No. 16-768

In the Supreme Court of the United States

RICHARD SNYDER, GOVERNOR OF MICHIGAN, ET AL., PETITIONERS

v.

JOHN DOES, #1-5, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the retroactive application of the Michigan Sex Offenders Registration Act to respondents violates the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. "Sex offenders are a serious threat in this Nation," *McKune* v. *Lile*, 536 U.S. 24, 32 (2002) (opinion of Kennedy, J.), and pose significant "public safety concerns," *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2503 (2013). Congress has enacted multiple laws to encourage and assist States in tracking where sex offenders live, work, and study, and in making that information available to the public. *Smith* v. *Doe*, 538 U.S. 84, 99 (2003).

a. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Of-

fender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038. The Wetterling Act encouraged States, as a condition of receiving federal funds, to enact sex-offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90. Congress then amended the federal scheme to create a national sex-offender registry, to require certain offenders to register, and to impose criminal penalties for failure to register.[1]

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*), to bring uniformity to the "patchwork" of existing federal and state sex-offender-registration laws, *Reynolds* v. *United States*, 565 U.S. 432, 435 (2012). SORNA establishes "comprehensive registration-system standards" and requires state and federal sex offenders "to register with relevant jurisdictions (and to keep registration information current)." *Ibid.* In particular, SORNA instructs each covered jurisdiction (including all 50 States, 42 U.S.C. 16911(10)) to "maintain a jurisdiction-wide sex offender registry" that includes certain offender-specific information and to

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[1] See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e) (Supp. II 1996)); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072 (Supp. II 1996)); Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 115(a)(2)(F) and (6)(C), 111 Stat. 2463-2464 (42 U.S.C. 14071(b)(7), 14072(i) (Supp. III 1997)); Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(b) [Tit. I, § 123(3)], 112 Stat. 2681-73 (42 U.S.C. 14072(i)(3) and (4) (Supp. IV 1998)).

make registration information available on the internet. 42 U.S.C. 16912(a), 16914(b), 16918(a). SORNA then requires sex offenders to register and to keep their registrations current in jurisdictions where they live, work, and study. 42 U.S.C. 16913. The length of time an offender must remain registered and the frequency with which the offender must appear and verify registry information depends on the offender's "tier," which is based on the nature and severity of the offender's offenses. 42 U.S.C. 16915-16916. SORNA requires covered jurisdictions to criminally penalize the failure to register. 42 U.S.C. 16913(e).

Congress directed the Attorney General to "issue guidelines and regulations to interpret and implement" SORNA's provisions. 42 U.S.C. 16912(b). In 2008, the Attorney General promulgated final guidelines to assist covered jurisdictions in complying with SORNA's requirements. See *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030 (July 2, 2008) (*Guidelines*).

A SORNA jurisdiction that fails to "substantially implement" SORNA's requirements risks losing ten percent of the funds otherwise available under the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. See 42 U.S.C. 16925(a). Congress established the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), which is under the jurisdiction of the Attorney General, to "administer the standards" that SORNA established and to provide technical assistance to covered jurisdictions. See 42 U.S.C. 16945.

b. In 1994, Michigan enacted the Sex Offenders Registration Act (SORA), 1994 Mich. Pub. Acts 1522-

1527. SORA created a non-public registry maintained solely for law-enforcement use. Pet. App. 10a. SORA was amended in 1996 to require law-enforcement agencies to make certain offender information available to the public, 1996 Mich. Pub. Acts 2283-2285; in 1999 to require sex offenders to register in person at regular intervals, Pet. App. 10a; and in 2006 to establish school-safety zones by prohibiting sex offenders from living, working, or loitering within 1000 feet of a school, see *id.* at 10a-11a. A first violation of those provisions is a misdemeanor and a second violation is a felony punishable by up to two years in prison. See Mich. Comp. Laws Ann. §§ 28.734-28.735 (West 2012).

