IN THE SUPREME COURT

STATE OF ARIZONA

State of Arizona, Appellant, v. Oscar Pena Trujillo, Appellee.	Supreme Court No. CR-18-0531-PR Court of Appeals No. 2 CA-CR-2017-0241 Pima County Superior Court No.: CR-20152255-001

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF OSCAR PENA TRUJILLO

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INTRODUCTION

Twenty-seven years ago, this Court decided that Arizona's then-existent sex offender registry scheme was not punitive. Since then, Arizona, like many states, has dramatically increased the requirements and restrictions imposed on registered sex offenders. In 1992, Arizona sex offenders had to register their personal information in a database whose access was limited, whereas today's laws require registrants to (i) report in person to make changes to their registry information; (ii) submit personal information to an online database that is instantly searchable by anyone with internet access; (iii) report any changes in email addresses or other "online identifiers"; and (iv) constantly monitor whether their living arrangements run afoul of a draconian residence requirement. These increasingly burdensome restrictions, combined with an increased understanding of the true effect of these burdens on registrants and their likelihood to re-offend, have caused many jurisdictions to hold that their sex offender registries are punitive rather than regulatory. Indeed, the Oklahoma Supreme Court has called them a modern day "scarlet letter." For these reasons, Amicus now urges this Court to reconsider its 1992 decision holding that Arizona's sex offender registration scheme is regulatory rather than punitive.

In the alternative, this case provides this Court with an opportunity to revive the original understanding of the Ex Post Facto Clause, which was meant to prohibit all retroactive laws regardless of their civil or criminal nature. Although this Court has thus far hewn closely to the United States Supreme Court's ex post facto jurisprudence, a more faithful reading of Arizona's Ex Post Facto Clause would

prohibit the application of ex post facto laws regardless of whether those laws are punitive.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Arizona ("ACLU of Arizona") is a state-wide nonpartisan organization with over 20,000 members throughout Arizona dedicated to defending the constitutional rights of all, including the rights of the criminally accused and the criminally convicted. The ACLU of Arizona's Smart Justice Campaign is part of a nationwide effort to dramatically reform our criminal legal system by reducing Arizona's prison population by 50% while fighting racism in the system to achieve a fairer criminal justice system for all. The ACLU of Arizona therefore defends individual rights through litigation, legislation, and public education. The ACLU of Arizona also frequently files amicus curiae briefs in Arizona courts on a wide range of civil liberties and civil rights issues.

The ACLU of Arizona offers this brief in support of Oscar Trujillo because the issue presented touches upon the core of its mission to protect individual rights guaranteed by the federal and state constitutions.

BACKGROUND

The ACLU of Arizona adopts the factual background as presented by Petitioner Oscar Pena Trujillo in its Petition for Review. This Brief will focus exclusively on Issue #3 from this Court's May 28, 2019 order granting the Petition for Review: "Should this Court reconsider the opinion in *State v. Noble*, 171 Ariz. 171 (1992)?"

I. THIS COURT'S DECISION IN *NOBLE*

In *State v. Noble*, this Court considered whether a sex offender registration requirement could constitutionally be applied to an offender who committed his crime before the registration requirement was legislatively enacted. While this Court held that the Ex Post Facto Clauses of both the United States and Arizona Constitutions prohibited a "law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed," 171 Ariz. 171, 174 (1992) (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798) (Opinion of Chase, J.)), it nonetheless found that the registration requirement was not punitive after evaluating it under the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Noble*, 171 Ariz. at 175-78.

Noble concerned a defendant who was convicted in 1988 of crimes that had occurred in 1981. 171 Ariz. at 173. Between the commission of Noble's crimes and his conviction for those crimes, Arizona passed a sex offender registration scheme, A.R.S. § 13-3821. 1983 Ariz. Sess. Laws, ch. 202, § 13 (1st Reg. Sess.). Under that registration scheme, a person "convicted of" a sexual offense was required to register with the sheriff of the county in which he resides within thirty days of the conviction or of moving to another Arizona county. *Id.* Upon registration, the sheriff was required to fingerprint and photograph the registrant and obtain a signed statement from the registrant "giving such information as required by the director of the department of public safety." *Id.* This information was "not disseminated to the general public," but was made available to "law enforcement personnel and select others," including "governmental licensing and regulatory agencies for use in

evaluating the fitness of prospective employees and licensees . . . . employers, [and] potential employers . . . .” *State v. Noble*, 167 Ariz. 440, 443 (App. 1990) (citing A.R.S. § 41-1750(B) (Supp.1990)).

