No. 01-729

IN THE SUPREME COURT OF THE UNITED STATES

RONALD O. OTTE AND BRUCE M. BOTELHO, *Petitioners,*

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, AND THE STATES OF ALABAMA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, MARYLAND, MASSACHUSETTS, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WASHINGTON, AND WEST VIRGINIA

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## QUESTION PRESENTED

Alaska's sex offender registration act 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?

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# AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, ATTORNEY GENERAL

Amici file this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

## INTEREST OF AMICI CURIAE

This brief is respectfully submitted in support of the petition for writ of certiorari by petitioner, the State of Alaska, which urges reversal of *Doe v. Otte,* 259 F.3d 979 (9th Cir. 2001). In an opinion authored by Judge Reinhardt, the Ninth Circuit held Alaska's sex offender registration and notification laws violated the Ex Post Facto Clause of the United States Constitution, reversing the decision of the Alaska district court.

All the states have a strong interest in monitoring the whereabouts of convicted sex offenders, and in disseminating information about such offenders to protect the public safety. All 50 states require registration by sex offenders, and most have some form of community notification regarding sex offender registrants. Twenty-eight states use the Internet to

disseminate information about registered sex offenders. As an example, California has the oldest sex offender registration statute in the country. California Penal Code section 290, was enacted in 1947 (made legislatively retroactive to 1944)[1], and currently there are 92,646[2] registered sex offenders in California. In 1996, California enacted its notification law, known as Megan's law.

The California Supreme Court has held that California's sex offender registration law (Cal. Pen. Code, § 290)[3] does not violate the Ex Post Facto Clause of the United States Constitution. *People v. Castellanos,* 21 Cal.4th 785 (Cal. Sup. Ct. 1999). The registration and public notification provisions of the California law were made expressly retroactive by the California Legislature. Cal. Pen. Code, § 290, subd. (r). The California sex offender registry includes persons convicted of specified sex offenses since 1944, and public notification is available on a majority of these registrants.

If the Ninth Circuit, following the rationale in *Doe v. Otte*, found California's notification law to violate the Ex Post Facto Clause, the state would be unable to alert the public to the presence of in excess of approximately 60,000 sex offenders convicted and registered prior to the enactment of California's

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1. Cal. Stats. 1947, ch. 1124, § 1.

2. Figure current as of November 9, 2001. Of those 92,646 registered sex offenders, 1,603 are statutorily designated high risk; 75,013 are designated serious sex offenders; and 16, 030 are "other" sex offenders, meaning their status as convicted sex offenders is not subject to public disclosure or notification under California's Megan's Law. Cal. Pen. Code §§ 290, subd. (n); 290.4, subd. (a).

3. The California Supreme Court has not considered the constitutionality of California's Megan's Law (public notification law), which is codified at California Penal Code section 290, subdivisions (m)-(r), and California Penal Code section 290.4.

notification law in 1996. Thus the Ninth Circuit's decision in *Doe v. Otte* may significantly affect California's ability to protect its citizens, as well as the ability of other states to notify the public about sex offenders convicted prior to the enactment of the state's notification law.

California is additionally interested in the outcome of this case because pending in the California Legislature is a bill, sponsored by the Attorney General of California, which would create an Internet site which would allow persons with a valid California driver's license to view information about convicted sex offenders who reside in the viewer's county of residence.[4/] Other states which may also wish to utilize new technology as a more effective means of public protection may have similarly enacted restricted notification statutes due to the lack of guidance from this Court on the constitutionality of such laws. The 28 states which have utilized the Internet as a means of notifying the public about registered sex offenders also have a strong interest in having the constitutionality of such notification settled by this Court. States which are considering modifying their sex offender notification laws are similarly in need of guidelines for enacting legislation in their respective states which will pass constitutional muster.

