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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

On the central issue before this Court – whether Suffolk County's suspicionless home-verification program's primary purpose is to gather incriminating evidence or update the sex-offender registry under the "special needs" doctrine – the Defendants disregard the key fact that the program has led directly to nineteen arrests, and they conspicuously fail to point to any record evidence as to how corrected information even makes its way to the state agency that maintains the registry. Instead, the Defendants attempt to rely on assertions that prosecutors were not involved and that the program did not lead to immediate arrests. But the first is contrary to the record, and the latter is not determinative. Rather, the key inquiry is whether the program results in the immediate provision of incriminating evidence to police, and the record before this Court plainly establishes that the Suffolk program does.

Moreover, even if the program were subject to the relaxed standards of the special needs doctrine, neither Defendant cites any decisions where a court has upheld under that doctrine a suspicionless search-and-seizure program aimed at the site of the greatest Fourth Amendment protections: the home. Instead, Defendants contend there is a reduced expectation of privacy in a home's curtilage, failing to recognize that this Court has expressly rejected that position following the key

Supreme Court case upon which Plaintiff relies, *Florida v. Jardines*, 569 U.S. 1 (2013).

ARGUMENT

The central issue in this appeal is whether the lower court erred when it determined that the County program's primary purpose is not law enforcement. While the County does not challenge the lower court's rulings that PFML is a state actor and a factual dispute exists as to whether a seizure occurred, PFML contests those rulings. Because these issues must be resolved prior to the special needs analysis, Plaintiff explains why PFML is incorrect before refuting Defendants' arguments that the program serves special needs.

I. The District Court Correctly Held that PFML Is a State Actor

Suffolk County concedes that PFML is a state actor for the purposes of this appeal, Brief for County of Suffolk (County Br.) at 15, but PFML asserts that the lower court improperly applied the joint-action and state-function tests. Because the facts, as they must be construed on summary judgment, plainly demonstrate that PFML is a state actor under the controlling precedent of the Supreme Court and this Court, this contention has no merit.

As to joint action, PFML argues that "the SCPD was not involved in the day to day management of the verification program." Brief for Parents for Megan's Law (PFML Br.) at 52. But the proper inquiry is whether the state significantly

encouraged the "specific conduct of which the plaintiff complains." *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012); *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 614-16 (1989). Here, the question is whether the County willfully participated in the intrusive interrogations of registrants in their home. It unquestionably did, by (i) sending a letter to registrants specifically because registrants were not cooperating, (ii) stating in the letter that registrants are required to comply and directing them to call the SCPD with any questions, (iii) telling registrants when they called to cooperate with PFML, and (iv) giving PFML the letter to use to force registrants to comply. Pl. Br. 21-22.

Nor are PFML's representations about SCPD's involvement in the program accurate. PFML Br. 51. The record demonstrates that the SCPD developed the content of the forms driving the information that the RVRs gathered (consistent with the District Attorney's instructions). JA1502 (Rau Dep. 49:9-51:2), 1578, 1589, 1594, 1600 (Giordano Dep. 23:17-21, 67:5-17, 89:3:15, 111:9-112:19). And the SCPD knew and sanctioned (i) PFML agents returning to homes up to five times, (ii) the use of a primary and secondary RVR, and (iii) the carrying of firearms. JA1627 (reporting up to five attempts), 1636 (same), 1643-45 (same), 1647-50 (same), 1791 (referring to consultation with the County on the firearm policy), 1796-99 (verification form indicating two PFML agents).

As to public function, PFML argues that registrant management is not a traditional and exclusive state function because it did not exist until the passage of SORA in 1995. PFML Br. 52-53. But a function does not have to be in existence for a long time to be a public function; the inquiry is whether the function is reserved to the State throughout that function's history. *See Sybalski v. Ind. Grp. Home Living Program, Inc.*, 546 F.3d 255, 259-60 (2d. Cir. 2008) (concluding that caring for the mentally ill is not a public function because historically institutional care was privatized); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (providing education to maladjusted high school students was not historically a public function). While registries are relatively recent, New York's SORA has always delegated monitoring registrants to local law enforcement. *See* Pl. Br. 22-23.

