STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2018AP2074-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES L. JACKSON, JR.,

Defendant-Appellant.

Appeal of a Judgment and an Order
Entered in the Calumet County Circuit Court,
the Honorable Jeffrey S. Froelich, Presiding

REPLY BRIEF

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ARGUMENT

I. Wis. Stat. § 301.45(2)(a)6m. deprives Mr. Jackson of the right to anonymous speech, and his prosecution under that statute violated the First Amendment.

Regarding Mr. Jackson's as-applied challenge, the state simply passes over the central fact of this case: that Mr. Jackson was criminally prosecuted for failing to disclose his online identity to the government. That is, he was convicted of the crime of anonymous speech. To show a First Amendment burden, he doesn't need to show that the government harmed him in *other* ways—that it disclosed his identity to others, or somehow hacked into his account. Resp. Br. 7-8. Jailing him was enough of a burden. And because this burden is not narrowly tailored to address the harms the state identifies, it is unconstitutional.

On the question of waiver, the state quibbles with Mr. Jackson's discussion of *U.S. v. Class*, 138 S. Ct. 798 (2018). Resp. Br. 5. It is true, as the state says, that the Court in one instance described the question as "whether a guilty plea by itself bars a *federal* criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." *Id.* at 803 (emphasis added). What the state doesn't acknowledge is that the Court also put the question in other ways. *See id.* at 801-02 ("Does a guilty plea bar a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution? In our

view, a guilty plea by itself does not bar that appeal."), 803 (question presented is "whether in pleading guilty a criminal defendant inherently waives the right to challenge the constitutionality of his statute of conviction"). As Jackson said in his opening brief, the basis and scope of the Court's decision is just not clear. App. Br. 14.

What is clear is that the state is wrong when it says that the claims *Class* exempted from waiver are akin to the category of "facial challenges" (a class of cases which all agree are not waivable). Resp. Br. 5. The Due Process claim in *Class* involved the particular circumstances of the defendant's conviction (his argument was that he had no notice that his conduct was prohibited) and the Court described the sort of claims exempted from waiver as those which challenged the right to punish the defendant's "admitted conduct" and which could be resolved "based upon the existing record." *Id.* at 805-06. That is precisely the type of claim Mr. Jackson is raising here.

Putting *Class* aside, the state offers no convincing reason waiver should apply under the *Tarrant* factors. It first makes the claim that Mr. Jackson "fails to identify" how the statute's application to him is unconstitutional. Resp. Br. 7. Mr. Jackson dedicated the entire first section of his brief to "identifying" the constitutional violation. App. Br. 5-12. The state may disagree with him on the merits, but that's not an argument that the claim shouldn't be reviewed.

The state next suggests that Mr. Jackson isn't really presenting an as-applied claim, because if the statute is unconstitutional as applied to him, then it's likely unconstitutional for many others as well. Resp. Br. 7-8. That argument misunderstands what an "as-applied challenge" is; it's simply a claim that the challenger's rights "were actually violated" on "the facts of the particular case." *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. That a particular statute may violate *many* people's rights can open up the possibility of facial challenges—but it doesn't prevent as-applied challenges by those whose rights have actually been violated.

The state finally suggests that the case presents "unresolved factual issues" such that review isn't merited. Resp. Br. 8. Like the circuit court, the state is knocking down strawmen. *See* App. Br. 15. If Mr. Jackson were claiming the state had publicly broadcast his internet identifiers, he would of course need proof of that. But he's not making that claim. He's arguing (among other things) that the statute lacks adequate safeguards to prevent the public release of what is supposed to be private information—resulting in a greater infringement on his right to anonymous speech. App. Br. 9-10. There are no factual issues to be resolved; Mr. Jackson's claim is fully presented. This Court should decide it.

On the merits, the state agrees with Mr. Jackson that the registry statute burdens his First Amendment rights, and thus that it must prove, beyond a reasonable doubt, that it is narrowly

tailored to address a compelling state interest. Resp. Br. 9-10. And it identifies an interest that all can agree is compelling: the protection of children. Resp. Br. 12-13.

