IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN THE INTEREST OF B., J., A Minor		**87 MAP 2013 (CP-67-JV-0000726-2010)**
IN THE INTEREST OF D., L., A Minor		**88 MAP 2013 (CP-67-JV-0000295-2011**
IN THE INTEREST OF E., D., A Minor		**89 MAP 2013 (CP-67-JV-0000599-2008)**
IN THE INTEREST OF H., K., A Minor		**90 MAP 2013 (CP-67-JV-0000788-2010)**
IN THE INTEREST OF M., A., A Minor		**91 MAP 2013 (CP-67-JV-0000315-2011)**
IN THE INTEREST OF T., J., A Minor		**92 MAP 2013 (CP-67-JV-0000413-2012)**
IN THE INTEREST OF T., D., A Minor		**93 MAP 2013 (CP-67-JV-0000215-2010)**

BRIEF OF APPELLEES

Appeal from the Order Issued By Senior Judge John C. Uhler of the York County Court of Common Pleas Dated November 1, 2013, *In re B.J., A Minor, et. al* CP-67-JV-0000726-2010, Holding that Pennsylvania's Sexual Offender Registration and Notification Act (SORNA) Is Unconstitutional As It Applies To Juveniles

Marsha L. Levick, Esq.
PA Attorney No. 22535
Riya Saha Shah, Esq.
PA Attorney No. 200644
Catherine Feeley, Esq.
PA Attorney No. 316097
JUVENILE LAW CENTER
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

Anthony J. Tambourino, Esq.
PA Attorney No. 86446
YORK COUNTY PUBLIC
DEFENDER'S OFFICE
45 N. George Street
York, PA 17401

Kurt A. Blake, Esq.
PA Attorney No. 68791
BLAKE & GROSS, LLC
29 East Philadelphia Street
York, Pennsylvania 17401

Korey Leslie, Esq.
PA Attorney No. 90866
KOREY LESLIE,
ATTORNEY-AT-LAW, LLC
101 South Duke Street
York, PA 17401-2038

Traci McPate, Esq.
PA Attorney No. 90572
GRIEST, HIMES, HERROLD,
SCHAUMANN, REYNOSA LLP.
129 East Market Street
York, PA 17401

Abigail E. Horn, Esq.
PA Attorney No. 203678
Aaron J. Marcus, Esq.
PA Attorney No. 93929
DEFENDER ASSOCIATION OF
PHILADELPHIA
1441 Sansom Street
Philadelphia, PA 19102

TABLE OF CONTENTS

PAGE

Page

Page

TABLE OF CITATIONS

Page(s)

UNITED STATES SUPREME COURT CASES

PENNSYLVANIA SUPREME COURT CASES

OTHER PENNSYLVANIA CASES

OTHER FEDERAL COURT CASES

OTHER STATES' COURT CASES

UNITED STATES CONSTITUTIONAL PROVISIONS

PENNSYLVANIA CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

PENNSYLVANIA STATUTES

OTHER STATE STATUTES

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

Prior to 2012, children convicted of sex offenses in Pennsylvania were not required to register as sex offenders. With the adoption of the Sex Offender Registration and Notification Act (SORNA) Pennsylvania now requires children as young as fourteen adjudicated of certain sexual offenses to register as sex offenders for the rest of their lives. 42 Pa.C.S. §9799.12. Appellees successfully challenged the constitutionality of SORNA as applied to children below; this appeal followed.

Mandatory, lifelong registration with attendant onerous reporting requirements not only violates state and federal constitutional protections against guarantees of due process, *ex post facto* laws, cruel and unusual punishment, but it also flies in the face of the protections afforded children since the United States Supreme Court's decision in *In re Gault*. 387 U.S. 1, 31 (1967). With balanced attention to the community's safety and the child's accountability, the Commonwealth has consistently treated children differently from adults, stressed rehabilitation, and shielded them from adult consequences so that children may become productive members of society. Long a court of second chances, lifetime registration as a sex offender up-ends that goal.

Scientific research confirms that children are different from adults and the law reflects these differences. These recognized differences are equally true with

regard to children who engage in sex offenses and informs the legal analysis of Appellees' arguments. First, registration impedes a child's fundamental reputation rights protected by the Pennsylvania Constitution and denies substantive and procedural due process. The initial registration and onerous reporting requirements lead to public disclosure of the child's status on the registry and communicate falsehoods about his future dangerousness. Second, registration, based solely on an adjudication of delinquency, flies in the face of the well-established irrebuttable presumption doctrine. Because the registration obligation rests solely on the underlying adjudication of delinquency and is not preceded by any individual determination of either the need or effectiveness of registration, it does not provide adequate due process. Third, imposing registration for conduct that occurred prior to the law's effective date, as here, violates the *Ex Post Facto* Clauses of both the United States and Pennsylvania Constitutions. And, finally, the lifetime registration requirement, which flows directly from the adjudication of guilt, is punitive and excessive in violation of the Pennsylvania and United States constitutional bans on cruel and unusual punishment.

The federal Adam Walsh Child Protection and Safety Act (Public Law 109-248, 120 Stat. 597)–the impetus for SORNA–provides that state courts may evaluate the constitutionality of their individual registration schemes. 42 U.S.C. §16925. Upon determination that the scheme is in violation of constitutional law, it

must be stricken without jeopardizing the state's federal financial benefits. 42 U.S.C. §16925. Imposing mandatory, lifetime sex offender registration on children adjudicated delinquent of certain sexual offenses, clearly, palpably, and plainly violates both the Pennsylvania and United States Constitutions.

COUNTER-STATEMENT OF THE CASE

This case is before the Court as a matter of exclusive jurisdiction on appeal from an Order of the Court of Common Pleas in York County, Juvenile Division. The Trial Court held Pennsylvania's SORNA statute unconstitutional as applied to children, both retroactively and prospectively. Appellees were adjudicated delinquent for qualifying offenses when they were children and retroactively registered as sex offenders under SORNA. As described by the Trial Court,

> As is all too common with juvenile sex offenders, [Appellees'] lives have been marred by tragedies, traumas, addictions, abuse, and personal victimization. Fortunately, as is also common with juvenile offenders, they have demonstrated a great capacity and willingness to rehabilitate and make better lives for themselves.

Tr. Ct. Op. at 3. While the Commonwealth's Statement of the Case offers stipulated information about Appellees and the case's procedural history, it falls woefully short of setting forth the full range of undisputed facts in evidence central to the court's ruling below and to this Court's determination of the Commonwealth's appeal.

I. CHILDREN, INCLUDING JUVENILE SEX OFFENDERS, ARE DEVELOPMENTALLY DIFFERENT FROM THEIR ADULT COUNTERPARTS.

Scientific research shows that children are different and the law reflects these differences. *See generally* Tr. Ct. Op. at 16-17. Youth is a developmental stage defined by psychology and brain development. *Id.* Children lack maturity, are more vulnerable to negative influences, have less control over their surroundings and are more open to reform than adults. *Id.* at 16. These features are not only a matter of common sense, but the product of immature adolescent brain development. *Id.* at 17.

Children who commit sex offenses are also different from their adult counterparts. The belief that "sex offenders are a very unique type of criminal" is false as to juveniles. Tr. Ct. Op. at 17 (quoting Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo,* 17 Sexual Abuse: J. Res. & Treatment 293, 296 (2005)). Unlike adult offenders, children's motivations are rarely sexual in nature. R.R. 232, *del Busto* ¶13. Rather, children "tend to offend based on impulsivity and sexual curiosity..." *Id.* (internal citations omitted). "[W]ith maturation, a better understanding of sexuality, and decreased impulsivity, most of these behaviors stop." *Id.* at ¶15.

While the Commonwealth asserts that "sexual offenders generally have a high rate of recidivism," Brief of Appellant at 43, this is contrary to the record

below. Research and stipulated reports in evidence establish that the sexual recidivism rate for juveniles is extremely low. R.R. 232-233, *del Busto* ¶14. "As a group, juvenile sex offenders pose a relatively low risk to sexually re-offend, particularly as they age into adulthood." R.R. 221, *Caldwell* ¶3C. One meta-study of 63 studies of over 11,200 youth found that the sexual recidivism rate is 7.09% over an average 5-year follow-up. *Id.* at 222. This is half as frequent as adult offenders, for whom sexual recidivism has been estimated at about 13% or higher. R.R. 232, *Pittman* ¶14. When the rare juvenile sex offender does re-offend, it is nearly always in the first few years after the original adjudication—a time when the child is already under court supervision. R.R. 216, *Letourneau* ¶A.

Although SORNA has fewer enumerated offenses for children than for adults, the list fails as a proxy for future risk. R.R. 222, *Caldwell* ¶E. A child's risk of sexual recidivism cannot be predicted by offense, but rather requires a risk-assessment. R.R. 231, *del Busto* ¶12. "The extant research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents." R.R. 222, *Caldwell* ¶3(D). A study comparing the sexual recidivism rates of children based upon the severity of their offense found "no significant difference" in recidivism rates. R.R. 217, *Letourneau* ¶C1(iii); R.R. 222, *Caldwell* ¶¶3(D-G). In fact, rather than comprising a special class, juveniles who commit sex offenses are no different from juveniles who commit non-sex crimes. R.R. 232, *del*

Busto ¶16. Demographic studies have found that personality and psychosocial circumstances are the same. *Id*. If they re-offend, all are far more likely to re-offend with *nonsexual crimes* than with sexual crimes. R.R. 216, *Letourneau* ¶B.

II. REGISTRATION OF JUVENILE OFFENDERS DOES NOT IMPROVE PUBLIC SAFETY.

As reflected in the record below, requiring juveniles to register as sex offenders does not improve public safety. R.R. 218-219, *Letourneau* ¶D3. Studies uniformly conclude that registration has no impact on already very low rates of sexual recidivism; nor does it deter first time offenses. R.R. 217-218, *Letourneau* ¶¶C1-C2; R.R. 221-24, *Caldwell* ¶¶3-4.

Conversely, registration imposes stigma and restrictions that could decrease public safety. R.R. 218-219, *Letourneau* ¶¶D1-D3. Requiring a child to register as a sex offender may negatively impact public safety in the realm of *non-sexual* offenses, by setting up obstacles between the child and a normal, productive life. *Id*. ¶C1(ii); R.R. 224, *Caldwell* ¶5(A); R.R. 232-233, *del Busto* ¶18. Registration also stigmatizes children, causing them to "view themselves as 'delinquent' even when they are law abiding," which could lead to non-sexual recidivism. R.R. 218, *Letourneau* ¶D1; R.R. 232-233, *del Busto* ¶18. Including children on a sex offender registry may also diminish public safety by diverting resources from high-risk offenders. *See* R.R. 218-19, *Letourneau* ¶D3; R.R. 231, *del Busto* ¶12. Moreover, as observed by the trial court, the harshness of the punishment could

deter families from reporting sex offenses, impeding both prosecution and treatment. R.R. 497, *Notes of Testimony,* Sept. 30, 2013 at 47.

III. SORNA IMPOSES RESTRICTIONS AND REGISTRATION REQUIREMENTS SUBSTANTIALLY MORE ONEROUS THAN MEGAN'S LAW.

SORNA is not Megan's Law. SORNA is a dramatically more severe registration scheme, and, for the first time, imposes registration on children. The extensive, onerous reporting requirements imposed on children include registration for life, regular in-person reporting, mandatory state incarceration for non-compliance, dissemination and inevitable public disclosure. Because these facts are critical to each of the legal claims at issue, Appellees describe them in detail, as follows.

A. Juvenile Offenders Must Comply With Extensive and Onerous Registration Requirements.

Under SORNA, registration is mandatory and triggered by an adjudication of delinquency alone. R.R. 181-182, *Registration Requirements* ¶3 (42 Pa.C.S. §9799.12) [hereinafter all parenthetical citations corresponding to R.R. 181-187, *Registration Requirements* will refer to Section 9799 *et seq.* in Title 42]. There is no risk-assessment. *Id.*[1] "Juvenile offenders must register for life." R.R. 181,

[1] This case does not involve "sexually violent delinquent children," who receive a risk-assessment and due process hearing. 18 Pa.C.S. §9799.12.

Registration Requirements ¶1 (9799.15).[2] This is so regardless of the facts of their offense, their individual circumstances, their success in treatment, their low risk of re-offense, or the effectiveness of registration in promoting public safety.

A juvenile offender must provide the Pennsylvania State Police (PSP) a long, detailed and personal list of information. This includes, *inter alia*: name, telephone numbers, social security number, residence, intended residence, mailing address, any "passport and documents establishing immigration status," the name and address of current and future employers, the name and address of any part time job—even one as short as four days—routes to work, information about any car he owns or merely "operates," including the "vehicle location." R.R. 183, *Registration Requirements* ¶11-18 (9799.16(b)(1-9); 9799.12); R.R. 189-200, SP 4-218.

A child must also register vague and complex Internet identifiers including "any designation or monikers used for self-identification in Internet communications or postings," any "[d]esignation used by the individual for purposes of routing or self-identification in Internet communications or postings,"

[2] A "juvenile offender" may petition for removal in twenty-five years if he or she "successfully completed court-ordered supervision without revocation," had no conviction for a second-degree misdemeanor or higher and successfully completed a court-recognized treatment program. 42 Pa.C.S. §9799.17. The promise of removal after twenty-five years is illusory. A child is disqualified if his juvenile probation is revoked; or if he has one misdemeanor. Life on the registry is itself "associated with increased risk" of new misdemeanor charges. R.R. 217-18, *Letourneau*, ¶¶C1(ii), D1. Furthermore, any failure to register will result in a new conviction. *See* Section VIII.A.2.g, *infra*.

and "any other designation used by the individual for purposes of routing or self-identification in telephonic communications." R.R. 183, *Registration Requirements* ¶11-13 (9799.16(b)(1-3)). The number of websites that this requirement may encompass is vast. R.R. 239-245, *Internet Identifiers*.

If the child does not have a residence for thirty consecutive days, he will be categorized as a "transient" and must register, in-person, monthly. R.R. 182, *Registration Requirements* ¶¶5-8 (9799.12; 9799.15(e)(h); 9799.25). The child must register his "temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park" and list places where he "eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth." *Id*. at 183, ¶16 (9799.16(b)(6)). Homelessness is common for registered offenders because of the difficulties securing work and housing. R.R. 224, ¶5; R.R. 237-238, *Pittman* ¶4 (almost half of interviewed juvenile registrants have experienced homelessness).

A child who is registered as a sex offender must also provide physical and biological information. R.R. 183, *Registration Requirements* ¶¶25-27 (9799.16(c)(1-5); 9799.39). This includes whether the child wears glasses, height, weight, hair color, eye color, race, ethnicity, birth state/territory and birth country, scars, tattoos, and amputations or any other "marks" on the child's body. *Id*. The registry will include photographs of the child's face and body, fingerprints, palm

prints and DNA. R.R. 184, *Registration Requirements* ¶¶26, 28-29 (9799.15(c)(4-5); 9799.39).

