No.

IN THE
Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

COLONEL GARY T. SETTLE, in his Official Capacity as Superintendent of the Virginia Department of State Police,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state sex offender registry that imposes restrictions on individuals beyond mere registration with state or local law enforcement constitutes "punishment" that is properly evaluated under the Eighth Amendment.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.[1]

[1] The district court granted Petitioner's request to proceed under a pseudonym in light of the sensitive nature of the facts at issue in this case. *See Doe v. Settle*, Case No. 2:20-cv-00190-RAJ-LRL, at Dkt. No. 5 (E.D. Va. April 20, 2022), and Petitioner proceeded in both the district court and the Court of Appeals as John Doe. Petitioner requests that this Court permit him to do the same.

RELATED PROCEEDINGS

Doe v. Settle, No. 20-1951 (4th Cir.) (opinion affirming the district court's dismissal of the complaint issued January 28, 2022, Mandate issued February 24, 2022).

Doe v. Settle, No. 2:20-cv-001900-RAJ-LRL (E.D. Va.) (opinion and order dismissing plaintiffs' complaint for failure to state a claim, issued August 17, 2020).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 2a) is reported at 24 F.4th 932. The decision of the district court (Pet. App. 37a) is unreported, but available at 2020 WL 5352002.

JURISDICTION

The decision of the court of appeals was entered on January 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The provisions of the Virginia Code that govern registration for sex offenders are reproduced in the appendix to this petition, at Pet. App. 56a–67a.

INTRODUCTION

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court set forth the framework for determining whether a sanction constituted "punishment" subject to the Eighth Amendment and other constitutional restrictions. First, courts examine the legislature's "intent as to the penal nature of a statute." *Id.* at 169. If the legislature did not intend for a

sanction to constitute punishment, courts then weigh the following factors "in relation to the statute on its face": (1) "whether [the sanction] has historically been regarded as punishment"; (2) "whether it comes into play only on a finding of *scienter*" or following a criminal conviction; (3) whether the sanction at issue "involves an affirmative disability or restraint"; (4) whether "its operation will promote the traditional aims of punishment"; (5) whether "an alternative purpose to which it may rationally be connected is assignable for it"; and (6) whether it appears excessive in relation to the alternative purpose assigned." *Id*. at 168–69.

In 2003, this Court applied these factors to the Alaska Sex Offender Registration Act ("Alaska SORA"). The Alaska SORA required individuals convicted of certain offenses to register with law enforcement for a period of years, up to life, following their release from custody, and made this information publicly available. *See generally Smith v. Doe*, 538 U.S. 84 (2003). Unlike most offender registries enacted in later years, the Alaska SORA did not impose residency restrictions on offenders and did not "specify a means of making registry information available to the public," *id*. at 106–07 (Thomas, J., concurring); nor did it impose restrictions on where an offender could live, work, or "loiter", or require offenders to register in person or update law enforcement of changes in personal information within days or minutes. *Id*. at 90 (opinion of the Court). This Court concluded that the Alaska SORA was not a "punishment" subject to the prohibition on *ex post facto* laws. The Court first held that Alaska's legislature did not intend the SORA as punishment, because "purpose and principal effect of notification are

to inform the public for its own safety," and that mere registration was not analogous to any historical punishments, including banishment, public shaming, or parole. *Id*. at 98–99. The Court then considered the relevant factors it articulated in *Mendoza*. First, it noted that the registry did not restrict where an individual could live or work, and imposed only a "minor and indirect" disability or restraint on individual liberty. *Id*. at 99–100. Second, though the registry might have a deterrent component, the Court concluded it was not retributive because Alaska's broad categories "are reasonably related to the danger of recidivism and this is consistent with the regulatory objective." *Id*. at 102. Third, the Court held that the reporting requirements are not excessive when viewed in light of the state's interest in public safety. *Id*. at 103–04. Though the Court acknowledged that the *Mendoza* factors were "neither exhaustive nor dispositive," but rather, were "useful guideposts" to its assessment of Alaska's regulatory scheme, it ultimately concluded, based only on its evaluation of the *Mendoza* factors, that the Alaska SORA was not punishment. *Id*. at 97.

In the following two decades, Virginia and other states have enacted registration requirements of their own, which have imposed new restrictions on offenders that are more punitive than those at issue in *Smith*. For example, offenders in Virginia must provide detailed personal information, including photographs, fingerprints, DNA samples, and any internet usage information to law enforcement. Pet. App. 61a, 5a–6a. And, they are required to update that information within days or sometimes minutes of any change. Title III offenders like Petitioner must notify law enforcement within three days of a change

in name, address, employment, or vehicle registration, and must inform law enforcement within *thirty minutes* of any change in email address or internet identification. Pet. App. 6a (citing Va. Code § 9.1-903). Offenders are barred from certain professions and from visiting schools, daycares, or any area being used for a school-related activity while children are present. Va. Code § 18.2-370(A). And registrants are prohibited from "loitering within 100 feet of any place that they know or have reason to know is a school, daycare, playground, athletic facility, or gym." Pet. App. 7a.

All 50 states and the District of Columbia have adopted some form of sex offender registration system, and the vast majority of these registries impose restrictions on individuals above and beyond the restriction imposed by the Alaska SORA that this Court evaluated in *Smith*.

This Court has not resolved the question whether registries like Virginia's, which impose restrictions far beyond registration, constitute punishment. The Alaska registry at issue in *Smith* presented a "close case" in light of significant indications of its "punitive character." *Smith*, 538 U.S. at 110 (Souter, J., concurring). "Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts." *Id*. at 109 (Souter, J., concurring). The registration laws enacted since then often prevent offenders from living, working, or even being present in certain places, and they subject individuals to significant monitoring and supervision by law enforcement; put simply, these registries are even more punitive in nature because they impose a greater "disability or restraint" on an of-

fender's liberty, more closely resemble both parole or probation and traditional punishments like banishment, and are more stringent and overbroad than the requirements imposed by the Alaska SORA at issue in *Smith*. These restrictions are imposed based only on offenders' crime of conviction, without any reference to their individual circumstances.

