No. 01-729

IN THE

Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, JANE DOE, AND JOHN DOE II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Alaska's sex offender registration act, Alaska Stat. §§ 12.63.010 *et seq.*, requires convicted sex offenders to register with the Alaska Department of Public Safety and makes offender information available to the public. The Department elected to publish the information on the Internet. Does the statute, on its face or as implemented by the Department of Public Safety, impose punishment for purposes of the Ex Post Facto Clause of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioners Glenn G. Godfrey (successor to Ronald O. Otte) and Bruce M. Botelho are, respectively, the Alaska Commissioner of Public Safety and the Alaska Attorney General. Otte and Botelho were defendants in the District Court and appellees before the Court of Appeals for the Ninth Circuit. Respondents John Doe I, Jane Doe, and John Doe II were plaintiffs in the District Court and appellants before the Court of Appeals for the Ninth Circuit.

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GLENN G. GODFREY AND BRUCE M. BOTELHO,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit, as amended, is reported at 259 F.3d 979 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a. The original opinion is reprinted at Pet. App. 33a. The opinions and orders of the United States District Court for the District of Alaska dated March 31, 1999, and August 12, 1999, are not reported; they are reproduced at Pet. App. 69a and 118a, respectively.

JURISDICTION

The judgment of the Ninth Circuit was entered on August 8, 2001. The Ninth Circuit denied petitions for rehearing and

for rehearing en banc on August 23, 2001, and September 6, 2001. Pet. App. 124a, 123a. The petition for certiorari was filed on November 21, 2001, and granted on February 19, 2002. 122 S. Ct. 1062. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, section 10 of the United States Constitution provides, in pertinent part: "No State shall * * * pass any * * * ex post facto Law."

The Alaska Sex Offender Registration Act, Alaska Stat. §§ 12.63.010-.100 and § 18.65.087, and pertinent regulatory provisions, are reprinted in the addendum hereto.

INTRODUCTION

The Alaska Sex Offender Registration Act ("ASORA") was enacted to protect the public and to assist law enforcement in investigating future crimes. It requires state law enforcement entities to gather truthful information about sex offenders and to make certain of that information available to the public. The State has chosen to make such information available on the Internet. Like all other courts to have considered sex offender registration laws, the Ninth Circuit concluded that the legislature acted with non-punitive intent when it passed the ASORA. The court of appeals erroneously departed from the overwhelming majority of courts, however, in holding that the ASORA was nonetheless so punitive in effect that it violated the Ex Post Facto Clause.

We are aware of no case in which this Court has held that a law had a non-punitive intent and yet nonetheless violated the Ex Post Facto Clause. Nor has this Court ever held that regulatory requirements like those imposed on sex offenders by the ASORA amount to punishment; indeed, it has countenanced far more onerous burdens imposed by non-punitive

regulatory statutes. The Ninth Circuit's decision should be reversed.

STATEMENT OF THE CASE

Statutory Background. 1. In 1994, after a series of sexual crimes against children committed by prior offenders made news across the country, Congress passed the Jacob Wetterling Crimes Against Children and Law Enforcement Act, 42 U.S.C. §§ 14071 *et seq.* The Wetterling Act directs the Attorney General to develop guidelines for state sex offender registration programs, *id.* § 14071(a), specifies registration requirements for individuals convicted of certain sex offenses and the duration of those requirements, and permits States to release registry information "to protect the public concerning a specific person required to register under [the Act]." *Id.* § 14071(e)(2). The Wetterling Act encourages States to adopt registration programs that conform to or exceed its terms by conditioning receipt of certain federal funds on the implementation of such programs. *Id.* § 14071(g)(2). In 1996, Congress amended the Wetterling Act to provide that offenders convicted of one "aggravated sex offense" or two or more triggering offenses be required to register for life, and to permit States to disclose registry information "for any purpose permitted under the laws of the State." *Id.* §§ 14071(b)(6), (e) (Supp. III 1997).

Today, all fifty States and the District of Columbia have sex offender registration and notification statutes on their books.[1] Approximately thirty States and the District of Col-

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[1] *See* Ala. Code §§ 13A-11-200, 15-20-21(1), 15-20-25(b) (2001); Alaska Stat. §§ 12.63.010-.100, 18.65.087 (2001); Ariz. Rev. Stat. §§ 13-3821 *et seq.* (2001 & Supp. 2002); Ark. Code Ann. §§ 12-12-901 *et seq.* (West 2001); Cal. Penal Code §§ 290 *et seq.* (West 1999 & Supp. 2002); Colo. Rev. Stat. § 18-3-412.5 (1999 & Supp. 2002); Conn. Gen. Stat. §§ 54-250 *et seq.* (2001); Del. Code Ann. tit. 11, §§ 4120, 4121, 4336 (2001 & Supp. 2002); D.C. Code Ann. §§ 22-4001 *et seq.* (2001); Fla. Stat. Ann.

umbia make their registries available on the Internet. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Summary of State Sex Offender Registries, 2001* (2002) (noting that "a growing number of States use[] the Internet to fulfill notifica-

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§§ 943.043(1), 943.0435(1) (West 2001); Ga. Code Ann. § 42-9-44.1 (2001); Haw. Rev. Stat. §§ 846E-1 *et seq.* (2001); Idaho Code §§ 18-8301 *et seq.* (2001 & Supp. 2002); 730 Ill. Comp. Stat. §§ 150/1 *et seq.* (1997 & Supp. 2002); Ind. Code §§ 5-2-12-1 *et seq.* (West 2001 & Supp. 2002); Iowa Code Ann. §§ 692A.1 *et seq.* (West 2002); Kan. Stat. Ann. §§ 22-4901 *et seq.* (2001); Ky. Rev. Stat. Ann. §§ 17.500 *et seq.* (West 2001); La. Rev. Stat. Ann. §§ 15:540 *et seq.* (West 2001 & Supp. 2002); Me. Rev. Stat. Ann. tit. 34-A, §§ 11201 *et seq.* (West 2001 & Supp. 2002); Md. Ann. Code §§ 11-701 *et seq.* (2001 & Supp. 2002); Mass. Gen. Laws ch. 6, §§ 178C-178P (2002); Mich. Comp. Laws Ann. §§ 28.721 *et seq.* (West 2002); Minn. Stat. §§ 243.166, 244.052 (1992 & Supp. 2002); Miss. Code Ann. §§ 45-33-21 *et seq.* (2001); Mo. Rev. Stat. §§ 589.400 *et seq.* (West 2002); Mont. Code Ann. §§ 46-23-501 *et seq.* (2001); Neb. Rev. Stat. §§ 29-4001 *et seq.* (2001); Nev. Rev. Stat. §§ 179D.350 *et seq.* (2001); N.H. Rev. Stat. Ann. § 651-B (2001); N.J. Stat. Ann. § 2C:7 (1995 & Supp. 2002); N.M. Stat. Ann. § 29-11A (Michie 2000); N.Y. Correct. Law § 168 (McKinney 2001 & Supp. 2002); N.C. Gen. Stat. §§ 14-208.5-208.31 (2001); N.D. Cent. Code § 12.1-32-15 (2001); Ohio Rev. Code Ann. §§ 2950.01 *et seq.* (West 2001); Okla. Stat. Ann. tit. 57, §§ 581 *et seq.* (West 1991 & Supp. 2002); Or. Rev. Stat. §§ 181.585 *et seq.* (2001); 42 Pa. Cons. Stat. Ann. §§ 9791 *et seq.* (West 1998 & Supp. 2002); R.I. Gen. Laws § 11-37.1 (2001); S.C. Code Ann. §§ 23-3-400 *et seq.* (2002); S.D. Codified Laws §§ 22-22-30 *et seq.* (Michie 2001 & Supp. 2002); Tenn. Code Ann. §§ 40-39-101 *et seq.* (2001 & Supp. 2002); Tex. Crim. Proc. Code Ann. §§ 62.01 *et seq.* (Vernon 2001); Utah Code Ann. § 77-27-21.5 (2001 & Supp. 2002); Vt. Stat. Ann. tit. 13, §§ 5401 *et seq.* (2001); Va. Code Ann. §§ 19.2-298.1 *et seq.*, -390.1 (Michie 2002); Wash. Rev. Code Ann. §§ 9A.44.130 *et seq.*, §§ 4.24.550 *et seq.*, § 4.24.5501 (2001 & Supp. 2002); W. Va. Code §§ 15-12-1 *et seq.* (2001); Wis. Stat. Ann. §§ 301.45 *et seq.* (West 2001 & Supp. 2002); Wyo. Stat. Ann. §§ 7-19-301 *et seq.* (Michie 2000).

tion requirements under Megan's Law"); http://www.meganslaw.org (collecting Internet sex offender registries).[2]

The rapid development of state sex offender statutes has led to a spate of lawsuits challenging their terms. A central question presented by many of those lawsuits is whether sex offender registration and notification constitute retroactive punishment prohibited by the Constitution's Ex Post Facto Clause. The overwhelming majority of courts have answered that question in the negative. *See infra* n.11.

2. The State of Alaska became the thirty-second State to enact a sex offender registration law when, in 1994, its legislature enacted the ASORA. The ASORA requires convicted sex offenders to register with law enforcement authorities and authorizes public disclosure of certain information in the sex offender registry. Alaska Stat. §§ 12.63.010, 18.65.087.

The ASORA was enacted "at a time when the state legislature perceived that Alaska's high rate of child sexual abuse constituted a 'crisis.' " Pet. App. 6a. The State's legislature heard testimony that the rate of child sexual abuse in Alaska was the highest in the Nation—indeed, more than six times the national average. *See Minutes of Hearing Before Senate Judiciary Comm.* ("*Senate Judiciary Hearing*"), 18th Alaska Legis., 1st Sess. 9 (Apr. 14, 1993) (No. 505); *Minutes of Hearing Before Senate Finance Comm.* ("*Senate Finance Hearing*"), 18th Alaska Legis., 1st Sess. 3 (Apr. 28, 1993). The State's sexual assault rate in 1993 was the second

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[2] Such laws are often called "Megan's Laws," after Megan Kanka, a seven-year-old New Jersey child who was sexually assaulted and murdered by a neighbor who—unbeknownst to the Kanka family—had two prior convictions for sexual offenses against children. *See* Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167, 1172 (1999).

highest in the Nation and had nearly doubled in the prior two years. *See Senate Judiciary Hearing* at 9, 13 (Nos. 505, 209); *Minutes of Hearing Before House Judiciary Comm.* ("*House Judiciary Hearing*"), 18th Alaska Legis., 1st Sess. 17 (Feb. 10, 1993) (No. 000). Legislators also heard testimony that about a quarter of Alaska's entire prison population was incarcerated for sexual offenses, and that studies had shown that sex offenders had high rates of recidivism. *See Minutes of Hearing Before House Finance Comm.* ("*House Finance Hearing*"), 18th Alaska Legis., 1st Sess. 7 (Mar. 3, 1993); *Senate Judiciary Hearing* at 9 (No. 505); *House Judiciary Hearing* at 9 (No. 612).

When it enacted the ASORA, the legislature stated its conclusions that:

> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety. [1994 Alaska Sess. Laws ch. 41, § 1.]

The ASORA requires people convicted of a "sex offense" or "child kidnapping"—as defined by the statute—who are physically present in the State of Alaska to register with the Department of Corrections if they are incarcerated, or with their local state trooper post or police department if they are at liberty. Alaska Stat. § 12.63.010(b).[3] A person required to

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[3] Those convicted before July 1, 1984 of one sex offense or child kidnapping do not have to register under the ASORA. *See*

register under the ASORA must provide various information, including his name, address, place of employment, and information about vehicles to which he has access. He must also allow the police department to take a photograph and a set of fingerprints. *Id.* §§ 12.63.010(b)(1)-(2).

