12-4288-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN DOE,

Plaintiff-Appellant,

v.

ANDREW CUOMO, as Governor of the State of New York, in his official and individual capacity, M. SEAN BYRNE, as Acting Commissioner of the State of New York Division of Criminal Justice Services, in his official and individual capacity, THE NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York (Brooklyn)

BRIEF FOR PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291 over the Judgment, A-213, which was a final judgment of the United States District Court for the Eastern District of New York, entered on September 28, 2012. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over this civil action arising under the Constitution and laws of the United States, and it had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over related state law claims. A Notice of Appeal, A-261, was timely filed on October 18, 2012.

ISSUES PRESENTED FOR REVIEW

1. Did the amendments to the New York Sex Offender Registration Act ("SORA") revoke plaintiff-appellant John Doe's right to file a Petition for Relief from registration?

2. Did the 2006 amendment to SORA extend Mr. Doe's duration of registration to a mandatory minimum of 20 years?

3. If the amendments apply to the plaintiff, do they violate his substantive due process rights by extending his duration of registration to a mandatory minimum of twenty years, where at his guilty plea he was specifically promised a maximum of ten years' registration and an opportunity to petition for relief from registration and he can prove he is not dangerous?

4. Does retroactively extending Mr. Doe's duration-of-registration and revoking his right to a Petition for Relief violate procedural due process, where the State has breached Mr. Doe's plea agreement and made the changes without notice or an meaningful opportunity to be heard?

5. Have the increased obligations and restrictions imposed by SORA and related enactments since this Court's decision in *Doe v. Pataki* ("*Doe II*"), 120 F.3d 1263 (2d Cir. 1997) rendered sex offender registration punitive for purposes of the Double Jeopardy and *Ex Post Facto* Clauses?

6. Do the obligations and restrictions imposed by SORA violate plaintiff's fundamental rights to privacy, freedom of movement and freedom from unreasonable searches and seizures, where plaintiff can show he presents no danger to the community?

STATEMENT OF THE CASE

This case presents an as-applied constitutional challenge to the retroactive application of amendments to New York's Sex Offender Registration Act ("SORA") to the plaintiff-appellant, known here by the pseudonym John Doe. When Mr. Doe pled guilty to a single misdemeanor fourteen years ago, the trial court explicitly promised—and the People of the State of New York agreed—that he could petition to be removed from the sex offender registry maintained by the state's Division of Criminal Justice Services ("DCJS"). Mr. Doe was also promised that his registration would automatically end in, at most, ten years. These promises were consistent with the law as it existed at the time of the plea.

But the state defendants, appellees here, broke their promises and violated the plea agreement by erroneously enforcing legislation that (1) purported to revoke Mr. Doe's right to petition the court for relief from registration and (2) extended the duration of mandatory registration to twenty years. They did so having already conceded that Mr. Doe presents

no danger to the community and therefore their retroactive application of the law violated the Due Process Clause because it was without rational basis, let alone narrowly-tailored to achieve a compelling state interest. At the same time, the defendants have enforced or threatened to enforce the numerous additional amendments to SORA after Mr. Doe's plea agreement, infringing on his fundamental rights to privacy and freedom of movement. In the end, all Mr. Doe seeks is to compel the defendants to honor the terms of his plea agreement, which would entail immediately removing him from the registry.

FACTS

A. The Plaintiff-Appellant's History and Characteristics

John Doe is a pseudonym for a 68-year-old Westchester businessman convicted in 1999 of misdemeanor attempted possession of a sexual performance by a child. N.Y. Penal Law §§ 263.16 and 110. Mr. Doe was born and raised in the Bronx. A-72: Attorney Affirmation in Support of Motion for Partial Summary Judgment (hereinafter "Aff."), Ex. E (Doe Affidavit) at 3. He took over a family pipefitting business in 1971 from his father, who passed away in 1980. The business, now operated by Mr. Doe's son, employs approximately 70 people, most of them union pipefitters, in a plant in Queens. Mr. Doe lives with his wife in Westchester County and

helps care for his 98-year-old mother. He has donated about $100,000 to the nursing home where his mother resides. A lounge outside the facility's library recognizes his family's generosity. A-72.

Despite his success, Mr. Doe has been touched by tragedy. His oldest daughter died from AIDS in 1987. Shortly before she died, she gave birth to a baby girl born with the HIV virus. The child was raised by Mr. Doe's other daughter and by her paternal grandmother, with Mr. Doe's assistance and financial support.

Mr. Doe has three grown children and five grandchildren, whom he visits on a weekly basis. The children's parents are fully aware of his conviction. A-73. One of the grandchildren, named after Mr. Doe, was diagnosed with leukemia at the age of 12. With his grandfather's support and a course of chemotherapy, the child was cured by the time he reached 16 in 2009. As a result of his family's experience with cancer, Mr. Doe gave tens of thousands of dollars to CancerCare, an organization providing free support for cancer victims. A-73. Mr. Doe has no prior arrests and has had no subsequent contacts with law enforcement. He has always been in full compliance with all sex offender registration obligations. Because of travel to Florida, his photograph, date of birth, physical description and hometown are published both on the Florida Department of Law Enforcement website,

available at http://offender.fdle.state.fl.us/offender/Search.jsp, and on the federal website maintained by the Department of Justice, *available at* www.nsopw.gov. As discussed below, he must register annually, submit to photographing at a police station every three years, and is subjected to numerous local restrictions on his work and travel.

B. Statutory Framework

The New York Sex Offender Registration Act, codified at Article 6-C of the New York Corrections Law, which includes §§ 168-a through 168-w, took effect on January 21, 1996. In addition, sex offender registration is addressed *inter alia*, in the Public Health Law §§ 2510(7), 1392-a, 1394-a and1394-b, the Social Services Law §§ 365-A(4)(e) and 369-ee(1)(e-1), and the Insurance Law § 4322(b-1). Provisions of SORA material to this action have been amended at least eight times since 1996. Nearly all of these amendments either expanded the pool of offenders required to register or made the conditions of registration harsher.

(1) Overview: Registration, Verification, Risk Level Determination and the *Doe v. Pataki* Litigation

SORA, as amended, requires any New York resident convicted of a sex offense to register and periodically verify his registration with DCJS.

N.Y. Corr. L. §§ 168-a *et seq*. A defendant convicted of an enumerated offense in New York is "certified" by the sentencing judge at sentencing. *See* Corr. L. §§ 168-d (certification requirement), 168-a(2)-(3) (enumerated offenses). All offenders must then register and "verify" by providing ongoing, detailed information to the registry and by appearing in person at a local law enforcement agency. The statute divides offenders into three categories, based on a judicial determination of their risk of recidivism or "re-offense." Corr. L. § 168-l. Mr. Doe has always been in the lowest category, level one.

(2) Duration of Registration

The duration of registration is counted "from the initial date of registration," not the time elapsed since the crime was committed. Corr. L. § 168-h. When passed in 1996, SORA provided that level one sex offenders were required to register for a maximum of ten years, Corr. L. § 168-h (1996 ed.), and could file a Petition for Relief seeking early removal from the registry, Corr. L. § 168-o (1996 ed.).

In January of 2006, the Legislature passed S. 6409 as Chapter 1 of the Session Laws of 2006. This amendment extended the duration of registration for level one offenders from ten to twenty years. *See* 2006 Sess. Laws of New York Ch. 1, § 3.

(3) Relief from Registration

The original enactment of SORA—still in force at the time Mr. Doe pleaded guilty—contained a sensible provision permitting "any sex offender" to petition the sentencing court for relief from all registration requirements. Corr. L. § 168-o (1996 ed.). The provision read, in pertinent part:

> Any sex offender required to register pursuant to this article may be relieved of any further duty to register upon the granting of a petition for relief by the sentencing court.

Id. There was no limitation on the timing or frequency of such a petition.

In 1999, two weeks after Mr. Doe's plea, the Legislature enacted a bill that arguably limited the availability of the Petition for Relief. 1999 Sess. Laws of New York Ch. 453, § 18. The amended law, effective January 1, 2000, *id*. § 29, stated that the Petition for Relief was available to offenders who had already "been registered for … ten years." *Id*. § 18. In order to obtain relief under this version of the law, the petitioner had to show his "risk of repeat offense and threat to public safety is such that registration or verification is no longer necessary." *Id*; *see also* Corr. L. § 168-o(1) (2000 ed.).

