No. 18-

# 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 North Carolina Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The first generation of sex offender registration statutes required only that offenders register with the government and that information about the offenders be available to the public. In *Smith v. Doe*, 538 U.S. 84 (2003), the Court rejected an Ex Post Facto Clause challenge to the retroactive application of one of these statutes, on the ground that such statutes were not punitive.

In the years since *Smith v. Doe*, the states have enacted a second generation of sex offender statutes that impose much harsher restrictions on registrants than the first generation of statutes did. North Carolina's is typical. It prohibits registrants from being on the premises of schools, parks, libraries, and swimming pools. It bars registrants from residing within 1,000 feet of any school. It excludes registrants from certain occupations. It imposes onerous in-person reporting requirements. It mandates extremely long registration periods. And it punishes violations of these restrictions as felonies.

The lower courts are divided over whether these second-generation statutes are sufficiently punitive to distinguish them from the statute the Court considered in *Smith v. Doe*.

The Question Presented is whether the retroactive application of North Carolina's sex offender registration statute violates the Ex Post Facto Clause.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISION INVOLVED ..... 1

STATEMENT ..... 1

REASONS FOR GRANTING THE WRIT ..... 10

I. The lower courts are deeply divided over whether the retroactive application of second-generation sex offender statutes, which include restrictions on where registrants can live, work, and be present, as well as onerous in-person reporting requirements, violates the Ex Post Facto Clause. ..... 10

II. This case is an ideal vehicle for resolving the conflict. ..... 19

III. The issue is very important. ..... 27

IV. The decision below is wrong. ..... 28

CONCLUSION ..... 34

APPENDICES

A. North Carolina Court of Appeals opinion ..... 1a

B. North Carolina Supreme Court order denying review ..... 14a

C. North Carolina Superior Court judgment ..... 16a

## TABLE OF AUTHORITIES

CASES

*ACLU v. Masto*, 670 F.3d 1046 (9th Cir. 2012) ..... 13, 16, 17, 18
*Boyd v. Washington*, No. 18-39 (pet. for cert. filed July 2, 2018) ..... 28
*Calder v. Bull*, 3 U.S. 386 (1798) ..... 32, 33
*Carmell v. Texas*, 529 U.S. 513 (2000) ..... 32
*Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), cert. denied, 559 U.S. 992 (2010) ..... 12, 14, 15, 16, 25
*Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), cert. denied, 138 S. Ct. 925 (2018) ..... 12, 14, 15, 19, 25
*Cummings v. Missouri*, 71 U.S. 277 (1866) ..... 33
*Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123 (Md. 2013) ..... 12
*Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), cert. denied, 546 U.S. 1034 (2005) ..... 13, 16, 17, 18
*Doe v. State*, 189 P.3d 999 (Alaska 2008) ..... 12
*Doe v. State*, 111 A.3d 1077 (N.H. 2015) ..... 12
*Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), cert. denied, 138 S. Ct. 55 (2017) ..... 12, 14, 15, 16, 25
*Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) ..... 32
*Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (per curiam) ..... 10
*Gundy v. United States*, No. 17-6086 (cert. granted Mar. 5, 2018) ..... 26
*In re Hall*, 768 S.E.2d 39 (N.C. Ct. App. 2014) ..... 9
*Kammerer v. State*, 322 P.3d 827 (Wyo. 2014) ..... 13, 17, 18

*Kansas v. Hendricks*, 521 U.S. 346 (1997) ..... 11, 31
*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) ..... 11
*Litmon v. Harris*, 768 F.3d 1237 (9th Cir. 2014) ..... 13
*Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) ..... 5
*Pennsylvania v. Muniz*, No. 17-575 (cert. denied Jan. 22, 2018) ..... 19
*Peugh v. United States*, 569 U.S. 530 (2013) ..... 11
*Riley v. New Jersey State Parole Bd.*, 98 A.3d 544 (N.J. 2014) ..... 12, 14, 25
*Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016) ..... 13, 16, 17, 18
*Smith v. Doe*, 538 U.S. 84 (2003) ..... passim
*Snyder v. Does #1-5*, No. 16-768 (cert. denied Oct. 2, 2017) ..... 19
*Starkey v. Oklahoma Dep't of Corrections*, 305 P.3d 1004 (Okla. 2013) ..... 12
*State v. Bowditch*, 700 S.E.2d 1 (N.C. 2010) ..... 25
*State v. Harris*, 817 N.W.2d 258 (Neb. 2012) ..... 13, 17, 18
*State v. Letalien*, 985 A.2d 4 (Me. 2009) ..... 12, 14, 25
*State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009) ..... 12
*State v. Seering*, 701 N.W.2d 655 (Iowa 2005) ..... 13, 17, 18
*State v. Trosclair*, 89 So. 3d 340 (La. 2012) ..... 13, 17, 18
*State v. White*, 590 S.E.2d 448 (N.C. Ct. App. 2004) ..... 3, 4, 9
*State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) ..... 12

*Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018) ..... 13, 16, 17, 18, 28

STATUTES

28 U.S.C. § 1257(a) ..... 1
34 U.S.C. § 20901 *et seq.* ..... 6, 26
34 U.S.C. § 20913(d) ..... 26
34 U.S.C. § 20915(a) ..... 6
34 U.S.C. § 20915(a)(2) ..... 6
34 U.S.C. § 20918 ..... 27

Ala. Code § 15-20A-10 ..... 23
Ala. Code § 15-20A-11 ..... 20
Ala. Code § 15-20A-12 ..... 23
Ala. Code § 15-20A-13 ..... 22
Ala. Code § 15-20A-15 ..... 24
Ala. Code § 15-20A-17 ..... 21

Ark. Code § 5-14-128 ..... 20
Ark. Code § 5-14-129 ..... 22
Ark. Code §§ 5-14-132 through -134 ..... 21
Ark. Code § 12-12-909 ..... 23

Cal. Penal Code § 626.81 ..... 21
Cal. Penal Code § 3003.5 ..... 20
Cal. Penal Code § 3053.8 ..... 21

Del. Code tit. 11, § 1112 ..... 20, 21
Del. Code tit. 11, § 4120(g) ..... 23
Del. Code tit. 11, § 4121(k) ..... 23

Fla. Stat. § 775.21 ..... 24
Fla. Stat. § 775.215 ..... 20
Fla. Stat. § 856.022 ..... 21

Ga. Code § 42-1-12(f) ..... 23, 24
Ga. Code § 42-1-15 ..... 20, 21, 23

Idaho Code § 18-8307 ..... 23
Idaho Code § 18-8309 ..... 24

Idaho Code § 18-8329 ..... 20, 21
720 Ill. Comp. Stat. § 5/11-9.3 ..... 21
730 Ill. Comp. Stat. § 150/3 ..... 24
730 Ill. Comp. Stat. § 150/8 ..... 20
Ind. Code § 11-8-8-7 ..... 24
Ind. Code § 11-8-8-14 ..... 23
Ind. Code § 11-13-3-4 ..... 20
Iowa Code § 692A.105 ..... 24
Iowa Code § 692A.108 ..... 23
Iowa Code § 692A.113 ..... 21, 23
Iowa Code § 692A.114 ..... 20
Kan. Stat. § 22-4905 ..... 23, 24
Ky. Rev. Stat. § 17.545 ..... 20, 22
La. Stat. § 14:91.2 ..... 20, 22
La. Stat. § 15:542 ..... 24
La. Stat. § 15:542.1.1 ..... 23
Me. Stat. tit. 34-A, § 11282 ..... 23, 24
Md. Code Crim. Proc. § 11-705 ..... 24
Md. Code Crim. Proc. § 11-707 ..... 23
Mich. Comp. Laws § 28.725 ..... 24
Mich. Comp. Laws § 28.725a ..... 23
Mich. Comp. Laws § 28.733 ..... 20, 22, 23
Mich. Comp. Laws § 28.734 ..... 22, 23
Mich. Comp. Laws § 28.735 ..... 20
Miss. Code § 45-33-25 ..... 20
Miss. Code § 45-33-26 ..... 22
Miss. Code § 45-33-29 ..... 24
Miss. Code § 45-33-31 ..... 23
Mo. Rev. Stat. § 566.147 ..... 20
Mo. Rev. Stat. § 566.149 ..... 22
Mo. Rev. Stat. § 566.150 ..... 22
Mo. Rev. Stat. § 589.414 ..... 23, 24

