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 REPLY BRIEF

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I. Updated Statement of Facts

Mr. Temelkoski was living in Florida when he filed his initial brief. Temelkoski Affidavit, Appendix 234a. He had lived in Michigan until 2014, but moved to Florida for a fresh start after the Wayne County Circuit Court ordered him removed from the sex offender registry. After the Michigan Court of Appeals ordered him to reregister, Mr. Temelkoski was unable to continue in the job he had found in Florida and was forced to move from his home. He and his family returned to Michigan in August 2016. *Id.* As a Michigan registrant, Mr. Temelkoski is once again subject for life to the full range of SORA restrictions. See Summary of Obligations, Disabilities and Restraints Imposed by SORA, Appendix 114a-127a.

Michigan's public sex offender registry now provides several pages of detailed information about Mr. Temelkoski. See Registry Printout, Appendix 236a-246a. Each page contains his photograph, and states that he is a Tier 3 (most dangerous) offender who must register for life. *Id.* A clickable map points to exactly where he lives, with a pin superimposed over his home. *Id.* His personal information appears not only through a name search, but through other types of searches, e.g., maps of all registrants within two miles of a given address. *Id.*

In describing the offense, the state's brief relies on inadmissible and mischaracterized hearsay from a police report. State's Brief, at 3; *Maiden v Rozwood*, 461 Mich 109, 124-25; 597 NW2d 817 (1999). In any event, while this Court cannot know exactly what occurred between the complainant and Mr. Temelkoski more than two decades ago, *the facts on which Mr. Temelkoski's arguments rest are not in question***.** It is undisputed that he pled guilty in 1994 under the Holmes Youthful Trainee Act (HYTA) which promised him that his record would be sealed, he would not be convicted, and he would suffer no "civil disability or loss of right or privilege" upon successful completion of probation. 1993 PA 293, § 14(2). And it is further undisputed that the Sex Offender Registration Act (SORA) has been retroactively applied to him.

II. Michigan's Sex Offender Registration Act Imposes Punishment.

As this brief was being written, the United States Court of Appeals for the Sixth Circuit issued its published decision in *Does v Snyder*, __ F3d __ (CA 6, 2016) (attached as Appendix 247a), holding that Michigan's Sex Offender Registration Act violates the Ex Post Facto Clause of the United States Constitution. The unanimous opinion, written by Judge Alice Batchelder, is grounded in the extraordinarily rich record available to the Sixth Circuit, which included a 269-page stipulated joint statement of facts summarizing seven expert reports, 22 depositions, and voluminous discovery documents.[1] Judge Batchelder explains that *Smith v Doe*, 538 US 84; 123 S Ct 1140; 155 L Ed 2d 164 (2003), should not "be understood as writing a blank check to states to do whatever they please in this arena." *Does*, __F 3d __; slip op at 12. The opinion holds:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
>
> We conclude that Michigan's SORA imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased. Indeed, the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders

[1] Because Mr. Temelkoski's case arose as a post-judgment motion in a criminal case, this Court does not have the benefit of a similarly comprehensive record. Should this Court wish to review the record in *Does v Snyder*, it is available as docket no. 90, PageID#3723-3989, case number 2:12-cv-11194, Eastern District of Michigan.

> rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice.

Id. at __; slip op at 12-13.

Although this Court is not bound by a decision of the Sixth Circuit, the state correctly notes that federal decisions "can be considered persuasive, particularly when interpreting federal laws that are similar to the state laws in question." State's Brief, at 20. *Does* addresses not an analogous federal law, but the same state law at issue here, and several of the same legal questions posed by this Court (questions #1 and #5). Should this Court reach the ex post facto issues,[2] it should treat *Does* as persuasive and reach the same conclusion as the Sixth Circuit.

A. The "Clearest Proof" Requirement Merely Restates the Presumption of Constitutionality Given to Legislative Enactments.

The state emphasizes that if SORA is intended as a civil remedy, Mr. Temelkoski must provide the "clearest proof that the statutory scheme is so punitive either in purpose or effect to negate the [legislature's] intention to deem it civil." *People v Earl*, 495 Mich 33, 44; 845 NW2d 721 (2014). There is, however, nothing novel about the principle that courts reviewing legislative enactments must accord those laws a presumption of constitutionality. "In analyzing constitutional challenges to statutes, this Court's authority to invalidate laws is limited and must be predicated on a *clearly apparent demonstration* of unconstitutionality." *People v Lockridge*, 498 Mich 358, 402; 870 NW2d 502 (2015) (emphasis added) (citation omitted).

