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S.C. SUPREME COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

JOHN DOE,
Plaintiff,

vs.

MARK KEEL, *in his official capacity as
Chief of the South Carolina State Law
Enforcement Division,*
Defendant.

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Civil Action No. 3:20-2755-MGL

**ORDER CERTIFYING A QUESTION TO
THE SOUTH CAROLINA SUPREME COURT**

I. INTRODUCTION

This case concerns Defendant Mark Keel’s (Keel) enforcement of the South Carolina Sex Offender Registration Act (SORA), S.C. Code §§ 23-3-400, *et seq.*, in his capacity as Chief of the South Carolina Law Enforcement Division (SLED). Plaintiff John Doe (Doe) takes issue with Keel’s continued publication of Doe’s last-known information on the State’s public sex offender registry, even after Doe permanently left the state.

Doe challenges this conduct on multiple grounds. First, Doe argues that Keel’s actions are incongruent with, and in violation of, SORA itself. Second, he contends Keel’s actions violate the Due Process, Equal Protection, and Double Jeopardy Clauses of the United States Constitution. Notably, the South Carolina Supreme Court has not yet addressed the question of statutory interpretation raised by Doe’s first argument. For that reason, this Court granted Doe’s Motion to Certify a Question of Law to the South Carolina Supreme Court.

II. LEGAL STANDARD

When a question of state law is determinative of a litigant's claim, and there is no controlling precedent in the decisions of the State Supreme Court, the Court can certify the question of law to the South Carolina Supreme Court. *See, e.g., Ashmore for Wilson v. Dodds*, 262 F. Supp. 3d 341, 361 (D.S.C. 2017) (“[T]he court will certify to the South Carolina Supreme Court the questions of law regarding South Carolina choice of law rules for fraudulent conveyance and unjust enrichment claims[.]”).

“Certification respects and promotes the core principles of judicial federalism, and it is particularly appropriate where the certified question implicates a state's important public policy concerns.” *Stiles v. Am. Gen. Life Ins. Co.*, 994 F. Supp. 712, 717 (D.S.C. 1998), *certified question answered*, 335 S.C. 222 (1999) (quoting *Shirley v. Russell*, 69 F.3d 839, 844 (7th Cir. 1995)).

The standard for certification is governed by the South Carolina Appellate Court Rule 244, which states that:

The [South Carolina] Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

S.C. App. Ct. R. 244(a).

The certification order must set forth: (1) “a statement showing fully the nature of the controversy in which the questions arose,” (2) “all findings of fact relevant to the questions certified,” and (3) “the questions of law to be answered[.]” S.C. App. Ct. R. 244(b). It is appropriate for the Court to certify a question to the South Carolina Supreme Court only when “the available state law is clearly insufficient[.]” *See Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994).

Here, the Court has failed to find, and the parties have neglected to provide, any controlling precedent in the decisions of the Supreme Court or Court of Appeals, and/or other sufficiently persuasive authority, concerning whether Keel's interpretation and application of the South Carolina Sexual Offender Registration and Notification Act, as it relates to Doe, are lawful. The Court therefore holds that the standard for certification is met here.

III. NATURE OF THE CONTROVERSY

In August of 2020, Doe filed a complaint against Keel, in his official capacity as Chief of South Carolina Law Enforcement Division, challenging the publication of his name, photograph, addresses, vehicle information, and criminal history on the South Carolina sex offender registry. Doe claimed that, because he no longer resides in South Carolina, Keel's actions are inconsistent with the text of SORA and that he is therefore entitled to a declaration that Keel's conduct is unlawful. Beyond that, Doe argued that Keel's actions violate the Due Process, Equal Protection, and Double Jeopardy Clauses of the United States Constitution and that declaratory and injunctive relief is separately appropriate on those grounds.

In May of 2021, the parties filed cross motions for summary judgment. As is relevant here, Doe argued that the text and purpose of SORA require SLED to publish only resident sex offenders on the Registry. Specifically, Doe maintained that SLED's authority to publish an offender's information on the registry is coextensive with its authority to require an offender to actively register as a sex offender.

