

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Jul 20 2022

CERTIFIED QUESTION OF LAW

S.C. SUPREME COURT

Appellate Case No. 2022-00388
District Court Case No. 3:20-cv-2755-MGL

John Doe,.....

Plaintiff,

v.

Mark Keel, in his Official Capacity as Chief of
the South Carolina Law Enforcement Division,.....

Defendant.

DEFENDANT’S RESPONSE BRIEF

Andrew F. Lindemann
LINDEMANN & DAVIS, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Defendant

TABLE OF CONTENTS

Table of Authorities iii

Certified Question Presented 1

Statement of the Case..... 2

Standard of Review 5

Arguments 6

 I. The South Carolina Sex Offender Registry Act allows for a registered sex offender to remain on the Registry after that offender relocates to another state..... 6

 II. The Plaintiff’s federal constitutional claims are beyond the scope of the certified question presented by the District Court, but if those claims are reached, the South Carolina Sex Offender Registry Act, as applied to the Plaintiff, does not violate the Due Process, Double Jeopardy, or Ex Post Facto Clauses of the United States Constitution. 20

Conclusion 28

TABLE OF AUTHORITIES

Cases

<i>Anderko v. South Carolina Law Enforcement Division,</i> Case No. 2015-CP-46-3931 (filed July 28, 2016).....	14, 15
<i>Anderko v. South Carolina Law Enforcement Division,</i> Opinion No. 2018-UP-461 (Ct. App. 2018).....	15
<i>Connecticut Dept. of Public Safety v. Doe,</i> 538 U.S. 1 (2003).....	10
<i>Cutshall v. Sundquist,</i> 193 F.3d 466 (6th Cir. 1999)	27
<i>Doe v. O'Donnell,</i> 86 A.D.3d 238, 924 N.Y.S.2d 684 (App. Div. 2011).....	13, 14, 15
<i>Doe v. Virginia Dept. of State Police,</i> 713 F.2d 745 (4th Cir. 2013)	23
<i>Does 1-7 v. Abbott,</i> 945 F.3d 307 (5th Cir. 2019)	27
<i>Dunton v. South Carolina Bd. of Examiners in Optometry,</i> 291 S.C. 221, 353 S.E.2d 132 (1987)	12
<i>Femedeer v. Haun,</i> 227 F.3d 1244 (10th Cir. 2000)	27
<i>Hodges v. Rainey,</i> 341 S.C. 79, 533 S.E.2d 578 (2000)	12
<i>Hudson v. United States,</i> 522 U.S. 93 (1997).....	24

<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144 (1963).....	24
<i>Keyserling v. Beasley</i> , 322 S.C. 83, 470 S.E.2d 100 (1996).....	5, 16
<i>Municipal Association of South Carolina v. AT&T Communications of Southern States, Inc.</i> , 361 S.C. 576, 606 S.E.2d 468 (2004).....	21
<i>Newman v. Richland County Historical Preservation Commission</i> , 325 S.C. 79, 480 S.E.2d 72 (1997).....	17
<i>Powell v. Keel</i> , 433 S.C. 457, 860 S.E.2d 344 (2021).....	8, 19, 20, 21, 22
<i>Prynne v. Settle</i> , 848 Fed. Appx. 93 (4th Cir. 2021).....	27
<i>Richmond Medical Center for Women v. Herring</i> , 570 F.3d 165 (4th Cir. 2009).....	23
<i>Riverwoods, LLC v. County of Charleston</i> , 349 S.C. 378, 563 S.E.2d 651 (2002).....	12
<i>Shaw v. Psychomedics Corp.</i> , 426 S.C. 194, 826 S.E.2d 281 (2019).....	5
<i>Smith v. Doe</i> , 538 U.S. 84 (2003).....	24, 26
<i>South Carolina Dept. of Mental Health v. Hanna</i> , 270 S.C. 210, 241 S.E.2d 563 (1978).....	12
<i>Spiteri v. Russo</i> , 2013 4806960 (E.D.N.Y. 2013).....	14
<i>State v. Walls</i> , 348 S.C. 26, 558 S.E.2d 524 (2002).....	10, 26, 27

<i>Steward v. Folz</i> , 190 Fed.Appx. 476 (7th Cir. 2006)	27
<i>Talbot v. Myrtle Beach Bd. of Adjustment</i> , 222 S.C. 165, 72 S.E.2d 66 (1952)	16
<i>Town of Hilton Head Island v. Kigre, Inc.</i> , 408 S.C. 647, 760 S.E.2d 103 (2014)	5, 16
<i>United States v. Under Seal</i> , 709 F.3d 257 (4th Cir. 2013)	23, 25, 26, 27
<i>United States v. Wass</i> , 954 F.3d 184 (4th Cir. 2020)	25, 26, 27
<i>West Virginia Pulp & Paper Co. v. Riddick</i> , 225 S.C. 283, 82 S.E.2d 189 (1954)	12, 13
<i>Young v. Keel</i> , 431 S.C. 554, 848 S.E.2d 67 (Ct. App. 2020)	11

