Appeal No. 22-CO-908

Regular Calendar: June 3, 2025

DISTRICT OF COLUMBIA COURT OF APPEALS

G.W.J.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

I. The Effects of SORA's Current Regulatory Scheme Are Punitive.

More than twenty years after *In re W.M.*, 851 A.2d 431 (D.C. 2004), held that the effects of the D.C. Sex Offender Registration Act ("SORA") were "civil" rather than "punitive" under the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), recent "amendments to SORA['s] implementing regulations" and new "evidence about SORA's 'necessary operation'" now "warrant revisiting" *W.M.*'s analysis and reaching the opposite conclusion, *Arthur v. United States*, 253 A.3d 134, 142 (D.C. 2021). Unlike the regulatory scheme considered in *W.M.*, the current scheme now subjects all Class A registrants who are not otherwise under supervision to the lifelong "physical restraint" of mandatory quarterly in-person reporting and semiannual home visits, and the pervasive, humiliating "disability" of Internet notification, *W.M.*, 851 A.2d at 444, the "serious negative consequences" of which have now been demonstrated by "[e]xtensive social science research" and recently recognized by this Court as "distinct from that resulting from the underlying conviction" and "intrinsic to SORA's design," *Fallen v. United States*, 290 A.3d 486, 496–98 (D.C. 2023). These severe disabilities and restraints can no longer be dismissed as "minor and indirect" and instead resemble traditional punishments like probation and public shaming. *Arthur*, 253 A.3d at 139 (quoting *Smith v. Doe*, 538 U.S. 84, 100 (2003)). At the same time, the decades-old assumption that "convicted sex offenders" categorically pose such a "frightening and high" risk of recidivism that they can be reasonably regulated "as a class" to "promote public safety," *W.M.*, 851 A.2d at 441, 445, has been supplanted by modern research showing that sex

offender recidivism is much lower than previously assumed, varies dramatically among sex offenders based on factors other than severity of the offense, and reliably decreases with age and offense-free time in the community to the point of being statistically insignificant. Br. for Appellant 29–39. In the face of these new insights, as well as the legislative finding in the Incarceration Reduction Amendment Act of 2016 ("IRAA") that "[y]oung offenders" "unconditional[ly] and categorical[ly]" "possess 'reduced culpability' for their crimes and an increased 'capacity for rehabilitation and growth,'" regardless of the severity of their offenses, *Bishop v. United States*, 310 A.3d 629, 635, 645 (D.C. 2024) (quoting D.C. Council, Report on B21-0683, at 4 (Oct. 5, 2016)), SORA continues to impose lifelong disabilities and restraints on all Class A registrants based solely on the severity of their past crimes, with no exception for demonstrably non-dangerous individuals like G.W.J. Cumulatively, this new "evidence about SORA's 'necessary operation'" now shows that the current scheme's far-reaching, debilitating effects on lifetime registrants are so "excessive with respect to [its public-safety] purpose" that it must be deemed "punitive" under the *Mendoza-Martinez* test. *Arthur*, 253 A.3d at 139, 142.

The government argues as a threshold matter that G.W.J.'s ex post facto claim is foreclosed from this Court's consideration, either because it presents a "facial" challenge that he failed to preserve in the Superior Court, or because it presents an "as-applied" challenge precluded by *Seling v. Young*, 531 U.S. 250 (2001). Br. for Appellee 6–7, 21, 36. On the merits, the government agrees that "changes to SORA's operation since *W.M.* was decided" may warrant "revisiting" *W.M.*'s analysis, but it

contends that the changes cited by G.W.J. are not enough to support a different conclusion. *Id.* at 6, 23. Both sets of arguments are meritless.

A. Appellant's Ex Post Facto Claim Is Neither Forfeited Nor Foreclosed.

The government first contends that G.W.J. forfeited any "facial" ex post facto challenge by arguing in the Superior Court that SORA's lifetime requirements, with no opportunity for relief, are punitive "when imposed on" those who committed their offenses as children. Br. for Appellee 21 (quoting App. C at 13). But as both the Supreme Court and this Court have emphasized, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *Arthur*, 253 A.3d at 140 n.13 (quoting *Citizens United*, 558 U.S. at 331). Because that distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint," the Supreme Court has expressed doubt that "a party could somehow waive a facial challenge while preserving an as-applied challenge." *Citizens United*, 558 U.S. at 330, 331.

