Supreme Court No. 97617-1
(Court of Appeals No. 78341-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BENJAMIN BATSON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Thirty-five years ago, Benjamin Batson was convicted in Arizona for engaging in sexual conduct with a 16-year-old. This conduct would not be considered criminal in Washington, where the age of consent is 16 years. Nevertheless, Washington law requires Mr. Batson, who is homeless, to register as a sex offender and report in-person on a weekly basis because he is required to register in Arizona. The registration requirements are a huge burden for Mr. Batson, and as a result he has been convicted of failure to register three times since moving to Washington approximately ten years ago.

The Court of Appeals correctly held that requiring Mr. Batson to register based on Arizona law is a violation of the non-delegation doctrine, relying on this Court's long-standing precedent that the legislature may not delegate its power to define the elements of crimes. The State now petitions for review, but fails to demonstrate that the Court of Appeals decision is anything more than a straightforward application of well settled law.

Mr. Batson asks this Court to deny review. If this Court does take review, it should also accept review of the additional constitutional claims Mr. Batson raised below that were not decided by the Court of Appeals.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals, applying this Court's long-standing precedent, properly found that the legislature unconstitutionally delegated its power to define an element of the crime of failure to register as a sex offender to other state's legislatures. Thus the court held that requiring Mr. Batson to register for conduct that occurred in Arizona 35 years ago—conduct which would not be considered criminal in Washington—was unconstitutional. The State fails to identify a conflict with the well settled precedent of this Court, but instead relies on dissimilar case law, policy arguments, and emotional appeals. Does this issue fail to meet the criteria for review under RAP 13.4?

2. This Court has not addressed whether registration violates ex post facto since 1994, when the requirements were significantly less stringent. Today, the obligations for homeless registrants include reporting in-person on a weekly basis as well as keeping a daily log of one's whereabouts. Further, registrants' personal information now appears on a public website. Do the changes to Washington's sex offender registration scheme raise a significant question of constitutional law requiring a reassessment of this Court's precedent?

3. The analysis of whether registration violates double jeopardy is the same as whether it violates ex post facto; under both analyses, the key question is whether registration is so punitive to constitute a criminal penalty. Does the issue of whether registration violates double jeopardy raise a significant question of constitutional law?

4. Under the equal protection clause of the Fourteenth Amendment and the privileges and immunities clause of the state constitution, persons similarly situated must receive like treatment. Here, Mr. Batson engaged in conduct that is not considered criminal under Washington law. However, unlike similarly situated Washington citizens, Mr. Batson is subject to stringent registration laws, including weekly check-ins and being labeled a dangerous "sex offender" on a state-run website. Should this Court review the significant constitutional question of whether requiring individuals like Mr. Batson to register violates equal protection?

C. STATEMENT OF THE CASE

It has been over three decades since Mr. Batson pled guilty to sexual conduct with a 16-year-old girl in Arizona. CP 246, 248. Although the conduct was consensual, racial bias likely contributed to criminal charges being filed and the girl's mother was dating the local sheriff in town. RP 166–67. Mr. Batson has not been convicted of any other sex

offense since.[1] CP 402–403. The 1984 conviction, which has made it nearly impossible for Mr. Batson to maintain steady housing and employment over the years, would not be considered criminal conduct in Washington, where the age of consent is 16.[2] *See* RP 168–73.

The state legislature amended the registration statutes in 2010.[3] Because of these amendments, Mr. Batson was required to register as a sex offender in Washington based solely on the fact that he would be required to register if he lived in Arizona.[4] Under the amendments, "[a]ny out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction" qualifies as a "sex offense" requiring registration.[5] When Mr. Batson first arrived in Washington, the law only required individuals to register if they had been convicted of an out-of-state sex offense

