

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Appellate 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 of the
State of South Carolina,

Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT PROPERLY DETERMINE THAT THE PLAIN LANGUAGE AND INTENT OF THE SOUTH CAROLINA SEX OFFENDER REGISTRY ACT DOES NOT AUTHORIZE APPELLANTS TO PUBLISH THE SOUTH CAROLINA SEX OFFENDER REGISTRY ON THE INTERNET IN THE MANNER IT DOES?
- II. DID THE TRIAL COURT PROPERLY DETERMINE THAT RESPONDENT IS ENTITLED TO EQUITABLE RELIEF?
- III. DID THE TRIAL COURT PROPERLY DETERMINE THE DURATION OF SORA'S REGISTRATION SCHEME AND THE BREADTH OF APPELLANTS' NOTIFICATION SCHEME VIOLATE RESPONDENT'S RIGHT TO EQUAL PROTECTION UNDER THE LAW?
- IV. DID THE TRIAL COURT PROPERLY DETERMINE THAT SORA VIOLATES RESPONDENT'S RIGHT TO DUE PROCESS?
- V. DID THE TRIAL COURT PROPERLY HOLD THAT THE SORA IS SO PUNITIVE IN EFFECT AS TO NEGATE THE STATE'S INTENT THAT IT BE NON-PUNITIVE?
- VI. DID THE TRIAL COURT PROPERLY DETERMINE THAT IF THE COURT WERE TO JUDICALLY EXPAND THE LANGUAGE OF SORA TO ALLOW FOR WHOLESALE PUBLICATION OF THE REGISTRY VIA THE INTERNET SUCH AN EXPANSION WOULD ACT LIKE AN *EX POST FACTO LAW* AND VIOLATE RESPONDENT'S RIGHTS TO DUE PROCESS?
- VII. DID THE TRIAL COURT PROPERLY REGARD AND CHARACTERIZE THE EVIDENCE IN THIS CASE?

FACTS

In 2008, Respondent participated in a Yahoo internet chat room. (R. pp. 117-118). A female adult officer from the Lexington County Sheriff's Office was similarly participating in the chat room, posing as a thirteen-year-old female in order to conduct a sting. (R. p. 62) Respondent anonymously corresponded with the undercover officer and their correspondence turned sexual. (Id.) Respondent and the officer planned a meeting site in Lexington County. Respondent drove to the site but did not stop. There was no meeting, because Respondent changed his mind. He was

afraid and ashamed. (R. p. 118). After he drove past, deputies stopped his car and arrested him for Solicitation of a Minor. (R. p. 119).

On April 2, 2009, Respondent pled guilty in Richland County, in front of the Honorable G. Thomas Cooper, Jr. (R. pp. 85- 92). The Court held sentencing in abeyance and held follow-up sentencing hearings November 2, 2009, and February 9, 2010, ultimately suspending the sentence on a probationary term of one year. (R. pp. 93-97; R. pp. 82-84). There was no victim and Mr. Powell had no prior record.

Prior to sentencing, Mr. Powell was evaluated by Thomas V. Martin, M.D., Lawrence H. Bergmann, Ph.D, LPC, and William Burke, Ph.D. (23;1-13) (R. pp. 87,89). Mr. Powell sought further treatment from Dr. Martin both before and after sentencing, in conjunction with his Sex Offender status, as well as an Interim Psychiatric Evaluation after the filing of this action. Dr. Martin found Mr. Powell does not meet criteria for major mental illness or sexual perversion and does not require a deterrent or any sex offender therapy. Dr. Martin opined that Respondent's registration is "detrimental" in a number of ways and he is of "very low risk" to re-offend. (Aff of Martin) (R. pp. 137-138).

The Court did not include the Sex Offender Registry on the sentencing sheet, but made clear that a separate statute, S.C. Code Ann. § 23-3-400 *et. seq.* (the Sex Offender Registry Act or SORA), was likely going to require Respondent to register. (R. p. 83). Respondent was required to register as a sex offender, and he did so. (R. pp. 118; R. pp. 243-244). He served his one-year probationary sentence without incident and has not been charged with or convicted of any other offense before or since. (R. pp. 121).

Mr. Powell registers bi-annually as a Sex Offender, as required by Defendant Keel. Respondent's registration as a sex offender has had a significant negative impact on his career, his family life, and his social life. (R. pp. 117-122; R. pp. 139-140; R. pp. 141—143).

SORA tasked SLED with developing the Sex Offender Registry to “collect, analyze, and maintain information; make information available to every enforcement agency in this state and other states; and establish a security system to ensure only authorized persons may gain access to information gathered...” S.C. Code Ann. § 23-3-410. SORA provides “public inspection” of certain registry information is allowed only upon a “request made in writing, on a form prescribed by SLED.” *Id.* § 23-3-490. Defendant Keel publishes the South Carolina Sex Offender Registry online. (R. pp. 245-247) (*see, e.g.* www.SCOR.sled.sc.gov).

The information SLED gathers and publishes about Respondent has increased since he first registered. (R. pp. 117-136). In addition to Respondent's photograph, personal information is now included online about skin tone, tattoos, scars, home, and vehicles, available online to the public. (*see, e.g.* www.SCOR.sled.sc.gov).

Other than the anonymous mouse clicks required to navigate the website, Defendants has conceded that there is no “form prescribed by SLED” to access the registry. According to Respondent's affidavit, SLED made changes to its sex offender website after the December 6, 2017, hearing in this case. (R. pp. 141-144). Pursuant to SORA, “the registry is under the direction of the Chief of the State Law Enforcement Division.” Yet, SLED allows at least one official law enforcement website to falsely publish that Respondent's offense involved a real 12-year-old victim.¹

¹ The Richland County Sheriff's Office website includes the following false information under the subheading, **Victim Info**. “Age of victim at time of the crime: 12. Gender of victim: Female.”

STANDARD OF REVIEW

When reviewing an order granting summary judgment, this Court applies the same standard used by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Summary judgment must be granted when “the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Rule 56(c), SCRCP. “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The absence of a genuine issue of material fact can be established by proving to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party satisfies its initial burden, the non-moving party must do more than rest upon mere allegations or denials to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRCP. There has been no dispute as to the material facts in this case therefore no additional material or testimony is required to reach legal conclusions to be drawn from the facts. *See Holmes v. East Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014) (citing *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 563 S.E.2d 331 (2002)).

ARGUMENTS

I. THE TRIAL COURT PROPERLY DETERMINED THAT THE PLAIN LANGUAGE AND INTENT OF THE SOUTH CAROLINA SEX OFFENDER REGISTRY ACT DOES NOT AUTHORIZE APPELLANTS TO PUBLISH THE SOUTH CAROLINA SEX OFFENDER REGISTRY ON THE INTERNET IN THE MANNER IT DOES.

