IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
JUVENILE DIVISION

In the Interest of

JUVENILES' REPLY TO COMMONWEALTH'S MEMORANDUM OF LAW OPPOSING MOTIONS FOR NUNC PRO TUNC RELIEF

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

Barbara Lee Krier
Anthony Tambourino
York County Public Defender
York County Judicial Center
45 North George Street
York, PA 17401
(717) 771-9217

Defender Association of Philadelphia
Abigail Horn, Aaron Marcus, Megan A. Perez
Amicus Curiae
1441 Sansom Street
Philadelphia, PA 19102
(267) 568-3190

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ARGUMENT

I. SORNA is Punitive in Effect Under the Seven *Mendoza-Martinez* Factors.

In the Commonwealth's Memorandum of Law Opposing Juveniles' Motions for *Nunc Pro Tunc* Relief [hereinafter "Commonwealth's Memo"], the Commonwealth tepidly attempts to refute Petitioners' argument that SORNA is punishment as applied to children. *See, e.g.*, Commonwealth's Memo at 9 ("conced[ing]" that SORNA is "similar[]" to probation, a historical form of punishment, but arguing that they are not "equal[]"). Because Petitioners have fully briefed SORNA's punitive effects especially when applied to juveniles, they do not repeat them here. *See* Petitioners' Memorandum of Law in Support of Motions for *Nunc Pro Tunc* Relief [hereinafter "Petitioners' Memo"] at Section IV. Rather, Petitioners reply briefly to address five assertions made by the Commonwealth.

First, in its analysis of the first *Mendoza-Martinez* factor, whether a sanction imposes an affirmative disability or restraint, the Commonwealth improperly cites to *Commonwealth v. Mountain*. *See* Commonwealth's Memo at 8, citing *Commonwealth v. Mountain*, 711 A.2d 473, 477 (Pa. Super. 1998). This case is inapposite for several reasons: *Mountain* raised no *ex post facto* claim; analyzed the long out-of-date, Megan's Law I, 42 Pa.C.S. § 9793; concerned registration applied only to adults; and was based upon an appellant's brief so weak that the dissenting member of the three judge panel questioned the majority's decision to reach and attempt to "make sense of appellant's claims." *Mountain*, 711 A.2d at 476; *see also id.* at 479 (Johnson, J., dissenting). Moreover, the registration requirements under scrutiny in *Mountain* were a ten-year registration period with yearly verification and the State Police had the duty to forward the information to local law enforcement where the registrant resides. 42 Pa.C.S. §§ 9795, 9796 (1998); *Mountain*, 711 A.2d at 478. These provisions are clearly distinct from the

burdensome registration and reporting requirements under SORNA. As set forth in detail in Petitioners' Memo, juveniles are required to register substantially more information, report nearly every change in circumstance and must provide in-person verification of registration every 90 days. The Commonwealth argues that "if turning over some information is deemed to be a very low burden, simply being required to provide additional information would not then tip the proverbial scales so as to constitute an affirmative disability or restraint." Commonwealth's Memo at 8-9. "Turning over" additional information is a gross understatement. The sheer volume of information, the increased in-person reporting requirements and the threat of felony prosecution for non-compliance renders any such comparison inapt.

Second, the Commonwealth asserts, without authority, that the Court should not consider SORNA's "substantial, secondary disabilities and restraints." Commonwealth's Memo at 9, n.2. This is incorrect. Under *Smith v. Doe*, a court considers "how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. 84, 99-100 (2003). The law's effects fall along a spectrum—from direct and major effects to effects that are indirect and minor. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. In other words, a court looks to all of a law's effects, both direct and indirect, and then seeks to determine whether they are major or minor and whether they are closely connected to the law or more tangential. *Id*.; *see also E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (considering indirect effects).

As to the secondary effects of sex offender registration laws, numerous state Supreme Courts have considered these effects when applying the *Mendoza-Martinez* test and have found them to constitute major disabilities. *See, e.g*., *Starkley v. Oklahoma Dep't of Corr.,* __P.3d__, * 16-17, 2013 Okl. 43 (Okl. 2013) (quoting Justice Souter in *Smith*); *Doe v. Dep't of Pub. Safety and Corr. Serv.*, 62 A.3d 123, 142-43 (Md. 2013); *Wallace v. State*, 905 N.E.2d 371, 379-80

(Ind. 2009). These cases demonstrate that disabilities and restraints that are major but indirect may be found punitive, especially, as here, when they are combined with major, direct disabilities.

