IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 119,796

STATE OF KANSAS,
Appellee,

v.

N.R.,
Appellant.

SYLLABUS BY THE COURT

1.

Mandatory lifetime postrelease registration under the Kansas Offender Registration Act, K.S.A. 2020 Supp. 22-4901 et seq., as applied to the juvenile sex offender in this case, does not constitute punishment for purposes of applying provisions of the Ex Post Facto Clause of the United States Constitution.

2.

Mandatory lifetime postrelease registration under the Kansas Offender Registration Act, K.S.A. 2020 Supp. 22-4901 et seq., as applied to the juvenile sex offender in this case, does not constitute punishment for purposes of applying provisions of the Eighth Amendment of the United States Constitution and section 9 of the Kansas Constitution Bill of Rights.

3.

Mandatory lifetime postrelease registration under the Kansas Offender Registration Act, K.S.A. 2020 Supp. 22-4901 et seq., as applied to the juvenile sex

offender in this case, does not infringe on the constitutional rights guaranteed under sections 1 and 18 of the Kansas Constitution Bill of Rights.

Review of the judgment of the Court of Appeals in 57 Kan. App. 2d 298, 451 P.3d 877 (2019). Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed September 17, 2021. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Rick A. Kittel, of Kansas Appellate Defender Office, argued the cause, and was on the briefs for appellant.

Jennifer Harper, assistant district attorney, argued the cause, and *Thomas R. Stanton*, district attorney, *Keith E. Schroeder*, former district attorney, and *Derek Schmidt*, attorney general, were with her on the briefs for appellee.

PER CURIAM: N.R. pled guilty to rape and was adjudicated a juvenile offender. As a result of this adjudication, he was required to register as a sex offender for five years under the Kansas Offender Registration Act (KORA). See K.S.A. 2006 Supp. 22-4906. Later amendments to KORA required N.R. to register for life. See K.S.A. 2020 Supp. 224906(d)(1), (h).

After failing to register in 2016, the State charged N.R. with violating KORA. N.R. moved to dismiss the charge, arguing that the lifetime registration requirements violated federal and state constitutional provisions against cruel and unusual punishment and the Ex Post Facto Clause of the United States Constitution. The district court denied the motion. The Court of Appeals affirmed, finding the lifetime registration requirements are not punishment as applied to N.R. and therefore do not trigger any of the constitutional provisions identified. On review, N.R. challenges the panel's holding. For the reasons stated below, we affirm.

FACTS

In August 2006, N.R. pled guilty to and was adjudicated of rape, a level 1 person felony. N.R. was 14 years old at the time he committed the offense. The magistrate judge sentenced N.R. to 24 months in a juvenile correctional facility but placed N.R. on 24 months' probation with community corrections. In November 2006, the magistrate judge additionally ordered N.R. to register "locally only, as a sex offender." N.R. was not required at that time to publicly register statewide or nationally. Although the magistrate judge's order did not specify how long N.R. would have to register locally, the statute in effect at the time of the adjudication—K.S.A. 2006 Supp. 22-4906(h)(1)—required N.R. to register for five years from the date of his adjudication.

In July 2011, just before N.R.'s registration period was about to expire, the Kansas Legislature substantially amended KORA. As a result of these amendments, N.R. was required to register for life. See K.S.A. 2011 Supp. 22-4906(h).

In June 2017, the State charged N.R. with four counts of failing to register pursuant to KORA. The complaint later was amended down to two counts. One count stemmed from an incident in August 2016, when N.R. was removed from his transitional housing program. N.R. was supposed to report in person to the Reno County Sheriff's Office within three days of his removal from the program because it constituted a change of residential address. He failed to do so. As for the other count, N.R. failed to report in person to the Reno County Sheriff's Office during the month of September 2016 as required. Because he had a previous registration violation, both of the 2016 charges were scored as level 5 person felonies.

Before trial, N.R. filed a motion to dismiss the case. Relevant here, N.R. argued KORA's mandatory lifetime registration requirements for juvenile sex offenders violate federal and state constitutional provisions against cruel and unusual punishment and the Ex Post Facto Clause of the United States Constitution. The State opposed the motion, claiming dismissal was inappropriate based on this court's decision in *State v. PetersenBeard*, 304 Kan. 192, 377 P.3d 1127 (2016), which held that KORA's lifetime registration requirements for adult offenders are not punitive and therefore are not subject to a punishment or ex post facto constitutional analysis.

At the hearing on the motion to dismiss, N.R. introduced two affidavits to support his motion: one from his fiancée and one from himself. As discussed further below, there is some dispute as to whether these affidavits were admitted into evidence. Each affidavit purportedly explained the various ways in which KORA's lifetime registration requirements specifically act as a punishment for N.R., his fiancée, and his young child. Both affidavits described how difficult it was for them to find and secure housing due to N.R.'s status as a sex offender; how hard it was for N.R. to find and maintain employment; how the $20 reporting fee imposed additional financial strain on the family because they already were a low-income household; how N.R. continued to struggle with his sobriety because treatment facilities and sober living houses across Kansas would turn him away due to his status, which led to homelessness and seeking shelter in drug houses; how neighbors and community members ostracized N.R. and his family when those individuals learned of his status, including two occasions where N.R. was threatened at gunpoint; how N.R. and his fiancée feared for their child's safety; how N.R. was concerned about not being able to participate in his child's school activities due to his status; how N.R. suffered from depression as a result of the lifetime registration requirements; and how N.R. attempted suicide as a result of his depression. The State reiterated the arguments from its response brief. After considering counsel's arguments,

the district court denied N.R.'s motion to dismiss based on this court's decision in *Petersen-Beard* holding that KORA lifetime registration requirements for adult offenders are not punitive.

The matter proceeded to a bench trial on stipulated facts. The district court ultimately found N.R. guilty and convicted him on both amended counts. The court sentenced him to 49 months in prison but granted N.R.'s request for a downward dispositional departure and ordered him to serve 36 months' probation with community corrections. N.R. timely appealed his conviction and sentence.

A panel of the Court of Appeals affirmed the district court's decision to deny the motion to dismiss, holding that KORA's lifetime registration requirements as applied to N.R. do not constitute punishment and therefore do not violate state and federal cruel and unusual punishment provisions or federal ex post facto provisions in N.R.'s case. See *State v. N.R.*, 57 Kan. App. 2d 298, Syl. ¶¶ 2-4, 302-03, 308-10, 451 P.3d 877 (2019) (relying on *State v. Rocheleau*, 307 Kan. 761, 765, 415 P.3d 422 [2018]; *State v. Marinelli*, 307 Kan. 768, 786, 415 P.3d 405 [2018]; *State v. Reed*, 306 Kan. 899, 904, 399 P.3d 865 [2017]; *Petersen-Beard*, 304 Kan. at 209).

N.R. timely petitioned for review challenging the panel's constitutional findings.

ANALYSIS

N.R. challenges the constitutionality of KORA's mandatory lifetime registration requirements as applied to him: a 14-year-old juvenile who committed a triggering offense under KORA that now requires him to register as a sex offender for the rest of his life. He makes no specific argument in his petition for review or in his supplemental brief that KORA as applied generally to juvenile sex offenders is punitive for the purposes of

accessing certain constitutional protections. Instead, N.R. claims that KORA's mandatory lifetime registration requirements as applied to the facts of his particular case constitute punishment that violates the federal Ex Post Facto Clause, violates the prohibition against cruel and unusual punishment under the Eighth Amendment of the United States Constitution and section 9 of the Kansas Constitution Bill of Rights, and—for the first time on review—infringes on the constitutional rights guaranteed under sections 1 and 18 of the Kansas Constitution Bill of Rights.

The constitutionality of a statute is a question of law over which we exercise unlimited review. This court presumes that statutes are constitutional and must resolve all doubts in favor of a statute's validity. *State v. Gonzalez*, 307 Kan. 575, 579, 412 P.3d 968 (2018).

N.R. acknowledges that his constitutional ex post facto and cruel and unusual punishment challenges are viable only if we find the lifetime registration requirements are punishment as applied to him. Given this initial hurdle, we begin our discussion with a brief review of the existing caselaw on the underlying issue of punishment.

Relevant caselaw

Both the United States Supreme Court and this court generally have held, without reference to age, that mandatory lifetime sex offender registration is not punishment. In 2003, the United States Supreme Court applied the intent-effects test to decide whether registration requirements under the Alaska Sex Offender Registration Act (ASORA) constituted punishment for ex post facto purposes. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 [1997]). Under the intent-effects test, courts first determine whether the Legislature intended the statute to establish a civil proceeding.

Smith, 538 U.S. at 92. If the Legislature intended to impose punishment, the inquiry ends, and the provision is deemed an ex post facto law. If, however, the Legislature's intent is nonpunitive, courts must go on to determine whether the statutory scheme is so punitive, either in purpose or effect, that it negates the Legislature's civil intent. In making this determination, """only the clearest proof"" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."' 538 U.S. at 92 (quoting *Hudson v. United States,* 522 U.S. 93, 100, 118 S. Ct. 488, 139 L. Ed. 2d 450 [1997]).

As noted above, the United States Supreme Court in *Smith* ultimately held ASORA was nonpunitive, and therefore, its retroactive application did not violate the Ex Post Facto Clause. *Smith*, 538 U.S. at 96, 105-06. The Court first concluded that the Alaska Legislature's intent "was to create a civil, nonpunitive regime." 538 U.S. at 96. The Court then analyzed the effects of ASORA using the seven-factor test of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). In this test, courts must consider

> "the degree to which the regulatory scheme imposes a sanction that: (1) has historically been regarded as punishment; (2) constitutes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) is rationally connected to a nonpunitive purpose; (5) is excessive in relation to the identified nonpunitive purpose; (6) contains a sanction requiring a finding of scienter; and (7) applies the sanction to behavior that is already a crime." *Petersen-Beard*, 304 Kan. at 198 (citing *Mendoza-Martinez*, 372 U.S. at 168).

The *Smith* Court explained that the first five factors are the most relevant, while the remaining two are to be given "little weight." 538 U.S. at 105. The relevant factors are "'useful guideposts'" that are "'neither exhaustive nor dispositive'" for purposes of examining the entire statutory scheme to determine its punitive effect. 538 U.S. at 97.

After reviewing the relevant *Mendoza-Martinez* factors, the *Smith* Court determined that ASORA's registration and notification requirements were not sufficiently punitive to overcome the nonpunitive legislative intent. As a result, the Court held that ASORA's retroactive application did not violate the Ex Post Facto Clause of the United States Constitution. *Smith*, 538 U.S. at 105-06.

As both parties acknowledge, this court addressed the punitive nature of KORA in four opinions filed on the same day in 2016. In three of the opinions, a majority of the court held that KORA, as amended in 2011, was punitive in effect and that its retroactive application to any sex offender who committed a registerable offense before July 1, 2011, violated the Ex Post Facto Clause. *Doe v. Thompson*, 304 Kan. 291, 327-28, 373 P.3d 750 (2016); *State v. Redmond*, 304 Kan. 283, 289-90, 371 P.3d 900 (2016); and *State v. Buser*, 304 Kan. 181, 190, 371 P.3d 886 (2016).

The fourth opinion, *Petersen-Beard*, considered whether KORA as amended in 2011 constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. To resolve this issue, the majority performed a traditional ex post facto analysis because the first step of an Eighth Amendment inquiry is to determine whether the practice at issue constitutes punishment. 304 Kan. at 196. A different majority—due to a change in the court's composition since *Thompson*, *Redmond*, and *Buser* were argued—ultimately ruled that KORA was nonpunitive. The majority first found that the Legislature did not intend for KORA's sex offender registration scheme to be punitive. 304 Kan. at 195. The majority then analyzed the *Mendoza-Martinez* factors and ultimately found the burdens KORA's registration requirements imposed were not so onerous as to constitute punishment. Specifically, the majority found public dissemination of registration information does not rise to the level of public shaming, does not impose an affirmative disability or restraint, are not excessive, and are rationally connected to a nonpunitive purpose. 304 Kan. at 198-209. In

so holding, the majority overruled *Thompson*, *Redmond*, and *Buser*, adopting the reasoning behind the dissent in *Thompson* "in toto" and "quot[ing] liberally" from it in reaching its decision. 304 Kan. at 197-209. This same majority later "explicitly extend[ed] the holding of *Petersen-Beard* to apply to ex post facto challenges." *Reed*, 306 Kan. at 904.

This is the current state of the law. Both the United States Supreme Court and the most recent majority of this court have held that mandatory sex offender registration is not punishment. Because the cases do not mention the age of the offender as a factor in the analysis, however, we now turn to N.R.'s attempts to distinguish *Smith* and *PetersenBeard* based on his juvenile status at the time of his offense.

Affidavits

In articulating his as-applied challenge, N.R. relies on specific facts set out in the two affidavits he introduced at the motion to dismiss hearing. As noted above, there is an issue regarding whether N.R. can rely on those facts to support his constitutional challenges. Specifically, the State argues he cannot rely on those affidavits because they were never formally admitted into evidence at the motion to dismiss hearing. Because he cannot rely on those affidavits, the State asserts that N.R.'s constitutional challenges necessarily fail. This argument persuaded the Court of Appeals panel, and it ruled that because the affidavits were not formally admitted into evidence at the motion to dismiss hearing or the bench trial, it could not consider them. *N.R.*, 57 Kan. App. 2d at 307 (citing *In re Estate of Watson*, 21 Kan. App. 2d 133, 137, 896 P.2d 401 [1995]).

An appellate court generally cannot consider evidence that was not presented at the district court level. *Volt Delta Res., Inc. v. Devine*, 241 Kan. 775, 782, 740 P.2d 1089 (1987) ("Evidence not presented to the trial court will not be considered for the first time

on appeal."). However, we previously have found affidavits that were not formally admitted into evidence may be considered for the first time on appeal. This is especially true if the affidavit was attached to a relevant motion that was argued before the district court, presented to the district court and referred to at oral argument, and at least somewhat considered by the district court in making a ruling on the relevant motion. See *Haddock v. State*, 282 Kan. 475, 492, 146 P.3d 187 (2006).

N.R.'s affidavit and his fiancée's affidavit were not attached as exhibits to N.R.'s original motion to dismiss. But his counsel presented both affidavits to the district court at the motion to dismiss hearing and highlighted specific facts from them when presenting oral argument on the merits of the motion. In presenting the affidavits to the court, counsel explained that they were signed and notarized and that she wished to label them as exhibits and present them as evidence. She then asked to approach the bench, and the court granted counsel's request but provided no indication as to whether the affidavits were admitted. The State never objected to the presentation of the affidavits or to counsel's remarks about them. The district court ultimately denied the motion to dismiss on legal grounds: that it was bound to follow the Legislature's directives and Kansas Supreme Court precedent. Because it relied on legal grounds, the district court did not make any factual findings regarding the affidavits or address their substance.

Given this background, and the fact that it appears the district court's decision *not* to make factual findings was based on its resolution of the issue presented as a matter of law, we will consider the affidavits, if necessary. See *Haddock*, 282 Kan. at 492.

Punishment

Under the two-part "intent-effects" test, N.R. concedes the Legislature intended KORA to be a regulatory and nonpunitive statutory scheme. Under step two of the test,

however, he argues that the effects of the law are punitive as applied to him. In making this argument, N.R. does not strictly adhere to the enumerated *Mendoza-Martinez* factors. Instead, he posits arguments throughout his brief that appear to coincide with two of the factors without expressly labeling them as such. Those two factors are affirmative disability or restraint and excessiveness. We discuss each in turn.

1. *Affirmative disability or restraint*

N.R. asserts that KORA's mandatory lifetime registration provisions as applied to him create an affirmative disability or restraint on his freedom of movement. N.R. focuses on the public dissemination aspect of juvenile sex offender registration as applied to him in arguing that KORA has created an affirmative restraint on his ability to find and maintain stable housing and employment. He points to his affidavit and his fiancée's affidavit for specific instances where he was unable to find housing, employment, and substance abuse treatment because of his status as an offender. He also asserts public dissemination of his information has subjected him to embarrassment and even violence from members of the community.

Under the amended and current version of KORA, juvenile offenders like N.R.—i.e., aged 14 to 17 who have committed the most serious sexual offenses—are subject to the same public dissemination requirements as their adult counterparts. In all other juvenile offender cases, KORA provides juvenile courts with the discretion to decide if an offender has to register and, if so, whether that registration is closed to the public. As the United States Supreme Court recognized in *Smith*, public dissemination of adult offender information was based on criminal records that already were public. Therefore, the court found adult offenders could not argue that public dissemination of information imposed an affirmative restraint or resembled historical shaming punishments. See *Smith*, 538 U.S. at 97-101. Can the same be said for juvenile offenders like N.R.?

The answer lies in the Revised Kansas Juvenile Justice Code (KJJC). See K.S.A. 2020 Supp. 38-2301 et seq. In Kansas, a juvenile offender's official court file—e.g., complaint, journal entries, orders—is open for public inspection. K.S.A. 2020 Supp. 382309(b). But the court has discretion to order that the official file be closed for juveniles under age 14 if the court determines it is not in the child's best interests. This option is not available for juvenile offenders like N.R., who were aged 14 to 17 when the crime was committed. See K.S.A. 2020 Supp. 38-2309(b). Police records and municipal court records similarly are kept confidential for juvenile offenders under the age of 14 but not for offenders aged 14 to 17. See K.S.A. 2020 Supp. 38-2310(a) and (c). So, the KJJC makes clear juvenile records for offenders aged 14 to 17 like N.R. are open for public inspection. And these specific provisions of the KJJC were in place at the time N.R. was adjudicated a sex offender in 2006, meaning he was not afforded any confidentiality protections at that time either. See K.S.A. 2005 Supp. 38-1607(b)-(c); K.S.A. 2005 Supp. 38-1608(a) and (c).

Given the juvenile court records of his rape adjudication were public at the time he was adjudicated, N.R. has failed to show that public dissemination of his registration information is sufficiently burdensome to distinguish it from adult offenders. "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Smith*, 538 U.S. at 101. In the absence of distinguishing features, the public dissemination aspects of juvenile sex offender registration fail to render his registration a punitive affirmative disability or restraint amounting to punishment. See *Petersen-Beard*, 304 Kan. at 199-202.

2. *Excessiveness*

N.R. focuses much of his challenge on this factor. He makes many of the same arguments: public dissemination of his information has subjected him to embarrassment and even violence from members of the community; and he is unable to find stable housing, employment, or substance abuse treatment programs because of his status. Accordingly, the above analysis related to these issues are incorporated and applied here.

N.R. does make a few additional arguments in challenging KORA as excessive in relation to its public safety purpose: he points to the real mental health effects it has had on him, such as depression and isolation; he has attempted suicide because of the mental health issues related to registering; he notes that KORA does not distinguish between adult and juvenile offenders; and he finally argues that KORA's lifetime registration requirements as applied to him do not serve relevant rehabilitation policy goals outlined in the KJJC.

The affidavits establish that N.R. has suffered personal harm, violence, mental health issues, and embarrassment because of public dissemination of his registration information. But as noted above, N.R. has an uphill battle to establish that his juvenile adjudication and registration information should have remained confidential following the 2011 KORA amendments.

Turning to his argument that KORA does not distinguish between adult and juvenile offenders, N.R. urges this court to consider United States Supreme Court precedent recognizing that juveniles are often less culpable and less dangerous than their adult counterparts. Because KORA fails to distinguish between adult and juvenile offenders, N.R. argues we must apply an analysis different than that in *Smith* or *Petersen-*

Beard for purposes of evaluating excessiveness. N.R. relies on three United States Supreme Court decisions and one Kansas Supreme Court decision to support his argument.

In *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court adopted a categorical rule precluding imposition of the death penalty on any offender under 18 years old. In adopting this rule, the Court relied on three differences between juveniles and adults: (1) the juvenile's lack of maturity and underdeveloped sense of responsibility; (2) his or her greater vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) that the juvenile's character was not as "well formed" as an adult's and his or her personality traits were "more transitory, less fixed." 543 U.S. at 569-70.

In *Graham v. Florida*, 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), the Court held a sentence of life without parole for a juvenile offender who did not commit homicide violated the Eighth Amendment. If a state imposes a life sentence on a juvenile offender, "it must provide him or her with some realistic opportunity to obtain release before the end of that term." 560 U.S. at 82. In rejecting the harsher punishment for juveniles, the Court emphasized the characteristics of youth, identified in *Roper*, that make juveniles less culpable and less susceptible to deterrence than adults. 560 U.S. at 68-72.

In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the Court again considered mandatory sentences of life without the possibility of parole for juveniles. It held "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'" because it "runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." 567 U.S. at 465. The Court

again relied on the three significant differences between children and adults, stating "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471.

As for Kansas law, N.R. relies on *State v. Dull*, 302 Kan. 32, 351 P.3d 641 (2015), to argue that his age at the time of his offense must be considered before he can be required to register for a lifetime. In *Dull*, this court held that mandatory lifetime postrelease supervision for juveniles constituted categorical cruel and unusual punishment. 302 Kan. at 61. In its analysis, this court considered United States Supreme Court and Kansas caselaw suggesting that the juvenile offender in the case had a diminished moral culpability when he committed a serious crime. 302 Kan. at 52. This court also recognized that juveniles generally have a "lower risk of recidivism" and that "[p]lacing lifetime restraints on a juvenile offender's liberties requires a determination that the juvenile will forever be a danger to society" and undermines juvenile rehabilitation. 302 Kan. at 60 (citing *Graham*, 560 U.S. at 74).

N.R. argues the differences between children and adults considered by the courts in the cases cited above to determine the harshness of sentencing apply equally to sex offender registration for juveniles. But to the extent N.R. is using the "children are different" analysis to determine whether mandatory lifetime sex offender registration for juveniles is punishment, his argument is circular. Specifically, he fails to recognize that he cannot use the *Miller* factors—applicable to harsh sentencing that is indisputably punishment—to establish that juvenile sex offender registration is punishment in the first instance. Unless he first establishes that registration is punishment, this line of cases arguably does not even apply to him. *Roper*, *Graham*, and *Miller* rely on the significant differences between children and adults in imposing the harshest *punishments*. And *Dull* is inapplicable for the same reason: that case involved lifetime postrelease supervision, which similarly is a sentencing and punishment issue. See *Martin v. Kansas Parole*

Board, 292 Kan. 336, 343, 255 P.3d 9 (2011) (postrelease supervision is part of sentence).

The underlying rationale in *Miller*—as set forth in *Roper*, expanded in *Graham*, and further clarified in *Miller* itself—is that there are constitutionally significant differences between children and adults that "diminish the penological justifications for imposing the harshest *sentences* on juvenile offenders." (Emphasis added.) *Miller*, 567 U.S. at 472. Relying on "children's diminished culpability and heightened capacity for change," the *Miller* Court expressly stated its belief that "sentencing juveniles to this harshest possible *penalty* will be uncommon." (Emphasis added.) 567 U.S. at 479. So, the *Roper*, *Graham*, and *Miller* cases, which recognize that children are less culpable and more capable of change than adults, are relevant in determining whether the harshest *punishment* is appropriate. But under the current state of the law in Kansas, the KORA registration requirements are not punitive. See *Petersen-Beard*, 304 Kan. at 209. Because they are not punitive, the KORA registration requirements are not subject to the punishment analysis set forth in the *Roper*, *Graham*, and *Miller* cases.

N.R.'s final excessiveness argument is that the effects of the lifetime registration requirements as applied to him run contrary to the policy goals outlined in the KJJC. "The primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community." K.S.A. 2020 Supp. 38-2301. The first stated goal is to protect public safety. See K.S.A. 2020 Supp. 38-2301. As noted above, the goal of the KORA statutory scheme also is to protect public safety. In this context, the KORA and the KJJC goals are consistent with one another.

As for the second goal, N.R. acknowledges that the registration requirements have held him accountable for his behavior, but he argues the burden of registration on him is

disproportionate to its benefits and therefore the effects of the registration requirements are excessive in relation to their public safety purpose. N.R. challenges the third goal by arguing that the registration requirements have worsened, instead of improved, his ability to live more productively and responsibly in the community, which demonstrates that the burden of the registration requirements on him are excessive in relation to its public safety purpose.

The KJJC policy argument posited by N.R. is a logical fallacy; specifically, it is a red herring. A red herring is a diversionary tactic used in an argument that introduces an irrelevant issue, usually to avoid addressing the key argument. N.R.'s argument is a red herring because it introduces an irrelevant issue into the argument—that the effects of the KORA registration requirements on him are excessive given the goals of the KJJC—when the actual issue presented is whether the effects of the KORA registration requirements on him are excessive in relation to KORA's public safety purpose. That the effects of the KORA registration requirements on him may not align with the some of the nonpublic safety goals of the KJJC is immaterial to whether the registration requirements are excessive given the public safety goals of KORA. The KJJC policy argument also is not relevant because it is undisputed that N.R. was not required to publicly register as a juvenile, he is no longer under the jurisdiction of the juvenile court, and he is now an adult.

Based on the discussion above, we find the effects of the KORA lifetime registration requirements as applied to N.R. do not impose an affirmative disability or restraint and are not excessive in relation to the stated nonpunitive purpose and goal of KORA: to protect public safety. None of N.R.'s arguments demonstrate that the effects of the law as applied to him are any different than the effects of KORA's lifetime registration requirements as applied to an adult offender. As such, we conclude N.R. has failed to establish by the clearest of proof that the burdensome effects on him resulting

from KORA's lifetime registration requirements are so onerous as to constitute punishment. See *Smith*, 538 U.S. at 92; *Petersen-Beard*, 304 Kan. at 195.

Having determined the lifetime registration requirements are not punishment as applied to N.R., we necessarily conclude there is no merit to the following constitutional claims submitted by N.R.: that the lifetime registration for him violates the Ex Post Facto Clause prohibiting retroactive *punishment* and the prohibition against cruel and unusual *punishment* under the Eighth Amendment of the United States Constitution and section 9 of the Kansas Constitution Bill of Rights. See *Hendricks*, 521 U.S. at 370-71 (recognizing that the Ex Post Facto Clause applies exclusively to penal statutes).

Due Process

N.R. argues the provision in KORA mandating public dissemination of his registration information violates his rights as enumerated in sections 1 and 18 of the Kansas Constitution Bill of Rights. Relying on the affidavits he presented to the district court, N.R. claims publication of his registration information has destroyed his reputation within the community by branding him as a sex offender. N.R. also claims that Kansas law fails to provide a mechanism for him to establish mitigating circumstances unique to his case or show that he no longer poses a threat to the community.

N.R. recognizes that this is a new constitutional argument and that this court generally does not consider such arguments on appeal. However, he asks the court to consider two exceptions: (1) this newly asserted theory poses only a question of law based on previously admitted facts and will be finally determinative of the case, and (2) consideration of this theory is necessary to "serve the ends of justice or to prevent the denial of fundamental rights." *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). The State counters, asserting that neither exception applies and that this court should

disregard N.R.'s new claim. Notwithstanding the State's argument, we will address N.R.'s argument under the second exception.

Section 1 of the Kansas Constitution Bill of Rights provides, "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 18 of the Kansas Constitution Bill of Rights guarantees the right to a remedy. It states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." This court has defined "remedy by due course of law" as the reparation for injury ordered by a court in due course of procedure after a fair hearing. *Harrison v. Long*, 241 Kan. 174, 179, 734 P.2d 1155 (1987). Remedy by due course of law refers to due process concerns. *In re Marriage of Soden*, 251 Kan. 225, 233, 834 P.2d 358 (1992).

The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. In reviewing a procedural due process claim, the court first must determine whether a protected liberty or property interest is involved. If so, the court then must determine the nature and extent of the process which is due. *State v. Wilkinson*, 269 Kan. 603, 608-09, 9 P.3d 1 (2000).

N.R. claims he is entitled to due process protection because he possesses a protected liberty interest in his reputation, which he alleges is being destroyed as a direct result of public dissemination of his registration status. The concept of "liberty" is broad and includes protection of a person's good name. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Relevant here, a person may be deprived of a "liberty" interest without due process if that person's standing in the community is damaged or if the person's reputation, honor, or integrity are questioned. *Winston v. State Dep't of Soc. & Rehab. Servs.*, 274 Kan. 396, 410-11, 49 P.3d 1274 (2002). The affidavits presented to the district court reflect N.R.'s belief that

the public's ability to access information identifying him as a person who has been adjudicated guilty of a certain sex offense harms his reputation in the community. As such, a protected liberty interest is involved.

Even though N.R. sufficiently identified an interest at stake, he is not entitled to any additional process beyond his original adjudication before being subjected to KORA's registration requirements. Additional process would be necessary only where it gives a sex offender the ability to prove or disprove facts related to the applicability of the registration requirements. Here, the only fact relevant to whether registration is required is whether the juvenile adjudication exists. KORA's registration requirements turn on an offender's conviction alone, which is a fact that a convicted offender already had a procedurally safeguarded opportunity to contest. Therefore, no additional process is required for due process. See *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) (denying procedural due process challenge to state sex offender registry where registration was required by the fact of conviction as sex offender, irrespective of any other factors, thus rendering any additional process meaningless and unnecessary). That he may be able to establish mitigating circumstances unique to his case or that he no longer poses a threat to the community are facts irrelevant to whether he is required to register under the KORA. N.R. is required to register based solely on his juvenile adjudication for rape, which explicitly triggers KORA's requirements. Because he is not challenging whether he received adequate due process in his juvenile proceeding, there is no basis for a procedural due process claim.

Conclusion

We conclude KORA's mandatory lifetime registration requirements as applied to N.R. are not punishment and, as a result, do not violate the federal Ex Post Facto Clause or the prohibition against cruel and unusual punishment under the Eighth Amendment of

the United States Constitution and section 9 of the Kansas Constitution Bill of Rights. Although N.R. has adequately identified an interest in his reputation, we conclude he is not entitled to any additional process beyond his original adjudication before being subjected to KORA's registration requirements.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

* * *

STANDRIDGE, J., concurring: Although I agree with the majority that *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016)—which holds lifetime registration for an adult offender is not punishment—is the governing law in Kansas, I write separately to emphasize that my agreement is grounded solely on principles of stare decisis.

The legal principles supporting the doctrine of stare decisis are well established. "[S]tare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an 'arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). Stare decisis ensures that "the law will not merely change erratically," which in turn "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986).

In Kansas, "'once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent

cases where the same legal issue is raised.'" *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004) (quoting *Samsel v. Wheeler Transp. Servs., Inc*. 246 Kan. 336, 356, 789 P.2d 541 [1990], *overruled on other grounds by Bair v. Peck*, 248 Kan. 824, 844, 811 P.2d 1176 [1991]). While this court is not inexorably bound by its own precedent, we should follow the law of earlier cases unless "'clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'" *Crist*, 277 Kan. at 715.

Petersen-Beard held that lifetime registration for an adult offender is not punishment. N.R. acknowledges this holding but attempts to distinguish it based on his juvenile status at the time of his offense. The majority finds "[n]one of N.R.'s arguments demonstrate that the effects of the law as applied to him are any different than the effects of KORA's lifetime registration requirements as applied to an adult offender." Slip op. at 17. Given this finding, the majority necessarily relies, at least in part, on the holding in *Petersen-Beard*. Based solely on principles of stare decisis as it applies here, I agree it was proper for the majority to do so.

The only change that has occurred since the *Petersen-Beard* decision was filed is the replacement of former members of the court by new members of the court. I believe that a change in the membership of this court cannot, in and of itself, justify a departure from the basic principle of stare decisis. See *Payne v. Tennessee*, 501 U.S. 808, 850, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Marshall, J., dissenting) (change in court's personnel "has been almost universally understood *not* to be sufficient to warrant overruling a precedent"); *State v. Marsh*, 278 Kan. 520, 577, 102 P.3d 445 (2004) (McFarland, C.J., dissenting) ("[W]e should be highly skeptical of reversing an earlier decision where nothing has changed except the composition of the court."). Any other conclusion would send the message that whenever there is a hotly contested issue in this

court that results in a closely divided decision, anyone who disagrees with the decision and has standing to challenge it need only wait until a member of the original majority leaves the court to bring another challenge. In my view, that would be a very dangerous message to send. Stability in the law and respect for the decisions of the court as an institution, rather than a collection of individuals, is of critical importance in our legal system.

Indeed, even if the majority decision in *Petersen-Beard* were flawed, overruling it under these circumstances—where the only factor that has changed is the composition of the court—would inflict far greater damage on the public perception of the rule of law and the stability and predictability of this court's decisions than would abiding by the decision. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854, 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (quoting *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 636, 94 S. Ct. 1895, 40 L. Ed. 2d 406 [1974] [Stewart, J., dissenting]: "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the [g]overnment. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."). In my opinion, reversing a decision solely because of a change in justices on the court would cause the people we serve to raise legitimate concerns about the court's integrity and the rule of law in the state of Kansas. It is for this reason that I concur in the judgment.

* * *

ROSEN, J., dissenting: For more than 15 years I have been a proud member of a court that has historically taken an unyielding stand against the degradation of rights guaranteed by our Constitution. Even in the era of Jim Crow and *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), this court protected civil rights against

forces of discrimination. See *In re Adoption of Baby Girl P.*, 291 Kan. 424, 242 P.3d 1168 (2010); *In re Adoption of G.L.V.*, 286 Kan. 1034, 190 P.3d 245 (2008) (protecting rights of natural parents); *State v. Ryce*, 303 Kan. 899, 368 P.3d 342 (2016), *adhered to on reh'g* 306 Kan. 682, 396 P.3d 711 (2017) (striking down as unconstitutional statute criminalizing refusal to submit to testing of bodily substances deemed to have been impliedly consented to); *In re L.M.*, 286 Kan. 460, 470, 186 P.3d 164 (2008) (upholding juveniles' constitutional right to jury trial). See, e.g., *Board of Education v. Tinnon*, 26 Kan. 1, 22-23 (1881) (power to divide city into districts does not include power to divide city according to race, color, nationality, or descent); *Webb v. School District*, 167 Kan. 395, 403-04, 206 P.2d 1066 (1949) (creation of special school district carved out to exclude African-American children was impermissible subterfuge for segregation).

Today, I feel none of that pride. Today, the court eschews the United States Constitution and the citizens it stands to protect for reasons I cannot comprehend. Today, I dissent.

I agreed with the majority of the court in *Doe v. Thompson*, 304 Kan. 291, 327-28, 373 P.3d 750 (2016), when we concluded lifetime registration constituted punishment for adult offenders. And I certainly believe it constitutes punishment for N.R., who was 14 years old when he committed the acts for which he was adjudicated an offender and placed on probation—not an adult convicted of a high-level felony and sent to prison—and for which our Legislature has retroactively imposed a life sentence.

I will initially consider the requirements and burdens that the Kansas Offender Registration Act (KORA) places on individuals and the negative impacts that ensue from registration. I will then explain why I do not consider this court's opinion in *State v. Petersen-Beard,* 304 Kan. 192, 377 P.3d 1127 (2016), a case with which I disagree in any event, to be constraining precedent in the present appeal. I will point out the differences

between public access to juvenile adjudications and public access to sex-offender registries. I will point out the dramatic imbalance between the public benefit of offender registration for juveniles and the lifetime punitive effect that such registration has on juveniles. And I will reiterate the special circumstances of juvenile behavior that distinguishes it from similar behavior committed by adults. I will conclude that registration is plainly punitive in nature, even if not in intention, and the registration statute, as applied to this appellant, is an unconstitutional ex post facto violation.

The Ex Post Facto Clause in the United States Constitution prohibits states from "pass[ing] any . . . ex post facto Law." Article I, section 10. A law violates this prohibition when it "'increase[s] the severity of [the] punishment'" after the crime was committed. *State v. Todd*, 299 Kan. 263, 278, 323 P.3d 829 (2014) (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 67 L. Ed. 2d 17 [1981]). The first step in analyzing whether legislation violates this constitutional directive is determining whether it constitutes punishment. In making this assessment, this court applies the "intenteffects" test. Under this framework, we deem legislation punishment when it is punitive either in purpose or effect—even if the Legislature intended a "regulatory scheme this is civil and nonpunitive." To assist with this analysis, this court has turned to the factors utilized by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963):

> "the degree to which the regulatory scheme imposes a sanction that: (1) has historically been regarded as punishment; (2) constitutes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) is rationally connected to a nonpunitive purpose; (5) is excessive in relation to the identified nonpunitive purpose; (6) contains a sanction requiring a finding of scienter; and (7) applies the sanction to behavior that is already a crime." *Petersen-Beard*, 304 Kan. at 198 (citing *Mendoza-Martinez*, 372 U.S. at 168).

The United States Supreme Court has noted that the first five factors are the "most relevant." *Smith v. Doe*, 538 U.S. 84, 97, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

The State alleged that when N.R. was 14 years old, he committed acts that, if he had been an adult, would have supported a charge for rape. N.R. pleaded guilty and was adjudicated an offender. A magistrate judge then suspended the imposition of sentence and placed N.R. on probation. The court also ordered N.R. to register as a sex offender "locally" for a period of five years. Shortly before this time expired, the Kansas Legislature enacted legislation requiring N.R. to register for life. N.R. acknowledges that the Legislature intended KORA be civil and nonpunitive but argues the requirement he register for the rest of his life is punitive in effect when applied to him.

