IN THE SUPREME COURT OF IOWA

No. 18-1045

STATE OF IOWA,

Appellee.

v.

LLOYD ASCHBRENNER,

Appellant,

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
HONORABLE MITCHELL TURNER, JUDGE

APPELLANT'S FINAL REPLY BRIEF

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CERTIFICATE OF SERVICE

On January 11, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

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ROUTING STATEMENT

Both parties agree that the case should be retained by the Supreme Court on both issues.

The First Amendment challenge to the requirement that everyone on the sex offender registry disclose all internet identifiers presents a case of first impression in Iowa. It involves a constitutional claim.

The *Ex post facto* challenge needs to be retained, to determine whether the sex offender registry is "punitive," as to adult sex offenders. Such a finding would prohibit the retroactive application of the 2009 changes to offenders such as Aschbrenner.

There are two reasons for to reconsider the *ex post facto* issue. First, the registry has changed dramatically since the Supreme Court found it not punitive in State v Pickens, 558 N.W. 2d 396 (Iowa 1997)

Second, the Iowa Supreme Court has recently found the sex offender registry to be punitive when applied to a juvenile offender. In Re T.H., 913 N.W. 2d 578 (Iowa 2018).

The Supreme Court should retain the case and decide these two important constitutional issues.

Purposes of a Reply Brief

In any reply brief, it is appropriate to do three things. First, the brief can update the case law if there have been any changes since the original brief. There are just a few out of state cases that should be mentioned on the First Amendment issue.

Second, the brief can reply to specific statements by the State in its brief.

Finally, the brief can point out the places in the State's brief where there is an agreement as to certain points, perhaps because the matter was not contested.

STATEMENT OF THE CASE

There is no disagreement about the statement of the case or the procedures below.

STATEMENT OF FACTS

There is not much disagreement as to the facts in Aschbrenner's case. Several points should be clarified.

Aschbrenner was convicted of Lascivious Acts in 2007, the class D felony, and was given probation. He completed the probation and then completed the ten years of special sentence. He had to register for ten years for that offense. While on supervision he completed sex offender treatment.

While under supervision by the Department of Correctional Services Aschbrenner was assessed for risk level. Those several risk reports showed him to be "low" risk and were submitted to the District Court as Exhibit E at the hearing on the Motion to Dismiss.

Aschbrenner had registration violations in 2008 and in 2014. Neither violation resulted in a revocation of his supervision. Both were treated as first offenses. He got a fine for the first case, and one day in jail for the second, with credit for time served.

The violation in 2008 did not affect the length of his registration. The 2014 violation added an additional ten years to his registration requirement. The

provision adding the ten years was included in Chapter 692A by in 2009. See 692A.106. [1]

Since Aschbrenner's offense was against a minor, in 2007, when he was sentenced, he was subject to the 2000 foot restriction passed by the legislature in 2003. The 2009 amendments substituted the safe zone restrictions for the 2000 foot restriction for Aschbrenner's crime. For that reason, he has not been subject to the 2000 foot restriction residency restriction since 2009. Instead, he is subject to the safe zone restrictions, limiting his activities at or near schools, parks, or places where minors would congregate.

CHAPTER 692A OVER TIME

The State does not contest or really discuss the historical development of Chapter 692A since its adoption in 1995. It is clear the statute changed substantially in 2009.

At that time, the following were added:

(1)The requirement to go in and physically see the sheriff to be photographed and to update all "relevant" information.

[1] The additional period of registration is not imposed by the sentencing court. Very seldom is there any reference to the additional ten years on the registry in any guilty plea colloquy. From this counsel's experience it is seldom explained as one of the "consequences" of a plea to a registry violation. Whether this additional period of registration is "collateral" or direct has not yet been addressed by the Courts. (There would be some question whether the "collateral" distinction still makes any sense). Aschbrenner was unrepresented in the 2014 registration case. In this case from 2018 Aschbrenner was told about the additional ten years on the registry. He now has a total of 30 years.

(2) Any violation of the statute added an additional ten years of registration.

