No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

N.R.,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

On Petition for Writ of Certiorari
to the Kansas Supreme Court

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Do the Ex Post Facto Clause and Eighth Amendment permit a state to retroactively impose registration obligations on a person who was adjudicated of a sex offense when he was a child?

2. Does the "intent-effects" test in *Smith v. Doe*, 538 U.S. 84 (2003), apply to a person who was adjudicated of a sex offense when he was a child?

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The split opinion of the Kansas Supreme Court is published at 495 P.3d 16. (Slip opinion included as Appendix A at Pet. App. 1a.) The opinion of the Kansas Court of Appeals is published at 451 P.3d 877. (Slip opinion included as Appendix B at Pet. App. 40a.) The oral judgment of the state district court is unreported. R. 6: 5.

JURISDICTION

The Kansas Supreme Court issued its opinion on September 17, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 9, cl. 3:

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

U.S. Const. amend. VIII:

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

Kan. Stat. Ann. § 22-4906(h) (2011), in part:

"… an offender 14 years of age or more who is adjudicated as a juvenile offender for an act which if committed by an adult would constitute a sexually violent crime … and such crime is an off-grid felony or a felony ranked in severity

level 1 of the nondrug grid … shall be required to register for such offender's lifetime."

Kan. Stat. Ann. § 22-4908 (2011), in part:

"No person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act."

The entirety of the Kansas offender registration act, found within the Kansas code of criminal procedure at Kan. Stat. Ann. § 22-4901 et seq., is included at Pet. App. 57a.

STATEMENT OF THE CASE

N.R. was 14 years old when a court adjudicated him as a juvenile offender and placed him on probation. Pet. App. 3a. At that time, the judge told him he had to register for five years. Pet. App. 3a. The month before those five years were up, the Kansas Legislature made sweeping changes to the Kansas Offender Registration Act (KORA). N.R. was caught up in them and, overnight, his registration obligations extended to the day he dies: no discretion, no individualized assessment, and no early removal. Pet. App. 3a; Kan. Stat. Ann. § 22-4902 et seq.

N.R. is not alone—there are other people like him in Kansas and across the nation.[1] Despite growing amounts of research, data, lived experience, and other

[1] To some degree, 41 states require registration for sex offenses committed by children. OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) STATE AND TERRITORY IMPLEMENTATION PROGRESS CHECK (September 30, 2020).

information, N.R.—and many others who are living with requirements retroactively applied to them for an adjudication they received as a child—hears this from the Kansas Supreme Court and other lower courts: what is happening to you and your family is acceptable because of *Smith v. Doe*, 538 U.S. 84 (2003).

But *Smith v. Doe* did not involve someone adjudicated of a sex offense when he was a child. In fact, the state where it came from, Alaska, did not, and to this day does not, require registration for children adjudicated of sex offenses. Alaska Stat. Ann. § 12.63.100(3) (2003); Alaska Stat. Ann. § 12.63.100(3) (West 2019). And this Court has acknowledged since *Smith v. Doe* that a person adjudicated as a juvenile offender and later subjected to registration requirements may have grounds for an ex post facto challenge. *U.S. v. Juvenile Male*, 564 U.S. 932, 937-38 (2011) (appeal dismissed for mootness).

Furthermore, *Smith v. Doe* is 18 years old. It was decided before Congress enacted the Sex Offender Registration and Notification Act (SORNA) in 2006, a federal law plus a series of legally binding guidance issued by the Executive Branch, which consists of requirements for states to implement in their own registries. 34 U.S.C. § 20901, et seq. Since 2006, registration requirements in different jurisdictions, including Kansas, have expanded exponentially, and the laws have become far more punitive.

In contrast, lower courts taking the default position that *Smith v. Doe* controls over their state's registry conditions is waning. Since 2009, at least eleven state courts of last resort and the Sixth Circuit have held that offender registration

statutes cannot be applied retroactively without violating prohibitions against ex post facto laws or cruel and unusual punishment. *See* Reasons for Granting the Petition, *infra*, at 12-13; *see also* Pet. App. 37a ("Across the nation, courts are creeping out of the shadow of *Smith* and declaring registration requirements punitive"). At least five state courts of last resort have reached this conclusion specifically regarding people adjudicated as juveniles. *See* Reasons for Granting the Petition, *infra*, at 12-13.