In-person reporting is onerous. A child as young as fourteen must report in person to the PSP every 90 days. R.R. 182, *Registration Requirements* ¶6 (9799.15(e)). Each time, he must verify all of the above information and be photographed. *Id.* In-person reporting takes place only at a PSP "approved registration site." *Id.* at ¶9 (9799.12; 9799.32). It is the child's obligation to find transportation. There is no exception if the child attends school, works full time, or both. R.R. 181-182, *Registration Requirements* ¶¶3, 6 (9799.12; 9799.15(e)).

Quarterly in-person reporting is just the baseline. A child must report in-person within three business days whenever changes to their registered information occur, including changes to, *inter alia*: residence, employment, school, telephone number, "temporary lodging," "e-mail address, instant message address or any other designations used in internet communications or postings," even a change in where a vehicle he owns or operates is parked. R.R. 185, *Registration Requirements* ¶36 (9799.15(g)). The child, who is likely growing and developing, must submit to a photograph whenever "there is a significant change in appearance." R.R. 184, *Registration Requirements* ¶26 (9799.15(c)(4)).

B. Children Will Be Subject To Mandatory State Prison Sentences For Failure To Register.

The registration requirements of SORNA would be difficult for mature, affluent and well-educated registrants to meet. *See* R.R. 238, *Pitman* ¶5. For children, this difficulty is amplified. *Id.* Over time, it is virtually certain that a child will fail to comply. R.R. 238, *Pittman* ¶5.

If the child gives incomplete or inaccurate information, does not register every ninety days, or does not appear within three days of a change in information, the child is subject to criminal prosecution. *See* R.R. 186-187, *Registration Requirements* ¶¶50-51 (9718.4(a)(1)(iii-iv)). The PSP will initiate arrest proceedings, notify the United States Marshals Service and the municipal police, who will locate and arrest the child. R.R. 185, *Registration Requirements* ¶40-42 (9799.22(a-d)). If the child is not arrested, the district attorney will seek an arrest warrant. *Id.* at ¶40 (9799.22(a)).

Failure to comply with SORNA is a felony with a mandatory minimum term of incarceration ranging from three to six years to seven to fourteen years. R.R. 186, *Registration Requirements* ¶¶50-51 (9718.4(a)(1)(iii-iv)). There is no defense to prosecution for failure to register or provide accurate information. For example, "a natural disaster or other event requiring evacuation of residences" does not discharge the duty to register. R.R. 186, *Registration Requirements* ¶45 (9799.25(e)).

C. **Information About A Child On The Registry Will Be Disseminated.**

Although children are not on the sex offender Internet website, juvenile information is widely released. This information will, in turn, be disseminated more broadly. *Affidavit of Professor Wayne A. Logan*, [hereinafter *Logan*] at A257, A259 at ¶¶12, 26 attached at Appendix A255-A260[3] (noting that historically, no registry has ever been effectively kept private). Within three business days, the PSP disseminates a child's registry information to a jurisdiction, district attorney, chief law enforcement officer, and county office of probation or parole where the child resides, works, goes to school, or terminates any one of these, as well as to the United States Attorney General, the Department of Justice and the United States Marshals Service. R.R. 184, *Registration Requirements* ¶32. For children in a court-ordered, full-time placement, the director of the facility will receive notice. R.R. 182, *Registration Requirements* ¶4 (9799.18(h)1(ii)(3)). A juvenile who attends college must report his registry information to campus security "or otherwise face expulsion or dismissal." A258, *Logan* ¶17.

The child will also be included in the National Sex Offender Registry, the National Crime Information Center (NCIC) and other databases. R.R. 184,

[3] This Affidavit was ruled admissible by J. Uhler on Sept. 27, 2013 and stipulated to by the Commonwealth on Sept. 30, 2013. R.R. 477; 511-12 *Notes of Testimony*, Sept. 30, 2013 at 7-8, 76-77. It was omitted in the Record and appended by Rule 1926 Motion filed by Appellees on April 17, 2014.

Registration Requirements ¶32 (9799.18(a)). The child's "criminal history" information will be available for employment-related background checks. R.R. 185, *Registration Requirements* ¶34 (9799.18(e)). The Pennsylvania registry will communicate with registries of other jurisdictions. *Id*. at ¶37 (9799.18(c)). If the child intends to move or travel internationally, the PSP will notify the United States Marshals Service, the Department of Justice and any jurisdiction requiring registration. *Id.* The child's fingerprints and palm prints will be submitted to the Federal Bureau of Investigation. R.R. 184, *Registration Requirements* ¶28 (9799.16(c)(5)). The child's DNA will be submitted into the combined DNA Index System (CODIS). *Id.* at ¶29 (9799.39; 9799.16(c)(6)). The child's fingerprints and photographs will be maintained "for general law enforcement purposes." *Id.*

Dissemination does not end there. SORNA does not prohibit any person or entity receiving a juvenile's registry information from disseminating it further. Tr. Ct. Op. at 14; R.R. 184, *Registration Requirements* ¶¶33-34 (9799.18(e)). Recipients may release this information "in the exercise of their discretionary authority." A257, *Logan* ¶13. Historically, "ostensibly private" registry information has been "commonly provided to members of the public by police." *Id*. at ¶10. As has happened nationally, members of the public may make fliers, post notices on social media websites and inform neighbors, employers, schools and anyone else. *Id*. at ¶¶12, 25.

A child's status as a sex offender may also be released unintentionally. Roommates, foster families or group home residents may see quarterly letters from the PSP. R.R. 186, *Registration Requirements* ¶44 (9799.25). The public may see the child travel to, enter or exit the PSP's registration site. A256, *Logan* ¶¶14, 15. "The lack of any requirement that confidentiality be maintained in such public circumstances presents obvious disclosure risk." *Id*. at ¶14.

If the PSP believes a child has failed to comply with SORNA, registry information will again be disseminated. The municipal police will locate and arrest the child, most likely at his residence, job or school. R.R. 185, *Registration Requirements* ¶40 (9799.22(a)); *see also* A259, *Logan* ¶23. Upon arrest, the charge of failure to register will appear on his public criminal record, even if he is a juvenile. 42 Pa.C.S. §6307(b). If the child is an adult, the court docket will be public, posted on the Internet, and available upon request by employers, landlords or others. 18 Pa.C.S. §9121.

IV. UNDER SORNA, REGISTERED CHILDREN SUFFER VARIOUS FORMS OF IRREPARABLE HARM.

Registration harms a child's ability to obtain stable housing, employment and schooling. Tr. Ct. Op. at 19. "[O]ne in five" registrants "report problems with obtaining housing or losing housing." R.R. 224, *Caldwell* ¶5(A). "Children subject to registration continuously report that finding or keeping employment is one of the most constant challenges relating to registration." R.R. 237-38, *Pittman* ¶3;

R.R. 224; R.R. 193, SP4-218 ¶¶H, I, 8 (requiring child to register his telephone number at work and his supervisor's name). Sex offender registration also inhibits a child's ability to succeed in school. *See* R.R. 193, SP4-218 ¶¶H, I, 8 (requiring child to register his room number at school); A258, *Logan* ¶17 (children required to report registration information to campus security); R.R. 238, *Pittman* ¶5.

Registration leads to depression, hopelessness, and fear for one's safety. Tr. Ct. Op. at 19; R.R. 224, *Caldwell* ¶5A; R.R. 237-38, *Pittman* ¶¶3-4. In extreme cases, sex offender registration has led juveniles to suicide. R.R. 232, *del Busto* ¶18. Many registrants experience vigilante activities such as property damage, harassment, and even physical assault. R.R. 224-225, *Caldwell* ¶5B.

V. CHILDREN REGISTERED AS SEX OFFENDERS IN PENNSYLVANIA WILL HAVE DIFFICULTY TRAVELING OUT OF STATE.

SORNA limits the ability of children to leave Pennsylvania even briefly:

> Children and young registrants have little control over where they live. Because there is no uniformity among the various states' registration and notification laws, registration becomes even more complex and onerous when a registrant is forced to travel or move to a different state by a parent or guardian who is likely not keeping track of the new state's laws.

R.R. 238, *Pittman* ¶6. If a child intends to travel or move abroad, he must register this information twenty-one days in advance. R.R. 185, *Registration Requirements* ¶38 (9799.15(i)). Any time a juvenile offender will be away from his residence for seven or more days, he must register this information. *Id.* at ¶35 (9799. 16(b)(7)).

Upon entering another state, the child must comply with the requirements of the federal government as well as the requirements of that particular state. R.R. 238, *Pittman* ¶6.

In forty-six states, Pennsylvania registrants will be registered sex offenders under most circumstances regardless of whether the Pennsylvania offense would require registration in the new state. *See* R.R. 359, *Memorandum in Support* n.36 (detailing varying state schemes).[4] States adopt radically different approaches to registration ranging from a requirement of reciprocal registration, *see id*. at n.37,[5] to an assessment of offense similarity. *Id*. at 359, n.38.[6] Sometimes, a combination of both is used, similar to Pennsylvania's scheme. *Id*. at 360, n.39.[7]

Typically, very little contact with the new state will trigger the child's obligation to register—whether that contact is by residence, employment or school. *Id.* at 360-65.[8] "[W]hen a Pennsylvania juvenile registrant travels to another state, during a family vacation, or relocates with his family to another state, perhaps as a

[4] Appellees rely on the statutory citations in their *Memorandum in Support of Nunc Pro Tunc Relief* found at R.R. 287-426. Following submission of the *Memorandum of Law* cited herein, there have been minor amendments in the laws of some states, none that materially impact Appellees' arguments. At the Court's request, Appellees can furnish current updated statutory citations.

[5] *See* note 4, *supra.*

[6] *See* note 4, *supra*.

[7] *See* note 4, *supra.*

[8] *See* note 4, *supra*.

result of a parent's job demands, the juvenile will be subject to the other state's registration requirements." A259, *Logan* ¶21; *see also* R.R. 361-63, *Memorandum in Support* (detailing "residency" definitions).[9] The same issue applies to registration based upon work and school in the new state. *See* R.R. 363-65, *Memorandum in Support* (detailing varying definitions of work and school).[10] A child may even be required to be simultaneously registered in both Pennsylvania and another state. 42 Pa.C.S. §9799.13.

ARGUMENT

VI. REGISTRATION IMPOSES STIGMA AND RESTRICTIONS IN VIOLATION OF CHILDREN'S REPUTATION RIGHTS EXPRESSLY PROTECTED BY THE PENNSYLVANIA CONSTITUTION.

The right to reputation occupies a unique place in Pennsylvania.[11] For children this right has a heightened importance. A child's character is not fully-

[9] *See* note 4, *supra*.

[10] *See* note 4, *supra*.

[11] When ruling SORNA unconstitutional both retroactively and prospectively, the lower court did not find a due process violation implicating Appellees' right to reputation. However, it is firmly established in Pennsylvania jurisprudence that an appellate court may affirm a valid judgment based upon any reason appearing in the record. *Commonwealth v. Moore*, 937 A.2d 1062, 1073 (Pa. 2007) (citing *Commonwealth v. Parker*, 919 A.2d 943, 948 (2007)). These arguments were all presented below. R.R. 409-417, *Memorandum in Support*. Notably, other Pennsylvania courts have found due process violations of the right to reputation in juvenile SORNA cases. *See* A12-33, *In re B.B.*; A54-56, *In re W.E.* While these cases are not controlling authority, they are cited herein for their illustrative purpose.

formed. Children are subject to an array of influences—sometimes negative—from which they are ill-equipped or unable to escape, and they generally bear less culpability than adults due to their age and circumstances. *See* Section I, *supra*; *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012). As one court noted with respect to the consequences of lifetime registration,

> [O]ne of the most essential qualities of reputation is that it may be improved. This situation is even more significant for juveniles because their character is often not firmly set. Thus, a truly rehabilitated juvenile might eventually gain a good reputation to match a good character. However, under [SORNA], lifetime registration will hold the juvenile's reputation in stasis. The law will imbue the juvenile with the reputation of a sexual offender through formative stages of his life and continuing into old age. A juvenile who was adjudicated delinquent when he was fourteen will continue to be known as a sexual offender when he is seventy.

In re B.B. et al., CP-45-JV-248-2012, Jan. 16, 2014, (Pa. Ct. Comm. Pl. Monroe) (Op. J. Patti-Worthington) at 22, attached at Appendix A1-A38 [hereinafter *In re B.B.*].

In Pennsylvania, the right to reputation, along with life, liberty and property, is a fundamental right, recognized and protected by the Pennsylvania Constitution. Pa. Const. art. I, §1.[12] *See also R. v. Com., Dept. of Welfare*, 636 A.2d 142, 149 (PA. 1994); *Hatchard v. Westinghouse Broadcasting*, 532 A.2d 346, 193 (Pa. 1987). As such, it cannot be abridged by the government without compliance with

[12] "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, §1.

state constitutional standards of due process. *Pennsylvania Bar Ass'n v. Com.*, 607 A.2d 850, 856 (Pa. Commw. Ct. 1992); *Balletta v. Spadoni*, 47 A.3d 183, 192 (Pa. Commw. Ct. 2012). SORNA violates children's substantive and procedural due process rights by impeding their fundamental right to reputation.

A. SORNA Causes Harm To A Child's Reputation.

Harm to reputation includes the defamatory character of the communication and the publication of the information by the defendant. *See* 42 Pa.C.S. §8343; *Maier v. Maretti*, 671 A.2d 701, 704 (Pa. Super. 1995). The harm here is specified and documented. The public will view children labeled as "sex offenders" as dangerous and their registry information will be kept forever and widely disseminated. Tr. Ct. Op. at 13; A257, *Logan* ¶¶12, 14. SORNA is a "state-endorsed reputation rating" and violates due process. A19, *In re B.B.*

1. As Applied To Children, The Label "Sex Offender" Is Defamatory.

Reputational impairment is not limited to the facts disclosed, but what the public may reasonably understand the communication to mean—"the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Thomas Merton Center v. Rockwell International Corp.*, 442 A.2d 213, 215 (Pa. 1981) (citing *Corabi v. Curtis Pub. Co.*, 273 A.2d 899, 907 (Pa. 1969); *see also* Restatement (Second) of Torts §563.

There is no question what the term "sex offender" means. By statute, the term "sex offender" does not merely imply that a juvenile was adjudicated delinquent, a fact not in dispute, but rather that the child is an ongoing threat because he "pose[s] a high risk of committing additional sexual offenses." 42 Pa.C.S. §9799.11(a)(4). The premise that a sex offender is at a high risk of reoffending is central to the legislative purpose of SORNA, as it is intended to allow government entities and communities to prepare for individuals presumed dangerous. 42 Pa.C.S. §§9799.11(a)(6)-(8).