KORA requires N.R. to register—in person—at least four times per year. When he is experiencing homelessness, he must register every 30 days and describe every place he has slept and frequented since the last registration and every place he intends to sleep and frequent until the next registration. K.S.A. 22-4905. He must also register in person anytime he moves, experiences a change in employment status, alters his school attendance, uses temporary lodging for seven or more days, or if any of the following things commence, change, or terminate: name, telephone number, identifying physical characteristics, occupation, employer, driver's license, identification card, vehicle information, professional licenses, designations, certifications, treatment for "mental abnormality or personality disorder," email addresses, online identities, personal web pages, travel documents, or name and telephone number of probation officer. K.S.A. 2020 Supp. 22-4905(h); K.S.A. 2020 Supp. 22-4907. If N.R. manages to keep up with these requirements, much of this information is posted on an easily accessible offender registration website that members of the public may peruse at their leisure. K.S.A. 2020 Supp. 22-4909. If N.R. fails to fulfill the requirements, he can be prosecuted and sentenced to years of prison time, even though he was never confined in a juvenile

correctional facility when he was adjudicated an offender for the underlying offense. K.S.A. 2020 Supp. 22-4903; K.S.A. 2020 Supp. 21-6804.

N.R. presented evidence that these onerous requirements have wrought havoc on his attempts to move beyond his adjudication and function within his community. To be brief, registration has caused him to experience homelessness, created barriers to substance abuse treatment, forced him apart from his family, created insurmountable financial strain, severely compromised his mental health, and put his life in danger. Countless jurists, scholars, and social scientists have confirmed how common these burdens are to those required to register. See *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (registration causes registrants and families "profound humiliation and isolation," jeopardizes employment and housing, destroys relationships, and spurs "'vigilante justice,'" frequently enough "that registrants justifiably live in fear"); Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 533 (2007) (offender registrants report several collateral consequences, "including employment difficulties, relationship problems, harassment, stigmatization, and persistent feelings of vulnerability"); Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 Conn. L. Rev. 1035, 1056-57 (2016) (registration causes difficulty with finding employment, securing housing, and maintaining relationships); Zevitz & Farkas, Sex Offender Community Notification: Assessing the Impact in Wisconsin, 9 (Washington D.C.: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 2000) (77% of offender registrants reported "being humiliated in their daily lives, ostracized by neighbors and lifetime acquaintances, and harassed or threatened by nearby residents or strangers").

The suggestion that these requirements and their effects are not punitive is simply wrong. But today's majority shrugs its shoulders and tosses these realities aside. It points

out that a previous majority of this court held mandatory lifetime registration for adult offenders did not constitute punishment for purposes of a cruel and unusual punishment analysis. Slip op. at 8 (citing *Petersen-Beard*, 304 Kan. 192). It takes the untenable position that, although the State action may be burdensome, it is not technically "punishment" and is therefore permissible. This position is at odds with authority holding that State action need not be intended to be punitive in nature for it to violate constitutional protection. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (indifference to prisoner needs may create constitutional claim); *Trop v. Dulles*, 356 U.S. 86, 95, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (even clear legislative classification of statute as "non-penal" does not alter fundamental nature of plainly punitive statute); see also *Ingraham v. Wright*, 430 U.S. 651, 684, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (White, J., dissenting) (state actions that are so cruel that they are not permitted as penal acts must not be permitted in non-penal contexts).

The majority avoids mentioning that, instead of meaningful analysis, much of the *Petersen-Beard* decision consisted of string cites to federal cases in which courts considered whether other state registration schemes were punitive. See *Petersen-Beard*, 304 Kan. at 214 (Johnson, J., dissenting) (observing that majority looks to federal caselaw even though "[o]rdinarily, any analysis of a Kansas legislative act would not begin with a consideration of merely persuasive federal authority when there are decisions of this court on point"). Then, it considers whether there is anything different about N.R.'s circumstances that would make mandatory lifetime registration punitive for him. It ultimately concludes the registration requirements are not so onerous as to constitute punishment for N.R. Slip op. at 17. Such a stunning conclusion leaves one at a loss as to what, if any, condition KORA could create that the majority would consider onerous.

In its first point, the majority rejects N.R.'s claim that the registration requirements cause an affirmative disability or restraint by making it difficult for him to find employment and housing and subjecting him to shame and ostracization in his community. The majority reasons that these consequences come from his juvenile adjudication, and those court records are already public, so the registration adds no disability or restraint. Slip op. at 12. The majority relies entirely on the United States Supreme Court decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), to come to this conclusion. Slip op. at 11. In *Smith*, the Court concluded that mandatory lifetime registration requirements under Alaska's registration scheme for an adult offender added no affirmative disability or restraint because the offender's conviction was already public. 538 U.S. at 101.

There is a glaring oversight with the majority's reasoning: it pays no attention to the difference between N.R.'s juvenile record being "open for public inspection" and registration on a sex offender database. There are, in fact, very consequential differences. To discover that N.R. was adjudicated for a sex offense through his juvenile record, one must travel to the courthouse, pay a fee, and look up his file on the public database. Alternatively, one can enter personal information into the Kansas Bureau of Investigation's (KBI) website to create an online account, pay a fee, and then look up N.R.'s record. In either case, one must at least know N.R.'s name to complete the search. The KBI website will also ask for N.R.'s birth date. I suspect most people are unaware they can do either of these things. In contrast, any person with internet access can look to see whether N.R. is on the sex offender registry without creating an account and without cost. In fact, one need not even know N.R.'s name to find him on the registry. Anyone can plug in an address and see the names and locations of registered sex offenders in any area they wish. People can find N.R. without looking for him.

In *Thompson*, this court noted the problem with relying on the 2003 *Smith* decision to hold that registration is akin to having a public criminal record. We observed that the *Smith* Court described the Alaska registration system as a "passive" one and compared it to "physically visiting 'an official archive of criminal records.'" *Thompson*, 304 Kan. at 321 (quoting *Smith*, 538 U.S. at 99). Such a description, we explained, is "antiquated in today's world of pushed notifications to listservs and indiscriminate social media sharing." *Thompson*, 304 Kan. at 321 And we pointed out that, since *Smith*, the Supreme Court has "recognized the vast amount of data that is currently available to most citizens on their smartphones and that 'a cell phone [can be] used to access data located elsewhere, at the tap of a screen.'" (Quoting *Riley v. California,* 573 U.S. 373, 397, 134 S. Ct. 2473, 189 L. Ed. 2d 430 [2014].) Other scholars have advanced similar criticisms. See, e.g. Carpenter, *A Sign of Hope: Shifting Attitudes on Sex Offense Registration Laws*, 47 Sw. L. Rev. 1, 25 (2017) ("[w]hen *Smith* was decided in 2003, the Internet's impact may not have been as well known or understood. So much so that the Court in *Smith* concluded that providing a name, address, and conviction on a public registry was tantamount to that same information being made available in a court-created public document").

It is clearly much simpler to get to N.R.'s adjudication from his registration than from his public record. But, even more disabling than this easy access is the fact that, once N.R.'s name is registered, he is officially *on the list*. To the public, being on the sex offender registry is a severe and serious marker; the government has deemed the people on this list so dangerous they need to be accounted for and identified to those around them. A law review article opines that "[s]ex offenders have supplanted insanity acquittees as the most despised segment of the American population." Cucolo & Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy,* 3 U. Denv. Crim. L. Rev. 185, 207 (2013). The authors note that people so labeled are "[r]egularly reviled as 'monsters' by district attorneys in jury

summations, by judges at sentencings, by elected representatives at legislative hearings, and by the media" and that "correctional officers rate sexual offenders as more 'dangerous, harmful, violent, tense, bad, unpredictable, mysterious, unchangeable, aggressive, weak, irrational, afraid, immoral and mentally ill' than other prisoners." 3 U. Denv. Crim. L. Rev. at 207-08. Another article explains "[a]s a result of the media's depiction of a one-dimensional 'sex offender' in broadcast news and newspaper articles, the general public has conceptualized what it believes to be the prototype of this 'monstrous imminent evil'—a male who violently attacks young children who are strangers." Cucolo & Perlin, "*The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 Case W. Res. L. Rev. 637, 644 (2019). This kind of stigma is debilitating; N.R. attested to the ostracization and death threats to which he's been subject since his registration.

These shocking barriers to N.R.'s ability to move beyond his juvenile adjudication and live a life outside the shadow of that event undoubtedly add an affirmative disability and restraint to N.R.'s life beyond what "public access" to his juvenile record does. The Legislature has constructed a scheme that equates to an effective banishment. This court has acknowledged this before. *State v. Myers*, 260 Kan. 669, 695, 923 P.2d 1024 (1996) (KORA imposes affirmative disability or restraint because "[u]nrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism" making it "impossible for the offender to find housing or employment"). And scholars have noted this reality for other registrants. See Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 Conn. L. Rev. 1035, 1055 (2016) ("most agree that carrying the label 'sex offender' is an order of magnitude more difficult to surmount" than "[c]riminal records alone"). The majority's quick dismissal of N.R.'s arguments—without any actual analysis of what registration means for him against the internet of today and the instantaneous

access to information via social media—is callously dismissive and grossly blind to realities of the present day.

Next, the majority summarily dismisses N.R.'s argument that "public dissemination of his information" is excessive in relation to its purpose. It concludes that the analysis regarding whether the public dissemination adds an affirmative disability or restraint resolves this claim, too. Slip op. at 12-13. In doing so, it ignores the crux of the question this factor presents: Is there an acceptable balance between the punitive effects of registration on N.R.'s life and registration's contribution to public safety? The answer is no.

The majority notes that the requirements N.R. faces are imposed in the name of public safety. But studies have shown that, in contrast to what the Supreme Court said in 2003, the risk of recidivism among sex offenders is not "frightening and high." *Smith*, 538 U.S. at 103 (quoting *McKune v. Lile,* 536 U.S. 24, 34, 122 S. Ct. 2017, 153 L. Ed. 2d 47 [2002]). It is, in fact, remarkably low. A Department of Justice study looked at the criminal records of 272,111 released prisoners in 15 states over a designated period of time. Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994 1 (2003). It found that only 5.3 percent of sex offenders in the study were arrested for a new sex offense and only 3.5 were convicted. Bureau of Justice Statistics at 1, 2. In contrast, the overall rearrest rate for non-sex offenders was 68 percent. Bureau of Justice Statistics at 2.

As scholars could have predicted, the registries appear to have had little effect on recidivism rates. A 2011 study found "little evidence to support the effectiveness of sex offender registries." Agan, *Sex Offender Registries: Fear Without Function?* 54 J.L. & Econ. 207, 208 (2011). Many commentators have written about the failings of these registries. See, e.g. Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic*

Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management, 4 Va. J. Crim. L. 241, 257 (2016) ("a large majority of lawmakers acknowledge that strict legislative initiatives have led to no appreciable reduction in sexual misconduct"); Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles, Evaluating the Ability to Predict Sexual Recidivism*, 14 Psychol. Pub. Pol'y & L. 89, 91 (2008) (citing multiple studies to support the notion that "[e]xtant research has not supported the effectiveness of sex offender registration and notification at reducing recidivism with adults").

And research reveals that registries, by and large, give us information we do not need. In his article "Sex Panic and Denial," Corey Rayburn Yung explains that "[f]amily members, friends, or other persons known to the victim commit approximately 93 percent of sexual offenses against children . . . ." Yung, *Sex Panic and Denial*, 21 New Crim. L. Rev. 458, 465 (2018). Thus, "[t]he prototypical fear-based myth . . . that there are a plethora of convicted sex offenders lurking in the bushes ready to attack any passing child or other victim" is false. 21 New Crim. L. Rev. at 465. If nearly all former juvenile offenders are not lying in wait to accost a stranger, then I can see no reason to publicly brand all of them for the rest of their lives as if they are.

Finally, N.R. argues that KORA's registration requirements are excessive because they were imposed as a result of a juvenile adjudication. N.R. claims that, as a juvenile, he was "less culpable and less predatory than adults," and "less likely to reoffend and more amenable to treatment than adults." Consequently, he argues, imposing the same registration requirements to him as the scheme would impose on a convicted adult offender is excessive. For support, N.R. cites cases from this court and the United States Supreme Court that identify differences between child offenders and adult offenders. See *State v. Dull*, 302 Kan. 32, 52, 351 P.3d 641 (2015) (juvenile offenders have a

"diminished moral culpability" compared to an adult offender); *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) ("juveniles have diminished culpability and greater prospects for reform"); *Graham v. Florida*., 560 U.S. 48, 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (same); *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (juveniles have "'lack of maturity and an underdeveloped sense of responsibility,'" "are more . . . susceptible to negative influences and outside pressures," and "character" "is not as well formed" so "personality traits . . . are more transitory, less fixed").

N.R.'s argument brings the punitive effect of his lifetime registration requirement sharply into focus. If he is less culpable than his adult counterpart, and he is less likely to endanger the public, treating him as if he is just as menacing is indefensible. Social scientists and scholars have confirmed that juvenile offenders are distinct from adult offenders. A report compiled by Human Rights Watch explains:

> "It is axiomatic that children are in the process of growing up, both physically and mentally. Their forming identities make young offenders excellent candidates for rehabilitation—they are far more able than adults to learn new skills, find new values, and re-embark on a better, law-abiding life. . . .
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> "Adolescent thinking is present-oriented and tends to ignore, discount, or not fully understand future outcomes and implications. Children also have a greater tendency than adults to make decisions based on emotions, such as anger or fear, rather than logic and reason. And stressful situations only heighten the risk that emotion, rather than rational thought, will guide the choices children make. Research has further clarified that the issue is not just the cognitive difference between children and adults, but a difference in 'maturity of judgment' stemming from a complex combination of the ability to make good decisions and social and emotional capability.

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"MRI (magnetic resonance imaging) images of the anatomy and function of the brain at different ages and while an individual performs a range of tasks reveal the immaturity of the portions of children's brains associated with reasoning and emotional equilibrium. . . .

. . . .

"Moreover, the fact that young people continue to develop into early adulthood suggests that they may be particularly amenable to change. . . . Both criminologists and development experts agree that '[f]or most teens, these [risky or illegal] behaviors are fleeting. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" Human Rights Watch, Raised on the Registry: The irreparable Harm of Placing Children on Sex Offender Registries in the US 25-27 (2013), available at https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placingchildren-sex-offender-registries-us#.

A recent study confirms this assessment. It considered 106 different analyses of recidivism rates among juvenile sex offenders between 1938 and 2014. The most recent data set, captured between 2000 and 2015, reported a mean recidivism rate for juveniles of 2.75 percent. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 Psychol. Pub. Pol'y & L. 414 (2016). A 2008 study assessed the effects of federal registration requirements on juvenile offenders. It observed that they were "based on the assumption that juvenile sex offenders are on a singular trajectory to becoming adult sexual offenders." But the authors of the study concluded "[t]his assumption is not supported by [the study's] results, is inconsistent with the fundamental purpose of the juvenile court, and may actually impede the rehabilitation of youth who may be adjudicated for sexual offenses." 14 Psychol. Pub. Pol'y & L. at 105.

The research demonstrates that lifetime registration for a juvenile offender has no rational connection to its purported purpose. This is true for N.R., who committed acts when he was 14 years old for which he was *adjudicated an offender*—not criminally prosecuted and convicted of a high-level felony, as an adult would have been—and placed on probation. Our justice system did not deem N.R. too dangerous to be outside the confines of a correctional facility; based on the facts before it, the court treated him like the developing, reformable juvenile he was. But the Kansas registration scheme takes no heed of this detail. It subjects N.R. to lifetime registration, which amounts to potentially 80 or so years of quarterly (at least), in-person registration that has and will continue to wreak havoc on N.R.'s life. For the rest of his days, he is branded a sex offender for all to see. This is in light of the reality that N.R. is highly unlikely to reoffend. This means that lifetime registration for N.R. is unrelated to a nonpunitive purpose, and, consequently, grossly excessive.

These observations provide more than enough to establish that lifetime registration has a punitive effect on N.R. The remaining *Mendoza-Martinez* factors that the Supreme Court has considered significant in deciding whether legislation is punitive strengthen this conclusion. Blasting N.R.'s name, identifying characteristics, and location across the internet with a bright red "sex offender" designation is akin to historical public shaming and humiliation tactics. See *Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting) ("public notification regimen, which permits placement of the registrant's face on a webpage under the label 'Registered Sex Offender,' calls to mind shaming punishments once used to mark an offender as someone to be shunned"); *People in Int. of T.B.*, 489 P.3d 752, 767 (2021) (registration for juvenile resembles traditional punishments of humiliation and shaming, especially in "era of social media").

Although not part of the majority analysis, this factor demands our collective attention because the impact of shame and humiliation cannot be overstated. As one set of

authors have explained, "'Shame is bordered by embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain," and is one of the most important, painful, and intensive of all emotions.'" Perlin & Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 S. Cal. Rev. L. & Soc. Just. 1, 7 (2014) (quoting Massaro, *The Meaning of Shame*: *Implications for Legal Reform*, 3 Pyschol. Pub. Pol'y & L. 645, 648 [1997]; Svensson et al., *Moral Emotions and Offending: Do Feelings of Anticipated Shame and Guilt Mediate the Effect of Socializing on Offending?* 10 Eur. J. Criminology 2, 3 [2012]). And "humiliation is the emotional experience of being lowered in status, usually by another person. There is the associated sense of powerlessness." Cucolo & Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 U. Fla. J.L. & Pub. Pol'y 291, 292 (2017). It is "'the rejection of human beings as human, that is, treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans.'" Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 489 (1997) (quoting Margalit, The Decent Society 121 [1996]). I cannot ignore such a punitive effect.

The registration requirements also serve the traditional punitive aims of retribution and deterrence. As I've noted, the registration scheme offered no individual assessment of N.R.'s risk of recidivism or general danger to society. Because these requirements "punish a juvenile for his past conduct without regard to the threat—or lack thereof—that the juvenile currently poses," they are, by nature, retributive. *People in Int. of T.B.*, 489 P.3d at 768 (citing *Smith*, 538 U.S. at 109 [Souter, J., concurring]); see also *Thompson*, 304 Kan. at 325 ("such arbitrariness is inherently retributive"). As far as deterrence, even the Supreme Court in *Smith* acknowledges that the registration requirements could have a natural deterrent effect. 538 U.S. at 102. This court noted the same in *Myers*. 260 Kan. at 695 ("Registration has an obvious deterrent effect.").

My colleagues may be comfortable to keep their heads in the sand and blindly "follow" a 2003 Supreme Court case that considers a different registration scheme and offers an outdated analysis. But when I look at the research and the arguments, I see the truth before us: lifetime registration for a 14-year-old offender is, unmistakably, punishment. My conclusion is not out of line with caselaw from other parts of the country. Across the nation, courts are creeping out of the shadow of *Smith* and declaring registration requirements punitive. See *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (Michigan's registration scheme punitive because it "severely restricts where people can live, work, and 'loiter,' . . . categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, . . . requires time-consuming and cumbersome in-person reporting" and is "supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe"); *People v. Betts*, No. 148981, 2021 WL 3161828, at *12 (Mich. 2021) (Michigan registration requirements punitive because they publicize wealth of information, encourage social ostracism, impose state supervision, serve to deter, are retributive because they offer no individualized assessment, and are excessive because their efficacy is unclear at best); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013) (Oklahoma's registration scheme punitive because its "many obligations impose a severe restraint on liberty without a determination of the threat a particular registrant poses to public safety"); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 568, 62 A.3d 123 (2013) (registration scheme as applied to offender violated state constitution's ex post facto clause because it had "essentially the same effect . . . as . . . probation" and imposed "shaming for life"); *Wallace v. State*, 905 N.E.2d 371, 379-84 (Ind. 2009) (Indiana's registration scheme punitive in effect because it creates "significant affirmative obligations," and "severe stigma," encourages "vigilante justice," resembles shaming punishments, probation, or parole, sometimes requires a finding of scienter, promotes deterrence and retribution, applies to already criminal

behavior, and is excessive in relation to purpose because there is no individual assessment of risk). And in a case that is notably reminiscent of the one before us, the Supreme Court of Colorado recently held that lifetime registration for a juvenile offender, who was twice adjudicated an offender for sexual offenses, was punitive and violated the prohibition against cruel and unusual punishment. *People in Int. of T.B.*, 489 P.3d 752 (Colo. 2021). The court was particularly swayed by the reality that "lifetime sex offender registration for juveniles does not bear a rational connection to, and is excessive in relation to, [the registration scheme's] nonpunitive purposes of protecting the community and aiding law enforcement." *T.B.*, 489 P.3d at 768. The court came to this decision after noting that juvenile offenders have a high capacity for reform. *T.B.*, 489 P.3d at 768.

I do not suggest that N.R.'s offense was inconsequential or should be overlooked. But I do suggest that we must follow our constitutional imperatives. N.R. is—very clearly—being punished by the Legislature's "civil scheme." The majority's refusal to acknowledge this is inexplicable. To put it plainly, in the words of my recently retired colleague, the majority's holding is "wrong-headed and utterly ridiculous. . . . [I]n the real world where citizens reside, registration is unequivocally punishment." *State v. PerezMedina*, 310 Kan. 525, 540-41, 448 P.3d 446 (2019) (Johnson, J., dissenting). Consequently, I would hold that N.R.'s lifetime registration requirement violates the Ex Post Facto Clause because it was enacted and imposed after N.R. committed the actions that led to his adjudication.

No. 119,796

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

N.R.,
Appellant.

SYLLABUS BY THE COURT

1.

We presume statutes are constitutional and resolve all doubts in favor of a statute's validity.

2.

Lifetime registration for juvenile sex offenders mandated by the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., does not constitute punishment for purposes of applying provisions of the United States Constitution.

3.

Lifetime registration for juvenile sex offenders mandated by the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., does not constitute punishment for purposes of applying section 9 of the Kansas Constitution Bill of Rights.

4.

Lifetime registration for juvenile sex offenders mandated by the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., is not part of a juvenile offender's sentence.

5.

To determine whether a legislature's statutory scheme is punitive as applied to a juvenile offender we use the "intent-effects" test adopted in *State v. Petersen-Beard*, 304 Kan. 192, 194-95, 377 P.3d 1127 (2016).

6.

The Kansas Offender Registration Act, K.S.A. 22-4901 et seq., itself, rather than a court order, imposes the duty to register upon sex offenders.

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed September 27, 2019. Affirmed.

Rick Kittel, of Kansas Appellate Defender Office, for appellant.

Thomas R. Stanton, deputy district attorney, *Keith E. Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., GARDNER, J., and LAHEY, S.J.

GARDNER, J.: N.R. appeals his conviction of failing to register as a sex offender. He argues that the district court erred in denying his motion to dismiss, which argued that imposition of lifetime postrelease registration under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., is unconstitutional as applied to a 14-year-old juvenile offender. N.R. also argues that his sentence is illegal because the registration requirement was improperly imposed by a magistrate court instead of by a district court. But we find that the registration requirement is not punishment as to a juvenile and is not part of a juvenile offender's sentence, so it does not violate the constitutional provisions N.R. raises. And the relevant statutes impose on the defendant a duty to register, making any lack of a magistrate court's authority to do so immaterial. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, N.R., then 14 years old, pleaded guilty to rape and was adjudicated a juvenile offender. As a result of his plea, the magistrate court granted N.R. probation with an underlying sentence of 24 months in a correctional facility. The magistrate court also ordered N.R. to register as a sex offender, without stating how long N.R. had to do so.

N.R. understood that he had to register for a period of five years from the date of adjudication. See K.S.A. 2006 Supp. 22-4906(h)(1) (requiring registration for five years under certain circumstances). But in 2011, before the five-year registration period expired, the Legislature amended the statute to require lifetime registration for some juvenile offenders based on age and the severity of the offense:

> "[An] offender 14 years of age or more who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in subsection (c) of K.S.A. 22-4902, and amendments thereto, and such crime is an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704, prior to its repeal, or section 285 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, shall be required to register for such offender's lifetime." L. 2011, ch. 95, § 6(h).

N.R. was adjudicated of committing rape, a severity level 1 offense if committed by an adult. See K.S.A. 2005 Supp. 21-3502(a)(2), (c). So the amended registration statute, as applied to N.R., required lifetime registration.

N.R. admits knowing that registration has always been a requirement of his release, and N.R. has registered as an offender from his adjudication until the present, except for a few instances. In 2012, N.R. was convicted of failing to register. Then in 2017, N.R. was charged with two counts of failing to register.

Before trial on those two counts, N.R. moved to dismiss, the denial of which he now appeals. He argued that the lifetime registration requirement:

- Violated the cruel and unusual punishment provision of the Eighth Amendment of the United States Constitution;
- violated the cruel or unusual punishment provision of section 9 of the Kansas Bill of Rights;
- violated the Ex Post Facto Clause of the United States Constitution; and
- was an illegal sentence imposed by a magistrate judge without authority to impose registration.

The district court held a hearing on N.R.'s motion and then denied it based on its duty to follow our Supreme Court's precedent about lifetime registrations requirements.

N.R. then tried his case to the bench based on stipulated facts. Those relevant facts are:

> "3. Defendant renews his objections and arguments regarding cruel and unusual punishment, ex post facto, and illegal sentence raised by written motion and in the motion hearing held February 9, 2018. The court denied the motion. The Defendant specifically reserves his right to appeal the Court's denial of the motion to dismiss in this matter.
>
> "4. The investigating officers in this case would testify consistently with their prior testimony at the preliminary hearing held November 27, 2017, and said testimony is hereby incorporated by reference. A summary of the evidence as it would be presented by the investigating officers and witnesses in this case is as follows:
>
> > "a. [N.R.] is required to register as a sex offender based on an adjudication for Rape, Sexual Intercourse with a Child < 14 YOA in Saline County, KS case # 2006 JV 238. (See attached Exhibit 1, which is hereby incorporated herein by reference as being accurate.).
> >
> > "b. [N.R.] is required to register four times each year with the months of registration determined by his birth month of December; making his registration

months March, June, September and December. [N.R.] registered June 30, 2016 listing his address as 100 E. 2nd, Apt. 9, Hutchinson, Reno County, Kansas. That address is managed by New Beginnings Inc. (New Beginnings).

"c. On August 11, 2016, New Beginnings terminated [N.R.'s] stay and he no longer resided at 100 E. 2nd, Apt. 9, Hutchinson, Reno County, Kansas. Brenda Heim of New Beginnings based the termination on no income, no permanent housing, and refusal to comply with the requirements of the program. (See attached Exhibit 2, which is hereby incorporated herein by reference as being accurate.).

"d. [N.R.] failed to report his change of residence by August 15, 2016, within three days, contrary to the requirements of his registration under K.S.A. 224905(g). [N.R.] had acknowledged he understood this requirement of registration by initialing #7 on his Kansas Offender Registration Form. (See attached Exhibit 3, which is hereby incorporated herein by reference as being accurate.).

"e. [N.R.] failed to report for registration between September 1 and September 30, 2016, his normal month of registration, contrary to the requirements of his registration under K.S.A. 22-4905(b). [N.R.] had acknowledged he understood this requirement of registration by initialing #5 on his Kansas Offender Registration Form. (See attached Exhibit 3, which is hereby incorporated herein by reference as being accurate.).

f. [N.R.] acknowledged he was required to register as an offender in Reno County, Kansas when he filled out Kansas Offender Registration Form with a Reno County address, 100 E. 2nd, Apt. 9, Hutchinson, Reno County, Kansas. (See attached Exhibit 3, which is hereby incorporated herein by reference as being accurate.).

"g. [N.R.] has a prior conviction for failure to register as a sex offender in Reno County case # 2012 CR 549. (See attached Exhibit 4, which is hereby incorporated herein by reference as being accurate.)."

The four exhibits referenced and incorporated in the stipulation are: (1) the original and amended juvenile offender complaints against N.R. and the related journal entries; (2) a document showing the termination of N.R.'s stay at New Beginnings; (3) a 2016 Kansas

offender registration form; and (4) a 2012 journal entry of conviction for N.R.'s failure to register as a sex offender.

After considering the evidence, the district court found N.R. guilty of failing to register on both counts. It sentenced N.R. to a controlling 49 months in prison but granted a dispositional departure to community corrections for 36 months. N.R. appeals the district court's denial of his motion to dismiss, reprising the arguments he made below.

I. THE DISTRICT COURT DID NOT ERR IN FINDING THE REGISTRATION REQUIREMENT CONSTITUTIONAL, AS APPLIED TO JUVENILES.

We first address N.R.'s argument that KORA's requirement of lifetime registration as a sex offender is unconstitutional as applied to juveniles. The State rejects N.R.'s asapplied constitutional arguments because the lifetime registration requirement is neither punishment nor part of N.R.'s criminal sentence.

Determining a statute's constitutionality is a question of law subject to our unlimited review. We presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. *State v. Petersen-Beard*, 304 Kan. 192, 194, 377 P.3d 1127 (2016). We must interpret a statute in a way that makes it constitutional if any reasonable construction exists that would maintain the Legislature's apparent intent.

This court is duty bound to follow our Supreme Court precedent, absent some indication it is departing from its previous position. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). Our Supreme Court has recently found that "[t]he legislature intended KORA to be civil and nonpunitive for all classes of offenders currently subject to its provisions." *State v. Huey*, 306 Kan. 1005, 1009, 399 P.3d 211 (2017), *cert. denied* 138 S. Ct. 2673 (2018).

Kansas courts have repeatedly held that offender registration under KORA is not punishment. See, e.g., *Petersen-Beard*, 304 Kan. at 209 (finding that lifetime registration as a sex offender under KORA is not punishment for either Eighth Amendment or § 9 purposes); *State v. Rocheleau*, 307 Kan. 761, Syl. ¶ 4, 415 P.3d 422 (2018); *State v. Watkins*, 306 Kan. 1093, 1095, 401 P.3d 607 (2017); *Huey*, 306 Kan. at 1009-10. Because registration is not punishment, our Supreme Court has explicitly rejected the argument that KORA's lifetime registration requirement violates an offender's constitutional rights as they relate to cruel and unusual punishment or ex post facto provisions. See *State v. Reed*, 306 Kan. 899, 904, 399 P.3d 865 (2017) ("Registration pursuant to KORA for sex offenders is not punishment. Accordingly, retroactive application of the tolling provision to extend Reed's registration period could not violate the Ex Post Facto Clause."); *Petersen-Beard*, 304 Kan. at 209 ("Because we conclude the registration requirements Petersen-Beard complains of are not punishment, his claim that those requirements violate the Eighth Amendment's prohibition against cruel and unusual punishment cannot survive.").

Similarly, the Kansas Supreme Court has held that a registration requirement is not part of a defendant's criminal sentence. *Rocheleau*, 307 Kan. at 765; *State v. Marinelli*, 307 Kan. 768, 786, 415 P.3d 405 (2018). As *Marinelli* noted:

> "[W]ithin KORA, there are statutory provisions that argue against considering registration to be part of a criminal sentence. For example, if an individual is convicted of a qualifying crime, but remains free on bond pending sentencing, that individual is immediately obliged upon conviction to register within three days. See K.S.A. 2017 Supp. 22-4904(a)(1)(B). And failing to do so could cause that individual to be charged with a new crime for not registering—even before sentencing for the underlying conviction." 307 Kan. at 786.

N.R. acknowledges these adverse rulings. Yet he asserts that they do not apply here because they considered only adult criminals, and, as the United States Supreme

Court has held, juveniles are different than adults. N.R. cites several federal cases that highlight the diminished culpability of juveniles and require a heightened scrutiny by the sentencing court when considering that diminished culpability. For example, *Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), outlawed the mandatory imposition of life without parole sentences for juveniles convicted of homicide. *Miller* was the third in a line of cases in which the United States Supreme Court held that "children are constitutionally different from adults for purposes of sentencing." 567 U.S. at 471; see *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (finding Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide); *Roper v. Simmons*, 543 U.S. 551, 578-79, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding imposition of the death penalty on offenders who were under age 18 when they committed their capital crimes was prohibited by the Eighth and Fourteenth Amendments).

Roper explained why the law does not usually equate the failings of a minor with those of an adult:

> "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. [Citations omitted.]." 543 U.S. at 570.

We have no quarrel with that general rationale. Those cases, however, dealt with the imposition of states' "harshest possible penalt[ies]"—execution and imprisonment for life without parole. 567 U.S. at 479. N.R. cites no authority for his assertion that a

lifetime registration requirement is one of Kansas' harshest possible penalties. Because KORA's registration requirement is not punishment, those federal cases are unpersuasive.

The federal cases more on point examine the constitutionality of sex offender registration requirements, generally, and as applied to juveniles. In *Smith v. Doe*, the United States Supreme Court held that Alaska's sex offender registration statute established a civil regulatory scheme and did not impose punishment, and thus did not violate the Ex Post Facto Clause. 538 U.S. 84, 105-06, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Like the Alaska statute upheld by the Supreme Court, the Kansas statute imposes a civil regulatory regime rather than punishment. See *Petersen-Beard*, 304 Kan. at 195-97. KORA requires various categories of sex offenders to provide personal information to the state and to keep that information updated and requires the state to publish that information. Such a scheme does not implicate the Ex Post Facto Clause or the Cruel and Unusual Punishment Clause because it is civil and regulatory in nature.

Cases applying KORA's federal counterpart, the Sex Offender Registration and Notification Act (SORNA), do not help N.R. Congress chose to extend SORNA to certain juveniles—those 14 years or older at the time of their offense where "the offense adjudicated was comparable to or more severe than aggravated sexual abuse" under 18 U.S.C. § 2241 (2012). 34 U.S.C. § 20911(8) (2017 Supp.). And SORNA may require juveniles who fit the criteria to register as sex offenders for life. 34 U.S.C. § 20915(a) (2017 Supp.).

Yet federal circuits have held that SORNA is not punishment. As the Kansas Supreme Court noted in *Petersen-Beard*, 304 Kan. at 197, the Fourth Circuit has held that SORNA is not punishment as applied to a juvenile. See *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013); see also *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009) (SORNA's express language shows that Congress sought to create a civil remedy, so the defendant must show that either the purpose or the effect of the regulation

is in fact so punitive as to negate its civil intent. "This he cannot do."); *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) ("SORNA's registration requirement demonstrates no congressional intent to punish sex offenders."), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432, 132 S. Ct. 975, 181 L. Ed. 2d 935 (2012). But see *Piasecki v. Court Common Pleas, Bucks Cnty, PA*, 917 F.3d 161, 172-73 (3d Cir. 2019) (finding sex offender registration requirements restrictive enough to constitute custody for habeas corpus "custody" requirement and were part of petitioner's sentence).

Even the Ninth Circuit has rejected the claim that SORNA's registration requirement, as applied to juveniles, violates the Eighth Amendment's prohibition against cruel and unusual punishment. In *United States v. Juvenile Male*, 670 F.3d 999, 1002 (9th Cir. 2012), the Ninth Circuit found the registration requirement, even if humiliating, failed to meet the high bar for cruel and unusual punishment claims:

> "Although defendants understandably note that SORNA may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescent, the statute does not meet the high standard of cruel and unusual punishment. The requirement that juveniles register in a sex offender database for at least 25 years because they committed the equivalent of aggravated sexual abuse is not a disproportionate punishment. These juveniles do not face any risk of incarceration or threat of physical harm. In fact, at least two other circuits have held that SORNA's registration requirement is not even a punitive measure, let alone cruel and unusual punishment. See *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) ("SORNA's registration requirement demonstrates no congressional intent to punish sex offenders'); see also *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009)." 670 F.3d at 1010.

N.R. has shown no support in federal law for his position.

As for Kansas law, N.R. relies on *State v. Dull*, 302 Kan. 32, 351 P.3d 641 (2015), in arguing that his age at the time of his offense must be considered before he can be required to register for a lifetime. In *Dull*, our Supreme Court acknowledged the diminished culpability of juveniles as compared to adult offenders and held that the mandatory imposition of lifetime postrelease supervision for a juvenile convicted of aggravated indecent liberties with a child was cruel and unusual punishment. 302 Kan. at 60-61. But *Dull* is distinguishable because under Kansas law, postrelease supervision is punishment and is part of an offender's sentence. See *State v. Gaudina*, 284 Kan. 354, 358, 160 P.3d 854 (2007). The registration requirement, however, is not punishment and is not part of an offender's sentence.

And *Dull* applied a two-pronged analysis from *Graham* to consider whether punishment is cruel and unusual under the Eighth Amendment. That test requires a court to consider the culpability of the offenders in light of their crimes and characteristics, including age:

> "'The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. [Citation omitted.] Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," [citation omitted], the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.' *Graham*, 560 U.S. at 61.
>
> . . . .
>
> "'" . . . The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. [Citations omitted.] In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. [Citations omitted.]"' *Mossman,* 294 Kan. at 929 (quoting *Graham*, 560 U.S. at 67)." *Dull*, 302 Kan. at 45, 51.

But the test that *Dull* used for determining whether punishment is cruel and unusual is not the proper test to use in analyzing whether a legislature's statutory scheme is punitive. See *Petersen-Beard*, 304 Kan. at 194-95. So *Dull* is neither controlling nor persuasive here.

N.R. generally argues that the effect of the lifetime registration requirement on him has been punitive. To show the burden that KORA's registration requirement has placed on him, N.R. relies on two affidavits his attorney reviewed during the hearing on his motion to dismiss—one from N.R. and one from his fiancée. But N.R. never moved to admit these affidavits, either at the hearing on his motion to dismiss or at trial, so the district court never admitted them as evidence. Although N.R. has included the affidavits in the record on appeal, we cannot consider evidence not admitted at trial. See *In re Estate of Watson*, 21 Kan. App. 2d 133, 137, 896 P.2d 401 (1995) (citing *Eisenhut v. Steadman*, 13 Kan. App. 2d 220, 767 P.2d 293 [1989]). And the record includes no testimony by N.R., or his fiancée, or anyone else about any hardships KORA's registration requirement imposes. Thus we have no evidence of any hardships N.R. suffered because of the registration requirement.