The "clearest proof" requirement simply restates that principle. It is not "meaningfully different from our standards for evaluating all constitutional challenges to a statute: the

[2] It may not be necessary for this Court to rule on the ex post facto issues because Mr. Temelkoski's due process arguments provide a separate and independent basis for this Court to rule in his favor. Alternately, the Court may wish to consider severing the ex post facto questions and holding them in abeyance until there is a final judgment in *Does*.

challenger bears the burden of demonstrating that the statute is unconstitutional." *Doe v State*, 167 NH 382, 402; 111 A3d 1077 (2015). See also *United States v Juvenile Male*, 590 F3d 924, 931 (CA 9, 2009) ("clearest proof" means "that the terms of the statute, the legal obligations it imposes, the practical and predictable consequences of those obligations, our society experience in general, and the application of our own reason and logic, establish conclusively that the statute has a punitive effect"); vacated as moot 564 US 932; 131 S Ct 2860; 180 L Ed 2d 811 (2011). In sum, like any litigant challenging the constitutionality of a statute, Mr. Temelkoski has the burden of establishing that the law is unconstitutional. While that task is challenging, as Judge Batchelder said in *Does*, "difficult is not the same as impossible." __F 3d __; slip op at 12.

Finally, in deciding whether Mr. Temelkoski has met his burden, this Court must evaluate whether the law as a whole – a law which "has grown into a byzantine code governing in minute detail the lives of the state's sex offenders," *Does*, __F 3d __; slip op at 2 – is punitive. Instead of parsing individual restrictions, "it is the entire 'statutory scheme' that must be examined for its punitive effect." *Doe v Thompson*, 373 P3d 750, 767; 304 Kan 291 (2016) (quoting *Smith*, 538 US at 92; *United States v Ward*, 448 US 242, 248-49; 100 S Ct 2636; 65 L Ed 2d 742 (1980)). The factors in *Kennedy v Mendoza-Martinez*, 372 US 144; 83 S Ct 544; 9 L Ed 2d 644 (1963), are useful "guideposts," but are not dispositive. *Smith*, 538 US at 97.

B. While Some Courts Maintain the Fiction that Registration Is Not Punishment, Increasingly Courts Are Recognizing the Real-World Consequences of Registration.

The state argues that courts consistently uphold registration laws against ex post facto challenges.[3] State's Brief, at 32. That is certainly not true after *Does v Snyder*, but it was also not

[3] Many of the cases cited by the state involved failure-to-register convictions, where registration laws punished the new offense of failing to register and not the original sex offense. Therefore, the punishment was not retroactive and did not implicate the Ex Post Facto Clause. See, e.g., *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011); *United States v Felts*, 674 F3d 599, 606 (CA 6, 2012). Here, Mr. Temelkoski has not been charged with violating SORA and is

true before. Over the last few years, court after court has held that modern "super-registration" laws impermissibly impose retroactive punishment. *Does*, __F 3d __; slip op at 12 (citing cases).

Admittedly, there is caselaw on both sides when it comes to other states' registration laws. The evolution in the law can be seen not only in the Sixth Circuit's *Does* decision, but in a series of recent Kansas Supreme Court decisions. In *Doe v Thompson*, 373 P3d 750, 765; 304 Kan 291 (2016), that court canvassed how much more punitive the Kansas statute is compared to that in *Smith* and concluded that this "mandates a different result under the federal Constitution."[4] The court held that KORA *is punishment* and violates the Ex Post Facto Clause. But the very same day it issued another decision holding that KORA *is not punishment* for purposes of the Eighth Amendment's ban on cruel and unusual punishment.[5] See *State v Peterson-Beard*, __ P3d __ ; 304 Kan 192; 2016 WL 1612851 (2016) (petition for cert filed, No. 16-5367). A change in the court's composition from one case to the other led to the different outcome. *Id.*, 2016 WL 1612851 at *17-19 (Johnson, J., dissenting). Thus, even the same court on the same day reached two different conclusions about whether registration is punishment.

