No. ____

IN THE
Supreme Court of the United States

JOSHUA VASQUEZ and MIGUEL CARDONA,

Petitioners,

v.

KIMBERLY FOXX, Cook County State's Attorney,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois law makes it a felony for people who have been convicted of certain offenses to "knowingly reside" within 500 feet of home daycares and other facilities. 720 ILCS 5/11-9.3 (b-5), (b-10). The ban does not exempt residences that were established before the opening of a new daycare, meaning that whenever a third party decides to operate a home daycare within 500 feet of the residence of someone subject to the law, that person must move out of his or her home or face arrest and criminal punishment.

The question presented, which has divided the state and lower federal courts, is:

Whether, as the court below held, the constitutionality of laws that impose criminal penalties for blameless action or inaction—such as maintaining a family home—is controlled by this Court's decisions upholding laws that impose registration requirements on those with prior convictions.

PARTIES TO THE PROCEEDING

Petitioners are Joshua Vasquez and Miguel Cardona.

Respondent is Cook County State's Attorney Kimberly Foxx.

The City of Chicago was a party in the proceedings below. Petitioners are not proceeding against the City of Chicago in this appeal and thus believe that the City has no interest in the outcome of this petition. Petitioners will serve the appropriate notice pursuant to Supreme Court Rule 12.6.

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The opinion of the Seventh Circuit Court of Appeals is reported at 895 F.3d 515 and reproduced in Petitioners' Appendix at 1a–18a. The opinion of the U.S. District Court for the Northern District of Illinois is not reported and is reproduced in Petitioners' Appendix at 20a–41a.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals from which review is sought was entered on July 11, 2018 (App. 1a–18a). The Seventh Circuit denied petitioners' request for rehearing on August 13, 2018 (App. 19a). This Petition has been timely filed in accordance with U.S. Supreme Court Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . .

The Ex Post Facto Clause, Art. §10 of the United States Constitution provides in relevant part:

> No state shall . . . pass any . . . ex post facto law.

The Takings Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> … nor shall private property be taken for public use, without just compensation.

The Illinois statute challenged in this case, 720 ILCS 5/11-9.3 (b-10), is reproduced in full at App. 42a.

STATEMENT OF THE CASE

This case, like *Packingham v. North Carolina*, 582 U.S. __, 137 S. Ct. 1730 (2017), involves a law that is extraordinary in our legal tradition. It deprives tens of thousands of people of the right to establish a secure, permanent home for themselves and their families. The law criminalizes the innocent act of remaining in one's own home without requiring any proof of evil intent or harm. For people subject to the law, their right to quietly enjoy their own homes is forever degraded and contingent on the whims of third parties over whom they have no control.

One would expect a measure that is so alien to American tradition to violate many different constitutional rights. And this law does. The Seventh Circuit was only able to uphold it by failing to take seriously the constitutional protections that apply to all citizens.

The Seventh Circuit made the same mistake a number of courts have made. It read this Court's decisions upholding registries, which impose no disabilities and merely make available factual public information, as settling the constitutionality of every law that applies to persons with previous convictions for sex offenses,

no matter the liberty and property interests at stake. Other courts, however, consistent with the principles affirmed in *Packingham*, have proceeded from the premise that persons with previous convictions who are no longer under criminal justice supervision presumptively enjoy the same rights to liberty and property as the rest of us.

I. The Residency Ban

The Illinois statute at issue makes it a felony for people who have been convicted of certain offenses to "knowingly reside" within 500 feet of a home daycare.[1] 720 ILCS 5/11-9.3 (b-10) (hereinafter the "Residency Ban" or "Ban"). The Ban applies to persons who have been convicted of a range of non-sexual and non-contact offenses, including non-parental kidnapping and indecency in a public park. 720 ILCS 5/11-9.3(d)(1) and (2). Violation of the Residency Ban is punishable by up to three years in prison. 720 ILCS 5/11-9.3(f); 730 ILCS 5/5-4.5-45(a).

The Ban does not exempt homes established before a new daycare is set up. Thus, those subject to the law ("affected individuals" or "affected persons") must move out if a home daycare moves in within 500 feet of them.