Rules and Statutes

Rule 208(b)(1)(C), SCACR	3
S.C. Code Ann. § 22-5-290	11
S.C. Code Ann. § 23-3-400, <i>et seq</i>	2, 10
S.C. Code Ann. § 23-3-430	2, 7, 8, 11
S.C. Code Ann. § 23-3-430(A)	10
S.C. Code Ann. § 23-3-430(E)	4, 8
S.C. Code Ann. § 23-3-430(F)	4, 8
S.C. Code Ann. § 23-3-430(G)	4, 8

S.C. Code Ann. § 23-3-460(A)	6, 7
S.C. Code Ann. § 23-3-460(E).....	8
S.C. Code Ann. § 23-3-460(F).....	4, 8, 9
S.C. Code Ann. § 23-3-460(G)	8
S.C. Code Ann. § 23-3-462.....	4, 8, 22
S.C. Code Ann. § 23-3-462(A)(1)(c).....	9, 22
S.C. Code Ann. § 23-3-462(C)	4, 8, 22
S.C. Code Ann. § 23-3-463.....	4, 8, 22
42 U.S.C. § 1983.....	2
42 U.S.C. § 16901, <i>et seq.</i>	14
42 U.S.C. § 16914.....	23
42 U.S.C. § 16918(a).....	23

Other Authorities

S.C. Regulation 73-270.....	19
2022 Act No. 221	4, 8, 22

CERTIFIED QUESTION PRESENTED

Does the South Carolina Sex Offender Registry Act (SORA) permit the publication of out-of-state offenders -- *i.e.*, individuals with qualifying sexual offenses but who do not live in South Carolina -- on the state's public sex offender registry?

STATEMENT OF THE CASE

The Plaintiff John Doe is a convicted sex offender. The Plaintiff has brought this lawsuit pursuant to 42 U.S.C. § 1983 challenging the constitutionality of the Sex Offender Registry Act, S.C. Code Ann. § 23-3-400, *et seq.* (“SORA”) and its application to out-of-state offenders such as the Plaintiff. The Plaintiff has also brought a state law claim for declaratory and injunctive relief. The Plaintiff contends that the Defendant Mark Keel, in his official capacity as Chief of the South Carolina State Law Enforcement Division (“SLED”), is not correctly interpreting or applying SORA and he seeks relief under state law.

In certifying the question, the United States District Court made the following verbatim findings of fact:

1. In 2011, Doe was convicted of a sexual offense in Colorado that triggered registration under S.C. Code Ann. § 23-3-430. When Doe committed the criminal offenses in question, he was a permanent resident of Greenville, South Carolina and was attending college at the University of South Carolina.

2. Doe was required to register as a sexual offender under S.C. Code Ann. § 23-3-430 from 2011 to 2015. Until June 2015, he re-registered biannually in Richland County and later in Greenville County.

3. Doe relocated to the State of Georgia in 2015 and, since then, has not remained in South Carolina for a total of thirty days during any twelve-month

period.

4. After relocating to Georgia, Doe's active registration requirements in South Carolina were suspended.

5. After relocating to Georgia, however, SLED continued to publish Doe's name, picture, offense, vehicle information, and last known addresses on the online sex offender registry.

6. Doe was born and raised in Greenville, South Carolina. He still has family in the state and returns to South Carolina for personal and professional reasons.

7. Doe is currently listed on the online sex offender registry operated by SLED.¹

¹ The Plaintiff has improperly exceeded the findings of fact made by the District Court in the "Statement of Case" section of his opening brief. The additional factual information provided is in dispute and was not specifically adjudicated by the District Court. *See*, Rule 208(b)(1)(C), SCACR (Statement of the Case "shall not contain contested matters").

In particular, the Plaintiff references purported findings of psychiatrist Thomas Martin, M.D. Those findings were not included in the District Court's findings of fact, and their admissibility and relevance are at issue in this litigation. By way of further explanation, Dr. Martin was never identified by the Plaintiff to be called as an expert witness or to offer any expert medical opinions. When the Plaintiff filed his designation of expert witnesses on December 9, 2020 (ECF #19), he did name Dr. Martin as an expert witness. In addition, the Plaintiff failed to comply with the disclosure requirements under Rule 26(a)(2)(B) or Rule 26(a)(2)(C), FRCP, and failed to produce either an expert report or the medical records of Dr. Martin. In the District Court, the Defendant filed objections to Dr. Martin being called as an expert witness, and those objections have not been ruled on at this time. (ECF #52). It is therefore improper for the Plaintiff to have cited any purported medical findings by Dr. Martin in his opening brief.

Similarly, the Plaintiff provides an explanation as to how his continued listing on the Registry has had a "stigmatizing" effect for he and his wife. That presents additional factual

As a result of his conviction of a sex offense, the Plaintiff was required by South Carolina law to register as a sex offender in accordance with SORA. That initial registration places the sex offender in the South Carolina Sex Offender Registry, and he remains on the registry for life unless removed pursuant to S.C. Code Ann. § 23-3-430(E), (F), and (G). Effective May 23, 2022 with the enactment of 2022 Act No. 221, the South Carolina General Assembly added S.C. Code Ann. §§ 23-3-462 and 23-3-463 which allow for the removal of an offender's name and identifying information from the Sex Offender Registry when specific conditions are met. S.C. Code Ann. § 23-3-462(C). As a result, there is now a fourth statutory mechanism for an offender to be removed from the Registry.

