No. 01-729

In The

Supreme Court of the United States

RONALD L. OTTE and BRUCE 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

BRIEF IN OPPOSITION

VERNE E. RUPRIGHT
Counsel of Record
Rupright & Foster
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

DARRYL L. THOMPSON
DARRYL L. THOMPSON, P.C.
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES - Continued

Regulations

Statutes

TABLE OF AUTHORITIES - Continued

Alaska Court Rules

BRIEF IN OPPOSITION

Respondents ["the Does"] respectfully request that this Court deny the petition for writ of certiorari because petitioners have failed to show compelling reasons, meeting the criteria listed in this Court's Rule 10, that justifies the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE

A. Introduction.

Article I, Section 12, of the Alaska Constitution accords the Does the right to rehabilitate and reintegrate with all the attendant rights possessed by any other member of the public. *Abraham v. Alaska*, 585 P.2d 526, 531 (Alaska 1978). This right is protected by the Due Process Clause of the 14th Amendment. *Ferguson v. State, Dept. of Corrections*, 816 P.2d 134, 139 (Alaska 1991).

In 1985, Doe I entered a plea of nolo contendere to a charge of intra-family sexual abuse. *Doe v. Otte*, 259 F.3d 979, 983 (9th Cir. 2001); *Pet. App. at 4a.* He was released from prison in 1990. *Id.* After his release, a state court determined that he was successfully rehabilitated and granted him custody of his minor daughter. *Id.* The state court's determination was based, in part, on psychiatric evaluations concluding that Doe I was "a very low risk for re-offending" and is "not a pedophile." *Id.* He remarried, and is a productive member of the community. *Id.*

Doe II was convicted via a nolo contendere plea in 1984. *Doe*, 259 F.3d at 983, *Pet. App. at 4a.* He was convicted of sexual abuse of a 14 year old child and was

released from prison in 1990. *Id.* After his release, he successfully completed a two-year program for treatment of sex offenders. *Id.*

Notwithstanding the Does right to reintegrate and regain the respect, rather than the fear and loathing of their fellow citizens[1], and notwithstanding the fact that the Does were rehabilitated and reintegrated, the Alaska legislature concluded that certain reintegrated prior-offenders were dangerous and should be supervised for life. Petitioners admit, the past conviction operates as conclusive proof of future dangerousness and the need for a lifetime registration requirement. *Pet. at 13.* Petitioners contend that imposition of this lifetime registration and public notification requirement, based only on a past conviction is regulatory. *Pet. App. at 79a.* Petitioners, however, have never been able to identify exactly what activity they are regulating. *Resp. App. at 7a.*

The Does argue that the Ninth Circuit court of appeals properly applied well established law and concluded the ASORA was excessive in light of its purported regulatory purpose, and that retroactive application of the ASORA violates the Ex Post Facto Clause. *Doe*, 259 F.3d at 993-994, *Pet. App. at 28a - 29a.*. Petitioners now seek a writ of certiorari from this Court. In doing so, they have completely failed to demonstrate the existence of any compelling reason why a writ should issue.

---

[1]. *Abraham v. Alaska*, 585 P.2d at 531.

B. The Alaska Sex Offender Registration Act ["ASORA"].

The ASORA was first passed by the Alaska legislature in 1994. *§ 1 ch. 41 SLA 1994*; Ak. *Stat. 12.63.010 (1994).* This version required previously convicted offenders to register with, and periodically report to the authorities. It also required registrants to immediately report any change in residence, and to update their registration information once per year. *Ak. Stat. 12.63.010(c) & (d) (1994).* Application of the ASORA's provisions are triggered solely by the prior conviction. *Ak. Stat. 12.63.100 (1994).*

Alaska created a central registry of sex offenders. *Ak. Stat. 18.65.087 (1994).* All information obtained during the registration process is kept in this central registry, and the offender's name, current address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, and length of sentence was available on demand to the general public.[2] *Ak. Stat. 18.65.087(b) (1994)*.

