No. 15-57

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 Court of Appeals of North Carolina

BRIEF FOR RESPONDENT IN OPPOSITION

ROY COOPER
Attorney General of North Carolina

Amy Kunstling Irene*
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
(919) 716-6500
airene@ncdoj.gov

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QUESTION PRESENTED

Whether the requirements imposed upon petitioner by North Carolina's Sex Offender and Public Protection Registration Programs — which, under a recent North Carolina Court of Appeals decision, may apply to petitioner for thirty years, not for life — violate the *Ex Post Facto* Clause of the United States Constitution.

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The decision of the Supreme Court of North Carolina (Pet. App. 1-2) is reported at 771 S.E.2d 285 (N.C. 2015). The opinion of the North Carolina Court of Appeals (Pet. App. 3-20) is reported at 768 S.E.2d 39 (N.C. Ct. App. 2014). The superior court's order is reproduced in the Appendix to the petition. (Pet. App. 21-23)

STATEMENT

A. Statutory Background.

North Carolina's legislature, the General Assembly, enacted North Carolina's original "Sex Offender Registration Program" in 1995. *See* N.C. Sess. Laws 1995-545. The registration requirements applied, *inter alia*, to people with "reportable convictions" who were released from a penal institution on or after the effective date of January 1, 1996, and registration was required to be maintained for ten years following such release. *Id.*

In 1997, the General Assembly made amendments to the registration program effective April 1, 1998 ("the 1997 amendments"). The 1997 amendments included changing the name of the registration program to the "Sex Offender and Public Protection Registration

Programs" ("SOPPRP")[1] and providing that registration would automatically terminate ten years from the date of the initial county registration if the registrant had not been convicted of a subsequent offense requiring registration. *See* N.C. Sess. Laws 1997-516.

The General Assembly amended SOPPRP in 2006 ("the 2006 amendments"). The 2006 amendments provided that, effective December 1, 2006, registration shall be maintained for a period of "at least" ten years following the date of initial county registration. N.C. Sess. Laws 2006-247, ss. 5(a) and 5(b).

The 2006 amendments further provided that a registrant who had not been convicted of a subsequent offense requiring registration could petition the superior court for termination of his registration requirement ten years after the date of his initial county registration. *See* N.C. Sess. Laws 2006-247, ss. 10(a) and 10(b); *see also* N.C. Gen. Stat. § 14-208.12A(a) (2013). That provision was also effective December 1, 2006, and applied to people for whom the registration period would terminate on or after that date. The 2006 amendments stated that the superior court "may" grant termination of the registration

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[1] The current version of SOPPRP is codified at N.C. Gen. Stat. § 14-208.5 (2013), *et seq*. Only Parts 1 and 2 of SOPPRP are pertinent to this case.

requirement if the petitioner established that (1) he had not been arrested for any crime that would require registration since completing his sentence; (2) termination from the registry "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 or required to be met as a condition for the receipt of federal funds by the State;" and (3) the court is "otherwise satisfied that the petitioner is not a current or potential threat to public safety." *See* N.C. Sess. Laws 2006-247, s. 10(a); *see also* N.C. Gen. Stat. § 14-208.12A(a1) (2013). Even if, however, these requirements were met, "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion." *In re Hamilton*, 725 S.E.2d 393, 399 (N.C. Ct. App. 2012).

The General Assembly made additional amendments to SOPPRP in 2008 ("the 2008 amendments"). The 2008 amendments, in relevant part, changed the version of N.C. Gen. Stat. § 14-208.6A that was then in effect to say that the legislature's objective is to establish a thirty-year registration requirement for people convicted of certain offenses, with an opportunity for those people to petition to shorten their registration time period after ten years of registration, *see* N.C. Sess. Laws 2008-117, s. 7; provided that registration shall be maintained for a period of at least thirty years following the date of

initial county registration unless the registrant, after ten years of registration, successfully petitioned to shorten his registration time under N.C. Gen. Stat. § 14-208.12A, *see* N.C. Sess. Laws 2008-117, s. 8; and provided that a request for termination of the thirty-year registration requirement may be made ten years from the date of initial county registration, *see* N.C. Sess. Laws 2008-117, s. 11. The requirements for termination of the registration requirement after ten years remained unchanged and are the same as those described above. *See* N.C. Gen. Stat. § 14-208.12A (2013).

