No. 13-110318-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

JOHN DOE,
Plaintiff-Appellee,

vs.

KIRK THOMPSON, DIRECTOR OF THE KANSAS BUREAU OF INVESTIGATION, AND FRANK DENNING, JOHNSON COUNTY, KANSAS, SHERIFF,
Defendants-Appellants.

BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County
Honorable Larry D. Hendricks
District Court Case No. 12-C-168

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Kansas law has required registration by certain offenders since 1993. As the state's registration legislation has been amended, the increasingly more onerous requirements have been applied retroactively. John Doe, a registrant under the Kansas Offender Registration Act ("KORA"), K.S.A. § 22-4901, *et seq.*, since 2003, challenged the retroactive application of the Act and all concomitant burdens. This is an appeal of, *inter alia*, the district court's ruling that this retroactive application violates the Ex Post Facto Clause of the United States Constitution.

STATEMENT OF ISSUES

I. Should the judicial notice statute, K.S.A. § 60-409, be construed to apply to non-adjudicative facts when the text is silent regarding its scope and applying it to non-adjudicative facts would be contrary to established practice, require artificial ignorance by Kansas courts evaluating questions of great importance, and create absurd results?

II. Did the district court commit reversible error for refusing to exclude out-of-court statements when those statements were offered for purposes other than the truth of the matters asserted and not relied upon in the district court's decision on the merits of the case?

III. Is the KORA punitive, such that its retroactive application violates the constitutional prohibition of ex post facto laws?

IV. Did the district court properly exercise its discretion by permitting a litigant functioning as a class representative to pursue a constitutional challenge under pseudonym after careful consideration of every factor supplied by the *Unwitting Victim* test?

STATEMENT OF FACTS

John Doe has been subject to the registration and notification requirements of the KORA since he was convicted of a covered offense on February 19, 2003. Vol. IV, p. 313; K.S.A. § 22-4902 (2002). The conduct that provided the factual basis for the conviction occurred between December 2001 and April 2002. Vol. IV, p. 311.

The text of the law in effect when Mr. Doe was first required to register speaks for itself, but it generally required mailing in a verification form supplied by the KBI every 90 days, K.S.A. § 22-4904(c) (2002), *see, e.g.,* Vol. IV, pp. 335-60, for a period of ten years for a first conviction of a covered offense. K.S.A. § 22-4906(a) (2002). Law enforcement and the KBI could make registration information available for

inspection online for the same period of time. *See* K.S.A. § 22-4909 (2002). No distinguishing identifier was required to be placed on a registered offender's driver's license. *See* K.S.A. § 8-243 (2002). No registration fees applied. *See* K.S.A. § 22-4901, *et. seq.* (2002). A KORA violation was a severity level 10, nonperson felony. K.S.A. § 22-4903 (2002).

A series of amendments to the KORA were subsequently passed by the Kansas legislature, including amendments effective July 1, 2011, increasing Mr. Doe's registration period from 10 to 25 years. 2011 Senate Bill 37. The text of the current KORA speaks for itself, but notable differences from the law in effect when Mr. Doe was first required to register include tiered registration durations extending ten-year terms of registration and notification to terms of 15 years, 25 years, or lifetime (K.S.A. § 22-4906), quarterly in-person reporting to law enforcement in each county of residence, employment, and schooling and in-person reporting with every change of residence, employment, and schooling (K.S.A. § 22-4905), and $20 fees to be paid at every quarterly registration in each county of residence, employment, and schooling (K.S.A. § 22-4905(k)). Convictions for non-fee-related violations now range from severity level 6, person felonies to severity level 3, person felonies, K.S.A. § 22-4903(c)(1), and a conviction for missing two or more fee payments is a severity level 9, person felony. K.S.A. § 22-4903(c)(3)(B). In addition, distinguishing identifiers must be placed on registered offenders' drivers' licenses. K.S.A. § 8-243.

On February 15, 2012, approximately one year before his 10-year registration period would have expired, Mr. Doe filed this action seeking declaratory judgment in Shawnee County district court. Vol. I, pp. 9-25. The parties filed motions for summary judgment on November 9, 2012. Vol. II, pp. 85-175; Vol. III, 176-288; Vol. IV, pp. 296-639; Vol. V, pp. 64-885. Judge Hendricks issued his decision granting summary judgment to Mr. Doe on July 15, 2013. Vol. X, pp. 1838-67. The Defendants timely appealed. Vol. X, p. 1868-70.

ARGUMENTS AND AUTHORITIES

I. Like the district court, this Court should consider legislative facts in its evaluation of the constitutionality of retroactive application of the KORA.

The Appellants contend that K.S.A. § 60-409 precluded the district court from considering relevant social science regarding sex offenders and the effects and efficacy of offender registration laws in the form in which they were submitted by the Appellee. The Appellee believes K.S.A. § 60-409 applies only to adjudicative facts, not the legislative facts the Appellants seek to exclude from the Court's consideration.

The issue is one of statutory construction. Because "[i]nterpretation of a statute is a question of law, . . . an appellate court's review is unlimited." *State v. Maass*, 275 Kan. 328, Syl. ¶ 1, 64 P.3d 382 (2003). Various canons of statutory construction apply. Applicable in this case is the "absurd result" rule of statutory construction,

which dictates that courts construe statutes in a manner that avoids absurd results. *State ex. rel. Beck v. Gleason*, 148 Kan. 1, 14, 79 P.2d 911 (1938).

A. The social science information considered by the district court constitutes legislative fact, not adjudicative fact.

The state of social science regarding the effects and efficacy of offender registration legislation is legislative fact, not adjudicative fact. Adjudicative facts are the "historical facts pertaining to the incidents which give rise to lawsuits." 2 McCormick on Evidence § 331, p. 611 (7th ed. 2013). Legislative facts, by contrast, have broad application and supply the grounds for policy judgments. Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 77 (1960); 2 McCormick, at p. 611. These are the facts demonstrated by the social science materials submitted with Mr. Doe's brief—such as the fact that, in the general population of sexual offenders, recidivism rates decline over time and the fact that notification schemes have not resulted in improved community safety.

Legislative facts do not become adjudicative simply because they are important to the case. The United States Supreme Court's decision in *Smith v. Doe* is illustrative. The Court considered social science research not in the summary judgment record, and relied on it in reaching its decision. The Appellants' attempt to categorize this information as adjudicative fact is unavailing.

B. K.S.A. § 60-409's silence regarding its scope does not extend its coverage to legislative facts. At most, it suggests that the statute is ambiguous.

While the Appellants correctly note that Kansas's judicial notice statute does not echo the federal statute's explicit recognition of the distinction between adjudicative facts and legislative facts, their interpretation of K.S.A. § 60-409's silence is unsupported by authority and impracticable. Michael Barbara's *Lawyer's Guide to Kansas Evidence*, cited by the Appellants in support of their argument, simply notes what is apparent from a rudimentary comparison of the statutes: Fed. R. Evid. 201 explicitly mentions legislative facts where K.S.A. § 60-409 does not. That does not mean that K.S.A. § 60-409 applies to legislative facts as well as adjudicative facts.

As demonstrated by the interpretation supplied by the Honorable Steve Leben, the silence is at least equally susceptible to a contrary interpretation—that K.S.A. § 60-409 does not apply to legislative facts. Steve Leben and Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away Cases*, 37 Washburn L.J. 497, 530-31 (1998) ("Judicial notice is governed by section 60-409 of the Kansas Statutes Annotated, which, like the federal rule, appears not to have been intended to apply to a court's finding of legislative facts. It appears then that, as in the federal system, there is no statutory prohibition against the use of social science research in determining legislative facts."). Appellee's alternative interpretation is dubious, given that this

Court has frequently considered, and relied upon, legislative facts without trying to push them through the 60-409 framework. *See* section I.C.1., below.

C. Applying K.S.A. § 60-409 to legislative facts would be contrary to established practice, require artificial ignorance by Kansas courts when evaluating questions of great importance, and create absurd results.

To the extent that K.S.A. § 60-409's silence creates ambiguity regarding the scope of its application, an interpretation applying it to adjudicative facts only is far more sound than the Appellant's proposed interpretation. Applying K.S.A. § 60-409 equally to legislative and adjudicative facts would not only be contrary to established Kansas court practice, it would undermine the policy considerations that underscore that practice by depriving the judiciary of valuable tools in evaluating the impact of its decisions:

> When justice is blind to the fruits of scientific and social scientific research, and to the demonstrable effects of a statute in operation, rules of law are divorced from the empirical world. Courts are thus rendered impotent in the exercise of their duty to safeguard fundamental constitutional guarantees for rights may be violated in innumerable ways not apparent by speculation.

Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 656 (1988) (discussing the importance of legislative facts in constitutional review). Applying K.S.A. § 60-409 equally to legislative and adjudicative facts would impose artificial ignorance on Kansas courts deciding questions of great importance. Absurdly, it would allow

Kansas courts to rely on social science information quoted in other courts' opinions while preventing them from making independent assessments of the validity of that information. The Appellants' interpretation of K.S.A. § 60-409 is simply unworkable.

1. Applying K.S.A. § 60-409 to legislative facts would be contrary to established practice.

By taking notice of the legislative facts, the district court did not "create[] a whole new category of evidence that would operate outside the statutory rules of evidence." Appellants' Brief, p. 19. The process of judicially noticing legislative facts has always eluded codified systems of judicial notice. 2 McCormick, at p. 614; *see also* Edward J. Imwinkelried, 2 Courtroom Criminal Evidence § 3001 (4th ed. 2005) ("Judicial notice embraces at least three distinct subjects: (1) Judicial notice of adjudicative facts; (2) Judicial notice of legislative facts; and (3) Judicial notice of law. Only the first type - notice of adjudicative facts is a proper subject of the rules of evidence . . . ."). Legislative facts encompass information relevant to the effects of legislation on the public at large—information that, in order to serve its purpose, may need to be gathered by the judiciary from sources other than opposing counsel. 2 McCormick, at p. 614. Contrary to the Appellants' assertions, *see* Appellants' Brief, p. 20, legislative facts generally are not necessarily indisputable. 2 McCormick, at p. 614. By their very nature, legislative facts are insusceptible to tightly-drawn evidentiary rules.

American courts have been receiving non-adjudicative facts by procedures outside the scope of evidentiary rules since long before K.S.A. § 60-409's enactment. Louis Brandeis submitted the first "Brandeis brief" in *Muller v. Oregon*, 208 U.S. 412, 28 S. Ct. 324 (1908). After Muller, social science briefs became customary in constitutional litigation, paving the way for landmark constitutional decisions like *Brown v. Board of Education*, 347 U.S. 483, 746 S. Ct. 86 (1954). And Kansas courts have embraced the practice of considering legislative facts in rendering their decisions.

