No. 122008

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JEROME BINGHAM Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-3150. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 CR 11336. Honorable Bridget Jane Hughes, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

DEBORAH NALL
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
4/3/2018 2:31 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

I. This Court has the power to consider Jerome Bingham's constitutional challenges to Illinois' Sex Offender Registration Act.

Jerome Bingham was convicted of attempt criminal sexual assault in 1983. But he was not subject to Illinois' Sex Offender Registration Act (SORA) until 2014, when he was convicted of theft. Bingham's first opportunity to challenge SORA was therefore on direct appeal of the theft conviction. The State argues that this Court lacks jurisdiction because the notice of appeal did not mention SORA. (St. Br. 21-23) Bingham acknowledges that "[a] notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts of judgments specified in the notice." *People v. Lewis*, 234 Ill. 2d 32, 37 (2009)) However, because a notice of appeal is intended to "inform the prevailing party that the other party seeks review of the trial court's decision," the notice must be liberally construed to determine if it identifies the complained-of judgment. *Id*.

Here, there is a single judgment—Bingham's theft conviction—identified in the notice of appeal. That theft conviction directly triggered Bingham's obligation to register as a sex offender. Moreover, as Bingham has consistently argued, that consequence is punitive. Denying Bingham's right to challenge that direct, punitive consequence of his conviction through a cramped reading of the notice of appeal is inconsistent with the liberal construction principle. Additionally, a reviewing court has the power to "set aside, affirm, or modify" any proceeding that is "dependent upon the judgment or order from which the appeal is taken." Sup. Ct. R. 615(b). Bingham's obligation to register as a sex offender is certainly dependent on his theft conviction. That serious consequence thus falls squarely within a reviewing court's power to address. This Court should not refuse to exercise that power simply because the notice of appeal does not specify SORA. Indeed,

the appellate court has uniformly considered constitutional challenges to SORA on direct appeal of criminal convictions that triggered the registration requirement. *See, e.g., People v. Bingham*, 2017 IL App (1st) 141350, ¶¶1, 21; *People v. Parker*, 2016 IL App (1st) 141597, ¶¶1-2, 54-82; *People v. Avila-Briones*, 2015 IL (1st) 132221, ¶¶1, 9-94. A party is not required to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Avila-Briones*, 2015 IL (1st) 132221, ¶35 (Internal citation omitted); *see also People v. Minnis*, 2016 IL 119563, ¶7 (same). This is so because "a challenge to the constitutionality of a statute may be raised at any time." *People v. McCarty*, 223 Ill. 2d 109, 123 (2006). Thus, while Bingham could have challenged SORA in a civil suit, that is not his only option. Importantly, "judicial economy would certainly be served by ruling on [his] claims now, rather than requiring him to file a separate civil suit challenging the statutes at issue or to purposely violate the statutes at issue in order to seek judicial review." *Avila-Briones*, 2015 IL (1st) 132221, ¶36.

This Court also has authority to consider Bingham's claims because "Article VI, section 16, of the Illinois Constitution vests this [C]ourt with supervisory authority over all of the lower courts of this state." *People v. Salem*, 2016 IL 118693, ¶20, citing Ill. Const. 1970, art. VI, § 16; *In re J.T.*, 221 Ill. 2d 338, 347 (2006). This Court's supervisory authority is "an extraordinary power" that "is hampered by no specific rules or means for its exercise." *McDunn v. Williams*, 156 Ill. 2d 288, 301 (1993), quoting *In re Huff*, 352 Mich. 402, 417-418 (1958) (Internal quotations and citations omitted.). The State's assertion that this Court "has no

power on direct appeal of a criminal conviction to 'order that [Bingham] be relieved of the obligation to register as a sex offender'" (St. Br. 22) is wrong.

