THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2013-0496

John Doe

v.

The State of New Hampshire

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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II. Did the trial court correctly conclude that, as applied to the Appellant, RSA Chapter 651-B, the Sex Offender Registry Act, does not violate the Appellant's right to procedural due process under Part I, Article 15 of the New Hampshire Constitution?

COUNTERSTATEMENT OF THE FACTS

Appellant pled guilty to two counts of aggravated felonious sexual assault in 1987. AA-1-3.[1] The Appellant's victim was his step-daughter, a member of his household, who was between 13 and 16 years of age. *Id.* Appellant pled guilty to engaging in sexual penetration with her by placing his penis in her mouth at Lambert's Park. *See id.* Appellant also pled guilty to engaging in sexual penetration with her by inserting his finger into her genital opening at his residence. *Id.* Both counts were class A felonies subject to RSA 632-A:2. *Id.* While Appellant testified that these were the only offenses he committed against his stepdaughter, he later discussed the frequency of the abuse, stating, "Sometimes it would happen twice a week, three times a week. Sometimes it wouldn't happen at all. Sometimes every night for like – for a little while[,]". SA2[2]-3, 26. The assaults occurred over the years, by Appellant's estimation, for "[n]o more than two years." *Id.* at 23.

Appellant admits that he felt shame after his first assault on his stepdaughter, and he believed it was wrong at the time. *Id.* at 29, 10. Nevertheless, he continued to abuse her. *Id.* at 3, 26. Appellant told her not to tell her mother, or anyone, or both she and Appellant would get in "big trouble." *Id.* at 24-5. Once she began to refuse his advances, he offered to pay her. *Id.* at 18-20.

Appellant was sentenced to two and a half to five years at the New Hampshire State Prison

[1] Appellant's Brief is referred to as "AB" and Appendix is referred to as "AA". The State's Appendix is referred to as "SA". N.H. Assoc. for Criminal Defense Lawyers' brief is referred to as "CB" and Appendix is referred to as "CA".

[2] All deposition pages cited herein are contained in the State's Second Appendix ("SA2") in Exh. E-1 *filed under seal below.*

on each count, to be served consecutively, which was deferred for two years. AA-3,4. He was placed on probation for four years, during which he was required to attend Adult Sex Counseling. *Id.* In 1990, the court granted his motion to terminate probation. AA-5,6.

Although Appellant has denied ever being attracted to children, including his stepdaughter, he explained that what was going through his mind during the abuse was "[s]atisfaction, I was waiting to be satisfied, wanted satisfaction. That's about the only thing that I really wanted was satisfaction. I wasn't getting it from my wife, so . . ." SA2 at 28. He also planned his offenses, keeping his stepdaughter up with him after the other children went to bed. *Id.* at 16. Even though he knew it was wrong, he did it "[f]or sexual satisfaction." *Id.* at 34. With respect to his stepdaughter, he claims, "I never hurt her physically" and "mentally, I don't believe I hurt her." *Id.* at 45. He does not believe his assaults on his stepdaughter had a significant impact on her life. *Id.* at 45-6.

Appellant states that he is unlikely to reoffend because he was ashamed of what he did. *Id.* at 118. However, he admitted feeling shame after his first assault on his stepdaughter, and he believed it was wrong at the time, but he continued to abuse her. *See* CA-140-42 and SA2 at 3, 26, 29. While Appellant asserts, "I don't believe I was dangerous ever," he also alleges that counseling "woke him up" because "I don't know why I was the way I was, you know, what made me do it and why I did it." *Id.* at 13. He stated "I just don't consider myself a threat to anybody, you know? Not anymore." *Id.* Appellant testified "Right now I feel I can handle myself. This was a one-time thing." *Id.* at 6. Appellant's testimony, however, establishes this was not "a one-time thing." He does not believe that he has ever posed a danger to the public. *Id.* at 43-4. Even when he committed the sexual assaults, he does not believe he was a danger to the public because, "That was at home. I stayed at home... I wasn't dealing with the public." *Id.* at 44. *But see* AA-3,4 (Appellant pleading guilty to sexual assault in a public park). Appellant's offenses came to light when he disclosed them to a counselor who reported them to the authorities. SA2 at 11. Appellant did not know of the duty to report; had he known, he would not have disclosed it. *Id.*

With regard to Appellant's housing difficulties, it is his primarily his finances that limit his housing options. *Id.* at 56. Appellant does not work. *Id.* at 31-2. He receives Social Security Disability, having applied for it in 2006. *Id.* at 31-2, 35. In 2004, he applied for Section 8 housing, which he wanted because it would be less expensive. *Id.* at 36-7, 41. At least as early as 2007, Appellant knew that he would not be accepted into the program because he was a lifetime registrant. *Id.* at 42-3. Appellant has lived at over 20 addresses, mostly in Manchester, but he cannot reconstruct the addresses of where he has lived because he has moved so many times. SA2 at 59-60; SA2 at 56. He lost one apartment because he did not pay the rent while he was in the hospital. SA2 at 38. He moved out of his son's house because it was crowded, and there were problems between his son and someone else in the home. *Id.* at 5. Appellant testified that he believes he is required to disclose to all of his landlords that he is on the registry, but he states he has not done that. *Id.* at 54-5.

Appellant has been convicted of willful concealment (RSA 644:17, I) and possession of a controlled drug (RSA 318-B:2) in 1994. In 2004, he was convicted for violation of a protective order (RSA 173-B:9). SA2 at 39-40. When he was arrested for violating the protective order that year, he was informed that he needed to register. *Id.*

The Sex Offender Registry Scheme

The sex offender registry was enacted in 1992. *State v. Costello,* 138 N.H. 587, 588 (1994). Appellant claims that in 1993, the registry was made retroactive to include him, yet he failed to register until 2004. AB-2; SA at 39-40; SA at 1-3 . Appellant's violations of RSA 632-A:2, on a victim under 18 years old, constitute "offenses against a child." RSA 651-B:1, VII(a). Because he committed an offense against a child, he is considered an "offender against children," and is required to register. RSA 651-B:1, VI. Appellant is a Tier III offender because of his violations of RSA 632-A:2 .[3] RSA 651-B:1, X(a). Tier III offenders must register and remain on the public list for life. RSA 651-B:6, I, III. As a Tier III offender, Appellant is required to report in person, quarterly, within five

[3]Because Appellant challenges the requirements as applied to him, this review is limited to Tier III offender requirements.

days after his birthday and every three months thereafter. RSA 651-B:4, I(a).

Each time the Appellant is required to report, he must provide the following information to the local law enforcement agency: name and any aliases, address of any permanent and temporary residence, and the name, address and date of any employment or schooling, professional licenses or certifications that authorize him to engage in an occupation or carry out a trade or a business. RSA 651-B:4, III(a-d). Appellant must provide the make, model, color, and license plate or registration number of any vehicle, watercraft or aircraft owned or regularly operated by him and the place where they are regularly kept. RSA 651-B:4, III(e). He must provide his date of birth, including any alias date of birth, social security number, physical description, including any identifying marks, telephone numbers for fixed location and cell phones, passport, travel and immigration documents, and the name, address, and phone number of any landlord if he resides in rental property. RSA 651-B:4, III(f-k). He must also report "any on-line identifier" he may use. RSA 651-B:4, IV(a).

If Appellant's information changes written notice must be given within five business days to the local law enforcement agency. RSA 651-B:5. If employment or schooling changes, he must report in person to the local law enforcement agency within five business days. RSA 651-B:5. Law enforcement forwards the information to the Division of State Police, within five days, so it can be included on the Registry System. RSA 651-B:5, I. Law enforcement in the city or town where the offender resides may notify the superintendent of the SAU and the principal of any school within its jurisdiction of an offender's new residence, or change of name or alias. RSA 651-B:5, III.

