Case No. 21-6719

IN THE SUPREME COURT OF THE UNITED STATES

N.R.,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

BRIEF OF THE STATE OF KANSAS IN OPPOSITION

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General

BRANT M. LAUE
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
MICHAEL R. SERRA
Assistant Solicitor General

120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
brant.laue@ag.ks.gov

QUESTIONS PRESENTED

1. Whether the Kansas Supreme Court correctly held that application of the Kansas Offender Registration Act to a person adjudicated of a registration offense as a juvenile offender does not constitute punishment for purposes of the Ex Post Facto Clause or the Eighth Amendment to the United States Constitution.

2. Whether the "intent-effects" test articulated in *Smith v. Doe*, 538 U.S. 84 (2003), applies to a person adjudicated of a registration offense as a juvenile offender.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

INTRODUCTION 1

STATEMENT 2

A. Petitioner's Juvenile Adjudication 2

B. Petitioner's Offender Registration Case 3

ARGUMENT 4

A. Lower Courts Are Not Divided 5

B. This Court's Applicable Precedents Are Clear 10

C. The Kansas Supreme Court Correctly Applied This Court's Precedents 11

D. This Case Is A Bad Vehicle In Any Event 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Doe v. Dept. of Public Safety & Corr. Services,
62 A.3d 123 (Md. 2013) 5, 11