## REASONS FOR GRANTING THE PETITION

Amici urge this Court to grant the petition because this is an issue of overriding importance to all fifty states, in that all the states have sex offender registration and notification laws, and federal funding to the states is conditioned on

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4. Only those registrants whose convictions are subject to public disclosure under California law would be listed on the proposed Internet site. California S.B. 721 (Battin), 2001-2002, Regular Session, available at http://www.leginfo.ca.gov/bilinfo.html.

compliance with federal law requiring the states to enact certain provisions in their sex offender registration and notification statutes.

Additionally, the states have a compelling public interest in monitoring the whereabouts of convicted sex offenders, which interest is frustrated by prohibiting the retroactive application of sex offender registration and notification laws. While the states' notification schemes vary, at least 28 states disseminate information about registered sex offenders in their states on the Internet, as did Alaska. Alaska's sex offender registration and notification requirements are no more onerous than the laws of many states, so if Alaska's law was properly construed as punitive, then it is possible that a majority of the states' laws, including California's, would be found violative of the Ex Post Facto Clause.

Finally, the vast majority of state and federal courts which have examined the issue ruled that the retroactive application of state sex offender registration and notification laws does not violate the Ex Post Facto Clause. Accordingly, amici urge this Court to grant the petition for certiorari because the Ninth Circuit's ruling in *Doe v. Otte* was contrary to this Court's precedent and to Constitutional intent and conflicts with the decision of another United States court of appeals on the same important issue. Sup. Ct. R. 10.

## I.

## THE FEDERAL MANDATE TO THE STATES REGARDING ENACTMENT OF SEX OFFENDER NOTIFICATION AND REGISTRATION LAWS MAKES THIS AN ISSUE OF NATIONAL IMPORTANCE

The states are required to conform state law to a series of federal laws and regulations pertaining to sex offender registration and notification or forfeit a substantial portion of

the state's federal crime funding.[5] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (hereinafter "Wetterling Act"), enacted by Congress in 1994, sets out minimum standards for sex offender registration with which the states must comply. Subsequent Congressional acts mandated that the states enact additional laws in order to meet the requirements for federal funding.

The Wetterling Act specifies that the states must obtain particular registration information from designated sex offenders, requires eligible sex offenders to remain registered for at least ten years, and mandates that states release "relevant information that is necessary to protect the public concerning a specific person required to register."[6] States must register persons convicted of a sex offense against a minor victim and

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5. Jacob Wetterling Act, 42 U.S.C. § 14071, subd. (g)(2): "A state that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 3756 of this title." In California, in 2001, this would have meant that noncompliance with the Wetterling Act and subsequent enactments (see text) would have cost the state 5.15 million dollars per year in Byrne Formula Grant Funding (42 U.S.C. § 3756.). California Senate Appropriations Committee Fiscal Summary on AB 4 (2001-2002 Regular Session), http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/ab_4_cfa_20010910_154244_sen_comm.html (last visited on Nov. 20, 2001.)

6. Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L.Rev. 593, 598-599 (2000) [hereinafter cited as "Logan"]; 42 U.S.C. § 14071 (1994 & 1999 Supp.); Final Guidelines for the Wetterling Act, as amended, 64 Fed. Reg. 572 (issued Jan. 5, 1999, amended Jan. 22, 1999.)

those convicted of sexually violent offenses.[7] The states must require registrants to submit changes of address to the state, and verify the address "at least annually." 42 U.S.C. § 14071, subd. (b)(1)(A), (b)(3)(A).

The federal guidelines establish minimum standards, or a floor, not a ceiling, for sex offender notification and registration laws. 64 Fed. Reg. at 575. Although the Wetterling Act requires that registered information be released 'as necessary to protect the public,' federal requirements on the geographic scope, method and extent of registration information disseminated were ill-defined as to how the states were to comply with the required mandate for public protection. While the federal guidelines did not mandate retroactive application of states' notification laws, they stated that "the Act does not preclude states from applying such standards retroactively to offenders earlier if they so wish." 64 Fed. Reg. at 581. However, the guidelines also state that states cannot comply with the act by releasing registration information only to law enforcement agencies, to other governmental or non-governmental agencies or organizations, to prospective employers, or to victims of the registrants' offenses; nor can the states comply by having "purely permissive or discretionary authority for officials to release registration information." 64 Fed. Reg. at 581.