The Department of Safety may require: a photograph taken by law enforcement, a DNA sample if such has not been already provided, a set of major case prints including fingerprints and palm prints, and a copy of a valid driver's license or identification card, which may be used in the performance of any valid law enforcement function, RSA 651-B:4, IV(a-d). The Division of State Police is required to maintain a list of all Tier III offenders required to register. This list is available to law enforcement officials for law enforcement purposes; *it is not available to the public*. RSA

651-B:7, II. The law enforcement list must include all information required by RSA 651-B:4. *Id.*

The Division must also maintain a separate *public* list of Tier III offenders who are required to register as a result of an offense against a child, or more than one sexual offense or offense against a child. RSA 651-B:7, III. The Appellant's convictions fall within this group of offenses. The *public* list must include the following information:

> (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, in or out of the 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 he is registered;
> (5) Outstanding arrest warrants, and the information listed in sub-paragraphs (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) Photograph of the offender; and
> (8) The address of any place where the individual is or will be a student.

RSA 651-B:7, III(a)(1)-(8).

In addition, the public list may include information on the profile of the victim and the method of approach utilized by the offender, RSA 651-B:7, III(b), but the public list does not actually include this information, *see* http://www4.egov.nh.gov/nsor/search.aspx. Appellant must be included on the public list in a way that "does not disclose, directly or indirectly, that the victim and the defendant were related or members of the same household." RSA 651-B:7, III(c)(1). The public list cannot contain the offender's social security number, an arrest which did not result in a conviction, or the name of the employer or school which he attends. RSA 651-B:7, III(c)(2)-(4).

The Department of Safety makes the list available through its public website. RSA 651-B:7, IV. The website allows "the public to obtain relevant information for each sex offender by a single query for any given zip code or geographical radius by the user." *Id.* Law enforcement has the discretion to notify the public that an offender on the public list is residing in the community. *Id.*

Although the registry requirements have increased, most of them have no impact on Appellant. Since approximately 2006 or 2007, he has had no employment to report, and has not had any professional licenses or certifications. SA-9 (Petition at 6 ¶ 18); SA2 at 41, 50-52. He has a cell phone, but no landline. *Id.* at 54. He does not have a passport. *Id.* He does not go to school or do any volunteer work. *Id.* at 51. He does not have a vehicle, and has not had one for four or five years. *Id.* at 51-2. He has no computer, no e-mail, and would not know how to go on-line. *Id.* at 47. Therefore, he has no on-line identifiers to report. Further, Appellant does not believe he has ever given a DNA sample, fingerprints, or palm prints when registering. *Id.* at 46-7. Appellant acknowledges that his name, address, age, race, sex, hair, and eye color are not private. *Id.* at 49-50. His convictions are already a matter of public record. *Smith v. Doe*, 538 U.S. at 98-99. Prior to his convictions, Appellant's name was in the papers. SA2 at 12.

Appellant admits that since he began registering in 2004, no one has ever confronted him about his status as a registered sex offender. *Id.* at 7. Other than his family, he is unaware that anyone knows about his status. *Id.* In fact, he cannot recall anyone ever saying anything to him about it, other than police. *Id.* at 7-9. Appellant has acknowledged that "the police have been nice where they don't mention it in front of the people that are in the house when I'm there when they're there. I go outside and say thank you for not saying anything in front of my friends." *Id.* at 49. In fact, he testified, "I don't - - I don't mind registering only because I have to. But if I didn't have to, if I don't have to register, why should I have to?" *Id.* at 106. "I mean, to go sign and register, that's not a big deal." *Id.* at 166, "Oh, no, the registry doesn't bother me. That doesn't bother me." *Id.* at 108.

SUMMARY OF THE ARGUMENT

The Sex Offender Registry does not violate the ex post facto clause of the New Hampshire Constitution as it inflicts no greater punishment than when the Appellant pled guilty and was sentenced in 1987. While the requirements related to the registry may impose additional burdens on him, they do not increase the criminal punishment for his earlier convictions. Even though the law

may disadvantage Appellant, unless it also provides greater punishment, its application to him is not ex post facto. Accordingly, the trial court's Order should be affirmed.

Appellant's procedural due process claim is really a substantive due process claim. The registry statute requires that individuals convicted of certain sexual offenses against children comply with the registry requirements. The risk of reoffending, the issue on which Appellant seeks a hearing, is irrelevant to the statute. Appellant did not appeal the lower court's finding that the statute is substantively valid. If the statute is substantively valid, there is no procedural due process issue related to the risk of reoffending. Accordingly, the Court should not reach the due process claim.

Even if the Court does reach the procedural due process claim, Appellant's position is inconsistent with the law and should be rejected. In light of the legitimate public interest in public protection present here, even assuming the existence of a legally protected right, which is not conceded, he was afforded more than adequate safeguards. Appellant was given notice and the opportunity to be heard prior to being convicted as a sex offender. It is that conviction that resulted in his inclusion in the group of offenders who must register. While Appellant claims that procedural due process requires that he be given a hearing as to whether he is at risk of re-offending, risk of re-offending is not material to whether he is subject to the registry. Due process does not require a hearing to establish a fact that is not material under the statute. As a result, Appellant's due process claim should be rejected and the trial court's Order affirmed.

ARGUMENT

I. STANDARD OF REVIEW

Appellant's issues on appeal raise questions regarding the constitutionality of a state statute, RSA Chapter 651-B (the "sex offender registry)". The constitutionality of a statute is a question of law that is reviewed *de novo*. *See Baines v. N.H. Senate President,* 152 N.H. 124, 133 (2005). A statute is presumed to be constitutional and will not be declared invalid except upon inescapable

grounds. *Id.* (quotation omitted). "This means that [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." *State v. Addison*, __N.H.__ (decided November 16, 2013), Lexis N.H. 122 (citation omitted). "It also means that when doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.* "The party challenging a statute's constitutionality bears the burden of proof." *Id.* While the Appellant brings his claim solely pursuant to the New Hampshire Constitution, the Court may look to federal opinions for guidance. *State v. Ball*, 124 N.H. 226, 231 (1986).

II. THE SEX OFFENDER REGISTRY ACT IS NOT AN EX POST FACTO LAW AS APPLIED TO THE APPELLANT

The Appellant argues that, as applied to him, the sex offender registry violates the ex post facto clause of the New Hampshire Constitution because it "inflicts greater punishment than when he pled guilty and was sentenced in 1987." AB-8. Appellant's position is erroneous.

The State Constitution provides that: "Retrospective 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 under the Federal Constitution and the New Hampshire Constitution is the same. *Costello*, 138 N.H at 589 (citation omitted). "The prohibition against ex post facto laws pertains only to legislation that imposes or increases *criminal* punishment." *State v. Comeau*, 142 N.H. 84, 87 (1997) (citation omitted). As a result, a law is ex post facto only if it: "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." *In re Evans*, 154 N.H. 142, 147 (2006) (citation omitted).

The focus of the State ex post facto analysis is not upon whether a law imposes additional burdens, but rather upon whether it "increases the punishment for or alters the elements of an offense, or changes the ultimate facts required to prove guilt." *Costello, 138 N.H* at 589. Even though a "law may disadvantage the defendant, unless it also provides greater punishment, its application to him is

not ex post facto." *Id.* A review of the statutory scheme, and its underlying legislative purpose, as applied to the Appellant, reveals that it does not impose greater punishment on Appellant. *Id.* Accordingly, RSA 651-B is not an ex post facto law as applied to Appellant.

