

**STATE OF MICHIGAN  
IN THE SUPREME COURT**  
Appeal from the Court of Appeals  
(Borello, P.J., and Whitbeck and K. F. Kelly, JJ.)

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

BOBAN TEMELKOSKI,

Defendant-Appellant.

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

**BRIEF OF AMICUS CURIAE OF THE  
CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

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**IDENTITY AND INTEREST OF AMICUS**

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in the State of Michigan. CDAM was organized for the purposes of promoting expertise in criminal and constitutional law, providing training for criminal defense attorneys to improve the quality of representation, educating the bench, the bar and the public for the need for quality and integrity in defense services, promoting enlightened thought concerning alternatives to and improvements in the criminal justice system, and guarding against the erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions. *CDAM Constitution and By-laws*, Art 1, sec. 2. Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an amicus curiae in litigation of relevance to the organization's interests. CDAM has a strong, direct institutional interest in this case because of the implications of the trial court's ruling on the constitutional rights of criminal defendants in Michigan. CDAM was invited to file an amicus brief in this matter.

## INTRODUCTION

In 1994, the State of Michigan enacted the Michigan Sex Offender Registration Act (SORA) directed at the post-conviction tracking and identification of sex offenders. 1994 PA 295. The requirements applied not only to those who were prospectively convicted of a specified offense - including being assigned to youthful trainee (HYTA) status - but also retroactively to anyone incarcerated, on probation or parole or under the jurisdiction of the juvenile court, on the effective date of the statute.

Initially, SORA created a law enforcement database of individuals convicted of sex offenses. SORA did not require regular verification nor reporting. There was no public access. In the ensuing years, the requirements associated with the database have exponentially expanded. And, each change has been applied to any person already on the registry.

In 1997, SORA was made public. 1996 PA 494. Later, SORA was made accessible by use of the internet. 1999 PA 85. Registrants were required to report in person in order to update their registration. Fingerprints and photographs were required. In 2002, SORA expanded to require registrants to provide employment information, volunteer activities and attendance at institutions of higher learning.

Several amendments occurred in 2004. Some of those changes were made in response to a recognition that non-dangerous juveniles were being made to register under SORA. As such, 2004 PA 240 provided that HYTA trainees adjudicated after October 1, 2004, were not subject to SORA registration. Those juveniles that were adjudicated under HYTA, prior to October 1, 2004, were forced to continue their registration status. Additional changes required an annual registration fee.

2004 PA 237. And, offenders were required to provide a photograph for use on the registry. 2004 PA 238.

In 2005, the registry began to impose greater restrictions on personal liberties. Sex offenders were prohibited from working or “loitering” within 1000 feet of designated areas and school zones. 2005 PA 121; 2005 PA 127. Penalties for violation of SORA were increased. 2005 PA 132. In 2006, subscribing members of the public were provided notification when an individual registered or moved to an identified zip code area. 2006 PA 46.

Most recently, in 2011, SORA was amended to create a 3-tier classification system. 2011 PA 17. This amendment extended the required number of years for reporting. Many registrants were now required to register for life. The amendments further commanded registrants to report personal information including internet addresses, screen names, professional licenses, contract employers, telephone numbers and vehicle information. Any changes in any required information must be reported to law enforcement within three days. This includes the sale of a vehicle, an added email address or the regular use of any automobile.

Thus, at present, a SORA registrant must minimally report in person every three months and provide proof of residence at a local law enforcement agency. He must provide his legal name, his nickname, his ethnic name or any other name by which he is known. He must provide his date of birth, social security number and address. He must advise law enforcement if he is to be away from home for over seven days and where he will be during that time period. He must provide his employer’s name and address and if the employment is not at a fixed location, he must provide the routes and general areas where employment occurs. He must disclose his license plate number and registration information and a description of any vehicle owned or regularly used.

Michigan's SORA requirements add ongoing and unpredictable penalties beyond the consequences of a criminal conviction especially in cases where a registrants criminal conviction was dismissed pursuant to the Homes Youthful Offender Act. § MCL 762.11. Registrants are subject to legally mandated limitations on housing, travel and employment. They may be prohibited from involvement with their children's school and recreational activities. Every aspect of their lives are scrutinized.

