BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CO-908

G.W.J., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 1981-FEL-499

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ISSUES PRESENTED

I. Whether the D.C. Sex Offender Registration Act (SORA) violates the Ex Post Facto Clause, where appellant G.W.J. has waived any facial ex-post-facto challenge to SORA, has failed to satisfy the requirements for a group-based as-applied ex-post-facto challenge, and has not, in any event, demonstrated any basis to depart from this Court's multiple precedents concluding that SORA's requirements do not impose "punishment" for constitutional purposes.

II. Whether SORA violates equal protection or due process, where this Court has previously found that the statute "easily" satisfies rational-basis review, and G.W.J. has not shown any basis to depart from that ruling.

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COUNTERSTATEMENT OF THE CASE

On January 23, 1981, G.W.J. was charged in a 49-count indictment for numerous crimes committed against ten elderly victims between October 1980 and January 1981, including murder, rape, burglary, and armed robbery. *See [G.W.J.] v. United States*, 482 A.2d 786, 788 (D.C. 1984). G.W.J. was 16 and 17 years old when he committed these offenses (Record on Appeal (R.) 41 at 5). Due to his age and the severity of the charges, G.W.J. was criminally prosecuted as an adult in the Superior Court. *See* D.C. Code § 16-2301(3)(A).

On November 9, 1981, after a jury trial on the charges related to four of the ten victims, G.W.J. was found guilty of three counts of first-degree felony murder (one predicated on rape and two predicated on robbery), two counts of first-degree burglary while armed, two counts of first-degree burglary, one count of armed robbery, and one count of robbery. *See [G.W.J.]*, 482 A.2d at 788. On June 3, 1982, G.W.J. entered a guilty plea on additional charges involving two of the other victims, including one count of assault with intent to commit rape and one count of second-degree burglary (R.41 at 2-3). Pursuant to a plea agreement, the government dismissed the remaining counts in the indictment (*id.*). The trial court sentenced G.W.J. to an aggregate of 82 years to life of incarceration (*id.*).[1]

G.W.J.'s IRAA Motion

On October 15, 2019, G.W.J. filed a motion to reduce his sentence pursuant to the Incarceration Reduction Amendment Act of 2016 (IRAA) (R.27). The government opposed G.W.J.'s immediate release but agreed that he was entitled to a limited sentence reduction based upon his rehabilitative efforts while incarcerated (R.36). On April 28, 2020, the Honorable Rainey Brandt issued an order granting

[1] After this Court largely affirmed G.W.J.'s convictions on direct appeal, his felony-murder conviction predicated on rape was vacated on remand as a result of merger with one of his felony-murder convictions predicated on robbery. *See [G.W.J.]*, 482 A.2d at 796 n.9; R.29, Ex. 25 at 7; R.43.

G.W.J.'s IRAA motion, concluding that G.W.J. was no longer a danger to the safety of any person or the community and that the interests of justice warranted a sentence reduction (R.41 at 17). Judge Brandt reduced G.W.J.'s aggregate sentence to time served and ordered his immediate release from incarceration (*id.*; R.43). G.W.J. was 56 years old at the time of his release, and he is now 60 years old (R.43 at 15).

G.W.J.'s Motion Opposing Sex-Offender Registration

On January 25, 2021, the Court Services and Offender Supervision Agency (CSOSA) notified G.W.J. that, as a result of his conviction for assault with intent to commit rape, he must register for his lifetime as a Class A sex offender under the D.C. Sex Offender Registration Act (SORA) (R.44; R.66 at 3).

On February 24, 2021, G.W.J. filed a motion under D.C. Code § 22-4004 opposing CSOSA's registration determination (Appendix (A.) A). G.W.J. conceded that assault with intent to commit rape was a SORA lifetime registration offense, *see* D.C. Code § 22-4001(6)(D), but he claimed that requiring his lifetime registration under SORA would result in multiple constitutional violations (A.A at 6). On May 12, 2021, G.W.J. filed a memorandum of law in support of his motion, claiming that "as applied to people required to register for offenses they committed as children," SORA registration violated the Ex Post Facto Clause and the Equal Protection Clause's "anti-animus principle" (A.C at 13). On December 31, 2021, G.W.J. filed

a supplemental memorandum, claiming that lifetime SORA registration violated due process "[b]oth facially and as applied to [G.W.J.]" (A.D at 1).[2]

On March 15, 2022, the government filed its opposition to G.W.J.'s motion (A.E). The government argued that G.W.J.'s claims were foreclosed by this Court's decisions in *In re W.M.*, 851 A.2d 431 (D.C. 2004), and *Arthur v. United States*, 253 A.3d 134 (D.C. 2021),[3] which held that SORA does not impose "punishment" for constitutional purposes and does not violate due process (A.E at 1-2). The government noted that SORA could not be found punitive as applied to a particular person because this Court had determined in *W.M.* that SORA is a civil regulatory scheme adopted to protect the public (*id.* at 26) (citing *Arthur*, 253 A.3d at 141-42). To the extent G.W.J. sought to raise an as-applied challenge for SORA registrants who committed their registration offenses as juveniles, the government argued that he failed to demonstrate a sufficient basis to support this group-based as-applied claim (*id.* at 25-53).

On August 8, 2022, G.W.J. filed a reply, contending that *W.M.* and *Arthur* did not foreclose his claims because those cases did not distinguish between "the mine run of sex offense cases" and "the smaller but significant sub-class of cases involving

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[2] G.W.J. also claimed below that the trial court's order reducing his sentence under the IRAA precluded any requirement for him to register as a sex offender, and that lifetime registration for individuals who committed their registration offenses as juveniles violated the Eighth Amendment (A.C at 13). He has abandoned those claims on appeal.

[3] *Arthur* was issued just over a month after G.W.J. filed his memorandum of law.

adjudicated-non-dangerous juvenile offenders like [G.W.J.]" (A.F at 2). G.W.J. emphasized that, other than his facial due-process claim, his constitutional claims were as-applied challenges addressed solely to "individuals convicted as juveniles . . . who have been adjudicated as non-dangerous" — which, he asserted, was "a readily discernable 'broad class' that is fundamentally and uniquely burdened by SORA's 'normal operation'" (*id*. at 2, 4-6) (quoting *Arthur*, 253 A.3d at 144). G.W.J. did not identify or provide evidence concerning any other individuals who belonged to this "sub-class" of SORA registrants.

On November 2, 2022, Judge Brandt issued an order denying G.W.J.'s motion (R.66). The trial court rejected G.W.J.'s as-applied ex-post-facto challenge "for those convicted [of registration offenses] as children" (*id*. at 10). The court explained that *W.M.* and *Arthur* had determined that SORA registration was "civil, non-punitive, and [ ] unrelated to a present finding of dangerousness," and G.W.J. had failed to demonstrate a basis "to adopt a contrary position" in this case (*id*.). The trial court also rejected G.W.J.'s equal-protection and due-process claims, finding that SORA "easily" satisfies rational-basis review because it is rationally related to legitimate government interests concerning public safety (*id*. at 9-12). The trial court issued a certification-of-sex-offender order, which indicated that G.W.J., as a Class A offender, was subject to lifetime registration under SORA (R.67). On November 30, 2022, G.W.J. filed this appeal (R.68).

SUMMARY OF ARGUMENT

G.W.J.'s claim that SORA violates the Ex Post Facto Clause fails because, as this Court has held multiple times, SORA registration is not "punishment" for constitutional purposes. *See In re W.M.*, 851 A.2d 431 (D.C. 2004); *Arthur v. United States*, 253 A.3d 134 (D.C. 2021); *Hickerson v. United States*, 287 A.3d 237 (D.C. 2023). Although G.W.J. made clear in the Superior Court that his ex-post-facto claim was an "as-applied" challenge, his appeal appears to assert a facial challenge to SORA with respect to sex-offender registrants generally. Such a claim is not properly before this Court, and any facial challenge to SORA should be rejected on that basis alone.

Even if this Court were to consider the merits of a facial claim, however, G.W.J. has not shown a basis to depart from this Court's precedents by presenting "the clearest proof" that SORA is so punitive in purpose and effect as to negate the D.C. Council's "clear and unequivocal" intent to establish "regulatory measures adopted for public safety purposes." *W.M.*, 851 A.2d at 441. G.W.J.'s one-sided recounting of social science concerning sex-offender recidivism rates ignores the existence of conflicting research that found sex offenders pose a significantly higher risk of reoffending compared with other types of criminals. Furthermore, the only changes to SORA's operation since *W.M.* was decided relate to a regulation and a policy about verification requirements, neither of which is the type of dramatic or marked change that would warrant "revisiting" this Court's binding precedent.

