

No. 23-1146

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IN THE  
**Supreme Court of the United States**

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JADE JOSEPH NICKELS,

*Petitioner,*

*v.*

DREW EVANS, SUPERINTENDENT, BUREAU  
OF CRIMINAL APPREHENSION,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MINNESOTA

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**RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Does Minnesota's registration statute implicate a liberty interest for procedural due process purposes, and if so, as this Court held in *Connecticut v. Doe*, does the criminal process that led to the conviction for which registration is required provide all the process that would be due?

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## INTRODUCTION

This Court should deny the Petition for a Writ of Certiorari for three reasons. First, Petitioner did not properly preserve this issue and the Court lacks jurisdiction. He only petitioned for review with the Minnesota Supreme Court on a promissory estoppel issue. While Petitioner asserts, “In the proceedings below, Minnesota once again declined to review its position,” Pet. 27, he did not offer the Minnesota Supreme Court the chance to consider granting review on the issue he identifies in his Petition for Writ of Certiorari.

Second, the lower courts’ decisions do not conflict. Instead, the decision below is a plain application of this Court’s Ruling in *Connecticut v. Doe*. The cases that Petitioner characterizes as in conflict are simply faithful applications of this Court’s settled precedent to different fact situations and different statutory provisions among the states.

Third, this case is not a good vehicle to consider the question presented. The Minnesota Court of Appeals decision is unpublished and of no precedential value. In addition, the record reflects that Petitioner’s liberty rights were not implicated by his registration as a predatory offender in Minnesota, and the Minnesota Court of Appeals correctly concluded that Petitioner’s procedural due process rights were not violated by his statutory registration requirement.

## STATEMENT OF THE CASE

### I. MINNESOTA'S PREDATORY OFFENDER REGISTRATION STATUTE.

#### A. Minnesota's Registry Information is Private and Limited.

Minnesota's predatory offender registration statute lists certain crimes for which registration is required. Minn. Stat. § 243.166, subd. 1b. The listed registration offenses include first through felony fifth-degree criminal sexual conduct and several other predatory crimes. *Id.*, subd. 1b(a)(1). The registration statute further provides that a person shall register if the person is charged with a listed offense and convicted of "that offense or another offense arising out of the same set of circumstances."<sup>1</sup> *Id.*

When a person is required to register in Minnesota, the sentencing court must tell the person of the duty to register, but the court may not modify the person's duty to register in the sentence or disposition order. *Id.*, subd. 2. If a person required to register is not notified by the sentencing court, the person's assigned corrections agent or law enforcement authority with jurisdiction over the person's primary address is charged with notifying the person of the statutory registration obligation. *Id.*

A registrant's term of registration is generally 10 years, but certain offenses and repeat registration

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1. This "same set of circumstances" language is unique to Minnesota and was added by the Minnesota Legislature in an effort to ensure that predatory offenders could not plead out of the statutory registration requirements. See *In re Lopez*, 778 N.W.2d 700, 704 (Minn. 2010).

offenses require lifetime registration. *Id.*, subd. 6. If a registrant is incarcerated following a new offense, the 10-year registration period restarts upon his release from prison.<sup>2</sup> *Id.*

The data in Minnesota’s registry is classified as private data to be used for law enforcement and corrections purposes and other limited human services purposes. Minn. Stat. § 243.166, subd. 7. Contrary to Petitioner’s assertion, Pet. 12-13, Section 243.166 does not generally “contemplate public release of sex offender status.” Rather, Minnesota’s registration statute does not include any community notification provisions.<sup>3</sup> Section 243.166 also does not include any residency, travel, or employment restrictions. *See* Minn. Stat. § 243.166.

While violation of the registration statute can result in felony prosecutions, those are separate criminal proceedings during which registrants are entitled to procedural due process before facing consequences for failure to register.<sup>4</sup> Also, Petitioner’s assertion that a

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2. The Minnesota Legislature recently amended this language, and restarting of the 10-year term now only occurs if a registrant is reincarcerated for another registration offense. *See* 2024 Minn. Laws Ch. 123, Art. 7, § 2.

3. Limited notification is allowed under the statute if a registered offender is admitted to a medical facility or cared for by certain personal care employees or if an offender is out of compliance with his registration obligations. *See* Minn. Stat. § 243.166, subd. 4b, 7a. However, Minnesota’s community notification process is in a separate statute, with separate procedures, and applies to only a fraction of registered offenders in Minnesota. *See* Minn. Stat. § 244.052.