The effective date provision of the 2008 amendments provided, in pertinent part:

> The maintenance of the registration period of 30 years required by G.S. 14-208.7, as amended by Section 8 of this act, applies to registrations made on or after December 1, 2008. The remainder of this act becomes effective December 1, 2008, and applies to offenses committed on or after that date.

N.C. Sess. Laws 2008-117, s. 22. The North Carolina Court of Appeals ruled in a published opinion filed on June 2, 2015, that the thirty-year registration period in the 2008 amendments applied retroactively to a defendant who, like petitioner, first registered before December 1, 2008, in connection with an offense

committed before December 1, 2008. *See State v. Surratt*, 773 S.E.2d 327, 329, 331 (N.C. Ct. App. 2015).

Petitioner has listed in the petition "numerous SOPPRP requirements" that he says he must now comply with for the rest of his life. (Pet. p. 7) His description of some of those requirements, however, omits the details of the requirements and makes them sound broader than they actually are.

- Petitioner says that "a wide range of information" is made publicly available online. (Pet. p. 7) The information that is in the publicly-available, online state registry is name, sex, address, physical description, picture, conviction date, offense for which registration was required, the sentence imposed as a result of the conviction, and registration status. The sheriff shall release any other relevant information that is necessary to protect the public concerning a specific person, but shall not release the identity of the victim. *See* N.C. Gen. Stat. § 14-208.10 (2013); N.C. Gen. Stat. § 14-208.15 (2013).

- Petitioner states that "[c]hanges to several categories of registration information must be reported to the sheriff's office in person within three business days." (Pet. p. 7) The changes to registration information that a registrant must report in person are a change of address, a move to

another county, an intent to move to another State or a subsequent change in that intent, a change in academic status, a change in employment status with respect to an institution of higher education, a change in online identifier or the obtaining of a new online identifier, and a change of name. *See* N.C. Gen. Stat. § 14-208.9 (2013).

- Petitioner has conflated and overgeneralized several requirements with his statement that "[r]egistrants are forbidden to live, work, or be present in or near schools, day care centers, and other premises intended primarily for the use, care, or supervision of minors." (Pet. p. 8) These requirements are as follows:

  i. A registrant may not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located. This requirement applies to any registrant who did not establish his residence prior to August 16, 2006. Changes in ownership of or use of property within 1,000 feet of a registrant's registered address that occur after a registrant establishes residency at the registered address shall not form the basis for finding a violation. *See* N.C. Gen. Stat. § 14-208.16 (2013).

  ii. Subject to some exceptions, a registrant may not knowingly be on the premises of any place

intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds; within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds that are located in malls, shopping centers, or other property open to the general public; or at any place where minors gather for regularly scheduled educational, recreational, or social programs. N.C. Gen. Stat. § 14-208.18 (2013).

iii. It is unlawful for a person who is required to register to work for any person or as a sole proprietor, with or without compensation, at any place where a minor is present and the person's responsibilities or activities would include instruction, supervision, or care of a minor or minors. N.C. Gen. Stat. § 14-208.17 (2013).

- Petitioner states that "[r]egistrants are banned from some professions. They cannot be granted EMS credentials or be licensed in the funeral industry, and cannot obtain certain commercial driver's license endorsements." (Pet. p. 8) The

provisions to which petitioner is referring are as follows:

i. SOPPRP provides that registrants may not obtain or renew a commercial driver's license with a P or an S endorsement (commercial passenger vehicles or school buses). Any registrant subject to this restriction is prohibited from driving a commercial passenger vehicle or school bus. *See* N.C. Gen. Stat. § 14-208.19A (2013); *see also* N.C. Gen. Stat. § 20-27.1 (2013); N.C. Gen. Stat. § 20-37.14A (2013).

ii. A separate provision of the North Carolina General Statutes that is not in SOPPRP provides that registrants may not obtain or renew EMS credentials. *See* N.C. Gen. Stat. § 131E-159(h) (2013).

iii. Another, separate provision of the General Statutes that is not in SOPPRP provides that people who have been convicted of certain specified sexual offenses may not obtain or renew a license to work in the funeral industry. *See* N.C. Gen. Stat. § 90-210.25B (2013). This determination is independent of whether the person is subject to registration under SOPPRP.

