No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS LEE SHAFFER
Petitioner,

v.

STATE OF KANSAS,
Respondent.

On Petition for Writ of Certiorari
to the Kansas Supreme Court

Petition for Writ of Certiorari

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QUESTION PRESENTED

Do the cumulative burdens of the Kansas Offender Registration Act constitute punishment under the test set out in *Smith v. Doe*, 538 U.S. 84 (2003), such that retroactive application violates the Ex Post Facto Clause?

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PETITION FOR WRIT OF CERTIORARI

Dennis Shaffer respectfully petitions this Court for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The split opinion of the Kansas Supreme Court is unpublished at 499 P.3d 458. (Slip opinion included as Appendix A at Pet. App. 1a.) The opinion of the Kansas Court of Appeals is unpublished at 452 P.3d 405. (Slip opinion included as Appendix B at Pet. App. 7a.) The oral judgment of the state district court is unreported. R: 13: 9.

JURISDICTION

The Kansas Supreme Court issued its opinion on November 19, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 9, cl. 3:

"No Bill of Attainder or ex post facto Law shall be passed."

The entirety of the Kansas offender registration act, found within the Kansas code of criminal procedure at **Kan. Stat. Ann. § 22-4901 *et seq.***, is included at Pet. App. 175a.

STATEMENT OF THE CASE

The State of Kansas retroactively imposed a Kansas Offender Registration Act (KORA) obligation on Dennis Shaffer beginning in 2009, based on a conviction from Missouri in 1994. This was possible because of *Smith v. Doe*, 538 U.S. 84 (2003), which has emboldened the Kansas Legislature to enact seemingly limitless expansion of KORA. The Legislature has made substantive changes to the registration regime in 14 of the last 28 years, with almost every single change being applied retroactively. *See* Pet. App. 227a for a year-by-year breakdown of changes.

At this point, there are over 22,000 people in Kansas who are registrants; about half register because of a sex offense, with about 5,000 people each in the drug and violent categories. Report of the Judicial Council Advisory Committee on Sex Offenses and Registration, December 11, 2020, p. 30. "[N]o other category of individuals who have completed their criminal sentence, including any term of parole or supervised release, is subject to anything remotely similar" to the "package of burdens" imposed by registration regimes. Ira Mark Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. Pa. J.L. & Pub. Aff. 1, 8 (2021).

There must be a limit to how far *Smith v. Doe* can go, and Kansas has exceeded it. *Smith v. Doe* was decided before Congress enacted the Sex Offender Registration and Notification Act (SORNA) in 2006, a federal law plus a series of legally binding guidance issued by the Executive Branch, which consists of requirements for states to implement in their own registries. 34 U.S.C. § 20901, *et*

seq. Since 2006, registration requirements in different jurisdictions, including Kansas, have expanded exponentially, and the laws have become far more punitive. Notably, Kansas is the only state that has fully implemented all 14 areas of SORNA. *See* Information Sharing and the Role of Sex Offender Registration and Notification, Final Technical Report (2020), pps. 49, 174 (found at https://www.ncjrs.gov/pdffiles1/nij/grants/254680.pdf). In the other 17 states that are in substantial compliance, the legislatures tailored their registries to some degree. Not only did Kansas fully implement all 14 areas, but it (1) went beyond what SORNA requires and (2) applied the requirements to all types of registrants (sex, drug, and violent). This makes Kansas different from every other state.

Additionally, since *Smith v. Doe*, there has been an explosion of research, data, and studies on recidivism rates of people who have committed a sex offense, as well as the efficacy of registration schemes. That evidence suggests that registration does not create public safety—in fact, it undermines that goal. *See* Reasons for Granting the Petition, *infra*, at 18-21. This Court would have two decades of new information to consider when analyzing the *Mendoza-Martinez* factors. *See*, *e.g.*, Lindsay Strong, *The Kansas Offender Registration Act: Where's the Constitutional Limit?*, 66 U. Kan. L. Rev. 787, 807 (2018) ("The *Mendoza-Martinez* factors most affected by modern research would be KORA's rational relation to a non-punitive purpose and KORA's excessiveness in respect to its purpose").

Also emboldened by *Smith v. Doe*, the Kansas Supreme Court continues to give limitless deference to KORA as a civil regulatory scheme with no punitive

effects, despite being presented evidence to the contrary. Fortunately, lower courts taking the default position that *Smith v. Doe* controls over their state's registry conditions is waning. Since 2009, at least 13 state courts of last resort and the Sixth Circuit have held that offender registration statutes cannot be applied retroactively without violating prohibitions against ex post facto laws or cruel and unusual punishment. *See* Reasons for Granting the Petition, *infra*, at 16; *see also* Pet. App. 64a ("Across the nation, courts are creeping out of the shadow of *Smith* and declaring registration requirements punitive").