Part of the rationale used by the Ninth Circuit Court of Appeals in *Doe v. Otte,* 259 F.3d 979, was that certain aspects of Alaska's sex offender registration and notification laws rendered the laws punitive and therefore unconstitutional as applied to respondents. Of the approximately eleven factors the Ninth Circuit relied on to find Alaska's Act punitive, *five* were specifically required by Wetterling, et al. Thus, under the Wetterling Act and subsequent enactments, Alaska's failure to implement such laws would require it to forfeit ten percent of

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7. See fn.6, *supra.*

the state's federal crime funding.[8/]

The Ninth Circuit held that under the first *Mendoza-Martinez* factor, i.e., whether the law involved an affirmative disability or restraint,[9/] the Alaska statute imposed an affirmative disability by subjecting sex offenders to "onerous conditions." *Doe v. Otte*, 259 F.3d 987-988. However, a number of the factors which the Court found rendered the statute onerous are required to be implemented by the states by the Wetterling Act, et al.

The Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (hereinafter "Lychner Act") requires the states to impose lifetime registration for offenders with one or more prior qualifying convictions and those with certain aggravated offenses. 42 U.S.C. § 14071, subd. (b)(6)(B)(i)-(ii). The federal guidelines note that states which allow such offenders to be relieved of registration in less than ten years, under any procedure for terminating registration, are not in

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8. Jacob Wetterling Act, 42 U.S.C. § 14071, subd. (g)(2). In California, in 2001, noncompliance with the Wetterling Act and subsequent enactments (see text) would have cost the state 5.15 million dollars per year in Byrne Formula Grant Funding (42 U.S.C. § 3756.). California Senate Appropriations Committee Fiscal Summary on AB 4 (2001-2002 Regular Session), http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/ab_4_cfa_20010910_154244_sen_comm.html (last visited on Nov. 20, 2001.)

9. The Ninth Circuit determined that the Alaska legislature's intent was that the statute be non-punitive, but ruled that the "effect" of the statute was so punitive that it violated the Ex Post Facto Clause. *Doe v. Otte,* 259 F.3d at 987. In deciding the effect of the law was punitive, the Ninth Circuit purported to apply the seven factors enunciated by this Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

compliance with federal law. 64 Fed. Reg. at 576, 582-583. Yet Ninth Circuit in *Doe v. Otte* found Alaska's registration law excessive in part because Alaska did not provide a process by which sex offenders could be relieved of registration upon a finding of rehabilitation, apparently without regard to a minimum registration period. *Doe v. Otte,* 259 F.3d 991-992.

Second, in 1998 Congress enacted heightened registration and notification requirements for "sexually violent predators."[10/] Federal law requires that sexually violent predators verify their address information quarterly (more frequently than is required for other offenders) and remain subject to registration and notification requirements for life. 42 U.S.C. § 14071, subd. (b)(3)(B).

Nevertheless, the Ninth Circuit disapproved the Alaska law's requirement that certain sex offenders (those convicted of "aggravated" offenses) reregister four times a year. The Ninth Circuit relied heavily on the fourth *Mendoza-Martinez* factor, whether a statute promotes traditional aims of punishment, in finding Alaska's law punitive. *Doe v. Otte,* 259 F.3d at 990. The Ninth Circuit cited the quarterly reregistration requirement imposed on certain sex offenders, which is mandated by the Wetterling Act, as a provision which rendered the Alaska law punishment.

Third, Congress required that the states obtain the name, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the registrant. 42 U.S.C. § 14071, subd. (b)(1)(B). The Ninth Circuit found the information required to be given under oath constituted "a wide variety of personal information," implying the requirement the sex offender provide his address, employer address, vehicle description, and information concerning mental health treatment

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10. Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act. 42 U.S.C. § 14071, subd. (a)(2), (a)(3)(C)-(E), (b)(1)(B), (b)(3)(B), (b)(6)(B)(iii) (Supp. 1999).

for any mental abnormality or personality disorder, was onerous as well.

