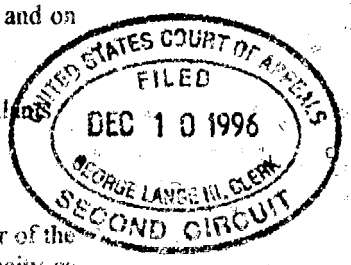
APPELLEE'S BRIEF

96-6249/6269

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN DOE, RICHARD ROE and SAMUEL POE, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees-Cross-Appellants



- against -

HON. GEORGE E. PATAKI, in his official capacity as Governor of the State of New York; PAUL SHECHTMAN, in his official capacity as Commissioner of the New York State Department of Criminal Justice Services; THE NEW YORK STATE DEPARTMENT OF CRIMINAL JUSTICE SERVICES; BRION TRAVIS, in his official capacity as Chairman of the New York State Board of Parole; THE NEW YORK STATE DIVISION OF PAROLE; GEORGE SANCHEZ, in his official capacity as Commissioner of the New York State Division of Probation; THE NEW YORK STATE DIVISION OF PROBATION; ELIZABETH M. DEVANE, in her official capacity as Chairperson of the New York Board of Examiners of Sex Offenders; THE NEW YORK STATE BOARD OF EXAMINERS OF SEX OFFENDERS,

Defendants-Appellants

BRIEF FOR APPELLEES-CROSS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs-Appellees-Cross-Appellants submit this brief in the above-captioned case, which plaintiffs brought on behalf of similarly-situated convicted sex offenders to challenge the retroactive application of New York's Sex Offender Registration Act (the "Act"). The United States District Court for the Southern District of New York (Chin, J.) enjoined retroactive application of the Act's community notification provisions on the ground that it would violate the Ex Post Facto Clause of the United States Constitution.

Judge Chin's analysis reflected governing principles from relevant Supreme Court cases as well as tests that have been commonly applied in notification decisions by other courts. He followed a four-part analysis that assessed the 1) purpose of the legislature; 2) the design of the statute; 3) the historical role of public notification as punishment; and 4) the effects of the law on persons subject to notification. Applying these tests, each of which had sub-parts, to the largely uncontested facts in the record, Judge Chin correctly concluded that retroactive application of the statute imposed added punishment in violation of the Ex Post Facto Clause. Plaintiffs support affirmance of this ruling. Applying the same test, Judge Chin upheld the registration duties imposed by the Act against an ex post facto challenge. Plaintiffs appeal from this portion of his decision.

STATEMENT OF FACTS

Overview of the Statute

New York's Sex Offender Registration Act, popularly known as "Megan's law," and technically as Article 6-C of the Correction Law, became effective on January 21, 1996. In a nutshell, the law requires individuals convicted of designated sex offenses to be registered with the Division of Criminal Justice Services (DCJS) and their local police departments. It also provides for public notification of the identity, whereabouts, alleged dangerousness, and other information about registered individuals through a "900" number, a "sexually violent predator subdirectory" kept in every police station, and direct public notification by police departments and civilian groups. The Act applies retroactively, that is, to all those who committed any one of 36 designated sex offenses before January 21, 1996 and are still in prison, or on probation or parole.

Legislative Purposes

The preamble to the Act expressed the legislature's general belief that, because of "the danger of recidivism posed by sex offenders," the public needed protection from them. Releasing information about sex offenders would aid the investigation, apprehension and prosecution of sex offenders.

Although many individual legislators expressed accord with these goals of public protection, many as well left no doubt of their desire to target and punish convicted sex offenders with the

new law and further penalize them in civilian life regardless of constitutional limitations.

Early in the debate Senator DiCarlo declared: "This legislation is important because we on the state level have not done what we should have done in terms of punishing sex offenders and keeping sex offenders off our streets." (JA 856)[1]

No other senator contradicted DiCarlo's characterization of the bill's purposes as "punishing sex offenders."[2] One senator called for removing sex offenders "from our neighborhoods and our streets" (JA 874), and another commented, "I say let's put them away forever." (JA 878) Another acknowledged that it would drive offenders out of their communities. (JA 914-16)

In the Assembly as well, a vocal minority of those who spoke unequivocally expressed punitive sentiments toward sex offenders. One assemblyman urged his colleagues not to afford the "protection" of the Constitution to the "animals," the "lowest of the low" who exploit children. (JA 81-82) One called for "ridding our society of the worst among us" (JA 833), and another characterized sex offenders as "the human equivalent of toxic waste." (JA 838) Putting a "tag" on them, another speaker noted, would drive them "out of town, out of state, and that's very good for us." (JA 809-

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[1] "JA ___" refers to pages in the Joint Appendix.

[2] Amicus U.S. Attorney includes DiCarlo's statement as among those that purportedly "evidence a purely regulatory motive." (Amicus Br. at 23) In the "regulatory" camp Amicus also places Senator Leichter, who opposed the bill as a violation of the Ex Post Facto clause. (JA 890-91; 945)

10) Others voiced the belief that sex offenders had no rights. (JA 813-14)

Design of The Statute

The Act imposes upon former sex offenders a series of registration obligations, the nature and duration of which are directly related to their crimes. The Act also creates a number of mechanisms to publicize a sex offender's history and status, the triggering of which is primarily tied to the crime and its circumstances, and also his criminal history and other factors that might indicate potential recidivism.

Conviction of any one of 36 offenses brings a defendant under the Act. [§§ 168-a(2)&(3)] At least seven of the designated offenses are misdemeanors. Several, such as unlawful imprisonment or kidnapping someone under 17, may not even involve sexual conduct. [P.L. §§ 135.05, 135.10, 135.20, 135.25] Others do not involve any use of force. [P.L. §§ 130.25, 255.25, 263.05, 263.10, 263.15]

Every "sex offender" under the Act must register annually for a period of ten years by providing information deemed "pertinent" by DCJS. [§ 168-b,h] An offender designated a "sexually violent predator," which designation can arise solely by conviction of a sexually violent felony [§ 168-a(3)], must appear in person at his local police station every 90 days to verify his registration. [§ 168-f(3)] This obligation lasts for a lifetime. [§ 168-h] (JA 704) The registration burden, for many individuals, continues long past

concurrent channels of public disclosure about a former offender. First, a "900" telephone number gives "relevant information" about any offender required to register under the Act, even level one "low risks," to any caller who can identify the person with some specificity. [§ 168-p] Second, the police disseminate "relevant information" such as his name, address, photograph, details of his crime and "background information" to "any entity with vulnerable populations." [§ 168-1]

Third, those entities then "further disseminate such information at their discretion." [§ 168-1] These two methods of disclosure apply to offenders designated risk level two ("moderate risk") and level three ("high risk"). And fourth, a "sexually violent predator subdirectory" containing the name, exact address, photograph, physical description, and "background information" of every offender in the state designated risk level three is distributed by DCJS to every police station in the state and made available to any member of the public who makes a written request to see it. [§ 168-q]

Effects of Public Notification

The harsh consequences that public notification inflicts on a former offender are amply demonstrated in the record. The district court's review of the manifold ramifications of community notification in New York, New Jersey, and other states led to its conclusion that, "[p]erhaps more clearly than anything else, the effects of community notification show that these provisions are

punitive." (JA 1008)

New York

During the few weeks in which community notification operated in New York before being enjoined by the court below, there were a number of dramatic illustrations of how it affected targeted individuals.

