No. 16-768

In the Supreme Court of the United States

RICHARD SNYDER, GOVERNOR OF THE STATE OF MICHIGAN; COL. KRISTE ETUE, DIRECTOR OF THE MICHIGAN STATE POLICE, PETITIONERS

v.

JOHN DOES #1–5; MARY DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The Does do not deny that federal and state courts have treated core components of modern sex-offender registration laws differently, and they agree that the Sixth Circuit's decision imperils the federal SORNA. But they argue that there is actually no split, because courts have simply reached different results based on different statutes and factual records.

Their argument rests on four false premises: (1) that a split on individual factors of the *Smith* test, or on individual components of state sex-offender registration acts, is not a split that this Court should care about; (2) that each state's SORA scheme is so unique as to be incomparable; (3) that the courts' conflicting outcomes are attributable to that supposed uniqueness; and (4) that it is appropriate for jurisdictions to have conflicting constitutional rules based on differences in the social statistics presented in a particular case. But an argument built on false premises is unsound. Accepting the Does' argument that there is no conflict, in the face of irreconcilable decisions on basic SORA features, threatens the venerable maxim that like cases should be treated alike.

Put simply, a legislature crafting a SORA system today has no way of knowing whether school safety zones, in-person reporting requirements, classification based on offense, or lifetime registration—or some combination of such elements—may be applied retroactively. This Court's guidance is necessary.

ARGUMENT

I. The decisions of the circuits and of state high courts are irreconcilable.

The Does do not deny that federal and state courts have treated core components of modern SORAs differently. Br. in Opp. 3–4, 19–20, 23–29. Instead, they argue that there is no split, and that the courts have simply reached different results based on different statutes and factual records. *Id*. But the courts' rulings on modern SORAs are irreconcilable.

The Does' first false premise is that a split in outcomes on individual factors of the *Smith* test, or on individual components of SORAs, is not a split that this Court should care about. Instead, they argue, it is only a court's conclusion on the punitiveness of a SORA regime's cumulative effects that matters. The Does' second and third false premises—which are related to the first—are that each state's SORA regime is so unique as to be incomparable, and that the courts' conflicting outcomes are attributable to that supposed uniqueness. These premises are each wrong.

As an initial matter, it is far from clear that this Court evaluates only the cumulative effects of a particular regime alleged to be punitive and does not evaluate its individual components for punitiveness. In *Hudson* v. *United States*, for example, this Court evaluated *separately* the punitiveness of two individual components of a regulatory regime: (1) money penalties and (2) debarment. 522 U.S. 93, 103–05 (1997) (finding "little evidence . . . that *either* OCC money penalties *or* debarment sanctions" were punitive (em-

phasis added)). This Court has also instructed, on remand following a ruling that a law is ex post facto, that "only the *ex post facto* portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him." *Weaver* v. *Graham*, 450 U.S. 24, 36 n.22 (1981).

Accordingly, a court may determine that some aspects of a SORA regime are punitive but others are not; and if so, it should sever retroactive application of only the punitive components. Accord *Kammerer* v. *State*, 322 P.3d 827, 837 (Wyo. 2014) ("If we held that [the travel provisions] were invalid, we would uphold those portions of the Act which could be given effect without the invalid provision."); *Coppolino* v. *Noonan*, 102 A.3d 1254, 1269, 1279 (Pa. Commw. Ct. 2014) (holding only one SORA provision punitive and severing it), aff'd, 125 A.3d 1196 (Pa. 2015). The Does' cited cases rendering decisions under *state constitutions* are not illuminating on this issue of federal law. See Br. in Opp. 25 n.7, 28. But even if relevant, these cases would only show that this is another issue on which the courts are split. Compare *Kammerer*, 322 P.3d at 837 (Wyo.) (evaluating provisions separately), with *Doe* v. *State*, 111 A.3d 1077, 1100 (N.H. 2015) (looking at aggregate effects).

But regardless of whether a SORA regime is evaluated holistically or in segments, it matters that courts have reached irreconcilable outcomes on individual factors of the *Smith* test and on individual components of SORAs. Contra Br. in Opp. 3–4, 19–20, 23–29. And even when a governing standard requires a

holistic approach (such as under a totality-of-the-circumstances test), this Court has often granted certiorari to resolve splits about particular issues. E.g., *Peugh* v. *United States*, 133 S. Ct. 2072, 2079, 2080 (2013) (addressing a circuit split under the Ex Post Facto Clause, where sentencing reasonableness was evaluated under the totality of the circumstances); *Missouri* v. *McNeeley*, 133 S. Ct. 1552, (2013) (resolving a split on a Fourth Amendment reasonableness issue, even though the governing test required "consider[ing] all of the facts and circumstances of the particular case"). Here, the splits have led to inconsistent treatment of SORA regimes as a whole.