Consistent with the Sixth Circuit's recent holding in *Does v. Snyder*, No. 15-1536, 2016 WL 4473231 (6th Cir. Aug. 25, 2016), this Court should find that Michigan's retrospective application of SORA restrictions violates the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution. SORA is no longer a simple registration tool. The expansion of the registry over the last two decades has created harsh restrictions on personal liberties. The excessive nature of those restrictions has rendered what was once a regulatory scheme as unconstitutionally punitive.

## ARGUMENT

**I. THIS COURT SHOULD ADOPT THE CONCLUSIONS AND RATIONALE OF THE SIXTH CIRCUIT COURT OF APPEALS OPINION IN *DOES v SNYDER*, NO. 15-1536, 2016 WL 4473231 (6TH CIR. AUG. 25, 2016), AND FIND THAT THE MICHIGAN SEX OFFENDER REGISTRY IMPOSES PUNISHMENT AND VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS. U.S. CONST. ART. I § 10; CONST. 1963, ART. I, § 10.**

On August 25, 2016, the Sixth Circuit Court of Appeals issued an opinion in *Does v. Snyder*, No. 15-1536, 2016 WL 4473231 (6th Cir. Aug. 25, 2016). In ruling on a challenge to the constitutionality of Michigan's sex offender registry, the Court concluded that the retroactive application of SORA's 2006 and 2011 amendments imposes punishment in violation of constitutional ex post facto prohibitions. *Id.* This Court ought to adopt the Sixth Circuit analysis and join in its conclusion.

While decisions of the United States Court of Appeals for the Sixth Circuit are not binding precedent on this Court, the decision is entitled to respectful consideration and may carry significant advisory value.<sup>1</sup> In fact, in a recent case before the Michigan Court of Appeals, the Court of Appeals found the vagueness analysis of the United States District Court's ruling in *Does*, was persuasive and adopted that holding in finding the challenged SORA provision unconstitutionally vague. *See People v Solloway*, \_\_\_ Mich App \_\_\_ (COA No. 324559, 2016 WL 3555211; June 30, 2016).<sup>2</sup> As such, the

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<sup>1</sup>*Abela v. Gen. Motors Corp.*, 469 Mich 603, 606 (2004); *People v. Bosca*, 310 Mich App 1, 76 appeal held in abeyance, 872 NW2d 492 (Mich 2015).

<sup>2</sup>The Sixth Circuit opinion technically vacated the lower court ruling finding the ex post facto conclusion had resolved the dispute. The Court stated that the District Court ruling may be correct, but they could no longer address the issue given their ex post facto resolution.

Sixth Circuit opinion in *Does*, which is based on a careful review of the history and development of Michigan's Sex Offender Registration Law, should similarly be given significant respect.

**A. DOES v SNYDER**

In *Does v Snyder, supra*, the Sixth Circuit Court of Appeals concluded that the challenged Michigan SORA amendments violated the constitutional prohibitions on ex post facto legislation. The Court's analysis was based upon the principles outlined by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 US 144, 83 SCt 554, 9 LEd2d 644 (1963).<sup>3</sup> In applying *Mendoza-Martinez*, the Court concluded that although the original SORA legislation did not evidence a punitive intent, the ultimate effect of SORA is indeed punitive and thus, may not be applied retroactively.

The five questions raised in *Mendoza-Martinez*, and applied in *Does*, direct courts to make the following inquiries:

- (1) Does the law inflict what has been regarded in our history and traditions as punishment?
- (2) Does it impose an affirmative disability or restraint?
- (3) Does it promote the traditional aims of punishment?
- (4) Does it have a rational connection to a non-punitive purpose?
- (5) Is it excessive with respect to this purpose?

In evaluating these questions in *Does*, the Sixth Circuit concluded that the answers resulted in a finding that the effect of SORA is, in fact, punitive.

