

In The
Supreme Court of the United States

DAVID PAUL HALL,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

REPLY TO BRIEF IN OPPOSITION

M. Gordon Widenhouse, Jr.
Counsel of Record for Petitioner
Rudolf Widenhouse & Fialko
312 West Franklin Street
Chapel Hill, NC 27516
(919) 967-4900
mgwidenhouse@rwf-law.com

Anne M. Hayes
Post Office Box 4203
Cary, NC 27519
(919) 402-6134
hayesannemarg@aol.com

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REPLY BRIEF FOR PETITIONER

Petitioner, who was released from prison in 2003 and required to register as a sex offender for ten years, is now being further punished by being compelled to remain on the sex offender registry for the remainder of his life. He also must forever comply with a host of new restrictions on his daily life. These facts are not in dispute. Moreover, petitioner has been judicially determined not to present a current or potential threat to public safety. Petition at 9-10, App. 22. The new requirements and restrictions imposed on petitioner are far more egregious than the Court considered in *Smith v. Doe*, 538 U.S. 84, 97-106 (2003), when the Court found the statute under review did not create a punitive scheme.

Nevertheless, respondent urges this Court to deny a writ of *certiorari*. But as petitioner shows below, respondent is mistaken when it asserts the duration of petitioner's registration requirement is unclear, and it mischaracterizes the arguments petitioner presents. Respondent also understates both the critical distinctions between the statute this Court found not punitive in *Smith* and the serious division among the courts of last resort that have grappled with the proper application of *Smith* to various sex offender registration statutes. This case presents an issue worthy of this Court's review.

A. Petitioner Must Register as a Sex Offender for the Remainder of His Life.

Petitioner, personally, must register as a sex offender for the full duration of his lifetime. Petition at App. 8, *In re Hall*, 768 S.E.2d 39, 43 (N.C. Ct. App. 2014), *appeal dismissed, review denied*, 771 S.E.2d 285 (N.C. 2015). This holding by the North Carolina Court of Appeals allows for no uncertainty about the lifetime duration of petitioner's registration obligation.

Despite this direct statement, respondent argues petitioner might instead be subject to a 30-year sex offender registration requirement, due to a 2008 amendment to SOPPRP's duration requirement. Brief in Opposition at 14-16 (citing *State v. Surratt*, 773 S.E. 2d 327, 331 (N.C. Ct. App. 2015)).¹ It asserts petitioner's case therefore is not a good vehicle for resolving the question of whether a retroactive requirement of lifetime registration

¹ Respondent claims "[t]he premise on which the petition is based has been called into question by a subsequent decision" of the lower court and suggests the case shows petitioner is not subject to lifetime registration. Brief in Opposition at 15-16 (citing *Surratt*). Respondent is decidedly wrong. *Surratt* involved a defendant's appeal from his criminal convictions for failing to change his address as a sex offender and for giving false information to the registry about his address. *Id.* at 329-33. The defendant argued (1) he was not required to register as a sex offender, and (2) the evidence otherwise failed to support one of the convictions. The court rejected the first argument but vacated the conviction addressed in the second argument. *Id.* at 333. *Surratt* in no way stands for the proposition that petitioner is not subject to lifetime registration.

under SOPPRP violates the *Ex Post Facto* Clause. Contrary to respondent's argument, the 2008 amendment has no effect on petitioner's eligibility to terminate his registration period.

Effective December 1, 2008, N.C. Gen. Stat. § 14-208.7(a) provides: "Registration shall be maintained for a period of at least 30 years" N.C. Sess. Laws 2008-117, §§ 8, 22. Prior to this amendment, Section 14-208.7(a) provided: "Registration shall be maintained for a period of at least 10 years" N.C. Sess. Laws 2006-247, §§ 5(a), 5(b). Critically, neither version of § 14-208.7(a) establishes an ending date for the registration period or allows for automatic termination of the registration requirement. Instead, both require petitioner to maintain his registration indefinitely. The registration requirement can be terminated only if petitioner can meet the requirements of N.C. Gen. Stat. § 14-208.12A. *See* Section 14-208.7(a).

