

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
Dennis J. Powell, Jr., )  
 )  
Plaintiff/ Petitioner, )  
 )  
vs. )  
 )  
 )  
Mark Keel, Chief, )  
 )  
State Law Enforcement Division, and )  
 )  
The State of South Carolina, )  
 )  
Defendant. )  
 )  
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IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT  
CASE NO.: 2016-CP-40-06960

Order Granting Plaintiff's  
Motion for Summary Judgment and  
Denying Defendants' Second Motion for  
Summary Judgment

**RECEIVED**

JUN 28 2019

SC Court of Appeals

THIS MATTER comes before the court upon Plaintiff's Motion for Summary Judgment filed July 20, 2018.<sup>1</sup> The court reviewed the following materials in consideration of Plaintiff's motion:

1. For Plaintiff: (1) Memorandum in Support of Motion for Summary Judgment filed August 7, 2018; (2) Exhibits A-D to Memorandum in Support of Motion filed December 4, 2017; (3) Affidavit of Plaintiff dated November 21, 2017, with Exhibits A-B, filed December 4, 2017; (4) Affidavit of Thomas V. Martin, M.D., dated November 29, 2017, filed December 4, 2017; (5) Second Affidavit of Plaintiff dated and filed August 13, 2018; (6) Third Affidavit of Plaintiff dated October 27, 2018 and filed October 29, 2018; (7) Affidavit of Dennis Powell, Sr., with Exhibit A, dated October 25, 2018, filed October 29, 2018; (8) Addendum to Plaintiffs Motions - in Response to Defendants' Second Motion for Summary Judgment, Memorandum in Support of Summary Judgment, and Defendants Response in Opposition to Plaintiff's Motion for Summary Judgment filed November 2, 2018; Plaintiff's Response to Defendant's Reply to Plaintiff's Addendum, filed February 8, 2019;

<sup>1</sup> Plaintiff filed a Motion for Summary Judgment June 26, 2017, withdrawn December 6, 2017, upon the Court's hearing Defendants' cross-Motion for Summary Judgment, denied by this Court's Order April 10, 2018.

(9) Defendant's Reply to Plaintiff's Addendum filed January 11, 2019; and (10) Plaintiff's Response to Defendant's Reply to Plaintiff's Addendum filed February 8, 2019.

2. For Defendants: (1) Defendants' Second Motion for Summary Judgment, Memorandum in Support of Summary Judgment, and Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment and the following exhibits: Affidavits of Laura Hudson, James Stewart, and Jennie Temple; excerpts of the Transcript of Record in this matter, December 6, 2017; Psychological Evaluation Report of Dr. William Burke, Ph.D, dated January 12, 2009; Report of Dr. Thomas V. Martin, M.D., dated October 30, 2005, and his affidavit dated November 29, 2017; Excerpt from Transcript of Record, Guilty Plea, April 2, 2009; First Chat transcript; Indictment of Dennis J. Powell, Jr, dated December 1, 2008; (2) Defendants' Motion for Summary Judgment and Motion in Support Thereof, dated June 30, 2017.

After reviewing the pleadings, motion, memoranda, affidavits and submissions, the court makes the following findings of fact and conclusions of law.

#### **Findings of Fact**

In 2008, Plaintiff participated in a Yahoo internet chat room. A female adult officer from the Lexington County Sheriff's Office was similarly participating in the chat room, posing as a thirteen-year-old female in order to conduct a sting. Plaintiff anonymously corresponded with the undercover officer and their correspondence turned sexual. Plaintiff and the officer planned a meeting site in Lexington County. Plaintiff drove to the site but did not stop. There was no meeting. As he was driving away, deputies stopped his car and arrested him for Solicitation of a Minor.

On April 2, 2009, Plaintiff pled guilty in Richland County, in front of the Honorable G. Thomas Cooper, Jr. The Court held sentencing in abeyance and held follow-up sentencing hearings

November 2, 2009, and February 9, 2010, ultimately suspending the sentence on a probationary term of one year. There was no victim and Mr. Powell had no prior record.

Prior to sentencing, Mr. Powell was evaluated by Thomas V. Martin, M.D., Lawrence H. Bergmann, Ph.D, LPC, and William Burke, Ph.D., with no adverse findings, all presented to the sentencing court. Mr. Powell sought further treatment from Dr. Martin both before and after sentencing, in conjunction with his Sex Offender status, as well as an Interim Psychiatric Evaluation after the filing of this action. Dr. Martin found Mr. Powell does not meet criteria for major mental illness or sexual perversion and does not require a deterrent or any sex offender therapy. Dr. Martin opined that Plaintiff's registration is detrimental and he is of low risk to re-offend.

The Court did not include the Sex Offender Registry on the sentencing sheet, but made clear that a separate statute, S.C. Code Ann. § 23-3-400 *et. seq.* (the Sex Offender Registry Act or SORA), was likely going to require Plaintiff to register. Plaintiff was required to register as a sex offender and he did so. He served his one-year probationary sentence without incident. He has not been charged with or convicted of any other offense before or since.

Mr. Powell registers bi-annually as a Sex Offender, as required by Defendant Keel. SORA tasked SLED with developing the Sex Offender Registry to "collect, analyze, and maintain information; make information available to every enforcement agency in this state and other states; and establish a security system to ensure only authorized persons may gain access to information gathered..." S.C. Code Ann. § 23-3-410. SORA provides "public inspection" of certain registry information is allowed only upon a "request made in writing, on a form prescribed by SLED." *Id.* § 23-3-490. Defendant Keel publishes the South Carolina Sex Offender Registry online.

According to Plaintiff's affidavits, the information SLED gathers and publishes about him has increased since he first registered. In addition to his photograph, personal information is now

included online about skin tone, tattoos, scars, home, and vehicles, available online to the public. Other than the anonymous mouse clicks required to navigate the website, Defendants conceded to this court there is no other “form prescribed by SLED” to access the registry. According to Plaintiff’s affidavit, SLED made changes to its sex offender website after the December 6, 2017, hearing in this case. Pursuant to SORA, “the registry is under the direction of the Chief of the State Law Enforcement Division.” Yet, SLED allows at least one official law enforcement website to falsely publish that Plaintiff’s offense involved a 12-year-old victim.<sup>2</sup>

On March 1, 2017, Mr. Powell filed this Complaint for Declaratory Judgment alleging: (1) his registration on the South Carolina Sex Offender Registry Act (“SORA”) for life with no access to judicial review violates his rights to both Equal Protection of the laws and Due Process of law under the Fourteenth Amendment; (2) registering him as a Sex Offender for life is punitive and excessive under the Eighth Amendment; and, (3) he is entitled to Equitable relief.