Because of the increasingly punitive nature of offender registration statutes, this Court should weigh in on whether KORA and similar schemes constitute punishment for purposes of the Ex Post Facto Clause and Eighth Amendment, when applied to people registering because of juvenile adjudications. Further, this Court's review is the only way that courts will have guidance in conducting this analysis in the context of people adjudicated as children. Although *Smith v. Doe* provided a framework, the statutory scheme in Alaska in 2003 was too different from the current landscape of offender registration requirements—and children are too different from adults—for its conclusion to be the guidance that courts need when considering different issues in 2021.

A. The Kansas Offender Registration Act

1. The Kansas Legislature created the first offender registry act in 1993. The Habitual Sex Offender Registration Act required a person twice convicted of a sexually violent crime to register with the sheriff in the county where he/she lived for ten years. The information was open to law enforcement agencies only. 1993

Kan. Sess. Laws, ch. 253. On April 14, 1994, the Legislature expanded the Act to include people with first-time convictions and renamed it the Kansas Sex Offender Registration Act. It allowed public access to registrants' information; interested parties had to go to the sheriff's office to access the information. 1994 Kan. Sess. Laws, ch. 107.

In 1997, the Legislature added people convicted of murder and manslaughter, along with people with convictions for certain crimes with victims under age 18. The Act was renamed and has since remained the Kansas Offender Registration Act. 1997 Kan. Sess. Laws, ch. 181. Since 1997, additional sex offenses have been added to the definition of offender, and children adjudicated of certain sex offenses were added in 2002. 2002 Kan. Sess. Laws, ch. 55. In 2006, the Legislature gave courts some discretion about whether to require registration for children adjudicated of some sex offenses. 2006 Kan. Sess. Laws, ch. 214.

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

2. The registration periods for people convicted of sex offenses range from 15 years to lifetime. From 2002 to June 2011, the registration period, if required at all, for all people adjudicated of sex offenses committed when they were children was five years or until they reached age 18, whichever was longer. Kan. Stat. Ann. §

22-4906 (2010). After July 1, 2011, the period for people adjudicated of certain levels of sex offenses was increased to lifetime. Kan. Stat. Ann. § 22-4906.

Although the original act permitted registrants to petition for early removal, since 1999 (for lifetime registrants) and 2001 (for anyone), early removal has been expressly prohibited by statute. Kan. Stat. Ann. § 22-4908; 1999 Kan. Sess. Laws, ch. 164; 2001 Kan. Sess. Laws, ch. 208. In 2011, the Legislature eliminated a safety valve created in 1999 for people whose registration period was over by July 1, 1999. 2011 Kan. Sess. Laws, ch. 95. Failing to comply with KORA is a felony. Kan. Stat. Ann. § 22-4903; *see also* Reasons for Granting the Petition, *infra*, at 21-22.

3. As this Court knows, in 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which was Title I of the Adam Walsh Child Protection and Safety Act. Pub. L. No. 109-248 (originally codified at 42 U.S.C. §16901, et seq.; now at 34 U.S.C. § 20901, et seq.). In 2011, the Kansas Legislature considered a bill with the stated purpose of bringing Kansas into "substantial compliance" with SORNA in order to avoid the loss of Byrne Grant money. See Hearing on H.B. 2322 Before the H. Comm. on Corr. and Juv. Justice, 2011 Leg. (testimony in support of the bill by Sgt. Al Deathe, Douglas County Sheriff; David Hutchings and Nicole Dekat, Kansas Bureau of Investigation).

The KORA overhaul became law, and eventually a number of registrants challenged the application of the 2011 amendments to their situations, arguing that retroactive application of the sweeping changes to the registrants violated the Ex Post Facto Clause. Pet. App. 8a-9a. After applying the factors set out in *Kennedy v.*

Mendoza-Martinez, 372 U.S. 144 (1963), to the 2011 KORA amendments, a majority (4-3) of one composition of the Kansas Supreme Court agreed that the 2011 version constituted punishment for the purposes of the Ex Post Facto Clause. *State v. Buser*, 304 Kan. 181, 371 P.3d 886 (2016); *State v. Redmond*, 304 Kan. 283, 371 P.3d 900 (2016); *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016); Pet. App. 82a. (KORA, as amended in 2011, was punitive in effect and could not be applied retroactively to any registrant who committed the qualifying crime prior to July 1, 2011).