Neb. Rev. Stat. § 29-4004 ..... 24
Neb. Rev. Stat. § 29-4006 ..... 23
N.H. Rev. Stat. § 651-B:4 ..... 24
N.H. Rev. Stat. § 651-B:5 ..... 24
N.J. Stat. § 2C:7-2 ..... 24
N.M. Stat. § 29-11A-4 ..... 24
N.C. Gen. Stat. § 14-202.5 ..... 5
N.C. Gen. Stat. § 14-208.6(1f) ..... 5
N.C. Gen. Stat. § 14-208.6(1n) ..... 5
N.C. Gen. Stat. § 14-208.7(a) ..... 5
N.C. Gen. Stat. § 14-208.7(b)(7) ..... 5
N.C. Gen. Stat. § 14-208.9 ..... 5
N.C. Gen. Stat. § 14-208.9(a) ..... 5
N.C. Gen. Stat. § 14-208.9A ..... 5
N.C. Gen. Stat. § 14-208.11(a) ..... 5
N.C. Gen. Stat. § 14-208.12A(a1)(2) ..... 6, 26
N.C. Gen. Stat. § 14-208.12A(a1)(3) ..... 6
N.C. Gen. Stat. § 14-208.15A(b) ..... 5
N.C. Gen. Stat. § 14-208.16(a) ..... 4
N.C. Gen. Stat. § 14-208.16(f) ..... 4
N.C. Gen. Stat. § 14-208.17(a) ..... 4
N.C. Gen. Stat. § 14-208.17(c) ..... 4
N.C. Gen. Stat. § 14-208.18(a) ..... 4
N.C. Gen. Stat. § 14-208.18(d) ..... 4
N.C. Gen. Stat. § 14-208.18(h) ..... 4
N.C. Gen. Stat. § 14-208.19A(c) ..... 5
N.C. Gen. Stat. § 14-208.40 ..... 25
N.C. Gen. Stat. § 131E-159(h) ..... 5
N.D. Cent. Code § 12.1-20-25 ..... 22
Ohio Rev. Code § 2950.034 ..... 21
Okla. Stat. tit. 21, § 1125 ..... 22
Okla. Stat. tit. 57, § 589 ..... 23
Okla. Stat. tit. 57, § 590 ..... 21

Or. Rev. Stat. § 163.476 ..... 22
42 Pa. Cons. Stat. § 9799.15(e) ..... 24
S.C. Code § 23-3-460 ..... 24
S.C. Code § 23-3-535 ..... 21
S.D. Codified Laws § 22-24B-2 ..... 24
S.D. Codified Laws § 22-24B-7 ..... 24
S.D. Codified Laws § 22-24B-22 ..... 21, 22
S.D. Codified Laws § 22-24B-23 ..... 21
S.D. Codified Laws § 22-24B-24 ..... 22
Tenn. Code § 40-39-203 ..... 24
Tenn. Code § 40-39-211 ..... 21, 22
Tex. Code Crim. Proc. art. 62.051 ..... 24
Tex. Code Crim. Proc. art. 62.063 ..... 23
Utah Code § 77-27-21.7 ..... 22
Utah Code § 77-41-105 ..... 24
Va. Code § 9.1-904 ..... 24
Va. Code § 18.2-370.2 ..... 22
Va. Code § 18.2-370.3 ..... 21
Wash. Rev. Code § 9A.44.130(6)(b) ..... 24
W. Va. Code § 15-12-3 ..... 24
W. Va. Code § 15-12-10 ..... 24
W. Va. Code § 62-12-26 ..... 21, 22
Wyo. Stat. § 6-2-320 ..... 21, 22
Wyo. Stat. § 7-19-302 ..... 24

OTHER AUTHORITIES

William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539 (1947) ..... 32

Ira Mark Ellman and Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Commentary 495 (2015) ..... 31
Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741 (2016) ..... 27
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National Conference of State Legislatures, *Sex Offender Enactments Database* ..... 27
J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 34 J.L.&. Econ. 161 (2011) ..... 30
U.S. Dep't of Justice, Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* (2012) ..... 31
Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wis. L. Rev. 727 (2015) ..... 32

## PETITION FOR A WRIT OF CERTIORARI

Anthony Rayshon Bethea respectfully petitions for a writ of certiorari to review the judgment of the North Carolina Supreme Court.

## OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is published at 806 S.E.2d 677. App. 1a. The order of the North Carolina Supreme Court denying review is reported at 813 S.E.2d 241. App. 14a.

## JURISDICTION

The judgment of the North Carolina Supreme Court was entered on May 9, 2018. On June 28, 2018, the Chief Justice extended the time for filing a certiorari petition to September 6, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Ex Post Facto Clause, U.S. Const. art I, § 10, provides: "No State shall … pass any … ex post facto Law."

## STATEMENT

In *Smith v. Doe*, 538 U.S. 84 (2003), the Court rejected an Ex Post Facto Clause challenge to the retroactive application of Alaska's sex offender registration statute, on the ground that the statute was civil, not punitive. Alaska's statute was typical of that era. It required only that offenders register with the state and that information about offenders be available to the public. *Id.* at 90-91. The Court concluded that Alaska's statute could be applied retroactively because it was "nonpunitive." *Id.* at 105-06.

In the years since *Smith v. Doe*, the states have added much harsher restrictions to their sex offender registration statutes. These second-generation statutes prohibit registrants from being on the premises of schools, parks, and other places where minors may be present. They bar registrants from living within a certain distance of a school. They exclude registrants from certain occupations. They impose frequent in-person reporting requirements. They mandate very long registration periods—much longer than the first-generation statutes did. They punish violations of these restrictions as felonies. And they are retroactively applied to offenders who were convicted before the statutes were enacted.

The lower courts are deeply divided over whether the retroactive application of these statutes violates the Ex Post Facto Clause. Some lower courts have concluded that under *Smith v. Doe* these statutes cross the line from civil to punitive and thus cannot be retroactively applied. Other lower courts, also applying *Smith v. Doe*, have concluded that substantively identical statutes do *not* cross that line and thus may be retroactively applied.

This case is representative. In 2004, when Anthony Bethea was convicted, North Carolina required sex offenders to register. The state made information about Bethea available to the public. That was all that registration involved. Now, Bethea is subject to a welter of restrictions on where he can go, where he can live, what jobs he can hold, when he can see his children, and the like. None of these restrictions existed when he was convicted. In 2004, moreover, registration lasted for ten years. Bethea should have been off the registry four years ago. After he was

convicted, however, North Carolina lengthened his registration period to thirty years. He is not even eligible to *seek* to end his registration until 2029.

