No. 01-729

IN THE

# Supreme Court of the United States

DELBERT W. SMITH 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**

## REPLY BRIEF FOR PETITIONERS

JOHN G. ROBERTS, JR.*
JONATHAN S. FRANKLIN
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

CYNTHIA M. COOPER
3410 Southbluff Circle
Anchorage, Alaska 99515
(907) 349-3483

*Counsel of Record

BRUCE M. BOTELHO
*Attorney General*
PATRICK GULLUFSEN
*Deputy Attorney General*
STATE OF ALASKA
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600

*Counsel for Petitioners*

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## REPLY BRIEF FOR PETITIONERS

### I. THE LEGISLATURE'S EXPRESS INTENT WAS REGULATORY.

1. The Alaska legislature's regulatory intent in passing the ASORA is plain on the face of the Act. In the Act's statement of findings, the legislature concluded that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the public from sex offenders is a primary governmental interest," that the government's interest in public safety outweighs offenders' privacy interests in certain truthful information, and that releasing that information to the public "will assist in protecting the public safety." 1994 Alaska Sess. Laws ch. 41, §1. The Act's statement of purpose makes clear that the legislature's

animating concern was protecting the public from a group of offenders that it concluded posed an appreciable risk of recidivism. *See* Pet. Br. 5-6, 24-26. The Ninth Circuit below correctly concluded that the legislature "acted with a non-punitive intent" in enacting the statute, joining every other court to have considered an ex post facto challenge to a sexual offender registration and notification law. Pet. App. 11a; *see* Pet. Br. 23-24 n.11.[1]

2. Respondents nonetheless argue that the Alaska legislature acted with punitive intent in enacting the ASORA, because its registration provisions (but not its notification provisions) are codified in Title 12 of the Alaska Code, titled "Criminal Procedure." Resp. Br. 25. But the placement of the ASORA's registration provisions in Title 12 says nothing about the legislature's intent. *See* Pet. App. 11a (rejecting argument that inclusion of registration provisions in criminal code signaled an intent to punish); *see also Patterson* v. *State*, 985 P.2d 1007, 1012 (Alaska Ct. App. 1999) (placing the ASORA, a "by-product of a sex offender's conviction," in Title 12 "does not indicate that the legislature had a punitive intent"). Title 12 contains many other provisions that do not involve criminal punishment, including civil procedures for disposing of recovered and seized property, Alaska Stat. §§ 12.36.010 *et seq.*; laws protecting the confidentiality of victims and witnesses to a crime, *id.* §§ 12.61.010 *et seq.*; laws governing the security and

[1] Respondents argue that the legislature's "subjective motivations" should not drive the Ex Post Facto Clause inquiry. Resp. Br. 16, 23-24 n.13. They are right. We have argued from the outset that the Ex Post Facto Clause demands not an examination of the legislature's subjective "motive"—and particularly not the motive of individual legislators, *see* Resp. Br. 23-24 n.13—but an objective inquiry into the *expressed* intent of the legislature, which can be overridden only by overwhelming evidence of the law's punitive effects. It is respondents, not we, who advocate going behind the legislature's express statements.

accuracy of criminal justice information, *id.* §§ 12.62.110 *et seq.*; laws governing civil post-conviction actions, *id.* §§ 12.72.010 *et seq.*; and actions for writs of habeas corpus, *id.* §§ 12.75.010 *et seq.*, which under Alaska law are "independent civil proceeding[s]." *State* v. *Hannagan*, 559 P.2d 1059, 1063 (Alaska 1977). The mere inclusion of the registration provisions in Alaska's criminal code thus in no way detracts from the legislature's express statements of regulatory purpose.[2]

3. Respondents also argue that the ASORA was enacted with punitive intent because defendants charged with covered offenses must be informed about the "registration and public notification provisions" of the ASORA before entering guilty pleas, and judgments of conviction must "includ[e] the registration and public notification provisions as part of the written judgment." Resp. Br. 6 (citing 1994 Alaska Sess. Laws ch. 41, §§ 10-11); *id.* at 27. To begin with, respondents are only half right; courts must notify defendants pleading guilty to, and those convicted of, qualifying sex offenses of the Act's registration requirements only. *See* Alaska R. Crim. Proc. 11(c)(4) (court may not accept plea to qualifying sex offense without first "informing the defendant in writing of the requirements of AS 12.63.010 [the registration