Fourth, the Ninth Circuit appeared to find that mandated annual reregistration contributed to rendering Alaska's Act punitive in effect. The Court noted that Washington's sex offender registration statute, which was upheld against a ex post facto challenge in *Russell v. Gregoire,* 124 F.3d 1079 (9th Cir. 1997), did not require annual reregistration, whereas Alaska's law requires annual address verification. In fact, the Wetterling Act was enacted in 1994, after Washington's sex offender registration law was enacted in 1990. The Wetterling Act required the states to mandate annual reregistration (see above), and every state which wishes to receive federal crime funding, including Washington today, requires annual reregistration or address verification.[11/]

Fifth, under the Wetterling Act, certain sex offenders are required to disclose information regarding employment if they are employed or carry on a vocation at an institution of higher learning. 42 U.S.C. § 14071, subd. (j). The Ninth Circuit in *Doe v. Otte* found that Alaska's registration law imposed an affirmative disability in part because offenders were required to disclose the names and addresses of their employers, stating that requiring submission of employer information was "likely to make the plaintiffs completely unemployable. . . ." and that publication of this information created "a substantial probability that registrants will not be able to find work. . . ." *Doe v. Otte,* 259 F.3d at 988. The court found that posting the sex offender registry on the Internet subjected registrants to "community obloquy and scorn," because the information was "more accessible to the public than records at police departments. . . ." *Doe v. Otte,* 259 F.3d at 988.

Five of the factors pertaining to Alaska's sex offender registration and notification laws, which the Ninth Circuit found created an affirmative disability and rendered the law excessive in relation to its purpose, are required by the Wetterling Act and

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11. Wash. Rev. Code § 9A44.135(1)(a), (b).

its progeny. All the states which wish to continue to receive the full amount of federal crime funding under the Byrne Act are required to mandate quarterly reregistration for certain sex offenders, to require a minimum registration period of ten years for all registered sex offenders (regardless of a finding of rehabilitation), and to require annual reregistration and address verification to obtain certain registrant information, including the name of the registrant's employer. Thus, all fifty states have an interest in the resolution of the issue posed in this case because their receipt of substantial federal crime funding depends on their ability to comply with federal law, yet full compliance may be impossible if the Ninth Circuit was correct in its construction of the Ex Post Facto Clause as it applies to Alaska's sex offender registration and notification law.

## II.

## MANY OTHER STATES HAVE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS SIMILAR TO ALASKA'S

All fifty states have sex offender registries which require sex offenders to submit personal information to a state registry.[12/] While the requirements of the states' registration laws vary widely, in general the statutes require registrants to submit information similar to that required by Alaskan law.[13/]

The states have disparate laws regulating which sex

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12. Logan, *supra* note 6, at 602; Comment, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?*, 52 Me. L. Rev. 175, 206 (2000)[hereinafter "Comment"].

13. Comment, *supra* note 11, at 207. Information such as name, current address, prior convictions, dates of commission and conviction of such offenses, date of birth, current place of employment, physical description of the registrant, photograph and fingerprints is frequently required.

offenders are required to register, the duration of that requirement, and reregistration and address verification requirements.[14] A review of the duration requirements for registration indicates that most states mandate a minimum registration period of ten years and many states require longer periods, up to and including lifetime registration, for more serious offenders.[15]

State statutes vary more in their notification provisions than in their registration laws. Every state has some version of Megan's Law.[16] At least 19 states require that all offenders convicted of specified sex offenses undergo public notification without an individualized assessment of the risk of recidivism.[17] There are 28 states which post information about registrants on the Internet, although some postings do not contain the entire state's registry, but are postings by individual police jurisdictions of offenders in their jurisdiction.[18] In New Jersey, the first state to enact a Megan's Law, the people approved a new law on November 7, 2000, amending the New Jersey Constitution to allow the legislature to create an Internet

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14. A summary of the fifty states' registration statutes, state by state, is posted at http://www.klaaskids.org/pg-legmeg.htm. [hereinafter "Klaaskids.org"] (last visited Nov. 14, 2001).