Under § 14-208.12A, a court can terminate an individual's registration obligation after ten years, but only if termination complies with "federal standards applicable to the termination of a registration requirement." § 14-208.12A(a1)(2). In this case, the lower court construed § 14-208.12A(a1)(2) and 42 U.S.C. § 16915(b) (the applicable federal standard) and concluded petitioner would never be eligible to have a court terminate his registration. Petition at App. 8; *Hall*, 768 S.E.2d at 42-43. The 2008 amendment to SOPPRP does not affect this conclusion.

B. Petitioner's *Ex Post Facto* Challenge Applies to SOPPRP in Its Entirety.

Respondent next suggests petitioner is challenging only discrete portions of the statute and argues this case is not a good vehicle for deciding whether individual requirements and restrictions of SOPPRP, in isolation, can violate the *Ex Post Facto* Clause. Brief in Opposition at 16-17. This argument is of no moment, because petitioner is not asking this Court to review individual requirements in isolation. Instead, petitioner argues that subjecting him to SOPPRP's aggregation of requirements and restrictions for his entire lifetime, with no opportunity for termination of registration based on an individualized assessment of risk, violates the federal *Ex Post Facto* Clause. *See Smith*, 538 U.S. at 116-17 (Ginsburg, J., joined by Breyer, J., dissenting). Thus, this case presents an issue worthy of review.

C. Petitioner Has Presented a Sufficiently Developed Record For Review of His *Ex Post Facto* Challenge.

Respondent next argues the record below is not sufficiently developed to warrant review of the decision below, because petitioner's housing and employment challenges were addressed only in the form of unsworn statements. Brief in Opposition at 17-18. But, respondent does not suggest petitioner has not experienced these difficulties. Moreover, respondent has never disputed the information presented in the trial court. In any event,

petitioner's constitutional challenge to SOPPRP is not dependent on proof of his personal hardships.

Respondent also complains the degree of the restrictions imposed by SOPPRP's restraints on housing, employment, and physical location have not been tested by the adversarial process because petitioner did not present evidence quantifying the geographical areas of prohibition. Brief in Opposition at 18. There can be no doubt, however, that if petitioner cannot "reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located," and cannot be present within 300 feet of numerous other types of premises, he is prohibited from living, working, or being physically present in large portions of his community. N.C. Gen. Stat. §§ 14-208.16, 14-208.18(a)(2). The Court should disregard respondent's suggestion that these restrictions are not substantial.²

² Barring access to judicial review for registrants who lack sufficient resources to develop evidence identifying the number and degree of exclusion zones in a geographical area would serve as an effective shield against *Ex Post Facto* challenges to sex offender registration programs. Registered sex offenders tend to be marginalized individuals who lack substantial financial resources, and who are highly unlikely to be able to marshal community support for their efforts to enforce their constitutional rights.

D. In Light of the Trend Toward Expanding Obligations and Restrictions Imposed by Sex Offender Registration Statutes, This Court Should Revisit the *Ex Post Facto* Issue Presented by Petitioner's Case.

Respondent next urges this Court to deny the petition on the grounds that it has already addressed the *Ex Post Facto* Clause in the context of a sex offender registration statute. Brief in Opposition at 19-28 (citing *Smith v. Doe*, 538 U.S. 84 (2003)). Aside from *Smith* being a sharply divided decision, SOPPRP imposes a much broader and more punitive aggregation of requirements and restrictions than the statute addressed in *Smith*. Because SOPPRP represents a trend toward expanding the scope and severity of registration obligations, this Court's review of the rejection of petitioner's *Ex Post Facto* challenge is warranted.