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[2] *See Cutshall* v. *Sundquist*, 193 F.3d 466, 474 (6th Cir. 1999) (location of Tennessee sex offender registration and notification law in criminal code did not warrant finding that the law was intended to punish), *cert. denied*, 529 U.S. 1053 (2000); *Doe* v. *Pataki*, 120 F.3d 1263, 1277-78 (2d Cir. 1997) (location of New York sex offender statute in "Corrections Law" volume of the state code did not "suggest[] that the legislature sought to punish sex offenders for their past offenses rather than to prevent any future harms that they might cause"), *cert. denied*, 522 U.S. 1122 (1998); *see also United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364-365 (1984) (Congress intended forfeiture to be a civil sanction, even though statute authorizing forfeiture was located in criminal code).

provision] and, if it can be determined by the court, the period of registration required"); Alaska Stat. § 12.55.148 (written judgment of conviction "must set out the requirements of AS 12.63.010 and, if it can be determined by the court, whether that conviction will require the offender or kidnapper to register for life or a lesser period").

And in any event, the fact that the legislature chose to notify convicted offenders or those considering pleas about the registration requirements does not render the requirements themselves punitive. Rather, because a registrant's *willful* failure to register carries a criminal penalty, notice of the requirements satisfies the willfulness prerequisite to any subsequent prosecution for failure to register. *See* Alaska Stat. §§ 11.56.835, 11.56.840; *see also id.* § 28.05.048 (requiring state Department of Motor Vehicles to "display notice of the registration requirements * * * at a place where the public may apply for a driver's license, identification card, or vehicle registration"). *Cf. Lambert* v. *California*, 355 U.S. 225, 229 (1957) (person could not be convicted of failure to register as convicted felon absent prior knowledge of duty to register). Such a later prosecution, of course, would not violate the Ex Post Facto Clause because it would be based prospectively on a failure to comply with the ASORA.

4. Finally, respondents repeatedly argue that the ASORA was intended to punish sex offenders because the legislature improperly "focused on the group of persons to whom the ASORA applies, and not on an activity from which these persons should be barred due to relevant past conduct." Resp. Br. 26; *see also id.* at 14, 16, 18, 19, 20, 21, 22, 34. According to respondents, because the ASORA is not aimed at prohibiting offenders from participating in a particular activity or profession, such as working in the banking industry, *Hudson* v. *United States*, 522 U.S. 93 (1997), holding union office, *De Veau* v. *Braisted*, 363 U.S. 144 (1960), or practicing medicine, *Hawker* v. *New York*, 170

U.S. 189 (1898), the law violates the Ex Post Facto Clause. *See* Resp. Br. 21-22.

That is wrong. First, regulatory laws may impact individuals without regard to their membership in any discrete "activity" or profession. Indeed, in *Kansas* v. *Hendricks*, 521 U.S. 346, 371 (1997), the Court held that a law permitting indefinite confinement of a subclass of sex offenders did not violate the Ex Post Facto Clause, because the confinement served valid regulatory purposes. *See also Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596 (1952) (deportation of legal resident aliens based on past Communist Party membership did not violate Ex Post Facto Clause); *cf. United States* v. *Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001) (law prohibiting felons from possessing firearms did not violate Ex Post Facto Clause).

Second, the laws respondents classify as regulating "activities" are better understood as responding to threats of harm of a localized scope and magnitude. New York passed the law challenged in *Hawker*, prohibiting convicted felons from practicing medicine, in order "to protect its citizens from physicians of bad character." 170 U.S. at 196. The legislature enacted the law at issue in *De Veau*, prohibiting felons from holding office in waterfront unions, as part of a "much-needed scheme of regulation" of New York's famously corrupt waterfront, after receiving "evidence that the presence on the waterfront of ex-convicts was an important contributing factor" to the corruption. 363 U.S. at 160; *see id.* at 158. And the order challenged in *Hudson*, which debarred the felon-petitioner from working in the banking field, was designed to "promote the stability of the banking industry." 522 U.S. at 105.[3]