The Petition for Relief provision was amended again in March 2002. 2002 Sess. Laws of New York Ch. 11, § 22. The 2002 amendments were silent with respect to level one and level two offenders, stating only that previously classified high-risk offenders could petition for relief from registration after a minimum of 13 years. Corr. L. § 168-o(1) (2003 ed.).

As a result of the amendments, the post-2006 registration requirements are vastly different from those in effect when Mr. Doe pled guilty. When the plea agreement was entered, existing law required a ten-year *maximum* duration of registration, which could be reduced by a successful Petition for Relief. Now, level one offenders affected by the amendments must register for twenty years.

(4) Community Notification

As a level one offender, Mr. Doe is not presently listed on the New York state sex offender website. However, Mr. Doe is listed, with his picture, date of birth and other identifiers, on the federal website, *available at* http://www.nsopw.gov/, and on Florida's website, *available at* http://offender.fdle.state.fl.us/offender/Search.jsp, as a result of his travel to that state.

Under the original enactment, publication of information about low-risk offenders was done in only two rather limited ways. First, DCJS was

authorized to share information with other sex offender registries, but had to "require that no information included in the registry shall be made available except in the furtherance of the provisions of this article." Corr. L. § 168-b(2) (1997 ed.). Second, DCJS was directed by statute to set up a "900" number that would charge callers to obtain information about registrants. Corr. L. § 168-p. This system came with meaningful statutory protections. Callers were required to identify themselves and provide not only a name but also a date of birth or exact address for the offender about whom they were seeking information. A preamble warned callers that they could be recorded, must be over 18, and were not to misuse the information.[1] The cost of the call was borne by the caller.

In September 2004, the Legislature abolished the fee to use the call-in number. *See* 2004 N.Y. Session Laws Ch. 361. In August 2005, the Legislature expanded community notification to include the Department of Health and the Department of Insurance so that low-risk offenders could be prevented from obtaining insurance for erectile dysfunction treatments. 2005 N.Y. Session Laws Ch. 645 § 6, *adding* Corr. L. § 168-b(2)(b). In June 2006, the Legislature added language to Corr. L. 168-l(6)(a) specifying

[1] The original SORA included a provision for a civil action with fines against "any person or group of persons [] engaged in a pattern or practice of misuse of the '900' number." Corr. L. § 168-p(3) (1997 ed.).

that police could publish information and photographs relating to low-risk offenders to "any entity with vulnerable populations related to the nature of the offense committed by such sex offender." Specifically, with respect to level one offenders, local law enforcement agencies were invited to

> disseminate relevant information which may include a photograph and description of the offender and which may include the name of the sex offender, approximate address based on sex offender's zip code, background information including the offender's crime of conviction, modus of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information.

2006 Session Law Ch. 106, *amending* Corr. L. § 168-l(6)(a).

Subsequently, some municipalities have listed level one offenders on their own separate internet sites.[2] It is unclear whether local law enforcement agencies have any duty to accurately reflect an offender's alleged "modus of operation" or "type of victim targeted." Thus, for example, in child

[2] *See*, *e.g.*, http://www.co.orange.ny.us/content/1162/1372/1490/default.aspx (accessed January 9, 2013); http://www.tocny.org/Portals /0/Police/COMMUNITY%20NOTIFICATION.pdf; http://www.icrimewatch.net/results.php?AgencyID=54667&SubmitNameSearch=1&OfndrLast=&OfndrFirst=&OfndrCity=albany&AllCity=.

pornography possession cases such as Mr. Doe's, local police routinely distribute the offender's photograph with a statement that he was a convicted sex offender with multiple child victims under 12 years old, but without specifying that the actual offense was attempted possession of child pornography that occurred 14 years ago.

Public dissemination of information about low-risk offenders was again expanded in 2008, 2008 N.Y. Session Laws Ch. 67, to enable social networking sites to request information "that would enable [them] to prescreen or remove sex offenders from [their] services[.]" Corr. L. § 168-b(10) (2009 ed.).

(5) Affirmative Obligations of Low-Risk Registered Offenders

In addition to public dissemination of personal information, low-risk offenders are subject to obligations and restrictions in New York and nationally due to their registered status. The penalty for failing to comply with any aspect of this complex regulatory scheme is a felony—a federal felony, if done in interstate—even if the underlying offense was a misdemeanor. Corr. L. § 168-t; 18 U.S.C. § 2250. Offenders must register as an initial matter and verify by mail every year. Corr. L. §§ 168-f(1), 168-f(2)(a). Since 2005, low-risk offenders have been required to appear in

person every three years at their local law-enforcement agency to be photographed. Corr. L. § 168-f(2)(b-3) (2006 ed.). Low-risk offenders must update their registration and pay a ten dollar fee, within ten days of any change in:

- address,
- accounts with internet access providers,
- internet identifiers, or
- enrollment, attendance, employment or residence at in any institution of higher education.

Corr. L. § 168-f(4).

(6) Additional Restrictions on Low-Risk Offenders

Restrictions on registered sex offenders have dramatically increased since SORA's initial 1996 enactment 1996.[3] State law prevents Mr. Doe from:

- working on an ice cream truck, Corr. L. § 168-v;
- receiving certain public health benefits, *see* New York Public Health Law § 2510(7), New York Social Services Law § 365-A(4)(e) & 369-ee(1)(e-1); and
- receiving certain health insurance benefits available to others, *see* N.Y. Ins.Law § 4322(b-1); Corr. L. § 168-b(2)(c).

[3] *See e.g.* A-91: Aff. Ex. E (DCJS List of County and Municipal Residency Restriction Laws); *but see, e.g.*, *Terrance v. City of Geneva*, 799 F.Supp.2d 250 (W.D.N.Y. 2011) (striking down local residency restriction).

The latter provision of the insurance law denies registered offenders health insurance for erectile dysfunction treatments. Ins. Law. § 4322(b-1).

Additionally, local ordinances place onerous residency and other restrictions on Mr. Doe. As the state probation department wrote:

> Recent state regulations combined with local laws and ordinances … have made it very difficult for sex offenders to obtain housing in many urban settings as well as suburban and rural areas. … [D]ue to residency restriction laws, sex offenders are barred from residing in several communities across the state.

New York State Division of Probation and Correctional Alternatives, *New York State Probation Sex Offender Management Practitioner Guidance*, at 36 (July 2009), *available at* http://dpca.state.ny.us/pdfs/sompractitionerguidanceluly2009.pdf (accessed March 13, 2013). A summary of such restrictions, published by defendant DCJS in 2009, shows *inter alia,* that as a low-risk registered sex offender, Mr. Doe --

- must sign a special verification form upon moving into Dutchess County;
- may not use a park in the Village of Middleport;
- may not work near a bowling alley in the Town of Hamlin;
- must have moved out of areas within 2000 feet of parks in the Village of East Rochester by February 9, 2010; and
- may not live within 500 feet of the property line of a park in Nassau County, placing Long Island's uniquely beautiful public beaches near New York City out of reach.

A-91: Aff. Ex. E. This is just a small sample of the 26 pages of provisions compiled by DCJS, virtually all of which were passed since 2007. While some of the restrictions are triggered by conviction, most are triggered by registration and thus, unless limited to moderate- or high-risk offenders, directly affect where Mr. Doe can live, work, and recreate.

In all, Mr. Doe is prohibited from living in parts or all of at least 34 municipalities and five counties throughout the state. He is prohibited from working in parts of two counties—Saratoga and Washington—and may not work in parts of the Town of Rochester. He is prohibited from entering areas otherwise open to the public in Orange County and two other municipalities.

(7) Enforcement

At the time Mr. Doe entered his guilty plea, violations of SORA's reporting requirements were punished as misdemeanors for the first offense and D felonies for subsequent offenses. Corr. L. § 168-t (1999 ed.). The punishments were increased in 2007, so that the first offense is now a felony punishable by up to three years in prison. 2007 Session Laws Ch. 373. Around the same time, a new federal statute, the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, made it a federal crime

punishable by a maximum of ten years imprisonment to fail to register or update registration after traveling interstate. *See* 18 U.S.C. § 2250(a).[4]

[4] The Adam Walsh Act, Pub. L. 109-248, § 2, states its statutory purpose is to "protect the public from sex offenders and offenders against children" and that it was passed "in response to the vicious attacks by violent predators against" seventeen children who were murdered by "predators" between 1989 and 2005. *Id*. § 102 ("Declaration of Purpose").