A sex offender who relocates to another state is required to comply with the terms of S.C. Code Ann. § 23-3-460(F), and during the period of time that the sex offender lives out-of-state, the in-person biannual or quarterly re-registration process is suspended until such time as the sex offender returns to South Carolina. However, the out-of-state offender is not removed from the Registry simply by relocating to another state.

information on which the District Court did not make any specific findings of fact and which incidentally is self-serving and has not been substantiated. Moreover, Doe's spouse is not a party to this litigation, and any impact that her husband's listing on the Registry may have on her personally is irrelevant and immaterial. The fact remains – as found by the District Court – the Plaintiff was adjudged a sex offender.

STANDARD OF REVIEW

“In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.” *Shaw v. Psychomedics Corp.*, 426 S.C. 194, 826 S.E.2d 281 (2019).

This Court has consistently ruled that “it is not within our province to weigh-in on the wisdom of legislative policy determinations.” *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103, 104 (2014). “We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.” *Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100, 101 (1996).

ARGUMENTS

I. The South Carolina Sex Offender Registry Act allows for a registered sex offender to remain on the Registry after that offender relocates to another state.

In his Complaint filed in the United States District Court, the Plaintiff seeks "declaratory and injunctive relief prohibiting Defendant from continuing to publish information about him on the South Carolina Sex Offender Registry." (ECF #1, p. 2). In his First Cause of Action, the Plaintiff alleges that he "is not a sex offender under South Carolina law and his inclusion on the Registry is not authorized by SORA." (ECF #1, ¶ 69). He alleged that "SLED's conduct listing Plaintiff on the Registry violates South Carolina law and should be enjoined by this Court." (ECF #1, ¶ 69).

By the very admissions contained in his Complaint and based on the District Court's findings of fact, the Plaintiff qualifies as a "sex offender" under SORA. S.C. Code Ann. § 23-3-460(A) provides in pertinent part:

Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal

courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article.

S.C. Code Ann. § 23-3-460(A). The Plaintiff does not dispute that he was adjudicated guilty of a criminal offense that qualifies for inclusion on the Registry. While a student at the University of South Carolina, and while he was residing in South Carolina, the Plaintiff was convicted of a sexual offense in Colorado which triggered registration under S.C. Code Ann. § 23-3-430. The Plaintiff was required to and did register as a sex offender in South Carolina, and his name was placed on the Registry. While the Plaintiff continued to reside in South Carolina up until June 2015, he re-registered biannually in Richland County and later in Greenville County.

In June 2015, the Plaintiff moved to Georgia. The Plaintiff contends that when he located to Georgia, he ceased being a "sex offender" under South Carolina law, and as a result, his name should be removed from the Registry. The Plaintiff's position is not supported by South Carolina law. As indicated, the Plaintiff qualified as a "sex offender" under S.C. Code Ann. § 23-3-460(A), and he was legally placed on the Registry as a result of his conviction for a sexual offense. That is not in dispute. South Carolina law, however, does not allow for the

removal of that designation once an offender leaves the State. Instead, as the South Carolina appellate courts have recognized, the offender's information remains on the Registry unless the offender qualifies for one of the three statutory bases for removal from the Registry as stated in S.C. Code Ann. § 23-3-430(E)-(G). *See, Powell v. Keel*, 433 S.C. 457, 860 S.E.2d 344, 347 (2021). *See, Young v. Keel*, 431 S.C. 554, 848 S.E.2d 67, 69 (Ct. App. 2020) ("§ 23-3-430 lists only three instances when a person convicted of a qualifying offense may be removed from the registry"). Those bases are: (1) where the offender's conviction is reversed, overturned, or vacated on appeal; (2) where the offender receives a pardon for the offense for which he was required to register and "the pardon is based on a finding of not guilty specifically stated in the pardon"; and (3) where the offender is successful on a writ of habeas corpus or a new trial motion and is subsequently acquitted. *See*, S.C. Code Ann. § 23-3-460(E)-(G). None of these bases for removal from the Registry are applicable to the Plaintiff, nor has he attempted to obtain his removal from the Registry by any of those mechanisms.

Effective May 23, 2022 with the enactment of 2022 Act No. 221, the South Carolina General Assembly added S.C. Code Ann. §§ 23-3-462 and 23-3-463 which allow for the removal of an offender's name and identifying information from the Sex Offender Registry when specific conditions are met. S.C. Code Ann. § 23-3-462(C). As a result, there is now a fourth mechanism for an offender to be

removed from the Registry. S.C. Code Ann. § 23-3-462(A)(1)(c) provides that the offender apply to SLED for removal from the Registry “if he is eligible to be removed under the laws of the jurisdiction where the conviction occurred.” *See*, S.C. Code Ann. § 23-3-462(A)(1)(c). The record does not indicate whether the Plaintiff has attempted or is in the process of attempting to utilize this new mechanism, and until he does so, the certified question before this Court is likely premature and may ultimately be deemed moot.