G.W.J.'s as-applied challenge to SORA — on behalf of a proposed "class" of individuals convicted of sex offenses as juveniles and later adjudicated as "non-dangerous" — is precluded by *Seling v. Young*, 531 U.S. 250 (2001). Moreover, even if this Court were to entertain G.W.J.'s group-based ex-post-facto challenge, it would fail because G.W.J. has not satisfied the essential requirements for bringing such a claim. Specifically, G.W.J. has not substantiated the existence of a "broad class," and he has failed to demonstrate that SORA's effects are more burdensome with respect to his proposed class.

Finally, G.W.J.'s equal-protection and due-process claims fail because, as this Court held in *W.M.*, SORA "easily" satisfies rational-basis review, as it is rationally related to the legitimate governmental goal of public safety. 851 A.2d at 435, 451. G.W.J.'s arguments (at 49) that SORA could be improved by implementing "actuarial risk assessment tools" and "individual determinations of future dangerousness" have no bearing on the constitutional validity of the statute. The Supreme Court has cautioned against courts sitting as "superlegislatures" that second-guess legislative policy choices. *Ewing v. California*, 538 U.S. 11, 28 (2003). Under rational-basis review, a law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for its requirements. *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 313 (1993). SORA easily satisfies this standard.

SORA'S ENACTMENT AND REQUIREMENTS

Laws creating sex-offender registries were enacted throughout the country in the 1990s, spurred by events like the sexual assault and murder of a seven-year-old New Jersey girl named Megan Kanka, who was victimized by a neighbor with an undisclosed history of sex offenses. *See Smith v. Doe*, 538 U.S. 84, 89 (2003). By 1994, Congress required states, as a condition of receiving certain federal funds, to establish sex-offender registries meeting minimum requirements. *See id*. at 89-90. Every state and D.C. ultimately enacted their own versions of these so-called "Megan's Laws." *Id.* In 2006, Congress updated the federal requirements for state sex-offender registries through the Sex Offender Registration and Notification Act (SORNA). *See Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). SORNA also created a nationwide registry to supplement the state-level registries. *See* 34 U.S.C. §§ 20901, 20921.

The D.C. Sex Offender Registration Act (SORA), which went into effect in July 2000, requires any "person who lives, resides, works, or attends school in [D.C.]," and who "[c]ommitted a registration offense at any time and is in custody or under supervision [at the time of or after SORA's enactment]" to register as a sex offender and comply with periodic verification and reporting requirements established by CSOSA. *Sullivan v. United States*, 990 A.2d 477, 478 (D.C. 2010) (citing D.C. Code §§ 22-4001(9), 22-4007, 22-4014). Unlike the federal SORNA, which applies to juveniles age 14 or older who have been adjudicated delinquent for certain sex offenses,

SORA does not apply to those adjudicated delinquent as juveniles. *Compare* 34 U.S.C. §§ 20911(1), (8), *with* D.C. Code § 22-4001(3)(A)(i) (limiting SORA's application to "conviction[s]" for registration offenses).[4] SORA registration is required for persons whose offenses were committed as juveniles only if the crimes were sufficiently severe to qualify for prosecution as an adult in criminal court. *See* D.C. Code § 16-2301(3)(A) (defendant is not a "child" for purposes of the D.C. juvenile justice system if he is age 16 or older and is charged with murder, first-degree sexual abuse, first-degree burglary, armed robbery, or assault with intent to commit those offenses).

SORA divides sex offenders into three classes for registration and notification purposes. These classifications are based on the nature of the offenses committed, rather than an individualized assessment of dangerousness or risk of recidivism. Persons who have committed first or second-degree sexual abuse, assault with intent to commit rape, or similar offenses are "Class A" offenders who must register on a lifetime basis. *See* D.C. Code § 22-4001(6). Persons convicted of less serious sex offenses are determined to be either "Class B" or "Class C" offenders who must comply with SORA's requirements for a 10-year registration period. *See* 28 C.F.R. § 811, Appendix A.

[4] For this reason, the federal government has determined that D.C. has not "substantially implemented" SORNA with respect to juvenile sex offenses. *See* SORNA Substantial Implementation Review: Washington, D.C. at 3, available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/district-of-columbia.pdf.

SORA requires registrants to provide CSOSA with a photograph, fingerprints, and other personal identifying information, including aliases, date of birth, physical characteristics, driver's license number, Social Security number, and places of residence and employment. *See* D.C. Code § 22-4007(a). SORA does not impose any restrictions on where a sex offender may live or work, but registrants must report any changes of address or other registry information to CSOSA for the duration of their registration periods. *See* D.C. Code § 22-4009(a). Lifetime registrants must verify registration information on a quarterly basis, and all other registrants must do so on an annual basis. *See* D.C. Code § 22-4008(a)(1); 28 C.F.R. § 811.9(a). As of February 2022, Class A and Class B offenders must complete their periodic verifications with CSOSA in-person. See A.H (CSOSA Policy Statement 4006) at 7.

CSOSA maintains offenders' information in a registry that is shared with law enforcement and certain government agencies. *See* D.C. Code § 22-4010. The Metropolitan Police Department (MPD) may provide "active notification" about certain offenders to organizations with particular need for the information, such as schools. D.C. Code § 22-4011(b)(3). MPD may also provide "passive notification" about registered offenders, which involves "making information about sex offenders available for public inspection" or responding to inquiries. D.C. Code § 22-4011(b)(1)(B).

As authorized by SORA, MPD maintains a website that publishes certain information for Class A and Class B offenders. *See* http://mpdc.dc.gov/service/sex-

offender-registry. Some types of personal identifying information — including fingerprints, driver's license numbers, and Social Security numbers — are not disclosed on the website. Where a particular registrant resides, works, or attends school may be identified "by block only." 6A DCMR § 420.1. The website explains that its "purpose" "is not to punish or stigmatize sex offenders, but rather to provide factual information that will allow adults in this community to make more informed decisions about whom they associate with or entrust their children to." *See* https://mpdc.dc.gov/service/sex-offender-registration-faq. The website clarifies that MPD "has not considered or assessed the specific risk of reoffense for any individual registrant" and "has made no determination that any offender included in the registry is currently dangerous." *See* https://sexoffender.dc.gov/disclaimer. The website warns that "[u]lawful use of this information to threaten, intimidate, harass, or injure a registered sex offender will not be tolerated and will be prosecuted to the full extent of the law." *See* http://mpdc.dc.gov/service/sex-offender-registry.

ARGUMENT

I. G.W.J.'s Ex-Post-Facto Claim Fails Because, as This Court Has Previously Held, SORA Registration Is Not "Punishment" for Constitutional Purposes.

A. Standard of Review and Applicable Legal Principles

This Court generally reviews ex-post-facto claims de novo. *Solomon v. United States*, 120 A.3d 618, 620 (D.C. 2015). Where a claimed constitutional violation "was not raised or passed on in the trial court," however, it is not properly before this Court on appeal, and the Court will decline to address it. *Sharps v. United States*, 246 A.3d 1141, 1159-60 (D.C. 2021) (citing *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003)). If this Court does address an unpreserved constitutional claim, it is "subject to the rigors of plain error review." *Conley v. United States*, 79 A.3d 270, 276 (D.C. 2013) (quotation marks omitted).

A violation of the Ex Post Facto Clause occurs when a statute "changes the punishment, and inflicts a greater punishment" than the law required at the time an offense was committed. *Solomon*, 120 A.3d at 621 (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). "A threshold question when evaluating an ex post facto challenge is whether the sanction complained of constitutes punishment at all." *Hickerson v. United States*, 287 A.3d 237, 244 (D.C. 2023). To determine if a law's consequences are "punishment" for purposes of an ex-post-facto claim, a court must first look to the legislature's intent. *Smith*, 538 U.S. at 92. "If the intention of the legislature was to

impose punishment, that ends the inquiry." *Id.* Where, however, a legislature's "intention was to enact a regulatory scheme that is civil and nonpunitive," a court "must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id.* (quotation marks omitted). Because courts "ordinarily defer to the legislature's stated intent," "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)); *see also United States v. W.B.H.*, 664 F.3d 848, 855 (11th Cir. 2011) ("We take the [Supreme] Court at its word: some evidence will not do; substantial evidence will not do; and a preponderance of the evidence will not do. Only the clearest proof will do.") (cleaned up). The effects of a statute are evaluated in this context according to the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See Smith*, 538 U.S. at 97. The "most relevant" 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.*

Constitutional claims may be facial or as-applied. *See Dubose v. United States*, 213 A.3d 599, 603-04 (D.C. 2019). A facial claim amounts to an argument that "no application" of the challenged statute "could be constitutional." *Id.* at 604

(quotation marks omitted). An as-applied challenge "is a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *Id.* (quotation marks omitted). The "very nature" of an as-applied claim "requires [an] appellant to create a record which establishes the relevant facts." *Lowery v. United States*, 3 A.3d 1169, 1175 (D.C. 2010).

