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IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY RILEY,

Appellant,

vs.

THE STATE OF NEVADA, ex rel. DEPARTMENT OF PUBLIC SAFETY,

Respondent.

No.: 79389

DC No.: CV19-00441

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APPELLANT'S OPENING BRIEF

APPEAL FROM GRANT OF MOTION TO DISMISS

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This is an appeal from the order of the Second Judicial District Court granting Respondent's Motion to Dismiss the Appellant's Petition for Termination of Duty to Register. Appellant filed his timely notice of appeal. Appellant's Appendix ("AA") – 0100 – 0102. *See* NRAP 4(a)(1) (providing 30 days to file a notice of appeal after the entry of written judgment or order.)

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it is an appeal involving matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions. *See* NRAP 17(a)(11).

1. STATEMENT OF THE ISSUES

The disparate treatment of the Appellant herein, to similarly situated litigants in prior cases, constitutes an Equal Protection Violation – the dismissal of his Petition in the Court below, was therefore in error.

2. STATEMENT OF THE CASE

On February 25, 2019, Mr. Riley filed a Petition for Termination of Duty to Register in the Second Judicial District Court, Washoe County. (AA – 0001 – 0047.) On April 29, 2019, The State of Nevada filed a Motion to Dismiss. (AA – 0050 – 0060.) On April 29, 2019, Mr. Riley filed his Opposition to the

Motion to Dismiss. (AA – 0061 – 0074.) On May 6, 2019, The State of Nevada filed its Reply in Support of its Motion to Dismiss. (AA – 0075 – 0082.) On July 2, 2019, the District Court entered an Order Grating Motion to Dismiss. (AA – 0083 – 0088.) Mr. Riley filed a timely Notice of Appeal on July 18, 2018. (AA – 0180 – 0182.)

3. STATEMENT OF FACTS

On or about March, 1983, a conviction was entered against Mr. Riley for one count of Attempted Lewdness with a Minor Under the Age of 14, in the Lyon County Court in Nevada. (AA – 0002.) Mr. Riley has had no arrests since that time. (AA – 0032.) Mr. Riley initially registered in Nevada on or about October 14, 1984 (AA – 0008), and had been continuously registered at the time of the litigation in the Court below. (AA – 0049.) His Annual Registration Verifications reveal that he was classified a Tier 1 offender at all times. (AA – 0015 – 0047.) Mr. Riley has completed all necessary requirements to be released from the duty to register. (AA – 0002.)

4. SUMMARY OF THE ARGUMENT

Under the Fourteenth Amendment to the United States Constitution, and Art. 4 § 21 of the Constitution of the State of Nevada, every citizen is entitled to equal protection of law. An individual may seek the vindication of a personal right to equal protection if, as a "class of one . . . the appellant can

demonstrate that he or she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." State Dep't of Publ. Safety v. Neary, 422 P.3d 1232, 2018 Nev. Unpub. LEXIS 677, 5 – 6, Nevada Supreme Court Case No. 72578, filed July 26, 2018 (unpublished disposition), quoting Malfitano v. Cty. Of Storey, 133 Nev. Adv. Rep. 40, 16, 396 P.3d 815, 821 (2017), quoting Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000).

5. LEGAL ARGUMENT

On January 22, 2016, the Nevada Supreme Court dissolved a stay of A.B. 579, known colloquially as the Adam Walsh Act. Doe v. Eighth Jud. Dist. Ct. of Nev., 2016 Nev. Unpub. LEXIS 81, 2016 WL 374956, Nevada Supreme Court Case No. 64890, filed January 22, 2016 (unpublished disposition). On or about June 1, 2016, the Nevada Department of Public Safety distributed a letter to every affected person on the Sex Offender Registry informing them that on July 1, 2016, the State would begin enforcing the provisions of A.B. 579, now found at Nev. Rev. Stat. § 179D *et seq.* During the interval from January 2016 to July 1, 2016, A.B. 579 was the law in Nevada – it was not enjoined, and had an effective date of July 1, 2008. However, the Department of Public Safety did not enforce the law in any way until July 1, 2016, and in fact specifically advised all those affected that it would not do so.

During the interval between January 22 and July 1, 2016, numerous individuals around the State successfully petitioned appropriate District Courts to be released from their duty to register as a sex offender. These petitions frequently argued that the respective petitioner had been assigned as Tier 1 offenders under the previous version of Nev. Rev. Stat. § 179D (colloquially known as Megan's Law), and that under A.B. 579[1], the required period of registration had passed. All other requirements being satisfied, several of these petitions were granted in various Judicial Districts around the state. See, e.g., Palmira v. State, Eighth Judicial District Court Case No. A-16-738771-P, Moccia v. State, Eighth Judicial District Court Case No. A-16-738722-P, Sipple v. State, Eighth Judicial District Court Case No. A-16-737035-P, Viars v. State, Eighth Judicial District Court Case No. A-16-738992-C, Nicholas v. State, Eighth Judicial District Court Case No. A-16-738997-C. (JA00136 – JA00145.) And, see also, Cooley v. State, Fourth Judicial District Court Case

