18-1602-cv

United States Court of Appeals
For the
Second Circuit

JOHN JONES,

Plaintiff-Appellant,

– v. –

COUNTY OF SUFFOLK, PARENTS FOR MEGAN'S LAW INC. AND THE CRIME VICTIMS CENTER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT AND SPECIAL APPENDIX

Erin Beth Harrist
Aadhithi Padmanabhan
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300

Lawrence Spirn
842 Fort Salonga Rd., Suite 2
Northport, NY 11768
(631) 651-9070

Attorneys for Plaintiff-Appellant

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INTRODUCTION

The central issue in this appeal is whether a suspicionless search and seizure program where state agents first coerce people on the sex offender registry to submit to potentially incriminating questioning in the doorways of their own homes, after which the agents provide that information immediately to police for investigation, is reasonable under the "special needs" exception to the Fourth Amendment. The District Court held that this program, jointly created and implemented by Defendants Suffolk County and Parents for Megan's Law (PFML), is constitutional because it meets the "special need" of verifying the information on the registry and granted summary judgment to Defendants.

In applying the special needs test, the District Court acknowledged that special needs never justify a suspicionless search and seizure program if its primary purpose is law enforcement. But it subsequently failed to give proper significance to Plaintiff's evidence consistent with *Ferguson v. North Carolina*, 532 U.S. 67 (2001), and this Court's recent decision in *Lynch v. City of New York*, 737 F.3d 150 (2d Cir. 2013). Pursuant to the program, PFML immediately sends the Suffolk County Police Department (SCPD) notification when a registrant provides information that is inconsistent with his registration information – a *per se* felony violation of New York's Sex Offender Registration Act (SORA) – and the SCPD opens a criminal investigation. The County has arrested nineteen

registrants as a result. Because the immediate purpose of the program is to investigate and arrest people for felony failure to register offenses, the special needs doctrine does not excuse the County from the warrant and probable cause requirements of the Fourth Amendment.

Even if the primary purpose is not law enforcement, the Supreme Court has never upheld a warrantless search or seizure regime targeting the home – the locus of the strongest Fourth Amendment protections – except in the case of probationers and parolees. Relying on this fact, this Court invalidated an administrative search regime targeting the home even when the state's interest for conducting the search was substantial in *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002). The District Court discounted the strength of these protections, relying on case law overruled by *Florida v. Jardines*, 569 U.S. 1 (2013), to conclude that the Plaintiff had a diminished expectation of privacy in his porch, walkway, and lawn. If accepted, the District Court's ruling would eviscerate the core protections of the Fourth Amendment by expanding the "special needs" doctrine to circumstances far more expansive than any sanctioned by the Supreme Court.

JURISDICTIONAL STATEMENT

This case presents a challenge under the Fourth Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983. As such, the District Court had subject matter jurisdiction under 28 U.S.C. §1331 and § 1343(a)(3)-(4). Because

the District Court issued a final decision, this Court has jurisdiction under 28 U.S.C. § 1291.

The District Court issued an order on March 30, 2018 granting the motion for summary judgment and later issued an accompanying decision on May 1, 2018. *See* Special Appendix ("SA") at 1-66. The Plaintiff filed a timely notice of appeal on May 25, 2018. *See* Joint Appendix ("JA") at 2533. In the decision being appealed, the District Court dismissed the complaint in its entirety, thereby disposing of all Plaintiff's claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred when it concluded that the primary purpose of the Suffolk County suspicionless search and seizure program was to verify the registry in light of record evidence that the primary purpose was to gather information to arrest registrants for violations of their registration requirements.

2. Whether the District Court erred when it concluded that the County's interest in verifying the registry outweighed Plaintiff's privacy in his own home, the locus of the strongest Fourth Amendment protections.

3. Whether, in light of the Supreme Court's decision in *Florida v. Jardines*, 569 U.S. 1 (2013), and its progeny in this Court, the District Court erred when it held that Plaintiff had diminished expectations of privacy on his porch steps, his walkway, and his lawn.

STATEMENT OF THE CASE

Plaintiff John Jones, proceeding by pseudonym in accordance with an order of Magistrate Judge Lindsay, filed his complaint in the Eastern District on January 9, 2015 in which he named as Defendants the County of Suffolk and Parents for Megan's Law. JA229-244.[1] The Defendants sought to dismiss the complaint in its entirety. Following briefing on the Defendants' motion, District Judge Joanna Seybert held that PFML was a state actor such that Plaintiff could assert a 42 U.S.C. § 1983 claim against it, denied the motion as to Plaintiff's Fourth Amendment claim, and granted the motion as to Plaintiff's due process claim. *Jones v. Cty. of Suffolk*, 164 F. Supp. 3d 388 (E.D.N.Y. 2016).

Following discovery, Defendants moved for summary judgment on August 24, 2017. The District Court issued an order granting summary judgment on March 30, 2018, later issuing a decision on May 1, 2018. JA2466-2532. On May 25, 2018, Plaintiff filed a timely notice of appeal. JA2533.

STATEMENT OF FACTS

In support of their summary judgment motions, the Defendants submitted more than 300 paragraphs combined in their 56.1 statements, the vast majority of

[1] Pursuant to the Magistrate Judge's Order permitting Plaintiff to proceed by pseudonym, the parties entered into a protective order protecting the identity of the Plaintiff and his family. For this reason, pseudonyms for him and his family are used herein and the publicly filed documents contain redactions of identifying information.

which Plaintiff disputed by citation to extensive evidentiary materials. JA55-161. In addition, Plaintiff submitted a 56.1 statement with 132 additional facts. JA162-186. In evaluating this record, it is well-established that "[t]he Court is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004).

Based on this record, the District Court correctly concluded that PFML was a state actor subject to constitutional restraint under the joint action and public function test and that there was a genuine issue of material fact regarding whether Plaintiff was seized when PFML interrogated him at his home. SA30-48. Nevertheless, in concluding that the primary purpose of the program is to verify the registry, the District Court both failed to acknowledge probative facts and failed to recognize the significance of certain facts showing that the immediate purpose was law enforcement.

Plaintiff sets forth the full set of facts that must be taken as true for the purposes of this appeal below.

I. Suffolk County's Home Address Verification Program

In February 2013, Suffolk County passed the "Community Protection Act," or "CPA," a law that authorized the County to contract with PFML to conduct

"home address verifications" of all the County's registrants. Pl. 56.1 ¶¶ 1-7 (JA162-64). Pursuant to the contract, PFML verifies that registrants are accurately reporting various pieces of information to the Division of Criminal Justice Services (DCJS), such as address and drivers' license number, as required by SORA. *Id.* ¶¶ 11-12, 23-24 (JA164-65, 167). Failure to provide accurate information to DCJS is a felony offense. N.Y. Correct. Law § 168-t.

The District Court failed to acknowledge evidence that enforcement of this criminal law was the primary focus of the County's verification program. The proposal for the program presented to Suffolk County officials explained that any discrepancies noted during a verification "will be evaluated and forwarded to Special Victim [Unit of the SCPD] for the appropriate enforcement action." JA2163; *see also* Pl. 56.1 ¶ 6 (JA163); JA1149-50 (Ahearn Dep. 16:5-17:6). When presenting the program to the County's Legislature, the Executive Director of PFML, Ms. Laura Ahearn, described it as a "comprehensive plan allow[ing] for the coordination and further, from law enforcement, enforcement, so that we are charging these offenders when they're violating registration laws. That's not happening as much as it can right now." JA1837. Further statements by Ms. Ahearn affirm this purpose:

> So the organizational plan that fits under the plan of the Police Department is designed not only to step up enforcement, which is a direct – that is a direct result of everything we've talked about in terms of address verification[.] JA1985.

> Ninety additional home address investigative leads and informationals were transmitted to police. These are the types of leads and information that we are sending to law enforcement on the home address activities. Sex offenders that were registered at an address but never lived there, sex offenders who moved to other addresses and failed to register the new address, inaccurate house numbers, misspelled street names, incorrect zip codes . . . JA2061.

> I just wanted to mention that [PFML] has been meeting with the District Attorney and having ongoing discussions. So now the collaboration, we had to square away our procedures and processes, and we worked with law enforcement to make that happen. And Law Enforcement was working with the District Attorney, and now the [PFML] has brought that together for a sort of real close triangle, all of us, Law Enforcement, District Attorney and the Agency working together to ensure we're all on the same page. JA2080.

While the District Court acknowledged that the statements of Ms. Ahearn and her colleagues were relevant to determining the purpose behind the program, *see* SA55-56, it did not acknowledge these statements or accept them as true, as it must on a summary judgment motion.

The County's Police Department (SCPD) also viewed the verification program as a "law enforcement initiative." JA1548 (Hernandez Dep. 34:18-35:3).[2] As expressed by Chief of Police James Burke: "That's why we partnered with Ms. Ahearn and her group, because they are specially trained, and they will assist us with respect to lead generation[.]" JA1838. These "leads" include information that

[2] Detective Lieutenant Stephen Hernandez was the commanding officer of the Special Victims Unit of the SCPD from March 2013 through January 2016. JA1541 (Dep. 9:21-10:14). He was also the County's 30(b)(6) deponent. JA1541.

a registrant may be failing to comply with his registration requirements, a felony offense. Pl. 56.1 ¶¶ 23-32, 54-59 (JA167-68, 173-74). How these leads are generated is specified in the contract resulting from the CPA, the central document setting forth the operational details of the program. *Id.* ¶ 11 (JA164). The contract requires that ex-law enforcement officers employed by PFML (referred to as Registration Verification Representatives, or "RVRs") go to the private residence of each Level One offender once a year and of each Level Two and Three offender twice a year, without providing any advance notice to the registrant. *Id.* ¶¶ 11-14 (JA164-65).[3] The SCPD retains discretion to order additional verifications as it desires. JA1378 (Contract Section III.A.7).

Each week, PFML provides to the SCPD a list of registrants scheduled for verifications the following week. Pl. 56.1 ¶ 16 (JA165). The SCPD removes approximately 10-45% of the names from the list during its review. *Id.* ¶ 19 (JA166). While conducting the verifications, the RVRs are governed by a Use of Force policy and a Firearm policy, which permits RVRS to carry firearms. *Id.* ¶ 77 (JA177); JA1789-1791.

[3] Pursuant to SORA, individuals convicted of certain sex offenses are assigned a risk level by the State Board of Examiners of Sex Offenders. Those determined to pose the lowest risk of reoffending are assigned a "Level One" designation, those who pose a moderate risk are assigned a "Level Two" designation, and those who pose a high risk are assigned a "Level Three" designation. N.Y. Correct. Law § 168-l.

Although the District Court acknowledged that "part of the program involved transmission of leads to SCPD," it ignored evidence in the record showing that these "leads" were transmitted to the SCPD for use as evidence in subsequent prosecutions and that the County District Attorney was involved in ensuring this evidence was sufficient for its own needs. In fact, the SCPD specifically developed the paperwork completed during the verifications to meet the needs of DA's office. Pl. 56.1 ¶¶ 20-21 (JA166-67). As explained by the SCPD officer responsible for implementation of the verifications, the SCPD was involved in "how we would collect evidence" from PFML by helping to create the forms RVRs used during the verifications. JA1589 (Giordano Dep. 67:10-17); *see also* Pl. 56.1 ¶ 20 (JA166). The DA's office provided input on how to run the program by sending "a letter with guidelines on what they would need to go forward with a criminal prosecution for cases against sex offenders." JA1594 (Giordano Dep. 89:3-23); *see also* JA1502 (Rau Dep. 49:9-22), JA1517 (Rau Dep. 109:12-110:10), JA1561-62 (Hernandez Dep. 89:18-92:7).

If PFML verified a registrant's information, they would submit a blue sheet to the SCPD that contained various information, such as the dates and times the verifications were attempted, the names and signatures of the PFML agents, and the information collected from the registrant. Pl. 56.1 ¶¶ 23-24 (JA167-68). When PFML gathered information demonstrating a possible violation of law, they

reported it as "lead" to the SCPD using a "rainbow sheet" that includes a checklist of possible crimes, including "failed to register as required" – a felony offense. *Id.* ¶¶ 26-27, 29 (JA168). Officer Giordano testified that both of these forms were used as evidence:

> Q: Were any of the forms you received from Parents from Megan's Law considered evidence as part of a criminal prosecution?
> A: If a case went to trial and a form was completed by an RVR, they were all hand signed, then, yeah, that would go to court as evidence.
>
> …
>
> Q: Do you know if the rainbow forms were ever used as evidence?
> A: If the rainbow form was generated regarding what Parents for Megan's Law believed was a crime, we drew a CC number. If the case was to go forward, it would be used as evidence. . . .
>
> Q: Do you know if the blue forms were ever used as evidence?
> A: They could have been. Its the same thing, anything that we received was considered an original form and it was treated that way, as a piece of evidence. . . .

JA1595 (Giordano Tr. 90:24-91:5, 92:11-16, 92:19-24); *see also* JA1502 (Rau Dep. 49:9-22), JA1517 (Rau Dep. 109:12-110:10); JA1561-62 (Hernandez Dep. 89:18-92:7).

As of April 26, 2016, the SCPD arrested nineteen registrants for failure to register as a result of the program since it began in approximately April 2013. Pl. 56.1 ¶ 53 (JA173).

II. Coercing the County's Registrants to Comply with the Verifications

In the beginning of the program, RVRs reported to PFML that SCPD officers were telling registrants that they did not need to comply with the verifications. *Id.* ¶ 37 (JA170). In response, Ms. Ahearn wrote to the SCPD Chief James Burke in June 2013 to set up a meeting "ASAP to discuss a serious breach of our collaboration which serves to directly undermine the County Executive's goals and directly compromises the safety of our staff." *Id.* ¶ 38 (JA170). In response, Chief Burke ordered Det. Lt. Stephen Hernandez, the Commanding Officer of the Special Victims Unit (SVU), to draft a letter to registrants. *Id.* ¶ 39 (JA170-71). The letter was sent to all registrants on SCPD letterhead on or before July 22, 2013, and was approved by the Chief of Police. *Id.* ¶¶ 40-41, 43 (JA171). The letter states:

> Recently, the Suffolk County Police Department and Parents for Megan's Law entered into a contract for the purpose of conducting verifications of registered sex offenders residential and employment addresses. Registered sex offenders are required to provide this information under the New York State Sex Offender Registration Act, also known as Megan's Law.

Id. ¶ 44 (JA171) (emphasis added); JA1767 (SCPD letter).

The number for the SCPD SVU unit was provided to registrants at the bottom of the letter. Pl. 56.1 ¶ 45 (JA172); JA1767 (SCPD letter). If registrants called the unit with questions, Det. Lt. Hernandez was ordered through his chain of command to instruct his officers not to tell registrants that compliance was

voluntary unless the registrant asked repeatedly whether he had to comply. Pl. 56.1 ¶¶ 46-49 (JA172). Det. Lt. Hernandez also sent a copy of this SCPD letter to Ms. Ahearn so that RVRs could show it to registrants at their doorsteps to "encourage cooperation." *Id.* ¶¶ 42, 71 (JA171, 176). After the SCPD sent the letter to registrants, it stopped receiving complaints from PFML that registrants were not cooperating. *Id.* ¶ 51 (JA172). In fact, according to PFML's own paperwork, 99% of registrants were compliant the first year of the program. *Id.* ¶ 52 (JA172-73).

III. The Threatening Nature of the Verifications

Each verification is conducted by a minimum of two PFML agents who position themselves at a distance of ten feet from each other at the registrant's front door. *Id.* ¶¶ 63-66 (JA175). The agents are trained to engage in a law enforcement technique known as "verbal judo" intended to gain compliance from registrants, *id.* ¶ 67 (JA175), and they often carry concealed firearms, *id.* ¶ 68 (JA175). They also use an array of tactics to make uncooperative registrants comply. For instance, they used Det. Lt. Hernandez's letter stating that compliance was required. *Id.* ¶ 71 (JA176). They also told registrants who did not cooperate with them that the SCPD would investigate them if they did not comply. *Id.* ¶¶ 72-73 (JA176). If a registrant was not home or did not answer the door, they returned to the registrant's home up to five times to attempt to conduct the investigation, a practice approved by the County. *Id.* ¶ 74 (JA176).

IV. The Verifications at Mr. Jones's Residence

Plaintiff John Jones is an honorably discharged veteran who lives in Suffolk County along with his wife, Jane Jones, and their minor children. *Id.* ¶ 78 (JA177-78). The Jones family have lived in their present home in Suffolk County for approximately fifteen years. *Id.* ¶ 79 (JA178). Since his sex offense conviction two decades ago, Mr. Jones has not been charged with any crimes or violations. *Id.* ¶ 80 (JA178). From January 5, 2005 until he was removed from the registry in March 2016, Mr. Jones was assigned a "Level One" risk level, the lowest possible risk of re-offending. *Id.* ¶ 82 (JA178). When his registration information was verified by PFML, he was not on parole, probation, or any other form of post-release supervision. *Id.* ¶ 83 (JA178).

In late July of 2013, Mr. Jones received the letter from Det. Lt. Hernandez about the PFML contract and showed it to his wife. *Id.* ¶¶ 84-85 (JA178-79). Mrs. Jones called the number of the SCPD SVU, provided at the bottom of the letter, to inquire whether they were required to open the front door and respond to the PFML agents' questions and demands for documentation. *Id.* ¶ 86 (JA179). The officer told Mrs. Jones that she and her husband should answer the PFML agents' questions and not be rude. *Id.* ¶¶ 87-90 (JA179). As a result of these communications with the SCPD, Mr. Jones understood that he was required to comply and feared repercussions if he refused. *Id.* ¶ 109 (JA181).

On August 16, 2013, two ex-law enforcement officers employed by PFML walked over the Jones's lawn and walkway and up the two steps to their front door. *Id.* ¶¶ 93-94 (JA180). Responding to their knock, Mr. Jones's minor son opened the door and then ran to tell his mother that two police officers were at their house insisting that they speak with his father. *Id.* ¶¶ 94-96 (JA180). When Mr. Jones came to the door, the PFML agents twice asked for Mr. Jones. *Id.* ¶¶ 97-98, 100 (JA180). Mrs. Jones responded that he was home but in the shower. *Id.* Mrs. Jones asked the agents to identify themselves, and one said they were from PFML. *Id.* ¶ 99 (JA180). When she asked why they were there and whether they had the authority to question Mr. Jones at his home, one agent responded that they could do what they wanted because they were from PFML. *Id.* ¶¶ 103-04 (JA181). The agents stayed approximately a foot from the front door for approximately fifteen minutes while waiting for Mr. Jones. *Id.* ¶¶ 101-02 (JA181).

Upon Mr. Jones's arrival at his front door, the agents interrogated him about the addresses that he reported to the State and the cars that he drives. *Id.* ¶¶ 106-107 (JA181). Notwithstanding that Mr. Jones was not required to register his work address as a Level One registrant, the agents also asked him several questions about his employment, including where he worked and for how long he had been employed. *Id.* ¶ 108 (JA181). After Mr. Jones finished answering their questions, they demanded to see his driver's license. *Id.* ¶ 110 (JA182). Since his license was

in his parked car, Mr. Jones went to retrieve it; the RVRs followed him closely as he walked over his property, remaining about two feet behind him. *Id.* ¶¶ 111-13 (JA182). The RVR who copied down Mr. Jones's license information told him that PFML agents may visit him at his job. *Id.* ¶ 116 (JA182).

