IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 15–15531

DAVID BERNARD CLARK

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–13–129–TUC–CKJ (HCE)

RESPONDENTS-APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this habeas corpus action under 28 U.S.C. § 2254. On February 20, 2015, the district court entered an order denying and dismissing the petition, which was a final order under Rules 54(a) and 58 of the Federal Rules of Civil Procedure. (Appellant's Excerpt of Records ["ER"] at 7.) On March 19, 2015, Petitioner-Appellant, David Bernard Clark ("Clark"), filed a timely notice of appeal. (ER at 195.) On July 13, 2015, this Court granted Clark's request for a certificate of appealability ("COA"). (ER at 195.) This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and –2253.

QUESTION PRESENTED FOR REVIEW

Whether Clark is entitled to federal habeas relief based on the claim that his conviction for failing to comply with Arizona's Sex Offender Registration Act violated the *Ex Post Facto* Clause of the United States Constitution?

STATEMENT OF THE CASE

In 1982, Clark pleaded guilty to sexual misconduct with a minor who is less than 15 years old. (ER at 53.) Arizona subsequently enacted its modern Sex Offender Registration Act ("Arizona's Act"), which required Clark to register as a sex offender based on his prior sexual-misconduct conviction. (ER at 53, 72.) Clark complied with Arizona's Act and properly registered for many years, but, in 2007, he completed an intercounty move and refused to register his new residence, as required. (ER at 71, 73-75.) Clark refused to register because "he was hiding out" from several outstanding warrants. (ER at 74-75.) Police ultimately found and arrested Clark in 2009, and the State charged him with failing to comply with Arizona's Act. (ER at 71, 73-75.) Clark later agreed to plead guilty to the failing-to-register offense and, in exchange, received a "somewhat mitigated" term of imprisonment. (ER at 71.)

After pleading guilty, Clark filed a petition for post-conviction relief with the trial court, arguing, among other things, that his failing-to-register conviction violated the *Ex Post Facto* Clause of the United States Constitution. (ER at 55-61.) The trial court rejected Clark's claim, on the merits, based on *State v. Henry*, 228 P.3d 900 (Ariz. Ct. App. 2010). (ER at 72.) In *Henry*, the Arizona Court of Appeals applied binding Supreme Court precedent and concluded that Arizona's Act did not violate the Constitution's *Ex Post Facto* Clause. *Id.* at

908, ¶ 26.

Clark appealed the trial court's decision by filing a petition for review with the Arizona Court of Appeals, asking that it overrule *Henry*. (ER at 77.) The court of appeals declined Clark's invitation and confirmed that his conviction did not violate the Federal Constitution's *Ex Post Facto* Clause. (ER at 187-88.) Clark then appealed to the Arizona Supreme Court, which initially granted review, but later vacated review as improvidently granted. (ER at 183.)

Having exhausted his state court remedies, Clark filed a Federal Petition for Writ of Habeas Corpus, arguing the state courts unreasonably concluded his failing-to-register conviction did not constitute an *ex post facto* violation. (ER at 25.) The district court rejected Clark's claim, finding that the relevant state-court decision had applied binding Supreme Court precedent and reasonably concluded Arizona's Act did not violate the *Ex Post Facto* Clause. (ER at 6, 13-20.) Consequently, the district court denied and dismissed Clark's petition. (ER at 6-7.)

Clark timely appealed the district court's order, and, on July 13, 2015, this Court granted his request for a COA, stating as follows:

> The request for a certificate of appealability is granted with respect to the following issue: whether appellant's conviction under Arizona's Sex Offender Registration Act violates the Ex Post Facto Clause of the United States Constitution. *See* U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e); *Smith v. Doe*, 538 U.S. 84 (2003); *American Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046

(9th Cir. 2012).

(ER at 1.)

SUMMARY OF ARGUMENT

To obtain relief in these habeas proceedings, Clark must demonstrate that the state courts unreasonably applied clearly established federal law in rejecting the claim that his conviction for failing to comply with Arizona's Act constituted an *ex post facto* violation. The Arizona Court of Appeals, however, applied binding Supreme Court precedent and reasonably determined that retroactive application of Arizona's Act does not violate the Federal Constitution's *Ex Post Facto* Clause. Clark has therefore failed to carry his burden on habeas review and, as a result, is not entitled to relief.