II. The District Court Correctly Held that a Reasonable Jury Could Find that Plaintiff Was Seized at His Residence

Both Defendants concede that PFML agents entered the curtilage of Plaintiff's home, and the County further concedes that a genuine issue of fact exists as to whether Plaintiff was seized. PFML Br. 42; County Br. 17. PFML, however, argues that it is entitled to summary judgment on Plaintiff's Fourth Amendment claim for three reasons. First, it argues there was no seizure because PFML conducted only a permissible knock and talk. PFML Br. 39-44. Second, it contends Plaintiff voluntarily consented to the encounter and was not coerced. PFML Br. 45-49. Third, it makes the extraordinary claim that any search was

reasonable based solely on Plaintiff's criminal history. PFML Br. 14-20. In addition, both Defendants argue that this Court's decision in *Doe v. Cuomo*, 755 F.3d 105 (2d Cir. 2014), forecloses Plaintiff's claim. PFML Br. 2, 17, 37; County Br. 17, 18, 25. These contentions are meritless, as set forth below.

A. The Verifications Are Not Permissible Knock and Talks

Contrary to PFML's assertion, Plaintiff does not challenge the lawfulness of a "knock and talk." PFML Br. 41. PFML, like any private citizen, is permitted to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v. Jardines*, 569 U.S. 1, 8 (2013). But that is not what PFML does. PFML's "approach" was preceded by the SCPD letter stating that registrants "are required to provide" information to PFML, the SCPD told Plaintiff and his wife that they had to answer PFML's questions, and PFML agents waited for an extended period of time at Plaintiff's front door after telling his wife they could do whatever they wanted because they were from PFML. Pl. Br. 11-12.[1] The agents stood in a staggered fashion and one followed Plaintiff closely until he provided the requested information. *Id.* at 14-15. This behavior far exceeds the "traditional invitation" to approach the home. *Jardines*, 569 U.S. at 8.

[1] PFML misrepresents the communication between PFML and Plaintiff's wife. PFML Br. 11, 44. One agent told her that they could do what they wanted because they were from PFML. JA1781-82.

PFML argues this case is similar to *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), in which the Tenth Circuit held police officers did not exceed the implied license to approach the door despite the presence of "No Trespass" signs. PFML Br. 43. But this case and *Carloss* are not similar; the officers in *Carloss* did not send a coercive letter, respond misleadingly to a phone call, and then assert their authority to remain on the property when questioned. Pl. Br. 11-15.

Carloss in fact refutes PFML's own assertion that it is irrelevant whether the RVRs waited for five or fifteen minutes before Plaintiff came to the door. PFML Br. 42-43. The Court in *Carloss* examined how long and in what manner the officers knocked on the door and interacted with the person who responded to the knocking, despite the fact that it was not the plaintiff, in evaluating whether the implied license was exceeded. 818 F.3d at 990-91, 998. So too, here, the evidence that the RVRs waited fifteen minutes is probative of whether they exceeded the implied license to be present on the curtilage. The fact that it is Plaintiff's wife, a non-party, who testified to this fact does not make it irrelevant, as PFML argues. PFML Br. 43. She was a witness to that behavior.

Nor is it accurate, as PFML contends, that Plaintiff's interactions with the RVRs did not occur on the curtilage. PFML Br. 44. PFML argues that – while waiting for Plaintiff to get out of the shower – the "RVRs had retreated from his door down the path, and off of his property to the sidewalk." *Id.* This misstates the

record. Plaintiff testified that his use of the term "sidewalk" referred to the private walkway directly in front of the three stairs in front of his front door. JA222 (Jones Dep. 118:17-120:2).

B. Plaintiff Was Coerced to Comply with the Verifications

PFML argues that Plaintiff was not coerced to comply with the verifications because there was no evidence of the six factors this Court considered in *United States v. Lee*, 916 F.2d 814 (2d Cir. 1990), because he voluntarily complied with the verification, and because he purportedly had only a subjective belief that compliance was mandatory. PFML Br. 39-40, 45-49. PFML both misconstrues the law on coercion and consent and ignores numerous objective facts from which a factfinder could conclude that a reasonable person would not feel free to end the encounter with PFML. *See Brown v. Oneonta*, 221 F.3d 329, 340-41 (2d Cir. 2000) (vacating summary judgment ruling that seizure did not occur under reasonable person test).

A seizure occurs when 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). Although the factors this Court considered in *Lee* are relevant to whether an interaction is coerced, they are only illustrative and not required. *Lee*, 916 F.2d at 819. Rather, whether a seizure occurred requires "a

consideration of all the circumstances surrounding the encounter." *United States v. Drayton*, 536 U.S. 194, 201 (2002).