The legislature placed these new disabilities in Title 12 of the Alaska Statutes, which contains Alaska's

---

[2]. Under the 1994 version, a specific demand for information was required, but under the 1998 amendments, Alaska published all of the information on the Internet. *See*, Internet Address: *http://www.dps.state.ak.us/Sorcr.* This site is maintained by the State of Alaska, Department of Public Safety.

criminal procedure and sentencing provisions. Moreover, it amended Rules 32 and 11 of the Alaska Rules of Criminal Procedure. Criminal Rule 11 was amended to require the duty to register be a "written" part of any plea agreement involving a sexual offense. Criminal Rule 32(b) was amended by requiring the duty to register to be a "written" part of any sentence imposed for a sex offense. The legislature intended that the ASORA apply retroactively to offenses committed prior to the effective date. *§ 12(a) ch. 41 SLA 1994.*

In 1998, the legislature made sweeping changes to the ASORA and related criminal statutes. In amending the ASORA, the legislature created a new offense for failure to register, and increased the classification of that offense from a misdemeanor to a felony. *Ak. Stat. 11.56.835 (1998).* The legislature also added those persons convicted of child kidnaping as persons who would be required to register under the ASORA. *Ak. Stat. 12.63.010(a) (1998).*

The 1998 amendments increased the amount of information to be collected and disclosed by an offender. *Ak. Stat. 12.63.010 (1998).* It also increased the length of the reporting requirement -- for some offenders, including the Does, from 15 years to life. *Ak. Stat. 12.63.010(d)(2) (1998).* Additionally, the amendments increased the frequency with which an offender must re-register. For persons required to register for life, re-

registration must occur four times per year. *Id.*[3] During each quarterly re-registration, the same information must be collected and provided, even if there are no changes in the information. *Id.*

C. Proceedings Below.

In 1994, the Does filed a complaint seeking injunctive relief and a declaratory judgment pursuant to *28 U.S.C. § 1343(3), 42 U.S.C. § 1983* and *28 U.S.C. § 2201. Pet. App. A-74a.* The district court granted a preliminary injunction, which required the Does' registration but precluded release of registration information. *Rowe v. Burton*, 884 F.Supp. 1372, 1385 (D. Alaska 1994). The Does also sought leave to proceed under pseudonyms, which leave was denied. *Rowe*, 884 F.Supp. at 1388. The Does successfully appealed that part of the district court's decision denying leave to proceed under pseudonym. *Pet. App. at 74a, fn. 15.*

In July 1998, petitioners filed a motion for summary judgment. *Pet. App. at 75a-76a.* The Does opposed and filed a cross-motion. *Id.* Petitioners made

---

[3]. Under the 1994 version of the ASORA, the Does were required to register for a period of 15 years, and re-register once per year. Under the 1998 version, the Does are required to register for life, and re-register four times per year.

no attempt to support any statement of fact with evidence.[4]

The Does submitted several affidavits supporting the excessive and punitive nature of the ASORA. *Pet. App. at 14a-15a, 107a. Id.* at *107a fn. 25.* One affidavit was from a former Alaska field service probation officer who compared the ASORA to other forms of criminal supervision under Alaska Law, e.g., probation, mandatory parole, and discretionary parole, and who concluded that the ASORA was nothing more than a disguised form of supervision. She also provided uncontested proof that prior offenders were losing employment and housing opportunities because the State published their names, addresses and places of employment on the World Wide Web. The State never contested any of the Does' evidence. In fact, the Ninth Circuit recognized that the Doe's evidence was "uncontradicted." *Doe*, 259 F.3d at 994, *Pet. App. at 28a.*

In 1999, the district court granted petitioners' motion for summary judgment. *Pet. App. at 69a, 118a.*

---

[4]. Petitioners make numerous representations of fact in their petition to this Court, which are unsupported by any evidence, either in the record before the district or appellate court, or in their appendix. *E.g., Pet. at 2-3.* Apparently, petitioners believe they need not support facts with evidence, and the Court should believe every word they say; at least, until they later say they were mistaken, in which case they maintain if the Court were to believe them it would constitute reversible error. *Pet., at 15.*

In doing so, the district court considered the 1998 amendments, enacted during the course of the litigation. *Pet. App. at 70a, fn. 3.* The Does appealed that decision, and the Ninth Circuit reversed. *Doe,* 259 F.3d at 993-995; *Pet. App. at 1a.*. Petitioners now seek a writ of certiorari.