Doe contends that, under this formulation, SLED must cease publishing an individual on the sex offender registry when they no longer meet the definition of "resident" under S.C. Code § 23-3-430(B). Finally, Doe asserted that the doctrine of constitutional avoidance tips the analysis in his favor because the alternative—publication of last-known information about out-of-state offenders—would render SORA unconstitutional.

In response, Keel urged the Court to adopt the reasoning of the York County Court of Common Pleas in *Anderko v. South Carolina Law Enf't Div.*, Case No. 15-CP-46-3931 (Ct. Com. Pl. July 28, 2016), which held that an out-of-state order terminating a person's sex offender registry obligations fails to require "removal" from the South Carolina registry. The Circuit Court's decision in *Anderko* was appealed to the South Carolina Court of Appeals, which affirmed the decision by unpublished opinion. *See Anderko v. South Carolina Law Enf't Div.*, 2018 WL 6528114 (S.C. Ct. App. 2018). In addition, *Anderko* appealed to the South Carolina Supreme Court, which denied a writ of certiorari.

Keel acknowledged the lack of a published decision of the Supreme Court, but argued that *Anderko* should be followed because it possesses "the imprimatur of binding South Carolina law." Citing to various rulings of the South Carolina Supreme Court, Keel also argued that SORA's lifetime registration scheme is constitutional.

On June 9, 2021, the South Carolina Supreme Court issued *Powell v. Keel*, 860 S.E.2d 344 (2021). In *Powell*, the Supreme Court struck down SORA's lifetime registration requirement as unconstitutional, and thereby overruled *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003), a case cited by Keel and the court in *Anderko*. 860 S.E.2d at 349. The *Powell* court held that "SORA's lifetime registration requirement is unconstitutional absent any opportunity for judicial review to assess the risk of re-offending." *Powell*, 860 S.E.2d at 345.

In light of these developments, the Court concludes that certification of the state law question presented by Doe's first claim for relief is appropriate.

IV. RELEVANT FINDINGS OF FACT

For the purposes of this Order, the Court makes the following findings of fact:

1. In 2011, Doe was convicted of a sexual offense in Colorado that triggered registration under S.C. Code § 23-3-430. When Doe committed the criminal offenses in question, he was a permanent resident of Greenville, South Carolina, and was attending college

at the University of South Carolina.

2. Doe was required to register as a sexual offender under S.C. Code § 23-3-430 from 2011 to 2015. Until June 2015, he re-registered biannually in Richland County and later in Greenville County.
3. Doe relocated to the State of Georgia in 2015 and, since then, has not remained in South Carolina for a total of thirty days during any twelve-month period.
4. After relocating to Georgia, Doe's active registration requirements in South Carolina were suspended.
5. After relocating to Georgia, however, SLED continued to publish Doe's name, picture, offense, vehicle information, and last known addresses on the online sex offender registry.
6. Doe was born and raised in Greenville, South Carolina. He still has family in the state and returns to South Carolina for personal and professional reasons. This fact is undisputed, but Doe disputes its relevance to the certified question because it was unknown to SLED until the filing of this action. This fact is included in this Order by agreement of the parties, and the Court takes no position on whether it bears on the South Carolina Supreme Court's resolution of the certified question.
7. Doe is currently listed on the online sex offender registry operated by SLED.

V. CERTIFIED QUESTION OF LAW

The Court respectfully requests that the South Carolina Supreme Court resolve the following certified question of law:

Does the South Carolina Sex Offender Registry Act (SORA) permit the publication of out-of-state offenders—*i.e.*, individuals with qualifying sexual offenses but who do not live in South Carolina—on the state's public sex offender registry?

VI. CONCLUSION

Because the question of state law is potentially determinative of Doe's claims and because the South Carolina Supreme Court has yet to pass on the question presented, the Court **CERTIFIES** the question above to the South Carolina Supreme Court under S.C. Appellate Rule 244.

The Clerk shall forward a copy of this order to the South Carolina Supreme Court under this Court's official seal, together with copies of any portions of the record requested by the South Carolina Supreme Court.

IT IS SO ORDERED.

Signed this 30th day of March 2022, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE