IN THE SUPREME COURT OF IOWA
Supreme Court No. 21–0079

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CAMERON JAMES HESS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HON. SARAH E. CRANE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Hess requests retention. *See* Def's Br. at 20–21. The State agrees that the Iowa Supreme Court should determine if sex-offender registration requirements count as punishment for juvenile offenders in criminal court. This issue arises in every criminal prosecution of a juvenile offender where conviction triggers a registration requirement. Sentencing in any such case requires a court to consider and resolve that as-yet-unresolved question in the space between *In re T.H.* and *Aschbrenner*, in determining the scope of its sentencing discretion. *See* Sent.Tr. 145:10–147:2. This Court should retain this appeal and dispel that uncertainty. *See* Iowa R. App. P. 6.1101(2)(d) & (f).

STATEMENT OF THE CASE

Nature of the Case

This is Cameron James Hess's direct appeal from convictions on four counts of second-degree sexual abuse, all Class B felonies, in violation of Iowa Code section 709.3(2). Hess committed each crime as a juvenile offender. The sentencing court recognized that it had discretion to suspend parts of his sentence that would be mandatory for an adult offender. *See* Iowa Code § 901.5(13).[1] It rejected Hess's

[1] An adult offender would have faced mandatory prison terms, with 70% mandatory minimums before parole eligibility. *See* Iowa

request for a deferred judgment and sentenced him to 25-year terms of incarceration, set concurrently. It suspended that sentence and placed Hess on probation. *See* Sentencing Order (1/7/21); App. 41; Sent.Tr. 139:23–142:19. Hess does not allege any error in any of that.

The sentencing court also imposed a lifetime special sentence under section 903B.1. Hess's first challenge is that a lifetime special sentence is part of the sentence under section 901.5(13), so the court had discretion to suspend it, and it erred by failing to recognize and exercise that discretion. *See* Def's Br. at 31–39.

Hess's second challenge is that the sentencing court also had discretion to suspend the sex-offender registration requirement, and that imposing such a requirement is cruel and unusual punishment. *See* Def's Br. at 39–87. The sentencing court found that sex-offender registration requirements for juvenile offenders in criminal court are not punishment. *See* Sent.Tr. 145:10–147:2. As such, it treated the sex-offender registration requirement as a mandatory consequence. *See* Sentencing Order (1/7/21) at 2; App. 42; Sent.Tr. 148:3–150:6.

Code § 907.3 (prohibiting deferred judgment or suspended sentence for convictions for a forcible felony); Iowa Code § 702.11(1) (defining "forcible felony" to include "any felonious . . . sexual abuse"); Iowa Code § 902.12(1)(c) (requiring a 70% mandatory minimum before parole eligibility for convictions for second-degree sexual abuse).

The sentencing court was correct. The registration requirement is not a sentence and is not punishment. It cannot be suspended under section 901.5(13), and it cannot be cruel and unusual punishment. This Court should either follow *Aschbrenner* and distinguish *In re T.H.*, or it should overrule *In re T.H.* altogether. *See State v. Aschbrenner*, 926 N.W.2d 240, 248 (Iowa 2019); *In re T.H.*, 913 N.W.2d 578 (Iowa 2018).

Statement of Facts

Hess confessed to multiple acts of sexual abuse against each of two female children.[2] *See* Minutes (8/2/18) at 19–21; C-App. 22–24; Add'l Minutes (8/26/20) at 24–26; C-App. 64–66; Verdict (9/2/20) at 3–6; App. 32–35. Additional facts will be discussed when relevant.

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[2] Hess also confessed to sexually abusing a third female child, when he was younger than 14 years old. He was charged with two additional counts of sexual abuse, but the State conceded that the district court did not have jurisdiction over those offenses, so the court entered not-guilty verdicts on those charges. *See* Hearing.Tr. (8/26/20) 10:14–15:5; Verdict (9/2/20) at 3; App. 32. At sentencing, the court indicated that it believed that it could not consider any facts about those particular acts of sexual abuse. *See* Sent.Tr. 125:5–18; Sent.Tr. 140:8–13. That was incorrect. Sentencing courts can consider any facts that the defendant admits. *See, e.g.*, *State v. Gordon*, 921 N.W.2d 19, 25 (Iowa 2018) (quoting *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998)). Hess admitted to those acts of sexual abuse and offered evidence of those admissions into the sentencing record. *See* Def's Ex. A, at 4; C-App. 57; *accord* Sent.Tr. 72:21–74:16; Sent.Tr. 134:17–135:10. It would not have been error to consider those facts.

ARGUMENT

I. The sentencing court did not have discretion over whether to suspend the lifetime special sentence.

Preservation of Error

Error was not preserved. Hess's counsel did not ask the court to exercise discretion over this part of the sentence, and he referred to "lifetime parole" as another one of the "adverse consequences" of any "formal adjudication." *See* Sent.Tr. 111:20–25. But this challenge may be raised for the first time on appeal. *See, e.g.*, *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999) (citing *State v. Wilson*, 294 N.W.2d 824, 825 (Iowa 1980)).

Standard of Review

The scope of sentencing discretion is defined by statutes that vest that discretion in a sentencing court. Review of an implied ruling on the scope of that discretion is for correction of errors at law. *See, e.g.*, *State v. Kramer*, 773 N.W.2d 897, 898 (Iowa Ct. App. 2009).

Merits

Some sentences are mandatory, leaving no room for exercise of sentencing discretion. But when sentencing a juvenile offender for anything other than a Class A felony offense, a sentencing court has discretion to "suspend the sentence in whole or in part," and it may

do so "notwithstanding section 907.3 or any other provision of law prescribing a mandatory minimum sentence for the offense." *See* Iowa Code § 901.5(13). Hess argues that the lifetime special sentence of parole is a part of the sentence and may be suspended, and that the sentencing court erred in not recognizing/exercising that discretion. But it does not "prescrib[e] a mandatory minimum sentence."

A lifetime special sentence under section 903B.1 is punishment that is imposed in addition to the sentence otherwise authorized by section 902.9. *See State v. Lathrop*, 781 N.W.2d 288, 295–97 (Iowa 2010). But it is not clear that section 901.5(13) applies to sentences authorized by section 903B.1, which is a special sentencing provision that is separate and distinct from the ordinary punishment provided in section 902.9(1)(b). *See* Def's Br. at 34–36. A similar assertion was rejected in *State v. Peterson*, 327 N.W.2d 735, 736–37 (Iowa 1982)—the court rejected the argument the plain language of section 901.5(2) authorized imposition of a fine-only sentence in a forcible felony case, because "section 901.5 is only a general or summary statute providing a procedure or framework for pronouncing judgment and sentence." *See id.* General sentencing provisions of section 901.5 must be read in conjunction with specific sentencing provisions of chapter 902 and

section 903.7 to determine what sentences are authorized. *See id.; cf. State v. Nail,* 743 N.W.2d 535, 541 (Iowa 2007) (sentencing statutes must be read *in pari materia*). In other words, section 901.5 is about the general process for imposing sentences from among options that are expressly authorized by other sections of the Iowa Code.

Section 901.5(13) authorized the court to suspend a sentence that it would impose under section 902.9(1)(b), even if precluded by section 907.3 or some other mandatory minimum sentence statute. But what about *special* sentences, imposed under section 903B.1? Section 903B.1 is different in kind. While it is a mandatory sentence, it is not a mandatory minimum sentence. *Cf. State v. Propps*, 897 N.W.2d 91, 101 (Iowa 2017) (mandatory incarceration with immediate parole eligibility is not a mandatory minimum sentence under *Lyle*). There is no provision in the Iowa Code that specifically authorizes the suspension of any special sentence of parole. That is likely because it would undermine the objectives of chapter 903B if a special sentence of supervision could be suspended, and replaced with a different kind of supervision on probation. If the legislature wanted to create a new type of sentence—a suspended parole—it would say so, somewhere in the Iowa Code. But no provision authorizing such a sentence exists.

Instead, section 903B.1 states that a person "shall" be sentenced to a lifetime special sentence, and "shall . . . begin the sentence under supervision as if on parole or work release." *See* Iowa Code § 903B.1. It removes the supervision of the matter from the court and creates a parole track for the offender. Creating a new, unauthorized option of suspended parole would replace those instances of "shall" with "may," and it would frustrate legislative intent by allowing a sentencing court to interpose itself between already-sentenced offenders and the Board of Parole. Generally, sentencing courts should not attempt to exercise functions that are expressly committed to the parole board, by statute. *See State v. Remmers*, 259 N.W.2d 779, 784 (Iowa 1977).

Reading the term "sentence" in section 901.5(13) to exclude a "special sentence" under section 903B.1 is also more consistent with the legislative intent of section 901.5(13). To assess legislative intent, courts look beyond language—they also consider "the objects sought to be accomplished, the purpose served, the underlying policies, the remedies, and the consequences of the various interpretations." *See Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359, 364 (Iowa 2000). Here, that means starting by recognizing that section 901.5(13) was enacted to

authorize sentencing procedures for juveniles that comported with *Graham v. Florida,* 560 U.S. 48. 81 (2010) and *Miller v. Alabama*, 567 U.S. 460, 477 (2012), which required that sentencing courts must have some amount of discretion in sentencing a juvenile offender to certain sentences *of incarceration* without the possibility of parole. To avoid that specific constitutional infirmity, the legislature gave Iowa courts authority "to suspend the sentence in whole or in part"—that is, to suspend an otherwise mandatory sentence *of incarceration*, in whole or in part. This is a situation where a term must be implied, out of necessity, to reconcile statutes with one another and with the legislature's intent and objectives. *See State v. Conner*, 292 N.W.2d 682, 686 (Iowa 1980). Section 901.5(13) was only aimed at addressing mandatory sentences of incarceration—not special sentences of parole, which do not violate *Miller* (or even *Lyle*). *See State v. Graham,* 897 N.W.2d 476, 490–91 (Iowa 2017); *Propps*, 897 N.W.2d at 97–104.

