No. 19-6432

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL ANTHONY THIBODEAUX,

Petitioner,

v.

DREW EVANS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As this Court held in *Connecticut v. Doe,* even assuming a liberty interest is implicated by the minimal requirements of a registration statute, does the criminal process that led to the conviction for which registration is required provide all the process that would be due?

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STATEMENT OF THE CASE

Thibodeaux's entire petition to this Court is based on a misstatement about the record: he claims that he was not convicted of an offense that requires registration. But in 1997, Thibodeaux pled guilty in juvenile court and was adjudicated guilty of criminal sexual conduct in the fifth degree. Pet. App. Ex. 1 at 2 (reported at *Thibodeaux v. Evans,* 926 N.W.2d 602, 605 (Minn. Ct. App. 2019)). The adjudication requires registration because he was charged with criminal sexual conduct in the fourth degree and was adjudicated guilty of criminal sexual conduct in the fifth degree, which arose out of the same set of circumstances as the original charged offense. *See* Minn. Stat. § 243.166, subd. 1b(a)(1).[1] Thibodeaux has never disputed that his adjudication requires registration.

Thibodeaux began registering in 1997. Twenty years later, Thibodeaux commenced this action to challenge his obligation to register on constitutional grounds.[2] He made three claims: that registration violates his rights to substantive and procedural due process; that registration offends the separation of powers; and

[1] Indeed, at several places in his petition he errantly states that he was not convicted of a sex offense. Pet. at 5, 6, 7, 12. Clearly, criminal *sexual* conduct in the fifth degree is a sexual offense. *See* Minn. Stat. § 609.3451, subd. 1(1) ("a person is guilty of criminal sexual conduct in the fifth degree . . . if the person engages in nonconsensual sexual contact").

[2] While his initial registration period was 10 years, the registration statute provides for extensions of the registration period because of subsequent incarcerations. Minn. Stat. § 243.166, subds. 6 (a), (c).

that equitable estoppel should prohibit his registration. The district court, the Honorable David C. Higgs, rejected his claims and granted summary judgment to Respondents. Pet. App. Ex. 2. The Minnesota Court of Appeals affirmed in an opinion filed on April 1, 2019. The Minnesota Supreme Court denied further review on June 26, 2019. Petitioner now asks this Court to review the decision of the Minnesota Court of Appeals.[3]

REASONS FOR DENYING THE PETITION

Thibodeaux has not identified any compelling reasons to grant review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). Again, his petition is based on the incorrect assertion that he was not convicted of an offense that requires registration. From that assertion, he argues that this case can resolve a question left open in *Connecticut Dep't of Pub. Safety v. Doe,* 538 U.S. 1 (2003). But this case will not answer any question left open in *Connecticut v. Doe* because this case is consistent with that case: in both cases the registration obligation is based on a conviction and any process due was provided in the criminal proceeding leading to the conviction. *See* Sup. Ct. R. 10(c) (Court grants certiorari when the case involves an important question of federal law that "has not been, but should be, settled by this Court"). Thibodeaux

[3] It appears Petitioner is only raising a procedural due process challenge in his petition. Pet. at 5.

then asserts a split of authority on the question presented. But again his conviction for an offense requiring registration makes the cases he relies on for the alleged split inapposite. In addition, the cases he offers as the other side of the split arise out of affirmative burdens and restraints far beyond registration such as mandatory treatment, compelled admissions, and loss of parole. *See* Sup. Ct. R. 10(a), (c) (Court grants certiorari when there is a circuit split or the lower court "decided an important federal question in a way that conflicts with relevant decisions of this Court"). Finally, he also asserts that other statutes and even some city ordinances affect his rights, but he has not asserted that any of those statutes or ordinances have been applied to him. This case is not a proper vehicle to address those assertions because Thibodeaux has not been affected by them.

