STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal From Lexington County
Hon. Grace Gilchrist Knie, Circuit Court Judge
Appellate Case Tracking No. 2019-000691

Eric Ragsdale, Appellant,

v.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

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STATEMENT OF THE CASE

The majority of the procedural history of this case is set forth in the Final Brief of Respondents. Subsequent to briefing and upon consideration of the submitted record, this Court issued an Order requiring supplemental briefing. This Court set the case for oral argument in June 2020 and requested:

> [T]he parties to file additional briefing addressing Appellant's due process argument, particularly in light of recent case law from across the country—see, e.g., *Doe v. Dep't of Pub. Safety*, 444 P.3d 116 (Alaska 2019) and cases cited therein—discussing whether the absence of a procedure to permit sex offenders to petition for removal from lifetime registration violates due process, either under the federal or state constitution.

This Supplemental Brief of Respondent follows.

ARGUMENT

I. South Carolina's sex offender registry does not violate either the United States or South Carolina Constitutions provisions requiring substantive due process because it specifies lifetime registration for all persons required to register pursuant to section 23-3-430 and 23-3-460 of the South Carolina Code.

South Carolina's lifetime registration requirement does not violate Appellant's substantive due process rights because there is a rational basis for the requirement in light of the expressed purpose behind the sex offender registry and the State's overwhelming interest in providing for the safety and welfare of its citizens. Cases such as Doe v. Department of Public Safety, 444 P.3d 116 (Alaska 2019) are inapposite because they have decided the issue based on their state's constitutional provisions which have been interpreted significantly different than provisions in South Carolina's Constitution. This Court should uphold the lifetime registration requirement as determined by the Legislature.

In reviewing a challenge to the constitutionality of a statute, an appellate court has a "very limited" scope of review. State v. Harrison, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." Id. at 292–93, 741 S.E.2d at 729 (citing Davis v. Cnty. of Greenville, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." Id. at 293, 741 S.E.2d at 729 (citing Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995)). The party challenging the constitutionality of the statute has "the burden of proving the statute unconstitutional." State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (citing State v. Bouye, 325 S.C. 260, 265, 484 S.E.2d 461, 464 (1997)).

Appellant has challenged the lifetime registration requirement as a violation of his substantive due process rights. This Court has thoroughly explained substantive due process challenges, the required findings and the burden of proof:

> The substantive due process guarantee ensures that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary or overly vague. The guarantee allows a court to examine the constitutionality of the underlying statute as opposed to merely the process by which it is applied to each individual. 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."
>
> When an act is challenged under the due process clause, this "Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated." Legislation restricting or impairing a fundamental right "is subject to 'strict scrutiny' in determining its constitutionality." **Legislation that does not infringe on fundamental rights is subject only to a rational basis test.** Under either type of analysis, the one who attacks the law bears the burden of showing it is unconstitutional.

In re Treatment & Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346-47 (2002) (internal citations omitted) (emphasis added).

The substantive component of due process protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed" and applies no matter the procedure utilized by the state. Palko v. Connecticut, 302 U.S. 319, 325-326 (1937); see also, Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them' "). The United States Supreme Court (USSC) has explained very pointedly: "[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this

unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992) (internal citations omitted).

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted).

In determining the need for registration of sex offenders, the South Carolina Legislature enacted the Sex Offender Registry Act (the Act), Sections 23-3-400 *et seq.* of the South Carolina Code. The South Carolina Legislature established the registration requirements for persons convicted of, adjudicated delinquent for, pled guilty or nolo contendere to certain sexual offenses. The Legislature articulated the purpose of the registry stating:

> 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 (Supp. 2019)(emphasis added).

To fulfill this purpose, the Legislature set forth specific requirements for registration which apply no matter the age of the person who committed the crime. Section 23-3-430 sets

forth the offenses which require a person to register on the sex offender registry (the registry). The requirement to register is mandatory for some offenses, and others, such as ABHAN to which Appellant pled guilty, allow discretion by the trial court to make a determination of whether the individual warrants registration. S.C. Code Ann. § 23-3-430 (Supp. 2019). The Legislature determined in order to best effectuate the purpose of the Act, providing for the safety and well-being of its citizens, allowing citizens to make an informed decision to provide for their own safety and well-being, and giving law enforcement an effective tool in investigating sexual based crimes, registration is required for the lifetime of the offender. S.C. Code Ann. § 23-3-460 (A) (Supp. 2019).

Appellant now asks this Court to vastly expand the fundamental rights and liberties recognized in South Carolina so as to have the Court substitute its preferences for the determinations made by the elected members of the South Carolina Legislature. This Court has not previously found fundamental rights and liberties implicated by the sex offender registry and should now analyze the statutes in the same manner it always has before—whether a rational basis exists for the requirements set forth by the South Carolina Legislature.

