18-1602-cv

United States Court of Appeals

for the

Second Circuit

JOHN JONES,

Plaintiff-Appellant,

– v. –

COUNTY OF SUFFOLK and PARENTS FOR MEGAN'S LAW,

Defendants-Appellees.

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

BRIEF FOR DEFENDANT-APPELLEE PARENTS FOR MEGAN'S LAW

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Parents for Megan's Law hereby disclose that the following corporations own ten percent (10%) or more of its stock:

None.

Dated: November 30, 2018

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INTRODUCTION

This brief is submitted on behalf of Defendant-Appellee Parents for Megan's Law (PFML) in response to the appeal by plaintiff-appellant John Jones of the District Court's (Judge Seybert) May 1, 2018 decision dismissing his action against Suffolk County and PFML.(JA-2467-2532) [1] Briefly stated, plaintiff, a convicted sex offender, brought this action to recover damages and other relief based upon 2 extremely brief interactions with PFML representatives seeking to verify his place of residence pursuant to the plaintiff's admitted duties to register his address and other information as a convicted sex offender. The trial court, after extensive discovery, recognized that the important societal safety interest of monitoring convicted sex offenders due to the likelihood of recidivism far outweighed the minimal intrusion on the plaintiff-sex offender. As such, as fully explained below, we request the District court order and judgment be affirmed, with costs to the non-profit PFML.

[1] All parenthetical references are to the unredacted Joint Appendix.

SUMMARY OF THE ARGUMENT

Under traditional Fourth Amendment analysis, whether an interaction with a State actor is reasonable is determined by examining the totality of the circumstances. This Court has already examined the expansive registration scheme of the Sex Offender Registration Act (SORA) and found that it reasonable under the Fourth Amendment based on the significant "special need" to monitor registered sex offenders. Doe v. Cuomo, 755 F.3d 105, 115 (2d Cir. 2014). In order to effectuate SORA's important policy objectives of avoiding recidivism and safety for children by monitoring convicted sex offenders, SORA already requires convicted sex offenders to annually report their residency and internet usernames and requires in-person visits to the local police station. (JA-261). Given that these requirements have already been found reasonable, the brief act of verifying a sex offender's address to ensure that he or she is where they claim to be, cannot be considered unreasonable.

Further, the District Court properly found that any intrusion upon the plaintiff-sex offender's privacy interest by the address verification was reasonable under the special needs exception to the Fourth Amendment. (JA-2530) It is well established that the state has a significant interest in the monitoring of convicted sex offenders such as plaintiff. Although plaintiff does have an expectation of privacy in the curtilage around his home, any intrusion upon that privacy was minimal as

Registration Verification Representatives (RVRs) in plain clothes simply knocked on plaintiff's door in broad daylight, spoke to him for less than five (5) minutes and left. The whole process took less time than dealing with a census taker or unwanted solicitation. In fact, the plaintiff admittedly joked with the RVRs. (JA-649) In brief, there could not have been a less intrusive means of achieving this important societal need. As such, the special needs doctrine applies and the verification was reasonable under the Fourth Amendment.

Plaintiff's attempt to characterize the home verification program as a law enforcement initiative that sought to coerce individuals into providing incriminating evidence is misguided and directly contradicted by the record. For example, shortly after the program went into effect, PFML Executive Director Laura Ahearn stated that "Parents rely on up to date sex offender registry information to keep their children safe…As a tool, the registry is only effective if it is accurate." (JA- 2131). So too, 2 years after the program was instituted, there were fortunately no cases of recidivism reported. (JA-2522)

However, it was unnecessary for the trial court to get to this test as it erred in finding that a seizure occurred in the first instance. The court failed to properly apply the factors previously identified by this Court in United States v. Lee, 916 F.2d 814, 819 (2d Cir. 1990). Simply stated, plaintiff has not identified a single action taken by the RVRs that would indicate to plaintiff, an individual quite familiar with

criminal justice procedure, that he was not free to terminate the encounter. During the two brief interactions with PFML Representatives, plaintiff testified that the plain clothes representatives identified themselves as being from PFML, never threatened him, never subjected him to physical contact, never displayed a weapon and never asked to enter the home. Plaintiff further testified that he joked with a PFML Representative during the second visit and may have offered to get his driver's license from his truck without being asked. (JA-649). Jones, a convicted felon, who had contacted his attorneys after receiving the Hernandez letter, cannot be said to be unsophisticated about his rights and criminal justice procedures. Indeed, his own attorneys took the position prior to filing this action that cooperation with the home verification process was not mandated. (JA-1131) As such, no seizure occurred.

Moreover, the lower court need not have even reached the seizure question as PFML is not a state actor, and thus no seizure could have occurred as a matter of law. To that end, the lower court improperly applied the joint action test in finding that PFML was a state actor joint action does not exist since, the County did not have the requisite control over the day to day operations of the program. Likewise, the lower court erred by finding that the public function test applied. Address verifications, and sex offender monitoring in general, are relatively new societal

needs that cannot be said to have been traditionally and exclusively reserved for state action.

STATEMENT OF FACTS

In 1992, plaintiff John Jones pleaded guilty to the attempted rape of a young woman at knifepoint. (JA-194-195). Plaintiff served nearly four (4) years in prison before being released on parole. (JA-195). After being released on parole, plaintiff was classified as a Level 2 sex offender under SORA, and then ultimately a Level 1 sex offender. (JA-1128-1132). Pursuant to SORA, plaintiff was required to: (i) fill out and send an annual registration form to the New York State Division of Criminal Justice Services; (2) personally visit his local policy department to have his photograph updated once every three years; and (3) notify law enforcement or the State of any changes to his address, educational enrollment, or "internet identifiers" within ten days of a change. (JA-622).

PFML is a not-for-profit entity that provides support services to child victims of sexual abuse, adult victims of rape, all victims of violent crimes, all victims of hate crimes and elderly, minor and disabled victims of all crime; their services include victim counseling, advocacy, and referrals. (JA-1022). While serving the community, PFML was informed numerous times that the sex offender registry maintained pursuant to SORA was out of date and thus providing little public service. (JA-357).

In 2013, the County of Suffolk enacted the "Community Protection Act" (CPA), which, in part, authorized the Suffolk County Police Department (SCPD) to

contract with PFML to provide Suffolk County with verification of the residency of registered sex offenders. (JA-621). Thereafter, PFML and the SCPD entered into a contract under which PFML would provide various services to the SCPD, including but not limited to child sexual abuse and adult rape prevention education and telephone help lines for victims; crime victim support services; community support; and providing verification of the residency of registered sex offenders (the "Contract"). (JA-340-351). Pursuant to the Contract, Level 1 sex offenders were to have their address verified on an annual basis and were not subject to employment verifications. (JA-347).