When Joseph Rossillo, 59, who had pled guilty to his first sex offense, a non-violent statutory rape, showed up for a court proceeding on January 29, 1996, he was greeted by a throng of reporters and photographers. The Westchester County District Attorney had issued a press release identifying him as the first sex offender in the county to register. Afterwards the media were a constant presence outside his house. (JA 378-80; 693)

Another offender on parole was the subject of a mass mailing to local residents by the school superintendent. The letter identified the man by name and street address. After the mailing he was fired from his job, his young nieces were harassed, and his brother received ominous, threatening phone calls inquiring whether he was the sex offender. (JA 112-13; 354-55; 694)

The experience of a former offender in Cornwall, New York was emblematic of the inevitable instant notoriety that community notification creates. On February 26, 1996 school officials circulated a written notice that an unnamed sex offender had been paroled into the community from prison. The local newspaper said he was classified as a "sexually violent predator." The ensuing

public panic led the police two days later to identify the offender as Mark Iannolo and to release his photograph and exact street address, which were published in the local newspaper the next day. (JA 381-84; 693-94) Although his crime was against an adult woman, Iannolo was branded in the community as a child molester. As a result of the publicity, he became reluctant to leave the safety of his home. (JA 354)

New Jersey

Community notification pursuant to New Jersey's "Megan's Law" produced a host of damaging consequences for former sex offenders, and often their families as well.

Former sex offender W.J. was forced to move from his apartment following notification after members of his community harassed his landlord. (JA 697) Another individual, R.R., had been convicted in 1986 of a sex offense against his 16-year-old stepdaughter, and released from prison in 1995. After police notification to the public that he posed a danger to children, his neighbors called him a "child molester," and his landlord locked him out of his apartment. He was physically attacked three times. (JA 696-97)

Carlos Diaz was driven out of town after a crowd of news vans, reporters, and members of the Guardian Angels set up a round-the-clock stake-out outside his mother's apartment building, where he had been living. The Guardian Angels posted "BEWARE" posters around the neighborhood with Diaz's picture on them. Under this unrelenting pressure, Diaz fled the State. Local politicians made

statements condemning Diaz and objecting to his family's presence in the community. The public hostility and media pressure rendered his mother a prisoner in her home. After a week, she too fled the home. (JA 130-145; 695-96)

The mother-in-law of offender A.A. was accosted in her home after his notification. Strangers on two occasions came to her door, demanded information about the whereabouts of A.A. and his family, and attempted to force their way into her home. (JA 697)

Former offender L.F. was told by a prospective employer that he could not hire him for his music store if there were "Megan's Law" notification, because his business could be badly hurt. (JA 697) Another offender, W.S., had held the same job for five years with an employer who knew of his conviction. The employer informed him, however, that he will probably lose his job if he is the subject of community notification. (JA 697-98)

E.B., a resident of Englewood, was the plaintiff under that pseudonym in a federal lawsuit challenging "Megan's Law." He became a community pariah after the Guardian Angels distributed 30,000 flyers identifying him as a sex offender. (JA 698) A *New York Times* writer who studied the case concluded: "E.B. is not living undisturbed or without punishment beyond that imposed by the courts. He could not be more of an outcast if he were a leper." Furthermore, rather than leave a former offender in peace after his sentence has been completed, Megan's Law "almost implores vigilantes to do their worst." (JA 390)

One such incident occurred in January 1995 when two men broke into the house of a sex offender in the middle of the night. They intended to beat him up, but mistakenly attacked another man, T.V., who was visiting that evening. T.V. not only suffered physical injuries from the attack. From the resulting publicity and mistaken impression that he was a sex offender, he lost his business, and his children and fiance were ridiculed and harassed. (JA 696)

Washington and Oregon[4]

In 1993, soon after public notification that convicted rapist Joseph Gallardo was to be released from prison in Washington, his home was burned to the ground by an arsonist. He then left Washington for New Mexico, but after Washington police notified his new community of his presence, he was forced to move again. (JA 694)

Public pressure following community notification forced the evictions of former sex offenders from their homes. One was evicted from his trailer park after a campaign of harassment and

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[4] The record also contained information concerning California's Child Molester Identification Line (CMIL), a "900" number in operation since January 1995. (JA 698-702) This limited disclosure mechanism, not yet challenged in court, differs substantially from New York's scheme. It covers only convicted child molesters, and limits access to its database to persons who are "able to explain how a particular child is at risk of being harmed." In addition, the California law has no analogue to the major disclosure mechanisms of the New York law — police and community groups.

intimidation. He then fled a second community after flyers were posted with his photograph. Residents of Tacoma forced two other offenders to relocate. The adoptive family of a 12-year-old classified as a "sexual predator" was evicted from its home after the child was released from a juvenile facility. (JA 694-95)

A Washington gas station that employed a former sex offender became the target of a boycott by persons who urged customers to stay away because a sex offender worked there. (JA 695)

In another incident public notification led to the circulation of posters with the offender's picture. The police characterized the posters as having a "vigilante edge." Subsequently, a stranger knocked on the offender's door, called him a "pervert," and punched him in the mouth. (JA 695)

As for Oregon, the parties did not stipulate to any facts about Oregon's notification law, which became effective in November 1993. Amicus U.S. Attorney, however, submitted a January 1995 report by the Oregon Department of Corrections, which administers the law, to the Oregon legislature (the "Oregon Report").

Only nine percent (237) of eligible offenders under the statute were subjected to community notification. (JA 609) A survey of 45 probation and parole officers supervising 2,160 sex offenders reported that less than 10% of that number had experienced some form of harassment, which included "name calling, graffiti, toilet papering and minor property vandalism, monitoring of a home by video camera, repeated reports of unfounded violations

to parole/probation officers, and picketing of residences." (JA 611) One offender committed suicide 10 days after community notification. Another had set up a vehicle so as to inhale carbon monoxide, as observed by his probation officer on a home visit. (JA 611-12)

The Oregon Report also pointed out that community notification made it difficult to find residences or employment for recently released sex offenders. Those already released had been asked to move by those they lived with or evicted by landlords. Harassment drove some offenders to new neighborhoods. Many moved from temporary residence to temporary residence; one became homeless and lived under a bridge. (JA 612-13)

Community transition programs and other supervised placements became reluctant to accept sex offenders because the publicity brought by notification might jeopardize the program's low profile and force closure. Notification also negatively affected employment opportunities for sex offenders, as businesses willing to quietly employ an offender would become unwilling if the hiring were to become public. (JA 612-13).

The Opinion Below

Judge Chin issued a permanent injunction against application of the Act's community notification provisions to individuals who committed sex offenses before January 21, 1996 because such notification amounted to added punishment in violation of the Ex Post Facto clause. (JA 948) Applying ex post facto and

"punishment" jurisprudence from relevant Supreme Court cases and canvassing every lower court case upholding or striking down public notification sex offender laws, he followed a four-part analysis drawn from tests commonly applied in those cases: 1) legislative purpose; 2) design of the statute; 3) historical treatment of public notification measures as punishment; and 4) the effects of public notification.