4. Petitioner also references the criminal provisions of the Sex Offender Registration and Notification Act (SORNA). Pet.

sentence for failure to register carries no possibility for probation, parole, discharge, work release, conditional release, or supervised release, is simply a misstatement of the statute. Pet. 13. Rather, the statute states that registrants are not eligible for those things “until that person has served the full term of imprisonment provided by law. . .” Minn. Stat. § 243.166, subd. 5(e). More importantly, section 243.166 specifically provides that a prosecutor may file a motion to have a person sentenced without regard to the mandatory minimum sentence. Minn. Stat. § 243.166, subd. 5(d). When presented with that motion, *or on its own motion*, the court may sentence the person without regard to the mandatory minimum sentence if the court finds substantial and compelling reasons to do so. *Id.* (emphasis added).

### **B. Minnesota’s Registry Statute has been Consistently Upheld by Courts.**

Minnesota courts have repeatedly been presented with arguments that the state’s registration statute violates the stigma plus test, but has rejected those arguments. That is true even as the legislature added new requirements to the statute.

The Minnesota Supreme Court first considered a procedural due process challenge to section 243.166 in *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999). Citing this Court’s decision in *Paul v. Davis*, 424 U.S. 693, 701-02 (1976), the court noted that a liberty interest is implicated when a loss of reputation is coupled with the loss of some other tangible interest, commonly known as the “stigma plus” test. *Id.*

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8-9. However, those provisions apply only to offenders required to register for federal crimes, which he is not. *See* 18 U.S.C. § 2250.

The Minnesota Supreme Court held that section 243.166 did not satisfy the “stigma plus” test. *Id.* at 718 (citing *Paul*, 424 U.S. at 701). The court acknowledged that being labeled a “predatory offender” is injurious to one’s reputation. *Id.* However, it drew a distinction between the presence of Boutin’s criminal case information in court documents and the active dissemination of such information to the general public, which does not occur under Minnesota’s registration statute. *Id.*

In *Boutin* the Minnesota Supreme Court held that complying with the requirements of the registration statute was a minimal burden, did not rise to the level of a liberty interest, and was not the sufficiently important interest the “stigma-plus” test requires.<sup>5</sup> *Id.*

In the last several years, the Minnesota Court of Appeals has evaluated requirements of Minnesota’s registration statute that the legislature has added after *Boutin* and has held that the registration requirements continue to pose a minimal burden on registrants. *See Thibodeaux v. Evans*, 926 N.W.2d 602, 607-08 (Minn. Ct. App. 2019), *pet. for rev. denied* (Minn. June 26, 2019),

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5. More recently, the Minnesota Supreme Court again addressed due process claims related to section 243.166. *Werlich v. Schnell*, 958 N.W.2d 354 (Minn. 2021). In *Werlich* the court held that because the Minnesota Legislature has added different registration requirements and statutory consequences since *Boutin*, the court was not necessarily bound to reach the same conclusion as it did in *Boutin*. *Id.* at 361-62. However, the court held that the *Paul v. Davis* analysis of whether consequences of registration are punitive or result in loss of recognizable interest that could give rise to a liberty interest under due process still applied. *Id.* at 362-63. It did not separately analyze a substantive claim of whether changes to the statute since *Boutin* resulted in a liberty interest for procedural due process purposes.



*cert. denied*, 140 S. Ct. 1136 (2020); *Bedeau v. Evans*, 926 N.W.2d 425, 4331-33 (Minn. Ct. App. 2019).

## II. PETITIONER’S CRIMINAL CASE RESULTED IN HIS STATUTORY REGISTRATION REQUIREMENT.

In June 1998, the State of Minnesota charged Petitioner with one count of first-degree criminal sexual conduct based on allegations that he injected a woman with a mixture containing cocaine and vaginally and orally penetrated her while she said “no.” Pet. App. 2a.

The State of Minnesota and Petitioner entered into an agreement under which he entered an *Alford* plea to a controlled substance offense and to an amended charge of fifth-degree criminal sexual conduct, arising out of the same set of circumstances as the first-degree criminal sexual conduct charge.<sup>6</sup> Pet. App. 2a-3a. The criminal court convicted Petitioner of those offenses and sentenced him to a 17-month prison sentence.<sup>7</sup> Pet. App. 3a.

Upon his 1999 release from prison, Petitioner first registered in conjunction with the offenses, beginning

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6. When a person enters an *Alford* guilty plea, the person acknowledges the evidence would support a jury verdict of guilty while maintaining the person’s claim of innocence. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

7. Petitioner asserts that he was required to register based on a dismissed charge. Pet. 16, 24. However, he is required to register based on his *convictions*, which require registration because he was charged with first-degree criminal sexual conduct and was convicted of fifth-degree criminal sexual conduct and a controlled substance offense, both of which arose out of the same set of circumstances as the original charged offense. See Minn. Stat. § 243.166, subd. 1b(a)(1).

the 10-year registration term. *Id.* He was reincarcerated several times between then and 2009, resulting in new 10-year registration periods. *Id.* His current registration period expires February 26, 2030. *Id.*

In 2010, Petitioner moved to withdraw his guilty plea as inaccurate and involuntary based on his registration requirement. *Id.* The district court denied the motion, concluding it was untimely and Petitioner's plea was accurate and voluntary. Pet. App. 3a-4a.

