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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: Case No. 2019-001063
Trial Court Case No.: 2016-CP-40-06960

Dennis J. Powell, Jr.

Respondent,

v.

Mark Keel, Chief, State Law
Enforcement Division, and the
State of South Carolina

Appellants.

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SC Court of Appeals

RECORD ON APPEAL – VOLUME III

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**ADDENDUM TO PLAINTIFF'S
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**

Analysis

Cooper Resort, Inc., v. South Carolina Public Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119 (1989.) This is just such a situation.

First and foremost, Defendant's actions are in violation of the language and intent of the statute. While the responsible agency's construction of any statute is afforded respectful consideration (*CFRE v Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011)) the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. *Nationwide Mutual Ins. CO. v. Rhoden*, 398 S.C. 393, 401 n. 4, 738 S.E.2d 477, n. 4 (2012) (If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this 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.").

Defendants suggest that the Court's Order Denying Defendant's Motion for Summary Judgment and Plaintiff's arguments disregard Supreme Court precedent; yet, none of the cases cited by Defendants have addressed the Defendant's own disregard of the plain language of the statute. On the contrary, this issue of statutory compliance has not yet been addressed by our courts. Defendant's affidavits and briefs make clear that Defendants have interpreted this statutory language in accordance with their wishes and preferences. Certainly, Defendants' approach to requests for, and release of, SORA information is simpler and less burdensome than the approach spelled out by the language of the statute. However, neither courts nor the executive branch are free to take such liberties with the law, as codified in statute, no matter how inconvenient compliance may be.

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 (A) and (B), based on whether the request is made to the county sheriff or to SLED.

a. Requests to the County Sheriff

S.C. Code Ann. § 23-3-490 (A), in the first four sentences of paragraph one, 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.” 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 requires the added requirement: “...if the request is made *in writing* on a form prescribed by SLED” (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 v. R. Design Const. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) ("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 of paragraph one, 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" (emphasis added). There is no provision for general publication of anything beyond 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." 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. *Anderson v. South Carolina Election Commission*, 397 S.C. 551, 556, 725 S.E.2d. 704, 725 (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.” *Davis v. Sch. Dist. of Greenville County*, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007). Furthermore, these terms must be given their fixed meaning: the meaning they had when the text was adopted. *In re Hospital Pricing*, 377 S.C. 48, 54, 659 S.E.2d. 131, 134 (2008).

Subsection(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, as the Defendants suggest. The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.” *Davis v. Sch. Dist. of Greenville County*, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007) (“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.’”). In this same Section, the legislature used the terms “publication” and “publishes.” Clearly, “transmission” does not have the same meaning as “publication,” as Defendants contend and as their interpretation requires. If the legislature intended to allow wholesale internet publication, not governed by subsections (A) or (B), they 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.” “If possible, every word and every provision 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 v. R. Design Const. Co., LLC.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (“Similarly, we are to construe a statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’”).

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 Defendants Second Motion for Summary Judgment, page 6. 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 South Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012); *Consumer Advocate v. South Carolina 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.”). The legislature already used the terms “publication” and “publishes” in this same Section and the Defendant’s concede that the “internet was increasing in popularity and use,” implying that the purpose of the 1998 amendment was to “specifically authorize(d) SLED to publish registry information online...” See Defendant’s Second Motion for Summary Judgment, page 6. 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 elected branches could have done so 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.

d. Summary of Methods of Requesting and Receiving Information

Taken together, these provisions may not be convenient for Defendants, but they are not ambiguous. Here is how 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.

Finally, a statute must be interpreted in a manner that furthers rather than obstructs its purpose. *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d. 418, 420 (2012). An interpretation that validates outweighs one that invalidates. *City of Rock Hill v. Harris*, 391 SC 149, 705 S.E.2d. 53 (2011). And, provisions should be interpreted in a way that renders them compatible, not contradictory, *Davis v. Sch. Dist. of Greenville County*, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007). Giving meaning to the plain and limiting language of S.C. Code Ann. § 23-3-490 is the only interpretation that is consistent with one of the enumerated purposes of SORA, as found in S.C. Code Ann. § 23-3-410:

Registry; contents and ***purpose***; cross-reference alias names.

(A) The registry is under the direction of the Chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the location of persons convicted of certain offenses. SLED shall develop and operate the registry to: collect, analyze, and maintain information; make information available to every enforcement agency in this State and in other states; ***and establish a security system to ensure that only authorized persons may gain access to information gathered under this article.***

(B) SLED shall include and cross-reference alias names in the registry. (emphasis added)

Defendant's interpretation – that the statute authorizes the wholesale publication of the registry, including all additional, detailed information (names, aliases, identifying characteristics, dates of birth, home address, photographs and other information) would not only render meaningless the language of subsections (A), (B), and (C), but it would also contradict this stated purpose of establishing “a security system to ensure that only authorized persons may gain access to information gathered under this article.” The statute clearly provides for a limited, controlled, and accountable system for tracking requests and releases of registry information and Defendant's

practice of allowing anonymous, unfettered access is simply not authorized by the plain language of the statute.

For all of these reasons, Defendants have long been publishing Plaintiffs more detailed information in an unlawful manner inconsistent with the language of the S.C. Code Ann. § 23-3-490.

e. Other Reasons Supporting Equitable Relief

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." *Walls, supra.*, at 31. 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. See footnote 7, *supra*. South Carolina courts have long observed that equity "looks beneath rigid rules of law to seek substantial justice." *Drury Development Corp. v. Foundation Insurance Co., et. al*, 380 S.C. 97, 668 S.E.2d 798 (2008). The Defendant's 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. 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

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.

f. Conclusion

Substantial justice is served in this case by granting Plaintiff's request for removal from the South Carolina Sex Offender Registry or from publication thereon. There is no genuine issue as to the fact that Defendant Keel maintains the state Sex Offender Registry, can cease publicizing Plaintiff's inclusion thereon, and can take appropriate action to ensure that SLED and other government actors are in compliance.

II. Equal Protection

Defendant's *ultra vires* publication of Plaintiffs information is a violation of the right to equal protection under the law.

III. Due Process

Defendant's *ultra vires* publication of Plaintiffs information is a violation of Due Process.

IV. Eighth Amendment

Defendant's *ultra vires* publication of Plaintiffs information renders the actions cruel, excessive and punitive in nature.

Respectfully Submitted,

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Columbia, South Carolina
November ____, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No.: 2016-CP-40-06960

Dennis J. Powell, Jr.,)
Plaintiff,)
v.)
Mark Keel, Chief,)
State Law Enforcement Division, and)
The State of South Carolina,)
Defendants.)

**DEFENDANTS' REPLY TO
PLAINTIFF'S ADDENDUM**

PLEASE TAKE NOTICE THAT the Defendants hereby reply to the Plaintiff's Addendum to Plaintiff's 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 (Addendum) and would assert the following arguments in opposition thereof:

ARGUMENTS

I. Statutory Compliance

In South Carolina, Courts have consistently held that “[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Kiriakides v. United Artists Commc’ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Further, the South Carolina Supreme Court recently reaffirmed that “we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute.” Senate by & through Leatherman v. McMaster, No. 2018-001455, 2018 WL 6187801, at *4 (S.C. Nov. 28, 2018). The Plaintiff's

Addendum and seemingly entire argument in this case is based on a flawed and incorrect isolation of phrases in South Carolina's sex offender registry statutes (collectively referred to as "SORA") that, if true, would negate the intent of SORA and would lead to a manifestly absurd result. As such, this argument must be rejected.

The intent of SORA is clear and unequivocal. SORA was created "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. To that end, it is inarguable that protecting the public, which is achieved by providing the public access to individual sex offender's information, is a stated intent of SORA. *Id.* The Legislature also specifically acknowledged that the "sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses" finding that "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.

In 2003, the Supreme Court specifically acknowledged that "the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal." Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003). The Court went on to specifically note that SORA "reasonably protects South Carolinians **because the registry notifies them of Appellant's sex offense.**" *Id.* (emphasis added). As such, the Supreme Court has unequivocally held that providing notice and information about sex offenders to the public is a vital intent and purpose of SORA. The Supreme Court has also noted that the "**purpose of the sex offender registry has nothing to do with retribution, and any deterrent effect of registration derives from the availability of information, not from punishment.**" In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679, *cert. denied sub. nom. J.D.B. v. South Carolina*, 138 S. Ct.

483, 199 L. Ed. 2d 360 (2017) (emphasis added). As such, as has been acknowledged in binding precedent, public access to sex offender information is SORA's mechanism to protect the public health, welfare, and safety of South Carolina citizens – the stated purpose of the entire SORA scheme. See S.C. Code Ann. § 23-3-400; Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003); In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679, *cert. denied sub. nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added).

Nevertheless, the Plaintiff's argument is that SLED is acting *ultra vires* by providing **too much** information to the public, and that the South Carolina Legislature actually intends to limit the public's access to SORA information, both in the means of access and in the source of information. This contention is directly contrary to the intent of the Legislature and should be rejected. To that end, the South Carolina Supreme Court has held

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)).

Moreover, the Plaintiff's argument does not appear to acknowledge the totality of S.C. Code Ann. § 23-3-410, which states unequivocally that

The [SORA] registry is under the direction of the Chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the location of persons convicted of certain offenses. SLED shall develop and operate the registry to: collect, analyze, and maintain information; make information available to every enforcement agency in this State and in other states; and establish a security system to ensure that only authorized persons may gain access to information gathered under this article.

To that end, the Plaintiff isolates on the last sentence of this statute while seeming disregarding the remainder. This isolated reading leads to the argument that despite putting the SORA registry under the direction of the Chief of SLED and mandating that the registry contain information necessary to assist law enforcement in the location of persons convicted of certain offenses, the Legislature actually intended to limit SLED's ability to provide access to SORA registry information and seeks to prohibit the public for accessing information from which the public can assist law enforcement in solving crimes. This is an incorrect reading that is inapposite to the intent of SORA.

There can be no question that assistance from the public, which includes any and all non-law enforcement witnesses or sources of information, is vital to law enforcement efforts throughout the state in solving all crimes and protecting the public. As such, SLED making SORA information available for the public to access both protects the public and assists law enforcement on a daily basis. As noted in the fact affidavit provided by Laura Hudson, Executive Director of the South Carolina Victim Assistance Network

South Carolina's passive Sex Offender law allows law enforcement and the public to inquire into an individual's offender status or determine the presence of sex offenders in a geographic location. It is not designed as a punishment for convicted offenders. Rather, it is designed to assist law enforcement in the protection of the public and it reduces the volume of inquiries that local law enforcement agencies would otherwise need to field from the public regarding sex offenders living in their neighborhoods. Public access to this information can prevent victimization and protect communities from sex crimes by encouraging them to remain vigilant and attentive without actively promoting the convictions of offenders.... A publically accessible Sex Offender Registry promotes community awareness and engagement. If residents, especially parents of young children, can learn of sex offenders' presence in their community, they can take steps to prevent victimization.... If offenders know that community members are aware of their identity and presence, they may be less likely to re-offend, considering the increased likelihood of detection, apprehension, and conviction. This provides peace of mind for parents and individuals living in a community where sex offenders are present.

A copy of this Affidavit is attached hereto in its entirety as Attachment A.

Similarly, SLED Major Jennie Temple acknowledged that the registry, including Mr. Powell's information, provides law enforcement the tools and information needed in investigating criminal offenses and law enforcement uses Registry information on a daily basis. Major Temple went on to acknowledge that the registry "also provides the public with vital information about certain offenders and their past conduct, which protects the public at large and provides information from which the public can make a host of informed decisions." A copy of this Affidavit is attached hereto in its entirety as Attachment B.

Plaintiff's incorrect interpretation of SORA would unequivocally limit the public's access to SORA information, thereby adversely affecting "law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses" in direct contravention of S.C. Code Ann. § 23-3-400. This is contrary to the entire purpose of SORA and must be rejected. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Rowland*, 86 S.C. 419, 68 S.E. 561 (1910)).

Furthermore, the Plaintiff misapprehends the intent of the last sentence of S.C. Code Ann. § 23-3-410 in any event. The "security system" addressed therein is simply a recognition that the Legislature has created a "private" registry for certain juveniles adjudicated delinquent of certain offenses. The Legislature has in fact determined that this SORA information should be limited to certain requestors and should not be available to the general public. Specifically, S.C. Code Ann. § 23-3-490(D)(2) states that certain juvenile SORA information "shall only be made available, upon request, to victims of or witnesses to the offense, public or private schools, child day care centers, family day care centers, businesses or organizations that primarily serve children, women, or vulnerable adults, as defined in Section 43-35-10(11)" This limitation in access stands in stark contrast to the openness of all other SORA information, which is mandated to be made

available to the general public. As such, SLED was mandated to create a "security system" to accommodate this limited access to the "private" registry and has done such. This in no way bears on the Plaintiff as there is no dispute that he was convicted as an adult and that § 23-3-490(D)(2) has no applicability to him.

Furthermore, the language of S.C. Code Ann. § 23-3-490(B) belies the Plaintiff's argument. This statute states in pertinent part,

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. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction.**

The clear and unequivocal language of this statute actually mandates that SLED provide requestors with access to specific information about sex offenders – "SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction." S.C. Code Ann. § 23-3-490(B). In fact, based on the language set forth in S.C. Code Ann. § 23-3-490(B), if SLED were to disregard this unambiguous mandate and not make information available to requestors, SLED would in fact be acting *ultra vires* in violation of state law. Notably, S.C. Code Ann. § 23-3-490(B) does not contain any limitation on who the "requestor" could be (as argued by the Plaintiff) in direct contrast to S.C. Code Ann. § 23-3-

490(D)(2), which does. This plain language of these statutes highlights the fallacy of the Plaintiff's argument, which should be rejected.

In addition, the fact that S.C. Code Ann. § 23-3-490(A) is limited to sheriffs is of no consequence and must not be read to restrict or limit SLED's ability to disseminate information. Rather, the separation of these two paragraphs stems only from the evolution of the statute throughout the legislative history. As discussed more fully in Defendants' previous filings, S.C. Code Ann. § 23-3-490 has evolved over the years.¹ Initially, SLED was in fact prohibited from releasing information, and S.C. Code Ann. § 23-3-490 provided that:

The provisions of this article do not authorize SLED to release information to the public unless a request is made in writing stating the name of the person making the request and the name of the person about whom information is sought. SLED is only authorized to release to the public the name of the county in which the offender is registered. Otherwise, SLED is not authorized to release any information contained in the registry to anyone other than law enforcement agencies, investigative agencies, and those agencies authorized by the court.

1996 South Carolina Laws Act 444 (S.B. 1286). As such, if this statute still existed, SLED would be acting *ultra vires*.

However, unfortunately for the Plaintiff, this statute was amended and no longer contains this limitation. In 1998, Legislature specifically expanded the information that SLED was authorized to disseminate to the current form of the statute, to wit:

(B) 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. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about

¹ 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 in this action on November 2, 2018 contains the history of public inspection of SORA information and more details about the history of this statute. The Defendants' previous arguments and supporting documentation are incorporated herewith, but are not attached hereto in the interests of judicial economy.

whom the information is sought. SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction....

1998 South Carolina Laws Act 384 (H.B. 4805) (emphasis added). As such, the Plaintiff's allegation that is acting *ultra vires* is simply wrong.

In addition, it was in this same bill - 1998 South Carolina Laws Act 384 (H.B. 4805) that the Legislature specifically authorized both the sheriffs' offices and SLED to transmit Registry information to requestors via the internet. Specifically, S.C. Code Ann. § 23-3-490(E) was clearly added to expand on the media and format with which both the sheriffs' office and SLED disseminate information tacitly authorizes both the sheriffs' offices and SLED to use computerized or electronic transmission of data or other electronic or similar means. Notably, the Plaintiff's recitation of S.C. Code Ann. § 23-3-490(E) in his Addendum leaves off the beginning clause of (E). This section begins "[f]or the purposes of this section", which is a direct indication that (E) applies to both (A) and (B) and is simply an authorization to specifically allow both the sheriffs and SLED to use electronic means - *i.e.* computers and the internet - as the means of making information available to the public. Plaintiff's mischaracterization of the effect of Paragraph (E) inaccurately represents its role in the statute compared to Paragraphs (A) and (B). These paragraphs all work in conjunction with one another to form a single harmonious result, which is a specific tacit authorization for SLED and the sheriffs' offices to each make SORA Registry information available for access by the public through electronic or similar means - *i.e.* the internet. This Legislative policy finding should be determinative in this matter as South Carolina Courts have also held that "[o]nce the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." Jones v. State Farm

Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989). Plaintiff's attempt to isolate these sections and read them as working averse to one another does not comport with the rules of statutory interpretation. See Senate by & through Leatherman v. McMaster, No. 2018-001455, 2018 WL 6187801, at *4 (S.C. Nov. 28, 2018) ("we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute."). As such, this argument should be rejected.

Moreover, if, as incorrectly suggested by the Plaintiff, SLED were not authorized to make information available to the public on the internet, the Supreme Court would have addressed such in the Hendrix v. Taylor case. In that case, the Supreme Court specifically addressed SLED's internet publication of SORA information. Rather than acknowledge the prohibition espoused by the Plaintiff, the Court in fact found the opposite and specifically directed that

under the "Offense" heading on the registry, SLED should provide (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of conviction. For example, in this case, Appellant's offense would appear under the "Offense" heading as follows:

Colorado
§ 18-3-404: Third Degree Sexual Assault
2000-03-08

Hendrix v. Taylor, 353 S.C. 542, 551–52, 579 S.E.2d 320, 325 (2003). Accordingly, it is inarguable that SLED is authorized to utilize the internet as a means of providing any and all public requestors information, and the binding precedent of this State indicates otherwise. See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008); In the Interest of Justin B., a Juvenile

under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) *cert. denied sub nom. J.D.B. v. South Carolina*, No. 17-536, 2017 WL 4539709 (U.S.S.C. Nov. 27, 2017). Each and every single one of these of these cases was decided after SLED made SORA information available for access by the public by electronic or other similar means – the internet. As such, this precedent forecloses this action. Put simply, the Plaintiff’s issue is not novel and has been tacitly and specifically rejected by South Carolina’s binding jurisprudence. *Id.*

Furthermore, a plain reading of SORA as a whole reveals a clear and unequivocal intent that SLED make SORA information available to the public should the public wish to seek it out and that SLED is authorized to make such information available on the publically accessible internet. *See Kiriakides v. United Artists Commc’ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); *Senate by & through Leatherman v. McMaster*, No. 2018-001455, 2018 WL 6187801, at *4 (S.C. Nov. 28, 2018). (“we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute.”).