Placement on the sex offender registry communicates incorrect public assumptions—that the child is incapable of rehabilitation, likely to recidivate, part of a homogeneous class (i.e., all sex offenders are alike), and a special kind of criminal. R.R. 237, *Pittman* ¶1; R.R. 232-233, *del Busto* ¶18. *See also* A23, *In re B.B.*; *In re W.E. et al.*, CP-36-JV-1085-2008, Feb. 11, 2014, (Pa. Ct. Comm. Pl. Lancaster) (Op. J. Workman) at A56 attached at Appendix A39-A58 [hereinafter *In re W.E.*]; Marcus Galeste et al., *Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers*, 13 Western Crim. Rev. 4, 15 (2012) ("[a] strong association was found between sex offender registration and/or community notification laws and sex offender myths.").

For children, these "sex offender" myths and assumptions are empirically false, *see* Sections I-II, *supra*, and directly affect a child's employment and

housing, as well as potentially marring his emotional well-being for life. *See* Section IV, *supra*. Children who commit sex offenses are open to rehabilitation and are highly unlikely to recidivate. *Id.* In Pennsylvania, the low recidivism rate of juvenile sex offenders is even more pronounced. Between 2007 and 2009, there were 423 youth adjudicated delinquent of the current registerable offenses: rape, involuntary deviate sexual intercourse, or aggravated indecent assault, excluding the inchoate offenses. Pennsylvania Juvenile Court Judges Commission, *The Pennsylvania Juvenile Justice Recidivism Report: Juveniles with Cases Closed in 2007, 2008, or 2009,* (November 2013) at A153, attached at Appendix A59-A250 (hereinafter "*JCJC Recidivism Report*"). Of those 423 youth, only six were subsequently adjudicated delinquent for similar offenses—less than 2%. *Id*.

Children who sexually offend are no different from other juvenile offenders who commit other non-sexual delinquent acts. Tr. Ct. Op. at 17; R.R. 233, *del Busto* ¶19. Moreover, the registered "sex offender" label is substantially more damaging to a child than a juvenile record, even though his record is publicly available. 42 Pa.C.S. §§6307-8. The message that a juvenile is a danger to society derives from the "sex offender" label, not from the adjudication alone. 42 Pa.C.S. §9799.11(a)(4); A19, *In re B.B.* SORNA "is intended to reduce the juvenile's reputation in the eyes of the public in order to ensure protection. Our State's enhanced protection of reputation requires limits on any interpretation which blurs

the line between adjudications and more fact-based inferences about those adjudications." *Id*. at A20.

Indeed, research has demonstrated that the label of a registered "sex offender" sends a message far more deleterious than a juvenile record. R.R. 224, *Caldwell* ¶5; R.R. 232, *del Busto* ¶18; R.R. 219, *Letourneau* ¶D1; Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 Analyses of Soc. Issues and Pub. Pol'y, 1, 10-13 (2007) (generally discussing the public perception of registered sex offenders). *See also* Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 519 (2013); Eric Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventative State*, Cornell Univ. Press (2006). Registrants find "their status as a 'felon' was not as hard to overcome as their 'sex offender' label." Richard Tewksbury & Michael Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 Sociological Spectrum 309, 330-32 (2006). Registration sends a message that the registered sex offender is likely to re-offend, is mentally ill and is dangerous. Sarah W. Craun & Matthew Theriot, *Misperceptions of Sex Offender Perpetration: Considering the Impact of Sex Offender Registration.* 24 J. of Interpersonal Violence, 2057-2072 (2009) (similar conclusions). As to children, these messages are false and defamatory.

2. SORNA Maintains And Communicates The Defamatory Message.

Government records containing stigmatizing information about an individual are a "threat" to that person's reputation. *Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978). *See also* A54, *In re W.E*. (registration is "more than a serious threat to the juveniles' reputations."). This remains true even if the records are kept confidential and only available to limited individuals, which is not the case here. *Pa. Bar Ass'n*, 607 A.2d at 853.

In *Pennsylvania Bar Association*, the Bar challenged a statute requiring reporting of attorneys associated with fraudulent insurance claims. *Id*. at 854. The court found that

> [t]he fact that the reports are only accessible to member-insurers and several other categories of individuals does not make them any less damaging, as the attorney must deal with these insurers in the course of his business, and his reputation in their eyes is at least as valuable as it is in the eyes of the general public, if not more so.

Id. Even in the absence of specified harm, the inclusion of names alone is a threat to reputation. *Id*. at 853. Under SORNA, the harm to reputation is worse as a child's sex offender registry information is not only kept, but widely disseminated. "Publication of defamatory matter is the intentional or negligent communication of such matter to one other than the person defamed." *Chicarella v. Passant*, 494 A.2d 1109, 1112 (Pa. Super. 1985) (citations omitted). When a speaker is

negligent, or worse, as to whether he communicates defamatory information, he cannot be shielded by his intent to keep the information private. *See* Restatement (Second) Torts §599 (1976).

Although children are not included on the sex offender Internet website, SORNA does not otherwise shield their information. Registry information will be disseminated automatically to primary sources and then released to secondary sources. *See* Section III.C, *supra*. SORNA does not prohibit, penalize or discourage the release of registry information. *See* Tr. Ct. Op. at 14; R.R. 184, *Registration Requirements* ¶33; A46, A55, *In re W.E.* No registry has ever been effectively kept private. A257, A259, *Logan* ¶¶12, 26. Historically, when registries have been ostensibly private, the general police practice is to "treat these records in much the same manner as other police data… [with] disclosure of material vary[ing] from one police department to another." *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. Pa. L. Rev., 60, 81 (1954). Once a child's status as a registered sex offender is released to a few members of the public, it may be widely distributed without penalty. A259, *Logan* ¶26, R.R. 237, *Pittman* ¶1.

When traveling outside the Commonwealth, either for work, school, or with his family, a child's status as a registered sex offender will likely become posted on the Internet. Tr. Ct. Op. at 14; R.R. 238, *Pittman* ¶6; R.R. 219, *Letourneau* ¶D3. At

least twenty-eight states include juvenile offenders on a public Internet website—often including enormous amounts of information. *See* R.R. 365-69, *Memorandum in Support*, 55-59 (detailing other states' public registry schemes).[13] Considering the negligible contact a child must have with another state in order to be included, over the course of decades, publication on the Internet is inevitable. *See* Section V, *supra* (detailing triggering contacts with other states). Contact with another state may also result in statutory community notification to neighbors and others. R.R. 365-69, *Memorandum in Support*; A259, *Logan* ¶22.

Once on the Internet, a child's registration information is permanently available world-wide. The federal government maintains a public Internet website, which includes the information of the 50 states. *See* National Sex Offender Public Website, *available at* http://www.nsopw.gov; 42 U.S.C. §16920; A259, *Logan* ¶22. Furthermore, many private websites mine state registries in efforts to disseminate information about and track registered sex offenders. R.R. 237, *Pittman* ¶1; R.R. 370-71, *Memorandum in Support*. These public websites are under no obligation to remove information which may be inaccurate or taken down by the state. R.R. 370-71, *Memorandum in Support*.

[13] *See* note 4, *supra*.

B. SORNA Denies Children Substantive Due Process.

Like the Due Process Clause of the Fourteenth Amendment of the Federal Constitution, Article I, Section 1 of the Pennsylvania Constitution guarantees certain inalienable rights. *Nixon v. Dep't of Pub. Welfare*, 839 A.2d 277, 286 (Pa. 2003). "While the General Assembly may, under its police power, limit those rights by enacting laws to protect the public health, safety, and welfare, any such laws are subject to judicial review and a constitutional analysis." *Id.* The analysis of laws that impede upon inalienable rights is "a means-end review, legally referred to as a substantive due process analysis." *Id.* Courts must weigh the rights infringed upon by the law against the interest sought to be achieved by it, and scrutinize the relationship between the law and that interest. *Id*. at 286-87.

Where laws infringe upon fundamental rights, courts apply a strict scrutiny test, which requires narrow tailoring to a compelling state interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *Nixon*, 839 A.2d at 287.[14] In Pennsylvania, courts must apply strict scrutiny when the Commonwealth communicates in some manner to defame or unjustly damage a person's

[14] Pennsylvania courts have also found that conviction-based presumptions fail rational-basis review. In *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth, Ct. 2012), the defendant was convicted of homicide decades earlier. The Court looked to his diminishing risk over time and his actual and current danger to children holding that a lifetime ban on employment was not rationally related to a legitimate government interest. *Id.*

reputation. *See Spadoni*, 47 A.3d at 191-92 (constitutional reputational damage established under the law of torts for defamation) (citing *Sprague v. Walter*, 543 A.2d 1078, 1084 (Pa. 1988)); *Nixon*, 839 A.2d at 287 (applying strict scrutiny to fundamental rights). As applied to children, SORNA violates substantive due process. U.S. Const. Am. XIV; Pa. Const. art. I, §1.

The stated interest of SORNA is to provide a "mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of the Commonwealth." Tr. Ct. Op. 21-22 citing 42 Pa.C.S. §9799.11. SORNA is predicated on the finding that sexual offenders "pose a high risk of committing additional sexual offenses." R.R. 187, *Registration Requirements* ¶52; (9799.11). This Court has held that protecting the public from high-risk sex offenders is a compelling state interest. *Commonwealth v. Lee*, 935 A.2d 865, 883 (Pa. 2007); *Commonwealth v. Williams*, 832 A.2d 962, 973 (Pa. 2003); *Commonwealth v. Gaffney*, 733 A.2d 616, 619 (Pa. 1999). This does not, however, end the analysis. Once the "end" is established as compelling, a court must determine whether the "means" is narrowly drawn to achieve that purpose. A statute is not narrowly tailored when a "less restrictive alternative [to accomplish the legislative goal] is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988). It is also not narrowly tailored if it is over-inclusive or sweeps within its reach situations not pertinent to

the legislative goal. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); A24, *In re B.B.*

SORNA is far from the least restrictive means to meet the state's compelling interest in protecting the public from high-risk sexual offenders, because the overwhelming majority of juvenile offenders are not "high risk." *See* Section I, *supra*. *See also*, A59-A250, *JCJC Recidivism Report*. "For such a system to be effective it should utilize a risk assessment and focus its attention on those that are most likely to sexually reoffend—a risk based system rather than an offense based system." R.R. 231, *del Busto* ¶¶11-12. This practice has been codified in Oklahoma:

> …[A] child accused of committing a registerable sex offense undergoes a risk evaluation process reviewed by a panel of experts and a juvenile court judge. The preference is for treatment, not registration, and most high-risk youth are placed in treatment programs with registration decisions deferred until they are released, at which point they may no longer be deemed high-risk. The programs and attention provided by the state to high-risk youth means that very few youth are ultimately registered. The few children that are placed on the registry have their information disclosed only to law enforcement, and youth offenders are removed once they reach the age of 21.

Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* at 6-7 (May 2013); *See also* Okl. Stat. tit. 10A §2-8-101, *et seq.*

Similarly, Pennsylvania's civil commitment statute known as Act 21 amply accounts for sexually dangerous juveniles, requiring the State Sexual Offenders

Assessment Board (SOAB) to assess juveniles who remain in need of treatment as they near their 21st birthday. 42 Pa.C.S. §6403(b). A full judicial hearing is afforded at which a court must find that the person is "*likely to engage in an act of sexual violence*." 42 Pa.C.S. §§6403(c)-(d). Commitment is initially for a period of one year, with annual review thereafter. 42 Pa.C.S. §6404(b). Act 21 demonstrates that individualized consideration is both a practical and reasonable means of protecting the public and that a mandatory, offense-based registration scheme is not the least restrictive approach.

In addition to failing the "least restrictive means" standard, SORNA is over-inclusive. SORNA sweeps into its reach many children who will never sexually re-offend. By failing to account for individual circumstances, SORNA ignores "a means to avoid including non-dangerous persons on the registry." A27, *In re B.B.* With a rate of recidivism for sexual offenses at less than 2% among Pennsylvania youth who will be required to register, nearly 98% of the children on Pennsylvania's registry will be improperly identified as "high-risk of re-offense." *See* Section I, *supra;* A153, *JCJC Recidivism Report*.

SORNA's legislative history also demonstrates that it is not narrowly tailored. The inclusion of children under the federal Adam Walsh Act appears to "have been part of a pragmatic compromise on the part of Congress rather than an attempt to limit juvenile registration to those who were at high risk of re-offense."

A32, *In re B.B.* (citing 96 Cong. Rec. 8023 (July 20, 2006) (statement of Sen. Kennedy), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2006-07-20/pdf/CREC-2006-07-20-pt1-PgS8012-2.pdf#page=12 ("In order for the registry to be effective, it should be targeted toward those who represent the highest risk to our communities. The current version takes a more sweeping approach toward juvenile offenders by expanding their registration requirements.")). As such, the federal government put in place a safeguard so that states could review this registration scheme under their State constitutions without jeopardizing the attached federal funding. 42 U.S.C. §16925(b)(1).[15] This Court should accept this invitation—as it must—because SORNA violates the substantive due process rights of juveniles.

C. SORNA Denies Children Procedural Due Process.

1. SORNA Does Not Provide Adequate Notice Or A Meaningful Opportunity To Be Heard.

SORNA also denies children adequate procedural due process because it infringes upon the fundamental right to reputation without notice and a meaningful opportunity to be heard. *Soja v. Pennsylvania State Police*, 455 A.2d 613, 615 (Pa.

[15] "When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court." 42 U.S.C. §16925(b)(1).

1982); *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975). Notice and a hearing are fundamental components of due process when a person's liberty interest is at stake in a legal proceeding. *Everett v. Parker*, 889 A.2d 578, 580 (Pa. Super. Ct. 2005). SORNA provides neither.

Notice is a basic axiom of due process that applies with special force to minors in court proceedings. *Gault*, 387 U.S. 1, 31. SORNA does not provide notice. A juvenile is entitled to no relief if a court fails to inform him of his need to register and the presumption that he is dangerous or at high risk of recidivism. "This lack of exception is consistent with the Act's failure to provide notice." A52, *In re W.E.* (citing 42 Pa.C.S. §§9799.23(a)-(d)).

Due process also requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The right to be heard must be in a manner appropriate to the nature of the case. *Bell v. Burson*, 402 U.S. 535, 541-42 (1971); *Fiore v. Com, of Pa., Board of Finance and Revenue*, 633 A.2d 1111, 1114 (Pa. 1993). "Plaintiffs who assert a right to a hearing under the Due Process Clause must first show that the facts they seek to establish in that hearing are relevant

under the statutory scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003).

