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IN THE SUPREME COURT OF IOWA

No. 18-1045

LLOYD ASCHBRENNER,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
HONORABLE MITCHELL TURNER, JUDGE

APPELLANT'S FINAL BRIEF

PHILIP B. MEARS

Mears Law Office
209 East Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

On January 8, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to

Lloyd Aschbrenner,
1820 A Avenue NE, No 2,
Cedar Rapids, IA 52402.

/s/ Philip B. Mears
MEARS LAW OFFICE

209 E. Washington Street, Suite 203
Iowa City, IA 52240

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

APPLICATION OF THE 2017 CODE TO ASCHBRENNER, INCLUDING THE INTERNET IDENTIFIER REQUIREMENT, VIOLATLES THE EX POST FACTO PROHIBITIONS IN THE IOWA AND UNITED STATES CONSTITUTIONS

Everett v. State, 789 N.W.2d 151 (Iowa 2010)
State v. Pickens, 558 N.W. 2d 396 (Iowa 1997)
Smith v. Doe, 538 U.S. 84 S. Ct. 1140 (2003)
In re Detention of Garren, 620 N.W.2d 275 (Iowa 2000)
In the Interest of T.H., 913 N.W. 2d 578 (Iowa 2018)
Kennedy v. Mendoza-Martinez, 372 U.S. 144 S. Ct. 554 9 L.Ed.2d (1963)
State v. Seering, 701 N.W. 2d 655 (Iowa 2005
State v. Graham 897 NW 2d 476 (Iowa 2017)
Does #1-5 v. Snyder, 834 F.3d 696 (C.A.6 (Mich.) 2016)
Commonwealth v. Muniz , 164 A. 3d 1169 (Penn. 2017)
Doe v. State, 167 N.H. 382, 111 A.3d 1077, 1100 (N.H. 2015)
State v. Letalien, 985 A.2d 4 (Me. 2009)
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Doe v. State, 189 P.3d 999 (Alaska 2008)
Gonzales v. State, 980 N. E. 2d 312 (Ind. 2013)
State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016
State v. Graham, 872 N.W. 2d 476, 484 (Iowa. 2017)

II

THE REQUIREMENT FOR DISCLOSURE OF INTERNET IDENTIFIERS FOUND IN THE REGISTRATION STATUTE VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE COMPARABLE PROVISION IN THE IOWA CONSTITUTION

Everett v. State, 789 N.W.2d 151 (Iowa 2010)
Packingham v. North Carolina, 137 S. Ct. 1730 (U.S.N.C. 2017)
Doe v. Harris 772 F3d (9th Cir. 2014)

Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997
McCullen v. Coakley, 573 U.S. 134 S. Ct. 2518, 2534, 189 L.Ed.2d 502 (2014)
Doe v. Shurtleff, 628 F.3d 1217 (10th Cir.2010) (upholding the regulation in 2010)
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White v. Baker, 696 F.Supp.2d 1289, 1307–08 (N.D.Ga.2010)
Citizens United v. Federal Election Commission 558 U.S. 310 S. Ct. 876, 175 L.E. 2d 753 (2010)
Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984)
Turner, 512 U.S. at 664, 114 S. Ct. 2445
Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir.2011)
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Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608 (E.D.Ky., 2017)
Doe v. Snyder, 101 F.Supp 3d 672 (E.D. Mich. 2015)
State v. Cutshall 2017 WL 2875693 (Iowa App)

ROUTING STATEMENT

The case should be retained by the Supreme Court. Both issues presented are important.

The Sex Offender Registry statute requires all registered sex offenders to disclose to their local sheriff all their social media addresses. The legal question of first impression is whether such a requirement violates the Free Speech provisions of the Iowa and the United States Constitutions to require that notification.

This question impacts every single sex offender in the statute.

The case should also be retained to decide the important question of whether the sex offender registration obligations imposed by the 2009 amendments to Chapter 692A can be applied retroactively to registrants from before 2009. Aschbrenner asserts that such an application violates the ex post facto prohibitions found in the Iowa and the United States Constitutions.

In this argument he is supported by the recent Iowa Supreme Court case of In the Interest of T.H., 913 N.W. 2d 578 (Iowa 2018). That case held that the registration statute as applied to juveniles was "punitive." It follows that the 2009 version of the statute cannot be applied to an adult registrant who offended in 2006.

STATEMENT OF THE CASE

Nature of the Case:

Lloyd Aschbrenner appeals from a judgment and sentence from Linn County for a violation of the Sex Offender Registry. He was found guilty of that offense on May 30, 2018 after a trial on the Minutes. He was sentenced that same day to a five year prison sentence, which was suspended. He was placed on supervised probation, which he is currently serving. He was fined $750 plus applicable surcharges. Appx. p. 68

Aschbrenner appealed on June 15, 2018. Appx. p. 72

Course of Proceeding:

Aschbrenner has been on the Sex Offender Registry since 2007. The original registration was to be for ten years. In 2014, the length of registration was extended by ten years because of a registration violation.

On July 10, 2017, a criminal complaint was filed for a Sex Offender Registration violation (penalty enhanced) because he "failed to provide all relevant information concerning his internet identities to the Linn County Sheriff." The violation was dated December 3, 2015.

The Trial information was filed on August 14, 2017 for that offense. Appx. p. 6 On October 16, 2017, Aschbrenner filed a Motion to Dismiss the

charges. Appx. p. 9 Aschbrenner presented two constitutional complaints in his Motion.

1. He claimed the prosecution was a violation of the *ex post facto* provision found in both the Constitutions of Iowa and the United States. He was prosecuted for failure to provide internet identifiers, which had not been part of the Registration Statute when he was convicted and placed on the Registration in 2006.
2. He asserted that the prosecution for failing to disclose internet identifiers was in violation of the First amendment of the constitution and the right of privacy found in the Iowa Constitution.

Hearing was held on a Motion on December 20, 2017. While most of the facts surrounding the violation were not in dispute, certain evidence was submitted at the hearing. No one testified.

On January 25, 2018, Judge Mitchell Turner denied the Motion. Appx. p. 57 Aschbrenner sought interlocutory review of that order, which was denied.

Aschbrenner then waived jury trial and agreed to a trial on the Minutes that took place on May 30, 2018. He was found guilty. Appx. p. 74 Aschbrenner was sentenced to the five years in prison. He was placed on

supervised probation for two years. He was fined $750 plus applicable surcharge. Appx. p. 68 He then appealed. Appx. p. 72

STATEMENT OF FACTS

The facts with regard to the legal claims presented are not complicated and were not really contested. Those facts would be:

1. Lloyd Aschbrenner was convicted in 2007 for a crime committed in 2006. The crime did not involve the internet or social media. Appx. p. 11

2. He was placed on probation, which was followed by a special parole. He discharged that supervision.

3. While his original length of registration was ten years, he received an additional ten years for a registration violation in Linn County in 2014.

4. The registration statute in 2006 appears in the Appendix submitted to the District Court. It was very different from the registration statue as it appears today.

5. Most of the changes in the registration statute between 2006 and 2017 took place in 2009. At that time, the legislature rewrote the entire statute. The differences between the statutes are not be contested.

6. One of the changes in 2009 was the requirement that a registrant provide the sheriff with all information listed as "relevant information," within five days of any change.

7. One piece of relevant information that is required today that was not required in 2007 was the list of all "internet identifiers," whatever that term means.

8. Aschbrenner was convicted of not disclosing a particular Facebook page.

9. That information would not have been required in 2007 at the time of his conviction.

The Sex Offender Registry over the years

The Sex Offender Registry was passed in 1995 and has gone through much development since. For purposes of this legal argument, there are three Iowa Codes to review. The first would be the original statute, which appeared first in the 1997 code.

The second point in time is 2006. That was when Aschbrenner committed his offense. That would be the 2007 Code.

Finally, there is the 2017 code, including the legislative changes made during the session in 2016.

An interesting observation can be made by just looking at the lengths of those three versions of Chapter 692A. In the 1997 code it was five pages long. In the 2007 code it was nine pages long. By the 2017 code, the Chapter is twenty-two pages long.

Before the individual code versions are reviewed, several overall comments should be made, perhaps emphasizing the more significant changes in those 20 years.

The original statute was passed in 1995. It applied to anyone with crimes after July 1, 1995, or who, on that date, were still being punished for crimes before that date.

In 1999, the legislature added a category of offenses called "aggravated offenses." A first offense for an "aggravated offense" carried lifetime on the registry.

In 2003, the legislature passed the residency restriction or the "2000 foot law." That new section provided that any sex offender with an offense against a minor could not live within 2000 feet of the school or a day care center. See 2007 code provision 692A.2A. Federal Judge Robert Pratt granted a state wide injunction. He found the statute was punitive and could not be applied retroactively. Doe v. Miller, 298 F.Supp.2d 844 (S.D. Iowa 2004).