In short, SORA does not include any provision that permits the removal of a sex offender from the Registry where the offender moved outside of South Carolina, except for the new mechanism recently enacted. When an offender relocates out-of-state, the offender's requirement to re-register quarterly or biannually is suspended until the offender returns to the State. S.C. Code Ann. § 23-3-460(F) states: "If a person required to register pursuant to this article moves outside of South Carolina, the person must provide written notice within three business days of the change of address to a new state to the county sheriff with whom the person last registered." S.C. Code Ann. § 23-3-460(F). The biannual re-registration requirement is then administered in that new state until the offender returns to South Carolina. However, contrary to the Plaintiff's position, there is no provision in SORA that declares that an offender who relocates to another state is no longer a "sex offender" under South Carolina law and must be removed from

the Registry.

In effect, the Plaintiff contends that the sex offender must be a current resident in order to continue to be included on the Registry. There is no such requirement. Instead, S.C. Code Ann. § 23-3-430(A) only requires that the offender be a resident at the time of the initial registration in South Carolina and then that designation remains for life as does his inclusion on the Registry, unless the offender qualifies for removal under the four mechanisms described above.

The public policy underlying the formation of the Registry supports that reading of SORA. The Registry was developed "to promote the state fundamental right to provide for the public health, welfare, and safety of its citizens." S.C. Code Ann. § 23-3-400. According to this Court, the Registry is "intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524, 526 (2002).² Thus, the Registry serves multiple purposes including providing warning to the public of sex offenders' whereabouts but also as a resource for law enforcement to solve sex crimes. The removal of a known sex offender with ties to South Carolina – even if they may be prior or infrequent ties – would be

² In *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003), the United States Supreme Court recognized that Megan's Law, as adopted across the country, is "a statute designed to protect [States'] communities from sex offenders and to help apprehend repeat sex offenders." 538 U.S. at 4.

detrimental to those stated purposes.

In the case of the Plaintiff, he continues to have substantial ties to South Carolina and, as the District Court found as fact, returns to the State for personal and professional reasons. He was born and raised in Greenville, and he still has family in the State. Therefore, the Plaintiff has significant ties to the State that cause him to return to the State. The removal of his photograph and related information from the Registry would be counter to the public safety and law enforcement purposes for which it was developed.

As discussed above, SORA includes *only* four bases for removal of a sex offender from the Registry. Prior attempts to imply or read an additional basis for removal in SORA have been rejected by the courts. For instance, in *Young v. Keel*, 431 S.C. 554, 848 S.E.2d 67 (Ct. App. 2020), a sex offender argued that the expungement of his conviction for a qualifying sex offense requires his removal from the Registry. The South Carolina Court of Appeals rejected that argument. The Court recognized that S.C. Code Ann. § 23-3-430 "lists only three instances when a person convicted of a qualifying offense may be removed from the registry" and rejected the offender's request that expungement be implicitly deemed a fourth basis for removal from the Registry. Importantly, the Court ruled: "The text of § 23-3-430 plainly lists only three exceptions to the registry requirement, and we hold § 22-5-290 does not, by statutory osmosis, create a

fourth for expungement." 848 S.E.2d at 69.

The same is true in the case at bar. SORA does not provide – by osmosis or otherwise – for an additional basis for removal from the Registry where a sex offender moves to another state. Importantly, SORA is a remedial statute, and under South Carolina law, a remedial statute "should be liberally construed in order to effectuate its purpose." *See, South Carolina Dept. of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563, 564 (1978). Moreover, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132, 133 (1987). Additionally, the Court should be guided by "[t]he canon of construction ‘*expressio unius est exclusio alterius*’ or ‘*inclusio unius est exclusio alterius*’ [which] holds that ‘to express or include one thing implies the exclusion of another, or of the alternative.’” *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651, 655 (2002). “The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.” *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 582 (2000). *See also, West Virginia Pulp & Paper Co. v. Riddick*, 225 S.C. 283, 82 S.E.2d 189, 190 (1954) (“[t]he inclusion in the

statute of certain specified exclusions leaves the inference that the Legislature intended no other exclusions from the exemption"). Thus, if the South Carolina General Assembly intended to allow for the removal of a sex offender from the registry when the offender relocates to another state, it could have and would have provided that by explicit terms.³ Such a basis for removal should not be implied particularly where such a result clearly works to the detriment of well-established reasons for the Registry – to protect public safety and to provide law enforcement with the tools needed to investigate sex offenses. In effect, the absence of such a provision indicates that relocation to another state is *not* a basis for removal from the Registry. That is also consistent with SLED's interpretation of SORA, and as the agency charged with the administration of SORA, its interpretation is entitled to most respectful consideration and should not be overruled absent compelling reasons, which have not been demonstrated by the Plaintiff in this litigation.

As indicated, the inclusion of out-of-state offenders on the Registry serves multiple purposes including providing warning to the public of sex offenders'

³ In *Doe v. O'Donnell*, 86 A.D.3d 238, 924 N.Y.S.2d 684 (App. Div. 2011), the New York Supreme Court applied this very rule of construction to a similar sex offender registry statute in addressing whether an offender who moves to another state should be removed from a registry. The New York court recognized that "[w]here a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." 924 N.Y.S.2d at 686. The court then ruled: "while SORA expressly addresses an offender's relocation to another state, it does not provide for his or her removal from the sex offender registry under such circumstances. Had the Legislature intended to require the Division to

whereabouts but also as a resource for law enforcement to solve sex crimes.⁴ In *Anderko v. South Carolina Law Enforcement Division*,⁵ the state circuit court recognized the policy reasons for maintaining out-of-state offenders on the Registry:

[A]s determined by the legislature, maintaining a list of out-of-state registrants assists law enforcement in continuing enforcement of this State's laws should a registrant return to reside in South Carolina. In that instance, a continued listing serves as notice to both the public and to law enforcement that action may be necessary to insure compliance with SORA. Further, *the continued listing of out-of-state offenders serves as notice to the public and to law enforcement should these individuals be found residing in the State of South Carolina without properly registering*. Moreover, as stated by the Supreme Court, "[r]egistering persons who committed crimes in another state when they move to South Carolina is a reasonable method of achieving ... [the goal of protecting the public and aiding law enforcement]." *Id.*

remove a sex offender from New York's registry upon his or her relocation from this state, it would have so provided." *Id.* (Citation omitted).

⁴ It is also noteworthy that the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901, *et seq.* "has no provision requiring removal from a state's registry once a sex offender moves out of that state." *Spiteri v. Russo*, 2013 4806960, *43 (E.D.N.Y. 2013).

⁵ The South Carolina appellate courts have not previously addressed this issue in any published opinion, and as a result, there is no binding precedent. Nonetheless, as referenced by the District Court in its Order Certifying Question to the South Carolina Supreme Court, this question did come before both the Court of Appeals and this Court in the *Anderko* case in recent years. (ECF #57, p. 4).

Anderko v. South Carolina Law Enforcement Division, Case No. 2015-CP-46-3931 (filed July 28, 2016), p. 5. (Emphasis added). (ECF #33-2). That ruling was affirmed by the South Carolina Court of Appeals in an unpublished opinion. *See, Anderko v. South Carolina Law Enforcement Division*, Opinion No. 2018-UP-461 (Ct. App. 2018). (ECF #33-3). A writ of certiorari was subsequently denied by this Court on June 28, 2019. (ECF #33-4).

Thus, there is an obvious recognition by the General Assembly and the courts that the continued inclusion of out-of-state offenders on the Registry serves important public safety and law enforcement interests. As the New York Supreme Court has similarly explained, in the absence of keeping a relocated sex offender on the Registry, "such an offender could simply leave and then return without re-registering, or relocate just outside of this state's borders, thereby posing a continuing public safety threat to New York citizens – situations which would effectively nullify the remedial objective of the statute." *Doe v. O'Donnell*, 86 A.D.3d 238, 924 N.Y.S.2d 684, 687 (App. Div. 2011). That same concern is equally applicable in South Carolina, where there are major population centers directly on the borders with neighboring states, and accordingly, many people live in North Carolina or Georgia yet work in South Carolina or otherwise are regularly crossing state lines in their day-to-day lives. Thus, in the case of out-of-state offenders such as the Plaintiff, who continues to have significant ties to the State

and returns to the State for personal and professional reasons, the Registry provides a resource for residents who may come into contact with the offenders while in the State as well as a tool for law enforcement to use in the event that the offenders return to the State to commit crimes. It also provides notice should the offender return to live in South Carolina without compliance with the SORA-mandated in-person biannual or quarterly re-registration process. In short, it lessens the opportunities for such former residents to avoid detection when in South Carolina.

Nonetheless, the Plaintiff argues that the continued inclusion of out-of-state offenders on the Registry should be disallowed by asking this Court to make policy decisions contrary to those made by the General Assembly. This Court, however, has consistently ruled that “it is not within our province to weigh-in on the wisdom of legislative policy determinations.” *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103, 104 (2014). In other words, “[w]e do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.” *Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100, 101 (1996). *See also, Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 72 S.E.2d 66, 68 (1952) (“One of the most firmly established principles in the field of constitutional law is that the wisdom of legislation is a matter exclusively for legislative determination”). In discussing the doctrine of separation of powers, former Chief Justice Toal wrote:

“Checks and balances” is not just an abstract phrase, but describes a set of concrete governmental arrangements allowing each branch of government to discharge its responsibilities without infringing on those of another branch. One of these arrangements is judicial review of certain executive and legislative actions. In determining when it is permissible to conduct such review, *it is important to distinguish between matters of policy and matters of law*. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, our role is confined to determining whether a particular action is legal.

Newman v. Richland County Historical Preservation Commission, 325 S.C. 79, 480 S.E.2d 72, 76 (1997) (Toal, J. dissenting). (Emphasis added).