### **III. PETITIONER'S CURRENT CIVIL CASE CHALLENGING HIS REGISTRATION UNDER MINNESOTA STATUTES SECTION 243.166.**

Petitioner commenced this action in February 2021 by filing a civil complaint in state court alleging procedural and substantive due process violations, promissory estoppel, and that Minnesota Statutes section 243.166 is an unconstitutional bill of attainder. Pet. App. 4a. Petitioner initiated the action pursuant to 42 United States Code section 1983 and asked for declaratory and injunctive relief. *Id.*

In March 2022, a Minnesota district court judge granted Respondent's motion to dismiss, finding that the Minnesota Bureau of Criminal Apprehension properly applied the registration statute to Petitioner, no violation of substantive or procedural due process, no promissory estoppel, and the registration statute is not an unconstitutional bill of attainder. Pet. App. at 39a-59a.

On November 16, 2022, after granting Petitioner's motion for reconsideration because the court had

considered documents outside of the complaint when it dismissed the complaint, the district court judge issued an order granting Respondent's motion for summary judgment on the same bases as it granted the motion to dismiss in the court's previous order.<sup>8</sup> Pet. App. 18a-38a.

The Minnesota Court of Appeals affirmed in a nonprecedential but thorough decision, denying Petitioner's requests for relief on each ground. Pet. App. 1a – 17a. In its procedural due process analysis, the court properly relied on the Minnesota Supreme Court's *Boutin* decision and this Court's holding in *Paul v. Davis*. Applying that precedent, it considered whether Petitioner had a loss of reputation coupled with the loss of some other tangible interest to rise to a liberty or property interest with which the State of Minnesota had interfered. Pet. App. 9a-10a. The court of appeals acknowledged that Minn. Stat. § 243.166 had been amended since the *Boutin* decision, imposing additional registration requirements, including a registrant's disclosure of his registration status before admission to a healthcare facility. *Id.* at 10a-11a.

The Minnesota Court of Appeals looked at four ways Petitioner asserted that his registration impacted his liberty rights and found he failed to present evidence to support any of them. *Id.* at 11a-12a. First, it rejected his contention that the requirements impacted his ability to obtain inpatient treatment, noting that he had been able to get such treatment. *Id.* Second, it rejected his argument

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8. Each party submitted evidence below and relied on that evidence in their summary judgment arguments. See Pet. App. 18a-38a exhibit and affidavit references.

that the registration requirements resulted, in part, in the termination of his parental rights, noting that his status as a registered offender was not the but-for cause of the termination of his parental rights. *Id.* at 12a. Instead, Petitioner ultimately agreed to terminate them, and he still had parental rights to another child. *Id.*

Third, the court of appeals held Petitioner had shown no impact of the registration requirements on his ability to find employment and housing.<sup>9</sup> *Id.* He had not shown how city ordinances had affected his ability to obtain housing or how the statutory registration requirements had affected his ability to find a job or housing. *Id.*

Finally, the appeals court found no liberty interest in being free from the threat of prosecution if Petitioner violated the terms of the registration statute. *Id.* at 12a-13a. The Minnesota Court of Appeals concluded that Petitioner had not presented evidence that the current version of the statute led to his loss of any tangible interest or was more than a minimal burden. *Id.* at 13a.

Petitioner petitioned the Minnesota Supreme Court for review. Pet. for Review, *Nickels v. Evans*, Minn. Ct. App. Case No. A22-0729, filed August 7, 2023. The sole issue he raised in his petition for review was promissory estoppel. *Id.* He did not seek review on the procedural due process grounds he raises here. *Id.* The Minnesota Supreme Court denied review. Pet. App. 62a. Petitioner then sought certiorari review.

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9. For this argument, Petitioner relied on residency restrictions enacted by different Minnesota cities, not on the registration statute, which contains no residency restrictions. Pet. App. 12a; *See* Minn. Stat. § 243.166.

## REASONS FOR DENYING THE PETITION

Petitioner has not identified any compelling reasons to grant certiorari. *See* Sup. Ct. R. 10 (“A petition for a writ of certiorari will be granted only for compelling reasons.”). Significantly, Petitioner failed to preserve this issue by not raising it in his petition for review to the Minnesota Supreme Court. He did not even give Minnesota’s highest court the opportunity to grant review on the procedural due process grounds he includes in his current Petition. On this basis alone, this Court should deny his petition for writ of certiorari.

