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Sex Offender Legislation Ex Post Facto: The History and Constitutionality of Michigan's Sex Offenders Registration Act

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SEX OFFENDER LEGISLATION EX POST FACTO: THE HISTORY AND CONSTITUTIONALITY OF MICHIGAN'S SEX OFFENDERS REGISTRATION ACT

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INTRODUCTION

Is Michigan's Sex Offenders Registration Act ("MSORA") constitutional? Until 2016, courts routinely said yes.[1] In 2016, the Sixth Circuit in *Does #1–5 v. Snyder* held that the statute was an unconstitutional ex post facto law.[2] In 2021, the Michigan Supreme Court echoed the Sixth Circuit's holding in *People v. Betts*.[3] In response, the Michigan legislature passed Public Law 295 of 2020 to amend MSORA,[4] and courts treat the amended act as a "new" statute.[5] Critical analysis of the amended statute's legality is difficult because the state legislature has seemingly ignored constitutional issues with statutory proposals until after the fact, and consequently the amended statute's constitutionality is unclear.

A class action challenging MSORA on multiple constitutional grounds is currently pending in federal court.[6] The U.S. Solicitor General agreed with the Sixth Circuit that the old statute violated the federal Ex Post Facto Clause[7] and Michigan's Attorney implied that she believes the statute may not survive rational basis review.[8] The 2021 amendments to MSORA preserved many of the provisions challenged by the plaintiffs in *Does #1–5 v. Snyder*.[9] This Note evaluates potential constitutional

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1. *See* Ryan W. Porte, Note, *Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution*, 45 HASTINGS CONST. L.Q. 715, 734 (2018).

2. (*Does I Appeal*), 834 F.3d 696, 705–06 (6th Cir. 2016).

3. 968 N.W.2d 497, 515 (Mich. 2021).

4. Act of Dec. 29, 2020, Pub. Act No. 295, 2020 Mich. Legis. Serv. 2232 (West).

5. Doe v. Snyder (*Does II*), No. 16-13137, slip op. at 2 n.1 (E.D. Mich. filed Aug. 26, 2021); *Betts*, 968 N.W.2d at 500 n.2, 521 n.30.

6. *See* Does v. Whitmer (*Does III*), No. 2:22-cv-10209 (E.D. Mich. Feb. 2, 2022). The complaint alleges violations of the federal Ex Post Facto, *infra* note 282, 318, Due Process, *infra* note 119, 282, and Equal Protection Clauses, *infra* note 247, as well as the First Amendment, *infra* note 330. Verified Class Action Complaint at 167–86, *Does III*, No. 2:22-cv-10209.

7. *See* Brief for the United States as Amicus Curiae, at 10–13, Snyder v. Doe, 138 S. Ct. 55 (2017) (mem.) (No. 16-768), *denying cert. to Does I Appeal*, 834 F.3d at 696.

8. *See* Brief of Amicus Curiae Michigan Attorney General Dana Nessel at 33, *Betts*, 968 N.W.2d at 497 (No. 148981) ("[R]egardless of what one believes about recidivism rates, [sex offender] registries are not good tools to protect the public.").

9. *Compare* MICH. COMP. LAWS ANN. §§ 28.721–28.736 (West 2020), *with id.* §§ 28.722, 28.723a–28.725a, 28.727–28.729 (Supp. 2021).

challenges to MSORA, identifies challenges that could be successful, and suggests actions that the State could take to remedy constitutional repugnancies.

Part I surveys the numerous amendments to MSORA since its enactment in 1994. Part II reviews the recent rulings from the Sixth Circuit and the Michigan Supreme Court and the amendments to MSORA enacted in response. Parts III–VI evaluate the merits of potential constitutional challenges to MSORA under the equal protection, due process, bill of attainder, ex post facto, double jeopardy, cruel and unusual punishment, and other clauses of the federal and Michigan constitutions.

Part III discusses procedural due process challenges to MSORA and avers that the statute is likely immune from them because its obligations and restrictions only apply to individuals that have already been convicted of crimes. Part III also examines a recent case brought by an individual wrongfully subject to MSORA and suggests that Michigan can take steps to avoid exposing state actors and municipalities to liability in the future.

Part IV assesses whether MSORA infringes on fundamental rights protected by the due process and equal protection clauses of the federal and Michigan constitutions. Part IV notes that the federal and state equal protection and due process clauses protect the same bundle of rights as far as MSORA is concerned, courts will not apply strict scrutiny to MSORA, and the statute has never failed the rational basis test concerning due process and equal protection challenges.

Part V addresses myriad challenges alleging that MSORA imposes unconstitutional punishment in violation of the bill of attainder, double jeopardy, ex post facto, and cruel and unusual punishment clauses of the federal and Michigan constitutions. Section V.A claims that MSORA is not a bill of attainder. Section V.B explains how the protections afforded by the state and federal double jeopardy, ex post facto, and cruel and unusual punishment clauses overlap in the context of sex offender registration laws, rendering the state and federal cruel and unusual punishment clauses superfluous as applied to sex offenders. Section V.B also determines that although the state and federal double jeopardy clauses are more protective than the state and federal ex post facto clauses, a successful state or federal ex post facto challenge may be more powerful than a successful state or federal double jeopardy challenge. Section V.C details that courts apply the intent-effects test when evaluating ex post facto and double jeopardy challenges to MSORA. Section V.C concludes that the Sixth Circuit and Michigan Supreme Court decisions, which invalidated the old MSORA under the intent-effects test, turned on whether MSORA passed the rational basis test.

Part VI considers whether MSORA as recently amended passes the rational basis test applied by the Sixth Circuit and the Michigan Supreme Court. Part VI also scrutinizes data that the Sixth Circuit and the Michigan Supreme Court cited in concluding that MSORA's obligations and restrictions were not rationally related to a legitimate purpose. Part VI asserts that the Michigan legislature could have rationally disagreed with the conclusions drawn from these data by the Sixth Circuit and the Michigan Supreme Court.

Part VII analyzes whether MSORA violates sex offenders' rights to a jury trial and anonymous speech. Section VII.A concludes that although MSORA does not

violate the right against self-incrimination under well-established precedent, the statute is more vulnerable to such challenges in the future if courts follow the Sixth Circuit and the Michigan Supreme Court. Section VII.B observes that recent amendments to MSORA made the statute susceptible to a First Amendment challenge and that the Michigan legislature should amend MSORA again should it wish to avoid such a challenge.

I. MICHIGAN'S SEX OFFENDERS REGISTRATION ACT

Following several high-profile child abductions and rapes by adult men in the late 1980s and early 1990s, States passed the first sex offender registration laws.[10] In 1994, the U.S. Department of Justice reported that thirty percent of female rape victims in Michigan were younger than thirteen years old and twenty-five percent were younger than ten years old.[11] On the same day that this report was published, Michigan passed the State's first sex offender registration law, the Sex Offenders Registration Act.[12] Congress soon enacted minimum standards for sex offender laws and conditioned the receipt of substantial federal funding for law enforcement on States' compliance with these guidelines.[13]

MSORA is a set of rules and obligations ostensibly designed to promote public safety that has been amended many times.[14] Identifying the individuals to whom specific provisions of MSORA apply, when they apply, and for how long, has grown more difficult with each amendment to the statute. The state legislature has amended the statute twenty-three times—an average of almost once per year—in the nearly twenty-five years since it was enacted in 1994.[15] To draw any conclusions about the constitutionality of the current version of MSORA, it is necessary to understand how the statute has evolved over the last three decades.

This Part discusses the evolution of MSORA since it was first enacted. Section I.A discusses how the statute functioned at first. Section I.B details amendments to the statute's reporting requirements. Section I.C examines changes to Michigan's sex offender registry. Section I.D and I.E survey changes to MSORA enacted in 2011, including the implementation of the statute's current tier system. Section I.F and I.G focus on two controversial elements of the statute: its treatment of non-adult offenders and student safety zones.

10. *See* Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 799, 794–96 (1996).

11. PATRICK A. LANGAN & CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., CHILD RAPE VICTIMS, 1992 (1994), https://www.bjs.gov/content/pub/pdf/CRV92.pdf.

12. Sex Offenders Registration Act, Pub. Act No. 295, 1994 Mich. Pub. Acts 1522.

13. *See* Violent Crime Control and Law Enforcement Act of 1994, § 170101, Pub. L. No. 103-322, 108 Stat. 1797, 2038–42.

14. *See* Sex Offenders Registration Act, MICH. COMP. LAWS ANN. §§ 28.721–28.730 (West 2020 & Supp. 2021).

15. *See id.* Historical and Statutory Notes.

A. In the Beginning: Registration for the Sake of the Registry

MSORA requires individuals convicted of offenses listed in the statute, called "listed offenses," to register with law enforcement once they begin a non-incarceratory sentence or are released from prison.[16] Sex offenders must provide certain information to law enforcement upon initial registration,[17] and this information is used to create profiles for each offender in the state sex offender registry.[18] Registrants must comply with MSORA during their registration periods[19] or face penalties.[20]

At first, only Michigan residents convicted of a listed offense after September 1995 were required to register.[21] Upon initial registration, sex offenders provided law enforcement with their names, social security numbers, addresses, and photographs.[22] Registrants were also required to report changes to their addresses in-person at their local police stations within ten days.[23] Only law enforcement could access registrants' information in the sex offender database.[24]

Offenders were required to register for twenty-five years following a conviction for a single listed offense after September 1995 and for life following a subsequent conviction for a listed offense.[25] In 1994, registrants' only ongoing obligations were to immediately report any changes to their addresses.[26] Non-compliance with MSORA was a felony punishable by four years in prison and a $2,000 fine.[27] The original MSORA did not remain static for long.

B. Stage II: Periodic Reporting and the Public Sex Offender Registry

In 1999, non-registrant offenders employed or attending school in Michigan were required to register,[28] penalties for non-compliance were made more severe,[29] and more offenses requiring registration were added to MSORA.[30] Only individuals convicted of the newly added offenses after the 1999 amendments were required to register as sex offenders.[31] All offenders convicted of even one *serious* offense were required to register for life.[32] Registrants were also required to immediately report

16. *See id.* § 28.723 (2020).
17. *Id.* §§ 28.724a, 28.727(1) (Supp. 2021).
18. *Id.* § 28.728.
19. *Id.* § 28.725(11)–(13).
20. *See id.* § 28.729.
21. Sex Offenders Registration Act, Pub. Act No. 295, § 3, 1994 Mich. Pub. Acts 1522, 1523–24.
22. *Id.* § 7(1), 1994 Mich. Pub. Acts at 1525.
23. *Id.* § 5(1), 1994 Mich. Pub. Acts at 1524–25.
24. *Id.* §§ 8, 10, 1994 Mich. Pub. Acts at 1526.
25. *Id.* § 5(3)–(4), 1994 Mich. Pub. Acts at 1525.
26. *See id.* § 5, 1994 Mich. Pub. Acts at 1524–25.
27. *Id.* § 9(1), 1994 Mich. Pub. Acts at 1526.
28. Act of June 28, 1999, Pub. Act No. 85, § 3(1), 1999 Mich. Pub. Acts 271, 273.
29. *See id.* § 2(d), 1999 Mich. Pub. Acts at 272.
30. *See id.* § 9, 1999 Mich. Pub. Acts at 280–81.
31. *Id.* § 3(2), 1999 Mich. Pub. Acts at 273.
32. *Id.* § 5(7), 1999 Mich. Pub. Acts at 276.

changes in their employment or school enrollment[33] and *periodically* report in-person to "update" the information they provided when they initially registered, even if their information had not changed.[34] Registrants convicted of less serious offenses reported annually and registrants convicted of more serious offenses reported quarterly.[35] Other significant changes were made to the database of sex offenders.

C. Michigan's E-Registry: There Goes the Neighborhood

In 1997, the legislature created a *public* sex offender registry ("PSOR") in addition to the existing law enforcement registry.[36] Sex offenders' names, physical descriptions, birth dates, and convictions were made available at local police posts to anyone living in the same zip code as a registrant.[37] The PSOR was made even more accessible to the public following an unsuccessful legal challenge to prevent the public release of offenders' information.[38]

The Michigan State Police published the PSOR online in 1999.[39] This change allowed anyone to browse a list of sex offenders living near them on the internet,[40] which soon included registrants' schools[41] and photographs.[42] The State also enabled individuals to opt into a notification system informing them when registrants moved to their area.[43] In 2011, MSORA was effectively re-written in its entirety.[44]

D. Tier I, Tier II, and Tier III: The Bad, the Very Bad, and the Damned

The 2011 amendments separated listed offenses into three tiers.[45] Individuals with no prior convictions for sex offenses convicted of a Tier I offense are placed in Tier I.[46] Individuals with no prior convictions for sex offenses who are convicted of a Tier II offense, and current Tier I offenders convicted of a subsequent Tier I offense,

33. *Id.* § 5(1)(a), 1999 Mich. Pub. Acts at 275.

34. *Id.* § 5a(4), 1999 Mich. Pub. Acts at 277.

35. *Id.*

36. *See* Act of Jan. 7, 1997, Pub. Act No. 494, §§ 8(2), 10(3), 1996 Mich. Pub. Acts 2283, 2284–85.

37. *See id.*

38. Ilaina Jonas, *Lists of Sex Offenders to Be Released*, DET. FREE PRESS, Apr. 1, 1997, at 1A.

39. David Ashenfelter, *Sex Offender List to Hit Web*, DET. FREE PRESS, Feb. 1, 1999, at 1A. The State codified the online PSOR later in 1999. Act of June 28, 1999, Pub. Act No. 85, § 8(2), 1999 Mich. Pub. Acts 271, 279–80.

40. To view Michigan's online registry, refer to https://mspsor.com/.

41. Act of July 25, 2002, Pub. Act No. 542, § 8(3)(b), 2002 Mich. Pub. Acts 1901, 1907.

42. Act of May 1, 2005, Pub. Act No. 238, § 8(3)(c), 2004 Mich. Pub. Acts 780, 781.

43. Act of Jan. 1, 2007, Pub. Act No. 46, § 10(3), 2006 Mich. Pub. Acts 129, 130.

44. Act of Apr. 12, 2011, Pub. Act No. 17, 2011 Mich. Legis. Serv. 82 (West) (enacting 2011 amendments to MSORA); Act of Apr. 12, 2011, Pub. Act No. 18, 2011 Mich. Legis. Serv. 94 (West) (also enacting 2011 amendments to MSORA).