D. The Ninth Circuit's Decision

In considering whether the ASORA was punishment for purposes of Ex Post Facto analysis, the Ninth Circuit applied the "intent-effects test." *Doe,* 259 F.3d at 984-985; *Pet. App. at 8a -9a.* In doing so, the panel considered the ASORA as a whole -- it did not separate the registration and public notification provisions. *Id.* It did so because the ASORA was enacted as a single piece of legislation, the Alaska Court of Appeals had previously applied the test to the ASORA as a whole, and the parties agreed that a unitary analysis was appropriate. *Doe,* at 985; *Pet. App. at 9a.*

In applying the "intent-effects test", the Ninth Circuit first examined the structure and design of the ASORA and concluded that the ASORA had a non-punitive intent. *Doe,* 259 F.3d at 986; *Pet. App. at 10a - 12a.*. In considering the ASORA's effect, the panel applied the seven factors enumerated in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963). *Doe,* 259 F.3d at 986; *Pet. App. at 12a - 27a.* The panel concluded that the Does had shown by the "clearest proof" that

notwithstanding the legislature's non-punitive intent, the ASORA should be classified as punitive for Ex Post Facto purposes. *Doe*, at 993-994; *Pet. App. at 28a.*. The panel held that four of the seven *Kennedy* factors compelled this result. *Id.* Although there were other issues raised in the appeal, the panel held it did not have to consider other arguments because the Ex Post Facto Clause barred application of the ASORA to Doe I and Doe II. *Doe*, 259 F.3d at 995; *Pet. App. at 31a.* Thus, Jane Doe received all of the relief she sought. *Id.*

REASONS FOR DENYING THE PETITION

I. Summary of argument.

Rule 14(1)(h) of this Court's rules of procedure requires a direct and concise argument discussing the factors listed in this Court's Rule 10, which a petitioner contends counsel in favor of granting the petition. Petitioners fail to recognize the existence of Rule 10, and they have failed to provide a direct and concise discussion of reasons warranting allowance of the writ. *See, Pet., generally.*

Petitioners' failure to consider this Court's Rule 10 and the factors listed therein resulted in a petition that is devoid of merit. *Pet. generally.* This is so, because the Ninth Circuit's decision does not erode the State's ability to protect its citizens. *Pet. at 6.* Rather, it requires petitioners to protect the rights of reintegrated, prior offenders and their families, who are also productive

citizens of the State. Moreover, petitioners' complaint about an alleged misstatement of Alaska law likewise lacks merit. *Pet. at 11.* This is because, even if it were true, the error would not change the result and harmless error does not represent important and compelling reasons justifying an exercise of this Court's discretionary jurisdiction. *Sup. Ct. R. 10.* Finally, petitioners' contention that a conflict exists between the Tenth and Ninth Circuits is also without merit. *Pet. at 9.* This is so because no conflict exists. It is also true because petitioners have failed to show that two circuit courts have applied or interpreted the same body of federal law differently. *Pet. generally.* At most, all petitioners have done is allege that either the Ninth or the Tenth Circuit misapplied a properly stated rule of law, but that is not grounds for issuance of a writ. *Sup. Ct. R. 10.*

II. The Petitioners' Lament Over An Admission Made During Oral Argument.

Petitioners' basic complaint is that the Ninth Circuit adopted a "verifiably false interpretation of Alaska's law" when it relied on counsel's statements at oral argument. *Pet. at 11, 15.*. Notably, petitioners made this same complaint in seeking rehearing, and in suggesting rehearing *en banc*, both of which were

denied.[5] *Pet. App. at 123a.*. There are two reasons why petitioners' complaint about this alleged misstatement fails to meet the compelling reasons test envisioned by this Court's Rule 10.

First, it was not a misstatement of Alaska law. Petitioners, through counsel, told the Ninth Circuit that under current law the Does could be required to report four times per year to the local police station. *Resp. App. at 4a.* Under current law, that could in fact be the case. *Ak. Stat. 12.63.010(d)(2) (1998).* The particular provision says that a registrant will register four times per year for the rest of his/her life, "in the manner required by the department." *Id.* Hence, the department could require in person reporting if it chose to do so. Indeed, in exercising the unfettered discretion vested by the statute, petitioners could even decide to verify employment by meeting the registrant at his place of employment and requiring the form be filled out and sworn to in front of an officer. Or, the same could be true for the registrant's home. The point being, the statute does not limit the procedures to be employed, and it provides no safeguards to protect registrants.

---

[5]. Although petitioners have previously complained about this alleged misstatement they have never provided a transcript of that statement so it could be viewed within the context in which it was made. Respondents provide that transcript. *Respondents' Appendix. 1a.*.