The Act requires offenders covered by its terms to notify their local police department when they change addresses. *Id.* § 12.63.010(c); *see* 13 Alaska Admin. Code §09.040. Offenders convicted of an "aggravated sex offense" or of two or more sex offenses are further required to provide quarterly "written verification" to their local police department of their current address and of any changes to their registry information, for the rest of their lives. Alaska Stat. §§ 12.63.010(d)(2), 12.63.020(a). Those convicted of one non-aggravated offense covered by the Act must provide annual "written verification" of their current address and of any changes to their registry information, for fifteen years. *Id.* § 12.63.010(d)(1). *See also* 13 Alaska Admin. Code § 09.025(d)-(e) (detailing procedures for receiving written submissions from registrants).[4] Registrants may request the Department of Public Safety to correct or review information maintained in the registry and may appeal adverse responses to the Commissioner of Public Safety. *Id.* § 09.060. A person who knowingly fails to register, to file an address change notice, or to file the required annual or quarterly written statement is subject to criminal prosecution. *See* Alaska Stat. §§ 11.56.835, 11.56.840.

1994 Alaska Sess. Laws ch. 41, § 12(a); 1998 Alaska Sess. Laws ch. 106, § 25(a).

[4] The Department of Public Safety may instruct an offender to appear in person to be photographed if five or more years have passed since a registration photograph was taken or there is reason to believe an offender's appearance has changed significantly. *Id.* § 09.030(b).

The ASORA designates most registration information as "nonconfidential" and requires that the State's Department of Public Safety make nonconfidential information available to the public. *See* Alaska Stat. § 18.65.087.[5] Until June 1997, the Alaska state troopers maintained a complete list of the State's registered sex offenders at each trooper post. Anyone who wished to could look at the list at the state trooper post, purchase a complete list of registered sex offenders, or request that a specific search be conducted. In June 1997, the Department of Public Safety made the sex offender registry available on the Internet. Pet. App. 73a.[6] The site displays a prominent warning: "This information is made available for the purpose of protecting the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution." Alaska Dep't of Public Safety, *Sex Offender Registration Central Registry* (http://www.dps.state.ak.us/nSorcr/asp/). Alaska, like some twenty other States, *see infra* n.27, takes a categorical approach to notification; the State does not individually assess the risk of recidivism posed by each registered sex

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[5] The following information provided by the registrant is kept confidential: fingerprints, driver's license number, anticipated changes of address, whether the registrant has been unconditionally discharged from the conviction, the date of the unconditional discharge, and whether the registrant has had treatment for a mental abnormality or personality disorder since the date of the conviction. *Id*. §§ 12.63.010(b), 18.65.087(b).

[6] The ASORA does not specify the means of making registry information public, and the regulations simply state that such information be provided "by posting or otherwise making it available for public viewing in printed or electronic form." Alaska Admin. Code § 09.050(a). The statute allows public access to information regarding motor vehicles to which the registrant has access and to information about the length and conditions of the registrant's sentence, but the Department of Public Safety does not post this information on the Internet. *Compare* Alaska Stat. § 18.65.087(b) *with* http://www.dps.state.ak.us/nSorcr/asp/.

offender before posting registry information on the Department of Public Safety website.

Facts. Respondent John Doe I was charged with three counts of first-degree sexual abuse of a minor. Ct. App. Sealed E.R. 113. He pled nolo contendere to one count of first-degree and one count of second-degree sexual abuse of a minor and was sentenced to twelve years' imprisonment, four years of which were suspended. *Id.* at 113-114. John Doe I was released from prison in December 1990. *Id.* at 114. He married respondent Jane Doe after his release from prison. *Id.* at 115. Respondent John Doe II was charged with first-degree sexual abuse of a minor. *Id.* at 126. He pled nolo contendere to one count and was sentenced to eight years' imprisonment. *Id.* John Doe II was released from prison in May 1990. *Id.*

John Doe I and John Doe II were required to register as sex offenders under the ASORA because they were convicted after July 1, 1984 of offenses triggering application of the statute. *See* 1994 Alaska Sess. Laws ch. 41, § 12(a). Because both were convicted of an "aggravated sex offense," *see* Alaska Stat. § 12.63.100(1), the Act required both to provide, on a quarterly basis, "written verification" of their current address and notice of any changes to their registry information. *See id.* §§ 12.63.010(d)(2), 12.63.020; 1998 Alaska Sess. Laws ch. 106, § 25 (new registration requirements for aggravated sex offenses apply retroactively).

Proceedings Below. 1. The Does sued petitioners—the state Commissioner of Public Safety and the state Attorney General—under 42 U.S.C. § 1983, claiming, *inter alia*, that the ASORA was an ex post facto law. Ruling on summary judgment, the District Court explained that the ex post facto issue turned on "whether the registration and/or notification provisions of ASORA constitute punishment." Pet. App. 76a. To answer that question, the court applied the two-step "intent-effects" test. *See Kansas* v. *Hendricks*, 521 U.S. 346,

361 (1997) (describing test); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980) (same). The District Court concluded that the legislature's intent was regulatory, not punitive, and that in particular the "legislative findings make plain that the 'release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety' "—clearly a non-punitive objective. Pet. App. 91a (quoting 1994 Alaska Sess. Laws ch. 41, § 1).

Turning to the effects prong, the court explained that plaintiffs were required to demonstrate by the "clearest proof" that despite the legislature's regulatory intent, the statutory requirements were "so punitive in effect as to prevent the court from viewing [them] as regulatory or civil in nature." *Id.* at 85a, 77a (quotation omitted). Reviewing several considerations set forth by this Court in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the District Court concluded that the plaintiffs had not satisfied that heavy burden. Pet. App. 90a, 94a, 99a. Plaintiffs appealed.

2. The Ninth Circuit reversed. On the first step of the inquiry the panel found that the legislature sent "conflicting signals" about its intent. Pet. App. 42a. Acknowledging that the legislature's express findings indicated that the Act had "a non-punitive purpose—protection of the public through the collection and release of information"—the court found those findings "by no means conclusive," stating that the "structure and design of the Alaska Act" supported the conclusion "that the legislature intended that the statute be punitive." *Id.* at 45a-46a.

Turning to the "effects" prong of the ex post facto inquiry, the Ninth Circuit recognized that "[w]hen a legislature plainly states its intent that a statute is *not* punitive, courts must 'reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention.' " *Id.* at 46a (quoting *Hen-*

dricks, 521 U.S. at 361) (emphasis in original). The court held, however, that it would not employ that strict standard in this case but would instead apply only "ordinary and customary legal standards" in examining the statute's effect, because the legislature's intent was "unclear." *Id.* at 47a.[7]

The Ninth Circuit found the Act punitive in effect. Applying the seven *Mendoza-Martinez* "factors," *see* 372 U.S. at 168-169, the court concluded that three factors weighed against, and four in favor of, finding the Act punitive. The court recognized that sex offender registration and notification statutes "have not historically been regarded as punishment." Pet. App. 65a. The Ninth Circuit also recognized that the Act's provisions did not take effect only on a finding of scienter, which likewise weighed against finding the statute punitive. *Id.* at 53a-54a. And the Ninth Circuit acknowledged that the Act undoubtedly had the "alternative non-punitive purpose" of "public safety, which is advanced by alerting the public to the risk of sex offenders in their communities." *Id.* at 58a-59a. The court found that non-punitive purpose to "unquestionably provide[] support, indeed the principal support, for the view that the statute is not punitive." *Id.* at 59a.

The court, however, found four *Mendoza-Martinez* considerations to weigh in favor of finding the statute punitive. First, it concluded that the ASORA "imposed an affirmative

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[7] *See also id.* at 48a n.8 ("in *Russell* [v. *Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998),] we required a showing of the 'clearest proof' because we determined that the legislature's manifest intent was that the statute not be deemed punitive, while here, because the legislative intent is unclear, we do not apply so burdensome a standard"); *id.* at 52a (noting that "the standard of proof we apply here is different than in [*Russell*]"); *id.* at 59a n.12 (again distinguishing the standard applied in *Russell*); *id.* at 61a n.14 (distinguishing "clearest proof" standard applied by the Tenth Circuit in *Femedeer* v. *Haun*, 227 F.3d 1244 (10th Cir. 2000)).

disability on the plaintiffs." *Id.* at 48a. The court viewed the Act as requiring plaintiffs and others convicted of aggravated sex offenses to "appear in person at a police station" four times each year to verify their information, which the court concluded was so "onerous" a requirement as to constitute an affirmative disability. *Id.* at 48a-49a.

The Act's notification provisions also imposed an "affirmative disability," the panel held, because "by posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally" and may "make the plaintiffs *completely* unemployable." *Id.* at 49a-50a (emphasis in original). Emphasizing again that the "standard of proof we apply here is different" than the exacting "clearest proof" standard, the court found that "[c]onsidered as a whole, the Alaska statute's registration and notification provisions[] impose a significant disability on the plaintiffs," and thus "clearly favor[] treating the Act as punitive." *Id.* at 52a.

The court found that another *Mendoza-Martinez* consideration, whether the statute promotes the "traditional aims of punishment—retribution and deterrence," also weighed "on the side of finding the Act punitive." *Id.* at 54a. The Act's registration obligations—which, the court reiterated, imposed on those convicted of aggravated sex offenses a "duty * * * to report quarterly to their local police stations"—appeared to the court to be "inherently retributive." *Id.* at 55a. The duration of the reporting requirements—and the fact that they were tolled in years of noncompliance—also gave the court pause. In its view, "requiring the offender actually to go to the police station and register 15 times (even if it takes more than 15 years when the offender skips some years)" exacted an additional penalty. *Id.* at 56a. The Act thus "appears to further the fundamental aims of punishment" and its requirements "suggest that they serve as retribution." *Id.* at 57a.

The court next concluded that because the Act "applies only to behavior that is already criminal," that weighed in favor of finding the statute punitive. *Id.* at 57a. Finally, the Ninth Circuit concluded that the ASORA "appears excessive in relation to [its] alternative purpose" of protecting the public. *Id.* at 59a (quotation omitted). The statute was "exceedingly broad," the court concluded, because it was not "limited to those who the state determines pose a future risk to the community;" rather, all sex offenders convicted after July 1984, no matter the risk they posed, were listed on the registry. *Id.* at 63a, 60a. Emphasizing again that the statute "forced" even a "successfully rehabilitated" offender "to submit to in-person registration at his local police department four times a year, every year," the court of appeals found that the ASORA's "unlimited public disclosure of sex offender information in all cases in which a defendant has ever been convicted of a sex offense" weighed "strongly in favor of a determination that its effect is punitive." *Id.* at 63a.

Weighing "all the *Mendoza-Martinez* factors together," under the "ordinary" standard of review it had held applicable, the court concluded, "on balance, * * * the effect of the Alaska statute is punitive." *Id.* at 66a. It accordingly found that the statute's application to John Doe I and John Doe II violated the Ex Post Facto Clause. *Id.*

3. The State sought rehearing and rehearing en banc. It challenged the panel's conclusion that the legislature's intent in enacting the ASORA was ambiguous, pointing out that Alaska's Act closely followed the structure and design of the Washington State sex offender law the Ninth Circuit had upheld in *Russell.* The State also pointed out that a critical factual error had permeated the panel's decision: *no one* was required to re-register "in person" at local police stations under the Act, as the opinion (six times) stated; registrants need only submit quarterly or yearly "written verification" of their information. Alaska Stat. § 12.63.010(d).

Without ruling on the petition for rehearing, the panel issued an amended opinion. Pet. App. 1a. The panel's amended decision made a U-turn from its initial conclusion on legislative intent: where it had once found the legislature's intent ambiguous, the panel now agreed that the Alaska statute was "remarkably similar" in structure to the Washington statute it had upheld in *Russell*, and it held that "the legislature acted with a non-punitive intent" when it passed the Alaska Act. *Id.* at 11a; *see id.* at 12a.

