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Court of Appeals  
Division I  
State of Washington

NO. 75228-6-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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JOHN DOE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT  
STATE OF WASHINGTON**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUES.....2

A. Did Doe fail to prove that RCW 9A.44.130(3), which requires registered sex offenders to provide advance notice before traveling abroad, is unconstitutional in all instances, where he has not attempted to travel abroad nor to provide notice?.....2

B. Does RCW 9A.44.130(3) implicate the substantive due process right to travel abroad, where the statute only requires registered sex offenders to provide advance notice before traveling abroad?.....2

C. Does RCW 9A.44.130(3) facially comply with due process concerns, where the Legislature and federal government have explained that international travel notification requirements serve a compelling state interest of protecting the community? .....2

D. Did the superior court correctly conclude that RCW 9A.44.130(3) does not violate article I, section 7’s right to privacy, where registered sex offenders have a diminished privacy interest in information related to their location and where complying with the registered sex offender requirements is a condition of their release? .....2

E. Did the superior court correctly conclude that RCW 9A.44.130(3) does not violate the ex post facto prohibition, where courts have repeatedly rejected ex post facto challenges to sex offender registration laws? .....2

F. Did the superior court correctly conclude that RCW 9A.44.130(3) is not unconstitutionally vague, where it sets forth when offenders must seek 21 days’ written notice and when they must seek 24 hours’ notice in-person? .....2

III.	STATEMENT OF THE CASE .....	2
	A. Doe Pleaded Guilty to Two Counts of Communicating with a Minor for Immoral Purposes, So He Has to Register as a Sex Offender.....	2
	B. In 2015, the Legislature Amended RCW 9A.44.130 to Require Registered Sex Offenders to Notify the Sheriff Before Traveling Internationally.....	3
	C. Doe Facially Challenged RCW 9A.44.130(3) and Sought a Preliminary Injunction, but the Superior Court Rejected the Preliminary Injunction and Granted Summary Judgment to the State .....	4
IV.	STANDARD OF REVIEW.....	5
V.	ARGUMENT .....	6
	A. Doe’s Facial Challenge Fails to Prove the Statute Is Unconstitutional in All Instances.....	6
	B. If the Challenge Is as-Applied to Doe, It Is Not Ripe.....	9
	C. RCW 9A.44.130(3) Is Constitutional on Its Face.....	10
	1. RCW 9A.44.130(3) does not violate Doe’s right to travel because it does not deter travel and is rationally related to an important governmental interest .....	11
	2. Doe’s other due process challenges lack merit.....	17
	3. RCW 9A.44.130(3) does not create an unconstitutional search .....	18
	4. RCW 9A.44.130(3) does not violate ex post facto provisions because it is not punitive.....	21
	5. RCW 9A.44.130(3) is not vague .....	22

VI. CONCLUSION .....	24
----------------------	----

## TABLE OF AUTHORITIES

### Cases

<i>Aptheker v. Sec’y of State</i> , 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).....	16
<i>Boyce Motor Lines, Inc. v. United States</i> , 342 U.S. 337, 72 S. Ct. 329, 96 L. Ed. 2d 367 (1952).....	22
<i>Califano v. Aznavorian</i> , 439 U.S. 170, 99 S. Ct. 471, 58 L. Ed. 2d 435 (1978).....	13
<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	17, 22
<i>City of Houston v. Hill</i> , 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed 2d 398 (1987).....	17
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	1, 5, 7, 22
<i>Eunique v. Powell</i> , 302 F.3d 971 (9th Cir. 2002) .....	13
<i>Haig v. Agee</i> , 453 U.S. 280, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981).....	13
<i>In re Meyer</i> , 142 Wn.2d 608, 619-21, 16 P.3d 563 (2001) .....	19, 20
<i>In re Taylor</i> , 60 Cal. 4th 1019, 343 P.3d 867 (2015).....	16
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997).....	19
<i>Island Cty. v. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	6

<i>Latif v. Holder</i> , 28 F. Supp. 3d 1134 (D. Or. 2014) .....	16
<i>Lawrence v. Texas</i> , 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).....	16
<i>Lummi Indian Nation v. State</i> , 170 Wn.2d 247, 241 P.3d 1220 (2010).....	7
<i>Momah v. Bharti</i> , 144 Wn. App. 731, 182 P.3d 455 (2008).....	15
<i>Plyler v. Doe</i> , 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).....	16
<i>Rabon v. City of Seattle</i> , 135 Wn.2d 278, 957 P.2d 621 (1998).....	10
<i>Romer v. Evans</i> , 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).....	16
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).....	15, 21
<i>St. Joseph Abbey v. Castille</i> , 712 F.3d 215 (5th Cir. 2013) .....	16
<i>State v. Afana</i> , 147 Wn. App. 843, 196 P.3d 770 (2008).....	19
<i>State v. Athan</i> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	19
<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	19
<i>State v. Boyd</i> , 137 Wn. App. 910, 155 P.3d 188 (2007).....	6
<i>State v. Bradley</i> , 105 Wn.2d 898, 719 P.2d 546 (1986).....	19