- The ban on the use of commercial social networking websites by registered sex offenders to

which petitioner refers (Pet. p. 9) is in a separate statute that is not in SOPPRP. *See* N.C. Gen. Stat. § 14-202.5 (2013).

B. Facts.

Petitioner pleaded guilty on January 18, 1982, in the Superior Court, Mecklenburg County, North Carolina, to first degree rape and second degree kidnapping. (R pp. 10-11)[2] The offense date for the first degree rape was alleged in the indictment to be July 2, 1981. (R p. 7) Petitioner was sentenced to life imprisonment for the first degree rape. (R pp. 12-13) According to statements made by the prosecutor in the proceedings below, the victim was a college student who defendant kidnapped and raped at knifepoint when he was twenty-six years old; petitioner served twenty-one to twenty-two years imprisonment; and petitioner was then on parole for five years. (T p. 15)[3] In April 2003, after his release from prison, petitioner registered pursuant to SOPPRP. (R p. 14; T p. 15)

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[2] Citations to "R p. ___" refer to the printed Record on Appeal, filed in the North Carolina Court of Appeals.

[3] Citations to "T p. ___" refer to the transcript of the September 2013 hearing in the superior court.

C. Lower Court Proceedings.

Petitioner filed a petition dated May 13, 2013, in the superior court, requesting that the court terminate his registration requirement. (R p. 14) Petitioner argued, *inter alia*, that requiring him to be subject to lifetime registration violates the United States Constitution's *Ex Post Facto* Clause, U.S. Const. art. I, § 10. (R pp. 17-28; T pp. 14-15) At the hearing on the petition for termination of his registration requirement, petitioner presented a printout of his online registry information; a September 16, 2013, mental health assessment that stated it was "not a sex offender specific risk assessment and should not be used as an indicator of risk or safety within the community" and "is based solely on [petitioner's] self-report;" his résumé; his honorable discharge from the United States Army; educational certificates and degrees; letters of support; a certificate of his completion in prison of the Sex Offender Accountability and Responsibility ("SOAR") Program and induction into SOAR's "Peer Counselor Hall of Fame;" a letter of appreciation from the North Carolina Administrative Office of the Courts for participating in the "Think Smart Program" in 1991; and unsworn oral statements from two of petitioner's supporters and from petitioner. (T pp. 2-11; Pet's Exs. 1-9)

The superior court denied petitioner's request to terminate his registration requirement. The superior court did not find that N.C. Gen. Stat. § 14-208.12A(a1)(2) (2013) had been satisfied, *i.e.*, that the requested relief "complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State."[4] (Pet. App. 22) The superior court did not explicitly rule on petitioner's *ex post facto* argument or make findings of fact or reach conclusions of law about it. (Pet. App. 21-23)

Petitioner appealed to the North Carolina Court of Appeals. One of petitioner's arguments was that due

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[4] Petitioner asserts that there was a judicial finding that he does not pose a threat to public safety. (Pet. pp. 19, 21, 23) The superior court's finding of fact on the pre-printed form order states that "[t]he petitioner is not a current or potential threat to public safety." (Pet. App. 22, Finding 6) The language of the statute, however, requires that the court be "*otherwise* satisfied that the petitioner is not a current or potential threat to public safety." N.C. Gen. Stat. § 14-208.12A(a1)(3) (2013) (emphasis added). The use of the word "otherwise" indicates that the requirement that the termination of registration comply with federal law also relates to public safety, and that if termination does not comply with federal law, then the petitioner is, in fact, a current or potential threat to public safety.