In addition, even assuming that SLED was in fact acting *ultra vires* and was providing the public with **too much information in too convenient a manner** (which SLED is not), the remedy for such would never be removal of the Plaintiff from the SORA registry in direct contravention of the plain language of the SORA removal provisions – S.C. Code Ann. § 23-3-430(E), (F), and (G), which set forth the only lawful avenues of removal. The South Carolina Supreme Court has held that a “court’s equitable powers **must yield** in the face of an unambiguously worded statute.” *Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm’n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *see also Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007). As such, even a finding that SLED were acting *ultra vires* (which SLED is not) would

not authorize this Court to re-write SORA's clear and ambiguous removal provisions and order that the Plaintiff be removed from the SORA registry entirely. *Id.* As such, this argument must fail.

II. Constitutional Challenges

Plaintiff's Addendum does not alter or affect the constitutional analysis in this matter. Accordingly, the Defendants would stand on the previous constitutional arguments made in this matter. Nevertheless, the Defendants would assert South Carolina law mandates that "all statutes are presumed constitutional and, if possible, will be construed to render them valid." Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001); Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). Further, a "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (citing Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995)). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). As such, all of the statutes in question must be presumed as constitutional in this action because there is and can be no showing of any legitimately cognizable repugnance to the constitution, much less one that is beyond a reasonable doubt. Therefore, based on the binding and authoritative precedent governing this issue, this action must fail.

III. Equitable Relief

The equitable relief sought by the Plaintiff is not available as a matter of law. The binding precedent of this state mandates otherwise. The South Carolina Supreme Court held unequivocally that a “court’s equitable powers **must yield** in the face of an unambiguously worded statute.” Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm’n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (emphasis added); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 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). The binding authority in this State also provides that “[c]ourts may not ignore statutes, precedent, or other binding authority while providing an equitable remedy. Johnson v. Lloyd, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Cl. App.2012) *reversed on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014). In *Johnson*, the Court of Appeals considered whether a circuit court could provide an equitable remedy that removed appellant from the sex offender registry, despite the fact that the sex offender registry provides methods for removal that the appellant did not qualify to utilize. The answer was clear and unequivocal:

The General Assembly enacted an unambiguously worded statute that sets for the legal remedies available to an individual on the registry. Because the sex offender statute provides an adequate remedy for Johnson, it was error for the circuit court to fashion an equitable remedy in this case.

Id., 399 S.C. 470, 476-77, 732 S.E.2d 198, 201. Although the Supreme Court subsequently overruled the Court of Appeals decision, the basis was not a flaw in the Court of Appeals’ rationale or ruling on the merits: “[b]ecause the State failed to argue that Petitioner [Johnson] was not entitled to equitable relief until its brief to the Court of Appeals, the issue was not preserved for appellate review. **We therefore reverse the Court of Appeals’ opinion on preservation grounds.**” Johnson v. Lloyd, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) (emphasis added).

Accordingly, the Court of Appeals decision in *Johnson* remains binding precedent on the issue of equitable authority.

Finally, Plaintiff argues that there are no facts in this record indicating that the Plaintiff is a danger or that the public is safer by having access to his SORA information. The record belies this contention. Not only does the South Carolina Legislature acknowledge that the Plaintiff, like all sex offenders, poses a risk of reoffending, the Plaintiff's own doctors have acknowledged that the Plaintiff presents a risk of reoffending *i.e.* that he is in fact a danger to the public, as well. *See* S.C. Code Ann. § 23-3-400; Attachment 9 (Dr. William Burke's Evaluation); Attachment 10 (Dr. Thomas V. Martin's Evaluation) 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 in this action on November 2, 2018.

Further, the jurisprudence of this state and the actual record in this matter also demonstrate that SLED making all SORA information available for access by the general public, including the Plaintiff's, does in fact protect the public and does in fact assist law enforcement in protecting all South Carolina citizens. *See Hendrix v. Taylor*, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003) (SORA "reasonably protects South Carolinians because the registry notifies them of Appellant's sex offense."); *see also* Attachment A; Attachment B.

CONCLUSION

Based on the foregoing, all previously filed materials in this action, and any arguments advanced at a hearing on this matter; Plaintiff's argument that SLED is acting *ultra vires* is without merit and should be rejected. Furthermore, judgment as a matter of law on all issues should be granted to the Defendants.

Respectfully Submitted,

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COLUMBIA, SOUTH CAROLINA
JANUARY 11, 2019

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,
Defendants,

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2016-CP-40-06960

PLAINTIFF'S RESPONSE TO
DEFENDANT'S REPLY TO
PLAINTIFF'S ADDENDUM

PLAINTIFF HEREBY responds to Defendant's Reply to Plaintiff's Addendum, without superseding his previous filings and arguments before the Court.

ARGUMENTS

I. THE SORA DOES NOT CONTEMPLATE OR ALLOW FOR PUBLICATION OF THE REGISTRY OVER THE INTERNET.

Plaintiff agrees with Defendants' contention that the intent of South Carolina's sex offender registry statutes (collectively referred to as "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.* While Defendants may not be as concerned, 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. For example, “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.” *Id.* § 23-3-490(E). “Transmission” is a far cry from “publication.” Defendants also seek to graft “publication to the public” to 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 does. *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* AL St. § 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." Of course, in order to reach any such implication, this Court must cut and gut, wholesale, much of the language of SORA.

Moreover, three memoranda of law later, Defendants have offered no explanation or justification for their failure to require that requests for offender/registry information be "in writing" and "on a form required by SLED" as explicitly required by the SORA. This requirement is intended to increase accountability and safety by mandating that SLED have a record of requestors of information. Apparently, such a simple non-discretionary act is just too burdensome for Defendants. It is not done in other states. It is not required by the federal statute. Ms. Hudson does not want SLED to require such a form. In any event, Defendants have ignored this mandate for years and now ask this Court to bless that recalcitrance.

On the other hand, consistent with his previous memorandum, Plaintiff requests only that this Court read the statute in its entirety, as written, and follow the rules governing statutory interpretation. Plaintiff is fully aware that this Court is the first to address these glaring issues and that the expeditious path would be to ignore the clear and specific language of the statute, bless SLED's actions, and preserve the status quo. While Plaintiff understands the temptation to take such an approach, Plaintiff respectfully requests that this Court do what the Defendants' have

refused to do: Take the statute as written, comply with its requirements, and respect its limitations. The Defendants' Reply provides a clear statement of what the Defendants wish the Legislature had written about the purpose of the Act and the purpose of the registry. Plaintiffs acknowledge 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, Plaintiff concedes that SLED's *ultra vires* approach is less burdensome, more embarrassing and dangerous for offenders, and more pleasing to victims' groups. But, even after many amendments to SORA over the last 20 years, the Legislature has not adopted such an approach and it is not this Court's job to rewrite the statute for the Legislature. This is perhaps because, as set forth more fully below, the duration and breadth of the SORA's registration and notification schemes are the broadest in the country, requiring lifetime registration and publication for all offenders, regardless of the level of offense or likelihood of recidivism. There is nothing illogical about requiring documentation and accountability as a counter-balance to such a lifetime registration scheme. The responsibility of balancing the need to protect a juvenile's reputation against the need to "to promote the state's fundamental right to provide for the ... safety of its citizens," section 23-3-400, falls to the Legislature, not the courts, S.C. CONST. art. I, § 8.

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" (Def. Reply. P. 4)" as Defendant contends. Defendant is not arguing that the public should have *no access* to the information on

the registry, just that the public's access be regulated in accordance with the plain language of the statute.¹

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 is specious at best. 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 Plaintiff acknowledges that courts in this State have addressed the importance of the registry and the public's access to it, Plaintiff is only challenging Defendants' *ultra vires* publication of the registry on the internet and the breadth of SORA's notification scheme and does not argue that the public should have no access to the registry at all.

II. INTERNET PUBLICATION OF THE SOUTH CAROLINA SEX OFFENDER REGISTRY IS UNCONSTITUTIONAL

Plaintiff relies on his previous memoranda, pleadings, and arguments regarding the Constitutional arguments addressed in the Defendants' Reply. However, in further response to Defendants' argument that SORA is non-punitive, Plaintiff now adds and preserves the argument that the breadth of the SORA's registry and notification scheme make it punitive. 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.

¹ Defendants' repeated reliance on the affidavits of Ms. Hudson and SLED Major Jennie Temple is not particularly persuasive, but it is telling. Both Ms. Hudson and Major Temple stress the importance of the registry and the public's access to it. As set forth above, Plaintiff is not arguing that the public should be denied access to the registry. Plaintiff is arguing that the public's access to the registry should be regulated so that his, and other registrants', constitutional rights are protected, as contemplated by the plain language of the statute.

The United States and South Carolina Constitutions specifically prohibit the passage of *ex post facto* laws. *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002) (citing *State v. Wilson*, 315 S.C. 289, 433 S.E.2d 864 (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. Huie*, 302 S.C. 169, 394 S.E.2d 486 (1990) (citing *Flemming v. Nestor*, 363 U.S. 603 (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.*

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.” *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (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. SORA's Notification Scheme is Punitive.

While Plaintiff concedes 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 *notification scheme* under the Act is punitive. Plaintiff even concedes that the vast majority of cases that have addressed the issue of whether a state's sex offender registration and notification requirements are punitive in nature have found that they are not. However, 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.² This means that all

² 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. §

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. This notification scheme is unlike any other in the country³ – 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 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

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. Additionally, twelve states, including South Carolina, require lifetime registration. See Ala. Code § 15-20A-10(f); Cal. Penal Code § 290; Colo. Rev. Stat. § 16-22-108; Del. Code Ann. § 4120; Fla. Stat. § 943.0435; Idaho Code § 18-8307; N.J. Stat. Ann. § 2C:7-2; Or. Rev. Stat. § 163A.010; S.C. Code Ann. § 23-3-460; Tenn. Code Ann. § 40-39-204; Va. Code Ann. § 9.1-908; Wyo. Stat. Ann. § 7-19-304. The remainder of states have registration requirements that are variations of those listed above. See Haw. Rev. Stat. § 846E-2 and S.D. Codified Laws § 22-24B-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); N.C. Gen. Stat. § 14-208.7 (requiring registration for 30 years); and Wash. Rev. Code § 9A.44.140 (requiring registration for a lifetime, 15 years, or 10 years depending on the scope of the offense).

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 is the only state that does not restrict the publication of information via the internet and/or provide for some mechanism by which a registrant can petition for removal from the registry.

³ 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).

industry for those found to have misappropriated bank funds is not an “affirmative disability or restraint” because the disability is severely limited. *Hudson*, 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, 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, (Powell Aff. ¶ 26), denied jobs he applied for because he was on the registry (Powell Aff. ¶ 27), has had to drastically change his career plans (Powell Aff. ¶ 28-35), and has made a substantially lower income, now earning only \$13/hour (Powell Aff. ¶ 36-37). The fact that Plaintiff faces the possibility of this kind of restraint for the remainder of his life, regardless of his low level of his offense, his lack of criminal history since his registration, and his minimal chance of recidivism, makes a decision allowing 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

As discussed more fully above, and in Plaintiff's prior filings, the plain language of the SORA does not permit wholesale publication of the registry via the internet and the internet publication of registry information under the SORA is unconstitutional.

Respectfully Submitted,

s/ Jon E. Ozmint

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ATTORNEYS FOR DENNIS POWELL, JR.

Columbia, South Carolina
February 8, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No.: 2016-CP-40-06960

Dennis J. Powell, Jr.,)
Plaintiff,)
v.)
Mark Keel, Chief,)
State Law Enforcement Division, and)
The State of South Carolina,)
Defendants.)

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND THE GRANT
OF SUMMARY JUDGMENT TO
PLAINTIFF**

PLEASE TAKE NOTICE THAT the Defendant South Carolina Law Enforcement Division by and through Chief Mark Keel (hereinafter "SLED"), and the State of South Carolina, by and through its undersigned attorneys, hereby move this Honorable Court for to alter, amend, and reconsider this Court's grant of summary judgment to the Plaintiff due to the factual and legal errors contained therein. The Defendants would also move for a final ruling on Defendants' Second Motion for Summary Judgment, which is still pending at this time. The grounds for this motion and arguments in support thereof are as follows:

FACTUAL BACKGROUND

As an initial threshold factual matter, while the Plaintiff attached certain affidavits to his filings in this case, the Plaintiff did not actually have any of the same admitted into the factual record in this matter. As such, any reliance on the same, or any other matter not properly admitted, is reversible error. In addition, the Court appears to have simply disregarded the factual evidence submitted by the Defendants in this matter, which is the only actual evidence admitted into the factual record in this matter. Notably, this Court admitted such Defendants evidence, which is set forth in more detail below, into the factual record without objection.

The Plaintiff was indicted for Criminal Solicitation of a Minor on December 1, 2008. The indictment reads:

That Dennis Powell, Jr., on or about November 12, 2007 to February 15, 2008, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Dennis Powell, Jr. a person eighteen years of age or older, did knowingly though the Internet contact and communicate with a person located within the County of Lexington, State of South Carolina, whom he reasonably believed to be a twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing this person to engage or participate in a sexual activity as defined in Section 16-15-375(5). This is in direct violation of Section 16-15-342 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

See Indictment.¹ Thereafter, in April of 2009, the Plaintiff pled guilty to this indictment and admitted under oath that he did in fact criminally solicit a minor with the intent to engage in sexual activity in violation of S.C. Code Ann. § 16-15-342(A). *See* Sentencing Sheet. It is noteworthy that the age listed in this indictment is “twelve year-old girl.” However, this Court erroneously found that the Plaintiff’s South Carolina Sex Offender Registry Act (SORA) registry listing “falsely” includes the age of 12 for the victim. *See* Order p. 5.

Moreover, the factual basis for this plea is set forth in the plea transcript. *See* Plea Transcript. This transcript indicates that the Plaintiff, who was 22 years old, admitted to have numerous sexually explicit conversations with an individual that the Plaintiff believed to be a 12 or 13-year-old girl in an online Yahoo Chatroom. The clear and unequivocal intent of these communications was for the Plaintiff to persuade, induce, entice, and coerce this 12 or 13-year-old girl to engage and participate in sexual activities as defined by S.C. Code § 16-15-375. *See*

¹2 Defendants’ incorporate by reference all of the attachments to the Defendants’ Second Motion for Summary Judgment, Memorandum in Support of Summary Judgment, And Defendants Response In Opposition To Plaintiff’s Motion for Summary Judgment and will simply reference those items herein.

Solicitation Chats. The Plaintiff admitted that he wanted to “teach” this 12 or 13-year-old girl various sex acts and the Plaintiff also sent pictures of his penis to this 12 or 13-year-old girl. Notably, the Plaintiff admitted “I would be in trouble, not you”, yet he did it anyway. *See* Solicitation Chats.

Ultimately, after having laid his intentional sexual “groundwork”, the Plaintiff set up a meeting with this 12 or 13-year-old girl at a skating rink in Lexington County for the express purpose of engaging in sexual activity with her. After setting up this meeting, the Plaintiff drove from Forest Acres to Lexington to engage in sexual activity with this 12 or 13-year-old girl. However, the Plaintiff did not stop at the skating rink, but instead drove by prior to being arrested by law enforcement. Fortunately for the citizens of South Carolina, this “12 or 13-year-old girl” was actually a law enforcement officer acting in an undercover capacity who apprehended the Plaintiff before he could victimize a 12 or 13-year-old minor child as he admittedly intended. *See* Plea Transcript; Solicitation Chats. However, the fact that this was a “sting” operation does not in any way make this a “victimless” crime as found by this Court because the Plaintiff’s admitted intent was to victimize a 12 or 13-year-old girl by engaging in sexual activity. *See* Victims’ Advocate Affidavit; Indictment; Sentencing Sheet; Plea Transcript.

Furthermore, subsequent to his conviction for Criminal Solicitation of a Minor, the Plaintiff was required to register on the South Carolina Sex Offender Registry Act (SORA) registry and did in fact so register with the Richland County Sheriff’s Department on or about February 11, 2010. *See* RCSO Affidavit. The Plaintiff has continuously registered since this time. *See Id.* However, it is noteworthy that the Plaintiff is not now and has never been subject to residency restrictions, work restrictions, or GPS monitoring based upon his lawful status as a sex offender. *See Id.*; Temple Affidavit. Further, the Plaintiff is not subject to any other restrictions, including, but not

limited to, internet usage, community involvement, or any prohibitions related to where he may go or with whom he may lawfully interact. *See* RCSO Affidavit; Temple Affidavit. Rather, the Plaintiff is subject to the same regulatory and administrative requirements and is treated like all other similarly situated registrants in South Carolina. *See* Temple Affidavit.

In addition, the Plaintiff did not appeal his 2009 conviction or sentence. The Plaintiff did not apply for post-conviction relief challenging the sufficiency of the legal representation for his criminal matter or any other matter that could be challenged through post-conviction relief. The Plaintiff has not sought a pardon for his conviction. The Plaintiff has not filed a petition for a writ of habeas corpus or a motion for new trial pursuant to Rule 29(b), South Carolina Rules of Criminal Procedure. Accordingly, the Plaintiff's conviction has not been reversed, overturned or vacated on appeal. As such, the Plaintiff does not meet any of the statutory criteria for removal set forth in South Carolina law.

HISTORICAL BACKGROUND OF SEX OFFENDER REGISTRATION

This Court's Order appears to misconstrue the history of sex offender registration in South Carolina. As noted by the South Carolina Supreme Court,

The movement to enact sex offender registration statutes arose after Megan Kanka, a seven-year old child, was raped and murdered in New Jersey by a convicted sex offender who had moved in across the street from her family. The killer enticed the girl to come over to his house in order to see his new puppy. The New Jersey legislature responded to this highly publicized event by declaring a legislative emergency to immediately debate and enact a sexual crimes bill.

On October 31, 1994, Governor Whitman signed the bill, which became known as Megan's Law. N.J. Stat. Ann. 2C:7-1 *et seq.* The law requires sexual criminals to register with local law enforcement.

The United States Congress also reacted to the national outrage over sexual crimes by passing the Jacob Wetterling Crimes Against Children and Sexually Violent Predator Act ("Jacob Wetterling Act"), which President Clinton signed on September 13, 1994. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C.A. § 14071 (West 1994). The

Jacob Wetterling Act gives states incentives to enact laws that protect the public from sexual criminals by conditioning federal funding under the Public Health and Welfare Code to state enactment of a sex crimes law. 42 U.S.C.A. § 14071(g)(1) and (g)(2). The Jacob Wetterling Act also creates a national sexual offender database, in which the states are required to participate. 42 U.S.C.A. § 14071(b)(2)(B).

Hendrix v. Taylor, 353 S.C. 542, 547–48, 579 S.E.2d 320, 322–23 (2003).

Thereafter, in 1996, Congress passed its own “Megan’s Law” mandating the public disclosure of information about certain sex offenders and empowering the individual states to determine the appropriate confines of such disclosure. *See* “Megan’s Law”, 42 U.S.C. 14071(d).

In 2006, Congress passed the “Adam Walsh Child Protection and Safety Act of 2006”, which included the Sex Offender Registration and Notification Act (SORNA). 42 U.S.C. § 16901 *et seq.* This federal law created a new baseline of sex offender registration and notification standards and directed the Department of Justice to establish the Dru Sjodin National Sex Offender Public Website. *Id.* As such, the U.S. Congress has mandated that states publish sex offender registry information online.

HISTORICAL BACKGROUND OF PUBLIC REGISTRATION IN SOUTH CAROLINA

The South Carolina Sex Offender Registry (hereinafter “Registry”) came into existence upon the passage of 1994 Act No. 487, Part II, § 112A following the federal trend set forth above. The Registry was created to be operated “under the direction of the chief of the State Law Enforcement Division (SLED)”. *Id.* In that regard, the South Carolina Legislature empowered SLED to “develop and operate” the Registry and to collect, maintain, and make Registry information available. *Id.* Notably, the initial iteration of the Registry was **not** open to public inspection. *Id.* (“Information collected for the offender registry shall not be open to inspection by the public. The information shall be made available only to law enforcement, investigative agencies, and those authorized by the court.”). However, the very first legislative change to the

Registry, which came upon the passage of 1996 Act 444, changed this and specifically made Registry information open and available to the public. Specifically, S.C. Code § 23-3-490 was amended to read:

Section 23-3-490. (A) Information collected for the offender registry is **open to public inspection**, upon request to the county sheriff. A sheriff must release information regarding a specific person who is required to register under this article to a member of the public if the request is made in writing, stating the name of the person requesting the information, and the name or address of the person about whom the information is sought. The information must be disclosed only to the person making the request. The sheriff must provide the person making the request with the full name of the offender, any aliases, the date of birth, a current home address, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction. A photocopy of a current photograph must also be provided. The provisions of this article do not authorize SLED to release information to the public unless a request is made in writing stating the name of the person making the request and the name of the person about whom information is sought. SLED is only authorized to release to the public the name of the county in which the offender is registered. Otherwise, SLED is not authorized to release any information contained in the registry to anyone other than law enforcement agencies, investigative agencies, and those agencies authorized by the court.

1996 South Carolina Laws Act 444 (S.B. 1286) (emphasis added).

Thereafter, in 1998, the South Carolina Legislature again amended the statute to expand the information that SLED was authorized to disseminate. Specifically, S.C. Code § 23-3-490 was expanded to provide that:

(B) 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. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction....**

1998 South Carolina Laws Act 384 (H.B. 4805) (emphasis added).

In addition, 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. Specifically, S.C. Code Ann. § 23-3-490(E) was added, which states, **“For purposes of this section, use of computerized or electronic transmission of data or other electronic or similar means is permitted.”** *Id.* (emphasis added). As such, the South Carolina Legislature specifically authorized SLED to publish Registry information online through electronic means in 1998. To that end, SLED first published Registry information on the internet on or about **November 22, 1999** and has published said Registry information on the internet continuously since. *See* Temple Affidavit.

Thereafter, the South Carolina Legislature acknowledged that the media could access and publish Registry information in newspapers. *See* 1999 South Carolina Laws Act 110 (H.B. 3075). Moreover, the current version of S.C. Code Ann. § 23-3-490(C) states “[n]othing in subsection (A) prohibits a sheriff from disseminating information contained in subsection (A) regarding persons who are required to register under this article if the sheriff or another law enforcement officer has reason to believe the release of this information will deter criminal activity or enhance public safety.”

Furthermore, as recognized by the Fourth Circuit Court of Appeals in the *United States v. Under Seal* case, the federal Sex Offender Registration and Notification Act (SORNA) also

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

United States v. Under Seal, 709 F.3d 257, 262 (4th Cir. 2013) (emphasis in original). As such, in order to comply with SORNA, South Carolina law enforcement entities are required to make certain information “available on the Internet” and available for public access.

Finally, throughout the history of the Registry, SLED has been empowered to determine the form of public requests for Registry information and the appropriate form for law enforcement to provide responsive information. *See* S.C. Code Ann. §§ 23-3-410, 490. To that end, SLED has determined that online publication through internet websites available on SLED’s website or the individual Sheriff’s Department websites is the appropriate form of both requests for and dissemination of Registry information, and has utilized this medium for dissemination since November of 1999. *See* Temple Affidavit. Further, SLED in exercising its statutory discretion has determined that the current level of security, which notifies requesters of the criminal penalties for improper use of Registry information and which seeks to prohibit non-humans from accessing the Registry, is sufficient. *See* Temple Affidavit *see also* S.C. Code Ann. §§ 23-3-400 *et. seq.* This level of security is more robust than that necessary to access SLED criminal records (SLED CATCH) or the general public index. *See* Temple Affidavit. Accordingly, this Court’s finding that the internet access and information required to utilize the SORA website somehow does not constitute a “form prescribed by SLED” is legal error that should be reconsidered. *See* Order p. 4.

ARGUMENTS

THIS COURT’S DECISION THAT SLED IS ACTING *ULTRA VIRES* IS WRONG

This Court’s decision to disregard the binding precedent in this matter is legally and factually incorrect and should be reconsidered. This decision rests on the fundamentally flawed premise that the South Carolina Legislature did not intend for SORA Registry information to be published on the internet or accessible online.

In South Carolina, Courts have consistently held that “[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.”). Kiriakides v. United Artists Commc’ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Further, the South Carolina Supreme Court recently reaffirmed that “we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute.” Senate by & through Leatherman v. McMaster, No. 2018-001455, 2018 WL 6187801, at *4 (S.C. Nov. 28, 2018). The decision in this case is based on a flawed and incorrect isolation of phrases in SORA that, if true, would negate the intent of SORA and would lead to a manifestly absurd result.

The intent of SORA is clear and unequivocal. SORA was created “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. To that end, it is inarguable that protecting the public, which is achieved by providing the public access to individual sex offender’s information, is a stated intent of SORA. *Id.* The Legislature also specifically acknowledged that the “sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses” finding that “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.

In 2003, the Supreme Court specifically acknowledged that “the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal.” Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003). The Court went on to specifically note that SORA “reasonably protects South Carolinians because the registry notifies them of

Appellant's sex offense." *Id.* (emphasis added). As such, the Supreme Court has unequivocally held that providing notice and information about sex offenders to the public is a vital intent and purpose of SORA. The Supreme Court has also noted that the **"purpose of the sex offender registry has nothing to do with retribution, and any deterrent effect of registration derives from the availability of information, not from punishment."** In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added). As such, as has been acknowledged in binding precedent, public access to sex offender information is SORA's mechanism to protect the public health, welfare, and safety of South Carolina citizens – the stated purpose of the entire SORA scheme. *See* S.C. Code Ann. § 23-3-400; Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003); In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added).

Nevertheless, the Court found that SLED is acting *ultra vires* by providing **too much** information to the public, and that the South Carolina Legislature actually intends to limit the public's access to SORA information, both in the means of access and in the source of information. This contention is directly contrary to the intent of the Legislature. To that end, the South Carolina Supreme Court has held

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)). Moreover, the decision does not acknowledge the totality of S.C. Code Ann. § 23-3-410, which states unequivocally that

The [SORA] registry is under the direction of the Chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the location of persons convicted of certain offenses. SLED shall develop and operate the registry to: collect, analyze, and maintain information; make information available to every enforcement agency in this State and in other states; and establish a security system to ensure that only authorized persons may gain access to information gathered under this article.

On that issue, the isolation of the decision to the last sentence of this statute fatally disregards the remainder of the statute. This isolated reading leads to the argument that, despite putting the SORA registry under the direction of the Chief of SLED and despite mandating that the registry contain information necessary to assist law enforcement in the location of persons convicted of certain offenses, the Legislature actually intended to limit SLED's ability to provide access to SORA registry information and seeks to prohibit the public for accessing information from which the public can assist law enforcement in solving crimes. This is an incorrect reading that is inapposite to the intent of SORA.

There can be no question that assistance from the public, which includes any and all non-law enforcement witnesses or sources of information, is vital to law enforcement efforts throughout the state in solving all crimes and protecting the public. As such, SLED making SORA information available for the public to access protects both the public and assists law enforcement on a daily basis. As noted in the fact affidavit provided by Laura Hudson, Executive Director of the South Carolina Victim Assistance Network, which is in the record in this matter, yet was disregarded by this Court:

South Carolina's passive Sex Offender law allows law enforcement and the public to inquire into an individual's offender status or determine the presence of sex offenders in a geographic location. It is not designed as a punishment for convicted offenders. Rather, it is designed to assist law enforcement in the protection of the public and it reduces the volume of inquiries that local law enforcement agencies would otherwise need to field from the public regarding sex offenders living in their neighborhoods. Public access to this information can prevent victimization and protect communities from sex crimes by encouraging them to remain vigilant and

attentive without actively promoting the convictions of offenders.... A publically accessible Sex Offender Registry promotes community awareness and engagement. If residents, especially parents of young children, can learn of sex offenders' presence in their community, they can take steps to prevent victimization.... If offenders know that community members are aware of their identity and presence, they may be less likely to re-offend, considering the increased likelihood of detection, apprehension, and conviction. This provides peace of mind for parents and individuals living in a community where sex offenders are present.

See Victims' Advocate Affidavit.

Similarly, SLED Major Jennie Temple acknowledged (in yet another disregarded affidavit admitted into the record in this matter) that the registry, including Mr. Powell's information, provides law enforcement the tools and information needed in investigating criminal offenses and that law enforcement uses Registry information on a daily basis. Major Temple went on to acknowledge that the registry "also provides the public with vital information about certain offenders and their past conduct, which protects the public at large and provides information from which the public can make a host of informed decisions." *See Temple Affidavit.* This Court's decision, which rests on the factually incorrect assertion that the Defendants provided no factual support whatsoever, is simply wrong.

This Court's incorrect interpretation of SORA also unequivocally limits the public's access to SORA information, thereby adversely affecting "law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses" in direct contravention of S.C. Code Ann. § 23-3-400. This is contrary to the entire purpose of SORA and must be rejected. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)).

Furthermore, this Court's decision misapprehends the intent of the last sentence of S.C. Code Ann. § 23-3-410 in any event. The "security system" addressed therein is simply a recognition that the Legislature has created a "private" registry for certain juveniles adjudicated

delinquent of certain offenses. The Legislature has in fact determined that this SORA information should be limited to certain requestors and should not be available to the general public. Specifically, S.C. Code Ann. § 23-3-490(D)(2) states that certain juvenile SORA information “shall only be made available, upon request, to victims of or witnesses to the offense, public or private schools, child day care centers, family day care centers, businesses or organizations that primarily serve children, women, or vulnerable adults, as defined in Section 43-35-10(11)” This limitation in access stands in stark contrast to the openness of all other SORA information, which is mandated to be made available to the general public. As such, SLED was mandated to create a “security system” to accommodate this limited access to the “private” registry and has done such. This in no way bears on the Plaintiff as there is no dispute that he was convicted as an adult and that § 23-3-490(D)(2) has no applicability to him.

In addition, the language of S.C. Code Ann. § 23-3-490(B) belies the Court’s ruling in this matter. This statute states in pertinent part,

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. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction.**

The clear and unequivocal language of this statute actually mandates that SLED provide requestors with access to specific information about sex offenders – “SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender’s date of birth, the home address on file, the

offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction.” S.C. Code Ann. § 23-3-490(B). In fact, based on the language set forth in S.C. Code Ann. § 23-3-490(B), if SLED were to disregard this unambiguous mandate and not make information available to requestors, SLED would in fact be acting *ultra vires* in violation of state law. Notably, S.C. Code Ann. § 23-3-490(B) does not contain any limitation on who the “requestor” could be (as argued by the Plaintiff) in direct contrast to S.C. Code Ann. § 23-3-490(D)(2), which does. This plain language of these statutes is contrary to the Court’s decision in this case.

In addition, the fact that S.C. Code Ann. § 23-3-490(A) is limited to sheriffs is of no consequence and must not be read to restrict or limit SLED’s ability to disseminate information. Rather, the separation of these two paragraphs stems only from the evolution of the statute throughout the legislative history. As discussed more fully above, S.C. Code Ann. § 23-3-490 has evolved over the years. Initially, SLED was in fact prohibited from releasing information, and S.C. Code Ann. § 23-3-490 provided that:

The provisions of this article do not authorize SLED to release information to the public unless a request is made in writing stating the name of the person making the request and the name of the person about whom information is sought. SLED is only authorized to release to the public the name of the county in which the offender is registered. Otherwise, SLED is not authorized to release any information contained in the registry to anyone other than law enforcement agencies, investigative agencies, and those agencies authorized by the court.

1996 South Carolina Laws Act 444 (S.B. 1286). As such, if this statute still existed, SLED would be acting *ultra vires*.

However, this statute was amended and no longer contains this limitation. In 1998, Legislature specifically expanded the information that SLED was authorized to disseminate to the current form of the statute, to wit:

(B) 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. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction....**

1998 South Carolina Laws Act 384 (H.B. 4805) (emphasis added). As such, the Court's determination that SLED is acting *ultra vires* is simply wrong.

In addition, it was in this same bill - 1998 South Carolina Laws Act 384 (H.B. 4805) that the Legislature specifically authorized both the sheriffs' offices and SLED to transmit Registry information to requestors via the internet. Specifically, S.C. Code Ann. § 23-3-490(E) was clearly added to expand on the media and format with which both the sheriffs' office and SLED disseminate information tacitly authorizes both the sheriffs' offices and SLED to use computerized or electronic transmission of data or other electronic or similar means. Notably, the Plaintiff's recitation of S.C. Code Ann. § 23-3-490(E) in his Addendum leaves off the beginning clause of (E). This section begins "[f]or the purposes of this section", which is a direct indication that (E) applies to both (A) and (B) and is simply an authorization to specifically allow both the sheriffs and SLED to use electronic means - *i.e.* computers and the internet - as the means of making information available to the public. The mischaracterization of the effect of Paragraph (E) inaccurately represents its role in the statute compared to Paragraphs (A) and (B). These paragraphs all work in conjunction with one another to form a single harmonious result; which is a specific tacit authorization for SLED and the sheriffs' offices to each make SORA Registry information available for access by the public through electronic or similar means - *i.e.* the internet.

This Legislative policy finding should be determinative in this matter as South Carolina Courts have also held that “[o]nce the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.” Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct.App.1989). This Court’s incorrect isolation of these sections does not comport with the rules of statutory interpretation. *See Senate by & through Leatherman v. McMaster*, No. 2018-001455, 2018 WL 6187801, at *4 (S.C. Nov. 28, 2018) (“we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute.”). As such, this Court’s decision should be reconsidered

Moreover, if, as incorrectly held by the Court, SLED was not authorized to make information available to the public on the internet, the Supreme Court would have addressed such in the Hendrix v. Taylor case. In that case, the Supreme Court specifically addressed SLED’s internet publication of SORA information. Rather than acknowledge the prohibition espoused by this Court, the Supreme Court in Hendrix in fact found the opposite and specifically directed that

under the “Offense” heading on the registry, SLED should provide (1) the state where the offense was committed; (2) the citation of that state’s statute that was violated; (3) the name of the crime committed; and (4) the date of conviction. For example, in this case, Appellant’s offense would appear under the “Offense” heading as follows:

Colorado
§ 18-3-404: Third Degree Sexual Assault
2000-03-08

Hendrix v. Taylor, 353 S.C. 542, 551–52, 579 S.E.2d 320, 325 (2003). Accordingly, it is inarguable that SLED is authorized to utilize the internet as a means of providing any and all public requestors information, and the binding precedent of this State indicates precisely that. *See State*

v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) *cert. denied sub nom. J.D.B. v. South Carolina*, No. 17-536, 2017 WL 4539709 (U.S.S.C. Nov. 27, 2017). Each and every one of these of the aforementioned cases was decided after SLED made SORA information available for access to the public by electronic or other similar means, *i.e.* the internet. As such, this precedent forecloses this action. Put simply, the Plaintiff's issue is not novel and has been tacitly and specifically rejected by South Carolina's binding jurisprudence. *Id.*

Furthermore, a plain reading of SORA as a whole reveals a clear and unequivocal intent that SLED make SORA information available to the public should the public wish to seek it out and that SLED is authorized to make such information available on the publically accessible internet. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); Senate by & through Leatherman v. McMaster, No. 2018-001455, 2018 WL 6187801, at *4 (S.C. Nov. 28, 2018). ("we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute.").

In addition, even assuming that SLED was in fact acting *ultra vires* and was providing the public with **too much information in too convenient a manner** (which SLED is not), the remedy for such would never be removal of the Plaintiff from the SORA registry, as this would be in direct contravention of the plain language of the SORA removal provisions – S.C. Code Ann. § 23-3-430(E), (F), and (G), which set forth the only lawful avenues of removal. The South Carolina Supreme Court has held that a "court's equitable powers **must yield** in the face of an

unambiguously worded statute.” Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm’n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). As such, even a finding that SLED were acting *ultra vires* (which SLED is not) would not authorize this Court to re-write SORA’s clear and ambiguous removal provisions and order that the Plaintiff be removed from the SORA registry entirely. *Id.* As such, this argument must fail.