Hess's reading of section 901.5(13) would enable a court to suspend a special sentence of parole. That would subvert the intent behind chapter 903B: to require parole supervision of sex offenders who are not in prison. *See State v. Wade*, 757 N.W.2d 618, 628 (Iowa 2008) ("[T]he legislature simply extended Iowa's parole supervision

scheme to require additional supervision for sex offenders consistent with the state's objective of protecting citizens from sex crimes.").

The special sentence under section 903B.1 is distinct, separate, and outside the scope of section 901.5(13). This parole is already like a suspended punishment. There is no statutory authorization that gives sentencing courts the discretion to suspend a suspended punishment. Section 901.5(13) was not enacted to authorize a brand new option of a suspended parole. Hess's reading would require courts to define a new sentencing option, where suspending parole would result in a term of probation—but it is the legislature's role to define sentences. *See, e.g.*, *State v. Fuhrman,* 261 N.W.2d 475, 479 (Iowa 1978).

While the sentencing court may not have identified this issue, the sentence it imposed was the only one authorized by law. Section 901.5(13) does not apply to special sentences under chapter 903B because it was only intended to apply to sentences of incarceration, and because there is nothing in section 901.5(13)—or anywhere else in the Iowa Code—that authorizes a suspended sentence of parole. *See Peterson*, 327 N.W.2d at 736–37. Chapter 903B stands apart from other sentencing provisions, and its special sentences do not implicate the concerns that section 901.5(13) aims to address. It does

not "prescribe[e] a mandatory minimum sentence," as that term is understood in the context of cases like *Miller* and *Lyle*—so its special sentences of parole fall outside the scope of section 901.5(13). Thus, section 901.5(13) did not give the sentencing court any discretion to suspend Hess's special sentence of parole under section 903B.1.

If this court disagrees, the proper remedy is resentencing, confined to the exercise of discretion over whether to suspend that special sentence. *See Ayers*, 590 N.W.2d at 33 (vacating "only that portion of the sentence" where sentencing court failed to exercise its discretion, and limiting scope of resentencing to match); *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1999) ("[R]esentencing should be limited only to the issue of the fine since defendant has not challenged the imposition of a term of incarceration."); *Kramer*, 773 N.W.2d at 901.

II. The sentencing court was correct that a sex-offender registration requirement is not part of the "sentence" and is not "punishment" for a juvenile sex offender in criminal court. This consequence of conviction was not within the scope of section 901.5(13), and it could not amount to cruel and unusual punishment.

Preservation of Error

The sentencing court rejected Hess's claim that the sex-offender registration requirement was punishment. *See* Sent.Tr. 129:25–130:3;

Sent.Tr. 135:23–136:18; Sent.Tr. 145:10–147:2. That ruling preserved error. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

A cruel-and-unusual-punishment challenge asserts a violation of constitutional rights. Review is de novo. *See State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005). The claim about section 901.5(13) is about statutory interpretation. Review of that implied ruling is for correction of errors at law. *See, e.g.*, *Kramer*, 773 N.W.2d at 898.

Merits

The State will address prudential concerns, then the merits.

A. This challenge is ripe because Hess is already subject to registration requirements.

Sometimes, challenges to a sentence are not ripe because the defendant has not yet started serving the sentence. *See, e.g.*, *State v. Tripp*, 776 N.W.2d 855, 858–59 (Iowa 2010). Similarly, a challenge to a sex-offender registration requirement is not yet ripe if the offender has not yet been required to register (which occurs when an offender is sentenced to prison, because they are only required to register upon release from incarceration). *See, e.g.*, *State v. Murray*, No. 17–1770, 2018 WL 4361053, at *2 (Iowa Ct. App. Sept. 12, 2018); *State v. Cox*, No. 16–0102, 2017 WL 4317289, at *6 (Iowa Ct. App. Sept. 27, 2017).

Here, Hess was sentenced to probation, so he is already subject to the registration requirement. *See* Iowa Code § 692A.103(1)(a); *accord* Sent.Tr. 148:3–150:6. As such, this challenge is already ripe.

Hess is even subject to the registration requirement during the pendency of this appeal. *See generally Maxwell v. Iowa Dep't of Public Safety*, 903 N.W.2d 179 (Iowa 2017). "No provision delays registration pending an appeal of the sex-offense conviction." *See id.* at 186. Hess is already required to register, so his challenge is ripe.

B. The registration requirement is not part of the "sentence for the offense" under section 901.5(13).

Hess correctly identifies *State v. Richardson* as the leading case that construes section 901.5(13). *See* Def's Br. at 48–52 (discussing *State v. Richardson*, 890 N.W.2d 609 (Iowa 2018)). But *Richardson* forecloses his claim that the sex-offender registration requirement is part of the "sentence for the offense" that a court may suspend under section 901.5(13). *Richardson* held a mandatory restitution award for causing a victim's death was not part of "the sentence" and cannot be suspended under section 901.5(13)—even though the restitution award was admittedly "partly punitive." *See Richardson*, 890 N.W.2d at 617. *Richardson* analyzed the text and structure of section 901.5 and other relevant statutes. Here, that kind of analysis forecloses Hess's claim.

First, the text of section 901.5(13) suggests that it applies to the kinds of punishments that a sentencing court can defer or suspend in some circumstances but must impose in others, because of provisions like section 907.3. *See Richardson*, 890 N.W.2d at 616. That suggested that restitution awards were not within the scope of section 901.5(13), because "the authority to defer judgment or sentence does not include the authority to defer restitution"—and restitution "is mandatory even when the foregoing sentencing options are exercised." *See id.* (citing *State v. Kluesner*, 389 N.W.2d 370, 372–73 (Iowa 1986)). That also describes sex-offender registration requirements in criminal court. *See* Iowa Code § 692A.101(7). Authority to defer/suspend a sentence (or even to defer judgment) never enables a criminal court to defer or suspend an automatic sex-offender registration requirement. Even a stay of execution of sentence during a pending appeal does not stay a sex-offender registration requirement. *See generally Maxwell*, 903 N.W.2d 179. That is because it is not part of the "sentence" at all.

Also, sex-offender registration requirements are applicable to some offenders who were never sentenced by any Iowa court. This includes offenders who received a deferred judgment or sentence, and offenders who were "acquitted by reason of insanity." *See* Iowa Code §

692A.101(7). It includes anyone who committed a qualifying offense in another jurisdiction—even if it was far beyond the jurisdiction of any Iowa court. *See* Iowa Code §§ 692A.102(a)(18)–(19), (b)(28)–(29), & (c)(41)–(42); Iowa Code § 692A.103(1). And it includes offenders who were convicted of specific federal crimes in federal courts. *See* Iowa Code §§ 692A.102(a)(12)–(17), (b)(20)–(27), & (c)(33)–(40). Iowa's automatic registration requirements apply to those offenders, without any need for Iowa sentencing courts to pronounce judgment or impose a sentence. And if an offender wants a determination about whether they may be required to register, they are not "re-sentenced" through an exercise of an Iowa court's judicial sentencing function—that is a determination made by the Department of Public Safety, as an administrative function. *See* Iowa Code §§ 692A.116, 692A.126(2). *Richardson* held restitution obligations were not part of a "sentence" under section 901.5(13) because they are imposed on offenders who are not "sentenced" at all, and because they are challenged/reviewed via avenues that do not require a "sentence" (or even a final judgment). *See Richardson*, 890 N.W.2d at 616 (citing *State v. Stessman*, 460 N.W.2d 461, 464 (Iowa 1990)). These registration requirements are even *more* detached from sentencing, so that same logic applies here.

Richardson also noted that all of the items in section 901.5 are actions that a sentencing court must take "[a]t the time fixed by the court for pronouncement of judgment and sentence"—and it noted that "[r]estitution is not mentioned anywhere within the list," and is instead found in another chapter of the Iowa Code. *See id.* at 616–17. It also observed that restitution may be determined and imposed at a subsequent point, after sentencing. *See id.* (citing Iowa Code § 910.3). That undermined claims that restitution was within the intended scope of section 901.5(13), which applies to parts of the sentence "that must be ordered at the time of pronouncement of sentence, not later." *See id.* at 617. Similarly, sex-offender registration requirements are absent from section 901.5—and, for that matter, from the rest of chapter 901, chapter 902, chapter 903, and chapter 907. They are in chapter 692A. In terms of timing, there are instances where sex-offender registration requirements can only be triggered by a determination that a fact was proven beyond a reasonable doubt, either during a trial or after trial (specifically, whether particular offenses were committed with sexual motivation). *See* Iowa Code § 692A.126(1). But other determinations that trigger registration requirements are made long after sentencing, or even in the absence of *any* sentencing before an Iowa court. *See,*

e.g., Iowa Code §§ 692A.116, 692A.126(2). That is permissible because "it is the operative command of the statutes [in chapter 692A] that impose[s] the registration requirement on the convicted party rather than the judgment of the court" during sentencing. *See Kruse v. Iowa Dist. Ct.*, 712 N.W.2d 695, 699 (Iowa 2006). Indeed, if an Iowa court enters (or defers) judgment on a qualifying conviction and neglects to mention the applicable registration requirement when it pronounces or explains the sentence, the offender is still subject to the applicable sex-offender registration requirement "notwithstanding the absence of a specific instruction from the court." *See id.* Were this a "sentence," the State would need to file a motion to correct an illegal sentence or find some other route to resentencing, to enable a sentencing court to amend the sentence or pronounce and impose a new sentence. But because this registration requirement is *not* a part of the "sentence," it can be applied after-the-fact. This is a "critical timing difference" that "further supports the proposition that [section 901.5(13)], like the rest of section 901.5, has no bearing" on any automatic sex-offender registration requirement. *See Richardson*, 890 N.W.2d at 616–17.

