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S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas**

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2019-000691

Eric Ragsdale,Appellant,

v.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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ARGUMENT

Appellant, Eric Ragsdale (“Ragsdale”) hereby submits this Supplemental Brief of Appellant at the request of this Honorable Court, specifically addressing the due process arguments outlined in Doe v. Department of Public Safety, 444 P.3d 116 (Alaska 2019), and how the absence of a procedure to permit sex offenders to petition for removal from lifetime registration violates substantive due process. For the reasons outlined herein, as well as those previously presented, the South Carolina Sex Offender Registration Act (“SORA”) violates both the United States and South Carolina Constitutions.

I. SOUTH CAROLINA’S SEX OFFENDER REGISTRATION ACT VIOLATES SUBSTANTIVE DUE PROCESS.

Both the United States and South Carolina Constitutions provide that “[no state] shall [] deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1; see also S.C. Const. Art. I, § 3. This guarantee covers more than just a fair process, as the Amendment “cover[s] a substantive sphere as well, ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’” See County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998)(quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). Thus, the protection against arbitrary governmental action is at the core of the Due Process Clause. See id., at 845. “Substantive due process is a doctrine that is meant to guard against unfair, irrational, or arbitrary state conduct that ‘shock[s] the universal sense of justice.’” Doe v. Department of Public Safety, 444 P.3d 116, 125 (Alaska 2019)(citing Church v. State Department of Revenue, 973 P.2d 1125, 1130 (Alaska 1999)).

In Doe, Appellant argued that the Alaska Sex Offender Registry Act (“ASORA”) violates the due process clause of the Alaska Constitution in that it infringes upon several protected rights, notably the “right to integrate into society, the right to privacy, the right to be let alone, and the

right to pursue employment. These rights, Doe contends, are fundamental, and that the State can only interfere if a compelling interest exists and the least restrictive means is utilized. See Doe, at 124. He argues that there are no compelling reasons justifying registration if the offender no longer presents a danger to the public. See id. Additionally, Doe argues that even if a compelling reason exists, ASORA fails the least restrictive means test as no procedures exist whereby a rehabilitated offender may demonstrate he no longer presents a risk. See id.

In evaluating the proper standard of review for the substantive due process claim, the Alaska Supreme Court deemed strict scrutiny the appropriate standard, noting the fundamental right to privacy explicitly enumerated in the Alaska Constitution. See id., at 126. The Court goes on to address the legitimate expectation of privacy in the information disclosed on the internet under ASORA. See id., at 127. In so concluding, the Alaska Court places great importance on the distinction between the availability of public records that might be located following a diligent search, and a computerized summary disseminated on a state-sponsored website. See id., at 128-29 (citing U.S. Department of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 764 (1989); Doe v. State, 189 P.3d 999, 1011 (Alaska 2008); Doe v. Portiz, 662 A.2d 367, 411 (N.J. 1995)).

While Doe presents no real challenge to the compelling interest in public safety and does not challenge the reliability of State cited studies, Doe does argue that “ASORA does not meet the least restrictive means because it does not permit a hearing by which a registrant can be relieved of ASORA’s requirements if he proves that he does not present a threat to the public: ASORA ‘labels all registrants with a ‘scarlet letter’ of ‘dangerous sex offender’ without any finding in that regard.’” See id., at 132. In this regard, Doe concludes that “ASORA’s coverage is excessive to the extent it applies to sex offenders who do not present a danger of committing new sex crimes.”

Id. at 132. In so holding, the Alaska Court notes that other states have similarly concluded that “offense-based registration statutes are constitutionally deficient on due process grounds because they fail to offer a sex offender an individualized hearing.” Id. at 133 (referencing Doe v. Attorney General, 686 N.E.2d 1007 (Mass. 1997)(finding the statute “unconstitutional as applied to the plaintiff in the absence of a right to a hearing and, if a hearing is requested, to a determination concerning his threat, if any, to minors and others for whose protection the act was passed” 686 N.E.2d at 1014); State v. Bani, 36 P.3d 1255 (Hawaii 2001); Millard v. Rankin, 265 F.Supp.3d 1211, 1232-33 (D.Colo. 2017)). The Alaska Court, instead of invalidating ASORA, chose to permit Doe to file a civil action wherein he was permitted to attempt to demonstrate he no longer poses a risk to the public that justifies continued registration. See id., at 135. In so doing, the Alaska Court was able to provide a restrictive means of furthering the purpose of protecting the public, while at the same time preventing those who no longer present a risk of recidivism from suffering from arbitrary and irrational government action.

Much like in Doe, our Courts have recognized the importance of substantive due process, and the requirement that Courts “ensures that legislation which deprives a person of life, liberty, or property right have, at a minimum, a rational basis and not be arbitrary or overly vague.” In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 346 (2002). “The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts ‘regardless of the fairness of the procedures used to implement them.’” Id., 351 S.C. at 140, 568 S.E.2d at 347 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)).

As was the case in Alaska in Doe, South Carolinians have a protected privacy right contained within the Constitution. See S.C. Const., Art. I, § 10. While this Court in Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003), rejected a fundamental right to privacy of arrest

records, no discussion is given to the impact a state sanctioned collection and distribution of those records has on a reasonable expectation of privacy. As discussed in Doe, an offender's privacy rights are implicated because of the aggregation and accessibility of the information. See Doe, at 129. Beyond this, however, we must also carefully examine who is bringing the claim in determining the rights being advanced. Here, it is the right of those persons who do not present a risk of reoffending. Therefore, we must also look specifically at the privacy right of those persons who do not present a risk of reoffending to be free from Governmental intrusion. As was argued in the Final Brief of Appellant, strict scrutiny is properly applied because of this privacy right.

