No. 18-308

In the Supreme Court of the United States

ANTHONY RAYSHON BETHEA,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the retroactive application of North Carolina's sex-offender registration law violate the Ex Post Facto Clause of the United States Constitution?

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INTRODUCTION

This Court has affirmed that states may retroactively impose "restrictive measures on sex offenders . . . 'to protect the public from harm'" without violating the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84, 93 (2003) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). Under *Smith*, a law may be applied retroactively as long as the law is not punitive, either in purpose or effect. *Id.* at 92.

In this case, petitioner Anthony Bethea requests that this Court review a particular application of the long-settled *Smith* test. Specifically, he claims that the North Carolina appellate courts wrongly held that the State's sex-offender registration statute was not punitive.

That case-specific question does not warrant this Court's review. Every court in the country agrees that the *Smith* test decides whether a registration law may be retroactively applied without violating the Ex Post Facto Clause. Although Bethea is right that some courts have reached different results under *Smith*, those courts were studying different statutes. When courts apply the same legal test to different circumstances, they will often reach different outcomes. That kind of variation does not constitute a division of authority that warrants this Court's review.

Moreover, even if Bethea's petition had raised a certworthy issue, this case is a poor vehicle to address that issue. For example, in his appeal to the state Supreme Court, Bethea claimed only that North Carolina cannot retroactively incorporate federal registration standards. He did not make a broader

attack on the statute's overall registration regime until his petition to this Court. This Court does not typically review questions that have not been raised or passed on below.

Finally, review is also not warranted because the North Carolina appellate courts decided the constitutional question here correctly. The text and structure of the registration statute show that the legislature did not intend registration to constitute punishment. Nor does registration resemble punishment in effect. Thus, the North Carolina courts correctly held that retroactively applying the registration statute to Bethea is fully consistent with the Ex Post Facto Clause.

The State of North Carolina respectfully requests that this Court deny the petition for certiorari.

STATEMENT

A. Federal Sex-Offender Registration Laws

Over the past several decades, Congress has enacted multiple laws to encourage states to track sex offenders and to allow the public to learn about their whereabouts.

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, Tit. XVII, § 170101, 108 Stat. 2038. This Act conditioned a state's receipt of certain federal funds on the state enacting laws that require sex offenders to register with the government. By 1996, every state, including North Carolina, had enacted a sex-offender

registration law of some kind. *Smith*, 538 U.S. at 89-90. In 1996, Congress also created a national sex-offender registry. *See* Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345.

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590, to establish "comprehensive registration-system standards" that would apply across all government sex-offender registries. *Reynolds v. United States*, 565 U.S. 432, 435 (2012). Under SORNA, each state must maintain a single, statewide registry and publish online certain information about registered offenders who live, work, or attend school in that state. 34 U.S.C. §§ 20912(a), 20914(b), 20920(a). In addition, states must enforce these requirements for a length of time that corresponds to the severity of an offense. *Id.* §§ 20911, 20915. Specifically, offenders are classified into three tiers, with respective registration periods of fifteen years, twenty-five years, and life. *Id.* § 20915(a).

SORNA does not directly address its application to offenses that occurred before the law's enactment. Instead, Congress directed the United States Attorney General to issue regulations on the law's retroactive application. *Id.* § 20912(b).

In 2007, then-Attorney General Alberto Gonzales issued a rule that applied SORNA's registration requirements to "all sex offenders," including those whose convictions predate the law's enactment.[1] Later Attorneys General issued regulations that modestly

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[1] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007).

reduced the scope of SORNA's retroactive application. However, every Attorney General has applied SORNA retroactively to at least three broad classes of sex offenders:

- offenders who were incarcerated or under criminal supervision at the time SORNA was enacted, either for the predicate sex offense or another crime;
- offenders who were, or should have been, registered under a pre-existing state registration law at the time SORNA was enacted; and
- offenders who are later convicted of a new felony offense.[2]

To maintain access to certain federal funds, states must adequately comply with SORNA's requirements. *Id.* § 20927(a). The United States Attorney General decides whether a state has adequately complied with the statute. *Id.* § 20945.

