No. 20-_____

In The
Supreme Court of the United States

STATE OF MARYLAND, *et al.*,

Petitioners,

v.

JIMMIE ROGERS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals of Maryland depart from this Court's decisions in *Smith v. Doe* and *Apprendi v. New Jersey* in holding, contrary to the decisions of numerous federal courts of appeals and state supreme courts, that sex offender registration constitutes "punishment" within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, and that, as a result, any fact necessary for placement on the sex offender registry, such as the victim's age, must be determined beyond a reasonable doubt during the criminal proceeding, even if that fact is not an element of the criminal offense that is the basis for registration?

PARTIES TO THE PROCEEDINGS

The petitioners are the State of Maryland and the Department of Public Safety and Correctional Services ("the Department"), a principal department of the State of Maryland. The respondent is Jimmie Rogers, a former registrant of the Maryland Sex Offender Registry ("the Registry").

RELATED CASES

- *State of Maryland v. Jimmie Rogers*, No. 02-K-15-001039, Circuit Court for Anne Arundel County, Maryland. Judgment entered October 20, 2015.
- *Jimmie Rogers v. State of Maryland, et al.*, No. C-02-CV-17-000296, Circuit Court for Anne Arundel County, Maryland. Judgment entered November 20, 2017.
- *State of Maryland v. Jimmie Rogers*, No. 1993, September Term, 2017, Court of Special Appeals of Maryland. Judgment entered March 28, 2019.
- *Jimmie Rogers v. State of Maryland, et al*., No. 32, September Term, 2019, Court of Appeals of Maryland. Judgment entered March 31, 2020.

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PETITION FOR A WRIT OF CERTIORARI

The State of Maryland and the Department respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 468 Md. 1 (2020). App. 1a. The opinion of the Court of Special Appeals of Maryland is reported at 240 Md. App. 360 (2019). App. 126a. The opinion of the Circuit Court for Anne Arundel County, Maryland is unreported. App. 139a.

JURISDICTION

The Court of Appeals of Maryland issued its decision on March 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Court has subject matter jurisdiction to review the Maryland court's decision, which "'depends on a federal constitutional ruling'" and expressly turns upon application of this Court's precedent; therefore, state-law references in the court's holding are "'not independent of federal law, and [this Court's] jurisdiction is not precluded.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)); *see Michigan v. Long*, 463 U.S. 1032, 1040, 1041, 1042 (1983) (explaining that when "a state court

decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so," unless the decision contains a " 'plain statement' that [it] rests upon adequate and independent state grounds"). The Maryland court's decision does not contain any " 'plain statement' that [it] rests upon adequate and independent state grounds." *Id.* at 1042.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The relevant provisions of Maryland's sex offender registration laws and criminal laws are set forth in the appendix to this petition. These include Md. Code Ann., Crim. Proc. §§ 11-701, 11-704, 11-706, and 11-717; and Md. Code Ann., Crim. Law § 11-303.

STATEMENT

"'Sex offenders are a serious threat in this Nation.'" *Connecticut Dep't of Pub. Saf. v. Doe*, 538 U.S. 1, 4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion)). "[T]he victims of sex assault are most often juveniles," and "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault," *McKune*, 536 U.S. at 34. To address the dangers posed by sex offender recidivism, in 1994, Congress enacted legislation (formerly 42 U.S.C. § 14071) that "condition[ed] certain federal law enforcement funding on the States' adoption of sex offender registration laws and set[] minimum standards for state programs." *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). Then, in 2006, to further "protect the public from sex offenders and offenders against children," Congress enacted the Sex Offender Registration and Notification Act ("SORNA"), "a comprehensive national system for the registration of those offenders." 34 U.S.C. § 20901 (formerly 42 U.S.C. § 16901). At present, sex offender registration and notification programs exist in all 50 states and the District of Columbia, as well as in certain United States territories and Indian tribal jurisdictions.

