CASE NO. 15-2346/2486

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DOES, #1-5; MARY DOE

Plaintiffs-Appellants/Cross-Appellees,

-vs-

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

Defendants-Appellees/Cross-Appellants.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, *Amici Curiae* Law Professors make the following disclosures:

1. Is any said *amicus* a subsidiary or affiliate of a publicly-owned corporation?

No.

2. Is there a publicly-owned corporation, not an *amicus*, which has a financial interest in the outcome?

No.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are 33 law professors who specialize in constitutional law, substantive criminal law, criminal procedure, and/or the legal treatment of persons with criminal records. As law professors, *amici* have an interest in helping the Court to ensure that the Ex Post Facto Clause of Article I of the United States Constitution is enforced in a manner consistent with its core goals and principles. A full list of amici is attached as Appendix A.

SUMMARY OF ARGUMENT

Michigan has retroactively placed punitive and highly burdensome restrictions on those convicted of sex offenses, including extensive requirements to appear frequently in person at police departments, as well as restrictions on their movement, residency, and place of work. These restrictions stem automatically from their convictions, with no individualized determinations. These regulations are different in degree and in kind from provisions previously upheld by the Supreme Court of the United States and this Court. They are far more burdensome, and are punitive rather than regulatory in their effect. This Court should find that Michigan's retrospective application of these restrictions violates the Ex Post Facto Clause of Article I, Section 10 of the Constitution.

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief, nor did any party or party's counsel or any person other than amici contribute money for the preparation and submission of this brief. The word count does not include the Statement of Interest.

This brief proceeds in two parts. First, reasoning from historical and doctrinal background, we show that Michigan's retroactive restrictions on sex offenders implicate the Ex Post Facto Clauses' core purposes. The Clauses were adopted against a background of rampant retrospective legislation, and the Framers viewed such legislation as a serious threat to fundamental liberties. Retrospective punishment presents a high risk of vindictive and abusive legislation that indulges the political passions of the moment, at the expense of a socially disfavored class. Moreover, it runs afoul of individuals' fundamental right to notice of the criminal laws governing their conduct. Michigan's retroactive application of burdensome restrictions on sex offenders entail precisely the sort of targeting of socially undesirable persons that the Framers were so concerned about.

Criminal law in general targets socially undesirable *conduct*, and to that end, Michigan certainly has the power to craft strong prospective criminal prohibitions and punishments of sex offenses. But the prospective character of criminal law is a crucial constraint on its abuse; it means that it does not target defined existing individuals or classes of persons. Rather, it gives every individual the chance to conform his or her conduct with the law, with notice of the consequences of failing to comply. The Ex Post Facto Clauses are a crucial bulwark of individual liberty and a protection against the abuse of government power. Antipathy toward or fear

of a given group of individuals—even to the extent that it is justified by their past conduct—cannot justify sacrificing this core feature of the rule of law.

Second, we address the core doctrinal question in the case: are the challenged restrictions "punishment"? The nature of the statutory restrictions and the voluminous factual record below amply support a conclusion that it is. We address this question by proceeding straightforwardly through five key factors identified by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), and applied to sex offender registration in *Smith v. Doe*, 538 U.S. 84, 100 (2003), which we distinguish, along with related Sixth Circuit precedents.

The restrictions at issue here are so much more burdensome than those upheld in prior cases that they should be seen as different in kind; this is no longer merely a "registration" case. They include frequent in-person appearances at police departments as well as the public dissemination of facts that go well beyond already-public criminal records. Moreover, registration also triggers extreme restrictions on freedom of movement—geographic exclusion zones that apply to work, residence, and "loitering." These restrictions place huge swaths of Michigan off-limits to registrants, and because the zones' borders are in practice unknown to registrants, they effectively chill an even broader range of lawful conduct.

With these distinctions in mind, application of the *Mendoza-Martinez* factors leads to the conclusion that the Michigan restrictions are clearly punitive in effect.