1. In 2004, petitioner Anthony Bethea, a school custodian and bus driver, pled guilty to six counts of sexual activity with a student. App. 1a. The charges arose from non-forcible acts of intercourse between Bethea and a female student at the high school where he worked. He had only just finished high school himself. He was nineteen and she was fifteen, except for the last occurrence, when he had just turned twenty. R. 46-47, 52.[1]

His guilty plea was pursuant to a negotiated plea agreement under which Bethea agreed: (1) to be sentenced to 40-48 months of imprisonment, suspended for 36 months of supervised probation with six months of electronic house arrest; (2) to complete a sex offender treatment program; and (3) to register as a sex offender for ten years. R. 11-22. He successfully completed the treatment program in 2006. R. 43. He successfully completed his period of probation in 2007. R. 35-37.

Under North Carolina's then-existing sex offender statute, Bethea was required to register with the sheriff of the county where he resided and to notify the sheriff if he moved. *See State v. White*, 590 S.E.2d 448, 450 (N.C. Ct. App. 2004). Once a year, he had to sign and return by mail a letter verifying his current address. *See id.* at 450-51. The sheriff's office

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[1] "R." refers to the Record on Appeal in the North Carolina Court of Appeals. "Tr." refers to the transcript of the Superior Court hearing held on October 31, 2016, on Bethea's application to be removed from the registry.

posted his registration information on the Internet. *See id.* at 456. These were the only obligations imposed by registration. At the time, North Carolina did not restrict where sex offenders could go, or where they could reside, or the jobs they could hold.

Under the then-existing statute, moreover, Bethea would be automatically removed from the register in 2014, ten years after he registered, if he did not commit any further offenses. App. 2a. This was the set of restrictions to which Bethea agreed when he pled guilty.

Beginning in 2006, however, North Carolina radically transformed its sex offender statute, by adding many more burdens that are entailed by registration. Now, Bethea is subject to a host of restrictions that did not exist at the time of his plea agreement. For example:

- It is a felony for him to be on the premises of schools (including his own children's schools, except under extremely limited circumstances), children's museums, child care centers, nurseries, playgrounds, libraries, arcades, amusement parks, recreation parks, swimming pools, and the state fairgrounds. N.C. Gen. Stat. § 14-208.18(a), (d), (h).

- It is a felony for him to reside within 1,000 feet of the property on which any school or child care center is located. *Id.* § 14-208.16(a), (f).

- It is a felony for him to work or volunteer in any field that involves the instruction or supervision of minors, such as helping to coach his children's sports teams. *Id.* § 14-208.17(a), (c).

- If he changes his address, even temporarily (such as when taking his family on vacation), he

must appear in person before the sheriff and provide written notice of the new address within three days of the change. *Id.* § 14-208.9(a).

- It is unlawful for him to obtain certain commercial driver's licenses, *id.* § 14-208.19A(c), or to work in emergency medical services, *id.* § 131E-159(h).

- He must provide the state with every form of identification he uses on-line, including every e-mail address, user ID, screen name, and so on. *Id.* §§ 14-208.7(b)(7), 14-208.6(1n). The state must furnish this information to any Internet service provider or website that requests it. *Id.* §§ 14-208.15A(b), 14-208.6(1f).[2]

- He must appear in person before the sheriff every six months to verify that none of his registration information has changed. *Id.* § 14-208.9A. Failure to do so is a felony. *Id.* § 14-208.11(a).

- Changes to his registration information must be reported in person to the sheriff within three days. *Id.* § 14-208.9.

Because of all these additional requirements, sex offender registration in North Carolina looks nothing like it did in 2004, when Bethea pled guilty.

Moreover, in the years since he pled guilty, North Carolina has drastically lengthened the registration period. In 2004, registration expired automatically after ten years. Now, registration lasts thirty years. *Id.* § 14-208.7(a). After ten years, a registrant may

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[2] North Carolina's sex offender statute also bars registrants from using social networking sites such as Facebook, *id.* § 14-202.5, but the Court held that this provision violates the First Amendment. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

petition the Superior Court to shorten the registration period. *Id.* But the court may grant this relief only if the court is "satisfied that the petitioner is not a current or potential threat to public safety." *Id.* § 14-208.12A(a1)(3). In addition, *id.* § 14-208.12A(a1)(2), the court may shorten the registration period only if doing so would comply with the federal Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 *et seq*. The federal statute establishes three tiers of offenders, whose registration periods must last fifteen years, twenty-five years, and for life. *Id.* § 20915(a). Bethea is a tier II offender, App. 4a, so his minimum registration period is twenty-five years. *Id.* § 20915(a)(2). Under North Carolina law, therefore, he is not even eligible to seek to have his registration period shortened until 2029. When he pled guilty, his registration period was scheduled to terminate automatically in 2014.

2. In 2014, ten years after he registered, Bethea petitioned the Superior Court to be removed from the registry. App. 4a. The court held a hearing, at which Bethea testified that when he pled guilty, he understood that registering meant that "I would just have to report my address where I lived, and that was it." T. 33. He also understood that registration "would expire after ten years if I upheld my bargain." T. 33.

At the hearing, Bethea described the severe effects of the new requirements. He and his family wished to move, but they could not, because of the difficulty of finding a location that does not violate the statute. T. 34. He could not find work as a truck driver, because "every time I apply for a truck driver job, the red flag always come[s] up as a sex offender.

It's not that it's a felony on my records because they only go back five and six years. But every time they see I'm still on the registry, it throws a flag." T. 34. He avoided taking vacations with his family for longer than three days, because of the difficulty of reporting his change of address. T. 35.

Worst of all, the new restrictions imposed by the statute prevented him from being a father to his children. He had already missed his oldest son's graduations from elementary school and middle school, he explained, "[a]nd I do not want to miss his high school graduation." T. 36. He had missed parent-teacher conferences. T. 36. He had been unable to go on school field trips with his children. T. 36. He recalled the difficulty of "telling my little eight-year-old baby girl I can't come eat lunch with her. It's hard to explain that to her." T. 36. He could not take his children to the park or to the state fair. T. 36. He had not been able to see his children play sports, because the games were held in a park. T. 37. "It's hard enough to be a parent," he observed, "without explaining the full effect to them why I can't walk you through the park on certain times and why I cannot go with you now to the state fair." T. 36.

Toward the end of his testimony, Bethea observed that he was now so much older than he had been at the time of his offense that he was hardly a danger to children. "To be honest, if I was just committing the crime at the age of 32 with a 14 year old, I would say, 'Lock me up,'" he observed. "But at the age of 19, I was so immature; and I felt then, just out of school myself for only two years, I had already knew her, so being in a relationship then I didn't feel that it was too much of a crime." T. 51. Today by contrast, teen-

age girls are no longer his peers; they are his children's peers. "[I]t's different now," he continued. "[W]hen I was working at the school, I was 19 and 20 years old. I felt like I still was a student. But now I am a grown man; and when I walk, when I have to go near a school or even pick my kids up or something, it's totally different. I'm a grown man. How I look at the children now is nowhere near the same as when I was 19." T. 52.

At the conclusion of the hearing, the court found that Bethea is not a current or potential threat to public safety. App. 5a. In an oral ruling, the court nevertheless denied his petition to be removed from the registry, on the ground he was not eligible to be removed until twenty-five years had elapsed. App. 5a-6a; T. 61.

