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DIVISION ONE
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No. 75228-6

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION ONE

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JOHN DOE,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

John Doe,
Appellant, pro se,
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A. SUMMARY OF ARGUMENT

For the first time in state history, with passage of Senate Bill 5154-2015 (SB5154) amending RCW 9A.44.130(3), the State of Washington will further restrict the rights of a disfavored minority group by restricting travel outside the United States of all registered sexual offenders (hereto referred to as Registrants). The new law requires all Registrants to provide advance notification, including personal travel information, and mandates a three-week waiting period prior to allowing a Registrant to leave the country. This legislation applies in a blanket fashion to all Washington Registrants, without regard to the circumstances of their conviction, designated risk level, or whether the Registrant poses a current risk to public safety. The requirement also applies in a blanked fashion to all persons convicted of either a felony or misdemeanor sexual offense, and includes juveniles, is irrespective of the type offense committed, and is irrespective of when the offense occurred (after 1990). Even though Washington evaluates a Registrant's risk to reoffend[1], this information is not considered by the statute.

The international travel notification and waiting period (INWP) imposed by RCW 9A.44.130(3) greatly exceeds the registration requirements reviewed by the Washington State Supreme Court in *Ward*[2] and the U.S. Supreme Court in *Smith*[3], where the courts ruled that the simple act of registration and public

[1] See RCW 4.24.550.

[2] Washington v. Ward, 123 Wash. 2d 488, 869 P.2d 1062 (WA. 03/17/1994).

[3] Smith v. Doe I, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (U.S. 03/05/2003)

notification was not punitive. Doe here argues that the imposition of this new retroactive affirmative restriction, when considered in its totality, makes the sex offender registration scheme in this state punitive. The new restriction also, when retroactively imposed on a free citizen, violates due process protected by both the State and U.S. Constitutions, for the restriction is not rationally related to the stated purpose, is overly broad, and restricts too much freedom.

Doe seeks review and relief from summary judgment by the Superior Court ruling that RCW 9A.44.130(3) is constitutional and dismissing Doe's complaint prior to trial.[4] [CP @ 261,262].[5] Given the Superior Court did not issue a written opinion, and stated in its written order that RCW 9A.44.130(3) was constitutional, it is not clear what analysis was performed by the Court when addressing each of the arguments presented by Doe.

B. ASSIGNMENT OF ERROR

1. The superior court erred in dismissing Mr. Doe's complaint prior to trial, preventing Doe from presenting evidence that the new statute provisions in question are punitive in effect, irrational, and overly broad as applied to him and similarly situated citizens.

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[4] Order of Summary Judgment included in Clerk's Papers, PDF pages 261 & 262.

[5] Clerks Papers designation [CP@X] where X is PDF page number of reference.

2. The superior court erred in granting summary judgment, when assuming the facts most favorably toward Doe,[6] and ruling the statute provisions in question was constitutional.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The INWP provision violates the Fifth Amendment of the U.S. Constitution, for it restricts the right to foreign travel and free association by Doe without due process, is overly broad in its application, and is without a rational basis.
2. The travel notification and waiting requirement violates the Fourth Amendment of the U.S. Constitution, and Article 1, Section 3 and 7 of the State Constitution, for it is unwarranted search and disturbs his personal affairs without authority of law.
3. The provision is not narrowly tailored to meet the goals of the State's prescribe protections, as applied to Doe and similarly situated free citizens, and therefore restricts more personal freedom than is necessary.
4. The INWP requirement is a prohibited retroactive restriction of Doe's right to travel for a past conviction even though Doe has completed his sentence and is no longer on probation.
5. The INWP provision is void for vagueness, for it provides insufficient notice to Doe of what is considered routine work travel or travel for family emergency situations, and does not clearly limit the authority of

[6] *Kofmehl*, 177 Wn.2d at 594; CR 56(c)

the county sheriff when reviewing and accepting Doe's written in-person explanation for short term notification.

D. STATEMENT OF CASE

I. SENATE BILL 5154-2015

The Washington State legislature passed Senate Bill 5154 during the 2015 regular legislative session (hereto referred to as SB5154). SB5154 was signed by the Governor and become law on or about July 24, 2015. SB5154 is a comprehensive revision of the sex offender registration and notification requirements, affecting all registered sexual offenders in the State of Washington.

SB5154 inserted a new section (3) into RCW 9A.44.130 which reads as follows:

> "(3) 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."

SB5154 added a new section to chapter 9A.44 RCW which reads in part: "(1) RCW 9A.44.128 through 9A.44.145 apply to offenders who committed their crimes and were adjudicated within the following time frames: (a) Sex offenders convicted of a sex offense on or after July 28, 1991, for a sex offense committed on or after February 28, 1990", making retroactive all amendments to these referenced RCW sections upon SB5154 becoming law.

RCW 9A.44.13 (3) will require a person who is a registered offender (a Registrant) under this chapter to provide law enforcement twenty-one days' notice prior to leaving the country, or under specific emergency situations, allows for an in-person 24-hour advance written notification to the County Sheriff where the person is registered. The new foreign travel and reporting requirements applies retroactively to all registered offenders within the State of Washington. To use the 24-hour advance written notification, a Registrant must travel to the country sheriff's office that performs registration functions, which are only open weekdays during business hours.

The new travel provisions require the county sheriff receiving notice to notify the United States Marshals office of the registrant's intended travel,

presumably providing all travel and personal information provided by the Registrant.[7]

II. DOE'S FILES COMPLAINT

Soon after Senate Bill 5154-2015 was signed into law, and prior to taking effect, Doe file a complaint in Superior Court seeking a ruling that the INPW provision was unconstitutional and injunctive relief preventing implementation of the new restrictions[8]. Doe motioned for and was granted by the Court the right to remain anonymous and proceed as a pro se John Doe litigant. [CP @ 131-132].

Doe also sought a preliminary injunction preventing the State from enforcing the new travel restriction while litigation proceeded.[9] Upon denial of his motion for preliminary injunction, Doe filed a motion for discretionary review with this Court, and then with the State Supreme Court.[10] The Division One Court's Commissioner denied review and issued a written ruling. The State Supreme Court Commissioner upon motion for discretionary review also denied review issuing a written ruling.

III. DOE IS A REGISTRANT

Doe pled guilty and was convicted in King County Superior Court in June 2011 of two counts in violation of RCW 9.68A.090-*Communication with a*

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[7] "The county sheriff shall notify the United States marshals service as soon as practicable after receipt of the notification", RCW 9A.44.130(3) as amended by Senate Bill 5154-2015.

[8] See Amended Complaint. [CP @ 158-176].

[9] See motion for Preliminary Injunction [CP @ 35-55].

Minor for an Immoral Purpose, a gross misdemeanor. Doe was sentenced, fined, and spent four months in the county jail and two years on probation. Upon Doe completing all court order requirements, including probation and paying all assessed court costs, the court terminated his probation in August 2013. Doe has not been convicted of any other offense, either prior to or after the referenced conviction for the gross misdemeanor. Doe is a free citizen who can travel and move freely as his wishes, however as a collateral consequence of his conviction is required to register as sexual offender for 10 years' post-conviction in the State of Washington.[11]

Doe travels for work and therefore researches the registration requirements of all jurisdictions he travels to, so that he does not run afoul of any criminal statutes, [CP@214 & 249]. Each state has their own rules and regulations regarding registration, making compliance with all the complex set of regulations a difficult task for any Registrant who travels.

