In the Supreme Court of South Carolina

CERTIFIED QUESTION OF LAW

From the United States District Court for the District of South Carolina
Judge Mary Geiger Lewis

Appellate Case No. 2022-000388
District Court Case No. 3:20-cv-2755-MGL

John Doe.....Plaintiff

v.

Mark Keel, in his Official Capacity as Chief of
the South Carolina Law Enforcement Division.....Defendant

PLAINTIFF'S OPENING BRIEF

David Allen Chaney Jr., #104038
Meredith McPhail, #104551
AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA
P.O. Box 1668
Columbia, SC 29202
(843) 282-7953
achaney@aclusc.org
mmcphail@aclusc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

There are over 8,000 individuals on South Carolina's public Sex Offender Registry ("the Registry") that do not live here. Some of these individuals—like John Doe[1]—are listed on our Registry despite no longer being required to register as a sex offender anywhere in the world. Because these individuals are not actively registering with law enforcement, their registry information is necessarily stale, inaccurate, and irrelevant to the safety and welfare of South Carolinians. And although publication of out-of-state offenders provides no discernible benefit to law enforcement or the community, it inflicts profound damage on the lives and reputations of the out-of-state individuals that are listed.

The question before the Court is whether the South Carolina Sex Offender Registry Act ("SORA" or "the Act") permits the South Carolina Law Enforcement Division ("SLED") to publish individuals who no longer live in South Carolina ("out-of-state offenders") on the Registry. Fortunately, the statute itself unambiguously answers that question in the negative. The plain text of SORA only requires registration for offenders "residing in the State of South Carolina," and only permits law enforcement to publish information about "persons who are required to register." S.C. Code §§ 430, 490. Taken together, these sections only permit SLED to publish *resident* sex offenders on the Registry.

But even if the Court finds that the text of SORA is ambiguous, the canons of statutory interpretation compel the same result. Automatic lifetime publication of out-of-state offenders impedes SORA's purpose by diluting the Registry with stale and inaccurate information, is contrary to SLED's own regulations, and would

[1] A protective order prohibits disclosure of Doe's true name and identity during the pendency of this case. This filing and its attachments are redacted in compliance with that order.

render the statute unconstitutional under the Due Process, Double Jeopardy, and *Ex Post Facto* Clauses. Therefore, the Court should answer the certified question in the negative and hold that SORA does not permit the publication of out-of-state offenders on the Registry.

QUESTION PRESENTED

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?

STATEMENT OF THE CASE

Plaintiff John Doe is a resident of Georgia who, despite not living in South Carolina or being required to register as a sex offender in South Carolina, is listed on the South Carolina Sex Offender Registry ("Registry").

When Doe was a freshman in college, he exchanged inappropriate pictures with someone posing as an underage woman in an online chatroom. As a result, Doe was prosecuted for a criminal sexual offense in Gilpin County, Colorado. After pleading guilty, Doe was sentenced to probation, which he served through the Interstate Compact in his then-home state of South Carolina. While in South Carolina, Doe registered as a sex offender under the South Carolina Sex Offender Registry Act ("SORA" or "the Act").

Doe successfully completed his probation sentence, and his case was closed with the South Carolina Department of Probation, Parole and Pardon Services on December 23, 2013. In summarizing his time with Doe, psychiatrist Thomas Martin wrote that Doe had "actively participated in treatment," "demonstrated excellent leadership abilities," and was a "model group member." Based on his time with Doe,

Dr. Martin concluded, "with a reasonable degree of medical and psychiatric certainty," that Doe is "a very low risk to re-offend."

In June of 2015, Doe moved from South Carolina to Marietta, Georgia. He notified law enforcement in South Carolina and in Georgia of his relocation and registered as a sex offender in Georgia upon his arrival. At that time, Doe's obligation to register in South Carolina was suspended. Shortly thereafter, Doe successfully petitioned to deregister as a sexual offender in Georgia.

Even after Doe left South Carolina and his registration obligations were suspended, Defendants continued to publish his name, face, home addresses, criminal history, and tier categorization on their online public Registry. As a result, Doe continued to experience the stigmatizing consequences of registration despite being permitted to deregister in Georgia. These consequences include being turned away from his son's scheduled surgery at Children's Hospital of Atlanta, not being allowed to participate as a volunteer coach for his kids' sports teams, not being allowed to volunteer at church functions, and refraining from attending his son's speech therapy lessons because they are at a public school that runs background checks for visitors. The Does have also repeatedly had travel reservations cancelled due to Doe's name on the South Carolina Registry. Along with these discrete impacts, the Does also live in constant fear and anxiety that a neighbor, friend, employer, or stranger will suddenly learn of South Carolina's designation of Doe as a "sex offender."

