THE STATE OF NEW HAMPSHIRE

John Doe

v.

State of New Hampshire

Case No. 2013-0496

REPLY BRIEF OF THE APPELLANT, JOHN DOE

William L. Chapman, Esq., #397
Orr & Reno, P.A.
45 S. Main Street
P.O. Box 3550
Concord, NH 03302-3550
Phone: (603) 224-2381
Fax: (603) 224-2318
wchapman@orr-reno.com

Gilles Bissonnette, Esq., #265393
18 Low Avenue
Concord, NH 03301
(603) 226-3149
gilles@nhclu.org

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Facts Governing This Appeal 1

II. The Intent and Effect of the Act Are Punitive 3

III. The Act Violates Procedural Due Process 5

A. The Act Implicates Appellant's Legally-Protected Liberty Interests 5

B. The Procedures In Place Do Not Afford the Requisite Safeguards 8

CONCLUSION 10

CERTIFICATE OF SERVICE 11

1122275_1

TABLE OF AUTHORITIES

Cases: ***Page***

Coco v. Jaskunas, 159 N.H. 515 (2009) 3

Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) 9, 10

Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989) 7

Dichiara v. Sanborn Reg'l Sch. Dist., 82 A.3d 225, 227 (2013) 6

Doe v. Att'y Gen., 686 N.E.2d 1007 (Mass. 1997) 6, 7

Doe v. Att'y Gen., 715 N.E.2d 37 (Mass. 1999) 7

Doe v. Pataki, 3 F. Supp. 2d 456 (S.D.N.Y. 1998) 6, 10

Doe v. Pryor, 61 F. Supp. 2d 1224 (M.D. Ala. 1999) 6, 10

Fed. Labor Relations Auth. V. Dep't of Defense, 977 F.2d 545 (11th Cir. 1992) 7

Gray, JoAnne & a. v. Leisure Life Industries & a., 77 A. 3d 1117 (2013) 3

Hamberger v. Eastman, 106 N.H. 107 (1964) 7

In re Bagley, 128 N.H. 275 (1986) 6, 8, 9

Noble v. Board of Parole & Post-Prison Supervision, 964 P.2d 990 (Or. 1998) 7, 10

State v. Costello, 138 N.H. 587 (1994) 3, 4

State v. Guidry, 96 P.3d 242 (Haw. 2004) 7, 10

State v. LaPlaca, 162 N.H. 174 (2011) 4

State v. Norman, 808 N.W.2d 48 (Neb. 2012) 7

State v. Veale, 158 N.H. 632 (2009) 6, 8, 9

Wallace v. Indiana, 905 N.E. 2d. 371 (Ind. 2009) 5

New Hampshire Statutes:

RSA Ch. 491:8-a,II 1

RSA Ch. 491:8-a,IV 2

RSA Ch. 632-A:14 3

RSA Ch. 632-A:17 3

RSA Ch. 651-B:7,II(b) 4

RSA Ch. 651-B:7,III 4

RSA Ch. 651-B:7,III(c)(2) 4

RSA Ch. 651-B:7,IV 4

Other Authorities:

New Hampshire Constitution, Part I, Article 23 5

1122845_1

ARGUMENT

I. The Facts Governing this Appeal

RSA 491:8-a,II requires that a party seeking summary judgment

> shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purposes of the motion unless within 30 days contradictory affidavits based on personal knowledge are filed ....

In moving for summary judgment, Appellant complied with this requirement. Appendix ("App.") at 72-78. Neither in its summary judgment filing nor in its separate objection to Appellant's motion, did the State file an affidavit that contradicted any facts in Appellant's affidavit.[1] As required by RSA 491:8-a,II, the facts set forth in Appellant's affidavit are taken as admitted.

