No. 18-308

In the Supreme Court of the United States

ANTHONY RAYSHON BETHEA,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the North Carolina Supreme Court

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY BRIEF FOR PETITIONER

North Carolina does not dispute that today's sex offender registration statutes are very different from the statute the Court considered in *Smith v. Doe*, 538 U.S. 84 (2003). Back then, registration simply meant registration. A registrant's name was entered on a list, and that was it. Today, registration means serious restrictions on where one can live, where one can work, where one can travel, and even where one can be present. Registrants cannot go to their children's schools except under extremely limited circumstances. They cannot take their families to a park or a playground. In many cities they are barred from residing in most or even all of the neighborhoods suitable for a family to live. Today, registrants suffer many burdens that did not exist when the Court decided *Smith v. Doe*.

Nor does North Carolina dispute that the states have been heaping these burdens on registrants retroactively, often many years after conviction. Anthony Bethea, for example, became a registrant in 2004 as part of a negotiated plea agreement. In that agreement, he consented to have his name placed on a publicly-available list for ten years. Since then, however, the state has retroactively added all sorts of new restrictions on where registrants can go and what they can do, restrictions Bethea had no idea would be imposed when he entered his plea. And the state has retroactively extended the registration period from ten years to thirty. When Bethea pleaded guilty, he reasonably believed that he would be able to resume a normal life in 2014, when he would be in his early 30s and would be starting a young family of his own. Instead, the state has retroactively con-

signed him to the netherworld of registration until long after his children are grown.

Nor does North Carolina dispute that this issue is extremely important. There are nearly a million registrants in the United States, many of whom, like Anthony Bethea, are subject to burdens that did not exist at the time of their convictions. Registrants are the most despised people in our communities, so the democratic process has produced registration statutes that have grown consistently more severe. North Carolina is typical in applying these newly severe restrictions to past registrants as well as future ones. The issue is coming before the Court with increasing frequency. This term alone, it has been raised in at least two other certiorari petitions. *See Vasquez v. Foxx*, No. 18-386 (pet. for cert. filed Sept. 21, 2018); *Boyd v. Washington*, No. 18-39 (cert. denied Dec. 10, 2018). The flow of certiorari petitions is likely to increase in the future, in light of the sheer number of registrants suffering retroactive burdens.

Nor does North Carolina dispute that the lower courts are divided on whether these retroactive restrictions violate the Ex Post Facto Clause. Several lower courts have recognized that there must be some limit on the power of a state to impose retroactive penalties under the guise of "civil" or "regulatory" measures. These courts have understood that the Ex Post Facto Clause is a substantive limit on retroactive legislation, not merely a formal hurdle that can be jumped with clever legislative drafting.

North Carolina cannot dispute any of this, because it is all true. Instead, the state offers three reasons for denying certiorari. First, North Carolina suggests (BIO 17-19) that the lower courts are not

really in conflict, because of differences in the details of state registration statutes. Second, North Carolina imagines (BIO 20-22) that this case is a poor vehicle for addressing the issue. Third, North Carolina asserts (BIO 22-29) that the decision below was correct on the merits. North Carolina is mistaken in all three respects.

ARGUMENT

I. The lower courts are in conflict.

North Carolina points (BIO 17-19) to minor differences between North Carolina's registration statute and those of other states as a reason for denying certiorari. But the lower court conflict is not caused by differences in the details of these statutes. It is caused by a genuine disagreement among the lower courts over how to apply *Smith v. Doe* to the new restrictions the states have retroactively imposed on registrants, restrictions the Court had no occasion to consider in *Smith v. Doe*.

For instance, North Carolina makes much (BIO 19) of the fact that in Pennsylvania, some registrants must report in person four times per year, while in North Carolina, registrants must report in person twice per year. But that difference is hardly the reason the Pennsylvania Supreme Court held that the retroactive application of Pennsylvania's registration statute violates the Ex Post Facto Clause. *Commonwealth v. Muniz*, 164 A.3d 1189, 1208-18 (Pa. 2017), cert. denied, 138 S. Ct. 925 (2018). Nothing in *Muniz* suggests the Pennsylvania Supreme Court would have reached a different conclusion if registrants had only been required to report semi-annually. Nor is there any reason to think

the North Carolina courts would decide the issue differently if North Carolina registrants were required to report quarterly. The difference in reporting period has nothing to do with the conflict between North Carolina and Pennsylvania over how to apply the Ex Post Facto Clause. It is clear from *Muniz* that Anthony Bethea would have won this case if he lived in Pennsylvania.