In *Doe*, the United States Supreme Court held that a Connecticut sex offender registration statute, which provided no hearing on the issue of future dangerousness prior to imposing community notification provisions on convicted sex offenders did not implicate procedural due process. Connecticut's scheme, however, explicitly "made no determination that any individual included in the registry is currently dangerous," *id.* at 5 (citations and quotations omitted), nor did it send such a message to the public. In stark contrast to the statutory scheme at issue in *Doe*, juvenile offenders are presumed dangerous under Pennsylvania's SORNA. 42 Pa.C.S. §§9799.11(a)(4), (7). Moreover, the instant case arises under the Pennsylvania Constitution, which unquestionably raises due process concerns. *Cf. Paul v. Davis*, 424 U.S. 693 (1976) (finding no reputation interest under the federal Constitution). This case involves children who have rehabilitative potential and whose reputations ought to be shielded by the law.

SORNA provides no hearing for the child to have his status as a sex offender reviewed. *See also* Section VII, *infra*. The adjudicatory hearing is no substitute for a risk-assessment and does not provide a juvenile with an opportunity to contest his future risk of dangerousness. At the adjudicatory hearing, the court must determine whether or not the child was involved in the criminal offense and will require

treatment, supervision or rehabilitation, defined broadly. 42 Pa.C.S. §6302 (definition of "delinquent child"). There is no opportunity to be heard on the issue of sexual recidivism. Furthermore, an adjudicatory hearing does not encompass the full panoply of criminal protections. The hearings are conducted in an "informal but orderly manner" and juveniles are not accorded equivalent procedural protections as their adult counterparts in criminal court. *See* 42 Pa.C.S. §6369(a).

The first opportunity for review of a child's registration status is after 25 years, if he is still eligible to petition for removal from the registry—an unlikely event. *See* Sections III.A n.2, *supra*, VIII.A.2.g, *infra*. "Considering the timing of this hearing and the possibly irrelevant considerations involved, we do not believe that this hearing provides a meaningful opportunity to challenge registration." A36, *In re B.B.*

2. SORNA Denies Procedural Due Process Under The *Mathews v. Eldridge* Test.

Whether the lack of notice and opportunity to be heard renders SORNA constitutionally deficient requires an analysis of the governmental and private interests affected. *Mathews*, 424 U.S. at 334-335. *See also Arnett v. Kennedy*, 416 U.S. 134, 167-168, (Powell, J., concurring in part); *Goldberg v. Kelly*, 397 U.S. 254, 263-266 (1970). A court must consider three distinct factors: the private interest that will be affected by the official action; the government's interest; and the risk of an erroneous deprivation of the liberty interest through the procedures

used, and the probable value, if any, of additional or substitute procedural safeguards. *Mathews*, 424 U.S. at 334-35. *See also Pennsylvania Coal Mining Ass'n v. Insurance Dept.*, 370 A.2d 685, 698 (Pa. 1977).

In the instant case, the private interest at issue is the fundamental right to reputation. *See* Section VI.A, *supra*. As a fundamental right is at stake, "the determination is of constitutional magnitude and should enjoy some appropriate, heightened protection." A30, *In re B.B.* The government interest is public safety. 42 Pa.C.S. §9799.11(a)(4). While theoretically significant, as shown in Section II, *supra*, SORNA fails to achieve the purported interest.

As to the third criterion, the risk of an erroneous deprivation of the liberty interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, the balance favors Appellees. Appellees have demonstrated that SORNA risks the loss of reputation of all registrants, despite the fact that the overwhelming majority will never re-offend. *See* Sections I, VI, *supra*. Alternatively, under Act 21 the deprivation of liberty is directly tied to the determination of future likelihood of offense. Although lifetime registration is not equivalent to indefinite commitment, the difference in the due process requirements for Act 21 and SORNA—where both are intended to further a similar public safety interest—is stark. The "risk of erroneous deprivation is severe, the

value of additional process is significant, and any addition presents only a minimum burden for the Commonwealth." A14, *In re B.B.*

VII. SORNA CREATES AN IRREBUTTABLE PRESUMPTION IN VIOLATION OF THE PENNSYLVANIA CONSTITUTION.

SORNA presumes that a juvenile offender is dangerous and provides no meaningful opportunity to challenge this presumption, which is neither "universally true" nor unknowable. *Department of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996). *See also* Section VI.C.1, *supra*. This Court has found that irrebuttable presumptions violate due process when "the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact are available." *Clayton,* 684 A.2d at 1063 (citing *Vlandis v. Kline*, 412 U.S. 441, 452 (1973)). See R.R. 409-10, *Memorandum in Support*, 99 (discussing the doctrine in greater length). The irrebuttable presumption doctrine is a robust doctrine, applied repeatedly by Pennsylvania courts. *See, e.g., Clayton,* 684 A.2d 1060 (driver's license suspension); *E.W. v. T.S.*, 916 A.2d 1197 (Pa. Super. 2007) (domestic relations case to determine paternity); *Commonwealth v. Thur*, 906 A.2d 552 (Pa. Super. 2006) (criminal case); *D.C. v. School District of Philadelphia*, 879 A.2d 408 (Pa. Commw, Ct. 2005) (education issue); *Fidelity Federal Sav. And Loan Ass'n v. Capponi*, 684 A.2d 580 (Pa. Super. 1996) (mortgage debt issue). Courts most often apply the irrebuttable presumption doctrine articulated in *Vlandis* when the

presumption in question affects a suspect class or implicates fundamental freedoms. *See, e.g., Commonwealth, Dep't. of Transp., Bureau of Traffic Safety v. Slater*, 462 A.2d 870, 876-881 (Pa. 1983). SORNA implicates a child's fundamental right to reputation. *See* Section VI, *supra*.

This Court has explained that it is not wise to pigeonhole whether an analysis of an irrebuttable presumption is solely one of substantive or procedural due process. *Clayton*, 684 A.2d at 1064. If a presumption is found to implicate fundamental freedoms, procedural due process requires that an individual have a "meaningful" opportunity to challenge the "paramount factor" behind the regulatory scheme in question. *Clayton*, 684 A.2d at 1065. In the instant case, the "paramount factor" is SORNA's conclusion that "[s]exual offenders pose a high risk of committing additional sexual offenses." R.R. 187, *Registration Requirements* ¶52; (9799.11(a)(4)). As the trial court held, SORNA presumes a juvenile offender's dangerousness. Tr. Ct. Op. at 37-38 citing 42 Pa.C.S. §9799.11. This presumption is far from "universally true." *Clayton*, 684 A.2d at 1063. To the contrary, it is uncontroverted—and stipulated to below—that children adjudicated of sex offenses have an extremely low risk of committing additional sexual offenses. Section I, *supra*; Tr. Ct. Op. at 18; R.R. 216-217, *Letourneau* ¶¶A-B; R.R. 221-22, *Caldwell* ¶¶3C, E-F; R.R. 232, *del Busto* ¶13-14. Nor is it true that

there is "no reasonable alternative means" of ascertaining dangerousness. *See, e.g.* R.R. 231, *del Busto* ¶12.

Despite the fact that the presumption of dangerousness is not true and can be determined, SORNA provides no opportunity for a juvenile to rebut this presumption. *See* Section VI.C.1, *supra*. A juvenile is adjudicated delinquent in a hearing with required due process safeguards, but that hearing does not provide an opportunity to challenge the statute's presumption that the adjudication means that he will "pose a high risk of committing additional sexual offenses," or that registration will "[offer] an increased measure of protection to the citizens of this Commonwealth." 42 Pa.C.S. §9799.11. These questions are not even before the court.

The instant case is analogous to this Court's decision in *Clayton*. This Court overturned a statute revoking a driver's license upon a single epileptic seizure. The Court held that while the regulatory scheme provided for a hearing to challenge whether the driver had suffered a seizure, that hearing did not allow for consideration of the "paramount factor behind the instant regulations," i.e. competency to drive. *Clayton*, 684 A.2d at 1065. While this Court noted the state's important interest in precluding unsafe or potentially unsafe drivers from driving on the state's highways, this interest did not outweigh a person's interest in retaining his or her license so as to justify the revocation without first affording

due process. *Id.* The Court found that the regulation violated the due process requirement that a hearing be "meaningful" and "appropriate to the nature of the case." *Id*. at 1065. *See also Bell v. Burson*, 402 U.S. 535 (1971) ("any hearing which eliminates consideration of [the paramount factor behind the instant regulations] is violative of procedural due process.")); *Pennsylvania v. Aziz*, 724 A.2d 371, 375 n.2 (Pa. Super. 1999) (noting the right to rebut the presumption asserted).

D.C. v. School District of Philadelphia, 879 A.2d 408 (Pa. Commw. Ct. 2005), is likewise instructive. In *D.C.*, the Commonwealth Court ruled unconstitutional a statute requiring, *inter alia*, Philadelphia youth returning from delinquent placement to be automatically placed in an alternative school. The court ruled that the statute created an irrebuttable presumption that the students were unfit for a regular classroom. *Id*. at 420. A student was sent to alternative school "regardless of whether the student performed in an exemplary manner during juvenile placement or otherwise does not pose a threat to the regular classroom setting." *Id*. at 418. The students were given no opportunity to challenge the need to protect the regular classroom environment against disruption. *Id*.

Moreover, in *D.C.*, the Commonwealth Court specifically noted that the adjudicatory hearing itself could not fulfill the requirements of due process because the determination of a returning student's fitness for the regular classroom "turns

on factors that could not be known at the time of the juvenile adjudication." *Id.* The same is true as to a child's risk of sexual re-offense. Because an adjudication requires a finding that the child is in need of treatment, supervision or rehabilitation, to be provided by the juvenile system, it is illogical—and punitive—to presume prior to providing this treatment that the child poses a permanent threat. Just so, Act 21 proceedings are not conducted at the time of adjudication. 42 Pa.C.S. §6403(b). The adjudicatory hearing does not consider whether the child poses a high risk of committing additional sexual offenses. *See also, In re. W.Z.*, 957 N.E.2d 367, 376-80 (Ohio Ct. App. 2011) (Ohio court found that classifying juveniles as sex offenders at adjudication was inappropriate because it disregarded the ameliorative impact of juvenile placement and treatment on the likelihood of re-offense. By imposing registration and notification at adjudication "without any other findings or support of the likelihood of recidivism, a child who commits a one-time mistake is automatically, irrebuttably, and permanently presumed to be beyond redemption or rehabilitation.").

In *Clayton, D.C.* and the instant case, the affected parties had a hearing but were never given the opportunity to challenge the *presumed* fact upon which their sanction was based. SORNA conflates the adjudicatory hearing with the risk of sexual re-offense. Though the state's interest in protecting communities from sex offenders is legitimate, it cannot render "inviolate" an unlawful, irrebuttable

presumption. *See Clayton*, 684 A.2d at 1065. Indeed, because sexual recidivism is the paramount factor behind the instant regulations, "any hearing which eliminates consideration of that very factor is violative of procedural due process." *Clayton*, 684 A.2d at 1065.

For all these reasons, SORNA violates the Pennsylvania guarantees of due process implicit in the irrebuttable presumption doctrine.

VIII. SORNA IMPOSES ADDITIONAL PUNISHMENT IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS.

SORNA cannot be couched in the legal fiction of remedial or administrative aims. Its mandatory nature, nearly insurmountable registration obligations, threat of incarceration, and accompanying harms all lead to the conclusion that the law is punitive. Tr. Ct. Op. at 31. This Court should recognize what a growing number of states now hold, that sex offender registration is punishment.

Ex post facto laws are prohibited under the United States and Pennsylvania Constitutions. U.S. Const. art. I, §§9, 10; Pa. Const. art. I, §17. The *Ex Post Facto* Clause bars a "lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). Although this Court has applied an *ex post facto* analysis to previous versions of Megan's Law, the instant case raises novel questions of law. *Cf. Lee*, 935 A.2d at 865; ("sexually

violent predator" provisions of Megan's Law II); *Williams*, 832 A.2d at 962 ("sexually violent predator" provisions of Megan's Law II); *Gaffney*, 733 A.2d at 616 (Megan's Law I); *Commonwealth v. Fleming*, 801 A.2d 1234 (Pa. Super. 2002) (Megan's Law II); *see also Smith v. Doe*, 538 U.S. 84 (2003) (Alaska law). First, SORNA is not Megan's Law. *See* Section III, *supra.* SORNA imposes increased in-person reporting requirements, imposes new, innumerable registration obligations and effectively cuts registrants off from full participation in society for life. *Id.* For these reasons, a number of state supreme courts have held that sex offender registration laws are punitive. *See Starkey v. Okla. Dep't of Corr*., 305 P.3d 1004 (Okla. 2013); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 143 (Md. 2013); *In re C.P.*, 967 N.E.2d 729 (Ohio 2012); *State v. Williams*, 952 N.E. 2d 1108 (Ohio 2011); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Gonzalez v. State*, 980 N.E. 2d 312 (Ind. 2013); *Hevner v. State*, 919 N.E.2d 109 (Ind. 2010); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Doe v. State*, 189 P.3d 999, 1000 (Alaska 2008).

Secondly, this Court has never considered lifetime sex offender registration as applied to children.[16] Section III.A, *supra*. SORNA's punitive effects are

[16] The Commonwealth states that SORNA accounts for differences between juveniles and adults by limiting SORNA's application to children. Brief of Appellant at 46. Notwithstanding the few differences between juvenile and adult registration, SORNA's punitive value is amplified when applied to children in light of the research presented in stipulated evidence.

significantly amplified when applied to children—children who are neither mature nor self-reliant, who are unlikely to recidivate, and whose lifetime reporting requirements will last years, if not decades longer than the same penalty imposed upon adults.

Despite the Commonwealth's suggestion to the contrary, the Fourth Circuit's decision in *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), and the Nevada Supreme Court's decision in *State v. Eighth Judicial Dist. Ct.* 306 P.3d 369 (Nev. 2013) ("*Logan D.*") are not only non-binding, but inapposite. *See Brown v. Levy*, 73 A.3d 514, 518 (Pa. 2013) (citations omitted). A review of the record and opinion in *Under Seal* demonstrates that the child did not establish, let alone prove, any facts to support his claim. *See generally Under Seal*, 709 F.3d at 263-66; Corrected Redacted Brief of Appellant *United States v. Under Seal*, 2012 WL 1018193 (2012). *Logan D.* suffers from the same dearth of factual evidence. The children did not show that registration and notification inflict any greater harm than disclosure of the adjudication alone, that registration does not protect the public, and that juvenile sexual offenders are any different than adult offenders. 306 P.3d at 377-78, 385-87. Appellees have done that and more. Furthermore, Nevada does not protect the right to reputation as fundamental. *Id.* at 377-78.

To the contrary, in the instant case, Appellees prove, by *undisputed* facts, that SORNA is punishment. Moreover, SORNA's application to children, like

Appellees, whose adjudications were for conduct occurring prior to the law's effective date violates both the United States and Pennsylvania *Ex Post Facto* Clauses.