15. Klaaskids.org, *supra* note 13.

16. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric,* 76 Ind. L.J. 315, 316 (Spring 2001); Comment, 2001 J.L. & Pol'y 879, 928.

17. Logan, *supra* note 6, at 603.

18. Http://www.parentsformeganslaw.com/ html/links/lasso, (last visited on November 29, 2001); see, e.g., Minn. Stat. 243.166(7) (state may make information on registrants out of compliance with registration laws available to public by "electronic, computerized, or other accessible means").

registry which could disclose the identify, specific whereabouts, physical characteristics and criminal history of sex offenders. Comment, 2001 J. L. & Policy 879, 928, fn. 110.

In sum, many states' sex offender registration laws contain the features which the Ninth Circuit in *Doe v. Otte* held created an affirmative disability and rendered the law excessive in relation to its purpose. Additionally, 28 states or local jurisdictions therein post registrant information on the Internet, a notification system which the Court in *Doe v. Otte* found punitive because it disseminated information beyond the local community, and 19 states disclose information about their registered sex offenders without an individualized risk assessment, as did Alaska. Thus, a decision by this Court regarding the extent to which the states have discretion to regulate sex offenders within their jurisdictions in order to ensure the public safety would resolve widespread questions regarding the constitutionality of the laws enacted by many of the states.

## III.

## THERE IS A SPLIT IN THE FEDERAL CIRCUITS AND STATE SUPREME COURTS REGARDING WHETHER RETROACTIVE APPLICATION OF SUCH LAWS VIOLATES THE EX POST FACTO CLAUSE

In contrast to the Ninth Circuit's ruling in *Doe v. Otte,* the vast majority of federal and state courts which have been confronted with the issue of the validity of sex offender registration and notification statutes found the laws did not violate the Ex Post Facto Clause.

In the most recent decision on this issue by a United States appellate court, *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000), the Tenth Circuit upheld the Utah sex offender registration and notification law against an ex post facto

challenge. Utah's statute was expressly retroactive and all the information in its sex offender registry was made public via the Internet. Reversing the district court, the Tenth Circuit noted that the lower court had placed undue emphasis on the apparent absence of procedural safeguards and potentially unlimited disclosure of the registry information over the Internet, ignoring this Court's specific disapproval in *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 493, 139 L. Ed.2d 450 (1997) of just such an approach, which placed undue emphasis on excessiveness. *Femedeer*, 227 F.3d at 1249-1250. The Tenth Circuit found that notification by itself did not prohibit sex offenders from pursuing any vocation or avocation available to other members of the public (*Femedeer*, 227 F.3d at 1250), in contrast to the Ninth Circuit's holding that public disclosure would likely make a sex offender "completely unemployable," creating an affirmative disability. *Doe v. Otte*, 259 F.3d at 988.

The Sixth Circuit held in *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) that the Tennessee sex offender registration and notification laws were not ex post facto. The Sixth Circuit utilized the two-part approach suggested by this Court in *Hudson v. United States*, 522 U.S. 93, 99 (the intent/effects test), and applied the factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144. In finding that the statute was not punitive in intent or effect, the Sixth Circuit observed that the registrant need only notify the registering authority where he lives, where he works, and other basic data; that he was free to live where he chose, to come and go as he pleased; and seek any employment he wished. The public notification provisions which allowed law enforcement to release registry information when necessary to protect the public, were not tantamount to imprisonment. This imposed no restraint whatever upon the activities of a registrant. *Cutshall* at 474-476. The fact that registrants were required to disclose employment information was a deterrent, but did not make the law punitive. *Cutshall* at 476, 480.