A. The Legislature Intended To Establish A Regulatory Scheme

The threshold question in determining whether a statute violates the ex post facto clause is "whether the legislature meant to establish 'civil' proceedings." *Smith v. Doe*, 538 U.S. 84, 92 (2003). In conducting its review of the legislature's intent, the Court "must first ask whether the legislature...indicated either expressly or impliedly a preference for one label or another.[4]" *Id.* at 93. The protective purpose of the statutory scheme at issue here is plainly civil. Accordingly, the trial court properly concluded that the statute is not an ex post facto law.

1. The Statutory Construction Evidences a Civil Regulatory Purpose

This Court found that the creation of the original registry was intended to be "merely regulatory." *Costello*, 138 N.H. at 590 (registry provides a means for law enforcement agencies to share information regarding whereabouts of convicted sexual offenders). Accordingly, the question for this Court is whether the legislative intent of the amendments was to transform the sex offender registry from a merely regulatory scheme to a punitive scheme.

Whether a statutory scheme is civil or criminal is "first of all a question of statutory construction." *See Smith v. Doe,* 538 U.S. at 92 (citation omitted). "The statute's text and its structure" must be considered "to determine the legislative objective." *Id.* "Nothing on the face of the [current] statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm. *Id.* at 93. Much as it did at the time of the *Costello* opinion, the current statute requires certain convicted sex offenders to register. RSA 651-B:2 (2009). Similarly, the current statute requires the offender to report information just as the

[4]Appellant argues that in *Smith* the court established that only an express statement as to intent should be considered. AB-16. However, the Appellant's position ignores that the court specifically provided that the analysis of legislative intent should consider whether the legislature made an indication as to its intention "*either* expressly or impliedly."

original registry did. In *Costello*, this Court held that the original sex offender registry, which included these registration and reporting requirements, "serves a regulatory purpose...". *Costello*, 138 N.H. at 590. The Court affirmed that holding in 2008 in the context of an appeal of the semi-annual fee related to the registry. *See Horner v. State*, 157 N.H. 400, 403-4 (2008). That the sex offender registry serves a regulatory purpose remains true today under the current statutory scheme.

The plain language of the statute does not indicate any punitive intent on the part of the legislature in making the amendments. Admittedly, the amount of information to be reported has increased and the method of collection has changed, but those facts alone do not automatically transform a regulatory scheme into "punishment" as Appellant contends. A review of the plain language of the current statute, including the additional information required and the methods of collection, reveal that they are reasonable means by which to further the *original* regulatory purpose of the registry. In fact, many of the amendments merely permit the State to verify the veracity of the information provided by a registrant. For example, Appellant objects to the semi-annual verification of his address by in-person visits to his residence. However, since provision of the information about the sex offender's address has already been found to be regulatory, verification of its truthfulness by the reasonable methods established in the statute must similarly be regulatory. Appellant also claims there is "no need for [him] to report every 3 months given the requirement that he notify law enforcement of a change of residence within 5 days." This position assumes the truthfulness of every registrant who reports, which the State is not required to do. The in-person reporting requirement permits the State to verify that the registrant is physically present in the State and that the identifying information provided is accurate. While Appellant may not enjoy the additional requirements caused by the amendments, on their face, they evidence and further the *exact same* regulatory purpose. The ability to require the reporting of information, without the related ability to verify its veracity, could undermine the protective purpose of the registry. As a result, these provisions serve to accomplish a legitimate governmental purpose and do not evidence a punitive intent.

In addition, the amendments provide for the increased sharing of the registrant's information. This change recognizes that to protect the public, particularly children, from sex offenders, more than just the police need to have information about them. Moreover, the requirements of the registry need to coincide with the mobility and technology of society. This is consistent with the protective purpose of the registry. *Costello, 138 N.H.* at 590. Furthering the legitimate government interest of public protection is clearly a civil purpose. *See U.S. v. Salerno*, 481 U.S. 739, 747 (1987). The sex offender registry statute remains non-penal because, to the extent it poses any additional disability over the original statute, which is not conceded, it serves "not to punish, but to accomplish...the legitimate governmental purpose[,]" of public protection. *Costello, 138 N.H.* at 590.

2. The Legislative History Evidences a Regulatory Purpose

In 1994, when the sex offender registry was found to serve a regulatory purpose in *Costello,* the purpose of the bill was "to assist police in keeping track of known sexual offenders who were convicted by requiring them to register with local authorities..." *Costello,* 138 N.H. at 590 (citing *N.H.S. Jour.* 270 (1992)). A review of the legislative history of the subsequent amendments supports the conclusion that the statutory scheme remains regulatory rather than punitive.

1996 Amendments

In 1996, a registrant was required to report annually his "current mailing address and place of residence or temporary domicile to the local law enforcement agency." Laws 1996, 293 (HB 1134). Offenders convicted of a violation of RSA 632-A:2 or :3 were registered for life. *Id.* Law enforcement could notify organizations including schools, daycare centers, libraries or any other organization where children gather and are supervised by persons in the organization, in the community where an offender intended to reside if the registered offender was convicted of violating RSA 632-A:2, I(l) or RSA 632-A:2, II. Laws 1996, 174(HB 1543); Laws 1996, 293. Organizations that received information were responsible "to take appropriate steps to educate and alert staff members who are charged with the care and supervision of children." *Id.* The information could be

used "***for the purpose of protecting the children*** in the charge of the organization..." *Id.* (emphasis added). The stated legislative intent behind these amendments was "to protect children." *See* testimony of Rep. Sytek, Sponsor of HB 1543 (Public Hearing on HB 1543, Jan. 10, 1996). The provisions confirm the continued civil protective purpose of the amendments. *See also* CA-156 (Excerpts of *Hearing on HBl 1543*, Apr. 8, 1996, explaining that parents could be carefully cautioned). These changes were made because there was frustration that law enforcement could not organizations charged with the care of children, because children were considered vulnerable. *See id.*, *see also* CA-165-66 (Excerpt of *Public hearing on HB 154*, Min. of Jan. 10, 1996).

1998 Amendments

In 1998, the effort to make the registry more effective in protecting the public continued. The law was amended to allow public access to the list upon request. In addition, law enforcement agencies were permitted to make "any use or disclosure of any such information as may be necessary to the performance of a valid law enforcement function." Laws 1998, 239:2 (HB 682). The list that could be made public included: the offender's name and address; his convicted offense; and the date and court for the conviction for which he is registered. *Id.* The list was permitted to include a photograph or physical description of the offender; date and court of other convictions; the victim's profile; and the offender's method of approach. *Id.*

The legislative history makes it clear that the purpose of these changes continued to be public protection. Specifically, HB 682 had two stated purposes: The protection of children; and, compliance with federal law (Megan's Law, 42 USCA §14701) requiring disclosure of "relevant information that is necessary to ***protect the public.***" CA-167 (Letter from Sr. Asst. Atty. Gen. Mark Attorri, to House Comm. on Criminal Justice and Public Safety (Feb. 13, 1997)); CA-171(Written Testimony of Rep. John E. Tholl, Jr., Feb. 3, 1997)("This bill will go a long way toward providing the necessary protection for our children."); CA-173-5 (*Hearing Before House Comm. on Criminal Justice and Public Safety on HB 682-FN-L,* Sept. 24, 1997, Comm. Min.); CA-176-8 (*Hearing on*

HB 682, Mar. 18, 1998 (testimony of Mark Attorri); *Public Hearing on HB 682, Senate Comm. On Judiciary,* March 18, 1994, (Comm. Min.). Moreover, a review of the extensive committee notes related to HB 682 reveals no punitive intent. *See House Criminal Justice and Public Safety Committee,* Comm. Min. Aug. 20, 1997 through Sept. 9, 1997. (Statements of Rep. Knowles that the bill is concerned with "protecting the children.")