Applying the *Mendoza-Martinez* factors to Arizona’s sex offender registry scheme, this Court found that “the overriding purpose of § 13-3821 is facilitating the location of child sex offenders by law enforcement personnel, a purpose unrelated to punish[ment].” *Noble*, 171 Ariz. at 178. It reached this holding in part because “potentially punitive aspects of the statute have been mitigated” and “the information provided by sex offenders pursuant to the registration statute is kept confidential.” *Id.* Nonetheless, this Court noted that “[o]ur decision is close.” *Id.*

II. THE PROLIFERATION OF SEX OFFENDER REGISTRATION LAWS AFTER 1992

After *Noble* was decided in 1992, a series of federal mandates caused Arizona to enact sex offender registry legislation that imposed progressively more burdensome registration requirements. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (“SORA”), which required states to establish sex offender registries or forfeit certain federal law enforcement funding. Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994). Under SORA, state registries had to include requirements that the registrants be fingerprinted, photographed, and that they report any changes of address within 10 days. *Id.* It further provided that the information collected from a registrant “shall be treated as private data” except that the information would be

released to law enforcement agencies who "*may* release relevant information that is necessary to protect the public." *Id.* (emphasis added).

Although Arizona's sex offender registry was compliant with SORA when it was passed, a new and more significant change in the law occurred in 1996 with the passage of Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996). That law permitted a state agency to release registration information "for any purpose" otherwise permitted by state law and further mandated that the state "*shall* release relevant information that is necessary to protect the public." *Id.* (emphasis added). On June 1, 1996, Arizona's version of Megan's Law went into effect. It required the department of public safety to provide a registrant's identifying information to the chief law enforcement officer of the community where the registrant then resides, who, in turn, "*shall* notify the community of the person's release to the community." 1995 Ariz. Sess. Laws, ch. 257, § 5 (2d Reg. Sess.) (emphasis added); *see also* A.R.S. §§ 13-3825(D)-(F) (requiring community notification of sex offender's presence in or relocation to community).

In 1998, Arizona established a sex offender website containing the name, address, date of birth, and photograph of registrants in certain risk assessment categories. 1998 Ariz. Sess. Laws, ch. 291, § 5 (2d Reg. Sess.). Eight years later, Congress would make such internet reporting mandatory with the Adam Walsh Child Protection and Safety Act of 2006, PL 109-248, §§ 118-19, 120 Stat. 587 (2006). Under the Walsh Act, a registrant had to provide much more information at registration, including his social security number, his employer's information, the information of any educational institution he attends, and his license plate number.

Id. § 114. Additionally, the Walsh Act created a National Sex Offender Registry that would be a repository of all the information aggregated in the various state websites. *Id.* § 119. Today, the Arizona database contains the information of almost 14,000 registered sex offenders. Ariz. Dept. of Pub. Safety, *Sex Offender Compliance*, https://www.azdps.gov/services/public/offender (last visited July 22, 2019).

In addition to having to register with and appear in a publicly searchable online database, Arizonans on the sex offender registry are subject to many more reporting requirements than they were in 1992. An Arizona sex offender must report his enrollment in a postsecondary institution. A.R.S. § 13-3821(N). He must provide law enforcement with a list of "online identifiers" including email addresses and screen names, disclose where they are used, annually confirm them, and report any changes to them. A.R.S. §§ 13–3821(I)–(J), (P), (R); 13–3822(C). He must annually update and continuously carry an identification card or driver's license. A.R.S. § 13–3821(J). And he must provide law enforcement with a DNA sample. A.R.S. § 13-3821(O).

As the obligations the State of Arizona has imposed on sex offenders and the amount of data on those offenders that the State has made publicly available have dramatically increased, so too have penalties for failing to comply with the dizzying array of registration requirements. In 1985, the penalty for failing to register was increased from a class two misdemeanor to a class six felony. 1985 Ariz. Sess. Laws, ch. 364, § 33 (1st Reg. Sess.). In 1998, failure to comply with any registration requirement became a class four felony. 1998 Ariz. Sess. Laws, ch. 291, § 3 (2d Reg. Sess.). Today, failure to update or carry photo identification and failure to annually

confirm online identifiers is a class six felony, while failure to comply with any other registration requirement is a class four felony. A.R.S. § 13-3824.