First, as regards legislative purpose, he took note that, concurrent with the legislature's "regulatory" aim to protect the public, the debate minutes in the Assembly also "vividly show the passion, anger, and desire to punish that members of the legislature felt toward sex offenders." (JA 993). Second, the design of the Act contained "classic indicia of a punitive scheme," particularly the triggering of its provisions by a crime, the sentencing judge's role in determining the level of notification, the overly broad number of former offenders it brought within its ambit, and the excessive degree of dissemination effectuated by its multiple public notification mechanisms. (JA 998-1001)

Third, historical analogues of public notification were regarded as punishment. In particular, branding and shaming measures used in the past to expose law-breakers "punished criminals by subjecting the offenders to public shame." (JA 1003). Notification, in addition, effectively imposed the historical penalty of banishment on sex offenders by the resulting ostracism and forced relocations. (JA 1007-08) And fourth, "the effects of

community notification show that these provisions are punitive." (JA 1008). Based on the factual showing outlined above, he concluded that because the Act imposed an affirmative disability or restraint on registrants, interfered with their ability to rehabilitate, and served the punishment goals of deterrence, retribution, and incapacitation, it imposed punishment on former sex offenders.

Applying the same four-part analysis to the Act's registration provisions, Judge Chin concluded that, although there were "some punitive aspects to registration," on the whole it was "regulatory and not punitive." (JA 1016).

ARGUMENT

POINT I

RETROACTIVE APPLICATION OF PUBLIC NOTIFICATION TO PLAINTIFFS-APPELLEES VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

The Ex Post Facto Clause

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497 (1994). Article I, §10 of the United States Constitution forbids the states from enacting any ex post facto law. Among the types of prohibited ex post facto law is any law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 Dall. 36 (1798). The prohibition against increased punishment after the offense was committed has remained constant in ex post facto cases. See, e.g., Collins v. Youngblood, 497 U.S. 37, 43, 110 S.Ct. 2715, 2719 (1990).

The framers of the Constitution regarded prohibition of ex post facto laws as a fundamental "constitutional bulwark in favor of personal security and private rights." The Federalist, No. 44 (Madison) Mentor ed. at 282. They recognized that such protections could only be preserved by "courts of justice." Id., No. 78 (Hamilton) at 466.

The Ex Post Facto Clause protects two basic values. First, it

ensures that legislative acts "'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451 (1987) (quoting Weaver v. Graham, 450 U.S. 24, 31, 101 S.Ct. 960 (1981)).

Second, the Clause erects a barrier to legislative abuses in the form of arbitrary or vindictive legislation directed against disfavored groups. Miller v. Florida, 482 U.S. at 429, 107 S.Ct. at 2451. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Landgraf v. USI Film Products, 114 S.Ct. at 1497.

In sum, "the Ex Post Facto Clause not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also restricts governmental power by restraining arbitrary and potentially vindictive legislation.'" Id. at 1498, quoting Weaver v. Graham, 450 U.S. 24, 28-29, 101 S.Ct. 960, 963-64 (1981).

DeVeau and Flemming

Appellants and Amicus U.S. Attorney attempt to elevate subjective legislative purpose to overriding significance in the test to determine whether a statute imposes added punishment in violation of the Ex Post Facto Clause. The legal basis for their test is purportedly founded on DeVeau v. Braisted, 363 U.S. 144, 80 S.Ct. 1146 (1960). Yet DeVeau simply does not stand for the

primacy of subjective legislative purpose in analyzing laws under the Ex Post Facto Clause. Nor do subsequent Supreme Court cases so circumscribe the inquiry. As the following discussion will show, DeVeau and those cases are perfectly consonant with the district court's multi-factoral analysis and conclusion that public notification under the Act amounts to punishment.

In DeVeau a union employment restriction on ex-felons was upheld against, inter alia, an ex post facto challenge. New York's Waterfront Commission Act had set up "a detailed scheme for governmental supervision of employment on the waterfront in the Port of New York." Id. at 145, 80 S.Ct. 1147. One element of that regulatory scheme barred ex-felons from collecting dues for any union representing workers on the waterfront; the aim was to combat corruption in that locale. Only the last paragraph of the plurality opinion addressed the ex post facto claim. Justice Frankfurter formulated the inquiry for that case as "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident[5] to a regulation of a present situation, such as the proper qualifications for a profession." Id. at 161, 80 S.Ct. 1155 (emphasis supplied).

A historical review of the sanction in question was integral

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[5] Among the definitions of "incident" in Webster's Dictionary (3d ed.) are: "an occurrence or sometimes a situation or thing taking place as part of a larger continuum but unimportant or nonessential," and "an accompanying minor occurrence or condition."

to Justice Frankfurter's analysis. "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. Federal law frequently and of old utilized this type of disqualification. Id. at 158-59, 80 S.Ct. at 1154 (emphasis supplied). "The disqualification of convicted felons for certain employments," id. at 159, 80 S.Ct. at 1154, in that case certain positions with labor unions on the waterfront, was not barred by the Ex Post Facto Clause.

The limited significance of DeVeau for this case is apparent. In light of historical restrictions on the entry of ex-felons into certain professions, the Court permitted an employment restriction incidental to government regulation of a "specified" activity. The case surely does not stand for the proposition advanced by appellants that "the focus of inquiry here, as in DeVeau, must be on the subjective intent or purpose of the legislature." (Appellants' Br. at 14) Legislative purpose is only the first step of the inquiry.

Two weeks after the DeVeau decision, the Court in Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367 (1960) explicated that part of the inquiry. The majority opinion was written by Justice Harlan, who had not participated in DeVeau. The Court upheld the denial of social security benefits to Nestor, a communist who had been deported.

The opinion noted that the social security system was "a highly complex and interrelated statutory structure." Id. at 610,

80 S.Ct. at 1372. "The fact of a beneficiary's residence abroad ... can be of obvious relevance to the question of eligibility." Id. at 612, 80 S.Ct. at 1373. The benefit to the domestic economy of payments spent by recipients "would be lost as to payments made to one residing abroad." Id.

The ground of Nestor's deportation was one of 14 for which benefits could be terminated. Id. at 604, 80 S.Ct. at 1369. There was no evidence that the legislation was aimed at particular individuals or that Congress was concerned with the grounds of deportation in order to curtail payment of benefits to those permanently excluded from the country. Id. at 619-20, 80 S.Ct. at 1377. Nestor's disqualification was pursuant to a statutory section that was "a small part of an extensive revision of the Social Security program." Id. at 518, 80 S.Ct. At 1376. As with the labor union restriction in DeVeau, the benefits denial in Flemming was an incidental side effect of a detailed regulation of a specific sector of the social economy.

In ascertaining whether the legislative design was punitive, the Court stressed that it must discern "the objects on which the enactment in question was focused." Id. at 513-14, 80 S.Ct. 1374. Justice Harlan noted two different types of legislative focus: one reflected regulation, the other indicated punishment. "Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment. . . ." Id. at 614, 80 S.Ct. at 1374. The "contrary" to that focus is punishment: "where the statute in

question is evidently aimed at the person or class of persons disqualified." Id. (Emphasis supplied.)

