2015 ME 3

STATE OF MAINE
KENNEBEC, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. KEN-14-5

JOHN DOE 46

Plaintiff-Appellant

v.

STEPHANIE P. ANDERSON, et al.

Defendants-Appellees

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT
DENYING APPELLANT'S MOTION FOR TEMPORARY RESTRAINING ORDER
AND OTHER INJUNCTIVE RELIEF

BRIEF OF DEFENDANTS-APPELLEES

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Doe 46, convicted in Maine of possession of sexually explicit material in 2003, is subject to registration for ten years pursuant to Maine's Sex Offender Registration and Notification Act (SORNA) of 1999. He has never registered.

The Plaintiff

Doe 46 presents the unique situation of a SORNA challenger whose conviction for possession of sexually explicit material has been the subject of litigation he has initiated in multiple public arenas without a pseudonym. The history of the litigation surrounding Doe's current and sought after professional licenses and criminal conviction is set out in some detail in the Decision and Order of Single Justice of the Supreme Judicial Court. *[Doe] v. Board of Bar Examiners* (Levy, J.) (App. at 118-138).[1] A summary follows.

Doe began acquiring child pornography over the Internet in the fall of 2001. *Id.* (App. at 119). Although he initially claimed that he had attempted to obtain child pornography only once, the Maine Computer Crimes Task Force found over 80 digital photographs on his computer, including "photographs of naked children, children engaged in sexual contact with other children, and two separate series of nine photographs of female children or adolescents having sex with adult men," and the single Justice found that he again

[1] To comply with the Court's interim Order of April 4, 2014 on Plaintiff's Motion to Seal Appendix, standard citation form for case names is not used. Instead, citations are to the redacted Opinions and Orders in the Appendix.

attempted to purchase videotapes of child pornography in early 2002. *Id.* (App. at 119-121).

On January 29, 2003, Doe, then and now a licensed physician, entered into a Consent Agreement with the Maine Board of Licensure in Medicine. *Id.* (App. at 121); *Consent Agreement* (App. at 139-42). As part of the Consent Agreement, Doe agreed to restrict his practice of medicine to adults over the age of 18, with any alteration of that restriction being "in the sole discretion of the [Board of Licensure]." (App. at 140).

One day later, on January 30, 2003, Doe was convicted on his plea of guilty in the Superior Court of a single count of possession of sexually explicit material (child pornography) in violation of 17 M.R.S.A. § 2924(2)(A), (B) (Supp. 2002) (Class D) (now codified at 17-A M.R.S. § 284(1)), and was sentenced to 364 days imprisonment, all but 72 hours suspended. *Judgment and Commitment,* (App. at 143); *see also Decision and Order* (App. at 121). Doe was placed on probation for a year, during which time he was required to submit to random searches for pornography, undergo psychological treatment, and restrict his medical practice to patients 18 years of age or older. The Judgment and Commitment form used at the time included a block for the presiding justice to check if SORNA requirements were implicated by a conviction. (App. at 144). At the time of Doe's sentence, SORNA did not require registration for persons convicted of or found not criminally responsible for possession of sexually explicit material; the SORNA block is not checked.

In 2006, Doe asked the Board of Licensure in Medicine to lift the adults-only restriction in place pursuant to the Consent Agreement. The Board denied that request, and Doe appealed the matter to the Superior Court. The Superior Court affirmed the Board's denial in November 2006. *[Doe] v. Board of Licensure of Medicine* (Marden, J.) (App. at 146-51). Doe then appealed the matter to the Law Court, which too affirmed the Board's decision, in November 2007. *[Doe] v. Board of Licensure in Medicine* (App. at 152-54).[2]

In the meantime, Doe attended law school and passed the Maine bar exam. (App. at 125) In February 2007, his application for bar membership was denied by the Maine Board of Bar Examiners on "moral character" grounds. *In re [Doe]* (App. at 155-56). Doe appealed the denial to the Supreme Judicial Court. The single Justice affirmed in a lengthy opinion, concluding:

> I attribute substantial weight to the pattern suggested by the instances of [Doe's] lack of candor, as well as to his resistance to treatment recommendations, because both bear directly on the level of trustworthiness required of members of the bar. Accordingly, I conclude that [Doe] has failed to prove that he possesses the good moral character necessary to practice law in the State of Maine.

(App. at 137).

On or about July 18, 2006, Doe received a notice from the State Bureau of Identification advising him of his duty to register as a ten-year registrant. Through counsel, Doe challenged the notification. *Doe's Supplemental Memo, Exhibit A* (App. at 46-48). Counsel to the Bureau subsequently advised the

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[2] The actions taken by the Board of Licensure in Medicine with respect to Doe's license are publicly available on a state agency's website; the summary published on the website includes a link to one of the court decisions [website address omitted].

Bureau that there might be a gap in SORNA into which Doe fell, and that if there were, a statutory amendment would be in order. *Doe's Supplemental Memo, Exhibit B* (App. at 50-51).

If any gap existed, it was without question resolved by Public Law 2009, Ch. 365, An Act to Improve the Use of Information Regarding Sex Offenders, which applied retrospectively to January 1, 1982. P.L. 2009, ch. 365, §§ B-15, B-22. The Bureau again advised Doe of his duty to register on or about February 27, 2012. (App. at 157). This suit followed.

