2013-0496

STATE OF NEW HAMPSHIRE
SUPREME COURT

JOHN DOE

v.

STATE OF NEW HAMPSHIRE

Appeal From An Interlocutory Ruling
Of The Merrimack County Superior Court

BRIEF FOR AMICUS CURIAE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING PLAINTIFF JOHN DOE

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QUESTION PRESENTED

Whether the Registration of Criminal Offenders Act, RSA 651-B, as amended after State v. Costello, 138 N.H. 587 (1994), is an *ex post facto* penal law in violation of Article I, Section 10 of the United States Constitution and Part I, Article 23 of the New Hampshire Constitution. Addendum at 1-234.

INTEREST OF THE AMICUS CURIAE

The New Hampshire Association of Criminal Defense Lawyers ("NHACDL") is the voluntary, professional organization of the criminal defense bar in New Hampshire. It has approximately 270 attorney members including almost 70 state court public defenders, all federal defenders assigned to the District of New Hampshire and close to 200 lawyers in private practice. Collectively the membership practices in all ten counties, all eleven superior courts, all fourteen district division courthouses, this court and the federal courts. NHACDL sponsors CLEs and training programs, provides mentors to new lawyers who ask for help, operates a listserv and maintains an electronic resource library. NHACDL also takes public policy positions on issues of importance to the criminal justice system. Thus, when an appellate decision is likely to impact the procedural fairness of criminal adjudications, NHACDL will take a stand. The issues presented in this case are of direct concern to NHACDL, its members and their clients. If the trial court's decision is affirmed, offenders who committed their crimes prior to amendments of RSA 651-B will be subject to *ex post facto* punishment in violation of the United States and New Hampshire Constitutions.

STATEMENT OF THE CASE AND THE FACTS

A. PROCEDURAL HISTORY AND FACTS

The Appellant's Brief adequately addresses the procedural history of this case and the pertinent facts.

B. LEGISLATIVE HISTORY

In the 1992, the New Hampshire legislature enacted its first statute adopting registration of sexual offenders by supplementing RSA 632-A with Sections 11-19. See RSA 632-A:11-19 (1993). RSA 632-A:11, III defined "sexual offenders" as people who have been convicted of violations of RSA 632-A:2, 3, 4. See RSA 632-A:11, III (1993).The 1992 statute required them to register with the Department of Safety, a Division of the State police. See RSA 632-A:11; 632-A:12, I. The Division, in turn, had to register sexual offenders residing in New Hampshire and was required to include "the *relevant* information" in the law enforcement name search (LENS) system "[u]pon receipt of information . . . concerning the conviction of...sex offender[s]." RSA 632-A:12, II (1993) (emphasis added). Under RSA 632-A:14, sexual offenders were required to report their current mailing addresses and places of residence or temporary domicile to the local law enforcement agencies. See RSA 632-A:14 (1993). Offenders were required to make their reports annually within 30 days after each anniversary of the date of release from custody following conviction and within 30 days after any change of address or place of residence. See RSA 632-A:14 (1993). RSA 632-A:15 required sexual offenders to notify local law enforcement agencies of their new address within 10 days of a change of residence. See RSA 632-A:15 (1993). Only offenders who were required to register as a result of a violation of RSA 632-A:2 or RSA 632-A:3 had to be registered for life. See RSA 632-A:16, I (1993). Sexual offenders convicted as a result of a violation of RSA 632-A:4 had to

be registered for 10 years from the date of their release following conviction. See RSA 632-A:16, II (1993). All records established and information collected as a result of the registration requirements were classified as confidential and were "available only to law enforcement officials and their authorized designees or to the individual requesting his own record in the LENS system." RSA 632-A:17 (1993). Unauthorized disclosure of confidential information was classified as a violation. See RSA 632-A:19, III (1993). Negligent failure to register was classified as a violation and knowing failure to register was classified as a misdemeanor. See RSA 632-A:19, I, II (1993).

In 1993, the legislature amended the Act by making it applicable to any sexual offender, irrespective of the date of the conviction who "completed his sentence not more than six years before the effective date." 1993 N.H. Laws 135:1, III.

In 1994, the New Hampshire Supreme Court decided that the 1993 version of the Act was not an *ex post facto* penal law. See State v. Costello, 138 N.H. 587 (1994). The Court determined that the 1993 registration scheme was not an *ex post facto* unconstitutional law because "any punitive effect of the registration requirement [was] *de minimis*." Id. at 591.

In 1996, the legislature repealed RSA 632-A:11-19 and enacted a new statute requiring registration of sexual offenders. See RSA 651-B (1996); 1996 N.H. Laws 293:1. The newly enacted RSA 651-B added "offenders against children" to the class of people required to register. See RSA 651-B:1, 2 (1996). It defined "offenders against children" as people who have been convicted of a violation or attempted violation of RSA 633:1-3 or RSA 645:2 (if the victim was under the age of 18 at the time of the offense), RSA 169-B:41, II, RSA 639:3, III, RSA 649-A:3 or RSA 650:2. See RSA 651-B:1, V (1996). Duration of registration depended on the nature of the conviction. See RSA 651-B:6 (1996). Any offender against children convicted of a violation

or attempted violation of RSA 169-B:41, II, RSA 633:1, RSA 633:2, RSA 639:3, III, RSA 645:2, II, RSA 649-A:3, I or RSA 650:2, II, or any equivalent offense in an out-of-state jurisdiction had to register for life. See RSA 651-B:6, I (1996). Any offender against children convicted of a violation or attempted violation of RSA 633:3, RSA 645:2, I or RSA 649-A:3, III, or of an equivalent offense in an out-of-state jurisdiction, had to register for ten years from the date of release following conviction. See RSA 651-B:6, II (1996). Law enforcement agencies were granted the right to notify schools, youth groups, day care centers, summer camps, libraries, or any other organizations where children gathered and were supervised of the names, addresses, offenses, the methods of approach utilized, information of profiles of previous victims of individuals convicted of violations of RSA 632-A:2, I (1) or RSA 632-A:2, II. See RSA 651-B:7, II (1996). Law enforcement agencies were also granted the right to provide photographs of identified offenders to these organizations. Id. With the foregoing exemptions, registration information remained confidential and in the hands of law enforcement under the 1996 law. The New Hampshire Supreme Court never opined on the issue of whether the 1996 law was an *ex post facto* law prohibited by Article I, Section 10 of the United States Constitution and Part I, Article 23 of the New Hampshire Constitution.

In 1998, the New Hampshire legislature again changed the registration scheme by repealing the 1996 version of RSA 651-B:7. See RSA 651-B:7 (1998). Pursuant to the newly enacted RSA 651-B:7, information collected pursuant to enforcement of registration requirement became "public records." Id. This amendment introduced a term "separate list." See RSA 651-B:7, II (a) (1998). The Division was required to:

> maintain a *separate list* of all individuals registered pursuant to this chapter who have been convicted of any violation or attempted violation of one of the following offenses, or of any law of another state or the

federal government reasonably equivalent to one of the following offenses:
(1) RSA 632-A:2, I(j).
(2) RSA 632-A:2, II.
(3) RSA 632-A:3, III.
(4) RSA 645:1, II.
(5) Any offense described in RSA 651-B:1, V [offenses against children].