In this case, contrary to the holding in *Smith* and the holdings of numerous federal and state cases decided after *Smith*, the Court of Appeals of Maryland held that sex offender registration constitutes "punishment" within the meaning of the Sixth and Fourteenth Amendments. 468 Md. at 45. As a result, under the

court's holding, any "fact necessary for placement on the Registry, such as the victim's age, must be determined by the trier of fact beyond a reasonable doubt, during the adjudicatory phase of the criminal proceeding prior to sentencing." 468 Md. at 6. By erroneously equating the collateral consequence of sex offender registration to criminal punishment, the decision of Maryland's highest court also conflicts with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), where the Court held that a fact, other than a prior conviction, must be "submitted to a jury, and proved beyond a reasonable doubt" if it "*increases the penalty* for a crime beyond the prescribed statutory maximum[.]" *Id.* at 490 (emphasis added).

Factual Background

1. In 1995, the Maryland General Assembly passed Maryland's first sex offender registration law, *see* 1995 Md. Laws ch. 142, and in 1997, the General Assembly established a sex offender registry, in accordance with the requirements of federal and Maryland law, *see* 1997 Md. Laws ch. 754 (establishing Registry); H.R. 2137, 104th Cong., 110 Stat. 1345 (1996) (enacting SORNA). SORNA directs jurisdictions such as Maryland to establish and maintain online registries upon which sex offenders shall register, to make those registries accessible to other jurisdictions and the public, and to maintain an individual on its registry if the individual is required by state or federal law to register. *See* 34 U.S.C. §§ 20911 and 20920 (formerly 42 U.S.C. §§ 16911(a) and 16918). Under Maryland's Sex

Offender Registration Act (the "Maryland Act"), the Department is responsible for maintaining the Registry. Since 2001, registrant information has been posted on the public website maintained by the Department. *See* Md. Code Ann., Crim. Proc. § 11-717(a), (b) (LexisNexis 2018 & Supp. 2019). In 2010, in accordance with SORNA, Maryland established a "tier" system of offenders, which classifies them according to the nature of their convictions. Tier I offenders must register in person with local law enforcement personnel every six months for 15 years, with an opportunity to petition for removal from the Registry after ten years. Md. Code Ann., Crim. Proc. § 11-707(a)(4)(i) (LexisNexis 2008 & 2018; Supp. 2019). Tier II offenders must register in person every six months for 25 years. *Id.* § 11-707(a)(4)(ii). Tier III offenders must register in person every three months for life. *Id.* § 11-707(a)(4)(iii).

2. The offenses for which registration is required under SORNA include any "specified offense against a minor" as defined in 34 U.S.C. § 20911(7) (formerly 42 U.S.C. § 16911(a)(7)). In conformance with that requirement, Maryland, like numerous other States, requires registration by offenders who commit certain offenses against minors or children within certain age ranges. As relevant to this case, the Maryland Act requires an individual to register as a tier II sex offender if convicted of the offense of human trafficking, and "the intended prostitute or victim is a

minor." Md. Code Ann., Crim. Proc. § 11-701(p)(2) (LexisNexis 2018).[1]

3. The offender in this case, respondent Jimmie Rogers, pleaded guilty to human trafficking on October 20, 2015. App. 5a. The victim of Mr. Rogers's offense, who is identified in the record as "M.H.," had been reported missing and was believed to be the victim of human trafficking. An undercover police officer, alerted by a post on "Backpage," a website known as an advertising hub for sex trafficking victims, suspected that the person featured in the post was a trafficking victim and might be M.H. App. 6a. The officer arranged to meet M.H. at a local hotel and, when officers arrived at the room and identified themselves, "M.H. explained that her 'boss,' later identified as Mr. Rogers, had rented the hotel room for her and would be back to check on her soon." App. 129a. M.H. informed the officers that "Mr. Rogers had posted her ad on Backpage and that she had, over several days, had sexual intercourse with men for money" at the direction of Mr. Rogers, who "set up 'dates' for her through Backpage and kept half of the proceeds in exchange for security." App. 129a. Mr. Rogers pleaded guilty to violating § 11-303(a) of the Criminal Law article of the Maryland Code, which provides that a person may not knowingly "take or cause another to be taken to any place for

[1] Chapters 21 and 22 of the 2019 Laws of Maryland, effective October 1, 2019, redesignated Criminal Law § 11-303 as Criminal Law § 3-1102, revised subsection (b)(2), changed "human trafficking" to "sex trafficking" in subsection (c), and revised subsection (f).

prostitution." Md. Code Ann., Crim. Law § 11-303(a) (LexisNexis 2012). He was sentenced to ten years' imprisonment, with a portion of the sentence suspended, and two years' probation. App. 9a.