Doe v. Miller,
405 F.3d 700 (8th Cir. 2005) 14

Doe v. State,
111 A.3d 1077 (N.H. 2015) 5

Doe v. State,
189 P.3d 999 (Alaska 2008) 5

Does #1-5 v. Snyder,
834 F.3d 696 (6th Cir. 2016) 6, 7, 11

Graham v. Florida,
560 U.S. 48 (2010) 10, 13

Hatton v. Bonner,
356 F.3d 955 (9th Cir. 2004) 14

Huey v. Kansas,
No. 17-7282 (cert denied June 25, 2018) 6

In re C.K.,
182 A.3d 917 (N.J. 2018) 5, 11

In re C.P.,
967 N.E.2d 729 (Ohio 2012) 9, 10

In re J.B.,
107 A.3d 1 (Pa. 2014) 5

In re T.B.,
489 P.3d 752 (Colo. 2021) 7, 8, 11

In re T.H.,
913 N.W.2d 578 (Iowa 2018) 7, 11

Johnson v. Madigan,
880 F.3d 371 (7th Cir. 2018) 7

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 11

Meredith v. Kansas,
No. 17-7301 (cert denied June 25, 2018) 6

Millard v. Camper,
971 F.3d 1174 (10th Cir. 2020) 14

Miller v. Alabama,
567 U.S. 460 (2012) 13

People v. Betts,
968 N.W.2d 497 (Mich. 2021) 6, 11

Petersen-Beard v. Kansas,
No. 16-5367 (cert denied Oct. 3, 2016) 6

Roper v. Simmons,
543 U.S. 551 (2005) 13

Simmons v. Kansas,
No. 17-8003 (cert denied June 25, 2018) 6

Smith v. Doe,
538 U.S. 84 (2003) 4, 10, 11, 12, 14

Starkey v. Okla. Dept. of Corrections,
305 P.3d 1004 (Okla. 2013) 5

State v. Letalien,
985 A.2d 4 (Me. 2009) 6, 7, 11

State v. Petersen-Beard,
377 P.3d 1127 (Kan. 2016) 3, 7, 10

State v. Reese,
212 P.3d 260 (Kan. Ct. App. 2009) 8

State v. Williams,
952 N.E.2d 1108 (Ohio 2011) 5, 9, 10, 11

United States v. Juvenile Male,
670 F.3d 999 (9th Cir. 2012) 14

United States v. May,
535 F.3d 912 (8th Cir. 2008) 14

United States v. Parks,
698 F.3d 1 (1st Cir. 2012) 14

United States v. Under Seal,
709 F.3d 257 (4th Cir. 2013) 14

United States v. Young,
585 F.3d 199 (5th Cir. 2009) 14

Vasquez v. Foxx,
895 F.3d 515 (7th Cir. 2018) 14

Wallace v. State,
905 N.E.2d 371 (Ind. 2009) 5

Wingo v. Kansas,
No. 17-6790 (cert denied June 25, 2018) 6

STATUES

28 U.S.C. § 1257 1

Kan. Stat. Ann. § 22-4906 ..... 8, 9

Kan. Stat. Ann. § 38-2309 ..... 9, 13, 16

Kan. Stat. Ann. 2011 Supp. § 22-4906 ..... 2, 3

OTHER AUTHORITES

Hearing on H.B. 2322 before the H. Comm. on Corr. and Juv. Justice,
2011 Kan. Leg 2

Kan. Sess. L. 2011, Vol. II, ch. 95, § 6 ..... 2,3, 9

Sup. Ct. R. 10 ..... 4, 11

OPINIONS BELOW

The opinion of the Kansas Supreme Court is published at 495 P.3d 16 (2021). Pet. App. 1a-39a. The opinion of the Kansas Court of Appeals is published at 451 P.3d 877 (2019). Pet. App. 40a-56a.

JURISDICTION

The Kansas Supreme Court issued its decision on September 17, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

INTRODUCTION

The Kansas Supreme Court held that the Kansas Offender Registration Act is not punitive in nature and determined that an extension in the length of registration can be applied retroactively to a juvenile offender who was subject to registration requirements at the time of sentencing. Petitioner argues such retroactive extension of the registration period violates the Ex Post Facto Clause and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution. Petitioner's arguments do not merit further review. There is no split of authority among lower courts, the Kansas Supreme Court correctly applied the governing legal standard, and this case is a poor vehicle to consider the question in any event.

STATEMENT

A. Petitioner's Juvenile Adjudication

Petitioner was adjudicated of one count of rape as a juvenile offender on August 11, 2006. Pet. App. 3a; R. IX, 12-13.[1] Petitioner was fourteen at the time, and the victim was either six or seven. R. IX, 6-7.

The Kansas registration statute in effect at the time permitted the sentencing judge to choose whether registration would be public or not, and the term of registration was five years from the date of adjudication. Pet. App. 3a. On November 9, 2006, Petitioner was ordered to register as a sex offender, but the court ordered the registration would not be public. R. IX, 14-15. Thus, Petitioner was originally required to register until August 11, 2011, at which time Petitioner would have been nineteen.

On July 1, 2011, the Kansas Legislature amended the Kansas Offender Registration Act (KORA) to bring it in line with the federal Sex Offender Registration and Notification Act (SORNA). *See* Hearing on H.B. 2322 before the H. Comm. on Corr. and Juv. Justice, 2011 Kan. Leg. The registration period for a juvenile adjudication for rape, where the juvenile was between fourteen and seventeen at the time the offense was committed, changed from five years to the offender's lifetime. *See* Kan. Stat. Ann. 2011 Supp. § 22-4906(h); *see also* Kan. Sess. L. 2011, Vol. II, ch. 95, § 6, pp. 1302-1311; Pet. App. 3a. Petitioner therefore became subject to a lifetime registration requirement. However, the statute did not expressly mandate that a

[1] References to "R." are to the appellate record below.

previously unpublished juvenile offender registration become public. Kan. Stat. Ann. 2011 Supp. § 22-4906(f), (h); *see also* Kan. Sess. L. 2011, Vol. II, ch. 95, § 6, pp. 1309-1310. From the Respondent's research, as of the date of this filing, it appears Petitioner's registration information is not publicly available on either the Kansas offender registry or the national offender registry.

B. Petitioner's Offender Registration Case.

In 2017, Petitioner was charged with four counts of failing to comply with registration requirements. Pet. App. 3a. Petitioner filed a motion to dismiss, arguing the 2011 modifications to the offender registration statute violated both the Kansas and federal constitutional provisions against cruel and unusual punishment and the Ex Post Facto Clause of the United States Constitution as applied to him. *Id.* at 4a; *see also* R. I, 45-60.