Relevant Legislative History[3]

The Legislature enacted the comprehensive "Sex Offender Registration and Notification Act of 1999" to expand upon the existing law, and to bring Maine into compliance with federal guidelines. 34-A M.R.S.A. §§ 11201-11252 [Chapter 15] (Pamph. 1999) ("SORNA of 1999"); P.L. 1999, ch. 437 (effective September 18, 1999), L.D. 1721, Summary (119th Legis. 1999); *State v. Haskell*, 2001 ME 154, ¶12, 784 A.2d 4, 10. Chapter 15 did not initially contain language regarding the purpose of the Act, but the previously enacted Chapters 11 and 13 (the latter with its explicit purpose clause at § 11101) remained in effect. Chapter 15 applied to offenders sentenced on or after its

[3] Additional history, including that of the "Sex Offender Registration Act," 34-A M.R.S.A. §§ 11001-11004 (Supp. 1992) (SORA, Chapter 11); P.L. 1991, ch. 809, § 1 (effective June 30, 1992) and the "Sex Offender Registration and Notification Act," 34-A M.R.S.A. §§ 11101-11144 (Supp. 1996) (SORNA, Chapter 13); P.L. 1995, ch. 680 (effective July 4, 1996); is set out in *Doe v. District Attorney*, 2007 ME 139 ¶¶ 10-19, 932 A.2d 552, and *State v. Letalien*, 2009 ME 130, ¶¶ 4-12, 985 A2d 4.

effective date of September 18, 1999; Chapters 11 and 13 remained applicable to persons sentenced after June 30, 1992 and through September 17, 1999.

SORNA of 1999 introduced definitions of "sexually violent predator," as distinguished from "sex offender"; and "sexually violent offense," as distinguished from "sex offense." The Legislature specifically enumerated the crimes falling within the categories of "sex offense" and "sexually violent offense," and defined "sex offenders" and "sexually violent predators" based on the category to which the individuals' convictions had been assigned. Registration was required for ten years or life, depending on the category. SORNA of 1999 expanded the list of offenses subject to registration. P.L. 1999, ch. 437; 34-A M.R.S.A. §§ 11203(5)-(8), 11225 (Pamph. 1999). At the time of its enactment, SORNA of 1999 did not require registration for persons convicted of possession of sexually explicit material, Doe 46's crime.

SORNA of 1999 contained language indicating that the "court shall determine at the time of conviction if a defendant is a sex offender or a sexually violent predator." 34-A M.R.S.A. § 11222(1) (Pamph. 1999). Despite this additional language, the statute retained the language imposing a duty on the Department of Corrections, county jails, state mental health institutions, and courts to advise offenders of the duty to register. 34-A M.R.S.A. § 11222(2) (Pamph. 1999). The legislation retained the language in Title 17-A M.R.S.A. § 1152(2-C) and amended 17-A M.R.S.A. § 1204(1-C) only to update references to SORNA of 1999. The State Bureau of Identification was authorized to suspend an individual's registration requirement under certain circumstances,

presumably even if there had been a court "determination" and/or the registrant had been ordered by the court to satisfy the requirements set forth in SORNA of 1999 as "part of a sentence." 34-A M.R.S.A. § 11225(3) (Pamph. 1999). Significantly, the court had no authority under SORNA of 1999 to set aside or modify a registration obligation.

Pursuant to SORNA of 1999, persons convicted and sentenced in other jurisdictions of registerable offenses, coming to Maine to establish a "domicile," attend school, or work, were required to register. There was no requirement of a determination by a Maine court and no corresponding provision in the Criminal Code applicable to these persons. 34-A M.R.S.A. §§ 11223-11224 (Pamph. 1999). In 2001, the Legislature applied the requirements of SORNA of 1999 retrospectively to 1992, and repealed the earlier registration laws. P.L. 2001, ch. 439, Part OOO (effective Sep. 21, 2001). This legislation updated references in the Criminal Code without making substantive changes. 17-A M.R.S.A. §§ 1152(2-C), 1204(1-C) (Supp. 2001). This amendment also significantly expanded the types of convictions subject to registration for the period 1992-1999, and specified registration deadlines for those persons sentenced from June 30, 1992 through September 17, 1999. These deadlines applied to persons not previously required to register and/or notified of the duty to register pursuant to one of the earlier Acts, as well as to those required initially to register under one of the repealed provisions—but not yet to Doe 46, who was sentenced in 2003. The legislation required these persons to register by September 1, 2002, unless sooner notified to do so. 34-A M.R.S.A.

§ 11222(2-A) (Supp. 2001). Because of the expanded coverage of the statute, for some registrants there was *no court determination regarding registration status*; these persons did not learn of the obligation to register at sentencing; there was no discretion exercised by a court. The duty to comply with the statute was accordingly not "part of" any sentence.

"An Act to Clarify the Sex Offender Registration and Notification Act of 1999" was enacted as emergency legislation by P.L. 2001, ch. 553 (varying effective dates; relevant provisions effective March 25, 2002). The technical changes made by this bill included clarification as to when certain offenders had to register and how the registration periods were to be calculated. L.D. 2022, Summary (120th Legis. 2001). Significantly for this case, the technical amendment to 34-A M.R.S.A. § 11222(2-A) recognized that (as in Doe 46's circumstances), *no court determination was necessary* to trigger the registration requirement for those persons sentenced from June 30, 1992 to September 17, 1999:

> *Notwithstanding subsection 1* [determination by court], a person who has been sentenced on or after June 30, 1992 but before September 18, 1999 for a sex offense or a sexually violent offense shall register...with the bureau by September 1, 2002 if the duty to register has been triggered under subsection 1-A, paragraph A, B or C [how and when different sentencing options trigger duty to register], unless sooner notified in writing of a duty to register under subsection 1-A, paragraph A, B or C by the bureau, the department or a law enforcement officer, in which case the person shall register within 10 days of notice.

34-A M.R.S.A. § 11222(2-A) (Supp. 2001) (emphasis provided).