First, the restrictions are closely analogous to traditional punishments, including modern probation and parole (which in fact are typically far less onerous) and the historical practice of banishment. Second, the restrictions impose affirmative disabilities or restraints—quite severe ones, as already described. Third, the restrictions serve traditional purposes of punishment, including retribution, general deterrence, incapacitation, and specific deterrence. Fourth, while the restrictions seek to advance the state's regulatory interest in protecting the public from sex offenses, the best empirical evidence indicates that they have in practice had the opposite effect. That empirical evidence was not yet available when the Court decided *Smith*, and informs the question whether the *effect* of the law (and not just its intent) is better characterized as punitive or regulatory. Finally, the restrictions are excessive with respect to their regulatory purpose. They are not tailored to individuals' risk, which the Supreme Court has indicated is necessary if a law is (like this one) sufficiently burdensome. Moreover, some of the restrictions are simply gratuitous and do not have any apparent connection to public safety.

I. ARGUMENT

A. Michigan's Retroactive Restrictions on Sex Offenders Implicate Core Purposes of the Ex Post Facto Clause.

The Framers' inclusion of the Ex Post Facto Clauses in the United States Constitution, U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or

grant any Title of Nobility"); U.S. CONST. art. I, § 9, cl. 3 (likewise restricting federal legislation), reflected their profound concern for the threat to human liberty posed by retroactive criminal laws. The founding generation viewed the Clauses as a critical substantive protection against vindictive legislatures and safeguard against tyranny. *See* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1267 (1998). The challenged Michigan sex offender restrictions are of a piece with the types of legislation the Ex Post Facto Clauses were designed to preclude.

The Framers' aversion to ex post facto laws was informed by experience. A review of the period between independence and the ratification of the Constitution reveals that state legislatures enacted countless abusive retrospective statutes, including bills of attainder, statutes confiscating property, and statutes setting aside court judgments. Evan C. Zoldan, *Reviving Legislative Generality*, 98 Marquette L. Rev. 625, 679 (2014). But by the time of the framing of the Constitution, the national mood had shifted considerably. Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wisc. L. Rev. 727, 768-69 (2015). A number of states prohibited ex post facto laws in their state constitutions, declaring them "oppressive, unjust, and incompatible with liberty." Maryland Const. of 1776, A Declaration of Rights, art. XV; North Carolina Const. of 1776, A Declaration of Rights, art. XXIV; *see also Place v. Lyon*, 1 Kirby 404, 405 (Conn. 1788) (holding that ex post facto laws

violate a "fundamental principle of justice." During debates over the language of the Constitution, James Wilson and Oliver Ellsworth, both future Supreme Court Justices, argued that ex post facto laws are so odious that they are void even without a specific prohibition in the Constitution's text. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed. 1911). James Madison likewise deemed them "contrary to the first principles of the social compact and to every principle of sound legislation." THE FEDERALIST No. 44, at 287 (James Madison) (Isaac Kramnick ed. 1987).

The Supreme Court has likewise recognized that the Ex Post Facto Clause serves several intertwined purposes: it protects socially disfavored groups from vindictive legislation, it preserves the separation of powers (wherein the legislature defines the law prospectively, while the judiciary subsequently applies that law to conduct after it has occurred), and it protects the core individual right to notice of criminal prohibitions and punishments. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). The principle of *nulla poena sine lege* is a fundamental feature of the rule of law that constrains every civilized system of government, including ours. Laws that failed to provide adequate notice were routinely condemned on the eve of the Constitution's framing. The Vermont Council of Censors summed up the national mood when it criticized its legislature for creating an environment in which citizens "scarce know what is law, or how to regulate their conduct." Address of

the Council of Censors (Feb. 14. 1786), *in* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 67 (Gillies & Sanford eds. 1991).

Among the most reviled of retrospective laws enacted during the period preceding the Constitution were statutes used to target political or social undesirables. For example, state legislatures enacted statutes confiscating property from, banishing, and in some cases condemning to death, citizens suspected of harboring heterodox political views. ZECHARIAH CHAFFEE JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 93 (1956). The legislature punished some of these individuals because they were believed to present a danger to the community, W.P. Trent, *The Case of Josiah Philips,* 1 AM. HIST. REV. 444, 454 (1896), and others merely because they offended the sensibilities of the politically powerful, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 367 (1969). In rejecting ex post facto laws, the framers affirmed their commitment to eradicating retrospective legislation that targeted politically vulnerable groups or individuals that ran afoul of the majority will. *See, e.g.*, JAMES WILSON, *Considerations on the Bank of North America 1785, in* 1 COLLECTED WORKS OF JAMES WILSON, at 60, 71 (Mark David Hall eds. 2007).