In an attempt to show that counsel's admission was a misstatement of the law, petitioners ignore the statute and cite to a regulation. *Pet. at 11, citing 13 Alaska Admin. Code §§ 09.025, 09.030.* The fatal flaw in this argument is that in applying the "intent-effects" test, the Ninth Circuit was required to, and did in fact, examine the ASORA on its face. *U.S. v. Ward*, 448 U.S. 240, 248 (1980). It was not required to look to the manner in which petitioners applied the ASORA[6]. *Seling v. Young*, 531 U.S. 250, 263 (2001). In properly applying decisions from this Court, and in examining the ASORA on its face, the particular provision allows unfettered discretion. It clearly allows an interpretation that would require in person reporting four times per year. *Ak. Stat. 12.63.010(d)(2) (1998).* That being the case, the statement was not a misstatement, and the Ninth Circuit did not adopt a "verifiably false interpretation of Alaska's law". *Pet. at 11, 15..*

Second, petitioners' argument has no merit because even if counsel made a misstatement of Alaska

---

[6]. In fact, even the Alaska Supreme Court has held that it is improper to consider an administrative interpretation adopted during the course of litigation when interpreting a statute. *See, Totemoff v. State*, 905 P.2d 954, 967 (Alaska 1995). Lower federal court's have similarly so held. *See, Lewis v. Grinker*, 965 F.2d 1206, 1220 (2nd Cir. 1992), *citing, Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

law, it was a harmless error - it would not change the result reached by the Ninth Circuit. *Pet. App. 1a.* This is so because in concluding that retroactive application of the ASORA violated the Ex Post Facto Clause, the court of appeals considered both the registration and public notification provisions as a whole, not just the registration aspect. *Doe*, 259 F.3d at 985, *Pet. App. at 9a.*

If, as petitioners contend, the in person reporting requirement was a misstatement of Alaska law, that small section of the ASORA relates only to registration - it has nothing to do with the excessive nature of the other registration provisions or the public notification requirements. *Doe*, 259 F.3d at 993, *Pet. App. at 28a - 29a.* That being true, any alleged error in relying on petitioners' concession would not change the fact that many other provisions, including the public notification provisions and the lack of an escape mechanism, also make the ASORA excessive in light of its purported regulatory purpose. *Id.* Moreover, it does not change the fact that one of the many reasons supporting the finding that the ASORA was excessive in relation to its purported regulatory purpose was that it lacked any procedures for making individual risk assessments before its onerous provisions were applied to reintegrated Alaska citizens. *Doe*, 259 F.3d at 992; *Pet. App. at 25a - 26a.*

As the court of appeals correctly held, nearly every sex offender registration and notification law that has been upheld tailored the provisions of the statute to the actual risk posed by the individual offender. *Id.* As petitioners admit, Alaska does not seek to determine individual risk. *Resp. App. at 9a.* Rather Alaska requires the reintegrated, rehabilitated offender to collect all of the necessary information, provide it to petitioners, who then posts that information on the World Wide Web. By doing so, petitioners are telling everyone that the reintegrated offender is dangerous. Although petitioners contend it is impossible to predict future dangerousness[7], by labeling a reintegrated, rehabilitated individual a "sex offender" and by publishing his picture and private information in a public database, petitioners have told the public the individual is dangerous. As petitioners admit, they have made this prediction without any proof of present day dangerousness. *Resp. App. at 9a.*

Clearly, even if there was a misstatement of Alaska law, it does not rise to the level of reversible error -- the error was harmless. Harmless error does not constitute sufficiently compelling reasons to support a petition for writ of certiorari and petitioners' argument to the contrary has no merit.

---

[7]. *See, Resp. App. at 9a.*

III. The Ninth Circuit's decision does not erode Alaska's ability to protect the public from sex offenders.

Lacking a cogent argument meeting the criteria of this Court's Rule 10, petitioners choose to rely on a confusing policy argument, which, in essence, seeks an exception to the prohibition on passage of Ex Post Facto Laws. *Pet. at 6 - 8.* Indeed, petitioners do not argue that the Ninth Circuit applied the wrong test, or that it misinterpreted decisions from this Court. *Id.* Rather petitioners argue that in protecting the rights of the Does, the Ninth Circuit has significantly restricted the means by which states in the Ninth Circuit can enforce their laws. *Pet. at 8.* This argument has no merit whatsoever because it is not the Ninth Circuit that prohibits retroactive application of punitive legislation; rather, it is the Ex Post Facto Clause that does so.