I. Prior South Carolina Case Law and Conclusions

South Carolina's sex offender registry has faced multiple challenges to its requirements of registration as well as its lifetime registration. This Court has already addressed challenges based on due process and found the individuals due process rights were not violated by the terms of the registry. Significantly, this Court has always applied a rational basis test to the Act and its requirements because the Court has refused to craft new fundamental rights and liberties in order to alter the determinations made by the South Carolina Legislature.

First, in State v. Walls, this Court declared the Act non-punitive, finding the Legislature "did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). This finding is amply supported by the language of section 23-3-400 and the express purpose of the Act set forth by the Legislature. The USSC upheld a similar registry statute as being non-punitive in Smith v. Doe, 538 U.S. 84 (2003).

This Court also considered challenges to the Act in Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003). Hendrix, who was convicted in Colorado, but moved to Anderson and became subject to South Carolina's sex offender registry requirements, challenged the constitutionality of the Act under Equal Protection and Due Process. Significantly, in Colorado, Hendrix was entitled to petition and be removed from the registry, while in South Carolina he was required to register for life. See Colo. Rev. Stat. Ann. § 16-22-113 (2018).

In considering his Equal Protection challenge, this Court explained Hendrix maintained application of the state's registry "has deprived him of his fundamental right to privacy, and therefore that the court should apply the strict scrutiny analysis." Hendrix, 353 S.C. at 549, 579 S.E.2d at 323–24. After noting the South Carolina Constitution in Article I, Section 10 provides for the right to be secure from "unreasonable invasions of privacy" and that the USSC "has recognized a right to privacy in limited circumstances," this Court concluded "the privacy protections do not extend to information about a sexual offense Appellant committed in another state, which became a matter of public record when Appellant registered as a sex offender in Colorado." Id. at 549, 579 S.E.2d at 324. This Court found: "the Court **need not apply a strict scrutiny** analysis to this matter" because a fundamental right was not implicated. Id. (emphasis added).

Hendrix also raised a due process challenge to the statute, and in particular its lifetime registration requirement juxtaposed to Colorado's statutory scheme which allows for a petition to be removed after five years. This Court found:

> Appellant's argument fails because this Court has ruled that registering as a sex offender is a non-punitive imposition. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Therefore, the length of time one must be listed on the sex offender registry is non-punitive, and **it cannot constitute a deprivation of a constitutionally protected liberty interest.** As such, Appellant has not shown a due process violation.

Id. at 552, 579 S.E.2d at 325 (emphasis added).

This Court considered application of the Act to a juvenile in In re Ronnie A., 355 S.C. 407, 585 S.E.2d 311 (2003). The appellant in that case was a twelve year old who had been adjudicated delinquent for committing first degree criminal sexual conduct with a minor. The Court, after analyzing its prior decisions, found: "The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is **rationally related** to achieving this legitimate objective." Id. at 409, 585 S.E.2d at 312 (emphasis added). The Court also stated: "Appellant has offered no valid basis upon which to distinguish juvenile sex offenders for purposes of due process." Id. at 409-410, 585 S.E.2d at 312. Once again it is significant that this Court applied the rational basis test and not strict scrutiny to consideration of the sex offender registry, finding no fundamental liberty interest has been implicated. Cf. In re Shaquille O'Neal B., 385 S.C. 243, 255, 684 S.E.2d 549, 556 (2009) ("[W]e have previously held that a person's due process rights are not violated by inclusion on the South Carolina Sex Offender Registry.").

Subsequently, in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), this Court considered the mandatory lifetime placement of an electronic monitoring device on a person

guilty of very select few crimes. Ultimately, this Court concluded while mandatory placement on monitoring was constitutional, the lifetime placement without any judicial review was unconstitutional. Id. at 508-509, 744 S.E.2d at 510. Importantly, this Court considered the due process implications based on the rational basis test and not based on strict scrutiny. The Court explained the "significant restraints" the monitoring places on an individual. Id. at 506, 744 S.E.2d at 509. The Court also cited to other cases explaining the impact based on the monitor's "permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities." Id. (citing, *inter alia*, Commonwealth v. Cory, 454 Mass. 559, 911 N.E.2d 187, 196 (2009)). Additionally, this Court noted the fact that the lifetime electronic monitoring only applied to individuals convicted of two specific crimes—CSC with a minor in the first degree and in the third degree—"which is beyond the norm of Jessica's law." Id., at 508, 744 S.E.2d at 510.