N.R. also argues, perhaps to meet part of the *Dull* test, that imposing a lifetime registration requirement on a juvenile contradicts the goals and policies of the Kansas Juvenile Justice Code. Those goals remain substantially unchanged since N.R.'s adjudication:

> "The primary goals of the juvenile justice code are to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community." K.S.A. 2018 Supp. 38-2301.

Our court emphasized the importance of the first goal in a similar case involving offender registration. *In re A.R.M.*, No. 95,870, 2007 WL 959621, at *5 (Kan. App. 2007)

(unpublished opinion). There, as here, the juvenile defendant argued that KORA's requirement that juveniles register as sex offenders constitutes cruel or unusual punishment in violation of both the Eighth Amendment to the United States Constitution and section 9 of the Kansas Constitution Bill of Rights. There, as here, the defendant relied on *Roper* in claiming that the inherent differences between adults and juveniles render application of KORA to juveniles cruel and unusual punishment. Yet we rejected the claim that KORA is unconstitutional as it applies to juveniles. As we explained, the public safety concern connected to sexual offense cases is a high priority and one that is met, at least in part, by registration requirements. See 2007 WL 959621, at *4-5.

As for the second goal, N.R. acknowledges that the registration requirement has held him accountable for his behavior, but he claims the burdens of registration are disproportionate to its benefits. N.R. attacks the third goal by alleging that the registration requirement has burdened, instead of improved, his ability to live more productively and responsibly in the community. But again he relies on the unadmitted affidavits, which we cannot do.

N. R.'s assertion that the registration requirement contradicts the goals or policies of the Kansas Juvenile Justice Code is thus unsupported by evidence. But even if N.R.'s assertions were backed by evidence, that would not matter. KORA's registration requirement is not part of the juvenile justice code, so N.R.'s showing that the registration requirement fails to meet the primary goals of the juvenile justice code would do nothing to show that the requirement is punishment.

N.R. has shown no reason why registration, which is not punishment for adults, should be considered punishment for juveniles. Our Supreme Court clarified in *PetersenBeard* the proper test for analyzing whether a legislature's statutory scheme is punitive.

Yet N.R. makes no attempt to apply that test, which we summarize below.

Petersen-Beard adopted the two-part framework set out in *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Under that "intent-effects" test:

> "'We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 [117 S. Ct. 2072, 138 L. Ed. 2d 501] (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid*. (quoting *United States v. Ward*, 448 U.S. 242, 248-249 [100 S. Ct. 2636, 65 L. Ed. 2d 742] (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks*, supra, at 361 [117 S. Ct. 2072], "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," [citations omitted].'" *Petersen-Beard*, 304 Kan. at 194-95.

The Kansas Supreme Court held in *Thompson* that our Legislature intended the lifetime registration provisions of KORA to be a nonpunitive and civil regulatory scheme rather than punishment. See *Doe v. Thompson*, 304 Kan. 291, 316-17, 373 P.3d 750 (2016), *overruled on other grounds by Petersen-Beard*, 304 Kan. 192; *Petersen-Beard*, 304 Kan. at 195. Because the Legislature did not intend for KORA's lifetime sex offender registration scheme to be punishment, N.R. bears the burden to show by "'the clearest proof'" its effects "'override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" *Smith*, 538 U.S. at 92; see *Petersen-Beard*, 304 Kan. at 195.

To decide whether the effects of the legislative enactment negate and override the Legislature's intent to establish a civil regulatory scheme, we use the seven factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). *Petersen-Beard*, 304 Kan. at 195. Those factors 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 an 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.

Mendoza-Martinez, 372 U.S. at 168-69; *Petersen-Beard*, 304 Kan. at 195. The Kansas Supreme Court analyzed these factors in detail in explaining why KORA is nonpunitive. See *Petersen-Beard*, 304 Kan. 204-209.

N.R. mentions a few of these factors in a conclusory way, yet he makes no attempt to show why his status as a juvenile warrants a different result as to any factor. As a result, N.R. has shown no reason for us to believe that the outcome of *Petersen-Beard* or other controlling precedent would have been any different had it involved a juvenile instead of an adult.

We conclude that the district court properly denied N.R.'s motion to dismiss. Because the registration requirement is not punishment and is not part of his sentence, N.R. can show no violation of the cruel or unusual punishment provision of the Eighth Amendment to the United States Constitution, of section 9 of the Kansas Constitution Bill of Rights, or of the Ex Post Facto Clause of the United States Constitution.

II. N.R.'S SENTENCE WAS LEGAL, AND HIS REGISTRATION REQUIREMENT WAS PROPERLY ORDERED BY A MAGISTRATE JUDGE.

We next consider N.R.'s argument that the magistrate judge lacked authority to order him to register, so his sentence is illegal. N.R. contends that by statute, magistrate judges are limited to deciding matters defined in the juvenile justice code, and the registration requirement is not in the juvenile justice code but only in the criminal code. The State counters that any lack of magistrate authority is immaterial because sex offenders must register under K.S.A. 2018 Supp. 22-4902(b) regardless of which court orders it.

N.R. was originally sentenced by a magistrate judge, who also required N.R. to register as a sex offender. Under K.S.A. 2018 Supp. 20-302b(a)(6), a magistrate judge may hear "any action pursuant to . . . the revised Kansas juvenile justice code." Under the revised code, "[i]f the court finds that the juvenile committed the offense charged . . . the court shall adjudicate the juvenile to be a juvenile offender and may issue a sentence as authorized by this code." K.S.A. 2018 Supp. 38-2356(b). N.R. is correct that this statute, as relevant here, limits magistrate judges to deciding matters defined in the juvenile justice code and to issuing sentences authorized by the juvenile justice code. He is also correct that the registration requirement appears in the criminal procedure code, not in the juvenile justice code. See K.S.A. 2018 Supp. 22-4906(h).

The registration requirement is not, however, part of a criminal defendant's sentence. *Rocheleau*, 307 Kan. at 765; *Marinelli*, 307 Kan. at 786. KORA imposes the duty to register on the offender, not a court's order, as the Kansas Supreme Court has recently clarified:

> "We have established that a person's status as an 'offender' might turn on a court determination, but the Act itself imposes the duty to register upon any such person, rather than the court's order. See K.S.A. 2017 Supp. 22-4903(a) (defining a KORA violation as failure by person defined as 'offender' to comply with the Act); K.S.A. 2017 Supp. 224906 (providing 'duration of registration' for 'offender' based on convicted crime);

> *Jackson*, 291 Kan. at 37 (analogizing 'statutorily required imposition of . . . registration' to standard probation conditions, characterizing registration as 'mandatory' rather than 'discretionary,' and holding registration requirement could be imposed in a journal entry without being pronounced from the bench as part of sentence). In other words, under the plain language of K.S.A. 2017 Supp. 22-4902, neither the fact of notice or its timing are dispositive to whether a person is an 'offender' and, therefore, subject to registration requirements." *Marinelli*, 307 Kan. at 790-91 (finding the district court's failure to notify defendant of his duty to register at the time of his conviction did not excuse defendant's duty to register under KORA).

"Since the duty to register under KORA springs into existence by operation of law immediately upon the existence of statutorily prescribed conditions, it is not within or part of a criminal sentence." *State v. Thomas*, 307 Kan. 733, 750, 415 P.3d 430 (2018). That same rationale compels the conclusion that KORA registration is not part of a juvenile offender's sentence.

Any lack of the magistrate judge's authority is immaterial because the duty to register arises by statute, falls on N.R., and is not part of N.R.'s sentence. N.R.'s adjudication of rape, a severity level 1 offense if committed by an adult, triggered his duty to register. Because N.R.'s registration requirement was not a part of his sentence but arose out of his adjudication, the magistrate did not err by telling N.R. about his statutory duty to register. Under K.S.A. 2018 Supp. 20-302b(a)(6), the magistrate judge had jurisdiction to hear N.R.'s case. After adjudicating N.R. as a juvenile offender, the magistrate judge sentenced N.R. to probation with an underlying term of incarceration, according to the provisions of the juvenile code. N.R.'s sentence is unaffected by his duty to register as K.S.A. 2018 Supp. 22-4906(h) requires. By telling N.R. about his duty to register, the magistrate judge neither caused the court to lose jurisdiction nor imposed an illegal sentence.

Affirmed.

22-4901. Citation of act.[1] K.S.A. 22-4901 through 22-4911 and 22-4913, and amendments thereto, shall be known and may be cited as the Kansas offender registration act.

History: L. 1993, ch. 253, § 17; L. 1994, ch. 107, § 1; L. 1997, ch. 181, § 7; L. 2011, ch. 95, § 1; July 1.

22-4902. Definitions. As used in the Kansas offender registration act, unless the context otherwise requires:

(a) "Offender" means:

(1) A sex offender;

(2) a violent offender;

(3) a drug offender;

(4) any person who has been required to register under out-of-state law or is otherwise required to be registered; and

(5) any person required by court order to register for an offense not otherwise required as provided in the Kansas offender registration act.

(b) "Sex offender" includes any person who:

(1) On or after April 14, 1994, is convicted of any sexually violent crime;

(2) on or after July 1, 2002, is adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;

(3) has been determined to be a sexually violent predator;

(4) on or after July 1, 1997, is convicted of any of the following crimes when one of the parties involved is less than 18 years of age:

(A) Adultery, as defined in K.S.A. 21-3507, prior to its repeal, or K.S.A. 2020 Supp. 21-5511, and amendments thereto;

(B) criminal sodomy, as defined in K.S.A. 21-3505(a)(1), prior to its repeal, or K.S.A. 2020 Supp. 21-5504(a)(1) or (a)(2), and amendments thereto;

(C) promoting prostitution, as defined in K.S.A. 21-3513, prior to its repeal, or K.S.A. 2020 Supp. 21-6420, prior to its amendment by section 17 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013;

(D) patronizing a prostitute, as defined in K.S.A. 21-3515, prior to its repeal, or K.S.A. 2020 Supp. 21-6421, prior to its amendment by section 18 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013; or

(E) lewd and lascivious behavior, as defined in K.S.A. 21-3508, prior to its repeal, or K.S.A. 2020 Supp. 21-5513, and amendments thereto;

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[1] Chapter 22 is called CRIMINAL PROCEDURE, and Article 49 is called OFFENDER REGISTRATION. As seen in the History, KORA has been codified in this place since its inception in 1993.

(5) is convicted of sexual battery, as defined in K.S.A. 21-3517, prior to its repeal, or K.S.A. 2020 Supp. 21-5505(a), and amendments thereto;

(6) is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of an offense defined in this subsection; or

(7) has been convicted of an offense that is comparable to any crime defined in this subsection, or any out-of-state conviction for an offense that under the laws of this state would be an offense defined in this subsection.

(c) "Sexually violent crime" means:

(1) Rape, as defined in K.S.A. 21-3502, prior to its repeal, or K.S.A. 2020 Supp. 21-5503, and amendments thereto;

(2) indecent liberties with a child, as defined in K.S.A. 21-3503, prior to its repeal, or K.S.A. 2020 Supp. 21-5506(a), and amendments thereto;

(3) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504, prior to its repeal, or K.S.A. 2020 Supp. 21-5506(b), and amendments thereto;

(4) criminal sodomy, as defined in K.S.A. 21-3505(a)(2) or (a)(3), prior to its repeal, or K.S.A. 2020 Supp. 21-5504(a)(3) or (a)(4), and amendments thereto;

(5) aggravated criminal sodomy, as defined in K.S.A. 21-3506, prior to its repeal, or K.S.A. 2020 Supp. 21-5504(b), and amendments thereto;

(6) indecent solicitation of a child, as defined in K.S.A. 21-3510, prior to its repeal, or K.S.A. 2020 Supp. 21-5508(a), and amendments thereto;

(7) aggravated indecent solicitation of a child, as defined in K.S.A. 21-3511, prior to its repeal, or K.S.A. 2020 Supp. 21-5508(b), and amendments thereto;

(8) sexual exploitation of a child, as defined in K.S.A. 21-3516, prior to its repeal, or K.S.A. 2020 Supp. 21-5510, and amendments thereto;

(9) aggravated sexual battery, as defined in K.S.A. 21-3518, prior to its repeal, or K.S.A. 2020 Supp. 21-5505(b), and amendments thereto;

(10) aggravated incest, as defined in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2020 Supp. 21-5604(b), and amendments thereto;

(11) electronic solicitation, as defined in K.S.A. 21-3523, prior to its repeal, and K.S.A. 2020 Supp. 21-5509, and amendments thereto;

(12) unlawful sexual relations, as defined in K.S.A. 21-3520, prior to its repeal, or K.S.A. 2020 Supp. 21-5512, and amendments thereto;

(13) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or K.S.A. 2020 Supp. 21-5426(b), and amendments thereto, if committed in whole or in part for the purpose of the sexual gratification of the defendant or another;

(14) commercial sexual exploitation of a child, as defined in K.S.A. 2020 Supp. 21-6422, and amendments thereto;

(15) promoting the sale of sexual relations, as defined in K.S.A. 2020 Supp. 21-6420, and amendments thereto;

(16) any conviction or adjudication for an offense that is comparable to a sexually violent crime as defined in this subsection, or any out-of-state conviction or

adjudication for an offense that under the laws of this state would be a sexually violent crime as defined in this subsection;

(17) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302, 21-5303, and amendments thereto, of a sexually violent crime, as defined in this subsection; or

(18) any act which has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim. As used in this paragraph, "sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(d) "Sexually violent predator" means any person who, on or after July 1, 2001, is found to be a sexually violent predator pursuant to K.S.A. 59-29a01 et seq., and amendments thereto.

(e) "Violent offender" includes any person who:

(1) On or after July 1, 1997, is convicted of any of the following crimes:

(A) Capital murder, as defined in K.S.A. 21-3439, prior to its repeal, or K.S.A. 2020 Supp. 21-5401, and amendments thereto;

(B) murder in the first degree, as defined in K.S.A. 21-3401, prior to its repeal, or K.S.A. 2020 Supp. 21-5402, and amendments thereto;

(C) murder in the second degree, as defined in K.S.A. 21-3402, prior to its repeal, or K.S.A. 2020 Supp. 21-5403, and amendments thereto;

(D) voluntary manslaughter, as defined in K.S.A. 21-3403, prior to its repeal, or K.S.A. 2020 Supp. 21-5404, and amendments thereto;

(E) involuntary manslaughter, as defined in K.S.A. 21-3404, prior to its repeal, or K.S.A. 2020 Supp. 21-5405(a)(1), (a)(2) or (a)(4), and amendments thereto. The provisions of this paragraph shall not apply to violations of K.S.A. 2020 Supp. 21-5405(a)(3), and amendments thereto, which occurred on or after July 1, 2011, through July 1, 2013;

(F) kidnapping, as defined in K.S.A. 21-3420, prior to its repeal, or K.S.A. 2020 Supp. 21-5408(a), and amendments thereto;

(G) aggravated kidnapping, as defined in K.S.A. 21-3421, prior to its repeal, or K.S.A. 2020 Supp. 21-5408(b), and amendments thereto;

(H) criminal restraint, as defined in K.S.A. 21-3424, prior to its repeal, or K.S.A. 2020 Supp. 21-5411, and amendments thereto, except by a parent, and only when the victim is less than 18 years of age; or

(I) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or K.S.A. 2020 Supp. 21-5426(b), and amendments thereto, if not committed in whole or in part for the purpose of the sexual gratification of the defendant or another;

(2) on or after July 1, 2006, is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony;

(3) has been convicted of an offense that is comparable to any crime defined in this subsection, any out-of-state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or

(4) is convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(f) "Drug offender" includes any person who, on or after July 1, 2007:

(1) Is convicted of any of the following crimes:

(A) Unlawful manufacture or attempting such of any controlled substance or controlled substance analog, as defined in K.S.A. 65-4159, prior to its repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, or K.S.A. 2020 Supp. 21-5703, and amendments thereto;

(B) possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance, as defined in K.S.A. 65-7006(a), prior to its repeal, K.S.A. 2010 Supp. 21-36a09(a), prior to its transfer, or K.S.A. 2020 Supp. 21-5709(a), and amendments thereto;

(C) K.S.A. 65-4161, prior to its repeal, K.S.A. 2010 Supp. 21-36a05(a)(1), prior to its transfer, or K.S.A. 2020 Supp. 21-5705(a)(1), and amendments thereto. The provisions of this paragraph shall not apply to violations of K.S.A. 2010 Supp. 21-36a05(a)(2) through (a)(6) or (b) which occurred on or after July 1, 2009, through April 15, 2010;

(2) has been convicted of an offense that is comparable to any crime defined in this subsection, any out-of-state conviction for an offense that under the laws of this state would be an offense defined in this subsection; or

(3) is or has been convicted of an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(g) Convictions or adjudications which result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction or adjudication. Any conviction or adjudication set aside pursuant to law is not a conviction or adjudication for purposes of this section. A conviction or adjudication from any out-of-state court shall constitute a conviction or adjudication for purposes of this section.

(h) "School" means any public or private educational institution, including, but not limited to, postsecondary school, college, university, community college, secondary school, high school, junior high school, middle school, elementary school, trade school, vocational school or professional school providing training or education to an offender for three or more consecutive days or parts of days, or for 10 or more nonconsecutive days in a period of 30 consecutive days.

(i) "Employment" means any full-time, part-time, transient, day-labor employment or volunteer work, with or without compensation, for three or more consecutive days or parts of days, or for 10 or more nonconsecutive days in a period of 30 consecutive days.

(j) "Reside" means to stay, sleep or maintain with regularity or temporarily one's person and property in a particular place other than a location where the offender is incarcerated. It shall be presumed that an offender resides at any and all locations where the offender stays, sleeps or maintains the offender's person for three or more consecutive days or parts of days, or for ten or more nonconsecutive days in a period of 30 consecutive days.

(k) "Residence" means a particular and definable place where an individual resides. Nothing in the Kansas offender registration act shall be construed to state that an offender may only have one residence for the purpose of such act.

(l) "Transient" means having no fixed or identifiable residence.

(m) "Law enforcement agency having initial jurisdiction" means the registering law enforcement agency of the county or location of jurisdiction where the offender expects to most often reside upon the offender's discharge, parole or release.

(n) "Registering law enforcement agency" means the sheriff's office or tribal police department responsible for registering an offender.

(o) "Registering entity" means any person, agency or other governmental unit, correctional facility or registering law enforcement agency responsible for obtaining the required information from, and explaining the required registration procedures to, any person required to register pursuant to the Kansas offender registration act. "Registering entity" shall include, but not be limited to, sheriff's offices, tribal police departments and correctional facilities.

(p) "Treatment facility" means any public or private facility or institution providing inpatient mental health, drug or alcohol treatment or counseling, but does not include a hospital, as defined in K.S.A. 65-425, and amendments thereto.

(q) "Correctional facility" means any public or private correctional facility, juvenile detention facility, prison or jail.

(r) "Out-of-state" means: the District of Columbia; any federal, military or tribal jurisdiction, including those within this state; any foreign jurisdiction; or any state or territory within the United States, other than this state.

(s) "Duration of registration" means the length of time during which an offender is required to register for a specified offense or violation.

(t) (1) Notwithstanding any other provision of this section, "offender" shall not include any person who is:

(A) Convicted of unlawful transmission of a visual depiction of a child, as defined in K.S.A. 2020 Supp. 21-5611(a), and amendments thereto, aggravated unlawful transmission of a visual depiction of a child, as defined in K.S.A. 2020 Supp. 21-5611(b), and amendments thereto, or unlawful possession of a visual depiction of a child, as defined in K.S.A. 2020 Supp. 21-5610, and amendments thereto; or

(B) adjudicated as a juvenile offender for an act which if committed by an adult would constitute the commission of a crime defined in subsection (t)(1)(A).

(2) Notwithstanding any other provision of law, a court shall not order any person to register under the Kansas offender registration act for the offenses described in subsection (t)(1).

History: L. 1993, ch. 253, § 18; L. 1994, ch. 107, § 2; L. 1997, ch. 181, § 8; L. 1999, ch. 164, § 29; L. 2001, ch. 208, § 10; L. 2002, ch. 55, § 1; L. 2002, ch. 163, § 6; L. 2003, ch. 123, § 3; L. 2006, ch. 214, § 6; L. 2007, ch. 183, § 1; L. 2008, ch. 74, § 1; L. 2009, ch. 32, § 44; L. 2010, ch. 147, § 8; L. 2011, ch. 95, § 2; L. 2012, ch. 149, § 1; L. 2013, ch. 127, § 1; L. 2014, ch. 117, § 2; L. 2016, ch. 96, § 7; L. 2017, ch. 78, § 21; July 1.

Revisor's Note:

Section was also amended by L. 2010, ch. 74, § 11, L. 2010, ch. 122, § 4, and L. 2010, ch. 155, § 9, but those versions were repealed by L. 2010, ch. 147, § 9, and L. 2010, ch. 155, § 26.

Section was amended twice in the 2011 session, see also 22-4902a.

Section was amended twice in the 2013 session, see also 22-4902b.

22-4903. Violation of act; aggravated violation; penalties; new and separate offense; prosecution, venue. (a) Violation of the Kansas offender registration act is the failure by an offender, as defined in K.S.A. 22-4902, and amendments thereto, to comply with any and all provisions of such act, including any and all duties set forth in K.S.A. 22-4905 through 22-4907, and amendments thereto. Any violation of the Kansas offender registration act which continues for more than 30 consecutive days shall, upon the 31st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate offense every 30 days thereafter for as long as the violation continues.

(b) Aggravated violation of the Kansas offender registration act is violation of the Kansas offender registration act which continues for more than 180 consecutive days. Any aggravated violation of the Kansas offender registration act which continues for more than 180 consecutive days shall, upon the 181st consecutive day, constitute a new and separate offense, and shall continue to constitute a new and separate violation of the Kansas offender registration act every 30 days thereafter, or a new and separate aggravated violation of the Kansas offender registration act every 180 days thereafter, for as long as the violation continues.

(c) (1) Except as provided in subsection (c)(3), violation of the Kansas offender registration act is:

(A) Upon a first conviction, a severity level 6 felony;

(B) upon a second conviction, a severity level 5 felony; and

(C) upon a third or subsequent conviction, a severity level 3 felony.

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime.

(2) Except as provided in subsection (c)(3), aggravated violation of the Kansas offender registration act is a severity level 3 felony.

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime.

(3) Violation of the Kansas offender registration act or aggravated violation of the Kansas offender registration act consisting only of failing to remit payment to the sheriff's office as required in K.S.A. 22-4905(l), and amendments thereto, is:

(A) Except as provided in subsection (c)(3)(B), a class A misdemeanor if, within 15 days of registration, full payment is not remitted to the sheriff's office;

(B) a severity level 9 felony if, within 15 days of the most recent registration, two or more full payments have not been remitted to the sheriff's office.

Such violation shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act. If the offender is required to be registered under both a person and nonperson underlying crime, the violation shall be designated as a person crime.

(d) Prosecution of violations of this section may be held:

(1) In any county in which the offender resides;

(2) in any county in which the offender is required to be registered under the Kansas offender registration act;

(3) in any county in which the offender is located during which time the offender is not in compliance with the Kansas offender registration act; or

(4) in the county in which any conviction or adjudication occurred for which the offender is required to be registered under the Kansas offender registration act.

History: L. 1993, ch. 253, § 19; L. 1999, ch. 164, § 30; L. 2003, ch. 123, § 4; L. 2006, ch. 212, § 20; L. 2007, ch. 183, § 2; L. 2011, ch. 95, § 3; L. 2012, ch. 149, § 2; L. 2013, ch. 127, § 2; L. 2016, ch. 97, § 4; L. 2017, ch. 100, § 3; July 1.

Revisor's Note:

Section was amended twice in the 2016 session, see also 22-4903a.

22-4904. Registration of offender; duties of court, correctional facility, treatment facility, registering law enforcement agency, Kansas bureau of investigation, attorney general; notification of schools and licensed child care facilities. (a) (1) At the time of conviction or adjudication for an offense requiring registration as provided in K.S.A. 22-4902, and amendments thereto, the court shall:

(A) Inform any offender, on the record, of the procedure to register and the requirements of K.S.A. 22-4905, and amendments thereto; and

(B) if the offender is released:

(i) Complete a notice of duty to register, which shall include title and statute number of conviction or adjudication, date of conviction or adjudication, case number, county of conviction or adjudication, and the following offender information: Name, address, date of birth, social security number, race, ethnicity and gender;

(ii) require the offender to read and sign the notice of duty to register, which shall include a statement that the requirements provided in this subsection have been explained to the offender;

(iii) order the offender to report within three business days to the registering law enforcement agency in the county or tribal land of conviction or adjudication and to the registering law enforcement agency in any place where the offender resides, maintains employment or attends school, to complete the registration form with all information and any updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto; and

(iv) provide one copy of the notice of duty to register to the offender and, within three business days, send a copy of the form to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation.

(2) At the time of sentencing or disposition for an offense requiring registration as provided in K.S.A. 22-4902, and amendments thereto, the court shall ensure the age of the victim is documented in the journal entry of conviction or adjudication.

(3) Upon commitment for control, care and treatment by the Kansas department for aging and disability services pursuant to K.S.A. 59-29a07, and amendments thereto, the court shall notify the registering law enforcement agency of the county where the offender resides during commitment of such offender's commitment. Such notice shall be prepared by the office of the attorney general for transmittal by the court by electronic means, including by fax or e-mail.

(b) The staff of any correctional facility or the registering law enforcement agency's designee shall:

(1) At the time of initial custody, register any offender within three business days:

(A) Inform the offender of the procedure for registration and of the offender's registration requirements as provided in K.S.A. 22-4905, and amendments thereto;

(B) complete the registration form with all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto;

(C) require the offender to read and sign the registration form, which shall include a statement that the requirements provided in this subsection have been explained to the offender;

(D) provide one copy of the form to the offender and, within three business days, send a copy of the form to the Kansas bureau of investigation; and

(E) enter all offender information required by the national crime information center into the national sex offender registry system within three business days of completing the registration or electronically submit all information and updated information required for registration as provided in K.S.A. 22-4907, and

amendments thereto, within three business days to the Kansas bureau of investigation;

(2) notify the Kansas bureau of investigation of the incarceration of any offender and of the location or any change in location of the offender while in custody;

(3) prior to any offender being discharged, paroled, furloughed or released on work or school release that does not require the daily return to a correctional facility:

(A) Inform the offender of the procedure for registration and of the offender's registration requirements as provided in K.S.A. 22-4905, and amendments thereto;

(B) complete the registration form with all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto;

(C) require the offender to read and sign the registration form, which shall include a statement that the requirements provided in this subsection have been explained to the offender;

(D) photograph the offender's face and any identifying marks;

(E) obtain fingerprint and palm prints of the offender; and

(F) provide one copy of the form to the offender and, within three business days, send a copy of the form and of the photograph or photographs to the law enforcement agency having initial jurisdiction and to the Kansas bureau of investigation; and

(4) notify the law enforcement agency having initial jurisdiction and the Kansas bureau of investigation seven business days prior to any offender being discharged, paroled, furloughed or released on work or school release.

(c) The staff of any treatment facility shall:

(1) Within three business days of an offender's arrival for inpatient treatment, inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located of the offender's presence at the treatment facility and the expected duration of the treatment, and immediately notify the registering law enforcement agency of an unauthorized or unexpected absence of the offender during the offender's treatment;

(2) inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located within three business days of an offender's discharge or release; and

(3) provide information upon request to any registering law enforcement agency having jurisdiction relevant to determining the presence of an offender within the treatment facility.

(d) The registering law enforcement agency, upon the reporting of any offender, shall:

(1) Inform the offender of the duty to register as provided by the Kansas offender registration act;

(2) (A) explain the procedure for registration and the offender's registration requirements as provided in K.S.A. 22-4905, and amendments thereto;

(B) obtain the information required for registration as provided in K.S.A. 22-4907, and amendments thereto; and

(C) require the offender to read and sign the registration form, which shall include a statement that the requirements provided in this subsection have been explained to the offender;

(3) complete the registration form with all information and updated information required for registration, as provided in K.S.A. 22-4907, and amendments thereto, each time the offender reports to the registering law enforcement agency. All information and updated information reported by an offender shall be forwarded to the Kansas bureau of investigation within three business days;

(4) maintain the original signed registration form, provide one copy of the completed registration form to the offender and, within three business days, send one copy of the completed form to the Kansas bureau of investigation;

(5) forward a copy of any certified letter used for reporting pursuant to K.S.A. 22-4905, and amendments thereto, when utilized, within three business days to the Kansas bureau of investigation;

(6) obtain registration information from every offender required to register regardless of whether or not the offender remits payment;

(7) upon every required reporting, update the photograph or photographs of the offender's face and any new identifying marks and immediately forward copies or electronic files of the photographs to the Kansas bureau of investigation;

(8) enter all offender information required by the national crime information center into the national sex offender registry system within three business days of completing the registration or electronically submit all information and updated information required for registration as provided in K.S.A. 22-4907, and amendments thereto, within three business days to the Kansas bureau of investigation;

(9) maintain a special fund for the deposit and maintenance of fees paid by offenders. All funds retained by the registering law enforcement agency pursuant to the provisions of this section shall be credited to a special fund of the registering law enforcement agency which shall be used solely for law enforcement and criminal prosecution purposes and which shall not be used as a source of revenue to reduce the amount of funding otherwise made available to the registering law enforcement agency; and

(10) forward any initial registration and updated registration information within three business days to any out-of-state jurisdiction where the offender is expected to reside, maintain employment or attend school.

(e) (1) The Kansas bureau of investigation shall:

(A) Forward all additions or changes in information to any registering law enforcement agency, other than the agency that submitted the form, where the offender expects to reside, maintain employment or attend school;

(B) ensure that offender information is immediately entered in the state registered offender database and the Kansas registered offender website, as provided in K.S.A. 22-4909, and amendments thereto;

(C) transmit offender conviction or adjudication data, fingerprints and palm prints to the federal bureau of investigation; and

(D) ensure all offender information required by the national crime information center is transmitted into the national sex offender registry system within three business days of such information being electronically submitted to the Kansas bureau of investigation.

(2) The director of the Kansas bureau of investigation may adopt rules and regulations necessary to implement the provisions of the Kansas offender registration act.

(f) The attorney general shall, within 10 business days of an offender being declared a sexually violent predator, forward to the Kansas bureau of investigation all relevant court documentation declaring an offender a sexually violent predator.

(g) The state department of education shall annually notify any school of the Kansas bureau of investigation internet website, and any internet website containing information on the Kansas offender registration act sponsored or created by the registering law enforcement agency of the county or location of jurisdiction in which the school is located, for the purpose of locating offenders who reside near such school. Such notification shall include information that the registering law enforcement agency of the county or location of jurisdiction where such school is located is available to the school to assist in using the registry and providing additional information on registered offenders.

(h) The secretary of health and environment shall annually notify any licensed child care facility of the Kansas bureau of investigation internet website, and any internet website containing information on the Kansas offender registration sponsored or created by the registering law enforcement agency of the county in which the facility is located, for the purpose of locating offenders who reside near such facility. Such notification shall include information that the registering law enforcement agency of the county or location of jurisdiction where such child care facility is located is available to the child care facilities to assist in using the registry and providing additional information on registered offenders.

(i) Upon request, the clerk of any court of record shall provide the Kansas bureau of investigation copies of complaints, indictments, information, journal entries, commitment orders or any other documents necessary to the performance of the duties of the Kansas bureau of investigation under the Kansas offender registration act. No fees or charges for providing such documents may be assessed.

History: L. 1993, ch. 253, § 20; L. 1994, ch. 107, § 3; L. 1996, ch. 224, § 4; L. 1997, ch. 181, § 9; L. 1999, ch. 164, § 31; L. 2000, ch. 150, § 2; L. 2001, ch. 208, § 11; L. 2003, ch. 123, § 5; L. 2006, ch. 214, § 7; L. 2007, ch. 183, § 3; L. 2010, ch. 135, § 35; L. 2011, ch. 95, § 4; L. 2012, ch. 149, § 3; L. 2013, ch. 127, § 3; L. 2016, ch. 64, § 2; July 1.

22-4905. Duties of offender required to register; reporting; updated photograph; fee; driver's license; identification card. Any offender required to register as provided in the Kansas offender registration act shall:

(a) Except as otherwise provided in this subsection, register in person with the registering law enforcement agency within three business days of coming into any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school. Any such offender who cannot physically register in person with the registering law enforcement agency for such reasons including, but not limited to, incapacitation or hospitalization, as determined by a person licensed to practice medicine or surgery, or involuntarily committed pursuant to the Kansas sexually violent predator act, shall be subject to verification requirements other than in-person registration, as determined by the registering law enforcement agency having jurisdiction;

(b) except as provided further, for any: (1) Sex offender, including a violent offender or drug offender who is also a sex offender, report in person four times each year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or is attending a school; and (2) violent offender or drug offender, report in person four times each year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or is attending a school, except that, at the discretion of the registering law enforcement agency, one of the four required reports may be conducted by certified letter. When utilized, the certified letter for reporting shall be sent by the registering law enforcement agency to the reported residence of the offender. The offender shall indicate any changes in information as required for reporting in person. The offender shall respond by returning the certified letter to the registering law enforcement agency within 10 business days by certified mail. The offender shall be required to report to the registering law enforcement agency once during the month of the offender's birthday and every third, sixth and ninth month occurring before and after the month of the offender's birthday. The registering law enforcement agency may determine the appropriate times and days for reporting by the offender, consistent with this subsection. Nothing contained in this subsection shall be construed to alleviate any offender from meeting the requirements prescribed in the Kansas offender registration act;

(c) provide the information required for registration as provided in K.S.A. 22-4907, and amendments thereto, and verify all information previously provided is accurate;

(d) if in the custody of a correctional facility, register with the correctional facility within three business days of initial custody and shall not be required to update such registration until discharged, paroled, furloughed or released on work or school release from a correctional facility. A copy of the registration form and any updated registrations for an offender released on work or school release shall be sent, within three business days, to the registering law enforcement agency where

the offender is incarcerated, maintains employment or attends school, and to the Kansas bureau of investigation;

(e) if involuntarily committed pursuant to the Kansas sexually violent predator act, register within three business days of arrival in the county where the offender resides during commitment. The offender shall not be required to update such registration until placed in a reintegration facility, on transitional release or on conditional release. Upon placement in a reintegration facility, on transitional release or on conditional release, the offender shall be personally responsible for complying with the provisions of the Kansas offender registration act;

(f) notwithstanding subsections (a) and (b), if the offender is transient, report in person to the registering law enforcement agency of such county or location of jurisdiction in which the offender is physically present within three business days of arrival in the county or location of jurisdiction. Such offender shall be required to register in person with the registering law enforcement agency every 30 days, or more often at the discretion of the registering law enforcement agency. Such offender shall comply with the provisions of the Kansas offender registration act and, in addition, shall:

(1) Provide a list of places where the offender has slept and otherwise frequented during the period of time since the last date of registration; and

(2) provide a list of places where the offender may be contacted and where the offender intends to sleep and otherwise frequent during the period of time prior to the next required date of registration;

(g) if required by out-of-state law, register in any out-of-state jurisdiction, where the offender resides, maintains employment or attends school;

(h) register in person upon any commencement, change or termination of residence location, employment status, school attendance or other information as provided in K.S.A. 22-4907, and amendments thereto, within three business days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered and provide written notice to the Kansas bureau of investigation;

(i) report in person to the registering law enforcement agency or agencies within three business days of any change in name;

(j) if receiving inpatient treatment at any treatment facility, inform the treatment facility of the offender's status as an offender and inform the registering law enforcement agency of the county or location of jurisdiction in which the treatment facility is located of the offender's presence at the treatment facility and the expected duration of the treatment;

(k) submit to the taking of an updated photograph by the registering law enforcement agency on each occasion when the offender registers with or reports to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment or attends school. In addition, such offender shall submit to the taking of a photograph to document any changes in identifying characteristics, including, but not limited to, scars, marks and tattoos;

(l) remit payment to the sheriff's office in the amount of $20 as part of the reporting process required pursuant to subsection (b) in each county in which the offender resides, maintains employment or is attending school. Registration will be completed regardless of whether or not the offender remits payment. Failure of the offender to remit full payment within 15 days of registration is a violation of the Kansas offender registration act and is subject to prosecution pursuant to K.S.A. 22-4903, and amendments thereto. Notwithstanding other provisions herein, payment of this fee is not required:

(1) When an offender provides updates or changes in information or during an initial registration unless such updates, changes or initial registration is during the month of such offender's birthday and every third, sixth and ninth month occurring before and after the month of the offender's birthday;

(2) when an offender is transient and is required to register every 30 days, or more frequently as ordered by the registering law enforcement agency, except during the month of the offender's birthday and every third, sixth and ninth month occurring before and after the month of the offender's birthday; or

(3) if an offender has, prior to the required reporting and within the last three years, been determined to be indigent by a court of law, and the basis for that finding is recorded by the court;

(m) annually renew any driver's license pursuant to K.S.A. 8-247, and amendments thereto, and annually renew any identification card pursuant to K.S.A. 2020 Supp. 8-1325a, and amendments thereto;

(n) if maintaining primary residence in this state, surrender all driver's licenses and identification cards from other states, territories and the District of Columbia, except if the offender is presently serving and maintaining active duty in any branch of the United States military or the offender is an immediate family member of a person presently serving and maintaining active duty in any branch of the United States military;

(o) read and sign the registration form noting whether the requirements provided in this section have been explained to the offender; and

(p) report in person to the registering law enforcement agency in the jurisdiction of the offender's residence and provide written notice to the Kansas bureau of investigation 21 days prior to any travel outside of the United States, and provide an itinerary including, but not limited to, destination, means of transport and duration of travel, or if under emergency circumstances, within three business days of making travel arrangements.

