No. 15-1536

United States Court of Appeals for the Sixth Circuit

JOHN DOES #1-5, AND MARY DOE,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, Governor of the State of Michigan, AND COL. KRISTE ETUE, Director of the Michigan State Police, in their official capacities,

Defendants-Appellants.

APPEAL OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICI CURIAE* SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, *Amici Curiae* National Association of Criminal Defense Lawyers, Criminal Defense Attorneys of Michigan, and National Association for Public Defense make the following disclosures:

1. Is any said *amicus* a subsidiary or affiliate of a publicly-owned corporation?

   No.

2. Is there a publicly-owned corporation, not an *amicus*, which has a financial interest in the outcome?

   No.

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INTERESTS OF *AMICI CURIAE*[1]

(1) NACDL: The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court, this Court, and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has consistently argued that "[p]enal statutes that do not provide for a clear and meaningful *mens rea* requirement are unacceptable." Edwin Meese III & Norman L. Reimer, *Forward* to BRIAN WALSH & TIFFANY JOSLYN, WITHOUT

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amici curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, at VI (The Heritage Found. & NACDL 2010).

(2) CDAM: Since its founding in 1976, Criminal Defense Attorneys of Michigan ("CDAM") has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the state's criminal defense bar in a wide array of matters. It is the state affiliate of NACDL.

As reflected in its by-laws, CDAM exists to, inter alia, "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an *amicus curiae* in litigation of relevance to the organization's interests.

CDAM has a strong, direct institutional interest in this case because of the implications of the trial court's ruling on the constitutional rights of criminal defendants in Michigan.

(3) NAPD: The National Association for Public Defense ("NAPD") is a national organization uniting nearly 7,000 public defense practitioners across the 50 states. As public defense experts, NAPD's mission is to ensure strong criminal justice systems, policies and practices ensuring effective indigent defense, system reform that increases fairness for indigent clients, and education and support of public defenders and public defender leaders.

I. INTRODUCTION

A core principle of the American justice system is that people should not face criminal prosecution and conviction unless they engage in inherently wrongful conduct or conduct that they know is unlawful. Without a clear connection between a person's conduct and his or her mental culpability, the unwary face unjust prosecution and punishment for actions that they had no reason to know are illegal, especially where the conduct is ordinarily innocent (as with much of the conduct proscribed by Michigan's Sex Offender Registration Act ("SORA")).

SORA is not a statute that merely requires registration; it criminalizes conduct that is ordinarily innocent. For example, SORA makes criminal failing to have a driver's license or state ID; taking one's own children to school or attending their sporting events; and working within 1,000 feet of school property. Registrants have been prosecuted for these and similar activities without knowing that what they were doing was criminal, and even after being expressly told by law enforcement officials that what they were doing was permitted.

Providing a general notice to registrants does not eliminate the requirement of proving knowledge or other wrongful intent. The U.S. Supreme Court and this Court have held repeatedly that the Due Process Clause bars the state from criminally prosecuting a person for otherwise-innocent conduct without proof of wrongful intent. The Supreme Court has also held that a convicted person's failure

to comply with a registration statute is exactly that kind of otherwise-innocent conduct. And numerous state courts have held that proof of wrongful intent is required to prosecute a person for violating a sex-offender-registration statute.

"[E]xpansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift" from the "fundamental anchor of the criminal justice system" that punishment should be based on an individual's intent to commit a wrongful act. Edwin Meese III & Norman L. Reimer, *Forward* to BRIAN WALSH & TIFFANY JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW, at VI (The Heritage Found. & NACDL 2010). The Due Process Clause protects diligent, law-abiding citizens from the whims of local law enforcement. This is especially true when criminalizing conduct that is not inherently evil. "Mens rea requirements . . . not only help to assign appropriate levels of punishment, but also to protect from unjust criminal punishment those who committed prohibited conduct accidentally or inadvertently." WALSH & JOSLYN, *id.*, at 4-5. "A person without intent and knowledge does not deserve government's greatest punishment or the extreme moral and societal censure such punishment carries." *Id.* at 5.