Federal courts of appeals and state courts of last resort have considered whether various state registration laws constitute punishment under *Mendoza*. These courts have disagreed sharply, and their different conclusions follow from their different approach to this Court's *Mendoza* factors, not from differences between state laws. The Sixth Circuit and nine state courts of last resort have concluded that these state registries constitute punishment under the framework established by *Mendoza*. The Fourth, Ninth, and Tenth Circuits, and 23 state courts of last resort have reached the opposite conclusion, most recently in the opinion below. This split is intractable and important; the Fourth Circuit's conclusion that the Virginia registry is not punishment closes the door to any meaningful constitutional challenge to an individual's inclusion on the registry, all while subjecting that individual to significant monitoring and supervision by law enforcement.

This Court should grant certiorari to resolve this split.

STATEMENT

1. In April 2007, Petitioner John Doe was arrested after being caught having sex with his then-fourteen-year old girlfriend. Doe had just turned eighteen and his girlfriend was three months shy of

her fifteenth birthday, the legal age of consent in Virginia.

Petitioner was charged with "carnal knowledge of a child" under Va. Code § 18.2-63, which criminalizes sex with children between the age of thirteen and fourteen. On the advice of counsel, Doe negotiated a guilty plea to "indecent liberties with children" under Va. Code § 18.2-370(A), which is a less serious and lower-class felony under Virginia law and which carries a shorter prison sentence.

Both carnal knowledge and indecent liberties subject a defendant to the Virginia Sex Offender Registry. But there is a key difference between the statutes for Registry purposes. The more serious "carnal knowledge" offense includes a so-called "Romeo and Juliet" exception, which allows an individual who is at most five years older than the victim to petition to be removed from the registry after a period of 15 years. Pet. App. 9a–10a (citing, *inter alia*, Va. Code § 9.1-902). The less serious indecent liberties statute does not. Petitioner, like others convicted of this less serious offense, therefore remains on the Virginia Sex Offender Registry for life without any opportunity to petition for removal; had he pleaded guilty to the more serious offense of carnal knowledge, he likely would have been removed long ago. Va. Code § 9.1-902.

2. Virginia's sex offender registration system was originally codified in Title 19 of the Virginia Code, which governs "Criminal Procedure." *See* Former Va. Code § 19.2-298.1–294.4 (repealed 2003). After this Court's 2003 decision in *Smith*, the Virginia Legislature moved the operative provisions to Title 9 of the Virginia Code, which governs "Commonwealth Public Safety," and included a statement that

the purpose of the registry was to assist law-enforcement agencies and others in protecting communities and families from sex offenders. *See* Virginia Bill S.1332 (approved March 18, 2003) (moving the Sex Offender Registry statute from the Penal Code to Title 9 of the Virginia Code, which governs public safety).

The registry is administered by Virginia state law enforcement agencies and requires registration "with the Department of State Police." *See, e.g.*, Va. Code § 9.1-903. The registry divides offenders into three tiers based solely on their crime of conviction, with Tier III being the most onerous. Va. Code § 9.1-902. Offenders must re-register at least four times a year, Va. Code § 9.1-904, and must be photographed in person by law enforcement at least once every two years. Va. Code § 9.1-903. They must also provide law enforcement with a significant amount of private information, including a DNA sample and fingerprints and palm prints, Va. Code § 9.1-903; all email addresses, instant messaging user names, or any other information regarding means of communication online or aliases they are currently using or intend to use, *id.*; and all "such other information as the State Police may from time to time determine is necessary to preserve public safety, including but not limited to the fact that an individual is wanted for failing to register or reregister." Va. Code § 9.1-913. All offenders, regardless of classification tier, must also update law enforcement almost immediately any time this information changes: within three days if the offender changes jobs, becomes unemployed, retired, disabled, or laid off, or if he moves, buys a car, or graduates from college. *See* Va. Code §§ 9.1-903; 9.1-906. Offenders must also update law enforce-

ment *within 30 minutes* if they create a new email address or other "internet identity information." Va. Code § 9.1-903. And they must notify law enforcement at least 10 days before any travel out of the state. Pet. App. 6a (citing Va. Code § 9.1-903(D)).

All offenders are also assigned to an investigative officer, who is permitted to enter the offender's home at any time for an in-person meeting. Va. Code § 9.1-907. Petitioner's case officer has visited his residence every six months.

Tier III offenders cannot be alone with a child. They cannot enter a school or daycare or "loiter[]" within 100 feet of them. Nor can they adopt a child. Pet. App. 7a; *see also* Va. Code §§ 16.1-228(6), 18.2-370.2, 63.2-1205.1. They are banned from various professions, including teaching, operating a daycare, or working for a ridesharing or taxi service. Va. Code § 22.1-296.1 (referencing Va. Code § 19.2-392.02); *see also* Va. Code §§ 46.2-116; 46.2-2099.49.

Offenders face severe penalties for even inadvertent failure to comply with these requirements. Offenders who fail to meet registration deadlines can be subject to further restrictions, including GPS ankle monitoring and arrested and convicted of a separate felony offense under Virginia law. Pet. App. 6a (citing Va. Code §§ 472.1; 9.1-907).

3. In April 2020, Petitioner sued Department of State Police Superintendent Gary T. Settle under 42 U.S.C. § 1983. Petitioner alleged violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as well as violations of the Virginia state constitution. Petitioner's equal protection and due process claims both focused on the differential treatment between offenders convicted of carnal knowledge (who can claim the benefit of

the Romeo-and-Juliet provision) and offenders convicted of indecent liberties (who cannot). Pet. App. 11a–12a; 55a. Petitioner also alleged that Virginia's registry, which required him to register for life, violated the Eighth Amendment's prohibition on cruel and unusual punishment.