(3) The definition of relevant information was added which greatly expanded the information that had to be disclosed, not just during the 104 times that you were in to see the sheriff, but also within five days of the change.

The State cannot dispute the fact that the registration statute in 2018 is very different and much more restrictive than what existed in 1995. Indeed most of the major changes in the statute they took place in 2009, two years after Aschbrenner was convicted of his sex offense.

ARGUMENT

I. APPLICATION OF THE 2017 CODE TO ASCHBRENNER, INCLUDING THE INTERNET IDENTIFIER REQUIREMENT, VIOLATLES THE EX POST FACTO PROHIBITIONS IN THE IOWA AND UNITED STATES CONSTITUTIONS

Summary of argument

Both initial briefs agree that the recent decision of In the Interest of T.H., 913 N.W. 2d 578 (Iowa 2018) is particularly important for the issue presented herein. In that case the majority of the Iowa Supreme Court found the registry statute to be "punitive" as applied to juveniles.

The parties also agree that most of the law in Iowa finding adult registration non punitive, was decided prior to the 2009 amendments. Those amendments substantially changed sex offender registration in Iowa.

In analyzing whether something is punitive, courts generally use the seven different factors from the case of Kennedy v. Mendoza-Martinez 372 U.S. 144 (1963).

As a practical matter, there are really two factors that are the principal ones to be considered in this challenge. Those are (1) whether the particular restrictions now imposed under 692A are similar to historical punishment, and (2) whether the enacted restriction is "excessive" in light of the non-punitive suggested goals.

Aschbrenner argues that the sex offender registry, as applied to adult offenders, is now similar to historical punishment in two ways. First Registration amounts to "public shaming." Second it is the equivalent of probation or parole.

He also asserts that the registration statute is now "excessive" in light of the promoted goal of preventing future sex offenses, and in particular child sex offenses. It is excessive because (1) offenders, and particularly low risk offenders, do not pose a risk of reoffending that merits the excessive restriction, and (2) because there is clear consensus that registration does not advance the goals sought to be achieved.

Discussion of Mendoza factors

A- The current version of the sex offender registry is a restrictive regulation that resembles historical punishment.

Public Shaming

The first way the registration statute resembles historical punishments is that it is similar to public shaming.

Public shaming was discussed in a United States Supreme Court case of Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.ed.2d 164 (2003). It was discussed in the T.H. case. The State cites Smith for the proposition that the Registry is not punishment when it only disseminates accurate information, which is already public.

Several observations about Smith are appropriate.

The Smith case was narrowly decided. Three justices dissented believing the statute "punishment", similar to historical shaming. The fourth judge, Justice Souter, concurred in the decision but acknowledged that the arguments for whether it was punitive or civil were "in rough equipoise." 123 S. Ct. 1156. Justice Cady cited the Souter concurrence in his T.H. opinion.

In T.H. Justice Cady discussed the Smith reasoning which had said that being on the registry was not punitive. He observed that "the Smith reasoning was

less persuasive in 2018 than it was in 2003." He cited a Pennsylvania case which noted the widespread availability of the internet today which exposed registrants to "ostracism and harassment."

Almost all of his reasoning on the public shaming part of his analysis for juveniles is applicable for adults. He does mention that juvenile records are often less public than adult records. At the same time, his decision that the registry is punitive presumably applies to juveniles who are prosecuted in adult court. They, of course, would have had their court records as open as juvenile records.

Adult shaming has often more of an impact than juvenile shaming, as it extends to barriers to employment and housing, factors children under 18 do not experience as much. Moreover, the major barriers to housing and employment occur not because of specific statutory restriction. The problem is that a landlord or potential employer will not give housing or jobs to persons who are on the registry.

Probation/parole

What has really changed with regard to the registry in the last 15 years, since the Smith decision by the United States Supreme Court, is that the Registry has become, essentially, a different form of probation. The change mostly happened in 2009.