The trial court properly determined that Appellants' publication of the South Carolina Sex Offender Registry on the internet is in violation of the language and intent of the South Carolina Sex Offender Registry Act ("SORA"). (R. pp. 3-36). The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. *See Nationwide Mutual Ins. Co. v. Rhoden*, 398 S.C. 393, 401 n. 4, 738 S.E.2d 477, 481-82 n. 4 (2012) (court holding that if legislative intent is clear as reflected in the statutory language, any public policy as promulgated by the court must give way). The text of a statute must be construed as a whole and "in harmony with its purpose." *16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012). The SORA 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 SORA has separate and distinct provisions regarding requests for, and the providing of: (1) listings of sex offenders; (2) more detailed information about specific sex offenders; (3) (the publication of) lists of all sex offenders in a particular county by a newspaper with general circulation; and, (4) (dissemination of) registry information by a county sheriff for specific law enforcement purposes. The statute divides these first three provisions into two subsections, S.C. Code Ann. § 23-3-490 (A) and (B), based on whether the request is made to the

county sheriff or to SLED, respectively. The fourth provision, dissemination of information for specific law enforcement purposes, is found in S.C. Code Ann. § 23-3-490(C).

a. Requests to the County Sheriff

S.C. Code Ann. § 23-3-490(A), in the first four sentences, covers requests for information made to sheriffs by members of the public. The statute specifically provides that a sheriff must “release information regarding persons required to register under this article to a member of the public if the request is made in writing, on a form prescribed by SLED.” *Id.* Because this provision allows the sheriff to provide additional detailed information (full names, aliases, identifying characteristics, dates of birth, home address, a photograph, and other information), this provision mandates the added requirement: “if the request is made *in writing* on a form prescribed by SLED.” *Id.* (emphasis added). The requirement for a written request cannot simply be ignored, as the Appellants suggest. The trial court properly determined that, because every word and every provision of a statute is to be given effect, the statute should not needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. *See 16 Jade Street, LLC*, 398 S.C. at 343, 728 S.E.2d at 450 (“Similarly, we are to construe a statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.’”).

Furthermore, S.C. Code Ann. § 23-3-490(A), in the fifth and final sentence, contains the section’s only reference to “publication” of the registry. The section provides that “[t]he sheriff must provide to a newspaper with general circulation within the county a *listing* of the (county) registry for publication.” *Id.* (emphasis added). There is no provision for general publication of anything beyond such a list to a newspaper.

b. Requests to SLED

Additionally, S.C. Code Ann. § 23-3-490(B) covers requests for information made to SLED. This section distinguishes between requests for “lists” of registered offenders versus requests “about a specific person” who is required to register. For lists, the first sentence of subsection (B) provides:

A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the state from SLED.

Id. Lacking the additional requirement of “in writing,” this provides that SLED may only release a “list” of all registered sex offenders in the state. Finally, for requests regarding a “specific person,” sentences two and three of S.C. Code Ann. § 23-3-490(B) provide:

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

By requiring that the request be made on “a form prescribed by SLED” and by imposing the additional requirement that the requestor have specific identifying information about the alleged registrant, the statute then allows SLED to provide other specific identifying information (full names, aliases, identifying characteristics, dates of birth, home address, and other information) beyond a listing.

The terms “writing,” “form,” and “list,” are not defined in the statute and must be given their ordinary meaning. *See Anderson v. S.C. Election Comm’n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012). Courts are required to give effect and meaning to statutory language in a manner that is internally consistent with other provisions of the statute and the trial court properly did this. “The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal*

Texts 180 (2012). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Davis v. Sch. Dist. of Greenville Cty.*, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Furthermore, the “goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.” *Id.* (quoting *Hodges*, 341 S.C. at 91, 533 S.E.2d at 584). These terms must be given their fixed meaning: the meaning they had when the text was adopted. *In re Hosp. Pricing*, 377 S.C. 48, 54, 659 S.E.2d 131, 134 (2008).

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

c. Electronic Transmission

S.C. Code Ann. § 23-3-490(E) was added in 1998 to allow the “use of computerized transmission of data or other electronic or similar means.” The trial court properly determined that this in no way authorizes the wholesale “publication” of all information about sex offenders to anyone. (R. p. 11). In this same section, the Legislature used the terms “publication” and “publishes.” Clearly, “transmission” does not have the same meaning as “publication.” If the legislature intended to allow wholesale internet publication, not governed by subsections (A) or

(B), it would have stated as much and repealed those subsections. A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning. *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 100, 705 S.E.2d 28, 34 (2011).

Likewise, the trial court properly determined that 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). (R. p. 11). Such an interpretation would render subsections (A) and (B) as mere surplusage, including, but not limited to, the requirement for a “written request,” and “a form prescribed by SLED.”

The Appellants 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” when it added section 23-3-490(E), (Appellant Initial Brief p. 8). However, the trial court properly determined that 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). (R. p. 12). The trial court properly construed the use of the term “transmission” as deliberate. (*Id.*). The elected branches could have expressly amended the language of the statute to provide for internet *publication* in 1998 or subsequently. However, neither the executive branch nor this Court or any court is free to add words or language to this statute or to interpret this statute in a manner that renders terms, provisions, or entire subsections of this statute as meaningless surplus. This Court is not permitted to add to what the text states or reasonably implies. That is, a matter not covered is to be treated as not covered. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012); *Consumer Advocate v. S.C. Dep't 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.”).

Appellants also now argue for the first time that the language of S.C. Code Ann. § 23-3-535(F)(1)(b) which specifically requires school districts to provide “the hyperlink to the sex offender registry website on the school district website . . .” provides evidence of a clear Legislative intent that SORA registry information be accessible on the internet. (Appellant Initial Brief p. 9). However, to argue that a requirement merely to include a hyperlink somehow grants Appellants authority to publish registry information online is specious, at best. All this does is confirm that Appellants were in fact *ultra vires* publishing the registry online, not that the Legislature had given them the authority to do so. In other words, this section simply requires districts to allow the public to link to the SLED registry website. Such a link in no way magically changes the substance, language, or meaning of SORA; it does not change the term “transmit” to “publish online” and it does not delete the requirement that requests must be made on “a form required by SLED” and in writing.”

The Appellants also speciously argue that in order to comply with the Federal Sex Offender Registration and Notification Act (SORNA), Appellants “are required” to make certain information available on the internet. (Appellant Initial Brief p. 9). However, just as with any other federal legislative scheme, jurisdictions are not mandated to do anything under the statute. Rather the SORNA provides:

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3750 et seq.).
[footnote omitted]

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter

34 U.S.C.A. § 20927. Like most so-called “federal mandates,” SORNA does not mandate at all. “Congress may not simply “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 161 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981)) court holding that. For this reason, Appellant’s argument that SORNA “requires” South Carolina to publish personal sex offender registry information on the internet unfettered is simply false. Further, the argument “we must do this because the feds require it” is even more specious—indeed, misleading—given that SORNA was passed in 2006 and, according to

Appellants, they first published registry information online on or about November 22, 1999. (Appellant's Initial Brief p. 8).

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

Taken together, these provisions may not be convenient for Appellants, but they are not ambiguous. Accordingly, the trial court properly found that, under the plain language of the statute, registry information may be requested and received:

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

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

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

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

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

(R. pp. 12-13).