In fact, every South Carolina appellate decision upholding the constitutionality of SORA, including all of the decisions finding that SORA is a civil and non-punitive statute, also found that SORA does not violate the equal protection or due process clauses of the constitution, and those decisions finding that SORA is not punishment (much less cruel and unusual punishment) were issued and decided after SLED’s online publication of Registry information on the internet. *See State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding that “the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest.”); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that “sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated.”); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008) (holding that registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) *cert. denied sub nom. J.D.B. v. South Carolina*, No. 17-536, 2017 WL 4539709 (U.S.S.C. Nov. 27, 2017) (reaffirming the constitutionality of SORA, even as related to online publication of juvenile Registry information, and reaffirming unequivocally that SORA is not punishment).

It is inarguable and incomprehensible to believe that these decisions were issued and decided without the Court's knowledge and appreciation of the publication of Registry information on the internet. Tellingly, the very decisions themselves belie this contention. *Id.* In 2003, the Supreme Court specifically acknowledged this fact in *Hendrix v. Taylor* noting,

when the South Carolina Law Enforcement Division ("SLED") registers a sex criminal due to his conviction of a sexual offense in another state, the agency must correctly state the offense the criminal committed in that jurisdiction. **Accordingly, under the "Offense" heading on the registry**, SLED should provide (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of conviction. **For example, in this case, Appellant's offense would appear under the "Offense" heading as follows....**

Hendrix v. Taylor, 353 S.C. 542, 551-52, 579 S.E.2d 320, 325 (2003) (emphasis added). It is axiomatic that the "Offense" heading referenced therein is the heading on the publically accessible Registry website and cannot be argued otherwise. *See Temple Affidavit.*

Moreover, in 2017, the South Carolina Supreme Court again acknowledged this premise in the context of juvenile registration on the publically accessible online registry in the case of *In the Interest of Justin B.* noting,

Justin B.'s age and the resulting **public registration** does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. *See Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (stating an "interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). A delinquent juvenile's reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but the juvenile's interest in that reputation is still neither liberty nor property. The responsibility of balancing the need to protect a juvenile's reputation against the need to "to promote the state's fundamental right to provide for the ... safety of its citizens," § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

In Interest of Justin B., 419 S.C. 575, 586, 799 S.E.2d 675, 681, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added). As such, it is factual

and legal error to argue that the internet changes any of the existing precedent in this State, which remains absolutely binding. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9; *see also* W. E. B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 312, 88 S. Ct. 450, 452, 19 L. Ed. 2d 546 (1967) (acknowledging that courts do not decide constitutional questions in a vacuum).

Furthermore, additional binding authority regarding the constitutionality of online publication is found in the landmark United States Supreme Court's decision in *Smith v. Doe*, which was also rendered after SLED, and other states, published Registry information online. In that decision, the U.S. Supreme Court specifically considered internet publication of sex offender information, and still unequivocally ruled that online public registration is non-punitive. *See Smith v. Doe*, 538 U.S. 84, 99, 123 S. Ct. 1140, 1150-51 (2003) (this decision was acknowledged by the South Carolina Supreme Court in In re Justin B., 405 S.C. 391, 747 S.E.2d 774 (2013) and in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)). The U.S. Supreme Court noted specifically:

The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. **The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.**

The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with

some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Smith v. Doe, 538 U.S. 84, 99, 123 S. Ct. 1140, 1150-51 (2003). South Carolina's SORA operates virtually identically to the website analyzed by the U.S. Supreme Court in *Smith v. Doe*. See Temple Affidavit. Moreover, the Defendants in this case do not utilize social media to disseminate Registry information. See *Id.*

Accordingly, the Court's determination that SLED's online publication is a new argument that somehow changes the analysis in this case and authorizes this Court to disregard binding precedent is legal error. See *Id.* As such, the plethora of binding precedent, discussed more fully below, remains the binding precedent that must be followed in this case. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (recognizing the decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. Therefore, the Court's decision must be altered and amended to comport with the binding precedent of this State.

EQUITABLE RELIEF IS NOT AVAILABLE AS A MATTER OF LAW

The equitable relief granted by this Court is not available as a matter of law. The binding precedent of this state mandates otherwise. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. The South Carolina Supreme Court held unequivocally that a "court's equitable powers **must yield** in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (emphasis added); see also Key Corporate Capital, Inc. v. County of Beaufort, 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). The South Carolina Legislature mandated lifetime SORA registration in South Carolina in clear, unequivocal, and unambiguous

statutory language. *See* S.C. Code Ann. § 23-3-460 (mandating registration for all offenders “for life”). The words “for life” in S.C. Code Ann. § 23-3-460 could not be more clear and unequivocal. Similarly, the Legislature has specifically enumerated avenues of relief that simply do not include equitable relief. *See* S.C. Code Ann. § 23-3-430(E),(F), and (G). Because the Legislature did not include such a provision in the statute, the canon of statutory construction *expressio unius est exclusion alterius*, which holds that to express or include one thing implies the exclusion of another, is determinative. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000); Black’s Law Dictionary 602 (7th ed. 1999). South Carolina courts have noted that this “maxim should be used to accomplish legislative intent [*i.e.* lifetime registration in South Carolina], not defeat it.” *S.C. Dep’t of Consumer Affairs v. Rent-A-Ctr., Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001). As such, no court can exercise equitable authority to change this statute.

Further, the binding authority in this State also provides that “[c]ourts may not ignore statutes, precedent, or other binding authority while providing an equitable remedy. *Johnson v. Lloyd*, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App. 2012) *reversed on other grounds by Johnson v. Lloyd*, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014). In *Johnson*, the Court of Appeals considered whether a circuit court could provide an equitable remedy that removed appellant from the sex offender registry, despite the fact that the sex offender registry provides methods for removal that the appellant did not qualify to utilize. The answer was clear and unequivocal:

The General Assembly enacted an unambiguously worded statute that sets for the legal remedies available to an individual on the registry. Because the sex offender statute provides an adequate remedy for Johnson, it was error for the circuit court to fashion an equitable remedy in this case.

Id., 399 S.C. 470, 476-77, 732 S.E.2d 198, 201. Although the Supreme Court subsequently overruled the Court of Appeals decision, the basis was not a flaw in the Court of Appeals' rationale or ruling on the merits: "[b]ecause the State failed to argue that Petitioner [Johnson] was not entitled to equitable relief until its brief to the Court of Appeals, the issue was not preserved for appellate review. **We therefore reverse the Court of Appeals' opinion on preservation grounds.**" Johnson v. Lloyd, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) (emphasis added). Accordingly, the Court of Appeals decision in *Johnson* remains binding precedent on the issue of equitable authority.

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, 255 (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). 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. South Carolina Law Enforcement Division, 395 S.C. 509, 719 S.E.2d 258, 259 (2011).

Furthermore, for a Court to fashion an equitable remedy in the face of an unambiguously worded statute would be a clear violation of the South Carolina Constitution's mandate for the separation of powers. See S.C. Const. art. I, § 8. The South Carolina Constitution specifically provides that "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." S.C. Const. art. I, § 8. The duration of sex offender registration is a matter of public policy that is solely in the province of the South Carolina Legislature. As such, any attempt by any court to invade the Legislature's

exclusive province is a violation of the separation of powers and is unconstitutional. *Id.* In addition, the South Carolina Supreme Court specifically held that

[i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Id.* Moreover, **"it is beyond this Court's power to effect a change in the statutes enacted by the Legislature."** State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (emphasis added). This entire action seeks for this Court to impermissibly and unconstitutionally act as a "superlegislature" and to add language to an unambiguously worded constitutional statute. As such, this request must fail and the Defendants are entitled to summary judgment in this matter.

This situation is comparable to legislatively mandated sentences for criminal offenses, whether minimums or maximums. With regard to sentencing for an offense that has a mandatory sentence range, the South Carolina Legislature has unilaterally prohibited judges from sentencing individuals outside the statutorily set amounts. However, these statutory ranges, and more specifically the statutorily mandated minimum sentences are, and have been consistently upheld as being, lawful. *See* State v. De La Cruz, 302 S.C. 13, 393 S.E.2d 184 (1990); State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); State v. Johnson, 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002). In fact, the South Carolina Supreme Court conclusively resolved this issue in *State v. De La Cruz* indicating

[w]e have held in the past that "[t]he penalty assessed for a particular offense is, except in the rarest of cases, **"purely a matter of legislative prerogative,"** and the legislature's judgment will not be disturbed." State v. Smith, 275 S.C. 164, 167, 268 S.E.2d 276, 277 (1980) (quoting Rummel v. Estelle, 445 U.S. 263, 100 S.Ct.

1133, 63 L.Ed.2d 382 (1980)). Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction. See Mistretta v. United States, 488 U.S. 361, ---, 109 S.Ct. 647, 650, 102 L.Ed.2d 714, 725-726 (1989), wherein the United States Supreme Court noted, "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." (Citing United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 5 L.Ed. 37 (1820); Ex Parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916)).

302 S.C. 13, 15-16, 393 S.E.2d 184, 186 (1990) (emphasis added).² 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 and South Carolina law. S.C. Const. art. I, § 8; S.C. Code Ann. §23-3-430; S.C. Code Ann. § 23-3-460 (setting forth lifetime registration in South Carolina in an unambiguously worded statute).

In this case, relying on overturned law, this Court improperly found equitable jurisdiction and granted equitable relief. See Key Corp. Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004) *reversed by* Key Corp. Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.C.2d 675 (2007). Notably, this Court has acknowledged on at least one prior occasion that it did not have equitable jurisdiction in similar SORA challenges.

On November 3, 2015, this Court granted summary judgment to the Defendants on a similar case and ruled that the constitutional application of the clear and unambiguous provisions of the Sex Offender Registry Act is not a "wrong cognizable in South Carolina law". This Court also ruled that fashioning a remedy outside the clear and unambiguous provisions of SORA would exceed his equitable powers and that his equitable powers must yield in the face of South Carolina's clear and unambiguous sex offender registry statutes. David Johnson v. Mark Keel,

² It is noteworthy that sex offender registration has been consistently held not to be "punitive in purpose or effect as to constitute a criminal penalty." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). However, the same sentiment would apply to an administrative requirement like registration in terms of the legislative prerogative.

Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2015-CP-43-0033, November 6, 2015 (unpublished). This decision was affirmed by the South Carolina Court of Appeals in an unpublished opinion on May 11, 2017, to wit: David Johnson v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Appellate Case No.: 2015-002387 (unpublished). *See* Attachment 1.

Similarly, this Court rejected a challenge for removal that did not adhere to the statutory avenues of relief in the matter of Gary Whisonant #368531 v. Mark Keel, Chief of the South Carolina Law Enforcement Division Civil Action No(s): 2017-CP-4006379, January 24, 2017 (unpublished). *See* Attachment 2. In finding no genuine issue of material fact, this Court noted that there is no legal basis for removal from the SORA registry outside the statutory avenues of relief and that the removal question was a matter of law. *Id.*

As such, even this Court has acknowledged in previous situations that there simply is no equitable jurisdiction in this matter. To that end, the binding authority in this State also provides that “[c]ourts may not ignore statutes, precedent, or other binding authority while providing an equitable remedy. Johnson v. Lloyd, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App.2012) *reversed on other grounds by Johnson v. Lloyd*, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014). Accordingly, this Court’s current ruling to the contrary should be altered, amended, and reconsidered.

CONSTITUTIONAL CHALLENGES IN THIS ACTION

As an overarching tenet regarding the fallacy of this Court’s legal determination in this case, the Defendants would assert South Carolina law mandates that “all statutes are presumed constitutional and, if possible, will be construed to render them valid.” Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001); Joytime Distributors and Amusement Co., Inc. v. State, 338

S.C. 634, 640, 528 S.E.2d 647, 650 (1999); Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). Further, a “legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.” Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (citing Westvaco Corp. v. South Carolina Dep’t of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995)). “A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.” Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). As such, all of the statutes in question must be presumed as constitutional in this action because there is and can be no showing of any legitimately cognizable repugnance to the constitution, much less one that is beyond a reasonable doubt. However, this Court did not even address or acknowledge the same in its decision.

Further, the binding precedent in this state, which is set forth below, conclusively resolves this entire action as a matter of law contrary to this Court’s ruling. The most compelling recitation of this precedent was provided by the South Carolina Supreme Court in *In Interest of Justin B.* from 2017 in which the court noted

As the family court indicated, we have already addressed many of the issues Justin B. raises in his challenge to the imposition of sex offender registration and electronic monitoring requirements. In *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002), we considered whether the sex offender registry violated the *ex post facto* clauses of the state and federal constitutions. 348 S.C. at 29, 558 S.E.2d at 525. We stated, “For the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature.” 348 S.C. at 30, 558 S.E.2d at 526. **We then held the sex offender registry did not violate the *ex post facto* clause because “it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes.”** 348 S.C. at 31, 558 S.E.2d at 526.

In *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003), we considered whether requiring a convicted Colorado sex offender to register in South Carolina violated the equal protection and due process clauses of the state and federal constitutions. 353 S.C. at 547, 579 S.E.2d at 322. As to the equal protection challenge, we found classifying an out-of-state sex offender as a sex offender in South Carolina “did not affect a fundamental right,” and therefore we applied the “rational relationship” test. 353 S.C. at 550, 579 S.E.2d at 324. Under that test, a statutory classification will be constitutional if the “classification bears a reasonable relation to the legislative purpose,” “the members of the class are treated alike under similar circumstances and conditions,” and “the classification rests on some reasonable basis.” *Id.* (quoting *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)). We held requiring an out of state offender to register in South Carolina was “reasonably related to the legitimate state purpose of protecting the public and aiding law enforcement in limiting the risk that sex offenders pose to communities.” *Id.* As to the due process challenge, we followed our holding in *Walls* that the sex offender registry is non-punitive and did not implicate a liberty interest, and therefore held there was no due process violation. 353 S.C. at 552, 579 S.E.2d at 325 (citing *Walls*, 348 S.C. at 31, 558 S.E.2d at 526).

Later that year, we decided *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003), in which an eleven-year-old challenged the mandatory lifetime registration requirement after he was found to have committed criminal sexual conduct with a minor. We followed *Hendrix*, and held “sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated.” 355 S.C. at 409, 585 S.E.2d at 312 (citing *Hendrix*, 353 S.C. at 552, 579 S.E.2d at 325).

We reiterated our holding in *Walls* that the legislative purpose for the sex offender registry “is to protect the public from those offenders who may re-offend.” *Id.* (citing *Walls*, 348 S.C. at 31, 558 S.E.2d at 526). We then concluded, “The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. Appellant has offered no valid basis upon which to distinguish juvenile sex offenders for purposes of due process.” 355 S.C. at 409-10, 585 S.E.2d at 312.

Finally, we considered an Eighth Amendment challenge to the section 23-3-540 requirement that juveniles submit to electronic monitoring for life in *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013). We held “the General Assembly intended section 23-3-540 as a civil scheme for the protection of the public.” 405 S.C. at 405, 747 S.E.2d at 781. We concluded, “Section 23-3-540’s electronic monitoring scheme bears a clear and rational connection to a non-punitive purpose,” and stated “the continuous monitoring of these offenders supports the General Assembly’s valid purpose of aiding law enforcement in the protection

of the community.” 405 S.C. at 407, 747 S.E.2d at 782-83. We held, however, “sex offenders ... are entitled to ‘avail themselves of the section 23-3-540(H) judicial review process.’ ” 405 S.C. at 408, 747 S.E.2d at 783 (quoting *State v. Dykes*, 403 S.C. 499, 510, 744 S.E.2d 505, 511 (2013))....

Justin B.’s age and the resulting public registration does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. *See Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (stating an “interest in reputation ... is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law”). A delinquent juvenile’s reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but the juvenile’s interest in that reputation is still neither liberty nor property. The responsibility of balancing the need to protect a juvenile’s reputation against the need to “to promote the state’s fundamental right to provide for the ... safety of its citizens,” § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

V. Conclusion

The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor is not a punitive measure, and the requirement bears a rational relationship to the Legislature’s purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. The requirement, therefore, is not unconstitutional. If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts. The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (internal citations omitted) (emphasis added). This decision is binding precedent that ends any constitutional argument in this matter as a matter of law. *See Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. Accordingly, this Court’s decision to the contrary should be reconsidered.

I. Equal Protection

“The initial inquiry in [this as with] any equal protection analysis is whether the plaintiff made ‘a showing that similarly situated persons received disparate treatment.’” State v. Walker, 422 S.C. 89, 92, 810 S.E.2d 38, 40 (2018). **The undisputed facts of this case are clear, unequivocal, and incontrovertible; the Plaintiff is in fact treated the SAME as all other similarly situation South Carolina registrants.** See RCSO Affidavit; Temple Affidavit. The Plaintiff does not even endeavor to claim otherwise and cannot. Rather, the Plaintiff claims that because other states treat their sex offenders differently that the Plaintiff **SHOULD** be treated differently than all other similarly situated South Carolina registrants. This is a perversion of equal protection and cannot form the basis of this Court’s decision in this matter.

The United States Supreme Court has long recognized that “[e]very state is entitled to enforce in its own courts its own statutes lawfully enacted....” Williams v. State of North Carolina, 317 U.S. 287, 295, 63 S.Ct. 2017, 212 (1942). In Sun Oil Co. v. Wortman, the United States Supreme Court acknowledged that a state cannot be compelled by the Full Faith and Credit Clause to substitute the statute of another state when “dealing with a subject matter concerning which it is competent to legislate.” 486 U.S. 717, 722 (1988) (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493, 501 (1939)). In addition, in Alaska Packers Association v. Industrial Accident Commission, the United State Supreme Court recognized “that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy.” 294 U.S. 532, 546-47 (1935). Moreover, the Court went on to state that the sovereignty of states to enforce their own laws is even more pressing because “a rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the

absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.” *Id.* at 547. As such, the Plaintiff’s attempts to violate South Carolina sovereignty by comparing his treatment to that of other states fails as a matter of law.

In addition, the binding precedent of this State indicates that the Plaintiff is not part of a suspect class, nor does his placement on the sex offender registry affect a fundamental right. *See Hendrix v. Taylor*, 353 S.C. 542, 549-50, 579 S.E.2d 320, 324 (2003) (citing *Cutshall v. Sundquist*, 193 F.3d 466, 483 (6th Cir. 1999)). The Plaintiff does not even allege otherwise. Therefore, the “rational relationship” test should be applied to determine whether the sex offender registry laws violate the Plaintiff’s right to equal protection. *Hendrix v. Taylor*, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003). Under this test, the Plaintiff’s classification as a sex offender in South Carolina is justified and does not violate equal protection 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.” *Id.* (quoting *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 599, 600 (2001)).

