

No. 09-\_\_\_\_

---

---

*Supreme Court of the United States*

---

**COMMONWEALTH OF KENTUCKY,**  
*Petitioner,*

v.

**MICHAEL BAKER,**  
*Respondent.*

---

*On Petition for a Writ of Certiorari to the  
Supreme Court of Kentucky*

---

**PETITION FOR WRIT OF CERTIORARI**

---

JACK CONWAY  
ATTORNEY GENERAL OF KENTUCKY

JASON B. MOORE\*  
MICHAEL L. HARNED  
ASSISTANT ATTORNEYS GENERAL  
*(COUNSEL OF RECORD)*  
1024 CAPITAL CENTER DRIVE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5342

*COUNSEL FOR PETITIONER  
COMMONWEALTH OF KENTUCKY*

\* *COUNSEL OF RECORD*

---

---

## **PETITION FOR A WRIT OF CERTIORARI**

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

### **OPINION BELOW**

The Kentucky Supreme Court's opinion is reported as *Commonwealth v. Baker*, 295 S.W.3d 437, 2009 WL 3161371 (Ky. 2009). Petitioner's Appendix ("App.") 1a-32a.

### **STATEMENT OF JURISDICTION**

The Kentucky Supreme Court rendered the judgment from which relief is sought on October 1, 2009. App. at 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

*Kentucky Revised Statute 17.545*

Registrant prohibited from residing in certain areas; violations; exception

- (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, elementary school, preschool, publicly owned playground, or licensed day care facility on July 12, 2006, shall move and comply with this section within ninety (90) days of July 12, 2006, and thereafter, shall be subject to the penalties set forth under subsection (3) of this section.
- (5) This section does not apply to a youthful offender probated or paroled during his or her minority or while enrolled in an elementary or secondary education program.

*Article I, Section 10 of the United States Constitution*

No state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

## **STATEMENT OF THE CASE**

1. The Kentucky General Assembly first enacted a law placing residency restrictions on registered sex offenders during the 2000 Regular Session as part of Senate Bill 263. Codified as KRS 17.495, and effective April 11, 2000, the original restriction provided 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.

In 2004, KRS 17.495 was amended by the General Assembly to specifically exempt youthful offenders from the residency restrictions.

During the 2006 Regular Session of the General Assembly, House Bill 3 was enacted which repealed KRS 17.495, amended the residency restriction statute, and reenacted it as a new section of KRS 17.500 to KRS 17.580. The current form of the statute, KRS 17.545, became effective on July 12, 2006.

2. On March 31, 1995, respondent entered a plea of guilty to a charge of third-degree rape in the Kenton County, Kentucky, Circuit Court, case number 94-CR-00427. App. 5a. As a result of his conviction, respondent was required to register as a sex offender

for a period of ten years pursuant to Kentucky Revised Statute (KRS) 17.520 . For reasons that are unclear in the record, respondent's period of registration is to expire on March 27, 2010. *Id.*

On February 2, 2007, respondent resided at 440 Merravay Drive in Elsmere, Kenton County, Kentucky. On that date, he was arrested and charged with being in violation of KRS 17.545 because his residence was located within 1,000 feet of East Covered Bridge Park. *Id.* Respondent subsequently moved the trial court to dismiss the charge on the basis that KRS 17.545 violated the following constitutional protections: 1) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; 2) Substantive Due Process as set forth in the Fifth Amendment to the United States Constitution; 3) The *Ex Post Facto* Clauses in Article 1, Section 10 of the United States Constitution and Section 19(1) of the Kentucky Constitution; and 4) The Inalienable Property Rights Provision as set forth in Section 1(5) of the Kentucky Constitution. *Id.*

On April 20, 2007, the trial court entered an opinion and order granting respondent's motion to dismiss on the basis that KRS 17.545 constituted an *ex post facto* punishment as applied to respondent whose triggering sex offender conviction pre-dated the effective date of the statute. App. 5a-6a. The trial court did not consider any of the other grounds raised in the motion to dismiss because they were mooted by its decision on the *ex post facto* claim. App. 6a.