ARGUMENT

CLARK IS NOT ENTITLED TO HABEAS RELIEF BECAUSE THE ARIZONA COURT OF APPEALS APPLIED BINDING SUPREME COURT PRECEDENT AND REASONABLY CONCLUDED THAT ARIZONA'S ACT DOES NOT VIOLATE THE CONSTITUTION'S *EX POST FACTO* CLAUSE.

Clark argues he is entitled to federal habeas relief based on the claim that Arizona's Act violates the *Ex Post Facto* Clause of the United States Constitution. But because the state courts denied Clark's claim on the merits, the question on habeas review becomes whether the relevant state-court decision unreasonably applied clearly established federal law when it rejected the claim.

The Arizona Court of Appeals, however, applied binding Supreme Court precedent and reasonably concluded that Arizona's Act does not violate the Federal Constitution's *Ex Post Facto* Clause. Thus, Clark's claim fails, and he is not entitled to habeas relief.

A. STANDARD OF REVIEW.

This Court reviews "a district court's dismissal of a habeas corpus petition *de novo* and may affirm on any ground supported by the record, even if it differs from the rationale of the district court." *Pollard v. White*, 119 F.3d 1430, 1433 (9th Cir. 1997).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a state prisoner is not entitled to federal habeas relief with respect to any federal claim that was adjudicated on the merits in state court proceedings unless adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

This standard is "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). It is also a "highly deferential standard for evaluating state-court

rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (citation and internal quotation marks omitted). Section "2254 stops short of imposing a complete bar on federal court relitigation of claims already rejected in state court proceedings." *Id.* (citations omitted). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunction in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

When determining whether a state court's ruling was "contrary to" or involved "an unreasonable application of" law, courts considering a federal habeas petition look to the holdings—not the *dicta*—of Supreme Court cases at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006). "While circuit law may be persuasive authority for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (citation and internal quotations omitted).

A state-court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth" by the Supreme Court or "confronts a set of facts that are materially indistinguishable

from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Early v. Packer*, 537 U.S. 3, 8 (2003) (citation and internal quotations omitted). A state-court decision is not contrary to Supreme Court precedent merely because the decision does not cite the relevant precedent—indeed, the state court is not even required to be *aware* of the relevant precedent, so as long as "neither the reasoning nor the result" of the decision contradicts the decisions of the Supreme Court. *Id*.

Under the "unreasonable application" clause of 28 U.S.C. § 2254(d), "a federal habeas court may grant [relief] if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). However, habeas relief is not warranted under this clause simply because a reviewing court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id*. at 411. Rather, the state-court's application of clearly established federal law must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

B. THE RELEVANT STATE-COURT DECISION REASONABLY CONCLUDED ARIZONA'S ACT DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE.

To the extent there is any "clearly established Federal law" to be applied to the question of whether Arizona's Act violates the Federal Constitution's *Ex*

Post Facto Clause, that law is found in *Smith v. Doe*, 538 U.S. 84 (2003). *See Hatton v. Bonner*, 356 F.3d 955, 960-61 (9th Cir. 2003) (applying *Smith* when reviewing a habeas petitioner's claim that California's sex offender registration statutes violated the *Ex Post Facto* Clause). In *Smith*, the Supreme Court reviewed Alaska's sex offender registration statutes and determined they did not violate the *Ex Post Facto* Clause. 538 U.S. at 105-06.

The Arizona Court of Appeals applied the Supreme Court's reasoning in *Smith* and similarly found that Arizona's Act did not violate the *Ex Post Facto* Clause. *Henry*, 228 P.3d 900, 903, ¶ 9. Both the trial court and court of appeals, in the instant case, relied on *Henry* in rejecting Clark's *ex post facto* claim. (ER at 72, 187-88.) Thus, *Henry*, as reflected in the state court decisions in this case, constitutes the relevant state court decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). As explained below, these decisions were not "contrary to, or involve[] an unreasonable application of, clearly established Federal law," *see* 28 U.S.C. § 2254(d)(1).