For example, this Court has reviewed science on the correlation between witness certainty and witness reliability multiple times. In *State v. Warren*, the Court was asked whether a trial court abused its discretion by refusing to permit an expert to testify regarding the unreliability of eyewitness identification and by refusing to give a cautionary instruction on eyewitness identification. 230 Kan. 385, 635 P.2d 1236 (1981). The Court expressed concern that "[i]n spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it." *Id.* at 392. After considering "literature on the subject," the Court concluded that requiring trial courts to admit expert testimony on the issue was not

the proper tack and directed that a cautionary jury instruction should be used. *Id.* at 395.

When the propriety of the cautionary instruction was questioned, this Court again turned to the "literature on the subject." In *State v. Mitchell*, the parties did not argue the merits of any particular studies on eyewitness reliability, but the Court looked to other jurisdictions that had considered the issue and examined the available science. 294 Kan. 469, 480-81, 275 P.3d 905 (2012). The Court ultimately agreed with the Connecticut Supreme Court's review of scientific reports and determined that "available studies are not definitive on the question whether there is a significant correlation between certainty and accuracy." *Id.* at 481. "[M]indful that the literature suggests certainty may not always be as reliable an indicator of accuracy," the Court concluded that the language of the challenged instruction placed "undue weight on eyewitness certainty evidence." *Id.* at 481.

Mindful of the broad application of its decisions, this Court has examined social science when deciding constitutional questions. In determining that the unlawful voluntary sexual relations statute, K.S.A. 2004 Supp. 21-3522, violated the equal protection provision of the Fourteenth Amendment to the United States Constitution, this Court relied on social science studies "indicating that sexual orientation is already settled by the time a child turns 14, that sexual orientation is not affected by the sexual experiences teenagers have, and that efforts to pressure teens

into changing their sexual orientation are not effective." *State v. Limon*, 280 Kan. 275, 297, 122 P.3d 22 (2005). In an apparent critique of methodology, the Court noted that "[n]either the Court of Appeals nor the State cite[d] any scientific research or other evidence justifying the position that homosexual sexual activity is more harmful to minors than adults." *Id.* at 296. The Court then relied on studies submitted by the amici curiae to conclude that the law lacked a factual connection to the espoused State interest in protecting the sexual development of children in a manner "consistent with traditional sexual mores." *Id.* at 297. The information supporting the Court's conclusion was not presented into evidence through the testimony of expert witnesses. Rather, it was received for the first time in the amici's Brandeis Brief. *Id.*

If the Appellants are correct, this Court's use of scientific information in *Warren*, *Mitchell*, *Limon*, and assorted other cases would be invalidated.

2. Applying K.S.A. § 60-409 to legislative facts would require artificial ignorance by Kansas courts when evaluating questions of great importance.

Because the social science regarding the effects and efficacy of offender registration laws has shifted since *State v. Myers* and *Smith v. Doe*, the Appellants could not find contemporary sources to support their position. Unable to refute current social science on the subject, the Appellants sought instead to exclude it. Their argument is not only contrary to established practice but contrary to the public policy

on which that practice was built—that the judiciary be cognizant of the world in which the law operates.

"The very nature of the judicial process necessitates that judges be guided, as legislatures are, by considerations of expediency and public policy. They must, in the nature of things, act either upon knowledge already possessed or upon assumptions, or upon investigations of the pertinent general facts, social, economic, political, or scientific." 2 McCormick, at p. 610. This information—"legislative facts"—that the Appellants desire the Court to ignore, informs judicial review in all cases. But it is particularly important to the judiciary in constitutional litigation. For, "when a court makes . . . constitutional law, it must attempt to decide not only the case before it but also a great many similar 'cases' not in court." Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. at 77. Thus, "'legislative facts' of broader application need illumination so that the court may make the best possible prediction of the effects of its decision." *Id.*

The Appellants' arguments demonstrate the significance of legislative facts to the constitutional question presently before the Court. For the duration of this case, the Appellants have maintained that *Smith v. Doe* controls. Significant portions of *Smith*'s analysis of the *Mendoza-Martinez* factors are directly based in the social science available at the time of the decision. *See, e.g., Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140 (2003) (relying on Department of Justice reports to support the

proposition that sex offenders pose a high risk of recidivism); *id.* at 104 (relying on a National Institute of Justice report to support the proposition that recidivism may be delayed). The Appellants built their arguments on this foundation of social science, directly quoting reports cited by the *Smith* court in their briefing in the district court and on appeal. Vol. III, pp. 189-90; Vol. VIII, p. 1450; Appellants' Brief, pp. 33-34. The Appellants' briefing on the merits demonstrates the impossibility of applying *Smith* to Mr. Doe's case without examining *Smith*'s underlying rationale. Yet, they balked when Mr. Doe asked the district court to consider information of the same ilk.

Legislative facts do become legal precedents, but they are not impervious to updated information. In his 1960 Supreme Court Review article discussing and advocating for the use of legislative facts in constitutional litigation, renowned constitutional law scholar, Kenneth Karst, explained that "[m]uch of the law's vitality comes from the willingness of courts to re-examine findings of legislative fact to a far greater extent than they re-examine other propositions of law":

> Abstractly, we might say that no rule of law should outlive its basis in legislative fact . . . . There is no . . . need to preserve the underlying findings of legislative facts beyond the time when they cease to reflect judicially determined reality. In other words, outmoded assumptions of legislative fact need not be extended to new cases, and the obvious corollary is that counsel must be given the opportunity to show that earlier findings fail to describe present fact.

Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. at 108. As Professor Ann Woolhandler has observed, counter-presentations are inevitable when contestable

studies form the basis of judicial decisions. *Rethinking the Judicial Reception of Legislative Facts*, 41 Vand. L. Rev. 111, 118 (1988). As is typical and expected, Mr. Doe challenged *Smith* by presenting information demonstrating that the assumptions and conclusions that formed the basis for that decision have been proven wrong after further inquiry.

3. The Appellants' interpretation of K.S.A. § 60-409 is impracticable and would create absurd results.

The Appellants' interpretation of K.S.A. § 60-409 would make litigation unnecessarily cumbersome and create absurd results. When no material facts respecting the litigants are disputed, courts would be forced to take cases to trial solely to develop issues pertinent to the broader application of the case. Experts would be required to permit judges to consult readily available information—despite the fact that, until the Appellants' proposal, the judiciary has generally accepted such information without expert witnesses furnishing foundation. *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 496 (1986) (noting that "[t]he parties appear to be free either to present legislative facts via expert witnesses at a hearing or to include them in briefs, as Brandeis did in Muller" and advocating briefing as the superior vehicle for presenting social science).

By repeating the social science reports quoted in *Smith*, it seems the Appellants carve out an exception for the consideration of social science whenever it has already

been incorporated in published legal authority. Absurdly, the Appellants' interpretation would permit the district court to consider social science information that has been quoted in other courts' decisions regarding the constitutionality of sex offender registration laws (even though it may be outdated), but it would not permit it to consider directly the same or similar information. This would be the case even though the information cited by other courts has not been filtered through the rules of evidence as the Appellants desire. Like this case, *Smith v. Doe* was decided in the district court on summary judgment, 538 U.S. at 91, and the information on which it relies is not followed by citations to the record but by direct citations to the social science reports. *See, e.g., Id.* at 104 (citing R. Prentky, R. Knight, and A. Lee, U.S. Dept. of Justice, National Institute of Justice, Child Sexual Molestation: Research Issues 14 (1997)).

However, if publication in legal authority is an exception to the reception of legislative facts by Kansas courts, Mr. Doe can offer plenty by this avenue. Just as the initial, untested data was incorporated into the *Smith* decision, updated information regarding the effects of registration has been incorporated into law in jurisdictions that have declined to let offender registration legislation outlive its basis in legislative fact. *See, e.g., Doe v. Alaska*, 189 P.3d 999, 1009-12 (Alaska 2008); *Starkey v. Dep't of Corrections*, 2013 OK 43, ¶ 56, 305 P.3d 1004 (Okla. 2013).

D. While the Court should not ignore valuable information regarding the effects and efficacy of offender registration legislation, analysis of the *Mendoza-Martinez* factors does not require reliance on specific social science reports or findings.

While this Court can and should consider legislative facts, reliance on specific social science reports and findings is not essential to affirming Judge Hendricks's ruling. Findings and conclusions in such reports can be reached by other means. They may be reached by exercising common sense, applying the Court's collective experience, consulting the *Myers* decision's summary of the defendant's proffer, and considering personal experiences conveyed by Mr. Doe in his declaration.

This Court has reached such conclusions by alternative means before, and it has done so specifically in evaluating the constitutionality of sex offender registration law. For example, in *State v. Myers*, the Court found that "[t]he practical effect of such unrestricted dissemination [of registration information] could make it impossible for the offender to find housing or employment." 260 Kan. 669, 696, 923 P.2d 1024 (1997). No supporting citation follows this statement, and no citation is necessary. Common sense indicates that broad public dissemination of offender criminal history will create housing and occupational difficulties. The same is true with regard to recidivism. It is a matter of common knowledge that crime rates are higher among the unemployed and homeless population.

Other courts have found retroactive application of similar offender registration legislation unconstitutional simply by comparing amended laws against prior laws and

making reasonable inferences about the effects of those amendments. *See, e.g., Ohio v. Williams*, 129 Ohio St. 3d 344, 2011 Ohio 337, 349, 4952 N.E.2d 1108 (Ohio 2011) ("Based on these significant changes to the statutory scheme governing sex offenders, we are no longer convinced that R.C. Chapter 2950 is remedial . . . ."); *Wallace v. Indiana*, 905 N.E.2d 371 (Ind. 2009). Moreover, without relying on any specific findings, the Court can consider that the relevant social scientific data has changed significantly since *Smith v. Doe*.

II. Judge Hendricks properly denied the Appellants' motion to strike.

A. There is no need to review the Appellants' objections to the Doe declarations because Judge Hendricks did not rely on them.

The Appellants' opening argument is a straw man. While Judge Hendricks described the Doe declarations in the "uncontroverted facts" section of his opinion, he did not rely on the declarations in reaching his decision. There is no reference to the declarations in his analysis. Therefore, the Appellants' claim of error in Judge Hendricks's refusal to strike the declarations should be summarily rejected.