Thus, as Chief Justice Marshall observed in *Fletcher v. Peck*, a core reason for the Ex Post Facto Clauses was to bar legislatures from enacting retroactive punishments when they were caught up in the "feelings of the moment" and

subject to "sudden and strong passions" toward a particular population. 10 U.S. 87, 137-38 (1810). This point was reiterated in *Cummings v. Missouri*, 71 U.S. 277 (1866), which struck down as a violation of the Ex Post Facto Clause a loyalty oath law that required affirmations concerning past conduct, which had the effect of retrospectively excluding past Confederate sympathizers from certain offices. The Court recognized that the public's outcry against Confederate sympathizers, while understandable in the Civil War's wake, was no justification for abridging one of the most important protections of liberty in the Constitution. *Id.* at 316-17.

To be sure, criminal laws routinely reflect community sensibilities, including anger and fear; criminalization is properly meant to condemn and punish conduct that society deems unacceptable. But the prospective character of criminal law is a crucial check on abuses of this function, by preventing entire classes of people from being suddenly subjected to harsh treatment. In effect, prospective criminal laws act slowly; they do not impose punishment on any individual right away. Rather they apply only after each individual has had the opportunity to learn of the law and the punishments it imposes, and has chosen to violate it anyway. Moreover, prospective criminal laws do not target any existing group or individual for punishment; they bar future *actions*, and attach punishment to them, such that every individual in society may decide (through his future conduct) whether to subject himself to those punishments.

The passions of the moment may thus routinely be reflected in legislation that binds future individuals, until and unless those passions fade and the legislation changes. But the Ex Post Facto Clause prevents the legislature from engaging in more sweeping legislation, targeting whole already-existing groups on the basis of *past* conduct, with a broad and sudden punitive effect. It likewise protects every individual from being subjected to punishments that he had no reason to anticipate at the time of his actions. The Clause thus acts, in James Madison's words, as a "constitutional bulwark" against instances of impassioned legislative overreach. *See* THE FEDERALIST, *supra*.

Michigan's retroactive application of its recent sex offender regulations is a perfect example of exactly this sort of overreach. There can be no doubt that sex offenders today are a disdained population—the target of severe social opprobrium and numerous innovative punishments and regulations. *See* Wayne A. Logan, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 85-108 (2009); Catherine L. Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L. J. 1071, 1073-74 (2012). Michigan has targeted this population with sweeping restrictions, triggered automatically by their convictions, no matter how long ago those convictions took place. The restrictions, as applied to plaintiffs and others whose

offenses predate their adoption, are plainly retroactive. At the time of their offenses, plaintiffs had no notice that they would be subject to them.

Certainly, legislatures are free to respond to the public demand to condemn and punish those who commit sex offenses. Michigan and other states have many constitutionally permissible tools at their disposal for such a response. They are, in particular, free to heighten the severity of punishments for sex crimes. But the Ex Post Facto Clause requires that such punishments be applied only prospectively.

B. The Challenged Restrictions Are Much More Burdensome than Previously Upheld Sex Offender Registration Requirements, and Are Punishment.

The Supreme Court has interpreted the Ex Post Facto Clauses to apply to retrospective *punishment, see, e.g.*, *Calder v. Bull*, 3 U.S. 386, 390 (1798), so the key question for this Court is whether the Michigan sex offender restrictions are punishment. The Supreme Court has held that legislation is punishment if it is punitive in intent *or* in effect. *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). Because decisions such as the Court's in *Smith* have established a strong norm of deference to legislatures concerning their intents, the critical question for courts most often concerns whether the effects of challenged statutes are punitive. *See*, *e.g.*, *Smith*, 538 U.S. at 92.

A review of Michigan's statutory requirements, M.C.L. § 28.721 *et seq.*, as well as the effects of their application, dictates the conclusion that the restrictions

are punitive. To determine if a law is punitive in its effects, the Supreme Court created the seven-factor test outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). The *Mendoza-Martinez* factors are "neither exhaustive nor dispositive," but are a useful means of determining whether the effects of a statute are punitive. *Smith*, 538 U.S. at 97. In *Smith*, the Supreme Court deemed five of the factors to be most relevant as applied to sex offender registries—namely, whether the scheme "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id*. Unlike in *Smith*, each of those factors strongly point toward a conclusion that the Michigan statute is punitive in its effects.