C. **SORA Has a Punitive Effect.**

Judge Batchelder's opinion in *Does* carefully applies the *Mendoza-Martinez* factors to SORA, and need not be repeated here.[6] But because this Court asked not only whether SORA is

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thus not arguing that a new sentence for a SORA violation is retroactive. Rather, he is arguing that the lifetime restrictions imposed by SORA on non-dangerous persons are punishment.

[4] The Kansas court noted that its statute requires frequent in-person reporting, longer registration terms, additional registration information, and notice of travel, and has family law consequences. All of this is true in Michigan as well. See MCL 28.721 *et seq.*; MCL 712A.13a(6); MCL 712A.19a(2)(d).

[5] The majority in *Peterson-Beard* purported to overrule *Thompson*. *Peterson-Beard*, 2016 WL 1612851 at *1. The dissent argued this was dictum. *Id.* at * 17-19 (Johnson, J., dissenting).

[6] If this Court decides that SORA is punitive as applied to non-convicted HYTA youth, the Court need not reach the question of whether SORA is punishment for registrants in general.

punishment, but also whether the answer to that question is different for non-convicted HYTA youth, Mr. Temelkoski will address three issues specific to HYTA trainees.

1. SORA Imposes Affirmative Disabilities and Restraints on Mr. Temelkoski, Who Would Otherwise Be Entirely Free to Live His Life Without Any Repercussions From His Dismissed and Sealed Charges.

Mr. Temelkoski's case was dismissed and his record sealed under HYTA, which also specifically bars imposition of any disabilities. 1993 PA 293, §§ 11, 14. The consequences he suffers stem not, as the state argues, "from the commission of the underlying act," State's Brief, at 19, but rather from SORA itself. As the Sixth Circuit explained with respect to one of the plaintiffs in *Does*, whose case had likewise been dismissed under HYTA,

> [b]ut for SORA's retroactive application to him, his criminal record would not be available to the public. Thus, unlike the statute in *Smith*, the ignominy under SORA flows not only from the past offense, but also from the statute itself.

Does, __F 3d __; slip op at 9.

The state does not dispute that SORA publicly labels HYTA youth as "convicted" sex offenders, prohibits them from living and working in much of the state,[7] bars them from their children's school events, requires them to report frequently in person, limits where and when they can travel, constrains their use of the Internet, and requires them to pay an annual supervision fee. See Summary of Obligation, Disabilities and Restraints Imposed by SORA, Appendix 114a-131a. Instead, the state contends only that "punishment in the criminal justice context must be reviewed as the *deliberate imposition by the state* of some measure *intended* to chastise, deter or discipline," State's Brief, at 19 (original emphasis), and argues that the harsh effects of SORA do not betray a governmental intent to punish. This argument is circular, and

[7] The state asserts that because Mr. Temelkoski lives in Florida, he lacks standing to challenge the exclusion zones. State's Brief, at 1. But Mr. Temelkoski has returned to Michigan, resolving any possible standing issues. Temelkoski Affidavit, Appendix 234a.

conflates the two prongs of the ex-post-facto punishment test, only one of which focuses on the legislature's intent. If the state *intends* to chastise, deter and discipline, then it intends to punish. And "[i]f the Legislature's intention was to impose criminal punishment, retroactive application of the law violates the Ex Post Facto Clause and the analysis is over." *Earl*, 495 Mich at 38. It is only if the state intends to create a non-punitive scheme that one reaches the *Mendoza-Martinez* factors and assesses whether that scheme imposes disabilities and restraints. Here, even if one assumes that the legislature did not specifically intend to punish, SORA is nonetheless punitive because it imposes affirmative disabilities and restraints on non-convicted HYTA youth.

Given that different courts have reached different conclusions about whether specific registration schemes impose affirmative disabilities and restraints, compare Temelkoski Opening Brief, at 26-34, with State's Brief, at 20-23,[8] it is most useful to look back at how this Court and the U.S. Supreme Court have understood that factors of the *Mendoza-Martinez* test:

> The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is "how the effects of the [a]ct are felt by those subject to it." *Smith*, 538 US at 99-100, 123 S Ct 1140. "If the disability or restraint is minor and indirect, it effects are unlikely to be punitive." *Id.* at 100, 123 S Ct 1140.

Earl, 495 Mich at 44. By contrast, when a significant consequence flows directly from the challenged statute, it is an affirmative disability or restraint.

