No. 18-308

IN THE

Supreme Court of the United States

ANTHONY RAYSHON BETHEA

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of North Carolina

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the retroactive application of North Carolina's sex offender registration statute violates the Ex Post Facto Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because, from common law to the Constitution, the prohibition of ex post facto laws has been an essential safeguard of our liberties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates all the Framers' warnings against retroactive laws. The prohibition of ex post facto laws was of the highest importance to the Framers of the Constitution, who firmly believed that the power to create retroactive legislation was a sign of tyranny. Despite clear warnings from the Framers about the inherent unfairness of such laws, the Supreme Court has adopted the view that the Ex Post Facto Clause does not prohibit states from enacting retroactive civil penalties. So long as a retroactive law contains a discernable regulatory purpose and a "civil" label, retroactive application will not run afoul of the

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief and consent has been given. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* funded its preparation or submission.

Ex Post Facto Clause. Having been given a blueprint to avoid judicial scrutiny, the Ex Post Facto Clause has become a mere procedural checkmark when drafting retroactive legislation. As a result, states like North Carolina have enacted increasingly burdensome retroactive penalties on convicted sex offenders under the guise of civil regulatory laws. Even after convicted sex offenders have paid their debts to society, they continue to face vengeful, excessive punishments under the Sex Offender Registry and Notification Act (SORNA) and its state counterparts. This unconstitutional practice flies in the face of the original meaning of the Ex Post Facto Clause.

The Court first considered the scope of the clause in *Calder v. Bull*, 3 U.S. 386 (1798). There, the Court drew some distinction between criminal rights and "private rights," arguing that restrictions against ex post facto laws were not designed to protect citizens' contract rights. But the Court did not reach the question of whether state-imposed penalties are distinguishable into "civil" and "criminal" categories. Successive cases have reaffirmed *Calder* to mean that the Clause does not guard against retroactive civil penalties. The artificial distinction between civil and criminal retroactivity, however, is wholly out of step with the original meaning of the Ex Post Facto Clause. Indeed, the historic evidence supports the proposition that the clause was originally intended to prohibit both criminal *and* civil retroactive laws.

Not only did the Court in *Calder* scrap the Ex Post Facto Clause as originally understood, but its subsequent jurisprudence abandoned the twin historical aims of the Clause: preventing vindictive legislation aimed at unpopular groups and providing sufficient

notice of the sanctions in place. As a replacement for these historic guiding principles, the Court has increasingly deferred to legislative intent—precisely what the Ex Post Facto Clause was intended to shield against. The Court's extreme deference has resulted in an unprincipled approach to ex post facto challenges.

In deciding whether a SORNA law constitutes retroactive punishment forbidden by the Ex Post Facto Clause, the Court has elected to rely upon an untenable "intent-effects test." *Smith v. Doe*, 538 U.S. 84, 92 (2003). Under this test, the Court provides the utmost deference to legislative intent, only invalidating a retroactive law if there is "clearest proof" that the legislature intended to impose punishment. *Id.* The Court's supreme deference to state legislatures has made it virtually impossible for those bringing ex post facto challenges to show that an enacted retroactive "civil" law has a punitive purpose or effect. States can skate around the Ex Post Facto Clause by merely attaching a "civil" label to any retrospective punishment. Due to the Court's exceedingly narrow interpretation in *Calder* and its progeny, ex post facto analysis has been relegated to a mere rubber stamp for legislative action.

The Court's unwillingness to invalidate civil statutes for their retroactive punitive effect incentivizes legislatures to enact increasingly burdensome civil penalties that alter the legal consequences of previously committed conduct without constitutional accountability. Since the Ex Post Facto Clause has lost its foundation in original meaning, the intent-effects test now rests on shaky ground and produces disparate results. The circuit courts are split on the question of whether SORNA laws are civil regulatory schemes or punitive measures in violation of the Ex Post Facto

Clause. Without guidance from this Court, lower courts will continue to reach conflicting decisions regarding the constitutionality of state SORNA laws.