The Commonwealth then moved the Kentucky Supreme Court for certification of the law, pursuant to Kentucky Rule of Civil Procedure (CR) 76.37(10), as to

whether KRS 17.545 constituted an *ex post facto* violation when applied to registered sex offenders who committed the offense requiring registration prior to July 12, 2006, the effective date of the statute. App. 6a. By a 5-2 vote, the Kentucky Supreme Court, applying the two-part test established by this Court in *Smith v. Doe*, 538 U.S. 84, 92 (2003), certified that the statute did violate the *ex post facto* prohibition under those circumstances. App. 19a.

The court first found the General Assembly had intended KRS 17.545's residency restriction to be a civil, nonpunitive, regulatory scheme. App. 10a. In reaching this conclusion, the court noted the General Assembly had not expressly stated its intent in enacting the statute, but its implied intent was nonpunitive based on the manner of the statute's codification and the fact that penalties for violating the statute only attached if the registrant failed to move. App. 9a-10a.

Applying the second part of the *Smith* test, however, the court found the residency restriction to be so punitive in effect as to negate the General Assembly's intent to create a civil regulatory scheme. App. 9a. In making this determination, the court considered the five factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), that this Court found relevant to its decision 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 a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Id.*; App. 11a. The

Kentucky Supreme Court found that all five of these factors weighed in favor of concluding KRS 17.545 was punitive in effect. App. 18a.

Specifically, the Kentucky Supreme Court found the residency restriction was “decidedly similar to banishment” and, thus, had traditionally been regarded as punishment in our history and traditions. App. 12a. The Kentucky Supreme Court also found the residency restriction promoted the traditional aims of punishment because the restrictions applied solely because prior convictions made a person a registered sex offender, App. 13a, and the residency restriction imposed an affirmative disability or restraint on registered sex offenders because it prohibited them from living within certain defined areas. App. 14a. Next, the Kentucky Supreme Court concluded that KRS 17.545 did not have a rational connection to the nonpunitive purpose of protecting public safety because the statute did not regulate any and all possible contact between registered sex offenders and children. App. 15a. Finally, the Kentucky Supreme Court found KRS 17.545 was excessive with respect to the nonpunitive purpose of protecting public safety because: 1) the statute applied to all registered sex offenders without an individualized assessment of whether a particular offender is a threat to public safety; and, 2) because of what the Kentucky Supreme Court said was “fluidity” in the residency restrictions. App. 16a-18a.

Two justices dissented from the court’s decision that the retroactive application of the statute constituted an *ex post facto* violation. According to the dissent, the majority of the court had “with respect to a most difficult

social problem, arrogated to itself the role of legislator and ha[d] substituted its public policy judgment for that of the General Assembly.” App. 19a. The dissent further stated that the majority had failed to properly defer to the General Assembly’s intent in enacting the statute and had erroneously been too strict in applying the *Mendoza-Martinez* factors. App. 21a, 23a, 27a, and 31a.

### **REASONS FOR GRANTING THE WRIT**

This Court has never considered whether the retroactive application of a statute imposing a residency restriction on registered sex offenders constitutes punishment prohibited by the *ex post facto* clause. The framework for such a review, however, has been well established. *Smith*, 538 U.S. at 92. Under that framework, the Court must first ascertain whether the legislature intended for “the statute to establish ‘civil’ proceedings.” *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). If the legislature did intend to create a civil, nonpunitive, regulatory scheme, then that scheme must be examined to determine whether it is “so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” *Id.* (quoting *Hendricks, supra*, at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-49)).