Third, with regard to the sixth *Mendoza-Martinez* factor, whether SORNA is rationally related to a non-punitive purpose, the Commonwealth provides no research to counter Petitioners' evidence to which it stipulated, that recidivism rates for juveniles who offend sexually are exceedingly low. *See* Commonwealth's Memo at 12. *See also* Stipulations Regarding Expert Witnesses. The Commonwealth merely points out, without more, that the juveniles subject to SORNA are a subset of all juvenile sex offenders. *Id.* Petitioners addressed this very point in their Memorandum, but highlight it here for the Court's convenience. Dr. Michael Caldwell's expert testimony explains that sexual recidivism cannot be predicted by offense. "The extant research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents." Caldwell Affidavit at ¶ 3(D), Petitioners' Memo Exhibit J. In a study that compared the sexual recidivism rates of children assigned to three groups according to the severity of their offense, "[t]here was no significant difference in the recidivism rates of juvenile offenders" in each of the three groups. Letourneau Affidavit at ¶ C1(iii), Petitioners' Memo Exhibit H; Caldwell Affidavit at ¶ 3(F-G), Petitioners' Memo Exhibit J. This research is contained in the stipulated expert reports jointly filed by Petitioners and the Commonwealth on August 30, 2103.

Fourth, with regard to the last *Mendoza-Martinez* factor, whether SORNA is excessive, the Commonwealth asserts—again without authority—that Petitioners' claim fails because they have not suggested "a less excessive" alternative to SORNA. Commonwealth's Memo at 13. There is no requirement that petitioners set forth an alternative legislative scheme, but rather,

petitioners must only show that the law is not reasonably designed to fulfill its purported function. *See Commonwealth v. Williams*, 832 A.2d 962, 981 (Pa. 2003).

Petitioners have shown overwhelming scientific and sociological consensus that registration and notification are not only ineffective in pursuing public safety, but may be counterproductive. Nevertheless, an alternative method of addressing public safety is to put trust in the balanced and restorative juvenile justice system, which aptly provides for the protection of the public and for the rehabilitation, supervision and treatment of delinquent youth. 42 Pa.C.S. § 6301. Another alternative is to require sex offender registration only after an individualized risk-assessment, a more targeted and likely more effective method of creating a sex offender registry, and the method used under Act 21, 42 Pa.C.S. § 6402, *et seq*.[1]

Fifth, the Commonwealth cites to *Commonwealth v. Abraham*, a case which held that counsel was not ineffective for failing to advise a defendant that he would forfeit a teacher's pension as a result of his conviction for a crime related to his public office. *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012); *see also* 43 P.S. § 1311, *et seq*. *Abraham* is not on point for two reasons. First—although the issue is not before this court—it is Petitioners' position that sex offender registration is so "enmeshed" with and "intimately related to the criminal process" that counsel would be ineffective for failing to advise a child regarding SORNA. *Padilla v.*

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[1] A study for the National Institute of Justice concluded that an offense-based system, is less effective at predicting risk than evidence-based models of sex offender risk. Kristin Zgoba, Michael Miner, Raymond Knight, Elizabeth Letourneau, Jill Levenson & David Thornton, *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 Nat'l Inst. of Just. (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf. A study by the University of Nebraska similarly found that the state's prior law, which utilized a psychological risk assessment, was more effective at predicting sex offender recidivism than the post-Adam Walsh Act "Tier" version. Consortium for Crime and Justice Research, *Nebraska Sex Offender Registry Study*, University of Nebraska at Omaha (2013), http://s3.documentcloud.org/documents/750534/ne-sex-offender-recidivism-report2.pdf.

Kentucky, 130 S.Ct. 1473, 1481-82 (2010); *see also United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013) ("in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea"); *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. App. 2010) (same); *People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011) (same).

