NO.___

In the
Supreme Court of the United States

ROBERT M. ATWELL,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

INTRODUCTORY STATEMENT: The Petitioner is a registered sex offender in the State of Missouri, with two qualifying convictions. The first was in 1996 and the second in 2001. While visiting in Johnson City, Tennessee, in August of 2018, Petitioner accompanied his girlfriend to register her son for the first day of elementary school. Petitioner was arrested and subsequently convicted of felony violation of the Tennessee Sex Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 (the "TSORA"), T.C.A §40-39-201, *et seq*., which prohibits sex offenders from "be[ing]… on the premises of any…public school…." T.C.A. §40-39-211(d)(1)(A).

1. Was the Petitioner's arrest and conviction under the TSORA a violation of the Ex Post Facto Clause of the U.S. CONST., art. 1, sec. 10, cl. 1?

RELATED CASES

- *State of Tennessee v. Robert M. Atwell, Jr.*, Docket No. 44381, Criminal Court for Washington County Tennessee. Judgment of Conviction entered on July 8, 2020.

- *State of Tennessee v. Robert M. Atwell, Jr.*, Docket No. E2021-00067-CCA-R3-CD, Tennessee Court of Criminal Appeals, Opinion filed March 1, 2022.

- *State of Tennessee v. Robert M. Atwell, Jr.*, Docket No. E2021- 00067-SC-R11-CD, Tennessee Supreme Court, Order denying Application for Permission to Appeal entered on August 3, 2022.

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JURISDICTION

The order by the Tennessee Supreme Court denying Petitioner's Application for Permission to Appeal was entered on August 3, 2022. On motion by the Petitioner, the Tennessee Supreme Court recalled and stayed it's mandate to allow Petitioner to file this Petition for Certiorari by order dated August 19, 2022. This Court has jurisdiction of this case pursuant to 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

The Petitioner is a registered sex offender in the State of Missouri, with two qualifying convictions. The first was in 1996 and the second in 2001. While visiting in Johnson City, Tennessee, in August of 2018, Petitioner accompanied his girlfriend to register her son for the first day of elementary school. Petitioner was arrested and subsequently convicted of felony violation of the Tennessee Sex Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 (the "TSORA"), T.C.A §40-39-201, *et seq*., which prohibits sex offenders from "be[ing]… on the premises of any…public school…." T.C.A. §40-39-211(d)(1)(A).

The federal question the Petitioner is asking this Court to review was first raised in the Tennessee Court of Criminal Appeals (the "CCA") pursuant to the plain error rule as set forth in Tenn. R. Crim. P. 52(b). In its opinion ("Appendix A"), the CCA recited the five factors necessary for plain error review, as follows: (1) the record must clearly establish what

occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5), consideration of the error is necessary to do substantial justice. Appendix A, pp. 15a-16a. The CCA concluded that "Defendant has not established that he is entitled to plain error relief. Specifically, he has not demonstrated that a clear and unequivocal rule of law was breached or that a substantial right was adversely affected." *Id* at 16a. To reach that conclusion, the CCA incorrectly interpreted federal law; therefore, this Court has jurisdiction to review the judgment and TSORA's violation of the Ex Post Facto Clause.

REASONS FOR GRANTING THE WRIT

I. THE CCA DECIDED THAT THE TSORA, WHICH IN ALL RELEVANT RESPECTS IS LIKE EVERY OTHER STATE SEX OFFENDER REGISTATION STATUTE, DOES NOT IMPOSE PUNISMENT, AND THEREFORE DOES NOT VIOLATE THE EX POST FACTO CLAUSE OF THE U.S. CONSTITUTION, WHICH CONFLICTS WITH OTHER STATE COURTS OF LAST RESORT AND A UNITED STATES COURT OF APPEALS

A. The CCA's Opinion, Which the Tennessee Supreme Court Refused to Review, Decided An Important Federal Question In A Way That Conflicts With The Decision of A United States Court of Appeals

In the case *sub judice*, the CCA's opinion (Appendix A) conflicts with the holding of the Sixth Circuit in *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom.*, *Snyder v. Does #1-5*, 138 S. Ct. 55 (Oct. 2, 2017).

Writing in FEDERALIST NO. 44, James Madison condemned *Ex Post Facto* laws as "fluctuating policy…." He then went on to commend "[t]he sober people of America…[who] have seen…that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference

being naturally produced by the effects of the preceding."