#### **Standard of Review**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The absence of a genuine issue of material fact can be established by proving to the trial court that there is an absence of evidence to support the non-

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<sup>2</sup> The Richland County Sheriff’s Office website includes the following false information under the subheading, **Victim**

moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party satisfies its initial burden, the non-moving party must do more than rest upon mere allegations or denials to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRPC. There has been no dispute as to the material facts in this case and this Court does not require additional material or testimony to reach legal conclusions to be drawn from the facts. *See Holmes v. East Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014) (citing *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 563 S.E.2d 331 (2002)).

### Conclusions of Law

#### I. Equitable Relief

The Sex Offender Registry, as implemented by Defendants and as applied to Plaintiff, justifies equitable relief in his case. Even if registration for law-enforcement-related purposes is equitable, SLED's failure to comply with the plain language of the statute and Defendants' methods of publicizing online the sex offender's criminal history and location and personal details are *ultra vires*; such publication is unrelated to the stated legislative purpose, is fundamentally unfair, and, accordingly, Plaintiff is entitled to equitable relief.

"Equity abhors a wrong without a remedy." *Key Corp. Capital, Inc. v. County of Beaufort*, 360 S.C. 513, 519, 602 S.E.2d 104, 107 (Ct. App. 2004) (quoting *State ex rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937)). The facts before the Court warrant an equitable solution. "Equity is reserved for situations where there is no adequate remedy at law." *Santee Cooper Resort, Inc., v. South Carolina Public Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119 (1989). This is just

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**Info.** "Age of victim at time of the crime: 12. Gender of victim: Female."

such a situation.

First and foremost, Defendants' actions are in violation of the language and intent of the statute. The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. *See Nationwide Mutual Ins. Co. v. Rhoden*, 398 S.C. 393, 401 n. 4, 738 S.E.2d 477, 481–82 n. 4 (2012) (court holding that if legislative intent is clear as reflected in the statutory language, any public policy as promulgated by the court must give way). The text of a statute must be construed as a whole. *16 Jade Street, LLC v. R. Design Const. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (“[T]he statute must also be read as a whole and in harmony with its purpose.”).

The statute does not authorize internet publication of the entire statewide registry in a manner that makes all information therein available to any person, at any time, without content restrictions, or without identification or a record of the requestor and/or the request. Such a reading would render meaningless and superfluous much of the language of S.C. Code Ann. § 23-3-490.

Instead, the statute has separate and distinct provisions regarding requests for, and the providing of: (1) listings of sex offenders; (2) more detailed information about specific sex offenders; (3) (the publication of) lists of all sex offenders in a particular county by a newspaper with general circulation; and, (4) (dissemination of) registry information by a county sheriff for specific law enforcement purposes. The statute divides these first three provisions into two subsections, S.C. Code Ann. § 23-3-490 (A) and (B), based on whether the request is made to the county sheriff or to SLED, respectively. The fourth provision, dissemination of information for specific law enforcement purposes, is found in S.C. Code Ann. § 23-3-490(C).

**a. Requests to the County Sheriff**

S.C. Code Ann. § 23-3-490(A), in the first four sentences, covers requests for information

made to sheriffs by members of the public. The statute specifically provides that a sheriff must “release information regarding persons required to register under this article to a member of the public if the request is made in writing, on a form prescribed by SLED.” *Id.* Because this provision allows the sheriff to provide additional detailed information (full names, aliases, identifying characteristics, dates of birth, home address, a photograph, and other information), this provision mandates the added requirement: “if the request is made *in writing* on a form prescribed by SLED.” *Id.* (emphasis added). The requirement for a written request cannot simply be ignored, as the Defendants suggest. If possible, every word and every provision of a statute is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. *16 Jade Street, LLC*, 398 S.C. at 343, 728 S.E.2d at 450 (“Similarly, we are to construe a statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’”).

S.C. Code Ann. § 23-3-490(A), in the fifth and final sentence, also contains the section’s only reference to “publication” of the registry. “The sheriff must provide to a newspaper with general circulation within the county a *listing* of the (county) registry for publication.” *Id.* (emphasis added). There is no provision for general publication of anything beyond such a list.

**b. Requests to SLED**

S.C. Code Ann. § 23-3-490(B) covers requests for information made to SLED. This section distinguishes between requests for “lists” of registered offenders versus requests “about a specific person” who is required to register. For lists, the first sentence of subsection (B) provides: “A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the state from SLED.” *Id.* Lacking the additional requirement of “in writing,” this provides that SLED may only release a “list”

of all registered sex offenders in the state. Finally, for requests regarding a “specific person,” sentences two and three of S.C. Code Ann. § 23-3-490(B) provide: “A person may request information regarding a specific person who is required to register under this article if the person requesting the information provides the name or address of the person about who the information is sought.” By requiring that the request be made on “a form prescribed by SLED” and by imposing the additional requirement that the requestor have specific identifying information about the alleged registrant, the statute then allows SLED to provide other specific identifying information (full names, aliases, identifying characteristics, dates of birth, home address, and other information) beyond a listing.

The terms “writing,” “form,” and “list,” are not defined in the statute and must be given their ordinary meaning. *See Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012). Courts are required to give effect and meaning to statutory language in a manner that is internally consistent with other provisions of the statute. “The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Davis v. Sch. Dist. of Greenville Cty*, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Furthermore, the “goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.” *Id.* (quoting *Hodges*, 341 S.C. at 91, 533 S.E.2d at 584). Furthermore, these terms must be given their fixed meaning: the meaning they had when the text was adopted. *In re Hosp. Pricing*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008).

S.C. Code Ann. § 23-3-490(C) notes that nothing in the Section should be construed as prohibiting sheriffs from disseminating information addressed in subsection (A) where doing so would enhance public safety or would deter criminal activity. But while the section does allow any law enforcement officer to make the determination that dissemination would achieve such a law-enforcement purpose, it does not authorize the dissemination of such information by any law-enforcement officer. On the contrary, and consistent with subsection (A), it authorizes only the sheriff to release that information that relates to the sheriff's own county.

**c. Electronic Transmission**

S.C. Code Ann. § 23-3-490(E) was added in 1998 to allow the “use of computerized transmission of data or other electronic or similar means.” This in no way authorizes the wholesale “publication” of all information about sex offenders to anyone. In this same section, the Legislature used the terms “publication” and “publishes.” Clearly, “transmission” does not have the same meaning as “publication.” If the legislature intended to allow wholesale internet publication, not governed by subsections (A) or (B), it would have stated as much and repealed those subsections. A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning. *Travelscape, LLC v. South Carolina Dep't. of Revenue*, 391 S.C. 89, 100, 705 S.E.2d 28, 34 (2011).

Likewise, the language of section 23-3-490(E) cannot render meaningless the limitations on the differing types of requests previously proscribed in subsections (A) and (B). Such an interpretation would render subsections (A) and (B) as mere surplusage, including, but not limited to, the requirement for a “written request,” and “a form prescribed by SLED.”

