

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 150643

Plaintiff-Appellee,

Court of Appeals No. 313670

v

Wayne Circuit Court No. 94-000424-
FH

BOBAN TEMELKOSKI,

Defendant-Appellant.

BRIEF OF ATTORNEY GENERAL BILL SCHUETTE AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	iii
Interest and Statement of Position of Amicus Curiae	1
Introduction and Summary of Argument	2
Argument	4
I. Applying SORA to Temelkoski does not violate the Ex Post Facto Clause because SORA is not punishment.	4
A. The Ex Post Facto Clause permits retroactive application of non-punitive civil regulatory laws.	7
B. The Legislature intended SORA to be a civil remedy, not a punishment.	8
C. SORA is a civil regulatory program that rationally advances public safety; it is not punitive in purpose or effect.	8
D. Any SORA component deemed punitive must be severed while leaving the rest of the statutory scheme intact.	29
II. Applying SORA to Temelkoski does not violate due process.	29
A. Temelkoski was not promised freedom from civil consequences at the time of his guilty plea.	30
1. The HYTA statute did not expressly or impliedly promise Temelkoski freedom from civil consequences at the time of his plea.	31
2. Temelkoski has not shown or even alleged that his plea was conditioned on any promise beyond HYTA’s text; indeed, the record refutes such a claim.	35
B. Requiring Temelkoski to register and comply with SORA does not violate due process.	36
1. A guilty plea is knowing and voluntary if the defendant is aware of <i>direct</i> consequences of his plea; due process does not require knowledge of <i>collateral</i> consequences.	36

2. SORA registration is a collateral consequence of
Temelkoski’s plea that lacks due-process implications..... 41

3. In any event, Temelkoski has failed to show plain error
that affected his substantial rights..... 45

III. Applying SORA to Temelkoski is not cruel and unusual punishment. 49

Conclusion and Relief Requested..... 50

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>ACLU of Nevada v Masto</i> , 670 F3d 1046 (CA 9, 2012).....	passim
<i>Anderson v State</i> , 182 SW3d 914 (Tex Crim App 2006)	5, 39, 42
<i>Ashwander v Tennessee Valley Auth</i> , 297 US 288 (1936)	30
<i>Brady v United States</i> , 397 US 742 (1970)	37
<i>Broadrick v Oklahoma</i> , 413 US 601 (1973)	30
<i>Chaidez v United States</i> , 133 S Ct 1103 (2013)	passim
<i>Commonwealth v Baker</i> , 295 SW3d 437 (Ky, 2009).....	6
<i>Commonwealth v Leidig</i> , 956 A2d 399 (Pa, 2008)	5, 27, 38, 42
<i>Commonwealth v Pridham</i> , 394 SW3d 867 (Ky, 2012).....	38
<i>Connecticut Dep't of Public Safety v Doe</i> , 538 US 1 (2003)	15
<i>Cutshall v Sundquist</i> , 193 F3d 466 (CA 6, 1999).....	6
<i>Davenport v State</i> , 620 NW2d 164 (ND, 2000)	42
<i>De Veau v Braisted</i> , 363 US 144 (1960)	20
<i>Doe v Bredesen</i> , 507 F3d 998 (CA 6, 2007).....	5, 6

<i>Doe v Cuomo</i> , 755 F3d 105 (CA 2, 2014).....	5, 18
<i>Doe v Dep't of Pub Safety & Corr Servs</i> , 62 A3d 123 (Md, 2013)	11
<i>Doe v Mich Dep't of State Police</i> , 490 F3d 491 (CA 6, 2007).....	13, 31
<i>Doe v Miller</i> , 405 F3d 700 (CA 8, 2005).....	5, 14, 16, 19
<i>Doe v Pataki</i> , 120 F3d 1263 (2 CA, 1997).....	5, 14
<i>Doe v State</i> , 111 A3d 1077 (NH, 2015).....	6
<i>Doe v State</i> , 189 P3d 999 (Alaska, 2008)	6
<i>Does #1-5 v Snyder</i> , __ F3d __, 2016 WL 4473231 (CA 6, 2016).....	6
<i>Does v Munoz</i> , 507 F3d 961 (CA 6, 2007).....	13
<i>Eastwood Park Amusement Co v Stark</i> , 325 Mich 60 (1949).....	29
<i>EB v Verniero</i> , 119 F3d 1077 (3d Cir. 1997).....	5
<i>Foo v State</i> , 102 P3d 346 (Hawai'i 2004)	5, 19, 39, 42
<i>Hatton v Bonner</i> , 356 F3d 955 (CA 9, 2003).....	5, 19
<i>Hawker v New York</i> , 170 US 189 (1898)	20
<i>Hudson v United States</i> , 522 US 93 (1997)	20
<i>In re Ayres</i> , 239 Mich App 8 (1999)	5

<i>In re Taylor</i> , 343 P3d 867 (Cal, 2015)	6
<i>Jackson v City of Detroit</i> , 449 Mich 420 (1995)	49
<i>Jideonwo v INS</i> , 224 F3d 692 (CA 7, 2000)	49
<i>Johnson v State</i> , 922 P2d 1384 (Wyo, 1996)	39, 42
<i>Kaiser v State</i> , 641 NW2d 900 (Minn, 2002)	5, 22, 42
<i>Kammerer v State</i> , 322 P3d 827 (Wyo, 2014)	5, 19
<i>Kansas v Hendricks</i> , 521 US 346 (1997)	9
<i>Kennedy v Mendoza-Martinez</i> , 372 US 144 (1963)	9
<i>Lafler v Cooper</i> , 132 S Ct 1376 (2012)	46
<i>Lambert v California</i> , 355 US 225 (1957)	9
<i>Libretti v United States</i> , 516 US 29 (1995)	40, 44
<i>Litmon v Harris</i> , 768 F3d 1237 (CA 9, 2014)	18
<i>Magyar v State</i> , 18 So3d 807 (Miss, 2009)	42
<i>Moore v Avoyelles Corr Ctr</i> , 253 F3d 870 (CA 5, 2001)	12
<i>Nollette v State</i> , 46 P3d 87 (Nev, 2002)	5, 19, 21, 39
<i>Padilla v Kentucky</i> , 559 US 356 (2010)	39, 40, 41, 43

<i>People ex rel Birkett v Konetski</i> , 909 NE2d 783 (Ill, 2009)	12, 13, 26
<i>People In Interest of JO</i> , 2015 WL 5042709 (Colo App, 2015)	27
<i>People v Arata</i> , 60 Cal Rptr 3d 160 (Cal App, 2007).....	49
<i>People v Cain</i> , 498 Mich 108 (2015)	35, 45, 47
<i>People v Carpentier</i> , 446 Mich 19 (1994)	35
<i>People v Cole</i> , 491 Mich 325 (2012)	36, 38, 41
<i>People v Cook</i> , 285 Mich App 420 (2009)	46
<i>People v Earl</i> , 495 Mich 33 (2014)	passim
<i>People v Effinger</i> , 212 Mich App 67 (1995)	48
<i>People v Fitchett</i> , 96 Mich App 251 (1980)	33
<i>People v Fonville</i> , 291 Mich App 363 (2011)	42, 44
<i>People v Giovannini</i> , 271 Mich App 409 (2006)	32
<i>People v Golba</i> , 273 Mich App 603 (2007)	5
<i>People v Grant</i> , 445 Mich 535 (1994)	45
<i>People v Gravino</i> , 928 NE2d 1048 (NY 2010)	passim
<i>People v Harnett</i> , 945 NE2d 439 (NY, 2011)	37, 38

<i>People v Killebrew</i> , 416 Mich 189 (1982)	36
<i>People v McClellan</i> , 862 P2d 739 (Cal, 1993)	42
<i>People v Montrose</i> , 201 Mich App 378 (1993)	48
<i>People v Mosley</i> , 344 P3d 788 (Cal, 2015)	passim
<i>People v Pennington</i> , 240 Mich App 188 (2000)	5
<i>People v Temelkoski</i> , 307 Mich App 241 (2014)	5
<i>People v Teske</i> , 147 Mich App 105 (1985)	32
<i>People v Tucker</i> , 312 Mich App 645 (2015)	5
<i>People v Vaughn</i> , 491 Mich 642 (2012)	45
<i>People v. Peque</i> , 3 NE3d 617 (NY, 2013)	41
<i>Phillips v Mirac, Inc</i> , 470 Mich 415 (2004)	7
<i>Puckett v United States</i> , 556 US 129 (2009)	45, 46
<i>RW v Sanders</i> , 168 SW3d 65 (Mo, 2005)	5, 9
<i>Santobello v NY</i> , 404 US 257 (1971)	36, 47
<i>Shaw v Patton</i> , 823 F3d 556 (CA 10, 2016)	passim
<i>Smith v Doe</i> , 538 US 84 (2003)	passim

<i>Stanbridge v Scott</i> , 791 F3d 715 (CA 7, 2015).....	37
<i>Starkey v Oklahoma Dep't of Corr</i> , 305 P3d 1004 (Okla, 2013).....	6
<i>State v Boche</i> , __ NW2d __, 294 Neb 912 (Neb, 2016)	26
<i>State v Boche</i> , 294 Neb 912 (2016).....	5, 27, 49
<i>State v Bollig</i> , 605 NW2d 199 (Wis, 2000).....	5, 42
<i>State v Burr</i> , 598 NW2d 147 (ND, 1999)	21
<i>State v Flowers</i> , 249 P3d 367 (Idaho, 2011)	42
<i>State v Jones</i> , 729 NW2d 1 (Minn, 2007).....	5, 22
<i>State v LeMere</i> , 879 NW2d 580 (Wis, 2016).....	passim
<i>State v Letalien</i> , 985 A2d 4 (Me, 2009)	6
<i>State v Moore</i> , 86 P3d 635 (NM, 2004).....	5, 39, 42
<i>State v Partlow</i> , 840 So2d 1040 (Fla, 2003).....	5, 39, 42
<i>State v Pentland</i> , 994 A2d 147 (Conn, 2010).....	42
<i>State v Petersen-Beard</i> , 377 P3d 1127 (Kan, 2016).....	11, 16, 27
<i>State v Schneider</i> , 640 NW2d 8 (Neb, 2002).....	42
<i>State v Seering</i> , 701 NW2d 655 (Iowa, 2005).....	5, 16, 19, 21