This Court's decision in *Arthur* illustrates the point. In *Arthur*, the appellant contended that SORA violated the Ex Post Facto Clause "as applied to him." *Arthur*, 253 A.3d at 140 (brackets omitted). "[N]otwithstanding the label appellant use[d] to describe his argument," however, the Court considered the merits of each of his arguments—some of which challenged the scheme's effects on his own individual circumstances (such as his "asserted job loss" and his "disqualification to reside in his ailing mother's public housing unit to assist her as a live-in aide," which the

Court rejected as too "idiosyncratic" to "support a claim that SORA is punitive," *id.* at 140, 144–45), and some of which challenged the "facial features of the SORA scheme" (such as his complaint about "active notification" and his citation of evidence on sex offender recidivism "from 2003," which this Court rejected as having been "already considered in *W.M.*" in 2004, *id.* at 142 & n.19). Noting that "a claim can have characteristics of as-applied and facial challenges," and that "facial challenges and as-applied challenges can overlap conceptually," the Court emphasized in *Arthur* that the "label a party gives to his challenge is not what matters." *Id.* at 140 & n.13 (quotation marks and brackets omitted) (quoting cases).

What matters instead to whether a claim is "preserved for appeal" is whether the trial judge was "fairly apprised as to the question on which she [was] being asked to rule." *Medhin v. United States*, 308 A.3d 1242, 1246 (D.C. 2024). Here, in both the Superior Court and this Court, G.W.J.'s claim focused on what all parties agree is the determinative question: "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." Br. for Appellant 15 (quoting *W.M.*, 851 A.2d at 443–44); App. C at 29. Each change to SORA's "necessary operation" that G.W.J. now asserts on appeal was also brought to the court's attention below. *See* App. C at 24–25, 32–34 (new regulation requiring in-person home verification); *id.* at 21–24 (new evidence showing direct, severe harms of registration and Internet notification); *id.* at 17–20, 37–38 (new evidence on sex offender recidivism); *id.* at

14–17, 40–43 (IRAA's treatment of young offenders).[1] Thus, "notwithstanding the label appellant use[d] to describe his argument," *Arthur*, 253 A.3d at 140, Judge Brandt was "fairly apprised as to the question on which she [was] being asked to rule," *Medhin*, 308 A.3d at 1246: "whether [SORA's] effects are so punitive as to render what the legislature has called a civil remedy in fact a criminal punishment," App. G at 9. She answered that question by ruling that *W.M.* and *Arthur* "are controlling here despite arguments to the contrary." *Id.* at 10. That ruling was legal error, and G.W.J.'s ex post facto claim is fully preserved for appellate review.

The government next contends (at 36) that, to the extent that G.W.J.'s ex post facto challenge is not "facial" but "as applied," it is barred by the Supreme Court's decision in *Seling*. But as this Court recognized in *Arthur*, *Seling* did not broadly hold that "ex post facto challenges cannot be brought on an as-applied basis" and can only be "facial." *Arthur*, 253 A.3d at 141. Rather, "[a] more precise description of the holding of *Seling*" is that a statute cannot be "declared punitive 'as applied'

[1] In a passing argument it fails to develop, the government asserts (at 31) that CSOSA's current "in-person verification policy" is "not properly before this Court" because G.W.J. did not cite the amended policy statement (App. H) below. But as explained in G.W.J.'s main brief (at 10 n.8), CSOSA amended Policy Statement 4006 in 2022 with no public notice, comment, or rulemaking procedure whatsoever. The amendment was not published in the Federal Register or publicized on the CSOSA website, and the government, despite representing CSOSA's interests, also failed to cite it below. G.W.J. became aware of the policy only after Judge Brandt denied his motion and ordered him to register, at which point CSOSA informed him that he was required to report in-person quarterly. Even then, the amended policy statement itself was not provided to G.W.J., and counsel discovered its existence only during preparation of the appeal. Because the policy's existence is undisputed on appeal, *see* Br. for Appellee 33; Br. for Intervenor 28, no factual development is needed, and this Court must consider it as part of SORA's "necessary operation."

