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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2014-002721

Edward Dean and Nolan Brown, ... Appellants,

v.

Mark Keel, in his official capacity as
Chief of the South Carolina Law
Enforcement Division, ...Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err by following this Court's precedential opinions in holding that the South Carolina Sex Offender Registry Act, S.C. Code Ann. §§ 23-3-400 *et seq.*, complies with the United States and South Carolina Constitutions?

STATEMENT OF THE CASE

Appellants Edward Dean and Nolan Brown filed a Complaint for declaratory judgment pursuant to S.C. Code Ann. § 15-53-130, *et seq.*, for a determination of their rights under the South Carolina Sex Offender Registry Act ("SORA" or the "Act") and the Constitutions of the United States and South Carolina. (Compl., R. p.__.) Through this action the Appellants sought to enjoin the South Carolina Law Enforcement Division[1] ("SLED") from requiring Appellants to register as sex offenders.

On April 30, 2013, Defendant Mark Keel, in his official capacity as Chief of SLED, filed an answer to the Complaint. (Answer, R. p. __.) Because the action presented questions of law, the parties agreed to submit to the Court stipulated facts (Stip. Of Facts, R. p. __.) and legal briefs, pursuant to a scheduling order. (June Consent Order, R. p. __.)

On July 2, 2014, Appellants submitted a written brief. (App. Br., R. p. __.) and on August 1, 2014 the Respondent Chief Keel submitted a written brief. (Resp. Br., R. p. __.)

By an Order filed on September 11, 2014, the Circuit Court ruled that the residency restrictions do not apply to the Appellants, but denied all other relief requested by the Appellants ruling in favor of Chief Keel. (Sept. Order, R. p. __.) On September 18 2014, the Appellants filed a Motion to Alter or Amend Judgment under Rule 59(e). (Mot. To Alter or Amend, R. p. __.) On September 30, 2014, Respondent Chief Keel filed a Response in Opposition (Resp. in Opp., R. p. __), and on the same day the Appellants

[1] The South Carolina Sex Offender Registry "is under the direction of the Chief of the State Law Enforcement Division (SLED)" in his official capacity. S.C. Code Ann. § 23-3-410(A).

filed a Reply. (App. Reply, R. p. __.) On December 5, 2014, the Circuit Court denied the Appellants Motion to Alter or Amend the Judgment. (Dec. Order, R. p. __.) Appellants filed the Notice of Appeal on December 22, 2014.

STATEMENT OF THE FACTS[2]

The underlying facts were stipulated by the Parties and are not in dispute. Appellant Edward Dean is a citizen and resident of Greenwood County, State of South Carolina. On July 31, 1990, the Family Court for Greenwood County adjudicated Mr. Dean delinquent for first-degree criminal sexual conduct with a minor. Mr. Dean was thirteen (13) years old.

Subsequent to Mr. Dean's Family Court adjudication, South Carolina enacted the SORA § 23-3-490(D)(1)(c) that requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, SLED determined that Mr. Dean was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website. South Carolina requires Mr. Dean to register as a sex offender based solely on a juvenile adjudication for criminal sexual conduct with a minor, first degree.

Appellant Nolan Brown is a citizen and resident of Greenwood County, South Carolina. On May 22, 1991, the Greenwood Country Family Court adjudicated Mr. Brown delinquent of first-degree criminal sexual conduct with a minor. He was fourteen (14) years old.

Subsequent to Mr. Brown's Family Court adjudication, South Carolina enacted the SORA. Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, SLED

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[2] The parties stipulated to the relevant facts and this recitation reflects that stipulation. (Stip. Of Facts, R. p. __.)

determined that Mr. Nolan was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website. South Carolina requires Mr. Brown to register as a sex offender based solely on a juvenile adjudication.

Mark Keel, is the Chief of SLED, duly appointed by the Governor. He is sued in his official capacity. The Sex Offender Registry "is under the direction of the Chief of the State Law Enforcement Division (SLED)" in his official capacity. S.C. Code Ann. § 23-3-410(A).

SOUTH CAROLINA SEX OFFENDER REGISTRY ACT (SORA)

The SORA is intended for investigative, statistical, and public safety purposes for the citizens of South Carolina and is not meant to punish or violate one's constitutional rights. Specifically, South Carolina Code § 23-3-400 provides:

> The **intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens**. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> **The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending**. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (emphasis added).

A person who has been convicted of, pled guilty or nolo contendere to, or been ***adjudicated delinquent*** for any of the offenses listed in § 23-3-430(C) shall be referred to as an offender and register under the Act. Section 23-3-430 applies to **all** offenders, adult and juveniles, as the language applies to those convicted and adjudicated delinquent. Offenses included in § 23-3-430(C) are:

- Criminal sexual conduct in the first degree (§ 16-3-652);
- Criminal sexual conduct in the second degree (§ 16-3-653);
- Criminal sexual conduct in the third degree (§ 16-3-654);
- Criminal sexual conduct with minors, first, second, and third degrees (§ 16-3-655(A)-(C));
- Engaging a child for sexual performance (§ 16-3-810);
- Producing, directing, or promoting sexual performance by a child (§16-3-820);
- Criminal sexual conduct: assaults with intent to commit (§ 16-3-656);

- Kidnapping (§ 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;
- Kidnapping (§ 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent; or
- Trafficking in persons (§ 16-3-930) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense.

A person required to register pursuant to the SORA is required to register for life. S.C. Code Ann. § 23-3-460. However, the frequency (biannually or quarterly) with which one must register depends on whether the offender has been convicted of, pled guilty to, or been ***adjudicated delinquent*** an offense that falls into Tiers I and II versus Tier III. These Tiers are set forth in federal law.

In 2006, the United States Congress enacted the Adam Walsh Child Protection and Safety Act, which included the Sex Offender Registration and Notification Act ("SORNA"). 42 U.S.C.A. §§ 16901–16962 (2006). SORNA was promulgated "to protect the public from sex offenders and offenders against children, and in response to ... vicious attacks by violent predators." *Id.* § 16901. SORNA mandates, in relevant part, that each state require persons convicted of certain sex offenses to periodically register with authorities and provide specified information, *id.* §§ 16913–16914, maintain a statewide sex offender registry containing specific information pertaining to each registered sex offender, *id.* §§ 16912 & 16914, implement a community notification program, *id.* § 16921, and provide a criminal penalty for sex offenders who fail to comply, *id.* § 16913. SORNA specifically defines the term "convicted" as including juveniles adjudicated delinquent for certain sex offenses. *Id.* § 16911(8).

Sex offenders are classified into three (3) tiers based on the severity of the offense, and juvenile sex offenders can fall into any of these categories. Each tier either

has a quarterly or bi-annual[3] reporting requirement. "The offender required to register shall register and must reregister at the sheriff's department in each county where he resides, owns real property, is employed, or attends any public or private school, including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school." S.C. Code Ann. 23-3-460(A).