It is true, that by holding retroactive application of the ASORA unconstitutional, the Ninth Circuit has restricted Alaska's ability to retroactively apply certain laws. *Pet. at 8.* However, requiring Alaska to follow the Constitution of the United States and prohibiting Alaska from violating the Ex Post Facto Clause is not unreasonable; it is mandated by over 200 years of history. *See E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810), *Calder v. Bull*, 3 U.S. (3 Dall) 386, 391 (1798).

It is not true that the Ninth Circuit has restricted the means by which all states within the Circuit may enforce their laws. *Pet. at 8.* In fact, in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied sub non., Stearns v. Gregoire*, 523 U.S. 1007 (1998), the Ninth Circuit rejected an Ex Post Facto challenge to the State of Washington's SORA. Considering *Russell and Doe*, all the Ninth Circuit has done is provide a guideline for the states in the Ninth Circuit to follow when enacting registration and notification statutes. If, as in *Russell*, the statutes are narrowly tailored and minimally intrusive, they will be upheld. If, however, as in *Doe*, the statutes are not narrowly tailored to the purported regulatory purpose, they will not withstand constitutional challenge. This is consistent with decisions from this Court. *See, NAACP v. Alabama*, 377 U.S. 288, 303-304 (1964).

In *NAACP*, this Court held that where exercise of the state's regulatory power infringes on protected freedoms, the means employed must be narrowly tailored. *Id.* Clearly, all the Ninth Circuit has done is hold petitioners to established standards set down by this Court, and held that Alaska's law could not be upheld because it was excessive in relation to its purported regulatory purpose. *Doe*, 259 F.3d at 991-992; Pet. App. at 24a - 27a.

Petitioners admitted before the Ninth Circuit that the provisions of the ASORA were much more onerous than the provisions of the Washington SORA. *Resp. App. at 3a - 4a.* When asked whether the panel was correct in determining that the Washington SORA was much less broad, and that the ASORA was much more excessive, petitioners responded by telling the panel they were correct in that analysis. *Resp. App. at 4a.* Moreover, petitioners told the panel that one of the significant differences between the Washington SORA and the ASORA was that Alaska makes no attempt to predict the risk posed by the individual offender, it just treats all persons previously convicted as presently posing a danger. *Resp. App. at 5a.* Here, petitioners argue that the Ninth Circuit's decision is going to restrict the manner in which states may enforce their laws, but that is simply not true. It is not true because, as petitioners admitted before the Ninth Circuit, no other state has a law that closely resembles the ASORA.. *Resp. App. at 7a.*

IV. The Ninth Circuit's decision in not in conflict with a decision from the Tenth Circuit.

Petitioners erroneously contend that the Ninth Circuit's decision conflicts with the Tenth Circuit's decision in *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000). *Pet. at 9 - 11.* This contention is unconvincing because the Ninth Circuit properly applied the "intent-

effects" test to Alaska law, while the Tenth Circuit applied the same test to Utah law. Application of the same body of federal law to a different set of facts or different state statutes does not constitute the type of conflict envisioned by this Court's Rule 10.

In seeking to determine whether the particular Act in question was "so punitive either in purpose or effect" that it should be considered to constitute punishment, both the Tenth and the Ninth Circuit applied the seven factors enumerated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-169. *Doe*, 259 F.3d at 984; *Pet. App. at 8a.*, *Femedeer*, 227 F.3d at 1248-1249. Each Court was applying this test to a different set of facts and a different appellate record. Petitioners make no assertion that the Ninth Circuit misapplied these factors, or that the Tenth Circuit relied on some properly interpreted body of federal law that the Ninth Circuit failed to consider. Rather, petitioners merely argue that in applying the same body of federal law to a different set of facts, each Court reached a different conclusion. That should certainly not be surprising, but it remains that proper application of the same body of federal law by two different appellate courts to two different sets of facts or to two different state statutes does not constitute a conflict between the Circuits. *See E.g., Weisgram v. Marley Co.*, 528 U.S. 440, 446 (2000), [conflict where federal rule was interpreted different by two or more

Circuit Courts]; *Drye v. U.S.*, 528 U.S. 49, 54 (1999), [conflict where prior decisions from this Court have been interpreted differently by the Circuits]; *and see, Curry v. Baker* 479 U.S. 1301, 1302 (1986), [no conflict where cases present unique facts closely tied to a specific State law].