At the hearing on the motion to dismiss, Petitioner introduced two affidavits. Pet. App. 4a. One affidavit was from Petitioner and the other from his fiancée. *Id.*; *see also* R. IX, 1-2. The affidavits detailed the hardships and difficulties offender registration imposed on Petitioner and his family. Pet. App. 4a; *see also* R. IX, 1-2. Specifically, Petitioner argued offender registration constituted punishment because it had resulted in hardship in obtaining housing, difficulties obtaining employment, financial strain, being ostracized by friends and neighbors, depression, attempts at suicide, and fear for his family's safety. Pet. App. 4a; s*ee also* R. IX, 1-2.

The district court denied the motion to dismiss. In doing so, it relied on the Kansas Supreme Court's decision in *State v. Petersen-Beard*, 377 P.3d 1127 (Kan.

2016), which applied the so-called "intent-effects" test from *Smith v. Doe*, 538 U.S. 84 (2003), to hold that KORA lifetime registration requirements do not constitute punishment. Pet. App. 4a-5a. The district court made no factual findings as to the information submitted by Petitioner and his fiancée. *Id.* at 10a.

The Kansas Court of Appeals upheld the district court's decision, and the Kansas Supreme Court granted review. *Id.* at 5a. Petitioner argued the lifetime registration requirements were unconstitutional as applied specifically to him as a juvenile offender. *Id.* Petitioner made no categorical argument regarding the constitutionality of offender registration as applied to all juvenile offenders. *Id.* at 5a-6a.

The Kansas Supreme Court noted that to succeed on either of Petitioner's constitutional challenges, it would have to find the lifetime registration requirement constituted punishment as applied to him. *Id.* at 6a. The court, however, ultimately held that the registration requirement did not constitute punishment as applied to Petitioner, and therefore the retroactive extension of KORA's requirements to Petitioner did not violate the Ex Post Facto Clause or the Cruel and Unusual Punishment Clause of the Constitution. *Id.* at 20a-21a.

ARGUMENT

This Court grants certiorari "only for compelling reasons." Sup. Ct. R. 10. Here, there is no split of authority, there is no need for guidance to state supreme courts, there is no need to correct any ruling of the Kansas Supreme Court, and this case is

not a good vehicle to address the questions presented. As such, there is no compelling reason to grant certiorari.

A. Lower Courts Are Not Divided.

Petitioner argues that there is a split of authority among lower courts regarding whether retroactive registration requirements for juvenile offenders constitute punishment. Pet. 12-14. Petitioner is wrong. Many of the cases Petitioner cites were resolved under state constitutions while others involved materially different registration schemes and therefore do no conflict with the Kansas Supreme Court's decision below.

First, most of the cases Petitioner cites are inapplicable because they were resolved under state constitutions—not the U.S. Constitution. In those cases, state courts held that retroactive application of registry requirements violated various unique provisions of the applicable state constitutions. *See In re C.K.*, 182 A.3d 917, 933-34 (N.J. 2018); *Doe v. State*, 111 A.3d 1077, 1089-90 (N.H. 2015); *In re J.B.*, 107 A.3d 1, 14-16 & n.26 (Pa. 2014); *Doe v. Dept. of Public Safety & Corr. Services*, 62 A.3d 123, 130-32 (Md. 2013); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004, 1030 (Okla. 2013); *State v. Williams*, 952 N.E.2d 1108, 1110-13 (Ohio 2011); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008). In fact, many of these courts specifically explained that they were interpreting their state constitutions more broadly than the U.S. Constitution. *See, e.g.*, *Doe*, 62 A.3d at 132 ("We are persuaded, in the present case, to follow our long-standing interpretation of the *ex post facto* prohibition and depart from the approach taken by the United States Supreme Court . . . ."); *Starkey*, 305 P.3d at 1021 ("How we apply

the 'intent-effects' test is not governed by how the federal courts have independently applied the same test under the United States Constitution . . . ."). Petitioner's case, of course, arises under the U.S. Constitution and does not implicate any of those state constitutional holdings.