The Residency Ban applies to thousands of people who are no longer under any criminal supervision (*e.g.*, probation or supervised release) and to people whom the state has removed from its sex offender

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[1] The law also prohibits "knowingly residing" within 500 feet of schools, playgrounds, and facilities that provide services to minors. 720 ILCS 5/11-9.3 (b-5), (b-10).

registry. The law provides no procedure to seek relief from the Ban. An affected person can live productively in the community for decades with his family, never committing any new offense, and yet he can be ordered to vacate any home he establishes, under threat of felony arrest and punishment, if a neighbor obtains a license to operate a home daycare within 500 feet of his home.

The Residency Ban is just one aspect of Illinois' comprehensive scheme regulating every aspect of the lives of people who have been convicted of sex offenses. Since Illinois created its first registry in 1986, Illinois' general assembly has passed more than a dozen laws applicable to people with prior convictions for sex offenses. Today, Illinois regulates where they may live, where they may "be present," what work they may do, and in what activities they may participate.[2]

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[2] *See, e.g.,* 720 ILCS 5/11-9.3 (b-2) (prohibiting "knowingly loiter[ing] on a public way within 500 feet of a public park"); (c-2) (prohibiting "participat[ion] in a holiday event involving children under 18 years of age, including but not limited to distributing candy or other items to children on Halloween"); 720 ILCS 5/11-24 (b) (prohibiting taking a photograph of "a child without the consent of the parent or guardian.") Moreover, unlike many states where restrictions on residency, employment and "presence" are tied to the offender's period of registration, Illinois ties these restrictions to the fact of conviction, and thus applies these restrictions for the rest of every offender's natural life. 720 ILCS 5/11-9.3 (d).

II. The Petitioners

Petitioner Joshua Vasquez is 39 years old. R. 17-1, Decl. of Vasquez, ¶1.[3] He has lived in an apartment on the northwest side of Chicago with his wife and their eleven-year-old daughter since 2013. *Id.* at ¶4. Mr. Vasquez's daughter attends a public school that is walking distance from their home, and Mr. Vasquez or his wife walks their daughter to school every day. *Id*. at ¶5.

In 2001, Mr. Vasquez was convicted of one count of possession of child pornography, which makes him subject to the Residency Ban for the rest of his life. *Id*. at ¶2. Mr. Vasquez has not been convicted of any other offense in the past 17 years. *Id*. at ¶3. He has been steadily employed at the same job since 2004. *Id*.

On August 25, 2016, Mr. Vasquez received a notice from the Chicago Police Department requiring him to vacate his apartment his apartment within 30 days because a neighbor less than 500 feet away had obtained a license to provide daycare in her home. [4] *Id*. at ¶7,8. The notice threatened him with arrest and prosecution if he did not comply by September 24, 2016. *Id*.; R. 17-3.

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[3] Petitioners refer to the entries on the district court's electronic record as R.__.

[4] It is the City of Chicago's practice to give people subject to the Residency Ban 30 days to move when a residence becomes unlawful due to the opening of a new prohibited facility (R. 1, Complaint, at ¶1, 2), but the statute itself does not provide any grace period.

This was the second time that Mr. Vasquez received such a notice. In 2013, his family was forced to move from their previous apartment because someone obtained a daycare license within 500 feet of that home. R. 17-1 at ¶12.

Mr. Vasquez and his wife do not want to disrupt their daughter's schooling by moving during the school year and do not have the savings to afford to move on short notice. *Id*. at ¶14; R. 1 at ¶29.

Petitioner Miguel Cardona, who is 50 years old, has resided in the same single-family home in Chicago for more than 25 years. R. 17-2, Decl. of Cardona, ¶5. He has owned the home since 2010, when his mother, with whom he lived, deeded it to him. *Id*.

Mr. Cardona was convicted in 2004 of indecent solicitation of a 17-year-old, which makes him subject to the Residency Ban for the rest of his life. *Id*. at ¶2. Mr. Cardona has not been convicted of any other offense in the past 14 years. *Id*. at ¶3. Since his release from custody, he has obtained a cosmetology license from the State and cuts hair for a living. *Id*. at ¶3, 4.