In addition, this Court has already denied similar petitions for writs of certiorari, including in a Minnesota case in which the petitioner, represented by the same attorney as Petitioner here, made many of the same arguments. Petition for Writ of Certiorari, *Thibodeaux v. Evans*, 140 S. Ct. 1136 (2020) (Thibodeaux challenged the application of Minnesota’s registration statute and argued this Court should address the procedural due process liberty claim not addressed in *Connecticut v. Doe*); *See also Gautier v. Jones*, 562 U.S. 836 (2010) (petition denied even where community notification was implicated where due process did not entitle him to a hearing to establish a fact not material under the Oklahoma registration statute); *Stark v. Texas*, 551 U.S. 1145 (2007) (petition denied where the petitioner argued the statute should have a means for a defendant to carve out an exception to the lifetime registration requirements). The Court should do so again here.

Petitioner’s petition is based on an incorrect assertion that he was required to register based on a dismissed

offense and his implication that he was not convicted of an offense that requires registration. From that assertion, he argues that this case can resolve a question left open in *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003). But this case will not answer any question left open in *Connecticut v. Doe* because this case is consistent with that case: in both cases the registration obligation is based on a conviction and any process due was provided in the criminal proceeding leading to the conviction. *See* Sup. Ct. R. 10(c) (Court grants certiorari when the case involves an important question of federal law that “has not been, but should be, settled by this Court”).

Petitioner then asserts a split of authority on the question presented. But again his conviction for an offense requiring registration makes the cases he relies on for the alleged split inapposite. In addition, the cases he offers as the other side of the split arise out of affirmative burdens and restraints far beyond registration such as community notification, mandatory treatment, loss of parole, and travel restrictions. *See* Sup. Ct. R. 10(a), (c) (Court grants certiorari when there is a circuit split or the lower court “decided an important federal question in a way that conflicts with relevant decisions of this Court”).

This case is not a good vehicle to consider the question presented where Petitioner seeks review of an unpublished nonprecedential decision and his liberty and procedural due process rights were not violated by his registration as a predatory offender in Minnesota, as the Minnesota Court of Appeals correctly held.

**I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE PROCEDURAL DUE PROCESS ISSUE PETITIONER RAISES HERE.**

Petitioner failed to preserve the procedural due process claim he raises in his Petition. This Court’s jurisdiction to review state court decisions is limited to review of “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). The Court’s rules require the petitioner to specify how and when the question presented was raised at each level of state court. U.S. Sup. Ct. R. 14.1(g)(i). The Petition does not comply with that Rule, but more importantly, this Court lacks jurisdiction due to Petitioner’s failure to raise his due process issue at the Minnesota Supreme Court.

While Petitioner raised a procedural due process claim in the Minnesota district court and the Minnesota Court of Appeals, he limited his petition to the Minnesota Supreme Court to a promissory estoppel issue, and did not raise the procedural due process issue he raises here. Pet. for Review, *Nickels v. Evans*, Minn. Ct. App. Case No. A22-0729, filed August 7, 2023. Therefore, Petitioner forfeited that claim,<sup>10</sup> and this Court has no jurisdiction over the unreserved procedural due process claim. See *Hemphill v. New York*, 595 U.S. 140, 148 (2022) (noting the Court “has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless

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10. The Minnesota Supreme Court considers issues not raised in a “petition for further review” – the document seeking discretionary review from the highest court – to be forfeited. See *In re Estate of Figliuzzi*, 979 N.W.2d 225, 231 n.4 (Minn. 2022) (noting that issues not raised in a petition for review are forfeited).

the federal claim ‘was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.’”); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (“we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant’s conviction. If the question was not so presented, then we have no power to consider it.”); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (“No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision in due time.”)

The Court should deny review because it lacks jurisdiction.

**II. THIS CASE DOES NOT IMPLICATE ANY SPLIT OF AUTHORITY, BUT FALLS SQUARELY WITHIN THE HOLDING OF *CONNECTICUT V. DOE*.**

Even if this Court had jurisdiction, it should deny certiorari because Petitioner cannot establish any of the compelling reasons identified in Rule 10. Petitioner asserts that this case will allow the Court to address a split of lower court authority over a question left open in *Connecticut v. Doe*. Pet. 3-4. In *Connecticut v. Doe*, this Court addressed a procedural due process challenge to Connecticut’s sex offender registration statute. *See Connecticut v. Doe*, 538 U.S. at 6-7. Unlike Minnesota’s statute, which provides that registration information is generally private and to be used for law enforcement purposes only, Connecticut’s registration statute required the Connecticut Department of Public Safety to post sex



offender registry information on a website available to the public. *Id.* at 4-5. A registered offender, on behalf of himself and others similarly situated, brought a § 1983 action challenging that statute as violating the Fourteenth Amendment's Due Process Clause. *Id.* This Court held that, even assuming a valid privacy interest, the statute did not violate procedural due process where the offenders were part of the registry based on a conviction covered by the statute. *Id.* at 7. In other words, the conviction process provided all the process that was due.