Second, several cases cited by Petitioner relate to the constitutionality of offender registration generally and not the question presented by Petitioner—the constitutionality of offender registration as applied to juveniles. *See People v. Betts*, 968 N.W.2d 497, 503-04 (Mich. 2021); *Does #1-5 v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009). This Court has repeatedly denied certiorari on the former question in cases from the Kansas Supreme Court. *See Simmons v. Kansas*, No. 17-8003 (cert denied June 25, 2018); *Meredith v. Kansas*, No. 17-7301 (cert denied June 25, 2018); *Huey v. Kansas*, No. 17-7282 (cert denied June 25, 2018); *Wingo v. Kansas*, No. 17-6790 (cert denied June 25, 2018); *Petersen-Beard v. Kansas*, No. 16-5367 (cert denied Oct. 3, 2016).

As Kansas explained in responding to those petitions, courts' differing conclusions as to whether offender registration constitutes punishment are attributable to material factual differences between offender registration schemes, not conflicting applications of the law. *See* Brief in Opposition at 14-18, *Simmons*, No. 17-8003; Brief in Opposition at 18-22, *Meredith*, No. 17-7301; Brief in Opposition at 16-20, *Huey*, No. 17-7282; Brief in Opposition at 6-8, *Wingo*, No. 17-6790. For instance, the Michigan offender registration law at issue in *Snyder* and *Betts* involved a geographic restriction—prohibiting the offender from living, working, or loitering

within 1,000 feet of a school—that made it practically impossible for an offender to find a place to live or work. *See Snyder*, 834 F.3d at 701-02. This sort of geographic restriction is entirely absent from both KORA and SORNA, a factor that easily distinguishes the result in *Snyder* (and similar cases) from the one repeatedly reached by the Kansas Supreme Court. *See Petersen-Beard*, 377 P.3d at 1135 (KORA contains no residency restriction); *see also Johnson v. Madigan*, 880 F.3d 371, 375 (7th Cir. 2018) (distinguishing *Snyder* on this basis). Likewise, *Letalien*, 985 A.2d at 8, 26, was a basic retroactivity case not involving a juvenile, and is not persuasive on the question presented here.

Third, only two cases have found juvenile offender registration punitive under the federal constitution, *In re T.B.*, 489 P.3d 752, 772 (Colo. 2021), and *In re T.H.*, 913 N.W.2d 578, 596-97 (Iowa 2018), but they likewise involve materially distinguishable laws. Similar to the Michigan law at issue in *Snyder*, the Iowa law at issue in *T.H.* included exclusion zones, employment restrictions, and residency restrictions, none of which exist under KORA. 913 N.W.2d at 585-86. The *T.H.* court's holding that the specific features of Iowa's law constitute punishment does not conflict with the Kansas Supreme Court's holding that the very different provisions of KORA do not.

The same is true of *T.B.*, in which the Colorado Supreme Court held that a Colorado law that mandated lifetime sex offender registration for juveniles with multiple adjudications constituted punishment for purposes of the Eighth Amendment. 489 P.3d at 765-69. The Colorado Supreme Court described the Colorado law—which required registration regardless of the juvenile's age—as an

outlier. *Id.* at 769-70; *see also id.* at 755 (noting the juvenile in question committed the first of his two offenses triggering mandatory registration when he was eleven). The court noted that many other states "do not require registration for offenses committed by juveniles under the age of fourteen," while others "allow courts discretion in determining whether to require registration for juveniles who have committed all but the most serious offenses." *Id.* at 769. Unlike the Colorado law at issue in *T.B.*, KORA does not mandate registration for any offense committed by a juvenile under fourteen, s*ee* Kan. Stat. Ann. § 22-4906(f), and it permits the sentencing court discretion in whether to require registration for juveniles over fourteen unless they have committed all but the most serious offenses, *id.* § 22-4906(g). KORA also does not mandate lifetime registration due to multiple juvenile adjudications, the provision found to be punishment in *T.B. See id.* § 22-4906(c); *State v. Reese*, 212 P.3d 260, 261 (Kan. Ct. App. 2009).