Consent, on the other hand, "must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit." *United States v. Como*, 340 F.2d 891, 894 (2d Cir. 1965) (finding no consent where officials made false representations about their intentions). In *United States v. Ruiz-Estrella*, for instance, this Court found that there was no consent in circumstances where a sky marshal took a person into a private stairwell and asked to search his bag, which was silently handed over. 481 F.2d 723, 728 (2d Cir. 1973). Despite lack of evidence of the *Lee* factors, the Court concluded there was no voluntary consent. *Id.*

In arguing there was no seizure, PFML relies heavily upon the assertion that Plaintiff did not elicit any evidence of the *Lee* factors. PFML Br. 39-40. But PFML omits the most relevant *Lee* factor here: "language or tone indicating that compliance with the officer was compulsory." 916 F.2d at 819. The SCPD told Plaintiff compliance was required in the letter; then, when he and his wife tried to clarify their obligations, they were told they "should answer" the questions. JA1767, 1772 (Mrs. Jones Dep. 14:7-17:9), 1781-82; *see United States v. Molt*, 589 F.2d 1247, 1251-52 (3d Cir. 1978) (finding lack of consent where agents falsely asserted their right to inspect records).

While PFML asserts that the letter does not indicate that registrants were required to comply with the verification (PFML Br. 45; *see also* County Br. 9), in fact it must be so read on summary judgment, as the lower court found. After explaining the verifications, the letter states: "Registered sex offenders are required to provide this information under the New York State Sex Offender Registration Act[.]" JA1767 (emphasis added); Pl. Br. 11.

Ignoring this evidence, PFML next argues that Plaintiff voluntarily consented to the encounter, but this argument fares no better. PFML first asserts that "at best, Plaintiff and his wife were unsure whether cooperation was mandatory." PFML Br. 46. Not only is this assertion inconsistent with Plaintiff's undisputed testimony that he believed compliance was mandatory based on the letter, even if true, it is also insufficient to provide the "clear and positive" evidence of consent that the Fourth Amendment requires. JA200 (Jones Dep. 30:24-31:25), 221-22 (Jones Dep. 117:16-118:16); *Como*, 340 F.2d at 894.

Next, PFML puts significant emphasis on a letter from Plaintiff's counsel to the Suffolk County Attorney, arguing that it shows Plaintiff was counseled that the verifications were not mandatory. PFML Br. 10, 46. As an initial matter, this letter was sent after Plaintiff was first seized in August 2013. JA1300-01 (dated June 30, 2014); Pl. Br. 14. It is also, however, unreasonable to assume that Plaintiff, in the face of numerous indications compliance was necessary, should subject himself to

possible arrest even if it were unconstitutional. Indeed, shortly after the program began, the County along with PFML proudly publicized that it had made eight arrests under the CPA and specifically linked those arrests to the verifications. JA2130-32.

Next, PFML argues that Plaintiff was not seized because he had only a subjective belief that compliance was mandatory. PFML Br. 47-48. But Plaintiff does not rely on subjective belief, but a substantial body of objective evidence. JA175-84 (Pl. 56.1 ¶¶ 63-77, 84-91, 96-116, 118-130), 1553-55 (Hernandez Dep. 56:14-57:2, 58:22-59:7, 64:17-21), 1613-14, 1767. Both Defendants rely on the factual assertion that forty-two registrants declined to cooperate, despite receiving the letter and the other coercive tactics of PFML. PFML Br. 8, 49 (citing JA1118); County Br. 9. This misrepresents the evidence. The cited evidence states that there were forty-two failure to cooperate incidents, not forty-two offenders, meaning that a registrant may have failed to cooperate multiple times. JA 1118. More importantly, PFML's own documentation boasts that 99% of registrants were compliant with RVRs during the first year of the contract, demonstrating that the coercive tactics were successful. JA1113, 1115; *see also* JA1513 (Rau Dep. 95:21-96:19), 2388 (Ms. Ahearn: "We get significant collaboration"). This evidence must be accepted as true on summary judgment.