The Defendants contend that “in 1998, as the internet was increasing in nationwide popularity and use, the South Carolina Legislature specifically authorized SLED to publish Registry

information on the internet.” *See* Def. Second Mot. for Summ. Judg., p. 6. However, such an interpretation finds no support in the statute, since the Legislature did not repeal subsections (A) and (B) nor did they use the term “internet” or the term “publication” in the 1998 Amendment, which added subsection (E) – the court construes the use of the term “transmission” as deliberate. The elected branches could have expressly amended the language of the statute to provide for internet *publication* in 1998 or subsequently. However, neither the executive branch nor this Court is free to add words or language to this statute or to interpret this statute in a manner that renders terms, provisions, or entire subsections of this statute as meaningless surplus. This Court is not permitted to add to what the text states or reasonably implies. That is, a matter not covered is to be treated as not covered. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012); *Consumer Advocate v. S.C. Dept. of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) (“The court has no right to add words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.”).

Finally, as noted by Defendants themselves, Def. Mot. Summ. Judg. p. 6, “to express or include one thing implies the exclusion of the other.” *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (*quoting* Black's Law Dictionary 602 (7<sup>th</sup> ed. 1999)). The statute contains no reference to internet publication of any sort. The statute never mentions the terms “internet,” or “web,” or any related term and it most certainly never does so in connection with publication. Having expressly included specific, limited, controlled, and accountable methods governing requests for and releases of registry information, and making no direct or indirect provision for internet publication, the statute excludes the anonymous, unfettered approach used by Defendants.

Taken together, these provisions may not be convenient for Defendants, but they are not ambiguous. The Court finds that, under the plain language of the statute, registry information may

be requested and received:

(1) From the sheriff of the county, persons may request and receive additional detailed information about one or more registered sex offenders pursuant to a request in writing, on a form prescribed by SLED. SLED may transmit the information by electronic or other means.

(2) From a sheriff of the county, newspapers of general circulation may request and receive a listing of the registry and may publish that list. The sheriff may transmit the information by electronic or other means.

(3) From a sheriff of the county, upon the finding by the sheriff or any other law enforcement officer that the release of SORA information would serve a law-enforcement purpose under Subsection (C), who may disseminate without request such information as he deems necessary to meet that purpose. The sheriff may transmit the information by electronic or other means.

(4) From SLED, persons may request and receive a list of registered sex offenders pursuant to a request made on a form prescribed by SLED. SLED may transmit the information by electronic or other means.

(5) From SLED, persons may request additional detailed information pursuant to a request made on a form prescribed by SLED that includes the name or address of the person about whom the information is sought. SLED may transmit the information by electronic or other means. And, by using such a list, any person can have ready access to more detailed information about any registrant or registrants by making a request to the sheriff of the county, in writing, on a form prescribed by SLED or by request to SLED on a form prescribed by SLED, including the name and address of the person about whom the information is sought. SLED may transmit the information by electronic or other means.

Independent of following these specific provisions of the statute, there is no allowance for the general release of all additional detailed information about all registered sex offenders, as Defendants contend.

Furthermore, giving meaning to the plain and limiting language of S.C. Code Ann. § 23-3-490 is the only interpretation that is consistent with the enumerated purposes of SORA. A statute must be interpreted in a manner that furthers, rather than obstructs its purpose. *Florence Cty. Democratic Party v. Florence Cty Republican Party*, 398 S.C. 124, 128, 727 S.E.2d. 418, 420

(2012). An interpretation that validates the statute's purpose outweighs one that invalidates it. *City of Rock Hill v. Harris*, 391 SC 149, 154, 705 S.E.2d. 53, 55 (2011). Furthermore, provisions should be interpreted in a way that renders them compatible, not contradictory. "Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

This Court agrees with Defendants' contention that the intent of SORA was to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens." S.C. Code Ann. § 23-3-400. However, the same section also acknowledges the delicate balance that must be struck between the intent to protect the public and the Legislature's intent not to "violate the guaranteed constitutional rights of those of have violated our nation's laws." *Id.* This Court finds that the Legislature was clearly concerned with accountability that would protect the rights of convicted offenders throughout the Act. In section 23-4-410, the Legislature requires Defendants to "establish a security system to ensure that only authorized persons may gain access to information gathered under this article"; in section 23-4-490, the Legislature refuses to allow anonymous requests for information by requiring that all requests be made in writing on a form prescribed by SLED; in section 23-3-490(B), the Legislature provides that a person can request "a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the State from SLED" on a form prescribed by SLED; and in section 23-3-490(D), the Legislature severely restricts Defendants' ability to disseminate information about juvenile registrants.

Defendants seek to add words and phrases to the language of the SORA that would undermine the Legislature's clear intent to protect the rights of registrants. The term "internet" never appears in the statute. The language that Defendants claim provides for wholesale publication of the registry on the internet merely states that the "use of computerized or electronic transmission of data or other electronic or similar means is permitted." § 23-3-490(E). "Transmission" is a far cry from

“publication.” Defendants also seek to graft “publication to the public” into sections 23-3-400, 410, and 490(E). Yet, the term “publication” only appears in section 23-3-490(A), in reference to sheriffs’ duties to provide county specific lists to newspapers upon request. Other states’ SORA statutes explicitly authorize publication of the registry on the internet. The few that don’t do not contain the explicit language regulating dissemination of the information that the South Carolina SORA contains. *Compare e.g.*, Fla. Stat. § 943.043 (“The department may notify the public through the Internet of any information regarding sexual predators and sexual offenders which is not confidential and exempt from public disclosure under s. 119.07(1) and s. 24(a)) *with* Ala. Code § 15-20A-21 (statute not enumerating ways that people can access registry information but allowing community notification by “publication.”).

Furthermore, the ability for the sheriff or SLED to provide information to the public without a specific record of the request and the requestor (*e.g.* on a form prescribed by SLED) is not set forth anywhere in the SORA. Rather, Defendants argue that SLED’s ability to provide information to the public without these safeguards is “implied,” “tacit,” or in the statute “as a whole.” This Court acknowledges that there may be a host of good policy reasons for allowing internet publication of the registry, without any forms that create a record of requests and accountability, like many states do. Certainly, the Court acknowledges that SLED’s *ultra vires* approach is less burdensome. But, even after many amendments to SORA over the last twenty years, the Legislature has not adopted such an approach and it is not this Court’s job to rewrite the statute for the Legislature. The duration and breadth of the SORA’s registration scheme are the longest and broadest in the country, requiring lifetime registration for all offenders, regardless of the level of offense or likelihood of recidivism. There is nothing illogical about requiring documentation and accountability in publication as a

counter-balance to such a lifetime registration scheme. The purpose and language of the statute suggest that such a balance is exactly what the General Assembly intended.