In August of 2020, Doe filed a lawsuit in federal district court seeking to enjoin SLED's publication of his name, picture, home addresses, offense history, tier classification, and other information on the Registry. Doe claimed that SLED is misapplying SORA by publishing him—an out-of-state offender—on the Registry and that his publication on the Registry violates the Due Process and Double Jeopardy Clauses of the United States Constitution.

On March 30, 2022, the United States District Court for the District of South Carolina certified the following question to the South Carolina Supreme Court: "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[2]—on the state's public sex offender registry?"

On April 29, 2022, this Court accepted the question and ordered briefing.

STANDARD OF REVIEW

"When a certified question raises a novel question of law, this Court is free to answer the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 11, 800 S.E.2d 479, 480 (2017) (quoting *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)) (quotation marks omitted).

ARGUMENT

I. The plain and unambiguous text of SORA does not permit South Carolina to publish out-of-state offenders on the Registry.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Cain v. Nationwide Prop. & Cas. Ins. Co.*, 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Here, the text is plain and unambiguous. SORA only authorizes the publication of information about "persons who are required to

[2] The term 'out-of-state offender' can refer to a resident whose predicate sexual offense was committed and prosecuted in a different state but who resides and registers in South Carolina. S.C. Code Ann. Regs. § 73-200(C). Here, however, the term 'out-of-state offender' refers to an offender with a qualifying sexual conviction who does not live in South Carolina.

register under this article." S.C. Code Ann. §§ 23-3-490(A), (C). Because out-of-state offenders are not "persons required to register under [SORA]," S.C. Code Ann. §§ 23-3-430(A), (B), they cannot be published on the Sex Offender Registry.

A. The text of SORA only requires residents of South Carolina to register as sex offenders.

Section 430 of SORA defines who must register as a sex offender under the Act. *See* S.C. Code § 23-3-430. Part (A) states that:

> (A) Any person, regardless of age, *residing in the State of South Carolina* who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article. A person who has been found not guilty by reason of insanity shall not be required to register pursuant to the provisions of this article unless and until the person is declared to no longer be insane or is ordered to register by the trial judge. A person who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any court in a foreign country may raise as a defense to a prosecution for failure to register that the offense in the foreign country was not equivalent to any offense in this State for which he would be required to register and may raise as a defense that the conviction, adjudication, plea, or finding in the foreign country was based on a proceeding or trial in which the person was not afforded the due process of law as guaranteed by the Constitution of the United States and this State.

S.C. Code Ann. § 23-3-430(A) (emphasis added).

Subsection (B) then clarifies that a "resident" is "a person who remains in this State for a total of thirty days during a twelve-month period." S.C. Code Ann. § 23-3-

430(B). Therefore, under the plain text of SORA, registration is not required for out-of-state offenders.

B. The text of SORA only authorizes SLED to publish "persons required to register" on the Sex Offender Registry.

Section 23-3-490 governs the dissemination of information gathered under SORA, including on the state's online Sex Offender Registry. S.C. Code Ann. § 23-3-490; *see Powell v. Keel*, 433 S.C. 457, 471, 860 S.E.2d 344, 351 (2021) ("[W]e hold subsection 23-3-490(E) permits the use of the internet to disseminate sex offender registry information to the public.").

Importantly, Section 490 circumscribes whose information may be published. *See*, *e.g.*, S.C. Code Ann. § 23-3-490(D)(2) (limiting public dissemination of information about persons adjudicated delinquent of certain offenses in family court). As relevant here, Subsections (A) and (C) only provide for the public disclosure of information "regarding *persons who are required to register* under this article[.]" S.C. Code Ann. §§ 23-3-490(A), (C) (emphasis added). By limiting public dissemination of registration information to "persons required to register," Section 490 plainly invokes Section 430(A), including its residency limitation. Therefore, the text of SORA only permits publication of South Carolina residents on the Registry.

C. This Court, in describing SORA in *Hendrix v. Taylor*, rightly articulated the most natural reading of the statute.

This Court has already interpreted these provisions. In *Hendrix v. Taylor*, the Court explained that "the following types of sex criminals are placed on the registry: (1) *A South Carolina resident* who has pled guilty or nolo contendere, or been convicted of a sex offense in this state, in any other state, or in federal court; (2) *A South Carolina resident* who is registered on another state's sex offender registry; or (3) A judge may order that a criminal be registered if good cause is shown." 353 S.C. 542, 548, 579 S.E.2d 320, 323 (2003) (emphasis added) (citing S.C. Code Ann. § 23-3-

430(A), (D)), *overruled on other grounds by Powell*, 433 S.C. 457. This intuitive reading has clear textual support and should govern here. Given these clear textual limits on publication, the certified question should be answered in the negative.