In 2011 (after SORNA was enacted), Michigan amended SORA in four important ways. First, offenders are classified into three tiers based on the nature and severity of their registration offenses and any prior sex-offense convictions. Mich. Comp. Laws Ann. § 28.722 (West 2012). Second, offenders must report in person any change in name, residence, employment, student status, vehicle use or ownership, temporary residence lasting more than seven days, e-mail address, instant message address, or "any other designations used in internet communications or postings" within three business days of the change. *Id.* § 28.725; see *id.* § 28.722(g). Third, certain information about a sex offender, including the offender's tier classification, is posted on the internet. *Id.* § 28.728(2)(*l*). Fourth, the most serious (tier-III) sex offenders are subject to a lifetime-registration requirement. *Id.* § 28.725.

2. Respondents are six individuals who qualify as tier-III sex offenders under SORA and therefore must register for life. Pet. App. 144a-146a. They filed this

action to challenge SORA on numerous constitutional grounds. As relevant here, they contend that retroactive application of SORA's 2006 and 2011 amendments violates the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3. Pet. App. 142a.

The United States District Court for the Eastern District of Michigan dismissed respondents' ex post facto claims. Pet. App. 148a-158a. The court analyzed those claims using the two-part test set out in *Smith* v. *Doe*, *supra*, where this Court rejected an ex post facto challenge to Alaska's sex-offender-registration system, 538 U.S. at 92. Pet. App. 148a-158a. Under that two-part test, a court asks first whether the legislature meant the statute to punish or to establish a civil, non-punitive scheme. *Smith*, 538 U.S. at 92. If the legislature intended punishment, "that ends the inquiry." *Ibid.* If the legislature intended a civil scheme, the court then assesses, using factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), whether the scheme is "so punitive either in purpose or effect" that it should be deemed punishment despite the State's intention. *Smith*, 538 U.S. at 92.

In this case, the district court first concluded that the Michigan legislature had no punitive intent in enacting SORA. Pet. App. 149a-151a. After examining SORA's text, structure, and "manner of codification," the court concluded that SORA is "a civil statute." *Id.* at 151a.

The district court then assessed whether the effects of SORA are "so punitive as to qualify as ex post facto punishment." Pet. App. 149a (citing *Smith*, 538 U.S. at 92). The court applied the seven *Kennedy* factors: (1) whether the sanction imposed by SORA

"involves an affirmative disability or restraint"; (2) "whether the statute imposes sanctions that have historically been considered punishment"; (3) "whether application of the statute requires a finding of scienter"; (4) "whether SORA serves any traditional aims of punishment" such as retribution and deterrence; (5) "whether the statute applies to behavior that is already a crime"; (6) "whether the statute is rationally connected to a nonpunitive purpose"; and (7) whether SORA "is excessive in relation to its nonpunitive interests." Pet. App. 151a-158a; see *Kennedy*, 372 U.S. at 168-169. The court concluded that, although the third and fifth factors weigh in favor of respondents, neither had significant weight, and the other five factors establish "that SORA, as amended in 2011, is a regulatory, not criminal statute." *Id.* at 155a-156a, 158a.

In particular, the district court rejected respondents' arguments that SORA's in-person reporting requirements and school-safety zones impose a disability or restraint, explaining that SORA does not impose "any physical restraint" and that respondents are not precluded from changing jobs, moving, or traveling. Pet. App. 152a-153a. The court also noted that any disability or restraint resulting from the school-safety zones is "minor and indirect" because SORA exempts persons who were already living within those zones when they were created. *Ibid.* The court concluded that SORA does not resemble historical punishments such as banishment and shaming because it does not "expel offenders from the community in any real sense." *Id.* at 154a-155a. The court also determined that SORA's use of "broad, offense-based categories" (rather than individualized assess-

ments) for classifying offenders is not retributive, *id.* at 155a, and that any incidental deterrent effects are insufficient to establish a punitive purpose, *id.* at 156a. Finally, the court concluded that SORA's non-punitive "public safety and community notification" purpose is "clear and obvious," *ibid.*, and that the lifetime reporting requirements reasonably further that non-punitive purpose, *id.* at 157a.

