12-4288

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,

Defendants-Appellees,

THE NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES,

Defendant.

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

BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

The New York State Legislature enacted the Sex Offender Registration Act (SORA) in 1996 to protect the public from the risk of recidivism posed by known sex offenders, and to assist law enforcement efforts to prevent sex crimes. Over the years, the Legislature has amended the statute from time to time, strengthening and extending its registration and notification requirements so as to enhance its ability to protect the public from the widely recognized risk of recidivism posed by convicted sex offenders. Of particular relevance to this appeal, in 2006 the Legislature extended the mandatory registration period for level-one offenders from ten years to twenty years.

Plaintiff John Doe pleaded guilty in 1999 to a child pornography offense that requires him to register as a level-one offender, subject to the lowest level of registration and notification requirements under SORA. In 2009, he sought relief from the registration requirement in state court, and that petition was denied on the ground that SORA, as amended, bars such relief until a level-one offender has registered for twenty years. In 2011, Doe brought this federal action against a number of state officials under 42 U.S.C. § 1983, claiming that continuing

enforcement of SORA against him violates his rights under the Equal Protection Clause, the Due Process Clause, the Fourth Amendment, the Ex Post Facto Clause, and the Double Jeopardy Clause. The U.S. District Court for the Eastern District of New York (Amon, C.J.) rejected all of Doe's constitutional claims and granted summary judgment to defendants. *Doe v. Cuomo*, No. 11 Civ. 02545, at *47 (E.D.N.Y. Sept. 28, 2012) (Slip op. at Joint Appendix ("J.A.") 214-260).

This Court should affirm. As an initial point, Doe's appellate brief raises several claims that he did not present below and that are therefore waived. For the first time on appeal, Doe argues that SORA, properly construed, does not require him to continue registering as a sex offender, and asserts that his state-court plea agreement promised him a special immunity from future legislative changes to SORA. These claims are not only waived but meritless. SORA as amended in 2006 clearly requires Doe to continue his registration for a period of twenty years as a level-one sex offender, and the state judge presiding over Doe's 1999 plea hearing did not grant him a special exemption from that requirement or any other provision of SORA that might be enacted and made applicable to him.

The federal constitutional claims that Doe did raise below were correctly rejected by the district court. Doe's claims under the Double Jeopardy and Ex Post Facto clause fail, because SORA is a civil, not penal, statute. This Court has already so ruled as to the original version of SORA in *Doe v. Pataki ("Doe II")*, 120 F.3d 1263 (2d Cir. 1997), and, contrary to Doe's claims, subsequent amendments to the statute as to level-one offenders, which have retained the original statute's focus on registration and public notification, have not somehow transformed the statute into a penal measure.

Doe's due process claims under the Fourteenth Amendment also fail. As to Doe's substantive due process claim, SORA does not interfere with any fundamental right. Doe's procedural due process claim is similarly meritless. Doe was not and is not entitled to a hearing to establish that he no longer poses a risk of re-offense, because a level-one sex offender's obligations under SORA derive from the offender's conviction of a qualifying sex offense, not any individualized showing of dangerousness.

Additionally, Doe's Equal Protection claim was properly dismissed, because the Legislature reasonably concluded that persons who have

been convicted of sex offenses should be treated differently from ordinary citizens who have not been convicted of a sex offense—which is the only classification Doe challenges on appeal. Finally, the requirement that a level-one sex offender mail in an annual verification form and appear once every three years to be photographed does not constitute an unreasonable seizure under the Fourth Amendment.

ISSUES PRESENTED

1. Whether Doe's contentions concerning the proper interpretation of SORA and his state-court plea agreement fail because they (a) were not raised below and thus are forfeited, (b) are barred by principles of res judicata and collateral estoppel, and (c) otherwise lack merit.

2. Whether Doe's ex post facto and double jeopardy claims fail because SORA's provisions regarding level-one offenders are civil in nature, not punitive, where (a) this Court held in *Doe v. Pataki* that SORA, as originally enacted, was a civil, regulatory scheme designed to protect the public from the risk of recidivism posed by dangerous sex offenders, and to assist law enforcement in preventing sex crimes, and (b) subsequent amendments to SORA regarding level-one offenders

have retained the statute's focus on registration and notification, and merely strengthened the statute's protections so as to better serve its civil regulatory objectives.

3. Whether Doe's claims that SORA infringe his fundamental constitutional rights fail, where the statute does not restrict his right to engage in consensual sexual activity; does not interfere with his ability to enter or leave the State or restrict where he may live, work, or visit; and makes available to the public only limited information about a sex offender, most of which is already a matter of public record as a result of his criminal conviction for a child pornography offense.

4. Whether Doe's remaining constitutional claims, alleging violations of procedural due process, equal protection, and the Fourth Amendment, also fail as a matter of law.

STATEMENT OF THE CASE

A. The Sex Offender Registration Act

The New York Legislature enacted SORA to protect the public from the demonstrated risk of recidivism by convicted sex offenders and to assist law enforcement in its efforts to prevent and investigate sex crimes. *See* ch. 192, § 1, 1995 N.Y. Laws 2870, 2870 (legislative purpose or findings); *see also People v. Mingo*, 12 N.Y.3d 563, 574 (2009) (describing the purpose underlying SORA as "protect[ing] the public from sex offenders"). To accomplish its dual purpose, SORA requires persons convicted of crimes enumerated as "sex offenses," Correction Law § 168-a(2), to register with the State Division of Criminal Justice Services (DCJS) and permits the limited release of certain information about the offender to law enforcement and members of the public. *See id.* §§ 168-a, 168-b, 168-f(1), 168-g, 168-*l*, 168-p, 168-q;[1] *see also* 1995 N.Y. Laws at 2879; *Doe II*, 120 F.3d at 1266-67.

The Act establishes three risk-level classifications to reflect a sex offender's risk of re-offense and dangerousness to the community,

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[1] Except where specifically noted, all citations to SORA are to the statute as currently enacted.

Correction Law § 168-*l*(6). An offender's risk level determines the length of his registration period and the type of information that may be disclosed about the offender under SORA's notification provisions, *id.* §§ 168-h, 168-*l*(6). In general, the required period of registration and the permitted extent of public notification increases as a sex offender's risk level increases. *Compare id.* §§ 168-h(1), 168-*l*(6)(a) *with* 168-h(2), 168-*l*(6)(c).

Doe is classified as a level-one sex offender, the lowest risk classification under SORA. Level-one offenders are required to register with DCJS for a period of twenty years. *Id.* § 168-h(1). They must notify DCJS of any change in address, and must appear in person once every three years to have a current photograph taken. *Id.* §§ 168-f(2)(b-3), 168-f(4). Persons may confirm a particular level-one offender's presence on the registry (and obtain limited additional information) by calling a 900-telephone number, identifying themselves, and providing sufficient information to identify the sex offender in question. *Id.* § 168-p. In addition, law-enforcement agencies are permitted, but not required, to disclose information about level-one offenders to entities with "vulnerable populations," such as schools and child-care centers.