A. *Legislative intent.*

When determining whether a state's sex offender registration statutes violate the Federal Constitution's *Ex Post Facto* Clause, *Smith* instructs courts to first determine if the state legislature intended that the statutes establish a civil, regulatory regime or punish sex offenders. 538 U.S. at 92. If the legislature

intended to punish sex offenders, the inquiry ends because "retroactive application of the statute would constitute an ex post facto violation." *Hatton*, 356 F.3d at 961 (citing *Smith*, 538 U.S. at 92-93). "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, [the court] must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith*, 538 U.S. at 92 (internal marks and quotation omitted).

In *Henry*, the Arizona Court of Appeals complied with the *Smith*'s directive by investigating the state legislature's aim and finding it intended Arizona's Act to establish a civil, regulatory system that "primarily served the nonpunitive goal of 'facilitating the location of child sex offenders by law enforcement.'" *Henry*, 228 P.3d at 905, ¶ 16 (quoting *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992). The court of appeals noted, in particular, that "the legislature furnished ample indication that it intended to protect communities, not punish sex offenders." *Id.* and ¶ 17 (quotation omitted). The Arizona Legislature also confirmed its nonpunitive aim in 1998 when it added A.R.S. § 13–3827(A), which states, "The purpose of the internet sex offender website is to provide sex offender information to the public." Thus, the court of appeals reasonably concluded that the legislature intended that Arizona's Act establish a civil, nonpunitive regulation. *See Hatton*, 356 F.3d at 961-63 (finding the state

court reasonably interpreted the legislature's nonpunitive intent based, in part, on the legislature's stated purpose).

Clark summarily asserts Arizona's Act is punitive because it was "enacted within the criminal code and non-compliance with the requirements results in actual punishment, such as the imprisonment and parole to which [he] has been subjected." (Opening Brief ["O.B."] at 8.) But "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith*, 538 U.S. at 94. And the Supreme Court concluded that Alaska's statutes were nonpunitive—even though an offender who failed to comply with them could be "subjected to a criminal prosecution for that failure." *Id.* at 102. Accordingly, the mere fact that Arizona's Act is codified in the state's criminal code, and contains a criminal penalty for noncompliance, does not override the Arizona Legislature's stated intent that the Act is regulatory—*not* punitive. *See id.* at 94; *see also American Civil Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1054-55 (9th Cir. 2012) (rejecting the claim that a state's registration statute was punitive because it was codified within the state's criminal rules and contained criminal penalties for noncompliance).

In any event, Clark's argument appears to present an impermissible "as-applied" challenge to Arizona's Act—that is, Clark argues the Act violates the *Ex Post Facto* Clause because the Act, as applied to him, resulted in "an actual

punishment of imprisonment." (O.B. at 5, 27.) The Supreme Court has "expressly disapproved of evaluating the civil nature of an Act by reference to the effect that Act has on a single individual." *Selig v. Young*, 531 U.S. 250, 262 (2001). Courts must instead evaluate a particular statute on its face when determining whether the statute is punitive in purpose or effect. *Hudson v. United States*, 522 U.S. 93, 100 (1997) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). Consequently, Clark's attempted "as-applied" *ex post facto* challenge to Arizona's Act in these habeas proceedings is misplaced and must be rejected. *See Selig*, at 263-64. ("Permitting respondent's as-applied challenge would invite an end run around the Washington Supreme Court's decision that the Act is civil in circumstances where a direct attack on that decision is not before this Court.").

B. *Effects of Arizona's Act.*

Because the Arizona Legislature intended that Arizona's Act be a civil regulation, the Act will not violate the *Ex Post Facto* Clause unless it is found to be "so punitive either in purpose or effect as to negate the State's intention to deem [them] civil." *Smith*, 538 U.S. at 92. "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation marks omitted).

