RECEIVED by MSC 4/22/2016 3:37:17 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
(Borello, P.J., and Whitbeck and K. F. Kelly, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BOBAN TEMELKOSKI,

Defendant-Appellant.
_________________________________/

Supreme Court No. 150643
Court of Appeals No. 313670
Wayne Cir. Ct. No. 94-000424-FH

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

David Herskovic (P68897)
Freedman & Herskovic PLC
3000 Town Center, Ste. 1250
Southfield, MI 48075

Miriam J. Aukerman (P63165)
American Civil Liberties Union Fund of Michigan
1514 Wealthy St. SE, Ste. 242
Grand Rapids, MI 49506

Michael J. Steinberg (P43085)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201

Attorneys for Defendant-Appellant

RECEIVED by MSC 4/22/2016 3:37:17 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

QUESTIONS PRESENTED 1

INTRODUCTION 2

STATEMENT OF FACTS 2

Mr. Temelkoski's Charges Were Dismissed and His Case Sealed Under HYTA 2

Procedural History of Mr. Temelkoski's Motion for Removal From the Sex Offender Registry. 4

OVERVIEW OF HYTA AND SORA IN THE LAST TWO DECADES 5

ARGUMENT 8

Standard of Review and Issue Preservation 8

Summary of Argument 8

I. IMPOSING SORA ON MR. TEMELKOWSKI VIOLATES DUE PROCESS. 9

A. The State's Promises Must Be Analyzed Under the 1994 Version of HYTA. 9

B. HYTA Provides for Dismissal of Charges and Freedom From Civil Consequences in Return for a Plea of Guilty and Completion of Terms Set by the Court. 11

C. Mr. Temelkoski Complied with the Terms of HYTA But the State Did Not. 12

D. Retroactive Lifetime Registration Violates Mr. Temelkoski's Right to Fair Warning and Upsets His Settled Expectations. 17

II. SORA IS PUNISHMENT. 19

A. Introduction 19

B. As "Super-Registration" Laws Have Become More Punitive, Courts Have Increasingly Found that SORA Laws Are Punishment. 19

C. Because SORA Imposes Severe Restraints, Individualized Risk Assessment Is Required. 21

D. SORA is "Punishment" Under the Established Legal Framework for Defining That Term. 23

E. The Legislature Intended SORA to Be Punitive. 24

F. SORA Has a Punitive Effect. 26

III. THE EX POST FACTO CLAUSE WAS DESIGNED TO PREVENT THE VERY HARMS SORA HAS CREATED 45

IV. SORA IS CRUEL AND/OR UNUSUAL PUNISHMENT FOR HYTA TRAINEES. 47
A. The Court Need Not Reach the Cruel and/or Unusual Punishment Question.................... 47
B. SORA Is Cruel or Unusual Punishment as Applied to Mr. Temelkoski. 47
RELIEF REQUESTED... 49

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

INDEX OF AUTHORITIES

Cases

Austin v United States, 509 US 602; 113 S Ct 2801; 125 L Ed 2d 488 (1993) 23
Bannum, Inc v City of Louisville, 958 F2d 1354 (CA 6, 1992) 43
Burgess v Salmon, 97 US 381; 24 L Ed 1104 (1878) 45
Byjelich v John Hancock Mut Life Ins Co, 324 Mich 54; 36 NW2d 212 (1949)......................... 15
City of Cleburne v Cleburne Living Ctr, 473 US 432; 105 S Ct 3249;
87 L Ed 2d 313 (1985) 43
City of Detroit v Walker, 445 Mich 682; 520 NW2d 135 (1994 17
Collins v Youngblood, 497 US 37; 110 S Ct 2715; 111 L Ed 2d 30 (1990).......................... 45, 47
Commonwealth v Baker, 295 SW3d 437 (Ky 2009)... passim
Connecticut Dep't of Public Safety, 538 US 1; 123 S Ct 1160; 155 L Ed 2d 98 (2003)............. 44
County of Wayne v Hathcock, 471 Mich 445; 684 NW2d 765 (2005) 8
Doe v Dep't of Pub Safety and Corr Servs, 430 Md 535; 62 A3d 123 (2013)...................... 20, 35
Doe v Harris, 3:12-cv-05173 (ND Cal)... 40
Doe v Kelley, 961 F Supp 1105 (WD Mich, 1997)... 36
Doe v Mich Dep't of State Police, 490 F3d 491 (CA 6, 2007) 10
Doe v State, 167 NH 382; 111 A3d 1077 (2015)... 20, 23, 36, 45
Doe v State, 189 P3d 999 (Alaska 2008) 21, 38
Doe v Thompson, District Court of Shawnee County, Kansas, issued July, 2013
(Docket No. 12-C-168) 42
Does v Snyder, 101 F Supp 3d 672 (ED Mich, 2015).. 30, 34
Does v Snyder, 932 F Supp 2d 803 (ED Mich, 2013)... 34
Duran v State, 180 Md App 35; 948 A2d 130 (2008) 16
Fletcher v Peck, 10 US 87; 3 L Ed 162 (1810).. 46
Fullmer v. Mich Dep't of State Police, 207 F Supp 2d 650 (ED Mich, 2002),
rev'd 360 F3d 579 (CA 6, 2004).. 25
Gen Motors Corp v Romein, 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992) 17
Grant v City of Alpena, 107 Mich 335; 65 NW 230 (1895) 11
In re CP, 131 Ohio St 3d 513; 2012 Ohio 1446; 967 N.E.2d 729 (2012) 21, 48
In re JB, 107 A3d 1 (Pa, 2014) 21
In re Taylor, 60 Cal 4th 1019; 184 Cal Rptr 3d 682; 343 P3d 867 (2015)............................ 31, 43
In re Valle, 364 Mich 471; 110 NW2d 673 (1961).. 13
INS v St Cyr, 533 US 289; 121 S Ct 2271; 150 L Ed 2d 347 (2001)... 18
Jideonwo v INS, 224 F3d 692 (CA 7, 2000) 16
Kansas v Hendricks, 521 US 346; 117 S Ct 2072; 138 L Ed 2d 501 (1997)................ 9, 22, 24, 45
Kennedy v Mendoza-Martinez, 372 US 144; 83 S Ct 544; 9 L Ed 2d 644 (1963) 23, 24
Landgraf v USI Film Products, 511 US 244; 114 S Ct 1483; 128 L Ed 2d 229 (1994)... 17, 18, 46

Lanni v Engler, 994 F Supp 849 (ED Mich, 1998) 36
Lawrence v Texas, 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003) 36
Lynce v Mathis, 519 US 433; 117 S Ct 891; 137 L Ed 2d 63 (1997) 15
Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999) 3
Mikaloff v Walsh, 2007 WL 2572268 (ND Ohio, Sept 4, 2007) 25
Missouri v Frye, __ US __; 132 S Ct 1399; 182 L Ed 2d 379 (2012) 16
Morrissey v Brewer, 408 US 471; 92 S Ct 259; 333 L Ed 2d 484 (1972) 35
Padilla v Kentucky, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010) 18
People of City of East Detroit v Vickery, 69 Mich App 183; 244 NW2d 404 (1976), *affirmed in part and reversed in part*, 401 Mich 843; 270 NW2d 471 (1978) 11
People v Arata, 151 Cal App 4th 778; 60 Cal Rptr 3d 160 (Cal 3rd Dist 2007) 16
People v Ayres, 239 Mich App 8; 608 NW2d 132 (1999) 23
People v Baker, 46 Mich App 495; 208 NW2d 220 (1973) 14
People v Bandy, 35 Mich App 53; 192 NW2d 115 (1971) 12
People v Bobek, 217 Mich App 524; 553 NW2d 18 (1996) 11, 12, 15
People v Carp, 496 Mich 440; 852 NW2d 801 (2014) 47
People v Cole, 491 Mich 325, 336; 817 NW2d 497 (2012) 26
People v Dash, 216 Mich App 412; 549 NW2d 76 (1996) 12
People v Dipiazza, 286 Mich App 137; 778 NW2d 264 (2009) .... passim
People v Dodds, 2014 Ill App 122268; 379 Ill Dec 657; 7 NE3d 83 (2014) 18
People v Earl, 495 Mich 33; 845 NW2d 721 (2014) .... passim
People v Fonville, 291 Mich App 363; 804 NW2d 878 (2011) 18
People v Giovannini, 271 Mich App 409; 722 NW2d 237 (2006) 11
People v Gornbein, 407 Mich 330; 285 NW2d 41 (1979) 11
People v Harns, 227 Mich App 573; 576 NW2d 700 (1998) 13
People v Killebrew, 416 Mich 189; 330 NW2d 834 (1982) 13
People v Lorentzen, 387 Mich 167; 194 NW2d 827 (1972) 49
People v Palma, 25 Mich App 682; 181 NW 2d 808 (1970) 15
People v Perkins, 107 Mich App 440; 309 NW 2d 634 (1981) 12, 26
People v Rahilly, 247 Mich App 108; 635 NW 2d 227 (2001) 10
People v Ryan, 451 Mich 30; 545 NW2d 612 (1996) 13
People v Schulter, 204 Mich App 60; 514 NW23 489 (1994) 17
People v Siebert, 20 Mich App 402; 507 NW 2d 211 (1993) 17
People v Stevens, 45 Mich App 689; 206 NW 2d 757 (1973) 14
People v Stevenson, 416 Mich 383; 331 NW 2d 143 (1982) 15
People v Temelkoski, 307 Mich App 241; 859 NW2d 743 (2014) .... passim
Santobello v New York, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971) 13, 16
Smith v Doe, 538 US 84; 123 S Ct 1140; 155 L Ed 2d 164 (2003) .... passim
Starkey v Okla Dep't of Corrs, 305 P3d 1004 (Okla 2013) .... passim
State v Letalien, 2009 ME 130; 985 A2d 4 (Me 2009) .... passim

RECEIVED by MSC 4/22/2016 3:37:17 PM

State v Pollard, 908 NE2d 1145 (Ind 2009) 32, 45
State v TK, 139 Wash 2d 320; 987 P 2d 63 (1990) 16
State v Williams, 129 Ohio St 3d 344; 2011 Ohio 3374; 952 NE2d 1108 (2011) 20
United States v Barnes, 278 F3d 644 (CA 6, 2002) 13, 16
United States v Barton, 455 F3d 649 (CA 6, 2006) 17, 18
United States v Brown, 381 US 437; 85 S Ct 1707; 14 L Ed 2d 484 (1965) 46
United States v Carter, 463 F3d 526 (CA 6, 2006) 43
United States v Juvenile Male, 590 F3d 924 (CA 9, 2009), *vacated as moot*, 131 S Ct 2860 (2011) 21, 28, 32, 36
United States v Knights, 534 US 112; 122 S Ct 857; 151 L Ed 2d 497 (2001) 35
United States v Le Blanc, 612 F2d 1012 (CA 6, 1980) 12
United States v Robison, 924 F2d 612 (CA 6, 1991) 14
United States v Skidmore, 998 F2d 372 (CA 6, 1993) 14
Wallace v State, 905 NE2d 371 (Ind 2009) .... passim
Weaver v Graham, 450 US 24; 101 S Ct 960; 67 L Ed 2d 17 (1995) 46
Whitaker v Perdue, District Court for the Northern District of Georgia, issued Mar 30, 2007 (Docket No. 4:06-cv-0140) 35

Statutes

1993 PA 293 5
1993 PA 293, § 11 9
1993 PA 293, § 14(1) 10
1993 PA 293, § 14(2) 10, 11, 14
1993 PA 293, § 14(3) 10, 14
1994 PA 286 5
1994 PA 286, § 14(2) 5
1994 PA 286, § 14(3) 5
1994 PA 295 5
1994 PA 295, § 10(1) 6
1994 PA 295, § 10(2) 6
1994 PA 295, § 10(3) 6
1994 PA 295, § 2(a)(ii) 5, 12
1994 PA 295, § 3 .... 5, 12
1994 PA 295, § 3(b) 4
1994 PA 295, § 3(b)-(c) 5
1994 PA 295, § 5(1) 6
1994 PA 295, § 5(3)-(4) 6
1996 PA 494, § 10(2) 6
1999 PA 85, § 10(2)-(3) 6
1999 PA 85, § 5a(4) 6

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

1999 PA 85, § 5a(6) 6
1999 PA 85, § 5a(7) 6
1999 PA 85, § 7(e) 6
1999 PA 85, § 8(2) 6
1999 PA 85, § 9 6
2002 PA 542, § 1a 25
2002 PA 542, § 4a 7
2004 PA 237, § 6 7
2004 PA 237, § 9(4) 7
2004 PA 239, § 11(2)(d)-(e) 7
2004 PA 240, § 2(a)(ii) 7
2004 PA 240, § 8 7
2004 PA 240, § 8c(15) 7
2004 PA 240, § 8d 7
2005 PA 121 7
2005 PA 127 7
2005 PA 132 7
2006 PA 46 7
2011 PA 17, § 2(r)-(w) 8
2011 PA 17, § 2(w)(v) 8
2011 PA 17, § 5 8
2011 PA 17, § 5(10)-(13) 8
2011 PA 17, § 5(12) 8
2011 PA 18, § 7 8
2011 PA 18, § 8c 8
2013 PA 149 8
Fla Stat 775.21(5)(d) (2015) 29
MCL 257.307(9) 29
MCL 28.721 ..... 1, 2
MCL 28.721a 24, 25, 38
MCL 28.722(b) 1, 12
MCL 28.722(b)(ii) 48
MCL 28.722(g) 33
MCL 28.723 12
MCL 28.723(1) 26
MCL 28.724 26
MCL 28.724(5) 26
MCL 28.725 29
MCL 28.725(1) 33
MCL 28.725(1)(e) 29

MCL 28.725(1)(f) ... 29
MCL 28.725a(3) ... 32
MCL 28.725a(5) ... 29
MCL 28.725a(8) ... 29
MCL 28.727 ... 29
MCL 28.727(1) ... 32
MCL 28.727(1)(e) ... 29
MCL 28.727(1)(i) ... 29
MCL 28.727(1)(p)-(q) ... 29
MCL 28.728 ... 29
MCL 28.728(1)(d) ... 29, 30
MCL 28.728(1)(f) ... 29, 30
MCL 28.729 ... 26, 29
MCL 28.730 ... 29
MCL 28.733(b) ... 33, 34
MCL 28.734(1)(a) ... 29, 30
MCL 28.734(1)(b) ... 29, 34
MCL 28.734(2)(a) ... 29
MCL 28.735(1) ... 29, 30
MCL 28.735(2)(a) ... 29
MCL 600.215(3) ... 1
MCL 712A.13a(6) ... 29
MCL 712A.19a(2)(d) ... 29
MCL 762.11 ... 1, 2
MCL 762.11(1) ... 24
MCL 762.11(4) ... 13
MCL 762.13 ... 13
MCL 762.14(1) ... 1, 24
MCL 762.14(2) ... 12, 24, 27
MCL 762.14(3) ... 27
MCL 762.14(4) ... 12
St. Lucie County, Florida, Mun Code 28-139 ... 29
Warren, MI (Mun Code 22-140) ... 29

Other Authorities

Attorney General Letter to Rep. Hoogendyk, July 14, 2006 ... 34
Caldwell, "What We Do Not Know About Juvenile Sexual Reoffense Risk," 7:4 *Child Maltreatment* 291-302 (Nov. 2002) ... 41
Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings LJ 1071 (2012) ... 20

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

Centers for Disease Control, *Trends in the Prevalence of Sexual Behaviors and HIV Testing National YRBS: 1991-2013* 41

Grossman et al., *Protective Effects of Middle School Comprehensive Sex Education with Family Involvement*, Journal of School Health (Nov 2014)........ 41

Hanson, et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, J of Interpersonal Violence, vol 29(15) (2014)........ 40

Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 404 (1958) 35

Huebner, et al., *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (2013)........ 31, 42

Ira & Tara Elmann,*"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const'l Commentary 495 (2015) 39

Levenson & D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, Criminal Justice Policy Review, vol. 18, no 2, 168-199 (2007)........ 39

MSP Press Release: Law Enforcement Agencies Conduct Sex Offender Sweep in Detroit (April 29, 2015) 33

Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161 (2011)........ 42

Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, Deviant Behavior, 25:3 (2004) 37

Sandler & Socia, *A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, Psychology, Public Policy and Law, 14(4) (2008)........ 39, 41, 42

Senate Fiscal Agency Bill Analysis, 2002 PA 542........ 25

Senate Fiscal Agency Bill Analysis, HB 4920 & HB 5240 (2004)........ 7

Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J Contemp Crim Just, 67-81 (2005) 31, 37

Tewksbury, et al., *Final Report on Sex Offenders: Recidivism and Collateral Consequences* (Sept 2011) 41, 43

US Dep't of Justice, Bureau of Justice Statistics, *Plea and Charge Bargaining* 16

US Dep't of Health, Education, and Welfare, National Institute of Child Health and Human Development, "National Longitudinal Study of Adolescent Health" (2000)........ 41

Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 Wash U L Rev 101 (2007) 35

Zandenberg & Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restrictions Laws Using GIS*, (Justice Research & Policy, 2006), ch 8(2) 31

Zevitz & Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 Behav Sci & Law 375 (2000)........ 31

Zevitz & Farkas, US Dep't of Justice, National Institute of Justice, Sex Offender Community Notification: Assessing the Impact in Wisconsin (Dec 2000) 37

Rules

MCR 7.215(J) 4
MCR 7.302(H)(1) 4
MCR 7.303(B)(1) 1

Regulations

24 CFR 5.856 29

Constitutional Provisions

Const 1963, art 1, § 10 .... 1, 19, 23, 45
Const 1963, art 1, § 16 .... 2, 19, 23
Const 1963, art 1, § 17 1
US Const, Am VIII 2, 19
US Const, Am XIV 1
US Const, art I, § 10 .... 1, 19

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear an appeal from the Court of Appeals. See MCR 7.303(B)(1) and MCL 600.215(3). This Court granted leave to appeal on December 18, 2015.

QUESTIONS PRESENTED

This Court's December 28, 2015 order granting leave to appeal sets out six questions, which are slightly reformulated here:

1. Does Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., impose "punishment," see *People v Earl*, 495 Mich 33; 845 NW2d 721 (2014)?

   Trial Court said: Yes
   Court of Appeals said: No
   Appellant says: Yes, although this Court need not reach the question

2. Does SORA impose "punishment" when applied to individuals who have successfully completed probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*.?

   Trial Court said: Yes
   Court of Appeals said: No
   Appellant says: Yes

3. Where the court has "discharge[d] the individual and dismiss[ed] the proceedings" without conviction under HYTA, MCL 762.14(1), does SORA violate due process by redefining the HYTA dismissal as a "conviction," MCL 28.722(b), and by requiring registration as if a conviction had occurred? See US Const, Am XIV; Const 1963, art 1, § 17.

   Trial Court did not address
   Court of Appeals did not address
   Appellant says: Yes

4. Assuming that SORA does not impose "punishment" but is a civil regulatory scheme, does applying that scheme to Mr. Temelkoski violate due process? See US Const, Am XIV; Const 1963, art 1, § 17.

   Trial Court did not address
   Court of Appeals did not address
   Appellant says: Yes

5. Is SORA an unconstitutional ex post facto punishment where it was enacted and made public only after the defendant committed the offense and pled guilty under HYTA? See US Const, art I, § 10; Const 1963, art 1, § 10.

Trial Court said: Yes
Court of Appeals said: No
Appellant says: Yes

6. Is it cruel and/or unusual punishment to require Mr. Temelkoski to register under SORA? US Const, Am VIII; Const 1963, art 1, § 16.

   Trial Court said: Yes
   Court of Appeals said: No
   Appellant says: Yes, although this Court need not reach the question

INTRODUCTION

Boban Temelkoski has never been convicted of a sex offense. Rather, the charges against him were dismissed almost two decades ago, under the Holmes Youthful Trainee Act (HYTA). MCL 762.11 *et seq*. HYTA is a diversion statute. It was designed to ensure that youths who fulfill court-imposed conditions have their cases dismissed and their records sealed. HYTA protects such youth from the lifelong consequences of a conviction, allowing them to put their mistakes behind them. Mr. Temelkoski's youthful offense will, however, follow him for the rest of his life because he has been retroactively required to register as a sex offender.

When Mr. Temelkoski entered his HYTA plea, Michigan's sex offender registry did not exist. He asks this Court to find that Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is unconstitutional as applied retroactively to him.

STATEMENT OF FACTS

Mr. Temelkoski's Charges Were Dismissed and His Case Sealed Under HYTA.

At the time of his offense (August 15, 1993), Mr. Temelkoski was 19 years old. He touched the breasts of the complaining witness, who was 12 years old. There was no intercourse or genital touching. Aside from these facts, the circumstances of the offense are disputed. Because Mr. Temelkoski accepted a plea bargain under HYTA, no trial was held and no court

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

ever made factual findings about what occurred.[1] In a letter in support of his motion for removal from the sex offender registry, Mr. Temelkoski described the offense as follows:

> What had happened was that I was [at] a banquet center where I went to see my brother. [The girl] was working there and she was crying about that everyone was getting tips and she was not. She asked me to give her a ride home and i [sic] did. During the drive, she was talking to me and she started to kiss me, so i [sic] kissed her too. I pulled my car into an alley in Hamtramck, and she again kissed me, which led to more kissing, and I eventually touched her breast. I stopped kissing and feeling her breasts when she told me she was 12 years old. Although the police report says that I told her "it didn't matter", this is not true. I never said that. I stopped the kissing and touching and took her home. As we drove home, she was still acting normal and happy and didn't seem upset at all.

Temelkoski Letter, Appendix 99a.

Mr. Temelkoski signed an (undated) "application and consent to be considered and assigned to the status of youthful trainee," which asked for a "pre-acceptance investigation" by probation regarding his suitability for HYTA. Appendix 9a. On February 11, 1994, he was referred to probation as a "special referral: HYTA." See HYTA Referral Slip, Appendix 10a.

On March 4, 1994, Mr. Temelkoski pled under HYTA to second-degree criminal sexual conduct. See Probation Order, Appendix 11a. The court ordered him to complete three years of probation, 50 hours of community service, and a high school or a vocational training program, and to pay supervision fees. *Id.* After he completed his HYTA traineeship, his case was dismissed with prejudice on April 16, 1997. See Order of Dismissal, Appendix 13a. The court also entered a separate order stating that the "State Police shall retain a **nonpublic record**" of the dismissed charges. See Disposition Order, Appendix 14a, (original emphasis). A notification of non-public record status, dated June 16, 1997, required the court "to immediately place [his] file

[1] In prior pleadings, the prosecutor improperly cited allegations in the police report as facts. See e.g., *People v Temelkoski*, People's Delayed Application for Leave to Appeal, Case No. 313670, at 3. Allegations in police reports are not admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 125; 597 NW2d 817 (1999).

in non-public record status" because the case had been dismissed under HYTA. Appendix 15a.

Procedural History of Mr. Temelkoski's Motion for Removal From the Sex Offender Registry.

When SORA took effect on October 1, 1995, Mr. Temelkoski was still on probation. He was therefore required to register. See 1994 PA 295, § 3(b); Order Amending Probation, Appendix 12a. As a registrant, he became subject to all future SORA amendments.

On August 9, 2012, Mr. Temelkoski filed a motion for removal from the sex offender registry in Wayne County Circuit Court. On September 21, 2012, that court granted his motion. See Trial Court Transcript, Appendix 16a-29a; Trial Court Order, Appendix 30a. On December 4, 2012, the prosecutor filed a delayed application for leave to appeal, which the Court of Appeals denied on July 8, 2013. On August 22, 2013, the prosecutor applied to this Court for leave to appeal. On October 28, 2013, this Court remanded the case to the Court of Appeals for consideration as on leave granted under MCR 7.302(H)(1).

The Court of Appeals issued a published opinion on October 21, 2014. See *People v Temelkoski*, 307 Mich App 241; 859 NW2d 743 (2014). The panel concluded that it was not bound by *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), which had held that registration of a HYTA trainee violated Michigan's prohibition on cruel or unusual punishment. The *Temelkoski* panel decided that the facts here are distinguishable, and that *Dipiazza's* constitutional analysis is "outdated" as a result of subsequent amendments to SORA. *Temelkoski*, 307 Mich App at 258. No conflict panel under MCR 7.215(J) was convened. Mr. Temelkoski, who had not been subject to SORA for two years, was required to re-register.

On December 15, 2014, Mr. Temelkoski sought leave to appeal. On December 18, 2015, this Court granted leave in an order setting out six questions for briefing.

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

OVERVIEW OF HYTA AND SORA IN THE LAST TWO DECADES

This case involves two statutes: (1) HYTA, under which Mr. Temelkoski was adjudicated in March 1994; and (2) SORA, which became effective in October 1995, and which has since been repeatedly amended to make the registry public and increase the restrictions on registrants. It is important to understand the evolution and intersection of these two statutes at the outset.[2]

SORA took effect some 18 months *after* Mr. Temelkoski's HYTA adjudication. See 1994 PA 295. The 1995 version of SORA required registration for individuals "convicted" of specified offenses. *Id.* § 3. SORA defined "convicted" as including "being assigned to youthful trainee status" under HYTA. *Id.* § 2(a)(ii). SORA was applied retroactively to people who were still incarcerated, on probation/parole, or under the jurisdiction of the juvenile court or Department of Social Services on the statute's effective date. *Id.* § 3(b)-(c).

At the same time, the legislature also amended HYTA, inserting a new provision that "[a]n individual assigned to youthful trainee status for a listed offense enumerated in [SORA] is required to comply with the requirements of that act." 1994 PA 286, § 14(3) (effective Oct. 1, 1995). In addition, section 14(2) of the act, which at the time of Mr. Temelkoski's adjudication had barred the imposition of any civil disabilities or loss of rights or privileges on HYTA trainees, was amended to cross-reference the new section 14(3): "*except as provided in subsection (3),* the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege." *Id.* § 14(2) (new language in italics). **The HYTA amendments requiring registration and limiting the absolute bar on civil disabilities for HYTA trainees all post-date Mr. Temelkoski's plea.**

[2] The appendix includes the version of HYTA in effect at the time of Mr. Temelkoski's plea, 1993 PA 293, and as amended after the creation of SORA, 1994 PA 286. The current versions of HYTA and SORA are also attached. See Appendix 47a-98a.The legislative history of HYTA and SORA are summarized at Appendix 147a-148a.

When first adopted, SORA did not require regular verification or reporting. After initial registration, a registrant's *only* obligation was to notify local law enforcement within 10 days of a change of address. 1994 PA 295, § 5(1); see also Order Amending Probation, Appendix 12a (requiring only notification of address changes). Information was maintained for 25 years for people convicted of one offense, and for life for people convicted of multiple offenses. 1994 PA 295, § 5(3)-(4). Mr. Temelkoski was required to register for 25 years.

SORA was initially designed as a law enforcement tool. Registration records, like HYTA information, were maintained in a private police database. SORA specifically provided that registry records were "confidential and shall not be open to inspection except for law enforcement purposes." 1994 PA 295, § 10(1). Registration records were exempt from the Freedom of Information Act, *id.*, and divulging registration information was a crime punishable by 90 days in jail. *Id.* § 10(2). People whose registration information was revealed had a civil cause of action for treble damages. *Id.* § 10(3). In other words, when first enacted, SORA – like HYTA – protected the confidentiality of a HYTA trainee's adjudication information.

In 1997, SORA amendments required law enforcement agencies to make registry information available to the public (for zip codes within the agency's jurisdiction) during business hours. People could view a paper copy of the registry at the police station. 1996 PA 494, § 10(2).

In 1999, SORA amendments gave the world direct Internet-based access to the registry. 1999 PA 85, §§ 8(2), 10(2)-(3). Registrants were required to report *in person*, either quarterly or yearly, depending on their offense. *Id.* § 5a(4). The 1999 amendments also required fingerprinting and photographs; required registrants to maintain a driver's license or personal identification card; and lengthened the penalties for some SORA offenses. *Id.* §§ 5a(6)-(7), 7(e), 9.

In 2002, SORA amendments required both resident and non-resident registrants to report

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

in person when they enrolled, dis-enrolled, worked, or volunteered at institutions of higher learning. 2002 PA 542, § 4a.

In 2004, the legislature amended SORA and HYTA out of concern that "juveniles who do not pose a danger to the public, and who do not pose a danger of reoffending," are "required to register as sex offenders unnecessarily." *Senate Fiscal Agency Bill Analysis*, HB 4920 & HB 5240, at 1 (2004). The SORA amendments defined "convicted," in relevant part, as:

> (A) Being assigned to youthful trainee status…before October 1, 2004...;
> (B) Being assigned to youthful trainee status…on or after October 1, 2004, if the individual's status of youthful trainee is revoked and an adjudication of guilt is entered.

2004 PA 240, § 2(a)(ii) (citations omitted). Thus HYTA trainees adjudicated after October 1, 2004, are not subject to SORA (unless their trainee status is revoked and they are actually convicted). But people like Mr. Temelkoski – who were assigned to HYTA *before* that date – must still register. The legislature also restricted eligibility for HYTA, so that only certain sex offenses are eligible for diversion, 2004 PA 239, § 11(2)(d)-(e), and created a procedure by which HYTA trainees and other youthful registrants could petition for shortened registration periods, 2004 PA 240, §§ 8c(15), 8d. The 2004 amendments also required registrants' photographs to be posted on the Internet-based public registry, created a one-time registration fee for registrants, and made failure to pay the fee a misdemeanor. 2004 PA 237, §§ 6, 9(4); 2004 PA 240, § 8.

The legislature amended SORA again in 2006. Those changes made it a crime for registrants to work, reside, or "loiter" within 1000 feet of school property. 2005 PA 121; 2005 PA 127. In addition, penalties for some SORA offenses were increased. 2005 PA 132. The 2006 changes also allowed subscribing members of the public to be notified by email when a person registers, or moves into a specified zip code. 2006 PA 46.

In 2011, SORA was amended to place registrants retroactively into three tiers based on

the offense of conviction. 2011 PA 17, §§ 2(r)-(w). A registrant's tier-classification determines how long the person must register and the frequency of reporting. *Id.* §§ 5(10)-(13). Tier I registrants must comply with all SORA obligations for 15 years; Tier II registrants must comply for 25 years; and Tier III registrants must comply for life. *Id.* Mr. Temelkoski – based solely on his offense and without any individualized risk assessment – was retroactively classified as a Tier III offender who must comply with SORA for as long as he lives. 2011 PA 17, §§ 2(w)(v); 5(12).

The 2011 amendments also required registrants to report a slew of personal information (e.g., Internet identifiers, telephone numbers, vehicle information, etc.) to law enforcement. Registrants must now report *in person within three days* when certain such information changes. 2011 PA 17, § 5; 2011 PA 18, § 7. In addition, the legislature revised the previous petitioning procedure for young offenders to be removed from the registry, eliminated the ability to petition for removal based on HYTA status, and set new petitioning criteria based on age differences and consent. 2011 PA 18, § 8c.

Amendments in 2013 required registrants to pay an annual fee. 2013 PA 149.

ARGUMENT

Standard of Review and Issue Preservation

Constitutional issues are reviewed de novo. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2005). This Court ordered briefing on all issues discussed below.

Summary of Argument

At the time of Mr. Temelkoski's plea, he was promised that he would suffer no further consequences and have no conviction if he successfully completed HYTA. Instead, the state has redefined his non-conviction as a conviction and subjected him to SORA for life. That violates due process because it vitiates the state's promises under HYTA, deprives Mr. Temelkoski of fair warning of the consequences of his plea, and upsets his settled expectations.

RECEIVED by MSC 4/22/2016 3:37:17 PM

In *Smith v Doe*, 538 US 84, 100; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the U.S. Supreme Court held that Alaska's registration statute was not punishment because it imposed only "minor and indirect" consequences. Since then, Michigan's SORA has become a "super-registration" law with endless obligations, lifetime supervision, an ever-increasing threat of incarceration, and an accompanying loss of jobs, housing, and reputation. Such extraordinary burdens can no longer be described as "regulation," nor, given the "magnitude of the restraint," *id.* at 104, can they be imposed without an individualized assessment of dangerousness. *Kansas v Hendricks*, 521 US 346, 368-71; 117 S Ct 2072; 138 L Ed 2d 501 (1997). Because the evidence shows that Mr. Temelkoski is very unlikely to reoffend, requiring him to register for life is not rationally related to, and is excessive in relation to, SORA's alleged public safety goals.

Imposing SORA on trainees whose HYTA cases were dismissed and records sealed is punitive. SORA brands these youths as *convicted* sex offenders. They suffer harms that cannot be attributed to their convictions (as they have none), but are solely the result of SORA. That is punishment. Imposing punishment retroactively violates the Ex Post Facto Clauses of the U.S. and Michigan Constitutions. Imposing SORA on HYTA youth who have no conviction is also cruel/unusual punishment. However, this Court need not reach that issue, since imposing punishment retroactively is unconstitutional regardless of whether it is also cruel/unusual.

I. IMPOSING SORA ON MR. TEMELKOWSKI VIOLATES DUE PROCESS.

SORA violates due process by redefining Mr. Temelkoski's HYTA dismissal as a "conviction" (Leave Grant Question #3), and by depriving him of his right to fair warning and settled expectations (Leave Grant Question #4).

A. The State's Promises Must Be Analyzed Under the 1994 Version of HYTA.

In March 1994, when Mr. Temelkoski pled guilty, HYTA provided that a court "without entering a judgment of conviction" may assign a qualified defendant to the status of youthful trainee. 1993 PA 293, § 11 (effective Jan. 1, 1994). If the youth successfully completes terms

RECEIVED by MSC 4/22/2016 3:37:17 PM

imposed by the court, "the court shall discharge the individual and dismiss the proceedings." *Id.* § 14(1). The dismissal of HYTA charges "is not a conviction for a crime and the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." *Id.* § 14(2). "[A]ll proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the department of social services, and law enforcement personnel for use only in the performance of their duties." *Id.* § 14(3).

In ruling that Mr. Temelkoski must register as though he had been convicted of a sex offense, the Court of Appeals wrongly relied on the *current* version of HYTA, rather than on the version in effect in March 1994. The panel's analysis turned on the fact that today HYTA contains a reference to SORA, which the panel described as "in effect an exception to HYTA's general [confidentiality] provision." *Temelkoski*, 307 Mich App at 249 (quoting *Doe v Mich Dep't of State Police*, 490 F3d 491, 495 (CA 6, 2007)).[3] At the time of Mr. Temelkoski's adjudication, however, that exception to HYTA's confidentiality provision did not exist.[4] When

[3] In *Doe*, two putative classes of HYTA trainees challenged the SORA registration requirement as violating substantive due process and equal protection. The court did not address the argument here that a defendant is entitled to specific performance of his plea. 490 F3d at 501 (finding that although the interaction of SORA and HYTA did not violate substantive due process, it created "inconsistency" and imposed harms that are "troubling and noteworthy").

[4] Although both statutes now reference each other, this Court has yet to address the import of those cross-references. In *People v Rahilly*, 247 Mich App 108, 114-15; 635 NW 2d 227 (2001), the Court of Appeals held as a matter of statutory construction and based on those cross-references, that HYTA trainees must register, despite the inconsistency between HYTA's promise of privacy and SORA's public registration. Judge Holbrook, in dissent, argued that requiring "defendants to comply with the SORA even though they have successfully completed their youthful trainee status would lead to an absurd result that is not in accord with [HYTA's] plain language and legislative goals," and warned that this construction was subject to constitutional challenge:

RECEIVED by MSC 4/22/2016 3:37:17 PM

Mr. Temelkoski pled, there were *no exceptions* to HYTA's promise that information about the youth's adjudication "shall be closed to public inspection," and that the youth "shall not suffer a civil disability or loss of right or privilege." 1993 PA 293, § 14(2).

Because Mr. Temelkoski was adjudicated in 1994, it is the 1994 version of HYTA that applies to his case. See *Grant v City of Alpena*, 107 Mich 335, 336; 65 NW 230 (1895) ("A law or any single provision thereof cannot begin to speak until it takes effect."); *People v Gornbein*, 407 Mich 330, 334; 285 NW2d 41 (1979) (prior law governed defendant's access to bail because it is "fundamentally unfair" to apply changes to bail law retroactively); *People of City of East Detroit v Vickery*, 69 Mich App 183, 196 n7; 244 NW2d 404 (1976) (later amendments to ordinance could not be considered in assessing constitutionality of ordinance extant at time of arrests), *affirmed in part and reversed in part*, 401 Mich 843; 270 NW2d 471 (1978).

B. HYTA Provides for Dismissal of Charges and Freedom From Civil Consequences in Return for a Plea of Guilty and Completion of Terms Set by the Court.

Michigan adopted HYTA so that youths under 21 can avoid the permanent consequences of a criminal record. See *Dipiazza*, 286 Mich App at 141 ("HYTA is essentially a juvenile diversion program for criminal defendants"); *People v Giovannini*, 271 Mich App 409, 412; 722 NW2d 237 (2006) (HYTA "permit[s] the use of rehabilitation procedures prior to conviction"); *People v Bobek*, 217 Mich App 524, 528-29; 553 NW2d 18 (1996) (HYTA "offers a mechanism by which youths…may be excused from having a criminal record"). The statute indicates a "legislative belief that individuals in the 17 to 20 age bracket" are amenable to rehabilitation.

> This is not a situation where a convicted sex offender is attempting to limit widespread exposure of that information which is already public. For one thing, once the youthful trainee successfully completes the trainee's program, the trainee's record is closed to public inspection. More importantly, as noted above, a final adjudication of guilt is never entered in such situations.

Id. at 122-23 (Holbrook J., dissenting) (citations and quotation marks omitted).

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

People v Perkins, 107 Mich App 440, 444; 309 NW 2d 634 (1981). The Act in effect "establish[es] an administrative procedure…prior to conviction" with the goal of using "rehabilitative procedures" to address youthful offending. *People v Bandy*, 35 Mich App 53, 59; 192 NW2d 115 (1971). HYTA "is a remedial statute and should be construed liberally for the advancement of the remedy." *Bobek*, 217 Mich App at 529.

A dismissal under HYTA is "not a conviction for a crime." MCL 762.14(2). See *People v Dash*, 216 Mich App 412, 414; 549 NW2d 76 (1996); *United States v Le Blanc*, 612 F2d 1012, 1013 (CA 6, 1980). HYTA specifically bars collateral consequences once HYTA charges are dismissed. MCL 762.14(2) (trainee "shall not suffer a civil disability or loss of right or privilege"). To ensure that dismissed charges do not come back to haunt youth, HYTA records are sealed. MCL 762.14(4) (all HYTA proceedings "closed to public inspection"); see also *Dash*, 216 Mich App at 414 (HYTA records not public).

C. Mr. Temelkoski Complied with the Terms of HYTA But the State Did Not.

When SORA took effect in 1995, it required people "convicted" of certain offenses to register. MCL 28.723, as enacted by 1994 PA 295, § 3. The statute included a provision, which has since become MCL 28.722(b), defining "convicted" as including "being assigned to youthful trainee status" under HYTA. 1994 PA 295, § 2(a)(ii). In other words, SORA *retroactively* redefined Mr. Temelkoski's non-conviction as a "conviction." That "conviction" made Mr. Temelkoski subject not just to the initial non-public registry, but to all of SORA's subsequent amendments including, e.g., the 1999 Internet registry and quarterly reporting requirements, the 2006 exclusion zones, the 2011 expanded and immediate reporting requirements, and the 2011 extension of his registration period from 25 years to life. This Court has asked whether such a legislative redefinition violates due process. The answer is **yes**.

A youthful defendant qualifies for HYTA only if the individual accepts responsibility, pleads guilty, and thereby gives up the constitutional protections afforded to criminal defendants. MCL 762.11(1) (conditioning HYTA on "plead[ing] guilty to a criminal offense"); *People v Harns*, 227 Mich App 573; 576 NW2d 700 (1998), *vacated in part on other grounds,* 459 Mich 895 (1998). A guilty plea "constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt." *Santobello v New York*, 404 US 257, 264; 92 S Ct 495; 30 L Ed 2d 427 (1971) (Douglas, J., concurring) (citations omitted). Under HYTA, the state promises that in return for the youth's guilty plea and completion of the court-imposed conditions, the charges will be dismissed. MCL 762.11(1), 762.11(4), 762.13, 762.14(1).

As this Court has explained, a defendant's waiver of constitutional rights "cannot be knowing or voluntary when the waiver was induced by reliance on a total package of concessions by both parties to which one party – the state – is no longer bound." *People v Killebrew*, 416 Mich 189, 207; 330 NW2d 834 (1982). Due process requires the state to honor the agreements it makes with defendants. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 US at 262. "[F]undamental fairness requires that promises made during plea-bargaining … be respected." *People v Ryan*, 451 Mich 30, 41; 545 NW2d 612 (1996) (citation omitted). See also *In re Valle*, 364 Mich 471, 477; 110 NW2d 673 (1961) (where defendant was promised but did not receive leniency, he was entitled to relief because "a plea of guilty in a criminal case must be entirely voluntary, by one competent to know the consequences"); *United States v Barnes*, 278 F3d 644, 648 (CA 6, 2002) ("fundamental fairness means that the courts will enforce promises made … that induce a criminal

RECEIVED by MSC 4/22/2016 3:37:17 PM

defendant to waive his constitutional rights and plead guilty"); *People v Stevens*, 45 Mich App 689, 692; 206 NW 2d 757 (1973) (defendant "entitled to relief if his plea of guilty was induced by an unkept promise"); *United States v Robison*, 924 F2d 612, 613 (CA 6, 1991); *People v Baker*, 46 Mich App 495, 497; 208 NW2d 220 (1973). In short, where a defendant fulfills the promises he made, the state must fulfill any promises it made in exchange.

Here, Mr. Temelkoski gave up his constitutional rights and successfully completed probation in return for three key promises from the state:

1. He would not be convicted, 1993 PA 293, § 14(2);
2. He would "not suffer a civil disability or loss of right or privilege," *id.*; and
3. "[A]ll proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection," *id.* § 14(3).

None of those promises was kept. Mr. Temelkoski fulfilled his end of the bargain. The state did not.

To determine whether a breach of Mr. Temelkoski's bargain has occurred, this court must "look to what the parties … reasonably understood to be the terms of the agreement." *United States v Skidmore*, 998 F2d 372, 375 (CA 6, 1993). When Mr. Temelkoski pled and undertook to complete the terms set by the court, he reasonably understood that upon finishing probation, he would not have a conviction, he would not suffer any further civil consequences, and the state would keep all information about the dismissed charges confidential. The "bargain" he made under HYTA did not anticipate that for the rest of his life he would have to report in person every three months, that he would be barred from living or working in much of state, or that he would be labeled as a convicted sex offender on a public registry accessible worldwide.

Michigan courts have recognized that HYTA's record-sealing provisions are central to the bargain between the defendant and the state. In *People v Palma*, 25 Mich App 682; 181 NW

RECEIVED by MSC 4/22/2016 3:37:17 PM

2d 808 (1970), the court vacated the defendant's plea as involuntary because the defendant had erroneously been told that he would be granted HYTA and have no record:

> Defendant was told that if he pled guilty he would be placed under [HYTA] or have his sentence deferred so that he would have no record. In this context, defendant could not make a meaningful choice with reference to whether he should plead guilty or not guilty and therefore his plea was not voluntary.

Id. at 684. Cf. *Bobek*, 217 Mich App at 530 (confidentiality provisions central to HYTA).

This Court, in *People v Stevenson*, 416 Mich 383, 400; 331 NW 2d 143 (1982), has also recognized that changes to the law which vitiate plea bargains violate due process. There, a defendant who had pled guilty to assault charges was later charged with felony murder when his victim died more than a year and a day after the crime. The Court abolished the "year and a day" rule (which had barred murder prosecutions if the victim did not die for 366 days). But the Court said the new rule could not apply retroactively because to do so would "deprive the defendant of most if not all of the benefit of his bargain." *Id*.

The state may not abrogate agreements under HYTA, which are in essence contracts between the state and the youth, by enacting legislation that eviscerates the terms of those agreements. "In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Lynce v Mathis*, 519 US 433, 440; 117 S Ct 891; 137 L Ed 2d 63 (1997). Where the state has "engaged in negotiations that may lead to an acknowledgment of guilt," *id.*, it cannot simply pass laws that alter the terms of the bargains that produced guilty pleas or probation compliance. Cf. *Byjelich v John Hancock Mut Life Ins Co*, 324 Mich 54, 61; 36 NW2d 212 (1949) ("A statute cannot be retroactive so as to change the substance of a contract previously entered into.").

Courts across the country, both state and federal, have held that where defendants bargain around collateral consequences, legislative amendments cannot be used to alter the consequences

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

imposed. For example, in *Jideonwo v INS*, 224 F3d 692 (CA 7, 2000), a defendant accepted a plea for the specific purpose of avoiding deportation. When the government amended the law, making the defendant deportable, the Seventh Circuit held that because a guilty plea is premised on a full understanding of its consequences, a later-enacted statute cannot be applied if it "attaches new legal consequences to the accused's decision to plead guilty" and "changes the consequences of [the plea] bargain." *Id.* at 699-700. See also *State v TK*, 139 Wash 2d 320; 987 P 2d 63 (1990) (en banc) (where youth were adjudicated under statute that allowed for record-sealing, and they had completed the requirements for sealing, amendments that would have revoked record-sealing could not be applied retroactively); *People v Arata*, 151 Cal App 4th 778; 60 Cal Rptr 3d 160 (Cal 3rd Dist 2007) (same); *Duran v State*, 180 Md App 35; 948 A2d 130 (2008) (sex offender registration could not be imposed in violation of terms of plea agreement).

The integrity of our criminal justice system – in which 94% of convictions result from guilty pleas, most of which are the result of plea or charge bargaining – requires the government to abide by the bargains it has made. See *Missouri v Frye*, __ US __; 132 S Ct 1399, 1407; 182 L Ed 2d 379 (2012); US Dep't of Justice, Bureau of Justice Statistics, *Plea and Charge Bargaining*.[5] Allowing the government retroactively to void the agreements it has made "directly involve[s] the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice." *Barnes,* 278 F3d at 648 (citation omitted).

Here Mr. Temelkoski seeks specific performance of the terms he was promised under HYTA.[6] Specific performance means that his non-conviction cannot be retroactively redefined as

---

[5] *Available at* https://www.bja.gov /Publications/PleaBargaining ResearchSummary.pdf.

[6] The remedy for failure to fulfill a plea agreement may, depending on the circumstances, be either plea withdrawal or specific performance of the plea agreement. *Santobello*, 404 US at 263. The defendant's preference is accorded "considerable, if not controlling weight." *Id.* at 267

RECEIVED by MSC 4/22/2016 3:37:17 PM

a "conviction" under SORA, that he cannot suffer any civil disability, and that the public cannot have access to information about his dismissed HYTA case. In other words, specific performance means that he cannot be subjected to SORA.

D. Retroactive Lifetime Registration Violates Mr. Temelkoski's Right to Fair Warning and Upsets His Settled Expectations.

"Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen Motors Corp v Romein*, 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992). Due process requires courts to protect "settled expectations" from being disrupted and ensure that retroactive legislation is not used as a "means of retribution against unpopular groups or individuals." *Landgraf v USI Film Products*, 511 US 244, 265-66; 114 S Ct 1483; 128 L Ed 2d 229 (1994). "[W]hen addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount." *United States v Barton*, 455 F3d 649, 654-55 (CA 6, 2006). See also *City of Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994) (concern about retroactive statutes arises from constitutional due process principles that prevent retroactive laws from impairing vested rights or contracts).

It is undisputed that Mr. Temelkoski had no notice at the time of his HYTA adjudication that he would later be subjected to SORA for life. Although criminal defendants are not entitled to notice of all "collateral" consequences, notice is required where the consequences are both significant and "intimately related to the criminal process," even if they are "not, in a strict sense,

---

(Douglas, J., concurring). See also *People v Schulter*, 204 Mich App 60, 67; 514 NW23 489 (1994) (reviewing court has discretion to order specific performance if plea agreement not fulfilled). Specific performance is the appropriate remedy where, as here, "it would be fundamentally unfair ... to permit reinstatement of the original charges after a prosecutor has obtained the benefit of a defendant's compliance with the plea agreement." *People v Siebert*, 20 Mich App 402, 427; 507 NW 2d 211 (1993).

a criminal sanction." *Padilla v Kentucky*, 559 US 356, 357; 130 S Ct 1473; 176 L Ed 2d 284 (2010). Thus, the U.S. Supreme Court has held that a law changing the immigration consequences of certain crimes cannot be applied retroactively. Because defendants "rely[] upon settled practice, the advice of counsel, and perhaps even the assurance in open court" regarding the consequences of a plea, the "potential for unfairness in the retroactive application of [the statute] … is significant and manifest." *INS v St Cyr*, 533 US 289, 323; 121 S Ct 2271; 150 L Ed 2d 347 (2001). Once plea agreements are made, "it would surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations" to impose more severe consequences than those considered by the defendant at the time of the plea. *Id.*

Registration under SORA, like deportation, is a "severe penalty" that is "intimately related to the criminal process." *Padilla*, 559 US at 357. Because defendants cannot make informed decisions about their cases or enter knowing and voluntary pleas if they lack notice of this sanction, courts have held that counsel who fail to advise defendants of sex offender registration are constitutionally ineffective. See, e.g., *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011); *People v Dodds*, 2014 Ill App 122268; 379 Ill Dec 657; 7 NE3d 83 (2014). If today's criminal defendants are entitled to notice that they will be required to register, then it is fundamentally unfair for Mr. Temelkoski to face lifetime registration retroactively when such notice was not given because Michigan did not yet have a sex offender registration law.

In sum, by retroactively imposing lifetime registration, the state has violated due process by abrogating the terms Mr. Temelkoski was promised under HYTA, by failing to provide him with "fair warning" of the consequences of his plea, and by upsetting the "settled expectations" arising out of his plea. *Barton*, 455 F3d at 654; *Landgraf*, 511 US at 265.

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

II. SORA IS PUNISHMENT.

SORA is punishment, both as applied to registrants in general and as applied to people who have successfully completed HYTA. (Leave Grant Questions 1 and 2.)

A. Introduction

Increasing a person's punishment retroactively violates the constitutional prohibition on ex post facto laws. US Const, art I, § 10; Const 1963, art 1, § 10. The U.S. and Michigan Constitutions also prohibit, respectively, punishments that are "cruel and unusual" or "cruel or unusual." US Const, Am VIII; Const 1963, art 1, § 16. The threshold question for both the ex post facto claim and the cruel/unusual punishment claim is whether SORA constitutes punishment. *People v Earl*, 495 Mich 33, 37; 845 NW2d 33 (2014); *Dipiazza*, 286 Mich App at 153.

This Court asked the parties to brief not only whether SORA is punishment, but also whether the answer to that question is different when applied to the class of individuals who have successfully completed probation under HYTA. If this Court decides that SORA is punishment for HYTA youthful trainees, then it need not reach the broader question of whether SORA is punishment irrespective of trainee status.

B. As "Super-Registration" Laws Have Become More Punitive, Courts Have Increasingly Found that SORA Laws Are Punishment.

In *Smith*, 538 US at 100, the U.S. Supreme Court found that a sex offender registration law that imposed only "minor and indirect" consequences did not constitute punishment. Thereafter, lower courts initially rejected similar challenges by finding most sex offender registration laws to be "regulatory" rather than punitive.

Legislatures – including in Michigan – responded as if they had a judicial blank check. They created "super-registration" schemes, and the U.S. Supreme Court "has yet to signal much-needed boundaries," leading to "runaway legislation that has become unmoored from its initial constitutional grounding." Carpenter, *The Evolution of Unconstitutionality in Sex Offender*

RECEIVED by MSC 4/22/2016 3:37:17 PM

Registration Laws, 63 Hastings LJ 1071, 1073-74 (2012). Increasingly, however, courts are recognizing that today's "super-registries" are punitive and bear little resemblance to the limited statute upheld in *Smith*. These laws no longer have "minor and indirect" consequences, but rather impose severe sanctions for a wide range of ordinary conduct. As the Ohio Supreme Court explained, distinguishing an unconstitutional registration statute from an earlier lawful version:

> No one change compels our conclusion that [the statute] is punitive. It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional. When we consider all the changes enacted by [the new statute] in the aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of [the law] is punitive.

State v Williams, 129 Ohio St 3d 344, 349; 2011 Ohio 3374; 952 NE2d 1108 (2011).

State courts – including in New Hampshire, Maine, Oklahoma, Ohio, Indiana, Kentucky, Maryland, and Alaska – have taken the lead, holding that registration statutes have evolved to become punitive and can no longer be retroactively applied, at least without individualized risk determinations. See, e.g., *Doe v State*, 167 NH 382, 389, 409-12; 111 A3d 1077 (2015) (registration "without regard to whether [registrants] pose a current risk to the public" violates ex post facto because the "statute has changed dramatically . . . [and] the punitive effects are no longer '*de minimis*'"); *State v Letalien*, 2009 ME 130; 985 A2d 4, 26 (Me 2009) (successive amendments converted registry law to a criminal statute); *Starkey v Okla Dep't of Corrs*, 305 P3d 1004 (Okla 2013) (extending registration without individualized assessment is punishment); *Williams*, 129 Ohio at 348 (new law "has changed dramatically" and imposes burdens that are punishment absent individualized finding of dangerousness); *Wallace v State*, 905 NE2d 371, 384 (Ind 2009) (registration "without regard to … particular future risk" is punishment); *Commonwealth v Baker*, 295 SW3d 437 (Ky 2009) (residency restrictions without individualized risk assessment is punishment); *Doe v Dep't of Pub Safety and Corr Servs*, 430 Md 535; 62 A3d 123 (2013) (retroactive registration violates ex post facto); *Doe v State*, 189 P3d 999, 1017 (Alaska

RECEIVED by MSC 4/22/2016 3:37:17 PM

2008) (registration is punishment absent opportunity for removal upon proof of rehabilitation). This Court should recognize what a growing number of states now hold: sex offender registration no longer has "minor and indirect" consequences, but rather for many defendants – including Mr. Temelkoski – is the most severe aspect of the punishment imposed.

