19A-315

IN THE
Supreme Court of the United States

MICHAEL ANTHONY THIBODEAUX,
Petitioner,

v.

DREW EVANS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

BRADFORD COLBERT, *Counsel of Record for Petitioner, Michael Thibodeaux*
ANDREW HALL, CERTIFIED STUDENT ATTORNEY
MITCHELL HAMLINE SCHOOL OF LAW
LEGAL ASSISTANCE TO MINNESOTA PRISONERS (LAMP) CLINIC
875 Summit Avenue, Room 254
St. Paul, MN 55105
(651) 290-8651
brad.colbert@mitchellhamline.edu

QUESTION PRESENTED FOR REVIEW

The Due Process Clause of the United States Constitution provides that the government may not infringe upon a person's protectable liberty interest without first affording that person procedural due process. The issue in this case is whether a person has a protectable liberty interest in not registering as a sex offender if he has not been convicted of a sex offense. This Court has previously determined that persons convicted of sex offenses do not have a liberty interest in being free from registration requirement, but this Court has not yet decided whether persons who have not been convicted of a sex offense have a liberty interest in being free from registration requirements as a sexual offender.

Table of Contents

TABLE OF AUTHORITIES

Secondary Sources

Local Ordinances

OPINIONS BELOW

The opinion of the court of appeals, attached at Exhibit 1, is reported at *Thibodeaux v. Evans*, 926 N.W.2d 602 (Minn. Ct. App. 2019). The opinion of the district court, court file number 62-CV-17-3564, attached at Exhibit 2, is unreported. The order of the Minnesota Supreme Court denying review is attached at Exhibit 3.

STATEMENT OF JURISDICTION

The Minnesota Court of Appeals entered judgment on April 1, 2019, affirming the district court's grant of summary judgment to Respondent Drew Evans. *Thibodeaux,* 926 N.W.2d at 609. The Minnesota Supreme Court denied Thibodeaux's petition for review on June 26, 2019. On September 18, 2019, Justice Gorsuch granted petitioner's request for additional time to file the petition, extending the timeline until October 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Const. Amend. V, § 1.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Minn. Stat. § 243.166, subd. 1(a).

Subdivision 1. **Registration required**. (a) A person shall register under this section if:

(1) the person was charged with or petitioned for a felony violation of or attempt to violate any of the following, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances:

(i) murder under section 609.185, clause (2); or

(ii) kidnapping under section 609.25, involving a minor victim; or

(iii) criminal sexual conduct under sections 609.342; 609.343; 609.344; 609.345; or 609.34551, subdivision 3; or

(iv) indecent exposure under section 617.23, subdivision 3.

STATEMENT OF THE CASE

The United States and all fifty states require certain persons to register as sex offenders. The laws of the United States and forty-nine of the fifty states provide that, before requiring a person to register as a sex offender, that person must have been convicted of a sex offense. But one state—Minnesota—requires persons to register as a sex offender if they have been charged with a sex offense and convicted "of any other offense" arising from the same set of circumstances. The issue presented by this case is whether a person who has not been convicted of a sex offense is entitled to any sort of due process before being required to register as a sex offender.

The Due Process Clause of the United States Constitution provides that a person cannot be deprived of life, liberty, property without being first provided due process of law. This Court has previously determined that persons *convicted* of sex offenses do not have a liberty interest protected by the Fifth Amendment in being free from registration requirements.[1] This Court has not yet decided whether persons who have not been convicted of a sex offense have a liberty interest in being free from registration requirements. This instant case is the perfect vehicle to decide this critical issue.

When he was sixteen years old, Michael Thibodeaux was charged by juvenile petition in the Ramsey County juvenile court with fourth degree criminal sexual conduct, which is a registerable offense.[2] Pursuant to plea negotiations, the State agreed to dismiss the juvenile petition containing the predatory offense and allow Thibodeaux to plead guilty to fifth degree

[1] *Connecticut Department of Safety v. Doe*, 538 U.S. 1, 7 (2003).
[2] Minn. Stat. § 243.166, subd. 1(a)(iii); *Thibodeaux v. Evans*, 926 N.W.2d 602, 605 (Minn. Ct. App. 2019).

criminal sexual conduct, which is a non-registerable offense. In exchange, Thibodeaux would not have to register as a predatory offender.[3] Indeed, after accepting Thibodeaux's plea, the sentencing court decreed that Thibodeaux would not have to register as a predatory offender.[4]

But despite (1) not having been convicted of a sex offense; (2) pleading guilty with the understanding that he would not have to register as a sex offender; and (3) the district court's order to the contrary, Drew Evans, the Superintendent of the Minnesota Bureau of Criminal Apprehension (BCA), forced Thibodeaux to register as a predatory offender.[5]

Thibodeaux sued the BCA, challenging its requirement that he register as a predatory offender.[6] Thibodeaux contended that the BCA violated his due process rights by requiring him to register as a predatory offender, and that the BCA was estopped from requiring his registration based on the 1997 plea agreement.[7] The parties filed dueling motions for summary judgement, which the district court granted to Evans.[8]