B. Common sense is an adequate substitute for the Doe declarations.

The Appellants' objections focus on Mr. Doe's statements about how others treat him and his family after learning that he is a registered offender. Specifically, they complain about Mr. Doe's statements about his children being teased at school and statements made when Mr. Doe was fired from his job. Yet Mr. Doe's experiences

are merely examples of common sense consequences of broad public dissemination of criminal history information.

Mistreatment by neighbors, peers, and employers who learned that Mr. Doe was a registered offender should be expected. It would defy common sense and life experience to expect anything less to come from effective public broadcasting of criminal history information for a select group of offenders. *See Smith v. Doe*, 538 U.S. at 109 (Souter, J., concurring) ("Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm."). When a group of penal records are selected and broadcasted with a warning, people encountering individuals identified with that group accept the statement made by selection rather than inquiring further. Even individuals who will not pre-judge someone by the sex offender label will be unlikely to take the label on themselves by association. Who would rent to a registered offender knowing that doing so would cause his or her rental property to be prominently identified on the KBI's sex offender map? What neighbor wants the same association with his or her neighborhood?

It is simply not reversible error for Judge Hendricks to have decided summary judgment after being exposed to Mr. Doe's real-world examples of what should be expected to come about from effective dissemination of criminal history.

C. Judge Hendricks could have considered the Doe declarations.

The Doe declarations are admissible to show to effects of registration on Mr. Doe. For example, Mr. Doe is competent to testify that he was fired after his manager claimed that someone had informed him that Mr. Doe was a registered sex offender. That out-of-court declaration is not offered for the truth of the matter asserted – that the manager was actually tipped off as to Mr. Doe's status. Instead, it is offered as circumstantial evidence of why Mr. Doe's employer did what he did next—fire Mr. Doe. Such circumstantial evidence is routinely admitted in employment discrimination cases. *See, e.g., Blair v. Henry Filters, Inc.*, 505 F.3d 517, 525 (6th Cir. Mich. 2007) ("these statements are admissible because they are not offered to prove that Blair was old or that he had difficulty ascending stairs. Instead, these statements are offered for the fact that Tsolis made them."); *Scull v. Wackenhut Corp.*, 2013 U.S. Dist. LEXIS 86733 (D.N.J. June 20, 2013) ("In the employment discrimination context, documents, such as an investigative report, on which an employer relies in making a termination decision are regularly admitted to show the state of mind of the person making the employment decision, a critical factor in such cases."). Furthermore, courts can consider hearsay statements contained within a declaration on summary judgment if there is a showing, or at least a possibility, that the statement would be submitted in admissible form at trial. *See Plaintiff's Response to Defendants' Motion to Strike*, at Vol. IX, pp. 1547-48. While Judge Hendricks did not cite this authority in his opinion,

it is a valid basis for rejecting the Appellants' argument. It is only one of many other valid, often unrefuted, grounds for rejecting the Appellants' complaints about Mr. Doe's declaration contained in the response brief.

Because the Appellants' argument is a straw man, the Appellee will not dedicate precious pages of briefing to the argument but, instead, incorporates by reference arguments already in the record. See Vol. IX., pp. 1543-1639.

III. The KORA violates the Ex Post Facto Clause.

Seeking to prevent laws "stimulated by ambition, or personal resentment, and vindictive malice," *Calder v. Bull*, 3 U.S. 386, 389 (1798), those laws that "might grow out of the feelings of the moment," *Fletcher v. Peck*, 10 U.S. 87, 138 (1810), the framers of the nation's Constitution included a provision prohibiting ex post facto laws, U.S. Const. Art. I., § 10, Cl. 1. Mr. Doe brought this suit alleging that the KORA violates the constitutional protection afforded by the Ex Post Facto Clause, and the district court agreed. Vol. X, pp. 1838-67. The constitutionality of a statute is a question of law subject to de novo review, *Myers*, 260 Kan. at 676, so this Court must perform its own analysis of the KORA. Using the test set out below, the Court will undoubtedly recognize that "[t]he KORA's current provisions subject Mr. Doe to punishment under any definition." Vol. X, p. 1865. "The increased requirements that are in effect, increased punishment, do not and cannot survive the revealing light of our Constitution." Vol. X, p. 1865.

A. To preserve the protections afforded by the Ex Post Facto Clause, the Court must evaluate the KORA's purpose and its effects.

The Ex Post Facto Clause forbids "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. at 390. Courts evaluate whether a law is punitive by considering the law's intent and its effect. If the legislature intends a law to exact punishment, then the Ex Post Facto Clause prohibits its retroactive application. *Smith*, 538 U.S. at Syl. (a). If the legislature intends to enact a civil, non-punitive law, a court must determine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it 'civil.'" *Id.* at 92 (quoting *United States v. Ward*, 448 U.S. 242, 248-29 (1980)). For retroactive application of a scheme legislatively categorized as civil will violate the Ex Post Facto Clause if it is actually punitive in purpose or effect. *See id.*

The United States Supreme Court has identified seven factors to consider when analyzing whether the effects of a statute are so punitive that they negate the intent of the legislature to deem the law civil:

> [1] whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment–retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Id. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) and describing the *Mendoza-Martinez* factors as "neither exhaustive nor dispositive," but "useful guideposts"). This Court has identified the most important factors as: [1] whether there is an affirmative disability or restraint; [4] whether the law promotes retribution and deterrence, the traditional marks of punishment; and, [6–7] whether the law's effects are excessive to any rationally-related non-punitive purpose. *Myers*, 260 Kan. at 695–700.

B. The world and offender registration laws have changed dramatically since *State v. Myers* and *Smith v. Doe.*

This Court last considered an Ex Post Facto Clause challenge to offender registration legislation in 1996, *State v. Myers*, 260 Kan. 669, and the United States Supreme Court last considered one in 2003, *Smith v. Doe*, 538 U.S. 84. Since these decisions, the legal landscape, the relevant social science, and the world have changed dramatically. Recognizing that this transformation has resulted in increasingly punitive effects, a trend has developed in the district courts of this state with more and more judges finding retroactive imposition of the augmented provisions violative of the Constitution. *See, e.g., State v. Broxterman*, Shawnee County Case No. 10-CR-1587 (Judge Mark Braun held that the 2011 amendments violated the Ex Post Facto Clause when applied to an offense occurring prior to July 1, 2011.) (Transcript of Broxterman Sentencing Hearing at Vol. V, pp. 842-52); *State v. Alexander*, Shawnee County Case No. 10-CR-1072 (Judge Nancy Parrish denied the State's

request for re-sentencing under the amended KORA and held that the applicable registration requirements were those in effect at the time of the offense conduct.) (Transcript of Alexander Re-Sentencing Hearing at Vol. V, pp. 854-75); *State v. O'Dell*, Shawnee County Case No. 11-CR-52 (Judge Richard Anderson found that imposition of registration obligations when no registration was required at the time of conviction violated the Ex Post Facto Clause.) (Supplemental Memorandum Decision and Order at Vol. V, pp. 877-85); *State v. Redmond*, Shawnee County Case No. 12-CR-2222, Appellate Case No. 13-110280-S (Judge Evelyn Wilson granted the defendant's motion to dismiss charges for failure to register based on the Ex Post Facto Clause.); *State v. Lord*, Butler County Case No. 13-CR-297 (Judge Charles Hart found that the distinguishable identifier placed on each registered offender's driver's license is punitive and that that form of public notification violates the Ex Post Facto Clause.) (a copy of the transcript is provided in Appendix A).

This Kansas trend coincides with a bent observable elsewhere, as the highest courts of other states evaluating offender registration legislation resembling today's KORA have held those statutes unconstitutional on ex post facto grounds. *See, e.g., Starkey v. Dep't of Corrections,* 2013 OK 43, 305 P.3d 1004 (Okla. 2013); *Ohio v. Williams*, 129 Ohio St. 3d 344, 2011Ohio 3374, 952 N.E.2d 1108 (Ohio 2011); *Wallace v. Indiana*, 905 N.E.2d 371 (Ind. 2009); *Doe v. Alaska*, 189 P.3d 999 (Alaska 2008).

Judge Hendricks joined the emerging consensus among his colleagues by granting John Doe's request for a declaratory judgment that retroactive application of the KORA violates the Ex Post Facto Clause of the United States Constitution. Vol. X, pp. 1865-66. In so holding, Judge Hendricks rejected the Appellants' argument that the result of a decade old case regarding a substantially distinct law dictates the outcome of this case. This Court should do the same. The *Smith* majority did not hold that retroactive application of registration legislation—however formulated and however implemented—can never offend the Constitution. The *Smith* majority's conclusions regarding a distinct law and based on outdated social science do not control the outcome of this case.

C. Because the purpose of the 2011 KORA amendments was preservation of federal grant money, deference to legislative intent is inappropriate.

"Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.'" *Smith*, 538 U.S. at 92 (citing *Kansas v. Hendricks*, 521 U.S. at 361). The *Smith* majority determined that the Alaska's sex offender registration statute created a civil, non-punitive regime because (1) the Alaska Legislature included an express statement of intent to create a regulatory scheme that would serve public safety; (2) the law's public disclosure provisions were codified with the Health, Safety, and Public Housing statutes, rather than the criminal statutes; and (3) Alaska's Department of Public Safety was given the responsibility of implementing the regime.

Id. at 92-96. The KORA differs from Alaska's law with respect to every single factor. The KORA has never contained an express statement of purpose. *See generally* K.S.A. § 22-4901 *et seq.*; see also *Myers*, 260 Kan. at 678. The statutes collectively known as the KORA are codified in the Kansas Code of Criminal Procedure. And the KORA is a complete statutory regime mandating stringent, step-by-step procedures for courts, offenders, probation officers, correctional facilities, the KBI, and law enforcement agencies. *See* K.S.A. § 22-4904 to K.S.A. § 22-4907. The three elements indicating a civil law in *Smith* all point toward a criminal law in this case.

Contrary to the Appellants' contentions that the purpose of the 2011 KORA amendments was public safety, legislative history demonstrates that the impetus behind their enactment was financial. Testifying before the House Committee on Corrections and Juvenile Justice, the chairperson of the group that initiated the 2011 KORA amendments stated that the "sole purpose" of the changes was to achieve the compliance necessary under the Adam Walsh Act to maintain Byrne-JAG funding from the federal government. Vol. V, p. 643. The Legislature did not review empirical evidence regarding offender behavior or the efficacy of registration and notification in Kansas to conclude that the changes were rationally related to public safety purposes. Rather, the substantive changes were enacted to preserve federal grant money.

