No. _____

In the Supreme Court of the United States

JASON BOYD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Washington

PETITION FOR A WRIT OF CERTIORARI

Leonard J. Feldman
PETERSON WAMPOLD ROSATO FELDMAN LUNA
1501 4th Avenue, Suite 2800
Seattle, WA 98101
(206) 624-6800
feldman@pwrfl-law.com

Lila J. Silverstein
Counsel of Record
WASHINGTON APPELLATE PROJECT
1511 3rd Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
lila@washapp.org

Counsel for Petitioner

QUESTION PRESENTED

Numerous jurisdictions require people with certain types of criminal convictions to register their locations with the government. First-generation registration statutes were regulatory, not punitive, and therefore could be applied retroactively without offending the Ex Post Facto Clause. This was in part because the statutes did not include any "in-person appearance requirement[.]" *Smith v. Doe*, 538 U.S. 84, 101 (2003). But legislatures have amended these statutes to add more onerous obligations. Washington's amended statute, which requires homeless registrants like Petitioner to report *in person weekly*, is "perhaps the most burdensome in the country." App. 28. Yet contrary to decisions of several jurisdictions and over a dissent, the Washington Court of Appeals held the amended registration statute is not subject to the Ex Post Facto Clause. The question presented is:

Whether the requirement of frequent, in-person reporting renders an offender-registration law punitive, such that applying the law retroactively violates the Ex Post Facto Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Jason Boyd[1] respectfully petitions this Court for a writ of certiorari to review the judgment of the Washington Court of Appeals in this case.

OPINIONS BELOW

The split opinion of the Washington Court of Appeals is published at *State v. Boyd*, 408 P.3d 362 (Wash. Ct. App. 2018). App. 3. The Washington Supreme Court's order denying review is unpublished. App. 1.

JURISDICTION

The Washington Supreme Court filed its order denying review on April 4, 2018. App. 1. The instant Petition for Writ of Certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 10, clause 1 of the United States Constitution provides:

> No State shall … pass any … ex post facto Law ….

Wash. Rev. Code § 9A.44.130 (2011) provides, in pertinent part:

---

[1] The case caption in the Washington courts spells Mr. Boyd's first name "Jayson," but Petitioner himself spells his name in the traditional way ("Jason").

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence … who … has been convicted of any sex offense or kidnapping offense … shall register with the county sheriff….

…

(2)(a) A person required to register under this section must provide the following information when registering: (i) Name and any aliases used; (ii) complete and accurate residential address or, if the person lacks a fixed residence, where he or she plans to stay; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) social security number; (viii) photograph; and (ix) fingerprints.

…

(5)(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence … shall make

> the offender subject to disclosure of information to the public at large pursuant to [Wash. Rev. Code §] 4.24.550.

Wash. Rev. Code § 9A.44.130 (1998) provided, in relevant part:

> (1) Any adult or juvenile residing in this state who … has been convicted of any sex offense or kidnapping offense … shall register with the county sheriff for the county of the person's residence.
>
> (2) The person shall provide the county sheriff with the following information when registering: (a) Name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; and (h) social security number.

The following provisions are also relevant and pertinent portions can be found in the appendix: Wash. Rev. Code § 9A.44.130(7) (1998); Wash. Rev. Code § 9A.44.130 (2000); Wash. Rev. Code § 9A.44.132 (2011); Wash. Rev. Code § 9A.44.140; Wash. Rev. Code § 9A.44.142.

STATEMENT OF THE CASE

1. In February 1998, when Jason Boyd was 23 years old, he had sex with a 15-year-old. App. 4. He ultimately pleaded guilty to Washington's version of statutory rape: rape of a child in the third degree. *Id.* Mr. Boyd has not committed a sex offense against

anyone since. *Id*. Nevertheless, he has been ordered to register as a sex offender under Wash. Rev. Code § 9A.44.130 and § 9A.44.140.

Mr. Boyd is homeless and has mental deficits. App. 4. At the time of his crime, homeless people did not have to register as sex offenders, because they do not have addresses. *Id.*; Wash. Rev. Code § 9A.44.130 (1998); *State v. Pickett*, 975 P.2d 584, 586 (Wash. Ct. App. 1999). But the following year, the legislature amended the statute to require homeless people to register in-person. Wash. Rev. Code § 9A.44.130 (2000); App. 34-36. Those assessed as low-risk had to appear in person monthly, while those with higher risk levels were required to appear weekly. Wash. Rev. Code § 9A.44.130(6) (2000); App. 36. The legislature later abandoned tiered obligations based on risk, and instead required all individuals – even those assessed at the lowest risk level – to appear in person weekly. Wash. Rev. Code § 9A.44.130(5)(b) (2011).