Thibodeaux then appealed this grant of summary judgment to the Minnesota Court of Appeals on April 1, 2019. The Court of Appeals affirmed the district court's grant of summary judgment to the BCA on April 1, 2019 (Exhibit 2).[9] The Court of Appeals, relying on the Minnesota Supreme Court's decision in *Boutin v. LaFleur*, held that the predatory offender registration statute did not implicate a fundamental right, was rationally related to the state's

[3] *Thibodeaux*, 926 N.W.2d at 605.
[4] *Id.*
[5] *Id.* Thibodeaux was only required to register after a subsequent conviction for fourth degree assault in 1997. *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 607–09.

legitimate interest in solving crimes, and therefore did not violate substantive due process.[10] Additionally, the found that, while being labeled a predatory offender was stigmatizing, the registration requirements were an insufficient injury to satisfy the "plus" requirement of the stigma-plus test and therefore the State did not have to provide Thibodeaux with any sort of due process before requiring him to register as a predatory offender.[11]

Mr. Thibodeaux filed a petition for review with the Minnesota Supreme Court; the Minnesota Supreme Court denied his petition for review on June 26, 2019 (Exhibit 3).[12] Mr. Thibodeaux is now asking this Court to grant certiorari to determine whether a person who has not bee convicted of a sex offense is entitled to due process before being required to register as a sex offender.

[10] *Id.* at 606 (citing *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999)).
[11] *Id.* at 608 (citing *Paul v. Davis*, 424 U.S. 693, 701–02 (1976)).
[12] *Id*. (*rev. denied* Jun. 26, 2019).

REASONS FOR GRANTING THE PETITION

1. Introduction

Offender registration systems in the United States began in the early twentieth century; these systems were developed in response to growing public concern over organized crime.[13] Criticized for being ineffective and potentially unconstitutional, these registries phased out of existence.[14] Similar criticisms have been lodged against modern sex offender registration systems.[15]

Despite these early failings, sex offender registration systems returned in force in the 1990s. Often, sex offender legislation bears the names of high-profile children victims.[16] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was passed in 1994 in response to Jacob's abduction at gunpoint in 1989.[17] That same year, New Jersey's "Megan's Law" added community notification requirements to offender registries, and President Clinton followed suit with federal legislation in 1996.[18]

Congress implemented even more aggressive sex offender registration and community notification requirements in the Pam Lyncher Sexual Offender Tracking and Identification Act of

---

[13] Elizabeth Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 729 (2013); Wayne Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 25 (2009).
[14] Platt, *supra* note 13, at 736; Logan, *supra* note 13, at 48.
[15] Guy Hamilton-Smith, *Sex Registries as Modern-Day Witch Pyres: Why Criminal Justice Reform Advocates Need to Address the Treatment of People on the Sex Offender Registry*, The Appeal (Dec. 12, 2017) https://theappeal.org/sex-registries-as-modern-day-witch-pyres-why-criminal-justice-reform-advocates-need-to-address-the-aca3aaa47f03/.
[16] Platt, *supra* note 13, at 736.
[17] *Id.*
[18] *Id.* at 736–37.

1996,[19] and again with the Adam Walsh Child Protection and Safety Act of 2006. The latter included the Sex Offender and National Registration Act (SORNA).[20]

Today, more than 900,000 people are listed on public sex offense registries.[21] Despite the ubiquity of such requirements, most empirical research demonstrates that registration has little or no impact on recidivism for sexual offenses.[22] Registration laws have generated a great deal of scholarly criticism on the dual grounds of (1) ineffectiveness and (2) inherent constitutional defects.[23]

---

[19] *Id.* at 737; Logan, *supra* note 13, at 61–62.

[20] *Id.* at 737; Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741, 748–49 (2016).

[21] Emily Horrowitz, *Timeline of a Panic: A Brief History of our Sex Offense War*, 47 SW. L. Rev. 33, 33 (2017).

[22] Luis C. deBaca, *Sex Offender Management Assessment and Planning Initiative Research Brief* 3 (2015) (citing Adkins et al., *The Iowa Sex Offender Registry and Recidivism* 21 (2000); Naomi Freeman, *The Public Safety Impact of Community Notification Laws: Rearrest of Convicted Sex Offenders* 1 (2012); Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism* 136–153 (2009); Sandler et al., *Does a Watched Pot Boil, A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law* 299–300 (2008); Schram et al., *Community Notification: A Study of Characteristics and Recidivism* 1 (1995); Richard Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration* 193–208 (2006); Zevitz et al., *The Impact of Sex-Offender Community Notification on Probation/Parole in Wisconsin* 8–21 (2000).).