to the application of the requirements of the federal Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16911, *et seq*., to him via N.C. Gen. Stat. § 14-208.12A(a1)(2) (2013), he will be subject to lifetime registration in North Carolina because he is a "tier III sex offender" under SORNA. Petitioner contended that retroactively subjecting him to lifetime registration violates the federal Constitution's *Ex Post Facto* Clause. Petitioner stated in the court of appeals that his *ex post facto* challenge was "narrowly tailored" in that he was not challenging the entire registry law, but rather the "retroactive lengthening of his registration obligation to a lifetime registration." (Pet's N.C. Ct. App. Reply Br. p. 4 n.1; *accord* Pet's N.C. Ct. App. Br. pp. 4, 17-18) Petitioner asserted that the application of the federal termination standards to him, in combination with the requirements and restrictions placed upon him by SOPPRP, has a punitive effect. (Pet's N.C. Ct. App. Br. p. 17)

The court of appeals concluded that "based on the application of SORNA standards, petitioner is a tier III sex offender subject to lifetime registration." (Pet. App. 8) The court explained that the North Carolina appellate courts have consistently held that North Carolina's sex offender registration provisions do not violate *ex post facto* protections. (Pet. App. 16) The court determined that the North Carolina Supreme Court's decision in another case, which upheld lifetime

satellite-based monitoring, "informs us that the imposition of lifetime sex offender registration programs does not constitute an *ex post facto* violation." (Pet. App. 17) The court "note[d] that [petitioner] has argued vigorously for a different result regarding the burden imposed on him by the registration requirements as they currently exist." (Pet. App. 18) The court stated that "[w]ithout addressing each individual point raised by [petitioner], we acknowledge these arguments and note that they have been previously addressed and rejected by our Courts." (Pet. App. 18-19)

Petitioner filed a notice of appeal (constitutional question) and petition for discretionary review in the Supreme Court of North Carolina, seeking review of the court of appeals' decision. On April 9, 2015, the supreme court allowed the State's motion to dismiss petitioner's notice of appeal for lack of a substantial constitutional question and denied petitioner's petition for discretionary review. (Pet. App. 1-2)

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT A GOOD VEHICLE TO RESOLVE PETITIONER'S *EX POST FACTO* ARGUMENT OR TO REVISIT WHETHER A SEX OFFENDER REGISTRY LAW CAN VIOLATE THE *EX POST FACTO* CLAUSE.

This case is not a good vehicle for resolving petitioner's argument that lifetime registration violates the *Ex Post Facto* Clause of the federal Constitution or for revisiting whether sex offender registry laws can violate *ex post facto* protections. This is so because petitioner may have a thirty-year registration period, rather than a lifetime registration period; petitioner does not seem to be arguing that he could not permissibly be subject to the requirements and restrictions of SOPPRP for a time period shorter than his lifetime; and the record below is not well-developed.

A. Petitioner May Be Subject To A Thirty-Year, Rather Than Lifetime, Registration Requirement Under State Law.

The petition is based on the premise that petitioner is subject to lifetime registration under SOPPRP. Petitioner asserts in the petition that the thirty-year registration period set forth in the 2008

amendments does not apply to him, and that he instead must maintain his registration period consistent with the 2006 amendments, *i.e.*, for at least ten years, with no upper limit. (Pet. p. 2 n.1) He contends that because of N.C. Gen. Stat. § 14-208.12A(a1)(2)'s incorporation of federal law, he will be subject to SOPPRP's requirements and restrictions for the rest of his life because he is a "tier III sex offender" under SORNA.[5]

The premise on which the petition is based has been called into question by a subsequent decision of the North Carolina Court of Appeals. After the decisions below in this case, the court of appeals ruled in another case in a published opinion that the thirty-year registration period in the 2008 amendments applied retroactively to a defendant who, like petitioner, first registered before December 1, 2008, in connection with an offense committed before December 1, 2008. The defendant in that case first registered in 1999 due to his conviction in 1994 for taking indecent liberties with a child. *See Surratt*, 773 S.E.2d at 329, 331.

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[5] The General Assembly made amendments to SOPPRP in 2001 that, among other things, provided for lifetime registration for certain offenders; however, those amendments applied to offenses committed on or after October 1, 2001. *See* N.C. Sess. Laws 2001-373.

Published opinions of the North Carolina Court of Appeals are binding on all trial courts in North Carolina as well as on subsequent panels of the court of appeals unless overturned by a higher court. *See In re Civil Penalty*, 379 S.E.2d 30, 37 (N.C. 1989). The published opinion in *Surratt* at least creates a question under state law of whether petitioner's registration period is thirty years pursuant to the 2008 amendments. Given this question about the length of petitioner's registration period, this case is not an appropriate one for this Court to use to resolve an *ex post facto* challenge to lifetime registration.