45. For an illustration of MSORA's tiers and their corresponding listed offenses, see SUZZANE LOWE, SENATE FISCAL AGENCY, S.B. 188, 189, & 206: SUMMARY AS ENACTED, S. 96, Reg. Sess. of 2011, at 3 tbl. 1 (Mich. 2012), http://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-0188-N.pdf.

46. MICH. COMP. LAWS ANN. § 28.722(q) (West Supp. 2021).

are considered Tier II offenders.[47] Individuals with no prior convictions for sex offenses convicted of a Tier II offense, and current Tier II offenders convicted of a subsequent Tier I or Tier II offense, are designated as Tier III offenders.[48]

Individuals convicted of a listed offense that formerly did not require registration and subsequently convicted of *any* felony, regardless of whether the conviction was for a sex offense, after July 1, 2011, are required to register as sex offenders.[49] All non-residents convicted of a listed offense in Michigan are also required to register regardless of whether they are working or studying in Michigan.[50] However, they are exempt from periodic and immediate reporting requirements.[51] Individuals convicted of most Tier I offenses are also exempt from being listed in the PSOR.[52]

The 2011[53] and subsequent[54] amendments also added new listed offenses. Unlike the offenses added in 1999, individuals convicted of these new listed offenses occurring after September 1995 are retroactively required to register as sex offenders.[55] The 2011 amendments also removed some offenses,[56] and registrants must petition courts to discontinue registration if their offense of conviction no longer requires registration under MSORA.[57] The 2011 amendments to MSORA vastly expanded the amount of information registrants must report upon initial registration.

E. 2011 Amendments: Registration for the Sake of Registration?

Following the enactment of the 2011 amendments, offenders must report their birth dates, employers, schools they attend, driver's license numbers, professional licensing information, and more when they initially register as sex offenders.[58] Registrants are also required to report all telephone numbers, email addresses, instant messaging usernames, and the plate number and description of any vehicle that they "routinely used."[59]

The 2011 amendments significantly altered other aspects of MSORA as well. For example, the periodic and immediate reporting regimes were changed; Tier I, II, and III offenders must report annually, bi-annually, and quarterly, respectively.[60] The amendments also narrowed the window of time during which registrants must report

47. *Id.* § 28.722(s).

48. *Id.* § 28.722(u).

49. *Id.* § 28.723(1)(e) (2020).

50. *Id.* § 28.723(3).

51. *Id.*

52. *Id.* § 28.728(4)(c).

53. *See* Act of Apr. 12, 2011, Pub. Act No. 17, § 2(s), (u), (w), 2011 Mich. Legis. Serv. 82, 84–86 (West).

54. *See* Act of Oct. 15, 2014, Pub. Law No. 328, § 2(u)(*vii*), https://www.legislature.mi.gov/documents/2013-2014/publicact/pdf/2014-PA-0328.pdf.

55. *See* MICH. COMP. LAWS ANN. § 28.723 (West 2020).

56. *See* Act of Apr. 12, 2011, Pub. Act No. 17, § 2(s), (u), (w).

57. . MICH. COMP. LAWS ANN. § 28.728c(15)(b) (West 2020). State officials also have a duty to remove individuals' information from the public and law enforcement databases when state officials discover they are no longer required to register as sex offenders. *Id.* § 28.728(9) (Supp. 2021).

58. *Id.* § 28.727(c), (f)–(g), (k), (m).

59. ACT OF Apr. 12, 2011, Pub. Act No. 18, § 7(1)(h)–(j), 2011 Mich. Legis. Serv. 95, 95 (West).

60. Act of Apr. 12, 2011, Pub. Act No. 17, § 5a(3), 2011 Mich. Legis. Serv. 82, 92 (West).

changes to information triggering immediate in-person reporting from ten days to three days.[61] Registrants are also required to immediately notify law enforcement when they intend to stay anywhere other than their reported address for more than seven days.[62]

Some changes implemented by the 2011 amendments have since been rolled back in response to adverse court rulings.[63] Specifically, registrants were required to report when they created any new email address, instant messaging username, or "any other designations used in internet communications or postings," and when they began to "regularly operate" any new vehicle or stopped using an old vehicle.[64] Registrants' email and instant messaging addresses and other online usernames were not listed in the PSOR.[65]

F. Non-Adult Offenders: Are the Kids Alright?

A "conviction" for a listed offense triggers MSORA obligations,[66] and a conviction as defined by MSORA includes judgments of conviction entered in both adult criminal proceedings and in proceedings applicable only to non-adult offenders.[67]

1. Juvenile Offenders

Some individuals convicted in juvenile courts must register as sex offenders.[68] Michigan's juvenile courts have jurisdiction over individuals younger than eighteen who were charged with most crimes.[69] Originally, *all* juveniles convicted of listed offenses in Michigan whose dispositions were public were required to register.[70] Since 2011, however, only juveniles convicted of Tier III offenses for conduct that occurred when they were at least fourteen years old are required to register.[71] Unlike the offenders discussed in the next Section, juvenile offenders have never been listed in the PSOR.[72]

61. *Id.* § 2(g), 2011 Mich. Legis. Serv. at 83.
62. . MICH. COMP. LAWS ANN. § 28.725(2)(b) (West Supp. 2021).
63. *See infra* Section II.D (discussing court rulings).
64. Act of Apr. 12, 2011, Pub. Act No. 17 § 5(1)(f)–(g).
65. Act of Apr. 12, 2011, Pub. Act No. 18 § 8(3)(e).
66. MICH. COMP. LAWS ANN. § 28.723 (West 2020).
67. *Id.* § 28.722(a) (Supp. 2021).
68. *See id.* § 28.722(a)(*iii*)–(*iv*).
69. *Id.* § 712A.2 (2012 & Supp. 2021).
70. Sex Offenders Registration Act, Pub. Act No. 295, § 2(a)(*iii*), 1994 Mich. Pub. Acts 1522, 1522–23.
71. MICH. COMP. LAWS ANN. § 28.722(a)(*iii*) (West Supp. 2021).
72. *See* Act of June 28, 1999, Pub. Act No. 85, § 8(2), 1999 Mich. Pub. Acts 271, 279.

2. Youthful Offenders

Some individuals convicted in an adult criminal court who were assigned youthful trainee status under Michigan's Holmes Youthful Trainee Act ("HYTA")[73] must register as sex offenders.[74] Courts may assign youthful trainee status to individuals between the ages of fourteen and twenty-six who are convicted of certain crimes.[75] Courts may require youthful trainees to attend school, maintain employment, serve jail time, or comply with probation.[76] Once youthful trainees fulfill their HYTA requirements, their charges are dismissed.[77] Unlike juvenile sex offenders, HYTA sex offenders have always been listed in the PSOR.[78] Formerly, *all* individuals assigned youthful trainee status for a listed offense were required to register as sex offenders regardless of whether they completed their HYTA requirements and their convictions were dismissed.[79]

In 2004, the legislature narrowed HYTA eligibility to exclude many individuals convicted of more serious sex offenses.[80] Further, individuals convicted of a listed offense and assigned youthful trainee status after October 2004 were only required to register as sex offenders if their HYTA status was revoked.[81] However, HYTA sex offenders assigned youthful trainee status before October 2004 were still required to register regardless of whether they completed their HYTA requirements.[82] Later, the 2011 amendments exempted all post-October 2004 HYTA offenders from registration, but pre-October 2004 registrants' statuses were not changed.[83]

G. Student "Safety" Zones

The Michigan legislature added *de jure* affirmative restrictions to MSORA in 2005 after the *Detroit News* reported that sex offenders were employed by or had volunteered with several Michigan schools.[84] The restrictions applied in so-called "[s]tudent safety zones," or "the area that lies 1,000 feet or less from school property."[85] Most registrants were prohibited from living, working, or "[l]oitering"

73. MICH. COMP. LAWS ANN. §§ 762.11–762.15 (West 2000 & Supp. 2021).

74. *Id.* § 28.722(a)(*ii*) (Supp. 2021).

75. *See id.* § 762.11.

76. *Id.* §§ 762.11(5)–(6), 762.13.

77. *Id.* § 762.14.

78. *Compare* Act of June 28, 1999, Pub. Act No. 85, § 8(2), 1999 Mich. Pub. Acts 271, 279 (the original PSOR provision containing no exception for HYTA offenders), *with* MICH. COMP. LAWS ANN. § 28.728(3) (West Supp. 2021) (current PSOR exceptions which do not include HYTA offenders).

79. *See* Act of Apr. 12, 2011, Pub. Act No. 18, § 8(1), 2011 Mich. Legis. Serv. 95, 96–97 (West) (exempting juvenile offenders from the PSOR but not HYTA offenders).

80. Act of July 21, 2004, Pub. Act No. 239, § 11(3), 2004 Mich. Pub. Acts 782, 783.

81. Act of July 21, 2004, Pub. Act No. 240, § 2(a)(*ii*)(B), Mich. Pub. Acts 785, 786.

82. *Id.* § 2(a)(*ii*)(A), 2004 Mich. Pub. Acts at 785.

83. Act of Apr. 12, 2011, Pub. Act No. 17 § 2(b)(*ii*).

84. PATRICK AFFHOLTER, SENATE FISCAL AGENCY, S.B. 129, 606, 607, 616, & 617, AND H.B. 4932 & 4934: ENROLLED ANALYSIS, S. 93, Reg. Sess. of 2005, at 1 (Mich. 2006), http://www.legislature.mi.gov/documents/2005-2006/billanalysis/Senate/pdf/2005-SFA-0129-E.pdf.

85. MICH. COMP. LAWS ANN. § 28.733(f) (West 2020).

within student safety zones.[86] Loitering was defined as "remain[ing] for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors."[87] There were narrow exceptions to the student safety zone restrictions and specific restrictions did not apply retroactively.[88]

For example, the residency restrictions did not apply retroactively to registrants living within a student safety zone before 2006, but only registrants' *current* addresses were grandfathered in; registrants were prohibited from moving from a grandfathered address inside a student safety zone to a new address inside a student safety zone.[89] However, individuals registered as sex offenders for the first time after January 1, 2006, were required to move outside of a student safety zone within ninety days of their registration.[90] The next Part discusses three court cases which led Michigan to dismantle or reform many of the provisions detailed in this Part.

II. *DOES I*, *DOES II*, *BETTS*, AND THE "NEW" MSORA

A. Does I: Lex Est Non Poena

In 2013, five registrants challenged MSORA in *Does 1–4 v. Snyder* ("*Does I*").[91] The ACLU argued on behalf of the plaintiffs that MSORA violated the Ex Post Facto Clause of the U.S. Constitution, the First Amendment, the Due Process Clause of the Fourteenth Amendment, and that parts of the statute were unconstitutionally vague.[92] Judge Robert H. Cleland for the Eastern District of Michigan dismissed the plaintiffs' ex post facto claims[93] but agreed with the ACLU that parts of the statute were vague.[94]

Judge Cleland held that MSORA's student safety zone restrictions were vague as applied because the statute did not clearly define where the 1,000-foot exclusion zones began and ended and the definition of "loiter" was ambiguous.[95] Judge Cleland also concluded that requiring registrants to report all telephone numbers, email addresses, and instant messaging addresses that they "routinely used" and any vehicles that they "regularly operate[d]" was facially vague because "routinely" was

86. *Id.* § 28.734(1).

87. *Id.* § 28.733(b).

88. *See id.* §§ 28.734(3), 28.735(3), 28.736(1).

89. *Id.* § 28.735(3)(c).

90. *Id.* § 28.735(4).

91. 932 F. Supp. 2d 803 (E.D. Mich. 2013), *rev'd*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016).

92. *Id.* at 808.

93. *Id.* at 814, 824.

94. *See Does I*, No. 12-11194, slip op. at 8–32 (E.D. Mich. filed Mar. 31, 2015), *rev'd*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016); *see also* People v. Solloway, 891 N.W.2d 255, 264–66 (Mich. Ct. App. 2016) (per curiam) (concluding that the same provisions challenged in *Does I* as vague were unconstitutionally vague under state law).

95. *Does I*, slip op. at 12–20 (E.D. Mich. filed Mar. 21, 2015).

undefined.[96] The plaintiffs appealed Judge Cleland's rulings in January 2016 in *Does #1–5 v. Snyder* ("*Does I Appeal*").[97]

B. Does I Appeal: And Now for Something Completely Different

On appeal, the Sixth Circuit reversed Judge Cleland's dismissal of the plaintiffs' ex post facto claims.[98] The court, focusing on MSORA's student safety zone provisions, the listing of registrants' tiers in the PSOR, and in-person reporting requirements, held that the statute's "2006 and 2011 amendments" violated the Ex Post Facto Clause.[99] The Sixth Circuit remanded without considering the plaintiffs' other challenges.[100] On remand, Judge Cleland entered a declaratory judgment that the 2006 and 2011 amendments violated the Ex Post Facto Clause and enjoined their enforcement against the plaintiffs.[101]

C. Does II and Betts: Lex Est Poena

The ACLU, recognizing that the Sixth Circuit's holding in *Does I Appeal* was not necessarily limited to the *Does I* plaintiffs, filed *Does v. Snyder* ("*Does II*"), a class action on behalf of all sex offenders registered in Michigan who were convicted before the 2006 and 2011 amendments to MSORA were passed.[102] In *Does II*, also heard by Judge Cleland, the court applied *Does I Appeal* to the entire class and held that the 2006 and 2011 amendments to MSORA could not be applied to any class member convicted before the amendments' effective dates.[103]

Unfortunately for the State, the 2011 amendments essentially re-wrote MSORA, rendering what remained of the statute in their absence "a 'nonsensical alphabet soup' of sentence fragments."[104] Consequently, the court held that the 2011 amendments were not severable from the rest of the statute and enjoined the State from enforcing MSORA against all Michigan's sex offenders, regardless of whether they were convicted after the 2011 amendments became effective.[105] A parallel suit filed in

96. *Id.* at 20–26.

97. 834 F.3d at 696.

98. *Id.* at 706.

99. *Id.* "2006 amendments" ostensibly referred to the amendments which added MSORA's student safety provisions. *See id.* at 698.

100. *Id.* at 706.

101. *Does I*, No. 12-11194, slip op. at 2 (E.D. Mich. Jan. 1, 2018), *rev'd*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016).

102. 449 F. Supp. 3d 719, 725–26 (E.D. Mich. 2020).

103. *Id.* at 729.

104. *Id.* at 732.