3. The court of appeals reversed. Pet. App. 10a-28a. It agreed with the district court that the legislature's intent in enacting SORA was non-punitive, *id.* at 17a, but concluded that the aggregate effect of SORA's provisions is so punitive that it qualifies as ex post facto punishment, *id.* at 18a-26a.

Focusing on five of the seven factors identified in *Kennedy*, the court of appeals first concluded that SORA resembles several traditional forms of punishment. Pet. App. 18a-21a. The court acknowledged that SORA does not formally banish offenders, but stated that the school-safety zones are "very burdensome" for offenders who are trying to find a place to live or work. *Id.* at 18a-20a. The court also characterized SORA as imposing a shaming penalty because it "ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness" without "any individualized assessment" and because in some cases it "discloses otherwise non-public information" such as sealed juvenile records. *Id.* at 20a. The court also analogized SORA's requirements to parole or probation because they restrict where offenders can live and work and require in-person reporting. *Id.* at 21a.

Second, the court determined that SORA imposes "direct restraints on personal conduct." Pet. App.

22a. In reaching that conclusion, the court relied most heavily on SORA's "regulation of where registrants may live, work, and 'loiter,'" *id.* at 21a, and the in-person reporting requirements, *id.* at 22a.

Third, the court held that, although SORA promotes some traditional aims of punishment (such as incapacitation, retribution, and deterrence), "many of th[o]se goals can also rightly be described as civil and regulatory." Pet. App. 23a. The court therefore accorded "little weight" to that factor. *Ibid.*

Fourth, the court concluded that what it considered the most significant factor—whether SORA bears a rational connection to a non-punitive purpose—favors respondents. Pet. App. 23a. The court acknowledged that recidivism rates of sex offenders are "frightening and high" and that the information-sharing and school-zone provisions in SORA are designed to "prevent[] some of the most disturbing and destructive criminal activity" and "keep sex offenders away from the most vulnerable." *Id.* at 24a. But the court found only "scant support" in the record to support "the proposition that SORA in fact accomplishes its professed goals." *Ibid.* The court found evidence supporting the view that "offense-based public registration has, at best, no impact on recidivism" and found nothing in the record to "suggest[] that the residential restrictions have any beneficial effect on recidivism rates." *Id.* at 24a-25a.

Finally, the court determined that SORA's punitive effects "far exceed even a generous assessment of their salutary effects." Pet. App. 25a. The court again emphasized the school-safety zones and the "frequent, in-person appearances." *Ibid.*

Taking all of the factors together, the court of appeals ultimately concluded that SORA, unlike the Alaska sex-offender-registration system at issue in *Smith*, has a punitive effect. Pet. App. 26a-28a. The court relied primarily on the cumulative effect of three features of SORA—(1) the school-safety zones, which "severely restrict[] where people can live, work, and 'loiter'"; (2) the tier-classification and disclosure system that purports to assess dangerousness but is not based on an individualized assessment; and (3) the "time-consuming and cumbersome in-person reporting" requirements—combined with what the court viewed as the "scant evidence" that those restrictions are "keeping Michigan communities safe." *Id.* at 26a. The court therefore held that retroactive application of the 2006 and 2011 SORA amendments to respondents violates the Ex Post Facto Clause. *Id.* at 27a.

DISCUSSION

Michigan's sex-offender-registration scheme contains a variety of features that go beyond the baseline requirements set forth in federal law and differ from those of most other States. After applying the multi-factor framework set out in *Smith* v. *Doe*, 538 U.S. 84 (2003), the court of appeals concluded that the cumulative effect of SORA's challenged provisions is punitive for ex post facto purposes. While lower courts have reached different conclusions in analyzing particular features of various state sex-offender-registration schemes, the court of appeals' analysis of the distinctive features of Michigan's law does not conflict with any of those decisions, nor does it conflict with this Court's holding in *Smith*. Every court of appeals that has considered an ex post facto challenge to a sex-offender-registry statutory scheme has applied the