2002 Amendments

The effort to expand the effective use of the information reported by registered sex offenders to protect the public continued in the 2002 amendments. The Department of Safety was permitted to make the public list available through its website. Laws 2002, 241:1. Based on the legislative history of the bill, the purpose of the broader publication of information ***was to protect children***. CA-179-84 (excerpts of *Hearing on HB 1426*, Mar. 28, 2002). Placement of the list on the website would allow "more current information to be available to the public in a more timely manner." *Id.*; *see also* CA-187-92 (Exhibit N, *Meeting on HB1426-FN*, Comm. Min. of Feb. 6, 2002.)

In addition, law enforcement agencies were allowed to photograph the offender upon registration and use the photograph "in the performance of any valid law enforcement function." *Id.* The protective intent of this provision was evident in the history. *Hearing on HB 1462, House Comm. on Criminal Justice and Public Safety* Feb. 6, 2002 (testimony of Rep. Neal Kurk, sponsor of amendment to include photograph requirement)("This would be good from a parental protection point of view and a police enforcement point of view…I would show my child the picture and tell him/her to 'be wary' of that person"). In fact, the legislative history makes clear that the legislature took the constitutionality of the proposed legislation very seriously and made every effort to comply with the requirements of the Constitution while still advancing the goal of public protection. *See, e.g., Hearing on HB 1426*, Mar. 28, 2002 (testimony of Rep. Knowles).

2006 Amendments

The *additional* requirements that came in 2006 are as follows: photograph at each time of

registering; providing age, race, sex, date of birth, height, weight, hair and eye color, mailing address, vehicle make, model, color, and license tag number. Laws 2006, 327(HB 1692). Whenever an offender's information changed, written notification had to be provided within five business days. *Id.* The 2006 changes made date of birth and outstanding arrest warrants public. Registration became required every six months. *Id.* Semi-annual address verification by certified letter was added. *Id.*

The legislative history evidences a continued intent to protect children with these changes. *See* CA-196 (Excerpt of *N.H.S. Jour.* 826 (2006) (regarding HB 1692-FN)); CA-196-98 (Excerpt of *Hearing Before the Criminal Justice Comm. Regarding HB 1692 (New Hampshire Sexual Predators Act)*, Jan. 17, 2006); CA-199-207 (Excerpt of *Hearing on HB1692-FN Establishing the New Hampshire Sexual Predators Act*, Senate Comm. on Judiciary, Apr. 4, 2006). *See also* CA-149-154 (CHRISTOPHER R. COLLINS, PROFILE OF A PEDOPHILE (1993) (referenced in testimony)); (*Letter from Governor Lynch to House Comm. on Criminal Justice and Public Safety* (Mar. 16, 2006 referencing 2004 Study of Univ. of Toronto indicating that the chance of recidivism increases the longer an offender has been back in the community).

2008 Amendments

In 2008, the law was amended to require an offender to provide "any online identifier" he uses or intends to use. Laws 2008, 323:6; *see supra* at 7. Local law enforcement was permitted to verify an offender's the address "through in-person contact" at the offender's home or residence. Laws 2008, 323:11. CA-209-215 (Excerpts of *Hearing on SB 495 "prohibiting internet solicitation and exploitation of children,"* Senate Comm. on Judiciary, Mar. 10, 2008; CA-216, *N.H.S. Jour.* 703 (2008). The sex offender registry statute was also amended to create a tiered classification system. Laws 2008, 334 (HB 1640). Tier III offenders were now required to register in person quarterly. Laws 2008, 334:4. Additional requirements imposed were: to report any professional licenses or certifications that authorized the offender to engage in an occupation or carry out a trade or business, state of registration of any vehicle owned or regularly driven by the offender, and the place or places

where those vehicles are kept, social security number, physical description to include identifying marks, such as scars and tattoos, telephone numbers for both fixed and cell phones, passport, travel, and immigration documents, and name, address, and phone number of any landlord if the offender resides in rental property. RSA 651-B:4, III(d-k).

The Department *was permitted to* require an offender to submit to a photograph taken by a law enforcement agency each time the person registered, provide a DNA sample if one had not already been provided, provide a set of major case prints including fingerprints and palm prints of the offender, and a photocopy of a valid driver's license or identification card. Laws 2008, 334. The legislative purpose of these statutory requirements was not to punish, but are for the legitimate governmental purpose of protecting the public, especially children, from convicted sex offenders. *See* CA-218 (Excerpt of *House Record on HB 1640-FN,* Mar. 5, 2008); CA-220-23 (Excerpt of *Hearing on HB 1640-FN*, Apr. 15, 2008). Moreover, the legislative history makes clear that the individual constitutional rights of sex offenders were balanced against the need for public safety. *See Final Committee Report, Comm. to Identify and Evaluate Classification and Risk Assessment Procedures for Convicted Sex Offenders* (Nov. 1, 2007)("The numerous policy decisions reflected in the attached legislative proposal represent the committee's attempt to balance the needs of public safety with an individual's constitutional rights.") As a result, the history makes clear that there was no punitive intent in making these amendments.

2009 Amendments

The 2009 changes made technical corrections to RSA 651-B to eliminate conflicts between statutes at the request of the New Hampshire Department of Justice and clarified the type of possession of images (amended from "child pornography" to "child sexual abuse" images) that was covered by the statute. Laws 2009, 306:6 (SB 142). The clarification regarding the type of possession of images is consistent with the civil purpose of protection of children. No additional reporting or registry requirements were added in 2009. *Id.* A mechanism for certain individuals to be

removed from the registry was included. *Id.* The stated intent of the legislation was civil rather than punitive. *See Comm. Report, Criminal Justice and Public Safety Comm.*, SB 142, May 12, 2009 (Statement of Intent).

2010 Amendments

The changes made in 2010 were again made at the request of the New Hampshire Department of Justice and were part of a continuing effort by the state to bring RSA 651-B into substantial compliance with the related federal civil law, the Adam Walsh Act. Laws 2010, 78 (HB1642); N.H. House Jour. 17(Feb. 26, 2010). To that end, the amendment clarified the definitions of "sexual offense" and "offense against a child" to include "an accomplice to, or an attempt, conspiracy, or solicitation to commit..." certain offenses. *Id.* Prior to the 2010 amendments, registered offenders were already required to report make, model, color, and license plate of any vehicle owned or regularly driven by the offender. *Id.* The 2010 amendment clarified that the requirement applied to any type of vehicle, including aircraft and boats, and provided that the registration number could be required rather than the license plate, where appropriate. *Id.* In addition, the amendment *decreased* the amount of information made public by removing the requirement to include online identifiers on the *public* list of sexual offenders. *Id.* These amendments are consistent with the protective purpose of the registry and do not evidence any punitive intent on their face.

As set forth herein above, the legislative history supports a finding of a protective civil purpose for each and every amendment to the registry. The statute continues to serve "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in the community." *Smith v. Doe*, 538 U.S. at 102-3. The serious concern for the safety of children in particular has been a consistent theme throughout the legislative history. Conversely, no punitive intent is evident. In fact, the legislative history reveals that the legislature consistently made an effort to balance the rights of the individual sex offender with the state's compelling interest in

public safety. "Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *U.S. v. Parks*, 698 F.3d 1, 5 (2012) (cert. denied by 2013 U.S. Lexis 3320)(citation omitted).

Appellant and the Amici point to a number of examples in the legislative history in support of their argument that the legislature intended a punitive purpose for the registry. While at first the examples may seem compelling, a review of the entire legislative history makes clear that, in many cases, the amendments were part of omnibus legislation and the legislative purpose statements pointed to were actually directed toward other parts of the legislation, not the amendments to the sex offender registry. For example, the amicus brief cites Senator Foster's written support for HB 1692-FN stating that "[t]he sentences we give should punish the perpetrator for they harm they've caused..." as supporting the claim of *punitive* intent. CB-18. On its face, the comment suggests that it refers to the goal of *criminal* sentences for offenses, not the civil requirements of the registry. Further review of HB 1692 reveals that, in addition to the amendments to the registry, the bill separately provided for extensive amendments to the criminal code, *including extended criminal sentences*. *See* HB 1692-FN. In light of that, the statement by Senator Foster is clearly a reference to the purpose of the changes to the criminal code, not the sex offender registry, which did not include "sentences" of any kind. In conducting its review of the legislative purpose in this case the Court should bear this in mind.