Section 23-3-460(B) requires that Tier III offenders, the highest tier level for the most severe sexual offenses, must register for life and *quarterly* verify registration information. S.C. Code Ann. § 23-3-460(B) ("A person classified as a Tier III offender by [SORNA] is required to register every ninety days."). The following Tier III offenses are included in § 23-3-460(B):

- Criminal Sexual Conduct in the First Degree (§ 16-3-652);
- Criminal Sexual Conduct in the Second Degree (§ 16-3-653);
- Criminal Sexual Conduct in the Third Degree (§ 16-3-654);
- Criminal Sexual Conduct with Minor (§ 16-3-655);
- Assault with Intent to Commit Criminal Sexual Conduct (§16-3-656).

The following Tier II offenses included below require biannual registration:

- Engaging Child for Sexual Performance (§ 16-3-810);
- Producing, Directing, or Promoting Sexual Performance by Child (§ 16-3-820);
- Committing or Attempting Lewd Act upon Child under Sixteen (where the victim is over 13, and the act does not consist of the touching of the victim's naked genitalia) (§ 16-15-140);
- Criminal Solicitation of a Minor (to engage in sexual activity) (§ 16-15-342);
- First Degree Sexual Exploitation of a Minor (§ 16-15-395);
- Second Degree Sexual Exploitation of a Minor (§ 16-15-405).

[3] "Biannually" means each year during the month of the offender's birthday and again during the sixth month following the offender's birth month. S.C. Code Ann. § 23-3-460(A).

The following Tier I offenses included below require biannual registration:

- Kidnapping (§ 16-3-910);
- Disseminating, Procuring or Promoting Obscenity (where the elements of the offense constitute possession or receipt of child pornography) (§ 16-15-305);
- Third Degree Sexual Exploitation of a Minor (§ 16-15-410).

Once an offender is required to register, the SORA lists the only mechanisms by which an individual can be removed from the Registry. Pursuant to § 23-3-430(E), "SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's ***adjudication***, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered." S.C. Code Ann. § 23-3-430(E) (emphasis added). Pursuant to § 23-3-430(F), an offender who receives a pardon "based on a finding of not guilty specifically stated in the pardon" shall be removed from sex offender registry. S.C. Code Ann. § 23-3-430(F). And finally, § 23-3-430(G) mandates removal for individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial. S.C. Code Ann. § 23-3-430(F). These are the only lawful avenues by which an individual who is properly placed on the Registry can be removed.

The law in South Carolina is clear. Under the SORA the Appellants are Tier III sex offenders (based on convictions of criminal sexual conduct with a minor, first degree) and they do not meet any of these statutory criteria in § 23-3-430 entitling them to removal.

SUMMARY OF ARGUMENT

This Court has repeatedly upheld the SORA against prior constitutional challenges of due process, *ex post facto*, equal protection, and cruel and unusual punishment.

(1) "[T]he General Assembly ... intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes. Hence, the language indicat[ed] the General Assembly's intention to create a non-punitive act" *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002)

(2) "[S]ince sex offender registration is non-punitive, no liberty interest is implicated regardless of the length of time registration is required." *Hendrix v. Taylor*, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003).

(3) Requiring a juvenile to register as a sex offender does not violate due process in situations where the juvenile's "registry information will not be made available to the public because of appellant's age [when juvenile is under the age of 12] at the time of his adjudication." *In re Ronnie A.*, 355 S.C. 407, 409-10, 585 S.E.2d 311, 312 (2003).

(4) "[A]ny assertion that juveniles should be entitled to a jury trial because they are subject to registering as a sex offender if they are adjudicated delinquent for certain sex offenses is without merit as our appellate courts have held that registering as a sex offender is a civil, non-punitive consequence." *In re Kevin R.,* 409 S.C. 297, 305, 762 S.E.2d 387, 391 (2014).

(5) The General Assembly began requiring lifetime Global Positioning Satellite (GPS) monitoring for an offender convicted or adjudicated delinquent of certain offenses, including criminal sexual conduct with a minor and lewd act. *In re Justin B.*,

405 S.C. 391, 747 S.E.2d 774 (2013) *cert. denied sub nom. Justin B. v. S.C*, 134 S. Ct. 1496 (U.S.S.C. 2014).

All of these precedents are well-supported and Appellants have raised no new issues in this case that have not already been decided by this Court. Therefore, there is no reason to overturn and supplant these opinions that support the SORA's implementation and protection of South Carolina citizens against sexual offenders, who, as the General Assembly found, pose a statistically significant high risk of re-offending.

Moreover, other states have similarly found the retroactive application of sex offender registration and notification requirements on juvenile offenders pursuant to adjudications rather than jury trials constitutional. *See In re Richard A.*, 946 A.2d 204 (R.I. 2008) ("The nature of the juvenile-justice system is not significantly compromised by a sex-offender-registration requirement. As such, the Registration Act is constitutional as applied to juveniles and respondent is not entitled to a jury trial."); *Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. 2002) (concluding that registration acts are "civil and regulatory in nature and are imposed in the interest of public safety."); *In re Jeremy P.*, 692 N.W.2d 311, 319 (Wis. Ct. App. 2004) (Court ruled that sex-offender registration was not criminal punishment and, therefore, the defendant had no right to a jury trial under either the federal or state constitution.); *In re Alva*, 92 P.3d 311, 325 (Cal. 2004) ("Registration has not historically been viewed as punishment, imposes no direct disability or restraint beyond the inconvenience of compliance, and has a legitimate nonpenal objective. Though registration may have incidental deterrent or retributive effects, and applies to conduct which is already a crime, these features are not sufficient to outweigh the statute's regulatory nature."); *People ex rel. J.T.*, 13 P.3d 321, 323 (Colo. Ct. App. 2000)

(court determined that the statutory duty to register as a sex offender did not constitute criminal punishment and accordingly, the juvenile had no statutory right to a jury trial); *In re Welfare of C.D.N.*, 559 N.W.2d 431, 435 (Minn. Ct. App. 1997) (refusing to recognize a right to a trial by jury in juvenile proceedings.).

Despite acknowledging opinions issued by this Court establishing the Constitutional nature of the SORA, the Appellants continue to argue against this precedent. Appellants allege that the SORA requirements for juvenile sex offenders, combined with the public nature of the Registry, create a constitutionally protected liberty interest which was infringed when Appellants were placed on the Sex Offender Registry without a jury trial. Appellants further assert that legislative amendments to the SORA, since its inception in 1994, have made it "increasingly punitive," but have not and cannot demonstrate that these amendments transform the SORA from a regulatory scheme to a criminal penalty, sentence or lifetime probation, particularly where several of the allegedly "punitive" effects do not apply to the Appellants in this case.

ARGUMENT

I. THE SORA COMPLIES WITH THE CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS.

The Constitutions of the United States and South Carolina provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1, S.C. Const. art. I, § 3. The *first* step in any substantive due process analysis is "to determine whether the claimed violation involves one of 'those fundamental rights and liberties which are, objectively, deeply rooted in the Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997) & *Palko v. Conn.*, 302 U.S. 319 (1937)).