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[3] *See also DeHainaut* v. *Pena*, 32 F.3d 1066, 1069 (7th Cir. 1994) (presidential directive barred former air traffic controllers who had participated in 1981 strike from employment with Federal Aviation Administration, on grounds that it would be "detrimental to the efficiency of operations at the [FAA] and to the safe and

Each law above was found to be non-punitive because it was a rational regulatory response to a perceived threat of harm—or as the Court put it in *De Veau*, a "relevant incident to a regulation of a present situation." 363 U.S. at 160. That was so even though the laws applied only to people based on their status as convicted felons. In contrast, a law will be found to be improperly punitive when, rather than "regulat[ing] * * * a present situation," the law "bears *no rational connection* to the purposes of the legislation of which it was a part." *Flemming* v. *Nestor*, 363 U.S. 603, 616 (1960) (emphasis added). The Court in *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866), for example, struck down a law requiring clergymen and other professionals to swear their support for the Union after finding that the law was not "a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged"; rather, the law was manifestly intended to punish Confederate sympathizers. *See Dent* v. *West Virginia*, 129 U.S. 114, 126 (1889) (law in *Cummings* struck down because "many of the acts from which the parties were obliged to purge themselves by the oath had *no relation* to their fitness for the pursuits and professions designated") (emphasis added).

The legislature in this case concluded that the potential harm posed by Alaskan sex offenders after their release from prison was directed not just at one profession, one industry, or any one uniquely sensitive field. The potential harm is of a larger scale, because the potential for sex offenders to re-offend exists in the community at large. The legislature's decision to require offenders to register and to make registry information available to the public has a rational connection to promoting community safety, and thus is a legitimate "relevant incident to [the] regulation of a present situation."

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effective performance of our national air traffic control system"), *cert. denied*, 514 U.S. 1050 (1995).

*De Veau*, 363 U.S. at 160. *See Hendricks*, 521 U.S. at 363 (approving indefinite civil detention of dangerous sex offenders "for the purpose of protecting the community from harm"). If the ASORA is of greater scope than the laws in *Hawker* or *De Veau*, it is only because of the broader scope of the threat that the legislature determined existed. *See* Pet. Br. 24-26 & nn.12-14.

## II. THE ASORA'S EFFECT IS NOT PUNITIVE.

The legislature's plainly regulatory intent can be defeated only if respondents carry the "heavy burden" of showing by the "clearest proof" that the effects of the ASORA are punitive. *Hendricks*, 521 U.S. at 361; *see United States* v. *Ward*, 448 U.S. 242, 249 (1980).[4] Respondents correctly recognize that the seven *Mendoza-Martinez* factors are best viewed as "guideposts," and also correctly acknowledge that some of those factors "might be more important than others." Br. 19, 29. But they are quite wrong in suggesting that "any one of the [*Mendoza-Martinez*] factors, or any combination

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[4] Respondents avoid that demanding standard whenever they can, instead invoking familiar phrases from other, unrelated constitutional precedents to support their arguments. *See, e.g.*, Resp. Br. 28 (arguing that the ASORA must be "narrowly tailored to achieve the stated purpose" to survive an ex post facto challenge); *id.* at 38 (same). Those catchphrases have no place here. The proper inquiry, as this Court has repeatedly held, is whether there exists "*unmistakable evidence*" of punitive effect sufficient to override the legislature's statement of regulatory intent. *Flemming*, 363 U.S. at 619 (emphasis added). Respondents suggest that the standard is actually "nothing more than the legal maxim that statutes enjoy a presumption of constitutionality." Resp. Br. 17. But as this Court explained in *Flemming*, the "clearest proof" standard reflects the Court's traditional deep reluctance to look beyond objective manifestations of legislative intent to determine whether an improper purpose lies behind a statute, in addition to the presumption of constitutionality that traditionally informs statutory analysis. 363 U.S. at 617; *id.* at 619.

of two or more, demonstrates that the ASORA is excessive." *Id*. at 20. In fact, as we explained in our opening brief, this Court has *never* found that the *Mendoza-Martinez* factors, in any permutation, overrode a legislature's regulatory intent. *See* Pet. Br. 32 & n.19. That is one of the reasons the Ninth Circuit's decision is so remarkable; and it is all the more remarkable that the court reached that decision after finding three of the seven factors to favor the conclusion that the ASORA is not punitive. *See* Pet. App. 29a-30a.

