No. 19-2523

In the United States Court of Appeals for the Seventh Circuit

BRIAN HOPE, et al.,

Plaintiffs-Appellees,

v.

COMMISSIONER OF INDIANA DEPARTMENT OF CORRECTION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:16-cv-02865-RLY-TAB

BRIEF OF NEBRASKA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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Interest of Amici States

The States of Nebraska, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Utah file this brief under Fed. R. App. P. 29(b)(2) in support of Appellants' petition for rehearing en banc. Amici States have an interest in maintaining a cohesive nationwide sex-offender registry, imposing critical registration requirements and restrictions on certain convicted offenders to protect the public, and extending comity to the differing policy choices of other jurisdictions. The panel majority's unprecedented expansion of the constitutional right to travel undermines these state interests. Thus, Amici States urge the en banc court to grant review.

Summary of the Argument

The panel majority construed a particular aspect of the right to travel—the right of new state residents to be free from intentional discrimination. But the majority extended that right, which this brief calls the "right to migrate," far beyond what the Supreme Court, this circuit, and other courts have recognized.

Supreme Court precedent applies the right to migrate only when a State (1) explicitly draws a classification based on residency and (2) intentionally disfavors new residents because of their recent arrival. But the Indiana Sex Offender Registration Act's (SORA) other-jurisdiction provision, as limited by Indiana's Ex Post Facto Clause, does neither of those things. It does not classify based on residency, and in fact, a change in residency is not even necessary to trigger the registration requirement. Nor does SORA have the purpose of disfavoring new residents. By applying the right to migrate in the absence of any such discriminatory purpose, the panel majority endorsed a disparate-impact theory that has no basis in Supreme Court or circuit case law.

That disparate-impact theory threatens to upend a broad array of state action, including any law that adversely affects new state residents more than long-term ones. Many States have statutes that, like SORA's other-jurisdiction provision, require sex offenders to register in their State if another jurisdiction requires them to register. Undermining those laws, as the panel's decision does, risks blowing a hole in our national efforts to register sex offenders and thereby harming law en-

forcement's ability to protect the public. The panel's ruling also jeopardizes other state laws that impose different collateral consequences—such as firearm and voting restrictions—as a result of criminal convictions. And it raises serious questions about statutes that incorporate grandfather clauses, professional regulations that favor in-state experience, and state action that extends comity to other jurisdictions' different policy choices. A panel decision that imperils so much state action warrants en banc consideration.

Argument

I. The panel's decision expanded the right to migrate in conflict with precedent from the Supreme Court, this circuit, and other courts.

A. The Fourteenth Amendment's Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. The Supreme Court has held that this Clause protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State," *Saenz v. Roe*, 526 U.S. 489, 502 (1999)—"the right to be treated like other citizens of that State," *id.* at 500.

"In reality," this right is "little more than a particular application of equal protection analysis," "protect[ing] new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982). It prohibits a State from "favor[ing] established residents over new residents based on the view that the State may take care of 'its own.'" *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 623 (1985).

Supreme Court precedent narrowly confines this right to migrate. It applies only when a State (1) explicitly draws a classification based on residency and (2) intentionally disfavors new residents because of their recent arrival. In *Saenz*, the Court recognized that an unconstitutional California statute, which purposefully disadvantaged new residents receiving welfare benefits, created "classifications . . . *defined entirely* by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members." 526 U.S. at 505 (emphasis added). And in *Hooper*, when invalidating New Mexico's tax exemption for Vietnam veterans who resided in the State before a certain date, the Court held that new citizens "may not be discriminated against *solely* on

the basis of their arrival in the State after [a particular date]." 472 U.S. at 623 (emphasis added).

Similarly, the plurality in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), when striking down New York's hiring preference for military veterans who were New York residents when they entered military service, announced that "the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, *simply* because of the timing of their migration, from other similarly situated residents." *Id.* at 904 (emphasis added). Reiterating the point, the plurality emphasized that New York denied the hiring preference "based *only* on the fact of nonresidence at a past point in time." *Id.* at 909 (emphasis added).

Illustrating the narrow scope of this right, the Supreme Court has applied it—or analogous equal-protection principles—only when striking down durational residency restrictions (laws limiting new citizens' rights for a certain duration after their arrival) or fixed-point residency restrictions (laws limiting citizens' rights if they arrived after a certain date). *See Zobel*, 457 U.S. at 58–59 & 58 n.3; *Soto-Lopez*, 476 U.S. at 903 n.3 &

905. Notably, those restrictions are expressly tied to residency and purposefully disadvantage new residents because of their arrival date.