The Sex Offender Registration Act plainly falls into the second punishment category. It is aimed solely at sex offenders. Its heavy impositions fall only on sex offenders. As one member of the Assembly declared, as for "the type of criminals we are speaking about with regard to this legislation ... we are sending a very, very important message to these individuals. . . ." (JA 831-32)

The legislative debate, of course, only made explicit what is inherent in the "punitive design" of the Act. Flemming v. Nestor, 363 U.S. at 617, 80 S.Ct. at 1376. Unlike the statutory section challenged by Nestor, which was only "a small part of an extensive revision" of Social Security and not aimed at people like him, the registration and public notification provisions of the Act focus entirely on convicted sex offenders. Even if Flemming v. Nestor had been the last relevant Supreme Court case, under its analysis the Sex Offender Registration Act would be punishment because of its punitive focus and design.

Kennedy v. Mendoza-Martinez

Three years later, the Court decided Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554 (1963). The challenged law in that case essentially divested an American of citizenship for draft evasion. The question was whether that was punishment. The Court concluded the law "decreed an additional punishment for the crime

of draft avoidance," which could not be imposed without procedural safeguards. Id. at 184, 83 S.Ct. at 575 (emphasis supplied).

The Court noted sufficient evidence of a punitive Congressional purpose to find the law to be punishment on that ground alone. Id. at 169, 83 S.Ct. at 568. Nevertheless, it specified relevant factors beyond legislative purpose to consider in determining whether a measure imposed punishment. All the factors were drawn from prior Court cases, including ex post facto cases. See id. at 168-69 and n.22-28, 83 S.Ct. 567-68 and n.22-28. The factors are:

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

Id. at 168-69, 83 S.Ct. at 567-68.

As noted above, these tests did not originate with Mendoza-Martinez. It was the first case to assemble them as factors in one broad test. The Supreme Court has consistently referred to them in assessing whether a particular measure is punishment. See, e.g., United States v. Ursery, 116 S.Ct. 2135, 2149 (1996); Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937, 1943, 1947

(1994); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365, 104 S.Ct. 1099, 1106 (1984); United States v. Ward, 448 U.S. 242, 247-48, 100 S.Ct. 2636, 2641-42 (1980).[6]

Ursery and Recent Punishment Jurisprudence

The Supreme Court's decision in United States v. Ursery, 116 S.Ct. 2135 (1996) represented the culmination of several of its cases in recent years dealing with the question of punishment, chiefly in the forfeiture and double jeopardy contexts. In Ursery the Court concluded that recent cases finding measures to be punishment were consistent with its holding that the in rem civil forfeiture in that case was not punishment. Id. at 2145-47.

In United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), a heavy civil fine imposed in a separate action after a criminal conviction was ruled to be punishment. The Ursery Court distinguished this civil penalty from in rem forfeiture because of the "historical distinction" between civil penalties and civil forfeiture." 116 S.Ct. at 2144.[7]

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[6] The court below, although it applied the factors, erroneously stated that Austin v. United States, 509 U.S. 602, 610 n.6, 113 S.Ct. 2801, 2806 n.6 (1993), had suggested the factors should not be applied in an inquiry involving the Ex Post Facto Clause. (JA 989) In fact, the Supreme Court had declined to apply the factors "only" in assessing whether the Excessive Fines Clause of the Eighth Amendment applied to in rem forfeitures. The Supreme Court made no reference, explicit or implicit, to the Ex Post Facto Clause, and applied Mendoza-Martinez factors in the subsequent cases of Kurth and Ursery.

[7] The Court also noted that the holding of Austin v. United States, 509 U.S. 602, 113 S.Ct. 2801 (1993), that

Similarly, the Court distinguished the marijuana "tax" held to be added punishment in Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994) from in rem forfeiture because the tax was so closely connected to an underlying crime. The Court stated: "The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested; thus, only a person charged with a criminal offense was subject to the tax." 116 S.Ct. at 2144.

The Court repeatedly distinguished the in rem forfeitures at issue in Ursery from in personam civil penalties, which were punishment. Id. at 2142. See also id. at 2150 (Kennedy, J., concurring) (Historically, in rem forfeiture "is not a second in personam punishment for the offense." In rem statutes are not directed at those who commit the crimes, but at those who misuse the property.) After a historical review of forfeitures, the Court pinpointed why they were not punishment: "[T]hey did not impose a second in personam penalty for the criminal defendant's wrongdoing." Id. at 2141.

The draconian public notification and onerous registration duties imposed on former offenders by the Sex Offender Registration Act are nothing if not "a second in personam penalty for the criminal defendant's wrongdoing." In view of the in rem/in

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forfeitures could be subject to the limits of the Excessive Fines Clause of the Eighth Amendment, did not automatically make such forfeitures punishment under the Double Jeopardy Clause. 116 S.Ct. at 2146.

personam distinction central to the Ursery decision, the continual, often permanent, consequences that the Act imposes on a sex offender place it squarely on the punishment side of the Ursery dichotomy. The Act's impositions are all in personam. Their severity and duration are directly related to the former offender's conviction and criminal history, the penal reflection of his "wrongdoing."

The rest of the Ursery analysis also supports the district court's decision. History was critical to the Ursery decision. "Since the earliest days of this nation," the Court began its review, in rem forfeitures were non-punitive remedies collateral to criminal cases, and "a long line of cases" showed that such actions "do not impose punishment." 116 S.Ct. at 2140. The central dichotomy of the case -- between in rem civil forfeitures and in personam civil penalties -- was a "historical distinction." Id. at 2144.

Besides historical analysis, the Ursery Court followed a multi-part analysis that corresponds to the other three parts of the test employed here: legislative purpose, statutory design, and effects. (The Court's reference to a "two-part" test is plainly a shorthand expression, since its analysis encompassed numerous elements. See id. at 2148-49.) The first part of its analysis--legislative intent--focused on the procedural mechanisms set up by Congress for enforcing the challenged forfeitures. The Court concluded that their in rem designation indicated a non-punitive purpose. Id. at 2147. In other words, the measure was designed in

a traditionally non-punitive manner.

The "second stage" of the analysis looked at whether it was punitive in "form" and "effect." Id. at 2148. The Court analyzed four of the "relevant factors" drawn from the Mendoza-Martinez test, and concluded that in rem civil forfeitures were not "punishment" under the Double Jeopardy Clause. Id. at 2149.[8]

In sum, the Ursery decision buttresses the district court's analysis of the ex post facto issue here. First, the Sex Offender Registration Act closely resembles the kind of in personam measure that the Supreme Court put in the category of punishment. Second, historical perspective was key to the Court's analysis, and the public disclosure of a person's criminal status historically has been considered punishment. And third, the Ursery court's multi-part analysis of purpose, form, and effects, including its discussion of factors from the Mendoza-Martinez test, resonates with the analytic approach employed by the district court here.

The Post-Ursery Decisions

Three courts other than the court below have ruled on retroactive sex offender community notification since Ursery. The first decision, W.P. v. Poritz, 931 F.Supp. 1199 (D.N.J. 1996), was issued one week after Ursery came out. Judge Bissell stated that

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[8] The Court did not explicitly refer to them as the Mendoza-Martinez factors, but directly drew them from United States v. Ward, 448 U.S. 242, 247-48, 249, 100 S.Ct. 2636, 2640, 2642 (1980), which did identify them as the Mendoza-Martinez factors.

