Abstract— CONDITIONAL SUPPORT to HB 5502 Relating to the sex offender registration act

West Virginians for Rational Sexual Offence Laws (WVRSOL) is a West Virginia non-profit association and an affiliate of the National Association for Rational Sexual Offence Laws (NARSOL) **conditionally supports HB 5502** because (1) it aligns the West Virginia registry more closely with the "*Adam Walsh Child Protection and Safety Act of 2006*" (SORNA Substantial Implementation Review State of West Virginia, 2016) and (2) it provides for registry relief for a group of registrants not previously available.

Full support is conditioned on the following necessary changes to HB 5502:

I. Removal of the residency restriction, which is NOT supported by the "*Adam Walsh Child Protection and Safety Act of 2006*" (Sensenbrenner, 2006) nor the U.S. Department of Justice SMART Office's SORNA Substantial Implementation Review State of West Virginia. (SORNA Substantial Implementation Review State of West Virginia, 2016) To include such a provision would almost certainly lead to costly litigation, which has been decided unfavorably throughout the United States.

II. Removal of all references to the collection of DNA samples for registrants under a civil regulatory schema for registering only not related to a criminal conviction in WV.

III. Reclassification of certain offenses, which are currently classified as lifetime (aka AWA' *Tier III*') but which, according to the the "*Adam Walsh Child Protection and Safety Act of 2006*" (Sensenbrenner, 2006) should all be 25 years (aka AWA' *Tier II*'). This approach will permit the limited law enforcement resources to be directed at the more severe offenses.

IV. Addition of the 5-year "Clean Record" credit outlined in §115 of the "*Adam Walsh Child Protection and Safety Act of 2006*." (Sensenbrenner, 2006) This approach is consistent with federal law and will remove the less severe offenses from the list.

V. Update by striking the updating to registry change reporting requirements from "within 10 business days" to "within 3 business days," which does not make West Virginia NOT substantially compliant. (SORNA Substantial Implementation Review State of West Virginia, 2016)

VI. Update to §15-12-2 (d) to make the current requirement for the person forced to register of "…*provide or cooperate in providing at a minimum*…" more understandable, similar to the "Adam Walsh Child Protection and Safety Act of 2006" §114. (Sensenbrenner, 2006)

VII. Addition of exemptions from public display/access on the WV Registry of (a) 15 years (aka AWA "Tier1") category registrants and (b) 'juvenile sex offenders' who had not attained the age of 18 years at the time of their offense. Having 15 years (aka AWA "Tier1"), low-risk registrants on the public registry does not enhance public safety, nor does having 'juvenile sex offenders' visible/accessible on the public registry, as well as the moral implications it raises.

VIII. Updates to several highlighted items in the bill make it void for vagueness and require clarification, etc.

CONDITIONAL SUPPORT Response to HB 5502

Relating to the sex offender registration act

February 20, 2024

House Judiciary Committee:

West Virginians for Rational Sexual Offence Laws (WVRSOL) is a West Virginia non-profit association and an affiliate of the National Association for Rational Sexual Offence Laws (NARSOL), which advocates for society's segment that is adversely affected by the sex offender registry. We help families impacted by the registry, seek ways to maintain and improve public safety, recommend prudent use of state funding in this area, and work to ensure that proposed legislation is constitutional.

WVRSOL **conditionally supports HB 5502** because it aligns the West Virginia registry more closely with the "*Adam Walsh Child Protection and Safety Act of 2006*" (SORNA Substantial Implementation Review State of West Virginia, 2016).

Full support is conditioned on the following necessary changes to HB 5502:

