



## Registry Matters Podcast

Episode 271

Recorded 7-8-23

### Important Subscriber Notice:

This is to inform you that RM Episode 270 recorded at the NARSOL Conference on June 24<sup>th</sup> was not transcribed. We made the decision because some of what was said was inaudible due to background noise. This noise was generated by the large number of people in the audience, and other activities taking place in the conference venue. We did not record an episode on July 1<sup>st</sup> due to the holiday weekend. We are contemplating only recording every other weekend for the remainder of July and August.

00:00:00

Announcer

Registry matters is an independent production. The opinions and ideas here are those of the host and do not reflect the opinions of any other organization. If you have problems with these thoughts FYP.

00:00:14

Andy

Recording live from FYP Studios, East and West transmitting across the internet. This is episode 271 of Registry Matters. Good evening, Larry. How are you?

00:00:27

Larry

I'm very warm. Thank you.

00:00:33

Andy

I'll get to that in a minute. So, um yeah, so we've been doing this for like five years. I just punched the crap out of the microphone, and I won't be able to get that out. So please make sure that you go over to the appropriate places, and you press like and subscribe and uh do those things for YouTube and if you can write a review on your podcast app. Oh, and let me say this one other thing, somebody keeps telling me to do this. Just in case if you become a patron, then you can listen to us record this live, which happens on Saturday nights almost only because of busy schedules and all that. But Saturday nights at seven o'clock Eastern time if you tell me anything about any other time zones, it doesn't matter. I don't care. Eastern is the only one that matters. Unless Larry, we're in central time zone, then central is the only one that matters. So it's where I am that matters. Is that fair?

00:01:24

Larry

I would say it's completely logical.

00:01:29

Andy

You can find the show over on podcast apps, all that stuff. But the other, the final thing that I want to mention before we actually roll into this is if you do have a question, and we've gotten a bunch of questions lately, you can certainly email it to us at registrymatterscast@gmail.com or you can leave a voice mail or send a voicemail, or a voice memo to the previous email address, or you can leave a voicemail at 747 227 4477. I think that's all the announcements I want to make before we roll in. This is gonna be a quick show because Larry. Tell me what we're gonna do this evening. I'll cover, the weather in a moment.

00:02:08

Larry

Well, we're gonna be doing a very abbreviated session, but we have a case from California that's pending in Federal US District Court there, launched by the Alliance for Constitutional Sexual Offense Laws, and we're gonna be discussing a case out of Idaho that's gone up to the Ninth Circuit Court of Appeals and it's back on remand. We will discuss the order that has been issued in that case. We've got something from a listener and then we've got stuff about the hovercraft. Both of us have experienced hovercrafts in the last week.

00:02:51

Andy

Yes, we have. Hey, we're gonna do an abbreviated session this evening for some unknown reason. What is that reason?

00:02:59

Larry

Well, it's 97 outside and in the building here it's 89.4.

00:03:06

Andy

Oh, God. And that's because of, did your boss not pay the electric bill?

00:03:14

Larry

No, it has to do with a replaced AC unit that cools our section. They replaced it about four years ago and it didn't hold up and it's down again and it's been down for a week and a half, and they blamed the holidays and all these different things.

00:03:31

Andy

The holidays made the AC go out?

00:03:34

Larry

In terms of getting technicians over here. But actually, they've had technicians and I don't think they're fully qualified so caused the problem by incompetence.

00:03:44

Andy

Hey, the way you just described it, is another part of the building cool?

00:03:48

Larry

Oh, yes. The whole entire building there's like 26 suites and we control four of them. This unit controls and cools our four plus one more. So, it's just us and the person has the fifth suite and he's gone for the summer. It's kind of funny that we're the only ones that don't have cooling.

00:04:05

Andy

I'm laughing because yes, that is funny that if it's really only impacting you, that's, I mean, other than it's really not cool, literally not cool. Well, since we're gonna keep this abbreviated so that you don't melt and you get very cranky when you're uncomfortably warm, we will dive right into this show and we'll begin with a comment from a listener and it goes:

We feel sometimes where Larry stops short of thinking outside the box to help a PFR get around the rules using the law / rules like cast men. For example, in episode 250, Larry describes the case of a person convicted in 1993 and Wisconsin did not require him to register because his conviction predated the registry. He moved to Nevada which makes him register, then moved back to Wisconsin, which now required him to register because he had been on the registry in another state. Then he decided to go to New Mexico to get off the registry because they didn't require him to register because their registry started in 1995. Then he went back, this is convoluted Larry, then he went back to Wisconsin, but now he's off the registry.