From the beginning of the program, PFML acted independently of the SCPD in designing and implementing the address verification program. PFML 56.1 at ¶¶ 20-24. The address verifications were typically conducted by a team of two (2) Registration Verification Representatives ("RVRs"). (JA-422-423). The SCPD had no involvement in the hiring or training of the RVRs. (JA-411-412). The SCPD did not provide any guidelines on how the verifications were to be conducted, and was, in fact, completely unaware of PFML's policies and procedures regarding the verifications. (JA-272-273).

Each week, PFML would create a list of potential sex offenders to be verified based on the contractual requirements as well as logistical concerns. (JA-416). PFML would submit the list to the SCPD prior to implementation so that any

offenders that were the target of ongoing investigations could be removed. (JA-416). Indeed, pursuant to the Contract, PFML was to take no part in investigations. (JA-1025). The SCPD never requested that PFML verify a particular sex offender at a particular time. (JA-420).

Should a verification attempt reveal a possible error or inconsistency with information reported by the sex offender pursuant to SORA, the SCPD was notified. (JA-1252-1253). At that point, PFML's involvement ended. (JA-1252-1253). Should the SCPD decide to perform additional investigation, PFML would play no part. (JA-1253).

Cooperation with the RVRs by the offenders was entirely voluntary. (JA-414). Sex offenders who chose not to cooperate were not penalized. (JA-427-428). Indeed, during the first year that the program was in operation, forty-two (42) sex offenders declined to cooperate. (JA-1118). RVRs were instructed that if an offender does not wish to cooperate, they were to end the verification attempt and leave the premises immediately. (JA-414). RVRs were further instructed that if any offender inquired, the RVRs were to inform the offender that the verifications were not mandatory. (JA-414). RVRs were trained to de-escalate situations and were instructed that the verifications were not to be confrontational. (JA-414). RVRs never identified themselves as police officers or otherwise insinuated that they were law enforcement personnel. (JA-414).

Shortly after the implementation of the program in 2013, PFML became concerned about the safety of the RVRs. (JA-1191-1192). Two incidents in particular highlighted this concern. In the first instance, an offender contacted PFML and stated that he would "slit the throat" of any RVR that attempted to verify his address. (JA-1192). Given that the offender, as all individuals on the registry, was a convicted felon, this threat was taken seriously. Another offender scheduled a time for the RVRs to attempt the verification. (JA-483). When the RVRs returned at the appointed time, the offender ordered his dogs to attack the RVRs. (JA-483). The RVRs were forced to flee the property and defend themselves. (JA-483).

As a result of these incidents, PFML expressed concern to the SCPD that the safety of the RVRs was in jeopardy. (JA-366-367). Although PFML was not consulted on the drafting of any letter, Detective Lieutenant Hernandez transmitted a form letter notifying all offenders of the contract that had been entered into between the SCPD and PFML. (JA-581). The letter states that offenders "will be asked to provide [the RVRs] with personal identification of an identifiable sort." (JA-581). (emphasis added). The letter further states that "you may be requested to provide your employment information to the representative." (JA-581). The letter does not indicate that compliance with the RVRs' requests is mandatory or that there are any penalties for declining to cooperate. (JA-581).

Plaintiff received the undated, unaddressed Hernandez letter in the summer of 2013. Plaintiff was unsure if compliance was mandatory, so his wife contacted the SCPD. (JA-237). Plaintiff's wife testified that she was told that plaintiff "should" cooperate, but not that he must cooperate. (JA-674). Plaintiff has never alleged that he was told that cooperation with the RVRs was mandatory. (JA-237).

In fact, in June 2014, Plaintiff's counsel transmitted a letter to the County stating that "we believe [offenders] have no legal obligation to answer questions or to provide documents and that the County – directly or through an agent – has no authority to take action against an individual who chooses not to answer questions or provide documents." (JA-1301). The letter from counsel further states that "In addition, we believe that neither County officials nor their agents have any authority to remain on the private property of a County resident covered by SORA who states that the officers do not have permission to remain on the property." (JA-1301). Nevertheless, shortly after this letter by his attorneys was sent, plaintiff voluntarily cooperated with his second address verification. (JA-183-184).

The first address verification of plaintiff occurred on August 6th, 2013. (JA-675). The RVRs knocked on the door, and then retreated to the bottom of the three stairs to wait for an answer. (JA-675, 1302). Plaintiff's wife, Mrs. Jones, appeared and the RVRs asked to speak with plaintiff. Mrs. Jones is not a plaintiff and so the brief time she spent voluntarily speaking with the RVRs is not actionable.

According to Mrs. Jones, she informed the RVRs that plaintiff was in the shower. (JA-676). Mrs. Jones did not specify how long it would take plaintiff to complete his shower. (JA-678). Mrs. Jones believes that it was approximately fifteen (15) minutes later that her husband appeared at the door. (JA-677). However, Mrs. Jones admitted that she does not have a good grasp of time. (JA-677). Further, the RVR conducting the verification indicated that he never had to wait for fifteen (15) minutes for an individual to appear at the door when conducting a verification. (JA-553).

According to Mrs. Jones, the RVRs stated that they were there "to do a house check" and then no further conversation ensued. (JA-676). Mrs. Jones testified that the RVRs did not appear to be armed, never threatened her, and never asked to enter her home. (JA-676). Mrs. Jones never asked the RVRs whether Mr. Jones was required to comply with the verification and never asked the RVRs to leave the premises. (JA-676-677).

When plaintiff voluntarily arrived at the door, the RVRs were standing on the walkway in front of his house, approximately five (5) feet from the front door. (JA-643). Plaintiff then walked to his truck which was parked on the street thirty (30) feet from the residence, with the RVRs following approximately two (2) feet behind. (JA-644). Plaintiff then handed his license to an RVR, who recorded the information

and the RVRs left. (JA-645). The entire encounter between plaintiff and the RVRs lasted less than 5 minutes. (JA-645).

According to plaintiff, the RVRs never threatened him or demonstrated any rude behavior. (JA-645-646). The RVRs never asked to enter plaintiff's home or to search his vehicle. (JA-646). Plaintiff never asked the RVRs whether he was required to cooperate with them. (JA-645).

The second and final verification of plaintiff occurred on July 9th, 2014, shortly after plaintiff's attorney sent the letter to the County. (JA-648). When the RVRs arrived, plaintiff answered his door and the RVRs asked to see his license. (JA-649). Plaintiff walked a short distance to his truck, which was again parked on the street, and produced his license. (JA-649). According to plaintiff, he and the RVRs joked and laughed about the pictures on their respective license, the RVRs then left with the entire interaction taking no more than two (2) minutes. (JA-649).