Critically, it is important to distinguish between matters of policy and matters of law. If a law may not be prudent or even effective, that is a matter of policy; it does not render the law illegal as a matter of state law. Yet, the Plaintiff is asking this Court to imply or read into SORA a fifth mechanism for the removal of an offender from the Registry – when an offender relocates out of state. He presents policy reasons for such a fifth mechanism; yet, to adopt the Plaintiff’s reasoning would require this Court to address matters of policy rather than matters of law – and that is beyond this Court’s prerogative under the separation of powers doctrine. As aptly stated by this Court on numerous occasions, this Court does not sit as a super-legislature.

Principally, the Plaintiff suggests that publishing out-of-state offenders on the Registry undermines the purpose of SORA because it does not provide

information regarding offenders “living” in South Carolina and makes the Registry “bloated” with outdated or stale information about the offenders. Those are explicitly matters of policy rather than matters of law. Moreover, as discussed above, there do exist valid and legitimate reasons for the General Assembly to believe that out-of-state offenders should remain on the Registry, specifically to provide notice to the public and law enforcement should the person return to the State either temporarily or permanently.

Next, the Plaintiff argues that the Registry ultimately includes persons, like himself, who are not “sex offenders” and that causes the Registry to contain “false information.” While the Plaintiff may think of himself as a “former sex offender,” that is a misnomer and entirely incorrect. As the District Court’s findings of fact demonstrate, the Plaintiff was convicted of a criminal sexual offense that qualifies for inclusion on the Registry. The Plaintiff was required to and did register as a sex offender in South Carolina and his name was placed on the Registry. That is undisputed. The Plaintiff was adjudged to be a “sex offender,” and that adjudication has not changed or been altered by any reversal of that conviction, by issuance of a writ of habeas corpus, or by pardon. That also is undisputed. Thus, the Plaintiff has been adjudged a “sex offender,” and he remains adjudged a “sex offender,” a status that does not change because the Plaintiff chose to move out of

state. In other words, he does not become a "former sex offender" by voluntarily relocating to another state.

Finally, the Plaintiff argues that the regulations currently promulgated by SLED support his position. He points to provisions in the regulations for removing deceased offenders, but there is an obvious difference between deceased offenders who can never offend again or physically return to South Carolina and out-of-state offenders, such as the Plaintiff, who may relocate back to the State or otherwise return periodically to the State for personal and professional reasons. Citing to S.C. Regulation 73-270, the Plaintiff also incorrectly states that an offender placed on "inactive status" by leaving the State is required to have his records destroyed. That is a misreading of the regulation, which applies only to the records maintained locally by a sheriff's office, and the destruction of those records is intended to be permissive rather than mandatory per the use of the word "may." There is, however, no provision in the regulations requiring an offender on "inactive status" for any reason, including relocation out of state, to be removed from the Registry.

In sum, existing case law has interpreted SORA as having three explicit statutory mechanisms for the removal of an offender from the Sex Offender Registry and that no other mechanism may be implied. In May 2022, the General Assembly added a fourth mechanism in response to this Court's decision in *Powell*

v. Keel, 433 S.C. 457, 860 S.E.2d 344 (2021). None of the mechanisms, as recognized under SORA, allow for a sex offender listed on the Sex Offender Registry to be removed simply because that person relocated to another state. There exist valid and legitimate reasons for the General Assembly to maintain out-of-state offenders on the Registry, and for these reasons, the Court is requested to answer the certified question in the affirmative.

II. The Plaintiff’s federal constitutional claims are beyond the scope of the certified question presented by the District Court, but if those claims are reached, the South Carolina Sex Offender Registry Act, as applied to the Plaintiff, does not violate the Due Process, Double Jeopardy, or Ex Post Facto Clauses of the United States Constitution.

In addition to addressing the certified question from the District Court, the Plaintiff also asks this Court to address the federal constitutional claims that are raised to and continue to be pending before the District Court. The Defendant believes that the constitutional issues are beyond the scope of the certified question as presented. The Plaintiff attempts to have this Court adjudicate the entire dispute by arguing the statutory rule of constitutional avoidance. However, if the District Court intended this Court to address the federal constitutional questions, it would have said so. Instead, in its Order Certifying Question to the South Carolina Supreme Court, the District Court “conclude[d] that certification of the state law questions presented by Doe’s first claim for relief is appropriate.” (ECF #57, p. 4).

The District Court also noted that “the South Carolina Supreme Court has not yet addressed the question of statutory interpretation raised by Doe’s first argument.” (ECF #57, p. 1). The first claim for relief in the Plaintiff’s Complaint includes no constitutional allegations. Paragraph 69 of the Complaint merely alleges: “Plaintiff John Doe is not a sex offender under South Carolina law, and his inclusion on the Registry is not authorized by SORA. As such, SLED’s conduct listing Plaintiff on the Registry violates South Carolina law and should be enjoined by this Court.” (ECF #1, ¶ 69).