On August 17, 2016, Cardona received notice from the Chicago police department that his address violates the Residency Ban because a home daycare business is licensed to operate in a residence approximately 475 feet from his house. *Id*. at ¶7,8. He was ordered to move within 30 days or face arrest and prosecution. *Id*.; R. 17-3. At the time of this notice, Mr. Cardona's mother had terminal lung cancer and relied on him for care. He could not move without also moving her. *Id*. at ¶3, 10. She died in 2017.

Both Mr. Vasquez and Mr. Cardona have been able to avoid moving only because the district court entered a temporary restraining order on September 14, 2016, prohibiting enforcement of the law against them. R. 14; R. 22 (extending injunction).[5]

III. Proceedings Below

Petitioners filed a complaint and motion for emergency injunctive relief in the U.S. District Court for the Northern District of Illinois on September 13, 2016. They alleged the Residency Ban violated the Fourteenth Amendment guarantee of Due Process, the Ex Post Facto Clause, and the Fifth Amendment Takings Clause.

Three months later, the district court granted the defendants' motions to dismiss, finding that Petitioners had not stated a claim that the Ban violates their constitutional rights. App. 20a–41a.

Petitioners timely appealed. The Seventh Circuit affirmed the district court's decision in its entirety on July 11, 2018 (App. 1a–18a) and denied Petitioners' request for rehearing on August 13, 2018 (App. 19a).

In its opinion, the Seventh Circuit looked repeatedly to this Court's decisions in *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) and *Smith v. Doe*, 538 U.S. 84 (2003) ("the *Doe* cases") as controlling precedents. As the Seventh Circuit put it, "The Illinois

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[5] By agreement of the parties, Petitioners remain in their homes to date, and the City of Chicago has agreed not to charge Petitioners for violation of the Residency Ban during the pendency of this appeal.

residency statute is similar enough to the sex-offender registration statute[] at issue in *Smith* … that it's safe to apply those holdings and reject the plaintiffs' challenge without further ado." App. 8a.

REASONS FOR GRANTING THE PETITION

The decision of the Seventh Circuit warrants review because it is based on a misunderstanding of this Court's precedents and conflicts with decisions of this Court and those of other lower federal and state courts. In addition, the case involves important and recurring questions of federal constitutional law.

Rather than seeing this law for what it is, a severe incursion on basic rights, the Seventh Circuit treated it as just another "sex offender law" and therefore constitutionally unproblematic under the *Doe* cases. In contrast, other courts have started from an opposite premise, the one that animated this Court's decision in *Packingham*: that laws which could not possibly be upheld if applied to other people do not suddenly become constitutional if they target people with previous convictions for sex offenses.

These courts have given the *Doe* decisions a properly limited reading, interpreting them as upholding the purely informational registration schemes at issue in those cases. The very premise of this Court's *Doe* decisions is that registration laws simply "disseminat[e] accurate information about a criminal record, most of which is already public," while allowing registrants to be "free to move where they wish and to live and work as other citizens, with no supervision." *Smith*, 538 U.S. at 99, 103.

It is important that this Court resolve the proper scope of the *Doe* cases. First, at least six Courts of Appeal and numerous state courts of last resort have been called upon to apply the *Doe* cases to laws restricting where people who have been convicted of sex offenses may live and to determine whether such laws exceed constitutional limitations. They are divided on the question. Second, an expansive reading of the *Doe* cases has animated not only judicial decisions, but also legislative activity throughout the country, affecting the rights of hundreds of thousands of people and their families.

Accordingly, this Court should grant the petition to resolve the conflict among the lower courts and clarify the scope of the *Doe* decisions.