**1. Traditional Form of Punishment**

The Sixth Circuit found that SORA restrictions meet the general accepted definition of traditional punishment. The Court recognized that despite the law's remedial statement of purpose, the law functions as an additional punishment for sex offenders:

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<sup>3</sup>This Court has adopted this test for ex post facto review. *People v Earl*, 495 Mich 33 (2014).

[T]hough SORA has no direct ancestors in our history and traditions, its restrictions do meet the general, and widely accepted, definition of punishment offered by legal philosopher H.L.A. Hart: (1) it involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed. See H.L.A. Hart, *Punishment and Responsibility* 4–5 (1968).

*Does v. Snyder, supra* at 4 (commenting on the restrictions imposed on Grand Rapids former sex offenders and noting the punishment resembled the common law punishment of banishment).

In a rare graphic inserted in a judicial opinion, the Sixth Circuit reproduced a map of Grand Rapids illustrating school zones where former offenders could not live, work, or “loiter.” *Id.* at 4. As the graphic illustrates, these restrictions severely limit opportunities for prior offenders, often many years after the offense was committed. The restrictions are imposed without regard to treatment received, whether the victim of the offense was a minor child, or whether the offender had worked in the geographical areas without incident (subject to a narrow grandfathering clause) for many years.

The Court further noted that the similarity between SORA and traditional shaming punishments favored a conclusion that SORA is punishment. This conclusion was heightened where one of the petitioners was on the registry as the result of a charge for which he had been given HYTA and thus, had no criminal conviction. Lastly, the Court agreed that SORA requirements bore distinct similarities to probation and parole. This factor was, thus, indicative of punishment.

## 2. Affirmative Disability or Restraint

The Court similarly concluded that the second factor operated in petitioner’s favor. SORA imposes far-reaching and onerous disabilities and restraints on registrants. These obligations are

imposed absent any showing of a nexus between the regulatory purpose of the statute and the job at issue. “Most significant is the regulation of where a registrant may live, work and ‘loiter.’” *Id.* at 5. The restrictions are, in many cases, life-long and consist of “direct restraints on personal conduct.” *Id.*

### 3. Traditional Aims of Punishment

SORA advances all of the traditional aims of punishment, i.e., incapacitation, retribution and deterrence. Its goal is to incapacitate and keep sex offenders away from further opportunity to offend. It seeks retribution in that it reflects only upon the offense and nothing else. “[I]t marks registrants as ones who cannot be fully admitted into the community.” *Id.* This also resolves in a finding that SORA is punishment.

### 4. Rational Relation to a Non-Punitive Purpose

The Sixth Circuit rejected the assertion that SORA was a successful means of controlling recidivism rates or protecting the community from further acts of criminal sexual activity. Rather, the Court cited existing research which illustrates a contrary conclusion:

One study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals. See Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003). Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism. [R. 90 at 3846–49]. In fact, one statistical analysis in the record concluded that laws such as SORA actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities. See Prescott & Rockoff, *supra* at 161. Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism rates. And while it is intuitive to think that at least some sex offenders—*e.g.*, the stereotypical playground-watching pedophile—should be kept away from schools, the statute makes no provision for individualized assessments of proclivities or dangerousness, even though the danger

to children posed by some—*e.g.*, Doe # 1, who never committed a sexual offense—is doubtless far less than that posed by a serial child molester.

*Does, supra* at 6. This factor also resolved in finding that SORA is punishment.

#### 5. Excessiveness

Last, the Sixth Circuit found the efficacy of the statute unclear while concluding that its negative effects were plain and sweeping. “SORA puts significant restrictions on where registrants can live, work, and ‘loiter,’ but the parties point to no evidence in the record that the difficulties the statute imposes on registrants are counterbalanced by any positive effects.” *Id.* The Court criticized the Michigan Legislature for having failed to review available data regarding recidivism rates prior to concluding that sex offenders as a whole are not subject to treatment and cure. *Id.*

#### 6. Conclusion

The Sixth Circuit concluded that the effect of Michigan’s SORA scheme is punitive:

A regulatory regime that severely restricts where people can live, work, and “loiter,” that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska’s first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.

*Id* at 7.