The reasoning in *Connecticut v. Doe* applies equally to reject any procedural due process claims related to Minnesota's registration statute. Minnesota's statute also requires a criminal conviction before the statutory registration obligation applies. As such, the Minnesota Court of Appeals has repeatedly rebuffed due process challenges like those Petitioner raises. *See Bedeau*, 926 N.W.2d at 431-33 (holding Bedeau received procedural due process during her criminal proceedings related to the registration obligation); *see also Jefferson v. Evans*, No. A23-1622, 2024 WL 2814453, at \*5 (Minn. Ct. App. June 3, 2024) (holding that because Jefferson received due process in the underlying criminal proceedings, requiring him to register based on that conviction does not violate his procedural due process rights); *Lange v. Evans*, No. A21-1546, 2022 WL 2438634, at \*6 (Minn. Ct. App. Oct. 18, 2022) (holding Lange had an opportunity to challenge probable cause in his criminal case); *Nguyen v. Evans*, No. A21-1319, 2022 WL 1210277, at \*9 (Minn. Ct. App. Apr. 25, 2022) (holding Nguyen received due process, challenging probable cause during the proceedings and during that civil case).

This case will not allow the Court to address a question left open in *Connecticut v. Doe* because it is entirely consistent with *Connecticut v. Doe*. Just as in that case, the registration obligation is based on criminal convictions. In this case, this Court would not need to decide whether there is a liberty interest implicated by the registration statute because even if there is, any process that was due was provided in the criminal proceedings that led to the convictions. This was the Court's holding in *Connecticut v. Doe*, and it applies equally here.

### **III. THERE IS NO SPLIT OF AUTHORITY, JUST VARYING STATUTORY REQUIREMENTS AMONG THE STATES.**

Petitioner claims a split of authority where none exists, certainly none that would be applicable to this case. Pet. 17-18. Petitioner has not shown a direct conflict between jurisdictions that is outcome dispositive. Rather, what Petitioner presents as a conflict of jurisdictions is simply different jurisdictions applying materially different registration statutes to different fact situations. The cases he offers as evidence of a conflict are easily distinguishable from the facts of this case.

1. First, Petitioner asserts that the Minnesota Supreme Court's decision conflicts "squarely" with the Tenth Circuit's holding in *Gwinn v. Awmiller*, 354 F.3d 1211 (10<sup>th</sup> Cir. 2004). Pet. 19. However, the facts addressed in *Gwinn* differ substantially from the facts here, because he was never convicted of any sexual offense, but registration was imposed as a condition of parole.

In 1987, Gwinn was charged with robbery, aggravated robbery, and sexual assault. *Id.* at 1214. He pled guilty to robbery, and the sexual assault charge was dismissed. *Id.*

When Gwinn was released from prison for that offense, his parole officer informed him that he was required to register as a sex offender and attend a community treatment program or he would be returned to prison for violation of parole. *Id.* at 1215. Gwinn said he was denied employment when background checks revealed he had been classified as a sex offender. *Id.* After a subsequent drug conviction, Gwinn could not participate in drug treatment programs because of his classification as a sex offender.

Eventually, the Colorado Department of Corrections held an administrative hearing to determine whether he should be classified as a sex offender. *Id.* The panel determined the classification of Gwinn as a sex offender was appropriate. *Id.*

In evaluating Gwinn's procedural due process claims, the Tenth Circuit found no procedural due process violations regarding the Department of Corrections' classification of Gwinn as a sex offender. *Id.* at 1216 – 1221. However, it concluded summary judgment was inappropriate regarding his parole officer's initial classification of Gwinn as a sex offender, relying on its decision in *Chambers v. Colorado Dep't of Corr.*, 205 F.3d 1237, 1242 (10<sup>th</sup> Cir. 2000) that pre-sentence notice of such a condition was required.<sup>11</sup> *Id.* at 1221-1222.

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11. The *Gwinn* Court was ultimately unable to evaluate Gwinn's allegations because the record contained no information as to whether Gwinn was required to register as a sexual offender, what provisions of Colorado law were invoked as justification for registration, and which defendants, if any, were responsible for the registration. *Id.* at 1224. There was also no information regarding what procedural due process protections, if any, were afforded to Gwinn before he was required to register. *Id.*

The *Gwinn* facts differ greatly from those here. In *Gwinn*, the Court was addressing a parole release condition that could result in revocation and a return to incarceration. There was no information regarding a statutory basis for registration in the record. In Petitioner's case, the registration obligation is a statutory requirement that applies automatically to his convictions. In addition, Petitioner had actual notice that his convictions could result in his registration under the statute, as is clear from the criminal record in his case, which shows his attempts to avoid the statutory registration requirement both at the time of his plea and later when he attempted to withdraw his plea. Petitioner received procedural due process in his criminal case. While violation of the registration statute could result in a felony prosecution, that would be a separate criminal proceeding during which Petitioner would be entitled to procedural due process before he faced any incarceration for failure to register.