same *Smith* framework to determine whether the aggregate effects of the challenged aspects of that scheme are punitive. And although most state sex-offender-registry schemes share similar features, they vary widely in their form and combination of those features. Accordingly, to the extent the courts of appeals have reached different outcomes in state sex-offender-registry cases, those outcomes reflect differences in the statutory schemes rather than any divergence in the legal framework. Finally, petitioners' concern (Pet. 26-29) that the court of appeals' decision will prevent the State from receiving some federal funding does not warrant review. That concern is premature, as it may well be the case that Michigan can continue to receive federal funds notwithstanding this decision. And the decision does not prevent the State from implementing a sex-offender-registration scheme that is consistent with federal law. Further review is therefore not warranted.

1. The court of appeals applied the correct legal framework to assess respondents' challenge to SORA. The court recognized that this Court has a "well established" ex post facto framework, which the Court used to evaluate the Alaska sex-offender-registration scheme at issue in *Smith*. Pet. App. 15a-17a. Under that framework, a court must first determine whether a legislature intended a statutory scheme with retroactive application to be punitive, or instead intended the statute to function as "a regulatory scheme that is civil and nonpunitive." *Smith*, 538 U.S. at 92; see Pet. App. 16a. If the legislature intended the scheme to be non-punitive, a court must then assess "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention to deem it

civil.'" *Smith*, 538 U.S. at 92 (brackets in original; internal quotation marks omitted) (quoting *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997)).

The court of appeals applied the *Smith* framework in this case. The court first determined that the Michigan legislature did not intend SORA to be punitive. Pet. App. 16a-17a. The court then "consider[ed] whether SORA's actual effects are punitive." *Id.* at 17a. The court of appeals correctly focused on the cumulative effects of the challenged aspects of SORA to decide if it is punitive, just as this Court had done in *Smith*. *Id.* at 17a-25a; see *Smith*, 538 U.S. at 97-106.[2] Also consistent with *Smith*, the court of appeals recognized the importance of respecting state policy judgments; the court acknowledged that "states are free to pass retroactive sex-offender registry laws" and that persons "challenging an ostensibly non-

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[2] Relying on *Hudson* v. *United States*, 522 U.S. 93, 103-105 (1997), and *Weaver* v. *Graham*, 450 U.S. 24, 36 n.22 (1981), petitioners contend (Pet. Reply Br. 2-3) that lower courts should separately evaluate each individual component of a statutory scheme to determine whether each component is punitive. Petitioners are incorrect. In *Hudson*, the Court concluded that neither of the challenged statutory requirements indicated that the scheme had a punitive effect under *any* of the relevant factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). *Hudson*, 522 U.S. at 103-105. The *Hudson* Court therefore had no need to consider the cumulative effect of such factors. In *Weaver*, when the Court analyzed changes to a state law governing the accrual of prison good-time credits, it expressly considered the aspects of the new law that reduced the availability of good-time credits *in conjunction with* other aspects of the law that expanded opportunities to obtain a reduction in sentence through means other than good behavior. 450 U.S. at 26-28, 34-36. Thus, the *Weaver* Court considered the cumulative effects of the new statutory scheme, just as the court of appeals did here.

punitive civil law" will have a "difficult" time "show[ing] by the 'clearest proof' that the statute in fact inflicts punishment." Pet. App. 26a (quoting *Smith*, 538 U.S. at 105).

To assess whether SORA's effects are punitive, the court used the "guideposts" that this Court set out in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and applied in *Smith*, 538 U.S. at 97. The court identified which of the seven factors were relevant to determining whether the challenged aspects of SORA are punitive, Pet. App. 17a-18a, and then applied them to this case, *id.* at 18a-27a. The court of appeals examined whether the challenged aspects of SORA resemble traditional punishment, impose affirmative disabilities or restraints, promote traditional aims of punishment, have a rational connection to a non-punitive purpose, or are excessive with respect to that purpose. *Id.* at 18a-26a; see *Smith*, 538 U.S. at 97. The court's assessment of those factors turned on record-specific evidence of the actual and aggregate effects of the challenged aspects of SORA. See, *e.g.*, Pet. App. 19a (citing map of Grand Rapids, Michigan, to illustrate effect of school-safety zones); *id.* at 24a (noting record evidence supporting respondents' contentions that "offense-based public registration" does not reduce recidivism).