The *next* step depends upon the result of the first. *Id.* at 739. If the asserted interest has been determined to be "fundamental," it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. *Id.* If the interest is determined not to be "fundamental," it is entitled only to the protection of rational-basis judicial review. *Id.* Accordingly, this Court has noted that, at a minimum, "the substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty or property." *Ronnie A.*, 355 S.C. at 409, 585 S.E.2d at 312.

Creating a new fundamental right is a power to be exercised with caution. The United States Supreme Court in *Washington v. Glucksberg* noted "we ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." 521 U.S. at 720 (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992)).

"By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* at 720 (citing *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977)).

The Appellants argue that lifetime sex offender registration violates their right to due process, because as juveniles they were not afforded the same constitutional safeguards that would have been afforded to an adult convicted of the same crime (criminal sexual conduct with a minor in the first degree), before being subject to the requirements of the SORA. (App. Br., R. p. __.) Using a combination of substantive and procedural due process theories, the Appellants contend the SORA has, through legislative changes, become increasingly punitive and deprives the Appellants of an alleged protected liberty interest. (App. Br., R. p. __.)

The SORA requirements for juvenile sex offenders who have been adjudicated delinquent are in accordance with both substantive due process and procedural due process under the Constitution.

A. Retroactive application of the SORA is constitutional.

There is a rational basis between SORA's registration requirements and the General Assembly's purpose for protecting the public; therefore, the retroactive application of SORA does not violate juvenile offenders' due process rights.

In challenging the constitutionality of the SORA, the Appellants bear a heavy burden, as "every presumption will be made in favor of its validity and no statute will be

declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *State v. Walls*, 348 S.C. 26, 29, 558 S.E.2d 524, 525 (2002) (citing *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001)); *see State v. White*, 348 S.C. 532, 536–37, 560 S.E.2d 420, 422 (2002) ("This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution."). All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. County of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996).

Importantly, the desirability of the legislation is not the issue before this Court. *See Keyserling v. Beasley*, 322 S.C. 83, 470 S.E. 2d 100 (1996). The Court "does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Id.* at 86, 470 at 101. Furthermore, "[a] legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995). Thus, while the Appellants clearly do not like the law and its application, their remedy lies with the General Assembly, not this Court.

This Court has noted that, at a minimum, "the substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty or property." *Ronnie A.*, 355 S.C. at 409, 585 S.E.2d at 312. Moreover, registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. *Id.*, at 409-10, 585 S.E.2d at 312 (internal citations omitted). Therefore, since no fundamental right exists requiring strict scrutiny, the juvenile sex offender registry provisions are subject to a rational basis

analysis. The rational basis test "demands no more than a 'reasonable fit' between government purpose ... and the means chosen to advance that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993) (upholding a law that permitted detained juvenile aliens to be released only to their parents).

In line with the stated purpose of its federal counterpart, the South Carolina General Assembly provided in § 23-3-400 that the SORA is not meant to punish, but is intended for investigative, statistical, and public safety purposes. *See* 42 U.S.C.A. § 16901 (2006) (stating that the purpose of the act was "to protect the public from sex offenders and offenders against children").

South Carolina Code § 23-3-400 states that "[s]tatistics show that sex offenders often pose a high risk of-reoffending. S.C. Code Ann. § 23-3-400. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction." *Id.* Moreover, in *Walls*, this Court considered the statutory construction and legislative history of the SORA, and found that "**it is clear that 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**." 348 S.C. at 31, 585 S.E.2d at 526 (emphasis added).

Accordingly, there is a rational basis between sex offender registration (adults and juveniles) and protecting the public and aiding law enforcement. The duration of the registration requirement is not excessive in relation to the legitimate non-punitive purpose. The intended purpose is to protect the public from those sex offenders who may

re-offend; therefore, protecting the public now or in the future accomplishes the purpose of the SORA. Thus, the retroactive application of SORA does not violate the Appellants' right to due process.

B. No jury trial is required under the constitution for juvenile offenders.[4]

The fundamental requirements of due process are fair notice and standards for adjudication. *State v. Green*, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012). Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and, (4) the right to confront and cross-examine witnesses. *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007).

Procedural due process requirements are not technical, and no particular form of procedure is necessary. *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

The United States Supreme Court has held that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). Several procedural safeguards applicable to criminal proceedings are also constitutionally mandated in juvenile delinquency proceedings, including the right to notice, the right to counsel, the right confront witnesses, the privilege against self-incrimination, and the standard of proof beyond a reasonable doubt. *Id.* at 532.

[4] The Appellants assert they do not want to turn back the clock and offer a jury trial, but instead they seek for this Court to "restore them to the position they were in at the time of their adjudications," "limit consequences of their adjudications to their twenty-first birthdays," and "extinguish the registration requirement." (App. Br., R. p. __.)

Therefore, the Court reasoned that a juvenile delinquency proceeding is fundamentally different from a criminal proceeding and cannot be equated to a criminal prosecution within the meaning of the Sixth Amendment. *Id.* at 541-51. If the purpose of due process is to ensure that specific procedures used to deny a person's liberty are sufficient as the particular situation demands, a juvenile's rights are protected at their adjudication by the "fundamental fairness" standard when the juvenile is required to register. *United States v. Juvenile Male*, 670 F.3d 999, 1014 (9th Cir. 2012) (citing *McKeiver*, 403 U.S. at 543).

More recently, this Court affirmed its prior holding in *Stephen W.* and offered additional precedential authority stating "***any assertion that juveniles should be entitled to a jury trial because they are subject to registering as a sex offender if they are adjudicated delinquent for certain sex offenses is without merit*** as our appellate courts have held that registering as a sex offender is a civil, non-punitive consequence." *Kevin R.*, 409 S.C. 297, 305, 762 S.E.2d 387, 391 (emphasis added); *In re Stephen W.*, 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014) (holding that juveniles are not constitutionally entitled to a jury trial in adjudication proceedings under the United States Constitution (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 530–57 (1971)); *id.* at 79, 761 S.E.2d at 234 ("[T]he South Carolina Constitution does not entitle juveniles to a jury trial in family court adjudication proceedings.").

In *Kevin R.* this Court noted there are no collateral consequences to a juvenile adjudication because an "adjudication is not the equivalent of a conviction" and furthered explained why juveniles are not entitled to a jury trial by stating "a juvenile who objects to the adjudication procedure or ruling has several avenues of recourse as he may file an appeal, an application for post-conviction relief, or a petition for a writ of habeas corpus."

409 S.C. at 305-07, 762 S.E.2d at 391-92. The Appellant in *Kevin R.* argued that jurors for a family court trial could be selected from a jury pool; however, this Court provided a separation of powers analysis stating such a "procedure would defeat the ***General Assembly's intent*** to keep juvenile proceedings separate and distinct from adult proceedings." *Id.* at 307, 762 S.E.2d at 392 (emphasis added).