II. Like the text of the statute, the canons of statutory interpretation all reject the publication of out-of-state offenders under SORA.

When a statute's language is unambiguous, an interpreting court need look no further than the text itself, but "if a statute is ambiguous, the Court must construe its terms" using principles of statutory interpretation. *State v. Taylor*, 436 S.C. 28, 34, 870 S.E.2d 168, 171 (2022). The principles of statutory interpretation support Doe's understanding of the Act.

A. Publishing out-of-state offenders on the Registry undermines the Act's purpose.

"[T]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Henry-Davenport v. Sch. Dist. of Fairfield Cnty.*, 391 S.C. 85, 88, 705 S.E.2d 26, 28 (2011); *see also Ventures S.C., LLC v. S.C. Dept. of Revenue*, 378 S.C 5, 8, 661 S.E.2d 339, 341 (2008); *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021); *Taylor*, 436 S.C. at 34. To that end, individual parts of a single statutory scheme must be construed together and "read in a sense which harmonizes with its subject matter and accords with its general purpose." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010); *see also Taylor*, 436 S.C. at 34.

Here, the purpose of the Registry Act is to promote South Carolina's "fundamental right . . . to provide for the public health, welfare, and safety of its citizens," by ensuring that law enforcement has access to accurate and up-to-date information about sexual offenders "who live within the law enforcement agency's jurisdiction." S.C. Code Ann. § 23-3-400. For several reasons, that purpose is undermined by the publication of out-of-state offenders on the Registry.

First, including out-of-state offenders does not provide law enforcement with any information whatsoever about offenders "*who live within* the law enforcement agency's jurisdiction." S.C. Code Ann. § 23-3-400 (emphasis added).

Second, relatedly, the publication of out-of-state offenders does not further the safety or welfare of *South Carolina citizens* or otherwise help law enforcement prevent, reduce, or solve crimes that threaten *South Carolina communities*. In fact, sex offender registries are already criticized for being bloated and overinclusive, thereby diluting law enforcement resources and impeding their ability to focus on high-risk offenders. *Powell*, 433 S.C. at 466 (citing Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 752 (2013) ("As registries expand, they become even less useful to both the public and law enforcement.")). Adding an additional 8,000 out-of-state entries to the public database does nothing more than flood the system with useless information.

Third, even if there were some infinitesimal advantage to tracking out-of-state sexual offenders, that advantage is destroyed when—as here—the information is outdated or inaccurate. As the Act itself recognizes, the utility of publication depends on the accuracy of registration. *See*, *e.g.*, S.C. Code Ann. Regs. § 73-240 ("SLED will ensure that all information maintained in the Registry is as up-to-date and accurate as possible"); S.C. Code Ann. §§ 23-3-460 (imposing strict obligations on offenders to update their registration within three days of a change in residence, employment, school), 23-3-470 (harshly punishing any failure to provide updated information as required elsewhere in the Act). But because SLED's authority to insist that an offender provide information to the Registry expires when the offender leaves South Carolina, information published on the Registry about out-of-state offenders is *necessarily* stale, outdated, and ultimately inaccurate. SLED currently has over 8,000 individuals on the Registry that do not satisfy the definition of "sex offender"

under South Carolina law and therefore do not have any obligation to provide updated information to SLED. These individuals can move, have records expunged or sealed, receive pardons, die, or obtain name changes. The Registry does not—indeed, *cannot*—track these developments.

A statute must be presumed not to require conduct that undermines its purpose. That basic rule governs here: SORA does not require publication of out-of-state offenders on the Sex Offender Registry.

B. SLED's implementation of SORA promotes inaccurate information about out-of-state offenders.

Publishing Doe (and other out-of-state offenders) on the Registry announces an incorrect statement about Doe's status as a sex offender. The public assumes that if you are on the sex offender registry, you are a sexual offender under the law of that state. In fact, SLED explicitly endorses this assumption on their public Registry website, which defines "sexual offender" by reference to Section 23-3-430.[3] But in reality, that assumption is not true—Doe is not a "sex offender" under SORA. *See* Part I. Moreover, along with false information about the legal status of out-of-state offenders, the Registry also publishes incorrect and outdated demographic information, including addresses. This Court can safely presume that the Legislature did not mean to pass a law that countenances misinformation. Any interpretation of the Act that allows—much less *requires*—SLED to publish false information on the Registry must be rejected.