This meant that the court's analysis of the effect of the statute became subject to the "clearest proof" standard, and the court recognized as much. *Id.* at 12a-13a. But the panel simply reinstated almost *verbatim* its earlier analysis of the effect of the ASORA—except for deleting its earlier repeated statements to the effect that the "standard of proof we apply here is different" than the "clearest proof" standard.[8] Thus,

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[8] The alterations in the amended opinion are telling. For example, the court initially concluded that the Act "*appears to* further the fundamental aims of punishment," and that its requirements "*suggest* that they serve as retribution," Pet. App. 57a (emphases added); the amended decision states that the Act affirmatively *did* "further[] the fundamental aims of punishment" and that the requirements "*show* that they serve * * * as retribution." *Id.* at 21a (emphasis added). *Compare also* Pet. App. 64a (original) ("the *Mendoza-Martinez* test leads us to hold that the Act's effect is sufficiently punitive that notwithstanding the legislature's ambiguous intent, the Alaska statute should be classified as punitive") *with id.* at 28a (amended) ("the *Mendoza-Martinez* test leads us to hold that the effects of the specific provisions of the Alaska Act provide the 'clearest proof' that, notwithstanding the legislature's non-punitive intent, the statute must be classified as punitive"); *and id.* at 66a (original) ("When we weigh all the *Mendoza-Martinez* factors together, we conclude, on balance, that for purposes of the Ex Post Facto Clause, the effect of the Alaska statute is punitive") *with id.* at 30a (amended) ("[W]eighing all of the *Mendoza-Martinez* factors together, the effects of the Act provide the clearest proof that it is punitive").

whereas the panel had initially found that various factors indicated a punitive purpose and effect under "ordinary" standards of review, it now found that those *same* factors provided the "clearest proof" of the law's punitive nature.

The panel also held fast to its conclusion that the ASORA required offenders to re-register "in person" at police stations quarterly or annually—despite the plain language of the statute permitting "written verification" of information. *See id.* at 7a. In a new footnote, the court opined that the statute "on its face, does not clearly specify that these registrations must be made in person at local police stations," but stated that "the government represented at oral argument that periodic in-person registration at local police stations is required by the Act." *Id.* at 7a n.4.

The State again sought rehearing en banc. The court of appeals denied both the original petition for rehearing and the petition for rehearing from its amended opinion. Pet. App. 123a-124a. This Court granted certiorari. 122 S. Ct. 1062 (2002).

SUMMARY OF ARGUMENT

The ASORA is a regulatory law intended to help protect the public from future harm by collecting truthful information and making it available to those who choose to access it. It is not a penal law intended to punish people for past acts. To determine whether a law is penal within the meaning of the Ex Post Facto Clause, the Court employs a two-step test. First, the Court asks whether the legislature intended that the law serve legitimate regulatory purposes, rather than punitive ones. If so, the inquiry is at an end, except in extremely limited circumstances where the party challenging the law carries the "heavy burden" of showing by the "clearest proof" that the stated intent is merely a charade for punitive goals. *Hendricks*, 521 U.S. at 361.

This "clearest proof" requirement exists not only because of the inherent difficulties in ascertaining legislative intent other than through the statutory language itself, but also because of the purposes of the Ex Post Facto Clause. The Ex Post Facto Clause protects against vindictive or malicious legislation, an inquiry that necessarily turns on the intent of the legislature. Precisely the same sanction can be either civil or penal depending on the legislature's intent. Thus, once it is determined that the legislature's intent was not punitive, the ex post facto inquiry is all but over. Other constitutional provisions, such as the Due Process Clause, protect against legislation that is irrational or does not sufficiently serve its stated purposes.

As every court to have considered the issue (including the Ninth Circuit below) has held, the intent behind sexual offender registration and notification statutes is regulatory, not punitive. As the Alaska legislature expressly declared, the ASORA was intended to "protect[ ] the public" and "protect[ ] the public safety," by collecting and making available truthful information that people may find useful to safeguard themselves and their children from possible *future* harm. 1994 Alaska Sess. Laws ch. 41, § 1. The law was not intended to punish people for *past* acts, and in fact imposes only minimal regulatory requirements on those required to register. The legislative history confirms this express non-punitive intent.

The ex post facto inquiry is therefore over unless there is the clearest proof that the legislature's expressed intent masks a true punitive purpose. To locate such proof, the Court has traditionally looked to the factors set forth in *Mendoza-Martinez* as guideposts. Demonstrating the narrowness of that inquiry, however, the Court has never held that a law had a non-punitive purpose but nevertheless violated the Ex Post Facto Clause in light of the *Mendoza-Martinez* factors. Indeed, the Court has routinely upheld the

retroactive application of laws far more onerous than the ASORA.

Contrary to the Ninth Circuit's holding, there is no proof, much less the required clearest proof, that the ASORA is so punitive in purpose or effect so as to negate the legislature's finding to the contrary. The Ninth Circuit correctly held that three *Mendoza-Martinez* factors indicated that the law is not punitive. *First*, registration and notification provisions have not historically been regarded as punishment. Registration requirements are commonplace in our regulated society, and provisions that make information about criminal records available to the public are likewise common and have never been considered additional punishment for the underlying crime. *Second*, the ASORA does not come into play only upon a finding of scienter. To the contrary, the law's provisions are triggered only by the fact of a conviction. *Third*, the law plainly has a non-punitive purpose that can rationally be assigned to it—protecting the public from future harm.

The Ninth Circuit erred, however, in concluding that the four other *Mendoza-Martinez* factors so outweighed the others and the legislature's intent as to render the ASORA punitive in fact. *First*, the ASORA imposes no affirmative disability or restraint. The registration and verification requirements are undemanding and, contrary to the Ninth Circuit, do not require that quarterly verifications be submitted in person. The notification provisions likewise impose no affirmative disability or restraint. Although notification could conceivably have negative collateral effects due to the actions of those who learn the information, those consequences accompany any disclosure of criminal records and are not an affirmative disability or restraint imposed by the law. *Second*, the ASORA does not further the traditional aims of punishment. It is not inherently retributive to collect truthful information and make it available to those who choose to access it as a means of safeguarding themselves and their families. And even if the law were seen as a

deterrent, the Court has long held that deterrence is a civil, not simply punitive, goal. *Third*, while the ASORA applies only to behavior that is already criminal, that factor should be of little import in the ex post facto inquiry, and the Court has never held a law punitive simply because it applies to convicted felons. *Finally*, the ASORA is not excessive in comparison to its regulatory purposes, particularly when compared to far more onerous laws the Court has upheld in the past. Ex post facto analysis does not require a perfect fit between means and ends, and such inquiries are in any event better left to a due process analysis.

ARGUMENT

I. THE ALASKA LEGISLATURE EXPRESSLY INTENDED THAT THE ASORA SERVE REGULATORY, NOT PUNITIVE, GOALS.

A. The Court Should Defer To The Legislature's Intent To Further Civil Goals Absent The "Clearest Proof" Of Punitive Intent.

The Ex Post Facto Clause provides that "[n]o State shall * * * pass any * * * ex post facto Law." U.S. Const. art. I, § 10, cl. 1. *See also id.* art. I, § 9, cl. 3. Since the early days of the Republic, it has been clear that this clause applies only to criminal punishments. It prohibits the retroactive application of a law that "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis removed). Thus, for a law to violate the Ex Post Facto Clause, it must impose "punishment," rather than a regulatory burden or civil sanction. *See, e.g.*, *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts."); *Trop* v. *Dulles*, 356 U.S. 86, 95-96 (1958) ("Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and *ex post facto* laws, it has been necessary to determine whether a

penal law was involved, because these provisions apply only to statutes imposing penalties.") (plurality).

In determining whether a law is penal for purposes of the Ex Post Facto Clause, the Court engages in a two-step inquiry. *See, e.g.*, *Hudson* v. *United States*, 522 U.S. 93, 99 (1997); *Hendricks*, 521 U.S. at 361; *United States* v. *Ursery*, 518 U.S. 267, 277-278 (1996).[9] Categorization of a law as civil or criminal " 'is first of all a question of statutory construction.' " *Hendricks*, 521 U.S. at 361 (quoting *Allen*, 478 U.S. at 368). *See also Ward*, 448 U.S. at 248-249 ("[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction."). Thus, in the first step, the Court "must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Hendricks*, 521 U.S. at 361. This inquiry asks whether the legislature "indicated either expressly or impliedly a preference" for a civil or criminal label. *Ward*, 448 U.S. at 248.

Under the second step in the analysis, if the legislature has indicated an intent to establish a civil sanction, the Court will "ordinarily defer to the legislature's stated intent," and "will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' "

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[9] The same general test for determining whether a law constitutes punishment applies to various other provisions of the Constitution, in addition to the Ex Post Facto Clause—including the Double Jeopardy Clause, *see, e.g.*, *Hendricks*, 521 U.S. at 360-369, the Bill of Attainder Clause, *see, e.g.*, *De Veau*, 363 U.S. at 160, the Self-Incrimination Clause of the Fifth Amendment, *see, e.g.*, *Allen* v. *Illinois*, 478 U.S. 364, 368-369 (1986), and the protections afforded by the Sixth Amendment, *see, e.g.*, *Ward*, 448 U.S. at 248. Various factors employed by the Court in the second step of the analysis may be more relevant to some constitutional provisions than others. *See infra* at 44-45.

Hendricks, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248-249). *See Helwig* v. *United States*, 188 U.S. 605, 613 (1903) ("If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will.").

The Court will look for that "clearest proof" by examining various factors, catalogued by the Court in *Mendoza-Martinez*. *See* 372 U.S. at 168-169. These factors must be "considered in relation to the statute on its face," *id.* at 169, and "no one factor should be considered controlling as they 'may often point in differing directions.' " *Hudson*, 522 U.S. at 101 (quoting *Mendoza-Martinez*, 372 U.S. at 169).

As the Court has made clear, however, such "clearest proof" will exist only in "limited circumstances," and a party bears a "heavy burden" when attempting to override the legislature's expressed intent. *Hendricks*, 521 U.S. at 361. The reason for this deference is in part due to the usual strong presumption of constitutionality afforded to legislation, as well as the hazards of attempting to discern a legislature's true motive other than through the express words of the statute. As the Court held when it first formulated the "clearest proof" requirement:

> Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. [*Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).]

The near-controlling weight given to the legislature's stated intent is also linked to the purposes of the Ex Post Facto Clause and related constitutional provisions that protect against, or provide procedural safeguards for, the imposition of punishment. For example, the Ex Post Facto Clause, and

its neighbor the Bill of Attainder Clause, were intended to protect against penal laws "stimulated by ambition, or personal resentment, and vindictive malice." *Calder*, 3 U.S. at 389. Thus, the Ex Post Facto Clause protects against vindictive, malicious legislation, a characterization that necessarily depends on the evident *intent* of the legislation, not its effects. That is why "[i]n deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute." *Trop*, 356 U.S. at 96 (plurality).

As the Court has noted, divorcing the inquiry from the legislature's purpose would be a futile exercise. "The Court has recognized that *any* statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect," and it is for this reason that "[t]he controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id.* (emphasis supplied). Because the effect of the sanction says little, if anything, about its punitive or non-punitive quality, *see, e.g.*, *Flemming*, 363 U.S. at 616 n.9 ("the severity of a sanction is not determinative of its character as 'punishment' "), whether a law impermissibly inflicts punishment, rather than some other form of hardship, depends on the intent of the lawmaker, not the nature of the hardship. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.' " *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994) (citations omitted). For example, even indefinite confinement—often a penal sanction—can also serve civil goals. *See Hendricks*, *supra*; *Allen*, *supra*.

For these reasons, "a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." *Trop*, 356 U.S. at 96 (plurality). Once it is evident that the legislature has such a legitimate non-penal, regulatory purpose, *other* constitutional provisions protect against laws that do not

legitimately serve their stated purposes, or are otherwise beyond the legislature's power. *Hudson*, 522 U.S. at 102-103. For example, the Due Process and Equal Protection Clauses protect against sanctions that are "downright irrational," and the Eighth Amendment protects against excessive civil fines. *Id.* at 103. The Due Process Clause also provides procedural protections where (unlike here) a law deprives a person of a liberty or property interest.[10] The Ex Post Facto Clause is not a substitute for these other provisions of the Constitution, and should not—through expansive application of wide-ranging, multi-factor inquiries—be made to serve the offices of other safeguards.