That ruling was reversed by the Eighth Circuit in a close vote. Doe v. Miller, 405 F.3d 700 (8th Cir.), cert. denied, 546 U.S. 1034, 126 S. Ct. 757, 163 L.Ed.2d 574 (2005). Judge Michael Melloy dissented from the panel decision. Five of the eleven judges voting would have granted rehearing en banc consideration. The Iowa Supreme Court upheld the statute. State v. Seering, 701 N.W. 2d 655 (Iowa 2005)

In 2005, there were major changes in connection with the penalties for sex offenders. Special sentences for virtually all sex offenses were introduced at that point. For the most part, however, those changes did not have a significant impact on the registry.

In 2009, partially to address the difficulties created by the 2000 foot law, the legislature completely rewrote the registration statute.

The 2000 foot law was limited to certain and more serious offenses.

In its place, "safe zone restrictions" were implemented, limiting the place where sex offenders with victims as a minor, could not go or loiter.

The Tier system was added. At this point, what Tier you are on impacts how frequently you have to see the sheriff face to face. It also matters as to how soon modification off the registry is available.

In addition, the information that had to be provided to the Sheriff greatly expanded, through the requirement to disclose what is called "relevant information."

Finally, much information had to be provided in person. You had to go see the sheriff on a regular basis.

1997 Code

This version of the code is particularly relevant because the main Iowa case considering whether the law is an *ex post facto* law looked at that version of the Code. In State v. Pickens, 558 N.W. 2d 396 (Iowa 1997) the Iowa Supreme Court held the 1995 statute did not violate the *ex post facto* provisions, so it could be applied to crimes committed before 1995.

Here are particular subsections from the 1997 Code.

692A.1 Definitions

Only seven terms were defined in 1995. That included the definitions for the particular offenses that required registration.

692A.2 Persons required to register

In the original version of 692A, passed in 1995 a person with a covered sexual offense only had to register for ten years. That commenced on the date of probation, parole, or release from custody. Lifetime registration for a second offense was added after 1995, but before 1999.

Lifetime for a first offense that was within the definition of an “aggravate offense” was added in 1999.

692A.3 Registration process

This subsection covered both the initial registration of the residence, along with changes in that address. You also had to give your telephone number.

692A.4 Verification of address

After the initial registration, which would have been in person, the verification of address was done annually and was done by mail.

692A.5 Duty to facilitate registration

This subsection dealt with the obligations of the court, jails, and prisons. It has not particularly changed in 20 years.

692A.6 Registration fees and civil penalty for offenders

This established certain registration fees and the civil penalty of $200.

692A.7 Failure to comply- penalty

A “willful” failure to register would be an aggravated misdemeanor for a first offense and a D felony for a second. There was also a provision that explained that an offense did not count for whether something was a second offense, if the earlier offence was more than ten years old.

None of the rest of these provisions is particularly relevant to the analysis in this case.

2007 Code

Here are the subsections from that code.

692A.1 Definitions

One major change from 1997 to 2007 in the definitions was the addition of the term "aggravated offense." See 692A.1(a). That additional definition was put into the code, with some federal prodding, in 1999. An aggravated offense required lifetime registration, even if it was only a first offense. See 692A.2(5).

692A.2 Persons required to register

This section changed greatly in the ten years since the statute was first enacted. There was still the reference to ten years on the registry in subsection one. There was also as of 2007 specific reference to ten years being for a "first offense."

Subsection 2 contains the language incorporating the special sentence, which went into effect in 2005.

Subsection 4 provided for an additional ten years of registration if a person violated specifically section 692A.4. That was the annual registration verification. That was still the only violation that would extend the time for

registration. If you did not tell the sheriff about a change during the year, and were charged for that, there would be no additional period of registration. Aschbrenner had a registration violation in 2008, which did not add any additional registration time.

Subsection 5 contained the reference to lifetime registration for either a second offense requiring registration, or for any aggravated offense. A first offense that was an aggravated offense would carry lifetime on the registry. This often overlooked provision had been added in 1999.

692A.2A Residency restrictions- child care facilities and schools

This was the "2000 foot rule" that was adopted by the legislature in 2003. As mentioned it was subjected to significant *ex post facto* analysis. Under the provision, sex offenders on the registry, with crimes against minors, could not live near schools or day care centers. This made it very difficult for them to find a place to live.

Aschbrenner was subject to this statute based on his conviction in 2007.

692A.3 Registration process

No significant change

692A.3A Additional registration requirements- institutions of higher education

You had to register where you went to school

692A.4 Verification of address and taking of photograph:

Annual verification was still by mail. You did have to go see the sheriff annually for a new photograph.

692A.4A Electronic monitoring

You could be put on a monitor, if you were on some sort of supervision.

692A.5 Duty to facilitate registration

No real change

692A.6 Registration fees and civil penalty for offenders

No real change

692A.7 Failure to comply- penalty

The reference to a "willful" violation was removed.

Nothing after this point in the 2007 Code is that important unless noted.

2017 Code

692A.101 Definitions

The provision about internet identifiers was added with the 2009 rewrite of the code. It appears in Subsection 15.

Also with the 2009 rewrite, there were certain places where a person could not “loiter,” hence the definition of that term in Subsection 17.

Section 23 was a big one. That was added in 2009 and contains the definition of "relevant information." This was a list of all of the information you had to tell the Sheriff if anything changed. This included employment information, internet identifiers, temporary lodging information, vehicle information, names, gender, and date of birth of each person residing with the offender. There was also a strange reference in Section 23(a)(1) to "criminal history including warrants, articles, status of parole, probation or supervised release, state of arrest, date of conviction, and registration status." This provision requires a person on the registry to notify the Sheriff when that person is arrested on a non registration charge, for example. The person is required to provide the date of arrest and the date of conviction and the status on parole or probation.[1]

692A.102 Sex offense classifications

This section, added in 2009, adopted the Tier system for offenses. You would be in a particular Tier based on your offense and which Tier you were in determined how frequently you had to go see the sheriff in person. It is one time a year for Tier one, the less serious offense. It is two times a year

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[1] One would not imagine that this would be charged very often. Counsel for Defendant knows of one case from Scott County where a registrant was given a fifteen year sentence (habitual offender) for a registration violation under this section. He failed to tell the Scott County Sheriff where he was registered, that he had been released on bond on a drug offense in Scott County.

for tier two. It is four times a year for tier three. This requirement of a personal visit, however, is in addition to the requirement that you appear personally and update any relevant information in between the times that you are scheduled to go to see the Sheriff.

692A.103 Offenders required to register

There was no real change since 2007, besides the section number changing.

692A.104 Registration process

No real change

692A.105 Additional registration requirements- temporary lodging

Residency has always been a somewhat elusive term. Everybody understands what a principal residence is. At the same time, you sometimes go stay with a relative or go on vacation or even travel to Des Moines for the Iowa State Fair. Subsection 105, when coupled with other expanded language about residence, made clear that you had to go see the Sheriff of wherever you went for a visit, if you were going to be there for more than five days.

692A.106 Duration of registration

With the 2009 rewrite, Subsection 4 provided that you got an additional ten years of registration for violating any of the requirements of

692A. In 2014, Aschbrenner had a registration violation in Linn County.[2] That registration violation did result in his ten year period of registration being extended by an additional ten years.

It should be noted that this direct consequence of a registration violation for someone not serving lifetime on the registry, probably should be included in the list of consequences an offender must be informed about at a guilty plea.

692A.107 Tolling of registration period

No real change

692A.108 Verification of relevant information

The annual verification as of 2007 was still being done by mail. The 2009 rewrite now provides that the verification needs to be done in person. It sets out the time frame for periodic verification.

692A.109 Duty to facilitate registration

No change

692A.110 Registration fees and civil penalty for offenders

No change

692A.111 Failure to comply- penalty

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[2] The Court remarkably denied Aschbrenner appointed counsel in that case. He did not challenge that case in a post conviction.

The failure to comply section did not change a lot in ten years. The reference to the ten year drop off time for counting previous offenses was eliminated.

692A.112 Knowingly providing false information

No change

692A.113 Exclusion zones and prohibition of certain employment-related activities

This is the provision that was added in 2009 as part of reworking the 2000 foot restriction currently found in 692A.114. After 2009, all sex offenders with offenses against minors were no longer subject to the 2000 foot restriction, only certain offenders were. On the other hand, there were certain places where sex offenders, with minors as a victim, could not go without written permission. This included real property of a public or non public school or the public library.