Courts have been especially concerned with juvenile registration, which undermines the very premise of rehabilitative laws like HYTA. The Ohio Supreme Court, in holding that juvenile registration is cruel and unusual punishment, explained:

> Registration and notification requirements frustrate two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma. Confidentiality promotes rehabilitation by allowing the juvenile to move into adulthood without the baggage of youthful mistakes. Public exposure of those mistakes brands the juvenile as undesirable wherever he goes.

In re CP, 131 Ohio St 3d 513, 531; 2012 Ohio 1446; 967 N.E.2d 729 (2012). The Ninth Circuit similarly found that retroactive juvenile registration is punitive: it is "a breach of faith to those young persons, some of whom are now elderly, who voluntarily accepted status as a juvenile delinquent believing that their juvenile offense would not later be made known to the world at large." *United States v Juvenile Male*, 590 F3d 924, 933 (CA 9, 2009), *vacated as moot*, 131 S Ct 2860 (2011). While "[i]t would be tempting to conclude … that in light of [*Smith*], sex offender registration does not constitute punishment," today's laws impose burdens that are "different both in nature and degree" from those in *Smith*, and the registration of youth "presents substantially different facts and issues that significantly affect our analysis." *Id.* at 931, 933. Cf *In re JB*, 107 A3d 1 (Pa, 2014) (juvenile registration violates due process absent risk assessment).

C. Because SORA Imposes Severe Restraints, Individualized Risk Assessment Is Required.

A central question in determining whether a statute is regulatory or punitive is whether the challenged restriction is imposed through an individualized assessment, or whether it is based

solely on past criminal conduct. In *Hendricks*, 521 US at 368-71, the Court held that civil commitment of certain sex offenders did not violate the Ex Post Facto Clause because commitment was based on *individualized* determinations of *current* dangerousness. The challenged statute was not punitive because it "unambiguously requires a finding of dangerousness," not just a past conviction. *Id.* at 357. Civil commitment was deemed regulatory because it was imposed through a regularly-reviewed, procedurally-safeguarded finding that the *individual* was likely to reoffend, and because the state "permitted immediate release upon a showing that the individual is no longer dangerous." *Id.* at 368-69. The regulatory, non-punitive nature of the scheme was demonstrated by the fact that the state had "taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards." *Id.* at 364. Individualized review ensured that the statute served its regulatory goal of public protection. While imposing the law based solely on past convictions would be punishment, limiting the statute to people individually determined to be dangerous made the law non-punitive.

Whether the absence of individualized review makes a statute punitive depends on "[t]he magnitude of the restraint." *Smith*, 538 US at 104. Whereas laws with "minor" consequences can be applied based merely on a prior conviction, *id.*, laws that impose serious consequences, as in *Hendricks*, require individual proof of dangerousness. *Hendricks*, 521 US at 357.

The *Smith* Court found that Alaska's registration statute did not impose restraints sufficient to make it punitive in the absence of individualized review. 538 US at 104. Distinguishing *Hendricks*, the Court explained that the statute did not require in-person reporting; registrants were "free to move where they wish and to live and work as other citizens, with no supervision" and were "free to change jobs or residences;" there was "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

otherwise occurred;" the "Act does not restrain activities sex offenders may pursue;" and the difficulties registrants faced "flow[ed] not from the Act's registration and dissemination provision, but from the fact of conviction." *Id.* at 100-01.

The presence of factors here that were absent in *Smith* compels a finding that SORA is punishment, absent individualized review. Over the last 20 years, SORA has become a system of permanent supervision that is more onerous than probation/parole and is coupled with lifetime restraints on housing, employment, and parenting. Reading *Hendricks* and *Smith* together, restraints of this magnitude constitute punishment unless there is individualized review. See, e.g., *Baker*, 295 SW3d at 446 (finding *Hendricks* more applicable than *Smith*; absent individual assessment the "magnitude of the restraint" makes residency restrictions punitive); *Doe*, 167 NH at 409-12 (absent individualized proof of "continuing risk to the public," registration law is unconstitutional); *Letalien*, 985 A2d at 24-26 (same for extending registration from 15 years to life); *Starkey*, 305 P3d at 1029 (same for lifetime registration).

D. SORA is "Punishment" Under the Established Legal Framework for Defining That Term.

This Court and the U.S. Supreme Court have adopted essentially the same framework for defining "punishment" under the Ex Post Facto Clauses of the Michigan and U.S. Constitutions.[7]

---

[7] In *Earl*, 495 Mich 33, this Court applied the "intent-effects" test, incorporating the seven factors of *Mendoza-Martinez*, 372 US at 168-69, to determine whether a law imposes "punishment" for purposes of Michigan's prohibition on ex post facto laws. Const 1963, art 1, § 10. It is unclear whether the same test applies to defining "punishment" for purposes of Michigan's prohibition on cruel or unusual punishment. Const 1963, art 1, § 16. See *Austin v United States*, 509 US 602, 609-10; 113 S Ct 2801; 125 L Ed 2d 488 (1993) (analysis of what constitutes "punishment" can vary between different constitutional provisions). The Michigan Court of Appeals has applied at least two different tests to define "punishment" for purposes of "cruel or unusual punishment" analysis. Compare *Temelkoski,* 307 Mich App at 258-59 (applying intent-effects and *Mendoza-Martinez* factors), with *People v Ayres*, 239 Mich App 8; 608 NW2d 132 (1999) (setting out four-factor totality of circumstances test); *Dipiazza*, 286 Mich App at 147 (same). As discussed in Argument IV, *infra*, this Court need not reach the "cruel or unusual

The first question is whether the legislature intended the statute to be civil or criminal. *Earl*, 495 Mich at 38; *Hendricks*, 521 US at 361. If the purpose is punitive, that ends the inquiry: the retroactive punishment is unconstitutional. *Earl*, 495 Mich at 38; *Smith*, 538 US 84 at 92. If the legislature's intent was regulatory, however, then the Court must determine whether the scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'" *Hendricks,* 521 US at 361. "Stated another way, even if the text of the statute indicates the Legislature's intent to impose a civil remedy, we must determine whether the statute nevertheless functions as a criminal punishment in application." *Earl*, 495 Mich at 38. The factors set out in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-69; 83 S Ct 544; 9 L Ed 2d 644 (1963), provide guidance on whether a purportedly civil law is in fact punitive. *Earl*, 495 Mich at 43-44.

E. The Legislature Intended SORA to Be Punitive.

SORA ostensibly is intended to "prevent[] and protect[] against the commission of future criminal sexual acts by *convicted* sex offenders." MCL 28.721a (emphasis added). HYTA trainees are not convicted offenders. MCL 762.14(2). Rather successful trainees have their charges dismissed without a judgment of guilt ever being entered. MCL 762.11(1); 762.14(1). The asserted legislative purpose of preventing crimes by *convicted sex offenders* simply does not apply to HYTA trainees. Rather, the legislature's redefinition of non-convicted HYTA trainees as "convicted" under SORA reflects a punitive intent, imposing a criminal label and what is effectively lifetime parole for charges that did not result in conviction.

Significantly, by 2004 the legislature was unhappy with the over-inclusion of young offenders, prompting an amendment that prospectively removed some HYTA trainees from SORA.

---

punishment" question, and therefore also need not decide whether "punishment" means the same thing for purposes of the Michigan Constitution's article 1, §§ 10 and 16. Accordingly, this brief analyzes "punishment" under the *Earl* test.

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

> The 2004 amendment was motivated, in part, by concerns that "the reporting requirements are needlessly capturing individuals who do not pose a danger of reoffending." House Legislative Analysis, HB 4920, 5195, and 5240, November 12, 2003, at 1. The concern also existed that "[s]uccessful completion of conditions [under HYTA] results in dismissal of the charges and the person is deemed as having no conviction. However, under [SORA], trainee status is defined as a 'conviction,' and trainees are required to register like other sex offenders and remain on the public list…. Many feel that the requirement to be registered as a sex offender works against the philosophy of HYTA, which is to give a break to first-time offenders who are likely to be successfully rehabilitated." *Id.* at 2.

Dipiazza, 286 Mich App at 148-49. While the 2004 amendment addressed that problem prospectively, SORA's legislative purpose remains frustrated[8] – and contradicts the legislative purpose of HYTA – for those like Mr. Temelkoski whose HYTA cases were dismissed before 2004.

As originally enacted, SORA contained no statement of intent. After parts of SORA were held unconstitutional in 2002, the legislature added the intent statement found in MCL 28.721a. See *Fullmer v Mich Dep't of State Police*, 207 F Supp 2d 650 (ED Mich, 2002), *rev'd* 360 F3d 579 (CA 6, 2004); 2002 PA 542, § 1a; *Senate Fiscal Agency Bill Analysis*, 2002 PA 542. The timing suggests an attempt to insulate the statute from legal challenges.

No declaration of intent accompanied the amendments in 2006 (exclusion zones) or 2011 (retroactive tier structure/reporting).[9] Statements by legislators, however, suggest a punitive intent. Legislators described the residency restrictions as "the price [offenders] pay" for crime, and argued that first-offense indecent exposure should result in registration to "mak[e] sure it has serious consequences for those who commit the crime." MIRS Reports, Appendix 149a-151a.

---

[8] The panel below suggested that the 2011 amendments to SORA resolved this problem by adding a consent exception with an age differential. *Temelkoski*, 307 Mich App at 257-58. However, that exception is intended to remedy only the "Romeo and Juliet" issue (which is not specific to HYTA), and does not address the related but distinct problem of registering non-dangerous youth who were never convicted, in contravention of HYTA's rehabilitative purposes.

[9] See *Mikaloff v Walsh*, 2007 WL 2572268, at *5-7 (ND Ohio, Sept 4, 2007) (unpub) (finding punitive purpose for residency law where legislature previously asserted non-punitive purpose for registration but was silent on purpose of residency restrictions). Appendix 152a-161a.

The fact that registration is intertwined with the criminal law is further evidence of punitive intent. An unregistered defendant cannot be sentenced. MCL 28.724(5). See *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012) (because electronic monitoring is part of sentence, it constitutes punishment). Registration is triggered exclusively by criminal offenses, and is handled by criminal justice agencies, including corrections, probation, parole, and police. MCL 28.723(1), 28.724. SORA imposes criminal rather than civil sanctions, and is codified in Chapter 28 of the Michigan Code, which concerns police enforcement activities. MCL 28.729.

F. SORA Has a Punitive Effect.

Assuming, *arguendo*, that the legislature had a non-punitive intent, the question is whether SORA is punitive *in effect*. To determine if a retroactive law is punitive, a court must "inquire how the effects of the Act are felt by those subject to it." *Smith*, 538 US at 99-100. The five *Mendoza-Martinez* factors that both this Court and the U.S. Supreme Court have identified as most relevant, see *Earl*, 495 Mich at 44-48; *Smith*, 538 US at 97, are discussed below.

1. SORA Imposes Severe Obligations, Disabilities, and Restraints.

a. Because Mr. Temelkoski's HYTA Record Is Sealed, All Consequences that He Suffers Are Solely Due to SORA.

SORA strips HYTA youth of the central benefit promised under HYTA: that they "not be stigmatized with criminal records for unreflective and immature acts." *Perkins*, 107 Mich App at 444. For the rest of his life, Mr. Temelkoski will be branded as a sex offender based on a single act as a teenager that occurred almost a quarter century ago. SORA will govern and control his life regardless of his dangerousness (then or now), his immaturity at the time, or his demonstrated rehabilitation. The combination of lifetime supervision, the disclosure of confidential information, and extensive restrictions on work, housing, and parenting, paints HYTA youth as beyond redemption – a notion that is wholly at odds with the history and purpose of that Act.

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

As the Court of Appeals recognized in *Dipiazza*, HYTA's legislative history itself shows that the legislature considers sex offender registration to be a disability or restraint:

> HYTA provides that an individual assigned to youthful trainee status "shall not suffer a civil disability or loss of right or privilege," MCL 762.14(2), *except* to the extent the individual is required to register pursuant to SORA. MCL 762.14(3). Consequently, the language of HYTA implies that the requirement for a youthful trainee to register as a sex offender results in a disability as well as a loss of right or privilege.

Dipiazza, 286 Mich App at 150 (original emphasis). That legislative history is especially relevant in Mr. Temelkoski's case, since neither SORA nor the SORA exception to HYTA's "no civil disabilities" rule existed when he was adjudicated.

The *Dipiazza* court also explained that because HYTA records are sealed, SORA imposes consequences on HYTA trainees that are different from those imposed on convicted adults:

> Under HYTA, "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection.…" MCL 762.14(4). Thus, unlike [for convicted adults], where the courts indicated that the registration requirement did nothing more than create a method for easier public access to compiled information that is otherwise available to the public through tedious research in criminal court files, in this case the registration requirement created public access to compiled information that was otherwise closed to public inspection.