A. SORNA Violates the *Ex Post Facto* Clause of the United States Constitution.

The applicable test under the *Ex Post Facto* Clause of the United States Constitution is the two-level inquiry of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), asking "'whether the legislature's intent was to impose punishment, and, if not, whether the statutory scheme is nonetheless so punitive either in purpose or effect as to negate the legislature's non-punitive intent.'" *Lee*, 935 A.2d at 873 (quoting *Williams*, 832 A.2d at 971) (additional citations omitted). The seven *Mendoza-Martinez* factors, which are guideposts, are:

> 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it comes into play only on a finding of scienter; 4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether the alternative purpose to which it may rationally be connected is assignable for it; and 7) whether it appears excessive in relation to the alternative purpose assigned.

Lehman v. Pennsylvania State Police, 839 A.2d 265, 271 (Pa. 2003). A litigant must show "clearest proof" that a law is punitive in effect. *Lee*, 935 A.2d at 876.

1. SORNA's Remedial Legislative Intent Is Inconsistent With Its Punitive Nature.

Appellees do not dispute that the stated goal was to enact a "nonpunitive" law providing "increased regulation of sexual offenders." 42 Pa.C.S. §§9799.11(a)(2), (b)(1). However, this stated goal is mere window dressing.

2. SORNA Is Punitive In Effect Under The *Mendoza-Martinez* Factors.

i. SORNA Imposes An Affirmative Disability Or Restraint.

Whether a law imposes an affirmative disability turns on "how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. at 99-100. A law's "effects" include all those along a spectrum from direct and major to indirect and minor effects. *Id*. For example, a $200 "assessment" imposed upon a DUI conviction is a direct and punitive effect. *Commonwealth v. Wall*, 867 A.2d 578, 582-83 (Pa. Super. 2005). Similarly, a prohibition on possessing a firearm is a direct disability, even though the other factors weighed against finding the restriction punitive. *Lehman*, 839 A.2d at 272. SORNA's effect on children is much greater than an assessment of $200 or a ban on purchasing a firearm, as the trial court properly held. Tr. Ct. Op. at 8-15.

a. SORNA Imposes Major Direct Disabilities And Restraints.

SORNA's in-person reporting requirements are more onerous than any prior sex offender registration law in this Commonwealth and are major, direct

disabilities and restraints. *See* Section III, *supra*; *see also generally* R.R. 181-201, *Registration Requirements* (9799.10-9799.41); *cf. Smith*, 538 U.S. at 100 (upholding Alaska adult statute, which did not require in-person reporting). SORNA's quarterly in-person reporting requirements and the additional in-person reporting requirements to add, remove, or update registration information are a major direct disability upon children. *See* Section III.A, *supra* (discussing the numerous requirements in detail). Such restraints are an added difficulty for children as young as fourteen, who must attend school, may not drive, may not have jobs, and may not even be free to leave home or school to comply with registration requirements without the permission or assistance of a parent, guardian or school administrator. *See, e.g.*, R.R. 238, *Pittman* ¶5.

Moreover, a child's registration information will change frequently, often for reasons outside of his control. For example, children in substitute care will have new registration obligations with each move to a new foster home. *See, e.g., In re: Adoption of S.E.G.*, 901 A.2d 1017, 1019 (Pa. 2006) (discussing the problem of "foster care drift"). Children who attend school or work will, of necessity, continuously add "designations used in Internet communications or postings," as they apply to college, seek financial aid, conduct job searches, use public libraries, and maintain social and professional networks. *See* R.R. 239-245, *Internet Identifiers*. Each time, the child must report within 72 hours in person to the PSP.

42 Pa.C.S. §9799.15(g). Taken to the extreme, SORNA literally requires that if a child parks his family car in a new spot, he must update the PSP. 42 Pa.C.S. §9799.15(g); R.R. 192, SP4-218 at 4.

SORNA also imposes an affirmative disability because it requires children to disclose massive amounts of personal, non-public information, including *inter alia*, routes to work, vehicle information, every email address, Internet name and "all identifiers affiliated with the sexual offender . . . (e.g., Facebook, Twitter, Tagged, MySpace)." R.R. 193, SP4-218 at 5; 42 Pa.C.S. §§9799.15, 9799.16; R.R. 181-87, *Registration Requirements* (9799.10-9799.41); R.R. 239-45, *Internet Identifiers*. The disclosure of Internet identifiers alone imposes an affirmative disability on the right to anonymous free speech. *See Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003); *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Pilchesky v. Gatelli*, 12 A.3d 430, 438-39 (Pa. Super. 2011).

This information is also disseminated. Section III.C, *supra*; Tr. Ct. Op. at 14-15; R.R. 237, *Pittman* ¶1; R.R. 181-185, *Registration Requirements* ¶¶2, 32-34, 37, 39, 40-42 (9799.10-9799.22); A257-A259, *Logan* ¶¶12-18, 22-27; 42 Pa.C.S. §9799.18. The dissemination "chills associational and expressive freedoms" and is an affirmative restraint. *United States v. Jones*, __U.S.__, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring). Other states have made similar findings. *See, e.g.*, *Starkey*, 305 P.3d at 1025; *Doe v. Alaska*, 189 P.3d at 1009-10. SORNA also poses

an affirmative disability and restraint because it excludes children from Pennsylvania's otherwise liberal juvenile expungement statute. 18 Pa.C.S. §9123(a.1).

The Commonwealth posits that registration is not burdensome despite the facts presented above. Brief of Appellant at 22 (citing *Commonwealth v. Mountain*, 711 A.2d 473, 477 (Pa. Super. 1998)). *Mountain* is inapposite. It raised no *ex post facto* claim and analyzed the long out-of-date, Megan's Law I, 42 Pa.C.S. §9793, which was applied to adults. *Mountain*, 711 A.2d at 476.

b. SORNA Imposes Major Indirect Disabilities And Restraints

SORNA poses additional affirmative disabilities and restraints through its major, secondary effects. The Commonwealth ignores this point, Brief of Appellant at 21-25, when there is no question that these effects are relevant to the *ex post facto* analysis. The *Smith* Court considered indirect disabilities—effects on housing and employment—but rejected these for lack of evidence in the record. *Smith*, 538 U.S. at 100-1. *Smith* expressly stated: "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.*; *see also E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997). Unlike *Smith*, the stipulated record here documents SORNA's major, indirect effects on children and cannot be ignored.

SORNA brands children as dangerous. Sections III.C, VI.A, *supra*. *See also* Tr. Ct. Op. at 14-15; R.R. 237, *Pittman* ¶1; R.R. 181, *Registration Requirements* (9799.10-9799.22), ¶¶2, 32-34, 37, 39, 40-42; A257-A259, *Logan* ¶¶12-18, 22-27. As a result, children will suffer "psychological symptoms such as shame, embarrassment, depression or hopelessness," and may become the target of harassment and violence. Section IV, *supra*; R.R. 224, *Caldwell* ¶5; *see also* R.R. 232-33, *del Busto* ¶¶18-19; R.R. 224, *Caldwell* ¶5; *Doe*, 62 A.3d at 142 (77% of registrants reported "threats/harassment"). Registration further harms a child's ability to obtain stable housing, employment and schooling. Tr. Ct. Op. at 19; A55, *In re W.E.*; A15, *In re. B.B. See, also, e.g.*, R.R. 224, *Caldwell* ¶5.A; R.R. 237-38, *Pittman* ¶¶3-5; R.R. 193, SP4-218 ¶¶H, I, 8 (registration of work phone number, supervisor's name and room number at school); A258, *Logan* ¶18 (registration information to campus security).

With little hope for gainful employment, some registrants turn to public housing for assistance. This is to no avail. Federal law permanently bars only two classes of people from admission to public housing: those convicted of manufacturing methamphetamine in public housing, 42 U.S.C. §1437n(f), and lifetime registered sexual offenders, 42 U.S.C. §13663(a), including "juvenile offenders." If forced to move, the child and his entire family suffers. R.R. 224, *Caldwell* ¶5; R.R. 237-38, *Pittman* ¶4. *See also* Jill Levenson & Richard

Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am. J. Crim. Justice, 52, 54-58 (2009).

SORNA also has a major impact on a child's ability to travel, no matter how briefly. Section V, *supra*; R.R. 238, *Pittman* ¶6. In this way, SORNA limits where a child may live, vacation, visit relatives, travel for work or attend school. R.R. 237-38, *Pittman* ¶¶3,6; R.R. 356-73, *Memorandum in Support*. SORNA's impact on inter-state travel (if one even risks doing so) is anything but minor.

In their totality, SORNA's damaging and punitive effects on children and their families are extraordinary. This factor weighs in favor of a finding that SORNA is punitive.

ii. SORNA Is Similar To Traditional Forms Of Punishment.

SORNA is similar to two traditional forms of punishment—probation and shaming. As to probation, these sanctions share the stated purpose of promoting public safety. *Compare* 42 Pa.C.S. §§9912(a), 6352(a) ("protect the community"), *with* 42 Pa.C.S. §9799.11(b)(1)-(2) (public safety). Both assume that individuals require supervision. *Compare Commonwealth v. Chambers*, 55 A.3d 1208, 1212 (Pa. Super. 2012) (asserting that a probationer is more likely to break the law), *with* 42 Pa.C.S. §9799.11(a)(4) (finding that sexual offenders pose a high risk of re-offense). They are part of the same Sentencing Code. 42 Pa.C.S. §§6352, 9721, 9754 (probation); 42 Pa.C.S. §§9799.10-41 (SORNA).

Procedurally, probation and sex offender registration are both imposed by the court at the time of disposition. A judge imposes probation conditions. 42 Pa.C.S. §§9754(a)-(b). Under SORNA, the judge informs the child and registration commences at the time of the disposition. 42 Pa.C.S. §§9799.23(a), 9799.20. Once initiated, the reporting requirements are also similar. Courts may impose "reporting" probation, which requires in-person reporting at designated intervals. 42 Pa.C.S. §9754(c)(10). As set forth above, SORNA imposes frequent and extreme reporting requirements with the state police. Section III.A, *supra*; *see* R.R. 181-87, *Registration Requirements* (9799.10-9799.41).

Probation and SORNA also share the threat of incarceration for non-compliance. 42 Pa.C.S. §9771(b); 18 Pa.C.S. §§4915, 9718.4, 9771; Section III.B, *supra*; R.R. 186-187, *Registration Requirements* ¶¶48-52; *Cf. Korematsu v. United States*, 319 U.S. 432, 434-35 (1943). Finally, probation and parole officers are tasked with enforcing both laws. 42 Pa.C.S. §9912 (probation); 42 Pa.C.S. §9799.22(d) (SORNA).

Maryland's Supreme Court recently declared:

> [SORNA's] restrictions and obligations have the same practical effect as placing Petitioner on probation or parole. *See Doe v. State*, 189 P.3d 999, 1012 (Alaska 2008); *Wallace*, 905 N.E.2d at 380-81. As a result of Petitioner's conviction; he was required to register with the State, and he must now regularly report in person to the State and abide by conditions established by the State or he faces re-incarceration. This is the same circumstance a person faces when on probation or parole; as the result of a criminal conviction, he or she must report to the State and must abide by

> conditions and restrictions not imposed upon the ordinary citizen, or face incarceration.

Doe, 62 A.3d at 139. Other courts have articulated the same. *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1126-27 (D. Neb. 2012); *Doe v. State*, 189 P.3d at 1009, 1012; *Wallace*, 905 N.E.2d at 380; *see also Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting); *Smith*, 538 U.S. at 111 (Stevens, J., dissenting).

SORNA is also similar to the historical punishment of shaming, especially when applied to children. *See, e.g.*, *Doe*, 62 A.3d at 140-41; *Wallace*, 905 N.E.2d at 380. In *Williams*, this Court correctly recognized that shaming punishments disclosed essentially the same information as disclosed by Megan's Law. The Court, however, found that Megan's Law's purpose was not to stigmatize, but rather to disclose "factual information concerning the local presence of a potentially harmful individual." *Williams*, 832 A.2d at 975-76. *Williams* does not control the instant case for two reasons. First, the message perpetuated by SORNA is not simply "factual information." To the contrary, the "sex offender" label sends a message far beyond the fact of a conviction. Section VI.A.1, *supra*; R.R. 224-45, *Caldwell* ¶5. As Maine's Supreme Judicial Court explained:

> '[W]hile registries do disseminate 'accurate information' otherwise available to the public, albeit in disaggregated form, the context in which the information is provided is far from neutral. The government's singling out of certain individuals, yet not others, combined with 'legislative findings' that those targeted pose particular risk, and sobriquets such as 'predatory sex offender,' 'sexually violent predator' or 'habitual sex offender,' contradict government neutrality. Even in jurisdictions that classify registrants in terms

> of risk, . . . each level carries a corresponding degree of disclosure and opprobrium, and hence community disdain. *To conclude that registries only contain 'accurate information' is to thus misstate the government's action; a wholly stigmatizing and unwelcome public status is being communicated, not mere neutral government-held information.'*

Letalien, 985 A.2d at 24 n.14 (quoting Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 138 (Stanford Univ. Press 2009)) (emphasis added).

The *Williams* Court's position on shaming also does not control because this case involves children who are not, in fact, a danger to the public. Section I, *supra;* R.R. 216, *Letourneau* ¶A; R.R. 232-33, *del Busto* ¶¶14, 19; R.R. 221-22, *Caldwell* ¶3(C). Branding a child a "sex offender" perpetuates the inaccurate message that all registrants are dangerous and the individual has no forum in which to dispute this stigma. *See* Section VI.A, *supra*; R.R. 216-18, *Letourneau* ¶¶A-B; R.R. 231-33, *del Busto* ¶¶10-19; 42 Pa.C.S. §9799.11(a)(4). SORNA does not merely disseminate accurate information; it sends a false and permanent message that amounts to shaming.

iii. SORNA Applies Only Upon A Finding Of Scienter.

The third factor asks whether registration comes into play only upon a finding of scienter. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). In other words, if there is a *mens rea* element, it is more likely a condition was intended as a punishment. *Wallace*, 905 N.E.2d at 381. Here, registration flows directly from a

finding of guilt, and the regulatory purpose is the reduction of future offending, thereby satisfying this prong of the *Mendoza-Martinez* test.

iv. SORNA Promotes The Traditional Aims Of Punishment.

A retributive purpose is one that "affix[es] culpability for prior criminal conduct." *Hendricks*, 521 U.S. at 347. SORNA punishes children by exacting retribution for past crimes. *See Mendoza-Martinez*, 372 U.S. at 168. On this point, *Lehman* is illustrative. The *Lehman* Court held that a prohibition on firearm possession by felons is not retributive because the conviction is a necessary, but not sufficient, condition. *Lehman*, 839 A.2d at 272. In other words, it is not only the conviction but the choice to possess a gun that triggers the prohibition. *Id.* (citing *Hendricks*, 521 U.S. at 362). As to SORNA, the opposite is true. It is based on an adjudication of delinquency alone.