Clearly, petitioners' request for relief does not meet this Court's Rule 10 test for conflict between the Circuits. As envisioned by the Rule 10, issuance of the writ is warranted if a court of appeals has rendered a decision on federal law that is in conflict with the decision of another United States court of appeals on the same body of federal law. There is clearly no conflict between courts in this case, because both the Ninth and Tenth circuits properly interpreted and applied the same body of federal law.

Petitioners are also wrong because the Ninth Circuit specifically distinguished this case from *Femedeer. Doe*, 259 F.3d at 992, fn. 11. In so doing, the Ninth Circuit concluded that *Femedeer* was distinguishable because "[u]nlike the Alaska statute ... the Utah database does not include employer names and addresses, and thus does not place the sex offenders' current employment in direct jeopardy." *Id.* Indeed, in upholding the Utah statute, the Tenth Circuit concluded that "notification does not by itself prohibit sex offenders from pursuing any vocation or avocation" because the

name of the employer and place of employment were not listed on the database. *Femedeer*, 227 F.3d at 1247, 1250.

The Ninth Circuit had evidence before it that constituted the "clearest proof" that employment was not only put in jeopardy, but opportunities were lost due to the public notification in Alaska. *Doe*, 259 F.3d at 987-988. No such evidence could have been before the Tenth Circuit because employer information was not included on the database. *Femedeer*, 227 F.3d at 1247, 1250.

The Ninth Circuit further distinguished Alaska's statutory scheme from Utah's by finding that Alaska's only applies to those found guilty of a sex offense, while Utah's applied to persons civilly committed or found not guilty by reason of insanity. *Doe*, at 991; *Femedeer*, 227 F.3d at 1251-1252. This finding was directly supported by petitioners admission that Alaska's statutory scheme was unique, and that it was excessive in light of other state registration and public notification laws. *Pet. App. at 4a, 7a.*

There is no conflict between the Tenth and Ninth Circuits, and certainly not the type of conflict envisioned by this Court's Rule 10. That being the case, there are no grounds for issuance of the requested writ.

V. The Ninth Circuit did not err by disregarding the Legislature's remedial intent.

Petitioners complain that the Ninth Circuit was simply wrong in concluding that the ASORA was different from, and more punitive than registration and public notification laws enacted by other states. *Pet. at 12-16.* At the risk of being redundant, respondents are again compelled to point out that petitioners' argument has no merit and the reasons asserted therein do not fit within the well defined tests enumerated in this Court's Rule 10.

First, the Alaska legislature's decision to rely solely on the past conviction as evidence of future dangerousness is contrary to decisions from this Court. *Pet. at 13.* Although cited by petitioners in briefing before the Ninth Circuit, petitioners ignore this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 360-362, (1997), wherein this Court upheld Kansas civil commitment provisions, in part, because it did not rely exclusively on the past conviction as evidence of future dangerousness. *Id.* The rationale of *Hendricks* is that if the past conviction is used as conclusive proof of future dangerousness, without any procedural protections, the particular state provisions will not pass constitutional muster. *Id.* Hence, petitioners are simply wrong to conclude that Alaska may do what other states may not

do. The federal constitutional applies to all states, and Alaska is not exempt for its requirements.

Petitioners are also wrong to rely on cases such as *Hawker v. New York*, 170 U.S. 189 (1898) to support the proposition that the prior conviction can be used as conclusive proof of future dangerousness. *Pet. at 13.* This is so, because the central premise in *Hawker* and its progeny is that the government may regulate a specific activity and bar felons from participating if relevant past conduct shows an unfitness to participate. Here, petitioners are not regulating a specific activity; rather, petitioners are compelling action on the part of a reintegrated, rehabilitated prior offender by requiring him to gather and collate information and neatly package that information so petitioners can disseminate it to the public with a warning that the individual presently presents a danger. Nothing in *Hawker* could fairly be read to authorize such punitive measures.