4. Because the age of the victim was not an element of the offense to which Mr. Rogers pleaded guilty, the prosecution's case did not present evidence of M.H.'s age at Mr. Rogers's plea hearing. App. 6a-9a. Instead, the Department, as part of its function of administering the registration law and maintaining the Registry and public website, determined that M.H. was a minor, and after Mr. Rogers's release from prison, informed him that he was required to register as a Tier II sex offender for a period of twenty-five years. Mr. Rogers complied and completed his initial registration on October 4, 2016. App. 10a.

Procedural History

5. Mr. Rogers then challenged his registration obligation by filing a civil declaratory judgment action, in the Circuit Court for Anne Arundel County, arguing that, despite the fact that M.H.'s age was not an element of the offense to which he pleaded guilty, he could not be required to register unless M.H.'s age had been determined beyond a reasonable doubt in the criminal proceeding. App. 154a-155a. The circuit court agreed and declared that Mr. Rogers was not required to register. App. 139a-140a. Maryland's intermediate appellate court, the Court of Special Appeals, determined that, because registration is not "punishment," M.H.'s age was not required to be determined in the

criminal proceeding. App. 134a-136a. The court remanded the case to the trial court for further proceedings to determine M.H.'s age. App. 138a.

6. A divided Court of Appeals of Maryland reversed that ruling in a 4-3 decision, which concluded that sex offender registration constitutes punishment within the meaning of the United States Constitution and this Court's precedent. *Rogers*, 468 Md. at 45. Employing the "intent-effects" test applied by this Court in *Smith v. Doe*, 538 U.S. at 92, as well as factors derived from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the majority acknowledged that the Maryland legislature did not intend the Maryland Act to be punitive. *Rogers*, 468 Md. at 38-39. Nevertheless, the majority determined that the "cumulative effects" of the registration statute, and in particular, amendments enacted in 2009 and 2010 that imposed additional requirements on registrants, transformed the statute from a civil remedy into a criminal penalty. *Id.* at 39. Relying in part on *Apprendi*, the majority also concluded that "placing [on the Registry] a defendant who is convicted of violating [the human trafficking statute] . . . essentially increases the punishment or penalty for that crime, and . . . the determination of the victim's age must be submitted to the trier of fact and proven beyond a reasonable doubt." *Rogers*, 468 Md. at 38. The majority further opined that the Maryland General Assembly did not explicitly authorize the Department to make the determination that M.H. was a minor, and "decline[d] to read into the

statutes and [the Department's] regulations the authority to permit the Department to take the action." *Id.* at 27.

7. The majority explained that the age of a victim would be determined beyond a reasonable doubt in a criminal proceeding as follows. When a defendant intends to plead guilty to violating Criminal Law § 11-303(a) or a similar offense in which the victim's age is not an element of the crime, the State would be required to include the victim's age in the statement of facts agreed to by both parties. If the defendant elects not to plead guilty, and chooses a jury trial, the jury would be required to make the finding regarding the victim's age; in a bench trial, the trial court would determine the victim's age. 468 Md. at 44-45. The majority suggested that determination of the victim's age beyond a reasonable doubt, though not an element of the offense, could be achieved by "a special verdict question submitted to the jury," or "sequential jury determinations," where the jury would first determine whether the defendant was guilty of violating the criminal statute, and "if so, next determine whether the victim was a minor" and thus whether the convicted defendant is required to register. *Id*. at 45.

8. Three dissenting judges criticized the majority's conclusion that it is for "the trier of fact—not the Department—[to] determine the facts necessary for placement on the Registry," such as M.H.'s age, beyond a reasonable doubt, even "where the offense does not require the State to prove the age of the victim in order to obtain a conviction." *Rogers*, 468 Md. at 55, 56

(Biran, J., dissenting). In the dissent's view, this flawed result arose from the majority's erroneous determination that registration constitutes punishment in the constitutional sense. On the contrary, "Maryland's sex offender registration regime is not punitive, but rather achieves the remedial purpose for which the General Assembly intended it: to protect the public." *Id.* at 47. Alternatively, the dissent reasoned, "even if sex offender registration in Maryland is considered effectively to be punitive, registration does not increase a person's punishment for a criminal offense beyond the otherwise applicable statutory maximum for that offense, within the meaning of *Apprendi*." *Id.*

