

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DELBERT W. SMITH AND BRUCE M :

4 BOTELHO, :

5 Petitioners :

6 v. : No. 01-729

7 JOHN DOE I, ET AL. :

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9 Washington, D. C.

10 Wednesday, November 13, 2002

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:04 a.m.

14 APPEARANCES:

15 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf

16 of the Petitioners.

17 THEODORE B. OLSON, ESQ., Solicitor General, Department of

18 Justice, Washington, D.C.; on behalf of the United

19 States, as amicus curiae, supporting the Petitioners.

20 DARRYL L. THOMPSON, ESQ., Anchorage, Alaska; on behalf of

21 the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 01-729, Delbert Smith and Bruce Botelho
versus John Doe.

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONERS

MR. ROBERTS: Thank you, Mr. Chief Justice, and
may it please the Court:

Alaska's Megan's Law makes available to members
of the public who seek it certain truthful information
about convicted sex offenders. The State makes this
information available to help protect against the risk
that the convicted sex offender will offend again. It
says that in the law. Sex offenses are crimes of
opportunity, and the purpose of making the information
available is to allow the members of the public to take
steps to reduce those opportunities.

QUESTION: One -- one line that I -- I think
there is respondents seek to establish in this case is
that this information has to be generated by acts that
occur after the conviction. You have to fill out the form
some -- four times a year, et cetera.

I -- I've read in the brief -- I'm sure my

1 colleagues have too the -- the problem about going to the
2 police station. Just assume hypothetically that you had
3 to go to the police station four times a year. Would that
4 change the case?

5 MR. ROBERTS: No, it wouldn't, Your Honor.
6 That's the case in -- in about 14 States that -- that a
7 quarterly verification has to be in person. It is not the
8 case in Alaska. And simply going to the police station
9 four times a year, which is reserved only for the most
10 serious sex offenses, the aggravated offenses -- in all
11 other cases it's just annually -- doesn't rise to the
12 level of a burden that is at all tantamount to what we
13 think of as punishment under the Ex Post Facto Clause.

14 QUESTION: I have forms I have to fill out four
15 times a year for the Government. I'm always afraid I'm
16 going to miss the deadline. If I had to present myself to
17 a -- a policeman, which is itself I think demeaning, I --
18 I just don't know any analogue for -- is there any
19 analogue for that in -- in regulation of --

20 MR. ROBERTS: In-person registration?

21 QUESTION: -- the regulation of regulated
22 industries or things like that?

23 MR. ROBERTS: I'm not sure of one where you
24 actually have to show up in person, but the question is
25 whether that in-person requirement is rationally related

1 to a legitimate regulatory purpose. That's the standard
2 under cases like Flemming.

3 QUESTION: Well, Mr. Roberts, do they in Alaska
4 have to go personally or not?

5 MR. ROBERTS: They do not. It clearly --

6 QUESTION: Even for aggravated offenses?

7 MR. ROBERTS: Even for aggravated offenses.

8 QUESTION: And it can be filed by mail or how?

9 MR. ROBERTS: Expressly can be filed by mail.
10 The instructions make that clear.

11 QUESTION: Could -- could the administrative
12 authorities interpret the statute so that you would have
13 to go to the station without amending the statute?

14 MR. ROBERTS: I don't think so, because the
15 statute says the initial registration has to be in person.
16 Typically it's in -- in prison. And then it says the
17 later verification has to be in writing. So I think it
18 would be an unreasonable reading of the statute to say
19 that the later verification had to be in writing.

20 QUESTION: Do we have an issue here because this
21 law was passed after a number of the people affected by it
22 had already been convicted, and so there are allegations
23 of retroactivity concerns?

24 MR. ROBERTS: The question is whether the
25 burdens that the law imposes constitute punishment. If

1 it's not punishment, then it's perfectly valid to apply it
2 to people who were convicted prior to the effective date.

3 And this is not --

4 QUESTION: Mr. Roberts, the only challenge in
5 this case is to the retroactivity. Is that correct?

6 MR. ROBERTS: Only the ex post facto challenge
7 is before the Court in this case.

8 QUESTION: And that's because these people were
9 tried, convicted, served their time before the passage of
10 the act.

11 MR. ROBERTS: That's correct, and --

12 QUESTION: And their principal complaint, as I
13 understand it, is that this is punishment because we can't
14 get out. There's no escape from it. We can prove with
15 expert testimony that we are cured. Nothing will get us
16 out from under this demeaning regime, that much more than
17 the burden of going to a police station, that that's what
18 it's about, that we're locked into this for life and it
19 has a devastating effect on our lives.

20 MR. ROBERTS: Well, for life, again only for
21 aggravated; for 15 years for other sex offenses. And yes,
22 that is one of their arguments, that they can't get out of
23 it.

24 But this Court's cases haven't drawn that line.
25 The question is whether the burdens are pursuant to a

1 legitimate regulatory objective, or whether they're
2 punitive. For example, in cases like Kansas against
3 Hendricks, couldn't get out of that, and yet that didn't
4 make it a violation of the Ex Post Facto Clause. Flemming
5 against Nestor. You couldn't avoid the sanction there,
6 and yet it did not rise to the level of punishment.

7 QUESTION: But there was a -- there was a
8 determination, at least in Hendricks, that you fit --
9 currently fit into a certain category.

10 MR. ROBERTS: A -- a particular subclass, yes.
11 It was an individualized determination required because
12 the depravation there, actual confinement, was far more
13 severe than the depravation at issue here. But neither an
14 individual determination, nor a chance to get out of it is
15 required to avoid the categorization as punishment. Cases
16 like Hawker and De Veau make clear that a -- a reasonable
17 legislature can treat a category -- a category of sex
18 offenders. They don't --

19 QUESTION: But in Hawker, you didn't have to do
20 anything. Here --

21 MR. ROBERTS: Hawker was --

22 QUESTION: -- I don't like to use the word
23 "affirmative action," because that has a connotation in
24 some other -- but you have to take an -- affirmative steps
25 for the rest of your life in -- in some cases. And

1 this -- and this seems to me very, very burdensome and to
2 differentiate this class.

3 MR. ROBERTS: Not true, of course, in Hendricks
4 or Flemming or Salerno, no opportunity to avoid it there.
5 You didn't have to do anything to get the sanction applied
6 to you. Now --

7 QUESTION: No, no, no. I was -- I was saying
8 but the requirement of the statute is that for the rest of
9 your life you have to take affirmative steps to -- to
10 re-register --

11 MR. ROBERTS: You have to register.

12 QUESTION: -- and to list all your automobiles
13 and -- and to show that you've --

14 MR. ROBERTS: You -- you have to fill out --

15 QUESTION: -- shaved your beard or something.

16 MR. ROBERTS: -- one -- one side of one page.
17 That's the form that's involved here. That in itself
18 cannot be punishment. We -- as Your Honor mentioned -- we
19 do that all the time in -- in today's society. So it must
20 be something else that makes this punishment.

21 Now, what the Ninth Circuit's -- Ninth Circuit
22 thought was that it was publishing it on the Internet,
23 that that made it punishment. But that's simply the
24 most -- most efficient and most economical way of making
25 information available.

1 It also is passive. It's not displayed to
2 people who have no interest in the information, and in
3 that sense is far less invasive.