Plaintiff did not believe that the RVRs were armed during this interaction. (JA-648). The RVRs did not threaten plaintiff or speak rudely to him. (JA-650). The RVRs did not ask to enter plaintiff's home or truck. (JA-650). Plaintiff never asked the RVRs whether he was required to comply with their request and never asked the RVRs to leave his property. (JA-649).

After 2014, Plaintiff was never visited again due to the pendency of this litigation, which was commenced in 2015. (JA-656). Plaintiff sought compensatory

damages and attorneys' fees as well as declaratory relief to prevent future verifications. (JA-243) The compensatory damages sought were for emotional distress, as plaintiff claimed that as a result of the verifications he was too embarrassed to attend his community activities. (JA-240-241). However, during his deposition, plaintiff testified that his embarrassment stemmed from an independent flyer transmitted by the Deer Park School District. (JA-637). As such, there are no legitimate compensatory damage claims.

Plaintiff was removed from the sex offender registry on March 16,2016, and therefore is no longer subject to any future address verifications. (JA-656).

POINT I

ANY SEIZURE WAS REASONABLE UNDER THE GENERAL FOURTH AMENDMENT BALANCING TEST.

The District Court correctly held that, under the special needs doctrine, even if a seizure had occurred, it was reasonable under the special needs exception to the Fourth Amendment warrant requirement. (JA-2530) However, the trial court need not even have reached the special needs exception and should instead have applied the general Fourth Amendment balancing test. The special needs test only applies when there is no suspicion that the individual in question has committed a crime. Chandler v. Miller, 520 U.S. 305, 305 (1997); Nicholas v. Goord, 430 F.3d 652, 661 (2d Cir. 2005). At bar, the verifications only targeted those individuals that had already been convicted, let alone suspected, of certain sex offenses requiring registration pursuant to SORA. As explained below, there was also proof that the verifications were undertaken to prevent the harm of recidivism. As such, the lower court should have applied the less stringent general balancing test.

In this regard, not even every seizure is a violation of the Fourth Amendment; rather, only those seizures that are unreasonable under the totality of the circumstances are a violation of an individual's Fourth Amendment rights. U.S. v. Montoya de Hernandez, 473 U.S. 531, 537 (1984)["What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the

search or seizure itself."]. In assessing the reasonableness of a seizure, the courts weigh any threat to public safety against the degree of intrusion posed by the seizure. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)[upholding a Michigan program stopping random drivers at checkpoints to search for drunk drivers.]; United States v. McCargo, 464 F.3d 192, 198 (2d Cir. 2006). The Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." U.S. v. Ulbricht, 14-cr-68(KBF) 2014 WL 5090039 at *5(S.D.N.Y, October 10, 2014)[quoting Bell v. Wolfish, 441 U.S. 520, 559 [1979]]. At bar, plaintiff was a registered sex offender who thus was no stranger to knowing his rights or actual searches and/or arrests.

Based on the high recidivism rates among sex offenders, New York State enacted SORA, a regulatory program to ensure that convicted sex offenders can be appropriately tracked and monitored, including the creation of a registry. NY Penal Law § 168 et seq. The registry does nothing to alleviate the concerns of the State or to protect the public-- unless it is accurate. Thus, Suffolk County passed the CPA, which allowed private citizens to conduct brief, voluntary visits with registered offenders in order to ensure that the information contained in the registry was accurate. (JA-621). The burden on the offenders is minimal, while the important task of ensuring an accurate registry is accomplished. (JA-2530).

For comparison, under SORA, plaintiff was already required to: (i) fill out and send an annual registration form to the State Division of Criminal Justice Services; (2) personally visit his local police department to have his photograph updated once every three years; and (3) notify law enforcement or the State of any changes to his address, educational enrollment, or "internet identifiers" within ten days of a change. (JA-234). Thus, not only was plaintiff required to provide his address, he was actually compelled to appear, in person, at the local police station. Plaintiff received a letter from the State of Division of Criminal Justice informing him that he must personally appear at his local precinct by a specified date. (JA-1303). The letter further informed plaintiff that failure to comply was a felony. (JA-1303).

By compelling plaintiff to appear at a police station under threat of arrest, plaintiff could contend he was arguably "seized" within the meaning of the Fourth Amendment under SORA. See e.g., Graham v. Connor, 490 U.S. 386, 395 (1989). The burdens that a sex offender faces under SORA can be even more onerous, as certain sex offenders are required to personally appear to verify their address every ninety (90) days. N.Y. Corr. Law § 168-h. However, plaintiff is not challenging these onerous restrictions mandated by SORA.

Similarly, plaintiff is not challenging the 2013 actions of the Deer Park School District, despite the fact that the District sent plaintiff's name and photograph along with a description of his crimes to every person living within the school

district. (JA-637). It was after the actions of the Deer Park School District that individuals began asking plaintiff about his crimes, plaintiff stopped attending school and community functions, and his daughter allegedly began losing friends at school. (JA-637-638). Rather than challenging SORA, which required plaintiff to appear in person at a police station, or the actions of the Deer Park School District, which caused plaintiff injury according to his testimony, plaintiff alleges that having a private citizen knock on his door and ask him to verify his identity and residence is unreasonable. His first verification visit was after the District alerted the community to his sex offender status.

The reason plaintiff is not challenging the requirements under SORA is strategic; this Circuit has repeatedly upheld statutory programs geared to track convicted sex offenders. This Court was confronted with the very question of whether any searches and/or seizure authorized by SORA are unconstitutional and found that they are not. Doe v. Cuomo, 755 F.3d 105, 115 (2d Cir. 2014). In fact, this Court held that even given the onerous provisions of SORA, "the degree of intrusion on convicted sex offenders is reasonable in relation to the interests advanced by SORA." Id. Thus, this Court has held that compelling certain sex offenders to appear at a police station in order to verify their address every ninety (90) days, and other offenders to personally appear at the precinct every three (3) years is reasonable. Id. Given this standard of reasonableness set by this Court with

regard to monitoring convicted sex offenders, we submit that plaintiff's admittedly minimal contacts with fellow private citizens at bar to verify his own information in the sex offender database once a year does not constitute an unreasonable seizure. Certainly, the undisputed facts of the brevity of the annual visits; the voluntary walks to his car accompanied by mutual jokes; and the fact that PFML was never provided information about, let alone visited, plaintiff's place of employment demonstrate that under the totality of the circumstances, this alleged seizure was reasonable. (JA-563)

In this regard, the Supreme Court has recognized the high recidivism rates of sex offenders. Smith v. Doe, 538 U.S. 84, 103 (2003)["The risk of recidivism posed by sex offenders is 'frightening and high.'"]. This Court has also taken notice of the high rate of recidivism. United States v. Lifshitz, 369 F.3d 173, 187 (2d Cir. 2004)["Examining the governmental interest involved, we observed the high rate of recidivism among sexual offenders"]

Recognizing this high rate of recidivism, this Court has repeatedly upheld sentences including lifetime supervision for those convicted of sex offenses. United States v. Kurzajczyk, 724 F. App'x 30, 33 (2d Cir. 2018); United States v. Hayes, 445 F.3d 536, 537 (2d Cir. 2006).