<i>State v Timperley</i> , 599 NW2d 866 (SD, 1999).....	42
<i>State v Trotter</i> , 330 P3d 1267 (Utah, 2014)	passim
<i>State v Ward</i> , 869 P2d 1062 (Wash, 1994).....	9, 21, 39, 42
<i>State v Williams</i> , 952 NE2d 1108 (Ohio, 2011).....	6
<i>State v Young</i> , 542 P2d 20 (Ariz, 1975).....	42
<i>Taylor v State</i> , 698 SE2d 384 (Ga Ct App, 2010)	42
<i>Under Seal</i> , 709 F3d at 265.....	18, 26, 49
<i>United States v Delgado-Ramos</i> , 635 F3d 1237 (CA 9, 2011).....	40
<i>United States v Felts</i> , 674 F3d 599 (CA 6, 2012).....	6
<i>United States v Hinckley</i> , 550 F3d 926 (CA 10, 2008).....	5
<i>United States v Juvenile Male</i> , 670 F3d 999 (CA 9, 2012).....	13
<i>United States v Leach</i> , 639 F3d 769 (CA 7, 2011).....	5, 19
<i>United States v Nicholson</i> , 676 F3d 376 (CA 4, 2012).....	40
<i>United States v Parks</i> , 698 F3d 1 (CA 1, 2012).....	5, 18, 22
<i>United States v Skidmore</i> , 998 F2d 372 (CA 6, 1993).....	31
<i>United States v Stock</i> , 685 F3d 621 (CA 6, 2012).....	6

<i>United States v Under Seal</i> , 709 F3d 257 (CA 4, 2013).....	5, 12
<i>United States v WBH</i> , 664 F3d 848 (CA 11, 2011).....	passim
<i>United States v Young</i> , 585 F3d 199 (CA 5, 2009).....	5, 14, 18
<i>United States v Youngs</i> , 687 F3d 56 (CA 2, 2012).....	40, 44
<i>Virsnieks v Smith</i> , 521 F3d 707 (CA 7, 2008).....	42
<i>Wallace v State</i> , 905 NE2d 371 (Ind, 2009).....	6
<i>Walters v Nadell</i> , 481 Mich 377 (2008).....	30
<i>Ward v State</i> , 315 SW3d 461 (Tenn, 2010).....	5, 38
<i>Weems v Little Rock Police Dep't</i> , 453 F3d 1010 (CA 8, 2006).....	5, 19
Statutes	
1993 PA 294.....	49
1994 PA 295.....	34
1996 PA 494.....	34, 48
2011 PA 18.....	28
42 USC § 16921(b)(2).....	12
MCL 28.721.....	2, 14
MCL 28.721a.....	9, 22
MCL 28.722(b).....	15
MCL 28.722(r)–(w).....	5

MCL 28.725(1) 5

MCL 28.725(10)–(12) 5

MCL 28.725a(3)(c)..... 5

MCL 28.728c(14)..... 28

MCL 28.728c(3)..... 28

MCL 28.733–35..... 5

MCL 725a(3) 5

MCL 750.520(c)..... 29

MCL 762.11..... 2

MCL 762.11(1) 2, 32

MCL 762.11(3)(c)(ii)..... 29

MCL 762.12(1) 32

MCL 8.5..... 30

Other Authorities

Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J of
Interpersonal Violence 15 (2014)..... 24, 25

Ira & Tara Elmann, “*Frightening and High*”: *The Supreme Court’s Crucial
Mistake About Sex Crime Statistics*, 30 Const’l Commentary 495, 501
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Initiative* (Oct 2014) 24, 28

Rules

MCR 7.312(H)(2)..... 1

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Oxford English Dictionary (2d ed, 1989) 16

INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this role, the court rules permit the Attorney General to file a brief as *amicus curiae*. MCR 7.312(H)(2).

Sex offenses pose a unique and intensely damaging harm to their victims. Moreover, sex offenders have been found to have significantly high rates of sexual recidivism. Studies cited by the U.S. Department of Justice have shown that the 5-year rate of sexual recidivism for all sex offenders is 14%, and the 20-year rate of the same is 27%.

To deal with this problem, the Legislature has implemented a civil regulatory program to monitor sex offenders released into the public, to create a physical buffer zone between them and our most vulnerable citizens, and to give the public a tool to learn about sex-offender presence in their communities and take appropriate precautions. That remedial program is currently under challenge, both in this Court and in the U.S. Court of Appeals for the Sixth Circuit.

As the chief law enforcement officer for the State, the Attorney General has a special responsibility to defend Michigan's Sex Offenders Registration Act (SORA), which was enacted to decrease offenders' opportunities for re-offense and to prevent harm to potential victims. As a non-punitive remedial program intended to protect the public safety, SORA may be applied constitutionally both prospectively and retroactively to those whose offenses occurred before its enactment.

INTRODUCTION AND SUMMARY OF ARGUMENT

When he was 19—an adult, not a juvenile—Boban Temelkoski committed second-degree criminal sexual conduct by touching the breasts of a 12-year-old girl. He later pleaded guilty, admitting the offense and requesting consideration under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 et seq.—a diversion program made available as a matter of legislative grace for certain qualified offenders between the ages of 17 and (at the time) 20.¹ Notably, HYTA now precludes youthful trainee status for Temelkoski’s offense.

At the time of his guilty plea, Temelkoski knew he was not promised freedom from civil consequences under HYTA. The statute itself did not guarantee him trainee status in exchange for his plea, instead leaving it to the court’s discretion. Even if granted, the court had discretion to revoke Temelkoski’s trainee status and enter a conviction against him at any time during his three years of trainee probation. Temelkoski signed a consent form at the time of his plea acknowledging that he understood this, and his attorney certified that he had explained these facts to Temelkoski and that Temelkoski fully understood the consequences of his plea. The court granted Temelkoski youthful trainee status and deferred his judgment of guilt, assigning Temelkoski three years of probation, among other things.

At the time of Temelkoski’s guilty plea in 1994, Michigan’s Sex Offenders Registration Act, MCL 28.721 et seq., did not exist. Approximately four months

¹ The current version extends HYTA’s age limit to age 24, requiring the prosecutor’s consent for offenses committed after age 21. MCL 762.11(1).

after his plea, SORA became law. And approximately fifteen months after that, SORA went into effect, applying retroactively to those who—like Temelkoski—were still incarcerated or on parole or probation as HYTA trainees. At the same time, the Legislature amended HYTA, requiring trainees with a listed offense to comply with SORA. Because Temelkoski’s case was still pending under HYTA, his probation was amended to require SORA registration. And shortly before his charges were dismissed under HYTA, the Legislature again amended SORA, requiring local law enforcement agencies to make information on the registry available to the public. Despite these amendments, at no point did Temelkoski seek to withdraw his plea.

Temelkoski now challenges SORA’s application to him under the Ex Post Facto and Cruel and Unusual Punishment Clauses of the United States and Michigan constitutions. He also, for the first time in 20 years, and only after prompting by this Court, raises a due-process claim that applying SORA to him violates the terms of his guilty plea.

Temelkoski’s claims all fail. Retroactively requiring him to comply with SORA does not violate the Ex Post Facto Clause because SORA is not punishment, as a multitude of courts throughout the country have held. His cruel-and-unusual-punishment claim fails for the same reason. Temelkoski’s due-process claim likewise fails because he was never promised freedom from civil consequences in exchange for his guilty plea, and SORA is not a punitive consequence of which due process required his knowledge. Requiring Temelkoski’s compliance with SORA is constitutional.

ARGUMENT

I. **Applying SORA to Temelkoski does not violate the Ex Post Facto Clause because SORA is not punishment.**

Requiring Temelkoski to comply with SORA does not violate either of the federal or Michigan Ex Post Facto Clauses, which this Court has treated as co-extensive. *People v Earl*, 495 Mich 33, 37 n 1 (2014). That is because complying with SORA does not constitute punishment.

Michigan's SORA requires offenders convicted of listed offenses to register and provide certain basic information. Offenders are classified into tiers according to their underlying offenses. MCL 28.722(r)–(w). The duration of the registration requirement depends on the tier, and in Temelkoski's case persists for his lifetime. MCL 28.725(10)–(12); MCL 725a(3). In addition to regular periodic in-person reporting—in Temelkoski's case, four times per year, MCL 28.725a(3)(c)—offenders are required to report in person within three business days of certain changes, including changes in residence, employment, educational enrollment, vehicle use or ownership, name, and e-mail address or other designations used in internet postings. MCL 28.725(1). Offenders are also required to comply with “student safety zones,” which generally prohibit offenders from residing, working, or loitering within 1,000 feet from school property. MCL 28.733–35.

The vast majority of courts addressing various iterations of federal and state SORA laws—including laws that resemble Michigan's—have held that those laws are *not* punitive. Indeed, not only has the U.S. Supreme Court held that a state sex-offender-registry law was not punitive, *Smith v Doe*, 538 US 84, 92, 96–97

(2003), all 11 regional federal circuit courts² and at least 15 state supreme courts have reached the same conclusion about SORA laws.³ And the Michigan Court of Appeals has upheld Michigan’s SORA law on five separate occasions. *People v Temelkoski*, 307 Mich App 241, 260–270 (2014); *People v Tucker*, 312 Mich App 645, 681 (2015); *People v Golba*, 273 Mich App 603, 620 (2007); *People v Pennington*, 240 Mich App 188, 196 (2000); *In re Ayres*, 239 Mich App 8, 19 (1999).

² *United States v Parks*, 698 F3d 1, 5–6 (CA 1, 2012) (federal SORNA); *Doe v Cuomo*, 755 F3d 105, 112 (CA 2, 2014) (New York law); *Doe v Pataki*, 120 F3d 1263, 1267, 1285 (2 CA, 1997) (New York); *EB v Verniero*, 119 F3d 1077, 1105 (3d Cir. 1997) (New Jersey); *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013) (federal SORNA); *United States v Young*, 585 F3d 199, 201, 204–05 (CA 5, 2009) (federal SORNA); *Doe v Bredesen*, 507 F3d 998 (CA 6, 2007) (Tennessee); *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) (federal SORNA); *Weems v Little Rock Police Dep’t*, 453 F3d 1010 (CA 8, 2006) (Arkansas law); *Doe v Miller*, 405 F3d 700, 719 (CA 8, 2005) (Iowa law); *ACLU of Nevada v Masto*, 670 F3d 1046, 1050, 1056–1057 (CA 9, 2012) (Nevada); *Hatton v Bonner*, 356 F3d 955, 964 (CA 9, 2003) (California); *Shaw v Patton*, 823 F3d 556, 571–572 (CA 10, 2016) (Oklahoma); *United States v Hinckley*, 550 F3d 926, 929, 937 (CA 10, 2008) (federal SORNA), abrogated on other grounds by *Reynolds v United States*, 132 S Ct 975 (2012); *United States v WBH*, 664 F3d 848, 852, 855, 857–858 (CA 11, 2011) (federal SORNA).