105. *Id.* at 733. The fact that Judge Cleland held that the statute in the absence of the 2011 amendments was non-functional means that the court likely invalidated not just the problematic provisions contained within the 2011 amendments, but rather both public laws passed in 2011 *in toto*. The parties conceded that the 2006 amendments were severable, but the point was mooted by the non-severability of the 2011 amendments. *Id.* at 733 n.9.

state court, *People v. Betts*, reached the Michigan Supreme Court while litigation in *Does II* was taking place.[106]

In *Betts*, the Michigan Supreme Court applied the same analysis as the Sixth Circuit had in *Does I Appeal* and held that the 2011 amendments were unconstitutional under the ex post facto clause of the Michigan constitution.[107] The Michigan legislature passed 2020 P.A. 295 to amend MSORA before the final judgments in *Does II* and *Betts*.[108]

Judge Cleland specified that *Does II* "did not address the constitutionality of the new SORA," defined as "the version of [the statute] . . . in effect as of March 24, 2021, including both sections that were not amended by Public Act 295 of 2020."[109] The Michigan Supreme Court similarly limited *Betts* to the "old" MSORA.[110] The State was permanently enjoined from prosecuting registrants for violations of MSORA that occurred before March 24, 2021.[111] The statute has not been amended since 2020 P.A. 295 became effective in March 2021.

D. The "New" MSORA

2020 P.A. 295 introduced a bevy of changes to MSORA.[112] Most significantly, the legislature completely removed the statute's student safety provisions.[113] The amendments also added a scienter requirement for violations of MSORA's immediate reporting provisions.[114] Further, individuals whose convictions for listed offenses were later set aside or expunged, and pre-2004 youthful trainees who completed their HYTA requirements, were exempted from registering as sex offenders.[115] 2020 P.A. 295 also introduced changes to the statute's reporting requirements and the information available in the PSOR.[116]

Local police departments may now allow registrants to report changes to their information remotely instead of in-person.[117] The "routine use" qualifier was removed from the phone number and vehicle reporting requirements, which, along with the email and instant messaging address reporting requirements, now only apply to individuals who first registered after July 1, 2011.[118] However, post-July 1, 2011, registrants must also report "all designations used for self-identification or routing in

106. *See* 968 N.W.2d 497 (Mich. 2021).

107. *Id.* at 507–15. The *Betts* majority also agreed with Judge Cleland that the 2011 amendments were non-severable. *Id.* at 515–18. *Contra id.* at 521–29 (Viviano, J., concurring in part and dissenting in part).

108. Act of Dec. 29, 2020, Pub. Act No. 295, 2020 Mich. Legis. Serv. 2232 (West).

109. *Does II*, No. 16-13137, slip op. at 2 n.1, 4 ¶ 2–3 (E.D. Mich. filed Aug. 26, 2021).

110. *Betts*, 968 N.W.2d at 500 n.2, 521 n.30.

111. *Does II*, slip. op. at 4 ¶ 2–3 (E.D. Mich. filed Aug. 26, 2021).

112. *See Betts*, 968 N.W.2d at 518 n.25.

113. *See* Act of Dec. 29, 2020, 2020 Mich. Legis. Serv. at 2249.

114. *Id.* § 9(2), 2020 Mich. Legis. Serv. at 2248.

115. *Id.* § 2(a)(*i*)–(*ii*), 2020 Mich. Legis. Serv. at 2232.

116. *See id.* § 5, 2020 Mich. Legis. Serv. at 2239–41.

117. *Id.* § 5(1), 2020 Mich. Legis. Serv. at 2239.

118. *Id.* § 5(2)(a).

internet communications or posting."[119] Further, the provision explicitly excluding registrants' online usernames from the PSOR was repealed.[120] Registrants' tier designations were also removed from the PSOR.[121]

Though 2020 P.A. 295 addressed many of the issues identified by the Sixth Circuit and the Michigan Supreme Court, the amendments potentially created other issues. The following Parts discuss potential challenges to the new MSORA under the federal and Michigan constitutions.[122]

III. THE PROCEDURE DUE BEFORE MSORA APPLIES

The due process clauses of the federal[123] and Michigan[124] constitutions prohibit the State from depriving individuals of protected liberty interests without adequate procedural safeguards. When the State seeks to deprive an individual of a liberty interest based on the existence of some fact, it must give that person a chance to contest whether the fact exists.[125] In *Connecticut Department of Public Safety v. Doe*, the Supreme Court held that convicted sex offenders had a chance to litigate the sole relevant fact concerning the applicability of sex offender laws—their guilt for a sex offense—at their criminal trials.[126]

The Sixth Circuit has interpreted *Connecticut Department of Public Safety* to effectively foreclose procedural due process claims against MSORA because MSORA requires registration solely based on criminal convictions.[127] State courts have held that MSORA does not implicate procedural due process because the statute does not infringe protected liberty interests as a matter of law under the federal and state constitutions.[128] However, some courts have recognized due process violations where States wrongfully classified individuals as sex offenders without an adequate

119. *Id.* § 2(g), 2020 Mich. Legis. Serv. at 2233. The *Does III* plaintiffs argue that these amended provisions are still unconstitutionally vague. Verified Class Action Complaint at 184, *Does III*, No. 2:22-cv-10209 (E.D. Mich. Feb. 2, 2022).

120. *Id.* § 8(3), 2020 Mich. Legis. Serv. at 2247.

121. *Id.* § 8(3)(e).

122. *See generally* Elizabeth Reiner Platt, Note, *Gangsters to Greyhounds: The Past, Present, and Future of Sex Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 767–78 (2013) (detailing legal challenges to States' sex offender laws).

123. Matthews v. Eldridge, 424 U.S. 319, 332 (1976).

124. *In re* Wentworth, 651 N.W.2d 773, 777 (Mich. Ct. App. 2002) (per curiam) (citations omitted).

125. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003).

126. *Id.* at 7–8.

127. *See* Doe v. Mich. Dep't of State Police, 490 F.3d 491, 502 (6th Cir. 2007); Fullmer v. Mich. Dep't of State Police, 360 F.3d 579, 581–82 (6th Cir. 2004); *accord* Doe v. Abbott, 945 F.3d 307, 312 (5th Cir. 2019); Murphy v. Rychlowski, 868 F.3d 561, 565–67 (7th Cir. 2017); Doe v. Cuomo, 755 F.3d 105, 112–13 (2d Cir. 2014); Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005); Doe v. Tandeske, 361 F.3d 594, 596 (9th Cir. 2004); *see also* Mileski v. Washington, 468 F. App'x 585, 586–87 (6th Cir. 2012) (holding that individuals convicted of non-listed offenses are afforded the chance to contest whether their convictions fall within the scope of MSORA's "catch-all" listed offense provision).

128. *See, e.g.*, People v. Bosca, 871 N.W.2d 307, 353 (Mich. Ct. App. 2015), *rev'd on other grounds*, 969 N.W.2d 55 (Mich. 2022) (mem.).

process for correcting the mistake.[129] A challenge on this ground against MSORA is currently pending in federal court.[130]

In *Hart v. Hillsdale County*, Anthony Hart challenged MSORA in federal court on procedural due process grounds.[131] In 2013, Hart was registered as a sex offender and incorrectly listed his address as *79* Budlong Street when updating his information with law enforcement.[132] After police discovered that Hart was living at *76* Budlong Street, he was arrested and charged with violating MSORA.[133] The following year, Hart was arrested again after he failed to annually register and was sentenced to up to two years in prison.[134] However, Hart had been convicted of only one listed offense as a juvenile and had been designated as a Tier II offender.[135] After the 2011 amendments, only Tier III juvenile offenders were required to register with MSORA, so Hart was not required to register as a sex offender when he was twice arrested for violating MSORA.[136]

Hart was unaware that he was no longer required to register with MSORA when he was arrested in 2013 and 2014.[137] The State was apparently unaware as well; law enforcement told Hart that he was required to register and Hart was convicted for MSORA violations years after his registration was no longer required.[138] After Hart had served nineteen months of his sentence, the Michigan Department of Corrections realized the error and released him.[139] Hart subsequently sued several sheriff's department employees under title 42, section 1983 of the U.S. Code, arguing that his wrongful inclusion in PSOR imposed stigma in violation of his liberty interests without due process.[140] Hart also sought to recover against the city and county of Hillsdale for his wrongful arrests and incarceration.[141]

The district court denied the State and municipal defendants' motion to dismiss for failure to state a claim, and they appealed.[142] On appeal, the Sixth Circuit allowed Hart's procedural due process claim to proceed against the municipal defendants and the county employees who published Hart's information in the PSOR and specified

129. *See* Schepers v. Comm'r, Ind. Dep't of Corr., 691 F.3d 909, 914–16 (7th Cir. 2012); Brown v. Montoya, 662 F.3d 1152, 1168–69 (10th Cir. 2011); *cf.* Vega v. Lantz, 596 F.3d 77, 80–82 (2d Cir. 2010) ("[W]rongfully classifying an inmate as a sex offender may have a stigmatizing effect which implicates a constitutionally protected liberty interest." (citations omitted)).

130. Hart v. Hillsdale Cnty., 973 F.3d 627 (6th Cir. 2020), *remanding to* No. 16-10253 (E.D. Mich. Jan. 1, 2021).

131. *Id.* at 643–44.

132. *Id.* at 633–34.

133. *Id.*

134. *Id.* at 634.

135. *Id.* at 633.

136. *Id.*

137. *Id.*

138. *Id.* at 633–34.

139. *Id.* at 634.

140. *Id.* at 634, 643–44. *See generally* Paul v. Davis, 424 U.S. 693, 701–10 (1976) (articulating the "stigma-plus" test for procedural due process claims upon which Hart relied).

141. . *Hart*, 973 F.3d at 645. The plaintiff sought to recover on a theory of municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Id.*

142. *Hart*, 973 F.3d at 634.

that Hart would need to identify a specific procedural flaw to prevail.[143] Hart's claims are currently set for trial.[144]

Hart could argue that the State's petition procedure for discontinuing registration was inadequate. MSORA allows individuals who are no longer required to register with MSORA to petition courts to discontinue their registration.[145] MSORA also imposes an affirmative duty to remove individuals' information from the public and law enforcement databases who are no longer required to register as sex offenders.[146] The Ninth Circuit held that similar procedures insufficiently guaranteed due process,[147] but a federal district court rejected a similar claim regarding MSORA because the plaintiffs had failed to show the deprivation of a protected interest.[148]

In any case, punishing individuals for failing to comply with MSORA who are not required to register as sex offenders serves no legitimate public safety purpose and exposes municipalities and state employees to liability. The Michigan legislature should require law enforcement to identify individuals who are currently complying with MSORA or whose information is listed in the public or law enforcement registries that are not required to register as sex offenders. The State should notify those individuals that their registration is no longer required and purge their information from its records. Placing the onus on private citizens to learn that their registration is no longer required and petition courts to recognize that fact does nothing to protect the public from supposedly dangerous sex offenders.

IV. STRICT SCRUTINY: THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

When plaintiffs challenge laws under the federal[149] or Michigan[150] constitutions' equal protection and due process clauses, courts apply strict scrutiny if the law infringes on fundamental rights. In equal protection cases, plaintiffs must also allege that they are a member of a class treated differently than some other group of people.[151] Sex offenders can accomplish this easily enough because they are necessarily members of a class of sex offenders. However, locating a fundamental interest has proven more difficult.

143. *Id.* at 645–46.

144. . Scheduling Order, *Hart*, No. 16-10253 (E.D. Mich. Jan. 7, 2021).

145. . MICH. COMP. LAWS ANN. § 28.728c(15)(b) (West 2020).

146. *Id.* § 28.728(9).

147. *See* Humphries v. Cnty. of Los Angeles, 554 F.3d 1170, 1184–1201 (9th Cir. 2009), *rev'd on other grounds*, 562 U.S. 29 (2010); *accord* Collier v. Buckner, 303 F. Supp. 3d 1232, 1265–71 (M.D. Ala. 2018) (holding that the plaintiffs stated colorable claims for procedural due process violations).

148. Akella v. Mich. Dep't of State Police, 67 F. Supp. 2d 716, 731–32 (E.D. Mich. 1997) (holding that plaintiffs whose address was wrongfully listed in the PSOR had failed to properly allege the deprivation of a protected liberty interest).

149. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (equal protection); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (due process).

150. Phillips v. Mirac, Inc., 685 N.W.2d 174, 184 (Mich. 2004) (equal protection); Morreale v. Dep't of Comm. Health, 726 N.W.2d 438, 441 (Mich. Ct. App. 2006) (due process).

151. *Cleburne*, 473 U.S. at 439; People v. Bosca, 871 N.W.2d 307, 354 (Mich. Ct. App. 2015) (state law), *rev'd on other grounds*, 969 N.W.2d 55 (Mich. 2022) (mem.).

Under the strict scrutiny standard, laws that infringe on fundamental rights must be "suitably tailored to serve a compelling state interest."[152] Courts treat the federal Equal Protection and Due Process Clauses as protective against infringements upon the same bundle of rights when evaluating challenges to MSORA.[153] In the equal protection context, courts also apply strict scrutiny to laws that discriminate against protected classes.[154]

Courts will apply rational basis review to laws that do not infringe on fundamental rights or discriminate against a protected class in equal protection[155] and substantive due process cases.[156] To pass the rational basis test, a law must be "rationally related to a legitimate state interest."[157]

No court has ever held that MSORA discriminates against a protected class or infringes on fundamental rights in an equal protection or due process challenge, so no court has ever applied strict scrutiny to MSORA in an equal protection or due process case. Courts have held that Michigan sex offenders generally[158] and sub-classes of Michigan sex offenders[159] do not constitute protected classes. Courts have also rejected claims that MSORA violates fundamental rights,[160] including the rights to travel,[161] obtain employment,[162] keep one's information private,[163] and more.[164]

152. *Cleburne*, 473 U.S. at 440.

153. *See, e.g.*, Doe v. Munoz, 507 F.3d 961, 966 (6th Cir. 2007) (holding that the plaintiffs' failures to show that MSORA deprived them of any fundamental rights under the Due Process Clause was dispositive of whether the plaintiffs had properly shown the deprivation of a fundamental rights under the Equal Protection Clause).

154. *See, e.g.*, Akella v. Mich. Dep't of State Police, 67 F. Supp. 2d 716, 731–32 (E.D. Mich. 1997).

155. *Cleburne*, 473 U.S. at 440; People v*Id*ziak, 773 N.W.2d 616, 628 (Mich. 2009) (state law).

156. Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Morreale v. Dep't of Comm. Health, 726 N.W.2d 438, 441 (Mich. Ct. App. 2006).

157. *Cleburne*, 473 U.S. at 439.