A statute cannot be "declared punitive 'as applied' to a particular person when the highest State court has already definitively construed the statute as civil." *Arthur v. United States*, 253 A.3d 134, 141 (D.C. 2021) (quotation marks omitted). Since this Court has "definitively construed SORA as civil," it may not "re-evaluate SORA's civil nature by reference to the effect that it has on appellant as 'a single individual.'" *Id.* at 141-42 (quoting *Seling v. Young*, 531 U.S. 250, 262 (U.S. 2001)). Although this Court, based on a government concession, previously entertained the possibility of an as-applied ex-post-facto challenge to SORA where "the punitive effects [were] alleged to burden a broad class of sex-offenders," *id.* at 144, the Court has since clarified that the "the viability of group-based ex post facto challenge[s]" to SORA is "questionable" under *Seling* and remains "an open question." *Hickerson*, 287 A.3d at 246 & n.11. To the extent that a group-based ex-post-facto challenge to SORA is permissible, a defendant bringing such a claim bears the burden of "substantiat[ing] the existence of a 'broad class'" and demonstrating that "[t]he burdens of registration" "fall more heavily" on the members of that class. *Id.* at 248-50. A litigant must provide

more than "mere assertion[s] of counsel" to satisfy these requirements. *Id.* at 249 (quoting *Arthur*, 253 A.3d at 145).

B. This Court's Prior Rejections of Ex-Post-Facto Challenges to SORA

This Court first rejected an ex-post-facto challenge to SORA in *In re W.M.*, 851 A.2d 431 (D.C. 2004), which relied heavily on the Supreme Court's rejection of a similar challenge to Alaska's sex-offender-registration statute in *Smith v. Doe*, 538 U.S. 84 (2003). *W.M.* found that, in creating SORA, the D.C. Council's intent "was to create a civil, nonpunitive regime." 851 A.2d at 443. *W.M.* then applied the *Mendoza-Martinez* factors to find that SORA's statutory scheme was not "so punitive either in purpose or effect" as to override the legislature's clear intent. *Id.* at 442. *W.M.* determined that "registration and public notification have not been regarded historically or traditionally as punishment" and rejected any analogy to "early colonial shaming punishments" because "the purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.* at 444 (quotation marks omitted). *W.M.* observed that SORA "imposes no physical restraint, nor does it restrain activities sex offenders may pursue," but instead allows them "to move where they wish and to live and work as other citizens, with no supervision." *Id.* (quotation marks omitted). Although SORA promotes deterrence, which is "one of the traditional aims of punishment," *W.M.* ascribed little weight to that factor

because "any number of governmental programs might deter crime without imposing punishment." *Id*. at 445 (quotation marks omitted). *W.M.* found it "more important that the scheme undeniably has a rational connection to a legitimate, non-punitive purpose of public safety, by alerting the public to the risk of sex offenders in their community." *Id.* (quotation marks omitted).

W.M. also found that SORA was not "excessive" in relation to its regulatory purpose. 851 A.2d at 445. Although SORA's requirements applied to all sex offenders "without regard to their future dangerousness," the legislature "reasonably could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism that is sufficient without more to justify a regulatory response." *Id.* (quotation marks omitted). *W.M.* emphasized that "the excessiveness inquiry" looks only to "whether the regulatory means chosen are reasonable in light of the nonpunitive objective" and does not ask "whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Id*. (quotation marks omitted). *W.M.* also found that the widespread availability of online registry information did not make SORA "excessive" because (i) members of the public must seek access to the information, (ii) the registry warns visitors against using the information to threaten or harass registrants, and (iii) the "general mobility" of the population made the use of an internet database reasonable. *Id*. at 446. *W.M.* found that "[t]he ease and efficiency with

which the Internet can be accessed by the public are, arguably, points in favor of, not against, its use" for the dissemination of sex-offender-registry information. *Id.*

In *Arthur v. United States*, 253 A.3d 134 (D.C. 2021), this Court again rejected an ex-post-facto challenge to SORA. Citing state-court decisions that reconsidered the constitutionality of state sex-offender registration laws that had "changed dramatically" and "markedly" after earlier decisions upholding them, *Arthur* considered whether any "record evidence" or "amendments to SORA or its implementing regulations" "warrant[ed] revisiting" *W.M.*'s rejection of a facial ex-post-facto challenge to SORA. *Id*. at 142. *Arthur* found that the defendant failed to identify any new features of SORA that demonstrated by "the clearest proof" that SORA's effects "negate[d] [the D.C. Council's] intention to establish a civil regulatory scheme [and] transform[ed] SORA's civil remedies into criminal penalties." *Id*. at 143 (quotation marks omitted).

Based on a government concession, *Arthur* also entertained the possibility of an as-applied ex-post-facto challenge to SORA where "the punitive effects [were] alleged to burden a broad class of sex-offenders." 253 A.3d at 144. As relevant here, *Arthur* rejected the defendant's claim that CSOSA's requirement for him to verify his registration information in-person on a quarterly basis was "an excessive personal appearance schedule" that showed "CSOSA had abused its authority." *Id*. at 138, 143-44 & n.20. *Arthur* also rejected the defendant's reliance on statistics purporting to demonstrate a "low recidivism rate of sex offenders." *Id*. at 142-43 & n.19. The Court

noted that conflicting data on this issue was "already extant" in 2004, when *W.M.* found that it was within a legislature's policy-making discretion to "reasonably" conclude "that a conviction for a sex offense provides evidence of substantial risk of recidivism that is sufficient without more to justify a regulatory response." *Id.*

Most recently, in *Hickerson v. United States*, 287 A.3d 237 (D.C. 2023), this Court rejected an ex-post-facto challenge to SORA "as applied" to individuals who had completed their sentences for registration offenses, including any terms of supervision, before the enactment of SORA, then later committed a non-sex offense that triggered a requirement to register as a sex offender. At the outset, the Court found it "questionable" whether the defendant could raise any type of as-applied ex-post-facto challenge to SORA under *Seling*, 531 U.S. at 262, noting that *Arthur* had "entertained" such a possibility only because of a government concession. *Hickerson*, 287 A.3d at 246 & n.11. Nevertheless, because *Arthur* was issued after the oral argument in *Hickerson*, the Court again "entertain[ed] the [ ] possibility" of an ex-post-facto claim "brought on behalf of a sufficiently broad class of registrants." *Id*. The Court rejected the claim for three reasons: (i) *Smith* and *W.M.* had rejected challenges brought by litigants within the same class proposed by the defendant; (ii) the defendant failed to show that the burdens of SORA registration "f[e]ll more heavily" on members of the proposed class; and (iii) the defendant's vague assertions failed to substantiate the existence of a sufficiently "broad class" to allow such a claim. *Id*. at 247-50.

This Court's decisions are consistent with the "overwhelming weight of authority" finding that sex-offender-registry laws are "civil and nonpunitive." *Anderson v. Holder*, 647 F.3d 1165, 1169 (D.C. Cir. 2011) (collecting cases). This includes multiple federal courts of appeals upholding state sex-offender-registry laws that imposed restrictions similar to, or greater than, SORA. *See, e.g., Shaw v. Patton*, 823 F.3d 556, 567 (10th Cir. 2016) (upholding Oklahoma act that requires weekly, in-person reporting by certain offenders and restricts where offenders may live); *Litmon v. Harris,* 768 F.3d 1237, 1242-43 (9th Cir. 2014) (upholding California requirement that offenders register in-person every 90 days); *American Civil Liberties Union of Nevada v. Masto,* 670 F.3d 1046, 1051, 1058 (9th Cir. 2012) (upholding Nevada law adding in-person registration requirements and expanding law-enforcement obligations to notify entities that an offender resides nearby); *Doe v. Bredesen,* 507 F.3d 998, 1000 (6th Cir. 2007) (upholding Tennessee law requiring, among other things, extended lifetime registration and satellite-based monitoring with wearable GPS device).[5]

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[5] G.W.J. (at 12) asserts that there are a "growing number of courts" holding otherwise, but the decisions he cites run contrary to the vast majority of jurisdictions that have addressed similar claims. *See Doe v. Settle* (4th Cir. 2022), *pet. for cert.*, 2022 WL 1358100, at *18-22 (collecting cases from more than 20 state supreme courts finding sex-offender-registry laws are not "punishment" for constitutional purposes). Notably, G.W.J. relies on some cases from jurisdictions where sex-offender statutes impose far more onerous restrictions than SORA does. *See, e.g., Does 1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016) (Michigan law "govern[ed] in minute detail the lives of the state's sex offenders," including restrictions on where sex offenders "may live, work, and 'loiter.'"); *State v. Letalien*, 985 A.2d 4, 11 (Me.
(continued . . .)