IV. FACTS ALLEGED BY DOE IN SUPERIOR COURT

Doe by reference included the alleged facts as outline in his amended complaint, [CP@158-176]. Doe also included by reference an accompanying declaration [CP@246] to his supplemental memorandum in opposition to the State's motion for summary judgment [CP@212], which are part of the record on appeal.

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[10] See Appellate Case NO. 92253-5
[11] See RCW 9A.44.140.

Doe travels a fair amount as a requirement by his employer, therefore he must keep abreast of the various registration laws for those states and jurisdictions he must travels to. He spends considerable amount of time researching these state registration laws. In his research, Doe has learned he was not required to register in all states he travels to.[12] He learned that that he was not required to register in the states of Alaska[13] or Texas.[14] Doe learned by case law that he was also not required to register in some other states he travels to.

Doe claimed he has traveled to Canada for work and with his family in the past and wishes to do so in the future. Doe was also actively preparing application to the Canada Border Service Agency in Ottawa for a temporary resident permit, which would allow him to travel to Canada freely for work purposes.

Doe has in the past traveled to Mexico with his family, both as impromptu and advanced scheduled visits, and wishes to travel to Mexico with his family in the future. Doe, in a January 2016 trip to Arizona where he visited family, wanted to drive to Nogales Mexico to shop, however he was out-of-state and unable to make the required notification to the King County

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[12] See Doe's accompanying declaration.

[13] Doe has an order issued by the Anchorage Superior Court ruling his Washington offense is not a registrable offense in Alaska.

[14] In Texas,Crabtree, Mark Alan Crabtree, Appellant v. the State of Texas, No. PD-0645-11 (Tex.Crim.App. 10/31/2012), the Attorney General is required to list all out-of-state offenses requiring registration in Texas. Doe requested and received a copy of the list for Washington State offenses from the Texas Attorney General and his offense is not listed. [CP@249].

Sheriff. Doe was unable to cross the border to shop in Mexico because he is a Washington Registrant and bound by RCW 9A.44.130(3). Had Doe been a registrant of Arizona, and not registered in Washington, he would not be required to provide advance notice and could have traveled over the border, for there is no Arizona state law which requires such notification.

Doe is a private pilot with an instrument rating, which means he is able to fly in low visibility weather conditions. Doe has flown internationally to Canada in the past and would like to do so in the future. Doe is also a part owner of a single engine aircraft, tail number N5232F. When flying, either domestically or internationally, as a private pilot, Doe must obtain a weather and flight briefing from the FAA flight service, and must arrange his flight accordingly. It is not possible with assurance to provide 21 days' advance notice of international flight plans when flying in a small aircraft. RCW 9A.44.130(3) effectively prevents Doe from flying internationally, for he is unable to provide three weeks' notice of detail travel plans when he flies outside the country.

Doe and his husband have a desire and future plans to take their children to Europe, for as teenagers, their children are old enough to appreciate foreign travel. Doe and his husband have traveled to Canada with their children in the past, taking an impromptu road trip up through British Columbia and Alberta. Now due to RCW 9A.44.130(2), any such travel must be planned at minimum three weeks in advance, which prevents Doe from using short term travel deals offered by Expedia and other online travel agencies.

Doe is a registered professional engineer in the province of British Columbia, Canada. Doe is presently working on a design project on Vancouver Island, in British Columbia, and had hoped to travel to the project site for commissioning this late summer through early fall. Such work activity does not allow for three-weeks' notice due to the nature of work, therefore Doe would be prevented from work travel to the project site due to being a Registrant in Washington State. This past January Doe, by way of email, was notified by his employer of a planned client meeting on Vancouver Island at a project site. The trip itinerary was finalized less than a week before the day of travel. This is typical of how Doe is expected to respond to work travel requirements. However, in this instance due to the INWP requirements, Doe made an excuse to his employer and did not travel outside the country.

Doe has applied for and has been issue a Concealed pistol permit[15] by the King County Sheriff, for he is legally allowed to carry a weapon while traveling within the State of Washington, as well as other states which have reciprocity and recognize Washington permits issued by law enforcement.

During one year of supervision probation by the Washington State Department of Corrections, Doe was restricted by his Community Corrections Officer (CCO) from leaving King County. Doe was unable to pick-up or drop-off his children at school because the school was two to three blocks over the county line. Doe's CCO would not allow him to leave the county to drop-off

[15] The Superior Court was briefed at the time that Doe filed for his permit, which was issued after ruled on the motion for summary judgment.

or pick-up his children. Had Doe's children gone to a closer school, Doe would have been able to drive his children to the school property. Doe's CCO would also not allow him to leave the county for work purposes, and is why he petitioned the trial court to modify his probation authorizing intrastate travel for work purposes. The trial court in December 2011 did issue an order allowing Doe to travel within the State of Washington for work purposes. [CP@248]

Doe had intended to have a professional colleague (who was also a former employer) and Doe's husband testify how the INWP requirements adversely affects his ability to travel for work and for personal reasons. Doe also intended to introduce evidence at trial that low level Registrants, such as himself, as well as the Registrant population as a whole, have a low rate to reoffend, and as such he believes the INWP requirement is irrational and without basis. [CP@217]

V. SUPERIOR COURT SUMMARY JUDGMENT

The State of Washington filed a motion for Summary Judgment and dismissal of John Doe's complaint. Doe filed a Memorandum in Opposition to State's Motion for Summary Judgment and was looking to proceed to trial. The trial court held a hearing on April 29, 2016 to address the State's Motion for Summary Judgment. The Court delayed a final decision regarding the State's motion to provide Doe additional time to respond and supplement the Court with information Doe felt appropriate. The next hearing on the State's Motion was held on May 16, 2016 at 11:00AM. [CP@213]

At the April 29th hearing, the Court addressed several motions, including the Motion to Strike Plaintiff's Amended Complaint. The Court denied the motion by the State and allowed Plaintiff to file his amended complaint, ruling that the amendment was more of a "clarification" than making new claims.

At the hearing the Court made clear it was looking to "resolve" this issue and made comment that State Counsel was probably not be "happy" with the Court in delaying the decision regarding motion for summary judgment. The Court instructed Mr. Doe to file any additional information that Doe wished the court to consider at the next hearing, requesting that Doe "not repeat" the information already in the record. Doe filed a supplemental Memorandum [CP @213] to his original Memorandum in Opposition to State's Motion for Summary Judgment.

The trial court held its final hearing on the State's motion for Summary Judgment on Mary 16, 2016. At that hearing, the court issued its oral ruling that RCW 9A.44.130(3) was constitutional and dismissed Does' complaint. During the hearing, the court signed the final order, [CP@258)].

In pronouncing its final ruling regarding summary judgment, the Superior Court did not issue a written opinion, but stated it its written order that RCW 9A.44.130(3) was constitutional.