B. North Carolina's Sex-Offender Registration Laws

In the 1990s, North Carolina implemented the federal Wetterling Act by requiring certain sex offenders to register with the government. The stated

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[2] *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011); The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2008).

purposes of the registration law were to enhance public safety and to protect communities. N.C. Gen. Stat. § 14-208.5.

North Carolina's early registration statute required offenders to register with the sheriff of the county where they chose to live after their release from prison. They were also required to notify the sheriff if they moved and to verify their current address annually. Registration information was consolidated in a statewide registry, and then posted publicly online. These requirements lasted for ten years, but the ten-year clock was renewed if an offender was convicted of a subsequent sex offense during the initial registration period. *See* Act of Sep. 17, 1997, ch. 516, § 1, 1997 N.C. Sess. Laws 2276, 2279-83.

In 2006, following the enactment of SORNA, North Carolina amended its state registration statute. *See* Act of Aug. 16, 2006, ch. 247, 2006 N.C. Sess. Laws 1065. The 2006 amendments made two major changes to bring North Carolina's registration scheme into compliance with federal law.

First, the amendments created a judicial process for removing offenders from the registry. Ten years after their initial registration, offenders may file a petition in state court requesting to be removed from the registration program. N.C. Gen. Stat. § 14-208.12A(a1). The court may grant removal petitions if three requirements are met:

- The petitioner has not been arrested for another sex offense requiring registration.

- Removal would comply with any applicable federal standards.

- The court is "otherwise satisfied that the petitioner is not a current or potential threat to public safety." *Id.*

Second, the 2006 amendments increased the number of times that offenders must verify their registration information. Specifically, offenders must drop off a form at a local sheriff's office every six months to verify that their registration information has not changed. *Id.* § 14-208.9A. When their information does change, offenders must drop off a form noting the change within three days. *Id.* § 14-208.9.

In addition, beginning with the 2006 amendments, the North Carolina General Assembly has added limited restrictions on where registered offenders may live and work. Under current North Carolina law, registered offenders may not:

- Establish a new residence within 1000 feet of an *existing* school or child-care center. *Id.* § 14-208.16(a).

- Visit a school, children's museum, child-care center, nursery, playground, or other "place intended primarily for the use, care, or supervision" of children. *Id.* § 14-208.18(a)(1).

- Be within 300 feet of any place intended for the "use, care, or supervision of minors" when located at "malls, shopping centers, or other

property open to the general public." *Id.* § 14-208.18(a)(2).

- Visit "any place where minors frequently congregate," such as swimming pools and libraries, when minors are present. *Id.* § 14-208.18(a)(3).

- Visit the North Carolina State Fair and other agricultural fairs. *Id.* § 14-208.18(a)(4).

- Work in a role that involves the in-person instruction, supervision, or care of minors. *Id.* § 14-208.17.

- Drive a school bus or other commercial passenger vehicle, or work in emergency medical services. *Id.* §§ 14-208.19A, 131E-159(h).

These limits are subject to various exceptions that allow offenders to remain active parents and full members of their local communities. For example, offenders may:

- Maintain their residence if they lived near a school or child-care center when the 2006 amendments went into effect. *Id.* § 14-208.16(a).

- Maintain their residence if, at any time, a new school or child-care center opens near their home. *Id.* § 14-208.16(d).

- Attend certain school events for their children, such as parent-teacher conferences, or visit

school anytime with the permission of school officials. *Id.* § 14-208.18(d).

- Attend or work for an institution of higher education. *See id.* §§ 14-208.17-18.

- Take their children to any location for emergency medical treatment. *Id.* § 14-208.18(b).

- Visit a school or any other site to vote. *Id.* § 14-208.18(e).

- Pass through a covered location for a short period of time for a valid reason. *See Does v. Cooper*, 148 F. Supp. 3d 477, 493-94 (M.D.N.C. 2015), *aff'd on other grounds*, 842 F.3d 833 (4th Cir. 2016).

- Visit a covered location without the knowledge that it is covered by the statute. *Id.* at 488.