Appellant, at the April 1, 2013 hearing, filed a response to the State's objection to his motion for summary judgment setting forth the undisputed material facts contained in his affidavit, including:

- After he pled guilty in 1987 to two counts of aggravated felonious sexual assault, the trial court suspended his sentence, placed him on probation for 4 years and required that he successfully complete a sex counseling course.
- The trial court granted his motion to terminate probation in August 1990. He has not committed another sexual offense since the two offenses, which occurred in 1983 and 1984.
- He was first notified of the Act's registration requirement in 2004. Since then has complied with all of its requirements.
- In 2005, an anonymous petition thwarted his plans to live with his son. It stated, in part: "Your neighbor ...is renting to another ... [registered offender and] has no concern for the children in this neighborhood ...."
- In 2006, he suffered a ruptured abdominal aortic aneurysm and is 100% disabled and unable to work. He suffers from "dropsy foot" and has difficulty walking without a cane.

[1] The State filed one affidavit by a State Police sergeant who recited that its website listed 2,210 offenders, 1,561 of whom are "active Tier III offenders." Addendum to Amicus Curiae Brief at 84.

- Because of his physical limitations he must live on the ground floor and he has a room in a boarding house. His doctors have told him he would benefit from congregate living offered at Manchester Public Housing. But he is too embarrassed to tell them he is ineligible for public housing because of his status as a lifetime sex offender registrant.
- He reports quarterly to the Manchester Police Department to register as a sex offender. Because of his "dropsy foot" he is unable to walk the approximately one mile to the police station and has difficulty meeting this requirement.
- Initially he registered in a private room but he now does it in the public lobby of the station. He finds this embarrassing and humiliating; anyone in the lobby can overhear what is said while he completes a two-page "Offender Registration Information" form.
- In addition to his quarterly reports to the Manchester Police Department, two times each year at least one Manchester police officer goes to his boarding house to verify that he continues to reside there. The visits are unannounced and can be intrusive because the police officer often looks through the window of his room.
- His name, address, photograph, criminal history, age, weight and height are listed on the State Police website. He is fearful that people in his neighborhood will find out he is a sex offender and "harass me or worse." [2]

These are the facts that govern this appeal. The State may not rely "upon mere allegations or denials of ... [its] pleadings." RSA 491:8-a,IV. For this reason, the Court should reject the State's allegations that:

- He is likely to "reoffend," and is a "threat" and "danger to the public." State's Brief at 2 (suggesting Appellant's denials are not to be believed).[3]
- Even though he has not reoffended for thirty years, his "'conviction for a sex offense provides evidence of a substantial risk of recidivism.'" Id. at 24.[4]
- His housing difficulties are primarily the result of his finances, not his status as a lifetime registrant as a sex offender. Id. at 3.
- He does not mind complying with the Act because no one has confronted him about his status as a sex offender; nor has he "experienced any stigmatization as a result of his registration as a sex offender or his inclusion on the public list. Id. at 6 and 32.[5]
- To provide Appellant a hearing would involve "massive" discovery and would be "extraordinarily costly, both financially and in terms of time." State's Brief at 35.[6]

[2] App. at 97-99.

[3] The State appears to want it both ways. It would like the Court to believe Appellant is likely to reoffend, while arguing that "risk of reoffending is not material to whether he is subject to the registry." State's Brief at 7 and 27.

[4] The State asserts this "'high rate of recidivism among convicted sex offenders and their dangerousness as a class'" established that Appellant's lifetime registration and reporting requirements are not "excessive." State's Brief at 24.

[5] The State overlooks (1) the anonymous petition circulate in 2005 that referred to Appellant as a "sex offender," which was after the Act was amended to require that his name, photograph and other information be listed on the State Police website; and (2) the humiliation and embarrassment he feels in reporting to the Manchester Police Department and fear that his neighbors will find out he is a registered sex offender. *Supra.*

[6] The State provided no evidence to support this assertion.