Application of the lifetime placement on the sex offender registry does not have the same "significant restraints" as electronic monitoring. The registry is not physically attached to the individual. Further, any monitoring performed by the registry is at most every 90 days and not constant. Electronic monitors allow for the immediate determination of where an individual is at any time as well as the historical tracking of that individual's every movement since the monitor was attached. This is significantly different than knowing the primary address or other contact for an individual within a county where he must register. Appellant may still go about his daily business without being tracked at every moment and without the physical reminder of his crime. Further, lifetime registration applies to **all** individuals convicted of a crime enunciated in section 23-3-430, not just individuals convicted of only two crimes.

Lifetime placement on the registry, in addition to not being nearly as onerous as lifetime electronic monitoring, is rationally related to the intent of the Act and not arbitrary or capricious in its application. The registry assists law enforcement by having a permanent record of individuals who have committed various sexual crimes and by giving a general location for those individuals. Additionally, the information regarding a person's crimes contained on the registry is publicly available. Further, the public has a right to know when there is an individual in their area they need to avoid or they need to ensure their children avoid. The registry is not just an important tool for law enforcement, but serves as an important tool for parents in protecting their children.

Most recently, this Court considered In the Interest of Justin B., which was a juvenile challenge to lifetime placement on the sex offender registry. See In the Interest of Justin B., 419 S.C. 575, 799 S.E.2d 675 (2017). This Court extensively reiterates its prior holdings including Walls, Hendrix, and Ronnie A. The Court makes it clear: "Beginning with Walls, and continuing through Hendrix, Ronnie A., Dykes, and Justin B., we upheld the constitutionality of the mandatory lifetime sex offender registry requirement with electronic monitoring for adults and juveniles." Justin B., 419 S.C. at 582, 799 S.E.2d at 678.

This Court then addresses several new challenges to the lifetime placement on the sex offender registry including: 1) application of Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); 2) violation of the doctrine of *parens patriae*; 3) conflicts with the purpose of the South Carolina Children's Code; and 4) damage to his reputation because the registration is viewable by the public. In part, this Court found:

> The purpose of the sex offender registry has nothing to do with retribution, and any deterrent effect of registration derives from the availability of information, not from punishment. Instead, the purpose of the registry and the electronic monitoring requirement

> is to protect the public and aid law enforcement. **We defer to the Legislature's determination** that these purposes are equally served by requiring registration of adults and juveniles.

Justin B., 419 S.C. at 583, 799 S.E.2d at 679 (emphasis added).

In addressing the concerns with *parens patriae* and the Children's Code as the registry relates to juveniles, this Court found no reason to divert from its previous holdings. Specifically, this Court stated:

> The State's policy of protecting its children involves more than protecting juvenile sex offenders. The legislative purpose of sex offender registration is to protect our citizens, including children, who are often the victims of sexual assault crimes. Thus, the sex offender registry is itself an exercise of the State's broad powers to protect its children under the *parens patriae* doctrine.

Id. at 585, 799 S.E.2d at 680. Essentially, this Court is explaining there is a rational basis for the registry—the protection of children from those that have been known to commit sexual assault crimes and other sex based crimes. In considering the Children's Code, this Court explained:

> The fact the Legislature chose to treat juveniles the same as adults in requiring registration for committing sex offenses, but to treat them differently in the punishment of ordinary offenses, is the **Legislature's prerogative**—so long as the Legislature's action is **rationally related** to its purpose. It is not a basis on which we will declare a statute unconstitutional.

Id. at 585–86, 799 S.E.2d at 680 (emphasis added). This Court's determination continues to recognize two important considerations: 1) the decision regarding the registry is most suitable for the Legislature and 2) consideration of the constitutionality of the registry is a consideration of whether it is rationally related to its purpose.

The Court finally considered a very important argument presented by Justin B. He maintained the public availability of the registry damaged his reputation and should be

considered in determining its constitutionality. This Court rejected the claim specifically explicating:

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

Id. at 586, 799 S.E.2d at 681 (emphasis added). This Court concludes with some very poignant holdings:

> The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender . . . is **not a punitive measure**, and the requirement **bears a rational relationship** to the Legislature's purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. The requirement, therefore, is not unconstitutional. If the requirement that juvenile sex offenders must register . . . is in need of change, that decision is to be made by the Legislature—**not the courts**.

Id. at 586–87, 799 S.E.2d at 681 (emphasis added).

II. Out of State Case Holdings

The USSC stated: "Sex offenders are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32 (2002) (plurality opinion). "[T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." Id., at 32–33.

The USSC in Smith v. Doe, 538 U.S. 84 (2003), addressed the issue of whether Alaska's Internet sex offender registry was an impermissible *ex post facto* statute. While the offenders in that case did not raise any privacy challenges the discussion of the posting of sex offender registry information on the Internet and its repercussions are certainly instructive:

> [T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.