The State's general contention that "collateral consequences" may not be challenged on direct appeal (St. Br. 20) is also wrong. Even if the requirement to register under SORA is a collateral consequence, which Bingham does not concede, that doctrine "was designed to limit Fifth Amendment Due Process challenges to guilty pleas" by "drawing a line between what judges were required to advise ('direct' consequences) and what they could ignore ('collateral' consequences)." McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 How. L.J. 795, 803–04 (2011). The State cites no cases applying the doctrine outside the guilty plea context. This Court should decline the opportunity to break new ground where there is no reasoned basis to do so. *See Avila-Briones*, 2015 IL App (1st) 132221, ¶31 ("The merits of a claim do not affect its justiciability.").

Finally, the State posits that allowing Bingham's appeal will "permit direct appeal challenges not only to sex offender registration obligations, but to any of the myriad other collateral consequences of convictions that are not imposed by trial courts and are not embodied in their judgments" such as "the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses." (St. Br. 22) This argument fails because the State cites no authority holding such appeals to be impermissible. Instead, the State relies on *People v. Molnar* (St. Br. 22), where this Court observed that "[t]he Department of State Police is the agency responsible for implementing" SORA. 222 Ill. 2d 495, 500

(2006). But *Molnar* never suggested or held that defendants may not raise constitutional challenges to SORA on direct appeal. Indeed, *Molnar* itself considered a constitutional challenge to SORA. 222 Ill. 2d at 508-529. The State's floodgates theory is a red herring. This Court has the power to consider Bingham's appeal.

II. Requiring Jerome Bingham to retroactively register as a sex offender for the rest of his life violates due process as applied to him.

Contrary to the State's claim, the record is sufficient for this Court to decide Bingham's as-applied due-process claim. It indisputably shows that Bingham has not been convicted of *any* other sex offenses since 1983, yet the State theorizes that Bingham's lack of such convictions "tells us little about whether he has *committed* a sex offense" since 1983. (St. Br. 28) In other words, the State asks this Court to hold that because he was once convicted of a sex offense, Bingham should no longer be considered innocent until proven guilty. That is impermissible. *See Nelson v. Colorado*, 581 U.S. __, 137 S. Ct. 1249, 1255–56 (2017), quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("'[A]xiomatic and elementary,' the presumption of innocence 'lies at the foundation of our criminal law.'").

The State also speculates that Bingham's "absence of sexual recidivism could be explained by his lack of opportunity rather than propensity." (St. Br. 28-29, note 16) In addition to improperly presuming Bingham's guilt, this argument fails because, without factoring in good time credit, Bingham has spent at least 17 years in society with no arrests for sexual offenses. Yet, other than a single sex offense when he was 24 years old, Bingham's criminal history consists only of minor drug offenses, thefts, and a 1999 conviction for violating an order of protection. (C. 33-34) Although the record does not include details about the order of protection (St. Br. 24), it must not have involved a sexual offense, because neither

the circumstances leading up to the order of protection, nor the subsequent violation, subjected Bingham to SORA.

And while the record lacks details about all the circumstances of Bingham's 1983 conviction for attempt criminal sexual assault, those details are not relevant given that he has never committed another sex offense. (St. Br. 23) Instead, Bingham's lack of sexual recidivism is what matters, because SORA's purpose is to protect the public from sex offenders. *See People v. Cornelius*, 213 Ill. 2d 178, 205 (2004) ("the primary purpose of the Registration Act and Notification Law is to assist law enforcement and to protect the public from sex offenders."). Moreover, although the attempt criminal sexual assault was punishable by 4–15 years' imprisonment, Bingham received the minimum of 4 years. Ill. Rev. Stat. 1973, Ch. 38, Sec. 8-4 (c), 11-1, 1005-8-1 (West 1983). (C. 34) The record shows that a judge who knew the circumstances surrounding the offense and Bingham's character believed the offense merited the minimum punishment.

The State claims this Court's consideration of Bingham's as-applied claim will stymie its ability to defend the registration requirement's constitutionality. (St. Br. 24-25) As shown above, the State's speculation about the impact of an evidentiary hearing is not persuasive, and this Court should reject it.