2. Petitioner also cites to the Tenth Circuit's decision in *Brown v. Montoya*, 662 F.3d 1152, 1168 (10<sup>th</sup> Cir. 2011), which also differs factually and legally from Petitioner's case. In *Brown*, a probation officer wrongly directed Brown to register as a sex offender and placed him in the sex offender probation unit when his conviction offense of false imprisonment was not included in the sex offender registry statute. *Id.* at 1157-59. Those placed on sex offender probation were subject to travel, employment, and residency restrictions that might be more stringent than those imposed on other types of offenders. *Id.* at 1159. Brown alleged that placing him in the sex offender probation unit and directing him to register as a sex offender without adequate process to determine that he actually was a sex offender constituted procedural due process violations. *Id.*

*Brown*, relying on *Gwinn*, found the plaintiff stated claims for procedural due process violations. *Id.* at 1167-69. The *Brown* facts too differ significantly from those here. *Brown* was incorrectly placed on the registry for an offense not included in New Mexico's registration statute and faced more stringent probationary requirements due to that classification than he would have had otherwise (including implicating his right to travel, employment, and residency). To the contrary, Petitioner is included in Minnesota's registry based on offenses included in its registration statute. He had notice that those offenses would require registration and received due process in his criminal proceedings that resulted in his registration convictions. In addition, Minnesota's registration statute contains no restrictions on travel, employment, or residency.

3. Petitioner also asserts that the decision below is incompatible with the Seventh Circuit's holding in *Schepers v. Commissioner, Indiana Department of Corrections*, 691 F.3d 909 (7<sup>th</sup> Cir. 2012). Pet. 20. Like *Brown*, *Schepers* is a case about a state mistakenly placing someone on a registry, which is not the case here. *Schepers* was convicted of two counts of child exploitation and erroneously designated as a "sexually violent predator" under the statute. *Id.* at 912.

Furthermore, the Indiana statute was significantly more restrictive and more publicly accessible than the Minnesota statute at issue here. The Indiana sex offender registry included a public database accessible via the internet. *Id.* at 911. In that case, some of the registrants' public pages might additionally carry the label of "sexually violent predator." *Id.* In addition, the

Indiana law required registered offenders to carry a valid driver's license or state identification card, forbade them from changing their names, and included residency and employment restrictions within the statute. *Id.* at 911-12. Finally, under that statute, if a "sexually violent predator" planned to be absent from home for more than 72 hours, the offender had to inform both local law enforcement in the county of residence and law enforcement where the offender intended to travel of his travel plans. *Id.* at 912. The Seventh Circuit concluded that the due process clause was implicated.

In contrast, Petitioner was not erroneously registered, and the Minnesota registration database is not a public database. It includes no public pages designating registrants as "sexually violent predators." In addition, Minnesota's registration statute has no requirement that registrants carry a driver's license or identification card at all times and no travel, residency, or employment restrictions. Finally, Minnesota's statute has no conditions related to travel plans.

4. Next, Petitioner asserts that Minnesota's decision directly conflicts with the Nebraska Supreme Court's holding in *State v. Norman*, 808 N.W.2d 48 (Neb. 2012). In that case, after he was charged with third-degree sexual assault of a child, Norman pled no contest to third-degree assault. *Id.* at 53. After a sentencing hearing, the court ordered him to register under Nebraska's sex offender registration law. *Id.* Norman appealed the portion of his sentence ordering him to register, claiming he was denied due process. *Id.*

Under Nebraska's law, persons convicted of certain offenses not sexual in nature were required to register

under the registration law if the court found evidence of sexual penetration or sexual contact in the record. *Id.* at 55. As with some of statutes in other cases cited by Petitioner in his conflict argument, Nebraska's sex offender registry information is made publicly available using the internet, without regard to classification as to level of dangerousness. *Id.* Norman's case was not a civil case alleging a procedural due process violation but was a criminal case in which he claimed the district court imposed an excessive sentence when it required him to register, in violation of procedural due process. *Id.* at 56.

While Norman prevailed on his procedural due process claim, the ruling was limited to holding that the trial court erred when it failed to consider evidence from the sentencing hearing when it determined he was subject to SORA. *Id.* at 57-58. The case was remanded with instructions to the district court to make the finding based on all the evidence in the record, including evidence from the sentencing hearing.