While the financial motivation behind 2011 S.B. 37 may not render it punitive, it certainly discourages the application of a heightened burden on a registrant challenging the statute based on its punitive effects. Justice Souter explained that the "heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction." *Smith*, 538 U.S. at 107 (Souter, J., concurring). *Smith* was a "close case," as there was "evidence pointing to an intended civil characterization of the Act, but also . . . considerable evidence pointing the other way." *Id.* Among the "evidence pointing the other way," Justice Souter listed that the registration requirements were codified among criminal statutes, that statement of the registration requirement was an element of the actual judgment for covered offenses, and that offenders were obliged to initially register with state and local law enforcement. *Id.* The KORA contains similar indicia that it is not a civil regime. The statutes collectively known as the KORA are codified in the Kansas Code of Criminal Procedure. *See* K.S.A. § 22-4901, *et. seq.* Kansas courts must, at the time of conviction, inform an offender of the duty of and procedure for registration, have him read and sign a specific form related to the same, send a copy of the form to local police and the KBI, and order him report to the appropriate law enforcement agency to register. K.S.A. § 22-4904(a). And Kansas offenders do not just complete their initial registrations with law enforcement; they are obligated to report in person to

local law enforcement at least four times per year in each jurisdiction in which they reside, work, or attend school. K.S.A. § 22-4905.

If legislative intent did not clearly point in the civil direction in *Smith*, it is even less clear in this case. The economic impetus to the version of the statute at issue in this case plus the criminal components of the statutory scheme make imposing a heightened burden on a challenger inappropriate.

D. The KORA is punitive in effect.

1. The KORA imposes affirmative disabilities and restraints.

The KORA imposes significant disabilities and restraints on Kansas registrants. Many of these disabilities and restraints were not considered in *Smith*. Others were evaluated against inadequate or incorrect background information. For the reasons discussed below, the *Smith* majority's conclusions about the 1994 Alaska Sex Offender Registration Act ("ASORA") simply do not apply to the KORA.

a. In-person reporting is a significant restraint and obligation similar to the reporting required of probationers and parolees.

Unlike the law considered in *Smith* and the law in effect when Mr. Doe first registered, today's KORA requires regular in-person reporting to law enforcement. *See* K.S.A. § 22-4905; *compare* K.S.A. § 22-4904 (2002), *Smith*, 538 U.S. at 101. This in-person reporting imposes significant restraints and obligations on registrants. Under the KORA, offenders must register within three business days of coming into

any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school. K.S.A. § 22-4905(a). Transient individuals must report in person to a registering law enforcement agency within three business days of entering a county and must register at least every thirty days (but more often at the discretion of the registering law enforcement agency), providing each time a list of places that the individual has slept and "frequented" and a list of places the individual intends to sleep and "frequent." K.S.A.§ 22-4905(e). They must also report in person four times per year in each county in which they work or attend school. K.S.A. § 22-4905(b). Individuals with fixed abodes must report in person four times per year in each county in which they reside, work, or attend school. K.S.A. § 22-4905(b). This requirement expands for individuals who travel, as the act presumes that one resides "at any and all locations where the offender stays, sleeps or maintains the offender's person for seven or more consecutive days or parts of days, or for seven or more non-consecutive days in a period of 30 consecutive days." K.S.A. § 22-4902(j). An offender may be deemed to reside in multiple jurisdictions and have to register in each jurisdiction. K.S.A. § 22-4902(k). Upon change or termination of an offender's place of residence, employment status, or school attendance, he must report in person to notify the law enforcement agency where he last registered. K.S.A. § 22-4905(g). If a change of residence, work, or school involves moving counties, the offender must report in

person in both the county he is entering and in the county he is leaving. *See* K.S.A. § 22-4905(a) & (g). These duplicative in-person reporting obligations are in addition to the requirement to provide written notification of the change to the Kansas Bureau of Investigation. K.S.A. § 22-4905(g). Unless the three-day period triggered by the change falls within the offender's pre-assigned registration month (*see* K.S.A. § 22-4905(b)), this update will not fulfill the offender's quarterly reporting obligation.

Mr. Doe is subject to every single one of these in-person reporting requirements for the duration of his registration term. The district court's decision notes that the KORA's reporting requirements "impose on offenders' time and serve as a physical restraint 12 times per year for offenders who live, work and attend schools in different counties." Vol. X, pp. 1850-51. This is true. But the restraints imposed by the KORA's in-person reporting requirements are not limited to twelve times per year because travel for work and leisure easily triggers provisions that deem an offender to work or live in multiple counties. In addition to quarterly reporting, Mr. Doe must report to the local sheriff's office upon entering and exiting each county where he stays for more than seven nights, whether for work or leisure.

These provisions are not a mere inconvenience. As the Supreme Judicial Court of Maine recognized, in-person reporting imposes an "impractical impediment that amounts to affirmative disability." *State v. Letalien*, 2009 ME 130, ¶ 37, 985 A.2d 4 (Me. 2009). This is especially true given that the reporting requirements resemble

probation and parole reporting requirements. *See Smith*, 538 U.S. at 111 (Stevens, J., dissenting) ("[t]he registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole."); *id.* at 115 (Ginsburg, J., dissenting); *Wallace v. Indiana*, 905 N.E.2d at 380-81 (analogizing similar obligations to probation and parole and finding them to be affirmative restraints); *Doe v. Alaska*, 189 P.3d at 1009 (evaluating in-person reporting). A registered offender who must report in person according the KORA's requirements may be under even more supervision than someone on probation or parole. *See* Andrea E. Yang, Comment, *Historical Criminal Punishments, Punitive Aims and Un-"Civil" Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U. Cin. L. Rev. 1299, 1328, n. 199 (2007). And the penalty for failure to report is much steeper. Whereas probation or parole might be revoked for non-compliance, K.S.A. § 22-3716, non-compliance with any of the KORA's provisions will result in a new person felony conviction, ranging in severity from level 6 to 3, *see* K.S.A. § 22-4903(c), with a potential prison sentence of up to 172 months (severity level 3, criminal history A). *See* 2013 Kansas Sentencing Guidelines. The mere failure to pay a registration fee is a crime—a felony if an offender is behind by two or more payments by the sixteenth day after his last reporting. K.S.A. § 22-4903(c).

b. The dissemination of registry information significantly impairs occupational and housing opportunities for registrants.

John Doe's first-hand experience and social science studies demonstrate that public dissemination of registry information causes substantial occupational and housing disadvantages. Although he maintained his job through the pendency of his criminal action, Mr. Doe's manager spoke of registration when terminating his employment. Vol. IV, pp. 318, ¶¶ 9-10. His subsequent employment applications were rejected, sometimes with reference also being made to registration. Vol. IV, pp. 318, ¶¶ 11. Despite his model tenancy until that point, attorneys representing Mr. Doe's landlord sent a letter notifying him that his lease would not be renewed shortly after his initial registration. Vol. IV, pp. 318, ¶ 15. Mr. Doe found searching for a new residence more challenging than he had expected, given his excellent credit history and sufficient income to pay monthly rent. Vol. IV, pp. 318, ¶ 16.

Mr. Doe's vocational and residential challenges are not the exception but the rule. In a study of registered sex offenders located in Kansas and Oklahoma, employment difficulties and challenges to obtaining housing were among the most commonly reported challenges associated with registration. Richard Tewksbury & Elizabeth Ehrhardt Mustaine, *Stress and Collateral Consequences for Registered Sex Offenders*, 15(2) J. Pub. Mgmt. & Soc. Pol'y 215, 226 (2009) (Vol. VI, pp. 927).

A Department of Justice report states that "[e]xpanded notification has created enormous obstacles in locating housing resources for returning sex offenders." Richard G. Zevitz & Mary Ann Farkas, Sex Offender Community Notification: Assessing the Impact in Wisconsin, U.S. Dept. of Justice, National Institute of Justice, Research in Brief 10 (2000) (Vol. VI, pp. 951). Where registered offenders can find housing, the local community seeks to exclude them. *See id.* at 1-2 (Vol. VI, pp. 942-43) (noting that nearly one-fifth of residents attending a community notification meeting expected that the meeting would present a forum for discussing the removal or prevention of the registered offender from living in the neighborhood). The same report communicated that 57% of sampled registered offenders reported losing employment as a consequence of public notification of registry information. *Id.* at 10 (Vol. VI, p. 951).

Research indicates that obtaining and maintaining employment is more difficult for registered sex offenders than for other felons. Richard Tewksbury & Matthew Lees, *Consequences of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 Soc. Spectrum 309, 309 (2006) (Vol. VI, pp. 889). Given that society and employers attach "especially harsh stigmas" on sex offenders as a class, registered offenders report that the status of "felon" is not as hard to overcome as their "sex offender" label. *Id.* at 331 (Vol. VI, pp.911).

The Appellants miss the mark by contending that the housing and occupational difficulties registrants experience "result from the offenders' conviction, which is a matter of public record." Appellants' Brief, p. 51. If true, this necessarily undermines the foundation of their argument that the KORA serves a public safety purpose. If the public is already well-informed about registrants' underlying convictions, then public dissemination of registry information is not rationally related to public safety and is certainly excessive. Moreover, this argument avoids the inherently selective nature of the registry, the message communicated by such selection, and the logical consequences of that message:

> Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.

Smith, 538 U.S. at 109 (Souter, J., concurring). A conviction makes finding housing and employment challenging; the notification provisions under the KORA make it virtually impossible.

c. The KORA requires payment of significant fees that resemble fines.

The law under which Mr. Doe first registered required no payment of registration fees. Today, the KORA requires that Mr. Doe pay a $20 fee at each quarterly reporting in each county of residence, work, or schooling. K.S.A. §

22-4905(k). These fees are "significantly higher than other states' fees that have been deemed non-punitive." Vol. X, p. 1853 (citing *People v. Foster*, 87 A.D.3d 299, 309, 927 N.Y.S.2d 92 (N.Y. App. Div. 2011); *Horner v. Governor*, 157 N.H. 400, 404, 951 A.2d 18 (N.H. 2008)). This obligation persists for the duration of each registrant's reporting requirements—indefinitely for lifetime registrants, a minimum of 15 years for all registrants. Failure to pay the fee is a crime; delaying payment of two or more fees for more than 15 days after the most recent registration is a severity level 9, person felony. K.S.A. § 22-4903(c).

An offender who lives, works, and attends school in three different counties must pay $60 per quarter and $240 per year in registration fees. However, given that a registrant may live, work, or attend school in more than one county, quarterly fees are not capped at $60. These fees are substantial–especially considering registrants' frequently limited employment options. Sixty dollars in quarterly reporting fees represents more than one full day's pay to a registrant working full-time in a minimum wage position.

d. Kansas law requires that one's registration status under the KORA be considered by courts determining child custody, residency, and parenting time.