The first major change was that offenders had to report in person to the sheriff. That is like having to go see the probation officer. In Aschbrenner's case,

since he is a Tier II offender, he has to go in at least twice a year. It is at least twice a year because there are some changes in required disclosure that require an in person visit.[2]

Prior to 2009, you would initially give the sheriff your information, and you would only have to go see the sheriff only if it ever changed. Prior to 2009 mostly you had to tell the sheriff where you lived.

Starting in 2009, you had to tell the sheriff all the things defined as "relevant information." There are 21 different items listed in 692A.101(23). That was much more information that had been required before. There were of course internet identifiers you had to give in detail. There were not only the places that you live, but also the names and birth dates of everyone that lived with you.[3] If you bought or sold a car, you had to tell the sheriff. If you lost your job or got a new part time job, you had to go tell the sheriff. There was duty to inform the sheriff about all "temporary" residences. If you go out of town on vacation you have to tell the

[2] If the person changes their residence, employment, or attendance as a student, those pieces of information require an actual in person appearance, on top of the obligation to go in several times a year based on your tier level. What that means is that a person, who drops their last class at the local community college or is fired from their job, has five days to take that information to the sheriff or they have committed a registration violation.

[3] Prior to 2009, and indeed afterwards you had to register where you resided, including even temporary residences. After 2009, you had to register whenever someone resided with you, even if only temporarily. Counsel is aware of charges having been brought under 692A for not registering that a girlfriend had started spending the night at the offender's residence.

sheriff if you are leaving for more than 5 days. If your work takes you to another town, you have to register there.

The State does not have much of a response to the argument that the registry is now similar to traditional probation/parole. At pages 21 and 22 of its brief, the State notes that if you are on formal supervision, you can be subjected to warrantless searches and electronic monitoring.

There is no doubt that probationers or parolees can be subjected to more harsh conditions than what they get for being on the registry. At the same time, there can be no question that being on the registry imposes many similar disclosure requirements. The registry as probation certainly has more requirements than someone on many probations. The registry requirements are perpetual. Those are the requirements year after year. On supervision, after an initial three to six month period when the supervising agent gets to know the probationer, usually the reporting requirement lightens up.

This Court should find that the current registration statute imposes conditions that are similar to probation and parole, which, in fact, is a form of traditional punishment.

B. The registry is clearly excessive and irrational when it comes to achieving non-punitive goals of the statute.

The discussion of whether the statute is excessive, which is one of the Mendoza factors, cannot avoid consideration of some of the social science that has now been extensively developed with regard to sexual reoffending. There are really two parts to this social science that should be discussed in addressing the question of whether the registry is excessive.

First, the Court should consider the overall question of what is the real risk of sex offenders reoffending. The State in its brief engages in that discussion at pages 27-31of its brief.

Second, the court should consider what we now know about whether the registry itself makes a bit of difference with regard to reoffending. This point is significant because the State in its brief did not discuss the fact that the evidence is that the registry does not promote or effect reoffending.

Here is what can be said about those factors.

Discussion of social science

The State, in its brief, and Justice Mansfield in his opinion in the T.H. case, argue that perhaps the courts should not really engage in discussion of what social science says about something like the risk of sexual offenders reoffending. There are two basic problems with position.

First, consideration of something like excessiveness or rationality requires a court to actually look at what a statute really does and what is the risk that it is trying to achieve.

Second, the foundation of legal consideration of sex offender restrictions, apparently, got off to a bad start, by considering bad social science.

The discussion of social science and reoffending rates has its unfortunate roots in two United States Supreme Court cases. In 2002 the United States Supreme Court, by a 5 to 4 vote, decided McKune v. Lile 536 U.S. 24, 34, 122 S.Ct. 2017, 2025, 153 L.Ed.2d 47(2002) That case uphold compulsory sex offender treatment in prison. Justice Anthony Kennedy wrote the plurality opinion for himself and three other judges. In that opinion he described the recidivism rate for sex offenders.