158. Lanni v. Engler, 994 F. Supp. 849, 855 (E.D. Mich. 1998); Haddad v. Fromson, 154 F. Supp. 2d 1085, 1094 (W.D. Mich. 2001), *overruled on other grounds by* Lapides v. Bd. of Regents, 535 U.S. 613 (2002); *accord* Cutshall v. Sundquist, 193 F.3d 466, 482 (6th Cir. 1999); Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347, 1353 (10th Cir. 2017); Doe v. Moore, 410 F.3d 1337, 1346 (11th Cir. 2005); United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir. 2001).

159. *See* Doe v. Mich. Dep't of State Police, 490 F.3d 491, 503 (6th Cir. 2007) (pre-2004 HYTA offenders under MSORA); *accord* U.S. v. Juvenile Male, 670 F.3d 999, 1009 (9th Cir. 2012) (juveniles); *Moore*, 410 F.3d at 1346 (multiple categories); Artway v. Att'y Gen., 81 F.3d 1235, 1267 (3d Cir. 1996) (repetitive and compulsive sex offenders).

160. State courts have held that MSORA violates *no* fundamental rights protected by state law. *See, e.g.*, People v. Bosca, 871 N.W.2d 307, 354 (Mich. Ct. App. 2015), *rev'd on other grounds*, 969 N.W.2d 55 (Mich. 2022) (mem.); *cf.* Millard v. Camper, 971 F.3d 1174, 1185 (10th Cir. 2020) ("The Appellees fail to show how [Colorado's Sex Offender Registration Act] violated their fundamental rights.").

161. *Does I*, 932 F. Supp. 2d 803, 814–17 (E.D. Mich. 2013), *rev'd*, 834 F.3d 696 (6th Cir. 2016); *accord* Hope v. Comm'r of Ind. Dep't of Corr., 9 F.4th 513, 525–28 (7th Cir. 2021); Doe v. Cuomo, 755 F.3d 105, 114 & n.5 (2d Cir. 2014); United States v. Ambert, 561 F.3d 1202, 1209–10 (11th Cir. 2009); United States v. Shenandoah, 595 F.3d 151, 162–63 (3d Cir. 2010), *abrogated by* Reynolds v. United States, 565 U.S. 432 (2012); Prynne v. Settle, 848 F. App'x 93, 103–04 (4th Cir. 2021); United States v. Byrd, 419 F. App'x 485, 491–92 (5th Cir. 2011).

162. *Does I*, 932 F. Supp. 2d at 817–18; *accord Prynne*, 848 F. App'x at 104.

163. *See infra* Section IV.A.

164. *See* Mileski v. Washington, 468 F. App'x 585, 587 (6th Cir. 2012) (right to be free from registration requirements following a conviction for a listed offense lacking a sexual element); *see also* Vasquez v. Foxx, 895 F.3d 515, 525 (7th Cir. 2018) (rejecting violation of right to establish home claim); *Moore*, 410 F.3d at 1344–45 (rejecting violation of right to refuse sex offender registration and prevent public dissemination of

Claims that MSORA violates registrants' privacy rights deserve special attention given the frequency with which courts have addressed such challenges.

A. Sex Offenders' Privacy: An Oxymoron

The Supreme Court has recognized constitutionally protected privacy interests in "avoiding disclosure of personal matters" and in "independence in making certain kinds of important decisions."[165] Concerning the first strand of protected privacy interests, courts have repeatedly held that MSORA registrants have no protected interests in preventing the State from publishing their publicly available information in the PSOR.[166] Even where MSORA discloses registrants' otherwise private information, courts hold that the State's interest in preventing future sex crimes outweighs registrants' privacy interests.[167]

The *Does I* plaintiffs challenged MSORA under the second strand of substantive due process privacy claims, arguing that MORA's student safety zones violated their rights to participate in the education and upbringing of their children.[168] Judge Cleland did not reach this privacy claim,[169] and it was mooted when MSORA's student safety zones were repealed, but other circuits have rejected similar claims.[170] Given courts' consistent refusals to hold that MSORA infringes on fundamental rights and the removal of the student safety provisions from MSORA, courts are unlikely to subject MSORA to strict scrutiny and will evaluate the statute under

information claims); Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004) (rejecting violation of right to be free from sex offender registration and notification requirements claims); Gunderson v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003) (rejecting presumption of innocence claim).

165. Whalen v. Roe, 429 U.S. 589, 599 (1977).

166. Lanni v. Engler, 994 F. Supp. 849, 856 (E.D. Mich. 1998); Doe v. Kelley, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); *In re* Wentworth, 651 N.W.2d 773, 778 (Mich. Ct. App. 2002) (per curiam); *accord* Cutshall v. Sundquist, 193 F.3d 466, 481 (6th Cir. 1999) ("The Constitution does not provide Cutshall with a right to keep his registry information private . . . ."); *Cuomo*, 755 F.3d at 114; Russell v. Gregoire, 124 F.3d 1079, 1093–94 (9th Cir. 1997); *Prynne*, 848 F. App'x at 105; *see also* Willman v. Att'y Gen., 972 F.3d 819, 825 (6th Cir. 2020) (rejecting claim that the publication of the plaintiff's information in Michigan's PSOR violated a *First Amendment* privacy right); *In re* Whittaker, 607 N.W.2d 387, 390 (Mich. Ct. App. 1999) (holding that MSORA did not deny parents of sex offender with whom sex offender lived equal protection by requiring that the parents' address be listed in the PSOR).

167. Doe v. Munoz, 507 F.3d 961, 964–66 (6th Cir. 2007) (holding that Michigan may disclose individuals' information whose convictions for listed offenses were subsequently set aside by court orders); Doe v. Mich. Dep't of State Police, 490 F.3d 491, 500–01 (6th Cir. 2007) (holding that Michigan may disclose HYTA offenders' information even where those offenders pled guilty in exchange for their information being kept private); *accord* A.A. *ex rel.* M.M. v. New Jersey, 341 F.3d 206, 210–14 (3d Cir. 2003); *Prynne*, 848 F. App'x 93 at 104–05.

168. *See Does I*, No. 12-11194, slip op. at 39–40 (E.D. Mich. filed Mar. 31, 2015), *rev'd*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016).

169. *Id.* at 44 (holding that it was impossible to tell whether MSORA's student safety provisions violated the plaintiffs' rights because the contested provisions were unconstitutionally vague).

170. *See* Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015 (8th Cir. 2006) (rejecting violation of right to reside with family members); Doe v. Miller, 405 F.3d 700, 709–11 (8th Cir. 2005) (rejecting violation of right to personal choices regarding the family); Paul P. v. Vernerio, 170 F.3d 396, 404–405 (3d Cir. 1999) (rejecting violation of interest in family relationships); *Prynne*, 848 F. App'x at 104–05 (rejecting violation of right to have biological children).

rational basis review. Part VI discusses whether MSORA passes the rational basis test.

V. BILL OF ATTAINDER, DUE PROCESS, EX POST FACTO, DOUBLE JEOPARDY, AND CRUEL & UNUSUAL PUNISHMENT CLAUSES

Challenges to MSORA brought under several constitutional provisions, namely the federal and Michigan bill of attainder, ex post facto, double jeopardy, and cruel and unusual punishment clauses, effectively amount to claims that the statute imposes unlawful punishment.[171]

A. The Bill of Attainder Clause

The bill of attainder clauses of the federal[172] and Michigan[173] constitutions prevent the State from passing laws punishing anyone without a judicial trial or conviction. The Supreme Court has invalidated five laws as bills of attainder,[174] each of which targeted political groups engaged in allegedly subversive activities.[175]

The English Parliament attainted those suspected of disloyalty to the Crown,[176] so the Court's bill of attainder jurisprudence tracks with an originalist understanding of attainder. Sex offenders are not a political class, so MSORA is not a bill of attainder within an originalist framework.

A purposive approach to attainder also cuts against interpreting MSORA as a bill of attainder. The talisman of attainder is punishment *purposefully* imposed,[177] and both federal[178] and state[179] courts have repeatedly held that the Michigan legislature did not enact MSORA to punish sex offenders.[180] Rather, the legislature enacted MSORA to protect public safety, so MSORA was not enacted with the intent to attain sex offenders.

In any case, the federal and state ex post facto and double jeopardy clauses adequately protect against attainder because those clauses effectively prohibit the Michigan legislature from subjecting registrants to the same obligations as the federal

171. *See* Jane Ramage, Note, *Reframing the Punishment Test Through Modern Sex Offender Legislation*, 88 FORDHAM L. REV. 1099, 1107 (2019).

172. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1344 (2d ed. Boston, Charles C. Little & James Brown 1851).

173. City of Detroit v. Div. 26 of Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emps., 51 N.W.2d 228, 232 (Mich. 1952).

174. Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WISC. L. REV. 1203, 1229 (2010).

175. *See* U.S. v. Brown, 381 U.S. 437 (1965) (communists and labor unionists); U.S. v. Lovett, 328 U.S. 303 (1946) (law targeting communists); Pierce v. Carskadon, 83 U.S. 234 (1872) (law targeting ex-Confederates); *Ex parte* Garland, 71 U.S. 33 (1866) (same); Cummings v. Missouri, 71 U.S. 277 (1866) (same).

176. Nixon v. Admin. of Gen. Servs., 433 U.S. 473–74 (1977).

177. *See Lovett*, 328 U.S. at 326–27 (Frankfurter, J., concurring).

178. *E.g.*, *Does I Appeal*, 834 F.3d 696, 700–01 (6th Cir. 2016).

179. *E.g.*, People v. Betts, 968 N.W.2d 497, 507–09 (Mich. 2021).

180. *See also* 57 C.J.S. *Mental Health* § 280 (2018) ("A sexual offender registration act does not adjudicate guilt nor inflict punishment, and thus, it may not constitute a bill of attainder." (footnote omitted)).

and state bill of attainder clauses ostensibly would.[181] Further, Michigan's two federal district courts held that MSORA was not a bill of attainder.[182] Federal precedent and the history of the federal Bill of Attainder Clause indicate that courts will decline to hold that MSORA's restrictions and obligations constitute attainder under either federal or state law.[183]

B. The Ex Post Facto, Double Jeopardy, and Cruel & Unusual Punishment Clauses

The double jeopardy, ex post facto, and cruel and unusual punishment clauses of the federal[184] and Michigan[185] constitutions prohibit the State from punishing individuals twice for the same conduct, increasing individuals' punishments for crimes after they have already been sentenced, and imposing punishment that is cruel and unusual, respectively. Until *Does I Appeal*, almost every other federal circuit court,[186] including prior Sixth Circuit panels,[187] that have considered whether a state sex offender registration law imposes unconstitutional punishment have held that it

181. *See infra* Part IV (discussing how the double jeopardy and ex post facto clauses of the federal and Michigan constitutions protect convicted sex offenders from being punished except as a sentence for their sex crimes).

182. Lanni v. Engler, 994 F. Supp. 849, 854–55 (E.D. Mich. 1998); Doe v. Kelley, 961 F. Supp. 1105, 1108–12 (W.D. Mich. 1997); *accord* Cutshall v. Sundquist, 193 F.3d 466, 477 (6th Cir. 1999); Roe v. Farwell, 999 F. Supp. 174, 193 (D. Mass. 1998).

183. *But see* Joel A. Sherwin, *Are Bills of Attainder the New Currency? Challenging the Constitutionality of Sex Offender Regulations that Inflict Punishment Without the "Safeguard of a Judicial Trial"*, 37 PEPPERDINE L. REV. 1301 (2010) (arguing that punitive sex offender laws are bills of attainder).

184. Calder v. Bull, 3 U.S. 386, 391 (1798) (ex post facto); *Ex parte* Lange, 85 U.S. 163, 174 (1873) (double jeopardy); Ingraham v. Wright, 430 U.S. 651, 666–67 (1977) (cruel and unusual punishment).

185. People v. Earl, 845 N.W.2d 721, 725 (Mich. 2014) (ex post facto); People v. Torres, 549 N.W.2d 540, 549 (Mich. 1996) (double jeopardy); People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992) (cruel *or* unusual punishment).

186. Hope v. Comm'r of Ind. Dep't of Corr., 9 F.4th 513, 530–34 (7th Cir. 2021); Doe v. Abbott, 945 F.3d 307, 313–15 (5th Cir. 2019); Vasquez v. Foxx, 895 F.3d 515 (7th Cir. 2018); Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); Doe v. Cuomo, 755 F.3d 105, 109–12 (2d Cir. 2014); Am. C.L. Union v. Masto, 670 F.3d 1046, 1052–58 (9th Cir. 2012); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1017 (8th Cir. 2006); Doe v. Miller, 405 F.3d 700, 718–23 (8th Cir. 2005); Hatton v. Bonner, 356 F.3d 955, 961–67 (9th Cir. 2004); Moore v. Avoyelles Corr. Ctr., 253 F.3d 870, 872–73 (5th Cir. 2001); Burr v. Snider, 234 F.3d 1052, 1053–55 (8th Cir. 2000); Femedeer v. Haun, 227 F.3d 1244, 1248–54 (10th Cir. 2000); Roe v. Off. of Adult Prob., 125 F.3d 47, 52–55 (2d Cir. 1997); Doe v. Pataki, 120 F.3d 1263, 1272–85 (2d Cir. 1997); E.B. v. Vernerio, 119 F.3d 1077, 1092–1105 (3d Cir. 1997); Russell v. Gregoire, 124 F.3d 1079, 1083–93 (9th Cir. 1997); Artway v. Att'y Gen., 81 F.3d 1235, 1253–67 (3d Cir. 1996); Windwalker v. Governor of Ala., 579 F. App'x 769, 771–73 (11th Cir. 2014); Johnson v. Terhune, 184 F. App'x 622, 624 (9th Cir. 2006).

But cf. Prynne v. Settle, 848 F. App'x 93, 101–03 (4th Cir. 2021) (holding that a plaintiff stated a colorable claim that state sex offender registration statute violated the Ex Post Facto Clause); Doe v. Miami-Dade Cnty., 846 F.3d 1180, 1183–86 (11th Cir. 2017) (holding that a plaintiff stated a colorable claim that state sex offender registration statute violated the Ex Post Facto Clause with respect to a county ordinance), *remanded to* No. 1:14-cv-23933-PCH, 2018 WL 10780510 (Dec. 18, 2018) (holding that county's sex offender residency restriction was rationally related to public safety).