I. Removal of the residency restriction, which is NOT supported by the "*Adam Walsh Child Protection and Safety Act of 2006*" (Sensenbrenner, 2006) nor the U.S. Department of Justice SMART Office's SORNA Substantial Implementation Review State of West Virginia. (SORNA Substantial Implementation Review State of West Virginia, 2016) To include such a provision would almost certainly lead to costly litigation, which has been decided unfavorably throughout the United States.
II. Removal of all references to the collection of DNA samples for registrants under a civil regulatory schema for registering only not related to a criminal conviction in WV.
III. Reclassification of certain offenses, which are currently classified as lifetime (aka AWA' *Tier III*') but which, according to the the "*Adam Walsh Child Protection and Safety Act of 2006*" (Sensenbrenner, 2006) should all be 25 years (aka AWA' *Tier II*'). This approach will permit the limited law enforcement resources to be directed at the more severe offenses.
IV. Addition of the 5-year "Clean Record" credit outlined in §115 of the "*Adam Walsh Child Protection and Safety Act of 2006.*" (Sensenbrenner, 2006) This approach is consistent with federal law and will remove the less severe offenses from the list.
V. Update by striking the updating to registry change reporting requirements from "within 10 business days" to "within 3 business days," which does not make West Virginia NOT substantially compliant. (SORNA Substantial Implementation Review State of West Virginia, 2016)
VI. Update to §15-12-2 (d) to make the current requirement for the person forced to register of "…*provide or cooperate in providing at a minimum*…" more understandable, similar to the "Adam Walsh Child Protection and Safety Act of 2006" §114. (Sensenbrenner, 2006)
VII. Addition of exemptions from public display/access on the WV Registry of (a) 15 years (aka AWA "Tier1") category registrants and (b) 'juvenile sex offenders' who had not attained the age of 18 years at the time of their offense. Having 15 years (aka AWA "Tier1"), low-risk registrants on the public registry does not enhance public safety, nor does having 'juvenile sex offenders' visible/accessible on the public registry, as well as the moral implications it raises.
VIII. Updates to several highlighted items in the bill make it void for vagueness and require clarification, etc.

I. **Support is conditioned on <u>removing</u> the residency restriction**, which is NOT supported by the "Adam Walsh Child Protection and Safety Act of 2006" (Sensenbrenner, 2006) nor a recognized shortfall to substantial compliance according to the *U.S. Department of Justice SMART Office's SORNA Substantial Implementation Review State of West Virginia* (SORNA Substantial Implementation Review State of West Virginia, 2016).

1. There is also no empirical evidence that the presence or distance restrictions make anyone safer. In fact, they do the opposite.
    a. In its decision, the Sixth Circuit Court of Appeals not only agreed but went on to declare that adding geographic exclusionary zones, among others, made Michigan's SORNA, post its 2006 and 2011 amendments, punishment and therefore could not be applied retroactively (Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016))
    b. Moreover, the Sixth Circuit Court of Appeals said that geographic exclusionary zones and in-person reporting requirements are onerous restrictions that are not supported by evolving research and best practices related to recidivism, rehabilitation, and community safety. (Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016))
    c. Additionally, Human Services professionals and nationally recognized experts on sexual abuse and sex offender legislation agree that distance restrictions are counterproductive. According to Gina Puls (Puls, 2016), residency restrictions, which prevent sex offenders from living within an established distance of various places where children gather, have created enormous hardship for released sex offenders as they attempt to reintegrate into society, and the effectiveness of these laws has increasingly been rejected.
2. Establishing presence or distance restrictions expands the use and impact of registry law in West Virginia. It invites litigation if passed as it transitions the WV registry from a "civil regulatory schema" into a "criminal punishment schema," which violates the Ex post facto clauses of the West Virginia and US Constitutions.
    a. Article III, Section 4 of the West Virginia Constitution prohibits "No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed." (West Virginia Constitution, n.d.) There is little doubt that this bill could be anything other than a retroactive increase in punishment, ex post facto, because it seeks to place retroactive restrictions and punishment on registrants who have completed their court-ordered sentences.
    b. WV §15-12-2 (a) makes the WV registry retroactively and prospectively adding a presence or distance restriction to the code, coupled with the above clause, would make the presence or distance restriction retroactive, and, as already established above would therefore transition the WV registry schema from a "civil regulatory schema" into a "criminal punishment schema," which violates the Ex post facto clauses of the West Virginia and US Constitutions.

        > Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him. (*Hensler v. Cross - West Virginia - Case Law - VLEX 895334483*, n.d.)

    c. Other jurisdictions have attempted to impose similar restrictions, only to have them stricken on constitutional grounds – most recently in Does v. Snyder, where the Sixth Circuit Court of Appeals determined Michigan's SORNA to be punishment and may not be applied retroactively. (Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016))

II. **Support is conditioned on <u>removing</u> all references to DNA sampling from registrants.**

1. Adding DNA sampling to §15-12-2 is unnecessary as WV code §15-2B-6 already codifies the collection of DNA samples upon conviction for registry offenses in West Virginia and those with equivalent offenses accepted from another state under any interstate compact or other reciprocal agreements.
2. Including DNA sampling to §15-12-2 would only impact people moving untethered to West Virginia who must register, i.e., not via a supervised interstate compact agreement or similar agreements—for these people, being forced to provide a DNA sample simply for registering invites litigation if passed as it transitions the WV registry from a "civil regulatory schema" into a "criminal punishment schema," which violates the Ex post facto clauses of the West Virginia and US Constitutions.
    a. Article III, Section 4 of the West Virginia Constitution prohibits "No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed." (West Virginia Constitution, n.d.) There is little doubt that this bill could be anything other than a retroactive increase in punishment, ex post facto, because it seeks to place retroactive restrictions and punishment on registrants who have completed their court-ordered sentences.
    b. WV §15-12-2 (a) makes the WV registry retroactively and prospectively adding a presence or distance restriction to the code, coupled with the above clause, would make the presence or distance restriction retroactive, and, as already established above would therefore transition the WV registry schema from a "civil regulatory schema" into a "criminal punishment schema," which violates the Ex post facto clauses of the West Virginia and US Constitutions.

> Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him. (*Hensler v. Cross - West Virginia - Case Law - VLEX 895334483*, n.d.)

III. **Support is conditioned on <u>reclassifying</u> the following offenses**, which are classified as lifetime (aka AWA' *Tier III*') but which, according to the the "*Adam Walsh Child Protection and Safety Act of 2006*" (Sensenbrenner, 2006), should all be 25 years (aka AWA' *Tier II*'):

1. §61-8A-1 et seq, §61-8B-9, §61-8B-11b, §61-8C-1 et seq, §61-8D-5, §61-8D-6, §61-8-12, §61-14-5(b), and §61-14-6(b) when the offense is NOT against a minor who has NOT attained the age of 12 years – these offenses should all be 25 years (aka AWA' *Tier II*') category when not committed against anyone not a minor who has NOT attained the age of 12.
2. §61-3C-14b and §61-14-6(a) – these offenses should all be 25 years (aka AWA' *Tier II*') category regardless.

Additionally, §61-8-A-9 (1st and 2nd offenses) and §61-8c-3a should be specifically called out as 15 years (aka AWA' *Tier I*'). Language needs to be added that specifies that all offenses where the sentencing judge made a written finding that the offense was sexually motivated and where the sentence is classified as a misdemeanor should be registerable as 15 years (aka AWA' *Tier I*').

IV. **Support is conditioned on the <u>addition</u> of the 5-year "Clean Record" credit outlined in §115 of the "Adam Walsh Child Protection and Safety Act of 2006"**

1. The "*Adam Walsh Child Protection and Safety Act of 2006*" provides a 5-year "clean record" reduction in registry requirements for Tier 1 (aka WV 15-year registrants) (Sensenbrenner, 2006) and needs to be added to HB 5502 and ultimately WV §15-12-2. This credit provision must be coded as automatic upon review without the registrant's request or court proceedings.
2. The "*Adam Walsh Child Protection and Safety Act of 2006*" provides a tier reduction for a "clean record" for Tier III (aka WV lifetime registrants) to Tier II (aka WV 25-year registration

(Sensenbrenner, 2006) and needs to be added to HB 5502 and ultimately WV §15-12-2. This credit provision must be coded as automatic upon review without the registrant's request or court proceedings.

V. **Support is conditioned on <u>striking</u> the updating to registry change reporting requirements from "within 10 business days" to "within 3 business days.**"

1. Changing the current registry update requirement from within 10 business days to within 3 business days does not make West Virginia NOT substantially compliant (SORNA Substantial Implementation Review State of West Virginia, 2016); however, it will cause many more technical registry violations, requiring judicial resources to process, in prison, and supervise post-release; and significant associated unnecessary costs.