Then there were also now prohibitions on loitering. You could not loiter near a public library, presumably even with permission. You could not loiter in places intended for the use of minors, such as playgrounds.

Then there were certain employment prohibitions setting forth certain jobs either paid or volunteer that was prohibited.

692A.114 Residency restriction- presence- child care facilities and schools

This was discussed with the previous section.

There is no change for the following unless indicated.

692A.115 Employment where dependent adults reside

692A.116 Determination of requirement to register

692A.117 Registration forms and electronic registration system

692A.121 Availability of records

This section greatly increased the information available to the public.

One section sets out what information will be available on the internet site. This includes both the information that is provided to the Sheriff that will be disclosed on the website and which information will not.

Subsection 5 includes information that can be available to the public upon specific request to the Sheriff. This includes information about employment, including the name and address of the employer. It includes education information and temporary lodging.

Subsection 7 provides a list of what information shall not be provided to the public. Internet identifiers are not listed. It would appear that there is no prohibition against the local sheriff giving out internet identifiers.

692A.122 Cooperation with registration

692A.126 Sexually motivated offense- determination

This is the provision that requires the Court to; essentially, make the determination as to whether certain defendants will go on the registry for certain non-apparent offenses. To go on the registry, there must be is a finding of sexual motivation.

692A.127 Limitations on political subdivisions- local governments could not have their own residency restrictions.

692A.128 Modification This is the provision, adopted in 2009, allowing for modification of the registry under certain circumstances.

ARGUMENT

I. APPLICATION OF THE 2017 CODE TO ASCHBRENNER, INCLUDING THE INTERNET IDENTIFIER REQUIREMENT, VIOLATLES THE EX POST FACTO PROHIBITIONS IN THE IOWA AND UNITED STATES CONSTITUTIONS

Standard of Review:

As this claim is based on a constitutional violation, review on appeal is *de novo*. Everett v. State, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of Error:

The claim was raised in Motion to Dismiss before the District Court. The judge addressed the issue on the merits. It was preserved for appeal by having a trial on the Minutes.

Summary of Argument

Aschbrenner's argument regarding the *ex post facto* prohibition is not complicated. He was convicted of his sexual offense in 2007. He was prosecuted under a provision of Chapter 692A that was added in 2009. He argues that the 2009 amendment amounted to additional punishment for his offense in 2007, which is prohibited.

The sex offender statute in Iowa was enacted in 1995. Many states adopted similar statute about that same time. In 1995, the Iowa statute primarily required registration of the address, with an obligation to tell the Sheriff when you got a new one. Verification of the address annually would be done by mail. The Iowa Supreme Court in 1997 determined that the statute was not "punitive" and could be applied retroactively to a person who had committed his crime before 1995. State v. Pickins, 558 N.W. 2d 396 (Iowa 1997)

In 2003, the United States Supreme Court upheld a similar registration statute from Alaska in the face of a similar *ex post facto* challenge. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L.Ed.2d 164 (2003).

Since Pickens and Smith were decided, registration statutes have changed substantially. The big change in Iowa took place in 2009, when the legislature rewrote the entire chapter. Registration has become, essentially,

another form of probation, with the Sheriff being the probation officer. In many cases, registration can impose restrictions greater than required by a probation officer, particularly after several years on supervision.

Under traditional *ex post facto* analysis, a statute that is civil on its face is analyzed to determine if the statutory scheme is "so punitive either in purpose or effect" to negate the purported civil purpose. In re Detention of Garren, 620 N.W.2d 275, 278 (Iowa, 2000)

The Iowa Supreme Court recently decided the case of In the Interest of TH, 913 N.W. 2d.578 (Iowa, 2018). In that case, the court considered the mandatory registration requirement imposed by a juvenile court after adjudicating the juvenile for a sexual forcible felony.

The decision divided the Supreme Court. Judge Cady wrote the opinion for the court. He found that the registration statute as applied to the juvenile in question was "punishment." In this, he was joined by 3 other justices. He decided, however, that the punishment was not “cruel and unusual,” and therefore the registration stood. In that part of his ruling he was joined by the other 3 justices.

The finding of punishment, however, sets the stage for consideration of the *ex post facto* challenge in this case.

Aschbrenner asserts that the logic from the TH case should lead to the conclusion that the registration statute, particularly the amendment in 2009, amounts to "punishment" for adult registrants, and therefore the amendment cannot be applied retroactively.

Earlier Cases from Iowa

There have not been many cases in Iowa involving an *ex post facto* challenge to Chapter 692A.

State v. Pickens, 558 NW 2d 396 (Iowa 1997) was decided not long after the statute was passed. Even at that time, there really was only a half-hearted challenge. Pickens apparently did not actually complain about the registration requirement itself. See opinion at page 398. Apparently, he conceded the registration requirement was not burdensome or punitive. Mostly he complained about the officials "dissemination of the information about his conviction."

The Iowa Supreme Court used the test from the Mendoza-Martinez case.

> In the absence of clear legislative intent, most courts have looked to the factors identified by the Supreme Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963). These factors are:
> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a 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 or 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.
>
> State v. Pickens, 558 N.W.2d 396, 399 (Iowa 1997)

The Court looked to see whether the registration statute was historically a "punishment." The Court said no. The Court characterized the statute as “remedial and not designed for deterrence or retribution purpose.”

The Iowa Supreme Court revisited a challenge under *ex post facto* in 2005. There was a challenge to the newly enacted residency restriction in State v. Seering 701 NW 2d 655 (Iowa 2005). The Court found the statute not to violate the *ex post facto* provision. Even though the residency restriction somewhat resembled banishment, it was not sufficient to overcome the presumption that the statute was civil and not punitive.

More recently, the Iowa Supreme Court briefly talked about the registry and whether it was punitive in State v. Graham 897 NW 2d 476 (Iowa 2017). It did not find the statute punitive. Graham was a juvenile at the time of his offense. That added that dimension to the whole question of whether the statute was punitive.

It should be noted, however, that the only claim advanced by Graham at the District Court level was that the 2000 foot restriction was unlawful.

The Supreme Court specifically noted that no claim was made that the periodic requirement to appear in front of the Sheriff was disproportionate. Essentially, the question of whether the registration statute was cruel and unusual punishment was not well presented.

In addition, Graham's offense was apparently in 2010. That was after the substantial changes were made in the registration statute. For that reason, it would have been difficult to argue *ex post facto*.

The 2018 case of In the Interest of T.H.

On June 15, 2018, the Iowa Supreme Court decided the case of In the Interest of T.H., 913 N.W. 2d 578 (Iowa 2018). As the case divided the justices 3-1-3, some care must be taken in describing the case and drawing conclusions from it.

T.H. was adjudicated delinquent in Woodbury County. After an evidentiary hearing he was found to have committed Sexual Abuse in the Third Degree in violation of 709.4(1)(a) of the 2016 code. This was the forcible felony of performing a sex act by force or against the will.

At the dispositional stage, T.H. was put into residential treatment. The judge ordered him placed on the sex offender registry, stating correctly that he had no discretion with regard to that decision. See 692A.103(4).

T.H. appealed raising two issues. He questioned the sufficiency of the evidence to find his adjudication. That claim was rejected. He also argued that the mandatory sex offender registration was "cruel and unusual punishment" in violation of the Iowa and United States Constitutions.

There were three opinions. Justice Cady wrote what could be thought of as majority opinion. He found that the sex offender registry as applied to juveniles was in fact "punishment." In this conclusion, he was joined by Justices Apple, Wiggins, and Hecht. However, he found that it was not "unusual punishment." In that part of the opinion he was joined by Justices Mansfield, Waterman, and Zager.

The end result was that the placement on the registry remained in place for T.H. But four justices concluded that the registry, as applied to juveniles, was punishment. As Justice Mansfield observed in this opinion, this would mean that the statute could not be applied retroactively.[3]

The three opinions should be discussed carefully to see what the judges would likely conclude for adults with an *ex post facto* claim. In fact, that is what Aschbrenner is presenting.

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[3] Many of the complaints about retroactive changes would focus on the 2009 rewrite of the Statute. The statute has not significantly changed since 2009. Ex post facto arguments would presumably only apply to individuals who committed their offenses before 2009.

Justice Cady, as an initial matter, analyzed how the Registration obligations are applied to juveniles, particularly who remain within the juvenile court's jurisdiction. He noted that judges in essentially sentencing a juvenile, who had been adjudicated for a forcible sexual felony, had no discretion about the registry. He concluded, however, that the lack of discretion was only temporary.

Justice Cady found that prior to T.H. aging out or the juvenile case ending, there would be court discretion to waive or modify the registration requirement. He also noted that the modification statute in the registry chapter, Section 692A.128, could provide relief for T.H. after five years, assuming that he satisfies the conditions of that statute.