to a particular person when the highest State court has already *definitively construed the statute as civil*." *Id.* (emphases added); *see Seling*, 531 U.S. at 267 ("We have not squarely addressed the relevance of conditions of confinement to a first instance determination, and that question need not be resolved here. [A confinement scheme], found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the . . . *Ex Post Facto* Clauses and provide cause for release."). *Seling*'s narrow holding—which arose from a habeas petitioner's challenge to his particular conditions of confinement under a state civil commitment scheme—rested on the Supreme Court's concern that "an as-applied analysis that is dependent on the day-to-day 'vagaries in the implementation' of confinement, which 'extends over time under conditions that are subject to change,' 'would prove unworkable' because it 'would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under *the Ex Post Facto* Clause.'" *Arthur*, 253 A.3d at 141 n.16 (ellipses and brackets omitted) (quoting *Seling*, 531 U.S. at 263). The Supreme Court thus disallowed a federal "end run" around a state's definitive construction of its own regulatory scheme based on "the effect that [scheme] has on a single individual." *Seling*, 531 U.S. at 262, 263.

Applying *Seling* in *Arthur*, this Court first found that the regulatory scheme challenged by the appellant had already been "definitively construed" as "civil" in *W.M.*, as "neither SORA nor its implementing regulations ha[d] been amended" since *W.M.* "to add any of the requirements appellant complain[ed] of in [his] appeal," and the statistical evidence on sex offender recidivism that appellant cited to show SORA's irrationality and excessiveness was "from 2003" and thus "already

extant" when this Court decided *W.M. Arthur*, 253 A.3d at 142 & n.19. Accordingly, under *Seling*, the Court could "not re-evaluate SORA's civil nature by reference to the effect that it has on appellant as 'a single individual.'" *Id.* at 142 (quoting *Seling*, 531 U.S. at 262). *Arthur* explained that, although appellant's disqualification from "resid[ing] in his ailing mother's public housing unit to assist her as a live-in aide" was "a serious and regrettable restraint," it was "only one incident"—"the type of idiosyncratic effect that cannot support a claim that SORA is punitive." *Id.* at 145 (citing *Seling*, 531 U.S. at 262). Nonetheless, *Arthur* recognized that *Seling* did not preclude consideration of whether SORA's "lifetime registration obligation" creates "a significantly increased risk of being unable to live in public housing"—a "more general restraint" that the appellant had failed to prove. *Id.*

Unlike in *Arthur*, the holding of *Seling* does not apply here. The regulatory scheme challenged by G.W.J., which has been amended since *W.M.* and *Arthur*, has never been "definitively construed as civil" because its punitive features are different from those "already considered in *W.M.*" *Id*. at 142. Those features do not depend on "vagaries in the implementation of [SORA]," or SORA's "idiosyncratic" effects on G.W.J. as a "single individual." *Id.* at 141 n.16, 142. Rather, they rely on new regulations and policies adopted in 2013 and 2022, long after *W.M.* was decided in 2004,[2] that dictate the "necessary operation" of the current scheme; "[e]xtensive social science research," recently cited in *Fallen* but not previously considered in

[2] Although CSOSA's 2013 regulation requiring in-person home visits existed when this Court decided *Arthur*, the appellant did not cite that regulation, and this Court did not consider it. CSOSA's 2022 policy statement requiring quarterly in-person verification did not exist until after *Arthur* was decided in 2021. *See infra* at 12.

W.M or *Arthur*, showing that registration and Internet notification have "serious negative consequences" for registrants in general that are not only "distinct from that resulting from the underlying conviction," but "intrinsic to SORA's design," *Fallen*, 290 A.3d at 496–98; and evidence postdating *W.M.*'s decision in 2004, including the enactment of the IRAA in 2016, showing the general irrationality and excessiveness of SORA's lifetime requirements, without exception, to all Class A registrants, even after they have been found to be rehabilitated and no longer dangerous. Br. for Appellant 19–43. None of these changes to SORA's "necessary operation" were considered in *W.M.* or *Arthur*, and none of them depend on G.W.J.'s individual circumstances. Thus, *Seling* does not bar G.W.J.'s ex post facto claim.

Because *Seling* does not apply here, this Court need not decide whether an exception to *Seling* exists for a "group-based" "as-applied ex post facto challenge" where "the punitive effects are alleged to burden a broad class of sex-offenders," Br. for Appellee 36 (quoting *Arthur*, 253 A.3d at 144)—a "possibility" that this Court "entertained" in *Arthur*, but did not establish or define. *Hickerson v. United States*, 287 A.3d 237, 246 (D.C. 2023). Even if G.W.J.'s ex post facto claim required such a "group-based" exception to *Seling*, however, the government's assertion that "he has failed to satisfy an essential requirement for such a claim"—"substantiating the existence of a broad class"—has no basis in law. Br. for Appellee 37 (brackets and quotation marks omitted) (quoting *Hickerson*, 287 A.2d at 249). The language from *Hickerson* cited by the government was pure dicta, written without the benefit of briefing or argument, after the Court stated that it would merely "entertain" the "possibility" of a "group-based" claim "without expressing an opinion on the point."

Hickerson, 287 A.3d at 246 ("[I]n *Arthur*, based on a government concession, we entertained the possibility that . . . an as-applied ex post facto challenge might lie if the punitive effects are alleged to burden a broad class of sex-offenders. Because the parties have not briefed or discussed this point—*Arthur* was decided after the argument in this case—we will entertain the same possibility, without expressing an opinion on the point."). Neither *Arthur* nor *Hickerson* purported to establish any "essential requirement" for a "group-based" ex post facto claim that has yet to be recognized in the law, Br. for Appellee 37, or to define the parameters of a "broad class," other than to say that it must be larger than "two individuals," *Hickerson*, 287 A.3d at 249. In any event, *Hickerson* noted that the appellant's "technical" failure "to substantiate the class of others like him" was a "minor shortcoming" that the Court likely would have overlooked had there not been other grounds for rejecting the claim. *Id.* at 249–50. Such a "technical" defect, if it somehow mattered in this case, could be easily remedied through a remand to the Superior Court, as the Court contemplated in *Hickerson*, *id.*, and as the Court just ordered in another SORA case.[3]

B. The Current Regulatory Scheme Is Punitive.

As G.W.J. argued in his opening brief, this Court should hold that, in light of recent changes to SORA's "necessary operation" the Court has never considered, the current scheme's "lifetime sex offender registration and Internet notification requirements—imposed solely on the basis of a past conviction, with no exception for those who are no longer dangerous—are unconstitutionally irrational, excessive,

[3] *See* Mem. Op. & J., *In re M.G.*, 19-SP-0767 (Feb. 28, 2025).

and punitive." Br. for Appellant 12. These changes include: (1) new requirements of quarterly in-person reporting and semiannual home verifications that resemble the physical restraint and supervision of probation, *id.* at 19–23; (2) new evidence, recently accepted in *Fallen* and unchallenged by the government, showing that Internet notification inflicts a panoply of serious harms on registrants, similar to those of historical shaming punishments, that are distinct and intrinsic to the notification scheme, *id.* at 23–29; (3) new evidence showing that sex offender recidivism is not nearly as "frightening and high" as assumed in *W.M.* and *Smith*, and in fact varies among sex offenders so dramatically and predictably based on factors other than the severity of the offense that a scheme intended to protect the public from recidivism can no longer rationally classify registrants as dangerous based solely on their past offenses, *id.* at 29–39; and (4) IRAA's legislative determination that young offenders are categorically unlikely to remain dangerous for the rest of their lives, regardless of the severity of their offenses, *id.* at 39–43.

The government acknowledges the existence of these changes but attempts a divide-and-downplay approach that mischaracterizes the import of each change and ignores their cumulative impact on the *Mendoza-Martinez* analysis.[4] This Court

[4] *See Doe #11 v. Lee*, 609 F. Supp. 3d 578, 596 n.16 (M.D. Tenn. 2022) (explaining that "the Court's task is not to parse the law's provisions separately and categorize them one-by-one as punitive or civil," but to consider the provisions "*together* to determine whether their *cumulative* effect is punitive"); *People v. Lymon*, --- N.W.3d ---, No. 164685, 2024 WL 3573528, at *6 (Mich. 2024) (approving of "reasonabl[e] appl[ication]" of "*Mendoza-Martinez* factors" to registry law "demonstrably different than the [decades-earlier] one . . . in *Smith* to determine that the cumulative punitive effects" "outweighed the Legislature's rational civil intent in enacting it").

should reject the government's spurious arguments and conclude that the *Mendoza-Martinez* factors weigh in favor of finding the current scheme punitive in effect.

1. New Evidence About the Burdens of SORA on Registrants

The government first misconstrues the 2013 amendment to 28 C.F.R. § 811.9 that added a new subsection (e): "CSOSA, either on its own accord or with its law enforcement partners, *will conduct home verifications*" "at least every six months, for all registered Class A sex offenders without supervision obligation." 28 C.F.R. § 811.9(e)(1) (emphasis added). Ignoring the plain language of the rule, and instead quoting from a "summary" published in the Federal Register, the government claims that subsection (e) merely "permit[s]," but does not require, CSOSA to "conduct[] home visits o[n] its own accord and with its law enforcement partners," Br. for Appellee 32 (quoting 78 Fed. Reg. 23835-01 (Apr. 23, 2013)), and that a "registrant may satisfy this requirement by returning address verification forms to CSOSA"—a "ministerial task" that does not resemble the "physical restraint" of probation, *id.* (citations omitted). But the rule itself uses the word "will," which is "used to express a command, exhortation, or injunction," *Will*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/will, and mere prefatory remarks cannot override the plain text of a rule. *See In re Greenspan*, 910 A.2d 324, 335–36 (D.C. 2006). Moreover, because subsection (e)'s new mandate is directed at CSOSA, and not registrants—who were already required under other, preexisting subsections of the regulation to periodically "verify [their] registration information" by returning verification forms to CSOSA, 28 C.F.R. § 811.9(a), (b), (d)—nothing supports the government's claim (at 32) that CSOSA's new duty to "*conduct* home verifications,"

"either on its own accord or with its law enforcement partners," 28 C.F.R. § 811.9(e) (emphasis added), can be satisfied by merely *receiving* the verification forms that registrants were already required to provide.

The government similarly obfuscates the import of a 2022 amendment to CSOSA's Policy Statement 4006, which now states that Class A registrants "*must* complete *in-person* registration verification every 90 days." App. H at 7 (emphasis added). While the government cites *Arthur* for the proposition that mandatory quarterly in-person verification is not "excessive" or an "abuse[of] authority," Br. for Appellee 33 (quoting *Arthur*, 253 A.3d at 138, 143–44 & n.20), *Arthur* plainly did not consider or address CSOSA's new policy requiring *all* Class A registrants to complete quarterly verification in person, as that policy was adopted on February 28, 2022, after *Arthur* was decided on July 1, 2021. Rather, *Arthur* addressed only the previous regulatory scheme under 28 C.F.R. § 811.9(d), which gave registrants "the option to complete [their] verifications by mail unless [one of three] specific circumstances applied." *Id.* (citing *Arthur*, 253 A.3d at 136 n.4); *see* 28 C.F.R. § 811.9(d)(1), (2), (3) (listing three circumstances when CSOSA may require a verification in person, including when the registrant earlier "failed to submit a timely verification or submitted an incomplete or inaccurate verification"). *Arthur* held that it was not "excessive" for CSOSA to require *the appellant* to complete his verification in person pursuant to 28 C.F.R. § 811.9(d) because he had repeatedly failed to register in the past, "even after being advised by CSOSA that he was required to do so," and the then-discretionary in-person verification requirement "as applied to him" served the nonpunitive purpose of securing his compliance with

SORA. *Arthur*, 253 A.3d at 143–44. *Arthur* said nothing about the current scheme requiring *all* Class A registrants to complete quarterly verifications in person for the rest of their lives, no matter the circumstances.[5]