³ E.g., *State v Boche*, 294 Neb 912 (2016); *People v Mosley*, 344 P3d 788, 799 (Cal, 2015); *State v Trotter*, 330 P3d 1267, 1276 (Utah, 2014); *Kammerer v State*, 322 P3d 827, 834–836 (Wyo, 2014); *People v Gravino*, 928 NE2d 1048, 1054–1055 (NY 2010); *Ward v State*, 315 SW3d 461 (Tenn, 2010); *Commonwealth v Leidig*, 956 A2d 399, 404–406 (Pa, 2008); *Anderson v State*, 182 SW3d 914, 918 (Tex Crim App 2006); *State v Seering*, 701 NW2d 655, 668 (Iowa, 2005); *RW v Sanders*, 168 SW3d 65, 70 (Mo, 2005); *Foo v State*, 102 P3d 346, 357 (Hawai’i 2004); *State v Moore*, 86 P3d 635, 641–643 (NM, 2004); *State v Partlow*, 840 So2d 1040, 1043 (Fla, 2003); *Kaiser v State*, 641 NW2d 900, 905–907 (Minn, 2002), superseded by statute as stated in *State v Jones*, 729 NW2d 1 (Minn, 2007); *Nollette v State*, 46 P3d 87, 90 (Nev, 2002); *State v Bollig*, 605 NW2d 199, 206 (Wis, 2000).

In contrast, a minority of state supreme courts have held—many based on state constitutions—that state SORAs are punitive and have limited their application.⁴

While Temelkoski correctly notes that the Sixth Circuit recently held Michigan’s SORA requirements punitive, *Does #1-5 v Snyder*, __ F3d __, 2016 WL 4473231, at *7 (CA 6, 2016), that decision is an outlier, even within the Sixth Circuit. Indeed, that decision is in direct tension with prior Sixth Circuit decisions that have, among other things, upheld as non-punitive *lifetime continuous GPS monitoring*, a considerably more onerous requirement than any Michigan imposes. See *Doe v Bredesen*, 507 F3d 998 (CA 6, 2007); *United States v Felts*, 674 F3d 599, 605–606 (CA 6, 2012); *United States v Stock*, 685 F3d 621, 627 n 4 (CA 6, 2012); *Cutshall v Sundquist*, 193 F3d 466, 477 (CA 6, 1999). Because the *Does #1-5* decision was incorrectly decided, is in tension with U.S. Supreme Court precedent, and has led to both an inter-circuit and intra-circuit split, the State plans to petition for Supreme Court review.

As the following analysis will show, Michigan’s SORA requirements are not punitive in either purpose or effect, and applying them retroactively to Temelkoski is constitutional.

⁴ E.g., *In re Taylor*, 343 P3d 867, 869 (Cal, 2015); *Doe v State*, 111 A3d 1077, 1100 (NH, 2015); *Doe v Dep’t of Pub Safety & Corr Servs*, 62 A3d 123, 124 (Md, 2013); *Starkey v Oklahoma Dep’t of Corr*, 305 P3d 1004, 1030 (Okla, 2013); *State v Williams*, 952 NE2d 1108, 1112–1113 (Ohio, 2011); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *State v Letalien*, 985 A2d 4, 26 (Me, 2009); *Commonwealth v Baker*, 295 SW3d 437, 447 (Ky, 2009); *Doe v State*, 189 P3d 999, 1017 (Alaska, 2008).

A. The Ex Post Facto Clause permits retroactive application of non-punitive civil regulatory laws.

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law that increases the punishment for a crime. *Earl*, 495 Mich at 37 & n 1. Determining whether a law constitutes punishment is a two-step inquiry. *Id.* at 38.

The Court “must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy.” *Id.* If the Legislature intended to impose criminal punishment, “retroactive application of the law violates the Ex Post Facto Clause and the analysis is over.” *Id.* If, on the other hand, the Legislature intended to enact a civil remedy, the Court must still ascertain “whether the statutory scheme is so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil.” *Id.*

Because the Court ordinarily defers to the Legislature’s stated intent, “*only the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* at 44 (emphasis added). The party objecting to the statutory scheme bears the burden of showing this “clearest proof.” *Id.* Moreover, the general rules of constitutional construction apply, as well as the fact that “[s]tatutes are presumed constitutional.” *Phillips v Mirac, Inc*, 470 Mich 415, 422 (2004). This Court will exercise the power to declare a law unconstitutional only “with extreme caution” and “never” exercises it “where serious doubt exists with regard to the conflict.” *Id.* “Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and

it is only when invalidity appears so clearly as to leave no room for reasonable doubt . . . that a court will refuse to sustain its validity.” *Id.* (quotations omitted).

B. The Legislature intended SORA to be a civil remedy, not a punishment.

For the reasons stated persuasively in the Wayne County Prosecutor’s brief (at 14–17), an analysis of SORA’s text, structure, and history shows that the Legislature intended SORA to be a non-punitive civil remedy. Indeed, even the few courts that have held SORA laws to be punitive generally have not done so on this ground. Temelkoski likewise acknowledged to the trial court, Court of Appeals, and this Court in his application that “SORA was not intended to punish an offender but rather make the community safer,” in contrast to his current argument. (Def’s Resp to Delayed App, 2/4/2013, p 6; see also Def’s Mot for Removal, 6/26/2013, p 7; Def’s App, 12/15/2014, p 7.) Accordingly, the Attorney General will focus on the second step of the analysis: whether SORA is punitive in purpose or effect.

C. SORA is a civil regulatory program that rationally advances public safety; it is not punitive in purpose or effect.

Michigan’s SORA law is a civil regulatory program that protects public safety from future harm by monitoring and alerting the public to the presence of offenders that, as a group, have been shown to pose a potential danger. MCL 28.721a (stating that “the intent” of the law is in “preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders” because they pose “a potential serious menace and danger” to “the people, and particularly the children,

of this state”). And that is the same purpose that the U.S. Supreme Court recognized in upholding a SORA registration statute as non-punitive, *Smith v Doe*, 538 US 84, 93 (2003), and in upholding as non-punitive civil commitment for sexually violent predators, *Kansas v Hendricks*, 521 US 346, 361 (1997). Michigan’s SORA law is not punitive in either purpose or effect.

In analyzing whether a regulatory scheme has the effect of being punitive, this Court considers whether the scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a non-punitive purpose; or (5) is excessive with respect to this purpose. *Earl*, 495 Mich at 43–44; *Smith*, 538 US at 97 (citing factors in *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963)). These factors are “neither exhaustive nor dispositive,” but are “useful guideposts.” *Smith*, 538 US at 97; *Earl*, 495 Mich at 43–44. Applying these factors to Michigan’s SORA law shows that the law is not punishment.

1. SORA has not historically been regarded as punishment.

As a relatively new regulatory scheme, SORA laws are “‘of fairly recent origin,’ ” which suggests they have not historically been regarded as punishment. *Smith*, 538 US at 98. Registration in general has not traditionally been viewed as punitive. *See, e.g., RW v Sanders*, 168 SW3d 65, 69 (Mo, 2005) (citing *Lambert v California*, 355 US 225, 229 (1957)); *State v Ward*, 869 P2d 1062, 1072 (Wash, 1994) (same). Instead, “[r]egistration is a traditional governmental method of making available relevant and necessary information to law enforcement agencies.” *Ward*,

869 P2d at 1072. Nor, as several courts have held, are requirements like those found in Michigan's SORA analogous to more traditional methods of punishment.

a. SORA does not resemble traditional shaming.

While offenders listed on sex-offender registries may feel shame, SORA laws do not resemble the traditional punishment of shaming. "Like Hester Prynne with her scarlet 'A,'" the colonial chastisement of shaming "required criminals to stand in public or bear brands displaying their crimes for 'face-to-face' public shaming[.]" *United States v WBH*, 664 F3d 848, 855 (CA 11, 2011) (citing *Smith*, 538 US at 98). The U.S. Supreme Court has correctly distinguished sex-offender registration from traditional shaming.

As the Court explained in *Smith*, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith*, 538 US at 98–99. The Court acknowledged that publicity from SORA "may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." *Id.* But it held that, "[i]n contrast to the colonial shaming punishments," Alaska's SORA law did not "make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id.* The same is true here.

Publication on the Internet does not alter the analysis, even though "the humiliation" to the offender "increas[es] in proportion to the extent of the publicity." *Id.* at 99. Indeed, "there is overwhelming federal authority holding that Internet posting of registrant information is not analogous to historical forms of

punishment.’” *State v Petersen-Beard*, 377 P3d 1127, 1133 & 1134 (Kan, 2016) (citing cases). The *Smith* Court focused on the key factor that “the purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender.” 538 US at 99.

SORA is also unlike shaming because it does not affirmatively publicize, like a public service announcement, who is on the registry and does not seek the public’s ridicule; rather, it merely makes offender information available for the public to search, sign up for notifications, or share a registrant’s profile with individual contacts. *Smith*, 538 US at 99; *State v Trotter*, 330 P3d 1267, 1276 (Utah, 2014). Further, Michigan’s registry allows the public to search by area and by non-compliant status, not just by name, which is consistent with its purpose of promoting public safety, as opposed to shaming particular individuals. It does not allow users to post comments for public view on a registrant’s profile. *Contra Doe v Dep’t of Pub Safety & Corr Servs*, 62 A3d 123, 145 (Md, 2013). In fact, recognition of the civil purpose of protecting public safety has led a number of courts to uphold even sex-offender registries that (unlike Michigan’s law) affirmatively publicize the identity of offenders. The federal Sex Offender Registration and Notification Act (SORNA), for example, requires officials to distribute notice of an offender’s status to “each school and public housing agency” in the area where the offender resides, yet “all federal circuits addressing whether SORNA’s publication requirements are punitive have followed *Smith* and held they are not” *Petersen-Beard*, 377 P3d at 1134 (citing 42 USC § 16921(b)(2)); see also *ACLU v Masto*, 670 F3d 1046, 1051,

1055–56 (CA 9, 2012) (requiring active notification to youth and religious organizations); *Moore v Avoyelles Corr Ctr*, 253 F3d 870, 872 (CA 5, 2001) (requiring sex offenders on probation to notify neighbors of residence and sex-offender status).

Temelkoski suggests that because his offense was originally sealed, in light of his youthful trainee status as a 19-year-old offender, it is punishment to make the information publicly available at all. (Def’s Br, p 9.) But if it is not punitive, as a general matter, to have information about a sexual offense publicly available (as a multitude of courts have held), it does not follow that the act of publishing the information for the first time is punitive. If Temelkoski’s theory were right, having a public trial in any criminal case would be punitive, rather than part of our commitment to transparency in the criminal process. See *Smith*, 538 U.S. at 99 (“[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused.”). Accordingly, the fact that Temelkoski’s crime—committed when he was an adult and to which he pleaded guilty—would not be public but for SORA does not render its publication punitive. That is why a number of courts have held that it is not punitive to publish truthful information about juvenile sex offenders. *WBH*, 664 F3d at 855 (not punitive to publish previously non-public youthful offender information); *United States v Under Seal*, 709 F3d 257, 265 (CA 4, 2013) (same); *People ex rel Birkett v Konetski*, 909 NE2d 783, 799 (Ill, 2009) (“registration requirement as applied to juveniles does not amount to a punishment”); see also

Smith, 538 US at 98–99 (dissemination of truthful information not punitive). Cf. *United States v Juvenile Male*, 670 F3d 999, 1011 (CA 9, 2012) (rejecting argument that SORNA violates due process by discarding juveniles’ “right to lifetime confidentiality”); *Does v Munoz*, 507 F3d 961, 965–966 (CA 6, 2007) (holding that juvenile sex offenders’ interest in private records was not a fundamental right); *Doe v Mich Dep’t of State Police*, 490 F3d 491, 501 (CA 6, 2007) (same).