Ursery stood for the proposition that there was no "universal analytical framework" for defining punishment. Id. at 1209. Following the Mendoza-Martinez analysis, but repeatedly stressing the non-punitive legislative purpose, he upheld New Jersey's Megan's Law.

Roe v. Office of Adult Probation, 938 F. Supp. 1080 (D. Conn. 1996) also followed the Mendoza-Martinez factors. After analyzing every factor, Judge Squatrito concluded that community notification in Connecticut constituted punishment in violation of the Ex Post Facto Clause. Id. at 1091-93.

Most significant, the Kansas Supreme Court held that that state's retroactive public notification statute, which is much narrower than New York's, violated the Ex Post Facto Clause. State v. Myers, 923 P.2d 1024 (Kan. 1996). The Kansas Sex Offender Registration Act did not provide for affirmative notification by the police and community groups as in New York, nor did it create a statewide "900" number including all registered sex offenders. Registration information was only available to the public for inspection at the local sheriff's office. Id. at 1031. There was no restriction on the dissemination of the information.

"The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment" and "leaves open the possibility that the registered offender will be subjected to public stigma and ostracism." Id. at 1041. Even though the legislative aim in enacting the disclosure provision was not to punish, "the repercussions, despite how they may be

justified, are great enough under the facts of this case to be considered punishment." Id. at 1043.

It is noteworthy that the Kansas court followed Ursery and Mendoza-Martinez in reaching its conclusion. Noting that in other cases, "[a]lthough often re-labeled, the Mendoza-Martinez factors continue to reappear in some form in ex post facto and double jeopardy analysis," the court stated: "We conclude that Ursery has endorsed the Mendoza-Martinez factors for consideration in the punitive/nonpunitive effect analysis." Id. at 1036.

This Court has also applied the Ursery analysis to an ex post facto case. In United States v. Certain Funds, 96 F.3d 20, 26 (2d Cir. 1996) the Court stated that the Ursery analysis of civil forfeiture statutes under the Double Jeopardy Clause was "equally applicable" to determining whether the same statutes were "criminal or penal for purposes of the Ex Post Facto Clause."

The District Court's Four-Part Analysis

In laying out the elements of its comprehensive analysis to determine whether public notification under the Act constituted additional punishment, the district court rejected appellants' restricted test that looked only at legislative intent and "overall design," because it would eliminate consideration of the "effects" of the Act as well as the historical treatment of registration and notification.[9] (JA 990) Neglect of these two vital areas would

[9] Amicus U.S. Attorney acknowledges that analysis must focus as well on the statute's effects, or "practical

contradict Ursery.

Instead, the court's analysis looked at "the totality of circumstances." (JA 990-91) Consistent with Supreme Court case law on "punishment," including Ursery and Mendoza-Martinez, and drawing upon common factors used in other Megan's Law decisions, the court below grouped the relevant factors into a four-part analysis: (1) legislative purpose; (2) design of the statute; (3) historical treatment of community notification; and (4) effects of the Act. (JA 991)

(1) Legislative Purpose

The court recognized that the preamble to the Act expressed a "regulatory" intent. Because of the "danger of recidivism posed by sex offenders," the preamble stated the public needed protection, and the Act's registration and notification provisions would assist in the investigation, apprehension, and prosecution of sex offenders. (JA 992-93)

Yet the legislature's own characterization of a statute does not end the inquiry into legislative purpose or the true character of a law. The Supreme Court in Kurth Ranch stated that "the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character." 114 S.Ct. at 1945. Similarly, in Collins v. Youngblood the Court stressed that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."

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application." (Amicus Br. at 16)

497 U.S. at 46, 110 S.Ct. at 2721.

The legislative debates over the Act revealed a concurrent legislative purpose different from that stated in the preamble. They contain "unmistakable evidence of punitive intent...." Flemming v. Nestor, 363 U.S. at 619, 80 S.Ct. at 1377.

In the Senate debate, immediately after the sponsor's description of the law's provisions, Senator DiCarlo lauded the legislation for "punishing sex offenders and keeping sex offenders off our streets." (JA 856) No other senator challenged his characterization of the law as "punishing sex offenders."

Senator Connor said that sex offenders had to be removed "from our neighborhoods and our streets." (JA 874) Senator Dollinger acknowledged that the inevitable consequence of notification was to drive sex offenders out of communities. (JA 914-16) "I say let's put them away forever," said Senator Mendez. (JA 878)

Senator Libous praised the permanent public exposure the law would create around sex offenders: "By enacting this bill today into law, we'll ensure that convicted sex offenders are never very far from the eyes of law enforcement authorities and from the public." (JA 924)

Assemblyman Healey urged his colleagues not to extend the "protection" of the Constitution to the "lowest of the low," the "animals" who exploit children. He declared that "we in New York have had it. We are coming to get them and it's going to stop." (JA 781-82)

Assemblyman Weisenberg said that public notification would put

a "tag" on a sex offender with the result "that this guy is going to go out of town, out of state, and that's very good for us." (JA 809-10) The next speaker said, "[W]ill they be wrongfully abused in their neighborhoods? You know what? I don't care." (JA 811)

Assemblyman Manning said that child molesters "have no rights." (JA 813-14) Assemblyman Doran called for "ridding our society of the worst among us," (JA 833) and Assemblyman Tedisco called repeat sex offenders "the human equivalent of toxic waste" in front of whom there should be warning signs. (JA 838)

Contrary to Appellants, Judge Chin did not conclude that the legislature adopted the statute to punish. Yet he could not fail to note that the Assembly debate minutes "vividly show the passion, anger, and desire to punish that members of the legislature felt toward sex offenders." (JA 993) The minutes do reveal, at least among a vocal minority in both houses, "a purpose 'to reach the person, not the calling,'" which indicates a punitive intent. Flemming v. Nestor, 363 U.S. at 616, 80 S.Ct. at 1375, quoting Cummings v. Missouri, 4 Wall. 277, 320 (1867). Nevertheless, Judge Chin did not conclude that the Act was punitive because of statements by legislators. The crux of his decision was obviously his subsequent analysis of statutory design, history, and effects.

But the unmistakable evidence of a punitive legislative purpose concurrent with an expressed desire to protect the public does make New York's law unique among challenged sex offender statutes. New Jersey, by contrast, shows a "dearth of legislative history" for its Megan's Law because "the legislation was rushed to

the floor without committee referral or debate." W.P. v. Poritz, 931 F.Supp. at 1199. That opinion's overemphasis on non-punitive legislative purpose, based entirely on the brief official statement of purpose in the statute, was thus in a context very different from New York's graphic legislative history.

(2) Statutory Design

Initially, one must discern "the objects on which the enactment in question" focuses to determine if it "imposes a punishment." Flemming v. Nestor, 373 U.S. at 613, 80 S.Ct. at 1374. It suggests punishment "where the statute in question is evidently aimed at the person or class of persons disqualified." Id. It is unquestionable that the Sex Offender Registration Act is so aimed. The "punitive design" is apparent. Id. at 617, 80 S.Ct. at 1376.