C. Publishing out-of-state offenders on the Registry prevents just, equitable, and beneficial operation of the Act.

Ultimately, "[a]ny ambiguity in a statute should be resolved in favor of a just,

[3] "What is a Sexual Offender?", Frequently-Asked Questions (FAQs) SLED (*available at*: https://scor.sled.sc.gov/FAQs.aspx).

equitable, and beneficial operation of the law." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (quoting *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993)). As outlined extensively herein, it is unjust and inequitable to publish the information of out-of-state offenders on the Registry, treating them identically to resident offenders, whom SORA, by its own text, prioritizes. Doe's situation exemplifies this injustice. Moreover, publication of out-of-state offenders prevents the benefit that SORA purports to offer by diluting any potentially useful information about offenders living within South Carolina with irrelevant information about out-of-state offenders. *See, e.g.*, S.C. Code Ann. § 23-3-400; *Powell*, 433 S.C. at 466; S.C. Code Ann. Regs. § 73-240. Ultimately, if the Court finds ambiguity in the text of SORA, it should be "resolved in favor of" Plaintiff's interpretation, which offers "a just, equitable, and beneficial operation of the law." *Roberts*, 393 S.C. at 342.

III. SLED's own regulations buttress the conclusion that out-of-state offenders should not be published on the Sex Offender Registry.

The General Assembly tasked SLED with promulgating regulations to implement SORA. S.C. Code Ann. § 23-3-420. Those regulations further highlight the absurdity of publishing stale information about inactive, out-of-state offenders.

A. SLED's treatment of deceased offenders shows that removing information from the Registry can further the Act's purpose.

Under Regulation 73-240, "[o]nce it has been determined that an offender is deceased, SLED will remove that offender from active status." S.C. Code Ann. Regs. § 73-240. As part of removing the offender from active status, the offender is also removed from the public Registry. Notably, this regulation (while entirely logical) is atextual—the text of SORA does not discuss how, why, or when to remove dead registrants from the Registry. But rather than rigidly and nonsensically concluding that the text forbids the removal of dead registrants, SLED elected to promulgate a

regulation that furthers the goals of SORA, preserves the integrity of its Registry, and avoids needlessly shaming the families of former offenders in perpetuity. In so doing, SLED acted consistently with the purpose of SORA by removing unhelpful information from the Registry.

B. SLED's regulation concerning "obsolete data" demonstrates that destruction of offender information can further the Act's purpose.

As with deceased offenders, SLED's regulations also contemplate moving an individual to "inactive status" when they relocate. *See* S.C. Code Ann. Regs. § 73-250. If a registered offender moves to a different county within South Carolina, law enforcement must ensure that the moving offender is placed on inactive status in the former county—or temporarily taken off the Registry—and then reentered into the system as a new, active entry in the receiving county. *Id.* If, on the other hand, a registered offender moves to a location outside of South Carolina, the former county's sheriff has two tasks: (1) place the newly-out-of-state offender on "inactive status" and (2) notify the receiving state of the offender's relocation. *Id.* Unlike an individual who moves within the state, an out-of-state offender remains on "inactive status" unless or until they return to South Carolina.

Once an offender is placed on "inactive status," that offender's former Registry entry may be destroyed. S.C. Code Ann. Regs. § 73-270. In fact, SLED's regulations emphasize the necessity of purging the Registry, demanding—in a regulation entitled "Disposition of Obsolete Data"—that "SLED will ensure that all information maintained in the Registry is as up-to-date and accurate as possible." S.C. Code Ann. Regs. § 73-240.[4] Surely the agency tasked with enforcing SORA would not permit,

[4] The example offered in 73-240 requires "remov[al of a deceased] offender from active status," *id.*, but 73-240 is not limited to a dead offender; rather, the disposition of a deceased offender's data merely illustrates the broader principle that all information should be up-to-date and accurate.

much less encourage, the destruction of valuable data. The SLED regulations, then, reflect a determination that retaining and publishing out-of-state and deceased offenders' data is superfluous and even counterproductive.

IV. Automatic lifetime publication of out-of-state offenders would, if required by SORA, render the statute unconstitutional.

Even if the Court determines that the text of the statute is ambiguous, the interpretive canon of constitutional avoidance easily resolves the question presented. If automatic lifetime registration of resident sex offenders violates the Due Process Clause, *Powell*, 433 S.C. at 465, then automatic lifetime publication of out-of-state offenders must as well. Furthermore, a registry scheme that gratuitously publishes offender information without regard for the accuracy of the information or whether it aids community safety is baldly punitive and thus violates the Double Jeopardy and *Ex Post Facto* Clauses of the United States Constitution.

A. The canon of constitutional avoidance directs courts to construe statutes so as to render them valid.

Constitutional avoidance is a judicial default rule that, like other tools of statutory interpretation, only comes into play if a statute's language is ambiguous. *Kirven v. Central States Health & Life Co. of Omaha*, 409 S.C. 30, 39, 760 S.E.2d 794, 799 (2014). Under this doctrine, "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Joytime Distributors & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). In other words, "[a] possible constitutional construction must prevail over an unconstitutional interpretation." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting *Curtis v. State*, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001)).

