No. _____

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 A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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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?

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The amended opinion of the court of appeals (App. 1a) is reported at 259 F.3d 979. The initial opinion of the court of appeals (App. 33a) is reported at 248 F.3d 832. The orders of the district court (App. 69a, 118a) are unreported.

JURISDICTION

The court of appeals issued its initial decision on April 9, 2001. On July 24, 2001, and again on August 8, 2001, the court of appeals amended its decision. The court of appeals entered identical orders denying the state's petitions for rehearing *en banc* on August 23, 2001, and September 6, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, Section 10 of the Constitution provides: "No State shall . . . pass any . . . ex post facto law. . . ."

The Alaska sex offender registration law, Alaska Stat. §§ 12.63.010-12.63.100 and § 18.65.087, and pertinent Alaska regulations are reproduced in the Appendix (App. 125a).

STATEMENT OF THE CASE

A. Statutory Background

As of 1993, Alaska's rate of child sexual abuse was the highest in the nation and six times the national average; its rate of sexual assault was the second highest in the nation and had nearly doubled in the previous two years. *See Hearing on HB 69 before House State Affairs Committee*, 18th Alaska Legis., 1st Session (Feb. 2, 1993). In response to this crisis, Alaska's legislature in 1994 enacted the Alaska Sex Offender Registration Act.

When adopting the statute, the legislature announced that its purpose was to "protect[ ] the public from sex offenders." 1994 Alaska Sess. Laws ch. 41, § 1. In keeping with this remedial objective, the legislature required registration of sex offenders who had committed their offenses before the law's effective date. The only sex offenders who were exempt from registration were those who had only one felony conviction and who had been unconditionally discharged before July 1, 1984. *See* 1994 Alaska Sess. Laws ch. 41, § 12(a).

The statute has two principal components. First, it requires persons convicted of sex offenses (such as child kidnapping, felony sexual assaults, sexual abuse of a minor, and distribution of child pornography) to register with the state. Alaska Stat. §§ 12.63.010 (registration requirements); 12.63.100(6) (sex offenses covered). Incarcerated sex offenders must register with the Department of Corrections; otherwise, sex offenders must initially register "in person" at the Alaska state trooper post or municipal police department. Alaska Stat. § 12.63.010(b).

Persons convicted of the most serious sex offenses must provide "written verification" of the registration information four times a year for life, while other sex offenders must do so once a year for 15 years. Alaska Stat. § 12.63.010(d).

Second, the statute provides that the registration information be made available to the public, thereby accomplishing its central objective. The legislation established a central registry for sex offender information, to be maintained by the Alaska Department of Public Safety. Alaska Stat. § 18.65.087(a). The department has exercised its authorized discretion by publishing the information on the Internet, thereby facilitating public access to it.

B. Proceedings Below

Among the sex offenders who fell within the scope of the new law were John Doe I and John Doe II. Doe I had sexually abused his daughter for two years while she was between the ages of nine and eleven. For this crime, Doe I had been sentenced to eight years' imprisonment. He was released from prison in 1990. App. 4a. John Doe II had sexually abused his daughter when she was 14 years old. He, too, had been sentenced to eight years' imprisonment and was released from prison in 1990. *Id.*

The Does filed a civil suit in federal district court, arguing, among many other things, that the sex offender registration statute violated the *Ex Post Facto* Clause as applied to persons whose offenses were committed before the statute's effective date. In 1999, the district court

granted summary judgment in favor of the state on all of the Does' claims. App. 69a, 118a.

The Ninth Circuit Court of Appeals reversed, holding that the statute violates the *Ex Post Facto* Clause as applied to offenders who were convicted before the statute's effective date. In addressing the pivotal question whether Alaska's statute is punitive or remedial, the panel acknowledged (in both its initial and amended opinions) that if the legislature intended the statute to be civil in nature, the party challenging the statute must provide "the clearest proof" that the statutory scheme is so punitive that it should nevertheless "be considered to constitute punishment." App. 8a, 40a (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

In its original opinion, the court of appeals concluded that it was unclear whether the Alaska legislature intended the statute to be civil or criminal in nature. The court therefore declined to require the Does to provide the "clearest proof" and instead applied "ordinary and customary legal standards" to determine whether the effect of the Alaska statute is punitive. App. 46a-47a. After reviewing the seven factors identified by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Ninth Circuit found that "the Act's effect is sufficiently punitive" to be "classified as punishment for *Ex Post Facto* Clause purposes." App. 64a.