<i>State v. Cates</i> , 183 Wn.2d 531, 354 P.3d 832 (2015).....	9
<i>State v. Enquist</i> , 163 Wn. App. 41, 256 P.3d 1277 (2011).....	11, 18, 21
<i>State v. Evans</i> , 177 Wn.2d 186, 298 P.3d 724 (2013).....	22, 24
<i>State v. Glas</i> , 147 Wn.2d 410, 54 P.3d 147 (2002).....	13
<i>State v. Quick</i> , 59 Wn. App. 228, 796 P.2d 764 (1990).....	19
<i>State v. Smith</i> , 185 Wn. App. 945, 344 P.3d 1244 (2015).....	12, 13, 17
<i>State v. Stevenson</i> , 128 Wn. App. 179, 114 P.3d 699 (2005).....	6
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	9
<i>State v. Ward</i> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	passim
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	17
<i>Tunstall ex rel. Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000).....	7
<i>United States v. Windsor</i> , ___ U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).....	16
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).....	1, 7

**Statutes**

42 U.S.C. § 16914(a)(7)..... 15

Laws of 1990, ch. 3, § 116..... 19

Laws of 2015, ch. 261..... 3

RCW 9A.44 ..... 18

RCW 9A.44.130..... passim

RCW 9A.44.130(3)..... passim

**Rules**

CR 56(c)..... 6

**Other Authorities**

*Hearing on S.B. 5154 Before the Senate Law and Justice Comm.,*  
64th Leg., Reg. Sess. (Jan. 22, 2015)..... 14

*Hearing on S.S.B. 5154 Before the House Public Safety Comm.,*  
64th Leg., Reg. Sess. (Mar. 3, 2015) ..... 14

SB 5154..... 3

The National Guidelines for Sex Offender Registration and  
Notification,  
73 Fed. Reg. 38030-01, 2008 WL 2594934 (Dep't of Justice, July  
2, 2008) ..... 14

## I. INTRODUCTION

John Doe has not attempted to travel abroad. But he asks this Court to take the extraordinary step of facially invalidating RCW 9A.44.130(3), which requires registered sex offenders to provide advance notice before leaving the country, because he might be impacted by the law by traveling in the future. Both the Washington and United States Supreme Court hold that laws should not be struck down based on imagined scenarios. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). A statute is facially invalid only if the plaintiff proves that the law is unconstitutional in all of its applications—a burden that Doe makes no attempt to meet.

To the extent he makes an as-applied challenge, his arguments are not ripe and equally lack merit. RCW 9A.44.130(3) does not implicate his right to travel because it does not prevent Doe from traveling abroad. Even if it did, the statute is rationally related to the government's interest in public safety. RCW 9A.44.130(3) does not create an unconstitutional search, as Doe has a diminished expectation of privacy as a sex offender. Nor does the statute violate the ex post facto prohibition, as it is a regulatory law not a punitive one. The statute clearly sets for the requirements for compliance, so it is not vague. This Court should affirm.

## II. ISSUES

- A. Did Doe fail to prove that RCW 9A.44.130(3), which requires registered sex offenders to provide advance notice before traveling abroad, is unconstitutional in all instances, where he has not attempted to travel abroad nor to provide notice?
- B. Does RCW 9A.44.130(3) implicate the substantive due process right to travel abroad, where the statute only requires registered sex offenders to provide advance notice before traveling abroad?
- C. Does RCW 9A.44.130(3) facially comply with due process concerns, where the Legislature and federal government have explained that international travel notification requirements serve a compelling state interest of protecting the community?
- D. Did the superior court correctly conclude that RCW 9A.44.130(3) does not violate article I, section 7's right to privacy, where registered sex offenders have a diminished privacy interest in information related to their location and where complying with the registered sex offender requirements is a condition of their release?
- E. Did the superior court correctly conclude that RCW 9A.44.130(3) does not violate the ex post facto prohibition, where courts have repeatedly rejected ex post facto challenges to sex offender registration laws?
- F. Did the superior court correctly conclude that RCW 9A.44.130(3) is not unconstitutionally vague, where it sets forth when offenders must seek 21 days' written notice and when they must seek 24 hours' notice in-person?

## III. STATEMENT OF THE CASE

- A. **Doe Pleaded Guilty to Two Counts of Communicating with a Minor for Immoral Purposes, So He Has to Register as a Sex Offender**

In June 2011, Doe pleaded guilty to two counts of communication with a minor for immoral purposes for his actions with a 12 year-old

victim. CP 282-83.<sup>1</sup> As a result of his convictions, Doe had to register as a sex offender, and he will remain on that registry until 2021. CP 287.