Because of the increasingly punitive nature of offender registration schemes, this Court should weigh in on whether KORA and similar schemes constitute punishment for purposes of the Ex Post Facto Clause. Although *Smith v. Doe* provided a framework, the statutory scheme in Alaska in 2003 was too different from the current landscape of offender registration requirements for its conclusion to be the guidance that courts and legislatures need now. Next year, KORA will be 30 years old. *Smith v. Doe* will be 20 years old. Now is the time for this Court to act.

A. The Kansas Offender Registration Act

1. The Kansas Legislature created the first offender registry act in 1993. The Habitual Sex Offender Registration Act required a person twice convicted of a sexually violent crime to register with the sheriff in the county where he/she lived for ten years. The information was open to law enforcement agencies only. 1993 Kan. Sess. Laws, ch. 253. On April 14, 1994, the Legislature expanded the Act to include people with first-time convictions and renamed it the Kansas Sex Offender

Registration Act. It allowed public access to registrants' information; interested parties had to go to the sheriff's office to access the information. 1994 Kan. Sess. Laws, ch. 107.

In 1997, the Legislature added people convicted of murder and manslaughter, and people with convictions for certain crimes with victims under age 18. The Act was renamed and has since remained the Kansas Offender Registration Act. 1997 Kan. Sess. Laws, ch. 181. Since 1997, additional sex offenses have been added to the definition of offender, and children adjudicated of certain sex offenses were added in 2002. 2002 Kan. Sess. Laws, ch. 55.

The Legislature broadened KORA further: in 2006, to include people convicted of any person felony [where a finding was made that] a deadly weapon was used," and in 2007, to include people convicted of manufacturing, possession of precursors, and drug distribution or possession with intent to distribute. 2006 Kan. Sess. Laws, ch. 214; 2007 Kan. Sess. Laws, ch. 183.

2. The registration periods for people convicted of sex offenses range from 15 years to lifetime, but most are lifetime. Kan. Stat. Ann. § 22-4906.

Although the original act permitted registrants to petition for early removal, now that process is expressly prohibited by statute. Kan. Stat. Ann. § 22-4908; 1999 Kan. Sess. Laws, ch. 164; 2001 Kan. Sess. Laws, ch. 208. 2011 Kan. Sess. Laws, ch. 95. Failing to comply with KORA is a mid-level felony or greater. Kan. Stat. Ann. § 22-4903; *see also* Reasons for Granting the Petition, *infra*, at 22-24.

3. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which was Title I of the Adam Walsh Child Protection and Safety Act. Pub. L. No. 109-248 (originally codified at 42 U.S.C. §16901, et seq.; now at 34 U.S.C. § 20901, et seq.). As a result, the Kansas Bureau of Investigation (KBI) formed the Offender Registration Working Group. In 2011, the Working Group, in conjunction with the KBI, introduced 2011 HB 2322. The stated purpose of the bill was to bring Kansas into "substantial compliance" with SORNA. *See*, *e.g.*, Testimony In Support of HB 2322, February 17, 2011, by Sg. Al Deathe, Douglas County Sheriff's Office ("HB2322 blends requirements of the Walsh Act with all the additional requirements the State of Kansas has added over the past three years"). If Kansas did not substantially implement the requirements of SORNA by July 27, 2011, it would lose ten percent of its Byrne Grant monies. *See* Testimony in Support of HB 2322, March 3, 2011, by Nicole Dekat, KBI. "[T]he KBI and the Working Group" also sought "changes that are not SORNA issues," including:

- "[r]estructuring the severity levels for violations" in order to "treat repeat offenders and absconders more harshly than first time violators" (i.e. first-time would be a severity level six instead of the current severity level five; second-time would be severity level five; and a third or subsequent conviction, or a violation lasting more than 180 days, would be a severity level three person felony);

- "Expanding venue to allow jurisdictions to better deal with the issues of noncompliant offenders"; and

- "Requiring that, during an offender's term of registration, no part of the offender's criminal record may be expunged. We believe that, because of the great scrutiny placed upon registered offenders, their complete criminal history should remain intact throughout the time they are required to register."

Additional components included allowing the court to require any person to register for an offense not otherwise required in KORA, make registration lifetime for anyone with two qualifying convictions (of any type), and requiring registrants to sign a registration form because it was "necessary for the efficient management of offender[s] under Kansas law and would provide necessary information for prosecution for noncompliance." Testimony in Support of HB 2322, March 3, 2011, by Dave Hutchings, KBI. There were many more changes in HB 2322, with the Group's suggestions outlined in the testimonies.