> Sex offenders are a serious threat in this Nation....
> Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. See U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) ("[T]he rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%," whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. "Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals").
> McKune v. Lile, 122 S.Ct. 2017, 2024, 536 U.S. 24, 32–33 (U.S.,2002)

The next year Justice Kennedy wrote the opinion for the full court in Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L.Ed. 2d 164 (2003). That case held that the Alaska sex offender registry could constitutionally be applied retroactively. Three judges dissented from that finding. One concurred.

Here is what Justice Kennedy wrote in Smith:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); see also *id.*, at 33, 122 S.Ct. 2017 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))). Smith v. Doe, 123 S.Ct. 1140, 1153, 538 U.S. 84, 103 (U.S.,2003)

The reference to sex offenders reoffending at a "frightening and high" rate has been cited in over one-hundred cases nationwide, including 14 cases in Iowa. One citation appeared in Justice Cady's opinion in the T.H. case. He quoted the Smith language critically, contrasting that statement with the research since 2003 regarding the rates of reoffending for juvenile offenders. 913 N.W. 2d at page 595.

An article from 2015 written by professors Ira and Tara Ellman was introduced at the District Court in this case. The article critically analyzed those quotes and reference in Smith and McKune regarding reoffending rates. Ellman,

Ira Mark and Ellman, Tara, 'Frightening and High': The Frightening Sloppiness of the High Court's Sex Crime Statistics (June 8, 2015).[4] Appx. p, 80.

Here is some of the observation:

The 80% number, which actually was for untreated offenders, came from a United States Department of Justice Guide to treating the incarcerated male sex offender. The DOJ got the 80% figure from an article from Psychology Today, written in 1986, by a clinician. The actual article contained no supporting reference for the number. It did not point to or discuss any actual study of offenders.

In the original McKune case the reference to 80% also included a reference a recidivism rate of only 15% for individuals who were ”treated”. 536 U.S. at p. 33.

The 80% number was from 1986, which was before sex offender treatment existed in many places. (The Iowa DOC did not start a program until the early 1990s).

The State, in its brief, discusses the article written by the Ellmans, asserting that it is “deeply flawed.” The State says nothing, however, about the observation in the article that Justice Kennedy’s quotes in the two Supreme Court cases were flawed. Instead, the State criticizes the article for relying on a meta analysis of 21 studies involving nearly 1,000 offenders. That study was authored primarily by R. Karl Hanson. R. Karl Hanson is widely regarded as one of the foremost experts on

[4] Available at SSRN: http://ssrn.com/abstract=2626429

sex offender reoffending in the world. He participated in the development of both the STATIC-99-R evaluation tool and the STABLE 2007 tool. These are two of the validated tools used by the Iowa Department of Corrections Services and the Iowa Department of Corrections for measuring risk of reoffending.

The State then goes on to discuss Dr. Hanson's findings from 2014. Dr. Hanson had noted, based on those 21 studies, that they showed an overall recidivism rate of 11.9%. The same paragraphs cited by the State noted that the rate would only be 2.9% in low risk cases.

The State does not dispute the fact that these are a far cry from 80% and would not appear to be "frightening and high."

Current information about reoffending

Studies like that meta analysis in 2014 by Dr. Hanson and his followup studies since then show that overall rates for reoffending that is somewhere between 5-15%.

This is consistent with the Iowa research Council's Report to the General Assembly that put the overall rates at 13-14%.[5]

[5] Div. of Criminal & Juvenile Justice Planning, Iowa Dep't of Human Rights, *Iowa Sex Offender Research Council Report to the Iowa General Assembly* 12 (2013), https://humanrights.Iowa.gov/sites/default/files/media/SORC_1-15-13_Final_Report_%5B1%5D.pdf, [https://web.archive.org/web/20170323233135/https://humanrights.iowa.gov/sites/default/files/media/SORC_1-15-13_Final_Report[1].pdf].

Professor Hanson and colleagues published an article in 2017 that talked about when reoffending occurred and measurements over time. The conclusion was that reoffending, if it was going to take place, was going to take place within the first five years. A more important part of the recent statistical conclusions is that the likelihood of reoffending declines dramatically when the offender gets through 5 or 10 years of living within the community without repeat offending. Indeed, the finding of the article is that for every five years of being offense free, there is a reduction in the percentage of risk by 50%. [6]

Someone like Aschbrenner was already measured as low risk when he was assessed by the Department of Correctional Services in 2011. Since he then went the next six years without any sexual reoffending, his risk level presumably would go even lower.