187. Doe v. Bredesen, 507 F.3d 998, 1003–07 (6th Cir. 2007); Cutshall v. Sundquist, 193 F.3d 466, 476–77 (6th Cir. 1999); *see also* United States v. Shannon, 511 F. App'x 487, 490–92 (6th Cir. 2013) (holding that federal sex offender registration statute did not impose punishment).

does not.[188] Michigan state courts also routinely rejected claims that MSORA punished, until *Betts*.[189] However, other state supreme courts have held that their States' sex offender registration laws punish ex post facto.[190]

1. Double Jeopardy, Ex Post Facto, and Cruel & Unusual Punishment Distinguished

In the context of sex offender registration laws, the federal and state double jeopardy clauses are more protective than the federal and state ex post facto clauses, and the cruel and unusual punishment clauses are moot. This is true because anyone convicted of a sex crime has faced some legal punishment. Therefore, punitive sex offender registration laws that apply to individuals who have already been convicted of sex crimes violate the federal and state double jeopardy and ex post facto clauses because such laws impose duplicative *and* retroactive punishment. Moreover, punitive sex offender registration laws that only *prospectively* apply to individuals convicted of sex crimes *will* violate the federal and state double jeopardy clauses once any sex offender is subject to them. However, such laws do not impose punishment ex post facto. As such, the federal and state double jeopardy clauses prohibit prospective *and* retroactive punitive sex offender registration laws, while the federal and state ex post facto clauses prevent only the latter. At bottom, Michigan may not enact an ostensibly civil regime to punish sex offenders, regardless of whether the punishment is cruel and unusual.[191]

188. A notable exception is the Ninth Circuit's decision in *Doe v. Otte I*, 259 F.3d 979 (9th Cir. 2001), which was reversed by the Supreme Court in *Smith*.

189. People v. Golba, 729 N.W.2d 916, 924–27 (Mich. Ct. App. 2007) (rejecting claim that MSORA is punitive under federal law).

For cases holding that MSORA is not punitive under federal and state law, see People v. Patton, 925 N.W.2d 901, 909–14 (Mich. Ct. App. 2018); People v. Tucker, 879 N.W.2d 906, 911–26 (Mich. Ct. App. 2015) (per curiam); People v. Costner, 870 N.W.2d 582, 588–90 (Mich. Ct. App. 2015); People v. Pennington, 610 N.W.2d 608, 609–13 (Mich. Ct. App. 2000) (per curiam); People v. Temelkoski, 859 N.W.2d 743, 750–61 (Mich. Ct. App. 2014) (per curiam), *rev'd on other grounds*, 905 N.W.2d 593 (Mich. 2018); and People v. Snyder, No. 325449, 2016 WL 683206, at *3 (Mich. Ct. App. Feb. 18, 2016) (per curiam), *rev'd*, 964 N.W.2d 594 (Mich. 2021) (mem.).

For cases holding that MSORA is not punitive under state law, see People v. Bosca, 871 N.W.2d 307, 351–52 (Mich. Ct. App. 2015), *rev'd*, 969 N.W.2d 55 (Mich. 2022) (mem.); People v. Fonville, 804 N.W.2d 878, 887–89 (Mich. Ct. App. 2011); *In re* TD, 823 N.W.2d 101, 105–10 (Mich. Ct. App. 2011), *vacating as moot* 821 N.W.2d 569 (Mich. 2012); and *In re* Ayres, 608 N.W.2d 132, 134–39 (Mich. Ct. App. 1999), *superseded by statute*, Act of June 28, 1999, Pub. Act No. 85, § 8(2), 1999 Mich. Pub. Acts 271, 279–80. *But see also infra* note 191 (discussing the sole state case holding that MSORA imposed cruel and unusual punishment).

190. *See* Doe v. State, 111 A.3d 1077, 1090–1100 (N.H. 2015); State v. Okla. Dep't of Corr., 305 P.3d 1004, 1017–31 (Okla. 2013); Wallace v. State, 905 N.E.2d 371, 377–84 (Ind. 2009); State v. Pollard, 908 N.E.2d 1145, 1148–54 (Ind. 2009); Commonwealth v. Baker, 295 S.W.3d 437, 442–47 (Ky. 2009); State v. Letalien, 985 A.2d 4, 12–26 (Me. 2009); Commonwealth v. Cory, 911 N.E.2d 187, 191–97 (Mass. 2009); Doe v. State, 189 P.3d 999, 1007–19 (Alaska 2008); *see also* Commonwealth v. Muniz, 164 A.3d 1198, 1208–22 (Penn. 2017) (challenge to federal sex offender registration laws). For an evaluation of these courts' holdings concerning the challenged sex offender statutes' rational relationships to legitimate purposes, see *infra* note 273 and accompanying text.

191. There was one successful MSORA challenge brought under the cruel or unusual punishment clause of the Michigan Constitution in *People v. Dipiazza*, 778 N.W.2d 264 (Mich. Ct. App. 2009). *Dipiazza* was decided

The federal and state ex post facto clauses also seem irrelevant at first blush, but successful ex post facto challenges may be more powerful than successful double jeopardy challenges. The federal and state double jeopardy clauses protect against retroactive *and* prospective punishment while the ex post facto clauses prevent only retroactive punishment, so successful ex post facto challenges may be more powerful than successful double jeopardy challenges. For example, it is unclear whether Judge Cleland in *Does II* would have voided the public laws containing 2011 amendments *in toto* if the plaintiffs had raised a double jeopardy challenge and not an ex post facto challenge.

Courts may apply different remedies to laws that violate the ex post facto clauses than those which place individuals in double jeopardy. The ex post facto clauses prohibit ex post facto *laws*,[192] so it follows that courts will enjoin States from enforcing laws imposing any retroactive punishment in their entirety. In contrast, the double jeopardy clauses prohibit punishment in the abstract,[193] so it is possible that in *Does II*, Judge Cleland would not have enjoined enforcement of the public laws containing the 2006 and 2011 amendments but rather only the problematic provisions themselves. In any case, the substantive inquiry in both double jeopardy and ex post facto cases is whether MSORA imposes punishment.

2. The Intent-Effects Test

Courts apply the "intent-effects" test to determine whether statutes impose retroactive punishment in violation of the state[194] and federal[195] ex post facto clauses or duplicative punishment prohibited by the double jeopardy clauses. Under the intent prong of the intent-effects test, courts ask whether the legislature enacted the law to punish.[196] If the legislature intended the law to be punitive, then it imposes punishment and may not be applied to individuals for conduct (1) that occurred before the law was passed (ex post facto); or (2) for which individuals have already been punished (double jeopardy).[197] If the legislature instead passed a law to create a civil

when MSORA still required pre-2004 HYTA offenders to register regardless of whether they successfully completed their HYTA requirements, and their convictions were dismissed. *Id.* The defendant in *Dipiazza* was convicted of a listed offense and assigned HYTA status before October 2004. *Id.* at 266. The defendant successfully completed his HYTA requirements, and his conviction was dismissed, but he was still required to register as a sex offender for twenty-five years. *Id.* The trial court reduced the defendant's registration period to ten years. *Id.* The court of appeals held that requiring the defendant to register as a sex offender was punishment that was cruel and unusual. *Id.* at 268, 273–74. However, the defendant in *Dipiazza* could have just as easily challenged his registration period under the double jeopardy clause of the Michigan constitution.

192. *See* U.S. CONST. art I, § 9, cl. 3 ("No . . . ex post facto *Law* shall be passed." (emphasis added)); MICH. CONST. art. I, § 10 ("No . . . ex post facto *law* . . . shall be enacted." (emphasis added)).

193. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."); MICH. CONST. art. I, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy.").

194. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 92–97 (2003).

195. *See, e.g.*, People v. Earl, 845 N.W.2d 721, 728 (Mich. 2014) (ex post facto clause); McClelland v. Mich. Dep't of State Police, No. 323875, 2016 WL 155869, at *3 (Mich. Ct. App. Jan. 12, 2016) (per curiam) (double jeopardy clause).

196. Porte, *supra* note 1, at 727.

197. *See id.*

regime, courts determine whether the law's effects render it punitive nonetheless.[198] Even *Does I Appeal*[199] and *Betts*[200] agreed that the Michigan legislature did not enact MSORA to punish sex offenders, so courts will focus on the effects prong of the intent-effects test in future challenges to the statute.

Courts examine the factors detailed by the Supreme Court in *Kennedy v. Mendoza Martinez*[201] to determine whether a law is effectively punitive.[202] The *Mendoza-Martinez* factors include whether the law: (1) imposes what has historically been regarded as punishment; (2) imposes affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) advances legitimate, nonpunitive purposes; and (5) is excessive in relation to its legitimate purpose.[203] In *Smith v. Doe*, the Supreme Court applied the intent-effects test and held that Alaska's Sex Offender Registration Act ("ASORA") did not impose punishment.[204]

ASORA was similar to MSORA in many respects.[205] For example, ASORA required all sex offenders to register with law enforcement for either fifteen years or for life, depending on the severity of their offenses.[206] Upon initial registration, registrants were required to provide law enforcement with, among other things, their names, addresses, employers, birth dates, driver's license numbers, and a description of any car they "ha[d] access to regardless of whether that access is regular or not."[207] This information, along with registrants' photographs, was published in an online database.[208] Alaska registrants were also subject to periodic and immediate reporting requirements.[209] However, unlike the old MSORA, ASORA's reporting requirements were not necessarily in-person; registrants could notify law enforcement in writing.[210] The Sixth Circuit and the Michigan Supreme Court applied the same analysis as *Smith* in *Does I Appeal* and *Betts* and held that MSORA imposed punishment.[211]

a. Resemblance to Traditional Forms of Punishment

Concerning the first *Mendoza-Martinez* factor, the Supreme Court in *Smith* rejected the respondent's arguments that ASORA's obligations resembled traditional forms of punishment.[212] *Smith* held that ASORA's obligations did not resemble

198. *Id.* at 728.
199. 834 F.3d 696, 700–01 (6th Cir. 2016).
200. 968 N.W.2d 497, 507–08 (Mich. 2021).
201. 372 U.S. 144, 168–69 (1963).
202. Smith v. Doe, 538 U.S. 84, 97 (2003).
203. *Id.*
204. *Id.* at 105–06.
205. *See id.* at 89–92.
206. ALASKA STAT. § 12.63.020 (2018).
207. *Id.* § 12.63.010 (2006).
208. *Id.* § 18.65.087 (2004).
209. *See id.*
210. *Id.*
211. *See* Porte, *supra* note 1, at 733–36.
212. Smith v. Doe, 538 U.S. 84, 97–99 (2003).

whipping, pillory, or branding because they imposed no physical pain.[213] The Court also held that Alaska's online registry did not resemble public shaming, humiliation, or banishment because it merely disseminated truthful information already available to the public.[214] Any negative effects stemming from the public availability of registrants' information were "but a collateral consequence of a valid regulation."[215]

Does I Appeal and *Betts* easily distinguished MSORA from ASORA. For example, both courts agreed that MSORA's student safety zone restrictions resembled banishment and parole.[216] Additionally, Michigan's PSOR went further than Alaska's by listing registrants' tier designations, which, according to the Sixth Circuit, shamed registrants by listing their *presumed* dangerousness without any measure of their *actual* dangerousness.[217] The Sixth Circuit also noted that pre-October 2004 HYTA sex offenders' information was listed in the public registry when, in the absence of MSORA, their records would have been sealed if they had completed their HYTA requirements.[218] Both courts also held that MSORA's in-person reporting requirements resembled parole because they enabled law enforcement to constantly monitor registered sex offenders.[219]

b. Affirmative Disability or Restraint

In *Smith*, Justice Kennedy concluded that the second *Mendoza-Martinez* factor weighed against finding that ASORA was punitive.[220] The Court reasoned that ASORA's ongoing reporting requirements did not impose affirmative disability because they left offenders *free to change* jobs or residences; offenders were required only to *report* those changes to law enforcement.[221] However, the Court did not address whether the lower court's erroneous assumption that ASORA's reporting requirements were in-person would have, if accurate, changed the affirmative disability calculus.[222]

Does I Appeal and *Betts* both held that multiple provisions of MSORA imposed affirmative disability or restraint. Specifically, both courts detailed that MSORA's in-person reporting requirements disabled registrants from engaging in various activities without reporting them to police, and MSORA's student safety provisions imposed obvious restraints.[223]

213. *Id.* at 97–98.

214. *Id.* at 98.

215. *Id.* at 99.

216. *Does I Appeal*, 834 F.3d 696, 701–03 (6th Cir. 2016); *People v. Betts*, 968 N.W.2d 497, 507–10 (Mich. 2021).

217. *Does I Appeal*, 834 F.3d at 702–03. *Contra Betts*, 968 N.W.2d at 528 (Viviano, J., concurring in part and dissenting in part) ("[T]he publication of the registrant's tier classification is not a punishment.").

218. *Does I Appeal*, 834 F.3d at 702–03.

219. *Id.*; *Betts*, 968 N.W.2d at 509–10.

220. Smith v. Doe, 538 U.S. 84, 100 (2003).

221. *Id.*

222. *Id.* at 101.

223. *Does I Appeal*, 834 F.3d at 703; *Betts*, 968 N.W.2d at 510–12.

c. Furtherance of the Goals of Punishment

In *Smith*, the State conceded the third *Mendoza-Martinez* factor and agreed with the respondents that ASORA may deter crime, but the Court held that this did not weigh heavily in favor of holding that ASORA was punitive.[224] The Court also held that even if Alaska's lifetime-registration periods implied that Alaska had retributively imposed more serious restrictions on offenders who had committed more serious crimes, the State's disparate registration periods were rationally connected to future dangerousness and were not punitive.[225]

Like Alaska in *Smith*, Michigan conceded that MSORA deterred sex crimes in *Does I Appeal*[226] and *Betts*.[227] Both courts articulated that MSORA was retributive because offenders' crimes of convictions, as opposed to individualized assessments of dangerousness, controlled whether Tier I, Tier II, or Tier III restrictions applied.[228] The Sixth Circuit also reasoned that MSORA incapacitated registrants by reducing opportunities to re-offend.[229]

d. Rational Connection to Nonpunitive Purpose

The Supreme Court has declared that the fourth *Mendoza-Martinez* factor, rational connection to a nonpunitive purpose, was the most significant.[230] In *Smith*, the parties conceded that ASORA legitimately furthered public safety.[231] In *Betts*, the Michigan Supreme Court held that MSORA furthered the same legitimate interest, "given the low bar of rationality."[232] In contrast, the Sixth Circuit questioned the efficacy of sex offender registration schemes in general, pointing to studies concluding that sex offender registration statutes are at best ineffective and, at worst, actually increase the risk of recidivism among registrants.[233]

e. Scope with Respect to Legitimate Purpose

The *Smith* litigants argued that although ASORA was rationally related to public safety, its provisions were overbroad.[234] The Court disagreed, holding that even if ASORA was not narrowly drawn, any imprecision did not "suggest that the Act's

224. *Smith*, 538 U.S. at 102. Justice Kennedy wrote that any deterrent effect caused by the statute was merely ancillary to its legitimate purpose. *Id.*

225. *Id.*

226. *Does I Appeal*, 834 F.3d at 704.