Having completed his prison term, Doe lives in King County and works as a licensed engineer in Washington, Alaska, British Columbia, and other states. CP 277. While Doe claimed that his work might take him out of the country, he has not traveled outside the country since his 2011 conviction or completion of his sentence in 2013. CP 288-89. He has no materialized travel plans out of the country, and Canada rejected his early 2015 request for a temporary residence permit. CP 289-91.

**B. In 2015, the Legislature Amended RCW 9A.44.130 to Require Registered Sex Offenders to Notify the Sheriff Before Traveling Internationally**

In May 2015, the Governor signed SB 5154, which amended and added requirements for registered sex offenders, including RCW 9A.44.130, taking effect July 24, 2015. Laws of 2015, ch. 261. In particular, the new RCW 9A.44.130(3)<sup>2</sup> requires sex offenders to notify

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<sup>1</sup>The superior court ordered that the true name and previous cause number for the criminal case be sealed or redacted in these proceedings. CP 131-32. Consistent with that order, the State will not disclose the name or previous cause number in this brief. Also consistent with that order, along with its motion for summary judgment, the State filed a declaration under seal that included exhibits containing identifying information. Because the declaration is under seal, the superior court will not provide the State with a copy of the declaration and exhibits containing the clerk's paper numbering. Using the index to clerk's papers, this brief identifies the clerk's papers page numbers based on the State's own copy of the declaration it filed, but the State cannot independently verify that clerk's papers page numbers match.

<sup>2</sup>RCW 9A.44.130(3) provides:

the county sheriff in writing at least 21 days before leaving the country.

Offenders must provide their name, passport number and issuing country, destination, itinerary details, and the departure and return dates. *Id.*

Offenders may provide 24 hours in-person notice if they have “unexpected travel due to family or work emergencies, or for offenders who travel routinely across international borders for work-related purposes.” *Id.* The offender must explain what made written notice impractical. *Id.* The sheriff then forwards this information to the U.S. Marshal. *Id.*

**C. Doe Facially Challenged RCW 9A.44.130(3) and Sought a Preliminary Injunction, but the Superior Court Rejected the Preliminary Injunction and Granted Summary Judgment to the State**

Before the statute took effect, Doe sued the State, alleging that RCW 9A.44.130(3) is unconstitutional and seeking a preliminary

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Any person required to register under this section who intends to travel outside the United States must provide, by certified mail, with return receipt requested, or in person, signed written notice of the plan to travel outside the country to the county sheriff of the county with whom the person is registered at least twenty-one days prior to travel. The notice shall include the following information: (a) Name; (b) passport number and country; (c) destination; (d) itinerary details including departure and return dates; (e) means of travel; and (f) purpose of travel. If the offender subsequently cancels or postpones travel outside the United States, the offender must notify the county sheriff not later than three days after cancellation or postponement of the intended travel outside the United States or on the departure date provided in the notification, whichever is earlier. The county sheriff shall notify the United States marshals service as soon as practicable after receipt of the notification. In cases of unexpected travel due to family or work emergencies, or for offenders who travel routinely across international borders for work-related purposes, the notice must be submitted in person at least twenty-four hours prior to travel to the sheriff of the county where such offenders are registered with a written explanation of the circumstances that make compliance with this subsection (3) impracticable.

injunction. CP 1-14. The superior court denied the request for a preliminary injunction. CP 129. This Court's commissioner denied his request, and this Court denied the motion to modify. CP 299-306.

Doe sought discretionary review from the supreme court. CP 309. The commissioner denied review, holding that Doe could not establish that he has a clear right to travel and that he failed to show the statute is excessive in relation to its nonpunitive purposes of tracking the whereabouts of sex offenders. CP 311-14. The supreme court denied the motion to modify. CP 135, 316.

At superior court, the State moved for summary judgment. CP 142-51. After allowing Doe multiple opportunities to make his record, the superior court granted the State's motion, ruling that RCW 9A.44.130(3) is constitutional.<sup>3</sup> CP 158-91, 205, 211-59. The court dismissed the case. CP 259. Doe appeals. CP 260.

#### IV. STANDARD OF REVIEW

This Court reviews summary judgment decisions involving constitutional challenges de novo. *Moore*, 151 Wn.2d at 668. Summary judgment is proper if the pleadings, depositions, interrogatory answers,

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<sup>3</sup>While Doe posits that he had no opportunity to put forth his case, the superior court gave him multiple opportunities to present any evidence supporting his case. CP 158-91, 205, 211-59.

affidavits, and admissions on file show no dispute of material fact and the party is entitled to judgment as a matter of law. CR 56(c).