In examining the purpose and effect of the regulatory scheme, however, this Court has held that deference must be given to the legislature’s intent to enact a civil, nonpunitive, regulatory scheme. *Id.* (citing *Hendricks, supra*, at 361). Further, “only the clearest of proof’ will suffice to override legislative

intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *Ward, supra*, at 249)). Most courts that have considered the issue have held that the retroactive application of a residency restriction statute to registered sex offenders does not constitute punishment prohibited by the *ex post facto* clause. By contrast, the Kentucky Supreme Court, following the lead of the Indiana Supreme Court in *Pollard v. State*, 908 N.E.2d 1145 (Ind. 2009), held that Kentucky’s residency restriction statute was so punitive in its purpose and/or effect as to negate the Kentucky General Assembly’s intent that the statute be part of a civil, nonpunitive, regulatory scheme. Certiorari should be granted to resolve this conflict among the courts and because the Kentucky Supreme Court has refused to follow this Court’s directive in *Smith, supra*, that deference be given to the legislature’s intent in the absence of the clearest proof of a punitive purpose or effect.

#### **A. THE KENTUCKY SUPREME COURT’S DECISION CONFLICTS WITH DECISIONS OF OTHER STATE SUPREME COURTS AND A FEDERAL COURT OF APPEALS**

The Kentucky Supreme Court recognized that its decision conflicted with the decisions of several state supreme courts, state courts of appeal, and a federal court of appeals which had upheld residency restriction statutes against *ex post facto* challenges. App. 6a, n. 2. However, it also noted that one state supreme court and a United States District Court had found the

retroactive application of such statutes did constitute *ex post facto* violations. Only this Court can establish a uniform rule on this constitutional issue.

In this case, the Kentucky Supreme Court determined that 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, constitutes a retroactive punishment in violation of the *ex post facto* clause when applied to registered sex offenders whose crimes were committed prior to the effective date of the statute constitutes a retroactive punishment in violation of the *ex post facto* clause. Applying the test set forth in *Smith, supra*, 538 U.S. at 92, the Kentucky Supreme Court concluded that, although the Kentucky General Assembly had intended KRS 17.545 to be a civil, non-punitive, regulatory scheme, App. 10a, the statute was so punitive in effect as to negate the legislature's intent. App. 18a. The Indiana Supreme Court and the United States District Court for the Northern District of Ohio have likewise held that the retroactive application of residency restriction statutes constitutes an *ex post facto* violation. *See Pollard, supra* (application of residency restriction statute to sex offender convicted prior to effective date of statute violates *ex post facto* clause contained in Indiana Constitution); *See also Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio 2007) (not reported in F.Supp.2d) (retroactive application of Ohio's residency restriction statute violates the *ex post facto* clause contained in the United States Constitution) In contrast to these two decisions, other state supreme courts and courts

of appeal, as well as a federal court of appeals, have reached the opposite conclusion.

The United States Court of Appeals for the Eighth Circuit has considered and rejected a claim that the retroactive application of a state sex offender residency restriction statute violates the *ex post facto* prohibition. In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), that court addressed such a challenge to Iowa's sex offender residency restriction statute, Iowa Code § 692A.2A. In considering the question, the Eighth Circuit applied the *Smith* framework and concluded that Iowa's statute was intended to be civil and was not so punitive in effect as to override the legislature's intent. The Eighth Circuit specifically concluded that the residency restriction was not the equivalent of banishment, and that the fairly recent origin of such restrictions suggested the restrictions did not involve a traditional means of punishing. *Id.* at 719-720. The Eighth Circuit recognized that a residency restriction statute does impose a disability or restraint on a sex offender subject to it. However, the Eighth Circuit concluded that the presence of a disability or restraint merely served to highlight the importance of the final two factors analyzed under *Smith*: whether the law was rationally related to a nonpunitive purpose and whether it was excessive in relation to that purpose. *Id.* at 721.