[23] J.J. Prescott & Jonah Rockoff, *Do Sex Offender Registration and Notification Law Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 192–93 (2011) (analyzing the effectiveness of sex offender registries, and concluding that the modest benefits which may be shown dissipate in proportion to the number of people added to those registries); Tamara Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 New Crim. L. Rev. 213, 252–255 (2011) (discussing objections to sex offender registration laws on the basis of substantive due process); Corey Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 Harv. J. on Legis. 369, 400–07 (2009) (criticizing sex offender registration laws on due process grounds); Caroline Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process* 31 Harv. C.R.-C.L. L. Rev. 89, 103–06 (1996) (analyzing substantive due process implications of sex offender registry laws).

2. Procedural Due Process

The Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, requires that no person shall be deprived of life, liberty, or property without due process of law.[24] The Due Process Clause provides both procedural and substantive protection from government action.[25]

Procedural due process "imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fourteenth Amendment."[26] Analysis of procedural due process requires a two-step inquiry: (1) whether a protectable liberty interest is at stake; and (2) whether the appropriate level of process was afforded.[27] One's personal reputation is within the "variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause."[28]

In *Paul v. Davis*, this Court established the stigma-plus test to determine whether an individual has alleged a sufficient liberty interest in their reputation to avail themselves of the protection of procedural due process.[29] Damage to reputation alone, *Paul* cautioned, is insufficient to trigger due process protection.[30] Damage to reputation along with an alteration in legal status, however, would implicate a protectable liberty interest.[31] Thus far, the application of

---

[24] U.S. Const. amend. 5; U.S. Const. amend. 14.
[25] *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Paul v. Davis*, 424 U.S. 693 (1976).
[26] *Mathews*, 424 U.S. at 332.
[27] *Id.* at 335.
[28] *Paul*, 424 U.S. at 710.
[29] *Id.* at 711.
[30] The plaintiff in *Paul* had been mistakenly put on a list of active shoplifters by police. While injurious to his reputation, it was insufficient to create a liberty interest. *Id*.
[31] *Id.*

procedural due process to registered sex offenders has happened only in the context of prisoners.[32] While the liberty of prisoners is necessarily circumscribed, this Court has found that state action can trigger the requirements of due process where a prisoner's liberties are infringed upon beyond the fact of confinement.[33] Even though Thibodeaux is no longer a prisoner, his registration requirement is analogous to the restrictions challenged in *Neal*.[34] Courts now apply this stigma-plus test to decide challenges to sex-offender registry legislation.[35]

This Court has previously addressed procedural due process challenges to sex offender registration requirements for persons who had been convicted of a sex offense in *Connecticut Department of Safety v. Doe*.[36] Doe argued that Connecticut had infringed a liberty interest by the damage done to his reputation and consequent alteration of his status under state law, without "notice or meaningful opportunity to be heard."[37] But this Court held that, because Doe had been convicted of a sex offense, he was not entitled to a due process hearing.[38] Where a person has been convicted of a sex offense, no further process beyond the fact of conviction is required to justify the registration of sex offenders.[39]

---

[32] *See, e.g., Neal v. Shimoda,* 131 F.3d 818 (9th Cir. 1997).
[33] One such circumstance is when the conditions of a prisoner's confinement are changed so severely that it essentially exceeds the sentence imposed by the court. *Vitek v. Jones,* 445 U.S. 480, 487–88 (1980). Another is when the state consistently bestows some benefit on prisoners, the denial of which to certain individuals "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484 (1995); *Wolf v. McDonnell,* 418 U.S. 539, 558 (1974).
[34] A more complete discussion of *Neal v. Shimoda* follows in Part IV.
[35] *E.g., Schepers v. Comm'r, Ind. Dept. of Correction,* 691 F.3d 909 (7th Cir. 2012); *Doe v. Michigan Dept. of State Police*, 490 F.3d 491 (6th Cir. 2007); *Gwinn v. Awmiller*, 354 F.3d 1211 (10th Cir. 2004).
[36] *Connecticut Department of Safety*, 538 U.S. at 7.
[37] *Id.* at 5–6.
[38] *Id.* at 7–8.
[39] *Id*.

In *Doe* this Court concluded that where registration was compelled by "the fact of previous conviction, not the fact of current dangerousness" there are no due process concerns. [40] Thus, the liberty interest question presented by this case – whether a person who has not been convicted of a sex offense has a liberty interest in not registering as a sex offender – has not been addressed by this Court.

3. Minnesota's Predatory Offender Registration Scheme

A. *Minnesota's registration statute applies expansively—even reaching persons who were never convicted of an enumerated predatory offense.*

While every state requires the registration of convicted sex offenders, Minnesota is the only state that forces individuals to register as predatory offenders when they have been charged with, but not convicted of, a registerable offense.[41] Minnesota's statute mandates registration of individuals who are convicted of an offense "arising out of the same set of circumstances" as a charged, enumerated predatory offense. Minn. Stat. § 243.166, subd. 1b(a)(1). Thus, there is no requirement that the charged predatory offense have resulted in a conviction, let alone an individualized determination of dangerousness.