Additionally, finding that the SORA does not contemplate or allow for the registry to be published on the internet would not “prohibit the public [from] accessing information from which the public can assist law enforcement in solving crimes” as Defendant contends. The public will continue to have access to the information of the registry. However, the public’s access will simply be regulated in accordance with the plain language of the statute.

Finally, Defendants’ argument that the “binding precedent of this State,” (Def. Reply p. 9), indicates that SLED is authorized to utilize the internet as a means of providing public access to the registry fails. This Court finds that none of the cases cited by the Defendants in support of this proposition addressed whether wholesale publication of the registry via the internet was authorized under the SORA. While the Court acknowledges that courts in this State have addressed the importance of the registry and the public’s access to it, the Court only takes issue with Defendants’ *ultra vires* publication of the registry on the internet and the breadth of Defendants’ publication scheme and does not argue that the public should have no access to the registry at all.

The Plaintiff’s equitable claims have merit for other reasons. The purpose of the Sex Offender Registry is “to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes.” *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). No facts in the pleadings or affidavits even suggest that Dennis Powell, Jr. is a danger to anybody, or that the government’s and public’s knowledge of his whereabouts for the rest of his life helps solve or prevent crime. Additionally, the separate and distinct methods used to publicize him as a former offender are unfair and disproportionate, undermining the stated legislative purpose of public safety. South Carolina courts have long observed that equity “looks beneath rigid rules of law

to seek substantial justice.” *Drury Dev. Corp. v. Foundation Ins. Co., et. al*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008). The Defendants’ own actions in this case, adding red letter warnings to its Registry website after this issue was raised by Plaintiff, (see Affidavit of Dennis Powell, Jr.) confirm the risks associated with such publication.<sup>3</sup> These are risks that our legislature was clearly concerned with, in drafting the limiting language of subsections (A) and (B).

Finally, Plaintiff’s affidavit suggests that the State, and SLED as the responsible agency, has allowed at least one government sponsored sex offender website to inaccurately publish that Plaintiff actually victimized a twelve-year-old girl. Such inaccuracy by a government actor begs for a remedy and removal from the registry, after his inclusion for almost a decade, is perhaps the only appropriate and equitable remedy therefor.

## II. Equal Protection

The duration the SORA’s registration scheme and the breadth of Defendants’ notification schemes violate Plaintiff’s right to equal protection under the law. The equal protection clause of the United States Constitution provides that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1; see also S.C. Const. art. I, § 3. 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.” *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001) (citing *Casbah, Inc., v. Thone*, 651 F.2d 551 (8th Cir. 1981)); *Hendrix v. Taylor*, 353 S.C. 542, 549, 579 S.E.2d 320, 232

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<sup>3</sup> According to affidavits, Defendants share this concern and at some point, after the December 6, 2017 hearing regarding this matter, SLED reportedly modified its sex offender registry website to include a warning against using the website “to unlawfully injure, harass, or commit a crime against any individual named in the registry...”

(2003). Plaintiff's status as a sex offender is not a suspect classification, nor are any fundamental rights being violated. Therefore, the legislation must be rationally related to a legitimate purpose.

The legislative intent of this statute is express:

"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.... 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.

This Court finds that, on its face, the General Assembly intended the SORA to provide for public safety and to aid law enforcement in knowing the location of sex offenders. The justification and purpose of this statute relies on the assertion that "[s]tatistics show that sex offenders often pose a high risk of reoffending." Thus, the question of law is whether the SORA as written and implemented bears a rational relationship to the stated purpose of public health, welfare, and safety of the state's citizens. I find it does not.

The SORA is intended to apply to "these convicted offenders" who "often pose a high risk for reoffending." The basis for the stated purpose—dangerous recidivism—groups low-level sex offenders, who have no indication of reoffending, into the same category as diagnosed sexual predators. The statute does not reference comparative recidivism rates, nor does it define its key terms - "sex offenders," "often," "high," "reoffending." The SORA makes no distinction between offenses, offenders, and recidivism, instead lumping together all individuals convicted of any of the offenses on the statutory list. Based on the uncontroverted evidence before the Court, Plaintiff does not fall into any high-risk category for recidivism other than having committed an offense on South

Carolina's list. Years after implementation of SORA, no evidence has been presented indicating all sex offenders reoffend at the same rate; nor has any statistical evidence been presented indicating low-level offenders, such as Plaintiff, reoffend at a "high" rate or even at a higher rate than any other group of sex offenders or any other group of offenders in general. The State has offered no evidence that the SORA has reduced sex offenses overall in South Carolina and, in any event, it is uncontested that Plaintiff's recidivism rate is zero percent.

In South Carolina, sex offenders convicted of victimless crimes, who show no risk of reoffending, and pose a low risk to the community, are not treated equally with sex offenders convicted of victimless crimes, who show no risk of reoffending, and pose a low risk to the community in other states across the country. South Carolina appears to be the *only* remaining state to maintain a lifelong registry for all sex offenders, with no fixed-period registration classification, no tiered review, no opportunity to petition for relief of restrictions, and no judicial removal process. Other states implement either: (1) a proportionality analysis, requiring a shorter registration period for less egregious offenders; or, (2) the ability to petition the court for removal after passage of a certain amount of time, as required by statute. Some states implement a mixture of these two approaches.<sup>4</sup>

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<sup>4</sup> The majority of states' registration requirements consist of either a lifetime requirement or registration for 10 years depending on the nature of the offense. *See* Ariz. Rev. Stat. Ann. § 13-3821(M); Conn. Gen. Stat. § 54-251; D.C. Code. § 22-4002; Ga. Code. Ann. § 42-1-12; Ill. Comp. Stat. § 150/7; Ind. Code § 11-8-8-19; Iowa Code § 692A.106; Me. Stat. tit. 34-A, § 11225-A; Minn. Stat. § 243.166; N.H. Rev. Stat. Ann. § 651-B:6; N.M. Stat. Ann. § 29-11A-4; R.I. Gen. Laws § 11-37.1-4; Tex. Code Ann. § 62.101; Utah Code Ann. § 77-41-105; Vt. Stat. Ann. tit. 13, § 5407; W. Va. Code § 15-12-4. Twelve states require registration with Title I of the federal Adam Walsh Child Protection and Safety Act of 2006. Pub. L. No. 109-248, 120 Stat 587; *see also* 34 U.S.C. § 20911. These states require registration based on the tier of offender. Tier III offenders must register for their lifetime, Tier II for 25 years, and Tier I for 15 years. *Id.*; *see* Kan. Stat. Ann. § 22-4906; La. Stat. Ann. § 544; Md. Code Ann. § 11-707; Mich. Comp. Laws § 28.725; Miss. Code. Ann. § 45-33-47; Mo. Rev. Stat. § 589.400; Neb. Rev. Stat. § 29-4005; Nev. Rev. Stat. § 179D.490; N.D. Cent. Code § 12.1-32-15; Ohio Rev. Code Ann. § 2950.07; Okla. Stat. § 583; Pa. Cons. Stat. § 9799.15. The following states have tiered registration requirements depending on the level of offense. *See* Haw. Rev. Stat. § 846E-2 and S.D. Codified Laws § 22-