Attempting to widen the margin of the Ninth Circuit's close call on the *Mendoza-Martinez* factors, respondents now challenge the three factors that the court found supported the conclusion that the ASORA was regulatory.

**Historical Punishment.** Along with every other circuit to have considered the issue, the Ninth Circuit found that sex offender registration and notification statutes bear no resemblance to historical punishments.[5] Pet. App. 18a. Undaunted by the courts' unanimous view, respondents, joined by their amicus the District of Columbia Public Defender Service, argue at length that the ASORA is indistinguishable from colonial "humiliatory" punishments. Resp. Br. 33-36; D.C. Pub. Def. Br. 17-24. Their arguments actually underscore the differences between contemporary sex offender laws and antiquated shaming penalties.

Respondents argue that the ASORA has a punitive pedigree because "shaming, ostracism, and community obloquy have historical roots and have traditionally been nothing but punishment." Resp. Br. 33. *See* D.C. Pub. Def. Br. 20-21 (citing Alice M. Earle, *Curious Punishments of*

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[5] *See Femedeer* v. *Haun*, 227 F.3d 1244, 1250-51 (10th Cir. 2000); *Russell* v. *Gregoire*, 124 F.3d 1079, 1089 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998); *Doe* v. *Pataki*, 120 F.3d at 1283; *E.B.* v. *Verniero*, 119 F.3d 1077, 1099 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998).

*Bygone Days* (1896) (Applewood reprint 1995)). That is only half the story.

> In many—indeed, in nearly all—of the penalties and punishments of past centuries, derision, scoffing, contemptuous publicity and personal obloquy were applied * * * by means of demeaning, degrading and helpless exposure in grotesque, insulting and painful "engines of punishment," such as the stocks, bilboes [leg shackles], pillory, brank [a metal cage for the head with a built-in gag], ducking-stool or jougs [iron collars fastened to a wall]. [Earle, *supra*, at 2-3.]

Whatever incidental embarrassment the ASORA visits on convicted sex offenders, the means by which it does so—registration and reporting—in no way resemble the "engines of punishment" colonial societies "in nearly all" cases used to elicit public contempt and obloquy. *Id.*

Still respondents argue that while bilboes, branks, and similar devices may have been the principal methods by which shaming punishments were administered, at least some punishments did not "involve[] infliction of physical pain," such as where "offenders were required simply to stand in public with signs cataloguing their offenses." D.C. Pub. Def. Br. 21 (quotation omitted). But this, too, misses the mark; the defining feature of all these ancient punishments was not pain, but a government-compelled *physical presence* before the community. *See E.B.* v. *Verniero*, 119 F.3d at 1099 ("these colonial practices inflicted punishment because they * * * *physically held* the person up before his or her fellow citizens for shaming") (emphasis added).

The government-compelled physical presence that was the hallmark of these early humiliatory punishments is entirely absent from modern registration and reporting regimes like the ASORA. Nowhere in their brief do respondents argue otherwise. The D.C. Public Defender Service, for its part, suggests that the analogy is satisfied because sex offenders are "required to 'physically' present themselves to provide

the information and sit for the photographs" that are added to the registry. D.C. Pub. Def. Br. 23. But reporting to a government agency outside the public eye is nothing close to being physically paraded before "the free gibes and constant mocking of the whole community." Earle, *supra*, at 3. Nor does the Public Defender Service get anywhere by characterizing the Internet registry as a "cyber-confrontation," Br. 3, because it is not a "confrontation" at all; the offender is not present for it. *See Doe* v. *Pataki*, 120 F.3d at 1284 ("traditional shaming penalties * * * enlisted the offender's physical participation in his own degradation").