4 The publication on the Internet will -- yes, it
5 may cause adverse consequences when members of the
6 community learn this public fact about someone's past.
7 But the State is certainly free to weigh the convicted sex
8 offender's interest in keeping that public fact from being
9 widely known against the interest of those in the position
10 of, say, Megan Kanka's parents.

11 QUESTION: Well, "waive" -- "waive" isn't quite
12 the word, Mr. Roberts. I mean, "waive" is something a
13 person does --

14 MR. ROBERTS: "Weigh." I'm sorry. "Weigh."

15 QUESTION: Oh, I thought you said "waive."

16 MR. ROBERTS: I'm sorry. Weigh the convicted
17 sex offender's interest in keeping a public fact about his
18 past secret against Megan Kanka's parents' interest in
19 knowing that their new neighbor across the street had
20 twice been convicted of sexually abusing young girls.
21 That's a determination for the legislature to make.

22 There are costs --

23 QUESTION: But you could get that from the
24 record of conviction.

25 MR. ROBERTS: Yes, and all the State is doing --

1 QUESTION: But under the statute we have here,
2 you have affirmative steps that have to be taken for the
3 rest of the person's life if he's a violent offender, to
4 report four times a year. I just don't know any analogue
5 for that.

6 MR. ROBERTS: Well, there are countless
7 analogues in the regulatory regime where people have to
8 file quarterly reports. If -- and -- and the question is
9 whether that requirement serves a valid regulatory
10 purpose. It can't rise to the level of punishment just
11 because the legislature has determined that the triggering
12 event --

13 QUESTION: Well, but I suppose that's because
14 you choose to be in a regulated industry, or you choose to
15 have this withholding regime. And it's -- it's not
16 imposed on a class of citizens by reason of their criminal
17 past.

18 MR. ROBERTS: There are -- there are many
19 disabilities that are imposed as a result of a prior
20 conviction that the Court has found don't constitute
21 punishment.

22 QUESTION: None which require affirmative steps.

23 MR. ROBERTS: Well, the affirmative steps --
24 it -- that has never been the test. The test has been
25 whether it rises to the level of punishment. Yes, the

1 affirmative step of filling out one side of one page with
2 the sort of information that you'd -- would put on your
3 application to join the Price Club requires. There's
4 nothing burdensome about that. It must be in their
5 argument the use that that information is put to.

6 QUESTION: What is our test for whether it rises
7 to the level of punishment?

8 MR. ROBERTS: Well, when the --

9 QUESTION: Didn't the Ninth Circuit found --
10 find there was no intent to make it punitive, but looked
11 to the effects?

12 MR. ROBERTS: That's right.

13 QUESTION: Is it an effects test and how do we
14 apply it --

15 MR. ROBERTS: Well, it's called the intent
16 effects test. You'd first see what the intent is, and
17 that is so critical, and nearly controlling because the
18 same sanction can be punitive or civil depending on the
19 purpose. Even confinement can be civil if the purpose is
20 protective. So that's why purpose is so controlling.

21 Now, once you determined that there's a
22 regulatory purpose, as every court has -- not just every
23 Federal court -- every court to look at these laws has
24 determined they have a valid civil regulatory purpose --
25 then the one challenging that determination carries the

1 heavy burden of establishing, by the clearest proof, with
2 unmistakable evidence, that the effect is so punitive that
3 the purported purpose must, in fact, be a charade. And --

4 QUESTION: But why isn't the evidence that this
5 is -- is a face plastered on the Internet, that in modern
6 times that is the equivalent of the town square where
7 you're shaming the bad actor? And here, you have a
8 person's face, and you have only the bad information. You
9 don't get the information that this person has
10 successfully completed a rehabilitation course. You don't
11 get the information that this was on the scale of sexual
12 offenses on the lighter side. The -- am I wrong about
13 that?

14 MR. ROBERTS: Yes. That information is
15 available. The circumstances, the crime for which the
16 person is convicted, is available. So --

17 QUESTION: Is it -- that's on the page -- the
18 page with the photograph says what the crime was?

19 MR. ROBERTS: That's my understanding, Your
20 Honor, yes, that -- that -- I'm not sure what it is in
21 every State, but the -- the circumstances of conviction
22 is -- it's one of the things that has to be registered,
23 and is available to the public. So if it -- you can find
24 out what the conviction was for.

25 Now, I don't -- I'm sorry.

1 QUESTION: In addition, on that page, what the
2 viewer will see -- you don't see on the page with the face
3 any disclaimer, any statement that the State is not
4 branding this person as dangerous. The State is simply
5 making a statement that there was a conviction in the
6 past.

7 MR. ROBERTS: It conveys simply the truthful,
8 objective information that this individual was convicted
9 of this crime, and the public is free to take appropriate
10 action if they think that's -- that's appropriate under
11 the circumstances. It is different from the historic
12 shaming penalties because of the purpose. And again,
13 purpose is the nearly controlling factor. The purpose of
14 the shaming penalties was not to inform. Everybody in the
15 colonial village knew the circumstances of the offense.
16 The purpose was to shame. Here, the purpose is to inform.

17 QUESTION: Mr. Roberts, on that point you said
18 this is truthful information, and it is. My question is,
19 isn't -- it's not the whole truth because the successful
20 rehabilitation in one case is not known. It's not known
21 in the other case that a judge determined this -- this
22 person had been cured to the extent that he could have the
23 custody of a -- a minor child. That information is not
24 known. So the -- the public is getting only the bad, and
25 not the good. Its judgment is being skewed. And that's

1 why it has a punitive flavor.

2 MR. ROBERTS: Well, it conveys the information
3 that the legislature thought was pertinent for people to
4 take action to protect themselves if they think it's
5 warranted. Nothing prevents them from finding out more if
6 they want to -- if they think that's pertinent --

7 QUESTION: But nothing would prevent anybody
8 from going to the court, or the police station and getting
9 a record of a particular person. It's made easy for them
10 by the State -- access is made easy -- but only access to
11 the bad information.

12 MR. ROBERTS: Well, access to the information
13 that the legislature thought was pertinent and that people
14 wanted to learn. There is no requirement --

15 QUESTION: Mr. Roberts, would it be possible for
16 a defendant to include additional information on the form,
17 and if so, would it appear on the Internet?

18 MR. ROBERTS: There's no provision for that
19 under Alaska's laws. I am aware of situations where --
20 where they have a more active notification, where the
21 offenders have taken steps to say, well, here's my side of
22 the story, but there's no provision for that on the
23 Internet.

24 QUESTION: Suppose they had the same statute,
25 but instead of it -- applying it to people who were

1 convicted, they applied it to people who had been
2 arrested, or alternatively, they applied it to people whom
3 a policeman said he had gotten suspicious information
4 about that he believed was accurate, no arrest -- now,
5 suppose it's exactly the same, but they just do -- they
6 apply it not in that way. What part of the Constitution,
7 if any, would that violate?

8 MR. ROBERTS: Well, it might violate the Due
9 Process Clause if there's not a rational connection
10 between --

11 QUESTION: Well, it's rational in the sense that
12 a -- a reasonable person would think that these -- it's a
13 way of stopping these, you know, criminals. They're
14 suspicious. They're -- they're -- suspicious people
15 against whom there are suspicions are more likely to
16 commit crimes than people who are not suspected.