Many legal scholars and judges, including justices of this Court, have signaled an increased willingness to ground constitutional interpretations in historical understandings. *See*, *e.g.*, *D.C. v. Heller*, 554 U.S. 570, 592–93 (2008); *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) ("I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause."). This case presents an excellent vehicle for the Court to revisit *Calder* and its progeny, as well as an ideal opportunity to ground the Ex Post Facto Clause in its original meaning and historic purpose. The Court should take this case and reaffirm that the Constitution's prohibition against ex post facto laws prohibits states from skirting constitutional scrutiny by simply labelling increasingly burdensome retrospective penalties as "civil" regulatory laws.

ARGUMENT

I. THE DECISION BELOW IS CONTRARY TO THE ORIGINAL MEANING AND HISTORICAL PURPOSE OF THE EX POST FACTO CLAUSE

A. The Ex Post Facto Clause Draws No Distinction Between "Civil" and "Criminal" Retroactive Penalties

Article I, Section 10 of the Constitution provides plainly that "[n]o State shall . . . pass *any* . . . Ex Post

Facto law." The Clause forbids the enactment of *any* law that "imposes punishment for an act that was not punishable at the time it was committed or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. 277, 325–26 (1866)). The Framers highlighted their profound concern over ex post facto lawmaking by including not one, but two explicit clauses in the Constitution prohibiting such laws. *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 515 n.1 (1995) (Stevens, J., dissenting) ("That the Framers included two separate clauses in the Constitution prohibiting ex post facto legislation highlights the Framers' appraisal of the importance of that prohibition."). In fact, until the ratification of the Fourteenth Amendment and the subsequent incorporation of the Bill of Rights to the states, the Ex Post Facto Clause was one of the few constitutional prohibitions on state conduct.

The Framers were deeply concerned with retroactive lawmaking. Alexander Hamilton, for instance, believed the proscription on ex post facto laws to be among the greatest "securities to liberty" guaranteed by the Constitution. The Federalist, No. 84. Similarly, James Madison maintained that the prohibition on ex post facto laws prevented abusive laws that were "contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist, No. 44. Madison himself believed the terms "ex post facto" and "retroactive" were synonymous with one another. Max Farrand, *Records of the Federal Convention of 1787* 440 (2d ed. 1937). Commentators have insisted that "[i]t is improbable that Madison alone understood the terms [of the Ex Post Facto Clause] to have the meaning he attaches to them." Oliver P. Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 320

(1920-21). The Framers displayed a clear aversion to *any* retroactive lawmaking, making no distinction between civil and criminal statutes.

Debates during the Constitutional Convention provide further evidence that the Ex Post Facto Clause was originally intended to encompass both civil and criminal retroactive laws. For example, when Rufus King moved to include specific language prohibiting retroactive interference with contracts, George Mason objected that unforeseeable situations may require that states have the power to interfere with private contracts. 2 *The Records of the Federal Convention of 1787*, at 439-40 (ed. Max Farrand, 1911). Madison, a key drafter of the Constitution, responded by asking, "[i]s not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null and void[?]" *Id.*

Following this discussion, the Convention moved to insert a prohibition on all "retrospective laws," a term which had never been construed as referring to criminal laws only. *Id.* The Committee on Style later changed the terminology from "retrospective laws" to its present form of "ex post facto." William W. Crosskey, Note, *Ex-Post-Facto and the Contracts Clauses in the Federal Convention*: *A Note on the Editorial Ingenuity of James Madison*, 35 U. Chi. L. Rev. 248, 250 (1968). Even with that edit, there is no evidence that any delegate objected to the Committee's use of the term "retrospective laws" or that the Convention intended to prohibit retroactive criminal laws alone.

Despite the Framers' strong repugnance towards retroactive lawmaking generally and the Constitution's explicit text prohibiting *any* retroactive law, the Court has interpreted the Ex Post Facto Clause as

merely prohibiting retroactive *criminal* penalties. In *Calder v. Bull*, 3 U.S. 386 (1798), the Court's first case concerning the clause, the question was whether the clause voids legislation that has retroactive effects on contract and property rights. *Id.* at 387. The Court had no cause to reach the specific question of whether state-imposed sanctions are distinguishable into "civil" and "criminal" categories. The *Calder* majority concluded that the constitutional prohibition on ex post facto laws was not intended to apply to civil laws. *Id.* at 391. The majority deduced that laws impairing contracts are considered a subclass of civil ex post facto laws, and if all civil ex post facto laws are prohibited under the Constitution, then it would have been unnecessary to include a specific prohibition against a subclass of ex post facto laws. *Id.* at 390.

However, *Calder*'s conclusion that the Ex Post Facto Clause only applies to retroactive criminal laws is undermined by a case the Court dealt with a mere 12 years later. In *Fletcher v. Peck*, the Court applied an ex post facto analysis to a civil statute. 10 U.S. 87, 139 (1810). The *Fletcher* Court found that a civil statute revoking land grants to bona fide purchasers without notice offended the ex post facto provisions of the Constitution. The Court noted in relevant part that:

> [a]n ex post facto law is one that renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which

> was not declared by some previous law to render him liable to that punishment.

Id. at 138.

The application of an ex post facto analysis in this case surely undermines *Calder*'s holding and suggest that early courts interpreted the clause to prohibit both criminal *and* civil retroactive penalties.

Other courts at or near the time of *Calder* that interpreted the Ex Post Facto Clause did not distinguish between civil and criminal penalties. Regardless of the label given to the law, any deprivation of rights was considered a punishment subject to scrutiny under the clause. *See Cummings v. Missouri*, 71 U.S. 277, 320 (1866) ("The deprivation of any rights, civil or political, previously enjoyed, may be punishment"). In the years leading up to *Calder*, cases from Maryland, Virginia, and New Jersey all suggested that the phrase "ex post facto" included both civil and criminal laws. 1 William Winslow Crosskey, *The True Meaning of the Prohibition of the Ex-Post-Facto Clauses*, in *Politics and the Constitution in the History of the United States* 324, 338–39 (1953) (recounting debate in the First Congress over the meaning of the Ex Post Facto Clause).

In *Satterlee v. Matthewson*, Justice William Johnson articulated a staunch challenge to the Court's holding in *Calder* that the Ex Post Facto Clause applied only to criminal penalties. 27 U.S. 380 (1829) (Johnson, J., concurring). In dissecting and refuting the underlying reasons for the *Calder* decision, Johnson stated that the issue in the *Satterlee* case was based in the "unhappy idea that the phrase 'ex post facto,' in the constitution of the United States, was confined to criminal cases exclusively; a decision which

leaves a large class of arbitrary legislative acts without prohibitions of the constitution." *Id.* at 416. He asserted that "the case of *Calder v. Bull* cannot claim the preeminence of an adjudged case upon this point, and if adjudged, was certainly not sustained by reason of authorities." *Id.*

The list of authorities challenging the holding in *Calder* is substantial and proves too exhaustive to catalogue here. To be sure, both the Framers' clear aversion to retroactive lawmaking generally and the debates that occurred during the Constitutional Convention support the contention that the Ex Post Facto Clause was originally intended to prohibit *all* retroactive civil penalties. Moreover, courts that dealt with ex post facto challenges at or near the time of *Calder* came to differing conclusions regarding the scope of the Clause. On balance, the historical evidence clearly weighs heavily in favor of reconsidering the underlying reasoning in *Calder* and its progeny.

B. The Primary Historical Purpose of the Ex Post Facto Clause Is to Prevent Arbitrary and Vindictive Legislation Aimed at Unpopular Groups

As Justice Chase expressed in *Calder*, speaking on the history of ex post facto laws,

> [w]ith very few exceptions, the advocates of [ex post facto] laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any Ex Post Facto law.

Calder, 3 U.S. at 389.