Statutes are entitled to a presumption of constitutionality. *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012). "When doubts exist as to the constitutionality of a statute, those doubts *must* be resolved in favor of its constitutionality." *State v. Addison*, __ N.H. __(decided November 16, 2013), Lexis N.H. 122 (citation omitted). Accordingly, in light of the presumption of constitutionality and in the absence of the required proof, Appellant has failed to meet his burden and the Court should affirm the Order below.

B. The Civil Purpose Of The Statutory Scheme Is Not Negated By Its Effect

The Appellant argues that even if the Legislature intended the purpose of the registry to be regulatory, its effect is so punitive as to negate the Legislature's intent. AB-17. The Appellant's position is legally incorrect. While the severity of the burden imposed is relevant to the determination, a statute is generally "considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." A statute that has both a penal and nonpenal effect is nonetheless nonpenal if that is the "evident purpose of the legislature." *See Costello, 138 N.H. at 590.* The *Costello* court stated that "the nonpenal, or regulatory, purpose of the legislature in enacting the sex offender registration law is manifest." *Id.* That remains true today, despite the added requirements over the years. As a result, the application of the statutes to the Appellant "does not impose greater punishment and would not, therefore, offend the ex post facto prohibition of the State Constitution." *Comeau, 142 N.H.* at 89.

Where, as here, the intention of the Legislature was to enact a regulatory scheme that is civil and nonpunitive, the Court "must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith v. Doe*, 538 U.S. at 92 (citation and quotation omitted). In analyzing the effects of a similar sex offender registry statute, the U.S. Supreme Court has applied seven factors that constitute "useful guideposts." *Smith v. Doe*, 538 U.S. at 97 (applying factors established in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-9 (1963)). "Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1961). The seven factors include whether the statutory scheme:

-imposes an affirmative disability or restraint;
-has been regarded in our history and traditions as a punishment;
-comes into play only on a finding of scienter;
-promotes the traditional aims of punishment;
-applies to behavior that is already a crime;
-has a rational connection to a non-punitive purpose; and
-is excessive with respect to this purpose.

U.S. v. Parks, 698 F.3d 1, 5 (2012). The *Kennedy* court acknowledged that the analysis is difficult and that each of the factors may "often point in differing directions." *Kennedy*, 372 U.S. at 168. As a result, the factors are "neither exhaustive nor dispositive.[5] *U.S. v. Ward*, 448 U.S. 242, 249 (1980).

In conducting the analysis using the seven factors, the bar is set very high as to what is required to establish that the punitive effect of a statute outweighs its civil purpose. "Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty..." *Smith v. Doe*, 538 U.S. at 92 (citation and quotation omitted.). Deference must be given to the legislature's intent. *Id.* In addition, the statute is entitled to a presumption of constitutionality as a starting point. *City of Manchester v. Secretary of State*, 163 N.H. 689 (2012). Given all of these factors weighing in favor of the conclusion of constitutionality, analysis of the Appellant's as applied constitutional challenge using the *Kennedy v Mendoza-Martinez* factors supports the conclusion that the statutory scheme is regulatory.

1. Affirmative Disability or Restraint

The Appellant claims that the lifetime registration requirement, along with the quarterly in person reporting requirement, and the semi-annual in-person verification procedures constitute affirmative restraints on him. AB-18. The question of whether the sex offender registry requirements impose an affirmative restraint is answered by examining the legislation's effect on those subject to it; even if a disability exists, if it is minor or indirect, its effects are unlikely to be punitive. *Smith v. Doe*, 538 U.S. at 100. Given that this is an as applied challenge, the focus is solely on the effect of the requirements on the Appellant. The registry does not impose any physical restraint on the Appellant. He is as free to marry, move, work, and travel as any other citizen is. The Appellant is similarly free to change his appearance and associate with whomever he chooses. The record establishes that this has proven to be true for the Appellant. Appellant has been married

[5]The test has not been formally adopted by this Court and was not employed in *Costello*, 138 N.H. 587 (1994).

several times and has lived at over 20 addresses, mostly in Manchester. SA2 at 59-60; SA2 at 56. The ability to make independent choices with regard to every aspect of his life make the registry requirements distinct from punitive statutory schemes like imprisonment, and probation and parole.

With regard to the housing issues Appellant asserts, his finances are what limit his housing options in the first instance. He lost one apartment because he did not pay the rent. In 2004, he applied for Section 8 housing because it would be less expensive. *Federal* law may not permit a lifetime registrant to access Section 8 housing. However, there is nothing in the text of the *state* law that limits his participation in assistance programs on the basis of his registration. Any effect on his ability to qualify for Section 8 housing is indirect, and therefore unlikely to be punitive. *Costello*, 138 N.H. at 590. Further, ineligibility for a single assistance program as a result of federal law is not as significant as occupational debarment, which has been found to be non-punitive. *Smith v. Doe*, 538 U.S. 100 (citations omitted) (referring to ineligibility to participate in the banking industry, ineligibility to work as a union official, and revocation of a medical license).

In addition, the reporting requirements Appellant complains of on appeal, while inconvenient, are no more onerous than many other requirements ordinary citizens are subject to and cannot, therefore, constitute a disability or undue restraint for purposes of finding the statute unconstitutional. The mere presence of a related physical burden does not render a statutory requirement a "criminal punishment." For example, vehicles must generally be physically inspected annually, pets must be vaccinated annually. Each of these requirements imposes a physical burden on the individual but is not punitive so as to constitute a disability or restraint. In any event, the Appellant acknowledged that "to go sign and register, that's not a big deal." SA2 at 106-7. "Oh, no, the registry doesn't bother me. That doesn't bother me." *Id.* The registration requirements do not place an affirmative disability or restraint on the Appellant.

Similarly, the twice annual verification by law enforcement at his residence cannot be said to constitute an affirmative disability. There are no affirmative requirements on the Appellant pursuant

to this provision. In addition, Appellant has acknowledged that "the police have been nice where they don't mention it in front of the people that are in the house when I'm there when they're there. I go outside and say thank you for not saying anything in front of my friends." *Id.* at 49. Many civil government programs require in-person verification of information. For example, income tax audits can require in-person meetings to verify information. In light of the minimal restraints and burdens directly associated with the registry, this factor weighs in favor of finding that the registry does not have a punitive effect.

2. History and Tradition as a Punishment

The next factor in the analysis considers whether the registry requirements have historically been regarded as punishments. Appellant claims that his appearance on the registry website causes him "great embarrassment and shame" and that, as a result, the registry requirements operate "to inflict public disgrace" on him, just like colonial punishment. AB-19. As a threshold matter, sex offender registries, and their related reporting and publication requirements have only come into existence in the recent past. As such, they are not a historical form of punishment. Further, the publication requirements of the registry are very different from the historical "shaming" punishments the Appellant refers to in support of his argument. While it is true that, "some colonial punishments were meant to inflict public disgrace" by having a person "stand in public with signs cataloguing their offenses" these punishments were crafted specifically for the purpose of embarrassing the person being punished. *Smith v. Doe*, 538 U.S. at 97. The requirements of the registry are distinct, having nothing to do with punishing the registrants. Instead, their purpose is to disseminate truthful information necessary to protect the public. *Id.* Appellant claims that the fact that he is not eligible for public housing pursuant to federal law is somehow further evidence that the registry constitutes a historical form of punishment. Appellant does not expand on how the ineligibility for public housing constitutes a historical form of punishment. In any event, the federal Section 8 public housing program is also fairly recent in its creation and, as a result, ineligibility cannot be said to be a

historical form of punishment. Appellant has provided no support for the suggestion that exclusion from a federal welfare program could qualify as a historical form of punishment.