Madison's prescient prose could not more accurately describe the enactment, and incessant amendment, of state sex offender registry laws. Initially enacted as helpful investigatory tools for law enforcement, rapacious legislators hungry for sound bites to demonstrate their commitment to law and order, have used the amendment process to pass soul-crushingly more burdensome requirements each legislative session.[1] One favorite such amendment is this: that sex offenders whose convictions occurred prior to the enactment of a registry law, are nevertheless required to register and become subject to the laws increasingly onerous terms, as well as its penalties. This modern-day phenomenon is rooted in the fear that unless every living sex offender, no matter how long ago they were convicted, is swept into the registry system, society is unsafe. Such has been the proffered justification behind legislative overreach, abuse of power, and violation of the Constitution since the founding of the Republic.[2]

When this Court decided its first sex offender registry case, *Smith v. Doe*, 538 U.S. 84, 123 S.Ct.

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[1] "Today, hundreds of thousands of individuals are subject to a social control method that was unimaginable a little over twenty-five years ago." Wayne A. Logan, *Challenging the Punitiveness of "New-Generation" SORN Laws*, 21 New Crim. L. Rev. 426, 426 (2018).

[2] *See, e.g.*, The Alien and Sedition Acts of 1798. To avoid a charge of false equivalency, undersigned counsel is simply making the point that acting out of irrational fear against an entire group, without any provision for individual assessment, inevitably leads to violating the Constitution.

1140, 155 L.Ed.2d 164 (2003), the issue before the Court was succinctly stated by Justice Kennedy as follows: "We must decide whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause." *Id.* at 89. A majority of the Court held that, "The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause." *Id*. at 105-06. In the ensuing 19 years, however, "an important shift has occurred in the views of state and lower federal courts, which have increasingly found fault with 'new generation' SORN laws, which in many respects are more expansive and onerous than those condoned by [this] Court [in *Smith*] in 2003."[3] Indeed, in 2016, when the Sixth Circuit held Michigan's law unconstitutional against the backdrop of the *Ex Post Facto* Clause, the court pointedly noted that Michigan's sex offender registry law was "something altogether different from and more troubling than Alaska's circa 2000 first-generation registry law." *Does #1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub nom*., *Snyder v. Does #1-5*, 138 S. Ct. 55 (Oct. 2, 2017).[4]

In a challenge to the TSORA on *ex post facto* grounds in 2019, the defense cited several prior cases that upheld the Tennessee registry law as

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[3] Logan, *supra* note 1 at 429.

[4] In point of fact, despite this Court's conclusion in S*mith v. Doe, supra*, that the Alaska registry law did not violate the U.S. *Ex Post Facto* Clause, the Alaska Supreme Court subsequently held that the Alaska registry law did violate the *ex post facto* provision in the Alaska Constitution. *Doe v. State*, 189 P.3d 999 (2008).

regulatory.[5] Rejecting the applicability of those cases, the District Court noted that "those cases involved earlier versions of the [TSORA], fairly described as '*first generation*' registry laws which simply required sex offenders to register." *Doe v. Rausch*, 382 F.Supp.3d 783, 794 (E.D. Tenn.) (emphasis added). The District Court went on to hold that the plaintiff was entitled to relief on *Ex Post Facto* grounds on an as-applied basis. *Id*. at 799-800.

In the instant case, the Petitioner contended that his arrest, prosecution, and conviction, all violated the *Ex Post Facto* Clause of the U.S. Constitution, and should be reviewed as plain error. The CCA found that Petitioner had not met two of the five elements necessary to invoke plain error review: (i) that a clear and unequivocal rule of law had been breached; and (ii), that one of his substantial rights was adversely affected by TSORA. The CCA was called on to interpret federal law to make its ruling, and in so doing misinterpreted both the Constitution and applicable federal caselaw. At no point did the CCA posit that there was any question as to the retroactivity of TSORA, but instead concluded that TSORA did not inflict punishment on the Petitioner. Petitioner was appealing a conviction under TSORA that resulted in his being sentenced to 90 days imprisonment, Appendix B, p. 33a, in a Tennessee Department of Corrections institution. Appendix C, p.

[5] "In support of his position, Defendant relies on *Smith v. Doe* …, *Doe v. Bredesen*, 507 F.3d 999 (6th Cir. 2007) …, and *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1997), the latter two which considered and rejected Ex Post Facto challenges to prior iterations of Tennessee's sex offender registration law." *Doe v. Rausch*, 382 F.Supp.3d 783, 793 n.3 (E.D. Tenn. 2019).

36a. Petitioner argued that the *Ex Post Facto* Clause contained in the U.S. Constitution is an unequivocal rule of law, and that his right to liberty was substantial and adversely affected by TSORA.