Consider, for example, some instances where courts have reached the *opposite* conclusion on the *same* basic SORA features under the *same* steps of the *Smith* test:

Whether categorization based on offense is a traditional aim of punishment	
Regulation "based solely upon prior offenses . . . furthers retribution" and therefore "promotes the traditional aims of punishment." *Commonwealth* v. *Baker*, 295 S.W.3d 437, 444–45 (Ky. 2009).	"[T]he classification of offenders based on their crimes is not indicative of retributive intent" under the "traditional aims of punishment" factor. *Kammerer* v. *State*, 322 P.3d 827, 838 (Wyo. 2014); see also *ACLU of Nevada* v. *Masto*, 670 F.3d 1046, 1057 (9th Cir. 2012); *United States* v. *W.B.H.*, 664 F.3d 848, 858 (11th Cir. 2011).
Whether publication of previously non-public information resembles shaming	
Publishing information "that would not be available to the public" previously "resemble[s] traditional shaming punishments." Pet. App. 20a (6th Cir.).	"[D]isseminating information" that previously was "not made public" did not subject sex offenders to "shaming." *W.B.H.*, 664 F.3d at 856–58 (11th Cir.).

Whether residency restrictions resemble banishment	
Describing as "far more intellectually honest" the conclusion that "residency restrictions constitute banishment." *Baker*, 295 S.W.3d at 444–45 (Ky.).	"Nor are the [residency] restrictions akin to banishment." *People* v. *Mosley*, 344 P.3d 788, 802 (Cal. 2015); accord *State* v. *Seering*, 701 N.W.2d 655, 667–68 (Iowa 2005); *Shaw* v. *Patton*, 823 F.3d 556, 568 (10th Cir. 2016); *Doe* v. *Miller*, 405 F.3d 700, 719 (8th Cir. 2005).
Whether residency restrictions serve a rational purpose	
"[R]esidency restrictions . . . do[ ] not have a rational connection to a nonpunitive purpose." *Baker*, 295 S.W.3d at 445–46 (Ky.).	Residency restrictions have "a rational connection" that "clearly exists—to protect society." *Seering*, 701 N.W.2d at 668 (Iowa); accord *Mosley*, 344 P.3d at 803 (Cal.); *Miller*, 405 F.3d at 716, 720 (8th Cir.).

Whether in-person reporting imposes a disability or restraint	
"[Q]uarterly in-person verification . . . imposes a disability or restrain that is neither minor nor indirect." *State* v. *Letalien*, 985 A.2d 4, 18 (Me. 2009); Pet. App. 22a (6th Cir.).	Requiring in-person appearances " 'every 90 days' "—i.e., quarterly—"does not constitute an affirmative disability." *Masto*, 670 F.3d at 1056 (9th Cir.); *W.B.H.*, 664 F.3d at 857 (11th Cir.) (same as to requirement "to verify in person every three months" and "within three days" of personal changes).
Whether residency restrictions are excessive	
"[R]esidency restrictions" are "excessive with respect to the nonpunitive purpose of public safety." *Baker*, 295 S.W.3d at 445–46 (Ky.); *id*. at 447–48 (stating that the excessiveness is "further heightened" by the fact an offender might have to move because of "the opening of a school").	"The residency restrictions of Jessica's Law meet [the] standard" of " '[t]he excessiveness inquiry' " and so are not punitive. *Mosley*, 344 P.3d at 791, 801, 803–04 (Cal.); *id*. at 801 (upholding residency restrictions even though "an offender must move from an already established residence if a school or park later opens nearby").

Whether in-person reporting serves a rational purpose	
"The requirement that registrants make frequent, in-person appearances before law enforcement, moreover, appears to have no relationship to public safety at all." Pet. App. 25a (6th Cir.).	"The in-person requirements help law enforcement track sex offenders and ensure that the information provided is accurate." *W.B.H.*, 664 F.3d at 857 (11th Cir.); accord *United States* v. *Parks*, 698 F.3d 1, 6 (1st Cir. 2012); *Shaw*, 823 F.3d at 576 (10th Cir.).