A primary question for this Court is whether *Smith*, which upheld an Alaska sex offender registration requirement, can be distinguished. It can and should be. The Alaska law is a first-generation registration requirement, imposing comparatively minor burdens: offenders did not need to register in person, faced only misdemeanor charges for failure to register, and remained free to work, reside, and travel wherever they wanted. *Smith*, 538 U.S. at 101; *see* ALASKA STAT. §§ 12.63.010(b) (2000). The Michigan law is different in kind. Its requirements far exceed registration, including frequent in-person appearances and a sweeping restriction on residency, work, and movement: with only narrow statutory

exceptions, registrants may not work, reside, or "loiter" within 1000 feet of a school. M.C.L. 28.734 & 28.735. Violations trigger serious felony sanctions, and for many offenders the law stays in effect for life. *Smith* did not contemplate laws like this, and its reasoning implies that this law should be struck down.

Three published Sixth Circuit cases have briefly addressed Ex Post Facto Clause challenges convictions for failure to register under the federal Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). *United States v. Coleman*, 675 F.3d 615, 619 (2012); *United States v. Stock*, 685 F.3d 621, 627 n.4 (2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012). For at least four reasons, these cases are not dispositive here. First, all three arose in the context of criminal convictions for failure to register, a violation of a *prospective* criminal statute, so the Ex Post Facto issue was deemed not presented at all. *E.g.*, *Felts*, 674 F.3d at 605-66 ("Felts's crime of failing to update his sex offender registry after the enactment of SORNA was entirely separate from his crime of rape of a child and aggravated sexual battery."). Because the instant case involves a civil challenge to the Michigan law's requirements, not a defense to a conviction for refusal to follow them, the prior criminal cases should be deemed simply inapposite. Second, the prior cases specifically involved convictions for failure to *register* under SORNA; the defendants had been released or moved to new jurisdictions and failed to register entirely. *See Stock*, 685 F.3d at 623; *Coleman*,

675 F.3d at 617-18; *Felts*, 674 F.3d at 602. The constitutionality of a basic, initial registration requirement had been addressed by the Supreme Court in *Smith*, so it is unsurprising that this Court would consider a conviction for failure to meet such a requirement permissible. But none of these criminal cases gave this Court reason to consider SORNA's more demanding additional requirements (those exceeding those of the Alaska law considered in *Smith*), which are mirrored in Michigan's law. These include frequent in-person appearance requirements, as well as the lifetime reach of the law. Third, the cases obviously did not address the additional Michigan-specific restrictions that are *not* included in SORNA, including its residency, work, and loitering restrictions. Fourth, in none of the cases was there a factual record demonstrating the punitive effects of the law in question. Here, an extensive record clearly demonstrates those effects.[2]

1. The Michigan Restrictions on Residency and Movement Are Analogous to Traditional Punishments.

In *Smith*, addressing the first *Mendoza-Martinez* factor, the Supreme Court considered whether the Alaska registration requirement was analogous to historical punishments such as banishment and shaming penalties. As the Court explained:

[2] *United States v. Shannon*, 511 Fed. Appx. 487 (6th Cir. 2013), involves a prospective challenge to SORNA's application brought by a criminal defendant at his sentencing. *Shannon* is unpublished and nonprecedential. In any event, the Court did not address any of SORNA's novel features other than the one on which the defendant focused, namely its application to juvenile convictions; it did not consider Michigan's residency, work, or travel restrictions; and it did not have the benefit of a factual record like the one developed in this case.

> Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required "to stand in public with signs cataloguing their offenses." … The aim was to make these offenders suffer "permanent stigmas, which in effect cast the person out of the community." The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one.

Smith, 538 U.S at 97-98. Actual, physical banishment was thus a maximally severe penalty in the colonial era; lesser (but still quite serious) punishments *"in effect* cast the person out of the community," by imposing stigma. *Id.* (emphasis added). Such actions were unquestionably considered "punishment" around the time of the founding, and would still be easily recognizable as punishment today. The Supreme Court, however, found that Alaska's registration requirement did not rise to this level. It did not resemble banishment; sex offenders remained free to live and work in their communities. And the state's Internet dissemination of records could not by itself count as punishment, because it amounted only to the further sharing of information (criminal records) that is already public record. The stigma, the Court held, flowed from the conviction itself.