This kind of thinking is outside the box, yet, in episode 254 a 70-year-old who wanted to join his wife in the Philippines didn't receive the acumen that we'd hoped from you, Larry said:

But anyway, let's assume that your state, wherever you're going to be, that required you file your 21-day notice as required by federal law with your local registration, they will transmit it to the US Marshals who will then, in turn, transmit it internationally to Interpol and Interpol will make sure the destination country has it. Well, here's where you

could run into the problem. The destination country having received that notice will in many instances, when you arrive, they will tell you, "Uh sorry, we're not admitting you into our country," which is their prerogative and you'll be facing a very expensive return flight to the United States. And that is what is going to happen, which is technically correct, but still not helpful.

We hope that Larry would say, "Tell the sheriff, you are going to Germany," buy a ticket to Germany and when you land in Germany, you can go anywhere you want, and you do not have to report to anyone anything. Now, could the Philippines still bar him from entry? Absolutely. But how or why they didn't receive any notice on him? They usually are very welcoming to Americans. We doubt they would scrutinize him or look for the PFR stamp on his passport or if they even know what it is, we are only trying to circumvent that notice or letter from reaching the airport staff. Otherwise, no one is going to bother a 70-year-old with an American passport. Why Germany? You should know why. After interviewing Steve River Whitsett, Episode 195, there are two cases to cite that SORNA has no jurisdiction outside us borders; Lester Ray Nichols; Nichols versus the United States, 55 80 78 US SCOTUS. We can't remember the second one. Now, Larry, may I channel my inner Larry and answer for you? You're gonna say you have no experience with international travel.

00:07:22

Larry

Well, that is true. It is one of the things I would say, yes, thanks.

00:07:28

Andy

All right. So, I've taken over your job. Why do we even need you? What else would you say there? I'm sure there's more that you would say to that.

00:07:35

Larry

He submitted a number of things we're gonna get to most of them but not on this episode. My heart was just so touched that he articulated what I said about the person from Wisconsin who went to Nevada. I mean, if he didn't use our transcript service, he did a good job because that is pretty much what I said. And too often people say things that I didn't say, or they misconstrue what they think that I said. But that's pretty spot on what I said.

00:08:05

Andy

Yeah, that was definitely using the transcript.

00:08:07

Larry

But what I didn't say on this case was I have a great fear of the federal people, their prosecutorial powers when they do have jurisdiction and clearly when it comes to international travel, the Feds do have some jurisdiction in terms of before you depart and the truthfulness of those statements that you make to them. So, I'm not about to sit here ever and tell people to do things to circumvent what's required in their jurisdiction. I can only imagine what would happen if I did. And I said, "Well, gee, you could kind of dodge it and play this little game and tell them you're going here and then actually go there." That's one of the reasons why they put that marker on the passport was to try to prevent people from being able to do that undetected.

My other concern is that his passport is probably in the system and even when it gets scanned in the Philippines, even though they didn't receive a notice, he still might be turned back. Then we sent him on two trips. But I appreciate where he's coming from. But I can't bring myself to advise people to do things that would be circumventing the law. The case from New Mexico where the guy called and told me he had that plan; he had researched the law. And I think I said that on the program. As a matter of fact, he said he had researched the law and he asked me, would it work? And I said, "Well, looking at the research, your research is accurate, and I would tell you that I can't find any fault with your logic." And it did work for him.

00:09:44

Andy

So, are you OK with this comment? I'm trying to get a feel. Did this rub you the wrong way at all or is this just we're kind of going down and taking the points of what the person is describing?

00:09:58

Larry

Not at all did it rub me the wrong way. I'm just letting people know that I'm gonna have a hard time advising people to try to circumvent the law. There are some organizations that may do that, but I'm gonna have a hard time doing that because the consequences are significant. When you're facing a federal prosecution, you're looking at a significant amount of time. And as we go down to this program tonight, we're gonna be talking about people who fear prosecutions that I think are even far stretched, far less likely to happen than what this could be. When you tell Florida that you're going to one country and then you quickly leave that country and go to another, it's possible that the feds may pick up on that and there could be a prosecution. So, I just can't bring myself to advise people to do that.