See RSA 651-B:7, II (a) (1998).

This list had to include the following information: (1) names and addresses of registered individuals; (2) offenses for which individuals were convicted; and (3) dates and courts of their convictions. See RSA 651-B:7, II (b)(1) (1998). The list could include the following: (1) offenders' photographs or physical descriptions; (2) dates and courts of offenders' other convictions, if any; (3) information on the profile of the victims; and (4) methods of approach utilized by the offenders. See RSA 651-B:7, II (b)(2) (1998). The information contained on a "special list" could become available to interested members of the public "upon request to the local law enforcement agency." See RSA 651-B:7, IV (1998). However, the 1998 Act required establishment of a record identifying "the parties to whom information from the list has been disclosed." Id.

In 1999, the legislature amended the duration of registration of requirements by requiring repeat offenders and offenders convicted for a violation of RSA 645:1 to register for life. 1999 N.H. Laws 177:4-5.

Starting from January 1, 2001, qualified sexual offenders and offenders against children became required to report their mailing addresses and places of residence or temporary domicile within 30 days after each anniversary of their birth instead of release of custody following conviction. See 2000 N.H. Laws 177:1.

Effective January 1, 2001, the "special list" of sexual offenders and offenders against children had to contain information about the offenders' outstanding arrest warrants. 2000 N.H. Laws 177:2, 5. Second knowing failure to register became a Class B Felony. 2000 N.H. Laws 177:4.

In 2002, the legislature, once again, changed provisions of the registration scheme. As of May 17, 2002, the Department received authority to make the special list of sexual offenders and offenders against children "available to interested members of the public through the use of department's official public Internet access site." 2002 N.H. Laws 241:1; 2002 N.H. Laws 241:5. At the same time, the local law enforcement agencies were granted the authority to photograph any individual who was required to register without asking the consent of the registrant. 2002 N.H. Laws 241:1.

The following year, sexual offenders and offenders against children became obligated to provide photographs taken by the law enforcement agencies as a part of their registration. 2003 N.H. Laws 316:1, 316:10, III. The Division had to disclose said photographs on the "separate list" of sexual offenders or offenders against children. 2003 N.H. Laws 316:3. In addition to a newly required disclosure of offenders' photographs, the legislature started to require a "separate list" to contain offenders' dates of birth. 2003 N.H. Laws 316:3. At the same time, it became no longer required to identify and maintain a record of the parties to whom the information from the list has been disclosed. 2003 N.H. Laws 316:2.

In 2005, the legislature further broadened the registration requirements by stating that enumerated offenders had to register even if they were found not guilty by reason of insanity. 2005 N.H. Laws 214:3.

In 2006, the Department had to register sex offenders and offenders against children upon "receipt of information . . . concerning *the disposition of any charges* against any sex offender of offender against children." 2006 N.H. Laws 327:5. Also, starting from 2007, sex offenders and offenders against children had to register in person. 2006 N.H. Laws 327:7. Additionally, the offenders became required to register within five (5) business days instead of the previously required thirty (30) days. Id. A new statute required the offenders to repeat their reports within thirty (30) days after the sixth month following their dates of birth. Id. The offenders became obligated to report the following:

> name, age, race, sex, date of birth, height, weight, hair and eye color, address of any permanent residence and address of any current temporary residence, within the state or out of the state, mailing address, date and place of any employment or schooling, and vehicle make, model, color, and license tag number.

Id.

The Department became obligated, semi-annually, to verify offenders' addresses by sending letters, by certified non-forwarding mail to the offenders. 2006 N.H. Laws 327:6. The legislature imposed a duty on the offenders to sign these letters and return them within 10 business days of receipt. Id. The Department could choose to deliver their letters by "other means" if the offenders' mailing addresses were post-office boxes. Id. Offenders who were required to register as a result of violation or attempted violation of RSA 632-A:2 had to be registered for life. 2006 N.H. Laws 162:3, 327:9. Offenders who were required to register as a result of violation of RSA 632-A:4, I(a) had to register for ten years. Id. Law enforcement agencies were granted the authority to "notify the public that an offender who [was] included on the public list . . . [was] residing in the community." 2006 N.H. Laws 327:11. The legislature amended the penalty provisions of the statute as well. 2006 N.H. Laws 327:12. Negligent failure to register became a misdemeanor, knowing failure to register became class B felony, and

repeated knowing failure to register became class A felony. Id. Furthermore, sexual offenders and offenders against children became obligated to pay a registration fee. 2006 N.H. Laws 327:13.

In 2008, the legislature again fundamentally amended the registration scheme. In 2008, the legislature created three tiers of classification for sex offenders and offenders again children. See 2008 N.H. Laws 334:1. All offenders were classified, not by risk, but by crime of conviction. Id. Tier I included offenders convicted of less serious sex crimes or crimes against children. Id. Tier II included more serious offenses. Id. Tier III included the most serious offenders under New Hampshire law. Id. Registration requirements were further expanded to include offenders charged with conspiracy, solicitation, or as accomplices to commit sexual offenses or offenses against children. Id. Starting from 2009, tier I and tier II sexual offenders and offenders against children were required to register semi-annually, within 5 business days after each anniversary of the offenders' dates of birth and every 6 months thereafter. 2008 N.H. Laws 334:4. Every tier III offender had to register "quarterly, within 5 business days after each anniversary of the offender's date of birth and every 3 months thereafter." 2008 N.H. Laws 334:4. In 2009, the offenders still had to report their names, dates of birth, addresses of any permanent residence and addresses of any temporary residences, within the state or out of the state, vehicles makes, models, colors, and license tag numbers, these reporting requirements were supplemented and the offenders became required to report the following additional information:

> (a) . . . aliases, electronic mail addresses, and any internet messaging, chat, or other internet communication name identities
>
> . . . .
>
> (c) Name, address, and date of any employment or schooling . . . If the offender does not have a fixed place of work, he or she shall provide

> information about all places he or she generally works, and any regular routes of travel.
> (d) Any professional licenses or certifications that authorize the offender to engage in an occupation or carry out a trade or business.
> (e) . . . state of registration of any vehicle owned or regularly driven by the offender, and the place or places where such vehicles are regularly kept.
> (f) . . . any alias date of birth used by the offender.
> (g) Social security number.
> (h) Physical description to include identifying marks such as scars and tattoos.
> (i) Telephone numbers for both fixed location and cell phones.
> (j) Passport, travel, and immigration documents.
> (k) The name, address, and phone number of any landlord, if the offender resides in rental property.