While the Appellants may be subject to the same sex offender registration requirements as an adult convicted of criminal sexual conduct with a minor in the first degree, the impact on their liberty is simply ***not*** comparable to the actual punishment an adult would receive for a conviction. Criminal sexual conduct with a minor in the first degree is a class A felony and has been deemed by the General Assembly to be a "violent" and a "most serious" offense. S.C. Code Ann. §§ 16-1-60, -90(A), 16-3-655(A), & 17-25-45. When the victim is less than eleven (11) years of age, an adult convicted of criminal sexual conduct with a minor in the first degree "must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life." S.C. Code Ann. § 16-3-655(C). An ***adult felony conviction*** for the offense involved carries a much greater punishment than the adjudication imposed on the Appellants, or any possible sanction that could be imposed on a juvenile, for the same crime.

Thus, juveniles are not constitutionally entitled to a jury trial in adjudication proceedings under the Constitution.

C. The *parens patriae* doctrine supports the constitutionality of the SORA.

The General Assembly has created a system for juveniles distinctly different from adult offenders based on the premise that "South Carolina, as *parens patriae*, protects and

safeguards the welfare of its children." *In re Kevin R.* at 304, 762 S.E.2d at 390-91 (emphasis added); *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992); *see State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting state's continued recognition of *parens patriae* in juvenile proceedings); *see State v. Eighth Jud. Dist. Ct. and Logan D.*, 306 P.3d 369, 381 (Nev. 2013) (internal citations omitted) (noting that public protection and the best interest of the child sometimes conflict, and when they do, it is the public interest that should predominate.). The continued recognition of the *parens patriae* doctrine distinguishes South Carolina from those jurisdictions that have found a juvenile is constitutionally entitled to a jury trial. *Id.*

"Most jurisdictions that have dealt with the issue of the continued viability of *McKeiver* have determined that it is still settled law; that is, jury trials in juvenile proceedings may be provided *if a State chooses to do so,* but it is not a mandated right required by concerns of fundamental fairness under the Federal Constitution." *In re Kevin R.* at 304, 762 S.E.2d at 390 (emphasis added) (citing *In the Interest of A.C.*, 43 A.3d 454, 461 (N.J. Ch. Div. 2012) (emphasis added)).

Furthermore, in *Kevin R.*, this Court cited as authority 43 C.J.S. *Infants* § 134 which states that "[a]lthough a jury trial in a juvenile delinquency proceeding may not be a federal nor a state constitutional requisite," a state may elect to do, "but such is the State's privilege and not its obligation." 409 S.C. at 308, 762 S.E.2d at 392-93.

As discussed above, adult sex offenders are required to register as sex offenders only after they have been convicted of a sex offense or found as the result of a judicial hearing to have committed a sexually motivated crime, with all the ***procedural*** protections guaranteed by South Carolina's criminal justice system. The Appellants argue

that juveniles are entitled to a jury trial [procedural due process protection] similar to an adult convicted of the same crime; however, the Appellants fail to recognize, in their *parens patriae* doctrine argument, that the General Assembly has in fact provided protection and installed safeguards for the welfare of the children of South Carolina [including the Appellants] through the juvenile system. Therefore, no jury trial is needed. In other words, the *parens patriae* doctrine is a reason no jury trial for a juvenile is applicable.

The Appellants miscast the *parens patriae* doctrine by relying on a footnote in *Kevin R.* 409 S.C. 297, 305 762 S.E.2d 387, 391.[5] (App. Br., R. p. __.) However, the fundamental problem with this reliance is that the opinion, including the footnote in context rather than in isolation as presented by the Appellants, fully supports the constitutionality of the SORA. For example, the very next sentence in the opinion states: "[W]e reaffirm the analysis in *Stephen W.* that addressed the issues raised by Appellant in the instant case." *Kevin R.*, 409 S.C. at 297, 762 S.E.2d at 391. Furthermore, the footnote cited refers to "commit[ing] the child to the custody or to the guardianship of a public or private institution or agency authorized to care for children or to place them in family homes or under the guardianship of a suitable person. Commitment must be for an

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[5] The footnote states:

> Although the issue is not before the Court, we note the inconsistent positions of the General Assembly to limit the negative civil parameters of adjudication proceedings but permit the consequences of an adjudication to continue for the lifetime of one who is adjudicated delinquent for sex offenses. If this state retains the doctrine of *parens patriae* in juvenile proceedings, then the consequences of these proceedings should expire when the individual reaches the age of twenty-one years old. *See* S.C.Code Ann. § 63–19–1410(A)(5) (2010) (providing that commitment "must be for an indeterminate period but in no event beyond the child's twenty-first birthday").

indeterminate period but in no event beyond the child's twenty-first birthday." S.C. Code Ann. § 63–19–1410(A)(5). This Section refers to the disposition powers of the court and furthers the argument that South Carolina provides protection and safeguards the welfare of its children through juvenile proceedings. Moreover, the expiration at the 21st birthday in this statute references institutional commitment; it does not absolve a juvenile of all consequences and accountability for criminal actions such as an adjudication of criminal sexual conduct with a minor, first degree, as the Appellants would like to believe.

Additionally, the Appellants try to underscore the *parens patriae* language in the footnote—which is mere *dicta* in any event—as creating a contradiction with governing law. However, this Court directly addressed the "apparent tension" claim by the Appellants.

> The apparent tension between the State's power as *parens patriae* and a juvenile's state constitutional right to a jury trial must be reconciled. ***Reconciliation is found by recognizing that the two are not mutually exclusive*** and that they are in fact dual tracks for handling juvenile transgressions. Although a juvenile is not entitled to a jury trial in an adjudication proceeding, the juvenile should be permitted to remove his case from the family court to a court of competent jurisdiction where a jury trial may be conducted. However, when this election is made, the juvenile forfeits the benevolent treatment of the *parens patriae* adjudication proceeding.

Kevin R., 409 S.C. at 310, 762 S.E.2d at 394 (emphasis added).

Lastly, the Appellants attempt to direct this Court to follow law from other states where a jury trial is required, but here again, this Court has rejected such arguments on the basis of the *parens patriae* doctrine that the Appellants underscored, and did so in *Stephen W.* and affirmed that ruling most recently in *Kevin R.* Ultimately, the Appellants' claim on the *parens patriae* doctrine crumbles under its own weight. They argue that the

parens patriae doctrine forbids the very outcome that the *parens patriae* doctrine permits (i.e., adjudication by a judge and not a conviction by jury). Therefore, the Appellants' arguments should be rejected.

D. The lifetime registration requirements of the SORA are constitutional.

Section 23-3-460(A) of the South Carolina Code of Laws states in pertinent part:

> The person required to register *shall register and must reregister at the sheriff's department in each county where he resides, owns real property, is employed, or attends any public or private school,* including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school....

S.C. Code Ann. § 23-3-460(A) (emphasis added). Furthermore, as the Appellants are classified as Tier III offenders pursuant to SORNA based on their adjudicated offense of criminal sexual conduct with a minor in the first degree, the Appellants must register *quarterly* instead of biannually. S.C. Code Ann. § 23-3-460(B) ("A person classified as a Tier III offender ... is required to register every ninety days."); *see* 42 U.S.C.A. § 16916. Notably, changing administrative or procedural aspects of the Registry does not change the underlying nature of a statute that has already been determined not to be a "criminal penalty." *Walls*, 348 S.C. at 30, 558 S.E.2d at 526 (holding sex offender registration non-punitive in purpose or effect and determining that sex offender registration did not constitute a criminal penalty).