In sum, precisely the same sanction can serve a civil or punitive goal depending on the purposes intended by the legislature. Thus, once it is determined that the legislature intended a civil goal, the ex post facto inquiry is at an end—except in those truly exceptional circumstances where there is the clearest proof that the legislature's expressed purpose is just a charade for punitive goals. *See Flemming*, 363 U.S. at 619 (legislature's expressed civil intent controlling in absence of "unmistakable evidence of punitive intent"). This case does not present such an exceptional situation. The intent of the Alaska legislature was expressly to create a civil, regulatory scheme to protect the public. And there is no proof—much less the clearest proof—that its intent was a sham so as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 154 (1956).

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[10] The Court recently granted certiorari in another case to determine whether a sex offender registration and notification statute violates the Due Process Clause. *See Connecticut Dep't of Pub. Safety* v. *Doe*, No. 01-1231 (cert. granted May 20, 2002).

B. In Enacting The ASORA, The Legislature Expressly Declared A Valid Regulatory Purpose.

Every court to have considered an ex post facto challenge to a sexual offender registration and notification law—including the Ninth Circuit in this case—has concluded that the laws were intended to serve valid regulatory, rather than punitive purposes.[11] As the Ninth Circuit held, "the legisla-

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[11] *See*, *e.g.*, Pet. App. 11a-12a; *Doe* v. *Department of Pub. Safety*, 271 F.3d 38, 60 (2d Cir. 2001), *cert. granted*, No. 01-1231 (U.S. May 20, 2002); *Moore* v. *Avoyelles Corr. Ctr.*, 253 F.3d 870, 872 (5th Cir.), *cert. denied*, 122 S. Ct. 492 (2001); *Burr* v. *Snider*, 234 F.3d 1052 (8th Cir. 2000), *cert. denied*, 122 S. Ct. 105 (2001); *Femedeer*, 227 F.3d at 1249; *Cutshall* v. *Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Roe* v. *Office of Adult Prob.*, 125 F.3d 47, 53-54 (2d Cir. 1997); *Russell* v. *Gregoire*, 124 F.3d at 1087-88; *Doe* v. *Pataki*, 120 F.3d 1263, 1276-78 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); *E.B.* v. *Verniero*, 119 F.3d 1077, 1096-97 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109-10 (1998); *Hyatt* v. *Commonwealth*, __ S.W.3d __, 2002 WL 337071, at *4 (Ky. 2002); *State* v. *Walls*, 558 S.E.2d 524, 526 (S.C. 2002); *State* v. *Kelly*, 770 A.2d 908, 952-954 (Conn. 2001); *Helman* v. *State*, 784 A.2d 1058, 1077 (Del. 2001); *State* v. *Haskell*, 784 A.2d 4, 10 (Me. 2001); *State ex rel. Oliveri* v. *State*, 779 So. 2d 735, 747 (La.), *cert. denied*, 533 U.S. 936 (2001); *Hensler* v. *Cross*, 558 S.E.2d 330, 335 (W. Va. 2001); *People* v. *Malchow*, 739 N.E.2d 433, 438 (Ill. 2000); *Meinders* v. *Weber*, 604 N.W.2d 248, 255 (S.D. 2000); *Patterson* v. *State*, 985 P.2d 1007, 1012-13 (Alaska Ct. App. 1999); *Kellar* v. *Fayetteville Police Dep't*, 5 S.W.3d 402, 407 (Ark. 1999); *People* v. *Castellanos*, 982 P.2d 211, 217 (Cal. 1999); *State* v. *Myers*, 923 P.2d 1024, 1031-32 (Kan. 1996) (holding that law was nevertheless punitive), *cert. denied*, 521 U.S. 1118 (1997); *State* v. *Burr*, 598 N.W.2d 147, 153 (N.D. 1999); *Commonwealth* v. *Gaffney*, 733 A.2d 616, 619 (Pa. 1999); *State* v. *Cook*, 700 N.E.2d 570, 580-581 (Ohio 1998), *cert. denied*, 525 U.S. 1182 (1999); *State* v. *Pickens*, 558 N.W.2d 396, 400 (Iowa 1997); *Opinion of the Justices*, 668 N.E.2d 738, 752 (Mass. 1996); *Snyder* v. *State*, 912 P.2d 1127, 1131 (Wyo. 1996); *Doe* v. *Poritz*, 662 A.2d 367, 404 (N.J. 1995); *State* v. *Costello*, 643 A.2d 531, 533 (N.H. 1994); *State* v. *Ward*,

ture viewed [the ASORA] as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information." Pet. App. 11a. In other words, the law was intended to protect the public against future harm, not to punish people for past acts. The Ninth Circuit therefore "conclude[d] that the legislative intent of the Act is non-punitive." *Id.* at 12a. Although the court erred in the remainder of its ex post facto analysis, that conclusion was plainly correct.

The legislature's non-punitive, regulatory intent is confirmed by the findings set forth in the ASORA itself. The statute expressly provides:

> The legislature finds that
>
> (1) sex offenders pose a high risk of reoffending after release from custody;
>
> (2) protecting the public from sex offenders is a primary governmental interest;
>
> (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and
>
> (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety. [1994 Alaska Sess. Laws ch. 41, § 1.]

The express purpose of the law is "protecting the public" and "protecting the public safety." *See Patterson*, 985 P.2d at 1011 ("the articulated purpose of ASORA is regulatory and based on public safety concerns"). That statement of purpose is conclusive as to the outcome of the first step in the ex post facto analysis. But in any event, that non-punitive

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869 P.2d 1062, 1068 (Wash. 1994) (en banc); *cf. State* v. *Noble*, 829 P.2d 1217, 1221 (Ariz. 1992) (en banc) (finding no ex post facto violation without finding of legislative purpose).

purpose is confirmed by the methods chosen to accomplish it. The law simply allows the government to collect truthful information, and to make it available to those who choose to learn it. Through these means, Alaska (1) has provided information people may consider pertinent in protecting their own safety—and, most importantly, the safety of their children—and (2) has provided law enforcement agencies additional data to enable them to investigate future crimes more efficiently.

There is no indication of punitive intent in the structure of the law. It imposes no legal restraints or disabilities on anyone. There are no restrictions on where registrants can live, travel, or work, what they can do, or with whom they may associate. Other than the ministerial acts of registering once in person and providing address change notifications and quarterly or annual written updates, the law imposes no legal requirements on offenders at all.

To the extent it is relevant, the legislative history amply confirms this non-punitive intent. The ASORA was prompted by evidence that Alaska had one of the highest rates of sexual offenses in the Nation, and that sex offenders had high rates of recidivism.[12] Lawmakers also heard evi-

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[12] *See, e.g., Senate Judiciary Hearing* at 9 (testimony that Alaska leads the Nation in child sexual abuse, is second in the Nation in sexual assaults, and that sexual offenders have the highest recidivism rate) (No. 505); *House Judiciary Hearing* at 9 (same) (No. 612); *id*. at 13 (testimony that sex offenders are recidivist threats for their entire life) (No. 283), *id*. at 17 (testimony that rate of rape in Alaska had increased 91% in previous two years) (No. 000); *Senate Finance Hearing* at 3 (testimony that recidivism rate for sex offenders is 80%); *Minutes of Hearing Before House State Affairs Comm.* ("*House State Affairs Hearing*"), 18th Alaska Legis., 1st Sess. 9 (Feb. 2, 1993) (testimony that Alaska is "the rape capital of the nation") (No. 343); *id*. at 10 (testimony that sex offenders have recidivism rates of 20-40% even with treatment)

dence that increasing the availability of information about offenders would allow parents and others to better protect children and other vulnerable people, and would allow law enforcement to locate potential suspects in future cases more efficiently.[13] Moreover, as the Ninth Circuit noted, the ASORA "was passed amid popular fear about the *release* of large numbers of sex offenders into the community as a means for members of the community to protect themselves." Pet. App. 11a. (emphasis in original). *See House Judiciary Hearing* at 17 (testimony that releases of sex offenders had doubled in past year) (No. 000).

In light of this testimony, the sponsors and supporters of the ASORA made clear, in response to specific questioning regarding the Ex Post Facto Clause, that the Act was not intended to be punitive. Rather, the legislative record shows that the ASORA was intended to further the legitimate regulatory goals of protecting the public from future harm, and aiding law enforcement in investigating future crimes.[14]

(No. 400); *House Finance Hearing* at 7 (testimony that 25% of Alaska jail population were sex offenders).

[13] *See Senate Judiciary Hearing* at 9 (testimony that sexual offender registration laws were supported by law enforcement as a beneficial system for aiding their jobs) (No. 545); *House Judiciary Hearing* at 9 (testimony that new law would aid in apprehension of future offenders) (No. 668); *id*. at 16 (testimony regarding Alaskan parents who did not know of sex offender in neighborhood until after he had lured children to his house) (No. 512); *House Finance Hearing* at 6 (new law would allow more effective screening of people working around children or vulnerable people); *id*. at 7 (new law would give law enforcement better chance of identifying future suspects); *Senate Finance Hearing* at 3 (same); *id.* (testimony that given high recidivism rates it is important for people to have access to information regarding offenders in order to protect themselves and their children).

[14] *See, e.g., Senate Judiciary Hearing* at 12 (statement that it is within the police power of the state to provide public protection

The express legislative findings to that effect are thus clearly supported by the legislative record.

No more is required to demonstrate the legitimate regulatory purposes of the law. The Court has consistently held that laws aimed at protecting the public from future harm by imposing on convicted felons regulatory requirements—even relatively onerous ones—are non-punitive:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation * * *. [*De Veau*, 363 U.S. at 160.]

As this Court has held, "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." *United States* v. *Salerno*, 481 U.S. 739, 747 (1987).

The Court should therefore follow the unanimous conclusion of the lower courts considering this and similar laws, and hold that the ASORA has a non-punitive intent. That intent, as noted, is controlling on the ex post facto inquiry absent the "clearest proof" that the legislature's expressed intent was a sham designed to mask a true punitive purpose. No such proof exists. Indeed, the means chosen by the legislature to effectuate its purposes—collecting truthful information and making it available to those who choose to learn it—are far less onerous than numerous retroactive regulations this Court has upheld in prior cases.

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and that law is not a punishment for sex offenders but rather was meant for public protection purposes) (statement of Sen. Donley) (No. 175); *House State Affairs Hearing* at 9 (law is regulatory only and did not promulgate an increase in punishment) (No. 289); *House Finance Hearing* at 7 (testimony of Deputy Commissioner of Public Safety that the public deserves the right to protection).

C. This Court Has Historically Displayed A Deep Reluctance To Override A Legislature's Non-Punitive Intent.

Given the rigorous standard of proof required to overcome the legislature's stated intent to regulate rather than punish, it is not surprising that this Court has upheld a variety of retroactive laws enacted with non-punitive intent, "despite the often-severe effects such regulation has had on the persons subject to it." *Flemming*, 363 U.S. at 616 (footnote omitted). This Court has found retroactive laws *not* to violate the Ex Post Facto Clause that have terminated accrued social security benefits because of past conduct, categorically prohibited convicted felons from working in a chosen profession, mandated deportation for conduct occurring before the law's passage, and permitted civil commitment of convicted felons for an indefinite period of time.