With this particular statutory framework in mind, he analyzed the "automatic "placement on the registry, using traditional analysis to determine whether the statute was “punitive.”

Whether something is "punitive" is necessary both to determine if it is cruel and unusual punishment and to determine if changes can be can be applied retroactively.

Here is how he determined whether the statute was "punitive." First the Court determines whether the legislative intent was specifically to

impose punishment. If it was intended to punish, then it is clearly a punishment.

But usually there can be some non punitive rationale identified with these registration statutes. Indeed public safety has long been so identified. T.H. at 588.

But even if it is not intended to be punishment, you need to use the multi-factor analysis set out in Kennedy v. Mendoza-Martinez. The question is whether the statute is "sufficiently punitive to render the scheme penal in nature." T.H. at 588.

Here is how Justice Cady analyzed the Mendoza factors:

1- Does the restraint involve an affirmative disability?

Justice Cady found the Registry statute to “plainly impose an affirmative disability or restraint.” He characterized the Statute as limiting reintegration into the community upon release from treatment. He mentioned the limited opportunity to develop social skills with peers. He noted the restrictions on even being certain places or having certain kinds of after-school activities or part-time employment.

He also specifically mentioned that under the current registration statute, the registrant would have to appear in person to register with a Sheriff and update their information. Justice Cady observed the “statutory

scheme which requires an in-person check-in, employment conditions, and the possibility of electronic monitoring are strikingly similar to a supervised probation."

He concluded that this factor weighs in favor of the statute being punitive.

2-Has the restriction been historically regarded as punishment?

Judge Cady considered several ways the Registry, particularly for juveniles, could be regarded as punishment.

He looked at the analogy to public shaming. He noted that this argument had been rejected in Smith, because, mostly, it was just dissemination of accurate information. He observed that historically juvenile criminal records were not subject to mass publication.

He also observed that the Smith rejection of publication argument was "less persuasive" in 2018 than in 2003. He noted that the Census Bureau estimated that 75% of households have internet access. Placement on the Registry subjects someone to this shaming at the touch of a mouse.

Cady found that the mass publication of a juvenile delinquency adjudication weighed this factor in favor of being punitive.

He did note without much discussion that other courts had concluded that the registry was now similar to "probation." 913 N.W. 2d at 590. He then observed that probation was a form of punishment.

3-Does the restriction comes into play only with finding of scienter?

It is not clear what this factor involves. Do you review the scienter of the underline crime that got you on the registry or the registration statute? In Pickins, the State conceded that this factor applied. That suggested that the State was agreeing that the factor favored punishment. Clearly, the underlined crime has scienter. Whatever this particular provision means, most Courts have regarded it as providing little weight to the analysis.

4- Does the restriction promote traditional aims of punishment-retribution or deterrence?

It is not entirely clear how consideration of the traditional aims of punishment, retribution and deterrence, gets applied to the registration statute. Justice Cady concluded that public safety was the primary concern for the statute, and therefore the factor favored the statute being non-punitive.

5- Is the behavior already a crime?

Like factor #3, it is not quite clear what this factor involves. Do you review the behavior of the underline crime that got you on the registry or the

registration statute? In Pickins, the State also conceded that this factor applied. That suggested that the State was agreeing that the factor favored punishment. Whatever this particular provision means, most Courts have regarded it as providing little weight to the analysis.

6- Is the restraint rationally related to a non punitive purpose?

Justice Cady found that mandatory registration of juveniles who have committed a more serious sex offense was rationally connected with protecting the community. This factor favored the statute being non-punitive.

7- Whether the restriction appears excessive?

Justice Cady regarded this final factor as the most significant of the seven.

Justice Cady then focused on the central part of the analysis in Smith, the risk of recidivism. He noted that in Smith, United States Supreme Court had placed significant weight on the "frightening and high" risk of recidivism.

In contrast, Justice Cady noted that research published since Smith "demonstrates that Juvenile sex offenders exhibit "drastically lower recidivism rates than their adult counterparts." He also noted that the

literature shows “no significant difference in re-offense rates in registered and non-registered juveniles.” Justice Cady’s conclusion was the following:

> *Smith*’s premise that the “frightening and high” rates of recidivism justify the harsh impositions of the sex offender regime has proven untrue in the context of juveniles. Indeed, the primary justification for the sex offender registry—protecting the public from individuals especially prone to reoffending—is substantially diminished with respect to juvenile offenders.
> In Interest of T.H., 913 N.W.2d 578, 596 (Iowa, 2018)

What about the other opinions?

Justice Cady’s opinion is really the most important opinion to come from the T.H. decision. Something should be said about the other two opinions.

Justice Appel wrote an opinion for in which he was doing by Justice’s Wiggins and Hecht. He would have found the automatic registration not only punishment, but also cruel and unusual punishment, as applied to juveniles. He talked about the low risk of juvenile sex offenders. He noted that juveniles are more responsive to treatment than adults. He concluded that

> “because of a low risk of recidivism in tandem with responsiveness to rehabilitative treatment, the current policies and practices designed to prevent adult reoffending lack proportionality between the crime and the punishment as a plead to juveniles”.
> 913 N.W. 2d at 603.

Justice Mansfield wrote an opinion, concurring and dissenting. He was joined by Justices Zager and Waterman. He criticized the use of social science as a foundation for the majority decision. In this, he failed to account for the fact that social science had been the foundation of the United State Supreme Court cases with regard to sex offenses.

He would not have found the statute punitive.

In a somewhat important observation at the close of his opinion, he noted that the determination that the statute was punitive "necessarily means the ex post facto clause applies." This is, of course, what Aschbrenner now argues in this case.

Major cases outside of Iowa

The Sixth Circuit Court of Appeals decision in Does v. Snyder is a very important case. Here is what the Court said:

> "the test we must apply, as a lower court, is quite fixed: an ostensibly civil and regulatory law, such as SORA, does not violate the Ex Post Facto clause unless the plaintiff can show "by the clearest proof" that "what has been denominated a civil remedy" is, in fact, "a criminal penalty," *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L.Ed.2d 164 (2003) (citation and internal quotation marks omitted).
>
> Does #1-5 v. Snyder, 834 F.3d 696, 700 (C.A.6 (Mich.) 2016)

It applied the test from Kennedy v. Mendoza–Martinez, 372 U.S. 144, 168–69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

As to the first factor, the Sixth Circuit found that the residency restriction at issue in the Snyder case resembled banishment. It found that the registry in general looked like public shaming, which was a historical punishment. Finally, it noted that the registration statute was very similar to parole or probation. The first factor from Smith favored the plaintiffs.

The Court concluded that there was very much an affirmative disability or restraint imposed by the statute. There were places that you could not live. There were places that you could not loiter. You had to physically go down to the Sheriff's office quite a bit.

The Court agreed that there a rational relation to a non punitive purpose.

The Sixth Circuit, however, took issue with the statement in the Smith case that the rates of reoffending were "frightening and high." Here is what the Sixth Circuit said about what the evidence appears to be from the academic literature at this point.

> Intuitive as some may find this, the record before us provides scant support for the proposition that SORA in fact accomplishes its professed goals. The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' " ... One study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of

> criminals. *See* Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003). Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism... And while it is intuitive to think that at least some sex offenders—*e.g.*, the stereotypical playground-watching pedophile—should be kept away from schools, the statute makes no provision for individualized assessments of proclivities or dangerousness, even though the danger to children posed by some—*e.g.*, Doe # 1, who never committed a sexual offense—is doubtless far less than that posed by a serial child molester.
>
> Does #1-5 v. Snyder, 834 F.3d 696, 704–05 (C.A.6 (Mich.) 2016)

This is the point made in the article Aschbrenner submitted to the District Court. See Exhibit F: Ellman. Ira Mark and Ellman, Tara, 'Frightening and High': The Frightening Sloppiness of the High Court's Sex Crime Statistics (June 8, 2015). Available at SSRN: http://ssrn.com/abstract=2626429 (Appx. p. 80)

When all of those factors were put together, the Sixth Circuit concluded that the statute imposed punishment and punishment cannot be retroactively imposed or increased.

It should be emphasized that Michigan applied for *certiorari* to the United States Supreme Court. After asking for and getting an amicus from the Department of Justice in late 2017, the Supreme Court denied *certiorari*. The DOJ had recommended that denial.

An additional well reasoned opinion was Commonwealth v. Muniz ,

164 A. 3d 1169 (Penn. 2017). Muniz concluded that the Pennsylvania Registration statute was punitive, and could not be applied to certain registrants because of the *ex post facto* clause.