The Iowa study

Between 2008 and 2010 the Iowa Department of Corrections, in conjunction with the Criminal and Juvenile Justice Planning Agency, did a study of sex offenders and re-offending specifically in Iowa. The statistical validation report of

[6] Hanson, R.K., Harris, A.J.R., Leetourneau, E., Helmus, L.M., & Thornton, D. (2017, October 19). Reductions in Risk Based on Time Offense Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender. Psychology, Public Policy, and Law. Advance online publication. http://dx.doi.org/10.1037/law0000135

January 2010 was introduced before the District Court and this case was part of the record for this appeal. Appx. p. 91.[7]

It is important in considering all statistics for reoffending that the period of time that you are looking at be considered. The study looking at sex offenders over 10 years, for example, logically requires the study go on for 10 years. The Iowa Department of Corrections study was limited to 5 years. This statistical method, however, is still meaningful considering that most reoffending happens during that initial 5 year period.

So with the understanding that the study was only for a 5 year period, it is nevertheless important to look at the reoffending rates for individuals, the totals from their study appeared figure 13 at page 12 of the study. The total recidivism rate for individuals with new convictions for sex offenses was 3.5%. If you add in crimes with sexual elements the total rate grows to 4.6%.

It is important to understand what those numbers meant. Those numbers meant that during the period of review which was approximately 5 years, after reviewing close to 1,000 individual sex offenders, only between 3 to 4% reoffended. That was the total number. If you broke it down based on the low,

[7] Iowa Department of Corrections Statistical Validation of the ISORA8 & Static-99 Final Report of January 2010 available at www.legis.iowa.gov/docs/publications/SD/12256.pdf

moderate, and high scoring system the numbers were even more telling. For low offenders the risk was 1.8%, for high offenders it was 14%.

There is no evidence that registration has an impact on reoffending

Aschbrenner mentioned in his opening brief that Justice Cady in the T.H. case had noted multiple studies that have shown no significant difference in reoffending rates between registered and non-registered juveniles. He specifically mentioned a Report of the Iowa Sex Offender Research Council in 2013. That same report made the same finding for adults.[8]

What about the important interest in protecting children?

The State, in its brief, asserts that virtually any risk of reoffending can justify the intrusive statute. After all, protecting children is a compelling justification. Fortunately, that is not standard.

In analyzing whether a particular provision is punitive under the Mendoza factors, the Court has to look at whether the response is excessive and whether it is rationally related to that compelling justification.

[8] Div. of Criminal & Juvenile Justice Planning, Iowa Dep't of Human Rights, *Iowa Sex Offender Research Council Report to the Iowa General Assembly* 12 (2013), https://humanrights.Iowa.gov/sites/default/files/media/SORC_1-15-13_Final_Report_%5B1%5D.pdf, [https://web.archive.org/web/20170323233135/https://humanrights.iowa.gov/sites/default/files/media/SORC_1-15-13_Final_Report[1].pdf].

The registration statute is excessive because it is premised on an over exaggerated assumption about the rate of reoffending. If the rate is really only 15%, that means that six out of seven individuals in that category will not reoffend. For someone like Lloyd Aschbrenner who is low risk to reoffend, 98 out of 100 such individuals will not reoffend.

Maybe there could be some justification for requiring the sex offender to give his current address to the sheriff. That is a far cry, however, from the present statute.

Furthermore, we now understand that registration does not make our communities safer. This means that the method chosen to achieve the goal is not rationally related to achieving the goals.

Specific response to statements in State's brief

The State's brief asserts that Iowa already tailors its registration statute narrowly, page 31. It points to the Tier system and the fact that residency and safe zone restrictions do not apply to all. Certain offenses are classified as "aggravated" meaning that registration is for life for those offenses.