The Michigan law is different. First, it is much more closely analogous to banishment. Indeed, it *is* banishment—not from the state in its entirety, but from a great many locations within it, including entire urban areas in which all locations are within 1000 feet of a school. *See*, *e.g.*, Jt. Statement of Facts, R.90, PageID 3810-3824 (describing the testimony of expert witness Peter Wagner and

displaying illustrative maps). Because working and "loitering" do not necessarily involve static locations, these restrictions are likely to effectively exclude registrants even from areas that they do not technically govern. As individuals travel, they cannot be expected to know at any given time where every nearby school is, and must err on the side of caution to avoid serious criminal punishment. *See id.* And surely, those permanently excluded by law from core community functions that take place in and near schools are seriously stigmatized and effectively cast out as surely as one who was made to temporarily display a sign with her offense. Here, the effect flows not merely from the conviction itself, but from the prohibitions on movement, work, and residency as well, which mark the offender permanently as a literal outcast.

Second, Michigan's restrictions are also analogous to parole or probation supervision, which is clearly punishment, *see United States v. Knights*, 534 U.S. 112, 119 (2001). Indeed, Michigan's restrictions are far *more* restrictive than ordinary parole or probation. In *Smith*, the Court took seriously the claim that registration requirements, even taken alone, were analogous to probation or supervised release, but ultimately rejected the argument because *solely* a reporting requirement was at issue, and not a direct restriction on liberty:

> This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders

> subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so.

538 U.S. at 101. In Michigan, registrants are *not* "free to move where they wish and to live and work as other citizens"; their actions need not merely be reported, but are directly constrained. Moreover, they also are required to appear *in person* at police departments under a long list of circumstances (unlike under the Alaska law), and these requirements for many registrants stay in effect for life—making them, again, like a supercharged, unending version of parole or probation.

Moreover, even apart from these direct restrictions, the Michigan law imposes public stigma that, unlike the Alaska law in *Smith*, does *not* merely amount to republishing information that was already public. The registration requirement is not restricted to those whose convictions are already public record. It applies, for example, to plaintiff Doe #2, whose charges (stemming from a sexual relationship with his 14-year-old girlfriend when he was 18 years old) was handled under the Holmes Youthful Trainee Act, which resulted in a dismissal of the case would otherwise (but for the registry have resulted in his record being sealed. Jt. Statement of Facts, R.90, PageID 3741-3747. Moreover, some of those required to register, such as Plaintiff Doe #1, were convicted of non-sex offenses (in this case, attempted robbery and kidnapping relating to the temporary detention

of the robbery victim), and indeed did not commit sex offenses at all. *Id.* at PageID 3737-3740. It is thus only their presence on the registry that subjects them to the public stigma associated with sex offenders. Moreover, the registry (and not the underlying conviction) labels each offender within a "Tier"; plaintiffs, in Tier III, are thus branded as especially serious offenders, even though some of their convictions potentially might not otherwise carry such a substantial public stigma.

2. The Michigan Statute Imposes An Affirmative Disability or Restraint

The second *Mendoza-Martinez* factor is whether the challenged regulation imposes an "affirmative disability or restraint." *Mendoza-Martinez,* 372 U.S. at 168-69. The Michigan statute plainly does. It directly and dramatically restricts where registered persons may live, work, and move. It also imposes burdensome responsibilities, including frequent personal appearances at police stations. In addition, offenders must pay a registration fee and failure to pay this fee is a separate criminal offense. Finally, failing to register is a felony that potentially triggers a substantial prison penalty. All of these are disabilities or restraints directly imposed by the law itself; these are in addition to the indirect social and economic consequences of the increased public accessibility of the record.

In *Smith*, by contrast, the Court found that the Alaska registration requirement imposed little disability or restraint on offenders. This finding was critical, because "[i]f the disability or restraint imposed is minor and indirect, its

effects are unlikely to be punitive." *Smith*, 538 U.S. at 100. The *Smith* Court reached its conclusion for several reasons, none of which apply here.