Moreover, *Abraham* was solely concerned with money. Requiring a child to register as a sex offender for life is nothing like "[n]ot getting money" after breaching an employment contract. *Abraham*, 62 A.3d at 350. *Abraham* held that the one time loss of a deferred pension is too minor to tilt a law toward punishment. *Id.* at 351. To equate a lifetime of registration and reporting requirements under threat of mandatory incarceration with the loss of a pension trivializes the harmful and serious effects of registration exemplified in Petitioners' Memo. *See* Petitioners' Memo at Section II. *See also* Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (May 2013).

II. Requiring Petitioners To Register As Sex Offenders Infringes On Petitioners' Right To Reputation Because Being Labeled A Registered Sex Offender Inaccurately Stigmatizes Juveniles And Is Substantially Different Than An Adjudication Alone.

The Commonwealth misunderstands Petitioners' claim under Article I, Section 1 of the Pennsylvania Constitution, which provides for the right to reputation. The Commonwealth asserts that being labeled a sex offender is no different than having a juvenile adjudication of delinquency. Additionally, the Commonwealth contends that because the registry is "non-public," and it cannot control what third parties may do, the law cannot be blamed for Petitioners' reputational loss. Commonwealth's Memo at 16-18. Both assertions are incorrect.

In Pennsylvania, "preservation of an individual's reputation is fundamental as it is recognized and protected by the Pennsylvania constitution. As such, [. . .] that right cannot be abridged without compliance with constitutional standards of due process . . . ." *Simon v.*

Commonwealth, 659 A.2d 631, 639 (Commw. Ct. 1995). Strict scrutiny applies when the Commonwealth communicates in some manner to defame or unjustly damage a person's reputation. *See Balletta v. Spadoni*, 47 A.3d 183, 191-92 (Commw. Ct. 2012) (recognizing that reputational damage in the constitutional context is established under the law of torts for defamation) (citing *Sprague v. Walter*, 543 A.2d 1078, 1084 (Pa. 1988)); *Nixon v. Dep't of Pub. Welfare*, 576 Pa. 385, 399-403 (Pa. 2003) (applying strict scrutiny to fundamental rights).

A person's reputation is harmed when he can show the defamatory character of the communication and the publication of the information by the defendant. *See* 42 Pa.C.S. § 8343. "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).

A. The Sex Offender Label Is Defamatory in Character.

Labeling a child a registered sex offender stigmatizes a child by perpetuating myths and falsehoods regarding his perceived dangerousness. The label is substantially more damaging to a child than the public availability of a juvenile record. 42 Pa.C.S. §§ 6307-08. Reputational impairment is not limited to the facts disclosed, but what the public may reasonably understand the communication to mean, i.e., "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); *see also* Restatement (Second) of Torts § 563; *Birl v. Philadelphia Electric Co.*, 167 A.2d 472, 475 (Pa. 1960).

In the case of SORNA, a lifetime label as a registered sex offender leads to consequences far greater than the availability of one's juvenile record alone. *See, e.g.*, Richard Tewksbury & Michael Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and*

Community Experiences, 26, Sociological Spectrum, 309, 330-32, (2006) (Registrants find "their status as a 'felon' was not as hard to overcome as their 'sex offender' label."); Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, Analyses of Soc. Issues and Pub. Pol'y, Vol. 7, No. 1, 1, 10-13 (2007) (generally discussing the public perception of registered sex offenders). Being placed on a sex offender registry sends a message to the public that the registered sex offender is likely to re-offend, is mentally ill and is dangerous. *See* Eric Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventative State*, Cornell Univ. Press (2006). *See also* 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) (finding that individuals who know a registered sex offender lives in their neighborhood are more likely to fear that a stranger will sexually abuse their child).

Other state Supreme Courts have recognized that disclosure of the sex offender label is far more damaging than disclosure of an adjudication for the crime. For example, quoting Professor Logan, 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.

State v. Letalien, 985 A.2d 4, 24 n.14 (2009) (quoting Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 138 (Stanford Univ. Press 2009)).