VI. **Support is conditioned on <u>updating</u> §15-12-2 (d) to delineate registrant vs State registry items.**

1. The current language in §15-12-2 (d) requires the person forced to register to "*provide or cooperate in providing*" items they do not know of nor have control over. The language must be updated to make it more understandable by delineating between registrant and State responsibilities similar to the "Adam Walsh Child Protection and Safety Act of 2006" (Sensenbrenner, 2006) §114.
2. §15-12-2 (d) should be updated to delineate registry requirements that must be provided by the registrant and those that are the purview and must be provided by the State, similar to how the "Adam Walsh Child Protection and Safety Act of 2006" (Sensenbrenner, 2006) §114 delineates it.
3. As it stands today, registrants are expected to "*provide or cooperate in providing*" items not under their purview for which they have no means of providing, e.g.,
    a. Date of all arrests;
    b. Date of all convictions;
    c. Status of parole, probation, or supervised release; and
    d. Outstanding arrest warrants, etc.

VII. **Support is conditioned on the addition of exemptions from public display/access on the WV Registry of (a) 15 years (aka AWA "Tier1") category registrants and (b) juvenile registrants.**

1. The "Adam Walsh Child Protection and Safety Act of 2006" provides for optional exemptions of:
    a. "Any information about a tier I sex offender convicted of an offense other than a specified offense against a minor," and
    b. "Any other information exempted from disclosure by the Attorney General."(Sensenbrenner, 2006)
2. HB5502 needs to add specific language using the optional exemptions above:
    a. To provide WV registrants classified as 15 years (aka AWA "Tier1") exemption from display/access on the WV public registry and
    b. To provide WV juvenile registrants, those who had not attained the age of 18 years at the time of their offense, exemption from display/access on the WV public registry.

VIII. **Support is conditioned on the <u>updates</u> to several highlighted items in the bill, which make it void for vagueness, require clarification, etc.**

1. The proposed updates to West Virginia Registry §15-12-2. (d)(8) removes the requirement to provide "screen names, user names, or aliases the registrant uses on the internet" and adds the requirement to provide the "Internet Protocol (IP) addresses of any computer or electronic device of the registrant."
    a. First, screen names, user names, aliases, and IP addresses are not included in the "Adam Walsh Child Protection and Safety Act of 2006" schema; as such, if the bill's purpose is to be taken seriously, then §15-12-2. (d)(8) should be struck. In addition, recent federal case law has concluded that collecting internet identifiers from registrants violates the First Amendment. (Cornelio v. Connecticut, 2023)

b. Second, the above requirement to provide IP addresses is not feasible as the standard for IP addresses is that they are dynamic, NOT static (*Network Fundamentals - Internet Protocol and IP Addressing | Information Security | University of Houston-Clear Lake*, n.d.), and constantly change with the location the device connects to the internet, i.e., coffee shop, work, home, etc. consequently providing an IP address, which changes constantly and frequently, is nonsensical.
c. In addition to 1. a. & 1. b. above, the proposed update and addition of WV §15-12-2-10 (b) include a distance restriction from a "child daycare facility," which is insufficiently defined. It would be difficult for registrants to know with certainty how to comply with this language when what constitutes a "daycare" isn't explicitly defined. As written, the clause would not likely survive a "void for vagueness" challenge.
    i. The "void-for-vagueness doctrine" requires a statute to be clear enough for those subject to it to understand what conduct would render them liable to its penalties. (Void for Vagueness and the Due Process Clause, n.d.) The standard for determining whether a statute provides fair notice is "whether persons of common intelligence must necessarily guess at [the statute's] meaning." (Galloway v. State, 781 A.2d 851, 2001)

WVRSOL supports legislation that actually reduces abuse and sexual offenses, helps children and families, and improves public safety. HB 5502 does this; unfortunately, it needs the modifications stipulated before WVRSOL can support it. Therefore, we **conditionally support HB 5502** and respectfully urge the House, its members, and the House Judiciary Committee to make the necessary modifications and pass HB 5502.

Sincerely,

Philip W. Kaso

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