But on that *same day*, a majority (4-3) of a one-justice-different composition of the Court overruled those three cases and held that lifetime sex offender registration was not punishment and, therefore, did not violate the Eighth Amendment prohibition against cruel and unusual punishment. *State v. Petersen-Beard*, 304 Kan. 192, 377 P.3d 1127 (2016), *cert. den.* October 3, 2016; Pet. App. 150a. The majority cut and pasted the dissent from *Doe v. Thompson* and adopted it as its reasoning and basis for decision, which was "a faithful application of federal precedents requires us to find that the provisions of KORA at issue here are not punitive for purposes of applying our federal Constitution." Pet. App. 156a.

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

time was set to expire, the 2011 amendments made Reed go from a 10-year registration period to lifetime).

None of these Kansas Supreme Court cases involved a registrant whose obligation resulted from a juvenile adjudication.

B. Proceedings in the district courts

1. In 2006, the State charged N.R. with rape in a juvenile offender complaint; N.R. was 14 at the time of the alleged offense. In August 2006, N.R. pled guilty as charged and was adjudicated a juvenile offender. The district court placed N.R. on probation for 24 months, with an underlying 24-month sentence in a juvenile correctional facility. Three months later, the magistrate judge ordered N.R. to register "locally only, as a sex offender," but not publicly statewide or nationally. Pet. App. 3a. The order did not say how long N.R. had to register, but the version of KORA in effect at the time required N.R. to register for five years. Kan. Stat. Ann. § 22-4902(b) and (c)(1); Kan. Stat. Ann. § 22-4906(h)(1) (2006); Pet. App. 3a.

On July 1, 2011, the month before the five-year period was set to expire, H. Sub. for S.B. 37 took effect. Pet. App. 3a; 2011 Kan. Sess. Laws, ch. 95 (see Pet. App. 57a for law in statutory form). Suddenly the expiration of N.R.'s registration period went from the following month to the day he dies. Kan. Stat. Ann. § 22-4906(h) (2011).

2. On June 2, 2017, (1) the State charged N.R. with four counts of KORA noncompliance, (2) the district court issued an arrest warrant, and (3) N.R. was arrested while at the offender registration office for a required quarterly

registration. R. 1: 11-14, 16, 20-21; R. 2: 2. Because N.R. had a prior conviction from 2012 for KORA noncompliance, his charges were severity level 5 person felonies (which is akin to involuntary manslaughter, attempted aggravated robbery, and reckless aggravated battery resulting in great bodily harm). Pet. App. 3a; *see* Kan. Stat. Ann. §§ 21-5405(b)(1)(A), 21-5420(c)(2), 21-5301(c)(1), 21-5413(g)(2)(C), respectively.

N.R. filed a motion to dismiss the charges, arguing that his lifetime registration requirements violated the Ex Post Facto Clause of the United States Constitution as well as state and federal constitutional protections against cruel and unusual punishment. Pet. App. 4a. The State opposed the motion, relying on *Petersen-Beard*. Pet. App. 4a.

At the motion hearing, N.R.'s counsel began her comments with "at a common sense level to say that a 14-year-old is now forced to register for the rest of his life as a sex offender isn't a punishment I think is just ridiculous." R. 6: 2. Counsel submitted two affidavits to the court—one from N.R. and one from his fiancée—detailing the "numerous ways in which [N.R.'s] registration requirement has served as a punishment for him, for his fiancée, for their child, [and] for their family," specifically instances (1) "where he was unable to find housing, employment, and substance abuse treatment because of his status as an offender," and (2) "public dissemination of his information has subjected him to embarrassment and even violence from members of the community." R. 6: 2; Pet. App. 4a.

In ruling on N.R.'s motion to dismiss, the district court said it was "duty bound" to follow the Kansas Legislature and Kansas Supreme Court, but noted that "I thought it was more than somewhat interesting on the day the opinions, I think, that are controlling came out that the Supreme Court . . . reversed themselves in the same day by adding an additional justice." R. 6: 5. At a bench trial on stipulated facts, the district court found N.R. guilty of two counts of KORA noncompliance. Pet. App. 43a. The district court sentenced N.R. to 49 months in prison, but placed him on probation for 36 months. Pet. App. 45a.