The court of appeals thus applied the correct legal standard to assess respondents' ex post facto challenges. The court's application of that correct legal standard does not warrant this Court's review. Although the court's decision does limit the reach of certain provisions that Michigan deemed appropriate to address the serious problem of sex-offender recidivism, its holding does not prevent the State from

implementing a scheme that is consistent with baseline federal standards or call into question other States' laws. In particular, because the court of appeals' holding is limited to "[t]he retroactive application of SORA's 2006 and 2011 amendments," Pet. App. 27a, Michigan remains free to enforce the pre-2006 version of SORA retroactively and to enforce the current version of SORA prospectively. Michigan may also be able to reenact in modified form a subset of the requirements in the 2006 and 2011 amendments. The court of appeals did not categorically bar the retroactive enforcement of exclusion zones or in-person registration requirements. Because the *Smith* analysis focuses on the cumulative effect of the statutory scheme, Michigan may be able to retroactively enforce amended versions of those requirements that are less onerous or far-reaching. Under those circumstances, the novel application of settled ex post facto standards to a single State's law does not warrant further review.

2. Petitioners err in contending (Pet. 16-24) that this Court's review is necessary to resolve conflicts between the court of appeals' decision and decisions of other courts of appeals and state courts of last resort. Petitioners are correct that courts have reached different conclusions about whether particular aspects of different sex-offender-registration laws have a punitive effect. But none of those decisions conflicts with the court of appeals' decision in this case about whether the cumulative effects of Michigan's SORA are punitive.

Petitioners are correct (Pet. Reply Br. 8) that "a handful of elements of modern" sex-offender-registration laws "span numerous jurisdictions." That

is due at least in part to the influence of SORNA and accompanying federal *Guidelines*, which establish a floor of requirements to qualify for federal funding. Those standards include that sex offenders maintain a current registration in jurisdictions where they live, work, and study and that they periodically appear in person to update their registration. 42 U.S.C. 16913, 16915-16916. SORNA also directs complying jurisdictions to make publicly available certain information about registered sex offenders. 42 U.S.C. 16918(a).

But as petitioners acknowledge (Pet. Reply Br. 8-9), those common elements can and do vary in form and character from jurisdiction to jurisdiction—because SORNA does not establish a federal ceiling for the form and character of those elements. For example, although SORNA (through the implementing *Guidelines*) requires a jurisdiction to make public the sex offense for which an offender is registered, 73 Fed. Reg. at 38,059, it does not require a State to make public the tier classification assigned to a registrant, as Michigan has chosen to do, Mich. Comp. Laws Ann. § 28.728(2)(*l*) (West 2012). Similarly, SORA goes beyond SORNA's in-person reporting requirements. SORNA directs jurisdictions to require periodic in-person appearances to verify registration information and take a photograph, and SORNA specifies that such in-person appearances must occur at least annually for the lowest-tier offenders and at least quarterly for the highest-tier offenders. 42 U.S.C. 16916. SORNA also requires that a sex offender appear in person to update a registration within three business days after any change of name, residence, employment, or student status. 42 U.S.C. 16913(c). In contrast to Michigan's SORA, however, SORNA does not require a regis-

trant to appear in person to update a registration after changes in, *inter alia*, motor vehicle information and internet identifiers. Compare Mich. Comp. Laws Ann. § 28.725(1)(e)-(g) (West 2012) with 42 U.S.C. 16914(a), 16915a(a); *Guidelines*, 73 Fed. Reg. at 38,054-38,058, 38,066. And SORNA does not require a jurisdiction to create any exclusion or school-safety zones, as Michigan has chosen to do. Mich. Comp. Laws Ann. § 28.734 (West 2012); see *id.* § 28.733(f). The sex-offender-registration laws of other jurisdictions similarly vary in their manner of implementing SORNA's core features and in their adoption of additional features not required by SORNA. See, *e.g.*, Center for Sex Offender Mgmt., *Fifty State Survey of Adult Sex Offender Registration Requirements*, http://www.csom.org/pubs/50%20state%20survey%20adult%20registries.pdf (last visited July 6, 2017).