Registration must be considered by Kansas courts determining child custody, child residency, and parenting time. K.S.A. § 23-3203. Kansas courts are not instructed to consider a registrant's offense of conviction or the conduct underlying

the conviction. *Id.* Only consideration of registration status is required. *Id.* This significant consequence is unique to the offender's registration status and not shared by felons generally. Notably, the *Smith* court did not consider any comparable disability. *See generally Smith*, 538 U.S. 84.

Mr. Doe disagrees with the district court's determination that this statutory mandate is "a minor disability." Vol. X, p. 1854. Mr. Doe is divorced and shares custody of his daughter with his ex-wife. Vol. XI, p. 11. In any subsequent modification of this custody arrangement, K.S.A. § 23-3203 dictates factors that must be considered by the presiding judge. The fact that a court determining his access to his daughter is required to consider his registration status, although it need not consider his conviction or the conduct underlying that conviction, certainly "feed[s] suspicion that something more than regulation of safety is going on." *Smith*, 538 U.S. at 109 (Souter, J. concurring).

2. The KORA imposes sanctions that have historically been regarded as punishment.

a. The KORA imposes probation and parole-like supervision.

The in-person reporting and requirements for production of vast amounts of information, records, DNA, and finger and palm prints mirror the supervision and constraint of probation or parole. See *Morrissey v. Brewer*, 408 U.S. 471, 477, 92 S. Ct. 2593 (1972). In addition, the travel disclosure requirements, and the practical

limitation on travel caused by inflexible in-person reporting requirements, are similar to those imposed on parolees and probationers. *See* K.S.A. § 22-4905(o).

b. Shame and stigma are ineluctable consequences of public notification pursuant to the KORA.

It is disingenuous to claim that Internet notification under the KORA does not subject registrants to shaming and stigma simply because the *Smith* majority determined that ASORA's rudimentary web notification scheme did not have those effects. Notification under the KORA is significantly more aggressive than the passive scheme examined in *Smith*, and, perhaps more importantly, today's Internet is substantially different than it was when *Smith* was decided. Technology and the way it operates have changed too much since 2003 for the *Smith* decision to dictate an outcome regarding the effects of an Internet notification scheme.

Like colonial offenders forced to wear signs or letters listing their offenses, *see* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1913 (1991), Kansas registrants must have their offenses listed next the photographs that are publicly displayed according to legislative mandate. K.S.A. § 22-4909(c) (requiring that websites created by a registering law enforcement agency or the Kansas bureau of investigation prominently display a current photograph of each offender and list the offense for which the offender is registered and any other offense for which the offender has been convicted or adjudicated—in addition to much more information). Individual registrants are not only identified by their specific

offenses; the KORA requires that registrants be labeled as a groups. *See* K.S.A. § 22-4909(c) (requiring that "[a]ny information posted on an internet website sponsored or created by a registering law enforcement agency or the Kansas bureau of investigation shall identify, in a prominent manner, whether an offender is a sex offender.) And, as discussed above in Part III.D.1.b., selection for inclusion in this group is intended to send a message—one that isolates the group's members from the rest of society.

Unlike the law considered in *Smith*, the KORA brands offenders with the prominent display of their registered offender numbers following the identifier "RO" on state-issued identification. *See* K.S.A. § 8-243(d). This is a "visible badge of past criminality" that is regularly presented to people inside and outside of law enforcement, including personnel at banks, stores, hotels, restaurants, airports. Vol. X, p. 1857; Vol. IV, p. 323, ¶ 37; *State v. Lord*, Butler County Case No. 13-CR-297 (attached as Appendix A).

Also unlike Alaska's notification website, which resembled an "official archive" requiring several steps before one might access the information, *Smith*, 538 U.S. at 98, the Appellants' websites are aggressive, interactive, and employ technology that is far advanced from what was in existence under the ASORA considered in *Smith*. As the district court noted, "the websites do not merely make information available for public viewing." Vol. X, p. 1856. The public need not even

actively search for registered offenders in the area. Using the 'Community Notification' tool on the KBI website, anyone may sign up himself or someone else to receive email alerts when a registered offender registers a home, work, or school address near any address of interest. People who never requested the information may encounter it via their friends' use of the "Share & Bookmark" function on the Johnson County Sheriff's website. Vol. X, p. 1856. Alaska's website did not "provide the public with means to shame the offender by, say, posting comments underneath his record," *Smith*, 538 U.S. at 99, but the Sheriff's website's links to social media does just that. Vol. X, p. 1856.

These distinctions were sufficient for the district court to determine that the KORA's notification provisions resemble historical shaming punishments. But they are just the tip of the iceberg. The district court did not consider third-party websites and applications that further facilitate shaming of registered offenders. While they may not be mandated by the KORA, that does not mean they cannot contribute to the KORA's punitive effect. The effect of the KORA can only properly be measured in the context of the environment in which it operates. The *Smith* court distinguished Alaska's notification website from traditional shaming punishments because it did not present registered offenders to the public for face-to-face shaming, but such a distinction is not appropriate in this case. The KORA operates in a world that is significantly different from the world that existed when *Smith* was decided. Since

Smith, the Internet has transformed—creating a new public forum presenting the opportunity to virtually confront and shame registered offenders. The major social media sites that today keep people in constant communication—like MySpace, Facebook, and Twitter—did not exist when *Smith* was decided. Moreover, the Internet is vastly more accessible now. Heather Kelly, Study: U.S. mobile Web use has doubled since 2009, CNNTech (Sept. 17, 2013), http://www.cnn.com /2013/09/16/tech/ mobile/phone-internet-usage/ (reporting that 91% of American adults have cellular telephones, more than half of them are smartphones, and two-thirds of cell phone owning Americans use their phones to access the Internet); Heather Kelly, 5 ways the iPhone changed our lives, CNNTech (June 30, 2012), http://www.cnn.com/2012 /06/28/tech/mobile/iphone-5-years-anniversary (discussing how the June 29, 2007, release of the iPhone "ushered in an age of all Internet, all the time"). Kansas law now recognizes that the Internet provides a forum for "cyberbullying." *See* K.S.A. § 72-8256(a)(2). The same forum cannot simply be ignored when examining the effects of the KORA's web-based notification system.

This Court did not ignore the environment in which sex offender registration legislation operates in its review of the 1994 Kansas Sex Offender Registration Act. It should not choose to wear blinders now. In 1996, this Court demonstrated specific concern about third-party dissemination of registry information when it determined that retroactive application of the KORA's notification provisions violated the Ex Post

Facto Clause. *Myers*, 260 Kan. at 696 ("Although 22-4909 does not impose any affirmative dissemination requirements on the authorities, it imposes no restrictions on anyone who inspects the information. The information could be routinely published in the newspaper or otherwise voluntarily disseminated by anyone. The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment. We find that the KSORA public disclosure provision does impose an affirmative disability or restraint. Unrestricted public access to the registered information leaves open the possibility that the registered offender will be subjected to public stigma and ostracism . . . ."). The Court's exact concerns came to be a reality, *see Registered Sex Offenders in Shawnee County*, Topeka Capital Journal Online (July 23, 2012) (Vol. IX , pp. 1642-53) (a slide show of all registered sex offenders in Shawnee County published on July 23, 2012, with the opportunity for Journal readers to comment offered immediately below the registrants' photographs and links to facilitate sharing via Facebook, Twitter, and e-mail)—and then some. *See, e.g.*, Vol. IX, pp. 1654-1707, offendex.com, familywatchdog.us, registeredoffenderlist.org, criminalwatchdog.com, mapsexoffenders.com.

As this Court predicted, contemporary studies show that unrestricted public access to registry information subjects registered offenders to considerable stigma and ostracism. See Tewksbury & Lees, *Consequences of Sex Offender Registration*, 26 Soc. Spectrum at 325-30 (Vol. VI, pp. 905-10); Jill S. Levenson & Leo P. Cotter, *The*

Effect of Megan's Law on Sex Offender Reintegration, 21 J. Contemp. Crim. Just. 49, 52 (2005) (Vol. VI, p. 957). As discussed above in Part III.D.1.b., Mr. Doe has felt the concrete effects of this stigma, including difficulties with housing, employment, and much more. Vol. IV, p. 320. Indeed, Mr. Doe's experiences lend credence to the notion that "[s]carlet letters take a modern form in sex offender registration and notification acts."Jocelyn Ho, Note, *Incest and Sex Offender Registration: Who Is Registration Helping and Who Is It Hurting?*, 14 Cardozo J. L. & Gender 429, 429 (2008).

While the legislature likely intended more than retribution, "vengeance for its own sake," *Artway v. Attorney General*, 81 F.3d 1235, 1255 (3d. Cir. 1996), it strains credulity to claim that KORA's deterrent effect is not substantial, or that it does not promote "community condemnation of the offender," *Abercrombie v. Indiana*, 441 N.E.2d 442, 444 (Ind. 1982), both of which are included in the traditional aims of punishment.

3. The KORA requirements are triggered by a finding of scienter.

The KORA's registration requirements are triggered by a criminal conviction or juvenile adjudication. Nearly all of the offenses at issue require specific intent.

4. The KORA serves the traditional aims of punishment.

In *Myers*, this Court declared that registration and public disclosure promote traditional aims of punishment, specifically deterrence and retribution:

> Registration has an obvious deterrent effect. A registered offender is more likely to think twice before committing another sex offense when the person knows that the local sheriff already has the offender's name on a list. We acknowledge the statement in Ursery, 135 L. Ed. 2d 549, 116 S. Ct. 2135, that "the purpose of deterrence . . . may serve civil as well as criminal goals." The stigma that will accompany public exposure of the registered information could be viewed as a form of retribution. We find that the KSORA public disclosure provision may have both a deterrent and retributive effect. However, the nonpunitive purpose of the statute cannot be accomplished without informing the public that a sex offender is in its midst. If the statute limited public disclosure to that necessary to protect the public, then its deterrent effect could be viewed as incidental to its nonpunitive purpose. Unlimited public access to the registry provides a deterrent or retributive effect that goes beyond such purpose.

Myers, 260 Kan. at 696; *see also Wallace*, 905 N.E.2d at 380-81 (concluding that public disclosure of offender information resembles the historical practice of shaming and citing case law in support). Deterrence and retribution are similarly served by the registration and public disclosure requirements in the KORA.

"When a restriction is imposed equally on all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses that regulation intended to prevent future ones." *Commonwealth v. Baker*, 295 S.W.3d 437, 439 (Ky. 2009). Without regard for any individual's risk to the community, the KORA is applied evenly to all individuals convicted of crimes covered by the KORA. And, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation, "[n]o person required to register as an offender pursuant to the Kansas

offender registration act shall be granted an order relieving the offender of further registration." K.S.A. § 22-4908.

