No. _____

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IN THE

# Supreme Court of the United States

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COMMONWEALTH OF KENTUCKY, *Petitioner*

v.

MICHAEL BAKER, *Respondent*

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On Application to Associate Justice John Paul Stevens from the Kentucky Supreme Court

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## APPLICATION TO STAY ENFORCEMENT AND EXECUTION OF KENTUCY SUPREME COURT OPINION PENDING CERTIORARI

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To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. § 2101(f), petitioner Commonwealth of Kentucky respectfully moves for an order staying the enforcement and execution of the opinion of the Kentucky Supreme Court certifying the law, in the above-entitled proceeding, pending the filing of and final action by this Court on a petition for certiorari seeking review of the Kentucky Supreme Court's opinion in this case.

The petition for certiorari will seek plenary review of the Kentucky Supreme Court's decision in *Commonwealth v. Baker*, — S.W.3d —, 2009 WL

3161371 (Ky. 2009), which certified that the retroactive application of Kentucky Revised Statute (KRS) 17.545 constituted an ex post facto violation.

Petitioner has exhausted all possibilities of securing a stay of the enforcement and execution of the opinion certifying the law from the Kentucky Supreme Court; and the Kentucky Supreme Court has ordered that its opinion be made final immediately.

(a) Procedural history of this case

The relevant procedural events in this case may be summarized as follows:

1. October 1, 2009 - The Kentucky Supreme Court rendered its opinion certifying that the retroactive application of KRS 17.545 violates the ex post facto clause of the United States and Kentucky Constitutions, a copy of which is attached hereto. The court having divided five to two, the dissenting opinion is also attached.

2. October 21, 2009 - Petitioner Commonwealth of Kentucky filed a motion to stay the execution and enforcement of the Kentucky Supreme Court's opinion pending certiorari proceedings pursuant to Kentucky Rule of Civil Procedure (CR) 76.44(b).

3. November 2, 2009 - The Kentucky Supreme Court denied petitioner's motion to stay execution and enforcement of the opinion. A copy of that order is attached.

4. November 5, 2009 - Date of filing the instant application with the Clerk of this Court.

5. December 30, 2009 - Present due date for filing petition for writ of certiorari, being ninety (90) days from the date of entry of the opinion of the Kentucky Supreme Court.

(b) Standards for granting a stay

This Court will grant a stay when there is "(1) 'a 'reasonable probability' that four justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction'; (2) 'a fair prospect that a majority of the Court will conclude that the decision below was erroneous'; and (3) a likelihood that 'irreparable harm [will] result from the denial of the stay.'" *Conkright v. Frommert*, 129 S.Ct. 1861, 1862 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers)). Each of these factors is satisfied here.

(c) Application of the stay standards to this case

I. The reasonable probability that the Court will grant certiorari

This case presents an important question of federal constitutional law that should be resolved by this Court, and there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari. The majority of the Kentucky Supreme Court determined that the retroactive application of KRS 17.545, which prohibits registered sex offenders from residing within 1,000 feet of a high school, middle school,

elementary school, preschool, publicly owned playground, or licensed day care facility, violates the ex post facto clauses of the United States and Kentucky Constitutions. In determining the statute constituted retroactive punishment, the Kentucky Supreme Court applied the two-part test set forth by this Court in *Smith v. Doe*, 538 U.S. 84 (2003). Applying that test, the majority of the Kentucky Supreme Court concluded that, although the Kentucky General Assembly had intended KRS 17.545 to be a civil, non-punitive, regulatory scheme (slip opinion, p. 9), the statute was so punitive in effect as to negate the legislature's intent (slip opinion, p.16).

As the dissenting opinion notes, the majority opinion of the Kentucky Supreme Court invalidating the retroactive application of a sex offender residency restriction statute stands "[v]irtually alone among appellate courts to consider the issue." (slip opinion, p. 17). Sex offender residency restriction statutes similar to KRS 17.545 have previously been considered by numerous state appellate courts and a United States court of appeals and those courts consistently have found the retroactive application of the statutes not to be an ex post facto violation. *See People v. Morgan*, 881 N.E.2d 507 (Ill. App. 2007); *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006) (applying Arkansas law); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (applying Iowa law); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. 2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Lee v. State*, 895 So.2d (Ala.Crim.App.

2004); *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004); *Denson v. State*, 600 S.E.2d 645 (Ga. App. 2004). Prior to 2009, no state or federal appellate court that had considered the issue had found the retroactive application of a sex offender residency restriction to be an ex post facto violation.