C. Proceedings in the Kansas appellate courts

1. N.R. appealed his conviction to the Kansas Court of Appeals, specifically challenging the district court's denial of his motion to dismiss on the same grounds as in district court. Pet. App. 45a-46a. The core of N.R.'s argument was "juveniles are different than adults," and he discussed cases from this Court dealing with "the diminished culpability of juveniles." Pet. App. 46a-47a, 50a-51a. The Court of Appeals ultimately concluded that "N.R. has shown no reason for us to believe that the outcome of Petersen-Beard or other controlling precedent would have been any different had it involved a juvenile instead of an adult," and affirmed his convictions. Pet. App. 54a.

2. N.R. filed a petition for review in the Kansas Supreme Court, which was granted. Pet. App. 2a. Again, N.R. argued constitutional grounds, as well as because juveniles are different from adults, the Court "must apply an analysis

differen than that in *Smith* or *Petersen-Beard* for purposes of evaluating excessiveness." Pet. App. 13a-14a.

The *N.R.* majority acknowledged that neither *Smith v. Doe* nor *Petersen-Beard* "mention the age of the offender." Pet. App. 9a. The Court admitted the "affidavits establish that N.R. has suffered personal harm, violence, mental health issues, and embarrassment because of public dissemination of his registration information." Pet. App. 11a. The Court discussed its own caselaw where it "recognized that juveniles generally have a 'lower risk of recidivism' and that '[p]lacing lifetime restraints on a juvenile offender's liberties requires a determination that the juvenile will forever be a danger to society' and undermines juvenile rehabilitation," and struck down mandatory lifetime postrelease supervision for children. Pet. App. 15a.

But then the Court characterized N.R.'s use of "the 'children are different' analysis" as a "circular" argument and a "red herring" because postrelease supervision and life without parole are "*punishment*", "*punishments*", or "*sentences*" (emphasis in original), "[b]ut under the current state of the law in Kansas, the KORA registration requirements are not punitive. See *Petersen-Beard* [citation omitted]. Because they are not punitive, the KORA registration requirements are not subject to the punishment analysis" set out in the Court's opinions. Pet. App. 16a. The Court held that "KORA's mandatory lifetime registration requirements as applied to N.R. are not punishment and, as a result, do not violate the federal Ex

Post Facto Clause or the prohibition against cruel and unusual punishment under the Eighth Amendment of the United States Constitution[.]" Pet. App. 20a-21a.

The dissent began like this:

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

Pet. App. 23a-24a. The dissent included research, data, real-world analysis, and a list of cases from other states where N.R.'s situation was decided differently. Pet. App. 25a-39a. The dissent concluded:

> N.R. is—very clearly—being punished by the Legislature's "civil scheme." The majority's refusal to acknowledge this is inexplicable. To put it plainly, in the words of my recently retired colleague, the majority's holding is "wrong-headed and utterly ridiculous. ... [I]n the real world where citizens reside, registration is unequivocally punishment." *State v. Perez-Medina*, 310 Kan. 525, 540-41, 448 P.3d 446 (2019) (Johnson, J., dissenting). Consequently, I would hold that N.R.'s lifetime registration requirement violates the Ex Post Facto Clause because it was enacted and imposed after N.R. committed the actions that led to his adjudication.

Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

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

As to registrants generally, N.R. acknowledges that only one federal court of appeal has determined that SORNA's registration requirements cannot be constitutionally applied to people whose offense pre-dated the requirements, while

at least nine have rejected ex post facto or cruel and unusual punishment claims. *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan's registry imposes punishment); Pet. App. 48a-49a, 130a-131a (for cases rejecting the issue). He also acknowledges that at least two federal courts of appeal have found that SORNA is not punishment as applied to someone adjudicated as a child. *See United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013); *U.S. v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012).