First, the Court emphasized that the Alaska statute required only *calling* the police once a year or, in some cases, once a quarter. "The Alaska statute, on its face, does not require these updates to be made in person. And…the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act." *Id.* The Court noted that the lower court had factually erred in finding that the statute had in-person reporting requirements, but the Court's language strongly suggests that if such requirements *had* existed, they would have constituted affirmative disabilities and restraints. *Id*. Here, in contrast, Michigan requires regular in-person visits (ranging from yearly to quarterly, depending on the tier of the offense), and also requires the registrant to visit in person "immediately" upon changing domicile or employment, enrolling or withdrawing from an educational institution, changing a name, establishing an email address "or any other designations used in internet communications or postings," such as a social media account or an account with any online forum, traveling anywhere for seven days or more, buying or beginning to regularly operate any vehicle or discontinuing ownership or operation. M.C.L. § 28.725.

Second, the Alaska law did not otherwise directly restrict registrants' freedoms; the Court emphasized that they remained free to change jobs and

residences with no restrictions other than needing to inform the police. *Smith*, 538 U.S. at 101. In Michigan, in contrast, registration triggers severe restrictions on residency, work, and movement, as detailed above.

The Supreme Court has upheld occupational restrictions against Ex Post Facto Clause challenges, but only narrow restrictions affecting specific occupational categories. *See De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (upholding restriction on union membership for waterfront workers as a limited "regulation [of the] proper qualifications for a profession"); *Hawker v. New York*, 170 U.S. 189, 197-198 (1898) (upholding restrictions on the practice of medicine). It has never upheld a sweeping restriction affecting all types of work (depending on location) and simultaneously also restricting residency and mere presence. In *Cummings*, the Court struck down occupational restrictions on Confederate sympathizers, recognizing that work restrictions may indeed be punitive in effect. 71 U.S. at 286 ("If the legislature may punish a citizen, by deprivation of office or place, on the ground that his continuing to hold it would be dangerous to the State, then every punishment, by deprivation of political or civil rights, is taken out of the category of prohibited legislation. Congress and the State legislatures…[could then] pass retroactive laws at will."); *see Hawker*, 170 U.S. at 198 (distinguishing *Cummings*).

Third, while the plaintiffs in *Smith* argued that the Internet dissemination of their records would likely lead to employment and housing disadvantages, the Court dismissed this argument:

> This is conjecture….The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords… Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record.

Smith, 538 U.S. at 100-01. Here, however, the Court need not rely on conjecture. Unlike in *Smith*, and unlike in prior Sixth Circuit cases, the record here amply demonstrates the severe occupational and housing disadvantages faced by convicted sex offenders in Michigan. Again, these disadvantages are in substantial part *directly imposed* by the statutory restrictions. This statute does not merely disseminate information that was "already a matter of public record"; it directly restricts where registrants can live, work, and move. Moreover, plaintiffs have introduced ample evidence that they face disadvantages that t1hey did *not* face prior to being placed on the registry. And, as discussed above, the statute applies to persons who were *not* convicted of any crime at all (participating instead in a diversion program resulting in dismissal), or whose convictions were not of sex offenses. The *Smith* Court's logic simply does not apply here.

3. The Statute Serves the Traditional Purposes of Punishment.

The traditional aims of punishment—the third *Mendoza-Martinez* factor—include incapacitation, retribution, and specific and general deterrence, all of which are advanced by the Michigan restrictions. As discussed above, the statute imposes a range of severe restrictions and burdens on offenders, and these are triggered directly by the fact of criminal conviction, rather than by any separate finding of dangerousness. The deliberate imposition of harms on individuals by the state, in direct response to conviction of a criminal offense, is traditionally the central characteristic of "punishment," meeting for example H.L.A. Hart's classic definition.[3] Because the restrictions are determined by the past offense, and not present dangerousness, they are in an important sense backward-looking, consistent with retributive theories of punishment. They likewise are likely to act as a general deterrent to other potential offenders. Indeed, the leading empirical

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[3] As Professor Carol Steiker has explained, "most discussions about the nature of punishment begin, even if they do not end," with Hart's five-part definition of the "standard" case of punishment:

> (i) It must involve pain or other consequences normally considered unpleasant.
>
> (ii) It must be for an offence against legal rules.
>
> (iii) It must be of an actual or supposed offender for his offence.
>
> (iv) It must be intentionally administered by human beings other than the offender.
>
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 800 (1997) (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4-5 (1968)).

study has concluded that registration requirements appear to have a general deterrent effect, but *not* to reduce crime by registrants themselves (their purported regulatory purpose). J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161 (2011). This research was not yet conducted when *Smith* was decided, but it is part of the record in this case.

