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S.C. SUPREME COURT

In the Supreme Court of South Carolina

CERTIFIED QUESTION OF LAW

From the United States District Court for the District of South Carolina
Judge Mary Geiger Lewis

Appellate Case No. 2022-000388
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

PLAINTIFF'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

INTRODUCTION

The South Carolina Sex Offender Registry Act ("SORA") does not authorize SLED to publish individuals on the public registry who no longer reside in the state of South Carolina (and therefore have no obligation to register with South Carolina law enforcement). The text, purpose, and logic of the statute support Plaintiff's interpretation: that publication must follow registration. Furthermore, if the contrary interpretation were adopted and SLED were allowed to publish out-of-state offenders on the registry, SORA would pose significant constitutional concerns under the Due Process, Double Jeopardy, and *Ex Post Facto* clauses.

Defendant's arguments to the contrary misunderstand the fundamental question before the court; unsuccessfully seek refuge in the newly enacted legislation; ignore governing statutory language; and disregard serious constitutional concerns. The Court should answer the certified question in the negative and hold that SORA does not permit SLED to publish the information of out-of-state offenders on South Carolina's public registry of sex offenders.[1]

ARGUMENT

I. The certified question does not present an issue of "removal" as contemplated by SORA.

Defendant Keel repeatedly and erroneously conflates the relief at issue here

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[1] Defendant asserts that this Court would be acting "beyond [its] prerogative" by answering the certified question because the question presents a "matter[] of policy rather than [a] matter[] of law." Ans. Br., p. 16–18. As a threshold matter, both the federal district court (in certifying the question) and this Court (in accepting the certified question) disagreed with Defendant's proclamation. The certified question presents a quintessential legal issue—statutory interpretation—that is squarely within this Court's "prerogative." *See State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979) ("The legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws.") (interpreting Article I, Section 8 of the South Carolina Constitution).

(removing the names of out-of-state individuals from the public registry while they are not required to register) with the relief contemplated by the statute's removal provisions (complete relief from publication *and registration* as a sex offender in South Carolina). This error infects Defendant's statutory analysis, derails Defendant's evaluation of case law, and informs Defendant's mistaken view that the legislature's recent amendment of SORA upsets the justiciability of this matter, *see* Part II.

A. SORA's "removal" provisions offer complete and permanent relief from registration and publication.

As Defendant repeats in his brief, there are four statutory provisions that offer "removal" for sex offenders. Although this Court has not always treated these provisions as inviolate, *see Edwards v. State Law Enforcement Div.*, 395 S.C. 571, 579–80, 720 S.E.2d 462, 466 (2011) (authorizing removal on the basis of a pardon before SORA was amended to authorize removal for a pardon only under certain circumstances), Defendant argues that they are narrow and exhaustive, Ans. Br. at 12-13 (arguing that removal cannot be implied). "Removal," under those provisions, means permanent relief from registration and publication. S.C. Code Ann. §§ 23-3-430, 462, 463. A person "removed" from the registry under those provisions is completely relieved from their obligation to register biannually for life. *Id.* The provisions allow for removal if:

> 1. "the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense . . . was reversed, overturned, or vacated on appeal and a final judgment has been rendered" S.C. Code Ann. § 23-3-430(E).
>
> 2. "an offender receives a pardon . . . based on a finding of not guilty specifically stated in the pardon" S.C. Code Ann. § 23-3-430(F).

> 3."an offender files a petition for a writ of habeas corpus or a motion for a new trial . . . based on newly discovered evidence" and "the circuit court grants the offender's petition or motion and orders a new trial; and a verdict of acquittal is returned at the new trial or entered with the state's consent" S.C. Code Ann. § 23-3-430(G).
>
> 4. after a certain number of years (based on the underlying offense), the petitioner meets a set of criteria or shows a court that he is "no longer a foreseeable risk to reoffend and that it is in the best interest of justice" S.C. Code Ann. §§ 23-3-462, 463.[2]

If a sex offender successfully obtains removal under any of those four provisions, he no longer has an obligation to register with law enforcement even while residing in South Carolina.