Justice Chase pointed out that the Clause protects liberty by preventing governments from enacting statutes with "manifestly unjust and oppressive retroactive effects." *Id.* "[A]llowing legislatures to pick and choose when to act retroactively, risks both 'arbitrary and potentially vindictive legislation,' and erosion of the separation of powers," as well as the potential for "violent acts which might grow out of the feelings of the moment." *Id.*

In accord with its primary historical purpose, the Ex Post Facto Clause protects individuals who are vulnerable to retribution extending beyond their original sentence, particularly when public sentiment is one of revenge and anger toward a specific offense. *Doe I v. Otte*, 259 F.3d 979, 982 (9th Cir. 2000). In such instances, the clause "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver*, 450 U.S. at 29; *see also Miller v. Florida*, 483 U.S. 423, 429 (1987) (restating that the primary historical purpose was to "assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation . . . [and] preventing legislative abuses."). This historical recitation has traditionally provided the Court a foundation from which to analyze the constitutionality of retroactive laws.

In cases presenting ex post facto challenges to SORNA laws, however, the courts have been largely silent regarding the primary historical purpose of the Ex Post Facto Clause. In *Smith*, for example, the majority made no mention of the Clause's goal of protecting unpopular groups from vindictive legislation. 538 U.S. 84 (2003). The Court ignored whether the intent of the legislature is "to punish [the] individual for past activity," or to restrict the individual pursuant to "a

regulation of a present situation." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). *Smith* has effectively allowed states to direct burdensome civil penalties towards a particular class of individuals.

It is indisputable that convicted sex offenders have been particularly vulnerable to vindictive, ongoing retribution by states under SORNA. *See* Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 Vand. L. Rev. 219, 220–31 (1995). Legislators are generally eager "to draft increasingly harsh registration and notification schemes to please an electorate that subsists on a steady diet of fear." Catherine L. Carpenter and Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L. J. 1071, 1074 (2012). This practice has led to "runaway legislation that has become unmoored from its initial constitutional grounding." *Id.*

As Justice Souter noted in *Smith*, "it would be naïve to look no further, given pervasive attitudes toward sex offenders" since the "Ex Post Facto Clause was meant to prevent 'arbitrary and potentially vindictive legislation.'" *Smith*, 538 U.S. at 108–09 (Souter, J., concurring) (quoting *Weaver*, 450 U.S. at 29). The clause's primary purpose is particularly important to stigmatized groups, such as convicted sex offenders. Accordingly, the Court should contextualize its ex post facto analysis within the scope of the primary historical purpose of the Clause.

C. The Court's Treatment of the Ex Post Facto Clause Ignores the Clause's Second Historical Purpose of Providing Sufficient Notice of Sanctions

The second historical purpose of the Ex Post Facto Clause is to ensure that laws give "fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 28–29. Through the prohibition on ex post facto laws, the Framers sought to guarantee that legislative acts provide individuals with proper notice. *Id.*; *Dobbert v. Florida*, 432 U.S. 298 (1977); *Kring v. Missouri*, 107 U.S. 221, 229 (1883); *Calder*, 3 U.S. at 387. The Framers recognized that ex post facto laws are inherently unfair because they deprive individuals of adequate notice of the wrongfulness of their behavior and the consequences thereof until after the fact. Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1276 (1998). The Framers anticipated the instability that retroactive legislation could create, and thus incorporated the Ex Post Facto Clause into the Constitution.

James Madison articulated the threat that ex post facto laws can have on established expectations:

> Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy

> which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. . .

The Federalist, No. 43.

The Framers thus recognized the need for individuals to remain informed about the status of the law. Restrictions on ex post facto lawmaking require legislatures to respect individual reliance on the state of the law as a means of protecting established expectations. After all, people should be able to rely on existing law when ordering their affairs. Clear legal obligations maximize individual freedom of action. Laws should therefore operate prospectively to provide adequate notice. The Framers included the Ex Post Facto Clause to protect these important values.

The need for notice is especially vital in the context of laws that create punishment, where potential deprivations of liberty are greatest. The requirement that laws be prospective in their application ensures that punitive legislation serves its purpose of deterrence. It also "assures that citizens are on notice of criminal statutes so that they can conform their conduct to the requirements of existing laws." J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 Geo. Mason L. Rev. 719, 721 (2011).