Even where a defendant is acquitted of the enumerated predatory offense,[42] or where the enumerated predatory offense is dismissed pursuant to a plea agreement,[43] the BCA can still force the individual to register. This is true even where a defendant has not been warned of his

---

[40] *Id.* at 4.
[41] Minn. Stat. § 243.166, subd. 1b(a); *Boutin*, 591 N.W.2d at 716; Justin Rose, *Where Sex Offender Registration Laws Miss the Point: Why a Return to an Individualized Approach and a Restoration of Judicial Discretion in Sentencing Will Better Serve the Governmental Goals of Registration and Protect Individual Liberties from Unnecessary Encroachments*, 38 Mitchell Hamline L.J. Pub. Pol'y & Prac. 2, 6 n.18 (2017).
[42] *State v. David*, No. A10-495, 2011 WL 68306, at *2–3 (Minn. App. Jan. 11, 2011); *State v. Meredith*, No. A06-2234, 2008 WL 942616, at *5–6 (Minn. App. Apr. 8, 2008).
[43] *See Boutin*, 519 N.W.2d at 716; *Gunderson v. Hvass*, 339 F.3d 639, 645 (8th Cir. 2003).

duty to register prior to entering a guilty plea.[44] It is also true when the BCA retroactively applies the statute to an individual whose charged conduct was not registerable when she was tried.[45] Thus, those charged with a predatory offense are not entitled to any constitutional protections before being required to register as a sex offender.

Instead, all that is needed for mandatory registration is a judicial determination of probable cause on the charged predatory offense—a negligible standard initially made *ex parte* and to which challenges are frequently waived as a matter of course.[46] Consequently, state prosecutors and the BCA are given virtually unfettered discretion in determining who will have to register as a predatory offender. Not even the court may modify a person's duty to register once a probable cause determination has been made.[47]

The lack of protections afforded to those required to register is problematic for additional reasons. Because predatory registration is not a measure found to implicate constitutional protections in Minnesota, those subject to its requirements are left without any form of process. Absent the anomalous case where a charge is found not to be supported by probable cause, judges are without power to override the statutory authority granted to the BCA.[48]

More still, the statute's scope is not limited to sex offenses. Persons charged with kidnapping or false imprisonment can be required to register[49]—even where there is no trace of

---

[44] *Taylor v. State*, 887 N.W.2d 821, 826 (Minn. 2016); *Kaiser v. State*, 641 N.W.2d 900, 906 (Minn. 2002).
[45] *State v. Lilleskov*, 658 N.W.2d 904, 909 (Minn. Ct. App. 2003).
[46] *State v. Lopez*, 778 N.W.2d 700, 703–04 (Minn. Ct. App. 2010) (noting futility of motion to dismiss where there is a fact question for the jury on each element of the crime charged).
[47] Marissa Ceglian, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J. L. Pol'y 843, 863 (2004).
[48] *See* Minn. Stat. § 243.166.
[49] Minn. Stat. § 243.166, subd. 1b(a).

sexual conduct.[50] As discussed *infra*, constitutional challenges to this exceedingly expansive application of section 243.166 have been futile.

B. *The burden of being required to register as a predatory offender in Minnesota has become exceedingly onerous and implicates myriad constitutional liberties.*

The requirements for persons registered as predatory offenders in Minnesota have grown severely more restrictive compared with those at the time of either *Boutin* or *Gunderson*.[51] In *Boutin v. LaFleur*, the Minnesota Supreme Court held that, pursuant to the "arising out of the same circumstances" language of section 243.166, an individual could be forced to register despite not being convicted of an enumerated predatory offense.[52] Writing for a 4-3 majority, the predatory registration requirements were characterized as threefold:

> Once instructed regarding the duty to register, the offender must comply with three requirements. First, the offender must submit a signed registration form which contains "information required by the bureau of criminal apprehension," along with "a fingerprint card, and photograph of the person taken at the time of the person's release from incarceration or, if the person was not incarcerated, at the time the person initially registered under this section." Second, the offender must sign and return an annual address verification form. Finally, the offender must notify law enforcement officials in writing at least five days prior to any change in address.[53]

The majority vastly understated Minnesota's registration requirements as they applied in 1999. This characterization certainly fails twenty years later.

---

[50] *Lopez*, 764 N.W.2d at 608. In *Lopez*, for instance, a defendant was convicted of a controlled substance violation stemming from a controlled purchase of methamphetamine. The defendant had also been charged with—and acquitted of—aiding and abetting kidnapping, as the criminal informant testified "he did not feel free to leave" during the transaction. *Id.* at 608. Despite being acquitted of the kidnapping charge, and despite the absence of a modicum of sexual behavior, the defendant was forced to register. *Id.* at 612.

[51] *Thibodeaux*, 926 N.W.2d at 608.

[52] 591 N.W.2d 711, 716 (Minn. 1999).

[53] *Id.* at 715 (citations omitted).

