4a.

(2) An individual required to be registered under this act who is not a resident of this state but has his or her place of employment in this state shall report in person and notify the registering authority having jurisdiction where his or her place of employment is located or the department post of the individual's place of employment immediately after the individual changes his or her place of employment or employment is discontinued.

(3) If an individual who is incarcerated in a state correctional facility and is required to be registered under this act is granted parole or is due to be released upon completion of his or her maximum sentence, the department of corrections, before releasing the individual, shall provide notice of the location of the individual's proposed place of residence or domicile to the department of state police.

(4) If an individual who is incarcerated in a county jail and is required to be registered under this act is due to be released from custody, the sheriff's department, before releasing the individual, shall provide notice of the location of the individual's proposed place of residence or domicile to the department of state police.

(5) Immediately after either of the following occurs, the department of corrections shall notify the local law enforcement agency or sheriff's department having jurisdiction over the area to which the individual is transferred or the department post of the transferred residence or domicile of an individual required to be registered under this act:

(a) The individual is transferred to a community residential program.

(b) The individual is transferred into a level 1 correctional facility of any kind, including a correctional camp or work camp.

(6) An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately before he or she changes his or her domicile or residence to another state. The individual shall indicate the new state and, if known, the new address. The department shall update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state.

(7) An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located not later than 21 days before he or she changes his or her domicile or residence to another country or travels to another country for more than 7 days. The individual shall state the new country of residence or country of travel and the address of his or her new domicile or residence or place of stay, if known. The department shall update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority.

(8) If the probation or parole of an individual required to be registered under this act is transferred to another state or an individual required to be registered under this act is transferred from a state correctional facility to any correctional facility or probation or parole in another state, the department of corrections shall promptly notify the department and the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. The department shall update the registration and compilation databases.

(9) An individual registered under this act shall comply with the verification procedures and proof of residence procedures prescribed in sections 4a and 5a.

(10) Except as otherwise provided in this section and section 8c, a tier I offender shall comply with this section for 15 years.

(11) Except as otherwise provided in this section and section 8c, a tier II offender shall comply with this section for 25 years.

(12) Except as otherwise provided in this section and section 8c, a tier III offender shall comply with this section for life.

(13) The registration periods under this section exclude any period of incarceration for committing a crime and any period of civil commitment.

(14) For an individual who was previously convicted of a listed offense for which he or she was not required to register under this act but who is convicted of any felony on or after July 1, 2011, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section. If those periods equal or exceed the registration period described in this section, the individual has satisfied his or her registration period for the listed offense and is not required to register under this act. If those periods are less than the registration period described in this section for that listed offense, the individual shall comply with this section for the period of time remaining.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2005, Act 123, Eff. Jan. 1, 2006;—Am. 2005, Act 132, Eff. Jan. 1, 2006;—Am. 2006, Act 402, Eff. Dec. 1, 2006;—Am. 2011, Act 17, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.725a Notice to registered individual; explanation of duties; reporting requirements.

Sec. 5a. (1) The department shall mail a notice to each individual registered under this act who is not in a state correctional facility explaining the individual's duties under this act as amended.

(2) Upon the release of an individual registered under this act who is in a state correctional facility, the department of corrections shall provide written notice to that individual explaining his or her duties under this section and this act as amended and the procedure for registration, notification, and verification and payment of the registration fee prescribed under subsection (6) or section 7(1). The individual shall sign and date the notice. The department of corrections shall maintain a copy of the signed and dated notice in the individual's file. The department of corrections shall forward the original notice to the department immediately, regardless of whether the individual signs it.

(3) Subject to subsection (4), an individual required to be registered under this act who is not incarcerated shall report in person to the registering authority where he or she is domiciled or resides for verification of domicile or residence as follows:

(a) If the individual is a tier I offender, the individual shall report once each year during the individual's month of birth.

(b) If the individual is a tier II offender, the individual shall report twice each year according to the following schedule:

Birth Month	Reporting Months
January	January and July
February	February and August
March	March and September
April	April and October
May	May and November
June	June and December
July	January and July
August	February and August
September	March and September
October	April and October
November	May and November
December	June and December

(c) If the individual is a tier III offender, the individual shall report 4 times each year according to the following schedule:

Birth Month	Reporting Months
January	January, April, July, and October
February	February, May, August, and November
March	March, June, September, and December
April	April, July, October, and January
May	May, August, November, and February
June	June, September, December, and March
July	July, October, January, and April
August	August, November, February, and May
September	September, December, March, and June
October	October, January, April, and July
November	November, February, May, and August
December	December, March, June, and September

(4) A report under subsection (3) shall be made no earlier than the first day or later than the last day of the month in which the individual is required to report. However, if the registration period for that individual expires during the month in which he or she is required to report under this section, the individual shall report during that month on or before the date his or her registration period expires. When an individual reports under subsection (3), the individual shall review all registration information for accuracy.

(5) When an individual reports under subsection (3), an officer or authorized employee of the registering authority shall verify the individual's residence or domicile and any information required to be reported under section 4a. The officer or authorized employee shall also determine whether the individual's photograph required under this act matches the appearance of the individual sufficiently to properly identify him or her from that photograph. If not, the officer or authorized employee shall require the individual to immediately obtain a current photograph under this section. When all of the verification information has been provided, the

officer or authorized employee shall review that information with the individual and make any corrections, additions, or deletions the officer or authorized employee determines are necessary based on the review. The officer or authorized employee shall sign and date a verification receipt. The officer or authorized employee shall give a copy of the signed receipt showing the date of verification to the individual. The officer or authorized employee shall forward verification information to the department in the manner the department prescribes. The department shall revise the law enforcement database and public internet website maintained under section 8 as necessary and shall indicate verification in the public internet website maintained under section 8(2).

(6) Except as otherwise provided in section 5b, an individual who reports as prescribed under subsection (3) shall pay a $50.00 registration fee as follows:

(a) Upon initial registration.

