ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	CASE NO. 2009-0088
	*	
Appellee,	*	On Appeal from the
	*	Warren County Court of Appeals
vs.	*	Twelfth Appellate District
	*	
GEORGE D. WILLIAMS,	*	Court of Appeals
	*	Case No. CA2008-02-029
Appellant.	*	

MERIT BRIEF OF *AMICUS CURAIE* AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC., IN SUPPORT OF APPELLANT, GEORGE D. WILLIAMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTERESTS OF AMICI

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation, Inc. (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. The ACLU of Ohio's commitment to the Bill of Rights includes a deep belief in the principles underlying of the Ex Post Facto Clause, Section 9, Article I of the United States Constitution and the Retroactivity Clause, Section 28, Article II, Ohio Constitution. Because this case implicates those principles, the ACLU of Ohio offers this brief to assist the Court in resolving this case.

STATEMENT OF THE CASE

Amicus adopts Appellant's statement of the case.

ARGUMENT

Proposition of Law: The retrospective application of Senate Bill 10 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. (Section 10, Article I of the United States Constitution, and Section 28, Article II of the Ohio Constitution, applied.)

In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, this Court held that legislatively mandated reclassification of sex offenders by the attorney general pursuant to R.C. 2950.031 and 2050.032 violates the doctrine of the separation of powers and, as a consequence, excised those sections from the Revised Code. Id. at paragraphs two and three of the syllabus, ¶¶ 60-61, 66. The Court specifically "decline[d] to address the remaining constitutional claims" raised in the jurisdictional memoranda and briefs. Id. at ¶ 62. The effect was to leave unresolved other questions concerning retrospective application of the Senate Bill 10, Ohio's Adam Walsh Act ("Adam Walsh Act"). Among those are the questions of whether retrnow again before the Court for consideration.

It is well to begin with the basic point that prior decisions of this Court do not mandate a finding that retrospective application of the Adam Walsh Act does not violate the Ex Post Facto Clause of the United States Constitution or the Retroactivity Clause of the Ohio Constitution. Respectively, Section 10, Article I of the United States Constitution, and Section 28, Article II of the Ohio Constitution. There are two reasons. First, as this Court explained in *Bodyke*, *stare decisis* "is not controlling in cases presenting a constitutional question." *Id.* at ¶ 37. Second, the Adam Walsh Act is substantially different from Ohio's version of Megan's law, which withstood ex post facto and retroactivity challenges in *State v. Cook* (1998), 83 Ohio St.3d 404, and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824. Moreover, *Ferguson* itself was decided by a bare majority of this Court, the dissenting Justices arguing that changes in R.C. Chapter 2950 since

Ohio adopted Megan's law had effected a change. Law that was once remedial, they argued, had become punitive. Id. at ¶¶ 45-47 (Lanzinger, J., dissenting, joined by Pfeifer and Lundberg Stratton, JJ.)

I. Alaska

In determining the legal consequence of retrospective application of the Adam Walsh Act, it is well to begin with Alaska. In *Smith v. Doe* (2003), 538 U.S. 84, the Supreme Court held that retroactive application of Alaska's version of Megan's law did not violate the Ex Post Facto Clause because it was remedial rather than punitive. The majority of this Court found that determination "compelling" in upholding Ohio's enhanced Megan's law against an ex post facto challenge in *Ferguson*. Id. at ¶ 35. Alaska's Supreme Court felt otherwise. Following the Supreme Court's decision in *Doe*, Doe sued the state of Alaska in Alaska's state court for a declaratory judgment that the law violated his rights under the Alaska Constitution. In 2008, the Alaska Supreme Court agreed. *Doe v. Alaska* (Alaska, 2008), 189 P.3d 999.

The *Doe* court recognized that its Constitution was a document of independent force, and although it applied the same tests the United States Supreme Court did in evaluating whether the effect of Alaska's Megan's law was remedial or punitive, see *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169, it reached a different conclusion. The Alaska court's analysis of the *Mendoza-Martinez* factors is particularly relevant to the Adam Walsh Act.

First, the court found that the Alaska law imposed an "affirmative disability." The registration requirements of the law, the court said, "are significant and intrustive, effectively treating sex offenders in much the same way as probationers and parolees are treated. 189 P.3d at 1009. Moreover, the public notification through posting of information on the internet not only leads to public shaming and to dangers of vigilantism but the prospect "that the registrant

will be denied employment and housing opportunities." Id. at 1010. That potential for denial of "housing opportunities," a possibility under Alaska's Megan's law, is mandated by the Adam Walsh Act.