Appellant's arguments implying that SLED is empowered to control the publication of registry information as it sees fit, and the more specific argument that SORA's provisions authorizing SLED to prescribe the form of public requests somehow grant it the power to publish the information online, are misplaced. Notably absent from SORA is the Legislature's direction and authorization for SLED to promulgate rules and regulations concerning the dissemination of registry information. When the Legislature wants to give SLED unfettered authority to regulate an area of law, it expressly gives SLED the ability to do so. *See, e.g.*, S.C. Code Ann. § 23-3-130 (specifically authoring SLED to promulgate rules and regulations regarding the reporting of criminal data by law enforcement under section 23-2-120)². The Legislature's decision not to grant SLED the authority to promulgate rules and regulations under SORA further supports the argument that Appellants are bound by the plain language of the statute that expressly governs how the public should request, and how SLED should disseminate, registry information.

² *See, e.g.*, section 73-23 S.C. Code Regs. Making public access to criminal records subject to an application that requires the requestor provide the subject's social security number and a fee in most cases, no matter how serious the offense, for a report that includes no personal details of the subject of the inquiry.

(E) All requests for criminal history record information by non-criminal justice users shall be made in writing or by personal appearance at the Criminal Records Department, or by the Internet.

(4) Persons wishing to determine whether criminal history records naming them are housed by SLED/CJIS may do so by inquiring in person at the Criminal Records Department between the hours of 8:30 a.m. and 5:00 p.m. Monday through Friday except legal State holidays. Proper identification will be required of persons making inquiries. S.C. Code Regs. 73-23 Dissemination of Criminal History Record Information. (South Carolina Code of Regulations (2018 Edition))

Furthermore, the trial court properly determined that giving meaning to the plain and limiting language of S.C. Code Ann. § 23-3-490 is the only interpretation consistent with the enumerated purposes of SORA. (R. p. 13). A statute must be interpreted in a manner that furthers, rather than obstructs its purpose. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). An interpretation that validates the statute's purpose outweighs one that invalidates it. *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011). Furthermore, provisions should be interpreted in a way that renders them compatible, not contradictory. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012).

The trial court agreed with Appellants' contention that the intent of SORA was to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens." (R. p. 14) (citing S.C. Code Ann. § 23-3-400). However, the court properly found that 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." (R. p. 14) (quoting S.C. Code Ann. § 23-3-400). 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 Appellants to "establish a security system to ensure that only authorized persons may gain access to information gathered under this article";³ in section 23-3-490, the Legislature refuses to allow anonymous requests for information by requiring that all requests be made in writing on a form prescribed by

³ The trial court's decision does not misapprehend the intent of the last sentence of S.C. Code Ann. § 23-3-410 as Appellants contend. (Appellant Initial Brief p. 14). Respondent acknowledges that this statutory section applies to juveniles. However, it is relevant here in that it provides another example of the Legislature's concern regarding the balance of the rights of registrants with the rights of the public.

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 Appellants’ ability to disseminate information about juvenile registrants.

Appellants seek to add words and phrases to the language of the SORA that would undermine the Legislature’s clear intent to protect the rights of registrants. The term “internet” never appears in the statute. The language that Appellants claim provides for wholesale publication of the registry on the internet merely states that the “use of computerized or electronic transmission of data or other electronic or similar means is permitted.” § 23-3-490(E). “Transmission” is a far cry from “publication.” Appellants also seek to graft “publication to the public” into sections 23-3-400, -410, and -490(E). Yet, the term “publication” only appears in section 23-3-490(A), in reference to sheriffs’ duties to provide county specific lists to newspapers upon request. Other states’ SORA statutes explicitly authorize publication of the registry on the internet. The few that don’t do not contain the explicit language regulating dissemination of the information that the South Carolina SORA contains. *Compare, e.g.*, Fla. Stat. § 943.043 (“The department may notify the public through the Internet of any information regarding sexual predators and sexual offenders which is not confidential and exempt from public disclosure under s. 119.07(1) and s. 24(a)), *with* Ala. Code § 15-20A-21 (statute not enumerating ways that people can access registry information but allowing community notification by “publication.”).

Furthermore, the ability for the sheriff or SLED to provide information to the public without a specific record of the request and the requestor (*e.g.*, on a form prescribed by SLED) is not set forth anywhere in the SORA. Rather, Defendants argue that SLED’s ability to provide

information to the public without these safeguards is “implied,” “tacit,” or in the statute “as a whole.” The trial court acknowledged 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, and that SLED’s *ultra vires* approach is less burdensome. (Order dated May 7, 2019, p. 13). But, even after many amendments to SORA over the last twenty years, the Legislature has not adopted such an approach and it is not this Court’s job to rewrite the statute for the Legislature. The duration and breadth of the SORA’s registration scheme are the longest and broadest in the country, requiring lifetime registration for all offenders, regardless of the level of offense or likelihood of recidivism. There is nothing illogical about requiring documentation and accountability in publication as a counter-balance to such a lifetime registration scheme. The purpose and language of the statute suggest that such a balance is exactly what the General Assembly intended.

Additionally, finding that the SORA does not contemplate or allow for the registry to be published on the internet would not prohibit the public from accessing information from which the public can assist law enforcement in solving crimes as Appellant contends. The trial court properly held that the public will continue to have access to the information of the registry, but that the public’s access will simply be regulated in accordance with the plain language of the statute. (R. p. 16). Similarly, under the trial court’s reading of the statute, Appellants will still be able to disseminate information as required under the statute, they will just have to do so in a way that complies with the statute’s plain language.

Finally, the trial court properly rejected the argument that the binding precedent of this State indicates that SLED is authorized to utilize the internet as a means of providing public access to the registry fails because 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. (Id.). While the trial court acknowledged that courts in this State have addressed the importance of the registry and the public's access to it, the trial court properly determined that the question of whether Appellants' *ultra vires* publication of the registry on the internet and the breadth of Appellants' publication scheme violated South Carolina law had not been directly addressed in any of the cases cited by Appellants.

II. THE TRIAL COURT PROPERLY DETERMINED THAT RESPONDENT IS ENTITLED TO EQUITABLE RELIEF.

The trial court properly determined that the Sex Offender Registry, as implemented by Appellants and as applied to Respondent, justifies equitable relief in his case. (R. p. 7). Even if registration for law-enforcement-related purposes is equitable, SLED's failure to comply with the plain language of the statute and Appellants' methods of publicizing online the sex offender's criminal history and location and personal details are *ultra vires*; such publication is unrelated to the stated legislative purpose, is fundamentally unfair, and, accordingly, Respondent is entitled to equitable relief.