Incidentally, SORNA has nothing to do with drug or violent offenses, yet the Working Group applied all of its suggestions to all types of registrants. The proponents did acknowledge that SORNA "requires a tiered duration of registration of 15 years, 25 years, and lifetime registration," but the Working Group "prefer[red] to manage the program within a two-tiered system," *i.e.* 15 years or life. *Id.*

The House committee that heard the bill did a "gut and go", *i.e.* gutted a Senate bill and put the contents of HB 2322 into it, thus creating House Substitute for Senate Bill No. 37. Minutes of the House Corrections and Juvenile Justice Committee, March 16, 2011, p. 2. H. Sub. for SB 37 passed the House; there were no explanations of vote. Because the House used the "gut and go" procedure, the provisions of HB 2322-turned SB 37 were never heard on the Senate side. In other words, there was no hearing in Senate Judiciary, and the Senate as a whole did not debate the bill. The Senate's input was limited to three members who served on the conference committee. Eventually both chambers adopted a conference committee

report. House J. 2011, p. 1028-30; Sen. J. 2011, p. 759-60. There were no explanations of votes. The KORA overhaul became law.

4. Eventually, a number of registrants challenged the application of the 2011 amendments to their situations, arguing that retroactive application of the sweeping changes to them violated the Ex Post Facto Clause. After applying the factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to the 2011 KORA amendments, a majority (4-3) of one composition of the Kansas Supreme Court agreed that the 2011 version constituted punishment for the purposes of the Ex Post Facto Clause. *State v. Buser*, 304 Kan. 181, 371 P.3d 886 (2016); *State v. Redmond*, 304 Kan. 283, 371 P.3d 900 (2016); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016); Pet. App. 108a. (KORA, as amended in 2011, was punitive in effect and could not be applied retroactively to any registrant who committed the qualifying crime prior to July 1, 2011).

But on that *same day*, a majority of a one-justice-different composition of the Court overruled those three cases and held that lifetime sex offender registration was not punishment and, therefore, did not violate the Eighth Amendment prohibition against cruel and unusual punishment. *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016), *cert. den.* October 3, 2016; Pet. App. 66a. The majority cut and pasted the dissent from *Doe v. Thompson* and adopted it as its reasoning and basis for decision, which was "a faithful application of federal precedents requires us to find that the provisions of KORA at issue here are not punitive for purposes of applying our federal Constitution." Pet. App. 72a.

The following year, when faced with a strictly Ex Post Facto claim, the Court did no new analysis or discuss the differences in situation, and simply pointed to *Petersen-Beard*. *State v. Reed*, 306 Kan. 899, 900, 904, 399 P.3d 865 (2017) (*Petersen-Beard* did not involve retroactivity, while *Reed* did; six months before his time was set to expire, the 2011 amendments made Reed go from a 10-year registration period to lifetime).

In August and October 2020, the Court granted petitions for review in *State v. Davidson* and *State v. N.R.* Order, *State v. N.R.*, No. 119,796 (Kan. August 27, 2020); Order, *State v. Davidson*, No. 119,759 (Kan. October 16, 2020). Mr. Davidson had been convicted in 2002 of aggravated criminal sodomy and N.R. had been adjudicated of rape in 2006 when he was a child; both had lifetime registration periods and had been convicted of KORA noncompliance. Pet. App. 16a-17a, 32a. The Court had not granted a petition about the retroactive application of the Kansas Offender Registration Act since *Petersen-Beard* was decided.

On September 17, 2021, the Court decided *Davidson* and *N.R. State v. Davidson*, __ Kan. __, 495 P.3d 9 (2021); *State v. N.R.*, __ Kan. __, 495 P.3d 16 (2021), *petition for cert. filed*, Dec. 16, 2021 (No. 21-6719). The Court had not held oral argument in *Davidson*. The Court did no new analysis in its *Davidson* decision; it simply "reaffirm[ed] [its] holding in *Petersen-Beard* that KORA registration requirements are not punitive in purpose or effect. Accordingly, retroactive application of KORA provisions to Davidson does not violate the Ex Post Facto Clause of the United States Constitution." Pet. App. 23a. The majority claimed that

"Davidson presents essentially the same arguments this court considered and rejected in *Petersen-Beard*. He presents no new evidence or analysis." Pet. App. 22a. But as Mr. Shaffer discusses in the Reasons to Grant Review, the Court said it "had the briefing in *Shaffer* and considered it when we decided *Davidson*." Pet. App. 2a.

The majority—which included three members of the Court that reversed itself *on the same day* in 2016—also commented that "[t]hough not discussed by Davidson, the only change that has occurred since *Petersen-Beard* is that three new justices have replaced three retired justices on the court. But 'we should be highly skeptical of reversing an earlier decision where nothing has changed except the composition of the court. [Internal citation omitted.].'" Pet. App. 24a. The majority "[kept] in mind that '[w]e do not overrule precedent lightly and must give full consideration to the doctrine of stare decisis,'" and the dissent "[stood] firm in [its] belief that the oppressive and onerous requirements of offender registration are punitive. This case presents just another prime example." Pet. App. 22a, 26a.