As such, the 2006 and 2011 amendments to SORA violate constitutional ex post facto prohibitions and the retroactive applications of the amendments was held to be unconstitutional as applied to the petitioners:

As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice. Such lawmaking has “been, in all ages, [a] favorite and most formidable instrument[ ] of tyranny.” *The Federalist No. 84, supra* at 444 (Alexander Hamilton).

*Does, supra* at 7.

**B. DOES v SNYDER AS APPLIED TO HYTA**

In evaluating SORA, the *Does* Court momentarily focused on one of the petitioners who had been sentenced pursuant to HYTA. In discussing the way in which SORA registration is similar to traditional forms of punishment, the Court referenced the fact that the individual petitioner had no criminal conviction yet his prior act was made public as a result of his mandated registration. The punitive effect of SORA registration was more egregious as applied to this individual. “But for SORA’s retroactive application to him, his criminal record would not be available to the public. \* \* \* [T]he ignominy under SORA flows not only from the past offense, but also from the statute itself.” *Id.*

Even if this Court disagrees with the Sixth Circuit’s conclusion as to the greater population of registrants, the Court cannot help but find that SORA is punitive as it applies to HYTA defendants - those individuals who pleaded guilty with the specific understanding that completion of their probationary period would result in a “clean slate,” only to find decades later that HYTA made no difference at all.

In order to illustrate the extreme level of punishment imposed upon HYTA registrants, Amicus has collected letters from non-party registrants who were similarly granted HYTA status and successfully completed its terms but are nonetheless required to maintain SORA registration (Exhibits A-I). None of these writers has a criminal conviction based upon the behaviors alleged. The letters express the utter humiliation, despair and overwhelming negative impact that SORA registration imposes. A review operates in favor of finding that SORA is punitive as applied to HYTA recipients.

**1. The Letters**

**(a) MM**

MM is 39 years old.<sup>4</sup> He was convicted of Criminal Sexual Conduct in the Second Degree when he was 18 years old for an offense committed when he was 15 years old. He was granted HYTA and successfully completed it. He was not ordered to register at the time that he was sentenced. Nonetheless, due to the subsequent creation of SORA, he has been on the registry over 20 years.

MM is divorced and he has custody of his three daughters. “Nothing prepared me for the obstacles I would face as a registered sex offender parent.” (Exhibit C at 2). MM is not permitted inside of his daughters’ schools. He is prohibited from coaching their sports teams, volunteering in their classrooms, attending school field trips, or participating in any other school activities. His children are isolated because other parents keep their children away due to his sex offender label. He is prohibited from even driving through the school pick-up line to retrieve his children after school and they are forced to walk in front of their friends to meet their father in an off-site pre-arranged spot.

He has been yelled at, stared at and called names. He has been ignored and avoided. He has been shamed and carries tremendous guilt over the impact on his family. Every time a neighbor finds

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<sup>4</sup>MM’s letter is attached as Exhibit C.

out about his registry status, the harassment and isolation begin anew. He and his family now live in an isolated area to avoid the inevitable problems of his SORA status.

MM is also limited in his employability. He is a licensed landscaper but cannot work in or near schools. He has been denied promotions and sales opportunities because of constraints on his travel. He has been denied admission to delivery facilities. He has given up promotion opportunities because the application process may result in the embarrassment and humiliation of a failed background check.

“Since becoming a registered sex offender, others define me by my registration status, and *only* by my registration status. Few people see me as a dedicated father, a loving husband, a fiercely loyal friend, a caring son, a committed employee, or a contributing member of society but instead know me and treat me) as a sex offender.”

(b) MP

MP is 38 years old and has been on the registry for since he was 20 years of age.<sup>5</sup> He was sentenced pursuant to HYTA and expected a clean record upon completion of his sentence. He did not know that he would have to register as a sex offender for his entire life. He has two children and his status is hurtful to them as well. He cannot attend field trips nor any school event for his children. He has been denied employment and housing. He long ago accepted responsibility for his actions but has “paid for them every single day since this has happened [18 years ago].”