On July 2, 2014, two PFML agents returned to Mr. Jones's residence when he was not at home. *Id.* ¶ 118 (JA183). The agents refused to permit Mrs. Jones's mother-in-law, who answered the door, to verify that Mr. Jones resided there. *Id.* ¶¶ 119-20 (JA183). Instead, three agents returned to his home on July 9. *Id.* ¶ 121 (JA183). The first agent knocked on the front door and a second agent stood in the driveway. *Id.* ¶ 124 (JA183-84). The third remained with PFML's car. *Id.* The first agent remained at Mr. Jones's front door while he made Mr. Jones answer a series of questions, demanded to see his driver's license, and followed him to his car while he retrieved it. *Id.* ¶¶ 125-29 (JA184).

Mr. Jones experienced emotional distress as a result of these verifications and no longer attends community events. *Id.* ¶ 131 (JA185); Pl. Resp. to County 56.1 ¶ 55 (JA71).

SUMMARY OF ARGUMENT

At the core of the Fourth Amendment is the requirement that law enforcement officials have a warrant supported by probable cause before searching or seizing a person. While this requirement may be waived in rare circumstances to

achieve a special government need, the special needs doctrine does not apply when the primary purpose of a suspicionless seizure program is law enforcement. As the Supreme Court explained in its most recent decision analyzing a program's primary purpose, central to this inquiry is whether information is provided to law enforcement for the specific purpose of incriminating the target of the search or seizure. *Ferguson v. City of Charleston*, 532 U.S. 67, 84-85 (2001). In *Ferguson*, the Supreme Court invalidated a public hospital policy requiring that the hospital test pregnant women for cocaine use and provide positive results to the police for purposes of arrest. In contrast, in its most recent case on "primary purpose," *Lynch v. City of New York*, 737 F.3d 150 (2d Cir. 2013), this Court upheld a NYPD breathalyzer policy requiring the testing of officers who discharge their firearms to determine if they are fit for duty, a requirement for a profession whose mission is to protect public safety.

Comparing *Ferguson* with *Lynch* illustrates the central points of inquiry for the "primary purpose analysis," a question of law. First, the court looks to the text of the underlying policy, analyzing how the program or policy treats the information gathered. In *Ferguson*, the hospital provided positive test results for cocaine to police for arrest and prosecution. In *Lynch*, on the other hand, the police officers were tested by their employer to determine if the officer was fit for duty. Second, the court looks to who the policy targets and the context for the search. In

Lynch, this Court found it significant that the NYPD policy was an employment policy in a profession involving public safety. Third, the court looks to whether the collected information is incriminating. Narcotic use is inherently criminal; alcohol use is not. Fourth, the court examines how closely involved the police and prosecutors are in the implementation of the policy. In *Ferguson*, police and prosecutors helped design the program, developed the procedures for collecting evidence, and were a direct recipient of information. In *Lynch*, prosecutors were not involved and only the internal affairs bureau of the NYPD directly received a positive result for safekeeping. Finally, the court inquires whether the program led to arrests. In *Ferguson*, arrests under the policy were numerous; in *Lynch*, there were none.

Here, Suffolk County has designed and implemented a suspicionless search and seizure program akin to the drug testing policy invalidated by the Supreme Court in *Ferguson*. Pursuant to this program, registrants are routinely seized on their very own doorsteps without any modicum of suspicion whatsoever. Having coerced registrants to comply by sending them a letter from the Police Department telling them that compliance is mandatory (and only informing them compliance is not mandatory if they ask repeatedly), the County compels registrants to provide information to ex-law enforcement officers employed by PFML at their doorsteps. Any discrepancies between the information provided to PFML with that on the

registry is a *per se* violation of SORA requirements and a felony offense. The SCPD is immediately notified on forms used as evidence by the District Attorney's Office. The County admitted that nineteen people were arrested as a direct result of this program.

Nevertheless, the District Court concluded that the primary purpose of this program was to verify the registry. But it did so without giving sufficient weight to the categories of evidence deemed significant in *Ferguson* and *Lynch*. While it acknowledged that the SCPD opened investigations based on the "leads" provided by PFML and that there were – undisputedly – nineteen arrests as a direct result of the verifications, the District Court failed to recognize that, as in *Ferguson,* this is conclusive evidence that the immediate objective of the program is for PFML to provide incriminating evidence to the SCPD. While the ultimate purpose might be to correct the registry (although how or when that occurs is absent from the record), the immediate consequences are a criminal investigation and possible arrest and prosecution.

Even if this Court agrees that the primary purpose is to verify the registry, reversal is still necessitated by the District Court's failure to recognize Plaintiff's privacy interest in his own home. This Court declined to validate a warrantless administrative search of the home in *Anobile v. Pelligrino,* 303 F.3d 107 (2d Cir. 2002) in recognition of the heightened privacy interests in the home. The District

Court relied on overruled law to conclude that the areas immediately surrounding the home are not subject to the greatest Fourth Amendment protections, a conclusion directly refuted by the Supreme Court in *Florida v. Jardines*, 569 U.S. 1 (2013), and *Collins v. Virginia*, 138 S. Ct. 1663 (2018). Upholding the County's program under these circumstances would mark a serious erosion of Fourth Amendment protections of the home.

ARGUMENT

The standards employed by this Court when reviewing orders granting summary judgment are well established:

> We review the grant of a motion for summary judgment de novo. In determining whether there are genuine issues of material fact that preclude judgment for the defendant as a matter of law, we must resolve all ambiguities in favor of the nonmoving parties. The Court is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments. Thus, we will affirm the district court's grant of summary judgment only if, taking all of plaintiffs' evidence as true, we find that no reasonable juror could conclude that plaintiffs have established that the [defendants] violated plaintiffs' constitutional rights . . .

Amnesty Am. v. Town of West Hartford, 361 F.3d 113, 122-23 (2d Cir. 2004) (internal citations omitted).

In Part I below, Plaintiff explains why the District Court correctly held that PFML is a state actor and that there is a genuine issue of material fact regarding whether Plaintiff was seized by PFML on the curtilage of his home. In Part II,

Plaintiff explains why the County's program of suspicionless seizures is invalid because its immediate purpose is to generate evidence that registrants are out of compliance with their registration requirements, a felony offense. Finally, in Part III, Plaintiff explains how reversal is necessary even if the Court finds that the program serves a "special need" because the District Court fatally erred in balancing the special need against Plaintiff's privacy interest in the areas surrounding his home, an area subject to the greatest protection under the Fourth Amendment.

I. The District Court Correctly Held that PFML Is a State Actor and that There Is a Genuine Issue of Material Fact Regarding Whether Plaintiff Was Seized in the Curtilage of His Home

The issues raised on summary judgment were whether PFML is a state actor subject to constitutional restraints and whether Plaintiff was seized when ex-law enforcement officers employed by PFML came to his home to interrogate him. Based on the record, the District Court properly concluded that PFML is a state actor under both the joint action and the public function test and that there was an issue of fact regarding whether Plaintiff was seized.

A. PFML is a State Actor Under Both the Joint Action and Public Function Test

To hold a private entity responsible for constitutional violations under Section 1983, it must be deemed a state actor. One way private entities become state actors is when they meet the requirements of the "joint action" test. This test

is met "when the state provides significant encouragement to the entity, the entity is a willful participant in joint activity with the state, or the entity's functions are entwined with state policies." *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012). There is "significant encouragement" when the state actively enables and demonstrates a strong preference for invasive conduct. *Skinner v. Railway Labor Execs. Ass'n.*, 489 U.S. 602, 614-16 (1989). This inquiry is fact specific and begins with an examination of the challenged conduct at issue. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001); *see also Fabrikant*, 691 F.3d at 207 (court must identify "the specific conduct of which the plaintiff complains, rather than the general characteristics of the [private] entity").

Here, the District Court correctly determined that PFML is a joint actor with Suffolk County because the County "worked with PFML to administer the program and maintained control over certain aspects of the program." SA36. Specifically, the SCPD proscribed the number of verifications and heavily modified PFML's proposed schedule of verifications, regularly removing 10-45% of the proposed registrants. Pl. 56.1 ¶¶ 10-14, 16, 18-19 (JA164-66). The SCPD also sent a letter to every registrant in the County stating they are required to comply with PFML and directing registrants to call the Special Victims Unit [SVU] with any questions. *Id.* ¶¶ 40-41, 43-46 (JA171-72). The Chief of Police James Burke directed SVU officers to purposely mislead registrants who called the

SVU by not telling them compliance was voluntary unless asked repeatedly. *Id.* ¶¶ 45-46, 48 (JA172). The SCPD specifically sent the letter to PFML to show registrants during verifications because of concerns that "sex offenders are not being cooperative with PFML." *Id.* ¶ 42 (JA171); JA1786-88. In addition, the County developed the forms used to collect the evidence gathered, in part to ensure it would be in a form usable by the County District Attorney. Pl.'s 56.1 ¶¶ 20-21 (JA166-67). Based on this record, the District Court correctly determined that PFML is a joint actor with Suffolk County. SA35-38; *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding state action when the State has "so far insinuated itself into a position of interdependence" with the private entity "that it must be recognized as a joint participant in the challenged activity").

A private entity can also be a state actor if it takes on a public function. *Fabrikant,* 691 F.3d at 207. Under this test, "[s]tate action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Horvath v. West Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004). Here, the District Court correctly concluded that the monitoring of registrants is an inherently public function delegated to local law enforcement pursuant to SORA. SA38-39. Other facts supporting this conclusion include that PFML uses retired ex-law enforcement personnel and operates pursuant to a Firearm and Use of Force Policy.

Pl. 56.1 ¶¶ 14, 68, 77 (JA165, 175, 177). The County considered the verification program to be a "law enforcement initiative," as did the police union. JA1548 (Hernandez Dep. 34:18-35:3). The police union was concerned about the removal of additional police functions after the program was created, requiring the County to sign a Memorandum of Understanding restricting any further delegation. Pl. 56.1 ¶¶ 8-9 (JA164).

For the above reasons, the District Court correctly found that PFML is a state actor that must comply with the Fourth Amendment.

B. The District Court Correctly Held That A Jury Could Find That Mr. Jones Was Unreasonably Seized

Acting pursuant to the authority conferred on them by Suffolk County, PFML agents entered Plaintiff's property for the improper purpose of effecting a seizure and requiring him to answer questions and produce documentation. As the District Court correctly recognized, these actions violate the Fourth Amendment under the recent Supreme Court case *Florida v. Jardines*, 569 U.S. 1 (2013). In light of evidence that Plaintiff was compelled to comply with the verifications, the District Court correctly concluded that it could not resolve as a matter of law whether a reasonable person in Plaintiff's position would not feel free to decline or terminate the encounter with PFML at his doorstep.

i. The Fourth Amendment Protects the Curtilage of the Home from Coerced Intrusions

The Fourth Amendment provides that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Within the scope of the Fourth Amendment's protections, "the home is the first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). As recently affirmed by the Supreme Court, the area that immediately surrounds the home – its curtilage – is entitled to the same protections as the interior of the home. *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (applying full scope of protections to the driveway); *see also United States v. Alexander*, 888 F.3d 628 (2d Cir. 2018) (applying full scope of protections to area in front of shed near back door of residence).

The Supreme Court recently held that government officials violate the Fourth Amendment when they enter the home's curtilage without a warrant or suspicion for the purpose of conducting a search. In *Jardines*, two officers approached the home of Mr. Jardines with a drug-sniffing dog. 569 U.S. at 3-4. As they approached the front door, the dog began showing signs that he smelled illegal drugs, sniffed the base of the front door, and indicated that he detected drugs by sitting down. *Id.* at 4. On the basis of the dog's behavior, the officers successfully applied for a warrant to search the residence, leading to Mr. Jardines's

arrest. He later challenged the canine investigation as an unreasonable search. *Id.* at 4-5.

The Supreme Court found that the conduct of the officers was a "straightforward" Fourth Amendment violation. *Id.* at 5. The Court first recognized the long-established principle that the core of the Fourth Amendment is "the right of a man to retreat into his home and there be free from unreasonable government intrusion." *Id.* at 6. After noting that the area immediately surrounding the home is included within the Fourth Amendment's protections, the Court held that the officers had clearly entered into a constitutionally protected space because "[t]he front porch is the classic exemplar of an area adjacent to the home and to which the activity of the life extends." *Id.* at 7.

Having determined the officers were in a constitutionally protected area, the Supreme Court in *Jardines* turned to the question of whether the officers had engaged in an "unlicensed physical intrusion"; in other words, whether the officers had exceeded the implied license to be present. *Id.* at 7-8. The Court concluded that they did. *Id.* at 9-10. In reaching this conclusion, the Court explained:

> [There is an] implicit license [that] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.

Id. at 8. The Court went on to explain, however, that the implied license to conduct a "knock and talk" did not permit the officers to be present on the curtilage with a drug-sniffing dog. The Court held that "whether the officer's conduct was an unreasonable search" depends upon whether the "officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." *Id.* at 10. Because the officers entered onto the property to conduct a search – as was apparent from the presence of the drug-sniffing dog – there was no implied license to be in the curtilage of the home. *Id.*

In a recent decision from earlier this year, the Supreme Court affirmed the principles in *Jardines*, concluding that, like the front porch, side garden, and area "outside the front window" in *Jardines*, the driveway was also "an area adjacent to the home and to which the activity of life extends." *Collins*, 138 S. Ct. at 1671. In *Collins*, the Court invalidated a search of a vehicle parked at the top of the driveway of a house, holding that "when a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred" because the "curtilage – the area immediately surrounding and associated with the home" is part of the home itself. *Id.* at 1670. The Court again made clear that these principles apply as well to seizures, noting that a seizure of incriminating evidence seen in plain view "cannot be justified if it is effectuated by unlawful trespass." *Id.* at 1672.

Simply put, the Supreme Court held in *Jardines*, and recently affirmed in *Collins*, that government agents cannot enter onto the curtilage of the home for the purpose of conducting a warrantless or suspicionless search or seizure.

ii. *Plaintiff Was Subject to a Coerced Intrusion by PFML*

Like the officers in *Jardines*, the PFML agents exceeded the implied license to approach the home because they did so with the improper purpose of seizing and restraining Plaintiff's liberty until their demands were met. This improper purpose is demonstrated by the substantial evidence that the County and its agents coerced Plaintiff to believe that he was required to comply with the interrogations. Based on this evidence, the District Court correctly concluded that it could not determine as a matter of law whether a reasonable person in Mr. Jones's position would have felt free to decline PFML's questioning.

In the context of an individual who is in a confined space which they have no desire to leave – such as one's residence – the appropriate inquiry for whether a seizure occurs is whether a "reasonable person would not feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991). Such a seizure in the home is 'presumptively unreasonable." *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). The proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *United States*

v. Drayton, 536 U.S. 194, 201 (2002). It is a fundamental principle that cooperation cannot be induced by coercive means. *Id.*

Here, as recognized by the District Court, the County used coercive means to compel registrants to comply. First, the encounter occurred on the bottom step outside Plaintiff's front entrance to his residence, as well as on his lawn and the front walkway, areas afforded heightened protections as explained in *Jardines* and *Collins*. SA44; Pl. 56.1 ¶¶ 94-115, 121-29 (JA180-84). The agents insisted on seeing his license, following him at a distance of two feet as he went to his car to get his wallet, and stood close by him while they took down information from his license. Pl. 56.1 ¶¶ 111-16 (JA182). Second, the Plaintiff received the letter from Det. Lt. Hernandez on SCPD letterhead explaining that the SCPD had contracted with PFML to conduct "verifications of registered sex offenders' residential and employment addresses" and that "registered sex offenders <u>are required</u> to provide this information under the New York State Sex Offender Registration Act." SA45; Pl. 56.1 ¶¶ 43-45 (JA171-72) (emphasis added).[4] Third, in response to the letter, Plaintiff's wife called the SCPD and asked whether her husband had to answer PFML's questions, only to be told her husband "had to answer the questions, [and]

[4] As the District Court acknowledged in her discussion of the coercive nature of this letter, "citizens do not often receive letters from the police announcing home visits by third-party groups." *Jones,* 164 F. Supp. 3d at 398.

not to be rude." Pl. 56.1 ¶¶ 85, 89, 91 (JA179).[5] Finally, the District Court recognized a dispute of fact existed regarding how long the RVRs waited outside of Plaintiff's home during the first verification. SA46.[6]

In light of all of the evidence, a question of fact existed for trial regarding whether a reasonable person in Mr. Jones's position would have felt free to terminate the encounter with PFML. On this basis, the District Court properly held that it "cannot resolve as a matter of law whether a reasonable individual would believe he could terminate the address verifications." SA47.

II. The Special Needs Doctrine Does Not Apply Because the Primary Purpose of the County's Program Is to Uncover Evidence that Registrants Are Guilty of Failing to Register, a Felony Charge

On rare occasion, the Supreme Court has upheld a suspicionless search or seizure program when it is justified by a special government need. But the Court has clearly instructed that the special needs doctrine does not apply when the immediate purpose of the program is to detect evidence of criminal wrongdoing. Determining the programmatic purpose requires a close review of the scheme at

[5] This exchange is consistent with the testimony of Det. Lt. Hernandez, who stated that he instructed his officers not to tell registrants that compliance was voluntary unless registrants repeatedly asked. Pl. 56.1 ¶ 47 (JA172).

[6] Additional evidence demonstrates that the PFML agents made registrants believe compliance was not optional. When Mrs. Jones questioned the agents' authority to remain on her family's property, one of the agents stated they could do what they wanted because they were from PFML and proceeded to wait close to the front door for fifteen minutes. Pl. 56.1 ¶ 101, 103-04 (JA181).

issue, focusing on whether the immediate objective of the seizure is to gather information for the investigation of a particular crime.

Here, a close review of the record demonstrates that the immediate objective of the seizures conducted by the County is to investigate whether the registrant is in violation of his registration requirements, a felony under New York's registration laws. While the District Court applied the correct principles of law, it failed to give the necessary weight to certain evidence as required by Supreme Court and this Court's precedent and ignored other probative evidence in the record.

A. Under Controlling Precedent in *Ferguson* and *Lynch*, the County's Verification Program's Immediate Purpose Is to Uncover Evidence that Registrants Are Not in Compliance with SORA, a Felony

As an initial matter, whether the primary purpose is law enforcement is a question of law. *Lynch v. City of New York*, 737 F.3d 150, 153 (2d Cir. 2013) (upholding grant of summary judgment because the primary purpose of a NYPD breathalyzer policy was not law enforcement). As instructed by the Supreme Court, courts should "not simply accept the State's invocation of a 'special need,'" but must rather carry out a "close review of the scheme at issue." *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001). Central to this inquiry is whether the information is gathered "for the investigation of a particular crime." *Lynch*, 737 F.3d at 158.

Ferguson is the controlling case on determining the programmatic purpose of a search and seizure policy. At issue in *Ferguson* was a public hospital policy of drug testing pregnant women and providing the results to police for criminal enforcement. 532 U.S. at 69-72. The policy was created by a task force that included the local District Attorney,[7] the public hospital, the police, and several other government agencies involved in drug treatment services. *Id.* at 71. It required that hospital staff test women receiving prenatal treatment for cocaine through a urine drug screen if they met certain criteria. *Id.* The policy ensured a proper chain of custody for the test results so that prosecutors could use them as evidence. *Id.* at 71-72. Women who tested positive were threatened with arrest in the event they failed to seek drug treatment. *Id.* at 72. The policy provided instructions to police to specifically investigate who provided the illegal drugs. *Id.* at 72-73. Beyond the provisions threatening women with drug treatment, the policy made no other mention of actions the hospital would take to improve healthcare for the mother or child. *Id.* at 73.