The district court granted the Superintendent's motion to dismiss. It concluded that Petitioner had failed to state a claim that his inclusion on the Virginia registry violated the Eighth Amendment prohibition on cruel and unusual punishment. Pet. App. 53a. The district court reasoned that "laws simply requiring individuals to register are not punitive and do not violate the *Ex Post Facto* Clause or the Eighth Amendment," Pet. App. 53a, and that "sanctions of occupational disbarment are nonpunitive." Pet. App. 53a. The district court agreed that "the locational restrictions on Plaintiffs' ability to live and loiter may be punitive," but it summarily concluded that they were not cruel or unusual. Pet. App. 53a. The district court did not consider the aggregate effect of the restrictions imposed by Virginia's Sex Offender Registry on an individual's liberty.

The Fourth Circuit affirmed. It first concluded that the registry's statement of purpose "cannot be read as expressing a punitive intent," because the Virginia legislature moved the statutory provisions governing registration out of the criminal code, which serves as "more evidence that Virginia had no punitive intent." Pet. App. 28a. The Fourth Circuit then considered the *Mendoza* factors, acknowledged differences between Virginia's registry and Alaska's, but concluded that the Virginia registry did not constitute punishment. Pet. App. 25a, 27a–28a.

First, stating that Virginia's registry has not been "regarded in our history and traditions as punishment," the court rejected the comparison between the registry and historical punishments like public shaming or banishment. In the court's view, the "intuitive comparison between these kinds of punishments" is not sufficient, especially since convictions were already public. Pet. App. 33a–34a. The court also rejected the comparison to parole or probation, reasoning that probation involves "a far more active role" than "simply collecting information for a database." Pet. App. 36a. The Fourth Circuit also compared the registry to the census and the registration of aliens, and concluded that registration in and of itself was "more like the common regulatory devices used at the founding than it is like historical forms of punishment." Pet. App. 33a.

Second, the Fourth Circuit rejected the contention that the Virginia registry "imposes an affirmative disability or restraint," concluding that the registry imposes only "minor and indirect" restraints on liberty, despite acknowledging that the registry prohibited individuals from holding certain jobs or entering a school to visit their own child. Pet. App. 33–34a.

Third, the Fourth Circuit concluded that the Virginia registry did not "promote[] the traditional aims of punishment," as it had only "wisps of deterrence and retribution" but that these "traditional punitive justifications are not the driving force." Pet. App. 34–35a. Fourth, the Fourth Circuit concluded that the registry had a "rational connection to a nonpunitive purpose," holding that the registry "is rationally connected to the legitimate goal of public safety" and

not "excessive with respect to this purpose." Pet. App. 26a–27a.

REASONS FOR GRANTING THE WRIT

This case meets all of the Court's criteria for granting certiorari.

First, the question presented concerns an intractable, acknowledged split in authorities on a recurring and important question of law that only this Court can resolve.

Second, the decision below is incorrect. The Fourth Circuit's decision conflict with the Eighth Amendment's original meaning and plain text, as well as with the common-sense application of *Mendoza*.

Third, the question presented is important. In the past two decades, state sex offender registries have become more prevalent and more restrictive. As a result, the split in authorities has deepened, and the Fourth Circuit's approach closes the courthouse door to any individual seeking to challenge his inclusion on the sex offender registry and the significant restrictions on the offender's liberty that result from it.

Fourth, there is an appropriate juncture for this Court to address the issues that *Smith* did not resolve in light of the proliferation of sex offender registration schemes like the one in Virginia and significant advances in technology, both of which make these registries significantly more burdensome on individuals.

Finally, this case is an ideal vehicle to resolve the question.

Certiorari is warranted.

A. The Question Presented Implicates an Intractable and Acknowledged Split in Authorities.

Four federal courts of appeals and 32 state courts of last resort have considered whether a state sex offender registry constitutes punishment under the Eighth Amendment and the prohibition against *ex post facto* laws, both of which apply only to "punishment." *See Smith*, 538 U.S. at 97 (*Mendoza* factors have "migrated into [the Court's] *ex post facto* case law from . . . the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses").

The Sixth Circuit and nine state courts of last resort have held that these registries constitute punishment. The Fourth, Ninth, and Tenth Circuits, and 23 state courts of last resort have reached the opposite conclusion.

This Court's intervention is necessary to resolve the split.

1. The Sixth Circuit and Various State Courts Have Concluded That Registries Like the One at Issue Constitute Punishment.

The Sixth Circuit and nine state courts of last resort have held that state sex offender registries, like Virginia's, that impose restrictions on individuals beyond mere registration constitute punishment for purposes of both the Eighth Amendment and the prohibition on *ex post facto* laws of the federal constitution.

In *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016), the Sixth Circuit concluded that the Michigan Sex Offender Registration Act constituted punishment under the prohibition on *ex post facto laws*. *Id*. at 705. The restrictions imposed under the Michigan law at issue in *Snyder* were substantively identical to the restrictions imposed on offenders under Virginia law: it required offenders to register in person with law enforcement and published information about offenders' names, addresses, and photographs; it required individuals to "immediately" update information such as new vehicles or e-mail accounts, and it prohibited individuals from "loitering" within 1,000 feet of a school. *Id*. at 697–98.

The court observed that the law was passed "for the professed purpose of making Michigan communities safer and aiding law enforcement," and therefore that the registry was not passed with punitive intent. *Id*. at 697, 700–01. The Sixth Circuit then applied the *Mendoza* factors and concluded that the Michigan registry's effects were "punitive," noting first that the registry's geographic restrictions are "very burdensome, especially in densely populated areas." *Id*. at 701. The restrictions forced individuals to "tailor much of their lives around . . . school zones" and meant that individuals "often have great difficulty in finding a place to live or work." *Id*.; *cf*. *Ortiz v. Breslin*, 142 S. Ct. 914, 915 (2022) (statement of Sotomayor, J.) (noting that offenders often are unable to find housing because of geographic restrictions). "Much like parolees, [offenders] must [also] report in person . . . [and] [f]ailure to comply can be punished by imprisonment, not unlike revocation of parole." *Snyder*, 834 F.3d at 703.