2008 N.H. Laws 334:4. The Department was also granted the authority to request offenders to submit the following:

> (a) A photograph taken by the law enforcement agency each time the person is required to report to the law enforcement agency under this section.
> (b) A DNA sample, if such sample has not already been provided.
> (c) A set of major case prints, including fingerprints and palm prints of the offender.
> (d) A photocopy of a valid driver's license or identification card issued to the offender. The consent of the registrant shall not be necessary to obtain this information. Such information may be used in the performance of any valid law enforcement function.

Id.

The 2008 statute also permitted law enforcement agencies and the Department of State to verify the address of any offender through in-person contact at the home and residence of the offender. 2008 N.H. Laws 323:11. These visits are often referred to as compliance checks. There is no limitation of the frequency of compliance checks.

In 2010, the legislature, once again, amended the statute by stating that the terms "sexual offense" and "offense against a child" also include "an accomplice to, or an attempt, conspiracy, or solicitation to commit" enumerated offenses. See RSA 651-B:1, V (2013). The legislature

also amended the statutory scheme to require the offenders to report make, model, color, and license plate or registration plate of watercrafts or aircrafts operated by them. See RSA 651-B:4, III (e) (2013). Furthermore, the legislature made it a class A misdemeanor for the sexual offenders and offenders against children convicted of a violation of RSA 632-A:2, RSA 632-A:3, or RSA 632-A:4 to initiate contact with the victim of the offenses at any time with the exception of the victims and the offenders who had preexisting relationships prior to the offense. See RSA 651-B:9, VIII. Finally, the legislature specifically stated that "RSA 651-B shall apply to any sexual offender or offender against children, regardless of the date of conviction, juvenile delinquency adjudication, finding of not guilty by reason of insanity, or commitment under RSA 135-E." 2010 N.H. Laws 78:9.

Since Costello, this Court has not had occasion to determine whether the sex offender registration scheme as amended over the years is an unconstitutional *ex post facto* law that violates Part I Article 23 of the State Constitution or Article I Section 10 of the United States Constitution.

SUMMARY OF ARGUMENT

RSA 651-B is an *ex post facto* law contrary to Article I, Section 10 of the Constitution of the United States of America and Part I, Article 23 of the New Hampshire Constitution. RSA 651-B, as amended on May 17, 2002 and thereafter, was amended with the purpose to penalize sex offenders and offenders against children who committed their crimes prior to May 17, 2002. In addition, RSA 651-B, as amended, in fact penalizes sex offenders and offenders against children subjecting them to additional punishment in violation of the United States and New Hampshire Constitutions.

The legislative history clearly demonstrates that, while amending RSA 651-B by extending its dissemination and reporting requirements, the legislature's primary purpose was to subject sex offenders and offenders against children to additional punishment. Furthermore, RSA 651-B's reporting and dissemination requirements are punitive in effect because (i) they include affirmative disabilities and restraints; (ii) they resemble the historical punishment of shaming and are comparable to conditions of supervised release, parole, and probations; (iii) they come into play on a finding of scienter; (iv) their operation promotes the traditional aims of punishment by not differentiating offenders based on the level of their dangerousness to the community; (v) they are triggered only by criminal behavior; and (vi) they are excessive when compared against the State's regulatory interests.

ARGUMENT

A. RSA 651-B IS *AN EX POST FACTO* PENAL LAW CONTRARY TO ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND PART I, ARTICLE 23 OF THE NEW HAMPSHIRE CONSTITUTION.

The United States Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10. The New Hampshire Constitution states that "[r]etroactive laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const. pt. I, art. 23. The protection afforded against *ex post facto* penal laws under both Article I, Section 10 of the Federal Constitution and Part I, Article 23 of the New Hampshire Constitution is the same. State v. Costello, 138 N.H. 587, 589 (1994); see also In re Evans, 154 N.H. 142, 152 (2006). Therefore, the analysis is the same under both constitutions. Costello, 138 N.H. at 589. Federal decisions may be referenced to the extent they may be of assistance in deciding the issue of *ex post facto* laws. Id.

A statute or its application is considered an *ex post facto* law of it:

> makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or aggravates a crime, and makes it greater, than it was when committed; or changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed.

Id. Specifically, a statute is an *ex post facto* law under the following two circumstances: (1) if legislature intended the statute as punitive law; or (2) if the statute's effect is so punitive that it overcomes its civil characterization. See Hudson v. United States, 522 U.S. 93 (1997); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Costello, 138 N.H. at 590-591. When a statute can be construed as having both penal and nonpenal effects, it "is nonetheless nonpenal if that is the evident purpose of the legislature." Costello, 138 N.H. at 590.

RSA 651-B is an *ex post facto* penal law as applied to sex offenders and offenders against children who committed their offenses prior to May 17, 2002. Since State v. Costello, 138 N.H. 587 (1994), the legislature has repeatedly addressed and substantially amended the registration and dissemination requirements of RSA 651-B with the intent to enact punitive law. The legislature's amendments have created a regulatory scheme that is so severe and so drastically different from the 1993 version of the Act that it constitutes *ex post facto* punishment as applied to sexual offenders who committed their offenses prior to May 17, 2002.

a. The Legislature intended to enact a punitive law when it amended RSA 651-B on May 17, 2002 and thereafter.

While it can be argued that RSA 651-B has a regulatory and protectionist component, a review of the legislative history reveals that the legislature, in amending the registration scheme, intended to enact a punitive law. Throughout the lower court proceedings, the State cited to State v. Costello, 138 N.H. 587 (1994) for the premise that the purpose of the sex offender registry requirements is regulatory and nonpenal. The New Hampshire Supreme Court in

Costello noted that a statute that has both a penal and nonpenal effect is nonetheless nonpenal if that is the "evident purpose" of the legislature. Costello, 138 N.H. at 590 (internal citation and quotations omitted). The Court went on to hold that the statute, as written at the time, did not present an *ex post facto* constitutional violation as any punitive effect of the registration requirement was *de minimis* and the regulatory purpose of the legislature in enacting the sex offender registration law was manifest. Id. at 590-91 (internal citation and quotations omitted). When Costello was decided the registry was essentially a confidential repository of simple information available only to law enforcement.

The sex offender registration requirements have been amended significantly since the New Hampshire Supreme Court's holding in Costello. These amendments indicate a punitive purpose. In the Superior Court Order, Judge McNamara recognized some of the indications that the amendments to RSA 651-B had a punitive intent. For example, that the legislature did not expressly indicate in the statutory text itself whether the Act was intended to be civil or punitive in effect and included the Act as a part of the criminal code, indicating a non-civil purpose. See Doe v. State, No. 11-CV-652, slip op. at 13 (N.H. Super. Ct. June 28, 2013). Furthermore, in his Order, Judge McNamara noted that at a May 2002 hearing on the amendment that would permit law enforcement to take and publish photographs of the registered offenders, Senator Pignatelli stated:

> I would be happy to tell you my reasoning on this. We had heard evidence that some people who have served their time in jail, but for committing these crimes against children, it really is a lifetime sentence, it isn't just your time in jail. Part of that lifetime sentence is to register every year with the local police station where you live. Some people change purposely, the way that they look from year to year. So this amendment ...would 'allow' local police department to photograph, if they chose to, offenders who came in and who did not look like their booking photo...