In support of his plain error argument, the clear and unequivocal rule of law that Petitioner argued had been breached was the U.S. Constitution's *Ex Post Facto* Clause itself. In an attempt to counter that contention, the CCA stated: "Tennessee's SORA laws have consistently been upheld against ex post facto challenges …," (Appendix A, 18a) and then proceeded to support that conclusion by citing from an unreported 2010 decision by the Tennessee Court of Appeals which erroneously claimed Tennessee's sex offender registry was upheld by this Court in *Smith v. Doe*, and which contained a string cite that included *Doe v. Bredesen* and *Cutshall v. Sundquist*,[6] the precedential value of which had been rejected by the U.S. District Court two years previously because of the vast changes to the TSORA after those cases were decided. *Doe v. Rausch*, 382 F.Supp.3d at 794. *See also Doe v. Rausch*, 461 F.Supp.3d 747 (E.D. Tenn. 2020).

The CCA also declined plain error review by holding that Petitioner "failed to show that one of his substantial rights was adversely affected by Tennessee's SORA." Appendix A, 21a. The CCA stated: "Although Defendant argues in his brief that the restrictions and reporting requirements of

[6] *John Doe v. Robert E. Cooper, Jr. as Attorney General for the State of Tennessee*, No. M2009-00915-COA-R3-CV, 2010 WL 2730583, at *7 (Tenn. Ct. App. July 9, 2010) *perm. app. denied* (Tenn. Dec. 7, 2010). Appendix A, 18a-19a.

Tennessee's SORA have the effect of punishment, he does not allege how the SORA, as applied to his particular circumstances, violates the Ex Post Facto Clause." Appendix A, 21a. The CCA concluded that since Petitioner was visiting Tennessee from Missouri, and had no children in Tennessee, that TSORA did not prevent him from finding a house or job in Tennessee, or from parenting "any children outside of Tennessee." *Id*. at 22a. On that basis, the CCA held "any challenge to the SORA is moot." *Id*. at 22a. With all due respect, the most important and overarching argument advanced by Petitioner in both his brief, and during oral argument before the CCA, was that his liberty interest was violated by being arrested, convicted, and sentenced to a term of imprisonment, under a statutory scheme that did not exist when he was convicted of sex offenses in Missouri. Other than life, there is no more "substantial right" to be vindicated in American jurisprudence than liberty. U.S. CONST., amend. V & XIV.

Surprisingly, the CCA totally dismisses the Sixth Circuit's holding in *Snyder* by failing to substantively address it, as follows:

> Although the Court of Appeals for the Sixth Circuit in *Does #1-5 v. Snyder* (citation omitted), which Defendant relies on in support of his argument, held that Michigan's SORA constituted an ex post facto violation as applied to five sex offenders in Michigan, this does not create a clear and unequivocal rule of law that

> the Tennessee SORA on its face violates the Ex Post Facto Clause.

Appendix A, pp. 19a-20a. While Petitioner specifically articulated why the Michigan statute in *Snyder* was comparable to the TSORA, and that, therefore, the holding in *Snyder* was applicable to TSORA, the CCA did not attempt to distinguish *Snyder*, but simply ignored it. The CCA stated its conclusion, as set out above, without explanation. With all due respect, the CCA refused to address the elephant in the courtroom, that the *Ex Post Facto* Clause is most certainly a clear and unequivocal rule of law, and that the TSORA inflicts punishment. In its failed attempt to justify holding that the *Ex Post Facto* Clause is not a clear and unequivocal rule of law, the CCA rejected the clear analysis contained in *Snyder* construing when a sex offender registry law inflicts punishment.

The CCA narrowly focused on language in *Snyder* dealing with restrictions on where registrants could live and work, and then declared "nothing in the record indicated that [Petitioner] was unable to find a house or job due to the SORA …." Appendix A, p. 22a. The anomaly inherent in the CCA's Opinion is that geographic restrictions on where a sex offender can live and work, were recognized by the court as indices of punishment, as set forth in *Snyder*, but the obvious and incontrovertible punishment faced by Petitioner, imprisonment, though strenuously argued, was ignored.

This judicial straining out a gnat to swallow a camel conflict with the decision of a United States Court of Appeals. Sup. Ct. R. 10(b). Most importantly

for this Petition, the Tennessee Supreme Court's failure to grant a discretionary appeal (Appendix D, p. 37a), leaves the CCA Opinion (Appendix A) undisturbed, and perpetuates that conflict.

One of the ways in which the judiciary has acknowledged the importance of separation of powers is the judicial restraint inherent in giving deference to the legislative branch of government in matters of law-making; however, that deference has limits.[7] And concepts of federalism are always present when the federal judiciary is asked to review state statutes, or state court decisions interpreting those statutes, against allegations that the U.S. Constitution is being transgressed. Nevertheless, sometimes judges must go where angels fear to tread. This case presents such a scenario.