(8) Summary of Material Changes to SORA Applicable to Level One Offenders

	At time of plea bargain	As currently in effect
Availability of Relief from Registration	Available	Not Available
Duration of Registration	10 Years Maximum	20 Years Minimum
Access to Community Notification of Low Risk Offenders	Only via fee-based 900 number	Disseminated to local police, who further disseminate to "vulnerable populations" at their discretion; dissemination to social networks, Dep't of Health, Dep't of Finance and Health Insurers and camps. No fee for special telephone number.
Information Disseminated About Low Risk Offenders	(1) Presence in the registry and (2) that he presents a low risk of re-offense	Police have discretion to publish photograph, "modus of operation" and "type of victim targeted." Federal website aggregates and republishes any out-of-state information.
Photographing and in-person appearances	Not required	Mandatory every three years
Penalty for first offense failure to register	State misdemeanor	State and federal felony
Restrictions on Movement	None (known)	Numerous local restrictions on residency, employment and use of public facilities

C. Prior Legal Proceedings

The Underlying Conviction and Sentence. John Doe pled guilty on August 17, 1999 to one count of attempted possession of a sexual performance by a child under New York Penal Law §§ 263.16 and 110, an A

misdemeanor. *See* A-38. Doe had downloaded six images allegedly depicting child pornography onto an office computer at his business in Queens. A-19: Compl. ¶ 55; A-121, ¶ 2 (Doe Affidavit).

At the time of Mr. Doe's guilty plea and sentence, the sentencing judge promised a sentence of three years of probation, a $90 mandatory surcharge, and a certificate of relief from civil disabilities. A-41: 8/17/99 Tr. at 8. Sex offender registration was expressly discussed. The parties stipulated—and the Court found—that Mr. Doe had no risk factors and therefore would be assessed at level one, the lowest risk for re-offense under SORA, Corr. L. §§ 168-a *et seq.*:

> The Court: Just for the record, your client, counsel, stipulates to zero total number of points to be assessed?
>
> [Prosecutor]: Yes, your honor.
>
> [Defense Counsel]: Yes.
>
> The Court: Level one with respect to registration requirements. Do you want to say anything on your client's behalf?

A-40-41: 8/17/99 Tr. at 7-8.

The issue of relief from registration, available under the law as it existed at the time, Corr. L. § 168-o (1999), was also expressly addressed.

The court acknowledged that initial registration was mandatory, but assured Mr. Doe that he could return to petition the court for relief from registration:

> The Court: …I have indicated to [defense counsel] that I will allow the lead [sic] to petition me as to registration, reporting requirements, and released relief at some future point, I am going to do that up front. I told you everything that is going to happen. Did anyone promise you anything different to get you to plead guilty at this time?
>
> Defendant: No.

A-39-40: 8/17/99 Tr. at 6-7.

The Court also made clear that the registration requirement was *part of* the sentence imposed, i.e. part of the punishment for the crime to which Mr. Doe pled guilty. The SORA risk level was determined right between the imposition of the special assessment and the granting of "Article 23," i.e. relief from civil disabilities:

> The Court: Three years probation, $90 in surcharges assessed, can he pay today the mandatory surcharge?
>
> [Defense Counsel]: Today.
>
> The Court: Risk level one article 23 granted.

A-41.

The Petition for Modification. Just over ten years later, Mr. Doe petitioned in New York State Supreme Court, Queens County for a

modification of his risk level under Corrections Law § 168-o, which had been amended several times. A-44: Aff. Ex. B (Sealed Petition under Corrections Law § 168-o) (hereinafter "Petition"). The Petition was filed with Mr. Doe's original sentencing judge, who had been sitting in New York City Criminal Court at sentencing, and had personally promised Mr. Doe an opportunity to petition for relief after sentencing. A-122: Aff. Ex. F ¶ 11. However, on his own motion, the judge transferred the Petition to New York City Criminal Court. *Id.*

Mr. Doe's Petition sought downward modification of his level one status, which had been suggested in the Eastern District of New York's decision in *Woe v. Spitzer*, 571 F.Supp.2d 382 (E.D.N.Y. 2008). *Woe* had stated that "all sex offenders … are afforded the statutory right to petition a court for an order modifying the level of notification. With respect to level one offenders, an adjustment of the risk level below level one would necessarily relieve the offender from any registration requirement." *Id.*, at 389 (citations omitted). Without questioning Mr. Doe's assertion that he posed no risk to the community, the Court held that modification from risk level one to risk level zero was not possible: "there is no provision in the statute to modify his level one classification." A-81-82. The court did not consider the availability of a Petition for Relief, whether Mr. Doe was

dangerous, whether SORA's amendments could be applied retroactively to Mr. Doe, or any related Constitutional questions which had been raised in the Petition.

The Complaint and Mr. Doe's Risk of Danger. Mr. Doe filed the Complaint in this case on May 26, 2011, alleging Constitutional claims grounded in the state's breach of the plea agreement. The Complaint alleged that retroactive application of the SORA amendments to Mr. Doe violates the federal Due Process and Equal Protection Clauses, the Fourth Amendment prohibition against unreasonable searches and seizures, the *Ex Post Facto* Clause, the Double Jeopardy Clause and similar provisions in the New York Constitution.

The Complaint also alleged that Mr. Doe is not and never was dangerous. It presented evidence that Mr. Doe had been repeatedly assessed by a noted expert on the treatment of sex offenders (referred to herein as "the Expert"). The New York State Department of Probation assigned the Expert to treat Mr. Doe after the conviction. The Expert found that Mr. Doe scored zero points on each of two separate actuarial risk assessments. *See* A-65-66: Aff. Ex. B [Petition Ex. C at 7-8 (zero points on Vermont Assessment of Sex Offender Risk and Stable-2007)]. In a report in 2009, the Expert concluded:

> Mr. [Doe] participated in this assessment in order to re-assess his potential risk factors for re-offense. The Actuarial Assessment tools used in this assessment indicate that Mr. [Doe] is a low risk to re-offend. The instant offense occurred almost 10 years ago and there were no reported relapses during that time.
>
> …It is my professional opinion that Mr. [Doe] is a low risk to re-offend based on his prior progress in treatment, a period of over 10 years since his offense, ongoing family support, positive stability in his life and his willingness to ongoingly discuss his prior misuse of the computer.

See A-63-64: Aff. Ex. B [Petition Ex. C at 5-6]. Defendants moved to dismiss, arguing that the Complaint was untimely, sued the wrong defendants, was barred by the Eleventh Amendment, and failed to state any Constitutional claims. The district court reached the Constitutional claims but found them without merit. This appeal followed.

SUMMARY OF ARGUMENT

Mr. Doe's continued inclusion in the Sex Offender Registry violates both the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment because he is not dangerous and is entitled to relief under the statutes in effect at the time he pled guilty. Even if SORA is not punitive, the amendments do not apply retroactively to Mr. Doe. If the amendments were read to bar Mr. Doe's Petition for Relief, they would remove important procedural protection against the unwarranted inclusion in

the registry of non-dangerous offenders. Similarly, if the amendments are read to extend Mr. Doe's duration of registration, they would upset Mr. Doe's rights under his plea agreement without notice or an opportunity to be heard in violation of the basic principles of procedural due process. Moreover, the classification used to determine Mr. Doe's continued inclusion in the registry violates the Equal Protection Clause of the Fourteenth Amendment.

Alternatively, we argue that the amendments to SORA have made it punitive. Accordingly, the increase in registration from a discretionary ten years to a mandatory twenty years violated both the *Ex Post Facto* and the Double Jeopardy Clauses by increasing the punishment for Mr. Doe's misdemeanor after it had been completed. Finally, the newly enacted restrictions on Mr. Doe's movement and the requirement that he appear in person for photographing every three years – under threat of felony prosecution – amount to a violation of his fundamental rights to privacy, travel, and freedom from unreasonable searches and seizures. As a result, the court below erred by granting summary judgment to the defendants and this court should reverse the decision below.

ARGUMENT

I. The Defendants' Retroactive Application of the SORA Amendments to Mr. Doe Violates Substantive Due Process

The Due Process Clause of the Fourteenth Amendment protects against deprivations of "life, liberty or property, without due process of law." U.S. Const. Amend. XIV. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (*quoting Zinermon v. Burch*, 494 U.S. 113, 125 (1990)).