Placement on the registry leads to incorrect public assumptions that the individual is incapable of rehabilitation, likely to recidivate, is part of a homogenous class (i.e, all sex offenders are alike), and that he is a special kind of criminal. Marcus Galeste et al., *Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers*, 13(2) Western Crim. Rev. 4-24 (2012). Galeste, *et al.* showed that in reviewing news articles regarding sexual offenses "[a] strong association was found between sex offender registration and/or community notification laws and sex offender myths. That is, when an article discussed sex offender registration/notification, sex offender myths were also present in the article." *Id.* at 15. The body of literature on the subject uniformly concludes that registration and notification severely limit an individual's future employment, ability to keep a job, ability to find or retain housing, and can lead to depression, hopelessness, and fear for their own safety. Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of registered Sex Offenders*, 34 Am. J. Crim. J., 54-58 (2009) (collecting and referencing studies reaching these conclusions). A significant minority of registrants "have experienced vigilante activities such as property damage, harassment, and even physical assault." *Id.*

B. The Sex Offender Label Will Be Disclosed To Third Parties.

The Commonwealth asserts that because the registry is purportedly "non-public" it cannot defame petitioners. SORNA cannot be shielded by such a legal fiction. The Court should not ignore the numerous ways sex offender registry information is publicly communicated. First, a child's sex offender status is released to numerous parties and there are no limits on their

discretion to disseminate the information to others. *See* Logan Affidavit, Petitioners' Memo Exhibit H. A child's sex offender registry status is also directly disclosed by innumerable, mandatory in-person appearances and shared with other states that have public juvenile registries. *Id. See also* Petitioners' Memo at 42-63. The Commonwealth will publicly disclose the child's sex offender label if the child is ever arrested for failure to register. *See* Logan Affidavit, Petitioners' Memo Exhibit K. Petitioners will also be forced to self-disclose to numerous other entities like schools, jobs, and housing agencies. *Id*.

Under Pennsylvania law, 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). SORNA's illusory "non-public" registry evinces not only a negligent statutory scheme, but a deliberate disregard for whether petitioner's information is shielded. *Id.* The damage done by the inevitable and foreseeable disclosure of petitioners as registered sex offenders falls squarely within the ambit of what the Pennsylvania Constitution protects.

CONCLUSION

WHEREFORE, Petitioners, by and through counsel, respectfully request that this Honorable Court declare 42 Pa.C.S. § 9799.10 *et seq.* unconstitutional as it applies to juvenile offenders and violative of the Juvenile Act, declassify Petitioners as "juvenile offenders" and order the Pennsylvania State Police to remove their names, photographs, and all other information from the sex offender registry.

Respectfully submitted,

____

Barbara Lee Krier
Anthony Tambourino
York County Public Defender
York County Judicial Center
45 North George Street
York, PA 17401
(717) 771-9217
Supreme Court ID: 35608

Marsha L. Levick
Supreme Court ID: 22535
Riya Saha Shah
Supreme Court ID: 200644
Juvenile Law Center
1315 Walnut Street, Ste 400
Philadelphia, PA 19107
(215) 625-0551

Defender Association of Philadelphia
Abigail Horn, Aaron Marcus, Megan Perez
Amicus Curiae
1441 Sansom Street
Philadelphia, PA 19102
(267) 568-3190

VERIFICATION

On this 10th day of September, 2013, I hereby verify that the facts set forth in the Reply are true and correct to my knowledge, information and belief, and that any false statements made are subject to penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

____

Barbara Lee Krier, Supreme Court ID: 35608

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2013 I am serving a true and correct copy of the foregoing Juveniles' Reply to Commonwealth's Memorandum of Law Opposing Motions for *Nunc Pro Tunc* Relief as follows:

The Honorable John C. Uhler, Sr. Judge
York County Court of Common Pleas
45 N. George St.
York, PA 17401

James Zamkotowicz, Esquire
York County District Attorney's Office
45 N. George St.
York, PA 17401

Via Facsimile and/or e-mail transmission:
Kurt Blake, Esquire
Traci McPate, Esquire
Korey Leslie, Esquire

____

Barbara Lee Krier
Senior Assistant Public Defender
York County Judicial Center
45 North George Street
York, PA 17401
(717) 771-9217
Supreme Court ID: 35608