Turning to the merits, the State first asks this Court to follow *People v. Boeckmann*, 238 Ill. 2d 1 (2010), and *People v. Johnson*, 225 Ill. 2d 573 (2007), which held that a statute should be upheld as *facially* constitutional "if there is a conceivable basis for finding it is rationally related to a legitimate state interest." (St. Br. 26-27) However, while facial challenges require that the statute be unconstitutional under any set of facts, as-applied challenges like Bingham's only

require the defendant to show a violation based on his or her specific circumstances. *People v. Thompson*, 2015 IL 118151, ¶36. The State's reliance on *Boeckmann* and *Johnson* is unfounded because Bingham has raised an as-applied challenge.

Bingham was convicted of attempt criminal sexual assault against an 18-year-old woman in 1983, when he was 24 years old, but he has never been convicted of another sex offense. (C. 30-34) He was 56 years old and married with three adult children when he was convicted of the current theft, which was a felony solely because he had been convicted of retail theft 14 years earlier. (C. 19, 30-36) Nothing about these facts suggests that Bingham poses any more risk of committing another sex offense than a person who was not convicted of theft. The State claims that Bingham's "extensive criminal history in the years following his sex offense conviction "'magnifie[s]' his threat" of committing future sex offenses. (St. Br. 27-28) But the State offers no reasoned explanation for how his history of minor theft and drug convictions renders Bingham more likely to commit more sex offenses.

Instead, in a vivid illustration of the State's reasoning, the State speculates that even though he has not been convicted of a sex offense since 1983, Bingham should nonetheless be required to register because he *might* have committed a sex offense without being caught. (St. Br. 28) That position should be rejected because Bingham must be presumed innocent, not guilty, of any criminal conduct that is unproven, uncharged, and almost certainly nonexistent.

The State also argues that the retroactivity provision at issue in this case "merely reflects [the General Assembly's] accommodation of the practical difficulties inherent in registering all pre-SORA sex offenders." (St. Br. 29) Bingham agrees that the General Assembly required a triggering felony offense to avoid

inconveniencing the State Police from "having to go out ... and find the sexual predators who didn't have to register before 1999." 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at 157 (statements of Representative Mell). But that legislative purpose does not render the legislation constitutional as applied to Bingham where there is no relationship between his *theft* offense and the potential risk that he will commit another *sex* offense. (St. Br. 29)

Next, the State invokes the United States Supreme Court's now-suspect declaration in 2002 that "[t]he risk of recidivism posed by sex offenders [wa]s 'frightening and high.'" (St. Br. 30) As explained in Bingham's opening brief, this statement was not based on actual evidence, but instead "was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons." (Op. Br. 42-44, quoting Ira Mark and Tara Ellman, *'Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Constitutional Commentary 495, 499 (2015) (Available at SSRN: https://ssrn.com/abstract=2616429).) Yet courts have long relied on that unsupported statement to reject challenges to registration. Ellman at 497 (As of a 2015 Lexis search, the phrase "frightening and high"appeared "in 91 judicial opinions, as well as briefs in 101 cases."). Actual research has since demonstrated that "people convicted of sex offenses are more likely to be rearrested, reconvicted, or reincarcerated for non-sex offenses than sex offenses." Sex Offender Registration Task Force (2017), 15, 16, *Sex Offenses and Sex Offender Task Force Final Report*, Springfield, IL: State of Illinois (Task Force Report).

As the State observes, Bingham is indeed challenging the premise that registration laws may "classify offenders based on the nature of their offense and

without any individualized determination of risk." (St. Br. 30) The State responds that rational basis review permits legislation to "be based on rational speculation unsupported by evidence or empirical data." (St. Br. 30) But, again, as-applied challenges only require a violation based on specific circumstances. *Thompson*, 2015 IL 118151, ¶36. The record supports Bingham's position because it shows that he has not committed a sex offense since his 1983 conviction of attempted sexual assault, and recent research undermines the theory that all sex offenders present a danger to the public. *See* Melissa Hamilton, *Briefing the Supreme Court: Promoting Science or Myth?*, 67 Em. L.J. Online 2021 (studies finding higher recidivism rates for sex offenders are based on flawed science). There is thus no reason to defer to the legislature's undifferentiated determination that everyone who has ever committed a sex offense is likely to commit another sex offense. Accordingly, this Court should hold that SORA's 2011 retroactivity provision violates due process as applied to Bingham, and exempt him from registration.