C. Bethea's Sex Crimes and Petition for Removal From the Registry

On September 13, 2004, petitioner Anthony Bethea pleaded guilty to six counts of felony sexual intercourse with a student. R. 12-22.[3] Bethea met the student because he worked as a bus driver and custodian at her school. Tr. 39. Bethea first had vaginal intercourse

[3] When this brief cites to "R.," it refers to the Record on Appeal in the North Carolina Court of Appeals, No. COA17-459. When the brief cites to "Tr.," it refers to the transcript of the trial court hearing held on October 31, 2016.

with the student when she was fourteen and he was eighteen. Bethea continued the sexual relationship until the victim was fifteen and he was twenty. Tr. 39-40.

These offenses classify Bethea as a tier II offender under federal law. 34 U.S.C. § 20911(3)(A)(iv); 18 U.S.C. § 2244(a)(3); 18 U.S.C. § 2243(a)(2). Bethea did not contest this classification below, nor does he contest it in his petition to this Court. R. 54; *see* Pet. 6.

On September 28, 2004, barely two weeks after his guilty plea, Bethea was arrested for failing to register as a sex offender. R. 73. After Bethea registered with his local county sheriff, the State voluntarily dismissed the failure-to-register charge. R. 74-76.

In 2007, when he was 23, Bethea was arrested for first-degree kidnapping and second-degree forcible rape of a sixteen year old girl. Tr. 43, 52. Bethea did not dispute that he had sexual intercourse with the girl, but claimed that the contact was consensual. Tr. 43-44. Two months later, after the girl recanted parts of her original statement, the State dismissed the charges. Tr. 16.

In 2014, ten years after his initial registration, Bethea filed a petition in state court to be removed from the registry. R. 38. Bethea agreed that he was not yet eligible for removal under North Carolina or federal law. However, he argued that the State violated the Constitution by extending his registration obligations past ten years—the registration period that was in effect in 2004 when he first registered with the State. Tr. 5, 14; R. 55-57.

At the removal hearing, Bethea testified that he "didn't feel that it was too much of a crime" to have sex with a minor because, at the time, he was only 19 years old himself. Tr. 51. He further testified that he did not believe that his later sexual relationship with a high-schooler when he was 23 was problematic "because she was 16. Sixteen is legal; right?" Tr. 52.

Bethea also testified on the effects of the registration statute's restrictions on his life. He acknowledged that he had never been forced to move, but claimed that the law made it a "hassle" to change residences. Tr. 34. He further acknowledged that the law did not prevent him from maintaining a commercial driver's license, but claimed that his placement on the registry made it difficult to find work as a truck driver. Tr. 34. He also presented a character witness, a friend from church, who testified that Bethea is able to participate in his religious community, including by attending weekly services and other church events. Tr. 57-58.

At the end of the hearing, the trial court denied Bethea's request to be removed from the registry. App. to Pet. 17a-18a. The court concluded that the registration statute required Bethea to remain registered for twenty-five years, because he was classified as a tier II offender under federal law. *Id.*; *see* 34 U.S.C. § 20915(a)(2).

Bethea appealed to the North Carolina Court of Appeals. On appeal, Bethea argued that it was unconstitutional to retroactively apply federal standards to decide his length of registration. App. to Pet. 10a.

The North Carolina Court of Appeals rejected Bethea's argument, holding that it was bound by its ruling in an earlier case, *In re Hall*, 768 S.E.2d 39 (N.C. Ct. App. 2014), *cert. denied*, 136 S. Ct. 688 (2015). App. to Pet. 12a. In *Hall*, the Court of Appeals held that North Carolina's registration statute was not punitive, and so could be retroactively applied without violating the Ex Post Facto Clause. 768 S.E.2d at 46.

Bethea appealed to the North Carolina Supreme Court under a state rule that allows appeals for cases involving a substantial constitutional question. *See* N.C. Gen. Stat. § 7A-30(1). He also filed a petition for discretionary review. *See id.* § 7A-31(b). In his combined notice and petition, Bethea presented the state Supreme Court with a single issue for review: whether "retroactive application of federal standards, resulting in Mr. Bethea's continued subjection to North Carolina's various sex offender restrictions," was unconstitutional. Notice of Appeal and Petition for Discretionary Review at 18, *In re Bethea*, No. 359P17 (N.C. 2017).