As discussed in further detail below, the Due Process Clause prevents the defendants from retroactively applying the SORA amendments to Mr. Doe in a number of different ways. First, it requires a presumption that the amendments do not apply to him in the first place. § A, *infra*. Second, if the amendments are applied retroactively, they infringe on his fundamental rights and are not narrowly tailored to a compelling government interest. § B, *infra*. Third, even if the amendments do not infringe Mr. Doe's fundamental rights, retroactive application violates substantive due process

because, in light of his plea agreement, it is not rationally based and is unreasonable. § C, *infra*.

A. The SORA Amendments Are Not Explicitly Retroactive and Therefore Do Not Apply to Mr. Doe

(1) Statutes Are Presumed Not to Be Retroactive

The Due Process Clauses protects individuals' freedom from the constant threat of unanticipated government action:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994), *quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). Specifically, "[t]he Due Process Clause ... protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf, 511 U.S. at 266*.

The risk of unfairness and arbitrary government action is particularly acute with respect to retroactive statutes, which "present[] problems of unfairness that are more serious than those posed by prospective legislation,

because [they] can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). In fact, "[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 270. Furthermore,

> retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Landgraf, 511 U.S. at 266. Sex offenders are a textbook example of an "unpopular group" that is the target of ceaseless political pressure. In light of these concerns, the Supreme Court has long held that a statute will not be applied retroactively, "whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Landgraf*, 511 U.S. at 272, *quoting Chew Heong v. U.S.*, 112 U.S. 536, 559 (1884).[5]

[5] The New York courts apply the same presumption against retroactivity. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998).

(2) The Relevant Provisions of the Amendments Are Not Explicitly Retroactive as Applied to Mr. Doe

The defendants rely on amendments enacted in 1999, which changed the level one registration requirement from a ten year maximum to a ten year minimum, 1999 Sess. Law News N.Y., Ch. 453 §§ 11, 18 (S. 6100), and in 2002, which appeared to restrict the Petition for Relief to certain level three offenders, 2002 Sess. Law News of N.Y., Ch. 11 § 22 (S. 6263-A). But nothing in the text or legislative history of these amendments indicates the Legislature intended them to apply to retroactively. On the contrary, in both sets of amendments the Legislature explicitly declared when the statute would come into effect and identified certain provisions that did apply retroactively. The 1999 specifies:

This act shall take effect on the first day of January next succeeding the date on which it shall have become a law; provided, however that the amendments made to subdivisions 2 and 3 of section 168-a of the correction law by sections one and two of this act shall apply to persons convicted of an offense committed prior to such date who, on such date, have not completed

service of the sentence imposed thereon.1999 Sess. L. News N.Y., Ch. 453 § 29 (S. 6100).[6]

Similarly, the legislative history of the 2002 amendments indicates that the amendments were intended to be prospective, with a few specific exceptions. The Introducer's Memorandum in Support of the 2002 amendments (S6236-A) states:

> Section 24 provides that this act shall take effect immediately with some exceptions. The act only applies to persons convicted of the new misdemeanor crimes added to the list of registerable sex offenses on or after the effective date. However, the act applies to any person convicted of the new felony crimes which were added to the list of registerable offenses prior to the effective date who, on such date, have not completed service of the sentence imposed thereon. Additionally, the provisions relating to a registered sex offender's obligation to provide notice of any change in status as a student or employee of an institution of higher education and those provisions relating to non-resident workers and students become effective on July 1, 2002. Further, the amendments pertaining to assessment of an offender's designation as a sexual predator, a sexually violent offender or a predicate sex offender apply to those individuals for whom an initial risk level determination has not been made as of the effective date of the act and to all offenders who commit an offense on or after the effective date.

[6] The amendment extending the registration period for level one offenders and the petition for early relief are not included in Sections 2 and 3 of 168-a, *i.e.* those sections of the enactment that were intended to apply retroactively.

Introducer's Memo in Support, Summary of Provisions § 24. The limited sections intended to be retroactive exclude the changes in the duration of registration or the availability of a Petition for Relief for level one offenders such as Mr. Doe. Had the Legislature intended such changes to be applied retroactively, it would have so indicated, as it did for several other provisions in the above language. The Legislature chose to state that each set of amendments would become effective in the future and would be applied prospectively, except for certain provisions, which it explicitly stated should be retroactive.

Nothing in the language of the 2006 amendments altered the *status quo* with respect to the Petition for Relief for level one offenders. Since the 2002 amendments were not retroactive as to Mr. Doe they did not affect his right to petition for relief. Therefore, even if this Court finds that the twenty year registration requirement applies to Mr. Doe, he retains his right to a Petition for Relief. This Court should, therefore, examine whether, as applied to Mr. Doe, the relevant amendments would have retroactive effect.

(3) The Post-Plea Amendments Have a Retroactive Effect as Applied to Mr. Doe

When a statute is not explicitly retroactive, before applying the presumption against retroactive statutes, courts assess "whether the new

statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. This Court has instructed that "the determination of whether a statute is impermissibly retroactive ... should be informed and guided by familiar considerations of *fair notice, reasonable reliance, and settled expectations*." *Peralta-Taveras v. Gonzalez*, 488 F.3d 580, n.2 at 584 (2d Cir. 2007) (internal quotations omitted, emphasis added).

As applied to Mr. Doe, the post-plea agreement amendments to SORA clearly operate with retroactive effect, such that they "take[] away or impair[] vested rights acquired under existing laws" on the date when he entered into a plea agreement with the State. *Landgraf*, 511 U.S. at 280, *quoting Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814). Mr. Doe's decision to plead guilty was based on his reasonable expectation that he could rely on (1) existing law, and (2) the People's and court's representations that he would be required to be on the sex offender registry for a maximum of ten years and could petition for early relief. At sentencing, the court explicitly guaranteed that Mr. Doe would have the right to petition for relief from SORA's registration and reporting requirements. A-39-40: 8/17/99 Tr. at 6-7 ("I will allow the lead [sic] to

petition me as to registration, reporting requirements, and released relief at some future point"). The judge then asked, "Did anyone promise you anything different to get you to plead guilty at this time?" *Id*.

This inquiry indicates that the ability to petition for relief was part of the plea agreement, i.e. among the promises made to induce Mr. Doe to give up his right to a trial. The amendments "increase [Mr. Doe's] liability" by obliging him to register longer than he agreed to and punishing him with a felony for failing to do so. They also impair "rights [he] possessed when he acted" (by accepting the plea bargain)—the right to petition for relief and the right to be free of the registration requirements. *See Landgraf*, 511 U.S. at 280.

Furthermore, it cannot be claimed that the law in effect at the time of the agreement was not part of the plea agreement. In *Doe v. Pataki* ("*Doe V*"), 481 F.3d 69 (2d Cir. 2007), this Court considered whether a stipulation between a plaintiff class of sex offenders and the State could be enforced against the State to prevent the retroactive application to the class of amendments to SORA. This Court identified the relevant issue as "whether these recitations [of existing law] are included only for informational purposes to reflect then-current state law … or as binding commitments precluding application of subsequent legislative changes to the Plaintiff

class[.]" *Id.,* at 76. Resolution of this issue turned on whether the recitations were included "as part of a resolution of disputed matters for which the parties had bargained, or only to illustrate the provisions of then-existing state law." *Id*.

This Court held that the parties' bargain was limited to "procedures for conducting redetermination hearings for level two and level three Plaintiffs and for notifying them of their right to such hearings," *id.*, at 73, and did not include "duration-of-registration or the scope-of-notification requirements." *Id.,* at 77. [7] In contrast, in Mr. Doe's plea agreement the duration of registration and the right to petition for relief were part of the bargain, as shown above. Thus, under the *Doe V* reasoning, because the ten-year maximum duration of registration and the right to a Petition for Relief were part of the bargain of the plea agreement they are subject to enforcement and those amendments to SORA that would require the State to breach its plea agreement should not be retroactively applied to Mr. Doe.

[7] In *Doe V*, this Court was concerned that enforcing the existing law as part of the stipulation would be tantamount to finding that the State had waived significant law-making authority. However, those concerns are not implicated when, as here, the agreement is limited to a single individual and to the specific circumstances of the agreement. This was, of course, not the case in *Doe V* which affected a large class of offenders *vis-à-vis* whom the law would have to remain static in all respects if existing law at the time of the agreement were to be enforced.