Response:

Iowa does treat some offenders differently. Tier classification, however, only has to do with the minimum number of times you have to go in and see the sheriff each year. All offenders with offenses against minors are subjected to the

safe zone restrictions. Whether an offense is "aggravated" only has to do with the length of registration.

What Iowa does not do is set the levels of registration based on risk. [9]

Dangerous offenders on parole can be placed on something called "intensive parole." Low risk offenders face minimal supervision. There is no equivalent on the registry. This is irrational. The registry is excessive.

II THE REQUIREMENT FOR DISCLOSURE OF INTERNET IDENTIFIERS FOUND IN THE REGISTRATION STATUTE VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE COMPARABLE PROVISION IN THE IOWA CONSTITUTION

Summary of argument

Both sides agree that the challenged provision requiring disclosure of all internet identifiers has First Speech implications and must be analyzed under the respective amendments. Clearly, the statute impinges on the right to anonymous

[9] In 2009, the legislature did provide for modification off the registry for low risk offenders after a certain period of time. It is not clear how long that provision will survive legislative tinkering. The Department of Public Safety proposed legislation in 2018 that would have substantially eliminated the availability of the modification provision. It did away with it entirely for tier two individuals. The bill passed the House but not the Senate. It is expected that it will be reintroduced this legislative session.

speech. Clearly, the statute requires disclosure of information about matters of public discourse.

The parties disagree as to how much of a burden is presented by the statute. The parties disagree about what the statute means.

Aschbrenner's argument can be summarized as follows:

1. The statute is incredibly broad. It covers virtually all internet speech.
2. Aschbrenner, even as a sex offender, has a Free Speech right to engage in internet speech. That includes the right to engage in that speech anonymously.
3. The required disclosure of internet identifiers is overly broad. The statute requires disclosure of clearly protected activity
4. The statute is unconstitutional because there is not a tight enough fit between the objective and the means chosen.

Discussion of statute and what does it mean

Since 2009, Lloyd Aschbrenner has been required to disclose to the sheriff all "internet identifiers." Here is the definition.

> **Section 692A.101. Definitions:**
> 15. "Internet identifier" means an electronic mail address, instant message address or identifier, or any other designation or moniker used for self-identification during internet communication or posting, including all designations used for

> the purpose of routing or self-identification in internet communications or postings.

What this language means is important, particularly in light of the claim that the statute is overbroad, which has significance under the First Amendment.

The initial briefs make an effort to identify what is covered by the statute. The parties agree that email and Facebook addresses are included.

Counsel for Aschbrenner in his brief included a possible list of internet identifiers that counsel thought he would have to disclose if he were on the registry. See page 67.

The State seems to recognize that a good portion of that list would, in fact, have to be disclosed. The State comes close to an admission that the statute is overbroad when it suggests on page 37 of its brief that "this court should adopt a reasonable construction of this provision that avoids any potential unconstitutionality." The State also recognizes that commercial identifiers for online shopping would be covered by this definition. Page 37 of the State's brief. Certainly if you obtain an Amazon account with a username and password, and sign into that Amazon account the username and password are "designations" "used for self-identification during internet communication."

The State suggests that if all you are doing is logging into Netflix, this might not be covered if all you were doing was watch movies (See Brief at page 37). The

problem with that analysis, however, is that Netflix login information certainly seems to be a "designation" "used for self-identification for internet communication." The communication identifies tells Netflix who you are for purposes of getting their services.

But it is not just the Hy-Vee fuel saver account that is implicated. A lot of newspapers or magazines have electronic passwords for accessing the newspaper either to read it or to make comments. That information should be disclosed. If the legislature had said that sex offenders had to submit a list to the sheriff of all newspapers or magazines they read, it would be hoped that there would be agreement that such a provision would be unconstitutional. Electronic submission of the information would be no different.

The Court should conclude that the statute can cover virtually everything an offender does on the internet.

Recent cases

There are two cases that should be mentioned that were decided in 2018, that were not covered in the opening brief. One case is the positive one. One is the negative one.

