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SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE A, et al.,

Respondents,

v.

WASHINGTON STATE PATROL, et al.,

Appellants.

WASHINGTON STATE PATROL'S ANSWER TO AMICUS BRIEF

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I. INTRODUCTION

The Community Notification portion of the Community Protection Act protects the public by providing for dissemination of information about sex and kidnapping offenders to the community and by giving public officers immunity when they do disseminate such information. The Washington State Patrol's role in this system is limited to maintaining the statewide Sex and Kidnapping Offender Database.

Amicus attempts to prevent disclosure of the State Patrol Database in response to public records requests by raising the specter of a constitutional ex post facto violation. But Amicus fails to recognize that the United States Supreme Court resolved this question in *Smith v. Doe*, holding that internet posting of Alaska's entire sex offender registry did not constitute additional punishment even where the State did not conduct any risk analysis or support the posting by a finding of a particular level of risk. *Smith v. Doe*, 538 U.S. 84, 99, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

Absent Amicus's phantom constitutional problem, this Court must determine what the legislature intended the Community Notification portion of the Community Protection Act to accomplish. The legislature's findings reflect that the legislature intended to protect the community first and foremost. Read in context with the rest of the Community Protection

Act, the legislature intended RCW 4.24.550 to address community notification, not restrict responses to public records requests.

While Amicus focuses on studies related to the risk of recidivism, these arguments are not reflected anywhere in the legislature's findings related to RCW 4.24.550, nor are they recited in any statement of purpose. Amicus attributes motivations to the legislature that are absent from the legislative history. And even if this Court were inclined to consider studies of sex offender recidivism, at best they present mixed results.

For all of these reasons, this Court should decline to adopt Amicus's reasoning, reverse the trial court, and vacate the permanent injunction.

II. ARGUMENT

A. **The Washington State Patrol's Database Contains Limited Information, and the Patrol Has Long Released the Database and Monthly Extracts in Response to Public Records Requests**

The Washington State Patrol's role in sex offender registration and community notification is limited to serving as the entity that maintains Washington's statewide Sex and Kidnapping Offender Database. RCW 3.43.540; CP at 34. The State Patrol Database includes the following information for currently registered sex offenders: (1) name, (2) residential address, (3) date of birth, (4) crime for which he or she was convicted, (5) date of conviction, and (6) county of registry. CP at 123.

Before the trial court's injunction was entered, the State Patrol for years routinely released copies of the database and monthly extracts to public records requesters including Washington's Office of Foster Care Licensing, the YMCA, and the Mid Columbia Housing Authority. CP at 124. When Amicus opines that "the [current] system is working," that system included routine disclosure of the State Patrol's Database and extracts in response to public records requests. Amicus Br. at 17.

B. Amicus Ignores the United States Supreme Court's Decision in *Smith v. Doe*, Which Resolved the Very Constitutional Concerns That Amicus Contends Are Looming

Throughout its brief, Amicus incorrectly asserts that public disclosure of the State Patrol's Database in response to a public records request might run afoul of the ex post facto clause. Amicus Br. at 1-4, 9-10, 14-17. Relying exclusively on *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994), Amicus contends that absent an individualized evaluation of an offender's risk to the community, public release of the entire database would be punitive. *See* Amicus at 14-17 (relying only on the portion of *Ward* that discusses the ex post facto clause); *see also Ward*, 123 Wn.2d at 496 (analyzing the ex post facto clauses of the state and federal constitutions without holding that the state constitution is more protective than the federal constitution, and explaining that the ex post facto clauses prohibit legislation that increases the quantum of punishment

applicable to the crime when it was committed). But Amicus ignores the United States Supreme Court's later decision in *Smith v. Doe*.

In *Smith*, the United States Supreme Court evaluated a sex offender notification system under which the Alaska Department of Public Safety, like the Washington State Patrol, is statutorily charged with maintaining a central registry of sex offenders. *Smith*, 538 U.S. at 90-91. Some of the fields in Alaska's database are kept confidential by statute, but many are made available to the public on the internet. *Id.* at 91. Publicly available information includes “the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located.” *Id.* at 91 (alterations in the original) (quoting Alaska Stat. § 18.65.087(b)). Alaska makes most of this public information for each registered sex offender available on the internet. *Id.* at 91; *see also* <http://www.dps.alaska.gov/sorweb/asp/sorcra1.aspx> (last visited May 27, 2015); <http://www.nsopw.gov/en/Registry> (last visited May 27, 2015) (providing links to all states' posted registries and databases).