History: L. 1993, ch. 253, § 21; L. 1994, ch. 107, § 4; L. 1997, ch. 181, § 10; L. 1999, ch. 164, § 32; L. 2001, ch. 208, § 12; L. 2003, ch. 123, § 6; L. 2006, ch. 214, § 8; L. 2010, ch. 135, § 36; L. 2011, ch. 95, § 5; L. 2012, ch. 149, § 4; L. 2013, ch. 127, § 4; L. 2016, ch. 64, § 3; July 1.

22-4906. Time period in which required to register; termination of registration requirement. (a) (1) Except as provided in subsection (c), if convicted

of any of the following offenses, an offender's duration of registration shall be, if confined, 15 years after the date of parole, discharge or release, whichever date is most recent, or, if not confined, 15 years from the date of conviction:

(A) Sexual battery, as defined in K.S.A. 21-3517, prior to its repeal, or K.S.A. 2020 Supp. 21-5505(a), and amendments thereto;

(B) adultery, as defined in K.S.A. 21-3507, prior to its repeal, or K.S.A. 2020 Supp. 21-5511, and amendments thereto, when one of the parties involved is less than 18 years of age;

(C) promoting the sale of sexual relations, as defined in K.S.A. 2020 Supp. 21-6420, and amendments thereto;

(D) patronizing a prostitute, as defined in K.S.A. 21-3515, prior to its repeal, or K.S.A. 2020 Supp. 21-6421, prior to its amendment by section 18 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013, when one of the parties involved is less than 18 years of age;

(E) lewd and lascivious behavior, as defined in K.S.A. 21-3508, prior to its repeal, or K.S.A. 2020 Supp. 21-5513, and amendments thereto, when one of the parties involved is less than 18 years of age;

(F) capital murder, as defined in K.S.A. 21-3439, prior to its repeal, or K.S.A. 2020 Supp. 21-5401, and amendments thereto;

(G) murder in the first degree, as defined in K.S.A. 21-3401, prior to its repeal, or K.S.A. 2020 Supp. 21-5402, and amendments thereto;

(H) murder in the second degree, as defined in K.S.A. 21-3402, prior to its repeal, or K.S.A. 2020 Supp. 21-5403, and amendments thereto;

(I) voluntary manslaughter, as defined in K.S.A. 21-3403, prior to its repeal, or K.S.A. 2020 Supp. 21-5404, and amendments thereto;

(J) involuntary manslaughter, as defined in K.S.A. 21-3404, prior to its repeal, or K.S.A. 2020 Supp. 21-5405(a)(1), (a)(2) or (a)(4), and amendments thereto;

(K) criminal restraint, as defined in K.S.A. 21-3424, prior to its repeal, or K.S.A. 2020 Supp. 21-5411, and amendments thereto, except by a parent, and only when the victim is less than 18 years of age;

(L) any act which has been determined beyond a reasonable doubt to have been sexually motivated, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;

(M) conviction of any person required by court order to register for an offense not otherwise required as provided in the Kansas offender registration act;

(N) conviction of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony;

(O) unlawful manufacture or attempting such of any controlled substance or controlled substance analog, as defined in K.S.A. 65-4159, prior to its repeal, K.S.A. 2010 Supp. 21-36a03, prior to its transfer, or K.S.A. 2020 Supp. 21-5703, and amendments thereto;

(P) possession of ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with intent to use the product to manufacture a controlled substance, as defined by K.S.A. 65-7006(a), prior to its repeal, K.S.A. 2010 Supp. 21-36a09(a), prior to its transfer, or K.S.A. 2020 Supp. 21-5709(a), and amendments thereto;

(Q) K.S.A. 65-4161, prior to its repeal, K.S.A. 2010 Supp. 21-36a05(a)(1), prior to its transfer, or K.S.A. 2020 Supp. 21-5705(a)(1), and amendments thereto; or

(R) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(2) Except as otherwise provided by the Kansas offender registration act, the duration of registration terminates, if not confined, at the expiration of 15 years from the date of conviction. Any period of time during which any offender is incarcerated in any jail or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration.

(b) (1) Except as provided in subsection (c), if convicted of any of the following offenses, an offender's duration of registration shall be, if confined, 25 years after the date of parole, discharge or release, whichever date is most recent, or, if not confined, 25 years from the date of conviction:

(A) Criminal sodomy, as defined in K.S.A. 21-3505(a)(1), prior to its repeal, or K.S.A. 2020 Supp. 21-5504(a)(1) or (a)(2), and amendments thereto, when one of the parties involved is less than 18 years of age;

(B) indecent solicitation of a child, as defined in K.S.A. 21-3510, prior to its repeal, or K.S.A. 2020 Supp. 21-5508(a), and amendments thereto;

(C) electronic solicitation, as defined in K.S.A. 21-3523, prior to its repeal, or K.S.A. 2020 Supp. 21-5509, and amendments thereto;

(D) aggravated incest, as defined in K.S.A. 21-3603, prior to its repeal, or K.S.A. 2020 Supp. 21-5604(b), and amendments thereto;

(E) indecent liberties with a child, as defined in K.S.A. 21-3503, prior to its repeal, or K.S.A. 2020 Supp. 21-5506(a), and amendments thereto;

(F) unlawful sexual relations, as defined in K.S.A. 21-3520, prior to its repeal, or K.S.A. 2020 Supp. 21-5512, and amendments thereto;

(G) sexual exploitation of a child, as defined in K.S.A. 21-3516, prior to its repeal, or K.S.A. 2020 Supp. 21-5510, and amendments thereto, if the victim is 14 or more years of age but less than 18 years of age;

(H) aggravated sexual battery, as defined in K.S.A. 21-3518, prior to its repeal, or K.S.A. 2020 Supp. 21-5505(b), and amendments thereto;

(I) promoting prostitution, as defined in K.S.A. 21-3513, prior to its repeal, or K.S.A. 2020 Supp. 21-6420, prior to its amendment by section 17 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013, if the person selling sexual relations is 14 or more years of age but less than 18 years of age; or

(J) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(2) Except as otherwise provided by the Kansas offender registration act, the duration of registration terminates, if not confined, at the expiration of 25 years from the date of conviction. Any period of time during which any offender is incarcerated in any jail or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration.

(c) Upon a second or subsequent conviction of an offense requiring registration, an offender's duration of registration shall be for such offender's lifetime.

(d) The duration of registration for any offender who has been convicted of any of the following offenses shall be for such offender's lifetime:

(1) Rape, as defined in K.S.A. 21-3502, prior to its repeal, or K.S.A. 2020 Supp. 21-5503, and amendments thereto;

(2) aggravated indecent solicitation of a child, as defined in K.S.A. 21-3511, prior to its repeal, or K.S.A. 2020 Supp. 21-5508(b), and amendments thereto;

(3) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504, prior to its repeal, or K.S.A. 2020 Supp. 21-5506(b), and amendments thereto;

(4) criminal sodomy, as defined in K.S.A. 21-3505(a)(2) or (a)(3), prior to its repeal, or K.S.A. 2020 Supp. 21-5504(a)(3) or (a)(4), and amendments thereto;

(5) aggravated criminal sodomy, as defined in K.S.A. 21-3506, prior to its repeal, or K.S.A. 2020 Supp. 21-5504(b), and amendments thereto;

(6) aggravated human trafficking, as defined in K.S.A. 21-3447, prior to its repeal, or K.S.A. 2020 Supp. 21-5426(b), and amendments thereto;

(7) sexual exploitation of a child, as defined in K.S.A. 21-3516, prior to its repeal, or K.S.A. 2020 Supp. 21-5510, and amendments thereto, if the victim is less than 14 years of age;

(8) promoting prostitution, as defined in K.S.A. 21-3513, prior to its repeal, or K.S.A. 2020 Supp. 21-6420, prior to its amendment by section 17 of chapter 120 of the 2013 Session Laws of Kansas on July 1, 2013, if the person selling sexual relations is less than 14 years of age;

(9) kidnapping, as defined in K.S.A. 21-3420, prior to its repeal, or K.S.A. 2020 Supp. 21-5408(a), and amendments thereto;

(10) aggravated kidnapping, as defined in K.S.A. 21-3421, prior to its repeal, or K.S.A. 2020 Supp. 21-5408(b), and amendments thereto;

(11) commercial sexual exploitation of a child, as defined in K.S.A. 2020 Supp. 21-6422, and amendments thereto; or

(12) any attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302 and 21-5303, and amendments thereto, of an offense defined in this subsection.

(e) Any person who has been declared a sexually violent predator pursuant to K.S.A. 59-29a01 et seq., and amendments thereto, shall register for such person's lifetime.

(f) Notwithstanding any other provisions of this section, for an offender less than 14 years of age who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in K.S.A. 22-4902(c), and amendments thereto, the court shall:

(1) Require registration until such offender reaches 18 years of age, at the expiration of five years from the date of adjudication or, if confined, from release from confinement, whichever date occurs later. Any period of time during which the offender is incarcerated in any jail, juvenile facility or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration;

(2) not require registration if the court, on the record, finds substantial and compelling reasons therefor; or

(3) require registration, but such registration information shall not be open to inspection by the public or posted on any internet website, as provided in K.S.A. 22-4909, and amendments thereto. If the court requires registration but such registration is not open to the public, such offender shall provide a copy of such court order to the registering law enforcement agency at the time of registration. The registering law enforcement agency shall forward a copy of such court order to the Kansas bureau of investigation.

If such offender violates a condition of release during the term of the conditional release, the court may require such offender to register pursuant to paragraph (1).

(g) Notwithstanding any other provisions of this section, for an offender 14 years of age or more who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in K.S.A. 22-4902(c), and amendments thereto, and such crime is not an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704, prior to its repeal, or K.S.A. 2020 Supp. 21-6804, and amendments thereto, the court shall:

(1) Require registration until such offender reaches 18 years of age, at the expiration of five years from the date of adjudication or, if confined, from release from confinement, whichever date occurs later. Any period of time during which the offender is incarcerated in any jail, juvenile facility or correctional facility or during which the offender does not comply with any and all requirements of the Kansas offender registration act shall not count toward the duration of registration;

(2) not require registration if the court, on the record, finds substantial and compelling reasons therefor; or

(3) require registration, but such registration information shall not be open to inspection by the public or posted on any internet website, as provided in K.S.A. 22-4909, and amendments thereto. If the court requires registration but such registration is not open to the public, such offender shall provide a copy of such court order to the registering law enforcement agency at the time of registration.

The registering law enforcement agency shall forward a copy of such court order to the Kansas bureau of investigation.

If such offender violates a condition of release during the term of the conditional release, the court may require such offender to register pursuant to paragraph (1).

(h) Notwithstanding any other provisions of this section, an offender 14 years of age or more who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime set forth in K.S.A. 22-4902(c), and amendments thereto, and such crime is an off-grid felony or a felony ranked in severity level 1 of the nondrug grid as provided in K.S.A. 21-4704, prior to its repeal, or K.S.A. 2020 Supp. 21-6804, and amendments thereto, shall be required to register for such offender's lifetime.

(i) Notwithstanding any other provision of law, if a diversionary agreement or probation order, either adult or juvenile, or a juvenile offender sentencing order, requires registration under the Kansas offender registration act for an offense that would not otherwise require registration as provided in K.S.A. 22-4902(a)(5), and amendments thereto, then all provisions of the Kansas offender registration act shall apply, except that the duration of registration shall be controlled by such diversionary agreement, probation order or juvenile offender sentencing order.

(j) The duration of registration does not terminate if the convicted or adjudicated offender again becomes liable to register as provided by the Kansas offender registration act during the required period of registration.

(k) For any person moving to Kansas who has been convicted or adjudicated in an out-of-state court, or who was required to register under an out-of-state law, the duration of registration shall be the length of time required by the out-of-state jurisdiction or by the Kansas offender registration act, whichever length of time is longer. The provisions of this subsection shall apply to convictions or adjudications prior to June 1, 2006, and to persons who moved to Kansas prior to June l, 2006, and to convictions or adjudications on or after June 1, 2006, and to persons who moved to Kansas on or after June l, 2006.

(l) For any person residing, maintaining employment or attending school in this state who has been convicted or adjudicated by an out-of-state court of an offense that is comparable to any crime requiring registration pursuant to the Kansas offender registration act, but who was not required to register in the jurisdiction of conviction or adjudication, the duration of registration shall be the duration required for the comparable offense pursuant to the Kansas offender registration act.

History: L. 1993, ch. 253, § 22; L. 1994, ch. 107, § 5; L. 1997, ch. 181, § 11; L. 1999, ch. 164, § 33; L. 2001, ch. 208, § 13; L. 2002, ch. 55, § 2; L. 2005, ch. 202, § 1; L. 2006, ch. 214, § 9; L. 2007, ch. 183, § 4; L. 2010, ch. 66, § 1; L. 2010, ch. 155, § 10; L. 2011, ch. 95, § 6; L. 2012, ch. 149, § 5; L. 2013, ch. 127, § 5; L. 2014, ch. 117, § 3; L. 2017, ch. 78, § 22; July 1.

Revisor's Note:

Section was also amended by L. 2010, ch. 122, § 5, but that version was repealed by L. 2010, ch. 155, § 26.

Section was amended twice in the 2011 session, see also 22-4906a.
Section was amended twice in the 2013 session, see also 22-4906b.

22-4907. Information required in registration. (a) Registration as required by the Kansas offender registration act shall consist of a form approved by the Kansas bureau of investigation, which shall include a statement that the requirements provided in this section have been reviewed and explained to the offender, and shall be signed by the offender and, except when such reporting is conducted by certified letter as provided in subsection (b) of K.S.A. 22-4905, and amendments thereto, witnessed by the person registering the offender. Such registration form shall include the following offender information:

(1) Name and all alias names;

(2) date and city, state and country of birth, and any alias dates or places of birth;

(3) title and statute number of each offense or offenses committed, date of each conviction or adjudication and court case numbers for each conviction or adjudication;

(4) city, county, state or country of conviction or adjudication;

(5) sex and date of birth or purported age of each victim of all offenses requiring registration;

(6) current residential address, any anticipated future residence and any temporary lodging information including, but not limited to, address, telephone number and dates of travel for any place in which the offender is staying for seven or more days; and, if transient, the locations where the offender has stayed and frequented since last reporting for registration;

(7) all telephone numbers at which the offender may be contacted including, but not limited to, all mobile telephone numbers;

(8) social security number, and all alias social security numbers;

(9) identifying characteristics such as race, ethnicity, skin tone, sex, age, height, weight, hair and eye color, scars, tattoos and blood type;

(10) occupation and name, address or addresses and telephone number of employer or employers, and name of any anticipated employer and place of employment;

(11) all current driver's licenses or identification cards, including a photocopy of all such driver's licenses or identification cards and their numbers, states of issuance and expiration dates;

(12) all vehicle information, including the license plate number, registration number and any other identifier and description of any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept;

(13) license plate number, registration number or other identifier and description of any aircraft or watercraft owned or operated by the offender, and information concerning the location or locations such aircraft or watercraft are habitually parked, docked or otherwise kept;

(14) all professional licenses, designations and certifications;

(15) documentation of any treatment received for a mental abnormality or personality disorder of the offender; for purposes of documenting the treatment received, registering law enforcement agencies, correctional facility officials, treatment facility officials and courts may rely on information that is readily available to them from existing records and the offender;

(16) a photograph or photographs;

(17) fingerprints and palm prints;

(18) any and all schools and satellite schools attended or expected to be attended and the locations of attendance and telephone number;

(19) any and all: E-mail addresses; online identities used by the offender on the internet; information relating to membership in any and all personal web pages or online social networks; and internet screen names;

(20) all travel and immigration documents; and

(21) name and telephone number of the offender's probation, parole or community corrections officer.

(b) The offender shall provide biological samples for DNA analysis to the registering law enforcement agency as required by K.S.A. 21-2511, and amendments thereto. The biological samples shall be in the form using a DNA databank kit authorized by the Kansas bureau of investigation. The registering law enforcement agency shall forward such biological samples to the Kansas bureau of investigation. Prior to taking such sample, the registering law enforcement agency shall search the Kansas criminal justice information system to determine if such person's DNA profile is currently on file. If such person's DNA profile is on file with the Kansas bureau of investigation, the registering law enforcement agency is not required to take biological samples.

History: L. 1993, ch. 253, § 23; L. 1996, ch. 224, § 5; L. 1997, ch. 181, § 12; L. 2001, ch. 208, § 14; L. 2007, ch. 183, § 5; L. 2010, ch. 135, § 37; L. 2011, ch. 95, § 7; L. 2012, ch. 149, § 6; L. 2013, ch. 127, § 6; July 1.

22-4908. Person required to register shall not be relieved of further registration. No person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act. This section shall include any person with any out-of-state conviction or adjudication for an offense that would require registration under the laws of this state.

History: L. 1993, ch. 253, § 24; L. 1994, ch. 107, § 6; L. 1997, ch. 181, § 13; L. 1999, ch. 164, § 34; L. 2001, ch. 208, § 15; L. 2011, ch. 95, § 8; L. 2012, ch. 149, § 7; July 1.

Revisor's Note:

Section was not amended in the 2012 session.

22-4909. Information subject to open records act; website posting; exceptions; nondisclosure of certain information. (a) Except as prohibited by subsections (c), (d), (e) and (f) of this section and subsections (f) and (g) of K.S.A. 22-4906, and amendments thereto, the statements or any other information required by the Kansas offender registration act shall be open to inspection by the public at the registering law enforcement agency, at the headquarters of the Kansas bureau of investigation and on any internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation that contains such statements or information, and specifically are subject to the provisions of the Kansas open records act, K.S.A. 45-215 et seq., and amendments thereto.

(b) Any information posted on an internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation shall identify, in a prominent manner, whether an offender is a sex offender, a violent offender or a drug offender. Such internet websites shall include the following information for each offender:

(1) Name of the offender, including any aliases;

(2) address of each residence at which the offender resides or will reside and, if the offender does not have any present or expected residence address, other information about where the offender has their home or habitually lives. If current information of this type is not available because the offender is in violation of the requirement to register or cannot be located, the website must so note;

(3) temporary lodging information;

(4) address of any place where the offender is a student or will be a student;

(5) license plate number and a description of any vehicle owned or operated by the offender, including any aircraft or watercraft;

(6) physical description of the offender;

(7) the offense or offenses for which the offender is registered and any other offense for which the offender has been convicted or adjudicated;

(8) a current photograph of the offender; and

(9) all professional licenses, designations and certifications.

(c) Notwithstanding subsection (a), information posted on an internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation shall not contain the address of any place where the offender is an employee or any other information about where the offender works. Such internet website shall contain a statement that employment information is publicly available and may be obtained by contacting the appropriate registering law enforcement

agency or by signing up for community notification through the official website of the Kansas bureau of investigation.

(d) Notwithstanding subsection (a), pursuant to a court finding petitioned by the prosecutor, any offender who is required to register pursuant to the Kansas offender registration act, but has been provided a new identity and relocated under the federal witness security program or who has worked as a confidential informant, or is otherwise a protected witness, shall be required to register pursuant to the Kansas offender registration act, but shall not be subject to public registration.

(e) Notwithstanding subsection (a), when a court orders expungement of a conviction or adjudication that requires an offender to register pursuant to the Kansas offender registration act, the registration requirement for such conviction or adjudication does not terminate. Such offender shall be required to continue registering pursuant to the Kansas offender registration act, but shall not be subject to public registration. If a court orders expungement of a conviction or adjudication that requires an offender to register pursuant to the Kansas offender registration act, and the offender has any other conviction or adjudication that requires registration, such offender shall be required to register pursuant to the Kansas offender registration act, and the registration for such other conviction or adjudication shall be open to inspection by the public and shall be subject to the provisions of subsection (a), unless such registration has been ordered restricted pursuant to subsection (f) or (g) of K.S.A. 22-4906, and amendments thereto.

(f) Notwithstanding subsection (a), the following information shall not be disclosed other than to law enforcement agencies:

(1) The name, address, telephone number or any other information which specifically and individually identifies the identity of any victim of a registerable offense;

(2) the social security number of the offender;

(3) the offender's criminal history arrests that did not result in convictions or adjudications;

(4) travel and immigration document numbers of the offender; and

(5) internet identifiers of the offender.

History: L. 1993, ch. 253, § 25; L. 1994, ch. 107, § 7; L. 1997, ch. 181, § 14; L. 2001, ch. 208, § 16; L. 2005, ch. 202, § 2; L. 2006, ch. 214, § 10; L. 2011, ch. 95, § 9; L. 2012, ch. 149, § 8; July 1.

22-4910. Effective date. K.S.A. 22-4901 through 22-4910 shall be effective on and after July 1, 1993.

History: L. 1993, ch. 253, § 26; April 29.

22-4911. Cause of action; not created. Nothing in the Kansas offender registration act shall create a cause of action against the state or an employee of the state acting within the scope of the employee's employment as a result of requiring

an offender to register or an offender's failure to register. This includes, but is not limited to, the person or persons assigned to a registering law enforcement agency to register offenders, and the person or persons assigned to enter all offender information required by the national crime information center into the national sex offender registry system.

History: L. 1999, ch. 164, § 36; L. 2011, ch. 95, § 10; July 1.

22-4912.

History: L. 1999, ch. 164, § 37; Repealed, L. 2011, ch. 95, § 14; July 1.

Note: This statute had read as follows from 1999 to June 30, 2011:

Relief from requirement registration

(a) Any offender who was required to be registered pursuant to the Kansas offender registration act K.S.A. 22-4901 *et seq.* and amendments thereto, prior to July 1, 1999, and who would not have been required to be registered pursuant to the Kansas offender registration act on and after July 1, 1999, as a result of enactment of this act, shall be entitled to be relieved of the requirement to be registered. Such offender may apply to the sentencing court for an order relieving the offender of the duty of registration. The court shall hold a hearing on the application at which the applicant shall present evidence verifying that such applicant no longer satisfies the definition of offender pursuant to K.S.A. 22-4902 and amendments thereto. If the court finds that the person no longer satisfies the definition of offender pursuant to K.S.A. 22-4902 and amendments thereto, the court shall grant an order relieving the offender's duty to register if the offender no longer fulfills the definition of offender pursuant to K.S.A. 22-4902 and amendments thereto. Such court granting such an order shall forward a copy of such order to the sheriff of the county in which such person has registered and to the Kansas bureau of investigation. Upon receipt of such copy of the order, such sheriff and the Kansas bureau of investigation shall remove such person's name from the registry.

(b) This section shall be part of an supplemental to the Kansas offender registration act.

22-4913. Offender residency restrictions; prohibition from adopting or enforcing; exceptions; definitions. (a) Except as provided in subsection (b), on and after June 1, 2006, cities and counties shall be prohibited from adopting or enforcing any ordinance, resolution or regulation establishing residential restrictions for offenders as defined by K.S.A. 22-4902, and amendments thereto.

(b) The prohibition in subsection (a), shall not apply to any city or county residential licensing or zoning program for correctional placement residences that includes regulations for the housing of such offenders.

(c) As used in this section, "correctional placement residence" means a facility that provides residential services for individuals or offenders who reside or have been placed in such facility due to any one of the following situations:

(1) Prior to, or instead of, being sentenced to prison;

(2) as a conditional release prior to a hearing;

(3) as a part of a sentence of confinement of not more than one year;

(4) in a privately operated facility housing parolees;

(5) as a deferred sentence when placed in a facility operated by community corrections;

(6) as a requirement of court-ordered treatment services for alcohol or drug abuse; or

(7) as part of voluntary treatment services for alcohol or drug abuse.

Correctional placement residence shall not include a single or multi-family dwelling or commercial residential building that provides a residence to staff and persons other than those described in paragraphs (1) through (7).

History: L. 2006, ch. 214, § 2; L. 2008, ch. 57, § 1; L. 2011, ch. 95, § 11; July 1.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 110,318

JOHN DOE,
Appellee,

v.

KIRK THOMPSON, DIRECTOR OF THE KANSAS BUREAU OF INVESTIGATION, and FRANK DENNING,
JOHNSON COUNTY, KANSAS, SHERIFF, *Appellants*.

SYLLABUS BY THE COURT

1.

Kansas' statutes governing judicial notice, K.S.A. 60-409 *et seq.*, apply to all facts, regardless of whether a particular fact may be labeled an adjudicative fact or a legislative fact.

2.

Although anonymous or pseudonymous litigation is an atypical procedure, it should be permitted where an important privacy interest outweighs the public interest in the litigant's identity.

3.

Article I, § 10 of the United States Constitution provides that no state shall pass any ex post facto law. Ex post facto laws include retroactively applied legislation that make more burdensome the punishment for a crime, after its commission.

4.

The constitutional prohibition on ex post facto laws applies only to penal statutes.

5.

To determine whether the retroactive application of a statutory scheme violates the Ex Post Facto Clause, a court first determines the legislature's intention. If a statutory scheme was intended to be punitive, it cannot be applied retroactively under any circumstances.

6.

If the legislature intended to enact a regulatory scheme that is civil and nonpunitive, the next inquiry is whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intent to deem it civil. If a statutory scheme is punitive in effect, the Ex Post Facto Clause prohibits its application retroactively.

7.

The Kansas Offender Registration Act, K.S.A. 22-4901 *et seq.,* as amended in 2011, is punitive in effect, and the amended statutory scheme cannot be applied retroactively to any sex offender who committed the qualifying crime prior to July 1, 2011.

Appeal from Shawnee District Court; LARRY D. HENDRICKS, judge. Opinion filed April 22, 2016. Affirmed.

Christopher M. Grunewald, assistant attorney general, argued the cause, and *Ward E. Loyd*, assistant attorney general, and *Derek Schmidt*, attorney general, were with him on the briefs for appellant Kirk Thompson, and *Kirk T. Ridgway*, of Ferree, Bunn, Rundberg, Radom & Ridgway, Chartered, of Overland Park, was with him on the briefs for appellant Frank Denning.

Christopher M. Joseph, of Joseph Hollander & Craft, LLC, of Topeka, argued the cause, and *Carrie E. Parker*, of the same firm, was with him on the brief for appellee.

James R. Shetlar, of Overland Park, was on the brief for *amicus curiae* The National Center for Victims of Crime.

Jessica R. Kunen, of Lawrence, was on the brief for *amicus curiae* American Civil Liberties Union Foundation of Kansas.

The opinion of the court was delivered by

JOHNSON, J.: Plaintiff, proceeding under the pseudonym John Doe, filed a declaratory judgment action against agents of the State, claiming that retroactive application of the 2011 amendments to the Kansas Offender Registration Act, K.S.A. 224901 *et seq.* (KORA), violated the Ex Post Facto Clause of Article I, § 10 of the United States Constitution (hereafter, Ex Post Facto Clause). The district court granted summary judgment in Doe's favor, finding that while the legislature intended KORA to be a civil statutory scheme, the act was punitive in effect pursuant to the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) (*Mendoza-Martinez* factors). Consequently, the district court concluded that, because KORA's retroactive application assigned a new punitive measure to a crime already consummated, it violated the Ex Post Facto Clause.

The State appealed the district court's judgment, arguing that the district court erred by (1) refusing to strike inadmissible evidence submitted in support of Doe's motion for summary judgment; (2) taking judicial notice of certain journal articles; and (3) concluding that the KORA amendments violated the Ex Post Facto Clause. In addition, the State complains about the district court's order granting Doe leave to proceed with a pseudonym. We affirm the district court's result.

Factual and Procedural Overview

In 2003, after being charged with inappropriately touching or fondling a 14- or 15year-old child, Doe pled guilty to and was convicted of one count of indecent liberties with a minor, in violation of K.S.A. 21-3503(a)(1) (Furse 1995). In April 2003, he received a controlling prison term of 32 months, but the prison portion of his sentence was suspended and he was placed on probation for 36 months. It appears that probation was Doe's presumptive sentence. Doe successfully completed his probation in April 2006.

At the time of his conviction, KORA required Doe to register with both the Kansas Bureau of Investigation (KBI) and the Johnson County Sheriff's Office for a period of 10 years from the date of his conviction, given that he was not incarcerated. K.S.A. 2002 Supp. 22-4906(a). Doe submitted his initial registration forms following his April 2003 sentencing and thereafter complied with the KORA registration and reporting requirements.

Information from the registration form, such as the offender's name, age, address, gender, race, and photograph, is available for public access on the Johnson County Sheriff's website, which allows the public to search for offenders by name or geographical location. In addition, the website contains a "share and bookmark" feature that allows users to share registry information via email and other Internet information sharing resources.

The KBI's website provides even more information for public access, including such additional information as the offender's hair and eye color, the dates of offense and conviction, the county of conviction, and the age of the victim. It also allows the public to search for an offender by name and geographical location. The public can also learn if a phone number, email, or Facebook identity belongs to an offender. Finally, the KBI

website provides a community notification system that allows an individual to be notified by email when a registered offender registers a home, work, or school address that is near an address of interest to the notified individual.

Before Doe was scheduled to complete his reporting requirements, on June 15, 2011, the KBI sent a letter to all registered offenders, including Doe, detailing recent legislative amendments to KORA that were to become effective on July 1, 2011. The letter advised Doe that the amendments were retroactive and would apply to all offenders regardless of when their underlying offenses occurred. Particularly germane to Doe was the notification that his period of registration had been extended from 10 years to 25 years after conviction, *i.e.*, Doe's KORA completion date was changed from the year 2013 to the year 2028.

In response, Doe filed a petition for declaratory judgment against KBI director Kirk Thompson and Johnson County Sheriff Frank Denning (hereafter collectively referred to as "the State"). Doe sought a judicial determination that the retroactive application of the 2011 KORA amendments, particularly the extension of the registration period, violated the Ex Post Facto Clause by effecting an after-the-fact increase in punishment for a previously committed crime. Doe sought, and was granted, leave to proceed with his lawsuit using a pseudonym in order to protect his identity, his family members' identities, and the identity of the victim in the underlying criminal case.

Both parties filed motions for summary judgment. To his motion, Doe attached affidavits and journal articles. The affidavits described how the registration requirements had adversely impacted Doe and his family. The journal articles provided general discussions of the difficulties that sex offenders encounter due to the registration requirements, together with social science findings regarding the impact that registration laws have on recidivism. The State filed a motion to strike specific portions of the

affidavits, claiming that they were "replete with testimony unsupported by specific material facts or personal knowledge or both; inadmissible hearsay testimony"; and contained lay opinion testimony that lacked proper foundation. In addition, the State contended that Doe's motion for summary judgment "inappropriately attempts to use general law journal articles and other publications in lieu of testimony to establish certain facts."

The district court denied the defendants' motion to strike and granted Doe's motion for summary judgment. As will be discussed in more detail below, the district court found that the 2011 amendments to KORA imposed additional burdens upon KORA registrants so as to render the act punitive in effect. Specifically, the district court concluded that "KORA's current provisions subject Mr. Doe to punishment under any definition," and, therefore, the retroactive application of those punitive provisions to a previously committed crime violated the Ex Post Facto Clause. The district court entered judgment requiring defendants to immediately terminate Doe's additional 15-year registration requirement and delete all KORA information that was being publicly displayed.

The State filed a timely appeal, invoking this court's jurisdiction pursuant to K.S.A. 60-2101(b), which provides that "[a]n appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court."

DENIAL OF STATE'S MOTION TO STRIKE MATERIAL FROM PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The State argues that the district court erred in failing to strike certain evidence that Doe submitted in support of his motion for summary judgment. Specifically, the State complains about: (1) testimony contained in the affidavits that was not based on

personal knowledge; (2) inadmissible hearsay evidence contained within the affidavits; and (3) purported "legislative facts" contained in journal articles, which forms the basis of the second issue discussed below. The State contends that the error was unfairly prejudicial because several of the objectionable affidavit statements "were recited by the district court as uncontroverted material facts." Doe claims that the State's argument is a "straw man," because the statements were not relied upon by the district court in deciding the summary judgment motion.

Standard of Review

The State challenges the legal basis upon which the district court considered the affidavits and journal articles in conjunction with Doe's summary judgment motion. We exercise de novo review over a challenge to the legal adequacy of the district court's decision to admit or exclude evidence. See *State v. Holman*, 295 Kan. 116, Syl. ¶ 6, 284 P.3d 251 (2012).

To the extent that we are called upon to interpret our judicial notice statute, K.S.A. 60-409, we conduct a de novo review. See *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013) (statutory interpretation a legal question subject to de novo review).

Analysis

We begin with the State's challenges to the affidavits of John Doe and his wife, Jane Doe. K.S.A. 2012 Supp. 60-256(e)(1), the statutory provision governing motions for summary judgment, contains a specific provision addressing affidavits or declarations that are submitted in support of, or opposition to, a summary judgment motion, to-wit:

> "A supporting or opposing affidavit or declaration must be made on personal knowledge, set out facts that would be admissible in evidence and show that the affiant or declarant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit or declaration, a sworn or certified copy must be attached to or served with the affidavit or declaration. The court may permit an affidavit or declaration to be supplemented or opposed by depositions, answers to interrogatories or additional affidavits or declarations."

Affidavits submitted in support of, or in opposition to, a summary judgment motion must set forth evidence in a form that would be admissible at trial. *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 285-86, 261 P.3d 943 (2011). Moreover, Kansas Supreme Court Rule 141(d) (2014 Kan. Ct. R. Annot. 258) provides that a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."

Although the State's motion to strike objected to 33 of the 44 paragraphs contained in Doe's affidavit and 15 of the 19 paragraphs contained in Jane Doe's affidavit, the State's brief in this appeal narrowed the focus of their objections to 12 paragraphs in Doe's affidavit and 6 paragraphs in Jane Doe's affidavit. The challenged paragraphs deal generally with how the registration has impacted the Does' children, Doe's employment and housing, Doe's access to school activities, and Doe's access to a hospital visitation.

With respect to the Does' children, the affidavits stated that other parents had instructed their children not to associate with the Doe family; that the Doe children had been teased at school and had come home crying because their classmates had called Doe a "bad man," a "pervert," or a "pedophile"; that the children were only repeating what they heard their parents say; and that the parents knew nothing about Doe except what could be reviewed on the offender registry. The State complains that the Does were not personally present to hear what the other children had said or what they had heard from

their parents, and that the Does could not personally know whether the other children's parents had accessed the registry or had obtained their knowledge from some other source.

The State's assertion that the affiants lacked personal knowledge has some merit with respect to the speculation about what the schoolmates' parents told them or that the parents obtained their knowledge of Doe by accessing the registry. But the Does observed first-hand the trauma their children had experienced and personally heard the children explain that the source of that mental anguish was teasing and name-calling by their schoolmates. To the extent the State is arguing hearsay, K.S.A. 2012 Supp. 60-460(l) recognizes an exception for statements of physical or mental condition, including the declarant's existing state of mind or emotion, when the mental condition is in issue or is relevant to prove or explain the acts or conduct of the declarant. See *State v. Hobson*, 234 Kan. 133, 154, 671 P.2d 1365 (1983). The Doe children's statements about what their schoolmates said and did was certainly relevant to explain why they came home from school crying.

With respect to his employment, Doe's affidavit stated that he had continued to work for a corporation throughout his prosecution and even after his conviction, but that he "was terminated once [his] presence on the Offender Registry was brought to the attention of [his] employer." Doe asserted that someone had told his manager that he was listed as a sex offender, whereupon the manager terminated Doe and had him escorted from the building. Doe related that the manager had said that other employees working for the company had felony convictions, but that Doe's listing on the registry would expose the company to public relations liabilities and issues related to employees' concerns for workplace safety.

Doe also testified about his attempts to find employment commensurate with his education, skills, and abilities. He said prospective employers always rejected him as soon as he disclosed his registration status. Some even told him to come back when he was "off the list."

The State's brief makes the somewhat confusing argument that Doe had "provided no basis to testify to the truth about [his] former manager's thoughts about Doe's registration status," for example, that there were corporate concerns about liabilities or that a coworker had found Doe on the registry and told the former manager. But, of course, Doe's basis for testifying about what his former manager said was that the manager was saying those things directly to Doe, while firing him. Moreover, whether the manager was being totally truthful in all that he said to Doe is not really the point. Rather, what is germane is that the manager told Doe that he was fired because his name was on the registry.

Again, although not argued by the parties, it appears that the manager's statement can be admitted under K.S.A. 2012 Supp. 60-460(l) to explain the manager's state-ofmind, *i.e.*, the reason he undertook the action at issue, even if it cannot be used to prove that Doe was actually listed on the registry or that there was actually a corporate concern about liabilities. See *Monroe v. Board of Ed. of Town of Wolcott, Connecticut*, 65 F.R.D. 641, 649 (D. Conn. 1975) (school principal's affidavit recitation based on what he heard the school board say were reasons for expelling a student fit hearsay exception for declarations of present existing motive or reason for action).

Perhaps Doe might have obtained an affidavit directly from the manager and avoided the State's hearsay challenge. But we recently opined that "[a] statement contemporaneously describing a declarant's belief or intention is inherently more trustworthy than a statement made after the fact, when incentives to embellish or fabricate

may have arisen." *State v. Cosby*, 293 Kan. 121, 131, 262 P.3d 285 (2011). Moreover, even if the manager's statement of the reason for firing Doe was not admissible, it would be reasonable to infer that the reason was the registry, given the timing and abruptness of the termination.