In *Smith v. Doe*, the Court considered whether the requirements of the registry constituted a historical form of punishment and concluded that they do not. *Id.* at 98-99. The reasoning in *Smith* is equally applicable here:

> Any initial resemblance to early punishments is, however, misleading...punishments that lacked the corporal punishment component, such as public shaming…involved more than the dissemination of information…By contrast, the stigma of [the registry] results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment....The publicity may cause adverse consequences for the convicted defendant...In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme...the purpose and the principle effect of notification are to inform the public for its own safety, not humiliate the offender."

Id.

For these reasons, the sex offender registry requirements in this case does not resemble historical forms of punishment, and this factor weighs in favor of concluding that the legislation is regulatory in character.

3. Comes into play only on a finding of scienter

This factor is of little weight to the ex post facto analysis of the registry. *Id.* at 105. In any event, the statutory requirements are not founded on a present or repeated violation, so no finding of scienter is required to trigger the requirements. *State v. Eighth Judicial Dist. Court*, 306 P.3d 369, 388 (Nev. 2013).

4. Promotes the traditional aims of punishment

Appellant claims that the registry requirements promote the traditional aims of punishment, namely retribution and deterrence. AB-20. As set forth herein above, the requirements do not promote retribution and deterrence, instead they promote public protection. Further, as applied to Appellant, the registry requirements have not had a retributive effect. In fact, no one has ever

confronted him about his status as a registered sex offender, and other than his family, Appellant is unaware that anyone knows about his status. Appellant cannot recall anyone ever saying anything to him about being a registered offender, other than the police during the semi-annual verification visits, and even the police have been nice about it. In addition, the deterrent effect, if any, is indirect and is no different from the deterrent effect in many civil regulatory schemes. "To hold that the mere presence of a deterrent effect "renders such sanctions criminal...would severely undermine the Government's ability to engage in effective regulation." *Smith v. Doe*, 538 U.S. 102.

5. Applies to behavior that is already a crime

Similar to the scienter factor, this factor is of little weight to the ex post facto analysis of a sex offender registry. *Smith v. Doe*, 538 U.S. at 105. *In Smith v. Doe*, the Court reasoned that the fact that the behavior regulated is already a crime is of little weight because the regulatory scheme applies "only to past conduct which was, and is, a crime." *Id.* Given the identical requirement of a conviction before the registry requirements apply, that rationale applies equally to this case.

6. Has a rational connection to a non-punitive purpose

This factor is the most significant factor in the determination of whether the effects of a statutory scheme are punitive or regulatory. *Id.* Appellant concedes that the sex offender registry has a reasonable alternative purpose with regard to those sex offenders who present a risk of reoffending. AB-22. As the Appellant acknowledges, "registration permits the public to know whether such sex offenders live in their communities." *Id.* While Appellant is correct that registry requirements are rationally connected to the legitimate non-punitive purpose of public safety, his argument regarding risk of reoffending overlooks the fact that the legislature has established a reasonable method to assess risk of future sexual assaults on children; a prior conviction for sexual assault on a child. While the Appellant may disagree with that decision, it is clearly rationally connected to the non-punitive purpose of protecting the public, particularly children, from sexual assault. Accordingly, this factor weighs in favor of finding the registry to be regulatory rather than punitive.

7. Not Excessive with respect to this purpose

The question of excessiveness is not whether the legislature made the best choice to address the problem it seeks to remedy, but whether the regulatory means chosen "are reasonable in light of the nonpunitive objective." *Smith v. Doe*, 538 U.S. at 105. As set forth herein above, the reporting requirements, including the in-person requirements, permit the State to collect information regarding the registrant and to verify the veracity of the information. While the Appellant may not enjoy these requirements, the reporting and verification provisions of the statute are a very reasonable means of accomplishing a legitimate governmental purpose and are not excessive.

In addition, the publication requirements provide for the increased sharing of the certain information consistent with the statute's protective purpose. In enacting the statutory scheme the legislature recognized that to protect the public, particularly children, from sex offenders, more than just the police needed to have information about sex offenders. This publication of information makes the regulatory program "effective" and therefore does not impose excessive "punitive restraints" that violate the ex post facto clause. *Smith v. Doe, 538 U.S. at 102.*

Appellant complains that the length of the reporting requirement, in his case, lifetime reporting, is excessive. However, the length of the reporting requirement is not excessive in light of the "high rate of recidivism among convicted sex offenders and their dangerousness as a class."[6] *Smith v. Doe*, 538 U.S. at 103 (citation omitted). "A conviction for a sex offense provides evidence of substantial risk of recidivism." *Id.* In New Hampshire, the law is well settled that sex offenders are a serious threat in this nation and the public interest in protecting vulnerable members of the community from sexual predators is a compelling one. *State v. Ploof,* 162 N.H.609, 627-28 (2011) (citation omitted). In enacting and amending the sex offender registry, our legislature has recognized these concerns. *See* CA-156-194. Accordingly, the reporting requirements are not excessive.

[6] The Appendix to the Amicus brief of Citizens for Criminal Justice Reform includes facts and opinions regarding recidivism that are not in the record.

The *Kennedy v. Mendoza-Martinez* analysis, on the facts of this case, weighs in favor of the conclusion that the sex offender registry is regulatory rather than punitive. *Kennedy*, 372 U.S. at 168. The question of whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective. *See Kennedy v. Mendoza-Martinez*, 372 U.S at 209. "Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it." *See id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). As a result, the Appellant has not shown, especially by the clearest proof, that the effects of the requirements on him negate our legislature's intention to establish a civil regulatory scheme.

C. The As Applied Constitutional Claim Fails Because The Appellant Is Not Burdened By The Requirements of the Registry.

In order to prevail on his as applied constitutional challenge, Appellant must show that the statute is unconstitutional in his particular circumstances, that is, that the requirements inflict greater punishment on *him*. He cannot make such a showing.

Although the requirements have increased since 1994, most of them have no impact on Appellant. For example, Appellant complains that information gets posted on the website, including his address, physical characteristics, and criminal history, yet he acknowledges that his name, address, age, race, sex, hair, and eye color are not private. His convictions are already a matter of public record. *Smith v. Doe*, 538 U.S. at 98-99. Appellant also complains that he should not be required to provide information such as his place of employment, professional licenses or certifications, telephone numbers, passport or travel documents, or name of landlord. Since 2006 or 2007, he has had no employment to report and has not had any professional licenses or certifications.

He has a cell phone, but no landline. He does not have a passport. *Id.* He does not go to school or do any volunteer work. He has not had a vehicle for four or five years. As to on-line identifiers, Appellant has no computer, no e-mail and would not know how to go on-line. Appellant does not believe he has ever given a DNA sample, fingerprints, or palm prints when registering. The remaining information Appellant must provide since *Costello* that is on the public list is as follows: his height, weight, offenses for which he is required to register, date and court of adjudication on the offenses for which he is registered, outstanding warrants (which do not appear to be applicable), and his photograph. RSA 651-B:7, III(a)(1)-(8). Anything pertaining to his appearance, such as his photograph, height, and weight, by virtue of these characteristics being plainly visible, are not private information. In addition, Appellant is required to provide his social security number, cell phone number, and name, address, and phone number of his landlord; but none of that that information is public. He also complains that he is required to report every three months. As set forth herein above, such requirements are for the regulatory purpose of enabling the police to keep track of convicted sex offenders, as well as enabling the public to protect itself. Appellant's as-applied challenge to the sex offender registry fails because he has not shown how it is unconstitutional as applied to him under the particular circumstances of this case. *Petition of S. N.H. Med. Ctr.*, 164 N.H. 319, 326 (2012).

