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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP2205

In the interest of C. G., a person under the age of 18:
STATE OF WISCONSIN,

Petitioner-Respondent,

v.

C. G.,

Respondent-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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INTRODUCTION

This Court should deny Ella's petition for review because the court of appeals reached the right result for the right reasons. Because Ella is a registered sex offender, Wis. Stat. § 301.47 prohibits her from legally changing her name. The court of appeals correctly held that this name-change ban does not implicate the First Amendment because Ella is still free to use whatever name she chooses. It also correctly held that Ella may not bring an as-applied claim alleging that the sex offender registration requirement is cruel and unusual punishment under the Eighth Amendment. A court determines whether a statutory scheme is punitive by focusing on the language of the statute, not a person's individual circumstances. And this Court has already held that juvenile sex offender registration is not punishment. There is no reason for this Court to review these issues.

ARGUMENT

I. The court of appeals correctly rejected Ella's First Amendment claim.

Ella's first issue presented asks whether Wis. Stat. § 301.47 violates her First Amendment rights because it prevents her from legally changing her name while she is a registered sex offender. (Pet. 1.) The court of appeals correctly resolved this issue. Ella's contrary argument misstates the law.

When addressing a challenge under the First Amendment's Free Speech Clause, a court must first determine whether the law at issue regulates speech or expressive conduct. *State v. Baron*, 2009 WI 58, ¶ 14, 318 Wis. 2d 60, 769 N.W.2d 34. "If neither speech nor expressive conduct is being regulated, [a court] need not utilize a First Amendment analysis because the statute does not implicate the First Amendment." *Id.* If "speech or expressive conduct is

being regulated," a court must decide whether "the statute's regulation [is] content based or content neutral." *Id.* "A content-based statute must survive strict scrutiny whereas a content-neutral statute must survive only intermediate scrutiny. In either event, it is the State's burden to prove that [the statute at issue] is constitutional." *Id.*

Here, the court of appeals properly applied this two-step analysis. It first concluded that Wis. Stat. § 301.47's name-change ban did not implicate the First Amendment because Ella may still use whatever name she chooses. (Pet-App. 113–15.) The court further held, in the alternative, that this name-change ban would satisfy intermediate scrutiny if it implicated the First Amendment. (Pet-App. 115–19.)

Ella spends little time arguing that the court of appeals was wrong to decide, as a threshold matter, that Wis. Stat. § 301.47 does not implicate the First Amendment. Her cursory argument conflicts with case law from around the country, including Wisconsin.

Tellingly, Ella's petition for review does not mention two cases on which the court of appeals heavily relied: *Williams v. Racine County Circuit Court*, 197 Wis. 2d 841, 541 N.W.2d 514 (Ct. App. 1995), and *Krebs v. Graveley*, No. 19-cv-634-jps, 2020 WL 1479189 (E.D. Wis. Mar. 26, 2020), *appeal filed*. As the court of appeals noted below, the *Williams* court "rejected" a similar argument, and the *Krebs* court rejected an argument identical to Ella's. (Pet-App. 115.) The court of appeals noted that, in *Krebs*, the federal district court "held that a transgender plaintiff failed to meet her burden of showing that Wisconsin's name-change ban for registered sex offenders implicated her right to free speech." (Pet-App. 115.) And the court in *Williams* held that the plaintiff (a prisoner) had no First Amendment right to change his name. *Williams*, 197 Wis. 2d at 846.

Ella is thus implicitly asking this Court to overrule *Williams*. But the doctrine of stare decisis requires a "compelling justification" to overturn a precedent; mere disagreement is insufficient. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 93, 264 Wis. 2d 60, 665 N.W.2d 257. This doctrine applies to published court of appeals decisions. *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405.

The court of appeals' decision is also consistent with case law from outside Wisconsin. As one court has explained, a person has no right to a legal name change because "[s]elf-expression does not require a court order." *Matter of Miller*, 617 N.Y.S.2d 1024, 1026 (N.Y. Civ. Ct. 1994). Even without a legal name change, a person may still "use whatever moniker she chooses for personal or professional purposes." *Id.* Other courts have held that an inability to legally change one's name does not violate the First Amendment if a person may still use whatever name he or she chooses. *Petition of Variable for Change of Name v. Nash*, 190 P.3d 354, 356 (N.M. Ct. App. 2008); *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763, 768 (Cal. Ct. App. 1992); *Petition of Dengler*, 246 N.W.2d 758, 761–64 (N.D. 1976).