ARGUMENT

I. THE MORE PUNITIVE NATURE OF ARIZONA'S SEX OFFENDER REGISTRY SCHEME 27 YEARS AFTER *NOBLE* SHOULD COMPEL THIS COURT TO RECONSIDER THAT DECISION

When this Court first considered whether Arizona's sex offender registration scheme constituted a punishment, it considered the question a "close" one. *Noble*, 171 Ariz. at 178. In that decision, this Court first looked to the legislative history and then to some of the factors outlined by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) before determining that, while the statutory scheme "has both punitive and regulatory effects," and though "several of the *Mendoza-Martinez* factors suggest that [the statute] is punitive," the statute, on balance, was regulatory and not punitive. *Noble*, 171 Ariz. at 178. But this was a fact-intensive analysis that required this Court to weigh several factors including whether registration provided an affirmative disability and whether it was excessive in relation to the purported non-punitive purpose. *Id.* Amicus now submits that, 27 years after this Court decided *Noble*, the sex offender registration scheme has become more burdensome, less tethered to its purported regulatory purpose, and, in a word, punitive.

To determine whether a registration requirement is punitive or regulatory, this Court must proceed, as it did in *Noble*, by first asking "whether the legislative aim was to punish. . . ." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). In *Noble*, this

Court held that the legislative history available in 1992 did not indicate whether the registration statute was intended to be punitive or regulatory. 171 Ariz. at 175. However, two subsequent Court of Appeals decisions published since *Noble* suggest otherwise. *See Ariz. Dept. of Pub. Safety v. Super. Ct. (Falcone)*, 190 Ariz. 490, 494 (App. 1997) ("the legislature furnished ample indication that it intended to protect communities, not punish sex offenders"); *State v. Henry*, 224 Ariz. 164, 169 ¶ 17 (App. 2010) (noting that the 1998 law's stated purpose was "to provide sex offender information to the public"). But even where a non-punitive purpose is indicated by the legislature, this Court must still "inquire[] further whether the statutory scheme was so punitive either in purpose or effect as to negate the intention." *Noble*, 171 Ariz. at 175 (quoting *United States v. Ward*, 448 U.S. 242, 250 (1980)).

When this Court has made such an inquiry into the punitive nature of a statute, it has followed the framework set forth in *Mendoza-Martinez*. *See Noble*, 171 Ariz. at 175. In *Noble*, this Court considered four of the seven factors put forth in *Mendoza-Martinez* as relevant to sex offender registry laws: (1) whether registration acts as an affirmative disability or restraint; (2) whether registration is historically regarded as a punishment; (3) whether registration serves the traditional aims of punishment; and (4) whether registration is excessive in relation to a non-punitive purpose. 171 Ariz. at 175-77. Though this Court determined in 1992 that these factors did not indicate that the registration scheme was punitive, a re-evaluation of these factors under the current statutory scheme must yield the opposite result.

A. Registration is an affirmative disability or restraint.

In *Noble*, this Court concluded that the 1992 registry did not impose an affirmative disability or restraint because of the registration requirement's "marginal impact on the information available to non-law enforcement personnel." 171 Ariz. at 176. The same cannot be said of Arizona's modern registry scheme. While in 1992, a registrant's information "may in some circumstances be available to potential employers and government agencies not involved in law enforcement," *id.*, the modern registry makes a registrant's information, including his name, address, photograph, and criminal history instantaneously available to anyone anywhere with access to an internet connection, *see* A.R.S. § 13-3827 (internet sex offender website).

In *Smith v. Doe*, 538 U.S. 84, 101 (2003), the United States Supreme Court held that an Alaska sex offender registry did not constitute a punishment for ex post facto purposes. But a key factor in determining that the Alaska statute in question did not impose an affirmative disability was the fact that the statute "does not require these updates [to the registry] to be made in person." *Id.* The modern Arizona statute, by contrast, *does* require updates to the registry to be made in person. *See* A.R.S. §§ 13-3821(J) (requiring a registrant to appear at Motor Vehicle Division annually to update driver license photo and address); 13-3822 (requiring registrant to register a new residence, address, or name "in person"). And unlike the registration laws at issue in *Smith*, certain registrants in Arizona are *not* "free to move where they wish and to live. . . as other citizens," 538 U.S. at 101. Arizona's registration scheme requires more than reporting, and in fact directly constrains where some registrants

may live and move. *See* A.R.S. § 13-3727(A) (prohibiting residence within one thousand feet of schools and child care facilities).