The U.S. Supreme Court, applying that test to the Alaska statute[9], concluded that the statute did not impose an affirmative disability or restraint, largely because the harms the

[8] The state relies heavily on *United States v WBH*, 664 F3d 848 (CA 11, 2011), and *United States v Under Seal*, 709 F3d 257 (CA 4, 2013). Both concern the federal registration statute, and both courts emphasized that registrants' housing and employment are not limited. *WBH*, 664 F3d at 857; *Under Seal*, 709 F3d at 265. By contrast, SORA does severely limit registrants' housing and employment. See *Does*, __F 3d __; slip op at 8 (showing illustrative map).

[9] In finding that Alaska's statute, which did not limit jobs or housing, did not impose an affirmative disability or restraint, *Smith* stated that the law was less harsh than occupational disbarment, which has been held to be nonpunitive. 538 US at 100. SORA, however,

plaintiffs alleged could not be tied directly to registration and would have occurred anyway as a result of their convictions. *Smith*, 538 US at 100-101. Here, by contrast, it is clear that all of the disabilities and restraints Mr. Temelkoski experiences flow directly from SORA, and not from a conviction that he does not have. Moreover, as Judge Batchelder explained in *Does*, SORA's burdens – which include restrictions on work, housing, and "loitering; in person reporting; and stigmatization as a "convicted" Tier III offender – cannot be described as "minor and indirect."

> [S]urely something is not "minor and indirect" just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment.

Does, __F 3d __; slip op at 10.

2. Internet Branding of Mr. Temelkoski as a Convicted Sex Offender Resembles the Historical Punishment of Shaming.

The state argues that publicly labeling Mr. Temelkoski as a "convicted sex offender" is not punitive because "dissemination of truthful information" is not punishment.[10] State's Brief, at 25. But the information disseminated about Mr. Temelkoski is not truthful because the public

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criminalizes registrants who work in *any employment* in the exclusion zones (and imposes countless other restrictions), and is thus harsher than a tailored prohibition on employment in one specific industry. See *Does*, __F 3d __; slip op at 10 ("[N]o disbarment case we are aware of has confronted a law with such sweeping conditions or approved of disbarment without some nexus between the regulatory purpose and the job at issue."); *Schware v Board of Bar Examiners of New Mexico*, 353 US 232, 239, 241-43; 77 S Ct 752; 1 L Ed 796 (1957) (criminal-history-based employment restrictions must be related to "the applicant's fitness or capacity" for particular work); *Hampton v Mow Sun Wong*, 426 US 88, 102-03; 96 S Ct 1895; 48 L Ed 2d 495 (1976) (invalidating regulations barring non-citizens from many federal jobs because the government cannot broadly deny substantial opportunities for employment "on a wholesale basis"); *Sugarman v Dougall*, 413 US 634, 646-47; 93 S Ct 2842; 37 L Ed 2d 853 (1973). The *Smith* Court did not reject the plaintiffs' distinction between tailored occupational bars and employment restrictions affecting a wide range of jobs, but simply concluded that there was no evidence that Alaska's statute affected employment. *Smith*, 538 US at 100. That is not true here.

[10] Mr. Temelkoski focuses here on the public shaming, as that analogy is particular apt given his lack of a criminal history. But SORA is akin to historical punishments in multiple ways: it "meets the general definition of punishment, has much in common with banishment and public shaming, and has a number of similarities to parole/probation." *Does*, __F 3d __; slip op at 9.

registry describes him as a "convicted sex offender" when he is not. See Sex Offender Registry Home Page, Appendix 237a. Moreover, unlike in *Smith*, where Alaska's registry republished information that was already public, here Michigan broadcasts information that is sealed. Indeed, Mr. Temelkoski's *own counsel* had to file a motion simply to review his court file. See Register of Action, Appendix 1a. See also *Does*, __F 3d __; slip op at 9 (distinguishing SORA from Alaska law because it "discloses otherwise non-public information" about HYTA trainees).

Smith was decided in the early days of the Internet, and the Court described Alaska's Internet registry as a passive system, akin to physically visiting "an official archive of criminal records." 538 US at 99. That analogy "is antiquated in today's world of pushed notifications to listservs and indiscriminate social media sharing." *Thompson*, 373 P3d at 768. Indeed, Michigan's website encourages such public shaming, prompting users to "Tell a Friend" or sign up to track particular registrants. Appendix 236a-245a. The consequences of such Internet notoriety are entirely different from the consequences of having a court file in an archive (particularly when that court file is sealed). As the *en banc* Sixth Circuit recently explained, in overruling an earlier decision holding that people have no privacy interest in their mugshots, twenty years ago

> booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have requires a trip to the local library's microfiche collection…. In 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades… Experience has taught us otherwise.