In response to a challenge by ten women arrested pursuant to the policy, the Supreme Court analyzed whether the policy's primary purpose was law enforcement or, as asserted by the City of Charleston, protecting the health of the

[7] The Charleston District Attorney is referred to as the Charleston Solicitor in the *Ferguson* opinion. *Ferguson*, 532 U.S. at 70-71.

mother and child. *Id.* at 81-82. Declining to accept the purported rationale at face value, the Supreme Court found that the immediate purpose was to gather evidence of unlawful drug use to give to police to coerce people into drug treatment at threat of arrest. *Id.* at 80. This was so, according to the Court, even if the ultimate goal was to help women get treatment for addiction. *Id.* at 82-84. The Court focused in particular on the extensive involvement of police and prosecutors in the daily administration of the policy, including the fact that the police dictated the procedures the hospital should follow. *Id.* at 82. Also probative was the complete lack of policy provisions regarding medical treatment for newborns and mothers, the purported state objective. *Id.*

Under these circumstances, the Supreme Court explained, the "special needs" doctrine cannot justify a suspicionless search.

> The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the "special needs" balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients <u>for the specific purpose of incriminating those patients</u>, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.

Id. at 84-85 (emphasis in original). The Court concluded that the Fourth Amendment's general prohibition against nonconsensual, warrantless and suspicionless searches necessarily applies and invalidated the policy.

The critical inquiry for determining a program's primary purpose is illustrated by contrasting the drug testing policy invalidated in *Ferguson* with the NYPD breathalyzer policy upheld by this Court in *Lynch*, 737 F.3d 150. In *Lynch*, this Court reviewed a NYPD policy requiring the administration of a breathalyzer test to an officer immediately after he or she causes injury or death as a result of firing his or her gun. *Id.* at 152. If the test shows a reading of less than the legal limit, there is no further action required. *Id.* at 154. If the test is higher, the officer is sent to have a more sensitive test conducted in the NYPD department (IAB) that monitors misconduct by officers and is interviewed on videotape about recent alcohol use. *Id.* If the more sensitive test confirms the results, the videotape is provided to the IAB Duty Captain to maintain for evidentiary purposes. *Id.* The Captain then determines whether the officer is unfit for duty. *Id.* The policy was applied 15-20 times in over seven years and no officer was ever criminally charged as a result. *Id.* at 155.

Upholding the policy, this Court found that, unlike in *Ferguson*, the immediate object of the policy was not the procurement of criminal evidence, but rather the special need to ensure officers were fit for duty. *Id.* at 159. Several

different aspects of the record supported this conclusion. First, in sharp contrast to the public hospital in *Ferguson*, the policy was an employment policy situated within a larger set of employment policies prohibiting consumption of alcohol. *Id.* at 154-55, 161. Consistent with this goal, the final step of the policy upon a positive test was a determination whether the officer was fit for duty. *Id.* at 154.[8] Second, unlike in *Ferguson*, a positive result was not a *per se* criminal offense. *Id.* at 159, 161. The ingestion of alcohol, as opposed to cocaine, is not criminally proscribed. *Id.* Thus, unlike in *Ferguson*, the policy was not based on a presumption that a positive result equated with criminal liability. *Id.* at 159. Finally, consistent with the conclusion that criminal adjudication was not the immediate goal, no officers were ever charged as a result of the breathalyzer test, in contrast with the ten women prosecuted under the policy in *Ferguson*. *Id.* at 153.

This comparison reveals several principles that guide this Court's analysis of the primary purpose of the County's program. The overarching inquiry is whether the program's immediate objective is to collect information for law enforcement officials for the purposes of prosecuting failure to register cases. *Ferguson*, 532 U.S. at 84; *Lynch*, 737 F.3d at 159. Several types of evidence are relevant to that

[8] The Supreme Court has several times upheld searches and seizures that occur in highly regulated and dangerous places of employment under the special needs doctrine. *See e.g.*, *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989) (upholding railroad employees' drug tests at work).

question, in particular (i) the terms of the relevant policies, *Ferguson*, 532 U.S. at 71-72, 81-82; *Lynch*, 737 F.3d at 153-55, 159-62, (ii) who is targeted and in what context, *Lynch*, 737 F.3d at 161, (iii) whether the information gathered is *per se* evidence of a crime, *Ferguson*, 532 U.S. at 84-85; *Lynch*, 737 F.3d at 159, (iv) the degree of involvement of prosecutors and police officers, including whether police procedures are used to collect the information, *Ferguson*, 532 U.S. at 82; *Lynch*, 737 F.3d at 154, 161, and (v) whether arrests result as a direct result of the program, *Ferguson*, 532 U.S. at 72; *Lynch*, 737 F.3d at 155. Applying this analysis to the County's program, this Court should determine that its primary and immediate purpose is to gather evidence for law enforcement to prosecute registrants for felony failure to register.

i. *Text of the Verification Policy Demonstrates the Immediate Purpose Is to Put Incriminating Evidence in the Hands of the Police*

The terms of the contract, the key operational document of the program, indicate that the purpose is to put incriminating information in the hands of the SCPD. It requires PFML agents to "notify the Special Victims Unit [SVU] of any address discrepancies as soon as practicable but not later than 24 hours after confirmation of an address discrepancy[,]" JA1375 (Contract Section II.3), which they do on forms permitting them to check off "may have failed to register as required." Pl. 56.1 ¶¶ 26-27, 29 (JA168). The immediacy with which the information is provided to the SCPD is similar to the program in *Ferguson*. In

Lynch, by contrast, the alcohol testing was set aside for potential (and unlikely) use in the future. 737 F.3d at 154, 159; *see also Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005) (upholding statute requiring convicted felons to provide DNA samples in part because it was for investigating unspecified crimes in the future).

The County judges the program's success by the number of leads generated by PFML, as evidenced by the routine reports PFML provides to high ranking members of the SCPD. Pl. 56.1 ¶¶ 35-36 (JA169-70). For instance, the Annual Report for 2013-2014 reported that PFML transmitted 173 "failure to register home address felony leads" to the SCPD in the program's first year. *Id.* at ¶ 54 (JA173). While taking care to ensure the timely delivery of "leads" to the SCPD, the contract includes no provisions about how or when the SCPD informs DCJS – the entirely separate state agency tasked with maintaining the registry – of incorrect information. JA1370-1420. In *Ferguson*, the Supreme Court found a similar lack of policy language furthering the state's purported "immediate purpose" compelling evidence that law enforcement was, in fact, the immediate goal. 532 U.S. at 82; *Lynch*, F.3d at 157, 159-62 (holding that the NYPD breathalyzer policy met the special need of personnel management where the focus of the policy language was on fitness for duty). This Court should draw a similar conclusion here.

ii. *The Program Targets People In Their Homes, the Site of the Greatest Fourth Amendment Protections*

The County's program is aimed at the home, the locus of the strongest Fourth Amendment protections. *See* Part I.B.i. above. As this Court recognized in *Lynch*, a key difference between the valid drug testing policy in *Ferguson* and the invalid alcohol testing policy in *Lynch* was the fact that the latter arose in the context of employment and, in particular, involved the testing of employees occupied in safety-sensitive positions. 737 F.3d at 161. In fact, this Court has specifically called into question the propriety of applying the special needs test to the home. *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002) (invalidating a search of a home conducted pursuant to an administrative scheme aimed at ensuring the safety of the horse racing industry).

iii. *Any Discrepancy with Information Reported to the Registry Is a Per Se Criminal Violation*

Any discrepancy between a registrant's documentation and what he reports to DCJS is a *per se* felony crime. Under New York's SORA, registrants are required to provide and verify with DCJS several pieces of information including name, aliases, date of birth, sex, race, height, weight, eye color, driver's license number, home address, and any internet identifiers. N.Y. Correct. Law §§ 168-b(1)(a), 168-f. Failure to provide accurate information is a felony pursuant to Section 168-t of SORA:

> Any sex offender required to register or to verify pursuant to the provisions of this article who fails to register or verify in the manner and within the time periods provided for in this article shall be guilty of a class E felony upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be guilty of a class D felony.

Pursuant to the SORA scheme, if PFML discovers any discrepancy between a registrant's location or other registerable information (such as driver's license number), the registrant is subject to criminal prosecution under Section 168-t. Consistent with this conclusion, PFML is required to notify the SCPD immediately of any discrepancies, upon which SCPD opens a criminal investigation into the registrant. JA1683-85 (PFML rainbow sheets); JA1560 (Hernandez Dep. 82:8-84:12); JA1375 (Contract Section II.3); Pl. 56.1 ¶ 32 (JA168-69); JA1592-93 (Giordano Dep. 78:13-24, 82:20-84:25). In this respect, the County's program is strikingly different from that in *Lynch*, where this Court relied heavily upon the fact that a positive breathalyzer test alone did not indicate criminality, and strikingly like that in *Ferguson*, where the positive cocaine test results did. *Lynch*, 737 F.3d at 159; *Ferguson*, 532 U.S. at 82.

iv. *The County Required PFML to Transmit Evidence to the SCPD in a Form the District Attorney's Office Could Use as Evidence in a Prosecution*

Consistent with its law enforcement purpose, the County's program was developed in accordance with procedures dictated by the County's Police Department to ensure that the gathered information could be used as evidence in

criminal prosecutions. Officer Donna Giordano, the officer charged with implementing the program, testified that the documentation completed by PFML "mirrored" SCPD forms in order to ensure they met the evidentiary needs of the County District Attorney's Office. Pl. 56.1 ¶¶ 20-21 (JA166-67). In relevant part, she testified as follows:

> Q: Have you ever spoken with someone at the district attorney's office about PFML's home verifications?
> A: In terms of? I mean, we had criminal cases. You know, that's really - - you speak to the district attorney's office all the time over different things, so that's a very broad question.
> Q: Did they ever have any input on how the program would be run?
> A: The district attorney's office sent a letter with guidelines on what they would need to go forward with a criminal prosecution for cases against sex offenders.

JA1594 (Giordano Dep. 89:3-15).[9] This fact was confirmed by PFML's own 30(b)(6) witness:

> Q: Do you have a sense of how frequently there were communications between the Suffolk County Police Department and the program manager?
> A: As necessary. And as far as communications, again, with the program a lot of the program - - certain things, the police department wanted so that would be communicated to us. I personally did not select blue and yellow for the form colors. There were certain requirements that had to be met in order for evidence to be accepted by the District Attorney's office. . . .

[9] Officer Giordano reiterated several times that the SCPD ensured that the information collected by PFML would be in a form that could be used during a subsequent prosecution. JA1589 (Giordano Dep. 67:5-17).

JA1502 (Rau Dep. 49:9-21); *see also* JA1523 (Rau Dep. 136:9-15) ("[W]e were advised how to prepare our paperwork so it would be commensurate with what was required by the District Attorney.").[10] Consistent with these protocols, the paperwork was used as evidence in prosecutions against registrants:

> Q: Were any of the forms that you received from Parents for Megan's Law considered evidence as part of a criminal prosecution?
> A: If a case went to trial and a form was completed by an RVR, they were all handsigned, then, yeah, that would go to court as evidence. . . .

JA1595 (Giordano Dep. 90:24-91:5).

v. *Numerous Arrests Were Made As a Direct Result of the Home Address Verifications*

Finally, like the program in *Ferguson*, and unlike that in *Lynch*, the County's program has directly resulted in numerous arrests, an undisputed admission by the County. Specifically, nineteen registrants were arrested for felony failure to register charges because of the home verifications. Pl. 56.1 ¶ 53 (JA173, citing JA2137-2147).

[10] Mr. Rau reiterated several times that the information collected by PFML was used as evidence:

> Q: What do you recall about Parents for Megan's Law communication with the Suffolk County Police Department regarding these concerns that the District Attorney had?
> A: I don't believe there were concerns. That would be an inaccurate phrasing. It was what the District Attorney needed should a case needed to be prosecuted. In other words, if we did a verification that a photograph was out of date, that the person doing the verification would print the image, would sign the image, would date the image when it was printed. These types of things. Evidentiary material.

JA1517 (Rau Dep. 109:12-24).

* * *

In conclusion, the County program's immediate objective is to uncover evidence that registrants are out of compliance with their registration obligations. For the same reasons set forth in *Ferguson*, (i) the policy language, (ii) the targeting of the home, (iii) the fact that information discrepancies are *per se* criminal violations under SORA, (iv) the extensive involvement of the SCPD and the District Attorney's office, and (v) the nineteen arrests conclusively show that the special needs test does not apply to the verification program.

B. The District Court Misapplied the Law to the Facts In Concluding That the Verification Program's Immediate Purpose Is Correcting the Registry

When reviewing the County's program, the District Court sidestepped the central inquiries required under *Ferguson* and *Lynch* for determining whether the immediate purpose of the County's program is crime control. *Ferguson*, 532 U.S. at 84. For all the reasons set forth above, the answer is that it is. Having discovered discrepancies in a registrant's information, PFML reports that incriminating information to the SCPD, which then opens a criminal investigation. The SCPD has arrested nineteen people as a result. In light of the similarity with *Ferguson*, the District Court erred by heavily relying on the precatory language in the contract and deposition testimony by PFML employees, while discounting the evidence presented by Plaintiff. *See* SA57-58.

Relying on Ms. Ahearn's deposition testimony about the program's purpose, for instance, is an approach specifically cautioned against by the Supreme Court in *Ferguson*. 532 U.S. at 81 ("we do not simply accept the State's invocation of a special need"). The District Court also relied upon Ms. Ahearn's testimony that PFML provides the information to the SCPD so that it "can reach out to the registrant and correct the information by providing the registrant the form to correct it," or the SCPD could reach out to DCJS directly. SA at 56. But the SCPD officers repeatedly testified that leads resulted in a criminal investigation, not outreach to DCJS. JA1560 (Hernandez Dep. 82:8-84:12); Pl. 56.1 ¶ 32 (JA168); JA1592 (Giordano Dep. 78:13-24, 82:20-84:25). The District Court also ignored other statements in the record where Ms. Ahearn affirms that the purpose was to prosecute offenders. *See e.g.*, JA1985, 2061, 2080.

The District Court also made a factual and legal error when it concluded that "information obtained by PFML does not itself constitute evidence of wrongdoing and is not sought in the course of investigating a crime." SA59.[11] This statement is

[11] The District Court made the same error when it stated that "the record also shows that the forms documenting address verifications were not used as evidence in those investigations and that SCPD would need to obtain additional information to support a finding of probable cause to arrest." SA58. The former point is incorrect as a matter of fact; the record does show that the forms documenting address verifications were designed to be used as evidence. JA1595 (Giordano Dep. 90:24-91:3, 92:11-17, 92:19-24); *see also* JA1502 (Rau Dep. 49:9-22), JA1517 (Rau Dep. 109:12-110:10); JA1561-62 (Hernandez Dep. 89:18-92:7). And because a discrepancy is a facial violation of the law, the provision of such information is incriminating. *See Ferguson*, 532 U.S. at 84-85. In addition, the controlling case law does not require that information

incorrect not only because record material shows that the information collected by PFML was used as evidence, but also because evidence of a discrepancy is itself "evidence of wrongdoing" under N.Y. Correct. Law § 168-t. Nor is it accurate under *Ferguson* to conclude, as the District Court did (SA59), that police officers must be engaged in an ongoing investigation for the purpose of a program to be law enforcement. In *Ferguson*, for instance, the police were not investigating the pregnant women for drug use before they were provided the positive drug tests by the hospital. *See* 532 U.S. at 71-72. As in the County's program, investigation and prosecution were a direct result of SCPD receiving the incriminating information.

III. Even Assuming the Special Needs Doctrine Applies, the District Court Failed to Give Sufficient Weight to Plaintiff's Privacy Interest in His Home, The Very Core of the Fourth Amendment

The identification of a special need does not, by itself, mean that it is constitutionally reasonable to conduct suspicionless seizures. A suspicionless seizure is only reasonable if the interests served by the special need outweigh the privacy interests at stake. The home – the target of the County's program – is the "first among equals," subject to the strongest Fourth Amendment protections. The Supreme Court has never permitted a suspicionless search and seizure at the home unless the resident had a reduced expectation of privacy, a fact recognized by this

collected without a warrant must alone be sufficient to establish probable cause, as long as it incriminates the target.

Court when it invalidated a suspicionless search of a residence in *Anobile*, 303 F.3d 107. Consistent with the approach in *Anobile*, this Court should invalidate the program even if the program's primary purpose was not law enforcement.

A. Special Needs Cannot Justify an Invasion of the Home Unless the Resident Has a Reduced Expectation of Privacy

The Supreme Court has applied the "closely guarded" special needs doctrine to suspicionless searches "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion[.]" *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (invalidating requirement that candidates for state office pass a drug test because the state's special need was not substantial enough to override the individual's privacy interest). As this Court has recognized, a diminished expectation of privacy is "a principal criterion of special-needs cases." *Nicholas*, 430 F.3d at 667.

Consistent with this approach, the Supreme Court has applied the special needs test in contexts with a reduced expectation of privacy, such as the roadways, public schools, and highly regulated commercial facilities, often comparing those contexts with the much stronger privacy interest in the home. *See U. S. v. Martinez-Fuerte,* 428 U.S. 543, 562 (1976) (upholding routine checkpoint stops at the border, reasoning that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation

of privacy and freedom in one's residence"); *New York v. Burger*, 482 U.S. 691, 700 (1987) (upholding a warrantless search conducted at a highly regulated business, recognizing that the expectation of privacy in a commercial premise is less than in an individual's home); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002) (upholding drug tests of athletes in school, noting that "Fourth Amendment rights . . . are different in public schools than elsewhere[.]"). The same is true for this Court's special needs cases. *Lynch*, 737 F.3d at 164 (holding that NYPD officers have a diminished expectation of privacy in employer testing that ensures fitness for duty); *Nicholas*, 430 F.3d at 669 (inmates subject to mandatory DNA testing statute have limited expectations of bodily privacy).

Consistent with this approach, the Supreme Court has only applied the special needs test to the home – the locus of the strongest Fourth Amendment protection, *see* Part I.B.i. above – once, and it involved circumstances in which the Court specifically held that the resident, a probationer, had a reduced expectation of privacy. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).[12] In *Griffin*, the plaintiff

[12] In a case decided prior to the modern development of the special needs doctrine, the Supreme Court addressed the constitutionality of searches to ensure compliance with the housing codes in *Camara v. San Francisco*, 387 U.S. 523 (1967). Noting these were "significant intrusions," the Court ruled that the government must obtain an administrative warrant meeting reasonable legislative or administrative standards, such as how long it has been since an inspection, the nature of the building, or the condition of the area. *Id.* at 538-39. Furthermore, the Court affirmed that an individual "has a constitutional right to insist that the inspectors obtain a warrant to search[.]" *Id.* at 540.

challenged a search of his home conducted by the probation department in response to information that he may have guns in his home. *Id.* at 872. His home was searched pursuant to a regulation that allowed home searches when there were "reasonable grounds" to believe a probationer had contraband. *Id.* at 870-71.[13]

Upholding the search because it served the special need of probation supervision, the Supreme Court emphasized that probationers have reduced expectations of privacy:

> To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special probation conditions.