For other state decisions finding an *ex post facto* violation see

New Hampshire: *Doe v. State,* 167 N.H. 382, 111 A.3d 1077, 1100 (N.H. 2015);

Maine: *State v. Letalien,* 985 A.2d 4, 26 (Me. 2009);

Oklahoma: *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013);

Kentucky: *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009);

Alaska: *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008).

Indiana: Gonzales v. State, 980 N. E. 2d 312 (Ind. 2013) (ex post facto as to increase from 10 to life)

Of some note is the confusion presented in the State of Kansas. That State's Supreme Court found an *ex post facto* problem, and overruled that precedent, on the same day in 2016. See State v. Petersen-Beard, 377 P.3d 1127, (Kan. 2016)

Application of this law to Aschbrenner's case

Simplified Facts

Lloyd Aschbrenner committed his offense in 2006. At that time, the registration statute was very different than its current version. Here is just a list of the requirements that Aschbrenner faces now even though he is not on parole or probation.

1. He has to report to the Sheriff in person at a minimum of twice a year along with every other time that any relevant information changes during the year.

2. He has to report about an incredible number of things, which are defined in "relevant information." It is not just the address and phone number that it was in 2007. You have to report sure who all lives at your house. You have to report whenever you leave the County even for a limited period of time. If you go temporarily stay at someone else's house, you have to list that address, and identify all lives in that house. You have to give your employer's name and address. You have to provide all of the Internet identifiers, whatever that term means. You have to provide motor vehicle information. You have to say whether are have been arrested on any new charge. Most of those things are what a person usually has to do with a probation officer.

3. If you do not do these things, you could be punished by a felony if you have one prior offense.

4. A violation of every section of the registration statute adds an extra ten years to the registration length (unless you get all the way to life on the registry).

5. You are restricted in terms of places you can go. You cannot go to parks, library, and cannot hold certain jobs.

Legal argument regarding Martinez factors

1- Does the restraint involve an affirmative disability?

In T.H. Justice Cady found that the registration statute “plainly imposed an affirmative disability or restraint.” While he was discussing juvenile restrictions virtually all of the restrictions apply to adults. They are prohibited from going the same places as juveniles. (Assuming they have a minor victim.) There are the same restrictions on employment and housing. They have, if anything, more “relevant information” then juveniles.

There is the requirement to affirmatively go into the sheriff’s department from one to four times a year (Aschbrenner as a tier II offender has to go in two times a year). But on top of that obligation there is the requirement to notify the sheriff within five days <u>of any change</u> in any of the information required to be disclosed. The sex offender registration obligations impose an affirmative disability or restraint on adult registrants as well as juveniles.

2-Has the restraint been historically regarded as punishment?

The Court should find the current registration statute, unlike the statute in Perkins, resembles historical punishment. There are two ways it is like punishment.

The requirement to actually go into the sheriff's office and continually update that information is similar to probation or parole, which is a traditional punishment. Here is what Justice Cady observed in the T.H. case, speaking of juveniles.

> (T)he statutory scheme, which requires in-person check-ins, employment conditions, and the possibility of electronic monitoring, is strikingly similar to supervised probation.
>
> In Interest of T.H., 913 N.W.2d 578, 589 (Iowa, 2018)

While he was speaking about juveniles, the restriction on adult registrants is identical to that imposed on juveniles.

The United States Supreme Court specifically noted in the Smith decision from Alaska, that a reason the statute was not punitive was there was no “in person requirement” to update the information. Smith , 538 U.S. 102, 123 S.Ct. 1140.

For other cases finding the in person requirement favoring punishment see:

Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) (The fact that the Alaska statute did not involve in person updates was important.) Doe v. State, 111 A.3d. 1077 (N.H. 2015); State v. Letalien, 985 A.2d 4, 18 (Me.2009)(finding that a quarterly, in-person reporting requirement for the remainder of an offender's life “is undoubtedly a form of significant supervision by the state” that “imposes a disability or restraint that is neither minor nor indirect”); Starkey v. Oklahoma Dept. of Corrections, 305 P.3d 1004, 1022 (Okla.2013) (finding that “the affirmative ‘in person’ registration and verification requirements alone cannot be said to be ‘minor and indirect’ ”); Doe v. State, 189 P.3d 999, 1009 (Alaska 2008) (finding that the registry scheme “compels affirmative post-discharge conduct,” its “duties are significant and intrusive,” and the time periods are “intrusive" . *Doe v. Dept. of Pub. Safety & Corr. Servs.,* 430 Md. 535, 62 A.3d 123, 139 (2013).

The sex offender registry is similar to public shaming.

Justice Cady talked about the fact that the Smith decision had rejected the argument that public disclosure of public information was not shaming. Justice Cady noted that the Smith reasoning was less persuasive in 2018 than it was in 2013. He then cited favorably to a Pennsylvania Court which noted that today “approximately 75% of households in the United States have internet access.” The fact that the "public information" is now at the

available at the click of a mouse, suggests that this is not just the republication of otherwise public information that it was in 2003. If you are on the registry, you are subject to public humiliation.

3-Does the restraint comes into play only with finding of scienter?

Whether something comes into play only with the finding of scienter is one of the Mendoza factors. The State in Pickins conceded that it was present. The registration obligation only came into play with the scienter from the original crime.

This factor does not appear to play much of a role in the analysis of registration statutes.

4- Does the restraint promote traditional aims of punishment-retribution or deterrence?

The Courts have largely made this factor a non-factor. In Smith, the United State Supreme Court noted that much regulation could have a "deterrent" effect in addition to having essentially a civil public safety purpose. The Iowa Supreme Court in had found the 2000 foot restriction had a deterrent effect which was only secondary and largely consistent with the regulatory objective. In T.H., Justice Cady found that the existence of essentially a civil purpose made this factor favor a finding of this statute was non-punitive.

5- Is the behavior already a crime?

The fifth Mendoza factor is largely a non factor. In Pickins, the State conceded that the factor was present, whatever that meant. For that reason, the Court did not discuss it. Similarly, the Smith Court did not find the factor to be useful. The Court noted that the regulatory scheme applied only to past conduct, which was crime. Justice Cady found the factor only slightly in favor of finding the scheme was punitive.

It does seem, however, that it is important to know which behavior is being reviewed under the Mendoza factors. Is it the original crime or the registration statute? If the behavior is the requirement that you tell the sheriff about a new Facebook page, that is a new crime.

The fact that the registration statute essentially criminalizes things that was not otherwise a crime, would suggest that this factor under Mendoza would suggest that the registration statute was punitive.

6- Is the restraint rationally related to a non punitive purpose?

To some extent this feels like a broken record. There is a non-punitive purpose somewhere in the registration statute. It is to protect society from sexual reoffending. This is a non-punitive purpose. As Judge Cady observed, there is a rational connection to protecting the community. See 913 N.W. 2d at 594.

7- Whether the restriction appears excessive?

The last Mendoza factor was regarded by the Iowa Supreme Court as the most important in the T.H. case. The Court found the statute "excessive" in large part by looking at the social science with regard to sex reoffending, particularly as been developed since the Smith case. The Court made several points from examination of that social science.

The Court started with a social science conclusion of the United States Supreme Court in Smith and an earlier case.

> In *Smith*, the Supreme Court placed significant weight on the risk of recidivism. The Court explained "the [Alaska] legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.' " *Id.* at 103, 123 S.Ct. at 1153 (quoting *McKune v. Lile,* 536 U.S. 24, 34, 122 S.Ct. 2017, 2025, 153 L.Ed.2d 47 (2002)). Indeed, "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune*, 536 U.S. at 33, 122 S.Ct. at 2024) (citing Bureau of Justice Statistics, U.S. Dept. of Justice, *Sex Offenses and Offenders* 27 (1997); Bureau of Justice Statistics, U.S. Dept. of Justice, *Recidivism of Prisoners Released in 1983* 6 (1997)); *accord Smith*, 538 U.S. at 103, 123 S.Ct. at 1153. In light of this serious risk, the *Smith* Court reasoned "the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause." 538 U.S. at 104, 123 S.Ct. at 1153.
> In Interest of T.H., 913 N.W.2d 578, 595 (Iowa, 2018)

This social science statement by the United State Supreme Court in 2002 and 2003 figured prominently in its decision to dispense with individual determinations of dangerousness and wide spread dissemination of information about convictions.