Notably, *Smith* did not hold that publishing previously non-public information is punitive. To the contrary, the Court noted that “most”—though, by implication, not all—of the information made public by Alaska’s SORA law was already public, *Smith*, 538 US at 98–99, and its analysis did not hinge on whether the information was otherwise public, see *id.* Publishing truthful information about Temelkoski to further a legitimate governmental objective is not punishment. *Id.*

Nor is it punitive that the registry refers to Temelkoski as “convicted” for purposes of SORA, as this information is truthful. *Id.* The Legislature defined “convicted” for purposes of SORA as including youthful trainees under HYTA. MCL 28.722(b). Accord *Konetski*, 909 NE2d at 800 (“for purposes of section 2, ‘convicted’ has the same meaning as ‘adjudicated’ ”). This does not render Temelkoski a “convict” for other statutory purposes, and the SORA website does not hold him out as such. Before a visitor may even search the registry, the website directs the visitor to the Sex Offenders Registration Act, MCL 28.721, et seq., (App 237a), which defines “convicted,” in relevant part, as *either* “(i) having a judgment of conviction or a probation order entered” or “(ii) [b]eing assigned to youthful trainee

status[.]” MCL 28.722(b). The information the registry provides about Temelkoski is accurate, and it does not constitute punishment. *Smith*, 538 US at 98–99.

The registry’s publication of “tier” levels based on the offense, with no individualized determination of dangerousness, similarly is not punitive. Tier levels are tied to the seriousness of the offense committed, again confirming that SORA is keyed to public safety. The Supreme Court has squarely held that “[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences,” noting that it has on multiple occasions upheld laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. *Smith*, 538 US at 103–104. Indeed, the Court upheld Alaska’s classification based on offense severity, explaining that the classifications were “reasonably related to the danger of recidivism” and that the lack of individualized determinations did not render SORA punitive. *Id.* at 102. Several courts to address this issue have reached the same conclusion. E.g., *Shaw v Patton*, 823 F3d 556, 571 (CA 10, 2016) (Oklahoma law); *Masto*, 670 F3d at 1056–1057 (Nevada law); *WBH*, 664 F3d at 852, 855, 857–858 (federal SORNA); *United States v Young*, 585 F3d 199, 201, 204–205 (CA 5, 2009) (federal SORNA); *Doe v Miller*, 405 F3d 700, 704, 719–722 (CA 8, 2005) (Iowa law); *Doe v Pataki*, 120 F3d 1263, 1267, 1285 (CA 2, 1997) (New York law). The Supreme Court has also squarely held that due process does not require individualized determinations of dangerousness before an offender

is included in a sex-offender registry. *Connecticut Dep't of Public Safety v Doe*, 538 US 1, 6 (2003). Temelkoski's argument on this point fails.

b. SORA does not resemble banishment or exile.

SORA similarly does not resemble the traditional punishment of banishment or exile, which represents “the complete expulsion of an offender from a socio-political community” and prohibits one “from even being present in the jurisdiction.” *Shaw*, 823 F3d at 566. “Exile” is defined as “[e]xpulsion from a country, esp[ecially] from the country of one’s origin or longtime residence.” *Black’s Law Dictionary* (8th ed, 2004). “Banishment” is defined as “[t]he action of authoritatively expelling from the country; a state of exile; expatriation,” or “[t]he action of peremptorily sending away; a state of enforced absence; dismissal.” *1 Oxford English Dictionary* (2d ed, 1989); see also *Black’s Law Dictionary* (8th ed, 2004) (defining banishment as exile).

In particular, Michigan’s student safety zones—which prohibit offenders from residing, working, or loitering within 1,000 feet of school property—do not resemble exile or banishment. The zones are “confined to specified geographic areas relevant to the regulatory purpose they serve,” *People v Mosley*, 344 P3d 788, 802 (Cal, 2015), which is to create a buffer between large groups of children and a group of offenders with high rates of recidivism. An offender subject to the zones is not “excluded from the state or any part thereof.” *Id.* While an offender “may have a sense of being banished to another area of the city,” “true banishment goes beyond the mere restriction of one’s freedom to go or remain where others have the right to be: it often works a destruction on one’s social, cultural, and political existence.” *State v*

Seering, 701 NW2d 655, 667–668 (Iowa, 2005). That is why numerous courts have upheld as non-punitive student safety zones similar to Michigan’s—or even twice as large. E.g., *Shaw*, 823 F3d at 571 (Oklahoma residency restriction of 2,000 feet from school, playground, park, or child care center); *Miller*, 405 F3d at 719 (Iowa 2,000-ft residency restriction); *Mosley*, 344 P3d at 790, 802 (in California, cannot reside within 2,000 feet of school or “where children regularly gather”); *Seering*, 701 NW2d at 667–668 (Iowa 2000-ft residency restriction from school or daycare center).

c. SORA does not resemble probation or parole.

SORA also is not akin to probation or parole. Indeed, the Supreme Court rejected this analogy in *Smith*. 538 US at 101. “Probationers are subject to searches of their persons and property simply on reasonable suspicion” of a violation and are subject to random drug tests. *Petersen-Beard*, 377 P3d at 1137. They may also be required to: “avoid injurious or vicious habits and persons or places of disreputable or harmful character”; permit state agents to visit their homes; remain in the state unless given permission to leave; “work faithfully at suitable employment”; accept the first offer of “honorable employment”; obtain written consent before changing jobs; perform community service; and go on house arrest. *Id.*; *Shaw*, 823 F3d at 565.

The same is not true of SORA offenders, who must report information for a database but are not under supervision. No specific officer has been assigned to supervise Temelkoski, nor is he subject to the stringent requirements listed above. Accord *Shaw*, 823 F3d at 565.

Notably, while Temelkoski claims that he “is subject to residence and compliance sweeps conducted by police,” (Def Br, p 32 & n 14), giving the impression that police conduct searches of offenders’ homes, he provides no statutory cite for that proposition, and the press release he cites does not so indicate. Instead, the release indicates that police attempted to contact offenders at their registered residences, using knock-and-talk procedures that may be applied to all citizens, to ensure that the offender actually lives where he says he does. As a result of the sweeps, police sought 98 warrants, confirming that offenders are not subject to searches or seizures without probable cause.

2. SORA does not impose an affirmative disability or restraint.

Nor does SORA impose a substantial disability or restraint akin to punishment. The relevant inquiry when determining whether a law imposes an affirmative disability or restraint is “how the effects of the act are felt by those subject to it.” *Earl*, 495 Mich at 44 (quoting *Smith*, 538 US at 99–100). “If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” *Id.* That is the case here.

SORA imposes only minor restraints that further its regulatory purpose, and it leaves offenders with substantial freedom. As the outset, SORA compliance does not resemble the “infamous punishment” of imprisonment—“the paradigmatic affirmative disability or restraint.” *Earl*, 495 Mich at 44–45 (citing *Smith*, 538 US

at 100). SORA's requirements, whether they are residency restrictions or in-person reporting, "impose no physical restraint[.]" *Smith*, 538 US at 100.

While Temelkoski challenges SORA's in-person reporting requirements, these are regulatory requirements that further a non-punitive purpose, including reporting requirements that are frequent. While reporting in person is "doubtless more inconvenient than doing so by telephone, mail or web entry," it "serves the remedial purpose of establishing that the individual is in the vicinity," "confirms identity by fingerprints," and "records the individual's current appearance." *United States v Parks*, 698 F3d 1, 6 (CA 1, 2012). Further, the inconvenience is minor "compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." *Id.*

And while the *Smith* Court noted that Alaska's statute did not require in-person reporting, the Court's decision did not depend on that fact, as evidenced by the multitude of courts that have upheld in-person reporting in *Smith*'s wake. *Litmon v Harris*, 768 F3d 1237, 1243 (CA 9, 2014) ("[T]here is no reason to believe that the addition of such a requirement would have changed the outcome."); see also *Parks*, 698 F3d at 6 (federal SORNA) (in-person reporting every 3 months); *Doe v Cuomo*, 755 F3d 105, 112 (CA 2, 2014) (New York statute) (triennial reporting); *Pataki*, 120 F3d at 1267, 1285 (New York statute) (every 90 days for "sexually violent predators"); *Under Seal*, 709 F3d at 265 (federal SORNA) (upholding, against 8th Amendment challenge, in-person reporting as non-punitive); *Young*, 585

F3d at 201, 204–05 (federal SORNA) (within 3 days of change in residence or employment); *United States v Leach*, 639 F3d 769, 773 (CA 7, 2011) (federal SORNA) (within 3 days of changing residence); *Masto*, 670 F3d at 1050, 1056–1057 (Nevada statute) (every 90 days); *Hatton v Bonner*, 356 F3d 955, 964 (CA 9, 2003) (California statute) (in-person reporting not punitive); *Shaw*, 823 F3d at 571 (Oklahoma statute) (*weekly* in-person reporting); *WBH*, 664 F3d at 852, 855, 857–858 (federal SORNA) (every 90 days and within 3 days of changing name, residence, employment, or student status); *Kammerer*, 322 P3d at 834–836 (Wyoming statute) (every 3 months; any change in residence, vehicle, or employment status within 3 days); *Foo v State*, 102 P3d 346, 357 (Hawai'i 2004) (initial in-person registration); *Nollette v State*, 46 P3d 87, 90 (Nev, 2002) (in-person reporting in any community in which offender is present for more than 48 hours).

SORA's student safety zones are also civil and regulatory in nature, rather than a punitive restraint. They are intended to protect the public safety by placing a physical buffer zone between offenders and the State's children, to decrease temptation and opportunities to reoffend. These restrictions, while they do impose some disability, are limited. *Mosley*, 344 P3d at 802; see also *Seering*, 701 NW2d at 668. For this reason, several courts have rejected arguments that similar student safety zones impose a punitive disability or restraint. *Shaw*, 823 F3d at 571; *Weems v Little Rock Police Dep't*, 453 F3d 1010, 1077 (CA 8, 2006) (Arkansas residency law); *Miller*, 405 F3d at 719; *Mosley*, 344 P3d at 790, 799; *Seering*, 701 NW2d at 668. Further, while Temelkoski objects to SORA's definition of "loitering" in

defining what behavior is prohibited in school zones, (Def Br, p 33–34), he notably has not brought a vagueness challenge. The student safety zones are not punitive.

Notably, in upholding Alaska’s SORA law, the Supreme Court found compelling that SORA’s obligations are “less harsh than the sanctions of occupational debarment,” which the Court has previously held non-punitive. *Smith*, 538 US at 99 (citing *Hudson v United States*, 522 US 93, 118 (1997) (indefinitely barring participation in the banking industry); *De Veau v Braisted*, 363 US 144 (1960) (forbidding work as union official); and *Hawker v New York*, 170 U.S. 189 (1898) (revocation of medical license)). That contrast remains compelling.