(b) Annually following the year of initial registration. The payment of the registration fee under this subdivision shall be made at the time the individual reports in the first reporting month for that individual as set forth in subsection (3) of each year in which the fee applies, unless an individual elects to prepay an annual registration fee for any future year for which an annual registration fee is required. Prepaying any annual registration fee shall not change or alter the requirement of an individual to report as set forth in subsection (3). The payment of the registration fee under this subdivision is not required to be made for any registration year that has expired before January 1, 2014 or to be made by any individual initially required to register under this act after January 1, 2019. The registration fee required to be paid under this subdivision shall not be prorated on grounds that the individual will complete his or her registration period after the month in which the fee is due.

(c) The sum of the amounts required to be paid under subdivisions (a) and (b) shall not exceed $550.00.

(7) An individual required to be registered under this act shall maintain either a valid operator's or chauffeur's license issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or an official state personal identification card issued under 1972 PA 222, MCL 28.291 to 28.300, with the individual's current address. The license or card may be used as proof of domicile or residence under this section. In addition, the officer or authorized employee may require the individual to produce another document bearing his or her name and address, including, but not limited to, voter registration or a utility or other bill. The department may specify other satisfactory proof of domicile or residence.

(8) An individual registered under this act who is incarcerated shall report to the secretary of state under this subsection immediately after he or she is released to have his or her digitalized photograph taken. The individual is not required to report under this subsection if he or she had a digitized photograph taken for an operator's or chauffeur's license or official state personal identification card before January 1, 2000, or within 2 years before he or she is released unless his or her appearance has changed from the date of that photograph. Unless the person is a nonresident, the photograph shall be used on the individual's operator's or chauffeur's license or official state personal identification card. The individual shall have a new photograph taken when he or she renews the license or identification card as provided by law, or as otherwise provided in this act. The secretary of state shall make the digitized photograph available to the department for a registration under this act.

(9) If an individual does not report under this section or under section 4a, the department shall notify all registering authorities as provided in section 8a and initiate enforcement action as set forth in that section.

(10) The department shall prescribe the form for the notices and verification procedures required under this section.

History: Add. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 237, Eff. Oct. 16, 2004;—Am. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2005, Act 322, Eff. Jan. 1, 2006;—Am. 2011, Act 17, Imd. Eff. Apr. 12, 2011;—Am. 2013, Act 149, Eff. Apr. 1, 2014.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.725b Sex offenders registration fund; creation; disposition of money; use; lapse; claim of indigence; waiver of fee; payments.

Sec. 5b. (1) Of the money collected by a court, local law enforcement agency, sheriff's department, or department post from each registration fee prescribed under this act, $30.00 shall be forwarded to the department, which shall deposit the money in the sex offenders registration fund created under subsection (2), and $20.00 shall be retained by the court, local law enforcement agency, sheriff's department, or department post.

(2) The sex offenders registration fund is created as a separate fund in the department of treasury. The state treasurer shall credit the money received from the payment of the registration fee prescribed under this act to the sex offenders registration fund. Money credited to the fund shall only be used by the department for training concerning, and the maintenance and automation of, the law enforcement database, public internet website, information required under section 8, or notification and offender registration duties under section 4a. Money in the sex offenders registration fund at the close of the fiscal year shall remain in the fund and shall not lapse to the general fund.

(3) If an individual required to pay a registration fee under this act is indigent, the registration fee shall be waived for a period of 90 days. The burden is on the individual claiming indigence to prove the fact of indigence to the satisfaction of the local law enforcement agency, sheriff's department, or department post where the individual is reporting.

(4) Payment of the registration fee prescribed under this act shall be made in the form and by means prescribed by the department. Upon payment of the registration fee prescribed under this act, the officer or employee shall forward verification of the payment to the department in the manner the department prescribes. The department shall revise the law enforcement database and public internet website maintained under section 8 as necessary and shall indicate verification of payment in the law enforcement database under section 8(1).

History: Add. 2004, Act 237, Eff. Oct. 16, 2004;—Am. 2011, Act 17, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.725c Fee collected by department of corrections; prohibition.

Sec. 5c. The department of corrections shall not collect any fee prescribed under this act.

History: Add. 2004, Act 237, Eff. Oct. 16, 2004.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.726 Providing or forwarding copy of registration or notification.

Sec. 6. (1) The officer, court, or agency registering an individual or receiving or accepting a registration under section 4 or receiving notice under section 5(1) shall provide the individual with a copy of the registration or notification at the time of registration or notice.

(2) The officer, court, or agency registering an individual or receiving or accepting a registration under section 4 or notified of an address change under section 5(1) shall forward the registration or notification to the department in a manner prescribed by the department immediately after registration or notification.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1996, Act 494, Eff. Apr. 1, 1997;—Am. 2011, Act 18, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.727 Registration information; format; fee; requirements; forwarding registration, notice, and verification information to federal bureau of investigation, local agencies, and other registering jurisdictions.

Sec. 7. (1) Registration information obtained under this act shall be forwarded to the department in the format the department prescribes. Except as provided in section 5b(3), a $50.00 registration fee shall accompany each original registration. All of the following information shall be obtained or otherwise provided for registration purposes:

(a) The individual's legal name and any aliases, nicknames, ethnic or tribal names, or other names by which the individual is or has been known. An individual who is in a witness protection and relocation program is only required to use the name and identifying information reflecting his or her new identity in a registration under this act. The registration and compilation databases shall not contain any information identifying the individual's prior identity or locale.

(b) The individual's social security number and any social security numbers or alleged social security numbers previously used by the individual.

(c) The individual's date of birth and any alleged dates of birth previously used by the individual.

(d) The address where the individual resides or will reside. If the individual does not have a residential address, information under this subsection shall identify the location or area used or to be used by the individual in lieu of a residence or, if the individual is homeless, the village, city, or township where the person spends or will spend the majority of his or her time.

(e) The name and address of any place of temporary lodging used or to be used by the individual during any period in which the individual is away, or is expected to be away, from his or her residence for more than 7 days. Information under this subdivision shall include the dates the lodging is used or to be used.

(f) The name and address of each of the individual's employers. For purposes of this subdivision, "employer" includes a contractor and any individual who has agreed to hire or contract with the individual for his or her services. Information under this subsection shall include the address or location of employment if different from the address of the employer. If the individual lacks a fixed employment location, the information obtained under this subdivision shall include the general areas where the individual works and the normal travel routes taken by the individual in the course of his or her employment.

(g) The name and address of any school being attended by the individual and any school that has accepted the individual as a student that he or she plans to attend. For purposes of this subdivision, "school" means a public or private postsecondary school or school of higher education, including a trade school.