(A) Connection to the Crime

As the court below noted, the Act contains "classic indicia of a punitive scheme." (JA 998) Its provisions are triggered by commission of a crime. This feature was critical to the Supreme Court's finding that the tax in Kurth Ranch amounted to punishment. 114 S.Ct. at 1947. Moreover, the sentencing judge determines the level of notification, and must consider any statement by the victim. [§ 168-n]

Many of the risk factors used to decide an offender's notification level relate to the crime and its circumstances, or his criminal history. See §§ 168-1(5)(a) (criminal history

factors); 168-1(5)(b)(i) (relationship with victim); 168-1(5)(b)(ii) (whether crime involved violence); 168-1(5)(b)(iii) (number and nature of prior offenses). His crime and criminal history are also part of the information disseminated to the public, initially by the police and local groups, and every time a former offender changes address, or someone consults the "900" number or the "sexually violent predator subdirectory."

In addition, the 90-day in-person registration requirement for a so-called "sexually violent predator" often arises purely by virtue of a conviction of one of the ten offenses enumerated in Section 168-a(3). Any failure to timely register subjects the individual to criminal prosecution or revocation of parole [§168-t], or revocation of probation. [§168-d(2)][10] See Trop v. Dulles, 356 U.S. 86, 97, 78 S.Ct. 590, 596 (1958) (statute that prescribes penal consequence for failure to comply with regulatory provision is penal law).

In sum, the Act's notification and registration provisions are not only "conditioned on the commission of a crime," Kurth Ranch, id., but bear a direct, inseparable, and continuing relationship to the offense.

(B) Excessive Sweep

The punitive design of the Act is also reflected by its

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[10] Prosecutions have been instituted against registrants as soon as one day after their alleged failure to verify their address with the police on the 90th day following initial registration. (JA 372)

excessiveness. In three broad ways it goes far beyond its ostensible purpose of protecting "vulnerable populations" from sex offenders who commit "predatory acts characterized by repetitive and compulsive behavior."

First, the Act is excessive in its sweep. It brings an unnecessarily broad range of offenders into its scope. The statute covers 36 offenses, including seven misdemeanors. Several, such as unlawful imprisonment or kidnapping someone under 17, may not even involve sexual conduct. [P.L. §§ 135.05, 135.10, 35.20, 135.25]

Significantly, the Act exposes a great number of first offenders to public notification. Nowhere is the statute limited to repeat offenders. Except for one of the 15 risk factors dealing with prior offenses, a first offender faces the same risk level scoring system that can lead to the same level three classification as a repeat offender.

Second, the Act permits public disclosure for all registrants, including those at the level one ("low risk") level. A caller to the "900" number may obtain information about any registered sex offender. [§168-p(1)] (JA 684, 706) The court below observed: "The fact that public disclosure is permitted even with respect to low risk individuals suggests a punitive design." (JA 1001)

Third, public notification under the Act is broad and virtually uncontrolled. The police may disseminate whatever they consider "relevant information" to any "entity with vulnerable populations." Those entities may then further disseminate the information "at their discretion." [§ 168-1(6)(b), (c)] Clearly,

the scope of disclosure through these channels ends up as unlimited.

The other two channels of concurrent disclosure -- the "900" number and the "sexually violent predator subdirectory" -- not only enlarge disclosure but perpetuate it as well. As long as one is in the central registry, he is subject to a continual series of disclosures by and to an unlimited number of persons. The subdirectory is especially egregious. Any person, for any reason, as long as it is "in writing," can obtain the subdirectory at a local police precinct. He or she can browse through its contents, which contain the name, photograph, exact address and "background information" of every person the state has designated level three. [§ 168-q(1)] The fact that the Kansas statute placed "no restrictions on who is given access to the registered offender information" was a key factor in the court's finding that "the excessive scope of public disclosure" made the statute punitive. State v. Myers, 923 P.2d at 1041.

(3) History

The importance of history to the punishment inquiry has been a consistent theme from DeVeau to Ursery. See, e.g., DeVeau v. Braisted, 363 U.S. at 158-59, 80 S.Ct. at 1154 (historical review of barring ex-felons from certain employment); Kennedy v. Mendoza-Martinez, 372 U.S. at 168 n.23, 83 S.Ct. at 567 n.23 ("Reference to history here is peculiarly appropriate." Similar measures "have throughout history been used as punishment."); United States v.

Ursery, 116 S.Ct. at 2149 ("in rem civil forfeiture has not historically been regarded as punishment").

The New York Court of Appeals has stated that "public disclosure of a person's crime, and the attendant humiliation and public disgrace, has historically been regarded strictly as a form of punishment." People v. Letterlough, 86 N.Y.2d 259, 266 (1995). In colonial America public identification of a transgressor was an essential element of punishment. Branding, the pillory, and the stocks were examples of public exposure as punishment. See Note, The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions, 1989 Duke L.J. 1357, 1361-62.

The aim of the pillory, for example, was chiefly psychological, designed to bring about humiliation because of the public disgrace. The message to the public conveyed by branding was that the offender was incorrigible and that disgrace should last until death. Lawrence Friedman, Crime and Punishment in American History at 40 (1993).

The Third Circuit has noted the argument that the public opprobrium and ostracism resulting from New Jersey's Megan's Law, which branded the offender as an outcast, was the "essence of historical punishment." Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1265 (3d Cir. 1996). The argument, the Court recognized, "has considerable force." Id. See also United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1982) (traditional punishment character of "painful publicity"), rev'd on other grounds, 741 F.2d 1542 (8th Cir. 1984) (en banc).

Community notification not only resonates strongly with historical shaming devices, it is representative of the modern use of public exposure as punishment. One authority has noted: "The last decade has witnessed the advent of a wide variety of shaming sanctions," the most "straightforward" of which operates "by communicating the offender's status to a wider audience." Dan M. Kahan, What Do Alternative Sanctions Mean, 63 U. Chi. L. Rev. 591, 613-32 (1996). A variety of methods of public exposure as punishment have been imposed on sex offenders. Id. at 632-33. See also Abril Bedarf, Examining Sex Offender Community Notification Laws, 83 Cal. L. Rev. 885, 912 (community notification laws "are reminiscent of shaming punishments").

The results of notification often amount to the historical punishment of banishment, as the district court noted. "Not only have sex offenders literally been forced to relocate to different towns and even different states, public notification has made it difficult if not impossible for them to reintegrate into society." (JA 1008) Banishment, the Supreme Court has noted, is "a fate universally decried by civilized people." Trop v. Dulles, 356 U.S. 86, 102, 78 S.Ct. 590, 599 (1958).

Appellants virtually concede that in view of history, public notification is punishment. (Appellants' Br. at 32) They contend that history should not be considered because the New York legislature had a purely "remedial purpose." Besides being postulated on an incomplete characterization of the legislative purpose, this position ignores the Supreme Court cases that make

history central to the analysis of whether a measure is punishment.[11]

History, moreover, must be evaluated separately from purpose. That factor, as well as all the other Mendoza-Martinez factors, is part of the "second aspect" of the inquiry whether a statute is penal. See United States v. One Assortment of 89 Firearms, 465 U.S. at 364-65, 104 S.Ct. at 1106. Otherwise, the multi-factoral analysis would be meaningless: any factor indicating punishment could be nullified by repeated resort to the putatively non-punitive legislative purpose.