Comparing SORNA to Act 21 also highlights SORNA's retributive purpose. Act 21 civil commitment requires not only adjudication, but a due process hearing, repeated year to year, to determine if the child "is in need of commitment for involuntary treatment." 42 Pa.C.S. §§6358, 9799.24. Accordingly, the Superior Court held that the law did "not affix culpability for prior criminal conduct" and was not retributive. *In re S.A.*, 925 A.2d 838, 842-44 (Pa. Super. 2007). SORNA punishes children for their adjudication, regardless of the facts of the underlying offense or their risk of re-offense. *See e.g.*, R.R. 232, *del Busto* ¶¶13-18; R.R. 216-

17, *Letourneau* ¶¶A-B; R.R. 221-22, *Caldwell* ¶3. *See also* R.R. 394, *Memorandum in Support* (describing the retributive legislative intent behind the federal Adam Walsh Act).

SORNA is also punitive as it seeks to deter, both specifically and generally. "The Adam Walsh Act was enacted to tighten control of sex offenders . . . It was argued that individuals who commit sexual acts against children are highly likely to do it again and therefore stricter laws are needed to decrease the likelihood of sexual re-offenses *and to act as a deterrent for repeat sexual offenses*." R.R. 231, *del Busto* ¶9 (emphasis added). Indeed, members of this Court and the General Assembly believe that deterrence is an "obvious" goal of sex offender registration laws. *Commonwealth v. Gehris*, 54 A.3d 862, 878 (Pa. 2012) (Castille, J.) (opinion in support of reversal).

SORNA intends to deter sexual re-offense by requiring registrants to regularly update personal information with law enforcement; registrants are aware that PSP and the public are keeping a watchful eye on them. 42 Pa.C.S. §§9799.10(6); R.R. 218, *Letourneau* ¶¶C, D1 (describing the "surveillance effect"). Appellees explain that SORNA is, in fact, an ineffective deterrent for children. *See* Section IX.A.2, *supra*. Whether SORNA works as a deterrent, however, is irrelevant to its *intended* aim, which is to deter re-offense. Thus, SORNA intends to promote a traditional aim of punishment and is punitive.

v. The Behavior To Which SORNA Applies Is Already A Crime.

SORNA applies only upon adjudication for a predicate crime. 42 Pa.C.S. §9799.13. It applies if the child poses little or no risk. "'The fact that the [a]ct uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community . . . there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.'" *Letalien*, 985 A.2d at 4 (quoting *Smith*, 538 U.S. 108 (Souter, J., concurring)). Thus, this factor supports a finding that the law is punitive. *See, e.g., Starkey*, 305 P.3d at 1028; *Wallace*, 905 N.E.2d at 382.

vi. SORNA Is Not Rationally Related To A Non-Punitive Purpose.

As applied to children, SORNA is not rationally-related to its purported non-punitive purpose, public safety. *See* Section VI.B, *supra*. It is undisputed that as to children the perception of a "high rate of recidivism among convicted sex offenders" is false. *Cf. Williams*, 832 A.2d at 979. *See also* Section I, *supra*; Tr. Ct. Op. at 17-18 (findings of fact); R.R. 218-19, *Letourneau* ¶¶A-B; R.R. 224-25, *Caldwell* ¶3; R.R. 232-33, *del Busto* ¶¶13-16. According to national data, roughly 93% of registered children will never sexually reoffend, R.R. 224-25, *Caldwell* ¶3.C, and 98% of Pennsylvania's children will not reoffend. A153, *JCJC Recidivism Report*.

Nor does SORNA improve public safety through deterrence. Section II, *supra*; R.R. 216-17, *Letourneau* ¶C; R.R. 224-25, *Caldwell* ¶4; R.R. 232-33, *del Busto* ¶¶13-16. As set forth in Section II, *supra*, lifetime sex offender registration for children negatively impacts public safety. Registering children who pose little risk of re-offense diverts resources from high-risk offenders. R.R. 232, *del Busto* ¶¶13-14. The mere existence of the registry may also produce an illusion of security. *See* Brief of the Cleveland Rape Crisis Center and Texas Association Against Sexual Assault as *Amicus Curiae* in Support of Appellant, *State v. Williams* at 3, *available at* http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=673991.pdf ("laws that notify or register people based on the crimes they commit miss the heart of the problem of sex-based crimes: protecting potential child victims from attackers they know.") It is not strangers who pose a threat, but rather family members or acquaintances who commit over 90% of child sexual assaults. *Id*; Kristen M. Zgoba, et al., *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act*, Research Report Submitted to the National Institute of Justice, at 25 (2012).

Finally, in *Williams*, this Court posited that Megan's Law would allow members of the public to protect themselves. *Williams*, 832 A.2d at 979. Similarly SORNA states that "[i]f the public is provided adequate notice and information

about sexual offenders, the community can develop constructive plans to prepare for the presence of sexual offenders in the community." 42 Pa.C.S. §9799.11(3). For children, this is illogical because even though information can be improperly disseminated to the public, *see* Section III.C, *supra*, the statute on its face excludes children from the public Internet website. 42 Pa.C.S. §9799.28(b).

vii. SORNA As Applied To Children Is Excessive.

In *Williams*, this Court explained that a law is excessive if it "is likely to result in individuals being deemed sexually violent predators who in fact do not pose the type of risk to the community that the General Assembly sought to guard against. . ." *Williams*, 832 A.2d at 983. This is exactly the case here. Indeed, this factor alone may be enough to make the law punishment for *ex post facto* purposes. *Lee*, 935 A.2d 865, n.24.

Juvenile SORNA is not marginally over-inclusive, it is significantly so. Section VI.B, *supra.* SORNA casts a global net. Of the children it sweeps up, almost none of them will ever commit another sexual offense in their lifetime. R.R. 222, *Caldwell* ¶3(C); R.R. 232, *del Busto* ¶14.[17] Although the list of offenses is limited, SORNA sweeps up children who engaged in a broad array of behavior. 18 Pa.C.S. §§3121(c), 3123(b), 3125(a)(7). This could include consensual sex, or

[17] In addition, for children that do pose a future risk, Pennsylvania's Act 21 provides an alternative means to safeguard society. 42 Pa.C.S. §6403(a)(3); *In re: A.C.*, 991 A.2d 884, 892 (Pa. Super 2010).

touching alone, between a fourteen year old boy and his girlfriend just shy of thirteen. 18 Pa.C.S. §3125(a)(7).

For all of these children, sex offender registration is for the rest of their lives. While there is a provision for removal after twenty-five years, this promise is illusory. A47, A50, A53, *In re W.E*. A child is disqualified if his juvenile probation is revoked or if he has even one misdemeanor of the second degree. Unfortunately, life on the registry is itself "associated with increased risk" of new, non-sexual charges. R.R. 217, *Letourneau* ¶C1(ii). This is a product of the "burdens" of registration and, more likely, "a surveillance effect," as the police "arrest registered youth for behaviors" that they may overlook for others. R.R. 218, *Letourneau* ¶D1.

Furthermore, any failure to comply with registration requirements will result in new criminal charges and, therefore, registration for life. Section III.B, *supra*; A47, 53, *In re W.E*.[18] Over decades, it is virtually certain that a child will fail to comply at some point. Section III.B, *supra*; R.R. 238, *Pittman* ¶5. The required information is minute, personal and overbroad—including items as short-lived as the child's parking spot, and as vague as "[d]esignation used by the individual for purposes of routing or self-identification in Internet communications or postings." Section III.A, *supra*; R.R. 181-87, *Registration Requirements* ¶¶1-7 (9799.10-

[18] Upon entering another state, the child must comply with the requirements of the federal government and each of the 50 states or face federal criminal charges for failure to register." 42 U.S.C. §16911(8); 18 U.S.C. §2250.

9799.19); 42 Pa.C.S. §9799.16; R.R. 189-200, SP 4-218. The penalty for even a minor misstep is a mandatory prison sentence of three to six years or five to ten years. 42 Pa.C.S. §9718.4. Other consequences that make SORNA excessive include its psychological harm, the barriers it creates to stable housing, employment and school, and the limitations it poses to leaving Pennsylvania. Sections IV-V, *supra*. For all of the above reasons, SORNA is excessive and overwhelmingly punitive under the applicable *Mendoza-Martinez* test. Its retroactive application violates the *Ex Post Facto* Clause of the United States Constitution.

B. SORNA Independently Violates The Pennsylvania Constitution.

This Court should affirm because lifetime sex offender registration of children violates the *Ex Post Facto* Clause of the United States Constitution. U.S. Const. art. I, §§9-10. Furthermore, the Pennsylvania Constitution provides a more expansive basis for this conclusion. Pa. Const. art. I, §17.

This Court has never conducted an analysis of Article I, Section 17, to determine whether or not the *Ex Post Facto* Clauses of the Pennsylvania and Federal Constitutions are coextensive. However, there have been hints of divergence. *Gaffney*, 733 A.2d at 622 (observing that "developments have occurred in federal *ex post facto* jurisprudence, which may impact the harmony between the [United States] and Pennsylvania constitutions") (internal citation omitted).

Under *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), this Court considers the following four factors in assessing the scope of the Pennsylvania provision:

> (1) the text of the provision of our Constitution; (2) the history of the provision, including the case-law of this Commonwealth; (3) relevant case-law from other jurisdictions; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Applying these factors demonstrates that Pennsylvania should take a broader view of what constitutes punishment, especially as to children.

1. Text

Our courts have generally held that "[t]he *ex post facto* clauses of the United States and Pennsylvania Constitutions are virtually identical in language, and the standards applied to determine *ex post facto* violations under both constitutions are comparable." *Commonwealth v. Allshouse*, 36 A.3d 163, 184 (Pa. 2012) (citing *Commonwealth v. Young*, 637 A.2d 1313, 1317 n.7 (Pa. 1993)). This assumption demands closer study.

Read without context, the text of neither *Ex Post Facto* Clause provides a definition of punishment. On the other hand, the location of the two Clauses speaks volumes. Pennsylvania's *Ex Post Facto* Clause is found within the Declaration of Rights, which delineates the "rights reserved and retained by the people." *Gondelman v. Commonwealth*, 554 A.2d 896, 904 (Pa. 1989). In contrast, the

federal Clause is not contained within the Bill of Rights, but within Article 1, Section 9, which limits the power of the Legislature, and within Article 1, Section 10, which limits the powers of states. U.S. Const. art. I, §§9-10.

Only in Pennsylvania do people have a fundamental right to be free of *ex post facto* laws. Under Pennsylvania law, the *Ex Post Facto* Clause announces a separate and distinct right, innate to an individual's "liberty" and "pursuit of happiness." Pa. Const. art. I, §1. *See also* Robert Woodside, *Pennsylvania Constitutional* Law 3 (1985) (noting the Article "designated rights of the individual"); Pa. Const. art. I, §25 (declaring that "everything in this article is excepted out of the general powers of government and shall forever remain inviolate"). The Clause must be given its independent due.

2. History And Pennsylvania Case Law

Pennsylvania's *Ex Post Facto* Clause was enshrined in our Constitution a "full ten years" before its federal counterpart. *See Edmunds*, 586 A.2d at 897. Both provisions were adopted to bar the retroactive application of criminal laws and increases in penal sanctions. *Commonwealth v. Lewis*, 6 Binn. 266, 268 (Pa. 1814) (citing *Calder v. Bull*, 3 U.S. 386, 390 (1798)); *Commonwealth v. Rose*, 81 A.3d 123, 128 (Pa. Super. 2013) (*en banc*); *Allshouse*, 36 A.3d at 184; *Hess v. Werts*, 4 Serg & Rawle 356, 364 (Pa. 1818). But neither *Calder*, nor any early Pennsylvania case, defined what constitutes "punishment" for *ex post facto* purposes.

Pennsylvania has long taken divergent approaches towards punishment. At its founding, William Penn and his Society of Friends steered Pennsylvania away from the then nationally-accepted view of corporal punishment as the norm. *See* Robert R. Tyson, *Essay on the Penal Law of Pennsylvania*, Law Academy of Philadelphia 9-13 (1827). These ideas eventually led to an emerging emphasis on surveillance and solitude instead of corporal sanctions. *See generally*, Michael Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York (1995) (discussing the individualized, panoptic "Pennsylvania model" of punishment). For example, Philadelphia's Walnut Street Prison required offenders entering and leaving the prison to record their information and history as a means of tailoring punishments. "As a result, future newcomers to Walnut Street could be compared against institutional records, and in the event of a match punishment and reform-related decisions could be made accordingly." Logan, *Knowledge as Power*, *supra*, at 3 (citing Pamela Sankar, *State Power and Record-Keeping: The History of Individualized Surveillance in the United States, 1790–1935*, (Ph.D. Diss. U. of Penn., 1992)).

Early in its history, Pennsylvania also considered as punishment sanctions that could be viewed as collateral. In 1804, the punishment for perjury "shall be the forfeiture of a sum of not exceeding five hundred dollars, imprisonment at hard labour not more than seven years, disqualification for any office under the

commonwealth, and the inadmissibility as a legal witness in any controversy." Robert R. Tyson, *Essay on the Penal Law of Pennsylvania*, Law Academy of Philadelphia 25 (1827) (citing 4 Sm. Laws. 200, repealed 1860); *cf. Commonwealth v. Abraham*, 62 A.3d 343, 350 n.8 (Pa. 2012) (referencing exclusion from public office as a collateral consequence). Such examples illustrate that Pennsylvania has often led the nation in defining punishment.

Under contemporary case law, both the United States and Pennsylvania *Ex Post Facto* Clauses utilize the *Mendoza-Martinez* test, but the two constitutions "afford separate bases for proscribing *ex post facto* laws," because the interest may not truly be identical. *Lehman*, 839 A.2d at 270 n.4; *see also Weaver*, 450 U.S. at 30; *Gaffney*, 733 A.2d at 622; *Interest of B.C.*, 683 A.2d 919, 927 (Pa. Super. 1996). The most significant difference in the case law is that, as applied in Pennsylvania, and as set forth above, the seventh factor alone might be dispositive. That is, a statute may be punitive when it is "so excessive relative to [its] remedial objective." *Lee*, 935 A.2d at 876 n.24; *see also Williams*, 832 A.2d at 972-73 (Pa. 2003) (leaving open this possibility, as explained in *Lee*); *cf. Hudson v. United States*, 522 U.S. 93, 101 (1997) (no one factor controlling).

Under *Lee* and *Williams*, this Court's case law supports the conclusion that the Pennsylvania *Ex Post Facto* Clause should be read more broadly than the

federal Constitution. Where, as here, a purportedly civil penalty is excessive, the law may be deemed punishment on that basis alone.