B. By contrast, the certified question only involves temporary clerical removal of names of individuals from the public registry who have no active duty to register in South Carolina.

Individuals who have a qualifying sexual offense but who do not reside in South Carolina are not required to register as sex offenders under SORA. If those offenders ever reside (or *again* reside) in South Carolina, their obligation to register under SORA would commence. Doe does not challenge that result. Rather, Doe argues that SORA—which does not authorize indefinite registration—also does not authorize indefinite publication. Moreover, the result urged by Doe—clerical removal of a non-registering individual from the public registry—is already used by SLED in other contexts. *See* S.C. Code Ann. Regs. § 73-240 (removing deceased offenders from active status); Part III.C, *infra*.

The exclusive issue is whether SLED may continue to indefinitely publish an individual as a sex offender *even after* their registration obligations have been

[2] In May of this year, the General Assembly added the fourth provision by passing House Bill 4075.

stayed. Because that question does not involve the relief contemplated by SORA's removal provisions, Defendant's key argument—that the statute's removal provisions are exhaustive—is irrelevant.[3]

C. Cases relied upon by Defendant Keel are inapposite because they, like SORA's removal provisions, only relate to complete forgiveness from SORA's mandates.

Two cases upon which Defendant relies heavily—*Young v. Keel*, 431 S.C. 554, 848 S.E.2d 67 (2020), Ans. Br., p. 11, and *Anderko v. S.C. Law Enforcement Div.*, Case No. 15-CP-46-3931 (July 28, 2016), *affirmed at* Opinion No. 2018-UP-461, 2018 WL 6528114 (Ct. App. 2018), Ans. Br., p. 14-15—answer questions distinct from the one presented here. The plaintiff in *Young v. Keel* sought to be "relieve[d] . . . of the requirement to register as a sex offender." *Id.* at 556. Likewise, the plaintiff in *Anderko*[4] sought an order that South Carolina must give "full faith and credit" to a Washington State Court order terminating his duty to register a sex offender. As explained above, the certified question here does not contemplate permanent relief from registration obligations. Rather, the certified question imagines that when an offender moves outside of South Carolina and his registration obligations are paused, so should the publication of his information be paused.

II. Answering the certified question is a proper exercise of this Court's discretion.

Defendant suggests that because Plaintiff may be entitled to removal under SORA's amended removal provisions, the case may no longer be justiciable in federal

[3] On this point, Defendant argues that it is "important" that "SORA is a remedial statute, and . . . 'should be liberally construed in order to effectuate its purpose.'" Ans. Br. at 12. But as this Court explicitly held in *Edwards*, 395 S.C. at 579–80, SORA is not a remedial statute.

[4] Additionally, this Court analyzes the question statutory interpretation *de novo* and need not give any weight to the trial court's cursory analysis in *Anderko*.

court and, therefore, this Court should decline to answer the certified question. That is incorrect. It is within the Court's sound discretion to accept the federal district court's certified question, SCACR 244, and both the district court and this Court considered certification appropriate in this case. Defendant has not shown those decisions to be improper or imprudent.

A. The new statute does not answer the question presented in this case.

The new statute addresses when a person who is *properly listed* on the public registry may petition for permanent relief from registration and publication. But the question here is fundamentally different: whether the State has authority to publish out-of-state offenders, such as Doe, on the registry while they are living in a different state. *See* Part I.A, *supra.* If the State lacks statutory authority to publish those individuals on the registry, then invocation of Section 462 or 463 would never be necessary or appropriate.