Indeed, every federal court of appeals to consider the issue has found that the registration and notification requirements of SORNA — which are similar to SORA and have far greater applicability to juvenile offenders, see pages 8-9, supra — are not "punishment" for constitutional purposes. *See, e.g., United States v. Parks*, 698 F.3d 1, 5-6 (1st Cir. 2012).[6] Unlike the state supreme court decisions relied upon by G.W.J. — but like this Court's decisions, *see W.M.*, 851 A.2d at 435 — these federal circuit cases are based on the federal Constitution's Ex Post Facto Clause and are bound by the Supreme Court's holding in *Smith*.[7]

2009) (registry law in Maine prohibited some sex offenders from "having direct or indirect contact with any child under the age of fourteen.").

[6] *See also United States v. Diaz*, 967 F.3d 107, 109-10 (2d Cir. 2020); *United States v. Shenandoah*, 595 F.3d 151, 158-159 (3d Cir. 2010); *United States v. Under Seal*, 709 F.3d 257, 266 (4th Cir. 2013); *United States v. Young*, 585 F.3d 199, 206 (5th Cir. 2009); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011); *United States v. May*, 535 F.3d 912, 919-920 (8th Cir. 2008); *United States v. Elk Shoulder*, 738 F.3d 948, 954 (9th Cir. 2013); *United States v. White*, 782 F.3d 1118, 1133-35 (10th Cir. 2015); *United States v. W.B.H.*, 664 F.3d 848, 851 (11th Cir. 2011).

[7] G.W.J. relies on a number of state-court cases that expressly relied upon the courts' interpretations of their respective state constitutions. *See, e.g., Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009) (applying state constitution to "reach a different conclusion . . . than the United States Supreme Court reached in *Smith*"); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 131 (Md. 2013) (explaining that the Maryland Declaration of Rights offers "broader" "protections" than the United States Constitution); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (applying only state constitution); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013) (same); *Doe v. State*, 189 P.3d 999 (Alaska 2008) (same).

C. To the Extent G.W.J. Asserts a Facial Ex-Post-Facto Challenge to SORA, His Claim is Waived and Foreclosed by Precedent.

1. A Facial Ex-Post-Facto Challenge to SORA Is Not Properly Before this Court.

On appeal, G.W.J. does not specify whether his ex-post-facto claim is a facial challenge to SORA or an as-applied challenge. G.W.J. argues that SORA is "punishment" "*especially*" as applied to juvenile offenders who have been found rehabilitated (at 1, 10, 43) (emphasis added), but elsewhere he asks this Court to "revisit" (at 18) *W.M.*'s conclusion that SORA's requirements are not "punishment" with respect to sex-offender registrants generally.

G.W.J.'s pleadings below, however, expressly and repeatedly made clear that he was asserting only an "as-applied" ex-post-facto challenge. G.W.J. claimed that SORA "when imposed on children and those whose sexual offending was limited to childhood" was "unavoidably punitive" (A.C at 13). See also A.C at 28 ("Sex Offender Registration *for Childhood Offenses* . . . Is Punitive and Therefore Violates the Ex Post Facto Clause") (emphasis added); *id.* (arguing that *W.M.* "was not asked to consider . . . the application of SORA to people who committed their crimes as children").[8] When the government stated in its opposition that G.W.J. "challenges the constitutionality of

[8] By contrast, G.W.J. expressly indicated that his due-process claim challenged SORA "[b]oth facially and as applied to [G.W.J.]" (A.D at 1).

SORA's requirements only as applied to individuals convicted of registration offenses committed as juveniles" (A.E at 26), G.W.J. did not dispute that characterization or suggest he was also asserting a facial challenge to SORA. To the contrary, G.W.J. argued in his reply that his "as-applied challenge" (A.F at 6) involved an even narrower class: "individuals convicted as juveniles and who have been adjudicated as non-dangerous" (A.F at 2). Citing *Arthur*, G.W.J. argued that this was "a readily discernable 'broad class' that is fundamentally and uniquely burdened by SORA's 'normal operation'" (*id.* at 2, 4-6). The trial court also viewed G.W.J.'s ex-post-facto claim as challenging SORA registration only "for those convicted as children" (R.66 at 9).

To the extent that G.W.J.'s appeal raises a facial challenge to SORA, therefore, it is not properly before this Court. *See Sharps*, 246 A.3d at 1159 ("[I]t is well-established that normally, a claim that was not raised or passed on in the trial court will be spurned on appeal.") (cleaned up). This Court should decline to address any facial challenge to SORA on this basis alone. Alternatively, any facial challenge to SORA should be summarily denied under plain-error review. *See Conley*, 79 A.3d at 276. As this Court has held multiple times that SORA's requirements are not "punishment," it cannot be "plain" under current law that SORA violates the Ex Post Facto Clause.

2. Any Facial Ex-Post-Facto Claim Also Fails Because G.W.J. Has Not Shown a Basis to Depart from This Court's Precedents.

Even if a facial challenge to SORA were properly presented by G.W.J.'s appeal, it would be foreclosed by this Court's decisions in *W.M.* and *Arthur*. *See Hickerson*, 287 A.3d at 246 n.10 ("To the extent Hickerson asks us to reverse *In re W.M.*, this panel lacks that authority.") (citing *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)). G.W.J.'s arguments (at 18) that new "record evidence" about sex offenders' recidivism rates, SORA's effects on registrants, and registrant verification policies warrant "revisiting" *W.M.* are unavailing. While this Court indicated in *Arthur* that such a claim could be permitted based on dramatic or marked changes to SORA's operation or effects, G.W.J. has not shown a basis to depart from this Court's precedents by presenting "the clearest proof" that SORA is so punitive in purpose and effect as to negate the D.C. Council's "clear and unequivocal" intent to establish "regulatory measures adopted for public safety purposes." *W.M.*, 851 A.2d at 441.

a. Conflicting Social Science About Sex-Offender Recidivism Rates Does Not Undermine This Court's Precedents.

This Court should reject G.W.J.'s claim (at 29-39) that empirical research about sex-offender recidivism rates undermines *W.M.*'s finding that the D.C. Council's "determination to legislate with respect to convicted sex offenders as a class" has a rational connection to a nonpunitive purpose (public safety) and is not excessive with

respect to that purpose. 851 A.2d at 445. This Court confronted a similar claim in *Arthur*, where the defendant likewise cited statistics purporting to demonstrate a "low recidivism rate of sex offenders." 253 A.3d at 142-43 n.19. *Arthur* noted that conflicting data on this issue was "already extant" in 2004, when *W.M.* concluded that it was within the legislature's policy-making discretion to "reasonably" conclude "that a conviction for a sex offense provides evidence of substantial risk of recidivism that is sufficient without more to justify a regulatory response." *Id.* As *Arthur* explained, it is not the Court's role to evaluate "whether the legislature made the best choice possible to address the problem it sought to remedy," and "a statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 140 (quotation marks and alterations omitted).

Furthermore, G.W.J.'s claim (at 30-31) that the only source of evidence for high recidivism rates among sex offenders is a "debunked" magazine article from 1986 is erroneous.[9] In *United States v. Kebodeaux*, 570 U.S. 387 (2013), the Supreme Court observed that "[t]here is evidence that recidivism rates among sex offenders are higher

[9] G.W.J.'s claim is based on the Supreme Court's statement in *Smith* that there is a "frightening and high" risk of recidivism among sex offenders. 538 U.S. at 103. According to G.W.J., the case cited by *Smith* for the "frightening and high" language — *McKune v. Lile*, 536 U.S. 24, 34 (2002) — relied on exaggerated and unsupported claims of an 80% recidivism rate among untreated sex offenders. *McKune* itself, however, acknowledged this estimate might be "exaggerated." 536 U.S. at 33. In any event, as discussed above, there is ample research concluding that released sex offenders recidivate at a significantly higher rate than released non-sex offenders.

than the average for other types of criminals." *Id.* at 395. *Kebodeaux* cited a Bureau of Justice Statistics (BJS) study "reporting that compared to [released] non-sex offenders, released sex offenders were four times more likely to be rearrested for a sex crime, and that within the first three years following release 5.3% of released sex offenders were rearrested for a sex crime." *Id.* (citing Dept. of Justice, BJS, P. Langan, E. Schmidt & M. Durose, Recidivism of Sex Offenders Released in 1994 (Nov. 2003)). The BJS study cited in *Kebodeaux* was "[p]erhaps the largest single study of sex offender recidivism conducted to date." Dept. of Justice, Office of Justice Programs, Sex Offender Management Assessment and Planning Initiative (SOMAPI) Report, Chapter 5: Adult Sex Offender Recidivism, at 110 (March 2017).[10]

Kebodeaux recognized that there was "conflicting evidence on the point," citing a study with a contrary conclusion. 570 U.S. at 395. *Kebodeaux* found, however, that

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[10] The SOMAPI report is available at https://smart.ojp.gov/somapi/initiative-home.