Justice Cady made several steps in his analysis:

1. Juvenile sex offenders exhibit drastically lower recidivism rates than their adult counterparts. This is similar to the conclusion stated by the Court in State v. Graham, 872 N.W. 2d 476, 484 (Iowa. 2017)

> There have now been several decades of empirical research on the recidivism rates of juvenile sex offenders. The literature suggests most juvenile offenders who commit sex offenses will outgrow their behavior and that juveniles adjudicated delinquent for sex offenses have extremely low rates of recidivism generally and even lower rates of sexual reoffending. *See* Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 14–15 (2013) [hereinafter Halbrook].

2. Actually Graham stated the next step in Cady's analysis. The overall rate for juveniles is very low.

3. Moreover sexual behavior with juveniles is apt to be exploratory in nature rather than permanent sexual deviance.

4. Justice Cady noted that there is reason to doubt the effectiveness of sex offender registration. He stated that multiple studies "have shown *no*

significant difference in re-offense rates between registered and non-registered juveniles." 913 N.W. 2d 595.

So what about adults? First of all, the same social science shows that the rates of reoffending for adults overall are very low. The Iowa Department of Corrections, for example, studied thousands of offenders in Iowa about ten years ago. The overall rates of reoffending, no matter what the level of risk was, were only about 3 percent. That is for adults. On average only 3 in 100 offenders is going to reoffend.

Offenders, such as Aschbrenner, who are regarded as "low risk" and who are starting to be older would have even lower rates.

It must be accepted that adults are different than juveniles. That is the whole premise of limiting punishment for juveniles. At the same time, the Smith statement by the United States Supreme Court almost taking judicial notice of high rates of risk for sex offenders is simply not supported by the statistics.

As a final matter, the evidence that the registration does not really affect reoffending, recognized in TH., would be the same for adults.

This Court should conclude that the final Mendoza factor favors of finding a punishment.

Conclusion under Mendoza

When you put all of the Mendoza factors together, the Court should reach the same conclusion for adult registrants as it reached in T.H. It should conclude that after the 2009 amendments the registry is sufficiently punitive to amount to imposition of additional criminal punishment. With that conclusion, it has to follow that the 2000 amendments cannot be applied to Lloyd Aschbrenner who committed his offense in 2006. The Court should set aside the conviction.

II. THE REQUIREMENT FOR DISCLOSURE OF INTERNET IDENTIFIERS FOUND IN THE REGISTRATION STATUTE VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE COMPARABLE PROVISION IN THE IOWA CONSTITUTION

Standard of Review:

As this claim is based on a constitutional violation, review on appeal is *de novo*. Everett v. State, 789 N.W.2d 151, 155 (Iowa 2010).

Preservation of Error:

The claim was raised in Motion to Dismiss before the District Court. The judge addressed the issue on the merits. It was preserved for appeal by having a trial on the Minutes.

Factual Discussion

The facts with regard to this legal claim are not complicated and should not be contested. Those facts would be the following:

1. Lloyd Aschbrenner was convicted in 2007 for a crime committed in 2006.

2. He was placed on probation and that was followed by a special parole. He has now discharged that supervision.

3. While his original length of registration was ten years, he received an additional ten years for a registration violation in Linn County in 2014.

4. The registration statute in 2006 was very different from the registration statue as it appears today.

5. Most of the changes in the registration statute between 2006 and 2017 took place in 2009. At that time the legislature rewrote the entire statute.

6. One of the changes in 2009 was the requirement that a registrant provide all information listed as "relevant information" to the sheriff within five days of any change.

7. One piece of relevant information that is required today that was not required in 2007 was the list of all "internet identifiers," whatever that term means.

8. Aschbrenner is charged in this case with having not disclosed an internet identifier, specifically a Facebook page.

9. That information would not have been required in 2007 at the time of his conviction.

Specifics of the statute

> **Section 692A.101. Definitions:**
> 15. "Internet identifier" means an electronic mail address, instant message address or identifier, or any other designation or moniker used for self-identification during internet communication or posting, including all designations used for the purpose of routing or self-identification in internet communications or postings.
>
> 23. a. "Relevant information" means the following information with respect to a sex offender:
>
> (9) Internet identifiers.
>
> **692A.104. Registration process**
> 1. A sex offender shall appear in person to register with the sheriff of each county where the offender has a residence, maintains employment, or is in attendance as a student, within five business days of being required to register under section 692A.103 by providing all relevant information to the sheriff.
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> 3. A sex offender shall, within five business days of a change in relevant information, other than relevant information enumerated in subsection 2, notify the sheriff of the county where the principal residence of the offender is maintained about the change to the relevant information. The department shall establish by rule what constitutes proper notification under this subsection.

692A.108. Verification of relevant information
1. A sex offender shall appear in person in the county of principal residence after the offender was initially required to register, to verify residence, employment, and attendance as a student, to allow the sheriff to photograph the offender, and to verify the accuracy of other relevant information during the following time periods after the initial registration:

a. For a sex offender classified as a tier I offender, every year.

b. For a sex offender classified as a tier II offender, every six months.

c. For a sex offender classified as a tier III offender, every three months.

This next provision is the Department of Public Safety Rule referred to in 692A.104 above. Updating "internet identifiers" can occur other than in person, assuming there is confirmation in writing by the sheriff.

IA ADC 661-83.3(692A)
83.3(4) *Updating relevant information not requiring personal appearance.* Any change in any item of relevant information other than changes of address, places of attendance as a student, or places of employment shall be communicated to the sheriff of the county of the registrant's principal residence in person, by telephone, or electronically, within five days of the change occurring. Any such change shall not be deemed to be completed until the registrant has received acknowledgment from the office receiving the change in printed or electronic form.

Summary of Argument

It is now clear that sex offenders have a right to use the internet, protected under the Free Speech provisions of the Constitutions. Indeed the United States Supreme Court in an 8-0 decision in June, 2017 struck down a North Carolina statute that criminalized the use of social media by convicted

sex offenders. Packingham v. North Carolina, 582 U.S. ——, 137 S. Ct. 1730, 198 L.Ed.2d 273 (2017).

While Iowa does not criminalize the use of the internet by sex offenders, it does require the disclosure within 5 days of all "internet identifiers." That provision requiring disclosure of "internet identifiers" is a common one around the country. This is probably the result of the Adam Walsh federal regulations from about ten years ago.

Aschbrenner asserts that it violates the First Amendment to require disclosure to government of the internet identifiers. He, therefore, cannot be punished for this current charge.

The First Amendment argument has been raised in challenging required disclosure of internet identifiers in several cases in the last 10 years.

The disclosure provision was held unconstitutional by the Ninth Circuit Court of Appeals in Doe v. Harris 772 F3d 563 (9th Cir. 2014). The analysis from that case applies to this case. It applies with even more force in light of the Packingham case.

The Harris court concluded that the restriction implicated the First Amendment. Applying intermediate scrutiny the Court then struck the statute. The Court concluded that the means chosen burdens substantially more speech than is necessary to further the government interest.

This court should reach the same conclusion.

Major cases outside of Iowa

A. Packingham v. North Carolina

Packingham v. North Carolina, 582 U.S. ——, 137 S. Ct. 1730, 198 L.Ed.2d 273 (2017), was decided by the United States Supreme Court in June of 2017. In North Carolina, unlike Iowa, registered sex offenders were barred from accessing certain social networking websites. That term was defined broadly. Packingham was convicted of a felony for posting something on his Facebook page. Ironically, he posted something praising an outcome he had in traffic court.

Here are statements from that case setting out the reasoning of the Supreme Court.

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5–6. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.,* at 6. This is about three times the population of North America.

> Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (U.S.N.C. 2017)
>
> This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." McCullen v. Coakley, 573 U.S. ––––, ––––, 134 S. Ct. 2518, 2534, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.,* at ––––, 134 S. Ct., at 2535 (internal quotation marks omitted).
> Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (U.S.N.C. 2017)
>
> In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.
> Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (U.S.N.C. 2017)

B. Doe v. Harris

The next important case is Doe v. Harris, 772 F3d 563 (9th Cir. 2014), a Ninth Circuit case from 2014. This was a case from California that challenged the requirement that sex offenders disclose their internet identifiers to law enforcement as part of the registration process. That requirement is similar to the Iowa requirement.

Harris was a civil rights case brought by registered sex offenders seeking injunctive relief in regard to that statute. The District Court granted relief. The Ninth Circuit upheld the injunction.

California law required sex offenders to notify Government within 24 hours of engaging in online communication with a new identifier. Here was the language of the statute enjoined in that case.

> The 2012 Californians Against Sexual Exploitation ("CASE") Act required sex offenders to provide "[a] list of any and all Internet identifiers established or used by the person" and "[a] list of any and all Internet service providers used by the person." *Id.* § 290.015(a)(4)-(5). The Act also requires registered sex offenders to send written notice to law enforcement within 24 hours of adding or changing an Internet identifier or an account with an Internet service provider ("ISP"). *Id.* § 290.014(b).