The *Smith* majority's analysis of whether offender registration legislation is retributive is inapplicable because it was based on assumptions that contemporary social scientific research has debunked. "[B]road categories . . . and the corresponding length of the reporting requirement" are not, as the *Smith* court concluded, "reasonably related to the danger of recidivism." *Smith*, 538 U.S. at 102. Most sex offenders do not recidivate, and those that do recidivate do not do so at equal rates. *See* Rebecca E. Swinburne, et. al., Predicting Reoffense for Community-Based Sexual Offenders: An Analysis of 30 Years of Data, Sexual Abuse: A Journal of Research and Treatment 3 (May 29, 2012), (Vol. VI, p.1007) (12.9% reoffense rate after 30 years); Andrew J. R. Harris & R. Karl Hanson, Sex Offender Recidivism: A Simple Question, Ottawa, ON: Public Safety and Preparedness Canada 11 (2004) (Corrections Research User Report 2004-03, on file with Static99 Clearinghouse at http://www.static99.org), ("After 15 years, 73% of sexual offenders had not been charged with, or convicted of, another sexual offense.") .

The recidivism rates of sexual offenders are conspicuously linked to identifiable risk factors like the gender of the victim, past sexual criminal history of the perpetrator, and the age of the offender. Harris & Hanson, Sex Offender Recidivism, at 11. For that reason, the Center for Sex Offender Management

recommends that registration laws incorporate "a comprehensive and ongoing assessment process to take into account the many differences between sex offenders." Final Report: Sex Offender Management Policy in the States: Strengthening Policy and Practice, supported by Award No. 2006-WP-BX-K003, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, at 16 (February 2010) (Vol. VI, p. 1066). The KORA's broad categories designating registration periods do not correlate with any readily identifiable factors. Thus, the offense-based tier system is not reasonably related to the danger of recidivism; it is simply retributive.

5. The KORA applies only to individuals convicted of certain crimes.

The text of the KORA clearly defines "offenders" as persons convicted of certain crimes. K.S.A. § 22-4902. Justice Stevens's dissenting opinion in *Smith* identified this indisputable factor as extremely important to his determination that offender registration legislation is punitive. Finding it to be "clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive," Justice Stevens noted that in each previous instance in which the Court determined that a purportedly civil regulatory scheme was specifically applied to convicted offenders, a conviction was only one way, among others, that someone might become subject to the scheme. *Smith*, 538 U.S. at 112 (Stevens, J., dissenting). That is, with respect to all other regulatory schemes that the Court had deemed

non-punitive, "conviction was a sufficient condition for the imposition of the burden, but it was not a necessary one." *Id.* at 112. "A sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment." *Id.* at 113.

6. The KORA's requirements are not rationally connected to public safety.

The law considered in *Smith v. Doe* contained an express statement of intent to create a regulatory scheme that would serve public safety. The KORA contains no such statement. Even if the Court previously read in a public safety purpose to a prior version of the law, that does not mean such a purpose necessarily applies to all amendments despite evidence to the contrary. Legislative history clearly indicates that the civil purpose served by the 2011 KORA amendments is not public safety. It is economics. If retroactive application of today's KORA is upheld, Mr. Doe and similarly situated offenders will be exposed to significantly increased burdens for significantly increased durations not to secure the public's safety, but to secure federal funding.

Even if the KORA is intended to serve public safety, it is not rationally related to that goal. The *Smith* court's determination that the 1994 ASORA was rationally connected to a public safety purpose was based on incomplete information regarding recidivism rates and zero information regarding the efficacy of registration. The *Smith* court relied on two sources in determining that sex offender recidivism rates

established a rational public safety interest underlying registration legislation: U.S. Department of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997) and U.S. Department of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 (1997). *Smith*, 538 U.S. at 103. But these reports did not provide an accurate picture of the general sex offender population. They only considered recidivism rates among a "high risk sample." Jill S. Levenson, *Sex Offense Recidivism, Risk Assessment, and the Adam Walsh Act*, 10(1) Sex Offender L. Rep. 1, 8 (2009) (Vol. VI, 1070). Recidivism rates for a corresponding sample of sex offenders referred to a treatment facility were "significantly lower." *Id* (citing Raymond A. Knight & David Thornton, Evaluating and Improving Risk Assessment Schemes for Sexual Recidivism, A Long-Term Follow-Up of Convicted Sex Offenders (Mar. 2007) (unpublished grant report for U.S. Dept. of Justice, on file with the National Criminal Justice Reference Service)). The recidivism rates cited were projected, not actual. *Id.* And the reports did not address whether registration and notification had any effect on recidivism.

Since *Smith*, researchers have inquired into the effects of registration and notification on sex offender recidivism rates. A 2011 article summarizing state panel data from all fifty states and the District of Columbia, Bureau of Justice Statistics, and location-specific data concluded that the "pattern of noneffectiveness across the data sets does not support the conclusion that sex offender registries are successful in

meeting their objectives of increasing public safety and lowering recidivism rates." Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. Law & Econ. 207, 235 (2011) (Vol. VI, p. 1101). Using Bureau of Justice Statistics that tracked the behavior of individual offenders, the study tested whether registration altered recidivism rates. *Id.* at 225. The results indicated that "an offender who should have had to register appears to behave no differently, or possibly worse, than one who did not have to register. If anything, registered offenders have higher rates of recidivism." *Id.* at 229.

A 2011 article the Journal of Law and Economics communicating the results of a study that used National Incident-Based Reporting System data to examine the efficacy of registration and notification laws reported that expanding the coverage of notification laws does not reduce crime. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. Law & Econ 161, 182 (2011), (Vol. VI, p. 1126). It notes that registration may reduce recidivism and notification may deter potential offenders but cautioned that notification laws may increase recidivism of convicted offenders. *Id.* at 186, 192 (Vol. VI, pp. 1130, 1136). And, while more and more offenders are being registered, there is a real concern that "the most dangerous predators [may] become lost among a growing swell of electronic information." Donna Lyons, *As the deadline approaches to comply with federal rules on sex offenders, some states are saying 'no thanks,'*

National Conference of State Legislatures (June 2011), available at http://www.ncsl.org/issues-research/justice/sex-offender-law-down-to-the-wire.aspx, (Vol. VI, p. 1237); Elizabeth J. Letourneau et. al., Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women 53 (Sept. 2010) (unpublished grant report for U.S. Dept. Of Justice, on file with the National Criminal Justice Reference Service) (Vol. VI, p. 1294) ("[O]nline notification was associated neither with general deterrence of sex crimes nor with reduced sexual recidivism rates . . . [and] the rapidly growing number of registered sex offenders listed on online websites may dilute the public's ability to identify truly dangerous individuals.").

Considering this information, the district court determined that the KORA's notification provisions are not rationally related to public safety. Vol. X, p. 1859-60. The Appellants insist that the district court is wrong because the KORA does not need to perfectly serve public safety interests. While a perfect fit may not be required to find a rational connection, the data does not merely demonstrate that the KORA could be more narrowly tailored. It demonstrates that the notification provisions may actually undermine public safety.

The district court determined that the registration provisions were related to public safety, but only by the slimmest of margins. Vol. X, 1859. Mr. Doe submits that any connection between registration and public safety is so tenuous it cannot

properly be considered rational. Adding more registrants for longer durations cannot improve public safety if it dilutes law enforcement's ability to track truly dangerous individuals. The swelling database of registrants, which does not discriminate based on risk for re-offense, cannot help law enforcement to focus their monitoring efforts on the most dangerous offenders. Rather, resources must be spread thin to track the ever-expanding registered offender population. *See* Zevitz & Farkas, *Sex Offender Community Notification*, at 5 (Vol. VI, pp. 946) (two-thirds of surveyed law enforcement identified labor expenditures as a concern, fifty-eight percent said complying with registration law increased workload, and one-fourth complained that the law put a strain on resources).

The Appellants' minimum efforts to apply the law to all the allegedly dangerous offenders it covers serve only to emphasize the attenuated connection. The Defendants make no effort to identify and register offenders who: (1) were never on the registry but are required to register under the current law; or (2) completed their initial registration period before the July 1, 2011, KORA amendment and have not re-entered the justice system. Vol. V, pp. 703-05. Rather, these offenders are only passively identified for registration—if they come "back on the radar" through subsequent encounters with the criminal justice system or otherwise. Vol. V, p. 705. The KBI cites inadequate resources to justify these shortcomings, but the Bureau has not actually bothered to weigh the cost of the pursuit against its benefits. Vol. V, pp.

706-08. This is not a matter of an underinclusive law, as the KORA does include these offenders within its ambit. Those charged with enforcement of the law simply assume that the costs of global enforcement outweigh the benefits. The Appellants cannot reasonably contend that the expanded provisions of the KORA are important to protecting Kansas communities from danger, while not even determining what would be required to facilitate comprehensive implementation.

To the extent that this Court agrees with the district court's determination that registration (distinct from notification) is rationally connected to public safety, the infirmity of the connection demonstrates that it deserves little weight in the Court's overall analysis of the *Mendoza-Martinez* factors.

7. The KORA's requirements are excessive in relation to any legitimate civil purpose.

Despite the Appellants' repeated requests that the Court focus on the tenuous connection between offender registration and public safety, the Court's inquiry does not end at the sixth *Mendoza-Martinez* factor. The Court must consider "whether the means chosen to carry out legitimate [civil] purposes are excessive, i.e., not close enough to be classified as non-penal." *Doe v. Alaska*, 189 P.3d at 1016. Assuming, arguendo, the KORA amendments is intended to serve a public safety interest, the means are grossly ill-fitted to that end.

Clinging to language noting that the fit need not be perfect, the Appellants ignore the corresponding mandate that the fit must be reasonable. *See Smith*, 538 U.S.

at 105. Despite scientific studies of sex offender recidivism and registry efficacy demonstrate that registration legislation does not improve public safety, the duration and extent of registration requirements and the scope of public notification have only increased. Augmenting the burdens imposed on registrants while the foundation for the asserted public safety interest dwindles is not reasonable. The KORA has exceeded the limits for offender registration to properly be categorized as non-punitive.