E. ARGUMENT

I. Revisit *Doe* and *Ward*

The Court's review should begin by with two land mark cases which affect the constitutionality of the registration scheme in Washington State. The

first case is the 1994 State Supreme Court ruling in *State v. Ward*.[16] This was the first time the high Court reviewed the sex offender registration requirements in Washington State. The Court held that the sex offender registration statute at that time, codified in RCW 9A.44.130-.140, which required sex offenders to register with the local county sheriff, "*did not violate ex post facto, equal protection, or due process provisions under the United States and Washington Constitutions.*" The Court found that the physical act of registration created no affirmative disability or restraint. Collecting information about sex offenders in order to aid community law enforcement "*does not restrain sex offenders in any way.*" The Court summed up the registration scheme that existed at the time of the *Ward* as follows:

> "Any person required to register under the statute who changes residence must either send written notice of the change of address to the county sheriff, if the person relocates within the same county, or reregister with the county sheriff in the new county, within 10 days of establishing the new residence. RCW 9A.44.130(4). The county sheriff must also obtain a photograph of the individual and a copy of the individual's fingerprints." [123 Wash2d Page 493]
>
> "The statute requires an offender to provide the local sheriff with eight pieces of information: name, address, date and place of birth, place of employment, crime for which convicted, date and place of conviction, aliases used, and Social Security number. In addition, the local sheriff must obtain two items: the offender's photograph and fingerprints. We note that at least one criminal justice agency routinely has all of this information on file at the time of an offender's conviction and sentencing. See RCW 10.97.030(1), (3). Thus, only if

[16] Washington v. Ward, 123 Wash. 2d 488, 869 P.2d 1062 (Wa. 03/17/1994)

> this information has changed since sentencing could registration require an offender to divulge information which is not already in the hands of the authorities." [123 Wash2d Page 500]

When *Ward* was issued, there was no international travel notification and waiting period included in the registration scheme. There was also no affirmative restraint on a Registrant for any activity.

The U.S. Supreme Court ruled on a similar statute from the State of Alaska, where another sex offender claimed ex post facto violations. The Court there stated:

> "Second, the Act does not subject respondents to an affirmative disability or restraint. It imposes no physical restraint, and so does not resemble imprisonment, the paradigmatic affirmative disability or restraint."[17]

A careful review of the *Ward* and *Smith* opinions will show the sex offender registration statute in both states at the time only required simple registration, and did not impose any kind of travel restriction or waiting period prior to any movement. In fact the Courts made clear in the rulings that registration allowed free movement and imposed no travel or affirmative restraint.

It is interesting to note that even though the U.S. Supreme Court ruled the Alaska registration scheme constitutional, follow-on rulings by the Alaska

[17] Smith v. Doe, Id

State Supreme Court declared that registration was punitive and could not be applied retroactively.[18]

It is also interesting to note that in *Smith*, Justice Souter's issued a separate concurring opinion where he stated:

> We have said that "only the clearest proof" that a law is punitive based on substantial factors will be able to overcome the legislative categorization. Ward, supra, at 249 (quoting Flemming v. Nestor, 363 U. S. 603, 617 (1960)). I continue to think, however, that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction. See Hudson v. United States, 522 U. S. 93, 113-114 (1997) (Souter, J., concurring in judgment). This means that for me this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way. (Smith v. Doe, Justice Souter, concurring in the judgment)

At the time of the *Smith* ruling, Justice Souter stated it was a "*close case*" for him, which was a case where the statute was less onerous than exists today in either Alaska or Washington. It begs the question that with the incremental burdens imposed over the years on all Washington State Registrants, what Justice Souter, or for that matter, what the entire Supreme Court, would say today. The same can be said about the *Ward* ruling, where the Washington State Supreme Court considered a less onerous registration scheme than exists today, and has not reviewed the punitive nature of sex offender registration since the 1994 *Ward* decision.

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[18] See Doe v. State, 189 P.3d 999 (Alaska 07/25/2008) and State v. John Doe A and John Doe B, # S-14486 – 2013, Alaska

Prior to Senate Bill 5154-2016, registration in this state did not impose any prior restraint to any activity. If a Registrant moved, he was required after the fact to make notification. There was no requirement for a Registrant to provide advance notice of any kind for any activity, especially to provide local law enforcement with contemporary private and personal information, including purpose and means of travel, prior to traveling. At the time of *Ward*, the information required by a Registrant consisted of eight pieces of information, with only his address and place of employment subject to periodic change.

II. RCW 9A.44.130(3)'s International Notification and Waiting Period Provision Violates Substantive Due Process and the Right to Travel

The International Notification and Waiting Period (INWP) provision of RCW 9A.44.130(3) fails any standard of review under the Due Process clause because it irrationally infringes upon the rights of Doe, and similarly situated Washington citizens, to travel internationally, succeeds only in disadvantaging an unpopular minority, and fails to increase public safety.

a) Standard of Review Under the Due Process Clause

The right to international travel is a liberty interest protected by the Fifth Amendment[19]. Doe alleges that the International Notification and Waiting Period (INWP) provision of the statute violates the substantive due process guarantee of the right to travel internationally because it is not

[19] Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964)

rationally related to a legitimate government interest.

In the context of a constitutional adjudication of fundamental rights, such as the right to travel internationally, rational basis review is not an automatic rubber-stamp of Congressional or State acts. See, e.g., Romer v. Evans, 517 U.S. 600, 632 ("[E]ven in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the classification adopted and the object to be obtained."); St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013) ("[A]lthough rational basis review places no affirmative evidentiary burden on the government, *plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality*." (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993)) (emphasis added)). In support of Doe's argument of irrationality, Doe intended to introduce evidence from witness testimony and other professional and government published documents, information that would have shown there is no nexus between the foreign travel by a Registrant and committing sex offenses, or with the intent of committing any offense at all.

As demonstrated below, the Supreme Court and the Ninth Circuit have "applied a more searching form of rational basis review" when a law displays animus or disregard toward a particular group of disadvantaged or politically unpopular people in connection with that group's exercise of a fundamental right. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). See also United States v. Windsor, 133 S. Ct. 2675, 2692 (2013)

(citing cases).

For example, courts have used rational basis review to strike down laws that disadvantage groups when the evidence supporting the government's purported interest is scant or contradicted by other evidence. See Plyler v. Doe, 517 U.S. 202, 228 (1982) (asserted interest in preserving resources by excluding undocumented children from public school is irrational because "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."). Similar rationales have been applied to strike down economic legislation that lacks evidence of benefit beyond protecting a favored market participant. Merrifield v. Lockyer, 547 F.3d 978, 991-92, 989 (9th Cir. 2008) ("[T]he singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals, or safety."). Accord Castille, 712 F.3d at 223.

Significantly, courts have also scrutinized the rationality of legislation that makes distinctions regarding sexuality in connection with fundamental rights, and struck down laws in the face of many conceivable and historically grounded rational bases when the burdens imposed on the targeted class are pronounced. See United States v. Windsor, 133 S. Ct. 2675, 2693, 2696 (2013) (without invoking heightened scrutiny, striking down federal Defense of Marriage Act on Due Process grounds notwithstanding "Congress['s] great authority to design laws to fit its own conception of sound national policy"); Romer, 517 U.S. at 633, 635 ("[I]dentif[ing] individuals by a single trait and

[denying] them protection across the board" fails rational basis review.).

Thus, where a vulnerable minority's fundamental rights (such as the right to travel internationally) are at issue, courts did not simply accept the government's rationale for the Congressional action, or accept a merely superficial assertion that the legislation serves a government interest. Rather, courts examined evidence regarding whether the stated purpose would actually be served, Plyler, 517 U.S. at 228, as well as the law's overbreadth, Aptheker, 378 U.S. at 505, Moreno, 413 U.S. at 356-58, and measured the lack of proportion between the harm inflicted by the law and its purported benefits. Romer, 517 U.S. at 635.