This Court has used the canon of constitutional avoidance to interpret SORA. In *State v. Ross*, 423 S.C. 504, 815 S.E.2d 754 (2018), for example, the Court considered whether Section 23-3-540(E) of the Act—which requires that any person

"who violates a provision of this article . . . be ordered by the court to be monitored . . . with an active electronic monitoring device"—violates the Fourth Amendment's prohibition on unreasonable searches and seizures. The Court concluded that automatic electronic monitoring might indeed constitute an unreasonable search but declined to strike the provision as unconstitutional. Instead, the court invoked the doctrine of constitutional avoidance to construe the Act as mandating electronic monitoring "only after the court finds electronic monitoring would not be an unreasonable search based on the totality of the circumstances presented in the individual case." *Id.* at 514–15.

B. Lifetime publication of out-of-state offenders on the public registry would violate the Due Process Clause.

"The substantive component of due process bars certain government actions regardless of the fairness of the procedures used to implement them." *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)) (quotation marks and internal alterations omitted). "[N]arrow tailoring is required . . . when fundamental rights are involved," but otherwise, the Due Process Clause requires "a 'reasonable fit' between governmental purpose and the means chosen to achieve that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993). Automatic lifetime publication of out-of-state offenders on the Registry cannot withstand constitutional examination.

1. Automatic lifetime publication on a Sex Offender Registry implicates a protected interest.[5]

Substantive due process analysis "must begin with a careful description of the asserted right." *Id.* at 302. Although courts have disagreed about whether sex

[5] In federal court, Doe argues that this interest is elevated to a fundamental one, thus triggering strict scrutiny, due to the "serious risk to the personal safety" of registrants that implicates their fundamental right to "personal security and bodily

offender registries *violate* offenders' right to privacy, there is no doubt that unfettered public dissemination of an offender's name, picture, home address, vehicle information, offense history, and tier categorization *implicates* the right to privacy. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 129 (Alaska 2019) (compiling cases). Here, out-of-state offenders have a protected interest in freedom from automatic lifetime branding as a sex offender by a state in which they do not reside.

Specifically, as the Supreme Court has explained, the state infringes on an offender's right to privacy when it aggregates and distributes public, but otherwise difficult to access, information: "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764 (1989). Here, the state of South Carolina has done exactly that. As a result, Doe, and others like him, have a nontrivial privacy interest in the extensive—and often inaccurate, *see* Part II.B—information disseminated on the Registry.

2. Lifetime publication of out-of-state offenders is not rationally related to a legitimate state interest.

Government intrusion on a non-fundamental interest may occur only if it is "rationally related to legitimate government interests." *Washington v. Glucksberg*,

---

integrity." *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998); *cf. Dykes*, 403 S.C. at 511 ("Dykes' status as a sex offender does not diminish her entitlement to certain fundamental rights.") (Hearn, J., dissenting). Doe does not waive that argument here, but notes that the inclusion of out-of-state offenders on the Registry fails even the less stringent rational basis test.

521 U.S. 702, 728 (1997).[6]

This Court's opinion in *Powell v. Keel* is instructive here. There, the Court was asked to determine the whether the Act's lifetime registration requirement violates due process. *Powell*, 433 S.C. at 460. The Court first found that "the lifetime imposition of sex offender registration implicates a protected liberty interest" in "freedom from permanent, unwarranted governmental interference." *Id.* at 464–65 (following *State v. Dykes*, 403 S.C. 499, 506, 508, 744 S.E.2d. 509, 510 (2013)). Having done so, the Court then applied the rational relationship test to determine "whether the requirement bears a reasonable relationship to any legitimate interest of government." 433 S.C. at 465 (quoting *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004)) (internal quotation marks omitted). In doing so, the Court evaluated whether the possible utility of indiscriminate lifetime registration bore a reasonable relationship to the legitimate government interest in "provid[ing] for the . . . safety of its citizens." *Id.* (quoting S.C. Code Ann. § 23-3-400's statement of SORA's purpose). Because "the lifetime inclusion of individuals who have a low risk of re-offending renders the registry over-inclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement" and because "there is no evidence in the record that current statistics indicate all sex offenders generally pose a high risk of re-offending," the Court ultimately held that SORA's lifetime registration requirement "is arbitrary and cannot be deemed rationally related to the General Assembly's stated purpose of protecting the public from those with a high

[6] The Supreme Court has not clearly articulated which test governs informational privacy claims. *Compare Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (applying strict scrutiny) *with Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) (applying rational basis) *and Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (applying a balancing test). Regardless, SORA's publication of out-of-state offenders would fail even the least stringent review.

risk of re-offending." *Id.* at 466, 472.