In *N.R.*, the Court agreed the "affidavits establish that N.R. has suffered personal harm, violence, mental health issues, and embarrassment because of public dissemination of his registration information." Pet. App. 40a. And the majority "recognized that juveniles generally have a 'lower risk of recidivism' and that '[p]lacing lifetime restraints on a juvenile offender's liberties requires a determination that the juvenile will forever be a danger to society' and undermines juvenile rehabilitation." Pet. App. 41a-42a (discussing how it struck down as unconstitutional the mandatory lifetime postrelease supervision for children).

But then the majority characterized N.R.'s use of "the 'children are different' analysis" as a "circular" argument and a "red herring" because postrelease supervision and life without parole are "*punishment*", "*punishments*", or "*sentences*" (emphasis in original), "[b]ut under the current state of the law in Kansas, the KORA registration requirements are not punitive. *See Petersen-Beard* [citation omitted]. Because they are not punitive, the KORA registration requirements are not subject to the punishment analysis" set out in the Court's opinions. Pet. App. 42a-44a. The majority held that "KORA's mandatory lifetime registration requirements as applied to N.R. are not punishment and, as a result, do not violate the federal Ex Post Facto Clause or the prohibition against cruel and unusual punishment under the Eighth Amendment of the United States Constitution[.]" Pet. App. 47a.

The *N.R.* dissent began like this:

> For more than 15 years I have been a proud member of a court that has historically taken an unyielding stand against the degradation of rights guaranteed by our Constitution. . . .
>
> Today, I feel none of that pride. Today, the court eschews the United States Constitution and the citizens it stands to protect for reasons I cannot comprehend.

Pet. App. 50a. The dissent included research, data, real-world analysis, and a list of cases from other states where N.R.'s situation was decided differently. Pet. App. 54a-65a. The dissent concluded:

> N.R. is—very clearly—being punished by the Legislature's "civil scheme." The majority's refusal to acknowledge this is inexplicable. To put it plainly, in the words of my recently retired colleague, the majority's holding is "wrong-headed and utterly ridiculous. ... [I]n the real world where citizens reside,

> registration is unequivocally punishment." *State v. Perez-Medina*, 310 Kan. 525, 540-41, 448 P.3d 446 (2019) (Johnson, J., dissenting). Consequently, I would hold that N.R.'s lifetime registration requirement violates the Ex Post Facto Clause because it was enacted and imposed after N.R. committed the actions that led to his adjudication.

Pet. App. 65a.

B. Proceedings in the district court

The State charged Mr. Shaffer with one count of violating KORA. Pet. App. 8a. Mr. Shaffer opted for a bench trial, at which the parties stipulated that Mr. Shaffer had a registration obligation due to a conviction for first degree sexual abuse in June 1994 in Missouri. Pet. App. 8a (notably, this fact, nor the previous one, are not included in the Kansas Supreme Court's opinion; these facts come from the Court of Appeals' decision). Mr. Shaffer's trial exhibits included a letter from the Kansas Bureau of Investigation, dated December 18, 2009, informing Mr. Shaffer that

> [o]n June 16, 2009, the Missouri Supreme Court ruled that requirements under the Sexual Offenders Registration and Notification Act (SORNA) now apply to require registration even of offenders who were convicted prior to January 1, 1995. Therefore you are now required to register in Kansas in any County where you reside, work or attend an educational institution, per K.S.A. 22-4902.

(R. 15: 146.)

Mr. Shaffer argued that retroactively imposing KORA obligations on him violated the Ex Post Facto Clause of the U.S. Constitution. (R. 13: 5-6.) The court quickly ruled against the constitutional issue, and found Mr. Shaffer guilty as charged. (R. 13: 6-9.)

C. Proceedings in the Kansas appellate courts

1. Mr. Shaffer appealed to the Kansas Court of Appeals. He detailed the stark differences between KORA and the Alaska Sex Offender Registration Act (ASORA) at issue in *Smith v. Doe*, and analyzed how KORA implicates all seven of the *Mendoza-Martinez* factors used in *Smith v. Doe*. Brief of Appellant at 17-31, *State v. Shaffer*, No. 119,738 (Kan. Ct. App. March 25, 2019). *See also* Pet. App. 202a (a chart comparing ASORA statutes with 2011 KORA).

The Court of Appeals had no choice but to affirm Mr. Shaffer's conviction: "Shaffer's argument is premised upon the conclusion that *Petersen-Beard* was wrongly decided. Even if we would assume this to be true, we lack the authority to overrule precedent established by the Kansas Supreme Court." Pet. App. 15a. The Court concluded "Shaffer has adequately preserved this issue and is free to seek review by the Kansas Supreme Court and urge it to change its prior holdings. But since we rely on the binding precedent, we cannot grant the relief he seeks." Pet. App. 15a.