Finally, Temelkoski is mistaken that HYTA’s language confirms that SORA is an affirmative disability or restraint. (Def Br, p 27.) The language he quotes simply confirms that it is a *civil* disability or loss of a *privilege*—not a punishment.

3. SORA only incidentally promotes the traditional aims of punishment.

The next factor asks whether the law promotes the traditional goals of punishment—namely, deterrence and retribution. *Smith*, 538 US at 102. Because SORA’s deterrence and retributive effects are minimal and incidental to the goal of protecting the public from potentially dangerous offenders, see *Earl*, 495 Mich at 45–47, this factor does not lean toward a determination that SORA is punishment.

Courts have given this factor less emphasis in the intent-effects analysis, given *Smith*’s admonition that “[a]ny number of governmental programs might deter crime without imposing punishment.” *Id.* Think, for example, of metal

detectors used to guard court entrances. As this Court and others have held, the presence of *some* punitive or deterrent effects does not render a regulatory regime punishment. *Earl*, 495 Mich at 45; accord *Shaw*, 823 F3d at 571 (listing cases); *Seering*, 701 NW2d at 668; *Nollette*, 46 P3d at 90; *State v Burr*, 598 NW2d 147, 154 (ND, 1999); *Ward*, 869 P2d at 1073. After all, “to hold that any governmental regulation that has indirect punitive effects constitutes a punishment would undermine the government’s ability to engage in effective regulation.” *Earl*, 495 Mich at 45 (citing *Smith*, 538 US at 102).

4. SORA rationally advances a non-punitive purpose.

A statute’s rational connection to a non-punitive purpose is the “most significant factor” in the determining whether the statute’s effects are punitive. *Smith*, 538 US at 102. And here, as in *Smith*, Michigan’s SORA program rationally furthers the “legitimate and non-punitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community.” *Id.*

The Legislature enacted SORA pursuant to its police power “to better assist law enforcement [] and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders.” MCL 28.721a. The Legislature determined that “a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.” *Id.* SORA’s registration requirements “are intended to provide law enforcement and the people of this state with an appropriate,

comprehensive, and effective means to monitor those persons who pose such a potential danger.” *Id.*

Smith recognized that these non-punitive purposes are important. *Smith*, 528 US at 102–103; see also *Earl*, 495 Mich at 42 (power to protect health and safety of citizens is a civil remedy, and not punitive). The Court cited “grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class,” describing it as “frightening and high,” citing statistics from the United States Department of Justice. *Smith*, 538 US at 103.

Further, SORA’s requirements rationally advance those purposes. Registration assists authorities in keeping track of offenders, alerts the public to their presence, and helps parents make informed decisions regarding child care and victimization prevention. *Smith*, 538 US at 103; *Trotter*, 330 P3d at 1276; *Kaiser v State*, 641 NW2d 900, 906 (Minn, 2002), superseded by statute as stated in *State v Jones*, 729 NW2d 1 (Minn, 2007). In-person reporting establishes that the offender is where he says he is, confirms identity by fingerprints, and records current appearance. *Parks*, 698 F3d at 6. Student safety zones create a buffer between children and a group of offenders with high rates of recidivism and are designed to reduce offenders’ temptations and opportunities to re-offend. *Shaw*, 823 F3d at 574.

While Temelkoski debates the effectiveness of these measures and the rate of recidivism among various sub-groups of sexual offenders, citing studies, the trial court made no factual findings on the risk of sex-offender recidivism. (See App 27a–

28a.) Accord *Masto*, 670 F3d at 1057 (similarly noting lack of trial court findings in rejecting attempt to distinguish *Smith* on basis of recidivism studies).

Moreover, even the studies on which Temelkoski relies confirm that it is rational to consider past sex offenders as potential future re-offenders. For example, one of those studies reports that “the observed sexual recidivism rate for all cases was 11.9% (n = 7,740), 2.9% for the low risk cases (n = 890), 8.5% for the moderate cases (n = 4,858), and 24.2% for the high risk cases (n = 1,992).” Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J of Interpersonal Violence 15 (2014). A rational legislature might think that an 11.9% chance of a new offense in a span of just five years is a public safety risk worth addressing. The U.S. Department of Justice’s Office of Justice Programs has also cited, in an October 2014 report, a large study of sex-offender recidivism showing that, while sex offenders had a lower *overall* rearrest rate (that is, rearrest rate for sexual *or* other crimes) than non-sex offenders within three years of release, their *sex crime* rearrest rate was *four times higher* than the rate of non-sex offenders. *Sex Offender Management and Assessment Initiative* (Oct 2014), p 93 (citing Langan, Schmitt, and Durose (2003)), available at http://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf. And the same report cited a large 2004 study by Harris and Hanson finding an even higher recidivism rate than the 11.9% just discussed: it found that the 5-year sexual recidivism rate for all sex offenders was 14%, and that the 10-year and 15-year sexual recidivism rates for sex offenders were 20% and 24%, respectively. *Id.* p 94. “Using the same data set, Hanson, Morton, and Harris

(2003) reported that the 20-year sexual recidivism rate for the sample was 27 percent.” *Id.* Again, a rational legislator could think that a more than one-in-four chance that the offender will commit another sex crime—odds higher than Russian roulette—is a public-safety issue.

Multiple studies also define recidivism in terms of new sexual offenses detected by authorities, which excludes consideration of undetected sexual offenses that nevertheless poses a public danger. See, e.g., Hanson, *High Risk*, at 6 (defining “offence-free” as “no new sexual offences were detected during th[e] time period”); Ira & Tara Elmann, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 Const’l Commentary 495, 501 (2015) (App 138a) (citing study defining recidivism to include only sex offenses that return an offender to prison). Indeed, the Hanson study cites this as a limitation of the study. Hanson, *High Risk*, p 12 (it is “well known” that “officially recorded charges or convictions” have “low sensitivity” in that “many offences are undetected”). As the Office of Justice Programs explained in its October 2014 report (at 89), “recidivism remains a difficult concept to measure, especially in the context of sex offenders. The surreptitious nature of sex crimes, the fact that few sexual offenses are reported to authorities, and variation in the ways researchers calculate recidivism rates all contribute to the problem.”

It is also possible that SORA registration is having its desired effect and decreasing offenders’ opportunities to re-offend. The Hanson study, indeed, cites this as another of the study’s limitations. Hanson, *High Risk*, p 11 (“it is possible

that certain forms of conditional release are sufficiently confining as to meaningfully limit opportunities” for re-offense).

The lack of agreement over how to interpret evolving data illustrates an important point: Setting public-safety policy is a task entrusted to the Legislature, not to the courts, and the Legislature has the institutional competence to study relevant statistics, to draw conclusions from those statistics, and to enact policy accordingly. And this is not a case where the Legislature has turned a blind eye to conclusive, agreed-upon data, rendering a policy irrational. Cf. *Smith*, 538 US at 87 (courts have a role in striking laws based on “sham or mere pretext”).

The law is also clear that a regulatory regime is not punitive “simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” *Smith*, 538 US at 102–103; accord *Mosley*, 344 P3d at 803–804 (fact that residency restrictions apply to offenders who are not child abusers not determinative). “The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences,” *Smith*, 538 US at 103, and *Temelkoski* has not shown that SORA’s non-punitive purpose is a “sham or mere pretext.” *Id.* As cited above, numerous decisions have upheld varying degrees of SORA requirements, both before and after *Smith*, including recently, despite the studies that *Temelkoski* marshals on his side. The Legislature’s decision to monitor this population and decrease their proximity to schoolchildren in light of current data was, at the least, rational.

5. SORA is not excessive in relation to its regulatory purpose.

Nor is SORA excessive in relation to its regulatory purpose. While SORA requirements may burden offenders, those requirements help achieve the Legislature's important purpose of protecting the public. See *Earl*, 495 Mich at 47–48 (fact that law may burden defendant not determinative). The burdens of SORA are not excessive in light of this benefit.

Temelkoski's participation in the HYTA program does not change the analysis. This Court directed the parties to address whether the answer to the question whether SORA is punishment "is different when applied to the class of individuals who have successfully completed probation under [HYTA.]" (12/18/2015 Order.) As an initial matter, Temelkoski was *not* part of the class of individuals who had successfully completed HYTA probation when SORA went into effect. And as discussed more fully in Section II, at the time Temelkoski pleaded guilty, HYTA expressly allowed the judge to revoke youthful trainee status at any time before Temelkoski completed the HYTA program.

Second, it is important to remember that Temelkoski was not a juvenile at the time of his offense; he was 19. (Def Br, p 2.) His cases discussing SORA's effect on juveniles are accordingly inapposite. Third, several courts have correctly concluded that applying SORA to juveniles is not punishment. See, e.g., *State v Boche*, __ NW2d __, 294 Neb 912, 943 (Neb, 2016); *Birkett*, 909 NE2d at 799; *Under Seal*, 709 F3d at 265; *WBH*, 664 F3d at 855; *People In Interest of JO*, 2015 WL

5042709, at *5–*6 (Colo App, 2015) (“Most jurisdictions to have addressed this issue continue to hold that sex offender registration for a juvenile is not punitive.”).

Lifetime registration also is not excessive. As illustrated by the data cited in the Office of Justice Program’s October 2014 report, “the [sexual] recidivism rates of sex offenders increase as followup periods become longer,” increasing in one study “from 14 percent after 5 years . . . to 24 percent after 15 years[.]” *Sex Offender Management and Assessment Initiative* (Oct 2014), p 95; see also *Smith*, 538 US at 104 (“most reoffenses do not occur within the first several years after release,” but may occur “as late as 20 years following release”). In accordance with these statistics, multiple courts have held that lifetime registration is not excessive. *Smith*, 538 US at 90, 102 (length reasonably related to danger of recidivism); *Boche*, 294 Neb at 934; *Petersen-Beard*, 377 P.3d at 1129; *Commonwealth v Leidig*, 956 A2d 399, 406 (Pa, 2008); *RW*, 168 SW3d at 70.

Importantly, *Temelkoski*’s is not simply a case of youngsters experimenting, contra Def Br, p 41—a scenario our Legislature has accounted for. To create an exception for consensual encounters between teenagers who are only a few years apart (so-called Romeo-and-Juliet situations), the Legislature specifically amended SORA in 2011. 2011 PA 18; MCL 28.728c(3) & (14). *Temelkoski*’s conduct notably would not fit into that exception. At age 19 (i.e., college age), *Temelkoski* kissed and groped a 12-year-old girl (i.e., a girl old enough to be in the sixth or seventh grade)—possibly with, possibly without, her consent. (See Pl’s Br, p 3 & n 5.) The Legislature rationally determined that *Temelkoski*’s was not conduct it wished to

exempt. Indeed, contrary to Temelkoski's representation that "HYTA trainees who are adjudicated of his offense today are not required to register at all," (Def's Br, p 48), those who commit Temelkoski's offense (criminal sexual conduct in the second degree, MCL 750.520(c) are *no longer even eligible for HYTA status*. MCL 762.11(3)(c)(ii) (court "shall not assign" HYTA status if offense involved second-degree criminal sexual conduct). A 19-year-old today in Temelkoski's shoes would be ineligible for HYTA, would be charged as an adult, and, if convicted, would not qualify for any SORA exceptions based on consensual teenage conduct.