With respect to housing, Doe's affidavit described his attempts to rent a place to live. Even though his rental applications reflected prior military service, an excellent credit history, and sufficient income to support the monthly rent, landlords repeatedly refused to rent to Doe. The landlords related to Doe that they had no problem with the registration per se but that the map on the website showing where sex offenders live was a problem because it would cause current tenants to leave and potential tenants to avoid the area.

In its brief, the State makes no separate argument as to why this statement should be struck, other than to refer back to its comprehensive presentation to the district court, which included tables specifying specific objections to each paragraph. But Doe could certainly testify that, after he began disclosing that he was listed on the sex offender registry, he was repeatedly denied housing. Then it would be a reasonable inference to draw that a website map showing the location of registered sex offenders would be an impediment to a registrant obtaining an apartment.

The only other affidavit paragraph that drew a specific argument from the State on appeal concerned Doe being denied admittance to visit neighbors at a hospital. The affidavit related that at the entrance, a security guard swiped Doe's driver's license but then advised him that the hospital could not accommodate his visit and that he had to leave. The affidavit added the declaration: "I was only barred from entering because I was listed on the Offender Registry, not because of my crime." The State argues that "Doe's testimony about the truth of whether a hospital barred his entry solely because of

his registration status and not his crime is not founded on personal knowledge of the hospital's policies or instructions to its guards."

The State's concern about whether the guard's actions were based upon hospital policy or instructions misses the point. As will be discussed later, Doe's status as a registrant was identified on his driver's license. Doe could certainly testify that he attempted to enter the hospital, but when he presented his sex offender driver's license, he was denied admittance. The district court could consider that testimony and infer that admittance was denied based upon the registry identification on the swiped license.

Nevertheless, to the extent the affidavits contain inadmissible evidence, a remand to the district court is unnecessary. The principal issue before us is whether the district court's summary grant of plaintiff's declaratory judgment was erroneous, as a matter of law. Accordingly, we will conduct a de novo review and can disregard any information that was improperly contained within the affidavits.

Judicial Notice of Journal Articles

The State next complains that the district court twice erred in its handling of the 16 journal articles attached as appendices to Doe's motion for summary judgment. First, it contends that the district court was wrong in ruling that the Kansas judicial notice statute does not apply to "legislative facts." Then, the district court compounded the error by actually taking judicial notice of the journal articles to support its determination that KORA violates ex post facto.

While Doe did not cite to the articles in his statement of uncontroverted facts, he used them to supply the factual premise for some of his legal arguments. For example, Doe referenced the journal articles to support his arguments that offender registration and

notification requirements create adverse collateral consequences for registered sex offenders, *e.g.*, that registered sex offenders face employment difficulties, challenges to obtain housing, and social stigmatization. He cited to other journal articles in support of the argument that such difficulties can increase a sex offender's recidivism rate; that the offense-based tier system of determining registration lengths was not reasonably related to the danger of recidivism; and that "[c]ontemporary studies overwhelmingly indicate that registration and notification laws do not reduce sex crime recidivism rates."

Standard of Review

The resolution of this issue will depend on the applicability of our judicial notice statute, K.S.A. 60-409. That presents a question of law subject to de novo review. *Jeanes*, 296 Kan. at 873.

Analysis

The State's motion to strike the journal articles asserted that Doe was inappropriately using the law journal articles and other publications as a substitute for the competent and admissible testimony needed to establish the material facts upon which his arguments relied. The State also argued that Doe's legal argument impermissibly relied on contentions of fact not contained in his statement of uncontroverted facts, in violation of Kansas Supreme Court Rule 141(a)(1). In response, Doe argued that the journal articles were not offered to prove adjudicative facts, but instead were relevant to establish legislative facts, to which the rules of evidence do not apply.

In denying the State's motion to strike, the district court concluded that the journal articles containing results of social science research studies were admissible as legislative facts. Accordingly, the district court opined that "[b]ecause the studies are legislative

facts, the judicial notice statutes do not apply, and the Court may take judicial notice of the studies when ruling on the parties' summary judgment motions." In its memorandum decision and order, the district court placed some reliance upon the social science research contained within certain journal articles.

On appeal, the State argues that Kansas' judicial notice statute, unlike federal law, makes no distinction between adjudicative and legislative facts, and that judicial notice of the social science evidence relied upon by the district court was not statutorily authorized. In addition, the State contends that the journal articles did not contain legislative facts; that the articles did not support the definitive conclusions reached by the district court; and that Doe was required to have an expert witness to authenticate, explain, validate, or adopt the conclusions upon which the district court relied. Doe counters that the journal articles do constitute legislative facts to which K.S.A. 60-409 is inapplicable and that both the United States Supreme Court and the Kansas Supreme Court have been taking judicial notice of legislative facts for years without any regard to evidentiary rules, such as evidence admissibility. Nevertheless, Doe suggests that we can hold that the 2011 amendments to KORA are punitive, in violation of the Ex Post Facto Clause, without relying on the legislative facts at issue here.

Doe's argument that appellate courts have selectively used "legislative facts" to support a holding is not entirely without merit. For instance, in *Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), which will be discussed in detail below, the United States Supreme Court refers to "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." The high Court even labels the risk of recidivism posed by sex offenders as "'frightening and high.'" 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34, 122 S. Ct. 2017, 153 L. Ed. 2d 47 [2002]). It gives one pause to think that the "legislative facts" frequently used to justify sex offender registration laws might not be completely accurate, if Doe's journal

articles are to be believed. Nevertheless, the question here is whether our judicial notice statute applied to Doe's appended journal articles, and we find that it does.

K.S.A. 60-409 specifically lists the type of facts that must or may be judicially noticed. For example, the statute provides that judicial notice *shall* be taken of common law, constitutions, and public statutes, as well as "specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute." K.S.A. 60-409(a). In addition, the statute provides that judicial notice *may* be taken of "such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and "specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." K.S.A. 60-409(b)(3) and (4).

A major impediment to Doe's argument is the statutory language. Unlike the federal rule of evidence, K.S.A. 60-409 does not explicitly limit its application to "adjudicative facts." *Cf.* Fed. R. Evid. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact."). Ordinarily, "[w]hen a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words." *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 725, 317 P.3d 70 (2014).

Perhaps more importantly, our statute appears to govern the types of facts which would fall within the category of "legislative facts." For example, K.S.A. 60-409(a) specifically provides that judicial notice *shall* be taken of laws, constitutions, and statutes. In contrast, the language of Fed. R. Evid. 201 does not mention statutes, laws, or regulations because the federal provision expressly excludes legislative facts, and

"[s]tatutes are considered legislative facts" of which the authority of courts to take judicial notice is "unquestionable." *United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006). Additionally, K.S.A. 60-409(a) provides that judicial notice shall be taken of "specific facts and propositions of *generalized knowledge* as are so universally known that they cannot reasonably be the subject of dispute." (Emphasis added.) This, too, appears to be encompassed by the definition of "legislative facts." See *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (defining legislative facts as "established truths, facts or pronouncements that do not change from case to case but apply universally").

Accordingly, even if the district court was correct in determining that the information in the journal articles constituted legislative facts, it nevertheless erred in finding that K.S.A. 60-409 did not apply. If a Kansas court is to take judicial notice of a fact—either adjudicative or legislative—it must do so in conformity with our judicial notice statutes.

Here, it appears that if the journal articles reporting social science findings fall within any statutory category it would be the provision for "specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." K.S.A. 60409(b)(4); see also K.S.A. 60-410 (provisions relating to determination as to propriety of taking judicial notice). But the district court found K.S.A. 60-409(b) inapplicable, and, consequently, it did not consider whether the articles upon which it relied were "sources of indisputable accuracy."

The State contends that the articles are not indisputably accurate because the subjects of recidivism and the measure of the benefits of public notification laws generally are not closed subjects. Instead, the State argues, the submitted articles are simply "recent scholarship on a debated subject." We agree. While it does appear that

there is an evolution of knowledge and opinion taking place with respect to sex offender recidivism and the effects of public notification laws, the articles appended by Doe to his summary judgment motion could not be deemed to be the definitive final word on the topic, *i.e.*, were not sources of indisputable accuracy.

But, again, we need not remand to the district court. We can simply conduct our de novo review without reference to the appended articles.

USE OF A PSEUDONYM

Before proceeding to the principal issue before us, we pause briefly to address the State's complaint that the district court should not have permitted Doe to proceed under a pseudonym.

Standard of Review

Both parties agree that an abuse of discretion standard of review applies when considering a district court's decision to allow an action to proceed anonymously. See *Unwitting Victim v. C.S.*, 273 Kan. 937, 944, 47 P.3d 392 (2002). Our familiar abuse of discretion standard is stated as follows:

> "'Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.' *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012)." *State v. Nelson*, 296 Kan. 692, 694, 294 P.3d 323 (2013).

Analysis

This court has expressly held that "[a]lthough anonymous or pseudonymous litigation is an atypical procedure, where an important privacy interest outweighs the public interest in the identity of the plaintiff, the plaintiff should be allowed to proceed anonymously." *Unwitting Victim*, 273 Kan. at 944. The *Unwitting Victim* court balanced the plaintiff's claimed right to privacy against the public interest militating against pseudonymity, utilizing nine factors: (1) The extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided and the substantiality of these bases; (3) the magnitude of public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his or her refusal to pursue the case at the price of being publicly identified; (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives; (7) the universal level of public interest in access to the identities of the litigants; (8) whether the litigant is a public figure; and (9) whether opposition to the pseudonym is illegitimately motivated. 273 Kan. at 947-48.

As the State acknowledges, the district court utilized the nine factors to conduct a balancing test, comparing the public's interests versus Doe's privacy rights. In other words, the district court used the correct legal standard.

The State does not point us to any place in the district court's careful consideration of the factors where the judge was arbitrary, fanciful, or unreasonable. We have carefully reviewed the court's rulings on each of the factors and cannot discern anything that was arbitrary, fanciful, or unreasonable. The State has failed to establish that no reasonable

person would have taken the view adopted by the trial court. To the contrary, the State has offered no rational explanation as to why the public's safety would be better protected by disclosing the identity of an individual challenging KORA on purely legal grounds as essentially a class representative. Rather, its complaint appears to be simply that the court did not assess the evidence in a manner that would yield the State's desired result. This was not a case of an abuse of discretion, but rather the exercise of learned discretion.

Finally, the State's challenges to the sufficiency of the evidence are unavailing. The district court had evidence to support its findings. We decline the State's implicit invitation to reweigh that evidence.

In short, the district court did not abuse its discretion when it permitted Doe to proceed pseudonymously.

EX POST FACTO CLAUSE VIOLATION

The State's substantive issue is whether the 2011 amendments to KORA can be retroactively applied to Doe without violating the Ex Post Facto Clause. The State contends that, even though Doe committed his crime before the 2011 amendments, the Ex Post Facto Clause is simply inapplicable because the amended KORA is still a regulatory scheme that is civil and nonpunitive. Our resolution will hinge on whether the 2011 amendments rendered the KORA statutory scheme so punitive in effect as to negate any implied intent to make it "civil." See *Smith*, 538 U.S. at 92 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 [1997]). We find that they do.

But before proceeding, we pause to clarify what we are not deciding today. We are not saying that the 2011 version of KORA is unconstitutional as applied to any sex offender who commits a covered crime on or after its July 1, 2011, effective date.

Although we are finding that the KORA statutory scheme is now penal in nature, the legislature is permitted to impose penal sanctions on future violators. We are saying that the legislature cannot add today's new sanction to a punishment imposed yesterday. The only sex offenders affected by this decision are those that have been complying with the Kansas registration requirements in effect when they committed their offenses. And this decision does not relieve any registrant from completing the registration requirements in effect when he or she committed the applicable offense. Further, this opinion will have no effect on any offender's obligations under federal law.

Likewise, as emphasized in *State v. Myers*, 260 Kan. 669, 700, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997), "we are not balancing the rights of . . . sex offenders against the rights of . . . their victims." Rather, our duty is to resolve "a claim of constitutional infringement arising from retroactive legislation." 260 Kan. at 700. The Constitution does not exclude sex offenders from its protections.

Standard of Review

"When the application of a statute is challenged on constitutional grounds, this court exercises an unlimited, de novo standard of review. *State v. Myers*, 260 Kan. 669, 676, 923 P.2d 1024 (1996)." *State v. Cook*, 286 Kan. 766, 768, 187 P.3d 1283 (2008).

Analysis

Ex Post Facto Clause

The constitutional protection in issue here is found in Article I, § 10, which simply states, in relevant part, that "[n]o State shall . . . pass any . . . ex post facto Law." "We have held that a law is ex post facto if two critical elements are present: (1) The law is retrospective, and (2) the law disadvantages the offender affected by it." *State v. Gleason*,

299 Kan. 1127, 1159-60, 329 P.3d 1102 (2014) (citing *State v. Jaben*, 294 Kan. 607, 612, 277 P.3d 417 [2012]; *State v. Cook*, 286 Kan. 766, 770, 187 P.3d 1283 [2008]).

Recently, this court clarified that "retroactively applied legislation that simply 'alters the situation of a party to his disadvantage' does not, in and of itself, violate the Ex Post Facto Clause. The disadvantage, to be unconstitutional under the Clause, must fall within one of the categories recognized in *Beazell* [*v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925)]." *State v. Todd*, 299 Kan. 263, 277, 323 P.3d 829 (2014). The *Beazell* category that is applicable here is """[a]ny statute . . . which makes more burdensome the punishment for a crime, after its commission."'" *Todd*, 299 Kan. at 277 (quoting *Beazell*, 269 U.S. at 169-70); see also *Gleason*, 299 Kan. at 1159-60. Doe claims, and the district court found, that the 2011 amendments to KORA made the punishment for Doe's 2001-2002 crimes more burdensome.

But "[t]he constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." *Myers*, 260 Kan. at 677. The State contends that KORA is not punishment for the sex offender's crime, but rather a civil regulatory scheme enacted for the purpose of public safety.

State v. Myers

Kansas first considered whether a sex offender registration law ran afoul of the Ex Post Facto Clause in *Myers*, which was filed in 1996. *Myers* related the relatively brief history of Kansas' law, beginning in 1993 with the Habitual Sex Offender Registration Act (HSORA), which required repeat offenders to register for 10 years. Registration consisted of a statement in writing that included the offender's name, date of birth, social security number, fingerprints, and a photograph, as well as information on the offense(s)

committed and the dates/location of conviction(s). K.S.A. 1993 Supp. 22-4907. But HSORA, specifically K.S.A 1993 Supp. 22-4909, said that the registration information "shall not be open to inspection by the public" or subject to the Kansas Open Records Act, and that the data could only be obtained by a law enforcement officer or other person specifically authorized by law.

The following year, the act was amended and renamed the Kansas Sex Offender Registration Act (KSORA) because it included first-time offenders, who were subject to the 10-year registration term. Second or subsequent offenses resulted in lifetime registration. KSORA also allowed for public inspection of registration information at the sheriff's office and specifically made the registration information subject to the Open Records Act. L. 1994, ch. 107, secs. 1-7.

Myers had committed his offense prior to the effective date of KSORA. Consequently, Myers claimed that the retroactive application of KSORA's reporting and disclosure requirements violated the Ex Post Facto Clause. The State conceded that KSORA was being retroactively applied to Myers but argued that the intent and purpose of KSORA was regulatory, rather than punitive. The *Myers* court agreed with the State, holding that while KSORA contained no express statement of legislative intent or purpose, "the legislative history suggests a nonpunitive purpose—public safety." 260 Kan. at 681.

But *Myers* recognized that its analysis did not end with its "public safety" conclusion. Rather, it had to determine "whether the 'statutory scheme was so punitive either in purpose or effect as to negate that intention.' *United States v. Ward*, 448 U.S. 242, 248-49, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)." 260 Kan. at 681. Ultimately, *Myers* determined that the registration component of KSORA was remedial but that the

public disclosure provisions of the act were too punitive in effect to withstand constitutional scrutiny. Specifically, the *Myers* court held:

> "For Myers, KSORA's disclosure provision must be considered punishment. We hold that the legislative aim in the disclosure provision was not to punish and that retribution was not an intended purpose. However, we reason that the repercussions, despite how they may be justified, are great enough under the facts of this case to be considered punishment. The unrestricted public access given to the sex offender registry is excessive and goes beyond that necessary to promote public safety." 260 Kan. at 699.

Enroute to that holding, *Myers* found that the practical effect of KSORA's unrestricted dissemination of registration information "could make it impossible for the offender to find housing or employment" and that "[u]nrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism." 260 Kan. at 696. Then, the court opined that "[t]o avoid the ex post facto characterization, public access [to registration information] should be limited to those with a need to know the information for public safety purposes" and that those authorized to access the information should only use it for public safety purposes. 260 Kan. at 700.

The State urges us to accept *Myers*' holding as being equally applicable to the registration component of KORA, but to find that *Myers*' holding on the public disclosure component was effectively overruled by the United States Supreme Court's decision in *Smith*.

Smith v. Doe

In *Smith*, the United States Supreme Court held that retroactive application of the Alaska Sex Offender Registration Act (ASORA) did not violate the Ex Post Facto Clause. 538 U.S. at 105-06. *Smith* was the first time the Court had considered this type of

claim; however, the Court applied its well-established framework of (1) determining whether the legislature's intention was to enact a "a regulatory scheme that is civil and nonpunitive" and, if so, (2) "examin[ing] whether the statutory scheme is '"so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."'" 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361). This framework is often referred to as the "intent-effects" test. See, *e.g.*, *Moore v. Avoyelles Correctional Center*, 253 F.3d 870, 872 (5th Cir. 2001).

Under the intent portion of the test, "[w]hether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.'" *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361). If the legislature intended to punish, the ex post facto violation is established and no inquiry into the effects of the act is required. 538 U.S. at 92-93.

The first inquiry under intent is whether "'the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" *Smith*, 538 U.S. at 93 (quoting *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 [1997]). The Court relied upon the Alaska Legislature's express statutory finding that "'sex offenders pose a high risk of reoffending' and identified 'protecting the public from sex offenders' as the 'primary governmental interest' of the law." *Smith*, 538 U.S. at 93 (quoting 1994 Alaska Sess. Laws, ch. 41, § 1). Citing to its earlier decision in *Hendricks*, the Court reiterated that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" *Smith*, 538 U.S. at 93 (quoting *Hendricks*, 521 U.S. at 363).

Smith held that the stated nonpunitive intent of the ASORA was not altered by the Alaska Constitution's inclusion of protecting public safety as a purpose for the criminal

justice system, by the legislature's partial codification of the ASORA in the criminal procedure code, or by the requirement for courts accepting criminal pleas and entering criminal judgments to inform defendants of the ASORA requirements. 538 U.S. at 93-96. The Court noted that its conclusion was "strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures[,]" but "[i]nstead . . . vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, . . . an agency charged with the enforcement of both criminal *and* civil regulatory laws." 538 U.S. at 96. Therefore, the Court held that the Alaska Legislature's intent "was to create a civil, nonpunitive regime." 538 U.S. at 96.

After concluding that the intent of the Alaska Legislature was nonpunitive, the Court turned to the effects of the ASORA. 538 U.S. at 97. The Court held that "[b]ecause we 'ordinarily defer to the legislature's stated intent,' [citation omitted] '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" *Smith*, 538 U.S. at 92 (quoting *Hudson*, 522 U.S. at 100). The Court utilized the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 544, 9 L. Ed. 2d 644 (1963), but noted that "[b]ecause the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts . . . they are 'neither exhaustive nor dispositive,' [citations omitted] but are 'useful guideposts.' [Citation omitted.]" 538 U.S. at 97. The Court explained:

> "The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.

Smith summarily dismissed the remaining two *Mendoza-Martinez* factors—"whether the regulation comes into play only on a finding of scienter and whether the

behavior to which it applies is already a crime"—by declaring those factors carried "little weight." 538 U.S. at 105.

Under the first factor, whether the "regulatory scheme . . . has been regarded in our history and traditions as a punishment," the Court reasoned that "[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." 538 U.S. at 97. The Court noted that sex offender registration and notification statutes "'are of fairly recent origin,' which suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." 538 U.S. at 97 (quoting *Doe I v. Otte*, 259 F.3d 979, 989 [9th Cir. 2001]).

The *Smith* Court rejected the respondents' argument that ASORA, and particularly its notification provisions, "resemble shaming punishments of the colonial period." 538 U.S. at 97-98. The Court recognized that "[s]ome colonial punishments indeed were meant to inflict public disgrace"; however, unlike the ASORA, the colonial punishments had a corporal element, involved direct confrontation between the public and the offender, or expelled the offender from the community. 538 U.S. at 97-98. The Court held that the stigma from the ASORA "result[ed] not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." 538 U.S. at 98. The Court was not swayed by the fact that Alaska posted registration information on the Internet, concluding that a member of the public visiting the State's website was analogous to the person visiting the official criminal records archive. 538 U.S. at 99.

In analyzing the second factor, whether "the regulatory scheme . . . imposes an affirmative disability or restraint," the Court considered "how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are

unlikely to be punitive." 538 U.S. at 97, 99-100. The Court noted that unlike prison, "the paradigmatic affirmative disability or restraint," the act did not impose physical restraint. 538 U.S. at 100. Further, the Court held the act less burdensome than occupational disbarment, which is nonpunitive. 538 U.S. at 100. Additionally, the Court rejected sex offenders' employment and housing difficulties as conjecture unsupported by evidence. 538 U.S. at 100. The Court recognized the potential "lasting and painful impact on the convicted sex offender"; however, the court held "these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." 538 U.S. at 101.

The Court also noted that the Ninth Circuit, which had held ASORA constituted punishment, incorrectly believed that ASORA required sex offenders to update registration in person. 538 U.S. at 101. Additionally, the Court rejected the Ninth Circuit's conclusion that registration was "parallel to probation or supervised release in terms of the restraint imposed" because while the "argument has some force," unlike registration, "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction." 538 U.S. at 101. Although noting that offenders "must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so." 538 U.S. at 101. The Court reasoned that although a sex offender may be prosecuted for a registration violation, such prosecution is separate from the individual's original offense. 538 U.S. at 102.

The third factor involves whether the "regulatory scheme . . . promotes the traditional aims of punishment." *Smith*, 538 U.S. at 97. The Supreme Court has described those aims as retribution and deterrence. See, *e.g.*, *Mendoza-Martinez*, 372 U.S. at 168. The Court held that although the ASORA might deter future crimes "[a]ny number of

governmental programs might deter crime without imposing punishment" and "'[t]o hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.'" *Smith*, 538 U.S. at 102 (quoting *Hudson*, 522 U.S. at 105). The Court held that the act's registration obligations were not retributive based upon the differing duration of reporting for different categories of offenders because these measures were "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." 538 U.S. at 102.

The Court found that the fourth factor, a rational connection to a nonpunitive purpose, was the most significant factor in its "determination that the statute's effects are not punitive." 538 U.S. at 102. In *Smith*, the respondents agreed that ASORA's nonpunitive purpose of alerting "'the public to the risk of sex offenders in their communit[y]'" was "valid, and rational." 538 U.S. at 103 (quoting *Otte*, 259 F.3d at 991). However, the Court summarily rejected the respondent's argument that ASORA was not "'narrowly drawn to accomplish the stated purpose,'" reasoning that a "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." 538 U.S. at 103.

When assessing the fifth factor, whether the regulatory scheme is excessive with respect to its purpose, the Court opined it need not determine "whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. The Court concluded that ASORA's application to all convicted sex offenders, without any individualized assessment of the offender's dangerousness, did not render the act punitive. Finding that the risk of recidivism by sex offenders was "'frightening and high,'" the Court held that "[i]n the context of the regulatory scheme the State can dispense with individual predictions of future

dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause." 538 U.S. at 103-04.

Relying on empirical research on child molesters, the Court also held that the duration of ASORA's reporting requirements was not excessive because "'most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.'" 538 U.S. at 104 (quoting National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 [1997]).

Finally, the Court held that the widespread dissemination of the registration information was not excessive, instead finding that the "notification system is a passive one: An individual must seek access to the information." 538 U.S. at 105. The Court also determined that making the registry information available throughout the state was not excessive in light of population mobility, citing to a study indicating that 38% of recidivist sex offenses took place in different jurisdictions than where the previous offense was committed. 538 U.S. at 105.

Having determined that the respondents had failed to show "that the effects of the law negate Alaska's intention to establish a civil regulatory scheme," the *Smith* majority declared that the act was nonpunitive and that its retroactive application did not violate the Ex Post Facto Clause. 538 U.S. at 105-06.

In stark contrast, the Alaska Supreme Court would later use the same intent-effects test that the *Smith* Court utilized but would find that ASORA violated the Ex Post Facto Clause of the Alaska state constitution, concluding:

> "Because ASORA compels (under threat of conviction) intrusive affirmative conduct, because this conduct is equivalent to that required by criminal judgments, because ASORA makes the disclosed information public and requires its broad dissemination without limitation, because ASORA applies only to those convicted of crime, and because ASORA neither meaningfully distinguishes between classes of sex offenses on the basis of risk nor gives offenders any opportunity to demonstrate their lack of risk, ASORA's effects are punitive. We therefore conclude that the statute violates Alaska's ex post facto clause." *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008).

Interestingly, the Alaska court cited with approval to *Myers*. *Doe*, 189 P.3d at 1017. Other states have likewise relied on their state constitutions to prohibit retroactive application of sex offender registration statutes. See *Wallace v. State*, 905 N.E.2d 371, 377-78 (Ind. 2009); *Doe v. Dept. of Public Safety and Correctional Services*, 430 Md. 535, 547-48, 62 A.3d 123 (2013); *State v. Williams*, 129 Ohio St. 3d 344, 347-49, 952 N.E.2d 1108 (2011); *Starkey v. Oklahoma Dept. of Corrections*, 2013 OK 43, ¶ 76-79, 305 P.3d 1004 (2013). But, Kansas does not have a specific Ex Post Facto Clause in our state constitution. *Todd*, 299 Kan. at 276.

And this court is bound by the United States Supreme Court's interpretation of the United States Constitution, albeit we are not bound by any lower federal court. See *Lockhart v. Fretwell*, 506 U.S. 364, 376, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."). Accordingly, our inquiry becomes whether KORA, as amended in 2011, is sufficiently distinct from ASORA reviewed in *Smith* that it mandates a different result under the federal Constitution.

Application of Intent-Effects Test to KORA, as Amended in 2011

In the initial step of the intent-effects test, the statutory provisions are construed to determine whether the legislature intended to enact a punitive provision. If so, retroactive application of the provisions is always prohibited; no further inquiry is needed. *Smith* found ASORA nonpunitive, first pointing to express statutory language, stating that the objective of the law was to protect the public from sex offenders and that the release of certain information to the public assists in protecting the public safety. 538 U.S. at 93. *Smith* also noted that Alaska's statutory scheme placed the notification provisions in the health, safety, and housing code, albeit the registration provisions were codified in the criminal procedure code. Moreover, the Alaska statute mandated no procedures but rather it vested the Alaska Department of Public Safety with authority to promulgate implementing regulations, leading the *Smith* Court to infer that "the legislature envisioned the Act's implementation to be civil and administrative." 538 U.S. at 96.

KORA, in contrast, is wholly contained within our criminal procedure code, mandates the manner of implementation, and imposes serious criminal sanctions for noncompliance. As *State v. Myers*, 260 Kan. 669, 678, 923 P.2d 1024 (1996), pointed out, Kansas' act "contains no express statement of legislative intent or purpose." Curiously, our sex offender act has been amended numerous times since *Myers* noted the absence of a legislative expression of intent or purpose while finding the notification provisions punitive in effect. See L. 1997, ch. 181, secs. 7-14; L. 1999, ch. 164, secs. 2934, 36; L. 2000, ch. 150, sec. 2; L. 2001, ch. 208, secs. 10-16; L. 2002, ch. 163, sec. 6; L. 2002, ch. 55, secs. 1-4; L. 2003, ch. 123, secs. 3-9; L. 2005, ch. 202, secs. 1-2; L. 2006, ch. 212, sec. 20; L. 2006, ch. 214, sec. 2, 6-10; L. 2007, ch. 181, secs. 1-7; L. 2008, ch.
57, sec. 1; L. 2008, ch. 74, sec. 1; L. 2009, ch. 32, sec. 44; L. 2010, ch. 66, sec. 1; L.

2010, ch. 74, sec. 11; L. 2010, ch. 135, secs. 35-37; L. 2010, ch. 147, sec. 8; L. 2010, ch. 155, sec. 10; L. 2011, ch. 95, secs. 1-11; L. 2012, ch. 149, secs. 1-10; L. 2013, ch. 127, secs. 1-8; and L. 2014, ch. 117, secs. 2-3. Nevertheless, the legislature has yet to definitively express the intent or purpose of the act.

Notwithstanding that KORA is more fully clothed in criminality than was *Smith*'s ASORA, we need not ruminate on how the high court would judge the Kansas Legislature's intent or purpose. We have our own precedent; *Myers* found a nonpunitive purpose of public safety in the legislative history of KSORA. Doe points us to no subsequent legislative history that would lead us to overturn *Myers*' holding on the intent portion of the analysis. Accordingly, we proceed to consider how the factual distinctions between the statute under examination in *Smith* and that under examination today affect the "effects" portion of the test.

We begin with a list of the most significant differences between the 2011 version of KORA and the version of ASORA reviewed in *Smith*:

- *KORA applies to a broader group of offenders*.
  The 2011 KORA applies to sex offenders, violent offenders, and drug offenders (with no personal use exception). K.S.A. 2011 Supp. 22-4902. ASORA only applied to sex offenders and child kidnappers. Alaska Stat. § 12.63.010 (2000).

- *KORA requires frequent in-person reporting regardless of registration changes*.
  KORA requires in-person quarterly reporting for sex offenders in each location where the offender resides, maintains employment, or attends school. K.S.A. 2011 Supp. 22-4905(b). Additionally, transient offenders must register in person in the location where the offender is physically present every 30 days. K.S.A. 2011 Supp. 22-4905(e). ASORA did not require in-person reporting after initial

registration. Alaska required annual written verification for nonaggravated sex offenses and quarterly written verification for aggravated offenses. Alaska Stat. § 12.63.010(d) (2000).

- *KORA often requires longer registration terms.*

  For the majority of first-time sex offenses, KORA requires 25 years or lifetime registration. K.S.A. 2011 Supp. 22-4906. For first-time nonaggravated sex offenses, the ASORA required 15-year registration. Alaska Stat. § 12.63.020 (2000).

- *KORA requires additional registration information.*

  In addition to the registration information offenders were required to provide under ASORA, KORA registration requires: alias dates or places of birth; temporary lodging information; telephone numbers; social security number; occupation; name of any anticipated employer and anticipated place of employment; photocopies of current driver's licenses and identification cards; aircraft and watercraft license plates and registration information; information concerning where motor vehicles, aircraft, and watercraft are habitually parked or otherwise kept; professional licenses, designations, and certifications; preconviction mental health treatment; schools attended or expected to be attended; travel and immigration documents; name and telephone number of probation, parole, or community corrections officer; email addresses; all online identities used on the Internet; any information relating to membership in online social networks; DNA exemplars; and the sex and date of birth of each victim. Compare K.S.A. 2011 Supp. 22-4907 with Alaska Stat. § 12.63.10 (2000).

- *KORA requires in-person registration updates.*

  KORA additionally requires in-person registration updates within 3 days of *any* information change. K.S.A. 2011 Supp. 22-4905(g). ASORA required a written update for a change of residence. Alaska Stat. § 12.63.010(c) (2000).

□

KORA requires additional information dissemination to the public.
In addition to the information made available to the public under ASORA, KORA disseminates: any other offenses for which the offender has been convicted or adjudicated; temporary lodging information; address of any place where the offender will be a student; and professional licenses, designations, and certifications the offender holds. K.S.A. 2011 Supp. 22-4909(b)(3), (5), (8), and (10); Alaska Stat. § 18.65.087 (2000).

- *KORA imposes costly registration fees.*
  KORA requires that offenders remit a $20 fee, four times per year, in each location where an offender resides, maintains employment, or attends school. K.S.A. 2011 Supp. 22-4905(k). ASORA allowed the department of public safety to adopt fees for registration and required that fees be based upon actual costs and be set at a level not to discourage registration. Alaska Stat. § 18.65.087(d)(3) (2000).

- *KORA requires provision of notice for travel outside the United States.*
  Under KORA, an offender must give 21 days' notice of international travel except in emergency situations. K.S.A. 2011 Supp. 22-4905(o). No restriction on travel was included in ASORA.

- *KORA requires annual driver's license and identification card renewal and the Motor Vehicle Drivers' License Act requires a distinguishing number on the KORA registrant's driver's licenses.*
  K.S.A. 2011 Supp. 22-4905(l); K.S.A. 2014 Supp. 8-243(d). ASORA did not contain similar requirements.

- *Kansas considers whether a parent is subject to KORA or is residing with a person subject to KORA in determining child custody, residency, and parenting time*.

  K.S.A. 2011 Supp. 23-3203(h), (j). Alaska's domestic relations code did not require consideration of registered offender status. See Alaska Stat. §§ 25.20.090 (2000); 25.24.150 (2000).

- *KORA imposes burdensome penalties for violations.*

  Under the 2011 KORA, a first conviction is a severity level 6 person felony, a second conviction is a severity level 5 person felony, a third conviction is a severity level 3 person felony, and a violation continuing for more than 180 days is a severity level 3 person felony. K.S.A. 2011 Supp. 22-4903. Under ASORA, the penalty for a first-time failure to register was a class A misdemeanor. Alaska Stat. § 11.56.840 (2000). The penalty for a second time failure to register or failure to register with the intent to escape detection or identification and to facilitate the person's commission of a sex offense or child kidnapping was a class C felony, the lowest severity level felony in Alaska. Alaska Stat. § 11.56.835 (2000); Alaska Stat. § 11.81.250 (2000).

The district court found these differences significant, opining that, since *Smith*, the requirements in Kansas had become "increasingly severe." Further, the district court noted that the advent of the widespread use of social media had significantly changed the landscape for dissemination of offender information. The court then individually discussed four of the *Mendoza-Martinez* factors.

Following the *Smith* format, we will likewise individually discuss the guideline factors from *Mendoza-Martinez*, although it is important to keep in mind that it is the entire "statutory scheme" that must be examined for its punitive effect. See *Smith*, 538

U.S. at 92 (effects analysis requires the appellate court to "examine . . . the *statutory scheme*" [emphasis added]); *Myers*, 260 Kan. at 681 (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 65 L. Ed. 2d 742 [1980]) ("ask whether the '*statutory scheme* was so punitive either in purpose or effect'" [emphasis added]). For instance, a particular registration requirement may not have the same punitive effect in a statutory scheme that permits a reduction in registration time for proven rehabilitation, as it does in a statutory scheme that precludes any individualized modifications.

The first factor considered by *Smith* was whether the regulatory scheme has been regarded in our history and traditions as a punishment. 538 U.S. at 97. Again, the *Smith* Court rejected the argument that ASORA's notification provisions "resemble shaming punishments of the colonial period," finding that such early punishments as shaming, humiliation, and banishment involved more than the dissemination of information. 538 U.S. at 97. Then, notwithstanding that the focus was supposed to be upon the "effects" of the law, rather than the legislative intent, *Smith* rationalized that Alaska did not "make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." 538 U.S. at 99. Nevertheless, the 2011 KORA crosses the line drawn by *Smith*.

Myers cited to *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1265 (3d Cir. 1996), for a quotation from Nathaniel Hawthorne, *The Scarlet Letter*, 63-64 (Random House 1950) (1850), which, referring to the portion of Hester Prynne's punishment for adultery that required her to wear a scarlet "A" upon her dress, stated: "'There can be no outrage . . . against our common nature,—whatever be the delinquencies of the individual,—no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do.'" KORA mimics that shaming of old by branding the driver's license of a registrant with the designation, "RO." See K.S.A. 2014 Supp. 8-243(d). While a driver's license is not worn upon a person's chest, it is required to be displayed for a variety of reasons unrelated to KORA's

public safety purpose, *e.g.*, to obtain medical treatment, to obtain a checking account balance from a bank teller, to vote in Kansas, etc. See also *Starkey v. Oklahoma Dept. of Corrections*, 2013 OK 43, ¶ 59, 305 P.3d 1004 (2013) ("driver's license is frequently necessary in face-to-face encounters when cashing a check, using a credit card, applying for credit, obtaining a job, entering some public buildings, and in air travel . . . subject[ing] an offender to unnecessary public humiliation and shame . . . not unlike a 'scarlet letter.'"). Consequently, in the words of *Smith*, the statutory scheme "[holds] the person up before his fellow citizens for face-to-face shaming." 538 U.S. at 98. In the words of the district court, "the notation on the [driver's] license is a visible badge of past criminality in line with traditional punishment."

Likewise, *Smith*'s description of Alaska's posting of registration information on the Internet as a passive system, akin to physically visiting "an official archive of criminal records," 538 U.S. at 99, is antiquated in today's world of pushed notifications to listservs and indiscriminate social media sharing. The Supreme Court has recently recognized the vast amount of data that is currently available to most citizens on their smartphones and that "a cell phone [can be] used to access data located elsewhere, at the tap of a screen." *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2491, 189 L. Ed. 2d 430 (2014). Indeed, *Myers*' fear that "[t]he print or broadcast media could make it a practice of publishing the list [of sex offenders] as often as they chose," 260 Kan. at 697, has come to pass. Websites contain pop-up ads offering to locate sex offenders for the viewer. Indeed, one would not be surprised to find that an application (app) for a mobile device had been developed that would provide instant access to the location of all sex offenders in a given location. And, as the district court noted, members of the public may now post public comments about an offender after using the Johnson County "share and bookmark" feature that posts registry information on social media sites such as Facebook, Twitter, and Myspace. In contrast, *Smith*'s analysis of ASORA specifically noted the absence of the ability of the public to comment. 538 U.S. at 99. The district court

therefore concluded that "citizens can use the county-sponsored website to create a virtual forum for public shaming, which closely resembles traditional punishment." We agree.