I. THIS CASE FALLS SQUARELY WITHIN THE HOLDING OF *CONNECTICUT V. DOE*.

Thibodeaux asserts that this case will allow the Court to address a question left open in *Connecticut v. Doe.* He is wrong, because this case presents the same context as that underlying the decision in *Connecticut v. Doe*. In that case, the petitioners raised a due process challenge to Connecticut's registration statute. 538 U.S. at 4. But, this Court held it did not need to decide whether there was a liberty interest implicated by the registration statute because even if there was, all the process that was due was provided in the criminal proceedings that led to the conviction. *Id.* at 7.

This case is entirely consistent with *Connecticut v. Doe* because, just as in that case, the registration obligation is based on a criminal adjudication. In this case, this Court would not need to decide whether there is a liberty interest implicated by the registration statute because even if there is, any process that was due was provided in the criminal proceedings that led to the adjudication. This was the Court's holding in *Connecticut v. Doe*, and it applies equally here.

This is not a case that will address something left unresolved in *Connecticut v. Doe*. This Court should deny the certiorari petition.[4]

II. THERE IS NO SPLIT OF AUTHORITY ON THE PERTINENT ISSUE.

Thibodeaux attempts to create a split of authority where none exists, certainly none that would be applicable to this case. The cases he offers as in conflict with the decision below are easily distinguishable.

In *Boutin v. LaFleur,* the Minnesota Supreme Court held that Minnesota's registration statute did not implicate a liberty interest because complying with the requirements of the registration statute was a minimal burden and clearly not the

[4]At one point, Thibodeaux states the registration statute is not limited to sex offenses. Pet. at 13. This is true; it is a predatory offender registration statute. Unfortunately, the footnote in which he describes the *Lopez* case for an example is mostly factually wrong. Pet. at 14 n.50. Lopez was not "acquitted" of the kidnapping charge; it was dismissed as part of a plea bargain. *See State v. Lopez,* 778 N.W.2d 700, 703 (Minn. 2010). And, more importantly, Lopez was *not* required to register because the Minnesota Supreme Court held the drug conviction did not arise out of the same set of circumstances as the kidnapping charge. *Id.* at 704-05.

sufficiently important interest the "stigma-plus" test requires. 591 N.W.2d 711, 718 (Minn. 1999). The court of appeals relied on *Boutin* in rejecting Thibodeaux's procedural due process claim. Pet. App. Ex. 1 at 5-6.

In seeking this Court's review, Thibodeaux offers what he claims is a split of authority. But the cases he relies on to create the conflict are clearly inapposite, as they address not registration obligations, but significant affirmative burdens and limitations, such as mandatory sex offender treatment, compelled admissions in treatment, and loss of parole, not arising from a conviction offense.

For example, *Neal v. Shimoda* involved the determination by the department of corrections that Neal was a sex offender, not by virtue of his conviction, but because prison staff made a clinical determination he would benefit from sex offender treatment based on allegations of sexual misconduct during the course of his crimes. 131 F.3d 818, 821-22 (1997).[5] He was then required to enter sex offender treatment and admit the alleged sexual conduct, and he would not be eligible for parole until he did so. *Id.* Neal had a liberty interest because of forced

[5]Thibodeaux asserts, incorrectly, that *Neal v. Schimoda* required offenders who had never been convicted of a sex offense to register without further process. Pet. at 21. But that case involved a sex offender treatment program requirement for imprisoned offenders and not a registration statute. 131 F.3d at 821-22; Pet. at 21.

treatment and the loss of automatic parole, none of which was based on a conviction.[6]

Likewise in *Kirby v. Siegelman,* one of the offenders in the consolidated cases, Robert Edmond, who was in prison for attempted murder, was classified by the prison as a sex offender based on two previous sex offense charges that did not result in convictions. Edmond's classification happened without any process, and subjected him to community notification and required him to complete sex offender treatment in prison in order to qualify for minimum custody and parole.[7] 195 F.3d 1285, 1288 (11th Cir. 1999). The prison treatment program required him to admit to past behavior in sex offender classes. *Id.* Like Neal, Edmond had a liberty interest because of forced treatment and the loss of automatic parole, none of which was based on a conviction.