Finally, the primary purpose of the ASORA's registration and reporting requirements is entirely distinct from the goal of humiliatory punishments. As the Public Defender Service notes, the "essence" of shaming penalties was just that: to inflict "public disgrace." Br. 21; *see also Doe* v. *Pataki*, 120 F.3d at 1283 (stigmatization penalties "primarily served distinctly punitive goals"). By contrast, the ASORA's animating purpose is "protecting public safety." 1994 Alaska Sess. Laws ch. 41, § 1. *See also Russell*, 124 F.3d at 1092 (Washington law "is not intended to be punitive—it has protective purposes—while shaming punishments were intended to and did visit society's wrath directly upon the offender") (internal quotation omitted). That Alaska's registration and notification methods may, from time to time, embarrass registered offenders is wholly incidental to the government's legitimate regulatory interests. Governments have often provided truthful information regarding criminal records to people who choose to access it in order to better protect themselves and others. Such actions have never been considered additional "punishment" for the crime. A ruling to the contrary would improperly remove a critical tool for protecting public safety.

**Scienter.** *Mendoza-Martinez* directs courts to inquire whether the sanctions challenged as punitive—here, registration and notification—"come[] into play only on a

finding of scienter." 372 U.S. at 168. The correct question under this inquiry is whether the ASORA "'on its face'" contains a scienter requirement. *Hudson*, 522 U.S. at 104 (quoting *Mendoza-Martinez*, 372 U.S. at 169). The ASORA contains no such requirement; the plain fact of conviction triggers the statute's registration and public notification requirements. *See Femedeer*, 227 F.3d at 1251; *Cutshall*, 193 F.3d at 475.

**Alternative, Non-Punitive Purpose.** The "[m]ost significant" *Mendoza-Martinez* factor is whether the law has an alternative, non-punitive purpose that can rationally be assigned to it. *United States* v. *Ursery*, 518 U.S. 267, 290 (1996); *Russell*, 124 F.3d at 1091. The ASORA certainly does: it protects public safety. The Ninth Circuit correctly recognized as much, finding the Act's community-protection purpose to be the "principal support * * * for the view that the statute is not punitive." Pet. App. 23a.

Even respondents recognize that the ASORA's non-punitive purpose is "valid[] and rational." Resp. Br. 38. They nonetheless argue that this crucial factor is of no moment here, because, in their view, the ASORA's alternative purpose is "ambiguous" and the law is not sufficiently "narrowly drawn." *Id.* (citing *New York* v. *Burger*, 482 U.S. 691, 693, 712 (1987)). The former objection is answered by the Ninth Circuit's unequivocal conclusion that the ASORA's intended purpose was regulatory. *See* Pet. App. 12a. And the latter objection makes no sense. The Court in *Burger* did not remotely address the questions at issue here, nor did it hold that regulatory laws *must* be drawn narrowly. To the contrary: "The legislature is not required to act with perfect precision" when regulating, "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." *Doe* v. *Pataki*, 120 F.3d at 1283.

Respondents' arguments on the remaining *Mendoza-Martinez* factors contribute little beyond the Ninth Circuit's demonstrably flawed justifications for its ruling.

**Affirmative Disability Or Restraint.** The ASORA does not impose physical restraints on registrants and does not constrain registrants' freedom of movement. Nor does the law on its face or of its own force curtail their employment, housing, or educational opportunities.

Respondents do not dispute any of this. They have also abandoned the Ninth Circuit's erroneous and persistent statements that the ASORA's registration requirements require offenders to "register in person four times each year every year of their lives"—an error forming the centerpiece of the court's conclusion that the law imposed an "affirmative disability" and was "excessive." *See* Pet. App. 13a-14a, 7a, 19a, 20, 27a, 28a; Resp. Br. 32 n.16 (acknowledging that "the panel may have relied on a misstatement of Alaska law"). Respondents contend instead that the law imposes an "affirmative disability or restraint" because registrants are exposed to "community scorn[] and outrage" and because private citizens in the community might take unlawful action against them. *See* Resp. Br. 31-33, 41; D.C. Pub. Def. Br. 13-27; ACLU Br. 18-21; N.J. Pub. Def. Br. 6-21.[6]

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[6] Respondents also argue that the law imposes affirmative disabilities on them because it violates their state-law "right * * * to reintegrate into society and to be left alone." Resp. Br. 31. The ASORA does nothing to hamper those "rights." It simply requires offenders to register; it imposes no further constraints than that. Nor does the law violate respondents' expectation of privacy. *Id.* at 39. The legislature balanced offenders' privacy interests against the need to protect community safety and concluded that passive dissemination of limited, truthful information was necessary to protect the public welfare. *See Patterson*, 985 P.2d at 1016 (rejecting sex offender's claim that the ASORA violated his privacy interests).