II. ARGUMENT

A. Due process bars the state from prosecuting a person for otherwise-innocent conduct—including convicted persons' failure to register their presence with law enforcement—without proof of wrongful intent.

It is "the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention." *Morissette v. United States*, 342 U.S. 246, 274 (1952). "[I]ntent generally remains an indispensable element of a criminal offense." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978). The Supreme Court has repeatedly affirmed that "'*mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *Id.* (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

"All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "Historically, it was presumed that the law, and especially the criminal law, was 'definite and knowable,' even by the average person." WALSH & JOSLYN, *supra*, at 4 (quoting 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 497 (Robert Campbell ed., Gaunt, Inc. 4th ed. 1976) (1879). While that may have been true when criminal laws were primarily directed to prohibiting *malum in se*—"evil in itself"—conduct, it is no longer so:

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, even a person with a clear moral compass is

> frequently unable to determine accurately whether particular conduct is prohibited. . . . In today's complex society, therefore, a person can reasonably be mistaken about the law.

JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 166 (3d ed. 2001) (internal quotation marks and citations omitted).

Thus, the Constitution bars criminal punishment for otherwise-innocent conduct absent proof of wrongful intent. "[W]here a criminal statute prohibits and punishes seemingly innocent or innocuous conduct that does not in itself furnish grounds to allow the presumption that defendant knew his actions must be wrongful, conviction without some other, extraneous proof of blameworthiness or culpable mental state is forbidden by the Due Process Clause." *Stanley v. Turner*, 6 F.3d 399, 404 (6th Cir. 1993).

Due process permits exceptions to this rule only "where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985). In *Wulff*, this Court concluded that the same penalties at issue in this case—up to two years in prison and a $2,000 fine—were not "relatively small." *Id.* Thus, the Court held, "the Constitution does not allow" that "a person acting with a completely innocent state of mind could be subjected" to those criminal penalties. *Id.*

The Supreme Court has applied this rule to registration laws like those at issue in this case, and held that due process requires proof of wrongful intent. In

Lambert v. California, the Court considered an ordinance requiring "any convicted person" to register if they remained in Los Angeles for more than five days or visited the city five or more times in 30 days. 355 U.S. 225, 226 (1957). Like the duty to register under SORA, the duty to register under the Los Angeles ordinance was triggered by a convicted person's "mere presence." *Id.* at 229. The Court concluded that a person's presence is ordinarily innocent activity—actually, that it isn't "any activity whatever"—and held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." *Id.*

The *Lambert* Court's reasoning applies with equal force to this case:

> As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Id. at 229-30 (internal citation omitted).

1. SORA criminalizes conduct that is ordinarily innocent, and even law enforcement officials disagree on what otherwise-innocent conduct SORA makes criminal.

SORA criminalizes a wide range of conduct that is ordinarily innocent. A person may be prosecuted not only for failure to register, but also for, for example:

- failing to have a driver's license or state ID card;[2]
- working within 1,000 feet of school property, even temporarily, and even if the person doesn't know he or she is within 1,000 feet of school property;[3]
- "loitering" within 1,000 feet of school property, even if the person doesn't know he or she is within 1,000 feet of school property;[4]
- failing to report a telephone number "routinely used;"[5] and
- failing to report license plate and registration numbers for any vehicle "regularly operated."[6]

A person convicted of doing any of these things may be punished by up to two years in prison and a $2,000 fine. *See* MICH. COMP. LAWS 28.729(2); MICH. COMP. LAWS 28.734(2).

Michigan law enforcement officials themselves disagree about what conduct SORA requires or prohibits. For example, law enforcement officials disagree regarding:

- whether registrants may watch their own children within 1,000 feet of school property, pick up or drop off their children at school, or take their children to a school playground on the weekend;[7]

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[2] MICH. COMP. LAWS 28.725a(7).
[3] MICH. COMP. LAWS 28.734(1)(a).
[4] MICH. COMP. LAWS 28.734(1)(b).
[5] MICH. COMP. LAWS 28.725a(4); MICH. COMP. LAWS 28.727(1)(h).
[6] MICH. COMP. LAWS 28.725a(4); MICH. COMP. LAWS 28.727(1)(j).