3. Other States

As set forth above, other state supreme courts have held that analogous sex offender registration laws are punitive under their state constitutions, even where the federal test is used. For example, in deciding whether sex offender registration is punishment, Indiana's Supreme Court explained,

> When we interpret language in our state constitution substantially identical to its federal counterpart, 'we may part company with the interpretation of the Supreme Court of the United States or any other court based on the text, history, and decisional law elaborating the Indiana constitutional right.' . . . [W]e often rely on federal authority to inform our analysis, even though the outcome may be different.

Wallace, 905 N.E.2d at 378. Other states that share common *Ex Post Facto* Clauses have similarly concluded that while the test they adopt is largely identical, the weight given to each factor and the outcome reached may be significantly different. *See e.g.*, *Starkey*, 305 P.3d at 1030 (finding the Oklahoma and Federal *Ex Post Facto* Clauses coextensive, but reaching an independent conclusion under the Oklahoma Constitution alone); *Letalien*, 985 A.2d at 27-28; *Doe v. State*, 189 P.3d at 1003, 1007, 1019. So too should Pennsylvania conduct an independent assessment of the *Mendoza-Martinez* factors and afford each factor the weight appropriate in this Commonwealth.

4. Policy

Finally, there are two "unique issues of state and local concern" that justify independent protections. *Commonwealth v. Russo*, 934 A.2d 1199, 1212 (Pa. 2007). These are Pennsylvania's significant presumption that children can be rehabilitated and Pennsylvania's recognition that reputation is a fundamental right.

First, Pennsylvania has a policy interest in the rehabilitation of children.[19] Pennsylvania has juvenile proceedings, in which the purpose "is to seek treatment, reformation and rehabilitation of the youthful offender, not to punish." *Commonwealth v. S.M.*, 769 A.2d 542, 544 (PA. Super. 2001) (internal quotations omitted); Tr. Ct. Op. at 15; A21-A22, *In re. B.B.*; *see also* R.R. 417-421, *Memorandum in Support* (discussing the policy underlying children's treatment). While a child has no constitutional right to treatment in juvenile court, only after a careful individualized assessment may he suffer longer and more severe adult consequences. R.R. 419, *Memorandum in Support*; 42 Pa.C.S. §6322(a). Even where a child commits murder or repeat offenses, permanent adult classification is not automatic because the Legislature has expressed a "belief that there will be instances where the young offender's need for care, guidance and control as a child

[19] As the trial court observed in its Eighth Amendment analysis, "[s]uch lifetime registration is also contrary to the rehabilitative goals of our juvenile justice system, as a court of second chances." Tr. Ct. Op. at 34. Appellees agree. Although Appellees do not raise a statutory claim before this Court, SORNA goes well beyond the jurisdictional bounds of the Juvenile Act. *See Memorandum in Support*.

outweighs the state and society's need to apply legal restraint and discipline as an adult." *Commonwealth v. Pyle*, 343 A.2d 101, 104 (Pa. 1975); 42 Pa.C.S. §6322(a) (providing for decertification).

In contrast, federal law, while accounting for youth, does not possess a juvenile court and automatically treats certain classes of children as adults. 42 U.S.C. §5032 (providing for mandatory treatment as an adult in special cases). The rehabilitative potential of children suggests that the Pennsylvania *Ex Post Facto* Clause should be read more broadly, where, as here, the sanction applies to children.

Pennsylvania has a second, major policy difference from the federal government regarding the right to reputation. Our Commonwealth stands alone in elevating the right to reputation to a fundamental right. Pa. Const. art. I, §1; Section VI, *supra*. In contrast, under the United States Constitution "[t]he words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

The protection of one's reputation is a "unique issue[] of state and local concern" that justifies the greater protections afforded under Pennsylvania's Constitution. *Russo*, 934 A.2d at 1212 citing *Edmunds*, 586 A.2d at 895. As a matter of policy, where, as here, a sanction infringes on an individual's reputation,

this harm should weigh in favor of finding the sanction punitive. This is so because reputation is commensurate with liberty in the Commonwealth. Pa. Const. art. I, §1. For this reason also, Article I, Section 17 affords greater protection than its federal counterpart and comprises an independent state ground to conclude that lifetime sex offender registration of children is punitive.

IX. REGISTRATION OF CHILDREN VIOLATES THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONAL BANS ON THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

It is punishment to brand a child as young as fourteen as a registered "sex offender" for the rest of his life. *See* Section VIII, *supra*. Such punishment is disproportionate when applied to children. Children are less mature, are more vulnerable to negative influences, lack control over their surroundings, and will mature and reform over time. Tr. Ct. Op. at 16-17; *Miller*, 132 S.Ct. at 2458, 2464-69; *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). The lower court properly held that as applied to children adjudicated in juvenile court, SORNA violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution. Tr. Ct. Op. at 35-36; U.S. Const. Amend. VIII, XIV; Pa. Const. art I. Sec 13. This is the same result properly reached by the Supreme Court of Ohio. *In re C.P.*, 967 N.E.2d at 732; *see* Section IX.B, *infra*. This Court should affirm.

A. Lifetime Sex Offender Registration Is A Disproportionate Punishment For Children Under The Eighth Amendment.

The Eighth Amendment's prohibition on cruel and unusual punishments "'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller*, 132 S.Ct. at 2463 (quoting *Roper*, 543 U.S. at 560). "The right flows from the basic 'precept of justice that punishment for crime should be graduated and proportionated to [the] offense.'" *Roper*, 543 U.S. at 560 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Proportionality is measured "according to 'the evolving standards of decency that mark the progress of a maturing society.'" *Miller*, 132 S.Ct. at 2463 (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976) (internal citations omitted)). Proportionality review must take into account that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S.Ct. at 2464.

The parties agree that a categorical or facial Eighth Amendment challenge, as here, requires a two-part proportionality review. Brief of Appellant at 39-40. First, the court considers whether there is a national consensus against the sentencing practice at issue. *Graham v. Florida*, 560 U.S. 48, 62 (2010). This exercise is necessary, but "not itself determinative of whether a punishment is cruel and unusual." *Id.* at 67. Second, the Court determines "in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* at 48-49 (citing *Roper*, 543 U.S. at 564).

1. No National Consensus Favors Mandatory, Lifetime Juvenile Sex Offender Registration.

In *Miller*, the United States Supreme Court declared unconstitutional mandatory juvenile life without parole. *Miller*, 132 S.Ct. at 2471. At the time, 28 states and the federal government had such laws in place. *Id*. In *Graham*, the high court struck juvenile life without parole sentences for non-homicide offenses "even though 39 jurisdictions permitted that sentence." *Id*. As to SORNA, the raw numbers are similar. In 2013, 38 states required registration for some adjudicated children. *Raised on the Registry*, at 17. Yet, as the *Miller* Court observed, "simply counting" states could "present a distorted view." *Miller*, 132 S.Ct. at 2459, 2472.

A closer analysis reveals that few states require mandatory, lifetime registration of children. A 2011 legislation review "found that only a small number of states were registering child sex offenders based *solely* upon the type of offense." *Raised on the Registry*, at 24 (citing Carole J. Petersen and Susan M. Chandler, *Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders*, 3 Wm. & Mary Pol'y Rev. 1, 11 (2011)). To the contrary, most states have safeguards such as "judicial discretion, consideration of individual circumstances, assessment of risk, or early termination of juvenile registration." *Id*; *see also* R.R. 221, *Caldwell* ¶3(B). For example, Wisconsin provides for judicial decision-making

based on facts about the child, the offense and a risk-assessment. W.S.A. §938.34(15m).

Reaction to the federal Adam Walsh Act further demonstrates the lack of national support for juvenile sex offender registration. Title I (SORNA) requires states to register children adjudicated of certain offenses. 42 U.S.C. §16911(4). The penalty for non-compliance is the loss of 10% of a state's federal funding under the Omnibus Crime Control and Safe Streets Act. 42 U.S.C. §16925. Despite this financial "stick," only seventeen states and three territories have "substantially implemented" SORNA. Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Substantial Implementation Reports: States and Territories, *available at* http://ojp.gov/smart/sorna.htm.

Moreover, a 2013 study by the Government Accountability Office found that of the nineteen states and territories that had then complied, eighteen deviated from the federal requirements. United States Government Accountability Office, Report to the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, *Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects*, GAO-13-211, 15 (Feb. 2013) *available at* http://www.gao.gov/products/GAO-13-211. For example, Maryland deviates from SORNA's requirements in that a child's registration is not for life,

but for a maximum of five years and is discretionary with the trial court based upon a risk-assessment. Md. Code Crim. Proc. §§11-704(c)(1), 11-704.1(d), 11-707(a)(4)(iv); *see also* SMART Office, *SORNA Substantial Implementation Review, State of Maryland—Revised* (July 19, 2011), *available at* http://ojp.gov/smart/pdfs/sorna/Maryland.pdf.

When looking more closely at the lack of substantial compliance with federal SORNA, "[t]he most commonly cited barrier to SORNA compliance was the act's juvenile registration and reporting requirements, cited by 23 states." Search Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA) at 2, *available at* http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf. A resolution of the Council of State Governments "strongly" opposed including children in SORNA. Council of State Governments, Resolution in Opposition to the Sex Offender Registration and Notification Act as it Applies to Juvenile Offenders (Dec. 6, 2008), *available at* http://goo.gl/sthtK2. New York took the position that including children in SORNA is in "direct conflict" with the state's "long standing public policy of treating child offenders differently from adult offenders so that children have the best opportunity of rehabilitation and reintegration." Letter from Risa S. Sugarman, Deputy Commissioner, State of New York Division of Criminal Justice Services to Linda Baldwin, Director, U.S.

Department of Justice, "SORNA General Information," (August 23, 2011) *available at* http://goo.gl/mIvk8B. The United States Attorney General found that juvenile registration was a primary reason for non-compliance by the states. Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1631-37 (Jan. 11, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-11/pdf/2011-505.pdf (eliminating requirement that children be included on state Internet registries, but explaining that the Attorney General lacks the authority to eliminate juvenile registration from the federal SORNA).

Resistance to lifetime juvenile registration is also evident in the behavior of prosecutors and juvenile courts. *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (taking into account juror behavior). Prosecutors may avoid mandatory sex offender registration and "selectively protect some youth" by "dismiss[ing], divert[ing], or chang[ing] the charges for juvenile sex offense cases." R.R. 219, *Letourneau* ¶D3; *Letourneau*, et al., *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?* Criminal Justice and Behavior, vol. 37, 3553-569, 565 (2010). *See also* Brief of Appellant at 48 (Deputy Prosecutor observing that "there are elements whose merits reasonable people could disagree over to be amended and improved"). Moreover, "demographic factors including

age and race also influence[] prosecutors' decisions, thus introducing the possibility of inequity." R.R. 219, *Letourneau* ¶D3.

Prior to SORNA's effective date, juvenile courts released many children from supervision thereby circumventing its retroactive application. 42 Pa.C.S. §9799.12; *see also* A6, *In re B.B.* Although it would be impossible to document the reasons for partial "not guilty" verdicts and negotiated pleas to non-SORNA offenses, anecdotally some juvenile courts appear reluctant to convict on SORNA offenses. Collectively, these facts demonstrate that no national consensus supports registration of children as "sex offenders" for life.

2. An Independent Review Demonstrates That Mandatory, Lifetime Sex Offender Registration Violates The Eighth Amendment.

The second step of Eighth Amendment review is the exercise of independent moral judgment. A court considers "the culpability of the offenders at issue in light of their crime and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67-68 (internal citations omitted). This review must take into account the distinctive qualities of youth set forth in detail in Section I, *supra*. *See also Miller*, 132 S.Ct at 2465-66; *Graham*, 560 U.S. at 76; R.R. 322-27, *Memorandum of Support*.

As to moral culpability, children who offend sexually have "diminished culpability and greater prospects for reform." *Miller*, 132 S.Ct. at 2464. These features are not only common sense, but the product of immature adolescent brain development. *Miller*, 132 S.Ct. at 2464-65. *See also J.D.B.*, 131 S.Ct. 2394, 2403 (2011); *Gall v. United States*, 552 U.S. 38, 58 (2007); *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Children who commit sex offenses are no different. They sexually offend for different reasons than adults—reasons related to impulsivity, immaturity and sexual curiosity. R.R. 232, *del Busto* ¶13. An overwhelming majority will not sexually reoffend. R.R. 216, *Letourneau* ¶A; R.R. 232-33, *del Busto* ¶¶14, 19; R.R. 221-23, *Caldwell* ¶3(C).

There is no question that SORNA offenses are serious. Yet, here too youth is relevant. One's youth may reflect on "the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 132 S.Ct. at 2468. In addition, a child "might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth." *Id.*

As to the severity of the punishment, it is difficult to overstate the impact that sex offender registration has on a child's life. *See* Sections IV, VIII, *supra*; Tr. Ct. Op. at 10-15, 19, 34; R.R. 181-87, *Registration Requirements* (9799.10-9799.41); R.R. 224, *Caldwell* ¶5(A); R.R. 232-33, *del Busto* ¶18. As the Supreme Court of Ohio explained:

> [f]or juveniles, the length of the punishment is extraordinary, and it is imposed at an age at which the character of the offender is not yet fixed. Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth.

In re C.P., 967 N.E.2d at 741-42. Moreover, a lifetime punishment is significantly longer when imposed on a child than on an adult. *Miller*, 132 S.Ct. at 2466; *Graham*, 560 U.S. at 70.

No penological justifications—retribution, deterrence nor rehabilitation—justify imposing mandatory, lifetime sex offender registration on children "even when they commit terrible crimes." *Miller*, 132 S.Ct. at 2465. "Because'[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'" *Miller*, 132 S.Ct. at 2465 (quoting *Graham*, 560 U.S. at 71 (internal citations omitted)). This applies with full force to juvenile sex offenders, who offend for reasons related to their immaturity and their environment, over which they have little control. R.R. 232, *del Busto* ¶¶13-15.

SORNA cannot be justified through the penological aim of deterrence. SORNA intends to deter sex offenders from re-offending, but fails in practice to do so. *See* Section VIII.A.2.d, *supra*. SORNA is an ineffective deterrent as to children "because 'the same characteristics that render children less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." Section I, *supra*; Miller, 132 S.Ct. at 2465 (quoting *Graham*, 560 U.S. at 71-72 (internal citations omitted)); *see also* R.R. 216-18, *Letourneau* ¶¶C(1)-(2); R.R. 223, *Caldwell* ¶4; R.R. 238, *Pittman* ¶5.

SORNA does not promote rehabilitation, but is antithetical to it. A lifetime punishment "forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. Sex offender registration inhibits the ability of "children to become responsible and productive members of the community," 42 Pa.C.S. §6301, by limiting their ability to find and keep housing, employment and schooling and by forever branding them dangerous. Section VI, *supra;* R.R. 237-38, *Pittman* ¶¶3-4; R.R. 232-33, *del Busto* ¶18; R.R. 218-19, *Letourneau* ¶¶D1, D3.