But since the passage of SORNA in 2006, at least eleven state courts of last resort have held generally that offender registration requirements cannot be applied retroactively without violating constitutional prohibitions. *See Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008); *People In Int. of T.B.*, 489 P.3d 752 (Colo. 2021); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009); *In Int. of T.H.*, 913 N.W.2d 578 (Iowa 2018); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.,* 62 A.3d 123, 137 (Md. 2013); *People v. Betts*, __ N.W. 2d __, 2021 WL 3161828 (Mich. 2021); *Doe v. State*, 111 A.3d 1077 (N.H. 2015); *State in Int. of C.K.*, 182 A.3d 917 (N.J. 2018); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011); *In re C.P.*, 967 N.E.2d 729 (Ohio 2012); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013); *In re J.B.*, 107 A.3d 1 (Pa. 2014). In five of these cases—Colorado (T.B.), Iowa (T.H.), New Jersey (C.K.), Ohio (C.P.), and Pennsylvania (J.B.)—the person in the case had been adjudicated as a child for the offense giving rise to their registration obligation.

The split is widening and will continue to do so as more courts "look at the research and the arguments, [and see the] truth before us: lifetime registration for a 14-year-old offender is, unmistakably, punishment." Pet. App. 38a.

B. Only this Court can provide guidance to lower courts on what test to use to evaluate issues involving retroactive application of registration requirements for people adjudicated as juveniles.

Smith v. Doe and *Petersen-Beard* are "the current state of the law" in this country and state, respectively. Pet. App. 21a. As the *N.R.* majority noted, this presents N.R. and others like him with "an uphill battle." Pet. App. 13a. Time after time, lower courts do not dig into the facts, arguments, data, and research put before them, and instead fall back on *Smith v. Doe*, even when the person before them was adjudicated as a child. *See, e.g.*, Pet. App. 27a, 30a, 45a-46a, 48a; *U.S. v. Elkins*, 683 F.3d 1039, 1041, 1044-45 (9th Cir. 2012) (Ninth Circuit, relying on *Smith v. Doe* and other Ninth Circuit cases that did the same, reversed district court and held that requiring registration for a pre-SORNA adjudication when the person was 14 did not violate the Ex Post Facto Clause).

This case is a perfect example of that. N.R. filed a detailed motion and presented affidavits describing

> how difficult it was for them to find and secure housing due to N.R.'s status as a sex offender; how hard it was for N.R. to find and maintain employment; how the $20 reporting fee imposed additional financial strain on the family because they already were a low-income household; how N.R. continued to struggle with his sobriety because treatment facilities and sober living houses across Kansas would turn him away due to his status, which led to homelessness and seeking shelter in drug houses; how neighbors and community members ostracized N.R. and his family when those individuals learned of his status, including two occasions where N.R. was threatened at gunpoint; how N.R. and his fiancée feared for their child's safety; how N.R.

> was concerned about not being able to participate in his child's school activities due to his status; how N.R. suffered from depression as a result of the lifetime registration requirements; and how N.R. attempted suicide as a result of his depression.

Pet. App. 4a; *see also* Pet. App. 27a ("[c]ountless jurists, scholars, and social scientists have confirmed how common these burdens are to those required to register"). But the district court did not "make any factual findings regarding the affidavits or address their substance" because "it was bound to follow the Legislature's directives and Kansas Supreme Court precedent." Pet. App. 10a. Then the *N.R.* majority blindly relied on *Petersen-Beard*, which blindly relied on *Smith v. Doe*. *See, e.g.*, Pet. App. 8a-9a, 16a, 132a.

But *Smith v. Doe*, *Petersen-Beard*, and *Reed* did not involve a person adjudicated as a juvenile. Pet. App. 9a. And this Court has not considered on the merits whether the test set out in *Smith v. Doe* applies to a person adjudicated as a juvenile. This Court acknowledged that a person adjudicated as a juvenile offender and later subjected to registration requirements may have grounds for an ex post facto challenge. *U.S. v. Juvenile Male*, 564 U.S. 932, 937-38 (2011) (appeal dismissed for mootness). Without guidance, what happened to N.R.—and to people litigating their issues in courts across the country—will continue, "leav[ing] one at a loss as to what, if any, condition KORA could create that the majority would consider onerous." Pet. App. 30a-31a.

