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NO. 97617-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN BATSON,

Appellant.

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

THE HONORABLE BARBARA LINDE, JUDGE

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**PETITIONER'S RESPONSE TO AMICUS CURIAE**

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**A. ISSUE PRESENTED**

Amici asks this Court to re-examine Washington's sex offender registration law in light of studies purporting to show it is ineffectual and unnecessary. Other studies, however, suggest the opposite. Is the interpretation of this conflicting data a policy question best considered by the legislature?

**B. ARGUMENT<sup>1</sup>**

**1. THE LEGISLATURE IS RESPONSIBLE FOR DECIDING PUBLIC POLICY.**

Amici asks this court to order changes to the registration scheme because, they allege, it is ineffective at reducing already low sex offender recidivism rates. Academic authority is hardly uniform on these points. But the more fundamental flaw in amici's argument is that it is addressed to the wrong institution. The legislature, not the judiciary, is entrusted with weighing academic studies against the public's desire for information about sex offenders living in their communities.

The legislature is the "fundamental source for the definition of this state's public policy." Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001); WASH CONST. art. II, § 1. Thus, it is inappropriate for the

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<sup>1</sup> Multiple briefs in this case have previously described the statutory scheme for sex offender registration in Washington. It is unnecessary to repeat this background information again here.

court to consider whether sex offenders *should* be required to register, or to weigh the benefits and demerits of such a policy. Rouso v. State, 170 Wn.2d 70, 74, 239 P.3d 1084 (2010). While courts are qualified to determine whether legislation is constitutional, they are not empowered to base decisions on whether they believe a particular policy is wise. Id. at 87-88; Port of Tacoma v. Parosa, 52 Wn.2d 181, 192, 324 P.2d 438 (1958); Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963).

When the legislature enacted a sex offender registration scheme, it apparently concluded that the benefit to the public outweighed any potential hardship to offenders. Amici would obviously have come to a different conclusion, but this is irrelevant to the court's inquiry. The constitution does not ask courts to supervise whether legislators have selected the optimum method for addressing a social problem. Smith v. Doe, 538 U.S. 84, 87, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). If amici believe Washington's registration law is poor policy, they should address their concerns to the legislature. Northwest Animal Rights Network v. State, 158 Wn. App. 237, 246, 242 P.3d 891 (2010). Questions about the efficacy of registration have no bearing on whether it is punitive for ex post facto purposes, nor on any of Batson's other constitutional claims. Wallace v. New York, 40 F.Supp.3d 278, 319 (E.D. N.Y. 2014); see

ACLU of Nevada v. Masto, 670 F.3d 1046, 1057 (2012) (“Even had [the district court] adopted the [defense expert]’s conclusions as its own, a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community.”).

**2. THE RECIDIVISM RATE FOR SEX OFFENDERS, AND THE EFFICACY OF REGISTRATION IN REDUCING THAT RATE, IS DISPUTED.**

Amici presents studies purporting to show that sex offenders have a relatively low recidivism rate. This data, however, can be misleading:

Unfortunately, recidivism remains a difficult concept to measure, especially in the context of sex offenders. The surreptitious nature of sex crimes, the fact that few sexual offenses are reported to authorities and variation in the ways researchers calculate recidivism rates all contribute to the problem.

The measurement problems found in sex offender recidivism research no doubt have contributed to a lack of consensus among researchers regarding the proper interpretation of some research findings and the validity of certain conclusions. While there is broad agreement that observed recidivism rates are not true reoffense rates, the magnitude of the gap between observed and actual reoffending, the propensity of sex offenders to reoffend over the life course and whether it is valid to characterize sex offender recidivism rates as low or high are examples of key issues that are subject to divergent viewpoints. While debate concerning the interpretation and policy implications of research findings occur in many public safety areas, it is both pronounced and ongoing in the context of sex offender recidivism.<sup>2</sup>

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<sup>2</sup> Roger Przbyski, Summary, Chapter 5: Adult Sex Offender Recidivism, Sex Offender Management Assessment and Planning Initiative, ([https://www.smart.gov/SOMAPI/sec1/ch5\\_recidivism.html](https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html)) (last accessed 2/10/2010).

Attempts to compute the efficacy of registration might differ due to variances in defining recidivism, follow-up periods, study methodology, or any of several other factors. While it is laudable in theory to align legislative practice with empirical evidence, “bridging the gap is plagued by measurement problems and conflicting interpretations of the existing scientific evidence.”<sup>3</sup>

Many sex offenders do not reoffend immediately following release, but years, or even decades, later. Doe, 538 U.S. at 104.<sup>4</sup> Those studies relying on shorter follow up periods “may mislabel a considerable proportion of repeat offenders as nonrecidivists, resulting in a significant underestimation of the absolute risk to public safety that sex offenders pose.”<sup>5</sup> While sex offender recidivism hovers around 14% after 5 years, this number balloons to almost 25% if individuals are followed for 15 years.<sup>6</sup> The numbers are even more alarming for high risk cohorts. For

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<sup>3</sup> Id.