2. Mr. Shaffer filed a petition for review in the Kansas Supreme Court, where he again argued that requiring him to register under KORA violates the Ex Post Facto Clause of the U.S. Constitution. Appellant's Petition for Review, *State v. Shaffer*, No. 119,738 (Kan. December 23, 2019). On August 27, 2020, the Court granted Mr. Shaffer's petition as well as the one in *N.R.*; the Court granted the petition in *Davidson* on October 16, 2020. Order, *State v. Shaffer*, No. 119,738 (Kan. August 27, 2020); Order, *State v. N.R.*, No. 119,796 (Kan. August 27, 2020); Order, *State v. Davidson*, No. 119,759 (Kan. October 16, 2020).

As mentioned earlier, the Court had not granted a petition about the retroactive application of the Kansas Offender Registration Act since *Petersen-Beard*. Mr. Shaffer filed a supplemental brief using all 25 pages allowed, and attached almost 70 pages of charts and legislative history. Incidentally, the State did not file a response to Mr. Shaffer's petition or his supplemental brief. The State did not file a supplemental brief. At oral argument, the State did not challenge the validity of the information Mr. Shaffer put in his supplemental brief. Oral Argument at 36:37, *State v. Shaffer*, No. 119,738, March 31, 2021.

Five days after it issued its opinions in *N.R.* and *Davidson*, the Court ordered Mr. Shaffer to answer why the Court should not summarily affirm his case because "[i]t appears this [C]ourt's ruling in [*Davidson* and *Petersen-Beard*] are dispositive of this appeal." Show Cause Order, *State v. Shaffer*, No. 119,738, (Kan. September 22, 2021). In his response to the Court's order, Mr. Shaffer explained how he had provided the Court with information and analysis it (1) did not have at the time of *Petersen-Beard*, (2) could not have had, *i.e.* cases, research, and data that have come out since *Petersen-Beard*, and (3) did not receive from Mr. Davidson or Mr. Petersen-Beard. Response to this Court's Order dated September 22, 2021, *State v. Shaffer*, No. 119,738 (Kan. October 6, 2021). He also explained four reasons it would be error for the Court to affirm his case on the basis of adherence to *Davidson* and *Petersen-Beard* as precedent. *Id.*

On November 19, 2021, in a 6-page, unpublished opinion, the Court insisted it had considered all of Mr. Shaffer's arguments and authorities, yet "summarily

affirmed" Mr. Shaffer's conviction, merely stating: "Simply put, the additional information presented by Shaffer in his petition for review and his supplemental brief does not change the answer to the threshold question decided in *Petersen-Beard* and affirmed in *Davidson*: KORA is not punitive." Pet. App. 5.

The dissent referred back to the dissents in *N.R.* and *Davidson*, also noting:

> The majority here summarily dismisses the compelling arguments and authority offered in Shaffer's brief and attachments by simply stating it offers nothing new or the cases relied on miss the mark. Apparently, other States don't share my colleagues' assessment of Shaffer's data and research that the majority continues to reject. As I stated in my dissent in *Davidson*, it is time for this court to join the ranks of the many other courts that have rightfully recognized the punitive nature of registration requirements.

Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

A. Lower courts are divided over whether retroactive application of modern-day registration requirements violates the Ex Post Facto Clause.

Mr. Shaffer acknowledges that only one federal court of appeal has determined that SORNA's registration requirements cannot be constitutionally applied to people whose offense pre-dated the requirements, while at least nine have rejected ex post facto or cruel and unusual punishment claims. *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, __ U.S. __, 138 S. Ct. 558 (2017) (Michigan's registry imposes punishment); *see also Does v. Wasden*, 982 F.3d 784, 792 (9th Cir. 2020) (reversing trial court dismissal of claims that Idaho registry was punitive and violated ex post facto clause; trial court erred by "finding the outcome

of the *Smith* factors analysis controlled by precedent"); Pet. App. 72a-73a (for cases rejecting the issue).

But since the passage of SORNA in 2006, at least thirteen state courts of last resort have held generally that offender registration requirements cannot be applied retroactively without violating constitutional prohibitions. *See Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008); *People In Int. of T.B.*, 489 P.3d 752 (Colo. 2021); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); *In Int. of T.H.*, 913 N.W.2d 578 (Iowa 2018); Commonwealth v. Baker, 295 S.W. 3d 437 (Ky. 2009), *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.,* 62 A.3d 123, 137 (Md. 2013); *People v. Betts*, __ N.W. 2d __, 2021 WL 3161828 (Mich. 2021); *Doe v. State*, 111 A.3d 1077 (N.H. 2015); *State in Int. of C.K.*, 182 A.3d 917 (N.J. 2018); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011); *In re C.P.*, 967 N.E.2d 729 (Ohio 2012); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013); *In re J.B.*, 107 A.3d 1 (Pa. 2014).