In analyzing SORA's effects under the first two *Mendoza-Martinez* factors—whether the scheme resembles traditional punishment, and whether it imposes an "affirmative disability or restraint"—*Smith* and *W.M.* emphasized that regular in-person verification was not a mandatory feature of the scheme and that registrants, unlike probationers, remained free to live their lives "with no supervision," *Smith*, 538 U.S. at 101. *Id.* (noting that Alaska's SORA scheme did "not require [any] updates to be made in person"); *W.M.*, 851 A.2d at 444 & n.16 (finding that CSOSA's "*discretionary* authority" to order "*occasional* in-person meetings"—"for instance, to update a registrant's photograph"—did not "amount to a significant affirmative disability" (emphases added)). The current scheme, by contrast, now requires all Class A registrants not otherwise under supervision to report in person to CSOSA every three months, and to submit to home verification visits by CSOSA officers every six months, *for the rest of their lives*. Far from leaving registrants free to live their lives "with no supervision," *W.M.*, 851 A.2d at 444 (quoting *Smith*, 538 U.S. at 101), the current scheme makes government supervision a regular, permanent feature of a Class A registrant's life—an "affirmative disability or restraint" that far

[5] Although *Arthur* also noted that the appellant had not "sought a relaxation" of his quarterly verification requirement under 28 C.F.R. § 811.11(a), *Arthur*, 253 A.3d at 144, Policy Statement 4006 makes no allowance for any such "relaxation," and 28 C.F.R. § 811.11(a) allows a registrant to seek relief only from "strict compliance with the *time limits*" of SORA's requirements, not relief from in-person reporting.

exceeds the maximum five-year period of probation authorized by D.C. law, *see* D.C. Code § 16-710. Thus, even on this basis alone, the first two *Mendoza-Martinez* factors weigh heavily in favor of finding the current scheme punitive.

On top of the onerous restraints of lifelong in-person supervision by CSOSA, however, are the even more pervasive, wide-ranging, debilitating consequences of lifelong Internet notification. Although *Smith* and *W.M.* acknowledged that any "stigma" or "occupational or housing disadvantages" experienced by registrants may indeed be "lasting and painful," they excluded these effects from their analysis of the *Mendoza-Martinez* factors because, in the absence of any record evidence to the contrary, they assumed that these disabilities and restraints, unlike the humiliation and ostracization of colonial shaming punishments, were not an "integral part of the [scheme's] objective," and "flow[ed] not from [its] registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith*, 538 U.S. at 98–01; *W.M.*, 851 A.2d at 444 & n.15. But as discussed in G.W.J.'s main brief (at 23–27), and as conceded by the government, *Fallen* "diverge[d] from *W.M.*," Br. for Appellee 30, on these key assumptions based on "[e]xtensive social science research," *Fallen*, 290 A.3d at 497, that was absent from the record in *W.M.* and *Smith*, but cited by G.W.J. in this case, *see* App. C at 21–24. Based on this new "evidence about SORA's 'necessary operation,'" *Arthur*, 253 A.3d at 142, *Fallen* found not only that Internet notification has "serious negative consequences for registrants"—including loss of housing, employment, and education, and harm to social relationships, physical safety, and psychological health—but that these severe disabilities and restraints are "distinct from that resulting from the underlying

conviction," and "intrinsic to SORA's design." *Fallen*, 290 A.3d at 496–98 (analogizing harms of SORA to the isolation and exclusion of incarceration and deportation, as the online registry "identifies the registrant as dangerous and disseminates information to the public that allows them to be shunned and denied opportunities to live and work in their communities"). Indeed, as explained in G.W.J.'s main brief, these modern insights about "the social stigma and other real-life consequences" of SORA, *Fallen*, 290 A.3d at 497—along with the explosion of Internet access and smartphones since *W.M.* and *Smith*—have led courts around the country to conclude that the Internet is the new "town square," *Doe v. State*, 111 A.3d 1077, 1097 (N.H. 2015), and today's online sex offender registries now accomplish "[y]esterday's face-to-face shaming punishment," *Commonwealth v. Muniz*, 164 A.3d 1189, 1212 (Pa. 2017), by holding offenders out to be shunned by the community. Br. for Appellant 28–29 (citing cases).