[1] The State's petition for review claims that Mr. Batson was initially accused of kidnapping and forcible rape and that he has also been arrested for other sex crimes. *See* Petition for Review at 1–2. There is no evidence to support these allegations; the State never produced discovery concerning the 1984 conviction or any records showing Mr. Batson was arrested for other sex offenses. The only reference of these allegations in the clerk's papers is an email sent by the prosecutor to defense counsel in Mr. Batson's 2011 case for failure to register. CP 179. The State should not be permitted to self-reference unsupported allegations before this Court. *See State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012) ("[A] prosecutor's assertions are neither fact nor evidence.") (internal citations and quotation marks omitted).
[2] RCW 9A.44.079.
[3] *See, e.g.*, Laws of 2010, ch. 265, 267.
[4] RCW 9A.44.130(1)(a); RCW 9A.44.128(10)(h); ARS § 13-1405(A); ARS § 13-3821(A)(4).
[5] RCW 9A.44.128(10)(h); RCW 9A.44.130(1)(a).

comparable to a Washington sex offense.[6] Because Mr. Batson's Arizona conviction is not comparable to any sex offense under Washington law, he had no duty to register here prior to the 2010 amendments.[7] Again, had he engaged in exactly the same conduct in Washington, he would have no duty to register at all.

Mr. Batson has spent the last two decades in Florida and Washington, struggling to hold down jobs and find stable housing because of the registration requirement. *See* RP 168–69. Each time he was able to find work in construction or a fast food restaurant, discovery of his prior conviction would soon land him out of a job. *See id.* In Washington, he was unable to use housing vouchers because of his conviction, despite his status as a Vietnam veteran. *See id.* at 171–73. And he could not live with family members due to fears for their safety based on his sex offender registration. *See id.* at 173. As a result, Mr. Batson has been homeless, bouncing between shelters and the streets, for most of his adult life. *See id.* at 171–73.

In 1999, Washington began requiring registrants who lacked a "fixed address" to report in-person at their local sheriff's office.[8] Registrants had to report on a monthly or weekly basis, depending on their

[6] *See* RCW 9A.44.130(10)(iv) (2008).
[7] *See id.*
[8] See Laws of 1999, 1st Spec. Sess., ch. 6 § 2.

assessed risk level.[9] The legislature subsequently amended the law to require all registrants without a fixed addressed to report weekly.[10] The legislature further amended the law in 2010 to require that registrants provide an "accurate accounting" of where they stayed during the week and provide it to the sheriff upon request.[11] This law created a huge burden for Mr. Batson, who, simply because he is homeless, is required by law to report in person fifty-two times per year as well as track his whereabouts on a daily basis.[12]

As a result, Mr. Batson, who could not find stable housing because of the registration requirement, was not always able to comply with the duty to register. He was convicted of violating the sex offender registration law in 2011 and 2014, although the latter conviction was overturned by the Court of Appeals based on insufficiency of the evidence. *See* CP 388; *State v. Batson*, 194 Wn. App. 326, 338, 377 P.3d 238 (2016). In the appeal of his 2014 conviction, Mr. Batson also challenged the constitutionality of his duty to register, but the Court of Appeals declined to reach that issue. *See id.* at 328. Mr. Batson was charged for a third time for failure to register in the instant case and was convicted after a stipulated bench trial. RP 149–51, 158; CP 381–87.

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[9] *See id.*
[10] See Laws of 2001, ch. 169, § 1.
[11] *See* Laws of 2010, ch. 265, § 1.
[12] *See* RCW 9A.44.130(6)(b).

On appeal, Mr. Batson challenged the registration statutes on several constitutional grounds, including the non-delegation doctrine, ex post facto, double jeopardy, and equal protection. The Court of Appeals agreed the statute was unconstitutional, holding that predicating a duty to register on another state's laws "is an unconstitutional delegation of the legislative function because it allows another state's legislature to define 'sex offense,' an element of the crime of felony failure to register." Opinion at 8 (Aug. 12, 2019). Because the Court of Appeals reversed on these grounds, it declined to address the other constitutional claims. *Id.* at 8 n.6.

The State petitioned for review from this Court on September 4, 2019.

D. ARGUMENT

1. Relying on this Court's well-settled precedent, the Court of Appeals held that allowing another state's legislature to define an element of the crime of failure to register was an unconstitutional delegation. Review should be denied.

"The legislative authority of the state of Washington *shall* be vested in the legislature." Const. art. II. § 1 (emphasis added). "[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others." *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998) (citations omitted). This legislative function includes defining the elements of crimes and setting punishments. *See State v. Wadsworth*, 139 Wn.2d 724, 734 & n.56, 991 P.2d 80 (2000).