(h) All telephone numbers registered to the individual or routinely used by the individual.

(i) All electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system.

(j) The license plate number, registration number, and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual and the location at which the motor vehicle, aircraft, or vessel is habitually stored or kept.

(k) The individual's driver license number or state personal identification card number.

(*l*) A digital copy of the individual's passport and other immigration documents.

(m) The individual's occupational and professional licensing information, including any license that authorizes the individual to engage in any occupation, profession, trade, or business.

(n) A brief summary of the individual's convictions for listed offenses regardless of when the conviction occurred, including where the offense occurred and the original charge if the conviction was for a lesser offense.

(o) A complete physical description of the individual.

(p) The photograph required under section 5a.

(q) The individual's fingerprints if not already on file with the department and the individual's palm prints. An individual required to be registered under this act shall have his or her fingerprints or palm prints or both taken not later than September 12, 2011 if his or her fingerprints or palm prints are not already on file with the department. The department shall forward a copy of the individual's fingerprints and palm prints to the federal bureau of investigation if not already on file with that bureau.

(r) Information that is required to be reported under section 4a.

(2) A registration shall contain all of the following:

(a) An electronic copy of the offender's Michigan driver license or Michigan personal identification card,

including the photograph required under this act.

(b) The text of the provision of law that defines the criminal offense for which the sex offender is registered.

(c) Any outstanding arrest warrant information.

(d) The individual's tier classification.

(e) An identifier that indicates whether a DNA sample has been collected and any resulting DNA profile has been entered into the federal combined DNA index system (CODIS).

(f) The individual's complete criminal history record, including the dates of all arrests and convictions.

(g) The individual's Michigan department of corrections number and status of parole, probation, or supervised release.

(h) The individual's federal bureau of investigation number.

(3) The form used for notification of duties under this act shall contain a written statement that explains the duty of the individual being registered to provide notice of changes in his or her registration information, the procedures for providing that notice, and the verification procedures under section 5a.

(4) The individual shall sign a registration and notice. However, the registration and notice shall be forwarded to the department regardless of whether the individual signs it or pays the registration fee required under subsection (1).

(5) The officer, court, or an employee of the agency registering the individual or receiving or accepting a registration under section 4 shall sign the registration form.

(6) An individual shall not knowingly provide false or misleading information concerning a registration, notice, or verification.

(7) The department shall prescribe the form for a notification required under section 5 and the format for forwarding the notification to the department.

(8) The department shall promptly provide registration, notice, and verification information to the federal bureau of investigation and to local law enforcement agencies, sheriff's departments, department posts, and other registering jurisdictions, as provided by law.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1996, Act 494, Eff. Apr. 1, 1997;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 237, Eff. Oct. 16, 2004;—Am. 2011, Act 18, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.728 Law enforcement database; information to be contained for each registered individual; public internet website; compilation; availability; removal; note.

Sec. 8. (1) The department shall maintain a computerized law enforcement database of registrations and notices required under this act. The law enforcement database shall contain all of the following information for each individual registered under this act:

(a) The individual's legal name and any aliases, nicknames, ethnic or tribal names, or other names by which the individual is or has been known.

(b) The individual's social security number and any social security numbers or alleged social security numbers previously used by the individual.

(c) The individual's date of birth and any alleged dates of birth previously used by the individual.

(d) The address where the individual resides or will reside. If the individual does not have a residential address, information under this subsection shall identify the location or area used or to be used by the individual in lieu of a residence or, if the individual is homeless, the village, city, or township where the individual spends or will spend the majority of his or her time.

(e) The name and address of any place of temporary lodging used or to be used by the individual during any period in which the individual is away, or is expected to be away, from his or her residence for more than 7 days. Information under this subdivision shall include the dates the lodging is used or to be used.

(f) The name and address of each of the individual's employers. For purposes of this subdivision, "employer" includes a contractor and any individual who has agreed to hire or contract with the individual for his or her services. Information under this subsection shall include the address or location of employment if different from the address of the employer.

(g) The name and address of any school being attended by the individual and any school that has accepted the individual as a student that he or she plans to attend. For purposes of this subdivision, "school" means a public or private postsecondary school or school of higher education, including a trade school.

(h) All telephone numbers registered to the individual or routinely used by the individual.

(i) All electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system.

(j) The license plate number or registration number and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual and the location at which the motor vehicle, aircraft, or vessel is habitually stored or kept.

(k) The individual's driver license number or state personal identification card number.

(*l*) A digital copy of the individual's passport and other immigration documents.

(m) The individual's occupational and professional licensing information, including any license that authorizes the individual to engage in any occupation, profession, trade, or business.

(n) A brief summary of the individual's convictions for listed offenses regardless of when the conviction occurred, including where the offense occurred and the original charge if the conviction was for a lesser offense.

(o) A complete physical description of the individual.

(p) The photograph required under section 5a.

(q) The individual's fingerprints and palm prints.

(r) An electronic copy of the offender's Michigan driver license or Michigan personal identification card, including the photograph required under this act.

(s) The text of the provision of law that defines the criminal offense for which the sex offender is registered.

(t) Any outstanding arrest warrant information.

(u) The individual's tier classification and registration status.

(v) An identifier that indicates whether a DNA sample has been collected and any resulting DNA profile has been entered into the federal combined DNA index system (CODIS).

(w) The individual's complete criminal history record, including the dates of all arrests and convictions.

(x) The individual's Michigan department of corrections number and the status of his or her parole, probation, or release.

(y) The individual's federal bureau of investigation number.

(2) The department shall maintain a public internet website separate from the law enforcement database described in subsection (1) to implement section 10(2) and (3). Except as provided in subsection (4), the

public internet website shall contain all of the following information for each individual registered under this act:

(a) The individual's legal name and any aliases, nicknames, ethnic or tribal names, or other names by which the individual is or has been known.

(b) The individual's date of birth.

(c) The address where the individual resides. If the individual does not have a residential address, information under this subsection shall identify the village, city, or township used by the individual in lieu of a residence.

(d) The address of each of the individual's employers. For purposes of this subdivision, "employer" includes a contractor and any individual who has agreed to hire or contract with the individual for his or her services. Information under this subsection shall include the address or location of employment if different from the address of the employer.