[1] Under Nev. Rev. Stat. § 179D.490, the full period of registration for a Tier 1 offender is 15 years. However, a Tier 1 offender may petition for release from the duty to register if he has registered for at least ten consecutive years, because under Nev Rev. Stat. § 179D.490(4)(a), if all requirements are satisfied, the registration period may be reduced by five years. A person may avail themselves of the five year reduction if they have registered for ten consecutive years, and have not been convicted of a crime punishable by more than one year in prison nor any sexual offense, successfully completes any applicable period of supervised release or probation or parole, and completes a treatment program. NRS §§ 179D.490(3) and (4).

No. CV-C-16-737, Tillery v. State, Fifth Judicial District Court Case No. CV38146, Hewitt v. State, First Judicial District Case No. 16 OC 00006 1E, Henson v. State, Fifth Judicial District Court Case No. CV37910.

In case after case, the State either took no position on, or did not oppose the above-captioned petitions.

Then, on July 1, 2016, A.B. 579, the Nevada implementation of the Adam Walsh Act, was again enjoined by the Nevada Supreme Court. Doe v. Eighth Jud. Dist. Ct., 2016 Nev. LEXIS 739, Nevada Supreme Court Case No. 70704, filed July 1, 2016 (unpublished disposition). On April 27, 2018, that stay was dissolved, and A.B. 579 once again became the law in Nevada. Doe v. Eighth Jud. Dist. Ct., 416 P.3d 208, 2018 Nev. Unpub. LEXIS 354, Nevada Supreme Court Case No. 70704, filed April 27, 2018 (unpublished disposition).

Mr. Riley is situated identically to those who successfully petitioned for release from the duty to register in 2016. With the benefit of their Tier 1 designation under Megan's Law, and the remaining statutory language under A.B. 579, Nev. Rev. Stat. §§ 179D.490(3)(a) and (4)(a), he should properly be released from the duty to register. However, the State of Nevada has made the arbitrary decision to treat Mr. Riley differently from those situated identically in 2016 – in whose cases the State of Nevada did not oppose release from the duty to register, and the District Court judge improperly dismissed Mr. Riley's

Petition, finding that - notwithstanding the fact that the State conceded and the Court found that the Petitioners in the 2016 cases cited above were certainly treated differently by the State at that time (AA – 0178) – Equal Protection did not demand Mr. Riley receive the same benefit as those who came before him. (*Id.*)

However, in this case, the State of Nevada opposed his position, arguing that his Tier level should be considered that under the Adam Walsh Act. The Court below was convinced and dismissed his claim on that basis – in error.

a. EQUAL PROTECTION AND THE CLASS OF ONE

Under the Fourteenth Amendment to the United States Constitution, and Art. 4 § 21 of the Constitution of the State of Nevada, every citizen is entitled to equal protection of law. The purpose of these constitutional protections is to ensure that the law is applied equally to every citizen as to others who are similarly situated. Equal Protection is frequently enforced when a member of a protected class seeks relief from a court, however, an individual may seek the vindication of a personal right to equal protection if, as a "class of one . . . the appellant can demonstrate that he or she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." State Dep't of Publ. Safety v. Neary, 422, P.3d 1232, 2018 Nev. Unpub. LEXIS 677, Nevada Supreme Court Case No. 72578,

filed July 26, 2018 (unpublished disposition), quoting Malfitano v. Cty. Of Storey, 133 Nev. Adv. Rep. 40, 16, 396 P.3d 815, 821 (2017), quoting Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074 (2000).

As the Nevada Supreme Court discussed in Neary, "The [Equal Protection Clause] creates no substantive rights." Vacco v. Quill, 521, U.S. 793, 799, 117 S. Ct. 2293, 2297 (1997). "Instead, it embodies a general rule that *States must treat like cases alike*." *Id.*, citing Plyler v. Doe, 457 U.S. 202, 216 (1982) (emphasis added). This is because, "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074-75 (2000).

"Thus, a 'class of one' equal protection claim is sufficient if the plaintiff alleges that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment." Las Lomas Land Co., LLC v. City of Los Angeles, 177 Cal. App. 4th 837, 858, 99 Cal. Rptr. 3d 503, 521 (2009), citing Village of Willowbrook v. Olech, 528 U.S. 562, 564 145 L. Ed. 2d 1060, 120 S.Ct. 1073 (2000); Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist., 113 Cal. App. 4th 597, 605–606, 6 Cal. Rptr. 3d 574 (2003). "The third element is essentially the same

rational basis test typically applied in some other types of equal protection cases." Las Lomas, 177 Cal. App. 4th at 858, 99 Cal. Rptr at 521.