Richardson also looked "elsewhere in the Iowa Code" to find other uses of the phrase "mandatory minimum sentence," and ask:

"Does it include restitution in other contexts?" *See id.* at 618. It also looked at other parts of the enactment that added section 901.5(13). *See id.* at 619 (discussing 2013 Iowa Acts ch. 42, § 15). It found that all other uses of that phrase had referred to incarceration or confinement. *See id.* at 618–19. That suggested that section 901.5(13) did not apply to mandatory restitution, which was very distinct from incarceration. The same logic applies here. Sex-offender registration requirements are neither incarceration nor confinement, and they are not included in any Iowa statutes that set out sentencing options. There is nothing to indicate any intent to include registration requirements within the scope of section 901.5(13)'s grant of authority to suspend a "sentence."

All in all, *Richardson* concluded that section 901.5(13) does not apply to a restitution award because "[r]estitution under chapter 910 is mandatory, may be imposed later, and operates independently from the section 901.5 sentencing options available to a court." *See id.* at 615–19. All of that is true of sex-offender registration requirements. They are mandatory. They need not be pronounced at sentencing, and they operate independently from sentencing in chapters 901 and 907. And they can even be triggered in the absence of any involvement from any Iowa court, whatsoever. Thus, *Richardson* forecloses Hess's claim.

Hess argues that *Richardson* supports his claim because "the requirements themselves are triggered 'upon a first or subsequent conviction' of a sex offense." *See* Def's Br. at 50 (quoting Iowa Code § 692A.103(1)). That is sometimes true—but they can also be triggered by other events, after sentencing. *See, e.g.*, Iowa Code § 692A.103(1) (registration requirement triggered for person with existing conviction upon change of circumstances, such that the person now "resides, is employed, or attends school in this state"); Iowa Code § 692A.126(2) (requirement triggered upon determination of sexual motivation made by Department of Public Safety, after the fact). Regardless, Hess is incorrect that a registration requirement being *triggered* on conviction is equivalent to inclusion on section 901.5's list of things that *must be ordered* at pronouncement of judgment and sentence. *See* Def's Br. at 50 (quoting Iowa Code § 901.5). *Kruse* established that a court's failure to state the applicable registration requirement at sentencing did not affect its ongoing applicability, in the slightest. *See Kruse*, 712 N.W.2d at 699. Registration requirements are simply not on the list of things to pronounce at sentencing under section 901.5—and, like restitution, they are automatically applied by "a separate overriding requirement unaffected by section 907.3." *See Richardson*, 890 N.W.2d at 616–17.

Hess also argues that *Richardson* supports his claim because "the registry requirements are tied to a specific group of offenses enumerated in section 692A.102." *See* Def's Br. at 51. Not quite—the list in section 692A.102 cannot be fully enumerated with specificity because it also encompasses convictions for similar offenses that were committed in other jurisdictions, *and* it applies to offenders who are subject to another jurisdiction's registration requirement. *See* Iowa Code §§ 692A.102(a)(18)–(19), (b)(28)–(29), & (c)(41)–(42); Iowa Code § 692A.103(1). And there are other offenses where it is not so categorical—where a separate factual determination must be made (sometimes years after the fact) to determine if *this* offense conduct included the key ingredient that triggers a registration requirement: sexual motivation. *See* Iowa Code § 692A.126. So this is just another compelling parallel to *Richardson*: like restitution obligations, these registration requirements are not just limited to "a particular offense or group of offenses," and they can be triggered by an additional fact that must be found *for the purposes of triggering this requirement* and may be found long after sentencing—or even in the absence of *any* sentencing before an Iowa court. *See Richardson*, 890 N.W.2d at 617. Again, *Richardson* does not support Hess's position—it forecloses it.

Hess's last argument in this section is that sex-offender registration requirements are a "mandatory minimum sentence," within the meaning ascribed to the phrase in *Richardson*, because they authorize supervision and monitoring of offenders, they place restrictions on offenders that can be enforced by criminal penalties, and because there are minimum periods before modification. *See* Def's Br. at 51–52. The State will address those arguments and show that sex-offender registration requirements are not punishment, in sections II-E and II-F. For now, it is enough to note two things. First, none of those restrictions are "confinement" or "incarceration"—which is what the phrase "mandatory minimum sentence" refers to, as used throughout the Iowa Code. *See Richardson*, 890 N.W.2d at 618–19. Second, *Richardson* acknowledged restitution was "partly punitive"—but it *still* was not part of the "sentence" that could be suspended or deferred under section 901.5(13). *See id.* at 617; *cf. State v. Klawonn*, 609 N.W.2d 515, 520 (Iowa 2000) (summarizing purposes of that restitution award as "remedial" towards estate, and both "punitive" and "rehabilitative" as to defendant). So there must be room to find that something is punitive or quasi-punitive, but that it is *still* outside the scope of section 901.5(13) because it is not a "sentence."

One final note: Hess cites *Klouda* for its definition of "sentence," but he does not address *Klouda*'s holding, or its implications. *See* Def's Br. at 47–48 (citing *Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 261 (Iowa 2002)). The upshot of *Klouda* is that "[b]ecause sentencing falls within the realm of judicial power, any encroachment on this power is a violation of the separation-of-powers doctrine." *See Klouda*, 642 N.W.2d at 261–62. That meant it was unconstitutional for ALJs to impose or reconsider sentences. *See id.* at 262. If Hess is right that a sex-offender registration requirement is a "sentence" under *Klouda*'s definition, that would mean DPS could not make a determination that an offender who moves to Iowa from another state is required to register—if it did, it would be exercising a judicial sentencing function. *See* Iowa Code §§ 692A.103(1), 692A.116. It could also become unconstitutional for DPS to classify or re-classify a sex offender as a Tier I, Tier II, or Tier III offender. *See* Iowa Code § 692A.102(1)–(5). And it would definitely be unconstitutional for DPS to make case-specific determinations regarding applicability of statutes that control the duration of registration—and yet, "the determination of the length of any required registration is an administrative decision initially committed to the Department of Public Safety." *See State v.*

Bullock, 638 N.W.2d 728, 735 (Iowa 2002); *accord Barker v. Iowa Dep't of Pub. Safety*, 922 N.W.2d 581, 587–88 (Iowa 2019) (citing and quoting *Bullock* with approval, and only distinguishing *Bullock* because Barker "was not asking the court to sentence him to a length of registration for which it did not have authority to determine"). If Hess is correct that these are all sentencing functions, chapter 692A would be riddled with separation-of-powers problems (and *Bullock* and *Kruse* would both be wrong). So if any ambiguity remains, and if this Court must select one of two competing plausible constructions of these statutes, it should adopt the State's reading and reject Hess's. *See State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016) ("The doctrine of constitutional avoidance counsels us to construe statutes to avoid constitutional issues when possible."); *accord State v. Iowa Dist. Ct.*, 843 N.W.2d 76, 84–85 (Iowa 2014) (applying that to chapter 692A).

In short: the reasoning from *Richardson* applies here, and it is bolstered by statutes committing most case-specific determinations of registration requirements to DPS. *Accord Bullock*, 638 N.W.2d at 735. Therefore, a sex-offender registration requirement is not a "sentence" that a court has discretion to suspend under section 901.5(13), and declining to exercise that non-existent discretion cannot be error.

C. If a registration requirement is not punishment, then it cannot be cruel and unusual punishment, and it is unlikely to be part of a "sentence" under section 901.5(13).

A claim alleging that something is cruel and unusual punishment automatically fails if it challenges something that is not a punishment. *See In re T.H.*, 913 N.W.2d at 587 (citing *State v. Crooks*, 911 N.W.2d 153, 165 (Iowa 2018)); *Doe v. Miller*, 405 F.3d 700, 723 n.6 (8th Cir. 2005); *cf. State v. N.R.*, No. 119,796, 2021 WL 4217146, at *7–8 (Kan. Sept. 17, 2021) ("Because they are not punitive, the [Kansas Offender Registration Act] requirements are not subject to the punishment analysis set forth in the *Roper*, *Graham*, and *Miller* cases.").

As discussed, *Richardson* establishes that something can be "partly punitive" but still fall outside of the scope of section 901.5(13). *See Richardson*, 890 N.W.2d at 617. On the other hand, if something is not punitive and is not punishment, then it *cannot* be part of the sentence within the meaning of section 901.5(13). This is because section 901.5(13) was enacted to give sentencing courts the authority to exercise discretion in punishing juvenile offenders and to choose not to impose otherwise mandatory punishment in sentencing them—which they needed, because the Iowa Supreme Court had already said that mandatory punishment for juveniles could be cruel and unusual.