In light of the variation among jurisdictions' sex-offender-registration laws, courts may reach different ex post facto results without creating conflicts over legal principles. That is true even when the two laws share common features when described at a relatively high level of generality. The details matter. The State's discussion of assertedly conflicting cases bears out that conclusion. Although noting disparate results, petitioners do not clearly identify any decisions that reach opposite conclusions about statutory provisions that are materially identical to each other or that are accompanied by other materially identical requirements.

For example, petitioners contend (Pet. 17-19) that a Tenth Circuit decision upholding as non-punitive a requirement that *transient* sex offenders make weekly in-person verification visits conflicts with the decision

below holding that Michigan's requirement that *every* sex offender appear in person within three business days to report any change in certain information, including vehicle use and internet identifiers. Compare *Shaw* v. *Patton*, 823 F.3d 556, 564-566 (2016), with Pet. App. 26a. Because those statutory provisions differ in significant ways, judicial decisions reaching different conclusions about their punitive effect do not conflict. The practical concerns about monitoring and verifying the identity of transient individuals are obviously quite different from such concerns with respect to individuals with a stable address. Petitioners similarly elide (Pet. 19-21) material differences among statutory provisions establishing school-safety zones, suggesting that Michigan's ban on living, working, or loitering within 1000 feet of a school has the same effect as state laws that ban only living within a similar distance from a school.

To the extent any tension exists among appellate courts about whether certain common features (described at a relatively high level of generality) of sex-offender-registration laws are punitive, this case would not be a suitable vehicle for resolving any such feature-by-feature tension because the court of appeals' decision here is directed at the *aggregate* effect of the challenged aspects of Michigan's law. See Pet. App. 26a (finding SORA punitive based on the school-safety zones, the public classification of offenders without an individualized risk assessment, and the "time-consuming and cumbersome in-person reporting" requirement). Petitioners do not identify any decision that upholds a statutory scheme that includes features comparable to those the court of appeals found in the aggregate to be objectionable here. Be-

cause the lower courts already apply the correct legal standard to the unique set of circumstances presented by each challenged law, further review in this case is not necessary to provide additional guidance to lower courts considering ex post facto challenges to sex-offender-registration laws.

3. Petitioners' contention (Pet. 24-26) that the court of appeals' decision conflicts with this Court's decision in *Smith* lacks merit. Petitioners do not dispute that the court of appeals applied the framework set out in *Smith*. Rather, petitioners argue that the decision below conflicts with *Smith* because *Smith* upheld a state registration law that included some (but not all) of the same features (though in different form) that are included in Michigan's law. No conflict exists between the decision in *Smith*, which considered the aggregate effects of a law containing a different combination of features, and the decision below. The court of appeals acknowledged some overlap between the two statutory schemes, but explained that it found Michigan's law to be "altogether different from and more troubling than Alaska's first-generation registry law." Pet. App. 26a. Unlike SORA, Alaska's law did not establish school-safety zones, did not publish a sex offender's tier classification, and did not require in-person appearances to update information such as temporary residence and e-mail address. See *Smith*, 538 U.S. at 90-91.

4. Finally, petitioners' contention (Pet. 26-29) that the court of appeals' decision jeopardizes Michigan's eligibility for certain federal funding by rendering the State out of compliance with SORNA is speculative and premature and may well be incorrect.