"Equity abhors a wrong without a remedy." *Key Corp. Capital, Inc. v. County of Beaufort*, 360 S.C. 513, 519, 602 S.E.2d 104, 107 (Ct. App. 2004), *rev'd on other grounds*, 373 S.C. 55, 644 S.E.2d 675 (2007) (quoting *State ex rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937))⁴. The facts before the Court warrant an equitable solution. "Equity is reserved for

⁴ Appellants claim the trial court relied on "overturned law" when citing to *Key Corp. Capital, Inc. v. County of Beaufort*, 360 S.C. 513, 519, 602 S.E.2d 104, 107 (Ct. App. 2004). However, the proposition that "equity abhors a wrong without a remedy" was not overturned. Rather the equitable relief awarded by the court below was reversed. See *Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007). On appeal, the Supreme Court in fact acknowledged that equitable relief is generally available where there is no adequate remedy at law. *Id.* at 61, 644 S.E.2d at 678.

situations where there is no adequate remedy at law.” *Santee Cooper Resort, Inc., v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179, 185, 379 S.E.2d 119 (1989). This is just such a situation.

The trial court also properly determined that Respondent’s equitable claims have merit for other reasons. (R. pp. 16-17). The purpose of the Sex Offender Registry is “to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes.” *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). No facts in the pleadings or affidavits even suggest that Respondent is a danger to anybody, or that the government’s and public’s knowledge of his whereabouts for the rest of his life helps solve or prevent crime. Additionally, the separate and distinct methods used to publicize him as a former offender are unfair and disproportionate, undermining the stated legislative purpose of public safety. South Carolina courts have long observed that equity “looks beneath rigid rules of law to seek substantial justice.” *Drury Dev. Corp. v. Foundation Ins. Co., et. al*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008). The Appellants’ own actions in this case, adding red letter warnings to its Registry website after this issue was raised by Respondent, (*see* R. pp. 141-142) confirm the risks associated with such publication.⁵ These are risks that our legislature was clearly concerned with, in drafting the limiting language of subsections (A) and (B).

Finally, the State, and SLED as the responsible agency, have allowed at least one government-sponsored sex offender website to inaccurately publish that Respondent actually victimized a twelve-year-old girl. (R. p. 120). Such inaccuracy by a government actor begs for a remedy, and removal from the registry, after inclusion for almost a decade, is perhaps the only appropriate and equitable remedy therefor.

⁵ According to affidavits, Appellants share this concern and at some point, after the December 6, 2017 hearing regarding this matter, SLED reportedly modified its sex offender registry website to include a warning against using the website “to unlawfully injure, harass, or commit a crime against any individual named in the registry. . . .”

III. THE TRIAL COURT PROPERLY DETERMINED THE DURATION OF SORA'S REGISTRATION SCHEME AND THE BREADTH OF APPELLANTS' NOTIFICATION SCHEME VIOLATE RESPONDENT'S RIGHT TO EQUAL PROTECTION UNDER THE LAW.

The trial court properly determined that the duration of the SORA's registration requirement and the breadth of Appellants' notification schemes violate Respondent's right to equal protection under the law. (R. p. 17). The equal protection clause of the United States Constitution provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also* S.C. Const. art. I, § 3. If a statutory provision "does not involve a suspect classification or a fundamental right, ... the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose." *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001) (citing *Casbah, Inc., v. Thone*, 651 F.2d 551 (8th Cir. 1981)); *Hendrix v. Taylor*, 353 S.C. 542, 549, 579 S.E.2d 320, 232 (2003). Respondent's status as a sex offender is not a suspect classification, nor are any fundamental rights being violated. Therefore, the legislation must be rationally related to a legitimate purpose.

The legislative intent of this statute is express:

"The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. . . . The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400.

The trial court properly determined that, on its face, the General Assembly intended the SORA to provide for public safety and to aid law enforcement in knowing the location of sex offenders. (R. p. 18). The trial court found that the justification and purpose of this statute relies on the assertion that “[s]tatistics show that sex offenders often pose a high risk of reoffending.” (Id.). Therefore, the trial court found that the question of law is whether the SORA as written and implemented bears a rational relationship to the stated purpose of public health, welfare, and safety of the state’s citizens and properly found that it does not. (Id.).

The SORA is intended to apply to “these convicted offenders” who “often pose a high risk for reoffending.” S.C. Code Ann. § 23-3-400. The basis for the stated purpose—dangerous recidivism—groups low-level sex offenders, who have no indication of reoffending, into the same category as diagnosed sexual predators. The statute does not reference comparative recidivism rates, nor does it define its key terms—“sex offenders,” “often,” “high,” “reoffending.” The SORA makes no distinction between offenses, offenders, and recidivism, instead lumping together all individuals convicted of any of the offenses on the statutory list. The trial court found that, based on the uncontroverted evidence before the Court, Dennis Powell, Jr. does not fall into any high-risk category for recidivism other than having committed an offense on South Carolina’s list and that years after implementation of SORA, no evidence has been presented indicating all sex offenders reoffend at the same rate; nor has any statistical evidence been presented indicating low-level offenders, such as Respondent, reoffend at a “high” rate or even at a higher rate than any other group of sex offenders or any other group of offenders in general. (Order dated May 7, 2019, pp. 16-17). Neither the State nor SLED has offered no evidence that the SORA has reduced sex

offenses overall in South Carolina and, in any event, it is uncontested that Dennis Powell, Jr.'s recidivism rate is zero percent.⁶

Appellants argue that Respondent has not even endeavored to claim that he is being treated differently from similarly situated persons. (Appellant Initial Brief p, 32). However, Respondent argued, and the trial court properly found, that in South Carolina, sex offenders convicted of victimless crimes, who show no risk of reoffending, and pose a low risk to the community, are not treated equally with sex offenders convicted of victimless crimes, who show no risk of reoffending, and pose a low risk to the community in other states across the country. (R. p. 19). South Carolina appears to be the *only* remaining state to maintain a lifelong registry for all sex offenders, with no fixed-period registration classification, no tiered review, no opportunity to petition for relief of restrictions, and no judicial removal process. Other states implement either: (1) a proportionality analysis, requiring a shorter registration period for less egregious offenders; or, (2) the ability to petition the court for removal after passage of a certain amount of time, as required by statute. Some states implement a mixture of these two approaches.⁷

⁶ This is an established fact. Appellants misstate the court's order, arguing it erred in "mischaracterizing" that Respondent "is of no risk of reoffending and his recidivism rate is zero percent") (Initial Brief of Appellants p. 42), where the Court order states he is of "low risk to re-offend." (Order 05-07-19; Aff of Martin R. pp.).