The split is widening and will continue to do so as more courts "join the ranks of the many other courts that have rightfully recognized the punitive nature of registration requirements." Pet. App. 5a.

B. Only this Court can put a stop to what lower courts and legislatures have been using *Smith v. Doe* to justify for almost 20 years.

Smith v. Doe and *Petersen-Beard* are "the current state of the law" in this country and state, respectively. Pet. App. 36a. This presents "an uphill battle" for registrants, to say the least. Pet. App. 40a. Time after time, lower courts do not dig

into the facts, arguments, data, and research put before them, and instead fall back on *Smith v. Doe*.

That is what happened in this case, and *Davidson* before it. Instead of digging into the research and arguments, the majority simply affirmed the cases on the basis of *Petersen-Beard*, which in turn was decided on the basis of *Smith v. Doe*, which was contrary to three other cases decided the same day as *Petersen-Beard*. Pet. App. 5a, 24a, 76a-90a. Similarly, in *N.R.*, instead of digging into the new developments since *Petersen-Beard*, the Court presumed KORA wasn't punishment, as illustrated by putting words like "sentence" and "punishment" in italics. But emphasizing words does not analysis make. Pet. App. 42a-44a. Without guidance from this Court, what happened to Mr. Shaffer, Mr. Davidson, and N.R.—and to people litigating their issues in courts across the country—will continue, "leav[ing] one at a loss as to what, if any, condition KORA could create that the majority would consider onerous." Pet. App. 54a-55a. *See also* Pet. App. 227a (detailing the expansion of KORA's scope and requirements from 1993 to the present).

C. The decision below is wrong.

1. By sticking with *Petersen-Beard* and, therefore, *Smith v. Doe*, the *Shaffer* majority ignores that *Smith v. Doe* was decided in part based on what we now know is misinformation about adults who have been convicted of sex offenses. Pet. App. 101a (for discussion of statistics, including Ira and Tara Ellman's *"Frightening and High": The Supreme Court's Crucial Mistake about Sex Crime Statistics*, 30 Const. Comment 494, 504 [2015]).

We have seen other courts acknowledge this; for example, in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), the Sixth Circuit held Michigan's version of SORNA was punitive and could not be retroactively applied. To distinguish the regulatory scheme at issue in *Smith v. Doe*, the *Snyder* court noted that the sex offender statutes of two decades earlier were far more modest than the 2016 Michigan SORA. *Id.* at 700. In coming to its conclusion, the Sixth Circuit also relied on empirical studies not available to earlier courts, which contradicted the assumption that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.;" *Id.* at 704-05. *See also* Association for the Treatment of Sexual Abusers, Registration and Community Notification of Adults Convicted of a Sexual Crime: Recommendations for Evidence-Based Reform, 2020, Appx. B, "Legal Challenges and Rulings," pp. 16-19.

2. Many proponents of ramping up KORA have claimed it was for public safety. That rationale appears in *Smith v. Doe* and *Petersen-Beard*. *See*, *e.g.*, Pet. App. 87a-88a. But there is no definitive evidence that the registration regime does that. In fact, there is evidence that registration decreases overall public safety. With the exception of one article added here, all of the information below was presented to the Court in Mr. Shaffer's supplemental briefing.

As for SORNA, a 178-page report from February 2020 – titled Information Sharing and the Role of Sex Offender Registration and Notification, Final Technical Report (found at https://www.ncjrs.gov/pdffiles1/nij/grants/254680.pdf), does not conclude that sex offender registration and notification schemes actually improve

public safety. The Report cites to "studies [that] have detected modest effects, suggesting that [sex offender registration and notification systems] may be associated with reductions in sex crimes under certain conditions [citations omitted], while others have failed to find significant effects." *Id.*, p. 23. The report says studies in 2010 and 2016 "concluded that SORNA's conviction-based classification system is ineffective in identifying those at highest risk of re-offending." *Id.*, p. 26-28.

Another federally-funded, DOJ-published report from 2011 contained even stronger language, concluding that:

- "Despite the fact that our legal responses to sex offenders, primarily sex offender registration and notification (SORN), are based on assumptions that those who commit sex crimes have no control over their sexual impulses and will repeat their crimes again, relatively little research has found support for such beliefs."

- "SORN is premised on the idea that by making information public about identities, and residential locations, of known sex offenders, the public will be better equipped to avoid situations in which these offenders have possibilities to reoffend. The research evidence, though, does not support this belief."

- "There are also significant economic costs associated with [SORN], which produce little or no increase in public safety."