I. The Seventh Circuit's Decision Conflicts with this Court's Precedents and the Decisions of Other State and Federal Courts

A. Procedural Due Process

The Seventh Circuit held that this Court's decision in *Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 7–8 (2003) "foreclosed" Petitioners' procedural due process claim. App. 16a. The Seventh Circuit cites *Conn. Dep't of Public Safety* for the proposition that so long as a person's current dangerousness "is not material to [a] statutory scheme," one subject to the scheme is not entitled to any process before the law is applied to them. *Id*. The Seventh Circuit thus held that because the Residency Ban applies categorically to all people convicted of certain offenses "regardless of their individual risk," Petitioners are not entitled to an opportunity to contest any deprivation that they suffer

when the Ban is applied to them years or decades later. *Id.*

The Seventh Circuit's reading of *Conn. Dep't of Pub. Safety* untethers the Court's decision from its context and ignores bedrock procedural due process principles. The registration law upheld in *Conn. Dep't of Pub. Safety* imposed no burdens beyond facilitating public access to conviction information that was already "publicly available." 538 U.S. at 5. The registry included an explicit disclaimer that "officials have not determined that any registrant is currently dangerous." *Id*. at 4. In that context, this Court concluded that registrants were not entitled to a hearing to contest that they are currently dangerous before being listed on the registry. *Id*. at 6.

Contrary to the Seventh Circuit's reading, *Conn. Dep't of Public Safety* did not undo longstanding precedent holding that when an individual is deprived of liberty and/or property, the state must provide procedures that appropriately balance the individual and public interests at stake. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Procedural due process would be a dead letter if lawmakers are given unlimited power to decide what is or isn't material to a statute's application. For example, there would be nothing to stop legislators from passing laws automatically terminating the parental rights of anyone who has been convicted of a sex offense; making it illegal for anyone who has been convicted of a sex offense to own property; or automatically civilly committing all persons who have been convicted of sex offenses. Under the Seventh Circuit's reading of *Conn. Dep't of Pub. Safety*, none of these laws would trigger procedural due process concerns because the question of whether

someone is "currently dangerous" would be immaterial to the applicability of any such statutory scheme.

This Court has never countenanced the categorical deprivation of property or fundamental liberties without procedural due process. Rather, the Court has noted that the "magnitude of the restraint" determines whether "individual assessment [is] appropriate." *Smith v. Doe*, 538 U.S. 84, 104. *See Kansas v. Hendricks*, 521 U.S. 326, 368 (1997) (upholding civil commitment scheme because it provided "strict procedural safeguards"); *Stanley v. Illinois*, 405 U.S. 645 (1972) (parental rights of unwed fathers could not be terminated on a categorical basis without an individualized determination concerning parental fitness); *see also*, *Packingham,* 137 S. Ct. 1730 (people convicted of sex offenses could not categorically be denied First Amendment rights).

The Seventh Circuit failed to account for the magnitude of the deprivation that the Residency Ban works and the importance of the rights at stake.[6] Here, the law divests people who have completed their sentences and gone on to live law-abiding lives of the right to occupy their own homes; it burdens their ability to provide their children a stable upbringing; it

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[6] There can be no question that the Residency Ban severely impairs property interests. This Court has long recognized the right to use and occupy the premises as a basic component of the property rights enjoyed by one who owns or leases real property. *See, e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53–54 (1993) ("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance. The seizure deprived Good of valuable rights of ownership, including … the right of occupancy [and] the right to unrestricted use and enjoyment...")

separates people from their spouses and children; and it makes it impossible to obtain a sense of security in one's own home, for all affected individuals must live in constant fear of a home daycare opening within 500 feet of their home.

Given the weighty liberty and property interests implicated by the Residency Ban, some process is required. Nothing in *Conn. Dep't of Public Safety v. Doe* negates that. The question is, where does being forced out of one's home fall on the continuum between registration (for which no additional process beyond that provided at the time of conviction is required) and civil commitment (for which robust procedural protection is necessary)?

The Seventh Circuit erred, as have the Fifth and Eighth Circuits,[7] in reading *Conn. Dep't of Public Safety* as broadly authorizing categorical deprivations of fundamental rights. This Court should grant the petition to clarify the proper scope and meaning of that decision.