The cases PFML cites, Br. 47-48, are not analogous to the coercive circumstances present here. In *Michigan v. Chesternut*, 486 U.S. 567 (1988), the Supreme Court held that a brief acceleration by officers in a patrol car to catch up with a person who ran when they approached was not so objectively intimidating that a reasonable person would not feel free to terminate the encounter. 486 U.S. 567 (1988). And *Florida v. Bostick* involved two officers who approached an individual on a bus and requested to search his luggage. 501 U.S. 429 (1991). Neither case involved a statement by officers indicating that compliance was required or a refusal to clarify one's legal obligations; indeed, in *Bostick*, the officers specifically advised the individual that he had a right to refuse consent. *Id.* at 432. Furthermore, PFML misstates *Bostick*'s holding. The Court did not hold that the encounter on the bus was not a seizure, *see* PFML Br. 48; rather, the Court remanded for evaluation under the proper test for a seizure: a consideration of "all the circumstances surrounding the encounter." 501 U.S. at 439-40.

C. PFML's Assertion that the Seizure Is Reasonable Solely Based on Plaintiff's Criminal Conviction Is Meritless

PFML argues that any seizure conducted pursuant to the program is reasonable because it targets registrants. PFML Br. 14-20. While it is not clear whether PFML is arguing that suspicion is unnecessary to conduct a seizure of a registrant or that there is always reasonable suspicion to seize a registrant because of their conviction, both arguments are baseless.

As this Court recognizes, there is a "universal consensus" that reasonable suspicion is not met because of a prior criminal conviction. *United States v. Lifshitz*, 369 F.3d 173, 188 (2d Cir. 2004). This is so because "reasonable" suspicion is based on a specific series of events, not the background of a particular person. *Id.* In *Lifshitz*, this Court applied these principles in a case where the government argued that a broad computer monitoring condition was justified solely because the plaintiff probationer was convicted of child pornography. *Id.* at 188. This Court firmly rejected this argument, finding that:

> There is, indeed, a nearly universal consensus that the criminal status of the probationer cannot, viewed on its own, be sufficient to support a determination that "reasonable suspicion" exists; . . . it is not enough to suspect that someone has committed a particular crime only because of a prior criminal conviction.

Id. This applies with equal strength to those no longer under court supervision. *United States v. Oates*, 560 F.2d 45, 59 (2d Cir. 1977) (a person's criminal records are insufficient to justify an investigative stop).

Consistent with the universal consensus, this Court has never held that a suspicionless search is reasonable merely because it is aimed at a person with sex-offense convictions. In *Roe v. Marcotte*, for instance, this Court applied the special needs test – not the general balancing test proposed by PFML, Br. 14-20 – to a Connecticut statute requiring people incarcerated for sex offenses to submit samples to a DNA databank. 193 F.3d 72, 79 (2d Cir. 1999). More recently, in *Doe*

v. Cuomo, this Court applied the special needs test to a Fourth Amendment challenge to SORA's registration and notification provisions. 755 F.3d 105, 115 (2d Cir. 2014).

No authority supports PFML's position that registrants have diminished Fourth Amendment rights, and PFML cites none. Instead, it tries to bolster its meritless position by citing various, unrelated decisions where a court ruled against an individual with a sex-offense conviction, ranging from rulings upholding challenged sentences for sex-offense convictions to decisions upholding the registration and notification provisions of SORA. PFML Br. 18-19 (citing *United States v. Kurzajczyk*, 724 Fed. Appx. 30 (2d Cir. 2018) (court did not commit plain error when sentencing individual convicted of child pornography); *United States v. Hayes*, 445 F.3d 536 (2d Cir. 2006) (same); *Litmon v. Harris*, 768 F.3d 1237 (9th Cir. 2014) (rejecting challenge to required appearance every ninety days before a precinct for sexually violent predator; no Fourth Amendment claim); *Weens v. Little Rock Police Dep't*, 453 F.3d 1010 (8th Cir. 2006) (residency restriction; no Fourth Amendment claim); *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004) (registration scheme; no Fourth Amendment claim); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (same)). Not one of these cases suggests that law enforcement can bypass Fourth Amendment requirements because someone is a registrant; in fact, none of them so much as involve a Fourth Amendment claim.