- "Further, there is a well-developed body of literature suggesting that sex offender registration and community notification has numerous costs in the form of collateral consequences for both sex offenders and their families [numerous citations omitted]. The importance of recognizing such collateral consequences is centered on the belief that such potentially deleterious effects on offenders may in fact contribute to sex offenders failing to register and to the related potential for recidivism [citation omitted], rather than facilitating community safety (the expressed purpose of SORN in the first place)."

Final Report on Sex Offenders: Recidivism and Collateral Consequences, September 30, 2011, pp. 1-2 (found at https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf).

If anything, registration requirements have the opposite effect on public safety. The 2020 Information Sharing and the Role of Sex Offender Registration and Notification, Final Technical Report explains many states' rationale for not substantially implementing SORNA and concerns expressed by state registry officials are because the minimum requirements of SORNA have the opposite effect on public safety:

- "[I]mplementing certain SORNA requirements [that are conviction-based rather than by risk assessment] would adversely affect the public safety efficacy of their SORN systems by restricting their ability to direct resources and attention toward those registrants who present more significant threats to public safety." *Id.*, p. 10 (*see also* p. 28-29).

- Constrained states' ability to adjust registry requirements for those determined to present minimal risk to the community. *Id.,* p. 10.

- Expanded the range of individuals subject to lifetime registration, which constrained states' ability to put focus on other offenders. *Id.*, p. 10.

- "[P]otential adverse public safety impacts related to the inclusion of adjudicated juveniles …. [S]tates expressed concern the juvenile registration might compromise the potential for these youth to effectively and safely integrate into society, thereby increasing rather than mitigating risk. *Id.*, p. 28-29.

Additional evidence that registration actually threatens public safety – for registrants, their families, victims, and the general public – includes:

- "[R]esearch has consistently shown that stable housing, secure employment and prosocial networks are all associated with lower rates of recidivism and increased desistence for people with a criminal conviction [citations omitted]…. Creating unnecessary and ineffective barriers for registrants to successfully reintegrate into society does not help registrants develop these identified protective factors or promote desistance." Association for the Treatment of Sexual Abusers, Registration and Community Notification of Adults Convicted of a Sexual Crime: Recommendations for Evidence-Based Reform, 2020, Appx. A, p. 15 (found at https://www.atsa.com/policy-papers/adultsorn).

- Registration and notification are ineffective at preventing sexual abuse – one study showed that "approximately 95% of prosecuted sexual crimes were committed by men never previously convicted of a sexual offense (i.e., men who would not have been on the registry)." *Id.*, p. 10. *See* also Ira Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. Pa. J. L. & Pub. Affs. 1, 19 (2021) ("One can't have much impact on the overall incidence of sexual offenses by concentrating efforts on a group that accounts for less than 5% of them").

- "In a review of eight individual surveys on [sex offender registration and notification's] impact on sexual offenders subject to it, Lasher and McGrath (2012) found that 8 percent of sex offenders reported physical assault or injury, 14 percent reported property damage, 20 percent reported being threatened or harassed, 30 percent reported job loss, 19 percent reported loss of housing, 16 percent reported a family member or roommate being harassed or assaulted, and 40 to 60 percent reported negative psychological consequences." Christopher Lobanov-Rostovsky, Sex Offender Management Assessment and Planning Initiative Research Brief, Adult Sex Offender Management, July 2015, p. 3.

- It may discourage reporting by victims for fear that "increased access to [the] information created by registration and notification laws makes it more likely that victims will be widely identified in their communities." Elizabeth Reiner Platt, *Gangster to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. of L. and Soc. Change, 727, 766 (2013).

As for KORA specifically, Mr. Shaffer knows of no research, reports, etc. on whether it is effective at public safety using any metric. All of this evidence (or lack thereof) points to a different outcome for KORA than ASORA in 2003, but the Court continues to follow *Smith v. Doe*.

3. *Smith v. Doe* instructs us to look at the entire statutory scheme to examine it for punitive effects. 123 S. Ct. at 1140. Mr. Shaffer respectfully contends that in *Petersen-Beard*, *Davidson*, and his case, the Court did not dive down to see how the scheme really operates. Instead, the Court "shrug[ged] its shoulders" at

what many registrants are required to do, and what can happen to them if they do not comply. Pet. App. 54a.

But we must consider how KORA plays out day to day. There are so many things we could look at (as shown in *Doe v. Thompson* and Pet. App. 227a), but to pick just one, consider how violations are handled. As seen in this case, if a registrant fails to timely comply with any duties under KORA, even unintentionally, they can be charged with a felony. Kan. Stat. Ann. § 22-4903. It was not always this way, though. From 1993 to mid-1999, failure to register was a nonperson misdemeanor. (In Kansas, most crimes are designated person or nonperson, which has a number of impacts, particularly in creating a person's criminal history score in a future case. *See* Kan. Stat. Ann. § 21-6809.) In 1999, the Legislature increased the penalty to the lowest-level nonperson felony. It remained that way until 2006, when the Legislature doubled the penalty for noncompliance and elevated it to a person felony. 2006 Kan. Sess. Laws, ch. 212.