For constitutional challenges, statutes are presumed to be constitutional. *Island Cty. v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Public safety statutes benefit from the presumption in favor of their constitutionality in every possible instance, provided a reasonable and substantial relationship exists between the statute and the public safety purpose. *State v. Boyd*, 137 Wn. App. 910, 916, 155 P.3d 188 (2007). This presumption is overcome in exceptional circumstances only. *State v. Stevenson*, 128 Wn. App. 179, 188, 114 P.3d 699 (2005).

## V. ARGUMENT

Doe cannot prove that RCW 9A.44.130(3) is facially unconstitutional in all instances, so his argument must fail. To the extent he makes an as-applied challenge, the issue is not ripe because he has not attempted to provide notice nor travel abroad. The superior court correctly held that RCW 9A.44.130(3) does not violate due process requirements, does not violate Doe's right to privacy, and does not violate the ex post facto prohibition. This Court should affirm.

### A. **Doe's Facial Challenge Fails to Prove the Statute Is Unconstitutional in All Instances**

Doe challenges RCW 9A.44.130(3) on its face, but fails to overcome the presumption in favor of constitutionality. Doe does not

contest the statute's application to his specific circumstances, but he seeks to invalidate it completely. CP 158-76. As he can succeed only if he shows that the statute can never be applied in a constitutional manner—but fails to do so—his challenge fails.

A facial challenge occurs when a party seeks to invalidate an entire statute, as opposed to preventing specific manners of its application.

*Moore*, 151 Wn.2d at 668-69. A facial challenge to a statute's constitutionality must be rejected unless there is no set of circumstances under which application of the statute would be valid. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 1220 (2010). This means that “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *Moore*, 151 Wn.2d at 669 (emphasis added); *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). Doe has not attempted to meet this burden.

Holding a statute facially unconstitutional has an extreme remedy—it renders the statute totally inoperative. *Moore*, 151 Wn.2d at 668-69. Facial challenges “run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to

which it is to be applied.” *Wash. State Grange*, 552 U.S. at 450 (internal quotations and quotation marks omitted).

Despite this, Doe asks this Court to strike down RCW 9A.44.130(3) without any opportunity to apply the law to the facts of a present conflict. Doe has not traveled internationally since 2011 and has not expressed any desire to do so. As the United States Supreme Court has cautioned, courts “must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Id.* at 449-50. Doe seeks this: a decision based on the hypothetical potential that one day Doe will wish to travel, and the notice provisions will inconvenience him. This conjecture is an insufficient basis for a facial attack on the statute.

While there are likely many possible constitutional applications of this statute, there is at least one possible application of the statute that would be constitutional, which is enough to overcome the high bar. For instance, a registered sex offender could plan a vacation abroad several months out. The offender could send the required information to the sheriff at least 21 days before the trip. The offender could then go on the trip and return home, all as planned. The offender would travel as he or she desired, and the sheriff would have the information needed to inform

the authorities. There is no inconvenience and would be no constitutional problem.

Doe's facial challenge must fail, where he cannot show that the statute is unconstitutional in every instance. He offers, at most, imagined future inconvenience, which is not enough to jump over the high fence for a successful facial challenge. The Court should affirm.

**B. If the Challenge Is as-Applied to Doe, It Is Not Ripe**

If Doe's challenge is construed to be as-applied, it is not ripe because he has not yet attempted to travel internationally. A pre-enforcement challenge to a release condition is ripe only when the issues raised are primarily legal, they do not require further factual development, and the challenged action is final. *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (challenge to community custody condition that an officer could search defendant's home for a computer not ripe where officers had yet to search his home). Courts also consider the hardship to the petitioner by refusing to review the challenge on direct appeal. *Id.* If the constitutional violation depends on the particular circumstances, further factual development needs to occur. *Id.* at 535 (citing *State v. Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010)).

Here, to the extent Doe raises an as-applied challenge, it requires further factual development and there has been no final action to

challenge. Further factual development is needed because Doe has not attempted to travel abroad nor to provide notice to the sheriff under RCW 9A.44.130(3). If he did, there would be a factual record to understand whether a constitutional right was violated. And as the sheriff has never dealt with Doe providing notice, there has been no final action to challenge. To the extent Doe makes an as-applied challenge, it is not ripe.

**C. RCW 9A.44.130(3) Is Constitutional on Its Face**

The Court should reject Doe's constitutional challenges because they lack merit. Doe now argues that RCW 9A.44.130(3) violates (1) his substantive due process right to travel; (2) his article I, section 7 right against warrantless searches; (3) the due process requirement that criminal statutes not be vague; and (4) the ex post facto clauses of the Washington and federal constitutions. Doe failed to show that he is entitled to an injunction or declaratory relief, so the superior court correctly granted summary judgment to the State. This Court should affirm.<sup>4</sup>

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<sup>4</sup>Doe raised the same arguments in his request for preliminary injunction and the subsequent requests for discretionary review as what he now raises on appeal. CP 35-55, 129, 299-306, 309-14. In deciding preliminary injunction requests, courts "must reach the merits of purely legal issues." *Rabon v. City of Seattle*, 135 Wn.2d 278, 286, 957 P.2d 621 (1998). The courts all rejected these legal arguments in concluding that Doe could not demonstrate that he had a clear legal right warranting a preliminary injunction.