It is important to note that courts have used rational basis review to strike down laws disadvantaging Registrants, where the evidence of the law's effectiveness is miniscule but its burden is overwhelmingly disruptive and injurious to constitutional rights. See In re Taylor, 60 Cal. 4th 1019, 1036, 1038, 1042 (2015) (Invalidating sex offender residency restrictions on federal due process grounds because they applied in a blanket fashion to all Registrants without regard to the details of their individual offenses, resulting in numerous injuries such as homelessness, lack of access to services, and effective banishment from whole communities).

Further, the U.S. Supreme Court invoked rational basis review to strike down an overbroad and inadequately justified passport restriction in a case

substantially similar to the restriction imposed by RCW 9A.44.130(3)[20]. In Aptheker v. Secretary of State, the Court invalidated a statute that denied passports to members of the Communist party, which had been defended on national security grounds[21]. The Court in that case held that the law infringed the individuals' Fifth Amendment right to international travel because it was not "narrowly drawn to prevent the supposed evil [of international travel to commit crimes]," explaining:

> The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and the purpose in and plans for travel. . . ***[P]recision must be the touchstone of legislation so affecting basic freedoms.***

Id. at 514 (citation omitted; emphasis added). Critically, the Court in that case noted the irrationality of assuming that all members of the group would engage in the activity feared by Congress, as well as the statute's failure to acknowledge totally legitimate purposes of international travel, such as visiting relatives. Id. at 505, 511. Accord Plyler, 517 U.S. at 228.[22]

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[20] Although the International Notification Provision of RCW 9A.44.130(3) is not technically a denial of a passport, the prevention of international travel is certainly within the statutes intent and effect, and the difficulties it imposes are sufficient to constitute an infringement of the right to travel. Latif v. Holder, 28 F. Supp. 3d 1134, 1149 (D.Or. 2014) (Even where not an outright ban on travel, inclusion on "no-fly" list deprives listees of right to travel by inducing carriers and governments to reject them, thereby "turn[ing] routine international travel into an odyssey that imposes significant logistical, economic, and physical demands on travelers.")

[21] Aptheker v. Sec'y of State, 378 U.S. 500, 502, 509 (1964).

[22] Although Aptheker involved a law targeting political affiliation, the Court made clear that the right to travel, rather than rights of association, were at issue. 378 U.S. at 505-508.

b) The International Notification requirement of RCW 9A.44.130(3) is Irrational for Numerous Reasons

The rationales of Aptheker, Taylor, Moreno, Plyler, Romer, Windsor, Merrifield, Castille, and other cases protecting fundamental rights for politically vulnerable minorities apply forcefully in this case. As discussed below, the INWP requirement is irrational for at least three related reasons: overbreadth, disregard of adjudicated determinations of risk[23], and severe infringement of a fundamental right.

(1) *Overbreadth*

First, the International Notification Provision of RCW 9A.44.130(3) applies in a blanket fashion to all individuals convicted of a sex offense, regardless of their risk of engaging in child sex trafficking.[24] As in Aptheker and Taylor, the deprivation of an individual's right to travel internationally is based upon an alleged relationship between risk of engaging in child sex trafficking and the fact that an individual was convicted of a sex offense, regardless of the offense committed (felony or misdemeanor), individual's risk to reoffend[25], or how long ago the offense was committed. As demonstrated,

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[23] Though the State of Washington requires a risk assessment performed on all Registrants, this determination is not considered by the statute imposing the travel notification and waiting period. See RCW 4.24.550.

[24] Given the purported purpose of SB-5154-2015, which codified the present RCW 9A.44.130(3) language, as introduced into the Senate Law and Justice Committee that the bill brings Washington State into compliance with the Adam Walsh Act, it is presumed the purpose of the International Notification and Waiting Period requirements the State is imposing were instituted to prevent registered sex offenders from committing sex offenses outside the U.S.

[25] Doe reiterates the fact that RCW 4.24.550 requires Law Enforcement to evaluate the risk of all offenders registered in their jurisdiction. This risk information is available; however, this

there is no evidence that the commission of a sex offense renders an individual likely to travel abroad for the purpose of committing another sex offense, in general, or child sex trafficking, in particular[26]. While the notification provision of RCW 9A.44.130(3) may be rational as applied to Registrants who have engaged in sex trafficking, the theoretical application of that provision to a small minority within a much larger targeted class is not sufficient to withstand constitutional scrutiny. See Aptheker, 378 U.S. at 505 (Rejecting government's argument that passport ban for all members of political party is rational because a few members may travel abroad for nefarious purposes). The irrationality of the INWP provision is further demonstrated by its failure to differentiate among the various risks posed by Registrants, and its implicit

determination that all Registrants pose the same high risk, in perpetuity. Cf. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (Rational basis review under Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike.").

After a given period of time, even high risk sex offenders demonstrate no greater risk of re-offense than persons never convicted of a sex offense[27],

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information is not considered by the statute.

[26] It should be noted that RCW 9A.44.1330(3) applies to all registrants, regardless if the victim for the underlying offense was a minor or not.

[27] See ***Report to the Washington State Legislature From the Sex Offender Policy Board, December 2008*** - *"[S]ex offenders have the lowest recidivism rates for felony offenses (13 percent) and violent felony offenses (6.7 percent)", according to a 2006 report from the Washington State Institute for Public Policy (E. Drake and R Barnoski, 2006, Sex offenders in Washington State: Key findings and trends, Doc. No. 06-03-1201)".* **Washington State Sex Offender Policy Board Annual Report to the Legislature 2009** – *"The reports found that, compared with the full population of felony offenders, sex offenders have the lowest*

yet RCW 9A.44.130(3) imposes the Notification Provision on some Registrants for life[28] despite the fact that some Registrants *never* display a statistically demonstrated risk of re-offense. Further, Registrants as a class display a low risk of re-offending, particularly when their conviction occurred decades in the past. The failure of the INWP requirement to consider such evidence, along with its emotionally fueled appeals to the safety of children (as significant as that motive is), merely confuses the issues and does not provide a rational basis sufficient to infringe fundamental constitutional rights. See City of Cleburne, 473 U.S. at 447-48 (Striking down zoning ordinance under rational basis review because the general public's "negative attitudes, or fear, unsubstantiated by factors properly cognizable in a zoning proceeding [i.e., evidence]" did not justify unique zoning restrictions for substance abuse and mental health facilities.); Aptheker, 378 U.S. 514 ("[P]recision must be the touchstone of legislation so affecting basic freedoms." (quoting NAACP v. Button, 371 U.S. 431, 438 (1963)).

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recidivism rates for felony offenses (13 percent) and violent felony offenses (6.7 percent) but the highest recidivism rates for felony sex offenses (2.7 percent). Sex offenders who victimize children have the lowest felony recidivism rates as well as the lowest sex (2.3 percent) and violent felony (5.7 percent) recidivism rates". **Washington State Sex Offender Policy Board Annual Report to the Legislature 2010** – "*On the other hand, based on current research, sex offenders, once detected, have a lower recidivism rate in general, and their crimes are much more likely to have been committed against known victims. The Department of Justice found that many more new sex crimes were committed by other types of criminals (87%) than by previously identified sex offenders (13%).*"

[28] Though Doe is required to register for 10 years under current statute, the legislature has in the past removed the requirement to register for the offense committed and reinstated the requirement a year later, and may modify the term of registration in the future. Present case law for prior version of RCW 9A.44.130 considered registration a regulatory burden, therefore under the State's argument the legislature could extend the length of registration at any time without violating ex post factor prohibitions, thereby extending the travel restriction on Doe past his current 10-year registration requirement.