In concluding that the Alaska statute is punitive, the court of appeals relied in part on the supposed requirement that some offenders visit the police station in person four times a year to verify their registration information. App. 39a, 48a, 55a-56a, 63a-64a. The state

filed a petition for rehearing *en banc* which pointed out that Alaska's statute does not, in fact, require any offender to visit the police station "in person" to verify his registration information; the statute requires only "written verification." (The court read the statute as it did based entirely on an answer given by the state's attorney to a question posed at oral argument. App. 7a n.4.) The petition also challenged the court's view that the legislature's "intent" was ambiguous. The state observed that the Washington sexual offender registration statute deemed "remedial" in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub nom., Stearns v. Gregoire*, 523 U.S. 1007 (1998), shared the very structural features that were cited by the *Doe* court as proof of the ambiguity of the Alaska legislature's intent.

On August 8, 2001, the court of appeals issued an amended opinion, which acknowledged that Alaska's statute was "remarkably similar" in structure to the Washington law. The court accordingly held that the intent of the Alaska law is non-punitive, and that only the "clearest proof" of punitive effect could negate that intent. App. 12a-13a. The court nonetheless reached the same result as when it had declined to apply the "clearest proof" standard. (Indeed, the portion of the opinion applying the seven *Mendoza-Martinez* factors is copied from the original opinion almost verbatim.)

The court agreed that several factors militated in favor of finding the statute non-punitive. Historically, "sex offender registration and notification provisions have not been regarded as punishment"; the statute does not contain a *mens rea* requirement; and the statute has the non-punitive purpose of protecting public safety.

App. 18a-19a, 23a, 29a-30a. The court found, however, that several other factors not only outweighed those three factors, but also provided the "clearest proof" of punitive effect.

The court stated that "[t]wo factors, particularly, demonstrate" the punitive effect of the statute: the substantial disability it imposes and its purported excessiveness. App. 28a-29a. Regarding the former, the court (again) pointed to the supposed requirement that some offenders visit the police station in person four times a year to verify their registration information. The court also was troubled by the state's decision to post registration information on the Internet, which "exposes all registrants to world-wide obloquy and ostracism." *Id.* The court found the statute excessive because it relies on the offender's convictions as a conclusive measure of the risk posed by the offender, rather than requiring individualized assessments of risk. Thus, information on all sex offenders is "available world-wide on the internet without any restriction." App. 24a.

The state again petitioned for rehearing *en banc*, arguing, among other things, that the panel had erred by persisting in relying on the misstatement of the state's attorney. The petition for rehearing was denied. App. 123a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Erodes the States' Ability to Protect the Public From Sex Offenders

Every state in the nation has enacted a version of "Megan's Law," which requires convicted sex offenders

to register with the state and provides for the disclosure to the public of that information.[1]

The general objective of these laws is to limit recidivism by alerting the public to potential threats to public safety posed by convicted sex offenders. The universal adoption of sex offender registration laws reflects the important interests they serve and the states' belief in their efficacy.

These state registration and notification laws vary widely, both in what they require of offenders and in the means by which they make the registry's information available. In spite of the formal variation among state laws, the key features of Alaska's statute are neither unique to Alaska nor peripheral to the core objective of disseminating information about offenders.

Thus, Alaska is not alone in relying on prior convictions as the exclusive measure of the future risk posed by an offender. One recent survey of state laws identified 19 states that "require[] all offenders convicted of certain child or sex offenses specified by the legislature to register and undergo notification, without regard for risk of individual offender recidivism." Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603

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[1] *See Doe v. Dep't of Public Safety ex rel. Lee*, Nos. 01-7600, 01-7561, 2001 WL 1336037 (2d Cir. Oct. 19, 2001) (citing *Roe v. Farwell*, 999 F. Supp. 174, 177 n.1 (D. Mass. 1998); 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)).