Detroit Free Press Inc v United States Dept of Justice, __ F3d __, 2016 WL 3769970, at *3, 5 (CA 6, 2016). See also *Peterson-Beard*, 2016 WL 1612851 at *20 (Johnson, J., dissenting) (arguing that *Smith* would now come out differently because the "current Supreme Court would be more attuned to the repercussions of Internet dissemination of a sex offender registry," and

citing *Riley v California*, 573 US __, 134 S Ct 2473, 2491; 189 L Ed 2d 430 (2014), for the Court's understanding that vast amounts of data are now accessible "at the tap of a screen").

3. As Applied to HYTA Youth, SORA Is Excessive in Relation to Any Non-Punitive Purpose.

The state asserts a generalized "public safety" purpose, and argues that it is not excessive to impose lifelong supervision without any individualized determination of dangerousness. The state does not claim – and is unwilling to prove through an individualized risk assessment – that Mr. Temelkoski, whose offense occurred over two decades ago, currently presents a risk to the public.[11] Rather, the state argues that simply because he has a non-conviction for a sex offense, "public safety" justifies regulating where he lives and works, disseminating his confidential non-conviction information, and requiring him to report in person within three days if he does something as innocuous as borrow a car.

The U.S. Supreme Court has set out two preconditions for dispensing with individualized determinations: 1) the restraints imposed are "minor," and 2) the state is "allow[ing] the public to assess risk on the basis of *accurate, nonprivate* information about registrants' convictions." *Smith*, 538 US 104 (emphasis added). Neither of those preconditions is met here.

Moreover, the state entirely ignores the science. The state does not refute the data showing that most registrants are at low risk to reoffend, that registration and exclusion zones are ineffective or even counterproductive, and that registration severely limits housing and employment opportunities and results in harassment. A comparison of the parties' respective Tables of Authorities is telling: the state cites no research at all, preferring to rely on fear rather than facts. By contrast, in *Does*, Judge Batchelder relied on an extensive record, including scientific

[11] The psychological assessment Mr. Temelkoski himself obtained shows he is not a danger to the public. See Forensic Psychological Evaluation, Appendix 101a-113a.

research, to conclude that there is "no evidence" that SORA's burdens are "counterbalanced by any positive effects." *Does*, __F 3d __; slip op at 12.

III. Where Mr. Temelkoski Was Promised a Sealed Record and No Civil Disabilities in Return for His Guilty Plea, Due Process Prohibits the State From Reneging On That Promise.

A. The Current Version of HYTA Is Irrelevant to Mr. Temelkoski's Case.

The state does not dispute that when Mr. Temelkoski pled guilty, SORA did not exist and HYTA promised a sealed record, no conviction, and no civil disabilities. State's Brief, at 40. The state instead argues that the current language of HYTA and SORA shows that *today* the legislature intends for HYTA youth to register. State's Brief, at 39-44. Given the legislative history and statutory cross-references, Mr. Temelkoski does not dispute that, as a matter of statutory construction, the legislature *today* intends for non-convicted HYTA youth to register as convicted sex offenders. But all that this statutory exegesis shows is that what the legislature intends today is not what the legislature intended in 1994. The state's statutory construction argument provides no answers to the constitutional due process questions posed by this Court.

B. The Legislature's Ability to Define the Terms of HYTA Prospectively Does Not Give the State the Power to Renege on Promises It Made Under HYTA in the Past.

The state argues that Mr. Temelkoski does not have a protected liberty interest in the benefits he was promised under HYTA, and therefore the state can take them away by retroactively redefining Mr. Temelkoski's non-conviction as a conviction. That argument ignores the well-established principle that liberty interests can attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law." *Paul v Davis*, 424 US 693, 710; 96 S Ct 1155, 47 L Ed 2d 405 (1976). Accordingly, Mr. Temelkoski has a liberty interest in the rights guaranteed under the 1994 version of HYTA and the state may not "remove or alter that protected status" without due process. *Id.* at 711.