Dissenting in *Smith*, Justice Ginsburg noted that the excessiveness of the ASORA's requirements in relation to its nonpunitive purpose ultimately "tip[ped] the balance" toward finding that the law was punitive in effect. 538 U.S. at 117 (Ginsburg, J., dissenting). Justice Ginsburg determined that the ASORA exceeded its public safety purpose because (1) it applied equally to all offenders—without regard to future dangerousness, (2) the duration of the reporting requirement was not keyed to the offender's risk of reoffending, (3) the reporting requirements were "exorbitant," and (4) the ASORA did not allow for the shortening of registration periods upon showing of rehabilitation. *Id.* at 116-17. These same factors have caused several other states to conclude that their offender registration laws are excessive. *See, e.g., Starkey v. Dep't of Corrections*, 2013 OK 43, 305 P.3d 1004, 1029-30 (relying on Justice Ginsburg's dissent); *Doe v. Alaska*, 189 P.3d 999, 1017 (citing Justice Ginsburg's dissent); *Wallace v. Indiana*, 905 N.E.2d 371, 383-84 (Ind. 2009) (citing similar

concerns); *Ohio v. Williams*, 129 Ohio St. 3d 344, 952 N.E.2d 1108, 1112-13 (citing similar concerns).

The KORA exhibits the same characteristics: a wide array of crimes that vary greatly in severity and trigger registration requirements without consideration for the offender's risk of recidivism, *see* K.S.A. § 22-4902; periods for registration and public dissemination of the registrant's information that do not correspond to the offenders' risks for reoffending, *see* K.S.A. § 22-4906; even more cumbersome reporting requirements than those considered in *Smith, see* K.S.A. § 22-4905; and no mechanism permitting an offender to be relieved from registration or public disclosure of his registry information, *see* K.S.A. § 22-4908.

Mr. Doe's situation provides an example of how these aspects of Kansas's law are not sufficiently related to protecting public safety to be classified as non-penal. He has lived in the same Kansas community offense-free since his conviction, yet the 2011 KORA amendments require Mr. Doe to register for an additional fifteen years. The determination that the duration of his registration period should be extended was based solely on his offense of conviction, with no consideration for the risk he poses. Despite the lack of evidence that Mr. Doe presents a danger to the community, the new scheme more than doubles his originally-imposed registration period while expressly prohibiting early termination of his registration obligations. This is plainly inordinate to the objective of protecting the public's safety, and the district court

properly found that Mr. Doe's 25-year registration period is excessive. *See* Vol. X, p. 1861-62.

Notably, Justice Ginsburg determined that the foregoing aspects of the law were excessive, even considering the erroneous information the majority relied on in asserting that the ASORA appropriately served public safety interests. In light of the scientific data now available, the balance of this case clearly weighs on the excessive side. The extended duration of reporting disregards current science demonstrating that recidivism rates decrease the longer offenders remain in the community offense free and the risk of recidivism decreases as the offender ages:

> [L]ife-time probation and registration requirements are unlikely to improve community safety. We found that after the age of 45, the risk for sexual reoffending drops precipitously. In addition, our data indicate that after 20 years in the community offense free, the risk of reoffending is extremely low.

Swinburne, et. al., *Predicting Reoffense*, at 4 (Vol. VI., pp.1015-16); Harris & Hanson, Sex Offender Recidivism, at11; *see also* Letourneau et. al., *Evaluating the Effectiveness of Sex Offender Registration and Notification*, at 54 (Vol. VI, p. 1295) (recommending that the duration of sex offender registration and notification requirements be limited because "few low risk offenders will sexually reoffend and that even high risk offenders are less likely to recidivate as they age and as they accumulate time in the community offense-free.") The KORA imposes lifetime registration requirements for some first offenses, regardless of the individual

offender's risk of recidivism. Thus, a low-risk offender who remains in the community offense free might be subject to registration requirements for a lifetime, while posing no threat to the community. With the same lack of consideration for the statistical decline of risk for re-offense over time, the 2011 amendments augmented the registration duration for all offenders registered in Kansas prior their enactment.

Because the KORA is more onerous than the law considered in *Smith* and because technology has changed markedly since *Smith* was decided, the KORA is excessive in even more ways that those identified in Justice Ginsburg's dissenting opinion. As identified by the district court, the consequences for failing to satisfy KORA requirements and the stigma associated with registration are also excessive in light of the asserted purpose of public safety.

If an offender even once fails to comply with any provision of the KORA, he may be convicted of a level 6 person felony, with a potential sentence ranging from 17 to 46 months in prison. *See* 2013 Kansas Sentencing Guidelines. The district court found that the potential to be incarcerated for more than two and one half years was excessive for an otherwise compliant registrant who fails to report in person just once. Vol. X, p. 1862. The mere failure to pay a quarterly registration fee within 15 days of when it is due is a level 9 felony, with a potential sentence ranging from 6 to 17 months in prison. As the district court noted, this feature of the KORA is dramatically different from the law considered in *Smith*, under which failure to comply with

registration requirements was a misdemeanor. Vol. X, p. 1863. Although the Appellants contend that "many civil regulatory programs have steep penalties for failure to comply," Appellants' Brief, p. 45, they fail to provide any comparable example.

The district court also determined that "the effects of offender stigma and ostracism are likely greater now than they were when *Smith* was decided." Vol. X, p. 1863. Judge Hendricks made this conclusion based on the fact that KORA's notification scheme is more aggressive than the notification scheme evaluated in *Smith*. Vol. X, p. 1863. Unquestionably, the Appellants' websites are far more aggressive, as they include features that not only encourage sharing registry information but also commentary on that information. As discussed in Part III.D.2.b., the effects of offender stigma and ostracism would be greater now than when *Smith* was decided even if the Appellants' websites were more constrained because the breadth of opportunities for sharing and commenting on offenders and their information has developed exponentially.

The Appellants discount the import of the seventh *Mendoza-Martinez* factor, couching the means-ends inquiry as a policy choice for the Legislature. But this ducks the fact that the United States Supreme Court has expressly identified this *Mendoza-Martinez* factor as among the most important considerations in the evaluation of the Ex Post Facto challenges to offender registration legislation. *Smith*,

538 U.S. at 97. Under the test outlined by the United States Supreme Court, this Court is charged to evaluate the reasonableness of the KORA. When it does, it should conclude that its provisions are excessive—especially considering that its relationship to public safety is sorely lacking.

E. Because the KORA is punitive, its retroactive application violates the Ex Post Facto Clause.

Today's KORA is punitive. While the Legislature is free to determine whether it is appropriately applied prospectively, its retroactive application is not permissible under the Ex Post Facto Clause.

IV. The district court properly granted leave to proceed pseudonymously.

A. The determination of whether to permit a litigant to proceed under pseudonym is vested in the discretion of the district court.

A district court's decision to permit a litigant to proceed under pseudonym is reviewed under an abuse of discretion standard. *Unwitting Victim v. C.S.*, 273 Kan. 937, 949, 47 P.3d 392 (2002). "An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances." *Id.* at 944 (quoting *Wright ex rel. Trust Co. of Kansas v. Abbott Labs.*, 259 F.3d 1226, 1233 (10th Cir. 2001)). Under this standard, an appellate court does not reweigh the evidence; it gives deference to the trial court's findings of fact. *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011).

B. The district court did not abuse its discretion in permitting Mr. Doe to proceed under pseudonym.

The district court identified the proper test under which to consider Mr. Doe's motion for leave to proceed under pseudonym–the factors outlined in *Unwitting Victim*:

> (1) the extent to which the identity of the litigant has been kept confidential;
> (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of those bases;
> (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity;
> (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities;
> (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified;
> (6) whether the party seeking to sue pseudonymously has illegitimate or ulterior motives; . . .
> [7] the universal level of public interest in access to the identities of the litigants;
> [8] whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identies,m beyond the public's interest which is normally obtained; and
> [9] whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

Vol. I, p. 41 (quoting *Unwitting Victim*, 273 Kan. at 948). After reviewing the briefing, Vol. I, pp. 31-37, Vol. XIII, pp. 3-12, and hearing evidence and argument, Vol. XI, pp. 1-70, the district court issued a written decision addressing every factor. Vol. I, pp.41-45. The Appellants argue that the district court abused its discretion by

misapplying the relevant legal standard, but the misapplication the Appellants assert amounts to nothing more than grievance that the district court ruled in Mr. Doe's favor. Their appeal simply asks this Court to reweigh the evidence in contravention of the applicable standard.

1. Factor 1: The extent to which the identity of the individual has been kept confidential

Examining the evidence before it, the district court believed that Mr. Doe's identity was not known the public in this case at that time. The Appellants' argument that the district court erred completely undermines their arguments on the constitutional issue in this case. As the Appellants would have it, the court should assume that the public regularly culls civil court filings in detail but ignores the criminal filings, thus necessitating the KORA's aggressive public notification provisions. The district court did not err by rejecting this strained analysis.

2. Factor 2: The bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases

At the hearing on his motion to proceed under pseudonym, Mr. Doe testified that, as a result of being a registered sex offender, his home had been defaced, he had received a threatening note, and his children had been teased and excluded at school. Vol. XI., p. 12. He stated that his concern was the potential for similar problems to erupt should media reports associate his name with this case, thus making him "the face of the sex offender" and the cause of other offenders being removed from the

registry. Vol. XI., p. 13-14. Mr. Doe's ex-wife testified that she was concerned that media attention featuring Mr. Doe's name would have a negative impact on their daughter. Vol. XI, p. 20. In light of this testimony, the district court determined that this factor favored Mr. Doe. Vol. I, p. 3. It strains credulity to assert that "it was unreasonable to conclude that the events surrounding his criminal conviction would resurface because of this case." Appellants' Brief, p. 58.

In reviewing Judge Hednricks's decision, the Court has the benefit knowing that his prediction was right—there was extensive press coverage of the decision. More than one reporter referred to Mr. Doe as a "molester," and numerous readers made disturbing comments on media websites, including comments about searching the registry in an attempt find Mr. Doe's identity and residential address. The district court did not abuse its discretion in evaluating this factor.

3. Factors 3 & 5: The magnitude of the public interest in maintaining the confidentiality of the litigant's identity and the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified

The district court determined that *Unwitting Victim* factors three and five–the magnitude of the public interest in the litigant's identity and the undesirability of his refusal to pursue the case at the price of being publicly identified–were related and found that maintaining the confidentiality of Mr. Doe's identity served the public's interest in resolution of an important constitutional issue. Vol. I, p. 43. The Appellants

challenge this finding by contending that "[t]he showing of Doe's reluctance to proceed was weak." The Appellants' challenge is premised on the weight of the evidence rather than legal error. Thus, they provide no basis for reversal under the abuse of discretion standard.