PFML also cites several cases, Br. 19, that do involve the Fourth Amendment, but where the defendant officers had demonstrated probable cause justifying an arrest. Setting aside they are an unreported Third Circuit case and three out-of-circuit district court cases, they in fact support the conclusion that registrants – as do all other persons – retain the right to be free from unreasonable searches and seizures. *White v. Andrusiak*, 655 Fed. Appx. 87 (3d Cir. 2016) (allegation of false arrest despite valid arrest warrant); *Page v. Fife Police Dep't*, 2010 WL 55899 (W.D. Wash. Jan. 4, 2010) (same); *Bell v. Norwood*, 2014 WL 4388348 (N.D. Ala. Aug. 28, 2014) (same); *Maraia v. Buncome Cnty. Sheriff's Dep't*, 2012 WL 5336955 (W.D.N.C. Oct. 2, 2012) (applying standard Fourth Amendment analysis to home verification).[2]

Because the verification program is not based on any reasonable suspicion, it is a suspicionless search regime subject to the stringent and "closely guarded" special needs inquiry. *See Nicholas v. Goord*, 430 F.3d 652, 661-62 (2d Cir. 2005).

D. *Doe v. Cuomo* Does Not Foreclose Plaintiff's Fourth Amendment Claim

Defendants argue that this Court's decision in *Doe v. Cuomo* upholding SORA's registration and notification requirements forecloses Plaintiff's Fourth Amendment claim. PFML Br. 2, 17, 37; County Br. 17, 18, 25. But the legal

[2] Notably, the coercive nature of the County's verification program starkly contrasts with that alleged in *Maraia*, 2012 WL 5336955, at *1.

requirements at issue in *Doe* – the regular submission in writing of certain information to the state and the triennial, in-person reporting requirement at police precincts, *see* 755 F.3d 105 – are not at all similar to the invasive intrusions into the home at issue in this case. Furthermore, this Court specifically recognized that SORA did not have a primary purpose of enforcing the criminal law. The entirety of the Fourth Amendment holding in *Doe* is as follows:

> Even if we assume for argument that SORA's requirements subject Doe to a search or seizure for Fourth Amendment purposes, we cannot agree that any search or seizure is unreasonable. Here, any searches or seizures required by SORA serve special needs – such as the protection of potential future victims and the solving of crimes in the future – and purport neither to facilitate the investigation of any specific crime nor primarily to serve a 'general interest in crime control.'

755 F.3d at 115. The same cannot be said of the County's program, for the reasons previously set forth by Plaintiff, Br. 29-43, and the reasons below.

III. The Verification Program's Immediate Objective Is to Generate Incriminating Evidence of Failure to Register

To support their argument that the special needs test applies, Defendants first argue that the Supreme Court requires a program to mandate immediate arrests to have a primary purpose of law enforcement. In contrast, they argue that the County's program is only "information seeking" because it does not mandate immediate arrest and only has a "hit rate" of 4%. Second, they both argue the program's purpose cannot be law enforcement because police and prosecutors are only minimally involved. Because the first argument misconstrues the "special

needs" test and the second ignores substantial portions of the record, these arguments have no merit.

A. The Special Needs Inquiry Looks to Whether the Program Gathers Incriminating Evidence of A Particular Crime, Not Whether It Mandates Immediate and Numerous Arrests

Defendants' central argument that the verification program is not aimed at law enforcement relies on the assertion that the program is merely "information gathering," as demonstrated by the fact that it does not mandate immediate arrests and that 4% of the PFML referrals resulted in arrests. PFML Br. 23-24, 28-30. But while immediate arrests may be probative of a program's primary purpose, they are not necessary. Rather, as the Supreme Court and this Court have repeatedly emphasized, the question is whether PFML is gathering incriminating information regarding a particular crime, specifically, in this case, failure to register. *See* Pl. Br. 32-34 (citing cases). Here, the record is clear that the program gathers such incriminating evidence and, while arrests may not happen immediately, they indisputably occur as a direct result of evidence PFML gathers.

The central inquiry under the special needs doctrine is whether the program is aimed at trying "to determine that a particular individual has engaged in some specific wrongdoing." *Nicholas*, 430 F.3d at 668. That type of program, impermissible in the absence of probable cause, stands in stark contrast to an

"information-seeking" program that may be permissible even if the information is sought for law enforcement goals. *Id.*

The crucial difference between "information-seeking" and unlawful searches is illustrated in the Supreme Court's discussion in *Illinois v. Lidster*, 540 U.S. 419 (2004). *Lidster* involved a checkpoint program where officers asked motorists whether they had information about an accident that resulted in the death of a bicyclist. *Id.* at 422. Contrasting these circumstances with the program at issue in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), where the Supreme Court struck down a checkpoint program where officers searched vehicles for drugs, the Court upheld the program.

> The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.

Lidster, 540 U.S. at 423 (emphasis in original). Under a similar rationale, this Court has upheld DNA sampling statutes because they seek information that may be useful in investigating future crimes, but which, at the time of collection, provide no evidence of any particular suspected wrongdoing. *Nicholas*, 430 F.3d at 667-69.