B. Petitioner Only Appears To Be Challenging Specific Registration Requirements And Restrictions To The Extent They Are Imposed For Life.

It would be difficult for this Court to use this case to cleanly and definitively address whether particular requirements and restrictions of a sex offender registration law, such as residency or occupational restrictions, can violate the *Ex Post Facto* Clause. This is so because petitioner does not seem to be arguing that he could not permissibly be subject to the requirements and restrictions of SOPPRP for some time period shorter than lifetime registration. He expressly states that the remedy he is seeking is a determination that he would be entitled to relief from the requirements of registration if a hearing resulted

in a finding that he did not pose a danger to the public. (Pet. p. 23 n.5) He does not state that the remedy he is seeking is a determination that he cannot be subject to SOPPRP's requirements and restrictions at all. Therefore, this case would not be an appropriate case to use to consider whether restrictions such as residency or occupational restrictions constitutionally may be imposed in general.

C. The Record Below Is Not Well-Developed.

Petitioner asks this Court to accept review of this case to revisit whether a sex offender registry law can violate the *Ex Post Facto* Clause. (Pet. pp. 24-30) This case would not be a good vehicle by which to do so because the record below is not well-developed.

At the hearing on petitioner's petition for removal from the registry, petitioner presented for the superior court's consideration only documentary exhibits (described in the Statement, *supra*) and unsworn statements from two of his supporters and from himself; he did not present sworn testimony. Even considering those exhibits and unsworn statements, the record below is thin. For example, the only indications of petitioner's living situation in the record below are a statement in the mental health assessment that petitioner "lives alone in a hotel apartment in Raleigh, NC" (Pet's Ex. 2, p. 1), statements in letters from supporters that being on the

registry has caused petitioner difficulty in finding a place to live (Pet's Ex. 6), and an assertion of petitioner's counsel in a court filing that petitioner has encountered barriers to finding suitable housing due to his registry status (R p. 26). There was no evidence presented about the effect of SOPPRP on housing for registrants generally. The superior court did not make any findings of fact or conclusions of law regarding the *ex post facto* issue. (Pet. App. 21-23)

The petition makes assertions about the registration requirement that have not been tested in the adversary process because petitioner did not present evidence about them in the superior court. The petition states that "[r]egistrants are prohibited from living, working, or being physically present in *large portions* of their communities as a means of protecting children from child predators" (Pet. p. 22 (emphasis added)), but there was no evidence presented in the superior court about whether the impact of SOPPRP's provisions is that registrants are, in fact, prohibited from living, working, or being present "in large portions" of their communities.

Given the scant evidence and absence of findings of fact and conclusions of law in the record below, this case would not be a suitable case to use for revisiting the *ex post facto* issue.

II. THIS COURT HAS ALREADY RULED THAT LIFETIME SEX OFFENDER REGISTRATION DOES NOT CONSTITUTE AN *EX POST FACTO* VIOLATION; THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENT; AND PETITIONER HAS IDENTIFIED NO REAL CONFLICT ON THIS ISSUE.

Even if petitioner is subject to lifetime registration, this Court has already ruled in *Smith v. Doe*, 538 U.S. 84 (2003), that lifetime sex offender registration does not constitute an *ex post facto* violation. The decision below in this case is consistent with *Smith v. Doe*, and petitioner has shown no real conflict between the decision below and other States' courts of last resort on this issue.

A. This Court Has Already Ruled That Lifetime Sex Offender Registration Does Not Constitute An *Ex Post Facto* Violation.

Petitioner argues that the retroactive application of a lifetime sex offender registration requirement, given the obligations and restrictions imposed upon him by SOPPRP, violates the *Ex Post Facto* Clause of the federal Constitution. This Court, however, already has resolved this issue in *Smith v. Doe*, which rejected an *ex post facto* challenge to lifetime registration under

Alaska's sex offender registry law. In so doing, this Court thoroughly analyzed and explicitly rejected many of the same arguments petitioner makes in the petition.