The North Carolina Supreme Court dismissed the appeal for lack of a substantial constitutional question and denied the petition for discretionary review. Pet. App. 14a-15a.[4]

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[4] This Court "treat[s] the North Carolina Supreme Court's dismissal of an appeal for lack of a substantial constitutional question as a decision on the merits." *Grady v. North Carolina*, 135 S. Ct. 1368, 1370, n.* (2015) (per curiam). Thus, "it is that court's judgment, rather than the judgment of the Court of Appeals, that is subject to [this Court's] review under 28 U.S.C. § 1257(a)." *Id.*

REASONS FOR DENYING THE PETITION

I. This Case Does Not Implicate a Widespread Split of Authority.

This Court's review is not warranted, because the petition does not identify any meaningful division of authority among the lower courts. Bethea's attempts to create a split fail for three reasons.

First, Bethea cites a number of cases that he claims depart from the decision below. But at least six of those cases were decided explicitly under state constitutional provisions alone. Those cases thus cannot make up any division of authority on the federal constitutional question Bethea is raising here.

Second, the cases that apply federal law are unified on the central legal question posed by Bethea's petition. Every court across the country applies the same test to decide whether a law may be retroactively applied under the federal Ex Post Facto Clause: the purpose-and-effects test articulated by this Court in *Smith*. *See* 538 U.S. at 94. Although Bethea is right that courts have reached different results when applying this test, that variation does not constitute a division of authority. When courts evaluate different state statutes under the same test, they will naturally reach different results.

Third, even if Bethea had identified meaningful variation in courts' application of the *Smith* test, that variation would not matter here. North Carolina's registration statute places less onerous restrictions on sex offenders than do any of the statutes that have

posed retroactivity problems under the Ex Post Facto Clause.

A. The majority of cases that Bethea claims are in conflict with the decision below relied only on state constitutions.

In his petition, Bethea cites eleven cases where courts ruled that sex-offender registration statutes were unconstitutional ex post facto laws. Pet. 12. A majority of those cases, however, are irrelevant to any issue here, because they were decided under state constitutional provisions alone.[5] Indeed, Bethea himself concedes that these six cases were not decided under federal law. Pet. 12.

Cases decided under state constitutions are not relevant to the federal constitutional question at issue here. After all, states are free to grant their citizens broader protections under their state constitutions than the protections offered by the federal Constitution. *See, e.g.*, *Florida v. Powell*, 559 U.S. 50, 59 (2010).

Here, the state-law cases cited by Bethea did just that: the courts explicitly interpreted ex post facto clauses in their state constitutions as granting rights broader than does the corresponding clause in the federal Constitution. For example, the Maryland

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[5] *See Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008); *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 137, 143 (Md. 2013); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013).

Court of Appeals explained that its holding was based on the fact that the "Maryland Declaration of Rights [is] broader than the protections provided by the parallel federal [Ex Post Facto] provision." *Doe*, 62 A.3d at 549; *see also, e.g.*, *Starkey*, 305 P.3d at 1021 (same in Oklahoma); *Doe*, 189 P.3d at 1005 (same in Alaska).

In sum, six of the cases cited by Bethea were explicitly resolved under state constitutions alone. Those cases cannot make up any part of a division of authority that would warrant this Court's review. *See* S. Ct. R. 10(b).

B. The lower courts all agree on the legal standards that apply to ex post facto challenges to registration statutes.

There is no conflict among the courts of appeals and state courts of last resort on the legal standards that govern cases like this one. Every court to consider a similar challenge has reached the same conclusion: to decide whether a registration scheme is impermissibly retroactive under federal law, courts must apply this Court's *Smith v. Doe* framework.

To decide whether a sex-offender registration scheme is "punitive," and therefore cannot be applied retroactively under the Ex Post Facto Clause, *Smith* establishes a two-part test. 538 U.S. at 92.

First, a court must decide whether the state legislature intended the registration restrictions to constitute punishment. *Id.* If the legislature did

intend for registration to be punishment, then the law cannot be applied retroactively. *Id.*

Second, if the court decides that the legislature lacked punitive intent, it then must decide whether the statute is nevertheless "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (quoting *Hendricks*, 521 U.S. at 361).