Compared to *Powell*, the infringement here is even less reasonable. The publication of out-of-state offenders on the Registry bears no relationship to the interest served by SORA. Publishing out-of-state offenders does not aid law enforcement, does not provide for the safety of its citizens generally and, more specifically, does not reduce sexual crime recidivism in the state.

In fact, publishing the data of offenders who no longer live in South Carolina and have no duty to report to South Carolina law enforcement[7] on the Registry actually hinders SORA's goals. *See* Part II.A. For one, the goal of South Carolina's Sex Offender Registry Act is to help South Carolina provide for the safety of *its* citizens by ensuring that law enforcement stays informed about sexual offenders "*who live within* the law enforcement agency's jurisdiction." S.C. Code Ann. § 23-3-400 (emphasis added). Even if that purpose is a legitimate state interest that warrants the registration and publication of *resident* sex offenders, *see*, *e.g.*, *Smith v. Doe*, 538 U.S. 84, 87 (2003), ("[T]he Act has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders *in their community*."), it does not support the inclusion of out-of-state offenders, who do not live "within the law enforcement agency's jurisdiction." To the contrary, the inclusion of out-of-state offenders causes the same dilutive effect criticized by this Court in *Powell*, 433 S.C. at 466.

---

[7] It is on these grounds that SORA is distinct from other sex offender registration and publication schemes that have generally been upheld on rational basis review. *See, e.g.*, *Doe v. Moore*, 410 F.3d 1337, 1343-44 (11th Cir. 2005). In every other challenge, the issue was whether the state could show a rational basis for publishing information about *resident* sex offenders who owed a *current* obligation to register. Here, the Court must answer an entirely different question: whether the state may publish information about individuals who do not live in South Carolina and have no duty to report to South Carolina law enforcement.

Moreover, there is scant evidence that the Act actually achieves its stated purpose. *See* Elizabeth J. Letourneau, et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, MED. U. S.C. 5 (2011)**.** In fact, research shows that broad notification schemes—such as the one administered by Defendants—likely *reduce* community safety. J. J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*, 54 J. L. & ECON. 161, 192 (2011).

The Act, if construed to allow publication of out-of-state offenders, does not pass constitutional muster because it does not bear a reasonable relationship to the state's legitimate interest. Therefore, under the principles of constitutional avoidance, SORA must be interpreted to prohibit the publication of out-of-state offenders.

C. Lifetime publication of out-of-state offenders on the public registry would cause SORA to violate the Double Jeopardy and *Ex Post Facto* Clauses.

In addition to significant due process problems, enforcement of the Act—if interpreted to permit lifetime publication of out-of-state offenders—would constitute punishment in violation of the Double Jeopardy and *Ex Post Facto* Clauses.

The Double Jeopardy Clause "protects against . . . multiple punishments for the same offense," *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); U.S. CONST. amend. V., and the *Ex Post Facto* clause prohibits "applying a new Act's higher penalties to pre-Act conduct," *Dorsey v. United States*, 567 U.S. 260, 275 (2012); U.S. CONST. Art. 1, § 9, cl. 3. In order to show a violation of either provision, a party must show that the government action in question constitutes punishment. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019). The Supreme Court has adopted a two-step test for establishing whether a law is punitive for purposes of Double Jeopardy or *Ex Post Facto*. See *United States*

v. Ward, 448 U.S. 242, 248– 249 (1980); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168–169 (1963).[8] The first step of the *Kennedy-Ward* test is to determine whether the legislature *intended* to establish a civil scheme or to impose punishment. *Hendricks,* 521 U.S. at 361. If the legislature intended to impose punishment, "that ends the inquiry." *Smith*, 538 U.S. at 92. But if the legislature intended to enact a nonpunitive regulatory scheme, courts must then proceed to step two and examine "whether the statutory scheme is so punitive either in purpose or effect as to negate" that intention. *United States v. Wass*, 954 F.3d 184, 189 (4th Cir. 2020) (quoting *Hendricks*, 521 U.S. at 361).

Plaintiff concedes, and this Court has held, *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002), that the Act's text evinces at least *some* civil purpose. The analysis turns, then, to the punitive purpose and effect of the Act.[9] To determine whether the actual effects of a regulatory scheme negate its purportedly nonpunitive purpose, the Court must consider a host of "non-dispositive guideposts." *Does #1-5 v. Snyder*, 834 F.3d 696, 701 (6th Cir. 2016). The factors identified by the Supreme Court in *Smith* as having particular relevance to sex offender schemes are: whether the government action (1) inflicts what has been historically or traditionally regarded as punishment; (2) imposes an affirmative restraint or disability; (3)

---

[8] The South Carolina Constitution's Double Jeopardy Clause is coextensive with its federal counterpart. *In re Mathews*, 345 S.C. 638, 651, 550 S.E.2d 311, 317 (2002) (citing *State v. Easler*, 327 S.C. 121, 132, 489 S.E.2d 617, 623 (1997)).