B. Lifetime Sex Offender Registration Of Children Violates The Eighth Amendment Because It Is Mandatory.

Lifetime juvenile sex offender registration is facially unconstitutional. In the alternative, the penalty violates the Eighth Amendment because it is mandatory. This argument draws upon Eighth Amendment jurisprudence prohibiting mandatory imposition of the death penalty. *Miller*, 132 S.Ct. at 2464; *see also*

Sumner v. Shuman, 483 U.S. 66, 73 (1987). *Miller* extended this line of reasoning to cases involving children, reasoning if "'death is different,' children are different too." *Miller*, 132 S.Ct. at 2470 (distinguishing *Harmelin*, 501 U.S. 957, 995 (1991)).

SORNA's mandatory registration is unconstitutional because it forecloses the court from considering youthful attributes. These include the child's "age, level of maturity, family and home environment, the circumstances of the offense, the extent of the child's participation in the unlawful conduct, the impact of familial and peer pressures, the child's ability to negotiate with police or prosecutors, and the possibility of rehabilitation." *Commonwealth v. Batts*, 66 A.3d 286, 291 (Pa. 2013). These are precisely the factors juvenile courts are adept at weighing. *See, e.g.*, A27, *In re B.B.*

Retribution—already a doubtful justification—is significantly less justified when lifetime sex offender registration is mandatory. "[T]he retribution interests of the State cannot be characterized according to a category of offense" because the circumstances of the offense may vary widely. *Shuman*, 483 U.S. at 84. As applied here, the circumstances of a SORNA offense may likewise vary widely possibly involving consensual sexual activity between peers. *See, e.g.*, 18 Pa.C.S. §3125(a)(7). Indeed, such a case is already pending before the Superior Court. *In re: O.M.*, CP-65-JV-0000551-2012, May 2, 2013 (Pa. Ct. Comm. Pl.

Westmoreland) (Op. J. Driscoll) (appeal pending at 852 WDA 2013), attached at Appendix A251-A254. In that case, the trial judge expressed his frustration, stating:

> [O]ne act of consensual intercourse with a twelve-year-old by a juvenile does not provide a rational basis for requiring lifetime registration. The facts of this matter do not prove (or suggest) that the juvenile is possessed of qualities of deviancy, has or is likely to commit acts of forcible sex, or is in any way a threat to the safety of others. In fact, it appears that actual sex offender evaluations have determined the juvenile to be an excellent candidate for compete rehabilitation.

Id at A253. Thus, because it is mandatory, Pennsylvania's lifetime juvenile sex offender registration statute violates the Eighth Amendment.

C. Lifetime Sex Offender Registration Of Children Violates The Pennsylvania Constitution.

This Court can and should grant relief under the Eighth Amendment. Article I, Section 13 of the Pennsylvania Constitution provides broader protections and an alternative basis to affirm. Appellees address each of the *Edmunds* factors in turn. *Edmunds*, 586 A.2d at 895.

1. Text

On its face, the text of Article I, Section 13 prohibits a broader class of punishments than the Eighth Amendment. Article I, Section 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, §13. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted." U.S. Const. Amend. VIII. Pennsylvania prohibits "cruel" punishments, not only punishments that are both "cruel and unusual."

In *Batts*, the impact of the omission of the word "unusual" was unclear. *Batts*, 66 A.3d at 297-98. *Batts* observed that the United States Supreme Court seemingly treated the phrase "cruel and unusual" as "an amalgam." *Batts*, 66 A.3d at 298 (citing *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality)). This does a disservice to the Court, which does not dismiss a word of the United States Constitution. *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) ("Every word appears to have been weighed with the utmost deliberation, and its full force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning."). The High Court has distinguished "cruel" from "unusual." *See Harmelin*, 501 U.S. at 994-95 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense. . ."); *Harmelin*, 501 U.S. at 967 ("As a textual matter, of course. . . a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.'").

Unlike the Eighth Amendment, Article I, Section 13 does not turn on whether a punishment is "unusual." Whether a sentence is common or rare is irrelevant. For this reason, the first step of Eighth Amendment proportionality review—consideration of whether there is a national consensus against the

practice—is not necessary to the analysis. *Cf. Roper*, 543 U.S. at 563. This Court may thus find that juvenile sex offender registration is "cruel," even if it is common.

2. History And Pennsylvania Case Law

The provision barring "cruel" punishments was omitted from the Pennsylvania Constitution of 1776 and added in 1790. Constitution of Pennsylvania 1790, Art. 9, Section 13. This provision was renumbered to Article I, Section 13, but otherwise unchanged in 1838 and 1873. Ken Gormley, et al., *The Pennsylvania Constitution: A Treatise on Rights and Liberties* at 518 (2004). "[T]here were early hints in Pennsylvania case law that Section 13 represents a substantive limit on legislative authority over punishment." *Id.* at 519 (citing *Commonwealth v. Hough*, 1 Dist. 51 (Pa. Ct. Comm. Pl. Phila. 1892) (holding constitutional a law allowing perpetual imprisonment for failure to pay a fine because it provided an exception for those unable to pay).

As this Court recently observed, it remains unresolved whether Article I, Section 13 is more expansive than the Eighth Amendment. *Commonwealth v. Baker*, 78 A.3d 1044, 1048 n.5 (Pa. 2013) ("We do not here hold that the state and federal constitutions are necessarily co-extensive with respect to non-capital mandatory recidivist sentences."); *see also Baker*, 78 A.3d at 1054 (Castille, C.J., concurring); *Commonwealth v. Cunningham*, 81 A.3d 1, 15-16 (Pa. 2013)

(Castille, C.J., concurring). While past cases found the Constitutions co-extensive, these opinions were limited to the specific punishment at issue. Importantly "[t]he court tends to look on a case-by-basis basis whether the state constitution follows federal law in each particular instance." Gormley, *et al.*, *supra*, at 521 (citing *Commonwealth v. Means*, 773 A.2d 143, 147-57 (Pa. 1991) (plurality)). *Edmunds* is also of recent vintage and its analysis has sometimes been deemed unnecessary. For example, in *Batts*, the *Edmunds* analysis was not briefed by the parties. *Batts*, 66 A.3d at 297, n.5; *see also Commonwealth v. Zettlemoyer*, 454 A.2d 937, 968 (Pa. 1982) (decided before *Edmunds*).

This Court's prior cases demonstrate that a distinguishing feature of Article I, Section 13 jurisprudence is a historical review of Pennsylvania's sentencing legislation. *Zettlemoyer*, 454 A.2d at 968 (Pennsylvania's history imposing the death penalty); *Means*, 773 A.2d at 151 (Pennsylvania's history of capital sentencing evidentiary rules); *Cunningham*, 81 A.3d at 11 (Castille, C.J., concurring) (Pennsylvania's use of juvenile life without parole). Such an approach is not required by the Eighth Amendment, which is focused on whether there is a national consensus against the sentencing practice at issue, rather than the historical use within Pennsylvania. *Graham*, 560 U.S. at 62.

In the instant case, unlike the adult sentencing cases, Pennsylvania has no history of imposing sex offender registration upon children adjudicated in

Pennsylvania's juvenile courts. Since the inception of Megan's Law I, Pennsylvania courts have imposed registration only upon an adult conviction. *See* Act 24 of 1995 (S.B. 7); Act 46 of 1996 (H.B. 814); Act 18 of 2000 (S.B. 380); Act 113 of 2000 (S.B. 844); Act 127 of 2002 (S.B. 138); Act 152 of 2004 (S.B. 92); Act 178 of 2006 (S.B. 944); Act 98 of 2008 (H.B. 301). In addition, when SORNA added children to Pennsylvania's sex offender registration scheme, it was the federal government that forced the issue, upon the threat of loss of funding. 42 U.S.C. §16925. No legislative history supported the change. Tr. Ct. Op. at 8-9; A45, *In re W.E.*; A31, *In re B.B.*

3. Other States

In 2012, the Supreme Court of Ohio held that its juvenile SORNA statute violated the Eighth Amendment and the Ohio Constitution. *In re C.P.*, 967 N.E.2d at 738. This decision was issued prior to *Miller*, which only strengthens its holding. This Court should follow this persuasive authority.

Prior to *In re C.P.*, Ohio had two juvenile sex offender registration categories. The more restrictive category, which applied to some "serious youthful offenders," is analogous to Pennsylvania SORNA. *Id*. at 736. The Ohio statute required mandatory lifetime registration, with the potential for review after 25 years; quarterly, in-person reporting; and the mandatory reporting of changes within three days. *Id*. at 736-37. Ohio also mandated community notification and

inclusion in the state's Internet registry. *Id*. at 736. Pennsylvania does not include children in the public sex offender website, but their registration status will nevertheless be widely disseminated. Sections III.C, VI.C, *supra*; R.R. 237, *Pittman* ¶1; R.R. 181, *Registration Requirements* ¶¶2, 32-34, 37, 39, 40-42 (9799.10, 9799.18, 9799.22); A257-A259, *Logan* ¶¶12-18, 22-27. *See also* Tr. Ct. Op. at 14-15; A46, A55, *In re W.E.*; A19, *In re B.B.*

Moreover, "serious youthful offenders" subject to the Ohio registration law were categorically more culpable than "juvenile offenders" in Pennsylvania. 42 Pa.C.S. §9799.12. Ohio's "Serious youthful offenders" "had a court impose on them a serious youthful offender ("SYO") dispositional sentence," a procedural process that takes into account individual characteristics. *In re C.P.*, 967 N.E.2d at 735.[20] In essence, this was an effort by Ohio to individually identify the children in juvenile court who are most dangerous. Yet, even for these most culpable children in juvenile court, Ohio struck the penalty. Pennsylvania's juvenile offenders have no such procedural protection.

4. Policy

As a matter of policy, Article I, Section 13 should be applied more broadly than the Eighth Amendment. The first reason for this is federalism. The Eighth

[20] In Ohio, "serious youthful offenders" have a jury trial right. *In re D.H.*, 901 N.E.2d 209 (Ohio 2009).

Amendment "includes a federalism-based constraint that looks to sentences for similar offenses in other states." *Baker*, 78 A.3d at 1055 (Castille, C.J., concurring); *Cunningham*, 81 A.3d at 17 (Castille, C.J., concurring). The United States is reluctant to invalidate a sentence imposed by a state government in a state court. "[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure . . . 'Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.'" *Harmelin*, 501 U.S. at 999 (Kennedy, concurring). Pennsylvania, on the other hand, has no federalism-based inhibitions. This Court need not fear that striking down a Pennsylvania sentence could intrude upon the sovereignty of another state that has different norms. *See also* 42 U.S.C. §16925(b)(1) (state sovereignty).

A second, Pennsylvania-specific value is "comparative and proportionate justice." *Baker*, 78 A.3d at 1055-56 (Castille, C.J., concurring); *Cunningham*, 81 A.3d at 17 (Castille, C.J., concurring). The federal government is not concerned with the internal coherence of Pennsylvania's own "overall legislative framework." *Baker*, 78 A.3d at 1057; *see also Harmelin*, 501 U.S. at 1004 (Kennedy, concurring) (declining to conduct comparative analysis of sentences imposed within Michigan). Pennsylvania, however, is highly concerned with comparative justice within the Commonwealth.

Under Pennsylvania's SORNA, two similar groups are afforded dramatically different experiences of justice in juvenile court—children who commit serious non-sexual offenses and children who commit serious sexual offenses. These children are similarly situated. They are young, they have committed serious crimes and they are capable of rehabilitation. Section I, *supra;* R.R. 232, *del Busto* ¶¶16, 19; R.R. 216, *Letourneau* ¶¶B, C(1)(iii); *see also* 42 Pa.C.S. §6302 (defining "child"). Yet, for these similarly situated children, SORNA leads to vastly different experiences. A child adjudicated delinquent for attempted murder, aggravated assault or armed robbery will be provided supervision and treatment; if he succeeds, he will be discharged from supervision. Even if he fails, the juvenile court's jurisdiction will expire at age 21. 42 Pa.C.S. §6302. In contrast, if the child commits a sexual offense, he will be provided supervision and treatment, but he will *also* be subjected to mandatory, lifetime registration as a "sex offender." This is contrary to "comparative and proportionate justice" and, for this reason also, "cruel." *Baker*, 78 A.3d at 1055-56 (Castille, C.J., concurring).

CONCLUSION

WHEREFORE, Appellees, by and through counsel, respectfully request that this Honorable Court affirm the lower Court and declare 42 Pa.C.S. §9799.10 *et seq.* unconstitutional as it applies to children retroactively and prospectively.

Respectfully Submitted,

/s/ Marsha L. Levick

Abigail E. Horn, Esq.
PA Attorney No. 203678
Aaron Marcus, Esq.
PA Attorney No. 93929
DEFENDER ASSOCIATION OF PHILADELPHIA
1441 Sansom Street
Philadelphia, PA 19102
Anthony J. Tambourino, Esq.
PA Attorney No. 86446
YORK COUNTY PUBLIC DEFENDER'S OFFICE
45 N. George Street
York, PA 17401

Kurt A. Blake, Esq.
PA Attorney No. 68791
BLAKE & GROSS, LLC
29 East Philadelphia Street
York, Pennsylvania 17401

Marsha L. Levick, Esq.
PA Attorney No. 22535
Riya Saha Shah, Esq.
PA Attorney No. 200644
Catherine Feeley, Esq.
PA Attorney No. 316097
JUVENILE LAW CENTER
The Philadelphia Building
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Korey Leslie, Esq.
PA Attorney No. 90866
KOREY LESLIE, ATTORNEY-AT-LAW, LLC
101 South Duke Street
York, PA 17401-2038

Traci McPate, Esq.
PA Attorney No. 90572
GRIEST, HIMES, HERROLD, SCHAUMANN, REYNOSA LLP.
129 East Market Street
York, PA 17401

CERTIFICATE OF COMPLIANCE

The undersigned certifies that based on the count of the word processing system, the foregoing brief complies with Pa.R.A.P. 2135(d) and this Court's April 9, 2014 Order granting acceptance of a Brief in excess of the word limit. It contains 19,734 words.

/s/ Marsha L. Levick
Marsha L. Levick
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
(215) 625-0551

PROOF OF SERVICE

On this 21st day of April, 2014, Riya Saha Shah, Esq., being duly sworn according to law does hereby state and aver that she has, by electronic filing and first class mail, served the foregoing *Brief of Appellees* upon:

James Zamkotowicz, Esq.
Caleb Enerson, Esq.
Thomas Kearney, III, Esq.
York County District Attorney's Office
45 N. George St.
York, PA 17401

/s/ Riya Saha Shah
Riya Saha Shah, Esq.
Juvenile Law Center
The Philadelphia Building
1315 Walnut Street, Suite 400
Philadelphia, PA 19107