Ignoring all this precedent, Ella asserts that "it is well-established . . . that changing one's name for religious purposes is expressive conduct protected by the First Amendment, regardless of informal name use." (Pet. 11 (citing *Salaam v. Lockhart*, 905 F.2d 1168, 1170 (8th Cir. 1990); *Malik v. Brown*, 71 F.3d 724, 727–29 (9th Cir. 1995)).) The cases that Ella cites are inapposite.

In *Salaam*, "Bilal Ali Salaam had his name legally changed by a state court after he converted to the Islamic faith." *Salaam*, 905 F.2d at 1169. Prison officials prohibited the use of his new name "on prison records and clothing, and in the mail room." *Id.* He sued the prison officials. *Id.* The

Eighth Circuit held "that the state authorities must deliver mail to Salaam addressed to him only as Salaam and must allow the addition of Salaam's current name to his clothing." *Id.* at 1170. The prison officials did "not contest . . . that their policy infringes on his free exercise rights." *Id.*

Contrary to Ella's suggestion, the *Salaam* court did not hold that the prisoner had a First Amendment right to change his name. A state court had already allowed him to change his name. The question was whether prison officials had to recognize his new legal name.

Malik is also unhelpful for Ella. The issue in *Malik* was essentially the same as the one in *Salaam*. "In 1978, [the plaintiff in *Malik*] legally changed his name to Dawud Halisi Malik after converting to Sunni Islam. He began to use his new name in 1988." *Malik*, 71 F.3d at 726. In a lawsuit, he alleged that prison officials violated his "constitutional rights by refusing to process mail and notarize documents on which he used his religious name." *Id.* The Ninth Circuit framed the issue presented as "whether a prisoner's First Amendment right to use his religious name in conjunction with his committed name on outgoing mail was clearly established in 1990," such that the prison officials would not be entitled to qualified immunity. *Id.* The court noted that federal cases had "consistently supported" the proposition that, "*in states where inmates are allowed to change names legally*, prisons are generally required to recognize only legally changed names." *Id.* at 727 (emphasis added).

That proposition belies any notion that Wisconsin is constitutionally required to allow Ella to legally change her name. Contrary to Ella's suggestion, the *Malik* court did not hold that the First Amendment requires States to allow inmates to change their names. If Wisconsin law allowed Ella to legally change her name, then the rationale of *Salaam* and *Malik* would allow her to use her new name on mail. But

nothing in either of those cases suggests that Ella has a First Amendment right to legally change her name.

Wisconsin law already recognizes this distinction. "[A] legal name change gives a person a positive right to use that new name." *State v. Tiggs*, 2002 WI App 181, ¶ 10, 256 Wis. 2d 739, 649 N.W.2d 709. But a person does not have a constitutional right to legally change one's name. *See id.* ¶¶ 7–8 (discussing and distinguishing *Williams*, 197 Wis. 2d 841).

Ella's citation to *Azeez v. Fairman*, 795 F.2d 1296 (7th Cir. 1986), is also inapt. (Pet. 11.) The court "concluded in *Azeez* that legitimate interests in maintaining security and order within prisons support requiring inmates to use their committed names *unless a state court approves a change-of-name application*." *Mutawakkil v. Huibregtse*, 735 F.3d 524, 526 (7th Cir. 2013) (emphasis added). The court reaffirmed that holding in *Mutawakkil*. *Id. Azeez* and *Mutawakkil* do not support Ella's view that the First Amendment requires a state court to allow her to legally change her name while she is on the sex offender registry. Rather, these cases are consistent with the principle that a prisoner has a right to use a new name only *if* a state court *allows* him to change his name.

Ella devotes several pages to arguing that Wis. Stat. § 301.47's name-change ban does not satisfy intermediate scrutiny. (Pet. 12–20.)[1] The court of appeals' application of intermediate scrutiny is sound. For the sake of conciseness, the State will not repeat the court of appeals' reasoning here. And if this Court were to grant review here, it would have no need to apply intermediate scrutiny because Ella's First

[1] In the court of appeals, Ella argued that strict scrutiny should apply to Wis. Stat. § 301.47's name-change ban because it is a content-based restriction on speech. (Pet-App. 116–17.) Ella does not advance that argument in her petition for review. (Pet. 12–20.)

Amendment claim fails at the outset: Wis. Stat. § 301.47 does not implicate the First Amendment. The court of appeals correctly reached this conclusion.