17 MR. ROBERTS: The legislature would have to show
18 a rational basis for its categorization. That's the
19 standard --

20 QUESTION: All right. Your answer is it
21 violates substantive due process or nothing.

22 MR. ROBERTS: Or -- it may or may not, depending
23 on what it shows.

24 QUESTION: All right. I've got that. I --

25 MR. ROBERTS: Here the legislature had a solid

1 basis, a basis that this --

2 QUESTION: Yes.

3 MR. ROBERTS: -- Court has recognized, as
4 recently as last June in the McKune case, for the
5 conclusion that those convicted have a high rate of
6 recidivism

7 QUESTION: Well, are you assuming from Justice
8 Breyer's hypothesis, Mr. Roberts, that the policeman who
9 has spotted some suspicious -- that these people have
10 previously been convicted, or that this is just the -- the
11 beginning of the whole story is that a policeman spots
12 someone?

13 MR. ROBERTS: Well, I understood the question to
14 be it's just the beginning of the whole story, and in that
15 case, I'd question whether --

16 QUESTION: Well, there's certainly no ex post
17 facto problem there, is there?

18 MR. ROBERTS: No, there wouldn't be --

19 QUESTION: No, what I was driving at is suppose
20 that this statute too is -- I -- suppose I were to believe
21 it was excessive in light of its purpose in respect to
22 some -- some people, but not to others. What part of the
23 Constitution would it violate, if any?

24 MR. ROBERTS: Certainly not the Ex Post Facto
25 Clause because in Seling against Young, the Court said you

1 look at the law on its face, not as applied. Halper had
2 started looking at laws as applied to determine whether
3 they're punishment, and in Hudson and in Seling, the Court
4 said we're not going to do that.

5 I'd like to reserve the remainder of my time,
6 Your Honor.

7 QUESTION: Very well, Mr. Roberts.

8 General Olson, we'll hear from you.

9 ORAL ARGUMENT OF THEODORE B. OLSON

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

12 MR. OLSON: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 Congress and the legislatures of 50 States have
15 agreed that citizens should have access to truthful
16 information concerning the identity and location of
17 convicted sex offenders.

18 QUESTION: Well, I suppose that the public in
19 theory has access to it anyway because convictions are a
20 matter of public record, and presumably any citizen who
21 wanted to dig deep enough could find out who had been
22 convicted of what.

23 What this scheme involves is getting a big
24 megaphone, in effect, making it more readily available.
25 Is that what we're talking about here?

1 MR. OLSON: I don't agree with the
2 characterization of this as a megaphone. What I -- what I
3 would characterize it instead of saying it is the least
4 intrusive, most passive way to provide information that is
5 already available to citizens, and can be obtained by
6 citizens, but to make it more accessible to them because
7 the people have decided that they want this information.
8 QUESTION: But it isn't passive because you have
9 a lifetime obligation to update it.
10 MR. OLSON: Yes, but it's --
11 QUESTION: It is not passive.
12 MR. OLSON: But it's -- but it's minimally
13 passive and -- and minimally --
14 QUESTION: Now we're up to minimally passive.
15 MR. OLSON: Well, Justice Kennedy, we have to
16 register to vote. We have to register to marry. We have
17 to register to get a driver's license. We have to
18 disclose our homes when we buy a car, when we get a
19 divorce, when we fill out a census form
20 QUESTION: And most -- most of those do not
21 involve -- involve shame or ridicule. This does.
22 MR. OLSON: Well, the -- that is a separate
23 question. I'm -- what I'm saying is that the burden of
24 registration or of keeping information current is a
25 minimally intrusive burden.

1 Now with respect to the question of shame, that
2 arises, to the extent that it exists at all, from the
3 conviction of violating a sex offense. There is due
4 process in connection with that -- that -- to the extent
5 that process is due -- and we'll get to that I know in the
6 subsequent case, but --

7 QUESTION: Well, but precisely, but that -- that
8 shows that there's an added burden here that was added by
9 the State after the conviction.

10 MR. OLSON: Yes, but that -- that is true of
11 many regulatory measures. You can lose your right to
12 practice in the securities field -- and that's been
13 held -- because of a conviction or to practice banking or
14 the right to vote. There are other consequences. This
15 Court has repeatedly said --

16 QUESTION: If a banker or securities dealer were
17 convicted of -- of -- of a crime, could the Government
18 after the fact -- prospective -- pardon me --
19 retroactively -- retroactively require that he or she file
20 their -- their earnings statements for the rest of their
21 life with some regulatory agency?

22 MR. OLSON: Well, I don't -- I -- I don't -- the
23 Court has never addressed that question, but the Court has
24 held that after the fact, it can -- the -- the legislature
25 can prevent those persons from practicing that profession,

1 including the practice of medicine, being a fund raiser
2 for a union, losing the right to vote. The fact that
3 this -- what the -- this --

4 QUESTION: But, General Olson, there's a -- a
5 difference in those -- those restrictions that affect one
6 part of one's life. I can't practice a particular
7 profession, but I can go out and get a job. I -- I'm not
8 affected in where I live. My neighbors know that I've
9 committed a crime, but they don't -- the same reaction --
10 the notion that I am being labeled not a convicted
11 offender -- which I am -- but a sex offender, a current
12 status -- a current status with no opportunity to get out.

13 MR. OLSON: Well, the -- well, the fact of
14 registration and disclosure relates to the conviction of a
15 sex offense. The public in 50 States and the legislature
16 and Congress have determined in response to the requests
17 of the people -- as Mr. Roberts said, the test, according
18 to this Court's jurisprudence, is the intent. The intent
19 here is not to punish. The intent is to respond to
20 citizens who have --

21 QUESTION: Well, I think it's -- it's easy for a
22 legislature to say that, and in part, it's right. But in
23 part, it seems to me that there are many indicia of
24 punishment here as well. That's why you just don't rest
25 when the legislature says it's regulatory. You must go

1 beyond that.

2 MR. OLSON: Yes. This Court has said that
3 only -- you would go beyond that only if the evidence was
4 the clearest proof, unmistakable evidence that the intent
5 or effect was punitive as opposed to regulatory. In this
6 case, there is no affirmative restraint on motion. There
7 is no confinement. There is no restriction on travel or
8 employment or recreation, no obligation to submit to
9 searches, intrusive supervision or questioning.

10 QUESTION: Well, there's no formal restriction
11 on employment, but it -- in many of these cases, these
12 people have terrible times renting a place to live,
13 getting a job.

14 MR. OLSON: Well, the empirical evidence is not
15 great that that is indeed a significant statistical
16 problem, but the problem, to the extent that it may exist,
17 results from the conviction of a -- of an -- of an
18 offense --

19 QUESTION: No. With -- with --

20 MR. OLSON: -- about which an employer may want
21 to know.

22 QUESTION: With respect, Mr. Olson, I mean, I
23 think that's what's bothering us. The -- the offense has
24 resulted in a conviction and a penalty. Each is a
25 one-time event, as it were, or a one-time status and each

1 is over. What this is doing is, in effect, imposing a
2 status of public shame for a period of 10 years, or
3 whatever it is, or a period of life in -- in the case of
4 certain offenses. And that is not merely the consequence
5 of the conviction for the crime which was defined, is
6 over, and done with. This is something new.