In *Smith v. Doe*, the respondents were subject to lifetime registration under Alaska's Sex Offender Registration Act (the "Act"), even though they were convicted before the passage of the Act, and they were required to verify their information quarterly. *Smith v. Doe*, 538 U.S. at 90-91. The following information about registrants was made publicly-available, with most of it being online: name; aliases; address; photograph; physical description; description, license, and identification numbers of motor vehicles; place of employment; date of birth; crime for which convicted; date of conviction; place and court of conviction; length and conditions of sentence; and a statement regarding whether the offender is in compliance with the updating requirements or cannot be located. *Id.* at 91.

The respondents argued that the Act was void as to them under the *Ex Post Facto* Clause. *Id.* at 91. This Court rejected that argument. The Court explained that to analyze this issue, it determines whether the legislature's intent was to enact a regulatory scheme that is civil and non-punitive. *Id.* at 92. If so, the Court further examines whether the statutory scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it

civil." *Id.* (internal quotations and brackets omitted). Because this Court ordinarily defers to the legislature's stated intent, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (internal quotation omitted).

This Court determined in *Smith v. Doe* that the legislature intended to create a civil, nonpunitive regime designed to protect the public from harm. *Id.* at 93, 96. As a result, the Court proceeded to analyze the effects of the Act by referring to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Smith v. Doe*, 538 U.S. at 97. The Court analyzed the seven factors as follows:

Traditional means of punishment. The Act did not involve a traditional means of punishment. The Act did not resemble the historical punishments of shaming and banishment, which "either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Id.* at 98.

The stigma associated with the Act resulted "not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id.* Although the publicity might cause adverse consequences for the convicted defendant, the publicity

and any resulting stigma was not an integral part of the objective of the regulatory scheme. *Id.* at 99.

The fact that Alaska had chosen to post the information online did not change this conclusion. *Id.* "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* The online availability of the registry information is analogous to a visit to an official archive of criminal records, and the Internet simply makes the document search more efficient, cost-effective, and convenient for Alaska's citizens.[6] *Id.*

Affirmative restraint or disability. The Act did not subject the respondents to an affirmative restraint or disability. The Act imposed no physical restraint, and therefore did not resemble the punishment of imprisonment, "which is the paradigmatic affirmative

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[6] Justice Thomas in his concurring opinion stated that he joined the Court's opinion upholding the Act against an *ex post facto* challenge, but he expressed his view that the determination of whether a statutory scheme is criminal or civil is based only on an examination of the scheme on its face. Because the Act did not specify a means of making registry information public, he believed the Court had strayed by considering whether Internet dissemination rendered the Act punitive. *Smith v. Doe*, 538 U.S. at 106-07 (Thomas, J., concurring).

disability or restraint." *Id.* at 100. The Act allowed registrants to change residences or jobs, but even the sanction of occupational debarment has been held to be nonpunitive. *Id.* There was no evidence in the record that the Act had led to substantial occupational or housing disadvantages for sex offenders that would not have otherwise occurred through routine criminal background checks by employers and landlords. *Id.*

The court below had erroneously concluded that the Act required in-person reporting to update registry information. *Id.* at 101. However, nothing in *Smith v. Doe* said that if there were an in-person reporting requirement, that would create an *ex post facto* violation. *See id.*

The registration system was not parallel to probation or supervised release. Registrants were not subject to supervision like that for probation or supervised release and, although they had to report certain changes, they did not have to seek permission to make those changes. *Id.* at 101-02.

Traditional aims of punishment. The mere presence of a deterrent purpose did not render the Act punitive because to hold otherwise would severely undermine the State's ability to engage in effective regulation. *Id.* at 102. The lower court's conclusion that the Act's registration obligations were retributive due to the length of the reporting requirement being

"measured by the extent of the wrongdoing, not by the extent of the risk posed," was rejected. *Id.* (internal quotation omitted). "The broad categories, . . . and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id.*

Rational connection to nonpunitive purpose. The Act's rational connection to a nonpunitive purpose was a "most significant" factor in the determination that the statute's effects were not punitive. *Id.* (internal quotation omitted). The Act had a legitimate, nonpunitive purpose of "public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 102-03. The respondents' argument that the Act lacked the necessary regulatory connection because it was not narrowly drawn to achieve its purpose was rejected. "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103.