The United States Supreme Court concluded that internet posting of the listed public information for each registered sex offender did not violate the ex post facto clause, and this was true even absent an individualized assessment of risk to the community. *Smith*, 538 U.S. at 103-04. The *Smith* Court explained: “Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Id.* at 98. The stigma of the registration and notification law results “not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.” *Id.* “In the context of [Alaska’s] regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants’ convictions without violating the prohibitions of the *Ex Post Facto* Clause.” *Id.* at 104.

Significantly, the fact that Alaska posts its entire registry on the internet “[did] not alter [the Court’s] conclusion.” *Id.* at 99. The *Smith* Court recognized that the public shame associated with being identified on the internet as a sex offender, as well as the broad geographic reach of the internet “do not render [i]nternet notification punitive” for purposes of the constitutional analysis. *Id.* “The purpose and the principal effect of

notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.” *Smith*, 538 U.S. at 99.

Thus, after *Ward*, the United States Supreme Court held that internet posting of an entire state sex offender registry, including the residential address of sex offenders and their birth dates, did not first require an individualized assessment of risk to be constitutional. The Washington State Patrol Database produced in response to public records requests includes far less information than Alaska posts on the internet; the record at issue in this litigation includes: the offender’s name, residential address, date of birth, crime for which he or she was convicted, date of conviction, and county of registration. CP at 123. Amicus’s failure to acknowledge *Smith* is fatal to its assertion that release of the entire Sex and Kidnapping Offender Database may render RCW 4.24.550 unconstitutional. Under the *Smith* Court’s reasoning, even internet posting of the entire State Patrol Database would not violate the ex post facto clause.

C. Amicus's Arguments for Keeping Level I Sex Offender Data Confidential Contradict the Legislature's Actual Intent and the Purpose Behind Community Notification

1. The purpose of the Community Notification portion of the Community Protection Act is to protect the community

Part I of the 1990 Community Protection Act is entitled "Community Notification." Laws of 1990, ch. 3, Part I. The Community Notification Part contains several sections requiring affirmative notice to certain parties when violent or sexual offenders are released from confinement. *E.g.*, Laws of 1990, ch. 3, §§ 101, 104, 109, 121. Multiple sections within the Community Notification Part authorize affirmative release of information to the general public (*see* Laws of 1990, ch. 3, §§ 102, 105, 110, 117, 120, 127), while others expressly provide immunity to government officials for their community notifications about violent and sex offenders (Laws of 1990, ch.3, §§ 112(12), 117, 126, 129(8)). Notably, where the legislature intended to restrict access to public records and reports related to violent and sexual offenders, the legislature had expressly said so. *See* Laws of 1990, ch. 3, § 108 (retaining preexisting language that read: "all *records and reports* made pursuant to [RCW 10.77—Criminally Insane—Procedures], shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician . . . [listing additional people]") (emphasis added);

§ 112 (retaining preexisting provision that read: “Information *and records* [related to mental health treatment under RCW 71.05] may be disclosed only” (Emphasis added.)). In contrast, the legislature specifically stated that nothing in the section that became RCW 4.24.550 implies that information regarding sex offenders is confidential except as otherwise provided by law. Laws of 1990, ch. 3, § 117(4).

Within this overall context of community notification, the legislature found that “sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is a paramount governmental interest.” Laws of 1990, ch. 3, § 116. The legislature was concerned that lack of information from penal and mental health systems could result in failure to meet this “*paramount concern* of public safety.” Laws of 1990, ch. 3, § 116. (emphasis added). The legislature explained that it was trying to solve a specific problem: “Overly restrictive confidentiality and liability laws governing the release of information about sexual predators have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety.” Laws of 1990, ch. 3, § 116. The legislature found that “[p]ersons found to have committed a sex offense have a reduced expectation of privacy because of the public’s interest in

public safety” Laws of 1990, ch. 3, § 116. While the legislature also referred to “limited circumstances” under which “information about sexual predators” should be released to the general public, this “release of information” does not refer to public records and instead refers to affirmative notification to the public. The overall context of the Community Notification Part of the Community Protection Act, as well as the provision explaining that nothing in RCW 4.24.550 made sex offender information confidential, evince legislative intent not to restrict public records responses, but to address proactive community notification. Laws of 1990, ch. 3, § 117(4).

In 1997, without any additional statement of findings or purpose, the legislature added subsections (2) and (3) to RCW 4.24.550. These subsections refer to “disclosure” of information upon request and “public disclosure.” RCW 4.24.550(2), (3) (Laws of 1997, ch. 364, § 1(2), (3)). The 1997 House Bill Report explains that the legislature was still addressing “public notifications.” The Final Bill Report does not mention disclosure of public records or former RCW 42.17 at all. Final Bill Report on S.B. 5759, 55th Leg., Reg. Sess. (Wash. 1997).¹ It is hard to believe

¹ At the time, the provisions related to public records were located at RCW 42.17. In 2005, the legislature recodified the public records provisions at RCW 42.56 and named the new chapter the Public Records Act. Laws of 2005, ch. 274.

the legislature would have adopted such a significant public records restriction without any mention of it in bill reports.

In sum, the legislature's stated findings supporting the Community Notification provisions strongly emphasize community safety while also explaining that sex offenders have a reduced expectation of privacy. While Amicus attempts to attribute its own public policy concerns to the legislature, nowhere does Amicus point to a legislative finding or statement of purpose to support its speculation that the legislature intended to keep public records related to Level I sex offenders confidential or withhold them from public records requesters. Amicus's attempted attribution is simply not supported by the legislature's actual findings.

2. Amicus's arguments regarding recidivism should be directed to the legislature

Amicus's arguments about recidivism rates and the effects of community notification on offenders are policy arguments that should be made to the legislature. Amicus's arguments amount to a discussion of why Amicus believes records related to Level I sex offenders should be exempt under the Public Records Act or subject to risk balancing before disclosure to a public records requester. But under the plain language of RCW 4.24.550(9), nothing in RCW 4.24.550 makes such information or records confidential, and RCW 4.24.550's plain language addresses the

sharing of “information” without mentioning “public records.” This Court has made it clear that policy arguments are not relevant where a statute is clear. *See State v. Sanchez*, 177 Wn.2d 835, 850 n.1, 306 P.3d 935 (2013); *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). This Court must look to the actual legislative intent underlying the Community Notification portion of the Community Protection Act. Amicus’s policy arguments should be made to the legislature, not this Court.

3. Even if this Court were to consider recidivism rates, Amicus does not provide the Court with the complete picture

Even if this Court were to consider recidivism studies in order to decide this case, the research is mixed, and some studies support maximizing the information available to the public. First, Amicus admits to an overall sex offender recidivism rate of approximately 15 percent over a four to five year period. *See* Amicus Br. at 4. That means about one in seven registered sex offenders will reoffend within five years. Another review of multiple studies concludes that “reoffenses often occur many years after the initial conviction” when an offender’s risk classification may have been reduced. Washington State Inst. for Pub. Policy, Lin Song & Roxanne Lieb, *Adult Sex Offender Recidivism: A Review of Studies 7* (Jan. 1994) (“When Do Most Reoffenses Occur?”). One study of child molesters found that 23 percent of the studied offenders were reconvicted

for a sexual or violent offense within the 22-year follow-up period, a rate of almost one in four. Song at 7. “The severity of the new offenses did not lessen over time.” Song at 7.

In addition, classification of offenders as Level I (low risk), Level II (moderate risk), or Level III (high risk) has not “accurately reflect[ed] their risk of reoffending.” Washington State Inst. for Pub. Policy, Robert Barnkoski, *Sex Offender Sentencing in Washington State: Sex Offender Risk Level Classification Tool and Recidivism* 1 (Jan. 2006). While one study has shown very low rates of a repeat felony sex offense, recidivism with a violent or other felony was more common, and the same study concluded that the notification levels “have little or no predictive accuracy.” Barnkoski at 2. Another study found a correlation between the development of more consistent community notification systems and a reduction in recidivism, though causation could not be shown. Washington State Inst. for Pub. Policy, Robert Barnkoski, *Sex Offender Sentencing in Washington State: Has Community Notification Reduced Recidivism? I* (Dec. 2005) (Summary sidebar).

At best, recidivism studies show that it is hard to predict with any certainty whether a sex offender will reoffend at some point in the future. Amicus’s reading of the statute would condition the ability to obtain the State Patrol Database entries in response to a public records request on an

inexact finding of an offender's risk. Such a result would mean that the public bears the risk of error more than the sex offender, contrary to the legislature's "paramount concern" for public safety. Laws of 1990, ch. 3, § 116.

D. Protecting Level I Sex Offender Data From Public Disclosure Would Provide More Privacy for Convicted Sex Offenders Than for Members of the General Public and Would Contravene Recent Expressions of Legislative Intent

Amicus's proposed result, that Level I sex offender information be protected from disclosure in response to a public records request, would protect some sex offenders' conviction information, addresses, and dates of birth from public disclosure, even though the same or comparable information must be disclosed where the subject is simply a member of the general public.