9. The dissenting judges also criticized the majority's "new, unprecedented, and ill-advised procedure that Maryland judges and juries must now try to carry out in criminal cases," *id*. at 47; the dissenting opinion predicted that, under this "[un]workable" process, unsupported by judicial authority in "Maryland or anywhere else," *id*. at 88, "some Maryland residents whose conduct warrants sex offender registration will not be required to register[.]" *Rogers*, 468 Md. at 48 (Biran, J., dissenting). And others, the dissent predicted, "who have previously registered as sex offenders in Maryland without ever disputing their status as such," will, like Mr. Rogers, "file similar declaratory judgment actions seeking removal from Maryland's Sex Offender Registry." *Id.* The dissent raised the additional concern that the majority's decision could "encourage some individuals who are currently registered as sex offenders in other

jurisdictions to move to Maryland in the hope that they will be able to avoid registration here." *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals of Maryland that sex offender registration constitutes punishment under the United States Constitution conflicts with this Court's precedent in at least two respects, and similarly conflicts with multiple decisions of federal and state appellate courts. First, the Maryland court's decision conflicts with *Smith v. Doe*, where this Court rejected an ex post facto challenge to Alaska's sex offender registration statute brought by two offenders who were required to register every four months for life. 538 U.S. at 102-06. Analyzing the statute under the intent-effects test, this Court concluded that the offenders had failed to show, "much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme," and thus the Court held that the Alaska statute is "nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause." 538 U.S. at 95. Like the Alaska statute upheld in *Smith*, the Maryland Act is not punitive in either intent or effect. Indeed, for purposes of analysis under the intent-effects test, the material features of the Maryland Act are indistinguishable from those of its Alaska counterpart.

Second, by reassigning responsibility for determining registrability from the Registry to the criminal jury, on the ground that registration is "punishment," the Maryland court's majority also distorts the principle this Court established in *Apprendi*. As the dissenting judges noted, by requiring a jury to determine a fact, such as a victim's age, that is not even an element of the charged offense, the *Rogers* majority opinion constitutes an "unprecedented and unwarranted" expansion of *Apprendi*'s rule, *Rogers*, 468 Md. at 85 (Biran, J., dissenting), beyond its "animating principle . . . [of] preserv[ing] . . . the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense," *Oregon v. Ice*, 555 U.S. 160, 168 (2009).

The decision in *Rogers* also conflicts with decisions of numerous federal and state courts of appeals upholding SORNA and state registration statutes, whereas only a minority of courts have reached conclusions similar to the Maryland court's. SORNA was enacted after *Smith v. Doe*, and it "closely resembles the Alaska Act that [this Court] in *Doe* held to be a civil regulatory scheme." *United States v. W.B.H.*, 664 F.3d 848, 854-55 (11th Cir. 2011). Federal courts of appeals have reached the "unanimous consensus" that SORNA is not punitive and have rejected challenges to it under the Ex Post Facto Clause, the Due Process Clause, the Double Jeopardy Clause, and the Eighth Amendment. *See United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012) (collecting cases and holding that SORNA is not an ex post facto

law). A majority of federal appellate courts have also upheld state registration statutes against such challenges. *See*, *e.g.*, *Doe v. Miller*, 405 F.3d 700, 723 (8th Cir. 2005) (upholding Iowa sex offender registration statute); *Does 1-7 v. Abbott*, 945 F.3d 307, 314-15 (5th Cir. 2019) (upholding Texas registration statute); *but see Does # 1-5 v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016) (holding that retroactive application of Michigan's registration law violated the ex post facto clause).

Similarly, a majority of state courts have also held, on the basis of *Smith v. Doe*, that state registration statutes are regulatory and not punitive, and have thus rejected claims that requiring a convicted sex offender to register constitutes punishment under the Constitution. *See State v. Aschbrenner*, 926 N.W.2d 240, 249 n.3 (Iowa 2019) (collecting cases and noting that "many state supreme courts and courts of appeal" have decided "that sex offender registration statutes are nonpunitive"); *but see State v. Letalien*, 985 A.2d 4, 24-25 (Me. 2009) (holding that retroactive application of amendments to Maine's registration law violated the ex post facto clause); *Commonwealth v. Muniz*, 640 Pa. 699 (2017) (holding that retroactive application of Pennsylvania's registration law violated the ex post facto clause).