The Appellants argue the increased frequency with which offenders must re-register; the increase in possible counties where registration is required; and, registering for the rest of their lives are all "punitive" requirements and the Registry is nothing more than a "lifetime probation." (App. Br., R. p. __.) Contrary to these assertions, this Court

already has held that the sex offender registry is *not* considered punitive; therefore, due process does not apply. *Hendrix*, 353 S.C. at 552, 579 S.E.2d at 325. Requiring registration as a sex offender is non-punitive, such that the length of time an individual is required to register is non-punitive, and thus the length of time on the registry was not a deprivation of a constitutionally protected liberty interest for purposes of a due process analysis. *Id.* Indeed, the lifetime registration promotes the protection of public welfare by maintaining the whereabouts of sex offenders.

The Appellants implicitly acknowledge that being placed on the Registry is constitutional. The length and manner of registration in and of itself cannot be punitive, nor can it be a post-sentence obligation or lifetime probation, as these are mere administrative implementations of the Registry. Thus, the lifetime registration requirements of the SORA are constitutional.

E. The residency requirements of the SORA are constitutional and inapplicable to the Appellants in any event.

The Court need not decide the constitutionality of the SORA's residency requirements because those requirements are not applicable to the Appellants. Thus, the Appellants lack standing to raise that issue and, alternatively, the Court generally does not decide constitutional matters which it need not determine to adjudicate the case before it. However, the Respondent will briefly address the residency restrictions.

The SORA limits sex offenders from residing in campus student housing at a public institution of higher learning (§ 23-3-465), and *adult* sex offenders from residing within one thousand (1,000) feet of certain proscribed areas (§ 23-3-535(B)). The student housing restriction would apply to the Appellants as "any person required to register under this article." S.C. Code Ann. § 23-3-465.

The Appellants cite to §§ 23-3-465 and 23-3-535(B) arguing that in 2005, the General Assembly began restricting residency by prohibiting sex offenders "from living in campus student housing at a public institution of higher learning supported in whole or in part by the State" and in 2008, the General Assembly prohibited sex offenders convicted of certain offenses from residing "within one thousand feet of a school, daycare center, children's recreational facility, park, or public playground." (App. Br., R. p. __.) However, the Appellants admit that the Circuit Court, while holding the residency restrictions constitutional, has already ruled that the § 23-3-535(B) restriction does not apply to the Appellants. (App. Br., R. p. __.)

Since the Appellants have not provided any information that they intend on residing in student housing in accordance with § 23-3-465 and the Circuit Court ruled in their favor holding § 23-3-535(B) does not apply to them; the Appellants lack standing to raise a constitutional issue with the registration residency requirements of §§ 23-3-465 and 23-3-535. Even if the Appellants had standing, the residency restrictions in §§ 23-3-465 and 23-3-535(B) of the SORA are, as the Circuit Court held, constitutional.

F. The GPS monitoring requirements of the SORA are constitutional and inapplicable to the Appellants in any event.

The Court need not decide the constitutionality of the SORA's GPS monitoring requirements because those requirements do not apply to the Appellants. Thus, the Appellants lack standing to raise that issue and, alternatively, the Court generally does not decide constitutional matters which it need not determine to adjudicate the case before it. Even though the Appellants lack standing, the Respondent will briefly address the GPS monitoring requirements.

The Sex Offender Accountability and Protection of Minors Act, also known in South Carolina as "Jessica's Law," was enacted in part as a result of the abduction, rape, and murder of Jessica Lunsford by a convicted sex offender in Florida. *State v. Dykes*, 403 S.C. 499, 502, 744 S.E.2d 505, 507 (2013). After considering the circumstances surrounding the Lunsford case, the Florida legislature and subsequently the South Carolina legislature and other states created laws that heightened criminal sentences and post-release monitoring of child sex offenders. *Id.* Therefore, in 2006 South Carolina enacted the Sex Offender Accountability and Protection of Minors Act (Jessica's Law), S.C. Code Ann. § 23-3-540(A).

Pursuant to Jessica's Law, any person convicted or adjudicated delinquent for the offenses of criminal sexual conduct in the first degree with a minor or committing or attempting a lewd act on a child under sixteen, with an offense date on or after July 1, 2006, was required to be ordered by the court to be monitored with an active electronic monitoring (GPS) device for the duration of the time that individual was required to register as a sex offender. S.C. Code Ann. § 23-3-540(A). In addressing an attack on the constitutionality of this requirement, this Court held that the imposition of lifetime electronic monitoring for a juvenile did not constitute punishment. *Justin B.*, 405 S.C. at 406, 747 S.E.2d at 782. This Court specifically noted that "Section 23-3-540's electronic monitoring requirement is a ***civil obligation similar to other restrictions the state may lawfully place upon sex offenders***." *Id.* at 395-96, 747 S.E.2d at 776 (internal citations omitted).

More recently in *Nation*, this Court affirmed its decision in *Dykes* finding that ***only*** the non-reviewable lifetime monitoring requirement in § 23-3-540(H) is

unconstitutional. *State v. Nation*, 408 S.C. 474, 480, 759 S.E.2d 428, 431 (2014) (internal citations omitted). "However, notwithstanding the absence of a fundamental right, we found that lifetime GPS monitoring "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." *Id.* This Court found that *Nation*, *Dykes* and other similarly situated sex offenders must comply with the monitoring requirement mandated by § 23-3-540(C), but persons convicted of criminal sexual conduct in the first degree and lewd act on a minor are entitled to avail themselves of the § 23-3-540(H) judicial review process as outlined for the balance of the offenses enumerated in § 23-3-540(G). *Id.* at 482, 759 S.E.2d at 432.

The Appellants argue that South Carolina did not convene a hearing to determine whether the Appellants met the specified criteria in order to be required to register as sex offenders, thereby, violating substantive due process. App. Brief at 8, 22. Additionally, the Appellants cite *Dykes* for the proposition that "the lifetime sex offender registration violates due process unless South Carolina offers the Appellants a hearing to determine whether they should be required to continue registering as sex offenders." (App. Br., R. p. __.) However, the due process analysis discussed in *Dykes* was in regard to GPS monitoring, ***not registration***, and is therefore distinguishable

The GPS monitoring *does not apply* to the Appellants. While it is the Respondent's position that even if the Appellants were required to wear the GPS monitoring, § 23-3-540(A) of the SORA would not violate the Appellants' substantive due process, because the Appellants are not subject to these requirements. This is a mere academic question not properly before the Court. As demonstrated above, GPS

monitoring requirements of SORA are constitutional and inapplicable to the Appellants in any event.

In conclusion, the SORA requirements for juvenile sex offenders who have been adjudicated delinquent, such as the Appellants, are in accordance with both substantive due process and procedural due process under the Constitution.