Doe's crime became a registerable offense when the Legislature next amended SORNA of 1999 in 2003 with "An Act to Amend the Sex Offender Registration and Notification Laws." P.L. 2003, ch. 371 (effective Sep.13, 2003). The Legislature thus brought the crimes of possession and dissemination of sexually explicit materials within SORNA's coverage. 34-A M.R.S.A. § 11203(6)(A) (Supp. 2003).[4] In that same bill, and following the Supreme Court's approval of the practice in *Smith v. Doe*, 538 U.S. 84 (2003), the Legislature required the State Bureau of Identification to maintain an Internet site providing for expanded public access to information concerning registrants. 34-A M.R.S. § 11221(9).

In a substantial bill implementing the recommendations of the Commission to Improve the Sentencing, Management and Incarceration of Prisoners and the Commission to Improve Community Safety and Sex Offender Accountability, the Legislature made several changes affecting SORNA of 1999. P.L. 2003, ch. 711, Parts B & C (effective July 30, 2004).[5] The references to "sex offender" and "sexually violent predator" throughout the law were replaced with "ten-year registrant" and "lifetime registrant." The Legislature authorized the State Bureau of Identification's to suspend an offender's duty to register during periods when the person is domiciled and remains outside Maine. 34-A M.R.S.A. § 11225(2-A) (Supp. 2004).[6] The legislation added several new definitions to SORNA of 1999 ("residence," "another state," "registrant,"

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[4] These offenses are now listed at 34-A M.R.S. § 11203(6)(B).
[5] The bulk of these amendments did not affect SORNA.
[6] This provision is now at 34-A M.R.S. § 11225-A(5), and applies to verification.

jurisdiction" and "tribe"), and amended the definition of "domicile." 34-A M.R.S.A. § 11203 (Pamph. 2006). Section B-13 of the bill amended 17-A M.R.S.A. § 1152(2-C) to delete the language that provided "*As part of a sentence*, the court shall order [persons convicted of covered offenses] to satisfy all requirements set forth in" SORNA with the following: "*At the time the court imposes a sentence*, the court shall order [persons convicted of covered offenses] to satisfy all requirements set forth in the Sex Offender Registration and Notification Act of 1999." 17-A M.R.S.A. § 1152(2-C) (Supp. 2006) (emphasis provided).

The next changes came with the next legislative session, with a number of technical revisions to SORNA of 1999. P.L. 2005, ch. 423 (effective September 17, 2005). The most significant change was the Legislature's extension of SORNA's applicability to persons sentenced on or after January 1, 1982. 34-A M.R.S.A. § 11202 (Pamph. 2006). A corresponding subsection was added to section 11222, identifying the registration deadlines for persons brought within the ambit of the Act by the extended lookback to 1982. 34-A M.R.S.A. § 11222(2-C) (Pamph. 2006), amended by P.L. 2009, ch. 365, Pt. B § 15. Logically, for these persons, as for Doe 46, the obligation to register was not made known to them or imposed at the time of sentence and was not imposed as "part of" any sentence, and there was no "court determination" regarding registration. The court was not given any discretion to set aside registration for this group.

In 2006, the Legislature made only a minor change to the law, to allow law enforcement agencies to maintain websites that include information concerning registrants, while making it plain that only the State Bureau of Identification was authorized to maintain the official state sex offender registry. P.L. 2005, ch. 545 (effective August 23, 2006), 34-A M.R.S. § 11221(11), (12).

The next significant changes came in 2009. An Act to Improve the Use of Information Regarding Sex Offenders, enacted as P.L. 2009, ch. 365 (effective September 12, 2009), allowed certain persons retroactively subject to registration (those sentenced January 1, 1982 through June 29, 1992) to be relieved of the registration requirements if they met the statutorily-established criteria. *Id.*, § B-3; 34-A M.R.S.A. §11202-A (Supp. 2010). The legislation eliminated all references in the sentencing provisions of the Criminal Code to SORNA. P.L. 2009, ch. 365, §§ A-3, A-4. It made clear that the duty to register attaches when the sentenced person is notified. *Id.*, § B-15; 34-A M.R.S. § 11222(1). This change resolved any doubt that Doe's 2003 conviction required registration.

After the Law Court determined in *State v. Letalien*, 2009 ME 130, 985 A.2d 4, that the retroactive application of quarterly, in-person verification for life to persons previously subject to SORA of 1991 or SORNA of 1995 violated prohibitions against *ex post facto* legislation, the Legislature responded to the Court's concern by significantly reducing the frequency of in-person appearances required for retroactive registrants, modeling Maine's law on the Alaska sex offender verification law approved in *Smith v. Doe*, 538 U.S. 84

(2003). The new law also extended the opportunity for relief created by Chapter 365 to all lifetime registrants retroactively subject to new or expanded registration requirements. P.L. 2009, ch. 570; 34-A M.R.S. § 11202-A. These revisions were subsequently upheld by this Court in the face multiple constitutional claims, including those based on *ex post facto* prohibitions, equal protection, and procedural and substantive due process. *Doe v. Williams*, 2013 ME 24, 61 A.3d 718.

The specific language and history of the statute demonstrates that Doe's crime was added to the list of registerable offenses by P.L. 2003, ch. 371, § 2, which became effective September 13, 2003. 34-A M.R.S.A. § 11203(6)(A) (Supp. 2003), now 34-A M.R.S. § 11203(6)(B). In 2004, the Legislature enacted the following language:

> 2-B. Duty to register for new crimes: For a person otherwise subject to subsection 2-A who has been sentenced for a crime added by an amendment to the definition of sex offense or sexually violent offense in section 11203 since September 1, 2002, if the duty to register has been triggered under subsection 1-A, paragraph A, B or C, that person shall register as a 10-year registrant or a lifetime registrant, whichever is applicable, with the bureau by June 1, 2005.