⁷ The majority of states' registration requirements consist of either a lifetime requirement or registration for 10 years depending on the nature of the offense. *See* Ariz. Rev. Stat. Ann. § 13-3821(M); Conn. Gen. Stat. § 54-251; D.C. Code. § 22-4002; Ga. Code. Ann. § 42-1-12; Ill. Comp. Stat. § 150/7; Ind. Code § 11-8-8-19; Iowa Code § 692A.106; Me. Stat. tit. 34-A, § 11225-A; Minn. Stat. § 243.166; N.H. Rev. Stat. Ann. § 651-B:6; N.M. Stat. Ann. § 29-11A-4; R.I. Gen. Laws § 11-37.1-4; Tex. Code Ann. § 62.101; Utah Code Ann. § 77-41-105; Vt. Stat. Ann. tit. 13, § 5407; W. Va. Code § 15-12-4. Twelve states require registration with Title I of the federal Adam Walsh Child Protection and Safety Act of 2006. Pub. L. No. 109-248, 120 Stat 587; *see also* 34 U.S.C. § 20911. These states require registration based on the tier of offender. Tier III offenders must register for their lifetime, Tier II for 25 years, and Tier I for 15 years. *Id.*; *see* Kan. Stat. Ann. § 22-4906; La. Stat. Ann. § 544; Md. Code Ann. § 11-707; Mich. Comp. Laws § 28.725; Miss. Code. Ann. § 45-33-47; Mo. Rev. Stat. § 589.400; Neb. Rev. Stat. § 29-4005; Nev. Rev. Stat. § 179D.490; N.D. Cent. Code § 12.1-32-15; Ohio Rev. Code Ann. § 2950.07; Okla. Stat. § 583; Pa. Cons. Stat. § 9799.15. The following states have tiered registration requirements depending on the level of offense. *See* Haw. Rev. Stat. § 846E-2 and S.D. Codified Laws § 22-24B-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,

In our neighboring state of North Carolina, a sex offender successfully petitioned the United States Supreme Court to remove social media restrictions connected to his registration. He was convicted of sexual conduct with minor—with an actual child victim, unlike Respondent. The Court noted he was “required to register as a sex offender—a status that can endure for 30 years or more.” *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 1734 (2017) (emphasis added). Yet, in South Carolina, pursuant to SORA, Respondent is required to register not for 30 years, but for life, for substantially less egregious conduct. This underscores the unequal protection of the laws afforded to him as a South Carolinian by SORA. Nationally, an overwhelming majority of low-level sex offenders with subsequent clean records, with little

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

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

chance of recidivism, with a low risk to the community, and whose crimes did not involve a victim, are treated differently than Respondent, simply because he lives and registers in South Carolina.

While maintaining a sex offender registry is certainly rationally related to the stated purpose of public health, welfare and safety, the requirement of mandatory lifetime registry for all sex offenders is not. There are no facts supporting a rational relationship between the statute's application of the SORA to the Respondent for life and its stated purpose, "protect[ing] the public from those offenders who may re-offend." *In re Justin B.*, 419 S.C. 575, 580, 799 S.E.2d 675, 678 (2017) (*citing Walls*, 348 S.C. at 31, 558 S.E.2d at 526). Notably, none of Appellants' affidavits, including one from SLED, one from the Richland County Sheriff's Office, and one from the S.C. Victim Assistance Network, cite any evidence data whatsoever of effectiveness of the SORA and its public purpose. Thus, the trial court properly found that "[u]nder the undisputed facts before this Court, the SORA and its implementation by [Appellants] are not rationally related to any legitimate government purpose, and therefore violate [Respondent's] right to equal protection of the law. Finally, [Appellant's] *ultra vires* publication of Respondent's information is a violation of the right to equal protection under the law. (R. p. 21).

IV. THE TRIAL COURT PROPERLY DETERMINED THAT SORA VIOLATES RESPONDENT'S RIGHT TO DUE PROCESS.

The trial court properly held that the SORA violates Plaintiff's right to due process under the law. (R. p. 19). Both the United States Constitution and South Carolina Constitution provide that: "No person shall be deprived of liberty without due process of law." U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Further, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Our State's Constitution provides, and our Supreme Court has repeatedly held, that statutory access to judicial review is hallmark evidence of due process. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." S.C. Const. art. 1, § 22; *Thompson v. State*, 415 S.C. 560, 566, 785 S.E.2d 189, 192 (2016) (citing *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). To survive a Due Process challenge, the law must have a rational relationship to the deprivation of the liberty interest and not be arbitrary, or "so inadequate that the judiciary will characterize it as arbitrary." *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 524, 319 S.E.2d 717, 721 (Ct. App. 1984) (citing *Jeffries v. Turkey Run Consol. Sch. Dist.*, 492 F.2d 1, 4 (7th Cir. 1974)). The SORA implicates registrants' liberty interests in demonstrably serious and permanent ways and is just such an arbitrary law.

In a case addressing the Registry's monitoring provision,⁸ the South Carolina Supreme Court held "a lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013). In *Dykes*, the court ruled "the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test." *Id.* at 508, 744 S.E.2d at 510. But notably, the court held that "we believe the final sentence of section 23-3-540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC 1st or lewd act on a minor." *Id.* "The complete absence of any opportunity for judicial review to assess a risk of re-offending . . . is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending." *Id.*

⁸ Respondent is not subject to electronic/GPS monitoring.

Similarly, the Court in *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 773 (2013)⁹, reviewed the case of a sex offender adjudicated in Family Court for criminal sexual conduct with a child. He challenged the electronic monitoring requirement as being cruel and unusual when applied to a juvenile. *Id.* at 394, 747 S.E.2d at 775. Although the court rejected that argument, the court did note he was “entitled to judicial review of his continued compliance with...electronic monitoring requirements.” *Id.* at 408, 747 S.E.2d at 783. The court held “Sex offenders . . . are entitled to avail themselves of the...judicial review process” in the context of the sexual violent predator (SVP) law. *Id.* (citing *Dykes*, 403 S.C. at 510, 744 S.E.2d at 511). *See also State v. Nation*, 408 S.C. 474, 482, 759 S.E.2d 428, 432 (2014).

The SORA arbitrarily deprives Respondent of substantial liberty interests and bears no rational relationship to any stated goal. The SORA does not afford him access to any judicial review of his placement on the Sex Offender Registry or his lifelong status on it. Registering as a Sex Offender implicates his liberty interests, just like the imposition of satellite monitoring would. He is labeled by the State as a Sex Offender, creating a presumption he is a risk to the public. He is subject to reporting requirements, disclosure requirements, and restrictions on where he lives and works. He is subject to the SORA’s payment provisions, as amended over the years, and he is even limited as to what he can do in his own home. The SORA does not afford a registrant an opportunity for judicial review of lifelong registration at any stage.

As further evidence of arbitrariness, this is a statutory aberration. To be sure, the most egregious and dangerous sex offenders, sexually violent predators (SVPs), pursuant to S.C. Code Ann. § 44-48-30, are entitled to more than a minimal level of judicial review. An offender is found to be a SVP when he or she (a) has been convicted of a sexually violent offense and (b) suffers

⁹ There are two separate S.C. Supreme Court *Justin B.* cases involving different juveniles, one decided in 2013 and the other in 2017, also cited at p.23, *supra*

from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. After involuntary commitment following a trial by court or jury, a SVP is entitled to *yearly* judicial review and may proceed, again, to a trial by court or jury to petition for release. In this case, Respondent has had no recidivism whatsoever for ten years, and is at low risk to re-offend, yet, under the SORA, these relevant facts will never be considered by any court in determining whether he should be required to continue registering every six months under SORA for the rest of his life.

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

impaired thereby; and that suitable employment has been secured for him.” S.C. Code Ann. § 24-21-640. Meanwhile, non-violent sex offenders who committed a crime with no victim and have no indications of recidivism have no relief from the Sex Offender Registry even if the offender can prove they are reformed and that the interest of society would not be impaired were they to be removed.