During the hearing, Bethea's counsel argued that retroactively applying the statutory provisions enacted after Bethea's conviction violated the Ex Post Facto Clause. R. 52-58; T. 5, 9-11, 13-14, 23. The Superior Court expressed considerable sympathy with this argument. The court reasoned:

> [H]e has to do all these different things, not be within a thousand feet of a school, and this kind of stuff. He can't—he—if he moves, he has to notify somebody. If he—if he—if any number of factors happen, that he has to be notifying people or he has to be changing things, and if he doesn't, there is a criminal penalty for it. It's difficult—I mean, how that can be civil in nature is just incredulous.
>
> … [T]hose are literally fundamental rights that people are assured of, to be able to move without some type of requirement or punish-

> ment or not be able to live a certain place, not be able to go to games, not be able to go to the fair, these kind of things.
>
> I mean, it's difficult for me to see how anyone—anyone—sees that as civil in nature. It's punishment. I mean, it's—it's punishment for something someone does, and it's increasing punishment.

T. 10-11. The court was nevertheless constrained to deny Bethea's petition. App. 16a-18a.

3. Bethea renewed his Ex Post Facto Clause argument on appeal. He argued that North Carolina's statute should be distinguished from the Alaska statute this Court upheld in *Smith v. Doe*, 538 U.S. 84 (2003), and from the earlier version of North Carolina's statute upheld in *State v. White*, 590 S.E.2d 448 (N.C. Ct. App. 2004), because North Carolina's statute imposes restrictions that are much more severe—so severe as to be punitive. Petitioner-Appellant's Brief, *In re Bethea*, at 20-22.

The North Carolina Court of Appeals affirmed. App. 1a-13a. Relying on its own precedent, the court held that the state's sex offender statute "sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of ex post facto laws." App. 12a (quoting *In re Hall*, 768 S.E.2d 39, 46 (N.C. Ct. App. 2014)).

The North Carolina Supreme Court denied review. App. 14a-15a.[3]

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[3] Because the North Carolina Supreme Court dismissed the appeal for lack of a substantial constitutional question, App. 14a, this Court is reviewing the judgment of the North Carolina

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari. There is a deep lower court conflict over whether the retroactive application of these second-generation sex offender statutes, of which North Carolina's is typical, violates the Ex Post Facto Clause. This case is an excellent vehicle for resolving the conflict. This issue affects an enormous number of people—virtually every sex offender in the country—because the states continue to pile greater and greater retroactive burdens on sex offenders. The decision below is incorrect, because restricting where a person can live and where he can go are burdens that are clearly punitive, and because the decision below is contrary to the original meaning of the Ex Post Facto Clause.

### I. The lower courts are deeply divided over whether the retroactive application of second-generation sex offender statutes, which include restrictions on where offenders can live, work, and be present, as well as onerous in-person reporting requirements, violates the Ex Post Facto Clause.

A. In *Smith v. Doe*, the Court held that the mere fact of having to register as a sex offender, with the corresponding availability of that information to the public, does not constitute punishment for purposes of the Ex Post Fact Clause. In recent years, however, the lower courts have split over how to apply *Smith*

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Supreme Court, not that of the North Carolina Court of Appeals. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1370 n.* (2015) (per curiam).

to the much harsher restrictions imposed by the second generation of sex offender statutes.

This lower court conflict exists within the framework set forth in *Smith*. Under the Ex Post Facto Clause, a state may not retroactively increase the punishment for an offense that has already been committed. *Peugh v. United States*, 569 U.S. 530, 538-39 (2013). But the Ex Post Facto Clause has no bearing on civil regulatory measures. To determine whether the Ex Post Facto Clause applies, therefore, a court must decide whether a law is "punitive" or merely "civil." *Kansas v. Hendricks*, 521 U.S. 346, 360-69 (1997).

*Smith* held that this determination has two steps. First, the court must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith*, 538 U.S. at 92 (citation and internal quotation marks omitted). "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* If the legislature intended to enact a civil regulatory scheme, however, the court must go on to examine the effects of the statute, to determine whether they are punitive. *Id.* In making this determination, *Smith* considered five factors drawn from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). These factors are: (1) whether the burdens imposed by the statute have "been regarded in our history and traditions as a punishment"; (2) whether the statute "imposes an affirmative disability or restraint"; (3) whether the statute "promotes the traditional aims of punishment"; (4) whether the statute "has a rational connection to a nonpunitive purpose"; and (5) whether the statute "is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.

All the cases on both sides of the split have applied this framework. They have all acknowledged that the legislatures did not intend to impose punishment, so they have all proceeded to consider the five factors the Court considered in *Smith*. But they have divided sharply on the outcome of this test.

The Sixth Circuit (reviewing Michigan's statute) and the Supreme Courts of Kentucky, Maine, New Jersey, and Pennsylvania hold that the retroactive application of second-generation sex offender statutes violates the Ex Post Facto Clause, because the restrictions imposed by these statutes have a punitive effect under *Smith*. *Does #1-5 v. Snyder*, 834 F.3d 696, 697-705 (6th Cir. 2016), cert. denied, 138 S. Ct. 55 (2017); *Commonwealth v. Baker*, 295 S.W.3d 437, 442-47 (Ky. 2009), cert. denied, 559 U.S. 992 (2010); *State v. Letalien*, 985 A.2d 4, 14-26 (Me. 2009); *Riley v. New Jersey State Parole Bd.*, 98 A.3d 544, 552-60 (N.J. 2014); *Commonwealth v. Muniz*, 164 A.3d 1189, 1208-18 (Pa. 2017), cert. denied, 138 S. Ct. 925 (2018).

Six other state supreme courts, although nominally interpreting the ex post facto clauses of their state constitutions, have reached the same conclusion by considering the identical factors this Court considered in *Smith*. *Doe v. State*, 189 P.3d 999, 1003-19 (Alaska 2008); *State v. Pollard*, 908 N.E.2d 1145, 1147-54 (Ind. 2009); *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 130-43 (Md. 2013); *Doe v. State*, 111 A.3d 1077, 1089-1100 (N.H. 2015); *State v. Williams*, 952 N.E.2d 1108, 1110-13 (Ohio 2011); *Starkey v. Oklahoma Dep't of Corrections*, 305 P.3d 1004, 1017-30 (Okla. 2013).

On the other side of the split, courts in several jurisdictions have held that the retroactive application of these second-generation sex offender statutes does not violate the Ex Post Facto Clause, because the restrictions imposed by these statutes do not have a punitive effect under *Smith*. *Vasquez v. Foxx*, 895 F.3d 515, 521-22 (7th Cir. 2018) (reviewing Illinois's statute); *Doe v. Miller*, 405 F.3d 700, 718-23 (8th Cir. 2005) (reviewing Iowa's statute), cert. denied, 546 U.S. 1034 (2005); *Litmon v. Harris*, 768 F.3d 1237, 1242-43 (9th Cir. 2014) (reviewing California's statute); *ACLU v. Masto*, 670 F.3d 1046, 1052-58 (9th Cir. 2012) (reviewing Nevada's statute); *Shaw v. Patton*, 823 F.3d 556, 560-77 (10th Cir. 2016) (reviewing Oklahoma's statute); *State v. Seering*, 701 N.W.2d 655, 666-69 (Iowa 2005); *State v. Trosclair*, 89 So. 3d 340, 347-57 (La. 2012); *State v. Harris*, 817 N.W.2d 258, 269-73 (Neb. 2012); *Kammerer v. State*, 322 P.3d 827, 831-39 (Wyo. 2014).