Id. § 168-*l*(6)(a). DCJS may not publish information about level-one offenders on its website, as it does with level two and level-three offenders. *See id.* § 168-q(1).[2]

As originally enacted in 1996, SORA provided a shorter registration period and somewhat more limited scope of notification as to level-one offenders. The initial version of SORA required level-one offenders to register for ten years and permitted them to petition a state court for relief from registration. A 1999 amendment eliminated level-one offenders' ability to petition for relief, *see* ch. 453, § 18, 1999 N.Y. Laws 3061, 3068-69, and a January 2006 amendment extended the registration period for level-one offenders from ten to twenty years, *see* ch. 1, § 3, 2006 N.Y. Laws 1, 1. A June 2006 amendment authorized law enforcement to disclose information about level-one offenders to entities with vulnerable populations, which had not previously been permitted.

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[2] In his brief, Doe discusses a number of additional requirements that he says are imposed on sex offenders by federal laws and local laws. *See, e.g.*, Brief for Appellant ("App. Br.") at 13-14. Because this case is a challenge to the state SORA, brought solely against state officials, those federal laws and local laws are not relevant here.

See ch. 106, § 1, 2006 N.Y. Laws 2550, 2550.[3] In enacting all three amendments, the Legislature stressed that its objective was to enhance SORA's ability to protect the public from the risk of recidivism by sex offenders and assist law enforcement in preventing and investigating sex offenses. *See* ch. 1, § 1, 2006 N.Y. Laws at 1 (legislative intent); Div. of Budget, Budget Report for S. 6100 §§ 4, 9, *reprinted in* Bill Jacket for ch. 453 (1999), at 4-5; N.Y. State Assembly Mem. in Support of A. 8370A, *reprinted in* Bill Jacket for ch. 106 (June 2006), at 1-2 (purpose & justification).

B. Doe's Child Pornography Offense

Doe downloaded six images of child pornography from an Internet chat room, and circulated those images via e-mail. (J.A. 19 (¶ 55), 219.) In 1999, he pled guilty to one count of attempted possession of a sexual performance by a child in violation of New York Penal Law § 263.16. (J.A. 19 (¶ 54).) He was sentenced to three years of probation. (J.A. 39.)

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[3] Additionally, a 2004 amendment eliminated the toll charge for the 900 number. *See* ch. 361, § 1, 2004 N.Y. Laws 3171, 3171.

During his plea hearing, Doe was told that Penal Law § 263.16 is an enumerated "sex offense" under SORA and that he would be required to register as a sex offender. *See* Correction Law § 168-a(2) (1996) (defining "sex offense" to include an attempt to violate Penal Law § 263.16); (*see also* J.A. 36.3 (8/17/99 Plea Hearing Tr. ("Tr.") 2:18-24)). Doe's plea agreement stipulated that he would be classified as a level-one offender. (J.A. 40-41 (Tr. 7:25-8:1).) At the plea hearing, the court emphasized that Doe "ha[d] to register" as a sex offender "[a]s often as directed" by SORA (J.A. 37 (Tr. 4:2-8); 37-38 (Tr. 4:18-5:8)), and emphasized that any possibility of relief from SORA's registration obligations was not "part of the bargain" (J.A. 37 (Tr. 4:2-8)). At the time of his plea hearing, the 1999 amendments to SORA, eliminating level-one offenders' ability to petition for early termination of their registration period, had been approved by the Senate and were awaiting the Governor's approval.

C. Doe's 2009 State-Court Petition for Relief from SORA Registration

In December 2009, a decade after the 1999 amendment eliminated level-one offenders' ability to petition for relief from registration, Doe filed a petition in New York Supreme Court seeking early relief from his registration obligations under SORA and removal from the State's sex-offender registry pursuant to Correction Law § 168-o.[4] (J.A. 44-45.) In 2011, the court denied Doe's petition. (J.A. 77-82.) After reviewing SORA's legislative history and the amendments to Correction Law § 168-o, the court concluded that the Legislature intended for level-one offenders to register for twenty years (J.A. 81), and that SORA did not permit a court to grant a level-one offender relief from registration or to modify an offender's risk level below level one, which is already the lowest risk level (J.A. 80). Doe did not appeal the state court's decision.

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[4] Doe's petition, originally filed in Supreme Court, Queens County (J.A. 44-45), was transferred to Criminal Court, Queens County (see J.A. 77-82), where Doe was sentenced in 1999 (*see* J.A. 36.2).

D. This Federal Action

On May 26, 2011, Doe commenced this action in federal district court under 42 U.S.C. § 1983, raising various constitutional challenges to SORA provisions mandating his continued inclusion in New York's sex-offender registry. (J.A. 28-34.) Doe did not challenge the applicability of the SORA amendments to him under state law, nor did he argue that application of SORA's provisions to him would violate his plea agreement in any way.

The district court rejected all of Doe's federal-law claims and granted summary judgment for defendants.[5] (J.A. 214-260.) The court dismissed Doe's substantive due process claim because (a) SORA does not interfere with any of Doe's fundamental rights, (J.A. 230-233); (b) SORA promotes a legitimate state interest of protecting the public safety, (J.A. 234); (c) the Legislature had a rational basis for requiring persons convicted of possession of child pornography to register as sex

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[5] Doe's complaint originally asserted a claim that SORA violated the Equal Protection, Double Jeopardy, Due Process, and Cruel and Unusual Punishment Clauses of the state constitution (J.A. 33 (¶ 121)), but Doe formally withdrew those claims (ECF No. 28, Pl. Opp. to Mot. to Dismiss at 2 n.1). The district court accordingly did not reach the merits of those claims. (J.A. 260.)

offenders, (J.A. 234-238); and (d) the Legislature also had a rational basis for extending the length of the registration period for level-one offenders from ten to twenty years (J.A. 238-239).

The court also rejected Doe's procedural due process claim, because Doe was not entitled to a hearing prior to the extension of his registration period, as a level-one offender, from ten to twenty years. Though Doe claimed he was entitled to a hearing to demonstrate that he is not presently dangerous, the district court disagreed, noting that the registration requirement applicable to Doe under the statute derives from his conviction for an enumerated sex offense, regardless of any showing of present dangerousness. (J.A. 241-242 (citing *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003)).)

The district court dismissed Doe's Double Jeopardy and Ex Post Facto clause claims, relying heavily on this Court's prior decision in *Doe II*, 120 F.3d at 1276-86, which rejected similar challenges to SORA as originally enacted on the ground that the statute is a civil regulatory measure, not a penal measure. The court concluded that amendments to SORA's provisions applicable to level-one offenders did not change the

statute's essential character as non-punitive in intent and effect. (J.A. 242-251.)

The court similarly dismissed Doe's equal protection claim, which claimed that SORA improperly permitted certain offenders—those convicted of unlawful surveillance in the second degree under Penal Law § 250.45—to petition a court for early relief from registration, *see* Correction Law § 168-a(2)(e), but did not permit child-pornography offenders like Doe to do so. (J.A. 251-256.) Applying rational-basis review, the district court upheld the Legislature's "carve-out" for offenders convicted of unlawful surveillance, but not those convicted of possession of child pornography, because the Legislature could reasonably have concluded that conduct encompassed by the offense of unlawful surveillance in the second degree was not "sufficiently demonstrative of deviant sexual urges" to warrant mandatory inclusion in the registry. (J.A. 254-256.)