227. *Betts*, 968 N.W.2d at 512.

228. *See Does I Appeal*, 834 F.3d at 704; *Betts*, 968 N.W.2d at 512. *Contra Betts*, 968 N.W.2d at 528 (Viviano, J., concurring in part and dissenting in part) ("I cannot see how the lack of [individualized risk assessments] and the reliance on the convicted offense constitutes a punishment.").

229. *Does I Appeal*, 834 F.3d at 704.

230. *Smith*, 538 U.S. at 102.

231. *Id.* at 103.

232. *Betts*, 968 N.W.2d at 513.

233. *Does I Appeal*, 834 F.3d at 704–05.

234. *Smith*, 538 U.S. at 103.

nonpunitive purpose [was] a 'sham or mere pretext.'"[235] The Court reasoned that Alaska could rationally legislate sex offenders as a class without individualized assessments of risk given the "frightening and high" recidivism rates reportedly present among *all* sex offenders.[236] Alaska's fifteen-year and lifetime reporting periods were also not found to be excessive in light of the length of time during which sex offenders are likely to re-offend.[237] Finally, Alaska's online registry was permissible "[g]iven the general mobility of our population."[238]

In contrast, *Does I Appeal*[239] and *Betts*[240] held that MSORA's student-safety zones, in-person reporting requirements, and separation of offenders into tiers without individualized risk assessments were excessive concerning the statute's questionably legitimate purpose. The Michigan Supreme Court also doubted whether the length of MSORA's registration periods was necessary.[241] Considering the aggregate weight of all five *Mendoza-Martinez* factors, both courts held that MSORA was an ex post facto law.[242] The next Section applies the *Does I Appeal* and *Smith* analyses to the new MSORA to determine whether the statute is still an ex post facto law.

3. The New MSORA Under the Intent-Effects Test

The Michigan legislature removed some of the provisions from MSORA that the Sixth Circuit and the Michigan Supreme Court took issue with and amended others.[243] The removal of MSORA's student-safety provisions and registrants' tiers from the PSOR ostensibly reduces the punitive effect of the new MSORA. However, local police stations now *may* allow registrants to report remotely.[244] The Michigan legislature should explicitly allow remote reporting, or else registrants whose local police posts continue to require in-person reporting could successfully challenge MSORA. The State did not address MSORA's tier system, but the Sixth Circuit's and the Michigan Supreme Court's objections to MSORA's lack of individualized risk assessments do not comport with well-established precedent as a matter of logic.

The courts' conclusions that MSORA's lack of individualized risk assessments renders the statute punitive is but another way of saying that Michigan may not

235. *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring)).

236. *Id.* (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)); *see also* Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 499 (2015) ("[T]he evidence for *McKune*'s claim that offenders have high recidivism rates . . . was just the unsupported assertion of someone without research expertise who made his living selling [sex offender] counseling programs to prisons." (footnote omitted)).

237. *Smith*, 538 U.S. at 104.

238. *Id.* at 105.

239. *Does I Appeal*, 834 F.3d 696, 705 (6th Cir. 2016).

240. 968 N.W.2d 497, 512–15 (Mich. 2021).

241. *Id.* at 514.

242. *Does I Appeal*, 834 F.3d at 705; *Betts*, 968 N.W.2d at 515.

243. *See supra* Section II.D.

244. MICH. COMP. LAWS ANN. § 28.725 (West Supp. 2021).

regulate sex offenders as a class, a view which *Smith* explicitly rejected.[245] The Supreme Court endorsed Alaska's two-tiered system[246] while *Does I Appeal* and *Betts* rejected Michigan's three-tiered system.[247] Neither Sixth Circuit in *Does I Appeal* nor the Michigan Supreme Court in *Betts* addressed why the latter is permissible while the former is not.

The U.S. Supreme Court's procedural due process jurisprudence in the sex offender registration law context also illustrates the issues with the courts' views. States may permissibly impose implications based solely on a criminal conviction, and such obligations are not necessarily punitive merely because a criminal conviction is a condition precedent to their application.[248] If States have the *power* to regulate sex offenders as a class, it defies logic to say that States impose unconstitutional punishment whenever they exercise that power.

The courts' concerns with MSORA's lack of individualized risk assessments were more likely an expression of the courts' dissatisfaction with the obligations and restrictions that the State categorically imposed.[249] Consequently, whether the new MSORA is an ex post facto law is likely controlled by the fourth and most important *Mendoza-Martinez* factor: rational connection to a legitimate, nonpunitive purpose.[250] However, it is also possible that federal courts could apply the Sixth Circuit's line of cases holding that *federal* sex offender legislation does not punish ex post facto to MSORA. To understand whether these holding could be applied to MSORA, it is necessary to discuss the current federal sex offender registration scheme.

245. Smith v. Doe, 538 U.S. 84, 87 (2003) ("The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not render the Act punitive." (citations omitted)).

246. *Id.* at 84. *See generally* text accompanying *supra* note 206 (detailing ASORA's fifteen-year and lifetime registration periods, which effectively created a two-tiered registration scheme).

247. *Does I Appeal*, 834 F.3d at 705; *Betts*, 968 N.W.2d at 515. The *Does III* plaintiffs argue that MSORA's lack of individualized review and the inability of Tier II and Tier III offenders to petition to end their registration periods. Verified Class Action Complaint at 169–76, *Does III*, No. 2:22-cv-10209 (E.D. Mich. Feb. 2, 2022). If states may prescribe different registration requirements based on registrants' perceived dangerousness, Michigan may restrict more dangerous offenders from petitioning to end their registration periods. The *Does III* plaintiffs' demand for individualized review should be rejected on the strength of *Smith* as well, though the courts' opinions in *Does I Appeal* and *Betts* cast doubt on whether either of the *Does III* plaintiffs' claims discussed will be dismissed.

248. *Smith*, 538 U.S. at 100.

249. Ironically, before the 2011 amendments, scholars argued that adopting a three-tiered registration system would make MSORA *less* punitive. *See* Kari Melkonian, Note, *Michigan's Sex Offender Registration Act: Does It Make Communities Safer? The Implications of the Inclusion of a Broad Range of Offenders, a Review of Statutory Amendments and Thoughts on Future Changes*, 84 U. DET. MERCY L. REV. 355, 378–80 (2007); Mark E. Rath, *Michigan's Scarlet Letter Laws: Are Changes in Order?*, 15 THOMAS M. COOLEY L. REV. 291, 314 (1995).

250. The language used by the Sixth Circuit and the Michigan Supreme Court implied that both courts are willing to overturn MSORA on the grounds that it is not rationally related to a public safety purpose. *Does I Appeal*, 834 F.3d 696, 704 (6th Cir. 2016) ("[T]he record before us provides scant support for the proposition that [M]SORA in fact accomplishes its professed goals."); People v. Betts, 968 N.W.2d 497, 514 (Mich. 2021) ("For our limited purpose in examining the potential excessiveness of the 2011 SORA in regard to its public-safety purpose, . . . the 2011 SORA's efficacy is unclear." (footnote omitted)).

4. Ex Post Facto Challenges to Federal Sex Offender Registration Laws

Challenges to federal sex offender legislation first arose after Congress passed the Sex Offender Registration and Notification Act ("SORNA") in 2006, which took effect in 2010.[251] SORNA requires sex offenders to comply with the registration obligations prescribed by the Act[252]—obligations that, since their enactment, essentially mirror the obligations in the new MSORA.[253] However, SORNA applies to all sex offenders as defined by federal law *regardless of when they were convicted*,[254] meaning that some sex offenders that are not required to register under Michigan law are still required to register *with* Michigan law enforcement under federal law.[255]

In *United States v. Felts*, an individual required to register as a sex offender in Tennessee under SORNA but who was *not* required to register under state law challenged SORNA in federal court in 2010.[256] The plaintiff had been convicted of a sex crime in 1994,[257] and Tennessee's registration requirement only applied to sex offenders convicted after January 1, 1996.[258] The plaintiff argued that SORNA violated the Ex Post Facto Clause by requiring him to register as a sex offender for the first time nearly twenty years after his conviction.[259] The Sixth Circuit eschewed the *Mendoza-Martinez* analysis and found instead that the Supreme Court's decision in *Smith* was dispositive.[260] Consequently, the Sixth Circuit held that SORNA did not violate the Ex Post Facto Clause.[261]

Felts ought to have controlled *Does I Appeal*, at least in part. The Sixth Circuit ostensibly disagreed, as the court did not discuss *Felts*—or any other SORNA cases—in *Does I Appeal*.[262] This may reflect a broader trend that courts will not consider SORNA cases when considering constitutional challenges to state sex

251. *See* United States v. Stock, 685 F.3d 621, 626 (6th Cir. 2012); *see also* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590 (2006) (codified as amended at 34 U.S.C. §§ 20901–20962 (2018 Supp. II)).

SORNA replaced the Jacob Wetterling Act, which had prescribed minimum guidelines for state sex offender registries and conditioned the receipt of federal funding to law enforcement agencies on states' compliance with minimum guidelines. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 170101, 108 Stat. 1796, 2038–42, *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 129, 120 Stat. 587, 600. SORNA retains these obligations on the States in addition to obligations imposed on sex offenders. *See* 34 U.S.C. §§ 20901–20962.

252. Reynolds v. United States, 565 U.S. 432, 434 (2012).

253. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,054–58, 38,062–69 (July 2, 2008); *see also* Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69,856, 69,884–87 (Dec. 8, 2021) (to be codified at 28 C.F.R. pt. 72) (current SORNA guidelines).

254. *See* 86 Fed. Reg. at 69,867–69 (to be codified at 28 C.F.R. pt. 72.3).

255. *See* Willman v. Att'y Gen., 972 F.3d 819, 823 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1269 (2021) (mem.).

256. United States v. Felts, 674 F.3d 599, 602 (6th Cir. 2012).

257. *Id.*

258. TENN. CODE ANN. § 39-13-703(3)(A) (2021).

259. *Felts*, 674 F.3d at 605–06.

260. *See id.* at 606.

261. *Id.*

262. 834 F.3d 696 (6th Cir. 2016).

offender registration laws, even if the underlying obligations are identical. This trend was repeated more recently in *Willman v. Attorney General*, where an individual convicted of a listed offense in Michigan before September 1995 challenged SORNA under the Ex Post Facto Clause in 2019.[263]

In *Willman*, The Sixth Circuit held that the plaintiff's Ex Post Facto claim was controlled by *Felts*, a decision with which more recent circuit court decisions were in accord.[264] *Willman* relegated its discussion of *Does I Appeal* to a footnote, where the Sixth Circuit noted that "[i]n that case, we determined that [MSORA] was an unconstitutional ex post facto law because it was retroactive, and its stringent restrictions (such as severe limits on where sex offenders were allowed to live and work) constituted punishment."[265]

Willman's characterization of *Does I Appeal* implies that the old MSORA imposed punishment ex post facto because of its residency restrictions. If this is true, the new MSORA does not violate the Ex Post Facto Clause. However, like *Felts*, *Willman* also did not apply a *Mendoza-Martinez* analysis.[266] Given the Sixth Circuit's trend of not discussing SORNA cases in the context of challenges to state sex offender registration laws and vice-versa, it is unclear whether federal courts will apply *Willman*'s SORNA analysis to the new MSORA. Last, even if *Willman* controls whether the new MSORA violates the federal constitution, *Willman* will not control a state court's decision concerning the constitutionality of MSORA under state law.[267] Consequently, whether MSORA has a rational connection to a legitimate, nonpunitive purpose will still likely control whether the statute punishes ex post facto.

VI. RATIONAL BASIS REVIEW: THE EQUAL PROTECTION, DUE PROCESS, AND EX POST FACTO CLAUSES

The rational basis test is effectively the same concerning equal protection, substantive due process, and ex post facto challenges to sex offender registration laws in federal[268] and Michigan[269] courts: rational connection to a legitimate government purpose. The *Mendoza-Martinez* factor concerning *nonpunitive* legitimate government interest applicable to ex post facto challenges will be the same as the interest in equal protection and substantive due process cases: public safety. Prior to

263. 972 F.3d 819, 822 (6th Cir. 2020).

264. *Id.* at 824–25. Only one of the cases cited by *Willman*, *United States v. Wass*, 954 F.3d 184 (4th Cir. 2020), was decided after the Sixth Circuit's decision in *Does I Appeal*. *See Willman*, 972 F.3d at 824–25.

265. *Willman*, 972 F.3d at 822 n.1.

266. *See id.* at 824–25.

267. People v. Gillam, 734 N.W.2d 585, 590 (Mich. 2007) ("[E]ven when there is no conflict among the lower federal courts, we are free to follow or reject their authority.").

268. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (equal protection); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (substantive due process); *see supra* Section V.B.2.d (ex post facto).

269. Phillips v. Mirac, Inc., 685 N.W.2d 174, 184 (Mich. 2004) (equal protection); Morreale v. Dep't of Comm. Health, 726 N.W.2d 438, 441 (Mich. Ct. App. 2006) (substantive due process); *see supra* Section V.B.2.d (ex post facto).

Does I Appeal and *Betts*, federal and state precedent uniformly held that MSORA was rationally related to public safety.

Courts have held in the equal protection,[270] substantive due process,[271] and ex post facto[272] contexts that MSORA rationally furthered public safety. Moreover, among the States whose supreme courts invalidated their sex offender registration regimes as ex post facto laws, the state supreme courts all held that the challenged sex offender laws were rationally related to a legitimate purpose when those laws contained no residency restrictions.[273] Registrants have claimed that MSORA's registration requirements lack a rational basis generally, and have also claimed that certain provisions lack a rational basis *when applied retroactively*.

1. Rational Basis for Applying MSORA Retroactively

Retroactive laws raise different concerns than prospective laws because retroactive laws may implicate individuals' "interests of fair notice and repose," and thereby offend due process.[274] In *Does I*, the plaintiffs argued that MSORA offended due process by retroactively requiring one of the plaintiffs to register as a sex offender when his non-sexual crime of conviction was added to MSORA as a listed offense after his conviction[275] and by retroactively extending the length of the other plaintiffs' registration periods.[276] The plaintiffs also argued that the notice interests of offenders who had pled guilty to listed offenses when MSORA imposed different requirements and shorter registration periods were implicated because those offenders may not have pled guilty if they had known their registration obligations would change in the future.[277]

270. *See* Lanni v. Engler, 994 F. Supp. 849, 855 (E.D. Mich. 1998); Haddad v. Fromson, 154 F. Supp. 2d 1085, 1094–96 (W.D. Mich. 2001), *overruled on other grounds by* Lapides v. Bd. of Regents, 535 U.S. 613 (2002).