In analyzing these two factors, the Eighth Circuit noted that "[t]he requirement of a 'rational connection' is not demanding: [a] 'statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.'" *Id.* (quoting *Smith*, *supra*, at 103). The Eighth Circuit concluded the Iowa sex offender residency restriction statute

“no doubt” had a purpose other than punishing sex offenders, and that the legislature could reasonably conclude the statute would protect public safety. *Id.* The Eighth Circuit also concluded the statute was not excessive in relation to its nonpunitive purpose despite the fact the statute did not make an individualized risk assessment before it applied to a particular sex offender. The Eighth Circuit stated:

The absence of a particularized risk assessment, however, does not necessarily convert a regulatory law into a punitive measure, for “[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.’

*Id.* (quoting *Smith, supra*, at 103).

The Eighth Circuit also stated that an argument that the legislature must tailor a residency restriction “to the individual circumstances of different sex offenders” was inconsistent with this Court’s direction “that the ‘excessiveness’ prong of the *ex post facto* analysis does not require a ‘close or perfect fit’ between the legislature’s nonpunitive purpose and the corresponding legislation.” *Id.* at 722.

In view of the higher-than-average risk of reoffense posed by convicted sex offenders, and the imprecision involved in predicting what measures will best prevent recidivism, we do not

believe the Does have established that Iowa's decision to restrict all such offenders from residing near schools and child care facilities constitutes punishment despite the legislature's regulatory purpose.

*Id.* at 722.

The Iowa Supreme Court has also considered whether the retroactive application of Iowa Code § 692A.2A constituted an *ex post facto* violation in *State v. Seering*, 701 N.W.2d 655 (Iowa 2005). In considering the issue, the Iowa Supreme Court applied this Court's framework as set out in *Smith*. *Id.* at 666-669. The Iowa Supreme Court first concluded that the legislature had intended the statute to be nonpunitive. *Id.* at 667. The court then analyzed the effect of the statute under the *Mendoza-Martinez* factors utilized by this Court in *Smith*.

First, the Iowa Supreme Court determined that the residency restriction was "far removed from the traditional concept of banishment" because it only restricted sex offenders from residing in particular areas and left them "free to engage in most community activities." *Id.* at 667-668. The Iowa Supreme Court then acknowledged that the residency restriction statute might have some deterrent effect, but noted that many "governmental restrictions, especially those designed to protect the health and safety of children" have some deterrent effect without imposing punishment. *Id.* at 668. The Iowa Supreme Court also recognized that the residency restriction statute imposed a form of disability, but the nature of the disability was not absolute. *Id.* The statute did,

however, clearly have a rational connection to a nonpunitive purpose - the protection of society, and it was not excessive with respect to that purpose “considering the special needs of children in this particular area and the imprecise nature of protecting children from the risk that convicted sex offenders might reoffend.” *Id.* After considering the factors set forth by this Court in *Smith*, the Iowa Supreme Court concluded the residency restriction statute was not so punitive in its effect as to impose criminal punishment. *Id.*

The Georgia Supreme Court likewise held that state’s sex offender residency restriction statute, OCGA § 42-1-13, did not violate the *ex post facto* clause when applied retroactively. *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004). Although the Georgia Supreme Court did not specifically apply the *Smith* framework in deciding the *ex post facto* claim, it still looked at whether the statute applied retrospectively, whether the statute was punitive or regulatory, and, if regulatory, whether the effect of the statute was punitive. *Id.* at 235 (citing *Weaver v. Graham*, 450 U.S. 24, 36 (1981); *United States v. Ursery*, 518 U.S. 267, 288-290 (1996); and *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991)).

Applying this analysis, the Georgia Supreme Court determined that the state’s sex offender residency restriction did not constitute an *ex post facto* violation because the statute did not apply retrospectively, i.e. the statute did not “alter[ ] the consequences for crimes committed prior to its enactment.” *Id.* (citing *Miller v. Florida*, 482 U.S. 423, 430 (1987)). Rather, the residency restriction statute “simply declares that convicted sex offenders who currently reside within

certain well-defined areas are guilty of a felony. If a convicted offender violates the statute, he can be prosecuted (or have his probation revoked) for that current violation.” *Id.* (citing *Hawker v. New York*, 170 U.S. 189 (1898) (new law criminalizing practice of medicine by convicted felon was not *ex post facto*)).