The proliferation of state sex offender registry laws was in large part a response to Congressional action that threatened the loss of federal funding for states that failed to enact such laws with "minimal" standards. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C §14071 (1994); Megan's Law, 42 U.S.C. §14071 (1996). By 1999, sexual offender registration laws had been enacted in all fifty states, the District

[7] One example of those limits was articulated by this Court, thus: "[A] Constitution that permits … allowing legislatures to pick and choose when to act retroactively, risks both 'arbitrarily and potentially vindictive legislation,' and *erosion of the separation of powers*,…." *Stogner v. California*, 539 U.S. 607, 611, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003)(emphasis added).

of Columbia, U.S. territories, and some tribal jurisdictions.[8]

The appetite for amending registry laws, by adding more and greater restrictions on where registrants can live and work, and even enjoy the out-of-doors (prohibitions on being in, on, or within certain distances of public parks, greenways or nature trails), has been developed by legislators emboldened by repeated challenges to the constitutionality of such amendments being turned back in court. In *Doe v. Rausch*, 461 F.Supp.3d 747 (E.D. Tenn. 2020), a case that held that TSORA violated the *Ex Post Facto* Clause on an as-applied basis, the court commented on a Tennessee Supreme Court opinion that warned of a day of reckoning, as follows:

> As a harbinger of this case and *forewarning to the Tennessee General Assembly*, the Tennessee Supreme Court explained that nothing in its opinion "preclude[d] the possibility that an amendment to the registration act imposing further restrictions may be subject to review on the grounds that the additional requirements render the effect of the act punitive." *Id.*; *see also Foley v. State*, (citation omitted) (Tenn. Crim. App. Feb. 27, 2020) (Holloway, Jr., J., concurring) (articulating concern that post-*Ward* additions to [TSORA] may

[8] WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 65 n.2 (Stanford Univ. Press 2009).

> have given it a punitive effect in violation of the Ex Post Facto Clause.)

Id. at 768 (emphasis added), citing *Ward v. State*, 315 S.W.3d 461, 475 (Tenn. 2010). Despite this forewarning, the Tennessee General Assembly was unable to wean itself from the easy lure of continued amendments to TSORA. After all, no class of criminal is considered more repugnant than sex offenders. Even "'in a prison setting a sex offender is the most despised type of inmate. J.A. 32.'" *Matherly v. Andrews*, 859 F.3d 264, 269 (4th Cir. 2017). Legislators, dependent on the support of their constituents for reelection, cannot afford to appear soft on crime, or worse, to be sympathetic to sex offenders. "[The Legislature's] responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Prods*., 511 U.S. 244, 266, 114 S.Ct. 1483 128 L.Ed.2d 229 (1994).

Days after the Sixth Circuit's opinion in *Snyder* was handed down in 2016, a class action was filed in the same Michigan District Court ("MDC") where *Snyder* originated, also styled *Doe v. Snyder*, 449 F.Supp.3d 719 (E.D. Mich. 2020) ("*Snyder II*"), challenging the constitutionality of the entire Michigan sex offender registry ("MSOR") on multiple constitutional grounds. In September 2018, the MDC certified the class, which was "comprised of a primary class and two subclasses." *Id*. at 726. The primary class consisted of all people who were or would be subject to registration under the Michigan sex offender registry, and sought relief for vagueness,

strict liability, and First Amendment violations. *Id.* The subclasses sought relief on *ex post facto* grounds and were defined as follows: (1) the pre-2006 *ex post facto* subclass consisted of members of the primary class who committed their offense(s) requiring registration before January 1, 2006, and who committed no subsequent registrable offense; (2) the second *ex post facto* subclass consisted of members of the primary class who committed their offense(s) requiring registration on or after January 1, 2006, but before April 12, 2011, and who committed no subsequent registrable offense. The MDC granted the plaintiff's motions for summary judgment and "enter[ed] permanent injunctive relief on behalf of the ex post facto subclasses and the primary class." 449 F.Supp.3d at 737. The MDC stated: "Michigan's SORA [Sex Offender Registry Act] is DECLARED NULL AND VOID as applied to members of the ex post facto subclasses…." *Id*. at 737-38 (emphasis in the original). In one fell swoop, the entire Michigan sex offender registry was abrogated as to those persons whose sex offenses pre-dated the offending provisions of the statute, i.e., on *Ex Post Facto* grounds. The *Snyder II* decision *was not* rendered on an as-applied basis.