These conflicting conclusions are not merely attributable to statutory differences. Instead, the courts are fundamentally at odds on even basic questions of how the *Smith* test applies to common elements of modern SORAs, and on whether such elements are punitive. This Court has described the *Smith* factors as "useful guideposts," *Smith* v. *Doe*, 538 U.S. 84, 97 (2003), but the guideposts cease to be useful when applied in a thoroughly contradictory fashion.

The Does' premise that each state's SORA is so unique as to be incomparable is also untrue. As the above chart and even a cursory review of the case law shows, a handful of elements of modern SORAs span numerous jurisdictions. These core elements include in-person reporting (often quarterly and within days of certain changes to personal information); categorization based on offense; lifetime registration and reporting for some offenders; and school safety zones

(which most often include residency restrictions, but may also include work and physical-presence restrictions, e.g., Tenn. Code Ann. § 40-39-211(a)(1); W. Va. Code Ann. § 62-12-26(b)). Indeed, the point of the federal SORNA and its guidelines for the states was to encourage uniformity. It is largely these core elements, in varying combinations, that the courts have struggled with.

Several factors also cut against the Does' argument that it is only the unique aspects of Michigan's SORA and its cumulative effect that grounds the decision that it is punitive. Contra Br. in Opp. 3, 19–20, 23–29. First, the Does have never argued, and cannot credibly argue, that some element other than the above core elements is what has tipped Michigan's law from non-punitive to punitive. Surely the Does would not agree that if only the travel notification requirement were eliminated, or the requirement to report internet identifiers, Michigan's SORA could be applied retroactively.

It also is unlikely that the Does truly believe the Sixth Circuit's decision is reconcilable with the decisions of other jurisdictions. While it is true that no other circuit has upheld an exact replica of Michigan's law, several courts have upheld quite extensive combinations of modern SORA elements, including extra requirements that Michigan does not have.

In *Masto*, for example, the Ninth Circuit rejected the ACLU's arguments against Nevada's SORA—which categorized offenders by tier based on offense, required additional offenders to register, expanded the length of registration, required quarterly in-per-

son reporting for some offenders, and *additionally required community notification* (which Michigan does not)—explaining that the ACLU's arguments "*do not approach* the 'clearest proof' of punitive purpose or effect required to establish a violation of the Ex Post Facto Clause[.]" 670 F.3d at 1058 (emphasis added). Similarly, in *W.B.H.*, the Eleventh Circuit upheld as non-punitive quarterly in-person reporting (and within three days of certain changes), lifetime registration, categorization based on offense, and publication of previously non-public youthful offender information—features all found in Michigan's system. 664 F.3d at 852, 856–58, 860. In *Kammerer*, the Wyoming Supreme Court upheld as non-punitive quarterly in-person reporting (and within three days of certain changes), tracking of internet identifiers, pre-travel notification requirements, and lifetime registration—again, all features of Michigan's system—plus community notification. 322 P.3d at 830–31, 838–39. And in *Shaw*, the Tenth Circuit upheld as non-punitive *weekly* in-person reporting, restrictions against residing within 2,000 feet of a school, and categorization based on offense. 823 F.3d at 560, 577.[1]

If those combinations of elements are not punitive, then some combination of Michigan's requirements would also pass muster in a legislative fix—but how is the legislature to know, based on the conflicting case law, *which* combination?

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[1] The Does are correct that the petition mistakenly characterized *Doe* v. *Bredesen*, 507 F.3d 998 (6th Cir. 2007), as upholding lifetime GPS monitoring instead of monitoring only for the duration of probation.

In reality, though, the Does do not suggest that the cases that upheld multiple components of modern SORA laws were correctly decided, despite arguing that those cases are reconcilable with the decision below. Indeed, of just the cases Michigan cited in its petition, branches of the American Civil Liberties Union have been involved in five, arguing that the Alaska, Maine, Nevada, New York, and Oklahoma SORA regimes—each of which is different in some aspect from Michigan's—are punitive. *ACLU of Nevada* v. *Masto*, 670 F.3d 1046 (9th Cir.); *Shaw*, 823 F.3d 556 (10th Cir.) (for plaintiff); *Doe* v. *Pataki*, 120 F.3d 1263 (2d Cir. 1997) (for plaintiffs); *Smith* v. *Doe*, 538 U.S. 84 (2003) (as amicus); *State* v. *Letalien*, 985 A.2d 4 (Me. 2009) (as amicus). Other examples abound. E.g., *Doe* v. *Miami–Dade Cty.*, *Florida*, 846 F.3d 1180, 1182 (11th Cir. 2017).