(e) The address of any school being attended by the individual and any school that has accepted the individual as a student that he or she plans to attend. For purposes of this subdivision, "school" means a public or private postsecondary school or school of higher education, including a trade school.

(f) The license plate number or registration number and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual.

(g) A brief summary of the individual's convictions for listed offenses regardless of when the conviction occurred.

(h) A complete physical description of the individual.

(i) The photograph required under this act. If no photograph is available, the department shall use an arrest photograph or Michigan department of corrections photograph until a photograph as prescribed in section 5a becomes available.

(j) The text of the provision of law that defines the criminal offense for which the sex offender is registered.

(k) The individual's registration status.

(*l*) The individual's tier classification.

(3) The following information shall not be made available on the public internet website described in subsection (2):

(a) The identity of any victim of the offense.

(b) The individual's social security number.

(c) Any arrests not resulting in a conviction.

(d) Any travel or immigration document numbers.

(e) Any electronic mail addresses and instant message addresses assigned to the individual or routinely used by the individual and any login names or other identifiers used by the individual when using any electronic mail address or instant messaging system.

(f) The individual's driver license number or state personal identification card number.

(4) The public internet website described in subsection (2) shall not include the following individuals:

(a) An individual registered solely because he or she had 1 or more dispositions for a listed offense entered under section 18 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under section 2d of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2d.

(b) An individual registered solely because he or she was the subject of an order of disposition or other adjudication in a juvenile matter in another state or country.

(c) An individual registered solely because he or she was convicted of a single tier I offense, other than an individual who was convicted of a violation of any of the following:

(*i*) Section 145c(4) of the Michigan penal code, 1931 PA 328, MCL 750.145c.

(*ii*) A violation of section 335a(2)(b) of the Michigan penal code, 1931 PA 328, MCL 750.335a, if a victim is a minor.

(*iii*) Section 349b of the Michigan penal code, 1931 PA 328, MCL 750.349b, if the victim is a minor.

(*iv*) Section 539j of the Michigan penal code, 1931 PA 328, MCL 750.539j, if a victim is a minor.

(*v*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*v*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law.

(5) The compilation of individuals shall be indexed alphabetically by village, city, township, and county, numerically by zip code area, and geographically as determined appropriate by the department.

(6) The department shall update the public internet website with new registrations, deletions from registrations, and address changes at the same time those changes are made to the law enforcement database

described in subsection (1). The department shall make the law enforcement database available to each department post, local law enforcement agency, and sheriff's department by the law enforcement information network. Upon request by a department post, local law enforcement agency, or sheriff's department, the department shall provide to that post, agency, or sheriff's department the information from the law enforcement database in printed form for the designated areas located in whole or in part within the post's, agency's, or sheriff's department's jurisdiction. The department shall provide the ability to conduct a computerized search of the law enforcement database and the public internet website based upon the name and campus location of an institution of higher education.

(7) The department shall make the law enforcement database available to a department post, local law enforcement agency, or sheriff's department by electronic, computerized, or other similar means accessible to the post, agency, or sheriff's department. The department shall make the public internet website available to the public by electronic, computerized, or other similar means accessible to the public. The electronic, computerized, or other similar means shall provide for a search by name, village, city, township, and county designation, zip code, and geographical area.

(8) If a court determines that the public availability under section 10 of any information concerning individuals registered under this act violates the constitution of the United States or this state, the department shall revise the public internet website described in subsection (2) so that it does not contain that information.

(9) If the department determines that an individual has completed his or her registration period, including a registration period reduced by law under 2011 PA 18, or that he or she otherwise is no longer required to register under this act, the department shall remove the individual's registration information from both the law enforcement database and the public internet website within 7 days after making that determination.

(10) If the individual provides the department with documentation showing that he or she is required to register under this act for a violation that has been set aside under 1965 PA 213, MCL 780.621 to 780.624, or that has been otherwise expunged, the department shall note on the public internet website that the violation has been set aside or expunged.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1996, Act 494, Eff. Apr. 1, 1997;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 238, Eff. May 1, 2005;—Am. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2011, Act 18, Eff. July 1, 2011;—Am. 2013, Act 2, Eff. June 1, 2013.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.728a Failure to register or update registration information; duties registering authority; duties of department.

Sec. 8a. (1) If an individual fails to register or to update his or her registration information as required under this act, the local law enforcement agency, sheriff's office, or department post responsible for registering the individual or for verifying and updating his or her registration information shall do all of the following immediately after the date the individual was required to register or to update his or her registration information:

(a) Determine whether the individual has absconded or is otherwise unlocatable.

(b) If the registering authority was notified by a registration jurisdiction that the individual was to appear in order to register or update his or her registration information in the jurisdiction of the registering authority, notify the department in a manner prescribed by the department that the individual failed to appear as required.

(c) Revise the information in the registry to reflect that the individual has absconded or is otherwise unlocatable.

(d) Seek a warrant for the individual's arrest if the legal requirements for obtaining a warrant are satisfied.

(e) Enter the individual into the national crime information center wanted person file if the requirements for entering information into that file are met.

(2) If an individual fails to register or to update his or her registration information as required under this act, the department shall do all of the following immediately after being notified by the registering authority that the individual failed to appear as required:

(a) Notify that other registration jurisdiction that the individual failed to appear as required.

(b) Notify the United States marshal's service in the manner required by the United States marshal's service of the individual's failure to appear as required.

(c) Update the national sex offender registry to reflect the individual's status as an absconder or as unlocatable.

History: Add. 2011, Act 18, Eff. July 1, 2011.

Compiler's note: Former MCL 28.728a, which pertained to feasibility studies for providing search by alias and mapping to show address was repealed by Act 240 of 2004, Eff. Oct. 1, 2004.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.728b Repealed. 2004, Act 240, Eff. Oct. 1, 2004.

Compiler's note: The repealed section pertained to compilation of individuals not requiring registration.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.728c Petition to discontinue registration; jurisdiction; limitations; oath; contents; false statement; filing copy with office of prosecuting attorney; notice; hearing; rights of victim; factors in court determination; granting of petition.

Sec. 8c. (1) An individual classified as a tier I offender who meets the requirements of subsection (12) may petition the court under that subsection for an order allowing him or her to discontinue registration under this act.