In setting out the undisputed "material facts" in its Order, the trial court did not refer, expressly or by implication, to any of the State's allegations. Addendum ("Add.") at 3 and 7-8. Moreover, it is well established that in ruling on a summary judgment a court must consider the evidence in the light most favorable to Appellant. *See, e.g., JoAnne Gray & a. v. Leisure Life Industries & a.*, 77 A. 3d 1117, 1120 (2013)("When 'reviewing the trial court's summary judgment rulings, we consider the evidence in the light most favorable to each party in its capacity as the nonmoving party ....'" (quoting *Coco v. Jaskunas,* 159 N.H. 515, 518 (2009)).

II. The Intent and Effect of the Act Are Punitive

The trial court in discussing whether the legislature intended the Act to have a regulatory or punitive effect concluded that the legislature had made "no express statement ... concerning the intent of the Act." Add. at 16. The State disagrees and argues that the legislative history evidences a regulatory purpose. State's Brief at 9-17.

The original version of the Act, which the Court upheld as regulatory in *State v. Costello*, 138 N.H. 587 (1994), required a sex offender to report annually "his current mailing address and place of residence ... to the local law enforcement agency" on a form provided by the Department of Safety. App. at 43 (RSA 632-A:14). The information provided by a sex offender remained confidential within law enforcement. Id. at 44 (RSA 632-A:17). Nowhere does the State, in discussing the legislative history, point to any evidence that the original version of the Act was not effective in "assist[ing] police in keeping track of known sexual offenders," and as "a means for law enforcement agencies in this State to share information regarding the whereabouts of convicted sexual offenders." 138 N.H. at 590.

The same is true for the 1996 amendments to the Act. In part, they authorized, but did not require, law enforcement to provide organizations in the community "where children gather"

information about registered sex offenders who reside in that community. Add. At 65-66 (RSA 651-B:7.II). However, in doing so the legislature also gave sex offenders the right to keep their information confidential within law enforcement upon a showing that "the risk of reoffending is low." App. at 65-67 (RSA 651-B:7,II(b) and III).[7] The State does not cite to any evidence that the 1996 amendment failed to keep the public or children safe or imposed unreasonable fiscal and administrative burdens on the state. *See State v. LaPlaca*, 162 N.H. 174, 178 (2011).

Nevertheless, the State argues that the legislature saw fit two years later, in 1998, "to make the registry more effective in protecting the public." State's Brief at 12. The 1998 amendments, in part, made information about sex offenders available to the public "upon request." App. at 71 (RSA 651-B:7,IV). The State asserts that "extensive committee notes ... reveals no punitive intent" on the part of the legislature in amending the Act. State's Brief at 13. Yet, it fails to mention, let alone explain why, that the legislature stripped out of the Act a sex offender's right to keep his information confidential by showing a low likelihood to reoffend. How can a non-punitive intent be squared with making public the names of sex offenders who can prove they are at low risk to reoffend?

The same lack of evidence attends the other four amendments to the Act discussed by the State. The additional reporting and verification requirements combined with posting the list on the State Police website go significantly beyond the original or 1996 version of the Act. Yet, the State cannot cite to any evidence in the legislative history that establishes the amendments were necessary to accomplish the regulatory purpose discussed in the *Costello* case: "to assist police in keeping track of known sexual offenders." 138 N.H. at 590.

Even if eliminating from the Act a sex offender's right to show he is a low risk to reoffend, while making him report quarterly to local law enforcement and subjecting him to in-person, at home

[7] Among the factors the trial court could consider is "[w]hether the petitioner's physical condition minimizes the risk of reoffending." App. at 66 (RSA 651-B:7,III(c)(2)).

verification by the police and being listed as a sex offender on the State Police website, is not proof of a punitive intent, it clearly demonstrates the Act's effect is excessive in relation to its purported regulatory purpose. In discussing the seventh factor under the *Mendoza-Martinez* test, what the Indiana Supreme Court stated in *Wallace v. Indiana*, 905 N.E. 2d 371 (2009), applies here with equal force:

> Indeed we think it significant for this excessiveness inquiry that the Act provides *no mechanism by which a registered sex offender can petition the court for relief* from the obligation of continued registration and disclosure. Offenders cannot shorten their registration or notification period, even on the *clearest proof* of rehabilitation (emphasis added).