In *Lee v. State*, 895 So.2d 1038 (Ala.Crim.App. 2004), the Court of Criminal Appeals of Alabama considered whether the retroactive application of that state’s sex offender residency restriction statute, § 15-20-26(a), Ala.Code 1975, constituted an *ex post facto* violation. Applying this Court’s Smith test, the Alabama court held that the Alabama Legislature’s intent in promulgating the statute was to create a civil, nonpunitive regulatory scheme and that the statute was not so punitive in its effect as to negate that intent. Specifically, the Alabama court found that there was no factual basis, much less “the clearest proof,” in the record to support a finding, based on the five factors considered by this Court in *Smith*, “that the effects of the residency requirement . . . negate the Legislature’s intention to protect the public, in particular children, from convicted sex offenders.” *Id.* at 1044.

The Fifth District Appellate Court of Illinois followed suit by determining the retroactive application of that state’s sex offender residency restriction statute, 720 ILCS 5/11-9.4(b-5), which prohibits a child sex offender from residing “within 500 feet of a playground or facility providing programs or services exclusively directed toward persons under 18 years of age,” did not constitute an *ex post facto* violation. *People v. Leroy*, 828 N.E.2d 769 (Ill.App. 5 Dist. 2005). The Illinois court directly applied the Smith framework in deciding the

*ex post facto* claim and concluded the statute was not so punitive in effect as to negate the Illinois legislature's intent to create a civil regulatory scheme. *Id.* at 778-782.

Specifically, the Illinois court found that application of the five *Mendoza-Martinez* factors did not weigh in favor of concluding the effect of the residency restriction was punitive, even though the statute did impose some disability or restraint on those persons subject to it, and because it might deter future crimes. The Illinois court noted "that to hold that the mere presence of a deterrent purpose renders a statute criminal would severely undermine the government's ability to engage in effective regulation." *Id.* at 781 (citing *Smith*, 538 U.S. at 102) ("Any number of governmental programs might deter crime without imposing punishment."). Further, the Illinois court found that the imposition of a disability or restraint alone was insufficient to create a punitive effect. *Id.* See also, *People v. Morgan*, 881 N.E.2d 507 (Ill.App. 3 Dist. 2007) (retroactive application of 720 ILCS 5/11/9.3(b-5), which prohibits a child sex offender from residing "within 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend," does not constitute an *ex post facto* violation).

**B. The Kentucky Supreme Court Has Refused To Follow This Court's Directive In *Smith* That Deference Be Given To The Legislature's Intent In The Absence Of The Clearest Proof Of A Punitive Purpose Or Effect**

Although all of the courts have agreed to a certain extent that residency restriction statutes might incidently promote a traditional aim of punishment and impose some degree of disability or restraint on the offender, the Kentucky Supreme Court veered from the holdings of the courts cited above in its analysis of the other three *Mendoza-Martinez* factors. Additionally, the Kentucky Supreme Court's decision conflicts with this Court's analysis of those factors in *Smith* in many ways. In doing so, the Kentucky Supreme Court has substituted its own policy judgment to override the intent of the Kentucky General Assembly despite the absence of any proof, much less the clearest proof, of a punitive purpose or effect. First, the Kentucky Supreme Court concluded the residency restriction was "decidedly similar to banishment," App. 12a, and that such restrictions, even though of recent origin, "have been regarded in our history and traditions as punishment." *Id.* However, 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 recent origin of these

restrictions refutes that they “have been regarded in our history and traditions as punishment.”