The government offers no substantive response to these points. It does not dispute that the harms of Internet notification recognized in *Fallen* are severe, direct, and intrinsic to the SORA scheme, and that their effects weigh heavily in the first two *Mendoza-Martinez* factors. Instead, it merely deflects by noting (at 30) that *Fallen* did not "question" the fourth *Mendoza-Martinez* factor—SORA's "rational connection to a nonpunitive purpose"—which *Smith* refers to as "a most significant factor," *Smith*, 538 U.S. at 102 (quotation marks and brackets omitted). But all of the *Mendoza-Martinez* factors contribute to the final analysis, and at least in the context of sex offender registration schemes, courts have found that the fifth factor—whether the scheme is "excessive with respect to [its nonpunitive] purpose"—"cuts

most directly to the question" of punitiveness. *Rodriguez v. State*, 93 S.W.3d 60, 75 (Tex. Crim. App. 2002); *see also State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) ("Excessiveness . . . is the key factor in our analysis."). In analyzing that key factor, *Smith* considered the "magnitude of the restraint" on the individual and held that, because the regulatory scheme imposed only "the more minor condition of registration," its lack of "individual assessment" did not make it excessive. *Smith*, 538 U.S. at 104. But now that *Fallen* has recognized, and the government does not dispute, that SORA imposes "serious negative consequences" that are far greater in magnitude than "the more minor condition of registration," the severity and nature of those harms weigh heavily in not just the first two *Mendoza-Martinez* factors, but also the final and arguably most significant one.

2. New Evidence About SORA's Relation to Public Safety

In analyzing the last three factors of the *Mendoza-Martinez* test, *Smith* and *W.M.* reasoned that the legislative decision to regulate "sex offenders as a class," based solely on their convictions "rather than . . . individual determinations of their dangerousness," was not "retributive" or aimed at "the extent of the wrongdoing," *Smith*, 538 U.S. at 102, but rather "reasonably related to" and not "excessive in relation to" the "nonpunitive purpose" of protecting public safety because there was "ample support for recognizing that 'the risk of recidivism posed by sex offenders is frightening and high,'" *W.M.*, 851 A.2d at 445 (quoting *Smith*, 538 U.S. at 103) (brackets and quotation marks omitted). As explained in G.W.J.'s main brief (at 29–39), however, that rationale has been upended by modern empirical research conducted since *Smith* and *W.M.* showing not only that sex offender recidivism is

nowhere near as high as previously assumed, but that recidivism risk varies so widely and predictably *among* sex offenders (based on actuarial risk factors such as age at the time of the offense and age at release), and declines so reliably with age and offense-free time in the community, that legislatures can no longer make "reasonable categorical judgments" about the lifelong future dangerousness of sex offenders based solely on their past crimes. Br. for Appellant 32–35 & nn.19–25. That conclusion is further bolstered by the legislature's findings in the enactment of the IRAA that those who committed even the most serious sex offenses in their youth are unlikely to remain dangerous after maturity. *See id.* at 39–42.

The government does not dispute the predictable variability of sex offender recidivism or question the validity of the underlying research. Instead, it argues only that the current evidence on sex offender recidivism is "conflicting," Br. for Appellee 23–27, and that a regulatory scheme's lack of "close or perfect fit with the nonpunitive aims it seeks to advance" does not make it irrational or excessive, *id.* at 43–44 (quoting *Smith*, 538 U.S. at 103). That argument misses the point. Contrary to the government's suggestion (at 24), *W.M.* did not acknowledge any "conflicting data" on sex offender recidivism or rest its conclusions on any lack of clarity in the "extant" data, and instead summarily adopted *Smith*'s analysis of the last three *Mendoza-Martinez* factors based on what it considered "ample support" for *Smith*'s view that sex offender recidivism is "frightening and high," *W.M.*, 851 A.2d at 445. But as explained in G.W.J.'s main brief (at 30–31), the only "support" cited in *W.M.* and *Smith* for that view was a Department of Justice publication stating that sex offender recidivism was "as high as 80%," *Smith*, 538 U.S. at 103—a statistic that

has now been widely rejected as the baseless assertion of a single correctional officer. The government makes no attempt to defend that "frightening and high" statistic, but claims (at 25) that the same conclusion about "high" sex offender recidivism can be drawn from a Bureau of Justice Statistics study, cited in *United States v. Kebodeaux*, 570 U.S. 387 (2013), reporting that 5.3% of sex offenders released in 1994 were rearrested for a sex crime within three years of release, compared to 1.5% of non-sex offenders. But not only did *Kebodeaux* acknowledge the existence of "conflicting evidence on th[is] point," citing a 2011 study "concluding that sex offenders have relatively low rates of recidivism," 570 U.S. at 396, even the relatively "high" 5.3% recidivism rate touted by the government here is more than *ten times lower* than the 80% rate assumed in *Smith* and *W.M.*, and does not provide "ample support" for the notion that sex offender recidivism is so "frightening and high" that the legislature can reasonably regulate sex offenders "as a class," without any need for individual determinations of dangerousness.