00:10:46

Andy

Yeah, and any time anybody's asking about how they should handle their probation officer or this or that. Can they do that? Like, you should just totally listen to what they say. It may be wrong and you should find a different way, but you got to do what they tell you to do.

00:11:00

Larry

That is correct.

00:11:02

Andy

When you say a significant federal prosecution time, how much time are you talking about if you traveled overseas without notifying them? And then when you come back, how much time would you get for that?

00:11:12

Larry

Well, I hear any square from the range of a year in federal prison to five or 10 years in federal prison for violating the federal requirements.

00:11:22

Andy

Ah come on, man, you could do that holding your breath. You know?

00:11:25

Larry

I don't want to do one year, much less five years.

00:11:30

Andy

All right. Well, again, we will keep things short so that you don't melt. We have at least two people, if not more, reach out to me directly to ask me about this SORNA ACSOL thing. This is from the Pacific Legal Foundation and the Alliance for Constitutional Sexual Offense Laws, otherwise known as ACSOL. Do you wanna cover this right now?

00:11:54

Larry

Yeah, let's do it.

00:11:55

Andy

All right. A listener sent us a link about this case and then somebody I met at a conference a few years ago even text messaged me. It states a federal court today issued a decision that denies a motion to dismiss two claims filed in the US Department of Justice. In the pending SORNA

lawsuit, the focus of the decision is the application of the recently issued SORNA regulations. This came from the Alliance for Constitutional Sexual Offense Laws, otherwise known as ACSOL. As I recall, you're not a big fan of this case. Do you wanna remind us why not?

00:12:29

Larry

Well, I do not see that the issue is ripe for determination yet. There has been no hint of prosecution by the federal government of anyone who has been relieved of their duty to register by a state. And I say relieved of, and I mean, by either timing out and receiving a letter that your time has expired or that you've gone through a judicial process. The federal government has said nothing. They've hinted at nothing.

00:13:00

Andy

I'm not in California, but this would be me because I had a judge say that I could come off the registry.

00:13:06

Larry

That is correct and there has been nothing, not even a peep. So, these issues are not ripe for litigation yet, in my opinion. And I continue to maintain that opinion despite the trajectory of this case, which is still ongoing.

00:13:21

Andy

And then, so what are the main issues that are going on with this.

00:13:24

Larry

Challenge? Well, according to ACSOL and I'm reading from their statement, the federal government has argued in the past that SORNA regulations apply to every person convicted of a sex offense unless there has been a court finding of innocence. And the plaintiffs have argued that SORNA regulations apply only to those who are currently required to register. Their theory is that the government might prosecute a person who no longer has a duty to register. That's their theory, but there's not been a hint of that.

00:13:57

Andy

And to provide some context and background, on January 13th of 2023 the court granted a motion for preliminary injunction. The court held that the individual plaintiffs, apart from Mr. Doe's, one indisputably demonstrated standing, but it declined to reach the question of whether Mr. Doe number one or ACSOL had standing as to the merit

of the plaintiff's claims. The court held that they demonstrated a likelihood of success on their due process claim and a substantial question going to the merits on the first amendment claim. Plaintiffs did not demonstrate a likelihood of success on their non-delegation and A P A. So, can you remind me what A P A is?

00:14:38

Larry

I believe it's the Administrative Practices Act.

00:14:42

Andy

OK. The government asked that the case be dismissed. What is the legal standard to survive such a motion?

00:14:49

Larry

According to the court, to survive a motion to dismiss, a plaintiff must allege enough facts to state a claim that relief is plausible on its face.

00:15:01

Andy

Would you mind if you could dumb that down specifically for me because I did not understand. What is the plausibility standard?

00:15:10

Larry

I thought it made sense. It means that the complaint on its face as written, with a presumption that all is true, would entitle the person to relief. Some people file complaints for perceived wrongs, but the law does not entitle them to any relief even though they have suffered a wrong. The Ninth Circuit has clarified that to survive such a motion, a complaint must (1) contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively, and (2), the factual allegations that are taken as true must plausibly suggest an entitlement to relief such as that it's not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. Meaning that litigation is expensive. You're paying an attorney or a legal team to defend you and if the complaint on its face as you read it, assuming it's all true, there's no vehicle to award you relief under the law, then you shouldn't have to continue to spend money. So that's what that motion is for.