The ASORA does not impose those consequences; they "(1) are wholly dependent on acts by private third parties, (2) result from information most of which was publicly available prior to the [Act], and (3) flow essentially from the fact of the underlying conviction." *Doe* v. *Pataki*, 120 F.3d at 1280; *see Meadows* v. *Board of Parole & Post-Prison Supervision*, 47 P.3d 506, 512 (Or. App. Ct. 2002) (unwelcome societal consequences "are the result of the offender's crimes and not of the designation and disclosure statutes"); *see also* N.J. Pub. Def. Br. 9, 15 (giving examples of negative community response to sex offender where *no* government-sponsored notification was conducted). As the Third Circuit recognized in *E.B.* v. *Verniero*, information relating to criminal convictions, publicized as a matter of course in our judicial system,

> may be the source of a wide range of adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism and/or vigilante retribution. Employment may be lost, and the opportunity for future employment may be dramatically reduced. * * * Nevertheless, our laws' insistence that information regarding criminal proceedings be publicly disseminated is not intended as punishment and has never been regarded as such. [119 F.3d at 1100.[7]]

Nor does Alaska foster or condone unlawful attacks on registrants by making registry information available to the public by way of the Internet. Alaska's electronic registry, like others of its kind, contains a stern warning: "This information is made available for the purpose of protecting

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[7] It is also wrong to suggest that making a sex offender registry available to the public amounts to calling a sex offender a "state-certified menace." D.C. Pub. Def. Br. 18. Alaska's electronic sex offender registry publishes truthful information in an accessible medium. It also publishes that information *passively*: Those that wish to access the registry can take the steps necessary to do so; those that do not, can decline.

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 (last visited August 29, 2002). And contrary to the New Jersey Public Defender's suggestion, Br. 11, the availability of prosecution against those who harass or injure registered offenders is not an empty threat. *See* PD 25a, 39-40 (lodged by N.J. Public Defender) (noting that two men were charged with assault after attacking a man believed to be a registered sex offender).

Respondents also claim that the ASORA and other such laws "do not protect the public" and may result in a "rise in criminal activity." Resp. Br. 33; *see also* N.J. Pub. Def. Br. 21; Mass. Comm. for Pub. Counsel Servs. Br. 18. How this supports their claim that the laws impose an "affirmative disability or restraint" on registrants is not immediately apparent. And respondents are wrong to boot: registration and disclosure statutes help prevent and solve crimes. *See* States' Amicus Br. 27-28; U.S. Br. 18 & n.15, 19-20 & n.17.

**Traditional Aims Of Punishment.** The ASORA's primary purpose is to protect public safety. *See* 1994 Alaska Sess. Laws ch. 41, § 1. Its registration and notification provisions are community safeguards; to the extent they may be said to "deter" crime, they do so by allowing members of the public to take precautions they may deem suitable, not by imposing additional potential penalties to discourage wrongdoers. And in any event, even if the ASORA may have the ancillary effect of deterring some sex offenders, that does not make it punitive: a deterrent purpose can "serve civil as well as criminal goals." *Ursery*, 518 U.S. at 292 (citing *89 Firearms*, 465 U.S. at 264, and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-678 (1974)); *see also Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996) (civil "forfeiture * * * serves a deterrent purpose distinct from any punitive purpose").

Acknowledging that statutes like the ASORA may permissibly "implicate deterrence" without constituting unlawful punishment, the Ninth Circuit nonetheless concluded that the Act's purportedly "retributive" objective was the "primar[y]" basis for weighing this *Mendoza-Martinez* factor "on the side of finding the Act punitive." Pet. App. 19a. According to the court, the ASORA's registration provisions were "inherently retributive" because they required repeat or aggravated sex offenders to "report quarterly to their local police stations" for life, and other offenders to "go to the police station and register" once a year for fifteen years. *Id.* at 19a, 20a-21a.