Since the ratification of the original Constitution, the need for notice and stability has not changed. The Court's view of the Ex Post Facto Clause, however, has transformed significantly. The present application of

the clause is out of line with its historical purpose of putting those convicted of crimes on notice of their potential punishments. Convicted sex offenders now fear the imposition of tougher and lengthier punishments, even after fulfilling their initial legal obligations. The Court should therefore align its ex post facto analysis with the historical aim of providing sufficient notice.

II. THE INTENT-EFFECTS TEST GIVES EXCESSIVE DEFERENCE TO LEGISLATURES, IMPOSES TOO-HIGH BURDENS ON THOSE MAKING EX POST FACTO CHALLENGES, AND ENCOURAGES STATES TO DISGUISE PUNISHMENTS AS "CIVIL" LAWS

A. The Ex Post Facto Clause Has Become a Mere Procedural Checkmark for State Legislatures

The watering down of the Ex Post Facto Clause and the values that underlie it has cleared the path for unaccountable deference to state legislatures. Deference to legislative intent, however, is *precisely* what the Ex Post Facto Clause was intended to guard against. Alexander Hamilton acknowledged the role of constitutional provisions in limiting legislative prerogatives:

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution

> void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Federalist, No. 78.

The Court has since abdicated its duty to enforce the protections afforded by the Ex Post Facto Clause. Instead of providing a necessary check on legislative authority, the Court almost entirely defers to legislative intent under the untenable "intent-effects test." This test is used to determine whether statutes are civil regulatory laws or punitive measures that violate the Constitution's ex post facto provisions. *Smith*, 538 U.S. at 92. The Court has applied the intent-effects test to a wide array of cases involving issues of due process, self-incrimination, double jeopardy, and ex post facto laws. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (applying the intents-effects test to due process, double jeopardy, and ex post facto laws).

The first element of the intent-effects test looks to the legislature's intent behind the enactment of the statute. *United States v. Ward*, 448 U.S. 242, 248 (1980). A court must determine whether the legislature either expressed or implied a preference for the statute to be classified as either civil or punitive. *Id.* The court considers the statute's text and structure, *Flemming v. Nestor*, 363 U. S. 603, 617 (1960), asking whether the legislature indicated either expressly or impliedly a preference for one label or the other, *Hudson v. United States*, 522 U. S. 93, 99 (1997). Courts examine various other factors as well, such as the procedural mechanisms in place for enforcing the statute and whether the statute is located within a state's criminal or civil code. Dana L. McDonald, Smith v. Doe: *Judicial Deference Towards the Legislative Intent*

Behind a Broad, Punitive Civil Law Betrays the Core Principles of the Ex Post Facto Clause, 63 Md. L. Rev. 369, 377 (2004). Absent conclusive evidence as to the penal nature of a statute, courts will not override the legislature's intent. *See Flemming*, 363 U.S. at 617.

In *Kennedy v. Mendoza-Martinez*, the Court wrestled, in the immigration context, with how to determine whether an act of Congress is "penal or regulatory in character." 372 U.S. 144, 168 (1961). The seven factors articulated in *Mendoza-Martinez*, *id.* at 168–70, have helped illuminate the Ex Post Facto Clause, but recent decisions showcase the Court's tendency to rubber stamp legislative conclusions under the intent-effects test. In *Smith*, for example, the Court found that the state legislature intended Alaska's SORNA law to be non-punitive, despite finding that several of the *Mendoza-Martinez* factors had *some* punitive effect. The majority did not require the state to show a finding of dangerousness before subjecting prior offenders to the SORNA's burdensome registration and notification provisions. *Smith*, 538 U.S. at 102–03. Instead of using the *Mendoza-Martinez* factors to determine whether the provisions of the SORNA served the intent of the legislature, the majority focused on the *degree* of the burden imposed by the SORNA, a distinction not made in prior ex post facto cases. After all, ex post facto jurisprudence is not concerned with degrees of burden. *See* Simeon Schopf, *"Megan's Law": Community Notification and the Constitution*, 29 Colum. J.L. & Soc. Probs. 117, 134 (1995) (noting that the proper constitutional issue is not the degree of burden on the defendant but whether the burden increases the punishment for the crime).