Finally, Michigan's SORA registry appropriately protects the interests of offenders by warning users, on the registry itself that any harassment of offenders or attempts at vigilantism can result in civil or criminal penalties. (App 237a.) See *EB v Verniero*, 119 F3d 1077, 1104 (CA 3, 1997) (New Jersey's warning appropriately managed risk to offenders).

The excessiveness inquiry "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Smith*, 538 US at 105. Indeed, "*Hendricks*, and the long line of cases on which it relies, counsels that *bona fide* remedial legislation may inflict very substantial individual hardship without implicating the Ex Post Facto [Clause.]" *EB*, 119 F3d at 1103–1104. Consistent with the holdings of several courts, as cited above, Michigan's SORA requirements do not constitute punishment and may be applied retroactively consistently with the Ex Post Facto Clause.

D. Any SORA component deemed punitive must be severed while leaving the rest of the statutory scheme intact.

Because Michigan's SORA requirements are not punitive, this Court should follow the numerous decisions from other jurisdictions upholding similar requirements against ex post facto challenge.

But, importantly, should this Court find any component of SORA punitive, Temelkoski remains obligated to register under SORA. Michigan Compiled Laws 8.5 requires this Court to sever any portion of SORA that it may find punitive and to leave the remainder of SORA intact. In short, this severance rule refutes Temelkoski's efforts to characterize Michigan's law as a "super-registration" law that must be considered in the aggregate, as MCL 8.5 requires this Court to examine each of SORA's "portions" individually. This is especially so, given that—as the decade preceding SORA's most recent amendments shows—the basic registration requirements can still be given effect. See also *Eastwood Park Amusement Co v Stark*, 325 Mich 60, 73 (1949) (stating general severability rule even in absence of severability clause).

An overwhelming majority of jurisdictions have correctly upheld retroactive application of basic SORA registration as non-punitive, see *supra* notes 2 and 3, including our Court of Appeals. There is no reason to depart from that consensus.

II. Applying SORA to Temelkoski does not violate due process.

Requiring Temelkoski to comply with SORA also does not violate due process. Indeed, it appears that the thought never occurred to him until this Court suggested the claim in its December 18, 2015 order, because he never raised that

claim at any point in this litigation before that order. Having never asserted a due-process claim, he cannot prevail on one now. *Walters v Nadell*, 481 Mich 377, 387 (2008) (per curiam) (“Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court.”). And courts should be especially reluctant to reach out for issues the parties have not raised when those issues are of a constitutional dimension. Cf, e.g., *Ashwander v Tennessee Valley Auth*, 297 US 288, 346 (1936) (Brandeis, J, concurring) (“The Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it.’ ”); *Broadrick v Oklahoma*, 413 US 601, 610–11 (1973). (“[U]nder our constitutional system courts are not roving commissions assigned to pass judgment” that extend beyond “the necessity of adjudicating rights in particular cases”). It is not necessary to resolve the due-process question here, because no party has raised it, so this Court should avoid the question.

But the claim also fails on its merits. Temelkoski was never promised freedom from civil consequences in exchange for his guilty plea, and SORA is a non-punitive collateral consequence of which due process did not require his knowledge. Regardless, Temelkoski has not shown that knowledge of SORA would have changed his plea. The claim fails.

A. Temelkoski was not promised freedom from civil consequences at the time of his guilty plea.

Temelkoski identifies three things he believes he was promised in exchange for his guilty plea: (1) that he would not be convicted; (2) that he would not suffer a

civil disability or loss of right or privilege; and (3) that all proceedings regarding the disposition of his criminal charge and his assignment as a youthful trainee would be closed to public inspection. (Def's Br, p 14.)

In fact, Temelkoski was promised *none* of these things at the time of his plea—under HYTA, or otherwise. The text of HYTA itself made plain that no defendant is promised these things, and Temelkoski signed a consent form acknowledging as much. Thus, any belief Temelkoski may have had that his plea entitled him to these results was not reasonable and cannot form the basis of a due process violation. *United States v Skidmore*, 998 F2d 372, 375 (CA 6, 1993) (looking to what the parties “reasonably” understood to be the terms of the agreement).

1. The HYTA statute did not expressly or impliedly promise Temelkoski freedom from civil consequences at the time of his plea.

No youthful defendant is promised freedom from civil consequences at the time of his plea, under the text of HYTA. *Contra Doe v Mich Dep't of State Police*, 490 F3d 491, 501 (CA 6, 2007) (mistakenly positing “consideration” for relinquishment of rights). Instead, following a defendant’s plea and application for HYTA status, a court has *discretion* to assign a qualified defendant to the status of youthful trainee, *or to deny such status and enter a conviction*. MCL 762.11(1) (“if an individual pleads guilty . . . , the court . . . *may* . . . assign that individual to the status of youthful trainee”) (emphasis added). Further, “at any time” during the youth’s completion of the HYTA program, the court “may at its discretion revoke [trainee] status” and enter a conviction. MCL 762.12(1). Thus, at the time of a

youthful defendant's plea, he is not promised HYTA's ultimate benefits, and even if he is granted HYTA status, he may still lose that status and its accompanying benefits before he completes the program.

These features of HYTA were all present at the time of Temelkoski's plea. At that time, the HYTA statute provided that "[i]f an individual pleads guilty . . . , the court . . . *may*, without entering a judgment of conviction and with the consent of that individual, *consider* and assign that individual to the status of youthful trainee." (App 48a, 1993 PA 293, emphasis added.) Temelkoski's cited cases, interpreting the same language, confirm that the trial court has "wide discretion" in deciding whether to grant youthful trainee status: "The act establishes an administrative procedure exercisable *at the discretion of the trial judge* . . . [to] *permit[]* the use of rehabilitation procedures prior to conviction." *People v Giovannini*, 271 Mich App 409, 412, 416 (2006) (emphasis added). "The case law clearly reflects the trial courts' exercise of that discretion, and further reflects that the appellate courts have upheld decisions denying [HYTA] placement in appropriate cases in which YTA status was unwarranted[.]" *Id.* at 416–417.

Thus, at the time Temelkoski pleaded guilty, the court could have denied him trainee status and entered a conviction against him, with all its attendant consequences. In *People v Teske*, 147 Mich App 105 (1985), for example, the Court of Appeals held that the trial court had not abused its discretion in denying HYTA status, and in imposing a sentence of 2 to 10 years of imprisonment, to an armed robbery defendant who had no prior convictions or criminal justice history. *Id.* at

106. And in *People v Fitchett*, 96 Mich App 251 (1980), there was no abuse of discretion in denying HYTA status and sentencing the youthful defendant to 15 years of imprisonment. *Id.* at 254. The HYTA statute promised Temelkoski nothing, and he took his chances when he pleaded guilty to criminal sexual conduct.

What is more, Temelkoski pleaded guilty knowing that the trial court could revoke his trainee status and enter a conviction against him at any time during his three years of probation. At the time of his plea, the HYTA statute provided that the court “may, *at any time*, terminate its consideration of the individual as a youthful trainee” and “may *at its discretion* revoke that status *any time* before the individual’s final release.” (App 48a, emphasis added.) Upon such termination or revocation, “the court may enter an adjudication of guilt and proceed as provided by law.” (*Id.*)

It is only *after* the trainee completes his HYTA program that he is discharged and his charges are dismissed, *after* which he “shall not suffer a civil disability or loss of right or privilege following his or her release[.]” (App 49a.) Of course, by that time in Temelkoski’s case (April 16, 1997, App 8a), SORA had gone into effect—both the initial version, 1994 PA 295, and the version making the registry available to the public, 1996 PA 494—and both the HYTA statute and Temelkoski’s probation had been amended to require his SORA registration. (App 51a, 1994 PA 286; App 7a.)

Beyond constructive knowledge from the statute itself, Temelkoski also had actual knowledge that HYTA promised him nothing. To obtain consideration for

HYTA status, Temelkoski had to waive his right to a trial. (App 48a, 1993 PA 293.) In doing so, he signed a written waiver of rights and consent and “*applied*” to the court “that it may consent to a *pre-acceptance* investigation by the Probation Department for the purpose of obtaining information useful to this Honorable Court *in determining my suitability for assignment to the status of Youthful Trainee.*” (App 9a, emphasis added.) This form put Temelkoski on express notice that he had not yet been accepted for HYTA status and that such acceptance was not guaranteed. Moreover, he expressly affirmed that he had “been informed that under the provisions of the Holmes Youthful Trainee Act, [he] may: . . . (3) [h]ave [his] status revoked by the Court at its discretion[,]” and “(4) [h]ave criminal proceedings reinstated against me.” (*Id.*) In addition to Temelkoski’s signature, his attorney certified that he had “explained the provisions of the Act” to Temelkoski and that Temelkoski “states that he fully understands.” (*Id.*)

Thus, when Temelkoski entered his plea, he did so knowing that it could result in a full criminal conviction—and all of that conviction’s lifelong consequences—*at any time during his three years of probation.* In short, Temelkoski was not promised—either at the time of his plea *or at any point until he was discharged* from the program—that he would not be convicted, let alone that he would be free from civil consequences. He received no promises from HYTA.

2. Temelkoski has not shown or even alleged that his plea was conditioned on any promise beyond HYTA’s text; indeed, the record refutes such a claim.

There is also no evidence that Temelkoski was promised anything above and beyond what HYTA’s text provided, and indeed the record refutes such a claim. Temelkoski bore the burden to prove the facts necessary for his claim, *People v Carpentier*, 446 Mich 19, 31 (1994), and he has not carried that burden. See *id.* at 33–35 (requesting juvenile records after their expungement does not satisfy burden; “state has a legitimate interest in promoting the finality of judgments”). And while the hearing notes for Temelkoski’s plea have been destroyed, (Pl’s Br, p 41; App 3b), Temelkoski has not even suggested—in his brief or in his affidavit to this Court (App 234a–235a)—that he received any special plea terms from the prosecutor.

The record, in fact, refutes any suggestion that Temelkoski was promised anything beyond his current misinterpretation of the HYTA statute. It appears that, during the *twenty years* between his subjection to SORA and this Court’s order granting leave to appeal, Temelkoski has not so much as hinted that he received any special plea terms, let alone asserted a due-process claim. Notably, he *still* alleges no breach of a plea promise in his affidavit to this Court. (App 234a–235a.)

This twenty-year silence has two implications. First, his due-process argument based on his plea—and indeed *any* due-process argument—is forfeited. *People v Cain*, 498 Mich 108, 114 (2015).