The *Snyder II* case is important to an understanding of the dynamics that shape the pervasive and spreading litigation over sex offender registration laws. In *Snyder II*, the district court issued stays to allow negotiations between "stakeholders" and legislators geared toward "legislative reform." *Id*. at 726. In the end, the Michigan legislature failed to take any action to conform the Michigan sex offender registry laws to

Constitutional mandates. Such is the nature of the beast! Most of the cases that have identified federal *Ex Post Facto* issues in state sex offender laws have come from Article III judges, appointed for life and not subject to the vagaries and shifting winds of political avarice. The courts have stepped in where the legislatures have refused to curtail passing increasingly onerous sex offender registry laws. As Madison warned, "one legislative interference is but the first link of a long chain of repetitions …," against which abuses the *Ex Post Facto* Clause was erected by the framers as a bulwark. Federalist No. 44.

Even though the CCA tacitly conceded retroactivity in its opinion by only discussing whether TSORA inflicts punishment (Appendix A), retroactivity is baked in to the TSORA by demanding compliance by individuals whose crimes were committed, and sentences completed years prior to its enactment. The Petitioner's convictions were in Missouri in 1996 and 2001. The TSORA was passed by the Tennessee General Assembly in 2004, and the provision Petitioner was charged with violating, T.C.A. §40-39-211(d)(1)(A), was added to TSORA by amendment in 2009. 2009 Tenn. Pub. Acts ch. 597, § 1. Moreover, Petitioner's prior convictions did not just trigger application of the TSORA to him, or enhance punishment after guilt was determined, but they are actually included as elements of the crime with which he was charged and convicted. As this Court has held:

> The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be

> recast as asking whether Fla. Stat. 944.275(1)(1979) applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative. The respondent concedes that the State uses 944.275(1), which was implemented on January 1, 1979, to calculate the gain time available to petitioner, who was convicted of a crime occurring on January 31, 1976. Thus*, the provision attaches legal consequences to a crime committed before the law took effect*.

Weaver v. Graham, 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1991) (emphasis added). There can be no doubt that TSORA attaches serious legal consequences to the crimes committed by Petitioner before TSORA existed. *See also Koch v. Village of Heartland,* 43 F.4th 747, 755 (7th Cir. 2022) ("The Act is retroactive because it applies to events occurring before its enactment.").

This case not only meets the standard for issuance of a writ pursuant to Sup. Ct. R. 10(b), it presents an issue of national scope,[9] in that every state in the Union, the District of Columbia, U.S. territories, and many tribal jurisdictions, have enacted sex offender registry laws. LOGAN, s*upra*

[9] "Today, roughly a quarter century after their genesis, SORN laws are a fixture of the nation's legal, social, and political landscape. They remain popular with the public, and political actors alike. And because of their retroactive scope, extended duration, limited opportunities for exit, and daily infusion of new registrants, state registries continue to expand." Logan, *supra* note 1, at 455-56.

note 8. For all of these reasons, this petition should be granted.

B. The CCA's Opinion, Which the Tennessee Supreme Court Refused to Review, Decided An Important Federal Question In A Way That Conflicts With the Decisions of Other State Courts of Last Resort

In 2009, after a series of legislative amendments, the Supreme Court of Maine decided that its sex offender registry was punitive and an *ex post facto* violation under both the state and federal constitutions. *State v. Letalien*, 985 A.2d 4, 17 (Me. 2009). The court also held that "[f]or ex post facto purposes" the sex offender registry law at issue "is properly evaluated on its face, and not in relation to how it has been applied against any individuals." *Id*. The amendments retroactively increased the offenders time on the registry from fifteen years to life, and his in-person registration became a quarterly obligation. *Id*. These same requirements are contained in TSORA.

In *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), the Pennsylvania Supreme Court held that the Pennsylvania sex offender registry law under consideration violated the *ex post facto* provisions of both the federal and state constitutions. The provisions the court found exceeded constitutional limitations are likewise found in TSORA.

Prior to the Sixth Circuit's opinion in *Snyder*, at least six state supreme courts held that the retroactive application of their sex offender and registration laws violated their respective state constitutions. *Starkey v. Okl. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. State*, 189 P.3d 999 (Alaska 2008).

CONCLUSION

The case *sub judice* presents an opportunity for this Court to fashion the contours of what does and does not run afoul of the TSORA specifically, and by analogy, the other state sex offender laws. A cursory review of the caselaw landscape reveals two glaring needs: guidance to the lower courts, as well as a rebuke to legislators who seem unfazed with infringing on basic Constitutional protections.

Respectfully, pursuant to S. Ct. R. 10(b), and for the reasons stated herein, the petition should be granted.

Respectfully submitted,

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