Another meta-analysis, with a combined sample of 4,724 sex offenders from studies in Canada, the U.S., and the U.K, found a 5-year 14% recidivism rate for all sex offenders; a 10-year 20% rate; and a 15-year 24% rate. SOMAPI Report 112 (citing A.J.R. Harris & R.K. Hanson, Sex Offender Recidivism: A Simple Question. Ottawa, ON: Public Safety and Emergency Preparedness Canada). Other studies have similarly "demonstrate[d] how the *recidivism rates of sex offenders increase as follow-up periods become longer*." *Id.* at 114 (emphasis in original). There is also "universal agreement in the scientific community that the observed recidivism rates of sex offenders are underestimates of reoffending." *Id.* at 107-09, 121 (noting "the frequency with which sex crimes are not reported to police, the disparity between the number of sex offenses reported and those solved by arrest[,] and the disproportionate attrition of certain sex offenders and offenses within the criminal justice system").

legislatures confronted with this mix of data were entitled to "weigh the evidence" and "reasonably conclude" that sex-offender registration and notification laws "can help protect the public" and "alleviate public safety concerns." *Id*. at 395-96. *Cf. Ewing v. California*, 538 U.S. 11, 27-28 (2003) (rejecting a challenge to the "wisdom, cost-efficiency, and effectiveness" of California's "three strikes law" aimed at reducing recidivism, and emphasizing that a court should "not sit as a 'superlegislature' to second-guess [legislative] policy choices"); *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1357-58 (2018) ("Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't our call to make. Policy arguments are properly addressed to Congress, not this Court.").

Two federal courts of appeals have also recently rejected constitutional challenges to sex-offender-registry laws based on recidivism data. In *Doe v. Settle*, 24 F.4th 932 (4th Cir. 2022), the Fourth Circuit found that Virginia's sex-offender-registry law was not "punishment" under the Eighth Amendment. *Id.* at 953. In response to research suggesting that "sex-offender registries may increase recidivism and therefore harm public safety," the Fourth Circuit held that "the Virginia legislature is free to disagree with that empirical prediction or pursue other goals like investigatory efficiency." *Id*. at 948. The Fourth Circuit concluded that the registry law was rationally connected to the nonpunitive purpose of "alerting the public to the risk of sex offenders in their community." *Id*. Furthermore the law was not "excessive" because the registry

information was "useful and relevant to the purposes of the law and help[ed] ensure that police and the public can make informed decisions." *Id*. at 949.

In *McGuire v. Marshall*, 50 F.4th 986 (11th Cir. 2022), the Eleventh Circuit likewise held that despite social science presented by the appellant "indicat[ing] that sex offenders may have lower recidivism rates than previously thought," it was "rational" for the legislature "to conclude that sex offenders pose a risk of committing future sex crimes." *Id*. at 1014. The Eleventh Circuit emphasized that the court "need not resolve" this "dispute about the relative rate of recidivism for sex offenders" because the court's "inquiry is limited to whether it would be rational for a legislature to draw these conclusions." *Id*. The same is true for the D.C. Council's policy decisions with respect to SORA.[11]

b. *Fallen* Does Not Support Finding That SORA Registration Is "Punishment."

Relying primarily on this Court's decision in *Fallen v. United States*, 290 A.3d 486 (D.C. 2023), G.W.J. argues (at 23-29) that new evidence "about the impacts of Internet notification on registrants" undermines *W.M.*'s conclusions with respect to "the first two *Mendoza-Martinez* factors" — i.e., whether, in its necessary operation,

[11] As discussed in section I.D.3, infra, there is also conflicting data on the specific issue of recidivism rates for juvenile sex offenders.

SORA's regulatory scheme has been regarded in our history and traditions as a punishment and whether it imposes affirmative disabilities or restraints.

W.M. found that "registration and public notification have not been regarded historically or traditionally as punishment" and rejected any analogy to "early colonial shaming punishments" because "the purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." 851 A.2d at 444 (quotation marks omitted). *See also Settle*, 24 F.4th at 951-52 (finding that "founding era laws" show that "far from being considered punishments" "registries and other publication of personal information would have been considered common regulatory tools"). *W.M.* further found that SORA "imposes no physical restraint, nor does it restrain activities sex offenders may pursue," but instead allows them "to move where they wish and to live and work as other citizens, with no supervision." 851 A.2d at 444 (quotation marks omitted). *W.M.* recognized that "the public availability of [registry] information may have a lasting and painful impact on the convicted sex offender," but found that "these consequences flow ... not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.* at 444 n.15 (quotation marks omitted).

Fallen held that SORA registration and notification are "additional statutory penalties" that must be considered in combination with any terms of incarceration and supervision when determining whether a defendant is entitled to a jury trial under the

Sixth Amendment. 290 A.3d at 491, 495 (quotation marks omitted). *Fallen* emphasized that its holding did not undermine, or even implicate, this Court's precedents addressing whether SORA imposes "punishment" for purposes of the Ex Post Facto Clause, since "analysis under the Sixth Amendment guarantee to a jury trial is fundamentally different from analysis under the Fifth Amendment's Ex Post Facto and Double Jeopardy Clauses[.]" 290 A.3d at 494, 497 (quotation marks omitted). The right to a jury trial depends only on whether the "complement of statutorily imposed penalties," which includes civil and regulatory consequences of a conviction, "clearly reflect[s] a legislative determination that the offense in question is a 'serious' one." *Id*. at 497 (quoting *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989)). By contrast, an ex-post-facto analysis "revolves around legislative intent: whether in enacting SORA the legislature crafted a civil, regulatory scheme or intended to impose a 'punishment.'" *Id*. Since the D.C. Council's intent with SORA "was to create a civil, nonpunitive regime," *W.M.* at 851 A.2d at 443, the statute could be viewed as "punishment" only if a litigant demonstrated "by the clearest proof" "that the effects of [SORA registration] negat[ed the legislature's] intention to establish a civil regulatory scheme." *Fallen*, 290 A.3d at 497 (quotation marks omitted).

Fallen's conclusion that SORA registration has "serious negative consequences for registrants," 290 A.3d at 496, is consistent with *W.M.*, which recognized that registration "may have a lasting and painful impact on the convicted sex offender," 851

A.2d at 444 n.15. The fact that such consequences are "serious" for purposes of a Sixth-Amendment analysis, however, does not mean that they constitute "punishment" under the Ex Post Facto Clause, particularly where there are no physical restraints, and the regulations have not been regarded historically or traditionally as punishment. *See Hickerson*, 287 A.3d at 241 n.4 (explaining that "there are penalties that trigger the Sixth Amendment's right to a jury trial but are not punishments under the Ex Post Facto Clauses," and that an analysis of either issue "sheds little light" on the other).

Fallen does appear to diverge from *W.M.* with respect to its finding that some of SORA's "harmful effects" "stem not just from the conviction but from the registration, disclosure, and dissemination provisions." 290 A.3d at 499. *Compare W.M.*, 851 A.2d at 444 n.15 (finding that the negative consequences for sex-offender registrants "flow" "from the fact of conviction, already a matter of public record"). Even if this finding arguably impacts the second *Mendoza-Martinez* factor — i.e., whether, in its necessary operation, SORA imposes affirmative disabilities or restraints — it does not undermine *W.M.*'s ultimate conclusion that SORA has not been shown "by the clearest proof" to be "so punitive either in purpose or effect as to negate [the D.C. Council's] intention to deem it civil." 851 A.2d at 440 (quotation marks omitted). The "most significant factor in assessing punitive effect" is a regulation's rational connection to a nonpunitive purpose. *Settle*, 24 F.4th at 948 (citing *Smith*, 538 U.S. at 102). *Fallen* expressly reaffirmed *W.M.* on this point, declining to "question" the D.C. Council's "policy

decision" "that enhanced disclosure and publicity about sex offenders is critical to SORA's purpose of protecting the public by making it easier for residents to identify and, as necessary, avoid interacting with offenders." 290 A.3d at 499. This is consistent with *W.M.*'s recognition that "[t]he ease and efficiency with which the Internet can be accessed by the public are, arguably, points in favor of, not against, its use" for the dissemination of SORA registry information. 851 A.2d at 446.

c. Registry Verification Policies Do Not Show That SORA Is "Punishment."