As applied to Mr. Doe, the relevant provisions of the 1999, 2002, and 2006 amendments have operated together with retroactive effect. The Court should apply the presumption against retroactivity to the provisions repealing the availability of the Petition for Relief, and hold that the repeal is ineffective as to Mr. Doe. In effect, due process requires the Court to find that the terms of Mr. Doe's plea agreement are not affected by the amendments: Mr. Doe was required to register for a maximum of ten years and Mr. Doe has the right to petition for early relief.[8] He has fulfilled his commitments under the plea agreement. This Court should reverse the district court's decision and order the defendants to fulfill their obligations by immediately removing Mr. Doe from the sex offender registry.

B. Retroactive Application of the SORA Amendments to Mr. Doe Violates His Fundamental Rights under the Due Process Clause

(1) Legal Framework

Assuming, for the sake of argument, that the amendments are explicitly retroactive and apply to Mr. Doe, their retroactive application violates Mr. Doe's fundamental rights to privacy and freedom of movement.

[8] Of course, given that Mr. Doe was required to register for only a maximum of ten years and that has already been registered for more than ten years, the question of early relief is moot.

Moreover, as applied to Mr. Doe, the enactments are not supported by a rational basis, as required by the Due Process Clause. *See* § C, *infra*.

Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). These rights and interests include those that are either (1) "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. at 721 or (2) "implicit in the concept of ordered liberty." *Id*. When legislation infringes such a right or liberty interest courts apply heightened scrutiny to the challenged legislation, *id.*, at 720, requiring it to be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). If no fundamental right is implicated, substantive due process requires only that legislation be rationally related to a legitimate government interest. *Washington v. Glucksberg*, 521 U.S. at 728.

When a statute applies to conduct that took place before its enactment, retroactive application of the law must be justified independent of prospective application: "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Pension Benefit Guaranty Corporation v. RA Gray & Co*., 467 US 717, 730 (1984), *citing Usery v.*

Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976); *see also Mojica v. Reno*, 970 F.Supp. 130, 169 (1997) ("With retroactive legislation, there must be an independent rationale for retroactivity. A purpose that supports a law's prospective characteristics is not sufficient, in itself, to support retroactiv[ity].").

Here, retroactive application of the SORA amendments to Mr. Doe unconstitutionally infringes on his fundamental rights of privacy and travel. Heightened scrutiny should be applied.

(2) SORA Violates Mr. Doe's Rights to Privacy in Intimate Affairs, Privacy of Personal Information and Freedom of Movement and Travel

Intimate Affairs. Substantive due process protects an individual's right to be free from government regulation of his or her intimate life. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). In *Lawrence v. Texas*, 539 U. S. 558 (2003), the Supreme Court noted that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id*. at 573-74, citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) . The Due Process Clause afforded the *Lawrence* petitioners the "full right"—a fundamental right—to engage in

homosexual relations "without intervention of the government." *Lawrence*, 539 U.S. at 578.

New York's SORA violates this fundamental right by denying insurance coverage—both public and private—for drugs, procedures or supplies for the treatment of erectile dysfunction to individuals required to register as sex offenders. *See* N.Y. Ins. Law § 4322(b-1) and Corr. L. § 168-b(2)(c). Denying all insurance coverage for treatment of erectile dysfunction places an unconstitutional burden on the fundamental right to freely engage in legal, protected sexual conduct. *See Skinner v. Oklahoma*, 316 U.S. 535 (1942) (fundamental right to procreation requires strict scrutiny of forced sterilization law).

SORA's prohibition on insurance coverage is not narrowly tailored to any government interest. It is far too attenuated from the state interests in protecting the public from sex offenders and detecting crime to justify the burden on Mr. Doe's right to privacy. The prohibition on insurance coverage bears no relationship to registerable offenses that include no actual sexual activity, such as attempted possession of child pornography. Nor does it have any effect on the wide range of sexual offences that can be perpetrated regardless of erectile dysfunction. The insurance prohibition unjustifiably burdens Mr. Doe's well-established right to engage in perfectly

legal sexual conduct, including sexual activity within the marital relationship.

Privacy of Personal Information. SORA's notification requirements also violate Mr. Doe's privacy interest in preventing the disclosure of his personal information. According to the Third and Sixth Circuits, the right to prevent the disclosure of private information is included in "the constitutional right to privacy only when disclosure would 'implicate a fundamental liberty interest,' such as the interest in preserving personal security or bodily integrity." *Paul P. v. Verniero*, 170 F.3d 396, 402 (3d Cir. 1999), *quoting Bloch v. Ribar*, 156 F.3d 673, 683-84 (6th Cir. 1998).[9] Incidents of harassment and physical threats against individuals who are registered sex offenders are well documented. *In Doe v. Pataki* ("*Doe I*"), 919 F.Supp. 691 (S.D.N.Y. 1996), the district court found that sex offenders had shown –

> that the injuries they will suffer are not speculative, for instances of irreparable harm have already been documented. Individuals registered with local authorities pursuant to the Act have

[9] In *Paul P.*, the Third Circuit addressed a facial challenge to New Jersey's sex offender registration statute. In that case, the court recognized a privacy interest in preventing the disclosure of personal information, but found that it did not rise to the level of a fundamental right and was overridden by a compelling government interest. *Paul P.*, 170 F.3d at 404. *Paul P.* is distinguishable from the instant case because while *Paul P.* addressed a facial challenge, the challenge here is as-applied.

> faced public ridicule and harassment, have lost their jobs, and have been threatened with physical harm.

Id., at 698. The danger posed by inclusion in the registry indicates that a fundamental liberty interest in preserving personal security or bodily integrity is implicated by SORA's amended notification requirements, which not only make personal information more readily available, but also require active distribution of personal information to relevant populations within the community. *See* 2006 Session Law Ch. 106, *amending* Corr. L. § 168-l(6)(a). Consequently, the interest in nondisclosure of personal information infringed by SORA falls within the scope of the constitutional right to privacy.

Freedom of Travel. Courts have recognized that substantive due process protects the right to freedom of movement and travel. A state violates this right when legislation (1) actually deters travel, (2) impedes travel as its primary objective, or (3) uses a "classification system which serves to penalize the exercise of" the right to travel. *Attorney Gen'l of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citing cases). This Court has also recognized a fundamental "right to *intrastate* travel, or what we sometimes will refer to as the right to free movement." *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (emphasis added).

SORA requires that registrants appear in person to be photographed every three years. This provision alone burdens Mr. Doe's freedom of movement. Under federal law, it is a crime for an offender to fail to register or update registration after traveling interstate. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 18 U.S.C. § 2250(a). As a result of travel while on probation, Mr. Doe is now listed on the sexual offender website in Florida and on the national Internet registry, even though he is not on New York's website. In this context, the mere fact of registration deters interstate travel and freedom of movement because any movement expands the geographical reach of the stigma and reputational harm associated with registration.

Moreover, Mr. Doe is subject to increasingly numerous local ordinances in New York that restrict and deter intrastate travel. For example, Mr. Doe cannot live in large swaths of five counties and 34 communities in the State of New York merely as a result of his inclusion in the registry. *See* A-91: NYS Sex Offender Residency Restriction Laws. He may not work in many locations in the Counties of Saratoga and Washington. He may not visit parks and playgrounds in Orange County, or the Towns of Rochester or Sheldon. His inclusion in the registry thus unconstitutionally restricts his freedom of movement and travel.

C. Even if SORA Does Not Violate Mr. Doe's Fundamental Rights, Retroactive Application of the Amendments to Mr. Doe Cannot Survive Any Level of Scrutiny

A statute that is unconstitutional under the deferential standard of rational basis review must also be unconstitutional under the more exacting standard of heightened scrutiny. Therefore, because the SORA amendments are not rationally related to a legitimate government objective *when retroactively applied to Mr. Doe*, they are unconstitutional under any level of scrutiny as to Mr. Doe.

(1) Retroactive Application of the Amendments is Unreasonable and Irrationally Violates Mr. Doe's Plea Agreement

All legislation must be justified by a rational basis, but *retroactive* laws must "meet a burden not faced by legislation that has only future effects." *Pension Benefits Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984), *discussing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 16-17 (1976). In particular, retroactive application of legislation that results in a state's breach of a prior agreement has been found unreasonable: "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate

course would serve its purposes equally well." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 30-31 (1977).