Moreover SORA not only couples damage to reputation with other restrictions (meeting the "stigma plus" test in *Paul v Davis*), but imposes burdens on other rights long recognized as fundamental, including the right to work, travel, parent, and speak freely (i.e., use the Internet). See *Meyer v Nebraska*, 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923); *Saenz v Roe*, 526 US 489, 498; 119 S Ct 1518; 143 L Ed 2d 689 (1999); *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *Watchtower Bible & Tract Soc'y v Village of Stratton*, 536 US 150, 164-66; 122 S Ct 2080; 153 L Ed 2d 205 (2002).

The state argues that the legislature can define the terms of HYTA prospectively, and therefore it can also break promises it made under earlier versions of the statute. State's Brief, at 45-46. As a matter of due process, this is false. Assuming that the state is able to modify HYTA *prospectively* so as to require the registration of HYTA youth[12], that does not equate to the right to renege on what it promised Mr. Temelkoski under earlier iterations of that statute.[13]

An example may clarify the point. The legislature recently amended HYTA to expand the upper age limit from 21 to 24, something that was well within the legislature's prerogatives. 2015 PA 31, § 11. Imagine, however, if the legislature had reduced the upper age limit to 18.

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[12] Because Mr. Temelkoski has a due process claim based on the abrogation of the promises made to him under the 1994 version of HYTA, which pre-dates SORA, this Court need not reach the question of whether prospective statutory amendments requiring registration of HYTA youth adjudicated after the creation of SORA violate due process. Youth adjudicated under later versions of HYTA or different iterations of SORA may have other due process arguments. (For example, the argument set out in section III.C – that publicly stigmatizing non-convicted HYTA youth as "convicted sex offenders" violates due process – applies to both retroactive and prospective registration of HYTA youth.)

[13] The due process arguments against retroactive application of SORA and of the HYTA amendments referencing SORA do not depend on whether registration is punishment. The 1994 HYTA statute specifically promised that "the individual assigned to the status of youthful trainee shall not suffer a *civil* disability or loss of right or privilege." 1993 PA 293, § 14(2) (emphasis added). If SORA is punishment, its application to Mr. Temelkoski violates the prohibition on ex post facto laws. If SORA imposes civil disabilities, then its application to Mr. Temelkoski violates due process because he was promised that no such civil disabilities would be imposed.

Could the legislature then renege on its promises to youth who had previously pled guilty under HYTA at ages 19 or 20 by unsealing their records, publicly labeling them as convicted, and imposing additional civil disabilities on their housing and employment? Certainly not, because that would effectively undo the benefits they were promised under HYTA at the time they pled.

Yet that is exactly what the state argues it can do to Mr. Temelkoski.[14] The legislature's ability to make HYTA unavailable to *future* 19- or 20-year-olds would not mean the legislature could take away those benefits from 19- or 20-year-olds who benefited from HYTA in the *past*. Likewise here, assuming that the state can require current HYTA trainees to register under SORA, it cannot take away the benefits it promised Mr. Temelkoski back in 1994.

C. The State Cannot Publicly Stigmatize Mr. Temelkoski as a "Convicted Sex Offender" by Redefining "Convicted" in Whatever Way It Wants.

The state also argues that it may define "conviction in different, even contradictory ways" to accomplish different legislative goals. State's Brief, at 43. The state is not free, however, to publicly label people as something they are not.

Courts have most frequently considered this issue where registries include individuals who did not commit sex offenses. In concluding that public labeling of non-sex offenders as sex offenders violates both substantive and procedural due process, courts have relied on *Vitek v Jones*, 445 US 480, 494; 100 S Ct 1254; 463 L Ed 2d 552 (1980), where the Supreme Court held, in the context of designating a prisoner as mentally ill, that due process protections apply where "stigmatizing consequences" are coupled with other restrictions. Because one "can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of [a

[14] While the state relies on *Doe v Mich Dep't of State Police*, 490 F3d 491, 501 (CA 6, 2007), which found a rational basis for public registration of HYTA trainees, that case did not concern individuals who had pled under HYTA *before* the adoption of SORA, nor did it address Mr. Temelkoski's argument here that under the *Santobello* line of cases, he has a right to "specific performance" of what he was promised under his plea.

person] as a sex offender," *Neal v Shimoda*, 131 F3d 818, 829 (CA 9, 1997), states may not simply impose the "sex offender" label on someone who does not meet the public understanding of what it means to be a "sex offender." See also *Meza v Livingston*, 607 F3d 392, 401-02 (CA 5, 2010); *Renchenski v Williams*, 622 F3d 315 (CA 3, 2010); *Gwinn v Awmiller*, 354 F3d 1211 (CA 10, 2004); *Kirby v Siegelman*, 195 F3d 1285 (CA 11, 1999); *State v Robinson*, 873 So 2d 1205 (Fl 2004); *State v Small*, 833 NE2d 774, 782-83; 162 Ohio App 3d 375 (2005).