II. APPELLANT HAS NOT DEMONSTRATED A PROCEDURAL DUE PROCESS VIOLATION

Appellant argues that RSA 651-A violates his right to "procedural due process guaranteed by the New Hampshire Constitution." AB-24. More specifically, he claims that he is entitled to a "procedure to allow him to demonstrate that he is not at risk to reoffend." AB-30.

A. Appellant's Procedural Due Process Claim Is A Substantive Due Process Argument.

Appellant's procedural due process claim is a "substantive due process argument recast in procedural due process terms." *Reno v. Flores*, 507 U. S. 292, 308 (1993) (quotation omitted). The

New Hampshire registry statute requires that all individuals convicted of certain sexual offenses against children register. The risk of reoffending, the issue on which Appellant seeks a hearing, is not material to the statutory scheme. Procedural due process "does not require the opportunity to prove a fact that is not material to the statutory scheme." *Connecticut Department of Public Safety v. Doe,* 538 U.S. 1, 4 (2003) (followed by *Doe v. Tandeske*, 361 F. 3d 594, 596 (2004)). Appellant's challenge is really aimed at whether the legislature's determination as to the criteria for registration established in the statute is constitutional. This is a substantive due process challenge. He does not dispute that he received procedural due process before being included in the class of offenders to whom the statute applies. Appellant did not appeal the lower court's finding that the statute is substantively valid. Accordingly, the Court should not reach the procedural due process claim.

B. The Procedural Due Process Claim Is Meritless.

Even if the Court does reach the procedural due process claim, Appellant's position is inconsistent with the law and should be rejected. Appellant claims that he was denied due process when he was put on the registry for life "with no opportunity whatsoever to demonstrate he should not be covered by it or have his information withheld." AB-24. In light of the legitimate public interest present here, Appellant was afforded more than adequate safeguards. He was given notice and the opportunity to be heard prior to being convicted as a sex offender. It is that conviction that resulted in his inclusion in the group of sex offenders who must register. While Appellant claims that procedural due process requires that he be given a hearing as to whether he is at risk of reoffending, risk of reoffending is not relevant to whether he is required to be subject to the sex offender registry. AB-30. The sole criteria is a conviction for one of the offenses set forth in the statute.

"To determine whether particular procedures satisfy the requirements of due process, [this Court] typically employs a two-prong analysis." *Appeal of School Admin. Unit #44*, 162 N.H. 79, 84 (2011). First, a determination as to whether a legally protected interest has been implicated must be made. *See Petition of Bagley*, 128 N.H. 275, 282-83 (1986). Second, the Court must determine

"whether the procedures provided afford adequate safeguards against a wrongful deprivation of the protected interest." *Id.* (citation omitted). In the Appellant's case they did.

1. *No Legally Protected Interest is Implicated.*

The "threshold determination in a procedural due process claim is whether the challenged procedures concern a legally protected interest." *State v. Veale,* 158 N.H.632, 637 (2009) (quotation and citation omitted). Appellant claims that three legally protected interests are implicated here — a right to privacy, a right to be let alone, and a right to be free from reputational and social stigmatization. In light of the specific facts of this case, no legally protected interests are implicated.

a. Right to Privacy

Appellant alleges that he has a right to privacy against "public disclosure of private facts and publicity which places the plaintiff in a false light in the public eye." AB-25. A review of the facts in this case reveals that no private facts are publicized and no false light cast. Accordingly, his privacy claim must fail.

Public disclosure "involves the invasion of something secret, secluded or private pertaining to the plaintiff." *Karch v. Baybank FSB*, 147 N.H. 525, 535 (2002) (quotation omitted). RSA 651-A provides for the publication of limited true information regarding certain convicted sex offenders. As set forth herein above, the information that is made available to the public is not secret, secluded private information, in fact, much of it is public. Further, in order to constitute a violation of the right of privacy as a result of public disclosure, the matter publicized must be of a kind that: "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Lovejoy v. Kinehan*, 161 N.H. 483, 486 (2011) (citation omitted). In this case, the disclosures relating to the Appellant's conviction, identifying information, and location address a matter of legitimate public concern, public protection, particularly protection of children. This Court has previously found that a prior conviction, even one that has been annulled, can constitute a matter of legitimate public concern. *Lovejoy*, 161 N.H. at 486 (finding an annulled conviction a matter of

legitimate public concern in the context of a campaign for public office). The public concern in this case, that children be protected from individuals known to have committed sexual assault on a child, is far more significant.

Moreover, no right to privacy is implicated because Appellant is not placed in a *false* light in the public eye. The Appellant takes issue with being considered a "dangerous sex offender" by virtue of being listed on the registry.[7] However, it is undisputed that the Appellant has been convicted of two counts of aggravated felonious sexual assault on a child. CA at 140-42. The fact that he is a convicted child sex offender is true and no false light can be created by dissemination of that information. In addition, the court records of his offenses have always been a matter of public record and his name was in the papers. Therefore, he has not been placed in a false light in the public eye by being listed on the registry. Appellant failed to establish any that a l*egally protected* privacy interest has been implicated.

b. Right to be Let Alone

For the first time on appeal the Appellant makes a general "right to be let alone" argument. Appellant argues that his right to be let alone consists of the four different rights the *Hamberger* court recognized. AB-25 (citing *Hamberger v. Eastman*, 106 N.H. 107, 110 (1964)). This argument was not raised before the trial court. Appellant claims that this new argument is merely a clearer statement of his "freedom from governmental regulation" argument below. However, the broad "right to be let alone" argument made on appeal is clearly not encompassed by the narrower "freedom from governmental regulation" argument made below. The "right to be let alone" "comprises four distinct kinds of invasion of four different interests of the plaintiff which are tied together by the common name, but otherwise have almost nothing in common..." Each separate invasion claim has its own elements, which the Appellant neither pled nor proved below. *See id.*

[7] The registry website does not label or describe him that way.

i. Appellant Waived His Right to Be Let Alone Claim

Appellant waived his "right to be let alone" claim by failing to raise it below. It is well established that this Court "will not review issues raised on appeal that were not first presented in the trial forum." *Tiberghein v. B.R. Jones Roofing Co.,* 151 N.H. 391, 393 (2004). There is nothing in the record to indicate that Appellant presented the trial court with the argument it makes here. Thus, Appellant has forfeited the argument on appeal. *Syncom Industries, Inc. v. Wood*, 155 N.H. 73 (2007).

Moreover, the Appellant makes only a passing reference to the "right to be let alone" claim. The sole basis for the claim on appeal is the legal conclusion that the statute's "redundant and multiple impositions are unreasonable." AB-26. The "right to be let alone" encompasses four kinds of invasion including: "(1) intrusion upon the plaintiff's physical and mental solitude or seclusion; (2) public disclosure of private facts; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness." *Hamberger*, 106 N.H. at 110 (citation omitted), yet the Appellant failed to even specify which of the four kinds of invasion is implicated or to articulate how the facts in this case satisfy the elements of any of the different invasion claims. "Neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration." *Guy v. Town of Temple*, 157 N.H. 642, 658 (2008) (citation omitted).

ii. The "Right to Be Let Alone" Claim is Without Merit

Even if the Court were to reach Appellant's "right to be let alone" argument, it is without merit. As set forth herein above, public disclosure of private facts is not present and no false light claim is implicated here, leaving only intrusion and appropriation. Appellant has made no allegations that assert an appropriation claim and there are no facts in this case to support such a claim.