[9] This is where the *Walls* decision falls short. The Court in *Walls* determined that "the language [of SORA] indicates the General Assembly's intention to create a non-punitive act[,]" and then held that "the Act is not so punitive in purpose or effect as to constitute a criminal penalty." 348 S.C. at 31. But the *Walls* Court failed to engage at all with the second step of analysis, which asks whether the punitive purpose or effect negates the legislature's expressed regulatory intent. Here, Plaintiff asks this Court to go where the *Walls* Court did not: to consider the punitive purpose and effect of SORA.

promotes the traditional aims of punishment, retribution and deterrence; (4) has a rational connection to a non-punitive purpose; or (5) is excessive. *Smith*, 538 U.S. at 97. Although all of the factors are relevant, "they may often point in differing directions." *Mendoza-Martinez*, 372 U.S. at 169.

Following *Smith v. Doe*, most courts have held that other state registry schemes are not punitive. But as the Fourth Circuit held recently, "*Smith* and its progeny should not be understood as writing a blank check to states to freely impose retroactive restrictions on sex offenders." *Pyrnne*, 848 F. App'x at 103 (holding that the plaintiff plausibly alleged that Virginia's registry act was punitive for *Ex Post Facto* purposes). Rather, the reviewing court must dutifully apply the five factors and determine whether the act before it constitutes punishment. *Id.* Here, as seen below, if SORA is interpreted as permitting permanent publication of out-of-state offenders, then its punitive effects far outweigh its putatively regulatory purpose.

(1) The first factor—whether the act in question inflicts what has been historically or traditionally regarded as punishment—divided the Supreme Court in *Smith*. There, a majority of the Court concluded that the Alaska registry statute's resemblance to early punishments was merely incidental. *Id.* at 98–99, 115–16; *but see id.* at 115 ("[The Act's] public notification regimen, . . . calls to mind shaming punishments once used to mark an offender as someone to be shunned.") (Ginsburg, J., dissenting). But here, the scales are tipped even further because SORA aligns far more closely with traditional forms of punishment than the law examined in *Smith*.

First, unlike the law in *Smith*, SORA (if construed as requiring automatic lifetime publication of out-of-state offenders) demonstrates an interest in causing publicity and stigma, much like the shaming punishments of old. This intent is shown by the gratuitous enforcement of aggressive and unfettered publication *even after* the offender ceases to live in South Carolina or be required to register as a sex offender in the state. *See* Part II(A).

Second, as many courts and scholars have acknowledged, the injury imposed by online notification has changed substantially since *Smith* was decided in 2003. *Commonwealth v. Muniz*, 164 A.3d 1189, 1212 (Pa. 2017), *abrogated on other grounds by Commonwealth v. Santana*, 266 A.3d 528 (2021); *Doe v. State*, 111 A.3d 1077, 1097 (N.H. 2015); Kristine L. Gallardo, *Taming the Internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 725 (2017). As a result, the Court's reasoning cannot apply with the same force. The internet (which was still in its infancy when the Court decided *Smith*) is where modern shaming—or "cancel culture"—reigns supreme. Gallardo, at 725.

Finally, unlike the Alaska law in *Smith*, SORA publishes information that is not otherwise publicly available: specifically, tier classifications (even incorrectly, in Doe's case) for each offender. *See Pyrnne v. Settle*, 848 F. App'x 93, 102 (4th Cir. 2021); *also see Does #1-5*, 834 F.3d at 702.

(2) Under the second factor, if a law "imposes an affirmative restraint or disability" that exceeds minor or indirect impacts, those effects are appropriately labeled as punitive. *Smith*, 538 U.S. at 99–100. SORA is uniquely harsh, imposing significant affirmative restraints that are far more onerous than those found to be nonpunitive in *Smith*. For one, prior to the South Carolina Supreme Court's decision in *Powell v. Keel*, SORA imposed lifetime, biannual registration for all offenders. Additionally, at least twice per year, registrants must provide law enforcement with "twenty-three separate items of information," and a registrant must reregister whenever he or she changes residences, employment, schools, vehicles, acquires new real estate, or changes internet providers. *Ross*, 423 S.C. at 513 (citing S.C. Code Ann. Regs. § 73-260). And when a technical violation occurs, severe consequences such as a new criminal prosecution, intrusive electronic monitoring, or imprisonment can follow. *Id.*; S.C. Code Ann. §§ 23-3-470(B), 23-3-540(E). Moreover, SORA imposes

strict residency restrictions and can result in extensive electronic monitoring, both of which constitute significant affirmative restraints.