The federal law at issue in *Flemming*, for example, retroactively terminated payment of accrued old-age, survivor, and disability benefits to alien residents deported for having been members of the Communist Party. *Id.* at 604-605. This Court held that the law did not violate the Ex Post Facto Clause, because the aim of the statute was not to punish: Congress's stated intent was to condition receipt of benefits on residence in the United States. *Id.* at 619-620. The fact that the law applied only to aliens deported for certain grounds did not make it punitive, because any inference that could be drawn from Congress's denying benefits only to some deportees amounted to only "'slight implication and vague conjecture,'" insufficient to defeat Congress's non-punitive intent. *Id.* at 620 (quoting *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)).[15]

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[15] *See also Butler* v. *Apfel*, 144 F.3d 622 (9th Cir. 1998) (amendment to Social Security Act precluding incarcerated felons from receiving benefits did not violate Ex Post Facto Clause); *Garner* v. *United States Dep't of Labor*, 221 F.3d 822, 826-827 (5th Cir. 2000) (retroactive application of statute requiring forfei-

Laws that prohibit convicted felons from working in a chosen profession also have been repeatedly upheld against Ex Post Facto Clause challenges. In *Hawker* v. *New York*, 170 U.S. 189 (1898), for example, the Court upheld the retroactive application of a state law prohibiting felons from practicing medicine in the State. This Court concluded that the State was "not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." *Id.* at 196.

The Court in *De Veau*, *supra*, similarly upheld the retroactive application of a state law effectively barring convicted felons from serving as officers or agents of waterfront unions. While the law doubtless brought "unpleasant consequences * * * to bear upon an individual for prior conduct," it was not intended to punish felons for past activity. 363 U.S. at 160. Rather, the legislature's purpose was to create a "scheme of regulation" of the crime-infested New York waterfront, and "for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." *Id.* *See also Hudson*, 522 U.S. at 103-105 (petitioners' debarment from the banking industry did not amount to criminal punishment, because Congress had intended debarment sanction to be "civil in nature," and petitioners had made "very little showing, to say nothing of the 'clearest proof,' " that the sanction was actually punitive); *Ex Parte Wall*, 107 U.S. 265, 288-289 (1883) (disbarment from roll of attorneys not "punishment" triggering Fifth and Sixth Amendment protections).[16]

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ture of federal employee benefits by those convicted of false statements did not violate Ex Post Facto Clause), *cert. denied*, 532 U.S. 906 (2001).

[16] *See also DiCola* v. *FDA*, 77 F.3d 504, 505, 507 (D.C. Cir. 1996) (federal statute prohibiting convicted felons from "providing services in any capacity" to pharmaceutical industry was "solely remedial" and did not violate Double Jeopardy or Ex Post Facto Clauses); *DeHainaut* v. *Pena*, 32 F.3d 1066, 1073 (7th Cir. 1994)

The Court has repeatedly found deportation not to violate the Ex Post Facto Clause, despite the severity of the sanction. *See Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952) (upholding retroactive application of law deporting legal resident aliens because of their membership in Communist Party). The Court has acknowledged that deportation is a "drastic measure and at times the equivalent of banishment or exile;" indeed, it may deprive a man "of all that makes life worth living." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). Yet the Court has held that even such a severe sanction is not "punishment" for purposes of the Ex Post Facto Clause. *See Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (deportation proceeding is "a purely civil action").

And in *Hendricks*, 521 U.S. at 363, the Court held that a law permitting indefinite confinement of "dangerously mentally ill" sex offenders did not constitute punishment for purposes of the Ex Post Facto or Double Jeopardy Clauses. The Court stated that it was the legislature's "manifest intent" to create a civil proceeding, *id.* at 361, and that the law was motivated by a "legitimate nonpunitive governmental objective": protecting the community from harm. *Id.* at 363. The civil commitment law imposed severe—and potentially lifelong—restraints on the liberty of sex offenders confined under its terms, but even that harsh restriction did not suffice to overcome the legislature's clear regulatory intent. *Id.*

Thus, as this Court observed in *Collins* v. *Youngblood*, 497 U.S. 37, 50 (1990), it will not suffice under the Ex Post Facto

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(upholding against ex post facto challenge a federal policy indefinitely barring air traffic controllers discharged for striking against government from re-entering the profession), *cert. denied*, 514 U.S. 1050 (1995).

Clause to show that a retroactive law merely "alters the situation of a party to his disadvantage;" retroactive laws imposing undeniably serious burdens have been upheld against ex post facto challenges. Rather, the law's controlling intent—or its unmistakable effect—must be to punish. *Id.* at 41; *see Flemming*, 363 U.S. at 617. Indeed, the Court has found laws enacted with arguably mixed or unclear legislative intent to violate the Clause *only* where the laws had the effect of increasing the duration of a prisoner's confinement or decreasing the quantum of proof necessary for conviction.[17] *See*, *e.g.*, *Lynce* v. *Mathis*, 519 U.S. 433, 445 (1997) (statute retroactively canceling early release credits for prisoners convicted of murder or related offenses violated Ex Post Facto Clause); *Weaver* v. *Graham*, 450 U.S. 24 (1981) (invalidating state law changing calculus for convicts' "good time" credits as violation of Ex Post Facto Clause; although the new law increased other opportunities for such credits, its effect was to delay release of certain prisoners); *Lindsey* v. *Washington*, 301 U.S. 397, 401-402 (1937) (state law that converted maximum sentence into mandatory sentence violated Ex Post Facto Clause when applied to offense committed before its enactment).[18]

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[17] There has been only one of the latter type of case: *Carmell* v. *Texas*, 529 U.S. 513 (2000), which involved a state law amended to provide that an accused sex offender could be convicted on the minor victim's testimony alone; previously the law had required additional corroborating evidence to support a conviction.

[18] The Court has not hesitated to strike down laws enacted with transparently punitive purpose that extend the duration of confinement or exact other harsh sanctions. *See Miller* v. *Florida*, 482 U.S. 423, 433 (1987) (invalidating law retroactively lengthening criminal sentences, where "sole reason" for the new law was to "punish sex offenders more heavily"). *See also Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 376-377, 380 (1866) (invalidating federal statute requiring attorneys to take an oath of loyalty to the United States because the statute was "a means for the infliction of punishment"); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 320

As commentators have noted, moreover, the Court has *never* found a law enacted with non-punitive intent to violate the Ex Post Facto Clause in light of the *Mendoza-Martinez* factors—as the Ninth Circuit did below.[19] We turn to those factors now.

II. THE EFFECT OF THE ASORA IS NOT PUNITIVE.

A. The *Mendoza-Martinez* Factors.

When this Court has examined whether the effect of a law is punitive, it has looked to the following factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may

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(1866) (striking down statute requiring priests, lawyers, teachers, and others to take oath of loyalty to the United States, upon finding that the disabilities created by the requirement were "exacted * * * because it was thought that the *** acts [prohibited under the oath] deserved punishment"); *cf. Trop*, 356 U.S. at 97 (plurality) (statute stripping convicted military deserters of United States citizenship had "no other legitimate purpose" but to punish).

[19] *See* Andrew J. Gottman, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause*, 56 Wash. & Lee L. Rev. 591, 644 (1999) ("The Supreme Court has never invalidated a law under the Ex Post Facto Clause using the *Mendoza-Martinez* factors"); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Civil-Criminal Distinction*, 42 Hast. L.J. 1325, 1358 (1991) (finding no Supreme Court case "in which the [*Mendoza*] factors have ever added up to a finding that a proceeding was criminal for all constitutional purposes").

> rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned * * *. [*Mendoza-Martinez*, 372 U.S. at 168-169 (footnotes omitted).]

The *Mendoza-Martinez* factors are culled from cases variously addressing whether a law is "punishment" under the Fifth, Sixth,[20] and Eighth[21] Amendments, and the constitutional prohibition against bills of attainder,[22] as well as the Ex Post Facto Clause.[23] Because the *Mendoza-Martinez* considerations were gathered from a number of different constitutional contexts, some prove more useful than others in an Ex Post Facto Clause inquiry. The question "whether the behavior to which [the new law] applies is already a crime," for example, is doubtless relevant to an inquiry under the Double Jeopardy Clause, *see Mendoza-Martinez*, 372 U.S. at 168 (citing *La Franca*, 282 U.S. at 572-573), but less so in determining whether a law exacts retroactive punishment in violation of the Ex Post Facto Clause. Because the factors are designed to apply across a variety of constitutional contexts, this Court has recognized that they are "neither exhaustive nor dispositive" and are meant for

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[20] *See Mendoza-Martinez*, 372 U.S. at 168 (citing, *inter alia*, *United States* v. *La Franca*, 282 U.S. 568, 572-573 (1931) (invalidating punitive monetary penalty as violating the Double Jeopardy Clause) and *Wong Wing* v. *United States*, 163 U.S. 228, 237-238 (1896) (striking down law requiring illegal aliens to serve one year's hard labor in prison before deportation, on Fifth and Sixth Amendment grounds)).

[21] *See Mendoza-Martinez*, 372 U.S. at 168 (citing *Trop*, 356 U.S. at 96 (striking down law stripping citizenship on Eighth Amendment grounds)).

[22] *See Mendoza-Martinez*, 372 U.S. at 168 (citing *United States* v. *Lovett*, 328 U.S. 303, 316 (1946) (invalidating bill of attainder)).

[23] *See Mendoza-Martinez*, 372 U.S. at 168 (citing, *inter alia*, *Flemming*, 363 U.S. at 617, and *Cummings*, 71 U.S. at 320-321).

"guidance" only. *Ward*, 448 U.S. at 249; *see also United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 365 n.7 (1984).

And while this Court's "intent-effects" test looks to the *Mendoza-Martinez* factors under the "effects" prong, one of the seven factors is itself aimed at legislative intent: "whether an alternative purpose to which [the law] may rationally be connected is assignable for it." 372 U.S. at 168-169. While this Court has cautioned that no one *Mendoza-Martinez* factor should be elevated to "dispositive" status, *Hudson*, 522 U.S. at 101, the Court has also noted that this "alternative purpose" inquiry is "[m]ost significant." *Ursery*, 518 U.S. at 290; *see also Moore*, 253 F.3d at 873 (same); *Russell*, 124 F.3d at 1091 (same).[24]

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[24] The Court has on occasion articulated different approaches to the question whether a statute inflicts forbidden punishment, but legislative intent remains the paramount inquiry under these formulations as well. In *Salerno*, for example, the Court cited *Mendoza-Martinez* but formulated the test this way:

> To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on " 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " [481 U.S. at 747 (quoting *Schall* v. *Martin*, 467 U.S. 253, 269 (1984) (quoting *Mendoza-Martinez*, 372 U.S. at 168-169)).]

And in *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), the Court articulated

> three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." [quoting

The Ninth Circuit ignored all this when it examined the allegedly punitive effects of the ASORA. The court instead gave scant weight to the "clearest proof" standard, a point confirmed by the fact that the change to that standard in the amended opinion produced no change whatever in the substantive analysis. *See supra* n.8.

B. The Ninth Circuit's Assessment Of The *Mendoza-Martinez* Factors Was Critically Flawed And Did Not Support A Finding By The "Clearest Proof" That The ASORA Is Punitive.

The Ninth Circuit correctly found three of the *Mendoza-Martinez* factors to weigh against a finding of punitive effect.

Historical Punishment. First, the panel recognized that registration and notification provisions like those in the ASORA are not historically regarded as punishment. Pet. App. 18a. As the same court earlier put it in *Russell*, registration is "typically and historically a regulatory measure." 124 F.3d at 1089. *See also Doe* v. *Pataki*, 120 F.3d at 1285 (registration "does not resemble any measures traditionally considered punitive").

The Act's notification provisions likewise are a far cry from the historical punishments to which *Mendoza-Martinez* referred. *See* 372 U.S. at 168 (citing, *inter alia*, *Wong Wing*, 163 U.S. 228 (one year's imprisonment at hard labor constitutes "punishment"), *Mackin* v. *United States*, 117 U.S. 348 (1886) (two years' imprisonment), and *Ex Parte Wilson*, 114 U.S. 417 (1885) (15 years' imprisonment)). Notification provisions cannot be compared with physical public punishments like whipping, branding, or the pillory, all of which required "the physical participation of the offender, and

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Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425, 475-476, 478 (1977).]