Id. (internal citation omitted). Judge McNamara went on to recognize that at the same hearing, Senator Pignatelli made statements concerning citizens that lived at residences previously occupied by registered sex offenders. Senator Pignatelli argued that having the photographs, if a local police department wanted, would eliminate the possibility that someone who has not been an offender would be harassed simply because they happen to live at the same address. Id. Judge McNamara recognized that the statements from Senator Pignatelli suggested a punitive purpose, with the first statement doing so expressly and the second implying that it would be acceptable for the registration to cause harassment for the offenders. Id. at 13-14. In his Order, Judge McNamara further noted that at a hearing held on April 15, 2008 regarding the amendments to the Act, Representative Dokmo made statements that the bill "doesn't just make the penalties tougher . . . " indicating a clearly punitive purpose, and that Representative Hammond raised concerns that the amendments did not provide a mechanism to "ferret out" who is really dangerous and who is not. Id. at 14 (internal citation omitted). Additionally, Judge McNamara indicated that certain amendments to the Act were made simultaneously and through the same bill as amendments to other portions of the criminal code regarding sex offenders and their sentences, and that collectively these circumstances indicated "some punitive intention behind the legislature's actions." Id.

There are some indications in the legislative history which evidence a protectionist or regulatory purpose to the amendments to the sex offender registry law. For example, at the Senate Judiciary Committee on April 8, 1996, Representative Donna Sytek addressed the 1996 amendment permitting local law enforcement agencies to disseminate information from the registry to organizations responsible for the care and supervision of children, applicable only to certain classes of sex offenders, and noted that the class of sex offenders was narrowly targeted

for the purpose of having more eyes and ears in the community looking out for children. Id. at 14-15. At the same hearing, Representative Sytek expressly stated that the legislature viewed this as a regulation rather than as an additional punishment for the underlying crime. Id. at 15. However, the statute today if significantly more severe that that proposed in 1996 legislature.

On March 28, 2002, Representative William Knowles addressed the amendment that made public information from the registry available on the Internet and again recognized that the law was not applicable to all sex offenders, but only a narrow group for the purpose of protecting children in the community. Id. Representative Knowles also referred to the portion of the amendment permitting the Department of Safety to electronically notify local law enforcement agencies as to who is on the particular list as a money saving device for the State. Id. On April 4, 2006 at a hearing regarding the enactment of the New Hampshire Sexual Predators Act, which included amendments to the Act, former-Governor John Lynch stated that the legislation was aimed at, among other things, improving registration and monitoring of sex offenders and giving parents better information about where the sexual predators are living in their neighborhoods. Id. (internal citation and quotations omitted). Former Attorney General Kelly Ayotte also spoke in favor of the bill, stating that the amendment's purpose, among other things, was to tighten registration requirements so that the public has more complete information about sex offenders in their communities and fewer offenders slip through the cracks. Id. These statements demonstrate that while amending the Act, the legislature considered its alternative regulatory and protectionist purpose. However, a few statements over the course of a decade do not override the fact that the legislature's main purpose was punitive.

The proper view of the legislative history indicates that the protectionist and regulatory purposes are outweighed by the punitive purpose of the amendments and that the legislature

recognized the constitutional challenges it may face if the amendments became too broad in scope. A comparison to the 1996 legislative history and later amendments is instructive. For example, at an April 8, 1996 hearing of the Senate Committee on Judiciary regarding House Bill 1543 relative to the confidentiality of records and information collected pursuant to the registration of sexual offenders, Representative Sytek stated: "[w]e are trying to not add an additional punishment to those who committed sex crimes, because that would be unconstitutional." See Confidentiality of Records and Information Collected Pursuant to the Registration of Sexual Offenders: Hearing on H.B. 1543 Before Sen. Committee on Judiciary (April 8, 1996) (statement of Rep. Donna P. Sytek). Representative Sytek further recognized that "[t]o do community-wide notification of somebody who was previously convicted gets you *on very thin constitutional ice because it could be perceived, it could be interpreted as an additional punishment.*" Id. (emphasis added).

At the same hearing, Senator Burton J. Cohen specifically asked, "[w]hat about the constitutional rights of that person who may have perhaps served the time and may have totally rehabilitated?" See Confidentiality of Records and Information Collected Pursuant to the Registration of Sexual Offenders: Hearing on H.B. 1543 Before Sen. Committee on Judiciary (April 8, 1996) (statement of Senator Burton J. Cohen). Lauren Noether, Belknap County Attorney at the time and Mark D. Attorri, Attorney with Attorney General's office, both also noted that the amendments at the time of the 1996 hearing were limited in such a way that they would conform with constitutional requirements. See Confidentiality of Records and Information Collected Pursuant to the Registration of Sexual Offenders: Hearing on H.B. 1543 Before Sen. Committee on Judiciary (April 8, 1996) (statements of Attys. Lauren Noether and Mark D. Attori). Attorney Noether recognized the constitutional concerns and Attorney Attori

specifically noted that the bill was carefully tailored and had a lot of precautionary provisions. Id. At a January 10, 1996 hearing in the House regarding the same amendments to the bill, Representative Sytek, once again, noted that the bill singled out a very narrow subset of sex offenders and recognized that notification to the community at large may be construed as additional punishment. See Confidentiality of Records and Information Collected Pursuant to the Registration of Sexual Offenders: Hearing on H.B. 1543 Before H. Corrections and Criminal Justice (June 10, 1996) (statement of Rep. Sytek). A review of the 1996 hearings indicates that even as early as 1996, the legislature understood that the amendments may encroach on the constitutional rights of sex offenders.

While the 1996 amendments were limited with the thought in mind of potential constitutional challenges, later amendments have veered from the narrowly tailored Act and have broadened the statute in such a way that it is now punitive in nature and unconstitutional. On February 13, 1997, Senior Assistant Attorney General with the Criminal Justice Bureau, Mark D. Attori wrote to The House Committee on Criminal Justice and Public Safety regarding HB 682-FN-local, which once again proposed amendments to sex offender registration requirements, and noted that if the legislature wished to enact a broad community-wide notification provision, "it could avoid any ex post facto problem by providing that such disclosure can only be made with regard to offenders whose crimes are committed after its effective date." See Correspondence of Mark D. Attori, dated February 13, 1997 (emphasis in original). While Attorney Attori ultimately recognized that this distinction would make the law confusing, his recognition of this issue as early as 1997 indicates that the legislature fully understood the possible constitutional implications of further expanding the sex offender registry requirements.