First, the Sixth Circuit considered whether the registry was analogous to historical forms of punishment, and concluded that while the level of individual supervision or restraint may be less than either incarceration or parole, "the basic mechanism and effects have a great deal in common," and imposed an affirmative restraint on liberty. *Id.* Second, the Sixth Circuit noted that it "should be evident" that the Michigan registry imposed an "affirmative disability or restraint" on offenders. *Id.* at 703. Third, the Sixth Circuit held that the Michigan registry advanced "all the traditional aims of punishment" because "[i]ts very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend" and "looks back at the offense (and nothing else) in imposing its restrictions." *Id.* at 704.

Finally, the Sixth Circuit concluded, even if the registry served the "nonpunitive purpose" of promoting public safety, the record "provides scant support for the proposition that [the registry] in fact accomplishes its professed goals" and that its "negative effects are plain on the law's face." *Id.* at 704–05. The Michigan registry therefore constituted punishment under the prohibition on *ex post facto* laws and its retroactive application to the plaintiffs in that case was unconstitutional. *Id.* at 706.

Nine state courts of last resort have reached the same conclusion when evaluating state registries that bear substantial similarities to Virginia's. For example, the Oklahoma Supreme Court applied the *Mendoza* factors and concluded that the Oklahoma state sex offender registry constituted punishment and therefore could not apply retroactively. *Starkey v. Oklahoma Dept. of Corr.*, 305 P.3d 1004, 1019–20

(Okla. 2013) (addressing claims brought under both the state and federal constitutions and noting that the standard under both was identical). In reaching this conclusion, the Oklahoma Supreme Court noted that the registry was not passed with punitive intent; rather, it was intended as a "civil regulatory scheme" created to "help prevent sex offenders from re-offending . . . and alert the public of such sex offenders when necessary." *Id.* at 1020.

Nevertheless, the court concluded that the registry's requirements that individuals verify their address in person and update law enforcement within three days of "changing or terminating employment or changing enrolment status as a student" mirrored traditional forms of punishment because they "imposed on offenders [treatment] similar to the treatment received by probationers subject to continued supervision." *Id.* at 1022–23. Like the Sixth Circuit, the Oklahoma Supreme Court also analogized these requirements to traditional punishments of banishment, public humiliation, and shame, noting that registration was "essentially a label not unlike a 'scarlet letter.'" *Id.* at 1025–26.

With respect to the second factor—an affirmative disability or restraint—the court also noted that Oklahoma imposed restrictions where an offender can live (not within 2,000 feet of a school, playground, childcare center, or other site whose primary purpose is working with children) and required the public dissemination of information about offenders which resulted in incidents of "vigilante justice." *Id.* at 1023–24. Taken together, "the cumulative effect" of Oklahoma's "registration and notification provisions impose substantial disabilities on registrants" and "clearly favor[] a punitive effect." *Id.* at 1025. Final-

ly, the Oklahoma court noted that the requirements were excessive with respect to their stated nonpunitive purpose because they were imposed based only on the crime of conviction and "without any individual determination" of the offender's risk of recidivism or any ability to petition for relief or discharge based on rehabilitation. *Id*. at 1029.

More recently, the Colorado Supreme Court has joined these states in concluding that lifetime sex offender registration, particularly for minors, not only constituted punishment but also violated the Eighth Amendment prohibition on cruel and unusual punishment. *People in Interest of T.B.*, 489 P.3d 752 (Col. 2021). In reaching this conclusion, the Colorado Supreme Court concluded, like the Sixth Circuit and the Oklahoma Supreme Court, that the Colorado registry—which required individuals to register in person and update information within five days of any change to residence, employment, or online identity and which publicly disseminated information about offenders—imposed "an affirmative disability or restraint" on individuals. *Id*. at 767. Moreover, the court noted, the community notification programs "resemble traditional forms of punishment, such as public shaming" because they not only inform the public but also "humiliate and ostracize the offenders." *Id*. (internal quotations omitted). The Colorado registry also promoted the traditional aims of punishment and, at least with respect to juveniles, lacks any rational connection to the state's purpose in promoting public safety especially because "registration requirements have no statistically significant effect on reducing recidivism rates among offenders." *Id*. at 768–69.

The Supreme Courts of New Hampshire, Kentucky, Iowa, Massachusetts, Michigan, New Jersey, and Pennsylvania have all similarly held that the state sex offender registries in force in those states constitute punishment. *See generally, e.g.*, *Doe v. State*, 111 A.3d 1077, 1095–96, 1101 (N.H. 2015) (focusing on New Hampshire's in-person registration requirements and its residency restrictions, as well as the requirement that individuals register for life without review); *Comm. v. Baker*, 295 S.W.3d 437, 444–45 (Ky. 2009) (noting that the residency requirements imposed by the Kentucky registry are "decidedly similar to banishment" and that the registry's restrictions are imposed "based solely upon prior offenses," meaning the registry "promotes and furthers retribution against sex offenders for their past crimes."); *People v. Betts*, 968 N.W.2d 497 (Mich. 2021) (agreeing with *Snyder*); *Comm. v. Cory*, 911 N.E.2d 187, 196–97 (Mass. 2009) (holding that a requirement that sex offenders wear an ankle monitor places a burden on liberty and promotes the traditional aims of punishment); *Riley v. N.J. State Parole Bd.*, 98 A.3d 544, 558–59 (N.J. 2014) (same); *see also*, *Comm v. Santana*, 266 A.3d 528 (Pa. 2021) (relying on *Comm v. Muniz*, 164 A.3d 1189 (Penn. 2017), and calling the imposition of restrictions under Pennsylvania's sex offender registry a "dramatic increase in the punishment imposed" on the defendant); *In interest of T.H.*, 913 N.W.2d 578 (Iowa 2018) (focusing on lifetime registration for minors).