Like the intent-effects test itself, each of these tests highlights the importance of legislative intent in the Ex Post Facto Clause inquiry.

typically required a direct confrontation"—orchestrated and encouraged by the government—between the offender and the public. *Russell*, 124 F.3d at 1091-92; *see also Femedeer*, 227 F.3d at 1250-51; *Doe* v. *Pataki*, 120 F.3d at 1284 ("traditional shaming penalties such as branding or the stocks enlisted the offender's physical participation in his own degradation;" notification "imposes no physical pain, mark, or restraint on the offender"). As the court recognized in *Russell*, sex offender notification provisions are more akin to " 'wanted' posters and warnings about escaped prisoners;" such notices have never been regarded as punishment. 124 F.3d at 1092.

Scienter. The Ninth Circuit also correctly found that the ASORA did not come into play "only on a finding of scienter." *Mendoza-Martinez*, 372 U.S. at 168; *see* Pet. App. 18a-19a. The panel reached that conclusion, however, by the wrong route. It recognized that "[a] defendant must be convicted of a sex offense before the Alaska statute's provisions become applicable, and those offenses generally require a finding of scienter." Pet. App. 18a. But because the panel viewed some of the offenses triggering the ASORA as "strict liability" offenses—i.e., those requiring no proof that the offender knew the victim's age—the panel concluded that the ASORA did not come into play "*only* upon a finding of scienter." *Id.* at 19a (emphasis in original).

But whether the *underlying* offenses triggering application of the ASORA require a finding of scienter is irrelevant. The question is whether application of the ASORA itself—the challenged law—requires such a finding. It does not. The ASORA is triggered not upon a finding of scienter, but upon the existence of a predicate fact: conviction of one of the sex offenses specified under the statute. *See Hudson*, 522 U.S. at 104 (law authorizing debarment from banking industry did not come into play on a finding of scienter; the law applied to "any person 'who violates' any of the underlying banking statutes, without regard to the violator's state of mind").

Other courts of appeal to have addressed the scienter factor have adopted this approach. *See Femedeer*, 227 F.3d at 1251-52 (sex offender statute "on its face * * * does not impose a scienter requirement"); *Cutshall*, 193 F.3d at 475 (state sex offender registration act "applies to persons convicted of any one of the sex offenses listed in the statute, without inquiry into the offender's state of mind"); *cf. Doe* v. *Pataki*, 120 F.3d at 1281 (prior conviction used "'solely for evidentiary purposes'" under the statute) (quoting *Hendricks*, 521 U.S. at 362).

Alternative, Non-Punitive Purpose. Finally, the Ninth Circuit found that the "[m]ost significant" *Mendoza-Martinez* factor, *Ursery*, 518 U.S. at 290—whether the law has an alternative non-punitive purpose that can rationally be assigned to it—weighed against finding the ASORA punitive. The panel recognized that the non-punitive purpose connected to the Act, "of course, is public safety, which is advanced by alerting the public to the risk of sex offenders in their communities." Pet. App. 23a. All the other courts to have considered the issue agree. *See, e.g.*, *Femedeer*, 227 F.3d at 1253; *Cutshall*, 193 F.3d at 476; *Russell*, 124 F.3d at 1089, 1091; *E.B.*, 119 F.3d at 1097.

Despite having found three factors—in addition to the legislature's clear non-punitive intent—to weigh against a finding that the ASORA was punitive, the Ninth Circuit nonetheless concluded that the other four *Mendoza-Martinez* factors collectively provided the "clearest proof" of the ASORA's punitive effect. Pet. App. 28a. Its analysis of those factors was deeply flawed.

Affirmative Disability Or Restraint. 1. The ASORA does not impose an "affirmative disability or restraint" on registrants. *See Mendoza-Martinez*, 372 U.S. at 168. This Court in *Hudson* likened that term, as "normally understood," to the "'infamous punishment' of imprisonment." 522 U.S. at 104 (quoting *Flemming*, 363 U.S. at 617); *see*

also Seling v. *Young*, 531 U.S. 250, 272-273 (2001) (Thomas, J., concurring in the judgment) (equating "affirmative disability or restraint" with "confinement"); *compare Hendricks*, 521 U.S. at 362 (noting that civil commitment scheme "does involve an affirmative restraint," but finding that disability outweighed by legislature's non-punitive purpose). The ASORA imposes on registrants no physical restraint of any kind. It does not restrict their freedom of movement, does not require pre-clearance before they can switch jobs or residences, and does not restrict them from living or working in any part of the community. *See, e.g.*, *Femedeer*, 227 F.3d at 1250 (offenders are "free to live where they choose, come and go as they please, and seek whatever employment they may desire"); *Cutshall*, 193 F.3d at 474; *E.B.*, 119 F.3d at 1102.[25]

2. According to the Ninth Circuit, however, the Act's registration provisions "impose a significant affirmative disability" because they "subject[] offenders to onerous conditions"—namely, the requirement that certain sex offenders, like respondents, "re-register at police stations four times each year every year of their lives." Pet. App. 13a-14a. The court viewed the requirement that offenders "appear in person at a police station on each occasion" as the critical factor making the law impermissibly "onerous." *Id.* at 14a.

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[25] Contrary to the Ninth Circuit's conclusion, quarterly or annual verification is not "in some respects * * * similar to probation or supervised release." Pet. App. 13a; *see also id.* at 19a-20a. Probation conditions are more burdensome and generally include participation in treatment programs, performance of community service, and restrictions regarding alcohol consumption, leaving the jurisdiction, and persons with whom the probationer can associate. *See* Alaska Stat. §§ 12.55.090-.101. Unlike the requirements of the ASORA, probation is quite plainly an alternative criminal sentence. Thus, violating a condition of probation can result in revocation and the imposition of a suspended period of imprisonment.

The court's holding was based on a persistent misapprehension of the relevant provision of the ASORA. The ASORA specifically permits registrants to submit "written verification" of their registry information quarterly or yearly. *See* Alaska Stat. §§ 12.63.010(d)(1) (annual verification), (d)(2) (quarterly verification). The Alaska Code provisions implementing the ASORA similarly make clear that registrants may verify their information by mail, rather than in person. The relevant Code provision specifies that

> When an offender submits a registration form to a registration agency *without appearing in person*, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies * * * the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections. [13 Alaska Admin. Code §09.025(d) (emphasis added).]

See also id. § 09.025(e) (information is considered submitted "on the date * * * it is postmarked, if mailed").

To be sure, the State bears significant responsibility for the panel's initial confusion. Asked at oral argument whether registrants must "go to the police station" to verify their registry information, counsel for the State responded, "under the current law, yes." *See* Pet. App. 7a n.4. The State's rehearing petition, however, corrected the misstatement. But the Ninth Circuit's amended opinion nonetheless persisted in placing heavy reliance on the supposed requirement of quarterly or annual "in-person" verification. *See id.* at 7a, 14a, 19a, 20a, 27a, 28a. The panel based its holding entirely on counsel's statement at oral argument. *Id.* at 7a n.4. Thus, in the face of the plain text of the statute, its implementing code provisions, and the State's corrective statement in its petition for rehearing, the Ninth Circuit panel opted to retain its demonstrably erroneous interpretation of the ASORA's requirements.

That was wrong. The principles that courts are not bound by stipulations of law, *see, e.g.*, *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917), and that estoppel does not typically run against the government, *see, e.g.*, *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 369 (1946), converge to make clear that the court should have decided the case under the correct view of what the ASORA provides. The court of appeals had an independent obligation to determine the meaning of the controlling statute, *see Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (court "retains the independent power to identify and apply the proper construction of governing law"), and a misstatement by counsel during oral argument cannot override the language of the statute.

The Act's registration requirement is, as other courts correctly have found, nothing like the "infamous punishment" of imprisonment. *See Cutshall*, 193 F.3d at 474; *Doe* v. *Pataki*, 120 F.3d at 1285; *E.B.*, 119 F.3d at 1102. The Act's requirement that certain offenders verify their information quarterly is in keeping with the federal Wetterling Act, which encourages States to require sex offenders to "verify the[ir] registration every 90 days after the date of the initial release or commencement of parole." 42 U.S.C. §14071(b)(3)(B). *See also* U.S. Dep't of Justice, Center for Sex Offender Management, *Sex Offender Registration: Policy Overview and Comprehensive Practices* (Oct. 1999) (http://www.csom.org/pubs/sexreg.html) (noting that "22 states require sexually violent predators to update their address information quarterly with law enforcement"). Quarterly (or more frequent) reporting requirements are a common feature of everyday life. *See Lambert* v. *California*, 355 U.S. 225, 229 (1957) ("Registration laws are common and their range is wide.").[26]

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[26] *See, e.g.*, 2 U.S.C. § 434 (requiring candidates and campaign committees to file monthly or quarterly reports of campaign contributions); 7 U.S.C. §6f (authorizing CFTC to require futures merchants to file quarterly reports detailing their financial activi-

Even if it were true, moreover, that the ASORA required quarterly in-person, rather than written, verification for those convicted of certain offenses, that would not transform the registration requirement into an "affirmative disability or restraint." If Kansas's statute permitting indefinite civil commitment of certain sexual predators does not impose an unduly punitive "affirmative disability or restraint," in light of the non-punitive purpose of the civil commitment statute, *see Hendricks*, 521 U.S. at 362-363, requiring offenders convicted of aggravated or multiple sex offenses to verify their information every 90 days—whether in person or not—similarly cannot qualify as an unduly punitive restraint, given the concededly non-punitive purposes of the ASORA. *See Doe* v. *Pataki*, 120 F.3d at 1284-85 (rejecting ex post facto challenge to New York law requiring quarterly in-person verification for certain offenders for at least ten years and potentially for life).

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ties); 15 U.S.C. § 78o-5(b)(2)(A) (authorizing SEC to require registered government securities brokers and dealers to file quarterly reports of their financial and securities activities); 17 U.S.C. § 1003(c) (requiring distributors of digital audio recording devices to file quarterly statement of accounts with Register of Copyrights); 26 U.S.C. § 527(j)(2) (requiring political organizations that accept contributions or make expenditures for electioneering functions to file election-year quarterly reports listing contributors and detailing expenditures); 30 U.S.C. § 1267(b)(1) (requiring mining permittees to make monthly reports of data required by the Department of the Interior); *id.* § 1232(c) (requiring coal mine operators to submit quarterly production statements); 42 U.S.C. § 1320b-7(a)(3) (requiring employers in States participating in social welfare programs to file quarterly wage reports with state agencies); 42 U.S.C. § 7671b (requiring those trading in ozone depleting substances to file annual or quarterly reports with EPA setting forth amount produced, imported, or exported); 49 U.S.C. § 30120(d) (requiring car manufacturers who have sold defective cars to provide quarterly reports on progress of the resulting notification programs).

3. The Ninth Circuit also found that the Department of Public Safety's practice of posting its sex offender registry on the Internet imposed a "substantial" and "burdensome" "affirmative disability or restraint" on registrants, because it exposed them to widespread "community obloquy and scorn that damage them personally and professionally." Pet. App. 17a, 13a, 14a. But the posting of the registry on the Internet imposes no affirmative disability or restraint at all on a registrant, and certainly nothing akin to the " 'infamous punishment' of imprisonment." *See Flemming*, 363 U.S. at 617. The Internet is simply the most efficient—and an increasingly common—way of making truthful information available to the public. *See Ashcroft* v. *ACLU*, 122 S. Ct. 1700, 1703 & n.2 (2002). As the Tenth Circuit observed in *Femedeer*, posting public information on the Internet "works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." 227 F.3d at 1251. It is a particularly useful means of making that information available to the far-flung reaches of our largest State, and of ensuring—through daily updates—that the information is current and accurate.

Information about criminal records is routinely made available to the public; indeed, criminal trials must be open to the public. Yet even though that information has always had the potential for negative collateral consequences as a result of the actions of those who learn it, making the information available to the public has never been considered additional "punishment" for the crime itself. *See E.B.*, 119 F.3d at 1099-1100. This Court has never held that a law imposes an "affirmative disability or restraint" as a result of actions that members of the public—not the State—may or may not take.