<sup>4</sup> See also Janyee Mathis, Updating the Law to Keep Pace With Newsfeeds and Online Victimization: The Need for Limited Access to Sex Offenders’ Online Identifiers, 49 Sw. L. Rev. 169, 175 (2020) (“additional research illustrated that [sex] offenders are more likely to recidivate over time, contrary to general crime offenders who tend to settle down with age.”).

<sup>5</sup> Przbylski, *supra*.

<sup>6</sup> Andrew Harris and R. Karl Hanson, Sex Offender Recidivism: A Simple Question, 7, Corrections Users Report No. 2004-03 Ottawa, ON, Canada: Public Safety and Emergency Preparedness Canada (2005) (available at <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/sx-ffndr-rcdvsm/sx-ffndr-rcdvsm-eng.pdf>) (last accessed 2/11/2020).

example, one study showed that the most serious sex offenders in Washington, defined as those ineligible for alternative sentencing, had a recidivism rate of 31% within seven years.<sup>7</sup> Another long-term study estimated that the highest risk child molesters had a 52% lifetime recidivism risk;<sup>8</sup> see also State v. Purser, 153 Ohio App.3d 144, 150, 791 N.E.2d 1053 (2003) (“Some studies have estimated the rate of recidivism as being as high as fifty-two percent for rapists and seventy-two percent for child molesters.”).

Furthermore, up to 86% of sex crimes against children may go unreported. Belleau v. Wall, 811 F.3d 929, 933 (7th Cir. 2016). Because sex offenses are often not reported, “researchers widely agree that observed recidivism rates are underestimates of the true re-offense rates of sex offenders.” People v. Pepitone, 2018 IL 122034 n.3, 106 N.E.3d 984 (2018).<sup>9</sup>

Academic authority regarding the deterrent effect of registration is also unsettled. One study found that California’s publication of sex

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<sup>7</sup> Lin Song and Roxanne Lieb, Washington State Sex Offenders: Overview of Recidivism Studies at 1, Washington State Institute for Public Policy, [https://www.wsipp.wa.gov/ReportFile/1188/Wsipp\\_Washington-State-Sex-Offenders-Overview-of-Recidivism-Studies\\_Full-Report.pdf](https://www.wsipp.wa.gov/ReportFile/1188/Wsipp_Washington-State-Sex-Offenders-Overview-of-Recidivism-Studies_Full-Report.pdf) (last accessed 2/10/2020).

<sup>8</sup> Harris and Hanson, *supra*, at 11.

<sup>9</sup> Quoting Sex Offender Management Assessment and Planning Initiative, Chris Lobanov-Rostovsky & Roger Przbylski, eds., Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking 91 (2014).

offender information on the Internet both deterred the commission of sex offenses in general and reduced recidivism.<sup>10</sup> Other researchers found registration had no effect on sex offender recidivism, but discerned a deterrent effect on the general population, “averting approximately three new first-time sex crime cases per month.”<sup>11</sup> There is “evidence that registration laws reduce the frequency of reported sex offenses,” but that additional notification is counterproductive.<sup>12</sup> In Minnesota, however, community notification laws appear to have had “a deterrent effect on sex offense recidivism.”<sup>13</sup>

Even a study relied on by amici acknowledged that sex offender recidivist rates approach 15%, and that the re-offense rates for individuals “who demonstrate deviant sexual interest and antisocial disorientation can

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<sup>10</sup> William Encinosa and Michael Rouissis, An Empirical Analysis of California Assembly Bill 488: Access to Information on Registered Sex Offenders Over the Internet Reduces Recidivism, 12 Fla. Coastal L. Rev. 429, 449 (2011).

<sup>11</sup> Dr. Elizabeth J. Letourneau, et al., Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women, 4-5, Medical University of South Carolina (2011) (available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf>) (last accessed 2/12/2020).

<sup>12</sup> J.J. Prescott and Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?, 54 JLECON 161, 192 (2011).