This Court has said "[a] statute must be complete in itself when it leaves the hands of the Legislature." *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 19, 24, 775 P.2d 947 (1989). In *State v. Dougall*, this Court applied the "rule of completeness" to the statute defining controlled substances. 89 Wn.2d 118, 570 P.2d 135 (1977). The defendant in *Dougall* was charged with possession of a controlled substance, and the definitional statute incorporated by reference all federally designated controlled substances. *Id.* at 120. Noting that the designation of controlled substances could change at any time under federal law, this Court held that "legislation which attempts to adopt or acquiesce in future federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void." *Id.* at 122–23. *Dougall* is "well settled" law. *See Diversified*, 113 Wn.2d at 25.

As the Court of Appeals recognized, *Dougall* controls here. *See* Opinion at 5. The duty to register is an element of the crime of failure to register. *See id.* at 6 (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 49C.02 (4th ed. 2016)). The statute in question ties the duty to register to the fluctuating requirements of another state. *See* RCW 9A.44.128(10)(h). By incorporating the impermanent laws of another state, "the substance of the law [was] incomplete when it passed the Legislature, thus transferring the power to render judgment on the

issue to [another] government." *Diversified*, 113 Wn.2d at 25. As the Court of Appeals explained:

> Batson's duty to register in this state is thus completely dependent on whether the Arizona Legislature retains or removes his crime of conviction on its list of registrable crimes. If the Arizona Legislature eliminates Batson's crime of conviction from this list, any duty to register in Washington evaporates. If, however, the Arizona Legislature then reinstates the registration requirement, Batson's duty under Washington law would be resuscitated. *As in* Dougall, *the sex offender registration statute permits future Arizona law to define an element of the crime.*

Opinion at 7 (emphasis added).

Nonetheless, the State insists this Court should take review because the State believes this case is more analogous to *Diversified*, which concerned a law that made certain portions of the state statutory scheme inoperative in the event they came into conflict with federal law. 113 Wn.2d at 24–25. As the Court of Appeals recognized, *Diversified* is not analogous because "[t]he sex offender registration statute does not provide that it becomes ineffective or inoperative if some event occurs in the future." Opinion at 7–8. Rather, "it transfer to Arizona the power to define whether Batson has an ongoing duty to register in Washington." *Id.* at 8.

Dougall squarely answers the question presented by this case: The legislature cannot delegate its power to define the elements of crimes. The Court of Appeals' adherence to *Dougall* does not have broader

implications, as the State suggests. *See* Pet. for Review at 7–8. The holding does not extend to other contexts, like driver's licenses, where the legislature has not delegated the definition of an element of a crime. *See id.* Thus there is no "significant question of state constitutional law" requiring review by this Court. *See* RAP 13.4(b)(3).

Further, the Court of Appeals' holding below was extremely narrow. The court stated, "We do not invalidate RCW 9A.44.128(10)(h) in its entirety, but do so to the extent it imposes a duty to register based on an out-of-state conviction that would not be classified as a sex offense under the other provisions of RCW 9A.44.128(10)." Opinion at 8. The holding only applies to the small class of people who, like Mr. Batson, were convicted of conduct that would not be considered a sex offense under Washington law.

The State raises the specter of sex offenders "roam[ing] unchecked throughout Washington" to argue that this case presents an issue of "substantial public interest that should be determined by the Supreme Court." *See* Pet. for Review at 8–9. This fervent appeal addresses the wrong audience. "The function of the judiciary is to say what the law is, whereas the legislature's function is to set policy and draft and enact law." *In re Estate of Hambleton*, 181 Wn.2d 802, 818, 335 P.3d 398 (2014). The statute as drafted is unconstitutional pursuant to well-settled law. *See*

Dougall, 89 Wn.2d at 122–23. Setting policy is not the purpose of this Court's review. *See Hambleton*, 181 Wn.2d at 818.

Because the non-delegation issue does not raise a significant question of constitutional law nor an issue of substantial public interest that should be determined by this Court, review should be denied. *See* RAP 13.4(b).