As of July 1, 2011, KORA noncompliance is a mid-level felony (akin to arson or involuntary manslaughter, for example) for a first or second offense, and a high level felony (akin to aggravated robbery, for example) for a third or subsequent offense or a violation that lasts over 180 consecutive days. Kan. Stat. Ann. § 22-4903. In 2013, the Legislature created a new crime: unless a registrant has received a court-issued waiver of payment (for which there is no statutory process after the original finding of indigency), it is a Class A misdemeanor (the highest category) if a registrant does not pay the $20 registration fee that is owed when a registrant goes

in for the quarterly registrations. It is a low-level felony if two or more $20 payments have not been paid. 2013 Kan. Sess. Laws, ch. 127.

A special sentencing rule makes all noncompliance violations carry a presumptive prison sentence. Kan. Stat. Ann. § 21-6804(m). Failing to comply is a strict liability offense; the only other strict liability crime specifically designated by Kansas statute is driving under the influence. Kan. Stat. Ann. § 21-5202; Kan. Stat. Ann. § 21-5203. It is normal to have a registrant who is facing more time for noncompliance than what they faced for the offense for which they register.

All of this shows how KORA is punitive in effect. What's more, here are some real-life examples where people were prosecuted for violating KORA:

- You forgot to register on time, get there two weeks (or less) late, and none of your information has changed since your previous registration. What's more, they turn you away and tell you to come back another day to update your information because they don't take registrations on Mondays.

- Your apartment burned down, which law enforcement knows, but you failed to go tell them within three business days that you had to move.

- You work in a county that is different from where you live and you failed to register in that other county (but are compliant - and therefore all of your information is on a public website - in your home county).

- You are homeless and do not report as frequently as law enforcement tells you to (which can be more than quarterly, because you are homeless).

- You buy a new jet ski and forget to include it on your registration form.

- You register while in jail and get out the next day. This happens during your registration month. You don't go in to register again during that month.

- You permanently move away from Kansas to a state that does not require you to register. You let the sheriff's office know, but don't write the KBI.

- The conviction for which you register, which occurred years ago, involved the person who is still your adult girlfriend.

- The sheriff department calls you to say you are late on your registration that month. You promptly go down there to fill out your paperwork, which makes you compliant, after which they arrest you and charge you with a violation.

Again, KORA is punitive in effect. These scenarios do not make the public safer.

Furthermore, in this so-called "civil regulatory scheme," people do not experience civil consequences. For example, they are not fined if they violate. They don't lose their license to do business. Instead, they are charged with a felony against the state, and risk losing their liberty. In 2018, 325 people were convicted of KORA violations, with 116 of them going to prison. Report of the Judicial Council Advisory Committee on Sex Offenses and Registration, December 11, 2020, p. 21. In 2019, 442 people were in Kansas prisons serving time for KORA registration violations. *Id*. From about 2015-2020, the number of convictions for registration violations increased by almost 65%. *Id*.

In FY 2019, 327 people were convicted: 123 went to prison and 204 went on probation. The average length of stay in prison was 19 months. Prison Bed Impact Assessment on 2020 HB 2475, Kansas Sentencing Commission, January 30, 2020. In In FY 2021, 275 people were convicted (during a pandemic): 91 went to prison, and the average sentence length was 28 months. Prison Bed Impact Assessment on 2022 HB 2515, Kansas Sentencing Commission, February 3, 2022.

How KORA noncompliance is handled and the penalties for it are a clear indicator that KORA is punishment in effect.

D. Now is the time for this Court to consider this important and recurring issue, and this case is an ideal vehicle to do so.

Mr. Shaffer's case is illustrative of an ongoing, national, constitutionally significant problem. This Court's review is the only way Mr. Shaffer and thousands of other people in Kansas (not to mention other states and jurisdictions) have any chance to receive consideration of the issues they present that are driven by research, data, and lived experience.

The *Petersen-Beard* majority identified the "real question" in 2016 as "[a]re there convincing reasons to believe the United States Supreme Court would view KORA differently than it viewed the Alaska law in 2003 when it decided *Smith*?" Pet. App. 76a. Mr. Shaffer presented reasons to the Court why the answer is yes. In response, the Court summarily affirmed his case. Mr. Shaffer has presented reasons why now is the time for this Court to answer that question with yes. To borrow words from the *Petersen-Beard* dissent, "[we] [are clinging] to the belief that the persons who have been privileged to serve on our nation's highest Court will yield to the facts and give a closer look at whether our statutory scheme is rationally connected to the nonpunitive purpose of public safety and whether its terms and conditions are excessive in relation to that public safety purpose." Pet. App. 103a.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Jennifer C. Roth

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