B. The courts that have found an Ex Post Facto Clause violation have distinguished *Smith* with respect to each of the five factors the Court identified as relevant. For each factor, these courts have found that the differences between the first-generation statutes, which only required registration and the public availability of information, and the second-generation statutes, which restrict where an offender may live and work and which impose periodic in-person reporting requirements, are large enough to push the statutes over the line from "civil" to "punitive."

The first factor is whether the statute imposes burdens that have "been regarded in our history and traditions as a punishment." *Smith*, 538 U.S. at 97.

In *Smith*, the Court found that mere public disclosure of information about the offender did not resemble any traditional punishment. *Id.* at 97-99. By contrast, the courts finding an Ex Post Facto Clause violation have determined that restrictions on where an offender may reside or even be present, as well as periodic in-person reporting requirements, *do* resemble traditional punishments—banishment and parole. *Does #1-5*, 834 F.3d at 701-03; *Muniz*, 164 A.3d at 1212-13; *Riley*, 98 A.3d at 557-58; *Letalien*, 985 A.2d at 19-20; *Baker*, 295 S.W.3d at 444. As the Sixth Circuit observed, these statutes' "geographical restrictions are … very burdensome, especially in densely populated areas" where many neighborhoods are off-limits because they are too close to a school. *Does #1-5*, 834 F.3d at 701. And the statutes' reporting requirements are similar to parole, in that "registrants are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person," while "[f]ailure to comply can be punished by imprisonment, not unlike a revocation of parole." *Id.* at 703.

The second factor is whether the statute "imposes an affirmative disability or restraint." *Smith*, 538 U.S. at 97. In *Smith*, the Court found that registration imposed no disability or restraint. *Id.* at 99-102. By contrast, the courts finding an Ex Post Facto Clause violation have determined that the second-generation statutes *do* impose substantial affirmative restraints. *Does #1-5*, 834 F.3d at 703-04; *Muniz*, 164 A.3d at 1210-11; *Riley*, 98 A.3d at 558-59; *Letalien*, 985 A.2d at 18; *Baker*, 295 S.W.3d at 445. As the Kentucky Supreme Court suggested, "[w]e find it difficult to imagine that being prohibited from

residing within certain areas does not qualify as an affirmative disability or restraint." *Id.*

The third factor is whether the statute "promotes the traditional aims of punishment." *Smith*, 538 U.S. at 97. In *Smith*, the Court found that registration did not promote the traditional aims of punishment to the extent necessary to be labeled punitive. *Id.* at 102. By contrast, most of the courts finding an Ex Post Facto Clause violation have determined that the second-generation statutes *do* sufficiently promote the traditional aims of punishment to be considered punitive. *Does #1-5*, 834 F.3d at 704; *Muniz*, 164 A.3d at 1214-16; *Baker*, 295 S.W.3d at 444-45.

The fourth factor is whether the statute "has a rational connection to a nonpunitive purpose." *Smith*, 538 U.S. at 97. In *Smith*, the Court found that registration was rationally connected to the nonpunitive purpose of alerting the public to the presence of offenders in their communities. *Id.* at 102-04. By contrast, some of the courts finding an Ex Post Facto Clause violations have determined that the second-generation statutes lack a rational connection to a nonpunitive purpose. *Does #1-5*, 834 F.3d at 704-05; *Baker*, 295 S.W.3d at 445-46.

The fifth and final factor is whether the statute "is excessive with respect to this [nonpunitive] purpose." *Smith*, 538 U.S. at 97. In *Smith*, the Court found that registration was not excessive. *Id.* at 103-05. By contrast, most of the courts finding an Ex Post Facto Clause violation have determined that the second-generation statutes *are* excessive. *Does #1-5*, 834 F.3d at 705; *Muniz*, 164 A.3d at 1217-18; *Baker*, 295 S.W.3d at 446-47. As the Kentucky Supreme Court explained, "[g]iven the drastic consequences of Ken-

tucky's residency restrictions, and the fact that there is no individualized determination of the threat a particular registrant poses to public safety, we can only conclude that [Kentucky's statute] is excessive with respect to the nonpunitive purpose of public safety." *Id.* at 446.

Applying the five *Smith* factors, these courts have accordingly concluded that the second-generation statutes are punitive. The Sixth Circuit aptly summarized the view of the courts on this side of the split:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law.

*Does #1-5*, 834 F.3d at 705.

C. The courts on the other side of the split—those that have held that the second-generation statutes are *not* punitive for purposes of the Ex Post Facto Clause—have disagreed on each of these five factors.

First, most of these courts have found that residency restrictions and in-person reporting requirements do not resemble traditional punishments. *Vasquez*, 895 F.3d at 521; *Doe v. Miller*, 405 F.3d at 719-20; *ACLU*, 670 F.3d at 1055-56; *Shaw*, 823 F.3d

at 563-68; *Seering*, 701 N.W.2d at 667-68; *Kammerer*, 322 P.3d at 834-36. As the Eighth Circuit reasoned, "we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, [the Iowa statute] restricts only where offenders may reside. It does not 'expel' the offenders from their communities." *Doe v. Miller*, 405 F.3d at 719.

Second, most of these courts have found that residency restrictions and in-person reporting requirements do not impose an affirmative disability or restraint. *Vasquez*, 895 F.3d at 521-22; *Doe v. Miller*, 405 F.3d at 720-21; *ACLU*, 670 F.3d at 1056-57; *Shaw*, 823 F.3d at 568-71; *Seering*, 701 N.W.2d at 668; *Harris*, 817 N.W.2d at 273; *Kammerer*, 322 P.3d at 836-37. In *Shaw*, for example, the offender owned a house within 2,000 feet of a school. *Shaw*, 823 F.3d at 568. "As a result," the Tenth Circuit acknowledged, "Mr. Shaw cannot reside in his own house." *Id.* The Tenth Circuit nevertheless determined that Oklahoma's "residency restrictions do not amount to a disability or restraint that has a punitive effect." *Id.* at 570.

Third, these courts have found that residency restrictions and in-person reporting requirements do not promote the traditional aims of punishment. *Doe v. Miller*, 405 F.3d at 720; *ACLU*, 670 F.3d at 1057; *Shaw*, 823 F.3d at 571-73; *Seering*, 701 N.W.2d at 668; *Trosclair*, 89 So. 3d at 353; *Harris*, 817 N.W.2d at 273; *Kammerer*, 322 P.3d at 837-38.

Fourth, these courts have found that residency restrictions and in-person reporting requirements have a rational connection to the nonpunitive purpose of protecting society from recidivist offenders. *Vasquez*,

895 F.3d at 522; *Doe v. Miller*, 405 F.3d at 721; *ACLU*, 670 F.3d at 1057; *Shaw*, 823 F.3d at 573-75; *Seering*, 701 N.W.2d at 668; *Trosclair*, 89 So. 3d at 354; *Harris*, 817 N.W.2d at 273; *Kammerer*, 322 P.3d at 838.