All conviction information is affirmatively public under RCW 10.97. RCW 10.97.050(1). And government agencies cannot withhold a person's address or date of birth when responding to a public records request absent a specific exemption under the Public Records Act or another statute. *See, e.g.*, RCW 42.56.230 (exempting personal information in files maintained for students, agency clients, and employees of public agencies to the extent release would violate a right to privacy); RCW 42.56.250(3) (exempting personal addresses and dates of

birth held in agency personnel records, rosters, mailing lists, or emergency contact information). Absent application of a specific exemption, if a public record request asks for a record containing a person's address or date of birth, that record must be provided. *See King County v. Sheehan*, 114 Wn. App. 325, 343, 57 P.3d 307 (2002) ("Generally, however, absent such a statute so providing, lists of names and addresses are not private."). The *Sheehan* court recognized that Washington's Public Records Act is stronger than the federal Freedom of Information Act in this regard. *Id.* at 344.

Thus, the result that Amicus advocates, protection from public disclosure of a registered sex offender's State Patrol Database information including name, conviction history, address, and date of birth, would put sex offenders in stark contrast with members of the general public who are not sex offenders and could not protect that same information from disclosure in response to a public records request. *See, e.g.*, RCW 29A.08.710(2) (making registered voters' names, addresses, and dates of birth affirmatively available for public inspection and copying). This Court should avoid this by applying the plain language of RCW 4.24.550(9) and recognizing that RCW 4.24.550 addresses the affirmative release of information outside of the context of a public records request. The community notification statute does not restrict

access to or make confidential public records related to sex offenders of any level. *See* RCW 4.24.550(9).

Amicus's proposed result is undercut even more in light of the legislature's recent rejection of a provision that would have amended RCW 4.24.550(9) to read "[s]ex offender and kidnapping offender registration information is exempt from public disclosure under chapter 42.56 RCW." Substitute S. B. 5154, § 1(9), 64th Leg., Reg. Sess. (Wash. 2015). This change would have had the effect that Amicus seeks here; it would have removed public records related to sex offender and kidnapping offender registration from the application of the Public Records Act, RCW 42.56, allowing disclosure only under RCW 4.24.550. But the legislature declined to adopt this provision, instead retaining the language of RCW 4.24.550(9): "Nothing in this section [RCW 4.24.550] implies that information regarding persons designated in subsection (1) of this section [including those convicted of sex or kidnapping offenses] is confidential except as may otherwise be provided by law." This is a plain indication of the legislature's ongoing intent that RCW 4.24.550 is not a valid basis to withhold records as confidential in response to a public records request.

The legislature, did, however, task the sex offender policy board with making findings and recommendations to the legislature regarding “the relationship between chapter 42.56 RCW and RCW 4.24.550.” Laws of 2015, ch. 261, § 16(1)(a).²

In sum, Amicus’s proposed result in this case would both ignore the legislature’s ongoing intent that RCW 4.24.550 not be a basis for public records withholding or redaction, and it would protect Level I sex offenders’ addresses and birthdates, but not those of the general public, from disclosure in response to a public records request. Amicus’s arguments about what the law should be must be targeted at the sex offender policy board as it makes recommendation to the legislature and to the legislature itself.

III. CONCLUSION

This court should conclude that RCW 4.24.550 is a community notification statute that governs the affirmative sharing of information by local law enforcement. The legislature did not intend for it to create an exemption to or limitation on the Public Records Act. Therefore, this Court should reverse the trial court and vacate the permanent injunction

² The 2015 Legislature also added to the list of people who are to receive Level I sex offender information “upon request,” “any individual who requests information regarding a specific offender.” Substitute S. B. 5154, §1(9), 64th Leg., Reg. Sess. (Wash. 2015).

that currently prevents release of the State Patrol Database under the
Public Records Act.

RESPECTFULLY SUBMITTED this 27th day of May 2015.

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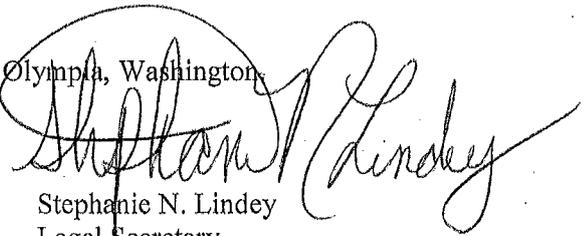
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Dear Clerk,

Attached for filing in case number 90413-8 please find the Washington State Patrol's Answer to Amicus Brief.

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Thank you,

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