7 MR. OLSON: Well, to apply the seven -- to the
8 extent that the Court would apply the Kennedy Mendoza-
9 Martinez factors, there is no affirmative disability or
10 restraint. Registration or publication has never been
11 considered historically as punishment. The -- the --
12 there is a regulatory purpose. The -- even the Ninth
13 Circuit --

14 QUESTION: May I ask you a question about that?
15 I -- I understand that the -- the percentage of sex
16 offenses in Alaska with children is extremely high, and
17 what is -- has been the effect of this scheme if it's been
18 employed? Has it had some effect there --

19 MR. OLSON: I --

20 QUESTION: -- in reducing the number of sex
21 offenses?

22 MR. OLSON: I do not know the answer to that,
23 and perhaps Mr. Roberts does.

24 But what this is -- and I think this is a proper
25 way to think of this statute -- in connection with a class

1 of offenses, where the -- where the rate of recidivism is
2 significantly higher -- as this Court has held very
3 recently -- than any other crime, people are asking their
4 government please allow us to know when we have someone in
5 our neighborhood. When we -- when we're hiring a new --

6 QUESTION: Could -- could the State require a
7 special mark on your license plate?

8 MR. OLSON: No, I -- well, I don't know, Justice
9 Kennedy, but I would say that would be considerably
10 different than what's here because that would --

11 QUESTION: I don't think it's very different.

12 MR. OLSON: Pardon me?

13 QUESTION: I don't think it's very different.

14 MR. OLSON: I -- I respectfully submit that it's
15 a great deal different. That mark on your license plate,
16 or mark on your forehead would go wherever you would go.
17 It would require you to carry the government's message
18 rather than the government supplying the message.

19 QUESTION: Well, this statute requires you to
20 make the government's message four times a year.

21 MR. OLSON: It only -- it doesn't require you to
22 make the government's message four times a year. The
23 government's message, I respectfully submit, is made when
24 a citizen submits an inquiry to the State through the
25 Internet listing. All -- it is required four times a year

1 is to advise the government of a current location or
2 current information so that the information on the
3 registry is accurate and -- and up-to-date.

4 This is information that citizens have requested
5 from their government. Their government has the
6 information of people who have committed certain types of
7 crimes, who society has perceived as particularly
8 dangerous. It's a self-protective mechanism. The -- not
9 only the --

10 QUESTION: But they -- the Megan's Laws are not
11 all one size and shape. I mean, some of them have the
12 disclaimer right on the page saying we're not labeling
13 this person dangerous and -- and have a chance for a
14 person to get off it. Here, because there's no give, it
15 does have a punitive feel.

16 I mean, as far as the Federal legislation is
17 concerned, a State that tells the whole truth -- is
18 that -- that kind of law is totally acceptable within the
19 Federal requirement, isn't it?

20 MR. OLSON: It -- it would seem to -- well, I
21 think the answer is that yes, it would because the Federal
22 statute simply prescribes a floor.

23 It's going to be virtually impossible and quite
24 burdensome for the State to supply what you suggest would
25 be complete information about any individual. What the

1 parents and the --

2 QUESTION: It doesn't -- at least to say what --
3 whether the crime was a misdemeanor or a felony, the
4 disclaimer certainly to -- to say, now we are not labeling
5 this person a forever sex offender. We are labeling this
6 person a convicted --

7 MR. OLSON: Well, and that is all that the
8 registry does, and I submit that to the extent that your
9 question goes to any of the seven Kennedy Mendoza-Martinez
10 factors, it's excessiveness is -- on -- on the scale.

11 QUESTION: Yes.

12 MR. OLSON: And I would submit that this
13 registry and this information, providing truthful, public
14 record, readily accessible information is -- is minimal.

15 QUESTION: Thank you, Mr. Olson. .

16 Mr. Thompson, we'll hear from you.

17 ORAL ARGUMENT OF DARRYL L. THOMPSON

18 ON BEHALF OF THE RESPONDENTS

19 MR. THOMPSON: Mr. Chief Justice, and may it
20 please the Court:

21 We believe that the Alaska Sex Offender
22 Registration Act imposes punishment because it possesses
23 three features which are classically considered to be
24 punishment, and not like any other civil or regulatory
25 measure this Court has seen before.

1 First of all, the sanction attaches
2 automatically and inescapably solely on a basis of a prior
3 conviction, without any determination of present
4 dangerousness at all.

5 Secondly, the sanction is a pervasive regulation
6 of the person themselves. There is no attempt to try to
7 regulate an activity or a profession here. It's a
8 regulation of the person himself.

9 QUESTION: Well, to what extent do you -- do you
10 mean, Mr. Thompson? You said to regulate the person
11 himself. I mean, he is not circumscribed in his
12 activities, is he?

13 MR. THOMPSON: He has to report four times a
14 year.

15 QUESTION: But not in Alaska -- .

16 MR. THOMPSON: Just like they do on probation.

17 QUESTION: In Alaska, not in person, I take it.

18 MR. THOMPSON: Well, we respectfully disagree
19 with Mr. Roberts' characterization of the statute. The
20 statute gives unfettered discretion to the Department of
21 Public Safety -- the police -- to administer it in a way
22 that it deems appropriate.

23 QUESTION: How -- how has it been administered?

24 MR. THOMPSON: Regulatorily they have done it by
25 mail. But I can cite you instances, with affidavits in a

1 parallel case, of people that were mandated to report to
2 the police. They can do it and --

3 QUESTION: Well, but that's not part of -

4 MR. THOMPSON: -- have the discretion to do it.

5 QUESTION: That's not -- that's not part of the
6 record here, is it?

7 MR. THOMPSON: That is not part of the record
8 here. But they have --

9 QUESTION: At least -- at least --

10 MR. THOMPSON: -- the unfettered discretion by
11 the pure statutory language.

12 QUESTION: When the -- they have to replace the
13 photographs periodically.

14 MR. THOMPSON: They do, and -- and they're
15 required to -- on their quarterly report to report any
16 changes in their physical characteristics, they gain
17 weight, they grow gray hair, they get lasik surgery, don't
18 have glasses, grow a beard, get fat. Whatever it is,
19 they've got to report that information. And you know
20 that's going to be a triggering event. I mean, if they
21 look different, the police are going to have them come
22 back in and get a new photograph --

23 QUESTION: Well, but I mean, how is that
24 different? Everybody -- you're sort of turning this on
25 whether you have to walk to the police station or not.

1 I mean, a lot of people have to go in and report different
2 things, send in forms, give their pictures, even give
3 their fingerprints.

4 I would think that the problem is what happens
5 to that information later, that everybody in the
6 neighborhood knows it, that they're likely to shun the
7 people, that -- that it may be too broad. I mean, is
8 that -- is it really the police -- having to walk
9 somewhere and write something as opposed to sending in a
10 report that makes all the difference?

11 MR. THOMPSON: No. I mean, what I -- what I --
12 the third characteristic is -- is the stigmatizing
13 characteristic, which I want to -- want to talk about
14 here. But it's not just --

15 QUESTION: Well, what about someone who is truly
16 a dangerous sex offender, who poses a real risk to
17 children in that area? Now, what about that? Are -- is
18 this a -- a scheme that is applied to such a person that
19 poses constitutional problems, do you think, or does
20 public safety rise to the level where it can be responded
21 to in this fashion?