The effects of a state's sex offender registration statutes must be evaluated by considering the factors set forth in *Mendoza-Martinez*. 538 U.S. at 97. Although the *Mendoza-Martinez* factors are "neither exhaustive nor dispositive," *Smith* explained that the factors most relevant when determining if a state's registration statutes violate the *Ex Post Facto* Clause are "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to its purpose." *Id.*

1. Arizona's Act does not impose a scheme that has been traditionally regarded as a punishment.

Smith noted that sex offender registration statutes "are of fairly recent origin," suggesting that they are not punitive in nature. *Id.* *Smith* then rejected the claim that registration statutes are tantamount to early public punishments, such as shaming, because those punishments "involved more than the dissemination of information" and "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* at 98-99. *Smith* further recognized that Alaska's registration statutes merely disseminated "accurate information about a criminal record, most of which is already public," and, as a result, said the process more closely resembled an archival search, rather than an attempt at public shaming. *Id.*

Relying on *Smith*'s reasoning, the Arizona Court of Appeals similarly concluded Arizona's Act did not impose a traditional form of punishment. *Henry*, 228 P.3d at 906, ¶ 20. This is because Arizona's Act simply made truthful information about an offender's criminal record—that was already available to the public—more accessible. *See Henry*, 228 P.3d at 906, ¶ 20 (quoting *Smith*, 538 U.S. at 98). Accordingly, the court of appeals' conclusion was reasonable and in agreement with binding Supreme Court precedent. *See Hatton*, 356 F.3d at 965.

Clark asserts the community notification provisions in Arizona's Act "go beyond the mere dissemination of factual information" and claims the Act is more analogous to shaming than the statutes in *Smith*.[1] (O.B. at 12-17.) But "[a]ctive dissemination of an individual's sex offender status does not alter the [Supreme] Court's court reasoning that 'stigma . . . results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.'" *Masto*,

[1] Clark also seems to argue *Smith*'s conclusion that registration statutes are not analogous to public shaming is outdated due to societal changes and greater accessibility to technology. (O.B. at 12-17.) Clark, however, does not cite any clearly established federal law to support his argument (*id.*), and this Court has rejected similar arguments, *see United States v. Shoulder*, 738 F.3d 948, 953-54 (9th Cir. 2012) (rejecting the argument that "[the Supreme] Court's analysis in *Smith* 'no longer holds true in today's society'") (internal marks omitted). Thus, Clark's argument fails.

670 F.3d at 1056 (quoting *Smith*, 538 U.S. at 98). Consequently, the state court reasonably relied on *Smith* and concluded that Arizona's Act did not impose a traditional form of punishment, notwithstanding the Act's community notification provisions. *See id.*

2. Arizona's Act does not impose an affirmative disability or restraint.

The second factor requires the state court to assess whether Arizona's Act subjects offenders to an "affirmative disability or restraint." *Smith*, 538 U.S. at 99 (quotation and marks omitted). "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. at 99-100. *Smith* concluded that "registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause." *Id*. at 102.

Clark asserts Arizona's Act imposes burdensome registration requirements that are analogous to probation. (O.B. at 17-19.) Although Arizona's Act might arguably be more burdensome than the statutes in *Smith*, the court of appeals noted that the "legislature has taken steps to tailor the statutes to serve more precisely their nonpunitive ends. For example, mandatory community and website notification is required only for offenders deemed to pose a heightened risk to the community, and other provisions limit public disclosure of an offender's online identifiers." *Henry*, 228 P.3d at 907 (internal citations

omitted). And while Arizona's Act requires registrants to annually renew state-issued identification by appearing in person to be photographed, that is not a sufficient basis for finding the Act imposes an affirmative disability or restraint, *see United States v. Elkins*, 683 F.3d 1039, 1049 (9th Cir. 2012) (stating that in-person registration requirements do not amount to a punitive restraint).

Moreover, Arizona's Act permits offenders to "move where they wish and to live and work as other citizens, with no supervision," just as the registration statutes in *Smith.* 538 U.S. at 101. Consequently, Arizona's Act is not tantamount to probation, as Clark suggests, and the court of appeals reasonably determined the Act did not impose an affirmative disability or restraint. *See Hatton*, 356 F.3d at 964 (finding that a state court reasonably determined that in-person registration requirements were not a punitive restraint).