Fifth and finally, these courts have found that residency restrictions and in-person reporting requirements are not excessive with respect to this nonpunitive purpose. *Vasquez*, 895 F.3d at 522; *Doe v. Miller*, 405 F.3d at 722-23; *ACLU*, 670 F.3d at 1057; *Shaw*, 823 F.3d at 576-77; *Seering*, 701 N.W.2d at 668; *Trosclair*, 89 So. 3d at 354; *Harris*, 817 N.W.2d at 273; *Kammerer*, 322 P.3d at 838-39. As the Eighth Circuit suggested, Iowa's ban on residing within 2,000 feet of a school, applied to all past offenders without any individualized determination of current dangerousness, was not excessive because there was no way "to articulate a precise distance that optimally balanced the benefit of reducing risk to children with the burden of the residency restrictions on sex offenders," and because there was "no way to predict whether a sex offender would 'cross over' in selecting victims from adults to children." *Doe v. Miller*, 405 F.3d at 722.

In short, the lower courts are divided over whether the second-generation sex offender statutes should be treated differently from the first-generation statutes for purposes of the Ex Post Facto Clause. The one point on which all courts on both sides of the split agree is that *Smith v. Doe* cannot answer this question, because the new statutes are so much harsher than the old ones. Only this Court can resolve the conflict.

## II. This case is an ideal vehicle for resolving the conflict.

A. This case is an excellent vehicle for answering the Question Presented. The Ex Post Facto Clause issue is cleanly presented, with no procedural obstacles to a decision on the merits. It is the only issue in the case. Resolution of the Question Presented will determine whether Anthony Bethea will be removed from the registry—and be relieved of the onerous restrictions the state has retroactively piled upon him—or whether he will remain on the registry until 2029 at the earliest.

B. The Court has recently denied certiorari on this question in two cases that were poor vehicles for addressing the issue. Our case is free of the flaws that were present in these cases.

In *Pennsylvania v. Muniz*, No. 17-575 (cert. denied Jan. 22, 2018), the Court lacked jurisdiction because the judgment below rested on an independent and adequate state law ground. After explaining why the retroactive application of Pennsylvania's sex offender statute violates the Ex Post Facto Clause of the U.S. Constitution, *Commonwealth v. Muniz*, 164 A.3d at 1208-18, the state supreme court held that it also violates the Ex Post Facto Clause of the Pennsylvania Constitution. *Id.* at 1218-23. No such jurisdictional problem exists in our case.

In *Snyder v. Does #1-5*, No. 16-768 (cert. denied Oct. 2, 2017), the Court called for the views of the Solicitor General, who advised denying certiorari on the ground that Michigan's sex offender statute differs in important respects from other states' stat-

utes. The Court denied certiorari at the first conference after hearing from the Solicitor General.

There is no such problem in our case. The retroactive burdens imposed by North Carolina's statute are similar to those imposed by many other states as part of sex offender registration.

● Many states, like North Carolina, impose restrictions on where a registrant may reside. *See* Ala. Code § 15-20A-11 (registrant may not reside within 2,000 feet of a school); Ark. Code § 5-14-128 (registrant may not reside within 2,000 feet of a school, park, or place of worship); Cal. Penal Code § 3003.5 (registrant may not reside within 2,000 feet of a school or park); Del. Code tit. 11, § 1112 (registrant may not reside within 500 feet of a school); Fla. Stat. § 775.215 (registrant may not reside within 1,000 feet of a school, park, or playground); Ga. Code § 42-1-15 (registrant may not reside within 1,000 feet of a school or church); Idaho Code § 18-8329 (registrant may not reside within 500 feet of a school); 730 Ill. Comp. Stat. § 150/8 (registrant may not reside within 500 feet of a school, park, or playground); Ind. Code § 11-13-3-4 (registrant may not reside within 1,000 feet of a school); Iowa Code § 692A.114 (registrant may not reside within 2,000 feet of a school); Ky. Rev. Stat. § 17.545 (registrant may not reside within 1,000 feet of a school or playground); La. Stat. § 14:91.2 (registrant may not reside within 1,000 feet of a school, park, playground, or swimming pool); Mich. Comp. Laws §§ 28.733, 28.735 (registrant may not reside within 1,000 feet of a school); Miss. Code § 45-33-25 (registrant may not reside within 3,000 feet of a school, playground, or park); Mo. Rev. Stat. § 566.147 (registrant may not reside within 1,000

feet of a school); Ohio Rev. Code § 2950.034 (registrant may not reside within 1,000 feet of a school); Okla. Stat. tit. 57, § 590 (registrant may not reside within 2,000 feet of a school, park, or playground); S.C. Code § 23-3-535 (registrant may not reside within 1,000 feet of a school, park, or playground); S.D. Codified Laws §§ 22-24B-22, 22-24B-23 (registrant may not reside within 500 feet of a school, park, playground, or pool); Tenn. Code § 40-39-211 (registrant may not reside within 1,000 feet of a school, park, playground, recreation center, or athletic field); Va. Code § 18.2-370.3 (registrant may not reside within 500 feet of a school); W. Va. Code § 62-12-26 (registrant may not reside within 1,000 feet of a school); Wyo. Stat. § 6-2-320 (registrant may not reside within 1,000 feet of a school).

- Many states, like North Carolina, impose restrictions on where a registrant may be present. *See* Ala. Code § 15-20A-17 (registrant may not loiter within 500 feet of a school, park, athletic field, etc.); Ark. Code §§ 5-14-132 through -134 (registrant may not enter any school, swimming area, or playground); Cal. Penal Code §§ 626.81, 3053.8 (registrant may not enter a school or park); Del. Code tit. 11, § 1112 (registrant may not loiter within 500 feet of a school); Fla. Stat. § 856.022 (registrant may not be present on the property of any school); Ga. Code § 42-1-15 (registrant may not loiter at any school or areas where minors congregate); Idaho Code § 18-8329 (registrant may not be on the premises of a school); 720 Ill. Comp. Stat. § 5/11-9.3 (registrant may not be present at a school, park, or playground); Iowa Code § 692A.113 (registrant may not be present at a school, library, playground, sports field, swim-

ming pool, or beach); Ky. Rev. Stat. § 17.545 (registrant may not be present at a school or playground); La. Stat. § 14:91.2 (registrant may not be present at or near a school, park, or library); Mich. Comp. Laws §§ 28.733, 28.734 (registrant may not loiter within 1,000 feet of a school); Miss. Code § 45-33-26 (registrant may not be present at a school); Mo. Rev. Stat. §§ 566.149, 566.150 (registrant may not be within 500 feet of a school, park, swimming pool, or museum); N.D. Cent. Code § 12.1-20-25 (registrant may not be present at a school); Okla. Stat. tit. 21, § 1125 (registrant may not loiter within 500 feet of a school, park, or playground); Or. Rev. Stat. § 163.476 (registrant may not be present at a school, a playground, or any other place children congregate); S.D. Codified Laws §§ 22-24B-22, 22-24B-24 (registrant may not loiter within 500 feet of a school, park, playground, swimming pool, or library); Tenn. Code § 40-39-211 (registrant may not be within 1,000 feet of a school, park, playground, recreation center, or athletic field); Utah Code § 77-27-21.7 (registrant may not be on premises of a school, swimming pool, park, or playground); Va. Code § 18.2-370.2 (registrant may not loiter within 100 feet of a school, playground, athletic field, or gym); W. Va. Code § 62-12-26 (registrant may not loiter within 1,000 feet of a school); Wyo. Stat. § 6-2-320 (registrant may not be on the premises of a school or loiter within 1,000 feet of a school).