This is inapposite to Petitioner's case. Petitioner is required to register by the plain language of the statute and his criminal convictions. The conviction court was not required to make any kind of finding for the plain language of the statute to apply, and registration is not part of his sentence but is a collateral consequence of registration.<sup>12</sup>

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12. The Minnesota Statute provides that courts may not modify the statutory registration obligation. *See* Minn. Stat. § 243.166, subd. 2. However, registrants have challenged whether the statute applies to them in a variety of ways including in their underlying criminal cases, in failure to register cases, as well as through civil actions. *See, e.g. State v. Berry*, 959 N.W.2d 184, 191 (Minn. 2021) (holding conviction did not arise from the same set of circumstances as the

*See Taylor v. State*, 887 N.W.2d 821, 824-26 (Minn. 2016) (holding registration is collateral consequence of a guilty plea); *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002) (holding duty to register is a collateral consequence of a guilty plea).

The other cases Petitioner cites as evidence of a purported conflict of authority are even more inapposite as they do not even relate to registration obligations. Instead, they address significant affirmative burdens and limitations not arising from a conviction with a statutory registration requirement. For example, *Meza v. Livingston*, Pet. 23, involved conditions imposed following incarceration. 607 F.3d 392, 396 (5<sup>th</sup> Cir. 2010). The

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charged listed registration offense); *State v. Martin*, 941 N.W.2d 119, 126 (Minn. 2020) (in failure to register case finding Martin was not required to register in Minnesota for his California conviction); *In re Lopez*, 778 N.W.2d 700, 707 (Minn. 2010) (reversing application of registration on appeal, finding not same set of circumstances); *State v. Davenport*, 948 N.W.2d 176, 179-80 (Minn. Ct. App. 2020) (holding Davenport was not required to register for aiding and abetting offense); *State v. Munger*, 858 N.W.2d 814, (Minn. Ct. App. 2015) (in failure to register case holding Munger was required to register under the registration statute and that registration did not violate his right to travel); *State v. Haukos*, 847 N.W.2d 270, 275 (Minn. Ct. App. 2014) (finding that because probable cause supported the charged registration offense that resulted in acquittal, registration was required for fifth-degree criminal sexual conduct arising out of the same set of circumstances); *State v. Ulrich*, 829 N.W.2d 429 (Minn. Ct. App. 2013) (holding that registration statute did not apply to Ulrich's conviction); *State v. Patterson*, 819 N.W.2d 462, 465 (Minn. Ct. App. 2012) (in failure to register case holding same set of circumstances did not apply to out-of-state offenses); *State v. Manning*, 532 N.W.2d 244, 248-49 (Minn. Ct. App. 1995) (holding registration statute was not ex post facto law);



registration requirement was not a statutory requirement. *Id.* The conditions were imposed because Meza allegedly sexually assaulted a girl in 1982. *Id.* The state did not dispute Meza had a liberty interest in being free from his sex offender registration and therapy release conditions and the court found such a liberty interest. *Id.* at 399-401.<sup>13</sup> This case does not involve supervision conditions, but instead a conviction of an offense included in the registration statute.

Four other cases cited by Petitioner involve the process required for community notification, which is made after offenders are assigned a risk level based on their assessed dangerousness to the community. *See Roe v. Attorney General*, 750 N.E.2d 897, 899-903 (Mass. 2001); *People v. David*, 733 N.E.2d 206 (N.Y. Ct. App. 2000); *Noble v. Board of Parole*, 964 P.2d 990, 996-97 (Ore. 1998); *Doe v. Poritz*, 662 A.2d 367, 419-22 (1995)<sup>14</sup> Community notification is much more public than registration, and these courts held some process was due before community notification could proceed. Registration under Minnesota's statute is different because it is based on a criminal conviction, with no associated determination of dangerousness and public disclosure.

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13. The *Meza* court acknowledged the Eighth Circuit's decision in *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003), and distinguished it because Texas's statute was not similar to Minnesota's statute. 607 F.3d at 401 n.10. Meza had not been charged with or convicted of a sex offense so the state could not prove he was charged with a non-sexual offense that arose out of the same set of circumstances. *Id.* Again, for this reason, the *Meza* opinion is inapposite here.

14. The cases described in this paragraph were all decided before this Court's 2003 opinion in *Connecticut v. Doe*.

6. The cases Petitioner cites where courts rejected stigma-plus claims like his are more factually and legally similar to this case. In *Gunderson v. Hvass*, 339 F.3d 639 (8<sup>th</sup> Cir. 2003), the Eighth Circuit addressed Minnesota's registration statute, found the statute applied to Gunderson's conviction offense, and found no violation of procedural due process. *Id.* at 642-44. For his procedural due process argument, Gunderson relied in part on *Doe v. Dep't of Pub. Safety*, 271 F.3d 38 (2d Cir. 2001), the case reviewed by this Court in *Connecticut v. Doe*. In its procedural due process analysis, the Eighth Circuit noted that unlike Connecticut's statute, Minnesota's registration statute did not provide for the public dissemination of Gunderson's registration information via the internet. *Id.* at 644. In addition, this Court had issued its opinion in *Connecticut v. Doe*, "eviscerating any persuasive value the Second Circuit opinion may have had as applied to this case." *Id.* The Eighth Circuit also considered the burdens of complying with the registration requirements and found the requirements were a minimal burden and not the sufficiently important interest the "stigma-plus" test requires. *Id.* at 644-45.