The only changes that G.W.J. identifies (at 19-23) with respect to SORA's actual operation since *W.M.* was decided in 2004 are a 2013 regulation related to verifying registrants' home addresses, and a 2022 CSOSA policy that makes in-person registration verifications required for Class A and Class B registrants. As G.W.J. acknowledges (at 10 n.8), he did not assert any claim or make any argument related to CSOSA's in-person verification policy in the Superior Court, and that issue is thus not properly before this Court on appeal.[12] Even assuming, however, that this Court may address both of these policies, neither is the type of dramatic or marked change

[12] G.W.J. asserts (at 10-11) that the government below did "not disput[e] that regular in-person verification requirements would impose a significant restraint on liberty that did not exist in *Smith* or *W.M.*" The government, of course, did not "dispute" this claim below because G.W.J. has raised it for the first time on appeal.

that would warrant a conclusion, contrary to *W.M.*, that SORA's requirements are "punishment" for constitutional purposes.[13]

A CSOSA regulation titled "Periodic verification of registration information," 28 C.F.R. § 811.9, was amended in 2013 to "clarif[y] the schedule for verifying home addresses, even for those sex offenders who are required to register but are not under CSOSA's supervision." Sex Offender Registration Amendments, 78 FR 23835-01. This regulation now specifies that, "for all registered Class A sex offenders without supervision obligation," home addresses must be verified "semi-annually, at least every six months." 28 C.F.R. § 811.9(e)(1). A registrant may satisfy this requirement by "[r]eturn[ing] address verification forms" to CSOSA, such as a signed copy of a lease or a deed. D.C. Code § 22-4008(a)(2). Contrary to G.W.J.'s claim (at 20-21), this ministerial task is not a type of "physical restraint" "akin to traditional forms of criminal punishment," such as probation and supervised release. While CSOSA is "permit[ted]" "to verify addresses of sex offenders by conducting home visits of its own accord and with its law enforcement partners," 78 FR 23835-01, G.W.J. has presented no evidence

[13] In his pleadings below, G.W.J. erroneously asserted that, as a result of new regulations, all Class A offenders were subject to "lifelong intrusive visits and searches of their homes merely as a result of their registration requirement" (A.C at 25). As the government explained (A.E at 12-14), G.W.J. was conflating SORA's registration requirements with certain conditions of release that can be imposed in connection with terms of probation, parole, or supervised release for sex offenders. G.W.J. has abandoned this claim on appeal.

to support his claim (at 23) that CSOSA will abuse this discretion and conduct "home verification" visits with "law enforcement agents" "every six months" for the duration of all Class A registrants' lifetimes.

In 2022, CSOSA amended its Policy Statement 4006 to require Class A and Class B offenders to complete their periodic verifications of registration information in-person with CSOSA. See A.H at 7. Registrants previously had the option to complete these verifications by mail unless specific circumstances applied. *See Arthur*, 253 A.3d at 136 n.4 (citing 28 C.F.R. § 811.9(d)). In *Arthur*, this Court rejected the defendant's claim that CSOSA's requirement for him to verify registration information in-person on a quarterly basis was "an excessive personal appearance schedule" that showed "that CSOSA had abused its authority." *Id*. at 138, 143-44 & n.20. *Arthur* also noted that registrants may seek "a relaxation of the time limits of the quarterly in-person reporting requirement" under 28 C.F.R. § 811.11. *See id*. at 144.

Furthermore, contrary to G.W.J.'s claim (at 23), requiring a registrant to appear in person merely to update and verify information does not "impose the same physical restraints as probation." In *Smith*, the Supreme Court explained that "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction," while, "[b]y contrast, offenders subject to [sex offender registration] are free to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 101-02.

See also Shaw v. Patton, 823 F.3d 556, 567 (10th Cir. 2016) (rejecting a comparison between Oklahoma's sex-offender registry and probation, since probation typically involves far more than mere reporting requirements, such as written consent from a probation officer if the probationer moves or changes jobs, and a deferred sentence of imprisonment that can be immediately reinstated if a condition of release is violated); *Settle*, 24 F.4th at 951 (finding that probation "involves a greater degree of intrusion and regularity" than in-person verification requirements; "Historically, a probation officer took a far more active role in a probationer's life than simply collecting information for a database.") (quotation marks omitted).

Notably, SORNA — which every federal court of appeals to address the issue has found does not impose "punishment" for constitutional purposes, see page 20, supra — also requires registrants to appear in-person to verify registration information. *See* 34 U.S.C. § 20918. The schedule of appearances for the highest level of offenders is "every 3 months," *id.*, which matches SORA's quarterly verification requirement for Class A offenders, *see* 28 C.F.R. § 811.9(a). In *United States v. Parks*, 698 F.3d 1 (1st Cir. 2012), the First Circuit rejected a claim that this requirement made SORNA "punishment" with respect to the Ex Post Facto Clause. *See id.* at 5-6. *Parks* explained:

> To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it 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 by fingerprints and records the individual's current appearance.

Id. at 6. *See also Arthur*, 253 A.3d at 143 (favorably citing *Parks* for the principle that in-person verification can "serve a non-punitive purpose"). Other courts have similarly held that in-person reporting requirements do not render sex-offender registration rules constitutionally impermissible "punishment." *See, e.g., State v. Petersen-Beard,* 377 P.3d 1127, 1132-37 (Kan. 2016) (quarterly in-person registration requirements did not constitute punishment); *Litmon v. Harris,* 768 F.3d 1237, 1242-43 (9th Cir. 2014) (upholding California requirement that offenders register in-person every 90 days); *American Civil Liberties Union of Nevada v. Masto,* 670 F.3d 1046, 1051, 1058 (9th Cir. 2012) (upholding Nevada law with in-person registration requirements); *Doe v. Cuomo,* 755 F.3d 105, 112 (2d Cir. 2014) (rejecting ex-post-facto challenge to New York's "triennial requirement that a level-one offender report to be photographed and fingerprinted rather than renew his registration in writing").[14]

[14] Even if this Court were to conclude that post-*W.M.* amendments to SORA's regulations and/or CSOSA's policies call the constitutionality of SORA into question (and as discussed in the text supra, they do not), the proper remedy would be for the Court to sever either or both amendments and to enforce SORA's remaining provisions — not to strike SORA down entirely or refuse to enforce any of its provisions. *See Gamble v. United States*, 30 A.3d 161, 167 (D.C. 2011) (noting that D.C. Code § 45-201(a) "adopts a broad principle of severability to be employed 'if any provision of any act . . . or the application thereof to any person or circumstance is held to be unconstitutional'").

D. Even Assuming G.W.J. Can Assert an As-Applied Ex-Post-Facto Challenge to SORA, He Has Failed to Satisfy the Requirements for Such a Claim.

1. An As-Applied Claim is Precluded by *Seling*.

As this Court recognized in *Hickerson*, "it is questionable whether any as-applied ex-post-facto challenge to SORA could succeed in this jurisdiction" due to this Court's ruling in *W.M.* 287 A.3d at 246. According to *Hickerson*, "[t]he Supreme Court in *Seling v. Young* suggested not." *Id*. In *Seling*, the Supreme Court declined to permit an "as-applied" ex-post-facto challenge to a state law, where the highest state court had already definitively construed the statute as civil. 531 U.S. at 263-64. The Supreme Court explained that allowing an "as-applied" claim to proceed in those circumstances "would invite an end run around the [state] Supreme Court's decision that the Act is civil in circumstances where a direct attack on that decision is not before this Court." *Id*. While *Arthur* entertained the possibility of an as-applied ex-post-facto challenge to SORA where "the punitive effects are alleged to burden a broad class of sex-offenders," 253 A.3d at 144, *Hickerson* clarified that this allowance resulted from a government concession at oral argument, 287 A.3d at 246. *Seling* did not discuss or recognize any exception for a "group-based" as-applied challenge, and G.W.J. has not identified any authority to support such a claim. Thus, G.W.J.'s as-applied ex-post-facto challenge —

which is the only type of ex-post-facto claim that he raised and preserved below — should be denied on this basis alone.[15]

2. G.W.J. Has Not Substantiated a Broad Class.

Even assuming that G.W.J. is permitted to bring the type of "group-based" as-applied claim contemplated in *Arthur*, he has failed to satisfy an essential requirement for such a claim: "substantiat[ing] the existence of a 'broad class.'" *Hickerson*, 287 A.2d at 249. G.W.J. asserted in his Superior Court briefing that his proposed class of individuals "convicted as juveniles" for registration offenses and later "adjudicated as non-dangerous" is "a readily discernable 'broad class' that is fundamentally and uniquely burdened by SORA's 'normal operation'" (A.F at 2). A litigant may not, however, establish a broad class "through the mere assertions of counsel." 287 A.2d at 249 (cleaned up). Like the defendant in *Hickerson*, G.W.J. failed to "identify *any* others who have found themselves in his situation." *Id*. (emphasis in original). Indeed, the only reference to a (single) similarly situated defendant in the proceedings below appeared in the government's briefing (A.E at 20-21). "[T]wo individuals do not constitute a broad class." *Hickerson*, 287 A.2d at 250.

