

POINTS AND AUTHORITIES

	Page(s)
ARGUMENT	20
I. This Court Should Decline to Consider Defendant’s Claims	20
A. A conviction’s collateral consequences may not be challenged on direct appeal	20
<i>People v. Delvillar</i> , 235 Ill. 2d 507 (2009)	20
<i>Chaidez v. United States</i> , 568 U.S. 342 (2013)	20
<i>State v. Trotter</i> , 330 P.3d 1267 (Utah 2014)	20
<i>Round v. Lamb</i> , 2017 IL 122271	20
<i>People v. Stavenger</i> , 2015 IL App (2d) 140885.....	20
<i>People v. Downin</i> , 394 Ill. App. 3d 141 (3d Dist. 2009).....	20
<i>People v. Reedy</i> , 186 Ill. 2d 1 (1999)	21
<i>People v. Lewis</i> , 234 Ill. 2d 32 (2009).....	21
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	22
<i>People v. Molnar</i> , 222 Ill. 2d 495 (2006).....	22
<i>People v. Avila-Briones</i> , 2015 IL App (1st) 132221.....	22
<i>Does #1-5 v. Snyder</i> , 834 F.3d 696 (6th Cir. 2016)	23
<i>People v. Minnis</i> , 2016 IL 119563.....	23
Sup. Ct. R. 615(b)	21
The Council of State Governments, National Inventory of the Collateral Consequences of Conviction — Illinois, available at https://niccc.csgjusticecenter.org/search/?jurisdiction=18	22

B. An as-applied constitutional challenge may not be raised for the first time on appeal where no factual record in support of the claim was developed below	23
<i>People v. Rizzo</i> , 2016 IL 118599	23
<i>People ex rel. Hartrich v. 2010 Harley-Davidson</i> , 2018 IL 121636	23
II. SORA Does Not Violate Due Process as Applied to Defendant	25
<i>People v. Rizzo</i> , 2016 IL 118599	25
<i>People v. Boeckmann</i> , 238 Ill. 2d 1 (2010).....	25, 26, 27
<i>People v. Gray</i> , 2017 IL 120958	25
<i>Heller v. Doe</i> , 509 U.S. 312 (1993).....	25, 30
<i>Hayashi v. Ill. Dep't of Fin. and Prof. Reg.</i> , 2014 IL 116023.....	25, 27
<i>In re M.A.</i> , 2015 IL 118049	25
<i>People v. Cornelius</i> , 213 Ill. 2d 178 (2004)	25
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	26
<i>People v. Lindner</i> , 127 Ill. 2d 174 (1989).....	26
<i>People v. Johnson</i> , 225 Ill. 2d 573 (2007)	26, 27
<i>People v. Anderson</i> , 148 Ill. 2d 15 (1992)	30
<i>Smith v. Doe</i> , 538 U.S. 84 (2003).....	30
<i>United States v. Kebodeaux</i> , 570 U.S. 387 (2013).....	31
<i>People v. Minnis</i> , 2016 IL 119563.....	31, 32
U.S. Dep't of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, <i>Sex Offender Management Assessment and Planning Initiative</i> (2014) (available at https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf).....	28, 31

Office of the Att’y Gen., U.S. Dep’t of Justice, <i>Applicability of Sex Offender Registration and Notification Act</i> , 72 Fed. Reg. 8894 (2007).....	29
Office of the Att’y Gen., U.S. Dep’t of Justice, <i>National Guidelines for Sex Offender Registration and Notification</i> , 73 Fed. Reg. 38030 (2008).....	29
III. SORA’s Recapture Provision Is Not an <i>Ex Post Facto</i> Law	32
<i>Calif. Dep’t of Corr. v. Morales</i> , 514 U.S. 499 (1995)	32
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990)	32
<i>Johnson v. United States</i> , 529 U.S. 694 (2000).....	32
U.S. Const. art. I, § 10.....	32
Ill. Const. art. I, § 16.....	32
A. The <i>Ex Post Facto</i> Clauses of the Federal and State Constitutions are coextensive	32
<i>People ex rel. Birkett v. Konetski</i> , 233 Ill. 2d 185 (2009).....	33
<i>Hill v. Walker</i> , 241 Ill. 2d 479 (2011)	33
<i>Barger v. Peters</i> , 163 Ill. 2d 357 (1994)	33
B. The recapture provision does not operate retroactively	33
<i>In re Veronica C.</i> , 239 Ill. 2d 134 (2010).....	33
<i>Johnson v. Madigan</i> , 880 F.3d 371 (7th Cir. 2018)	33, 34, 35
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244 (1994)	34
<i>Hayashi v. Ill. Dep’t of Fin. and Prof. Reg.</i> , 2014 IL 116023.....	34
<i>People v. Tucker</i> , 879 N.W.2d 906 (Mich. App. 2015).....	34
<i>Nichols v. United States</i> , 511 U.S. 738 (1994)	34

<i>United States v. Rodriquez</i> , 553 U.S. 377 (2008).....	35
<i>People v. Dunigan</i> , 165 Ill. 2d 235 (1995).....	35
C. SORA does not impose punishment	35
<i>Smith v. Doe</i> , 538 U.S. 84 (2003).....	<i>passim</i>
<i>United States v. Parks</i> , 698 F.3d 1 (1st Cir. 2012).....	36, 46
<i>United States v. Under Seal</i> , 709 F.3d 257 (4th Cir. 2013).....	36
<i>United States v. Young</i> , 585 F.3d 199 (5th Cir. 2009)	36
<i>United States v. Leach</i> , 639 F.3d 769 (7th Cir. 2011).....	36
<i>Am. Civ. Lib. Union of Nevada v. Masto</i> , 670 F.3d 1046 (9th Cir. 2012).....	37, 39, 49, 51
<i>Shaw v. Patton</i> , 823 F.3d 556 (10th Cir. 2016).....	37, 42, 43, 44, 45
<i>United States v. W.B.H.</i> , 664 F.3d 848 (11th Cir. 2011).....	37, 46
<i>Does #1-5 v. Snyder</i> , 834 F.3d 696 (6th Cir. 2016)	37, 43, 47
<i>People v. Smith</i> , 2015 IL 116572	37
<i>People v. Cornelius</i> , 213 Ill. 2d 178 (2004)	37, 49
<i>People v. Malchow</i> , 193 Ill. 2d 413 (2000)	37
<i>People v. Adams</i> , 144 Ill. 2d 381 (1991).....	38
<i>Kansas v. Hendricks</i> , 521 U.S. 346 (1997)	38, 48
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963)	38
<i>United States v. Ursery</i> , 518 U.S. 267 (1996).....	39
<i>Hudson v. United States</i> , 522 U.S. 93 (1997).....	39, 47, 47
<i>State v. Petersen-Beard</i> , 377 P. 3d 1127 (Kan. 2016).....	39
<i>State v. Seering</i> , 701 N.W.2d 655 (Iowa 2005).....	42

<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017)	42
<i>Doe v. Miller</i> , 405 F.3d 700 (8th Cir. 2005).....	42, 48
<i>People v. Mosley</i> , 344 P.3d 788 (Cal. 2015)	42
<i>People v. Minnis</i> , 2016 IL 119563.....	44, 50, 51
<i>Samson v. California</i> , 547 U.S. 843 (2006)	44
<i>United States v. Knights</i> , 534 U.S. 112 (2001).....	44
<i>Mueller v. Raemisch</i> , 740 F.3d 1128 (7th Cir. 2014)	45
<i>Litmon v. Harris</i> , 768 F.3d 1237 (9th Cir. 2014)	46
<i>Belleau v. Wall</i> , 811 F.3d 929 (7th Cir. 2016)	47
<i>United States v. Kebodeaux</i> , 570 U.S. 387 (2013)	50, 51
720 ILCS 5/11-9.3.....	43
730 ILCS 5/3-3-7	44
730 ILCS 5/5-6-3(a)	44
730 ILCS 5/5-6-3(b)	44
730 ILCS 5/5-6-4(e)	45
730 ILCS 150/3(a)	47
Sup. Ct. R. 341(h)(7).....	37, 45
Office of the Att’y Gen., U.S. Dep’t of Justice, <i>National Guidelines for Sex Offender Registration and Notification</i> , 73 Fed. Reg. 38030 (2008).....	46
96th Ill. Gen. Assemb., Senate Proceedings, Mar. 16, 2010.....	38

NATURE OF THE ACTION

Defendant was convicted of felony theft. As a result of that conviction, he is required to register as a sexual predator under the Sex Offender Registration Act (SORA) because he was previously convicted of a qualifying sex offense. On direct appeal of the theft conviction, the appellate court rejected defendant's arguments that requiring him to register as a sexual predator violates the due process and *ex post facto* clauses of the federal and state constitutions. In this Court, defendant renews his challenges to SORA. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

In 2011, in an effort to comply with federal guidelines governing state sex offender registration and notification laws, the General Assembly added a "recapture provision" to SORA. Under that provision, a person who was convicted of a qualifying sex offense before SORA's enactment must register as a sexual predator if he is subsequently convicted of any other felony offense. Defendant was convicted of attempted criminal sexual assault in 1983, before SORA's enactment, and had not previously been required to register as a sexual predator based on that conviction. However, after his 2014 felony theft conviction, he became subject to SORA under the recapture provision. The issues presented for review are:

1. Whether defendant may challenge a collateral consequence of his theft conviction on direct appeal.

2. Whether defendant may raise an as-applied constitutional challenge for the first time on appeal when no evidentiary record related to the claim was developed below.

3. Whether requiring defendant to register as a sex offender based on the combination of a qualifying sex offense conviction that predates SORA and a subsequent non-sex-offense conviction that postdates it satisfies due process because it is rationally related to the State's legitimate interest in protecting the public from sex offenders.