The transformation of the regulatory purpose of the law in 1996 as sanctioned in Costello to punitive purpose is illustrated as time goes on. In a Senate Journal dated April 13, 2006, Senator Foster, writing in favor of House Bill 1692-FN, an amendment establishing the New Hampshire Child Protection Act of 2006, wrote that "it's about sending the message that we, our community of New Hampshire, have zero tolerance" and "[t]he sentences we give should punish the perpetrator for the harm they've caused . . ." See Senate Journal (April 13, 2006) (statement of Senator Foster). During a hearing on April 4, 2006 before the Senate Committee on Judiciary, regarding House Bill 1692-FN and the establishment of the New Hampshire Sexual Predators Act, Governor John Lynch noted that the "punishment that sexual predators face should be commensurate with their crimes and with the lasting damage they inflict" and that the proposed legislation "contain[ed] provisions aimed at increasing the penalties on people who prey on children". See Establishing the New Hampshire Sexual Predators Act: Hearing on HB 1642-FN Before Sen. Committee on Judiciary (April 4, 2006) (statement of Governor John Lynch). While Governor Lynch's statements may not have been directed towards the registry requirements, his testimony at the April 4, 2006 hearing clearly demonstrates the punitive purpose behind amendments to the law regarding sex offenders.

Again, at a March 10, 2008 hearing before the Senate Committee on Judiciary with respect to SB 495-FN regarding prohibiting Internet solicitation and exploitation of children, Senator Joseph A. Foster, Governor John Lynch, and Attorney General Kelly Ayotte made statements indicating that the amendments were aimed at increasing penalties for sex offenders. See Prohibiting Internet Solicitation and Exploitation of Children: Hearing on SB 495-FN Before Sen. Committee on Judiciary (March 10, 2008) (statements of Senator Joseph A. Foster, Governor John Lynch, and Atty. General Kelly Ayotte). On April 15, 2008, at a hearing on HB

1640-FN regarding the newly entitled amendment relative to the classification of convicted sex offenders and offenders against children, Representative Hammond once again expressed concern that the requirements for sex offenders do not provide a mechanism to weed out the most dangerous individuals from the one time offender. See Classification of Convicted Sex Offenders and Offenders Against Children and Provisions Requiring DNA Testing of Criminal Offenders: Hearing on HB 1640-FN Before Sen. Committee on Judiciary (April 15, 2008) (statement of Rep. Hammond). Representative Hammond specifically indicated that his concern was "not only for [the sex offenders'] safety and harassment . . .", but also that there was "no leeway to ferret out who really is and isn't" dangerous. Id. Representative Hammond went on to propose a hypothetical to exemplify his concern:

> Now, if you're on there for five years as a young person, what are your chances of getting a decent job and getting on with your life and trying to integrate into society, getting married, raising children in a normal manner? I say it is rather handicapped. I'm concerned about employment. I have talked to a number of sex offenders who have been very hampered in their attempts to get meaningful gainful employment and re-integrate into society after they paid their debt.

Id. Representative Hammond's testimony at the April 15, 2008 hearing once again demonstrates the punitive nature of the sex offender registry requirements. Once a registered sex offender has paid his or her debt to society, he or she is further punished and stigmatized by the crimes of his or her past. Such punishment lasts far beyond any criminal sentence, and is legislatively intended to do so. Despite the testimony recognizing constitutional concerns during the drafting of the amendments to the Act, the legislature chose to enact the statute which does not contain any provisions which would indicate that the reporting requirements correspond with the level of dangerousness of each individual offender. The legislature's actions in enacting the current version of the statute and ignoring its overreaching effect clearly demonstrate its intent to punish

sex offenders. The legislative history as a whole demonstrates that the evident purpose of the amendments to RSA 651-B post – Costello are penal. The punitive purpose of the sex offender registry requirements is no longer "*de minimis*" as the Court in Costello described it. The penal purpose of RSA 651-B is manifest and overrides any regulatory and protectionist purpose it may serve.

b. RSA 651-B's punitive effect overcomes its civil character, if any.

RSA 651-B is a punitive law because its punitive effect clearly overcomes its civil character, if any.

Ex post factor analyses of the statutory effect of a law involves the application of seven factors identified in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963): (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. See Mendoza-Martinez, 372 U.S. at 168-69; Doe v. State, 189 P. 3d 999, 1008 (Alaska 2008). No single factor is determinative and all of them have to be weighed in deciding whether the Statute is punitive in effect. Id.

RSA 651-B is a punitive law because (1) its sanction involves an affirmative disability or restraint; (2) it sanctions the offenders in the way that historically regarded as punishment; (3) it is applicable to the crimes requiring the showing of scienter; (4) it promotes traditional aims of punishment; (5) it applies to criminal behavior; and (6) it is excessive in relation to the alternative purpose assigned.

1. RSA 651-B imposes affirmative disability and restraint.

A statute involves an affirmative disability or restraint if it imposes significant affirmative obligations and a severe stigma on every person to whom it applies. See Wallace v. State, 905 N.E. 2d 371, 379 (Ind. 2009).

RSA 651:B clearly involves the imposition of an affirmative disability and restraint. The statute requires for most offenders quarterly registration, the payment of a fee, and allows unfettered compliance checks by law enforcement without prior notice. RSA 651-B:3, III, IV; RSA 651-B:4; RSA 651-B:11. As recognized by Judge McNamara, the New Hampshire registration scheme requires in person registration and the additional imposition of compliance checks which individually and combined creates an affirmative disability or restraint. See Doe v. State, No. 11-CV-652, slip op. at 17-20 (N.H. Super. Ct. June 28, 2013) (weighing in favor of a finding that the scheme is an ex post facto punitive statute); see also Starkey v. Oklahoma Department of Corrections, 305 P.3d 1004, 1022-3 (Ok. 2013) ("We agree with Justice Stevens' finding in his dissent in *Smith v. Doe*, that these duties imposed on offenders are similar to the treatment received by probationers subject to continued supervision".) The Supreme Courts of Oklahoma and Alaska have both recognized the extensive harmful effects that registration imposes on an offender. See Starkey v. Oklahoma Department of Corrections, 305 P.3d 1004, 1024, n.81 (2013).

2. RSA 651-B's registration and dissemination requirements sanction offenders in a way that is historically regarded as punishment.

RSA 651-B registration and dissemination requirements constitute punishment by shaming and are similar to supervised release, parole and probation. These sanctions are historically regarded as punishment.

Although the New Hampshire Supreme Court addressed the constitutionality of RSA 651-B in State v. Costello, 138 N.H. 587 (1996), it did not decide whether the requirements set forth by RSA 651-B resemble a sanction historically regarded as a punishment. See Costello, 138 N.H. at 590. It is well-settled, however, that registration acts such as RSA 651-B are of fairly recent origin and there is no historical equivalent to their requirements. See Wallace v. State, 905 N.E. 2d 371, 381 (Ind. 2009); Doe v. State, 189 P.3d 999, 1012 (Alaska 2008). A number of courts have decided that registration acts sanction offenders in a way that is historically regarded as punishment because (i) the dissemination provision of registration acts resemble the punishment of shaming and (ii) their registration and disclosure provisions were comparable to conditions of supervised release or parole. Id.