B. This case does not suffer from ripeness or mootness issues.

To the extent that Defendant claims the case before the district court is not justiciable as a result of the new statutory enactment, that argument fails. Defendant claims, without analysis or citation, that "the certified question before this Court is likely premature." Ans. Br., p. 9. Plaintiff understands Defendant's argument that the case is "premature" to be an argument that the case is not ripe. A case is ripe only when it "has taken on fixed and final shape," *Trustguard Ins. Co. v. Collins*, 942 F.3d 195, 200 (4th Cir. 2019) (internal quotation marks omitted), and "no longer is dependent on future uncertainties," *NAACP v. Bureau of the Census*, 945 F.3d 183, 192 (4th Cir. 2019) (internal quotation marks omitted). Here, here no future occurrence is necessary for this Court to decide the certified question.

Defendant also claims, without analysis or citation, that "the certified question before this Court . . . may ultimately be deemed moot." Ans. Br., p. 9. But

"[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Employees Intern. Union, Local 1000*, 567 U.S. 298, 307–08 (2012) (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984) (internal alteration omitted); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("[A] federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.") (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)) (internal quotation marks omitted). This case is not moot because Plaintiff "ha[s] a concrete interest . . . in the outcome of the litigation," *Knox*, 567 U.S. at 307–08: specifically, Defendant will be forced to cease publication of Plaintiff's information on the registry. The General Assembly's May 2022 SORA legislation does not change that analysis.

III. Plaintiff's interpretation of SORA is more harmonious with the statute as a whole and with this Court's precedent.

The text of SORA is dispositive here because it simply (and unambiguously) does not contain authority for the State to publish out-of-state offenders on the registry. *See* Op. Br. at 4–7; *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008). But even if this Court finds it necessary to examine other statutory interpretation principles, *State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022), those also support Plaintiff's position.

A. SORA's text does not permit publication of out-of-state offenders on the registry.

Defendant pledges allegiance to the statutory text while simultaneously—and conveniently—disregarding some of the most important language in SORA.

1. Only residents must register.

The statute's text is clear that only South Carolina residents have to register: "Any person . . . *residing in* the State of South Carolina who [has qualifying convictions] . . . shall be required to register pursuant to the provisions of this article." S.C. Code Ann. § 23-3-430 (emphasis added). A resident is someone who "remains in this State for a total of thirty days during a twelve-month period." S.C. Code Ann. § 23-3-430(B).

Defendant asserts that Section 430 "only requires that the offender be a resident at the time of the initial registration . . . and then that designation remains for life[.]" Ans. Br., p. 10. But that interpretation, which lacks any support in the statutory language or in case law, stretches SORA's text beyond plausibility.

First, the syntax of the provision is dispositive. The General Assembly drafted and then approved the language 'residing in' in the present participle, "mean[ing] presently and continuously . . . [and] does not include something in the past that has ended[.]" *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 336 (7th Cir. 2019); *see also Am. Gas & Elec. Co. v. S.E.C.*, 134 F.2d 633, 648 (D.C. Cir. 1943) ("And 'controlling,' the present participle form of the verb, therefore means the act or fact of exercising restraining or directing influence over; it conveys the idea of process or continuance."); *Sonitrol Nw., Inc. v. Seattle*, 528 P.2d 588, 594 (Wash. 1974) (en banc) ("The words 'operating' and 'conducting' are in present participle form which excludes in its application the one-time installation services of a local alarm system."); *Concordia Fire Ins. Co. of Milwaukee v. Smith*, 237 P.2d 631, 632–33 (Okla. 1951) ("[T]he word 'falling' is a derivative and partakes of the meaning of the verb fall and as a present participle expresses a state of action in progress or a present descending."); *Al Otro Lado v. Wolf*, 952 F.3d 999, 1011–13 (9th Cir. 2020); *Scott v. Scott*, 423 P.3d 1275, 1281 (Utah 2017). In the text of SORA, the present participle use of 'residing' refers to individuals "presently and continuously" residing

in South Carolina, not who resided in South Carolina at a specific point in the past. *Shell*, 941 F.3d at 336.