P.L. 2003, c. 711, § C-21, effective April 30, 2004 (codified at 34-A M.R.S.A. § 11222(2-B)). Doe originally argued in response to the initial notice from the Registry that his registration obligation was not "triggered" by subsection 1-A, paragraphs A, B and C. (App. at 46-48). However, the internal statutory reference to those provisions is more appropriately read, not as a requirement for determination by the court, but reference to an event—the imposition of sentence or release from custodial portion of a sentence—that triggered the

obligation to register. Doe's obligation was triggered because he was no longer in custody. Any remaining doubt was removed by the enactment of P.L. 2009, c. 365, § B-15, which added paragraph D to subsection 11222(1-A): "If the events stated in paragraphs A to C have passed, an offender must register within 5 days after having received notice of that duty from a court, the department, the bureau or a law enforcement agency." These amendments applied retroactively to January 1, 1982. P.L. 2009, ch. 365, § B-22.

Procedural History of the Instant Case

Doe 46 initiated this case by filing a Complaint for Injunctive and Declaratory Relief and Motion to Proceed under Pseudonym on April 4, 2012 in the Superior Court, Kennebec County (Docket No. CV-12-24). *Docket Record, Complaint* (App. at 1, 159). After an initial telephone conference on these pleadings, Plaintiff filed a Verified Complaint for Temporary Restraining Order and Other Injunctive Relief with Incorporated Memorandum of Law. (App. at 1-2, 14) This second complaint has been treated as the operative pleading for the purposes of this litigation. Plaintiff's Verified Complaint recited a list of alleged constitutional violations. After a telephone conference on May 4, 2012, the Court denied the Motion for Temporary Restraining Order to the extent it was based on violation of prohibitions against *ex post facto* legislation, afforded Plaintiff an additional opportunity to brief the issues not previously briefed, specifically, bill of attainder and separation of powers, and granted the Motion for Pseudonym. The Court further indicated that the proceedings would be stayed upon issuance of an order on Plaintiff's pending motion, until resolution

by the Law Court of the "Doe" litigation [*Doe v. Williams*, Kenn. Superior Court Docket No. CV-06-113] then awaiting oral argument in the Law Court. *Docket Record* (App. at 2); *Hearing/Conference Record* (App. at 158); *see also Plaintiff's Supplemental Memorandum* (App. at 25-51); *Defendants' Memorandum in Opposition* (App. at 52-63).

After the Law Court's decision in *Doe v. Williams*, 2013 ME 24, 61 A.3d 718, the Superior Court conducted a conference with counsel to determine what legal issues might still remain in Doe 46's case that had not been addressed by the Law Court. Docket Record (App. at 4). The Superior Court allowed the parties to submit supplemental correspondence to the Superior Court to provide updated references with respect to the bill of attainder and separation of powers, and allowed Doe to make a due process argument based on *Doe v. Williams*, 2013 ME 24, 61 A.3d 718. *Correspondence, Merrill to Murphy, J.* (App. at 83-87); *Correspondence, Stern and Smith to Murphy, J.* (App. at 88-89).

The Superior Court found against Doe on all grounds. *Order on Motion for Temporary Restraining Order and other Injunctive Relief* (App. at 6). Plaintiff filed a Motion for Reconsideration, which Defendants opposed. *Docket Record, Motion, Opposition* (App. at 5, 90, 101). The Superior Court denied the request as a reiteration of previous arguments. (App. at 13). No additional findings were requested or made. Plaintiff's appeal to this Court followed. He has briefed issues of procedural due process, bill of attainder, and separation of powers.

STATEMENT OF ISSUES

I. Whether Maine's SORNA of 1999 violates constitutional protections of procedural due process, or requires an "as applied" analysis.

II. Whether Maine's SORNA of 1999 amounts to a Bill of Attainder under Article I, Section 11 of the Maine Constitution or Article I, Section 10 of the United States Constitution.

III. Whether Maine's SORNA of 1999 violates Article III, the Separation of Powers Provision of Maine's Constitution.

SUMMARY OF ARGUMENT

The Superior Court's decision to deny injunctive relief is reviewed for abuse of discretion; factual findings underlying it are reviewed for clear error, and the legal conclusions *de novo*. *Windham Land Trust et al. v. Jeffords et al.*, 2009 ME 29 ¶¶ 40-42, 967 A.2d 690, 702 (internal citations omitted). As with a preliminary injunction, the party seeking the permanent injunction has the burden of establishing the four elements that are a prerequisite to the grant of injunctive relief: 1) irreparable injury will inure to the requestor in the absence of injunctive relief; 2) the injury outweighs the harm to the party opposing the injunction; 3) the public interest will not be adversely affected by granting the injunction; and 4) the party seeking the injunction succeeds on the merits. *Id.* (internal citations omitted). The focus in this litigation has been on the merits of Doe's legal arguments. He failed to make the required showing before the Superior Court, and similarly falls short here.

Doe's procedural due process challenge is simply a repackaging of arguments that have been made and rejected before. In the process of making

his argument, he erroneously attributes legal and factual consequences to the Maine registration requirement.

Maine's SORNA is not an unconstitutional bill of attainder. It does not meet the "functional test" adopted by this Court and the United States Supreme Court.

Maine's SORNA does not violate the separation of powers clause of the Maine Constitution. Classification of convicted sex offenders is not a function assigned to the exclusive province of any one branch of government. In any event, there was never any judicial action with respect to Doe's registration requirement.

ARGUMENT

I. Maine's SORNA of 1999 comports with procedural due process requirements, and Doe's due process challenge does not call for an "as applied" analysis.