In 2003, The United States Supreme Court decided whether dissemination of sex offenders' information via the internet under the Alaska Sex Offender Registration Act ("ASORA") resembled the punishment of shaming. Smith v. Doe, 538 U.S. 84, (2003). The Supreme Court acknowledged that some colonial punishments "were meant to inflict public disgrace." Id. at 97. "Humiliated offenders were required to stand in public with signs cataloguing their offenses." Id. (citations omitted). "At times the labeling would be permanent: A murderer might be branded with an 'M,' and a thief with a 'T.'" Id. (citations omitted). "The aim was to make these offenders suffer permanent stigmas, which in effect cast the person out of the community." Id. The United States Supreme Court further acknowledged that "publicity associated with dissemination of offenders information via the internet may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism." Id. at 99. The Supreme Court, concluded, however, that ASORA's registration and dissemination requirements did not resemble a punishment of shaming because "the 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." Id. at 98. The Court found that the difference between colonial shaming and "adverse consequences" to the defendant under ASORA, was the fact that the State did not make publicity and the resulting stigma an integral part of the objective of the regulatory scheme . . . and the attendant humiliation [was] but a collateral consequences of a valid registration" Id. at 98-99.

In 2008, five years after the United States Supreme Court's decision, the Alaska Supreme Court revisited the issue of the constitutionality of ASORA. Doe v. State, 189 P.3d 999 (Alaska 2008). Despite the United States Supreme Court's decision in Smith v. Doe, 538 U.S. 84 (2003), the Alaska Supreme Court, decided that ASORA's requirements allowing public access via the internet to information including offenders' names, aliases, dates of birth, addresses, physical descriptions, motor vehicles, places of employment, convictions and sentences resembled historic punishment because (i) its dissemination provision resembled the punishment of shaming; and (ii) registration and disclosure provisions were comparable to conditions of supervised release or parole and probation. Doe, 189 P. 3d at 1001, 1012.

Similarly, in 2009, in Wallace v. State, 905 N.E. 2d 371 (2009), the Indiana Supreme Court noted that, similar to sex offenders, persons on probation were required to report regularly to a probation officer and had to permit the probation officers to visit their homes. Id. at 380-381. As a result, the Indiana Supreme Court held that registration requirements of the Indiana Sex Offender Registration Act resembled historic punishment because they resembled punishment of shaming and were comparable to supervised probation or parole. Id.

Similar to the registration and dissemination requirements of ASORA and the Indiana Sex Offender Registration Act, the registration and dissemination requirements of RSA 651-B

sanction offenders in a way that is historically regarded as punishment. Specifically, starting from May 17, 2002, RSA 651-B disseminates the following information via the internet:

> (1) Offender's name, alias, age, race, sex, date of birth, height, weight, hair and eye color, and any other relevant physical description.
> (2) Address of any permanent residence and address of any temporary residence, within the state or out-of-state.
> (3) The offense for which the individual is required to register and the text of the provision of law defining the offense, and any other sex offense for which the individual has been convicted.
> (4) The date and court of the adjudication on the offense for which the individual is registered.
> (5) Outstanding arrest warrants, and the information listed in subparagraphs (a)(1)-(3), for any sexual offender or offender against children who has not complied with the obligation to register under this chapter.
> (6) Criminal history of the offender, including the date of all convictions and the status of parole, probation, or supervised release, and registration status.
> (7) A photograph of the individual.
> (8) The address of any place where the individual is or will be a student.

RSA 651-B:7, III, IV.

The provisions of RSA 651-B allowing dissemination of reported information via the internet are unconstitutional because they are the modern day equivalent of shaming. The argument that the purpose of the amendment allowing dissemination of this information via the internet was not intended to shame the offenders is of no consequence. See Doe v. Dep't of Pub. Safety, 62 A.3d 123, 140-143 (Md. 2013) (recognizing that 77% of registered sex offenders are threatened or harassed, the court in Maryland found the registration scheme to be tantamount to the historical punishment of shaming.) It is not disputable that sex offenders are subject to shaming because information about their identities and offenses are available via the internet. See Smith, 538 U.S. at 99 (stating that "publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.") It is

further undisputed that, although dissemination of offenders information via the Internet is not exactly the same as standing with the sign listing your crimes it nonetheless "resembles" the colonial punishments. Id. ("Widespread disseminations of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community") (Souter, J., concurring). In fact, in today's society bereft with search engines such as Google, the dissemination of the shame is far more widespread and permanent. In essence, the State requires offenders to stand before the entire world with a sign listing their offenses by disseminating their most personal information via the internet making them suffer permanent stigmas ostracizing them from the community. Sex offenders and offenders against children, who committed their crimes prior to May, 17, 2002, are humiliated, shamed and often ostracized from the community for crimes committed decades ago and for which such shaming was not an authorized punishment at the time of conviction.

The RSA 651-B requirements are comparable to conditions of supervised release, parole, and probation and, in some instances, are stricter than parole and probation requirements. For example, under RSA 651-B:3, III, the Department has a right to visit the offenders at their residences in order to verify their addresses two times per year and any time at their discretion. See RSA 651-B:3, III, IV. Probationers, however, are required to permit probation or parole officers to visit their residences "at reasonable times." N.H. Super. Ct. R. 107(h). Furthermore, offenders under RSA 651-B:4, are required to report in person to the local law enforcement agency: (i) within 5 business days after the person's release, or within 5 business days after the person's date of establishment of residence, employment, or schooling in New Hampshire; (ii) tier III

offenders are also required to report in person quarterly, within 5 business days after each anniversary of the offenders' date of birth and every 3 months thereafter; (iii) tier I and tier II offenders are required to report in person semi-annually, within 5 business days after each anniversary of the offenders' date of birth and every 6 months thereafter. See RSA 651-B:4, I. Probationers are only required to report to the probation or parole officer "at such times and places as directed." N.H. Super. Ct. R. 107(a).

Similar to the registration and dissemination requirements in Alaska and Indiana, the registration and dissemination requirements of RSA 651-B resemble the punishment of shaming and are comparable to conditions of supervised release, parole, and probation. RSA 651-B sanctions offenders in a way that is historically regarded as punishment.

3. *RSA 651-B is punitive in effect because it applies, in vast majority offenses, to the crimes requiring the showing of scienter.*

"The existence of a scienter requirement is an important element in distinguishing criminal from civil statutes." See Wallace v. State, 905 N.D.2d 371, 381 (Ind. 2009) (quoting Kansas v. Hendricks, 521 U.S. 346, 362 (1997)). It is undisputed that "because those convicted of offenses that required mental culpability [are] overwhelmingly subject to the registration requirements, the third factor weigh[s] in favor a finding that the registry [is] punitive." See Doe v. State, No. 11-CV-652, slip op. at 21 (N.H. Super. Ct. June 28, 2013); see also Doe, 189. P 3d at 1012-13; Wallace, 905 N.D.2d at 381.

4. *RSA 651-B is punitive because it promotes traditional aims of punishment – retribution and deterrence.*

The statute is punitive if, among other things, it promotes traditional aims of punishment – retribution and deterrence. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

> Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing "justice." Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem. . . .

Doe v. State, 189 P. 3d 999, 1013-14, n. 107 (Alaska 2008) (citing Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1255 (3rd Cir. 1996)).