Finally, the district court rejected Doe's Fourth Amendment claim premised on SORA's requirement that he be photographed once every three years and that he mail a verification form annually confirming his current address. (J.A. 256-259.) The court concluded that even if

SORA's information-gathering requirement implicated a Fourth Amendment right, that intrusion was reasonable under the special-needs test. (J.A. 258-259.)

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment. *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). This Court should affirm the grant of summary judgment, because the district court correctly ruled that Doe's constitutional challenges to SORA have no merit.

1. Doe devotes a significant portion of his appellate brief to claims that were not raised in the lower court and are therefore waived. Doe did not assert below his present contentions that SORA, properly construed, requires him to register for only ten years and permits him to petition a state court for relief from the registration requirement. Nor did Doe assert below that he was promised at his plea hearing that SORA would not be amended to extend level-one offenders' registration period or to eliminate their ability to petition for relief from registration. In any event, even if these claims had been raised below,

they lack merit because the terms of SORA are clear, and the state judge presiding over Doe's plea hearing did not grant him any special immunity from potential legislative changes to SORA.

2. The federal constitutional claims that Doe did raise below are likewise without merit. Doe's Double Jeopardy and Ex Post Facto Clause claims fail because SORA is a civil statute, not a penal statute. This Court reached that very conclusion in upholding SORA, as originally enacted, against double jeopardy and ex post facto challenges in *Doe II*. The Court held there that SORA is a civil regulatory measure intended to protect the public from the risk of recidivism posed by sex offenders and to assist law enforcement in preventing and investigating sex crimes.

Contrary to Doe's contention, subsequent amendments to SORA, as applied to level-one offenders, have not somehow transformed the statute from a civil regulatory program into a punitive measure. The core structural features of the act—already upheld by this Court as non-punitive in intent and effect—remain unchanged; the statute continues to focus on sex-offender registration and public notification. Statutory amendments extending level-one offenders' registration period from ten

to twenty years and modestly increasing the scope of notification applicable to such offenders fall well within the range of reasonable legislative judgments, rationally connected to the basic civil regulatory objectives that SORA is intended to serve.

3. Doe's due process claims under the Fourteenth Amendment also fails. SORA does not infringe any of Doe's fundamental rights. First, SORA's bar on publicly-funded health-insurance coverage for erectile-dysfunction medication and treatment does not violate any constitutional right to engage in consensual, lawful sexual activity. It is a reasonable legislative judgment not to subsidize with public monies the provision of erectile-dysfunction medication to individuals who have previously been convicted of a sex offense. Second, the dissemination to the public of certain, limited information about a sex offender, most of which is already publicly available given his or her criminal conviction, does not implicate the constitutional right to privacy. Third, the requirement that a sex offender appear in person to supply a current photograph once every three years does not restrict the constitutional right to travel. SORA does not prevent Doe from entering or leaving the State, and it does not restrict where Doe may live, visit, or work.

Doe's procedural due process claim is also meritless. Doe was not entitled to notice and a hearing prior to the Legislature's enactment of the amendments strengthening SORA's provisions as to level-one offenders. The Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), forecloses Doe's argument that he is entitled to a hearing now to establish that he no longer poses a risk of re-offense, because Doe's obligation to register under SORA derives from his conviction of an enumerated sex offense, not any factual showing of current dangerousness.

4. Finally, Doe's remaining constitutional claims were properly dismissed. SORA does not violate Doe's Equal Protection rights, because the Legislature had a reasonable basis for treating convicted sex offenders differently from ordinary citizens who have not been convicted of a sex offense, which is the only classification in SORA that Doe challenges on appeal. Moreover, the requirements that Doe appear once every three years to be photographed and annually mail in a verification form do not constitute a Fourth Amendment seizure. Doe is not restricted from leaving the State or from moving within the State, and SORA's modest requirement of a personal appearance every three

years does not effect a seizure of Doe's person. And even if SORA did effect a seizure, its minimal, non-intrusive requirements mandating registration by mail and a personal appearance every three years to supply a current photograph would be justified under the special-needs test, in light of the State's strong interest in protecting the public by ensuring that the information on its sex-offender registry is accurate and up to date.

ARGUMENT

POINT I

DOE'S ARGUMENTS ABOUT THE PROPER INTERPRETATION OF STATE LAW AND ABOUT HIS STATE-COURT PLEA AGREEMENT ARE UNPRESERVED AND MERITLESS

A significant portion of Doe's brief on appeal is devoted to pressing arguments that he did not assert in the court below. In particular, Doe argues that, as a matter of New York law, SORA is not properly construed to require him to register for a period of twenty years, or to deny him the ability to petition a state court for relief from that requirement. App. Br. at 24-28. He also argues that the state-court judge who presided over his plea hearing promised him that he would have the ability to petition for relief from registration and would only be required to register for a ten-year period. *Id.* at 29-31. None of these claims were asserted in the court below, and they are therefore forfeited. *See, e.g.*, *In re: Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132-33 (2d Cir. 2008). Even if Doe had not forfeited the claims, they have no merit.

A. Doe's Contentions About the Meaning of SORA Are Barred, Baseless, and Not Properly Raised in This § 1983 Action.

Even if Doe had preserved his claims about the meaning of SORA in the district court below (and he did not), those claims would provide no basis to grant him relief in this federal action. Doe argues that SORA, properly construed, continues to permit him to petition for relief from the registration requirement, and requires him to register for only ten years, not twenty years. He contends that 1999 and 2006 amendments to SORA that eliminated level-one offenders' right to petition for relief and extended their registration period from ten to twenty years, respectively, were not intended to apply to him, because he committed his child pornography offense before those amendments were enacted. App. Br. at 23-32. These contentions fail for several reasons.

First, a claim that state officials are violating state law is not cognizable in an action under 42 U.S.C. § 1983, which lies only to redress deprivations of *federal* constitutional or statutory rights. *See Dwares v. City of N.Y.*, 985 F.2d 94, 98 (2d Cir. 1993) (§ 1983 covers alleged deprivations of "a right, privilege or immunity secured by the

Constitution or laws of the United States") *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 507 U.S. 163 (1993); *see also Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) ("[A] mere error of state law is not a denial of due process" (quotation marks omitted)); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984) (federal court lacks power to enjoin state officials to comply with state law).

Second, Doe's contentions about the meaning of SORA are barred by res judicata and collateral estoppel. In December 2009, Doe petitioned a state court for relief from his twenty-year registration obligation under Correction Law § 168-o(2). (J.A. 44-45, 127-159.) The state court rejected the petition on the ground that SORA did not give level-one offenders like Doe the right to petition for relief from registration. (J.A. 81.) Doe did not appeal that ruling in the state courts.

The state-court decision rejecting his petition for relief, on the ground that no such petition is authorized under SORA, bars as a matter of collateral estoppel his present argument that state law gives him the right to petition for relief. *See, e.g.*, *Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1285 (2d Cir. 1986) (superseded on other grounds);

see also Winters v. Lavine, 574 F.2d 46, 60-61 (2d Cir. 1978). Moreover, because Doe could have raised before the state court his present contention that his registration period under SORA is only ten years, not twenty years, his current argument on that point is barred as a matter of res judicata. *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (explaining that res judicata bars a litigant from raising a theory of recovery that could have been raised in a prior action).