Under the enhanced effects of Minnesota's current registration law, it is no longer tenable to posit that registration does not "require an affirmative disability or restraint"[54] or otherwise implicate an individual's protectable liberty interest.[55] Rather, Thibodeaux and others predatory offenders suffer from the restraint on numerous liberty interests not considered in *Boutin*. These restraints derive from both legislative expansions in the registration law and exceedingly restrictive ordinances enacted by localities throughout the state of Minnesota.

In Minnesota, the registration statute itself exacts a multitude of restraints that touch every facet of an individual's life—where one can live, work, travel, receive healthcare, and associate.

First, the registration statute imposes onerous reporting requirements. All predatory offenders must report to their corrections agent or law enforcement authority their primary address; all secondary addresses; the addresses of all property owned, leased, or rented; the addresses of all schools the individual attends; the year, color, model, make, and license plate number of all motor vehicles owned or regularly driven; and all telephone numbers, including those used at work, school, and home. Any changes in this information must be "immediately" reported.[56]

Moreover, the reporting requirements become exceedingly burdensome when an individual is homeless or lacks a permanent address.[57] In such a case, the individual must report

---

[54] *State v. Manning*, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995).
[55] *Boutin*, 591 N.W.2d at 717-19.
[56] Minn. Stat. § 243.166, subd. 4a(1)–(6).
[57] Minnesota Dep't of Corrections, *The Effects of Failure to Register on Sex Offender Recidivism* 23–24 (2010) (analyzing the rates of recidivism for failure to register charges for registered predatory offenders. The data indicates that offenders with a GED or high school diploma have a 39-43% lower likelihood of incurring a failure to register charge. *Id.* "Moreover, the concentration of undereducated minorities from urban settings among [failure to register]

weekly and in person with their supervising law enforcement authority.[58] Coupled with the local ordinances and landlord practices that effectively banish predatory offenders from obtaining housing in entire communities, discussed *infra*, this requirement is particularly oppressive. After all, those deemed noncompliant may be charged with an entirely new felony.[59] Thus, noncompliant predatory offenders may be punished by way of an entirely new conviction—a conviction for conduct that would otherwise be unpunishable.

Next, Minnesota's registration statute also interferes with an individual's right to obtain medical treatment. Registrants now must disclose sensitive information before being admitted to receive medical treatment at health care facilities.[60] This information, which includes an individual's name and physical description, conviction history, assigned risk level, and profile of likely victims, is then distributed to all residents at the facility.[61] Individuals have a tangible privacy interest in receiving inpatient medical treatment *without* sharing personal information to a large group of individuals that may in turn disseminate that information to the public.

In a similar fashion, registration implicates an individual's constitutional right to marry and live with family. This Court has determined that "freedom of personal choice in matters of . . . family life is one of the liberties protects by the Due Process Clause of the Fourteenth Amendment."[62] Thus, "[t]here does exist a 'private realm of family life which the state cannot

---

offenders raises the question about the extent to which homelessness may be associated with registration noncompliance. *Id*. at 25.).

[58] Minn. Stat. § 243.166, subd. 3a.

[59] *Id.*, subd. 5. The stakes are high for individuals charged under this statute. A first-time conviction carries a mandatory minimum sentence of a year and a day, and all subsequent convictions carry a mandatory minimum sentence of two years imprisonment. *Id.*

[60] § 243.166, subd. 4b(c).

[61] *Id.*, subd. 4b(d).

[62] *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974).

enter' that has been afforded both substantive and procedural protection."[63] In Minnesota, registrants must receive authorization from their supervising corrections agency to live in a household where children reside. The agency then must notify the appropriate child protection agency.[64]

Moreover, in response to sex offender legislation at the state level, cities and ordinances across the United States have enacted their own restrictive ordinances. These ordinances typically incorporate and apply to persons who must register under a state's sex offender statute. They frequently restrict where an individual may live, travel, and associate.[65] Such is the case in Minnesota.

Since 2006, at least 66 Minnesota communities have enacted laws placing residency or other spatial restrictions on predatory offenders that limit virtually every aspect of their daily life.[66] In the city of Vadnais Heights, for instance, a level III offender may not live "within 500 feet of any school, licensed child care center, library, city park, religious facility, bus stop, state licensed residential facility housing minors, or adult use business."[67] In Grand Rapids, predatory offenders are subject to a similar residency restriction, but are additionally prohibited from participating "in a holiday event involving children under 18 years of age, such as distributing

[63] *Smith v. Org. of Foster Families*, 431 U.S. 816, 842 (1977) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))
[64] Minn. Stat. § 244.057.
[65] Code of the Village of Waterford § 174-7.2 (as revised by Ordinance No. 653), available at https://www.waterfordwi.org/DocumentCenter/View/4368/Ordinance-653?bidId=.
[66] Richard Weinberger, *Residency Restrictions for Sexual Offenders in Minnesota: False Perceptions for Community Safety* 9 (2017) https://mnatsa.org/wp-content/uploads/2017/05/MnATSA-Residency-Restrictions-April-2017.pdf.
[67] Vadnais Heights, Minn. Code § 24.33.

candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, or wearing an Easter Bunny costume on or preceding Easter."[68]

Moreover, these local laws are not uniform, but instead vary in degree and in kind in the many cities and counties throughout Minnesota. This severely burdens predatory offenders when they travel throughout the estate, as they must consider at all times whether they are in compliance with the web of laws governing their behavior wherever they are presently located or living. Ergo, the dizzying and complex web of restrictions throughout the state will severely burden an individual's ability to live, travel, and associate throughout the state.