In Wallace v. State, 905 N.E. 2d 371 (Ind. 2009), the Indiana Supreme Court decided that the registration act promoted traditional aims of punishment because the registration requirements were not triggered by the offender's act, but by conviction only. 905 N.E. 2d at 381-382. In New Hampshire, the registration requirements are triggered by conviction or similar judgment. See RSA 651-B:1, XI(a) (stating that RSA 651-B applies to a person charged with one of the enumerated offenses which resulted in a conviction, a finding of not guilty by reason of insanity, an adjudication of a juvenile delinquent from another jurisdiction where the juvenile is required to register under the laws of that jurisdiction, or an order committing a person as a sexually violent predator). The Alaska Supreme Court noted that ASORA did not base its registration requirements on a particularized determination of the risk of each offender to society, but rather on the criminal statute the person was convicted of violating. Doe, 189 P.3d at 1014. The Alaska Supreme Court specifically noted that, under ASORA, "[e]very person convicted of a sex offense [was required to] provide the same information, and the state publishe[d] that information in the same manner, whether the person was convicted of a class A misdemeanor or an unclassified felony." Id. ay 1013-14. The court further considered that ASORA applied only to the offenders who were convicted of their crimes. Id. As a result, the Alaska Supreme Court held that registration and unlimited public dissemination requirements of ASORA provided a

deterrent and retributive effect that went beyond any non-punitive purpose and served the traditional goals of punishment. Id.

Similar to ASORA, RSA 651-B does not classify offenders and determine the length of their registration based on his or her risk to society. See RSA 651-B:1. Registration requirements under RSA 651-B:1 are predicated solely by the nature of offenders' offenses. Id. Furthermore, similar to ASORA's requirements, offenders in New Hampshire are required to provide the same information regardless of the nature of their offenses or extent of their dangerousness to the community. See RSA 651-B:4, III. In addition, registration is required upon a conviction for committing a crime or the functional equivalent of a conviction. Similar to ASORA, RSA 651-B is punitive in effect because it provides a deterrent and retributive effect which extends beyond any non-punitive purpose.

5. *RSA 651-B is triggered only by a finding of criminal behavior.*

The act is punitive in effect if it is triggered only by criminal conviction. Doe v. State, 189 P.3d 999,1014-15 (Alaska 2008). The registration requirements of RSA 651-B are triggered only by a criminal conviction or its functional equivalent such as a finding of delinquency or a not guilty by reason of insanity. See RSA 651-B:1. Delinquency is, in effect, a conviction. A finding of not guilty by reason of insanity is a judgment that the defendant committed the criminal behavior but was not responsible due to his mental illness. In New Hampshire, the sex offender registration scheme is triggered only upon a finding of criminal behavior without regard to any consideration of true risk.

6. *RSA 651-B is punitive because it is excessive in relation to any alternative purpose.*

The act is punitive if, among other things, it appears excessive in relation to the alternative purpose assigned. See Kennedy v.Mendoza-Martinez, 372 U.S. 144, 169 (1963). The statute's rational connection to a non-punitive purpose is the most significant factor in determination that the statute's effects are not punitive. See Smith v. Doe, 538 U.S. 84, 102 (2003) (citation omitted). "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." Id. at 103. The law is punitive, if "means chosen to carry out legitimate purposes are excessive, *i.e.*, not close enough to be classified as non-penal." Doe v. State, 189 P. 3d 999, 1017 (Alaska 2008). "[I]f the registration and disclosure are not tied to a finding that the safety of the public is threatened, there is an implication that the Act is excessive." Wallace v. State, 905 N.D.2d 271, 383 (Ind. 2009).

The Supreme Court in Smith v. Doe, 538 U.S. 84 (2003) concluded that ASORA as it then existed was not excessive in relation to its regulatory purpose, even though it (i) applied to all convicted sex offenders without regard to their future dangerousness; (ii) required lifelong registration; and (iii) placed no limits on the number of persons who had access to the information. Id. The Court reasoned that the requirement to register without determination of each person's dangerousness was justified in light of ASORA's purpose to prevent recidivism. Id. The Court further found that the lifelong duration of the reporting requirement was not excessive in light of research demonstrating that some reoffenses may occur 20 years following release. Id. (citations and quotations omitted). As to the world-wide dissemination of information via internet, the Court concluded that such a "passive" notification system was justified "[g]iven the general mobility of our population." Id. at 105.

However, Justice Souter, in his concurring opinion, specifically stated that:

> [t]he fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Id. at 109 (Souter, J., concurring).

Despite the United States Supreme Court's decision in Smith, the Alaska Supreme Court, once again, considered whether the means chosen to carry out the State's interest in public safety were excessive as compared to the State's interest in public safety. Doe, 189 P.3d at 1017-18. While analyzing ASORA's means as compared to the State's purpose of public safety, the Alaska Supreme Court considered the following: (i) ASORA encompassed a wide array of crimes that varied greatly in severity; (ii) ASORA provided no mechanism by which a registered sex offender could petition the state or a court for relief from the obligations of continued registration and disclosure; (iii) offenders could not shorten their registration or notification period, even on the clearest determination of rehabilitation or conclusive proof of physical incapacitation; (iv) the registration and re-registration requirements were demanding, intrusive and were of long duration; (v) ASORA's dissemination provisions were sweeping and did not include procedures allowing offenders to petition the Court to order the State to restrict dissemination if the court finds that dissemination was not required for public safety and that publication of the information could reveal the identity of the victim. Id. at 1018. As a result, the Alaska Supreme Court held that ASORA's "registration and dissemination provisions [had] consequences to sex offenders that [were] beyond the state's interest in public safety." Id.

Similarly, the Indiana Supreme Court concluded that the Indiana Sex Offenders Act was too broad and sweeping because it (i) made information on all sex offenders available to the general public without restriction and without regard to whether the individual posed any particular future risk; and (ii) provided no mechanism by which registered sex offenders could petition the court for relief from the obligation of continued registration and disclosure even on the clearest proof of rehabilitation. Wallace, 905 N.D.2d at 384.

Similarly, while analyzing the constitutionality of Maine's Sex Offender Registration and Notification Act ("MSORNA") of 1999, the Maine Supreme Court noted that MSORNA's registration and dissemination requirements were not predicated by the level of dangerousness of each individual offender. State v. Letalien, 985 A.2d 4, 24 (Me. 2009). The Court further noted that it did not have records which would show that "the regulatory means chosen-in particular, increasing the registration period from fifteen years to life without the possibility of a waiver, and increasing the verification from infrequent notices to quarterly in-person reporting and fingerprinting at a police station-are reasonable in light of the law's non-punitive purpose." Id. at 23. The Court noted that "[n]o statistics have been offered to suggest that every registered offender or a substantial majority of the registered offenders will pose a substantial risk of re-offending long after they have completed their sentences and probation, including any required treatment." Id. As a result, the Court acknowledged the over-inclusive nature of the statute and noted that "many of the persons included in the registry may no longer pose a danger to the public." Id. The Court did note, however, that "information concerning the conviction history and current whereabouts of every sex offender benefits public safety." Id. at 24. As a result, although the Court stated that it leaned toward the view that the increased regulatory scheme of MSORNA "appeared excessive when applied to registered offenders . . . because there [was] no

consideration of the individual circumstances or rehabilitation of each offender," it treated the seventh factor of Mendoza-Martinez test as neutral. Id.