In *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009), however, the Indiana Supreme Court departed from the cases cited above and found that state's sex offender residency restriction statute to be a violation of the ex post facto clause when applied retroactively. The majority opinion of the Kentucky Supreme Court relied heavily upon the *Pollard* decision in rejecting the analysis of the courts that had found there was no ex post facto violation in applying a sex offender residency restriction retroactively (slip opinion, p. 6, 13, and15). A conflict is thus occurring in the consideration of the issue presented in this matter, and this Court should exercise its authority to resolve this conflict among the state and federal courts as this issue will only become more prevalent. For instance, the California Supreme Court heard arguments on November 3, 2009, addressing this precise issue. *In re J. (E.) On Habeas Corpus,* S156933; *In re P. (S.) On Habeas Corpus*, S157631; *In re S. (J.) On Habeas Corpus*, S157633; and *In re T. (K.) On Habeas Corpus,* S157634.

The majority opinion of the Kentucky Supreme Court in this matter is now the second state court of last resort which "has decided an important

federal question in a way that conflicts with the decision of another state court of last resort [and] of a United States court of appeals." Sup. Ct. R. 10(b). From this circumstance emerges the "certworthy" question whether the retroactive application of a sex offender residency restriction statute constitutes a violation of the ex post facto clause. Further, although the majority opinion determined that KRS 17.545 violated both the ex post facto clauses of the United States and Kentucky Constitutions, the Kentucky Supreme Court has never indicated that the ex post facto clause of the Kentucky Constitution provides any greater protection than the same clause in the United States Constitution. In fact, the majority's analysis of the question in this matter relied exclusively on the precedents of this Court applying the ex post facto clause of the United States Constitution. Thus, it is proper for this Court to review the issue presented herein as there is no independent and adequate state grounds for supporting the Kentucky Supreme Court's decision. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

As this Court stated in *Smith v. Doe*, 538 U.S. at 103, "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" In an attempt to protect the public and limit the temptation for such recidivism on the part of sex offenders, residency restriction statutes such as KRS 17.545 are becoming more prevalent. Because of this prevalence, there is a reasonable probability that this Court is likely to agree that it should grant a writ of certiorari to consider the important constitutional question of whether the retroactive

application of such statutes constitutes an ex post facto violation and resolve the conflict that now exists between state courts of last resort and a United States court of appeals.

II. The 'fair prospect' that the decision below will be found erroneous

As the dissenting opinion herein points out, "the majority has, with respect to a most difficult social problem, arrogated to itself the role of legislator and has substituted its public policy judgment for that of the General Assembly" (slip opinion, p. 17). For that reason, and the fact that all but one other state appellate court as well as a United States court of appeals considering the issue have found "that retroactive sex offender residency restrictions do not exceed legislative authority to address vital public safety concerns," there is a fair prospect a majority of this Court will conclude the Kentucky Supreme Court erroneously found such practice constitutes an ex post facto violation.

As noted, the majority opinion concluded that the Kentucky General Assembly intended the residency restrictions to serve a regulatory, non-punitive, public safety function (slip opinion, p. 7-9). The statute, therefore, passed constitutional muster under the first part of this Court's two-part test for considering whether a statute violates the ex post facto clause set forth in *Smith*, *supra*. The majority then analyzed whether the statute was so punitive in purpose or effect to negate its civil intent under the second part of the *Smith* test. In doing so, the majority considered the five factors from this

Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which this Court found relevant in *Smith*, 538 U.S. at 97. Those five factors are "whether, in its necessary operation, the regulatory scheme" (1) has been regarded in our history and traditions as punishment, (2) promotes the traditional aims of punishment, (3) imposes an affirmative disability or restraint, (4) has a rational connection to a non-punitive purpose, or (5) is excessive with respect to the non-punitive purpose. Id.. The majority opinion, departing from the decisions of all but one state appellate court and a United States court of appeals, concluded that all five of the factors weighed in favor of finding KRS 17.545 was punitive in effect (slip opinion, p. 16). However, the majority ignored this Court's admonishment that "*only the clearest proof will suffice* to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92.

The dissenting opinion correctly asserts, however, that "the majority's application of the [United States] Supreme Court's factors fails at several points to defer, as we are obliged to do, to permissible legislative judgments, and amounts thus to judicial legislating under the guise of constitutional analysis" (slip opinion, p. 21). For instance, because the residency restrictions contained in KRS 17.545 leave registrants free to visit, work, and participate in the community they are not a traditional form of punishment such as banishment which this Court has defined as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a

specified period of time, or for life." *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905).