Just at the legislature may not redefine non-sex offenses as sex offenses, the state may not stigmatize Mr. Temelkoski as a "convicted sex offender" when he was never convicted of a sex offense. Viewing the registry, the public would think Mr. Temelkoski was convicted. He was not, and no amount of verbal gymnastics can change that fact.

The state also argues that deeming Mr. Temelkoski "convicted" for SORA purposes but "non-convicted" for HYTA purposes "does not lead to absurd results" because Mr. Temelkoski need not list his offense when applying for employment. State's Brief, at 39-40. But:

> The fact that one who is successfully released from the status of youthful trainee need not list the offense as a conviction when applying for a job seems like a hollow benefit if the person is at the same time required to be registered as a sex offender pursuant to the SORA. It would be easy enough for a prospective employer to access the established Internet Web site and discover the applicant's history. Knowing this, would not an applicant be wise to simply list the offense on an application and thus avoid the added problem of having the potential employer feel as if the applicant was being untruthful and attempting to hide a criminal past? Or, should the applicant wait for discovery and hope that the employer will be satisfied with an explanation on how the applicant is not considered to have been convicted on one hand, but is considered to have been convicted on the other?

People v Rahilly, 247 Mich App 108, 119-20; 635 NW 2d 227 (2001) (Holbrook, J., dissenting).

D. The State's Other Arguments Are Unavailing.

Instead of engaging with Mr. Temelkoski's argument that he is entitled to specific performance under the *Santobello* line of cases, the state throws up procedural objections. First, the state argues that he should be required to produce a transcript from the plea hearing, even

though that transcript no longer exists.[15] State's Brief, at 41. Yet the prosecution does not explain why that transcript is necessary. Mr. Temelkoski's appendix contains the relevant documents showing that he pled guilty under HYTA, that he successfully completed probation, and that all charges were dismissed and his record sealed. Appendix 1a-15a. Mr. Temelkoski's argument is based not on any utterances in court, but rather on the plain language of HYTA in 1994.

The state also argues that registration is a permissible probation condition that was imposed on Mr. Temelkoski in 1996. State's Brief, at 40. This is an odd argument, because the state simultaneously contends, with respect to the ex post facto claim, that registration is unlike probation (which is a historical form of punishment, *United States v Knights*, 534 US 112, 119; 122 S Ct 857; 151 L Ed 2d 497 (2001)). State's Brief, at 25-26. In any event, Mr. Temelkoski was discharged from probation on April 16, 1997. See Order of Dismissal, Appendix 13a. He cannot be subject to probation conditions when he is no longer on probation. And if the state's justification for registration is that it is a form of probation, then not only is registration punishment, but the term of the registration/probation cannot extend any longer than the maximum probation term allowed by statute, which for Mr. Temelkoski was three years. 1993 PA 293, § 13(1)(b); *People v Wakefield*, 46 Mich App 97, 99; 207 NW2d 461 (1973).

Finally, the state argues that Mr. Temelkoski should have brought a motion earlier. State's Brief, at 41. Back in 1996 when Mr. Temelkoski was first required to report address changes within ten days for inclusion in a confidential law enforcement-only database, he could not have known that two decades later he would be barred from living, working or spending time

[15] Mr. Temelkoski sought counsel in 2011, after SORA was amended to retroactively extend his registration period from 25 years to life. He filed his motion for removal from the registry on 8/9/2012. See Register of Action, Appendix 1a. Although Mr. Temelkoski's counsel sought to obtain transcripts from the 1994 plea proceedings, no transcripts were ever produced and the court reporter's notes were destroyed 15 years after they were made, in other words in 2009, before Mr. Temelkoski's motion was filed. See Letter Re Destruction of Records, Appendix 3b.

with his children in much of the state; would be required to report in person within three days if he starts driving a different car; and would have his picture, personal details, and home address (complete with map) broadcast on the Internet as a "convicted sex offender."

Respectfully submitted,

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