The INWP provision also restricts Doe when he is not in the State of Washington, for when he temporarily leaves the state he remains a Registrant here and subject to RCW 9A.44.130. Therefore, when he is temporarily out of the State and wishes to depart the country from there, he is prohibited from doing so unless he provides three weeks' notice. The alternative short term notice, for routine business or emergency situations, available in the statute is foreclosed to Doe while out-of-state, for he would be required to return to King County to present himself in person 24-hours prior to departing the country.

Even if Doe were in a state such as Alaska or Texas, which does not require he register as a sexual offender, he is unable to depart the country from there. If Doe is obeying the laws of Alaska or Texas, and not required to register, there is no legitimate interest by Washington State to require he provide advance notice of international travel to Washington law enforcement.

(2) *Disregard of Adjudicated Determinations of Risk*

Second, the irrationality of the INWP provision is further evidenced by its applications to individuals whose risk to public safety has already been adjudicated and determined to be low or insignificant. The State of Washington State employs a risk assessment regime when determining a Registrant's risk level under RCW 4.24.550[29], and therefore when

[29] Senate Bill 5154-2015 modified the language of section (6) stating law enforcement

determining public notification requirements. The Courts also impose restrictions on individuals based on the offense committed and included in their sentences. These restrictions are required to have a nexus to the offense committed[30].

SB-5154-2015, which modified RCW 9A.44.130(3), without debate in the legislature or testimony regarding the need for international travel notification and waiting requirement[31], imposes a travel restriction on a population which shows the lowest risk of all felony offenders (See WA SOPB reports to the legislature 2008, 2009, and 2010). The registrant

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"...shall assign a risk level classification to all offenders after consideration of: (i) Any available risk level classifications provided by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (ii) the agency's own application of a sex offender risk assessment tool; and (iii) other information and aggravating or mitigating factors known to the agency and deemed rationally related to the risk posed by the offender to the community at large.

[30] *State v. Brown*, 162 Wn.2d 422, 435,173 P.3d 245 (2007) (adherence to judicially imposed nexus analysis harmonizes the imposition of mandatory deadly weapon/firearm sentence enhancements with the constitutional right to bear arms); *State v. Schelin*, 147 Wn.2d 562, 575, 55 P.3d 632 (2002) (" Requiring a nexus between the defendant, the crime, and the weapon protects against violation of the right to bear arms."); Dennis E. Ritter v. State of Washington, Board of Registration, No. 40010-3-II (Wash.App.Div.2 05/11/2011). "We hold that in order for the Board to suspend the license of a professional engineer under RCW 18.235.130(1) for a proscribed act "relating to" professional engineering or under RCW 18.43.105(10) for not exhibiting "accepted professional conduct," the Board must first find a nexus between the misconduct and the profession. Our view that both statutes require such a nexus protects the licensee's substantive due process interest in maintaining his license"; United States v. Barsumyan, 517 F.3d 1154 (9th Cir. 02/28/2008), "But there is no indication that Barsumyan used a computer in any of those crimes either. Even if he had, however, Sales is clear that a mere nexus between the crime and a computer does not justify proscribing the use of anything containing a circuit board or microchips."; United States v. Fernandez, 776 F.3d 344 (5th Cir. 01/14/2015) "In the absence of evidence to the contrary, the court's general concerns about recidivism or that Fernandez would use a computer to perpetrate future sex-crimes are insufficient to justify the imposition of an otherwise unrelated software-installation special condition."

[31] A review of the legislative record, floor debates, committee hearing briefings and testimony, shows there was no debate regarding the INWP requirement or discussion specifically why it is needed for public safety. The only reference found was staff reports indicating the addition of the INWP requirement.

population includes more than violent or repeat felony offenders, but also misdemeanor offenders as well. There are numerous studies which demonstrate that registered sex offenders pose no higher risk to reoffend than general offender population[32], and Doe intended to introduce this evidence at trial.

Doe was convicted of a misdemeanor offense and has been released from the court jurisdiction for the that conviction. In terminating Doe's probation, the court entered an order removing any restrictions from interaction with minors, ordering "*All conditions within this Court's Judgment and Sentence, including the Court's Orders precluding the Defendant from having unsupervised contact with minors, are hereby terminated...*"[33].

There are hundreds of individuals in Washington who have committed their offense years ago who are now required to provide notice and prevented from travel without waiting three weeks. This requirement is not only irrational, it is also categorically baseless, and therefore unconstitutional. Cf. Windsor, 133 S. Ct. at 2696 (Rational basis review invalidated federal law that declined to recognize state marriages, as "no legitimate purpose overcomes the purpose and effect to disparage and it injure" a class in connection with *rights that have been granted by a state.*); Moreno, 413 U.S. at 356-58 (Rational

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[32] See NJ report, WA State Sex Offender Policy Board reports, and CA DOC&R Reports cited throughout the pleading.

[33] See Judgement and Sentence regarding Doe's Conviction in King County Superior Court, order Terminating Probation dated August 14, 2013, which was to be introduced at trial.

basis review prevented government from citing desire to combat fraud as basis for food stamp program exclusion where excluded individuals were among those least likely to commit fraud.).

(3) *Impact on Fundamental Right*

Third, RCW 9A.44.130(3) constitutes a direct and intentional infringement of a fundamental right, the right to travel internationally. This distinguishes the statute from a typical piece of economic legislation or other enactment that is entitled to routine deference by the courts. As numerous cases establish, where a fundamental right is infringed, rational basis review is employed to ensure that the law is not motivated by animus toward a targeted class and that the State is not abdicating its responsibility to a disfavored minority by burdening their rights without adequate consideration of the law's effects upon them. Windsor, 133 S. Ct. at 2692 ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision [at issue].").

Although RCW 9A.44.130(3) will do virtually nothing to prevent international child sex trafficking, it will massively disrupt a Doe's legitimate international travel for business and personal purposes, often by preventing such travel from occurring at all[34]. This is precisely the type of disproportionate disadvantage against an unpopular minority that rational

[34] Doe intended at trial to provide evidence of the disruption RCW 9A.44.130(3) will have on his ability to travel for work and personal reasons.

basis review has been invoked to strike down. Accordingly, since the effect of the INWP provision is to seriously disadvantage a particular disfavored group without serving its purported objective of preventing child sex trafficking, it cannot survive rational basis review.

III. Violation of Article I, Section 3 & 7

"When a party claims both state and federal constitutional violations, we turn first to our state constitution." Patton, 167 Wn.2d at 385 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

Article I, Section 7

Article I, Section 7 of the Washington constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A court analyzing a privacy claim applies a two-part test. State v. Surge, 160 Wash.2d 65, 71, 156 P.3d 208 (2007). First, the court must determine whether the state action constitutes a disturbance of one's private affairs. Second, the court must determine whether the intrusion is authorized by law. York v. Wahkiakum Sch. Dist. No. 200, 163 Wash.2d 297, 306, 178 P.3d 995 (2008).