Unlike in *Lidster*, the County's program does not merely seek information as PFML contends. PFML Br. 21. Here, PFML records evidence of unlawful conduct (specifically, that a registrant's reported information is inaccurate) in a form

prescribed and sanctioned by the District Attorney that it then immediately provides to the police. Pl. Br. 9-10; *see* JA1375 (contract), 1502 (Rau Dep. 49:9-51:2), 1578, 1589, 1594, 1600 (Giordano Dep. 23:17-21, 67:5-17, 89:3-15, 111:9-112:19), 1683-85 ("rainbow forms"). The incriminating evidence then initiates further investigatory steps from the SCPD that have, at least nineteen times, led to an arrest for felony failure to register. JA2141. This is not like *Lidster*, where the information was used to help solve a crime involving other perpetrators, or the DNA statute cases, where the evidence is put into a database for potential future use.

PFML argues that it did not immediately notify the SCPD any time there was a discrepancy with the registry, but this assertion is contradicted by the record. PFML Br. 33. Not only is the contract language clear, the SCPD officer charged with implementing the CPA testified that "if [PFML] suspected criminality, they would email us so we would get it right away." JA1592 (Giordano Dep. 79:4-14).

PFML also argues that PFML does not gather evidence that is "per se a felony," focusing on the fact that the inability to complete a verification – for instance, because a person is never home when they visit – is not evidence of a felony. PFML Br. 28. That may be true, but Plaintiff is not referring to instances when PFML is unable to complete a verification, but when they gather information that shows a registrant is not accurately reporting information to the registry. For

instance, if PFML attempts a verification at a home, insists upon seeing a registrant's license, and discovers that the registrant has not reported the correct driver's license number, the PFML agent is required to fill out a form, approved by the District Attorney, that includes a checkbox for "failed to register as required" and submit that information immediately to the SCPD.[3] Pl. Br. 5-10. That information is, in the language of this Court, evidence "that a particular person [the registrant] has engaged in some specific wrongdoing [failure to register, a felony offense]." *Nicholas*, 430 F.3d at 668.

The only authority PFML cites for the proposition that "immediate arrests" are necessary is *Ferguson v. City of Charleston*, but the Supreme Court relied upon the *immediate provision of incriminating evidence* to the police, not *immediate arrests*. 532 U.S. 67, 79-85 (2001). In fact, in *Ferguson* the women who tested positive were not arrested unless they failed to meet their substance-abuse program requirements or tested positive a second time. *Id.* at 72-73. The key factor invalidating the program, rather, was that "the immediate objective of the searches was to generate evidence for law enforcement purposes." *Id.* at 83. The Supreme Court found it significant that, despite claiming that the immediate purpose of the

[3] While the program is referred to as an address verification program, it is undisputed that PFML sought and recorded other registerable information, including license plate numbers. JA1796-99; JA1508 (Rau Dep. 75:22-76:17).

program was to improve the health of pregnant women, the test results were immediately provided to police to coerce women into drug treatment. So too, here, the incriminating evidence is immediately given to the police, not to the separate agency that maintains the registry. Pl. Br. 35-36. While maintaining the registry's accuracy may be a benevolent goal, it cannot be achieved through provision of incriminating evidence to law enforcement. *See Ferguson*, 532 U.S. at 85 (a benign motive "cannot justify a departure from Fourth Amendment protections").[4]

Because the special needs inquiry looks to the immediate provision of incriminating evidence to law enforcement, there is no requirement that the program lead to immediate arrests or a certain number of arrests, as PFML asserts (PFML Br. 29-30), although arrests are highly probative of a law enforcement purpose. Given this, PFML's assertion that 4% of referrals resulted in an arrest does not help its argument. *Id.* at 30.[5] The nineteen arrests of registrants is in sharp contrast to the zero arrests in programs approved by this Court. *See Lynch v City of*

[4] For its part, the County argues that registrants' awareness of their SORA obligations distinguishes this case from *Ferguson*, in which the hospital's drug tests were – unknowingly to the pregnant women – given to police and prosecutors. County Br. 22-23, 25 (citing *Ferguson*, 532 U.S. at 78). But the cited portion of *Ferguson* simply compared the *Ferguson* policy with other drug testing cases in which the tests were conducted for employment or other non-law enforcement purposes. *Ferguson*, 532 U.S. at 77-78. It did not hold that an individual's Fourth Amendment rights are violated only if the person does not know the gathered information is going to the police. *See Edmond*, 531 U.S. 32 (invalidating a program where police notified motorists there was a narcotics checkpoint and conducted search of the vehicles for drugs).