Id. at 98–99. The Court continued:

> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.
>
> The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Id. at 99. The USSC has recognized that the notoriety and shame brought upon a sex offender is not caused directly by the sex offender registry, but is instead caused by the offenders actions in committing the underlying sexual offense.

Around the same time in Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003), the USSC considered a procedural due process challenge to the state's mandatory registration requirements. The argument before the Court centered on the lack of an ability to present evidence a person is not currently dangerous and whether a hearing or other mechanism is required. The Court specifically found procedural due process was not implicated because Connecticut, like South Carolina, has the same procedure for everyone and a determination of current or future dangerousness is not a consideration. The Court stated:

> 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. Unless 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. It may be that respondent's claim is actually a substantive challenge to Connecticut's statute "recast in 'procedural due process' terms." Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections, and maintains, as he did below, that his challenge is strictly a procedural one. But States are not barred by principles of "procedural due process" from drawing such classifications. Such claims "must ultimately be analyzed" in terms of substantive, not procedural, due process. Because the question is not properly before us, we express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process.

Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7–8 (2003) (internal citations omitted).

Since that time, several states have judicially found their registration schemes to be unconstitutional based primarily on their own state constitutions. Generally, the states have

found fundamental rights or liberties in areas not recognized under the federal constitution or previously under the South Carolina Constitution.

For example, in In re J.B., 107 A.3d 1 (Pa. 2014), the Supreme Court of Pennsylvania considered whether lifetime registration for a class of juvenile sex offenders violated their due process rights. The Court specifically considered the juvenile offenders' right to reputation. Id. at 16. The Pennsylvania Court instructed: "This Court has recognized that the right to reputation, although absent from the federal constitution, is a fundamental right under the Pennsylvania Constitution." Id. The Court noted the Pennsylvania Constitution provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1. No similar provision occurs in the South Carolina Constitution, and as discussed above, this Court recently found juvenile reputation was not a fundamental right, liberty, or property interest in Justin B., 419 S.C. at 586, 799 S.E.2d at 68.1

Both New Jersey and Massachusetts found their sex offender registry statutes violated due process rights because individualized hearings were not offered. The Courts relied on findings that the registry, even though it released primarily publicly available information, violated rights of privacy and reputation of its registrants under their respective state constitutions. See Doe v. Poritz, 662 A.2d 367, 419 (N.J. 1995) (finding "protectible interests in both privacy and reputation" under the New Jersey Constitution); Doe v. Attorney Gen., 686 N.E.2d 1007, 1013 (Mass. 1997) (finding "plaintiff has sufficient liberty and privacy interests" under the Massachusetts Constitution).

However, the Courts relied in part on federal cases stemming from consideration of FOIA and the release of otherwise exempt information. See United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 500 (1994); United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762–764 (1989).[1] Whether something implicates privacy concerns for application of FOIA and other statutes is vastly different than whether the registry implicates rights and liberties that are so ingrained in the fabric of the nation as to be fundamental requiring a triggering of strict scrutiny.

Additionally, the Courts relied on their own state constitutions, which include provisions dissimilar from those of the South Carolina Constitution. See Mass. Const. Pt. 1, art. I ("All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."); N.J. Const. art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."). These broad provisions do not appear in the South Carolina

[1] Additionally, in looking at similar FOIA and exemption laws in South Carolina, this Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, this Court has also stated: " 'one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.' " Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)). Importantly, the Court has held that, as a matter of law, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.' " Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting Meetze, 230 S.C. at 337, 95 S.E.2d at 609). Such considerations certainly should apply in determining the extent of privacy to be allocated to a convicted sex offender and the publication of otherwise public information when the reason for the publication is the result of the sex offender's own actions.

Constitution, nor does the South Carolina Constitution provide a right to privacy and reputation as broad as that found in these cases. Further, this Court has explicitly rejected prior claims regarding reputation and the publishing of the information. See e.g., Hendrix, 353 S.C. at 549, 579 S.E.2d at 323–24; Justin B., 419 S.C. at 586, 799 S.E.2d at 681.

Recently, in Doe v. Department of Public Safety, the Alaska Supreme Court issued a divided opinion finding their registration requirements violate due process. Doe v. Dep't of Pub. Safety, 444 P.3d 116, 119 (Alaska 2019)[2]. The Alaska Court applied strict scrutiny based on the conclusion sex offenders have a reasonable expectation of privacy in their information disseminated as part of the registration requirements of Alaska's sex offender registry. Further, the Court found the "compilation and notification provisions" directly raise issues related to Alaska's constitutional right to privacy. Id. at 128.