In *Doe v. Pataki*, 427 F.Supp.2d 398 ("*Doe IV*") (S.D.N.Y. 2006), *rev'd on other grounds*, 481 F.3d 69 (2d Cir. 2007), Judge Chin observed that "even where legitimate reasons exist for legislative abrogation of state contracts, courts have found such legislation unreasonable if the problem sought to be resolved existed at the time the state entered the contract." *Doe IV*, 427 F.Supp.2d at 411. An agreement with a sex offender was entitled to the same weight as any other:

> The State cannot be permitted to unilaterally re-write the contract and ignore a judgment of the Court merely because the contract was with individuals convicted of serious crimes. [The State] knew the nature of plaintiffs' crimes when they entered into the Stipulation in 2004, and nothing has changed since then. Nor can defendants avoid their obligations under the Stipulation merely because they represent the State, for governmental bodies—no less than private citizens—have an obligation to honor contracts and consent decrees to which they are a party.

Id., at 400. *See also S. California Gas Co. v. City of Santa Ana,* 336 F.3d 885, 895-96 (9th Cir. 2003) (finding legislation unreasonable where harms redressed by legislation were anticipated when city entered contract: "[c]hanged circumstances and important government goals do not make an

impairment reasonable if the changed circumstances are 'of degree and not kind'.").

Abrogation of Mr. Doe's plea agreement is clearly a "drastic impairment," given the magnitude of both Mr. Doe's and New York State's interest in the plea agreement. *See Santobello v. New York*, 404 U.S. 257, 264 (1971) ("[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.") (citations omitted);. Furthermore, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court indicated that promises made by a court when entering a plea should be viewed similarly to those made by prosecutors during negotiations and highlighted the unfairness of retroactively applying changes in the law that upset the terms of a plea agreement:

> The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like Jideonwo and St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose §

> 212(c) relief, a great number of defendants … agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations," to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief.

Id., at 323-24 (holding that provisions barring discretionary relief as to convicted aliens did not apply to aliens who had already pled guilty when the provisions were enacted).

In *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996), the Supreme Court "reaffirmed that the government cannot ignore the common-law principle that a party responsible for the changed circumstances that make performance of its contractual obligations impossible cannot evade responsibility by pointing to the changed circumstances, or by asserting that the contract did not specify what should occur in that event." *Doe V*, 481 F.3d at 84, 85 (Pooler, J., dissenting) *citing Winstar,* 518 U.S. at 904-910 . Here, the State itself was responsible for the changes in circumstances—i.e., changes in the law—that caused it to breach the plea agreement and was aware, at the time of the plea agreement, of the circumstances that those changes were meant to address. When it agreed to Mr. Doe's plea, the State was aware of the purposes behind SORA and the nature of the requirements

it imposed on sex offenders. Indeed, the State knew or should have known the 1999 amendments to SORA were pending in the Legislature, but nonetheless (1) chose not to address the effect on Mr. Doe of future amendments to SORA; (2) set forth explicitly the duration of registration that would be applied to Mr. Doe, *viz.* a maximum of ten years; and (3) acceded to the court's guarantee "up front" that Mr. Doe could petition for early relief. The state attempt to breach these agreements – to in effect take back the plea agreement – is just the sort of arbitrary, capricious and irrational government behavior that the Due Process Clause guards against.

(2) A Mandatory Minimum of Twenty Years' Registration is Irrational Because Mr. Doe is Not Dangerous

New York's SORA was enacted in order to "protect the public" from "the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior." 1995 Session Laws of New York Ch. 192, § 1 ("Legislative Purpose or Findings"). *See also* A-234 (*Doe v. Cuomo*, 11-CIV-02545-CBA-JO, slip. op. at 28 (E.D.N.Y. Sep. 28, 2012)).

While this is a reasonable government objective, it is not rationally served by the application of SORA to Mr. Doe. It has never been suggested that Mr. Doe poses any danger to the community. In fact, under the SORA

standards, Mr. Doe is and always was at zero risk for recidivism and not a danger to the community. A-40 (People stipulate zero points assessed under SORA). Mr. Doe's conduct during his three years of probation and every year since confirms that he is not, and never was, a danger to the public.

SORA is intended to protect the public, but for legislation to be reasonable and rationally related to this end there must be a real, identifiable danger. *Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537, 541 (N.Y. 1956).[10] As applied to Mr. Doe, SORA is neither reasonable nor rationally related to protecting the public from a real danger, because Mr. Doe is not a danger to the community.

While the State might argue it is entitled to paint with a broad brush and the SORA scheme might unwittingly capture some non-dangerous registrants, this argument goes too far in Mr. Doe's case. This Court did

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[10] In *Defiance Milk Products*, the Court of Appeals found:

> [D]ue process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to *some actual and manifest evil*. And even though a police power enactment may have been or may have seemed to be valid when made, later events or later-discovered facts may show it to be arbitrary and confiscatory.

Id. at 541 (citations omitted, emphasis added). The statute at issue in that case was challenged under the Due Process Clauses of both the New York and the federal constitutions. New York's Due Process Clause is coextensive with that of the federal constitution. *See Central Sav. Bank in City of New York v. City of New York*, 280 N.Y. 9, 10 (N.Y. 1939) ("The clauses are formulated in the same words and are intended for the protection of the same fundamental rights of the individual and there is, logically, no room for distinction in definition of the scope of the two clauses.").

find, in *Doe II,* that the notification provisions of SORA that were in effect at the time were "reasonably related to the nonpunitive, *prospective* goals of protecting the public and facilitating law enforcement." *Doe II*, 120 F.3d at 1281-82 (emphasis added). However, in arriving at this conclusion the court emphasized that those required to register could petition for early relief:

> [A]lthough the act technically covers a large number of offenses, including some ... that appear to present far less compelling need for community notification, the Act also contains a number of moderating provisions capable of greatly limiting the extent of notification or even relieving the offender from notification altogether. ... Moreover, the Act allows any offender ... to petition the court for relief from its requirements.

Id. at 1282. The ability to petition for early relief was an essential ground for the Doe II panel's decision that it was reasonable for the Legislature to paint with a broad brush: it is self-evidently reasonable to accept that SORA may be applied to persons who pose no danger of re-offense or any other kind of harm when such over-inclusion can be remedied through early relief. By contrast, it is not reasonable to accept such over-inclusion when a person will be subject to the wide-reaching SORA requirements for twenty or more years with no available remedy to correct the inclusion of that person within the scope of the statute.

II. The Defendants Violated Mr. Doe's Right to Procedural Due Process by Retroactively Applying the SORA Amendments to Him Without Notice and an Opportunity to Be Heard

Mr. Doe has been denied procedural due process because (1) his duration of registration was extended from ten to twenty years without notice or an opportunity to be heard and (2) his right to petition for relief was arguably revoked.[11] The district court erroneously found that the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe* ("*Connecticut Department*"), 538 U.S. 1 (2003) "forecloses any contention that Mr. Doe is entitled to further process in this case." A-241. The Supreme Court's decision in *Connecticut Department* rests on the fact that under the Connecticut statute current dangerousness is irrelevant: "the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law." *Id.,* at 7. Analogously, the district court concluded that current dangerousness was irrelevant under New York SORA because "all individuals convicted of enumerated sex offenses, regardless of their risk level, must register for at least twenty years." A-241.[12]

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[11] Note that, as set forth above, we do not concede that Mr. Doe has no right to petition for relief; we make this argument in the alternative, assuming but not conceding that the repeal was effective as to Mr. Doe.

[12] It is worth noting that the District Court's interpretation of SORA effectively denies the right to appeal to all offenders who were initially

But the district court in this case erroneously considered SORA as it exists today, not the scheme under which Mr. Doe pled guilty. At the time Mr. Doe pled guilty, the sentencing court had the power to grant relief from "any further duty to register" at any time. Corr. L. § 168-o (1996 ed.). Thus, unlike the Connecticut law requiring automatic registration, the New York law was discretionary. If the offender asked to be relieved from registration, the sentencing court could make a determination as to whether such relief was justified. Thus, unlike Connecticut, New York implicitly required an assessment of *current* dangerousness.

Second, by retroactively applying the SORA amendments to Mr. Doe, the State infringed on a protected liberty interest without due process. Mr. Doe has a protected liberty interest in the terms of his plea agreement,[13] which provided to him individually the right to petition for relief and the right to end his registration after ten years. Procedural due process guarantees are triggered when "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." *Paul v. Davis*, 424 U.S. 693, 711 (1976). Not only was Mr.