The court of appeals explained that SORA is punitive because of the cumulative effect of three statutory features: the school-safety zones in which a sex offender is not permitted to live, work, or loiter; the requirement that an offender be categorized into a tier based on his underlying offense without an individualized assessment and that his assigned tier be made public; and the requirement that sex offenders appear in person "to report even minor changes to their information." Pet. App. 26a; see *id.* at 18a-26a.[3] The court thus held that those features of SORA—*i.e.*, "SORA's 2006 and 2011 amendments"—may not be applied retroactively. *Id.* at 27a; see *id.* at 11a (describing amendments). Because SORNA does not require States to enact statutory provisions paralleling those the court of appeals identified as problematic, it is doubtful that complying with the court of appeals' decision will imperil Michigan's eligibility for SORNA-related funds—particularly if the legislature amends the relevant provisions of SORA to address the court of appeals' concerns while satisfying the floor imposed by SORNA. See *Guidelines*, 73 Fed. Reg. at 38,046 (explaining that SORNA creates "a floor, not a ceiling").

In particular, SORNA does not require jurisdictions to adopt residential restrictions or school-safety zones at all. Michigan's inability to retroactively en-

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[3] The court of appeals also noted that certain SORA provisions, including the in-person reporting requirements, apply to tier-III offenders for life. Pet. App. 22a. But the court's ultimate conclusion that the cumulative effects of SORA are punitive did not depend on that aspect of SORA. *Id.* at 26a (noting that the cumulative effects of aspects of SORA are punitive when they apply for "years" or for "a lifetime").

force those provisions of SORA will therefore have no effect on the State's substantial compliance with SORNA. Although SORNA does require jurisdictions to subject offenders to different requirements based on each offender's offense tier (as defined under SORNA), 42 U.S.C. 16911(2)-(4), it does not require jurisdictions to make an offender's tier classification public—an aspect of SORA that the court of appeals found to "resemble traditional shaming punishments." Pet. App. 20a. Finally, although SORNA does mandate that jurisdictions require in-person appearances within three business days of a change to a registrant's name, residence, employment, or student status, 42 U.S.C. 16913(c), SORNA does not mandate that Michigan impose that requirement with respect to what the court of appeals viewed (Pet. App. 26a) as "even minor changes to their information," *i.e.*, changes to a registrant's vehicle use or ownership, temporary residence for more than seven days, e-mail address, instant message address, or "any other designations used in internet communications or postings," Mich. Comp. Laws Ann. § 28.725 (West 2012).

Petitioners assert (Pet. 27) that the State cannot substantially comply with SORNA if the court of appeals' decision stands. But the State's inability to enforce retroactively the school-safety zones, the publication of offenders' tier classification, and the in-person reporting requirement for changes to vehicle ownership, temporary residence, e-mail address, and other online designations would have no effect on its SORNA compliance. And those changes alone may be sufficient to eliminate the court of appeals' concerns about the ex post facto application of SORA. And even if the State chooses not to reinstate (through new

legislation) the retroactive application of the few relevant features in SORA that are required by SORNA, the State would not necessarily lose any federal justice-assistance funding. Under 42 U.S.C. 16925(a), the Attorney General has discretion to determine that a jurisdiction has "substantially implement[ed]" the requirements of SORNA notwithstanding some degree of deviation from SORNA's requirements. In light of that discretion, the Attorney General's decision whether to reduce funding for Michigan would ultimately turn on any modifications the State might make to SORA as well as the nature and rationale behind any deviations from SORNA. Whether the State might lose some portion of its federal funds therefore depends at least in part on decisions within the State's control.

Even if the Attorney General determines that the court of appeals' decision prevents the State from substantially implementing SORNA at least until amending legislation is enacted, SORNA gives the State the option of applying for reallocation of any funds lost due to lack of substantial implementation if those funds will be used for the purpose of implementing SORNA. See 42 U.S.C. 16925(c). The SMART office within the Department of Justice has provided guidance to SORNA jurisdictions about how to request such reallocation. See Office of Justice Programs, Dep't of Justice, *Byrne JAG Grant Reductions under SORNA*, https://www.smart.gov/byrneJAG_grant_reductions.htm (last visited July 6, 2017). Petitioners' claimed practical effects of the decision below therefore are speculative and may never occur. Accordingly, review is not warranted on that basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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