**1. RCW 9A.44.130(3) does not violate Doe's right to travel because it does not deter travel and is rationally related to an important governmental interest**

Doe's substantive due process arguments fail, where RCW 9A.44.130(3) does not deter travel, but enacts an important governmental interest in protecting the safety of the community.<sup>5</sup> While RCW 9A.44.130(3) may cause an annoyance to Doe, it does not deter his ability to travel. It only requires notice.

Our supreme court upheld the Legislature's placing registration requirements on sex offenders. *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994). The court rejected a challenge to a statute requiring sex offenders provide information to the sheriff. *Id.* In explaining that the statutes do not violate ex post facto prohibition or the right to privacy, the court explained that the statutes rationally related to the goals of public safety and effective operation of government. *Id.* at 503-04.

This Court has rejected an argument nearly identical (if not worse) than Doe's. *See State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011). There, a transient registered offender argued that another section in RCW 9A.44.130 requiring offenders to register within certain time frames when they moved to different counties violated the right to travel. *Id.* at 49-53.

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<sup>5</sup>Doe appears to raise his due process challenge under both the state and federal constitutions. As the statute is constitutional under either clause for the same reasons, the State will not repeat its analysis.

This Court held that the statute's purpose was not to deter travel (and it did not deter travel), so there was no constitutional violation. *Id.* at 51. The Court added that since the defendant had yet to try to leave the state, he could not yet argue that his right to travel was implicated. *Id.*

This Court echoed that reasoning in *State v. Smith*, 185 Wn. App. 945, 954-55, 344 P.3d 1244 (2015). An offender facially challenged a former version of RCW 9A.44.130, arguing that it violated his right to travel by requiring him to provide notice of when he travels. *Id.* at 953-54. The Court disagreed, holding that nothing in the statute prevented the offender from traveling within or outside the state. *Id.*

Here, RCW 9A.44.130(3) does not deter Doe's ability to travel. He can still travel internationally, and nothing in the statute precludes him from doing so. He only needs to provide notice to the sheriff of his travel, either 21 days in advance or 24 hours in person, if the travel is an emergency or routine business. Because this statute does not deter travel (and because he has not attempted to travel internationally), Doe's right to travel is not implicated.

Even if the statute implicated a right to travel, the statute is rationally related to an important, if not compelling, governmental interest in the safety of the community. At the outset, under federal constitutional law, the freedom to travel outside the United States must be distinguished

from the right to travel within the United States, and the former enjoys lesser protection. *See Haig v. Agee*, 453 U.S. 280, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981); *Califano v. Aznavorian*, 439 U.S. 170, 176, 99 S. Ct. 471, 58 L. Ed. 2d 435 (1978). Even if advance notification requirements implicate the right to travel, the State likely will need to advance only a rational or important governmental reason for the requirements rather than a compelling state interest. *See Eunique v. Powell*, 302 F.3d 971 (9th Cir. 2002) (lead opinion applying rational basis, concurrence applying intermediate scrutiny).

The State has a compelling interest in protecting the health, safety, and welfare of its residents by enabling law enforcement to know when sex offenders are in the community. *Smith*, 185 Wn. App. at 954-55; *see State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002) (where statute's purpose is to promote safety and welfare, the statute is presumed constitutional if it bears a reasonable and substantial relationship to that purpose). The federal Department of Justice explained that there are safety interests unique to international notification statutes like the one presented here: that the presence of sex offenders implicates the same public safety concerns in communities abroad for which the United States has responsibility; that it is important to identify sex offenders, whether convicted in this country or another country, when they enter or reenter

the United States; and that such identifications of sex offenders requires cooperative efforts between the United States and foreign countries. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-01, 2008 WL 2594934 (Dep't of Justice, July 2, 2008). Cooperation with other countries about knowing when sex offenders leave and enter the United States requires that federal authorities will need information from local jurisdictions, like county sheriffs. 73 Fed. Reg. at 38066.

Recognizing these interests, both law enforcement and the criminal defense bar provided testimony to the Legislature supporting enactment of the statute.<sup>6</sup> Law enforcement pointed out that the law would protect the State's eligibility for federal grants and promote safety to the community. *Hearing on S.S.B. 5154 Before the House Public Safety Comm.*, 64th Leg., Reg. Sess. (Mar. 3, 2015), available at <http://www.tvw.org/watch/?eventID=2015031068> (testimony of James McMahan, Policy Director of the Washington Association of Sheriffs and Police Chiefs, explaining financial consequences, beginning at 1:20:08).