The South Carolina Supreme Court previously ruled in mandatory binding precedent that the SORA Registry “complies with the first prong of the test, as the legislative purpose is clearly defined” in the text of the law. *Hendrix v. Taylor*, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003) (citing S.C. Code Ann. § 23-3-400). Classifying an individual as a sex offender is “reasonably related to the legitimate state purpose of protecting the public and aiding law enforcement in limiting the risk that sex offenders pose to communities.” *Id.*; *see also In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003). Registration as a sex offender is not a punishment, but rather a regulatory requirement imposed to promote public safety. *Williams v. State*, 378 S.C.

511, 516, 662 S.E.2d 615, 618 (2008); *see also* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). As such, the Plaintiff unequivocally fails on the first prong.

In addition, all members of the Plaintiff's class, *i.e.* those persons convicted of Criminal Solicitation of a Minor, are treated identically. *See* Temple Affidavit. And, all members of the class "are subject to uniform administrative and legal procedures." Hendrix v. Taylor, 353 S.C. 542, 550, 551, 579 S.E.2d 320, 324 (2003) *see also* Temple Affidavit. It is indisputable that the Plaintiff is in fact treated identically to all similarly situated South Carolina registrants, and the Plaintiff does not even allege otherwise. As such, the Plaintiff unequivocally fails on the second prong.

And, as to the third and final component of the test, the South Carolina Supreme Court has determined in binding precedent that classification of the Plaintiff as a sex offender "is reasonable because the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal." Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003). Further, the Registry accomplishes this goal. *See* S.C. Code Ann. § 23-3-400; Temple Affidavit; Victims' Advocate Affidavit.

In sum, the South Carolina Legislature has determined unequivocally that the Registry is the appropriate mechanism by which to provide for the public health, welfare, and safety of South Carolina citizens; that the Registry provides law enforcement with tools needed to investigate; and that sex offenders as a class pose a risk of re-offending. *See* S.C. Code Ann. § 23-3-400 *et seq.* And, according to the United States Supreme Court, the Legislature has the authority to do this:

Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. 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**.

Smith v. Doe, 538 U.S. 84, 103, 123 S.Ct. 1140, 1153 (2003) (emphasis added) (rejecting an argument that the Alaska registry law was excessive because it applies to all convicted sex offenders without regard to their future dangerousness). Accordingly, similar to Alaska, the South Carolina Legislature has enacted a Registry that protects all South Carolinians and aids law enforcement. As such, the Plaintiff unequivocally fails the third prong.

Further, any attempt to redefine existing law to include a distinction between “low-risk sex offenders” and “diagnosed sexual predators” must fail as a matter of law. *See* S.C. Code Ann. § 23-3-400 (stating the purpose of the Registry as applicable to all offenders, which has been recited countless times by South Carolina appellate courts). The binding precedent on point and the South Carolina Constitution prohibits the Plaintiff or any Court from re-writing the existing statutes to include categories of offenders that simply do not exist in the law. *See Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (indicating that it is beyond a Court’s power to change a statute or second guess the wisdom or folly of the Legislature); S.C. Const. art. I, § 8 (mandating separation of powers between the Legislature and the Courts). Put simply, it is a matter of legislative prerogative to have one single class of offenders who are treated the same, and regardless of Plaintiff’s or any Court’s opinion on what the Legislature “should” do, the law mandates adherence to the clear and unequivocal Legislative prerogative. *Id.* As such, the Plaintiff’s equal protection claim fails as a matter of law and this Court’s decision must be altered or amended.

II. Due Process

“The substantive due process guarantee ensures that legislation which deprives a person of a life, liberty, or property right [has], at a minimum, a rational basis, and not be arbitrary or overly vague.” In re Treatment and Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346

(2002). As discussed above, the binding precedent in this state has conclusively rejected this claim.

The most compelling recitation of the argument on this specific precedent was provided by the South Carolina Supreme Court in *In Interest of Justin B.* from 2017 in which the court noted

As to the due process challenge [in *Hendrix*], we followed our holding in *Walls* that the sex offender registry is non-punitive and did not implicate a liberty interest, and therefore held there was no due process violation. 353 S.C. at 552, 579 S.E.2d at 325 (citing *Walls*, 348 S.C. at 31, 558 S.E.2d at 526).

Later that year, we decided *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003), in which an eleven-year-old challenged the mandatory lifetime registration requirement after he was found to have committed criminal sexual conduct with a minor. **We followed *Hendrix*, and held “sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated.” 355 S.C. at 409, 585 S.E.2d at 312 (citing *Hendrix*, 353 S.C. at 552, 579 S.E.2d at 325).**

We reiterated our holding in *Walls* that the legislative purpose for the sex offender registry “is to protect the public from those offenders who may re-offend.” *Id.* (citing *Walls*, 348 S.C. at 31, 558 S.E.2d at 526). We then concluded, **“The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. Appellant has offered no valid basis upon which to distinguish juvenile sex offenders for purposes of due process.” 355 S.C. at 409-10, 585 S.E.2d at 312.**

Justin B.’s age and the resulting public registration does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. See *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (stating an “interest in reputation ... is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law”). A delinquent juvenile’s reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but the juvenile’s interest in that reputation is still neither liberty nor property. The responsibility of balancing the need to protect a juvenile’s reputation against the need to “to promote the state’s fundamental right to provide for the ... safety of its citizens,” § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

V. Conclusion

The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor is not a punitive measure, and the requirement bears a rational relationship to the

Legislature's purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. **The requirement, therefore, is not unconstitutional.** If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts. The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

In Interest of Justin B., 419 S.C. 575; 580–82, 586–87, 799 S.E.2d 675, 677–78, 681, *cert. denied* *sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added).

This case is binding precedent.

Notably, this decision was also issued after the *Dykes* decision relied on by the Court and this decision in fact references the *Dykes* case. Accordingly, had *Dykes* espoused a new due process test, as erroneously found by this Court, it would have been discussed and applied in *Justin B.* However, *Dykes* did not announce a new substantive due process test, and it is error to hold otherwise. The South Carolina Supreme Court has specifically acknowledged this in *State v. Nation* noting,

A majority of this Court rejected *Dykes*'s arguments, holding that mandatory GPS monitoring **did not violate *Dykes*'s right to substantive due process.** *Id.* at 503, 744 S.E.2d at 507; *see also id.* at 510 n. 9, 744 S.E.2d at 511 n. 9 (**rejecting *Dykes*'s remaining arguments**). **Specifically, we disagreed with *Dykes*'s assertion that, as a convicted sex offender, she had a fundamental right to be "let alone."** *Id.* at 505–06, 744 S.E.2d at 508–09 ("The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense." (citing *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997))). 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.* at 506, 744 S.E.2d at 509. In light of the General Assembly's intent to protect the public from sex offenders and aid law enforcement, we held that an initial, mandatory imposition of GPS monitoring for certain sex crimes involving children was rationally related to the law's stated purpose. *Id.* at 507–08, 744 S.E.2d at 509–10.

Despite generally upholding the constitutionality of *Jessie's Law*, we found the final sentence of subsection (H) unconstitutional as arbitrary and not rationally

related to the statute's purpose. *Id.* at 508, 744 S.E.2d at 510 (citing S.C. Code Ann. § 23-3-540(H)).

State v. Nation, 408 S.C. 474, 479-80, 759 S.E.2d 428, 431 (2014), *abrogated by* State v. Ross, 423 S.C. 504, 815 S.E.2d 754 (2018) (such abrogation being on other grounds) (emphasis added). As such, there is no *Dykes* test that can be used or relied on by the Court, and the precedent set forth in *Justin B.* remains the binding authority in this State specifically rejecting a due process challenge to the Registry. In Interest of Justin B., 419 S.C. 575, 580-82, 586-87, 799 S.E.2d 675, 677-78, 681, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017).

Accordingly, there is no viable due process claim based on the lack of individual judicial review of Plaintiff's registration requirement. In fact, the Supreme Court in *Dykes* specifically rejected this argument. See State v. Dykes, 403 S.C. 499, 510 n. 9, 744 S.E.2d 505, 511 n. 9 (rejecting *Dykes*' procedural due process claim under Rule 220, SCACR). The United States Supreme Court has also rejected this argument. See Connecticut v. Doe, 538 U.S. 1, 8 (2003) ("rejecting sex offender's due process argument requesting a hearing on his current level of dangerousness, and stating those 'who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in the hearing are relevant to the statutory scheme'").

Therefore, the espoused precedent in this state remains binding authority. See Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. **Specifically, "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."** In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (emphasis added); Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003); In Interest of Justin B., 419 S.C. 575, 580-82, 586-87, 799 S.E.2d 675, 677-78, 681, *cert. denied sub nom. J.D.B. v. South Carolina*,

138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). As such, the Plaintiff's due process claim fails as a matter of law and this Court's decision to the contrary should be reconsidered.

III. The Plaintiff's Claims for Excessive Punishment Fail as a Matter of Law

In addition, contrary to this Court's decision, South Carolina courts have conclusively held that registration pursuant SORA is not punishment. See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding that "the length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest."); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); In Interest of Justin B., 419 S.C. 575, 580-82, 586-87, 799 S.E.2d 675, 677-78, 681, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). This precedent does not change with online publication of Registry information on the internet, which, of course, occurred prior to such decisions. See Temple Affidavit; *supra*.

Moreover, the South Carolina Legislature also made it abundantly clear that the intent of SORA is "to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens" and to "provide law enforcement with the tools needed in investigating criminal offenses." S.C. Code Ann. § 23-3-400. In that regard, the South Carolina Supreme Court has held that registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety. See Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008). And the Registry accomplishes this stated intent. See Victims' Advocate Affidavit; Temple Affidavit. As such, any claim asserting that SORA registration constitutes punishment of any kind, much less excessive punishment, fails as a matter of law.

IV. Ex Post Facto

In addition, this Court's finding that Plaintiff's SORA registration constitutes acts as an *ex post facto* violation is legal error on an issue that was not properly raised at any time in this matter. Notably, this argument is absent from Plaintiff's Complaint or the Motion for Summary Judgment filed by the Plaintiff. In addition, regardless of the deficiency of process on this issue, this Court's determination of this issue is in complete disregard of binding South Carolina precedent. See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) ("We [the South Carolina Supreme Court] find the [Sex Offender Registration] Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions."). See Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. It is noteworthy that the law in question regarding SLED's authority to electronically transmit SORA information was enacted in 1998, 10 years prior to the Plaintiff's guilty plea. Similarly, SLED began publishing SORA information on the internet in 1999, again 10 years prior to the Plaintiff's guilty plea. Accordingly, laws and decisions occurring 10 years prior to application to the Plaintiff simply cannot properly be held to be *ex post facto*. Accordingly, this Court's decision must be reconsidered.

INACCURACIES AND MISCHARACTERIZATIONS

Although aforementioned South Carolina law and jurisprudence indicates that there is no legally cognizable constitutional or equitable claim in this matter, the Defendants are informed and believe that rebutting the Court's myriad of incorrect assertions is not required because none of these have any bearing whatsoever on the decision in this case. However, the Defendants would

like to take this opportunity to “set the proverbial record straight” regarding factual inaccuracies and mischaracterizations.

1. Mischaracterization of Doctor Evaluations and Risk of Reoffending

The Court found that the Plaintiff is of no risk of reoffending and that his recidivism rate is “zero percent”. *See* Order p. 17. This finding is absolutely unsupported by the evidence in this matter and even the Plaintiff’s own doctors contravene this finding. Dr. William Burke evaluated the Plaintiff in 2009. *See* Burke Evaluation. He provided in his evaluation that “Based upon the STATIC-99 score, this places Mr. Powell in the **Low Medium risk category** relative to other adult male sex offenders.” This indicates unequivocally that the Plaintiff has a risk of reoffending, albeit a Low Medium risk. The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders that provides scores that are either in the Low, Medium-Low, Medium-High, or High Category. *Id.* There is not even a category for **no risk** of recidivism because that category does not exist. As such, Dr. Burke clearly concluded that the Plaintiff presents a risk of reoffending, and this cannot be argued otherwise. *Id.*

The Plaintiff also sought out the services of Dr. Thomas V. Martin in 2009. *See* Martin 2009. Dr. Martin opined in his evaluation: “It is also my opinion that Mr. Powell is a low-risk to re-offend sexually while he continues in therapeutic treatment.” *Id.* Furthermore, Dr. Martin provided an affidavit in this current action in which Dr. Martin stated, “[i]t is the opinion of this Examiner to a reasonable degree of medical and psychiatric certainty that Mr. Powell poses a very low risk to sexually reoffend.” Martin 2017. As such, even Dr. Martin concluded on two separate occasions that the Plaintiff is at risk of reoffending, albeit a low one – not that he presents **no risk**. As such, it is factually and legally inaccurate to articulate otherwise.

Most significant in the matter of reoffending is that the South Carolina General Assembly explicitly stated in S.C. Code Ann. § 23-3-400, which is the purpose section of SORA, that “[s]tatistics show that sex offenders often pose a high risk of re-offending.” This is a statutory finding that is well within the province of the Legislature to make. *See Smith v. Doe*, 538 U.S. 84, 103, 123 S.Ct. 1140, 1153 (2003). As such, there is no conclusion that can be derived after an **accurate reading** of the evaluations of the Plaintiff’s two different doctors provided that concludes the Plaintiff poses **no risk** of reoffending. Accordingly this Court’s finding is factually incorrect.

2. Criminal Solicitation with a Minor is not a Victimless Crime

The growth of the internet in the last two decades has given rise to a new and dangerous avenue for sexual predators to prey on minors. The ability to solicit minors for sexual purposes is now possible with simply a few keystrokes. Accordingly, this crime is taken very seriously by the State of South Carolina. The South Carolina Attorney General’s Office and other state and federal prosecutors dedicate considerable resources, often in unison with other state and federal law enforcement agencies, to arrest and prosecute these dangerous predators. The crime of criminal solicitation specifically provides that a person is guilty if the person has the **intent** to perform a sexual act in the presence of a person under the age of eighteen, or a person **reasonably believed** to under the age of eighteen. *See* S.C. Code Ann. § 16-15-342. The Plaintiff’s guilty plea constitutes an admission of such. *See* Sentencing Sheet; Plea Transcript.

In order to protect vulnerable minors in our society from irreversible harm, this law exists because simply attempting this type of sexual conduct with someone believed to be under eighteen is a most serious offense. Often times, arrests for this offense occur after a “sting” operation, which is when law enforcement poses undercover online as minors in order to catch these sexual

predators. To say this is a victimless crime because the solicited person is not actually a minor is directly contrary to the conduct the law seeks to prevent, and it goes against the government's mandate to protect society from these dangerous individuals. Lastly, SORA has the express purpose of aiding law enforcement and protecting the public. As such, SORA provides no distinction between whether an actual minor is solicited or an undercover police officer is solicited, because what matters is simply the intent of the perpetrator, which in this case was for a 22-year old that

did knowingly though the Internet contact and communicate with a person located within the County of Lexington, State of South Carolina, whom he reasonably believed to be a twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing this person to engage or participate in a sexual activity as defined in Section 16-15-375(5).

See Indictment.

Put simply, Criminal Solicitation of a Minor is not a victimless crime and to say that it is constitutes an affront to all victims of sexual offenses because this completely disregards the ripple effect that crime has on the victims themselves and community at large. *See* Victims' Advocate Affidavit. It is error for this Court to hold otherwise.

3. Plaintiff's Additional Claims of "Hardship"

This Court's finding that Plaintiff's is a victim of numerous "hardships", none of which are relevant to this action as legally cognizable direct punishment attributable to the Registry, is error. The 2008 South Carolina Court of Appeals case *Williams v. State* addressed the characterization of "consequences" related the sexual offender registry. "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." *Williams v. State*, 378 S.C. 511, 514, 662 S.E.2d 615, 617 (2008) (citing *Brown*

v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991)). The court determined that a defendant does not have to be advised of all of the collateral consequences of his plea in order for the plea to withstand constitutional scrutiny. “The distinction between ‘direct’ and ‘collateral’ consequences of a plea ... turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Williams v. State, 378 S.C. 511, 515 (2008) (internal citations omitted). A consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. Williams v. State, 378 S.C. 511, 515 (2008). In *Williams*, the Court found that sex offender registration is a collateral consequence, not a direct consequence. *Id.* As such, the Plaintiff’s claims of hardship are not even collateral consequences. In fact, they are best characterized as collateral to the collateral consequence of registration. Accordingly, any perceived hardship suffered by the Plaintiff, even if assumed as true, has no bearing whatsoever on this action and simply does not rise to the level of legally cognizable punishment. See Williams v. State, 378 S.C. 511, 514, 662 S.E.2d 615, 617 (2008).

Therefore, even assuming all of the Plaintiff’s “hardships” as true, this does not and cannot alter the binding precedent in this State which concludes unequivocally that online public registration is **NOT PUNISHMENT**. See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that “sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated.”); In Interest of Justin B., 419 S.C. 575, 580-82, 586-87, 799 S.E.2d 675, 677-78, 681, *cert. denied sub. nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017).

Moreover, the Plaintiff is treated the same as all other similarly-situated South Carolina sex offenders and can claim no disparate treatment whatsoever. *See* RCSO Affidavit; Temple Affidavit. Accordingly, this Court's decision must be altered and amended. In addition, this Court improperly relied on several items outside the record in this matter, including pre-filed legislation.

THE PLAINTIFF CLAIMS IN THIS ACTION FAIL AS A MATTER OF LAW

The South Carolina Legislature has mandated that SORA registration in South Carolina is for life. *See* S.C. Code Ann. § 23-3-460 (mandating registration "for life"). This lifetime mandate is set forth in clear, unequivocal, and unambiguous statutory language and represents the clear policy of South Carolina's lawmakers. As such, this specific statutory language is determinative and leaves no room for judicial interpretation or second-guessing. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.") (internal citations omitted). Further, South Carolina jurisprudence on this issue is clear, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261, 262 (1998) (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)).

SORA, and more specifically S.C. Code Ann. § 23-3-430(E), (F), (G), provides the only lawful mechanisms and avenues by which an individual can be removed from the SORA 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). 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. S.C. Code Ann. § 23-3-430(F). And finally, pursuant to § 23-3-430(G) individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial are removed. S.C. Code Ann. § 23-3-430(G). However, there is no genuine issue of material fact to suggest that Plaintiff meets any of these statutory criteria and, in fact, he concedes that he does not. *See* Complaint. Accordingly, there is no legal or constitutional basis for the Plaintiff to be removed from the SORA registry and the Defendants are entitled to judgment as a matter of law. As was conclusively held in *Justin B.*,

If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts. The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied*, *sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). As such, the Plaintiff has brought his arguments to the wrong forum and only the South Carolina Legislature can rewrite the clear and unequivocal laws applicable to this case.