Any suggestion that disseminating sex offender registration on an Internet website reaches no more members of the public and is no more burdensome to the offender than maintaining an archived criminal record simply ignores the reality of today's world. Moreover, the argument that the additional widespread dissemination enhances the effectiveness of the registration system simply misses the point; the focus of this part of the intent-effects test is to assess whether there is a penal effect on the offender. For example, placing the offender in a locked stockade on the courthouse square would more effectively achieve the purpose of public safety, but, of course, the effect of that method could not be labeled nonpunishment.

On the registration side of the statutory scheme, KORA utilizes a traditional means of punishment when it requires quarterly registration in person in each location where the offender works, lives, or attends school. Reporting in person to a State agent, up to 12 times a year, to update the agent on the offender's personal, employment, and educational status replicates what we most often see when the criminal sanction of probation or parole is imposed.

The next *Mendoza-Martinez* factor—whether the statutory scheme subjects the offender to an affirmative disability or restraint—involves an inquiry into "how the effects of the Act are felt by those subject to it." 538 U.S. at 99-100. *Smith* noted that ASORA imposed no physical restraint on offenders, and, although registrants had to inform the authorities of certain changes, such as a job or residence, the offenders were not required to obtain prior permission for the change. Of course, in Kansas, KORA requires 21 days' prior notification for international travel.

But the more common restraint on an offender's freedom of movement under KORA is more indirect. The offender must register in person quarterly in each applicable jurisdiction and remit $20 to each jurisdiction each time, at the risk of committing a new felony under K.S.A. 2011 Supp. 22-4903. As the district court noted, that will result in the offender paying from $80 to $240 a year. Further, KORA's definition of "reside" is extremely broad. K.S.A. 2011 Supp. 22-4902(j) provides that "[i]t shall be presumed that an offender resides at any and all locations where the offender stays, sleeps or maintains the offender's person for seven or more consecutive days or parts of days, or for seven or more non-consecutive days in a period of 30 consecutive days." Under those rules, an offender could inadvertently acquire a new registration residence by taking a week's vacation out-of-county, or by having a sales route where the offender stays in an out-ofcounty motel for 2 nights a week, *i.e.*, 8 nonconsecutive days in a period of 30 consecutive days. As the district court opined, "in-person, quarterly reporting restricts offenders' time and freedom" and is akin to the punitive measure of probation or parole, as we have discussed above.

The district court also found that KORA registration and notification created housing and occupational barriers for an offender. *Smith* rejected as "conjecture" the argument that registration under ASORA had created employment or housing problems in that case, declaring that "these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." 538 U.S. at 100-01. But here, the State's argument that Doe's employment and housing barriers were constructed by his conviction, rather than by his registration, is not supported by the evidence.

Granted, the district court relied on social science research gleaned from the journal articles for such information as the pervasiveness of employment difficulties associated with registration. But the district court also had direct testimony in this case

from Doe himself, stating that he retained his job through the time of his prosecution and conviction, only to be fired after his registration became public. Moreover, Doe's listing on the registry was the reason given for both his job termination and his inability to get a better job. Likewise, the published map showing the residential location of sex offenders was the reason given by prospective landlords for refusing to rent to Doe.

To say Doe's housing and employment problems flowed from the public record of his conviction, rather than from the notification provisions of KORA, defies logic and common sense. First, one would have to question how many members of the general public are proficient at accessing and interpreting archived court records. Next, those records would not identify the offender's place of employment, so that a public relations reaction to the corporate employer would be a remote possibility, whereas the offender is tied to the employer in the registry. Likewise, the criminal defendant's address at the time of conviction, even if contained within the public portion of the court records, would not necessarily be the same as when the record was accessed. Moreover, although a defendant on probation must notify the defendant's probation officer of a change of address, that information is not open to the public. Certainly, potential landlords would have no concern that other tenants would ascertain the offender's current address from the prior court record. That information would have to come from KORA.

Blaming the public record of conviction, rather than KORA registration and dissemination, for housing and employment difficulties also defies our precedent. *Myers* looked at the practical effect of unrestricted dissemination of registration information and concluded that it "could make it impossible for the offender to find housing or employment." 260 Kan. at 696. Certainly, the ensuing increase in the number of people with access to the Internet since *Myers*, along with the increased ease with which information can be shared and commented upon, only serves to corroborate that case's prescient holding.

Accordingly, we affirm the district court's determination that KORA's statutory scheme works an affirmative disability or restraint on the offender.

The next factor is whether the statutory scheme promotes the traditional aims of punishment: deterrence and retribution. *Smith* acknowledged the deterrent effect of the law but summarily considered that to be a necessary component of effective government regulation. *Smith* then rejected the lower court's conclusion that ASORA was retributive for basing the length of the reporting requirement on the extent of wrongdoing, rather than the risk posed by the offender. It concluded, without further explanation, that the broad categories and length of required reporting were "reasonably related to the danger of recidivism" and, thus, consistent with the regulatory objective. 538 U.S. at 102. But *cf. Com. v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009) ("When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.").

If the 10-year length of reporting was reasonably related to the danger of recidivism in 2003, when Doe was convicted and the year after *Smith* was decided, one has to wonder what happened in 2011 to make the reasonable relationship two and a half times greater. The State has provided nothing to support the reasonableness of the 25year reporting term. Even *Smith*'s "legislative fact" in support of ASORA's length of reporting was that sex offenders may reoffend "'as late as 20 years following release.'" 538 U.S. at 104. KORA's new reporting term is 25% longer than *Smith*'s outside limit. Moreover, Doe's "legislative fact" from current social science indicates that the risk of recidivism actually decreases as the offender ages. Even if we do not take judicial notice of that "legislative fact," we can conclude that there is no evidentiary or logical support for the increase in reporting term. Such arbitrariness is inherently retributive.

The next factor—which *Smith* labeled "a '[m]ost significant' factor"—is the act's rational connection to a nonpunitive purpose. *Smith* found ASORA rationally connected to the nonpunitive purpose of public safety, even though the act was not "'narrowly drawn to accomplish the stated purpose.'" 538 U.S. at 102-03. *Smith* would apparently require the imprecision to render the nonpunitive purpose a "'sham or mere pretext.'" 538 U.S. at 103 (quoting *Hendricks*, 521 U.S. at 371).

Arguably, under the current KORA, public safety has become a pretext. Without differentiating between the 18-year-old immature, marginally intelligent, sexually naïve person who succumbs to the seduction of a mature-acting, sexually informed 15-year-old child and the 30-year-old confirmed pedophile that rapes preschoolers and is not amenable to rehabilitation, KORA fails to effectively notify the public of the danger of recidivism. Too much is too little. Moreover, that flaw is accentuated by KORA's prohibition in K.S.A. 2011 Supp. 22-4908: "No person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under the act." Even fully rehabilitated offenders will be on the registry for a quarter-century. In the words of the district court, "[w]ithout a mechanism for challenging long registration periods, offenders who are compliant with the registration requirements and have a low risk of recidivism suffer consequences that outweigh the minimal increases in public safety created by registration." *Cf. Gonzalez v. State*, 980 N.E.2d 312, 320-21 (Ind. 2013) (finding that Indiana's registration law was excessive in relation to its articulated purpose because the act contained no mechanism for determining whether offender had been rehabilitated or no longer presented a risk to the public thereby alleviating the need for registration).

On the flip side, the registry could be underinclusive because only *convicted* sex offenders must register. One who has engaged in the same conduct as Doe might well avoid being subjected to the rigors of registration by pleading to a non-sex offense, by

being acquitted because of a suppressed confession, or by having a conviction overturned on appeal because of an illegal search or some other reason, other than insufficient evidence. One can envision that a prosecutor might use offender registration as a plea bargaining chip to leverage a guilty plea to a charge that the prosecutor has amended from a KORA offense to a non-KORA offense, which would effectively nullify the public safety purpose of KORA. Again, the point is that the statutory scheme is not closely connected to the nonpunitive purpose of public safety.

The final factor is whether the statutory scheme is excessive in relation to its regulatory purpose. Our discussion of the other factors has touched upon the excessive nature of KORA, at least as amended in 2011. For instance, the information a registrant is required to provide has increased dramatically from that required in the *Myers* era, to include such items as the registration number of owned watercraft.

And the penalty for noncompliance with the stringent and complicated registration rules has been elevated to a level 6 person felony, as opposed to being a misdemeanor under the act reviewed in *Smith*. Granted, the countering argument is that the increased penalty is for committing a new crime. But the sex or other offense is a *necessary* predicate to any conviction for failing to comply with KORA, because only those who have been convicted of a qualifying offense are subject to the registration requirements. Moreover, when the penalty for failing to comply with registration exceeds the penalty for the crime triggering the registration requirement, the statutory scheme loses its civil regulatory blush.

Smith relied heavily on its "legislative facts" to justify ASORA's excessive provisions, which may or may not remain valid. But what we do know is that *Smith*'s reliance on the notification system being "passive," 538 U.S. at 105, does not translate to today's system under KORA. For instance, the KBI will provide active notification under

certain circumstances, and, as the district court correctly noted, "the current internet notification schemes are more aggressive than they were when *Smith* was decided, offenders are at a greater risk of suffering ostracism and even vigilante acts by members of the community." Again, *Myers* got it right with respect to the effects of unlimited public dissemination of registration information.

In finding that the current KORA's statutory scheme is so punitive in effect as to negate the implied legislative intent to deem it civil, we are not unaware of the fact that a number of federal Circuit Courts of Appeal have found the federal act, the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* (2012), nonpunitive and appropriately applied retroactively. Those cases are not persuasive because of the differences between SORNA and KORA. For instance, SORNA differentiates between classes of offenders, whereas KORA is a one-size-fits-all scheme; KORA is not restricted to just sex offenders, whereas SORNA is; KORA has no mechanism for obtaining an early release from the registration requirement, whereas SORNA allows for a reduction in registration time for a clean record; KORA requires a special, annually renewed driver's license and child custody notification not found in SORNA; KORA requires more registration information than SORNA; KORA imposes a fee, whereas SORNA does not; and KORA has a broader definition of "resides" than SORNA. See 42 U.S.C. §§ 16911, 16914-16 (2012). In other words, looking at the statutory scheme as a whole, the effects of KORA are considerably more punitive than those of SORNA.

In short, we affirm the district court. KORA as amended in 2011 is punitive in effect, and the amended statutory scheme cannot be applied retroactively to any person who committed the qualifying sex offense crime prior to July 1, 2011.

MICHAEL J. MALONE, Senior Judge, assigned.[1]

* * *

BILES, J., concurring in part and dissenting in part: I agree with the majority that our legislature intended for the Kansas Offender Registration Act (KORA) and its 2011 amendments to be a civil regulatory scheme for public safety that was nonpunitive. I also agree the proper retroactivity test boils down to whether the 2011 amendments that prompt the present controversy render KORA so punitive as applied to sex offenders as to negate that intent. See *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (applying intent-effects test for federal Ex Post Facto Clause purposes). Our state constitution does not contain a similar provision or suggest a different analytical process. See *State v. Todd*, 299 Kan. 263, 276, 323 P.3d 829 (2014) (no Ex Post Facto Clause in Kansas Constitution).

But this just means we are being asked to answer a federal question, which logically suggests adhering to the federal law on this subject. My colleagues in the majority too easily disregard the substantial federal caselaw that yields a contrary result from the one reached today. This caselaw uniformly concludes that the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* (2012), as well as offender registration laws from other states, are nonpunitive and may be applied retroactively without violating the federal Ex Post Facto Clause. This authority sets the path we must follow.

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[1] **REPORTER'S NOTE:** Senior Judge Malone was appointed to hear case No. 110,318 under the authority vested in the Supreme Court by K.S.A. 20-2616 to fill the vacancy on the court created by the appointment of Justice Nancy Moritz to the United States 10th Circuit Court of Appeals.

Standard of review

Our standard of review is well known when considering a challenge to a statute's constitutionality; yet its recitation in the majority opinion tellingly ignores critical components, namely: we always presume legislative enactments are constitutional and we resolve all doubts in favor of a statute's validity. *State v. Cheeks*, 298 Kan. 1, 4, 310 P.3d 346 (2013); *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315, 255 P.3d 1186 (2011). This presumption of constitutionality emanates from the critical doctrine of separation of powers, which recognizes that courts are concerned only with the legislative power to enact statutes—not with the wisdom behind them. *Miller v. Johnson*, 295 Kan. 636, 646, 289 P.3d 1098 (2012).

We do not declare a statute unconstitutional unless it is clear beyond a reasonable doubt that the statute infringes on constitutionally protected rights. *State v. Carr*, 300 Kan. 1, 285, 331 P.3d 544 (2014) (quoting *State v. Brown*, 280 Kan. 898, 899, 127 P.3d 257 [2006]). And as the United States Supreme Court noted in *Smith*, "'only the clearest proof'" of punitive effect is sufficient to override the legislature's intent to create a civil regulation. *Smith*, 538 U.S. at 91 (quoting *Hudson v. United States*, 522 U.S. 93, 100, 118 S. Ct. 488, 139 L. Ed. 2d 450 [1997]); see also *United States v. Young*, 585 F.3d 199, 2005 (5th Cir. 2009) ("[Y]oung must present the 'clearest proof' that either the purpose or the effect of [SORNA] is in fact so punitive as to negate its civil intent. This he cannot do.").

The majority's analysis deviates from these principles by framing the question as an examination into whether differences between KORA and the Alaska statute the United States Supreme Court upheld in *Smith* "mandates a different result." Slip op. at 30. But viewing the controversy in this way ignores the presumption of constitutionality, resourcefully casts off the numerous decisions cited below that have upheld various registration requirements against federal retroactivity challenges, and renders meaningless the "clearest proof" standard stated in *Smith*. The majority's stated reason for this approach is that federal circuit court opinions are not binding on state supreme courts, so the majority will not consider whether their holdings may inform our thinking. This smacks of simply being a means to a predetermined end.

Discussion

The Ex Post Facto Clause of the United States Constitution prohibits state and federal governments from retroactively imposing additional punishment for a criminal offense. U.S. Const. art. I, §§ 9-10. As noted, Kansas does not have a comparable constitutional dictate. See *Todd*, 299 Kan. at 276.

Federal appellate courts have unanimously held retroactive application of the federal offender registration requirements found in SORNA does not violate the Ex Post Facto Clause. *United States v. Brunner*, 726 F.3d 299, 303 (2d Cir. 2013); *United States v. Parks*, 698 F.3d 1, 5-6 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Elkins*, 683 F.3d 1039, 1045 (9th Cir. 2012); *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011); *United States v. W.B.H.*, 664 F.3d 848, 860 (11th Cir. 2011); *United States v. Shenandoah*, 595 F.3d 151 (3d Cir.), *cert. denied* 560 U.S. 974 (2010), *abrogated on other grounds by Reynolds v. United States*, 535 U.S. ___, 132 S. Ct. 975, 181 L. Ed. 2d 935 (2012); *United States v. Gould*, 568 F.3d 459, 466 (4th Cir. 2009), *cert. denied* 559 U.S. 974 (2010); *Young*, 585 F.3d at 206 (noting that Young

made no "effort to prove that the effect of SORNA is so punitive as to make it not a civil scheme, and any attempt to do so would have been futile"); *United States v. May*, 535 F.3d 912, 919-20 (8th Cir. 2008), *cert. denied* 556 U.S. 1258 (2009), *abrogated on other grounds by Reynolds*, 132 S. Ct. 975; *United States v. Hinckley*, 550 F.3d 926, 937-38 (10th Cir. 2008), *abrogated on other grounds by Reynolds*, 132 S. Ct. 975 (2012); see also *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013) (applying *MendozaMartinez* factors to hold SORNA was not cruel and unusual punishment as applied to a juvenile); *United States v. Stacey*, 570 Fed. Appx. 213, 216 (3d Cir. 2014) (holding ex post facto challenge to conviction for failing to register under SORNA foreclosed by
Shenandoah); *United States v. Sampsell*, 541 Fed. Appx. 258, 260 (4th Cir. 2013) (holding ex post facto challenge to SORNA foreclosed by *Gould*).

In addition, federal circuit courts have upheld state sex offender registration laws against federal ex post facto challenges, even when those state laws contained provisions more expansive in scope and impact than either SORNA or the Alaska provisions addressed in *Smith*. See *Litmon v. Harris*, 768 F.3d 1237, 1242-43 (9th Cir. 2014) (upholding California requirement that offenders register in-person every 90 days); *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1051, 1058 (9th Cir. 2012) (upholding Nevada law expanding category of individuals who must register, increasing time period offenders were subject to registration, adding in-person registration requirements, and expanding law enforcement obligations to notify specified entities that an offender resided nearby); *Doe v. Bredesen*, 507 F.3d 998, 1000 (6th Cir. 2007) (upholding Tennessee law requiring, among other things, extended lifetime registration and satellite-based monitoring with wearable GPS device); *Hatton v. Bonner*, 356 F.3d 955, 967 (9th Cir. 2004) (upholding California law containing several provisions different from the Alaska statute analyzed in *Smith*).

The majority disingenuously characterizes this unanimous body of caselaw as just the decisions of "a number of Federal Circuit Courts of Appeal," which it then discounts by noting the obvious, *i.e.*, there are differences between the federal SORNA and our state's KORA. Slip op. at 44. And while it is true that none of the statutory schemes upheld by other courts are identical to KORA, there is substantial overlap, and so the rationale from those decisions should apply with equal force here. I would not so quickly disdain this federal caselaw because it compellingly answers the real question presented: Are there convincing reasons to believe the United States Supreme Court would view KORA differently than it viewed the Alaska law in 2003 when it decided *Smith*? See *Litmon*, 768 F.3d at 1243 ("[T]here is no reason to believe that the addition of [the 90day, in-person registration] requirement would have changed the outcome [in *Smith*]."). If the answer to that question is no, then this court must affirm.

To answer the question presented, we apply the two-step test from *Smith* to determine whether the 2011 KORA amendments constitute an additional form of punishment when applied to offenders required to comply with them because of convictions that occurred before the amendments were enacted. See *Smith*, 538 U.S. at 92. And as noted, the majority correctly concludes in the first step that the Kansas Legislature intended for its 2011 amendments to preserve KORA's status as a civil regulatory scheme. Slip op. at 32. After that, we move to the second step, where we must decide whether those 2011 amendments are """so punitive either in purpose or effect as to negate [the State's] intention" to deem [KORA] "civil."'" *Smith*, 538 U.S. at 92. This is where I depart from the majority's analysis.

For this second step, we should follow the federal factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *Smith*, 538 U.S. at 97. Those factors consider the degree to which the regulatory scheme imposes a sanction that: (1) has historically been regarded as punishment; (2) constitutes

an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) is rationally connected to a nonpunitive purpose; (5) is excessive in relation to the identified nonpunitive purpose; (6) contains a sanction requiring a finding of scienter; and (7) applies the sanction to behavior that is already a crime. *Mendoza-Martinez*, 372 U.S. at 168. In *Smith*, the Court focused on the first five as more relevant in evaluating Alaska's registration and notification law, concluding the remaining two were of "little weight." 538 U.S. at 105. I will do the same.

HISTORICAL FORM OF PUNISHMENT

The majority holds that the 2011 KORA "crosses the line drawn by *Smith*" by too closely resembling the shaming punishments from the colonial period. Slip op. at 36-37. KORA does this, according to the majority, by posting the registrant's information on the Internet, "branding" a registrant's driver's license with the letters "RO," and requiring quarterly registration in each location where an offender works, lives, or attends school. Let's take each of these in turn.

Posting offender information on the Internet

As summarized below, there is overwhelming federal authority holding that Internet posting of registrant information is not analogous to historical forms of punishment. The analysis used to reach that conclusion applies in equal force to KORA, regardless of other differences the statutory schemes may have. The majority overreaches by rejecting this caselaw and adopting a contrary view.

In *Smith*, the United States Supreme Court held that Alaska's offender registration act could apply retroactively and "[t]he fact that Alaska posts the information on the Internet does not alter our conclusion." 538 U.S. at 99. The Court held the posting

requirement was not akin to historical punishments despite recognizing that it subjects the offender to public shame or humiliation because most of the information related to an already public criminal record and dissemination of it furthers a legitimate governmental objective. 538 U.S. at 99. The *Smith* Court explained:

> "[T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." 538 U.S. at 98-99.

The *Smith* Court then added:

> "The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." 538 U.S. at 99.

In so holding, the Court's analysis recognizes the obvious—posting information on the Internet makes it far more accessible and subjects the offender to increased shame and

humiliation. Nevertheless, the Court held that Internet posting did not make Alaska's statutory scheme punitive.

The majority characterizes the *Smith* Court's 2003 analysis of the Internet as "antiquated," and then concludes: "Any suggestion that disseminating sex offender registration [information] on an Internet website reaches no more members of the public and is no more burdensome to the offender than maintaining an archived criminal record simply ignores the reality of today's world." Slip op. at 38.

But as seen from its holding, *Smith* did not base its conclusion on some oldfashioned, dial-up modem/floppy disk notion of the World Wide Web; nor did it consider accessing offender information on the Internet nothing more than a walk to the courthouse to thumb through publicly available paper files. *Smith*'s rationale withstands the more recent development of a mobile, smartphone Internet. Indeed, these developments can be viewed as furthering the nonpunitive, public safety ends supporting offender registration because, as *Smith* acknowledged, "[w]idespread public access is necessary for the efficacy of the scheme." *Smith*, 538 U.S. at 99. The majority simply disagrees with the Court's conclusion but needs a rationale for considering the question further. This becomes overwhelmingly evident when the authority from more recent courts applying *Smith* is acknowledged.

Consider first the federal notification statute, SORNA. Similar to KORA, the federal law requires that offender information including the offenders' names, physical descriptions, photographs, criminal offenses, and criminal histories be made publicly available on the Internet. See 42 U.S.C. §§ 16914, 16918-16920 (2012). Under SORNA, the states and enumerated territories, including the District of Columbia and Puerto Rico, must each maintain websites for this purpose. See 42 U.S.C. §§ 16911(10); 16918(a) (2012). The federal government, in turn, must maintain a website containing "relevant

information for each sex offender and other person listed on a jurisdiction's Internet site." 42 U.S.C. § 16920. Each of these websites must make the information obtainable "by a single query for any given zip code or geographic radius set by the user." 42 U.S.C. §§ 16918(a), 16920(b). And among SORNA's others mandates, an appropriate official must affirmatively distribute notice of an individual's sex offender status to "each school and public housing agency" in the area where that sex offender resides. 42 U.S.C. § 16921(b)(2) (2012). In short, SORNA goes further than the Alaska scheme at issue in *Smith* and further than KORA as to affirmative notification of statutorily specified groups.

Nevertheless, all federal circuits addressing whether SORNA's publication requirements are punitive have followed *Smith* and held they are not, despite candidly recognizing they can result in greatly increased public shame. See, *e.g*., *Parks*, 698 F.3d at 5-6 (noting the disadvantages from the publicity attendant to SORNA's Internet requirements "are obvious" and refusing to invalidate SORNA due to "wide dissemination" of offender's information, citing *Smith*); *Hinckley*, 550 F.3d at 937-38 ("SORNA, just as the *Smith* scheme, merely provides for the 'dissemination of accurate information about a criminal record, most of which is already public'"); see also *United States v. Talada*, 631 F. Supp. 2d 797, 808 (S.D. W. Va. 2009) (citing *Smith* and upholding SORNA as a valid regulatory program even though it requires widespread Internet dissemination of offenders' information, a community notification program, and in-person reporting).

Also persuasive is the Ninth Circuit's 2012 decision upholding retroactive application of a Nevada statute that, among other things, not only required Internet publication of registration information, but also active notification to specified groups over and above what was required by SORNA, such as youth and religious organizations.

Masto, 670 F.3d at 1051. In rejecting any notion that these features were akin to historical forms of punishment, the Ninth Circuit held:

> "Active dissemination of an individual's sex offender status does not alter the [*Smith*] Court's core reasoning that 'stigma . . . results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.' [Citation omitted.] Though 'humiliation increas[es] in proportion to the extent of the publicity,' the 'purpose and the principal effect of notification are to inform the public for its own safety.' [Citation omitted.]" 670 F.3d at 1056.

There is also recent state court authority, relying heavily on *Smith*, that holds posting registered offenders' information on the Internet is not akin to traditional shaming punishments. See *Kammerer v. State*, 322 P.3d 827, 834-36 (Wyo. 2014) ("Although dissemination of information relating to a registrant's status as a sex offender may have negative consequences for the registrant, information regarding the offense is made public at the time of trial, and its publication under WSORA is merely a necessary consequence of the Act's intent to protect the public from harm."); *State v. Letalien*, 2009 ME 130, ¶ 38, 985 A.2d 4 (2009) (Internet posting of sex offender information is not punitive in purpose or effect, citing *Smith*; Maine and federal Ex Post Facto Clauses are coextensive); see also *Doe I v. Williams*, 2013 ME 24, ¶ 35, 61 A.3d 718 (2013) (following *Letalien*).

I would follow this abundant caselaw and hold that KORA's Internet posting of information is not akin to historical shaming punishments. And in reaching that conclusion, I would further note the majority's discussion of the sharing functions available on the Johnson County Sherriff's website is irrelevant to the statute's constitutionality because KORA does not require this capability; and, just as importantly,

the majority cites no authority that would find a federal ex post facto violation because of a nonstatutorily mandated software feature added by a local law enforcement agency.

Regardless, given the overwhelming weight and substance of the caselaw rejecting federal ex post facto challenges based on widespread Internet dissemination of offender registration information, as well as the federal courts' more recent validations of *Smith*, I would not consider *Smith*'s rationale to be "antiquated" or subject to easy dismissal, and I would not weigh this against the statute's constitutionality. The majority errs in this regard.

"Branding" a registrant's driver's license

Next, the majority declares that KORA "mimics [the] shaming of old by branding the driver's license of a registrant with the designation, 'RO.'" Slip op. at 36. The majority is referring to K.S.A. 2011 Supp. 8-243, which provides that an offender's driver's license "shall be assigned a distinguishing number by the division [of motor vehicles] which will readily indicate to law enforcement officers that such person is a registered offender. The division shall develop a numbering system to implement the provisions of this subsection." This requirement, while not technically contained in KORA, differentiates Kansas laws from SORNA, although the statute only requires a distinguishing number and the "RO" practice is just a decision by a state agency that is not specifically dictated by the statute. See K.S.A. 2011 Supp. 8-243(d).

The majority draws support for its view from a divided decision in *Starkey v. Oklahoma Dept. of Corrections*, 2013 OK 43, 305 P.3d 1004 (2013), which considered the Oklahoma Constitution's Ex Post Facto Clause. See Okla. Const., art. 2, § 15. But I do not find *Starkey* persuasive for several reasons.

First, although the Oklahoma Supreme Court applied the intent-effects test, that court's majority suggests they applied a lower standard as to when the effects of a measure are punitive under the Oklahoma Ex Post Facto Clause by noting that the United States Constitution simply establishes a floor for constitutional rights in Oklahoma. 2013 OK 43, ¶ 45 ("How we apply the 'intent-effects' test is not governed by how the federal courts have independently applied the same test under the United States Constitution as long as our interpretation is at least as protective as the federal interpretation."). Second, Oklahoma's offender registry law imposed harsher restraints on offenders because of residency boundaries (minimum distance from schools, playgrounds, etc.) and a requirement that Oklahoma driver's licenses and identification cards spell out the term "Sex Offender." In contrast, KORA contains no residency exclusions and Kansas simply uses as a matter of state agency practice an abbreviation (RO), which applies equally to non-sex-offenders. Finally, the *Starkey* court relied upon the totality of the Oklahoma law's harsher circumstances when determining they weighed in favor of punishment. 2013 OK 43, ¶ 61 ("[W]e are not making a determination of the constitutionality of any of these individual registration requirements but for purposes of analyzing the second *Mendoza-Martinez* factor we find the totality of these requirements weigh in favor of punishment.").

Offering a different analysis, the Louisiana Supreme Court's unanimous decision in *Smith v. State*, 84 So. 3d 487 (La. 2012), reached the opposite conclusion regarding its driver's license labeling and is more on point. In so holding, the Louisiana court acknowledged that including the words "sex offender" printed in orange color on an offender's driver's license "may be remotely similar to historical forms of punishment, such as public humiliation, [but] the immediate need for public protection was a corollary of, rather than an addendum to, the punishment for sex offenders." *Smith*, 84 So. 3d at 496 n.7-8, 498. The court then concluded that the requirement of a notation on an offender's driver's license "may be harsh, may impact a sex offender's life in a long-lived

and intense manner, and also be quite burdensome to the sex offender, [but] we do not find them to constitute an infringement of the principles of *ex post facto*." 84 So. 3d at 499.

Admittedly, the Louisiana court did not articulate whether it was relying on the federal or state constitution for its holding, but this does not appear to make a difference because that court had previously held Louisiana's Ex Post Facto Clause offers the same protections because it was patterned after the United States Constitution. See *State ex rel. Olvieri v. State*, 779 So. 2d 735 (La. 2001). For this reason, I find the Louisiana decision more persuasive than the Oklahoma decision.

Quarterly registration

Next, the majority labels KORA's quarterly, in-person registration requirements for each location where the offender works, lives, or attends school as "a traditional means of punishment" by likening the requirement to probation or parole. Slip op. at 38. It does so without citation to any authority or explanation as to how quarterly reporting mandates offend federal ex post facto caselaw. Again, a review of the unanimous federal caselaw upholding SORNA is persuasive and leads to a contrary conclusion.

SORNA's in-person reporting requirements differentiate between types of sex offenses in determining the frequency of in-person reporting. There must be in-person verification "not less frequently than" once a year for Tier I sex offenders, twice a year for Tier II sex offenders, and four times per year for Tier III sex offenders. 42 U.S.C. § 16916 (2012); see 42 U.S.C. § 16911 (defining Tiers I, II, and III). In *Parks*, the First Circuit recently noted SORNA's in-person requirement was "surely burdensome for those subject to it," but nevertheless concluded this was not punitive, noting:

> "To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance. Further, the inconvenience is surely minor compared to the disadvantages of the underlying scheme in its consequences for renting housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld." 698 F.3d at 6.

See *Doe v. Pataki*, 120 F.3d 1263, 1281-82 (2d Cir. 1997); see also *Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014) (approving triennial, in-person reporting as being reasonably related to the nonpunitive, prospective goals of protecting the public and facilitating law enforcement efforts).

Admittedly, KORA's reporting requirements are more burdensome than those in SORNA because under KORA, all sex offenders are subject to in-person registration four times per year, and drug and violent offenders must report in person a minimum of three times per year. K.S.A. 2011 Supp. 22-4905(b). KORA further requires an offender to report registration changes in person "to the . . . agency or *agencies* where last registered." (Emphasis added.) K.S.A. 2011 Supp. 22-4905(a), (g). In addition, the definition of "reside" in KORA is broader than the definition in SORNA. Compare K.S.A. 2011 Supp. 22-4902(j) (definition of "reside") with SORNA's 42 U.S.C. § 16911. Therefore, it is obvious KORA imposes a greater registration burden on the offender than SORNA. But the question is whether the federal courts would view these changes as tipping the balance. I think not.

Consider again as an example *Matso* in which the Ninth Circuit rejected a federal ex post facto challenge to a Nevada law that essentially mirrored SORNA's registration requirements, but also expanded the category of individuals required to register, added to

the frequency offenders were subject to registration, and required in-person registration. *Matso*, 670 F.3d at 1051; see also *Litmon*, 768 F.3d at 1242-43 (holding California's 90day, in-person lifetime registration requirement does not violate federal ex post facto principles); *Hatton*, 356 F.3d at 965 (no evidence California's registration requirement has an objective to shame, ridicule, or stigmatize sex offenders). These decisions strongly point in a direction that indicates KORA's reporting requirements do not offend federal ex post facto principles.

Additionally, the majority's analogy to probation is not persuasive. While probation/parole may have "reporting" in common in the abstract, this is only one aspect of many conditions attached to these punishments. For example, probationers are subject to searches of their persons and property simply on reasonable suspicion of a probation violation or criminal activity and are subject to random drug tests. They may also be required to avoid "injurious or vicious habits" and "persons or places of disreputable or harmful character"; permit state agents to visit their homes; remain in Kansas unless given permission to leave; work "faithfully at suitable employment"; perform community service; go on house arrest; and even serve time in a county jail. K.S.A. 2011 Supp. 216607(b), (c).

In sum, I do not believe the federal courts, more specifically the United States Supreme Court, would hold that this historical-form-of-punishment factor weighs toward an ex post facto violation.

AFFIRMATIVE DISABILITY OR RESTRAINT

The majority focuses next on what it characterizes as the "more common restraint on an offender's freedom of movement" under KORA, which is the quarterly registration requirement in each applicable jurisdiction and the required $20 registration fee, as well

as the KORA's broader definition of the word "resides." Slip op. at 39. The majority notes the registration costs, depending on circumstances, could be $80 to $240 annually.

But the majority fails to explain how the federal courts would hold that these components of KORA would weigh this factor against the Kansas law. For example, no evidence was presented establishing that the KORA registration costs were a fine instead of a fee. See *Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014) ("The burden of proving that it is a fine is on the plaintiffs . . . .").

In *Mueller*, the Seventh Circuit recently upheld Wisconsin's annual $100 registration fee against a sex offender who moved out-of-state but was still required to register in Wisconsin. In doing so, the court noted first that plaintiff had done nothing to get over the first hurdle by presenting evidence regarding the fee versus the registration program's cost. 740 F.3d at 1134 ("[T]hey cannot get to first base without evidence that it is grossly disproportionate to the annual cost of keeping track of a sex offender registrant—and they have presented no evidence of that either. They haven't even tried."). Similarly, Doe has done nothing as to this evidentiary hurdle, yet the majority strikes this factor against KORA even though the burden is on the challenger and the statute is presumed constitutional.

Second, the Seventh Circuit noted the nonpunitive purpose of collecting fees and where the responsibility lies for having to provide a registry, stating:

> "The state provides a service to the law-abiding public by maintaining a sex offender registry, but there would be no service and hence no expense were there no sex offenders. As they are responsible for the expense, there is nothing punitive about requiring them to defray it." 740 F.3d at 1135.

If it is the potential for a total annual cost of $240 that offends the majority, what is the legal basis for that? The majority leaves this unexplained.

Next, the majority holds that housing and employment problems result from the registry, which ties back to the widespread dissemination of information on the Internet discussed above, which *Smith* and the other federal courts have plainly rejected. But the majority believes KORA suffers an additional evidentiary blow because of direct evidence that Doe actually lost a job and housing opportunities because of the Internet registry. I disagree this tips the balance when the caselaw is considered.

As noted earlier, my review of federal caselaw from *Smith* on down shows the courts have fully understood that actual consequences result from offender registration and have not dismissed these consequences simply as conjecture. See, *e.g.*, *Smith*, 538 U.S. at 99; *Parks*, 698 F.3d at 6 ("The prospective disadvantages to Parks from such publicity are obvious."). Indeed, several courts have approved state laws that imposed actual residential living restrictions on offenders, which are literally off-limits zones disabling offenders from living in close proximity to schools, playgrounds, etc. See *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (Iowa's 2,000-foot buffer zone regulatory, not punitive); *Salter v. State*, 971 So. 2d 31 (Ala. Civ. App. 2007) (approving 2,000-foot buffer zone); *People v. Leroy*, 357 Ill. App. 3d 530, 828 N.E.2d 769 (2005) (approving 500-foot buffer zone); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005) (upholding 2,000foot buffer zone); see also *Doe v. Bredesen*, 507 F.3d 998, 1004 (6th Cir. 2007) ("The [Tennessee] Act's registration, reporting, and surveillance components are not of a type that we have traditionally considered as a punishment, and the district court correctly found that they do not constitute an affirmative disability or restraint in light of the legislature's intent."); *Standley v. Town of Woodfin*, 186 N.C. App. 134, 650 S.E.2d 618 (2007) (upholding ban on entering public park); *Doe v. Baker*, No. Civ. A. 1:05-CV2265, 2006 WL 905368 (N.D. Ga. 2006) (unpublished opinion) (upholding 1,000-foot buffer

zone). Clearly, such exclusions cause lost opportunities for housing and employment for offenders, yet these prohibitions were upheld as nonpunitive.

I am not persuaded the federal courts would find KORA to impose requirements traditionally considered to be affirmative disabilities or restraints to the point of weighing this factor against constitutionality.

TRADITIONAL AIMS OF PUNISHMENT

The third *Mendoza-Martinez* factor is whether the "regulatory scheme . . . promotes the traditional aims of punishment." *Smith*, 538 U.S. at 97. The Court has described those aims as retribution and deterrence. See, *e.g.*, *Mendoza-Martinez*, 372 U.S. at 168.

The majority's analysis of this factor is muddled and difficult to unpack. It is unclear to me whether the majority is relying on the articles attached to Doe's summary judgment motion or its own intuition. As best as I can tell, the majority ultimately ignores the attachments and simply holds that KORA promotes traditional aims of punishment because the legislature increased the reporting term from 10 to 25 years. Slip op. at 41. But this conclusion is at odds with the federal caselaw.