The court determined, too, that the effects of Megan's law "resemble[d] the punishment of shaming" and again noted that the disclosure provisions were akin to those of probation or parole. They had "effects like those resulting from punishment." Id. at 1012. What is true of Alaska's Megan's law is true of Ohio's Adam Walsh Act.

Although the court found the question of whether scienter was a predicate to the statute's application to be of "little weight," it did "weakly impl[y] a punitive effect. Id. at 1013. Far more significant was that the statute's "application to a broad spectrum of crimes regardless of their inherent or comparative seriousness" and its determination of registration status "based on a particularized determination of the risk the person poses to society but rather on the criminal statute the person was convicted of violating" made its "retributive and deterrent effects . . . not merely incidental to the statute's regulatory purpose." Id. at 1013-1014.

The court also recognized that conviction of a sex offense was the triggering event for application of the law. That is, sexually criminal conduct and the dangers of recidivism are essentially irrelevant. One who commits a sex offense but enters a plea bargain to, for instance, a simple assault, will have no registration requirement, regardless of the underlying conduct. The effect, the court said, is that the registration requirements are in fact additional punishment for the underlying conviction, not protections against recidivism based on conduct. Id. at 1014-1015.

While the law clearly advanced a legitimate, non-punitive regulatory purpose, the court said, its substance was excessive for that aim and its overall effect viewed as punitive. Id. at

1016-1018. Accordingly, the court held that the law violated the Ex Post Facto Provisions of the Alaska Constitution. Id. at 1019.

What the Alaska Supreme Court found to be true of its version of Megan's law is clearly true of Ohio's Adam Walsh Act.

II. Maine

Like the Alaska Supreme Court, Maine's Supreme Judicial Court recently examined its state's 1999 version of Megan's law and found that it was punitive and violated the Ex Post Facto clause of both the Maine and federal constitutions. *State v. Letalien* (Maine 2009), 985 A.2d 4. As in *Doe,* the court in *Letalien* examined its statute in light of the factors set forth in *Mendoza-Martinez.*

Maine's law, the court said, imposes an affirmative disability or restraint because, even more than Alaska which does not require regular in-person verification, Maine mandates regular verification at the local police station of residence, employment, and school localtions and provision of fingerprints and photographs. That places "substantial restrictions on the movements of lifetime registrants" and "is undoubtedly a form of significant supervision by the state . . . [that] imposes a disability or restraint that is neither minor nor indirect." *Letalien,* 985 A.2d at 18. The same is, of course, true in Ohio under the Adam Walsh Act.

Unlike the court in *Doe*, the court in *Letalien* concluded that the sanctions imposed by its state's law were not those historically regarded as punishment. However, the court explained that the 1999 revisions to Megan's law modified and increased the registration requirements previously imposed as part of sentences and found that problematic. Id. at 19-21. Also not like Alaska, Maine's statute is not "triggered only on a finding of *scienter,*" a factor pointing against punitive application of the law. Id. at 21. Oddly, the court noted that it simply could not

determine whether the law was unreasonably more harsh than the law that the Supreme Court had found non-punitive in *Smith v. Doe*, and the Alaska court had found punitive in *Doe v. Alaska*. Id.

The court did conclude that because the law applied only to persons "convicted of specified crimes" and was not "based on individualized assessment of an offender's risk of recidivism," it is punitive in its application. Id. at 22. Nevertheless, and although those concerns make it "lean toward the view that the increased regulatory scheme of SORNA of 1999 appears excessive," the court felt itself "uncertain" and treated the excessiveness factor as neutral. Id. at 24.

Ultimately, analyzing all these factors, the court concluded:

> The retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is, by the clearest proof, punitive, and violates the Maine and United States Constitutions' prohibitions against ex post facto laws

Id. at 26.

Again, what is true of Maine's 1999 revision of Megan's law is even more clearly true of Ohio's Adam Walsh Act.

III. Indiana

Also in 2009, the Indiana Supreme Court found that retroactive application of its version of Megan's law violated the ex post facto provisions of its constitution. Again, it looked to *Mendoza-Martin* factors. *Wallace v. State* (Ind. 2009), 905 N.E.2d 371.

