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Honorable Arlen Specter
Chairman
Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20515-6275

Honorable F. James Sensenbrenner
Chairman
Honorable John Conyers
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515-6275

Re: Federal sex offender registry legislation
S 792, S 1086 and HR 3132

Dear Senator Specter, Senator Leahy, Chairman Sensenbrenner, and Ranking Member Conyers:

In New Jersey, the Office of the Public Defender represents all indigent persons who are entitled to a court hearing concerning the Megan's Law tier classification or community notification proposed for them by the State. Over the past ten years the Office has represented registrants in approximately 3000 cases in a state where approximately 5000 cases have been adjudicated.

We believe that our extensive experience with due process hearings, and our work with the Judges, prosecutors and parole personnel involved in the New Jersey system, as well as our contacts with some of the most renowned experts in the field of sex offender recidivism, has given us a unique perspective to provide the Judiciary Committee with comments concerning the proposed bills regarding sex offenders.

We therefore wish to make three main points regarding the proposed federal legislation:

1. Sex offender notification, especially when it occurs via the Internet, may prevent or diminish access by registrants to jobs, housing and treatment, each of which is essential to reducing recidivism levels. Notification may also reduce the likelihood that child victims of intra-familial offenders will report abuse since their family name will be posted on the Internet.

Therefore, since Internet notification can actually decrease public safety by de-stabilizing offenders who need employment and treatment to maintain their low risk status, and since notification may discourage reporting by incest victims, it should therefore **only occur for higher risk offenders**.

2. The goal of a community notification system is to inform the public regarding convicted sex offenders who pose a true risk. Placing all registered sex offenders on the Internet, including young, juvenile offenders and consensual offenders, (even with a mention of their risk level), creates the mis-impression that all offenders on the website pose the same risk. This may create an overload of information which is confusing to the public, and dilute the efficacy of the law. It also may unnecessarily deprive offenders who are not high risk of the basic means to live productively in society, thus increasing the risk of re-offense.

3. Due process hearings for registered sex offenders are critical to avoiding mistakes in notification decisions and to ensure that the information the public receives is accurate. Due process hearings serve to preserve the integrity of the notification system.

1. Effect of Community Notification on Recidivism

Studies have found that steady employment, stable housing, and ongoing treatment for sex offense recidivism are extremely important to prevent reoffense.¹ An isolated, unemployed and homeless sex offender unquestionably presents a greater risk than one who has the support of friends and family, is employed and has a place to live.

Treatment has been shown to help reduce the risk that a sex offender will re-offend by more than half. *See* Center for Sex Offender Management, *Recidivism of Sex Offenders* (“Recidivism Study”) at 12-14 (May 2001) (studies showing 18% with treatment v. 43% without treatment; 7.2% with relapse prevention treatment v. 13.2% of all treated offenders v. 17.6% for untreated offenders). *Ten Year Recidivism Followup of 1989 Sex Offender Releases*, State of Ohio Dept. of Rehabilitation and Correction (April 2001) (sex- related recidivism after basic sex offender programming was 7.1% as compared to 16.5% without programming).²

Notification laws directly interfere with treatment, as the negative impact on the offender’s prospects for employment leaves them less able to afford such therapy. It also affects registrants indirectly, creating the belief that they will never be able to lead a normal life, and sapping them of their motivation to pursue and complete therapy. Affidavit of Timothy P. Foley, Ph.D., dated October 1, 2001 (available upon request). In his aforementioned affidavit, Dr. Foley, a well-known expert in the field of sex offender treatment and recidivism, describes a patient who was doing very well in sex offender therapy, but due to the stressors of community notification became suicidal and re-offended.

It is therefore extremely important that low-risk offenders -- who are working hard to rehabilitate by maintaining a steady job for many years, pursuing sex offender and substance abuse therapy, and living in stable home environments

-- not be placed on the Internet, which could result in their being uprooted and therefore becoming a higher risk for re-offense.

2. Rating Registrants by Tier Level

Unlike New Jersey's current system, two of the proposed federal bills, (HR 3132 and S 792) would disseminate information via the Internet without first determining registrant risk levels, and without affording due process safeguards to registrants.

S 1086 would require a determination of risk level, but nonetheless requires posting of every offender on the Internet. All three of the proposed bills, include everything from less-serious offenders like statutory consensual offenders, as well as offenders who have remained offense-free for as much as 25 years or more,(including those with cases of minor infractions).