I. The Decision of the Court of Appeals of Maryland Conflicts with *Smith v. Doe* and *Apprendi v. New Jersey*.

The decision of the Court of Appeals of Maryland directly contradicts this Court's decision in *Smith v. Doe*. Indeed, the decision in *Smith v. Doe* compels the conclusion that the Maryland Act is a non-punitive, civil regulatory scheme. When the Alaska offenders in *Smith v. Doe* committed their crimes in the mid-1980s, Alaska had no sex offender registration requirement; the Alaska statute was not enacted until 1994. Despite this fact and that retroactive application of the statute required immediately their registration for life, this Court concluded that "registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the Ex Post Facto Clause." *Smith*, 538 U.S. at 102. In particular, the lifetime reporting requirement, the Court determined, is "not excessive" and "reasonably related to the danger of recidivism," because "most reoffenses do not occur within the first several years after release" and may take place "as late as 20 years following release." *Id.* at 94. The Court also found unpersuasive arguments that the Alaska law was excessive because of its "wide dissemination of [offender] information" on the Internet. 538 U.S. at 99. Rejecting that notion, the Court instead reasoned that the "purpose and the principal effect of notification are to inform the public for its own safety," and "[w]idespread public access is necessary for the efficacy of the scheme." 538 U.S. at 99.

Like the Alaska statute upheld in *Smith*, the Maryland Act is not punitive, either in effect or intent. Both statutes require the offender to supply the same personal identifying information, such as name, home and work addresses, aliases, date of birth, fingerprints, and physical features; information relating to the crimes that triggered the registration obligation; current educational enrollment and employment status; personal motor vehicle description and license number; and certain treatment history. *See* Md. Code Ann., Crim. Proc. § 11-706(a) (LexisNexis 2018); *Smith v. Doe*, 538 U.S. at 90 (citing Alaska Stat. § 12.63.010(b)-(c) (1994)).[2]

The most significant difference between the two States' schemes is arguably Maryland's requirement of in-person registration, which dates from 1997. That requirement, however, does not transform the Maryland Act into a penal statute, because "'[a]ppearing in person may be more inconvenient, but requiring it is not punitive.'" *American Civil Liberties Union of Nev.*

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[2] Both Maryland's statute and the Alaska statute also make the same offender information generally available through a public website: name, date of birth, home and work addresses, and a photograph and physical description; description and license identification numbers of motor vehicles; information relating to the crime requiring registration; and a statement as to whether the offender is in compliance with the statute's requirements. *See* Md. Code Ann., Crim. Proc. § 11-717 (LexisNexis 2018); *Smith*, 538 U.S. at 91 (citing Alaska Stat. § 18.65.087(b) (1994)). Both statutes also place similar limits on the dissemination and use of the information contained in the offenders' registration statements. *Smith*, 538 U.S. at 90-91; Md. Code Ann., Crim. Proc. § 11-717.

v. Masto, 670 F.3d 1046, 1053 (9th Cir. 2012) (quoting *United States v. W.B.H.*, 664 F.3d at 857); *see also United States v. Elkins*, 683 F.3d 1039, 1045 (9th Cir. 2012) (holding that requiring offender to register in person every three months for life does not render SORNA punitive); *United States v. Hinckley*, 550 F.3d 926, 936-38 (10th Cir. 2008) (rejecting argument that SORNA's in-person registration requirements violates ex post facto clause). Indeed, the Court of Appeals of Maryland itself concluded in 2002 that the Maryland Act was not punitive, and thus did not violate the rule announced in *Apprendi*, despite the presence of the in-person registration requirement. *Young v. State*, 370 Md. 686, 715-16 (2002).

Although more recent amendments enacted since 2003 to comply with SORNA requirements have imposed additional obligations on offenders to provide information to law enforcement, including a requirement to notify law enforcement if the offender will be absent from his or her residence for more than seven days, Md. Code Ann., Crim. Proc. § 11-705(i) (LexisNexis 2008 & Supp. 2010), such obligations also do not transform the Maryland Act into a punitive statute. *See United States v. Kebodeaux*, 570 U.S. 387, 398 (2013) (noting modifications to SORNA requiring that a sex offender update his registration within three business days of moving to a new residence); *see also Doe v. Moore*, 410 F.3d 1337, 1348-49 (11th Cir. 2005) (upholding Florida statute requiring sex offenders to notify law enforcement in person when they change location of abode or residence).