See generally, e.g., *State v. Null*, 836 N.W.2d 41, 71–77 (Iowa 2013); *accord Richardson*, 890 N.W.2d at 631 (Appel, J., dissenting) (noting section 901.5(13) "was enacted in part in response to our holdings with respect to mandatory minimum sentences for juvenile offenders").

The legislature enacted section 901.5(13) with the intent to vest sentencing courts with the discretion that they needed in sentencing juvenile offenders, to avoid imposing unconstitutional punishments. The term "sentence" in the resulting enactment should be construed in light of that purpose. *Cf. State v. Thompson*, 836 N.W.2d 470, 482 (Iowa 2013) (noting that it was apparent from context that legislation was enacted as a response to a particular holding, and explaining that courts "must interpret the resulting statutory enactment mindful of the legislature's purpose"). As such, "sentence" in section 901.5(13) should be read to exclude consequences of conviction that cannot be cruel and unusual punishment because they are not punishment at all.

D. If *In re T.H.* is still valid, it is distinguishable for the reasons identified in *Aschbrenner*. Hess is an adult who has no developmental need to socialize with a peer group of minors, and his prosecution and conviction are matters of public record.

The sentencing court found that *In re T.H.* was distinguishable, for the same reasons described in *Aschbrenner*. *See* Sent.Tr. 145:10–

147:2. And it specifically cited *Aschbrenner* as the basis for its ruling. Hess's appellate brief does not cite or discuss *Aschbrenner* at all, nor does it identify error in the lower court's application of *Aschbrenner*. That means his brief fails to establish error in the challenged ruling—it is flatly insufficient. This Court should not consider new arguments about *Aschbrenner* in Hess's reply brief, even if he characterizes them as responses to the State's briefing. An appellant cannot sandbag their actual challenge to the lower court's ruling until their reply brief, then unveil it as a reply to the appellee's observation that their initial brief did not contain any such challenge to the substance of the ruling. *See Bennett v. MC No. 619, Inc.*, 586 N.W.2d 512, 521 (Iowa 1998) (noting that appellant Bennett's failure to make argument or cite authority to challenge a particular ruling in his initial brief "constitutes a waiver of this issue," and "refus[ing] to consider the issue even though [appellee] MC raised it in its brief and Bennett responded in his reply brief").

This brief is the State's only opportunity to respond to Hess's challenge on its merits. Hess appears to have made a strategic choice to make no arguments about *Aschbrenner* for the State to respond to. By doing so, Hess has waived his opportunity to identify any error in the lower court's application of *Aschbrenner* as grounds for reversal.

Given the limited scope of Hess's advocacy, the State need not provide anything beyond the sentencing court's actual ruling, which explained how *Aschbrenner* rendered *In re T.H.* distinguishable:

> With regard to the registry argument, I have now had a chance to read *In the Interest of T.H.*, which was 913 NW.2d . . . 578. That's a 2018 case. And then I've also read *State versus Aschbrenner*, which is 926 N.W.2d 240. That's a 2019 case.
>
> So *In the Interest of T.H.* found that registry for juveniles in juvenile court was punishment. *State versus Aschbrenner* clarified that it was still good law that registry for adults is not considered punishment and is considered a collateral consequence.
>
> This case falls in the middle, right, because it's a juvenile, but someone who was a juvenile at the time of the offense but charged in adult court, currently an adult.
>
> The factors that *Aschbrenner* looked at to distinguish *In the interest of T.H.* were three factors: The lower recidivism rate of juveniles, which would be applicable here based on the expert testimony we heard; the confidentiality of juvenile proceedings, which would not be applicable here because we have someone who's waived up [from] juvenile court does not have that confidentiality; and then the impact on reintegration with peers.
>
> This was essentially that a registry requirement for someone who is themselves a juvenile would prohibit them from going to places where juveniles go even though they are also a juvenile. So that does not currently apply because Mr. Hess is not currently a juvenile.
>
> So, given the focus on those three factors and the fact that two of the three do not apply here, I find that this case falls into the *Aschbrenner* category where registry requirement would not be considered to be punishment.

Sent.Tr. 145:10–147:2. That ruling is logical and entirely correct.

Hess does not even directly engage with that ruling, at any point in his brief. Instead, he makes a generalized argument that *In re T.H.* applies, for three reasons. *See* Def's Br. at 40–47. But none are valid.

First, Hess argues a sex-offender registration requirement is "an affirmative restraint akin to supervised probation." *See* Def's Br. at 42. But *In re T.H.* focused on a particular brand of "affirmative restraint" that was unique to juvenile registrants (and could, therefore, be used to justify its departure from Iowa precedent): the rules against their presence at "public libraries," at "elementary or secondary schools," and at "any place intended primarily for the use of minors"—which includes a juvenile's young peers. *See In re T.H.*, 913 N.W.2d at 588 (citing and quoting Iowa Code §§ 692A.113(1)(h), 692A.113(3)(a)–(e)). *In re T.H.* voiced concern regarding the uniquely punitive effect that could have on registrants *who are juveniles*: it "could prevent [them] from participating in prosocial after-school activities, sports teams, and youth clubs that are available to their peers, which in turn severely limits their opportunities to develop communication and social skills with children their own age." *See id.* Those concerns are inapplicable to Hess, who was no longer a juvenile—at the time of sentencing, he was 20 years old. *See* PSI (11/24/20) at 9; C-App. 51; *Aschbrenner*,

926 N.W.2d at 248 (noting *In re T.H.* had "focused on factors unique to juveniles," which included "the impact of school exclusion zones on the child offender's ability to reintegrate with peer groups"). There is nothing in Hess's brief that responds to the sentencing court's finding that barring Hess from places and activities that are for juveniles will have no "impact on [his] reintegration with peers . . . because [Hess] is not currently a juvenile." *See* Sent.Tr. 146:10–20; *cf. Aschbrenner*, 926 N.W.2d at 248 (holding sex-offender registration requirements were still not punishment as applied to adults, who "are better able to meaningfully reintegrate into the community and interact with their peer groups notwithstanding the restrictions in the sex offender registration statute, such as avoiding schools and school events."). Thus, Hess's first argument fails to show that *In re T.H.* is applicable.

Second, Hess argues that publication of his information on the sex-offender registry website is public shaming that "goes well beyond merely unsealing previously confidential records" and will leave him "publicly branded as a deviant on a website known to and accessible by the juvenile's peers." *See* Def's Br. at 42–43 (quoting *In re T.H.*, 913 N.W.2d at 592). But these proceedings were already public record as a result of transfer to criminal court and denial of reverse waiver—

and both came long before the subsequent judgment of conviction that triggered a sex-offender registration requirement. *See* Order (10/9/18); App. 16. No confidential or sealed records were released. And neither transfer nor denial of reverse waiver are punishment. *Cf. Crooks*, 911 N.W.2d at 163–65 (holding waiver of 13-year-old child to criminal court under section 232.45(7) is not punishment). This is not a situation like *In re T.H.*, where registration invites public access to information that might otherwise remain confidential or sealed. *See In re T.H.*, 913 N.W.2d at 590 (noting "juveniles may be prosecuted as adults and thus lose the confidentiality benefits of the juvenile system," independent of subsequent requirement to register as a sex offender).

There are deep conceptual problems with that entire segment of *In re T.H.*, which will be discussed later. For now, what matters is that the sentencing court was correct: *In re T.H.* is distinguishable because these criminal proceedings were already public record, so registration could not become punitive as a result of effects on "the confidentiality of juvenile proceedings, which would not be applicable" to "someone who's waived up" and "does not have that confidentiality." *See* Sent.Tr. 146:1–24 (citing *In re T.H.*, 913 N.W.2d at 590); *accord N.R.*, 2021 WL 4217146, at *5–6.

Third, Hess argues that *In re T.H.* established that registration requirements for juvenile offenders are excessive in relation to their non-punitive purpose, because of "the low likelihood of recidivism among juvenile sex offenders." *See* Def's Br. at 43–45. Here, too, there are profound problems with *In re T.H.*'s analysis on this factor, which will be discussed later. For now, consider three responses. First, Hess was *already* a recidivist sexual offender—he had committed acts of sexual abuse against at least two young girls, at least twice *each*, and he had committed many of those acts of sexual abuse after reportedly feeling shame and remorse about *prior* acts of sexual abuse. *See* PSI (11/24/20) at 14; C-App. 56; Minutes (8/2/18) at 19–21; C-App. 22–24; Add'l Minutes (8/26/20) at 24–26; C-App. 64–66; Def's Ex. A, at 3–4; C-App. 69; Sent.Tr. 71:11–72:20; *accord* Sent.Tr. 140:14–20 ("It wasn't a one-time lapse in judgment. It was a series of offenses with multiple victims."). Second, the record showed Hess was a much higher risk to reoffend than an average juvenile sex offender. *See* PSI (11/24/20) at 11; C-App. 53; Sent.Tr. 17:6–24:15; Sent.Tr. 84:7–85:1. Third, while "fit" is the most important factor in the *Mendoza-Martinez* analysis, it is not solely determinative. As such, the sentencing court could find *In re T.H.* was distinguishable, even without findings on this factor.