In our neighboring state of North Carolina, a sex offender successfully petitioned the United States Supreme Court to remove social media restrictions connected to his registration. He was convicted of sexual conduct with minor—with an actual child victim, unlike Plaintiff. The Court noted he was “required to register as a sex offender—a status that can endure for 30 years or more.” *Packingham v. North Carolina*, 582 U.S. \_\_\_, 137 S. Ct. 1730, 1734 (2017) (emphasis added). Yet, in South Carolina, pursuant to SORA, Plaintiff is required to register not for 30 years, but for life, for substantially less egregious conduct. This underscores the unequal protection of the laws afforded to Plaintiff by SORA. Nationally, an overwhelming majority of sex offenders with little to no chance of recidivism, with a low risk to the community, and whose crimes did not involve a victim, are treated differently than Plaintiff, simply because he lives and registers in South Carolina.

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24B-2.1 (requiring registration for a lifetime, 25 years, or 10 years depending on the scope of the offense); Ky. Rev. Stat. Ann. § 17.520, Mass Gen. Laws ch. 6, § 178G, and N.Y. Correct Law § 168-h (requiring registration for a lifetime or 20 years depending on the scope of the offense); Alaska Stat. § 12.63.020, Ark. Code Ann. § 12-12-919, and Wis. Stat. § 301.45 (requiring registration for a lifetime or 15 years depending on the scope of the offense); and Wash. Rev. Code § 9A.44.140 (requiring registration for a lifetime, 15 years, or 10 years depending on the scope of the offense). North Carolina requires registration for 30 years, allowing for a petition for removal from the registry after 10 years. *See* N.C. Gen. Stat. § 14-208.7.

Additionally, twelve states, including South Carolina, require lifetime registration. Of the twelve states with lifetime registration requirements, other than in California where the Act is scheduled to be repealed and replaced by an Act allowing for petitions for removal, South Carolina would be the only state that does not restrict the publication of information and/or provide for some mechanism by which a registrant can petition for removal from the registry for certain offenses, should the Court allow Defendants to continue the wholesale internet publication of registration information for all offenders. *See* Ala. Code § 15-20A-10(f) (§ 15-20A-24 allowing for petition for removal from registration and notification requirements); Cal. Penal Code § 290 (repeal scheduled and new legislation allows for petition for removal); Colo. Rev. Stat § 16-22-108 (§ 16-22-111 limiting internet posting of registration information to certain violent and felonious offenses); Del. Code. Ann. § 4120 (§ 4121 allowing for risk assessment and tiered offenses with differing registration and notification requirements); Fla. Stat. § 943.0435 (§ 943.04354 allowing for petitions for removal from the registry under certain circumstances); Idaho Code § 18-8307 (§ 18-8310 allowing for petitions for removal after 10 years for certain offenses); N.J. Stat. Ann. § 2C:7-2 (§ 2C:7-8 providing for 3 levels of notification depending on risk of re-offense with pending proposed legislation that would base registration requirement on offense rather than risk of re-offense); Or. Rev. Stat. § 163A.010 (§ 163A.010 providing for different notification procedures based on risk assessment); Tenn. Code Ann. § 40-39-204 (§ 40-39-207 allowing for petitions to terminate registration requirement under certain circumstances); Va. Code Ann. § 9.1-908 (§ 9.1-908 allowing for petitions for removal from registry for certain non-violent offenses after 15 or 25 years depending on the offense); Wyo. Stat. Ann. § 7-19-304 (§ 7-19-304 allowing for petitions for removal from registry after 10 or 25 years depending on the offense).

The requirement of mandatory lifetime registry for all sex offenders bears no rational relationship to the stated purpose of public health, welfare and safety. There are no facts supporting a rational relationship between the statute's application of the SORA to this Plaintiff for life and its stated purpose, "protect[ing] the public from those offenders who may re-offend." *In re Justin B.*, 419 S.C. 575, 580, 799 S.E.2d 675, 678 (2017) (citing *Walls*, 348 S.C. at 31, 558 S.E.2d at 526). Under the undisputed facts before this Court, the SORA and its implementation by Defendants are not rationally related to any legitimate government purpose, and therefore violate Plaintiff's right to equal protection of the law. Finally, Defendant's *ultra vires* publication of Plaintiff's information is a violation of the right to equal protection under the law.

### **III. Due Process**

The SORA violates Plaintiff's right to due process under the law. Both the United States Constitution and South Carolina Constitution provide that: "No person shall be deprived of liberty without due process of law." U.S. Const. Amend. XIV, § 1; S.C. Const. Art. I, § 3. Further, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

Our State's Constitution provides, and our Supreme Court has repeatedly held, that statutory access to judicial review is hallmark evidence of due process. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." S.C. Const. art. 1, § 22; *Thompson v. State*, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) (citing *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). To survive a Due Process challenge, the law must have a rational relationship to the deprivation of the liberty interest and not be arbitrary, or "so inadequate that the judiciary will characterize it as

arbitrary.” *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 524, 319 S.E.2d 717, 721 (Ct. App. 1984) (citing *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 4 (7th Cir. 1974)). In a case addressing the Registry’s monitoring provision,<sup>5</sup> the South Carolina Supreme Court held “a lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference.” *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013).

In *Dykes*, the court ruled “the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test.” *Id.* at 508, 744 S.E.2d at 510. But notably, the court held that “we believe the final sentence of section 23–3–540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC 1st or lewd act on a minor.” *Id.* “The complete absence of any opportunity for judicial review to assess a risk of re-offending...is arbitrary and cannot be deemed rationally related to the legislature’s stated purpose of protecting the public from those with a high risk of re-offending.” *Id.*

Furthermore, in *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 773 (2013), a juvenile was adjudicated in Family Court for CSC with a child. He challenged the electronic monitoring requirement as being cruel and unusual punishment when applied to a juvenile. *Id.* at 394, 747 S.E.2d at 775. Although the court rejected that argument, the court did note Appellant was “entitled to judicial review of his continued compliance with...electronic monitoring requirements.” *Id.* at 408, 747 S.E.2d at 783. The court held that “Sex offenders...are entitled to avail themselves of the...judicial review process” in the context of the sexual violent predator (SVP) law. *Id.* (citing

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<sup>5</sup> Plaintiff is not subject to electronic/GPS monitoring.