Mr. Boyd was told he had to register, and he largely complied. App. 4. But the obligations were onerous and occasionally he did not report as ordered. He pleaded guilty to the crime of failure to register in 2009, 2010, and 2013. *Id*. Each time he missed a check-in and pleaded guilty, the 10-year registration period restarted. Wash. Rev. Code § 9A.44.140(3); App. 38-39.

After his most recent release from confinement, Petitioner registered address changes with the Skagit County Sheriff's Office more than 20 times. App. 4. He then registered as transient on December 11, 2014, and checked in weekly for the next six

weeks. App. 4-5. He was required to report every Monday between 8:30 and noon, and to document where he slept each night the previous week. App. 27. During the week of December 24, 2014, for example, the sheriff's "Transient Tracking" sheet shows that Mr. Boyd slept in the following locations: "Hwy 9" on Monday; "Concrete apt. #3 behind bakery"[2] on Tuesday; "McLaughlin M.V." on Wednesday; "Lafayette mom's" on Thursday; "Bro Casey Hwy 9" on Friday; and "Concrete fishing" on Saturday and Sunday. App. 5 n.1.

2. After he failed to check in between January 27, 2015 and February 10, 2015, the State charged Petitioner with failure to register as a sex offender. App. 5. Mr. Boyd was convicted as charged and sentenced to 45 months in prison. *Id*.

3. Petitioner appealed and argued the amended registration statute violated the Ex Post Facto Clause as applied to him and others similarly situated, because his crime occurred before the legislature enacted the onerous provisions requiring frequent in-person reporting for those without homes. The state supreme court had held the *original* version of the statute was not punitive and therefore not subject to ex post facto limitations, but this was because the original statute had no in-person reporting requirements. *See State v. Ward,* 869 P.2d 1062, 1074 (Wash. 1994). Defendants with fixed addresses simply had to fill out and send in a short form with name, address, and other basic information, and had to send written notice of an address change if they moved. Wash. Rev. Code §

[2] Concrete is the name of a town in Washington.

9A.44.130 (1998). The Washington Supreme Court concluded, "it is inconceivable that filling out a short form with eight blanks creates an affirmative disability." *Ward*, 869 P.2d at 1068. But subsequent amendments added frequent in-person reporting and other requirements, rendering the formerly regulatory statute punitive.[3]

The Court of Appeals rejected the argument, in a rare split opinion. The two-judge majority concluded the amended registration statute was not subject to the Ex Post Facto Clause because it was not punitive. App. 10. The majority described the weekly in-person reporting requirement for homeless people as a mere "inconvenience." App. 10, 12, 14.

The dissenting opinion found the provision punitive and subject to ex post facto limitations. It noted that when Petitioner was 23 and had sex with a 15-year-old, "registrants had no in-person reporting requirements." App. 25. "Now, a registrant like Boyd who lacks a fixed residence must report in person to the county sheriff at least 52 times each year." *Id.* If he had not been subjected to the amended statute, Petitioner "would have been free of the registration statute long ago and the legal

[3] In addition to adding burdensome in-person reporting requirements, the legislature increased the punishment for non-compliance, added internet notification, and began treating *all* homeless registrants as "high risk" regardless of risk assessments. *See* Wash. Rev. Code § 9A.44.130 (6)(b) (2011); Wash. Rev. Code § 9A.44.130 (7) (1998); Wash. Rev. Code § 9A.44.132 (1)(b) (2011); App. 33, 37.

jeopardy it has put him in repeatedly for failure to report." *Id.*

Noting that Washington's amended registration statute is "perhaps the most burdensome in the country[,]" App. 28, the dissent stated it "would join the jurisdictions holding that frequent in-person reporting requirements render a registration statute so punitive that applying it retroactively violates the constitution." App. 32.

4. Mr. Boyd filed a timely Petition For Review, which the Washington Supreme Court denied. App. 1-2.

REASONS FOR GRANTING THE PETITION

I. There is a conflict among lower courts regarding whether next-generation registration statutes are punitive and subject to the Ex Post Facto Clause.

Like Washington's legislature, legislatures in other jurisdictions have amended their registration statutes over the years to make the obligations more and more burdensome. Although some courts have held such amendments are constitutionally insignificant, others have held similar provisions are punitive and subject to ex post facto limitations. This Court should grant review to resolve the conflict.

The conflict has arisen because modern statutes scarcely resemble the Alaska law this Court addressed in *Smith* – indeed, one court described the burdens imposed by current provisions as "greater than those imposed by the Alaska statute by an order of magnitude." *Does #1-5 v. Snyder*, 834 F.3d

696, 703 (6th Cir. 2016). Thus, this Court's guidance is essential to ensure reasonably uniform treatment and prevent legislatures from "sweep[ing] away settled expectations suddenly" and using "retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

A. Federal circuit courts disagree about whether substantially similar registration statutes are punitive.

This Court indicated in *Smith v. Doe* that a statute mandating regular in-person appearances would create an "affirmative disability or restraint," suggesting punishment subject to ex post facto limitations. 538 U.S. at 101. But the circuits are split on this principle.