(4) Effects

The Third Circuit has recognized the "strong reasons" put forth by a former offender that public notification would have "devastating effects." Artway v. Attorney General of New Jersey, 81 F.3d at 1266. "In addition to the ostracism that is part of its very design, notification subjects him to possible vigilante reprisals and loss of employment." Id. The Kansas Supreme Court found that dissemination of information about a registered offender would subject him to "public stigma and ostracism," and "could make it impossible for the offender to find housing or employment."

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[11] Amicus U.S. Attorney claims that an inquiry into history is simply not required. (Amicus Br. at 45) In advancing this proposition it ignores the centrality of the historical inquiry in the Supreme Court cases cited by Appellees, and instead cites bill of attainder cases, under which only a small category of "legislative punishments" unique to that type of case are considered historically.

State v. Myers, 923 P.2d at 1041.

The record before Judge Chin bears out these statements. See above at 7-13) The few notifications that took place before his preliminary injunction confirmed the statement of Senator Jones that there was a "tremendous uproar" in his district over a released sex offender and that "every one of these cases is evoking panic out there." (JA 938) The public panic that erupted when the initial generalized notification of Mark Iannolo was effected, which in two days resulted in his name, photograph, and address displayed in the local newspaper, demonstrates the unstoppable momentum of community notification. A former offender goes from anonymous to public pariah in a few days.

As Judge Chin found in his decision granting a preliminary injunction: "Individuals who have been subjected to community notification provisions have been publicly ostracized. They have been threatened with physical harm. Their families have been harassed. They have lost their jobs. And their crimes have been featured in newspapers for all to see." Doe v. Pataki, 919 F. Supp. 691, 701 (S.D.N.Y. 1996)

The record below reinforces these findings with numerous similar examples from New Jersey. (JA 685-98) Studies and newspaper accounts from Washington and Oregon confirm the continual effects such as housing loss, chronic displacement, job loss, and ostracism, as well as incidents of arson, assault, and suicide. (JA 611-13, 694-96)

The statement of the former offender subject to Kansas' law

illustrates the meaning of public notification: "I was evicted from my mother's apartment; left me virtually homeless. I had nowhere to go. . . . I can't live like this and every morning I get up to look at the paper -- I'm paranoid. . . . I live with 12 other guys. They are about ready to kick me out on the street. I have no money. . . . I would rather go back to prison. I can't do this." State v. Myers, 923 P.2d at 1028.

No Meaningful Prior Public Access to Information

Appellants and Amici seek to divert attention from the undeniably damaging effects of public notification by propounding spurious distinctions that have no legal significance. For one, they contend that the Act is not ex post facto punishment because the information it disseminates is "already public information available through other means." (Appellants' Br. at 38) As a matter of fact, this is not true. As a matter of law, it would not render the effect of the state's disclosure any less punitive.

First, disclosure under the Act is surely not limited to information already available to the public. The "exact address" of a level three offender is not public until the government makes it so, nor is his photograph connected with his name and address. [§168-1(6)(c)] Moreover, the police have discretion to disseminate any "relevant information" as well as "background information," two broad categories not limited to matters of public record.

In addition, no one in New York State has ever been publicly labeled a "sexually violent predator" who presents a danger to

public safety and high risk of committing more sexually violent offenses. Such government-sponsored alarmism about a putative future danger posed by a former sex offender does not disclose "information" or "facts."

Second, "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because the information may be available to the public in some form." United States Dept. of Defense v. F.L.R.A., 114 S.Ct. 1006, 1015 (1994). There is also a world of difference between the existence of isolated facts of one's criminal history in various repositories of data, and the collection into one package and broadcasting of those details by the government to the public. The Supreme Court has recognized "a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." United States Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764, 109 S.Ct. 1468, 1477 (1988).

In that case the Court recognized an individual's "substantial" privacy interest in a rap sheet, as well as aspects of his "criminal history that may have been wholly forgotten." 489 U.S. at 769-70, 109 S.Ct. at 1481. Clearly, those details are not perpetually public, as defendants assume. The New Jersey Supreme Court has likewise acknowledged the "distinction between merely providing access to information," which, "although accessible to

the public, may remain obscure." Doe v. Poritz, 662 A.2d 367, 411 (N.J. 1995). Sex offenders have a privacy interest "when the government assembles those diverse pieces of information into a single package and disseminates that package to the public." Id. The Third Circuit in Artway also noted the significant difference between the "mere fact" of an offender's past conviction, which "might be learned from . . . public records," and the State's determination "that the prior offender is a future danger to the community." 81 F.3d at 1266 (emphasis in original).

The examples proffered by Appellants and Amici of various statutory and regulatory provisions that purportedly effectuated public notification of offenders before the Act demonstrate that only the most narrow and discreet disclosures have been permitted. See, e.g., Gen. Bus. Law §72 (DCJS may reveal to Secretary of State criminal history of applicant for private investigator); Tax Law § 1605 (same for applicants to sell lottery tickets); Social Services Law §378-a (access to conviction records by authorized agency for applicants for child care positions); Vehicle and Traffic Law § 509-d(2) (same for school bus drivers).

These provisions are narrowly tailored disclosures to particular government officials as part of a voluntary job application process for sensitive positions. They are a far cry from the public notification provisions of the Act, which broadcast to the public criminal history, personal data, and alarms about the purported danger posed by the person.

Finally, appellants rely on Section 149 of the Correction Law.

This authorized nothing more than notification to the victim or victim family member of the escape or release of a violent felony offender. Notably, the drafters of the Act pointed to this very statute to illustrate that "Megan's Law" represented a salient departure from prior law. The Act was a new mechanism of publicizing information that had not been previously exposed to public view. The Memorandum of the State Senate sponsor stresses this. It contrasted the Act's broad innovation in this respect with the "limited, one-time" notification regarding a released multi-felony offender under Section 149 of the Correction Law: "However, no such information available to the general public currently exists in New York State." (JA 705)

Spurious Public/Private Dichotomy

Appellants also argue that the effects suffered by registrants under the Act do not constitute an "affirmative disability or restraint" because they result from the actions of private citizens, not the state. (Appellants' Br. at 35)[12] This argument simply ignores the comprehensive, indispensable role of the government in initiating, effectuating, and perpetuating public notification.

The state gathers all the information. The state determines

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[12] Amicus U.S. Attorney's version of this argument is a purported distinction between the (unspecified) "direct" and "indirect" effects of the statute. (Amicus Br. at 36-38) It almost entirely relies on an irrelevant bill of attainder case, Linnas v. INS, 790 F.2d 1024 (2d Cir. 1994), in which that artificial dichotomy never even appears.

an offender's risk level, whether he is to be called a "sexually violent predator," and what information is to be publicized. Local law enforcement authorities then disseminate this information to community entities of their own choosing.