00:16:20

Andy

According to ACSOL, the court criticized the federal government stating that the Department of Justice has not provided any clarification or further explanation regarding the applicability of the regulations. Instead, the court noted

that the federal government has asserted that it need not concern itself with the peculiarities of state law, even though most individuals are convicted in state court, not federal court of a PFR-type offense. Why can't you see the potential threat here, Mr. Larry?

00:16:50

Larry

Because again, there hasn't been the slightest hint that these new regulations change the status quo. I don't know why that's so hard to understand. What I think they were looking for when they did these regulations, they were trying to give the states an invitation and the road map on how to administratively implement the full plethora of requirements of the A W A because many states had failed to do it legislatively. I don't think they were looking to bother the people who have been released from the registry. Now, if, for example, a state would want to include those who have already been discharged and they're looking and angling to bring them back, if a state has such sinister intentions, these new regulations would provide them with that road map. But as far as the federal government, there has not been a hint, the slightest hint of prosecution. So that's why I can't see it.

00:17:52

Andy

The reason why you can't see it is because you are too stubborn. Even the judge disagrees with you, Larry. The judge noted that if the court were to accept the federal government's assertion regarding applicability of the regulations, many offenders are across the country who cannot register with their states are apparently supposed to hope that they are not prosecuted by the federal government. And if they are, they should try to prove impossibility at trial. What are people supposed to do in Larry's perfect world? Just hope for the best.

00:18:26

Larry

No. You don't need to just hope for the best. A person would wait until the DOJ announces that it will prosecute anyone who's been released from registration. If that person would still be defined as a PFR under the federal definition, they have not announced that yet. At that time, there would be a plethora of arguments that could be made to combat the government. The risk now is that we will get a decision that answers the question that isn't ripe nor have the arguments been fully developed. Remember the Wilman case from Michigan.

00:19:01

Andy

Remind me of some of those arguments from the Wilman case.

00:19:05

Larry

I didn't assert those arguments of the Wilman case, but that was a case where they threw everything with the kitchen sink saying that there was no federal registry. They got a decision from the sixth circuit saying there was an independent federal duty to register. You do not want that coming down from the Ninth Circuit. I don't know why that's hard to understand. If the federal judge agrees with ACSOL and the Pacific Legal Foundation's arguments, it's going to be appealed and you do not want an unfavorable decision yet. But what are some of those arguments if this were to be developed? I would want to develop it. There'd be several. First, we would argue that there's a lack of federal jurisdiction over registration since there is no federal registry. That's a simple argument, ain't no federal registry period. So, therefore, there's no federal jurisdiction to enforce a registry. Now people are gonna say, "Well, Larry, don't you understand, people get prosecuted all the time." Yes, they do because they transfer from one state to another. They move, relocate, do what they call interstate commerce. They travel on interstate commerce, and they do not register in the new state. That's when there is a federal jurisdictional hook, but that is an undeveloped argument, and it will not be developed in this case.

Second, we would argue that the doctrine of federalism and that's that, specifically, the things that are not enumerated as federal jurisdiction are delegated to the states. And conservatives generally are fond of that argument of protecting states from overreaching federal government. That isn't being developed in the case the way it's postured right now. And third, we would argue that the regulations, if applied to a person who has been released from registration by court order, that would be undoing a judicial order, and that violates the separation of powers doctrine. We've got good arguments. We're not, in a venue that allows these arguments to be developed. We're arguing about the Administrative Practices Act. We're arguing about the language of the regulations and we're arguing about a hypothetical that maybe someday somewhere, someone might be prosecuted. And so I'm afraid of this litigation.

00:21:28

Andy

What do you? I was in the army and there were some things about trajectory like with rockets flying over and whatnot. So, what does the term trajectory mean as far as a legal case goes?

00:21:39

Larry

Well, it means right now this decision means that this case lives on. The government was not able to extinguish it and that ACSOL will have its day in court. That's what it means.

00:21:53

Andy

And today's decision is a significant victory for registrants and their loved ones stated ACSOL's executive director, Janice Bellucci. And so what? What happens next after that then?

00:22:05

Larry

Well, the court stated that the parties shall proceed to discovery in due course after discovery has closed and the defendants have certified that the administrative record is complete. They may move for summary judgment on the four of the plaintiff's claims and this case could drag on for another year or more. But I'm afraid in summary judgment that bad things can happen. I'm one of those who don't want questions that don't need to be answered to be presented. I just don't see the reason for this case.