Doe claims that he satisfies the "stigma plus" test necessary to establish a procedural due process claim, and that the Superior Court erred by not considering his challenge "as applied." In so doing, he attempts to repackage arguments made and rejected previously, speculates as to factual consequences of registration, and recites a litany of legal consequences he erroneously attributes to Maine's SORNA. (Appellant's Br. at pp. 8-22).

Doe ignores the fact that this Court in *Doe v. Williams*, 2013 ME 24, 61 A.3d 718, specifically upheld the legislative structure of SORNA, which calls for retroactive registration of a group of sex offenders who were not subject to SORNA at the time of their convictions. Plaintiff attempts to repackage the

arguments rejected in *Doe v. Williams* precisely because courts have upheld, against procedural due process claims, legislative structures that require persons who were convicted of certain crimes to register as sex offenders. *See, e.g., CT Dept. of Public Safety, et al. v. Doe,* 538 U.S. 1, 8 (2003) ("States are not barred by principles of 'procedural due process' from drawing such classifications.") (Internal citations omitted). Procedural due process is simply not implicated under the stigma plus test Plaintiff seeks to invoke. Plaintiff has not identified a liberty or property interest that has "attain[ed] this constitutional status by virtue of the fact that [it has] been initially recognized and protected by state law." *Paul v. Davis*, 424 U.S. 693, 710 (1976). Further, he has not identified a "right or status previously recognized by state law [that] was distinctly altered or extinguished." *Id.* at 711. *Doe v. Williams* itself noted that "[o]ther courts have held that sex offender registration requirements are not violations of due process under the stigma-plus test because registration does no more than make the fact of conviction public, just as SORNA of 1999 does here." 2013 ME 24, ¶ 63. As with the plaintiffs in *Doe v. Williams*, Doe 46's "legal status is unaffected by SORNA of 1999." *Doe v. Williams*, 2013 ME 24, ¶ 62, 61 A.3d at 737.

Plaintiff submits a general list of consequences that he claims would flow from registration: "Upon registration, a person becomes liable to laws that would otherwise not be applicable." (Appellant's Br. at 10). Plaintiff misidentifies the catalyst—it is his conviction, not registration, and his

conviction came with all of the due process attendant to criminal proceeding in Maine.

Many of the purported ramifications do not flow from registration or are simply not applicable to this Doe, even as a result of his conviction. For example, Doe references the federal crime of failure to register, in violation of 18 U.S.C. § 2250; this offense does not have, as an element, a Maine registration requirement. *See United States v. Stevens*, 598 F.Supp.2d 133, 144 ("The Court is unaware of any authority that Mr. Stevens must also have been required to register under Maine law for him to be subject to [the federal] SORNA's requirements."), vacated and remanded on other grounds, 132 S.Ct. 1739, 182 L.Ed.2d 525 (2012).

Doe also attempts to invoke residency restrictions: "The State of Maine imposes residency restrictions on offenders," citing 30-A M.R.S. § 3014. (Appellant's Br. at 10-11). In fact, the State does not and no municipality in Maine has the authority to restrict Doe's residence: Maine statute specifically provides that municipal residency restrictions may *not* be premised on an individual's registration status or obligation, and Plaintiff's conviction is not within the listed convictions that would be regulated. 30-A M.R.S. § 3014(2).[7]

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[7] Section 3014(2) provides, in relevant part:

> **Residency restriction ordinance.** A municipality may adopt an ordinance regarding residency restrictions for persons convicted of *Class A, B or C sex offenses* committed against persons who had not attained 14 years of age at the time of the offense. Any such ordinance is limited as follows.
>
> ...
>
> D. *An ordinance may not be premised on a person's obligation to register* pursuant to Title 34-A, chapter 15.

Several other assertions require clarification. Doe attempts to raise the specter of restricted zones by referencing 17-A M.R.S. § 261 (Appellant's Br. at 11), but this statute is unrelated to registration status. Doe also references a requirement of advanced notice before international travel by citing to the Department of Justice's Guidelines for jurisdictions seeking to comply with the federal SORNA (Appellant's Brief at 11).[8] However, this requirement is not part of SORNA of 1999. Finally, Doe claims that the "U.S. Marshals Service has also been given jurisdiction over sex offender compliance." (Appellant's Brief at 11). In fact, while Title 28 U.S.C. § 566(e)(1)(C) authorizes the Service to issue administrative subpoenas for the purpose of investigating sex (and other) crimes, these are federal offenses. 18 U.S.C. § 3486.

Doe calls for an "as applied" analysis, and asserts that he is different, but the information published about this Doe on the Registry website would not differ from that of any other Doe or named registrant, including those before the Law Court in *Doe v. Williams*. The public reprobation that follows conviction of a sex offense—and many crimes—is no doubt unwelcomed by most convicted offenders. However, as with all convicted offenders, these consequences flow from his decision to engage in the criminal conduct and the publicly available criminal conviction based on that conduct. *Smith v. Doe*, 538 U.S. 84, 101 (2003) ("Although the public availability of the information may

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(Emphasis supplied).

[8] See http://ojp.gov/smart/pdfs/final_sornaguidelines.pdf. The Guidelines reference international travel at pp. 53-54. Maine's SORNA of 2013, which Does not apply to Doe 46, incorporates this requirement at 34-A M.R.S. § 11286.

have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, *but from the fact of conviction, already a matter of public record.*") (Emphasis supplied). Doe was convicted of a crime only after being afforded the full panoply of rights guaranteed by the Maine and U.S. Constitutions. Publication of that fact does not violate procedural due process. *CT Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

As with the *ex post facto* challenges to SORNA, the proper analysis is "facial," not "as applied." The same rationale applies. An "as applied" analysis would "result in inconsistent outcomes and unnecessarily invite individuals to challenge the constitutionality of the statute based on their personal circumstances." *See State v. Letalien*, 2009 ME 130, ¶ 34, 985 A.2d 4, 17.

