

# In Wisconsin: Important Seventh Circuit Decision on the Ex Post Facto Clause

written by Adele Nicholas | August 10, 2022



By Adele Nicholas . . . We achieved a small but important victory in the Seventh Circuit this week. The Seventh Circuit found that a municipal ordinance enacted by the Village of Hartland, Wisconsin, that banned registrants from establishing a home in the Village is retroactive within the meaning of the ex post facto clause. The ruling opens an important avenue for persons with past convictions to challenge burdensome restrictions that are regularly heaped on them by local government entities that would like to banish them from their communities.

The case overturns a rule concerning “retroactivity” adopted by the Seventh Circuit in 2011. In order to prevail on an ex post facto claim, a plaintiff must prove both that a law is “retroactive” and that it is “punitive.” In the 2011 case *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011), the Seventh Circuit held that the federal Sex Offender

Registration and Notification Act was not “retroactive” as applied to a person convicted of his offense prior to its enactment. The Court’s logic was that the registration requirement only applied to “conduct occurring after the law’s enactment—that is, a sex offender’s failure to register or update his registration following interstate travel.” The Court applied this “retroactivity” rule again in the 2018 case *Vasquez v. Foxx*, holding that an Illinois statute that prohibits individuals classified as “child sex offenders” from living within 500 feet of home day cares was not retroactive because it applied “only to conduct occurring after its enactment—i.e., knowingly maintaining a residence within 500 feet of a child day-care home or group day-care home.”

These decisions greatly hampered our ability to pursue ex post facto challenges because almost any law could be characterized as “prospective,” even when applied to persons convicted long before the statute was passed. We believed the decision to be inconsistent with decisions of the U.S. Supreme Court and other jurisdictions that have considered the issue.

We sought to challenge that interpretation of “retroactivity” by bringing an ex post facto challenge to a municipal ordinance in Hartland, Wisconsin, which established a “moratorium” prohibiting registrants from establishing a residence anywhere in the Village. The district court granted summary judgment to the Village on the basis of “retroactivity,” and we appealed.

[In the decision entered by the Seventh Circuit on Monday, August 8,](#) the Seventh Circuit overturned the retroactivity rule from *Leach and Vasquez* and finally brought our circuit in line with the Supreme Court and other jurisdictions to have looked at the issue. The Seventh Circuit found that Hartland’s ordinance was retroactive because it “attached new legal consequences” to a crime committed before the enactment.

The case doesn’t resolve the question of whether Hartland’s

ordinance is punitive (the second part of the ex post facto analysis), and we will now go back to the district court to prove our case that a ban on residing in the community is not a legitimate regulation but rather an impermissible punishment.

My law partner and co-counsel on the case is Mark Weinberg. We have been working together on behalf of registrants in the Midwest for the past seven years, and we're heartened by this win!