In concluding that mandatory lifetime registration is punishment, the *T.B.* court relied on the fact that under Colorado law, sex offender registration led to public dissemination of information about juvenile adjudications that would otherwise be confidential, and the court distinguished this Court's decision in *Smith* on this basis. *T.B.*, 489 P.3d at 767 ("[*Smith*] involved adult offenders, whose convictions are 'already a matter of public record.' Not so for juvenile offenders." (citation omitted)). But in Kansas, juvenile adjudication information, including "the complaint, process, service of process, orders, writs and journal entries reflecting hearings held,

judgments and decrees entered by the court" are public records. Kan. Stat. Ann. § 38-2309(a)-(b).

By contrast, juvenile offender registration often is not public in Kansas. For juvenile offenders under fourteen and those older than fourteen who have committed all but the most serious crimes, the juvenile court may require that registration remain private, in which case "such registration information shall not be open to inspection by the public or posted on any internet website." Kan. Stat. Ann. § 22-4906(f)(3), (g)(3). Petitioner's registration status is private by order of the juvenile court and not currently publicly available online on either the Kansas or national offender registry database. R. IX, 14-15. While the registration term for Petitioner's rape adjudication changed in 2011, the private status of his registration did not. *See* Kan. Sess. L. 2011, Vol. II, ch. 95, § 6, pp. 1309-1310. Because KORA, especially in Petitioner's case, is materially different from the Colorado law at issue in *T.B.*, there is no conflict.

Petitioner also cites *In re C.P.*, 967 N.E.2d 729 (Ohio 2012), which held that "the Eighth Amendment forbids the automatic imposition of lifetime sex-offender registration and notification requirements" for certain juvenile offenders. *Id.* at 744. But the Ohio Supreme Court did not address the preliminary question of whether offender registration constitutes punishment, which was the basis of the Kansas Supreme Court's decision below. Rather, the court began with the holding in its prior decision in *Williams* that the law was punitive and then proceeded to determine whether the punishment was cruel and unusual. *Id.* at 734 (quoting *Williams*, 952

N.E.2d at 1112, for the proposition that "[f]ollowing the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive"); *id.* at 753 (O'Donnell, J., dissenting) ("The majority opinion begins with the premise that R.C. Chapter 2950 is punitive and then it applies the two-part analysis discussed by the Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010)."). But, as noted above, *Williams* was decided exclusively on state constitutional grounds. *See* 952 N.E.2d at 1110 ("Because we conclude that S.B. 10 violates the Ohio Constitution, we need not discuss whether S.B. 10 also violates the United States Constitution."). *C.P.* therefore does not conflict with the Kansas Supreme Court's analysis on any federal question.

Simply stated, there is no split of authority on the questions presented by Petitioner.

B. This Court's Applicable Precedents Are Clear.

Petitioner next asserts state supreme courts are in need of guidance as to what legal test to utilize when faced with a question of whether juvenile offender registration requirements are punitive. Pet. 14-16. But this Court answered that question long ago.

In *Smith*, this Court made clear that the determination of whether a statute is considered punitive for purposes of the Ex Post Facto Clause or the Eighth Amendment is governed by what lower courts have often referred to as the "intent-effects" test. *See Petersen-Beard*, 377 P.3d at 1130. Courts must first determine if the intent of the legislature was to impose punishment or to enact a civil, nonpunitive regime. *Smith*, 538 U.S. at 92. If the latter, courts then examine whether the effects of the statute are so punitive as to override the State's intent to deem it civil, but

"only the clearest proof will suffice." *Id.* (internal quotation marks and citation omitted). This inquiry relies on the seven factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the "most relevant" of which this Court described as whether the challenged scheme "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.

The Kansas Supreme Court below applied this test, Pet. App. 6a-18a, as did all of the cases Petitioner cites in support of his alleged split that addressed whether offender registration constitutes punishment for purposes of the U.S. Constitution. *See Betts*, 968 N.W.2d at 507-08; *T.B.*, 489 P.3d at 765; *T.H.*, 913 N.W.2d at 587-88; *Snyder*, 834 F.3d at 700-01; *Letalien*, 985 A.2d at 18-26.