III. The 2012 amendment to Illinois' Sex Offender Registration Act (SORA) violates federal and state constitutional prohibitions against *Ex Post Facto* laws because the legislature intended it to be retroactive and because the current version of Illinois' sex offender registration and notification scheme has a punitive effect that overcomes the legislature's intent to create a civil regulatory scheme.

Illinois' current registration and notification scheme has evolved from a regulatory scheme into *ex post facto* punishment. The State concedes that Illinois' scheme is more burdensome than the Alaska scheme upheld in *Smith v. Doe*, 538 U.S. 84 (2003), but nonetheless insists that "SORA and the park restriction" are not punitive in effect. (St. Br. 39-52) The State is wrong.[1]

[1] The State contends that Bingham has forfeited any argument that the "park restriction" was intended as punishment because he did not separately

Although it does not involve an *ex post facto* challenge, instructive here is *People v. Tetter*, 2018 IL App (3d) 150243, which was decided after Bingham's opening brief. The defendant in *Tetter* argued that Illinois' current registration and notification scheme violates the 8th Amendment and Illinois' proportionate penalties clause. 2018 IL App (3d) 150243, ¶38. *Tetter* acknowledged that earlier versions of the scheme were held not to be punishment. *Id*. at ¶¶43-44. However, because this Court has not addressed the current version of the scheme, *Tetter* considered for itself whether its effects have become so punitive that they negate "the legislature's intent to deem the laws civil." *Id.* at ¶46.

Tetter first addressed whether the current scheme imposes disabilities or restraints. *Tetter* held that the scheme has restricted sex offenders' ability to "live, work, and move about the community" and is thus "akin to probation or supervised release[,]" both of which "are considered punishment." *Id*. at ¶48, citing *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). The court thus concluded that the scheme imposes affirmative disabilities and restraints similar to punishment. *Tetter*, 2018 IL App (3d) 150243, ¶52.

In sharp contrast to *Tetter*, the State asserts, in reliance on *Smith*, that SORA does not restrain activities sex offenders may pursue, and allows them to change jobs and residences. (St. Br. 45) The State is wrong because "registration formally excludes [sex offenders] from many jobs, and as a practical matter keeps

---

discuss the legislative intent behind the park restriction. (St. Br. 37) This contention misconstrues the nature of Bingham's argument, which challenges the statutory scheme of which the park restriction is part. (Op. Br. 14, A19-20) Moreover, as the State acknowledges, the purpose of the park restriction is the same purpose that Bingham discussed in relation to the scheme as a whole. (St. Br. 38; Op. Br. 43) Bingham has forfeited nothing.

them from many more." Ira Mark Ellman and Tara Ellman, *'Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics,* 30 Constitutional Commentary 495, 496-497 (2015). The State does grudgingly concede that the "park restriction ... imposes an affirmative disability or restraint in some sense." (St. Br. 47) But because the park ban curtails First Amendment rights, it is a far more severe restraint than the State admits. (Op. Br. 36)

Instead, the State argues that the park ban is "a far cry from 'the paradigmatic affirmative disability or restraint' of imprisonment[,]" and "imposes nowhere near the 'significant restraints on how [sex offenders] may live their lives' that the residency, work, and loitering restrictions found punitive in" [*Doe v.*] *Snyder*[, 834 F. 3d 696 (6th Cir. 2016) (*certiorari* denied No. 16-768, 2017 WL 4339925 (Oct. 2, 2017))]. (St. Br. 47, internal citations omitted). But as the Sixth Circuit said in *Snyder*, "something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound." 834 F. 3d at 703; *see also* Catherine L. Carpenter*, A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 SW. L. REV. 1, 2 (2017) (reporting that newly enacted residency requirements prevented a young Chicago resident from attending his church). Indeed, the State seems to recognize that this factor weighs in favor of finding SORA's effects to be punitive where it notes that no single factor is determinative. (St. Br. 47-48)