Similarly, in *Chambers v. Colorado Dept. of Corr.*, Chambers was not charged with a sex offense but was classified based on Colorado Department of Corrections policy as a sexual offender because of an earlier victim statement in a

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[6]The *Neal* court noted that the other offender in the lawsuit, Martinez, who was convicted of attempted rape and admitted that offense, had received the minimum protections required by due process during his criminal proceedings. 131 F.3d at 831. This aspect of the decision is actually consistent with the result in Thibodeaux's case, as his registration is based on an adjudication.

[7]Because Kirby had not suffered injury or come into immediate danger of suffering injury, the court affirmed the district court's dismissal of his claims on ripeness grounds. 195 F.3d at 1289-90.

case unrelated to his incarceration conviction. 205 F.3d 1237, 1238-41 (10th Cir. 2000). That classification required him to participate in sex offender treatment. *Id.* at 1238. Treatment included group therapy conditioned upon an inmate admitting he committed a sex offense. *Id.* Because Chambers denied his sexually assaultive behavior, he was ineligible for the program and earned less good time credit, thus delaying parole eligibility. *Id.* at 1239-42. Chambers had a liberty interest because of forced treatment and the loss of automatic parole, none of which was based on a conviction.

Renchenski v. Williams also involved sex offender conditions imposed on an imprisoned offender, including classification as a sex offender under Connecticut Department of Corrections policy and forced sex offender treatment, based on the official version of the offense even though he was never charged with or convicted of a sex offense. 622 F.3d 315, 320-21 (3rd Cir. 2010). Although Renchenski was subject to a life sentence without parole, he was required to admit to his offenses or be dismissed from treatment. *Id.* at 321. In addition, his refusal to participate in treatment subjected him to substantial penalties, including loss of his prison job, disciplinary custody, cell restriction, suspension of the right to receive visitors, and loss of other privileges. *Id.* at 323, 326-27, 330.[8] Renchenski had a liberty interest

[8] The court held that because Renchenski, unlike Thibodeaux, was never charged with or convicted of, a sex offense, the procedure afforded during his trial and (Footnote Continued on Next Page.)

because of forced treatment and the substantial penalties he faced if he refused treatment.

The *Anthony A. v. Comm'r of Corr.,* Connecticut Supreme Court opinion also involves a prison classification of an inmate as a sex offender for programming purposes and not a sex offender registration statute. 166 A.3d 614, 615-17 (Conn. 2017). Anthony was classified as a sex offender based on a dismissed charge, and if he did not participate in sex offender treatment, he risked forfeiture of supervised community release, parole, and the opportunity to earn good time credit. *Id.* at 617. Anthony too had a liberty interest because of forced treatment and the loss of automatic parole, none of which was based on a conviction.

Similar to the cases above, *Coleman v. Dretke,* involved an offender who faced the potential of parole revocation and reimprisonment based on his sex offender classification. 395 F.3d 216, 223 (5th Cir. 2004). The State of Texas imposed sex offender registration requirements and treatment on Coleman, who

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(Footnote Continued From Previous Page.)
conviction for the 1982 murder could not serve as the sufficient procedural safeguard for 14th Amendment purposes. *Renchenski,* 622 F.3d at 331.

was charged with sexual assault but convicted of misdemeanor assault, as part of his conditions of parole from prison. *Id.* at 219.[9]

Meza v. Livingston, like *Coleman,* involved enforced sex-offender conditions imposed as part of mandatory supervision conditions following incarceration and for which he could be returned to prison if violated. 607 F.3d 392, 396 (5th Cir. 2010). The registration requirement was not a statutory requirement. *Id.* The conditions were imposed because Meza allegedly sexually assaulted a girl in 1982. *Id.* The state did not dispute Meza had a liberty interest in being free from his sex offender registration and therapy release conditions and the court found such a liberty interest. *Id.* at 399-401.[10]