On the second part of the *Smith* test, courts consider the statute's overall structure to decide whether the statute is punitive. Specifically, courts balance the following five factors:

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."

Id. at 97.

Thus, the *Smith* test requires courts to analyze a law's cumulative burdens, examine its historical usage, and assess its purpose and practical effect.

The fact that courts have applied this multi-factor framework differently to different state laws does not represent a conflict. It is only natural that courts would reach different results after analyzing different statutory schemes. A diversity of outcomes is especially appropriate here, when the operative test requires a fact-sensitive, holistic balancing of numerous factors.

Indeed, courts have recognized that the results under the *Smith* test will vary depending on the specific provisions in a particular statute, such as the duration, type, and magnitude of the statute's restrictions. That is, "[i]t is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional" under *Smith*. *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011). Any one factor can tip the balance. *State v. Letalien*, 985 A.2d 4, 17 (Me. 2009) ("Sometimes one factor will be considered nearly dispositive of punitiveness 'in fact,' while sometimes another factor will be crucial to a finding of nonpunitiveness.").

In sum, given the flexible, context-dependent nature of the *Smith* test, it is no surprise that courts have reached different results after examining varying state laws. Whether a particular law is deemed punitive will depend on a careful balancing of factors that will differ by case. Thus, the different outcomes that Bethea identifies here are not evidence of a division of authority at all, let alone one that warrants this Court's review.

C. North Carolina's registration scheme differs greatly from laws that courts have held punitive under the Ex Post Facto Clause.

Bethea cites several cases where courts have found that a state sex-offender registration statute did not survive the *Smith* test. Pet. 13-18. In these cases, however, the statute in question imposed meaningfully more burdensome restrictions than North Carolina's law here. The decisions reached by those courts are therefore consistent with the conclusion that retroactive application of North Carolina's registration requirements does not violate the Ex Post Facto Clause.

First, North Carolina's registration statute includes a number of key limits that are not found elsewhere. For example, although the statute generally bars offenders from living within 1000 feet of schools and child-care centers, offenders always have the right to remain living in their current homes. *See* N.C. Gen. Stat. § 14-208.16(a), (d).

This feature of North Carolina's registration statute eliminates the risk that offenders will be forced from their homes based on events outside their control. Courts have held that statutes without this protection are punitive, because they force offenders to live under the "constant threat of eviction." *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009). The Kentucky Supreme Court, for example, has held that Kentucky's residency restrictions prevent offenders from settling into "a permanent home" because "there are no guarantees a school or [other covered facility] will not

open up within 1,000 feet of any given location." *Id.* Offenders in North Carolina face no equivalent limit on their freedom.

North Carolina's registration law also includes other important limits not found in statutes that courts have found punitive. For example:

- Offenders can enter a school's premises for parent-teacher conferences, or anytime with the principal's permission. N.C. Gen. Stat. § 14-208.18(d).

- Offenders can attend (and work at) institutions of higher education, even if those locations would otherwise be covered by the statute's geographic restrictions. *See id.* §§ 14-208.17-18.

- Offenders can visit covered locations to vote. *Id.* § 14-208.18(e).

These limits further distinguish North Carolina's registration scheme from those that courts have found punitive.

North Carolina's registration statute is distinguishable from statutes that have been held nonretroactive in other ways as well.

For example, the registration statute held punitive by the Pennsylvania Supreme Court was more restrictive than North Carolina's statute here in at least two important ways. *See Commonwealth v. Muniz*, 164 A.3d 1189, 1218 (Pa. 2017).

First, the Pennsylvania law requires offenders to confirm their registration status in person as frequently as four times a year. *Id.* at 1210-11. North Carolina, in contrast, requires offenders to appear only twice a year. N.C. Gen. Stat. § 14-208.9A(a)(1)-(2). As Bethea himself argues, the frequency of reporting obligations is a material factor on whether a statute is punitive. *See* Pet. 2, 23.