In many cases, local laws effectively banish predatory offenders from entire communities. The city of St. Michael is illustrative. There, it is unlawful for a level III offender to establish a permanent or temporary residence within 2,000 feet of any school, licensed child care facility, private playground, public park, or public playground. More still, level III offenders may not live within 2,000 feet of *any other* level III offender.[69] A violation leads to a fine of up to $1,000 or confinement for up to 90 days, and every day a registrant remains in violation constitutes a separate offense.[70] Level III offenders searching for housing in towns like St. Michael—with residency restrictions identical or similar to those of communities all over the state—are effectively banished.[71] This Court has deemed durational residency requirements—those requiring a person to live somewhere for a specified amount of time before receiving some

[68] Grand Rapids, Minn. Code § 42.07.
[69] St. Michael, Minn. Code XI, § 99.04.
[70] *Id.* § 99.99.
[71] A search of the level III offender database for St. Michael, Minnesota yields not one result. *See* Minnesota Predatory Offender Search, Bureau of Criminal Apprehension, https://por.state.mn.us/OffenderSearch.aspx (agree to terms and conditions, then select "Saint Michael" for city field and "MN-Minnesota" for state field) (last visited Oct. 15, 2019).

benefit—to be unconstitutional.[72] Here, effectively excluding registrants from whole communities is an even greater infringement on the right to travel.

These barriers to affordable housing and employment are heightened at the local level when coupled with the stigma surrounding sex offenders. Landlords, employers, and others are widely permitted to—and do—discriminate against those required to register as a predatory offender.[73] This renders the collective impact of registration immeasurable for predatory offenders who, like any other citizen, possess a tangible interest in obtaining employment and affordable housing. Courts faced with registration laws similar to Minnesota's have recognized the harm done to a registrant's "reputation and professional life, employability, associations with neighbors, and choice of housing."[74] "Potential employers and landlords will foreseeably be reluctant to employ or rent" to individuals like Thibodeaux upon learning of their status as a "predatory offender."[75] Consequently, registrants are hard-pressed to live near and associate with family or take advantage of other resources they might otherwise access in the community. Similarly, residency restrictions may prevent a registrant from living near their place of employment.

These restrictions become increasingly restrictive if an individual seeks employment or education outside of the state, as they then must comply with *that* state's registration requirements.[76] In this way, registration infringes a person's rights to both intra and interstate travel.

---

[72] *E.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 269 (1974).
[73] *See, e.g.*, Minneapolis, Minn. Code Title 7 § 139.30(c)(2).
[74] *State v. Bani*, 36 P.3d 1255, 1266 (Hawaii 2001).
[75] *Id.* at 1265.
[76] Minn. Stat. § 243.166, subd. 3(d).

For years, state and federal jurists have criticized the Minnesota Supreme Court for its crippling application of Minnesota's registration law.[77] The harm perpetuated by this law is coextensive with the larger unsettled federal question: whether persons who have never been convicted of an enumerated predatory offense have a liberty interest in not being required to register as a predatory offender.

4. Split Authority

This Court has held that a person *convicted* of a sex offense is not entitled to any further due process before being required to register pursuant to SORNA.[78] The Court has not yet addressed the question of what process is due to a person who has not been convicted of a sex offense, yet still required to register as a sex offender. Without the benefit of clarification of this issue at the highest level, the circuit courts have split on the question of whether a state intrudes upon a protected liberty interest by requiring a person not convicted of a sex offense to register as a sex offender.

---

[77] *See, e.g.*, *Gunderson*, 339 F.3d at 645 (Beam, J., concurring) ("[T]he Minnesota Supreme Court's interpretation of the statute in *Boutin* . . . turn[s] reason and fairness on its head."); *State v. Collier*, No. A16-0268, 2017 WL 5985377, at *6 (Minn. App. Dec. 4, 2017) (Cleary, C.J., concurring) ("While existing caselaw suggests that appellant has not been denied his constitutional right to procedural due process, that caselaw is arguably outdated, overtaken by what it means to be labelled a predatory offender in 2017, subjected to new and more invasive registration requirements and living restrictions, eighteen years after Boutin."); *In re Welfare of J.S.K.*, No. C5-02-388, 2002 WL 31892086, at *3 (Minn. App. Dec. 31, 2002) (Randall, J., concurring) ("The presumption of innocence embedded in both the U.S. Constitution and the Minnesota Constitution is swept aside in favor of a 'rule' that says you are 'guilty' and must register as a predatory sex offender simply because you were 'charged' with an offense requiring registration, even though that charge did not stick. Your absolute right to plead not guilty and stand trial, which may result, as here, in a conviction/adjudication for an offense not requiring registration as a predatory sex offender, is rendered almost meaningless.").