(2000). Among these states are Illinois, Michigan, and Virginia.[2]

Nor is Alaska alone in using the Internet to facilitate public access to the registry. States that make sex offender information available on the Internet include Delaware, Georgia, Illinois, Kentucky, Michigan, Nebraska, North Carolina, South Carolina, Virginia, and West Virginia.[3]

And the number of states that make this information available on the Internet appears to be growing. *See* Note, *Megan's Law: Analysis on Whether It Is Constitutional to Notify the Public of Sex Offenders via the Internet*, J. Marshall J. Computer & Info. L. 1133, 1137 (1999) (identifying eight states that used the Internet for notification as of 1998).

By holding Alaska's version unconstitutional as applied to persons convicted prior to enactment, the Ninth Circuit has significantly restricted the means by which states in the Ninth Circuit, and possibly across the country, can enforce their laws.

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[2] Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev. 593, 603 n.39 (2000); *see also, e.g.*, 730 Ill. Comp. Stat. § 150/2 *et seq.*; Mich. Comp. Laws § 28.722 *et seq.*; Va. Code § 19.2-298.1.

[3] These states' sex offender registry sites are, respectively: <http://www.state.de.us/dsp/sexoff/index. htm>; <http://www.ganet.org/gbi/disclaim.html>; <http://samnet.isp.state.il.us/ispso2/sex-offenders/index.asp>; <http://kspsor.state.ky.us>; <http://www.mipsor.state.mi.us>; <http://www.nsp.state.ne.us/sor>; <http://sbi.jus.state.nc.us/sor>; <http://www.scattorneygeneral.com/public/registry.html>;<http://sex-offender.vsp.state.va.us>; <http://www.wvstatepolice.com/sexoff>.

II. The Decision Below Conflicts with a Decision of the Tenth Circuit

The Ninth Circuit's decision directly conflicts with the decision of the Tenth Circuit in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). In *Femedeer*, the Tenth Circuit considered a Utah sex offender registration statute that shares the two features principally relied upon by the Ninth Circuit as evidence that Alaska's statute is punitive. Like Alaska's statute, Utah's statute requires everyone convicted of a sex offense to register; it contains no mechanism for individualized assessment of risk. Utah Code § 77-27-21.5. And, like Alaska, Utah makes information from the sex offender registry available to the public on the Internet. *Femedeer*, 227 F.3d at 1247. As the court explained, in Utah, "[a]ccess to this information is not controlled in any way; anyone with access to the Internet can access all of the registry information, regardless of their place of residence or any other specific need." *Id.* But the Tenth Circuit held that neither of these features made the Utah statute punitive.

With respect to the first feature – the statute's lack of any mechanism for individualized risk assessment – the Tenth Circuit acknowledged that "[o]ther states have chosen to incorporate more defined risk assessment mechanisms into their sex offender registry and notification schemes." *Femedeer*, 227 F.3d at 1253. But the court said this feature of the Utah statute did not make the statute excessive in relation to its legitimate purpose. Rather, a statute's failure to "achieve[] a perfect fit between ends and means" does not necessarily make the statute punitive. *Id.*

With respect to the second feature – the state's use of the Internet to make sex offender information available to the public – the Tenth Circuit observed that "[d]issemination of information about criminal activity . . . has never been regarded as punishment when it is done in furtherance of a legitimate governmental interest." *Femedeer*, 227 F.3d at 1251. The use of the Internet, ruled the court, "works merely a technological extension, not a sea change, in our nation's long history of making information public regarding criminal offenses." *Id.* The court also rejected the notion that Internet publication imposes "excessive costs" on the offenders: "the farther removed one is from a sex offender's community and from Utah generally, the less likely one will be to have an interest in accessing this particular registry." *Id.* at 1253. In sum, the benefits of Internet notification "justif[y] the means employed." *Id.*

