No. 18-386

IN THE
Supreme Court of the United States

JOSHUA VASQUEZ and MIGUEL CARDONA,

Petitioners,

v.

KIMBERLY FOXX, Cook County State's Attorney,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Illinois' Residency Ban has the devastating effect of depriving tens of thousands of people of the ability to establish secure, stable homes for themselves and their families. After having carefully chosen a home that complies with the restriction on living within 500 feet of schools, playgrounds and daycares, a person subject to the Residency Ban can be forced to move out immediately under threat of felony prosecution if a neighbor obtains a license to operate a home daycare within 500 feet of his home. And then, after finding and moving to a new residence that complies with the law, he can be kicked out again at any time.

The Seventh Circuit concluded that this extraordinarily disabling law is essentially no different from a registration scheme that merely makes available public information about past convictions. Respondent argues that the Seventh Circuit's decision does not merit review because it is wholly consistent with Supreme Court precedent and in harmony with the decisions of other lower courts.

Contrary to Respondent's argument, courts below are deeply divided over the important and recurring question at the core of this case—namely, whether this Court's 2003 decisions upholding the constitutionality of registration laws (*Smith v. Doe*, 538 U.S. 84 (2003) and *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003)) ("the *Doe* cases"), should be extended to laws that impose severe, life-altering restraints on where people can live, work, and be present. For the reasons set forth below, this Court should grant review.

I. The Lower Courts Are in Conflict Regarding the Proper Application of the *Doe* Cases to Laws that Impose Residency Bans

Respondent argues that the petition for a writ of certiorari should be denied because the Seventh Circuit decision "faithfully followed" Supreme Court precedent and "does not conflict with any decision of this Court or other federal courts." BIO at 7. Contrary to Respondent's claim, there exists a serious conflict among lower courts concerning how to apply the *Doe* cases to laws that impose significant disabilities such as residence bans.

The Seventh Circuit found Illinois' Residency Ban "similar enough" to the registration laws at issue in the *Doe* cases to uphold the dismissal of all of Petitioners' claims on a Rule 12 (b)(6) motion. App. 8a. In contrast, the Sixth and Eleventh Circuits and several state courts of last resort have applied this Court's precedents to residency bans and reached the opposite conclusion.

- *Doe v. Miami-Dade Cty.*, 846 F.3d 1180, 1186 (11th Cir. 2017) ("[Plaintiffs] have stated a plausible claim that the County's residency restriction [prohibiting people who have been convicted of certain offenses from residing within 2,500 feet of schools] is so punitive in effect as to violate the ex post facto clauses of the federal and Florida Constitutions.");

- *Does #1–5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016), cert. denied 138 S. Ct. 55 (2017) ("As should be evident, [Michigan's sex offender registration act] requires much more from

registrants than did the statute in *Smith*. Most significant is its regulation of where registrants may live, work, and 'loiter.' …[T]hese restrictions put significant restraints on how registrants may live their lives.");

- *Commonwealth v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009), cert. denied, 559 U.S. 992 (2010) ("Although the General Assembly did not intend [a statute prohibiting registrants from residing within 1,000 feet of areas where children congregate] to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil.");

- *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1023 (Okla. 2013) (applying *Smith* and finding that a registration statute which imposed a ban on living within 2,000 feet of schools, parks, and child care centers violated the ex post fact clause of the Oklahoma constitution);

- *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009) (applying *Smith* and finding that a ban that prohibited residing within 1,000 feet of schools, youth centers and parks violates the Indiana constitution's prohibition on ex post facto laws "because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed.")[1]

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[1] Other state supreme courts applying *Smith* have concluded that registration statutes that did not impose residency bans also raised ex post facto concerns. *See Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), cert. denied, 138 S. Ct. 925 (2018); *State v.*

Respondent seeks to minimize this conflict by claiming that the residency laws struck down by other courts are "factually distinguishable" from Illinois' Residency Ban. BIO at 9-10. For example, Respondent points out that the law at issue in *Doe v. Miami-Dade Cty.* prohibits people convicted of certain offenses from living with 2,500 feet of schools (while Illinois' Residency Ban prohibits residing within 500 feet of schools, playgrounds, and daycare centers) and that the plaintiffs in *Does v. Snyder* challenged the constitutionality of Michigan's entire registration scheme rather than simply its residential exclusion zones. *Id*. But by focusing on these insignificant differences, Respondent ignores the central issue on which the courts are sharply divided—whether the *Doe* cases settled the constitutionality of laws that impose much more onerous restraints than registration laws impose.

Since *Smith v. Doe* and *Conn. Dep't of Pub. Safety v. Doe* were decided in 2003, the lower courts have been called upon to apply these cases to ever-more-extreme laws governing every aspect of the lives of people who have been convicted of sex offenses. The proper application of this Court's precedents to residence bans and other burdensome registration laws is a recurring question that is ripe for Supreme Court review. In the past two years, this Court has denied petitions in at least four cases that raised similar questions. *See Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), cert. denied, 138 S. Ct. 925 (2018)

Letalien, 985 A.2d 4, 14-26 (Me. 2009); *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 130-43 (Md. 2013); *Doe v. State*, 189 P.3d 999, 1003-19 (Alaska 2008); *Doe v. State*, 111 A.3d 1077, 1089-1100 (N.H. 2015); *State v. Williams*, 952 N.E.2d 1108, 1110-13 (Ohio 2011).