Additionally, respondent's suggestion that SOPPRP is no more punitive than the statute reviewed in *Smith* is plainly inaccurate. For example, respondent acknowledges SOPPRP mandates twice-yearly, in-person verifications by registrants, as well as in-person reporting of information at other times. Brief in Opposition at 26-27. In contrast, *Smith* rejected an *Ex Post Facto* challenge, in part, because the statute at issue had no in-person reporting requirement. *Smith*, 538 U.S. at 101. An intended consequence of SOPPRP's in-person reporting requirements is that petitioner, who is subject to a lifetime registration obligation, must present himself at a sheriff's office every six months for life, within three business days of

receiving a verification form, to verify information on the form. N.C. Gen. Stat. § 14-208.9A. Additionally, he must report to the sheriff's office within three business days of moving to a new residence, changing academic status, changing employment status if obtaining or terminating employment at an institution of higher education, or changing his name. N.C. Gen. Stat. § 14-208.9(a), (c), (d), (f). Any change to an online identifier or the addition of a new online identifier triggers a ten-day deadline for an in-person report. § 14-208.9(e).

Respondent argues the in-person reporting requirement is not punitive because it serves a legitimate regulatory purpose. Brief in Opposition at 26-27 (citing *Doe v. Miller*, 405 F.3d 700, 718-23 (8th Cir.), *cert. denied*, 546 U.S. 1034 (2005)). However, at least four state courts of last resort have held that in-person reporting requirements create an affirmative disability or restraint, contributing to each court's ultimate determination that its state's sex offender registration statute was punitive. *Doe v. State*, 111 A.3d 1077, 1094-96, 1100 (N.H. 2015) (applying the intents-effects analysis of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1021-23, 1025, 1030 (Okla. 2013) (same); *Gonzalez v. State*, 980 N.E.2d 312, 317, 321 (Ind. 2013) (same); *State v. Letalien*, 985 A.2d 4, 18, 26 (Me. 2009) (same). Clearly, the in-person reporting requirement is a significant factor in *Ex Post Facto* analysis. See *Smith*, 538 U.S. at 116-17 (Ginsburg, J., joined by Breyer, J., dissenting) (addressing the burden of reporting requirements and likening them

to conditions of supervised release or parole). A mature division exists among state jurisdictions.

Respondent acknowledges SOPPRP imposes express residency and employment restrictions, in contrast to the statute at issue in *Smith*. Brief in Opposition at 26; *Smith*, 538 U.S. at 100. Yet, respondent argues the residency restrictions are not punitive because they further SOPPRP's public protection purpose. Brief in Opposition at 27. But satisfaction of the intent prong of the *Mendoza-Martinez* intent-effects analysis does not end the inquiry about whether a provision is punitive. At least three courts of last resort have held residency restrictions created an affirmative disability or restraint, contributing to each court's ultimate determination that its state's sex offender statute was punitive. *Starkey*, 305 P.3d at 1023-25, 1030 (Okla.) (applying the *Mendoza-Martinez* intent-effects analysis); *State v. Pollard*, 908 N.E.2d 1145, 1150, 1154 (Ind. 2009) (same); *Commonwealth v. Baker*, 295 S.W.3d 437, 445, 447 (Ky. 2009) (same). Thus, residency restrictions also are a significant factor in *Ex Post Facto* analysis.

As petitioner has explained, SOPPRP also imposes additional types of requirements and restrictions not reviewed in *Smith*. See Petition at 24-26. The most burdensome of these is the premises restriction, discussed at pages 4-5, above. N.C. Gen. Stat. § 14-208.18. The premises restriction applies to a broad category of registered sex offenders, regardless of whether their offenses included a minor, N.C. Gen. Stat. 14-208.18(c), and it affects everyday decisions about where a registrant

can work, worship, and participate in myriad other activities of daily life.

The striking differences between the burdens imposed by SOPPRP and the statute reviewed in *Smith* reveal why the issue presented here is worthy of determination by this Court. In light of the sharply divided decision in *Smith*, and the division among courts of last resort regarding the proper application of *Smith*, a writ of *certiorari* should issue.

CONCLUSION

The petition should be granted.

Respectfully submitted,

M. GORDON WIDENHOUSE, JR.

Counsel of Record

Rudolf Widenhouse & Fialko

312 West Franklin Street

Chapel Hill, NC 27516

mgwidenhouse@rwf-law.com

Telephone: (919) 967-4900

Facsimile:

ANNE M. HAYES

Post Office Box 4203

Cary, NC 27519

hayesannemarg@aol.com

Telephone: (919) 402-6134

Facsimile: (919) 439-6384