B. Registration is analogous to historical punishments.

In *Noble*, this Court agreed that "registration has traditionally been viewed as punitive" and conceded that "a sentence of permanent government surveillance" could be cruel and unusual. 171 Ariz. at 176-77. But it also concluded that the provisions in the statute "limiting access to the registration information significantly dampen its stigmatic effect." *Id.* at 177. As already discussed, the modern Arizona statute places no restrictions on who may access a registrant's information—indeed, it a legislative goal that information be as widely available as possible. *See* A.R.S. § 13-3827.

The modern statute's in-person reporting and supervision requirements are akin to probation and parole, which "like incarceration, [are] 'a form of criminal sanction.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (citation omitted). Even in *Smith*, the Court found that the comparison to parole and probation "has some force." 538 U.S. at 101. Though the Court in *Smith* ultimately rejected the comparison, in part, because the statute in question did not require in-person reporting and registrants were "free to move where they wish and to live and work as other citizens, with no supervision," as discussed above, that can no longer be said of Arizona's statute. Thus, although the Arizona Court of Appeals has since concluded that *Smith*'s holding that registration laws have not been traditionally viewed as punishment undermines the contrary conclusion this Court reached in

Noble, *see Henry*, 224 Ariz. at 170 ¶ 20, this Court should nonetheless find that *Smith* now provides an outdated view of this topic and thus no longer adequately addresses this factor. In short, the Supreme Court's holding that the type of registration requirements imposed in *Smith* were not close enough analogues to probation and parole to be considered punitive should not bar this Court from finding that Arizona's modern statute indeed imposes restrictions closely analogous to parole and probation. These types of requirements have historically been considered punitive. *See State v. Mendivil*, 121 Ariz. 600, 602 (1979) ("probation . . . constitute[s] a penalty for purposes of the ex post facto laws.").

The public dissemination of sex offenders' information via the internet registry also resembles shaming, one of the most traditional forms of punishment. *See Smith*, 538 U.S. at 97 ("Some colonial punishments indeed were meant to inflict public disgrace."); *see also* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1913 (1991) (shaming punishments like branding "were permanent stigmas, which in effect cast the person out of the community, though they did not involve physical banishment."). Indeed, many state courts that have concluded modern sex-offender registries constitute punishment have called the requirements that a registrant's information be instantly available to virtually anyone at the click of a button a "scarlet letter." *See, e.g., Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1025 (Okla. 2013) (Oklahoma's statute "subjects an offender to unnecessary public humiliation and shame and is essentially a label not unlike a "'scarlet letter.'"); *Smith v. State*, 203 P.3d 1221, 1227 (Idaho 2009) ("for

an offender designated as a [violent sexual predator], the scarlet letters are indelible.").

Likewise, in holding that a similar provision in its sex offender registry was punitive, the New Hampshire Supreme Court refuted the State's argument that registration website was merely for the dissemination of information. The court concluded that, because the information was instantly accessible online, the registration website differed significantly from ways in which other public information and records are typically disseminated. *Doe v. State*, 111 A.3d 1077, 1097 (N.H. 2015) ("Placing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame or shun."); *see also Doe v. State*, 189 P.3d 999, 1012 (Alaska 2008) ("the dissemination provision at least resembles the punishment of shaming").

C. Registration serves the traditional aims of punishment.

Noble acknowledged that registration serves, "at least in part, the traditional deterrent function of punishment." 171 Ariz. at 177. This holding is arguably undermined by *Smith*, which held that "[a]ny number of governmental programs might deter crime without imposing punishment." 538 U.S. at 102. But as the Alaska Supreme Court recently noted, "a statute limiting registration requirements and public dissemination to the extent necessary to protect the public could have a deterrent effect that would be merely incidental to its non-punitive purpose," but "registration and unlimited public dissemination requirements provide a deterrent and retributive effect that goes beyond any non-punitive purpose and that essentially

serves the traditional goals of punishment." *Doe*, 189 P.3d at 1014. The fact that Arizona's modern registration scheme requires all offenders who have been convicted of certain offenses to submit their information to the internet registry also suggests that the scheme is retributive. *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009) ("When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.").

D. Registration is excessive with respect to its purpose.

This Court previously held that registration was rationally related to the non-punitive purpose of "facilitating law enforcement by aiding in investigative work." *Noble*, 171 Ariz. at 177. *Smith* reinforced this notion, holding that such an investigative purpose was "consistent with grave concerns over the high rate of recidivism among convicted sex offenders," which that Court claimed was "frightening and high." 538 U.S. at 103. But these claims have not aged well.