4. Factor 4: Whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities

Conceding that "the public may have less of an interest in knowing the [sic] Doe's identity because he is functionally a class representative," the Appellants maintain that the public's interest in his identity is not "atypically weak." Appellants' Brief, p. 59. But they provide no explanation. Noting that the challenged law was "validly enacted" and insisting that its purpose is to ensure public safety does not explain the connection between Mr. Doe's identity and the purely legal issues in this case. The district court properly weighed this factor in favor of allowing Mr. Doe to proceed under pseudonym.

5. Factor 7: The universal level of public interest in access to the identities of litigants

The district court ruled that the universal level of public interest in access to the identities of litigants weighed in the Appellants' favor. Vol. I, p. 44. This point in their favor did not satisfy them. More points should have been awarded for this factor, they say. Appellants' Brief, p. 60 ("the district court undervalued this factor"). But nothing about the district court's assessment of this factor exhibits clear error or

"ventur[ing] beyond the limits of permissible choice under the circumstances." *Unwitting Victim*, 273 Kan. at 944.

6. Factor 8: Whether there is a particularly strong interest in knowing the litigant's identity

The Appellants do not challenge the district court's analysis of the eighth factor. Nor does the Appellee.

7. Factors 6 & 9: Whether either party has illegitimate motives

Because the Appellants conceded that Mr. Doe had no illegitimate ulterior motive in seeking to proceed under pseudonym, the district court properly determined that the sixth *Unwitting Victim* factor—whether the party seeking to sue pseudonymously has illegitimate ulterior motives–favored Mr. Doe.

Regarding the ninth *Unwitting Victim* factor–whether opposition to pseudonym was illegitimately motivated, the district court did not hold that it favored Doe. It acknowledged that Doe did not assert that the Appellants' motives were improper and proceeded to discuss how other considerations outweighed the neutrality of their motives. Vol. I, pp. 44-45. This was not an abuse of discretion.

If, as the Appellants suggest, Judge Hendricks perceived that the Appellants' motives were illegitimate, Mr. Doe commends his insight. Although Mr. Doe originally gave them the benefit of the doubt, the baseless appeal of this issue (especially after the significant press coverage and disturbing reader comments on news websites) and request for an order to amend the petition to include his legal

name are apparent intimidation tactics designed to pressure Mr. Doe to drop his case and discourage future challenges to the KORA.

CONCLUSION

The collateral issues in this appeal simply detract from the significant legal focus of this case: whether the KORA has passed the point at which the significant burdens imposed on registrants for periods ranging from 15 years to life can honestly be deemed civil in nature. Dated case law evaluating distinguishable registration regimes does not control the answer to this inquiry. The time has come for a fresh examination of the KORA.

Respectfully submitted,

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I, Carrie Parker, certify that on April 23, 2014, a copy of this brief was placed in the United States Mail, postage pre-paid, addressed to:

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Carrie Parker

APPENDIX A

IN THE THIRTEENTH JUDICIAL DISTRICT

DISTRICT COURT OF BUTLER COUNTY, KANSAS

STATE OF KANSAS,)
Plaintiff,)
)
vs.) Case No. 2013-CR-297
)
SAMUEL TRACY LORD,)
Defendant.)

TRANSCRIPT

OF

OPINION RULING

held on the 27th day of March, 2013, in the District Court of Butler County, Kansas, Butler County Judicial Center, 201 West Pine, Courtroom D, in the City of El Dorado, County of Butler, and State of Kansas, before the Honorable Charles Hart, District Judge.

APPEARANCES

The STATE OF KANSAS appears by Mr. Joseph Penney, Assistant Butler County Attorney, Butler County Judicial Center, 201 W. Pine, Suite 104, El Dorado, Kansas 67042.

The Defendant, SAMUEL TRACY LORD, appears in person and by counsel, Mr. Gail Jensen, 226 W. Central, Suite 102, El Dorado, Kansas 67042.

I N D E X

THE COURT: The case is entitled: State of Kansas versus Samuel Lord. The case number is 13-CR-297. The State of Kansas appears by Assistant Butler County Attorney, Joe Penney. The defendant, Mr. Lord, appears in person and by his attorney, Gail Jensen. This matter comes back before the Court this date for opinion ruling.

The Court thanks respective counsel for their memorandum and argument in regards to the issue of the case.

The Court finds that the defendant, Mr. Lord complains of retroactive provision changes: specifically, going from three to four times per year to register; the duration changing from 10 years to lifetime registration; an entirely new fee is imposed of $20 per registration visit; and, finally, the defendant, Mr. Lord, is now required to obtain a driver's license that bears, on its face, that the defendant is a registered offender.

The Kansas Supreme Court has held in State vs. Armbrust that so long as the actual criminal violation for which the defendant is being charged occurred after the effective date of the statute providing punishment for the violation, there is no violation of the ex post facto clause of the United

States Constitution.

The Kansas Supreme Court went on to state: (As read)

> "It is well-established that a criminal statute in effect at the time of the offenses are controlling."

In State vs. Myers, 260 Kansas 669, the Kansas Supreme Court found, as to registration, the Sex Offender Registration Act law to be remedial in nature, not punishment and thus not a violation of the Ex Post Facto Clause of the United States Constitution.

The Court finds: As to the first three change provisions in defendant's obligations and requirements pursuant to the cited case law, this Court concurs with the arguments of the State.

However, the Court now finds Mr. Lord is now required to bear on the face of his driver's license that Mr. Lord is a registered offender. This requirement was not part of his previous obligations and registration.

In State vs. Myers, the Kansas Supreme Court determined that public notification, if retroactively applied, would violate the Ex Post

Facto Clause.

In United States Supreme Court Case Smith vs. Doe, 538 U.S. 84, the Court stated that a law is punitive if it is based on substantial factors that would overcome a legislative categorization.

Pursuant to defense counsel's argument, this Court finds it noteworthy that the 2011 Senate Bill that changed the Kansas Offender Registration Act makes no effort to categorize this as civil law, and it is, in fact, located in the criminal code.

To suggest that this is merely civil in nature when individuals are required to disclose that they are a registered offender any time they present their driver's license to cash a check; to affirm their identity; to lease an apartment or rent an automobile; or conduct any other type of business that requires identification is obviously punitive in nature.

This Court finds this public notification on the offender's driver's license, being retroactively applied, violates the Ex Post Facto Clause of the Constitution of the United States as held by the Kansas Supreme Court in State vs. Myers.

This Court subsequently grants defendant's motion to dismiss Counts 2 through 5, inclusive.

And the Court does request that Mr. Jensen would prepare an appropriate journal entry.

The Court will go off record for purposes of scheduling.

(THEREUPON, an off-the-record discussion was had.)

THE COURT: We are back on the record. The record may reflect the presence of defendant, Mr. Lord, along with respective counsel.

The Court has taken the opportunity to clear, um, on counsel's calendars and with Mr. Lord next appearance date on the pretrial conference plea docket, Friday, June the 6th. That would be at 9:00 a.m. And with jury trial to commence Monday. That would be June 9, at 9:00 a.m.

Mr. Lord, in the interim, I do continue you on the bond that you have previously posted. I do order you to stay in contact and communication with Mr. Jensen. Keep him advised at all times of your current address, telephone number, and place of employment.

DEFENDANT LORD: Yes, sir.

THE COURT: Your next obligation to the Court is to be back here on June the 6th. That's Friday at 9:00 a.m.

DEFENDANT LORD: Okay.

THE COURT: And, Mr. Lord, do you have any questions?

DEFENDANT LORD: I do not, sir.

MR. PENNEY: And, Judge, I guess just for the record, the State would maintain an objection to the ruling, um, mainly for the reasons, I suppose, previously noted in argument.

THE COURT: And the Court does so note. And, um, anything further?

MR. JENSEN: Your Honor, I just -- I think it's implicit in the Court's ruling, but does the Court want me to place in the journal entry that Count 1, because of the Court's ruling, would be governed by the previous version, if you will, of the Offender Registration Act that was an effect that -- in effect at the time alleged in the complaint to be the date of the offense?

THE COURT: Thank you.

Any objection to that, Mr. Penney?

MR. PENNEY: Uh, Your Honor, I think that makes sense. I mean, essentially, that's how we would have proceeded on that. Um, I guess the other question I have is -- (interrupted)

THE COURT: -- well, that -- that is the

order of the Court, then -- (interrupted)

MR. PENNEY: Right, right.

THE COURT: -- to have Mr. Jensen journalize that to that effect.

MR. JENSEN: I will.

THE COURT: And, Mr. Penney.

MR. PENNEY: Um, well, does the Court intend to, uh, make any orders relating to -- I mean, cuz' -- okay, let me think. Uh, the way it is right now, Mr. Lord is currently reporting and, presumably, reporting under the -- the modern scheme, and I presume he's got a driver's license that's noted "registered offender." And, you know, I -- I don't have any direct power to alter that, I guess, unless there's some particular court orders, um, relating to actions of the sheriff's department or, maybe, the Department of Motor Vehicles.

MR. JENSEN: If I might, in response to that Your Honor, suggest that what, perhaps, we ought to do is provide the, uh, sheriff's office with a copy of the journal entry and advise them that based on the Court's ruling, uh, Mr. Lord should be, uh, registering per, uh, the prior version.

THE COURT: Thank you, Mr. Jensen.

And, Mr. Penney, I think that sounds appropriate to me. Um -- (pause).

MR. PENNEY: I -- I think that would be the best way to communicate that, is to send them a copy or have some of that language in the journal entry. I mean, like I said, I -- the State maintains an objection, but I think as far as communicating that information, that would be appropriate.

THE COURT: Surely. And I -- (pause.) I think -- is it Deputy Morgan that's in charge of that?

MR. PENNEY: Deputy Waldorf.

THE COURT: Deputy Waldorf.

MR. PENNEY: And Teri, uh, Bowlin.

THE COURT: Yes. So that's who that would need to go to, a copy.

MR. JENSEN: I'll see to it, Your Honor.

THE COURT: Okay. There being nothing further, court is in recess.

MR. JENSEN: Thank you, Your Honor.

(THEREUPON, the proceedings were adjourned.)

C E R T I F I C A T E

STATE OF KANSAS)
)
COUNTY OF BUTLER)

I, RHONDA L. LANDSVERK, a Certified Shorthand Reporter in and for the State of Kansas, duly commissioned as such by the Supreme Court of the State of Kansas, do hereby certify that I was present at and reported in shorthand the foregoing proceedings had at the aforementioned time and place; further that the foregoing is a true and accurate transcript of my notes requested transcribed.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this _____ day of _____.

RHONDA L. LANDSVERK, CSR, CRI, CCR
CERTIFIED SHORTHAND REPORTER #1006