Finally, in legislation pre-filed for this session of the General Assembly, there is proposed a “Vulnerable Adult Maltreatment Registry.”¹⁰ Unlike under the SORA, an individual proposed to be listed on the Vulnerable Adult Maltreatment Registry “must have the right to appeal the determination” and “seek judicial review in the South Carolina Administrative Law Court. . .”¹¹

There is no such process available to Respondent. In this case, Respondent must continue to register for life. No such factual scenario has ever come before our appellate courts. Even the most egregious sexually violent predators, such as Justin B. in the 2017 case involving the rape of a five-year-old, (*see Justin B. (2017), supra.*)¹² have multiple opportunities to present cases seeking to reassess their danger to the community and risk of recidivism, while Respondent, who committed a victimless crime and shows no risk of recidivism, cannot have his lifetime status as a registered Sex Offender reviewed in any form or fashion. It is undisputed the SORA affords him no opportunity for judicial review.

¹⁰ H. 3273 2019-20, The earlier version of which was cited in the record in this case as Central Registry of Vulnerable Adult Abuse, Neglect, and Exploitation. H.4413, 2017-2018

¹¹ Proposed section 43-35-640(A)

¹² Sexually Violent Predators, S.C. Code Ann. § 44-48-30. An offender is found to be a sexually violent predator when he or she (a) has been convicted of a sexually violent offense and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. The offender may then be involuntarily committed to the Department of Mental Health, but only after a trial. Under § 44-48-110, a sexually violent predator is entitled to yearly review by the court of his or her mental health evaluations and may proceed to trial to petition for release from the Department of Mental Health.

Consistent with evolving Sex Offender Registry jurisprudence nationwide on equal protection, the Eighth Amendment, and due process, the Supreme Court in Alaska recently decided a due process case that asked “whether the Alaska Sex Offender Registry (ASORA) violates due process by requiring all sex offenders to register without providing them a procedure for them to establish that they do not represent a threat to the public.” The Alaska Supreme Court concluded that ASORA violates due process, but its defect may be cured by providing a procedure for offenders to establish their non-dangerousness.” *Doe v. State of Alaska*, 444 P.3d 116 (Alaska 2019) The court in *Doe* applied a strict scrutiny test to Alaska’s registry scheme, recognizing a right to privacy in Alaska’s constitution, and acknowledging U.S. Supreme Court binding precedent that “liberty” as protected by the Due Process clause includes certain other rights.” *Id.* (citing *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997)).

Similarly, South Carolina’s Constitution contains an express right to privacy: “the right of the people to be secure against . . . unreasonable invasions of privacy shall not be violated,” S.C. Const. art. I, § 10. South Carolina courts have consistently “acknowledged the higher level of privacy protection afforded by our state constitution.” *State v. Counts*, 413 S.C. 153, 164, 776 S.E.2d 59, 65 (2015). In the context of Respondent’s mandated registration as a sex offender, the record in this case is replete with liberty interests in his personal privacy being implicated by his status on the Sex Offender Registry and Appellants’ online publication of it. (See, e.g., R. pp 117-136; R. pp. 139-142; R. p. 68-81).

Under the *Dykes* test, the statute is arbitrary. Additionally, Appellant’s *ultra vires* publication deprives Respondent of his right of fair warning and implicates his liberty interests, therefore violating his rights to Due Process under the Fourteenth Amendment of the U.S. Constitution and Article 1, Sections 3 and 10 of the South Carolina Constitution.

V. THE TRIAL COURT PROPERLY HELD THAT THE SORA IS SO PUNITIVE IN EFFECT AS TO NEGATE THE STATE’S INTENT THAT IT BE NON-PUNITIVE.

The SORA as implemented today—mandating lifelong registration, and adding national, and international Registered Sex Offender status along with free-access internet publication for life to anyone curious, coupled with the restrictions attached to being a registered sex offender—render the current SORA as punitive.

More than fifteen years ago, the South Carolina Supreme Court held that “sex offender registration . . . is non-punitive. . .” *In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311 (2003); *In re Justin B.*, 419 S.C. at 581, 799 S.E. 2d at 678. In the later *Justin B.* case, on the question of electronic monitoring, the Court found “the requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor¹³ is not a punitive measure. . .” *In re Interest of Justin B.*, 799 S.E.2d 675, 419 S.C. 575 (S.C., 2017) ¹⁴ However, much has changed in sixteen years. The U.S. Supreme Court mandates a two-part threshold analysis for Eighth Amendment challenges to statutes alleged to be punitive: “If the intention of the legislature was to impose punishment, that ends the inquiry. If . . . the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.” *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361, (1997)).

The SORA self-identifies as “not intended to violate the guaranteed constitutional rights of those who have violated our nation’s laws,” S.C. Code Ann. § 23-3-400 and has been interpreted

¹³ Electronic monitoring is not applicable to Respondent

¹⁴ Other states have concluded sex offender registries and publication methods are punitive. *See, e.g.*, AK: *Doe v. State*, 189 P.23d 999 (2008); MI: *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016); NH: *Doe v. State*, 167 N.H. 382 (2015); OK: *Starkey v. Oklahoma Dept. Of Corrections*, 305 P.3d 1004 (Okla. 2013).

as such. Therefore, the trial court properly applied the second part of the *Smith v. Doe* test: Is the SORA so punitive in effect as to negate the state's intent that it be non-punitive? (*See* R. p. 26). Useful guideposts to answering this question are found in *Doe*, 583 U.S. at 86–87 (*citing Kennedy v. Mendoza-Martin*, 372 U.S. 144, 168–69 (1963)): (1) does the sanction involve an affirmative disability or restraint; (2) has it historically been regarded as a punishment; (3) does it come into play only on a finding of scienter; (4) does its operation promote the traditional aims of punishment—retribution and deterrence; (5) is the behavior to which it applies already a crime; (6) is there an alternative purpose to which it may rationally be connected; and, (7) does it appear excessive in relation to the alternative purpose assigned.

The SORA contains the following statement of intent:

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

S.C. Code Ann. §23-3-400.

Twenty-plus years later, the execution of the SORA has gone far afield of that constitutional intent. This statement of legislative purpose never references any need for publication to the general public, nor does it refer to statistical information that public identification of sex offenders and their locations lower the rate of recidivism or increases public safety. Appellants in this case filed affidavits from representatives of SLED, local law enforcement, and the SC Victim's Assistance Network, none of which include any supporting data linking the SORA of today to the intent of the legislation. Internet publication of registry

information, when registration is for life, is in no way necessary or even related to the stated legislative intent. Even if SLED identified and kept a record of those requesting access and even if SLED limited that information to the statutorily proscribed information, changes to technology impacting the internet—such as automated data mining and collection—since the passage of the SORA would likely have thwarted such efforts. By publicly branding all sex offenders for life, especially minor offenders like Respondent, the State has gone beyond the express legislative intent of the statute. The distinctly non-proscribed and different methods used to publicize registry information have converted what might have been a non-punitive tool for law enforcement into a punitive scheme and the trial court properly held that this distinctly different publication method potentially *increases* the risk to public safety by leading a lifetime of discrimination against registrants.¹⁵

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

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

¹⁵ As noted above, during this litigation, SLED even felt compelled to modify the sex offender registry website to warn against the public's use of information from the website to harm, injure, or otherwise discriminate against registrants.