A similar issue arose in the case of *Municipal Association of South Carolina v. AT&T Communications of Southern States, Inc.*, 361 S.C. 576, 606 S.E.2d 468 (2004), in which this Court was asked to answer a certified question addressing state law only. There were also underlying federal constitutional issues presented in the federal court action. In answering the certified question, this Court wrote:

We also note that although the issues of reasonableness and constitutionality of such a fine are apparently at issue in this case, we are limited to answering only the certified question before us. Therefore, we specifically express no view as to the reasonableness or constitutionality of the fine imposed.

606 S.E.2d at 471.

Nonetheless, if this Court intends to address the Plaintiff’s constitutional challenge to the application of SORA, the Defendant will briefly respond. Citing this Court’s decision in *Powell, supra*, the Plaintiff argues that the lifetime

publication of out-of-state offenders on the Registry, if required by SORA, renders the statute unconstitutional. However, the effective date of the *Powell* opinion was delayed by this Court for twelve months, that is, until June 9, 2022. *Powell*, 860 S.E.2d at 352. In the interim, the General Assembly enacted 2022 Act No. 221, which was effective May 23, 2022, and those amendments to SORA rectified the due process infirmities found by this Court. As discussed above, the General Assembly added S.C. Code Ann. §§ 23-3-462 and 23-3-463 which allow for the removal of an offender’s name and identifying information from the Sex Offender Registry when specific conditions are met. S.C. Code Ann. § 23-3-462(C). S.C. Code Ann. § 23-3-462(A)(1)(c) provides that the offender apply to SLED for removal from the Registry “if he is eligible to be removed under the laws of the jurisdiction where the conviction occurred.” *See*, S.C. Code Ann. § 23-3-462(A)(1)(c). The record does not indicate whether the Plaintiff has attempted or is in the process of attempting to utilize this new mechanism, and until he does so, the certified question before this Court is likely premature and may ultimately be deemed moot. Nonetheless, without the Plaintiff attempting to utilize the new process created in response to *Powell*, the Court is not in a position to determine whether the Plaintiff can state an *as-applied* challenge to SORA’s requirement that out-of-state offenders remain on the Registry even when they relocate to another state.

It is important to recognize that the Plaintiff has pled only an as-applied challenge to SORA rather than a facial challenge.⁶ In the prayer of his Complaint, the Plaintiff asks the District Court to "declare that Defendant's conduct is unconstitutional *as applied to Plaintiff*, in violation of the Fifth and Fourteenth Amendments." (ECF #1, p. 26). (Emphasis added). The Plaintiff does not allege that SORA, including the use of the Registry, is unconstitutional under all conceivable circumstances.⁷ He only argues that his inclusion on the Registry as an out-of-state offender after relocating to Georgia is unconstitutional. Thus, his

⁶ "An as-applied challenge attacks the constitutionality of a statute based on a developed factual record and the application of a statute to a specific person. By contrast, a litigant asserting a facial challenge contends that a statute operates in an unconstitutional manner." *Doe v. Virginia Dept. of State Police*, 713 F.2d 745, 762 (4th Cir. 2013) (Keenan, J., concurring). (Citations omitted). *See also, Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 172-173 (4th Cir. 2009).

⁷ As recognized by the Fourth Circuit in the *United States v. Under Seal* case, SORNA, as enacted by Congress:

requires that a sex offender registry include the name, address, physical description, criminal history and status of parole, probation, or supervised release, current photograph, and other identifying information. 42 U.S.C. § 16914. SORNA further requires that "each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." 42 U.S.C. § 16918(a).

United States v. Under Seal, 709 F.3d 257, 262 (4th Cir. 2013). Because South Carolina is required by federal law to implement a sex offender registry, the Plaintiff cannot bring a facial challenge without also challenging the constitutionality of SORNA, which he has not done. That is further indication that the Plaintiff has not alleged a facial challenge in this litigation.

as-applied due process claims cannot be determined by this Court without any factual record.⁸

Moreover, this Court should reject the Plaintiff's claim that the inclusion of out-of-state offenders on the Registry violates the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.⁹ The Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997). (Emphasis in original). When determining whether a punishment is criminal, courts use the same factors announced in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), as the framework for assessing whether a statutory scheme is civil or penal in nature. The same factors are used in both ex post facto and double jeopardy inquiries.

In *Smith v. Doe*, 538 U.S. 84 (2003), the United States Supreme Court analyzed whether the Alaska Sex Offender Registration Act was a civil or penal

⁸ The Plaintiff is seeking to have his information – and his alone -- removed from the Registry. In fact, he makes that clear in his response memorandum filed in the District Court where he confirms that he seeks to "enjoin Defendants' unconstitutional conduct without invalidating the entire State law." (ECF #35, p. 3).