In New Hampshire, an "action based upon an intrusion upon the plaintiff's physical and mental solitude or seclusion must relate to 'something secret, secluded or private pertaining to the

plaintiff.'" *Fischer v. Hooper*, 143 N.H. 585, 590 (2005). "Liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues." *Id.* (citation omitted). On appeal, Appellant has not pointed to any intrusion relating to something secret or secluded. Appellant's conviction is clearly not secret or private. Furthermore, the only claim by Appellant that even purports to be an allegation of intrusion is the twice yearly requirement that the address of the offender be verified in person[8]. RSA 651-B:4, III. Even that does not implicate Appellant's right to be let alone because it cannot be said to be offensive to persons of ordinary sensibilities. Verification of information provided remotely is commonplace in society and is routinely done for many reasons. As a result, even if a visit from a law enforcement officer to a person's residence were considered an intrusion it cannot be said to go beyond the limits of decency as required to constitute a violation of the right to be let alone.

The Appellant cast this claim below as the right to be free from governmental regulation. The Appellant failed to cite to any authority in support of his claim. The trial court rejected this claim, properly reasoning that there is no generalized right to be free from governmental regulation, and that such a proposition is inconsistent with common sense regulations that all persons in an organized society submit to every day.

iii. The Right to be Free from Stigmatization is Not Implicated

Appellant claims that placement on the registry implicates his right to be free from reputational and social stigmatization. As a threshold matter, Appellant has failed to establish that he has actually been subject to social stigma because, as he testified, he could not recall anyone ever saying anything to him regarding the fact that he is registered, other than the police who were nice. Given that he has brought an as applied constitutional challenge, this failure is fatal to his claim.

In any event, including an individual convicted of repeated sexual assault on a child on the

[8]In the alternative, the statute permits verification by sending a letter by certified non-forwarding mail to the offender.

sex offender registry, which contains only accurate information, cannot be said to damage the protected interest in reputation because any damage to reputation occurred as a result of the conviction, and the sexual assault on a child, not the inclusion on the registry.

2. *The Procedures Provided Afforded Adequate Safeguards*

Even if the Court should determine that a legally protected interest is implicated in this case, the procedures provided to the Appellant afforded adequate safeguards to the Appellant. Accordingly, the Appellant's due process claim must fail.

"[T]he requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Veale*, 152 N.H. at 632 (citation omitted). In determining what process is required, a balancing of three factors is required: first, the private interest at stake; second, the risk of an erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *State v. LaPlaca*, 162 N.H. 174, 178 (2011) (citation omitted).

a. No Private Interest Is Present

As discussed at length above, Appellant has not articulated any legally cognizable, protected interest entitled to the procedural due process protections of Part I, Article 15 of the New Hampshire Constitution. Following his admissions in his deposition, the interests at issue do not rise to the level of a true protected interest. Courts have previously rejected arguments similar Appellant's. *See, e.g., Connecticut Department of Public Safety v. Doe*, 538 U.S. 4 (2003). In any event, the record establishes that the Appellant has not experienced any stigmatization as a result of his registration as a sex offender or his inclusion on the public list.

b. Risk of Erroneous Deprivation and Probable Value, if any, of Additional or Substitute Safeguards

The statutory scheme at issue provides for application of the registry requirements to a

limited group of sex offenders. It is undisputed that the group, including the Appellant, must be given the most extensive due process procedures available prior to being convicted and becoming subject to the registry requirements. As a result, the risk of erroneous deprivation is minimal.

Moreover, this Court has recognized that where multiple, related interests exist that "are not in tension[,] . . . one procedure for reliably determining [one] equally protects both." *Veale*, 158 N.H. at 641 (procedure for determining competency to stand trial deemed adequate protection of the reputational interest implicated by a finding of legal incompetency); *see also State v. Harvey*, 108 N.H. 196, 198 (1967) (procedure afforded by appeal from adverse administrative determination of tax abatement deemed adequate protection of the liberty interest implicated by civil commitment in enforcement of a tax liability); *see also Harrison v. Wille*, 132 F.3d 679, 683 (11th Cir. 1998) (procedural opportunity to clear reputation was provided by virtue of process preceding employment termination).

Consistent with that reasoning, the United States Supreme Court has found that a convicted sex offender "has already had a procedurally safeguarded opportunity to contest" the triggering event for the registration requirement: the conviction itself.[9] *See Conn. v. Doe, 538 U.S. at 7-8.* Due process does not require "a hearing to establish a fact that is not material under the...statute." *Id.* Accordingly, the risk of erroneous deprivation of the Appellant's private interests is minimal.

Similarly, the probable value of additional safeguards is low. The safeguard Appellant seeks is a hearing to assess risk of reoffending. However, that is not necessary for, or relevant to, the determination of whether an individual should be included on the registry. The legislature has already determined the sole criteria for registration: conviction. As set forth herein, the reasons for this determination are compelling. Conversely, the safeguard Appellant seeks could have a negative

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[9] Appellant attempts to distinguish this case from the *Conn.* case on the basis that the Connecticut website contained a "disclaimer" stating that no independent determination of risk of dangerousness had been made and the New Hampshire registry does not. AB-30. Appellant's argument overlooks the fact that the New Hampshire website reports only accurate information and does not characterize the registrants as dangerous. "Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith v. Doe,* 538 U.S. at 98-99.

impact in light of the risk of error that exists in making predictions as to likelihood to reoffend.

Appellant's reliance on *Petition of Bagley, 128 N.H. 275, 281 (1986)* is misplaced. AB-32. Appellant cannot make any analogous claim to that of the Bagleys. In *Bagley*, the Petitioners were not afforded *any* due process prior to a categorical determination about them being made and being placed on the central registry. *Petition of Bagley*, 128 N.H. 275, 281 (1986)). Conversely, Appellant received the most thorough of all judicial proceeding processes available before being included in the category of offenders subject to the registry requirements.

c. The Government's Interest in Public Protection is Significant

The government interest in public protection in this case is compelling. This Court has previously held that the protection of society from certain classes of people is a legitimate state interest. *Ploof*, 162 N.H. at 627-28. "Sex offenders are a serious threat and the public interest in protecting vulnerable members of the community from sexual predators is a compelling one." *Id.*, *citing Smith v. Doe*, 538 U.S. at 4. This concern is consistent with the "high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith v. Doe*, 538 U.S. at 103 (citation omitted). "A conviction for a sex offense provides evidence of substantial risk of recidivism." *Id.* In enacting the registry, our legislature has recognized these concerns. CA-156-94. If the process Appellant seeks were employed, the consequences of a mistake in predicting the risk of reoffending are significant. In light of these concerns and the legitimate public protection interest, the legislature was acting within its discretion when it decided to make inclusion in the registry based solely upon conviction and not permit exclusion on the basis of a *prediction* of a risk of reoffending.

Moreover, the function involved, and the fiscal and administrative burdens that such a hearing would entail would be extraordinary. Such a process would be time consuming and expensive because it would require a tribunal to decide the level of dangerousness for every offender whose information is available to the public. The record below revealed that there were 2,210 offenders whose information was available on the website. CA-84 (Affidavit of Sgt. Cheryl

Nedeau). Of those, 1,561 are active Tier III offenders. *Id.* Such a determination would require each party to have expert witnesses to opine on the offender's level of dangerousness. The discovery would be massive because it would include information pertaining to the underlying convictions, criminal history, counseling, mental health, and medical treatment records, and incarceration or institutionalization. The process would resemble one similar to that set forth in RSA chapter 135-E relative to sexually violent predators, who are subject to years of civil commitment. This would be extraordinarily costly, both financially and in terms of time, for the parties and the tribunal. Accordingly, in light of the process Appellant has already been afforded in his criminal proceedings, and the government's compelling interest, a hearing for Appellant is not necessary to comply with the requirements of procedural due process and the Order of the trial court should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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