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[15] *Hickerson* declined to bar consideration of the as-applied claim in that case because *Arthur* was issued after oral argument and neither party had the opportunity to address it. *See* A.3d at 246. There is no such impediment to applying *Seling* in this case to preclude G.W.J.'s as-applied challenge to SORA.

G.W.J.'s scarcity of examples may be related to SORA's limited application to juvenile offenders. In D.C., sex-offender registration is required based upon offenses committed by juveniles only where, as here, the crimes were sufficiently serious for the juvenile defendant to be prosecuted and convicted as an adult in criminal court. G.W.J.'s proposed class, moreover, would include only those juvenile offenders who successfully moved for their release pursuant to the IRAA based upon a finding of "non-dangerousness" by a Superior Court judge. G.W.J.'s failure to substantiate "a sufficiently broad class of registrants," *Hickerson*, 287 A.2d at 246, is an independent ground that, on its own, requires the rejection of his as-applied claim.[16]

3. G.W.J. Has Not Demonstrated That SORA's Effects Are More Burdensome with Respect to His Proposed Class.

G.W.J.'s "group-based" as-applied claim also fails to satisfy another essential requirement: demonstrating that "[t]he burdens of registration" "fall more heavily" on the members of his proposed class. *Hickerson*, 287 A.2d at 248-50. G.W.J. does not argue that SORA's registration and notification requirements are somehow more onerous to members of his proposed class than they are to other sex-offender

[16] *Hickerson* indicated that, because *Arthur* was decided after argument, the Court "might be inclined to remand to give [the defendant] an opportunity to substantiate the class" if that were the only deficiency with his claim. 287 A.2d at 250. In this case, both parties have had the opportunity to address *Arthur* below and on appeal.

registrants. Nor would there be any basis for such a claim. Unlike cases that have addressed the effects of sex-offender registration laws on individuals who were still juveniles at the time of their registration, *see, e.g., In re C.P.,* 967 N.E.2d 729 (Ohio 2012), G.W.J. is a 60-year-old man. Any other members of his proposed class would also be well into adulthood, given that their offenses would necessarily have been committed before SORA's enactment in 2000.

G.W.J. argues (at 33-34) that recidivism research about juvenile sex offenders shows that SORA is "especially" excessive with respect to its nonpunitive purpose when applied to those whose registration offenses were committed as juveniles. This claim fails for the same reason discussed above in connection with G.W.J.'s reliance on general sex-offender recidivism data: there is conflicting social science on this issue. Indeed, a source that G.W.J. cited and relied upon in his Superior Court briefing (A.C at 20) presents a complex picture of juvenile-sex-offender studies.[17] One study of more than 1,700 youths, spanning multiple decades, showed that "10 percent of those who committed a sexual assault as a juvenile also committed an adult sexual offense, and 17 percent of those who committed a serious sexual assault as a juvenile also committed an adult sexual offense." *Id*. at 2. Several large-scale meta-studies of

[17] *See Recidivism of Juveniles Who Commit Sexual Offenses*, by Christopher Lobanov-Rostovsky, prepared as part of the Department of Justice Sex Offender Management Assessment and Planning Initiative. Available at: https://www.smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/juvenilerecidivism.pdf.

recidivism by juveniles who had committed sexual offenses showed recidivism rates ranging from 5 percent to 22 percent. *See id*. Meanwhile, the results of single studies examining recidivism for juveniles who committed a sexual offense and were subsequently released from a correctional or residential facility "varied considerably across studies." *Id*. The sexual recidivism rates ranged "from a low of 0 percent after 1 year of follow-up to a high of *41 percent after 5 years of follow-up*." *Id*. at 2-3 (emphasis added). Furthermore, "[s]ome studies found that juveniles who commit sexual offenses had significantly higher rates of sexual and general recidivism than their general-offending juvenile counterparts, and others did not." *Id*. at 4.

The D.C. Council was entitled to "weigh the evidence" and "reach a rational conclusion" that "safety needs" justify SORA's registration rules, including for those whose offenses were committed as juveniles. *Kebodeaux*, 570 U.S. at 396. *See also Vaughn v. State*, 391 P.3d 1086, 1098 (Wyo. 2017) (requiring sex offender registration for juvenile offenders was "a permissible choice for [the] policy-making branch of our government to make" despite the existence of "scholarly resources which suggest that juvenile sex offenders are not at as great a risk as adult sex offenders to harm others"); *In re A.C.*, 54 N.E.3d 952, 965 (Ill. App. Ct. 2016) (rejecting constitutional challenge to registration of juvenile sex offenders where respondent cited research concluding that "juvenile sexual offenders have a low risk of reoffending" and registration could "undermine" "efforts toward rehabilitation"; "It is best left to the

legislature and not the courts to determine whether a statute is wise or whether it is the best means to achieve the desired result.") (quotation marks omitted).

Contrary to G.W.J.'s argument (at 39-43), SORA is not "wholly irrational and excessive" because, unlike the IRAA, it does not account for differences between adult and juvenile offenders. Indeed, SORA does reflect a policy decision by the D.C. Council to treat juveniles differently. Unlike SORNA and the sex-offender-registry laws in many jurisdictions, SORA has limited application to juveniles because it does not apply to any individuals adjudicated delinquent in juvenile proceedings. *See* D.C. Code § 22-4001(3)(A)(i). The D.C. Council's decision to limit SORA in this way means that registration will be required only where the offenses were sufficiently serious for the defendant to be prosecuted and convicted as an adult in criminal court. *See United States v. Under Seal*, 709 F.3d 257, 266 (4th Cir. 2013) (finding that SORNA's regulatory scheme is "not excessive" with respect to its nonpunitive purpose in part because "Congress, in enacting SORNA, intentionally carved out a specific and limited class of juvenile offenders," so that its "registration requirements apply only to those who commit the most serious sex crimes"); *Vaughn*, 391 P.3d at 1096 (state registry law was "rationally related to a legitimate government interest" where the legislature determined that only juveniles who committed "the most serious of sexual offenses" "must register in order to protect the public").

The differences between SORA and the IRAA discussed in G.W.J.'s brief likewise reflect rational policy choices and distinctions made by the D.C. Council. Given the "diminished culpability of juveniles," D.C. Code § 24-403.03(c)(10), the IRAA allows juvenile offenders to seek an early release from lengthy sentences of incarceration, which plainly constitute "punishment" for constitutional purposes. *Cf. Graham v. Florida*, 560 U.S. 48, 69 (2010) (lifetime incarceration without parole is the second-most severe punishment permitted by law and "share[s] some characteristics with death sentences that are shared by no other sentences"). SORA, by contrast, is a regulatory measure that endeavors to "promote public safety in at least three ways: by facilitating effective law enforcement; by enabling members of the public to take direct measures of a lawful nature for the protection of themselves and their families; and by reducing registered offenders' exposure to temptation to commit more offenses." *W.M.*, 851 A.2d at 441 (quoting Council of the District of Columbia, Comm. on the Judiciary, Report of Bill 13-350, "The Sex Offender Registration Act of 1999," at 3).