Excessiveness in relation to purpose. The respondents' argument that the Act was excessive because it applied to all sex offenders regardless of their future dangerousness was rejected. The State's determination to regulate sex offenders as a class, rather than based on an individualized determination of dangerousness, does not make the Act a punishment under the *Ex Post Facto* Clause. *Id.* at 103-04.

The duration of the reporting requirements — which was lifetime duration for the respondents — was not excessive. *Id.* at 104. Nor was the wide dissemination of the information online excessive. *Id.* at 105. "The excessiveness inquiry of [this Court's] *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy." *Id.* at 105. Instead, "[t]he question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* The Act met that standard. *Id.*

Finding of scienter; application to past conduct only. The final two factors were "of little weight" to the case. *Id.* at 105. That the Act applied only to past criminal conduct was a necessary beginning point because recidivism is the statutory concern. *Id.* "The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation." *Id.*

This Court ultimately determined that an analysis of the Act's effects led to the conclusion that the respondents could not show, "much less by the clearest proof," that the effects of the Act negated Alaska's intent to establish a civil regulatory scheme. *Id.* The Court therefore held that the Act was nonpunitive, and its retroactive application did not violate the *Ex Post Facto* Clause. *Id.* at 105-06.

B. The Decision Below Is Consistent With This Court's Precedent.

The decision below rejecting petitioner's *ex post facto* challenge is consistent with *Smith v. Doe*. The North Carolina General Assembly unquestionably intended to enact a regulatory scheme that is civil and nonpunitive, as evidenced by the "Purpose" section of SOPPRP. *See* N.C. Gen. Stat. § 14-208.5 (2013). Petitioner does not challenge that this was the legislature's intent. (Pet. p. 14)

Regarding the effects of SOPPRP, the only differences petitioner has specifically identified as being significant between SOPPRP and Alaska's Act are SOPPRP's requirement that verification and updating be done in person, and restrictions on residency and employment. (Pet. pp. 26-27) Although those features were not present in Alaska's Act, nothing in *Smith v. Doe* indicates that the presence of such features would have been enough to tip the balance to create an *ex post facto* violation.

Smith v. Doe said that the lower court erroneously concluded that the Act required in-person updating, but it did not say that an in-person reporting requirement would have created an *ex post facto* violation. *Smith v. Doe*, 538 U.S. at 101. Requiring in-person verification twice per year and in-person reporting for certain, limited changes is not punitive;

instead it is a reasonable measure to help ensure that the sheriff's office is receiving accurate, up-to-date information from the registrant himself.

The residency restrictions in SOPPRP do not constitute banishment, as described in *Smith v. Doe*, in that they do not expel a registrant from the community, *see id.* at 98, nor are they otherwise punitive. Instead, they impose reasonable, specific distance restrictions on the registrant's residence in order to further the public protection purpose of SOPPRP. *See Doe v. Miller*, 405 F.3d 700, 718-23 (8th Cir.) (rejecting *ex post facto* challenge to Iowa's 2,000-foot residency restriction for people convicted of certain offenses involving minors), *cert. denied*, 546 U.S. 1034 (2005). Moreover, as already noted in the Statement and Section I, *supra*, the record below in this case is not well-developed. The record does not speak to whether the 1,000-foot residency restriction has had an effect on petitioner specifically or on other registrants generally that would be akin to banishment or otherwise be punitive. *Cf. id.* at 706-08 (describing the evidence in that case).

This Court explicitly stated in *Smith v. Doe* that it has held that occupational debarment is nonpunitive. *Id.* at 100. The Court explained that it had so held in *Hudson v. United States*, 522 U.S. 93, 104 (1997) (forbidding further participation in banking industry); *De Veau v. Braisted*, 363 U.S. 144 (1960) (prohibiting

work as union official); and *Hawker v. New York*, 170 U.S. 189 (1898) (revocation of medical license). *Smith v. Doe*, 538 U.S. at 100.