4. Whether SORA's recapture provision comports with *ex post facto* principles because it (a) does not operate retroactively, and (b) imposes nonpunitive, civil regulations that may be applied retroactively in any event.

JURISDICTION

This Court granted defendant's petition for leave to appeal on May 24, 2017. Jurisdiction thus lies under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

I. Statutory Background

Sex offenders present serious "public safety concerns" due to "evidence that [their] recidivism rates . . . are higher than the average for other types of criminals." *United States v. Kebodeaux*, 570 U.S. 387, 395 (2013); *see also Smith v. Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). To address these concerns, "States in the early 1990's began

enacting registry and community-notification laws to monitor the whereabouts of individuals previously convicted of sex crimes.” *Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016). By 1996, two years after Congress entered the field with federal guidelines for state sex offender registration programs, “every State, the District of Columbia, and the Federal Government had enacted some variation of a sex-offender registry.” *Id.* (internal quotation marks omitted). Because the state laws that exist today have been shaped by evolving federal standards, it is helpful to understand the federal guidelines before delving into the specifics of Illinois law.

A. Federal guidelines for state sex offender registration and notification laws

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (codified at 42 U.S.C. § 14071, *et seq.* (1994)), which established minimum standards for sex offender registration laws and conditioned certain federal funding to States on their adoption of laws meeting those standards. *Nichols*, 136 S. Ct. at 1116. In 1996, Congress amended the federal standards to require community notification in addition to registration. *See Megan’s Law*, Pub. L. 104-145, 110 Stat. 1345 (codified at 42 U.S.C. § 14071(d) (1996)). And in 2003, Congress required States to create Internet sites to make sex offender registration information available to the public. *See PROTECT Act*, Pub. L. No. 108-21, § 604, 117 Stat. 688 (codified at 42 U.S.C. § 14071(e)(2) (2003)).

Despite these efforts, “a patchwork of . . . state registration systems” remained, “with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost.” *Kebedeaux*, 570 U.S. at 399 (internal quotation marks omitted). In 2006, “to make these state schemes more comprehensive, uniform, and effective,” *Carr v. United States*, 560 U.S. 438, 441 (2010), Congress replaced the Wetterling Act and its subsequent amendments with the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (codified at 34 U.S.C. § 20901, *et seq.*). SORNA establishes “comprehensive . . . standards” for state sex offender registration and notification laws and “mak[es] federal funding contingent on States’ bringing their systems into compliance with those standards.” *Reynolds v. United States*, 565 U.S. 432, 435 (2012).¹ Although Illinois has not yet substantially complied with SORNA, *see* U.S. Dep’t of Justice, Office of Justice Programs, *SORNA Substantial Implementation Review State of Illinois* (July 2016) (available at <https://www.smart.gov/pdfs/sorna/Illinois-hny.pdf>), many of the relevant provisions of Illinois law that are challenged here are best understood against the backdrop of SORNA.

SORNA directs each State “to maintain a [state]-wide sex offender registry,” 34 U.S.C. § 20912(a), and requires sex offenders to “register, and keep the registration current, in each [State] where the offender resides,” “is

¹ SORNA “sets a floor, not a ceiling, for [state] programs.” Office of the Att’y Gen., U.S. Dep’t of Justice, *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030, 38046 (2008).

an employee,” or “is a student,” 34 U.S.C. § 20913(a). The duration of a sex offender’s duty to register, and the frequency with which he must appear in person to verify his registration information, is tied to the severity of his qualifying sex offense. Sex offenders convicted of the most serious sex offenses — including any offense (or attempt to commit an offense) comparable to or more serious than sexual abuse, *see* 34 U.S.C. § 20911(4)(A); *see also* 73 Fed. Reg. 38054 (such “comparable offenses . . . would be those that cover . . . “[e]ngaging in a sexual act with another by force or threat”) — must register for life, 34 U.S.C. § 20915(a)(3), and appear in person to verify their registration information every three months, 34 U.S.C. § 20918(3).² SORNA requires States to make a sex offender’s failure to comply with his registration obligations a criminal offense punishable “by a maximum term of imprisonment that is greater than 1 year.” 34 U.S.C. § 29013(e).

² SORNA calls these offenders “Tier III sex offender[s].” 34 U.S.C. § 20911(4). Tier II sex offenders, those convicted of a range of less serious sex offenses, *see* 34 U.S.C. § 20911(3), must register for 25 years, 34 U.S.C. § 20915(2), and appear in person to verify their registration information every six months, 34 U.S.C. § 20918(2). Tier I sex offenders, those convicted of the least serious sex offenses, must register for 15 years, 34 U.S.C. § 20915(1), and appear in person to verify their registration information every year, 34 U.S.C. § 20918(1). A State need not divide its sex offenders into three tiers. “Rather, the SORNA requirements are met so long as sex offenders who satisfy the SORNA criteria for placement in a particular tier are consistently subject to at least the duration of registration [and] frequency of in-person appearances for verification . . . that SORNA requires for that tier.” 73 Fed. Reg. 38053. Conversely, a State will not be deemed to have substantially complied with SORNA if it “substitute[s] some basically different approach to sex offender registration and notification,” such as pegging the duration and frequency of an offender’s registration and verification requirements to an individualized “risk assessment” rather than an offense-based categorization. 73 Fed. Reg. 38047.

A State's sex offender registry must include, among other things, the following information about a registered sex offender: name and any aliases; any telephone number, including cellphone number; any email address or other designation used for self-identification or routing in Internet communication or posting (collectively referred to as "Internet identifiers"); address of any place the sex offender resides, including information about any place in which the sex offender is staying when away from his residence for seven or more days; name and address of any place where the sex offender is employed or attends school; license plate number and description of any vehicle owned or operated by the sex offender; a current photograph of the sex offender, as well as a physical description of the sex offender, including any identifying marks, such as scars or tattoos; the text of the provision of law defining the criminal offense for which the sex offender is registered; the sex offender's criminal history; and a set of fingerprints and palm prints. *See* 34 U.S.C. § 20914(a), (b); § 20916(a), (e)(2); 73 Fed. Reg. 38054-38058.

In addition to regularly appearing in person to verify registration information, under SORNA sex offenders must appear in person within three business days of any "change of name, residence, employment, or student status" and must report "all changes" to their registration information at that time. 34 U.S.C. § 20913(c); 73 Fed. Reg. 38065. States must also require sex offenders to immediately report any change in their vehicle information,

Internet identifiers, or temporary lodging information, but such changes need not be reported in person. 73 Fed. Reg. 38066.

SORNA further mandates targeted and Internet-based community notification. Within three days of a sex offender registering or updating his registration information, States must provide the registration information to specified entities and individuals, including schools and public housing agencies in the areas where the sex offender resides, works, or goes to school; social service entities responsible for protecting minors in the child welfare system; volunteer organizations in which contact with minors or other vulnerable individuals might occur; and any organization, company, or individual that requests such notification. 34 U.S.C. § 20293(b); 73 Fed. Reg. 38060-38061.

SORNA also directs States to “make available on the Internet” (with certain mandatory and discretionary exceptions) “all information about each sex offender in the registry.” 34 U.S.C. § 20920(a).³ The website must include the following information: names and aliases; residence, employment, and school addresses; license plate and vehicle-description information; a physical description of the sex offender; the sex offense for which the offender is registered; and a current photograph. 73 Fed. Reg. 38058-38059. It must

³ A State may not include, among other things, a sex offender’s Internet identifiers on its sex offender website, but it may “disclose [that] information to any one by means other than public Website posting.” Office of the Att’y Gen., U.S. Dep’t of Justice, *Supplemental Guidelines for Sex Offender Registration and Notification*, 76 Fed. Reg. 1630, 1637 (2011).

“permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user,” 34 U.S.C. § 20920(a), and must also be searchable “by name, county, and city/town,” 73 Fed. Reg. 38058.

Finally, SORNA “appl[ies] to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to [SORNA’s] enactment.” 28 C.F.R. § 72.3; *see also* Office of the Att’y Gen., U.S. Dep’t of Justice, *Applicability of Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8896 (2007) (“SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA.”). However, because it may be difficult, “[a]s a practical matter,” for a State to identify and register all sex offenders with pre-SORNA convictions, “particularly where such sex offenders have left the justice system and merged into the general population long ago,” a State may substantially comply with SORNA by registering those sex offenders with pre-SORNA convictions who are otherwise “within the [State’s] cognizance,” 73 Fed. Reg. 38046, either because they “remain in the system as prisoners, supervisees, or registrants [under the State’s pre-SORNA registration law],” or because they “reenter the system through a subsequent [felony] conviction,” 76 Fed. Reg. 1639. In other words, States may substantially comply with SORNA by providing a mechanism to “recapture” and register

subsets of sex offenders with pre-SORNA convictions, including those who are subsequently convicted of another felony offense. *See* U.S. Dep’t of Justice, Office of Justice Programs, *Sex Offender Registration and Notification Act Substantial Implementation Checklist—Revised*, at 13 (available at <https://ojp.gov/smart/pdfs/checklist.pdf>).

B. Illinois’s sex offender registration and notification laws and related statutes

In 1996, the General Assembly enacted the Sex Offender Registration Act (SORA), 1995 Ill. Legis. Serv. Pub. Act 89-8, § 20-20 (West) (codified at 730 ILCS 150/1, *et seq.*). The following year, it passed what is now called the Sex Offender Community Notification Law (Notification Law), 1997 Ill. Legis. Serv. Pub. Act 90-193, § 20 (West) (codified at 730 ILCS 152/101, *et seq.*).⁴ These laws “operate in tandem, providing a comprehensive scheme for the registration of Illinois sex offenders and the dissemination of information about these offenders to the public.” *People v. Cornelius*, 213 Ill. 2d 178, 181 (2004). Because the laws operate in tandem, this brief will refer to them collectively as SORA, unless otherwise indicated.