As such, certain protective measures have been held to be reasonable given the totality of the circumstances. For example, the 9th Circuit upheld a California law requiring registered sex offenders to appear, in person, at the local police

precincts every ninety (90) days. Litmon v. Harris, 768 F.3d 1237 (9th Cir. 2014). See also Weens v. Little Rock Police Dept., 453 F.3d 1010 (8th Cir. 2006)[upholding Arkansas statute that placed residency restrictions on registered sex offenders]; Doe v. Tandeske, 361 F.3d 594 (9th Cir. 2004)[upholding Alaska Sex Offender Registration Act]; Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999)[upholding Tennessee Sex Offender Registration and Monitoring Act].

Similar, or even more onerous, registration verification programs have been challenged in courts, and each time, the program has been upheld. See White v. Andrusiak, 655 Fed.Appx. 87 (3d Cir. 2016); Page v. Fife Police Dep't, C08-5381(FDB)(KLS) 2010 WL 55899 (W.D. Wash. January 4, 2010); Bell v. Norwood, 11–CV–3732(RDP) 2014 WL 4388348 (N.D. Ala. August 28, 2014); Maraia v. Buncombe County Sheriff's Dept., 12-cv-1998 2012 WL 5336955 (W.D.N.C. October 2, 2012). In fact, plaintiff's attorney at bar, the American Civil Liberties Union, challenged one such program in Alabama. (JA-1304-1325). That program required at-home verifications every month of all offenders. (JA-1308). The ACLU settled the case, with the at-home verifications remaining in place for all offenders other than low-risk juvenile offenders. (JA-1330). Further, even the low-risk juvenile offenders were subject to an initial at-home visit from law enforcement under the terms of the settlement. (JA-1330). Thus, the ACLU signed off on a program even more burdensome than the one being challenged at bar.

At bar, the address verification program in question is far less onerous than those regulations that have been repeatedly upheld. The program is entirely voluntary, as opposed to the mandatory reporting and verification requirements of SORA that have previously been upheld. (JA-414). The interactions with plaintiff were brief; plaintiff testified that both his interactions with PFML took less than five (5) minutes; and he clearly was comfortable with the process to have joked and laughed with the RVRs.. (JA-645). As a comparison, under SORA, plaintiff was forced to travel to the precinct and wait to have a photograph and fingerprint taken. At no time was physical force or even the threat of physical force involved in the brief visits with plaintiff. (JA-645). Indeed, it is clear that any "seizure" that occurred at bar was much less severe than the requirements that have been repeatedly upheld as reasonable in the context of the convicted sex offenders. As such, even if a seizure did occur, it was reasonable in order to ensure that the sex offender registry contained accurate information. If addresses are not verified, it would devalue the entire SORA program, as there is little point to maintaining a registry of convicted sex offenders if there is no means to ensure that the registry is accurate.

In view of the foregoing, an application of the general balancing test clearly weighs in favor of the important societal safety interests implicated at bar.

POINT II

THE DISTRICT COURT CORRECTLY HELD THAT THE VERIFICATIONS CONSTITUTED A SPECIAL NEED.

A. The Special Needs Doctrine Applies

Assuming, *arguendo,* that the general balancing test is not used, the lower court correctly held that the special needs doctrine applies. Plaintiff's argument that the special needs doctrine should not apply rests entirely on the contention that the primary purpose of the verification program was law enforcement. In making this argument, plaintiff misstates both the law and the facts. Plaintiff failed to recognize that even a law enforcement program that is "information-seeking" is subject to the special needs doctrine. Nicholas v. Goord, 430 F.3d 652, 668 (2d Cir. 2005).

As an initial matter, plaintiff failed to provide any evidence that the address verifications constitute a law enforcement initiative—particularly since they only existed as a means to implement the special state initiative of SORA. As explained below, but for SORA, there would be no need for address verifications as SORA recognized the societal need to monitor convicted sex offenders to avoid future heinous sexual abuse of the type perpetrated by these individuals. NY Penal Law § 168, *et seq.*

The evidence in the record is clear that the purpose of this verification program was to ensure that the registry was accurate. The evidence at bar, including the actual contract, made clear that the purpose of the program was to ensure an

accurate registry. Ms. Ahearn testified that the verification was developed after PFML had learned from members of the community, through a help line that PFML maintained, that the information in the sex offender registry was incorrect. (JA-357) This testimony is consistent with statements from Ms. Ahearn in May 2013, just after the verification program began, that "[p]arents rely on up to date sex offender registry information to keep their children safe…As a tool, the registry is only effective if it is accurate." (JA-2131).

To that end, the record demonstrates that an accurate registry prevents repeat offenses. As Ms. Ahearn,a well-recognized expert in the field, testified, "research indicates that when a registry is up to date and accurate that those registrants have lower rates of recidivism." (JA-357). Likewise, the legislature's determination to enact the CPA was based in part on statements during the public hearing that "it's been proven that sex offender registry reduces sex offender recidivism. However, the registry is only good if its accurate." (JA-1826-1827). Further, after implementation of the program, Suffolk County reported a "100% reduction in sex offender recidivism." (JA-2133).

Thus, the District Court properly found that the primary purpose of the home verification program is to maintain an accurate sex offender registry. (JA-2520)

Plaintiff's legal argument relies entirely on the Supreme Court's decision in Ferguson v. City of Charleston, 532 U.S. 67, 72 (2001). However, examination of

the facts of Ferguson reveals that the program struck down by the Supreme Court was different from the address verification program in several key aspects. The most obvious and important difference is that, pursuant to the mandatory drug testing program in Ferguson, if a drug test came back positive, "the police were to be notified without delay and the patient promptly arrested." Id. at 72. Further, the policy outlined the specific offenses with which the pregnant women would be charged:

> The policy also prescribed in detail the precise offenses with which a woman could be charged, depending on the stage of her pregnancy. If the pregnancy was 27 weeks or less, the patient was to be charged with simple possession. If it was 28 weeks or more, she was to be charged with possession and distribution to a person under the age of 18—in this case, the fetus. If she delivered "while testing positive for illegal drugs," she was also to be charged with unlawful neglect of a child. Under the policy, the police were instructed to interrogate the arrestee in order "to ascertain the identity of the subject who provided illegal drugs to the suspect."

Id. at 72-73.