Article 1, Section 7, provides greater protection from state action than does the Fourth Amendment. State v. Eisfeldt, 163 Wash.2d 628 (2008) (citing State v. Simpson, 95 Wash.2d 170, 178 (1980)); State v. Hinton, 179 Wash.2d 862, 868, 319 P.3d 9 (2014). Although similar, " 'the protections guaranteed by Article 1, Section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States

Constitution.' " Id. at 634 (quoting State v. McKinney, 148 Wash.2d 20, 26 (2002)). "The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to ... warrantless, but reasonable searches." Article 1, Section 7, is unconcerned with the reasonableness of a search, but instead requires a warrant before any search, whether reasonable or not. Id. at 634-35 (citing Const. art. 1, Section 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.")). "This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions ..." State v. Valdez, 167 Wash.2d 761, 772 (2009) (internal quotation marks and citations omitted). The distinction between article 1, section 7, and the Fourth Amendment arises because the word "reasonable" does not appear in any form in the text of article 1, section 7, as it does in the Fourth Amendment. "Understanding this significant difference between the Fourth Amendment and Article 1, Section 7 is vital to properly analyze the legality of any search in Washington. Id.

In State v. Boland, 115 Wash.2d 571, 800 P.2d 1112 (1990), the State Supreme Court held that under our state constitution, a defendant's private affairs were unreasonably intruded on by law enforcement officers when they removed garbage from his trash can and transported it to a police station to be searched by state and federal narcotics agents. The Supreme Court held that any resident who places garbage in a can and puts it on the curb for collection reasonably believes the garbage will not be subjected to a warrantless

governmental search. 115 Wash.2d at 578. "While a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion." Id.at 581. In other words, we expect the collector to pick up our garbage and remove it for proper disposal; we do not expect that the government will search the contents of our garbage bags to identify evidence of wrong-doing.

In State v. Afana, 196 P.3d 770, 147 Wash.App. 843 (Wash.App.Div.3 12/04/2008), evidence found in a drug safe in the trunk of a car was thrown out. The State Supreme Court reversed a decision of the Court of Appeals in which that court reversed the trial court's suppression of drug evidence found in Afana's car. At the time of the warrantless search of his car, due to the arrest of his passenger, the search violated the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution. Because the arresting officer did not, at the time of the search, have a reasonable basis to believe that the arrestee posed a safety risk or that Afana's car contained evidence of the crime for which the arrest was made. The Court held that the trial court properly suppressed the drug evidence as fruit of an unconstitutional search under Article I, Section 7. "In reversing the Court of Appeals, we reject the State's proposed good faith exception to our exclusionary rule." Id.

The INWP provision of RCW 9A.44.130(3) forces Doe to divulge to the county sheriff specific and personal information regarding his travel plans, including "(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."[35] This is clearly an invasion of Doe's personal affairs and is a warrantless search of his papers and personal plans.

This begs the question, why is it unlawful to search Doe's garbage but lawful to force him to provide law enforcement with personal information regarding his travel? Why is it unlawful for law enforcement to search his car for drugs or other contraband without a warrant, but is lawful to force him to provide personal travel plans to the same law enforcement? Doe is a free citizen and was such for years prior to passage of SB 5154-2015 and the codification of the INWP requirement. Clearly the INWP requirement violates Article I, Section 7 without authority of law or probable cause. Doe as a free citizen is entitled to protection under Article I, Section 7, and RCW 9A.44.130(3) is a violation of these protections.

The State in its Motion for Summary Judgment [CP@148] claims there is no privacy violation because the federal government can search people crossing the border. The State cites State v. Bradley[36] and State v. Quick.[37] The State incorrectly interprets these cases, for they do not authorize state actors to interfere with foreign travel. First, the cases deal with individuals returning to the U.S. and being searched by federal officials, not state officials.

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[35] See RCW 9A.130(3).

[36] *State v. Bradley,* 105 Wn.2d 898, 719 P.2d 546 (1986) (border 5 searches are governed by federal law and do not depend upon probable cause).

[37] *State v. Quick,* 6 59 Wn. App. 228, 232, 796 P.2d 764 (1990).

In Bradley the defendant was returning to the U.S. and was searched by U.S. Customs officials and prosecuted under state statute. In the Bradley case the Washington State Supreme Court stated:

> For purposes of search and seizure law a border search conducted by United States Customs officials is equivalent to a search conducted in a different jurisdiction. Technically, state jurisdiction extends over United States border stations for the purpose of preserving the peace and making arrests. 8 U.S.C. § 1358 (1982)."
>
> "Several courts accordingly have concluded that evidence lawfully obtained under federal standards by United States Customs officials is admissible in state court even if the search and seizure would have violated state law. See State v. Allard, 313 A.2d 439 (Me. 1973); Morales v. State, 407 So. 2d 321 (Fla. Dist. Ct. App. 1981)." Id.

A border patrol agent may, but does not always do so, search a vehicle at the border without probable cause or a warrant. State v. Bradley, 105 Wn.2d 898, 902, 719 P.2d 546 (1986). When a federal agent conducts a warrantless search at a location other than at the border, federal law requires articulable facts to support a reasonably certain conclusion that contraband has crossed the international border. State v. Quick, 59 Wn. App. 228, 233, 796 P.2d 764 (1990) (citing United States v. Potter, 552 F.2d 901, 907 (9th Cir. 1977)). The Potter court defined reasonable certainty as a standard higher than probable cause but less than proof beyond a reasonable doubt. Potter requires, under the totality of the facts and circumstances within the agent's knowledge and experience, that the agent performing the search has a firm belief that contraband has crossed the border. Potter, 552 F.2d at 907.

These are not state actors, however, who are searching travelers crossing the border, for the border inspections are not considered under the jurisdiction of Washington State. These cases do not support the State's claim that there is no violation of Article I, Section 7 by requiring Doe to report to local law enforcement and provide notification. In most cases, there is no inspection by U.S. officials of persons leaving the country. For all Doe's foreign travels, he has never been searched or questioned by U.S. officials when leaving the U.S.[CP@232]

However, when a party returns to the U.S. from foreign travel, the information provided to U.S. Customs and Border Patrol is much less than that required by RCW 9A.44.130. Being inspected at the border when returning is not the same as requiring Doe to provide detail travel information prior to leaving the country. For not all information required by the state statute is made available to federal officials when being inspected upon return to the U.S.

Lastly, the States claims in its motion [CP@63] that "... *no warrantless search occurs because as registered sex offenders, they must agree as a term of their release to follow the conditions of being a registered offender. This is one such requirement.*" However, the INWP requirement never existed when Doe first registered as a sexual offender, but is now being imposed retroactively. This also begs the question, how did Doe agree to this travel notification and waiting period requirement when it did not exist when he pled to the underlying offense? If this were a procedural change, then Doe should be required to follow the requirement. However, it is a far stretch to say the INWP

requirement is anything other than a substantive change in the registration statute.

Article I, Section 3

The Fifth Amendment to the United States Constitution and Article I, Section 3 of the Washington Constitution guarantee that "[n]o person shall be deprived of life, liberty, or property, without due process of law." This right to due process includes the right to be heard and to offer testimony.[38] The accused's right to due process "is, in essence, the right to a fair opportunity to defend against the State's accusations."[39] And the right "to call witnesses in one's own behalf [has] long been recognized as essential to due process."[40] "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process."[41]

RCW 9A.44.130(3) takes away Doe's right to travel freely without due process, imposing a waiting period of three weeks before he can travel, a clear violation of Article I, Section 3 protections. The statute implies that Doe is dangerous to the public and therefore requires he abide by these new

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[38] *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (quoting *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

[39] *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

[40] *Chambers*, 410 U.S. at 294.