Second, North Carolina's registration statute requires offenders to disclose to the public far less personal information than its Pennsylvania counterpart requires. Pennsylvania law requires offenders to disclose a vast amount of their personal information to the State, including where they work, where they attend school, and their license plate numbers. Pen. Cons. Stat. § 9799.28(b). All of that information is then posted publicly online. *Id.* In contrast, North Carolina does not even collect most offenders' employment, school, or license-plate information, let alone post that information online. *See* N.C. Gen. Stat. § 14-208.10(a).

In sum, other state statutes include elements that make them far more punitive than North Carolina's registration scheme here. Thus, the cases that Bethea cites do not show a conflict of authority. They instead show courts consistently applying a multi-factor standard to reach different results in meaningfully different circumstances.

II. This Case Is a Poor Vehicle to Decide the Broad Issues Raised in the Petition.

Even if Bethea had identified a meaningful division of authority on the broad issues raised by his petition, this case would be a poor vehicle for resolving those issues.

In his petition to this Court, Bethea broadly objects to the registration statute's limits on his movement, living arrangements, and employment. Pet. 20-23.

Yet in his notice of appeal to the North Carolina Supreme Court, Bethea did not claim that these limits themselves violated the Constitution. Instead, Bethea raised a far narrower issue: Whether the State violated the Ex Post Facto Clause by retroactively applying "federal standards" to determine the *length* of his registration. Notice and Petition at 18.

Thus, until he reached this Court, Bethea did not claim that North Carolina's registration statute as a whole is punitive. Instead, he argued that the State could not apply federal standards to retroactively *extend* his registration obligations past the ten-year period that applied when he first registered. *Id.*

That limited argument does not warrant this Court's review, for three reasons.

First, there is no widespread division of authority on whether a state violates the Ex Post Facto Clause when it retroactively incorporates federal SORNA standards. Bethea cites only two cases that address this incorporation issue. In one case, the Ninth Circuit held that incorporation of federal standards did not

make Nevada's registration statute punitive. *See ACLU of Nev. v. Masto*, 670 F.3d 1046, 1050 (9th Cir. 2012). In the other case, the Pennsylvania Supreme Court considered the state's incorporation of federal standards as only one among several factors that made the state law constitutionally problematic. *Muniz*, 164 A.3d at 1209. The court did not hold that the incorporation issue was decisive. This shallow and developing split does not warrant this Court's review.

Second, this Court is currently considering a case that could affect the outcome here. In *Gundy v. United States*, No. 17-6086 (argued Oct. 2, 2018), this Court will decide whether the United States Attorney General has the authority to apply SORNA's standards retroactively as a matter of federal law. *Gundy* Pet. 17-18. If this Court concludes that the Attorney General lacks that authority, then Bethea could file a petition in North Carolina state court, requesting to be removed from the registry. *See* N.C. Gen. Stat. § 14-208.12A(a1).

Third, Bethea's petition suffers from a mismatch between his claim and his requested remedy. In this case, Bethea seeks to be removed from North Carolina's sex-offender registry altogether. Pet. 19. But if this Court were to hold that some of the registration statute's restrictions were punitive, the proper remedy would be to exempt Bethea from those particular restrictions, not to terminate his duty to register. *See* Act of Aug. 16, 2006, ch. 247, sec. 21, 2006 N.C. Sess. Laws 1065, 1085 (including an express severability clause). After all, this Court has previously held that it is constitutional to retroactively require a sex offender to register for his entire lifetime.

Smith, 538 U.S. at 90-91. Thus, because Bethea does not have the right to complete removal from the registry, he cannot obtain the relief he seeks here.

For each of these three reasons, this case is a poor vehicle for this Court to review the constitutionality of North Carolina's sex-offender registration statute.

III. North Carolina Courts Have Correctly Held That the State's Registration Scheme Is Not Punitive.

This Court's review is also not warranted because the North Carolina appellate courts have decided the constitutional question correctly here. Retroactive application of North Carolina's registration statute does not violate the Ex Post Facto Clause because it is not punitive. Instead, the statute's purpose and effect is to establish a civil regulatory program to safeguard the public.