The Maryland court's majority opinion completely ignores *Smith v. Doe*—not once in the majority opinion is *Smith* even mentioned. Instead, the court improperly relies on this Court's decision in *Apprendi*. That case is inapposite, because whether to require a defendant to register as a sex offender is historically not a question decided by juries, and the Maryland Act's registration requirements therefore do not implicate the Sixth Amendment jury trial guarantee that was the basis of the rule announced in *Apprendi*. Vastly extending *Apprendi* beyond its Sixth Amendment roots is also inconsistent with principles of state sovereignty, as "the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status," *Oregon v. Ice*, 555 U.S. at 171, and this is especially the case with "state legislative innovations," *id.*, such as sex offender registration statutes, which serve the "salutary objective," *Blakely v. Washington*, 542 U.S. 296, 308 (2004), of "[e]nsuring public safety," *Smith*, 538 U.S. at 108.

II. Pertinent Federal and State Appellate Court Decisions Are Split and the Majority of Them Conflict with the Decision of the Court of Appeals of Maryland.

Most federal and state courts to consider such challenges have rejected claims that SORNA and state registration statutes impose punishment on sex offenders and have upheld such statutes against constitutional challenges. In doing so, these courts

have been mindful that statutes enacted since *Smith v. Doe* contain additional registration requirements not featured in the Alaska statute, but have nevertheless concluded that these post-*Smith* statutory innovations do not transform registration schemes from civil remedies into criminal penalties. For example, in recently affirming the dismissal of a sex offender's complaint that Texas's registration statute subjected him to punishment in violation of the Ex Post Facto Clause, the Double Jeopardy Clause, and the Eighth Amendment, the Fifth Circuit concluded that, "[e]ven if the Texas statute is harsher than the Alaska statute considered in *Smith*, and even if the [offenders] are correct that sex-offender registries have questionable efficacy, [the Texas registration statute] still advances the nonpunitive public purpose of defending public safety." *Does 1-7 v. Abbott*, 945 F.3d at 315. With one exception, *see Does # 1-5 v. Snyder*, 834 at 705-06, the other circuits to have considered whether sex offender registration is punitive have also rejected such claims. *See Shaw v. Patton*, 823 F.3d 556, 570-71 (10th Cir. 2016) (holding that Oklahoma sex-offender registry is nonpunitive; rejecting ex post facto claim); *Felts*, 674 F.3d at 606 (noting agreement among the circuits that SORNA does not violate the ex post facto clause); *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009) (rejecting challenge to SORNA under the ex post facto clause).

Other federal courts are in accord. *United States v. Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009) (rejecting challenges to SORNA under the ex post facto clause and upholding statute under the commerce clause); *United States v. Lawrance*, 548 F.3d 1329, 1332-36 (10th Cir. 2008) (rejecting challenges to SORNA under the ex post facto and due process clauses and upholding statute under the commerce clause); *United States v. May*, 535 F.3d 912, 922 (8th Cir. 2008) (rejecting challenge to SORNA under the ex post facto clause and upholding statute under the commerce clause); *Hatton v. Bonner*, 356 F.3d 955, 963-64 (9th Cir. 2004) (upholding California registration statute against ex post facto claim); *Masto*, 670 F.3d at 1053 (holding that expansion of Nevada statute's registration requirements does not violate ex post facto clause or double jeopardy clause); *Windwalker v. Governor of Ala.*, 579 F. App'x 769, 772 (11th Cir. 2014) (per curiam) (rejecting ex post facto, due process, and equal protection challenges to Alabama registration statute); *see also United States v. Diaz*, 967 F.3d 107, 111 (2d Cir. 2020) (per curiam) (recognizing, based on *Doe v. Pataki*, 120 F.3d 1263, 1283 (2d Cir. 1997), law of the circuit holding that "mandatory registration and notification requirements of New York State's Sex Offender Registration Act, which are analogous to SORNA's requirements, are nonpunitive in purpose and effect").