It is not "wholly irrational" that the D.C. Council has chosen to balance the interests of individual juvenile offenders with the safety interests of the community by providing an avenue for relief from the severe punishment of incarceration while continuing to impose SORA's registration and notification requirements on released sex offenders. This is particularly true given the existence of evidence, discussed above, that juveniles who commit sexual offenses have higher rates of recidivism than their

general-offending juvenile counterparts. For the same reason, G.W.J.'s reliance (at 39) on a line of Supreme Court cases concerning the death penalty and lifetime incarceration without the possibility of parole for juveniles is misplaced, since those decisions addressed criminal sentences for juvenile defendants that are indisputably punitive. *See State v. N.R.*, 495 P.3d 16, 23 (Kan. 2021) (reliance on these cases to argue that "lifetime sex offender registration for juveniles is punishment" "is circular"; defendant cannot rely on cases addressing "harsh sentencing that is indisputably punishment" "to establish that juvenile sex offender registration is punishment in the first instance"); *In re J.W.*, 787 N.E.2d 747, 757 (Ill. 2003) (rejecting constitutional challenge to juvenile sex-offender registration that "analogize[d] the lifetime requirement in this case to the imposition of the death penalty," where "[t]here is no question that the death penalty is punishment," and the Illinois sex offender registry law had previously been held to be nonpunitive).[18]

Finally, G.W.J.'s reliance (at 42-43) on the trial court's conclusion in granting his IRAA motion that he is no longer dangerous is unavailing. *W.M.* expressly contemplated that a regulatory measure "lack[ing] a close or perfect fit with the

[18] A number of courts have found that sex-offender registration requirements are not "punishment" even when applied on a lifetime basis to juvenile offenders. *See, e.g., United States v. Juvenile Male*, 670 F.3d 999, 1007 (9th Cir. 2012); *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011); *State v. Boche*, 885 N.W.2d 523, 531-32 (Neb. 2016); *People ex. rel. Birkett v. Konetski*, 909 N.E.2d 783, 797 (Ill. 2009); *N.R.*, 495 P.3d at 25; *Vaughn*, 391 P.3d at 1096.

nonpunitive aims it seeks to advance," *Smith*, 538 U.S. at 103, may result in the outcome that G.W.J. claims has occurred in his case: "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application." 851 A.2d at 445 n.17 (quotation marks and citations omitted). The D.C. Council's "determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make [SORA] a punishment under the Ex Post Facto Clause." *Id.* at 445. *See also Arthur*, 253 A.3d at 143 (objections that SORA's effects may be "unfair to former offenders who have rehabilitated themselves . . . neither negate [the Council's] intention to establish a civil regulatory scheme nor transform SORA's civil remedies into criminal penalties") (quotation marks omitted). *Cf. Does v. Munoz*, 507 F.3d 961, 966-67 (6th Cir. 2007) ("[d]espite the determination" under a different state law that specific sex offenders were no longer dangerous, "it remains rational for [the state] to seek to provide law enforcement and the people of [the state] with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger"); *Settle*, 24 F.4th at 949 ("That [the defendant] himself may not pose a danger is beside the point"; a legislature may make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences") (quotation marks omitted).

II. G.W.J.'s Equal-Protection and Due-Process Claims Fail Because, as This Court Has Previously Held, SORA Easily Satisfies Rational-Basis Review.

A. Standard of Review and Applicable Legal Principles

Equal-protection and due-process claims are reviewed de novo. *See Sharps*, 246 A.3d at 1157; *Gross v. United States*, 771 F.3d 10, 12 (D.C. Cir. 2014).

The Equal Protection Clause bars states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. States are "presumed to have acted within their constitutional power" even if, "in practice, their laws result in some inequality." *McGowan v. State of Md.*, 366 U.S. 420, 425-26 (1961). "Defining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 315-16 (1993).

Where a fundamental right or protected classification is not at issue, statutes are "accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Under "rational-basis" review, a law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns*, 508 U.S. at 313. Rational-basis review is a "paradigm of judicial restraint," under which courts have

no "license . . . to judge the wisdom, fairness, or logic" of a state legislature's choices. *Id*. at 313-14. Rather, the party challenging the law must prove that it "rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller*, 509 U.S. at 324 (quotation marks omitted).

The Due Process Clause encompasses "a substantive sphere" that "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quotations marks and citations omitted). Unless the government has acted in an "egregious" manner or has infringed on a "fundamental right," a challenged governmental action need only "be rationally related to legitimate government interests." *Id.* at 846. When a "rational basis" for particular legislation satisfies equal-protection review, it "also satisfies substantive due process analysis." *Executive Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 569 (8th Cir. 2008).

B. Argument

G.W.J. concedes (at 43-50) that his equal-protection and due-process claims are subject to rational-basis review, abandoning his claims below that stricter scrutiny is warranted because (as he argued) SORA implicates the Equal Protection Clause's "anti-animus principle" (A.C at 13, 51) or intrudes on a fundamental liberty interest (A.D at 1). G.W.J.'s claims are foreclosed by *W.M.*, which found that SORA "easily" satisfies rational-basis review because it is rationally related to the legitimate

governmental goal of public safety. 851 A.2d at 435, 451. Moreover, even if this Court were able to overturn *W.M.*'s holding on this point — which it is not, *see M.A.P.*, 285 A.2d at 312 — G.W.J. presents no compelling reason to do so.

G.W.J.'s attempt to distinguish *W.M.* with respect to these claims relies on the same faulty premise he invoked to support his ex-post-facto challenge: the erroneous claim (at 48) that there exists "no evidence" that sex offenders "generally pose a high risk of re-offending" because social-science studies have reached contrary conclusions on this issue. As discussed supra — at pages 24-25, 39-40 — there is conflicting data on the question of sex-offender recidivism (including for juvenile offenders), and there is indeed significant "evidence that recidivism rates among sex offenders are higher than the average for other types of criminals." *Kebodeaux*, 570 U.S. at 395. Deciding which research to credit and how to address the implications of that research through public regulations are issues "appropriately directed to the legislature, which has primary responsibility for making the difficult policy choices[.]" *Ewing*, 538 U.S. at 27-28. The Supreme Court has made clear that rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. The Constitution does not require that a law be based on what a court determines is empirically correct data, or that the law be proven effective in practice — only that "there is any reasonably conceivable state of facts that could provide a rational basis" for its enactment. *Id*. Indeed, "a legislative choice is not subject to courtroom factfinding

and may be based on rational speculation unsupported by evidence or empirical data." *Id*. at 315; *see also Heller*, 509 U.S. at 320. So long as the legislature's classification "has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quotation marks omitted). *See also United States v. Juvenile Male*, 670 F.3d 999, 1009 (9th Cir. 2012) (rejecting equal-protection challenge to SORNA's application to juvenile offenders because "protecting our communities is a legitimate legislative purpose").

G.W.J. (at 49) proposes alternatives to SORA's lifetime-registration requirement for the most severe category of sex offenders — including "actuarial risk assessment tools to distinguish high-risk sex offenders from low-risk ones" or "individual determinations of future dangerousness." This argument, however, is properly addressed to Congress or the D.C. Council, not this Court. The Supreme Court has cautioned against courts "sit[ting] as a 'superlegislature' to second-guess [ ] policy choices." *Ewing*, 538 U.S. at 28. As *W.M.* explained, the constitutionality of a statute does not hinge on a court's assessment about "whether the legislature has made the best choice possible to address the problem it seeks to remedy," but only "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." 851 A.2d at 445 (quotation marks omitted). G.W.J. has failed to show that SORA "rests on grounds wholly irrelevant to

the achievement of the State's objective," *Heller*, 509 U.S. at 324, and *W.M.*'s finding that SORA "easily" satisfies rational-basis review remains true.

Finally, G.W.J.'s reliance on *Powell v. Keel*, 860 S.E.2d 344 (S.C. 2021), is misplaced, since that decision is readily distinguishable on multiple bases. First, the court's substantive due-process analysis relied in part on a finding that South Carolina's sex-offender-registry statute "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." 860 S.E.2d at 347-48. The South Carolina Supreme Court recognized this broadly stated fundamental right in 2013, when assessing a due-process challenge to satellite monitoring. *See id.* at 347 (citing *State v. Dykes*, 744 S.E.2d 505 (S.C. 2013)). Neither this Court nor the U.S. Supreme Court, however, have recognized any comparable right as a fundamental liberty interest protected under the Due Process Clause. To the contrary, *W.M.* held that a registrant's "interest in being free of SORA's registration obligations" did not implicate any fundamental rights or liberty interests. 851 A.2d at 450.[19] Second, the court in *Powell* found "no evidence in the record that current statistics indicate all sex offenders generally pose a high risk of re-offending." *Id.* at 466. As discussed, there is, in fact,

[19] Other courts addressing due-process challenges to sex-offender registry laws have agreed with *W.M.* (and disagreed with the South Carolina Supreme Court) on this point. *See, e.g., Juvenile Male*, 670 F.3d at 1012 ("individuals convicted of serious sex offenses do not have a fundamental right to be free from sex offender registration requirements"); *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009); *Munoz*, 507 F.3d 961 at 965-66; *Vaughn*, 391 P.3d at 1096.

significant evidence that sex offenders generally pose a high risk of reoffending, despite conflicting research on this issue.

For all of these reasons, G.W.J.'s equal-protection and due-process claims should be denied under rational-basis review.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Adam G. Thompson, Esq., Public Defender Service, AGThompson@pdsdc.org, on this 22nd day of May, 2024.

/s/
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