Third, Doe is incorrect in arguing that the Legislature did not make the 1999 and 2006 amendments to SORA applicable to him because it did not expressly provide for retroactive application.[6] The 1999 amendment to Correction Law § 168-o eliminated the right of level-one offenders to petition the court for relief from the statute's registration requirements, effective January 1, 2000. Doe is wrong to characterize the application of this 1999 amendment to him as

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[6] Although Doe argues that certain 2002 amendments to SORA do not apply to him (App. Br. at 26-28), the applicability of those amendments is irrelevant. The 2002 amendments neither eliminated Doe's right to petition for early termination of his registration period (the 1999 amendments did that), nor extended his registration period (the 2006 amendments did that). Therefore, the 2002 amendments have no relevance here.

retroactive. The amendment removed a procedural right of certain offenders to petition for relief from the statutory registration requirement, effective on January 1, 2000. By its terms, it applies to all sex offenders required to register under SORA. Correction Law § 168-o(2). Moreover, as a general matter, changes to procedures apply to any proceeding pending as of the effective date or filed thereafter. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994); *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 889-90 (2d Cir. 1995); *Matter of Marino S.*, 100 N.Y.2d 361, 370-71 (2003).[7] Accordingly, the 1999 amendment is

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[7] This understanding of the 1999 amendment is also supported by the amendment's purpose, which was to ensure that SORA complied with federal requirements concerning a state's sex-offender registration program. *See* Introducer's Mem. in Support of S. 6100 (budget implications), *reprinted in* Bill Jacket for ch. 453 (1999), at 5; Div. of Budget, Budget Report for S. 6100, *reprinted in* Bill Jacket for ch. 453 (1999), at 4 ("This legislation is necessary to bring the State into compliance with Federal Regulations."). Before the 1999 amendments, Correction Law § 168-o provided a procedural mechanism for sex offenders to seek a shorter registration period. *See* Correction Law § 168-o (1996); *see also id.* § 168-h (1996). But to receive federal grant monies, a state's sex-offender registration scheme had to require an offender to register for a minimum period of ten years. *See* 42 U.S.C. § 14071(b)(6)(A) (1997-1998). To ensure continued federal approval of SORA, *see id.* § 14071(b) (1997-1998), the 1999 amendment to Correction Law § 168-o eliminated this procedural mechanism as to all

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properly construed to bar petitions for relief filed after its effective date by Doe and all other level-one offenders, no matter when they were convicted.

The 2006 amendment, on the other hand, enacted a substantive change to level-one offenders' registration period, extending the applicable period from ten to twenty years. But the Legislature was explicit that the 2006 amendment was to "apply to all sex offenders registered or required to register immediately *prior* to the effective date of this act, or who are required to register on or after such date." Ch. 1, § 6, 2006 N.Y. Laws at 2 (emphasis added). There is thus no basis for Doe's contention that the 2006 amendment was not intended to apply to him, were that contention properly presented here.

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level-one offenders that were then registered or that would be registered in the future.

B. Doe's Newly Raised Argument That His Plea Agreement Promised Him that SORA Would Not Change Is Without Foundation.

Doe also argues for the first time on appeal that the state court at his criminal plea hearing promised him that he would always be able to petition for relief from registration and promised that he would have a maximum registration term of ten years. App. Br. at 29-31. He contends that the court's statements gave him a vested right in the current state of the law under SORA, and that subsequent changes to the law, if applied to him, would violate either substantive or procedural due process. *See id.* at 2-3, 29-30; *see also id.* at 18-19, 22, 41-43.

These arguments are waived and barred by res judicata. *See supra*, at I.A. They are also meritless. The transcript from Doe's plea hearing shows that his plea agreement contained a stipulation that he would be classified a level-one offender under SORA (J.A. 40-41), which he indisputably has been. The plea hearing discloses no promise that he would be subject to a maximum registration period of ten years; the length of his registration requirement was not discussed at all at the hearing (*see* J.A. 36.2-42.). Nor did the judge promise Doe any special immunity from potential statutory amendments that might eliminate

level-one offenders' ability to petition for relief from SORA's registration requirements. To the contrary, the judge made clear that matters relating to relief from registration were "not part of the bargain" (J.A. 37). The judge also stressed that he was "not changing the normal registration practice," and that Doe would be required to register "[a]s often as directed as to what the registration unit [of DCJS] requi[r]es." (J.A. 37-38.)

Doe evidently relies on the judge's statement at the plea hearing that Doe was "free to come and petition" for relief from registration "right [ ] now," and that the judge would "allow [Doe's attorney] to petition . . . as to registration" (J.A. 38, 39-40). But these statements merely described Doe's rights to petition for relief under then existing law; they did not purport to promise Doe that the Legislature would not change the law or to grant Doe some special immunity against future legislative changes.[8] *See Doe v. Pataki*, 481 F.3d 69, 79 (2d Cir. 2007)

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[8] Doe's current argument about the meaning of these statements at his plea hearing is further undercut by the fact that he failed to present them in his state-court petition seeking relief from registration, which would have been a far more appropriate venue for his allegation that his state-court plea hearing had guaranteed him a special

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(rejecting argument that language in consent decree describing existing law constituted a promise that the law would not change); *see also United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005) (observing that a change in the law is a risk that accompanies a plea agreement).[9]

POINT II

DOE'S EX POST FACTO AND DOUBLE JEOPARDY CHALLENGES FAIL BECAUSE SORA IS A CIVIL STATUTE, NOT A PENAL MEASURE

Doe also argues that SORA, as applied to level-one offenders whose criminal conduct predates the 1999 and 2006 amendments, violates the Ex Post Facto and Double Jeopardy Clauses in the U.S. Constitution. The ex post facto and double jeopardy claims fail because

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immunity from future changes to SORA. In the state-court petition, Doe argued only that the amendments to SORA did not eliminate his ability to petition for early relief from registration (*see* J.A. 146-150), and, alternatively, that due process requires that he be afforded a hearing to demonstrate that his continued inclusion in the sex-offender registry is unnecessary because he is not dangerous (*see* J.A. 152-157).

[9] Even if the Court were to conclude that Doe was promised a ten-year registration period (which he was not), the proper remedy is to permit the state court to decide whether to enforce the promise or vacate Doe's guilty plea. *See Santobello v. New York*, 404 U.S. 257, 262-63 (1971). Doe has no federal right to one form of relief rather than another.

those clauses apply only to penal statutes. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (ex post facto); *United States v. Ursery*, 518 U.S. 267, 273 (1996) (double jeopardy). As the district court correctly concluded, SORA is not a penal statute, but rather is a civil regulatory measure intended to protect the public from the demonstrated risk of recidivism posed by convicted sex offenders and to assist law enforcement in preventing sex offenses. (J.A. 243-251.)