All told, the Tenth Circuit concluded that the evidence that Utah's statute was punitive "does not come even close to the 'clearest proof' necessary to overcome the civil intent of Utah's legislature." *Femedeer*, 227 F.3d at 1253. Not surprisingly, then, the Ninth Circuit explicitly acknowledged its differences with the Tenth Circuit. After pointing out a minor difference between Utah's notification mechanism and Alaska's notification mechanism, the Ninth Circuit said: "In any event, we respectfully disagree with the conclusions espoused by the Tenth Circuit in *Femedeer*." App. 25a n.11.[4]

[4] The Alaska and Utah statutes differ in that Utah's statute requires registration by those "found not guilty by reason of insanity" of sex offenses, while Alaska's does not. *Compare* Utah

Of course, the Ninth Circuit also relied on a third factor in declaring Alaska's law punitive: the supposed requirement that some sex offenders re-register "in person" at the police station four times a year. As noted above, however, Alaska's statute does not in fact require "in person" re-registration. Under the Alaska statute, the offender must register "in person" just once, when he is released from prison or enters the state. *See* Alaska Stat. § 12.63.010(b) (requiring registration "in person" at the nearest police station). After this initial registration, the offender is required only to provide quarterly or annual "written verification" of his registration information. Alaska Stat. § 12.63.010(d). *See also* 13 Alaska Admin. Code §§ 09.025, 09.030 (offender may be required to visit police station every five years to be re-photographed).[5]

Stat. § 77-27-21.5(1)(d)(iii) *with* Alaska Stat. § 12.63.100(3). The Ninth Circuit discussed this feature of the Alaska statute briefly, stating "this factor also provides support for the conclusion that the Act's effect is punitive." App. 23a. Even a cursory reading of the Ninth Circuit's opinion makes clear that this one difference between the statutes was not responsible for the different outcomes. And as the Ninth Circuit acknowledged, in Alaska, the defense of insanity is available only to the very rare offender who is unable to appreciate the basic "nature and quality" of his conduct, *e.g.*, is unable to appreciate that he engaged in sexual relations. *Id.* at 22a n.9. It is difficult to see how the Alaska statute's failure to cover sex offenders fitting within that small category makes the statute more punitive.

[5] The Ninth Circuit's decision in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), also conflicts with the decision by Alaska's intermediate appellate court in *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999). In *Patterson*, the court concluded that Alaska's statute did not violate the *Ex Post Facto* Clause. *Id.* at 1011-13. The Alaska Supreme Court is presently considering the *ex post facto* issue in a quartet of cases: *State v. Doe*, No. S-8972;

III. The Ninth Circuit Erred By Far Too Readily Disregarding the Legislature's Remedial Intent

The Ninth Circuit simply was wrong in concluding that Alaska's statute was dramatically different from, and dramatically more "punitive" than, sex offender registration statutes upheld in cases like *Russell*, 124 F.3d at 1087; *Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); and *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997), *cert. denied sub nom., Verniero v. W.P.*, 522 U.S. 1110 (1998). The factors relied upon by the Ninth Circuit for finding the Alaska statute punitive fall far short of overcoming the strong contrary presumption created by the legislature's intent to enact a remedial civil scheme.

Elmore v. State, No. S-9495; *Martin v. State*, No. S-10139; and *Doe v. State*, No. S-10338. This Court should not wait for the Alaska Supreme Court to decide these cases. First, giving the Alaska Supreme Court time to decide its cases will not materially aid this Court in resolving the issues presented in this petition. Though this Court would be bound by a state supreme court's construction of a state statute, the Court will not be bound by a state supreme court's conclusion as to whether the statute complies with federal constitutional law. *See O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Whether the statute requires quarterly in-person verification is not even an issue in the state cases. The Alaska statute is so clear and the Ninth Circuit's reading of the statute is so obviously at odds with the text that this Court should grant the petition at this time and then decide the constitutional issue. Second, the decisions by the Alaska Supreme Court, regardless of their outcomes, will not resolve the conflict between the Ninth and Tenth Circuits.