Turning to the "history and tradition as punishment" factor, *Tetter* held that Illinois' current sex offender statutes, like parole or mandatory supervised release (MSR), satisfy the traditional definition of punishment because they involve "unpleasant consequences following from an offense against the law, applying to the offender, being intentionally administered by people other than the offender,

and being imposed and administered by a legal system against which the offense was committed." *Id*. at ¶56. Although Bingham is not a child sex offender and therefore is not subject to the school zone restriction, it is also notable that *Tetter* found Illinois' current sex offender statutes to be arguably more restrictive than the scheme the Sixth Circuit deemed to be punishment in *Snyder* because Illinois imposes "a 500-foot zone around public parks and a 100-feet zone around school bus stops that Michigan's SORA did not impose" and prohibits registrants from setting foot in the school zones. *Id*. at ¶55. *Tetter* thus held that this factor weighed in favor of finding the scheme to be punishment under the intent-effects test. *Id*.

In contrast, the State contends that SORA's registration requirements do not resemble probation or parole because of the absence of supervision. (St. Br. 43) The State then briefly references Bingham's point that Illinois' current scheme results in ongoing supervision by requiring sex offenders to disclose Internet identifiers. (Op. Br. 40; St. Br. 43) But, relying on *People v. Minnis*, 2016 IL 119563, ¶48, the State insists that disclosure of Internet identifiers, like disclosure of other personal information, is insignificant because a sex offender does not have to disclose the content or recipients of his communications. (St. Br. 43-44)

Although the State concedes that "the Internet has evolved" since *Smith* was decided, its argument denies reality—and ignores recent case law—by insisting that the differences between the Internet in 2003 and today do not alter *Smith*'s analysis. (St. Br. 40) This claim is soundly rebutted by *Packingham v. North Carolina*, in which the United States Supreme Court found unconstitutional a North Carolina statute that prohibited sex offenders from gaining access to a number of websites, including Facebook. 582 U.S. __, 137 S. Ct. 1730, 1734 (2017).

The Court first warned that "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham*, 137 S. Ct. at 1736. The Court then observed that, while "it is clear that a legislature 'may pass valid laws to protect children' and other victims of sexual assault 'from abuse[,]' ... the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.'" *Id*. (Internal citations omitted). Barring sex offenders from using social networking sites violates the First Amendment because cyberspace in general, "and social media in particular[,]" have become "the most important places (in a spatial sense) for the exchange of views[.]" *Id*. at 1735-1738.

As set forth in Bingham's opening brief, disclosure and registration of Internet identifiers has been held to be a severe restriction akin to parole and probation because such disclosure furthers state and local authorities' ability to monitor private aspects of sex offenders' lives, thereby chilling their ability to freely communicate. (Op. Br. 40) Both *Tetter* and *Packingham* support Bingham's reasoning. *Smith* and *Minnis* do not support the State's position because both decisions precede and therefore do not consider the impact of *Packingham*. The State's failure to respond to the lengthy discussion on this topic in Bingham's opening brief is also telling. (Op. Br. 37-39, 41-42)

For similar reasons, this Court should also reject the State's argument that publishing a person's photograph on the Internet above the bright red label "SEXUAL PREDATOR" is not the modern-day equivalent of face-to-face shaming. (St. Br. 41) The State argues that it is merely "a statutory phrase denoting the nature and severity of an offender's sex offense[.]" (St. Br. 41) But, according to

"the most current and scientifically rigorous research available on sex offender polices and practice," broad use of the phrase "sexual predator" reduces "public safety because it removes the ability to accurately differentiate between high-risk and low-risk individuals." Task Force Report at i, 26. The label can also "produce significant collateral consequences for lower-risk individuals." *Id*. at 27. The Association for the Treatment of Sexual Abusers therefore recommends that, if used, the "controversial" phrase be reserved for only certain, more dangerous sex offenders. *Id*. at 26-27. The findings of the task force demonstrate the phrase's severely negative connotations, and thus support Bingham's position.