⁴ An earlier version of the registration law, passed in 1986, applied only to habitual child sex offenders. *See People v. Adams*, 144 Ill. 2d 381, 385-86 (1991). In 1993, the law was expanded to apply to all child sex offenders, before it was eventually replaced by SORA. *See People v. Molnar*, 222 Ill. 2d 495, 499 (2006). Likewise, the initial version of the notification law applied only to child sex offenders. *See* 1995 Ill. Legis. Serv. Pub. Act 89-428 (West). When the law was expanded to cover all sex offenders, it was initially called the Sex Offender and Child Murderer Community Notification Law. It received its current title in 2006. *See* 2006 Ill. Legis. Serv. Pub. Act 94-945, § 1030 (West).

Under SORA, a “sex offender” is any person who is convicted of an enumerated offense or an attempt to commit an enumerated offense. 730 ILCS 150/2(A)(1)(a), (B).⁵ SORA divides sex offenders into two tiers based on the severity of their qualifying sex offense. A person convicted of a more serious sex offense (including, as relevant here, criminal sexual assault), is deemed a “sexual predator.” 730 ILCS 150/2(E)(1). Any other sex offender is simply labeled a “sex offender.” The duration of a person’s registration obligation is based on that individual’s classification: a sexual predator must register for life; a sex offender must register for ten years. *See* 730 ILCS 150/7.

When first enacted, SORA did not classify sex offenders into tiers. Any person convicted of an enumerated sex offense was a “sex offender” subject to a ten-year registration period. *See* 730 ILCS 150/2, 150/7 (1996). The “sexual predator” tier, with lifetime registration, was created in 1999, but it applied only prospectively to those persons convicted of a qualifying offense after July 1, 1999. *See* 1999 Ill. Legis. Serv. Pub. Act 91-48, § 5 (West) (codified at 730 ILCS 150/2(E) (West 2000)). In 2011, in an effort to comply with SORNA’s guidelines, the General Assembly added several recapture provisions to SORA. *See* 2011 Ill. Legis. Serv. Pub. Act 97-578, § 5 (West) (eff. Jan. 1,

⁵ The definition of “sex offender” also includes any person who is charged with an enumerated offense and is found not guilty by reason of insanity or who is found unfit for trial and, at a subsequent discharge hearing, is the subject of a finding not resulting in an acquittal (a so-called “not-not-guilty finding”). 730 ILCS 150/2(A)(1)(b), (d); *see People v. Cardona*, 2013 IL 114076, ¶¶ 20, 25.

2012). Under the provision at issue here, a person who was convicted of a sexual-predator-qualifying offense before July 1, 1999 must register for life as a sexual predator if he is convicted of any other felony offense after July 1, 2011. *See* 730 ILCS 150/2(E)(7); *see also* 730 ILCS 150/3(c)(2.1) (“A sex offender or sexual predator, who has never previously been required to register under [SORA], has a duty to register if the person has been convicted of any felony offense after July 1, 2011.”).

A sex offender⁶ must register in person with the law enforcement agency in the jurisdiction in which he resides. 730 ILCS 150/3(a).⁷ He must initially register within three days of being sentenced or, if sentenced to prison, within three days of his release. 730 ILCS 150/3(c)(3), (4). He likewise must register within three days of beginning school or establishing a place of residence, employment, or temporary domicile. 730 ILCS 150/3(b). Thereafter, he must “report in person to the appropriate law enforcement agency with whom he . . . last registered” on a yearly basis or “at such other

⁶ Other than the duration of the duty to register (discussed above), SORA’s registration requirements apply equally to sexual predators and sex offenders. Accordingly, for the sake of convenience, the remainder of this brief will refer to both tiers of offenders as “sex offenders,” unless otherwise noted.

⁷ If the person is employed at or attends an institution of higher education, he must also register with the law enforcement agency in the jurisdiction in which the institution is located and with the institution’s public safety or security director. 730 ILCS 150/3(i)-(ii). There is no evidence in the record that defendant is employed at or attends, or is likely in the future to be employed at or attend, such an institution.

times at the request of the law enforcement agency not to exceed 4 times a year.” 730 ILCS 150/6.⁸

When registering, a sex offender must provide the following information:

- a current photograph and a description of any distinguishing marks on his body;
- his current address;
- his telephone number, including cellphone number;
- his place of employment, including his employer’s telephone number;
- any school attended;
- all email addresses, instant messaging identities, chat room identities, and other Internet communications identities that he uses or plans to use, as well as all Uniform Resource Locators (URLs) that he has registered or uses and all blogs and other Internet sites that he maintains or to which he has uploaded any content or posted any messages or information;⁹
- the license plate number for any vehicle registered in his name;
- any extension of the time period for registering that he received, as well as the date on which and the reason why the extension was granted;

⁸ A sex offender “who lacks a fixed address must report weekly, in person,” with the law enforcement agency in the jurisdiction where he is located. 730 ILCS 150/3(a) (second-to-last hanging paragraph). There is no evidence in the record that this provision currently applies, or is likely to apply, to defendant.

⁹ Borrowing SORNA’s terminology, this brief will refer to these pieces of information as the sex offender’s “Internet identifiers.” *See* 34 U.S.C. § 20916(e)(2) (defining “Internet identifiers” as “electronic mail addresses and other designations used for self-identification or routing in Internet communications or posting”).

- a copy of the terms and conditions of his parole or supervised release;
- the county in which he was convicted; and
- his age and his victim's age at the time of the offense.

730 ILCS 150/3(a). A sex offender “shall pay a \$100 initial registration fee and a \$100 annual renewal fee,” but these fees may be waived if the offender is indigent. 730 ILCS 150/3(c)(6). A violation of any of SORA's registration requirements is a Class 3 felony, 730 ILCS 150/10, the maximum punishment for which is five years in prison, 730 ILCS 5/5-4.5-40(a).

In addition to the regular reporting requirement, a sex offender who “changes his . . . residence address, place of employment, telephone number, cellular telephone number, or school,” must “report in person, to the law enforcement agency with whom he . . . last registered,” and provide his “new address, change in employment, telephone number, cellular telephone number, or school,” as well as “all new or changed” Internet identifiers. 730 ILCS 150/6.¹⁰ Moreover, if a sex offender “is temporarily absent from his . . . current address . . . for 3 or more days,” he must “notify the law enforcement agency having jurisdiction of his . . . current registration” and provide “the itinerary for travel.” 730 ILCS 150/3(a) (third-to-last hanging paragraph).

The Notification Law directs the Illinois State Police (ISP) to “establish and maintain a Statewide Sex Offender Database” and to make the

¹⁰ Defendant incorrectly states that a sex offender must immediately report in person any time he changes any of his Internet identifiers. *See* Def. Br. 33.

information contained in the database accessible on the Internet via a link labeled “Sex Offender Information” on ISP’s homepage. 730 ILCS 152/115; *see* <https://www.isp.state.il.us/sor/>. When a user arrives at the registry website, he sees a disclaimer that warns, among other things, that the “[i]nformation compiled on this [r]egistry may not be used to harass or threaten sex offenders or their families”; that “[h]arassment, stalking[,] or threats may violate Illinois criminal law”; and that “[a]nyone who uses [the registry] information to commit a criminal act against another person is subject to criminal prosecution.” The user must indicate that he “agree[s] with . . . the[se] conditions” before he is allowed to “enter th[e] site.”

The user then may search for a sex offender by last name, city, county, and zip code, as well as by status (compliant, non-compliant, or location unknown) and offender type (child sex offender, adult sex offender, or murderer). The website also contains a link (titled “Mapping”) that allows users to search for sex offenders within a given radius of an identified address. *See* 730 ILCS 152/115(b) (directing ISP to “make the information contained in the Statewide Sex Offender Database searchable via a mapping system which identifies registered sex offenders living within 5 miles of an identified address”).

When a user clicks on a sex offender’s name, the website displays the offender’s photograph and lists the offender’s name and aliases; date of birth; height, weight, sex, and race; address; county of conviction; qualifying sex

offense; and the age of the offender and victim at the time of the offense. The website does not list an offender's Internet identifiers. For an offender classified as a "sexual predator," the website includes the designation "Sexual Predator" in red type, hyperlinked to a page that provides a list of sexual-predator-qualifying offenses.

In addition, the Notification Law directs local law enforcement agencies to disclose the names, addresses, dates of birth, places of employment, schools attended, Internet identifiers, and qualifying offenses of all sex offenders to the Illinois Department of Children and Family Services and the following entities or persons in the jurisdiction in which the sex offender is required to register or is employed: schools, child care facilities, libraries, public housing agencies, social service agencies and volunteer organizations providing services to minors, and any victim of a sex offense who has notified the law enforcement agency that he or she desires to receive such notice. 730 ILCS 152/120(a), (a-2), (a-3), (h). The ISP or any local law enforcement agency, in their discretion, also may disclose, "to any person likely to encounter a sex offender," the offender's name, address, date of birth, and Internet identifiers; the offense for which the offender was convicted; the offender's photograph or other information that will help identify the offender; and the offender's employment information. 730 ILCS 152/120(b). For all other members of the public, a sex offender's name, address, date of birth, Internet identifiers, qualifying offense, age (and that of

his victim) at the time of the offense, county of conviction, license plate numbers, and any distinguishing marks on his body “shall be open to inspection,” in person, upon request. 730 ILCS 152/120(c).