00:22:34

Andy

And it's like, so from my point of view, this is it, it's establishing a standard that you don't want to have a standard established for. Is that a reasonable way to word it?

00:22:46

Larry

You're running the risk if this judge says there is a federal duty to register and that these regulations are good, but they just need a little bit of tweaking to make it clear that you have this federal duty to register. If I'm the US Department of Justice, I've won something that I never in my wildest mind thought I could win. I've got the opportunity to prosecute tens of thousands of people who have been discharged for registration by judicial orders. And then you're gonna have to litigate those claims later saying that it disrupts the judicial order and you've got an appellate level decision saying that this is fine and good stuff. I'd rather not have this decision now. If I'm wrong and it comes back that everything's hunky dory and they win, then I'll say, "Too bad, so sad, I was wrong," but I don't like doing risky litigation. This seems to be a very risky gamble to me.

00:23:40

Andy

The federal DA. So, what should we do? The attorney general, do you think they would then go on a witch-hunt to find us all?

00:23:51

Larry

If they have that power, here's what they would do. If it is clear the courts interpret that there is a federal obligation independent of what the state has said, the state's rights have been extinguished and the states would have to register people that they don't wish to register that they've already discharged. I could see when we have a president in the executive branch that says, "I want the laws enforced to the fullest extent and maximum penalties." I could see that because they have unlimited resources financially. There has never been a cut in my lifetime to the US Department of Justice budget. It just grows and grows and grows and I think that you're asking for trouble folks.

00:24:29

Andy

In chat someone just said, "I was having a good day until now, Larry, so thanks for that." Haven't you argued with some of the attorneys that kind of go around like the NARSOL orbit about whether there is a federal duty to register? You've just spent 10 minutes saying there's no federal duty to register. But you've argued with lawyers that there is.

00:24:48

Larry

Well, the courts have said there is. So, the Wilman case said there is.

00:24:54

Andy

And there's nothing written in any doctrine or whatever law anywhere that says that there's a federal duty to register.

00:25:00

Larry

Well, in the sixth circuit, there is such a ruling that has been interpreted that way. That's the recklessness I'm worried about. Now there's an independent federal duty in the sixth circuit. I see folks. Why do you want an independent duty to register? Why are you asking a question that we don't need an answer to?

00:25:21

Andy

All right. We will move along and I'm certain that this is going to come back around, don't you think? I'm certain this will not be the last time we cover this.

00:25:32

Announcer

Registry Matters Promo Deleted.

00:26:18

Andy

All right. And then finally you put in a case here from Idaho. What is this about?

00:26:27

Larry

This case? Is *Does v. Raul Labrador*, the attorney general of Idaho. It was dismissed and is now on remand from the Ninth Circuit because the appeal was successful.

00:26:40

Andy

I see. All right, the plaintiffs are six men and women who must register for life under Idaho's "Sexual Offender Registration Notification and Community Right-to-Know Act, hereinafter, Idaho SORA. Plaintiffs were each charged or convicted before 2006 when the Idaho Legislature began amending SORA to impose increasingly harsh restrictions. That sounds familiar. How many times has Idaho amended SORA?

00:27:10

Larry

Well, Idaho's original PFR law came into effect July 1, 1993. The law imposed only a duty for persons convicted of certain felony crimes to register with their local sheriff. And the registry was not available to the public. But in 1998 the Idaho legislature repealed the 1993 law and passed SORA and SORA created a central registry and information on the registry publicly available. It also delineated 17 registerable offenses and expanded the category required to register. And in terms of how many times, it's gonna take me forever. But basically, it's been amended every year since 2000 all the way through 2020. Each set of amendments was applied retroactively in the same manner as the 1998 version of SORA.

00:28:00

Andy

When was the original case filed?

00:28:02

Larry

This case is old. It was filed in September of 2016.

00:28:08

Andy

For some background and context on appeal, the Ninth Circuit found no error in the court's analysis of plaintiffs' vagueness, free association, equal protection contracts clauses, takings, separation of powers, and state Police Power challenges and affirmed the dismissal of those claims. The Ninth Circuit found the court only erred in dismissing plaintiffs ex post facto and free exercise claims and accordingly in dismissing plaintiffs eighth amendment and double jeopardy claims on the same basis. What is left for the trial court to decide then?

00:28:45

Larry

The two things are the ex post facto and the free exercise claims related to religious exercise. And that's a significant claim. The free exercise of religion is enshrined in our constitution.