To determine whether a statute is civil or penal, the court conducts a two-step inquiry, first asking whether the legislature intended to create a civil statute, and second asking whether the statute is nonetheless so punitive in form or effect as to override the legislature's stated intent. *See Smith v. Doe*, 538 U.S. 84, 92 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

Doe acknowledges that, after conducting this two-step inquiry this Court in *Doe II* upheld SORA, as originally enacted in 1996, over ex post facto and double jeopardy challenges brought on behalf of a diverse class of level one, two, and three sex offenders. 120 F.3d at 1285. The Court found "ample evidence" that the New York Legislature enacted SORA in 1996 to further non-punitive goals: to protect the public from

potentially dangerous persons by providing vulnerable populations with information to assess the potential risks from convicted sex offenders and to facilitate law enforcement's efforts at preventing and investigating sex crimes. *Id.* at 1276-77; *see also Matter of North v. Bd. of Examiners of Sex Offenders of State of N.Y.*, 8 N.Y.3d 745, 752 (2007) (explaining that SORA is a "remedial statute intended to prevent future crime" and not aimed at "imposing punishment for a past crime"). The Court further concluded that the statute was not so punitive in form or effect as to negate the Legislature's stated, non-punitive purpose. *Doe II*, 120 F.3d at 1278-85.

Several years after *Doe II*, in *Smith v. Doe*, the Supreme Court rejected an Ex Post Facto Clause challenge to Alaska's sex-offender registration statute on the ground that the statute established a civil, regulatory scheme. 538 U.S. at 105-06. Like SORA, Alaska's statute required a convicted sex offender to register and provided for the dissemination of his information to the public via a central registry of sex offenders. *Id.* at 90-91. The Court explained that the statute, by establishing a registration and notification scheme that alerted the public to the risk of sex offenders in their community, rationally

advanced the legislature's stated non-punitive purpose of protecting the public. *Id.* at 102-03.

Other federal courts of appeals have likewise consistently upheld sex-offender registration schemes as non-punitive statutes that do not violate the Ex Post Facto Clause in the U.S. Constitution. *See, e.g.*, *United States v. Elkins*, 683 F.3d 1039, 1045 (9th Cir. 2012) (federal sex-offender registration statute); *Anderson v. Holder*, 647 F.3d 1165, 1173 (D.C. Cir. 2011) (District of Columbia); *Doe v. Bredesen*, 507 F.3d 998, 1007 (6th Cir. 2007) (Tennessee); *Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000) (Utah); *Herrera v. Williams*, 99 F. App'x 188, 190 (10th Cir. 2004) (New Mexico).[10]

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[10] Doe cites five state-court decisions that find sex-offender registration statutes to be punitive (App. Br. at 57 n.17), but all are inapposite. Four of the cases were decided based on the ex post facto clause in the relevant state's constitution, not under the Ex Post Facto Clause in the U.S. Constitution, as definitively applied by the Supreme Court in *Smith*. *See Doe v. Dep't of Public Safety*, 430 Md. 535, 568 (Md. Ct. App. 2013) (Maryland constitution); *Ohio v. Williams*, 129 Ohio St. 3d 344, 349, 2011 Ohio 3374 ¶¶ 20-21, 952 N.E.2d 1108, 1113 (2011) (Ohio constitution); *Wallace v. Indiana*, 905 N.E.2d 371, 384 (Ind. 2009) (Indiana constitution); *Doe v. Alaska*, 189 P.3d 999, 1019 (Alaska 2008) (Alaska constitution). Two of those decisions expressly describe the relevant state prohibition against ex post facto laws as broader than the federal prohibition. *See Dep't of Public Safety*, 430 Md. at 558-59;

(*continued on the next page*)

In an effort to evade this Court's controlling decision in *Doe II*, Doe argues that the amendments to SORA since it was originally enacted, have rendered the statute punitive as applied to level-one offenders, even though the statute was initially civil in nature as to such offenders. Regarding the first step of the relevant inquiry, however, the amendments have only further confirmed that the Legislature intended to create a civil regime. SORA's requirements remain focused on registration and public notification, as the statute always has been. The Legislature has also made clear that the amendments to the statute have been intended to heighten the protection of the public from the risks posed by dangerous sex offenders. *See, e.g.*, Budget Report for S. 6100, *reprinted in* Bill Jacket for ch. 453, *supra*, at 4 (stating that "[e]nactment of this legislation is essential to public safety as it widens the number of sex offenses deemed predictive of continuing criminal behavior after conviction . . . ."); N.Y. State

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Alaska, 189 P.3d at 1005. In the fifth case, *Maine v. Letalien*, the requirement to register was explicitly made part of the offender's criminal sentence. 2009 ME 130 ¶¶ 40-41, 985 A.2d 4, 20 (Maine Sup. Ct. 2009). Here, there is no dispute that registration under SORA is only a collateral consequence of Doe's conviction, not part of his criminal sentence.

Senate Introducer's Mem. in Support of S. 6409, *reprinted in* Bill Jacket for ch. 1 (2006), at 3-4 (extending the registration period for all sex offenders because of their continued risk of re-offense); (*see also* J.A. 244-246).

Nor have the amendments done anything to make the statute so punitive in effect or form as to override the Legislature's stated intent to create a civil statute. (*See* J.A. 247-251.) The amendments have not changed the core structural features of the statute, which this Court has already held are non-punitive in intent and effect. Both the length of registration and extent of public notification under SORA remains calibrated to a sex offender's perceived risk of re-offense. *Compare* Correction Law §§ 168-*l*(5), (6), 168-p *with id.* §§ 168-*l*(5)-(6) (1996), 168-p (1996).

To be sure, the amendments to SORA have lengthened the registration period for level-one offenders from ten to twenty years, eliminated level-one offenders' ability to petition a state court for relief from the registration requirements, and increased somewhat the degree of public notification for level-one offenders. But all these changes fall well within the range of reasonable legislative judgments in light of the

statute's civil regulatory objectives, and thus do nothing to undermine the Legislature's stated civil intent under the statute.

In *Smith*, the Supreme Court made clear that only "the clearest proof" of punitive effect is sufficient to override a legislature's stated civil intent. 538 U.S. at 92 (quotation marks omitted). The Court also stressed that considerable latitude must be given to the legislature to make reasonable policy judgments about the extent of registration and notification necessary to protect the public. In short, "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* at 103. Moreover, a legislature reasonably may "dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions." *Id.* at 104.

The changes made as to level-one offenders by the amendments to SORA are just such reasonable legislative judgments, and thus are entitled to deference. Contrary to Doe's arguments (App. Br. at 50), the extension of the registration period for level-one offenders from ten to

twenty years does not transform SORA into a punitive statute. In its 2006 amendments to SORA extending the registration period for level-one offenders, the Legislature found that the longer registration period was necessary because level-one offenders "continue to threaten the safety of our communities." N.Y. State Assembly Mem. in Support of S. 6409, *reprinted in* Bill Jacket for ch. 1, *supra*, at 3. The Legislature's decision to extend the registration period was expressly guided by a desire "to enhance public safety and provide better tracking and monitoring of sex offenders." Ch. 1, § 1, 2006 N.Y. Laws at 2 (legislative intent). Moreover, in *Smith*, the Alaska statute in question mandated registration for fifteen years to life, *see* 538 U.S. at 90, depending on the severity or quantity of sex offenses committed by the registrant, yet the Court did not find the statute punitive as to such offenders. *See also id.* at 104 (noting research that re-offenses by sex offenders can occur "as late as 20 years following release" (quotation marks omitted)).