Additionally, *Hawker* and its progeny are clearly distinguishable because laws, such as those before the Court in *Hawker,* have no effect on the individual unless the individual seeks to participate in the activity being regulated. If, the individual does not seek to participate, he will never feel the effect of the law. Here, the ASORA goes directly to the individual and compels action, e.g., gathering and collating otherwise private information, without any activity participation required to trigger its

effects and application. *See, Pet. at 15.* Hence, petitioners' reliance on *Hawker*, and on laws that regulate business, etc., is misplaced. *Id.*

Moreover, petitioners' argument ignores this Court's reasoning in *Flemming v. Nestor*, 363 U.S. 603, 612-616 (1960) wherein this Court held that focusing on an activity from which an offender should be barred because of relevant past conduct is appropriate; but focusing on the person or persons to be barred presumes punitive intent. *Id.* Here, the ASORA does not bar participation in any activity that the state has the power to regulate; rather, it is aimed at the class of persons to whom the ASORA applies. *Id., Resp. App. at 8a - 9a.* The danger posed by laws which seek to regulate the person, rather than an activity from which the person should be barred, was best expressed in a recent decision from the Massachusetts Supreme Court. In *Doe v. Attorney General*, 715 N.E.2d 37, 43 (Mass. 1999), the Massachusetts Court said:

> Registration--the requirement that a citizen regularly report to the police for an extended term of years--engages serious liberty interests, and presents an "importantly distinct kind of constitutional danger. It is a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons

> not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Id., [citations omitted]. Clearly, petitioners' reliance on *Hawker* and its progeny is woefully misplaced because the ASORA does not regulate an activity from which the Does should be barred because of relevant past conduct.

Next, petitioners argue that use of the Internet to allow the public access to public information does not make Alaska's law punitive. *Pet. at 13.* But, Alaska does much more than make information available. *Resp. App. at 5a.* Alaska forces its reintegrated citizens to compile the information and provide information that is otherwise private, e.g., place of employment, name of employer, home address, vehicle description, etc. *Id.* Publication of this information makes it nearly impossible for fully reintegrated citizens to obtain and maintain employment. *Doe*, 259 F.3d at 987. Petitioners' argument ignores all of these realities and oversimplifies their case regarding Internet publication. Moreover, it also ignores this Court's characterization of the Internet as a technological advancement that allows a person to become a town crier with a voice that

resonates farther than it could from any historial soapbox. Reno v. A.C.L.U., 521 U.S. 844, 869 (1997).

Petitioners' argument regarding use of the Internet is deceptive because it suggests that all they do is make the otherwise available information more readily available. *Pet. at 13-14.* But, if that is really the case then the petition for writ of certiorari is an exercise in futility because the ASORA is completely unnecessary. Why have a law that compels previously convicted and now reintegrated offenders to compile information and report that information four times per year, if the information is already available? Doesn't the simple fact that the ASORA compels the doing of an unnecessary act compel the conclusion that it is excessive in relation to its purported regulatory purpose? Wouldn't that fact alone indicate the ASORA is nothing more than a penal measure dressed in civil clothing?

The fact is, the ASORA compels compilation by certain of its reintegrated citizens because it does not have ready access and when petitioners publish that information they are telling the public these individuals are dangerous. *Pet. at 13-14.* Moreover, contrary to their suggestion, that they are merely making information available [*Id.*], they tell the public to either use that information or be subject to criminal penalties. As an example, failure to use the information could result in a charge of endangering the welfare of a child *Ak. Stat.*

11.51.100(a)(2)(A), or a finding of a child in need of aid *Ak. Stat. 47.10.011(7), or an* allegation of misrepresentation in a real property transfer. *Ak. Stat. 34.70.050.* Although they tell the public to use the information, they have not enacted any penalties for misuse of that information.

Unquestionably, petitioners suggestion that publication of the information on the Internet merely makes otherwise available information, more readily available is simply not true. More importantly, the argument simply does not and could not meet the criteria listed in this Court's Rule 10. Consequently, petitioners have failed to show why that argument justifies the grant of a writ of certiorari.

CONCLUSION

The petitioners having failed to identify any compelling reason to justify this Court's exercise of its discretionary jurisdiction, the request for a writ of certiorari must be denied.

RESPECTFULLY SUBMITTED;

VERNE E. RUPRIGHT
Counsel of Record
Rupright & Foster, LLC
322 Main Street
Wasilla, Alaska 99654
Ph: (907) 373-3215
Fax: (907) 373-3217

DARRYL L. THOMPSON
DARRYL L. THOMPSON, P.C.
841 I Street
Anchorage, Alaska 99501
Ph: (907) 272-9322
Fax: (907) 277-1373