⁹ As a threshold point, the Court should be aware that the Plaintiff never even alleges an ex post facto claim in his federal Complaint. The words "ex post facto" do not appear in that pleading. The Plaintiff should, therefore, not be permitted to raise a new claim or issue to address a certified question of state law. Notably, in its Order Certifying Question to the South Carolina Supreme Court, the District Court states that Plaintiff "contends Keel's actions violate the Due Process, Equal Protection and Double Jeopardy Clauses of the United States Constitution." (ECF #57, p. 1). The District Court makes no mention of an ex post facto claim.

statute for purposes of determining whether retroactive application of the Act violated ex post facto. Specifically, the Supreme Court looked at whether "the regulatory scheme has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." 538 U.S. at 97. The Supreme Court evaluated the Alaska Act using those factors and concluded that the sex offenders "cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme." 538 U.S. at 105. The Supreme Court thus concluded that "[t]he Act is nonpunitive." *Id.*

The Fourth Circuit has also held that sex offender registry laws are civil and non-punitive. In *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), the Fourth Circuit ruled that the federal SORNA "is a non-punitive, civil regulatory scheme, both in purpose and effect. The 'clearest proof' sufficient to override the intent of Congress that SORNA's registration requirements are civil and non-punitive is absent in this case." 709 F.3d at 263-264. The Court relied, in part, on express language in SORNA "that Congress sought to create a civil remedy, not a criminal punishment." 709 F.3d at 264. *Under Seal* was followed in 2020, by the Fourth Circuit's decision in *United States v. Wass*, 954 F.3d 184 (4th Cir. 2020), where the Court again applied the *Mendoza-Martinez* factors in evaluating

SORNA and reaffirmed the decision in *Under Seal*. The Fourth Circuit in *Wass* confirmed that the same analysis "remains the law of this Circuit and compels the conclusion that SORNA's registration requirements, as applied to Wass, do not violate the ex post facto clause." 954 F.3d at 193.

This Court has also addressed on several occasions whether SORA – at issue in this litigation – is civil and non-punitive. In *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002), this Court addressed whether the South Carolina Sex Offender Registry violated ex post facto. This Court held that the statutory scheme did not violate ex post facto because "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." 558 S.E.2d at 526. This Court concluded that "the language indicates the General Assembly's intention to create a non-punitive act." *Id.*

Based on the foregoing case law – from the United State Supreme Court, the Fourth Circuit Court of Appeals, and the South Carolina Supreme Court – it is abundantly clear that SORA is a civil and non-punitive statutory scheme. SORA is nearly identical to the Megan's Law analyzed in *Smith* and complies with the federal SORNA. Thus, because SORA presents a non-punitive statutory scheme, the application of the registry requirements under South Carolina law to the Plaintiff is not violative of the Double Jeopardy Clause. That conclusion is also

supported by other federal circuit courts that have upheld sex offender registration schemes to similar double jeopardy challenges. *See e.g., Steward v. Folz*, 190 Fed.Appx. 476 (7th Cir. 2006); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000); *Does 1-7 v. Abbott*, 945 F.3d 307 (5th Cir. 2019); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999).¹⁰

In sum, the application of SORA to the Plaintiff has been intended as non-punitive and is not in violation of the Double Jeopardy Clause. At any rate, it is equally important to note that the requirements of SORA were in place *before* the Plaintiff was convicted in Colorado, and therefore, the application of SORA cannot constitute the imposition of multiple criminal punishments for the same offense. Accordingly, the application of SORA to the Plaintiff, including the recent amendments, does not violate his federal constitutional rights.

¹⁰ In an attempt to get this Court to re-examine its previous decision in *Walls*, which of course is beyond the scope of the certified question presented, the Plaintiff nonetheless places great weight on the Fourth Circuit's *unpublished* decision in *Prynne v. Settle*, 848 Fed. Appx. 93 (4th Cir. 2021) (unpublished). The Plaintiff cites that case in his attempt to suggest that the Fourth Circuit has "opened the door" for courts to re-examine whether sex offender registry statutes are punitive rather than civil. However, what the Plaintiff fails to make clear is that *Prynne* is purely a pleading case. The Fourth Circuit found that an ex post facto challenge to the Virginia sex offender registry statute should not have been dismissed at the pleading stage where the plaintiff at least pled "a plausible claim that the registry affects her in an excessively punitive way, despite its intended non-punitive purpose." 848 Fed. Appx. at 103. The Fourth Circuit did not, however, consider the merits of the ex post facto challenge but instead remanded that claim for further proceedings. Importantly, the Fourth Circuit did not overrule its prior decision in *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), where the Court ruled that the federal SORNA "is a non-punitive, civil regulatory scheme, both in purpose and effect. The 'clearest proof' sufficient to override the intent of Congress that SORNA's registration requirements are civil and non-punitive is absent in this case." 709 F.3d at 263-264. Likewise, the Fourth Circuit did not overrule its more recent decision in *United States v. Wass*, 954 F.3d 184 (4th Cir. 2020).

CONCLUSION

Based on the foregoing discussion and analysis, the Defendant Mark Keel, in his official capacity as the Chief of the State Law Enforcement Division, respectfully requests that the Court answer the certified question in the affirmative, thereby confirming that South Carolina statutory law permits an out-of-state offender to remain listed on the Sex Offender Registry after the offender has relocated to another State.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

*Counsel for Defendant Mark Keel,
in his official capacity as the Chief
of the State Law Enforcement Division*

July 20, 2022