22 MR. THOMPSON: Well, unlike the -- the Kansas
23 situation, Kansas v. Hendricks, there's no effort to weed
24 out those who are dangerous from those who are not.

25 QUESTION: Yes. That's not the question I asked

1 you.

2 MR. THOMPSON: I apologize.

3 QUESTION: I asked you whether, as applied to
4 someone who is exceedingly dangerous, in your view does
5 the scheme survive?

6 MR. THOMPSON: Well, no. It's still an evasive
7 regulation of the individual just like probation and it's
8 still a stigmatizing system that labels them as dangerous.

9 QUESTION: Maybe he deserves stigmatization
10 if -- with the high recidivist rate under the facts that
11 Justice O'Connor gave you. The person is still dangerous.

12 MR. THOMPSON: But not all of them are. And
13 that's the problem with this statute. It applies to those
14 people that are demonstrably not dangerous.

15 QUESTION: If that's the problem --

16 QUESTION: But your --

17 QUESTION: -- how -- how -- this is -- what is
18 your response to Justice -- to the argument that was made
19 on the other side? It said simply this, that you're --
20 you're raising an ex post facto claim. Now, we don't want
21 to be nitpicking about this, but an ex post facto claim is
22 a question of whether this is punishment, and they're
23 saying it's not seen as punishment. It wasn't their
24 intent to punish. It was their intent to inform so that
25 the thing won't happen again. That's not a punitive

1 intent.

2 And therefore, your claims about how bad this is
3 may be right. And suppose I accept them. Suppose I think
4 they're right. Should I not, nonetheless, wait until
5 somebody raises a substantive due process claim? That way
6 you can decide if the problem with the statute is overly
7 broad, if the problem is that some people should have it
8 applied to them and others shouldn't. All the things that
9 you mentioned would come into play. But as far as
10 punitive intent is concerned, that's not the
11 legislature's --

12 MR. THOMPSON: Well, we -- I'm sorry. We
13 disagree --

14 QUESTION: I mean, that's the argument.

15 MR. THOMPSON: Yes.

16 QUESTION: And I'd like to -- but tell me what
17 about the relation of the substantive Due Process
18 Clause -- about why isn't that the better vehicle to make
19 your argument? Now, that's what I'd just like to hear you
20 discuss.

21 MR. THOMPSON: I mean, it certainly is a
22 vehicle, you know, to talk about whether or not it's
23 narrowly tailored to -- to a specific regulatory goal.
24 I think that is a proper challenge, and it was challenged
25 at the lower court level.

1 But we're here today on an ex post facto
2 question before the Court, and the question is, is it
3 punishment, or is it not? And we -- we respectfully
4 disagree that this is intended to be purely a regulatory
5 measure. And we disagree because the State's sole
6 reliance is on the language found in the preamble of the
7 statute, that it's designed to protect the public. That's
8 one of the penal goals under the constitution in the State
9 of Alaska for criminal justice system

10 QUESTION: Of course, that's true, but in my
11 mind rings a case, in which I was in dissent, but the
12 majority has the law, and that's Hendricks. If, after
13 all, it's not punishment to put a person in a cell -- and
14 I thought it was, but the majority thought it wasn't --
15 why is it punishment, following the law, to simply require
16 the person to make reports four times a year?

17 MR. THOMPSON: Well, it is -- it is -- probation
18 requires the exact same thing, and that's our point.

19 QUESTION: And it -- it required less than
20 putting the person in what was, in effect, a jail cell.
21 I'm -- I'm looking at the precedent on ex post facto.

22 MR. THOMPSON: Certainly. And -- and -- and you
23 know, Hendricks and Salerno present the types of cases
24 that are steeped in the pedigree of this Court looking to
25 the need to protect the public from those people that are

1 actively dangerous now, and that's why it was important in
2 Hendricks that there was, in fact, those protections
3 afforded to the individual. I mean, it doesn't happen
4 automatically that Hendricks was going to be put in jail.
5 There had to have been a jury trial, or trial by a judge
6 with a preponderance beyond a reasonable doubt, and he's
7 allowed an annual review. He can petition at any time.
8 The secretary, at his own discretion, can remove that
9 restriction. So the duration of that is solely limited
10 and -- and looks to the purpose to protect the people from
11 those -- the public from those people that are dangerous.

12 None of those protections are here. In fact,
13 this is a wide-sweeping statute that takes everybody in.
14 And -- and we have to look --

15 QUESTION: I -- I guess that one of the problems
16 I have with -- with your side of the case is that this is
17 public information insofar as a conviction is concerned.
18 Insofar as addresses, credit card companies, and driver's
19 license bureaus have this stuff all the time. It would
20 seem to me that if the Court were to strike down these
21 laws, some private business could have a web -- a web
22 page, just like credit card companies do. There may be
23 some Privacy Act concerns, but still, this is truthful
24 information.

25 MR. THOMPSON: It's not truthful information,

1 and respectfully, I -- I agree with what Justice Ginsburg
2 was saying earlier. I mean, it's -- it's false --

3 QUESTION: It's -- it's truth as far as it goes.
4 There's nothing false in the information reported.
5 I questioned whether it was the whole truth because it has
6 the bad side, but none of the good.

7 MR. THOMPSON: It's sort of the sin of omission,
8 particularly when we look -- we look to --

9 QUESTION: Well, I -- I suppose a lot of
10 credit --

11 MR. THOMPSON: Well, and -- and it goes further
12 than that.

13 QUESTION: -- the credit reports are misleading
14 too. Maybe the person is now very successful, and is
15 paying all their bills. You don't know.

16 MR. THOMPSON: But the legislatures made it
17 clear that they are telling the public that these people
18 weren't just someone who once had a conviction. They're
19 telling the public that these people are actively
20 dangerous now, presently dangerous to be actively avoided.

21 And how do they do that? If you know someone is
22 on the registry -- and the idea being make my own informed
23 choice. Now that I know this information, get some more
24 information. And if you know they're on the registry and
25 you get the rest of that information, you know they're

1 cured, you know they've been great --

2 QUESTION: Well, does -- does any entity in a
3 society, a -- a nursery school have an interest in -- in
4 knowing the background of their employees?

5 MR. THOMPSON: Readily available, and it has
6 always been available and it was available before the
7 statute.

8 QUESTION: Well, they have an -- they have an
9 interest in knowing that. That isn't -- that isn't
10 somehow punitive or -- or half the truth. They make
11 the -- they make the inference that there's -- that
12 there's a hazard here, a risk they don't want to take.

13 MR. THOMPSON: What I was getting at earlier
14 was -- is that the State of Alaska makes it a crime,
15 felony child endangerment, if you leave your kid alone
16 with someone who's on the registry. And it doesn't matter
17 that that person is safe. It doesn't matter that that
18 person is not dangerous. So the State is telling you that
19 they are to be avoided.

20 QUESTION: Well, but that -- that issue is
21 not -- not before the Court, and if that's so, this --
22 this just shows that it's a regulatory scheme which has
23 another valid purpose.

24 MR. THOMPSON: We disagree. What we think that
25 demonstrates is that it's a clear proclamation because it

1 came at the same time as the amendments in '97, a clear
2 proclamation of a legislative intent to tell the public
3 that everyone on that registry is currently, presently
4 dangerous.

5 QUESTION: Well, you disagree with -- you
6 disagree with the court of appeals then when they said it
7 was not a punitive intent on the part of --

8 MR. THOMPSON: Yes, we do disagree with that and
9 we -- we briefed that in our brief.

10 QUESTION: Well, you would -- you would concede
11 that it is least ambiguous because the legislature said
12 our purpose is regulatory. So you're not going to say
13 that's -- that's incredible.

14 MR. THOMPSON: Well, the legislature never said
15 it was a civil regulatory measure. What the legislators
16 said and what their sole reliance on intent is, is in the
17 preamble where it says it serves to protect the public.
18 And -- and it's clear that protection of the public in --
19 in Salerno was -- was viewed as a proper regulatory goal,
20 but in -- in Brown it's also viewed as a proper criminal
21 goal. And in Alaska, it's the goal -- one of the stated
22 goals under article I, section 12 of the penal
23 administration -- it is a criminal goal to protect the
24 public. So I don't think that -- that's -- that's --

25 QUESTION: But it's a civil goal too, I --

1 MR. THOMPSON: It is a civil goal too.

2 QUESTION: You rely to some extent on the
3 placement in the criminal code both that the information
4 about this registry system has to be part of every
5 criminal judgment and part of every rule 11 colloquy.

6 MR. THOMPSON: That's -- that's true. The
7 legislature, you know, in our view considered it such an
8 important component and consequence of any criminal
9 conviction, that in fact, that's the only information that
10 a judge has to give to someone convicted of a sex offense
11 in writing.

12 QUESTION: So I thought it might be fair for you
13 to say, well, it's -- it's mixed. It's ambiguous. In
14 some respects, it's -- looks regulatory. In other
15 respects it looks punitive. I thought that's what would
16 you say instead of -- so we have to look further. But are
17 you saying right from the very reading of this law, it is
18 necessarily punitive?

19 MR. THOMPSON: We do believe that. I mean, it
20 was intended, again, to protect the public, but when you
21 look to a law that's -- that's geared directly at
22 individuals or groups of individuals and not set out to
23 regulate any kind of activities, you know, that is an
24 intent in our view to -- to punish --

25 QUESTION: Would it affect --

1 MR. THOMPSON: -- solely based upon a prior
2 conviction.

3 QUESTION: Your claim is an ex post facto claim,
4 a retroactivity claim. Suppose this scheme, the Alaska
5 scheme, did allow people -- like the parties here -- to
6 say, I'm no longer dangerous. Here's the documentation of
7 that. Take me off the list. Would you say, nonetheless,
8 it's still punitive? Are you saying that even if someone
9 made no showing at all of lack of dangerousness,
10 this is -- it would be ex post facto and therefore must
11 fall?

12 MR. THOMPSON: If I -- Justice Ginsburg --

13 QUESTION: You -- you are asserting that Doe I
14 and II are people who are no longer dangerous.

15 MR. THOMPSON: Yes.

16 QUESTION: But I'm asking you about the people
17 in this large category who are still dangerous, or at
18 least have made no showing that they're not dangerous.
19 You would have the same ex post facto argument with
20 respect to those people? Or does it depend, to some
21 extent, on the ability to show that you're not dangerous?

22 MR. THOMPSON: First of all, I think we would --
23 we would take the position that in the absence of any
24 criteria of actual present dangerousness demonstrates
25 that -- that the legislature is aimed at the prior

1 conviction and tacking on certain responsibilities to the
2 prior conviction as opposed to really trying to fit the
3 goal here of protecting the public from dangerous people.

4 QUESTION: But if the legislature says we don't
5 want this to be punitive, therefore we will give everyone
6 who was a convicted sex offender an opportunity to show
7 that they're no longer dangerous, and then there will be a
8 determination made, yes, you are, no, you're not, would
9 you still be making the ex post facto argument for the
10 people who have not shown they're no longer dangerous?

11 MR. THOMPSON: I think it would certainly be a
12 closer call, and --

13 QUESTION: Why would it be a --

14 MR. THOMPSON: -- and my clients would certainly
15 invite that hearing.

16 QUESTION: Why would it be a closer call? Why
17 would it be a closer call? Is everything that is bad
18 regulation punishment? I mean, all that would show -- all
19 you're claiming is that some people who are not dangerous
20 are -- are wrongly covered by this regulatory measure.
21 That still doesn't prove that the regulatory measure is
22 punitive. It just shows that it's stupid.

23 (Laughter.)

24 QUESTION: That doesn't make it violate the Ex
25 Post Facto Clause. Every regulatory measure that goes too

1 far is -- is not criminal punishment.

2 MR. THOMPSON: It is if it looks just like
3 probation and has the same consequences as probation
4 because probation is historically --

5 QUESTION: That's -- that's -- the question
6 Justice Ginsburg started with is every time -- you just
7 replied to Justice Scalia -- and what I hear are words
8 that seem to apply with equal force to a perfectly-
9 tailored statute that would catch only the most dangerous
10 sex offenders who everyone agrees are virtually
11 uncontrollable and might repeat their offense many, many
12 times.

13 See, if it applies -- if the argument -- the
14 question people are asking you -- I'm simply repeating
15 it -- is, on your argument why isn't that just as much an
16 ex post facto law? What has it got to do with the matter
17 that it's overly broad, et cetera, which sounds to me like
18 a substantive due process argument, not an ex post facto
19 argument? That's the same question. But I would like you
20 to focus right on it.

21 MR. THOMPSON: Well, I apparently have not been
22 doing a very good job of it, but I'll try.

23 When we look to whether or not the statute
24 imposes a punishment, I think it's important that we look
25 to whether or not it -- it's -- fits with the umbrella of

1 things which have historically considered to be
2 punishment. And that's one of our starting points, and
3 that's why I keep going back to the concept of probation
4 and parole because historically there's no dispute that
5 probation is a deprivation of liberty. Not -- it's not
6 like going to jail, but it's a deprivation of liberty.
7 And -- and it's been considered as punishment, and that's
8 what this thing does to people.

9 Now, if it was a perfectly-tailored -- such that
10 it could weed out the dangerous from the non-dangerous --
11 well, we would invite that because my clients wouldn't be
12 here today. My client has been determined, you know, to
13 be not dangerous by a superior court family judge.

14 But would it still be punishment? I think we'd
15 have to look at the -- a little bit closer at it. But,
16 you know, if there's a closer nexus between the public
17 purpose and there -- there is a weeding out, maybe it
18 wouldn't be punishment because maybe it's -- it's
19 escapable, it -- it's --

20 QUESTION: But then -- then you might --

21 MR. THOMPSON: -- at that point, it's not
22 regulating him for life.

23 QUESTION: Well, at that point at least there
24 would be -- I -- I assume your -- your point would be that
25 there -- there is at least a -- a credible basis to say

1 that if it covers only those who are affirmatively shown
2 to be dangerous, the object is simply to apprise the
3 public to who is dangerous, and that doesn't sound very
4 punitive. But if there is no attempt to weed out the
5 dangerous from the non-dangerous, then the claim that the
6 object is simply to apprise the public of who is dangerous
7 is not so credible. I mean, isn't -- isn't --

8 MR. THOMPSON: That is my point.

9 QUESTION: -- that one of your points?

10 QUESTION: If that's your point, then how do you
11 respond to their argument which is that that's just too
12 tough to do? We don't know enough about it. It -- it
13 would invite endless hearings. It would be impossible to
14 administer this statute. I'm not making the argument.
15 I'm repeating it --

16 MR. THOMPSON: Right.

17 QUESTION: -- for you to respond to.

18 MR. THOMPSON: I guess that would make the --
19 the due process hearing or the -- the hearing that is
20 established in -- in Hendricks, and the hearing that's
21 established in Salerno futile as well. I mean, judges are
22 called upon every day to make determinations as to whether
23 or not people are presently dangerous. They do it every
24 day in the context of evaluating the sentencing criteria
25 in the State of Alaska. It's called the Chaney Criteria.

1 They have to look to whether or not someone poses a risk
2 to the community. That's what they have to do in --

3 QUESTION: How many Megan's Laws have that
4 regime? I -- I understand that some of them do. Some of
5 them are like Alaska. They say this is based solely on
6 your past conviction. Others say you have an opportunity
7 to show that you're no longer dangerous. What -- in -- in
8 the range of Megan's Laws that all the States have, how
9 many treat this as something you can get out of by showing
10 you're not dangerous?

11 MR. THOMPSON: You know, I don't have a -- a
12 number for you. I can't tell you if it's 23 States or
13 not. I don't -- I'm sorry. I don't --

14 QUESTION: What's wrong about --

15 MR. THOMPSON: I don't know that. .

16 QUESTION: What's wrong about warning the public
17 about who may be dangerous? You -- you seem to say that
18 it's only -- it's only okay if the State warns the public
19 about who is dangerous. What's wrong about warning the
20 public about who may be dangerous? Let the public make --
21 you know, the later -- later determination.

22 MR. THOMPSON: I guess we get down to this who
23 determines who they're -- who may be dangerous or not.
24 I mean, what -- what's the criteria for that?

25 QUESTION: What is irrational or

1 unconstitutional about warning the public about a category
2 of people who may be dangerous as to whom -- as the entire
3 category of whom, there's more likely to be danger than --
4 than with respect to other people? Where is it written
5 that you can only warn the public about those whom you
6 have -- are sure are dangerous?

7 MR. THOMPSON: Part of the problem with the
8 statute, it's not just a warning of the public. I mean,
9 it -- it's -- there are really various components. It's
10 not just a notification statute. I mean, you know, the
11 public right now has access to -- through another statute
12 that we have -- to offender information. All they've got
13 to do is request. And this is an unnecessary statute
14 in -- in one sense. Does it broadcast it on the Internet?
15 No. But the same information is available, and it's
16 information that's available not just going to a
17 courthouse, but you can actually request the State for
18 that information. And -- and for some people, the
19 information may be limited. There are some restrictions.

20 QUESTION: I'm -- I'm not sure if it helps you
21 or hurts you. It -- it indicates that -- that the most
22 distressing and damaging fact that you have -- that you
23 have the conviction is available to the public anyway.
24 And this is just a regulatory scheme to -- to make that
25 information more clear as to how many people are in the

1 community have suffered that conviction.

2 MR. THOMPSON: What I was going to say is that
3 the information as to serious offenses that are beyond
4 10 years is limited. There's some sense of limitation,
5 some sense of it's been a long time. So that information
6 is limited to those people that have a need to know, like
7 for example, the day care providers and the teachers
8 and -- and schools who want to know --

9 QUESTION: Well, but I take it under the
10 registration form we're talking about, that the date of
11 the conviction is there, and the -- the citizen can make
12 up his or her own mind as to whether the conviction was so
13 long ago that they're no longer worried about it.

14 MR. THOMPSON: They really don't have the right
15 kind of information to make that decision. I mean, what
16 they have is only the conviction --

17 QUESTION: You want -- you want more information
18 on this form?

19 MR. THOMPSON: Absolutely not.

20 (Laughter.)

21 MR. THOMPSON: The -- you know, I don't. I
22 don't want more information.

23 And the -- the tribunal that should be making
24 the determination of dangerousness really ought to be in a
25 thoughtful, rational process in front of a -- of a judge.

1 QUESTION: What -- what if the State simply
2 decided we're going to put on the Internet, the same way
3 that Alaska does here, the names of all the people who had
4 criminal convictions of any sort without any more
5 information in -- in the last 5 years? Now, if they
6 applied that to people who were convicted after they
7 passed it, would that be ex post facto?

8 MR. THOMPSON: I don't know that it would. It
9 would probably have the same stigmatizing effect. I mean,
10 I just -- I want to share with you the State has already
11 done that in the State of Alaska. You can get information
12 as to anyone in the State of Alaska by a click of a mouse
13 by going on the Internet, if their convictions were in the
14 State of Alaska. That information is already available.

15 QUESTION: If it had the same stigmatizing
16 effect, why would your answer be different? Why -- why
17 would it not be ex post facto in that case, whereas it is
18 in this? I'm not sure what line you're drawing.

19 MR. THOMPSON: Well, the stigmatizing effect
20 here is that these people are being currently labeled
21 as -- as sex offenders.

22 QUESTION: No. I -- I realize that, but you
23 said in answer to the Chief Justice's question that there
24 would be the same -- in your judgment, there would be the
25 same stigmatizing effect if they put every criminal

1 conviction on -- on the Internet. And if -- if the
2 stigmatizing effect would be the same and the information
3 would be just as readily available, why would your answer
4 be different, that that would not be ex post facto whereas
5 this is? That would not be punitive. This is punitive.

6 MR. THOMPSON: Well, perhaps it would, but you
7 know, our analysis of this ex post facto argument is
8 really a composite of a variety of components of the
9 statute and not simply the public notification provision.

10 QUESTION: Well, what --

11 MR. THOMPSON: It's certainly an important part.

12 QUESTION: You're tapping everything, the
13 register and --

14 MR. THOMPSON: Yes.

15 QUESTION: So you would say even just the
16 requirement that they register, even if it's just
17 circulated to law enforcement people, that's impermissibly
18 retroactive as well.

19 So there can be -- is there any scheme for
20 keeping track of ex-offenders that would pass the ex post
21 facto test in your judgment, or is it just they've served
22 their time, they've done whatever, parole is given to
23 them, and that's it?

24 MR. THOMPSON: You know, if -- if the
25 requirements of the individual subject to the registration

1 requirements alone were not as onerous as here where they
2 have to report on every 90 days all kinds of personal
3 information, and if they don't, then they're going to
4 be -- go -- go to jail, it may be a closer call. I mean,
5 there was the -- the history of the felony registrations,
6 but they've never really been approved by this Court as
7 somehow being a proper regulatory measure.

8 QUESTION: On the other hand, I don't know of
9 any precedent -- perhaps you can tell us if there is --
10 from this Court saying that a measure with a declared
11 regulatory purpose is, nonetheless, impermissibly
12 retroactive. I don't know of any case that so holds.

13 MR. THOMPSON: Nothing is jumping out at me
14 either.

15 (Laughter.)

16 QUESTION: Let me ask you to comment on -- on
17 one thing --

18 MR. THOMPSON: But these are unique statutes.

19 QUESTION: I'm sorry. One -- one thing that
20 makes it more difficult perhaps than it might be to see
21 your side of the argument -- go back to the Chief
22 Justice's question. What if they put every criminal
23 conviction on the Internet?