*Dykes*, 403 S.C. at 510, 744 S.E.2d at 511). See also *State v. Nation*, 408 S.C. 474, 482, 759 S.E.2d 428, 432 (2014).

The SORA is just such an arbitrary law, depriving Plaintiff of substantial liberty interests, and bearing no rational relationship to any stated goal. The SORA does not afford Plaintiff access to any judicial review of his placement on the Sex Offender Registry or his lifelong status on it. Registering as a Sex Offender implicates his liberty interests, just like the imposition of satellite monitoring would. He is labeled by the State as a Sex Offender, creating a presumption he is a risk to the public. He is subject to reporting requirements, disclosure requirement, and restrictions on where he lives and works. He is subject to the SORA's payment provisions, as amended over the years, and he is even limited as to what he can do in his own home. The SORA does not afford a registrant an opportunity for judicial review of lifelong registration at any stage. As further evidence of arbitrariness, this is a statutory aberration. In this case, Plaintiff has no risk of recidivism, yet, under the SORA, this controlling factor will never be considered by any court in determining whether he should be required to register under SORA for his lifetime.

To be sure, the most egregious and dangerous sex offenders, SVPs, pursuant to S.C. Code Ann. § 44-48-30, are entitled to more than a minimal level of judicial review. An offender is found to be a sexually violent predator (SVP) when he or she (a) has been convicted of a sexually violent offense and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. After involuntary commitment following a trial by court or jury, a SVP is entitled to *yearly* judicial review and may proceed, again, to a trial by court or jury to petition for release.

The General Assembly has afforded others Due Process in scenarios where criminal charges come with collateral consequences. A person can commit a violent crime and be found Not Guilty by Reason of Insanity pursuant to S.C. Code Ann. § 17-24-40. With that finding, the defendant is committed to a hospital with the requirement his or her mental health be evaluated. The evaluation is considered when the judge is determining whether the defendant needs to remain committed or be released. However, if the defendant is committed, he or she is entitled to continuous review of his or her mental health. The court may then reconsider the commitment. Therefore, a violent offender found guilty by reason of insanity has more access to judicial review, as well as the ability to be completely released into the community without restrictions, than a non-violent sex offender who committed a crime with no victim and has no risk of recidivism who is forced to remain on the Sex Offender Registry for life with no opportunity of review. Even defendants sentenced to lengthy prison terms have access to quasi-judicial review and the ability to be released. The Parole Board “must carefully consider the record of the prisoner,... and no such prisoner may be paroled until it appears...the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.” S.C. Code Ann. § 24-21-640. Meanwhile, non-violent sex offenders who committed a crime with no victim and have no indications of recidivism have no relief from the Sex Offender Registry even if the offender can prove they are reformed and that the interest of society would not be impaired were they to be removed.

Finally, in legislation pre-filed for the last session of the General Assembly, there is proposed a “Central Registry of Vulnerable Adult Abuse, Neglect, and Exploitation.”<sup>6</sup> Unlike under the SORA, an individual proposed to be listed on the Vulnerable Adult Abuser Registry “must be afforded an opportunity for an administrative due process hearing to contest a determination...”

There is no such process available to Plaintiff. In this case, Plaintiff has no risk of recidivism, yet he must continue to register for life. No such factual scenario has ever come before our appellate courts. Even the most egregious sexually violent predators<sup>7</sup> have multiple opportunities to present cases seeking to reassess their danger to the community and risk of recidivism, while Plaintiff, who committed a victimless crime and shows no risk of recidivism, cannot have his lifetime status as a registered Sex Offender reviewed in any form or fashion. It is undisputed the SORA affords Plaintiff no opportunity for judicial review.

Under the *Dykes* test, the statute is arbitrary. Additionally, Defendant’s *ultra vires* publication of Plaintiff’s information is a violation of Due Process. There is no dispute as to any material fact on this issue, and summary judgment is granted on this claim.

#### IV. Eighth Amendment

More than fifteen years ago, the South Carolina Supreme Court held that “sex offender registration...is non-punitive...” *In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311 (2003); *In re*

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<sup>6</sup> H.4413, 2017-2018, introduced by Rep. G.R. Smith.

<sup>7</sup> Sexually Violent Predators, S.C. Code Ann. § 44-48-30. An offender is found to be a sexually violent predator when he or she (a) has been convicted of a sexually violent offense and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. The offender may then be involuntarily committed to the Department of Mental Health, but only after a trial. Under § 44-48-110, a sexually violent predator is entitled to yearly review by the court of his or her mental health evaluations and may proceed to trial to petition for release from the Department of Mental Health.

*Justin B.*, 419 S.C. at 581, 799 S.E. 2d at 678.<sup>8</sup> However, much has changed in fifteen years and the U.S. Supreme Court mandates a two-part threshold analysis for Eighth Amendment challenges to statutes alleged to be punitive: “If the intention of the legislature was to impose Punishment, that ends the inquiry. If...the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.” *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361, (1997)).

The SORA self-identifies as “not intended to violate the guaranteed constitutional rights of those who have violated our nations’ laws,” S.C. Code Ann. § 23-3-400 and has been interpreted as such. Therefore, this Court applies the second part of the *Smith v. Doe* test: Is the SORA so punitive in effect as to negate the state’s intent that it be non-punitive? Useful guideposts to answering this question are found in *Doe*, 583 U.S. at 86–87 (citing *Kennedy v. Mendoza-Martin*, 372 U.S.144, 168–69 (1963)): (1) does the sanction involve an affirmative disability or restraint; (2) has it historically been regarded as a punishment; (3) does it comes into play only on a finding of scienter; (4) does its operation promote the traditional aims of punishment—retribution and deterrence; (5) is the behavior to which it applies already a crime; (6) is there an alternative purpose to which it may rationally be connected; and (7) does it appear excessive in relation to the alternative purpose assigned.

The SORA contains the following statement of intent:

“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

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<sup>8</sup> Other states have concluded sex offender registries and publication methods are punitive. See, e.g., AK: *Doe v. State*, 189 P.23d 999 (2008); MI: *Does v. Snyder*, 834 F.3d 696 (6<sup>th</sup> Cir. 2016); NH: *Doe v. State*, 167 N.H. 382 (2015); OK: *Starkey v. Oklahoma Dept. Of Corrections*, 305 P.3d 1004 (Okla. 2013).

state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nations 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.