But the fact that KORA has a deterrent effect is not conclusive. The *Smith* Court found that "[a]ny number of government programs might deter crime without imposing punishment" and "'[t]o hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.' [Citations omitted.]" 538 U.S. at 102. The Court also rejected the lower court's finding that Alaska's registration obligations were retributive based upon the length of reporting differing between individuals convicted of nonaggravated offenses

and those "convicted of aggravated or multiple offenses." 538 U.S. at 102. The Court found the "categories . . . and the corresponding length of the reporting requirement are *reasonably related to the danger of recidivism*, and this is *consistent with the regulatory objective*." (Emphasis added.) 538 U.S. at 102.

The *Smith* Court's analysis is equally applicable to KORA, though not wholly dispositive because the Court was addressing a 15-year registration requirement and KORA has a 25-year requirement. But SORNA imposes a 25-year registration requirement on Tier II offenders and a lifetime requirement on Tier III offenders, 42 U.S.C. § 16915 (2012), and the federal courts addressing this issue have upheld SORNA based on *Smith*.

The Eleventh Circuit addressed this registration requirement in *W.B.H.* and held that SORNA is no different than the Alaska act at issue in *Smith*. 664 F.3d at 858-59. The *W.B.H.* court reasoned that SORNA is "reasonably related to the danger of recidivism posed by sex offenders." 664 F.3d at 858. And the court explained that while SORNA "allows the public and law enforcement to determine the general whereabouts of convicted sex offenders, . . . it does not directly restrict their mobility, their employment, or how they spend their time." 664 F.3d at 858. So, the court found that any deterrent effect or purpose of SORNA does not justify a finding that the act's purpose is punitive. 664 F.3d at 858; see also *Under Seal*, 709 F.3d at 265 (quoting from *Smith* to find that SORNA does not promote traditional aims of punishment).

I would find under *Smith* and the cases interpreting SORNA that the traditional aims of punishment factor weighs in favor of KORA being fairly characterized as nonpunitive.

RATIONAL CONNECTION TO NONPUNITIVE PURPOSE

In *Smith*, the Court identified this as "a 'most significant' factor in our determination that the statute's effects are not punitive." 538 U.S. at 102 (citing *United States v. Ursery*, 518 U.S. 267, 290, 116 S. Ct. 2135, 135 L. Ed. 2d 549 [1996]). The *Smith* Court did not elaborate on what is meant by "rational connection to a nonpuntive purpose" before analyzing the Alaska act under the standard. One commentator has noted that the standard is "deferential to the state purpose (much like rational basis review under substantive due process analysis)." Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 Ga. L. Rev. 961, 984 (2006). In *State v. Cook*, 286 Kan. 766, 774, 187 P.3d 1283 (2008), this court determined that "the registration act was intended to promote public safety and to protect the public from sex offenders, who constitute a class of criminals that is likely to reoffend."

The majority concludes that arguably under the current version of KORA, "public safety has become a pretext." Slip op. at 42. The majority finds fault with KORA because it does not distinguish between types of offenders and contains no mechanism for relieving a "fully rehabilitated" offender from its notification burdens. But the Ninth Circuit and others have rejected similar arguments. In *Matso*, the court held:

> "Plaintiffs argue *Smith* overstated the risk of sex-offender recidivism. They note that *Smith* cited several studies on sex offender recidivism. *See id.* at 104. Plaintiffs then rely on an expert declaration critiquing the methodology of the recidivism studies in *Smith.* The district court did not make any factual finding regarding the risk of sex offender recidivism. Even had it adopted the declaration's conclusions as its own, a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community." 670 F.3d at 1057.

See also *Bredesen*, 507 F.3d at 1006 (Tennessee Legislature "could rationally conclude that sex offenders present an unusually high risk of recidivism, and that stringent registration, reporting, and electronic surveillance requirements can reduce that risk and thereby protect the public" and concluding that "[w]here there is such a rational connection to a nonpunitive purpose, it is not for the courts to second-guess the state legislature's policy decision"). In addition, the Second Circuit recently held the New York Legislature's "decision to eliminate the possibility of relief from registration for twenty years" for level one offenders did not render the registration provisions punitive. *Cuomo*, 755 F.3d at 112.

The majority fails to cite any authority for its analysis of this factor; and the proposition that offender registration schemes are rationally related to the nonpunitive purpose of public safety finds overwhelming approval in the federal caselaw. Even *Myers*, 260 Kan. at 681, appears to assume offender registration is rationally connected to public safety, and the Alaska state case that held post-*Smith* changes to the Alaska act were an ex post facto violation admits registration, at least as to sex offenders, advances a nonpunitive public safety purpose. See *Doe v. State*, 189 P.3d 999, 1015-16 (Alaska 2008).

I do not see how the majority can say no public safety purpose is rationally furthered by having sex, drug, and violent offenders register. I would follow the referenced precedent and hold that KORA has a rational connection to a nonpunitive purpose, so this factor does not weight towards punishment.

EXCESSIVE IN RELATION TO REGULATORY PURPOSE

In *Smith,* the Court clarified that "[t]he excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best

choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." 538 U.S. at 105. The *Smith* Court further noted that ex post facto jurisprudence does not preclude a state from making reasonable categorical judgments that certain crimes should have particular regulatory consequence.

Instead of independently analyzing this factor, the majority merely harkens back to the ground it already plowed, concluding: "Our discussion of the other factors has touched upon the excessive nature of KORA." Slip op. at 43. The majority then specifically cites the fact that the 2011 KORA amendments required more information from the offenders and that the penalty for noncompliance has increased. Slip op. at 43. I would hold that neither of these requirements is excessive given KORA's public safety purpose based on the authority cited above.

CONCLUSION

Although the 2011 KORA offender registration scheme imposes a number of burdens on sex offenders, I believe the applicable federal caselaw considering similar burdens under other offender registration schemes compels us to conclude that the 2011 KORA amendments do not violate the United States Constitution's Ex Post Facto Clause as applied to sex offenders and that the United States Supreme Court would so hold.

NUSS, C.J., and LUCKERT, J., join in the foregoing concurring and dissenting opinion.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 108,061

STATE OF KANSAS,
Appellee,

v.

HENRY PETERSEN-BEARD,
Appellant.

SYLLABUS BY THE COURT

1.

Lifetime postrelease registration for sex offenders mandated by the Kansas Offender Registration Act, K.S.A. 22-4901 *et seq.*, does not constitute punishment for purposes of applying provisions of the United States Constitution. Contrary holdings in *State v. Redmond*, 304 Kan. ___, ___ P.3d ___ (No. 110,280, this day decided), *State v. Buser*, 304 Kan. ___, ___ P.3d ___ (No. 105,982, this day decided), and *Doe v. Thompson*, 304 Kan. ___, ___ P.3d ___ (No. 110,318, this day decided), are overruled.

2.

Lifetime postrelease registration for sex offenders mandated by the Kansas Offender Registration Act, K.S.A. 22-4901 *et seq.*, does not constitute punishment for purposes of applying § 9 of the Kansas Constitution Bill of Rights.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 9, 2013. Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed April 22, 2016. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Appendix E

Michelle A. Davis, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Christina M. Trocheck, first assistant county attorney, argued the cause, and *Ellen Mitchell*, county attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Henry Petersen-Beard challenges his sentence to lifetime postrelease registration as a sex offender pursuant to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq.*, as cruel and unusual punishment in violation of § 9 of the Kansas Bill of Rights and the Eighth Amendment to the United States Constitution. Because we find that lifetime registration as a sex offender pursuant to KORA is not punishment for either Eighth Amendment or § 9 purposes, we reject Petersen-Beard's argument that it is unconstitutionally cruel and/or unusual and affirm his sentence. In so doing, we overrule the contrary holdings of *State v. Redmond*, 304 Kan. ___, ___ P.3d ___ (No. 110,280, this day decided), *State v. Buser*, 304 Kan. ___, ___ P.3d ___ (No. 105,982, this day decided), and *Doe v. Thompson*, 304 Kan. ___, ___ P.3d ___ (No. 110,318, this day decided).

FACTUAL AND PROCEDURAL BACKGROUND

Petersen-Beard pled guilty to and was convicted of one count of rape for having sexual intercourse with a 13-year-old girl when he was 19 years old. Prior to sentencing, he filed motions asking the district court to depart from the presumptive guidelines sentence and to declare KORA's requirement of lifetime registration unconstitutional under § 9 of the Kansas Bill of Rights and the Eighth Amendment to the United States Constitution. The district court granted Petersen-Beard's motion for a downward durational departure but denied his request to find KORA's lifetime registration requirements unconstitutional. As such, the district court sentenced Petersen-Beard to 78

months' imprisonment with lifetime postrelease supervision and lifetime registration as a sex offender—the lowest sentence permitted by law.

Petersen-Beard appealed the district court's ruling to the Court of Appeals but did not prevail. *State v. Petersen-Beard*, No. 108,061, 2013 WL 4046444 (Kan. App. 2013) (unpublished opinion). Petersen-Beard now brings his appeal to this court reprising the arguments he made below that the requirement in Kansas law of lifetime registration as a sex offender is unconstitutional. We granted Petersen-Beard's petition for review pursuant to K.S.A. 20-3018(b), exercise jurisdiction pursuant to K.S.A. 60-2101(b), and affirm.

ANALYSIS

Standard of Review

This appeal requires us to decide whether KORA's mandatory lifetime sex offender registration as set forth in K.S.A. 22-4901 *et seq.*, runs afoul of either the Eighth Amendment's prohibition against "cruel and unusual punishments" or § 9's prohibition against "cruel or unusual punishment." The constitutionality of a statute is a question of law over which this court exercises plenary review. *State v. Mossman*, 294 Kan. 901, 906, 281 P.3d 153 (2012). "We presume statutes are constitutional and must resolve all doubts in favor of a statute's validity." *State v. Soto*, 299 Kan. 102, 121, 322 P.3d 334 (2014). "It is not the duty of this court to criticize the legislature or to substitute its view on economic or social policy; it is the duty of this court to safeguard the constitution." *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 562, 186 P.3d 183 (2008).

Typically, challenges arising under either the Eighth Amendment or § 9, or both, attack criminal sanctions against persons convicted of crimes as being cruel and/or unusual. Such is the case with Petersen-Beard's argument here. However, as the State

points out, there remains a threshold question as to whether the challenged sanction is punishment at all for purposes of either the Eighth Amendment or § 9, or is rather a civil and nonpunitive sanction. Here, the State claims that KORA's requirement of lifetime sex offender registration in Petersen-Beard's case is not punishment at all and is therefore not subject to our normal cruel and unusual analysis. For the reasons set forth below, we agree.

KORA's lifetime sex offender registration requirements are not punishment for purposes of applying the United States Constitution.

In *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the United States Supreme Court set out the following framework for analyzing whether a legislature's statutory scheme is punitive:

> "We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is '"so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."' *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980)). Because we 'ordinarily defer to the legislature's stated intent,' *Hendricks*, *supra*, at 361, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward*, *supra*, at 249, [100 S. Ct. at 2641]); see also *Hendricks*, *supra*, at 361; *United States v. Ursery*, 518 U.S. 267, 290 (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)."

This framework is often referred to as the "intent-effects" test. *Moore v. Avoyelles Correctional Center*, 253 F.3d 870, 872 (5th Cir. 2001). In *Smith v. Doe*, the Supreme Court reasoned that a "conclusion that the legislature intended to punish" would resolve

the question of the punitive nature of the statutory scheme "without further inquiry into its effects." 538 U.S. at 92-93. Applying the intent-effects test to KORA's lifetime registration provisions, we have held today in *Thompson* that our legislature intended those provisions of KORA to be a nonpunitive and civil regulatory scheme rather than punishment. See *Doe v. Thompson*, 304 Kan. ___, ___ P.3d ___ (No. 110,318, this day decided), slip op. at 22-31 (citing *State v. Myers*, 260 Kan. 669, 923 P.3d 1024 [1996] [lifetime postrelease registration under Kansas Sex Offender Registration Act was nonpunitive in nature], *cert. denied* 521 U.S. 1118 [1997]. We agree and do not disturb that aspect of *Thompson* or its companion cases. See *State v. Redmond*, 304 Kan. ___, ___ P.3d ___ (No. 110,280, this day decided), slip op. at 6; *State v. Buser*, 304 Kan. ___, ___ P.3d ___ (No. 105,982, this day decided), slip op. at 6.

Because the legislature did not intend for KORA's lifetime sex offender registration scheme to be punishment, we must next turn to the effect of those provisions to determine whether, by """the clearest proof,""" those effects "'override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" *Smith*, 538 U.S. at 92. The Supreme Court in *Smith* utilized the seven factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), to decide whether the effects of the legislative enactment negated and overrode the legislature's intent to establish a civil regulatory scheme. *Smith*, 538 U.S. at 97. The *Mendoza-Martinez* factors are:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *Mendoza-Martinez*, 372 U.S. at 168-69.

While in *Smith*, the *Mendoza-Martinez* factors were applied to determine whether a lifetime registration scheme was punishment for ex post facto purposes rather than for purposes of the Eighth Amendment, there exists no analytical distinction between or among the different constitutional contexts in which the question of punishment versus a civil regulatory scheme can arise. "The common inquiry across the Court's Eighth Amendment, ex post facto, and double jeopardy jurisprudence is determining whether the government's sanction is punitive in nature and intended to serve as punishment." *Hinds v. Lynch*, 790 F.3d 259, 264 n.5 (1st Cir. 2015) (citing *Mendoza-Martinez*); see also *United States v. Under Seal*, 709 F.3d 257, 263-64 (4th Cir. 2013) (using *MendozaMartinez* factors to determine federal Sex Offender Registration and Notification Act
(SORNA), 42 U.S.C. § 16901 *et seq.* (2012), is nonpunitive for purposes of the Eighth Amendment); *Myrie v. Commissioner*, *N.J. Dept. of Corrections*, 267 F.3d 251, 262 (3d Cir. 2001) (applying *Mendoza-Martinez* factors to an Eighth Amendment "Excessive Fines" Clause challenge); *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999) (using *Mendoza-Martinez* factors to determine Tennessee's Sex Offender Registration and Monitoring Act was nonpunitive under the Eighth Amendment); *Hare v. City of Corinth, MS*, 74 F.3d 633, 651-52 (5th Cir. 1996) (Dennis, J., concurring) (using *MendozaMartinez* factors to evaluate whether a pretrial detainee was punished under the Eighth Amendment); *People v. Adams*, 144 Ill. 2d 381, 388, 581 N.E.2d 637 (1991) (court would have used *Mendoza-Martinez* factors to evaluate Eighth Amendment claim if conclusive evidence of legislative intent was unavailable); *In re Justin B.*, 405 S.C. 391, 404, 747 S.E.2d 774 (2013) (using *Mendoza-Martinez* to evaluate sex offender registration under the Eighth Amendment).

Given this, if KORA's lifetime sex offender registration requirement is punishment for either ex post facto or double jeopardy purposes, it must necessarily also be

punishment for Eighth Amendment purposes. The reverse would likewise be true. Thus, while the question of whether KORA is punishment arises here in the context of the Eighth Amendment, we must necessarily address our decisions, issued today, in *Redmond*, *Buser*, and *Thompson*. In *Redmond*, *Buser*, and *Thompson*, we held that the identical statutory provisions we consider here are, in fact, punishment for ex post facto purposes. *Redmond*, 304 Kan. ___, ___, No. 110,280, slip op. at 9; *Buser*, 304 Kan. ___, ___, No. 105,982, slip op. at 12; *Thompson*, 304 Kan. ___, ___, No. 110,318, this day decided, slip op. at 44.

If we were to follow those holdings, we would conclude that KORA's lifetime sex offender registration requirement is punishment for Eighth Amendment purposes and we would proceed with a cruel and unusual analysis pursuant to established precedent. However, this court is persuaded that the holding of *Thompson*, *Buser*, and *Redmond* that KORA constitutes punishment is incorrect. We are instead convinced by the dissent in *Thompson* that a faithful application of federal precedents requires us to find that the provisions of KORA at issue here are not punitive for purposes of applying our federal Constitution. We therefore overrule the contrary holdings of *Thompson*, *Buser*, and *Redmond*.

Because we are persuaded by the *Thompson* dissent on this question, we take the unusual step of quoting liberally from that opinion and adopting its reasoning in toto:

> "Federal appellate courts have unanimously held retroactive application of the federal offender registration requirements found in SORNA does not violate the Ex Post Facto Clause. *United States v. Brunner*, 726 F.3d 299, 303 (2d Cir. 2013); *United States v. Parks*, 698 F.3d 1, 5-6 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Elkins*, 683 F.3d 1039, 1045 (9th Cir. 2012); *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011); *United States v. W.B.H.*, 664 F.3d 848, 860 (11th Cir. 2011); *United States v. Shenandoah*, 595 F.3d 151 (3d Cir.), *cert. denied* 560

U.S. 974 (2010), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. ___, 132 S. Ct. 975, 181 L. Ed. 2d 935 (2012); *United States v. Gould*, 568 F.3d 459, 466 (4th Cir. 2009), *cert. denied* 559 U.S. 974 (2010); *Young*, 585 F.3d at 206 (noting that Young made no "effort to prove that the effect of SORNA is so punitive as to make it not a civil scheme, and any attempt to do so would have been futile"); *United States v. May*, 535 F.3d 912, 919-20 (8th Cir. 2008), *cert. denied* 556 U.S. 1258 (2009), *abrogated on other grounds by Reynolds*, 132 S. Ct. 975 (2012); *United States v. Hinkley*, 550 F.3d 926, 93738 (10th Cir. 2008), *abrogated on other grounds by Reynolds v. United States*, 565 U.S.
___, 132 S. Ct. 975, 181 L. Ed. 2d 935 (2012); see also *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013) (applying *Mendoza-Martinez* factors to hold SORNA was not cruel and unusual punishment as applied to a juvenile); *United States v. Stacey*, 570 Fed. Appx. 213, 216 (3d Cir. 2014) (holding ex post facto challenge to conviction for failing to register under SORNA foreclosed by *Shenandoah*); *United States v. Sampsell*, 541 Fed. Appx. 258, 260 (4th Cir. 2013) (holding ex post facto challenge to SORNA foreclosed by *Gould*).

"In addition, federal circuit courts have upheld state sex offender registration laws against federal ex post facto challenges, even when those state laws contained provisions more expansive in scope and impact than either SORNA or the Alaska provisions addressed in *Smith*. See *Litmon v. Harris*, 768 F.3d 1237, 1242-43 (9th Cir. 2014) (upholding California requirement that offenders register in-person every 90 days); *American Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1051, 1058 (9th Cir. 2012) (upholding Nevada law expanding category of individuals who must register, increasing time period offenders were subject to registration, adding in-person registration requirements, and expanding law enforcement obligations to notify specified entities that an offender resided nearby); *Doe v. Bredesen*, 507 F.3d 998, 1000 (6th Cir. 2007) (upholding Tennessee law requiring, among other things, extended lifetime registration and satellite-based monitoring with wearable GPS device); *Hatton v. Bonner*, 356 F.3d 955, 967 (9th Cir. 2004) (upholding California law containing several provisions different from the Alaska statute analyzed in *Smith*).

"The majority disingenuously characterizes this unanimous body of caselaw as just the decisions of 'a number of Federal Circuit Courts of Appeal,' which it then discounts by noting the obvious, *i.e*., there are differences between the federal SORNA and our state's KORA. Slip op. at 44. And while it is true that none of the statutory schemes upheld by other courts are identical to KORA, there is substantial overlap, and so the rationale from those decisions should apply with equal force here. I would not so quickly disdain this federal caselaw because it compellingly answers the real question presented: Are there convincing reasons to believe the United States Supreme Court would view KORA differently than it viewed the Alaska law in 2003 when it decided *Smith*? See *Litmon*, 768 F.3d at 1243 ('[T]here is no reason to believe that the addition of [the 90-day, in-person registration] requirement would have changed the outcome [in *Smith*].'). If the answer to that question is no, then this court must affirm.

"[Given that the legislature did not intend KORA to be punishment], we must decide whether KORA is "''so punitive either in purpose or effect as to negate [the State's] intention' to deem [KORA] 'civil.''" *Smith*, 538 U.S. at 92. This is where I depart from the majority's analysis.

"For this second step, we should follow the federal factors laid out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *Smith*, 538 U.S. at 97. Those factors consider the degree to which the regulatory scheme imposes a sanction that: (1) has historically been regarded as punishment; (2) constitutes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) is rationally connected to a nonpunitive purpose; (5) is excessive in relation to the identified nonpunitive purpose; (6) contains a sanction requiring a finding of scienter; and (7) applies the sanction to behavior that is already a crime. *Mendoza-Martinez*, 372 U.S. at 168. In *Smith*, the Court focused on the first five as more relevant in evaluating Alaska's registration and notification law, concluding the remaining two were of 'little weight.' 538 U.S. at 105. I will do the same.

"HISTORICAL FORM OF PUNISHMENT

"The majority holds that the 2011 KORA 'crosses the line drawn by *Smith*' by too closely resembling the shaming punishments from the colonial period. Slip op. at 36-37. KORA does this, according to the majority, by posting the registrant's information on the Internet, 'branding' a registrant's driver's license with the letters 'RO,' and requiring quarterly registration in each location where an offender works, lives, or attends school. Let's take each of these in turn.

"*Posting offender information on the Internet*

"As summarized below, there is overwhelming federal authority holding that Internet posting of registrant information is not analogous to historical forms of punishment. The analysis used to reach that conclusion applies in equal force to KORA, regardless of other differences the statutory schemes may have. The majority overreaches by rejecting this caselaw and adopting a contrary view.

"In *Smith*, the United States Supreme Court held that Alaska's offender registration act could apply retroactively and '[t]he fact that Alaska posts the information on the Internet does not alter our conclusion.' 538 U.S. at 99. The Court held the posting requirement was not akin to historical punishments despite recognizing that it subjects the offender to public shame or humiliation because most of the information related to an already public criminal record and dissemination of it furthers a legitimate governmental objective. 538 U.S. at 99. The *Smith* Court explained:

> '[T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse

consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.' 538 U.S. at 98-99.

"The *Smith* Court then added:

'The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.' 538 U.S. at 99.

In so holding, the Court's analysis recognizes the obvious—posting information on the Internet makes it far more accessible and subjects the offender to increased shame and humiliation. Nevertheless, the Court held that Internet posting did not make Alaska's statutory scheme punitive.

"The majority characterizes the *Smith* Court's 2003 analysis of the Internet as 'antiquated,' and then concludes: 'Any suggestion that disseminating sex offender registration [information] on an Internet website reaches no more members of the public and is no more burdensome to the offender than maintaining an archived criminal record simply ignores the reality of today's world.' Slip op. at 37-38.

"But as seen from its holding, *Smith* did not base its conclusion on some oldfashioned, dial-up modem/floppy disk notion of the World Wide Web; nor did it

consider accessing offender information on the Internet nothing more than a walk to the courthouse to thumb through publicly available paper files. *Smith*'s rationale withstands the more recent development of a mobile, smartphone Internet. Indeed, these developments can be viewed as furthering the nonpunitive, public safety ends supporting offender registration because, as *Smith* acknowledged, '[w]idespread public access is necessary for the efficacy of the scheme.' *Smith*, 538 U.S. at 99. The majority simply disagrees with the Court's conclusion but needs a rationale for considering the question further. This becomes overwhelmingly evident when the authority from more recent courts applying *Smith* is acknowledged.

"Consider first the federal notification statute, SORNA. Similar to KORA, the federal law requires that offender information including the offenders' names, physical descriptions, photographs, criminal offenses, and criminal histories be made publicly available on the Internet. See 42 U.S.C. §§ 16914, 16918-16920 (2012). Under SORNA, the states and enumerated territories, including the District of Columbia and Puerto Rico, must each maintain websites for this purpose. See 42 U.S.C. §§ 16911(10); 16918(a) (2012). The federal government, in turn, must maintain a website containing 'relevant information for each sex offender and other person listed on a jurisdiction's Internet site.' 42 U.S.C. § 16920. Each of these websites must make the information obtainable 'by a single query for any given zip code or geographic radius set by the user.' 42 U.S.C. §§ 16918(a), 16920(b). And among SORNA's others mandates, an appropriate official must affirmatively distribute notice of an individual's sex offender status to 'each school and public housing agency' in the area where that sex offender resides. 42 U.S.C. § 16921(b)(2) (2012). In short, SORNA goes further than the Alaska scheme at issue in *Smith* and further than KORA as to affirmative notification of statutorily specified groups.

"Nevertheless, all federal circuits addressing whether SORNA's publication requirements are punitive have followed *Smith* and held they are not, despite candidly recognizing they can result in greatly increased public shame. See, *e.g.*, *Parks*, 698 F.3d at 5-6 (noting the disadvantages from the publicity attendant to SORNA's Internet requirements 'are obvious' and refusing to invalidate SORNA due to 'wide dissemination' of offender's information, citing *Smith*); *Hinckley*, 550 F.3d at 937-38 ('SORNA, just as

the *Smith* scheme, merely provides for the "dissemination of accurate information about a criminal record, most of which is already public"'); see also *United States v. Talada*, 631 F. Supp. 2d 797, 808 (S.D. W. Va. 2009) (citing *Smith* and upholding SORNA as a valid regulatory program even though it requires widespread Internet dissemination of offenders' information, a community notification program, and in-person reporting).

"Also persuasive is the Ninth Circuit's 2012 decision upholding retroactive application of a Nevada statute that, among other things, not only required Internet publication of registration information, but also active notification to specified groups over and above what was required by SORNA, such as youth and religious organizations. *Masto*, 670 F.3d at 1051. In rejecting any notion that these features were akin to historical forms of punishment, the Ninth Circuit held:

> 'Active dissemination of an individual's sex offender status does not alter the [*Smith*] Court's core reasoning that "stigma . . . results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." [Citation omitted.] Though "humiliation increas[es] in proportion to the extent of the publicity," the "purpose and the principal effect of notification are to inform the public for its own safety." [Citation omitted.]' 670 F.3d at 1056.

"There is also recent state court authority, relying heavily on *Smith*, that holds posting registered offenders' information on the Internet is not akin to traditional shaming punishments. See *Kammerer v. State*, 322 P.3d 827, 834-36 (Wyo. 2014) ('Although dissemination of information relating to a registrant's status as a sex offender may have negative consequences for the registrant, information regarding the offense is made public at the time of trial, and its publication under WSORA is merely a necessary consequence of the Act's intent to protect the public from harm.'); *State v. Letalien*, 2009 ME 130, ¶ 38, 985 A.2d 4 (2009) (Internet posting of sex offender information is not punitive in purpose or effect, citing *Smith*; Maine and federal Ex Post Facto Clauses are coextensive); see also *Doe I v. Williams*, 2013 ME 24, ¶ 35, 61 A.3d 718 (2013) (following *Letalien*).

"I would follow this abundant caselaw and hold that KORA's Internet posting of information is not akin to historical shaming punishments. And in reaching that conclusion, I would further note the majority's discussion of the sharing functions available on the Johnson County Sherriff's website is irrelevant to the statute's constitutionality because KORA does not require this capability; and, just as importantly, the majority cites no authority that would find a federal ex post facto violation because of a nonstatutorily mandated software feature added by a local law enforcement agency.

"Regardless, given the overwhelming weight and substance of the caselaw rejecting federal ex post facto challenges based on widespread Internet dissemination of offender registration information, as well as the federal courts' more recent validations of *Smith*, I would not consider *Smith*'s rationale to be 'antiquated' or subject to easy dismissal, and I would not weigh this against the statute's constitutionality. The majority errs in this regard.

"*'Branding' a registrant's driver's license*

"Next, the majority declares that KORA 'mimics [the] shaming of old by branding the driver's license of a registrant with the designation, "RO."' Slip op. at 36. The majority is referring to K.S.A. 2011 Supp. 8-243, which provides that an offender's driver's license 'shall be assigned a distinguishing number by the division [of motor vehicles] which will readily indicate to law enforcement officers that such person is a registered offender. The division shall develop a numbering system to implement the provisions of this subsection.' This requirement, while not technically contained in KORA, differentiates Kansas laws from SORNA, although the statute only requires a distinguishing number and the 'RO' practice is just a decision by a state agency that is not specifically dictated by the statute. See K.S.A. 8-243(d).

"The majority draws support for its view from a divided decision in *Starkey v.*

Oklahoma Dept. of Corrections, 2013 OK 43, 305 P.3d 1004 (2013), which considered the Oklahoma Constitution's Ex Post Facto Clause. See Okla. Const., art. 2, § 15. But I do not find *Starkey* persuasive for several reasons.

"First, although the Oklahoma Supreme Court applied the intent-effects test, that court's majority suggests they applied a lower standard as to when the effects of a measure are punitive under the Oklahoma Ex Post Facto Clause by noting that the United States Constitution simply establishes a floor for constitutional rights in Oklahoma. 2013 OK 43, ¶ 45 ('How we apply the "intent-effects" test is not governed by how the federal courts have independently applied the same test under the United States Constitution as long as our interpretation is at least as protective as the federal interpretation.'). Second, Oklahoma's offender registry law imposed harsher restraints on offenders because of residency boundaries (minimum distance from schools, playgrounds, etc.) and a requirement that Oklahoma driver's licenses and identification cards spell out the term 'Sex Offender.' In contrast, KORA contains no residency exclusions and Kansas simply uses as a matter of state agency practice an abbreviation (RO), which applies equally to non-sex-offenders. Finally, the *Starkey* court relied upon the totality of the Oklahoma law's harsher circumstances when determining they weighed in favor of punishment. 2013 OK 43, ¶ 61 ('[W]e are not making a determination of the constitutionality of any of these individual registration requirements but for purposes of analyzing the second *Mendoza-Martinez* factor we find the totality of these requirements weigh in favor of punishment.').

"Offering a different analysis, the Louisiana Supreme Court's unanimous decision in *Smith v. State*, 84 So. 3d 487 (La. 2012), reached the opposite conclusion regarding its driver's license labeling and is more on point. In so holding, the Louisiana court acknowledged that including the words 'sex offender' printed in orange color on an offender's driver's license 'may be remotely similar to historical forms of punishment, such as public humiliation, [but] the immediate need for public protection was a corollary of, rather than an addendum to, the punishment for sex offenders.' *Smith*, 84 So. 3d at 496 n.7-8, 498. The court then concluded that the requirement of a notation on an offender's driver's license 'may be harsh, may impact a sex offender's life in a long-lived and intense manner, and also be quite burdensome to the sex offender, [but] we do not find them to

constitute an infringement of the principles of *ex post facto*.' 84 So. 3d at 499. "Admittedly, the Louisiana court did not articulate whether it was relying on the federal or state constitution for its holding, but this does not appear to make a difference because that court had previously held Louisiana's Ex Post Facto Clause offers the same protections because it was patterned after the United States Constitution. See *State ex rel. Olvieri v. State*, 779 So. 2d 735 (La. 2001). For this reason, I find the Louisiana decision more persuasive than the Oklahoma decision.

"*Quarterly Registration*

"Next, the majority labels KORA's quarterly, in-person registration requirements for each location where the offender works, lives, or attends school as 'a traditional means of punishment' by likening the requirement to probation or parole. (Slip op. at 38.) It does so without citation to any authority or explanation as to how quarterly reporting mandates offend federal ex post facto caselaw. Again, a review of the unanimous federal caselaw upholding SORNA is persuasive and leads to a contrary conclusion.

"SORNA's in-person reporting requirements differentiate between types of sex offenses in determining the frequency of in-person reporting. There must be in-person verification 'not less frequently than' once a year for Tier I sex offenders, twice a year for Tier II sex offenders, and four times per year for Tier III sex offenders. 42 U.S.C. § 16916 (2012); see 42 U.S.C. § 16911 (defining Tiers I, II, and III). In *Parks*, the First Circuit recently noted SORNA's in-person requirement was 'surely burdensome for those subject to it,' but nevertheless concluded this was not punitive, noting:

> 'To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance. Further, the inconvenience is surely minor compared to the disadvantages of the underlying scheme in its consequences for renting

> housing, obtaining work and the like—consequences that were part of the package that *Smith* itself upheld.' 698 F.3d at 6.

See *Doe v. Pataki*, 120 F.3d 1263, 1281-82 (2d Cir. 1997); see also *Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014) (approving triennial, in-person reporting as being reasonably related to the nonpunitive, prospective goals of protecting the public and facilitating law enforcement efforts).

"Admittedly, KORA's reporting requirements are more burdensome than those in SORNA because under KORA, all sex offenders are subject to in-person registration four times per year, and drug and violent offenders must report in person a minimum of three times per year. K.S.A. 2011 Supp. 22-4905(b). KORA further requires an offender to report registration changes in person 'to the . . . agency or agencies where last registered.' (Emphasis added.) K.S.A. 2011 Supp. 22-4905(a), (g). In addition, the definition of 'reside' in KORA is broader than the definition in SORNA. Compare K.S.A. 2011 Supp. 22-4902(j) (definition of 'reside') with SORNA's 42 U.S.C. § 16911. Therefore, it is obvious KORA imposes a greater registration burden on the offender than SORNA. But the question is whether the federal courts would view these changes as tipping the balance. I think not.

"Consider again as an example *Matso* in which the Ninth Circuit rejected a federal ex post facto challenge to a Nevada law that essentially mirrored SORNA's registration requirements, but also expanded the category of individuals required to register, added to the frequency offenders were subject to registration, and required inperson registration. *Matso*, 670 F.3d at 1051; see also *Litmon*, 768 F.3d at 1242-43 (holding California's 90-day, in-person lifetime registration requirement does not violate federal ex post facto principles); *Hatton*, 356 F.3d at 965 (no evidence California's registration requirement has an objective to shame, ridicule, or stigmatize sex offenders). These decisions strongly point in a direction that indicates KORA's reporting requirements do not offend federal ex post facto principles.

"Additionally, the majority's analogy to probation is not persuasive. While probation/parole may have 'reporting' in common in the abstract, this is only one aspect of many conditions attached to these punishments. For example, probationers are subject to searches of their persons and property simply on reasonable suspicion of a probation violation or criminal activity and are subject to random drug tests. They may also be required to avoid 'injurious or vicious habits' and 'persons or places of disreputable or harmful character'; permit state agents to visit their homes; remain in Kansas unless given permission to leave; work 'faithfully at suitable employment'; perform community service; go on house arrest; and even serve time in a county jail. K.S.A. 2011 Supp. 216607(b), (c).

"In sum, I do not believe the federal courts, more specifically the United States Supreme Court, would hold that this historical-form-of-punishment factor weighs toward an ex post facto violation.

"AFFIRMATIVE DISABILITY OR RESTRAINT

"The majority focuses next on what it characterizes as the 'more common restraint on an offender's freedom of movement' under KORA, which is the quarterly registration requirement in each applicable jurisdiction and the required $20 registration fee, as well as the KORA's broader definition of the word 'resides.' Slip op. at 38. The majority notes the registration costs, depending on circumstances, could be $80 to $240 annually.

"But the majority fails to explain how the federal courts would hold that these components of KORA would weigh this factor against the Kansas law. For example, no evidence was presented establishing that the KORA registration costs were a fine instead of a fee. See *Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014) ('The burden of proving that it is a fine is on the plaintiffs . . . .').

"In *Mueller*, the Seventh Circuit recently upheld Wisconsin's annual $100 registration fee against a sex offender who moved out-of-state but was still required to

register in Wisconsin. In doing so, the court noted first that plaintiff had done nothing to get over the first hurdle by presenting evidence regarding the fee versus the registration program's cost. 740 F.3d at 1134 ('[T]hey cannot get to first base without evidence that it is grossly disproportionate to the annual cost of keeping track of a sex offender registrant—and they have presented no evidence of that either. They haven't even tried.'). Similarly, Doe has done nothing as to this evidentiary hurdle, yet the majority strikes this factor against KORA even though the burden is on the challenger and the statute is presumed constitutional.

"Second, the Seventh Circuit noted the nonpunitive purpose of collecting fees and where the responsibility lies for having to provide a registry, stating:

> 'The state provides a service to the law-abiding public by maintaining a sex offender registry, but there would be no service and hence no expense were there no sex offenders. As they are responsible for the expense, there is nothing punitive about requiring them to defray it.' 740 F.3d at 1135.

"If it is the potential for a total annual cost of $240 that offends the majority, what is the legal basis for that? The majority leaves this unexplained.

"Next, the majority holds that housing and employment problems result from the registry, which ties back to the widespread dissemination of information on the Internet discussed above, which *Smith* and the other federal courts have plainly rejected. But the majority believes KORA suffers an additional evidentiary blow because of direct evidence that Doe actually lost a job and housing opportunities because of the Internet registry. I disagree this tips the balance when the caselaw is considered.

"As noted earlier, my review of federal caselaw from *Smith* on down shows the courts have fully understood that actual consequences result from offender registration and have not dismissed these consequences simply as conjecture. See, *e.g.*, *Smith*, 538 U.S. at 99; *Parks*, 698 F.3d at 6 ('The prospective disadvantages to Parks from such

publicity are obvious.'). Indeed, several courts have approved state laws that imposed actual residential living restrictions on offenders, which are literally off-limits zones disabling offenders from living in close proximity to schools, playgrounds, etc. See *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (Iowa's 2,000-foot buffer zone regulatory, not punitive); *Salter v. State*, 971 So. 2d 31 (Ala. Civ. App. 2007) (approving 2,000-foot buffer zone); *People v. Leroy*, 357 Ill. App. 3d 530, 828 N.E.2d 769 (2005) (approving 500-foot buffer zone); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005) (upholding 2,000foot buffer zone); see also *Doe v. Bredesen*, 507 F.3d 998, 1004 (6th Cir. 2007)('The [Tennessee] Act's registration, reporting, and surveillance components are not of a type that we have traditionally considered as a punishment, and the district court correctly found that they do not constitute an affirmative disability or restraint in light of the legislature's intent.'); *Standley v. Town of Woodfin*, 186 N.C. App. 134, 650 S.E.2d 618 (2007) (upholding ban on entering public park); *Doe v. Baker*, No. Civ. A. 1:05-CV2265, 2006 WL 905368 (N.D. Ga. 2006) (unpublished opinion) (upholding 1,000-foot buffer zone). Clearly, such exclusions cause lost opportunities for housing and employment for offenders, yet these prohibitions were upheld as nonpunitive.