(1) There is affirmative restraint. In addition to the information the government requires of many personal details of Respondent's life, he is restricted as to where he lives, with whom he volunteers or works¹⁶, and even some of his behavior at home. Appellants offer testimony Respondent "has never been subject to residency or work restrictions based upon his lawful status a sex offender." (R. p. 243). Respondent may never have run afoul of any of these restrictions himself, but they are most certainly there. For example, sex offenders are prohibited from living in campus housing,¹⁷ Sex offenders may not work as taxi or charter drivers, foster care providers, truck driver trainers, childcare workers, or group home employees.¹⁸ In Respondent's real life, he lost at least one job with a country club caterer because the club could not allow him to work on the premises. (R. p. 119). He has lost adult relationships directly because of sex offender status, including that a divorced mother with custody cannot marry or cohabit with Respondent or risk losing custody of her children.¹⁹ Also, South Carolina sends its information to the Department of Justice. The International Megan's Law of February 2016, required a "unique identifier" placed on the passports of Americans convicted of sex offenses with children and requires offenders to notify law enforcement twenty-one days before traveling abroad, and allowing for the revocation of passports previously issued to these individuals that do not contain the identifier.²⁰ In addition to this unavoidable identifier by the US government, registered Sex Offenders holding the marked passport could be denied entrance to foreign countries.²¹ As a South Carolina sex offender, Respondent cannot be removed from the Registry, so the law works an unconstitutional lifelong

¹⁶ E.g., Respondent struggles that "Uncle Dennis" cannot volunteer with his nephew's sports teams (R. p.121).

¹⁷ (R. p. 123-136)

¹⁸ Sec. 103-33, 114-550, 114-503, 114-521 S.C. Code of Regs.

¹⁹ (R.p.120); not to mention adoption-- the fundamental right to build a family.

²⁰ 22 U.S.C § 212(b).

²¹ See also David Post, "The Yellow Star, The Scarlet Letter, and the International Megan's Law," Wash. Post, January 6, 2016.

deprivation of travel liberty, as compared to similarly situated U.S. citizens of other states. All these are affirmative restraints.

(2) From the stocks, to flogging, to chain gangs, public shaming is historically punitive. Two decades after passage of the SORA, even South Carolina courts and juries recognize as much; in 2013, a Clarendon County jury awarded \$890,000 to a non-sex offender whose condominium board circulated a flier identifying him as a sex offender. “There are certain names you just can’t call people.”²²

Respondent is publicly shamed for life by being on the Sex Offender Registry. His face and identifying information appear on the South Carolina Sex Offender website, other official, government websites authorized by SLED, and the National Sex Offender Public Website. This internet publication scheme is different than the NCIC-based restricted access publication process applicable to any other group of offenders, including violent and repeat offenders, even child abusers and killers.²³ It is also much less reliable. Having promulgated this information on the internet, Appellants are apparently unwilling to exercise their statutory authority to prevent false information from being published by subordinate government actors. Additionally, Appellants are powerless to control its continued dissemination via a host of privately-operated sites, including, but not limited to sites that profit from Respondent’s information, including the false information about an alleged twelve-year-old victim. (*See* R. p. 120).

A university graduate with many local ties, Respondent has lost at least two jobs and has been denied employment as a result of his registry status, it has negatively impacted his personal

²² “South Carolina Man Wins Damages,” The Post & Courier, Dec. 13, 2013.

²³ The General Public has access to bare-bones criminal records (no photo, residential details) only through a formal request to SLED (and usually payment) where the requestor provides the subject’s social security number. *See* Sec. 72-23 S.C. Code Regs. *See also* S.C. Code Ann. § 20-7-650 et seq., The South Carolina Central Registry of Child Abuse and Neglect, restricted by SCDSS, subject to administrative review, and not available to the general public on the internet.

relationships, and he and his family have been shamed in their community. The U.S. Supreme Court case *Smith v. Doe, supra*, which held “adult sex offender registries do not resemble traditional forms of punishment, such as public shaming,” *id.* at 98, was decided in 2003. Justice Kennedy wrote the Court’s opinion in *Smith v. Doe*. However, fourteen years later, a U.S. District Court inventoried changes to the internet and society and noted the following:

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

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

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

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

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

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

(7) The Sex Offender Registry's effects on Plaintiff are excessive in relation to the stated purpose for which it was created. As Appellants point out, Respondent subjected himself to a battery of tests by experts in the field. (Appellant's Initial Brief p. 42). The Court cited the expert opinion that he is of low risk to re-offend and has not re-offended in any manner. He has furthered his education and maintained employment. The effect of his being registered is on him personally, but it reaches his family and impacts his relationships. In most any other context, the state's publication of Respondent's personal information is expressly illegal. *See* Family Privacy Protection Act of 2002, S.C. Code Ann. § 30-2-20.

In 2019, the onerous lifetime burdens of the Sex Offender Registry upon Respondent are cruel and excessive in his case, and wildly disproportionate to his offense, a victimless crime for

which he received a one-year suspended sentence. Additionally, Appellants' *ultra vires* publication of Plaintiffs information renders the actions cruel, excessive and punitive in nature.

Based on the evidence of the cruel and excessive punitive effects of the Sex Offender Registry on Respondent, the trial court properly determined that he was entitled to summary judgment on this claim.

VI. THE TRIAL COURT PROPERLY DETERMINED THAT IF THE COURT WERE TO JUDICALLY EXPAND THE LANGUAGE OF SORA TO ALLOW FOR WHOLESALE PUBLICATION OF THE REGISTRY VIA THE INTERNET SUCH AN EXPANSION WOULD ACT LIKE AN *EX POST FACTO LAW* AND VIOLATE RESPONDENT'S RIGHTS TO DUE PROCESS.

Appellants argue that the trial court's holding that allowing for the wholesale publication of the sex offender registry via the internet would act like an *ex post facto* law because it was not raised by Respondent. (Appellant's Initial Brief, p. 41). This is factually incorrect; Respondent did argue for an *ex post facto* analysis as regards an internet publication scheme not in place at the time he pled.²⁴ The Court included an *ex post facto* analysis in its opinion. Respondent's argument that SLED's evolving practice of wholesale internet publication to the international general public was not then and is not now authorized by statute or regulation was persuasive to the Court.