286 Mich App at 150 (citations and quotation marks omitted). The court found that SORA "forces [HYTA youth] to retain the status of being 'convicted' of an offense, thus frustrating the basic premise of HYTA." *Id.* at 152. Such public registration "result[s] in devastating financial and emotional consequences." *Id.* at 150-53.

Here, the panel below reached the opposite conclusion, holding that SORA does not impose disabilities on HYTA trainees: "'[a]lthough the public availability of information may have a lasting and painful impact on the convicted sex offender, those consequences flow not

RECEIVED by MSC 4/22/2016 3:37:17 PM

from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record.'" *Temelkoski*, 307 Mich App at 265 (quoting *Smith*, 538 US at 101).[10]

That analysis is simply incorrect. Dismissed HYTA charges are not "already a matter of public record." *Id.* Registration of HYTA trainees involves publication of non-public information. Mr. Temelkoski's dismissed charges do not appear on a background check. It is *only because* he is subject to SORA that he is denied job after job, and apartment after apartment. It is *only because* he is subject to SORA that the public even knows about his case. Compare *Smith*, 538 US at 100 (questioning whether registration led to "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").

The Ninth Circuit has addressed this very issue, holding that sex offender registration for juveniles[11] under the federal registration statute is punishment because it

> does not merely provide for further public access to information already available; it makes public information about sex offenders that would otherwise permanently remain confidential and exposes persons who were adjudicated delinquent years before to public humiliation and ignominy for the first time. It also seriously jeopardizes the ability of such individuals to obtain employment, housing, and education…. The disadvantages that flow to former juvenile offenders on account of having a public record as sex offenders must be attributed to [registration] alone.

Juvenile Male, 590 F3d at 935. The same is true here.

---

[10] The panel below believed that SORA does not impose restraints or disabilities because "SORA is not intended to chastise, deter or discipline; rather, it is a remedial measure meant to protect the health, safety and welfare of the general public." *Temelkoski*, 307 Mich App at 266. That argument fails because it conflates the "intent" and the "effects" prongs of the punishment test. If the legislature's intent is punitive, that ends the inquiry. If the legislature's intent is remedial, however, then the court must analyze the statute under the *Mendoza-Martinez* factors to determine whether the law's *effects* are punitive. *Smith*, 538 US at 92; *Earl*, 495 Mich at 38.

[11] The "essential underpinning" of earlier Michigan Court of Appeals' cases upholding registration for young offenders was "the fact that strict statutory guidelines protected the confidentiality of registration data," and "that premise is no longer valid" because registration data has become public. *Dipiazza*, 286 Mich App at 146.

RECEIVED by MSC 4/22/2016 3:37:17 PM

b. SORA Imposes Extensive Restraints and Disabilities on Registrants.

Because he is subject to SORA, Mr. Temelkoski will forever be:

- restricted in where he can live, MCL 28.728(1)(d), 28.735(1);
- restricted in where he can work, MCL 28.728(1)(f), 28.734(1)(a);
- barred from attending his children's school events, and restricted in maintaining normal family relationships, MCL 28.734(1)(b);
- required to report frequently in person, and subjected to ongoing supervision, MCL 28.725, 28.727;
- identified publicly and falsely as a convicted sex offender, MCL 28.728, 28.730;
- constrained in using the Internet, MCL 28.725(1)(f), 28.727(1)(i);
- limited as to where and when he can travel, MCL 28.725(1)(e), 28.727(1)(e);
- required to provide biometric information to the state, including palm prints, fingerprints, and regular photographs, MCL 28.725a(5), 28.725a(8), 28.727(1)(p)-(q);
- required to pay an annual supervision fee, MCL 28.725a(6); and
- subjected to a vast array of other restrictions encompassing virtually every facet of life.

SORA's restrictions and obligations are too extensive to be set out here, and are instead listed in the *Summary of Obligations, Disabilities and Restraints Imposed by SORA*. Appendix 114a-127a. Mr. Temelkoski could face up to ten years in prison if he fails to fulfill each and every one of SORA's extensive requirements. MCL 28.729, 28.734(2)(a), and 28.735(2)(a).

Because Mr. Temelkoski is subject to SORA, he must also comply with a host of other Michigan laws, federal laws, other states' laws, and local ordinances.[12] Because he must register in Michigan, he is subject to state and local registration laws in Florida, where he now lives. See Fla Stat 775.21(5)(d) (2015) (designating as a "sexual predator" any individual who is subject to sex offender registration in another state); St. Lucie County, Florida, Mun Code 28-139 (registrants cannot live within 2,500 feet of schools, parks, or childcare facilities).

[12] For example, federal law bars lifetime registrants from accessing subsidized housing (24 CFR 5.856); Michigan law bars registrants from renewing their driver's licenses by mail and subjects them to different standards for termination of parental rights (MCL 257.307(9), 712A.13a(6), 712A.19a(2)(d)); and registrants are banned from parks, playgrounds, and city recreation facilities in Warren, MI (Mun Code 22-140).

SORA's obligations and restraints are much more severe than in *Smith*, 538 US 84. The chart below summarizes the differences.

Smith v Doe	***SORA***
No limitations on work; free to change jobs; no evidence of occupational disadvantages	Barred from working in extensive areas covered by exclusion zones; evidence of severe occupational consequences
No limitations on housing; free to change homes; no evidence of housing disadvantages	Barred from living in extensive areas covered by exclusion zones; evidence of severe housing consequences
No limitations on parenting	Severely restricts parenting
No in-person reporting	In-person reporting for life
No immediate reporting	Immediate reporting for life
No state assertion of dangerousness	Classification of Tier III as most dangerousness
No limitations on free speech	Must report Internet speech
No limitations on travel	Must report travel in advance

Several of these distinctions are particularly important. First, unlike the statute in *Smith*, SORA makes it a crime for registrants to live, work or "loiter" within 1,000 feet of school property. MCL 28.734(1)(a), 28.735(1). Because Michigan does not provide maps of the exclusion zones, no one can know exactly how much of the state is off-limits or where the prohibited zones are. See *Does v Snyder*, 101 F Supp 3d 672, 682-84 (ED Mich, 2015) (appeal pending) (holding zones unconstitutionally vague as applied to plaintiffs). What is clear is that SORA's exclusion zones make vast areas of the state off limits, and thereby severely limit access to employment and housing. By requiring that registrants' employment and residential addresses be posted on the registry, MCL 28.728(1)(d), (f), SORA makes it difficult for registrants to obtain jobs or housing even outside the exclusion zones, as landlords and employers are understandably concerned about having their addresses listed.

Because Mr. Temelkoski is on the registry, he has had difficulty finding work, making it hard to support his family. Temelkoski Letter, Appendix 99a. Research confirms that registration severely limits employment opportunities. See, e.g., Tewksbury, *Collateral Consequences of Sex*

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

Offender Registration, 21 J Contemp Crim Just, 67-81, at 75 (2005) (43% of respondents lost jobs after being listed on the registry); Zevitz & Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 Behav Sci & Law 375, 381 (2000) (57% of registrants reported losing work as a result of public notification).

The exclusion zones likewise restrict housing. Because of SORA's zones, many Michigan registrants have been "unable to live with family, or had to relocate because the residence was within the restricted zone." Huebner, et al., *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri*, at 10 (2013) (reporting on a DOJ-funded evaluation of Michigan's exclusion zones). Research in other states confirms that registration severely restricts access to housing. See e.g., Zandenberg & Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restrictions Laws Using GIS*, (Justice Research & Policy, 2006), ch 8(2) (housing options for registrants within urban residential areas in Orange County, Florida, are limited to only 5% of potentially available parcels); Tewksbury, *supra*, J Contemp Crim Just at 75 (study of Kentucky registrants found 45% lost housing after being listed on publicly accessible registries); Zevitz & Farkas, *supra*, 18 Behav Sci & Law at 381 (Wisconsin study found 83% of registrants reported being excluded from housing as a direct result of community notification).

Courts have likewise found that residency restrictions severely limit access to housing. See, e.g., *In re Taylor*, 60 Cal 4th 1019, 1040; 184 Cal Rptr 3d 682; 343 P3d 867 (2015) (exclusion zones "greatly increased homelessness" and disrupted family life; plaintiffs were relegated to sparsely populated areas where they were cut off from transportation, employment, and services needed to reintegrate into the community).

Other courts have focused on the impact of exclusion zones on housing and employment

when finding similar registration schemes to be punishment. See *State v Pollard*, 908 NE2d 1145, 1150 (Ind 2009) (distinguishing *Smith* because exclusion zones impose barriers that are "neither minor nor indirect," but rather create "a substantial housing disadvantage" that limits "one's freedom to live on one's own property"); *Commonwealth v Baker*, 295 SW3d 437, 445 (Ky 2009) (finding it "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability"); *Wallace v State*, 905 NE2d 371, 380 (Ind 2009) (registration is affirmative disability because it results in lost employment opportunities and housing discrimination); *Juvenile Male*, 590 F3d at 935 (invalidating registration statute that "seriously jeopardizes the ability … to obtain employment, housing, and education"). Unlike in *Smith*, SORA "has led to substantial occupational or housing disadvantages" and limited registrants' ability to provide for or even live with their families. *Smith*, 538 US at 101.

Another reason SORA is more punitive than the Alaska statute in *Smith* is because Michigan registrants experience a level of supervision and reporting that is at least as restrictive as probation or parole. However, it lasts for life. Mr. Temelkoski must provide fingerprints and palm-prints, as well as extensive personal information on his appearance, employment, education, housing, telephone use, Internet use, vehicle use/storage, travel, and even nicknames. MCL 28.727(1). Much of that private information is published on the Internet. MCL 28.728(2). He must report *in person every three months forever*, MCL 28.725a(3), must report *immediately in person* for many minor events (like creating an internet account or "regularly" borrowing a car).[13] He is subject to residence and compliance sweeps conducted by police.[14] There are no

[13] Registrants must report in person "immediately" (i.e., within three days) whenever they:

- change their residence;
- begin/change/discontinue employment;
- buy or begin to use a vehicle, or cease to own or use a vehicle;
- intend to travel for more than seven days;

RECEIVED by MSC 4/22/2016 3:37:17 PM

exceptions to the immediate reporting requirements or to the lifetime quarterly reporting requirements, regardless of age, disability, or other factors which could make compliance impossible. Such intrusive monitoring is fundamentally different from the quarterly verification requirements upheld in *Smith*, which did not require in-person appearances. 538 US at 101.

Numerous courts have found such intrusive reporting and supervision to be punishment.

> [I]t belies common sense to suggest that a newly imposed life-time obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the exercise of individual liberty.

Letalien, 985 A2d at 24-25. See also *Starkey v Okla Dep't of Corrs*, 305 P3d 1004, 1022-23 (Okla 2013) (appearing in person "every 90 days for life and every time he moves, changes employment, changes student status, or resides somewhere for 7 consecutive days" is a restraint); *Wallace*, 905 NE2d at 379 (registry "imposes significant affirmative obligations and a severe stigma…, and compels affirmative post-discharge conduct … under threat of prosecution").

Unlike the statute in *Smith*, SORA severely restricts parenting by prohibiting "loitering" within 1000 feet of a school. "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." MCL 28.733(b). There is no parental exception to the prohibition on

---

- enroll/dis-enroll as a student;
- change their name; or
- establish an e-mail address, instant message address, or other internet designation.

MCL 28.722(g) and 725(1). (Enforcement of the provision requiring immediate reporting of Internet information was enjoined in *Does*, 101 F Supp 3d at 704, because of the impact on registrants' First Amendment rights.)

[14] State, federal, and local police regularly conduct sweeps to monitor registrants. See, e.g. Press Release: Law Enforcement Agencies Conduct Sex Offender Sweep in Detroit (April 29, 2015), *available at* http://www.michigan.gov/msp/0,4643,7-123-58995_67828-353461--,00.html.

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

observing or contacting children within exclusion zones. MCL 28.733(b) and 28.734(1)(b). Under SORA's plain language, Mr. Temelkoski could be charged with a crime simply for observing or contacting *his own children* anywhere in those zones.

Mr. Temelkoski is married and has two children, now ten and fourteen. Temelkoski Lettter, Appendix 99a. He cannot participate in their activities:

> It is so hard for my kids. I cannot tell them about the registry. My daughter asks me to go to school for her play but i [sic] could not go to school because I am on the registry and had to make up a lie to tell her why I couldn't go. This made her very upset and made me feel guilty and upset.

Temelkoski Letter, Appendix 99a. See also *Does v Snyder*, 932 F Supp 2d 803, 819 (ED Mich, 2013) (SORA "appears to prevent [registrants] from engaging in a plethora of activities closely related to the upbringing of their children"); *Does*, 101 F Supp 3d at 698 (SORA is so vague that "it is unclear whether a registrant may visit a public library or attend a parent-teacher conference," or accompany his children "to parks, playgrounds, movie theaters, restaurants, and other establishments and places in the state"); Attorney General Letter to Rep. Hoogendyk, July 14, 2006, Appendix 128a-131a (ruling that registrant-parents cannot watch their children in activities like plays or sporting events on school grounds).

Perhaps the most punitive aspect of SORA is that it destroys an individual's right to live like other free persons in society. It triggers countless legal barriers, and fosters private-sector discrimination and state-sanctioned ostracism. The U.S. Supreme Court has held that a similar all-encompassing regime – denaturalization – is punishment:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. … [the individual has] lost the right to have rights.