Doe's assertion that SORNA is to blame for any "stigma" fails to find footing particularly in light of the litigation trail he himself has chosen to break and pursue. Doe has litigated, in his name, restrictions placed on his medical license and the denial of his application to the Maine Bar. He has litigated these issues before the Board of Licensure in Medicine, the Maine Board of Bar Examiners, the Maine Superior Court, the Supreme Judicial Court, and the Law Court. In each instance, the decision was public, and the decision was based on Doe's conviction and his own conduct—not registration. The consequences could not have been based on registration, as he has never registered.

II. Maine's SORNA is not a Bill of Attainder.

The Maine Constitution, article I, section 11, and the U.S. Constitution, article I, section 10, prohibit "bills of attainder,[9] which apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *State v. Myrick,* 436 A.2d 379, 383 (Me.1981) (quotation marks omitted). The Law Court has adopted the United States Supreme Court's "functional test" to determine if punishments violate the Attainder Clause. *DaimlerChrysler Corp. v. Executive Director, Maine Revenue Services,* 2007 ME 62, ¶ 35, 922 A.2d 465. Under the functional test, a bill of attainder is a law that (1) inflicts punishment (2) upon an identifiable individual or group of individuals (3) without provision of the protections of a judicial trial. *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468 (1977); *Williams v. Ohio,* 728 N.E.2d 342, 358 (Ohio 2000). Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder. *Communist Party of U.S. v. Subversive Activities Control Bd.,* 367 U.S. 1, 83 (1961). "The Supreme Court has struck down statutes on bill of attainder grounds only five times in the nation's history." *Elgin v. U.S. Dept. of Treasury,* 641 F.3d 6, 19 (1st Cir. 2011). Plaintiff fails to meet any prong of the functional test.

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[9] The U.S. Constitution states, in part: "No state shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts ...." U.S. CONST. art. I, § 10, cl. 1. The Maine Constitution provides: "The Legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts, and no attainder shall work corruption of blood nor forfeiture of estate." ME CONST. art. I, § 11.

Punishment

"The functional test analyzes whether or not a law advances non-punitive purposes." *DaimlerChrysler Corp.*, 2007 ME 62, ¶ 35; *see also State v. Myrick*, 436 A.2d 379, 383 (1981) ("a bill of attainder is penal in nature"). The courts analyze "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475-76. Where the state law has a non-punitive purpose, it is not a bill of attainder. *DaimlerChrysler Corp*, 2007 ME 62, ¶ 36.

In rejecting the *ex post facto* challenge, this Court already has found that *lifetime* registration pursuant to Maine's SORNA serves non-punitive purposes and is not punishment. *Doe v. Williams*, 2013 ME 24 ¶ 42, 61 A.3d at 733. The obligations imposed upon a ten-year registrant such as Doe are insubstantial compared to the quarterly, in-person lifetime verification requirements that concerned the Law Court in *State v. Letalien*, 2009 ME 130, 985 A.2d 4, prior to the Legislature's revision of the law and subsequent review by this Court. The Law Court's holding in *State v. Myrick*, *supra*, is also instructive. There, the Law Court found that the prohibition against possession of a firearm—a constitutional right beyond any entitlement articulated here—when imposed by legislation applied retrospectively, *i.e.*, to convictions occurring prior to the effective date of the prohibition—is not a bill of attainder. *Myrick*, 436 A.2d at 383-4. It is not surprising that courts in other jurisdictions hold that there is no bill of attainder problem where sex

offender registration has been found not to be punishment under an *ex post facto* analysis. *See, e.g., Williams v. Ohio,* 728 N.E.2d at 358; *Artway v. Attorney General of State of New Jersey,* 81 F.3d 1235, 1267 (3rd Cir. 1996) (holding that registration provisions of Megan's Law do not constitute punishment, and therefore do not offend *ex post facto* or bill of attainder clauses); *Cutshall v. Sundquist,* 193 F.3d 466 (6th Cir. 1999) (upholding Tennessee's sexual offender statute against *ex post facto* and bill of attainder challenges on the ground that it was not punitive); *Doe v. Poritz,* 662 A.2d 367, 422 (1995) (statute did not impose punishment for purpose of constitutional challenges under the *ex post facto* and bill of attainder clauses).

Doe's assertion that the potential impact of registration on the ability to practice a profession amounts to punishment finds no footing in his case. Indeed, the Supreme Court in *Smith v. Doe* noted that it has found that specific provisions providing for occupational disbarment are nonpunitive. *Smith v. Doe,* 538 U.S. 84, 100 (2003). Instead, Doe's case gives a face to the holding of the United States Supreme Court in that same case—the consequences flow from the "fact of conviction, already a matter of public record." *Id.* at 101. Doe's medical license has already been restricted, and his application to the Maine Bar was denied—not because he is a registered sex offender—but because of his criminal conviction, the underlying conduct, and, in the case of his bar application, his moral character, as well.

Identifiable Individual or Group

The fact that sex offender registration applies only to sentenced sex offenders does not render it sufficiently specific within the meaning of the bill of attainder clause. *Williams v. Ohio,* 728 N.E.2d at 358. Maine's SORNA applies to a far broader class of individuals than the legislation upheld in *Nixon,* where the law applied to a single individual. *Id.; see also Nixon,* 433 U.S. at 471 n. 31. The bill of attainder clause does not "invalidat[e] every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals." *Nixon,* 433 U.S. at 471.