In a comprehensive study on re-offense rates, the U.S. Department of Justice Bureau of Justice Statistics ("BJS") tracked sex offenders released from prison in 15 states, including Arizona, and concluded that only 3.5 percent of those released were reconvicted for a new sex offense within a three-year period. Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, at 1-2 (Nov. 2003), available at: https://www.bjs.gov/content/pub/pdf/rsorp94.pdf (last viewed Jul. 22, 2019). Similar studies confirm these results, likewise demonstrating low

recidivism rates among sex offenders. *See e.g.*, State of Connecticut, Office of Policy and Management, *Recidivism Among Sex Offenders in Connecticut*, at 4 (Feb. 2012) (finding a 3.6% recidivism rate); Justice Research and Statistics Association, *Improving State Criminal History Records: Recidivism of Sex Offenders Released in 2001*, at 17 (Nov. 2009) (studying recidivism rates in several states and noting 2.3% recidivism rate in Arizona). Importantly, the BJS found that individuals who had been convicted of a sex offense had the *lowest* rate of re-arrest following release from prison. Bureau of Justice Statistics, *Recidivism of Offenders Placed on Federal Community Supervision in 2005: Patterns from 2005 to 2010*, at 6 (Jun. 2016), available at: https://www.bjs.gov/content/pub/pdf/ropfcs05p0510.pdf (last viewed Jul. 22, 2019). Likewise, in a 2005 report, the Arizona Department of Corrections found that those convicted of sex offenses had the lowest recidivism rate among all prisoners released in Arizona between 1990 and 1999. Arizona Department of Corrections, *Arizona Inmate Recidivism Study, Executive Summary*, at 6 (May 2005), available at: https://corrections.az.gov/sites/default/files/recidivism_2005.pdf (last viewed Jul. 22, 2019). In fact, over 90% of those convicted of sex offenses in Arizona during that period were not convicted of any new felony within three years of release. *Id.*

Moreover, thanks to several other empirical studies, we know now that registration schemes may actually *increase* recidivism, directly contradicting their stated purpose. *See Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016) (surveying empirical research). In any event, it is now clear that the Supreme Court relied on flawed information when it famously said that the risk of recidivism among

sex offenders was "frightening and high." *See* Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495 (2015). Courts increasingly take notice of this research in decisions concluding that sex offender registry schemes cannot use such faulty research to support their claims to be merely regulatory in nature. *See e.g., Snyder*, 834 F.3d at 704-05 ("The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that '[t]he risk of recidivism posed by sex offenders is 'frightening and high.'").

Stripped of any empirical support, registration's purpose seems to be nothing more than "a bare . . . desire to harm a politically unpopular group." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985). Without any cognizable tie to recidivism rates, this Court should no longer give credence to the claims that the registration scheme is regulatory in nature. The purpose of the statute is punishment. This Court should now treat it as such.

II. *NOBLE* WAS DECIDED CONTRARY TO THE ORIGINAL MEANING AND PURPOSE OF THE EX POST FACTO CLAUSE

This Court may find that *Noble* was wrongly decided even if it does not view Arizona's modern sex offender registration regime as punitive. Article I, § 10 of the U.S. Constitution prohibits Congress and any state from "pass[ing] *any* . . . ex post facto Law." Likewise, the Arizona Constitution provides that "[n]o . . . ex-post-facto law . . . shall ever be enacted." Ariz. Const. art. II, § 25. The purposes of these clauses are "to assure that legislative Acts give fair warning of their effect and permit

individuals to rely on their meaning until explicitly changed" and to restrict "governmental power by restraining arbitrary and potentially vindictive legislation." *State v. Yellowmexican*, 142 Ariz. 205, 207 (App. 1983) (citing *Weaver v. Graham*, 450 U.S. at 28–29). Yet these dual purposes have been neutered by only affording protections against ex post facto *criminal* laws—a distinction at odds with the Framers' aversion to *any* retroactive lawmaking. Accordingly, this Court should redecide *Noble* to give effect to the original meaning and purpose of the Ex Post Facto Clause. It should hold that imposing more restrictive registration requirements on past offenders violates the Ex Post Facto Clause of Arizona's Constitution regardless of whether these requirements are "punitive."