Trop v Dulles, 356 US 86, 101-02; 78 S Ct 590; 2 L Ed 2d 630 (1958). SORA is at least as destructive.

2. SORA Imposes Sanctions Historically Regarded as Punishment.

SORA imposes sanctions that closely resemble historical forms of punishment: probation/parole, banishment, and shaming. First, the in-person reporting requirements are akin to probation and parole, which "like incarceration, [are] a form of criminal sanction." *United States v Knights*, 534 US 112, 119; 122 S Ct 857; 151 L Ed 2d 497 (2001) (internal quotations omitted); *Morrissey v Brewer*, 408 US 471, 477-79; 92 S Ct 259; 333 L Ed 2d 484 (1972). Residency, occupational, and travel restrictions are also typical of correctional supervision. The *Smith* majority rejected an analogy to probation/parole because Alaska's statute did not require in-person reporting and registrants were "free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101. By contrast, SORA requires in-person reporting and limits where registrants can live and work. As the Maryland Court of Appeals explained, today registration has "the same practical effect as placing Petitioner on probation or parole." *Doe*, 430 Md at 562.

Second, residency, work, and loitering restrictions are like banishment. *See* Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 Wash U L Rev 101 (2007). While neither the US Supreme Court nor this Court has considered whether exclusion zones resemble banishment, other courts have so held. See, e.g., *Baker*, 295 SW3d at 444; *Starkey*, 305 P3d at 1025-26; *Whitaker v Perdue*, District Court for the Northern District of Georgia, at *19, issued Mar 30, 2007 (4:06-cv-0140) (unpublished) (Appendix 162a-204a).

Finally, by publishing stigmatizing information, SORA resembles traditional shaming punishments. "What distinguishes a criminal from a civil sanction … is the judgment of community condemnation which accompanies and justifies its imposition." Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 404 (1958). Sex offender registration is "state-sponsored condemnation." *Lawrence v Texas*, 539 US 558, 575; 123 S Ct 2472; 156 L Ed 2d

RECEIVED by MSC 4/22/2016 3:37:17 PM

508 (2003). The sex offender registry is a wall of shame, accessible world-wide. "[T]he Internet is our town square. Placing offenders' pictures and information online … holds them out for others to shame or shun." *Doe*, 111 A3d at 1097.

In *Smith*, 538 US at 98, the U.S. Supreme Court majority rejected analogies to historical shaming punishments because the stigma of registration results "from the dissemination of accurate information about a criminal record, most of which is already public." The Court described the Internet registry site as "analogous to a visit to an official archive of criminal records," where the public registry "makes the document search more efficient, cost effective, and convenient." *Id.* at 99. See also *Doe v Kelley*, 961 F Supp 1105, 1110 (WD Mich, 1997) (Michigan's registry is not the "modern-day equivalent" of branding or shaming punishments because it "does nothing more than provide for compilation and public accessibility to information that is already a matter of public record"); *Lanni v Engler*, 994 F Supp 849, 855 (ED Mich, 1998) (rejecting comparison to shaming punishments because "the sting of notification comes… from the dissemination of accurate public record information").

That logic does not apply here. A visit to a criminal records archive would produce no information about Mr. Temelkoski or his dismissed case. With regard to sealed HYTA records, SORA does not make already public information more accessible. Instead the registry unseals and broadcasts non-conviction information that would otherwise be confidential. The suffering, humiliation, and ostracism Mr. Temelkoski endures results directly from the fact that the state publishes otherwise confidential and highly stigmatizing information about him. "The registration and notification system here cannot be compared to a visit to a criminal archive, as such a visit would yield no information about juvenile adjudications." *Juvenile Male*, 590 F3d at 935.

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

Smith also rejected the analogy to historical shaming punishments on the assumption that registry information being disseminated was accurate. See *Smith*, 538 US at 84 (stigma results from "dissemination of accurate information about a criminal record"). Michigan's registry falsely labels HYTA trainees as "*convicted* sex offenders,"[15] when they are not. Moreover, SORA labels registrants by tiers, thereby singling out some registrants as more dangerous. Mr. Temelkoski is branded as Tier III, the most dangerous. Michigan's registry has extensive search and notification features (*e.g.,* one-click access to maps of registrants' homes), allows tracking of individual registrants through email updates, and facilitates shaming by providing tools for the public to forward registrants' photos, criminal records, and personal information. While the U.S. Supreme Court emphasized in *Smith*, 538 US at 99, that the public "must take the initial step" of accessing website, that is not how the Michigan registry works.

Publicly branding individuals as "convicted sex offenders" has devastating social consequences, as "[n]o other crime invokes such negative public perceptions." Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, Deviant Behavior, 25:3, 215, 217 (2004). Harassment of registrants is common. A Department of Justice study found 77% of registrants had experienced threats or harassment. See Zevitz & Farkas, US Dep't of Justice, National Institute of Justice, *Sex Offender Community Notification: Assessing the Impact in Wisconsin,* at 9 (Dec 2000); Tewksbury, *supra*, J Contemp Crim Just at 76 (registrants experience assaults, harassment, job loss, housing denial, etc.).

---

[15] Michigan Sex Offender Registry Home Page, *available at* http://www.communitynotification.com/cap_main.php?office=55242/.

RECEIVED by MSC 4/22/2016 3:37:17 PM

3. SORA Serves the Traditional Aims of Punishment.

When a restriction is "imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant might be to public safety, that restriction begins to look far more like retribution for past offenses than regulation intended to prevent future ones." *Baker*, 295 SW3d at 444. See also *Starkey*, 305 P3d at 1027-28 (extending registration period without individual assessment of risk is retributive); *Letalien*, 985 A2d at 22 (registry punitive because it applies exclusively to crimes, is not based on risk, and cannot be waived even if registrant is low risk); *Doe*, 189 P3d at 1014 (when law "determines who must register based not on a particular determination of the risk the person poses to society but rather on the [conviction]," it creates a "retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment").

4. SORA Is Not Rationally Related to a Non-Punitive Interest.

SORA is supposed to "protect[] against the commission of future criminal sexual acts by *convicted* sex offenders." MCL 28.721a (emphasis added). Registration of non-convicted individuals is not rationally related to that interest. Moreover, both the psychological evaluation of Mr. Temelkoski and the scientific research on recidivism show that requiring him to register *for life* does not promote, and likely undermines, SORA's purported goals.

a. Mr. Temelkoski Is Very Unlikely to Reoffend.

Before filing for removal from the sex offender registry, Mr. Temelkoski underwent an extensive psychological evaluation. See Rasmussen Evaluation, Appendix 101a-113a. The psychotherapist who did the evaluation had more than 20 years of mental health experience. *Id.* at 101a. His risk assessment drew on a broad array of standard clinical psychological methods and tools, incorporating both actuarial risk assessment tests and clinical interviews. *Id.* at 103a.

In 14 different psychological tests Mr. Temelkoski scored as low risk to reoffend. *Id.* at 105a-112a. He does not "demonstrate any indications of sexual deviance, sexual predatory behavior, and/or pedophilia." *Id.* at 106a. The psychotherapist found that Mr. Temelkoski "is an excellent candidate for removal from SORA" and "is a low recidivistic risk." *Id.* at 112a. There is no evidence, much less a judicial finding, that Mr. Temelkoski poses any danger to the public.

b. The Scientific Research Shows Common Assumptions about Recidivism Are Wrong, and that Most Registrants Are Unlikely Ever to Reoffend.

Many judicial decisions in the past have relied on myths about sex offender recidivism, rather than on scientific research. Misinformation about sex offender recidivism has even found its way into U.S. Supreme Court decisions. See Ira & Tara Elmann, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Const'l Commentary 495 (2015), Appendix 132a-146a.[16] In fact, the research demonstrates that – contrary to popular belief – the recidivism risk for most people convicted of sex offenses is quite low, and that recidivism risk drops off dramatically over time, even for high-risk offenders.

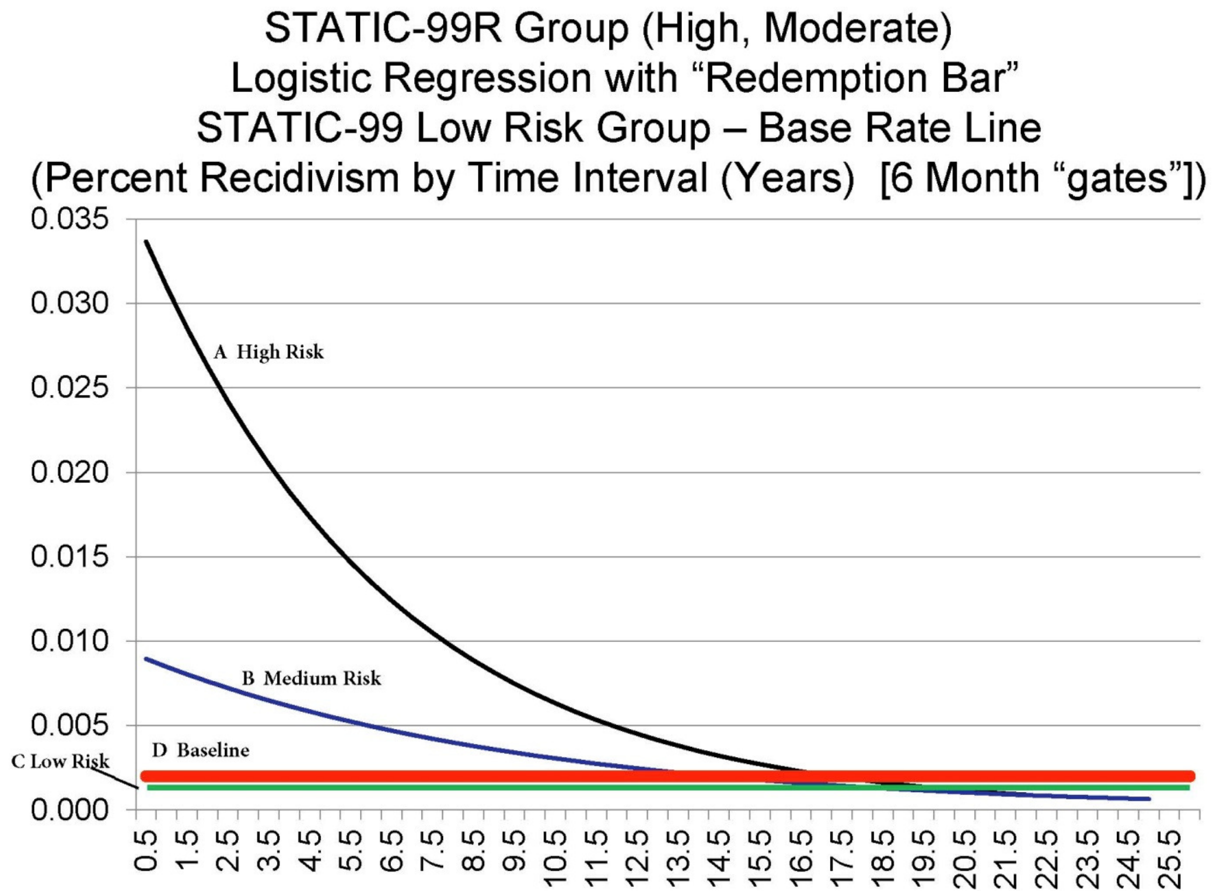
Recidivism rates for sex offenses are lower than for other crimes. See Levenson & D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, Criminal Justice Policy Review, vol. 18, no 2, 168-199 (2007) (collecting recidivism research). Moreover, the vast majority of new sex offenses are *not* committed by registrants. A New York study found 95% of sex offenses were committed by non-registrants. Sandler & Socia, *A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, Psychology, Public Policy and Law, 14(4), at 297 (2008). The risk of an "out of the blue" sex offense by someone without a prior sex offense history is between 1% and 3% over a 4-5 year

[16] If the Court is going to read one (short) academic article summarizing sex offender recidivism research, this is the one to read.

RECEIVED by MSC 4/22/2016 3:37:17 PM

period. Hanson, et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, J of Interpersonal Violence, vol 29(15), at 2806 (2014).

Recidivism risk varies and declines with age and time spent offense-free in the community. *Id.* Low-risk registrants are very unlikely ever to re-offend, and indeed pose essentially the same risk of committing a new sex offense as a baseline population of individuals arrested for some other non-sex offense. *Id.* at 2792, 2806. As summarized in the graph below, the recidivism risk of medium and high risk registrants drops dramatically over time. [17] *Id.* at 2792.



[17] Recidivism was calculated at six month intervals: .5, 1.0, 1.5 years. An actuarial risk assessment tool (Static 99R) was used to classify men with sex offenses into low, medium, and high risk categories. See *Doe v Harris*, 3:12-cv-05173 (ND Cal), Doc 24-1, Pg 30 (exhibit by Dr. Karl Hanson summarizing research).

RECEIVED by MSC 4/22/2016 3:37:17 PM

For clarity, letters have been added to the graph: line A represents high risk, line B represents medium risk, line C represents low risk, and line D represents the "base rate" of sexual offending of a group previously arrested for some type of non-sexual crime who have no recorded history of sex offenses.

c. The Scientific Research Shows Youthful Sexual Activity Is Common.

Youthful sexual contact is quite common. In 1993 (the date of Mr. Temelkoski's offense), 9% of youth reported having had intercourse before age 13, and half of high school students reported having done so. See Centers for Disease Control, *Trends in the Prevalence of Sexual Behaviors and HIV Testing National YRBS: 1991-2013*.[18] The conduct at issue here – kissing and touching of breasts – is presumably far more frequent than intercourse.[19]

d. The Scientific Research Shows Registration Is Ineffective or Counter-productive.