Applying *Smith v. Doe*, a majority of pertinent state court decisions have also declared that sex offender registration statutes do not constitute punishment under the United States Constitution; these decisions recognize that, "in light of the substantial interests at stake," notification and registration requirements "constitute a reasonable method of achieving the goal of public safety." *Kammerer v. State*, 322 P.3d 827, 839 (Wyo. 2014).[3]

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[3] *See also R.W. v. Sanders*, 168 S.W.3d 65, 70 (Mo. 2005) (upholding Missouri registration statute against ex post facto challenge); *State v. Worm*, 268 Neb. 74, 88, 680 N.W.2d 151, 163 (2004) (rejecting claim that Nebraska registration statute is punitive); *Rainer v. State*, 286 Ga. 675, 675-76 (2010) (upholding Georgia registration statute); *State v. Druktenis*, 135 N.M. 223, 235, 86 P.3d 1050, 1062 (N.M. Ct. App. 2004) (retroactive application of New Mexico registration statute does not violate ex post facto clause); *State v. Trosclair*, 89 So. 3d 340, 357 (La. 2012) (amendment to Louisiana registration law extending supervision period for certain sex offenders does not violate ex post facto clause); *State v. Meador*, 785 N.W.2d 886, 889 (N.D. 2010) (holding that North Dakota registration statute is remedial and non-punitive); *State v. Petersen-Beard*, 304 Kan. 192, 209, 377 P.3d 1127, 1140 (2016) (lifetime registration requirement mandated by Kansas registration statute does not constitute punishment under the Eighth Amendment); *State v. Joslin*, 145 Idaho 75, 86, 175 P.3d 764, 775 (2007) (requirement that sex offenders register under Idaho law does not constitute punishment); *State v. Trotter*, 330 P.3d 1267, 1277 (Utah 2014) (registration requirement imposed by Utah law is a collateral consequence of guilty plea because registration is a civil remedy); *In re Hall*, 238 N.C. App. 322, 331, 768 S.E.2d 39, 46 (2014) (North Carolina registration statute is not punitive; rejecting ex post facto claim); *State v. Gibson*, 182 A.3d 540, 554-55 (R.I. 2018) (holding that sexual offender registration under Rhode Island statute "is a civil regulatory process").

A minority of courts, however, including one federal court of appeals and the highest courts of two States, have adopted the view that state registration statutes, while not punitive in intent, are punitive in effect. Employing the same two-step inquiry that this Court applied in *Smith v. Doe*, these courts have decided that registration constitutes "punishment" and have thus refused to allow enforcement of registration requirements enacted after the offenders committed their crimes. In *Does # 1-5 v. Snyder*, the Sixth Circuit determined that Michigan's registration law, by "categoriz[ing] [sex offenders] into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, . . . requir[ing] time-consuming and cumbersome in-person reporting," and prohibiting them from living, working, or loitering within 1000 feet of a school, "brands registrants as moral lepers solely on the basis of a prior conviction." 834 F.3d at 705. In 2009, the Supreme Court of Maine decided that the retroactive application of an amendment to that State's registration law violated the Ex Post Facto Clause because it increased the length of registration terms and the frequency of reporting requirements. *State v. Letalien*, 985 A.2d at 24-25. And the Supreme Court of Pennsylvania also recently held that the Ex Post Facto Clause prohibited application of sex offender registration requirements to an offender who committed his offense before the requirements went into effect. *Commonwealth v. Muniz*, 640 Pa. at 748-49. This Court's intervention is now necessary to resolve these conflicts among the jurisdictions.

III. This Issue Is of Exceptional Importance Because of the Continued Danger Posed by Sex Offenders in the Community and Because the Decision Below Calls into Question the Convictions of Numerous Maryland Sex Offenders.

Since this Court decided *Smith* in 2003, Maryland and other States have continued their efforts to maintain effective registration systems to curb the risk to public safety posed by sex offenders. That risk remains "frightening and high." *Smith*, 538 U.S. at 103. A 2017 report by the Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART") shows that the 15-year sexual recidivism rate for offenders who already had a prior conviction for a sexual offense was 37 percent, and that more than one-quarter of all sex-offenders will commit another sexual offense within 20 years of release.[4] Disturbingly, because "[r]esearch has clearly demonstrated that many sex offenses are never reported to authorities," and "[s]ex offenders do not typically self-report sex crimes," the "[o]bserved recidivism rates of sex offenders are underestimates of actual reoffending." *Id.* at 3, 16, 109.