At bar, the address verification program did not subject registrants to immediate arrest. Rather, if the RVR visit revealed a possible inconsistency with the offender's registration in formation, the RVR forwarded the information to the SCPD, and neither PFML nor SCPD was not required to take any further action. (JA-1252-1253). In reality, as explained below, the SCPD investigated and very few arrests were ultimately made.

After referring the potential inconsistency to SCPD, the RVR's involvement was finished. In the vast majority of cases, PFML was not even notified whether the SCPD made a follow-up visit or if any legal action was undertaken. (JA-1253).

This difference is crucial. In Lynch v. City of New York, 737 F.3d 150, 158 (2d Cir. 2013), this Court held that "the primary purpose is determined by reference to the immediate objective of the challenged search program, not its ultimate goal."

In Ferguson, relied on by plaintiff, the program itself mandated that women that tested positive for narcotics during pre-natal checkups were to be arrested. The Community Protection Act, on the other hand, does not mandate arrest, or even investigation. Thus, it cannot be stated that the "immediate objective" is to secure criminal prosecutions.

So too and significantly, the police and solicitor in Ferguson were intimately involved in the day to day implementation of the policy.

> Moreover, throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy. Police and prosecutors decided who would receive the reports of positive drug screens and what information would be included with those reports. Law enforcement officials also helped determine the procedures to be followed when performing the screens. In the course of the policy's administration, they had access to Nurse Brown's medical files on the women who tested positive, routinely attended the substance abuse team's meetings, and regularly received copies of team documents discussing the women's progress. Police took pains to coordinate the timing and circumstances of the arrests with MUSC staff, and, in particular, Nurse Brown.

Id.

At bar, there was no such coordination between the police and/or the DA and PFML. The record is clear that PFML designed the protocols to be used during the verification attempts. (JA-272-273). The SCPD was not involved in the training of RVRs. (JA-411-412). There is no evidence that the SCPD had access to any of PFML's files. Further, while the police in Ferguson coordinated arrests with the hospital staff, PFML was not even notified if an arrest was to occur. (JA-1253).

Plaintiff nevertheless points to five (5) factors from Ferguson :

> (1) the terms of the relevant policies, (2) who is targeted and in what context, (3) whether the evidence gathered is *per se* evidence of a crime, (4) the degree of involvement of prosecutors and police officers, including whether police procedures are used to collect information, and (5) whether arrests result as a direct result of the program.

Plaintiff's Brief at p. 35[internal citations omitted]. However, not one of these factors actually support plaintiff's position.

1. The Text of the CPA and Agreement

The Ferguson Court held that the text of the policy itself demonstrated that the primary purpose of the program was law enforcement. Id. At 82. "Tellingly, the document codifying the policy incorporates the police's operational guidelines. It devotes its attention to the chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests." Id.

Simply stated, there is no such language in either the CPA or the contract between PFML and the County. 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. (JA-340-351) In other words, none of the language that the Supreme Court found indicative of law enforcement being the primary purpose is present at bar.

The language of the contract does contain an explicit purposes section that has no mention of arrest:

> (i) verification of residency reporting of all registered sex offenders who are not homeless and who are required to report pursuant to SORA;
>
> (ii) proactive monitoring of sex offenders to ensure accurate reporting of 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.

(JA-343).

Plaintiff points to an isolated section of the contract that indicates PFML should notify the SCPD within twenty-four (24) hours of any discrepancies, and that there is no similar provision requiring PFML to notify the state agency that maintains

the registry. Plaintiff's Brief at pp. 35-36. However, the verification attempts themselves are not conclusive evidence that the registry is incorrect. Moreover, there is nothing in the contract regarding arrests or that this verification process was to aid in arresting sex offenders. For this reason, the contract merely provides that PFML shall provide notice to the SCPD, who can then determine whether or not further investigation is necessary, as explained below.

2. RVRs Do Not Enter the Homes of Any Offenders

Plaintiff alleges that "the program targets people in their homes," an assertion that is factually incorrect. Plaintiff's Brief at p. 37. It is undisputed that the RVRs never entered plaintiff's home or even sought permission to do so. (JA-646).

In order to overcome this fact, plaintiff attempts to conflate the home with the curtilage surrounding the home. To that end, plaintiff erroneously cites to Anobile v. Pelligrino, 303 F.3d 107 (2d Cir. 2002). However, Anobile is distinguishable from the case at bar. In Anobile, investigators entered into the dormitory of various jockeys and searched the for evidence of drug use. Id. at 113. This Court invalidated the search, finding that the dormitory was like a home, and therefore subject to heightened protection under the Fourth Amendment. Id. at 119-120. At bar, the RVRs never entered the home and never conducted a search. Rather, the RVRs simply walked up to plaintiff's door, rang the bell, and politely spoke with plaintiff for a few minutes. (JA-645-646).

The law is clear that merely entering onto the curtilage of a home for the purpose of asking questions is permissible. Fla. v. Jardines, 569 U.S. 1, 8 (2013). In Jardines, the Supreme Court stated that the police cannot enter the curtilage of the home for the purpose of conducting an invasive search. Id. It is undisputed that no search occurred at bar. Accordingly, the fact that the verification took place on the curtilage of plaintiff's home does not prevent application of the special needs doctrine.

3. A Discrepancy in an Offender's Registration Information is not a Per Se Felony.

Plaintiff argues that "if PFML discovers any discrepancy between a registrant's location or other registrable information (such as a driver's license number), the registrant is subject to immediate criminal prosecution." Plaintiff's Brief at p. 38. However, an offender being at a different location from their registration alone does not subject an offender to prosecution. As an initial matter, the SORA regulations only apply to an offender's residence. NY Corrections Law § 168-f(2). Thus, an offender being at a different "location" is not *per se* a violation of SORA. Accordingly, when RVRs are unable to complete an address verification, the matter is referred to the SCPD for possible investigation. (JA-410). No individual is subject to arrest merely because the RVRs were unable to complete a verification.

Further, even if the offender is residing at a different location from that listed on their registration, the offender is not subject to immediate arrest. There is no requirement that an offender notify the State prior to changing residence. Rather, there is a grace period built into SORA during which a registrant can notify the State after they have already moved. NY Corrections Law § 168-f(4). Thus, where an RVR finds a discrepancy between the offender's registered and actual addresses, additional investigation would be needed prior to prosecution--as actually occurred at bar, as explained below. Indeed, the lower court found that "the SCPD would need to obtain additional information to support a finding of probable cause." (JA-2523).

For this reason and numerous others, plaintiff's argument that "numerous arrests" were made as a result of the verification program fails. Plaintiff argues that "nineteen registrants were arrested for felony failure to register charges because of the home verifications." Plaintiff's Brief at 40. It is unknown how many resulted in convictions and/or the precise circumstances of these arrests, but plaintiff clearly overstates the impact of this number –particularly when compared with the overall number of verifications and referrals by PFML as set forth below.