Finally, a separate provision of Illinois law prohibits sexual predators from knowingly being present in, or loitering within 500 feet of, a public park, defined to include any “park, forest preserve, bikeway, trail, or conservation area under the jurisdiction of the State or a unit of local government.” 720 ILCS 5/11-9.4-1. A first violation of this provision is a Class A misdemeanor, and any subsequent violation is a Class 4 felony. 720 ILCS 5/11-9.4-1(d).¹¹

II. Factual and Procedural History

A. Defendant is convicted of theft.

In 2014, defendant was convicted of theft. C114.¹² Although theft is generally a Class A misdemeanor, defendant’s offense was elevated to a Class 4 felony because he had previously been convicted of another theft offense. C19, RD20; *see* 720 ILCS 5/16-1(b)(2). The trial court sentenced defendant to

¹¹ The appellate court recently declared the park restriction facially unconstitutional under the due process clauses of the federal and state constitutions. *See People v. Pepitone*, 2017 IL App (3d) 140627. This Court allowed the People’s petition for leave to appeal and heard oral argument on January 9, 2018. Illinois law imposes additional restrictions on child sex offenders, *see* 720 ILCS 5/11-9.3, but those restrictions do not apply to defendant and thus are not at issue here.

¹² The common law record is cited as “C__”; the report of proceedings is cited as “R__”; and materials in the appendix to defendant’s opening brief are cited as “A__.”

three years in prison and one year of mandatory supervised release, and imposed several fines and fees. C114, RE11.

B. Defendant is obligated to register as a sex offender.

Defendant was convicted of attempted criminal sexual assault in 1983. C34. Today, a person convicted of that offense must register for life as a sexual predator. *See* 730 ILCS 150/2(E)(1). However, because SORA did not exist in 1983, and did not apply retroactively to defendant when it was enacted, *see* 730 ILCS 150/3(c) (1996), defendant had not been required to register. That changed in 2014, when defendant's felony theft conviction triggered SORA's recapture provision. As discussed, 730 ILCS 150/2(E)(7) and 730 ILCS 150/3(c)(2.1), added to SORA in 2011, provide that any person convicted of a sexual-predator-qualifying offense before July 1, 1999, who had not previously been required to register under SORA, must register as a sexual predator if he is convicted of any other felony offense after July 1, 2011.¹³

C. On appeal from his theft conviction, defendant challenges his registration obligation.

On direct appeal of his theft conviction, defendant argued that the conviction was improperly elevated from a misdemeanor to a felony, and that the trial court erred in imposing certain fines and fees. A3. The appellate court rejected the first contention but partially agreed with the second. A13-

¹³ Because defendant was sentenced to imprisonment for the theft conviction, the Illinois Department of Corrections was required to inform him of his duty to register prior to his release. *See* 730 ILCS 150/4, 150/5-7.

17. The appellate court thus affirmed the trial court's judgment but directed the clerk to modify the fines and fees imposed. A17.

In addition to challenging his conviction and sentence, defendant asked the appellate court to "relieve[] [him] of the obligation to register as a sex offender." Brief and Argument of Defendant-Appellant, *People v. Bingham*, No. 1-14-3150, at 42. He argued that the registration requirement violates due process as applied to him because it is not rationally related to the goal of protecting the public from sex offenders, and that it violates the constitutional prohibitions against *ex post facto* laws because it imposes retroactive punishment for his prior sex offense. A3.

At the outset, the appellate court rejected the State's argument that defendant could not raise an as-applied challenge to SORA's registration requirements when the issue was not litigated below and no evidentiary record or factual findings related to the claim were made. See Brief and Argument of Plaintiff-Appellee, *People v. Bingham*, No. 1-14-3150, at 4 (citing *People v. Mosley*, 2015 IL 115872, ¶ 47). The appellate court concluded that the "record on appeal is sufficient [to enable] review [of] defendant's as-applied challenge" because it "contains the transcript of the bench trial" detailing "the circumstances of [defendant's] felony theft offense" and the sentencing hearing transcript and pre-sentence investigation report that "explored [defendant's] criminal history," including his prior sex offense. A9.

Turning to the merits of the due process claim, the appellate court held that requiring defendant to register as a sex offender based on the combination of his 2014 felony theft conviction and 1983 attempted criminal sexual assault conviction “is a reasonable method for accomplishing the desired legislative objective of protecting the public from sex offenders,” which “is obviously a legitimate state interest.” A9-10 (internal quotation marks omitted). The appellate court observed that defendant’s “lengthy criminal history from 1983 to 2014 . . . shows his . . . general tendency to return to his prior criminal behavior,” one aspect of which “involved a sex offense.” A10. And when a person “has committed a sex offense in the past . . . and has shown a recent, general tendency to recidivate,” lawmakers “reasonably could determine that . . . he poses the potential threat of committing a new sex offense in the future.” A10-11. Indeed, for defendant, who had committed “no less than 11 crimes . . . since his attempted criminal sexual assault,” that “threat is magnified.” A11.

The appellate court likewise rejected defendant’s *ex post facto* challenge, adhering to this Court’s repeated holdings that neither SORA’s registration requirements nor its community notification provisions constitute punishment. *See* A11-13 (citing, *inter alia*, *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 207 (2009), and *People v. Malchow*, 193 Ill. 2d 413, 424 (2000)). Defendant did not argue that the park restriction constituted punishment, and the appellate court thus did not address that provision.

ARGUMENT

I. This Court Should Decline to Consider Defendant's Claims.

A. A conviction's collateral consequences may not be challenged on direct appeal.

Defendant's sex offender registration requirement is a collateral consequence of his theft conviction. *See People v. Delvillar*, 235 Ill. 2d 507, 520 (2009) (explaining that collateral consequences of a conviction are "effects upon the defendant that the circuit court has no authority to impose"); *see also Chaidez v. United States*, 568 U.S. 342, 349 n.5 (2013) (sex offender registration "commonly viewed as collateral" consequence of conviction); *State v. Trotter*, 330 P.3d 1267, 1276 (Utah 2014) ("registration requirement is properly characterized as a collateral consequence because, although automatic in effect, it is unrelated to the range of the defendant's punishments" and "is beyond the control of the trial court"). The requirement was not imposed by the trial court (nor could the court have exempted defendant from it), and it is thus not reflected in the trial court's judgment. *See* C114 (mittimus); RE11 (oral pronouncement of sentence). Nor, unlike a term of mandatory supervised release (MSR), is it an implicit part of the sentencing judgment. *Compare Round v. Lamb*, 2017 IL 122271, ¶ 16 ("the MSR term is included in the sentence as a matter of law"), *with People v. Stavenger*, 2015 IL App (2d) 140885, ¶ 11 ("registration requirement is not an element of a defendant's sentence"), and *People v. Downin*, 394 Ill. App. 3d 141, 146 (3d Dist. 2009) ("registration as a sex offender is merely a collateral

consequence of defendant's conviction"). It is also unlike a truth-in-sentencing provision reducing a defendant's entitlement to good-conduct credit, which may be challenged on direct appeal, because "good-time credit is inherent in each sentence" and may be considered by the trial court "in determining [a] defendant[s] sentence[]." *People v. Reedy*, 186 Ill. 2d 1, 7 (1999).

In criminal cases, "[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). Likewise, the scope of appellate review is defined by the trial court's judgment and the proceedings and orders related to it. An appellate court may "(1) reverse, affirm, or modify the judgment or order from which the appeal is taken; (2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken; (3) reduce the degree of the offense of which the appellant was convicted; (4) reduce the punishment imposed by the trial court; or (5) order a new trial." Sup. Ct. R. 615(b). The requirement that defendant register as a sex offender is not encompassed within the judgment or any order of the trial court and cannot be characterized as a "proceeding[] subsequent to or dependent upon" the judgment or any order of the trial court. Nor, even if the requirement were deemed punishment (as defendant argues), would it be "punishment imposed by the trial court." Accordingly, a reviewing court has no power on

direct appeal of a criminal conviction to “order that [the defendant] be relieved of the obligation to register as a sex offender,” Def. Br. 52, when that obligation was not imposed by the trial court.

A contrary rule would 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 consequences could include “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.” *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010) (Alito, J., concurring in the judgment); *see also* The Council of State Governments, National Inventory of the Collateral Consequences of Conviction — Illinois, available at <https://niccc.csgjusticecenter.org/search/?jurisdiction=18> (listing numerous collateral consequences in Illinois). Allowing defendants to challenge collateral consequences on direct appeal would place appellate courts in the position of ruling on the validity (or resolving the details) of regulatory programs administered by state agencies and officials that are not parties to the action. *See People v. Molnar*, 222 Ill. 2d 495, 500 (2006) (ISP is “the agency responsible for implementing [SORA].”). And it would force them to do so in a posture where, as here, there has been little, if any, factual development below. *See People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 86 (where defendant challenged SORA on direct appeal rather than in a

civil action, the record lacked “detailed factual findings” concerning the registration system and its effect on registrants); *cf. Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (addressing *ex post facto* challenge to Michigan SORA in civil action against state officials charged with administering the program and based on a detailed factual record produced in the trial court).¹⁴

B. An as-applied constitutional challenge may not be raised for the first time on appeal where no factual record in support of the claim was developed below.

Even if defendant otherwise could challenge his registration requirement on direct appeal, his failure to litigate his as-applied due process challenge in the circuit court — and to create a factual record in support of it — makes it impossible to adjudicate that claim on appeal. As this Court has repeatedly stressed, “[a] court is not capable of making an ‘as applied’ determination of unconstitutionality when there has been no evidentiary hearing and no findings of fact. Without an evidentiary record, any finding that a statute is unconstitutional ‘as applied’ is premature.” *People v. Rizzo*, 2016 IL 118599, ¶ 26 (bracketed material and some internal quotation marks omitted); *see also People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 31 (“All as-applied challenges are, by definition, reliant on the application of the law to the *specific* facts and circumstances alleged by the

¹⁴ In addition to civil actions seeking declaratory or injunctive relief, challenges to sex offender registration requirements are also properly raised by defendants charged with violating the laws’ provisions. *See, e.g., People v. Minnis*, 2016 IL 119563, ¶¶ 5-6 (defendant charged with failing to register moved to dismiss indictment on ground that statute was unconstitutional).

challenger. Therefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review.”) (emphasis in original; internal quotation marks omitted).