The close connection between the right to migrate and equal-protection guarantees, *see Zobel*, 457 U.S. at 60 n.6, further confirms that the right to migrate protects against only purposeful efforts to disadvantage new citizens. It has long been the law that "discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"—a "[d]isproportionate impact" on a protected group does not suffice. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The same must be true of the right to migrate, lest the Fourteenth Amendment bestow more protection on new resident sex offenders than racial minorities.

B. The panel majority construed the right to migrate far beyond what the Supreme Court has recognized. Four factors demonstrate this.

First, nothing in SORA's other-jurisdiction provision explicitly discriminates based on residency. As the panel dissent observed, "[n]either SORA nor Indiana's Ex Post Facto Clause discriminates based on residency. Neither even mentions residency." Slip Op. at 55–56.

Second, a residency change is not a prerequisite to the application of SORA's other-jurisdiction provision—either by itself or as limited by the State's Ex Post Facto Clause. That provision is triggered by one simple factor: the obligation to register in another jurisdiction. And that obligation arises in many circumstances that do not involve a residency change. As the panel majority conceded, a lifelong Indiana resident might have a registration obligation if they work or attend school in another jurisdiction. *Id.* at 40–41. Because a residency change is not a necessary trigger of the burden, this case is entirely unlike those in which the Supreme Court has applied the right to migrate.

Third, SORA's other-jurisdiction provision does not favor established residents. The panel majority's insistence that it does misreads Indiana case law. According to the majority, the other-jurisdiction provision, as limited by Indiana's Ex Post Facto case law, favors established residents because it does not burden anyone who moved to Indiana before 2006. *Id.* at 10, 26, 28. But the dissent explained that this premise is "incorrect" because "the other-jurisdiction provision does apply retroactively to offenders who became Indiana residents prior to [that date]."

Id. at 56. Thus, the challenged laws simply do not favor Indiana residents based on when they arrived.

Fourth, even if SORA had the incidental effect of burdening some new residents, nothing suggests that Indiana acted with the purpose of disfavoring newcomers. Rather, the State enacted SORA's other-jurisdiction provision to comply with federal law—the Sex Offender Registration and Notification Act (SORNA)—that seeks to maintain a cohesive national sex-offender registry by having States respect the registration policies of other jurisdictions. *See* 34 U.S.C. § 20901 (establishing "a comprehensive national system" for sex-offender registration); 34 U.S.C. § 20927 (withholding federal funding for noncompliance). The panel majority said that SORA reflects "purposeful . . . disparate treatment" that violates "the Supreme Court's right-to-travel jurisprudence." Slip Op. at 21. But it cites nothing to suggest that maintaining a cohesive national sex-offender registry by affording comity to another jurisdiction's policy choices is an illicit purpose. Nor does it claim that Indiana sought to favor its established residents. By applying the right to migrate without finding any such discriminatory purpose, the panel transformed that right into a disparate-impact claim. And in so doing, it put a question

mark on every state law that has the incidental effect of burdening new residents more than long-term ones.

C. In addition to these conflicts with Supreme Court precedent, the panel's decision is inconsistent with the case law of this and other circuits. In *Sklar v. Byrne*, 727 F.2d 633 (7th Cir. 1984), this Court held that Chicago's ordinance prohibiting the registration of handguns after a particular date did not violate the right to migrate even though it had the effect of disadvantaging new residents. The right did not apply, this Court reasoned, because "[n]ew residents have not been singled out for discriminatory treatment," and a law's "indirect effects on those who travel" do not establish a violation. *Id.* at 639. The ordinance barred handgun registration by many who were not new residents, including lifelong Chicagoans who simply neglected to register before the ordinance's enactment. The same is true here: SORA's other-jurisdiction provision requires registration by many who did not migrate to Indiana, such as lifelong Hoosiers who work or attend school in another jurisdiction or who committed a registrable sex offense while passing through another jurisdiction.

The panel's ruling also conflicts with the Third Circuit's decision in *Connelly v. Steel Valley School District*, 706 F.3d 209 (3d Cir. 2013), which held that a school policy favoring in-state teaching experience did not violate the right to migrate. "The right to travel simply is not implicated," the Third Circuit held, "when there is no discrimination based on the duration of one's residency," *id.* at 215, or when the benefit or burden at issue "is conditioned on factors other than duration of residency," *id.* at 214. In *Connelly*, the government conditioned the benefit on the location of the plaintiff's "teaching experience—not his residency"—thus the right did not apply. Similarly here, the challenged burden is triggered only by the plaintiffs' out-of-state registration requirement—not their residency. By applying the right to migrate anyway, the panel parted ways with the Third Circuit.