Unlike New Jersey,(which, notably, has half the national reoffense rate), the federal proposals do not allow exemptions for single juvenile offenders, consensual and household or incest offenders, (the latter of which is needed to protect incest victims from re-victimization by publishing their relative's family name on the Internet).³ Thus, New Jersey does not subject these registrants, (who are in low-risk categories), to Internet notice. *N.J.S.A. 2C:7-13f*. See *N.J.S.A. 2C:7-13d (1)-(3)*.⁴

In New Jersey, the three-tiered system makes meaningful distinctions among the thousands of persons convicted of a sex offense in their states, and protects incest offense victims in order to encourage them to report crimes. Only high-risk and most moderate-risk offenders are placed on the Internet.⁵ In contrast, the three proposed federal bills have a broad-based type of approach to notification, lumping minor offenders with those who pose a true risk, and failing to provide law enforcement and the public with accurate information needed to promote community safety.

Notably, formal studies of sex offender recidivism confirm that re-offense rates vary greatly among different categories of offenders. See United States Department of Justice, Center for Sex Offender Management, *Myths and*

Facts About Sex Offenders, at 2 (August 2000). In conclusion, it is essential that the public receive correct information about the risks of offenders, and that certain categories of low risk offenders not be subject to such notice.

Therefore, any sex offender registry law should require risk assessment and a tiered approach to community notification tied to risk level.

3. Due Process Hearings

As proposed by S 1086, due process hearings are *essential* to prevent misinformation from being presented to the public.

In New Jersey, we have found that perhaps the most extreme example of errors are the cases where the person's offense was not even subject to the community notification statute. This has occurred in approximately two dozen of our cases.

More commonly, due process review reveals errors in the tier level assigned to the registrant. In New Jersey, registrants prevail in challenges to the tier classification proposed by the prosecutor in significant numbers of cases. *See AOC Report* at 19 (over 22% of hearings result in a reduction in a registrant's level of risk assessment).

At times, these errors are basic, involving errors in numerical calculations on the actuarial scale used for assessing risk, inadvertent failure of the state to follow its own risk assessment guidelines, or a failure to obtain or consider relevant information bearing upon the registrant's risk determination (e.g., records establishing successful treatment, employment, or demonstrating years of offense-free conduct since release from incarceration).

Several examples illustrate the many cases we see where basic errors are prevented through due process:

Registrant D.D. was an 18 year-old Central American high school student studying in New Jersey. D.D. had a consensual sexual relationship with a 15 year-old girl who attended the same school. The prosecutor scored the actuarial scale incorrectly basing her decision on records of another individual with the same name. As a result of the hearing, the corrected low risk rating allowed D.D. to continue to attend college.

In another case, D.M. was able to establish from discovery that his sole underlying offense was intra-familial, and therefore of a low-risk nature, not posing a risk outside the family home. D.M. also provided evidence, missed by the state, that he had a good record of employment and residential supervision making him a low risk on the State's actuarial scale, and not subject to community notification.

Due process hearings have made it possible for these types of corrections to occur in countless cases.

In other cases, due process review has allowed the prosecutor or the court to carefully re-examine whether the nature of an offense justified notification. For instance, at the age of 13, A.J. was found delinquent when, prior to Megan's Law and based on his attorney's advice, he pled guilty to a sex offense and received probation. Both A.J.'s treating psychologist and the state's psychologist testified that A.J. did not commit the underlying offense. When a polygraph test confirmed the psychologists' opinions, A.J. was not made subject to community notification.

In F.M.'s case, Internet notification was avoided where a teenager's sole offense, eight years earlier, involved unlawful consensual sex with his girlfriend (and now fiancée) with whom he lives and has a child.

In addition, in R.C.'s case, the prosecutor's proposed notification was reversed based upon evidence demonstrating that R.C. has severe heart problems and suffered two strokes. R.C. is now non-communicative and confined to a wheelchair, information the prosecutor did not know when making the original risk classification decision.

Finally, in T.T.'s case the court declined to order notification when it was demonstrated, through expert testimony, that 12 year-old T.T.'s offense of giving an enema to his 6-year-old step brother and then to himself did not constitute a sex offense.

Furthermore, when given the opportunity to do so, the courts have recognized that certain categories of sex offenders raise special considerations and may not be appropriate for community notification.

For example, in *In re Registrant J.G.*, 169 N.J. 304, 337 (2001), the Court held that special considerations may need to be taken into account in cases where the offender was a pre-pubescent child (stating that "in many instances, sexually improper behavior by such young children is more a reflection of inadequate adult supervision, immaturity,

inappropriate media exposure, or a prior history of emotional abuse than it is of irremediable sexually predatory inclinations.”). *Id.* at 340. Thus, the court stressed that the offender’s young age must be considered in any risk assessment, and provided a mechanism by which such offenders can apply to be excused from the requirements of Megan’s Law. *Id.* 333- 34, 340.