Id. at 873-74 (internal citations omitted). The Court specifically noted that the departures from the warrant and probable cause requirements "would not be constitutional if applied to the public at large." *Id.* at 875. Furthermore, even in *Griffin* where the Supreme Court validated the search, there were still "reasonable grounds" to suspect Griffin was violating his probation conditions; the search was not suspicionless. *Id.* at 870-71.

This Court recognized the unsuitability of applying the special needs doctrine to justify a warrantless administrative search scheme targeted at the home

[13] The regulations provided that an officer should consider a variety of factors in determining whether "reasonable grounds" exist, including whether an informant provided the information, the reliability and specificity of that information, the reliability of the informant, and the officer's own experience with the probationer. *Griffin*, 483 U.S. at 871.

in *Anobile*, 303 F.3d 107 (2d Cir. 2002). *Anobile* addressed the constitutionality of searches of commercial facilities and dormitories at Yonkers Raceway pursuant to a regulatory scheme aimed at ensuring the integrity and safety of horse races. *Id.* at 110-12. While upholding the searches of the commercial facilities, the Court invalidated the dormitory searches. *Id.* at 117-18. Concluding that the dormitories were "homes" for the Fourth Amendment purposes, the Court noted the following:

> Neither the Supreme Court nor this Court has ever permitted warrantless administrative searches of a person's residence unless: exigent circumstances exist, business was conducted in the home, or the search was directed at convicted felons still serving sentences of probation or parole. . . . Given the Supreme Court precedent emphasizing the strong privacy interests in homes, we decline to take a step to erode this strong interest.

Id. at 120-21. Because homes are entitled to the greatest protections, this Court found that the searches was "highly intrusive" and could not be outweighed by the state's "substantial interest" in the safety of the racing industry. *Id.* at 120.

This Court should similarly decline to erode the strong constitutional protections of the home in this case. Here, as in *Anobile*, the County has enacted a scheme sanctioning regular suspicionless seizures at the homes of registrants. Plaintiff, like many other registrants subjected to the scheme, long ago completed his sentence and his period of post-release supervision. *See Smith v. Doe*, 538 U.S. 84, 101-03 (2003) (rejecting proposition that individuals subject to registration requirements have the same limitations on freedom and privacy as those on probation and parole); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737

(2018) (noting the troubling imposition of severe regulations on registrants who have already served their sentence and are no longer subject to court supervision). Nevertheless, pursuant to the County's program, he was subjected to annual, invasive investigations at his home and the possibility of other investigations in the County's discretion. Pl. 56.1 ¶ 13 (JA165); JA1378 (Contract Section III.A.7). As this Court recognized in *Anobile*, applying the special needs doctrine to suspicionless search program targeting the home far extends the application of the "special needs" doctrine sanctioned by the Supreme Court and erodes the very core of Fourth Amendment protections.

B. The District Court Relied on Overruled Law When It Held that Plaintiff's Privacy Interest Was Diminished

The District Court committed clear legal error when it conducted the special needs balancing test because it failed to recognize the full weight of Plaintiff's interest in his home. The District Court first erred when it held that the interactions with PFML happened on "areas outside the home where his expectation of privacy is diminished." SA61. As discussed at length in Section I. B. above, the Supreme Court has recently affirmed that areas designated as curtilage, including front porches and driveways, are entitled to the same protections as those that attach to the home itself. *Collins*, 138 S. Ct. at 1670; *Jardines*, 569 U.S. at 11.

In reaching the contrary conclusion, the District Court relied on two cases that were overruled by *Jardines*: *U.S. v. Titemore*, 437 F.3d 251 (2d Cir. 2006),

and *Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004). In *Titemore*, this Court applied the proposition that a resident does not have a reasonable expectation of privacy in areas of the home where uninvited visitors can approach. *Titemore*, 437 F.3d at 260-61. In a later decision, however, this Court recognized that *Titemore*'s "broad holding has been abrogated by *Jardines*." *U.S. v. Allen*, 813 F.3d 76, 84 n.10 (2d Cir. 2016). In *Jardines*, the Supreme Court affirmed that residents have the same expectation of privacy in their homes as in their curtilage even if it is in an area accessible to the public. *Jardines*, 569 U.S. at 7 (front porch); *Collins*, 138 S. Ct. 1663 (top of driveway).

This Court's treatment of the curtilage in *Palmieri v. Lynch* is no longer valid for the same reasons. In *Palmieri*, this Court applied the special needs test in a Fourth Amendment challenge to the conduct of an employee of the New York Department of Environmental Conservation. 392 F.3d at 77, 81. The employee went onto the plaintiff's land to inspect the tidal wetlands off of his backyard because the plaintiff had applied for a permit to extend his dock. *Id.* at 77. The Second Circuit concluded that Palmieri had a diminished expectation of privacy in his backyard and deck, relying on the principle – no longer valid after *Jardines*, *Collins*, and *Alexander*, 888 F.3d 628 – that areas exposed to view that any visitor may routinely use have lesser protections. *Id.* at 81-82; *see* Part I.B.i. above. *Palmieri* is also distinguishable from this case because the plaintiff already had a

permit providing that his property was open to routine inspection by state officials; he had also applied for a new permit and was on notice that the application process required on-side inspection. *Id.* at 82-83.

Finally, the District Court also erred when it stated, without citing to any legal precedent, that "Plaintiff clearly had a diminished expectation of privacy interest in his personal information, such as his address, since that information was already on the registry and available to the public." SA62. First and foremost, there is no support for the proposition that a registrant's privacy interest in his *actual home* is lessened because he registers his address with the State. But, moreover, as a Level One registrant, Plaintiff's address is not available to the public on the registry website. N.Y. Correct. Law § 168-q (only Level Twos and Threes are on the public registry). Only his zip code is permitted to be publicly disseminated, not his street address. *Id.* at § 168-l.[14]

[14] The District Court correctly noted that, even if there is a non-law enforcement purpose, the court must still inquire into whether the special needs are incompatible with the usual warrant and probable cause requirement and "not needed to prevent the mischief" that those requirements prevent. *Lynch*, 737 F.3d at 162. But the District Court incorrectly concluded that the County's program presents no such opportunity for mischief because the program was administered with little to no discretion. SA at 59. That is not so. While the contract requires PFML to verify each registrant once or twice a year depending on their level, it also explicitly permits the SCPD to add additional investigations at its own discretion. Pl. 56.1 ¶ 13 (JA165); JA1378 (Contract Section III.A.7). And while the District Court concluded that PFML sought the same information from each offender, Plaintiff was asked about his employment – information that, as a Level One, he was not required to register. Pl. 56.1 ¶ 108 (JA181); N.Y. Corr. Law § 168-b(1)(e). Nor is that information included on the standard PFML form. JA1027-30. The PFML agents also threatened to see him at his place of employment. Pl. 56.1 ¶ 116 (JA182). These investigations are not like the *Lynch* breathalyzer test, which are required to be conducted in a "private setting" and in a "dignified, respectful fashion." *Lynch*, 737 F.3d at 153.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully urges the Court to reverse the District Court and remand this matter for further proceedings.

Respectfully submitted,

/s/ Erin Beth Harrist

Erin Beth Harrist
Aadhithi Padmanabhan
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, N.Y. 10004
(212) 607-3300

LAWRENCE SPIRN
842 Fort Salonga Rd., Suite 2
Northport, N.Y. 11768
(631) 651-9070

Counsel for the Plaintiff-Appellant

Dated: August 2, 2018
New York, N.Y.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Local Rule 32.1(a)(4) in that it contains a total of 12,820 words.

/s/ Erin Beth Harrist

ERIN BETH HARRIST

SPECIAL APPENDIX

John Jones v.
County of Suffolk, Parents for Megan's Law Inc. and The Crime Victims Center

No. 18-1602-cv

SA1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
JOHN JONES,

Plaintiff,

-against-

MEMORANDUM & ORDER
15-CV-0111(JS)(ARL)

COUNTY OF SUFFOLK and
PARENTS FOR MEGAN'S LAW,

Defendants.
----------X

APPEARANCES

For Plaintiff: Christopher T. Dunn, Esq.
Erin B. Harrist, Esq.
Aadhithi Padmanabhan, Esq.
New York Civil Liberties Union
125 Broad St., 19th Floor
New York, NY 10004

Jennifer Spirn, Esq.
Lawrence F. Spirn, Esq.
Spirn & Spirn
150 Motor Parkway, Ste. 401
Hauppauge, NY 11788

For County of Suffolk: Marlene Lange Budd, Esq.
Rudolph Max Baptiste, Esq.
Suffolk County Attorney's Office
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, NY 11788

For Parents for Megan's Law: Michael Anthony Miranda, Esq.
Richard B. Epstein, Esq.
Miranda Sambursky Slone Sklarin
Verveniotis LLP
240 Mineola Blvd.
Mineola, NY 11501

SEYBERT, District Judge:

Plaintiff John Jones[1] ("Plaintiff") commenced this action against the County of Suffolk ("the County") and Parents for Megan's Law ("PFML" and collectively "Defendants") on January 9, 2015, alleging violations of his rights under the United States and New York Constitutions. (Compl., Docket Entry 1.)

On March 30, 2018, the Court granted the County's motion for summary judgment (County Mot., Docket Entry 119), and PFML's motion for summary judgment (PFML Mot., Docket Entry 120) and indicated that a decision would follow. The Court now sets forth its findings, reasoning, and conclusions.

BACKGROUND

I. Factual Background[2]

The Court assumes familiarity with its prior Order resolving the Defendants' motions to dismiss the Complaint. See Jones v. Cty. of Suffolk, 164 F. Supp. 3d 388 (E.D.N.Y. 2016).

A. The Contract with PFML

Plaintiff is a veteran who resides in Suffolk County

[1] On May 4, 2015, Plaintiff was granted permission to proceed under a pseudonym in this litigation. (May 2015 Order, Docket Entry 38.)

[2] The following material facts are drawn from Defendants' Local Civil Rule 56.1 Statements, (PFML 56.1 Stmt., Docket Entry 122; County 56.1 Stmt., Docket Entry 111-1), Plaintiff's Responses to Defendants' Local Civil Rule 56.1 Statements, (Pl.'s PFML Resp., Docket Entry 128; Pl.'s County Resp., Docket Entry 127), and Plaintiffs' Local Civil Rule 56.1 Counterstatement (Pl.'s 56.1

with his wife, Jane Jones, and their children. (Pl.'s 56.1 Counterstmt. ¶ 78; Mr. Jones Aff., Harrist Decl., Ex. 21, Docket Entry 129-21, ¶¶ 2-3, 6.) He pled guilty to attempted rape in 1992, served a four-year jail sentence, and was released on parole in 1996.[3] (PFML 56.1 Stmt. ¶¶ 74, 76; Pl.'s PFML Resp. ¶ 74; County 56.1 Stmt. ¶ 3; Pl.'s County Resp. ¶ 3; Mr. Jones Dep. 9:24-10:6.) He remained on parole until 1998. (Mr. Jones Dep. 10:15-21.) Since his conviction, Plaintiff has not been charged with any crimes or violations, but as a result of his conviction, Plaintiff was required to register as a sex offender. (Pl.'s 56.1 Counterstmt. ¶ 80; Mr. Jones Aff. ¶¶ 4-5.)

Pursuant to New York's Sex Offender Registration Act ("SORA"), sex offenders are required to register with the New York Staate Division of Criminal Justice Services (the "Division"). (Pl.'s PFML Resp. ¶¶ 3-4); see N.Y. Correction Law § 168-a(5),

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Counterstmt., Docket Entry 126). Any relevant factual disputes are noted. All internal quotation marks and citations have been omitted.

[3] An Offender Report submitted by PFML indicates that Plaintiff pled guilty to rape, not attempted rape. (Offender Rep., Miranda Decl., Ex. Q, Docket Entry 124-17, at 3.) However, a Sex Offender Information form maintained by the Suffolk County Police Department indicates that Plaintiff's guilty plea was for attempted rape. (SCPD Info. Form, Harrist Decl., Ex. 49, Docket Entry 129-49, at 1.) Because the parties cite to Plaintiff's testimony, and he testified that he pled guilty to attempted rape, the Court relies on that testimony for purposes of this Memorandum and Order. (See Mr. Jones Dep., Miranda Decl., Ex. B., Docket Entry 124-2, 9:24-10:6.)

168-f(1). In connection with the SORA requirements, sex offenders are classified as level one ("Level One Offenders"), level two ("Level Two Offenders"), or level three offenders ("Level Three Offenders"). See N.Y. Correction Law § 168-l(6). For as long as the offender is required to register, he or she is required to report his or her address to the Division on an annual basis, and for Level One and Level Two Offenders, to appear at a local law enforcement agency and provide a current photograph every three years. (PFML 56.1 Stmt. ¶¶ 3-4; Pl.'s PFML Resp. ¶¶ 3-4); see N.Y. Correction Law § 168-f. Level One Offenders remain on the registry for twenty years, and Level Two and Level Three Offenders are on the registry for life. (PFML 56.1 Stmt. ¶ 81.)

When Plaintiff was released in 1996, he was required to register as a sex offender pursuant to SORA and re-register each year until he was removed from the registry. (County 56.1 Stmt. ¶¶ 1, 43; Pl.'s County Resp. ¶ 1.) Plaintiff testified that when he was released, he was classified as a Level One Offender. (Pl.'s PFML Resp. ¶ 77; Pl.'s County Resp. ¶ 4; Mr. Jones Dep. 10:25-11:8.) A Notice of Hearing from 2004 and a reclassification order from 2005 indicate that he was a Level Two Offender upon release and that he was re-classified as a Level One Offender on January 5, 2005. (PFML 56.1 Stmt. ¶¶ 77, 80; County 56.1 Stmt. ¶ 5; Notice of Hr'g, Miranda Decl., Ex. R, Docket Entry 124-18, at 1 ("You are currently registered as a level 2 sex offender."); Redetermination

Order, Miranda Decl., Ex. S, Docket Entry 124-19.)

According to Plaintiff, between approximately 1996 and 2012, SCPD detectives came to his home each year, verified that he still resided there, and asked to see his driver's license. (County 56.1 Stmt. ¶¶ 25, 39; Mr. Jones Dep. 101:20-103:19.) He testified that the incidents lasted two or three minutes and that on some occasions, he allowed them into his home. (County 56.1 Stmt. ¶ 40; Mr. Jones Dep. 102:19-103:14.) He also indicated that on at least one occasion, one of the detectives was carrying a firearm. (County 56.1 Stmt. ¶ 38; Pl.'s County Resp. ¶ 38; Mr. Jones Dep. 102:9-11.) Pursuant to SORA, from approximately 2005 to 2016, Plaintiff was also required to visit an SCPD precinct every three years to submit a photograph and fingerprints. (County 56.1 Stmt. ¶¶ 24, 33, 42.)

PFML is a not-for-profit organization that provides support to victims of sexual abuse, rape, violent crimes, hate crimes, and other crimes through victim counseling, advocacy, and referrals. (PFML 56.1 Stmt. ¶ 1.) Prior to February 2013, PFML received complaints from members of the community about the accuracy of the sex offender registry, including the addresses provided by sex offenders. (PFML 56.1 Stmt. ¶ 6.) Laura Ahearn was the executive director of PFML during the relevant period. (Ahearn Dep., Miranda Decl., Ex. U, Docket Entry 124-21, 8:5-8.)

Ahearn testified that in 2012, the Suffolk County

Executive and his staff requested that PFML develop a sex offender management plan for the County, including a proposal for in-person address verifications. (Pl.'s 56.1 Counterstmt. ¶¶ 1-2; Ahearn Dep. 9:3-10:25.) PFML developed the proposal--the "PFML Sex Offender Tracking and Community Support Program"--and presented it to the Suffolk County Legislature and the Legislature's Public Safety Committee. (Pl.'s 56.1 Counterstmt. ¶¶ 4-5; PFML Proposal, Harrist Decl., Ex. 52, Docket Entry 129-52.) Subsequently, in February 2013, the County passed the Community Protection Act ("CPA"), which among other things, authorized the Suffolk County Police Department ("SCPD") to contract with PFML to conduct address verifications of registered sex offenders. (PFML 56.1 Stmt. ¶ 2; County 56.1 Stmt. ¶¶ 14-15; CPA, Harrist Decl., Ex. 53, Docket Entry 129-53.) PFML and SCPD subsequently entered into a contract (the "Contract"), which provided that PFML would verify the addresses of registered sex offenders.[4] (PFML 56.1 Stmt. ¶ 8; Contract, Miranda Decl., Ex. K, Docket Entry 124-12.) The Contract became effective on May 1, 2013 and expired on April 30, 2016. (Contract at 1; PFML 56.1 Stmt. ¶ 9; County 56.1 Stmt. ¶ 16.)

Pursuant to the Contract, PFML agreed to use Registry Verification Field Representatives ("RVR" or "RVRs") to "conduct in-person Home Address Verifications for Level One, Level Two, and

[4] PFML also agreed to render other services not relevant here. (PFML 56.1 Stmt. ¶ 8.)

Level Three Sex Offenders required to report pursuant to SORA, excluding Homeless Sex Offenders and persons currently incarcerated . . . utilizing Sex Offender Registry information available pursuant to New York State Corrections Law § 168-1 and/or identified through [PFML's] use of electronic data or other publically available information." (Contract at 8, III(A)(2); PFML 56.1 Stmt. ¶ 18; County 56.1 Stmt. ¶ 61.) The Contract defined an RVR as "a retired law enforcement officer, employed by [PFML], whose principal duties include in-person or other means of verification of Sex Offender home or work addresses." (Contract at 5, I(E); PFML 56.1 Stmt. ¶ 19; County 56.1 Stmt. ¶ 62.) The RVRs were required to conduct the verifications utilizing unmarked vehicles and to display identification that did "not resemble law enforcement identification nor include insignia that appears to be a law enforcement badge, shield or image." (PFML 56.1 Stmt. ¶ 49; Contract at 8, III(A)(2)-(3).) The identification cards displayed the RVR's name, picture, the organization ("Parents for Megan's Law & The Crime Victims Center"), the program ("Sex Offender Registration Verification Program"), and the phrase "[a] contract agency of the County of Suffolk." (County 56.1 Stmt. ¶ 77; Pl.'s County Resp. ¶ 77; Identification Card, Harrist Decl., Ex. 50, Docket Entry 129-50.)

The Contract required PFML to verify the home addresses of Level One Offenders once a year and the home addresses of Level

Two and Level Three Offenders twice per year. (PFML 56.1 Stmt. ¶ 25; Contract at 8, III(A)(5).) Additionally, PFML agreed to conduct work address verifications for Level Three Offenders and to access publicly available records and data to confirm the work addresses provided by Level Three Offenders.[5] (Contract at 9, III(B); PFML 56.1 Stmt. ¶¶ 15-16; Pl.'s PFML Resp. ¶ 15.) The Contract further required that each week, PFML submit a list of the sex offenders scheduled for address verifications to SCPD, and SCPD "reserve[d] the right to alter, reject or suspend any scheduled in-person Home Address Verification at its sole discretion." (PFML 56.1 Stmt. ¶ 26; County 56.1 Stmt. ¶ 18; Contract at 9, III(A)(6).) An evaluation from 2014 indicates that between May 1, 2013 and April 30, 2014, SCPD removed between ten and forty-five percent of the offenders scheduled to be verified each week. (Pl.'s 56.1 Counterstmt. ¶ 19; Performance Eval., Harrist Decl., Ex. 16, Docket Entry 129-16, at 4.) When it conducted its review, SCPD removed any offenders who were the subject of ongoing investigations and never added any sex offender to the weekly lists provided by PFML. (PFML 56.1 Stmt. ¶¶ 28-29.) However, the parties agree that PFML decided which sex offenders would be subject to address verifications each week, based on

[5] PFML points out, however, that during the term of the Contract, PFML did not conduct any in-person work address verifications. (PFML 56.1 Stmt. ¶ 17.)