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<sup>6</sup> Groups testifying in favor of the bill included the Washington Association of Sheriffs and Police Chiefs, Pierce County Sheriff's Office, and the Washington Association of Criminal Defense Lawyers. The American Civil Liberties Union of Washington State signed-in as supporting the bill on two occasions, but did not testify. *Hearing on S.B. 5154 Before the Senate Law and Justice Comm.*, 64th Leg., Reg. Sess. (Jan. 22, 2015), available at <http://www.tvw.org/watch/?eventID=2015011201>; *Hearing on S.S.B. 5154 Before the House Public Safety Comm.*, 64th Leg., Reg. Sess. (Mar. 3, 2015), available at <http://www.tvw.org/watch/?eventID=2015031068>.

The criminal defense bar pointed out that the statute would even benefit registered offenders by eliminating confusion by mirroring federal regulations in state law. *Id.* (testimony of Paul Strophy, Washington Association of Criminal Defense Lawyers, beginning at 1:14:20).<sup>7</sup>

RCW 9A.44.130(3) is rationally related to the State's recognized interests in assisting law enforcement agencies to protect communities by regulating sex offenders by requiring notice of specific information and sharing that information with the appropriate federal authorities.<sup>8</sup> The statute does this, while also making Washington law consistent with the approaches taken by other states. The statute facially satisfies the state and federal due process requirements.

As this Court lacks jurisdiction to overturn state or federal supreme court case law, this Court should reject out of hand Doe's request to revisit *Ward* and *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). *Momah v. Bharti*, 144 Wn. App. 731, 745, 182 P.3d 455 (2008) (court of appeals cannot overrule binding state and federal precedent); *see* Doe Br. 12-16. Both *Ward* and *Smith* remain good law, and their holdings

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<sup>7</sup> Federal statutes governing sex offender registration now require sex offenders to provide advance notice to "the appropriate official" before traveling outside the United States. 42 U.S.C. § 16914(a)(7).

<sup>8</sup> Doe is not a "vulnerable minority" entitled to heightened constitutional protection. Doe Br. 19, 21. He is a convicted sex offender, and sex offenders pose a public safety concern. CP 319.

cannot be meaningfully distinguished from this case.<sup>9</sup> While neither case dealt with a statute requiring notification of international travel, those cases analyzed statutes requiring registration, notification of change of residence, and public dissemination of information—all more burdensome on an offender than providing notice of international travel. *Contra Doe Br. 14-15.*

Doe similarly misplaces his reliance on *Aptheker v. Sec’y of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964). There, the Court struck down a statute banning communists from obtaining passports as violating the substantive due process right to travel abroad. *Id.*<sup>10</sup> Here, RCW 9A.44.130(3) does not ban travel, and it is much more connected to the purpose it serves—keeping track of the movement of sex offenders to protect the community.

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<sup>9</sup>Doe cites to foreign or irrelevant case law. *See Doe Br. 17-21* (citing, among others, *United States v. Windsor*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013); *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *In re Taylor*, 60 Cal. 4th 1019, 343 P.3d 867 (2015)). These cases have no bearing on whether RCW 9A.44.130(3) violates substantive due process requirements.

<sup>10</sup>Contrary to Doe’s assertions otherwise, requiring notification is not the same as denying an individual the right to fly by being placed on a no-fly list. *Doe Br. 20 n.20* (citing *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014)). Doe can still fly (even still as a private pilot) and travel—he just has to provide notice if the travel is international.

## 2. Doe's other due process challenges lack merit

Like a deer in the headlights, Doe's other due process arguments freeze upon examination. First, RCW 9A.44.130(3) is not overbroad. A law is overbroad if it sweeps within its prohibitions constitutionally protected activities, usually those protected by the First Amendment. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001); see *City of Houston v. Hill*, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed 2d 398 (1987). The standard is very high, and the statute at issue must "make unlawful a substantial amount of constitutionally protected conduct." *Williams*, 144 Wn.2d at 206 (quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26-27, 992 P.2d 496 (2000)) (internal citations omitted).

Aside from Doe not mentioning any First Amendment concern, he also fails to identify what constitutionally protected conduct is unlawful. To the extent he implies that the statute makes unlawful international travel, for the reasons mentioned above, that is not the case. Instead, he posits that there is no evidence that sex offenders are likely to travel abroad to commit another sex offense. Doe Br. 22-23. But courts have consistently upheld sex offender registration requirements and the Legislature and federal agencies have logically explained the nexus between international travel notification and community safety here and abroad. See e.g., *Ward*, 123 Wn.2d 488; *Smith*, 185 Wn. App. 945;

*Enquist*, 163 Wn. App. 41. And Doe’s argument that the statute does not account for the fact that once identified, registrants display a low risk of re-offending, falls flat because an integral part of registration is maintaining accurate information about the locations of registered sex offenders, including when they travel abroad.<sup>11</sup> This information helps create a lower recidivism risk.