Notably, even the Fourth Circuit in *Prynne v. Settle*, considering the same Virginia statute at issue here, allowed an *ex post facto* claim to move forward based on its conclusion that the plaintiff in that case plausibly alleged that the statute constituted pun-

ishment under *Mendoza*. 848 F. App'x 93, 103 (4th Cir. 2021).

2. The Fourth, Ninth, and Tenth Circuits and Several Other State Courts Have Concluded That Registries Like the One at Issue Are Not Punishment.

The Fourth, Ninth, and Tenth Circuits, as well as the supreme courts of 23 states, applying the same *Mendoza* factors, have concluded that state sex offender registries are not punishment, even when they impose restrictions beyond mere registration.

In *American Civil Liberties Union of Nevada v. Masto*, the Ninth Circuit concluded that the Nevada sex offender registry, which required in-person registration and public notice of certain individuals' sex offender status, did not constitute punishment under the prohibition on *ex post facto* laws. 670 F.3d 1046, 1050–51 (9th Cir. 2012). Specifically, the Ninth Circuit, applying the *Mendoza* factors, noted that the registry did not resemble traditional punishments such as public shaming because the "purpose and principal effect" of Nevada's public notice requirement was "to inform the public for its own safety"; "shame is but a collateral consequence" of that requirement. *Id*. at 1055–56. The Nevada registry also did not impose an "affirmative disability or restraint" because it "imposes no physical restraint" on individuals or otherwise prevents them from changing jobs or residences. *Id*. at 1056. And, the Nevada registry served the "legitimate public safety interest in monitoring sex-offender presence in the community," and was not excessive with respect to this purpose. *Id*. at 1057.

The Tenth Circuit, in a series of decisions, has reached a similar conclusion. First, in *Femedeer v. Haun*, decided before this Court's decision in *Smith*, the Tenth Circuit applied the *Mendoza* factors to determine that the Utah registry did not constitute punishment under the prohibition on *ex post facto* laws. 227 F.3d 1244 (10th Cir. 2000). There, the Tenth Circuit stated that the Utah registry did not pose an affirmative disability or restraint on offenders because registration and notification alone do not "prohibit sex offenders from pursuing any vocation or avocation." *Id.* at 1250. Furthermore, the Tenth Circuit held, the Utah registry, which publicized information about offenders, did not resemble historical punishments such as public shaming, *id.* at 1251, and the registration statute "has civil purposes," in addition to "effects of deterrence, avoidance and investigation." *Id.* at 1252. The Tenth Circuit reaffirmed its holding in *Femedeer* following this Court's decision in *Smith*. *Doe v. Shurtleff*, 628 F.3d 1217, 1227 (10th Cir. 2010). And, most recently, the Tenth Circuit applied almost identical reasoning when it split with the Oklahoma Supreme Court and concluded that the Oklahoma registry did not constitute punishment under the prohibition on *ex post facto* laws. *Shaw v. Patton*, 823 F.3d 556, 563 (10th Cir. 2016) (recognizing its disagreement with the Oklahoma Supreme Court in *Starkey*, 305 P.3d 1004); *see also, id.* at 564–66 (holding that the Oklahoma registry did not resemble probation or any other historical punishment).

The Fourth Circuit in the decision below reached a similar conclusion as to the Virginia registry. Applying the *Mendoza* factors, the Fourth Circuit acknowledged that the Virginia registry could be

overbroad in some circumstances but nevertheless held that it was a "reasonable" means of promoting the state's legitimate interest in public safety. Pet. App. 28a. Like the Ninth and Tenth Circuits, the Fourth Circuit rejected comparisons between the Virginia registry and traditional forms of punishment like banishment, public shaming, or parole, noting that the "intuitive comparison between these kinds of punishments" is not sufficient and that the registry was "more like the common regulatory devices used at the founding than it is like historical forms of punishment." Pet. App. 33–38a. And, the Fourth Circuit, in contrast to the Sixth Circuit and various state courts, concluded that the disability or restraint imposed by registry was only "minor and indirect." Pet. App. 33a.

The highest courts of at least 23 states have similarly concluded that state registries do not constitute punishment for purposes of either the Eighth Amendment or Ex Post Facto analysis. The Supreme Court of Illinois, for example, held that the Illinois Sex Offender Registry was not "so punitive that it defeats the legislature's intent" to create a civil regulatory scheme. *People v. Malchow*, 739 N.E.2d 433, 439 (Ill. 2000). Like the Virginia registry, the Illinois registry required individuals to register with law enforcement periodically and publicized information about offenders. *Id.* at 437. Like the Fourth Circuit, the Illinois Supreme Court rejected the comparison between the registry and traditional punishments like branding, shaming, or banishment, noting that the Illinois statute was intended "to protect the public rather than to punish sex offenders." *Id.* at 439. The Court also concluded that the registry did not place "an *affirmative* disability or restraint on sex

offenders. Their movements are not restricted in any way." *Id*. And, the registry did not promote the traditional goals of deterrence and retribution: "it is unlikely," the Court concluded, "that those not already deterred from committing sex offenses by the possibility of a lengthy prison term will be deterred by the additional possibility of community notification." *Id*. at 440.

The highest courts of appeals of 19 other states and the District of Columbia[2] have similarly applied the *Mendoza* factors and concluded that state sex offender registries were not punishment for purposes of the prohibition on *ex post facto* laws or the Eighth Amendment. *See generally, e.g.*, *State v. Letalien*, 985 A.2d 4 (Maine 2009) (applying on *Mendoza* and holding that the Maine registry is not punishment because its punitive effect, which includes public notice, does not override its regulatory purpose); *State v. Petersen-Beard*, 377 P.3d 1127 (Kans. 2016) (holding that lifetime registration does not constitute punishment); *State v. Guidry*, 96 P.3d 242 (Haw. 2004) (same); *State v. Johnson*, 266 P.3d 1146 (Idaho 2011) (same, where the statute included both public dissemination and lifetime registration); *see also, e.g.*, *State v. Dickerson*, 2013 WL 2451243 (Conn. March 10, 2013); *Arthur v. United States*, 253 A.3d 134 (D.C. 2021); *Rainer v. State*, 286 Ga. 675 (Ga. 2010);

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[2] Though the Supreme Court of Alabama has not decided the question presented, the Alabama Court of Criminal Appeals, the state's intermediate court of appeals, has concluded that the Alabama registry, which includes residency restrictions, is not punishment both on its face and in terms of its effect. *Lee v. State*, 895 So. 2d 1038 (Ala. Crim. App. 2004), *accord State v. Biddle*, 187 So. 3d 1122 (Ala. 2015).