The state creates and maintains the "900" number and "sexually violent predator subdirectory," both of which make notification a continual enterprise. The state also effectuates the transfer of a former offender's information, whenever he moves, to the police in the new jurisdiction, thereby initiating a new round of public notification. The permanent public exposure by state action is the essence of the statutory scheme, as Senator Libous indicated: "By enacting this bill today into law, we'll ensure that convicted sex offenders are never very far from the eyes of law enforcement authorities and from the public." (JA 924) (Emphasis supplied.)

Even if the state did not perpetuate notification but only initiated it, the obvious reality is that its dramatic effects simply do not happen unless the state starts up the notification machinery. The power of notification to turn a former offender's life upside down has been amply demonstrated in this record. The state-initiated notification often ends up with the affected person jobless, homeless, friendless, rootless, and hopeless. To avoid constitutional scrutiny, Appellants now point the finger for the Act's inevitable and demonstrated consequences at "private citizens." Yet, as the Third Circuit recognized, the "devastating effects" of public notification, such as community ostracism, are "part of its very design." Id. at 1266 (emphasis supplied).

POINT II

RETROACTIVE APPLICATION OF THE ACT'S SPECIAL REGISTRATION REQUIREMENTS FOR "SEXUALLY VIOLENT PREDATORS" VIOLATES THE EX POST FACTO CLAUSE.

The District Court concluded that the Sex Offender Registration Act's registration requirements are more regulatory than punitive, framing the issue as "whether registration imposes requirements or leads to results that are so excessive that the punitive aspects overcome the regulatory purpose." (JA 1016) In fact, while the registration duties imposed on persons classified at levels 1 and 2 may be primarily regulatory, the converse is true for those designated "sexually violent predators." The court below did not separately address the unique burdens of this "level 3" registration as a distinctive form of punishment. Yet its onerous requirements are excessive in design, punitive in effect, and unnecessary to accomplish the Act's purported regulatory purpose.

Statutory Design

(1) Connection to the Crime

Under the Act, the registration level is set by the sentencing court, at the same time it classifies the offender for community notification. (§168-n) As with notification, the registration level is inextricably intertwined with the underlying crime. For example, the court must consider issues that traditionally influence sentencing decisions, such as use of violence or a weapon [§168-l(5)(b)(ii)], the registrant's relationship with the victim

[§168-1(5)(b)(i)], the victim's age [§168-1(5)(a)(iv)], the registrant's use of alcohol or drugs [§168-1(a)(ii), and the victim impact statement [§168-1(i)]. Similarly, the court must consider the registrant's criminal history [§168-1(a)(i, iii & v), (b)(iii)], and potential for rehabilitation [§168-1(c-h)]. The registration level thus has a direct and inseparable relationship with the commission of the underlying crime. See Kurth Ranch, 114 S.Ct. at 1947 (connection to crime critical to punishment finding).

(2) Excessive Sweep

The court below concluded that the registration provisions do "not suffer from the same excesses in design that exist with respect to notification," primarily because "[r]egistration can be accomplished privately." JA 1017. This was error as to level 3, which differs in the duration, frequency and nature of registration.

While persons classified at levels 1 and 2 can register privately, by mailing written forms to the state Division of Criminal Justice Services (DCJS) annually, see §168-f(2), level 3 registrants must also report in person to the local police department every 90 days. §168-f(3). And, while the registration duties of level 1 and 2 registrants expire after 10 years, those of level 3 offenders last a lifetime.[13] §168-h. These onerous duties

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[13] Level 3 offenders may petition the sentencing court to be relieved of their registration obligations after 10 years. § 168-o. Thus, the registrant bears the burden of initiating a review of the duration of registration, and of establishing that

are enforced through penal sanctions, a "classic indicia of a punitive scheme," as the court below noted. JA 998-9. A registrant who fails to report in person to the police every 90 days can be charged with a class A misdemeanor, punishable by a sentence as long as one year. §168-t. A second violation is a class D felony, punishable by up to 7 years in prison.[14] Id.

The additional requirements for level 3 registrants are wholly unnecessary to satisfy the Act's purported regulatory purpose. As with levels 1 and 2, persons classified at level 3 must register in writing with DCJS annually, and must also give written notice 10 days prior to any change in address. §168-f. These duties are enforced by penal sanctions. §168-t. Thus, other provisions of the Act sufficiently serve the Act's regulatory function and insure that level 3 registrants will provide accurate and up-to-date address information to law enforcement. The additional obligations for level 3 serve only the separate punitive function of forcing this group alone to show up every 90 days before local police for the rest of their lives.

Effects of the Act

As the court below acknowledged, the effects of level 3 registration duties are plainly punitive. JA 1018. Quarterly, "in

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it has become unnecessary.

[14] The Act's registration duties are being vigorously enforced. Level 3 registrants have been prosecuted for *de minimis* delays in reporting. (JA 371-72; 693 ¶45) Moreover, violation of the registration requirements is a ground for revoking parole. §168-t.

person" lifetime reporting is a significant restraint on liberty. Level 3 registrants can't travel outside their communities on the day they must report, and must even take time off from school or work to present themselves for a police interview. In any small town, this reporting requirement will inevitably expose the individual to public identification as a "sexually violent predator." §168-f(3).

It is this "in person," lifetime character of level 3 registration that marks it as a punishment akin to lifetime parole. As the California Supreme Court, which has enforced that state's sex offender registration statutes for more than half a century, has noted, "[n]eedless to say, law enforcement 'command performances' involve compulsion and restraint." In Re Reed, 33 Cal.3d 914, 920, 663 P.2d 216, 218 (1983) (*in bank*).

Historical Treatment of Registration

The District Court observed that registration has not historically been viewed as a form of punishment. (JA 1017) Yet registration requirements for persons convicted of various crimes have been established only in this century. It is thus impossible to review the history of registration statutes in the same way that the court traced the evolution of modern community notification statutes from older, public shaming punishments.

Nonetheless, in California, which has subjected convicted sex

offenders to lifetime registration since 1944,[15] courts have long viewed a lifetime registration requirement as punishment. See In Re Reed, supra (imposition of lifetime sex offender registration on a person convicted of disorderly conduct violated the state Constitution's ban on cruel and unusual punishment); In Re Birch, 10 Cal.3d 314, 321, 515 P.2d 12, 16 (1973) (*in bank*) (conviction vacated where counsel and court failed to advise the defendant of the sex offender registration requirement). The Birch court said: "[I]n view of the unusual and onerous nature of the sex registration requirement that follows inexorably from a conviction . . . the trial court's duty surely included an obligation to advise petitioner of this sanction prior to accepting his guilty plea. Id. at 321, 515 P.2d at 16.

The registration duty long considered punishment in California is actually a less severe sanction than that imposed by New York on level 3 registrants. While both are lifetime duties, only New York requires quarterly, "in person" reporting by registrants. Thus, this Court should accordingly hold that level 3 registration constitutes punishment which may not be retroactively applied to persons whose crimes occurred before the effective date of the Sex Offender Registration Act.

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[15] See Cal. Penal Code §290(a) (West 1996). Section 290 requires persons convicted since 1944 of enumerated sex crimes to furnish their addresses to local law enforcement for the rest of their lives.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court below as to public notification, and reverse as to level three registration.

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Respectfully submitted,

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