Doe’s arguments that RCW 9A.44.130(3) disregards “adjudicated determinations of risk” and impacts a fundamental right similarly lacks merit, as the goals of the statute are served by applying it to all sex offenders. This statute helps prevent recidivism by tracking the movement of sex offenders. RCW 9A.44.130(3) applies equally to all registered sex offenders, just as do the other notification requirements in chapter 9A.44 RCW. Doe, like all other registered offenders, has to follow all notification requirements. This Court should affirm.

**3. RCW 9A.44.130(3) does not create an unconstitutional search**

RCW 9A.44.130(3) does not create an unconstitutional search under article I, section 7 of the state constitution, because it does not disturb a sex offender’s private affairs and because any intrusion would be

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<sup>11</sup>Doe’s argument that he would be treated differently in other states makes no sense, where Doe remains a resident of Washington, subject to Washington’s registration requirements. *Contra* Doe Br. 23-24. And while it may be an annoyance for Doe to provide notice of impending international travel from another state, that does not mean it is a constitutional violation. *Id.*

authorized by law.<sup>12</sup> Under article I, section 7, courts determine whether state action constitutes a disturbance of one's private affairs, and whether the intrusion is authorized by law. *State v. Athan*, 160 Wn.2d 354, 366, 158 P.3d 27 (2007).<sup>13</sup>

The Washington Supreme Court has already explained that the sex offender registry does not violate offenders' right to privacy. *In re Meyer*, 142 Wn.2d 608, 619-21, 16 P.3d 563 (2001) (rejecting sex offenders' various due process challenges to registration requirements). All citizens' movements in and out of the United States are subject to tracking by State and federal law enforcement, meaning that the expectation is minimized. *State v. Bradley*, 105 Wn.2d 898, 719 P.2d 546 (1986); *State v. Quick*, 59 Wn. App. 228, 232, 796 P.2d 764 (1990). In enacting the sex offender registry laws, the Legislature found that sex offenders have a "reduced expectation because of the public's interest in public safety and in the effective operation of government." *Ward*, 123 Wn.2d at 502 (quoting Laws of 1990, ch. 3, § 116).

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<sup>12</sup>Doe incorrectly implies that article I, section 7 affords greater protection than the Fourth Amendment in this case. The supreme court recognized that "the state constitution offers no greater protection than the federal constitution" to "the right to nondisclosure of intimate personal information, or confidentiality." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 124, 937 P.2d 154 (1997).

<sup>13</sup>Doe's discussion of *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990) and *State v. Afana*, 147 Wn. App. 843, 196 P.3d 770 (2008) is confusing. Doe Br. 29-30. Neither case provides any helpful analysis related to the private affairs of sex offenders nor their travel abroad. This case is not about police snooping into any citizen's cars or garbage; this case is about keeping the authorities abreast of sex offenders' locations.

Putting aside that no search has actually occurred, Doe, like all registered sex offenders, has a diminished expectation of privacy. *See Meyer*, 142 Wn.2d at 619-21; *Ward*, 123 Wn.2d at 502. He already has to register and to provide updates when he moves interstate and intrastate. *See generally* RCW 9A.44.130. And the information required by RCW 9A.44.130(3) (i.e., name, passport number, destination, itinerary, means of travel, and purpose of travel) is no different than information when anyone else travels outside the country. RCW 9A.44.130(3) does not impermissibly interfere with sex offenders' private affairs, so it does not violate article I, section 7.

Second, any intrusion would be authorized by law. Registered sex offenders agree as a term of their release to follow the conditions of being a registered offender. Doe made that agreement as part of his plea deal. Compliance with RCW 9A.44.130(3) is one such requirement for Doe's conditional release to the public. Although the international travel notification requirement was not in effect during his plea, it is a collateral consequence of his plea. *Ward*, 123 Wn.2d at 512-15 (sex offender registration is a collateral consequence to a plea, so no notice was required). The superior court correctly rejected Doe's argument that RCW 9A.44.130(3) violates his right to privacy.