Second, his twenty-year silence on this point indicates that he and his attorneys did not believe—before this Court’s order, which suggested the claim—that any terms of his plea had been violated. Accordingly, based on HYTA’s text

and the complete absence of evidence of any extra-textual promises, Temelkoski's plea was not "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 (1982). His cases regarding breaches of plea agreements are accordingly inapposite. (Def Br, p 13, 15.) The *Santobello* maxim that "when a plea rests . . . on a promise or agreement of the prosecutor . . . such promise must be fulfilled," *Santobello v NY*, 404 US 257, 262 (1971), has no application when the prosecutor, court, and statute promised nothing. Temelkoski is not entitled to relief.

B. Requiring Temelkoski to register and comply with SORA does not violate due process.

Even if Temelkoski had not forfeited any plea-based due-process argument, and even if this Court found some variance between SORA and the range of outcomes that he may have envisioned at the time of his plea, requiring him to register for and comply with SORA still does not violate due process. That is because SORA registration was a collateral, not a direct, consequence of his plea about which due process required no warning, and, in any event, he has not shown he would have pleaded differently had he known about SORA.

1. A guilty plea is knowing and voluntary if the defendant is aware of *direct* consequences of his plea; due process does not require knowledge of *collateral* consequences.

To be constitutionally valid, due process requires that a guilty plea be voluntary and knowing. *People v Cole*, 491 Mich 325, 332–333 (2012). Courts throughout the country, including this Court, have held that a plea is knowing and

voluntary when the defendant is aware of the *direct* consequences of the plea. *Id.* (citing *Brady v United States*, 397 US 742, 755 (1970)). A defendant need not be aware of a plea's *collateral* consequences for the plea to be knowing and voluntary. *Id.* at 333–334.

The prevailing distinction between direct and collateral consequences “turns on whether the result represents a definite, immediate and largely automatic effect on *the range of the defendant’s punishment.*” *Id.* at 334 (emphasis added). In general, a consequence is “direct” if it is “imposed by the sentencing court as part of the authorized punishment, and included in the court’s judgment.” *Stanbridge v Scott*, 791 F3d 715, 719 (CA 7, 2015). “Direct” consequences “are essentially the core components of a defendant’s sentence: a term of probation or imprisonment, a term of post-release supervision, a fine.” *People v Harnett*, 945 NE2d 439, 442 (NY, 2011).

In contrast, consequences other than those imposed directly by the court as part of the punishment are generally considered “collateral.” See, e.g., *Stanbridge*, 791 F3d at 719 (consequence is collateral if not included in court’s judgment, regardless of whether it is imposed automatically upon conviction); *People v Gravino*, 928 NE2d 1048, 1054 (NY, 2010) (non-penal consequences that result from fact of conviction generally considered to be collateral). “[E]ffects of a conviction commonly viewed as collateral include civil commitment, civil forfeiture, *sex offender registration*, disqualification from public benefits, and disfranchisement.” *Chaidez v United States*, 133 S Ct 1103, 1108 n 5 (2013) (emphasis added); see also

Foo, 102 P3d at 357 (listing “loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver’s license, loss of the right to possess firearms or an undesirable discharge from the Armed Services”).

This Court, like many others, has defined the direct versus collateral distinction in terms of whether the consequence is punitive, citing the prevailing consensus that the distinction turns on whether the consequence is an effect on the “range of the defendant’s punishment.” *Cole*, 491 Mich at 334 (applying *Smith*’s ex post facto framework to determine whether statute “imposes punishment or is nonpunitive”); cf. *Earl*, 495 Mich at 39 n 2 (treating analysis to determine whether law imposes punishment for purposes of due process the same as that for ex post facto analysis). Important to this Court’s analysis in *Cole* was that the mandatory lifetime electronic monitoring at issue in that case is “*part of the sentence itself*.” 491 Mich at 335 (emphasis in original).

Several other courts have taken the same approach and analyzed whether the consequence is punitive. See, e.g., *State v LeMere*, 879 NW2d 580, 591–595 (Wis, 2016); *Trotter*, 330 P3d at 1276 (registration unrelated to range of defendant’s punishments and beyond control of trial court); *Commonwealth v Pridham*, 394 SW3d 867, 881–882 (Ky, 2012); *Harnett*, 945 NE2d at 441–442; *Gravino*, 928 NE2d at 1054–1055 (SORA requirements “not part of the punishment imposed by the judge” and are “nonpenal consequences that result from the fact of conviction”); *Ward v State*, 315 SW3d 461 (Tenn, 2010) (“nonpunitive and . . . therefore a collateral consequence”); *Leidig*, 956 A2d at 404–406; *Anderson v State*, 182 SW3d

914, 918 (Tex Crim App 2006); *Foo*, 102 P3d at 358; *State v Moore*, 86 P3d 635, 641–643 (NM, 2004); *State v Partlow*, 840 So2d 1040, 1043 (Fla, 2003); *Nollette*, 46 P3d at 89–91; *Johnson v State*, 922 P2d 1384, 1387 (Wyo, 1996); *Ward*, 869 P2d at 1068.

Notably, the U.S. Supreme Court’s decision in *Padilla v Kentucky*, 559 US 356 (2010), “did not eschew” the distinction between direct and collateral consequences. *Chaidez*, 133 S Ct at 1112 (“We did not think, as Chaidez argues, that *Strickland* barred resort to that distinction. Far from it[.]”). In *Padilla*, the Court held that counsel engaged in deficient performance by failing to advise the defendant that his guilty plea made him subject to automatic deportation, *Padilla*, 559 US at 369, despite the prevailing view at the time that deportation was a collateral, not a direct, consequence of a conviction. Relying on the “unique nature of deportation,” *id.* at 357, 365, the Court explained that deportation is “*uniquely* difficult to classify as either a direct or a collateral consequence” and that “the collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning *the specific risk of deportation.*” *Id.* at 366 (emphasis added).

Among the factors the *Padilla* Court considered were that “the penalty of deportation” amounted to “banishment or exile,” *id.* at 366, 373, and that deportation imposed harsh effects only on a uniquely vulnerable class, *id.* at 370–371. As the Wisconsin Supreme Court explained in *LeMere*, “not all people convicted of certain crimes face deportation . . . ; only noncitizens face deportation’s penal effects.” *LeMere*, 879 NW2d at 593. Indeed, the *Padilla* Court “used the word ‘noncitizen’ 17 times and appeared to view noncitizens—‘a class of clients least able

to represent themselves’—as a particularly vulnerable class.” *Id.* (citing *Padilla*, 559 US at 370–371). The *Padilla* Court likewise described deportation as a “penalty” at least five times. *Id.* at 592–593 (giving examples).

As the Court has since clarified, *Padilla* is limited to the “unique” “penalty of deportation.” See *Chaidez*, 133 S Ct at 1110–1112; see also *LeMere*, 879 NW2d at 592 (noting that *Padilla* used “unique” multiple times). Indeed, the Court subsequently listed “sex offender registration” as an “effect[] of a conviction commonly viewed as collateral,” *Chaidez*, 133 S Ct at 1108 n 5, thereby reaffirming the viability of the direct versus collateral distinction generally.

What is more, *Padilla* concerned the Sixth Amendment right to effective assistance of counsel, not what due process requires a court to inform a defendant about the consequences of his plea. The Supreme Court has made clear that an attorney’s obligations under the Sixth Amendment to advise a client of consequences of a guilty plea are broader than a judge’s obligations under the Fifth and Fourteenth Amendments to ensure that a plea is voluntary. *United States v Youngs*, 687 F3d 56, 62 (CA 2, 2012) (citing *Libretti v United States*, 516 US 29, 50–51 (1995)). Thus, even if the *Padilla* Court had demonstrated a categorical unwillingness to apply the direct versus collateral distinction in the Sixth Amendment context—which it did not—that would not demonstrate an intent to jettison the distinction in the due-process context. *Youngs*, 687 F3d at 62; see also *United States v Delgado-Ramos*, 635 F3d 1237, 1240–1241 (CA 9, 2011); *United States v Nicholson*, 676 F3d 376, 381 n 3 (CA 4, 2012). (And for this reason,

Temelkoski's cited Sixth Amendment cases are inapposite. Def's Br, p 18.) Notably, the Supreme Court has also held that *Padilla* does not apply retroactively to cases in which the conviction became final before *Padilla*. *Chaidez*, 133 S Ct at 1105.

This Court's decision in *Cole*, defining the direct versus collateral distinction in terms of whether the consequence affects "the range of the defendant's punishment," post-dates *Padilla*, as do decisions from other courts concluding that non-punitive consequences of a plea are collateral. See, e.g., *LeMere*, 879 NW2d at 591–595; *Trotter*, 330 P3d at 1273–1276 (automatic nature of registration requirement not determinative; registration collateral because not related to punishment and "beyond the control of the trial court"); cf. *People v. Peque*, 3 NE3d 617, 638 n 11 (NY, 2013) (explaining why *Gravino* analysis survives *Padilla*). Thus, whether a consequence of a plea affects the defendant's "punishment" remains the correct analysis, and it is the analysis that this Court should apply here.

2. SORA registration is a collateral consequence of Temelkoski's plea that lacks due-process implications.

Because, as discussed in Section I, SORA is not punishment, nor is it part of the sentence imposed by a court, it is a collateral consequence of Temelkoski's plea that does not render his plea unknowing or involuntary. *Cole*, 491 Mich at 334; see also *Stanbridge*, 791 F3d at 719.

A majority of courts have held, both before and after *Padilla*, that SORA registration and compliance is a collateral consequence of a guilty plea about which a defendant need not be informed. These courts are correct. See, e.g., *Virsnieks v*

Smith, 521 F3d 707, 715–716 (CA 7, 2008); *Trotter*, 330 P3d at 1276; *State v Flowers*, 249 P3d 367, 372 (Idaho, 2011); *Gravino*, 928 NE2d at 1049; *Ward*, 315 SW3d at 472; *Magyar v State*, 18 So3d 807, 811–12 (Miss, 2009); *Leidig*, 956 A2d at 404–406; *Anderson*, 182 SW3d at 918; *Foo*, 102 P3d at 358; *Moore*, 86 P3d at 641–643; *Partlow*, 840 So2d at 1043; *Kaiser*, 641 NW2d at 905–907; *State v Schneider*, 640 NW2d 8 (Neb, 2002); *Nollette*, 46 P3d at 89–91; *Davenport v State*, 620 NW2d 164, 166 (ND, 2000); *State v Bollig*, 605 NW2d 199, 206 (Wis, 2000); *State v Timperley*, 599 NW2d 866, 869 (SD, 1999); *Johnson*, 922 P2d at 1387; *Ward*, 869 P2d at 1068, 1076; *State v Young*, 542 P.2d 20, 22 (Ariz, 1975); see also *Chaidez*, 133 S Ct at 1108 n 5 (sex-offender registration is “commonly viewed as collateral”).