According to the State, "[w]hat matters, under *Smith*, is that Illinois's website today, like Alaska's in 2003, does not place a sex offender 'before his fellow citizens for *face-to-face* shaming.'" (St. Bt. at 40) This is not persuasive because "[t]he Internet, in essence, has the ability to make all communication face-to-face." Prana A. Topper, *The Threatening Internet: Planned Parenthood v. ACLA and A Context-Based Approach to Internet Threats*, 33 COLUM. HUM. RTS. L. REV. 189, 229 (2001). This Court should therefore reject the State's position and hold that the combination of more onerous registration requirements and the changed nature of today's Internet requires divergence from *Smith's* reasoning.

Finally, the State argues that the park ban is a "modest restriction" that is not as severe as the historical punishment of banishment. (St. Br. 41-42) This characterization defies reason. As the court observed in *People v. Pepitone*, the park ban prohibits participating in an "extensive" list of activities. 2017 IL App (3d) 140627, ¶23, *appeal allowed* in No. 122034 (May 24, 2017). Examples include:

> attending concerts, picnics, rallies, and Chicago Bears games at Soldier Field; or expeditions to the Field Museum, the Shedd Aquarium,

> the Art Institute, the Adler Planetarium, or the Museum of Science and Industry, all of which are public buildings on park land; bird-watching; photography; hunting; fishing; swimming at a public beach; walking along riverwalks; cycling on bike trails; hiking at Starved Rock; and the list goes on and on.

Id. These extensive restrictions, combined with the shaming caused by labeling people as "sexual predators" and publishing their personal information on the Internet, show that the "history and tradition as punishment" factor weighs in favor of finding that the effects of Illinois' scheme are punitive.

Turning to the "traditional aims of punishment" factor, *Tetter* held that it weighed in favor of punishment because Illinois' sex offender statutes "do not merely deter recidivism[.]" *Tetter*, 2018 IL App (3d) 150243, ¶59. The scheme instead *incapacitates* convicted sex offenders "by banning them from places where children routinely congregate" and "serves as retribution for sex crimes committed." *Id.*

Tetter's holding that Illinois' current scheme has evolved into a force of retribution supports Bingham's argument that sex offender registration has morphed from a minor deterrent similar to other civil penalties into a powerful, retributive deterrent that is punitive. (Op. Br. 42-43) The State relies on *Smith* in arguing that Internet dissemination is meant to protect the public, not punish sex offenders. (St. Br. 48-49) But, regardless of what was *meant*, this Court must consider the *effect*. *See Smith*, 538 U.S. at 92 (despite legislature's intent to enact non-punitive scheme, court had to examine effects to determine whether scheme's effects were punitive). The State's denial of reality does not make reality disappear.

Regarding the "rational relation to a nonpunitive purpose" and "excessive application" factors, *Tetter* held that the scope of Illinois' restrictions "substantially outpace their public safety objective" because there is no provision for individualized

consideration of risk. 2018 IL App (3d) 150243, at ¶¶66-67. The court further held that unlike the schemes of other states, such as New Hampshire, Illinois' scheme is irrevocable, with no provision for sex offenders to petition for removal from the registry. *Id.* at ¶68. *Tetter* therefore concluded, "Although the sex offender statutes' restrictions may present fair and just punishment in many or most cases, they nonetheless constitute punishment." *Id.* at ¶69.

In his opening brief, Bingham argued that Illinois' current scheme is excessive in relation to its purpose in part because it does not permit registrants to petition for removal. (Op. Br. 45) The State counters by asserting, "This argument too is foreclosed by *Smith*[.]" (St. Br. 51) *Tetter* supports Bingham because it shows that his argument is *not* foreclosed by *Smith*. Instead, as Bingham argued throughout his opening brief, *Smith*'s reasoning is outdated due to SORA's more onerous requirements and the myriad ways the Internet—and through it, modern-day life—has changed since 2003, when *Smith* was decided. The State's insistence that this Court should follow *Smith* lacks force because the State fails to acknowledge how the modern Internet has expanded SORA's impact. This Court should reject the State's argument and hold that the current version of Illinois' registration and notification scheme constitutes punishment.