Nor, moreover, is passive notification on the Internet as invasive as other active steps States may take to notify communities of the presence of sex offenders. Some States, for example, permit law enforcement officials to go door-to-door in an offender's neighborhood to inform community

members of his presence, *see* Del. Code Ann. tit. 11, § 4121(a)(1) (2001); *see also* D.C. Code § 22-4011(b)(1)(A), or to publish offenders' names in newspapers, in fliers, or through local television outlets. *See Russell*, 124 F.3d at 1082; Susan D. Oakes, *Megan's Law: Analysis on Whether it is Constitutional to Notify the Public of Sex Offenders via the Internet*, 17 J. Marshall J. Computer & Info. L. 1133, 1142 (1999) (citing statutes). One State requires offenders to announce their presence in the community by personally notifying, by mail, " '[a]t least one person in every residence or business' " within a one-mile radius of the offender's residence. *See State ex rel. Olivieri*, 779 So. 2d at 739 (quoting La. Rev. Stat. Ann. § 15:542(B)(1)(a)). Under all those notification schemes, community members may receive notice of an offender's presence in the neighborhood whether they ask for it or not. In contrast, as this Court recently recognized in *Reno* v. *ACLU*, 521 U.S. 844, 869 (1997), the Internet is "not as 'invasive' as radio or television." For an Internet user to obtain information, he or she must take "a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at 854 (quotation omitted). And as the Tenth Circuit has observed, the fact that Internet users in far-off places can access a State's registry does not mean that they will, or that they would have any interest in doing so. *See Femedeer*, 227 F.3d at 1253.

Alaska's scheme of Internet notification—shared by some thirty other States—thus does not impose an "affirmative disability or restraint" on Alaska registrants even remotely akin to imprisonment or confinement; it is today simply the most expedient method of conveying information to members of the public who are interested in that information. The purposes of the ASORA are constitutional, and they are not rendered unconstitutional because the State elects to implement the Act in the most efficient and economical way. *See Seling* v. *Young*, 531 U.S. at 263 ("The civil nature of a confinement scheme cannot be altered based merely on

vagaries in the implementation of the authorizing statute."); *id*. at 270 n.* (noting "irrelevance of subsequent executive implementation" to ex post facto analysis) (Scalia and Souter, JJ., concurring); *Mendoza-Martinez*, 372 U.S. at 169 ("factors must be considered in relation to the statute on its face"); *supra* n.6.

Traditional Aims Of Punishment. The Ninth Circuit also concluded that the ASORA "furthers the traditional aims of punishment—retribution and deterrence," and counted that *Mendoza-Martinez* factor as weighing in favor of finding the statute punitive. Pet. App. 21a. The court based its conclusion that the ASORA was "inherently retributive" on its erroneous assumption that the Act required in-person quarterly or annual registration. *Id.* at 19a-20a. Moreover, the fact that the ASORA may have a deterrent effect does not make the statute punitive. This Court has long recognized that deterrence "'may serve civil as well as criminal goals,'" and thus "the mere presence of this purpose is insufficient to render a sanction criminal." *Hudson*, 522 U.S. at 105 (quoting *Ursery*, 518 U.S. at 292); *see also Garner*, 221 F.3d at 827 ("That a statute serves to deter future conduct does not automatically render it punitive, particularly where its overriding goal is remedial"). To hold that every statutory scheme with a deterrent purpose "renders such sanctions 'criminal' * * * would severely undermine the Government's ability to engage in effective regulation." *Hudson*, 522 U.S. at 105. The ASORA may deter future crime by causing those subject to its provisions to appreciate that public awareness may make it more difficult for them to commit future crimes undetected, but that does not make the law punitive.

Application To Behavior That Is Already Criminal. The Ninth Circuit also concluded that the fact that the ASORA "applies to behavior that is already criminal" gave additional support to the "conclusion that its effect is punitive." Pet. App. 21a. That finding is of dubious merit for two reasons. First, as noted, while it may be appropriate in a

Double Jeopardy Clause inquiry to ask whether a law attempts to criminalize behavior that is already subject to criminal penalties under another statute, *see La Franca*, 282 U.S. at 573, it is less apparent how this factor assists in resolving the question presented by the Ex Post Facto Clause: whether a law seeks to impose retroactive punishment. The Ex Post Facto Clause inquiry does not turn on whether the law in question exacts a second criminal punishment for an act already criminally punishable; it asks only whether the law unfairly exacts punishment for past acts—whether or not criminal when done. *See Calder*, 3 U.S. at 390; *Cummings*, 71 U.S. at 325-326.

Nor, moreover, can it be enough to render a statute punitive to find that it is triggered by a criminal violation. "By itself, the fact that a * * * statute has some connection to a criminal violation is far from the 'clearest proof' necessary to show that a proceeding is criminal." *Ursery*, 518 U.S. at 292. *See also Ward*, 448 U.S. at 250 (" 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission' ") (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938)).

Excessiveness. Finally, the Ninth Circuit concluded that the ASORA was too "excessive"—the final *Mendoza-Martinez* factor—to be non-punitive. "Most important" to its conclusion on this factor was the court's finding that the statute authorized release of "information as to all sex offenders," not just those who had been individually screened and found to "pose[] a risk of recidivism." Pet. App. 24a. Noting that some States individually classify offenders by "risk category" and restrict public notice to those offenders deemed most likely to re-offend, *id.* at 26a, the panel concluded that Alaska's categorical approach to public notice was "exceedingly broad." *Id.* at 27a.[27]

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[27] The federal guidelines implementing the Wetterling Act provide that "States * * * are free under the Act to make judgments

The Ninth Circuit failed to acknowledge, however, that many laws that impose regulatory burdens on convicted felons—and that make no risk assessment at all—have been upheld against Ex Post Facto Clause challenges. In *Hawker*, for example, this Court upheld against an ex post facto challenge a state law barring convicted felons from practicing medicine. The law contained no exception for "reformed" felons, nor did it provide a method for obtaining an exemption from its terms. The law's categorical application did not trouble this Court:

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concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories." 64 Fed. Reg. 572, 582 (1999). The guidelines emphasize that States "retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes." *Id.*

More than twenty other States follow Alaska's categorical approach. *See*, *e.g.*, Ala. Code §§ 15-20-21(1), 15-20-25(b) (2001); Fla. Stat. Ann. §§ 943.043(1), 943.0435(1) (West 2001); Ga. Code Ann. § 42-9-44.1 (2001); 173 Ill. Comp. Stat. Ann. § 152/115, 152/120(c) (West Supp. 2002); Ind. Code Ann. § 5-2-12-11(b) (West 2001); La. Rev. Stat. Ann. § 15:546 (West 2001); Md. Code Ann. § 11-717 (2001); Mich. Compl. Laws Ann. § 28.728(2) (West 2002); Miss. Code Ann. § 45-33-49 (2001); Mo. Ann. Stat. § 589.417.2 (West Supp. 2002); N.M. Stat. Ann. § 29-11A-5.1 (Michie 2000); N.C. Gen. Stat. § 14-208.15 (2001); Okla. Stat. Ann. tit. 57, § 584(E) (West Supp. 2002); Or. Rev. Stat. § 181.592 (2001); S.C. Code Ann. Rev. § 23-3-490 (2001); S.D. Codified Laws § 22-22-40 (Michie 2001); Tenn. Code Ann. § 40-39-106(f) (2001; Tex. Crim. Proc. Code Ann. § 62.08 (West Supp. 2002); Utah Code Ann. § 77-27-21.5 (2001 & Supp. 2002); Va. Code Ann. § 19.2-390.1(B)-(D) (Michie 2002); W. Va. Code § 151-2-2(h) (2001); Wis. Stat. Ann. § 301.46(5) (West 2001). Hawaii's categorical notification law, Haw. Rev. Stat. § 846E-3, was found to violate the Due Process Clause in *State* v. *Bani*, 36 P.3d 1255 (Haw. 2001).

> It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. [170 U.S. at 197 (citing cases).]

Sixty years later, in *De Veau*, 363 U.S. 144, this Court upheld against an ex post facto challenge a law effectively banning convicted felons from serving as officials of waterfront unions. The Court rejected the suggestion that the law could have been tailored more closely to exclude only those likely to commit further criminal violations as union officials: "Duly mindful as we are of the promising record of rehabilitation by ex-felons * * * it is not for this Court to substitute its judgment for the [legislature] regarding the social surgery required by a situation as gangrenous as [this]."[28] As this Court similarly noted in *Hendricks*, particularly where the legislature is addressing an intractable social problem susceptible to a variety of remedial approaches, state legislatures have "the widest latitude in drafting" civil remedial statutes. 521 U.S. at 360 n.3 (citing *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983)).[29]

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[28] *Cf. United States* v. *Hemmings*, 258 F.3d 587 (7th Cir. 2001) (statute prohibiting felons from possessing firearms not ex post facto law); *United States* v. *Mitchell*, 209 F.3d 319 (4th Cir.) (same), *cert. denied*, 531 U.S. 849 (2000).

[29] As was explained in hearings on the ASORA, studies demonstrate that sex offenders have high rates of recidivism. *See supra* n.12; *see also* Grant T. Harris, *et al.*, *Appraisal and Management of Risk in Sexual Aggressors: Implications for Criminal Justice Policy*, 4 Psychol. Pub. Pol'y & L. 73, 107 (1998) (noting "considerable risk" of recidivism among sex offenders); U.S. Dep't of

The courts of appeal, too, have recognized that the Ex Post Facto Clause does not demand a "perfect fit between ends and means." *Femedeer*, 227 F.3d at 1253 (upholding Internet notification). Similarly rejecting the contention that Louisiana's sex offender registration law was punitive because it "d[id] not condition neighborhood notification on carefully calibrated, individualized determinations of dangerousness," the Fifth Circuit noted:

> "A perfect fit between ends and means" need not exist for the legislature's objective intent to be other than punitive: "If a reasonable legislator motivated solely by the declared remedial goals could have believed the means chosen were justified by those goals, then an objective observer would have no basis for perceiving a punitive purpose in the adoption of those means." [*Moore*, 253 F.3d at 873 (quoting *E.B.*, 119 F.3d at 1098).]

See also Doe v. *Pataki*, 120 F.3d at 1282-83 ("The legislature is not required to act with perfect precision, and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction.").

The panel's conclusion that the statute was unduly broad in application is in any event more pertinent to a due process inquiry than to the question whether the law inflicts imper-

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Justice, Bureau of Justice Statistics, *Child Victimizers: Violent Offenders and Their Victims* 9 (1996). But determining to any degree of certainty whether a *particular* offender is likely to reoffend is far from an exact science. *See, e.g.*, John Monahan, The Clinical Prediction of Violent Behavior (1995). It is in precisely such circumstances that the legislature should be given the most rein in crafting a remedial regulation that adequately protects public safety, giving due weight not only to judgments concerning likelihood of recidivism and the ability to make individual determinations on that score, but also to the extent of the harm caused by such recidivism that may occur.

missible retroactive punishment. The question whether a statute unnecessarily captures offenders who are not dangerous or likely to commit sexual offenses in the future does not turn on whether the law applies retroactively; it turns on whether it is rational to categorize all sex offenders as subject to the same registration and notification provisions. That is a due process question. The Ninth Circuit erred in importing that inquiry into its Ex Post Facto Clause analysis.