Judicial Trial

"A law violates this clause only if it establishes a person's guilt legislatively." *Pennington v. Golonka,* 439 Fed.Appx. 553, 554 (7th Cir. 2011), (*citing Nixon,* 433 U.S 425). The registration obligation imposed by Maine's SORNA does not establish guilt. Doe's guilt was established beyond a reasonable doubt when he was convicted, on his own plea of guilty in the Superior Court, after having had an opportunity for trial, with all the rights conferred upon every criminal defendant under the Maine and United States Constitutions. The determination of guilt has previously been made in court. There is no guilt by legislation. Where implementation of the law, as here, is "left to the executive branch" and the judicial branch "determines whether it has been breached," the clause is not violated. *Id.* (sex offender statute). SORNA is not a bill of attainder.

III. Maine's SORNA does not violate the separation of powers clause.

Overview

Doe's "separation of powers" argument was rejected by the Superior Court. Doe did not have a registration requirement at the time of his conviction and sentence. There was no action for the sentencing court to take with respect to the non-existent registration. The Legislature subsequently placed Doe's conviction for possession of sexually explicit materials in that category of crimes that requires registration for ten years; it is a "sex offense" under SORNA of 1999, as amended. The fact that an agency of the State subsequently advised Doe as to what the Legislature had done (by informing him that he now has a statutory obligation to register) does not transform SORNA into a statute that violates the separation of powers clause. ME. CONST. art. III, §§ 1, 2. Executive agencies implement the laws enacted by the Legislature; the Judiciary interprets and applies those laws. Separation of powers does not require abstention from the core functions to be performed by each of the branches of Government.

Doe's separation of powers argument turns on whether the Maine Legislature, by adding a category of crime requiring registration under SORNA, altered a court's sentence. Because registration under the law at the time Doe was sentenced could not have been part of his sentence, and because the registration requirement is not now a "sentence," the separation of powers clause is neither implicated nor offended.

The Constitutional Provisions

Separation of powers of the executive, legislative, and judicial branches is required by Article III of the Maine Constitution:

> **§ 1. Powers distributed**
>
> Section 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.
>
> **§ 2. To be kept separate**
>
> Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

ME. CONST. art. III, §§ 1, 2.

> Because of article III, section 2, the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government. The United States Constitution has no provision corresponding to article III, section 2 of the Maine Constitution.... Rather, at the federal level the separation of powers principle is inferred from the overall constitutional structure.... Under the Maine Constitution ... our inquiry is ...: has the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power.

State v. Hunter, 447 A.2d 797, 799-800 (Me. 1982). The Law Court has explained that "Our approach is akin to one of the tests used by federal courts for determining whether an issue is nonjusticiable as a 'political question': whether there is a 'textually demonstrable constitutional commitment' of the issue to another branch of the government." *Id.* at 800 n.4.

"Judicial jurisdiction implies the power to hear and determine a cause, and ... Congress cannot subject the judgments of [a court] to the re-

examination and revision of any other tribunal or any other department of the government." *United States v. O'Grady,* 89 U.S. (22 Wall.) 641, 647-648 (1874). "The Legislature may not disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers." *Grubb v. S.D. Warren Co.,* 2003 ME 139, ¶ 11, 837 A.2d 117. In particular, "[r]egardless of the propriety of the sentence imposed, ... the judgment of the sentencing justice" cannot be countermanded by the other branches of government. *Rogers v. State,* 528 A.2d 462, 465 (Me. 1987).

Absence of Conflict between the Branches of Government

Doe 46 does not present a viable separation of powers issue because he was not convicted of a crime for which a court could "sentence" him to register. Quite simply, there is no conflict between any judgment or sentence and the amended SORNA legislation. Registration is a subsequent collateral consequence of Doe's conviction and sentence. *Compare State v. Myrick, supra,* (prohibition against possession of firearm by person convicted of crime punishable by one year or more incarceration).

The key to this argument, of course, is the statutes themselves. The parties agree that possession of sexually explicit material was not a registerable offense at the time Doe was sentenced, and that Doe is required to register under the current law. 34-A M.R.S. § 11203(6)(B) (defining "sex offense" to include Doe's crime), § 11222 (duty to register on notice). At the time Doe was convicted and sentenced, the court could not order him to comply with SORNA, because he was not defined as a "sex offender" or "sexually violent predator" by

the Legislature; his crime was neither a "sex offense" nor a "sexually violent offense." 34-A M.R.S.A § 11203(6), (7) (Supp. 2002); *Cf. State v. Johnson,* 2006 ME 35, ¶3, 894 A.2d 489 court required to determine into which category defendant fell). The court had no authority to include satisfaction of SORNA as part of Doe's sentence. Such an issue was not before the court. There is nothing in the record indicating that the presiding justice on January 29, 2003, engaged in any deliberative process or made a decision regarding if or how Doe should register, nor should he have. The Legislature had, four years earlier, eliminated sentencing court's discretionary authority to waive registration for convicted offenders. The sentencing court could not exercise its judgment to select a category—the Legislature had established the categories. P.L. 1999, ch. 437. In Doe's case, neither category applied. Because the presiding judge or justice could not choose that Doe was "a sex offender" *or* a "sexually violent predator," no separation of powers problem exists. In short, the absence of a judicial action (indeed, the legal impossibility of that action), coupled with a subsequent legislatively enacted collateral consequence, does not implicate separation of powers issues.