The appellate court held that the record here “is sufficient [to enable] review [of] defendant’s as-applied challenge” because it “contains the transcript of the bench trial” detailing “the circumstances of [defendant’s] felony theft offense” and the sentencing hearing transcript and pre-sentence investigation report that “explored [defendant’s] criminal history,” including his prior sex offense. A9. But neither the trial or sentencing hearing nor the pre-sentence report developed the record with an eye toward litigating a challenge to defendant’s sex offender registration obligation. Indeed, that obligation was not mentioned during the proceedings in the trial court. The record thus contains no information about the conduct underlying defendant’s attempted criminal sexual assault conviction or his subsequent offenses prior to the theft conviction. For instance, there is no evidence about the circumstances that led to an order of protection being issued against him, nor of the conduct that resulted in him being convicted of violating that order. *See* Def. Br. 2. All of these facts may be relevant to defendant’s risk of sexual recidivism, and would thus bear on his claim that no rational basis exists for applying SORA to him. While defendant may prefer to litigate the issue in the absence of those and other facts, the People’s ability to defend the constitutionality of the registration requirement as applied to defendant and

the Court's ability to resolve the issue have been stymied by defendant's failure to raise his claim below.

II. SORA Does Not Violate Due Process as Applied to Defendant.

If the Court were to reach defendant's as-applied challenge to the constitutionality of SORA, it should reject the claim. Defendant contends that requiring him to register as a sex offender violates the due process clauses of the federal and state constitutions.¹⁵ Because he concedes that SORA affects no fundamental right, *see* Def. Br. 6, rational basis review applies. *See Rizzo*, 2016 IL 118599, at ¶ 45; *People v. Boeckmann*, 238 Ill. 2d 1, 7 (2010). That review "is highly deferential," *People v. Gray*, 2017 IL 120958, ¶ 61, and does not give courts "a license . . . to judge the wisdom, fairness, or logic of legislative choices," *Heller v. Doe*, 509 U.S. 312, 319 (1993) (internal quotation marks omitted), even where those choices "yield harsh results," *Hayashi v. Ill. Dep't of Fin. and Prof. Reg.*, 2014 IL 116023, ¶ 32. Rather, "[a] statute will be upheld under the rational basis test as long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." *In re M.A.*, 2015 IL 118049, ¶ 55.

SORA's purpose "is to assist law enforcement and to protect the public from sex offenders." *People v. Cornelius*, 213 Ill. 2d 178, 205 (2004). "There is no doubt that preventing danger to the community is a legitimate

¹⁵ Defendant "does not argue that the state due process clause provides greater protection than that provided by the federal constitution," so there is "no compelling reason to construe the state due process clause independently of its federal counterpart." *People v. Gray*, 2017 IL 120958, ¶ 56.

regulatory goal.” *United States v. Salerno*, 481 U.S. 739, 747 (1987); *see also* Def. Br. 8 (conceding that SORA’s “purpose is legitimate”). The only question, then, is whether requiring defendant to register as a sex offender is rationally related to that goal.

In arguing that it is not, defendant relies primarily on *People v. Lindner*, 127 Ill. 2d 174 (1989), where this Court held that a provision of the Vehicle Code revoking the driver’s license of anyone convicted of certain sex offenses bore no rational connection to the Code’s purpose of ensuring “the safe and legal operation and ownership of motor vehicles.” *Id.* at 178, 182-83. Defendant contends that the sex offender registration requirement is likewise unconstitutional as applied to him because “there is absolutely no connection between [his] minor theft . . . convict[ion] and the threat that [he] is likely to commit a sex offense.” Def. Br. 12. But defendant is not subject to SORA solely because he was convicted of theft. He is subject to SORA because he was convicted of attempted criminal sexual assault and later triggered SORA’s recapture provision by reentering the criminal justice system with his theft conviction.

More apt guidance is found in *Boeckmann* and *People v. Johnson*, 225 Ill. 2d 573 (2007). In *Boeckmann*, this Court distinguished *Lindner* and concluded that a law suspending the driving privileges of any person under age 21 who is convicted of unlawfully consuming alcohol was rationally related to the goal of roadway safety because “[t]he legislature could have

rationally believed young people who have a driver's license and consume alcohol illegally may also drive after consuming alcohol, regardless of whether a motor vehicle is involved in the charged offense." 238 Ill. 2d at 10. Likewise, in *Johnson*, this Court held that a provision of SORA requiring a person convicted of aggravated kidnapping of a minor to register as a sex offender, even if the kidnapping had no sexual component, *see* 225 Ill. 2d at 576, 580, was rationally related to SORA's purpose of protecting the public from sex offenders because the legislature could have reasonably concluded "that aggravated kidnapping can be a precursor to sex offenses against children," *id.* at 591.

These cases illustrate the well-established rule that "[l]egislation must be upheld [under rational basis review] if there is a conceivable basis for finding it is rationally related to a legitimate state interest." *Boeckmann*, 238 Ill. 2d at 7; *see also Hayashi*, 2014 IL 116023, at ¶ 29 ("As long as there is a reasonably conceivable set of facts showing that the legislation is rational, it must be upheld."). Here, the General Assembly could reasonably have concluded that a person who has been convicted of a serious sex offense, and thereafter demonstrates an inability to conform his conduct to the law by committing an additional felony offense, presents a threat of committing not only future crimes in general, but also future sex crimes. Indeed, as the appellate court aptly observed, defendant is particularly ill suited to raise an as-applied challenge to SORA's rationality because his extensive criminal

history in the years following his sex offense conviction “magnifie[s]” his threat of recidivism. A11.

Defendant repeatedly notes that he has not been convicted of a sex offense since 1983. *See* Def. Br. 5, 8, 13. One of his *amici* contends that this fact “provides strong evidence that he is not likely to commit a future sex crime,” and argues that the recapture provision is thus “perversely irrational in that it targets individuals who have gone at least 12 years without being convicted of any sexual offense.” Brief *Amicus Curiae* of the Collateral Consequences Resource Center (CCRC Br.) at 8, 19 (emphasis omitted). But these arguments ignore the widely recognized reality that sex offenses are underreported. *See* U.S. Dep’t of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Sex Offender Management Assessment and Planning Initiative* (2014) (“SOMAPI Report”) (available at https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf) at 90-91. Thus, the fact that defendant has not been convicted of a sex offense since 1983 (or, more generally, that any offender subject to registration under the recapture provision has not been convicted of a sex offense since July 1, 1999) tells us little about whether he has *committed* a sex offense in that period, and correspondingly little about his risk of committing such offenses in the future.¹⁶

¹⁶ Moreover, for defendant, who has spent a good deal of time since 1983 either incarcerated or subject to probation or supervised release, *see*

Indeed, the General Assembly could have rationally concluded that SORA's goal of protecting the public from sex offenders would be served by requiring the registration of *all* sex offenders, whether their qualifying convictions pre-dated or post-dated SORA. Congress reached this very conclusion in SORNA, which "requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA." Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8896 (2007). In doing so, Congress sought to create a more comprehensive registration system that would better achieve SORNA's regulatory objectives. *See id.* (if registration scheme were "deemed inapplicable to sex offenders convicted prior to its enactment, then the resulting system for registration of sex offenders would be far from comprehensive, and would not be effective in protecting the public from sex offenders") (internal quotation marks omitted). The fact that the General Assembly instead opted for a recapture provision that limits SORA's applicability to persons with pre-SORA sex offenses who subsequently commit another felony merely reflects an accommodation of the practical difficulties inherent in registering all pre-SORA sex offenders. *See* Office of the Att'y Gen., U.S. Dep't of Justice, *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030, 38046 (2008); *see*

Def. Br. 2-3, the absence of sexual recidivism could be explained by his lack of opportunity rather than propensity.

also *Heller*, 509 U.S. at 320 (“The problems of government are practical ones and may justify, if they do not require, rough accommodations.”) (internal quotation marks omitted); *People v. Anderson*, 148 Ill. 2d 15, 31 (1992) (“The legislature need not deal with all conceivable evils at once; it may proceed one step at a time.”).

Finally, defendant and his *amici* challenge the very premise of sex offender registration laws that classify offenders based on the nature of their offense of conviction and without any individualized determination of risk, questioning the accuracy of the Supreme Court’s oft-cited observation that “[t]he risk of recidivism posed by sex offenders is frightening and high.” *Smith v. Doe*, 538 U.S. 84, 103 (2003) (internal quotation marks omitted). They contend that “recidivism rates for released sex offenders generally are low, and even lower with the passage of time,” CCRC Br. 8, and that “sex offenders are actually *less* likely to recidivate than other types of criminals,” Def. Br. 44 (internal quotation marks omitted; emphasis in original); see also Brief of Illinois Voices for Reform at 3. But under rational basis review, “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Heller*, 509 U.S. at 320.

Regardless, in “[p]erhaps the largest single study of sex offender recidivism conducted to date . . . researchers found a sexual recidivism rate of 5.3 percent for . . . sex offenders . . . during [a] 3-year [post-release] followup

period” — a “sex crime rearrest rate [that] was four times higher than the rate for non-sex offenders.” SOMAPI Report at 93. Another study with a “large sample size and extended followup period” estimated sexual recidivism rates for all sex offenders over five-, ten-, fifteen-, and twenty-year follow-up periods at 14%, 20%, 24%, and 27%, respectively. *Id.* at 94. Such studies, it must be remembered, necessarily *underestimate* the true rates of sex offense recidivism because sex offenses are underreported. *See id.* at 91 (“researchers widely agree that observed recidivism rates are underestimates of the true reoffense rates of sex offenders”); *id.* at 101 (“there is universal agreement in the scientific community that the observed recidivism rates of sex offenders are underestimates of actual reoffending”).

