No. 19-35391

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOES, John and Jane, 1-134,

Plaintiffs-Appellants,

v.

LAWRENCE WASDEN, Attorney General
of the State of Idaho; et al.,

Defendants-Appellees.

On appeal from the United States District Court
for the U.S. District of Idaho
D.C. No. 1:16-cv-00429-DCN
Honorable David C. Nye

APPELLANT'S REPLY BRIEF

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INTRODUCTION

It probably comes as no surprise that the State of Idaho has alleged that the Does have failed to meet their burden in this appeal. The crux of the State's defense is that the Does have presented new arguments on appeal that should not be considered by this Court. Although the State alleged that arguments raised for the first time on appeal generally will not be considered, noting the Court's discretion in this regard, the State neglected to set forth the exceptions to the general rule.

In particular, while the State has alleged that Does have presented new argument on appeal that should not be considered, it is clear that the majority of the arguments made by Does are purely legal in nature. In addition, the State has cited to public policy considerations for sex offender registries, however, has failed to demonstrate any rational relationship between the effective date of July 1, 1993, relative to the Sex Offender Notification and Right to Know Act ("SORA"), to any nonpunitive purpose nor a rational relationship to public safety. The effective date of July 1, 1993, creates two classes of persons whose possible registration as a sex offender is contingent upon the date of their conviction and discharge from probation, parole, or incarceration, whichever the case may be, without regard to the nature of their offense.

In addition, SORA creates an additional class of individuals based on specific circumstances such as whether or not that person was required to register in another state prior to moving to Idaho, without regard to the date of their conviction, as opposed to those who are convicted in Idaho and remain in Idaho.

The interpretation of SORA is also subject to differing conclusions, and is vague and ambiguous. Based upon a literal interpretation of some of the provisions contained therein, any person convicted of a crime on or after July 1, 1993, may be required to register as a sex offender (Idaho Code Section 18-8304(b).)

While Does have challenged the constitutionality of SORA upon the basis of varying clauses of the United States and Idaho Constitutions, most of the claims all support the proposition that SORA is punitive in its intent and/or effect.

ARGUMENT

I. NEW ARGUMENTS

The State has asserted that Does have made new arguments, which should be deemed to have been waived, to include the following:

1. Based on the Does' misinterpretation of Idaho Code §18-8316, they argue that SORA violates the *Ex Post Facto* Clause because Idaho law requires individualized assessment of an offender's risk of recidivism. Appellants'

Opening Br. (Dkt. 11) ("Does' Brief") at 10-11.

2. SORA is unconstitutionally punitive because it creates two separate categories of sex offenders - those convicted outside of Idaho, and those convicted within Idaho. *Id*. at 14.

3. SORA is vague at [sic] to what it requires of sex offenders convicted in jurisdictions other than Idaho. *Id.* This argument appears to be based on the misconception that SORA requires someone convicted of any crime outside of Idaho to register as a sex offender upon moving to Idaho. *Id*. at 17.

4. Based on a former version of Idaho Code § 18-8304 as interpreted by *State v. Dickerson,* 129 P.3d 1263 (Idaho Ct. App. 2016), SORA unconstitutionally burdens a sex offender's right to travel. *Id.* at 17.

5. The Does raise a new state claim in relation to Does 62, 82, 85, 132 and 106 based on the alleged misapplication by the State of Idaho Code § 18-8304.

6. The Does now claim that SORA violates Idaho's Free Exercise of Religion Protected Act ("FERPA"), Idaho Code § 73-401, et seq. *Id*. at 5, 26.

7. The Does' equal protection argument now relies on the alleged impingement of their right to travel. *See id*. at 5, 15-19.

(Appellee's Brief, p. 10-11.)

The arguments referenced by the State are being made for multiple

purposes, as opposed to a single purpose. Does assert that their arguments are appropriately presented to this Honorable Court for consideration.

This Court has discretion to hear arguments raised for the first time on appeal and "may exercise this discretion (1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." (Citation omitted) (*Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011)).