Respondents now recognize that the Ninth Circuit may have relied on a "misstatement of Alaska law." Resp. Br. 32 n.16. They nonetheless argue that the provisions are "retributive" because "there [i]s no way to escape the ASORA's effect." The law's categorical application does not make it retributive. *See* Pet. Br. 46-47; *Hawker*, 170 U.S. at 197 (legislature could permissibly enact a "rule of universal application"). Respondents also suggest that retribution and deterrence alone could suffice to "classify the ASORA as penal," Resp. Br. 37, citing this Court's decision in *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767 (1994). But the Court in *Kurth Ranch* expressly stated that the deterrent effect of the high drug tax at issue there did not in and of itself render the tax punitive; rather, it was a rare "concoction of anomalies" that did that law in. *Id.* at 781, 783. Respondents acknowledge as much. *See* Resp. Br. 37 (tax in *Kurth Ranch* "was penal due to its *excessive effect and* deterrent goals") (emphasis added).

**Application To Behavior That Is Already Criminal.** "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 89 Firearms*, 465 U.S. at 365-366 (fact that civil forfeiture sanction was based on same behavior giving

rise to a criminal violation "is not sufficient to persuade us" that forfeiture was punitive). The laws in *Hawker*, *De Veau*, *Hudson*, and *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924)—all found to pass muster under the Ex Post Facto Clause—were triggered by criminal conviction. The ASORA's registration requirements are no different.

**Excessiveness.** Respondents claim that the ASORA is "excessive" because it applies to "persons convicted of a sex offense who pose no threat whatsoever to the public." Resp. Br. 42. This glibly assumes what studies have shown is exceedingly difficult to determine in advance—that we can confidently discern which offenders pose no future threat. *See* Pet. Br. 47-48 n.29. In any event, the legislature was not required to tailor its regulation that exactingly. *See* Pet. Br. 46-47; *Hawker*, 170 U.S. at 197; *De Veau*, 363 U.S. at 160.

Respondents and their amici relatedly claim that the ASORA is "excessive" because it overestimates the risk of sex offender recidivism. Resp. Br. 42; N.J. Pub. Def. Br. 22-24; Mass. Comm. for Pub. Counsel Servs. Br. 2-24. Their statistical evidence is unconvincing; it also falls far short of showing that the legislature's choice to endorse contrary evidence was so wrongheaded that it renders the ASORA punitive.

Sex offenders pose a "frightening and high risk of recidivism." *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002). The largest recidivism study ever conducted in the United States recently concluded that, within three years of release, 46% of those imprisoned for rape and 41.4% of those imprisoned for other sexual assault were rearrested. U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* 8 (2002). The study recognized that such rearrest statistics *understate* recidivism rates, *id.* at 2—a point particularly relevant with respect to sexual offenses. *See* Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Follow-up Study*, Fed. Probation 58, 58 (1985) (recidivism

rates based on arrest or conviction data underestimate actual sex offenses); Lita Furby, *et al.*, *Sex Offender Recidivism: A Review*, 105 Psychological Bulletin 3-30 (1989) (finding that fewer than 10% of sexual offenses are reported). What is more, the study confirmed that those imprisoned for rape and other sexual assault were far more likely than other violent offenders to be rearrested for the same offense after release. U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* 10.

The risk of sex offenders reoffending is particularly "frightening," as this Court put it in *McKune*, because of the havoc such offenses can wreak on the community—and too often on its most vulnerable citizens. *See McKune*, 122 S. Ct. at 2024-25 (noting that "the victims of sexual assault are most often juveniles," and that "[n]early 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger") (citations omitted); U.S. Dep't of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Offense, and Offender Characteristics* 12 (2000) (67% of sexual assault victims are juveniles, and one in seven are under six years of age). Studies also consistently show that children abused by sex offenders are more likely to become offenders themselves. *See* Lawrence A. Greenfeld, Bureau of Justice Statistics, *Sex Offenses And Offenders* 23 (1997) (noting that 35% of sex offenders were themselves abused as children); *Doe* v. *Poritz*, 662 A.2d 367, 375-376 (N.J. 1995).