The changes to the scope of notification applicable to level-one offenders are likewise fully consistent with the statute's non-punitive character. First, both as originally enacted and today, SORA permits public access to a level-one offenders registry information via a 900-

telephone number. *See* Correction Law §§ 168-*l*(6)(a) (1996), 168-p (1996). The amended statute preserves this avenue of public notification, and also preserves previously existing safeguards to prevent the misuse of information. *Doe II*, 120 F.3d at 1282. Before obtaining information about level-one offenders via a 900-telephone number, the caller must identify herself, *see* Correction Law § 168-p(2)(c)—Doe is mistaken in asserting (App. Br. at 52) that this requirement has been eliminated. The caller is informed that illegal use of the information is a crime, Correction Law § 168-p(2)(e), and the statute elsewhere provides that misuse of the 900-telephone number can be grounds for an injunction, restraining order, or monetary fine, *id.* § 168-p(3). In addition, a caller is required to provide certain identifying information about the sex offender before she may obtain confirmation that the offender is on the registry. *See id.* § 168-p(2)(f).[11] Thus, unlike in the statutory scheme upheld in *Smith*, a caller cannot "fish" for information about a registered level-one sex offender. *Cf.*

[11] The fact that the 900-number is now free, *see* Correction Law § 168-p(1), whereas a fee was initially charged, *see id.* § 168-p(2)(b) (1996), has no relevance to whether the statute is civil or punitive in effect.

Smith, 538 U.S. at 99 (information about sex offender available to anyone by visiting the State's Department of Public Safety web site).

Though the original statute did not, SORA as amended now also permits, but does not require, a law enforcement agency to disseminate information concerning a level-one offender to entities with vulnerable populations. *See* Correction Law § 168-*l*(6)(a). But the provision permitting this targeted form of notification does not transform the statute into a punitive measure; it is plainly rationally connected to SORA's non-punitive purpose of alerting the public to the risk of sex offenders in their community. The Supreme Court observed that "widespread public access is necessary for the efficacy of" a sex-offender registration scheme. *Smith*, 538 U.S. at 99. The Legislature reasonably determined that the former provision of SORA, excluding level-one offenders from its notification provisions regarding vulnerable populations, hindered its goal of protecting the public from dangerous sex offenders.

SORA previously allowed for entities with vulnerable populations to further disseminate a sex offender's information—so-called secondary notification—for level-two and three offenders only. *See* Correction Law §§ 168-*l*(6)(b)-(c) (1996). Now, secondary notification for level-one

offenders is also permitted. *See* Correction Law § 168-*l*(6)(a). In 2006, the Legislature concluded that level-one sex offenders continue to pose a danger to society, and therefore wider dissemination of their registry information was necessary to protect the public. *See* N.Y. State Senate Introducer's Mem. in Support of S. 6409, *reprinted in* Bill Jacket for Ch. 1, *supra*, at 3-4. In *Doe II*, this Court recognized that secondary notification "promote[s] public safety and facilitate[s] the prosecution of sex crimes" because entities in the community "know better than either the legislature or the police when additional notification is needed." 120 F.3d at 1282. Extending secondary notification to level-one offenders thus does not render the statute punitive, but rather is entirely consistent with the Legislature's intent to enhance public safety because it ensures that all communities are provided with the information necessary to assess the potential risks from convicted sex offenders.

In any case, the limited dissemination of information about level-one offenders that SORA now permits is far less widespread than the *affirmative* dissemination of information that the Supreme Court in *Smith* upheld as consistent with a regulatory, non-punitive intent. The

sex offender statute upheld there permitted the dissemination of a sex offender's name, complete address, photograph, physical description, license and motor-vehicle identification numbers, place of employment, date of birth, crime of conviction, and the offender's sentence, to *anyone* on the Internet. 538 U.S. at 91. By contrast, SORA does not make a level-one offender's information publicly available to anyone on the Internet, *see* Correction Law § 168-*l*(6)(a), and does not disclose a sex offender's home address, his place of employment, his date of birth, or his license and motor-vehicle identification numbers, *compare id.* § 168-*l*(6) *with Smith*, 538 U.S. at 91. If the broader scope of public notification—to *any* member of the public, regardless of their need for such information—was deemed non-punitive in *Smith*, then the limited public notification here is necessarily also consistent with the Legislature's stated non-punitive intent.

Doe also complains about SORA's requirement of in-person appearance by registered sex offenders for photographing (App. Br. at 53), but his argument is misplaced. SORA has always required a level-one sex offender to register in writing, via mail, as it does today. *Compare* Correction Law § 168-i (1996) (providing that registration

"shall consist of a statement in writing") *with id.* § 168-i; *see also id.* § 168-f(2)(a) (1996); *id.* § 168-f(2)(a). Although SORA now requires a sex offender to appear once every three years to be photographed, *see id.* § 168-f(2)(b-3), such a requirement does not render the statute punitive. The requirement that a sex offender appear only once every three years (a total of six times over the span of Doe's twenty-year registration period) is reasonably related to the non-punitive goal of protecting the public and facilitating law enforcement's efforts by ensuring that a sex offender cannot thwart the purpose of registration by changing his appearance to avoid detection.

For all of these reasons, the amended provisions of SORA applicable to level-one offenders are fully consistent with the Legislature's stated intention to create a civil statute, and provide no reason to deem the statute so punitive in form or effect as to override that stated civil intent.

POINT III

SORA DOES NOT INFRINGE ANY OF DOE'S FUNDAMENTAL CONSTITUTIONAL RIGHTS

Doe does not deny that the Legislature had a rational basis to enact SORA to protect the public from the risk of recidivism posed by convicted sex offenders. He nonetheless argues that SORA violates substantive due process because it interferes with three fundamental constitutional rights. (App. Br. at 34-38.) First, he argues that SORA infringes his right to engage in legal sexual conduct, because it prohibits use of public funds to reimburse expenses of erectile-dysfunction treatment for sex offenders. Second, he argues that SORA violates his right to privacy mandating public disclosure of information about his sex offense conviction, along with his current photograph and zip code of residence. Third, he argues that SORA violates his right to travel by requiring that he appear in person once every three years to have his photograph taken for the sex-offender registry. None of these arguments has merit.

Erectile-dysfunction treatment. There is no merit to Doe's argument that restrictions on public funding of erectile-dysfunction treatment for sex offenders violates his right to engage in consensual

sexual activity. To the extent Doe asserts that SORA bars private insurance coverage for such treatment as to sex offenders (*see* App. Br. at 35), he is mistaken. SORA's restriction on erectile-dysfunction medication and treatment applies only to publicly-funded health-insurance programs, such as Medicare, Medicaid, and Healthy New York.[12] *See* N.Y. State Senate Introducer's Mem. in Support of S. 5921, *reprinted in* Bill Jacket for ch. 645 (2005), at 2 (statement in support) (explaining that the amendment to Correction Law § 168-b will prohibit erectile-dysfunction drugs "from being covered under the Medicaid, Family Health Plus, EPIC and Healthy New York Programs"). And Insurance Law § 4322(b-1), which Doe also cites, applies only to health maintenance organizations that receive certain funding from the State. *See* Insurance Law § 4321-a. These statutes represent a reasonable legislative judgment that public monies should not be used to fund erectile-dysfunction treatment for convicted sex offenders, given their demonstrated risk of reoffending through unlawful sexual conduct. *See* N.Y. State Senate Introducer's Mem. in Support of S. 5921, *reprinted in*

[12] Healthy New York is a government-subsidized health plan. *See* 11 N.Y.C.R.R. § 362-1.1(c), (g).