00:28:56

Andy

Yeah, like first amendment kind of stuff. Are these facial or as applied challenges?

00:29:01

Larry

I had trouble in the brief time I had to prepare. It was difficult to determine which things are.

00:29:08

Andy

What would you mind if you could go through and explain what facial versus applied means?

00:29:13

Larry

A facial challenge is when you challenge the entire legislative enactment or provision. You're arguing that there are no set of circumstances that such an enactment could be constitutional. An as applied challenge you do not look at the text or the face of the statute because it could be constitutional in many circumstances. But rather you argue that the law is valid on its face, but nonetheless, it's unconstitutional as it's being applied in a particular case or situation like your own. So, you say yes, you could do this, but you just can't do it to me. And here's why, here's why I fit into a constitutional carve out. I'm protected. You can't do that to me.

00:29:53

Andy

On page 18, the court stated nevertheless, given the Ninth Circuit 's holding in Wasden, the court must, in evaluating the instant motion to dismiss, consider only whether plaintiffs have plausibly alleged that SORA on its face, is punitive in effect. Wasden, 982 F.3d at 791. If plaintiffs have done so and survived the defendant's motion to dismiss, they will nonetheless face a heavy burden when seeking to override a legislative expression of intent that a challenged provision is civil and only the clearest of proof will suffice to meet that burden on summary judgment or at trial. What is the legal test you refer to over and over and over again?

00:30:37

Larry

Well, the Kennedy Mendoza Martinez factors from the US Supreme Court in 1963 and there's seven of them, but the courts mostly rely on these five and they include whether the law (1) inflicts sanctions which have historically been regarded as punishment, (2) imposes an affirmative disability or restraint. That's my favorite, (3) promotes the traditional aims of punishment, (4) has a rational correlation to a non-punitive purpose, and (5) is excessive in respect to its stated purpose

00:31:08

Andy

Just in my mind. Some of those other ones inflict sanctions which have historically been regarded as punishment, telling people where they can and can't live. Seems like that would be considered punishment, Larry.

00:31:18

Larry

And locking them up in places where they're not allowed to live. Definitely punishment

00:31:24

Andy

Or even where they're not supposed to be, like in North Carolina, where the registration officer is or to go visit your politician is in the mall, which is right next to a door to daycare. How are you supposed to function in a democracy where you are not allowed to be present where your politician is working?

00:31:44

Larry

You're gonna have to find another option.

00:31:47

Andy

All right, the plaintiffs highlight, they are required to report annually in person and must provide a photograph, 23

fingerprints and palm prints. I only have 10 fingers. Larry. How do you get to 23?

00:32:01

Larry

That was a typo?

00:32:02

Andy

Oh, ok. I was like, damn. So, ok. I was like butt print. I was trying to figure out what else you could do. In addition to yearly mandatory reporting, plaintiffs must report in person within two working days whenever certain information changes, including a change in name, that probably doesn't happen too often, residence more often, employment somewhat often, student status, and immediate reporting is required for any changes in vehicle information that probably happens a lot, and internet usernames a lot, as well as for any travel that is seven days or longer. There are no good exceptions to the notification and reporting requirements regardless of illness, injury, transportation issues, or other emergencies. Plaintiffs must report within two days or face criminal charges. The current version of SORA imposes penalties of up to 10 years imprisonment for violating the law. Can you admit that Idaho's law does impose disabilities and restraints and also inflicts sanctions which have historically been regarded as punishment. I'm gonna add that.

00:33:05

Larry

I can indeed. And the court stated on page 34; given the burdensome extent of reporting requirements and the criminal sanctions associated with failure to comply, plaintiffs plausibly allege their lives and travel are supervised in ways that resemble probation and parole. Like parolees, plaintiffs contend they are not free to move where they wish to, to live and work as other citizens without supervision and they relied on *Smith versus Doe*, which is the precedential case from your Supreme court. They relied on *Smith v Doe*, 538 U.S. at 101. I cite pages 100 and 101 all the time. The disability restraint. That is the most important thing that they said in that entire case that we can go on. We've got to focus on the disability restraints. [Andy and not recidivism, right]? I don't give a rat's ass about recidivism.