"logistical considerations" and "the requirements of the [C]ontract." (PFML 56.1 Stmt. ¶ 27.)

PFML was also required to conduct address verifications "on an as needed basis upon [SCPD's] written request" and to provide written quarterly and annual reports to SCPD detailing, inter alia, the number and location of home address and work address verifications and the "number and method of inquiries or leads received by [PFML] and the action taken by [PFML] for each." (Contract at 9, III(A)(7); Contract at 11, VI(A).) SCPD agreed to provide information regarding the "disposition on any leads forwarded to [SCPD]" upon request. (Contract at 12, VI(C).)

There is some dispute regarding how PFML obtained registrants' information. Pursuant to SORA, PFML is designated as a vulnerable entity and is entitled to receive information from the Division about sex offenders in Suffolk County. (County 56.1 Stmt. ¶ 17.) PFML alleges that, as a result of its vulnerable entity status, it received registrants' information prior to entering into the Contract and continued to do so during the Contract term. (PFML Stmt. ¶¶ 10-12.) However, Plaintiff points out that pursuant to the Contract, SCPD agreed to "provide [PFML] with all information it is permitted to under New York State Correction Law § 168-1, including but not limited to all Suffolk County Level One notifications, which are limited to the approximate address based on the Sex Offender's zip code, all

notifications for Sex Offenders registered as 'homeless' and all registrants with an 'unknown' address." (Pl.'s PFML Resp. ¶ 12; Contract at 7, II(B)(1).)

B. The Home Verification Program

Kenneth Rau, PFML's grant administrator, testified that the purpose of the address verification program was "to ensure that information provided on the registry was accurate so that people could act upon accurate information." (County 56.1 Stmt. ¶¶ 57, 60; Rau Dep., Harrist Decl., Ex. 4, Docket Entry 129-4, 19:16-20:5.) Ahearn gave similar testimony. (See Ahearn Dep. 117:11-23.) PFML's 2013-14 Annual Report to the County (required by the CPA) summarizes the program's purposes as the following:

> Parents for Megan's Law and the Crime Victims Center (PFML) was charged with developing and implementing a sex offender management plan for Suffolk County that would promote public safety and; ensure a more updated and accurate sex offender registry through in-person sex offender address verifications and collaboration with law enforcement agencies through the provision of potential felony out-of-compliance investigative leads; educate the community through the provision of prevention education programs and sex offender email alerts, and engage the community in reporting out-of-compliance registrants.

(2013-14 Annual Rep., Harrist Decl., Ex. 11, Docket Entry 129-11, at ECF p. 3.) Additionally, Plaintiff points to statements made by Ahearn at several meetings of the Suffolk County Legislature and the Suffolk County Legislature Public Safety Committee

emphasizing that the address verification program would lead to increased enforcement and leads for law enforcement, (Jan. 31, 2012 Minutes, Harrist Decl., Ex. 41, Docket Entry 129-41, at 14 ("Address verification enhances law enforcement . . . and increases registration compliance. . . . So what we're going to do in supporting law enforcement is we're going to bring on two teams of two retired law enforcement staff will conduct in-person address verifications . . . and any inconsistencies are going to be transmitted and forwarded to Suffolk County P.D. for enforcement."); (Feb. 5, 2013 Tr., Harrist Decl., Ex. 42, Docket Entry 129-42, at 139 (discussing that stepping up enforcement will be "a direct result of everything that we've talked about in terms of address verification"); (Mar. 13, 2014 Minutes, Harrist Decl., Ex. 43, Docket Entry 129-43, at 15 (discussing the "type of leads and information that we are sending to law enforcement on the home address activities"), and press releases regarding the County's enforcement and monitoring efforts pursuant to the CPA and the partnership with PFML, (May 23, 2013 Press Release, Harrist Decl., Ex. 45, Docket Entry 129-45, at 1; Feb. 27, 2015 Press Release, Harrist Decl., Ex. 46, Docket Entry 129-46).

PFML alleges that SCPD did not provide any guidelines for executing the home verification program and was not aware of the procedures used by RVRs. (PFML 56.1 Stmt. ¶¶ 23-24.) However, Plaintiff alleges that the Contract provided guidance by

specifying the frequency of the home verifications and requiring that PFML provide a weekly schedule and quarterly and annual reports on the verifications to SCPD. (Pl.'s PFML Resp. ¶¶ 23-24.) Plaintiff further alleges that SCPD provided guidance regarding how to gather and report information to SCPD to ensure that the information could be used by the District Attorney's office in investigations or prosecutions. (Pl.'s PFML Resp. ¶ 23; see e.g., Rau Dep. 50:14-51:2.) The parties dispute whether SCPD was involved in the formulation of PFML's firearm policy but agree that PFML created its own use of force policy. (County 56.1 Stmt. ¶¶ 76, 78; Pl.'s County Resp. ¶ 78.) The parties further agree that other than the requirement that RVRs be retired law enforcement officers, SCPD did not have control over the hiring of RVRs and did not provide training to the RVRs.[6] (PFML 56.1 Stmt. ¶¶ 20-21; Pl.'s PFML Resp. ¶ 20.)

According to SCPD Detective Lieutenant Stephen Hernandez, the commanding officer of the Special Victims Unit and the County's Rule 30(b)(6) witness, SCPD received documentation regarding every address verification conducted by PFML. (County 56.1 Stmt. ¶¶ 81, 84; Pl.'s County Resp. ¶ 84; Hernandez Dep., Harrist Decl., Ex. 6, Docket Entry 129-6, 24:7-11.) Additionally,

[6] The parties dispute who trained the RVRs, but appear to agree that to the extent they were trained, it was by PFML employees. (See PFML 56.1 Stmt. ¶¶ 22; Pl.'s PFML Resp. ¶ 22; County 56.1 Stmt. ¶ 59; Pl.'s County Resp. ¶ 59.)

while SCPD and PFML had different systems for maintaining the records from address verifications, SCPD developed the forms that PFML used to gather information. (County 56.1 Stmt. ¶¶ 96, 107.) For example, if an address verification was successful, and the information in the registry was confirmed, PFML used a blue form to document the verification and relevant information was entered into a SCPD Special Victims Unit database. (Pl.'s 56.1 Counterstmt. ¶¶ 23, 25; Rau Dep. 51:10-22; Hernandez Dep. 71:10-14.) PFML reported potential violations to SCPD on different forms, on which PFML could indicate that the offender "failed to register as required" or "refused to cooperate with address verification," or that the address "was unable to be confirmed for the reason(s) provided." (Pl.'s 56.1 Counterstmt. ¶¶ 27, 28-29, Rainbow Form Samples, Harrist Decl., Ex. 18, Docket Entry 129-18, at 1-2.)

Address verifications were usually conducted by two RVRs, one of which was the primary RVR who talked to the offender and made notes about the verification. (PFML 56.1 Stmt. ¶ 37; County 56.1 Stmt. ¶ 71.) Occasionally, a third RVR was also present, and if so, that RVR waited near the vehicle.[7] (PFML 56.1 Stmt. ¶¶ 38-39; Pl.'s PFML Resp. ¶ 38.) The RVRs typically wore

[7] Rau testified that the third RVR stays near the car because it could be "intimidating" if three RVRs approached the offender's home. (PFML 56.1 Stmt. ¶ 40; Pl.'s PFML Resp. ¶ 40; Rau Dep. 75:5-12.)

slacks, a dress shirt, and a tie. (PFML 56.1 Stmt. ¶ 52.) Although the Contract specified that the identification cards worn by RVRs could not resemble law enforcement badges, Rau testified that it was possible that, in part due to the identification cards worn by RVRs, the RVRs could be mistaken for police officers. (PFML 56.1 Stmt. ¶ 50; Pl.'s PFML Resp. ¶ 50; Rau Dep. 123:4-15.) Mrs. Jones, Plaintiff's wife, testified that she assumed the RVRs were police officers when they came to her home based on the way they were dressed and their identification cards. (Pl.'s PFML Resp. ¶ 50; Mrs. Jones Dep., Harrist Decl., Ex. 26, Docket Entry 129-26, 20:13-21:16.)

After PFML conducted an address verification,[8] it notified SCPD if there was a possible error or inconsistency with the information on the registry or if a particular offender's address could not be verified. (PFML 56.1 Stmt. ¶ 30.) While there may be no immediate consequences, if the RVRs were unable to verify the address of a particular offender, SCPD would receive a tip, and generally, a detective from SCPD would visit the offender's home. (PFML 56.1 Stmt. ¶ 43; Pl.'s PFML Resp. ¶ 43; County 56.1 Stmt. ¶ 69; Pl.'s County Resp. ¶ 69; Giordano Dep., Miranda Decl., Ex. L, Docket Entry 124-13, 58:8-21; Hernandez Dep.

[8] Pursuant to PFML's policy, if the offender was not home, RVRs could attempt to verify the address up to five times. (Oct. 2014 Letter, Pl.'s Ex. 15, Docket Entry 129-15, at 1-2.)

76:5-78:20; 2013-14 Annual Rep. at ECF p. 4 (reporting that PFML transmitted 927 investigative leads during the time period covered by the Report).) Specifically, Hernandez testified that when SCPD received information from PFML that an offender failed to cooperate, SCPD would open an investigation. (Pl.'s County Resp. ¶ 86; Hernandez Dep. 78:7-20.) However, he testified that the information was only a tip and that further investigation would be necessary to develop probable cause and make an arrest.[9] (County 56.1 Stmt. ¶ 98.) The 2013-14 Annual Report stated that "99% of registrants were cooperative with PFML Registry Verification . . . staff," and PFML transmitted 42 "refusal to cooperate investigative leads" and 173 "failure to register home address felony leads" during that time period. (PFML 56.1 Stmt. ¶¶ 46-47; Pl.'s PFML Resp. ¶¶ 46-47; Pl.'s 56.1 Counterstmt. ¶ 54; 2013-14 Annual Rep. at ECF p. 4, 7.) As of April 2016, nineteen offenders were arrested "for a criminal offense as a result of address verifications conducted pursuant to the Community Protection Act." (Pl.'s 56.1 Counterstmt. ¶ 53; County's Am. Resp. to Interrogs., Harrist Decl., Ex. 48, Docket Entry 129-48, ¶ 3 at 5, & Ex. F at 7-11.)

[9] Detective Giordano, who was assigned to SCPD Special Victims Unit, testified that she was not aware of any consequences for offenders that did not cooperate with SCPD when SCPD detectives conducted the address verifications prior to the enactment of the CPA. (Pl.'s County Resp. ¶ 102; Giordano Dep. 20:3-21.)

PFML maintains that after it transmitted a tip, "PFML's involvement in the matter [was] concluded," and SCPD did not provide any updates to PFML regarding its use of the information. (PFML 56.1 Stmt. ¶¶ 31, 35.) However, Plaintiff counters that PFML received information from SCPD about the leads it provided. (Pl.'s PFML Resp. ¶ 31, 35; Rau Dep. 102:16-103:2; Hernandez Dep. 73:3-10.) Additionally, at least one RVR testified in a case against a sex offender regarding information gathered during an address verification. (Pl.'s PFML Resp. ¶ 30; McCormack Dep., Harrist Decl., Ex. 17, Docket Entry 129-17, 22:19-25:19.) In any event, the parties agree that PFML was not involved in any arrests and that SCPD retained sole discretion regarding how to use the leads provided by PFML. (PFML 56.1 Stmt. ¶¶ 32, 34.)

The parties vigorously dispute whether cooperation with the RVRs was voluntary; based on testimony by PFML personnel, PFML alleges that compliance was voluntary, but Plaintiff, relying on his and his wife's testimony, a letter sent by SCPD, a conversation with SCPD, and the nature of the address verifications, alleges that sex offenders were told that compliance was required.[10] (PFML 56.1 Stmt. ¶ 42; Pl.'s PFML Resp. ¶ 42.) PFML personnel testified that RVRs were trained to end the verification and leave the property if the sex offender refused to cooperate. (PFML 56.1

[10] These facts are discussed in greater detail below.

Stmt. ¶ 44; County 56.1 Stmt. ¶¶ 63, 67; Rau Dep. 40:8-42:9; Waser Dep., Miranda Decl., Ex. E, Docket Entry 124-5, 18:24-19:11; McCormack Dep. 17:20-18:8.) PFML personnel also testified that RVRs were advised to avoid confrontation. (PFML 56.1 Stmt. ¶ 48; Rau Dep. 23:11-27:10; McCormack Dep. 17:20-18:8.) However, one RVR testified that he never received training on conducting the verifications, (Carboine Dep., Harrist Decl., Ex. 2, Docket Entry 129-2, 14:3-11) and that occasionally, the RVRs "would talk to [the offender] and try to get them to comply with what we wanted" by telling them "that if the verification wasn't completed by us we would in turn have to report this to [SCPD]." (Carboine Dep. 34:19-35:6.) (Pl.'s PFML Resp. ¶ 44.) It appears that some RVRs used "verbal judo"--a technique used by law enforcement for several purposes, including to encourage compliance--during the address verifications. (County 56.1 Stmt. ¶¶ 65-66; Pl.'s PFML Resp. ¶ 44; Carboine Dep. 41:14-44:5; Rau Dep. 23:16-28:11.) If an offender asked the RVRs whether he or she was required to comply, Rau testified that RVRs were trained to tell the offender that the RVRs were there to "verify" and that the offender was "not compelled to give us the information." (Pl.'s PFML Resp. ¶ 45; Rau Dep. 41:14-42:9.) Ahearn testified that it was possible for the RVRs to verify the offender's address without their cooperation, including through a "visual identification." (County 56.1 Stmt. ¶ 72; Pl.'s County Resp. ¶ 72; Ahearn Dep. 81:6-18.)

C. The SCPD Letter

After the address verification program began, Ahearn contacted SCPD because PFML heard that SCPD officers were informing offenders that "they d[id] not have to cooperate with [PFML] staff for address verifications." (PFML 56.1 Stmt. ¶ 55; Pl.'s PFML Resp. ¶ 55; June 2013 E-mail, Harrist Decl., Ex. 30, Docket Entry 129-30.) Based on this information, as well a threat made by an offender to PFML staff and an incident during which an offender ordered his dogs to attack the RVRs, PFML became concerned about the RVRs' safety. (PFML 56.1 Stmt. ¶¶ 56-60; Pl.'s PFML Resp. ¶¶ 56-60.) The Chief of SCPD made the decision to send a letter to offenders to advise them of the Contract between the County and PFML and ordered Detective Lieutenant Hernandez to draft the letter.[11] (Pl.'s 56.1 Counterstmt. ¶¶ 39-40; Hernandez Dep. 42:20-44:11.)

Thereafter, Hernandez sent a letter to offenders (the

[11] The parties dispute whether the purpose behind the SCPD Letter was to protect the RVRs or to address PFML's concerns regarding cooperation. (See, e.g., County 56.1 Stmt. ¶ 20; Pl.'s County Resp. ¶ 20.) Hernandez testified during his deposition that the Letter was written after receiving "complaints from [PFML] that some of the sex offenders were not being receptive to their RVRs" and was intended to "encourage cooperation." (Pl.'s County Resp. ¶ 20; Hernandez Dep. 42:24-43:15.) He further testified that he "wanted to keep everybody safe." (Hernandez Dep. 43:22-23.) Brian McCormack, one of the RVRs, agreed during his deposition that giving registrants a copy of the Letter occasionally resulted in increased cooperation. (McCormack Dep. 34:16-25.)

"SCPD Letter" or the "Letter") advising them that SCPD and PFML "entered into a contract for the purpose of conducting verifications of registered sex offenders residential and employment addresses." (PFML 56.1 Stmt. ¶ 63; County 56.1 Stmt. ¶ 19; SCPD Letter, Miranda Decl., Ex. V, Docket Entry 124-22.) The SCPD Letter stated that "[r]egistered sex offenders are required to provide this information under the New York State Sex Offender Registration Act, also known as Megan's Law." (SCPD Letter.) The Letter further explained that RVRs from PFML would be visiting them to "conduct in person residence verifications" and that the offender would be asked "to provide them with personal identification of a verifiable source, (e.g. a NY State Driver's License or NY State Identification Card) or other accepted forms of documentation that provides current address information." (SCPD Letter.) Finally, the Letter advised that the offender "may be requested to provide . . . employment information to the representative." (SCPD Letter.) PFML provided the postage for mailing the SCPD Letter. (Pl.'s Counterstmt. ¶ 50; July 16, 2013 E-mail, Harrist Decl., Ex. 56, Docket Entry 129-56.)

The parties dispute whether the Letter gave the impression that cooperation with the RVRs was mandatory. (PFML 56.1 Stmt. ¶ 66; Pl.'s PFML Resp. ¶ 66.) In an email seeking approval of the draft Letter, Hernandez explained that "some of our sex offenders are not being cooperative with PFML verification

personnel" and that he anticipated that when the RVRs visited an offender's home or employer, a copy of the Letter would be provided. (Pl.'s PFML Resp. ¶ 63; Hernandez E-mail, Harrist Decl., Ex. 31, Docket Entry 129-31, at 1.) Additionally, Hernandez testified at his deposition that there was less resistance from offenders after the Letter was sent. (Pl.'s Counterstmt. ¶ 51; Hernandez Dep. 19:25-20:7.) When asked about the SCPD Letter, Plaintiff agreed that there was no language in the Letter specifying that "a failure to comply . . . [was] a felony or any sort of crime." (Mr. Jones Dep. 34:6-9.) Hernandez testified that he told his detectives that if any offenders called with inquiries related to the SCPD Letter, they were to advise the offender that SCPD "encourage[s] cooperation," but if the offender asked if they had to cooperate with the RVRs, the detectives should tell them "[t]he answer is no."[12] (County 56.1 Stmt. ¶ 89; Hernandez Dep. 52:22-53:15.)

D. Plaintiff's Address Verifications

In approximately June 2013, Mr. and Mrs. Jones received the SCPD Letter. (PFML 56.1 Stmt. ¶ 126; Mrs. Jones Dep. 14:16-22.) After Plaintiff showed the Letter to his wife, she called SCPD and asked a male officer if her husband "had to abide by this [L]etter and he said that [her husband] should answer the

[12] Plaintiff maintains that this testimony conflicts with what his wife was told by a SCPD detective. (See Section I.D.)

questions, [and] not to be rude to the people from Megan's Law." (PFML 56.1 Stmt. ¶ 128; Pl.'s 56.1 Counterstmt. ¶ 85; Mrs. Jones Dep. 16:10-17:5; Mr. Jones Dep. 23:25-24:2.) Mrs. Jones testified that the officer did not indicate that there would be penalties if her husband refused to cooperate. (PFML 56.1 Stmt. ¶ 130; Pl.'s PFML Resp. ¶ 129; Mrs. Jones Dep. 17:10-12.) Mr. Jones testified that after the call, his wife relayed the information to him. (Pl.'s 56.1 Counterstmt. ¶ 91; Mr. Jones Dep. 24:25-26:3.)