Registration was not part of Doe's sentence in 2003. As constituted, registration is neither part of a criminal defendant's sentence now, nor is it punitive.[10] Under Doe's view, the judge must make a decision on this issue regardless of the nature of the offense (theft? arson?), and every notice sent by

[10] Certainly Doe's ten-year registration requirement does not create the constitutional concern triggered by quarterly in-person verification for life to which Letalien was subject.

an agency regarding a statutorily created collateral consequence would violate separation of powers. Such an application of the separation of powers clause is absurd, and should not be embraced.

Case law limits the reach of the separation of powers clause. In *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010), Ohio's highest court struck down that state's sex offender reclassification provisions as unconstitutional because they violated the separation of powers doctrine. There, the prior state law required the court to conduct a hearing and to consider a variety of factors in determining how to classify a person convicted of a sex crime for purposes of sex offender registration. That scheme was amended to require reclassification by the state Attorney General based on the nature of the sex crime. The court found that it was a violation of separation of powers for "the attorney general to reclassify sex offenders who have already been classified by court order under former law" under these circumstances. *Id.* at 767. In the present case, Doe was not ever classified as "a sex offender or a sexually violent predator" by a court exercising any discretion; the statute did not contemplate a court hearing comparable to the Ohio process.

Maine's situation falls on the other side of the line, under cases such as *Milks v. Florida,* 894 So.2d 924 (Fl. 2005). There, as here:

> The [statute] neither provides for any predesignation (or preregistration or pre-public-notification) hearing on the issue of an offender's actual dangerousness, nor does it provide the trial court with any discretion on the matter. If a person has been convicted of an enumerated offense, he must be designated by the court as a "sexual predator," and he is automatically subject to the Act's requirements.

Id. at 925 (footnote omitted). There, as here, registration and notification were "dependent only on one's designation as a sexual predator ... which itself did not require a finding of 'dangerousness,' only the existence of a qualifying conviction (or combination of convictions)." *Id.* at n.2. "The [statute] vest[ed] no discretion in the trial courts with respect to determining whether the [statute] should apply to a particular qualifying offender," and therefore no separation of powers issue arose. *Id.* at 925-26. The scheme involved in the present case is of the same nature: the presiding justice had no discretion to determine whether a defendant was either a sex offender or a sexually violent predator because he was neither – therefore, there is no separation of powers violation.

Significantly, the trial court in 1999 and at the time Doe was convicted in 2003 and sentenced had no discretion. Title 17-A M.R.S.A. § 1152(2-C) (Supp.1996), at that time provided that "As part of a sentence, the court *shall* order every natural person who is a convicted sex offender or sexually violent predator, as defined under Title 34-A, section 11203 to satisfy all requirements set forth in" SORNA. P.L. 2001, c. 439, Part OOO, § 2, effective September 21, 2001 (emphasis added). Title 34-A M.R.S.A. § 11222(1) at that time mandated that the "court *shall* determine at the time of conviction if a defendant is a sex offender or a sexually violent predator. A person who the court determines is a sex offender or a sexually violent predator *shall* register according to this subchapter." Public Laws 1999, ch. 437, §2 (emphasis added). The court's involvement was purely ministerial: to notify the sex offender of his registration

obligations. *Smith v. Doe,* 538 U.S. 85, 95 (2003) ("Although other methods of notification may be available, it is effective to make it part of the plea colloquy or the judgment of conviction.") Where a judge simply made a "determination of whether persons convicted of certain offenses were within the scope of the registration requirements," "these are findings that did not involve an exercise of discretion by the sentencing court" and "the sentencing courts simply notified those persons convicted of registerable offenses of their obligations under SORA. This notification procedure does not prevent the legislature from changing the law." *Doe v. Nebraska,* 734 F.Supp.2d 882, 936-37 (D.Ct. Neb. 2010).

Any analogy to *State v. Letalien*, 2009 ME 130, 985 A.2d 4, would be unhelpful, except to mark the distinction. Unlike Doe 46, Letalien was convicted on August 19, 1996, and sentenced on August 30, 1996, at a time when conviction for his crime required the court "[a]s part of a sentence, [to] order" him to register under SORNA. *Id.* at ¶¶ 2-5. Key to the Law Court's holding in *Letalien* was the fact that a judge imposing sentence on a person convicted of gross sexual assault against a child under 16 prior to the effective date of SORNA of 1999 had the discretionary authority to set aside or, subsequently, modify the registration obligation. *Id.*, at ¶ 4, n. 6, ¶ 39. The sentencing court had control over the *appropriateness* of registration. That authority no longer exists for judges faced with an offender such as Doe 46—or any sentenced sex offender.

Nor does *State v. Johnson,* 2006 ME 35, ¶ 3, 894 A.2d 489, assist Doe. There, the Law Court found that the State had failed to follow the appropriate litigation track in seeking to correct the lower court's erroneous classification of Johnson as a sex offender rather than a sexually violent predator. The Court did not delve into any constitutional analysis. Finally, *Bossie v. State*, 488 A.2d 477 (Me. 1985), too is not pertinent. There, the petitioners-prisoners were convicted when the calculation of "good-time" reductions (for faithfully observing rules and requirements) in their sentences was controlled by Maine statute. The Law Court held that the Legislature's amendment to that statute increasing the reductions could not apply to these prisoners because it infringed upon the Executive's commutation powers, in violation of the separation of powers clause. In the present case, no such conflict exists.

CONCLUSION

For the foregoing reasons, the Superior Court's Order denying Plaintiff's Complaint for Injunctive Relief should be affirmed.

Respectfully submitted,

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DATED: April 25, 2014

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CERTIFICATE OF SERVICE

I, Laura Yustak Smith, Assistant Attorney General, certify that I have mailed two copies of the foregoing "Brief of Defendants/Appellees" to Doe 46's attorney of record, Bruce M. Merrill, at 225 Commercial St., Suite 501, Portland, ME 04101.

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