In *Russell v. Gregoire*, 124 F.3d 1079 it was held that Washington's registration and notification statutes were

intended to be regulatory, not punitive, and that the effect of those statutes was not so punitive as to overcome the clear regulatory intent; consequently, the laws did not violate the Ex Post Facto Clause. The Ninth Circuit in *Doe v. Otte* attempted to distinguish the Washington registration statute from Alaska's, but in fact there was no significant difference between Washington's registration law and Alaska's.[19/] The principal distinction between the two states' laws lay in the scope and method of notification: in Washington, the disclosing law enforcement agency needed some evidence of the offender's future dangerousness, risk of reoffense, or threat to the community to justify disclosure in a given case. *Russell,* 124 F.3d at 1082. Additionally, in Washington the police agency could disclose only information "relevant to and necessary for

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19. The only difference which the *Doe v. Otte* opinion noted between Washington's registration law and Alaska's was the frequency of registration. The *Russell* opinion did not discuss whether there was an annual reregistration requirement under the Washington law at that time. Washington's law, enacted in 1990, predated the Wetterling Act, which mandated annual updates of registration, but the Ninth Circuit in *Russell* noted it was construing the act as amended through 1996. *Russell,* 124 F.3d at 1081. In *Doe v. Otte,* the Ninth Circuit assumed that Washington required offenders to register only once unless they changed addresses. However, Alaska's law, as does Washington's today, conforms to the Wetterling requirement that offenders convicted of more serious ("aggravated") offenses, verify their addresses quarterly. (Wash. Rev. Code, §9A44.135(1)(b): sexually violent predators verify quarterly; other registrants verify addresses annually: Wash. Rev. Code, § 9A.44.135(1)(a); and see discussion *infra* at Section I). It was this quarterly verification registration requirement which the Ninth Circuit found so outrageous in *Doe v. Otte. Doe v. Otte*, 259 F.3d at 987 (quarterly reregistration "vastly more burdensome" than the registration scheme approved in *Russell v. Gregoire.*)

counteracting the offender's dangerousness," and the information could only be disseminated within a narrow geographical area. *Russell,* 124 F.3d at 1082. Additionally, the notification form used for notification about level three offenders (the most dangerous offender classification), which could be distributed to neighbors, schools, and the news media, did not contain the offender's exact address nor any information about the offender's employment. *Russell,* 124 F.3d at 1083.

Significantly, the Ninth Circuit in *Russell* analyzed the constitutional issue in part by examining this Court's opinion in *Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) ("Although we recognize that 'a civil label is not always dispositive,' we 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." *Hendricks*, 117 S.Ct. at 2082), while the Ninth Circuit panel which found the Alaska statute unconstitutional in *Doe v. Otte* virtually ignored that decision.[20] Although the Ninth Circuit in *Doe v. Otte*, in its third and final amended version of that opinion, purported to assess the Alaska law by requiring the "clearest proof" that the statute was so punitive in purpose or effect it negated the State's intent, the Court apparently ignored this Court's admonition in *Hendricks* that to prove that a civil proceeding imposes punishment is a heavy burden. *Hendricks,* 117 S.Ct. at 2082. The *Doe v. Otte* court also overlooked this Court's statement in *Hendricks,*

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20. In *Doe v. Otte* the Ninth Circuit cited *Hendricks* for the proposition that the federal appellate court need not defer to the highest state court on whether a state statute is punitive, but relied on *Hendricks* for little else. *Doe v. Otte,* 259 F.3d at 985, n.6. However, the Alaska Supreme Court never reviewed the issue here presented, although an Alaska appellate court had found Alaska's registration and notification laws were not ex post facto. *See Patterson v. State*, 985 P.2d 1007 (Alas. App. 1999).

which was observed in *Russell,* that simply because the statute imposes an affirmative disability or restraint, and even if it imposes a sanction traditionally regarded as punishment, these features do not necessarily override the statute's nonpunitive nature. *Russell,* 124 F.3d at 1086.