Does assert that the majority of their arguments, in particular the facial analysis, are purely a question of law and consideration of these matters do not prejudice the State's ability to present relevant argument that could affect the decision. Does assert that their argument(s) do "not affect or rely upon the factual record developed by the parties, and will not prejudice the party against whom it is raised." (Citations omitted) (*Fed. Ins. Co. v. Union Pac. R. Co.*, 651 F.3d 1175, 1178 (9th Cir. 2011)).

A. Citations to Record.

Does set forth with particularity in their Amended Complaint (Part II) that "the fact that the Idaho Legislature has not included all of those convicted of the same sexual offenses in the registration scheme, is powerful evidence of an intent to punish those who are recently convicted of a sexual offense, on or after January

1, 1993, or those who are incarcerated or under probation or parole on or after January 1, 1993 for a sexual offense." (EOR Vol. II, p.8-9.)

In addition, Does made similar arguments at the hearing on the Motion to Dismiss Amended Complaint for Injunctive and Declaratory Relief (Part II), wherein counsel stated as follows:

> "The first concern that we have with this registry, and the -- one of the primary reasons that we assert that it is in fact punitive, in spite of allegations otherwise, is that there's a cutoff in time that applies to sex offenders. If we were concerned about recidivism and those who are convicted of sexual offense, then why is it that the legislature picked 1993 as the inception date. Obviously, there are those residing in the state of Idaho who have been convicted of sexual offenses prior to 1993 such that they are not required to register, and yet this registry does not target them in any shape or form. It does, however, target anyone who is on probation, parole, was incarcerated, or was convicted or pled guilty of a sexual offense occurring after 1993. And so right from the outset, you have to ask a question about why that is. If the goal of the legislature is to prevent recidivism and identify sex offenders as being the class worthy of trying to prevent recidivism, then why is it that we distinguish between those who were convicted prior and after 1993? Because there is no reason. It was just selected as a starting point. It was an arbitrary decision, at least from our perspective."

(Appellee's Supp. Excerpts of Record, Vol. I, p. 11, Ll. 23-25, p. 12, Ll. 1-18).

Does also alleged Equal Protection violations relative to the distinctions between juvenile and adult registration in their Amended Complaint for Injunctive and Declaratory Relief, including, but not limited to, the following:

a. Juvenile sex offenders are not subject to the same tiered designations as adult sex offenders (i.e., "rescidivist", those convicted of an "aggravated offense", and "violent sexual predator").

b. Juvenile sex offenders, even in those circumstances where they would otherwise qualify as an adult "violent sexual predator", are limited to registration as a sex offender annually, as opposed to the more onerous requirement of every ninety (90) days, are not faced with more burdensome and frequent verification of address, and are not subject to the requirement that they wear an electronic monitoring device at all times, faced by adult offenders in that same class.

c. In the event of a failure to register, juvenile offenders are subject to a general misdemeanor criminal charge, whereas adult sex offenders are subject to being charged criminally at a felony level for the identical conduct.

d. Upon reaching the age of twenty-one (21) years, all juvenile sex offenders are entitled to be removed from the juvenile sex offender registry, unless the prosecuting attorney files a petition with the court asking that the juvenile offender be transferred to the adult registry and, after hearing, that the court determines the juvenile poses and ongoing threat to the safety of others. The level of the burden of proof on the State in making such a showing is not prescribed by the statute. By contrast, adult sex offenders who have been designated as a "recidivist", a "violent sexual predator", or those who were convicted of an "aggravated offense" are required to register for life. Only those adult sex offenders whose conviction(s) do not fall within one (1) of those designations may petition for removal from the sex offender registry. The petition may be filed on or after a period of ten (10) years from the date the adult offender was released from incarceration or placed on parole, supervised release or probation, whichever is greater, at which time the court is required to schedule a show cause hearing to determine whether the offender is to be exempted from the duty to register as a sexual offender. The burden of proof required to be shown by the petitioner is clear and convincing evidence.

(Amended Complaint, EOR Volume II, p.187-188, see generally p. 186-189).