If this Court wants to let *In re T.H.* stand, this is how to do it. The sentencing court found *In re T.H.* was distinguishable, for most of the reasons identified in *Aschbrenner*. *See* Sent.Tr. 145:10–147:2. That ruling makes sense, as applied to a judgment of conviction for a juvenile offender in criminal court who reached the age of majority before entry of that judgment. For that offender, there is no element of public shaming because the proceedings are already public record, and restrictions that may limit their opportunities to interact with children do not deprive them of age-appropriate socialization with peer groups (other adults). Hess's brief does not engage with that ruling or identify any error in it. This Court could affirm that ruling and stop there.

E. *In re T.H.* was wrongly decided and should be overruled. Sex-offender registration under chapter 692A is never a punishment.

In re T.H. was correct that "the legislative intent behind our current sex offender statute remains protective and nonpunitive." *See In re T.H.*, 913 N.W.2d at 588; *accord Seering*, 701 N.W.2d at 667 (citing *In re S.M.M.*, 558 N.W.2d 405, 406 (Iowa 1997)) (noting intent of chapter 692A was "to protect the health and safety of individuals, especially children, not to impose punishment"). It was also correct to identify the *Mendoza-Martinez* factors as the next step in the analysis:

> [W]e also consider whether the effects and impact of chapter 692A on juveniles is sufficiently punitive to render the scheme penal in nature. In this inquiry, we are guided by the *Mendoza-Martinez* factors, which consider whether **(1)** "the sanction involves an affirmative disability or restraint," **(2)** "it has historically been regarded as a punishment," **(3)** "it comes into play only on a finding of scienter," **(4)** "its operation will promote the traditional aims of punishment—retribution and deterrence," **(5)** "the behavior to which it applies is already a crime," **(6)** "an alternative purpose to which it may rationally be connected is assignable for it," and **(7)** "it appears excessive in relation to the alternative purpose assigned."

In re T.H., 913 N.W.2d at 588 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)); *accord Seering*, 701 N.W.2d at 667–68 (examining these factors as "helpful guides to determine if a statute has a punitive effect, so that the regulatory scheme under the statute intended . . . to be nonpunitive nevertheless imposes . . . punishment"). And it even analyzed four of those seven factors correctly—but those were not the factors that led it to depart from Iowa precedent.

(3) On scienter, *In re T.H.* correctly noted that chapter 692A can trigger without a finding of scienter—unlike registry requirements in some other states. *See In re T.H.*, 913 N.W.2d at 592 (citing *In re Nick H.*, 123 A.3d 229, 244 (Md. Ct. Spec. App. 2015)). It was correct enough to find that "the lack of a scienter requirement weighs in favor, albeit marginally, of finding the statute nonpunitive." *See id.*

(4) On whether chapter 692A's registration requirements promote retribution and deterrence (traditional aims of punishment), *In re T.H.* correctly found that any retributive or deterrent effects of sex-offender registration were merely incidental to the regulatory and non-punitive purpose, and that "requiring juvenile offenders to abide by exclusion zones and employment restrictions directly promotes the civil objective of . . . reducing the opportunities for juveniles who have committed aggravated sexual offenses to reoffend." *See id.* at 593–94. Again, this "weighs in favor of finding the statute nonpunitive." *See id.*

(5) On whether sex-offender registration requirements apply to behavior that is already criminal, *In re T.H.* correctly observed that a conviction for a sex offense would be "a necessary beginning point, for recidivism is the statutory concern." *See id.* at 594 (quoting *Smith v. Doe*, 538 U.S. 84, 105 (2003)) "When reducing recidivism is the nonpunitive goal, using conviction of a sexual offense" to identify the group of people whose conduct should be regulated to reach that goal cannot provide strong evidence of punitive purpose or punitive effect; rather, it is "a natural and nonsuspect means of achieving that goal." *See id.* It was odd that *In re T.H.* gave any weight to this factor at all, after saying all that. But weighing it "only slightly" is correct enough.

(6) On whether the sex-offender registration requirement is rationally related to nonpunitive purposes, *In re T.H.* was correct to find that "[m]andatory registration for juveniles who have committed aggravated sexual offenses clearly has a rational connection to the nonpunitive goal of protecting the community, especially children, from subsequent sexual offenses"—which meant this was yet another factor that "weighs in favor of finding the statute nonpunitive." *See id.*

But: The first problem with *In re T.H.* is that, when it got to the balancing test at the end, it discarded everything that it had just said in analyzing those four factors that it had gotten right. All it said was:

> *h. Balancing*. Considering all of the *Mendoza-Martinez* factors, we conclude that mandatory sex offender registration for juvenile offenders is sufficiently punitive to amount to imposing criminal punishment. The statute imposes an affirmative restraint akin to supervised probation. It mandates the mass dissemination of offender records that are historically kept confidential to promote the juvenile's potential for rehabilitation. And the sheer number of restrictions imposed on juveniles, given the demonstrated low juvenile recidivism rate, is excessive in light of the civil purpose of preventing multiple offenses.

Id. at 596. Of course, "balancing" implies a qualitative judgment—but this "balancing" did not even *mention* the other factors that weighed in favor of a non-punitive effect. It is not "balancing" to load one side of the scale and remark on its weight—the entire point is *comparison*.

The bigger problem—and the thrust of the State's critique—is that *In re T.H.* assigned outcome-determinative weight to three factors based on its incorrect analysis of those factors, earlier in the opinion. The State will address each factor, in order of ascending importance.

1. Sex-offender registration has always imposed an affirmative restraint, but only a minimal restraint that protects the public. That restraint is not and has never been akin to supervised probation.

Before *In re T.H.*, the Iowa Supreme Court had recognized that sex-offender registration does impose some affirmative restraint or disability—but not to a degree that it rises to the level of punishment.

> The evidence in the case illustrates the difficulty that can result from the residency restrictions in obtaining housing in some communities of the state. These restrictions clearly impose a form of disability. Yet, the disabling nature of the statute is not absolute. Moreover, we are mindful of the objectives of the residency restriction under the statute and understand that a statute that imposes some degree of disability does not necessarily mean the state is imposing punishment.

Seering, 701 N.W.2d at 668 (citing *Smith*, 538 U.S. at 100); *cf. State v. Pickens*, 558 N.W.2d 396, 399 (Iowa 1997) (holding that required dissemination of public information was not an affirmative disability and did not rise to level of punishment). Chapter 692A was amended in 2009 "to more closely conform Iowa's sex offender registry law to the Federal Sex Offender Registration and Notification Act (SORNA)."

See Maxwell, 903 N.W.2d at 185 n.4. Most federal courts have found SORNA does not impose an affirmative disability or restraint that rises to the level of punishment. *See, e.g.*, *Aschbrenner*, 926 N.W.2d at 249 n.2 & n.3 (collecting cases). Moreover, "[t]he pre-2009 version of chapter 692A" that Iowa courts repeatedly upheld as non-punitive "had more severe residency restrictions" than the current version of chapter 692A that applies to Hess. *See State v. Showens*, 845 N.W.2d 436, 440–41 (Iowa 2014); *accord Wright v. Iowa Dept. of Corrections*, 747 N.W.2d 213, 218 (Iowa 2008) (rejecting a claim that chapter 692A residency restrictions were punishment because Wright was "still free to engage in most community activities and free to live in areas not covered by the residency restrictions"); *Seering*, 701 N.W.2d at 668.

In re T.H. proclaimed that "the statutory scheme, which requires in-person check-ins, employment conditions, and the possibility of electronic monitoring, is strikingly similar to supervised probation." *See In re T.H.*, 913 N.W.2d at 589. That was false. None of those are like supervised probation, even taken together. And none of them are otherwise significant enough as restraints or disabilities to enable a finding that sex-offender registration requirements are punitive. The State will address those features, then compare them to probation.

In re T.H. placed the most emphasis on the requirement that offenders appear in-person to update information and for periodic check-ins. It distinguished *Smith* by noting that chapter 692A requires a Tier III offender to "appear in person *every three months* to verify their residence, employment, and school." *See In re T.H.*, 913 N.W.2d at 588–89. But this is very thin gruel. "Appearing in person may be more inconvenient, but requiring it is not punitive." *See United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011); *accord United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013); *cf. Litmon v. Harris,* 768 F.3d 1237, 1242–43 (9th Cir. 2014) (rejecting claim that California registration requirements were ex post facto punishment, and noting that it requires offenders to appear/register in-person every 90 days).

Sometimes, a disability or restraint is assessed by whether that particular feature is excessive in relation to its non-punitive purpose. *See, e.g.*, *Miller*, 405 F.3d at 720–21. Here, requiring in-person appearances is reasonable and is not excessive.

> 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.

United States v. Parks, 698 F.3d 1, 6 (1st Cir. 2012); *accord State v. Petersen-Beard*, 377 P.3d 1127, 1136 (Kan. 2016); *Kammerer v. State*, 322 P.3d 827, 836–37 (Wyo. 2014). *In re T.H.* was quick to seize on a potential basis for distinguishing *Smith*, but it failed to identify *why* occasional in-person appearances should be considered punitive—nor did it reckon with the vast weight of persuasive authority that rejected attempts to distinguish *Smith* on that basis. *See, e.g.*, *Shaw v. Patton*, 823 F.3d 556, 568–69 (10th Cir. 2016) (collecting other cases holding "that in-person reporting requirements are not considered punitive"); *accord Aschbrenner*, 926 N.W.2d at 249 n.2 & n.3 (collecting cases).