A. The North Carolina legislature intended to enact a nonpunitive, regulatory scheme.

Under this Court's *Smith* framework, courts analyzing an ex post facto claim must first decide whether the legislature intended a registration scheme to serve as punishment. *Smith*, 538 U.S. at 92; *see supra* p. 12.

The North Carolina General Assembly did not intend the state's registration statute to be punitive. At least four features of the statute's structure show the General Assembly's civil, nonpunitive intent.

First, the legislature directly articulated its nonpunitive intent in the statute's statement of purpose. According to that statement, the statute's purpose is "to assist law enforcement agencies' efforts to protect communities" from the danger that sex offenders may commit new offenses after their release. N.C. Gen. Stat. § 14-208.5. Registries advance that purpose because, among other reasons, they allow law enforcement officers to "quickly apprehend" offenders who commit new crimes. *Id.* This Court has previously held that a registration statute with an explicit public-safety rationale of this kind was not intended to be punitive. *See Smith*, 538 U.S. at 93.

Second, North Carolina's registration statute imposes a more stringent set of registration obligations on offenders who are more likely to pose a danger to public safety. N.C. Gen. Stat. § 14-208.6A. In the legislature's judgment, offenders who fit into this category include recidivists and offenders who suffer from a "mental abnormality" that makes them "predispose[d]" to commit criminal sex offenses. *Id.* § 14-208.6(1j), (2b). Thus, the legislature has confirmed its public-safety purpose by calibrating the statute's registration obligations based on an offender's likely future dangerousness. In this way, North Carolina's statute again mirrors the registration statute that this Court upheld in *Smith*. *See* 538 U.S. at 93.

Third, the legislature placed responsibility for managing the statewide sex offender registry with the North Carolina Department of Public Safety. N.C. Gen. Stat. § 14-208.13(a). That Department, moreover, was granted the authority to adopt rules and

regulations to govern the registry's administration and organization. *Id.* § 143B-905(c). Once again, North Carolina's registration statute closely follows the statute upheld in *Smith*, which vested the Alaska Department of Safety with the power to "promulgate implementing regulations." 538 U.S. at 96. Just as in *Smith*, the legislature's decision to bypass ordinary criminal procedures shows that it did not intend the registration statute to impose criminal sanctions. *Id.*

Fourth, the legislature underscored its public-safety intent by naming the 2006 amendments "An Act to Protect North Carolina's Children." Act of Aug. 16, 2006, ch. 247, sec. 1(a), 2006 N.C. Sess. Laws 1065, 1066. This civil language shows that the legislature did not intend the registration statute's residency and other restrictions to be punitive.

For these and other reasons, the North Carolina appellate courts held correctly that the General Assembly intended the registration statute to create a civil regulatory scheme to protect public safety. Indeed, in his petition, Bethea does not even argue that the General Assembly intended the registration statute to be punitive. *See* Pet. 29. Thus, there is no dispute that the law passes the first part of the *Smith* test.

B. North Carolina's registration statute is nonpunitive in purpose and effect.

North Carolina's registration statute also passes the second part of the *Smith* test.

Under that test, the Court must decide whether a statute's restrictions are "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith*, 538 U.S. at 92 (quoting *Hendricks*, 521 U.S. at 361). 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.*

Bethea cannot meet that high evidentiary standard here. As described above, courts consult five factors to decide whether a sex-offender registration scheme is punitive "in purpose or effect." *Id.*; *see supra* p. 12. Each of those factors shows that the North Carolina registration statute creates civil obligations alone—not punishment.

Bethea has not satisfied the first *Smith* factor, which asks whether a law resembles a traditional kind of punishment. 538 U.S. at 97. Bethea claims that this factor favors his claim because the statute's restrictions are akin to criminal banishment. Pet. 29. He is mistaken. In *Smith*, this Court explained that banishment requires a person to be "expelled . . . from the community." *Id.* at 98.

Here, North Carolina's residency and other restrictions do not come close to expelling Bethea from his community. He is free to remain living in his home and cannot be forced to move. *See* N.C. Gen. Stat. § 14-208.16 (a), (d). He is free to work in any job that does not involve supervising minors or other vulnerable persons. *See id.* § 14-208.17. He can attend school events for his children, including parent-teacher

conferences. *See id.* § 14-208.18(d). And he can continue to pursue his own education, including by enrolling as a student at a college or university. *See id.* § 14-208.9(c). Thus, in no way does North Carolina's registration scheme resemble banishment.