The residency restriction imposed through KRS 17.545, while burdensome to the registrant, is not retributive. As the United States Court of Appeals for the Eighth Circuit explained in *Doe,* 405 F.3d at 720, "[t]he primary purpose of [sex offender residency restriction statutes] is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The [statutes are] designed to reduce the likelihood of reoffense by limiting the offender's temptation and reducing the opportunity to commit a new crime."

The majority opinion herein also applied far too strict of a standard in determining that KRS 17.545 does not rationally serve a valid non-punitive purpose. As this Court has stated, a statute's "rational connection to a non-punitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102 (citation omitted). However, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance." *Smith*, 538 U.S. at 103. The majority opinion acknowledged that the residency restrictions served the non-punitive purpose of public safety, but concluded the statute was not rationally connected to that purpose because the statute did not do everything possible to keep registered sex offenders from interacting with children (slip opinion, p. 13). In order for a civil, regulatory, statute to pass

muster under such an analysis, the statute would have to be "perfect" in the eyes of the court. This is not the correct standard for analyzing whether a statute "rationally serves" a valid non-punitive purpose.

Contrary to the majority opinion's conclusion, the residency restriction in KRS 17.545 is not excessive with respect to its purpose of protecting public safety. The majority reached this conclusion because the statute does not provide for any individual assessment of future dangerousness, but rather applies to all registered sex offenders (slip opinion, p. 15-16). In *Smith*, 538 U.S. at103, this Court explained that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." This is precisely what the Kentucky General Assembly has done when it enacted KRS 17.545. There is nothing to support the conclusion that the legislature's "categorical judgment that conviction of specified crimes" requiring registration as a sex offender should entail a residency restriction as a consequence is unreasonable. "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Smith*, 538 U.S. at 104.

The majority also concluded that the residency restriction in KRS 17.545 was excessive because the restricted areas could change as protected sites

come and go (slip opinion, p. 16). This conclusion is nothing more than speculation on the part of the majority, as the dissenting opinion points out (slip opinion, p. 28), as there is nothing in the record to suggest protected sites change with undue frequency. Without some evidence to demonstrate such "fluidity" places an undue burden on registered sex offenders, the majority has merely replaced the Kentucky General Assembly's public policy determination with its own.

For these reasons, a majority of the Court is likely to hold that the determination of the Kentucky Supreme Court that the retroactive application of a sex offender residency restriction statute constitutes an ex post facto violation is erroneous.

III. Absent a stay, petitioner will suffer irreparable harm

Unless the Court issues a stay pending review of this matter on a writ of certiorari, the opinion of the Kentucky Supreme Court will permit registered sex offenders whose offenses occurred prior to the effective date of the statute to establish residency within the prohibited areas surrounding protected sites. According to data supplied by the Kentucky State Police, approximately 5,526 convicted sex offenders in Kentucky could be affected by the ruling of the Kentucky Supreme Court. This creates a substantial public safety concern in light of the high rate of recidivism with sex offenders; the specific public safety concern the Kentucky General Assembly sought to address when it passed KRS 17.545. For instance, experts relied upon by the

United States Court of Appeals for the Eight Circuit opined that "there are 'very high rates of re-offense for sex offenders who had offended against children,'" *Miller*, 405 F.3d at 707, and agreed "that reducing opportunity and temptation is important to minimizing the risk of reoffense." *Id.* at 716. Likewise, the Illinois appellate court found "it is reasonable to believe that a law that prohibits child sex offenders from living within 500 feet of a school will reduce the amount of incidental contact child sex offenders have with the children attending that school and that consequently the opportunity for the child sex offenders to commit new sex offenses against those children will be reduced as well." *Leroy*, 828 N.E.2d at 777.

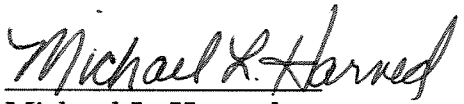
A stay of the enforcement and execution of the Kentucky Supreme Court opinion will also have minimal effect on registered sex offenders who committed their offenses prior to the effective date of the statute and are covered by the decision of the Kentucky Supreme Court. The statute has been in effect and applicable to all registered sex offenders since July 12, 2006, nearly three and one half years. It can be presumed that, during that time, most registered sex offenders have established residences that are in compliance with the residency restrictions contained in KRS 17.545. If the Court stays the enforcement and execution of the Kentucky Supreme Court opinion herein, these registered offenders will not be harmed in any manner. However, absent a stay these same registered offenders could move to a residence inside the prohibited area surrounding a protected site only to be

required to move again or risk being in violation of the statute should this Court grant petitioner's petition for a writ of certiorari and reverse the decision of the Kentucky Supreme Court.