905 N.E.2d at 384 (noting "a number of courts give the greatest weight to [the seventh] factor." *Id.* at 383). Here, the trial court implicitly acknowledged the Act's excessiveness when it stated that although Appellant "has not reoffended in almost 30 years ... [and] suffers from a permanent disability that prevents from moving around without a cane ... [he] has no recourse to demonstrate that he is not longer a danger to the public at large." Add. at 28.

The Act as applied to Appellant is punitive and violates the prohibition against *ex post facto* laws guaranteed by Part I, Article 23 of the New Hampshire Constitution.

III. The Act Violates Procedural Due Process[8]

A. The Act Implicates Appellant's Legally-Protected Liberty Interests

The State's argument that the Act implicates no legally-protected liberty interest is wrong. First, it cannot be disputed that the Act erodes Appellant's right to be free from reputational and social stigma. His name, photograph, and other personal information are listed on the State Police website to warn the public that he is a danger to children; and it authorizes the

[8] At the outset, the State claims that Appellant's procedural due process claim is really a substantive due process argument, which Appellant did not appeal. For this reason, "the Court should not reach the procedural due process claims." State's Brief at 27. The State is wrong. It conflates the procedural and substantive due process claims separately raised by Appellant before the trial court – claims which are independent of one another. App. at 26, 34.

police to "affirmatively notify the public" that Appellant resides "in the community." *See* RSA 651-B:7, IV(c).

As this Court held in *In re Bagley*, "[t]he general rule is that a person's liberty may be impaired when governmental action seriously damages his standing and associations in the community." *In re Bagley*, 128 N.H. 275, 284 (1986).[9] Unable to distinguish Appellant's situation from the petitioners in *In re Bagley* or the defendant in *State v. Veale*, 158 N.H. 632 (2009), or cite a single case in support of its position, the State instead (i) incorrectly asserts that "Appellant has failed to establish that he has actually been subject to social stigma" and (ii) asks this Court to make the impermissible factual inference that "any damage to [his] reputation occurred as a result of [his] conviction." State's Brief at 31-32. The State overlooks undisputed evidence in the record evidencing stigma,[10] and it disregards the well-established principle that a court on summary judgment is to make "all inferences properly drawn from [the record] in the light most favorable to the non-moving party," here, the Appellant. *Dichiara v. Sanborn Reg'l Sch. Dist.*, 82 A.3d 225, 227 (2013).

Second, the Act plainly implicates Appellant's right to privacy. The State contends that no privacy interest is implicated because "much of" the information concerning Appellant

---

[9] Indeed, as one court has explained in examining sex offender registration requirements:

> [W]idespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences. Thus, there is no genuine dispute that the dissemination of the information contemplated by the Act to the community at large is potentially harmful to plaintiffs' personal reputations.

Doe v. Pataki, 3 F. Supp. 2d 456, 467-468 (S.D.N.Y. 1998)(applying stricter stigma-plus test); *see also, e.g., Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999)("While it might seem that a convicted felon could have little left of his good name, community notification in this case will inflict a greater stigma than would result from conviction alone"); *Doe v. Att'y Gen.*, 686 N.E.2d 1007, 1011-12 (Mass. 1997)(same).