Scientific research "casts serious doubts on the effectiveness of sex offender registries to significantly reduce rates of sexual offending." Sandler & Socia, *supra*, at 297. See also Tewksbury, et al., *Final Report on Sex Offenders: Recidivism and Collateral Consequences*, at 60 (Sept 2011) (finding sex offender registration laws are "not likely an effective deterrent for sex offen-

---

[18] *Available at* http://www.cdc.gov/healthyyouth/data/yrbs/pdf/trends/us_sexual_trend_yrbs.pdf.

[19] More recent studies have found that:

- three quarters of youth between the ages of 12 and 16 have had sexual intercourse, with 80% reporting having had sex by the age of 15. See Caldwell, "What We Do Not Know About Juvenile Sexual Reoffense Risk," 7:4 *Child Maltreatment* 291-302 (Nov. 2002).
- 11% of boys and 4% of girls reported having had intercourse by the start of 6th grade. Grossman et al., *Protective Effects of Middle School Comprehensive Sex Education with Family Involvement*, Journal of School Health (Nov 2014).
- by age 14, about one-fifth of teens have started having sexual intercourse and more than one third report genital play with another teen. See US Department of Health, Education, and Welfare, National Institute of Child Health and Human Development, "National Longitudinal Study of Adolescent Health" (2000).

RECEIVED by MSC 4/22/2016 3:37:17 PM

der recidivism (which by itself is not a highly likely occurrence) and may produce … collateral consequences that inhibit reintegration"). "The limited effectiveness of registration and notification laws may be due to the fact that these laws were largely based on commonly held myths and misconceptions," including:

- The myth that people with past sex offenses will inevitably reoffend, when in fact recidivism rates are relatively low and the vast majority of sex offenses are committed by people without prior sex offense convictions; and

- The myth that sex offenses are committed by strangers, when in fact family members, intimate partners, and acquaintances are much more likely to be the offenders (e.g., 93% of child sexual abuse victims knew their abusers).

Sandler & Socia, *supra*, at 297-98.

Research analyzing data from 15 states, including Michigan, found that public registration may actually *increase* recidivism, leading to more sex offenses. See Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161 (2011). That public registration undermines SORA's intended goals – while counterintuitive – likely reflects the severe "social and financial costs associated with the public release of [registrants'] criminal history and personal information." *Id.* at 192. See *Doe v Thompson*, District Court of Shawnee County, Kansas, at *23, issued July, 2013 (12-C-168) (unpublished) Appendix 204a-234a ("Because [registry] notification schemes can increase recidivism, they are not rationally related to public safety.").

Research on exclusion zones barring registrants from proximity to schools has similarly shown that such laws are ineffective or counterproductive. A study of Michigan's residency restrictions (funded by the Department of Justice) found that, if anything, zones have *increased* rather than decreased recidivism. Huebner, *supra*, at 10. The California Supreme Court, in striking down a residency law for paroled sex offenders, explained that such exclusion zones

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

> impose[] harsh and severe restrictions and disabilities on the affected [persons'] liberty and privacy rights … while producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children.

In re Taylor, 60 Cal 4th at 1038.

e. Unsubstantiated Fears About Registrants Are Not Enough to Justify SORA.

The research shows that registration laws "produce little or no increase in public safety," Tewksbury, *Final Report*, *supra*, at 2, and may instead put the public at greater risk. A rational relationship to SORA's avowed public safety goals requires more than myths and fear. In *Bannum, Inc v City of Louisville*, 958 F2d 1354 (CA 6, 1992), the Sixth Circuit, applying rational basis review, invalidated a regulation restricting housing for released prisoners because the city's only justification was the unsupported assertion that prisoners are likely to reoffend. If the goal is to protect against recidivists, "then some data reflecting the extent of the danger must exist." *Id.* at 1361. "Negative attitudes," "unsubstantiated" fears, or the "desire to impede a politically unpopular group" cannot provide a rational basis for the restriction, absent actual evidence of danger. *Id.* at 1360-61 (citing *City of Cleburne v Cleburne Living Ctr*, 473 US 432; 105 S Ct 3249; 87 L Ed 2d 313 (1985)). Here the state has offered no evidence that HYTA trainees as a group are likely to reoffend, much less evidence that Mr. Temelkoski is likely to do so.

Lifetime registration is particularly irrational, since recidivism risk drops sharply over time. In *United States v Carter*, 463 F3d 526 (CA 6, 2006), the Sixth Circuit emphasized that the passage of time matters in imposing restrictions on former offenders: a sex-offender treatment condition could not be imposed in 2005 for a 1988 sex offense. Because of the passage of time, the condition was not reasonably related to public protection. *Id.* at 531-32. The same is true with regard to SORA's lifetime registration requirement.

RECEIVED by MSC 4/22/2016 3:37:17 PM

5. SORA Is Excessive in Relation to Non-Punitive Interests.

Courts often give "greatest weight" to the question of whether a law is excessive in relation to its non-punitive purpose. *Wallace*, 905 NE2d at 383. While the legislature need not have made "the best choice to address the problem," "the regulatory means chosen [must be] reasonable in light of the nonpunitive objective." *Smith*, 538 US at 105.

Here, SORA is excessive in relation to its avowed public safety goals because its onerous restrictions are imposed without any individualized consideration, and without *any evidence* that its conditions protect the public. The fact that SORA registration is based solely on convictions – or here non-convictions – absent any individualized determination of whether the person is dangerous shows that it is excessive in relation to its ostensible non-punitive goal. As Justice Souter explained in his concurrence in *Smith*:

> The fact that the Act uses past crime as a touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on: when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

538 US at 109 (Souter, J., concurring). See also *id.* at 116 (Ginsburg, J., dissenting) (Alaska's SORA is excessive in relation to its non-punitive purposes because it applies without "any determination of a particular offender's risk of reoffending" and because "past crime alone, not current dangerousness, is the 'touchstone' triggering [its] obligations"); *id.* at 113 (Stevens, J, concurring in *Connecticut Dep't of Public Safety*, 538 US 1; 123 S Ct 1160; 155 L Ed 2d 98 (2003) and dissenting in *Smith*) (because registration without individualized assessment is "a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty, [it] is punishment").

The presence of factors here that were absent in *Smith* compels a finding that SORA is excessive in relation to any non-punitive purpose, absent individualized review. Over the last 20 years, SORA has become a system of permanent supervision that is more onerous than probation/parole and is coupled with lifetime restraints on housing, employment, parenting, travel, and speech. Reading *Hendricks* and *Smith* together, restraints of this magnitude are excessive unless there is individualized review. See *Baker*, 295 SW3d at 446 (finding *Hendricks* more applicable than *Smith*; "Given the drastic consequences … and the fact that there is no individual determination of the threat a particular registrant poses to public safety, we can only conclude that [the law] is excessive with respect to the non-punitive purpose of public safety."); *Starkey*, 305 P3d at 1030 (because act's "many obligations impose a severe restraint on liberty without a determination of the threat a particular registrant poses to public safety," statute is excessive in relation to non-punitive purpose); *Pollard*, 908 NE2d at 1153 (statute exceeds non-punitive purpose because it restricts residency "without considering whether particular offender is a danger"); *Wallace*, 905 NE2d at 384; *Doe*, 111 A3d at 1100; *Letalien*, 985 A2d at 24-26.

III. THE EX POST FACTO CLAUSE WAS DESIGNED TO PREVENT THE VERY HARMS SORA HAS CREATED

SORA imposes an unconstitutional ex post facto punishment, where it was enacted, made public, and amended (to impose ever more onerous restrictions) only after Mr. Temelkoski committed his offense and pled guilty under HYTA. (Leave Grant Question #5.)

The Ex Post Facto Clauses of the U.S. and Michigan Constitutions prohibit the legislature from retroactively inflicting greater punishment than that permitted at the time of the crime. US Const, art I, § 10, cl 1; Const 1963, art 1, § 10; *Collins v Youngblood*, 497 US 37, 42-43; 110 S Ct 2715; 111 L Ed 2d 30 (1990). "[T]he ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." *Burgess v Salmon*, 97 US 381, 385; 24 L Ed 1104 (1878). SORA violates this basic rule.

RECEIVED by MSC 4/22/2016 3:37:17 PM

The "proper scope" of a constitutional provision "must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate." *United States v Brown*, 381 US 437, 442; 85 S Ct 1707; 14 L Ed 2d 484 (1965). The prohibition on ex post facto laws is intended to address two problems with retroactive laws: lack of fair notice and vindictive lawmaking. *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1995).

First, retroactivity is dangerous because it gives the legislature "unmatched powers … to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 511 US at 266. The Ex Post Facto Clause "assure[s] that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Graham*, 450 US at 28-29. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id*. at 30. Second, the Ex Post Facto Clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 US at 266. The Framers "viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment," and adopted the Ex Post Facto Clause to shield against "those sudden and strong passions to which men are exposed." *Fletcher v Peck*, 10 US 87, 137-38; 3 L Ed 162 (1810) (Marshall, CJ). See also *McRunels*, 237 Mich App at 175 (Ex Post Facto Clause was intended in part "to secure substantial personal rights against arbitrary and oppressive legislation").

RECEIVED by MSC 4/22/2016 3:37:17 PM

RECEIVED by MSC 4/22/2016 3:37:17 PM

The dangers that motivated adoption of the federal and Michigan Ex Post Facto Clauses are exactly the dangers presented by SORA's retroactivity. Mr. Temelkoski, who was adjudicated under HYTA's promise of a sealed record and no collateral consequences before the registry even existed, could not imagine that he would become subject to an all-encompassing lifetime registration regime. Moreover, antipathy toward sex offenders is "of the moment": there is no more despised group today, and hence no group more at risk of retributive legislation fueled by the "sudden and strong passions" which follow highly-publicized crimes.

Here, there is no question that SORA has been imposed retroactively. Because SORA is punishment, its retroactive application by definition violates the federal and Michigan prohibitions on ex post facto laws. See *Collins*, 497 US at 42-43; *Earl*, 495 Mich at 37.

IV. SORA IS CRUEL AND/OR UNUSUAL PUNISHMENT FOR HYTA TRAINEES.

It is cruel and/or unusual punishment to require Mr. Temelkoski to register under SORA. (Leave Grant Question #6.)

A. The Court Need Not Reach the Cruel and/or Unusual Punishment Question.

To prove cruel and/or unusual punishment, Mr. Temelkoski must establish both that SORA is punishment, and that it is cruel and/or unusual. By contrast, to establish that SORA violates the prohibition on ex post facto laws, Mr. Temelkoski need only prove that it is punishment, since there is no dispute that it was retroactively applied. If SORA is punishment, it thus necessarily violates the prohibition on ex post facto laws, and the Court need not reach the question of whether it also violates the prohibition on cruel and/or unusual punishments.

B. SORA Is Cruel or Unusual Punishment as Applied to Mr. Temelkoski.

Michigan's "cruel *or* unusual punishment" clause provides greater protections than the "cruel *and* unusual punishment" clause of the federal Eighth Amendment. See e.g., *People v Carp*, 496 Mich 440, 519; 852 NW2d 801 (2014). To determine whether a punishment is pro-

portionate to the offense, the court must assess "(1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *Id.* at 520.

First, the punishment imposed here – branding Mr. Temelkoski as a convicted child molester and subjecting him to all the associated consequences of registration *for life* – is severe in comparison to the offense, which involved kissing a girl and touching her breasts. As the Ohio Supreme Court explained in holding that juvenile registration violates both the federal and Ohio prohibitions on cruel/unusual punishment, "the length of the [lifetime] punishment is extraordinary," especially given that youth are less culpable. *In re CP*, 131 Ohio St at 523-25.

Second, the punishment imposed on Mr. Temelkoski is disproportionate compared to the punishment imposed on other people who have committed far much more serious offenses. Like violent rapists, Mr. Temelkoski must register for life. At the same time, HYTA trainees who are adjudicated of his offense today are not required to register at all. MCL 28.722(b)(ii).

Third, the punishment imposed on Mr. Temelkoski is also disproportionate to that imposed in other states. The Court Appeals, in finding HYTA registration to be cruel or unusual punishment in *Dipiazza*, noted that "[o]ther states are recognizing the need to distinguish between people who truly represent a danger to the public and those who do not." 286 Mich App at 156. See also *In re CP*, 131 Ohio St at 520-23 (summarizing developments "reflective of a national consensus" against registration of youthful offenders).

RECEIVED by MSC 4/22/2016 3:37:17 PM

Finally, SORA does nothing to make Mr. Temelkoski "a better member of society." *People v Lorentzen*, 387 Mich 167, 181; 194 NW2d 827 (1972). Instead, branding him as a sex offender undermines the very rehabilitative goals that HYTA was designed to achieve.

RELIEF REQUESTED

The judgment of the Court of Appeals should be reversed and the trial court's order granting Mr. Temelkoski's motion seeking removal from the sex offender registry should be affirmed.

Respectfully submitted,

/s/ David Herskovic
David Herskovic (P68897)
Freedman & Herskovic PLC
3000 Town Ctr, Ste 1250
Southfield, MI 48075
248-356-2010

/s/ Miriam Aukerman
Miriam Aukerman (P63165)
American Civil Liberties Union Fund of Michigan
1514 Wealthy SE, Suite 242
Grand Rapids, MI 49506
616-301-0930

/s/ Michael J. Steinberg
Michael J. Steinberg (P43085)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
616 578-6814

Attorneys for Defendant-Appellant

April 22, 2016

RECEIVED by MSC 4/22/2016 3:37:17 PM