[41] *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019(1967).

restrictions, however the statute does not provide him an opportunity to demonstrate that he is not a danger and should be allow to travel without restriction. There is no due process afforded Doe, or ability to petition to have these travel notifications and waiting requirements removed based on his offense and designated low risk level. By statute, his liberty interest has been infringed without a hearing or an opportunity to be heard, provide testimony and evidence.

IV. Violation of Ex Post Facto

The INWP provision is a violation of the ex post facto clause of both the State and U.S. Constitution. When evaluating whether there is violation of an ex post facto application, the court looks past the legislative intent and purpose of whether the statute was intended to regulate or punish. The Court also examines whether the actual effect of the statute is so punitive as to negate the Legislature's regulatory intent[42]. The court looks at the factors listed in Kennedy[43] for assistance in determining whether the effect of a statute is regulatory or punitive.

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ."[44]

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[42] United States v. Ward, 448 U.S. 242, 248-49, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980).

[43] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963)

[44] Ward, 448 U.S. at 249; In re Young, 122 Wash. 2d 1, 857 P.2d 989 (1993).

The ex post facto clause forbids the State from enacting any law that imposes punishment for an act that was not punishable when committed or that inflicts a greater punishment than could have been imposed at the time the crime was committed. *State v. Ward*,[45]. The ex post facto analysis is essentially the same in Washington as under the federal constitution. See State v. Edwards[46]. A law violates ex post facto principles if it (1) is substantive, rather than merely procedural; (2) is retrospective, applying to events that occurred before the law's enactment; and (3) disadvantages the person affected by it. Ward, 123 Wn.2d at 498. A law "disadvantages" a defendant only if it enhances the punishment that existed under the prior law. Ward, 123 Wn.2d at 498.

Restrictions on one's freedom of movement are a typical forms of punishment that are imposed at sentencing. Being incarcerated prevents an offender from traveling and is the most obvious restriction. Community Custody is also a form of punishment and imposed by the court at sentencing. RCW 9.94A.701 through 745 (Supervision of Offenders in the Community) authorize the courts and the Department of Corrections to impose restrictions, including travel, while an offender is on Community Custody and supervised.

The legislature acknowledged the utility of electronic home monitoring

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[45] See State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994)

[46] State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)).

to restrict an offender's freedom of movement while on supervision, amending in 2005 RCW 9.94A.737, which relates to community custody violations. See Laws of 2005, ch. 435, § 1:

> *"The legislature believes that electronic monitoring, as an alternative to incarceration, is a proper and cost-effective method of punishment and supervision for many criminal offenders. The legislature further finds that advancements in electronic monitoring technology have made the technology more common and acceptable to criminal justice system personnel, policymakers, and the general public."*[47]

The Washington Department of Corrections commonly restricts the freedom of movement of offenders on community custody[48], and originally imposed a county geographical restriction on Doe at commencement of his supervision. Doe was required to stay within the boundaries of King County and was not allowed to leave the county without written permission by his Community Corrections Officer (CCO), [CP@248]. Upon motion by Doe, the trial court issued an order allowing Doe to travel within the State of Washington for work purposes, overriding standard DOC policy.[49]

The twenty-one-day travel notice and waiting requirement is a physical "restraint" upon Doe, and limits his ability to freely travel out of the country. Doe must wait three-weeks before he can travel outside the country under a

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[47] Harris v. Charles, 214 P.3d 962, 151 Wash.App. 929 (Wash.App.Div.1 08/31/2009)

[48] See WA Department of Corrections Policy 380.650 – Travel for Community Offenders.

[49] See Trial Court Modification of Doe's J&S, order issued December 5, 2011, was to be introduced under seal or reacted at trial.

statute requirement, and if he fails to do so is subject to prosecution for failure to register, therefore he is physically restrained from traveling as he wishes. This restraint was not a current requirement for sex offenders at the time Doe was convicted for the underlying gross misdemeanor sexual offense, and therefore is an ex post facto application. It is as if SB 5154-2015 resentenced Doe to further travel restrictions past the expiration of his court imposed probation.

The Washington Supreme Court in *Ward* ruled on the registration requirements in determining whether the statute was regulatory or punishment. The 1991 version of Chapter 9A.44 RCW did not contain a waiting and notification period prior to foreign travel. The statute at that time had no requirement to provide detail day-to-day travel information, including the purpose of a Registrant's travel, nor a requirement to justify and explain in-person to the County Sheriff the reason why it was "impracticable" for the Registrant to provide three-weeks' notice in an emergency situation before traveling.

RCW 9A.44.130(3) as amended by SB5154-2015 has moved the registration scheme past the regulatory intent to effectively becoming punitive in effect on all registrants convicted prior to the enactment of the bill, and meets the Ward factors. The statute meets the first Ward criterial, for the requirement is substantive and not merely procedural. It also meets the second factor, for it is imposes a substantive requirement retroactively. Lastly, as Doe argued herein, the travel restriction is overbroad and not narrowly tailored, and

infringes on his Fifth Amendment right to international travel. The statute meets all the Kennedy and Ward requirements, and therefore is a violation of prohibited ex post facto application.

Doe urges this Court to take notice that many other states', such as Alaska[50], Indiana[51], Maryland[52], New Hampshire[53] and Oklahoma[54], highest courts have all ruled that some aspects of their State's sex offender registration statutes are sufficiently punitive that they may not be applied retroactively (ex post facto violation).

Federal District Judge Obert Cleland, United States District Court, E.D. Michigan, Southern Division, ruled Michigan's Sex Offender Registry law was so vague that parts of it were unconstitutional[55], including the requirement that offenders stay at least 1,000 feet from schools. Judge Cleland, in a 72-page ruling, struck down several reporting requirements of the 1994 law, which has been amended several times by state lawmakers to make sex offender registration requirements stricter.

Sex offender registration requirements over time continue to become more burdensome and punitive, and both State and Federal Courts are taking

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[50] State v. John Doe A and John Doe B, # S-14486 – 2013, Alaska.

[51] State v. Hough, No. 64A05-1203-MI-113, 2012, Indiana.

[52] John Doe v. DPS and Correctional Services, Case No. 125 - 2013, Maryland.

[53] Doe v. State, Supreme Court Case 2013-496, New Hampshire.

[54] Starky v. Oklahoma DPS, SD- 109556, 2013, Oklahoma.

[55] Does v. Snyder, Case No. 12-11194, March 31, 2015, US District Court, E.D. Michigan, Southern Division.

notice, ruling these regulatory schemes have moved past the legislative regulatory intent into being punitive. The trend now in courts across the country is to restrain state legislatures from imposing overly burdensome ex post facto regulations, or in some cases unconstitutional burdens, on all sex offenders. In Michigan the federal court ruled that Michigan's sex offender law was more than punitive, but some provisions were just unconstitutional. This confirms Doe's argument that RCW 9A.44.130 when applied in its entirety is more than a regulatory scheme, it is punitive and should be interpreted like any other penal statute. Senate Bill 5154 finally moved the registration scheme from regulatory to being essentially punishment.