Twenty-plus years later, the execution of the SORA has gone far afield of that constitutional intent. This statement of legislative purpose never references any need for publication to the general public, nor does it refer to statistical information that public identification of sex offenders and their locations lower the rate of recidivism or increases public safety. Internet publication of registry information, when registration is for life, is in no way necessary or even related to the stated legislative intent. Even if SLED identified and kept a record of those requesting access and even if SLED limited that information to the statutorily proscribed information, changes to technology impacting the internet – such as automated data mining and collection – since the passage of the SORA would likely have thwarted such efforts. By publically branding all sex offenders for life, especially minor offenders like Plaintiff, the State has gone beyond the express legislative intent of the statute. The distinctly non-proscribed and different methods used to publicize registry information have converted what might have been a non-punitive tool for law enforcement into a punitive scheme, with the only evidence before this Court being that this distinctly different publication method potentially *increases* the risk to public safety.<sup>9</sup>

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<sup>9</sup> As noted in footnote 3 above, during this litigation, SLED even felt compelled to modify the sex offender registry website to warn against the public's use of information from the website to harm, injure, or otherwise discriminate against registrants.

Accordingly, Plaintiff does not argue against precedent in asserting that the entirely different and distinctly punitive and risk-increasing publication methods for these low-level criminal convictions is unconstitutional, when such publication is for life. Plaintiff's argument is that SLED has not followed the plain language of statute, and that the extra-statutory and risk-increasing publication methods used by the Defendants and others to publish information about him is unconstitutionally punitive to him. This has not been addressed by our appellate courts. This Court finds the publication methods utilized by SLED to be punitive, in violation of the SORA, in violation of Plaintiff's Eighth Amendment rights, and not rationally tied to the SORA's express purpose.

The supporting facts are not in dispute. Under the *Smith v. Doe* factors:

(1) There is affirmative restraint. In addition to the information the government requires of many personal details of Mr. Powell's life, he is restricted as to where he lives, with whom he volunteers or works, and even some of his behavior at home. Also, South Carolina sends its information to the Department of Justice. The International Megan's Law of February 2016, required a "unique identifier" placed on the passports of Americans convicted of sex offenses with children and requires offenders to notify law enforcement twenty-one days before traveling abroad, and allowing for the revocation of passports previously issued to these individuals that do not contain the identifier.<sup>10</sup> In addition to this unavoidable identifier by the US government, registered Sex Offenders holding the marked passport could be denied entrance to foreign countries.<sup>11</sup> As a South Carolina sex offender, Plaintiff cannot be removed from the Registry, so the law works an

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<sup>10</sup> 22 U.S.C § 212(b).

<sup>11</sup> See also Post, David. "*The Yellow Star, The Scarlet Letter, and the International Megan's Law.*" The Washington Post, January 6, 2016.

unconstitutional lifelong deprivation of travel liberty, as compared to similarly situated U.S. citizens of other states.

(2) From the stocks, to flogging, to chain gangs, public shaming is historically punitive. Two decades after passage of the SORA, even South Carolina courts and juries recognize as much; in 2013, a Clarendon County jury awarded \$890,000 to a non-sex offender whose condominium board circulated a flier identifying him as a sex offender. “There are certain names you just can’t call people.”<sup>12</sup>

Plaintiff’s is publicly shamed by being on the Sex Offender Registry. His face and identifying information appear on the South Carolina Sex Offender website, other official, government websites authorized by SLED, and the National Sex Offender Public Website. This internet publication scheme is different than the NCIC–based publication process for any other group of offenders, including violent and repeat offenders. It is also much less reliable. Having promulgated this information on the internet, Defendants are apparently unwilling to exercise their statutory authority to prevent false information from being published by subordinate government actors. Additionally, Defendants are powerless to control its continued dissemination via a host of privately-operated sites, including, but not limited to sites that profit from Plaintiff’s information, including the false information about an alleged twelve-year-old victim.

A university graduate with many local ties, Plaintiff has lost at least two jobs and has been denied employment as a result of his registry status, it has negatively impacted his personal relationships, and he and his family have been shamed in their community. The Supreme Court case *Smith v. Doe, supra.*, which held “adult sex offender registries do not resemble traditional forms of

punishment, such as public shaming,” *id.* at 98, was decided in 2003. Justice Kennedy wrote the Court’s opinion in *Smith v. Doe*. However, fourteen years later, a U.S. District Court inventoried changes to the internet and society and noted the following:

“SORA’s effects...are plainly punitive. Justice Kennedy...did not foresee the development of private, commercial websites exploiting the information...and the opportunities for ‘investigative journalism.’... The justices did not foresee the ubiquitous influence of social media. The...General Assembly’s disavowal of any punitive intent is an avoidance of any responsibility for the results of warning the public of the dangers to be expected from registered sex offenders....[T]he effect of publication of the information is to expose the registrants to punishments not by the state but by their fellow citizens. The fear that pervades the public reaction to sex offenses generates reactions that are cruel and in disregard of any objective assessment of the individual’s actual proclivity to commit new sex offenses.”

*Millard v. Rankin*, 265 F.Supp.3d 1211, 1226 (D. Colo. 2017.)

(3) The SORA applies to Plaintiff regardless of his actual intent. In this case, there was no victim; Plaintiff changed his mind, drove past the meeting place set by the undercover officer and did not stop.

(4) In its operation in this case, the SORA bears no relationship to public safety and only acts as a punishment of him. Plaintiff is humiliated and stigmatized as a child predator for his crime, which acts as punitive retribution. As the Colorado District Court put it in 2017: “This ongoing imposition of a known and uncontrollable risk of public abuse of information from the sex offender registry, in the absence of any objective risk to the public by posed by each individual sex offender, has resulted in and continues to threaten plaintiffs with punishment disproportionate to the offenses committed.” *Millard*, 265 F.Supp.3d at 1232.

(5) The behavior to which the SORA applies is a crime;

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<sup>12</sup> “South Carolina Man Wins Damages,” *The Post & Courier*, December 13, 2013.

(6) There is no alternative purpose in Mr. Powell's case that justifies his registration; it is only punitive to him. As noted by the U.S. District Court in Michigan last year in a sex offender registry review that concluded "SORA imposes punishment," "[It] brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins." *Doe v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016). Michigan – similarly to South Carolina and the federal government – "began taking a more aggressive tack," adding online public access, photographs, living restrictions, public notification and posting rules, and internet access rules supported by "at best, scant evidence that such restrictions serve the professed purpose of keeping communities safe." *Id.* at 698, 705. Similar to South Carolina, "what began...as a non-public registry maintained solely for law enforcement use has grown into a byzantine code governing in minute detail the lives of the state's sex offenders." *Id.* at 697. The court found the 2016 Michigan SORA "something altogether different from and more troubling than...first-generation registry law." *Id.* at 705.

(7) The Sex Offender Registry's effects on Plaintiff are excessive in relation to the stated purpose for which it was created. He poses no threat and has not re-offended in any manner. He has furthered his education and maintained employment. The effect of his being registered is on him personally, but it reaches his family and impacts his relationships. In most any other context, the state's publication of Mr. Powell's personal information is expressly illegal. *See* Family Privacy Protection Act of 2002, S.C. Code Ann. § 30-2-20.