Clark also takes particular exception to the requirement that he must register "for the duration of his life," and he argues that such a life-time registration requirement amounts to an affirmative disability or restraint. (O.B. at 9-11.) Clark's proffered exception, however, again attempts an impermissible, "as-applied" challenge to Arizona's Act in these habeas proceedings. *See Selig*, at 263-64. Clark's argument also relies on *state court* decisions from other jurisdictions, which are irrelevant to this Court's analysis of whether the state court unreasonably applied clearly established federal law. And as discussed,

clearly established federal law plainly permits state legislatures to impose life-long registration requirements. *Smith*, 538 U.S. at 103. ("The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."); *see also Masto*, 670 F.3d at 1056 (finding that Nevada's lifetime in-person registration requirements did not impose an affirmative disability or restraint). Thus, Clark's complaint is unavailing and does not establish that Arizona's Act imposes an affirmative disability or restraint. *See Hatton*, 356 F.3d at 964.

3. Arizona's Act does not promote the traditional aims of punishment.

While Arizona's Act might have some deterrent effect, the Arizona Court of Appeals reasonably concluded the Act, as a whole, was civil in nature and did not promote the traditional aims of punishment. *See id.* at 965 ("[A]ny number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government's ability to engage in effective regulation.") (Quoting *Smith*, 538 U.S. at 102).

Clark contends that *Smith* found that Alaska's registration statutes were not retributive because they "distinguished between offenders convicted of a non-aggravated offense . . . and those convicted of an aggravated offense or

multiple offenses." (O.B. at 20.) In fact, however, this Court had found that the registration statutes ***were*** retributive because of the very fact that "the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." *Smith*, 538 U.S. at 102 (emphasis added; internal quotation marks omitted). Thus, *Smith* did not find the statutes were non-retributive *because* of the differentiated requirements, but *in spite of* them. *Hatton*, 356 F.3d at 965. Furthermore, the Supreme Court went on to conclude that the differentiated reporting requirements were "reasonably related to the danger of recidivism." *Smith*, 538 U.S. at 102.

Nonetheless, the Arizona Court of Appeals noted that "mandatory community and website notification is required only for offenders deemed to pose a heightened risk to the community." *Henry*, 228 P.3d at 907, ¶ 23. This demonstrated that the "legislature has taken steps to tailor the statutes to serve more precisely their nonpunitive ends." *Id*. *Henry*, therefore, reasonably determined that Arizona's Act did not promote the traditional aims of punishment. *See Hatton*, 256 F.3d at 965.

4. Arizona's Act is rationally connected to a nonpunitive purpose.

Under *Smith*, a "most significant factor" is whether a state's registration statutes are rationally connected to a nonpunitive purpose. 538 U.S. at 102-03. The Supreme Court found that Alaska's registration statutes clearly served "a

legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* Without question, Arizona's Act serves a similar public-safety purpose and is therefore rationally connected to a nonpunitive purpose. *See id.* Thus, this "significant factor" undoubtedly supports the finding that the state court reasonably determined the effects of Arizona's Act are not punitive.[2] *See Hatton*, 356 F.3d at 966.

5. Arizona's Act is not excessive in relation to its nonpunitive purpose.

Clark first contends that the community notification provisions in Arizona's Act make the Act excessive in relation to its nonpunitive purpose. (O.B. at 24-25.) The notification provisions, however, "provide for levels of notification based on the risk that a particular sex offender poses to the community." A.R.S. § 13–3826(E)(1). And since the notification provisions are based on a risk assessment, they cannot be deemed punitive in light of the Legislature's stated, nonpunitive purpose. *See Smith*, 538 U.S. at 102

[2] Clark concedes this factor weighs in favor of finding that the effects of Arizona's Act are not punitive, and he asks that the factor not be given "undue weight." (O.B. at 23.) But the Supreme Court explicitly stated, "The Act's rational connection to a nonpunitive purpose is a most significant factor in [this Court's] determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102 (internal quotation marks and alteration omitted). Thus, Clark's request directly contravenes Supreme Court precedent and must be rejected.

(upholding reporting requirements that "are reasonably related to the danger of recidivism" because such requirements are "consistent" with a regulatory objective); *see also Hatton*, 356 F.3d at 966.