2. Because it reversed on non-delegation grounds, the Court of Appeals declined to reach the other constitutional challenges raised below. If review is granted, this Court should also review whether the registration statutes violate ex post facto, double jeopardy, and equal protection because these issues raise significant questions of constitutional law.

In addition to the non-delegation issue, Mr. Batson raised three additional constitutional challenges to the registration statutes. Specifically, he argued that the registration requirements violate ex post facto and double jeopardy, and that requiring individuals who have engaged in conduct that is not criminal under Washington law to register as sex offenders violates equal protection. *See* Brief of Appellant at 17–41. The Court of Appeals declined to rule on these additional constitutional grounds. *See* Opinion at 8 n.6. If this Court grants review of the non-delegation issue, it should also review the other constitutional claims raised below because they raise significant questions of law under the state and federal constitutions. *See* RAP 13.4(b)(3).

a. Due to significant changes in the registration laws, is time to revisit *Ward's* ex post facto analysis.

In 1994, this Court held that sex offender registration does not violate ex post facto because it merely serves a regulatory function and is not punitive. *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994); U.S. Const. art. 1, § 10; Const. art. I § 23. Lower courts have been bound by *Ward* despite the fact that today's registration requirements are significantly more burdensome, and have more severe attending consequences, than the requirements considered by the *Ward* court in 1994. *See State v. Boyd*, 1 Wn. App. 2d 501, 522–24, 408 P.3d 362 (2017) (Becker, J. dissenting). This is particularly true for registrants who are homeless. *See id.* In light of these changes, the soundness of the *Ward* decision should be reconsidered.

A criminal law violates ex post facto if it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Ward*, 123 Wn.2d at 497 (emphasis omitted); . To determine whether a law is punitive or merely "regulatory," courts consider the following four factors: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether its operation will promote retribution and

deterrence, the traditional aims of punishment, and (4) whether it appears excessive to its non-punitive purpose. *See id.* at 500–511. Because of the increasingly onerous and punitive nature of registration, the time is ripe to reassess whether registration constitutes punishment pursuant to these factors.

1. Washington now requires weekly in-person reporting for homeless registrants and metes out harsher consequences for failing to report.

In *Ward*, this Court determined the registration laws in effect "impose[] no significant additional burdens on offenders" because they only required providing identifying information as well as a photograph and fingerprints. 123 Wn.2d at 500. The court further noted that this information was already routinely obtained during sentencing. *See id.* The court concluded that "it is inconceivable that filling out a short form with eight blanks creates an affirmative disability. Registration alone imposes burdens of little, if any, significance." *Id.* at 501.

In contrast, under the revised registration statute in effect today, all individuals lacking a "fixed residence" like Mr. Batson now must report in person every week—52 times a year. *See* RCW 9A.44.130 (6)(b). Further, those lacking a fixed residence must "keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff

upon request." *See id.* These requirements are a far cry from "filling out a short form." *Ward*, 123 Wn.2d at 501.

This state's registration requirements for homeless individuals are "perhaps the most burdensome in the country."[13] *Boyd*, 1 Wn. App. 2d at 525 (Becker, J., dissenting). The weekly reporting requirement "can readily lead to an unending cycle of imprisonment for transient offenders," which is "the paradigmatic affirmative disability or restraint." *Id.* Mr. Batson's cyclical incarceration typifies the punitive nature of these requirements; he has been imprisoned in Washington at least three times on charges of failing to register since moving here approximately a decade ago. *See* CP 80, 402; *State v. Batson*, 194 Wn. App. 326, 377 P.3d 238 (2016). Again, Mr. Batson has been required to register and repeatedly prosecuted on the basis of conduct that Washington does not even deem criminal.

In addition to placing a more onerous burden on homeless registrants, the legislature has increased the punishments for non-compliance since 1994 as well. *Compare* Laws of 1990 ch. 3, § 402

[13] A recent fifty-state survey of registration requirements across reveals that Washington is one of only eleven states that require weekly in-person registration for homeless individuals; only one other state has a more demanding registration law. *See* Elizabeth Esser-Stuart, *The Irons Are Always In the Background: The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 Tex. L. Rev. 811, 835, 856 & n. 160 (2018).