As this Court stated in *Smith*, it is reasonable for policy-makers to "conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism," 538 U.S. at 103, and that conclusion is

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[4] *See* Sex Offender Management and Assessment and Planning Initiative 112 (Mar. 2017), https://SMART.gov/SOMAPI.

"consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Id.* If unreviewed, the decision below imperils Maryland's ability to monitor the presence of sex offenders in the community, because it contemplates the removal from the Registry of numerous offenders, like Mr. Rogers, for whom the trier of fact never made the determination of the age of the victim because it was not an element of the registrant's offense.

Moving forward, the court's opinion will likely result in nonregistration of offenders who meet the statutory criteria for sex offender registration. As the dissent reasoned, Maryland trial judges, concerned about a defendant's right to a fair trial, may exclude evidence from the jury regarding the victim's age because it does not bear on a defendant's actual guilt or innocence and could inflame jurors. As a result, trial courts could "decline to give the jury the special verdict form envisioned by the Majority, even with the knowledge that this will make the defendant immune to sex offender registration." *Rogers*, 468 Md. at 87 (Biran, J., dissenting).

The court's opinion also fails to explain how judges and juries will determine "a fact necessary for placement on the Registry" for an offender who is convicted of an offense in another State or foreign jurisdiction and then moves to Maryland. Offenders must register in Maryland if they commit in another jurisdiction an offense that, if committed in Maryland, "would constitute" an offense requiring registration under the

Maryland Act. Md. Code Ann. Crim. Proc. §§ 11-701(o)(3), 11-701(p)(5) & 11-701(q)(5) (LexisNexis 2018 & Supp. 2019). Because these offenders have *already* been convicted of a sex offense in another jurisdiction, it would be impossible for a Maryland judge or jury to determine a factual predicate for registration "during the adjudicatory phase of the criminal proceeding prior to sentencing." *Rogers*, 468 Md. at 45. As a result, if applicable to out-of-state offenders, the decision below will eviscerate registration requirements for these offenders and turn Maryland into a "haven" State for individuals seeking to escape registration. By thus allowing sex offenders to circumvent sex offender registration and reporting requirements and "slip through the cracks," *Carr v. United States*, 560 U.S. 438, 455 (2012), the Maryland court's decision would also frustrate the very purpose of SORNA: to "protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," 34 U.S.C. § 20901. *See United States v. Gould*, 568 F.3d 459, 473 (4th Cir. 2009) (noting that the effectiveness of sexual offender registration and notification "'depends on also having effective arrangements for tracking of registrants as they move among jurisdictions and some national baseline of registration and notification standards'") (quoting 73 Fed. Reg. 38030, 38045).

Finally, the decision below calls into question the validity of the convictions of a vast number of Maryland offenders. Under the court's extraordinary

expansion of the *Apprendi* rule, no longer is a sex-offender registration requirement merely a "collateral consequence" of a defendant's conviction. *See*, *e.g.*, *Calhoun v. Attorney Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) ("join[ing] the circuits uniformly holding that the requirement to register under state sex-offender registration statutes does not satisfy [28 U.S.C.] § 2254's condition that the petitioner be 'in custody' at the time he files a habeas petition," because registration requirements are "collateral consequences of conviction"). Instead, under the Maryland court's view, a requirement to register is now part of the conviction itself. As a result, many offenders who are on the Registry as the result of pleading guilty to a registerable offense will seek to invalidate their guilty pleas on the ground that at the time of conviction they were not informed of the registration consequences of their pleas. In Maryland, such a challenge could be raised immediately after the guilty plea via an application for leave to appeal, but it could also be brought years later, in a petition for post-conviction or coram nobis relief. *See Skok v. State*, 361 Md. 52, 72 (2000) (explaining circumstances in which defendant may file a post-conviction or coram nobis petition). Because the original guilty plea eliminated the need for a trial, a successful post-conviction or coram nobis petition would place the prosecution at the disadvantage of having no prior testimony to use as evidence at any retrial, and given the passage of time in many cases, further prosecution of these individuals could be extremely difficult. Under these circumstances, this

Court should review the decision of the Court of Appeals of Maryland to consider the important issues presented by this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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