Indeed, although *Smith* emphasized that a regulatory scheme "is not deemed punitive simply because it lacks a close or perfect with the nonpunitive aims it seeks to advance," 538 U.S. at 103, the conclusion in *Smith* and *W.M.* that SORA's over-inclusiveness was not "excessive" was based on an assumption of "ample support" for an 80% fit—not "conflicting evidence" showing at best a 5.3% fit. It is irrational and excessive to treat all convicted sex offenders as dangerous enough to require at least ten years of government supervision and community avoidance if only a small proportion of them are actually dangerous at the time of their release. It is even more irrational and excessive to treat them as *permanently* dangerous and in need of

lifetime supervision and avoidance when the undisputed evidence shows that even those who pose the highest risk of recidivism at the time of release will pose no appreciable risk after reaching the age of 60, or after living offense-free in the community for 20 years. *See* Br. for Appellant 32–33. If a large proportion of convicted sex offenders on the registry are not in fact dangerous, and if their risk can be readily determined—points strongly supported by evidence the government does not meaningfully dispute—then their inclusion in the registry irrationally counteracts SORA's nonpunitive purpose of identifying dangerous sex offenders to the community so that they can be shunned and avoided.

As explained in G.W.J.'s main brief (at 39–43), the irrationality and excessiveness of SORA's categorical lifetime regulation of sex offenders, with no exception for demonstrably non-dangerous individuals, is further evidenced by the legislature's finding, in its enactment of the IRAA in 2016, that young offenders are particularly unlikely to remain dangerous for the rest of their lives. Although the government notes (at 41) that SORA does not apply to juvenile delinquency adjudications and reserves its application to convictions for "serious" offenses committed by children whom the law allowed the government in its discretion to prosecute as adults, it does not dispute the legislative determination that young offenders are categorically and unconditionally unlikely to remain dangerous for the rest of their lives, even when they are prosecuted as adults for "serious" offenses—a finding that undercuts the rationality of SORA's lifelong application to all Class A registrants, with no exception for young offenders or those who have proven to an IRAA judge that they are no longer dangerous.

SORA's lack of any relief mechanism or judicial review for demonstrably non-dangerous registrants makes it among "the most stringent in the country." *Powell v. Keel*, 860 S.E.2d 344, 346 (S.C. 2021). In light of the unchallenged evidence in the record that "it takes more than a conviction for a sexual crime to identify individuals who have an enduring risk for sexual crime," Br. for Appellant 36, this Court should hold that SORA's imposition of severe, lifelong burdens on all Class A registrants, with no exception for demonstrably non-dangerous individuals like G.W.J., is irrational, excessive, and punitive.

For all of the same reasons that SORA's treatment of Class A registrants is irrational and excessive under the *Mendoza-Martinez* factors, *see supra*, it is also an irrational classification that violates equal protection and substantive due process. *See* Br. for Appellant 43–50. Contrary to the government's claim (at 46–47), that conclusion is not "foreclosed by *W.M.*," which merely assumed that SORA satisfied rational-basis review because the appellants did "not contend otherwise," *W.M.*, 851 A.2d at 451, and in any event was decided on a different factual and legal record.

In sum, as a result of developments in the past two decades—significant changes to SORA's regulatory restraints, evidence recognized in *Fallen* showing the extensive harms of Internet notification, and the irrational excessiveness of SORA's treatment of all Class A offenders as permanently dangerous despite new empirical research and legislative findings to the contrary—there now exists the clearest proof of SORA's punitiveness and irrationality. This Court should reverse the trial court's order and require G.W.J.'s removal from the registry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion has been served electronically upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney for the District of Columbia, 601 D Street NW, Washington, DC, 20579, and Caroline Van Zile, Solicitor General for the District of Columbia, Office of the Attorney General, 400 6th Street NW, Suite 8100, Washington, DC 20001, on this 22nd day of May, 2025.

/s/ Adam G. Thompson
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