(c) MT

In 2001, MT was charged with Criminal Sexual Conduct at the age of 20.<sup>6</sup> He was sentenced pursuant to HYTA and completed his supervision. Nonetheless, he has lived every day for the last 15 years with the social stigma, fear and isolation of being labeled a sex offender. He suffers

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<sup>5</sup>See Exhibit D.

<sup>6</sup>See Exhibit E.

inescapable moral, physical and emotional burdens. It has impacted his ability to gain successful employment and obtain suitable housing.

MT was originally advised that he would need to register for 25 years. But as a result of subsequent SORA amendments, he is now classified as a Tier 3 offender and is required to register for life. “This has been extremely devastating emotionally, because it has closed any light at the end of the tunnel.” The impact is living a punishment every day. He has been targeted and harassed. People assume he is a violent child predator because he is on the registry.

While attending the University of Michigan in 2006, he was called to the Dean’s office when a student reported MT’s registry status. He was accused of lying on his application because he did not disclose a prior criminal conviction. He was forced to appear at an administrative hearing and publicly reveal his non-public HYTA status in order to prove his lack of prior criminal history.

MT suffers constant anxiety and stress. He suffers from depression. He has endured three eviction hearings as a result of his SORA status. Each hearing was initiated on the grounds that he did not disclose a criminal conviction on his housing application. People have protested outside of his apartment. He felt compelled to leave his parent’s home when neighbors complained of his presence.

Despite obtaining a Master’s Degree, MT has been consistently turned down for employment. He was denied an insurance license due to his SORA status. No firm will sponsor him due to his registry status. He cannot hold steady employment and lives week to week.

(d) DD

DD is 36 years old.<sup>7</sup> He was placed on the registry after an offense which occurred while he was in high school. He entered his plea in May 2004, and was sentenced pursuant to HYTA. He was

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<sup>7</sup>See Exhibit A.

advised that his SORA registration was non-public. There were no annual fees and no photographs were published. He completed therapy and was released from supervision early. Seven years after his plea under HYTA, DD was classified as a Tier 3 offender. He must now register for life.

DD has been rejected by employers due to his SORA status. He has been hired only to be terminated once a background check revealed his SORA status. He was accused of lying because he denied having a prior criminal conviction and when he finally convinced the employer to retain him, another employee discovered his SORA status in an internet “Google” search. The company was criticized for hiring a sex offender and DD was terminated. He has been unable to secure employment even with his college degree. Companies have repeatedly noted that due to the SORA registry’s requirement of recording an employer’s address, they cannot hire him.

Landlords refuse to rent to DD as his SORA status is seen as a threat to other residents. He is denied federal subsidized housing because he is a lifetime SORA registrant. He has been denied entry on a cruise ship due to his status. “Due to the rapidly changing laws that seem to be added frequently to the Sex Offender Registry, I live in constant fear of the unknown.” (Exhibit A at 2).

(e) DKS

DKS pleaded guilty to Criminal Sexual Conduct in the Third Degree as the result of an incident which occurred in 1996, when he was 18 years old.<sup>8</sup> He was sentenced to HYTA probation and advised that he had to register under the new non-public SORA. He believed that he had the chance at a renewed life after the fulfillment of his HYTA requirements. He was wrong.

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<sup>8</sup>See Exhibit B.

DKS is now 38 years old and a Tier 3 offender. His SORA requirements have been amended on numerous occasions. His life is consumed with public humiliation and the loss of substantial opportunities. He has completed job applications stating truthfully that he had no criminal conviction but was accused of lying when his SORA status was discovered. He is only employed now through the kindness of a friend.

DKS has been turned down for housing and at age 38, is living with his parents. He has a two year old son and lives in fear of the consequences that the child will face as the result of his father's registry status.

(f) PZ

PZ was granted HYTA status when he was 20 years old.<sup>9</sup> He was told that he had to register for 10 years. He is now 33 years of age and identified as a Tier 3 offender. He must register for life.