Thibodeaux relies on three cases that address predatory offender registration statutes in other states: *Doe v. Alaska,* 444 P.3d 116 (Alaska 2019), *Doe v. Sex*

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[9]In a later opinion, *Coleman v. Dretke,* 409 F.3d 665. 669 (5th Cir. 2005), the court distinguished the *Coleman* case from *Connecticut v. Doe.* In doing so, the court noted that the *Doe* plaintiff challenged sex offender registration alone and not behavior modification therapy. *Id.* In addition, the *Doe* plaintiff, like Thibodeaux here, had been convicted of an offense enumerated in the registration statute. *Id.* The *Coleman* court noted that Coleman had never been convicted of an offense enumerated in Texas's registration statute and challenged not only sex offender registration but the requirement that he undergo invasive behavior-modification therapy. *Id.*

[10]The *Meza* court acknowledged the 8th Circuit's decision in *Gunderson v. Hvass,* 339 F.3d 639 (8th Cir. 2003), and distinguished it because Texas's statute was not similar to Minnesota's statute. 607 F.3d at 401 n.10. Meza had not been charged with or convicted of a sex offense so the state could not prove he was charged with a non-sexual offense that arose out of the same set of circumstances. *Id.* Again, for this reason, the *Meza* opinion is inapposite here.

Offender Registry Bd., 41 N.E.3d 1058 (Mass. 2015), and *Doe v. Snyder,* 834 F.3d 696 (6th Cir. 2016). Pet. at 23-24. Those cases, which involve registration statutes that include community notification components, also do not present a split of authority on the pertinent issue.

Doe v. Alaska is not a procedural due process case, but is a substantive due process case, so it does not address the stigma-plus issue Thibodeaux raises in this case. 444 P.3d at 126-29. And, the Alaska court relied on its state constitution in its substantive due process analysis, finding a right to privacy in that Doe sought to shield sensitive personal information from broad public disclosure. *Id.* at 126-29.

But even so, the Alaska statute differs from Minnesota's registration statute in many ways, most significantly because it includes broad public notification. *Id.* at 126-29. The opinion is largely focused on the public disclosure of Doe's registration information on the internet, something that Minnesota's statute generally does not allow. *Id.* at 126-30. *See* Minn. Stat. § 243.166, subd. 7 (classifying registry information as private information to be used by law enforcement, corrections agencies, or the commissioner of human services only for specific purposes and allowing for limited disclosure of information on offenders out of compliance with the law for 30 days or longer).

In addition, the court found that the Alaska statute must offer offenders a right to a hearing where they could attempt to prove they were not likely to

reoffend. *Id.* at 132-35. Again, this is inapposite here because Minnesota's community notification statute has a process for such a hearing. *See* Minn. Stat. § 244.052, subd. 6.

Doe v. Sex Offender Registry Bd. also does not present a conflict here. That case involved the proper burden of proof for risk level assessment under the community notification provisions of the Massachusetts statute, provisions that Minnesota does not have in the registration statute challenged here. 41 N.E.3d at 1059-60. Unlike Minnesota's notification statute, the Massachusetts statute provided for broad internet notification of registration information on the internet for level two and level three offenders. *Id.* at 1066.[11]

Finally, *Doe v. Snyder* does not support a conflict of authority. That case involved an ex post facto challenge to the Michigan sex offender registration act, which included risk level assignments and public notification with no hearing.[12] *Id.*

[11] The court noted that recent internet dissemination requirements in particular increased the extent of the private interests affected by classification. 41 N.E.3d at 1066.