CONCLUSION

This Court's decision to disregard binding and authoritative Supreme Court precedent is legal error. *See State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent."); S.C. Const. art. V, § 9 ("The decisions

of the Supreme Court shall bind the Court of Appeals as precedents.”) As such, the binding precedent of this State as set forth above is determinative in this matter.

Accordingly, for the reasons stated above, any to be set forth in any subsequent memorandum of law, and all those advanced at any hearing on this matter; this Court’s decision to grant Plaintiff judgment as a matter of law must be altered, amended, and reconsidered.

Respectfully Submitted,

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Attorney General

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**ATTORNEYS FOR THE STATE OF SOUTH
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ATTORNEYS FOR CHIEF KEEL AND SLED

COLUMBIA, SOUTH CAROLINA
MAY 17, 2019

The Supreme Court of South Carolina

David Johnson, Petitioner,

v.

Mark Keel, Director, South Carolina Law Enforcement
Division (SLED) and the State of South Carolina,
Respondents.

Appellate Case No. 2017-001695

Lower Court Case No. 2015-CP-43-00033

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

James, J., not participating

Columbia, South Carolina

September 29, 2017

cc: -

The Honorable Jenny Abbott Kitchings
Charles Thomas Brooks, III, Esquire
Adam L Whitsett, Esquire

T. Parkin C. Hunter, Esquire
The Honorable James C. Campbell

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David Johnson, Appellant,

v.

Mark Keel, Director, South Carolina Law Enforcement
Division (SLED) and the State of South Carolina,
Respondents.

Appellate Case No. 2015-002387

Appeal From Sumter County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-192
Submitted April 1, 2017 – Filed May 11, 2017

AFFIRMED

Charles Thomas Brooks, III, of Law Office of Charles T.
Brooks, III, of Sumter, for Appellant.

Adam L. Whitsett, of the South Carolina Law
Enforcement Division, and Senior Assistant Attorney
General T. Parkin C. Hunter, both of Columbia, for
Respondents.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: Rule 56(c), SCRCP (providing a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) ("On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party."); S.C. Code Ann. § 23-3-460(A) (Supp. 2016) ("A person required to register [on the sex offender registry] is required to register biannually *for life*." (emphasis added)); S.C. Code Ann. § 23-3-430 (E), (F), (G) (2007 & Supp. 2016) (setting forth three statutory mechanisms by which a person's name may be removed from the sex offender registry); *Key Corp. Capital, Inc. v. Cty. of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007) ("If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (quoting *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006))); *id.* ("[T]his [c]ourt does 'not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.'" (quoting *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996))); *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) ("It is well known that equity follows the law." (quoting *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007))); *id.* ("When providing an equitable remedy, the court may not ignore statutes, rules, and other precedent."); *Key Corp.*, 373 S.C. at 61, 644 S.E.2d at 678 ("Indeed, a 'court's equitable powers must yield in the face of an unambiguously worded statute.'" (quoting *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989))).

AFFIRMED.¹

WILLIAMS and KONDUROS, JJ., and LEE, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

RECORDED

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4300033

David Johnson

2015 NOV -9 AM 9:34

Mark Keel

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

RECEIVED

CERTIFIED TRUE COPY

OF ORIGINAL FILED

NOV 18 2015

DEPUTY CLERK OF COURT

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2126

11/9/2015

Judge Code

Date

For Clerk of Court Office Use Only

CPFORM4Cm
SOCA SCRPC Form 4C (Revised 3/2013)

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box and to attorneys of record or to parties (when appearing pro se) as follows:

Charles Thomas Brooks III 309 Broad St. Sumter, SC
29150

Adam L Whitsett PO Box 21398 Columbia, SC 29221

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
David Johnson,
Plaintiff,
v.
Mark Keel, Director, South Carolina Law
Enforcement Division (SLED) and the
State of South Carolina,
Defendants.

RECORDED IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No.: 2015-CP-43-00033
2015 NOV -6 PM 2:54
JAMES S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY S.C.

ORDER GRANTING SUMMARY
JUDGMENT

CERTIFIED TRUE
OF ORIGINAL FILE
DEPUTY CLERK
SUMTER
SOUTH CAROLINA

This matter came before me on October 26, 2015 on the Defendants' Motion for Summary Judgment. The Defendants were represented at the hearing by Adam L. Whitsett, Esquire, General Counsel to the South Carolina Law Enforcement Division.¹ The Plaintiff was represented by Charles T. Brooks, III, Esquire, of The Brooks Law Office, LLC. Based upon the arguments presented at the hearing and the applicable South Carolina law, I hereby GRANT the Defendants' Motion for Summary Judgment.

BACKGROUND

The Plaintiff was convicted of Criminal Sexual Conduct with a Minor 1st Degree in 1992. The Plaintiff was sentenced to twenty-six (26) years of incarceration for this offense. Upon the Plaintiff's release from incarceration, he was required and did in fact register as a sex offender pursuant to the South Carolina Sex Offender Registry Act, § 23-3-400 *et seq.* ("SORA"). See State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (holding that SORA "is not so punitive in purpose or effect as to constitute a criminal penalty" and that "the Act does not violate the *ex post facto* clauses of the state or federal constitutions"); Hazel v. State, 377 S.C.

¹ The Defendants are additionally represented in this action by Assistant Attorney General Courtney Lowell and Assistant Attorney General Marcie Greene.

60, 64, 659 S.E.2d 137, 139 (2008) (holding that "the applicable [Sex Offender Registry] statute is the statute that existed at the time of respondent's release from prison."). The Plaintiff filed this present action in January of 2015 seeking for this Court to fashion equitable personal relief for the Plaintiff. The Defendants Answered the Complaint and filed the present Motion for Summary Judgment.

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings... show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) *citing* Rule 56(c), SCRPC (emphasis in original).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

LAW/ANALYSIS

Based on the following, there is no genuine issue of material fact in dispute in this matter. Further, there is no factual dispute requiring the services of a fact finder. Accordingly, Defendants are entitled to a judgment as a matter of law. See George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); Rule 56(c), SCRPC

The Plaintiff was properly registered as a sex offender upon being released from incarceration in accordance with SORA. S.C. Code Ann. § 23-3-430(C)(4); State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (holding South Carolina's SORA "is not so punitive in purpose or effect as to constitute a criminal penalty" and that "the Act does not violate the *ex post facto* clauses of the state or federal constitutions"); Hazel v. State, 377 S.C. 60, 64, 659 S.E.2d 137, 139 (2008) (holding that "the applicable [SORA] statute is the statute that existed at

the time of respondent's release from prison." SORA is clear and unambiguous and mandates lifetime registration for all sex offenders in South Carolina. S.C. Code Ann. § 23-3-460 ("A person required to register pursuant to this article is required to register biannually for life").² SORA also provides the only lawful avenues by which individuals can be removed from the registry.³ See S.C. Code Ann. § 23-3-430(E), (F), (G). There is no genuine issue of material fact to suggest that Plaintiff meets any of these statutory criteria for removal from SORA. Accordingly, there is no legal basis for the Plaintiff to be removed from the registry and the Defendants are entitled to judgment as a matter of law. See S.C. Code Ann. § 23-3-460; S.C. Code Ann. § 23-3-430; Lozada v. South Carolina Law Enforcement Div., 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011)(acknowledging that "[w]hether an individual must be placed on the sex offender registry is a question of law.")

The Plaintiff's argument in this matter is that his constitutional SORA registration requirement constitutes a "wrong" that would justify this Court fashioning the Plaintiff an equitable personal remedy. This argument is without merit. The constitutional application of the clear and unambiguous provisions of SORA is not a "wrong" cognizable in South Carolina law. The South Carolina Supreme Court has held unequivocally that "the court's equitable powers must yield in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). In addition, the South Carolina Supreme Court has also specifically held that,

[i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636,

² I note that South Carolina law requires registration every ninety days for persons "classified as a Tier III offender by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006"; however, this registration is also "for life".

³ In fact, the mechanisms for both placement on and removal from the registry are provided by this same code section, S.C. Code § 23-3-430.

640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Id.* Moreover, "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." *State v. Corey D.* 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); see also *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007).

Moreover, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *State v. Smith*, 330 S.C. 237, 240, 498 S.E.2d 648, 650 (Cl.App. 1998). Accordingly, for this Court to fashion an equitable remedy outside of the clear and unambiguous provisions of SORA would exceed this Court's authority and this Court's equitable powers must yield to the clear and unambiguous language of SORA.

In addition, fashioning an equitable remedy in the face of the clear and unambiguous provisions of SORA would constitute a violation of the South Carolina Constitution's mandate for the separation of powers. See S.C. Const. art. I, § 8. The length of an individual's sex offender registration pursuant to SORA is solely a matter of legislative prerogative and there is no judicial discretion over such without violating the South Carolina Constitution. *Id.* This situation is comparable to legislatively mandated minimum or maximum sentences for criminal offenses. With regard to sentencing for an offense that has a mandatory minimum or maximum sentence, the South Carolina Legislature has unilaterally prohibited judges from sentencing individuals above or below the statutorily set amounts. However, these statutory sentence provisions are, and have been consistently upheld as being, lawful. See *State v. De La Cruz*, 302 S.C. 13, 393 S.E.2d 184 (1990); *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *State v.*

24

Johnson, 350 S.C. 543, 567 S.E.2d 486 (Cl. App. 2002). In fact, the South Carolina Supreme Court conclusively resolved this issue in *State v. De La Cruz* indicating

[w]e have held in the past that "[t]he penalty assessed for a particular offense is, except in the rarest of cases, 'purely a matter of legislative prerogative,' and the legislature's judgment will not be disturbed." State v. Smith, 275 S.C. 164, 167, 268 S.E.2d 276, 277 (1980) (quoting Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction. See Mistretta v. United States, 488 U.S. 361, —, 109 S.Ct. 647, 650, 102 L.Ed.2d 714, 725-726 (1989), wherein the United States Supreme Court noted, *16 "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control." (Citing United States v. Willberger, 18 U.S. (5 Wheat) 76, 5 L.Ed. 37 (1820); Ex Parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916)).

302 S.C. 13, 15-16, 393 S.E.2d 184, 186 (1990).⁴ Similarly, the duration of an individual's sex offender registration pursuant to SORA is purely a matter of legislative prerogative and there is no judicial discretion over this duration without violating the South Carolina Constitution and South Carolina law. S.C. Const. art. I, § 8; S.C. Code Ann. §23-3-430; S.C. Code Ann. § 23-3-460 (setting forth lifetime registration in South Carolina in an unambiguously worded statute).

Furthermore, the purely equitable relief sought by the Plaintiff in this matter is simply not available as a matter of law. The South Carolina Supreme 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) citing 27 Am.Jur. 2d, *Equity*, § 94 (1966) (emphasis added). The Santee Cooper 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.* This does not however mean that the person

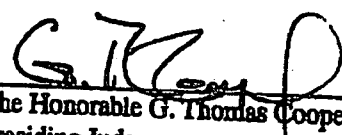
⁴ It is noteworthy that sex offender registration has been consistently held not to be "punitive in purpose or effect as to constitute a criminal penalty." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). However, the same sentiment would apply to an administrative requirement like registration in terms of the legislative prerogative.

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 Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007); Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Ultimately, the Court in Santee Cooper noted that "the court's equitable powers must yield in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). The statutory language of SORA providing for lifetime registration in South Carolina is unambiguously worded. See S.C. Code Ann. § 23-3-460 ("A person required to register pursuant to this article is required to register biannually for life.")⁵ Accordingly, this Court's equitable powers must yield to the clear and unambiguous language of SORA and there is no legal or constitutional basis for the Plaintiff to be removed from the registry.

CONCLUSION

Therefore, based on the foregoing and all applicable South Carolina law, it is hereby ORDERED, DECREED, and ADJUDGED that the Defendants' Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.


 The Honorable G. Thomas Cooper
 Presiding Judge
 Court of Common Pleas
 3rd Judicial Circuit

COLUMBIA, South Carolina
NOVEMBER 3, 2015

⁵ However, certain offenders must register every ninety days. S.C. Code Ann. § 23-3-460(B).

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2017CP4006379**

Gary Whisonant #368531

South Carolina Law Enforcement Division

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of January, 2018 to attorneys of record or to parties (when appearing pro se) as follows:

Gary Whisonant

Adam L. Whitsett

Gary Whisonant

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Gary Whisonant #368531,

Petitioner,

v.

Mark Keel, Chief,
State Law Enforcement Division

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No.: 2017-CP-400-6379

**ORDER GRANTING SUMMARY
JUDGMENT**

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JEA
RICHLAND

This matter came before me on January 18, 2018 for a hearing on the Defendant's Motion for Summary Judgment. Petitioner was present at the hearing and represented himself *pro se*. Defendant was represented at the hearing by Adam L. Whitsett, General Counsel for the South Carolina Law Enforcement Division (SLED). Based upon the filings in this matter, the arguments presented at the hearing, and the applicable South Carolina law; I hereby GRANT Defendant's Motion for Summary Judgment.

BACKGROUND

Petitioner was convicted of one count of assault and battery, two counts of misconduct in office, and second degree sexual misconduct with an inmate, on or about April 22, 2014. At that sentencing hearing, the Honorable Robert E. Hood sentenced Petitioner to a five year suspended sentence, reduced to three years' probation. In addition, Judge Hood specifically ordered that the Petitioner register as a sex offender in South Carolina. Petitioner did not appeal his conviction and did not challenge at that time. Similarly, the Petitioner did not file for post-conviction relief and has not sought a pardon for his offenses. Furthermore, in 2014, the Petitioner did in fact register as a sex offender pursuant to the South Carolina Sex Offender Registry Act, § 23-3-400 *et seq.* ("SORA").



STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings... show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) *citing* Rule 56(c), SCRCP (emphasis in original).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

LAW/ANALYSIS

Based on the following, there is no genuine issue of material fact in dispute in this matter. Further, there is no factual dispute requiring the services of a fact finder. Accordingly, the Defendant is entitled to a judgment as a matter of law. *See* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); Rule 56(c), SCRCP

The Petitioner was properly registered as a sex offender in accordance with SORA. S.C. Code Ann. § 23-3-430(C)(20); S.C. Code Ann. § 23-3-430(D). SORA is clear and unambiguous and mandates lifetime registration for all sex offenders in South Carolina. S.C. Code Ann. § 23-3-460 ("A person required to register pursuant to this article is required to register ... for life"). SORA also provides the only lawful avenues by which individuals can be removed from the registry.¹ *See* S.C. Code Ann. § 23-3-430(E), (F), (G). However, there is no genuine issue of material fact to suggest that Petitioner meets any of these statutory criteria for removal from SORA. Accordingly, there is no legal basis for the Petitioner to be removed from the registry and the Defendant is entitled to judgment as a matter of law. *See* S.C. Code Ann. § 23-3-460; S.C.

¹ In fact, the mechanisms for both placement on and removal from the registry are provided by this same code section, S.C. Code § 23-3-430.

Code Ann. § 23-3-430; Lozada v. South Carolina Law Enforcement Div., 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011)(acknowledging that “[w]hether an individual must be placed on the sex offender registry is a question of law.”).

CONCLUSION

Therefore, based on the foregoing and all applicable South Carolina law, it is hereby ORDERED, DECREED, and ADJUDGED that the Defendant's Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.



The Honorable G. Thomas Cooper,
Presiding Judge
Court of Common Pleas
5th Judicial Circuit

Camden, South Carolina
January 23, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2016-CP-40-06960
Dennis J. Powell, Jr.,	)	
Plaintiff,	)	Plaintiff's Reply to Defendants'
vs.	)	Motion to Alter or Amend
	)	the Grant of Summary Judgment
Mark Keel, Chief	)	to Plaintiff
State Law Enforcement Division, and	)	
The State of South Carolina,	)	
Defendant,	)	
	)	

NOW COMES Plaintiff Dennis J. Powell, Jr. and files this response to the Defendants' Notice of Motion and Motion to Alter or Amend the Grant of Summary Judgment to Plaintiff ("Motion.") The motion should be denied because Defendants have stated no adequate grounds for reconsideration or this Court's amendment of its Order under Rule 59(e), SCRCP.

The Order the Defendants are seeking to have reconsidered was issued May 7, 2019, upon Plaintiff's Motion for Summary Judgment and Defendants' Second Motion for Summary Judgment.¹ The Court reviewed legal memoranda submitted by the parties and the uncontested record in this case and heard argument from both parties March 26, 2019.

As an initial matter, Defendants' motion is 45 pages long and should be stricken under Order of the South Carolina Supreme Court No. 2015-09-10-01 on motions practice in civil cases:

"Unless an exception is granted by the court, no initial or opposing memorandum shall exceed 35 double-spaced pages or 15 double-spaced pages in the case of any reply. This page limitation is exclusive of affidavits and other supporting documentation. Parties shall refer to specific page numbers in citing to affidavits, exhibits, or other written materials provided in support of legal or factual positions..."

¹ Defendants' first Motion for Summary Judgment was denied by 17-page order filed April 10, 2018, and subsequently Defendants' Motion to Reconsider that Order was denied.

A motion to alter or amend judgment is made pursuant to Rule 59(e), SCRCP. In their Notice of Motion and Motion, Defendants move for the Court to reconsider its order, and “move for final ruling on their Second Motion for Summary Judgment,” alleging it is “still pending.” (Motion, p. 1). Plaintiff respectfully submits it is not; it is resolved. The Court’s filed order is an “Order Granting Plaintiff’s Motion for Summary Judgment *and Denying Defendants’ Second Motion for Summary Judgment.*” (emphasis added.)