Similar to ASORA, MSORA, and the Indiana Sex Offenders Act, RSA 651-B, does not differentiate offenders based on their actual dangerousness to the community and requires them to provide the same information regardless of their risk of recidivism. Information reported by offenders under RSA 651-B is further disseminated via the internet regardless of whether or not each individual offender poses a risk to society. Additionally, similar to ASORA, MSORA, and the Indiana Sex Offenders Act, the statute does not have any procedure, which would allow the offenders to demonstrate their safety to the public and shorten their registration requirement. RSA 651-B.

Significantly, there is no evidence which would demonstrate that requirements set forth by RSA 651-B were actually based on some empirical study suggesting that ten year or life-long registration is required in order to prevent recidivism. It is undisputed, however, as noted by Justice Souter, that registration and dissemination requirements without consideration of each offender's dangerousness are overly broad and sweeping. It undoubtedly effects offenders who pose no danger of reoffending.

The extent of RSA 651-B's registration requirements is similar to the unconstitutional, extensive and unwarranted ASORA's requirements. ASORA compelled registration under threat of prosecution making failure to register or to update information a class A misdemeanor. See ALASKA STAT. § 12.63.010 (2008); ALASKA STAT. § 11.56.840 (2008). Similarly, RSA 651-B compels registration under a threat of prosecution making negligent failure to register a class A misdemeanor and knowing failure to register class A or B felony. See RSA 651-B:9, II, III.

Furthermore, ASORA compelled offenders to contact law enforcement agencies and disclose the following information:

> (A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;
> (B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;
> (C) all aliases used;
> (D) driver's license number;
> (E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;
> (F) any identifying features of the sex offender or child kidnapper;
> (G) anticipated changes of address; and
> (H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter.
> . . . .
> a complete set of the sex offender's or child kidnapper's fingerprints and . . photograph.

See ALASKA STAT. § 12.63.010 (2008).

A review of the statute demonstrates that RSA 651-B's reporting requirements are even broader and more intrusive than ASORA's. Similar to ASORA, RSA 651-B:4 compels the offenders to disclose (i) name and aliases; (ii) address of any permanent residence; (iii) place of employment; (iv) license plate or registration number and state of registration of any vehicle

owned or regularly operated by the offender; (v) date of birth; and (vi) physical description. RSA 651-B:4, III. In New Hampshire, however, the offenders are required to provide the following additional information:

> . . . .
> (b) . . . address of any current temporary residence, within the state or out-of-state, and mailing address. . . . If the offender cannot provide a definite address, he or she shall provide information about all places where he or she habitually lives.
> (c) Name, address, and date of . . . schooling. . . . If the offender does not have a fixed place of work, he or she shall provide information about all places he or she generally works, and any regular routes of travel.
> (d) Any professional licenses or certifications that authorize the offender to engage in an occupation or carry out a trade or business.
> (e) Make, model, color, and license plate or registration number and state of registration of any . . . watercraft, or aircraft owned or regularly operated by the offender, and the place or places where such vehicles, watercraft, or aircraft are regularly kept.
> . . . .
> (g) Social security number.
> . . . .
> (i) Telephone numbers for both fixed location and cell phones.
> (j) Passport, travel, and immigration documents.
> (k) The name, address, and phone number of any landlord, if the offender resides in rental property.
> . . . .
> electronic mail address, instant message screen name, user identification, user profile information, and chat or other Internet communication name or identity information

RSA 651-B:4, III; RSA 651-B:4-a, III

In addition to the reporting requirements set forth in ASORA, offenders in New Hampshire may also be required to provide a DNA sample, if such sample has not already been provided, and a photocopy of a valid driver's license or identification card issued to the offender. RSA 651-B:4, IV.

Furthermore, the duration of registration requirements under ASORA are similar to RSA 651-B. ASORA required sex offenders convicted of an aggravated sex offenses or two or more sex offenses to re-register quarterly for the rest of their lives and all other offenders to re-register annually for fifteen years. Doe, 189 P. 3d at 1009; see ALASKA STAT. § 12.63.010 (2008). Similarly, RSA 651-B requires the offenders to register for 10 years or life.

Therefore, similar to ASORA, MSORNA, and Indiana Sex Offenders Act, RSA 651-B is excessive and overbroad as it relates to the purpose of public protection because it does not consider the circumstance and rehabilitation of each offender and broadly applies to offenders who do not pose any danger to society. It applies excessive and unwarranted reporting requirements, and applies terms of registration without having any evidence that ten-year or life time registration is warranted in order to preclude recidivism.

7. *The totality of the Mendoza-Martinez factors demonstrates that RSA 651-B has an overwhelming punitive effect.*

The legislative history clearly demonstrates that, while amending RSA 651-B by extending its dissemination and reporting requirements, the legislature's primary purpose was to subject sex offenders and offenders against children to additional punishment. Furthermore, RSA 651-B's reporting and dissemination requirements are punitive in effect because (i) they involve affirmative disability and restraint; (ii) they resemble historical punishment of shaming and comparable to conditions of supervised release, parole, and probations; (iii) they come into play on a finding of scienter; (iv) their operation promotes the traditional aims of punishment by not differentiating offenders based on the level of their dangerousness to the community; (v) they apply only upon a finding of criminal behavior; and, (vi) they are excessive when compared to the State's purpose of public safety.

STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2013-0496

JOHN DOE

v.

STATE OF NEW HAMPSHIRE

Appeal From An Interlocutory Ruling of the Merrimack County Superior Court

AMICUS CURIAE'S ERRATA

Counsel file this errata to correct an error in their brief. At Page 36, the brief states: "RSA 651-B is unconstitutional *ex post facto* penal law as applied to the offenders who committed their crimes after May 17, 2002." This is incorrect. It should state: "RSA 651-B is unconstitutional *ex post facto* penal law as applied to the offenders who committed their crimes before May 17, 2002."

Counsel apologize for this error and any attendant confusion.

Respectfully submitted,

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CONCLUSION

RSA 651-B is unconstitutional *ex post facto* penal law as applied to the offenders who committed their crimes after May 17, 2002.

Respectfully Submitted,
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By Its Attorneys,

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CERTIFICATE OF SERVICE

I, Michael J. Iacopino, hereby certify that I have served copies of this brief by emailand first class mail to (a) William Chapman, Esq., counsel for plaintiff, (b) Karen Schlitzer, Esq., counsel for the State, and (c) Gilles Bissonette, counsel for amicus New Hampshire Civil Liberties Union on December 23rd, 2013.

Michael J. Iacopino