Clark next complains, again, that the lifetime registration requirements make Arizona's Act punitive. (O.B. at 24-25.) But, as explained above, a lifetime-registration requirement does not cause a statute to be punitive. Indeed, *Smith* specifically held that there was no punitive effect when some offenders had to register four times each year for the rest of their lives. 538 U.S. at 102; *Doe I v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001), *rev'd by Smith v. Doe*, 538 U.S. 84 (2003). And Arizona's Act does provide a means for certain offenders to be relieved of the registration and notification provisions. *See* A.R.S. §§ 13–3821(H), 13–3825(L); *Henry*, 228 P.3d at 907, ¶ 23 ("A.R.S. § 13–923 . . . allows a court to terminate both registration and community notification provisions pursuant to §§ 13–3821(H) and 13–3825(L)."). Consequently, Clark's complaints are unavailing.

Essentially, Clark's argues Arizona's Act is excessive in relation to its nonpunitive purpose because the Arizona Legislature could have tailored the Act more narrowly. Arizona's Act, however, cannot be "deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103. Instead, the relevant question is whether "the

regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* at 104. And the chosen means by the state legislature are reasonable in light of the Act's nonpunitive objective. *See Masto*, 670 F.3d at 1056 (upholding a Nevada registration law even though it imposed lifetime in-person registration requirements).

6. Other Factors.

Smith held that the two remaining *Mendoza-Martinez* factors "are of little weight" when reviewing sex offender registration statutes. *Smith*, 538 U.S. at 105. Thus, they do not support a finding that *Henry* unreasonably determined the effects of Arizona's Act are not punitive. In any event, when discussing these factors, Clark relies on state-court decisions from other jurisdictions. (O.B. at 20-23.) These cases, however, do not determine what is clearly established federal law and are therefore irrelevant to this Court's analysis of Clark's habeas claim.

7. Summary.

Again, to obtain relief in these habeas proceedings, Clark must demonstrate that the Arizona Court of Appeals unreasonably applied clearly established federal law—*i.e.*, *Smith*—when it concluded Arizona's Act does not violate the *Ex Post Facto* Clause of the United States Constitution. The state legislature, however, "furnished ample indication" that it intended Arizona's Act

to be a civil regulation, *Henry*, 228 P.3d at 905, ¶ 17, and an analysis of the relevant *Mendoza-Martinez* factors reveals the Act is not "so punitive in either purpose or effect as to negate [the State's] intention to deem it civil," *Smith*, 538 U.S. at 92 (internal quotation marks omitted). Thus, the court of appeals applied the two-step process required by *Smith* and reasonably concluded Arizona's Act did not violate the *Ex Post Facto* Clause. *See Hatton*, 356 F.3d at 967.

Ultimately, Clark argues the court of appeals' decision was unreasonable because some state courts have reached a different conclusion, overturning their sex offender registration statutes based on *Smith*. But several other state courts have applied *Smith* and concluded, just as the Arizona Court of Appeals did in *Henry*, that their respective registration statutes do not violate the *Ex Post Facto* Clause. *See, e.g., Commonwealth v. Perez*, 97 A.3d 747, 759 (Pa. 2014); *Kammerer v. State*, 322 P.3d 827, 839 (Wyo. 2014); *Lee v. State*, 895 So.2d 1038, 1044 (Ala. Crim. App. 2004); *State v. Worm*, 680 N.W.2d 151, 163 (Neb. 2004); *Haislop v. Edgell*, 593 S.E.2d 839, 846 (W. Va. 2003). And this Court has applied *Smith* and reached largely the same conclusion as *Henry* with respect to the retroactive application of federal sex offender registration statutes, *Elkins*, 683 F.3d at 1049, and Nevada registration statutes, *Masto*, 670 F.3d at 1053-58. Accordingly, it simply cannot be said that the Arizona Court of Appeals' decision in *Henry* involved an unreasonable application of *Smith*. *See*

Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (stating that "circuit precedent may be persuasive in determining what law is clearly established and whether a state court applied that law unreasonably") (quotation omitted). Thus, Clark's claim fails, and he is not entitled to habeas relief.

CONCLUSION

For the foregoing reasons, Respondents-Appellees request that this Court affirm the district court's order denying and dismissing Clark's habeas petition with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 2, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 4,822 words.

s/ Andrew S. Reilly
Assistant Attorney General

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28–2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases.

Respectfully submitted this 2nd day of February, 2016.

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