1. August 2013 Verification

On August 6, 2013, RVRs Mike Waser and Robert Carboine went to Plaintiff's residence to conduct an address verification. (PFML 56.1 Stmt. ¶ 95; County 56.1 Stmt. ¶ 12.) Plaintiff's wife testified that after the RVRs knocked on the door, the couple's son answered and told her that someone was at the door. (PFML 56.1 Stmt. ¶¶ 96, 99.) Mrs. Jones testified that when she came to the front door, the RVRs were "about a foot" from the front door. (Mrs. Jones Dep. 23:2-5.) They asked to speak to Plaintiff, and Mrs. Jones told them that he was in the shower. (PFML 56.1 Stmt. ¶¶ 101-02.) She testified that she asked them to identify themselves, and they told her they were from PFML. (Mrs. Jones Dep. 22:13-23:10.) They also stated that they were there to do "a house check" and "want[ed] to know if this is where [Plaintiff] lives." (PFML 56.1 Stmt. ¶ 110; Pl.'s PFML Resp. ¶ 111; Mrs. Jones Dep. 24:8-16.) She testified that the RVRs waited outside for

approximately fifteen minutes until Plaintiff finished his shower, but admitted that her "time concept is really not that good."[13] (PFML 56.1 Stmt. ¶¶ 103, 106; County 56.1 Stmt. ¶ 54; Mrs. Jones Dep. 26:4-7.) Mrs. Jones testified in an affidavit that when she asked the RVRs "whether they had the authority to question my husband at our home," one of them said "they could do what they wanted because they were from Parents for Megan's Law." (Mrs. Jones Aff., Harrist Decl., Ex. 27, Docket Entry 129-27, ¶ 8.) When asked if the RVRs were armed, Mrs. Jones testified that she "didn't see any guns," and Plaintiff testified that he did not know if the RVRs were armed.[14] (PFML 56.1 Stmt. ¶¶ 112, 125; Pl.'s PFML Resp. ¶¶ 112, 125; Mrs. Jones Dep. 22:2-5; Mr. Jones Dep. 44:3-4.) She also said that the RVRs never asked to enter the home and that she did not ask them to leave. (PFML 56.1 Stmt. ¶¶ 113-14; County 56.1 Stmt. ¶ 53.) Additionally, Mr. Jones testified that they did not request permission to enter his home or vehicle. (PFML 56.1 Stmt. ¶ 136.) Mrs. Jones testified that she felt threatened "[j]ust lookwise and just because they were Parent's for Megan's

[13] PFML notes that neither Plaintiff nor his wife called SCPD or their attorney during this time. (PFML 56.1 Stmt. ¶¶ 104-05.)

[14] Plaintiff points out that the RVRs who conducted the first address verification, Waser and Carboine, both testified that they carried guns during address verifications. (Pl.'s PFML Resp. ¶ 112; Carboine Dep. 17:11-23 (testifying that he carried a gun "almost everyday"); Waser Dep. 25:22-26:1 (testifying that he carried a gun "on occasion" or "very rarely").)

Law," and that "[she] felt [her] privacy was invaded, especially with all the children in the house and the neighbors." (Pl.'s PFML Resp. ¶ 116; Mrs. Jones Dep. 25:20-23.)

Plaintiff testified that he got out of the shower and came to the door about fifteen minutes after the RVRs arrived. (Mr. Jones Dep. 38:11-21.) Carboine testified that he did not "ever remember waiting 15 minutes because someone was in the shower," but acknowledged that he did not have any recollection of this particular address verification. (PFML 56.1 Stmt. ¶¶ 107-08; Pl.'s PFML Resp. ¶¶ 107-08; Carboine Dep. 59:25-60:10, 62:13-63:10.) Mr. Jones testified that when he got to the door, the RVRs were waiting in the walkway about five feet from his house. (PFML 56.1 Stmt. ¶ 118.) In an affidavit, Mr. Jones testified that the RVRs also "asked [him] a series of questions, including where [he] work[ed] and how long [he] ha[d] worked there."[15] (Mr. Jones Affidavit ¶ 10.) At that point, Plaintiff and the RVRs walked to his truck--which was parked in the street about thirty or forty feet from the front door--to retrieve his driver's license; according to Plaintiff, the RVRs followed about two feet behind him while he walked to his vehicle. (PFML 56.1 Stmt. ¶¶ 120-22; Pl.'s 56.1 Counterstmt. ¶ 114; Mr. Jones Dep. 45:9-15.) Plaintiff testified that after he gave the primary RVR his license,

[15] PFML alleges that the RVRs never asked Level One Offenders about their employment. (PFML 56.1 Stmt. ¶ 54.)

he said "[w]e may see you at your job." (Pl.'s PFML Resp. ¶ 123; Mr. Jones Dep. 47:3-5.) Then, the RVRs left. (PFML 56.1 Stmt. ¶ 123.) A Verification Report was completed after the address verification indicating that the verification was successful and noting Plaintiff's driver's license number and expiration date. (PFML 56.1 Stmt. ¶¶ 137-38; First Verification Rep., Miranda Decl., Ex. I, Docket Entry 124-10.)

Plaintiff testified that less than five minutes elapsed from the time he came to the door to when the RVRs left; Mrs. Jones estimated that it was ten minutes. (PFML 56.1 Stmt. ¶ 124; Pl.'s PFML Resp. ¶ 124; County 56.1 Stmt. ¶ 27; Pl.'s County Resp. ¶ 27; Mrs. Jones Dep. 28:11-16.) Mr. Jones testified that he did not ask the RVRs whether he was required to answer their questions or whether there would be consequences if he did not cooperate. (PFML 56.1 Stmt. ¶ 133; Mr. Jones Dep. 49:9-14.) He also testified that the RVRs did not threaten or insult him in any way. (PFML 56.1 Stmt. ¶ 134-35; County 56.1 Stmt. ¶ 28.) Nonetheless, Mr. Jones stated that he believed he would face penalties if he failed to cooperate with the RVRs, including being arrested, and that he believed that he was required to comply with their requests. (Pl.'s 56.1 Counterstmt. ¶ 109; Mr. Jones Dep. 30:24-31:5, 118:10-16.)

2. July 2014 Verification

On July 2, 2014, two RVRs attempted to conduct an address

verification at Plaintiff's residence but were told by his mother-in-law that he was not home. (PFML 56.1 Stmt. ¶ 147; Pl.'s 56.1 Counterstmt. ¶ 119.)

On July 9, 2014, two RVRs, Mike Waser and Brian McCormack, returned to Plaintiff's home to verify his address. (PFML 56.1 Stmt. ¶ 148; County 56.1 Stmt. ¶ 11.) Plaintiff testified that when he came to the door, one of the RVRs was waiting "at the bottom of the step" and one was approximately fifteen feet from the front door. (Pl.'s 56.1 Counterstmt. ¶ 124; Mr. Jones Dep. 60:9-16.) He further testified that a third RVR was waiting by the car and that none of the RVRs showed any identification. (PFML 56.1 Stmt. ¶ 149; Pl.'s 56.1 Counterstmt. ¶ 123; Mr. Jones Dep. 60:15-62:19.) He testified that one of the RVRs was not armed, and that he did not know if the second RVR was armed.[16] (PFML 56.1 Stmt. ¶ 154; Pl.'s PFML Resp. ¶ 154; Mr. Jones Dep. 61:7-25.) The RVR closest to him asked him questions and requested that he produce identification, and Plaintiff walked to his truck, which was parked on the street about thirty to forty feet away, to retrieve his driver's license while the primary RVR

[16] Plaintiff points out that the RVRs who conducted the second address verification, Waser and McCormack, both testified that they carried guns during address verifications. (Pl.'s PFML Resp. ¶ 154; McCormack Dep. 20:11-21:10 (testifying that he carried a firearm most days, including during address verifications); Waser Dep. 25:22-26:1 (testifying that he carried a gun "on occasion" or "very rarely").)

followed him. (PFML 56.1 Stmt. ¶ 151; Pl.'s 56.1 Counterstmt. ¶¶ 125-27; Mr. Jones Dep. 64:10-20.) Plaintiff testified that when he gave the RVR his license, he "told him not to laugh at [his] picture," and the RVR "laughed" and said "[m]y picture is not that good either." (PFML 56.1 Stmt. ¶ 152; Pl.'s PFML Resp. ¶ 152; Mr. Jones Dep. 65:7-11.)

Plaintiff indicated that the entire verification lasted approximately two minutes. (PFML 56.1 Stmt. ¶ 153; County 56.1 Stmt. ¶ 30; Pl.'s County Resp. ¶ 30.) According to Plaintiff, the RVRs did not threaten him, speak rudely to him, or request permission to enter his home or vehicle. (PFML 56.1 Stmt. ¶¶ 155-57; County 56.1 Stmt. ¶ 31.) Additionally, Plaintiff did not ask the RVRs to leave or whether he was required to comply, or call SCPD or his attorney during the verification. (PFML 56.1 Stmt. ¶¶ 159-62; County 56.1 Stmt. ¶ 31.) The RVRs completed a Verification Report documenting the visit indicating that the verification was successful and noting Plaintiff's driver's license number and expiration date. (PFML 56.1 Stmt. ¶¶ 163-64; Second Verification Rep., Miranda Decl., Ex. J, Docket Entry 124-11.)

PFML did not attempt to verify Plaintiff's address in 2015. (PFML 56.1 Stmt. ¶ 167.) On March 16, 2016, Plaintiff was removed from the registry, and as a result, he is no longer subject to address verifications and the requirements of SORA. (PFML 56.1

Stmt. ¶¶ 82-83; County 56.1 Stmt. ¶ 24.)

II. Procedural Background

The Complaint, filed on January 9, 2015, asserts claims for violations of Plaintiff's right to be free from unreasonable search and seizure and his right to due process under the United States and New York Constitutions. (Compl. ¶¶ 65-66, 68-69.) Additionally, he claims that the CPA violates the New York Constitution because it is pre-empted by SORA. (Compl. ¶ 67.) The County and PFML moved to dismiss on March 10, 2015 and April 17, 2015, respectively. (See County Mot. to Dismiss, Docket Entry 25; PFML Mot. to Dismiss, Docket Entry 36.)

A. The Court's February 16, 2016 Order

The Court granted in part and denied in part Defendants' motions to dismiss. Initially, the Court determined that Plaintiff's allegations were sufficient to find that PFML was a state actor under either the joint action or public function tests. Jones, 164 F. Supp. 3d at 397. The Court found that Plaintiff's allegations that SCPD dictated how many visits each offender would receive, that PFML submitted the verification schedule to SCPD each week for modification and approval, and the allegations related to the SCPD Letter were adequate to allege that the County acted jointly with PFML. Id. at 396. Additionally, the Court held that because the allegations demonstrated that "the County delegated to PFML the inherently public function of monitoring sex

offenders," the elements of the public function test were also satisfied. Id. at 396-97.

Next, the Court considered whether Plaintiff adequately alleged a violation of his Fourth Amendment rights. Id. The Court found that the allegations--including those related to the SCPD Letter and the conduct of the RVRs during the address verifications--"raise[d] questions about whether a reasonable person in Jones' position would feel free to terminate his interactions with PFML." Id. at 398. Further, the Court explained that these allegations "give[ ] the encounter the appearance of a seizure of Jones' person, rather than a consensual 'knock and talk,'" which was found to be permissible in Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495, (2013). Id. at 397-98. Therefore, the Court denied Defendants' motions to dismiss the Fourth Amendment claim. Id. at 398. Additionally, the Court denied the County's motion to dismiss Plaintiff's claim under Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Id. at 399-400.

However, after analyzing Plaintiff's substantive due process claim, the Court dismissed that claim as duplicative of the Fourth Amendment claim. Id. at 398-99.

B. Defendants' Summary Judgment Motions

The County and PFML moved for summary judgment on August 24, 2017. (See County Mot., PFML Mot.) On September 29,

2017, Plaintiff opposed Defendants' motions, and the County and PFML filed reply briefs on October 12, 2017 and October 13, 2017, respectively. (Pl.'s Opp. Br., Docket Entry 125; County Reply, Docket Entry 130; PFML Reply, Docket Entry 131.)

DISCUSSION

I. Legal Standard

Summary judgment will be granted where the movant demonstrates that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine factual issue exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed 2d 202 (1986). In determining whether an award of summary judgment is appropriate, the Court considers the "pleadings, deposition testimony, answers to interrogatories and admissions on file, together with any other firsthand information including but not limited to affidavits." Nnebe v. Daus, 644 F.3d 147, 156 (2d Cir. 2011).

The movant bears the burden of establishing that there are no genuine issues of material fact. Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223 (2d Cir. 1994). Once the movant makes such a showing, the non-movant must proffer specific facts demonstrating "a genuine issue for trial." Giglio v. Buonnadonna Shoprite LLC, No. 06-CV-5191, 2009 WL 3150431, at

*4 (E.D.N.Y. Sept. 25, 2009) (internal quotation marks and citation omitted). Conclusory allegations or denials will not defeat summary judgment. Id. However, in reviewing the summary judgment record, "'the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.'" Sheet Metal Workers' Nat'l Pension Fund v. Vadaris Tech. Inc., No. 13-CV-5286, 2015 WL 6449420, at *2 (E.D.N.Y. Oct. 23, 2015) (quoting McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997)).

II. The State Actor Doctrine

The County and PFML argue that PFML is not a state actor under 42 U.S.C. § 1983 ("Section 1983"). (County Br., Docket Entry 119-26, at 13-15; PFML Br., Docket Entry 123, at 8-11.) The County argues that PFML is not a state actor under the joint action test because SCPD was not involved in training PFML staff or developing PFML's procedures. (County Br. at 13.) Additionally, the County contends that PFML "determined which individuals would be verified[ ] and who would conduct the verifications." (County Br. at 13.) The County argues that PFML is also not a state actor under the public function test because it was not engaged in a law enforcement activity, but an "administrative undertaking to verify the integrity of publically available information." (County Br. at 14.) According to the County, PFML's role was limited to "ministerial and information gathering functions only." (County

Br. at 15.) PFML makes similar arguments and points out that although the Court found that Plaintiff sufficiently alleged that PFML was a state actor at the motion to dismiss stage, the evidence undermines the Complaint's allegations related to state action. (PFML Br. at 8.) PFML contends that it acted independently, that the County did not manage the address verification program, and that address verifications were "an administrative function that was not traditionally within the exclusive province of the state." (PFML Br. at 8-9.) Relevant to the public function test, PFML maintains that because the address verification program did not exist prior to the enactment of the CPA, PFML could not have been performing an activity "exclusively within the realm of the state." (PFML Br. at 11.)

Plaintiff argues that the Court should deny Defendants' motions on this ground because all of the allegations the Court relied on in its February 16, 2016 Order have been substantiated by admissible evidence. (Pl.'s Opp. Br. at 8.) Plaintiff contends that PFML is a state actor under the joint function test because, inter alia, the County dictated how often PFML would verify offenders' addresses, developed the forms used by PFML to gather information, fielded inquiries from offenders and informed them they did not have to cooperate, and opened investigations based on tips from PFML. (Pl.'s Opp. Br. at 11.) Additionally, Plaintiff argues that PFML was performing a public function by monitoring

sex offenders, especially in light of evidence demonstrating that SCPD detectives visited offenders' homes prior to SCPD entering into the Contract with PFML. (Pl.'s Opp. Br. at 12-13.) Finally, Plaintiff claims that the evidence shows that by forwarding leads to SCPD, PFML was engaged in criminal investigations. (Pl.'s Opp. Br. at 13.)

A. State Action Generally

Section 1983 provides individuals with "a method for vindicating federal rights," including those rights conferred by the United States Constitution. Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694, 61 L. Ed. 2d 433 (1979). To state a claim under Section 1983, a plaintiff must demonstrate that the defendant deprived him of a federal or constitutional right while acting under color of state law. Cox v. Warwick Valley Cent. Sch. Dist., 654 F.3d 267, 272 (2d Cir. 2011). The state action requirement exists "[b]ecause the United States Constitution regulates only the Government, not private parties." Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 186 (2d Cir. 2005) (internal quotation marks and citation omitted).

It is well established that "a private entity does not become a state actor for purposes of § 1983 merely on the basis of 'the private entity's creation, funding, licensing, or regulation by the government.'" Fabrikant v. French, 691 F.3d 193, 207 (2d Cir. 2012) (quoting Cranley v. Nat'l Life Ins. Co. of Vt., 318

F.3d 105, 112 (2d Cir. 2003). Additionally, the existence of a contract between the private entity and the State--standing alone--does not render a private entity a state actor under Section 1983. See, e.g., Grogan v. Blooming Grove Volunteer Ambulance Corps., 768 F.3d 259, 269 (2d Cir. 2014) (holding that volunteer ambulance company was not a state actor under entwinement test despite contract between the company and the town). Rather, "[f]or the conduct of a private entity to be fairly attributable to the state, there must be such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." Cranley, 318 F.3d at 111 (internal quotation marks and citations omitted).

Although there is no one standard for determining whether an entity is a state actor, several tests have emerged. See Fabrikant, 691 F.3d at 207 (explaining that there is "'no single test to identify state actions and state actors.'") (quoting Cooper v. U.S. Postal Serv., 577 F.3d 479, 491 (2d Cir. 2009)). Specifically, courts have found a private party's actions to be attributable to the state when:

> (1) the entity acts pursuant to the "coercive power" of the state or is "controlled" by the state ("the compulsion test"); (2) when the state provides "significant encouragement" to the entity, the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or (3)

> when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296, 121 S. Ct. 924, 930, 148 L. Ed. 2d 807 (2001)). "The fundamental question under each test is whether the private entity's challenged actions are 'fairly attributable' to the state." Fabrikant, 691 F.3d at 207 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 2770, 73 L. Ed. 2d 418 (1982)). This inquiry is fact specific and begins with an examination of the conduct at issue. See Brentwood, 531 U.S. at 295, 121 S. Ct. at 930, 148 L. Ed. 2d 807.

The Second Circuit has instructed that when faced with "whether a private entity acts under color of state law for purposes of § 1983," the district court should identify "the specific conduct of which the plaintiff complains, rather than the general characteristics of the entity." Fabrikant, 691 F.3d at 207 (internal quotation marks and citation omitted). Moreover, the plaintiff must demonstrate that "the state was involved 'with the activity that caused the injury' giving rise to the action." Sybalski, 546 F.3d at 257-58 (quoting Schlein v. Milford Hosp., Inc., 561 F.2d 427, 428 (2d Cir. 1977)) (emphasis omitted).

As discussed, the Court previously held at the motion to dismiss stage that Plaintiff's allegations were sufficient to meet

either the joint action or public function tests. The Court will address each theory in turn.

B. The Joint Action or Close Nexus Test

For an entity to be considered a state actor under the joint action or close nexus test, there must be a "sufficiently close nexus between the State and the challenged action."[17] Lynch v. Southampton Animal Shelter Found., Inc., 971 F. Supp. 2d 340, 351 (E.D.N.Y. 2013) (internal quotation marks and citation omitted). "The requisite nexus between the State and the challenged conduct exists 'where a private actor has operated as a willful participant in joint activity with the State or its agents, or acts together with state officials or with significant state aid.'" Spavone v. Transitional Servs. of N.Y. Supportive Housing Prog., No. 16-CV-1219, 2016 WL 2758269, at *4 (E.D.N.Y. May 12, 2016) (quoting Abdullahi v. Pfizer, Inc., 562 F.3d 163, 188 (2d Cir. 2009)). Further, under what has been referred to as the entwinement theory, "[a] private entity may be considered a state actor 'when it is entwined with governmental policies, or when government is entwined in its management or control.'" Grogan, 768 F.3d at 264 (quoting Brentwood, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807). The decisive factor is the degree

[17] Courts seem to use the terms joint action and close nexus interchangeably. For the sake of clarity, the Court will refer to this test as the joint action test for purposes of this Memorandum and Order.

of control that the government exercises over the private party's activities. Id. at 269. Finally, after the Supreme Court's decision in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), several courts have considered a private entity to be a state actor when the state has "'so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity.'" Lynch, 971 F. Supp. 2d at 352 (quoting Hollman v. Cty. of Suffolk, No. 06-CV-3589, 2011 WL 2446428, at *7 (E.D.N.Y. June 15, 2011)).