In re T.H.'s reliance on employment conditions as a mark of an affirmative disability or restraint is similarly untenable. A flat ban on employment in certain occupations is generally not considered to be an affirmative restraint or disability, for the purposes of this analysis. *See Smith*, 538 U.S. at 100 (collecting cases that considered "sanctions of occupational debarment, which we have held to be nonpunitive"); *cf. ACLU of Nev. v. Masto*, 670 F.3d 1046, 1056–57 (9th Cir. 2012) (determining that requirement of quarterly in-person reporting and fingerprinting is still not an affirmative disability or restraint because "the burden remains less onerous than occupational debarment").

Additionally, most exclusion zones and employment conditions only apply to registrants who were "convicted of a sex offense against a minor." *See* Iowa Code §§ 692A.113, 692A.114(1)(c). That is not an enhanced punishment—if it were, a victim's minor status would always need to be proven beyond a reasonable doubt, to the finder of fact in a criminal prosecution. *See Alleyne v. United States*, 570 U.S. 88 (2013). Because those requirements are not punishment, they can be triggered by administrative determination—either from existing records, or after a contested-case hearing. *See Kruse*, 712 N.W.2d at 699; *id.* at 701 n.3 (citing Iowa Admin. Code r. 661—83.3(4), renumbered as 83.3(5)).

As for the possibility of electronic monitoring, *In re T.H.* did not recognize critical limitations in the pertinent statute:

> 1. A sex offender who is placed on probation, parole, work release, special sentence, or any other type of conditional release, may be supervised by an electronic tracking and monitoring system in addition to any other conditions of supervision.
>
> 2. The determination to use electronic tracking and monitoring to supervise a sex offender shall be based upon a validated risk assessment approved by the department of corrections, and also upon the sex offender's criminal history, progress in treatment and supervision, and other relevant factors.

Iowa Code § 692A.124(1)–(2). Note that electronic monitoring is only available if an offender is *already on* supervised conditional release—

this does not make it possible to use electronic monitoring to supervise a sex offender who is not already subject to supervision. This cannot make registration "akin to probation"—it can only supplement some *other* existing supervision that is already "akin to probation" (at least). And more importantly, electronic monitoring is only available upon an individualized assessment of risk, progress, and other relevant factors. *See State v. Coleman*, 907 N.W.2d 124, 136 (Iowa 2018) (noting that "section 692A.124 provides for electronic tracking and monitoring if necessary based upon a risk assessment of the offender's background and other safety factors"). So this monitoring can *only* occur if there is an individualized finding that it furthers a non-punitive safety interest.

Even taken together, this is not "akin to probation." In *Jepsen*, the Iowa Supreme Court found that a defendant who served part of a term of probation as an illegal sentence (because the only statutorily authorized sentence was non-suspended incarceration) had to receive one-for-one credit for each day spent on probation, as "time served." *See State v. Jepsen*, 907 N.W.2d 495, 502–04 (Iowa 2018). It clarified that probation was punishment, and it explained why—which included cataloguing some of the conditions of Jepsen's probation:

> Probation is a set of conditions exacted by a court of law as a consequence for the defendant's criminal conduct.

> Even though it is not the most restrictive means of punishment, the liberty of a probationer is nevertheless affirmatively restrained throughout the term of probation. Jepsen, for example, was ordered to complete a cognitive empathy course and "maintain gainful and full-time employment at a lawful occupation unless excused by [a] probation officer for schooling, training, or other acceptable reasons." If Jepsen's probation officer deemed it necessary, Jepsen would be required to enter a "Residential Treatment Facility (and follow all rules of said facility and successfully complete the program)." Jepsen was also ordered to register as a sex offender, obtain a sex offender evaluation, and comply with "any and all sex offender treatment." The requirements associated with the sex offender registry are substantial. [Footnote citing Iowa Code §§ 692A.104, 692A.111, 692A.113, 692A.114, 692A.121 omitted.] Finally, Jepsen was ordered to "participate in any other programs deemed necessary for his rehabilitation by his probation officer." On top of these specific mandates, Jepsen was required to abide by all of the general probation requirements, including regular meetings with his probation officer.

See id. at 502. This is far more extensive supervision than would be required from the sex-offender registry requirement, alone—and there are more *affirmative* obligations that appear aimed at rehabilitation, rather than prohibitions/exclusion that relate to public safety. Also, note that Jepsen was convicted of third-degree sexual abuse—so he was already required to register as a sex offender. *See id.* at 497–98. The fact that complying with sex-offender registration requirements was *also* included as a condition of probation helps to illustrate how probation is punitive, and sex-offender registration is non-punitive.

Standing alone, violating registry requirements is a *new* offense. The harm is the danger to the community from violating regulations that are meant to close off opportunities for sexual reoffending; penalties escalate for serious or repeated violations. *See* Iowa Code § 692A.111. Sex-offender registration requirements do not operate as punishment for the triggering conviction—they only regulate future conduct, and the only penalty for any violation or noncompliance is a punishment for *that act* that subverted the non-punitive public safety interest. But probation, by contrast, looks *backward* at an underlying conviction to set individualized conditions of probation.[3] And upon revocation, the court imposes the *original* punishment for the underlying conviction—not because violating conditions of probation necessarily endangered the public, but because it shows that probation with those conditions cannot effectively rehabilitate the defendant or protect the community (because the defendant cannot or will not comply), which means that less lenient and more effective punishment must be imposed *instead*. *See generally State v. Covel*, 925 N.W.2d 183, 187–88 (Iowa 2019).

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[3] *See, e.g.*, *Lathrop*, 781 N.W.2d at 299 (quoting 21A AM. JUR. 2D *Criminal Law* § 846, at 33–34) ("A condition of probation which requires or forbids conduct which is not itself criminal is valid [only] if that conduct is reasonably related to the crime of which defendant was convicted or to future criminality.").

Compliance with registry requirements is only ever cross-referenced as a condition of probation because chapter 692A serves a very different, non-punitive purpose on its own. Like any non-punitive consequence, it can be specified as a condition of probation when appropriate, and *then* it becomes part of the punishment for the offense—which is why *Jepsen* mentioned it. *See Jepsen*, 907 N.W.2d at 502. But without a condition of probation that incorporates it, sex-offender registration remains regulatory and non-punitive—both in purpose and in effect. *Jepsen* illustrates that probation entails a much more comprehensive and pervasive form of supervision than sex-offender registration, with a wide range of affirmative restraints. And even when registration is cross-referenced as a condition of probation, chapter 692A still serves a distinct, forward-looking, regulatory and non-punitive purpose.

The Kansas Supreme Court has noted other key differences between probation and sex-offender registration requirements:

> 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.

Petersen-Beard, 377 P.3d at 1137. Similarly, the Tenth Circuit held that Colorado's sex-offender registration requirements—which included in-person reporting and disclosure of internet identifiers—were not akin or analogous to probation because "[a]ny monitoring capability stemming from these requirements falls short of the 'far more active' role law enforcement plays in a probationer's life, such as mandating employment, requiring consent before moving or changing jobs, and forbidding drug and alcohol use." *See Millard v. Camper*, 971 F.3d 1174, 1182–83 (10th Cir. 2020) (quoting *Shaw*, 823 F.3d at 564–65). And other courts have echoed the observation that sex offenders are often required to provide *notice* of changes—which is different from probationers, who must usually get *consent* from probation officers to change employment or residence. *See, e.g.*, *Under Seal*, 709 F.3d at 265 ("SORNA does not prohibit changes, it only requires that changes be reported."); *accord In re Justin B.*, 747 S.E.2d 774, 780 (S.C. 2013).

In re T.H. ignored the realities of sex-offender registration (and of probation) when it asserted that registration is "akin to probation." *See In re T.H.*, 913 N.W.2d at 588–89. It is not. None of the features

that *In re T.H.* cited as support for that conclusion are things that can actually amount to a significant affirmative restraint or disability, for the purpose of this analysis. This factor does not support the result that *In re T.H.* used it to reach.

2. Records of registered sex offenders are not made public in a way that resembles shaming, branding, or any other punishment—even for juveniles.

To find that sex-offender registration for juvenile adjudications was punishment, *In re T.H.* started from the premise that records for any juvenile offender/delinquent are typically confidential or sealed, and are only made public upon a finding that the juvenile is "in need of punishment and beyond rehabilitation." *See id.* at 589–92. But that premise is incorrect. When records for a juvenile become public as a result of transfer, denial of reverse waiver, or operation of some other provision of law, that is not punishment, nor does it require a finding that the juvenile offender is "beyond rehabilitation." *See, e.g.*, *Crooks*, 911 N.W.2d at 163–64 (explaining "[w]aiver of a child for prosecution as a youthful offender [under section 232.45(7)] is not a decision to abandon efforts to rehabilitate the child"); Iowa Code § 232.45(6)(c) (instructing district courts to consider whether reverse waiver is "in the best interests of the child and the community"). When a juvenile

commits a delinquent act that would qualify as a forcible felony, any related records are *presumptively* public; they can only be sealed or made confidential upon certain findings about the best interests of the offender and the public. That analysis is unrelated to culpability or rehabilitation. *See* Iowa Code §§ 232.147(4), 232.149A, 232.150. And neither culpability nor the need for retributive punishment are factors in making decisions about transfer or reverse waiver. *See, e.g.*, Iowa Code §§ 232.8(1), 232.45(6)(c) & (8), 803.5(5), 803.6(4). There is no situation where an Iowa court would order that records should become public (or take any other action that would cause that result) because a juvenile deserves punishment, rather than rehabilitation. That means *In re T.H.* was incorrect to find that public availability of records of delinquency/conviction is punitive for juveniles because it occurs when they are "deemed to be deserving of punishment, rather than rehabilitative services"—that is a demonstrably false premise with no support in Iowa law. *See In re T.H.*, 913 N.W.2d at 589–91.