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[7] *See Doe v. Miller*, 405 F. 3d 700, 709 (8th Cir. 2005) ("the Iowa residency restriction does not contravene principles of procedural due process under the Constitution. The restriction applies to all offenders who have been convicted of certain crimes …. Once such a legislative classification has been drawn, additional procedures are unnecessary."); *Duarte v. City of Lewisville, Texas*, 858 F.3d 348, 353 (5th Cir. 2017) (cert denied 138 S.Ct. 391 (2017)) ("procedural due process does not entitle the Duarte Family to a hearing to 'establish a fact that is not material' under the Ordinance.")

B. Substantive Due Process and Takings

With regard to Petitioners' substantive due process claim, the Seventh Circuit found that the Residency Ban implicated no fundamental rights and was therefore subject to rational basis review. App. 17a–18a. Applying that standard, the court concluded that even if the Residency Ban is "unwise or improvident" and its burdens "highly disproportionate to any benefit," it is not the courts' role "to second guess [a] legislative policy judgment" that the Residency Ban benefits public safety.[8] *Id*.

The Seventh Circuit was mistaken in concluding that the Residency Ban does not implicate rights that merit closer scrutiny under the substantive component of the due process clause. In *Conn. Dep't of Pub. Safety v. Doe*, this Court noted that while it was permissible for the state to categorically apply a registration requirement to all people who had been convicted of certain offenses, a registration law is still subject to scrutiny under "the substantive component of the Fourteenth Amendment's protections" to the extent that it affects constitutionally protected liberty interests. 583 U.S. at 8.

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[8] The assumption that the Residency Ban will prevent harm is almost surely wrong. In *Does #1–5 v. Snyder,* 834 F.3d 696, 698 (6th Cir. 2016) (cert denied 138 S. Ct. 55 (2017)), the Sixth Circuit noted numerous empirical studies suggesting that such laws actually disserve public safety by "exacerbat[ing] risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Snyder*, at 704–05 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011)).

As explained above, the Residency Ban severely burdens constitutionally protected property and liberty rights. In rejecting Petitioners' substantive due process claims, the Seventh Circuit did not properly consider the costs and consequences of the restriction, as required by this Court's precedents.[9]

Similarly, with regard to Petitioners' claim under the Fifth Amendment Takings Clause, the Seventh Circuit erred by likening the Residency Ban to a conventional land-use regulation or zoning law and minimizing the effect the law has on affected individuals' property rights. Unlike a zoning law, the Residency Ban runs not with the land, but with the person. The property from which the state seeks to evict Petitioners may be used by anyone else for residential purposes; and there is no place in Illinois where affected persons can establish a permanent home, because their right to remain in any home they establish is always contingent on the actions of third parties. While the Seventh Circuit acknowledged that the Residency

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[9] In this case, the procedural and substantive demands of due process necessarily go hand in hand. That is, procedural due process is a necessary safeguard against arbitrary deprivations of rights protected by the substantive component of due process. *See Demore v. Kim*, 538 U.S. 510, 551 (2003) (Souter, J., concurring in part) ("The substantive demands of due process necessarily go hand in hand with the procedural, and the cases insist at the least on an opportunity for a detainee to challenge the reason claimed for committing him.") The issue here is the categorical deprivation of rights. Petitioners do not contend that the Residency Ban is impermissible in every application. There may be a compelling reason for Illinois to prohibit a particular person from remaining in a home that is within 500 feet of a daycare. But the Ban's "one size fits all" approach creates a great risk of depriving people of constitutionally protected liberty and property interests in circumstances where doing so will serve no government objective at all.

Ban impairs "any property-rights expectations" that people subject to the law can have in any home they establish (App. 15a), it nonetheless concluded that such interference was reasonable. A law permanently depriving a class of people of the ability to have a reasonable expectation that they will be able to reside in their own homes is anathema to this Court's Takings jurisprudence, which has emphasized that property rights are essential to promote security and freedom. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.")

C. Ex Post Facto

The Seventh Circuit held that the Residency Ban is "neither retroactive nor punitive and thus raises no ex post facto concerns." App. 11a–12a. But just as it did with the due process claims, the Seventh Circuit supported this conclusion with an overly expansive interpretation of this Court's precedents, specifically the decision in *Smith v. Doe*, 538 U.S. 84 (2003).