In both Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 42 S. Ct. 190 (1923), and Allegheny Pittsburgh Coal Co. v. County Com., 488 U.S. 336, 109 S. Ct. 633 (1989), appellants brought equal protection claims as classes of one. Each claimed that land they owned had been assessed at a higher value than that of comparable land owned by others in nearby areas. *Id.* In each instance, respondents argued that the correct resolution, in the event that equal protection was found to have been violated, was to raise the assessed value of the similarly situated properties, not to reduce the burden of the plaintiff in each case. *Id.* However, the United States Supreme Court held, in both instances, that the remedy demanded by Equal Protection was to provide the plaintiff-appellants with the benefit conferred to others. Sioux City Bridge Co., 260 U.S. at 446, 42 S. Ct. at 192 ("This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its value is to have his assessment reduced to the percentage of that value at which others are taxed . . . The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."), Allegheny Pittsburgh Coal Co., 488 U.S. at 346,

109 S. Ct. at 639 ("A taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. 'The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.'"), quoting Hillsborough v. Cromwell, 326 U.S. 620, 623, 66 S. Ct. 445, 448 (1946).

Analogously, it does not fall to Mr. Riley to see that the State of Nevada attempts to force those previously released from the duty to register to once again register with the Department of Public Safety. Equal Protection must be achieved by the State treating the Mr. Riley in the same manner it has treated others similarly situated – although the exact text of the law may be frustrated or not strictly upheld. Sioux City Bridge Co., 260 U.S. at 446, 42 S. Ct. at 192, Allegheny Pittsburgh Coal Co., 488 U.S. at 346, 109 S. Ct. at 639.

Having chosen not to oppose the release from the duty to register of those who came before them, similarly situated, the State may not now oppose Mr. Riley's release from the duty to register on the basis of a different interpretation of the law without offending the Equal Protection Clauses of the United States and Nevada Constitutions. The State is obligated to illustrate some rational basis for the disparate treatment it seeks to enforce – some

justification for their desired discrimination.

b. RATIONAL BASIS

In Malfitano v. Cty. Of Storey, 133 Nev. Adv. Rep. 40, 16, 396 P.3d 815, 821 (2017), this Court examined differences between Malfitano's circumstances and those of individuals similarly situated, as argued by the State: "In particular . . . Malfitano had recently been denied a gaming license . . . These concerns directly relate to Malfitano's financial standing . . . and therefore the Liquor Board had a rational basis[.]" This examination illustrates that the rational basis argued by the State must relate to the individual in question. The implication for the cases herein then, is that the State must point to some difference between Mr. Riley and those similarly situated who came before him.

This reasoning comports entirely with the United States Supreme Court's reasoning in analogous cases – to constitute a rational basis, the distinction upon which the government bases disparate treatment must exist within the individual. In Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 170 L. Ed. 2d 975, 128 S. Ct. 2146 (2008), the Supreme Court discussed why, as a result, class-of-one claims were not feasible in certain contexts where discretionary decisions were required of governments:

> What seems to have been significant in Olech and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. There was no indication in Olech that the zoning board was exercising discretionary authority based on subjective, individualized determinations—at least not with regard to easement length, however typical such determinations may be as a general zoning matter. Rather, the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement. This differential treatment raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it."

Las Lomas, 177 Cal. App. 4th at 859, 99 Cal. Rptr. 3d at 522, quoting Engquist, 553 U.S. at 602 – 603, 170 L. Ed. 2d at 986, 128 S. Ct. at 2153.

The facts herein compare easily to those mentioned in the above cases. Here, Respondent established a consistent manner of dealing with similarly situated petitioners in 2016. Then, in 2018, owing to no personal assessment or distinction drawn between Mr. Riley and the 2016 petitioners, Respondent decided to treat Mr. Riley differently than the 2016 petitioners.

Instead, Respondent argued that the so-called rational basis for the departure from its previous position is owed either to a previous incorrect reading, and a desire now to depart from that reading, or what they call direction from this Court in Neary. But Equal Protection demands Mr. Riley receive the same benefit as was extended to those before him.

Respondent can offer no rational basis related to Mr. Riley or his circumstances which justifies this departure from their previous position – it has simply decided to treat Mr. Riley differently than it did the similarly situated 2016 petitioners, and Equal Protection demands it not be allowed to.

The result, therefore, must be that Mr. Riley enjoys the equal protection of laws guaranteed to him under the United States and Nevada Constitutions, and he must be released from the duty to register, as were those similarly situated who came before him.

6. CONCLUSION

The disparate treatment of Mr. Riley, and those similarly situated who came before him is a violation of the Equal Protection clauses of the Nevada and United States Constitutions. Equal Protection demands Mr. Riley be released from the duty to register, as were the similarly situated Petitioners discussed herein throughout.

DATED this 27th day of February, 2020.

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7. ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not contain more than 12 pages.

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3. Finally, I hereby certify that I have read this appellate brief, and do the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of February, 2020.

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CERTIFICATE OF MAILING

I hereby certify and affirm that Appellant's Opening Brief was filed electronically with the Nevada Supreme Court on the 27th day of February, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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