Other Circuits have also held that various state laws on registration and notification did not constitute punishment for purposes of the Ex Post Facto Clause. *Moore v. Avoyelles Correc. Ctr.*, 253 F.3d 870 (5th Cir. 2001) (notification); *Burr v. Snider,* 234 F.3d 1052 (8th Cir. 2000) (registration); *Doe v. Pataki,* 120 F.3d 1263 (2d Cir. 1997) (registration and notification); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (notification); *Roe v. Office of Adult Probation,* 125 F.3d 47, 53-55 (2d Cir. 1997) (notification); *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996) (registration). In comparison, on a related issue, the Second Circuit recently held that Connecticut's sex offender registration/notification law, which disseminated information over the Internet, violated the Due Process Clause. *Doe v. Lee,* ___ F.3d ___ (3d Cir. 2001), 2001 U.S. App. Lexis 22517.

Other federal cases finding such laws not ex post facto are *Corbin v. Chitwood*, 145 F.Supp.2d 92, 99 (D.Ct. Me. 2001) (notification); *Miller v. Taft*, 151 F.Supp.2d 922 (D.Ct. Ohio 2001) (registration and notification); *Lanni v. Engler*, 994 F. Supp. 849 (D. Mich. 1998) (registration and notification); *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998) (registration; but found notification too broad); *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996) (registration and notification).

The high courts of most states which have considered the issue have upheld their states' sex offender registration and/or notification laws against ex post facto challenges. *See, e.g., State ex rel. William Olivieri v. State of Louisiana*, 779 So.2d 735 (La. 2001) (notification); *State v. Haskell*, ___ A.2d ___, 2001 Me. Lexis 157 (Me. Nov. 5, 2001) (registration); *Helman v. State,* ___ A.2d ___, 2001 Del. Lexis 477 (Nov. 7, 2001) (registration and notification); *People v. Malchow,* 739 N.E.2d 433 (Ill. 2000) (notification); *Meinders v. Weber*, 604

N.W.2d 248 (S.D. 2000) (registration); *Hensler v. Cross*, ___ S.E.2d ___ (W.Va. Dec. 7, 2001), available at www.state.wv.us/wvsca/docs/fall01/29653.htm (registration and notification); *People v. Castellanos*, 982 P.2d 211 (Cal. 1999) (registration); *Kellar v. Fayetteville Police Department*, 5 S.W.3d 402 (Ark. 1999) (notification); *Commonwealth v. Gaffney*, 733 A.2d 616 (Pa. 1999) (registration); *Snyder v. State*, 912 P.2d 1127 (Wyo. 1996) (registration); *State v. Costello*, 643 A.2d 531 (N.H. 1994) (registration); *State v. Ward*, 869 P.2d 1062 (Wash. 1994) (registration); *State v. Noble*, 829 P.2d 1217 (Ariz. 1992); but cf. *State v. Bani*, 2001 Haw. Lexis 455 (Haw. Nov. 21, 2001) (Internet notification violates Hawaii's constitutional provision on procedural due process); *Doe v. Attorney Gen. (No. 2)*, 425 Mass. 217, 222, 680 N.E. 2d 92 (Mass. 1997) (portion of notification law held likely punitive for ex post facto double jeopardy purposes); *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (registration not punitive but notification law ex post facto).

Although respondents raised only an ex post facto challenge to Alaska's law, the issue of whether sex offender registration and notification constitute punishment is relevant in other constitutional contexts, such as under the Double Jeopardy and Due Process Clauses. See, e.g., *Hendricks*, 117 S.Ct. at 2081-2086 (Court used same test for Double Jeopardy and Ex Post Facto Clauses.) The Second Circuit recently used the intent-effects analysis to determine whether Connecticut's notification law violated the Due Process Clause, concluding the law was punitive under that test. *Doe v. Lee*, ___ F.3d ___, 2001 U.S. App. Lexis 22517. The Ninth Circuit reached the opposite conclusion in *Russell*, 124 F.3d 1079, finding Washington's registration and notification laws were not violative of due process. Thus, a decision by this Court resolving the issue in the ex post facto context may well resolve other constitutional challenges to sex offender registration and notification laws.

## CONCLUSION

For the foregoing reasons, amici respectfully request that this Court grant the petition for certiorari filed by the State of Alaska.

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