- Many states, like North Carolina, impose restrictions on where a registrant may work or volunteer. *See* Ala. Code § 15-20A-13 (registrant may not work or volunteer within 2,000 feet of a school or 500 feet of a park or athletic field); Ark. Code § 5-14-129

(registrant may not work or volunteer in any position involving children); Ga. Code § 42-1-15 (registrant may not work or volunteer within 1,000 feet of a school or church); Iowa Code § 692A.113 (registrant may not work in many places children might be present); Mich. Comp. Laws §§ 28.733, 28.734 (registrant may not work within 1,000 feet of a school); Okla. Stat. tit. 57, § 589 (registrant may not work in any position involving children); Tex. Code Crim. Proc. art. 62.063 (registrant may not operate a bus, taxi, or limousine).

● Many states, like North Carolina, impose periodic in-person reporting requirements. *See* Ala. Code §§ 15-20A-10, 15-20A-12 (every three months, but homeless registrants must report every seven days); Ark. Code § 12-12-909 (every three or six months, but homeless registrants must report every thirty days); Del. Code tit. 11, §§ 4120(g), 4121(k) (every three months, six months, or one year, with more frequent reporting for homeless registrants); Ga. Code § 42-1-12(f) (annually); Idaho Code § 18-8307 (every three months or annually); Ind. Code § 11-8-8-14 (every three months or annually); Iowa Code § 692A.108 (every three months, six months, or annually); Kan. Stat. § 22-4905 (every three months); La. Stat. § 15:542.1.1 (every three months, six months, or annually, but homeless registrants must report every fourteen days); Me. Stat. tit. 34-A, § 11282 (every three months, six months, or annually); Md. Code Crim. Proc. § 11-707 (every three months or six months); Mich. Comp. Laws § 28.725a (every three months, six months, or annually); Miss. Code § 45-33-31 (every three months); Mo. Rev. Stat. § 589.414 (every three months or six months); Neb.

Rev. Stat. § 29-4006 (every three months, six months, or annually); N.H. Rev. Stat. § 651-B:4 (every three months or six months); N.M. Stat. § 29-11A-4 (every three months or six months); 42 Pa. Cons. Stat. § 9799.15(e) (every three months, six months, or annually); S.C. Code § 23-3-460 (every three months or six months); S.D. Codified Laws § 22-24B-7 (every six months); Utah Code § 77-41-105 (every six months); Va. Code § 9.1-904 (every three months, six months, or annually); Wash. Rev. Code § 9A.44.130(6)(b) (weekly for registrants lacking a fixed address); W. Va. Code § 15-12-10 (every three months or annually).

● Many states, like North Carolina, require in-person notification if a registrant changes his address for more than a few days. *See* Ala. Code § 15-20A-15; Fla. Stat. § 775.21; Ga. Code § 42-1-12(f); Idaho Code § 18-8309; 730 Ill. Comp. Stat. § 150/3; Ind. Code § 11-8-8-7; Iowa Code § 692A.105; Kan. Stat. § 22-4905; La. Stat. § 15:542; Me. Stat. tit. 34-A, § 11282; Md. Code Crim. Proc. § 11-705; Mich. Comp. Laws § 28.725; Miss. Code § 45-33-29; Mo. Rev. Stat. § 589.414; Neb. Rev. Stat. § 29-4004; N.H. Rev. Stat. § 651-B:5; N.J. Stat. § 2C:7-2; S.C. Code § 23-3-460; S.D. Codified Laws § 22-24B-2; Tenn. Code § 40-39-203; Tex. Code Crim. Proc. art. 62.051; Utah Code § 77-41-105; W. Va. Code § 15-12-3; Wyo. Stat. § 7-19-302.

North Carolina's statute is thus typical of the second-generation sex offender statutes the states have enacted in recent years.

For this reason, it is clear that the outcome of this case would have been different had the case arisen in any of the jurisdictions on the opposite side of the

split. In *Does #1-5*, the Sixth Circuit found an Ex Post Facto Clause violation in the retroactive application of a state law that, like North Carolina's, bars registrants from living within 1,000 feet of a school or being present on school property, and imposes regular in-person reporting requirements. *Does #1-5*, 834 F.3d at 697-98. In *Baker*, the Kentucky Supreme Court found an Ex Post Facto Clause violation in the retroactive application of a state law that, like North Carolina's, bars registrants from living within 1,000 feet of a school. *Baker*, 295 S.W.3d at 440. In *Letalien* and *Muniz*, the Maine and Pennsylvania Supreme Courts found Ex Post Facto Clause violations in the retroactive application of state laws that, like North Carolina's, impose regular in-person reporting requirements. *Letalien*, 985 A.2d at 18; *Muniz*, 164 A.3d at 1208. In *Riley*, the New Jersey Supreme Court found an Ex Post Facto Clause violation in the retroactive application of a state law that, like North Carolina's, requires GPS monitoring of certain offenders. *Riley*, 98 A.3d at 546. (The North Carolina Supreme Court reached the opposite conclusion in *State v. Bowditch*, 700 S.E.2d 1, 5-13 (N.C. 2010). Mr. Bethea's offense is not among those for which GPS monitoring is required. N.C. Gen. Stat. § 14-208.40.).

North Carolina's residency restrictions, location restrictions, and in-person reporting requirements would not be applied retroactively to Anthony Bethea if our case could have been decided by the Sixth Circuit or by the Supreme Courts of Kentucky, Maine, New Jersey, or Pennsylvania. But these provisions *would* be applied retroactively to Bethea if our case had been decided by the Seventh, Eighth,

Ninth or Tenth Circuits, or by the Supreme Courts of Iowa, Louisiana, Nebraska, or Wyoming. There are some variations among state statutes, but this lower court conflict is not caused by the variations. It is caused by a divergence in views among the lower courts regarding how to apply *Smith v. Doe*.

C. The Question Presented in *Gundy v. United States*, No. 17-6086 (cert. granted Mar. 5, 2018), is: "Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine." Although *Gundy* involves sex offender registration, *Gundy* will have no effect on the Question Presented in our case, for two reasons.

First, *Gundy* involves the non-delegation doctrine, not the Ex Post Facto Clause. There is no overlap between these two issues. Regardless of how the Court resolves the non-delegation issue, the Ex Post Facto Clause issue will remain the subject of a deep lower court conflict.

Second, *Gundy* is a challenge to the *federal* Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20901 *et seq*., while our case challenges a state statute. The restrictions imposed on Mr. Bethea are imposed by state law, not by SORNA.[4]

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[4] There is one provision of North Carolina's sex offender statute that indirectly incorporates SORNA by reference. *See* N.C. Gen. Stat. § 14-208.12A(a1)(2) (authorizing a court to terminate the 30-year registration requirement if, among other things, "[t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement

For instance, even if the Court in *Gundy* were to invalidate the retroactive application of SORNA's in-person reporting requirement, *id.* § 20918, that could not benefit state offenders like Mr. Bethea, because North Carolina, like other states, imposes its own in-person reporting requirement by statute.

There is no chance, therefore, that the Court's decision in *Gundy* will answer the Question Presented in our case.

**III. The issue is very important.**

This issue is important because it affects so many people. Every state requires sex offenders to register. Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741, 751-52 (2016). At last count, there are 904,011 registered sex offenders. National Center for Missing & Exploited Children, *Map of Registered Sex Offenders in the United States*, http://www.missingkids.org/content/dam/ncmec/en_us/SOR%20Map%20with%20Explanation.pdf. This figure has been growing in recent years, because registration periods have become so long and because these longer periods are retroactively applied. As a result, the number of offenders added to the registry each year far exceeds the number removed. There is no reason to expect this trend to stop any time soon.