Moreover, throughout this litigation the Does have attacked specific components of Michigan's law, an approach that seems contrary to their current argument that the judicial splits are all properly reconcilable based on the cumulative effect of Michigan's SORA. In their briefing to the Sixth Circuit, the Does argued, for example, that classifying offenders based on offense and requiring them to register for life is "irrational and excessive." (Case No. 15-2346, R. 43 at 22–23.) They also acknowledge that many suits have challenged only a single aspect of a SORA, Br. in Opp. 23 & n.4, a litigation tactic that would be pointless if a reviewing court nonetheless had to examine every aspect of the law to complete its holistic analysis.

In any event, the Does' current argument purports to override any differences among statutes. For example, they cite virtually the same bullet list of "facts"—really social-science claims—that they provided to the Sixth Circuit, Br. in Op. 17–19, which they argue support the conclusion that Michigan's SORA is punitive. These "facts" would threaten virtually every aspect of sex-offender registration, in Michigan and elsewhere. E.g., Br. in Opp. 17 ("Public registries are likely to increase rather than decrease recidivism."); *id.* ("Exclusion zones have no impact on or may even increase recidivism."); *id.* at 19 ("Tier classifications do not correspond to the actual risk of recidivism."); *id.* (Conviction-based registries "compromis[e] law enforcement's ability to monitor and the public's ability to identify those who are truly dangerous."). Indeed, all but one of the Does' bulleted "facts" would threaten the federal SORNA. The Does challenge not just the cumulative effect of Michigan's law—they challenge its basic components.

The Does also attribute the judicial splits to differences in each case's factual record. Br. in Opp. 3–4, 17 & n.3, 23–24 n.4, 27–28. But whether a sex offender may be subject retroactively to modern SORAs does not depend on what social statistics he marshals for the court; it is not an adjudicative fact dependent on the case-specific record that could differ across circuits, but rather a legislative fact. Fed. R. Evid. 201 advisory committee's note. Either common features of modern SORAs are punitive, or they are not. Without this Court's guidance, the state and federal courts will remain hopelessly split. Nor *should* the constitutional answer depend on disputed social science. While the courts have a limited role in striking laws based on

"sham or mere pretext" by checking to ensure the statute has "a rational connection to a nonpunitive purpose," *Smith*, 538 U.S. at 87, setting public-safety policy is a task entrusted to the legislature, which has the institutional competence to study relevant statistics, to draw conclusions from those statistics, and to enact policy accordingly. See *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) (recognizing that Congress has "the power to weigh the evidence" from social science).

By focusing on variations in SORAs, it is the Does who have lost the forest for the trees. Basic shared components of these laws, not unique features, have driven virtually every ex post facto decision on modern SORA regimes.

II. The Does admit that under the Sixth Circuit's logic, the federal SORNA falls.

The Does also confirm that retroactive application of the federal SORNA would have to cease under the Sixth Circuit's logic, explaining that Michigan can retain "*virtually* all"—that is, *not all*—SORNA-congruent features of its registry. Br. in Opp. 33 (emphasis added). And to reiterate: all but one of the Does' bulleted "facts" to support that Michigan's SORA is irrational and excessive would likewise threaten the federal SORNA. *Id.* at 17–19.

III. The decision below put Michigan at risk of losing federal funding.

Finally, the Does agree that Michigan cannot fully comply with federal SORNA requirements in light of the Sixth Circuit's decision. Br. in Opp. 33. They sug-

gest that, because the Department of Justice has *partially* (with the exception of Nevada) waived SORNA's retroactivity requirement for other states in incomparable circumstances, it may be willing to *fully* waive the retroactivity requirement for Michigan. *Id*. at 33–34. They also suggest that the Department may overlook Michigan's non-compliance because of the Sixth Circuit's decision, despite statutory language that permits deviations only when compliance would conflict with "a ruling of the jurisdiction's highest court." 42 U.S.C. § 16925(b)(1).

As a backup plan, the Does suggest that Michigan simply defy Congress and forgo federal law enforcement funding. Br. in Opp. 35–37. This approach is untenable.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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