In *Smith*, this Court found that an Alaska statute requiring people who had been convicted of sex offenses to register with law enforcement authorities did not constitute "a retroactive punishment prohibited by the ex post facto clause." *Id.* at 89. The *Smith* Court noted that Alaska's registration law imposed only "minor and indirect burdens" on registrants (*id.* at 104), and that "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens." *Id.* at 103.

In its analysis, the Seventh Circuit concluded that "[t]he Illinois residency statute is similar enough to the sex-offender registration statutes at issue in *Smith* … that it's safe to … reject the plaintiffs' challenge without further ado." App. 8a. The court erred in so readily likening the Residency Ban to the registration statute at issue in *Smith*. The consequences of the two laws are not remotely comparable. In contrast to the "minor and indirect" burdens imposed by the registration statute in *Smith*, the Residency Ban has life-changing effects, subjecting affected individuals and their families to instability in any home they establish for the rest of their lives. This Court has never countenanced the retroactive application of a law with such sweeping consequences.[10]

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[10] Because it erroneously decided that the Residency Ban was equivalent to a registration statute, the Seventh Circuit gave short shrift to its consideration of the *Mendoza-Martinez* factors, which guide the analysis of whether a law that is formally characterized as a civil regulation crosses the line into impermissible punishment. *Smith v. Doe*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169 (1963)). The *Mendoza Martinez* analysis considers whether the statute (1) imposes what 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; and (4) has a rational connection to a nonpunitive purpose and, if so, whether it is excessive with respect to that purpose. *Id*. Because the decisions below disposed of the case on a motion to dismiss, Petitioners were denied the opportunity to develop the factual record concerning the severe burden the Residency Ban places on the ability to find compliant housing; the ineffectiveness of such restrictions in preventing crime; and the disproportionality between the harm inflicted on people subject to this law and the public safety objectives achieved. A proper application of *Mendoza-Martinez* requires an analysis of these factors with the benefit of a factual record.

The Seventh Circuit also departed from this Court's precedents in holding that the Residency Ban is not "retroactive" because it only penalizes "conduct occurring after its enactment—*i.e.*, knowingly maintaining a residence within 500 feet of a child day-care home." App. 8a. Under the Seventh Circuit's understanding of what constitutes "retroactivity," any burden, no matter how punitive, could be seen as prospective and thus would not raise ex post facto concerns. For example, a law banishing all people who have been convicted of sex offenses from the state wouldn't be retroactive because it would only penalize "conduct occurring after its enactment"—*i.e.* knowingly remaining in the state.

This cramped understanding of what constitutes retroactivity conflicts with this Court's precedents and the decisions of many other Courts of Appeal, which hold that a law is "retroactive" if it increases the burdens on individuals convicted before its enactment based exclusively on their past conduct. *See e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994) (defining retroactive law as one that "attaches new legal consequences to events completed before its enactment"); *see also*, *Doe v. Miami-Dade County*, 838 F.3d 1050, 1053 (11th Cir. 2016) ("The ... residency restriction applies to individuals convicted of relevant sexual offenses before the passage of the Ordinance. ... Therefore, we accept for purposes of this appeal that the residency restriction applies retroactively."); *Does #1–5 v. Snyder*, 834 F.3d at 698 ("The 2006 and 2011 amendments apply retroactively to all who were required to register under SORA."); *Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016) ("A statute is enforced retroactively if it governs conduct that preceded the statute's enactment. ... That is the case here: Mr.

Shaw is subject to statutes enacted in 2009 and 2014 for conduct that took place in 1998.")

II. This Case Warrants the Supreme Court's Intervention

In the fifteen years since this Court decided the *Doe* cases, almost every state has expanded the restrictions it imposes on people who have been convicted of sex offenses, including restrictions on where they can live, work and be "present." In *Packingham*, this Court noted the "troubling fact" that such laws often "impos[e] severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system." 137 S. Ct. at 1737.