Defendants allege the affidavits filed and considered in support of Plaintiff’s motion were not “admitted into the factual record.” (Motion p.1) That is false. Each party submits affidavits for consideration in compliance with Rule 5(c), SCRCP, and Plaintiff did just that. Furthermore, at the hearing on Defendants’ first (cross) motion for summary judgment, Defendants consented to the court’s consideration of the affidavits filed in support of Plaintiff’s withdrawn first Motion for Summary Judgment. (April 20, 2018 Order p.1) Neither party objected to the Court’s consideration of any of the evidentiary submissions by either side. New or novel arguments cannot properly be raised in a motion to reconsider. “A party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment.” *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (citing *City of Pattersn v. Reid*, 318 S.C. 183, 456 S.E.2d 436 Ct. App. 1995);

Defendants allege the Court did not consider their evidentiary submissions (e.g. characterizing the affidavit of Agent Temple as “yet another disregarded affidavit,” Motion p. 12). On the contrary, in its detailed and thoughtful order, the Court explicitly identifies the evidentiary submissions it considered for both parties, which were extensive and included Ms. Temple’s affidavit among several others. (Order pp. 1-2.)

Defendants allege “factual inaccuracies.” (Motion pp.38-39.) Their allegations are either inaccurate themselves, or are mischaracterizations or misstatements of the court’s order:

(1) Defendants state “the court found that the Plaintiff is of no risk of re-offending” (Motion p. 39.) This misstates the order. The Court cited Dr. Thomas V. Martin’s opinion this plaintiff is of “very low risk to sexually re-offend.” (Order p. 3). The Order actually states “...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....” (emphasis added) (Order p. 17.)

(2) Defendants state the Court found Plaintiff’s rate of recidivism is “zero percent” and puts that in quotations as if it is false. That is in fact the correct percentage of this plaintiff’s recidivism rate. (see Order, p. 3)

(3) Defendants state “it is error for the court to hold” criminal solicitation of a minor is a victimless crime. (Motion p. 41) The court made no such holding. This is another mischaracterization of the order. The fact is, there *was no victim* in the plaintiff’s case. (See Order p. 29).

(4) Defendants state the Court’s finding “that Plaintiff is a victim of numerous “hardships,” is error” and there is a need to “set the record straight.” (Motion pp. 39, 41.) This language is another misstatement of the order. Plaintiff defers to the Court’s order, the South Carolina Sex Offender Registry Act as promulgated, and Plaintiff’s affidavits.

The Court did not overlook any material fact or principle of law that should have been appropriately considered, and its judgment and reasoning were sound, comprehensive, and based in fact and law. Therefore, there is no basis for the court’s decision or order to be altered. For

these reasons, and incorporating the previous arguments and evidence submitted on his behalf, the Plaintiff respectfully requests this court deny Defendants' Motion to Reconsider.

Respectfully submitted,
S/ Elise F. Crosby (#7077)
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405 Dozier Street
Georgetown, South Carolina 29440

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Columbia, S.C. 29260

Attorneys for Plaintiff

Georgetown, South Carolina
May 24, 2019

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND

COPY
shardoon@sccourts.org

4 Dennis J. Powell, Jr.,
5 Plaintiff,

6 vs.

Transcript of Record
Case No.: 2016-CP-40-06960

7 Mark Keel, Chief, State Law Enforcement Division, and
8 the State of South Carolina,
9 Defendants.

10
11
12 March 26, 2019
Columbia, South Carolina

13
14 B E F O R E:

15 The Honorable G. THOMAS COOPER

16 A P P E A R A N C E S:

17 Joe M. Crosby, Representing the Plaintiff
18 Adam Whitsett, Representing Defendants

19
20
21
22 SHARON G. HARDOON, CSR
23 Official Circuit Court Reporter, II
24
25

1 THE BAILIFF: Order in the court. All
2 rise.

3 THE COURT: Good morning, Counsel.

4 MR. WHITSETT: Good morning, Your Honor.

5 THE COURT: Mr. Whitsett, you requested
6 this hearing, so you may proceed.

7 MR. WHITSETT: Thank you, Your Honor.
8 May it please the Court --

9 THE COURT: You have to identify
10 yourself? You have it?

11 THE COURT REPORTER: Yes, sir.

12 THE COURT: Okay.

13 MR. WHITSETT: Thank you, Your Honor.
14 May it please the Court? I'm Adam Whitsett,
15 general counsel at SLED here on behalf of the
16 defendants. Sitting with me at counsel table is
17 Paul Ahern, another attorney at SLED, and also
18 here in the courtroom are two members of the
19 Attorney General's office, who are also on the
20 pleadings in this case.

21 For preservation purposes, we would
22 officially incorporate all of the arguments that
23 we have previously submitted in this matter,
24 including those set fourth in our second summary
25 judgment which was also our response to

1 plaintiff's summary judgment, and our reply to the
2 addendum.

3 I've also spoken with counsel and we have
4 premarked some of the exhibits to those filings
5 that we would like to submit into the court record
6 as well, I believe without objection. There's
7 nothing new. It's the same exhibits we remarked.

8 THE COURT: Give those to the court
9 reporter.

10 MR. WHITSETT: We have previously marked
11 those as 1 through 10 for identification, but we
12 would submit those.

13 THE COURT: Any objection?

14 MR. WHITSETT: No, sir.

15 MR. CROSBY: They were all attached, Your
16 Honor. It's the indictment, the guilty plea, sort
17 of establishing the factual basis of this, and I
18 believe some of the other affidavits.

19 THE COURT: They have been made part of
20 the record.

21 MR. WHITSETT: Thank you, Your Honor.

22 This case, at its core, is about nothing
23 less than the sovereignty of the state of South
24 Carolina and the separation of powers mandated in
25 our constitution. Our courts have long held that

1 it's simply beyond the powers of the courts to
2 effectuate change in statutes enacted by the
3 legislature and that courts do not sit as super
4 legislatures to second guess the wisdom or the
5 folly of the decisions of the general assembly.

6 Our courts have also specifically
7 acknowledged that, once the legislature has made a
8 choice, there is simply no room for courts to
9 impose a different judgment based on their own
10 notions of public policy.

11 This entire case is an attempt to side
12 step and to disregard the separation of powers and
13 to replace decades of juris prudence in this state
14 with what, I would say, opposing counsel believes
15 that a policy of this state should be.

16 South Carolina's sovereignty, South
17 Carolina's constitution and those same decades of
18 binding authority and juris prudence mandates that
19 we reject these attempts and that we uphold and
20 follow the law as espoused by the legislature.

21 There have been a lot of attempts in this
22 case to, sort of, side step or minimize or
23 trivialize the facts, but the only true relevant
24 facts are those that we've submitted into the
25 record, and those are ones that, when we look at

1 the juris prudence, sort of, what we ultimately
2 follow there.

3 First and foremost -- and these are
4 uncontradicted in the record as it were.
5 Mr. Powell pled guilty to the felony offense of
6 criminal solicitation of a minor. In doing so, he
7 admitted under oath the following conduct, as
8 charged in the indictment which we just submitted
9 into the record. Dennis Powell, Jr. on or about
10 November the 12th, 2007 to February the 15th of
11 2008 did willfully and knowingly commit the crime
12 of criminal solicitation of a minor, to wit,
13 Dennis Powell, Jr., a person 18 years or older,
14 did knowingly through the Internet contact and
15 communicate with a person located in the county of
16 Lexington, state of South Carolina, whom he
17 reasonably believed to be a 12-year-old girl for
18 the purpose and with the intent of persuading,
19 inducing, enticing, or coercing that person to
20 engage or participate in sexual activity as
21 defined by section 16-15-375, paragraph 5.

22 We've also submitted the relevant
23 portions of the plea colloquy wherein under oath,
24 before Your Honor, Mr. Powell did admit that
25 conduct without reservation, without

1 qualification, without minimization. He admitted
2 that conduct there.

3 As such, the factual record in this case
4 demonstrates unequivocally that Mr. Powell
5 absolutely intended to sexually victimize a
6 12- or 13-year-old girl. And, in pleading guilty,
7 he admitted that felonious conduct under oath. He
8 specifically admitted he thought he was soliciting
9 a girl 13 years old for the specific purpose of
10 having sex with her, also sent some very
11 disturbing pictures of himself.

12 We're not going to go through the chats.
13 We've submitted those into the records. They are
14 graphic. They are disturbing. And they are
15 felony conduct that forms the basis of his plea.
16 There is no legitimate minimization of this
17 conduct.

18 The second important crucial fact that we
19 would say is that criminal solicitation, the
20 offense, was at the time of the plea and remains
21 today a mandatory statutory registry offense. It
22 is the admitted conduct under oath, which is
23 uncontroverted, meets the criteria set forth in
24 the statute for this offense.

25 In South Carolina, our legislature has

1 mandated the sovereign policy determination that
2 all sex offender registration, regardless of age,
3 regardless of offense, is for life. That's set
4 forth in a clear and unequivocal statute, for
5 life.

6 In addition, all adult registration is
7 public and must be made available to the public by
8 both SLED and the relevant sheriff's office of
9 jurisdiction.

10 South Carolina's statutorily mandated
11 sex offender registry acts also do contain several
12 specific statutory authorized mechanisms for
13 removal. They are set forth clearly and
14 unequivocally in the statutes. It's section
15 23-3-430, paragraphs E, F, and G set forth the
16 statutory -- these are the only lawful, enumerated
17 avenues of relief, but there is no facts in the
18 record and no facts before Your Honor in this
19 entire action to suggest that Mr. Powell meets
20 them.

21 In fact, he concedes that he does not and
22 has not even sought to avail himself of one of
23 those avenues, which is the pardon route. These
24 are the only lawful mechanisms by which an
25 individual can properly be removed from the

1 registry in South Carolina.

2 The facts before Your Honor also
3 inclusively establish that Mr. Powell is
4 absolutely and unequivocally treated the same as
5 all similarly situated South Carolina registrants.
6 He is subject to the same administrative and legal
7 procedures of all other registrants, and can claim
8 and does claim no disparate treatment from other
9 similarly situated registrants.

10 Mr. Powell, we've established through the
11 facts before Your Honor, has no legal residency
12 restrictions, no legal work restrictions, no GPS
13 monitoring requirement, no legal Internet or
14 social media restrictions, and South Carolina does
15 not impose any of the these assumed restrictions
16 that Mr. Powell has claimed in this action, and
17 certainly none that would come close to rising to
18 the level of occupational debarment. Again, there
19 are no work restrictions imposed by South Carolina
20 law in this action.

21 Rather, Mr. Powell is simply subject to
22 the same administrative and legal procedures and
23 provisions as all other similarly situated
24 residents. He is treated the same as everyone
25 else.

1 Finally, in addition to the legislative
2 finding set forth in our statute, that statistics
3 show that sex offenders often pose a high risk of
4 reoffending. Every single doctor who has
5 evaluated Mr. Powell has determined and has
6 indicated that he does, in fact, pose a risk of
7 reoffending, just like all other individuals who
8 have proven themselves capable of committing
9 certain sexual offenses, particularly those
10 against children. It's both legal and factual
11 error to conclude otherwise.

12 So, it's against these factual backdrops
13 that we start looking at this case and start, sort
14 of, developing the framework of the argument.

15 Our courts have held, and we cited them
16 numerous times throughout our thing, that all
17 rules of statutory construction are subservient
18 to, one, that legislative intent much prevail and
19 it could reasonably be discovered in the language
20 used, and that language must be construed in the
21 life of the intended purpose of the statute.

22 The law also requires that we read
23 statutes and entire statutory schemes as a whole,
24 in a harmony with a purpose, and instructs that we
25 not concentrate on isolated phrases to attempt to

1 defeat that purpose and meet the intent of the
2 whole scheme.

3 Fortunately, in this area of law, there
4 is an entire juris prudential body of case law,
5 and we have developed the purpose over the
6 statutory scheme, and our courts have acknowledged
7 it time and time again. As far as back as 2003,
8 our Supreme Court specifically acknowledged the
9 purpose of the law is to protect the public
10 welfare and to assist law assist law enforcement
11 in accomplishing that goal.

12 The Court in that case, the Hendrix case,
13 went on to specifically note that the whole scheme,
14 the entire act reasonably protects South Carolinians
15 because the registry notifies them of the appellant's
16 sex offense. It is this notice that we will see
17 throughout as the protection aspect, and as the
18 information that is there and that is there for the
19 purpose of protecting.

20 Back in 2003, the Supreme Court
21 acknowledged that notice and information to the
22 public equals protection. The Supreme Court has
23 also noted in the Justin B. case, the purpose of
24 the registry has nothing with retribution, and any
25 determined effect derives from the availability of

1 information, not from punishment. You will see
2 that theme throughout the entire litany of cases.
3 This is simply not legally cognizable punishment.

4 As such, and has been acknowledged in the
5 binding precedent of the state, public access to
6 sex offender information, it is the schemes'
7 entire mechanism to protect the public health,
8 welfare, and safety of the citizens and to assist
9 law enforcement in doing the same which are the
10 stated statutory and are the acknowledged stated
11 purposes of the entire Sex Offender Registry Act
12 scheme.

13 We've also submitted into the record
14 today several affidavits indicating that these
15 notice provisions do, in fact, work, and do, in
16 fact, keep the community safe. The Internet
17 publication of registry information provides the
18 public with vital information from which the
19 public make informed decisions. That's all it
20 does. It provides information from which the
21 public can then make informed decision.

22 Beyond that, it's every individual's
23 decision, every business decision. It's all just
24 information from which informed decisions can be
25 made. That's a critical distinction from saying,

1 the law imposes restrictions. It does not. It
2 simply provides information.

3 I think the historical timeline that we
4 set forth, in almost painful detail -- and the
5 documents go through this in both the public
6 registration in courts across the country and in
7 the federal law, and then as specifically related
8 and applied in South Carolina law. And we've seen
9 throughout that history, the intent of the scheme
10 has been since the original iteration to make this
11 information more public and more accessible.

12 Every single enactment since the 1994
13 original has been towards making more information
14 available through more means and more sources.
15 That is the intent and that is the point.

16 To that end, specifically, in 1998, the
17 legislature mandated that SLED itself provide
18 certain information, and it provided, at a
19 minimum, the names of the requested registered sex
20 offenders, aliases, other identifying physical
21 characteristics, each offender's date of birth,
22 the home address on file, the offense for which
23 the offender was required to register, the date,
24 city and state of his conviction to any and all
25 requesters. That's set forth in the statute

1 itself. That is what the 1998 amendment did.

2 In that same bill in 1998, the
3 legislature authorized both SLED and the relevant
4 sheriff's departments around the state to provide
5 this mandated information through, and I'll quote,
6 "The use of computerized or electronic
7 transmission of data or other electronic or
8 similar means." "Computerized or electronic
9 transmission of data or other electronic or
10 similar means."

11 You use the phrase the "electronic or
12 similar means" to account for the fact that
13 technology is evolving and that we're not trying
14 to restrict this information.

15 Similar means exactly what it says. An
16 electronic or computerized data means computers.
17 That means the Internet. That is tacit, specific
18 authorization to use electronic or other similar
19 means. That's exactly what it says. It's an
20 authorization for both SLED and the relevant
21 sheriff's office to do that and provide
22 information through that means.

23 We have tracked down the date we provided
24 to Your Honor, factually. The first date that
25 SLED began publishing sex offender registry

1 information on the Internet was November of 1999.
2 That's in the affidavit which we provided Your
3 Honor. So the law changed in 1998, and then the
4 information was published through computers on the
5 Internet in 1999.

6 So every single decision that has been
7 handed down by our courts, every single
8 authoritative decision, came after the Internet
9 publication of this information, every single one.

10 It's also, we've gone through the history,
11 required to comply with the relevant federal laws and
12 we determine -- and we'll see throughout these
13 statutes that SLED has been empowered with determining
14 the form required. And then the factual record before
15 Your Honor SLED has, in fact, determined that the
16 forms necessary for this information for the safety,
17 for the security is the electronically accessible
18 computer form. It's the electronically accessible
19 access portal for information through which interested
20 individuals can go and affirmatively try and find this
21 information, try and find this stuff.

22 Folks have to go on the website, they
23 have to enter information, and then they are
24 provided access to the statutorily mandated
25 information.

1 And so SLED has been empowered with
2 determining that form and has determined that that
3 is the appropriate form.

4 And every single one of the decisions
5 came down after that, and that's the precedent
6 that exists. Similarly, every legislature that
7 has been seated since that time and is charged
8 with the duty and the knowledge of being aware of
9 the surroundings. Our courts have acknowledged
10 time and time again that courts and the
11 legislature, they don't operate in a vacuum. They
12 are presumed to know what's happening in the world
13 around them.

14 And so we -- you know, it is illogical to
15 presume that both the courts and the legislature
16 didn't passively know that this would be the
17 information that's required to be put out was
18 being put out on the Internet. In fact, our case
19 law suggests the exact opposite.

20 And if you look at some of those
21 decisions, and we quoted them in chapter and verse
22 in our materials, many of those decisions
23 specifically reference certain things on the
24 Internet. The Hendrix case most foremost where it
25 said, chapter and verse, under the offense

1 heading, which is only the offense heading on the
2 Internet, SLED must put the following information.
3 And so that's tacit acknowledgement, as far as
4 back 2003, that our courts and our highest court
5 was aware of the Internet publication. In fact,
6 it was a mandate that SLED put certain information
7 on the Internet under the offense heading. That's
8 the specific language we quoted and is in our
9 materials before Your Honor.

10 Again, as I mentioned, in order to comply
11 with all of the federal requirements with SORNA
12 and Adam Walsh Act, it's required to be made
13 available publicly on the Internet.

14 And our law, as I stated, gives SLED, a
15 defendant in this action, with the authority and
16 the discretion to determine the necessary form,
17 and SLED has done that. The necessary applicable
18 form that provides for both safety, security, and
19 all of the things that SLED needs to account for
20 is the information portal on the Internet.

21 I believe opposing counsel is getting
22 caught up with the form being some piece of paper.
23 Form is exactly that. We get to determine the
24 mechanism. The mechanism is the website. You go
25 on the website, you have to enter the information.

1 No different than submitting a piece of paper.
2 It's not form as in piece of paper. It's form as
3 in mechanism and means, and that's exactly what's
4 been done in this case. And the record contains
5 affidavits from both SLED and the Richland County
6 Sheriff's Department to confirm that that method
7 complies with the statute.

8 In addition, the U.S. Supreme Court has
9 passively ruled on this. In the Smith v. Doe case
10 from years ago, the Supreme Court took a focused
11 specific look at the Internet publication of
12 registry information and said specifically that it
13 was authorized.

14 Our registry, we've established through
15 the affidavits before Your Honor, complies with
16 the prongs and complies with what the Supreme
17 Court in the Smith v. Doe case said was the
18 overall requirements. And what they were looking
19 at for Alaska's registry in Smith v. Doe, our
20 registry operates similarly. So the same
21 precedent that would apply there, applies in our
22 case.