(convictions for failure to register range from a gross misdemeanor to a Class C felony) *with* RCW 9A.44.132(1) (the first or second failure to register conviction is a Class C felony, and the third or more failure to register conviction is a Class B felony). Should Mr. Batson's current conviction and duty to register stand, he faces the prospect of a Class B felony when he inevitably misses one week of in-person reporting in the future.

2. The creation of an online sex offender database makes registration information available to the general public.

In addition to the minimal burden of registering under the 1994 requirements, the *Ward* Court found that registration was not punitive because "[t]he Legislature placed significant limits on (1) whether an agency may disclose registrant information, (2) what the agency may disclose, and (3) where it may disclose the information." 123 Wn.2d at 502. This Court noted that "in many cases, both the registrant information and the fact of registration remain confidential." *Id.*

The *Ward* Court further cited that disclosure was only warranted where an agency had "some evidence that the offender poses a threat to the public or, in other words, some evidence of dangerousness in the future." *Id.* at 503. This Court further considered that disclosure must only include "relevant and necessary" information, and that the "geographic

scope" of the disseminated information could be limited "only to the surrounding neighborhood, or to schools and day care centers." *See id.* at 503–504. This Court concluded that "[t]his statutory limit ensures that disclosure occurs to prevent future harm, not to punish past offenses." *Id.* at 503.

The Internet age entirely undercut the privacy safeguards cited by the *Ward* court. Beginning in 2001, the state began to maintain a searchable database of sex offenders accessible by the general public. *See* Laws of 2001, ch. 283 § 2. Initially, the state's sex offender website only included registrants designated as the highest risk to reoffend; now, however, the website contains information about all Level II and Level III registrants, as well as Level I registrants who are out of compliance. *See id.*; RCW 4.24.550(5).

These databases include photographs, names, ages, identifying characteristics such as race, height, and weight, the predicate criminal conviction, as well as a mappable address. In contrast to the carefully measured dissemination of information envisioned in *Ward*, Mr. Batson's mugshot is now the first thing that appears in a Google search of his name. The statutory limits on disclosure invoked by *Ward* have eroded; disclosure is the presumption, regardless of whether such information is

"relevant and necessary" to prevent future threats. *Compare* 123 Wn.2d at 503–504.

Mr. Batson has been fired from jobs due to the readily accessible nature of his sex offender registration online. *See* RP 168–69. He also avoids living with family members due to fears for their safety should someone find his address on the sex offender website. *See id.* at 173. These barriers to employment and housing, as well the very real fear of vigilante violence[14] and the public ostracization inherent to the online registry, continue to punish Mr. Batson for conduct dating back three decades.

3. Recent research shows registration does not reduce recidivism.

The *Ward* court concluded the registration statute was "not excessive in relation to its purpose." 123 Wn.2d at 508. The legislative history of the sex offender registration law reveals that legislators were driven to pass the law primarily due to concerns about the "high" risk of

[14] Offender registries have repeatedly been used by vigilantes to locate and murder people with listed addresses. Several of these murders have occurred here in Washington State. *See* Lexi Pandell, "The Vigilante of Clallam County," The Atlantic (Dec. 4, 2013), *available at* https://www.theatlantic.com/national/archive/2013/12/the-vigilante-of-clallam-county/281968/ (last accessed October 4, 2019); Donna Gordon Blankinship, "Man held in sex offender killings, says he found victims on Web," The Seattle Times (Sept. 6, 2005) *available at* https://www.seattletimes.com/seattle-news/man-held-in-sex-offender-killings-says-he-found-victims-on-web/ (last accessed Oct. 4, 2019).

sex offender recidivism. *See* Laws of 1990, ch. 3, § 401 (declaring that "sex offenders often pose a high risk of reoffense.") However, as subsequent social science research has conclusively demonstrated, sex offender registration does not reduce recidivism.

As a threshold matter, sex offenders in fact have a very low rate of recidivism: the Department of Justice puts the statistic at just 3.5 percent,[15] and study after study has found similarly low recidivism rates.[16] Further, studies of the effects of sex offender registries have concluded that they do *not* reduce recidivism of sex offenses.[17] And some studies have even

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[15] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, "Recidivism of Sex Offenders Released from Prison in 1994" 2 (Nov. 2003), *available at* https://www.bjs.gov/content/pub/pdf/rsorp94.pdf (finding that only 3.5 percent of released sex offenders were convicted of a new sex crime within three years).

[16] *See, e.g.*, State of Connecticut, Office of Policy and Management, "Recidivism among sex offenders in Connecticut" 4 (Feb. 2012), *available at* https://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/sex_offender_recidivism_2012_final.pdf (finding that 2.7 percent of released sex offenders were convicted of a new sex crime within five years of release, and concluding that "[t]hese low re-offense rates appear to contradict a conventional wisdom that sex offenders have very high sexual re-offense rates"); Maine Statistical Analysis Center, "Sexual Assault Trends and Sex Offender Recidivism in Maine" 12 (2010), *available at* https://cpb-us-w2.wpmucdn.com/wpsites.maine.edu/dist/2/115/files/2018/06/Sexual-Assault-Trends-and-Sex-Offender-Recidivism-in-Maine-201-24o3nu2.pdf (finding that 3.8% of sex offenders were convicted of a new sex offense within three years of release); Stan Orchowsky & Janice Iwama, Justice Research and Statistics Association, "Improving State Criminal History Records: Recidivism of Sex Offenders Released in 2001" 17 (Nov. 2009), *available at* http://www.jrsa.org/pubs/reports/sex_offender_final.pdf (assessing the recidivism rates of sex offenders in Alaska, Arizona, Delaware, Illinois, Iowa, New Mexico, and South Carolina from 1.8% to 4%);

[17] *See* J.J. Prescott & Jonah E. Rockoff, "Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?" 54 J. L. & Econ. 161, 192 (2011) (finding a "lack of empirical evidence for the recidivism-reducing benefits of registration and notification"); Amanda Y. Agan, 54 "Sex Offender Registries: Fear without Function?" 54 J. Law & Econ. 207, 235 (2011) (finding that the data "does not support the conclusion that sex

found that providing public access to registration databases has the potential to *increase* recidivism, "perhaps because of the social and financial costs associated with the public release of [registrants'] criminal history and personal information."[18] This research indicates that registration is grossly excessive in relation to its purpose of preventing recidivism.

4. There is a growing national consensus that registration is punitive.

Other courts around the country have recognized that in-person reporting, increased punishments, and searchable online databases place a significant disability and restraint on registrants. For example, the Sixth Circuit recently concluded that Michigan's registration laws—which required quarterly or annual in-person registration, an accessible online database, and significant punishments for noncompliance—were "direct restraints" and thus punitive. *See Does #1–5 v. Snyder*, 834 F.3d 696, 697–98, 703, 705 (6th Cir. 2016).

offender registries are successful in meeting their objectives of increasing public safety and lowering recidivism rates."); Richard G. Zevitz, "Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration," 19 Crim. Justice Studies 193 (2006) (concluding that community notification had no direct effect on recidivism).

[18] *See* Prescott, et. al. *supra* at note 17, at 192.

The New Hampshire, Maryland, Indiana, and Maine supreme courts have similarly concluded that quarterly and annual in-person reporting requirements are punitive in nature. *See Doe v. State*, 111 A.3d 1077, 1196 (N.H. 2015) ("[T]he frequent reporting and checks by the authorities," including home visits and quarterly in-person registration, cannot be described as "*de minimus*"); *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 62 A.3d 123, 139 (Md. 2013) (quarterly in-person registration is akin to "an additional criminal sanction."); *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009) (annual in-person registration, along with other strident requirements, "imposes significant affirmative obligations and a severe stigma on every person to whom it applies."); *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009) (quarterly in-person registration "imposes a disability or restraint that is neither minor nor indirect.").

If this Court accepts review of the non-delegation issue, it should also accept review of the ex post facto issue due to the significant changes in the registration requirements since *Ward* was decided in 1994. Specifically, the burdensome requirements for homeless registrants, the advent of an online database, new research on the efficacy of registration, and a growing national consensus that registration is punitive warrant this Court's review.

b. The registration requirements violate double jeopardy for the same reasons they violate ex post facto; accordingly, if this Court accepts review of one issue it should accept review of the other.