In contrast to the majority view, some courts, including the Michigan Court of Appeals, *People v Fonville*, 291 Mich App 363 (2011), have held that a defendant must be informed about SORA consequences before entering a guilty plea include a case from. See *State v Pentland*, 994 A2d 147 (Conn, 2010) (trial court failed to comply with statute requiring advisement of registry, but proper remedy is to seek withdrawal of plea, not removal from registry); *People v McClellan*, 862 P2d 739, 745 (Cal, 1993) (holding SORA a direct consequence, but court’s failure to inform defendant was harmless); *Taylor v State*, 698 SE2d 384, 388 (Ga Ct App, 2010) (attorney’s failure to advise client of SORA constituted deficient performance under Sixth Amendment; remanding for decision on prejudice). In *Fonville*, while the Court of Appeals correctly held that SORA registration is not “punishment” under the Eighth Amendment, 291 Mich App at 381, it nevertheless held that counsel’s

failure to inform Fonville of SORA before he pleaded guilty was constitutionally deficient performance and that Fonville was prejudiced. *Id.* at 395. In so holding, the court analogized SORA to the unique penalty of deportation that *Padilla* addressed. *Id.* at 389–393.

Fonville is both incorrectly decided and distinguishable. First, it is inconsistent with *Padilla*'s holding that deportation is “unique.” *Padilla*, 559 US at 357, 365–366; *Chaidez*, 133 S Ct at 1110; see also *LeMere*, 879 NW2d at 593.

Second, the court erred in concluding that SORA resembles the uniquely severe penalty of deportation. Notably, “the automatic nature of the registration requirement cannot alone render the consequence identical to deportation”; otherwise, “other civil deprivations such as losing one’s right to vote or carry a weapon would suffice to remove the consequence from the direct versus collateral dichotomy[.]” *Trotter*, 330 P3d at 1273. Instead, the severity of the consequence must be considered. *Id.*

Unlike SORA, the Supreme Court held that deportation is “the equivalent of banishment or exile.” *Padilla*, 559 US at 373. Non-citizens confronted with deportation “face possible exile from this country and separation from their families.” *Id.* at 370. They are “deprive[d] . . . of the right to stay and live and work in this great land.” *Trotter*, 330 P3d at 1273. Deportation “creates a permanent physical separation from the United States and, to a lesser extent, from people who live here.” *LeMere*, 879 NW2d at 594. If the deported person wishes to maintain relationships with friends and family who live in the United States, “deportation’s

permanent physical separation could create a more onerous burden than time served in an American prison.” *Id.* “The person’s friends and family likely would need to spend hundreds, if not thousands, of dollars on international travel expenses for a single physical reunion.” *Id.* While SORA is a serious consequence—as are multiple other automatic consequences deemed to be collateral, including disenfranchisement and the loss of public benefits, public employment, a driver’s license, or the right to possess firearms—it is “not akin to the restrictions and consequences faced,” *uniquely*, “by deportees.” *Trotter*, 330 P3d at 1274.

Moreover, *Fonville* pre-dated this Court’s decision in *Cole*, which continued—post-*Padilla*—to define the direct versus collateral distinction in terms of whether the consequence affects “the range of the defendant’s *punishment*.” *Cole*, 491 Mich at 334 (emphasis added).

Finally, even if *Fonville* was correctly decided, its analysis still does not govern Temelkoski’s claim. Temelkoski argues that applying SORA to him violates due process because such application breached the supposed terms of his plea agreement and rendered his plea unknowing and involuntary. Temelkoski has not asserted a claim of ineffective assistance of counsel. In contrast, *Fonville* concerned the Sixth Amendment right to effective assistance of counsel, which—as discussed above—is broader than a court’s responsibility under the Fifth and Fourteenth Amendments to ensure that a plea is voluntary. *Youngs*, 687 F3d at 62 (citing *Libretti*, 516 US at 50–51). *Fonville*—or indeed any ineffective-assistance case—does not govern Temelkoski’s due-process argument.

3. In any event, Temelkoski has failed to show plain error that affected his substantial rights.

Even if Temelkoski could show a constitutional error (which he cannot), he cannot meet his burden of showing prejudice.

Because Temelkoski forfeited his due-process claim, he must show plain error that affected his substantial rights. “[I]ssues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances.” *Cain*, 498 Mich at 114 (2015) (citing *People v Grant*, 445 Mich 535, 546 (1994)). “[T]his Court disfavors consideration of unpreserved claims of error, even unpreserved claims of constitutional error.” *Id.* (citing *People v Vaughn*, 491 Mich 642, 653–654 (2012)).

Thus, this Court may grant relief for Temelkoski’s unpreserved claim of constitutional error only if he satisfies the plain-error standard by showing: (1) that an error occurred; (2) that the error was plain, *i.e.*, clear or obvious; (3) that the error affected his substantial rights, *i.e.*, that it affected the outcome of the lower court proceedings; and (4) that the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,” in which case this Court has *discretion* to remedy the error. *Cain*, 498 Mich at 116. “Meeting all four prongs is difficult, as it should be.” *Id.* at 116 (citing *Puckett v United States*, 556 US 129, 135 (2009)).

As explained in Section II.B.2, applying SORA to Temelkoski is not an error, let alone an error that is “clear or obvious, rather than subject to reasonable dispute.” *Puckett*, 556 US at 138. Indeed the majority of courts to address the issue

have held that it is not an error at all. Temelkoski accordingly has failed Steps 1 and 2 of the plain-error analysis.

But Temelkoski also fails Step 3 because he cannot show that knowledge of SORA would have changed his plea. *Lafler v Cooper*, 132 S Ct 1376, 1384 (2012) (“In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice.”).

Temelkoski has not addressed the standard of review that applies to his forfeited claim, other than to note that this Court has requested briefing on due process. (Def Br, p 8.) He accordingly has not argued that any purported breach of his plea agreement constitutes a structural error. But the U.S. Supreme Court rejected that argument in *Puckett v United States*, 556 US 129 (2009), in which the Court addressed the standard of review that applies to a forfeited claim that the government had breached its plea agreement. But see *People v Cook*, 285 Mich App 420, 424, 427 (2009) (holding that constitutionally invalid jury waiver is structural error, where attorney waived trial on defendant’s behalf and record contained no evidence that defendant was informed of right to trial). The petitioner in *Puckett* argued that the breach required relief regardless of prejudice because the breach was a structural error, because it rendered the plea agreement void, and because it rendered the plea involuntary and unknowing.

The Court rejected these arguments. *Id.* at 136–141. While the Court acknowledged that the prosecutor’s breach was “undoubtedly a violation of the defendant’s rights” and that the Court had a policy interest in establishing trust

between defendants and prosecutors, citing *Santobello*, it cautioned that “the rule of contemporaneous objection is equally essential and desirable[.]” *Id.* at 136, 141.

“[W]hen the two collide we see no need to relieve the defendant of his usual burden of showing prejudice.” *Id.* at 141. The Court similarly rejected the argument that a plea breach will always constitute a miscarriage of justice—the fourth prong under plain-error review—emphasizing that courts must apply that prong on a “case-specific and fact-intensive basis.” *Id.* at 142–143. This Court has further held that even structural errors do not automatically satisfy the fourth prong. *Cain*, 498 Mich at 115–116.

The record here refutes any claim that knowledge of SORA would have changed Temelkoski’s plea. As explained above, Temelkoski pleaded guilty to criminal sexual conduct knowing that he was not guaranteed HYTA status, and that even if such status were granted, it could be revoked at any time. Accordingly, at the time of his plea, Temelkoski knew a potential result was a full criminal conviction and all of that conviction’s lifelong consequences. And yet he still chose to plead guilty.

Temelkoski also knew before his case was dismissed under HYTA that he would have to comply with SORA, given that his probation was amended to require SORA registration, and yet he appears to have made no attempt to withdraw his plea. This includes the first version of SORA that required publication of sex-offender information, which went into effect before Temelkoski’s case was dismissed. (1996 PA 494, § 10(2).) While the Attorney General does not agree that

Temelkoski's plea was unknowing or involuntary, nothing prevented him from making that argument if he truly believed at the time that his plea terms had been breached. At the time, a plea could be withdrawn after sentencing in the court's discretion for an error in the plea proceeding. *See, e.g., People v Montrose*, 201 Mich App 378, 380 (1993); *People v Effinger*, 212 Mich App 67, 69 (1995). Temelkoski's failure to lodge any complaint when his HYTA probation was amended to require SORA registration suggests that he did not view SORA as a deal-breaker.

And, as noted above, Temelkoski failed for *twenty years* to raise any due-process claim based on his plea, until asked to do so by this Court—again suggesting that he did not view SORA as a deal-breaker. To reiterate, he still has submitted no affidavit or declaration to this Court stating that he would not have pleaded guilty had he known about SORA. (See App 234a–235a.)

That Temelkoski has never tried to withdraw his plea makes sense, because he still gained significant advantages from his participation in the HYTA program. Contrary to his suggestion that SORA obliterates HYTA's benefits, he still does not have a “conviction” for any purpose other than SORA—*e.g.*, for purposes of employment, sentencing guidelines scoring, impeachment in court. And significantly, “all proceedings regarding the disposition of [Temelkoski's] criminal charge and [his] assignment as youthful trainee” remain “closed to public inspection[.]” (App 50a, 1993 PA 294.) *See RW*, 168 SW3d at 71 (noting that SORA does not require “the records of a [youthful offender's] court proceeding to be opened and, therefore, do[es] not conflict with” the youthful offender statute; “[t]he

registration requirements in no way permit public access to the official arrest, court and conviction records made confidential”).

In sum, there is no evidence that knowledge of SORA would have changed Temelkoski’s plea, and indeed the record refutes such a claim. *Contra Jideonwo v INS*, 224 F3d 692, 695, 699 (CA 7, 2000) (requiring a showing of specific facts demonstrating actual reliance, and citing significant evidence that plea was influenced); *People v Arata*, 60 Cal Rptr 3d 160, 162 (Cal App, 2007) (defendant submitted own declaration explaining plea promises and reliance, and corroborating declaration of defense attorney and statutory text). Temelkoski has not carried his burden of showing plain error.

III. Applying SORA to Temelkoski is not cruel and unusual punishment.

Because applying SORA to Temelkoski is not punishment, it also is not cruel or unusual punishment under either of the Michigan or federal constitutions. (Def’s Br, p 47.) *Jackson v City of Detroit*, 449 Mich 420, 430 (1995) (Eighth Amendment outlaws cruel and unusual “punishments”); *Boche*, 294 Neb. at 923 (because registration requirements are not punishment, cruel and unusual punishment argument “must necessarily fail”); *Under Seal*, 709 F3d at 265 (applying *Mendoza-Martinez* factors to hold SORNA not cruel and unusual punishment as applied to juvenile). Temelkoski’s claim fails.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Attorney General, as *amicus curiae*, respectfully requests that this Court affirm the decision of the Court of Appeals and reject Temelkoski's due-process claim raised for the first time before this Court.

Respectfully submitted,

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