Second, the Kentucky Supreme Court found KRS 17.545 did not have a rational connection to the nonpunitive purpose of protecting public safety because the statute did not prohibit sex offenders from having any and all contact with children but rather only prohibited sex offenders from residing within certain prohibited areas. App. 15a. “It is difficult to see how public safety is enhanced by a registrant not being allowed to sleep near a school at night, when children are not present, but being allowed to stay there during the day, when children are present.” *Id.* (footnote omitted). The Kentucky Supreme Court, however, applied far too strict of a standard in determining that KRS 17.545 is not rationally connected to 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 Kentucky Supreme Court 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. *Id.* 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. App. 17a.

Finally, the Kentucky Supreme Court also relied on the fact that KRS 17.545 lacks an individual risk assessment as support for its finding that the statute was excessive in relation to its nonpunitive purpose. None of the statutes considered in the cases cited above provided for an individual risk assessment of the sex offenders before they would be subject to the restriction, yet all of the statutes were found not to be excessive in relation to their nonpunitive purpose. In *Smith*, 538 U.S. at 103, 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 Kentucky Supreme Court also concluded that the residency restriction in KRS 17.545 was excessive because the restricted areas could change as protected sites come and go. App. 18a. This conclusion is nothing more than speculation on the part of the Kentucky

Supreme Court, as the dissenting opinion points out. App. 30a. 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 Kentucky Supreme Court has merely replaced the Kentucky General Assembly’s public policy determination with its own despite the deference courts are supposed to give to the legislature in making such determinations.

In the final analysis, the Kentucky Supreme Court has split from the holdings of other courts considering *ex post facto* claims to the retroactive application of sex offender residency restriction statutes. In doing so, as the dissent states, the Kentucky Supreme Court has “arrogated to itself the role of legislator and has substituted its public policy judgment for that of the General Assembly.” App. 19a. The split of authority on the question presented in this matter, as well as the Kentucky Supreme Court’s erroneous application of this Court’s precedent, should be settled by this Court.

**C. The Question Presented In This Matter Is One Of National Importance Given The Prevalence Of Sex Offender Residency Restriction Laws**

This Court has recognized that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’” *Smith*, 538 U.S. at 103. “When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.” *McKune v. Lile*, 536 U.S. 24, 33 (2002) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27

(1997); U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, p. 6 (1997)). Other studies of sex offender recidivism indicate that rapists repeat their offenses at a rate up to 35 percent; offenders who molest young girls, at a rate up to 29 percent; and offenders who molest young boys, at a rate up to 40 percent. L.Song & R. Lieb, *Adult Sex Offender Recidivism: A Review of Studies*, 5-6 (Washington State Institute for Public Policy, Jan. 1994). Moreover, the recidivism rates do not appreciably decline over time, and thus, in contrast with other types of offenders, the tendency to reoffend does not appear to decline with an offender's increasing age. *Id.*

The management of sex offenders is among the principal topics facing legislatures across the nation. *See* Center for Sex Offender Management, *Legislative Trends in Sex Offender Management*, 2 (November 2008). 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 have become a prevalent part of the management scheme. As of 2008, well over half of the states, and many local jurisdictions, have enacted some type of sex offender residency restriction law. *Id.* Due to their prevalence, challenges to the retroactive application of these statutes under the *ex post facto* clause will be frequent and numerous. The division that has now emerged among the lower courts on this question leaves state legislatures uncertain as to whether they may employ this important measure to protect the public. Review of this issue by this Court is necessary to settle this uncertainty.

**CONCLUSION**

For the foregoing reasons, the Commonwealth of Kentucky prays this court to grant the petition for writ of certiorari.

JACK CONWAY  
ATTORNEY GENERAL OF KENTUCKY

JASON B. MOORE\*  
MICHAEL L. HARNED  
ASSISTANT ATTORNEYS GENERAL  
*(COUNSEL OF RECORD)*  
OFFICE OF CRIMINAL APPEALS  
OFFICE OF THE ATTORNEY GENERAL  
1024 CAPITAL CENTER DRIVE  
FRANKFORT, KENTUCKY 40601  
(502) 696-5342

\*COUNSEL OF RECORD

## APPENDIX