Bill Jacket for ch. 645 (2005), at 2 (declaring that limitations on public subsidies of erectile-dysfunction medication were adopted due to concerns that the use of such medication by convicted sex offenders "increases the immediate danger of reoffense").

Contrary to Doe's argument, the Constitution does not protect any fundamental right to receive public subsidies for medical treatment to permit one to engage in sexual conduct. The Supreme Court has made clear that the government has broad latitude to restrict use of public funds for particular purposes: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Harris v. McRae*, 448 U.S. 297, 317-18 (1980).

The rights and liberties deemed "fundamental" under the Constitution are quite limited. *See Reno v. Flores*, 507 U.S. 292, 302 (1993) (cautioning that a substantive due process analysis requires a "careful description of the asserted right"). SORA neither prohibits Doe from engaging in private consensual sexual activity, *cf. Lawrence v.*

Texas, 539 U.S. 558, 578 (2003), nor interferes with Doe's reproductive choices, *cf. Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Nor does SORA prevent Doe from purchasing erectile-dysfunction medication with his own funds, which the record suggests are substantial (*see* J.A. 23 (Compl. ¶¶ 75(e)(iv)(4), 75(f), 75(g)), or from obtaining reimbursement for such expenses through private insurance that does not accept public funding.[13]

Disclosure of information. SORA provides for limited disclosure of a level-one offender's photograph, name, zip code, crime for which he was convicted, his modus of operation and preferred victim type, the name and address of the school where the offender works or is enrolled, and any special conditions of his parole or probation. *See* Correction Law § 168-*l*(6)(a). This limited disclosure of basic information about Doe does not implicate any fundamental constitutional right.

Much of the information disclosed under SORA, such as the details of Doe's sex-offense conviction or his physical, identifying

[13] It is doubtful that Doe even has standing to raise his claims about erectile-dysfunction medication. He does not allege that he needs or wants such medication or that any provision of state law has impaired his ability to obtain it.

characteristics are matters of public record. "[T]here is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record." *Doe v. City of N.Y.*, 15 F.3d 264, 268 (2d Cir. 1994); *see also Paul v. Davis*, 424 U.S. 693, 713 (1976) (holding that disclosure of official records pertaining to arrest for shoplifting and shoplifter's photograph did not violate petitioner's substantive due process rights); *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (no privacy interest in facial characteristics, handwriting, or voice). Thus, the disclosure of Doe's name, photograph, the crime for which he was convicted, and the conditions of his probation does not infringe a fundamental right because such information is already publicly available. *See Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005); *Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999) (no constitutional right to keep private offender's registry information, such as current address and place of employment, private); *Paul P. v. Verniero*, 170 F.3d 396, 405 (3d Cir. 1999) (same); *E.B. v. Verniero*, 119 F.3d 1077, 1103 (3d Cir. 1997) (same).

The disclosure of certain information that may not have been previously available publicly, such as Doe's zip code, and his enrollment

or employment at a school, similarly does not violate substantive due process. There is no broad fundamental right to privacy in such information. Rather, personal privacy rights protected by the substantive due process clause are "limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty.'" *See Paul*, 424 U.S. at 713 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *cf. Doe*, 15 F.3d at 266-67 (recognizing a constitutional right to privacy in person's HIV status). For this very reason, courts have repeatedly rejected substantive due process clause challenges to the publication of basic information about convicted sex offenders. *See United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir.) *writ of cert denied*, 133 S. Ct. 234 (2012); *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009); *Doe v. Mich. Dep't of State Police*, 409 F.3d 491, 500-01 (6th Cir. 2007); *Does v. Munoz*, 507 F.3d 961, 965 (6th Cir. 2007); *Moore*, 410 F.3d at 1344-45; *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004); *Paul P.*, 170 F.3d at 405; *E.B.*, 119 F.3d at 1103-04.

Requirement to appear for a photograph. Doe's argument that SORA restricts his right to travel is also meritless. As an initial matter, Doe bases this argument primarily on requirements in federal

or local law that are not properly at issue in this § 1983 action naming only state officials as defendants. Consequently, Doe's complaint that federal law requires him to update his federal registration after interstate travel is irrelevant. Doe's complaints about local laws imposing residency restrictions on sex offenders are similarly irrelevant, because SORA imposes no residency requirement at the state level. (J.A. 230-231.) Nor does Doe allege that he is subject to any local residency restriction in any event. (*See, e.g.*, J.A. 188 (Tr. 29:15-25).)

The primary provision of state law that Doe alleges to infringe his right to travel is SORA's requirement that registrants appear to be photographed every three years. *See* Correction Law § 168-f(2)(b-3). This requirement does not infringe the right to travel, which protects (1) the right of a citizen to enter and leave a State; (2) the right to be treated as a "welcome visitor" when temporarily in a State not one's home; and (3) the right to be treated like other residents after relocating to the State. *See Saenz v. Roe*, 526 U.S. 489, 500 (1999). The requirement to appear for a photograph does not "directly impair the exercise of the right to free interstate movement." *Id.* at 501. The requirement does not prevent Doe from traveling to another state or

treat non-resident sex offenders differently from resident sex offenders. *Cf. Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005) (Iowa residency restrictions do not implicate a fundamental right to travel). And although SORA requires a registered sex offender to update his address with DCJS within ten days of a change in address, *see* Correction Law § 168-f(4), such a requirement in no way prevents a sex offender from leaving or entering the State, or even significantly burdens his ability to do so.

Nor do the restrictions of which Doe complains burden any fundamental right to intrastate travel. *See Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) (recognizing "that the Constitution also protects the right to travel freely within a single state"). SORA does not prevent Doe from traveling within New York; it does not require him to receive permission prior to moving residences; and it does not restrict where he can live, visit, or work in New York. SORA simply requires that Doe update his contact information if he changes residences, Correction Law § 168-f(4)—a task Doe would have to complete in any event for his personal matters. Such a requirement does not

"unreasonably burden or restrict" his movement within the State. *Shapiro v. Thomas*, 394 U.S. 618, 629 (1969).

POINT IV

DOE'S REMAINING CONSTITUTIONAL CLAIMS ALSO FAIL AS A MATTER OF LAW

A. SORA Does Not Violate Doe's Right To Procedural Due Process.

Doe argues that procedural due process required that he be given a hearing to demonstrate that he did not pose a risk of re-offense prior to the Legislature's extension of his registration period from ten to twenty years as a level-one offender (App. Br. at 46). As the district court correctly concluded, this argument is foreclosed by the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). (J.A. 241-242.) There, the Court made clear that no such hearing is required as to a statutory sex-offender registration requirement based solely on the nature of a person's offense of conviction, and not based on any individualized finding of dangerousness. As the Court observed, "[p]laintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they

seek to establish in that hearing are relevant under the statutory scheme." *Id.* at 8.