(2) An individual classified as a tier III offender who meets the requirements of subsection (13) may petition the court under that subsection for an order allowing him or her to discontinue registration under this act.

(3) An individual classified as a tier I, tier II, or tier III offender who meets the requirements of subsection (14) or (15) may petition the court under that subsection for an order allowing him or her to discontinue registration under this act.

(4) This section is the sole means by which an individual may obtain judicial review of his or her registration requirements under this act. This subsection does not prohibit an appeal of the conviction or sentence as otherwise provided by law or court rule. A petition filed under this section shall be filed in the court in which the individual was convicted of committing the listed offense. However, if the conviction occurred in another state or country and the individual is a resident of this state, the individual may file a petition in the circuit court in the county of his or her residence for an order allowing him or her to discontinue registration under this act only. A petition shall not be filed under this section if a previous petition was filed under this section and was denied by the court after a hearing.

(5) A petition filed under this section shall be made under oath and shall contain all of the following:

(a) The name and address of the petitioner.

(b) A statement identifying the offense for which discontinuation from registration is being requested.

(c) A statement of whether the individual was previously convicted of a listed offense for which registration is required under this act.

(6) An individual who knowingly makes a false statement in a petition filed under this section is guilty of perjury as proscribed under section 423 of the Michigan penal code, 1931 PA 328, MCL 750.423.

(7) A copy of the petition shall be filed with the office of the prosecuting attorney that prosecuted the case against the individual or, for a conviction that occurred in another state or country, the prosecuting attorney for the county of his or her residence, at least 30 days before a hearing is held on the petition. The prosecuting attorney may appear and participate in all proceedings regarding the petition and may seek appellate review of any decision on the petition.

(8) If the name of the victim of the offense is known by the prosecuting attorney, the prosecuting attorney shall provide the victim with written notice that a petition has been filed and shall provide the victim with a copy of the petition. The notice shall be sent by first-class mail to the victim's last known address. The petition shall include a statement of the victim's rights under subsection (10).

(9) If an individual properly files a petition with the court under this section, the court shall conduct a hearing on the petition as provided in this section.

(10) The victim has the right to attend all proceedings under this section and to make a written or oral statement to the court before any decision regarding the petition is made. A victim shall not be required to appear at any proceeding under this section against his or her will.

(11) The court shall consider all of the following in determining whether to allow the individual to discontinue registration under subsection (12) or (13) but shall not grant the petition if the court determines that the individual is a continuing threat to the public:

(a) The individual's age and level of maturity at the time of the offense.

(b) The victim's age and level of maturity at the time of the offense.

(c) The nature of the offense.

(d) The severity of the offense.

(e) The individual's prior juvenile or criminal history.

(f) The individual's likelihood to commit further listed offenses.

(g) Any impact statement submitted by the victim under the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, or under this section.

(h) Any other information considered relevant by the court.

(12) The court may grant a petition properly filed by an individual under subsection (1) if all of the following apply:

(a) Ten or more years have elapsed since the date of his or her conviction for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.

(b) The petitioner has not been convicted of any felony since the date described in subdivision (a).

(c) The petitioner has not been convicted of any listed offense since the date described in subdivision (a).

(d) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.

(e) The petitioner successfully completed a sex offender treatment program certified by the United States attorney general under 42 USC 16915(b)(1), or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner's confinement, release, probation, or parole.

(13) The court may grant a petition properly filed by an individual under subsection (2) if all of the following apply:

(a) The petitioner is required to register based on an order of disposition entered under section 18 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18, that is open to the general public under section 28 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.28.

(b) Twenty-five or more years have elapsed since the date of his or her adjudication for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.

(c) The petitioner has not been convicted of any felony since the date described in subdivision (b).

(d) The petitioner has not been convicted of any listed offense since the date described in subdivision (b).

(e) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.

(f) The court determines that the petitioner successfully completed a sex offender treatment program certified by the United States attorney general under 42 USC 16915(b)(1), or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner's confinement, release, probation, or parole.

(14) The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply:

(a) All of the following:

(*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.

(*ii*) The petitioner is not more than 4 years older than the victim.

(b) All of the following:

(*i*) The individual was convicted of a violation of section 158, 338, 338a, or 338b of the Michigan penal code, 1931 PA 328, MCL 750.158, 750.338, 750.338a, and 750.338b.

(*ii*) The victim was 13 years of age or older but less than 16 years of age at the time of the violation.

(*iii*) The individual is not more than 4 years older than the victim.

(c) All of the following:

(*i*) The individual was convicted of a violation of section 158, 338, 338a, 338b, or 520c(1)(i) of the Michigan penal code, 1931 PA 328, MCL 750.158, 750.338, 750.338a, 750.338b, and 750.520c.

(*ii*) The victim was 16 years of age or older at the time of the violation.

(*iii*) The victim was not under the custodial authority of the individual at the time of the violation.

(15) The court shall grant a petition properly filed by an individual under subsection (3) if either of the following applies:

(a) Both of the following:

(*i*) The petitioner was adjudicated as a juvenile.

(*ii*) The petitioner was less than 14 years of age at the time of the offense.

(b) The individual was registered under this act before July 1, 2011 for an offense that required registration but for which registration is not required on or after July 1, 2011.

History: Add. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2011, Act 18, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.728d Providing copy of court order granting petition to department and individual.

Sec. 8d. If the court grants a petition filed under section 8c, the court shall promptly provide a copy of that order to the department and to the individual. The department shall promptly remove an individual's registration from the database maintained under section 8(1).

History: Add. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2011, Act 18, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.729 Registration required; violations; penalties.

Sec. 9. (1) Except as provided in subsections (2), (3), and (4), an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:

(a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(b) If the individual has 1 prior conviction for a violation of this act, by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.

(c) If the individual has 2 or more prior convictions for violations of this act, by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

(2) An individual who fails to comply with section 5a, other than payment of the fee required under section 5a(6), is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(3) An individual who willfully fails to sign a registration and notice as provided in section 7(4) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(4) An individual who willfully refuses or fails to pay the registration fee prescribed in section 5a(6) or section 7(1) within 90 days of the date the individual reports under section 4a or 5a is guilty of a misdemeanor punishable by imprisonment for not more than 90 days.