State v. Trosclair, 89 So. 3d 340 (La. 2012); *R.W. v. Sanders*, 168 S.W.3d 65 (Mo. 2005); *State v. Mount*, 78 P.3d 829 (Mont. 2003); *State v. Worm*, 680 N.W.2d 151 (Neb. 2004); *State v. Eighth Jud. Dist. Ct.*, 306 P.3d 369 (Nev. 2013); *State v. Bowditch*, 700 S.E.2d 1 (N.C. 2010); *State v. Meador*, 785 N.W.2d 886 (N.D. 2010); *State v. Gibson*, 182 A.3d 540 (R.I. 2018); *In re Justin B.*, 747 S.E.2d 774 (S.C. 2013); *Ward v. State*, 315 S.W.3d 461 (Tenn. 2010); *Haislop v. Edgell*, 593 S.E.2d 839 (W. Va. 2003); *Kammerer v. State*, 322 P.3d 827 (Wyo. 2014).

And, courts in California, Alabama, Arizona, Michigan, and Florida have all concluded that sex offender registries are not "punishment" in the context of a defendant's challenge to his criminal conviction and sentence. *See generally, e.g.*, *People v. Mosley*, 344 P.3d 788 (Cal. 2015); *State v. Trujillo*, 248 Ariz. 473 (Ariz. 2020); *Robinson v. State*, 730 So.2d 252 (Ala. 1998); *State v. Partlow*, 840 So.2d 1040 (Fla. 2003). Notably, this includes the Michigan Court of Appeals, which has held that the same Michigan sex offender registry at issue in *Snyder* did not provide the defendant with a valid basis to revoke his guilty plea and seek relief from his conviction and sentence. *See People v. Fonville*, 804 N.W.2d 878, 888, 892(Mich. Ct. App. 2011); *People v. Costner*, 870 N.W.2d 582, 589 (Mich. Ct. App. 2015).

B. The Opinion Below Is Incorrect.

The Fourth Circuit's conclusion that the Virginia Sex Offender Registry is not punishment is incorrect. It conflicts with both the plain meaning and the original common-law understanding of the word "pun-

ishment", and misapplies this Court's decision in *Mendoza*.

1. The Virginia Registry Is Punishment Under the Original Understanding of the Eighth Amendment.

The Eighth Amendment limits the power of the government to impose "punishment." *See Ingraham v. Wright*, 430 U.S. 651, 666–67 (1977). The significant restraints on liberty imposed by the Virginia Sex Offender Registry and others like it make clear that inclusion on these registries falls within the scope of "punishment." Indeed, the common definition of that word makes clear that "punishment" applies to *any* sanction, "such as a fine, penalty, confinement, or loss of property, right, or privilege," that is "assessed against a person who has violated the law." *Punishment* BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Punishment*, OXFORD ENGLISH DICTIONARY https://www.oed.com/view/Entry/154677?redirectedFrom=punishment#eid (last visited Apr. 26, 2022) ("[t]he infliction of a penalty or sanction in retribution for an offense or transgression"); *Punishment*, MERRIAM-WEBSTER https://www.merriam-webster.com/dictionary/punishment (last visited Apr. 26, 2022) (same); *see also* Pet. App 37a–38a ("Founding era legal dictionaries echo this focus on the cause-and-effect interaction between a legal violation and the imposition of some negative consequence by the state." (citing, *inter alia*, Samuel Johnson, *A Dictionary of the English Language*, (10th ed. 1792); Noah Webster, *An American Dictionary of the English Language* (1828); and Giles Jacob, *A New Law Dictionary* (1782))). There

can be no doubt that the restrictions imposed by the Virginia registry are, in fact, sanctions that are imposed as a consequence of the offender's conviction for a qualifying offense. After all, Petitioner and other offenders are only subject to the registry's requirements as a consequence of a criminal conviction of a qualifying offense.

That the Virginia registry is punishment is confirmed by the original public meaning of that term. At common law, "punishment" was intended as a "precaution against future offenses of the same kind," not as a means of "attornment or expiation for the crime committed." 4 WILLIAM BLACKSTONE, COMMENTARIES *11. Traditionally, this aim was effectuated in three ways: "by amendment of the offender himself," whether through corporal punishment, fines, or temporary exile or imprisonment; by "deterring others by the dread of his example"; or by "depriving the party injured of the power to do further mischief." *Id*. This understanding of the aim of punishment—to deter future crime, both by the offender through "amendment of the offender" or deprivation of his ability to "do further mischief" and by others by "the dread of his example"—carried through into the American tradition, and has informed this Court's interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment. *See, e.g.*, 18 U.S.C. § 3553(a) (incorporating these aims into the consideration of the appropriate sentence to impose on a defendant).

This Court has applied this understanding to hold that "[a]ny deprivation or suspension of [an individual's civil liberties] for past conduct is punishment." *Cummings v. Missouri*, 71 U.S. 277, 321–22 (1866). Punishment, this Court has explained, is not

restricted "to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights." *Id*. The Eighth Amendment framework "cannot be evaded by giving a civil law form" to an effectively punitive sanction. *Burgess v. Salmon*, 97 U.S. 381, 385 (1878); *see also Austin v. United States*, 509 U.S. 602, 610 (1993) ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.") (quoting U.S. v. Halper, 490 U.S. 435, 447-448 (1989).