[78] *Connecticut Department of Safety*, 538 U.S. at 7.

Most of the lower courts to address the issue have concluded that persons who have not been convicted of a sex offense have a liberty interest protected by the Fifth or Fourteenth Amendments in not being classified as a sex offender.[79] Just one year after the passage of the Jacob Wetterling Act, the Ninth Circuit held that due process was violated where prisoners who had never been convicted of a sex offense were required to register without further process.[80] At issue in *Neal* was Hawaii's 1992 Sex Offender Treatment Program (SOTP), which required inmates identified as sex offenders to complete 25 psychoeducational courses before they could become eligible for parole.[81]

Neal protested his forced inclusion in this program because he had never been convicted of a sexually violent offense.[82] The unilateral classification of prisoners as sex offenders without further notification in *Neal* was analogized by the Ninth Circuit to the nonconsensual transfer of prisoners to mental hospitals for commitment without further proceedings in *Vitek v. Jones*.[83] In *Vitek* the petitioner protested his placement in a mental hospital absent a finding that he was suffering from a mental illness for which he could not receive adequate treatment in a standard correctional facility.[84] This Court agreed that characterizing the petitioner as mentally ill was stigmatizing. Further, the transfer to the mental hospital constituted a major change in conditions. Thus, petitioner was entitled to notice and an adequate hearing.[85]

---

[79] *See, e.g., Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010); *Chambers v. Colorado Dept. of Corrections*, 205 F.3d 1237 (10th Cir. 2000); *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999); *Neal*, 131 F.3d at 818; *Doe v. Dep't of Public Safety*, 444 P.3d 116 (Alaska 2019).
[80] *Neal*, 131 F.3d at 830–32.
[81] *Id.* at 821–22.
[82] *Id.* at 822.
[83] *Id.* at 828 (citing *Vitek v. Jones*, 445 U.S. 480, 487–88 (1980)).
[84] *Vitek*, 445 U.S. at 487–88.
[85] *Id.* at 488.

The Ninth Circuit's reasoning in *Neal* was soon echoed by the Tenth and Eleventh Circuits. In 1999, the Eleventh Circuit held that an inmate who has never been convicted of a sex crime has "a protected liberty interest in not being classified as a sex offender."[86] The petitioner in *Kirby* was serving a sentence for attempted murder, but was required to participate in sex-offender classes as a prerequisite for parole eligibility.[87] The *Kirby* petitioner had previously been charged with, but not convicted of, two sex offenses, and was thus labeled as a sex offender.[88] The Eleventh Circuit found that the petitioner had a liberty interest in not being classified as a sex offender, and that an inmate who has never been convicted of a sex crime is entitled to due process before being labeled as such.[89]

The following year, the Tenth Circuit found "procedural scrutiny" merited where a state labeled a prisoner without a conviction for a sex offense a sex offender—a label "replete with inchoate stigmatization."[90] *Chambers* also involved a challenge to a state's use of a Sex Offender Treatment Program.[91] The petitioner was classified as an "S-2 sexual offender," which meant that he had been charged with, but not convicted of, a sex offense prior to the offense for which he was serving his sentence.[92] The petitioner's challenge was precipitated by the reduction of his good time credits when he refused to admit to the sexually assaultive behavior of which he had

[86] *Kirby*, 195 F.3d at 1291–92. *Kirby* involved the consolidation of the claims of two inmates, Kirby and Edmond. *Id.* at 1287. Kirby's claim was held to not be ripe, but the Court recognized that Edmond had sufficiently alleged a liberty interest. *Id.* at 1290.
[87] *Id.* at 1288.
[88] *Id.*
[89] *Id.* at 1291–92.
[90] *Chambers*, 205 F.3d at 1242–43.
[91] *Id.* at 1238.
[92] *Id.*

not been convicted.[93] The Tenth Circuit analogized the petitioner's position to *Neal* and *Kirby*, and recognized a protectable liberty interest.[94]

More recently, the Fifth Circuit first held in 2004 that persons are required further process before they can be required to register as sex offenders when they have not been convicted of a sex offense.[95] The Fifth Circuit later had the opportunity to examine more closely what process was due a person who had never been convicted of a sex offense.[96] Specifically, the court found:

> [W]e find Meza is due: (1) written notice that sex offender conditions may be imposed as a condition of his mandatory supervision; (2) disclosure of the evidence being presented against Meza to enable him to marshal the facts asserted against him and prepare a defense; (3) a hearing at which Meza is permitted to be heard in person, present documentary evidence, and call witnesses; (4) the right to confront and cross-examine witnesses, unless good cause is shown why this right should not be granted; (5) an impartial decision maker (which we assume the Board will be); and (6) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision.[97]