Faced with “conflicting evidence on the point,” the task of “weigh[ing] the evidence and . . . reach[ing] a rational conclusion” lies with the legislature, not the courts. *United States v. Kebodeaux*, 570 U.S. 387, 396 (2013); *see also People v. Minnis*, 2016 IL 119563, ¶ 41 (“the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems”). Indeed, one *amicus* acknowledges that “even a 5-7% rate of recidivism is a matter of tremendous concern when serious sex offenses such as rape are involved,” but argues that registration and notification laws like SORA are ineffective at addressing the problem and may be counterproductive. CCRC Br. 11-12, 20-25. Aside from the fact that none of the evidence cited in support of these contentions was subject to adversarial

testing below, the argument presents a quintessential “question[] of policy” that is “more appropriately directed to the legislature than to this court.”

Minnis, 2016 IL 119563, at ¶ 40.

III. SORA’s Recapture Provision Is Not an *Ex Post Facto* Law.

The Court should likewise reject defendant’s *ex post facto* challenge.

Both the United States Constitution and the Illinois Constitution prohibit *ex post facto* laws. *See* U.S. Const. art. I, § 10; Ill. Const. art. I, § 16. These provisions are “aimed at laws that ‘retroactively alter the definition of crimes or increase the punishment for criminal acts.’” *Calif. Dep’t of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). Thus, “[t]o prevail on [an] *ex post facto* claim, [a person] must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted.” *Johnson v. United States*, 529 U.S. 694, 699 (2000). As discussed below, defendant’s *ex post facto* challenge to SORA’s recapture provision fails on both fronts, under both the state and federal constitutions.

A. The *Ex Post Facto* Clauses of the Federal and State Constitutions are coextensive.

At the outset, this Court should reject defendant’s invitation to construe the Illinois Constitution’s *Ex Post Facto* Clause more expansively than the Federal Constitution’s cognate clause. *See* Def. Br. 48-51. This Court has long held that “the *ex post facto* clause in the Illinois Constitution

does not provide greater protection than that offered under the United States Constitution.” *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 209 (2009); *see also Hill v. Walker*, 241 Ill. 2d 479, 488 (2011) (“This court, in interpreting the *ex post facto* prohibition in the Illinois Constitution, looks to the United States Supreme Court’s interpretation of the *ex post facto* clause of the United States Constitution.”). Indeed, as this Court recognized nearly a quarter century ago, “[t]he drafters of our modern constitution intended the Illinois *ex post facto* clause to do no more than conform to the Federal Constitution’s general prohibition on the States.” *Barger v. Peters*, 163 Ill. 2d 357, 360 (1994). Thus, “in construing this State’s constitutional provision” barring *ex post facto* laws, there is no “basis to depart from the [United States] Supreme Court’s construction of the Federal *ex post facto* clause.” *Id.*

B. The recapture provision does not operate retroactively.

SORA’s recapture provision “doesn’t offend the Constitution’s *ex post facto* clause because it doesn’t apply retroactively.” *Johnson v. Madigan*, 880 F.3d 371, 376 (7th Cir. 2018) (rejecting *ex post facto* challenge by similarly situated sex offender).¹⁷ Defendant contends that the requirement that he register as a sexual predator retroactively increases the punishment for his 1983 attempted criminal sexual assault conviction. But defendant’s registration requirement was not triggered by his 1983 conviction, nor was it

¹⁷ The People did not advance this argument below, but “an appellee may raise any argument . . . supported by the record to show the correctness of the judgment below.” *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010).

automatically imposed by the enactment of the recapture provision in 2011. Rather, it occurred as a result of his subsequent felony conviction in 2014. To be sure, the 2014 conviction would not have triggered the registration requirement had defendant not been convicted previously of a qualifying sex offense, but “a statute is not made retroactive merely because it draws upon antecedent facts for its operation.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.24 (1994) (internal quotation marks omitted); *see also Hayashi v. Ill. Dep’t of Fin. and Prof. Reg.*, 2014 IL 116023, ¶ 25. A statute operates retroactively if it “creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already deemed past.” *Landgraf*, 511 U.S. at 269 (internal quotation marks omitted). But “[t]he sequence of events that dubbed [defendant] a sexual predator wasn’t completed before the [recapture provision’s] enactment; the [2014] felony conviction came later.” *Johnson*, 880 F.3d at 376.

The recapture provision is thus analogous to a recidivism statute that enhances the punishment for a current offense based on a defendant’s prior convictions. *See People v. Tucker*, 879 N.W.2d 906, 910 (Mich. App. 2015) (finding “caselaw on recidivist statutes helpful” in determining that similar recapture provision in Michigan SORA did not operate retroactively). Both the United States Supreme Court and this Court have long recognized that recidivist laws “do not change the penalty imposed for the earlier conviction.” *Nichols v. United States*, 511 U.S. 738, 747 (1994); *see also United States v.*

Rodriquez, 553 U.S. 377, 386 (2008) (“When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions.”); *People v. Dunigan*, 165 Ill. 2d 235, 242 (1995) (“The punishment imposed under [an habitual criminal statute] is for the most recent offense only” and “does not punish a defendant again for his prior felony convictions”). Likewise, the requirement that defendant register under SORA arose prospectively from his 2014 conviction, “not through [retroactive enhancement] of his 1983 sentence.” *Johnson*, 880 F.3d at 376. Thus, even if SORA’s consequences for sex offenders were deemed punitive, their application to defendant would not violate the constitutional prohibition against *ex post facto* laws.

C. SORA does not impose punishment.

Requiring defendant to register as a sex offender under SORA comports with *ex post facto* principles for an additional reason: SORA is a nonpunitive, regulatory scheme.

In *Smith v. Doe*, 538 U.S. 84 (2003), the United States Supreme Court held that retroactive application of Alaska’s sex offender registration and notification law did not violate the *Ex Post Facto* Clause because the law’s registration requirements and notification provisions were nonpunitive. Under the Alaska law, a person convicted of multiple sex offenses, or an aggravated sex offense, was required to register for life and verify his registration information quarterly; if convicted of a single, non-aggravated

sex offense, he was required to register for fifteen years and verify his information annually. *Id.* at 90. The initial registration had to be done in person, but subsequent updates and verifications could be by mail. *Id.* at 101. The law required a sex offender to “provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver’s license number, information about vehicles to which he has access, and postconviction treatment history,” and “permit the authorities to photograph and fingerprint him.” *Id.* at 90. Most of the offender’s registration information was made available to the public on the Internet. *Id.* at 91.

Although Illinois’s current registration requirements are somewhat more burdensome than the requirements considered in *Smith*, nothing in the Court’s decision suggests that the increased burdens transform an otherwise civil, regulatory scheme into a punitive one. Indeed, in all relevant respects, SORA’s provisions are no broader than the current federal guidelines established by SORNA, *see supra* pp. 4-9, and the vast majority of federal courts of appeals that have considered the question have rejected *ex post facto* challenges to SORNA and to state laws adopting equally (or more) burdensome requirements.¹⁸ This Court should reach the same conclusion here with respect to Illinois’s current SORA requirements.

¹⁸ *See United States v. Parks*, 698 F.3d 1, 5-6 (1st Cir. 2012); *United States v. Under Seal*, 709 F.3d 257, 263-66 (4th Cir. 2013); *United States v. Young*, 585 F.3d 199, 204-06 (5th Cir. 2009); *United States v. Leach*, 639 F.3d

The framework for determining whether a law is punitive for *Ex Post Facto* Clause purposes is well established and looks primarily to legislative intent. *See Smith*, 538 U.S. at 92. If the legislature’s “intention was to enact a regulatory scheme that is civil and nonpunitive,” a court may “override” that intent only if the party challenging the law shows by “the clearest proof” that “the statutory scheme is so punitive either in purpose or effect as to negate [the legislature’s] intention to deem it civil.” *Id.* (internal quotation marks omitted).

Defendant “concedes that the legislature intended [SORA] to create a civil remedy,” Def. Br. 31, and he fails to discuss the legislative intent behind the park restriction, thus forfeiting any argument that it was intended as punishment, *see People v. Smith*, 2015 IL 116572, ¶ 22 (citing Sup. Ct. R. 341(h)(7)). In any event, this Court has repeatedly recognized that SORA and the Notification Law were intended to assist law enforcement and protect the public rather than to punish sex offenders. *See People v. Cornelius*, 213 Ill. 2d 178, 205 (2004) (“the primary purpose of [SORA and the Notification Law] is to assist law enforcement and to protect the public from sex offenders”); *People v. Malchow*, 193 Ill. 2d 413, 420 (2000) (“protection of the public, rather than punishing sex offenders . . . is the intent of the

769, 772-73 (7th Cir. 2011); *Am. Civ. Lib. Union of Nevada v. Masto*, 670 F.3d 1046, 1053-58 (9th Cir. 2012); *Shaw v. Patton*, 823 F.3d 556, 561-77 (10th Cir. 2016); *United States v. W.B.H.*, 664 F.3d 848, 852-60 (11th Cir. 2011); *but see Does #1-5 v. Snyder*, 834 F.3d 696, 700-05 (6th Cir. 2016) (finding Michigan SORA punitive based, in large part, on provisions prohibiting sex offenders from living, working, or loitering within 1,000 feet of a school).

Notification Law”); *People v. Adams*, 144 Ill. 2d 381, 387 (1991) (“The debates of the legislature . . . show the purpose of the [Habitual Child Sex Offender Registration Act, a precursor to SORA] to be nonpenal.”). And the legislative history of the park restriction reveals that it, too, was intended to foster public safety rather than impose punishment. *See* 96th Ill. Gen. Assemb., Senate Proceedings, Mar. 16, 2010, at 55 (Statement of Sen. Althoff) (purpose of park restriction is “to protect users of public parks from child sex offenders and sexual predators who use the attributes of a park to their advantage to have access to potential victims”).