II. THE SORA COMPLIES WITH THE CONSTITUTION'S EQUAL PROTECTION CLAUSE.

The Equal Protection Clauses of the Constitutions of the United States and South Carolina provide that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1, S.C. Const. art I, § 3. Equal protection requires that "all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *G.T.E. Sprint Commc'ns Corp. v. Pub. Serv. Comm'n,* 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986).

"If a statutory provision 'does not involve a suspect classification or a fundamental right ... the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose.'" *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 323 (citing *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)). Convicted sex offenders are not a suspect class. *Id.* Likewise, delinquent juvenile sex offenders cannot be a suspect class. Nor is age a suspect classification. *Gregory v. Ashcroft*, 501 U.S. 452, 453 (1991); *Arnold v. Ass'n of Citadel Men*, 337 S.C. 265, 272, 523 S.E.2d 757, 761 (1999).

Therefore, since no fundamental right exists requiring strict scrutiny, the juvenile SORA provisions are subject to a rational basis analysis. The rational basis test "demands no more than a 'reasonable fit' between government purpose ... and the means chosen to

advance that purpose." *Reno*, 507 U.S. at 305 (upholding a law that permitted detained juvenile aliens to be released only to their parents). Equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. *Skyscraper Corp. v. County of Newberry*, 323 S.C. 412, 417, 475 S.E.2d 764, 767 (1996). "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

A. The classification bears a reasonable relation to the legislative purpose sought to be effected.

This Court has previously found that the registration of juvenile sex offenders is rationally related to achieving a legitimate legislative purpose. *Ronnie A.*, 355 S.C. at 409, 585 S.E.2d at 312. This Court in *Ronnie A.* rejected the claim by a juvenile offender that the lifelong "stigma" of sex offender registration violates the due process clause. *Id.* The Court reasoned that "[t]he intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may re-offend.

The registration of offenders, ***including juveniles*** who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective." *Id.* (emphasis added). Therefore, the classification bears a reasonable relation to the legislative purpose sought to be effected.

B. The members of the class are treated the same under the same or similar circumstances.

All persons who are twelve (12) years of age and older at the time of adjudication for a first offense of any offense listed in § 23-3-430(C) are treated the same; they are

required to register as sex offenders, and their information is available to the public. Moreover, since the Appellants are classified as Tier III offenders pursuant to § 23-3-460(B), the Appellants must register quarterly.

The Appellants argue that lifetime sex offender registration violates the equal protection clause because as juveniles they were not afforded the same constitutional safeguards that would have been afforded to an adult who was convicted of the same crime (criminal sexual conduct with a minor in the first degree), before being subjected to the requirements of the SORA. (App. Br., R. p. __.)

While the Appellants may be subject to the same sex offender registration requirements as an adult convicted of criminal sexual conduct with a minor in the first degree, the impact on their liberty is ***not*** comparable to the actual punishment an adult would receive for a conviction. An *adult felony conviction* for the offense involved carries a much greater punishment than the adjudication imposed on the Appellants, or any possible sanction that could be imposed on a juvenile. Furthermore, as discussed in Section I(C), *supra*, the family court adjudication process protects and safeguards a juvenile's procedural due process rights. Moreover, the registration requirement repeatedly has been held to be non-punitive and civil in nature, and is necessary to protect the public.

C. <u>The classes rest on a reasonable basis.</u>

The purpose of § 23-3-490 reasonably relates to the stated goals of protecting the public and assisting law enforcement because the likelihood to re-offend is inherent and universally recognized for the type of offenders required to register. Section 23-3-400 states that "[s]tatistics show that sex offenders often pose a high risk of-reoffending. S.C.

Code Ann. § 23-3-400. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction." *Id.* Ultimately, there is a reasonable relationship as the General Assembly has related the SORA to protecting the public.

The Appellants cite *Graham v. Florida* in an attempt to argue that juveniles are also part of a suspect class entitled to special protections. (App. Br., R. p. __.); *Graham v. Florida*, 560 U.S. 48 (2010). Unlike this case, *Graham* dealt with a juvenile who was ***sentenced*** to life in prison without parole for a non-homicide crime. *Id.* Here, the Appellants pleaded guilty to criminal sexual conduct with a minor in the first degree; therefore, as a result are required to register as sex offenders for life. The Appellants also cite to a footnote in *HHHunt Corp.* which makes a distinction that strict scrutiny, not rational basis, applies when a fundamental right is affected *such as race, religion, or alienage*. Again, age is not a suspect classification, and thus HHHunt is inapplicable. *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010).

As stated above, the SORA is not punishment and certainly is not a punishment of life in prison without parole. Instead, it imposes a registration requirement to allow the public and law enforcement to stay apprised of the location of sex offenders in an effort to protect South Carolinians, and especially its children. Therefore, the SORA complies with the Constitution's Equal Protection Clause.

III. THE SORA COMPLIES WITH THE CONSTITUTION'S *EX POST FACTO* PROHIBITION.

The Constitutions of the United States and of South Carolina specifically prohibit the passage of *ex post facto* laws. U.S. Const. art. I, § 10; S.C. Const. art. I, § 4.

This Court previously considered and rejected a claim that requiring sex offender registration based on a 1973 conviction was unconstitutional as a violation of the *ex post facto* clauses of the United States and South Carolina Constitutions. *Walls*, 348 S.C. at 30, 558 S.E.2d at 525. In order for a law to be prohibited by the *ex post facto* clause, two elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 430 (1987). However, before this two part analysis can begin, the statute in question must be found to be punitive in nature such that it inflicts punishment merely by requiring the conduct called for in the law. *Walls*, 348 S.C. at 30, 558 S.E.2d at 526. Without such a finding, the *ex post facto* clause has not been violated. *Smith v. Doe*, 538 U.S. 84, 106 (2003).

While this Court in *Walls* found that the act met the first prong of determining whether it falls within *ex post facto* prohibitions as it applied to events occurring prior to the enactment, this Court upheld the constitutionality of the act, finding that sex offender registration requirements did not "disadvantage the offender affected by it" as required by the second prong of the test. 348 S.C. at 31, 585 S.E.2d at 526. In reaching its decision, this Court considered the statutory construction and legislative history of the SORA, and found that

> it is clear that 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. Hence, the language indicates the General Assembly's intention to create a non-punitive act.

Id. "Thus, a likelihood of re-offending lies at the core of South Carolina's civil statutory scheme." *Dykes*, 403 S.C. at 507, 744 S.E.2d at 510. Requiring registration as a sex

offender is non-punitive, such that the length of time an individual is required to register is non-punitive, and thus the length of time on the registry was not a deprivation of a constitutionally protected liberty interest for purposes of a due process analysis. *Hendrix*, 353 S.C. at 325, 579 S.E.2d at 552. Thus, precedent of this Court dictates that the Appellants have failed to establish that the legally mandated registration is punitive for purposes of the *ex post facto* prohibition.

Moreover, the SORA is rationally related to the stated goals of protecting the public and assisting law enforcement because the likelihood to re-offend is inherent and universally recognized for the type of offenders required to register. *Smith*, 538 U.S. at 103 ("The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness *as a class*. The risk of recidivism posed by sex offenders is 'frightening and high.'" (citing *McKune v. Lile,* 536 U.S. 24, 33-34 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* 27 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* (1997))).

With regard to the Appellants' requirement to register, § 23-3-460(A) states that a sex offender is "required to register biannually for life.... and must reregister at the sheriff's department in each county where he resides, owns real property, is employed, or attends any public or private school...." S.C. Code Ann. § 23-3-460(A) (emphasis added). Furthermore, the Appellants are classified as Tier III offenders based on their adjudicated offense of criminal sexual conduct with a minor in the first degree.

Therefore, South Carolina law requires the Appellants to register, in person, at the Sheriff's Department "every ninety days" instead of biannually.[6] S.C. Code Ann. § 23-3-460(B) ("A person classified as a Tier III offender ... is required to register every ninety days.").

As a matter of law, the length and manner of registration in and of itself cannot be punitive, nor can it be a post-sentence obligation or lifetime probation, as these are mere administrative implementations of the SORA. Additionally, there is a reasonable and rational basis between juvenile sex offender registration and protecting the public and aiding law enforcement. The duration of the registration requirement is not excessive in relation to the legitimate non-punitive purpose. And the intended purpose is to protect the public from those sex offenders who may re-offend; therefore, protecting the public now or in the future accomplishes the purpose of the SORA.

Therefore, the SORA is not punitive and as a result does not violate the *ex post facto* laws under the Constitution.

IV. THE SORA COMPLIES WITH ANY CONSTITUTIONAL RIGHT TO PRIVACY.

Registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. *Ronnie A.*, 355 S.C. at 409-10, 585 S.E.2d at 312 (internal citations omitted). The rational basis test "demands no more than a 'reasonable fit' between government purpose ... and the means chosen to advance that purpose." *Reno*, 507 U.S. at 305. Furthermore, the

[6] Additionally, as part of registration, "[t]he State Law Enforcement Division may charge a reasonable fee to cover the cost of copying and distributing sex offender registry lists as provided for in this section ... the sole purpose of offsetting the cost of providing sex offender registry lists." S.C. Code Ann. § 23-3-490(B).

United States Supreme Court has held that injury to reputation, does not implicate a liberty interest for the purposes of due process analysis. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 2 (2003).

As discussed thoroughly in the *Hendrix* case, this Court explicitly rejected the argument of a fundamental right to privacy in the context of the SORA, reasoning that "[a]lthough the U.S. Supreme Court has recognized a right to privacy in limited circumstances, ***the privacy protections do not extend to information about a sexual offense ... which became a matter of public record when Appellant registered as a sex offender***...." *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 324 (emphasis added); *State v. Eighth Jud. Dist. Ct. and Logan D.*, 306 P.3d 369 (Nev. 2013) (holding that the right to privacy is not a fundamental right protected by the substantive component of the Fourteenth Amendment of the United States Constitution).

The SORA does not render the entire juvenile adjudication process public. Juvenile sex offenders can still avail themselves of closed hearings, sealed records, and the other procedural protections of the juvenile process.

The Appellants ask this Court to "remove information about their adjudications from the Internet." (App. Br., R. p. __.) Furthermore, all persons who are twelve (12) years of age and older at the time of adjudication for a first offense of any offense listed in § 23-3-430(C) are required to register as sex offenders, and their information is available to the public. Therefore, the Appellants were required to register as a result of their delinquency adjudication of criminal sexual conduct with a minor in the first degree. S.C. Code Ann. § 23-3-430(C)(4).

Therefore, the SORA complies with any constitutional right to privacy.

V. THE SORA COMPLIES WITH THE CONSTITUTION'S CRUEL AND UNUSUAL PUNISHMENT PROHIBITION.

The Eighth Amendment to the United States Constitution provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Similarly, the South Carolina Constitution provides: "[e]xcessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted...." S.C. Const. art. I, § 15. The bar for cruel and unusual punishment is high. *Juvenile Male*, 670 F.3d at 1010. The United States Supreme Court notes that the core of the Eighth Amendment prohibits excessive sanctions. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Punishment is "excessive," and therefore prohibited by Eighth Amendment, only if it is not graduated and proportioned to the offense. *Id. at* 304.

Thus, for Eighth Amendment purposes, the court conducts a proportionality analysis to determine whether the punishment is disproportionate to the crime committed. *Id.* at 311; *Solem v. Helm*, 463 U.S. 277, 285 (1983) (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense). Likewise, in analyzing the prohibition against cruel and unusual punishment in the South Carolina Constitution, this Court has recognized the concept of requiring a sentence to be in proportion to the crime. *Jones*, 344 S.C. at 55, 543 S.E.2d at 545; *Stockton v. Leeke*, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977). Indeed this Court has held that a sentence, though not cruel and unusual in kind, may be so severe in duration as to be cruel and unusual. *State v. Kimbrough*, 212 S.C. 348, 353, 46 S.E.2d 273, 275 (1948). However, the prohibitions of the Eighth Amendment only forbid extreme sentences that are grossly disproportionate to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001

(1991); *State v. McKnight,* 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003) (must determine if the duration of the sentence is not grossly disproportionate with the severity of the crime).

This Court has already concluded that the SORA is not so punitive in purpose or effect so as to constitute a criminal penalty. *Walls*, 348 S.C. at 31, 558 S.E.2d at 526. The non-punitive "purpose" of the statute is certainly no different whether the SORA is applied to an adult or a juvenile.

In this case, the mere fact that the Legislature enacted a law requiring lifetime registration for all individuals, adult or juvenile, who were found to have committed a sex crime is not punishment. Even if it were deemed punishment, lifetime registration is not excessive and is graduated and proportioned to the offense. Moreover, when viewing an adult's conviction of the same crime as the Appellants, criminal sexual conduct with a minor in the first degree, appearing on the Registry due to a juvenile adjudication creates less of a burden to reputation than appearing due to an adult conviction.

Therefore, registration in accordance with SORA, even by juveniles, does not constitute punishment of any kind, much less unconstitutional cruel and unusual punishment.

VI. THE "INDEPENDENT AND ADEQUATE STATE GROUNDS" CLAIM DOES NOT APPLY IN THESE CIRCUMSTANCES.

The adequate and independent state grounds doctrine is used by ***Federal*** courts as a limitation on jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). To assist federal courts in determining when application of the independent and adequate state grounds doctrine bars federal proceedings, the Court has provided the following direction:

> [W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and interdependence of any possible state law ground is not clear from the face of the opinion, [federal courts] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Long, 463 U.S. at 1040-41.

In each constitutional claim the Appellants claim the independent and adequate state grounds doctrine somehow requires a finding of unconstitutionality under the S.C. Constitution. However, the plain application of the doctrine applies to federal courts. In other words, it is nonsensical for the Appellants to try and use a Federal court jurisdictional doctrine as a sword in a state complaint against a state official under state law in state court. Accordingly, the independent and adequate state grounds claim does not apply.