In 2010, the Third Circuit relied upon the reasoning of the above cases to hold that an inmate who had not been convicted of a sex offense had a protectable liberty interest in being free from classification as a sexual offender.[98] The majority of state courts to address the issue have also found that persons who have not been convicted of sex offenses have a protectable liberty interest in being free from being required to register as sex offenders.[99]

---

[93] *Id.* at 1239.
[94] *Id.* at 1243.
[95] *Coleman v. Dretke*, 395 F.3d 216, 222–23 (5th Cir. 2004). *See also Coleman v. Dretke*, 409 F.3d 665, 668 (5th Cir. 2005).
[96] *Meza*, 607 F.3d at 399.
[97] *Id.* at 411.
[98] *Renchenski v. Williams*, 622 F.3d 315, 327–28 (3d Cir. 2010).
[99] *See, e.g., Doe*, 444 P.3d at 134; *Anthony A. v. Commissioner of Correction*, 166 A.3d 614, 624 (Conn. 2017); *Doe v. Sex Offender Registry Bd.*, 41 N.E.3d 297, 311–12 (Mass. 2015).

Very recently, the Sixth Circuit examined the constitutionality of Michigan's Sex Offender Registry Act in *Does #1-5 v. Snyder*.[100] While the challengers ultimately prevailed on ex post facto grounds, the Sixth Circuit characterized the petitioners' due process arguments as "far from frivolous and involv[ing] matters of great public importance."[101] The Sixth Circuit challenged this Court's conclusions in *Smith* about the risk of recidivism posed by sex offenders, and found that registration legislation has been shown to increase recidivism by further disenfranchising registered offenders.[102]

By contrast, a few Circuits and states have not recognized a liberty interest for persons who have not been convicted of a sex offense. As discussed previously, in 1999, a closely divided Minnesota Supreme Court held that no protectable liberty interest was implicated where a defendant who had never been convicted of a sex offense was nevertheless required to register as a predatory offender.[103]

The Eighth Circuit affirmed that approach four years later in *Gunderson v. Hvass*.[104] Brian Gunderson was charged with first degree criminal sexual conduct after a woman that he drove home from a bar accused him of forcibly raping her.[105] Gunderson admitted that a physical altercation occurred between him and the complainant, but consistently denied sexual contact.[106] The BCA's medical examination corroborated Gunderson's version of events, finding no physical evidence of sexual assault.[107]

---

[100] 834 F.3d 696 (6th Cir. 2016).
[101] *Id.* at 706.
[102] *Id.* at 705–06.
[103] *Boutin*, 591 N.W.2d at 717–19.
[104] *Gunderson*, 339 F.3d at 643–45 (8th Cir. 2003).
[105] *Id.* at 641.
[106] *Id.*
[107] *Id.*

Following the BCA's report, Gunderson's attorney negotiated a plea agreement under which the entirety of the original complaint was dismissed, and a second complaint charging Gunderson with only third degree assault was filed.[108] Gunderson pled guilty to the second complaint and, after being committed to prison following a probation violation, was informed that he would be required to register as a predatory offender on the basis of the charges in the original complaint.[109]

In both *Boutin* and *Gunderson*, the courts recognized that being labeled as a sexual offender was stigmatizing and injurious to the petitioners' respective reputations.[110] However, both courts found that the registration requirements attendant upon classification as a predatory offender were only minimal, and therefore insufficient to trigger the "plus" requirement of the federal procedural due process test.[111] This reasoning continues to be relied upon, despite the increasing severity and restrictiveness attendant upon being required to register as a predatory offender.[112]

[108] *Id.*
[109] *Id.* at 641–42.
[110] *Id.* at 644–45; *Boutin*, 591 N.W.2d at 716.
[111] *Id.*
[112] *See Thibodeaux*, 926 N.W.2d at 608.

CONCLUSION

The Due Process Clause of the United States Constitution provides that the government may not infringe upon a person's protectable liberty interest without first affording that person procedural due process. The issue in this case is whether a person has a protectable liberty interest in not registering as a sex offender if he has not been convicted of a sex offense. This Court has previously determined that persons convicted of sex offenses do not have a liberty interest in being free from registration requirement, but this Court has not yet decided whether persons who have not been convicted of a sex offense have a liberty interest in being free from registration requirements as a sexual offender.

Petitioner asks this Court to accept review of this case for two reasons. First, guidance from this Court will resolve the currently fractured precedent at the federal appellate level. Second, a decision in this case will answer the raised, and as of yet unanswered, question of whether a person who has not been convicted of a sex offense has a liberty interest in not registering as a sex offender and if so, what process they are due.

Dated: October 23, 2019

Respectfully Submitted,
/s/ Bradford Colbert

Bradford W. Colbert
Counsel of Record for Petitioner
Legal Assistance for Minnesota Prisoners
875 Summit Avenue, Suite 254
St. Paul, MN 55105
(651) 290-6413