The Court is unpersuaded by Defendants' arguments and concludes that the evidence is sufficient to establish that PFML is a state actor under the joint action test because the County worked with PFML to administer the program and maintained control over certain aspects of the program. As the Court indicated in its prior Order, see Jones, 164 F. Supp. 3d at 396, the Contract dictated how many visits each sex offender would receive, SCPD retained discretion to modify the schedule of visits on a weekly basis, and most significantly, the SCPD Letter created the appearance of joint action. (See Section I.C.; Contract at 8-9, III(A)(5)-(A)(6).) Additionally, SCPD assisted with developing PFML's forms for documenting information obtained during address verifications and fielded inquiries from offenders regarding the address verification program. (County 56.1 Stmt. ¶¶ 89, 107; PFML

56.1 Stmt. ¶¶ 128-30.) Moreover, in this case, the evidence demonstrates SCPD's involvement in the address verification program specifically--"'the activity that caused the injury' giving rise to the action." Sybalski, 546 F.3d at 257-58 (quoting Schlein, 561 F.2d at 428).

PFML cites several cases, including Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982), to support its argument that PFML is not a state actor under the joint action test. (PFML Br. at 10.) In Rendell-Baker, the Supreme Court concluded that a school that was regulated by the state and received substantial government funding was not a state actor for purposes of a Section 1983 claim. Rendell-Baker 457 U.S. at 839-43, 102 S. Ct. at 2770-72, 73 L. Ed. 2d 418. However, the basis for finding PFML to be a state actor is neither extensive regulation nor government funding, and as a result, Rendell-Baker is not instructive here. Neither is Shapiro v. Goldman, No. 14-CV-10119, 2016 WL 4371741, at *10-11 (S.D.N.Y. Aug. 15, 2016), aff'd, 696 F. App'x 532 (2d Cir. 2017), in which the court found that a non-profit corporation that analyzed no-fault insurance claims and forwarded tips to law enforcement was not a state actor. As discussed above, PFML and SCPD's relationship went beyond PFML forwarding unsolicited information to SCPD. The Court also finds the relationship between Facebook and the state discussed in Doe v. Cuomo--cited by the County--to be materially different from the

relationship between PFML and SCPD. See Doe v. Cuomo, No. 10-CV-1534, 2013 WL 1213174, at *1-2, 8-9 (N.D.N.Y. Feb. 25, 2013) ("Cuomo").

C. The Public Function Test

"Under the public function test, [s]tate action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." Grogan, 768 F.3d at 264-65 (internal quotation marks and citation omitted) (alteration in original). The relevant inquiry is whether "the activity historically has been an exclusive prerogative of the sovereign." Id. at 265 (internal quotation marks and citation omitted).

The Court finds that PFML is also a state actor under the public function test. Previously, this Court held that "the monitoring of registered sex offenders is an inherently public function." Jones, 164 F. Supp. 3d at 397. This is evidenced by the regulatory regime designed to monitor sex offenders that began with SORA, which was enacted in 1996 to monitor sex offenders through registration and notification requirements and to formulate a system of classifying offenders. See Wallace v. New York, 40 F. Supp. 3d 278, 288-89 (E.D.N.Y. 2014). PFML argues that because the address verification program did not exist prior to the Contract with PFML, the verifications were not an exclusive function of the state. However, there is evidence that prior to

the Contract with PFML, SCPD detectives performed address verifications of registered sex offenders. (County 56.1 Stmt. ¶¶ 25, 39; Mr. Jones Dep. 101:20-103:19; see also supra note 9.) Additionally, while it is not dispositive, after the police unions "raised issues with respect to some of the duties that may be performed by PFML," the County and the police unions entered into a Memorandum of Understanding (the "Memorandum of Understanding") clarifying the duties of RVRs. (Mem. of Understanding, Harrist Decl., Ex. 54, Docket Entry 129-54.) Detective Lieutenant Hernandez testified that he understood that "sex offender management" was previously "the function of the police department" and "solely the function of the detectives in the [SCPD]," and that those concerns probably led to the execution of the Memorandum of Understanding between the County and the police unions. (See Pl.'s 56.1 Counterstmt. ¶ 9; Hernandez Dep. 88:18-89:3.)

Because the Court concludes that PFML is a state actor, it will proceed to consider Defendants' remaining arguments.

III. Unreasonable Search or Seizure

The County and PFML argue that because Plaintiff voluntarily cooperated with the RVRs, he was not seized within the meaning of the Fourth Amendment. (PFML Br. at 13-18; County Br. at 15-20.) PFML maintains that Plaintiff was not compelled to cooperate with the RVRs. (PFML Br. at 13.) It reasons that the address verifications were "brief, non-threatening interactions"

that did not constitute a seizure as a matter of law. (PFML Br. at 15.) Additionally, PFML raises an argument considered by this Court in it prior Order--that the interaction between Plaintiff and the RVRs is analogous to a "knock and talk," which is not a violation of the Fourth Amendment. (PFML Br. at 15-16.) PFML also argues that the RVRs are akin to census takers. (PFML Br. at 17.) According to PFML, "[P]laintiff's own actions indicate that he was unsure whether compliance was mandatory," and further, an objective person would conclude that compliance with the RVRs was not required. (PFML Br. at 18-19.) The County contends that because "the verifications took less than five (5) minutes," "the PFML representatives never threatened him, intimated him, or asked to enter his home," and Plaintiff was not told that he had to comply with the address verifications, a reasonable person would understand that he was free to terminate the encounter and that, therefore, Plaintiff's cooperation with the RVRs was voluntary. (County Br. at 18.)

Plaintiff relies on the Court's prior Order and argues that Defendants are not entitled to summary judgment because he has "substantiated the allegations relied upon by the Court in its earlier ruling and adduced additional evidence demonstrating the compelled nature of the investigations." (Pl.'s Opp. Br. at 14.) Plaintiff points to the SCPD Letter, the phone call that his wife had with SCPD prior to the first address verification, and the

fact that the RVRs waited fifteen minutes until he was out of the shower to speak with him to support his argument that a reasonable person in his position would not feel free to terminate the interaction. (Pl.'s Opp. Br. at 15-17.) Further, Plaintiff maintains that PFML's procedures for address verifications, including that the RVRs use "verbal judo" to encourage offenders to comply and that they sometimes carry concealed firearms, are "inherently threatening." (Pl.'s Opp. Br. at 17.) Finally, Plaintiff contends that based on all of the circumstances surrounding the address verifications, a jury could find that a reasonable person would feel compelled to cooperate with the RVRs. (Pl.'s Opp. Br. at 18-19.)

PFML contends that if the Court were to find that Plaintiff was seized, Plaintiff's Fourth Amendment claim would still fail because any seizure was reasonable. (PFML Br. at 21-25.) PFML avers that the Court should find that the seizure was reasonable because "[t]he burden on the offenders is minimal, while the important task of ensuring an accurate registry is accomplished." (PFML Br. at 22.) PFML maintains that "the address verification program in question is far less onerous than those regulations that have been repeatedly upheld," including SORA, which required Plaintiff to report to his local police precinct every three years to update his photograph. (PFML Br. at 23-25.) The County emphasizes that the Second Circuit, in Doe v. Cuomo,

755 F.3d 105, 112 (2d Cir. 2014), found certain provisions of SORA to be constitutional, despite the intrusions on the privacy of the sex offender. (County Br. at 19-20.)

Plaintiff argues that the seizure was not reasonable because the balancing test advocated by the County and PFML (a component of the special needs test) only applies when the immediate objective of the program is a purpose other than to generate evidence for law enforcement. (Pl.'s Opp. Br. at 22-23.) Plaintiff maintains that there is "substantial evidence that the immediate purpose of the verification program is to generate evidence that registrants are not in compliance with their SORA obligations." (Pl.'s Opp. Br. at 23.) Additionally, Plaintiff contends that the reasoning in Doe v. Cuomo, which involved SORA's registration provisions, does not extend to searches at offenders' homes. (Pl.'s Opp. Br. at 23.)

The Fourth Amendment protects an individual's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. However, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred," which implicates a citizen's Fourth Amendment rights. Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968). To determine whether the Fourth Amendment has been violated, the Court

"must engage in a two-part analysis: (1) considering all of the circumstances of the case, was there a seizure within the meaning of the Fourth Amendment; and (2) if there was a seizure, was such seizure reasonable." Jie Yin v. NFTA, 188 F. Supp. 3d 259, 270 (W.D.N.Y. 2016) (internal quotation marks and citation omitted).

A. Whether Plaintiff was Seized

A seizure takes place when a reasonable person would not "feel free to decline [a police] officers' requests or otherwise terminate the encounter.'" Florida v. Bostick, 501 U.S. 429, 436, 111 S. Ct. 2382, 2387, 115 L. Ed. 2d 389 (1991); see also United States v. Serrano, 695 F. App'x 20, 22 (2d Cir. 2017). In other words, "in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Bostick, 501 U.S. at 439, 111 S. Ct. at 2389, 115 L. Ed. 2d 389; see also United States v. Lee, 916 F.2d 814, 819 (2d Cir. 1990) ("Essentially, this inquiry is an objective assessment of the overall coercive effect of the police conduct.").

The following factors suggest a seizure has occurred: "the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory;

prolonged retention of a person's personal effects . . . ; and a request by the officer to accompany him to the police station or a police room." Lee, 916 F.2d at 819; see also United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980). For example, in United States v. Drayton, the Supreme Court found that police officers who boarded a Greyhound bus and asked passengers questions about their travel plans and luggage did not "seize" the passengers because "there was nothing coercive or confrontational about the encounter." 536 U.S. 194, 203-04, 122 S. Ct. 2105, 2112, 153 L. Ed. 2d 242 (2002) (internal quotation marks and citation omitted). However, the Supreme Court concluded that while police officers may ask questions and request identification "even when [they] have no basis for suspecting a particular individual," officers may "not induce cooperation by coercive means." Id. at 201, 122 S. Ct. at 2110, 153 L. Ed. 2d 242.

Considering all of the circumstances in this case, the Court finds that there is a genuine issue of fact as to whether a reasonable person in Plaintiff's position would have felt free to terminate the address verifications. First, as the Court noted in its prior Order, the encounter took place within the curtilage, "an area afforded heightened Fourth Amendment protection." Jones, 164 F. Supp. 3d at 398. Second, before the first verification, Plaintiff received the SCPD Letter from Detective Lieutenant

Hernandez, which (1) displayed SCPD letterhead, (2) explained that SCPD had entered into a contract with PFML "for the purpose of conducting verifications of registered sex offenders' residential and employment addresses," and (3) stated that "[r]egistered sex offenders are required to provide this information under the New York State Sex Offender Registration Act, also known as Megan's Law." (SCPD Letter (emphasis supplied).) Although the SCPD Letter also stated that "[y]ou will be asked to provide them with personal identification" and "you may be requested to provide your employment information," (SCPD Letter), this language, in combination with the language indicating that offenders are required to provide such information, renders the Letter "ambiguous as to whether compliance was mandatory." Jones, 164 F. Supp. 3d at 398. As this Court pointed out, "[c]itizens do not often receive letters from the police announcing home visits by third-party groups." Id. Third, after receiving the SCPD Letter, Plaintiff's wife testified that she called SCPD and asked if her husband "had to abide by this [L]etter" and was told that "[her husband] should answer the questions, [and] not to be rude to the people from Megan's Law."[18] (PFML 56.1 Stmt. ¶ 128; Pl.'s 56.1 Counterstmt. ¶ 85; Mrs. Jones Dep. 16:10-17:5.) Fourth, there is

[18] While Mr. Jones was not a party to the conversation, Mrs. Jones relayed the conversation to her husband. (Pl.'s 56.1 Counterstmt. ¶ 91; Mr. Jones Dep. 24:25-26:3.)

a dispute regarding how long the RVRs waited to speak with Plaintiff during the first address verification, which could impact whether a reasonable individual would believe that compliance was required. Plaintiff testified that when they came to his home on August 6, 2013, the RVRS waited for approximately fifteen minutes--until he got out of the shower--to speak with him. (Mr. Jones Dep. 38:19-21.) However, one of the RVRs verifying Plaintiff's address that day testified that he did not believe he ever waited as long as fifteen minutes to speak with an offender because the offender was in the shower, but acknowledged that he did not have any recollection of the August 6, 2013 verification. (PFML 56.1 Stmt. ¶¶ 107-08; Pl.'s PFML Resp. ¶¶ 107-08; Carboine Dep. 59:25-60:10, 62:13-63:10.)

Defendants emphasize that several characteristics of the encounters--including that the visits were brief and that the RVRs were polite and never threatened Plaintiff--demonstrate that Plaintiff's cooperation was voluntary and that a reasonable person would not assume otherwise. (See, e.g., PFML Br. at 13-14.) Additionally, they point out that Plaintiff never asked the RVRs to leave or asked them if he was required to comply with their requests. (See, e.g., PFML Br. at 14.) While these facts may be relevant to whether Plaintiff was seized, Defendants completely ignore the fact that Plaintiff received the SCPD Letter, which could be interpreted as advising offenders that compliance was

mandatory, and that Mrs. Jones had a conversation with a police officer during which she was told that her husband "should" comply. The law is clear that whether a seizure occurred must be determined "in view of all of the circumstances surrounding the incident." Mendenhall, 446 U.S. at 554, 100 S. Ct. at 1877, 64 L. Ed. 2d 497. When all of the relevant circumstances are considered, the Court cannot resolve as a matter of law whether a reasonable individual would believe he could terminate the address verifications. See McCaffrey v. Cty. of Nassau, No. 11-CV-1668, 2013 WL 2322879, at *10 (E.D.N.Y. May 25, 2013) (denying summary judgment on Fourth Amendment claim due to a "significant issue of fact as to whether a reasonable person would have believed that he was not free to leave").

The cases cited by Defendants do not change the result. See, e.g., Mendenhall, 446 U.S. at 555, 100 S. Ct. at 1877-78, 64 L. Ed. 2d 497 (holding that individual was not seized when she was approached by federal agents in airport and asked for her identification); Neighbour v. Covert, 68 F.3d 1508, 1511 (2d Cir. 1995) (holding that plaintiff was not seized when she was approached by two officers at work, questioned, and asked by the officers to come to the police station); Caulfield v. Bd. of Educ. of City of N.Y., 583 F.2d 605, 611-12 (2d Cir. 1978) (finding that questionnaires collecting biographical information from school personnel did not constitute a search or seizure); Ligon v. City

of N.Y., 925 F. Supp. 2d 478, 506-07 (S.D.N.Y. 2013) (finding that encounters between one plaintiff and the New York Police Department were not seizures in class action challenging New York Police Department's stop and frisk practices). Specifically, Mendenhall, Neighbour, and Ligon did not involve encounters at the individual's home and were not preceded by letters from law enforcement or conversations during which law enforcement told the individual he should comply.

B. Whether the Seizure was Reasonable

Finally, the Court considers whether, assuming Plaintiff was seized, the seizure was reasonable. See United States v. Lifshitz, 369 F.3d 173, 178 (2d Cir. 2004) ("The touchstone in evaluating the permissibility of any search is reasonableness.") (internal quotation marks and citation omitted). Generally, a seizure must be supported by a warrant and probable cause, or when a warrant is not required, by "'some quantum of individual suspicion.'" Lynch v. City of N.Y., 737 F.3d 150, 157 (2d Cir. 2013) ("Lynch II") (quoting Maryland v. King, 569 U.S. 435, 447, 133 S. Ct. 1958, 1969, 186 L. Ed. 2d 1 (2013)). However, probable cause or some degree of suspicion is not "'an indispensable component of reasonableness is every circumstance.'" Id. (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)); see also City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S. Ct. 447, 451, 148 L. Ed. 2d 333

(2000). Courts have found that certain suspicionless seizures are reasonable "where the program was designed to serve special needs, beyond the normal need for law enforcement." Edmond, 531 U.S. at 37, 121 S. Ct. at 451, 148 L. Ed. 2d 333 (internal quotation marks omitted); see also Nicholas v. Goord, 430 F.3d 652, 661 (2d Cir. 2005) (discussing the contexts in which the special needs exception has been applied). While the Supreme Court has applied the special needs exception--articulated for the first time by Justice Blackmun in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985)--to different circumstances, in each case, the Supreme Court "found that the suspicionless-search regime at issue served some special need distinct from normal law-enforcement needs." Nicholas, 430 F.3d at 661. On the other hand, when the program is designed to "uncover evidence of ordinary criminal wrongdoing," there is no special need beyond the need for law enforcement and the special needs exception does not apply. See Edmond, 531 U.S. at 41-42, 121 S. Ct. at 454, 148 L. Ed. 2d 333 (holding that checkpoint program designed to confiscate narcotics violated the Fourth Amendment). The Second Circuit has explained that "what makes the government's need . . . 'special,' despite its relationship to law enforcement, is . . . its incompatibility with the normal requirements of a warrant and probable cause, and especially, the corollary that the nature of the search involved greatly attenuates the risks and harms that

the warrant and probable cause requirements are intended to protect against." United States v. Amerson, 483 F.3d 73, 82 (2d Cir. 2007).

If the program's primary purpose is a special need beyond traditional law enforcement, a court engages in a "'context-specific' assessment of the special needs as weighed against the privacy interest affected." Lynch II, 737 F.3d at 163-64 (quoting Chandler v. Miller, 520 U.S. 305, 314, 117 S. Ct. 1295, 1301, 137 L. Ed. 2d 513 (1997)). Specifically, a balancing test of three factors is required: "'(1) the nature of the privacy interest involved; (2) the character and degree of the government intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs.'" Amerson, 483 F.3d at 83-84 (quoting Cassidy v. Chertoff, 471 F.3d 67, 75 (2d Cir. 2006)).

1. The Primary Purpose of the Address Verification Program

To determine whether a program serves special needs apart from normal law enforcement needs, "a court must conduct a 'close review of the scheme at issue' in light of 'all the available evidence' to determine its 'primary purpose.'" Lynch II, 737 F.3d at 157 (quoting Ferguson v. City of Charleston, 532 U.S. 67, 81, 121 S. Ct. 1281, 1290, 149 L. Ed. 2d 205 (2001)). The inquiry should focus on the "immediate objective of the

challenged . . . program, not its ultimate goal." Id. at 158 (internal quotation marks and citation omitted); see also Nicholas, 430 F.3d at 667 ("[W]e first ask what the statute's primary purpose is, mindful that it is the statute's immediate rather than ultimate objective that is relevant."). The Second Circuit has explained that generally, a law enforcement purpose is one involving "ordinary evidence gathering associated with crime investigation." Nicholas, 430 F.3d at 663. If one of the purposes of a particular program is a normal law enforcement need, such as crime control, the special needs doctrine may still apply if that need is not the primary purpose of the program. See Lynch v. City of N.Y., 589 F.3d 94, 102 (2d Cir. 2009) ("Lynch I") ("[T]he mere fact that crime control is one purpose--but not the primary purpose--of a program of searches does not bar the application of the special needs doctrine.") (emphasis in original).