II. SORA IS PUNITIVE IN INTENT AND/OR EFFECT

A law can violate the Ex Post Facto Clause in one of two ways: (1) where punitive intent is shown, the analysis ends – the law violates the Ex Post Facto Clause; or (2) where the intent is civil, a law nonetheless violates the Ex Post Facto Clause if its effects are punitive. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

Pursuant to *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the following factors have been deemed determinative of whether a laws's effects are punitive: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether its operation will promote the traditional aims of punishment, retribution and deterrence; whether an alternative purpose to which it may rationally be connected is assignable for it; whether it appears excessive in relation to the alternative purpose assigned; whether it comes into play only on a finding of scienter, and; whether the behavior to which it applies is already a crime. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

The State of Idaho suggests that Does' Ex Post Facto claims are foreclosed. While the Court in *Doe* did find that Alaska's registration and notification laws

did not violate the Ex Post Facto Clause, the State of Idaho ignores the fact that all sex offender registries are not the same, and States do not have carte blanche authority to enact whatever laws they like so long as they pertain to an unpopular class of criminal defendants, in this case, sex offenders.

Michigan's version of SORA is very similar to Idaho's. Recently, in the case of *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. Ct.App. 2016), the 6th Circuit Court of Appeals was presented with the opportunity to review the Michigan Act while considering similar constitutional issues as are before this Court. In its review of the facts, the Court addressed the legislative history and time line of Michigan "SORA".

The Court distinguished the holding of the United States Supreme Court in . *Doe*, based upon the fact the Alaska Sex Offender Registry Statute in question was much less onerous in its requirements than that of Michigan's SORA. The Sixth Circuit Court concluded:

> "Michigan's SORA imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased. Indeed, the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause. As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people

> without prior notice. Such lawmaking has "been, in all ages, [a] favorite and most formidable instrument[ ] of tyranny." *The Federalist No.84*, *supra* at 444 (Alexander Hamilton). It is, as Justice Chase argued, incompatible with both the words of the Constitution and the underlying first principles of "our free republican governments." *Calder*, 3 U.S. at 388–89; *accord The Federalist No. 44*, *supra* at 232 (James Madison) ("[E]x post facto laws ... are contrary to the first principles of the social compact, and to every principle of sound legislation."). The retroactive application of SORA's 2006 and 2011 amendments to Plaintiffs is unconstitutional, and it must therefore cease."

Significantly, in *Snyder* a Petition for Writ of Certiorari was filed with the United States Supreme Court which was denied by Order dated October 2, 2017. *Snyder v. John Does #1-5*, *et al*, 138 S.Ct. 55 (2017). For similar recent holdings finding SORA violative of Ex Post Facto protections, See, *State v. Buser*, 304 Kan.181 (2016) and *John Doe v . Dpt. Of Public Safety and Correctional Services*, 430 Md. 535 (2013).

Determining whether a law is civil or criminal "is first of all a question of statutory construction." *Smith*, 538 U.S. at 92-93. Thus, "[w]e consider the statute's text and its structure to determine the legislative objective." *Id*. The task of discerning legislative intent is a factual inquiry. See, e.g., *Garrett v. U.S.*,471 U.S. 773, 778 (1985). The Idaho SORA laws are located in the Idaho criminal code. The *Smith* Court described this fact as probative of effect. *Smith*, 538 U.S. at 85-86.

In *Smith*, the majority found civil intent and thus required the "clearest proof." *Smith*, 538 U.S. at 92. However, concurring and dissenting opinions raised a question not addressed by the majority: whether the law's challengers should have to show punitive effect by the "clearest proof" when evidence of civil intent is not clear. Justice Souter explained:

> "…We have said that 'only the clearest proof' that a law is punitive based on substantial factors will be able to overcome the legislative categorization. *Ward*, supra, at 249, 100 S.Ct. 2636 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)). I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction. See *Hudson v. United States*, 522 U.S. 93, 113-114, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (SOUTER, J., concurring in judgment). *Smith* 538 U.S. at 107-108 (concurring only in judgment)."