Like the sex-offender registration statute upheld in *Connecticut Department of Public Safety*, as to level-one offenders like Doe, SORA's registration requirement is triggered solely by the offender's conviction for an enumerated sex offense. *See* Correction Law §§ 168-a(1-3) (definition of "sex offender" and covered sex offenses), 168-f (registration requirement). Doe pleaded guilty to violating Penal Law § 263.16 (J.A. 36.4, 38-39); he was afforded a procedurally safeguarded opportunity to contest the facts underlying his conviction as part of his criminal proceeding, and he chose to plead guilty to resolve the charge (J.A. 36.2-42). Doe's conviction for an enumerated sex offense pursuant to his guilty plea triggers his obligation to register under SORA as a level-one offender. *See* Correction Law §§ 168-f(1), 168-a(1), (2)(a)(i). Due process does not require that Doe be afforded a hearing to establish his present "dangerousness," because it is irrelevant to the requirement that he continue to register under SORA.

Doe's attempt to distinguish Connecticut's registration scheme is unavailing. App. Br. at 47. Both New York's and Connecticut's sex-

offender statutes condition registration on a conviction for an enumerated sex offense. *Compare* Conn. Gen. Stat. §§ 54-250(8), 54-251, 54-252, 54-253, 54-254 *with* Correction Law §§ 168-a(1), (2), 168-f. Doe is similarly mistaken in arguing that the Legislature's extension of the length of the registration period for level-one offenders infringed his protected liberty interests due to the terms of his plea agreement. (App. Br. at 47-48.) As shown *supra* at I.B., the length of Doe's registration requirements was not part of his plea agreement. And as the district court explained, Doe does not have a protected liberty interest in the length of his registration period in any event. (J.A. 240-241.)

Doe's suggestion that he was entitled to notice or a hearing before the Legislature enacted the 1999 and 2006 amendments to SORA is also without merit. It is well settled that there is no constitutional requirement that an affected party be afforded a hearing prior to the enactment of legislation. *See Minn. State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271, 283-84 (1984); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915).

B. SORA Does Not Violate Doe's Equal Protection Rights.

On appeal, Doe limits his equal-protection challenge to the claim that "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." App. Br. at 49.[14] But as we have shown, neither level-one offenders in general, nor Doe in particular, were ever promised a maximum of ten years of registration. In any event, the Legislature had a rational basis to distinguish between level-one offenders who have been previously convicted of a sex offense and ordinary citizens who have not been. The Legislature concluded that a registration period of twenty years for all

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[14] Doe makes a fleeting attempt to argue that sex offenders convicted of attempted possession of child pornography are a suspect class (*see* App. Br. at 49 n. 14), but no court has ever held that sex offenders, or specifically child-pornography offenders, are a suspect class entitled to heightened scrutiny. *See, e.g.*, *Lustgarden v. Gunter*, 966 F.2d 552, 555 (10th Cir. 1992) (holding that sex offenders are not members of a suspect classification); *Moore*, 410 F.3d at 1346 (explaining that sex offenders are not members of a suspect class); *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001) (same); *Cutshall*, 193 F.3d at 482 (same); *Artway v. Att'y Gen. of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996) (subcategory of "repetitive and compulsive sex offenders" is not a suspect or quasi-suspect class (quotation marks omitted)).

level-one offenders was warranted because, given the seriousness of their offense, such offenders still "continue to threaten the safety of our communities." *See* N.Y. State Senate Introducer's Mem. in Support of S. 6409, *reprinted in* Bill Jacket for ch. 1, *supra*, at 3 (justification); Ch. 1, § 1, 2006 N.Y. Laws at 1 (legislative intent). This rational basis is more than sufficient to uphold the Legislature's decision to treat level-one sex offenders differently from ordinary citizens who have not been convicted of any sex offense. *See Beatie v. City of N.Y.*, 123 F.3d 707, 712 (2d Cir. 1997); *see also Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (explaining that classification resulting in "inequality" is not sufficient grounds to strike down statute under rational-basis review (quotation marks omitted)); *Dandridge v. Williams*, 397 U.S. 471, 501 (1970) ("[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.").

C. SORA Does Not Violate Doe's Fourth Amendment Rights.

Doe brings a Fourth Amendment challenge to SORA's requirements that he, as a level-one offender, (1) appear in person every three years to be photographed, Correction Law § 168-f(2)(b-3), and (2) submit an annual verification form confirming his current address, *id.* § 168-f(2)(a). But these requirements do not effect any seizure of Doe's person under the Fourth Amendment, and even if they did, the requirements would be reasonable under the special-needs doctrine.

The requirements that Doe appears once every three years to be photographed and submit an annual verification form do not constitute a Fourth Amendment seizure. These requirements stand in sharp contrast to the kinds of restrictions on movement that this Court has held to effect a seizure. For example, in *Murphy v. Lynn*, this Court held that post-arrest requirements that a person not leave the State and attend eight court appearances in a single year constituted a seizure. 118 F.3d 938, 945 (2d Cir. 1997). Here, by contrast, SORA does not restrict Doe's ability to travel outside the State and requires only that he appear in person to be photographed once every three years. This modest appearance requirement is more akin to a pre-arraignment

summons requiring a subsequent court appearance, which this Court has held does not effect a Fourth Amendment seizure. *See Burg v. Gosselin*, 591 F.3d 95, 98-99 (2d Cir. 2010). And contrary to Doe's argument, the fact that Doe's non-compliance with the appearance requirement could result in a felony charge, *see* Correction Law § 168-t, does not convert the requirement into a seizure. *See Burg*, 591 F.3d at 99 (explaining that the threat of confinement for failure to appear in response to a summons does not turn the summons into a seizure).

Even if SORA's photograph and annual verification requirements did constitute a Fourth Amendment seizure, they would be justified under the established special-needs test. (J.A. 258-259.) Both requirements serve purposes distinct from ordinary crime detection activities: they ensure that the State's sex-offender registry contains updated contact information for convicted sex offenders, so that entities with vulnerable populations may take any necessary precautions, and they assist law enforcement authorities to investigate future sex offenses. *Cf. Nicholas v. Goord*, 430 F.3d 652, 668-69 (2d Cir. 2005) (concluding that New York's DNA registry statute satisfies a special need because its primary purpose is to assist law enforcement in solving future crimes);

Maryland v. King, 133 S. Ct. 1958, 1980 (2013) (upholding cheek swabs for DNA testing of arrestees). Indeed, because of Doe's status as a convicted sex offender, the State "already has a plethora of identifying information" and therefore the degree to which SORA intrudes on his privacy is minimal. *Nicholas*, 430 F.3d at 671. Thus, in light of the State's strong interest in collecting and maintaining information concerning the identity and residence of convicted sex offenders, SORA's requirements would be reasonable under the Fourth Amendment, even if they did implicate the Amendment's protections. (J.A. 259.)

CONCLUSION

For the reasons discussed, this Court should affirm the district court's grant of summary judgment for Appellees.

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June 17, 2013

Respectfully submitted,

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Gil Abadi, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,820 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Gil Abadi
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