The Alaska Supreme Court determined its broad stand-alone right to privacy provision allowed for a right to privacy in cases where people seek to shield sensitive information from public disclosure. Id. at 126 (citing Alaska Wildlife All. v. Rue, 948 P.2d 976, 980 (Alaska 1997) ("[U]nder appropriate circumstances, a statute requiring the disclosure of a person's identity must yield to the constitutional right to privacy."). The Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." Alaska Const. art. I, § 22. This is significantly different from the South Carolina Constitution which has incorporated a freedom from unreasonable invasions of privacy in its search and seizure section of the Constitution. See S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . .").

[2] Even though several cases have Doe as a named party, any case citation using the short citation of Doe will be to Doe v. Dep't Pub. Safety, 444 P.3d 116 (Alaska 2019).

The Alaska Court considered whether the sex offenders had a "legitimate expectation of privacy" in the information on the registry. The comparison is made between the expectation of a sex offender, who has already committed a very public act and whose conviction is clearly a matter of public record, and a medical marijuana patient preventing the disclosure of the use of marijuana and their underlying medical condition, a police officer protecting his personnel file, and to significant disclosures by an individual placing a political advertisement. The Court specifically found "[t]he fact that a person has been convicted of a sex offense is, if anything, more sensitive" and squarely falls within the state's right to privacy. Doe, 444 P.3d at 128. The Court found the compilation of the data and dissemination by the government enhances the violation of the right to privacy, even though the information would otherwise be public. The Court advances the conclusion that a sex offender has a legitimate expectation of privacy that his conviction and other information will not be disseminated and that the government instead "ensur[es] that a person cannot assume anonymity—in this case, [by] preventing a person's criminal history from fading into obscurity and being wholly forgotten." Doe, 444 P.3d at 130 (quoting Poritz, 662 A.2d at 411("However public any of those individual pieces of information may be, were it not for the Notification Law, those connections might never be made. We believe a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity—in this case, preventing a person's criminal history from fading into obscurity and being wholly forgotten.")).

The Court, applying strict scrutiny, determined, while the State had a compelling interest in disclosure for public safety, Alaska's sex offender registry requirements were excessive to the extent it could apply to sex offenders who do not present a danger of committing new sex

offenses. Id. at 132-133. The Court concluded in order to accommodate the constitutional rights of sex offenders, hearings must be provided in which the sex offender may attempt to prove they are not likely to reoffend. Id. at 133.

The opinion was divided, with two of the five justices dissenting. The dissent takes issue with the majority's conclusion that a sex offender has a legitimate expectation of privacy in the information disclosed by the registry. Id. at 137 (Bolger, C.J., dissenting). The dissent logically finds a significant distinction between a convicted sex offender and the other individuals recognizes by Alaska as having a right to privacy in their information. Additionally, the dissent notes that sex offenders, by virtue of having been convicted of committing a serious felony, have a reduced expectation of privacy. Id. (citing, *inter alia*, State v. Bowditch, 364 N.C. 335, 349–50, 700 S.E.2d 1, 11 (2010) ("it is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy"). The dissent properly concludes: "Considering the limitations on a sex offender's privacy interests and the State's constitutionally protected interest in public safety, a lower level of scrutiny is appropriate. And under such a review, the State's registration is a fair and reasonable tool to promote the State's interest." Id. at 138.

Other courts have come to different conclusions regarding substantive due process challenged to their sex offender registry statutes, finding strict scrutiny should not apply because a fundamental liberty or right is not implicated. Generally, the courts have considered whether a sex offender's reputation or right to privacy and not have information disseminated should be considered fundamental rights. The court have found no historical basis for the establishment of those rights such that they would be deemed fundamental.

In State v. Druktenis, 86 P.3d 1050, 1077 (N.M. 2004), the Court of Appeals of New Mexico considered whether government dissemination of the information contained in the sex offender registry or intrusions and damage to a sex offender's reputation implicated a fundamental right justifying application of strict scrutiny. The Court provided extensive analysis indicating no fundamental right exists:

> First, the United States Supreme Court has not expanded its view of an implied fundamental right to include the implied privacy interest Defendant claims has been burdened. Fundamental rights essentially have emanated from natural law concepts or very basic liberal (in the nineteenth century sense of the term) democratic concepts clearly essential to individual liberty in this Country in the view of a majority of Justices of the United States Supreme Court. We have not found the interests asserted in this case to have their origin in natural law, nor have we found where the interests historically have been considered essential to constitutional democracy, as is, for example, the right to vote.

Id. at 1077. The Court continued:

> Further, for the liberty interest to be a fundamental one, the interest must be one "traditionally protected by our society," or "rooted in history and tradition." We have dug but not unearthed a clear historically- or traditionally-rooted interest in freedom from the government dissemination of information such that the interest should be denominated "fundamental."