Second, if Defendant's assertion were true—that the 'residing in' language is operative only at the moment of initial registration—then Doe would still be required to register with South Carolina law enforcement because he was "residing in" South Carolina at the time of his initial registration. But there is no dispute that Doe is not currently required to register with South Carolina law enforcement. *See* Ans. Br., p. 9.

2. Only those who must register may be published.

Under S.C. Code Ann. § 23-3-490, only "persons who *are* required to register" may be published on the registry. (Emphasis added). The inescapable conclusion is that—if only residents (people "remain[ing] in the state for a total of thirty days during a twelve-month period") must register, and only "persons . . . required to register" can be published—only residents can be published. This excludes out-of-state offenders.

B. Publication of out-of-state offenders on the registry undermines SORA's stated purpose.

SORA's purpose is to promote South Carolina's "fundamental right . . . to provide for the public health, welfare, and safety of its citizens," by ensuring that law enforcement has access to accurate and up-to-date information about sexual offenders "who live within the law enforcement agency's jurisdiction." S.C. Code Ann. § 23-3-400. Publication of out-of-state offenders on the public registry undermines that stated purpose.

1. SORA envisions publication of data regarding offenders specifically "who live within the law enforcement agency's jurisdiction."

According to the text of the statute, the purpose of SORA is to track offenders "*who live within* the law enforcement agency's jurisdiction." *Id.* (emphasis added). This explicitly excludes out-of-state offenders. This is another instance where, despite declaring fidelity to the statutory text, Defendant disregards a dispositive provision. The General Assembly was clear in its purpose: to publish data regarding offenders *who live within* South Carolina, not those who have moved away from South Carolina.

2. Publication of out-of-state offenders reduces the helpfulness of the registry.

Moreover, inclusion of out-of-state offenders necessarily offers the public stale and inaccurate information. Because out-of-state offenders are not required to register, those individuals do not have to provide updated contact, employment, or any other kind of information to law enforcement. As a result, the only information available for law enforcement to publish is inaccurate. Providing the public with inaccurate, outdated information does not enhance safety. Moreover, Defendant's argument that outdated offender information bolsters SORA's purpose, Ans. Br., p. 10–11, directly contravenes this Court's concerns in *Powell* that irrelevant information would bog down the public registry and diminish its usefulness. *Powell v. Keel*, 433 S.C. 457, 466, 860 S.E.2d 344, 349 (2021).

3. Defendant's case law does not address these issues.

The New York case relied upon by Defendant is inapposite. In *Doe v. O'Donnell*, 924 N.Y.S.2d 684 (App. Div. 2011), the petitioner relocated from New York to Virginia. *Id.* at 685. Under the New York sex offender statute, the *O'Donnell* petitioner was still required to actively register with New York law enforcement

even though he no longer resided in the state. *Id.* There are important differences between *O'Donnell* and the present case. First, the question presented in *O'Donnell* was one of *registration* requirements, not *publication* requirements. *Id.* at 686–87 (emphasizing legislature's motive "to allow local law enforcement agencies and the state to monitor the whereabouts of sex offenders"). Unlike the *O'Donnell* petitioner, Plaintiff is under no obligation to register with South Carolina law enforcement unless he again becomes a South Carolina resident. Second, because the *O'Donnell* petitioner had active registration requirements, his information in the New York registry was current (and therefore accurate). Because the statute in *O'Donnell* is not analogous to SORA, the New York court's reasoning does not apply in the present case and does not offer support to Defendant's argument.

4. SORA already accounts for Defendant's concerns about an offender frequently crossing state lines.

Defendant's concern about an offender frequently crossing state lines has already been contemplated by the legislature. South Carolina's General Assembly explicitly accounted for this in Section 23-3-430(B), outlining which individuals are required to register by defining the term 'resident.' That provision requires any person who spends a total of thirty or more days in South Carolina over a one-year period to register. For example, if an individual lives in Georgia or North Carolina but spends thirty cumulative days in a twelve-month period in South Carolina, such as a person who works full-time in South Carolina, that person qualifies as a "resident" under Section § 23-3-430(B) and would be required to register.