In *Cutshall v. Sunquist*, 193 F.3d 466, 470-71 (6<sup>th</sup> Cir. 1999), the Sixth Circuit addressed a registration statute that, like Minnesota's, provided for registry information to be private, with limited disclosure for law enforcement purposes or to protect the public. Under Tennessee's statute, as under Minnesota's, Cutshall was free to live where he chose, come and go as he pleased, and seek any employment he wished. *Id.* at 474.

Cutshall's procedural due process claims were based on the stigma of registration and allegations it deprived

him of employment and privacy. *Id.* at 479. The Sixth Circuit rejected his claims, finding that the Tennessee statutes in no way infringed upon Cutshall's ability to seek, obtain, and maintain a job. *Id.* at 479-80. The Court also held Cutshall had no privacy claim in his registry information. *Id.* at 480-82. Without the "plus" factor of employment or privacy, Cutshall failed to satisfy the *Paul* stigma-plus test. *Id.* at 82.

In *Russell v. Gregoire*, 124 F.3d 1079, 1081-82 (9<sup>th</sup> Cir. 1997), the Ninth Circuit addressed a statute that, like Minnesota's, required offenders to register by virtue of their convictions in a central registry. The *Russell* Court separately analyzed Washington's registration and community notification provisions for ex post facto purposes.<sup>15</sup> *Id.* at 1087-93. Regarding procedural due process, because the Court found no right to privacy in the accumulation and dissemination of information under the statutes, which it described as "carefully designed and narrowly limited," it found no liberty interest at stake. *Id.* at 1094.

Petitioner is asking this Court to find a conflict where none exists. For him to assert he would have prevailed in a federal court in the Fifth, Seventh, or Tenth Circuits as well as in Massachusetts, Nebraska, New Jersey, New York, Oregon, or Rhode Island, Pet. 31, simply disregards the different facts and statutes being applied in the cases he asserts conflict with Minnesota's Supreme Court.

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15. The Court noted that registration did no more than apprise law enforcement officials of certain basic information about an offender living in the area and placed no restraint on the offender's movements. *Russell*, 124 F.3d at 1087.

In seeking this Court's review, Petitioner offers a false conflict. Certiorari is unwarranted because Petitioner has not shown a conflict between federal courts of appeals or state courts of last resort that is relevant to his circumstances.

**IV. THIS UNPUBLISHED STATE COURT OF APPEALS DECISION WITH NO PRECEDENTIAL VALUE IS A POOR VEHICLE FOR THIS COURT'S REVIEW.**

Even if this Court had jurisdiction, and there was a relevant split of authority, this case would be a poor vehicle to address it for at least three reasons. First, the Minnesota Court of Appeals decision is designated as nonprecedential. *See* Minn. Stat. § 480A.08; Minn. R. Civ. App. P. 136.01, subd. 1(c) (nonprecedential opinions are not binding authority except as law of the case, *res judicata*, or collateral estoppel). Second, the registry statutes of the states vary widely, making a decision regarding any due process protection owed to Petitioner applicable to very few other jurisdictions. In particular, Minnesota's statute is unique with respect to its "same set of circumstances" language, its data privacy provisions, and its lack of residency, association, or employment restrictions. *See* Minn. Stat. § 243.166, subd. 1b, 7.

Finally, the record reflects that Petitioner's liberty rights were not implicated by his registration as a predatory offender in Minnesota, where he received due process in his criminal proceedings and section 243.166 required his registration based on his convictions. Pet. App. 2a-3a. He had additional due process in his criminal case when he moved to withdraw his guilty plea because of his registration requirement and the district court concluded it was accurate and voluntary. Pet. App. 3a-4a.

The Minnesota Court of Appeals correctly concluded that under Petitioner's procedural due process rights were not violated with respect to his statutory registration requirement, which was based on his conviction offense.

### CONCLUSION

In sum, certiorari is unwarranted because this Court has no jurisdiction over the procedural due process issue raised. But even if it did, this Court already found registration does not violate a liberty interest where due process is provided in a criminal case and registration is based on a person's conviction, and therefore this case does not implicate any conflict of federal appellate courts and state courts of last resort.

For all of these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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