Id. Most significantly, the Court acknowledged the significant difference between a sex offender asserting a right to privacy preventing the dissemination of his own choices versus that of others such as consenting adults, family relationships, and marital privacy. The Court stated:

> One convicted of a heinous sex offense starts a quest for constitutional protection from a much different and clearly less favorable position than those who to date have obtained privacy protection in the United States Supreme Court. cf. Whalen, 429 U.S. at 609, 97 S.Ct. 869 (Stewart, J., concurring) (stating that the ratio decidendi of Griswold supporting constitutional protection relating to marriage, privacy in the home, and the right to use contraceptives, "does not recognize a general interest in freedom from disclosure of private information"). . . . Further, the concern

> about restrictions as to those convicted of criminally heinous acts harming non-consenting victims, often children, is simply not comparable to the protection of the privacy and dignity of those involved in the intimate decisions and relationships protected in Supreme Court cases.

Id. at 1078. The Supreme Court of Wyoming also explained similarly:

> This is a balancing process in which we find the government's interest to be very high, and the private interest of the registrant to be not so high—in particular, not so high as the fundamental interest involved in the parent-child relationship, or the fundamental interest in not being civilly committed, or the fundamental interest in not being deported. Clearly, the sexual offender does not stand on equal footing with the unconvicted as far as his right to be left alone by the government is concerned. The nature of his crime has heightened society's interest in protecting itself from him.

J.J.F. v. State, 132 P.3d 170, 179 (Wyo. 2006).[3]

The Court in Druktenis found only a rational basis was necessary. A holding which comports entirely with this Court's prior decisions. The Court determined it "will not question the wisdom, policy, or justness of legislation enacted by our Legislature." Id. at 1081 (citations omitted). Citing other New Mexico case law, the Court stated: "[a] determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is a legislative function and should not be interfered with, save in a clear case of abuse." Id. The Court concluded: "The State, without question, has a legitimate and compelling interest in protecting the public from sex offenders, and the notification provisions are unquestionably rationally related to that goal. We think it proper to defer to our Legislature's judgment as to a

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[3] Other commentators have noted: "There is nothing in the Constitution that requires private citizens to associate involuntarily with convicted sex offenders, nor to look favorably upon them as potential employees or neighbors. Rather, social stigma and other adverse consequences are simply an inherent result of the commission of many sex offenses." Stephen R. McAllister, "Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws, 29 Tex. Tech L. Rev. 97, 134 (1998)

protective course of action in regard to persons convicted of the notification-triggering sex offenses." Id. at 1082.

In Ex Parte Chamberlain, the Court of Appeals of Texas, Fort Worth upheld its prior determinations that a sex offender's interest in reputation is not a fundamental right or liberty interest triggering heightened due process protection after that prior opinion was vacated by the Court of Criminal Appeals. See Ex parte Chamberlain, 352 S.W.3d 121, 122 (Tex. App. 2011); Ex parte Chamberlain, 335 S.W.3d 198, 200 (Tex.Crim.App.2011) (vacating Ex Parte Chamberlain, 306 S.W.3d 328, 334 (Tex. App. 2009)).[4] The Court, in citing to numerous cases finding no right to reputation for a sex offender, the Court found:

> In the absence of authority establishing that a sex offender possesses a fundamental right or liberty interest in his reputation, we decline to recognize this allegedly fundamental right or liberty interest. Because Chamberlain has not established that he possesses a fundamental right or a liberty interest that the SORP impinges upon, his as-applied constitutional challenges are not subject to the heightened substantive due process protection provided when the government interferes with a fundamental right or liberty interest.

Chamberlain, 306 S.W.3d at 334. As a result, the Court concluded the registration requirements satisfy the rational basis test. Id. at 338.

In People v. Cornelius, 821 N.E.2d 288, 297 (Ill. 2004), the sex offender challenged the "wholesale dissemination" by the state of his information of the sex offender registry. He alleged it violated his right to privacy under the Illinois Constitution. Significantly, the Illinois Constitutional provision, unlike the Alaska Constitutional right to privacy, is very similar to the South Carolina Constitution's provision. See Ill. Const.1970, art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable

[4] Because the Court of Appeals reaffirmed its rulings as announced in the 2009 opinion, it will be the one cited to for all substantive discussion.

searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.").

The Illinois Court, much like this Court, has recognized the rights guaranteed by its constitution go beyond those recognized by the federal constitution; however, the Court also acknowledged that "under the expanded privacy protections afforded by the Illinois Constitution, it is well settled that the right to privacy is not absolute. Only unreasonable invasions of privacy are constitutionally forbidden." Cornelius, 821 N.E.2d at 298. The Court explained:

> Criminal proceedings are open to the public, and "[w]hat transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity." In addition, the court's file for each case is deemed to be a public record, and "shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records . . . ." Thus, all information in defendant's court file, including any personal information with respect to defendant, is available for inspection by anyone in the world. This leads us to conclude that defendant does not have a cognizable privacy interest in his sex offender registry information. Defendant "engaged in conduct that lowered the privacy bar . . . [as][h]is acts spawned a criminal prosecution culminating in a public record that contains the challenged information." Accordingly, "defendant cannot argue that the compilation and dissemination of truthful information that is already, albeit less conveniently, a matter of public record constitutes a legitimate privacy interest."