Only the courts in *C.K.*, 182 A.3d at 933-34, *Doe*, 62 A.3d at 130-32, and *Williams*, 952 N.E.2d at 1110-13, did not apply the intent-effects test and the *Mendoza-Martinez* factors, and all of those cases were resolved under the applicable state constitutions.

In short, Petitioner has failed to demonstrate any confusion as to the federal standard or any need of guidance from this Court.

C. The Kansas Supreme Court Correctly Applied This Court's Precedents.

While "misapplication of a properly stated rule of law" is rarely a basis for certiorari, Sup. Ct. R. 10, the Kansas Supreme Court not only correctly identified the proper legal standard, it correctly applied it in this case. Petitioner argues the Kansas

Supreme Court's decision was wrong because it ignored science and research supporting Petitioner's argument that juvenile offenders are categorically different from adult offenders. Pet. 16-17. But as the Kansas Supreme Court noted, Petitioner's argument on appeal was that KORA was unconstitutional *as applied to him*—not to juveniles more broadly. *See* Pet. App. 5a-6a. While Petitioner referred to various studies in his appellate briefing, that was the first time those studies had been presented to any court in this case. They were not presented to the state district court, which could have made the factual findings necessary for review of Petitioners' legal assertions.

Rather than getting bogged down in inappropriate appellate fact finding, the Kansas Supreme Court noted that both it and this Court have held offender registration is not punitive, and then proceeded to address Petitioner's challenge under the two *Mendoza-Martinez* factors Petitioner raised: affirmative disability or restraint and excessiveness. *Id.* at 11a-18a. The Kansas Supreme Court got the analysis right under both factors.

As to affirmative disability or restraint, the Kansas Supreme Court found that Petitioner failed to establish how public offender registration posed any obstacles different from those posed by having a felony level sex offense on one's criminal record. *Id.* at 11a-12a. This reasoning is in line with this Court's holding in *Smith*. 538 U.S. at 101 ("Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of

conviction, already a matter of public record."). As the Kansas Supreme Court explained, Petitioner's juvenile adjudication is a public record, Kan. Stat. Ann. § 38-2309(a)-(b). And, although the Kansas Supreme Court did not appear to recognize this fact, Petitioner's offender registration remains unpublished as noted above.

As to excessiveness, the Kansas Supreme Court found the argument centered on "public dissemination of [Petitioner's] information" and thus failed for much of the same reasons as the affirmative disability or restraint factor. Pet. App. 13a. The Kansas Supreme Court then turned to Petitioner's argument that juveniles are different from adults in terms of potential for rehabilitation and reform as it applies to punishment, an argument based on this Court's decisions in *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), *Graham v. Florida*, 560 U.S. 48, 74 (2010), and *Miller v. Alabama*, 567 U.S. 460, 465 (2012). Pet. App. 13a-16a. But the court found Petitioner's reliance on those cases to be "circular" as Petitioner could not establish the effects of KORA were punitive as applied to him. *Id.* at 15a ("Unless [Petitioner] first establishes that registration is punishment, this line of cases arguably does not even apply to him."). Absent the clearest proof that registration constituted punishment, the Kansas Supreme Court correctly found Petitioner did not set forth any evidence to establish a punitive effect of offender registration that would negate KORA's regulatory intent.

This holding and analysis is consistent with this Court's holding in *Smith*, as well as an established line of federal circuit cases dealing with both juvenile and adult offender registration:

- *Millard v. Camper*, 971 F.3d 1174, 1184 (10th Cir. 2020) ("[W]e conclude that the Appellees have not presented the clearest proof of punitive effect, and that therefore CSORA is not punitive as applied to Appellees.");

- *Vasquez v. Foxx*, 895 F.3d 515, 520 (7th Cir. 2018) ("SORNA's registration regime for sex offenders is not penal in nature.");

- *United States v. Under Seal*, 709 F.3d 257, 264 (4th Cir. 2013) (holding a juvenile offender adjudicated for aggravated sexual abuse could not, "much less by the 'clearest proof,'" prove that SORNA's effects negated Congress' non-punitive intent);