Defendant thus bears the “heavy burden,” *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997), of demonstrating by “the clearest proof” that SORA and the park restriction are “so punitive either in purpose or effect as to negate [the legislature’s] intention to deem [them] civil,” *Smith*, 538 U.S. at 92 (internal quotation marks omitted). In assessing the punitive effect of a statutory scheme, courts look to several factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See Smith*, 538 U.S. at 97. As relevant here, those factors “are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes

the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose.” *Id.*¹⁹

The *Mendoza-Martinez* factors are “neither exhaustive nor dispositive,” but provide “useful guideposts.” *Smith*, 538 U.S. at 97 (internal quotation marks omitted); *see also Hudson v. United States*, 522 U.S. 93, 101 (1997) (“no one factor should be considered controlling as they may often point in differing directions”) (internal quotation marks omitted). Because the party seeking to overcome the legislature’s intention to deem a statute civil must demonstrate the law’s punitive effect by the clearest proof, “even a showing that *most* of the relevant factors weigh in [his] favor . . . may be insufficient” to overcome the legislature’s intent. *Am. Civ. Lib. Union of Nevada v. Masto*, 670 F.3d 1046, 1055 (9th Cir. 2012) (emphasis added). Here, the balance of factors does not demonstrate, let alone by the clearest proof, that SORA and the park restriction are punitive in effect.

Resemblance to traditional punishment. *Smith* rejected the contention that Alaska’s sex offender registration and notification law resembled the historical punishments of shaming or banishment or the

¹⁹ Two additional factors identified in *Mendoza-Martinez* — “whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime — are of little weight” when assessing regulations aimed at the threat of recidivism posed by sex offenders. *Smith*, 538 U.S. at 105. In any event, these factors cut both ways. Because SORA applies to persons charged with an enumerated offense but found not guilty by reason of insanity or “not-not-guilty,” *see supra* p. 10 n.5, a finding of scienter is not required. And while SORA and the park restriction “are tied to criminal activity,” that fact “is insufficient to render the statutes punitive.” *United States v. Ursery*, 518 U.S. 267, 292 (1996).

modern-day punishments of probation or parole. 538 U.S. at 98-99, 101.

With respect to shaming, the Court noted that any “stigma” associated with the publication of an offender’s registration information on the Internet “results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.” *Id.* at 98. “In contrast to the colonial shaming punishments,” modern-day sex offender registration and notification laws do “not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.” *Id.* at 99. To be sure, the Internet has evolved since 2003 (when *Smith* was decided), *see* Def. Br. 37-39, but not in any way that alters *Smith*’s analysis. *See State v. Petersen-Beard*, 377 P. 3d 1127, 1134 (Kan. 2016) (“*Smith* did not base its conclusion on some old-fashioned, dial-up modem/floppy disk notion of the World Wide Web.”). That today’s Internet has a greater reach and is more easily accessible simply enables the State to achieve its regulatory goal of fostering public safety in a “more efficient, cost effective, and convenient” manner. *Smith*, 538 U.S. at 99 (“[w]idespread public access” to registration information “is necessary for the efficacy of the [statutory] scheme”). What 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.” *Id.* at 98 (emphasis added). Nor does it “provide the public with a means to shame the offender by, say, posting comments under his record.” *Id.* at 99. And today, as much

as in 2003, “[a]n individual seeking [registration] information must take the initial step of going to [ISP’s] Web site, proceed to the sex offender registry, and then look up the desired information.” *Id.*²⁰

Defendant contends that designating him on the website as a “Sexual Predator” amounts to shaming. *See* Def. Br. 41. But “sexual predator” is a statutory phrase denoting the nature and severity of an offender’s sex offense, and the website provides a hyperlink from that designation to a page that provides users with a list of qualifying offenses. Moreover, before a member of the public can gain access to the website, he is warned that “[a]nyone who uses [the registry] information to commit a criminal act against another person is subject to criminal prosecution,” and must agree not to use the “[i]nformation compiled” on the website “to harass or threaten sex offenders or their families.” *See supra* p. 14. In context, it is clear that the website’s “purpose and . . . principal effect . . . are to inform the public for its own safety, not to humiliate the offender.” *Smith*, 538 U.S. at 99.

SORA likewise does not resemble the historical punishment of banishment, and defendant does not appear to argue otherwise. Instead, he argues only that the park restriction resembles banishment. *See* Def. Br. 41. But the modest restriction on a sexual predator’s right to be in or near parks is a far cry from the historical punishment of banishment, which “ordinarily

²⁰ Defendant does not contend that SORA’s targeted notification provisions resemble shaming, and the argument would fail in any event. *See Masto*, 670 F.3d at 1056 (“Active dissemination . . . does not alter [*Smith*’s] core reasoning.”).

involved complete expulsion from a geographic area, such as a town, a county, or a state.” *Shaw v. Patton*, 823 F.3d 556, 566 (10th Cir. 2016) (footnotes omitted). “[T]rue banishment goes beyond the mere restriction of one’s freedom to go or remain where others have the right to be.” *State v. Seering*, 701 N.W.2d 655, 667 (Iowa 2005) (internal quotation marks omitted).²¹

Indeed, several courts have held that far more burdensome restrictions on where sex offenders may *live* do not constitute punishment. *See Shaw*, 823 F.3d at 566-67, 570 (upholding restriction on residing within 2,000 feet of a school, playground, park, or child care center); *Doe v. Miller*, 405 F.3d 700, 705, 719-20 (8th Cir. 2005) (upholding restriction on residing within 2,000 feet of a school or child care facility); *People v. Mosley*, 344 P.3d 788, 791, 802 (Cal. 2015) (concluding that restriction on residing within 2,000 feet of a school or park where children regularly gather was not punitive). And the restrictions that were deemed punitive in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), prevented sex offenders from “living, working, or loitering within 1,000 feet of a school,” which (as the record there demonstrated)

²¹ Defendant makes much of the Supreme Court’s observation in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017), that parks are “essential venues for public gatherings.” *See* Def. Br. 36, 41. But *Packingham* held that a law banning sex offenders from using social media platforms violated the First Amendment because “it burden[ed]” an “unprecedented” amount of speech. *Id.* at 1737. Whether the First Amendment likewise prohibits a ban on sexual predators entering public parks is a question distinct from the *ex post facto* challenge presented here, and one that was neither presented nor addressed below.

resulted in sex offenders having “great difficulty in finding a place where they may legally live or work.” *Id.* at 698, 702 (emphasis added). While Illinois law imposes various restrictions on where *child* sex offenders may live and work, *see* 720 ILCS 5/11-9.3, those restrictions do not apply to defendant and thus are not at issue here.

Finally, neither SORA nor the park restriction is analogous to the punishments of probation or parole. *Smith* squarely forecloses the contention that SORA’s registration requirements resemble probation or parole, both of which “entail a series of mandatory conditions and allow the supervising officer to seek revocation of probation or [parole] in case of infraction.” 538 U.S. at 101. Unlike those subject to probation or parole, “no specific officer . . . is assigned to consult with [a sex offender] or to supervise him.” *Shaw*, 823 F.3d at 564. The “absence of supervision” fundamentally “distinguishes” sex offender registration from probation or parole. *Id.* at 565; *see Smith*, 538 U.S. at 101 (those subject to sex offender registration “are free to move where they wish and to live and work as other citizens, with no supervision”). Defendant contends that the requirement that sex offenders register their Internet identifiers (which *Smith* did not consider) amounts to supervision. Def. Br. 40. But requiring an offender to disclose his Internet identifiers no more allows for active supervision than does the requirement that he disclose his name, address, and telephone number. Neither aspect of the registration law requires a sex offender to divulge the contents of any of

his communications or to “disclos[e] [the] individuals with whom [he] interact[s].” *Minnis*, 2016 IL 119563, ¶ 48.

Considering the park restriction in addition to the registration requirements does not change the calculus. Although that provision does modestly restrict a sex offender’s movements, the offender remains free of both supervision and nearly all of the “multiple conditions beyond regular reporting to law enforcement” that are the hallmark of probation and parole. *Shaw*, 823 F.3d at 565. For one thing, probationers and parolees, unlike sex offenders, have diminished expectations of privacy for Fourth Amendment purposes. *See Samson v. California*, 547 U.S. 843, 857 (2006); *United States v. Knights*, 534 U.S. 112, 121 (2001). Moreover, in addition to other conditions, a probationer in Illinois must “refrain from possessing a firearm or other dangerous weapon,” may “not leave the State without the consent of the court,” must “permit the probation officer to visit him at his home or elsewhere to the extent necessary to discharge his duties,” and must “perform . . . community service.” 730 ILCS 5/5-6-3(a). He also may be required to “work or pursue a course of study or vocational training”; “undergo medical, psychological or psychiatric treatment[,] or treatment for drug addiction or alcoholism”; “attend or reside in a facility established for the instruction or residence of defendants on probation”; and “support his dependents.” 730 ILCS 5/5-6-3(b); *see also* 730 ILCS 5/3-3-7 (conditions for “parole or mandatory supervised release”). And while a sex offender who fails to comply

with a registration requirement or violates the park restriction “may be subjected to a criminal prosecution for that failure,” any such “prosecution is a proceeding separate from the individual’s original offense.” *Smith*, 538 U.S. at 102. On the other hand, a probationer who violates a condition of his probation “ordinarily face[s] revocation of [his] probation and imprisonment for the underlying offense.” *Shaw*, 823 F.3d at 566; see 730 ILCS 5/5-6-4(e) (“If the court finds that the offender has violated a condition [of probation] at any time prior to the expiration or termination of the period, it . . . may impose any other sentence that was available . . . at the time of initial sentencing.”).²²

Affirmative disability or restraint. SORA likewise imposes no affirmative disability or restraint that renders it punitive in effect. Like the registration law in *Smith*, SORA “imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.” 538 U.S. at 100. Nor does it “restrain activities sex offenders may pursue,” but instead “leaves them free to change jobs or residences.” *Id.* Defendant argues that SORA differs from the law considered in *Smith* because it requires sex offenders to verify and update their registration information in person rather than by mail. Def. Br. 34.