Justice Ginsberg echoed this point in a dissent joined by Justice Breyer:

> "Accordingly, in resolving whether the Act ranks as penal for ex post facto purposes, I would not demand 'the clearest proof' that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy v. Mendoza-Martinez* … I would neutrally evaluate the Act's purpose and effects. …".

Smith, 538 U.S. at 114-115.

In addressing SORA's purpose and effects, the State of Idaho has acknowledged many of the burdens that sex offenders are required to bear in Idaho as follows:

A sex offender that has committed an aggravated offense is not eligible to petition the court to be exempt from registration requirements. Idaho Code § 18-8310(1). None of the Does allege they are a "recidivist" or "Violent Sexual Predator" as defined in Idaho Code §§ 18-8303(14) and (17). Violent sexual predators are required to register quarterly; all other sex offenders, such as the Does, must register annually. Idaho Code § 18-8307(5)(a)(b).

The Idaho State Police maintain the digital sex offender registry. Idaho Code §§ 18-8303(5); 18-8305(1). The registry includes such information as names and aliases used by a sex offender, names or identifiers the sex offender uses on the internet, a physical description, all arrests and convictions, the text of the law that the sex offender violated resulting in his registration as an offender, parole status, physical address where the sex offender resides, license plate and vehicle description, place of employment, what professional licenses the sex offender maintains, current photograph, set of finger and palm prints, and a copy of the sex offender's driver's license. Idaho Code § 18-8305(1). The public has access to the sex offender registry via the internet. Idaho Code § 18-8323(1).

Registration forms are mailed annually to sex offenders via non-forwardable mail, unless the sex offender is a recidivist or violent sexual predator, in which case the form is mailed quarterly. Idaho Code § 18-8307(5). Completion of the registration process requires appearing in person at the sheriff's office for the county in which the sex offender is required to register. Idaho Code § 18-8307(5)(c). Failure to register is a felony with penalties of imprisonment up to ten years and a fine of no more than $5,000. Idaho Code § 18-8311(1). Use of the information on the registry to commit a crime against any person is punishable as a misdemeanor with up to a year in jail and/or no more than a $1,000 fine. Idaho Code § 18-8326.

The only employment that Idaho's SORA specifically prohibits for sex offenders is working at a day care center, group day care facility or family day care home. Idaho Code § 18-8327(1). Nor can a sex offender be on the premises of such places if children are present,

> unless dropping off or picking up the sex offender's children. *Id.*
>
> Sex offenders are prohibited from being on the premises of school buildings or grounds, to include any property posted with a notice that it is used by a school, when the sex offender has reason to believe children under the age of eighteen are present and involved in a school activity. Idaho Code § 18-8329(1)(a). Further, sex offenders may not be present on such premises when children are present within thirty minutes before and after a scheduled school activity. *Id.* Nor can sex offenders loiter within five hundred feet of such properties when children under eighteen are present and involved in a school activity, or present within thirty minutes before or after a scheduled school activity. Idaho Code § 18-8329(1)(b). An offender cannot be on any vehicle used to transport children under the age of eighteen to or from school or a school related event when such children are on the vehicle. Idaho Code § 18-8329(1)(c).
>
> A sex offender cannot reside within five hundred feet of property on which a school is located. Idaho Code § 18-8329(1)(d). Sex offenders who lived in a residence within five hundred feet of a school prior to July 1, 2006 are exempt from the prohibition. *Id.* Additional exceptions to the five hundred foot proscription apply, to include dropping off or picking up the sex offender's children and living in an approved or licensed incarceration facility or homeless shelter that is within the proscribed five hundred foot limit. Idaho Code § 18-8329(2).

(Appellees Answering Brief p.3-5)

Does applied these registration requirements to the *Kennedy-Mendoza* factors in detail, in their Response to Defendants' Motion to Dismiss, as set forth in the Supplemental Excerpts of Record p.93-120. In addition to those arguments, Does ask this Honorable Court to specifically consider the following arguments in

support of their claim of constitutional violations relating to Ex Post Facto, Equal Protection, Due Process, and Cruel and Unusual Punishment.