Those 19 arrests took place over three (3) years; during which time thousands of home verifications were conducted by PFML. JA2141. Moreover, plaintiff fails to mention that PFML referred one hundred seventy-three (173) people to the SCPD for failure to register in just the first year of the program. JA576. During the second

year, PFML referred thirty-six (36) offenders during the first quarter and forty-four (44) during the second quarter for failure to register; i.e. a total of 253. (JA1641, JA2449). Importantly, these referrals were a fraction of the total number of verifications; to wit: for example, during the first year of the program, PFML conducted 2,640 verification attempts of 1,353 sex offenders. (JA576). It only made 173 referrals of the 2640 visits.

In view of the foregoing, PFML referred a mere two hundred fifty-three (253) offenders to SCPD for failure to register during the first 18 months of the program, but only nineteen (19) offenders in total were arrested over the first thirty-six (36) months. JA2141. Assuming a similar number of referrals over the remaining 18 months, that means that less than four percent (4%) of PFML referrals resulted in an arrest.

Clearly, offenders were not subject to immediate arrest if PFML found a discrepancy in the registration. Rather, the investigatory process reflected that the overwhelming majority of address verification issues did not lead to an arrest. Correspondingly, it reflects that the investigation process led to most issues not being further pursued by the County, thereby further diminishing plaintiff's immediate arrest argument.

4. Police and Prosecutor Involvement Was Minimal

In Ferguson, the prosecutor and police were intimately involved in the day to day operations of the program. Police had direct access to the hospital's records, police and prosecutors were present at regular meetings, police determined the procedures to be used, and arrests were coordinated between the police and the hospital. Id. The Court noted that the solicitor, police, and hospital worked in close consultation in developing the drug testing program. Ferguson, 532 U.S at 82. In fact, the solicitor "took the first steps in developing the policy at issue" in Ferguson. Id. at 71.

At bar, the police and prosecutors had no involvement with the day to day operations of the verification program. In fact, there is no evidence that any prosecutor ever met with PFML personnel. Further, neither the police nor the prosecutor had any input into the procedures used by the RVRs during the verifications. (JA-272-273). Nor were police or prosecutors involved in the training of RVRs. (JA-411-412). There is no evidence police or prosecutors ever attended a meeting of the RVRs. In sum, there is no evidence that the police or prosecutors had any involvement with the day to day operations.

Plaintiff argues that the police and District Attorney had input over the types of forms used by PFML when reporting on the results of the verifications. Plaintiff's Brief at pp. 38-39. Plaintiff provides no authority indicating that input over forms

supports a finding that the primary purpose of the program was law enforcement. In fact, the forms used by PFML were not actually even used during criminal prosecutions. (JA-2524)

5. No Arrests Were Made Based Solely on the Verifications

Finally, contrary to plaintiff's assertions, the mere fact that a few individuals referred to the SCPD by PFML were subsequently arrested and prosecuted does not bar application of the special needs doctrine. As this Court has held, results of a program "might ultimately be used as evidence in a criminal prosecution does not take the case out of the special needs doctrine." Lynch v. City of New York, 737 F.3d 150, 162 (2d Cir. 2013). There is no evidence in the record to even suggest that a single offender was immediately arrested after a verification attempt. To the contrary, Sergeant Hernandez testified that the information received from PFML was considered "a tip." (JA-256). In fact, plaintiff appears to concede this point, stating that when PFML notified the SCPD of a possible discrepancy, "SCPD open[ed] a criminal investigation into the registrant." Plaintiff's Brief at p. 38. Opening an investigation is not an arrest.

In this regard, the verification program is markedly different from the blood tests performed in Ferguson. In invalidating blood testing program, the Supreme Court noted that the program documents indicated what charges should be brought against a patient based entirely on the blood test. Id. at 72-73. At bar, on the other

hand, no charges could be levied against offenders based entirely on a failed verification. Thus, the verification program is akin to the breath tests in Lynch where an officer could be criminally prosecuted as a result of the breathalyzer, but only after additional investigation and discretion on the part of the State. Lynch, 737 F.3d at 159.

Further, there is no evidence to support plaintiff's assertion that PFML would always "immediately" notify the SCPD any time there was a discrepancy with the verification. Plaintiff's Brief at p. 38. Plaintiff cites to the testimony of Stephen Hernandez, who appeared to be unsure of his testimony, stating that "if I recall correctly, this might have been something that they may have deemed more urgent and instead of waiting, they gave it to us immediately." JA266. Thus, Hernandez testified that PFML would only provide the information immediately when it felt it important to do so. Further, when asked if these immediate reports were from the home verification program or another source, such as the tip lines that PFML operates (and are not challenged at bar), Hernandez stated "I have no idea." (JA266).

As discussed earlier, less than four percent (4%) of the offenders referred by PFML to the SCPD were ever arrested. Clearly, additional investigation to establish probable cause was required prior to the arrest of any offenders. As such, the immediate result of the verification program was not arrest and prosecution.

As the primary purpose of the registration verification program was to ensure an accurate registry rather than for law enforcement purposes, the special needs doctrine applies.

B. The Verification Program is Reasonable Under the Special Needs Balancing Test.

Once a court finds that the special needs doctrine applies, it must balance "(1) the nature of the privacy interest allegedly compromised by the challenged governmental conduct; (2) the character of the intrusion imposed by the challenged conduct; and (3) the nature and immediacy of the state's concerns and the efficacy of the governmental conduct in meeting them" Palmieri v. Lynch, 392 F.3d 73, 81 (2d Cir. 2004)[quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822 (2002)].

The lower court properly noted that plaintiff has a heightened privacy interest in the curtilage around his home. However, contrary to plaintiff's assertions, this does not end the analysis. Not a single case has stated that state actors are forbidden from entering the curtilage of the home. Rather, the law is clear that state actors may enter the curtilage, but not the home itself. Fla. v. Jardines, 569 U.S. 1, 8 (2013).

Plaintiff asserts that two cases relied on by the District Court, U.S. v. Titemore, 437 F.3d 251 (2d Cir. 2006) and Palmieri v. Lynch, 392 F.3d 73 (2d Cir. 2004), were overruled by Jardines. Plaintiff cites to U.S. v. Allen, 813 F.3d 76, 84 (2d Cir. 2016) for the proposition that "Titemore's 'broad holding has been

abrogated by Jardines.'" Plaintiff's Brief at p. 49. However, this Court made no such sweeping statements in Allen. Rather, this Court stated that "[t]o the extent that Titemore may be read broadly to permit law enforcement officers to enter curtilage to search for evidence, that broad holding has been abrogated by Jardines." Id. at 84[emphasis added]. Plaintiff is not alleging that the RVRs entered the curtilage to conduct a search for evidence.