Courts have also recognized that widespread notification may be inappropriate where the underlying offense involved an immature young adult (age 21) having consensual sexual relations with an underage teenage girlfriend (age 15). *In re Registrant E.I.*, 300 N.J. Super. 519, 526 (App. Div. 1997) (stating that a “mechanical” application of the law to all cases will “impede [its] beneficial purpose.”) *Id.* at 526.

Similarly, there has been a recognition that it is important to consider the *nature* of the risk presented by the offender. In *In re Registrant F.G.*, 317 N.J. Super. 379 (App. Div. 1998), *approved in part, disapproved in part, on other grounds*, *In re Registrant M.F.*, 169 N.J. 45 (2000), the Appellate Division concluded that a registrant who limited his offending behavior to a victim within his own household, and did not seek victims in the community-at-large, may not present a risk of the type community notification is designed to address. *See also, In re Matter of T.S.*, 364 N.J. Super. 1 (App. Div. 2003) (holding that where an offense involved kidnaping a child as part of an escape from a grocery store robbery, and involved no intent to commit a sexual offense, Megan’s Law community notification was inappropriate.)

As these examples illustrate, New Jersey, like other states, have risk classification systems that are working well. The one- size-fits-all approach proposed by the federal government would interfere with those systems, and would be prohibited by some state constitutions.

4. Internet Notification Can Victimize Innocent People, and Can Lead to Higher Risk of Registrants

Based upon our experience, and upon studies in the area, the stress caused by community notification may in some cases trigger a new sex offense, by removing the supportive components of their rehabilitation. *See R. Karl*

Hanson & Andrew Harris, Solicitor General of Canada, *Dynamic Predictors of Sexual Recidivism*, 1998-1 at 2 (“recidivists showed increased anger and subjective distress just prior to offending”). Sex offender notification has a devastating impact on sex offenders, which can raise their risk of reoffense.

Sex offender notification can also impact friends and families, leading to the victimization of innocent people. Since notification began in New Jersey in 1994, and despite government warnings, there have been a number of violent incidents following notification, some of which have victimized innocent citizens.

F.G. was paroled in 1992 and lived in the community without incident. In 1998, F.G. had the fact of his neighborhood notification published in the newspaper. Late that same evening, someone fired five shots from a high caliber handgun into F.G.’s home. Several bullets almost hit one of F.G.’s family members. Due to this incident, F.G. checked himself into a hospital and was placed on a suicide watch.

In M.G.’s case, community notice occurred approximately two weeks after his release from prison. Eleven days later, two men broke into M.G.’s house in the middle of the night. A guest was sleeping on the sofa and one of the intruders began to beat the guest while yelling, “Are you the sex offender?” Meanwhile the other intruder threw a beer bottle through the front window.

Another registrant received anonymous calls stating his “house will be burned down” or “his body will be cut up in little pieces.” Following notification another registrant also received a letter stating: “YOU SHOULDN’T BE ALLOWED TO LIVE ON OUR STREET. YOU ARE SCUM. YOU SHOULD DIE. WATCH YOUR BACK.” We have documented through affidavits a dozen instances where registrants have been threatened with death or bodily harm following Megan’s Law notification. (We will be happy to provide a detailed summary of these affidavits to you upon request, they are currently filed under seal with the New Jersey Appellate Division.)

We have documented that serious bouts of depression and anxiety frequently follow Internet notification, often requiring professional intervention, including prescribing anti-depressant medication.

As aforesaid, the concern for public safety here is that registrants subject to harassment and injury of this kind, and who become depressed and suicidal, also become a higher risk for recidivism in some cases. That is why notification must be accurately determined, and must only involve the highest risk registrants.

In the time since New Jersey's Megan's Law was enacted, New Jersey's Department of Corrections has conducted a number of studies of the recidivism rates of released sex offenders. Those studies indicate that relatively few commit another sex offense.⁶

While there is little, if any, evidence that notification laws are effective in reducing recidivism⁷, our experience in New Jersey demonstrates that there is a very real likelihood that they lead to violence in the community, and increase the risk that an offender will commit another crime of some kind.

Based upon the foregoing, only higher-risk offenders should be subject to Internet notice, and lower risk categories should be excluded by appropriate due process hearings. In this way, the public will receive accurate information regarding risk, and sex offender recidivism will be decreased rather than enhanced.