A better approach is to recognize that presumptive public access to records is a clear sign that public dissemination is non-punitive.

> 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."

N.R., 2021 WL 4217146, at *5–6 (quoting *Smith*, 538 U.S. at 101); *accord State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306 P.3d 369, 384 (Nev. 2013) (rejecting argument that public availability of juvenile's sex-offender registration records made registration punitive because "juvenile sex offender records were available to the public" through other non-punitive means, "albeit in limited circumstances").

The rest of *In re T.H.*'s discussion of this factor was aimed at distinguishing *Smith* because more people use the internet now than when *Smith* was decided in 2003. *See In re T.H.*, 913 N.W.2d at 591. This implies that the legislature could pursue a non-punitive objective of making sex-offender registration records available to Iowans who wanted to check them—but if it *succeeds* in doing so, that is punitive. This makes no sense. "[D]issemination of information relating to a registrant's status as a sex offender may have negative consequences for the registrant," but that is "a necessary consequence of the Act's intent to protect the public from harm." *See Kammerer*, 322 P.3d at 834–36. And nothing in *Smith* has become less valid over time. This

is still a repository of information, like an archive of records—rather than something analogous to stocks in the public square, like a page with hecklers "posting comments underneath [an offender's] record." *See Smith*, 538 U.S. at 99. The principal effect of the registry web site is still "to inform the public for its own safety, not to humiliate." *See id.* Dissemination of accurate information regarding sex offenders cannot become punitive simply because modern technology enables the State to succeed in accomplishing that objective. And even with the benefit of widespread public internet access, this system is still "a passive one: An individual must seek access to the information." *See id.* at 104–05; *accord* Iowa Code § 692A.121(13) (noting that notifications "shall be available by free subscription" and specifying that certain options for notification shall be available "if selected by a subscriber").

Any "public humiliation" that may occur is only a byproduct of legitimate endeavors to inform Iowa residents that a sex offender may present a specific danger that warrants certain precautions. *See Masto*, 670 F.3d at 1055–56. "Widespread public access is necessary for the efficacy of the scheme" to offer that information, and any impact on the offender "is but a collateral consequence of a valid regulation." *See Smith*, 538 U.S. at 99. *In re T.H.* was incorrect to call that punitive.

3. The "demonstrated low juvenile recidivism rate" is still far greater than the background rate of sexual offenses among the general population. Mandatory initial registration (with potential for future modification) is not excessive in relation to that significant risk of recidivist sexual offending.

The final *Mendoza-Martinez* factor is "whether the regulatory means chosen are reasonable in light of the nonpunitive objective," or whether those regulatory means "are so excessive as to cross the line from a civil regulation to a criminal punishment." *See In re T.H.*, 913 N.W.2d at 594 (first excerpt quoting *Smith*, 538 U.S. at 105). This is where *In re T.H.* relied on empirical research from outside the record of adjudicative facts, to conclude that "juvenile sex offenders exhibit drastically lower recidivism rates than their adult counterparts." *See id.* at 595–96.[4] That led it to conclude that "the primary justification for the sex offender registry—protecting the public from individuals especially prone to reoffending—is substantially diminished with respect to juvenile offenders." *See id.* at 596. But that recidivism rate is still quite high *compared to non-offenders*, and high enough that mandatory initial registration is still not excessive and non-punitive.

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[4] The dissent pointed out that the majority opinion had relied on a report from the Iowa DHR, but had not "accurately" described what the report said about research on juvenile sex-offender recidivism. *See In re T.H.*, 913 N.W.2d at 609–10 (Mansfield, J., dissenting in part).

In re T.H. was not entirely incorrect: empirical research tends to calculate/estimate sexual recidivism rates for juvenile sex offenders somewhere in the range from 4% to 14%. Dr. Rosell testified that the "base rate" for sexual re-offense for juvenile sex offenders in Iowa was approximately 7%, at 40 months. *See* Sent.Tr. 35:12–40:7. A survey of relevant empirical research found "observed sexual recidivism rates of juveniles who commit sexual offenses range from about 7 percent to 13 percent after 59 months, depending on the study." *See* Christopher Lobanov-Rostovsky, *Recidivism of Juveniles Who Commit Sexual Offenses*, in SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE at 251–61 (updated Mar. 2017), *available at* https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/somapi_full_report.pdf. The report from the Iowa Department of Human Rights that was cited in *In re T.H.* described empirical studies that had found sexual re-offense rates for juvenile sex offenders that ranged from as low as 4%, to as high as 14%. *See* Div. of Criminal & Juvenile Justice Planning, Iowa Dep't of Human Rights, *Iowa Sex Offender Research Council Report to the Iowa General Assembly* 12 (2013), *available at* https://humanrights.Iowa.gov/sites/default/files/media/SORC_1-15-13_Final_Report_%5B1%5D.pdf. It seems likely that the true rate

of sexual recidivism for juvenile sex offenders in Iowa is somewhere in that 4% to 14% range. It also seems likely that it is somewhat lower than the sexual recidivism rate for adult sex offenders. *See id.* at 13 (discussing meta-analyses that found overall sexual re-offense rates of 13% across 61 studies, and 14% across 73 studies).

But does that mean that sex-offender registration requirements are *excessive*, in relation to that risk of sexual re-offense/recidivism? That same report noted that there were approximately 440 offenders convicted of sex offenses in Iowa in each of the few years preceding the report (and approximately 120 juveniles who were adjudicated delinquent for potentially qualifying offenses in each of those years). *See id.* at 6, 8. Just over 3,000,000 people live in Iowa; that includes about 2,300,000 adults. *See* https://www.census.gov/quickfacts/IA. The odds that an Iowan adult, chosen at random, would be one of the 440 who are convicted of a sex offense in a given year: about 0.0019% (or 440 divided by 2,300,000). Dr. Rosell stated that an Iowa juvenile who is convicted of a sex offense has, on average, about a 7% chance of committing another sex offense in the next 40 months. *See* Sent.Tr. 35:12–40:7. Divide by 40 and multiply by 12 for a yearly rate: 2.1%—or about *1,000 times* the estimated background rate for sex offenses.

In other words, an Iowan who has recently committed a sex offense as a juvenile offender is approximately 1,000 times more likely to commit a sexual offense in the next few years than a randomly selected adult. Focusing preventative regulatory efforts on that particular population is not excessive or irrational, by any stretch of the imagination.

There is also an inherent problem with using data that shows relatively low sex-offender recidivism rates during recent years—with chapter 692A and SORNA in effect—to argue that there was never any real need for sex-offender registration requirements, in the first place. That is an argument for "throwing away your umbrella in a rainstorm because you are not getting wet." *See Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting). That same data may just be showing that registration *works*, as intended and as anticipated. *See, e.g.*, *Seering*, 701 N.W.2d at 670 ("Experts from both sides agreed that the mere opportunity to reoffend was often a key component of an offender's decision to reoffend."); Sent.Tr. 53:20–55:3 (testifying that requiring juvenile sex offenders to register for initial period after conviction is effective at reducing sexual re-offense and recidivism).[5]

[5] Hess cites a study that shows that sex offender registration has no *general* deterrent effect on juveniles—that is, it does not appear to deter juveniles before they commit their initial qualifying sex offenses.

Moreover, sex offenses are not a negligible harm, such that the benefits of preventing some sexual victimization might be outweighed by burdens on those offenders who would choose not to re-offend in the absence of any restrictions or community notification measures. At Hess's sentencing, one victim's stepmother found herself unable to describe the full impact of Hess's abuse: "The emotional damage that this child has received is beyond anything I can describe to you." *See* Sent.Tr. 123:7–11. The description that she *could* give included "severe trust issues [and] mental health issues," and she said that their family was "continuously in counseling and therapy." *See* Sent.Tr. 122:12–21. Sexual victimization often produces that kind of long-lasting anguish. *See, e.g.*, *State v. Walker*, 935 N.W.2d 874, 880 (Iowa 2019) (noting that "[t]he emotional and psychological injuries" from sexual abuse "may linger longer than the physical injuries"); *State v. Oliver*, 812 N.W.2d 636, 651 (Iowa 2012) (quoting victim impact statement); *In re D.D.*, 955 N.W.2d 186, 199 (Iowa 2021) (Christensen, C.J., concurring)

See Def's Br. at 84–85 (citing Elizabeth J., Loterneau et al., *Juvenile Registration and Notification Policy Effects: A Multistate Evaluation Project* 31 (2018), *available at* https://www.ojp.gov/pdffiles1/ojjdp/grants/251494.pdf. That study noted that it did not have data to test a hypothesis on registration's effect on juvenile sexual recidivism. *See* Loternaeu et al., *Project*, at 12 ("[T]he available data do not permit comparing state policies with respect to their impact on recidivism.").