(5) The court shall revoke the probation of an individual placed on probation who willfully violates this act.

(6) The court shall revoke the youthful trainee status of an individual assigned to youthful trainee status who willfully violates this act.

(7) The parole board shall rescind the parole of an individual released on parole who willfully violates this act.

(8) An individual's failure to register as required by this act or a violation of section 5 may be prosecuted in the judicial district of any of the following:

(a) The individual's last registered address or residence.

(b) The individual's actual address or residence.

(c) Where the individual was arrested for the violation.

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 237, Eff. Oct. 16, 2004;—Am. 2005, Act 132, Eff. Jan. 1, 2006;—Am. 2011, Act 18, Eff. July 1, 2011.

Compiler's note: For transfer of powers and duties of Michigan parole and commutation board to Michigan parole board within department of corrections, and abolishment of Michigan parole and commutation board, see E.R.O. No. 2011-3, compiled at MCL 791.305.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.730 Confidentiality; exemption from disclosure; availability of information on public internet website; violation as misdemeanor; penalty; civil cause of action; applicability of subsections (4) and (5) to public internet website.

Sec. 10. (1) Except as provided in this act, a registration or report is confidential and information from that registration or report shall not be open to inspection except for law enforcement purposes. The registration or report and all included materials and information are exempt from disclosure under section 13 of the freedom of information act, 1976 PA 442, MCL 15.243.

(2) A department post, local law enforcement agency, or sheriff's department shall make information from the public internet website described in section 8(2) for the designated areas located in whole or in part within the post's, agency's, or sheriff's department's jurisdiction available for public inspection during regular business hours. A department post, local law enforcement agency, or sheriff's department is not required to make a copy of the information for a member of the public.

(3) The department may make information from the public internet website described in section 8(2) available to the public through electronic, computerized, or other accessible means. The department shall provide for notification by electronic or computerized means to any member of the public who has subscribed in a manner required by the department when an individual who is the subject of the public internet website described in section 8(2) initially registers under this act, or changes his or her registration under this act, to a location that is in a designated area or geographic radius designated by the subscribing member of the public.

(4) Except as provided in this act, an individual other than the registrant who knows of a registration or report under this act and who divulges, uses, or publishes nonpublic information concerning the registration or report in violation of this act is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(5) An individual whose registration or report is revealed in violation of this act has a civil cause of action against the responsible party for treble damages.

(6) Subsections (4) and (5) do not apply to the public internet website described in section 8(2) or information from that public internet website that is provided or made available under section 8(2) or under subsection (2) or (3).

History: 1994, Act 295, Eff. Oct. 1, 1995;—Am. 1996, Act 494, Eff. Apr. 1, 1997;—Am. 1999, Act 85, Eff. Sept. 1, 1999;—Am. 2002, Act 542, Eff. Oct. 1, 2002;—Am. 2004, Act 240, Eff. Oct. 1, 2004;—Am. 2006, Act 46, Eff. Jan. 1, 2007;—Am. 2011, Act 18, Eff. July 1, 2011.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.731, 28.732 Repealed. 2011, Act 18, Eff. July 1, 2011

Compiler's note: The repealed sections pertained to effective date and conditional effective date of act.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.733 Definitions.

Sec. 33. As used in this article:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) "Loiter" means to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors.

(c) "Minor" means an individual less than 18 years of age.

(d) "School" means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school.

(e) "School property" means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:

(*i*) It is used to impart educational instruction.

(*ii*) It is for use by students not more than 19 years of age for sports or other recreational activities.

(f) "Student safety zone" means the area that lies 1,000 feet or less from school property.

History: Add. 2005, Act 121, Eff. Jan. 1, 2006;—Add. 2005, Act 127, Eff. Jan. 1, 2006.

Compiler's note: MCL 28.733 was added by 2005 PA 121 and 2005 PA 127. 2005 PA 127, being substantively the same as the 2005 PA 121, supersedes and becomes the only version on its effective date.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.734 Prohibited conduct; violation; penalty; exceptions; other violations; right to vote.

Sec. 34. (1) Except as provided in this section and section 36, an individual required to be registered under article II shall not do 1 or more of the following:

(a) Work within a student safety zone.

(b) Loiter within a student safety zone.

(2) An individual who violates this section is guilty of a crime as follows:

(a) For the first violation, the individual is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

(b) An individual who violates this section and has 1 or more prior convictions under this section is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(3) Subsection (1)(a) does not apply to any of the following:

(a) An individual who was working within a student safety zone on January 1, 2006. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

(b) An individual whose place of employment is within a student safety zone solely because a school is relocated or is initially established 1,000 feet or less from the individual's place of employment. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

(c) An individual who only intermittently or sporadically enters a student safety zone for the purpose of work. However, this exception does not apply to an individual who initiates or maintains contact with a minor within a student safety zone.

(4) This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

(5) Nothing in this section shall be construed to prohibit an individual from exercising his or her right to vote.

History: Add. 2005, Act 127, Eff. Jan. 1, 2006;—Am. 2005, Act 322, Eff. Jan. 1, 2006.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.735 Registered individual residing in student safety zone; prohibited conduct; violation; penalties; exceptions.

Sec. 35. (1) Except as otherwise provided in this section and section 36, an individual required to be registered under article II shall not reside within a student safety zone.

(2) An individual who violates subsection (1) is guilty of a crime as follows:

(a) For the first violation, the individual is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

(b) An individual who violates this section and has 1 or more prior convictions under this section is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(3) This section does not apply to any of the following:

(a) An individual who is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone. However, the individual may initiate or maintain contact with a minor with whom he or she attends secondary school or postsecondary school in conjunction with that school attendance.

(b) An individual who is not more than 26 years of age and attends a special education program, and resides with his or her parent or guardian or resides in a group home or assisted living facility. However, an individual described in this subdivision shall not initiate or maintain contact with a minor within that student safety zone. The individual shall be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.

(c) An individual who was residing within that student safety zone on January 1, 2006. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

(d) An individual who is a patient in a hospital or hospice that is located within a student safety zone. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

(e) An individual who resides within a student safety zone because the individual is an inmate or resident of a prison, jail, juvenile facility, or other correctional facility or is a patient of a mental health facility under an order of commitment. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone.