PZ has lived in 20 residences over the past 13 years. Landlords reject him because of his SORA status. He has lived with family members and he moves from place to place. He graduated from Michigan State University with a degree in Supply Chain Management but he cannot get a job because of his registry status. "Having been rejected so often has affected me psychologically. I find it difficult and stressful to apply for work, a place to live and even making and keeping friends. \* \* \* There's no possibility of leading a normal life, so long as I'm required to remain on the list."

(g) RJ

RJ is 34 years old.<sup>10</sup> He has been on the registry since he was 19 years old. His plea of guilty resulted from a consensual sexual relationship with his 15 year old girlfriend. At the time of his plea,

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<sup>9</sup>See Exhibit F.

<sup>10</sup>See Exhibit H.

he was told that he would have to register for 15 years but could petition for earlier removal. He was told that if he completed HYTA, his file would be sealed and no one would know what he had done.

“The constantly changing laws make life as a sex offender extremely hard.” (Exhibit H at 1). He has been fired from jobs when his SORA status was discovered. Offers from Google and Facebook were rescinded when he failed the background check. He was asked not to attend his class reunion due to his status on the registry. Dating is impossible. “I fear I will be alone for the rest of my life and never get to experience having children of my own because of my mistake when I was 18.” (Exhibit H at 1). He has developed anxiety and depression.

RJ obtained a degree from the University of Michigan and is a mid-level manager at a marketing agency. His employment often requires his presence at client sites but he has missed out on many opportunities due to travel restrictions. He has lost out on promotions and salary raises due to his geographic and travel limitations. RJ has tried to do everything to improve his life. He has not engaged in additional criminal behavior. He has a job and pays taxes and donates to charity. “Yet I feel like everything I’ve done to better myself can come crashing down at the whim of a new sex offender law.” (Exhibit H at 2).

(h) RC and AS

RC is a Tier 3 offender.<sup>11</sup> He was 20 years old at the time that he received HYTA status. He is now 36 years of age. When he was 19 years old he became friends with AS - a 13 year old girl. The relationship later became sexual and RC was criminally charged. He received HYTA and successfully completed his supervision in 2003.

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<sup>11</sup>See Exhibit G.

RC worked 15 years for a single company but was laid off in 2013. He has received subsequent job offers but all have been rescinded when his SORA status was discovered. He chose not to start a family because “I didn’t want my children or future wife to have to deal with the harassment or judgmental opinions from strangers all because of something that I did when I was young.” (Exhibit G at 2). He was forced to leave his home of 28 years because he was in a school safety zone.

AS was the victim of RC’s offense.<sup>12</sup> At the age of 14 she had consensual intercourse with a 20 year old. When he was sentenced, she believed he would be on the registry for 5-10 years. She now knows that he has to register life. RC’s registry requirements are a burden on AS. She feels that she has played a part in ruining his life. She maintains that the incident was consensual and she carries a sense of tremendous guilt.

AS is married and has two young children. She is a military wife and lives elsewhere. For 16 years she has thought about what happened with RC. She checked the registry once or twice a year to see if he was still on it and contacted him after 15 years when she saw that he was listed as non-compliant. It turned out that he was non-compliant because his home was in a school safety zone. It was the home in which he had lived since he was a child. He had remained there even after his initial SORA registration. He had to move. AS feels guilt because RC’s life has been impacted by a decision that the two of them made together.

## **2. The Punitive Effect of SORA on HYTA Registrants is Consistent**

These letters bear certain consistent threads. Each individual entered a plea under HYTA with the understanding that upon successful completion of probation, they would be able to pursue their

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<sup>12</sup>See Exhibit I.

lives unencumbered by their prior behavior. Even in cases where the individual knew that there was a registration requirement, the obligations were limited in substance and limited in time. In every case, a judge presumably determined that the youth before him was capable of reformation and deserved a chance at a life without being haunted by a prior criminal sexual conviction. In every case, both the defendant and the judge were wrong.

These individuals are forever marked. They suffer continuing shame and humiliation. They are depressed and anxious and live each day without knowing what new penalties might be inflicted tomorrow. Their ability to obtain employment is greatly diminished. They are prevented from participating in the raising of their own children. They are denied housing and when obtained, risk later eviction. They are fearful and lonely. All that they believed to be true as a youth has been, over time, furiously ripped to shreds as SORA has become more and more pervasive and invasive.