**4. RCW 9A.44.130(3) does not violate ex post facto provisions because it is not punitive**

Courts have consistently held that the sex offender registry does not violate the ex post facto clauses of the federal and state constitutions, so there is no ex post facto problem here. In *Ward*, the supreme court held that there was no ex post facto violation when the Legislature applied the sex offender registry law to individuals already convicted and sentenced before its enactment. 123 Wn.2d at 496. In *Smith*, the U.S. Supreme Court rejected a similar ex post facto challenge. 538 U.S. 84. Similarly, in *Enquist*, the court held that the parts of RCW 9A.44.130 requiring a transient offender to register are not an ex post facto violation. 163 Wn. App. at 45-49. The court explained that while registering and providing notice might be an inconvenience, it was not punitive. *Id.* at 49. These holdings alone dispose of Doe's argument, as the international travel notice requirement is now part of the same sex offender registry scheme.<sup>14</sup>

As explained by the supreme court commissioner rejecting Doe's motion for discretionary review, he cannot meaningfully distinguish the international travel notification from those provisions identified in *Ward*, *Smith*, and *Enquist*. Just like in those cases, which all explained that sex

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<sup>14</sup>Contrary to Doe's bald assertions otherwise, the international travel notification does not suddenly make the sex offender registration scheme punitive. Doe Br. 36, 38, 41. Rather, it is consistent with *Ward* and *Enquist*'s holdings that the scheme nonpunitively regulates information relating to sex offenders.

offender registry statutes serve the nonpunitive function of tracking sex offenders' whereabouts, the same is true here. Doe's ex post facto challenge fails.<sup>15</sup>

#### **5. RCW 9A.44.130(3) is not vague**

The statute explains when and how a registered offender must provide notice that he or she is travelling internationally, so the court should reject Doe's vagueness argument. A statute is unconstitutionally vague if it (1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Lorang*, 140 Wn.2d at 30. Courts find statutes to be unconstitutionally vague for failure to provide warning only in exceptional circumstances. *State v. Evans*, 177 Wn.2d 186, 204-05, 298 P.3d 724 (2013). A statute is facially vague only if there is no manner in which the statute could be constitutional. *Moore*, 151 Wn.2d at 669. "The mere need for statutory construction does not render a statute unconstitutional." *Evans*, 177 Wn.2d at 203. As the U.S. Supreme Court explained, "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce*

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<sup>15</sup>Doe again cites foreign cases analyzing dissimilar schemes. Doe Br. 38-39. To the extent those cases may be analogous, our supreme court rejected an ex post facto argument in *Ward*, and that decision controls here.

*Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 2d 367 (1952).

RCW 9A.44.130(3) puts offenders on notice that they have to provide 21 days' written notice before traveling abroad. If there is a family or work emergency or if work requires routine international travel, and providing written notice is impractical, registered offenders can provide 24 hours' notice in person. *Id.* While there may be scenarios that call into question whether 24 hours' notice is permitted, there are scenarios, like visiting a parent abroad who suddenly became ill, where this provision could be constitutionally applied. The statute does not allow for arbitrary application because it allows the 24 hours' in-person notice when there is a family or work emergency (or routine business travel) that makes regular written notice impractical. Sheriffs and registered offenders can use that standard in evaluating whether to wait 21 days or to do 24 hours' in-person notice.

Doe's quibbling with the provision allowing offenders to provide 24 hours' in-person notice does not render the statute unconstitutional. *See* Doe Br. 43-45. Nor does the questions he raises about how sheriffs will treat notices. Doe Br. 45. At most, Doe shows that there may be instances, with actual facts and testimony, that may require statutory construction.

And statutory construction would not render RCW 9A.44.130(3) vague. *Evans*, 177 Wn.2d at 203.<sup>16</sup> This court should affirm.

## VI. CONCLUSION

Doe's facial challenge to RCW 9A.44.130(3) must fail, where he cannot show that the statute cannot be constitutionally applied in all instances. And RCW 9A.44.130(3) serves an important—if not compelling—governmental interest: it protects the community by obtaining and enabling dissemination amongst authorities about the whereabouts of sex offenders. The superior court correctly granted summary judgment to the State. This court should affirm.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of September, 2016.

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<sup>16</sup>Doe's argument that the 24 hours' notice chills his willingness to travel for legitimate purposes stops in its tracks. Doe Br. 44-45. This provision serves as less of a deterrence to travel than requiring only 21 days' written notice. Offenders can even provide 24 hours' notice instead, if they meet the criteria.

NO. 75228-6

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

JOHN DOE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF  
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the State's Brief of Respondent and this Declaration of Mailing in the below described manner.

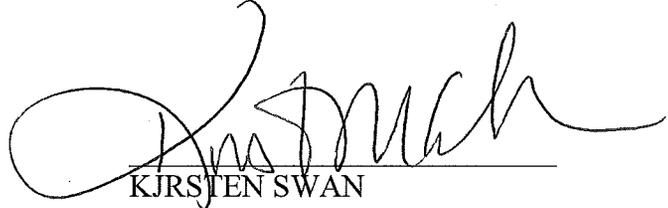
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DATED this 16<sup>th</sup> day of September, 2016, at Seattle,  
Washington.



KIRSTEN SWAN  
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