Bethea further claims that the statute's periodic in-person verification requirements are similar to parole. Pet. 29. However, this Court has already rejected the argument that requiring sex offenders to regularly verify their information is akin to parole. *See Smith*, 538 U.S. at 101-02. Parole is vastly more onerous than registration, because it involves regular and ongoing state supervision of a parolee's life activities. *See Shaw v. Patton*, 823 F.3d 556, 564 (10th Cir. 2016).

On the second *Smith* factor, Bethea has not shown that the registration statute imposes a physical or other affirmative restraint on him. 538 U.S. at 97. Bethea claims that the statute's in-person reporting requirements are akin to a physical restraint. Pet. 29. That argument is unconvincing. The law merely requires offenders to drop off a form at their local sheriff's office twice a year, to confirm that they have not moved. N.C. Gen. Stat. § 14-208.9A. If offenders do choose to move, they must drop off another form with their sheriff to report the move. *Id.* § 14-208.9(a). These modest physical requirements are a far cry from the kinds of restraints that this Court has previously found to be meaningful, restraints like involuntary civil commitment. *Hendricks*, 521 U.S. at 363. Any modest physical restraint here, moreover, would not be sufficient to overcome the registration statute's other nonpunitive elements. *See id.* (concluding that, despite

the physical restraint, Kansas's civil-commitment law was not punitive).

The third *Smith* factor, which asks whether a law promotes the traditional aims of punishment, also weighs in favor of the State here. 538 U.S. at 97. Bethea claims that the registration statute is "political[ly] motivate[ed]" and thus amounts to "sheer retribution." Pet. 30. This unfounded speculation cannot override the statute's expressly regulatory objective: to protect the public from sex offenders by reducing the risk that they will commit further crimes. N.C. Gen. Stat. § 14-208.5. As this Court held in *Smith*, a sex-offender registration law is not "retributive" so long as its measures "are reasonably related to the danger of recidivism." 538 U.S. at 102. The registration statute easily satisfies that standard here. By limiting opportunities for sex offenders to come into close contact with children, the statute is reasonably directed to reducing the risk that offenders will reoffend.

Bethea also claims that the registration statute promotes the traditional goal of incapacitating criminals. Pet. 30. This argument fails for all the same reasons that show that the law is not akin to banishment: Bethea is free to fully participate in the community, subject to narrowly targeted restrictions. *See supra* p. 20. In no way has he been formally incapacitated in a way that mirrors traditional confinement.

The fourth *Smith* factor, which asks whether a law is rationally related to a nonpunitive purpose, also favors the State. 538 U.S. at 97. North Carolina's law

meets this standard here, because it is designed to advance public safety. As this Court held in *Smith*, sex-offender registration requirements advance public safety "by alerting the public to the risk of sex offenders in their community." *Id.* at 102-03. The residency and other restrictions here similarly advance public safety by limiting sex offenders' access to children. This public-safety objective is especially pronounced for offenders like Bethea, who was convicted of having sexual intercourse with a minor. The North Carolina legislature rationally concluded that barring him from driving a school bus, for example, will promote public safety.

Finally, Bethea cannot meet the final *Smith* factor, which asks whether a law is excessive in relation to its purpose. *Id.* at 97. This inquiry does not ask "whether the legislature has made the best choice possible to address the problem it seeks to remedy," but only "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* at 105. Bethea claims that the registration statute is excessive because it applies to all sex offenders, regardless of their individual dangerousness. Pet. 30-31. This Court rejected the exact same argument in *Smith*. As the Court then held, a sex-offender regulation is not excessive merely because the state chooses to regulate offenders as a class. 538 U.S. at 103-04.

In sum, all of the *Smith* factors show that North Carolina's sex-offender registration statute is not punitive, either in purpose or effect. The North Carolina appellate courts therefore correctly decided that the statute may be retroactively applied without interfering with the Ex Post Facto Clause. This Court's

intervention is therefore not necessary to correct any error below.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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