[12] In contrast, Minnesota's notification statute, which is not at issue here, provides for a meeting at which an offender may appear prior to assignment of the risk level and includes a process for an offender to appeal that risk level assignment if assigned a risk level two or three. *See* Minn. Stat. § 244.052, subds. 3, 6.

at 697-702. The statute itself, unlike Minnesota's statute, also contained restrictions on where offenders could live, work, or loiter. *Id.* at 698.[13]

In seeking this Court's review, Thibodeaux offers a false conflict. Accordingly, certiorari is unwarranted because Thibodeaux has not shown a conflict between federal courts of appeals or state courts of last resort that is applicable to, or could even be addressed by this Court.

III. THIBODEAUX HAS NOT ESTABLISHED THAT HE HAS SUFFERED OR IS IN IMMEDIATE DANGER OF SUFFERING AN INJURY BECAUSE OF PREDATORY OFFENDER REGISTRATION TO WARRANT THIS COURT'S REVIEW.

In an attempt to argue for a liberty interest affected by the registration statute, Thibodeaux references statutes other than the registration statute he challenges, and even some city ordinances. *See* Pet. at 17-19. This case does not present a vehicle to address those claims because Thibodeaux has not established that any of those statutes or ordinances have been applied to him. The decision below concluded Thibodeaux lacked standing to raise them. Pet. App. Ex. 1 at 6.

At best, these other statutes and ordinances are merely indirect adverse effects of the registration statute that cannot form the basis of a challenge to the registration statute. *See O'Bannon v. Town Court Nursing Center,* 447 U.S. 773,

[13]The Michigan Supreme Court had already upheld the statute on procedural due process grounds, relying on *Connecticut v. Doe*. *Doe v. Michigan Dep't of State Police,* 490 F.3d 491, 501-02 (Mich. 2007) (holding that because registration was based on conviction procedural due process challenge was foreclosed).

788-89 (1980) (holding due process challenge may only be maintained for government action that directly affects a citizen's rights, not for indirect or incidental effects). If those statutes or ordinances were ever applied to him, he may have a challenge to them at that time, but not now. *Id.* at 790. This case does not provide any moment to examine statutes or ordinances that may be applied incidentally at some other time.

In addition, the actual application of these statutes or ordinances to him is too speculative to invoke this Court's review. *See Clapper v. Amnesty Int'l U.S.A.,* 568 U.S. 398, 409 (2013) (holding that to raise challenge in federal court party must show an injury in fact, that is actual and imminent and not too speculative); *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (holding that to invoke federal court authority party must show a direct injury or one that is imminent and both real and immediate; it may not be conjectural or hypothetical). Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts. *Chafin v. Chafin,* 568 U.S. 165, 171 (2013).[14] Rather than showing an

[14]This is something the court recognized in the *Kirby* case when it did not address Kirby's claims challenging his sex offender classification. *See* 195 F.3d at 1290 (holding whether a contingency would occur was a matter of speculation and the court must not pass on hypothetical matters).

actual or imminent harm, Thibodeaux simply speculates that these statutes and ordinances will be applied to him at some point.

Thibodeaux's arguments related to the ordinances are even more speculative because all of the ordinances cited by him apply only to registered predatory offenders who have been assigned a risk level of three for community notification purposes under Minn. Stat. § 244.052, which is not challenged here. *See* Vadnais Heights, Minn. Code § 24.32; Grand Rapids, Minn. Code § 42-107 (b) (1); St. Michael, Minn. Code § 99.02. They do not impose restrictions on all offenders registered under Minn. Stat. § 243.166. *Id.* In addition, the Minneapolis Code he cites for the proposition that it allows landlords to discriminate against predatory offenders only states a landlord may screen a person using any non-discriminatory criteria and does not specifically reference registered predatory offenders. *See* Minneapolis, Minn. Code Title 7 § 139.30 (c) (2). This case will not present an opportunity to address the other statutes or ordinances discussed because he does not have standing to challenge them.

CONCLUSION

For all of these reasons, this Court should deny the petition for a writ of certiorari.

Dated: December 30, 2019

Respectfully submitted,

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