"I am not persuaded the federal courts would find KORA to impose requirements traditionally considered to be affirmative disabilities or restraints to the point of weighing this factor against constitutionality.

"TRADITIONAL AIMS OF PUNISHMENT

"The third *Mendoza-Martinez* factor is whether the 'regulatory scheme . . . promotes the traditional aims of punishment.' *Smith*, 538 U.S. at 97. The Court has described those aims as retribution and deterrence. See, *e.g.*, *Mendoza-Martinez*, 372 U.S. at 168.

"The majority's analysis of this factor is muddled and difficult to unpack. It is unclear to me whether the majority is relying on the articles attached to Doe's summary judgment motion or its own intuition. As best as I can tell, the majority ultimately ignores

the attachments and simply holds that KORA promotes traditional aims of punishment because the legislature increased the reporting term from 10 to 25 years. Slip op. at 41. But this conclusion is at odds with the federal caselaw.

"But the fact that KORA has a deterrent effect is not conclusive. The *Smith* Court found that '[a]ny number of government programs might deter crime without imposing punishment' and "'[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." [Citations omitted.]' 538 U.S. at 102. The Court also rejected the lower court's finding that Alaska's registration obligations were retributive based upon the length of reporting differing between individuals convicted of nonaggravated offenses and those 'convicted of aggravated or multiple offenses.' 538 U.S. at 102. The Court found the 'categories . . . and the corresponding length of the reporting requirement are *reasonably related to the danger of recidivism*, and this is *consistent with the regulatory objective*.' (Emphasis added.) 538 U.S. at 102.

"The *Smith* Court's analysis is equally applicable to KORA, though not wholly dispositive because the Court was addressing a 15-year registration requirement and KORA has a 25-year requirement. But SORNA imposes a 25-year registration requirement on Tier II offenders and a lifetime requirement on Tier III offenders, 42 U.S.C. § 16915 (2012), and the federal courts addressing this issue have upheld SORNA based on *Smith*.

"The Eleventh Circuit addressed this registration requirement in *W.B.H.* and held that SORNA is no different than the Alaska act at issue in *Smith*. 664 F.3d at 858-59. The *W.B.H.* court reasoned that SORNA is 'reasonably related to the danger of recidivism posed by sex offenders.' 664 F.3d at 858. And the court explained that while SORNA 'allows the public and law enforcement to determine the general whereabouts of convicted sex offenders, . . . it does not directly restrict their mobility, their employment, or how they spend their time.' 664 F.3d at 858. So, the court found that any deterrent effect or purpose of SORNA does not justify a finding that the act's purpose is punitive. 664 F.3d at 858; see also *Under Seal*, 709 F.3d at 265 (quoting from *Smith* to find that SORNA does not promote traditional aims of punishment).

"I would find under *Smith* and the cases interpreting SORNA that the traditional aims of punishment factor weighs in favor of KORA being fairly characterized as nonpunitive.

"RATIONAL CONNECTION TO NONPUNITIVE PURPOSE

"In *Smith*, the Court identified this as 'a "most significant" factor in our determination that the statute's effects are not punitive.' 538 U.S. at 102 (citing *United States v. Ursery*, 518 U.S. 267, 290, 116 S. Ct. 2135, 135 L. Ed. 2d 549 [1996]). The *Smith* Court did not elaborate on what is meant by 'rational connection to a nonpuntive purpose' before analyzing the Alaska act under the standard. One commentator has noted that the standard is 'deferential to the state purpose (much like rational basis review under substantive due process analysis).' Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 Ga. L. Rev. 961, 984 (2006). In *State v. Cook*, 286 Kan. 766, 774, 187 P.3d 1283 (2008), this court determined that 'the registration act was intended to promote public safety and to protect the public from sex offenders, who constitute a class of criminals that is likely to reoffend.'

"The majority concludes that arguably under the current version of KORA, 'public safety has become a pretext.' Slip op. at 42. The majority finds fault with KORA because it does not distinguish between types of offenders and contains no mechanism for relieving a 'fully rehabilitated' offender from its notification burdens. But the Ninth Circuit and others have rejected similar arguments. In *Matso*, the court held:

> 'Plaintiffs argue *Smith* overstated the risk of sex-offender recidivism. They note that *Smith* cited several studies on sex offender recidivism. *See id.* at 104. Plaintiffs then rely on an expert declaration critiquing the methodology of the recidivism studies in *Smith.* The district court did not make any factual finding regarding the risk of sex offender recidivism. Even had it adopted the declaration's conclusions as its own, a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community.' 670 F.3d at 1057.

See also *Bredesen*, 507 F.3d at 1006 (Tennessee Legislature 'could rationally conclude that sex offenders present an unusually high risk of recidivism, and that stringent registration, reporting, and electronic surveillance requirements can reduce that risk and thereby protect the public' and concluding that '[w]here there is such a rational connection to a nonpunitive purpose, it is not for the courts to second-guess the state legislature's policy decision'). In addition, the Second Circuit recently held the New York Legislature's 'decision to eliminate the possibility of relief from registration for twenty years' for level one offenders did not render the registration provisions punitive. *Cuomo*, 755 F.3d at 112.

"The majority fails to cite any authority for its analysis of this factor; and the proposition that offender registration schemes are rationally related to the nonpunitive purpose of public safety finds overwhelming approval in the federal caselaw. Even *Myers*, 260 Kan. at 681, appears to assume offender registration is rationally connected to public safety, and the Alaska state case that held post-*Smith* changes to the Alaska act were an ex post facto violation admits registration, at least as to sex offenders, advances a nonpunitive public safety purpose. See *Doe v. State*, 189 P.3d 999, 1015-16 (Alaska 2008).

"I do not see how the majority can say no public safety purpose is rationally furthered by having sex, drug, and violent offenders register. I would follow the referenced precedent and hold that KORA has a rational connection to a nonpunitive purpose, so this factor does not weight towards punishment.

"EXCESSIVE IN RELATION TO REGULATORY PURPOSE

"In *Smith,* the Court clarified that '[t]he excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.' 538 U.S. at 105. The *Smith* Court further noted that ex post facto jurisprudence does not preclude a

state from making reasonable categorical judgments that certain crimes should have particular regulatory consequence.

"Instead of independently analyzing this factor, the majority merely harkens back to the ground it already plowed, concluding: 'Our discussion of the other factors has touched upon the excessive nature of KORA.' Slip op. at 43. The majority then specifically cites the fact that the 2011 KORA amendments required more information from the offenders and that the penalty for noncompliance has increased. Slip op. at 43. I would hold that neither of these requirements is excessive given KORA's public safety purpose based on the authority cited above.

"CONCLUSION

"Although the 2011 KORA offender registration scheme imposes a number of burdens on sex offenders, I believe the applicable federal caselaw considering similar burdens under other offender registration schemes compels us to conclude that the 2011 KORA amendments do not violate the United States Constitution's Ex Post Facto Clause as applied to sex offenders and that the United States Supreme Court would so hold." *Doe v. Thompson*, 304 Kan. ___, ___ P.3d ___ (No. 110,318, this day decided), slip op. at 47-66 (Biles, J., concurring in part and dissenting in part).

Because we conclude the registration requirements Petersen-Beard complains of are not punishment, his claim that those requirements violate the Eighth Amendment's prohibition against cruel and unusual punishment cannot survive.

KORA's lifetime sex offender registration requirements are not punishment for purposes of applying the Kansas Constitution.

Having held that KORA's lifetime sex offender registration requirements are not punishment for purposes of applying our federal Constitution, we must next consider

whether those same requirements might still be punishment for purposes of applying the Kansas Constitution. We conclude they are not.

Section 9 of the Kansas Constitution Bill of Rights provides that "[a]ll persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

"This court . . . can construe [its] state constitutional provisions independent of federal interpretation of corresponding provisions." *State v. Schultz*, 252 Kan. 819, 824, 850 P.2d 818 (1993). While we have the freedom to extend greater protection to Kansas citizens under the Kansas Constitution than exists under comparable provisions of the federal Constitution, we generally have not done so. See *State v. Spain*, 269 Kan. 54, 59, 4 P.3d 621 (2000); *Murphy v. Nelson*, 260 Kan. 589, 597, 921 P.2d 1225 (1996); *State v. Morris*, 255 Kan. 964, 981, 880 P.2d 1244 (1994); *Schultz*, 252 Kan. at 826.

However, we have shown a willingness to evaluate § 9 under a separate analytical framework. See *State v. Mossman*, 294 Kan. 901, 924, 281 P.3d 153 (2012) (explaining how proportionality analysis can differ between the two clauses). In this instance, however, we find no textual or historical evidence that the drafters of § 9 intended the meaning of "punishment" to differ from the same word's meaning as used in the Eighth Amendment to the United States Constitution.

The origins of the Eighth Amendment and similar state prohibitions ("punishments clauses"), such as § 9 of the Kansas Bill of Rights, are in the 1689 English Bill of Rights. See, *e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 966, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); *Solem v. Helm*, 463 U.S. 277, 285 n.10, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); 3 Story, Commentaries on the Constitution of the United States § 1896 (1833). By 1791,

five state constitutions prohibited "cruel or unusual punishments." See Del. Declaration of Rights, sec. 16 (1776); Md. Declaration of Rights, art. 22 (1776); Mass. Declaration of Rights, art. XXVI (1780); N.C. Declaration of Rights, sec. 10 (1776); N.H. Bill of Rights, art. 33 (1784). Two others prohibited "cruel" punishments. See Pa. Const., art. IX, sec. 13 (1790); S.C. Const., art. IX, sec. 4 (1790). The Eighth Amendment most closely followed the Virginia Declaration of Rights, which prohibited "cruel and unusual" punishment. Va. Declaration of Rights, sec. 9 (1776).

The Kansas Bill of Rights, adopted as part of the Wyandotte Constitutional Convention of 1859, was modeled after the Ohio Bill of Rights, although there were "a few transpositions and changes in phraseology." Perdue, The Sources of the Constitutions of Kansas, reprinted in 7 Kansas Historical Collections 130-151 (1902). Ohio had created a new constitution in 1851 and its punishments clause read: "All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Ohio Const., art. I, § 9 (1851). Our § 9 tracks Ohio's § 9, but for one key distinction: "or" vs. "and." While this textual difference may support a divergent application of § 9 in some cases, it is immaterial to our decision today.

The record regarding the adoption of the Kansas Bill of Rights—and § 9 in particular—is scarce. We can find no textual or historical reason to depart from our general practice of giving an identical interpretation to identical language appearing in both the Kansas Constitution and our federal Constitution. There is no evidence that the word "punishment" meant anything different to the drafters of the Kansas Constitution than it did to the framers of the Bill of Rights. Therefore, we conclude the term punishment has the same meaning in § 9 as it does in the Eighth Amendment. Because we have held that KORA's sex offender registration requirements do not qualify as

punishment as that word is used in the Eighth Amendment, we likewise conclude that those requirements are not punishment as that word is used in § 9.

Affirmed.

* * *

JOHNSON, J., dissenting: I dissent from the majority's decision in this case and from the majority's declaration that it is overruling the decisions in *State v. Redmond*, 304 Kan. ___, ___ P.3d ___ (No. 110,280, this day decided), *State v. Buser*, 304 Kan. ___, ___ P.3d ___ (No. 105,982, this day decided), and *Doe v. Thompson*, 304 Kan. ___, ___ P.3d ___ (No. 110,318, this day decided), which I will hereafter collectively refer to as "Ex Post Facto cases."

The majority does not explain the unusual circumstance whereby the opinions in the September 2014 Ex Post Facto cases are being filed on the same day as the opinion in this September 2015 case that purports to overrule their holdings. I firmly believe that some explanation is warranted in the interests of clarity and transparency. Moreover, I want to assure that the defendants in the Ex Post Facto cases obtain the relief to which they are entitled.

The "overruled" Ex Post Facto cases dealt with the question of whether article I, § 10 of the United States Constitution—the Ex Post Facto Clause—prohibited the retroactive application of the 2011 amendments to the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 *et seq*. An initial consideration was whether KORA was even subject to the Ex Post Facto Clause. The three cases were set together and heard on this court's docket on September 11, 2014.

At that time, and for some 3 months thereafter, a position on this court was open due to the appointment of our colleague, Nancy Moritz, to the United States 10th Circuit Court of Appeals. Consequently, the Chief Justice utilized his constitutional and/or statutory authority to assign a senior district court judge as the seventh member of this court to hear and decide cases coming before the court during the vacancy period, which included the September 2014 docket. See K.S.A. 20-2616(b) ("A retired justice or judge so designated and assigned to perform judicial service or duties shall have the power and authority to hear and determine all matters covered by the assignment."); see also Kan. Const. art. 3, § 6(f) ("The supreme court may assign a district court judge to serve temporarily on the supreme court."). Notably, our constitution does not restrict or limit the power and authority of a temporarily assigned justice nor does it restrict or limit the precedential effect of the decisions issued by a supreme court that includes a justice that is temporarily assigned. Indeed, the Chief Justice often announces at oral argument that a temporarily assigned jurist will be fully participating in the decision of the court.

As evidenced by the opinions that are now being publicly filed, a majority of the constitutionally constituted court hearing the Ex Post Facto cases voted to hold that KORA's statutory scheme, after the 2011 amendments, was so punitive in effect as to negate any implied legislative intent to deem it civil, so that it was subject to the Ex Post Facto Clause's prohibition on retroactive application. The decision specifically left intact all provisions of the 2011 iteration of KORA for any person who committed a qualifying offense after July 1, 2011, the effective date of the 2011 amendments. In other words, the majority opinion in the Ex Post Facto cases did not hold KORA unconstitutional, but rather it held that the retroactive application of KORA's amendments was unconstitutional. The prohibitions against cruel and/or unusual punishment in our federal and state constitutions were neither raised as issues nor discussed by this court in the Ex Post Facto cases.

By August 2015, the opinion in *Thompson*, the lead Ex Post Facto case, was ready to be filed with the Clerk of the Appellate Court. By that time, the vacancy on this court had been filled and this case had been set on a docket to be heard by the newly constituted court the following month, September 16, 2015, *i.e.*, a year after the arguments in *Thompson.* Thereupon, notwithstanding that the outcome for the Ex Post Facto litigants would be unaffected by any subsequent ruling in another case, a majority of the Ex Post Facto court ordered that the opinions in those cases were to be held in abeyance pending the newly constituted court's hearing and resolution of PetersenBeard's cruel and unusual punishment case.

Then, after a majority of the court in this case determined that it could overrule the holdings in the Ex Post Facto cases for all future litigants—as disclosed in the majority opinion above—a majority of the Ex Post Facto court ordered that the release of the Ex Post Facto cases was to be further delayed until this *Petersen-Beard* opinion was ready to be filed. The apparent rationale for the delay was to make the holding in the Ex Post Facto cases applicable solely to the parties in those cases.

To be clear, this *Petersen-Beard* opinion does not change the result for the Ex Post Facto defendants, *i.e.*, John Doe in *Doe v. Thompson*, No. 110,318; Joseph M. Buser in No. 105,982; and Promise Delon Redmond in No. 110,280. Likewise, Leonard D. Charles, whose case No. 105,148 was heard on the same docket as the Ex Post Facto cases, will be governed by the holding in his case. Plainly stated, all of those litigants won on appeal, and the KORA amendments cannot be applied to them. But they had to wait for many months—unnecessarily in my view—to reap the benefits of their respective wins. I find that to be a denial of justice.

Turning to the merits of this case, I begin by clarifying what is before us to be decided. The issue presented here was whether the KORA provision requiring

PetersenBeard to register as a sex offender for the rest of his life was unconstitutionally cruel and unusual punishment under the Eighth Amendment to the United States Constitution or unconstitutionally cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights. The Ex Post Facto Clause of article I, § 10 of the United States Constitution was not in play here. Moreover, the issue is not limited to retroactivity, but rather Petersen-Beard seeks to nullify KORA's lifetime registration provision for all offenders, both past and future. In other words, the issue in this case is not the same issue presented in the cases it purports to overrule, notwithstanding the possibility that the analyses might overlap in some respects.

Further, the question of whether KORA is subject to the cruel and unusual constraint of the Eighth Amendment to the United States Constitution was not presented to or decided in the Ex Post Facto cases. Consequently, the majority's assertion that its determination that KORA is not punitive for Eighth Amendment purposes requires the reversal of the prior Ex Post Facto cases is dictum. See *Law v. Law Company Building Assocs.*, 295 Kan. 551, 564, 289 P.3d 1066 (2012) (nobody bound by dictum, not even the court that issued it). If this case is to provide authority for the proposition that the Ex Post Facto Clause does not apply to KORA because the act is nonpunitive for both Eighth Amendment and Ex Post Facto purposes, then a subsequent case that presents that precise issue can make that determination. Accordingly, the litigants of that subsequent case could challenge the applicability of the federal circuit courts of appeal cases addressing the constitutionality of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.* (2012), upon which the majority in this case relies to conflate the two types of cases.

Likewise, the *Thompson* dissent, adopted as the majority's rationale, presents string cites to federal circuit courts of appeal decisions that analyze the constitutionality of SORNA or other states' registration acts in light of those federal circuit courts' mandatory

authority from the United States Supreme Court. While perhaps interesting, those citations are only tangentially connected to the issue before this court. Our task, as the *Kansas* Supreme Court, is to rule on the constitutionality of the *Kansas* registration act. A federal court's determination that a federal act is constitutional might be used as an analog to inform a state court's decision on its own laws, but state courts are not bound by any lower federal court decision, even on matters of federal constitutional law. As stated by a member of the United States Supreme Court:

> "The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Lockhart v. Fretwell*, 506 U.S. 364, 376, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring).

Ordinarily, any analysis of a Kansas legislative act would not begin with a consideration of merely persuasive federal authority when there are decisions of this court on point. If there is direct authority in this State, it is binding on the lower State courts and is entitled to the benefit of the doctrine of stare decisis in this court. In *Thompson*, the majority opinion began its analysis by discussing the direct authority of *State v. Myers*, 260 Kan. 669, 699, 923 P.2d 1024 (1996), *cert. denied* 521 U.S. 1118 (1997), which held that the disclosure provisions of a prior registration law—the Kansas Sex Offender Registration Act (KSORA)—were punitive in effect, precluding their retroactive application under the Ex Post Facto Clause. The State in *Thompson* had argued that *Myers* was overruled by the United States Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 103-04, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). But that was not accurate, because *Smith* did not review the *Myers* decision and did not even consider the Kansas registration act. Rather, the *Smith* court held that the Alaska Sex Offender Registration Act (ASORA) was nonpunitive and not subject to the Ex Post Facto Clause.

Accordingly, *Smith* is important only as a guide as to how the United States Supreme Court might view KORA for federal constitutional purposes; it is not direct, mandatory authority that KORA is nonpunitive.

The *Thompson* dissent obliquely recognized that *Smith* was not directly binding in that Ex Post Facto case when it stated that "the real question presented" was: "Are there convincing reasons to believe the United States Supreme Court would view KORA differently than it viewed the Alaska law in 2003 when it decided *Smith*?" *Thompson*, slip op. at 49 (Biles, J., concurring in part and dissenting in part). Of course, the majority's recitation of that issue statement presents an incomplete picture in Peterson-Beard's case because of the State constitutional provision in play here. The United States Supreme Court does not have authority to interpret § 9 of the Kansas Constitution Bill of Rights. It is this court's view of KORA that will decide that issue, even if this court chooses to adopt a rationale consistent with the *Smith* majority. The majority must own that decision; it cannot hide behind federal decisions.

Setting aside for a moment the State constitutional question, the answer to the question posed by the *Thompson* dissent is *yes*, there are convincing reasons to believe that the United States Supreme Court, in 2016, would view the current version of KORA differently than it viewed ASORA in 2003, when it decided *Smith*. The majority in *Thompson* attempted to explain those reasons, and I will reiterate some of them here, albeit I do not intend to clip and paste the entire majority opinion into this dissent. In addition, I will present some points that were not explicitly made in *Thompson*.

March 5, 2016, marked 13 years since *Smith* was decided, and there are new justices now. Five of the justices involved in the *Smith* decision, *i.e.*, 55.56% of the Court, are no longer on the Court. Three of the five justices (60%) joining the majority opinion in *Smith*, upon which the *Thompson* dissent heavily relies, are no longer on the Court.

Surely, the majority here, especially the *Thompson* dissenters, can appreciate the impact of a change in Court composition.

And not only are the new justices different, but they are younger, which might well make them more attuned to the digital age. For instance, the youngest member of the current court was about 21 years old when IBM introduced the PC (personal computer) in 1981, as compared to Chief Justice Rehnquist—a member of the *Smith* majority—who was approaching 60 years old when the personal computer revolution began to go mainstream. The *Smith* majority, authored by Justice Kennedy, who was 67 years old at the time, described Alaska's posting of registration information on the Internet as a passive system, akin to physically visiting "an official archive of criminal records," 538 U.S. at 99.

In contrast, in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2491, 189 L. Ed. 2d 430 (2014), a majority of the 2013 Term Supreme Court noted that ordinary citizens with smartphones can easily access vast amounts of data and that "a cell phone [can be] used to access data located elsewhere, at the tap of a screen." 573 U.S. at ____, 134 S. Ct. at 2491. That data includes push notifications of sex offender registries and indiscriminate sharing of social media. Certainly, if nothing else, a majority of the Court must now recognize that ubiquitous tweeting and other social media have changed the landscape of information sharing. Pointedly, Twitter did not exist until 3 years after *Smith* was decided. In short, I believe a majority of the current Supreme Court would be more attuned to the repercussions of Internet dissemination of a sex offender registry.

In this State, *Myers* displayed a great deal of prescience. It held that despite how one might try to justify the disclosure provisions of KSORA, the repercussions visited upon Myers were "great enough . . . to be considered punishment. The unrestricted public access given to the sex offender registry is excessive and goes beyond that necessary to

promote public safety." 260 Kan. at 699. *Myers* fretted that "[t]he print or broadcast media could make it a practice of publishing the list [of sex offenders] as often as they chose." 260 Kan. at 697. Not only has that circumstance come to pass, but the unnecessary digital distribution of the sex offender registry has gone far beyond that imagined by the *Myers* court. In other words, the punitive effect on offenders is even greater now.

The explanation that the repercussions to which *Myers* referred arise from the fact that the offender was convicted in a public proceeding and the records of that conviction are public information is nonsensical. The whole purpose of the registry is to provide easy access to information that most people would not know. It is the wide dissemination of the information that causes the punitive effect. Moreover, the public record of conviction does not provide the wealth of current information about the offender that he or she must provide for the sex offender registry and keep updated. Public shaming is much more effective if the public knows where the offender lives, works, and/or attends school, as well as the make, model, and license number of the vehicle he or she drives.

Likewise, the attempted rationale that an Internet-based registry is merely the dissemination of accurate information is unpersuasive. An example of traditional public shaming referred to in *Myers* came from Nathaniel Hawthorne's *The Scarlet Letter* (Random House 1950) (1850), in which Hester Prynne's punishment for adultery required her to wear a scarlet "A" upon her dress. One could describe the information being conveyed by that scarlet letter as "accurate information." Yet, Hawthorne described its punitive effect as follows: "'There can be no outrage . . . against our common nature,—whatever be the delinquencies of the individual,—no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do.'" *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1265 (3d Cir. 1996) (quoting *The Scarlet Letter*, 63-64). Further, one has to challenge the accuracy of the disseminated

information when it does not differentiate between the extremely low-risk offenders and the extremely dangerous high-risk offenders. Ultimately, however, the point is that, despite the spin the majority would put on it, today's dissemination of sex offender registry information does resemble traditional forms of punishment.

In *Thompson*, we set forth KORA's onerous requirements and differentiated them from both *Smith*'s ASORA and the dissent's SORNA. It is unfathomable to me that any rational person could say with a straight face that being forced to comply with those Draconian terms and conditions of registration for the rest of one's life, under penalty of going to prison for a new felony, is not an affirmative disability or restraint on the offender. The majority quibbles over whether the required monetary payments due each quarterly reporting date is a fine or fee. But *Smith* described the intent-effects test as being in two parts, whereby the second step examines the "punitive . . . purpose or effect." 538 U.S. at 92. I submit that a substantial fee, even if its *intent* is to cover the government's cost of the registry, can have a punitive *effect* on the offender who might be living hand-to-mouth because of problems getting and maintaining employment.

Moreover, although the majority compares individual provisions of KORA to corresponding provisions in SORNA, in the *Thompson* majority we cautioned that

> "it is important to keep in mind that it is the entire 'statutory scheme' that must be examined for its punitive effect. See *Smith*, 538 U.S. at 92 (effects analysis requires the appellate court to 'examine . . . the *statutory scheme*' [emphasis added]); *Myers*, 260 Kan. at 681 (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S. Ct. 2636, 65 L. Ed. 2d 742 [1980]) ('ask whether the "*statutory scheme* was so punitive either in purpose or effect"' [emphasis added]). For instance, a particular registration requirement may not have the same punitive effect in a statutory scheme that permits a reduction in registration time for proven rehabilitation, as it does in a statutory scheme that precludes any individualized modifications." *Thompson*, slip op. at 35-36.

That distinction is particularly compelling when considering that SORNA allows an offender the opportunity to reduce his or her registration time, whereas under KORA there is no opportunity for relief from lifetime registration even for a completely rehabilitated offender. The punitive effect of being required to register in person quarterly might be mitigated if the requirement could be terminated when it was no longer necessary, rather than mandatorily continuing for a lifetime.

Perhaps the most compelling reason for the current Supreme Court to view KORA differently than the *Smith* Court viewed ASORA involves the last two factors discussed by the majority: whether the statutory scheme is rationally connected to a nonpunitive purpose; and whether the statutory scheme is excessive in relation to the identified nonpunitive purpose.

Smith analyzed ASORA against the nonpunitive purpose of public safety. The Court opined that a registration act need not be "'narrowly drawn to accomplish the stated purpose,'" so long as "the Act's nonpunitive purpose is [not] a 'sham or mere pretext.' *Hendricks*, 521 U.S., at 371 (KENNEDY, J., concurring)." *Smith*, 538 U.S. at 103. *Smith* then determined that "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." 538 U.S. at 103. The *Smith* majority then supported that ruling as follows:

> "The risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v. Lile*, 536 U.S. 24, 34[, 122 S. Ct. 2017, 153 L. Ed. 2d 47] (2002), see also *id.*, at 33 ('When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault' (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)))."
> 538 U.S. at 103.

The Court then determined that "[t]he duration of the reporting requirements is not excessive," because research on child molesters had shown that most of them do not reoffend within the first several years after release, but rather a reoffense may occur "'as late as 20 years following release.' National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997)." 538 U.S. at 104. But a recent investigation into the source of *Smith*'s seemingly compelling statistics calls into question their bona fides.

In *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495 (2015), the authors Ira and Tara Ellman point out that Justice Kennedy, the author of the *Smith* majority, was also the author of a fourperson plurality decision in *McKune*, which is *Smith*'s cited source for the "frightening and high" statistic. In *McKune*, Justice Kennedy wrote that the recidivism rate of untreated sex offenders "'has been estimated to be as high as 80%,'" which he later referred to as "'a frightening and high risk of recidivism.'" 30 Const. Comment. at 495-96 (quoting *McKune*, 536 U.S. at 33-34). The source of the 80% statement—apparently taken from a reference in an *amicus* brief filed by the Solicitor General—was cited as the U.S. Dept. of Justice, Nat. Institute of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender*, xiii (1988). Although that Practitioner's Guide was published by the Justice Department, its "Preface notes that its contents present the views 'of the authors and do[es] not necessarily represent the official position or policies of the U.S. Department of Justice.'" 30 Const. Comment. at 498 n.11. The Practitioner's Guide cited a 1986 article in Psychology Today as the source of its claim. That mass-marketed magazine article—designed for a lay audience—contained the following bare assertion, without attribution or supporting reference: "'Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do.'" 30 Const. Comment. at 498 (quoting Freeman-Longo & Wall, *Changing a Lifetime of Sexual*

Crime, Psychology Today, March 1986, at 64). The author of the magazine article was a counselor who was touting his prison counseling program for sex offenders and whose "unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with [the counselor's] equally unsupported assertion about the lower recidivism rate for those who complete [the counselor's] program." 30 Const. Comment. at 498.

The article did not stop at challenging the factual support for *McKune*'s "frightening and high" finding. It cited to studies utilizing accepted methodologies to support the proposition that the purported 80% risk of reoffending was way off base, both as a stand-alone statistic for sex offenders and as a comparison to other offenders. "One recent study found that about 3% of felons with *no* known history of sex offenses commit one within 4.5 years of their release," whereas "[a]bout 97.5% of the low-risk offenders were offense-free after five years." 30 Const. Comment. at 502-04. In other words, the risk of recidivism within 5 years of release from prison for a low-risk sex offender (about 2.5%) is virtually identical to that of a released prisoner who was not convicted of a sex offense (about 3.0%).

Further, the sample group of the study *Smith* used to declare that reoffenses do not occur within the first several years of release, but rather "may occur 'as late as 20 years following release,'" 538 U.S. at 104, consisted of "rapists and child molesters released from the Massachusetts Treatment Center for Sexually Dangerous Persons, established in 1959 'for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses.'" 30 Const. Comment. at 503 n.29 (citing Prentky, Lee, Knight, & Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. & Hum. Behav. 635, 637 [1997]). While the public might assume that everyone on the sex registry is a forcible rapist or molester of young children, that is simply not the reality, as evidenced by the facts of this case. But even for the

offenders initially assessed as high-risk, the likelihood of reoffending decreases over time. "Those who haven't re-offended after fifteen years are not high-risk for doing so, regardless of their offense or their initial risk assessment." 30 Const. Comment. at 503.

The article recognized that human nature is such that, when faced with an immeasurable fear and strongly held belief, a person will tend to ignore or discount quantifiable facts. "The label 'sex offender' triggers fear, and disgust as well. Both responses breed beliefs that do not yield easily to facts." 30 Const. Comment. at 508. Yet, I must cling to the belief that the persons who have been privileged to serve on our nation's highest Court will yield to the facts and give a closer look at whether our statutory scheme is rationally connected to the nonpunitive purpose of public safety and whether its terms and conditions are excessive in relation to that public safety purpose. If they do, I submit that an objective analysis will disclose that, in the current version of KORA, public safety has crossed over the line and is now a "sham or mere pretext" for imposing additional punishment on the offender.

The *Thompson* majority pointed out that KORA does not differentiate between the young immature adult whose indiscretion with a consenting and encouraging teenager has led to a qualifying conviction and the middle-aged confirmed and incorrigible rapist and pedophile. We said that mixing in low-or-no-risk offenders with the high-risk offenders created an overinclusive system where "[t]oo much [was] too little." *Thompson*, slip op. at 42. In other words, "[i]f the registry's main purpose is to let us monitor and warn people about those who committed violent, coercive, or exploitative contact sex offenses, we dilute its potential usefulness when we fill it up with people who never did any of those things." 30 Const. Comment. at 504.

We also pointed out in the *Thompson* majority that KORA's statutory scheme was also too underinclusive to be rationally related to the nonpunitive purpose of public

safety. *Thompson*, slip op. at 42-43. For the registry to provide effective public safety, it should notify the public of all persons known to have committed acts considered to be sex offenses. Yet, only persons *convicted* of a qualifying crime are required to register.

It is not uncommon for a prosecutor to entice a plea agreement from a defendant charged with a registration-qualifying sex offense by offering to amend the charge to a crime that will not require the defendant to register. Certainly, that circumstance dilutes the State's argument that nullifying KORA in any respect will leave the young children of this State defenseless—the State effects the same result through a plea agreement. But more importantly for our purposes, one would think that, if the legislature's true intended purpose for the registry was public safety, it would have prohibited prosecutors and courts from circumventing the public's safety through a plea bargain. The legislature has demonstrated that it knows how to do that for driving under the influence (DUI): "No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with [DUI] . . . to avoid the mandatory penalties established by this section . . . ." K.S.A. 2015 Supp. 8-1567(m).

Likewise, the registry would not include a person who has committed a qualifying sex offense but who avoided being convicted of the crime on some legal basis. For instance, an acquittal could follow the court's suppression of illegally obtained evidence. While the exclusionary rule will entice proper police conduct in the future, the exclusion of the sex offender from the registry does not further its purpose of public safety. In another area deemed to be a civil regulatory statutory scheme, the Sexually Violent Predator Act, K.S.A. 2015 Supp. 59-29a01 *et seq*., the legislature made a provision for the civil commitment of a qualifying person, even where that person was deemed incompetent to stand trial in his or her criminal case. K.S.A. 2015 Supp. 59-29a07(g). No

similar procedure is in place under KORA, further rendering its public safety purpose suspect.

Given the foregoing, together with the other points made in the *Thompson* majority, I have every confidence that the United States Supreme Court would find that the current "statutory scheme [of KORA] '"is so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."'" See *Smith*, 538 U.S. at 92. Accordingly, even under the issue framed by the *Thompson* dissent and adopted by the majority here, Petersen-Beard should prevail.

But even though that was the end of the analysis in *Thompson*, we have more to discuss in this case. The Kansas Constitution was not involved in *Redmond*, *Buser*, or *Thompson*, because our state constitution does not contain an ex post facto provision. It is involved here, however, because, in addition to the Eighth Amendment's prohibition against cruel and unusual punishment, our own constitution—in § 9 of the Kansas Constitution Bill of Rights—prohibits "cruel or unusual punishment." The majority recognizes that this court can independently interpret our own State constitution in a manner that extends greater protection to our Kansas citizens than the United States Supreme Court has provided under its interpretation of the United States Constitution. Then, it dismisses that proposition with the superficial rationale that "we generally have not done so" and "[w]e can find no . . . reason to depart from our general practice." Slip op. at 24-26.

I will not prolong this dissent with a discussion of the historical development of this court's practice of simply adopting federal constitutional interpretation for similar State constitutional provisions, or my opposition to such a practice. Suffice it to say that it has not always been that way. See Monnat & Nichols, *The Loneliness of the Kansas Constitution*, 34 J. Kan. Ass'n Just. 10, 11 (September 2010) ("In its early opinions, the

Kansas Supreme Court routinely interpreted the Kansas constitution as an independent document with force of its own.").

More importantly, even if we adopt the federal analytical model, we need not apply it to Kansas' statute in the same manner as the United States Supreme Court applied it to Alaska's statute. Indeed, after *Smith*, the Alaska Supreme Court considered the same statute in the same case with the same defendants, utilizing the same intent-effects test and *Mendoza-Martinez* factors to determine the same ex post facto issue, albeit under the Alaska state constitution. The state court found that its statute, ASORA, violated the Ex Post Facto Clause of the Alaska state constitution, concluding:

> "Because ASORA compels (under threat of conviction) intrusive affirmative conduct, because this conduct is equivalent to that required by criminal judgments, because ASORA makes the disclosed information public and requires its broad dissemination without limitation, because ASORA applies only to those convicted of crime, and because ASORA neither meaningfully distinguishes between classes of sex offenses on the basis of risk nor gives offenders any opportunity to demonstrate their lack of risk, ASORA's effects are punitive. We therefore conclude that the statute violates Alaska's ex post facto clause." *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008).

In the *Thompson* majority, we found it interesting that the Alaska court had cited with approval to *Myers*, even after the *Smith* decision. See *Doe*, 189 P.3d at 1017. We also noted that other states have found their sex offender registration statutes constrained by their state constitutions. See, *e.g.*, *Wallace v. State*, 905 N.E.2d 371, 377-78 (Ind. 2009); *Doe v. Dept. of Public Safety and Correctional Services*, 430 Md. 535, 547-48, 62 A.3d 123 (2013); *State v. Williams*, 129 Ohio St. 3d 344, 347-49, 952 N.E.2d 1108 (2011); *Starkey v. Oklahoma Dept. of Corrections*, 2013 OK 43, ¶¶ 76-79, 305 P.3d 1004 (2013).

In short, even if we were not convinced that the United States Supreme Court would find KORA punitive, we can and should still find that it is so punitive in effect as to negate any pretended civil regulatory purpose under our State constitution. The citizens of this State are entitled to have their own Supreme Court interpret their own constitution in a logical, rational manner that is consistent with actual, not made-up, facts. Consequently, I would find that this matter should proceed to a determination of the cruel or unusual analysis.

* * *

BEIER and ROSEN, JJ., join Justice Johnson's dissent as to the result. See *Doe v. Thompson*, 304 Kan. ___, ___ P.3d ___ (No. 110,318, this day decided); *State v. Buser*, 304 Kan. ___, ___ P.3d ___ (No. 105,982, this day decided); and *State v. Redmond*, 304 Kan. ___, ___ P.3d ___ (No. 110,280, this day decided); see also *State v. Charles*, 304 Kan. ___, ___ P.3d ___ (No. 105,148, this day decided) (following *Doe*, *Buser*, *Redmond*; imposition of registration requirement for violent offender qualifies as punishment, entitling defendant to relief under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [2000]).