[10] In 2005, Appellant was unable to move in with his son after an anonymous petition was circulated to neighbors that referred to Appellant as a "registered offender." *Supra* at 1. Further, Appellant must report quarterly to the Manchester Police Department and register as a sex offender. This takes place "in the public lobby within hearing of other people waiting to conduct police business," which Appellant finds "embarrassing and humiliating." *Supra* at 2. And Appellant is "too embarrassed" to tell his doctors that he is not eligible for congregate services provided by the Manchester Housing Authority because of his status as "a lifetime sexual offender registrant." *Supra* at 1.

disclosed under the Act "is public." State's Brief at 28. However, "just because the information 'is not wholly private does not mean that a person has no interest in limiting disclosure or dissemination of the information.'" *Fed. Labor Relations Auth. v. Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989)). For example, this Court has ruled that the disclosure of a person's home address can invade that person's privacy. *See, e.g., Brent v. Paquette*, 132 N.H. 415, 427 (1989); *Doe v. Att'y Gen.*, 686 N.E.2d 1007, 1012 (Mass. 1997) (same).[11]

Finally, the State contends that Appellant's argument that the Act implicates his "right to be let alone" was not raised in the trial court. State's Brief at 29-30. This too is wrong. As Appellant explained in his opening brief, this right more aptly encompasses the right to be free from state intrusions that go above and beyond what a reasonable person can expect in a free society. Appellant's Brief at 26. As the Massachusetts Supreme Judicial Court explained, sex offender registration fundamentally alters the relationship between a citizen and the government, and resembles that which would be found in a totalitarian form of government. *Doe v. Att'y Gen.*, 715 N.E.2d 37, 43 (Mass. 1999) (quoting *Doe v. Att'y Gen.*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring)). Several other courts agree.[12] Appellant raised this argument below, App. at 27-28, and this argument was dismissed by the trial court based on the mistaken

[11] Moreover, the State appears to argue that to show the Act implicates his privacy interests, Appellant must satisfy all the elements of an "invasion of privacy" civil action. State's Brief at 28, 30-31. The State cites no case law for this contention; it conflates the independent "invasion of privacy" tort with the separate procedural due process analysis requiring only that a privacy interest *be implicated.* Appellant's Brief at 25 (citing *Hamberger v. Eastman*, 106 N.H. 107, 110 (1964), as illustrative of the Court's concern for privacy rights).

[12] *See, e.g., Noble v. Board of Parole & Post-Prison Supervision*, 964 P.2d 990, 995-96 (Or. 1998)("When a government agency focuses its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic or belonging to a certain undesirable group ... the interest of the person to be labeled goes beyond mere reputation ... It is an interest in knowing when the government is moving against you and why it has singled you out for special attention"); *State v. Guidry*, 96 P.3d 242, 249 (Haw. 2004)("The registration requirement imposes unending governmental regulation of basic life activities despite the completion of, and following any criminal sentence"); *see also State v. Norman*, 808 N.W.2d 48, 62 (Neb. 2012).

assumption that Appellant was asserting a "generalized right to be free from governmental regulation." Add. at 31.

B. The Procedures In Place Do Not Afford The Requisite Safeguards

The Act deprives Appellant of his legally-protected liberty interests. First, the State's contention that "Appellant received the most thorough of all judicial proceeding processes available before being included in the category of offenders subject to the registry requirements" misses the point. State's Brief at 27 and 34. This argument merges the due process Appellant received concerning his criminal convictions in 1987 with the after-the-fact application of the Act's ever-increasing burdensome and restrictive requirements, beginning on January 1, 1994 – *four years after Appellant had completed his sentence and was free of any governmental restrictions*. When Appellant pled guilty in 1987, he received no notice (let alone a hearing) that his name would forever be placed in a State Police public registry of sexual offenders, plainly suggesting that he is danger to children.

This Court's decisions in *In re Bagley* and *State v. Veale*, support the conclusion that Appellant has suffered an erroneous deprivation of his rights. In *Bagley*, the Court concluded that the State's decision to place petitioners' names in a *confidential* registry of alleged child abusers violated due process, in part, because the statutory regime failed to "specify a means by which the subject of an abuse or neglect report and investigation may challenge a determination" by the State. 128 N.H. at 281. As the *Bagley* Court explained, due process requires that the petitioners have the right to challenge that determination in a hearing where an individualized assessment can be made based on the circumstances of the petitioners' situation. *Id.* at 287. Central to *Bagley*'s holding was the fact that petitioners did not receive notice of the State's decision:

> Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. To be considered adequate, the notice must give a reasonably complete statement of the information upon which the proposed action is based [and] the full reasons for that action ....