The United States and South Carolina Constitutions specifically prohibit the passage of *ex post facto* laws." *Walls*, 348 S.C. at 30, 558 S.E.2d at 525 (citing *State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993)). For 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." *State v. Huiett*, 302 S.C. 169, 172, 394 S.E.2d 486, 487 (1990) (citing *Flemming v. Nestor*, 363 U.S. 603, 635 (1960)). (citing *Miller v. Florida*, 482 U.S. 423 (1987)). Accordingly, and because the SORA

²⁴ (R. pp. 299-308).

narrowly and precisely limits the ways in which Appellants' can disseminate sex offender registry information to the public, the trial court properly determined that if it were to judicially expand the language of the statute to allow for internet publication, its decision would act as an *ex post facto* law. "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *Johnson v. Lloyd*, 407 S.C. 610, 757 S.E. 2d 705 (2014) (citing *State v. Wise*, 359 S.C. 14, 596 S.E.2d 475 (2004)). The issue was in fact both raised to and ruled on by the trial court in this case. The publication scheme implemented by appellants under SORA acts as a "law" applicable to Respondent's prior conduct. This is arguably the very crux of the trial court's *ex post facto* analysis. Appellants' ever-changing nature of the data requested and the methods of publication by it and third parties are now punitive to Respondent. These consequences and SLED's licentiousness in sharing his personal details—purposefully or inadvertently, accurately or not—with third parties were not anticipated or known by Respondent at the time of conviction and he is disadvantaged by it.

The trial court acknowledged it is established in South Carolina that the SORA is not punitive in nature as a whole, but properly found that no court in this State has ever specifically addressed whether the "*publication scheme as implemented by Defendants* is punitive." (R. p. 33). The trial court also acknowledged that the vast majority of cases that have addressed the issue of whether a state's sex offender registration and requirements are punitive in nature have found that they are not. " (Id.). However, as set forth more fully above, South Carolina is the only state in the country that requires lifetime registration for sex offenders for all sex offenses without the opportunity for judicial review of the registration requirement. This means that all sex offenders in South Carolina, regardless of recidivism rate or risk, will be subject to the wholesale publication of their registry information for life, no matter what the level of the offense. Appellants'

publication scheme is therefore unlike any other in the country²⁵—the lifetime duration of the Act’s requirements, coupled with the lack of any individualized assessment of the risk of recidivism and the lack of any tiered publication/notification system makes Appellants’ 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. Ever-expanding internet publication and the ramifications thereof severely disable and restrain Respondent. The trial court properly found the procedures employed under the SORA have made Respondent virtually unemployable in any field and will likely affect other registrants in the same way. Appellants publish the names and addresses of registrants and enable anonymous searches through a simple name search or even a search by location. The breadth of the information available on the registry and the ease with which members of the public can access the information severely curtail the Respondent’s ability to find and maintain employment. In fact, since Respondent registered, he has been fired and denied jobs he applied for not because he has a criminal conviction but solely because he is a Registered Sex Offender, discoverable on the Sex Offender Registry online. Because he is on the registry, has had to drastically change his career plans, settling as a low wage hourly food and beverage worker. The fact that Respondent faces the possibility of this kind of restraint for the remainder of his life, regardless of the low level of his offense, his lack of criminal history since

²⁵ 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).

his registration, and his low chance of recidivism, makes the wholesale internet publication of South Carolina's sex offender registry unconstitutional. The trial court's ruling that these ever-increasing internet-publication-related consequences operate *ex post facto*, in violation of Respondent's rights, is supported by the evidence in this case.

VII. THE TRIAL COURT DID NOT DISREGARD AND MISCHARACTERIZE THE EVIDENCE IN THIS CASE.

Appellants attempt to mislead this court by misstating both the trial court's order and the affidavit of Dr. Thomas V. Martin. On its face, the Order plainly states Respondent is of "low risk to re-offend" (R. p. 5). Again, as previously argued and as the Court properly recognized as fact, his rate of recidivism is zero percent. Respondent respectfully submits it is in fact Appellants who are mischaracterizing the evidence and the circuit court's findings for this Court.²⁶

In this same vein, it bears pointing out Respondent submitted into evidence testimony from his guilty plea hearings related to recidivism and a new and updated evaluation by Dr. Thomas Martin, relevant to his arguments. It was Appellants who filed publicly—online for all the world—the 2009 confidential medical records from Drs. Burke and Martin that were sought by Respondent in connection with his criminal case ten years ago. These records were his own, submitted to the Solicitor²⁷ only in connection with his 2009 General Sessions case. Similarly, Appellants publicly filed—again, online, for all the world—salacious and embarrassing transcripts that were presumably evidence in the Solicitor's case, unfiled in a public electronic forum. The case ended by Respondent's guilty plea long ago, unappealed and unchallenged in this case. Respondent can only speculate as to the reason the State of South Carolina and SLED chose to publish these

²⁶ Respondent pointed out this fallacy in his Memorandum in Opposition to Defendants' Motion to Alter or Amend, R. p. , but Appellants repeat it here.

²⁷ Not Appellants

materials online now, since the conduct and the conviction are matters of unchallenged fact and law in this case—ironically a case involving online publication.

Respondent's experts characterized him as having a low risk to re-offend, both in 2009 and at the time he filed this case. Time has borne them out, as he has not re-offended. He has never failed to comply with the Sex Offender Registry requirements and presents with a long, consistent history of appropriate behavior with no history of aberrant behavior around children. Diagnostically, and after many hours of forensic psychiatric assessment, Respondent does not meet the criteria for a major mental illness, substance abuse disorder, personality disorder, nor does he meet the criteria for a sexual perversion disorder. He requires no sex offender-related therapy. Respondent submits the mischaracterization on these points is not his or the trial court's.

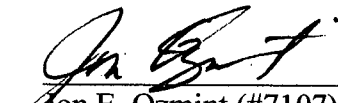
CONCLUSION

Appellants argued South Carolina courts are without power to declare a statute or its implementation unconstitutional, under a theory of separation of powers.²⁸ To the contrary, the entire body of constitutional law and basic civics tells us it is precisely the judicial branch's function to review laws made by the legislative branch, applying constitutional scrutiny when

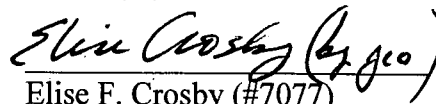
²⁸ See, e.g., "Jurisprudence mandates that we . . . uphold and follow the law as espoused by the legislature" (Tr. 4:18-20); "It would be legal and constitutional error" for the trial court to find SORA unconstitutional (Tr. 23:20); "We all have opinions on what the law should say... We must follow the law . . . respect it's the constitutional function of the legislature to make the laws and follow those laws. Even if we don't like them. Even if we don't respect them . . . The constitutional separation of powers mandates that. . ." (Tr. 25:9-22)

appropriate. Respondent asked this of the circuit court and submits the circuit court's order should be affirmed for the reasons state herein.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
December 20, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Dennis J. Powell, Jr. Respondent,

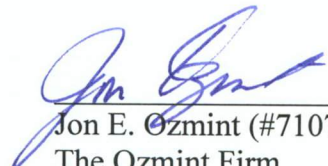
v.

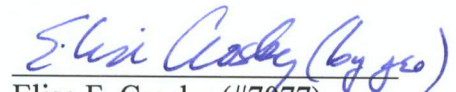
Mark Keel, Chief, State Law Appellant.
Enforcement Division of the
State of South Carolina,

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DEC 23 2019
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.


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