We need to resist the temptation of enacting broad-brush, 'one-size-fits-all' draconian measures that will have the opposite effect of protecting public safety. Through our well-intentioned zeal to protect children, we may actually be enacting laws of unintended consequences.

Respectfully submitted,

Michael Z. Buncher

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State of New Jersey

cc: Members of the Senate Judiciary Committee

Members of the House Judiciary Committee

¹ The Center for Sex Offender Management in their article “Recidivism of Sex Offenders”, published in May, 2001, cites at least five studies which support this view, including Hanson (2000), Kruttschnitt, Uggen and Shelton, (2000), Alexander (1999), Hanson and Harris (1998), Gendreau, Little and Goggin, (1996) and Andrews (1982).

² See also Orlando, Dennise, *Sex Offenders*, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of 68 recidivism studies showed 10.9% for treated offenders v. 18.5% for untreated offenders, 13.4% with group therapy, 5.9% with relapse prevention combined with behavioral and/or group therapy).

³ Many studies have concluded that incest offenders present little risk of re-offense. *See, e.g.*, United States Department of Justice, Center for Sex Offender Management, *Recidivism of Sex Offenders* (May 2001) (citing study which found a 4% rate of recidivism for incest offenders). New Jersey often considers incest offenders a low risk, and when only one offense exists such registrants, by law, are not subject to Internet notification. *N.J.S.A. 2C:7-13d (2)*.

⁴ In such lower risk cases, however, the State may, when appropriate, provide notification to schools, community groups and agencies caring for woman and children. In addition, the statute contains an override provision authorizing Internet notification when the State demonstrates by clear and convincing evidence that one of the above enumerated offenses was committed by a registrant who poses a risk of re-offense similar to an offender who does not qualify for an exception. *N.J.A.S. 2C:7-13e*.

⁵ In addition to Internet notice, moderate risk offenders have notification provided directly to schools, community groups and agencies caring for women and children in the area in which the offender resides and works. All high risk offenders also have notification provided to schools and community groups and door-to-door to homes located in their neighborhoods. Low risk offenders have notification provided to local law enforcement.

⁶ The conclusions reached by these studies included the following:

- Of the 115 inmates released in 1994, from the sex offender treatment facility (“Avenel”) where offenders found to be repetitive and compulsive are incarcerated, 7 (6%) were re-convicted of a sex offense within five years following their release.
- Of the 123 inmates released from Avenel in 1995, 8 (6.5%) were re- convicted of a sex offense in five years following their release.
- Of the 79 inmates released from Avenel in 1990, only 3 (3.8%) were re- convicted of a sex offense in the ten years following their release.
- Of the 507 inmates released from Avenel during the years 1994-1997, 34 (6.7%) were re-arrested for a sex offense in the three years following their release. The recidivism rates for sex offenders studied were “substantially lower” than the rates for all inmates released in 1991. For example, the study that looked at sex offenders released between 1994- 1997 concluded

that these offenders were significantly less likely to be re-arrested (32% v. 53%), and less than half as likely to be re-convicted (20% v. 41%). Note, that these numbers are for re-arrests/re-convictions for any type of offense, not just sex offenses. Considering that in 1999, New Jersey enacted a civil commitment law for sexually violent predators, *N.J.S.A. 30:4-27.24 et seq.*, and, therefore the most dangerous offenders are now being civilly committed when their sentences are complete, presumably the recidivism rates would now be even lower.

⁷ The common belief that community notification reduces recidivism has never been established. A Washington State study found “little evidence that community notification prevented recidivism among adult sex offenders.” D. Schram, Ph.D., C. Milloy, Ph.D, Washington State Institute for Public Policy, *Community Notification: A Study of Offender Characteristics and Recidivism* at 16 (Oct. 1995). Similarly, a study conducted in Iowa found no significant difference in sex offense recidivism rates between sex offenders subject to that state’s registration and community notification law, and sex offenders who were not. Iowa Dep’t of Human Rights, *The Iowa Sex Offender Registry and Recidivism* 19 (Dec 2000). Even law enforcement agencies are doubtful that community notification is worthwhile; a Department of Justice survey of law enforcement agencies in Wisconsin found that “only 41 percent believed it improved management and containment of sex offender behavior through greater visibility.” U.S. Dep’t of Justice, National Institute of Justice, *Sex Offender Community Notification: Assessing the Impact in Wisconsin* at 6 (Dec. 2000).