The onerous lifetime burdens of the Sex Offender Registry upon Plaintiff are cruel and excessive in his case, and wildly disproportionate to his offense, a victimless crime for which he received a one-year suspended sentence. Additionally, Defendant's *ultra vires* publication of Plaintiff's information renders the actions cruel, excessive and punitive in nature. Based on the

evidence of the cruel and excessive punitive effects of the Sex Offender Registry on Plaintiff, he is entitled to summary judgment on this claim.

#### V. Ex Post Facto

Furthermore, if this Court were to judicially expand the language of SORA and allow wholesale publication of the registry via the internet, such an expansion would act like an *ex post facto* law and violate Plaintiff's rights to Due Process.

"The United States and South Carolina Constitutions specifically prohibit the passage of *ex post facto* laws." *Walls*, 348 S.C. at 30, 558 S.E.2d at 525 (citing *State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993)). For the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal in purpose and nature. *State v. Huiett*, 302 S.C. 169, 172, 394 S.E.2d 486, 487 (1990) (citing *Flemming v. Nestor*, 363 U.S. 603, 635 (1960)). Furthermore, for a law to "fall within *ex post facto* prohibitions, two critical elements must be present. First, the law must be retroactive so as to apply to events occurring before its enactment. Second, the law must disadvantage the offender affected by it." *Id.* (citing *Miller v. Florida*, 482 U.S. 423 (1987)).

The United States Supreme Court has held that though the Ex Post Facto Clause serves to limit legislative power, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, can function like an *ex post facto* law, and violate the Due Process Clause." *Bowie v. City of Columbia*, 378 U.S. 347, 353 (1964). In addressing a deprivation of the right to fair warning claim regarding a criminal charge under South Carolina's trespass statute, the United States Supreme Court held that "there can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352.

The Court stated:

When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' ..., or to 'guess at (the statute's) meaning and differ as to its application,' ..., the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

*Id.*

Accordingly, for the reasons set forth below, and because the SORA narrowly and precisely limits the ways in which Defendants' can disseminate sex offender registry information to the public, if this Court decides to judicially expand the language of the statute to allow for internet publication, the Court's decision would act as an *ex post facto* law and violate Plaintiff's rights to due process under the U.S. and South Carolina Constitutions.

**a. Defendant's Publication Scheme is Punitive.**

While this Court acknowledges it is established in South Carolina that the SORA is not punitive in nature as a whole, no court in this State has ever specifically addressed whether the *the publication scheme as implemented by Defendants* is punitive. This Court acknowledges that the vast majority of cases that have addressed the issue of whether a state's sex offender registration and requirements are punitive in nature have found that they are not. However, as set forth more fully above, South Carolina is the only state in the country that requires lifetime registration for sex offenders for all sex offenses without the opportunity for judicial review of the registration requirement. This means that all sex offenders in South Carolina, whether they pose a continued risk of recidivism or not, will be subject the wholesale publication of their registry information for life, no matter what the level of the offense. Defendant's publication scheme is therefore unlike any other

in the country<sup>13</sup> – the lifetime duration of the Act’s requirements, coupled with the lack of any individualized assessment of the risk of recidivism and the lack of any tiered publication notification system makes Defendants’ wholesale and unrestricted internet publication of the registry punitive – it is so punitive in effect as to negate the intention to create a civil regulatory scheme.

**b. Internet Publication Severely Disables and Restrains the Plaintiff.**

The Supreme Court held that a sanction of “occupational debarment” from the banking industry for those found to have misappropriated bank funds is not an “affirmative disability or restraint” because the debarment is limited only to the banking industry. *Hudson v. United States*, 522 U.S. 93, 104 (1997). On the other hand, in the present case, the procedures employed under the SORA have made Plaintiff virtually unemployable in any field and will likely affect other registrants in the same way. Defendants publish the names and addresses of the registrants and enable anonymous searches for an individual through a simple “Name Search.” Plaintiff and other registrants are also required to provide employment information when they register. The breadth of the information available on the registry and the ease with which members of the public can access the information, severely curtail Plaintiff’s ability to find and maintain employment. In fact, since Plaintiff registered, he has been fired by a catering company, denied jobs he applied for because he was on the registry, has had to drastically change his career plans, and has made a substantially lower

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<sup>13</sup> Other states have chosen to incorporate more defined risk assessment mechanisms into their sex offender registry and notification schemes and have survived *ex post facto* changes on that basis, *See, e.g., Smith v. Doe*, 538 U.S. 84, 87 (2003) (court holding that Alaska’s sex offender registration and notification requirements, which included internet publication were not punitive, in part because the Act differentiated between individuals convicted of aggravated or multiple offenses and those convicted of a single non-aggravated offense,. Court held that “these broad categories and the reporting requirement’s corresponding length are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.”). *See also generally Russell v. Gregoire*, 124 F.3d 1079, 1082 (1997) (upholding Washington’s scheme conditioning notification upon evidence of an offender’s threat to the community); *Doe v. Pataki*, 120 F.3d 1263, 1268, 1285 (2d Cir.1997) (upholding New York’s three-tiered notification scheme); *Verniero*, 119 F.3d 1007, 1111 (1997) (upholding New Jersey’s three-tiered notification scheme).

income, now earning only \$13/hour. The fact that Plaintiff faces the possibility of this kind of restraint for the remainder of his life, regardless of the low level of his offense, his lack of criminal history since his registration, and his minimal chance of recidivism, makes the wholesale internet publication of South Carolina's sex offender registry unconstitutional. Allowing anonymous, wholesale internet publication of the sex offender registry under the SORA would be punitive and would deprive Plaintiff of his right of fair warning, therefore violating his rights to Due Process under the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 3 of the South Carolina Constitution.

### Conclusion

The Defendants have failed to offer any evidence that Dennis Powell, Jr.'s registering as a Sex Offender and the State's *ultra vires* methods of internet publication of the registry for the remainder of his life protects the public or aids law enforcement. The unchallenged facts before the Court expressly refute such conclusions and support relief on all of Plaintiff's claims. For this and the other reasons cited hereinabove and in the record, Plaintiff is entitled to Summary Judgment on all his claims for relief under Rule 56(c), SCRPC.

SLED is hereby ordered to immediately remove Plaintiff from the Sex Offender Registry and to use appropriate and reasonable means to notify other law enforcement agencies that Plaintiff is no longer on the Sex Offender Registry.

AND IT SO ORDERED.

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G. Thomas Cooper, Jr.  
Presiding Judge

\_\_\_\_\_, South Carolina  
\_\_\_\_\_, 2019



Richland Common Pleas

**Case Caption:** Dennis J Powell Jr vs Mark Keel , defendant, et al

**Case Number:** 2016CP4006960

**Type:** Order/Summary Judgment

So Ordered

s/ Honorable G. Thomas Cooper, Jr. Circuit  
Judge 2126