Defendant now argues that continued publication of out-of-state offenders is justified because *some* of those individuals *may* have continued contact with South

Carolina.[5] But only the words are the law, and the legislature devised a simple test for determining who must register as a sex offender. *See* S.C. Code Ann. § 23-3-430. That SLED would prefer the test to be broader and more inclusive does not bear on the Court's statutory analysis.

5. Removing an offender from the public registry would not impede law enforcement's access to archival data.

Defendant argues that removal of out-of-state registrants would frustrate law enforcement's ability to track potentially dangerous individuals with ties to South Carolina. This fails on two grounds.

First, SLED already makes no effort to update registry information about out-of-state offenders. When an individual leaves South Carolina, their transition to nonresident status is processed by law enforcement and the registration process is frozen indefinitely unless and until the person becomes a resident of South Carolina again. Because there is minimal value in retaining stale and inaccurate data about previous residents, there is no prejudice to law enforcement if that data is purged.

Second, Doe is not arguing that SLED is required to delete its internal law enforcement records. Doe is simply arguing that SLED may only publish an offender on the state's sex offender registry while the individual is required to register as a sex offender in this state. Pausing publication would not require SLED to purge out-of-state offenders' information from their records; rather, it would just require SLED to stop broadcasting that information to the public. That could be

[5] Defendant parades Doe's connections to South Carolina as evidence in his favor, but the argument is hollow. Until Doe contacted SLED about taking his name off the registry, SLED had no clue where Doe was living or what he was up to. The same is true of the over 8,000 other out-of-state individuals that SLED insists on publishing on their online registry. SLED permanently and indiscriminately publishes everyone forever, whether they have continued ties to South Carolina or not.

accomplished by distinguishing the registry from a more all-encompassing internal list.[6]

SLED already does this in other contexts. For example, pursuant to Section 23-3-490(E)(2), the information of juveniles adjudicated delinquent of a sex offense (other than a Tier III offense) "shall only be made available, upon request, to victims of or witnesses to the offense, public or private schools, child day care centers, family day care centers, [and] businesses or organizations that primarily serve children, women, or vulnerable adults[.]" The statute continues, "[n]othing in this section shall prohibit the dissemination of all registry information to law enforcement." S.C. Code Ann. § 23-3-490(E)(3). In other words, there is already registry-related information that law enforcement possesses but *cannot publish* (with some exceptions). That very practice would be available to law enforcement here, even if the certified question is answered in the negative.[7]

C. Defendant's interpretation contradicts SLED's current practice, which reflects public policy.

Plaintiff agrees that deference is owed to state agencies, Ans. Br., p. 12, but that deference supports Plaintiff's interpretation of SORA, not Defendant's.

On one hand, Defendant argues that the four statutory mechanisms are the exclusive path to removal. Ans. Br., p. 8–9. But when confronted with SLED's atextual practice of removing dead offenders from the registry, Defendant acknowledges and even supports the practice, explaining the practicality behind it. Ans. Br., p. 19. But Defendant cannot have it both ways: either the four statutory

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[6] This would address Defendant's concerns about law enforcement's ability to maintain safety in South Carolina's communities.

[7] Plaintiff emphasizes that he is not asking the Court to take a position on whether SLED should retain internal data. Plaintiff is simply arguing that the certified question is limited to the narrow question of publication and does not affect registration or internal law enforcement data.

mechanisms Defendant relies upon are the exclusive paths to removal, as argued repeatedly throughout Defendant's brief, or they are not. If the four statutory mechanisms are exclusive, then under Defendant's own reading of SORA, SLED is violating the law.

Moreover, Defendant mischaracterizes both SLED's own regulations and Plaintiff's analysis thereof.[8] Although Defendant explains Regulation 73-250, which governs state action when an offender moves to another state, he glosses over Regulation 73-240, which demands that "SLED [ ] ensure that all information maintained in the Registry is as up-to-date and accurate as possible," and 73-270, which permits the destruction of an offender's data when that offender is moved to inactive status. S.C. Code Ann. Regs. §§ 73-240, 270; *see also* Op. Br., p. 11–12. Both regulations flatly contradict Defendant's assertion that "[t]he removal of a known sex offender with ties to South Carolina—even if they may be prior or infrequent ties—would be detrimental to those stated purposes." Ans. Br., p. 10–11.

IV. Plaintiff's interpretation must prevail because Defendant's interpretation of SORA would render the statute unconstitutional.

Plaintiff is not asking this Court to adjudicate his constitutional claims. But "[w]here a statute is susceptible of two constructions, one of which presents grave and doubtful constitutional questions, and the other of which avoids those questions, the Court's duty is to adopt the latter." *Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009). Here, if SORA authorizes permanent publication of out-of-state offenders, it presents grave and doubtful due process and double jeopardy concerns. Therefore, it is this Court's duty to interpret SORA as not authorizing such

[8] Plaintiff did not, as Defendants claim, "incorrectly state[] that an offender placed on 'inactive status' by leaving the State is required to have his record destroyed." Ans. Br., p. 19. Rather, on pages eleven and twelve of the Opening Brief, Plaintiff argues that SLED's regulations permitting and even encouraging deletion of obsolete data highlight the importance of an up-to-date registry.

publication.

A. Permanent publication of non-registering out-of-state offenders violates the Due Process Clause.

State intrusion on an individual's right to privacy—such as the aggregation and distribution of offenders' information—violates substantive due process if it is not rationally related to legitimate government interests. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Powell*, 433 S.C. at 460.

Permanent publication of out-of-state offenders is not rationally related to South Carolina's legitimate stated purpose of promoting the State's "fundamental right . . . to provide for the public health, welfare, and safety of its citizens," by ensuring that law enforcement has access to accurate and up-to-date information about sexual offenders "who live within the law enforcement agency's jurisdiction." S.C. Code Ann. § 23-3-400. In fact, publication of out-of-state offenders actually undermines that interest by diluting the publicly available database with (often outdated or inaccurate) information about individuals who no longer spend substantial time in South Carolina. Based on this "grave" constitutional issue, the Court should reject Defendant's interpretation of SORA.[9]

[9] The new statutory amendments to SORA, passed to comply with this Court's decision in *Powell*, do not resolve the due process issues that were already present and were outlined in Plaintiff's Opening Brief. Op. Br., p. 14–17. The issue here is different than the question answered in *Powell*. In *Powell*, an offender whose SLED had authority to publish argued that lifetime *registration* was unconstitutional. 433 S.C. at 459–60. Here, on the other hand, the question is whether permanent *publication* of *out-of-state offenders* is rationally related to a legitimate government interest.

B. SORA also implicates "grave and doubtful" Double Jeopardy and *Ex Post Facto* concerns if construed to permit publication of out-of-state offenders.[10]

The Double Jeopardy clause prohibits the imposition of multiple punishments for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), whereas the *Ex Post Facto* clause prohibits imposition of a statute's new, higher punishment for pre-statute conduct, *Dorsey v. United States*, 567 U.S. 260, 275 (2012). In either case, the provision is only violated if the State's conduct constitutes punishment. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019). Under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), courts first ask whether the legislature's intent was to impose punishment. *Id.* at 168–69; *Hendricks*, 521 U.S. at 361. If so, the state conduct constitutes punishment. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If not, however, courts evaluate "whether the statutory scheme is so punitive in purpose or effect" so as to constitute punishment. *United States v. Wass*, 954 F.3d 184, 189 (4th Cir. 2020) (quoting *Hendricks*, 521 U.S. at 361). To do so, courts consider the following factors: whether the government action (1) inflicts what has been historically or traditionally regarded as punishment; (2) imposes an affirmative restraint or disability; (3) promotes the traditional aims of punishment, retribution and deterrence; (4) has a rational connection to a non-punitive purpose; or (5) is excessive. *Smith*, 538 U.S. at 97.