Meanwhile, the states are constantly adding new requirements to their sex offender statutes. *See* National Conference of State Legislatures, *Sex Offender*

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or required to be met as a condition for the receipt of federal funds by the State").

*Enactments Database*, http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx. Sex offenders are perhaps the most despised people in our communities, so elected officials face powerful incentives to add to their punishments.

What has happened in North Carolina has happened nationwide. For years now, the states have been heaping these restrictions on offenders without any scruples about retroactivity. There is no way to know exactly how many offenders are currently burdened by retroactive limits on where they can live, where they can go, where they can work, and so on, but there can be no doubt that the number is very large. States and offenders alike need to know whether the Ex Post Facto Clause imposes any limits.[5]

## IV. The decision below is wrong.

A. Review is also warranted because the decision below is wrong. The North Carolina courts, like those of several other jurisdictions, have been parroting this Court's conclusion in *Smith v. Doe* without taking account of the fact that current sex offender statutes look nothing like the sex offender statute the Court considered in *Smith v. Doe*. Registration, by itself, may not be punitive. But when reg-

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[5] One indicator of the frequency with which this issue arises is that it is raised in another pending certiorari petition, *Boyd v. Washington*, No. 18-39 (pet. for cert. filed July 2, 2018). We understand that a certiorari petition raising this issue will also be filed in *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018). If the Court grants certiorari in *Boyd* or *Vasquez*, our case should be held.

istration entails serious restrictions on where one can live, where one can be present, where one can work, and the extent to which one can travel, it becomes punitive.

The ostensible non-punitive justification for these heavy retroactive burdens is that they are necessary to protect the public from sex offenders who might repeat their offenses. But the fact that a measure is intended to protect the public is hardly a reason not to call it punishment. One of the main purposes of punishing offenders is to protect the public by reducing the frequency of offenses.

B. As several of the lower courts have recognized, the *Smith v. Doe* factors all indicate that these restrictions have punitive effects.

First, they are much like traditional punishments. Periodic in-person reporting requirements are similar to parole and probation. Sharp restrictions on where a registrant can live, work, and even be present may not be identical to banishment, but they are similar. In some respects they are even harsher. A person who was banished from one jurisdiction could enjoy full liberty in all others. But a registrant carries his status with him everywhere he goes, and most of the jurisdictions to which he can go have restrictions similar to those at home.

Second, they impose affirmative disabilities and restraints. Registrants cannot live in many neighborhoods, because they would be too close to a school. They are barred from many more locations, like parks and museums. They are excluded from occupations. Burdensome reporting requirements make travel extraordinarily difficult. If these are not disa-

bilities and restraints, it is hard to imagine what would be.

Third, they are intended to promote the traditional aims of punishment—incapacitation, deterrence, and retribution. The rationale for not letting registrants live near a school, for example, is to reduce the opportunity for registrants to encounter children. That is incapacitation. The harsher the restraints entailed by a violation of the law, the greater deterrent effect those restraints will have. And no doubt much of the political motivation underlying these measures is sheer retribution—the belief that sex offenders deserve severe punishment.

Fourth, they lack a rational connection to the ostensibly nonpunitive purpose of protecting the public. There appears to be no evidence whatsoever that restricting where registrants may reside, for example, actually does protect the public by reducing the rate of reoffending. Nor is there much reason to think it would. The same is true of the other restrictions imposed by these statutes.[6]

Fifth, they are grossly excessive with respect to the purpose of protecting the public. There is a growing consensus that, contrary to what was once believed, recidivism rates of sex offenders are no great-

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[6] To our knowledge, the best analysis of this topic is J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 34 J.L.&. Econ. 161 (2011). The authors examine the first-generation statutes that required only registration and public availability of information, and conclude that these statutes actually *increased* recidivism. *Id.* at 192. They note that no research has yet been done on the effects of the restrictions included in the second-generation statutes. *Id.* at 192-93.

er than those of other offenders. *See, e.g.*, U.S. Dep't of Justice, Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* 102 (2012), available at https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf ("Research comparing the recidivism rates of sex offenders with non-sex offenders consistently finds that sex offenders have lower overall recidivism rates than non-sex offenders."); Ira Mark Ellman and Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Commentary 495 (2015) (explaining how the Court was misinformed about the recidivism rates of sex offenders).

If there are sex offenders who can reliably be predicted to have a high chance of reoffending, special precautions should be taken with this special group. Indeed, such offenders could be civilly committed without violating the Ex Post Facto Clause. *Kansas v. Hendricks*, 521 U.S. 346, 360-71 (1997). But that would not justify imposing draconian retroactive restrictions on *all* former offenders. As the trial court below found, Anthony Bethea is not a current or potential threat to public safety. App. 5a. The chance he will reoffend is virtually nil. There is no reason to place retroactive limits on where *he* can live and work, just because there may be others for whom such limits are necessary. There is no reason to prevent *him* from spending time with his own children, just because there may be other parents who cannot be trusted.

We do not mean to minimize the gravity of some of the offenses these statutes govern. The worst offenders should no doubt be punished harshly. But no one should be punished retroactively. This is exactly

why we have an Ex Post Facto Clause—to prevent governments from responding to popular pressure by heaping retroactive burdens on the most hated people in our midst.

C. The decision below is also contrary to the original meaning of the Ex Post Facto Clause. *See Carmell v. Texas*, 529 U.S. 513, 525 n.14 (2000); *Eastern Enters. v. Apfel*, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring); Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wis. L. Rev. 727 (2015); William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539 (1947).

The view that the Ex Post Facto Clause applies only to punishments traces back to *Calder v. Bull*, 3 U.S. 386 (1798), the Court's first case involving the Clause. The topic addressed in *Calder*, however, was not whether state-imposed sanctions are divisible into "criminal" and "civil" categories, but rather whether the Ex Post Facto Clause voids legislation that has retrospective effects on contract and property rights. *Id.* at 390 (Chase, J.), 397 (Paterson, J.), 400 (Iredell, J.). Justices Chase and Paterson reasoned that if the Ex Post Facto Clause voided such legislation, the Contracts Clause would have been unnecessary. *Id.* at 390, 397.

Thus when Justice Chase said "the restriction not to pass any ex post facto law, was to secure the person of the subject from injury, or punishment," *id.* at 390, he was explaining that the Clause protects against retroactive harms imposed on a person directly by the state, in contrast to losses incidentally suffered by "the citizen in his private rights, of either property, or contracts," *id.* Likewise, when Justice

Iredell said that the Clause "extends to criminal, not to civil, cases," *id.* at 399, he meant to exclude from the Clause's coverage "cases that merely affect the private property of citizens," *id.* at 400, such as when "[h]ighways are run through private grounds," *id.* In *Calder*, the Court had no occasion to consider whether a penalty directly imposed by the state on an individual, on the ground that the individual has committed a crime, is exempt from the Ex Post Facto Clause if the penalty can be labelled "civil" rather than "criminal." In more recent cases, however, the Court has erroneously assumed, without examining the question, that *Calder* drew a line between civil and criminal penalties.

In interpreting the Ex Post Facto Clause, early American lawyers would not have distinguished between civil and criminal sanctions imposed on offenders. Both would have been considered punishments subject to scrutiny under the Clause. *See, e.g.*, *Cummings v. Missouri*, 71 U.S. 277, 320 (1866) ("The deprivation of any rights, civil or political, previously enjoyed, may be punishment"); *id.* at 327-29 (Ex Post Facto Clause violated by state law disqualifying ex-Confederates from, *inter alia*, holding public office).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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