Bingham contends that the 2011 retroactivity clause violates both federal and Illinois' *Ex Post Facto* Clauses. (Op. Br. 48-51) The State asks this Court to remain in lockstep with the federal constitution based on this Court's precedent. (St. Br. 32-33) The State does not, however, offer any reasoned response to Bingham's actual argument. Bingham therefore stands on his opening brief.

Finally, the State claims that even if the effects of Illinois' current scheme are punitive, there is no *ex post facto* violation because the amendment at issue is not retroactive. (St. Br. 33-35) The State relies on cases analogizing the 2011 retroactivity provision to recidivist statutes enhancing punishment for current offenses based on defendants' prior convictions. (St. Br. 33-35, citing *People v. Tucker*, 879 N.W.2d 906, 910 (Mich. App. 2015), and *Johnson v. Madigan*, 880 F. 3d 371, 376 (7th Cir. 2018)) But those cases are inapplicable because unlike the recidivist sentencing statutes they upheld, the legislature's clear intent in adopting the 2011 retroactivity provision was to impose registration and other punitive consequences for the prior offense, with the current offense serving only as an administratively convenient way to accomplish that retroactive effect. Moreover, notwithstanding its punitive effect, SORA is a civil regulatory scheme, not a criminal recidivist statute. This difference is crucial because civil regulatory schemes like SORA require a completely different analysis than criminal sentencing statutes, which necessarily involve punishment. Thus, this Court must reject the State's argument because acceptance would immunize the retroactivity provision from constitutional protections against unfair punishment, thereby giving the legislature free rein to act outside the bounds of constitutional requirements.

Indeed, finding new ways to regulate sex offenders has already become a "rite of spring" for new legislators in Illinois. Michelle Olson, *Putting the Brakes on the Preventive State*, 5 NW J. L. & SOC. POL'Y 403, 416 (Fall 2010). The General Assembly has amended the registry at least 23 times since it was created, "each time adding new offenses or requirements." Task Force Report at 7. This is so despite the fact that "the most current and scientifically rigorous research available

on sex offender policies and practice" has "not established that registries have any effect on the sexual crime rate, and most studies find no reduction in sexual recidivism due to registries." Task Force Report at i, iii.

The Appellate Court has recognized that SORA's new requirements have become increasingly more onerous. *See People v. Tetter*, 2018 IL App (3d) 150243, ¶¶45-69. (Op. Br. 14-15, citing additional cases) Yet, during the final legislative debate on the 2011 retroactivity provision, concerns expressed by some courageous legislators were quelled by a single reference to this Court's determination that SORA is not punishment. *See* 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at 157 (statements of Representative Eddy) (responding to concerns that the 2011 retroactivity provision was additional punishment for "someone who has already been sentenced for" a sex offense by saying that the question of whether SORA is "additional punishment has been adjudicated to the Supreme Court and the Supreme Court said it is not"). SORA thus epitomizes a situation in which this Court's intervention is necessary to check the legislature, because, clearly, the legislature is incapable of checking itself. *See Packingham*, 137 S. Ct. at 1736 ("the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protection.'"). This Court should reject the State's effort to insulate SORA from judicial review.

To determine if a statute may be applied retroactively, this Court uses the approach set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *Hayashi v. Illinois Dep't of Fin. and Prof'l Regulation*, 2014 IL 116023, ¶23. The first question is whether the legislature has spoken clearly regarding whether the law should apply retroactively. *Landraf*, 511 U.S. at 257. In this case, both the plain language

of the statute and the legislative history demonstrate the General Assembly's intent to enact a statute with retroactive application.

The relevant subsection provides that "[a] sex offender or sexual predator, who has never previously been required to register under this Act, has a duty to register if the person has been convicted of any felony offense after July 1, 2011." 730 ILCS 150/3 (West 2012) (effective January 1, 2012). This language clearly demonstrates that the General Assembly intended the new law to have retroactive effect. But, should there be any doubt, such intent is cemented by the legislative history of House Bill 1253, which became Public Act 97-578.