Id. at 299–300 (citations omitted). The Court articulated:

> Even if the collateral effect of the Internet notification provision is to "shame" defendant, this effect is the "result of the offender's crimes and not of the designation and disclosure statutes. The statutes do not 'affirmatively' impose those negative consequences. Rather those consequences are byproducts of the nature of the offender's crimes and of people knowing about a sex offender's status—which can occur in many ways, and not merely by way of a community notification statute."

Id. at 302 (quoting Meadows v. Board of Parole & Post–Prison Supervision, 47 P.3d 506, 512 (Or. App. 2002)). In the end, the Supreme Court of Illinois concluded "defendant has failed to

satisfy his burden to clearly establish that the Internet dissemination provisions contained in 115(b) of the Notification Law violate his right to privacy under the Illinois Constitution." Id. at 303.

Also in Cornelius, the defendant alleged a substantive due process violation of his right to reputation. The Court held:

> It is well settled, however, that damage to an individual's reputation does not constitute a deprivation of the fundamental right to life, liberty or property. We agree with the State that "the 'right' to be free from the shame, stigma and embarrassment resulting from a conviction for sexually abusing a child is not the kind of 'fundamental right' contemplated" by our constitution. Accordingly, because no fundamental right is implicated by the Internet provisions of the Notification Act, strict scrutiny analysis does not apply.

Id. at 304. The Court concluded a rational basis for the dissemination existed and upheld the registration law as constitutional.

Because there is such a mix of opinions from around the country, this Court should rely on its own previous determinations regarding the Act. This Court should not rely on case law from other states relying on their own individual interpretations of the state constitutions in order to vastly expand the definition of fundamental right and liberty in South Carolina in order to overturn a valid Legislative determination.

III. Consideration of South Carolina's Right to Privacy and Due Process

As discussed above, the USSC has been very reluctant to expand those liberties and rights it deems fundamental. In discussing the expansion of liberties deemed fundamental for due process consideration, the USSC has stated:

> Without that core textual meaning as a limitation, defining the scope of the Due Process Clause "has at times been a treacherous

> field for this Court," giving "reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court."

Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)). Justice White explained the dangers:

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . ., **the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.** Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Moore, 431 U.S. at 544 (emphasis added) (White, J. dissenting).

This Court should not create new rights solely to be able to strike down what this Court has previously deemed a purely legislative decision. If this Court sought to apply the logic of the Alaska Supreme Court it would require an extensive expansion of the right of privacy in South Carolina and a determination that otherwise public information should be withheld for sex offenders. As this Court has explained in Dykes:

> Indeed, courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [members of the judiciary]." The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.' "

Dykes, 403 S.C. at 505–06, 744 S.E.2d at 509 (quoting Washington v. Glucksberg, 521 U.S. 702 (1997) (noting the USSC's reluctance to expand the concept of substantive due process)). This

Court should continue to exercise the judicial restraint discussed by the USSC when it comes to creating new fundamental rights and liberties, and should confirm its prior holdings that any changes to the Act should fall upon the duly elected South Carolina Legislature and not the Courts. See S.C. CONST. art. I, § 8; Justin B., 419 S.C. at 586-587, 799 S.E.2d at 681.

This Court has already rejected the majority of the issues raised in other states and found fundamental rights and liberties under the South Carolina Constitution have not been implicated by the Act. The states that have found due process concerns have done so relying on the language of their own Constitutions, most of which are significantly broader than South Carolina's Constitution. Even considering South Carolina's right to be free from unreasonable invasions of privacy, there is no reason for this Court to depart from its long-standing rulings regarding the Act.

This Court should find no fundamental rights or liberties are implicated by the sex offender registration's mandatory lifetime requirement. In Hendrix, this Court concluded the State's right to privacy language does not extend to information about the sexual offense or that sexual offender included in the registry. Additionally, this Court specifically concluded the length of time one is on the registry "cannot constitute a deprivation of a constitutionally protected liberty interest." Hendrix, 353 S.C. at 552, 579 S.E.2d at 325. In Dykes, this Court concluded there was no fundamental right of a sex offender to be "let alone" that is "deeply rooted in this Nation's history and tradition." Dykes, 403 S.C. at 506, 744 S.E.2d at 509. Finally, just recently the Court determined that while a juvenile's reputation "may be in greater need of protection" that an adult, the "interest in that reputation is still neither liberty nor property." Justin B., 419 S.C. at 586, 799 S.E.2d at 681. This Court has addressed the various means by which other states have relied on their own constitutions to determine registration without a

means to be removed based on a showing of low risk violates substantive due process. This Court should not expand the fundamental rights and liberties in this case and should only require a rational basis for the lifetime registration.