(d) Conclusion

For the foregoing reasons, petitioner requests that an order be entered staying the enforcement and execution of the Kentucky Supreme Court's opinion in this matter pending completion of certiorari proceedings before this Court.

Respectfully submitted,



November 5, 2009

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CERTIFICATE OF SERVICE

I, Michael L. Harned, a member of the Bar of this Court, hereby certify that on the 4th day of November, 2009, a copy of this Application to Stay Enforcement and Execution of Kentucky Supreme Court Opinion Pending Certiorari in the above-styled case was mailed, first class postage prepaid, to Hon. Bradley Fox, Fox & Scott, PLLC, 517 Madison Avenue, Covington, Kentucky 41011, counsel for respondent. I further certify that all parties required to be served have been served.

Respectfully submitted,

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# APPENDIX

RENDERED: OCTOBER 1, 2009
TO BE PUBLISHED

# Supreme Court of Kentucky

2007-SC-000347-CL

COMMONWEALTH OF KENTUCKY — PETITIONER

V.

FROM KENTON DISTRICT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
NO. 07-M-00604

MICHAEL BAKER — RESPONDENT

**OPINION OF THE COURT**

**CERTIFYING THE LAW**

## I. INTRODUCTION

The question of law to be answered is whether KRS 17.545, which restricts where registered sex offenders may live, may be applied to those who committed their offenses prior to July 12, 2006, the effective date of the statute. We hold that it may not. Even though the General Assembly did not intend the statute to be punitive, the residency restrictions are so punitive in effect as to negate any intention to deem them civil. Therefore, the retroactive application of KRS 17.545 is an ex post facto punishment, which violates Article I, Section 10 of the United States Constitution, and Section 19(1) of the Kentucky Constitution.

## II. BACKGROUND

### A. Kentucky's Sex Offender Residency Restrictions

On July 29, 1994, seven-year-old Megan Kanka disappeared from her neighborhood in Hamilton Township, New Jersey. Soon after, police discovered that Megan had been raped and murdered by a man previously convicted of sex offenses. New Jersey enacted what became known as "Megan's Law," requiring sex offenders to register with the state, and establishing notification procedures for those living nearby. The same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, which conditioned certain law enforcement funding on states enacting their own version of Megan's Law.

Like every other state, Kentucky has enacted a version of Megan's Law. The General Assembly first enacted sex offender registration requirements in 1994, amending them in 1996 and again in 2000. The 2000 amendments to our Megan's Law also included residency restrictions on sex offenders as a condition of their probation or parole. That restriction, codified at KRS 17.495, read as follows:

> No registrant, as defined in KRS 17.500, who is placed on probation, parole, or other form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence.

This Court upheld the registration provisions of Kentucky's Megan's Law in Hyatt v. Commonwealth, 72 S.W.3d 566 (Ky. 2002). The next year, the

United States Supreme Court upheld Alaska's sex offender registration statute against an ex post facto challenge in Smith v. Doe, 538 U.S. 84 (2003).[1]

In 2006, the General Assembly enacted House Bill 3, which amended Kentucky's residency restrictions to their current form. 2006 Ky. Acts 182. The current residency restriction statute, effective July 12, 2006, codified at KRS 17.545, reads as follows:

> (1) No registrant, as defined in KRS 17.500, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. The measurement shall be taken in a straight line from the nearest property line of the school to the nearest property line of the registrant's place of residence.
>
> (2) For purposes of this section:
>
> (a) The registrant shall have the duty to ascertain whether any property listed in subsection (1) of this section is within one thousand (1,000) feet of the registrant's residence; and
>
> (b) If a new facility opens, the registrant shall be presumed to know and, within ninety (90) days, shall comply with this section.
>
> (3) Any person who violates subsection (1) of this section shall be guilty of:
>
> (a) A Class A misdemeanor for a first offense; and
>
> (b) A Class D felony for the second and each subsequent offense.
>
> (4) Any registrant residing within one thousand (1,000) feet of a high school, middle school,

[1] Doe subsequently challenged the registration statute in state court on state law grounds, with the Alaska Supreme Court holding that the statute cannot be applied retroactively. Doe v. State, 189 P.3d 999 (Alaska 2008).