VII. THE SORA PROVIDES AN ADEQUATE REMEDY AT LAW.

The SORA lists the only mechanisms and avenues by which an individual can be removed from the Sex Offender Registry.[7] Pursuant to § 23-3-430(E), "SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's ***adjudication***, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered." S.C. Code Ann. § 23-3-430(E). Pursuant to § 23-3-430(F), an offender who receives a pardon "based on a finding of not guilty specifically stated in the pardon" shall be removed from sex offender registry. S.C. Code Ann. § 23-3-430(F). And finally,

[7] In fact, the mechanisms for both placement on and removal from the South Carolina sex offender registry are provided by this same code section. *See* S.C. Code Ann. § 23-3-430.

§ 23-3-430(G) mandates removal for individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial. S.C. Code Ann. § 23-3-430(F). These are the only lawful avenues by which an individual who is properly placed on the Registry can be removed.

Equitable relief sought by the Appellants in this matter is not simply available. This Court has noted that "[e]quitable relief is generally available ***only*** where there is no adequate remedy at law" and that an "adequate legal remedy may be provided by statute." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (emphasis added). This Court further noted that an "'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id* at 621. This does not, however, mean that the person seeking relief must be eligible for the relief set forth in the statute. Rather, it means only that some certain definitive statutory relief exists. *Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007); *Santee Cooper Resort, Inc.*, 298 S.C. at 185, 379 S.E.2d at 123. Ultimately, this Court in *Santee Cooper* noted that "the court's equitable powers must yield in the face of an unambiguously worded statute." 298 S.C. at 185, 379 S.E.2d at 123 (emphasis added).

Moreover, it is well-known and undisputed that "equity follows the law." This maxim alone is a basis for denying equitable relief in this case. *See Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 254-55, 715 S.E.2d 348, 355 (Ct. App. 2011); *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 319–20, 659 S.E.2d 263, 267 (Ct. App. 2008). Furthermore, South Carolina law is also clear that "[w]hether an individual

must be placed on the sex offender registry is a question of law." *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011).

South Carolina's statutory lifetime registration requirement is set forth in an unambiguously worded statute. *See* S.C. Code Ann. § 23-3-460 ("A person required to register pursuant to this article is required to register biannually for life.").[8] As such, South Carolina law mandates that there is ***no equitable jurisdiction*** in this matter. The Respondent respectfully asserts that this Court's powers must yield in the face of South Carolina's unambiguously worded SORA, which sets forth lifetime registration. Removal of an individual, by another means other than one of the enumerated avenues, is a violation of the South Carolina Constitution's mandate for the separation of powers. *See* S.C. Const. art. I, § 8; *Key Corp. Capital, Inc.*, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute setting forth certain remedies); *Santee Cooper Resort, Inc.*, 298 S.C. at 185, 379 S.E.2d at 123.

This situation is analogous to legislatively mandated minimum sentences for criminal offenses. *See* S.C. Code Ann. § 16-11-330 (10 years); S.C. Code Ann. § 44-53-370 (various mandatory minimums for distribution or trafficking illegal drugs); S.C. Code Ann. § 16-3-30 (30 years). Following convictions of these offenses, the South Carolina Legislature has prohibited judges from sentencing individuals below the statutorily set amount, and these statutory minimums have been consistently upheld as being lawful. *See State v. De La Cruz*, 302 S.C. 13, 393 S.E.2d 184 (1990); *Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *State v. Johnson*, 350 S.C. 543, 567 S.E.2d 486 (Ct.

[8] Certain offenders must register every ninety days. S.C. Code Ann. § 23-3-460(B).

App. 2002). There is no equitable allowance for a lighter sentence. This Court has also noted that:

> [u]nder the mandatory sentencing guidelines, the prosecutor can still choose not to pursue the triggering offenses or to plea the charges down to non-triggering offenses. Choosing which crime to charge a defendant with is the essence of prosecutorial discretion, not choosing which sentence the court shall impose upon conviction. **Further, we found the matter of sentencing if convicted of a triggering offense to be a matter within the province of the legislature**.

Jones, 344 S.C. at 56, 543 S.E.2d at 545 (internal citations omitted) (emphasis added).

Similarly, the duration of an individual's sex offender registration is purely a matter of legislative prerogative and there is no judicial discretion over this duration without violating the South Carolina Constitution. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.").

The Appellants assert they do not want to turn back the clock and offer a jury trial, but instead they ask this Court to "restore them to the position they were in at the time of their adjudications-protect the confidentiality of their juvenile records, ***remove information about their adjudications from the Internet***, limit consequences of their adjudications to their twenty-first birthdays, and ***extinguish the registration requirement***." (App. Br., R. p. __.) (emphasis added.) Therefore, this requested relief requires this Court to impermissibly act as a superlegislature and to add language to an

unchallenged constitutional and unambiguously worded statute, which would violate the South Carolina Constitution.

The law in South Carolina is clear; the Appellants do not meet any of these statutory criteria in § 23-3-430 such that they are entitled to removal. In fact, there is no indication that the Appellants have even attempted to avail themselves of any of the statutory avenues for removal. Assuming the Appellants do not qualify for removal, they simply are asking this Court to legislate and create a remedy for them that does not exist in the statute. Essentially the Appellants argue that if a statute does not include them they are entitled to equitable relief to obtain indirectly what they cannot obtain directly (such as, in the case of mandatory sentencing, a lighter sentence). However, this is nonsensical and bad public policy.

Since there is no legal basis for the Appellants to be removed from South Carolina's Sex Offender Registry, the Appellants are not entitled to removal through equitable relief.

CONCLUSION

For all of the foregoing reasons, this Court should AFFIRM the Circuit Court's Order finding the SORA constitutional and DENY the Appellants' requested relief.

Respectfully submitted,

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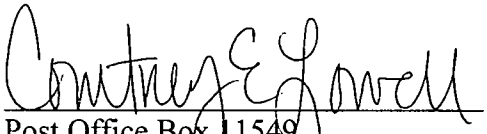
BY: 
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Columbia, South Carolina
May 22, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENWOOD COUNTY

Donald B. Hocker, Circuit Court Judge

RECEIVED
MAY 22 2015
S.C. Supreme Court

Appellate Case No. 2014-002721

Edward Dean and Nolan Brown, ... Appellants,

v.

Mark Keel, in his official capacity as
Chief of the South Carolina Law
Enforcement Division, ...Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I served the Initial Brief of the Respondent on the Appellants in the above-captioned matter by depositing a copy of said document in the United States mail, postage prepaid, on May 22, 2015, addressed to their attorney of record as follows:

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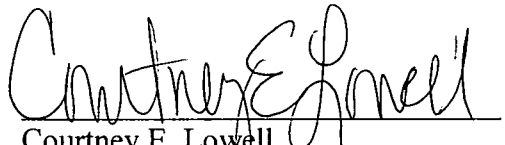

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