²² Defendant has not argued that the \$100 initial registration fee and \$100 annual renewal fee are fines rather than fees. He has thus waived any such argument. See Sup. Ct. R. 341(h)(7); see also *Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014) (offender bears burden of demonstrating that registration fee is actually a fine, which requires “evidence that it is grossly disproportionate to the annual cost” of administering the system).

“But there is no reason to believe that the addition of such a requirement would have changed the outcome” in *Smith. Litmon v. Harris*, 768 F.3d 1237, 1243 (9th Cir. 2014). “Appearing in person may be more inconvenient, but requiring it is not punitive.” *United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011). Rather, the in-person appearance requirement “serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity . . . and records the individual’s current appearance.” *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012); *see also* 73 Fed. Reg. 38067 (“in-person appearance requirements provide reasonably frequent opportunities to obtain a photograph of the sex offender and a physical description that reflects his or her current appearance” and “to review with the sex offender the full range of information in the registry [and] obtain . . . information about any changes in the registration information or new information that has not been reported since the initial registration or the last appearance”); *id.* at 38065 (requiring in-person reporting within three business days of a change of name, residence, employment, or school attendance “serve[s] to ensure — in connection with the most substantial types of changes bearing on the identification or location of sex offenders [] — that there will be an opportunity to obtain all required registration information from sex offenders in an up to date form”).

Defendant further notes that SORA requires a sex offender to “notify the law enforcement agency having jurisdiction of his . . . current registration,” and to provide “the itinerary for [his] travel,” if he “is temporarily absent from his . . . current address . . . for 3 or more days.” 730 ILCS 150/3(a) (third-to-last hanging paragraph); *see* Def Br. 34-35. But this provision does not impose any “physical restraint” on sex offenders, nor does it “restrain” their ability to travel. *Smith*, 538 U.S. at 100; *cf. Belleau v. Wall*, 811 F.3d 929, 931, 937-38 (7th Cir. 2016) (law requiring person released from civil commitment for sex offense to wear GPS monitoring device does not constitute punishment). At most, any disability or restraint caused by the travel-reporting requirement is only “minor and indirect,” and thus is “unlikely to be punitive” in effect. *Smith*, 538 U.S. at 100.

The park restriction, to be sure, imposes an affirmative disability or restraint in some sense. But it is not an affirmative disability or restraint in the sense “that term is normally understood.” *Hudson*, 522 U.S. at 104. It is a far cry from “the paradigmatic affirmative disability or restraint” of imprisonment. *Smith*, 538 U.S. at 100. And it would appear to be no harsher than the sanction of occupational debarment, which the Supreme Court has repeatedly “held to be nonpunitive.” *Id.* (citing cases). Moreover, it imposes nowhere near the “significant restraints on how [sex offenders] may live their lives” that the residency, work, and loitering restrictions found punitive in *Does #1-5* did. *See* 834 F.3d at 702-03. In any event, the presence of an

affirmative disability or restraint “does not inexorably lead to the conclusion that the government has imposed punishment.” *Hendricks*, 521 U.S. at 363; *see also Hudson*, 522 U.S. at 101 (no one *Mendoza-Martinez* factor is dispositive). Rather, at most, it “points . . . to the importance” of other *Mendoza-Martinez* factors, such as “whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose.” *Doe*, 405 F.3d at 721.

Traditional aims of punishment. Defendant contends that SORA’s deterrent effect “weighs in favor” of deeming it punitive. Def. Br. 42-43. But “[a]ny number of governmental programs might deter crime without imposing punishment.” *Smith*, 538 U.S. at 102. Indeed, “all civil penalties have some deterrent effect.” *Hudson*, 522 U.S. at 102. “To hold that the mere presence of a deterrent purpose renders such sanctions criminal would severely undermine the Government’s ability to engage in effective regulation.” *Smith*, 538 U.S. at 102 (internal quotation marks and ellipses omitted). *Smith* likewise rejected the contention that sex offender registration and notification laws promote retribution. *See* 538 U.S. at 102. Defendant attempts to distinguish *Smith* on the ground that a sex offender’s registration information is more widely available on today’s Internet than it was when *Smith* was decided. *See* Def. Br. 42. But “[w]idespread public access [to a sex offender’s registration information] is necessary for the efficacy” of the regulatory scheme, the “purpose and . . . principal effect of

[which] are to inform the public for its own safety,” not to punish the sex offender. *Smith*, 538 U.S. at 99.

Rational connection to nonpunitive purpose. A statute’s “rational connection to a nonpunitive purpose is a most significant factor” in determining whether the law’s effects are punitive. *Smith*, 538 U.S. at 102.²³ It is well settled that SORA is rationally connected to the nonpunitive purpose of assisting law enforcement and protecting the public from the threat of recidivism posed by sex offenders. *See Cornelius*, 213 Ill. 2d at 205 (concluding that the dissemination of sex offender registration information on the Internet “bears a rational relationship to the[] goals” of “assist[ing] law enforcement and . . . protect[ing] the public from sex offenders”). And defendant does not dispute that the park restriction likewise is rationally connected to the nonpunitive purpose of fostering public safety. Rather, he concedes that this most significant factor “weighs against a finding of punitiveness.” Def. Br. 43.

Excessiveness in relation to nonpunitive purpose. Defendant contends that “Illinois’ scheme has become so excessive it is no longer rationally related to [its] nonpunitive purpose.” Def. Br. 43.²⁴ He argues that

²³ Defendant incorrectly states that the next factor — whether the law is excessive in relation to its nonpunitive purpose — is the most significant factor. Def. Br. 43.

²⁴ Defendant’s arguments on this factor are directed exclusively at SORA and the Notification Law. He makes no argument that the park restriction is excessive in relation to its nonpunitive purpose.

SORA is excessive because, in his view, it “applie[s] to people who pose little to no risk of reoffending.” Def. Br. 44. But “[t]he State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.” *Smith*, 538 U.S. at 104. In light of “grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class,” a State may “conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism” and “should entail particular regulatory consequences.” *Id.* at 103.

Defendant argues, to the contrary, that “sex offenders are actually less likely to recidivate than other types of criminals.” Def. Br. 44 (internal quotation marks omitted; emphasis omitted). But as discussed above in connection with defendant’s due process challenge, *see supra* pp. 30-31, the evidence on this point is conflicting at best, vesting the legislature with the duty “to weigh the evidence and to reach a rational conclusion.” *Kebedeaux*, 570 U.S. at 396; *see also Minnis*, 2016 IL 119563, at ¶ 41 (“the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems”). “The excessiveness inquiry . . . is not an exercise in determining whether the legislature has made the best possible choice to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.”

Smith, 538 U.S. at 105; *see also Masto*, 670 F.3d at 1057 (even “a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community”). In light of the available evidence, the General Assembly’s conclusion that SORA’s registration requirements and notification provisions further public safety is “eminently reasonable.” *Kebedeaux*, 570 U.S. at 395.²⁵

Defendant further argues that SORA is excessive because it does not allow an offender to be relieved of the duty to register upon a showing that he “no longer presents a risk.” Def. Br. 45. This argument too is foreclosed by *Smith*, which concluded that a law containing a lifetime registration requirement and providing no mechanism for making an “individual determination of . . . dangerousness” was neither excessive nor punitive. 538 U.S. at 104. Finally, defendant contends that dissemination of registration information on the Internet renders SORA excessive. Def. Br. 46. Recognizing that *Smith* rejected this proposition as well, *see* 538 U.S. at 104-05, he again argues that the Internet’s growth from 2003 to today calls for a reassessment of *Smith*’s reasoning. But for the reasons discussed above, *see supra* pp. 40-41, this argument is unavailing.

²⁵ Likewise, defendant’s contention that sex offender registration and notification laws are counterproductive, *see* Def. Br. 44-45, presents a “question[] of policy” that is “more appropriately directed to the legislature than to this court.” *Minnis*, 2016 IL 119563, at ¶ 40.

* * *

In sum, all of the relevant *Mendoza-Martinez* factors point toward a finding that SORA and the Notification Law are not punitive in effect. And while the park restriction may arguably impose an affirmative disability or restraint, every other factor points the other way with respect to that provision. Indeed, there is no dispute that the park restriction is rationally connected to a nonpunitive purpose — the most significant of the *Mendoza-Martinez* factors — and defendant has made no argument that it is excessive in relation to that purpose. He has thus failed to show, much less by the clearest proof, that either SORA or the park restriction is so punitive in effect as to overcome the legislature’s intent to deem them civil.

CONCLUSION

This Court should hold that defendant cannot challenge his obligation to register as a sex offender on direct appeal of the conviction that gave rise to that collateral consequence, and/or that defendant has failed to sufficiently develop a record in support of his as-applied due process challenge, and should therefore dismiss this appeal in its entirety or decline to consider the as-applied challenge. In the alternative, the Court should affirm the appellate court's judgment that SORA does not violate due process as applied to defendant, and that SORA's recapture provision is not an unconstitutional *ex post facto* law.

February 28, 2018

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 13,567 words.

/s/ Eric M. Levin
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PROOF OF FILING AND SERVICE

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 February 28, 2018, the **Brief of Plaintiff-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail 13 copies of the **Brief of Plaintiff-Appellee People of the State of Illinois** to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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