The Virginia Sex Offender Registry meets this definition. It imposes significant restrictions on an individual's liberty and serves, in effect, to force "amendment of the offender" and to deprive "him of the power to do further mischief." 4 WILLIAM BLACKSTONE, COMMENTARIES *11; *Cummings*, 71 U.S. at 321–22. The Virginia registry not only publicizes the name, address, and employment information of every person listed, it also prohibits individuals from seeking certain kinds of employment and requires individuals to verify their information every three months, report any changes to personal information or contact information, and permit law enforcement officers to perform "random home visits" every month. Pet. App. 5a. In imposing these restrictions, the Virginia registry deprives the offender of the "power to do further mischief" by subjecting the offender to frequent monitoring and prohibiting the offender from having frequent contact with children. In the same way, registration forces "amendment of the offender" by placing him under strict supervision. And as the Sixth Circuit acknowledged, the affirmative restraints on liberty imposed by these restrictions "should be evident," *Snyder*, 834 F.3d at

703. These restrictions on liberty are significant, and fall within both the common law understanding and this Court's historical definition of punishment.

2. The Virginia Registry Is Punishment Under *Mendoza*.

The Virginia registry is punishment under the *Mendoza* factors. As discussed above, the conduct that triggers registration is criminal, and Doe would not be subject to the registry's requirements but for his conviction under Virginia law for designated offenses. Va. Code § 9.1-901.

1. The Fourth Circuit's conclusion that the Virginia registry imposes only minor restrictions on liberty ignores the cumulative effect of the numerous conditions imposed by that statute. Pet. App. 34a. The Virginia registry prohibits individuals from entering a school or daycare, even to visit their own child during school hours, without permission, Va. Code § 18.2-370.5; from "loitering" within 100 feet of such places, Va. Code § 18.2-370.2; from adopting a child without permission, Va. Code § 63.2-1205.1; or from teaching, operating a daycare, or working for a ridesharing service, Va. Code §§ 22.1-289.035; 46.2-2099.49. It also requires individuals to be photographed by law enforcement at least once every two years and to permit law enforcement to check in with the individual at his residence. And it requires offenders to notify law enforcement within thirty minutes of a new email address or other "internet identity information" and within three days of changing jobs, becoming disabled, or moving states, among other things.

These restrictions are substantial and go far beyond what this Court considered in *Smith*. The Virginia registry, like several others that post-date *Smith*, requires much more from offenders than the registry at issue in *Smith*, and certainly imposes more than a "minor and indirect" inconvenience on offenders. *See Snyder*, 834 F.3d at 703; *Doe v. State*, 111 A.3d at 1095–96; *T.B.*, 489 P.3d at 767.

2. As discussed above, the affirmative restraints on liberty imposed by the Virginia registry on individuals have been regarded in our history and tradition as punishment. *See Mendoza*, 372 U.S. at 168. As discussed above, both the common law and this Court's jurisprudence read the word "punishment" to extend to any deprivation or suspension of life, liberty, or property as a consequence of a criminal conviction. *Cummings*, 71 U.S. at 321–22; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES*11. There can be no doubt that the restrictions imposed by the Virginia registry fit into this historical understanding—registration requirements are triggered by a criminal conviction and Virginia law imposes affirmative restrictions on offenders, including restrictions on their ability to hold certain professions and visit certain areas. These restrictions result in a deprivation of liberty and, in some instances, the use and enjoyment of property.

Moreover, these affirmative restraints on liberty—including requirements that the individual must update authorities with changes in address and check in regularly with state law enforcement—resemble the traditional conditions of supervised release. These conditions, when imposed in the context of supervised release, are considered punishment and routinely analyzed under the Eighth Amend-

ment's framework. *See, e.g.*, *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003); *United States v. Williams*, 636 F.3d 1229 (9th Cir. 2011); *see also United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004); *United States v. Lundy*, 734 F. App'x 728 (11th Cir. 2018).

The Fourth Circuit's analysis of these burdens cannot be reconciled with the cumulative effect of these restrictions or the original understanding of punishment. Pet. App. 34a–35a. As the Sixth Circuit explained, although the registry's restrictions on an individual's movement do not "make the registrant dead in the law and entirely cut off from society," the restrictions are significantly burdensome and so resemble banishment. *Does*, 834 F.3d at 701. This is particularly true because Virginia law prohibits offenders from adopting a child and bars them from entering schools or daycare centers, or "loitering" within 100 feet of such places. Va. Code §§ 18.2-370.5, 18.2-370.2, 63.2-1205.1. And, the Virginia registry allows for the wide dissemination of information that allows individuals on the registry to be identified by anyone in the world and subjects those individuals to threats, shame, and humiliation. *See* Pet. App. 29a. That the publication of this information does not, in and of itself, "involve[] physical pain and direct confrontation with the community," Pet. App. 30a, is irrelevant. It still has the effect of humiliating and ostracizing the offenders and enables the use of registry information to "harass, victimize, or discriminate against" offenders, *Interest of T.B.*, 489 P.3d at 767, in a manner that is analogous to common law punishments like the stocks or the ducking stool. 4 WILLIAM BLACKSTONE, COMMENTARIES *370.

Finally, the Fourth Circuit's piecemeal approach, comparing individual conditions imposed by the Virginia registry to various historical punishments, misses the point entirely. Pet. App. at 29a–34a. While individual restrictions imposed by the registry may not be punitive, their aggregate effect certainly is, and it is this aggregate effect that the Fourth Circuit should have considered when applying the *Mendoza* factors. *See Starkey*, 305 P.3d at 1025 (considering the cumulative effect of restrictions imposed on offenders for purposes of *Mendoza*).

3. The Fourth Circuit's conclusion that the Virginia registry includes only "wisps of deterrence and retribution" is also incorrect. Pet. App. 35a. The Virginia registry, like dozens of others like it around the country, furthers the traditional aims of punishment—namely, retribution and deterrence. As the Sixth Circuit explained, the registry's goal is "incapacitation insofar as it seeks to keep sex offenders away from the opportunity to reoffend." *Does*, 834 F.3d at 703. And, "it is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions," and in the case of Tier III offenders, forecloses any opportunity for those individuals to ever petition for removal from the registry and seek "full[] admi[ssion] into the community." *Id.*

4. Finally, even accepting that the registry furthers the non-punitive aim of public safety, its restrictions, taken in the aggregate, are excessive with respect to that purpose. The regulatory regime in place severely restricts where offenders can travel or "loiter", hinders their ability to fully participate in the lives of their children, and prevents individuals like Doe from ever petitioning for removal by making a showing that he no longer presents a danger to the

community. *See Does*, 834 F.3d at 705. These requirements are supported by "at best—scant evidence" that such restrictions actually further public safety. In fact, the State has proffered no explanation here as to how the registry's stringent requirements further its non-punitive aims.

To be sure, this does not mean that Virginia and other states cannot impose stringent requirements on individuals convicted of sex offenses. But when they do so, these requirements must comply with the Eighth Amendment's prohibition on cruel and unusual punishment, and an individual challenging these restrictions must have the ability to do so under the Eighth Amendment standard.

C. The Split Is Important and Unlikely to Be Resolved Without This Court's Intervention.

The split in authorities on the question is important and has only deepened as states around the country pass more restrictive sex offender registries. Both the state and federal courts continue to grapple with the appropriate framework to apply when evaluating challenges to an individual's inclusion on a state's sex offender registry, and the courts have been unable to arrive on a single coherent and consistent framework. This Court's intervention is necessary to ensure that courts around the country apply a single approach to registries like Virginia's that impose restrictions on liberty above and beyond mere registration.

As of 2018, anywhere between 780,000 and 1 million people around the country are subject to registration requirements like the ones imposed by Vir-

ginia. *How Many Registered Sex Offenders Are There in Your State?* SAFEHOME.ORG (Aug. 24, 2021), https://www.safehome.org/data/registered-sex-offender-stats/; Steven Yoder, *Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall*, THE APPEAL (Jul. 03, 2018). As registries become more restrictive, and their information more widely disseminated, they raise significant constitutional concerns. *Cf. Ortiz*, 142 S.Ct. at 915 (statement of Sotomayor, J.) (noting that residency restrictions imposed by the New York registry "raise constitutional concerns."). Inclusion on registries like Virginia's not only subjects individuals to significant restraints on liberty and forces them to bear the brunt of public shame and ridicule, it also can, in some instances, force an individual to remain incarcerated beyond the period of his sentence. *See id.*

The Fourth Circuit's categorical rule that such registries are not punishment, and therefore are not evaluated under the Eighth Amendment, would close the courthouse door to people like Doe, who are seeking to challenge their inclusion on a registry without also challenging their underlying conviction. *See, e.g.*, 28 U.S.C. § 2254 (requiring an individual challenging his state conviction or sentence to be "in custody"); Pet. App. 17a–21a, 35a–36a (rejecting a challenge to the Virginia registry under the Equal Protection Clause and the Due Process Clause); *Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020) (rejecting a Colorado registry under the Due Process Clause).

D. This Case Presents an Ideal Vehicle.

This case is an ideal vehicle for resolving the question presented.

The question presented was briefed and decided in both the district court and the court of appeals, and is dispositive here. The Fourth Circuit, in a published, precedential opinion, concluded categorically that Virginia's Sex Offender Registry did not constitute punishment, and therefore could not be challenged as cruel and unusual under the Eighth Amendment. Pet. App. 35a. In doing so, the Fourth Circuit declined to adopt the approach taken by the Sixth Circuit and various states, including Colorado, which have registries that are substantially similar to the one at issue here. Pet. App. 25a, 35a. This case cleanly presents the question, unobstructed by any threshold issues that would preclude this Court's review.

Resolution of the question presented will not require this Court to inquire into the legality of Petitioner's inclusion on Virginia's Sex Offender Registry or otherwise wade into the factual bases underlying his original prosecution, sentence, and ongoing registration. Petitioner here brought suit under 28 U.S.C. § 1983 on the narrow question of whether his inclusion on the Virginia registry for life violated the Eighth Amendment. Because both the district court and the Fourth Circuit concluded that sex offender registries were categorically not "punishment," they dismissed Petitioner's complaint without any consideration of the merits of Petitioner's Eighth Amendment claim. This Court's resolution of the question presented, and determination of the scope of the Eighth Amendment, will resolve the question wheth-

er Petitioner can move forward with his claim under the proper standard.

This case provides this Court with the opportunity to clarify the scope of the Eighth Amendment's prohibition on cruel and unusual punishment, and to ensure that individuals like Petitioner have a meaningful ability to challenge their inclusion on harsh and restrictive sex offender registries.

E. This is an Appropriate Time for This Court to Address the Implications of *Smith*.

Finally, given the proliferation of more restrictive registration requirements since 2003, the lower courts need guidance from this Court on the proper application of *Mendoza* to state registration systems that go beyond the registry at issue in *Smith*.

As several courts have acknowledged, since *Smith*, many more states have adopted sex offender registries and, like Virginia, have imposed requirements far more stringent and restrictive than the ones at issue in *Smith*, resulting in the uneven approaches taken by various courts around the country. Pet. App. 29a (noting that "offender registries are a modern invention"); *Snyder*, 834 F.3d at 698.

The proliferation of social media has made it easier for anyone around the world to access information publicized by a state sex offender registry and use that information to target, harass, or shame individuals whose names appear on that registry. *See Prynne*, 848 F. App'x at 98; *cf. Riley v. California*, 573 U.S. 373, 393–94 (2014) (recognizing that significant change in the amount of information stored on cell phones requires a change in a court's approach to

searches of cellphone data under the Fourth Amendment). The change in technology, combined with the prevalence of these registries, constitute a significant change in the law in intervening years that, combined with the deep and entrenched split in authorities, justify this Court providing greater clarity about how *Smith* applies to the new generation of registries.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 28, 2022