N.R.'s case also illustrates what happens when a person adjudicated as a juvenile attempts to argue considerations, such as juveniles are different from adults, that may not fit neatly into one of the *Mendoza-Martinez* factors used in

Smith v. Doe. The *N.R.* majority acknowledged this Court's decisions, as well as its own, where heart of the outcome was that children are different, but instead of digging into the research and arguments N.R. made, the majority simply presumed it wasn't punishment, as illustrated by putting words like "sentence" and "punishment" in italics. But emphasizing words does not analysis make. Pet. App. 15a-16a, 18a. The majority accused N.R. of "circular" reasoning and introducing a "red herring", but it is the Court that is circular. Pet. App. 16a. In the words of the dissent, "N.R.'s argument brings the punitive effect of his lifetime registration requirement sharply into focus. If he is less culpable than his adult counterpart, and he is less likely to endanger the public, treating him as if he is just as menacing is indefensible." Pet. App. 34a.

C. The decision below is wrong.

1. The majority ignores science and research related to children. N.R.'s arguments and information centered around the fact that children are different from adults. Pet. App. 13a-17a, 34a. "Social scientists and scholars have confirmed that juvenile offenders are distinct from adult offenders." Pet. App. 34a; *see also* Association for the Treatment of Sexual Abusers, Registration and Community Notification of Children and Adolescents Adjudicated of a Sexual Crime: Recommendations for Evidence-Based Reform (2020) (review of "the emergence and development of sexual offender registration and community notification (SORN) laws, identify how these laws have been applied to children and adolescents adjudicated for a sexual crime, and consider the extent to which these laws" are

based on research and science, have affected recidivism, and meet the intended goals).

By sticking with *Petersen-Beard* and, therefore, *Smith v. Doe*, the *N.R.* majority ignores that *Smith v. Doe* was decided in part based on misinformation about adults who have been convicted of sex offenses. Pet. App. 32a-33a, 186a-188a. N.R. joins the majority in *Doe v. Thompson*/dissent in *Petersen-Beard* in "cling[ing] to the belief that the persons who have been privileged to serve on our nation's highest Court will yield to the facts and give a closer look at whether our statutory scheme is rationally connected to the nonpunitive purpose of public safety and whether its terms and conditions are excessive in relation to that public safety purpose." Pet. App. 188a.

2. The majority "shrugs its shoulders" at what N.R. is required to do for the rest of his life, and ignores reality. Pet. App. 27a. Instantly, with no assessment or opportunity for early removal, N.R. went from being almost done with an already pretty onerous registration requirement to the expanded obligations shown below (the italicized language in the chart below summarizes *new requirements* created by H. Sub. for S.B. 37, which continue to this day), which will continue for the rest of N.R.'s life:

Who is required to register as an offender	**Brief summary of what it requires registrant to do**	**Length of registration, noncompliance penalty, relief from registration, and information accessible**
The same categories as prior law, *only reorganized, and*	*within *3 business* days, must register with sheriff in county of residence, employment, or	*Increases registration periods from 10 years or life to 15, 25, or lifetime, depending on offense* (exs.: violent/drug

adds lifetime registration for kidnapping and aggravated kidnapping *regardless of victim's age* *Removes personal use exception from manufacturing registration requirement, and adds as qualifying convictions any attempts, conspiracies, or solicitations to commit the enumerated drug offenses* *Excludes people adjudicated as a juvenile offender for an act that would, if committed by an adult, be a sexually violent crime, if the court finds that the act involved non-forcible sexual conduct, the victim was at least 14, and the offender was not more than four years older than the victim*	school, or intended residence, employment, or school and report changes within *3 business* days (used to be 10 days on both) to the old and new (if applicable) agencies as well as written notice to KBI **people who cannot physically register in person are subject to verification requirements determined by registering agency* **at registering law enforcement agency's discretion, violent and drug offenders can report three times in person and one time by certified letter* **transient offenders can be made to register every 30 days or more often, at the discretion of the registering agency* Information required to be reported at quarterly visits: *name *and all aliases* *date and place of birth, *and alias dates/places* **title and statute number of* offense(s) committed, county/*state/country* and date of conviction(s), *and case nos.* *current *residential* address, *and any anticipated future residence and any temporary lodging information [including] address, phone number, dates of travel if*	offenders went from 10 to 15; some sex offenders went from 10 to 25 while others went from 10 to life; some juveniles went from 5 to life) *Upon a conviction for second registerable offense, offender has to register for life (exs.: two drug convictions, or one drug and one violent, or one drug and one sex)* *Changes penalty for violating to a severity level 6 for a first offense, 5 for a second, and 3 for a third or subsequent or for one longer than 180 days)* (it had been a severity level 5) A new offense every 30 days of noncompliance *or every 180 days for an aggravated one* *Expands venue for prosecution to counties* not only where offender resides*, but also where they are required to be registered, where they are located during noncompliance, or where conviction requiring registration occurred* *Emphasizes that a KORA violation is the "failure by an offender to comply with any and all provisions of such act"* *Amends adult and juvenile expungement statutes to forbid expungement of any conviction or any part of the offender's criminal record while the*