As the history of Michigan's sex offender registration laws demonstrate, the reasonable expectations of a criminal defendant entering into a plea agreement have changed. In other civil contexts, the courts have permitted parties to seek relief where significant changes in the law have altered the legal landscape.<sup>13</sup> Defendant herein, as well as the numerous other registrants impacted by the ever-changing SORA requirements, have similarly had their plea agreements rewritten by an altered legal landscape. They too ought not be encumbered by new and ever-changing "regulations" that alter the very core of their lives.

The collateral consequences of pleading guilty to a sex offense - even with the added promise that no conviction will be entered - have become "moving targets." Registration sunset provisions

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<sup>13</sup> See, e.g. *Northridge Church v. Charter Twp. of Plymouth*, 647 F3d 606, 614 (6th Cir 2011) ("modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree is designed to prevent").

have been eliminated, an individual's right to travel, reside in the community of their choice, raise a child, seek employment and continue their education are all severely impacted. When these individuals tendered their pleas, they agreed to do so under a provision which allowed them to have a sealed record, maintain their civil rights, and otherwise move forward with their lives. The entire fiber of these agreements have been rewritten by subsequent Legislative changes. The substance of their plea agreements and concessions have been abrogated as surely as if the Court had imposed these conditions on their judgment of sentence. No matter the number of years that go by and the lack of further criminality, an individual is entirely unable to purge this nominally civil obligation. It is a continuing obligation that will be a burden throughout a person's lifetime.

The tragic flaws in the application of SORA to HYTA recipients was recognized by the Michigan Court of Appeals in 2009. See, *People v Dipiazza*, 286 Mich App 137 (2009). Therein, the Court of Appeals reviewed the history of SORA and held that the defendant's continued registration met the legal definition of punishment and was unconstitutionally cruel and unusual. This Court should recognize the *DiPiazza* analysis as consistent with the Sixth Circuit Court's analysis in *Does*, and conclude that the effect of SORA is punitive.

**C. MICHIGAN SHOULD COME FULL CIRCLE: DOES v SNYDER AND PEOPLE v DIPIAZZA.**

Ironically, the Court of Appeals ruling in this case recognized that developments in the law can be a basis for a court jettisoning past interpretations but then paid little attention to the massively increased burdens imposed under the most recent incarnation of Michigan Sex Offender Registration Act. In its quest to limit *People v Dipiazza*, 286 Mich App 137 (2009), the Court of Appeals failed

to recognize that the changes to Michigan's sex offender registry have for the most part driven the statute away from even a remotely risk-based analysis and moved it to a one size fits all model.<sup>14</sup>

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<sup>14</sup>The Sixth Circuit addressed this history in *Doe v. Snyder*, No. 15-1536, 2016 WL 4473231, at 1 (6th Cir. Aug. 25, 2016). See also *People v. Tucker*, 312 Mich App 645 (2015) (outlining the facts in reaching a contra analysis on the ex post facto issue).

Like many states, Michigan has amended its Sex Offender Registration Act (SORA) on a number of occasions in recent years for the professed purpose of making Michigan communities safer and aiding law enforcement in the task of bringing recidivists to justice. Thus, what began in 1994 as a non-public registry maintained solely for law enforcement use, see Mich. Pub. Act 295, § 10 (1994), has grown into a byzantine code governing in minute detail the lives of the state's sex offenders, see Mich. Comp. Laws § 28.723, *et seq.* Over the first decade or so of SORA's existence, most of the changes centered on the role played by the registry itself. In 1999, for example, the legislature added the requirement that sex offenders register in person (either quarterly or annually, depending on the offense) and made the registry available online, providing the public with a list of all registered sex offenders' names, addresses, biometric data, and, since 2004, photographs. See Mich. Pub. Act. 85 §§ 5a(4), 8(2), 10(2)(3) (1999); Mich. Pub. Acts 237, 238 (2004). Michigan began taking a more aggressive tack in 2006, however, when it amended SORA to prohibit registrants (with a few exceptions, see Mich. Comp. Laws § 28.734–36) from living, working, or “loitering”<sup>1</sup> within 1,000 feet of a school. See Mich. Pub. Acts 121, 127 (2005). In 2011, the legislature added the requirement that registrants be divided into three tiers, which ostensibly correlate to current dangerousness, but which are based, not on individual assessments, but solely on the crime of conviction. See Mich. Pub. Acts 17, 18 (2011). The 2011 amendments also require all registrants to appear in person “immediately” to update information such as new vehicles or “internet identifiers” (*e.g.*, a new email account). See *id.* The 2006 and 2011 amendments apply retroactively to all who were required to register under SORA. See Mich. Pub. Act 46 (2006); Mich. Pub. Acts 17, 18 (2011). Violations carry heavy criminal penalties. See Mich. Comp. Laws § 28.729.