The proper application of the *Doe* cases to today's much harsher sex offender laws is a recurring issue on which courts have reached conflicting decisions.[11] The Seventh Circuit's decision conflicts with the decisions of several other courts which have found residency bans distinguishable from the registration laws at issue in the *Doe* cases.

- *Does #1–5 v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016) (cert denied 138 S. Ct. 55 (2017)) (finding Michigan scheme regulating the residency, presence and employment of sex offenders violated

[11] Indeed, another petition for a writ of certiorari currently pending before this Court seeks clarification about *Smith*'s application to a sex offender registration scheme. *See Boyd v. State of Washington*, No. 18-39 (pet. filed July 2, 2018) (the question presented is whether "the requirement of frequent, in-person reporting renders an offender-registration law punitive, such that applying the law retroactively violates the Ex Post Facto Clause.")

the Ex Post Facto Clause because it imposed "direct restraints" that are "greater than those imposed by the Alaska statute by an order of magnitude.");

- *Doe v. Miami-Dade County*, 838 F.3d 1050, 1052 (11th Cir. 2016) (finding that plaintiffs stated a claim that a local residency ordinance which prohibited "a person who has been convicted of any one of several enumerated sexual offenses involving a victim under sixteen years of age from 'resid[ing] within 2,500 feet of any school'" violated the ex post facto clause)[12];

- *Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951, 954 (E.D. Wis. 2017) (local residency ordinance violated the ex post facto clause because the restrictions imposed were "not rationally connected to its purposes.");

- *Evenstad v. City of West St. Paul*, 306 F. Supp. 3d 1086 (D. Minn. 2018) (enjoining enforcement of a local ordinance "restricting sex offenders from residing within 1,200 feet of schools, day care centers, and group homes" because it was "excessive in relation to its stated purpose.");

- *Doe v. Miller*, 405 F.3d 700, 718 (8th Cir. 2005) (applying *Smith* and *Conn. Dep't of Public Safety* and finding residency law did not violate

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[12] Unlike Illinois' Residency Ban, the residency law at issue in *Doe v. Miami-Dade* explicitly exempted residences established before a school was opened. *Id.* at 1052 (citing Miami-Dade Cty., Fla., Code of Ordinances ch. 21, art. XVII, §21-282(1)).

Eighth Amendment, Due Process Clause or Ex Post Facto Clause);

- *Shaw v. Patton*, 823 F.3d 556, 561-62 (10th Cir. 2016) (applying *Smith* and finding that reporting, residency and loitering restrictions did not violate the Ex Post Facto clause).

- *Duarte v. City of Lewisville, Texas*, 858 F.3d 348 (5th Cir. 2017) (cert denied 138 S.Ct. 391 (2017)) (applying *Conn. Dep't of Public Safety* and rejecting procedural due process challenge to residency ordinance).

Several state supreme courts also have distinguished the *Doe* cases to hold state registration laws unconstitutional.[13]

This Court should grant the petition to provide uniform guidance to the courts below and to properly constrain courts' unwarranted extension of the holdings

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[13] *See In re Taylor*, 343 P.3d 867 (Cal. 2015) (residency law violated due process); *Mann v. Georgia Dept. of Corrections*, 653 S.E.2d 740 (Ga. 2007) (residency law violated the Fifth Amendment Takings Clause); *Commonwealth v. Muniz*, 164 A.3d 1189, 1218, 1222-23 (Pa. 2017) (Pennsylvania registration scheme violated ex post facto clause under state and federal constitutions); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (same regarding Maine scheme); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (New Hampshire scheme violates state constitution); *Starkey v. Okla. Dep't of Corrections*, 305 P.3d 1004, 1030 (Okla. 2013) (same regarding Oklahoma scheme); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 143 (Md. 2013) (same regarding Maryland scheme); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (same regarding Indiana scheme); *Doe v. State*, 189 P.3d 999, 1019 (Ala. 2008) (retroactive application of Alaska registration scheme violates state constitution, despite ruling in *Smith*).

in *Smith* and *Conn. Dep't of Public Safety* to laws that do not remotely resemble the registry laws upheld in those cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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