Indeed, the Allen Court cited approvingly to Titemore. The Allen Court noted that "[i]n Titemore, a police officer wishing to speak with a suspect in his home walked across the front lawn, up three steps to a porch, and approached a sliding-glass door. The glass door was open, but the screen was closed. Standing outside the screen door, the officer spoke to Titemore." Allen, 813 F.3d at 84. The officer was able to see a rifle through the screen door. Id. The officer then requested permission to enter the home, which was granted by the suspect. Id. The suspect moved to suppress the rifle, claiming that the officer did not have permission to be on the property when he first saw the weapon. Id.

As this Court stated in Allen, it "affirmed the district court with little difficulty, because 'when a police officer enters private property for a legitimate law enforcement purpose and embarks only upon places visitors could be expected to go, observations made from such vantage points are not covered by the Fourth Amendment.'" Allen, 813 F.3d at 84[quoting Titemore, 437 F.3d at 260. At bar,

the RVRs walked along the path to plaintiff's home, knocked on the door, and ask questions, precisely what occurred in Titemore and was approved of in Allen.

In this regard, the District Court correctly held that the privacy interest an individual has in the curtilage around their home is diminished from that of the 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. Kentucky v. King, 563 U.S. 452, 469 (2011). As such, Allen is inapposite and the Court must analyze not only the privacy interest, but also the character of the intrusion and the nature of the state's concerns.

PFML constructed a verification program specifically to pose a minimal intrusion on the privacy concerns of the sex offenders. The RVRS were trained in verbal judo to de-escalate the nature of the visit—particularly since they were dealing with often violent offenders as evidenced by the threats they received, whether from offenders or their dogs. (JA-409). The RVRs knocked on the door and asked to speak with plaintiff. (JA-675). At no time did they ask to enter the home or ask any personal questions of plaintiff or his wife. (JA-610, 675). The RVRs only asked plaintiff to view his driver's license, a publicly issued document that does not contain personal information. (JA-649). There is no evidence that the RVRs attempted to peer into the home itself, or searched any area of the property itself. In fact, plaintiff does not allege any "search" took place. (JA-229-244).

Rather, plaintiff attempts to claim that he suffered damages as a result of a seizure, in the form of embarrassment that prevented him from attending community functions, such as his children's school events. (JA-240-241). However, plaintiff's testimony was clear that it was a flyer sent by the Deer Park School District that caused any emotional distress. (JA-637). For this reason, plaintiff cannot maintain a legitimate claim for damages at bar. Indeed, the RVRs were instructed never to discuss the reason for their visit with anyone other than the offender in order to ensure that the verifications posed as minimal an intrusion as possible. (JA-477).

As such, it is clear that any intrusion upon plaintiff's privacy rights was minimal.

Finally, but just as importantly the Court must analyze the nature of the state's concerns. The Supreme Court has acknowledged the significant state interest in monitoring sex offenders. Smith v. Doe, 538 U.S. 84, 103 (2003)[noting that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"]. In this regard, this Court has already held that the burdensome requirements of SORA are permissible given the significant state interest. Doe v. Cuomo, 755 F.3d 105, 115 (2d Cir. 2014). In upholding the constitutionality of SORA, this Court noted that "[s]tudies have shown that sex crimes are widespread, and that their impact on both the victim and society as a whole is devastating." Id. For this reason, this Court has previously upheld laws requiring convicted sex offenders to provide blood samples

for the purpose of maintaining a DNA database. Roe v. Marcotte, 193 F.3d 72, 79-80 (2d Cir. 1999). Despite the significant intrusion in taking a blood sample, this Court recognized that the risk posed by repeat sex offenders was sufficient to allow for the collection. Id.

Given the significant state interest in preventing sex crimes, and the minimal intrusion into plaintiff's privacy, the search was reasonable based on the special needs doctrine.

POINT III

PLAINTIFF WAS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The lower court should not even have reached the question of reasonableness, however, as no seizure occurred at bar. The lower court correctly stated the standard for determining whether a seizure occurs, but failed to apply the standard to the facts at bar. Further, the lower court failed to identify any material facts in dispute. As such, the lower court should have found that no seizure occurred.

A. Plaintiff Was Not Seized

"Only 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," under the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 20 (1968). In cases where there is no physical force or restraint, the test of whether a person is seized is whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Brendlin v. California, 551 U.S. 249, 254 (2007); United States v. Drayton, 536 U.S. 194, 202 (2007).

This Court has previously identified the factors to be considered in determining whether cooperation was coerced: "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 police room." (JA-2509-2510). Quoting United States v. Lee, 916 F.2d 814, 819 (2d Cir. 1990). At bar, not one of these factors would indicate that plaintiff was coerced into cooperating with the RVRs.

It is undisputed that during the first verification of plaintiff, only two (2) RVRs were present. (JA-643). As "several" refers to more than two, it is clear that there were not "several" officers present. During the second verification, plaintiff alleges that a third RVR was present, but that the third person waited by the car during the entirety of the verification. (JA-60). As such, the third person was not a "threatening person."

Similarly, both plaintiff and his wife admit that they never saw a weapon on any of the RVRs. (JA-648, 676). Likewise, at no time did the RVRs make physical contact with plaintiff or his wife. (JA-643, 649, 676). Further, both plaintiff and his wife testified that the RVRs were polite and did not make any threatening remarks. (JA-645, 649, 676). Nor did the RVRs unduly retain plaintiff's personal effects; rather, plaintiff handed the RVRs his license, they wrote down the number, and immediately returned it. (JA-645). Finally, the RVRs did not ask plaintiff to accompany them to a police station or other location. (JA-645-650).

Thus, not one of the factors enunciated by this Court and cited by the lower court would indicate that a seizure occurred. Plaintiff himself does not argue that any one of these factors were satisfied. Instead, plaintiff argues that under Jardines

and Collins v. Virginia, 138 S. Ct. 1663 (2018) the entry into the curtilage of the home was sufficient to trigger the Fourth Amendment protections. This argument is entirely meritless.

Neither case cited by plaintiff supports the proposition that entry into the curtilage of a home is a *per se* violation of an individual's Fourth Amendment rights. Rather, the Jardines Court held that there is an assumed license to enter a person's property in order "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Id. at 8. Thus, it is clear that the RVRs had implicit permission to enter the curtilage of plaintiff's home for the purpose of asking questions.

In both Jardines and Collins, the conduct of the police went beyond merely entering the curtilage of the home and knocking. In Jardines, the officers received a tip that the plaintiff was growing marijuana in his home. Id. at 3. The officers then brought a drug-sniffing dog onto the plaintiff's property, and allowed the dog to wander the property on a six-foot long leash. Id. The Supreme Court held that the plaintiff's Fourth Amendment rights were violated because the police did not have an implicit license to bring a drug-detecting dog onto the property to roam around searching for contraband. Id. at 9.