The Court's approach in *Smith* ignored the central goal of ex post facto jurisprudence, namely to determine whether the intent of the legislature is "to punish [the] individual for past activity," or to restrict the individual pursuant to "a regulation of a present situation." *De Veau*, 363 U.S. at 160. The Court should have found the legislature's intent to be ambiguous and applied the *Mendoza-Martinez* factors with less deference. Instead, the Court ultimately deferred to the legislature in its application of each factor. *Smith*, 538 U.S. 97–101. By failing to require the law's provisions to serve the statute's stated intent, the Court set a precedent that allows states to enact broad, punitive measures that violate the Ex Post Facto Clause.

In many instances in which the Court has employed the intent-effects test, it has deferred to legislative intent. *See*, *e.g*, *Hendricks*, 521 U.S. at 361. And while the presumption of constitutionality affords great deference to legislatures, *Lambert v. California*, 355 U.S. 225, 228 (1957), great deference does not translate into unrestrained legislative freedom. Legislative authority may never override constitutional principles. The intent-effects test as applied in the Court's ex post facto jurisprudence affords nearly universal deference to legislative intent, a practice that is at direct odds with the original understanding and historical purpose of the Ex Post Facto Clause.

B. The "Clearest Proof" Standard Makes It Nearly Impossible for Those Bringing Ex Post Facto Challenges to Show that a Law with a "Civil" Label Has a Punitive Purpose or Effect

If a court finds that the legislature intended to establish a civil penalty, it then proceeds to determining

whether the statute is "so punitive either in purpose or effect" as to negate the legislature's intent to establish a civil penalty. *Ward*, 448 U.S. at 249. The burden is thus on the challenger to show that the retroactive law is punitive. A court will only invalidate the legislature's intent if the challenger can show "clearest proof" that the statute has a punitive effect. *Hudson*, 522 U.S. at 99–100. The clearest proof standard, however, has proven to be an impossible standard to meet for those bringing ex post facto challenges.

When considering whether legislation that is expressly or implicitly civil has a punitive effect, it is unclear what a challenger would have to show to meet this burden. The seven factors articulated in *Mendoza-Martinez* do not provide a dispositive test for determining whether a statute's purpose is punitive. *Ward*, 448 U.S. at 249 (describing the factors as "neither exhaustive nor dispositive"). The factors are instead "useful guideposts" for determining the effect of the statute in question. *Hudson*, 522 U.S. at 99.

In cases where the Court has required clearest proof, the Court has found that the legislature unambiguously stated that its intent was civil. *See, e.g., Ward*, 448 U.S. at 249. The clearest proof standard effectively permits legislators to avoid judicial scrutiny by simply labelling SORNA laws as having a "civil" purpose. Consequently, those bringing ex post facto challenges have a huge hill to climb to show that retroactive application of a law violates the Ex Post Facto Clause. In *Smith*, for example, several of the *Mendoza-Martinez* factors were recognized as having *some* punitive effect, yet the Court found that no factor cut in favor of "clearest proof." *Smith*, 538 U.S. at 96.

The uncertainty of what constitutes a "punitive" measure under the seemingly insurmountable clearest proof standard affords great leeway for state legislatures to enact retroactive laws that can have significant punitive effects. Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 326 (1992). Sex offender registration schemes are designed to both protect the public and impose punitive burdens on the offender's liberty, making them difficult to categorize. In *Smith*, Justice Souter observed, "the indications of punitive character . . . and the civil indications . . . are in rough equipoise." 538 U.S. at 110 (Souter, J. concurring). Such a heightened burden only makes sense when the evidence of legislative intent clearly points in the civil direction. *Hudson*, U.S. at 113–14 (Souter, J., concurring in judgment). Regarding SORNA laws, however, legislative intent is not always clear. Such laws tend to impose increasingly burdensome penalties upon certain groups while maintaining a "civil" label. When SORNA laws are viewed from this lens, the clearest proof standard proves to be an impossible standard to meet for those bringing ex post facto challenges.