[5] Assuming this number is accurate, it is not dissimilar to the 9% hit rate in *City of Indianapolis v. Edmond*, in which the Supreme Court invalidated a suspicionless checkpoint program. 531 U.S. at 35.

New York, 737 F.3d 150, 159 (2d Cir. 2013) (no arrests from challenged NYPD policy of administering breathalyzer tests to officers who discharge firearms); *Nicholas*, 430 F.3d at 668-69 (noting only hypothetical potential arrests in the future under DNA sampling statute).

For these reasons, it is not necessary that the program mandate immediate arrests or meet a certain threshold of arrests, nor that the program gather information that is alone sufficient for arrest. The central inquiry is whether the program's immediate objective is to gather incriminating evidence of a particular crime, and the record as it must be read on summary judgment plainly establishes that the program's immediate objective is to gather evidence that registrants are guilty of failing to register pursuant to Correction Law § 168-t.

B. The SCPD and the Suffolk County District Attorney Were Closely Involved in the Home Verification Program

Defendants also assert that the program's primary purpose is not law enforcement because police and prosecutors were minimally involved. PFML Br. 26, 31-32; County Br. 6-7. That contention is contradicted by evidence that the District Attorney and police were closely involved in the development of the verification program for the express purpose of ensuring that collected information would be admissible evidence in a prosecution. While Plaintiff previously addressed this topic at length, *see* Pl. Br. 6-10, 35-36, 38-40, he addresses unsupported contentions by PFML below.

While acknowledging that the District Attorney had "input over the types of forms used by PFML," PFML asserts there is no legal authority that such input demonstrates that the program's purpose was law enforcement. PFML Br. 31-32. That is incorrect. The Supreme Court in *Ferguson* found it significant that the hospital's policy incorporated chain of custody requirements to ensure admissibility in criminal prosecutions. *See Ferguson*, 532 U.S. at 71-72, 82. PFML's related argument that the forms were not used as evidence, *see* PFML Br. 32, is contradicted by SCPD witnesses. Pl. Br. 9-10.

Tellingly, PFML provides no support for the contention that PFML forms were not used as evidence except a citation to the district court's opinion. PFML Br. 32 (citing to JA2524). But, as previously noted, the District Court failed to acknowledge evidence that the PFML forms were designed to be admissible in prosecutions. Pl. Br. 6-10, 42-43.

Citing to the contract, PFML also asserts that "there is no mention of criminal charges, there are no instructions as to how PFML should handle evidence, and there is no incorporation of any police procedures." PFML Br. 26. While the contract does not explicitly state that out-of-compliance registrants will be charged with felony failure to register, it refers to precisely those circumstances. PFML is required to notify the SCPD immediately of an address discrepancy (JA345), to report on the number of "leads" it provides to the SCPD (JA350-51),

and receives information on the "disposition on any leads forwarded to the" SCPD (JA351).[6] The reports from PFML to the SCPD pursuant to the contract reported on the number of "failure to register home address felony leads" transmitted during each reporting period. JA1622-24. And while the contract itself does not specify how PFML should handle evidence, the undisputed testimony is that the DA's office provided input on how to run the program. JA1594 (Giordano Dep. 89:3-89:15), 1502 (Rau Dep. 49:9-51:2), 1517 (Rau Dep. 109:12-110:10). Consistent with those instructions, the SCPD created the forms PFML used during the verifications to ensure evidence was collected consistent with those needs. JA1589 (Giordano Dep. 67:10-17). This process, resulting in nineteen arrests, plainly distinguishes this program from that in *Lynch*, despite PFML's assertions to the contrary (Br. at 32-33). *Lynch*, 737 F.3d at 159 ("even if [breathalyzer] testing 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 . . . testing is the procurement of criminal evidence in order to prosecute the police officer in question").

[6] The County's claim that SCPD never provided information on the disposition of leads forwarded to the SCPD, Br. 8, is incorrect. PFML's Mr. Rau testified that he would receive information on the outcome of investigations from the SCPD. JA429 (Rau Dep. 102:16-103:20).