In Ex Parte Odom, 2018 WL 6694790 (Court of Appeals of Texas, Houston (1st District)), a Texas Court of Appeals upheld a conviction for not reporting a Facebook account. The defendant raised a First Amendment challenge.

Odom complained the Texas statute was overbroad and that it was unconstitutional on its face as not being sufficiently tailored to promote the compelling state interest.

The judge started by agreeing that the reporting requirement implicated the First Amendment. The court found the statute not unconstitutional relying on Doe v. Shurtleff, 628 F.3d 1217 (10th Cir.2010). That case, remarkably, had said that speech was only chilled "when an individual whose speech relies on anonymity is forced to reveal his identity as a precondition to expression" 628 Fd.2d at 1225.

If you know you are going to have tell the sheriff within five days, after you posted a comment on a blog. it certainly seems like that would chill free expression.

The second case that should be mentioned is Doe v. Marshall, 2018 WL 1321034 (United States District Court, M.D. Alabama, March 14, 2018). This case had been overlooked originally and was only discovered because it was cited in the Odom case. In this Alabama case, United States Chief District Judge Keith Watkins' ruling on a Motion to Dismiss was published in Westlaw.

The case was brought as a civil rights case complaining about any number of parts of the Alabama registration statute. One claim challenged the requirement to disclose of internet identifiers. The plaintiff challenged both the overbreadth of the scope of the statute, itself as well as bring the facial challenge to the statute. The Alabama statute was very much like Iowa. Here is the language:

> A registrant is required to report "[a]ny email addresses or instant message address or identifiers used, including any designations or monikers used for self-identification in Internet communications or postings other than those used exclusively in connection with a lawful commercial transaction.

The court noted that the breadth of the statute would allow prosecution for using a girlfriend's computer for internet research, connecting to a Wi-Fi spot at McDonalds or at the terminal at the public library, or even borrowing a friend's smart phone to read the news online. He repeated the language from the Ninth Circuit case Doe v. Harris

, when it observed that "just as the act burdens sending child pornography and soliciting sex with minors, it also burdens blogging about political topics and posting comments on online news articles".

In a somewhat interesting twist, the legislature in Alabama, to make the statute more palatable, added a provision that the disclosure requirement did not apply commercial transactions. The Assistant Attorney General in this case suggested that the Iowa statute should be interpreted to include that exception.

Judge Watkins noted that by elevating commercial speech over political speech the statute became "content based" and strict scrutiny would apply to the facial challenge.

He went on to find the statute would be unconstitutional even using a lesser standard.

This ruling was only a ruling on the government's Motion to Dismiss. Nevertheless its analysis is helpful. Examination of the docket in this case shows the matter set for trial in the February of 2019.

Claims under the First Amendment

As with any complaint brought under the Free Speech provisions of either the Iowa or the United States constitution, there are several points should be made about the analysis.

First a person can challenge the statute even if the statute could constitutionally be applied to his particular behavior. The overbreadth doctrine "enables litigants to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statutes very existence may cause others not before the court to refrain from constitutionally protected speech or expression" Hill v. Colorado 530 U.S. 703 (2000). The overbreadth must be real and substantial "judged in relation to the statutes plainly legitimate sweep" Broadrick v. Oklahoma 413 U.S. 601, 615

(1973). There is special concern within the overbreadth context that a statute deters protected speech, whereas here it imposes criminal sanctions. See Virginia v. Hicks 539 U.S. 113, 119 (2003). See City of Maquoketa v. Russell, 484 N.W.2d 179, 182 (Iowa, 1992)

Second, the Free Speech provisions protect the right to speak anonymously. Our country was founded by people speaking anonymously or using pseudonyms. “Even the arguments favoring the ratification of the constitution advanced in the federalist papers were published under fictitious names “McIntyre v. Ohio Elections Commission 514 U.S. 334, 342 (1995).

The internet identifier disclosure provision requires disclosure of virtually all contacts established by an individual through the internet. While you do not have to disclose the information before, you are given five days to contact the sheriff or you could be committing a felony.