23 There's simply no legitimately cognizable
24 argument that SLED is not following the statutes
25 in this case. This was not even raised in the

1 original pleadings in this matter.

2 And, frankly, it would lead to an almost
3 absurd; if not an outright absurd result, that the
4 intent of the statute, the intent of all of this
5 is to provide the public information. It would be
6 an absurd result to say that we're somehow
7 breaking the law by providing too much information
8 or by providing it through a form that we get to
9 determine and have discretion over what's
10 available.

11 So this argument that we're providing too
12 much information when the entire purpose, intent,
13 and goal is to provide information leads to a
14 manifestly absurd result. And even if we are to
15 assume that that is true, removal would never be
16 the remedy to that. Removal would never even come
17 into play in that discussion. So I think those
18 arguments are simply without merit.

19 Turning to the specific constitutional
20 arguments that are raised, all of which have been
21 conclusively resolved by binding precedent.

22 Equal protection, we'll start there.
23 There's not even argument that Mr. Powell is
24 treated differently than other similarly situated
25 South Carolina registrants. He is. Factually,

1 conclusively, he is. He just doesn't like that
2 fact. He doesn't want to be treated like everyone
3 else that is similarly situated is treated, but
4 that is not an equal protection violation.
5 Because we treat you like everyone else cannot
6 form the basis of an equal protection challenge,
7 and South Carolina retains the sovereign right to
8 determine how our statutory scheme is to be
9 enacted and to be handled.

10 And so this attempt to try and say, well,
11 other states do it differently, simply cannot form
12 the basis of an equal protection challenge. All
13 states maintain the sovereign right to enact that.
14 We provided Your Honor the case law that talks
15 about the inapplicability of the full faith and
16 credit clause to an action like this. It simply
17 does not apply and would lead to the absurd result
18 that the state of South Carolina and South
19 Carolina courts have to go other courts to see
20 what the registry should be, or we have to look at
21 Georgia or North Carolina and see what our sex
22 offender laws have to be. And that's an absurd
23 result that our courts throughout the state and
24 throughout this country have rejected.

25 Looking at the specific prongs necessary

1 of equal protection, we need to look no further
2 than Hendrix and Justin B. to say that the scheme
3 meets all of the prongs of equal protection. The
4 ultimate finding is that a registration of
5 offenders including, as was the case in the
6 Justin B., juveniles who have proved themselves
7 capable of committing certain sex offenses is
8 rationally related to achieving the legitimate
9 objective of protecting the public and any law
10 enforcement.

11 Prong one, classifying an individual as a
12 sex offender is reasonably related to the
13 legitimate state purpose of protecting the public
14 and any law enforcement and limiting the risk that
15 sex offenders pose to communities. Registration
16 as a sex offender is not punishment, but rather a
17 regulatory requirement imposed to promote public
18 safety.

19 In addition, prong two, all members of
20 the plaintiff's class, all similarly situated
21 South Carolina registrants are treated the same,
22 are treated identically. They are all subject to
23 the same administrative and legal procedures.

24 And as to the third and final prong, the
25 South Carolina Supreme Court has conclusively

1 determined in binding precedent that
2 classification in the sex offender scheme is
3 reasonable because the purpose of the law is
4 protecting the public welfare and to assist in law
5 enforcement and the registry accomplishes that
6 goal. That's the binding precedent applicable in
7 this state, and I submit it would be an error of
8 law and a constitutional -- constitutionally
9 suspect to finding equal protection violation in
10 the face of binding precedent when there is no
11 claim of disparate treatment.

12 When you look at the due process
13 argument, our Supreme Court has conclusively
14 rejected this argument. The Justin B. case, which
15 is the most recent and, sort of, the most
16 compelling authority before Your Honor on this
17 issue completely dispelled the argument and went
18 through the history of it.

19 I simply -- I couldn't have said it
20 better, so I quoted them directly on the
21 historical underpinnings of it in addressing this
22 act -- this allegation specifically.

23 There is no legally cognizable liberty
24 interest affected in this action. Our Supreme
25 Court has conclusively resolved that. There's no

1 liberty interest or corroborating interest
2 affected by lifetime public registration on the
3 Internet. Lifetime public registration on the
4 Internet does not give rise to any due process,
5 concerns, or any due process challenge. It's
6 legal and constitutional error to find otherwise.

7 In addition, specifically towards the
8 Dikes case, which was a case that predated
9 Justin B. in which the electronic monitoring
10 provisions were ultimately found to be
11 constitutionally suspect. That has no
12 applicability before Your Honor today.

13 We've gone into excruciating detail into
14 that in our brief, but suffice it to say, in those
15 statutory provisions there was a mechanism for
16 certain individuals to seek removal of the
17 electronic monitoring. And it was -- I would
18 concede, as the Court found, haphazardly drawn.
19 And that's what the Court found arbitrary, was a
20 mechanism for some people to seek relief where
21 others did not have it.

22 We do not have that here today. In fact,
23 this action is an attempt at that here today, to
24 give one individual an attempt to come off that is
25 not available to any or all other registrants.

1 So that is not a due process violation.
2 The Dikes case did not establish a new test or a
3 new due process concern. And Justin B.
4 inclusively resolved that to be the fact.
5 Justin B., which came out several years after the
6 dike's case, and said, there is no liberty
7 interest affected by lifetime public registration.

8 Looking at the punishment allegation, our
9 courts have held up and down from 2002 through
10 2017, which was the most recent pronouncement.
11 There have been other decisions that did not get
12 published, but the published decision, from 2002
13 through 2017, our courts have uniformly rejected
14 the argument that this is punishment.

15 Our courts who had the knowledge and
16 benefit of Internet registration, and Internet
17 publication of this information, in every single
18 decision rejected that it was punishment, and that
19 remains the law of this state, and it would be
20 legal and constitutional error to find otherwise.

21 With regard to this Court's equitable
22 jurisdiction, our law is clear that if there is a
23 statutory scheme, if we have a clear and
24 unambiguous statute, there is no equitable
25 jurisdiction that applies.

1 Your Honor has ruled that on two prior
2 occasions, as has numerous courts around the
3 state, including the Supreme Court, including the
4 Court of Appeals who issued the only binding
5 precedential case in the Johnson vs. Lloyd case
6 that we cited in our materials that wasn't
7 overruled on other grounds, as we noted, but it
8 was binding authority and was specific authority
9 reached by an appellant court of this state saying
10 that there is no equitable jurisdiction in the
11 registry context. That the registry itself
12 provides for statutory avenues of relief and that
13 those are final. And if that needs changed, that
14 needs to come from the legislature, not the
15 courts. That is the binding precedent. And any
16 equitable powers must yield in the face of this
17 clear and unambiguous statute, which is
18 unequivocally registration is for life. That
19 comes directly from 23-34-60.

20 The statute is clear and unequivocal. It
21 does not meet any of the statutory criteria. None
22 have even been alleged. There's is no factual
23 basis that Mr. Powell meets any of the statutory
24 criteria. So we submit that it would be legal and
25 constitutional error for this court to assume the

1 role of the legislature and to rewrite a clear and
2 unambiguous statute that sets forth an adequate
3 legal remedy as our courts have already found.

4 In conclusion, Your Honor, I stated all
5 of the binding precedent. I referenced the
6 binding precedent to suggest that we are simply in
7 the wrong forum to address the policy
8 considerations raised by opposing counsel.

9 We all have opinions on what the law
10 should say. I mean, we all do. Everyone does.
11 But in our system, we must follow the binding
12 precedent enacted by the juris prudence. We must
13 follow the statutes. We must follow the
14 constitutional mandate for separation of powers.
15 We must follow the law in this case and the
16 binding precedent. We must respect it's the
17 constitutional function of the legislature to make
18 the laws and follow those laws. Even if we don't
19 like them, even if we don't respect them, even if
20 we disagree with them wholeheartedly, it's binding
21 precedent. The constitutional separation of
22 powers mandates that we follow down those
23 appellate decisions, the juris prudence, and all
24 of that.

25 The Justin B. court said it very

1 eloquently: "If the requirement of the juvenile
2 sex offenders," and I would submit all sex
3 offenders, "must register and/or wear an
4 electronic monitor is in need of change, that
5 decision is to be made by legislature, not the
6 courts."

7 That's the penultimate argument before
8 you today, that the policy decisions can only be
9 resolved by the legislature who as enacted clear
10 and unequivocal policy that's been upheld through
11 binding precedent in this state.

12 To put it simply, our legislature has
13 determined its legislature policy prerogative that
14 lifetime registration for all sex offenders is the
15 law of the state, regardless of age. Lifetime for
16 all. Equal treatment for all. If that is to
17 change, it must come from the legislature. It can
18 cannot come from courts.

19 Our legislature has determined that all
20 registrants should be treated the same in terms of
21 the mechanisms for removal. If that is to change,
22 should there need to some mechanism to treat,
23 perceive low risk offenders different than high
24 offenders, that is only a change that can come
25 from the legislature. Those are policy matters

1 that our system of government, that our
2 constitution mandate come from the legislature,
3 not the courts. It's legal and constitutional
4 error otherwise.

5 Our legislature has also determined that
6 electronic public Internet access to information
7 is the best and serves the best to provide notice
8 to the public and information to law enforcement,
9 and that is the way to best protect the public,
10 that is the best way to effectuate the purpose of
11 the registry, which is protection. If that is to
12 change, it must come from the legislature.

13 However, we provided that legislative
14 history to suggest the exact opposite. Every
15 change since the initial iteration has been for
16 more access to information through more means.
17 That is the intent and that is the purpose.

18 And, frankly, as our legislature and our
19 courts have held, the public needs this
20 information to be able to make informed decisions.
21 Again, that's the point. This is just information
22 from which informed individuals can make informed
23 decisions. And our legislature has determined
24 that the public needs to know when certain
25 individuals proved themselves capable of

1 committing certain sex crimes, especially sex
2 crimes involving children, like Mr. Powell is.

3 That's all the registration is, and
4 that's all it's intended to be. Information for
5 concerned citizens who are proactive and go look
6 for this information, have access to it, and can
7 make informed life and business decisions.

8 It works. We have submitted that the
9 factual underpinnings for it on the record, and
10 our courts have acknowledged time and time again
11 that it does, in fact, protect the public by
12 providing this time of information. Internet
13 publication meets the statutory purpose of
14 protecting the public and assisting law
15 enforcement.

16 In addition, it's clear that our
17 legislature wanted to take all factors out of the
18 equation in terms of registration or in terms of
19 removal. Every one is treated the same. If they
20 are rich, poor, influential, not, it is equality.
21 Everyone is treated the same. If you commit the
22 offense, you're on. If you commit the offense,
23 you have the statutory avenues for removal.
24 Everyone is treated the same.

25 And I implore you to not treat this

1 plaintiff differently than all other similarly
2 situated registrants.

3 THE COURT: All right. I think I
4 understand your argument.

5 MR. WHITSETT: Thank you, Your Honor.

6 THE COURT: Thank you. Mr. Ozmint.
7 Mr. Crosby.

8 MR. CROSBY: Judge, I'll be brief.

9 Actually, I think we really want this
10 court and the entire judicial system to stay in
11 its lane. The State talks about the separation of
12 powers. The reason have a judiciary is because
13 unreasonable -- our founding fathers knew it was
14 unreasonable to suggest, or even think, that the
15 elective branch is going to voluntarily raise
16 their hand and say any statute violates the
17 constitutional rights of Mr. Powell. They're
18 never going to do that.

19 SLED is not going to come in here and
20 say, Judge, we -- in trying to interpret this
21 statute, this language that the legislature wrote
22 that's apparently so unclear explicitly that Mr.
23 -- that the State had to use the word "tacit" over
24 a dozen times in their argument -- in their
25 20-minute argument, because the expressed language

1 of this statute is so perfectly clear.

2 They're never -- the role of this court,
3 the role of any court, is not to take the easy
4 task. The easy task is to say, SLED's got great
5 discretion. The legislature wrote, kind of, a
6 sloppy statute here, and let everybody -- let the
7 elective branches go on their merry way.

8 So we're begging, not only this court,
9 but we'll be begging, I'm certain, if we're
10 fortunate enough to get any more out of this
11 court, we may be begging our State Supreme Court
12 to stay precisely in its lane.

13 And the lane, the role of the judicial
14 branch, is to do exactly what the State doesn't
15 want you to do, which is to say, when you violate
16 a man's rights, when you've written a statute like
17 this, and when society's standards change -- this
18 whole notion, Internet publication is the same now
19 as it was -- if everything the State said is true,
20 and we're only -- and we weren't looking at the
21 language of this statute, and we're only looking
22 at the constitutional issues, this whole notion of
23 standards don't involve -- I don't know where that
24 comes from. I guess, as a young man, I believed
25 that. I don't believe that anymore.

1 I had a dear friend who passed. He lived
2 down by the State prison. He told me a story one
3 day about a guy running. The trustee, also on a
4 horse, threw the trustee at 30/30. And the
5 trustee shot about 15 yards behind the inmate that
6 was running and he didn't stop. He shot about
7 five yards behind him, and he didn't stop. He
8 shot at his feet, and he got stopped and laid
9 down. It's a true story.

10 When the trustee went over and picked him
11 up and brought him back and tied him to the cotton
12 wagon. They were cutting cotton. I can show the
13 field they were cutting in. And another trustee
14 grabbed a whip, handed to him by the officer on
15 the horse, and he whipped that inmate. And here's
16 what the courts at the time said about that. It
17 wasn't punishment. That was an administrative
18 sanction.

19 What's happened to that man in today's
20 world is punishment. Independent of the fact it
21 goes beyond what the legislature wrote, even if
22 this was -- even if the legislature had written
23 what SLED wanted it to write, we'll rely on our
24 briefs and previous arguments about all that.
25 It's punishment.

1 In 2019, when somebody goes on the
2 Internet and this is what they read about
3 Dennis Powell, that he victimized a 13-year-old
4 girl. Because of this great computer system that
5 they have, he is treated a little differently, by
6 the way, because he is not only on SLED's website,
7 but because our Sheriff in the State Law
8 Enforcement Division in our county get along so
9 well -- as you know, our Sheriff runs his own
10 website. So when they go on that website, it
11 doesn't say he communicated with a police officer
12 posing as a young girl. It says he victimized a
13 13-year-old girl. It's going to say that for the
14 rest of his life.

15 For me, the court that finally stood up
16 and said, you can whip that convict to within an
17 inch of his life as an administrative sanction
18 anymore, was on the right side of history.

19 When the judicial branch stands up to the
20 legislative and executive, to the elected branches
21 who says, no, you can't do that anymore, that is
22 precisely what the separation of powers was
23 intended to allow.

24 One other thing we rely on, as the State
25 so eloquently put it, in regards to preserving all

1 issues, we would rely on our briefs and our
2 previous arguments. And, Your Honor,
3 respectfully, we would -- we're going add some
4 language to our proposed final order that would
5 simply require that SLED preserve all changes to
6 its website from the date so that if this case
7 ever comes back and we have to have a factual
8 basis as to how SLED did or did not change their
9 website during the pendency of this litigation, we
10 would be able to track that.

11 Beyond that, that's only new information,
12 I think. It has been briefed in writing or argued
13 orally that we will be adding.

14 THE COURT: Have you suggested that to
15 the State?

16 MR. CROSBY: Yes, sir. And, actually,
17 they've assured us in writing that they've done
18 that.

19 THE COURT: Okay.

20 MR. CROSBY: That they can track those
21 changes.

22 MR. WHITSETT: And, Your Honor, you know,
23 I would state that depending on the timing of some
24 of these decisions, since this case was originally
25 filed, there has been subsequent registration

1 period requirements at which point the relevance
2 of the Sheriff's Office would have uploaded the
3 most current information, and we would
4 respectfully submit they are required to do that,
5 and we said that we're going to continue following
6 that function.

7 THE COURT: The request was limited to
8 the State Law Enforcement Division.

9 MR. WHITSETT: And I think it says, as I
10 understand, as far as being able to identify when
11 certain changes were made, and that, sort of, is
12 what it is.

13 THE COURT: Do you know what his request
14 is?

15 MR. WHITSETT: We do, Your Honor.

16 THE COURT: You may continue.

17 MR. CROSBY: Judge, that's all we have.

18 THE COURT: All right. Anything in
19 reply?

20 MR. WHITSETT: Only extremely briefly,
21 Your Honor. We have suggested the separation of
22 powers and following the binding precedent of the
23 courts who have fulfilled their role in this, and
24 who have conclusively looked at this, as recently
25 as 2017, and who have gone through that

1 historical, and have fulfilled that function that
2 opposing counsel wants you to --

3 THE COURT: I've read every one of
4 them.

5 MR. WHITSETT: And so we are -- to
6 suggest that this is a blank slate and that there
7 isn't a body of binding precedent, I think is just
8 error.

9 THE COURT: I was --

10 MR. WHITSETT: And we're asking that you
11 follow that binding precedent as well.

12 THE COURT: I was the one that suggested
13 that.

14 MR. WHITSETT: Thank you, Your Honor.

15 THE COURT: All right. Well, to that
16 point, proposed orders in 10 days, 20 days?

17 MR. WHITSETT: I think we can agreed to
18 30, and schedule an order. But I'm happy to do
19 whatever, Your Honor.

20 THE COURT: Thirty days is fine. Not a
21 lot is going to change in 30 days. Thank you very
22 much, counsel. I appreciate your argument.

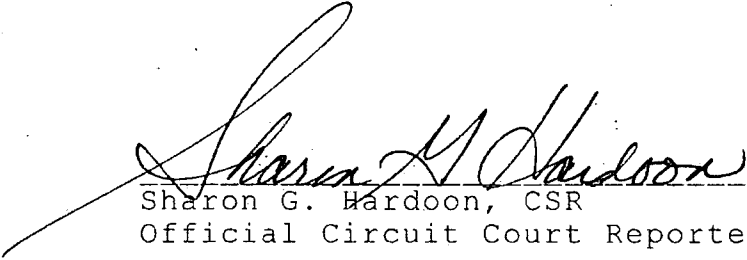
23 (The hearing was concluded.)
24
25

CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Court Reporter for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas, Richland County, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

August 4, 2019


Sharon G. Hardoon, CSR
Official Circuit Court Reporter, II

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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