The double jeopardy clauses of the Fifth Amendment to the U.S. Constitution and Article I, § 9 of the state constitution together protect "a defendant from a second trial for the same offense and against multiple punishments for the same offense." *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). The duplicate punishments must be criminal in nature, as opposed to a "civil penalty," in order to violate double jeopardy. *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). The analysis of whether a penalty is criminal punishment applies the same factors as the ex post facto analysis. *See In re Arseneau*, 98 Wn. App. 368, 379–80, 989 P.2d 1197 (1999). Thus if this Court concludes that the ex post facto issues raises a significant question of constitutional law and accepts review, it should accept review of the double jeopardy issue on the same basis.

c. Whether there is a rational basis for requiring individuals who have engaged in conduct that is legal in Washington to register as sex offenders raises a significant constitutional question warranting this Court's review.

At a minimum, laws challenged on equal protection grounds must have a rational basis in order to be upheld as constitutional. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992); U.S. Const. amend.

XIV; Const. art. I § 12. This test applies "whenever legislation does not infringe upon fundamental rights or create a suspect classification." *State v. Smith*, 93 Wn.2d 329, 336, 610 P.2d 869 (1980). Under the rational basis test, "the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective." *Coria*, 120 Wn.2d at 169. In evaluating statutes under the rational basis test, courts apply a three-part test: "1. Does the classification apply alike to all members within the designated class? 2. Does some rational basis exist for reasonably distinguishing between those within the class and those outside the class? and 3. Does the challenged classification bear a rational relation to the purpose of the challenged statute?" *Morris v. Blaker*, 118 Wn.2d 133, 149, 821 P.2d 482 (1992) (citing *Associated Grocers Inc. v. State*, 114 Wn.2d 182, 187, 787 P.2d 22 (1990), *cert. denied.*, __ U.S. __, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991)).

Here, the designated class is defined as all individuals who, like Mr. Batson, are required to register in Washington State for out-of-state conduct that is not criminal under Washington's laws. This class is "similarly situated" to individuals who have engaged in legal sexual activity while under Washington's jurisdiction. *Manussier*, 129 Wn.2d at 672. Prior to 2010, both groups "receive[d] like treatment," *id.*, because the law required that only individuals convicted of an out-of-state offense

comparable to a Washington State sex offense needed to register. *See* RCW 9A.44.130(10)(iv) (2008) (defining a "sex offense" to include "[a]ny federal or out-of-state conviction for an offense that *under the laws of this state* would be classified as a sex offense.") (emphasis added).

However, the legislature amended the law in 2010 to eliminate the comparability requirement and require registration for "[a]ny out-of-state conviction for: [a]n offense for which the person would be required to register as a sex offender while residing in the state of conviction." Laws of 2010, ch. 267, § 1. This case presents the significant constitutional question of whether there is a "rational basis" for requiring individuals like Mr. Batson to register when similarly situated individuals escape the burden of weekly check-ins and being labeled a dangerous "sex offender" on a state-run website. *See Morris*, 118 Wn.2d at 149 ("Does some rational basis exist for reasonably distinguishing between those within the class and those outside the class?"); *Yakima Cty. Deputy Sheriff's Ass'n v. Board of Com'rs for Yakima Cty.*, 92 Wn.2d 831, 836, 601 P.2d 936 (1979) ("[D]oes the difference in treatment between those within and without the designated class serve the purposes intended by the legislation?"). Accordingly, if this Court accepts review, it should accept review of the equal protection issue because it raises a significant question of constitutional law.

E. CONCLUSION

The non-delegation issue presented by the State was decided consistent with this Court's precedent and thus does not raise a significant question of constitutional law. The non-delegation issue also does not deal with an issue of substantial public interest, as the Court of Appeals' holding is narrow and reflects the unique circumstances of this case. However, if this Court does accept review, it should grant review of the other constitutional claims raised before the Court of Appeals. In the alternative, should this Court accept review of the non-delegation issue and reverse, it should remand the remaining constitutional claims to the Court of Appeals for consideration in the first instance.

DATED this 4th day of October, 2019.

Respectfully submitted,

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