271. *See* Doe v. Munoz, 507 F.3d 961, 966 (6th Cir. 2007); Doe v. Mich. Dep't of State Police, 490 F.3d 491, 501 (6th Cir. 2007); Akella v. Mich. Dep't of State Police, 67 F. Supp. 2d 716, 733 (E.D. Mich. 1999); People v. Bosca, 871 N.W.2d 307, 354–56 (Mich. Ct. App. 2015) (state law challenge), *rev'd on other grounds*, 969 N.W.2d 55 (Mich. 2022) (mem.); *In re* TD, 823 N.W.2d 101, 110 (Mich. Ct. App. 2011) (same), *vacating as moot* 821 N.W.2d 569 (Mich. 2012).

272. *See* Doe v. Kelley, 961 F. Supp. 1105, 1110 (W.D. Mich. 1997); People v. Patton, 925 N.W.2d 901, 913 (Mich. Ct. App. 2018) (state law challenge); People v. Tucker, 879 N.W.2d 906, 917, 924 (Mich. Ct. App. 2015) (per curiam) (federal and state law challenge); People v. Temelkoski, 859 N.W.2d 759–61 (Mich. Ct. App. 2014) (per curiam) (same), *rev'd on other grounds*, 859 N.W.2d 743 (Mich. 2018).

273. *See* Doe v. State, 111 A.3d 1077, 1099–1100 (N.H. 2015); State v. Okla. Dep't of Corr., 305 P.3d 1004, 1028 (Okla. 2013); Wallace v. State, 905 N.E.2d 371, 383 (Ind. 2009); State v. Pollard, 908 N.E.2d 1145, 1152–53 (Ind. 2009); State v. Letalien, 985 A.2d 4, 22 (Me. 2009); Commonwealth v. Cory, 911 N.E.2d 187, 197 (Mass. 2009); Doe v. State, 189 P.3d 999, 1016 (Alaska 2008); Commonwealth v. Muniz, 164 A.3d 1198, 1216–17 (Penn. 2017); *see also* Commonwealth v. Baker, 295 S.W.3d 437, 446 (Ky. 2009) (holding that Kentucky's sex offender residency restrictions were not rationally related to public safety).

274. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

275. *Does I*, 932 F. Supp. 2d 803, 820–21 (E.D. Mich. 2013), *rev'd on other grounds*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016).

276. *Does I*, No. 12-11194, slip op. at 55–66 (E.D. Mich. filed Mar. 31, 2015), *rev'd on other grounds*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016).

277. *See Does I*, 932 F. Supp. 2d at 820; *Does I*, No. 12-11194, slip op. at 59.

Concerning the plaintiffs' plea bargain claim, Judge Cleland held that even if the state had retroactively altered the plaintiffs' plea agreements, rational basis review was still proper.[278] In Judge Cleland's view, the state's legitimate public safety interest justified monitoring sex offenders, regardless of when their convictions occurred.[279] Consequently, the Michigan legislature's retroactive application of registration obligations as such,[280] as well as the retroactive application of registration obligations for longer periods of time, survived rational basis review.[281] *Does I* effectively closes the door on due process retroactivity challenges to MSORA, which imposes fewer obligations and restrictions on sex offenders than the old MSORA, unless courts are willing to depart from the well-established principle that MSORA is justified on public safety grounds.[282]

2. Rational Basis for MSORA Generally

Courts determined that MSORA promoted awareness of sex offenders so that members of the public could avoid them if desired—an appropriate response considering the allegedly high likelihood that sex offenders will commit another sex crime[283] and the seriousness of the crimes that sex offenders commit.[284] Additionally, MSORA allowed law enforcement to more easily apprehend registered sex offenders who do offend again.[285] Courts have also held that MSORA has a rational basis for treating different classes of sex offenders differently without any individualized assessment of risk,[286] a view explicitly repudiated by *Does I Appeal* and *Betts*.[287]

278. *Does I*, No. 12-11194, slip op. at 60.

279. *Id.* at 61–62; *Does I*, 932 F. Supp. 2d at 820–21 (citing Doe v. Mich. Dep't of State Police, 490 F.3d 491, 501 (6th Cir. 2007)).

280. *See Does I*, 932 F. Supp. 2d at 821.

281. *Does I*, No. 12-11194, slip op. at 61–62.

282. The plaintiffs in *Does III* raise the same argument as the *Does I* plaintiffs concerning MSORA's retractive imposition of lifetime reporting requirements framed as an ex post facto challenge. Verified Class Action Complaint at 168–69, *Does III*, No. 2:22-cv-10209 (E.D. Mich. Feb. 2, 2022). The *Does III* plaintiffs also argue that the Michigan legislature's alleged retroactive alteration of sex offenders' plea agreements warrants strict scrutiny. *Id.* at 179–81.

283. Doe v. Kelly, 961 F. Supp. 1105, 1110 (W.D. Mich. 1997); *Haddad*, 154 F. Supp. 2d at 1094; *TD*, 823 N.W.2d at 110; *see also Akella*, 67 F. Supp. 2d at 733 (holding that likelihood that sex offenders will re-offend is irrelevant).

284. Lanni v. Engler, 994 F. Supp. 849, 855 (E.D. Mich. 1998); *Haddad*, 154 F. Supp. 2d at 1094.

285. Doe v. Munoz, 507 F.3d 961, 966 (6th Cir. 2007); Doe v. Mich. Dep't of State Police, 490 F.3d 491, 501 (6th Cir. 2007); *Patton*, 925 N.W.2d at 913.

286. *Munoz*, 507 F.3d at 966 ("This court has already held that the state has a rational basis for treating sex offenders differently from other offenders by requiring them to register." (citing Cutshall v. Sundquist, 193 F.3d 466, 482–83 (6th Cir. 1999)); *Mich. Dep't of State Police*, 490 F.3d at 504–06 (holding that Michigan could rationally require all pre-October 2004 youthful trainees convicted of sex offenses to continue registering as sex offenders even though post-October 2004 youthful offenders convicted of sex offenses were required to register as sex offenders only if they *failed to complete* their HYTA requirements); *accord* Doe v. Cuomo, 755 F.3d 105, 113, 115 (2d Cir. 2014); Litmon v. Harris, 768 F.3d 1237, 1244 (9th Cir. 2014).

But see supra note 191 (discussing *Dipiazza* which held that the issue litigated in *Mich. Dep't of State Police* was cruel and unusual punishment as applied).

287. *See Does I Appeal*, 834 F.3d 696, 704 (6th Cir. 2016); *People v. Betts*, 968 N.W.2d 497, 512–15 (Mich. 2021).

The Sixth Circuit[288] and the Michigan Supreme Court[289] questioned whether MSORA legitimately advanced public safety based on several comprehensive studies analyzing data concerning convicted sex offenders.[290] Dr. Patrick Langan et al.[291] and Dr. Mariel Alper & Matthew Durose[292] concluded that sex offenders are *less* likely to re-offend than other types of criminals. Professors J.J Prescott & Jonah Rocktoff[293] and Professor Beth Huebner et al.[294] reported increases in recidivism among sex offenders following States' implementations of sex offender registration schemes. The courts cited these data supporting their conclusions regarding MSORA while ignoring other data tending to undermine their conclusions.

The courts' conclusions that sex offenders were less likely than other types of criminals to be re-arrested based on Langan et al. and Alper & Durose paints an incomplete picture. That the sex offenders tracked in both studies were less likely than individuals convicted of other crimes to be re-arrested for *any* crime is arguably irrelevant because MSORA's purpose is to protect the public from *sex* crimes, not all crimes.[295] The relevant statistic is the likelihood that convicted sex offenders will commit another *sex crime*.

Studies cited by both courts indicate that sex offenders are more likely than individuals arrested for other crimes to commit another sexual offense. Langan et al. reported that thirty percent of the child molesters and nearly forty percent of the statutory rapists they tracked had prior arrests for sex offenses.[296] According to Alper & Durose, "[s]ex offenders were three times as likely as other offenders to be arrested for rape or sexual assault during the 9 years following release."[297] These data imply that convicted sex offenders pose a cognizable risk of committing a sex crime following their release from prison in general, and the risk that convicted sex offenders will commit a sex crime is higher than the risk that individuals released from prison for other crimes will commit a sex crime. Other researchers support this

288. *See Does I Appeal*, 834 F. 3d 696, 704–05 (6th Cir. 2016) (first citing PATRICK E. LANGAN ET AL., U.S. DEP'T OF JUST., NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003), https://bjs.ojp.gov/content/pub/pdf/rsorp94.pdf, and then citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & ECON. 161 (2011)).

289. People v. Betts, 968 N.W.2d 497, 514 (Mich. 2021) (first citing MARIEL ALPER & MATTHEW DUROSE, U.S. DEP'T OF JUST., NCJ 251773, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14) (2019), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/rsorsp9yfu0514_sum.pdf; then citing BETH M. HUEBNER ET AL., AN EVALUATION OF SEX OFFENDER RESIDENCY RESTRICTIONS IN MICHIGAN AND MISSOURI 72 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf; and then citing Prescott & Rockoff, *supra* note 288, at 192)).

290. *See also* Joshua E. Montgomery, Note, *Fixing a Non-Existent Problem with an Ineffective Solution:* Doe v. Snyder *and Michigan's Punitive Sex Offender Registration and Notification Laws*, 51 AKRON L. REV. 537, 569–73 (2018) (detailing studies cited by the courts).

291. LANGAN ET AL., *supra* note 288, at 14.

292. ALPER & DUROSE, *supra* note 289, at 5 tbl. 3.

293. Prescott & Rockoff, *supra* note 288, at 192.

294. HUEBNER ET AL., *supra* note 289, at 69.

295. MICH. COMP. LAWS ANN. § 28.721a (West 2020) ("[T]he sex offenders registration act was enacted . . . with the intent to . . . prevent[] and protect[] against the commission of future *criminal sexual acts* by convicted sex offenders." (emphasis added)).

296. LANGAN ET AL., *supra* note 288, at 12 tbl. 6.

297. ALPER & DUROSE, *supra* note 289, at 5.

conclusion.[298] If MSORA *increases* recidivism, however, then these data are less persuasive.

The studies cited by Sixth Circuit and the Michigan Supreme Court imply that MSORA does not fulfill its purported purpose to reduce sex crimes.[299] Prescott & Rocktoff argued that sex offender laws are at best ineffective and at worst increase recidivism,[300] and Huebner found that Michigan's student safety restrictions increased the likelihood that convicted sex offenders would re-offend.[301] However, other researchers, including Vásquez, found the opposite concerning other States' sex offender laws.[302] Even if there is a correlation between MSORA and increased incidents of sexual violence among registered sex offenders, a direct causal link between MSORA and sex offender recidivism is hardly the only reasonable conclusion.

For example, among States where Vásquez et al. observed increases in incidents of sexual violence among registered sex offenders following the implementation of sex offender registration regimes, they reasoned that more sex crimes might have been reported and discovered in those States due to increased attention placed on crimes of sexual violence and a greater ability on the part of law enforcement to apprehend sex offenders attributable to those States' sex offender laws.[303] In any case, the data are clear that sex offenders are more likely than individuals convicted of other crimes to commit a sex crime, and there is no academic consensus concerning whether sex offender registration laws increase recidivism among sex offenders.

If courts no longer use the Due Process Clause to invalidate laws "because they may be unwise, improvident, or out of harmony with a particular school of thought,"[304] then the Ex Post Facto and Double Jeopardy Clauses should be no

298. *See* Bob Edward Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQUENCY 175 (2008); Ralph C. Serin et al., *Psychopathy, Deviant Sexual Arousal, and Recidivism Among Sexual Offenders*, 16 J. INTERPERSONAL VIOLENCE 234 (2001).

299. Montgomery, *supra* note 290, at 574 ("If the federal courts will accept that recidivism rates are not frighteningly high and that [sex offender registration acts] do not reduce recidivism, then a rational connection to a non-punitive purpose will not be present.").

300. *See* Prescott & Rockoff, *supra* note 288, at 180 tbl. 3, 183 tbl. 4, 195 tbl. 5, 189 tbl. 6; *see also* Kristin M. Zgoba & Meghan M. Mitchell, *The Effectiveness of Sex Offender Registration and Notification: A Meta-Analysis of 25 Years of Findings*, J. EXPERIMENTAL CRIMINOLOGY (forthcoming), https://doi.org/10.1007/s11292-021-09480-z (concluding based on meta-analysis of several studies that sex offender laws have *no* effect on recidivism).

301. *See* HUEBNER ET AL., *supra* note 289, at 50 tbl. 13. However, Huebner et al. concluded that "if residency restrictions have an effect on recidivism, the relationship will be very small." *Id.* at 69. Furthermore, MSORA's residency restrictions were repealed. *Supra* note 113.

302. Vásquez et al., *supra* note 298, at 187; *see also* Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAVIOR 537 (2010); Grant Duwe & William Donnay, *The Impact of Megan's Law on Sex Offender Recidivism: The Minnesota Experience*, 46 CRIMINOLOGY 411, (2008); WASH. INST. FOR PUB. POL'Y, SEX OFFENDER SENTENCING IN WASHINGTON STATE: HAS COMMUNITY NOTIFICATION REDUCED RECIDIVISM? (2005), https://www.wsipp.wa.gov/ReportFile/919/Wsipp_Has-Community-Notification-Reduced-Recidivism_Report.pdf.

303. Vásquez et al., *supra* note 298, at 188.

304. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

exception.[305] Moreover, MSORA is now well within the norm of other States' sex offender registration regimes[306] and federal guidelines.[307]

The Sixth Circuit and the Michigan Supreme Court have ventured into uncharted territory.[308] It is unclear whether they will continue to evaluate whether a rational basis for MSORA exists based on some researchers' interpretations of data concerning incident rates of sexual violence.[309] However, what is clear is that the Sixth Circuit and the Michigan Supreme Court have endorsed a particular interpretation of sex offender registration laws about which reasonable minds could differ.