- whether registrants must report shoveling snow for pay (or report ceasing shoveling snow for pay), a one-week temporary job site, or volunteering at a fundraiser;[8] and
- how frequently a registrant could use a vehicle before having to report it as "regularly operated."[9]

These are not hypothetical problems. Registrants have been charged with violations of SORA after being told by law enforcement officials that they were permitted to do exactly what they did—for registering annually instead of quarterly, attending their children's sporting events, and re-shingling roofs near a school, for instance.[10]

And Michigan law enforcement officials admit that registrants cannot determine what conduct SORA requires or prohibits. For example, the state does not produce maps or other information identifying 1,000-foot exclusion-zone boundaries or explaining how they are determined, and even officers in the Michigan State Police's SOR unit do not know how registrants could determine where they are.[11] Local law enforcement agencies use different measuring methods, which change the zones' sizes and shapes and make the boundaries "effectively

[7] R. 90, Joint Statement of Facts ¶¶ 591-99, 701, PageID #3870-73, 3895.
[8] *Id.* ¶¶ 854, 856, PageID #3930-32.
[9] *Id.* ¶¶ 855, 859, PageID #3931-33.
[10] *Id.* ¶¶ 848-49, PageID #3927-28.
[11] *Id.* ¶¶ 440-43, 455-57, PageID #3833, 3836-37.

unknowable."[12] The manager of the SOR unit has gone so far as to "encourage [her] staff not to answer questions about geographic zones."[13]

Imposing strict liability for this conduct serves no valid penal purpose. As one commentator explained:

> An individual is blameworthy, not because of accidental conduct, but because of a conscious and knowing breach of the law. At a minimum, the defendant must have acted below the standard of care that a reasonable person would have exercised under the same conditions. A strict liability defendant punished for an act that he has been misled into committing has not consciously decided to violate society's norms. Accordingly, under classic retributivist theory, this defendant does not "deserve" to be punished.

Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 426 (1993). Similarly, "an individual who has no basis for believing he is engaging in unlawful conduct will not be deterred from engaging in that behavior. If an individual has no indication that he is doing anything wrong until the harmful act is completed, then he has no reason to alter his conduct." *Id.* at 427. Thus, prosecuting a person for otherwise-innocent conduct without proof of wrongful intent violates the most basic notions of due process:

> Classic Anglo-American legal philosophy is that "[i]t is better that ten guilty persons escape than one innocent suffer." Strict liability theory operates from the opposite perspective. Under the strict liability doctrine, an occasional innocent may be punished to assure the safety of the majority. Thus, the prosecution of good faith defendants under

[12] *Id.* ¶¶ 379, 416-24, PageID #3810, 3827-29.
[13] *Id.* ¶¶ 404, 458, PageID #3824, 3837.

> strict liability laws appears to conflict with the most fundamental principles of just punishment.

Id. (quoting WILLIAM BLACKSTONE, OXFORD DICTIONARY OF QUOTATIONS 73 (2d ed. 1972).

2. Notice provisions do not replace the due process requirement of proving wrongful intent.

Because SORA punishes conduct that is ordinarily innocent, and is triggered by a registrant's mere presence, due process requires "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply . . . before a conviction under [SORA] can stand." *Lambert*, 355 U.S. at 229.

The state argues that due process does not require proof of knowledge because it generally gives a written notice to those required to register,[14] but *Lambert* expressly requires the state to prove "actual knowledge" or "proof of the probability of such knowledge and subsequent failure to comply." *Lambert*, 355 U.S. at 229. In many cases, the state may be able to meet its burden of proving knowledge or other wrongful intent by introducing evidence that it provided notice (if the notice adequately informs the registrant of the duty allegedly violated). But generally giving a written notice does not undo *Lambert* and relieve the state of its burden in individual prosecutions.

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[14] Appellant Br. at 23-24.