(3) The third factor—whether the statute promotes retribution and deterrence—also weighs toward a finding that SORA constitutes punishment. As noted above, prior to this Court's decision in *Powell v. Keel*, SORA indiscriminately and retributively imposed lifetime registration and publication for an entire category of offenders, *Powell*, 433 S.C. at 463, "feed[ing] suspicion that something more than regulation of safety is going on," *Smith*, 538 U.S. at 109 (Souter, J., concurring). And, as other courts have noted, when a criminal conviction is both necessary and sufficient to trigger a restriction, the restriction "begins to look far more like retribution for past offenses than a regulation intended to prevent future ones." *Doe*, 111 A.3d at 1098 (quoting *Com. v. Baker,* 295 S.W.3d 437, 444 (Ky. 2009)). Additionally, SORA affirmatively encourages the use of publication as a mechanism for deterrence. S.C. Code Ann. § 23-3-490(C).

Moreover, text of the statute, its location within the state code, and the entities charged with its enforcement point to a conclusion SORA is aimed at the traditional ends of criminal punishment: retribution and deterrence. The Act resides in Title 23 of the South Carolina Code, which is reserved for "Law Enforcement and Public Safety," and in the chapter dedicated specifically to the South Carolina Law Enforcement Division (SLED). Finally, the Act leans heavily on the state law enforcement apparatus to administer its requirements. Primary responsibility for implementing the Act is delegated to SLED, § 23-3-410(A); registration of individual offenders is assigned to local sheriff's offices, § 23-3-460(A); and the Act's electronic monitoring provisions are implemented by the Department of Probation, Parole, and Pardon Services, § 23-3-540.

(4) The fourth and "[m]ost significant factor" in determining whether the statute's effects are punitive is whether the law bears a rational connection to a

nonpunitive purpose. *Smith*, 538 U.S. at 102 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)) (brackets in original). A passing semblance to punishment can be excused where a statute's mandates accomplish a sincere and legitimate nonpunitive purpose. But where the means don't accomplish the putatively nonpunitive end, the "actual effects" of the statute start to feel increasingly punitive. *See Does #1-5*, 834 F.3d at 704 (noting on this *Mendoza-Martinez* factor that there was "scant support for the proposition that SORA in fact accomplishes its professed goals").

Here, the Act's declared "nonpunitive purpose" is to reduce sexual recidivism by providing law enforcement with relevant information about convicted offenders who live within the agency's jurisdiction. S.C. Code Ann. § 23-3-400. But as discussed already, SORA's perpetual publication of out-of-state offenders simply does not accomplish this purpose. *See* Part II.A.

(5) The fifth factor—excessiveness—is closely intertwined with the fourth. Essentially, this factor asks "whether the regulatory means chosen are *reasonable* in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. Like other schemes that have been struck down as punitive, the Act here casts an overinclusive net that captures dangerous and docile offenders alike, and, prior to *Powell v. Keel*, indiscriminately subjected all of them to a lifetime of onerous reporting requirements and unfettered online publication. *See Starkley v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1029 (Okla. 2013); *Muniz*, 164 A.3d at 1218. Furthermore, the Act's use of publication to accomplish a deterrent purpose, coupled with SLED's irrational publication policy, conclusively demonstrate that SORA is only nominally regulatory.

Here, each of the five *Martinez-Mendoza* factors point toward the law's punitive impact. Because SORA's punitive effects so clearly negate its regulatory intent, it can only be applied by the original sentencing court. Therefore, the only

way to shield SORA from a successful constitutional challenge is to conclude that the Act prohibits publication of out-of-state offenders.

CONCLUSION

SORA's text is clear: publication of out-of-state offenders on the Registry is not authorized. Moreover, the rules of statutory interpretation and other guiding principles—including examination of the statute's purpose, the equities involved, the relevant SLED regulations, and the constitutional issues raised by the Defendants' interpretation—point unequivocally toward the same result. Plaintiff respectfully asks this Court to answer the certified question in the negative.

Respectfully submitted,

/s/ *Allen Chaney*

David Allen Chaney, Jr.
S.C. Bar No. 104038
ACLU of South Carolina
P.O. Box 1668
Columbia, South Carolina 29202
(843) 282-7953
achaney@aclusc.org
Attorney for Plaintiff

/s/ *Meredith McPhail*

Meredith McPhail
S.C. Bar No. 104551
ACLU of South Carolina
P.O. Box 1668
Columbia, South Carolina 29202
(843) 508-8327
mmcphail@aclusc.org
Attorney for Plaintiff

May 31, 2022