Expands definitions of many terms (ex. "reside" and "employment")	*staying 7 or more days, or if transient, places stayed and frequented since last reporting* **all phone numbers at which the offender maybe contacted* **any and all* schools *and satellite schools attended or expected to attend and their locations and phone numbers* *social security number *and any alias numbers* **name and number of probation or parole officer* *identifiers such as race, *ethnicity*, sex, age, hair and eye color, *height and weight*, scars, blood type **all professional licenses, designations, and certifications* *occupation and name of employer, *as well as address and telephone number, and name of any anticipated employer* **all current* driver's license or ID card *including a photocopy of all such DLs or IDs and their numbers, states of issuance and expiration dates* *vehicle information, including license plate number, *any other identifier and description of any vehicle owned or operated by offender or regularly drives either for work or personal use, and*	*offender is required to register as provided in KORA* *Expands no relief from registration provision to include people with out-of-state convictions or adjudications* *Repeals 22-4912* (which had provided that anyone required to be registered prior to 7/1/99 who would not have been required to register on and after 7/1/99 shall be entitled to be relieved of the requirement by applying to the sentencing court *On and after June 1, 2006,* prohibits cities and counties from adopting or enforcing residence restrictions for offenders Same public access as 2005 *If someone is a confidential informant or been provided a new identity, they must register but it will not be open to public inspection*

	information RE: the location of any of those vehicles **license plate number, registration number or other description of any aircraft or watercraft owned or operated by offender and where stored* *any and all email addresses *and any and all online identities and any information RE: online social networks* *sex and *date of birth or purported* age of victim *photograph; fingerprints *and palm prints*; DNA **all travel and immigration documents; notify registering agency and KBI within 21 days of travel outside the U.S.*	

Compare Kan. Stat. Ann. §§ 22-4904, 22-4906(h)(1), *with* 2011 Kan. Sess. Laws, ch. 95; Pet. App. 57a. "The majority's quick dismissal of N.R.'s arguments—without any actual analysis of what registration means for him against the internet of today and the instantaneous access to information via social media—is callously dismissive and grossly blind to realities of the present day." Pet. App. 31a.

The majority fails to appreciate the punitive effect of current KORA requirements, particularly as it relates to people who were adjudicated as children—and especially as it relates to N.R: "If N.R. fails to fulfill the requirements, he can be prosecuted and sentenced to years of prison time, even though he was never confined in a juvenile correctional facility when he was

adjudicated an offender for the underlying offense." Pet. App. 26a-27a. *Smith v. Doe* instructs courts to look at the entire statutory scheme to examine it for punitive effects. Pet. App. 7a. Courts must look at how it plays out day to day. To pick just one thing, consider how violations are handled. As seen in this case, if a registrant (in any category) fails to timely comply with any duties under KORA, even unintentionally, they can be charged with a felony. Kan. Stat. Ann. § 22-4903. It was not always this way, though. From 1993 to mid-1999, failure to register was a nonperson misdemeanor. (In Kansas, most crimes are designated person or nonperson, which has a number of impacts, particularly in creating a person's criminal history score in a future case. *See* Kan. Stat. Ann. § 21-6809.) In 1999, the Legislature increased the penalty to the lowest-level nonperson felony. It remained that way until 2006, when the Legislature doubled the penalty for noncompliance and elevated it to a person felony. 2006 Kan. Sess. Laws, ch. 212.

As of July 1, 2011, KORA noncompliance is a mid-level felony (akin to arson or involuntary manslaughter, for example) for a first or second offense, and a high level felony (akin to aggravated robbery, for example) for a third or subsequent offense or a violation that lasts over 180 consecutive days. Kan. Stat. Ann. § 22-4903. In 2013, the Legislature created a new crime relating to KORA noncompliance: unless a registrant has received a court-issued waiver of payment in the past three years, it is a Class A misdemeanor if a registrant does not pay the $20 registration fee that is owed when a registrant goes in for the quarterly

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

A special sentencing rule makes all noncompliance violations carry a presumptive prison sentence. Kan. Stat. Ann. § 21-6804(m). Failing to comply is a strict liability offense; the only other strict liability crime specifically designated by Kansas statute is driving under the influence, although the Court recently held that rape is a strict liability offense. Kan. Stat. Ann. § 21-5203; *State v. Dinkel*, 495 P.3d 402, 403 (Kan. 2021) ("There is no mental culpability requirement for the crime of rape of a child under 14 years of age").

These are penalties that N.R., and others like him, face for the remainder of his life if he fails to comply with every aspect of KORA.

3. The majority does not appreciate the distinctions between SORNA and KORA. In *Petersen-Beard* and *N.R.*, the Court cited to federal circuit court decisions that upheld SORNA requirements. Pet. App. 48a-49a, 130a-131a. Shortly after *N.R.*, the Court rejected an ex post facto challenge in a case involving an adult conviction, citing to *Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020). *See State v. Shaffer*, No. 119,738, 2021 WL 5406136 (Kan. 2021) (unpublished).

But Kansas is different from SORNA guidelines and states like Colorado. For example, Kansas expressly forbids early release from registration, which is particularly onerous for people adjudicated as children. N.R. and hundreds of people in Kansas (as well as people in other states) similarly situated must register until they die. *Compare* 34 U.S.C. § 20915(b) (provides for a reduction after 25 years of

"clean record" for "sex offender adjudicated delinquent), Colo. Rev. Stat. § 16-22-103(4), 16-22-113 (petition for removal provisions), *with* Kan. Stat. Ann. § 22-4908 ("No person required to register as an offender . . . shall be granted an order relieving the offender of further registration…").

This was by design. H. Sub. for S.B. 37 (2011), the final home of the sweeping changes to KORA, contained provisions not relating to or required by SORNA. See Hearing on H.B. 2322 Before the H. Comm. on Corr. and Juv. Justice, 2011 Leg. (testimony in support of the bill by Sgt. Al Deathe, Douglas County Sheriff; David Hutchings and Nicole Dekat, Kansas Bureau of Investigation). The proponents proposed amendments that were not SORNA-related. For example, the proponents acknowledged that SORNA "requires a tiered duration of registration of 15 years, 25 years, and lifetime registration," but they "prefer[red] to manage the program within a two-tiered system," i.e., 15 years or life. *See* Hutchings. The proponents did not mention—at least not in their written testimony—that requiring people adjudicated of sex offenses committed as children to register for life with no chance of early removal was their idea; this is not a SORNA requirement. *See* 34 U.S.C. § 20915(b); *also see* Deathe, Hutchings, and Dekat.

Notably, H. Sub. for S.B. 37 also did away with a registrant being able to expunge any part of their criminal record while they were registering for an offense, and struck language that had been in place since 1999 that allowed removal of people from the registry if their registration requirement was over as of July 1, 1999. *See* Dekat; *see also* H.B. 2322 (2011); H. Sub. for S.B. 37 (2011).

To the extent that the Court relies on federal precedent in N.R.'s case, it does so without acknowledging the extreme nature of KORA's provisions.

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

N.R.'s case is illustrative of an ongoing, national, constitutionally significant problem. In Kansas alone, over 900 people register because of a juvenile adjudication for a sex offense. Kansas Judicial Council, Report of the Judicial Council Advisory Committee on Sex Offenses and Registration, at 8 (December 11, 2020). This Court's review is the only way N.R. and so many others have any chance to receive consideration of the issues they present that are driven by research, data, and lived experience.

NR's case presents an ideal vehicle for this Court to consider the questions of national import. N.R. raised these issues below, and the appellate courts considered them.

The *Petersen-Beard* majority identified the "real question" in 2016 as "[a]re there convincing reasons to believe the United States Supreme Court would view KORA differently than it viewed the Alaska law in 2003 when it decided *Smith*?" Pet. App. 132a. N.R. has presented reasons why now is the time for this Court to answer that question with yes, particularly with regard to people adjudicated as children.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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