* * * *

The Ninth Circuit ultimately concluded that its analysis of four *Mendoza-Martinez* factors trumped the legislature's acknowledged non-punitive intent—not to mention three other *Mendoza-Martinez* factors weighing against a finding that the ASORA was punitive. Pet. App. 30a-31a. The court was wrong in its analysis of those four factors and wrong in its ultimate conclusion. This Court has time and again held that even statutes that impose heavy regulatory burdens will not be found to violate the Ex Post Facto Clause if they are enacted with a non-punitive purpose. The ASORA plainly was. Its provisions do not exact punishment; they are intended to protect the public, and ancillary burdens on registrants are an acceptable part of that vital regulatory effort.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

1994 Alaska Session Laws ch. 41, § 1 provides:

The legislature finds that

(1) sex offenders pose a high risk of reoffending after release from custody;

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety;

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

1994 Alaska Session Laws ch. 41, § 12(a) provides:

A sex offender with only one conviction for a sex offense who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under AS 12.63.010, added by section 4 of this Act. A sex offender who has been unconditionally discharged from a sex offense on or after July 1, 1984, but before the effective date of this Act, shall register under AS 12.63.010, added by section 4 of this Act, by July 1, 1994. A sex offender with two or more convictions for a sex offense before the effective date of this Act, regardless of whether the sex offender was unconditionally released from the sex offense before, on, or after July 1, 1984, shall register under AS 12.63.010, added by section 4 of this Act, by July 1, 1994.

Alaska Statute § 12.63.010 provides:

(a) A sex offender or child kidnapper who is physically present in the state shall register as provided in this section. The sex offender or child kidnapper shall register

(1) within the 30-day period before release from an in-state correctional facility;

(2) by the next working day following conviction for a sex offense or child kidnapping if the sex offender is not incarcerated at the time of conviction; or

(3) by the next working day of becoming physically present in the state.

(b) A sex offender or child kidnapper required to register under (a) of this section shall register with the Department of Corrections if the sex offender or child kidnapper is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender or child kidnapper resides at the time of registration. To fulfill the registration requirement, the sex offender or child kidnapper shall

(1) complete a registration form that includes, at a minimum,

(A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;

(B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;

(C) all aliases used;

(D) driver's license number;

(E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;

(F) any identifying features of the sex offender or child kidnapper;

(G) anticipated changes of address; and

(H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter;

(2) allow the Alaska state troopers, Department of Corrections, or municipal police to take a complete set of the sex offender's or child kidnapper's fingerprints and to take the sex offender's or child kidnapper's photograph.

(c) If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police department located nearest to the new residence or, if the residence change is out of state, to the central registry.

(d) A sex offender or child kidnapper required to register

(1) for 15 years under (a) of this section and AS 12.63.020(a)(2) shall, annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's or child kidnapper's initial registration, provide written

verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and notice of any changes to the information previously provided under (b)(1) of this section;

(2) for life under (a) of this section and AS 12.63.020(a)(1) shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and any changes to the information previously provided under (b)(1) of this section.

(e) The registration form required to be submitted under (b) of this section and the annual or quarterly verifications must be sworn to by the offender or kidnapper and contain an admonition that a false statement shall subject the offender or kidnapper to prosecution for perjury.

(f) In this section, "correctional facility" has the meaning given in AS 33.30.901.

Alaska Statute § 12.63.020 provides:

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more

than two times has been convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's or child kidnapper's unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense or for a single child kidnapping if the sex offender or child kidnapper has supplied proof that is acceptable to the department of the unconditional discharge; the registration period under this paragraph

(A) is tolled for each year that a sex offender or child kidnapper

(i) fails to comply with the requirements of this chapter;

(ii) is incarcerated for the offense or kidnapping for which the offender or kidnapper is required to register or for any other offense;

(B) may include the time a sex offender or child kidnapper was absent from this state if the sex offender or child kidnapper has complied with any sex offender or child kidnapper registration requirements of the jurisdiction in which the offender or kidnapper was located and if the sex offender or child kidnapper provides the department with proof of the compliance while the sex offender or child kidnapper was absent from this state; and

(C) continues for a sex offender or child kidnapper who has not supplied proof acceptable to the department of the offender's or kidnapper's unconditional discharge for the sex offense or child kidnapping requiring registration.

(b) The department shall adopt, by regulation, procedures to notify a sex offender or child kidnapper who, on the reg-

istration form under AS 12.63.010, lists a conviction for a sex offense or child kidnapping that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's or kidnapper's duty under (a) of this section for that sex offense or child kidnapping. As a part of the regulations, the department shall require the offender or kidnapper to supply proof acceptable to the department of unconditional discharge and the date it occurred.

Alaska Statute § 12.63.030 provides:

(a) If a sex offender or child kidnapper notifies the department that the sex offender or child kidnapper is moving from the state, the department shall notify the Federal Bureau of Investigation and the state where the sex offender or child kidnapper is moving of the sex offender's or child kidnapper's intended address.

(b) If a sex offender or child kidnapper fails to register or to verify the sex offender's or child kidnapper's address and registration under this chapter, or the department does not know the location of a sex offender or child kidnapper required to register under this chapter, the department shall immediately notify the Federal Bureau of Investigation.

Alaska Statute § 12.63.100 provides:

In this chapter,

(1) "aggravated sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.410, 11.41.434, or a similar law of another jurisdiction;

(2) "child kidnapping" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping;

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping if the victim was under 18 years of age at the time of the offense; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.300, or a similar law of another jurisdiction, if the victim was under 18 years of age at the time of the offense;

(3) "conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether

the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

(4) "department" means the Department of Public Safety;

(5) "sex offender or child kidnapper" means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999;

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law or another jurisdiction:

(i) AS 11.41.410 – 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 – 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;

(v) AS 11.61.125 or 11.61.127;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

(7) "unconditional discharge" has the meaning given in AS 12.55.185.

Alaska Statute § 18.65.087 provides:

(a) The Department of Public Safety shall maintain a central registry of sex offenders and child kidnappers and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives registration or change of address information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders and child kidnappers. Unless the sex offender or child kidnapper provides proof satisfactory to the department that the sex offender or child kidnapper is not physically present in the state or that the time limits described in AS 12.63.010 have passed, the Department of Public Safety may enter and maintain in the registry information described in AS 12.63.010 about a sex offender or child kidnapper that the department obtains from

(1) the sex offender or child kidnapper under AS 12.63;

(2) a post of the Alaska state troopers or a municipal police department under (a) of this section;

(3) a court judgment under AS 12.55.148;

(4) the Department of Corrections under AS 33.30.012 or 33.30.035;

(5) the Federal Bureau of Investigation or another sex offender registration agency outside this state if the information indicates that a sex offender or child kidnapper is believed to be residing or planning to reside in the state or cannot be located;

(6) a criminal justice agency in the state or another jurisdiction;

(7) the department's central repository under AS 12.62; information entered in the registry from the repository is not subject to the requirements of AS 12.62.160(c)(3) or (4); or

(8) another reliable source as defined in regulations adopted by the department.

(b) Information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be bcated.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction.

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the

fee for an information request may not be greater than $10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender a child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

(e) The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under AS 40.25.100 – 40.25.220.

13 Alaska Administrative Code § 09.025 provides:

(a) The department will approve or provide forms for an offender or a registration agency to submit registration information to the department, including

(1) initial registration information required under AS 12.63.010(b)(1);

(2) a photograph required under AS 12.63.010(b)(2);

(3) a set of fingerprints required under AS 12.63.010(b)(2);

(4) notice of change of address required under AS 12.63.010(c);

(5) annual or quarterly verification of registration information required under AS 12.63.010(d);

(6) proof of unconditional discharge date as provided in AS 12.63.020(a)(2)(A) and (C) and 12.63.020(b);

(7) proof of compliance with a sex offender registration program in a jurisdiction outside this state as provided in AS 12.63.020(a)(2)(B);

(8) proof that an offender is not physically present in this state as provided in AS 18.65.087(a);

(9) a request to review or have corrected information maintained in the registry about the offender as provided in AS 18.65.087(d);

(10) a request to appeal an adverse decision under (9) of this subsection.

(b) The department's forms will contain a notice that offenders who move out of this state must comply with registration requirements of their new locations.

(c) When an offender appears in person to submit information to a registration agency, the registration agency shall collect the information from the offender on a form approved or provided by the department. The registration agency shall review the completed form in the presence of the offender. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency may not accept the form until the offender makes all necessary corrections.

(d) When an offender submits a registration form to a registration agency without appearing in person, the registration agency shall review the form. If the form or any document submitted in connection with the form has obvious discrepancies, is incomplete, or is not legible, the registration agency will notify the offender of the need for corrections and may not accept the form until the offender makes all necessary corrections.

(e) If registration information is accepted by a registration agency, an offender is considered to have submitted the information on the date that

(1) it is delivered in person to a registration agency;

(2) it is postmarked, if mailed;

(3) delivery is documented according to written instructions on a registration form, if a method of delivery other than in-person or mail is approved by the department.

13 Alaska Administrative Code § 09.030 provides:

(a) Within 90 days after an offender registers under this chapter, the department will mail the offender a registration verification form that includes, based on the most recent information the department has obtained about the offender under AS 18.65.087(a),

(1) a statement of the duration of the offender's duty to register;

(2) an explanation of the annual or quarterly schedule by which the offender must submit registration verification information to the department for the duration of the offender's duty to register;

(3) the name of the offender's registration agency.

(b) If five or more years have passed since the date of an offender's registration photograph or there is another reason to believe the offender's appearance has changed significantly, a registration agency may instruct the offender in writing

(1) to appear in person at the registration agency to allow a photograph to be taken; or

(2) if authorized in writing by the department, to submit a new photograph without appearing in person.

13 Alaska Administrative Code § 09.050 provides:

(a) The department will provide information in the central registry that is subject to public disclosure under AS 18.65.087 for any purpose, to any person, without charge, by posting or otherwise making it available for public viewing in printed or electronic form.

(b) The department will charge a fee of $10 for each request to provide

(1) a printed copy, including a photograph if its is available, of registry information about one registrant who is specified by name; or

(2) a printed copy of the list of all registrants in a geographical area; in this paragraph, "geographical area" means

(A) a municipality or village;

(B) an area designated by a single postal ZIP code; or

(C) a street name within a specified municipality or village.

(c) If the department determines that it is in the public interest, the department will reduce or waive the fee described in (b) of this section.

13 Alaska Administrative Code § 09.060 provides:

(a) Upon receiving a completed department form from a person asking the department to review or correct information maintained in the registry about that person, the department will respond in writing within 30 days. If the request is denied, the department will state the reasons for the decision.

(b) An adverse response under (a) of this section may be appealed to the commissioner within 30 days after the

person receives the response. The appeal must be in writing and must set out the reasons for the appeal. The commissioner will respond in writing within 45 days after receipt of the appeal.

(c) Repealed 11/3/99.

(d) Failure of the appropriate official to issue a response within the time limits described in (a) or (b) of this section is a denial of the request or appeal.

13 Alaska Administrative Code § 09.900 provides:

(a) In this chapter and AS 12.63, unless the context requires otherwise, "Alaska state trooper post" means a permanent office of the department's division of Alaska state troopers or division of fish and wildlife protection.

(b) In this chapter, unless the context requires otherwise,

(1) "conviction" has the meaning given in AS 12.63.100;

(2) "days" means calendar days;

(3) "department" means the Department of Public Safety;

(4) "offender" means a person required to comply with registration requirements under AS 12.63; "offender" includes both a sex offender and a child kidnapper;

(5) "offense" means a conviction for which a person is required to register under AS 12.63;

(6) "registration agency" means

(A) for an offender who is incarcerated in a state correctional facility, the state correctional facility in which the offender is incarcerated;

(B) for an offender who is not incarcerated in a state correctional facility

(i) if the offender's residence address is in Anchorage, the department's permits and licensing unit in Anchorage;

(ii) if the offender's residence address is outside of Anchorage, the Alaska state trooper post or municipal police department nearest to the offender's residence address;

(7) "registration program" means a system of registration that qualifies for federal funding under 42 U.S.C. 14071 (Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act);

(8) "state correctional facility" has the meaning given in AS 33.30.901;

(9) "unconditional discharge" has the meaning given in AS 12.55.185.

(c) In AS 18.65.087, "another reliable source" includes, upon verification by the department, the following:

(1) a court of another jurisdiction;

(2) the victim of the offense or a member of the victim's family;

(3) an employer of the offender;

(4) an acquaintance or a neighbor of the offender;

(5) a member of the offender's family.