A. The Ex Post Facto Clause does not distinguish between civil and criminal punishment.

The Framers were deeply concerned with retroactive lawmaking, drawing no distinction between criminal and civil statutes. Alexander Hamilton, for instance, believed the proscription on ex post facto laws to be among the greatest "securities to liberty" guaranteed by the Constitution, as such lawmaking has "been in all ages, [a] favorite and most formidable instrument[] of tyranny." *The Federalist*, No. 84. James Madison likewise 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. Constitutional Convention debates further demonstrate that the Ex Post Facto Clause was intended to apply equally to retroactive civil and criminal laws. *See* Max

Farrand, The Records of the Federal Convention of 1787, vol. 2 at 439-40 (1911) (responding to the proposed inclusion of specific language prohibiting retroactive interference with contracts, Madison asked "[i]s not that already done by the prohibition of ex post facto laws [?]").

Notwithstanding the Framers' contempt of retroactive lawmaking and the Constitution's explicit text prohibiting *any* retroactive law, the United States Supreme Court interpreted the Ex Post Facto Clause as merely prohibiting retroactive *criminal* penalties in *Calder v. Bull*, 3 U.S. 386 (1798). *Calder* and its progeny—adopted by Arizona courts thus far— have given rise to a test under which the Court defers to legislative intent, only invalidating a retroactive law if there is "clearest proof" that its effects negate an intent or presumption that the law be deemed "civil." *Smith*, 538 U.S. at 92. Courts' unwillingness to invalidate civil statutes for their retroactive punitive effects incentivizes legislatures to enact increasingly burdensome retroactive penalties on convicted sex offenders under the guise of civil regulatory laws. The legal consequences of sex offenders' previously committed conduct continue to be altered—without constitutional accountability, and contrary to the original intent of the Ex Post Facto Clause. This case presents a vehicle for this Court to ground Arizona's ex post facto analysis in the provision's original meaning and to uphold the Arizona Constitution's promised protections. *See Pool v. Super. Ct.*, 139 Ariz. 98, 108 (1984) (while we give great weight to the decisions of the United States Supreme Court, "we cannot and should not follow federal precedent blindly.").

B. *Noble* ignores the Ex Post Facto Clause's purpose of preventing arbitrary and vindictive legislation aimed at unpopular groups.

"With 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 . . . the Federal and State Legislatures, were prohibited from passing . . . any ex post facto law." *Calder*, 3 U.S. at 389. Thus, the Ex Post Facto Clause prevents "arbitrary and potentially vindictive legislation," *Weaver*, 450 U.S. at 29, and protects groups of individuals who are vulnerable to retribution extending beyond their original sentence, particularly when public sentiment is one of revenge and anger toward a certain offense, *see Doe I v. Otte*, 259 F.3d 979, 982 (9th Cir. 2001).

Although the *Snyder* court recognized that "the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause," *Snyder*, 834 F.3d at 705-06, that court is in the minority. Courts are largely silent as to this historical purpose of the Ex Post Facto Clause when analyzing sex offender registration laws, *see e.g., Smith*, 538 U.S. at 84; *Noble*, 171 Ariz. 171. There is no question that sex offenders are a stigmatized group subject to vindictive legislation, passed by lawmakers eager "to draft increasingly harsh registration and notification schemes to please an electorate that subsists on a steady diet of fear." Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L. J. 1071, 1074 (2012). Accordingly, this Court should reconsider *Noble* in light of this historical purpose and prevent laws from

directing onerous, retroactive penalties toward a particular class of unpopular individuals.

C. *Noble* also ignores the clause's purpose of providing sufficient notice of penalties.

The Framers also rejected ex post facto laws as inherently unfair, because they deprive individuals of adequate notice of the wrongfulness of their behavior and the consequences thereof until after the fact. *See* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1276 (1998). Such notice, the U.S. Supreme Court has repeatedly explained, is of particular importance in the context of criminal law, where the risk of deprivation and unfairness is greatest: "[F]air warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. 188, 191 (1977). In other words, the Ex Post Facto Clause "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).

Noble's holding is in conflict with the Ex Post Facto Clause's purpose of putting those convicted of crimes on notice of their punishments. As a result, convicted sex offenders who have fulfilled their initial legal obligations now fear the imposition of additional burdensome punishments. This Court should thus redecide *Noble* to reflect the Ex Post Facto Clause's historical aim of providing sufficient notice.

CONCLUSION

In the 27 years since this Court decided *State v. Noble*, Arizona's sex offender registration scheme has become a punitive measure. But even if the registration scheme were not punitive, this Court should reconsider *Noble* by holding that Arizona's Ex Post Facto Clause prohibits applying new registration requirements on offenders whose crimes occurred before those requirements took effect, consistent with the Clause's original meaning.

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Respectfully submitted,

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