The Tenth Circuit views Oklahoma's weekly reporting requirement for transient individuals and quarterly reporting requirement for others as nonpunitive. *Shaw v. Patton*, 823 F.3d 556, 568 (10th Cir. 2016).[4] The court held, "These in-person reporting requirements are burdensome; but under our precedents, the burden is not so harsh that it constitutes punishment." *Id.* Other circuits have

[4] The Oklahoma Supreme Court disagrees. Ostensibly relying on the state constitution – but citing the *Mendoza-Martinez* factors and federal ex post facto cases – that court held the same statute could not be applied retroactively. *Starkey v. Oklahoma Dep't of Corrections,* 305 P.3d 1004, 1017-31 (Okla. 2013) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). Among other reasons, the court noted the in-person reporting requirements were "significant and intrusive[,]" and distinguished the statute from Alaska's. *Starkey*, 305 P.3d at 1021-22 (contrasting *Smith v. Doe*, 538 U.S. at 101).

reached similar conclusions for less-frequent appearance requirements. *E.g. Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014) (requiring triennial in-person reporting is not punitive); *United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011) (requiring quarterly in-person reporting for the most dangerous offenders "may be more inconvenient" than the requirements at issue in *Smith*, but "it is not punitive").

The Sixth Circuit, in contrast, recognizes the requirement of regular in-person reporting constitutes an affirmative disability. *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016). In *Snyder*, the court addressed a Michigan registration statute whose original version, like Washington's, was merely regulatory. *Id.* at 697. But like the Washington legislature, the Michigan legislature amended its statute on several occasions to make it more punitive. "In 1999, for example, the legislature added the requirement that sex offenders register in person (either quarterly or annually, depending on the offense) and made the registry available online, providing the public with a list of all registered sex offenders' names, addresses, biometric data, and, since 2004, photographs." *Id.* at 697-98. Other amendments created school-zone prohibitions and added risk classifications based on convictions rather than individual assessments. *Id.* at 698. Like Washington's statute, Michigan's law exacerbates these restraints by imposing significant prison terms for failure to report. *Id.*

The court described the new provisions as "direct restraints" that are "greater than those imposed by the Alaska statute by an order of

magnitude." *Snyder*, 834 F.3d 696 at 703. The new requirements resembled the punishment of parole or probation because Michigan's offenders are not only barred from school zones, but also, "much like parolees, they must report in person, rather than by phone or mail." *Id.* Failure to report "can be punished by imprisonment, not unlike a revocation of parole." *Id.* And even though Michigan registrants do not have to appear in-person as often as Mr. Boyd does, many of them "averred that [the statute's] requirements are more intrusive and more difficult to comply with than those they faced when on probation." *Id.* What is more, the requirement of frequent, in-person reporting "appears to have no relationship to public safety at all." *Id.* at 705.

The Sixth Circuit thus concluded the amendments were punitive and subject to the Ex Post Facto Clause. *Id.* The court emphasized that while severe punishment may be appropriate for most sex offenses, "punishment may never be retroactively imposed or increased." *Id.* "As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice." *Id.* at 706.

Had Mr. Boyd's case been decided by the Sixth Circuit, the outcome likely would have been different. *See* App. 29 (citing *Snyder*, 834 F.3d at 703).

B. State courts disagree about whether substantially similar registration statutes are punitive.

State courts are also divided. The Wyoming Supreme Court, for example, ruled that a quarterly in-person reporting requirement did not constitute an affirmative disability. *Kammerer v. State*, 322 P.3d 827, 836-37 (Wyo. 2014). In so holding, it endorsed the First Circuit's characterization of the obligation as "inconvenient" but not punitive. *Id.* (quoting *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012)).

While the Washington and Wyoming courts may be aligned, the New Hampshire and Maine Supreme Courts fall on the other side of the divide. Like the Sixth Circuit, these state courts recognize the punitive nature of in-person reporting requirements. *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 16 (Me. 2009).

The New Hampshire Supreme Court in 1994 had rejected an ex post facto challenge to that state's original registration statute. *Doe v. State,* 111 A.3d at 1084 (citing *State v. Costello,* 643 A.2d 531 (N.H. 1994)). But in 2015 the court reviewed the amended statute and held it was punitive and violated the ex post facto clause as applied to defendants who committed their crimes before the amendments. *Doe v. State*, 111 A.3d at 1100. This was so in part because the amendments added in-person reporting requirements: higher risk individuals must appear four times per year and lower risk offenders must report twice per year. *Id.* at 1094.