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[10] Defendant protests that "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." Ans. Br., p. 24, fn.9. First, it is important to note that the legal test to determine whether state action constitutes punishment is exactly the same for the purposes of both the Double Jeopardy and *Ex Post Facto* clauses. Second, Plaintiff did not include an *Ex Post Facto* claim in his federal complaint because such a claim is not implicated by the facts of Doe's situation. But, as explained at length above and in Plaintiff's Opening Brief, the constitutionality of Defendant's statutory interpretation is relevant to this Court's consideration and is properly addressed by Plaintiff's brief.

Defendant cites cases upholding the Alaska sex offender statute, *Smith v. Doe*, 538 U.S. 84 (2003); federal SORNA, *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), *United States v. Wass*, 954 F.3d 184 (4th Cir. 2020); and South Carolina's SORA, *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). Plaintiff does not dispute the existence or holdings of those cases. However, those cases do not answer the question before the Court: whether gratuitous publication of *out-of-state* offenders, if required by SORA, would raise grave and doubtful constitutional concerns. Rather, Defendant merely cites the basic facts and holdings of those cases and declines to meaningfully engage Plaintiff's in-depth, SORA-specific arguments under the *Mendoza-Martinez* factors. *See* Op. Br. p. 19–23.

Ultimately, as the Fourth Circuit said in its unpublished opinion in *Prynne v. Settle*,[11] 848 F. App'x 93 (4th Cir. 2021), "*Smith* and its progeny should not be understood as writing a blank check to states to freely impose retroactive restrictions on sex offenders." *Id.* at 103. Rather, *Smith* requires courts to exhibit fidelity to the principles of *Martina-Mendoza*, faithfully applying its test to determine whether state action constitutes punishment. *Id.* Despite Defendant's assertion that this issue is "abundantly clear," Ans. Br., p. 26, some courts applying that inquiry to increasingly severe sex offender statutes have recently held that the challenged state action does constitute punishment. *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696, 697 (6th Cir. 2016) (Michigan law found to violate *Ex Post Facto*) ("[W]hat began in 1994 as a non-public registry maintained for law enforcement use has grown into a byzantine code governing in minute detail the lives of the state's sex offenders.");

[11] Defendant complains that "Plaintiff fail[ed] to make clear [ ] that *Pyrnne* is purely a pleading case." Ans. Br., p. 27 fn. 10. However, Plaintiff's Opening Brief, included the following parenthetical explanation of *Pyrnne*: "holding that the plaintiff *plausibly alleged* that Virginia's registry act was punitive for *Ex Post Facto* purposes." Op. Br., p. 19 (emphasis added).

Commonwealth v. Muniz, 164 A.3d 1189, 1218 (Pa. 2017); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008). And this Court, of course, did the same last year in *Powell*.

Plaintiff is confident that this Court will engage in the full SORA- and question-specific analysis required of the *Martina-Mendoza* test. Though it may be a high bar to meet, SORA's publication of out-of-state offenders does constitute punishment, thereby implicating the Double Jeopardy and *Ex Post Facto* clauses. Under the canon of constitutional avoidance, then, this Court must interpret SORA to prohibit such publication.

CONCLUSION

Defendant's arguments do not undermine Plaintiff's assertion that SORA does not permit SLED to publish the information of out-of-state offenders on the public registry. Plaintiff asks this Court to preserve SORA by interpreting the statute accordingly, to carry out the intent of the legislature and preserve its constitutionality. Plaintiff respectfully asks that this Court answer the certified question in the negative.

Respectfully submitted,

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