(4) An individual who resides within a student safety zone and who is subsequently required to register under article II shall change his or her residence to a location outside the student safety zone not more than 90 days after he or she is sentenced for the conviction that gives rise to the obligation to register under article II. However, this exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone during the 90-day period described in this subsection.

(5) This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

History: Add. 2005, Act 121, Eff. Jan. 1, 2006;—Am. 2005, Act 322, Eff. Jan. 1, 2006.

SEX OFFENDERS REGISTRATION ACT (EXCERPT)
Act 295 of 1994

28.736 Exemptions.

Sec. 36. (1) Subject to subsection (2), sections 34 and 35 do not apply to any of the following:

(a) An individual who is convicted as a juvenile under section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, of committing, attempting to commit, or conspiring to commit a violation solely described in section 520b(1)(a), 520c(1)(a), or 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, if either of the following applies:

(*i*) The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim.

(*ii*) The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.

(b) An individual who was charged under section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, with committing, attempting to commit, or conspiring to commit a violation solely described in section 520b(1)(a), 520c(1)(a), or 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, and is convicted as a juvenile of violating, attempting to violate, or conspiring to violate section 520e or 520g of the Michigan penal code, 1931 PA 328, MCL 750.520e and 750.520g, if either of the following applies:

(*i*) The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim.

(*ii*) The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.

(c) An individual who has successfully completed his or her probationary period under sections 11 to 15 of chapter II for committing a listed offense and has been discharged from youthful trainee status.

(d) An individual convicted of committing or attempting to commit a violation solely described in section 520e(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520e, who at the time of the violation was 17 years of age or older but less than 21 years of age and who is not more than 5 years older than the victim.

(2) An individual who is convicted of more than 1 offense described in subsection (1) is ineligible for exemption under this section.

History: Add. 2005, Act 121, Eff. Jan. 1, 2006.

EXHIBIT B

Ira Ellman, *The Supreme Court's Crucial Mistake About Sex Crimes Statistics*, Casetext (July 28, 2015)

https://casetext.com/posts/the-supreme-courts-crucial-mistake-about-sex-crime-statistics

The Supreme Court's Crucial Mistake About Sex Crime Statistics

a commonly-cited statistic about sex offender re-offense rates is wrong

by Ira EllmanProfessor at Sandra Day O'Connor College of Law, Arizona State University

Proponents of criminal justice reform never talk about sex offenders. They're political untouchables subject to lifelong restrictions that continue long past their confinement, restrictions justified as necessary to protect the public from their propensity to re-offend. Two Supreme Court decisions established that justification. But they rely on a scientific study that doesn't exist.

"Frightening and High"

McKune v. Lile, 536 U.S. 24, 33 (2002) rejected, 5-4, Robert Lile's claim that Kansas violated his 5th Amendment rights by punishing him for refusing to complete a form detailing prior sexual activities that might constitute an uncharged criminal offense for which he could then be prosecuted. The form was required for participants in a prison therapy program; refusing to join the program meant permanent transfer to a higher security unit where he would live among the most dangerous inmates and lose significant privileges, including the right to earn the minimum wage for his prison work and send his earnings to his family. Justice Kennedy explained the treatment program helped identify the traits that caused "such a frightening and high risk of recidivism" among sex offenders—a rate he said "has been estimated to be as high as 80%." The following year in *Smith v. Doe,* 538 U.S. 84 (2003) the Court upheld Alaska's application, to those convicted before its enactment, of a law identifying all sex offenders on a public registry. It reasoned that the *ex post facto* clause was not violated because registration is not punishment, but merely a civil measure justified because the "risk of recidivism posed by sex offenders" is "frightening and high", 536 U. S. at 34.

The idea that sex offenders repeat their crimes at high rates has fed legislation imposing increasingly harsh post-release burdens on them, nearly all triggered by being on a sex offender registry. Registrants may face residency restrictions sometimes severe enough to exclude them from entire cities and prevent them from living with their families, "presence restrictions" barring them from using public libraries or parks with their families, formal exclusion from many jobs, and informal exclusion from many more. The registration requirement typically extends for decades, and in some states, such as California, for life, with no path off the registry for most registrants. Courts have usually turned back challenges to registration and the consequences that flow from it; a Lexis search finds that in 91 cases the

court's opinion quotes Justice Kennedy's dramatic statement that the sex offender recidivism rate is "frightening and high". But is it? Do those convicted of sex offenses really re-offend 80% of the time, or anything close to that?

A "Statistic" With No Support

McKune provides just one citation for its much-quoted statement: a 1988 Justice Department "Practitioner's Manual". That reference likely came from the amicus brief supporting Kansas filed by the Solicitor General, then Ted Olson, which also cites it. This Practitioner's Guide itself provides but one source for the claim, but it's no scientific study. It's a 1986 article from *Psychology Today*, a mass market magazine aimed at a lay audience, which had this sentence: "Most untreated sex offenders released from prison go on to commit more offenses–indeed, as many as 80% do." Freeman-Longo, R., & Wall, R, *Changing a lifetime of sexual crime*, Psychology Today (1986). That sentence is a bare assertion with no supporting reference. Nor did its author have the scientific credentials needed to qualify at trial as an expert on recidivism. He was a counselor, not a scholar, and the article containing the sentence isn't about recidivism statistics. It's about a counseling program for sex offenders he then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported assertion about the lower recidivism rate for those who complete his program.

So what *is* the re-offense rate for those convicted of a sex offense? One cannot calculate it without first defining "re-offense," without specifying the time period to employ, and without considering whether the categories of people these laws label "sex offender" all present the same risk level. Consider first what counts as a re-offense. If the purpose of the sex offender registry is to aid the police in investigating sex offenses, or warn the public about persons thought likely to commit them, then we want to know the rate at which those convicted of a sex offense commit another one. That's different than the rate at which they commit any offense that returns them to prison. When the California Corrections Department recently examined cases of sex offender registrants returned to prison for a new offense, they found that in 88% of the cases, the new offense was a parole violation. Parole violations are generally acts that aren't crimes for anyone not on parole—things like going to a bar or visiting a friend who's also an ex-felon. Only 1.8% of those re-incarcerated had committed a new sex offense.