Here was the reasoning of the Circuit Court.

1. Sex offender participation with the internet is protected by the First Amendment. This part of the reasoning is reinforced by the Packingham decision a few years later.

2. Notification to government of communication with a new identifier "significantly burdened the individual's ability and willingness to speak out on the internet." For that reason, the First Amendment was implicated by the restriction.

> There can be little doubt that requiring a narrow class of individuals to notify the government within 24 hours of

> engaging in online communication with a new identifier significantly burdens those individuals' ability and willingness to speak on the Internet.
> Doe v. Harris, 772 F.3d 563, 572 (C.A.9 (Cal.) 2014)

The disclosure requirement also implicated the right to engage in anonymous speech.

> The Act also has the inevitable effect of burdening sex offenders' ability to engage in *anonymous* online speech. Appellees allege that the Act allows law enforcement to disclose their identifying information to the public without imposing sufficient constraints on law enforcement's discretion to do so. The Supreme Court has subjected speaker regulations—such as disclosure requirements—to First Amendment scrutiny.
> Doe v. Harris, 772 F.3d 563, 574 (C.A.9 (Cal.) 2014)

3. The Court concluded that the intermediate level of scrutiny was appropriate, rather than strict scrutiny, in light of the purported content neutrality of the restriction.

A couple comments should be made about the determination that the intermediate scrutiny would be appropriate.

First of all, virtually all of the cases that have considered the constitutionality of the required disclosure of internet identifiers have recognized that the First Amendment is implicated. For that reason, at least intermediate scrutiny should apply. This is true even for the one Court of Appeals case that in 2010 resolved the balancing in favor of the State. See

Doe v. Shurtleff, 628 F.3d 1217, 1223 (10th Cir.2010) (upholding the regulation in 2010);

For cases striking the provisions after applying First Amendment analysis see Doe v. Nebraska, 898 F.Supp.2d 1086, 1093 1107–08 (D.Neb.2012) and White v. Baker, 696 F.Supp.2d 1289, 1307–08 (N.D.Ga.2010)

The argument that traditional "strict scrutiny" should apply does have some support. While there was no content restriction in the Ninth Circuit case, the restriction only applied to certain speakers. The United States Supreme Court discussed this principle in Citizens United v. Federal Election Commission 558 U.S. 310, 130 S. Ct. 876, 175 L.E. 2d 753 (2010). In that case, the court applied strict scrutiny to a regulation that was based on the identity of the speaker and not the content of the message. The Ninth Circuit rejected that argument and that level of scrutiny, but the argument is still there.

4. The intermediate scrutiny test would be the following:

> Content-neutral restrictions on protected speech survive intermediate scrutiny so long as "'they are narrowly tailored to serve a significant governmental *577 interest, and ... leave open ample alternative channels for communication of the information.' " Ward, 491 U.S. at 791, 109 S. Ct. 2746 (quoting Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984)). "To satisfy this standard, a regulation need not be the least speech-

> restrictive means of advancing the Government's interests." *Turner,* 512 U.S. at 662, 114 S. Ct. 2445. Rather, the test is whether "the means chosen ... 'burden[s] substantially more speech than is necessary to further the government's legitimate interests.' " *Id.* (quoting Ward, 491 U.S. at 799, 109 S. Ct. 2746); see Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 947 (9th Cir.2011) (en banc). The government must also "demonstrate that the recited harms are real ... and that the regulation will in fact alleviate these harms in a direct and material way." Turner, 512 U.S. at 664, 114 S. Ct. 2445.
>
> Doe v. Harris, 772 F.3d 563, 576–77 (C.A.9 (Cal.) 2014)

To some extent, all levels of scrutiny under the Constitutions involve a balancing test. The different levels of scrutiny, strict or intermediate scrutiny, or rational basis, look at the kind of government justification that is offered for the statute. The examination also looks at how close is the fit between the statute and the harm to be prevented.

With intermediate scrutiny, the government interest must be "significant." Under strict scrutiny it would need to be "compelling." The fit does not have to be the "least restrictive" measure. However, it cannot "burden speech more than necessary."

A final point taken from Harris is that "the perceived harm must be real and the measure taken must alleviate the harm in a direct and material way."

5. The government interest in requiring disclosure of internet identifiers, and for that matter, the entire registration statute, is to protect society from repeat sex offenders. The government interest is certainly a real one, particularly in protecting children from individuals on the internet who would prey upon them.

6. The disclosure provisions, however, according to the Harris ruling, does not satisfy the other requirements of intermediate scrutiny.

In Harris case, the Court struck the statute for three reasons. First, the Court noted that the statute, using terms very similar to Iowa's, did not provide much guidance as to what had to be disclosed.

> Thus, whether narrowly construed or not, the ambiguities in the statute may lead registered sex offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report. "This uncertainty undermines the likelihood that the [Act] has been carefully tailored to the [State's] goal of protecting minors" and other victims. *Reno,* 521 U.S. at 871, 117 S. Ct. 2329. And this uncertainty is particularly troubling because unclear laws inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972) (alteration in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L.Ed.2d 377 (1964)).
>
> Doe v. Harris, 772 F.3d 563, 579 (C.A.9 (Cal.) 2014)

Second, the Court was concerned about whether the information regarding internet identifiers could be made public. The Court felt that

absent safeguards to prevent public disclosure, required disclosure would particularly burden the right to anonymous speech.

Finally, the Court noted that the reporting requirement in California within a 24 hour timeframe would undoubtedly chill First Amendment activity. This was particularly the case given the possibility of criminal sanctions for failing to update information. Doe v. Harris, 772 F.3d 563, 582 (C.A.9 (Cal.) 2014)

C. Other cases outside Iowa

Here are other cases that have found disclosure provisions unconstitutional.

In Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608 (E.D.Ky., 2017) the United States District Court enjoined the State of Kentucky from a variety of sex offender requirements pertaining to the internet. One of those provisions was the requirement of disclosure. Here was the statute:

> KRS § 17.510 requires Doe and other registered sex offenders to provide all of their e-mail addresses, instant messaging names, or "other Internet communication name identities" to their local probation and parole offices. KRS § 17.510(10)(c).

In Doe v. Nebraska 898 F. Supp. 2d 1086 (D. Neb. 2012), the United States District Court enjoined a portion of the Nebraska Sex Offender Registration Act having to do with registration of internet identifiers.

> In relevant part, these statutes provide:
> Neb.Rev.Stat. § 29–4006(1)(k) and (s):
> (1) Registration information required by the Sex Offender Registration Act shall be entered into a data base in a format approved by the sex offender registration and community notification division of the Nebraska State Patrol and shall include, but not be limited to, the following information:
> ....
> (k) The person's remote communication device identifiers and addresses, including, but not limited to, all *global unique identifiers,* serial numbers, *Internet protocol addresses,* telephone numbers, and account numbers specific to the device;
> ....
> (s) All email addresses, instant messaging identifiers, chat room identifiers, *global unique identifiers,* and other Internet communication identifiers that the person uses or plans to use, all domain names registered by the registrant, and all blogs and Internet sites maintained by the person or to which the person has uploaded any content or posted any messages or information.
> Neb.Rev.Stat. § 29–4006(2):

There was the District Court decision in Doe v. Snyder, 101 F.Supp 3d 672 (E.D. Mich. 2015). At the district court level the Court addressed not only the *ex post facto* claim that was reversed on appeal, but also certain internet provisions of the Michigan statute. One of them was the requirement that offenders had to disclose the following.

The federal District Court judge enjoined the enforcement of that the disclosure provision, concluding that it did not survive constitutional scrutiny. He relied at least in part on Doe v. Harris, the Ninth Circuit case. He ruled against the Plaintiffs on the broader claim that the statute violated

the ex post facto clause. The Plaintiffs appealed the ex post facto part of Judge Clelend's decision. The state of Michigan did not appeal the injunction with regard to the internet provision.

White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2010) enjoined the requirement in Georgia requiring disclosure of internet information. Here was the specific language of that statute.

> Subsection (K) of O.C.G.A. § 42–1–12(a)(16) requires that a registered sex offender provide to law enforcement officials their "E-mail addresses, usernames, and user passwords ("Internet Identifiers" or "internet identifying information")." O.C.G.A § 42–1–12(a)(16)(K) (the "2008 Amendment"). The term " '[u]sername' means a string of characters chosen to uniquely identify an individual who uses a computer or other device with Internet capability to gain access to e-mail messages and interactive online forums." O.C.G.A. § 42–1–12(a)(21.1). The term " '[u]ser password' means a string of characters that enables an individual who uses a computer or other device with Internet capability to gain access to e-mail messages and interactive online forums." *Id.* at (a)(21.2)

Judge Duffey found the First Amendment implicated and essentially applied an intermediate level of scrutiny. The judge found several provisions of the Georgia statute troubling. One was the fact that the offender was required to disclose not only usernames but also passwords. Second, the identification of these identifiers was too broad. The judge was also troubled by the fact that the information could be disclosed to law enforcement agencies for any law enforcement purposes, not just purposes

concerning misuse of the internet having to do with children. Finally, he was troubled by the possibility of this information being released to the community.