Third, a statute is unconstitutional if there is not a sufficiently precise fit between the objects sought in the statute itself. As with other constitutional challenges, the initial legal question is whether the standard is rational basis or strict scrutiny or something in the middle.

Most of the cases that have looked at this issue about offender disclosure have used "intermediate scrutiny." Restrictions on protected speech can survive so long as “they are narrowly tailored to serve a significant government interest” put

another way the test is whether "the means chosen… burden substantially more speech than is necessary to further the government interest" see Doe v. Harris, 772 F.3d 563 (9th Cir. 2014).

Does the Iowa Statute burden more speech than necessary to further the government interest?

The State identifies two interests served by this statute.

(1) There is the interest of a parent who wants to know whether the person communicating with their child is a sex offender. (State's brief at p. 39)

(2) The second interest is providing assistance to law enforcement in tracking down perpetrators of further sexual assault or worse. State's brief at p. 46.

Neither of these obviously legitimate goals fits sufficiently with the means chosen to justify the intrusion into the first amendment area.

What about the parent's concern?

First, if the parent knows the name of the person, the parent can look the person up on the registry to see if they are a sex offender.

Second, if the parent only has an internet address such as bigbadwolf@gmail the sheriff, upon request, is not going to search some data base of internet addresses of sex offenders (if it exists) to see who that is. Section 692A.121(5)(a) would apply. The parent could only ask for information about a

specific offender. Indeed "internet identifiers" would not be disclosable under that section. See 692A.121(5)(b)

Assisting law enforcement

Assisting law enforcement to solve crimes would be recognized as a legitimate governmental reason. Indeed, it would probably be a compelling reason.

First, as discussed in the previous section, the vast majority of all sex offenders will not reoffend.

Second, the statistical likelihood that sharing "internet identifiers" is going to assist in a criminal investigation would be incredibly small.

Third, most of the information required to be disclosed under the "internet identifier" provision would never be of help to law enforcement.

The statute is not narrowly tailored

Even applying intermediate scrutiny, the disclosure of these internet identifiers must be narrowly tailored to advance any interest of the State. The means chosen must not substantially burden more speech that is necessary.

Put another way, the statute would be unconstitutional if a substantial number of its applications were unconstitutional when compared to the possible legitimate applications.

The internet provision in Iowa requires the disclosure within 5 days of an incredible amount of information. Most of that information is not going to assist

law enforcement in solving crimes. None of it is going to assist the parent who is concerned about the child communicating with a possible predator. There are quite a number of internet contacts that have significant value under the first amendment. Given the suggested reasons for the statute and the burden placed by the statute, the Court should find the fit not sufficiently precise or narrow, and find the statute unconstitutional.

Specific response to State's brief

The State in its brief at page 52 says “the legislature is not required to subdivide registration requirements for adult sex offenders and only pursue policies that would prevent or dissuade each registrant from re-committing their previous sex offense.”

Response: The legislature when it legislates on matters affecting the First Amendment is very much required to legislate carefully, ensuring that there is a close fit between the reasons for the legislation and the means chosen.

CONCLUSION

Achbrenner committed his crime in 2006. That crime imposed a registration requirement as described in the Code at the time. In 2009, the registration code changed considerably, substantially increasing the obligations of a registrant. One such obligation was the requirement to disclose "relevant information" to the

sheriff, on a regular and face-to-face basis. That included all "internet identifiers."Aschbrenner did not do tell the sheriff about a Facebook page. He was prosecuted and was convicted.

He makes two arguments. First, the registration statute as amended in 2009 now constitutes punishment. As such changes in the statute cannot be applied to people convicted before 2009.

He also complains based on the free speech provisions of the Iowa and United States Constitutions. Social media is now protected by the Constitution, even if you are a sex offender. That should prohibit a requirement that registrants give the government a current list of all their internet identifiers.

For both reasons the Court should set aside the conviction in this case.

RESPECTFULLY SUBMITTED,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Reply Brief was $4.20.

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/s/ Philip B. Mears — 1/11/2019
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