But when it comes to showing how the statute advances this interest, the state can make only vague gestures. In a single paragraph, it offers two hypotheticals: the police might learn of a child receiving inappropriate communications from an unknown email address, or they might hear that a particular registrant is actually soliciting children. Resp. Br. 13. Indeed, these things could happen. And in either case, with or without the statute, police would have every tool they needed to investigate—whether by search warrant, by subpoena or warrant for electronic communications under Wis. Stat. § 968.375, or even by arrest. Even in its own hypotheticals, the state doesn't identify any work the statute does toward the interest of protecting children.

Still less can the state show the statute is narrowly tailored toward that goal. Its first argument is the bald assertion that there's no such thing as anonymity on the internet. Resp. Br. 13-14. If that were true (it isn't[1]) it would still be irrelevant. It's elementary that the First Amendment doesn't restrain the conduct of private citizens or private

[1] Even the popular magazine article the state cites for its claim details a series of methods for protecting one's identity on the internet.

companies; it restrains the government. *See, e.g.*, *Hudgens v. N. L. R. B.*, 424 U.S. 507, 519 (1976). The fact that private individuals or companies might possibly be able to learn the identity of a speaker doesn't mean the government can criminalize the failure to identify oneself.

The state's only other argument about narrow tailoring is the bald assertion that Mr. Jackson, because he committed a sex offense 29 years ago, "poses a high risk of recidivism." Resp. Br. 16. The claim that sex offenders as a class pose a high

re-offense risk is an oft-repeated (and thoroughly debunked) canard.[2] The fact that the state is relying on unsupportable claims about recidivism shows just how far we are from narrow tailoring.

The state cites a few cases upholding electronic-identity disclosure statutes, like *Doe v. Shurtleff*, 628 F.3d 1217, 1224–25 (10th Cir. 2010). *Shurtleff*, like most such cases, predates *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017), in which the Supreme Court made clear that restricting a registrant's internet use is a serious burden on speech, and can be justified only where it substantially advances an important state interest. The state has made no showing of the kind here.

The state finally accuses Mr. Jackson of "cherry picking" statutory provisions that permit the release of his purportedly private information to the public. Resp. Br. 20. Oddly, it then goes on to agree with Mr. Jackson that this is exactly what these provisions do. Resp. Br. 22-23. The state proposes that a law enforcement officer is bound to release information only in "good faith." *Id.* The provision the state cites is actually one conferring *immunity* on those who release information. Wis. Stat. § 301.46(7). It's hard to imagine a weaker protection of privacy than

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[2] *See, e.g.*, Radley Balko, *How a dubious statistic convinced U.S. courts to approve of indefinite detention*, Washington Post, August 20, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/08/20/how-a-dubious-statistic-convinced-u-s-courts-to-approve-of-indefinite-detention/.

possible civil liability for a law enforcement officer who engages in "wanton or intentional misconduct" in releasing information. Like the provisions in *Doe v. Harris*, 772 F.3d 563, 580-81, (9th Cir. 2014), the Wisconsin statute lacks any "effective constraint on law enforcement decisions that may infringe First Amendment rights."

II. Wis. Stat. § 301.45(2)(a)6m. infringes on far more speech than can be justified and chills protected speech, and is thus unconstitutionally overbroad.

As Mr. Jackson pointed out in his opening brief, the statute, by its own terms, requires him to disclose virtually any internet user name he adopts: whether it be for commenting on a website or opening a bank account. App. Br. 19. The state does not really dispute this; its response is instead to claim, without explanation, that this is not a "real or substantial" burden. Resp. Br. 30. But it obviously is, in 2019; most people conduct much of the business of life on the internet. Because the state makes no attempt to show how the statute's required disclosure of all this information is narrowly tailored to preventing sex offenses, this Court should hold it unconstitutionally overbroad.

CONCLUSION

Because Wis. Stat. § 301.45(2)(a)6m. is unconstitutional as applied to Mr. Jackson, and is also unconstitutionally overbroad, he respectfully requests that this Court reverse his conviction and remand with directions that the charge be dismissed with prejudice.

Dated this 13th day of May, 2019.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,522 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of May, 2019.

Signed:

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Assistant State Public Defender