00:34:01

Andy

All right. So, I see that also the court noted that plaintiffs plausibly allege SORA resembles, at least in some respects, the ancient punishment of banishment. Specifically, the current version of SORA bars plaintiffs from residing within 500 ft of a school or daycare measured from the nearest point of the exterior wall of the registrant's dwelling unit to



the school or daycare's property line. That's better than other places where they do it. Property line to property line Larry because that's only it's the exterior wall of the registrant's dwelling.

00:34:34

Larry

Plaintiffs also noted that the current version of the law bars them from loitering within 500 ft from the property line of a school or a daycare playgrounds including properties posted with a notice that they are used by a school or daycare. Anytime there are children present at a school or daycare for regular activities or within 30 minutes before or after such activities. How on earth would you know all that kind of stuff as a PFR?

00:35:02

Andy

Especially when your internet access is restricted? How are you supposed to know where all of the daycares and all those playgrounds and all that?

00:35:08

Larry

How would you know where the activities are going on?

00:35:12

Andy

Well, you could use the internet to go see what their calendar is. You are super big on these disabilities and restraints. How are they doing on those particular elements?

00:35:27

Larry

They're doing good so far. SORA specifically limits plaintiffs' ability to travel. For instance, plaintiffs must provide in-person notice of their presence to law enforcement in a jurisdiction in which they travel, even if such jurisdictions do not impose the registration requirement. Now we see that all the time. A person is told by their home state, you have got to go and check in with the PFR office. Then you get to the PFR office in the jurisdiction, and they say we don't have any interest in you. You're only gonna be here for 24 hours. But anyway, because PFR laws are so complex and vary from state to state. it is difficult for registrants to obtain accurate information about either affirmative reporting obligations (such as registering one's presence in a state), or prohibitions on ordinary behavior (such as visiting a library or park) in other jurisdictions. And plaintiffs allege that they even avoid interstate travel due to the risk of unintentionally violating. So that's the sad thing about this when people are afraid to travel, which is one of your fundamental freedoms, but they're doing great so far.

00:36:31

Andy

I don't know how much we were talking at the time, but the first time that I traveled when I was on supervision, my handler says, "Well, make sure you go visit the registry office," and I get up to where I was going and the guy's like, "I'm not signing that." I was like, "But they told me to get you to sign it." "I'm not signing it." Now. I'm like, now, what do I do? I've left home, I need to get this guy to sign it to prove that I went where I said I was gonna go, and he won't sign it. How am I supposed to win that battle when I get home? He's like, "Well, you didn't get it signed. How do I know that you went where you said you were gonna go?" But I could take a selfie in front of the office maybe?

00:37:06

Larry

But you're not allowed to have a smartphone.

00:37:10

Andy

All right. Footnote 28 states of course, to succeed on the merits of their ex post facto claim, plaintiffs will have to establish with evidence that SORA imposes substantial occupational and/or housing disadvantages for registrants that would not have otherwise occurred through the use of routine background checks by employers and landlords. And that's from Smith 538 US at 100. Does that mean they could still lose on this point?

00:37:34

Larry

Oh, yes. It does mean that. The court's ruling is only on the state's motion to dismiss. The court has found that the plaintiffs have plausibly alleged that SORA imposes significant restrictions on housing and employment. That's a much lower standard than what's required to prevail on the merits. They have to show by the clearest of proof.

00:37:56

Andy

You are absolutely Mr. Doom and Gloom tonight. [Larry. Um Yeah] And so back to what I just brought up a minute ago about you, you absolutely detest the recidivism argument. I noticed that this has been raised as a defense by the state. Has the judge given any hint as to where he's at on that issue?

00:38:18

Larry

Not really. The judge noted ultimately, the court finds further SORAs, extensive regulations actually assist law enforcement and parents in protecting Idaho's children and communities and prevent recidivism and issues appropriately reserved for summary judgment after the

parties have had the opportunity to develop the record. The judge has already telegraphed us that this case is gonna be decided with summary judgment. So, we shall see.

00:38:44

Andy

So, this is always confusing to me. I know you hate summary judgment. But is this one of those times where summary judgment is good for us?

00:38:52

Larry

Remember we carry the burden of proof. I would like to see a trial on any issue where there's any doubt that the evidence is not sufficient. You need to tell the judge, "Judge, I'm sorry. We've got 32 witnesses. We're gonna call on this. This is gonna require several days to hear from the witnesses. The court is gonna have to clear their calendar." That's what you got to tell the judge.