The state's argument would turn *Lambert* on its head. Consider a registrant who receives the state's written notice, asks law enforcement to clarify what specific conduct is or isn't permitted, and complies with all those instructions. That registrant has done everything society asks of us as citizens, and has no knowledge or probability of knowledge that his or her conduct violates the law—that is, despite the written notice, the state cannot satisfy *Lambert*. But according to the state, if the registrant unwittingly violates the law—by, for example, temporarily working within 1,000 feet of an unmarked and unidentified school building, or dropping off his or her children at school after being told it was permitted—prosecutors can send him or her to prison for up to two years. This is true, according to the state, even if its notice does not adequately inform the registrant that specific conduct isn't permitted, and even if law enforcement officials themselves cannot determine what isn't permitted. That is fundamentally unfair and violates due process, and nothing in *Lambert*, or any other decision of the Supreme Court or this Court, suggests otherwise.

Numerous state courts, considering their own sex-offender-registration statutes, have reached the same conclusion. *See State v. Garcia*, 752 P.2d 34, 35-36 (Ariz. Ct. App. 1987); *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004); *Commonwealth v. Ramirez*, 865 N.E.2d 1158, 1162 (Mass. App. Ct. 2007); *Garrison v. State*, 950 So. 2d 990, 994 (Miss. 2006); *Varnes v. State*, 63 S.W.3d 824, 830-31 (Tex. Ct. App. 2001). In each case, the court followed *Lambert* and

concluded that due process required the state to prove knowledge or other wrongful intent. *See, e.g.*, *Giorgetti*, 868 So. 2d at 519 ("[A]t a minimum 'actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under [the sexual offender registration statutes] can stand. As the Court did in *Lambert*, we agree that ordinarily moving one's residence would not give rise to the belief that a crime was being committed absent some express knowledge to the contrary." (quoting *Lambert*, 355 U.S. at 229) (second alteration in *Giorgetti*)).

B. Prosecutorial discretion adds to SORA's due process problems.

Although the state claims that law enforcement officials exercise their discretion to "bring[] an offender into compliance rather than assuming non-compliance and prosecuting" and do not impose "unreasonably harsh enforcement,"[15] the record establishes that they exercise their discretion inconsistently. Some may emphasize bringing offenders into compliance. But others have prosecuted registrants for violations of SORA even after law enforcement officials told the registrants that they were permitted to do exactly what they did—for registering annually instead of quarterly, attending their children's sporting events, and re-shingling roofs near a school, for example.[16]

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[15] *Id.* at 19.

[16] R. 90, Joint Statement of Facts ¶¶ 848-49, PageID #3927-28.

"[O]ne of the critical functions served by an adequate *mens rea* requirement is to protect those who are reasonably mistaken about or unaware of the law." WALSH & JOSLYN, *supra*, at 4. SORA leaves it to local law enforcement officials to decide what conduct violates the statute and which persons will be prosecuted. By imposing strict liability, the state would leave citizens seeking to comply with the law with no defense. But the Constitution "does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Regardless of what a state claims its law enforcement officials do, a court should "not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* As Justice Breyer explained in his concurring opinion in *Chicago v. Morales*, a law "is unconstitutional . . . [when] the [prosecutor] enjoys too much discretion in *every* case. And if every application of the [statute] represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." 527 U.S. 41, 71 (1999) (Breyer, J., concurring) (emphasis in original). Prosecutorial discretion cannot cure SORA's due process problems—only proof of a defendant's wrongful intent can.

III. CONCLUSION

Because SORA punishes otherwise-innocent conduct, due process requires that the state prove that a registrant knowingly violated the law to convict him or her.

The district court's decision properly applies this established principle and should be affirmed.

Respectfully submitted,

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Dated: September 30, 2015

CERTIFICATE OF SERVICE

I certify that on this 30th day of September, 2015, I filed this *Brief of National Association of Criminal Defense Lawyers, Criminal Defense Attorneys of Michigan, and National Association for Public Defense as* Amici Curiae *Supporting Affirmance* electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ Christian J. Grostic
Counsel for Amici Curiae

ADDENDUM:
Designation of Relevant District Court Documents

Relevant documents in the electronic record are designated below, pursuant to Sixth Circuit Rule 30(g).

(“R.” = Record-Entry Number from District Court Docket)

R.	Description	PageID #
90	Joint Statement of Facts	3723-3991