IV. Defendants Misconstrue the Heightened Constitutional Protections Afforded the Home When Applying the Special Needs Balancing Test

If this Court concludes that the program's purpose is not law enforcement and therefore is subject to the relaxed standards of the special needs doctrine, the Suffolk program still violates the Fourth Amendment unless the special need outweighs the privacy interest at stake. In conducting this balancing test, both Defendants assert that Plaintiff had a reduced expectation of privacy in the curtilage of this home. County Br. 26-29; PFML Br. 34-36. But Defendants ignore the explicit ruling in *Jardines* that the curtilage is subject to the same heightened protections as the home itself. Because a diminished expectation of privacy is "a principal criterion of special-needs cases," *Nicholas*, 430 F.3d at 667, the verification cannot meet the Fourth Amendment's reasonableness requirement. *See* Pl. Br. 44-48.[7]

In *Jardines*, the Supreme Court held that "the area immediately surrounding and associated with the home – what our cases call the curtilage – [is] part of the home itself for Fourth Amendment purposes." 569 U.S. at 6. Next, the Court held

[7] PFML also argues that the intrusion into the home was minimal because Plaintiff did not suffer damages. PFML Br. 13, 16-17, 36-37. PFML claims that any injury suffered by Plaintiff was the result of a flyer sent to his children's school district, rather than the verifications. PFML Br. 37. This assertion is disputed. JA66, 71 (Pl. Resp. to County 56.1 ¶¶ 36, 55); JA143-44 (Pl. Resp. to PFML 56.1 ¶¶ 88, 91). Regardless of this dispute, however, this Court has held that "a litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999).

that a knock and talk is permissible so long as the state actor does not exceed the implied license to approach the home. *Id.* at 8-9. The lawfulness of the knock and talk, however, does not mean that there is a reduced expectation of privacy in the curtilage; indeed, such a conclusion would render these two holdings in *Jardines* in conflict. Rather, the lesson from *Jardines* is a person's heightened expectation of privacy in their home is not compromised when visitors merely approach the home, knock, and wait briefly to be received.

Nevertheless, Defendants repeatedly assert that there is a reduced expectation in the curtilage because of the permissibility of knock and talks. County Br. 26-29; PFML Br. 34-36. For instance, PFML argues:

> The District Court correctly held that the privacy interest an individual has in the curtilage around their home is diminished from that of a home itself. A state actor may not enter the home without first receiving permission to do so, few exceptions aside. The state can, however, enter the curtilage of the property without obtaining explicit permission to do so.

PFML Br. 36; *see also* PFML Br. 27-28 (arguing that Plaintiff "attempts to conflate the home with the curtilage surrounding the home" when relying on *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002)); PFML Br. 35-36; County Br. 29. This conclusion cannot be reconciled with the ruling in *Jardines*. A knock and talk is permissible because it does not infringe upon the expectation of privacy, not because the curtilage is less protected than the home.

The error of the County's position is further demonstrated by the County's reliance on *United States v. Reyes*, 283 F.3d 446 (2d Cir. 2012), *see* County Br. 24, a case this Court explicitly overruled in light of *Jardines*. In *United States v. Alexander* (a case neither Defendant cites), this Court held that "our analysis in *Reyes* rested on the principle, untenable after *Jardines*, that the route which any visitor to a residence would use is not private in the Fourth Amendment sense." 888 F.3d 628, 636 (2d Cir. 2018); *see* Pl. Br. 48-51.

Nor is it accurate, as the County argues, that registrants have a diminished expectation in their *actual* residence because their addresses are registered with the State. County Br. 24. The County cites no legal authority for the proposition that registrants who are no longer under court supervision have diminished Fourth Amendment rights, and, as Plaintiff discusses at length in Section II.C, there is no such support. Moreover, Plaintiff's address was not publicly available on the registry because he is a Level One registrant. *See* Pl. Br. 50.[8]

In short, despite Defendants' attempts to argue the curtilage does not enjoy the same privacy protections as the home, this argument is not tenable after *Jardines* and *Alexander*.

[8] The County also argues that Plaintiff had a diminished expectation of privacy in his home because he knew that SCPD officers had periodically visited his home to verify his registration prior to the contract with PFML. County Br. 18-19, 24. Here, again, the County cites to no support for the proposition that Plaintiff has diminished Fourth Amendment rights. *See supra* Section II.C.

CONCLUSION

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

Respectfully submitted,

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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(a)(7)(b) in that it contains a total of 6,481 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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