As we showed in our certiorari petition (Pet. 20-24), North Carolina's registration statute is quite similar to those of many other states, which impose the same restrictions on registrants. Yes, there are tiny differences among the statutes. Some states bar registrants from living within 2,000 feet of a school, while others set the limit at 1,000 feet. Some states forbid registrants from being present at a school, while others extend the ban to parks and playgrounds as well. But to focus on such differences is to miss the forest for a few twigs. The important question is whether the Ex Post Facto Clause allows a state to impose these burdens retroactively, regardless of whether the reporting period is quarterly or semi-annually, whether the distance is 2,000 feet or 1,000, or whether parks and playgrounds are included. It would make no sense for the Ex Post Facto Clause to forbid a state from retroactively imposing a quarterly reporting requirement but not a semi-annual one, or for the Clause to forbid a state from retroactively imposing a 2,000-foot limit but not a 1,000-foot limit. The lower courts are in conflict about the meaning of the Ex Post Facto Clause, not about minor details of the state statutes.

II. This case is a good vehicle.

North Carolina offers (BIO 20-22) three reasons this case is supposedly a poor vehicle for addressing the Question Presented. None of these reasons has any substance.

First, the state contends (BIO 20) that the issue was not adequately raised below. This claim is simply false. In his notice of appeal to the North Carolina Supreme Court (at pp. 12-17), Bethea argued that the Ex Post Facto Clause was violated, not merely by the retroactive lengthening of his registration period, but also by the addition of new restrictions on where registrants can live, work, and be present, as well as new reporting requirements. He made the same arguments in the Court of Appeals and in the trial court. Pet. 8-9. The issue is properly preserved for this Court's review.

Second, the state erroneously suggests (BIO 21) that *Gundy v. United States*, No. 17-6086 (argued Oct. 2, 2018), could somehow affect the Question Presented. As we explained in our certiorari petition (Pet. 26-27), this is not so. In *Gundy* the Court will address the non-delegation doctrine, not the Ex Post Facto Clause. And while *Gundy* might invalidate, on non-delegation grounds, the retroactive application of the *federal* registration statute, that will not stop the states from continuing to seek to apply their own registration statutes retroactively.

Third, the state incorrectly posits (BIO 21-22) a "mismatch" between the Ex Post Facto Clause issue and the remedies that might be available to Anthony Bethea should he prevail on that issue. No such mismatch exists. If the Court grants certiorari and determines that the Ex Post Facto Clause bars

North Carolina from retroactively heaping burdens on registrants like Bethea, the Court would presumably remand to the state courts for further proceedings, as it does in most cases. On remand, the state would be free to make whatever arguments it chooses regarding the appropriate remedy.

III. The decision below is incorrect.

North Carolina devotes most of its attention to the merits (BIO 22-29). Of course, certiorari would be warranted even if the decision below were correct, because of the lower court conflict and the importance of the issue. But the decision below is not correct. The retroactive application of North Carolina's registration statute violates the Ex Post Facto Clause, for two reasons.

First, under the factors considered in *Smith v. Doe*, the harsh restrictions the state imposes on registrants are punitive, not merely civil. The flaw in North Carolina's analysis is its assumption that the conclusions of *Smith v. Doe* apply equally to the second-generation statutes of which North Carolina's is typical. But these second-generation statutes are much more severe than the statute the Court considered in *Smith v. Doe*. As amici MacArthur Center and NARSOL demonstrate, registration now entails devastating burdens on registrants and their families. Registrants are barred from living in all but small pockets of many cities. They are prohibited from accompanying their own children to what would normally be family activities, like school plays or soccer games. If the distinction between "regulatory" and "punitive" measures is to have any meaning, such burdens are punitive.

Second, the text and history of the Ex Post Facto Clause indicate that the Clause applies equally to all retroactive burdens imposed by the state on persons who have committed crimes, without regard to whether those burdens are labelled "criminal," "civil," "regulatory," or anything else. As we explained in our certiorari petition (Pet. 32-33), and as amicus Cato Institute discusses in much greater detail, the Court's Ex Post Facto Clause doctrine has wandered away in recent years from the Clause's original meaning and from its most sensible meaning. This case would be a good opportunity to reconsider that doctrine afresh. The Ex Post Facto Clause was meant to prohibit, and *should* prohibit, a state from doing precisely what North Carolina and other states are doing—adding burdens entailed by the commission of an offense long after the offense was committed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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