00:39:12

Andy

And do you think they'll do that? [Larry: Probably not]. All right. The conclusion reads in part; Plaintiffs have plausibly alleged that SORA is so punitive in effect that it negates the Idaho legislature's intent to enact a civil regulatory scheme. As such, plaintiffs' ex post facto and double jeopardy claims survive the instant motion to dismiss. Given the Ninth Circuit's holding in Wasden, 982 F.3d at 794, the Court also finds Plaintiffs' FERPA, what is FERPA?

00:39:47

Larry

It's Free Exercise of Religion Protection Act of Idaho.

00:39:59

Larry

The court also stated all plaintiffs may litigate each of their claims. It is important to note that the court is not at this juncture holding SORA as facially unconstitutional. To find SORA unconstitutional, only the clearest of proof will suffice to override legislative intent and transform what has been denominated as the civil regulation into a criminal penalty. Folks, the judge is telling you that you better come loaded, you better come with proof.

00:40:28

Andy

It seems not hard to develop this proof in my mind. Maybe I'm naive or Pollyanna about it, but it doesn't seem very difficult to prove that a lot of the SORA regulation. So, regulation stuff is very much disabilities and restraints.

00:40:45

Larry

Well, some of it will be obvious because the state will be forced to make stipulations that these laws are being actively enforced. But when you say I didn't get a job because of the registry, that's very subjective. We don't know that you didn't get a job because of the registry. We just don't. You don't have the proof of that. You're speculating.

00:41:03

Andy

Yeah. Yeah. I, I know I'm with you on that. And then how many jobs did you not apply for that maybe you were qualified for just because of some level of fear? So, you just opted out instead of trying to go get a higher-paying job. So that would be very hard to prove as well.

00:41:21

Larry

This case is gonna be running for quite some time. Even though it's several years old, it's got a ways to go and now that it's survived at its back at the district court level, I'm gonna try to reach out to the attorneys and see if we can be of any help.

00:41:35

Andy

Do you have good feelings about it in general though?

00:41:37

Larry

I do. I think that they've got a great opportunity there to make some progress, but they gotta do it right.

00:41:47

Andy

They can get some free publicity here.

00:41:49

Larry

You can't do it on a low budget and hope for the best. You got to go in with proof.

00:41:53

Andy

You and your money all the time. Larry, you're all about the money. That's right. I know and someone in chat says Larry's favorite phrase, "Summary judgment."

00:42:06

Larry

Yeah, that's my favorite alright.

00:42:09

Andy

All right. Well, we are going to close out the show. I know it's shorter than normal. But again, Larry is probably sweating. I can just picture him in there. It's just glistening down his head because the air conditioner is dead and he's in a very hot part of the country with no AC. So, I just want to announce that because of the conference interacting with a bunch of people, we got four new patrons. We've got Families for a Better Florida who is listening in chat tonight, and we also had Christian and I think I know who that one is. And also we have Randall and some snail-mail people, right?

00:42:41

Larry

We did, we have let's say Frank, he's who's in Ohio. He's a guest in the BOP and we have Daniel in Arizona who's a guest in the Arizona Department of Corrections. And I want to offer my apology to one of our subscribers, Benjamin. He sent a letter and I intended to use parts of it. The letter didn't get scanned and now the letter is gone. So, Benjamin, if you can remember what you wrote to us, write it again, and we'll look at some of those questions that you sent that are no longer around.

00:43:10

Andy

Very good. As a reminder, I said it all at the beginning, the show notes you can find over at registry matters.com, and then the transcripts you can usually find over at FYP education.org. And then if you want to leave a voicemail at 747 227 4477 at email rgistrymatterscast@gmail.com. And then finally, it is so important, and is appreciated by us that we have the support of our patrons and you can do that over at Patreon.com/registry matters. As always Larry, I

think that you are amazing and I appreciate all the work that you do and put in if we could give you a virtual round of applause, like, thank you for all that. You do, buddy. I appreciate it.

00:43:51

Larry

I appreciate it. And all the thousands that showed up this evening. And at the conference, we had them packed in like sardines in that room.

00:43:59

Andy

That was a funny episode, Larry because when you started, you were like hunched over and you were like, I feel lousy and then we start getting you talking and you perk up and you get excited and you start getting more animated and we had a lot of fun. It was a great time.

00:44:13

Larry

All right. Well, we'll see you in a couple of weeks.

00:44:16

Andy

Very good. I'll talk to you soon. Have a great night.

00:44:19

Larry

Good night.

00:44:25

Announcer

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