Meanwhile, the statute's purported regulatory purpose—to prevent recidivism—is itself also a traditional aim of punishment, which seeks to reduce recidivism through channels including incapacitation and specific deterrence. This statute seeks to incapacitate sex offenders from committing certain sex crimes (by barring them from places where they might have access to children) and to specifically deter them by making it more likely that they will be caught if they commit crimes. Because the same interests can be simultaneously described as punitive and regulatory, the fact that the restrictions advance them may not be very helpful in disentangling whether the restrictions should count as punishment for the purpose of the Ex Post Facto Clause. In *Smith*, the Court acknowledged that the statute could serve the traditional punishment purpose of general deterrence, but found that this factor was not dispositive, given its holdings on the other *Mendoza-Martinez* factors. 538 U.S. at 102. Here, however, those other factors tilt in *favor* of a finding of punitiveness.

4. The Michigan Statute Does Not Effectively Serve Its Purported Nonpunitive Purpose, and Is Excessive with Respect to that Purpose.

The final two *Mendoza-Martinez* factors considered in *Smith* are closely interrelated: whether the statute advances a legitimate nonpunitive purpose and whether it is excessive with respect to that purpose. Here, the statute seeks to serve the same basic purpose as the Alaska statute in *Smith*: preventing recidivism by registrants. This purpose is surely legitimate, and given *Smith*, we do not doubt that it can be characterized as nonpunitive or regulatory, even though it is also a traditional purpose of punishment.

However, here the factual record differs from that in *Smith*, including strong evidence (unavailable when *Smith* was decided) that the challenged restrictions fail to accomplish their regulatory purpose. The leading empirical study in the field finds that sex offender registration and notification requirements actually appear to *increase* recidivism (likely by undermining offenders' ability to find stable housing and employment). *See* Prescott & Rockoff, *supra*; Jt. Statement of Facts, R.90, PageID 3842-3846 (describing Prescott testimony). Moreover, expert witness Jill Levenson testified as to studies demonstrating that residency restrictions also do not appear to reduce recidivism, and may increase it by impeding offenders' successful reintegration. Jt. Statement of Facts, R.90, PageID 3846-3849.

Because the key inquiry in this case concerns whether the *effects* of the law are punitive rather than regulatory, empirical evidence as to what those effects

actually are is important. In an "effects" inquiry (distinct from the question of punitive *intent*, *Smith*, 538 U.S. at 92), the fact that a legislature may have intended the law to serve a regulatory purpose is not enough to sustain it. Empirical evidence may, over time, reveal that a law initially believed to be nonpunitive in effect should, in fact, be understood as punitive—and that is the case here.[4]

Moreover, having a nonpunitive purpose (even if it is indeed effectively accomplished) cannot be understood as sufficient, in and of itself, to defeat an Ex Post Facto Clause challenge; the *Mendoza-Martinez* factors must be considered in combination. This is especially so if (as here) the asserted nonpunitive purpose is prevention of recidivism and protection of public safety, because traditional criminal punishment *routinely* and centrally seeks to serve those same purposes (among others). For example, arguably the principal purpose of incarceration is to incapacitate offenders and thereby protect the community, and the historical punishment of banishment likewise seeks to protect the community by removing offenders. Yet no one could doubt that incarceration and banishment are

[4] Empirical evidence also now demonstrates that the magnitude of the state's interest in reducing recidivism is less than had previously been believed when *Smith* was decided (although we do not doubt that it still remains a legitimate state interest). *See Smith*, 538 U.S. at 103 (citing earlier studies for the proposition that the "risk of recidivism posed by sex offenders is 'frightening and high'"). For example, a Department of Justice study of the 9,691 sex offenders released in fifteen states since 1994 found that sex offender recidivism was only 5.3% in the critical window of three years after release. Lawrence A. Greenfeld, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003). This rate is significantly lower than recidivism rates for many other groups of criminal offenders.