*Does v. Snyder*, No. 15-1536, 2016 WL 4473231, at 1 (6th Cir. Aug. 25, 2016).

As Sixth Circuit Judge Batchelder noted in *Does*, regarding Michigan’s SORA:

[W]hat began in 1994 as a non-public registry maintained solely for law enforcement use, *see* Mich. Pub. Act 295, § 10 (1994), has grown into a byzantine code governing in minute detail the lives of the state's sex offenders. *Does v. Snyder*, No. 15-1536, 2016 WL 4473231, at 1 (6th Cir. Aug. 25, 2016).

Contrary to the Court of Appeals ruling below, *Dipiazza* was not a narrow case-specific ruling.

The *Dipiazza* Court looked at national trends and recognized that Michigan’s SORA was punitive in nature. Quoting the Indiana Supreme Court’s ruling in *Wallace v. State*, 905 NE2d 371, 384 (Ind., 2009), the *Dipiazza* Court stated in broad language that a non-individualized application of such laws would make the law punitive. The *DiPiazza* Court noted that “the Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk.” *Id.*<sup>15</sup> “Consequently, ‘if the registration and disclosure are not tied to a finding that the safety of the public is threatened, there is an implication that the Act is excessive.’ *Id.* at 383” *People v. Dipiazza, supra* at 155–156 (relying on a vacated Court of Appeals ruling; *In re TD*, 292 Mich App 678 (2011), vacated, 493 Mich 873 (2012)).

In the case herein, the Court of Appeals retraced the same legal history as *DiPiazza* and reached a contrary legal conclusion. That attempt at strictly limiting *Dipiazza*, is an act of judicial nullification

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<sup>15</sup>As one commentator has noted:

Where sex offender registration laws serve to protect the community and track recidivists, they are legitimate regulatory vehicles that withstand constitutional scrutiny. But central to their legitimacy must be the determination that the regulation is carefully crafted to limit its punitive effect. Only statutes that \* are sufficiently tailored to meet their civil aims and limit their incidental punitive effects will be deemed constitutional.’

Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 BU L Rev 295, 303-04 (2006).

and a complete repudiation of interpanel stare decisis.<sup>16</sup> The conclusions reached in *People v. Dipiazza, supra*, as to the nature of SORA as punishment are entirely consistent with *Does v Snyder, supra*. There is no rationale basis to limit its holding and every reason to accept the underpinnings of the decision.

### **SUMMARY AND RELIEF REQUESTED**

**WHEREFORE**, for the foregoing reasons, Amicus respectfully asks that the Court find that the retroactive application of SORA provisions violates constitutional ex post facto prohibitions and asks that this Court grant the relief requested.

Respectfully submitted,

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Dated: September 6, 2016.

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<sup>16</sup>Edward M. Wise, *The Legal Culture of Troglodytes: Conflicts Between Panels of the Court of Appeals*, 37 Wayne L Rev 313 (1991).

**CERTIFICATE OF SERVICE**

The Amicus Curiae's Brief in Support of Defendant-Appellant was filed electronically using the Court's TrueFiling system on September 6, 2016, which will send copies by e-mail to all counsel of record.

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