SUPREME COURT OF THE UNITED STATES

No. 01–729

DELBERT W. SMITH AND BRUCE M. BOTELHO, PETITIONERS *v.* JOHN DOE I ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 5, 2003]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

As JUSTICE SOUTER carefully explains, it is unclear whether the Alaska Legislature conceived of the State's Sex Offender Registration Act as a regulatory measure or as a penal law. See *ante*, at 1–2 (opinion concurring in judgment). Accordingly, in resolving whether the Act ranks as penal for *ex post facto* purposes, I would not demand "the clearest proof" that the statute is in effect criminal rather than civil. Instead, guided by *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963), I would neutrally evaluate the Act's purpose and effects. See *id.*, at 168–169 (listing seven factors courts should consider "[a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute"); cf. *Hudson* v. *United States,* 522 U. S. 93, 115 (1997) (BREYER, J., concurring in judgment) ("[I]n fact if not in theory, the Court has simply applied factors of the *Kennedy* variety to the matter at hand.").[1]

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[1] The *Mendoza-Martinez* factors include "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative [nonpuni-

Measured by the *Mendoza-Martinez* factors, I would hold Alaska's Act punitive in effect. Beyond doubt, the Act involves an "affirmative disability or restraint." 372 U. S., at 168. As JUSTICE STEVENS and JUSTICE SOUTER spell out, Alaska's Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism. See *ante*, at 3–4, and n. (SOUTER, J., concurring in judgment); *ante*, at 1–2 (STEVENS, J., dissenting in No. 01–729 and concurring in judgment in No. 01–1231).

Furthermore, the Act's requirements resemble historically common forms of punishment. See *Mendoza-Martinez*, 372 U. S., at 168. Its registration and reporting provisions are comparable to conditions of supervised release or parole; its public notification regimen, which permits placement of the registrant's face on a webpage under the label "Registered Sex Offender," calls to mind shaming punishments once used to mark an offender as someone to be shunned. See *ante*, at 2 (STEVENS, J., dissenting in No. 01–729 and concurring in judgment in No. 01–1231); *ante*, at 3 (SOUTER, J., concurring in judgment).

Telling too, as JUSTICE SOUTER observes, past crime alone, not current dangerousness, is the "touchstone" triggering the Act's obligations. *Ante*, at 3 (opinion concurring in judgment); see *ante*, at 2–4 (STEVENS, J., dissenting in No. 01–729 and concurring in judgment in No. 01–1231). This touchstone adds to the impression that the Act retributively targets past guilt, *i.e.*, that it "revisit[s] past crimes [more than it] prevent[s] future ones." *Ante*, at 3 (SOUTER, J., concurring in judgment); see *Mendoza-*

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tive] purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." 372 U. S., at 168–169.

Martinez, 372 U. S., at 168.

Tending the other way, I acknowledge, the Court has ranked some laws civil and nonpunitive although they impose significant disabilities or restraints. See, *e.g.*, *Flemming* v. *Nestor,* 363 U. S. 603 (1960) (termination of accrued disability benefits payable to deported resident aliens); *Kansas* v. *Hendricks,* 521 U. S. 346 (1997) (civil confinement of mentally ill sex offenders). The Court has also deemed some laws nonpunitive despite "punitive aspects." See *United States* v. *Ursery,* 518 U. S. 267, 290 (1996).

What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. See *Mendoza-Martinez*, 372 U. S., at 169. As respondents concede, see Brief for Respondents 38, the Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. See *ante*, at 15 (majority opinion). But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. See *ante*, at 2. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.[2] However plain it may be that a

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[2] For the reasons stated by JUSTICE SOUTER, see *ante*, at 4, n. (opinion

former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

John Doe I, for example, pleaded *nolo contendere* to a charge of sexual abuse of a minor nine years before the Alaska Act was enacted. He successfully completed a treatment program, and gained early release on supervised probation in part because of his compliance with the program's requirements and his apparent low risk of reoffense. Brief for Respondents 1. He subsequently remarried, established a business, and was reunited with his family. *Ibid.* He was also granted custody of a minor daughter, based on a court's determination that he had been successfully rehabilitated. See *Doe* v. *Otte*, 259 F. 3d 979, 983 (CA9 2001). The court's determination rested in part on psychiatric evaluations concluding that Doe had "a very low risk of re-offending" and is "not a pedophile." *Ibid* (internal quotation marks omitted). Notwithstanding this strong evidence of rehabilitation, the Alaska Act requires Doe to report personal information to the State four times per year, and permits the State publicly to label him a "Registered Sex Offender" for the rest of his life.

Satisfied that the Act is ambiguous in intent and punitive in effect, I would hold its retroactive application incompatible with the *Ex Post Facto* Clause, and would therefore affirm the judgment of the Court of Appeals.

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concurring in judgment), I do not find the Court's citations to *Hawker* v. *New York,* 170 U. S. 189 (1898), and *De Veau* v. *Braisted,* 363 U. S. 144 (1960), see *ante*, at 16–17, convincingly responsive to this point.