The time period also matters. The most cautious measure would ask whether an offender *ever* commits another sex offense, but there's the disadvantage that a sample limited to deceased offenders would necessarily exclude most released in the past ten or twenty years. There are studies that track people for long periods, however, and a recent meta-analysis by leading scholar Karl Hanson combined the data from 21 studies which followed nearly 8,000 offenders for an average of 8.2 years, and as long as 31. Sixteen of the 21 studies tracked offenders in other western countries (most often, Canada), allowing us to measure the re-offense rate we get *without* the distinctly harsh American system of long sentences and post-release restrictions. The studies examined different populations of offenders; some might be expected to present a higher risk of re-offense than others. Hanson used a well-established risk measure, the Static 99-R, to sort the offenders into three risk categories. Nearly 20% of the *high-risk* offenders committed a new sex offense within five years of release, and an additional 12% did so during the next 10

years. But the 68% who *hadn't* committed a new sex offense fifteen years after release rarely did later. Indeed, *none* of the high-risk offenders who were offense-free after 16 years committed a sex offense thereafter.

This point is important because most people are typically put on registries for decades, and often for life; being offense-free for fifteen years or more won't get them removed even though that history tells us they're very unlikely to commit a new offense. Indeed, it's mistaken to think of anyone offense-free for fifteen years as high-risk. At the time of their release we cannot tell which high-risk offenders will be among the two-thirds who won't re-offend, but that is revealed over time. Those who haven't re-offended after fifteen years are not high-risk for doing so.

And what about those who were *not* classified high-risk in the first place? About 97.5% % of the low-risk offenders were offense-free after five years; about 95% were still offense-free after 15 years. Some context can help here. About 3% of felons with *no* known history of sex offenses commit one within 4.5 years of their release. Of course, they're not on the sex offender registry after release even though the chance of their committing a sex offense is the same or higher than the chance of a new sex offense by a either a low-risk offender, or a high-risk sex offender who has been offense free for fifteen years. What about the chance of a sex offender committing some other serious crime? Released sex offenders are actually *less* likely to commit a new felony of any kind, after release, than are other released felons.

Sex offender registries include a lot of people who are low-risk from the outset: a teenager who had consensual sex with another teenager, people who possessed erotic images of anyone under 18 but never even attempted to commit any contact offense, and even, depending on the state, someone convicted of public urination. A Justice Department study found that more than a quarter of all sex offenders were minors at the time of their offense. People may assume the registry's purpose is to warn people about those who committed violent, coercive, or exploitative contact sex offenses, but they're in fact filled up with people who never did any of those things.

Or, people who once did but are very unlikely to do so again because it's been so long since they committed any crime. The *Smith* respondents who challenged the Alaska registry were classified as "aggravated" sex offenders, required under Alaska law to register *four times a year for life*, because they had been pled *nolo contendere* in 1984 to sexual contact with minors. *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001). They were released in 1990. One had completed a two-year post-release treatment program. The other had remarried and been granted custody of his daughter after psychiatric evaluations found he had "a very low risk of re-offending" and was "not a pedophile". Neither had re-offended in the twelve years since release, a fact that alone predicts a re-offense rate below 5%. Alaska posts the address and place of employment of all registrants "for public viewing in print or electronic form, so that it can be used by "any person" and "for any purpose." Alaska Admin. Code tit. 13, § 09.050(a) (2000) as described in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

Why The Re-offense Statistic Matters to Courts

There's a constitutional problem with rules that justify substantial burdens on large groups of low-risk offenders by mistakenly classifying them high-risk. In *In the Interest of J.B.*, 107 A.3d 1

(Pa. 2014), the Pennsylvania Supreme Court struck down state rules required by federal law that placed juveniles over 14 on the state registry for 25 years if they committed a rape or "aggravated indecent assault". The rules' rationale was the legislative finding that such offenders "pose a high risk of committing additional sexual offenses" but the court objected that this finding just wasn't true of juveniles, and therefore unconstitutionally burdened their ability "to obtain housing, schooling, and employment, which in turn hinders their ability to rehabilitate." The California Supreme Court used different labels but a similar logic when it held this year, in *In re Taylor*, 60 Cal. 4th 1019, that it was unconstitutionally irrational to automatically subject *every* sex offender parolee in San Diego County to residency restrictions that impeded their rehabilitation and left many of them with no place to live. Once again, the problem with the statute was its application to every sex offender, without regard to their individual circumstances including an individualized assessment of each offender's risk of re-offense.

The logic of these decisions offers hope for a wider judicial rationalization of the rules on sex offender registries, but to realize that hope, one must apply the principle adopted by both the Pennsylvania and California supreme courts to a correct understanding of the facts. The principle is that public safety policies that restrict and burden individuals cannot be based on sweeping generalizations about the risk posed by *anyone* who commits an act that puts him on a sex offender registry, given the fact that the risk varies across individual registrants in ways we can easily assess, and also declines over time for any individual who remains offense-free. The burdens of registration must be targeted on those who are in fact high-risk. But while these recent decisions offer hope, the Pennsylvania opinion also illustrates the difficulty of getting courts to understand the facts well enough to apply them properly. It rejected the law's application to juveniles because of their low re-offense rate of ("between 2-7%"), but it failed to understand that the re-offense rate for many if not most adults on the registry is within the same 2-7% range, especially if one includes adults who have been on the registry fifteen years without a new offense.

Writing on a different subject entirely, Eula Biss recently observed:

Risk perception may not be about quantifiable risk so much as it is about immeasurable fear. Our fears are informed by history and economics, by social power and stigma, by myth and nightmares. And as with other strongly held beliefs, our fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves.

The label "sex offender" triggers fear, and disgust as well. Both responses breed beliefs that do not yield easily to facts. That's why even those politicians now urging criminal justice reforms conspicuously omit mentioning sex offenses when they argue for less punitive policies that would facilitate the offenders' reintegration into civil society. Unfortunately, the Supreme Court has fed the fear. It's become the "go to" source that courts and politicians rely upon for "facts" about sex offender recidivism rates that aren't true. Its endorsement has transformed random opinions by self-interested non-experts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed. The Court's casual approach to the facts of sex offender re-offense rates is far more frightening than the rates themselves, and it's high time for correction. Perhaps there's now hope it may soon happen.