The court had no trouble concluding that the law imposed affirmative disability and restraint through the intrusiveness, of the duties imposed on those who must register and,

especially, the need to reregister whenever there is a change of as little as 72 hours in residence. Id. at 379-380. The Adam Walsh Act, of course, has similar 72 hour notification rules, but they apply to more than mere changes in residence. The court then echoed *Doe* in finding that the Indiana law was not only akin to historical shaming punishments but that its "reporting provisions are comparable to supervised probation or parole." Id. at 380. Like the Alaska Supreme Court, too, the Indiana Supreme Court found that its state's law was only slightly punitive in its application of scienter. Id. at 381.

The court, however, was passionate in its determination that that statute advanced retribution and deterrence. Although the act clearly has a remedial purpose also, "it strains credulity to suppose that the Act's deterrent effect is not substantial, or that the Act does not promote "community condemnation of the offender." Id. at 382. And the Indiana law, like the laws of Alaska and Maine and Ohio, is triggered only upon conviction of specified offenses. Id.

Perhaps most importantly, the act is excessive. It does not involve individualized determinations of risk. It allows for no reduction or cancellation of registration or notification status upon a showing that the offender is not a danger. "The non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping." Id. at 384.

IV. <u>Nevada</u>

To date, and so far as amicus is aware, there is but a single federal court decision formally addressing whether a state's version of the Adam Walsh Act violates the Ex Post Facto Clause of the United States Constitution. In *American Civil Liberties Union of Nevada v. Masto*, ___ F. Supp.2d ___, 2008WL8088482 (D. Nev. Oct. 7, 2008), appeal pending (CA 9,

No. 09-16008) (copy attached), the district court granted a permanent injunction against retroactive application of Nevada's Adam Walsh Act.

The court noted that the law reclassified sex offenders based not on the risk they posed (which was the original classification scheme) but based exclusive on the crime committed.

> Because of the changed standards, numerous people: (1) whose crimes were committed in the distant past; (2) who have been determined by the state of Nevada to be unlikely to re-offend; and (3) who have complied with the law, attended counseling, and who have not committed additional crimes would be thrown back into the system or be subject to more onerous monitoring and residency requirements.
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> . . .
>
> The application of these laws retroactively is the equivalent a new punishment tacked on to the original sentence – sometimes years after the fact – in violation of the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution, as well as the Contracts clauses of the U.S. and Nevada Constitutions.

Id. at *5.

Nevada's Adam Walsh Act is, in these respects, essentially indistinguishable from Ohio's.

What is evident from these examples is that a law with the features of the Adam Walsh Act is inherently substantive and punitive. When applied retrospectively, as the Adam Walsh Act is applied, it affirmatively disadvantages. Regardless of whether the law has a partially remedial purpose, the overall effect of the law is punitive.

For these reasons, it violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

CONCLUSION

For the foregoing reasons, as well as for the reasons advanced in the merit brief of Mr. Williams, amicus urges this Court to find that application of Ohio's Adam Walsh Act to persons who were charged with and convicted of crimes that occurred before its effective date violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

The American Civil Liberties Union of Nevada, Does 1-8 and Does A-S, individuals,

Plaintiffs,

v.

Catherine Cortez Masto, Attorney General of the State of Nevada; Jerald Hafen, Director of the Nevada Department of Public Safety; Bernard W. Curtis, Chief, Parole and Probation Division of the Nevada Department of Public Safety; Captain P.K. O'Neill, Chief, Records and Technology Division of the Nevada Department of Public Safety; Michael Haley, Sheriff of the Washoe County Sheriff's Office; Michael Poehlman, Chief of the Reno Police Department; Richard A. Gammick, District Attorney of Washoe County; Douglas Gillespie, Sheriff of the Las Vegas Metropolitan Police Department; Joseph Forti, Chief of the North Las Vegas Police Department; David Roger, District Attorney of Clark County; Chief Richard Perkins, Henderson Police Department,

Defendants.

2:08-cv-00822-JCM-PAL

PLAINTIFFS' REVISED ORDER GRANTING PERMANENT INJUNCTION

On September 10, 2008, a hearing was held before Hon. Judge James C. Mahan on Plaintiffs' Motion for Summary Judgment. Appearing for plaintiffs the American Civil Liberties Union and Does 1 through 8 were Margaret McLetchie and Allen Lichtenstein. Robert Langford appeared for Plaintiffs Does A through S. Binu Palal and Kimberly Buchanan appeared for defendants.

Plaintiffs filed their complaint on June 24, 2008, requesting that this court declare A.B. 579 and S.B. 471 unconstitutional and to issue an injunction prohibiting the enforcement of changes to various N.R.S. provisions to be modified by the implementation of A.B. 579 and S.B. 471. Plaintiffs stated several causes of action, including that the laws violated: (1) Procedural Due Process under the U.S. Constitution; (2) the Ex Post Facto Clause under the U.S. Constitution; (3) the Double Jeopardy Clause under the U.S. Constitution; (4) the Contracts Clause under the U.S. and Nevada Constitutions; (5) the Separation of Powers under the Nevada Constitution; and (6) the prohibition against Vague and Ambiguous laws under the U.S. Constitution.

Plaintiffs originally named two sets of defendants:

(1) the "State Defendants:" Defendant Cortez Masto, Attorney General of the State of Nevada; Defendant Jerald Hafen, Director of the Nevada Department of Public Safety; Defendant Bernard W. Curtis, Chief of the Parole and Probation Division of the Nevada Department of Public Safety; and Defendant Captain P.K. O'Neill, Chief of the Records and Technology Division of the Nevada Department of Public Safety; and

(2) Defendant Michael Haley, Sheriff of the Washoe County Sheriff's Office; Defendant Michael Poehlman, Chief of the Reno Police Department; Defendant

Richard A. Gammick, District Attorney of Washoe County; Defendant Douglas Gillespie is Sheriff of the Las Vegas Metropolitan Police Department; Joseph Forti, Chief of the North Las Vegas Police Department; including but not limited to the community notification provisions therein; Defendant David Roger, District Attorney for Clark County, Nevada; and Defendant Chief Richard Perkins of the Henderson Police Department.

Plaintiffs subsequently entered stipulations, approved by this court, with all the Law Enforcement Defendants, dismissing them from this action on the condition that they abide by the terms of any relief.

On June 30, 2008, the court denied plaintiffs' request for a Temporary Restraining Order but granted Plaintiffs' Preliminary Injunction Motion.

In July of 2007, the Nevada Legislature passed A.B. 579 which mandated that its restrictions, notification provisions, and potential criminal penalties apply retroactively, not just to pedophiles, but to anyone who has committed any offense that involves "any sexual act or sexual conduct with another" – no matter how minor the sexual offense was – and to offenses committed as long ago as July 1, 1956. In July of 2007, the Nevada Legislature also passed S.B. 471, which imposed G.P.S. monitoring and movement and residency restrictions on certain sex offenders. Plaintiffs submitted declarations, uncontroverted by the defendants, making clear that the Parole and Probation Department was applying S.B. 471's provisions retroactively.

Together, A.B. 579 and S.B. 471 redefine who is considered a "sex offender," the way in which sex offenders are classified and monitored, and what restrictions apply to which sex offenders. Prior to the enactment of these laws, sex offenders had been individually assessed

and classified based on psychological assessments focusing on whether the offenders pose a risk to society and are likely to re-offend. The statutes mandated that sex offenders would henceforth be automatically classified based on one factor, the crime committed. Because of the changed standards, numerous people: (1) whose crimes were committed in the distant past; (2) who have been determined by the state of Nevada to be unlikely to re-offend; and (3) who have complied with the law, attended counseling, and who have not committed additional crimes would be thrown back into the system or be subject to more onerous monitoring and residency requirements.

A.B. 579 and S.B. 471 do not provide any procedural due process protections, leaving even people who believe that they have been miscategorized as sex offenders with no means to challenge the application of A.B. 579 and S.B. 471.

The application of these laws retroactively is the equivalent a new punishment tacked on to the original sentence – sometimes years after the fact – in violation of the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution, as well as the Contracts clauses of the U.S. and Nevada Constitutions. Moreover, because they do not provide any procedural protections from their retroactive application, A.B. 579 and S.B. 471 violate the Due Process Clause of the U.S. Constitution.

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For these reasons, the Court hereby grants Plaintiffs' Motion for Summary Judgment, making the June 30, 2008 Preliminary Injunction enjoining the enforcement of A.B. 579 and S.B. 471 a Permanent Injunction.

Respectfully submitted,

DATED: October 7, 2008

ACLU of NEVADA, Attorneys for the ACLU of Nevada and Does 1-8

By: /s/
Margaret A. McLetchie

DATED: October 7, 2008

ROBERT L. LANGFORD & ASSOCIATES, Attorneys for the ACLU of Nevada and Does 1-8

By: /s/
Robert L. Langford

IT IS SO ORDERED.

James C. Mahan

~~HONO~~RABLE JUDGE JAMES C. MAHAN

Dated: October 7, 2008