("D.D. described her sexual abuse by stating, '[I]t makes my body feel like it's getting stabbed in the heart.'"); *cf. Wade*, 757 N.W.2d at 625–26 (collecting authority that recognizes "[t]he State has a strong interest in protecting its citizens from sex crimes").

Courts considering similar arguments about recidivism rates mostly reach the right conclusion: that "a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community." *See Masto*, 670 F.3d at 1057; *accord Hope v. Comm'r of Indiana Dep't of Correction*, 9 F.4th 513, 534 (7th Cir. 2021) (quoting *Vasquez v. Foxx*, 895 F.3d 515, 522 (7th Cir. 2018)) (rejecting similar challenge on excessiveness and explaining that "[s]imilar recidivism rates across different categories of crime would not establish that the nonpunitive aim of this statute—protecting children—is a sham"); *People v. Pepitone*, 106 N.E.3d 984, 992–93 & n.3 (Ill. 2018) (noting that whether sexual recidivism rates in 5%-to-25% range are "low or high" is "subjective," and finding that is a complex policy and value judgment that is best left to legislature); *cf. United States v. Kebodeaux*, 570 U.S. 387, 395–96 (2013) (noting "conflicting evidence" on sex-offender recidivism rates, but Congress may still conclude "safety needs justify postrelease registration rules").

Mandatory initial registration is made even less excessive by the subsequent availability of modification: Tier I offenders can apply for modification after two years; Tier II and Tier III offenders can apply after five years. *See* Iowa Code § 692A.128; *cf. Fortune v. State*, 957 N.W.2d 696, 704–07 (Iowa 2021) (holding modification is within the discretion of the district court when statutory requirements are met, and it "should consider only those factors that bear on whether the applicant is at low risk to reoffend and there is no substantial benefit to public safety in extending the registration requirements" for "the individual applicant"). It is not excessive in relation to the compelling non-punitive interest—preventing sex offenses and victimization—to require all convicted sex offenders to register for some initial period, and then make individualized decisions about modification *later*, with the benefit of information about each offender's post-release conduct that can enable a court to determine if it is safe to remove *that offender* from the registry. *See Commonwealth v. Lacombe*, 234 A.3d 602, 626 (Pa. 2020) (noting its "excessiveness concerns" were alleviated by "a removal mechanism for lifetime registrants"); *cf. Doe v. State*, 111 A.3d 1077, 1100–01 (N.H. 2015) (noting state registry would not be punitive "[a]bsent the lifetime-registration-without-review provision").

Even if the rate of sexual recidivism for juvenile sex offenders in Iowa is between 4% and 14%, mandatory initial registration is *still* not excessive in relation to non-punitive safety interests. That rate is still about 1,000 times higher than the background offense rate, and that justifies mandatory initial registration for every offender in that group that presents a disproportionate risk of future sexual victimization, as a preventative regulatory measure. Preventing sexual victimization is a compelling non-punitive interest. And the subsequent availability of modification ensures that the actual length of a required registration does not become excessive in relation to the recidivism risk presented by each individual offender. *See Fortune*, 957 N.W.2d at 705 (quoting *Iowa Dist. Ct.*, 843 N.W.2d at 84) (noting section 692A.128 "balances the registry's protective purpose with . . . an individual's interest in removal from the registry when appropriate"). Thus, *In re T.H.* was wrong to find that mandatory initial registration for sex offenders is excessive in relation to that non-punitive public-safety interest, and it was wrong to assign punitive weight on this critical factor.

4. *In re T.H.* imposes unnecessary burdens and should be overruled sooner, rather than later.

The pragmatic consequences of *In re T.H.* create an impetus for this Court to overrule it, at the earliest opportunity. For starters, if a

juvenile sex offender reaches adulthood and moves to Iowa, requiring that person to register might impose *ex post facto* punishment—and no matter the result, litigating those claims will burden Iowa courts. *See, e.g.*, *Hope v. Comm'r of Indiana Dep't of Correction*, 984 F.3d 532 (7th Cir. 2021), *vacated and reversed on rehearing en banc*, 9 F.4th at 519 (summarizing recent Indiana caselaw as "prohibit[ing] retroactive application of [Indiana] SORA to offenders convicted before its enactment unless the marginal effects of doing so would not be punitive," and considering petitoner's equal-protection challenge "to treat[ing] similarly situated offenders differently based solely on whether an offender had an out-of-state registration obligation").

Additionally, if a registration requirement is "punishment" in certain cases, that means that DPS must maintain different versions of registry requirements and restrictions for different sex offenders, depending on which edition of the Iowa Code applied to each of their qualifying offenses. Even for a single offender, that can be difficult—Hess points out that the offense date for his sex offenses is uncertain, and that makes it difficult to know which edition of the Code applies. *See* Def's Br. at 60 n.5. And this becomes more burdensome for DPS as time goes on, with each subsequent amendment to chapter 692A.

As long as *In re T.H.* stands, "a juvenile can no longer be subjected to a new or different registration requirement enacted after his or her underlying conviction." *See In re T.H.*, 913 N.W.2d at 610 (Mansfield, J., dissenting). That entails inconsistent requirements for offenders who were convicted at different times. Even if new research identifies better ways to manage recidivism risk, all requirements for offenders convicted for sex offenses that they committed as juveniles are frozen at the moment of conviction, and DPS (and local sheriffs) will have to administer different versions of registry requirements, in perpetuity.

Overruling *In re T.H.* now will also minimize whiplash effects. With every year that passes, it becomes more burdensome to comply with *In re T.H.*—and it also becomes more burdensome to overrule it. Any juvenile sex offenders who are adjudicated under *In re T.H.* will need to know if they become subject to new registration requirements each time chapter 692A is amended; if it becomes non-punitive, they will lose the windfall exemption that *In re T.H.* granted. And when *In re T.H.* is eventually overruled, all registration requirements for those offenders will snap back into place. The longer that takes, the more offenders will be affected—and the more burdensome it will be for those offenders, for DPS, for local sheriffs, and for Iowa courts.

To summarize: *In re T.H.* was wrong in a number of ways that caused it to assign punitive weight in the *Mendoza-Martinez* analysis, when it should have assigned non-punitive weight. It was wrong to find registration was a significant affirmative disability or restraint—it is not "strikingly similar to supervised probation." *See In re T.H.*, 913 N.W.2d at 589. It was wrong to assert that offense records only typically became public when juveniles were "deemed to be deserving of punishment, rather than rehabilitative services," and it was wrong to hold that the non-punitive interest in keeping all Iowans informed about the risks posed by sex offenders in their communities *became* punitive when DPS became able to succeed in advancing that interest, by using a website. *See id.* at 589–91. And it was wrong to proclaim that mandatory initial registration was clearly excessive in relation to the level of recidivism risk—which, even if it really is as low as 4%, is still much higher than the background sexual-offense rate and is still high enough to warrant these preventative regulatory restrictions, to further compelling interests in protecting Iowans from sexual abuse. This Court should act now, before adverse consequences accumulate—it should seize this opportunity to set the bone while the break is fresh. *In re T.H.* was wrongly decided, and this Court should overrule it.

F. Even if a sex-offender registration requirement counts as punishment, it is not cruel and unusual.

Hess builds to a cruel-and-unusual punishment challenge. *See* Def's Br. at 56–86. Even if registration requirements are punishment, Hess's challenge still fails. He is incorrect to claim that his challenge stands on a better record than the challenge in *Graham*—here, too, "no record was developed before the district court on the impact" of the challenged provisions on Hess. *See* Def's Br. at 75–76 (discussing *Graham,* 897 N.W.2d at 489). Nor is there any record on the impact of the provision that Hess claims is the most problematic: the period before eligibility for modification. *See* Def's Br. at 77–79 (citing Iowa Code § 692A.128(2)(a)). The availability of that modification after a certain period is enough to distinguish most cases that struck down *mandatory lifetime* sex offender registration for juveniles. *See, e.g.*, *Powell v. Keel*, 860 S.E.2d 344, 348–49 (S.C. 2021) (finding that "the initial mandatory imposition of sex offender registration" for juvenile offenders is constitutional, but holding that lack of "any opportunity for judicial review to assess the risk of re-offending" and end/modify registration requirements at any point during the offender's lifetime was unconstitutional because it "cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those

with a high risk of re-offending"); *State v. Boche*, 885 N.W.2d 523, 531–38 (Neb. 2016) (holding that lifetime registration and supervision were not cruel and unusual, even if mandatory for juvenile offenders, because freedom from incarceration and individualized consideration of conditions of supervision meant "there is no denial of hope").

In any event, Hess's challenge is foreclosed by *State v. Propps*, which held it is constitutional—even after *Lyle*—for the legislature to specify some minimum punishment for juvenile offenders, other than mandatory incarceration with mandatory ineligibility for parole. *See Propps*, 897 N.W.2d at 97–104. And *Graham* held mandatory parole under "the general framework of supervision provided" for parolees is not cruel and unusual when imposed on a juvenile offender, especially if the offender "may be relieved of parole obligations in the future." *See Graham,* 897 N.W.2d at 490–91. So this claim would still fail because release from incarceration with future opportunities for modification cannot be cruel and unusual punishment, even for juvenile offenders.

CONCLUSION

The State respectfully requests that this Court disavow and overrule *In re T.H.*, reject all of Hess's challenges, and affirm.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: December 14, 2021

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