When viewed through the lens of a rational basis, the Legislature's determination is easily upheld as fully supporting and effectuating the Legislature's policy behind the sex offender registry. The purpose behind the sex offender registry unquestionably serves a substantial and compelling governmental interest—public safety and law enforcement. The State's interest, especially in the ongoing safety of its citizens, is particularly substantial in light of the serious, long-term impact of sex offenses on victims. The Supreme Court of Illinois detailed exhaustively numerous sources detailing the physical, emotional, and psychological trauma suffered by victims of sex offenders. People v. Huddleston, 816 N.E.2d 322, 338-340 (Ill. 2004); see also, New York v. Ferber, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'")(quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

The policy of protecting the citizens of the state from possible repeat sex offenders and assisting law enforcement in the investigation of possible sexual offenses is furthered by having the sex offender registry. The Legislature has determined a victim of a criminals' sexual assault should have the peace of mind of always being able to know where her assailant is residing. A mother looking to decide where she will move her young son and daughter should be able to know if someone in the area has preyed upon children in the past and whether her children need additional supervision or warning. The Legislature of South Carolina has concluded a woman who believes she has found a man worth dating should have the right to verify he has not

attacked women in his past. The Legislature has found maintaining the general location and contact information for those at risk of being recidivist sex offenders benefits law enforcement by being able to more easily include or eliminate possible suspects. These decisions, which are reasonable related to the underlying purpose of the Act are furthered by mandatory, lifetime registration and are not an arbitrary or capricious application of the Legislature's power.

As this Court has recently stated: "Determinations of public policy, however, are chiefly within the province of the legislature, whose authority on these matters we must respect." Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 271, 802 S.E.2d 794, 797 (2017) (citing Taghivand v. Rite Aid Corp., 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (recognizing that the "primary source of the declaration of the public policy of the state is the General Assembly")). The Legislature in South Carolina has adopted a zero tolerance and zero risk stance when faced with the question of the public safety and the possibility of recidivism of sex offenders. The Legislature has determined all persons who commit the class of crimes found in section 23-3-430 are required to register. Further, the Legislature has determined the people of South Carolina are not willing to accept any risk related to whether these individuals are possible recidivists by imposing lifetime registration under section 23-3-460. Appellant contends if he is low risk he should be allowed off, but the Legislature's determination is that no risk is acceptable and the only means of properly effectuating that policy determination is through lifetime registration.

As the Court of Appeals of New Mexico stated:

> While our Legislature might have adopted a more discriminating scheme that would allow the attempted winnowing out of likely non-recidivists, we will not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."

Druktenis, 86 P.3d at 1085 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)).

This Court has expressed: "In honoring separation of powers, we adhere to the principle that a court must not reject the legislature's policy determinations merely because the court may prefer what it believes is a more equitable result." Smith v. Tiffany, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017). This Court continued: "[T]he policy decision belongs to the legislature, and the legislature has crafted the provisions of the Act as it sees fit. We are a court, not a legislative body. That a court may disagree with a legislative body's policy decisions or believe a perceived 'more fair' outcome exists is of no moment." Id. at 565, 799 S.E.2d at 488. The balancing of the interests of the sex offenders listed on the registry with the needs of the victims, society in general, and law enforcement is the role of the Legislature, and the Legislature as rationally determined to weigh that balance in favor of the victims, the people of South Carolina, and law enforcement. As this Court stated in Justin B., if the Act "is in need of change, that decision is to be made by the Legislature—not the courts." Justin B., 419 S.C. at 587, 799 S.E.2d at 681.

Accordingly, this Court should find the lifetime registration requirements of section 23-3-460 do not implicate fundamental rights or liberties, and as a result, this Court should determine whether that policy decision by the South Carolina Legislature is rationally related to the purpose to be served by the sex offender registry—protecting the people of South Carolina and assisting law enforcement. Because the lifetime registration is certainly rationally related to the purpose of the Act, Appellant has failed to meet his very high burden of establishing the provision is unconstitutional. Therefore, this Court should find section 23-3-460 of the South Carolina Code constitutional and uphold the trial court's grant of summary judgment in favor of Respondents.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the mandatory, lifetime registration requirements of the sex offender registry do not implicate any fundamental rights or liberties, are rationally related to the stated purpose of the registry, and do not violate Appellant's substantive due process rights. Accordingly, this Court should find section 23-3-460 of the South Carolina Code to be constitutional and uphold the trial court's grant of summary judgment in favor of Respondents.

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