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assessed as level one because they can neither seek downward modification nor petition for relief.

[13] The district court misinterpreted Mr. Doe's claim as "'the right to continuation of the ten year registration requirement,'" A-240, which was found not to exist in *Woe v. Spitzer*, 571 F.Supp.2d 382, 389 (E.D.N.Y. 2008).

Doe's plea agreement recognized by state law, but his opportunity to petition for relief was also explicitly guaranteed by the sentencing court.

The terms of Mr. Doe's plea agreement were nullified without prior notice to Mr. Doe and with no opportunity to be heard. It thus violated his elementary right to procedural due process. "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential," *Doe III*, 3 F.Supp.2d at 456, 469 (S.D.N.Y. 1998) (emphasis added). Furthermore, the petition for relief provided procedural due process protections that were recognized as necessary in *Id.* at 470-72. Thus, the State has violated Mr. Doe's right to due process as guaranteed by the Fourteenth Amendment.

III. Applications of the SORA Amendments to Mr. Doe Violates Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The level of scrutiny courts apply to ensure that state-created classifications comply with this guarantee differs depending on the nature of the classification. Classifications involving a

"suspect or quasi-suspect class," or impacting certain fundamental constitutional rights, are subject to heightened equal-protection scrutiny. *See Artway v. Attorney General*, 81 F.3d 1235, 1267 (3d Cir. 1996). Other classifications, however, need only be rationally related to a legitimate government goal. *See Chapman v. United States*, 500 U.S. 453, 465 (1991) (applying rational basis test to classification based on nature of offense).[14] For the reasons set forth in § I.C, *supra*, there is no rational basis to treat a demonstrably non-dangerous offender who was promised a maximum of ten years of registration different from any other citizen after those ten years have expired. Thus Mr. Doe's continued inclusion in the registry violates the Equal Protection Clause. *See Connecticut Department*, 538 U.S. at 9 (Souter, J. concurring) ("the line drawn by legislatures between offenders who are sensibly considered eligible to seek discretionary relief from the courts and those who are not is, like all legislative choices affecting individual rights, open to challenge under the Equal Protection Clause").

[14] We submit that persons convicted of attempted child pornography are a "suspect or quasi-suspect class," although we acknowledge that the Second Circuit, in a cursory opinion, appears to have ruled otherwise. See *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999). The elements that make the traditional suspect classes suspicious – a "history of purposeful unequal treatment" and "political powerlessness," *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) – are applicable, in our view, to sex offenders as a group and especially to child pornography offenders.

IV. Application of the SORA Amendments to Mr. Doe Would Violate His Rights under the *Ex Post Facto* and Double Jeopardy Clauses Because the Amendments Have Rendered the Overall Scheme Punitive

The amendments to SORA outlined above have been so pervasive that it has been rendered punitive. Therefore, the extension of the duration of registration to twenty years would constitute additional punishment and violates the Double Jeopardy and *Ex Post Facto* Clauses.

We are aware that this Court found that New York's SORA, as it existed sixteen years ago, was not punitive and therefore did not raise *ex post facto* or double jeopardy concerns. *See Doe II*; *see also Smith v. Doe*, 538 U.S. 84 (2002) (retroactive application of Alaska SORA did not violate *ex post facto* because law was not punitive). However, as the chart on page 16, *supra*, demonstrates, the amended New York Sex Offender Registration Act is vastly more intrusive now than when it was first enacted. When this Court in 1997 reversed Judge Chin's holding that the Act's notification provisions constituted "punishment," it noted that the question of was "not free from doubt." *Doe II*, 120 F.3d at 1265. We ask the Court to reapply its analysis to SORA as it exists today and as it applies to Mr. Doe. We submit that the result of such an analysis would be a conclusion that today's SORA is a punitive statute and thus its extension to twenty years to Mr. Doe is invalid.

In assessing whether a statute is punitive, a court first must ask whether the legislature intended it to be criminal or civil. *Doe II*, 120 F.3d at 1274, *quoting U.S. v. Ursery*, 518 U.S. 267, 288 (1996). If the law is intended to be civil, the party claiming it is criminal may still prevail if it demonstrates by "the clearest proof" that sanctions imposed are "so punitive in form and effect as to render them criminal despite [the legislature's] intent to the contrary." *Id*. The latter inquiry is "highly context specific." *Id*. at 1275.[15] This two-part test applies to the analysis under both the *Ex Post Facto* Clause and the Double Jeopardy Clause. *Id*.

A. Legislative Intent

In *Doe II*, the Second Circuit concluded that there was "ample evidence that the New York legislature intended the SORA to further non-punitive goals." *Doe II*, 120 F.3d at 1276. The court relied, in part, on the

[15] Courts frequently analyze the "useful guideposts" to determine whether a statute is punitive in effect that were initially set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *see Smith v. Doe*, 538 U.S. 84, 97 (2003). The *Martinez-Mendoza* factors are "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69.

fact that for low-risk offenders, "the sole method of public access to registration information is through the special '900' phone number." *Id*. at 1278. That of course has changed – the phone number is now free; notification is also made through law enforcement, social network providers, health insurers, the Department of Health and the Department of Finance. *See* Facts § B.6 *supra*. The Court in 1997 also pointed to the fact that the law had "many procedural safeguards" protecting the use of the information. *Id*. Two of the most important safeguards – a requirement that callers identify themselves, and the availability of the petition for relief – are now gone. Moreover, the Court acknowledged that the statute amends New York's Correction Law and "comments of some legislators reveal their animosity toward, and even a desire to punish, sex offenders." *Id*. at 1277. Thus the basis for the Court's conclusion that the statute was not intended to be punitive has, at least in part, been repealed. The result, we submit, is that a statute whose non-punitive intent was "not free from doubt" in 1997 has been amended so thoroughly that it is now clearly punitive in intent.[16]

[16] The circuit did not address the duration of registration, which was ten years for both low- and moderate-risk offenders at the time. However, the way duration of registration was structured is further evidence that the statute was punitive: each registrant had to be registered not for a period of time after his crime – which would be a rational proxy for dangerousness – but rather for a set period, which seems more akin to discharging a prison sentence. Thus someone convicted of Mr. Doe's crime in 1993 and

B. Punitive Form and Effect

Even assuming SORA was intended to be non-criminal, the amendments since 1999 have rendered it overwhelmingly punitive in its *effects* on Mr. Doe.

(1) Amended SORA imposes an "affirmative disability or restraint"

The district court misinterpreted *Doe II*'s finding that "SORA's requirement that 'sexually violent predators' register in person every ninety days … was not 'sufficiently severe to transform an otherwise nonpunitive measure into a punitive one.'" A-248, *quoting Doe II*, 120 F.3d at 1285. But we argue not that in-person verification alone renders SORA punitive, but that the restraint imposed, in conjunction with other SORA requirements, makes the SORA scheme, as a whole, punitive in effect. The *Mendoza-Martinez* factors are not evaluated independently, but cumulatively.

Further, the *Smith* court's conclusion that Alaska's statute did not impose a disability was based in large part on the fact that it did not require in-person verification, finding that it therefore did not impose state

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sentenced to three years probation would first register in 1996 and be required to register (absent a successful petition) until 2006. But someone convicted in 1996 would also get off the registry in 2006. The Legislature never explained any rationale for this distinction, which is further evidence of its punitive intent, especially now that the relief from registration provision is arguably no longer available.

supervision as would probation or supervised release. *See Smith*, 538 U.S. at 101. In contrast, in *Maine v. Letalien*, 985 A.2d 4 (Maine Sup. Ct. 2009), decided after *Smith*, the Maine high court found that quarterly in-person verification amounted to supervision and was an affirmative disability. *See id.*, at 18. Although in-person verification is less frequent under New York's SORA, it still imposes ongoing state supervision amounting to a "disability or restraint."

(2) SORA is "excessive in relation to its regulatory purpose."

The district court's reasoning with respect to this factor is unpersuasive. Not only does the court summarily dismiss any differences between New York's and Alaska's SORA, but in so doing it focuses on the wrong issue. The district court should have asked whether the *increased* burdens from retroactive application to level one offenders are excessive. *See Letalien*, 985 A.2d at 22-23.