In short, this Court should not review Ella's First Amendment claim. Her citation to inapplicable case law is not a reason for this Court to grant her petition for review. Contrary to Ella's suggestion, the federal cases that she cites did not hold that state courts are constitutionally required to allow prisoners to change their names. Ella's view conflicts with case law from around the country, including binding Wisconsin precedent that she fails to even mention in her petition for review.

II. The court of appeals correctly rejected Ella's Eighth Amendment claim.

Ella's second issue presented asks whether requiring her to register as a sex offender is cruel and unusual punishment under the Eighth Amendment. But this Court has already held that mandatory sex offender registration is not punishment. *State v. Bollig*, 2000 WI 6, ¶ 27, 232 Wis. 2d 561, 605 N.W.2d 199. That holding applies to juveniles. *State v. Hezzie R.*, 219 Wis. 2d 848, 881, 580 N.W.2d 660 (1998); *State v. Jeremy P.*, 2005 WI App 13, ¶ 13, 278 Wis. 2d 366, 692 N.W.2d 311.

Here, the court of appeals correctly held that under *Seling v. Young*, 531 U.S. 250, 263–65 (2001), Ella could not bring an as-applied challenge to circumvent *Bollig*'s holding. (Pet-App. 119–22.) In trying to circumvent *Young*, Ella notes that *Young* dealt with double jeopardy and *ex post facto* claims. (Pet. 22.) But the multi-factor test for determining whether a statute has a punitive effect applies to many types of constitutional challenges that involve possible punishment. *Smith v. Doe*, 538 U.S. 84, 97 (2003). These factors entered "*ex post facto* case law from double jeopardy jurisprudence," and

they "have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses." *Id.* This multi-factor test is "considered in relation to the statute on its face." *Young*, 531 U.S. at 262 (citation omitted). A court does not "evaluat[e] the civil nature of an Act by reference to the effect that Act has on a single individual." *Id.* There is no merit to Ella's suggestion that she may challenge the civil nature of a statutory scheme by bringing an as-applied Eighth Amendment claim.

Ella further argues that the petitioner in *Young* challenged the implementation, not the application, of a statutory scheme. (Pet. 22.) But she fails to explain the difference between these two things. And she does not cite any authority for the notion that an "as-implemented" constitutional challenge is distinct from an "as-applied" challenge. The Supreme Court in *Young* repeatedly referred to the challenge there as an "as-applied" challenge and held that it was impermissible. *Young*, 531 U.S. at 263–65.

Ella's as-applied challenge is impermissible under *Young*. Indeed, courts have often ruled that litigants' as-applied challenges to sex offender registration requirements were foreclosed by precedent holding that those requirements were not punitive. *See, e.g.*, *King v. McCraw*, 559 F. App'x 278, 281–82 (5th Cir. 2014); *United States v. Elkins*, 683 F.3d 1039, 1041, 1045–46 (9th Cir. 2012); *United States v. Slater*, 373 F. App'x 526, 527 (5th Cir. 2010); *Houston v. Williams*, 547 F.3d 1357, 1364 (11th Cir. 2008). Ella's claim is foreclosed by *Hezzie R.* and *Bollig*, which held that sex offender registration is not punitive. She may not circumvent those precedents by bringing an as-applied challenge.

In attempting to distinguish *Bollig*, Ella notes that it applied to adults. She suggests that *Bollig* does not apply to juveniles, citing *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48, 68 (2010). (Pet. 24.) But this Court held in *Hezzie R.*, 219 Wis. 2d at 881, that juvenile sex offender registration is not punishment. *Simmons* and *Graham* did not abrogate *Hezzie R.* Instead, *Simmons* dealt with a juvenile death sentence, and *Graham* involved a juvenile life sentence without the possibility of parole—two things that unquestionably are punishment.

In *Smith*, 538 U.S. 84, the United States Supreme Court held that Alaska's sex offender registration requirement is not punitive. This Court's decisions in *Hezzie R.* and *Bollig* are consistent with *Smith*.

In short, *Young* forecloses Ella from bringing an as-applied challenge to circumvent this Court's holdings in *Hezzie R.* and *Bollig*. This reason alone justifies declining to review her second issue presented. Even if Ella could collaterally attack those precedents through an as-applied challenge, she has not provided a "compelling justification" to overturn them. *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶ 93.

CONCLUSION

This Court should deny Ella's petition for review.

Dated this 2nd day of March 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 2340 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this response to petition for review filed with the court and served on all opposing parties.

Dated this 2nd day of March 2021.

_____
SCOTT E. ROSENOW
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