C. The Court's Unwillingness to Invalidate Retroactive "Civil" Laws Incentivizes State to Enact Punishments that Alter the Legal Consequences of Previously Committed Conduct without Constitutional Accountability

Since *Calder*, the Court has largely refused to invalidate civil penalties because of their retroactive effects, despite how egregious the punishments have become. For example, the Court has upheld "civil commitment" schemes in which states refuse to release

convicted sex offenders from prison after they have served their sentences. *Hendricks*, 521 U.S. at 369–70. In *Hendricks*, the Court held that civil commitment is not punishment even though it results in continued incarceration. *Id.* at 370–71. Invasive and stigmatizing sex offender registration and notice laws have also been upheld. *Smith*, 538 U.S. at 85. The *Smith* case set a particularly poor precedent that permits states to enact retrospective "civil" regulatory laws in violation the Ex Post Facto Clause. *Smith* essentially signaled to states that they are immune from ex post facto challenges if they simply give their sex offender registration laws a "civil" label.

Yet the years since *Smith* "have been marked by a dizzying array of increased registration and community notification requirements, the emergence of harshening residency restrictions, and the elimination of individuated risk assessment." Carpenter and Beverlin, *supra*, at 1078. Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize convicted sex offenders. As the Court observed in *Lawrence v. Texas*, even a conviction of a misdemeanor sexual offense imposes a stigma that "is not trivial." 539 U.S. 558, 575 (2003). Other courts have also acknowledged that sex offender registration can involve significant and intrusive burdens that stigmatize the offender. *See, e.g., State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004) (recognizing that Florida's statute "imposes more than a stigma," subjecting designated sexual predators to "life-long registration requirements"). These burdensome requirements are similar to shaming punishments that were used throughout history to disable offenders from living normally in the community. *See* Toni Massaro, *Shame,*

Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1913 (1991).

The states' success in imposing increasingly burdensome retroactive registration and notification schemes on convicted sex offenders will incentivize legislatures to expand their civil regulatory schemes. Some states have proposed creating registries for convicted drunk drivers. Michael J. Watson, *Carnage on Our Nation's Highways: A Proposal for Applying the Statutory Scheme of Megan's Law to Drunk-Driving Legislation*, 39 Rutgers L.J. 459 (2008). At least four states have created registries for those convicted of methamphetamine use. Brian A. Loendorf, *Methamphetamine Offender Registries: Are the Rights of Non-Dangerous Offenders Cooked?* 17 Kan. J.L. & Pub. Pol'y 542, 551 (2008). Other state proposals include: expanding the list of registerable offenses to include tongue-kissing of a minor; requiring offenders to register with campus police if attending school; barring sex offenders from attending festivals or Halloween activities; increasing the reach of residency restrictions; and requiring weekly registration for homeless offenders. Carpenter and Beverlin, *supra*, at 1100.

Allowing such invasive and harsh retroactive sex offender registries has opened the floodgate for states to continue expanding the burdensome civil regulatory schemes. In the wake of *Smith*, states have a perverse incentive to impose longer and harsher punishments on vulnerable groups. Simply by concealing retroactive punishments under the guise civil statutes, states have become immune from ex post facto challenges and judicial scrutiny. The Framers could not have anticipated the development of these complex regulatory schemes that impose retroactive penalties on those

that have already been convicted and paid their debts to society. If left unchecked by the judiciary, state legislatures will continue to impose further retroactive punishments on convicted sex offenders and other groups prone to public animus.

CONCLUSION

The Ex Post Facto Clause is, in James Madison's words, a "constitutional bulwark in favor of personal security and private rights." The Federalist, No. 43. The petitioners have correctly pointed out that this case creates numerous splits among the circuit courts. That fact alone warrants this Court's attention, but the constitutional implications of the decision below add further import.

The petition should be granted.

Respectfully submitted,

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