- *United States v. Parks*, 698 F.3d 1, 5-6 (1st Cir. 2012) (joining "every circuit to consider the issue" by concluding that SORNA's registration requirements are not so punitive in effect as to constitute punishment);

- *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012) ("Although defendants understandably note that SORNA may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescent, the statute does not meet the high standard of cruel and unusual punishment.");

- *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009) (holding SORNA's express language shows that Congress sought to create a civil remedy, so the defendant must show that either the purpose or the effect of the regulation is in fact so punitive as to negate its civil intent which they cannot do);

- *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008) ("SORNA's registration requirement demonstrates no congressional intent to punish sex offenders."), *abrogated on other grounds*, *Reynolds v. United States*, 565 U.S. 432 (2012);

- *Doe v. Miller*, 405 F.3d 700, 723 (8th Cir. 2005) ("[W]e conclude that the [Appellees] have not established the 'clearest proof' that Iowa's choice [in sex offender residency restrictions] is excessive in relation to its legitimate regulatory purpose, such that a statute designed to be nonpunitive and regulatory should be considered retroactive criminal punishment.");

- *Hatton v. Bonner*, 356 F.3d 955, 967 (9th Cir. 2004) ("When we examine the seven *Mendoza-Martinez* factors, Petitioner cannot demonstrate through 'the clearest proof' that [California's sex-offender registration statute] is 'so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.'" (second alteration in original) (quoting *Smith*, 538 U.S. at 92)).

Consistent with all of these decisions, the Kansas Supreme Court correctly applied this Court's precedents in this case.

D. This Case Is A Bad Vehicle In Any Event.

Petitioner finally argues this case is an "ideal vehicle" for this Court to consider this issue. Pet. 24. That is incorrect for three reasons.

First, Petitioner's challenge below was not a facial challenge to KORA as applied to all juvenile offenders adjudicated of a registration offense; it was an as-applied challenge to the alleged punitive effects of registration on Petitioner himself. *See* Pet. App. 5a-6a ("[Petitioner] makes no specific argument in his petition for review or in his supplemental brief that KORA as applied generally to juvenile sex offenders is punitive for the purposes of accessing certain constitutional protections."). Thus, the Kansas Supreme Court's holding was limited to the constitutionality of KORA as applied to Petitioner. *Id.* at 20a ("KORA's mandatory lifetime registration requirements *as applied to* [*Petitioner*] are not punishment . . . . (emphasis added)); *see also id.* at 1a-2a (Syl. ¶¶ 1-3) (referring to KORA "as applied to the juvenile sex offender *in this case*" (emphasis added)). The Kansas Supreme Court did not address the categorical challenge that Petitioner now presents.

Second, the record in this case is not sufficiently developed to resolve Petitioner's claim as recast for this Court. While Petitioner provided information on the negative effects registration has had in his own life, Petitioner failed to develop a record by way of any expert witness testimony or studies regarding the alleged punitive nature of KORA and its specific effects on juveniles writ large. While Petitioner now makes various references to studies and reports demonstrating that

children are different from adults, none was provided to the state district court. Petitioner's brief to the Kansas Supreme Court did cite some studies, but that court cannot make the required factual findings.

Third, Petitioner's case does not present the same concerns that animate many offender registration cases. Both the petition and the dissent below take significant issue with the public dissemination of offender registration information, as do the vast majority of state court cases Petitioner relies on. But Petitioner's registration is private by judicial order, an order that apparently remains in effect. Any public shame or humiliation that Petitioner claims to be suffering is the result of the public record of his juvenile adjudication, *see* Kan. Stat. Ann. § 38-2309(a)-(b), not his offender registration. The fact that a *conviction* or *juvenile adjudication* results in hardships does not mean that *registration* is cruel and unusual punishment.

In sum, this case is not a good vehicle for this Court to address the questions presented by Petitioner.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
/s/ Brant M. Laue
BRANT M. LAUE
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
MICHAEL R. SERRA
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
brant.laue@ag.ks.gov

Counsel for Respondent

March 9, 2022