<sup>13</sup> Megan’s Law in Minnesota: The Impact of Community Notification on Sex Offender Recidivism, 46, Minnesota Department of Corrections (available at <https://pdfs.semanticscholar.org/50d3/0e5ef1503f6a7f165b9881f5c0aed5274131.pdf>) (last accessed 2/12/2020);

Chris Lobanov-Rostovsky, Sex Offender Management Assessment and Planning Initiative, Chapter 8: Sex Offender Management Strategies, Sex Offender Registration and Notification ([https://www.smart.gov/SOMAPI/sec1/ch8\\_strategies.html](https://www.smart.gov/SOMAPI/sec1/ch8_strategies.html)) (last accessed 2/10/2020).

be significant.”<sup>14</sup> Amici’s authorities do not necessarily advocate for abolishing registration, but for limiting it to the most serious offenders.<sup>15</sup>

The point of presenting this information is not to prove that registration is the best solution for reducing recidivism, or to have the court accept any particular study. Rather, it is meant to illustrate why the legislature is uniquely suited to debate the academic merit of conflicting studies as a matter of both constitutional principle and practical application. As the Pennsylvania Supreme Court has acknowledged:

We recognize there are studies which find the majority of sexual offenders will not re-offend, and that sex offender registration laws are ineffective in preventing re-offense; we also recognize there are studies that reach contrary conclusions. In this context, we find persuasive PDAA’s argument that policy regarding such complex societal issues...is ordinarily a matter for the General Assembly.

Commonwealth v. Muniz, 640 Pa. 699, 746, 164 A.3d 1189 (2017).

**3. AMICI FAILS TO CONSIDER THE UNIQUE HARM CAUSED BY SEX OFFENDERS, AS WELL AS BENEFITS TO REGISTRATION THAT MAY ESCAPE STATISTICAL ANALYSIS.**

Whether sex offender recidivism rates are “low” is a matter of perspective. Society may be prepared to absorb a 75%, or even 95%, risk that a shoplifter might strike again without resorting to tools like

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<sup>14</sup> Monica Robbers, Life on the Outside: Sex Offenders and Disintegrative Shaming, 53 Int’l Journal of Offender Therapy and Comparative Criminology 5, 9 (2008).

<sup>15</sup> Id. at 24.

registration. However, the same society could conclude that even a 5% risk of recidivism for rape or child molestation is intolerable. Amici's reliance on statistical studies ignores relative moral judgments that factor into such policy questions.

Amici avers that sex offender recidivism is much lower than the recidivism rate for property offenses like theft, and they are probably correct. Brief of Amicus Curiae at 3. But amici fail to consider that the damage caused to society by sex offenders is qualitatively more harmful than most other crimes. See People v. McKee, 207 Cal App. 4<sup>th</sup> 1325, 1342, 144 Cal.Rptr.3d 308 (2012) ("The People presented evidence that the victims of sex offenses suffer unique and, in general, greater trauma than victims of nonsex offenses"); see Doe, 120 F.3d at 1266 (studies show that molested children are more likely to develop psychological problems and later be abusive themselves). These comparisons thus fail to tell the whole story of the legislature's policy rationale.

The level of one's desire to mitigate harm is influenced by its severity, not just its likelihood. The State has a heightened responsibility to protect its residents from this class of offender. Citizens should rightly "ask themselves whether they should worry that there are people in their community who have 'only' a 16 percent or an 8 percent probability of molesting young children – bearing in mind the lifelong psychological

scars that such molestation frequently inflicts.” Belleau, 811 F.3d at 933-34.

Other positive effects of registration are challenging to account for and likely escape numerical analysis. For example, it is difficult to accurately calculate how many people never became victims in the first place because they were aware of a registrant’s presence and took steps to protect themselves. Current registration laws originated in large part, after all, from the rape and murder of a 7-year-old girl whose parents “said they never would have let her play outside unsupervised if they had known that their neighbor [who kidnapped Megan]...was a sex offender.”<sup>16</sup> Even if registration does not reduce recidivism in broad statistical metrics, the legislature can still desire to give individual citizens the tools to protect themselves. L.A. v. Hoffman, 144 F.Supp.3d 649, 666 (D. New Jersey 2015).

It is also unclear how many sex offenses were solved because police investigators knew how to find a particular registrant. Furthermore, non-compliance with registration is a major risk factor for recidivism, thus

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<sup>16</sup> Olivia Waxman, The History Behind the Law That Created a Registry of Sex Offenders, Time Magazine (May 30, 2017) (available at <https://time.com/4793292/history-origins-sex-offender-registry/>).

allowing law enforcement to focus their resources on those individuals most likely to re-offend.<sup>17</sup>

It is undeniable that registration inconveniences some offenders. But highlighting favorable studies and cataloguing the difficulties these individuals face in the community cannot substitute for the legislature's decision-making process. This Court should resist the temptation to referee political disputes and consider only the legal merits of Batson's position.

**C. CONCLUSION**

The State respectfully requests this Court reverse the Court of Appeals and reinstate Batson's conviction for failing to register.

DATED this 25 day of February, 2020.

Respectfully submitted,

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<sup>17</sup> Daniel Freedman, Determining the Long Term Risks of Recidivism and Registration Failures among Sexual Offenders, 76 Federal Probation 14, 16 (2012).

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