"punishment." Here, the similarity of Michigan's restrictions to banishment, and the harshness of the disabilities it imposes, weighs heavily in favor of characterizing it as punishment, even if it also serves a regulatory objective.

In any event, the Michigan restrictions are also excessive with respect to their regulatory purpose, in ways that differ from the Alaska statute at issue in *Smith* and from the federal registration requirement considered in prior Sixth Circuit cases. We have already detailed above the ways in which Michigan's legislative scheme is particularly harsh, including its restrictions on movement, residency, and work, the fees it imposes, and its many personal appearance requirements. These requirements are excessive. The fees and frequent personal appearance requirements bear no apparent relationship whatsoever to public safety at all. How, for example, could public safety be advanced by requiring a registrant to appear *in person* (and not merely call) whenever he creates a new login for some online function? These are simply gratuitous burdens.

The restrictions on movement, residency, and work likewise are far out of proportion to anything required to promote public safety—especially as applied to offenders like the plaintiffs, most of whom have committed relatively less serious sex offenses that were not covered by Michigan's registration requirements in their prior incarnations. While it may certainly be reasonable for a state to restrict some sex offenders' access to jobs and locations where children are present, here the

restrictions are sweeping and not individualized; they do not merely apply to offenders whose individual histories suggest that they pose a threat to children. In *Smith* and other cases, courts have upheld some registration requirements and other restrictions even though they similarly lacked individualized fact-finding. But this was because these requirements were deemed only minimally burdensome. The Supreme Court has made clear that when a state imposes greater burdens on individuals, its obligation to make sure those burdens are appropriately tailored grows. *Smith*, 538 U.S. at 104 (distinguishing *Hendricks*, 521 U.S. at 363).

We acknowledge that the plaintiffs bear the burden of providing the "clearest proof" that this statute is unconstitutional. *Id.* at 92. This standard, however, cannot mean that no proof suffices. Indeed, even by this standard, *Smith* itself was a difficult case, drawing dissents from three Justices and a concurrence from a fourth, Justice Souter, that emphasized the case's extremely close nature. *Smith*, 538 U.S. at 110 (Souter, J., concurring). The Michigan statute is much harsher than the Alaska statute at issue in *Smith*, and much more analogous to traditional punishments; moreover, the record in this case far more effectively demonstrates its punitive effects and its failure to accomplish its regulatory purpose. The case is no longer close; the "clearest proof" standard is satisfied.

By holding Michigan's sex offender restrictions unconstitutional, the Sixth Circuit would join a growing body of courts that have concluded that burdensome

next-generation sex offender restrictions have crossed the line from regulatory to unconstitutionally punitive. *See*, *e.g.*, *Doe v. New Hampshire* 111 A.3d 1077, 1100-02 (N.H. 2015) (holding that the sex offender "statute has changed dramatically . . . to the point where the punitive effects are no longer '*de minimis*'"); *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004, 1030 (Ok. 2013) (holding the Oklahoma sex offender restrictions unconstitutional); *Doe v. Dept. of Public Safety and Corr. Servs*., 62 A.3d 123, 143 (Md. Ct. App. 2013) ("The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime."); *State v. Williams*, 952 N.E.2d 1108, 1112-13 (Ohio 2011) ("The statutory scheme has changed dramatically…[W]e conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive."); *Wallace v. Indiana*, 905 N.E.2d 371, 384 (Ind. 2009) ("Thus, the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping."); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (holding that "the retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA…is punitive"); *Com v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009) (holding that Kentucky's "residency restrictions are so punitive in

effect as to negate any intention to deem them civil"); *Doe v. Alaska*, 189 P.3d 999, 1017 (Alaska 2008) (holding that a modified Alaska registration system now violated the Ex Post Facto Clause).

II. CONCLUSION

The collective effects of Michigan's collateral restrictions on sex offenders are so punitive that this Court should hold them unconstitutional violations of the Ex Post Facto Clause when retrospectively applied to the Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of January, I filed on behalf of law professors as *amici curiae* in support of plaintiffs-appellants electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

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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 6740 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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