The Court of Appeals, Division I, Commissioner in her ruling denying Doe his Motion for Discretionary Review cited and misinterpreted the State Supreme Court's ruling in State v. Ward[56] by stating: "*Our Supreme Court has upheld the statutory sex offender registration requirement over an ex post facto challenge by holding that it may be burdensome but not punitive to require convicted sex offenders, upon release, to register with their local sheriff's office*".[57] The Commissioner failed to note the State Supreme Court's ruling in Ward, as well as the Court of Appeals, Division II, ruling *in* State v. Enquist, (163 Wn. App. 41, 49-52, 256 P.3d 1277, 2011), never considered restricting travel by imposing a notification and waiting period. Until the

[56] State v. Ward, 123 Wn.2d 488, 496-511, 869 P.2d 1062, 1994

[57] See Appeals Court Division I Commissioner ruling on Doe's Interlocutory appeal for Preliminary Injunction.

enactment of SB 5154-2015, notification requirements were triggered after the act of traveling, not prior. The Commissioner never addressed Doe's argument that the right to international travel is a liberty interest protected by the Fifth Amendment[58] requiring due process before restricting it. In not addressing that point, it was unclear whether the Commissioner considered the right to travel an important right or more of a privilege granted to citizens of the State, a right that may be restricted without due process, in violation of U.S. Supreme Court precedent.

The Commissioner's ruling also failed to give recognition to the accumulative restrictions placed on all registrants since the State Supreme Court's ruling in *Ward*, and appears to impose no boundaries on how the State can restrict the rights of any Registrant.

The Commissioner's ruling places no bounds on how far the State may go in restricting any rights of a Registrant under the premise of improving public safety. Doe argues that the restrictions imposed today by RCW 9A.44.130(3) are far more onerous than those ruled on in *Ward*. The registration scheme has finally become sufficiently burdensome and onerous that the effect is punitive and further punishes Doe for a past offense, violating the ex post facto prohibitions of both the State and U.S. Constitutions.

V. VOID FOR VAGUENESS

The guarantee of due process, contained in the Fourteenth Amendment

[58] Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964).

to the United States Constitution and Article I, Section 3 of the Washington Constitution, requires that laws not be vague. *Bahl*, 164 Wn.2d at 752-53. The laws must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to "'protect against arbitrary enforcement.'" *Bahl*, 164 Wn.2d at 752-53 (quoting *City of Spokane v. Douglass,* 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

"Under the due process clause, a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed'; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement." City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000) (quoting State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270 (1993) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990))).

The purpose of the vagueness doctrine is twofold: "first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement." Halstien, 122 Wn.2d at 116-17; Lorang, 140 Wn.2d at 30 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)); State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998); City of Tacoma v. Luvene, 118 Wn.2d 826, 844, 827 P.2d 1374 (1992). "A statute is unconstitutionally vague if either requirement is not satisfied." Halstien, 122 Wn.2d 117-18 (citing Douglass, 115 Wn.2d at 178). Moreover, "we are

especially cautious in the interpretation of vague statutes when First Amendment interests are implicated." Lorang, 140 Wn.2d at 31.

RCW 9A.44.130(3) reads in part:

> "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."

Doe contends the twenty-four-hour notice provision for unexpected travel purposes in RCW 9A.44.130(3) fails both aspects of the vagueness test because the statute does not define the criminal offense in a way a reasonable person would know what conduct is prohibited and because there is no ascertainable standard to prevent arbitrary enforcement when a Registrant must report in-person to the county sheriff with a written explanation why more notice was "impracticable".

Here the statute in question makes it a criminal offense to travel outside the United States without providing twenty-one days' advance notice to the county sheriff, which is very clear in its intent and language of what conduct is proscribed. However, the vagueness of the alternative travel notices for "unexpected travel due to family or work emergencies, or for offenders who travel routinely across international borders for work related purposes..." is unconstitutionally vague. First, the definition of what constitutes an

emergency, for either family or business purposes, sufficient to be impracticable to provide three weeks' notice is arbitrary and vague. Second, what constitutes routine business travel is vague. And thirdly, what the role of the county sheriff is and what is he is to do with the written explanation of why a Registrant is unable to provide three-weeks' notice is unquestionably open for many interpretations.

A registrant must provide in-person written explanation to the county sheriff at least 24 hours in advance in an emergency situation or for routine business travel. The definition of what constitutes an emergency situation or routine business travel sufficient to be "impracticable" to provide more notice is left up to the interpretation of the Registrant and county sheriff, who presumed is authorized to arrest the Doe for failure to register if the Doe plans to travel and the sheriff does not accept the written explanation. The statute implies that the county sheriff has a right to challenge or deny Doe's reduce travel notification for not being proper, for why else is Doe required to make an in-person notification? Prior SB 5154-2015 travel notification requirements, such as moving or being absent a sufficient period of time, required Doe to mail a certified letter to the county sheriff providing such notice.

This new requirement not only allows for an arbitrary application by law enforcement of what is or is not impracticable, it is a strong incentive for Doe to not travel at all or avoid travel unexpectedly for very legitimate reasons to prevent the potential of misapplication of the statute by the sheriff. This will

have an extreme chilling effect on a Doe's willingness to travel for legitimate purposes, causing him to avoid travel all together.

If Doe is legitimately unable to provide twenty-one days' notice, but could have provided 20 days' notice but did so only 18 days prior to leaving, has he violated the statute? Is the county sheriff going to arrest the Registrant because he did not provide as much notice as the sheriff thought he should have? Is county sheriff to provide approval or disapproval of a Registrant's short notice during his in-person notification? Who at the county sheriff's office is authorized to approve or disapprove a Registrant's travel? Whose definition of routine business travel and family emergency conditions are to be used in authorizing the short term notification? These are questions which lead to elements of a crime for which Doe could be charged if he does not fully comply. A violation of this notification clause subjects Doe to a misdemeanor charge of Failure to Register (RCW 9A.44.132)[59]. Doe should not have to wait to be charged and allow the courts to determine these definitions. Clearly the alternate travel notification requirement is sufficiently vague to meet the void for vagueness challenge.

F. CONCLUSION

For the reason stated herein, the International Notification and Waiting Period requirement as codified in RCW 9A.44.130(3) is unconstitutional

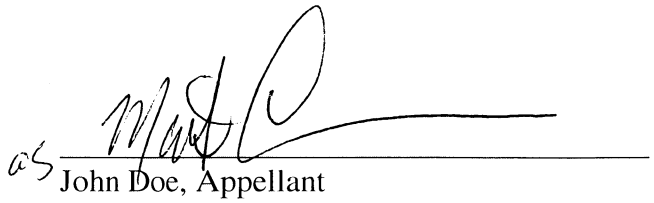
[59] Doe is subject to a misdemeanor charge of Failure to Register due to his underlying offense being a misdemeanor. If the underlying sex offense is a felony, then Failure to Register is a felony offense. See RCW 9A.44.132.

based on the alleged facts. If the facts presented by Doe are true, which this court must assume when reviewing a motion for summary judgment[60], then this Court must reverse the Superior Courts summary judgment order.

If this Court accepts the legal arguments that Doe has presented, and determines the statute in question is fatally flawed, this Court must rule in favor of Doe's complaint, granting him injunctive relief.

Respectfully submitted,

Date: July 18, 2016.



as John Doe, Appellant

[60] "We examine the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor, to determine if a genuine material issue of fact exists." *Kofmehl*, 177 Wn.2d at 594; CR 56(c)