24 Well, there's one difference between the
25 situation that would obtain then and the situation that --

1 that you're objecting to here. That is, that there is not
2 the same high recidivism rate for crimes generally that
3 there is, apparently undisputedly, for sex crimes in the
4 State of Alaska. And therefore, when you earlier made the
5 argument that there is something very -- something less
6 than credible in the State's claim that it's merely trying
7 to inform the public when, in fact, it makes no
8 differentiation between current dangerousness and un-
9 current dangerousness, the answer is there is -- or an
10 answer is -- there is a very high recidivism rate, and
11 that high recidivism rate does support the claim that
12 there is something that -- that it is credible to say that
13 by publishing this information, we are simply trying to
14 inform people of a probability of dangerousness, leaving
15 them to do what they want.

16 What is -- is there any -- do you have any
17 response to this claim that the high recidivism rate
18 itself supports the argument that, in fact, this is
19 nothing but a safety information kind of measure, whereas
20 broadcasting all criminal convictions would not be
21 justified as having a good fit between the object and what
22 the State was doing? Do you have any response to that?

23 MR. THOMPSON: I certainly don't profess to be
24 an expert on the statistical recidivist rates. I think
25 that is --

1 QUESTION: You don't dispute the State's
2 recidivism figure, do you?

3 MR. THOMPSON: Well, actually vis-a-vis the
4 brief that was submitted by Massachusetts as an amici in
5 this, sets forth a very different pattern of recidivist
6 rates. I mean, when we say recidivist rates, are we
7 talking about repeat sex offenses? Are we talking about
8 repeated crimes? I mean, there are all different ways in
9 which --

10 QUESTION: They're making specific -- they're
11 making specific claims. They -- they set out specific
12 percentages with respect to Alaska. Are you disputing
13 those figures or not?

14 MR. THOMPSON: We do.

15 QUESTION: You do. All right.

16 MR. THOMPSON: We do, but I don't think we did
17 it directly in our brief, but I think other -- other
18 briefs --

19 QUESTION: That's -- that's the trouble. Yes.

20 MR. THOMPSON: -- do.

21 You know, even if we accept --

22 QUESTION: Do you take into account that the
23 degree of harm, if you make a mistake? That is, suppose
24 somebody is a pickpocket and you have a list and say,
25 pickpockets have to register, the same thing as here. So

1 if you make a mistake about a pickpocket, somebody is out
2 of some change. If you make a mistake here about a
3 person's dangerousness, the consequences could be very
4 grave.

5 MR. THOMPSON: And there's a solution to that,
6 and the solution is have -- is to look to the
7 individualized determination of the person's present
8 dangerousness. And, you know, in the McKune case, the --

9 QUESTION: Would it be all right to have the
10 person report every 90 days to have a determination of
11 present dangerousness?

12 MR. THOMPSON: It certainly wouldn't be
13 necessary for John Doe I. He's already had a
14 determination that he's not dangerous by a court. I don't
15 know why you'd have to continue to redo that. I mean, the
16 idea is you get progressively --

17 QUESTION: I'm interested in the Chief Justice's
18 hypothetical.

19 MR. THOMPSON: No, it wouldn't be all right.

20 QUESTION: It wouldn't be all right?

21 MR. THOMPSON: No, not every 90 days. That's --
22 that's awfully burdensome to require someone not just to
23 come into the police station or fill out a written form,
24 but to require someone -- as a direct consequence of a
25 prior conviction, to require someone to come and -- and be

1 subject every 90 days to a judicial scrutiny as to whether
2 or not you're still dangerous, that seems to be a pretty
3 big disability.

4 QUESTION: It is a way out.

5 MR. THOMPSON: It is a way out.

6 QUESTION: And one of your complaints is this
7 system provides no way out.

8 MR. THOMPSON: That's absolutely correct. It is
9 a way out.

10 The Alaska Sex Offender Registration Act really
11 is nothing other than tacking on -- for my clients -- a
12 lifetime of probation, a lifetime of community
13 supervision, having to report to the police -- my time is
14 up.

15 QUESTION: Thank you, Mr. Thompson.

16 Mr. Roberts, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

18 ON BEHALF OF THE PETITIONERS

19 MR. ROBERTS: Thank you, Mr. Chief Justice.

20 I think it is very important to place the
21 various points that have been touched on this morning in
22 the proper legal framework.

23 The question, Justice Kennedy, is not whether
24 it's burdensome to require someone to fill out a form and
25 verify it. The question is, is that so punitive that you

1 don't believe the legislature when it says that we're
2 doing this to prevent future harm?

3 The question, Justice Ginsburg, is not whether
4 it might be a better system if it included other
5 information, or whether that would be too burdensome for
6 the State. The question is, does the failure to put on
7 ameliorative information convince you that the legislature
8 was simply not telling the truth when it said we're doing
9 this to prevent future harm?

10 And the question is not whether you should have
11 an individualized determination or a group determination.
12 It is, is the group determination so irrational that you
13 think the legislature was not really interested in
14 preventing future harm, it was just doing this to punish?
15 In fact, as Justice Ginsburg pointed out, this Court has
16 never found a law with a civil regulatory purpose to
17 violate the Ex Post Facto Clause.

18 QUESTION: Is the effects test used to impeach
19 the finding that the legislature had a regulatory intent?

20 MR. ROBERTS: I think that is --

21 QUESTION: I -- I thought that it was an
22 additional step that you had to take if you -- even if you
23 find the legislature had the -- the permitted intent.

24 MR. ROBERTS: I think it only makes sense if you
25 view it as impeaching the intent because, as Chief Justice

1 Warren pointed out in Trop v. Dulles, the evident purpose
2 is controlling because the same sanction can be civil or
3 criminal. \$10,000 civil penalty is not criminal.
4 A \$10,000 fine is. You don't look at the perspective of
5 the individual because --

6 QUESTION: So long as the legislature has a pure
7 intent, it can have as burdensome a regulation as it wants
8 based on previous criminal convictions?

9 MR. ROBERTS: I think if the regulation is so
10 burdensome that it causes you to doubt the intent, then
11 you do have a problem, but that is the purpose.

12 QUESTION: You're not saying -- you're saying if
13 it's -- it wouldn't violate the Ex Post Facto Clause in
14 your view. It might violate some other clause like the
15 substantive due process.

16 MR. ROBERTS: But again, with respect to both
17 the Ex Post Facto Clause and the Due Process Clause, the
18 question is whether there's a rational connection between
19 the sanction and the legislative purpose.

20 Now, if it is too extreme, it may cause you to
21 doubt that connection. For example, it may be -- the
22 legislature may say we think safe crackers present a risk
23 of recidivism, so we're going to cut off their hands.
24 There may be a rational connection there, but it's too
25 excessive given the purpose.

1 There's no way in which this law can be regarded
2 as too excessive. It simply makes available information
3 that is already a matter of public record, and publicly
4 available because criminal trials under our system have to
5 be public.

6 Thank you, Your Honor.

7 CHIEF JUSTICE REHNQUIST: Thank you,
8 Mr. Roberts.

9 The case is submitted.

10 (Whereupon, at 11:03 a.m., the case in the
11 above-entitled matter was submitted.)

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