First, the Alaska legislature's decision to rely on past convictions as evidence of future dangerousness does not make Alaska's statute punitive. A wide array of remedial, civil statutes impose consequences on offenders exclusively on the basis of a past conviction, without any individualized risk assessment. Two obvious examples are statutes prohibiting the possession of firearms by convicted felons, *see, e.g.*, Alaska Stat. § 11.61.200, and statutes debarring convicted felons from the practice of medicine. *See Hawker v. New York*, 170 U.S. 189 (1898) (holding that use of felony conviction as conclusive evidence of unfitness to practice medicine not punitive).

Second, Alaska's use of the Internet to provide public access to information contained in the sex offender registry does not make Alaska's law punitive. The availability of sex offender information "world-wide" does not, as the Ninth Circuit ruled, make the statute "excessive in relation to the alternative purposes assigned." App. 23a-24a, 27a. Alaska makes the information available worldwide only because the best vehicle for providing *local* access – the worldwide web – necessarily facilitated wider access as well. An Internet provider does not have the option of providing content only to users whose computers are located within a particular geographical area. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 853-54 (1997). Not surprisingly, state and local governments routinely make information of purely local interest available "world-wide" on the Internet.

Further, there is no reason to suppose that the availability of sex offender information "world-wide" will have a significant impact on any sex offender. It is difficult to understand why anyone in, say, Florida or Brazil

would have an interest in the Alaska sex offender registry.

The court of appeals also was wrong to express concern about the ease with which local residents could access information through the Internet. *See* App. 14a, 16a, 24a. The very point of sex offender registration is to provide local residents with information necessary to enable them to protect themselves and their children from offenders. It does not make sense both to acknowledge the importance of this purpose and at the same time to argue that the efficient accomplishment of the purpose makes the sex offender registration act punitive.

In one very important sense, Internet notification is far less intrusive than vehicles chosen by some other states for facilitating public access to sex offender material. Though the state's use of the Internet makes the sex offender information readily available to those who pursue it, it makes the information available to no one else. As this Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. at 854, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." Of pornography, the Court said, "[t]hough such material is widely available, users seldom encounter such content accidentally." *Id.* The same is true of sex offender information. This makes Internet publication less intrusive than, say, mailing an information packet concerning the sex offender to everyone who lives within a certain distance of him. *See, e.g., E.B. v. Verniero*, 119 F.3d at 1088.

Finally, the Ninth Circuit's adoption of a verifiably false interpretation of Alaska's law, in reliance on a mistatement at oral argument, was manifestly in error. This Court long has recognized that questions of law should not be resolved on the basis of a stipulation of the parties. *See, e.g., Young v. United States*, 315 U.S. 257, 259 (1942); *Estate of Sanford v. Comm'r of Internal Revenue*, 308 U.S. 39, 50-51 (1939); *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281 (1917). Two factors make the court's reliance on the state's "concession" particularly inapt in this case. First, the state's "concession" obviously was not a product of deliberation; the "concession" was made at oral argument, in response to a judge's question concerning an aspect of the law that had not been addressed in the parties' briefs. Second, the state's error was brought to the court's attention *before* the court undertook the critical task of determining whether the statute's "effects" provided "the clearest proof" of a punitive end.

The requirement that some offenders provide quarterly *written* verification of their whereabouts is not so onerous as to make the act punitive. Quarterly reporting requirements are relatively common; perhaps the most well-known is the requirement that persons who are self-employed pay "estimated taxes" every three months. *See* 26 U.S.C. § 6654(c). Indeed, this Court has upheld quarterly reporting requirements even when the requirements affect the exercise of constitutional rights. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 900-01 (1992) (upholding statute that required abortion facilities to "file quarterly reports showing the number of abortions performed broken down by trimester"); *Buckley v. Valeo*, 424

U.S. 1, 62-64 (1976) (upholding statute that required candidates for public office to file quarterly reports identifying the sources of campaign contributions).

All told, the Ninth Circuit committed manifest error when it held that Alaska's sex offender registration statute violates the *Ex Post Facto* Clause. Given the importance of the issue and the conflict among the circuits that the Ninth Circuit's decision creates, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 21, 2001