“To survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate that interest.” Luckabaugh, 351 S.C. at 140-41, 568 S.E.2d at 347 (citing Washington v. Glucksberg, 521 U.S. 702 (1997)). The stated purpose of the South Carolina Sex Offender Registration Act (“SORA”) is to “promote the state’s fundamental right to provide for the public health, welfare, and safety of its citizens” and “provide law enforcement with the tools needed in investigating criminal offenses.” See S.C. Code Ann. § 23-3-400. While this stated purpose might be compelling, certainly, as was the case with Doe, the means are not narrowly tailored.

As was the case in Doe, SORA has an “offense-based” registration requirement, as opposed to an “offender-based” registration. Thus, if anyone is convicted of an “offense” that qualifies for registration, they are forever required to register. This “one size fits all” system leads to excessive coverage where it applies to offenders who do not pose a present danger of committing new sex crimes. See Doe, at 132. Doe concluded that, “[t]o pass muster under a least restrictive means test, ASORA must accommodate the constitutional rights of sex offenders by offering them the right to a hearing consistent with due process principals under which they may

attempt to prove that they are not likely to re-offend.” Doe, at 133.

The foregoing conclusion in Doe is equally applicable in the instant matter. Requiring registration for offenders who do not present a likelihood of reoffending bears no relation to the stated purpose of the statute of protecting the public and is certainly not narrowly tailored to effectuate that stated purpose. The public needs no protection from someone who is not likely to reoffend.

Even if the Court doesn’t apply strict scrutiny, and uses the rational basis test, the statute still fails. Under that standard, the Court is to determine “whether the statute bears a reasonable relationship to any legitimate interest of government.” Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)(citing R.L. Jordan Co. v. Boardman Petroleum, Inc., 338 S.C. 475, 477, 527 S.E.2d 763, 765 (2000)). While the State certainly has a legitimate interest in protecting the public, the mandatory lifetime registration scheme for those persons who can demonstrate they no longer present a risk of reoffending does not bear a reasonable relationship to protecting the public. It ignores the possibility of rehabilitation. As was noted in the previous section, the public needs no protection from someone who is not likely to reoffend.

Neither this Court, nor the United States Supreme Court has ruled on this precise issue. The United States Supreme Court has, however, suggested substantive due process may be violated in a similar situation. In Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160 (2003). The Supreme Court evaluated a due process challenge to Connecticut’s sex offender registration system, which required registration based on a defendant’s prior conviction instead of their current risk level, similar to South Carolina’s current registration system. See Connecticut, 538 U.S. at 4, 123 S.Ct. at 1163. The United States Court of Appeals for the Second Circuit held that this system deprived sex offenders of a protected liberty interest

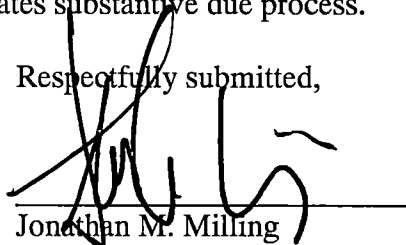
because it lacked a mechanism to determine whether registrants are likely to be “currently dangerous.” Id. The Supreme Court reversed the decision of the Second Circuit, finding procedural due process did not apply, as it “does not require the opportunity to prove a fact that is not material to the State's statutory scheme.” Id. “In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed.” Id., 538 U.S. at 7, 123 S. Ct. at 1164.

The Supreme Court noted, however, that substantive due process might invalidate the statute, if “respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.” Id., 538 U.S. at 7–8, 123 S. Ct. at 1164. In fact, the Supreme Court theorized that the “procedural” claim advanced by respondent might actually be a “substantive” challenge to Connecticut’s statute “recast in ‘procedural due process’ terms.” Id., 538 U.S. at 8, 123 S.Ct. at 1164-65 (quoting Reno v. Flores, 507 U.S. 292, 308, 113 S.Ct. 1439 (1993)). Because respondent expressly disavowed any reliance upon the substantive due process clause, the question of the validity of Connecticut’s law when faced with such a challenge was not before the Supreme Court. That the Supreme Court deemed it necessary to raise this issue in the Opinion reveals the importance of the question, and may provide some insight as to how the analysis might differ from the procedural due process claim. Doe provides the analysis as to how substantive due process is violated in this situation. Now that the question is before this Court, it must be answered in the affirmative, substantive due process is violated.

CONCLUSION

For the reasons set forth herein, SORA violates substantive due process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Milling', is written over a horizontal line.

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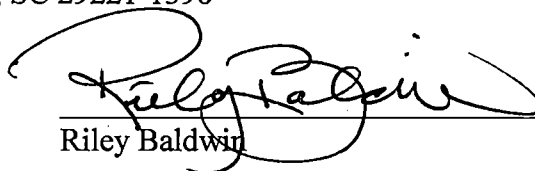
Mark Keel, Chief, State Law Enforcement Division,
and the State of South CarolinaRespondent

CERTIFICATE OF SERVICE

I, the undersigned employee of Milling Law Firm, attorneys for John Doe, do hereby certify that I have served all parties in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleading: Supplemental Brief of Appellant

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March 20, 2020