For example, in Lynch II, the Second Circuit examined whether the special needs test applied to a policy of the New York City Police Department ("NYPD") requiring that a breathalyzer be administered to any officer who discharges a firearm within the city resulting in injury or death, which plaintiffs argued violated their Fourth Amendment rights. Lynch II, 737 F.3d at 152-53. The court concluded that the evidence demonstrated that the primary purpose of the initiative was "personnel management of, and the maintenance of public confidence in, the NYPD." Id. at 159.

Additionally, it reasoned that "the possibility that . . . test results might ultimately be used as evidence in a criminal prosecution does not take the case out of the special needs doctrine." Id. at 162. The Second Circuit also considered whether the special needs proffered by the NYPD were "incompatible" with the traditional requirements of a warrant and probable cause such that it was appropriate to dispense with those requirements. Id. at 162-63. The court held that because the mandatory breathalyzer tests were limited to specific, narrow circumstances and did not involve any exercise of discretion, the traditional requirements of a warrant and probable cause were not necessary. Id. For these reasons, the Second Circuit found that the breathalyzer policy primarily served a non-law enforcement purpose and satisfied the first criterion for application of the special needs test. Id. at 163.

Additionally, in Nicholas, the Second Circuit considered whether a New York statute requiring that certain convicted felons provide DNA samples served a special need beyond criminal investigation. Nicholas, 430 F.3d at 655, 668-69. Initially, the court acknowledged that while "[t]here can be little doubt that New York's statute serves a purpose related to law enforcement[,] . . . we do not think that fact automatically condemns the New

York statute."[19] Id. at 668. Relying on Illinois v. Lidster, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), the Second Circuit explained that the distinction between a program that employs "information-seeking searches or seizures, which respond to special law enforcement concerns," and searches "aimed at detect[ing] evidence of ordinary criminal wrongdoing" is critical. Nicholas, 430 F.3d at 668 (internal quotation marks and citations omitted). It reasoned that New York's DNA statute was akin to an "information-seeking" search or seizure because "at the time of collection, the samples . . . provide no evidence in and of themselves of criminal wrongdoing and are not sought for investigation of a specific crime." Id. at 669 (internal quotation marks and citation omitted). As a result, the court concluded that the statute served a special need distinct from normal law enforcement needs and proceeded to apply the balancing test outlined above. Id. Previously, the Second Circuit upheld a similar statute which required convicted sex offenders to provide a blood sample for a DNA database on similar grounds. See Roe v. Marcotte, 193 F.3d 72, 79-80 (2d Cir. 1999).

Accordingly, the Court examines the primary purpose of

[19] The court agreed that the purpose was "to create a DNA database to assist in solving crimes should the investigation of such crimes permit resort to DNA testing of evidence." Nicholas, 430 F.3d at 668 (internal quotation marks and citation omitted).

the address verification program and begins by looking to the CPA. The purpose of the CPA--of which the address verification program was only one part--was "to make Suffolk County families and communities safer through the implementation of a series of law enforcement initiatives affecting all sex offenders across the County." (Contract at 4, Article I.) However, the appropriate inquiry is narrower; rather than examining the CPA as a whole, the Court must focus on the purpose of the address verification program specifically.

The terms of the Contract indicate that the purpose of the program was to verify the information provided by offenders pursuant to SORA. The Contract states that "the Community Protection Act authorizes the Commissioner of the Department and/or his designee to execute a contract with the Contractor [PFML] to carry out a program for the purposes of:

(i) verification of residency reporting of all registered sex offenders who are not homeless and who are not required to report pursuant to SORA;
(ii) proactive monitoring of registered sex offenders to ensure accurate reporting of registered sex offender addresses, which includes monitoring of social media for address verification and to ensure registered sex offenders are not using social media in violation of applicable law;
(iii) development of a system for community reporting of SORA violations;
(iv) development of community email alert and website enhancements to provide notification of registered sex

> offenders;
> (v) provision of crime victim services; and
> (vi) provision of community outreach and prevention education.

(Contract at 4 (emphasis supplied).) PFML's 2013-14 Annual Report to the County states that "a more updated and accurate sex offender registry" would be accomplished "through in-person sex offender address verifications and collaboration with law enforcement agencies through the provision of potential felony out-of-compliance investigative leads." (2013-14 Annual Rep. at ECF p. 3.)

Similarly, according to PFML personnel, the purpose of the program was to ensure that the registry was accurate. Ahearn testified that the address verification provision of the CPA was included because members of the community were concerned that the registry was not accurate and made complaints to that effect. (Ahearn Dep. 20:14-22:11; PFML 56.1 Stmt. ¶ 6.) Rau, PFML's grant administrator, testified that "the purpose of the registration verification program was to ensure that information provided on the registry was accurate so that people could act upon accurate information." (County 56.1 Stmt. ¶ 60; Rau Dep. 19:16-20:5; see also Ahearn Dep. 78:2-5 (Q: "So the goal of the home address verification program from PFML[´s] perspective was to get an up-to-date registry? A: To ensure the registry is up to date.").) Additionally, Ahearn testified that "[t]he objective is not to

generate leads. The objective is to have an up-to-date registry to make sure that when parents or victim[s] of sexual assault [are] checking the registry and knowing where that registered offender is and knowing that the information [is] up to date and accurate."[20] (Ahearn Dep. 117:13-18.) She explained that any inconsistency in the registrant's information, including an incorrect zip code, for example, would be transmitted to SCPD as a lead and "the idea is [that] [SCPD] can reach out to the registrant and correct the information by providing the registrant the form to correct it," or SCPD could reach out to the Division directly to make corrections. (Ahearn Dep. 118:5-119:4.)

As discussed, part of the program involved transmission of leads to SCPD. After SCPD received the form documenting the tip from PFML, SCPD opened an investigation and typically, a detective would visit the offender's home. (Hernandez Dep. 76:5-78:20.) Detective Lieutenant Hernandez believed that the forms

[20] There is some evidence in the record connecting an accurate registry with reduced recidivism. (See, e.g., Ahearn Dep. 22:11-16; Jan. 31, 2012 Minutes at ECF p. 11-12 (SCPD Chief James Burke explaining that the proposed sex offender management plan would "strengthen[ ] our address verification efforts" and stating that "[i]t's been proven that [the] sex offender registry reduces sex offender recidivism . . . [but] the registry is only good if it's accurate"); Feb. 27, 2015 Press Release ("Since the implementation of the Community Protection Act, there are no reported cases with the Suffolk County Police Department of Suffolk County registered sex offenders reoffending in the County, a 100% reduction in sex offender recidivism.").)

used by PFML to transmit failure-to-cooperate leads to SCPD were not used as evidence in any subsequent investigation related to the offender's failure to register and testified that further investigation would be necessary to develop probable cause and make an arrest. (Hernandez Dep. 96:13-97:9; County 56.1 Stmt. ¶ 98.) PFML was not involved in any arrests, and SCPD retained sole discretion regarding how to use the leads provided by PFML. (PFML 56.1 Stmt. ¶¶ 32, 34.)

Plaintiff argues that "there is substantial evidence that the immediate purpose of the verification program is to generate evidence that registrants are not in compliance with their SORA obligations." (Pl.'s Opp. Br. at 23.) He points to several facts to support this argument, including that: (1) if the offender's address was successfully verified, PFML provides information gathered during address verifications to SCPD on "blue sheets," and the information was entered into a SCPD database in the event it becomes relevant to a future investigation, (Pl.'s 56.1 Counterstmt. ¶¶ 23-25); (2) if the address verification revealed a violation of the law or the offender refused to cooperate, PFML transmitted the information and the potential violation to SCPD, which led to the opening of an investigation, (Pl.'s 56.1 Counterstmt. ¶¶ 26-32); (3) the County has arrested nineteen offenders for failure to register as a result of address verifications as of April 2016, (Pl.'s 56.1 Counterstmt. ¶ 53);

and (4) the County has issued press releases publicizing the number of arrests made pursuant to the CPA, including forty-four arrests as of February 2015, (Pl.'s 56.1 Counterstmt. ¶¶ 60-61). These facts do show that on certain occasions, the tips provided by PFML led to the opening of an investigation which resulted in an arrest. However, the record also shows that the forms documenting address verifications were not used as evidence in those investigations and that SCPD would need to obtain additional information to support a finding of probable cause to arrest. Thus, in the Court's view, these facts do not support Plaintiff's contention that the primary purpose of the address verification program was generating evidence to charge non-compliant offenders.[21]

In view of the all of the evidence, the Court concludes that the address verification program served a special need because the primary purpose of the program was to verify the addresses of registered sex offenders in order to improve the accuracy of the sex offender registry. To be sure, the program also served to bring offenders into compliance with SORA and to ensure that non-compliant offenders would face consequences, including criminal investigation and possible arrest, which is undoubtedly a law enforcement need. But the fact that the address verification program "serves a purpose related to law enforcement" does not

[21] The fact that one RVR testified against an offender does not change this result. (See McCormack Dep. 22:19-25:19.)

"automatically condemn[ ]" it. Nicholas, 430 F.3d at 668. The information obtained by PFML does not itself constitute evidence of wrongdoing and is not sought in the course of investigating a crime. See id. Moreover, the Second Circuit has been clear that the immediate objective of the program--not the program's ultimate goal--is the primary purpose relevant to the application of the special needs test. See Lynch II, 737 F.3d at 159 ("[E]ven if . . . test results might ultimately provide evidence relevant to a criminal prosecution--something that has never occurred to date--the record does not here admit a conclusion that the immediate object of the . . . testing is the procurement of criminal evidence in order to prosecute the police officer in question.") (emphasis omitted). Finally, because the address verification program applied uniformly to all registered sex offenders in Suffolk County (consistent with their classification as either a Level One, Level Two, or Level Three Offender), the frequency of the visits was dictated by the Contract between PFML and SCPD, and it appears that the same information was sought from every offender, the program was administered with little to no discretion, which weighs in favor of dispensing with the traditional warrant and probable cause requirements. See Lifshitz, 369 F.3d at 187 (noting that in cases involving drug testing and DNA collection, "the lack of discretionary application of the procedure minimized the concerns traditionally underlying the requirements of probable cause and

reasonable suspicion"); Lynch II, 737 F.3d at 163 ("'Indeed, in light of the standardized nature' of . . . testing, and the 'minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.'") (quoting Maryland, 569 U.S. at 447, 133 S. Ct. at 1970, 186 L. Ed. 2d 1); Amerson, 483 F.3d at 82 ("This lack of discretion removes a significant reason for warrants--to provide a check on the arbitrary use of government power.").

Accordingly, the Court will proceed to balance this special need against Plaintiff's privacy interest utilizing the three factors outlined above. See Amerson, 483 F.3d at 83-84 (quoting Cassidy, 471 F.3d at 75) ("[T]his balancing test is to be based on an examination of three factors: '(1) the nature of the privacy interest involved; (2) the character and degree of the government intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs.'").

2. Plaintiff's Privacy Interest and the Government Intrusion

As the Court previously acknowledged, Plaintiff's encounters with the RVRs occurred within the curtilage, an area implicating heightened privacy interests. See Jardines, 569 U.S. at 7, 133 S. Ct. at 1415, 185 L. Ed. 2d 495 (quoting California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809, 1812, 90 L. Ed. 2d

210 (1986)) ("Th[e] area around the home is 'intimately linked to the home, both physically and psychologically' and is where 'privacy expectations are most heightened.'"). However, this fact does not end the analysis. See United States v. Titemore, 437 F.3d 251, 258 (2d Cir. 2006) (quoting United States v. Arboleda, 633 F.2d 985, 992 (2d Cir. 1980) ("'Terming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis.'"). Notably, Plaintiff's interactions with the RVRs occurred on the steps, the walkway leading to the sidewalk, the sidewalk, or the street where Plaintiff's truck was parked[22]--areas outside the home where his expectation of privacy is diminished. See Titemore, 437 F.3d at 259 (observing that "while the sliding-glass door and porch are connected to the house and, in this respect, would tend to support a finding that they are within the curtilage of the home, they also constitute part of a principal entranceway, which has been associated with a diminished expectation of privacy" in case involving a state trooper entering defendant's property after receiving vandalism

[22] (See Mr. Jones Dep. 40:17-24 (testifying that during the first address verification, the RVRs were "on the sidewalk" in front of his house when he came to the door), 60:9-16 (testifying that during the second address verification, one RVR was at the bottom of the steps, one was fifteen feet away, and a third was standing near the back of a car); Mrs. Jones Dep. 22:16-25 (testifying that during the first address verification, the RVRs were standing in front of the porch at the bottom of the steps).)

complaint); Palmieri v. Lynch, 392 F.3d 73, 81-82 (2d Cir. 2004) (quoting United States v. Reyes, 283 F.3d 446, 465 (2d Cir. 2002)) ("'[T]he route which any visitor to a residence would use is not private in the Fourth Amendment sense.'"). Thus, while Plaintiff had a substantial privacy interest, the interest was not without its limits. Moreover, Plaintiff clearly had a diminished privacy interest in his personal information, such as his address, since that information was already on the registry and available to the public.

Next, the Court considers the character and degree of the government intrusion. As discussed, the fact that Plaintiff was visited at his home is significant. However, several other facts demonstrate that the degree of the intrusion was limited, including that the address verifications only lasted several minutes,[23] the RVRs never sought to enter Plaintiff's home or vehicle, and the RVRs were dressed in plain clothes and used an unmarked car. (PFML 56.1 Stmt. ¶¶ 124, 136, 153, 157; Pl.'s PFML Resp. ¶ 124; County 56.1 Stmt. ¶¶ 27, 30, 31; Pl.'s County Resp. ¶¶ 27, 30; Mrs. Jones Dep. 28:11-16; Mr. Jones Dep. 40:25-41:6, 61:2-62:11; Contract at 8, III(A)(2).)

3. The Government's Need

[23] While Plaintiff maintains that the RVRs waited outside for approximately fifteen minutes while he showered before the first address verification--assuming he was seized--the Court does not consider him to have been seized during that time.

The government has a strong interest in monitoring registered sex offenders and ensuring the safety of its residents. "Studies have shown that sex crimes are widespread . . . and that their impact on both the victim and ociety as a whole is devastating." Doe v. Pataki, 120 F.3d 1263, 1266 (2d Cir. 1997) ("Doe I") (citations omitted). It is undisputed that the actions of sex offenders inflict serious harm to society. Id. Further, the government has a strong interest in reducing recidivism among sex offenders and protecting future potential victims.[24] See id. (acknowledging that while the findings of studies are inconsistent, "[s]ome studies have . . . demonstrated that, as a group, convicted sex offenders are much more likely than other offenders to commit additional sex crimes"); Lifshitz, 369 F.3d at 187 (observing that "there is a high rate of recidivism among sex offenders"); see also Doe v. Cuomo, 755 F.3d 105, 115 (2d Cir. 2014) ("Doe II") (holding that SORA registration requirements did not violate Fourth Amendment because the registration requirements serve special needs and "the degree of intrusion on convicted sex offenders is reasonable in relation to the interests advanced by SORA").

In this case, the County and PFML sought to advance these

[24] Here, there is evidence that the address verification program was motivated in part by a desire to reduce recidivism. See supra note 20.

interests by verifying the accuracy of the sex offender registry. The accuracy of the registry is critical to its effectiveness; if an offender reports an incorrect address or fails to report any address, the registry cannot serve the purposes for which it was intended. Additionally, while verifying the information required some intrusion on the privacy of the offenders, the County employed the least intrusive mechanism to accomplish the task--for Level One Offenders such as Plaintiff, a brief, yearly verification by PFML staff.

4. Balancing

Balancing the relevant factors--Plaintiff's significant privacy interest, the limited nature of the intrusion, and the government's strong interest in monitoring sex offenders--the Court finds that, if Plaintiff was seized, the seizure was reasonable and did not violate the Fourth Amendment. While Plaintiff's privacy interest weighs in his favor, the nature of the intrusion and the County's compelling interests tip the balance in Defendants' favor. Thus, Plaintiff's Fourth Amendment claim is DISMISSED. Further, because Plaintiff has not established a constitutional violation, his claim for municipal liability against the County under Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S Ct. 2018, 56 L. Ed. 2d 611

(1978), is also DISMISSED.[25]

C. Remaining State Law Claims

In light of the dismissal of the federal claims, only Plaintiff's state law claims remain. (See Compl. ¶¶ 67-69.) "[A]bsent exceptional circumstances, where federal claims can be disposed of pursuant to Rule 12(b)(6) or [on] summary judgment grounds, courts should abstain from exercising pendant jurisdiction." Dole v. Huntington Union Free Sch. Dist., 14-CV-1283, 2016 WL 4703658, at *7 (E.D.N.Y. Sept. 8, 2016), aff'd, 699 F. App'x 85 (2d Cir. 2017) (internal quotation marks and citation omitted); Krumholz v. Vill. of Northport, 873 F. Supp. 2d 481, 492 (E.D.N.Y. 2012). The Court determines that retaining jurisdiction over the state law claims is unwarranted. Thus, the Court declines to exercise supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367(c)(3), and the state law claims are DISMISSED WITHOUT PREJUDICE.

CONCLUSION

For the foregoing reasons, the County's motion for summary judgment (Docket Entry 119) and PFML's motion for summary judgment (Docket Entry 120) are GRANTED. Plaintiff's Fourth Amendment and Monell claims are DISMISSED WITH PREJUDICE. The

[25] In light of the Court's determination, it declines to address Defendants' arguments related to damages and PFML's argument that Plaintiff's claims should be dismissed as moot. (See County Br. at 20; PFML Br. at 12.)

Court declines to exercise supplemental jurisdiction over the remaining state law claims, and those claims are DISMISSED WITHOUT PREJUDICE. The Clerk of the Court is directed to enter judgment accordingly and mark the case CLOSED.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: May 1, 2018
Central Islip, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

JOHN JONES,

Plaintiff,

- against -

JUDGMENT
CV 15-111 (JS)(ARL)

COUNTY OF SUFFOLK and
PARENTS FOR MEGAN'S LAW,

Defendants.

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A Memorandum and Order of Honorable Joanna Seybert, United States District Judge, having been filed on May 1, 2018; granting Defendant the County of Suffolk's motion for summary; granting Defendant Parents for Megan's Law's motion for summary judgment; dismissing Plaintiff's Fourth Amendment and Monell claims with prejudice; declining to exercise supplemental jurisdiction over Plaintiff's remaining state law claims; dismissing Plaintiff's state law claims without prejudice; and directing the Clerk of the Court to enter judgment accordingly and mark the case closed, it is

ORDERED AND ADJUDGED that Plaintiff John Jones take nothing of Defendants the County of Suffolk and Parents for Megan's Law; that Defendant the County of Suffolk's motion for summary is granted; that Defendant Parents for Megan's Law's motion for summary judgment is granted; that Plaintiff's Fourth Amendment and Monell claims are dismissed with prejudice; that the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims; that Plaintiff's state law claims are dismissed without prejudice; and that this case is hereby closed.

Dated: Central Islip, New York
May 1, 2018

DOUGLAS C. PALMER
CLERK OF THE COURT

BY: /S/ JAMES J. TORITTO
DEPUTY CLERK