The panel majority's attempt to distinguish *Connelly* is off base. Slip Op. at 41–43. It offers a convoluted discussion about purported differences between the out-of-state teaching experience in *Connelly* and the out-of-state registration requirement here. *Id.* But it misses the forest for the trees: the right to migrate did not apply in *Connelly*, just like it does not apply here, because the government explicitly conditioned the right

or burden "on factors other than duration of residency." *Connelly*, 706 F.3d at 214. Thus, the panel majority failed to explain away the conflict with *Connelly*.

II. The panel's decision threatens to invalidate a wide range of state action.

When courts unjustifiably extend constitutional rights, unmooring them from their established framework, States lose their ability to regulate in the best interests of their citizens. Because the panel's decision is such a substantial departure from precedent, it threatens to unleash great mischief on the States.

A. Consider just the topic of sex-offender registration. Many States have statutes that closely track SORA's other-jurisdiction provision. *E.g.*, Neb. Rev. Stat. §§ 29-4003(1)(a)(iv) & (1)(b)(iii); Iowa Code § 692A.103(1); La. Stat. Ann. § 15:542.1.3(A); Tex. Code Crim. Proc. Ann. art. 62.001(10); *see also* Pet. at 13 (collecting statutes). They enacted those statutes to ensure compliance with federal law that seeks to maintain a cohesive national sex-offender registry by having States extend comity to other jurisdictions' registration policies. *See* 34 U.S.C. §§ 20901 & 20927 (discussed above). If States cannot enforce these laws, that will jeopardize public safety by reopening the massive hole that allowed "tens of

thousands of sex offenders" to sneak through the "gaps" in the prior registration system. Matthew Miner, *The Adam Walsh Act's Sex Offender Registration and Notification Requirements and the Commerce Clause*, 56 Vill. L. Rev. 51, 63 (2011).

Past right-to-migrate challenges to similar sex-offender registration laws have been unsuccessful. *E.g.*, *Doe v. Peterson*, No. 8:18-CV-422, 2018 WL 5255179, at *6 (D. Neb. Oct. 22, 2018) ("enforcement of Iowa's sex offender registration requirements against Plaintiff while [residing] in Nebraska will not impede his right to travel"); *Doe v. Jindal*, No. CV 15-1283, 2015 WL 7300506, at *9 (E.D. La. Nov. 18, 2015) (right to travel does not "allow[] a sex offender easily to escape the registration requirement imposed by his jurisdiction of conviction by moving to [another] state"). But litigants continue to raise this issue in federal courts. *E.g.*, *Doe v. Peterson*, No. 8:18-CV-507 (D. Neb.) (awaiting summary-judgment ruling). The panel's decision is a blueprint for sex offenders seeking to avoid registration by relocating. If allowed to stand, it will undermine national efforts to prevent the sex offenses that have traumatized—and in some instances taken the lives of—so many victims.

B. The ramifications of the panel's decision will reach well beyond sex-offender registration. Laws addressing other collateral consequences of criminal convictions—such as firearm and voting restrictions—will also be vulnerable to right-to-migrate challenges. For example, some States prohibit felons from possessing firearms even if their felony conviction was in a different State. *E.g.*, Neb. Rev. Stat. § 28-1206(1)–(2). Under the panel majority's logic, if the underlying criminal conduct was a felony in State A—the State of conviction—but would not have been in State B—the State that bars the firearm possession—then the right to migrate might foreclose State B from enforcing its firearm ban against new residents convicted in State A. *See* Slip Op. at 43–44 (using similar reasoning). After all, the same conduct would not have invoked the ban had it occurred in State B, and therefore the felon who moves to State B is treated worse than the lifelong State B resident who behaved identically. *See id.* The panel's decision thus threatens to limit state regulations that govern the many collateral consequences of criminal convictions.

The potential impact of the panel majority's disparate-impact theory extends further still, jeopardizing myriad other state laws and regulatory actions. For instance, statutes with grandfather clauses have

the inherent effect of favoring some longtime residents, so they will be at risk. *Cf. Sklar*, 727 F.2d at 639. Numerous professional regulations, such as those preferring in-state experience, also disadvantage new residents; they too will be susceptible to challenge. *Cf. Connelly*, 706 F.3d at 214–15. And many regulatory actions extending comity to another State's differing policy choices—including countless domestic-relation issues like out-of-state marriage recognition—will have the effect of treating some new residents differently from lifelong ones. All this state action—and more—will be vulnerable unless en banc review is granted.

Conclusion

Amici States urge this Court to grant rehearing en banc.

Respectfully submitted,

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Certificate of Compliance

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I certify that on February 10, 2021, I electronically filed this brief with the Clerk of this Court using the CM/ECF system. I also certify that all counsel in the case are registered CM/ECF users and that the CM/ECF system will serve them a copy of this brief.

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