(question presented was whether retroactive application of Pennsylvania's registration law violated the Ex Post Facto Clause); *Duarte v. City of Lewisville, Texas*, 858 F.3d 348 (5th Cir. 2017), cert denied 138 S.Ct. 391 (2017) (whether a residency ban could be applied without procedural due process to people no longer subject to supervision of the criminal justice system); *Does #1–5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), cert. denied 138 S. Ct. 55 (2017) (whether retroactive application of Michigan's registration scheme violated the Ex Post Facto Clause); and *State v. Boyd,* 1 Wash. App. 2d 501, 408 P.3d 362 (2017) (cert. denied Dec. 10, 2018) (whether frequent, in-person reporting requirements renders a registration law punitive).

Another pending petition (also set for conference on January 4, 2019) seeks review on a similar question. *See Bethea v. North Carolina*, No. 18-308 ("whether second-generation [registration] statutes are sufficiently punitive to distinguish them from the statute the Court considered in *Smith v. Doe*.").

Contrary to Respondent's arguments, there is conflict among the lower court that continues to deepen. This Court's intervention is warranted.

II. Respondent's Characterization of the Residency Ban as a Zoning Law Should Be Rejected

As explained in the petition for a writ of certiorari, the Residency Ban violates the Takings Clause and the Fourteenth Amendment guarantee of substantive due process because it permanently deprives people subject to the law of the right to acquire property with

the expectation that they will be able to use it as their residence. Pet. at 13–15.

In response, Respondent argues that the Seventh Circuit properly viewed the Residency Ban as a regulatory measure that reasonably "adjusts the benefits and burdens of economic life" under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). BIO at 15–16.

This argument is off base. The *Penn Central* framework is useful for analyzing the constitutionality of generally applicable zoning or land-use regulations that affect a property owner's economic interests. But the Residency Ban is not a zoning law. That is, it doesn't apply to particular parcels of land that Illinois has deemed inappropriate for residential use; rather, it follows Petitioners anywhere they live, making their property rights forever subsidiary to the rights of others who seek to operate daycare businesses. Thus, Respondent's attempt to analogize the Residency Ban to a land-use law falls apart.[2]

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[2] Respondent also claims that Petitioners are procedurally barred under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) from pursuing their takings claim because they didn't first exhaust state court remedies (*e.g.*, by bringing an inverse condemnation claim). BIO at 14. This argument can be easily rejected. It is well established that where, as here, a party brings a facial challenge to a law, exhaustion of state court remedies is not required. *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) ("As this [facial challenge] does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.").

Similarly, Respondent misguidedly analogizes this case to *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1074 (7th Cir. 2013) and *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1091 (9th Cir. 2015), two cases in which courts held that regulations enacted for the public welfare (an indoor smoking ban in *Goodpaster* and a rent-control ordinance in *Rancho de Calistoga*) do not constitute takings because property owners could have anticipated the regulations' being applied to them. BIO at 18. Respondent argues that, just as business owners who choose to operate in regulated industries cannot complain when regulations are applied to them, Petitioners cannot complain about being forced to leave their homes when a day-care opens because they knew they were subject to the Residency Ban when they moved in. BIO at 18.

The analogy should be rejected. Petitioners are not real estate investors who willingly bought property in a regulated industry, and their complaint is not about a regulatory diminution in the value they can derive from their property. Petitioners simply seek to live in their own homes — a basic property right that all people presumptively enjoy. *See United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 53-54 (1993) (the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance.")

Finally, Respondent tries to gloss over the Georgia Supreme Court's decision in *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740 (2007). In *Mann*, the court struck down a statute under which people who had been convicted of certain sex offenses could be forced to move if a "child care facility, church, school or area where minors congregate" opened within 1,000 feet of

the residence. *Id*. at 741. The court concluded that forcing an individual to vacate a home that he had purchased solely for use as his residence is "functionally equivalent to the classic taking," notwithstanding the fact that the ousted property owner could sell or lease the property. *Id*. at 744 (citing *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539 (2005)).

Respondent tacitly acknowledges that *Mann* conflicts with the Seventh Circuit decision, but minimizes the conflict by calling *Mann* an "outlier" that did not properly apply *Penn Central*. BIO at 17.

III. This Case Warrants The Court's Intervention

Absent this Court's review, the more than 40,000 people subject to the Residency Ban in Illinois face the risk of felony prosecution for the innocent act of remaining in their homes when someone decides to open a home daycare business nearby. The Ban inflicts substantial hardship not only on the people subject to the law, but also on their children and loved ones, who must live in constant fear of suddenly being forced to move from their homes.

Moreover, the consequences of the Court's inaction here reach far beyond this case. Legislatures nationwide continue to impose harsh restrictions on people who have been convicted of sex offenses that make their lives difficult long after they are subject to criminal justice supervision. The Seventh Circuit's decision—and other lower court decisions extending the holdings of the *Doe* cases to today's much more restrictive laws—stands for the proposition that any disabilities imposed on people who have been convicted of sex

offenses are constitutionally permissible, no matter how harsh, counter-productive, ill-conceived, or out of step with legal tradition. Accordingly, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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