The New Hampshire court agreed with other state court opinions finding such "in-person requirements to be a restraint." *Id.* "[T]he frequent reporting and checks by the authorities at the petitioner's residence do entail a level of oversight by the State to which few citizens are subject." *Id.* at 1096. Such burdens cannot be described as "*de minimus*." *Id.*

The Maine Supreme Court similarly held that quarterly in-person registration for life "imposes a disability or restraint that is neither minor nor indirect." *Letalien,* 985 A.2d at 18. The court noted, "it belies common sense to suggest that a newly imposed lifetime obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the free exercise of individual liberty." *Id.* at 24-25.

Like the Sixth Circuit, the Maine court noted the restraint is amplified by harsh penalties for failure to comply. *Id.* Washington has similarly increased the punishment for failure to register, yet the Court of Appeals ignored this aspect of the analysis. App. 33, 37.

While the Maine and New Hampshire courts were also troubled by the absence of a mechanism for seeking relief from registration, Washington's provisions suffer substantially similar flaws. *Compare Letalien*, 985 A.2d at 24-26; *Doe v. State,* 111 A.3d at 1100 *with* App. 27-29. Mr. Boyd, for example, may be relieved from registration if he spends ten consecutive years in the community

without committing certain offenses. Wash. Rev. Code § 9A.44.140(3); Wash. Rev. Code § 9A.44.142(1)(b); App. 38-43. But the promise of an end date is illusory for people without homes, as it is virtually impossible for individuals sleeping under bridges to report to the sheriff's office 520 times straight without missing a week. Indeed, Petitioner has dutifully reported scores of times over the last 20 years, but has been convicted of failure to register three times. And each time he is released from prison, his "10-year" obligation restarts from the beginning. Wash. Rev. Code § 9A.44.140(3); App. 38-39. The restraint amounts to a life sentence, and cannot be dismissed as regulatory. *See* App. 27 ("Boyd's duty to check in every week in person after he is released will continue for many years and perhaps for his entire life if the statute as presently written is applied to him.").

II. The issue is important because registration statutes have been extended to non-sex offenders, and this case is a good vehicle because Washington's law is one of the most punitive in the nation.

As noted, this Court should grant review because lower courts have grappled with increasingly burdensome registration statutes and reached different results on materially similar facts. But it is not just the obligations that have increased; legislatures have also expanded the reach of registration laws to burden former offenders who have not committed sex crimes – or crimes against persons at all.

In Kansas, for example, even drug offenders must appear on the state's public registry. Kan. Stat. Ann. § 22-4902(a)(3). Drug offenders subject to the law must report in-person quarterly. Kan. Stat. Ann. § 22-4905(b)(2). These individuals have complained that the public conflates them with sex offenders, because both types of offenders appear, with pictures, in the online database.[5] One person explained:

> One boss, when he fired me, said he didn't want customers to think they had hired "that type of person." Everyone just assumed that I was a sex offender. I explained it to people over and over that my crime had to do with drugs. It was exhausting.[6]

Petitioner recognizes that the wisdom of such statutes is within a legislature's purview to determine. But the *retroactive* application of these laws is a constitutional concern of the utmost importance, and one this Court should address.

This case is a good vehicle for the issue. Washington's amended statute is "perhaps the most burdensome in the country." App. 28. It "goes well beyond requirements that other jurisdictions have

---

[5] *See*, e.g., https://www.kbi.ks.gov/registeredoffender/GeographicalSearchResults.aspx.

[6] https://www.themarshallproject.org/2018/05/03/want-to-escape-a-criminal-past-move-to-alaska-like-i-did?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20180504-1045.

held unconstitutional in ex post facto challenges." App. 29. While other courts have found quarterly in-person reporting requirements to be punitive and subject to ex post facto limitations, the Washington Court of Appeals held a *weekly* in-person reporting requirement was merely "inconvenient" and regulatory. App. 14. There can be little doubt the case would have been decided differently in several other courts. Similarly situated individuals will continue to be treated differently until this Court resolves the conflict.

Moreover, the issue is outcome-determinative. Petitioner does not complain about provisions that do not apply to him; rather, the most punitive amendments to Washington's law are the very amendments that have doomed Petitioner to a lifetime cycle of incarceration and supervision. The issue matters to Petitioner and others similarly situated, warranting this Court's review.

As Chief Justice John Marshall explained in describing Article I, section 10:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of

> those sudden and strong passions to which men are exposed.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810). "The restrictions on the legislative power of the states are obviously founded in this sentiment." *Id.* at 138.

Because protection against ex post facto laws is a critical constitutional concern, this Court should grant review. This Court should provide guidance and resolve the jurisdictional conflict regarding application of the Ex Post Facto Clause to next-generation registration statutes.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

Lila J. Silverstein
WASHINGTON APPELLATE PROJECT
1511 3rd Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
lila@washapp.org

Counsel for Petitioner

JULY 2, 2018