D. Iowa case

There is one Iowa case regarding the internet since the United States Supreme Court decision in Packingham in June of 2017. In State v. Cutshall 2017 WL 2875693 (Iowa App), the Court of Appeals considered a condition of probation where a sex offender was prohibited from accessing the internet or possessing any device with internet capability.

The Court vacated that portion of the sentencing order with instructions that the District Court strike that condition of probation. The Court by footnote referred to the Packingham case.

The Court of Appeals noted that the condition was not reasonable in light of the fact that Cutshall's crime, as shown in the Minutes, did not indicate that he had used the internet to find his victims. The State apparently conceded error on appeal.

What is significant is that the Iowa appellate court said the probation condition was overbroad, and therefore improper, because the crime did not involve the internet. If this "fit" is required for upholding a condition of probation, it should also be required when considering a provision requiring

full disclosure of all internet identifiers. Such a disclosure provision, in some cases lasting for decades or lifetime, is overly broad unless the crime involved the internet. It should be struck utilizing even intermediate scrutiny.

Application of the law to this case

The analysis from Packingham and Harris case should apply to the Iowa statue that was used for this prosecution.

Aschbrenner has a First Amendment right to have a Facebook account.

The prior disclosure requirement in Chapter 692A infringes on that First Amendment right.

This Court needs to engage in at least intermediate scrutiny. That requires the Government to show that the law is “narrowly tailored to serve a significant Government interest.”

In this case, there are several things that are wrong with the statute when that analysis is applied.

The definition of internet identifiers is full of ambiguities

Several of the recent cases have been concerned with definition of internet identifiers involved in those particular jurisdictions. To some extent, the definitions in all these cases are related to each other. They all

essentially were taken or evolved from the federal regulations published after the Adam Walsh Act about ten years ago.

In Harris, the Court noted:

> In most of the recent cases, the courts have concluded that one problem under First Amendment analysis is that either the definition of what was prescribed was vague or it was certainly overbroad. Thus, whether narrowly construed or not, the ambiguities in the statute may lead registered sex offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report. “This uncertainty undermines the likelihood that the [Act] has been carefully tailored to the [State's] goal of protecting minors” and other victims. *Reno,* 521 U.S. at 871, 117 S. Ct. 2329. And this uncertainty is particularly troubling because unclear laws inevitably lead citizens to “‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.” Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972) (alteration in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L.Ed.2d 377 (1964)).
>
> Doe v. Harris, 772 F.3d 563, 579 (C.A.9 (Cal.) 2014)

The Sixth Circuit case Does v. Snyder held the Michigan statute was punitive and therefore could not be applied retroactively. The District Court had in fact set aside or found several portions of the internet reporting provisions to be unconstitutional.

Here is the Iowa language.

> 15. “Internet identifier” means an electronic mail address, instant message address or identifier, or any other designation or moniker used for self-identification during

> internet communication or posting, including all designations used for the purpose of routing or self-identification in internet communications or postings.

There are problems with this definition. The definition includes the phrase "any other designation or monitored use for self-identification during internet communication or posting."

Everyone would agree that this would include a Facebook or email address. The difficulty, as identified in some of the cases, is that so much of our lives, at this point, are on the internet. This includes social communication. It includes political communication. It includes commercial communication.

This counsel has thought about what I might have to disclose if I was being careful and was on the Registry. Here is a list:

Home email
Office email
EDMS login name
ID to get records from County Attorney
Online banking
Courts online advanced sign in ID
Westlaw sign in information
Blogger sign in
Press Citizen log in
ESPN sign in
Netflix log in
New York Times electronic subscription log in
Facebook account
Facebook groups
HyVee fuel saver card

Log in information for participation with Amazon
or Apple
All stores with online shopping

It is assumed that the sheriff would really not care about my HyVee fuel saver id. But that is covered by the definition. If I had to tell the sheriff about every such id, I am not sure I would sign up to contribute to certain blogs.

The problems identified in other cases would apply to the Iowa statute.

The statute is not narrowly tailored

The statute is not narrowly tailored. The disclosure requirement applies to all sex offenders, no matter what the nature was of their offense. At best, the statute should only apply in those offenders where the internet figured in the particular offense. See State v. Cutshall 2017 WL 2875693 (Iowa App)

Even then, when First Amendment rights are involved, the requirement for a close fit should require the State to consider such factors as how old is the criminal case, whether the person has completed treatment and supervision, and whether the person is low risk to reoffend.

Problems with possible public disclosure

Several courts including the Ninth Circuit in Harris case expressed particular concern for public disclosure of internet information. The concern, as identified by the court, was that if the information could be given out to the public, it would particularly chill free expression.

The Iowa disclosure to the public is generally covered by section 629A.121 of the 2017 Code. There had been a comparable provision in 2007 found in 692A.13. In 2007, there was not anywhere near as much information being given to the sheriff. No information had to be provided about the internet information.

So what does section 692A.121 say?

The first part covers the availability of records on the internet site. See 692A.121(2)(b)(1) and (2). The sections talk about what should be and should not be on the internet site. Information about internet identifiers is not being disclosed on internet site.

The next part talks about what information an agency, which presumably includes the sheriff, may provide to the public. See 692A.121(3)(b). It would appear that the cross reference with the previous section on the internet would mean that the public could not get internet identifiers under this subsection.

At the same time several provisions in the section make clear that a member of the public can contact the sheriff "to verify if a particular internet identifier…is one that has been included in a registration by the sex offender." See 692A.121(9) Someone can contact the department and ask if a particular Facebook account is included in the registration for the offender.

In other words, the department can give out confirmation of whether a particular internet identifier is either one that has been listed or is not. This ability to publicly confirm internet identifiers presumably would act in the same chilling manner as the Court had talked about in Harris.

The dangers requiring disclosure of internet identifiers is not significant

First of all, it is not clear that the government harm of repeat sex offending is anywhere near as great as it has been presumed in some of the earlier cases. The rate of reoffending in general is quite low. The Iowa DOC actually measured reoffending rates in 2010. It found, in a verified study, that there was a total reoffending rate of less than 5%. That was for everybody. That study was consistent with other studies that showed the overall reoffending rate as being in the single digits. See Exhibit F: Ellman. Ira Mark and Ellman, Tara, 'Frightening and High': The Frightening Sloppiness of the High Court's Sex Crime Statistics (June 8, 2015). Available at SSRN: http://ssrn.com/abstract=2626429. Appx. p.80

If overall reoffending is small, the chances that disclosure of internet identifiers would materially aid in the advancement of any government interest is even smaller.

The Court should find the disclosure requirement of internet identifiers to be unconstitutional.

CONCLUSION

Achbrenner committed his crime in 2006. That imposed a registration requirement as described in the code at the time. In 2009, the registration code changed considerably, substantially increasing the obligations of a registrant. One such obligation was the requirement to disclose "relevant information" to the sheriff on a regular and face-to-face basis. Aschbrenner did not do that with regard to a Facebook page and was prosecuted and convicted.

He makes two arguments. First, the registration statute as amended in 2009 now constitutes punishment. Changes in the statute cannot be applied to people convicted before 2009. His conviction should be set aside.

He also complains based on the free speech provisions of the Iowa and United States Constitutions. Social media is now protected by the Constitution, even if you are a sex offender. That should prohibit a

requirement that registrants tell the government a current list of all their social media participation.

This is a second reason to set aside the conviction in this case.

RESPECTFULLYSUBMITTED,

/s/ Philip B. Mears
PHILIP B. MEARS

MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax

philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR APPELLANT

REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

RESPECTFULLYSUBMITTED,

/s/ Philip B. Mears
PHILIP B. MEARS

MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax

philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR APPELLANT

ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Brief was $8.10.

RESPECTFULLYSUBMITTED,

/s/ Philip B. Mears
PHILIP B. MEARS

MEARS LAW OFFICE
209 E. Washington Street
Paul-Helen Building, Suite 203
Iowa City, Iowa 52240
(319) 351-4363 Office
(319) 351-7911 Fax

philmears@mearslawoffice.com
AT0005330

ATTORNEY FOR APPELLANT

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/s/ Philip B. Mears — 11-9-2018
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