Respondents and their amici cite somewhat more optimistic numbers. But the study touted by the New Jersey Public Defender Service (at 22-23 & n.6) to support its argument that "relatively few [offenders] commit another sex offense" examines only the re-conviction and re-arrest rate for sex offenders who served their time at a state treatment facility. Studies have indicated " 'a significant difference between treated and untreated individuals,' " as this Court noted in *McKune*: " 'the rate of recidivism of treated sex offenders is

fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%." 122 S. Ct. at 2024 (quoting U.S. Dep't of Justice, Nat. Inst. of Corrections, *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii (1988)). Nor does the study acknowledge the vast gap between offenses for which arrests are made or convictions are obtained, and the number of reported offenses for which *no* arrests are made—not to mention the very high percentage of sex offenses that go unreported. *See* Furby, *supra*, at 3.

Nor is it helpful to compare recidivism rates of sex offenders with those of other felons. *See, e.g.*, Mass. Comm. for Pub. Counsel Servs. Br. 5; N.J. Pub. Def. Br. 23 (contending that "as a group, sex offenders have lower rates of recidivism than other types of offenders"). Most victims of burglaries, for example, are not minors, and most victims of burglaries are not by virtue of that fact more likely to grow up to be burglars themselves. The legislature could rationally conclude that the potential devastating harm inflicted by sex offenders on vulnerable populations justified adopting regulatory requirements for those offenders and not others, to assist the community in protecting those who cannot protect themselves.

In any event, respondents' competing statistics and studies show only that there is conflicting evidence about sex offenders' propensity to reoffend. Respondents and their amici do not provide any guidance on how this Court—as opposed to the state legislature—can determine what level of threat the citizens of Alaska must tolerate before their representatives may take protective action. It is in exactly these circumstances that the legislature should have the most leeway in fashioning remedies for an intractable social problem. *See Hendricks*, 521 U.S. at 360 n.3; *De Veau*, 363 U.S. at 158 ("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 that of the legislature); *Hawker*,

170 U.S. at 197 ("Doubtless, one who has violated the criminal law may thereafter reform * * *. But the legislature has power in cases of this kind to make a rule of universal application"). Given the grave risks posed to the community by a reoffense, coupled with evidence of a strikingly high recidivism rate for sex offenders, Alaska's legislature was well within bounds to require sex offenders to register and to make registry information available to the public. Indeed, it makes particular sense for the legislature to make truthful information available to members of the public through an electronic registry; that passive method of notification allows each member of the community to decide whether to access registry information in the first instance, and whether to take precautionary measures in light of what they find.[8]

Finally, the debate over which and how many sex offenders are likely to reoffend is, as we observed in our opening brief, of dubious relevance to the Court's Ex Post Facto Clause inquiry. Pet. Br. 48-49. Respondents' arguments on this score apply across the board, regardless of when the underlying offense was committed, and they are more properly addressed in a due process challenge.

* * * *

The *Mendoza-Martinez* "test" was never meant to be the sort of exercise in sums that the Ninth Circuit conducted; no meaningful outcome is produced by simply adding its factors together. The factors each give insight into facets of the issue, but the question in the end is still a unified inquiry: where the legislature has expressed a regulatory intent, is there overwhelming evidence that the expressed intent is simply a charade for truly punitive goals? The answer in this case is clear: a law that does not restrain offenders' freedom,

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[8] *Cf. 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) (noting that state prohibitions on "the dissemination of truthful, nonmisleading commercial messages" are generally subject to "rigorous" First Amendment review).

does not look or operate like historical punishment, that was motivated by a genuine and compelling regulatory purpose, and that was enacted in measured response to a valid and grave threat to community safety, does not violate the Ex Post Facto Clause.

## CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
JONATHAN S. FRANKLIN
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

CYNTHIA M. COOPER
3410 Southbluff Circle
Anchorage, Alaska 99515
(907) 349-3483

*Counsel of Record

BRUCE M. BOTELHO
*Attorney General*
PATRICK GULLUFSEN
*Deputy Attorney General*
STATE OF ALASKA
Department of Law
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600

*Counsel for Petitioners*