At the hearing on this bill, the sponsor explained that it had been amended after being vetoed at the end of the prior Session, but "now says that instead of our State Police having to go out ... and find the sexual predators who didn't have to register before 1999, ... if a sexual predator reoffends on any type of offense, they then get placed on the Sexual Offender Registry." 97th Ill. Gen. Assem., House Proceedings, March 31, 2011, at 151 (statements of Representative Mell). Representative Mell later confirmed that any new offense would "retroactively" subject all those who had not previously been required to register or whose registration obligation had expired to lifetime registration. *Id*. at 154 (statements of Representatives Mautino and Mell). Representative Golar then said,

> Representative, I actually supported this Bill last year. However, this year after careful consideration and reading upon the rules of this, I have found that I have some questions that I would like to... to ask. Representative, this law by definition applies to people who committed offenses more than 25 years ago and also who have not committed any new sex offense... offenses since. However, as currently written this law makes the registry retroactive to everyone.

Id. at 155-156.

In response to Representative Golar's concerns, Representative Eddy reassured all those in opposition that there was no constitutional problem with retroactivity because this Court had already decided SORA did not constitute punishment. *Id*. at 157. Representative Flowers responded by expressing some of her concerns with the Bill, including that adding to the registry all "ex sex offenders" who "did not commit another sex offense but committed an offense" makes the public "no better and no safer." *Id*. at 159. Representative Mell concluded the debate with the following explanation of the Bill's history:

> this came from a ... constituent who was a victim and she found out that ... her perpetrator was living right around the corner from her. But since, you know, he committed this offense against her and it ... was horrific, before 1999 that, you know, he wasn't on any kind of a list. And surely, she'd want to know where this man was living. So, this passed out of here last year.

Id. at 160. House Bill 1253 then passed with a vote of 85 to 25. *Id*. at 161.

Based on this history, there is no question that the legislature intended for the 2011 retroactivity provision to, in fact, retroactively impose registration and other consequences on the former conviction for a sex offense, with the current offense serving solely as a convenient way to impose those retroactive consequences. That clear legislative intent distinguishes Bingham's case from those relied on by the State, which upheld statutes that used a defendant's former offenses solely to increase the range of punishment for the current offense. (St. Br. 34-35, citing *Nichols v. United States*, 511 U.S. 738, 747 (1994), *United States v. Rodriquez*, 532 U.S. 377, 386 (2008), and *People v. Dunigan*, 165 Ill.2d 235, 242 (1995)) Here, by contrast, the legislative history clearly shows that the General Assembly meant to impose new consequences for prior sex offenses. That matters because, unlike

the cases on which the State (and the Seventh Circuit in *Johnson*) relies, the General Assembly was *not* imposing consequences for the most recent offense.

In sum, the State's argument that the provision is not retroactive fails because we have a tripartite system of government that requires checks and balances. Accepting the State's argument would remove the check of judicial review for sex offenders, which is exactly what *ex post facto* law is intended to prevent. This Court must intervene because, as the above-referenced legislative history highlights, the legislature's responsiveness "to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266. Here that risk has become reality. This Court should therefore hold that the current version of Illinois' registration and notification scheme constitutes punishment, and thus that SORA's 2011 retroactivity provision violates the federal and state *Ex Post Facto* Clauses.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

DEBORAH NALL
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Deborah Nall, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance, is 20 pages.

/s/Deborah Nall
DEBORAH NALL
Assistant Appellate Defender

No. 122008

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JEROME BINGHAM Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-3150. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 CR 11336. Honorable Bridget Jane Hughes, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us; Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov; Michael A. Scodro, Mayer Brown LLP, 71 South Wacker Drive, Chicago, IL 60606, mscodro@mayerbrown.com; Mark G. Weinberg, Law Office of Mark G. Weinberg, 3612 N. Tripp Avenue, Chicago, IL 60641, mweinberg@sbcglobal.net; Adele D. Nicholas, Law Office of Adele D. Nicholas, 5707 W. Goodman Street, Chicago, IL 60630, adele@civilrightschicago.com; Mr. Jerome Bingham, 2054 N Nagle, Chicago, IL 60707

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 3, 2018, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Carol Chatman
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us