The remainder of petitioner's arguments about SOPPRP, such as that it imposes lifetime registration without an individualized determination, requires online posting of information, is based on past crimes, and is not drawn narrowly enough, were all explicitly discussed and rejected in *Smith v. Doe*.

C. Petitioner Has Identified No Real Conflict Between The Decision Below And The Decisions Of Other States' Courts Of Last Resort.

Petitioner claims that there is a conflict between the decision below and the decisions of other States' courts of last resort. Petitioner, however, has failed to identify any real conflict on the federal *ex post facto* issue.

The majority of cases petitioner has cited from other States found violations of *state*, not federal, constitutional *ex post facto* protections. Those cases are *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008); *Gonzalez v. State*, 980 N.E.2d 312, 321 (Ind. 2013); *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); *Doe v. State*, 111 A.3d 1077, 1089 (N.H. 2015); and *Starkey*

v. Oklahoma Dep't of Corrections, 305 P.3d 1004, 1030 (Okla. 2013).

It is true that the courts in those cases chose to use the same factors discussed in *Smith v. Doe* as a guide for their state constitutional analysis, but their use of those factors as a guide did not somehow convert their decisions into presenting any sort of federal constitutional issue. To the extent the effect of their decisions was to grant more protection to their citizens under their state constitutions, state courts are free to do so when resolving state constitutional challenges. *See Florida v. Powell*, 559 U.S. 50, 59 (2010). Notably, however, a dissent in one of those cases pointed out that "[t]he majority of state courts addressing the issue have found that retroactive application of their respective sex offender registries to offenders with convictions that pre-date the statute's enactment is not punitive and/or does not violate the prohibition against ex post facto laws." *Starkey*, 305 P.3d at 1038-39 n.10 (Winchester, J., dissenting) (collecting cases).

Petitioner has cited two state court cases that found federal *ex post facto* violations. Those cases are readily distinguishable factually from this case.

In *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), *cert. denied*, 559 U.S. 992 (2010), the Supreme Court of Kentucky held that the retroactive application of a statute which restricted where registered sex

offenders could live violated federal and state constitutional *ex post facto* protections because the restrictions were so punitive in effect as to negate any intention to deem them civil. *Id.* at 439. Kentucky's residency restrictions required a sex offender to move within 90 days if a new school, daycare, or playground opened within 1,000 feet of his residence, *id.* at 440-41, 444, 446-47, which meant the offender "face[d] a constant threat of eviction," *id.* at 445. SOPPRP's residency restrictions, in contrast, explicitly provide that changes in ownership of or use of property within 1,000 feet of a registrant's registered address that occur after a registrant establishes residency at the registered address shall not form the basis for finding a violation. *See* N.C. Gen. Stat. § 14-208.16(d) (2013).

In *State v. Letalien*, 985 A.2d 4 (Me. 2009), the Supreme Judicial Court of Maine held that the retroactive application of lifetime sex offender registration and quarterly in-person verification without any opportunity to ever be relieved of those duties violated federal and state constitutional *ex post facto* protections. *Id.* at 26. The court noted that "[t]he unique history of the development of sex offender registration laws in Maine is integral to the question." *Id.* at 19. Critical to the court's analysis was the fact that the duty to register "was an integral part of the criminal sentencing process and the resulting sentence," and the provisions at issue "ma[de] more burdensome the registration

requirements that resulted from an offender's original sentence." *Id.* at 25. Because sex offender registration was required to be part of the defendant's criminal sentence, the retroactive application of the provisions at issue "modified and enhanced a portion of his criminal sentence." *Id.* at 20. In a subsequent case, the court emphasized that "[o]ur ex post facto analysis in *Letalien* was informed and driven in significant part by the fact that registration was part of Letalien's criminal sentence." *Doe v. Williams*, 61 A.3d 718, 734 (Me. 2013). Unlike in *Letalien*, the registration requirement in this case was not part of petitioner's criminal sentence, nor does SOPPRP provide that the registration requirement is part of criminal sentences for other offenders.

* * * *

Petitioner has failed to show that this case is an appropriate vehicle to resolve the issue. He also has failed to show that the decision below conflicts with this Court's precedent or that there is a real conflict with other States' courts of last resort. Certiorari review is therefore unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Amy Kunstling Irene*
Assistant Attorney General

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