128 N.H. at 286-87 (internal quotations and citations omitted); *see Veale*, 158 N.H. at 643 (due process satisfied where defendant given notice of competency hearing and the opportunity to provide his own testimony and the testimony of witnesses). As in *Bagley*, Appellant received no notice that his name would be placed in a *public* registry of sexual offenders, nor does he have a means to expunge his name from the registry based on the individual facts and circumstances of his situation.

Second, *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003), does not support the State's position that Appellant has received adequate process. State's Brief at 33. Unlike the Act, dangerousness was immaterial to Connecticut's statutory scheme. As the Connecticut's website explained, "[t]he registry [was] based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses," and Connecticut has "made no determination that any individual included in the registry is currently dangerous." 538 U.S. at 5.

In contrast, the Act assumes that all those listed on the registry are dangerous. In fact, the State concedes in its brief that the Act exists because of the legislature's belief that *all* convicted sex offenders are at risk of reoffending and, thus, represent a "serious threat" to the public interest. State's Brief at 24 and 34. For this reason, the disclaimer on the State Police website states that the information published "is made available for the purpose of protecting the public" – a statement that makes clear that the State Police believe all individuals on the registry are dangerous. See Division of State Police, "Support Services Bureau Registered Offenders

Disclaimer," available at http://www.nh.gov/safety/divisions/nhsp/offenders/disclaimer.html (last visited Mar. 10, 2014); *see State v. Guidry*, 96 P.3d 242, 252 (Haw. 2004)(in distinguishing *Conn. Dep't of Pub. Safety* from the Hawaii Act, the court explained that inasmuch as Hawaii collects information "necessary to protect the public, the information can only be relevant because of the assumption that an offender continues to pose a threat to society"). Unlike the Connecticut Act, "dangerousness" is clearly relevant to the Act.

Finally, as explained above and in Appellant's opening brief, Appellant's private reputational and privacy interests are substantial. *See Guidry*, 96 P.3d at 253 (recognizing strong private interests in procedural due analysis with respect to sex offender registration act); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1233 (M.D. Ala. 1999)(same); *Doe v. Pataki*, 3 F. Supp. 2d 456, 469 (S.D.N.Y. 1998)(same); *Noble v. Board of Parole & Post-Prison Supervision*, 964 P.2d 990, 996 (Or. 1998)(same). The State's interests implicated by providing Appellant with due process are not. It afforded sex offenders the right to a hearing under the 1996 amendment to the Act and there is no evidence in the record why it cannot do so today.

Fundamental fairness, the touchstone of due process, requires that Appellant be given the opportunity to show that he is not likely to reoffend, and should not, for the rest of his life, be on the State Police website warning that he is a danger to children.

CONCLUSION

For the reasons stated in this reply brief and Appellant's opening brief, the Court should reverse the trial court and enter judgment for Appellant.

JOHN DOE

By his Attorneys,

ORR & RENO, P.A.

Dated: March 12, 2014

By: William L. Chapman

William L. Chapman, Esq. (NH Bar No. 397)
45 South Main Street
P.O. Box 3550
Concord, NH 03302-3550
(603) 223-9107
wchapman@orr-reno.com

NEW HAMPSHIRE CIVIL LIBERTIES UNION

Dated: March 12, 2014

By: Gilles Bissonnette by William L. Chapman

Gilles Bissonnette, Esq. (NH Bar No. 265393)
18 Low Avenue
Concord, NH 03301
(603) 226-3149
gilles@nhclu.org

CERTIFICATE OF SERVICE

I, William L. Chapman, Esq., hereby certify on this 12th day of March, 2014, I mailed two copies of this brief to Karen A. Schlitzer, counsel for the State of New Hampshire.

William L. Chapman

William L. Chapman, Esq.

1120773_1