A. Lack of Individualized Risk Assessment

Idaho Code Section 18-8316 states that:

> If ordered by the court, an offender convicted of any offense listed in section 18-8304, Idaho Code, may submit to an evaluation to be completed and submitted to the court in the form of a written report from a certified evaluator as defined in section 18-8303, Idaho Code, for the court's consideration prior to sentencing and incarceration or release on probation. The court shall select the certified evaluator from a central roster of evaluators compiled by the sexual offender management board. A certified evaluator performing such an evaluation shall be disqualified from providing any treatment ordered as a condition of any sentence, unless waived by the court. An evaluation conducted pursuant to this section shall be done in accordance with the standards established by the board pursuant to section 18-8314, Idaho Code.

While Does concede that this code section incorporates the word "may", ("shall" was replaced with "may" effective July 1, 2011; SORA, 2011 Idaho Laws Ch. 311 (S.B. 1154)). Does continue to assert that where the State of Idaho authorizes the preparation of a risk assessment prior to sentencing, the State of Idaho should be required to perform an individualized risk assessment prior to imposing regulatory consequences, especially given that Idaho already has the framework in which to implement a risk assessment prior to sentencing, i.e., prior to imposing regulatory consequences.

The fact that the State of Idaho has chosen to forego an individualized risk assessment prior to imposing regulatory consequences, in spite of having the framework in which to conduct an individualized risk assessment, is additional evidence of punitive intent and/or effect.

B. Juvenile vs. Adult Risk Assessment

Does previously alleged that Idaho has implemented a system whereby an individualized risk assessment, for the purposes of registration, may be performed for juveniles (at age 21 as previously noted), whereas adult sex offenders are given no such consideration. Effectively, this means that all juvenile sex offenders are required to register for a minimum of three (3) years, after which a risk based assessment (hearing) *may* be requested by the prosecution to determine whether the juvenile poses an ongoing threat to the safety of others. If such a request is not made by the prosecutor, the juvenile is deleted from the registry. (Idaho Code Section18-8410) (See Appellant Brief p.25.)

The fact that the State of Idaho has chosen to forego an individualized risk assessment for adults, as opposed to making it available for juveniles, is additional evidence of punitive intent and/or effect.

C. July 1, 1993

In addition, Does allege that the statutory framework of SORA creates two

(2) separate classes of persons based solely upon whether or not those persons plead guilty to, or have been found guilty of, a sex crime prior to July 1, 1993, where the person, as a result of the offense, was not incarcerated in a county jail facility or a penal facility and was not under probation or parole supervision, on or after July 1, 1993. (Idaho Code Section 18-8304(d)).

The fact that the State of Idaho has arbitrarily chosen July 1, 1993 as the date upon which registration versus non-registration is focused, is additional evidence of punitive intent and/or effect.

D. In-State vs. Out-Of-State

Does allege that the statutory framework of SORA also creates two (2) separate classes of persons, those who are not required to register as sex offenders in Idaho by virtue of the July 1, 1993, effective date, and those persons who are convicted of a substantially equivalent sexual offense outside of the State of Idaho, whose State from which they are moving from requires them to register, regardless of the date of their conviction, or the timing of their probation, parole, or incarceration.

The fact that the State of Idaho has created two (2) classes of individuals determined primarily by sex offender registration in another State, is additional evidence of punitive intent and/or effect.

CONCLUSION

Does respectfully request that this Honorable Court consider all of the arguments Does have made, including those that this Court may deem to be newly made, on the basis that said arguments are purely legal. Does assert that they have met their burden of demonstrating a plausible claim of relief and respectfully request that the Judgment of the District Court be reversed and the case remanded for consideration of Does' claims on the merits.

Counsel requests oral argument.

Dated This 5th day of November, 2019.

FULLER LAW OFFICES

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John and Jane Does 1-134

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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