VII. OTHER CONSTITUTIONAL CLAIMS: THE FIFTH, SIXTH, AND FIRST AMENDMENTS

Registered sex offenders have unsuccessfully claimed that MSORA violates several other constitutional rights,[310] including the right to a jury trial guaranteed by the Fifth and Sixth Amendments and the right to anonymous speech protected by the First Amendment. Claims that MSORA infringes on the right to a jury trial may be more viable if courts follow *Does I Appeal* and *People v. Betts* and hold that MSORA

305. *See* Smith v. Doe, 538 U.S. 84, 105 (2003) ("The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy."); *see also* Doe v. Mich. Dep't of State Police, 490 F.3d 491, 505–506 (6th Cir. 2007) ("[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" (quoting Heller v. Doe, 509 U.S. 312, 319 (1993))); *In re* TD, 823 N.W.2d 101, 110 (Mich. Ct. App. 2011) (same), *vacating as moot* 821 N.W.2d 569 (Mich. 2012) ("[A] statute is constitutional 'if the legislative judgement is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable.'" (quoting TIG Ins. Co. v. Dep't of Treasury, 629 N.W.2d 402, 407 (Mich. 2001))).

306. *See* ANDREW J. HARRIS ET AL., INFORMATION SHARING AND THE ROLE OF SEX OFFENDER REGISTRATION AND NOTIFICATION: FINAL TECHNICAL REPORT app. A (2020), https://www.ncjrs.gov/pdffiles1/nij/grants/254680.pdf (detailing every State's sex offender registration statutes).

307. Brief for the United States as Amicus Curiae, at 2, Snyder v. Doe, 138 S. Ct. 55 (2017) (mem.) (No. 16-768), 2017 WL 2929534 (detailing differences between the old MSORA and federal guidelines); *see also* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,029 (July 2, 2008); *cf.* MODEL PENAL CODE §§ 213.11A–H (AM. L. INST., Tentative Draft No. 5, 2021) (detailing model sex offender registration statute that is stricter than the new MSORA in many ways).

308. *See* Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of* Doe v. Snyder, 58 B.C. L. REV. ELEC. SUPPLEMENT 34, 40–41 (2017).

309. The *Does III* plaintiffs argue that the new MSORA still violates the Ex Post Facto Clause. Verified Class Action Complaint at 166–68, *Does III*, No. 2:22-cv-10209 (E.D. Mich. Feb. 2, 2022).

310. Several individuals incarcerated for sex offenses in Michigan have unsuccessfully argued that conditioning parole or probation on their participation in sex offender treatment programs violated their rights against self-incrimination because their consent to treatment would have amounted to an admission that they *require treatment*, and therefore that they are guilty. *See* Morris v. Berghuis, No. 2:12-CV-10417, 2013 WL 1874872, at *6 (E.D. Mich. Mar. 28, 2013); Spencer v. Atterberry, No. 1:10-cv-735, 2011 WL 65866, at *8–9 (W.D. Mich. Jan. 10, 2011); Rice v. Mich. Parole Bd., No. 1:05-CV-549, 2005 WL 2297436, at *3– 4 (W.D. Mich. Sept. 21, 2005). This view is supported by a plurality of the Supreme Court in *McKune v. Lile*, 536 U.S. 24, 35 (2002), which held that that conditioning sex offenders' receipt of probation or parole on their participation in sex offender treatment does not infringe on their rights against self-incrimination. *Accord* Roman v. DiGuglielmo, 675 F.3d 204, 214–15 (3d. Cir. 2012); Gwinn v. Awmiller, 354 F.3d 1211, 1217 n.9 (10th Cir. 2004); Ainsworth v. Stanley, 317 F.3d 1, 4–6 (1st Cir. 2002); Neal v. Shimoda, 131 F.3d 818, 832–33 (9th Cir. 1997). Consequently, courts are unlikely to change their views absent a change in controlling precedent.

imposes punishment. Courts are more likely to recognize that MSORA violates the First Amendment in light of changes to Michigan's PSOR enacted by 2020 P.A. 295.

A. Right to a Jury Trial

In *People v. Golba*,[311] the defendant argued that requiring him to register as a sex offender violated the rule announced in *Apprendi v. New Jersey*[312] and *Blakely v. Washington*,[313] namely, that the Fifth and Sixth Amendments preclude courts from increasing defendants' sentences beyond statutory maximums based on facts that were not submitted to a jury.[314] The defendant argued that the court, and not the jury, had found that his conviction required MSORA registration, and therefore the court had increased his punishment by requiring his registration and compliance with MSORA based on this finding in excess of the statutory minimum punishment for his offense of conviction.[315]

In *Golba*, whether the trial court's order violated the Fourth and Sixth Amendments turned on whether compliance with MSORA is "punishment" within the meaning of the *Apprendi-Blakely* rule.[316] The court held that MSORA did not impose punishment, and therefore the trial court did not increase the defendant's punishment based on a fact not submitted to the jury.[317] It is possible that if courts reverse course in line with *Does I Appeal* and *Betts* and hold that MSORA imposes punishment, then registrants could successfully challenge the statute on the grounds rejected in *Golba*.[318]

B. Right to Anonymous Speech

Laws which restrict speech must be "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information."[319] The *Does I* plaintiffs argued that the MSORA provision requiring them to report all online usernames upon initial registration and immediately update

311. 729 N.W.2d 916 (Mich. Ct. App. 2007).

312. 530 U.S. 466 (2000).

313. 542 U.S. 296 (2004).

314. *Golba*, 729 N.W.2d at 615.

315. *Id.* at 605, 615.

316. *Id.* at 615.

317. *Id.* at 617–21; *cf.* Virsnieks v. Smith, 521 F. 3d 707, 717 (7th Cir. 2008) (holding that *Apprendi* claim challenging sex offender registration was not cognizable on habeas review because the plaintiff was not "in custody.").

318. *But see* U.S. v. Hardeman, 598 F. Supp. 2d 1040, 1048 (N.D. Cal. 2009) (holding that the fact of prior conviction upon which sex offender registration depends need not be submitted to a jury under *Apprendi*).

319. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

changes to any online username in-person within three days violated their First Amendment rights to anonymous speech.[320]

The parties conceded that the State had a compelling interest in preventing sex crimes, and the court held that the challenged provisions were content-neutral and that the plaintiff's rights to anonymous speech were not infringed because MSORA did not "unmask registrants' anonymity to the public."[321] However, the court held that the internet reporting provisions unconstitutionally burdened registrants' speech because they were vague and required registrants to report updates to their internet designations in person.[322]

The Michigan legislature's attempt to address *Does I* created other issues. 2020 P.A. 295 eliminated required in-person reporting,[323] exempted offenders convicted after July 1, 2011 from the internet reporting requirements,[324] and amended the definition of "online identifiers" to address vagueness issues.[325] The court's conclusion in *Does I* that MSORA's internet reporting requirements did not burden registrants' rights to anonymous speech only makes sense in the context of the old MSORA, which *expressly forbid* listing registrants' online usernames in the PSOR.[326] While the new MSORA does not require registrants' online usernames to be listed in the PSOR, the statute no longer prohibits it.[327]

Federal appellate courts are split on whether the potential that law enforcement will publicly disclose sex offenders' online usernames impermissibly chills registrants' rights to anonymous speech.[328] Interestingly, neither circuit that addressed whether state sex offender registries chilled speech discussed SORNA, which prohibits states from listing registrants' online usernames in any public sex offender database.[329] As such, it is unclear whether SORNA's restrictions on state registries sufficiently protect Michigan registrants' anonymous speech, and the Michigan legislature should remove law enforcement's discretion under state law to

320. *Does I*, No. 12-11194, slip op. at 44 (E.D. Mich. filed Mar. 15, 2015), *rev'd*, *Does I Appeal*, 834 F.3d 696 (6th Cir. 2016); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (recognizing authors' rights to be published anonymously).

321. *Does I*, slip op. at 46–52 (E.D. Mich. filed Mar. 15, 2015).

322. *Id.* at 53–55; *accord* Doe v. Harris, 772 F.3d 563, 578–82 (9th Cir. 2014).

323. Act of Dec. 29, 2020, Pub. Act No. 295, § 5(1), 2020 Mich. Legis. Serv. 2232, 2239.

324. *Id.* § 5(2)(a).

325. *Id.* § 2(g), 2020 Mich. Legis. Serv. at 2233.

326. Act of Apr. 12, 2011, Pub. Act No. 18, § 8(3)(e), 2011 Mich. Legis. Serv. 92, 98.

327. Act of Dec. 29, 2020, § 8(3).

328. *Compare* Doe v. Harris, 772 F.3d 563, 579–91 (9th Cir. 2014) (holding that California's sex offender registration law chilled anonymous speech because law enforcement *could* release offenders' online usernames to the public), *with* Doe v. Shurtleff, 628 F.3d 1217, 1224 (10th Cir. 2010) (rejecting claim that a registrants' First Amendment rights were chilled because sex offender registration statute did not prevent the State from publishing his online usernames and because his usernames were possessed by law enforcement).

329. 28 U.S.C. §§ 20916(c), 20920(b)(4) (2018 Supp. II); Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1,630, 1,637 (Jan. 11, 2011); *see also* Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69,856, 68,858 (Dec. 8, 2021) ("Disclosure of sex offender information is separately addressed in statutory provisions that are not implicated by this rulemaking and in the SORNA Guidelines and SORNA Supplemental Guidelines.").

list offenders' online usernames in the PSOR to prevent a First Amendment challenge to the statute.[330]

CONCLUSION

MSORA has been amended many times since its enactment. Over the last twenty-five years, changes to the statute have generally made compliance more difficult until the Sixth Circuit invalidated the entire statute under federal law. A subsequent Michigan Supreme Court decision also nullified the statute on state law grounds. Amendments enacted after the Sixth Circuit's decision vastly reduced the obligations and restrictions imposed on sex offenders by MSORA, and courts treat the amended statute as a "new" law. Though the constitutionality of the new statute is unclear, a close examination of the statute's history and past decisions concerning challenges to it, some conclusions can be drawn.

For example, certain constitutional challenges to MSORA are unlikely to be successful. MSORA is almost certainly not a bill of attainder because it does not punish a political class, and the Michigan legislature did not create MSORA to punish sex offenders. Similarly, registrants challenging MSORA on procedural due process grounds will likely not succeed because the statute applies to individuals convicted of crimes, and criminal trials provide registrants with adequate process. However, the Ninth Circuit recognized that procedures nearly identical to MSORA's were *in*adequate concerning individuals *wrongly* subjected to California's sex offender registration statute.[331] Michigan should identify individuals currently complying with MSORA who are not subject to the statute or whose information is incorrectly listed in the public registry and take steps to remedy these issues.

The federal and state double jeopardy, ex post facto, and cruel and unusual punishment clauses uniquely interact concerning challenges to sex offender registration laws. The federal and Michigan constitutions' cruel and unusual punishment clauses are moot concerning challenges to MSORA because the double jeopardy and ex post facto clauses prohibit punishing sex offenders regardless of whether the punishment is also cruel and unusual. The double jeopardy clauses of the federal and Michigan constitutions prevent the State from punishing sex offenders both proactively and retroactively, while the ex post facto clauses prevent only the latter. However, successful ex post facto challenges to MSORA may result in courts invalidating more of the statute than successful double jeopardy challenges.

Ex post facto, double jeopardy, equal protection, and substantive due process challenges to MSORA have become more viable after *Does I Appeal* and *Betts*. Courts will likely apply the rational basis test to MSORA and not strict scrutiny in equal protection and substantive due process cases. The rational basis test is also implicated as part of the intent–effects test applicable in double jeopardy and ex post facto cases.

330. The *Does III* plaintiffs have raised an anonymous speech challenge on these grounds, Verified Class Action Complaint at 186–88, *Does III*, No. 2:22-cv-10209 (E.D. Mich. Feb. 2, 2022), which the Michigan legislature could render moot by amending MSORA.

331. *Id.* 772 F.3d at 579–91.

In the past, courts have uniformly held that MSORA was rationally related to public safety, but the Sixth Circuit and the Michigan Supreme Court disagreed in the ex post facto context. Rational minds could disagree with the courts' conclusions in *Does I Appeal* and *Betts*—conclusions applicable in not only ex post facto cases but in equal protection, substantive due process, and double jeopardy cases as well. Moreover, the Sixth Circuit's and Michigan Supreme Court's conclusions that MSORA imposed punishment could influence whether the question of the statute's applicability to convicted sex offenders must be submitted to a jury.

The MSORA amendments to enacted in response to *Does I Appeal* and *Betts* also made a First Amendment challenge more viable by removing the statutory restriction on listing offenders' online usernames in the PSOR, even though the State, even though the PSOR does not currently include offenders' usernames. The mere *possibility* that the State will publicly list offenders' usernames potentially burdens offenders' rights to anonymous speech. The danger that offenders' speech will be de-anonymized may unconstitutionally burden offenders' speech. The State should amend MSORA to explicitly exclude registrants' online designations from the PSOR.

Whether *Does I Appeal* will, as some scholars contend, revolutionize federal courts' approaches to sex offender registration legislation remains to be seen.[332] However, the *Betts* decision has already had a demonstrable effect in Michigan. The Michigan Supreme Court recently vacated several defendants' convictions for MSORA violations that occurred between the 2011 and 2021 amendments where those defendants' convictions for listed offenses pre–dated the 2011 amendments because MSORA was an ex post facto law as applied to them.[333] The broader implications of these recent cases are unclear.

For example, is every individual convicted for MSORA violations between the 2011 and 2021 amendments whose convictions for listed offenses pre-date the 2011 amendments entitled to have their conviction vacated? The Michigan Supreme Court implies that the answer is yes. If this is correct, then how will courts treat individuals whose sentences for other crimes were increased based on convictions for MSORA violations? How will other States whose sex offender statutes impose more stringent requirements on individuals with out-of-state convictions for failing to comply with another State's sex offender registration statutes treat in-state offenders with MSORA convictions?

If the legislature does not address these concerns and those discussed above through legislation, it will risk another successful challenge to the statute *in toto*. In the future, the legislature should critically evaluate any additions to MSORA's registration requirements *before* the amendments are passed, so that the legality of the statute is no longer determined ex post facto.

332. *See* Ramage, *supra* note 171, at 1127–29.

333. People v. Almadrahi, 969 N.W.2d 56 (Mich. 2022) (mem.); People v. Bosca, 969 N.W.2d 55 (Mich. 2022) (mem.); People v. Fleck, 969 N.W.2d 14 (Mich. 2022) (mem.); People v. Hadley, 969 N.W.2d 14 (Mich. 2022) (mem.); People v. Pohly, 969 N.W.2d 330 (Mich. 2022) (mem.); People v. Smith, 969 N.W.2d 15 (Mich. 2022) (mem.); People v. Werner, 969 N.W.2d 330 (Mich. 2022) (mem.).