New York's amended SORA contains sufficient distinctions from the 1996 SORA and from Alaska's SORA so that *Smith* and *Doe II* are not dispositive. First, the *Smith* Court found that notification was not excessively wide because "the notification system is a passive one: An individual must seek access to the information." 538 U.S. at 105. Similarly, this Court

pointed to the fact that "for level-one offenders, only public access, not affirmative dissemination of information to the community, is available[.]" *Doe II*, 120 F.3d at 1282. This Court further emphasized, "Notification is limited for persons unlikely to re-offend." *Id*. However, SORA now requires active dissemination of the level one offender information. 2006 Session Law Ch. 106, *amending* Corr. L. § 168-l(6)(a). In *Doe II*, the court found that distribution to community organizations was not excessive, however, that distribution did not apply to level one offenders. Appellant submits that proactive distribution of information is excessive vis-à-vis level one offenders, who are unlikely to endanger the community or reoffend.

Second, in concluding that duration-of-registration was not excessive for level one offenders this Court relied on the protections provided by the Petition for Relief. In discussing the moderating effect of "limitations on notification," the Court stated, "[s]imilarly, a first time offender who can demonstrate that he does not present a danger to the community may petition the court to be relieved from the Act's requirements." *Doe II*, 120 F.3d at 1282. In fact, this Court emphasized this point repeatedly, stating, "we note that an offender required to register can petition the court to be relieved of that duty," *id.* at 1285, and "offenders subject to [the Act's] notification and registration requirements may petition to be relieved from these burdens,"

id. at 1278. Unlike the district court, the *Doe II* panel concluded that the Petition for Relief was an important safeguard in ensuring SORA's requirements for level one offenders were not "excessive relative to its regulatory purpose."

The Court has never analyzed the myriad additional burdens and restrictions on offenders catalogued above. It did not assess the effects of the restrictions on residency, employment and use of public facilities, *see* Facts § B.5-B.8 *supra*, the harsh penalties for failing to comply with registration requirements—subjecting a misdemeanant to a possible felony charge upon the first failure to comply, or limitations on offenders' access to health care benefits and housing. Coupled with the doubling of the duration of registration and the repeal of any ability to be removed from the registry, they provide "the clearest proof" that a formerly non-punitive scheme has evolved to become punitive, at least when applied to Mr. Doe. "[E]ven if sex offender registration schemes initially were constitutional, serially amended sex offender registration schemes…are not. Their emergence demands reexamination of the traditionally held assumptions that defined original registration laws as civil regulations." Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1130-32 (2012) (summarizing

cases holding that amendments to sex offender registration laws have rendered them punitive for *ex post facto* purposes).[17] For the same reasons, application of the amendments to Mr. Doe violates the Double Jeopardy Clause.

V. The District Court Erred in Finding that SORA's Verification Requirements and Restrictions on Movement Do Not Implicate the Fourth Amendment

Finally, we submit that Mr. Doe's continued inclusion in the registry violates his right to be free from unreasonable searches and seizures. The district court rejected this claim, finding that the requirement – under threat of felony prosecution – that Mr. Doe appear every three years to be photographed and the local restrictions on his movements did not amount to a Fourth Amendment seizure. The district court distinguished SORA's verification requirement from the conditions of post-arraignment release that were considered a seizure in *Murphy v. Lynn*, 118 F.3d 938 (2d Cir.1997). It

[17] Five state supreme courts—Alaska, Indiana, Maine, Maryland and Ohio—have recently determined that their states' versions of sex offender registration have become punitive and therefore may not be applied retroactively to offenders whose crimes were complete prior to enactment. *See John Doe v. Department of Public Safety and Correctional Services,* Case No. 125, Md. Ct. App., March 4, 2013 (slip op.); *Ohio v. Williams*, 952 N.E.2d 1108 (Ohio Sup. Ct. 2011); *Maine v. Letalien*, 985 A.2d 4 (Maine Sup. Ct. 2009) (reading the Maine Constitution as co-extensive with the U.S. Constitution for purposes of Ex Post Facto analysis); *Wallace v. Indiana*, 905 N.E.2d 371 (Ind. Sup. Ct. 2009); *Doe v. State*, 189 P.3d 999 (Ala. Sup. Ct. 2008).

highlighted that the *Murphy* order required eight court appearances and restricted interstate travel, relying on *Burg v. Gosselin*, 591 F.3d 95 (2d. Cir. 2010), for the proposition that it is, *inter alia*, "[t]he number of appearances [that] … bear on whether there was a seizure." A-257, *quoting Burg v. Gosselin*, 591 F.3d at 98. However, this is a misreading of *Burg*. In that case, this Court found that a non-felony summons requiring a single court appearance was not a Fourth Amendment seizure. In *dicta*, the Court did mention that the *Murphy* order required eight appearances but it went on to say, "The number of appearances *may* bear upon whether there was a seizure." *Burg v. Gosselin*, 591 F.3d at 98 (emphasis added). Thus the number of appearances is not a necessary consideration. Even if it were, requiring ongoing, triennial, in-person verification for, arguably, a minimum of twenty years is far more comparable to the pre-arraignment order in *Murphy* than the mere summons in *Burg*.

Further, the district court failed to consider a key factor in this Court's reasoning in *Burg*: "Burg's alleged offense was an infraction, and the summons thus does not impose the burdens … that are imposed when '[a] person fac[es] serious criminal charges.'" *Id.*, at 99, *quoting Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring). In *Albright*, Ginsburg stated:

> A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often [required] … [to] seek formal permission from the court (at significant expense) before exercising … [his] right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.
>
> … [A] defendant released pretrial is … still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges.

Albright, 510 U.S. at 278-79 (Ginsburg, J., concurring). In contrast to *Burg*, SORA's verification requirements impose the burdens attendant with facing serious criminal charges because any failure to comply with almost any aspect of SORA is a felony. Corr. L. § 168-t. In fact, as in *Albright*, SORA requires registrants to appear upon state command, adversely affects employment prospects and causes reputational harm, and imposes financial and emotional strain associated with stigma plus.

Finally, the district court rightly analyzed SORA's Fourth Amendment intrusions under the "special needs" test for suspicionless intrusions. *See Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005). Such

intrusions are justified only when they "serve some special need distinct from normal law enforcement needs." *Id*. at 661. The relevant inquiry concerns the statute's primary purpose, rather than ultimate objective. *Id*. at 667-68.

Here, the district court erred in finding that, *as applied to Mr. Doe*, SORA's intrusions have as an "immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation." A-258, *quoting Nicholas v. Goord*, 430 F.3d at 663. The court mentions two possible special needs that SORA might serve: solving past and future crimes, and preventing recidivism. A-258. However, neither of these purposes is served in Mr. Doe's case. It is has been established that this was Mr. Doe's first offense, so detecting past crimes is irrelevant. It has also been established that Mr. Doe's conduct since the events underlying his guilty plea has been without reproach and that he poses no risk of re-offence. Therefore, detecting future crime and deterring recidivism are also irrelevant with respect to Mr. Doe. Thus, as applied to Mr. Doe, SORA's intrusions serve no "special need." SORA's stated purposes are enhancing public safety and promoting law enforcement, neither of which constitute "special needs."

Further, even if SORA's intrusions serve a special need, courts must balance the state interest in that special need against the nature and extent of the privacy intrusion "to determine whether it is reasonable within the meaning of the Fourth Amendment." *See Nicholas*, 430 F.3d at 669. The district court argued that SORA's verification requirements are less intrusive than requiring a blood sample to collect DNA. While, this may be true in the abstract, the privacy intrusion under SORA is much greater than under statutes requiring blood samples to collect DNA because that genetic information is not distributed to the public. In contrast, SORA makes information gathered easily available and results in proactive distribution of information, even for level one offenders. Further, the state's interest in collecting this information is at its lowest point with respect to level one offenders, and especially as applied to Mr. Doe, who is not dangerous and presents no risk of re-offense. Thus, contrary to the district court's finding, SORA's intrusions are not reasonable within the meaning of the Fourth Amendment.

CONCLUSION

For the reasons set forth above, the decision below should be REVERSED.[18]

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[18] In the event plaintiff "substantially prevails," he is entitled to attorneys fees and other costs under 42 U.S.C. § 1988.

[19] The Attorneys acknowledge the assistance of Kate Fletcher in preparing this Brief.

Certificate of Compliance

In accordance with Fed. R. App. P. 32(a)(7), the body of the annexed Memorandum of Law contains 13,665 words according to the word count provided by the word-processing system used to prepare it.

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