In Collins, the police officer was searching for a particular stolen motorcycle, which they believed was in the possession of the petitioner. The officer went onto

the petitioner's property, walked up to the driveway, and pulled a tarp off of a motorcycle in order to examine it. There was no dispute that by removing the tarp that the officer had gone beyond the bounds of the implicit license. Rather, the state argued that the motor vehicle exemption applied, even though the motorcycle was in a driveway. The Supreme Court disagreed.

The pertinent question then is not whether the RVRs entered the curtilage of plaintiff's home, of which there is no dispute, but whether the RVRs took any action in violation of the implicit license to enter the property, which they did not. Simply stated, neither plaintiff nor the district court was able to identify any action on the part of the RVRs that changed the encounter from a permissible knock and talk to a seizure within the meaning of the Fourth Amendment.

Plaintiff argues that "the District Court recognized a dispute of fact existed regarding how long the RVRs waited outside of Plaintiff's home during the first verification." Plaintiff's Brief at p. 29. However, plaintiff does not even attempt to explain why the dispute, whether the RVRs waited five (5) minutes or fifteen (15) minutes is relevant. Assuming that the RVRs waited for fifteen (15) minutes, the fact still remains that the RVRs did not infringe upon the license to enter plaintiff's property and ask questions. Moreover, there was no infringement upon plaintiff's rights as there is no evidence he was even aware that he RVRs were there; it is

undisputed that during the supposed 15 minutes of showering, the RVRs interacted only with plaintiff's wife, who is not a party. CITE

The Tenth Circuit faced a similar question recently in U.S. v. Carloss, 818 F.3d 988 (2016), a case decided after Jardines. In Carloss, the police received a tip that a previously convicted felon owned a machine gun. Id. at 990. The police went to the felon's residence to speak with him. Id. Despite the presence of several "No Trespassing" signs, the police entered the property, walked to the door and began knocking. Id. Nobody answered the door, but the officers could hear movement inside. Id. The officers continued knocking for "several minutes" until finally one of the individuals residing in the home came out. Id. The police subsequently entered the house, finding the machine gun. Id. at 991.

The felon subsequently sought to suppress the machine gun, arguing that by remaining on the property and continuing to knock for "several minutes" after receiving no response, the officers "exceeded the scope of their implied license" to enter the property. Id. at 997-998. The Tenth Circuit affirmed the denial of the motion, refusing to place a time limit on the implied license. Id. at 998. Specifically, the Tenth Circuit found that "the officers were no doubt to remain a bit longer, hoping someone would respond to their knock, because they heard movement inside the house and received no request from inside the house to depart." Id.

The case at bar is similar. The RVRs were informed that plaintiff was indeed home, and neither plaintiff nor his wife asked the RVRs to depart. As such, the implied license to knock on plaintiff's door and ask questions did not expire.

Upon arriving at the plaintiff's residence, the RVRs knocked on the door and asked to speak with plaintiff. (JA-675). Plaintiff's wife informed the RVRs that plaintiff was in the shower. (JA-67). At no point did plaintiff's wife ask the RVRs to leave, or do anything to indicate that the RVRs should leave. (JA-676). Nor did she advise the RVRs that they should not wait or that her husband would not be immediately available. Significantly, the RVRs never attempted to enter the home or even asked to enter the home.[2]

In fact, plaintiff himself testified that when he came to the door, the RVRs were waiting "on the sidewalk." (JA-643). Thus, while waiting for plaintiff, the RVRs had retreated from his door down the path, and off of his property to the sidewalk. (JA-1302).

In other words, the RVRs arrived at plaintiff's residence and were told that he was engaged in an activity that would be completed shortly. The RVRs took no further action until plaintiff appeared. Thus, pursuant to Jardines, the RVRs never violated the implicit license to enter plaintiff's property and no seizure occurred.

[2] Previously, during verifications conducted by the police, the officers would in fact ask to and then enter the home. (JA218)

B. Plaintiff Voluntarily Cooperated With the Verification.

Plaintiff cannot dispute that he approached the RVRs, answered their questions, and retrieved his license without any threat on the part of the RVRs. Nonetheless, plaintiff alleges, and the lower court improperly found, that plaintiff was somehow "coerced" into cooperating with the verification.

In finding an issue of fact, the district court improperly relied on the letter transmitted by officer Hernandez in determining that plaintiff may have thought he had to cooperate with the verification—a position his lawyers did not even espouse prior to commencing this case. (JA-1301, JA-2510-2511). However, there is no support for such a finding in the letter itself or in the circumstances under which the letter was sent.

Significantly, the Hernandez letter was not transmitted until after the verification program was underway. (JA-366-367). During initial verification attempts, one offender had his dogs attack the RVRs. (JA-483). Another threatened to cut the throat of the RVRs. (JA-1192). Thus, the letter was transmitted to all offenders in order to provide background on the program and ease any concerns offenders may have. Nowhere in the letter does it indicate that plaintiff was required to comply with the verification, or that he would face any penalties if he failed to do so.

Nor can plaintiff establish that he believed that he was required to cooperate with the RVRs as a result of the letter. At best, Plaintiff and his wife were unsure whether cooperation was mandatory, and thus they had previously called the SCPD --not PFML--for clarification. (JA-674). Plaintiff's wife testified that she did not receive a clear response. (JA-674). Plaintiff also testified that he contacted his attorney to discuss the letter after receiving it. (JA-200). This was before the first visit in 2013.

In fact, prior to the second verification in 2014, plaintiff, through his attorneys, sent a letter to the County specifically stating that plaintiff believed that the verification was optional. (JA-1300-1301). The relevant portion of the letter reads as follows:

> We believe that [registered sex offenders] have no legal obligation to answer questions or to provide documents, and that the County – directly or through an agent – has no authority to take any action against a covered individual who chooses not to answer questions or to provide documents. In addition, we believe that neither the County officials nor their agents have any authority to remain on the private property of a County resident covered by SORA who states that the officers do not have permission to remain on the property.
>
> (JA-1301).

Thus, plaintiff cannot claim to have been coerced. If he was unsure whether compliance was required he (or his wife) could have asked the RVRs, who were specifically instructed to inform any offender who inquired that cooperation was not

required. (JA-414). Certainly, if plaintiff truly believed that he was being coerced, he would not have made jokes with the RVRs. (JA-649).

The RVRs were trained that if an individual did not wish to cooperate with the verification, they were to immediately terminate the verification attempt. (JA-410). To that end, the RVRs were trained in verbal judo in order to defuse potentially tense situations. (JA-409). The very purpose of this program was to ensure that the RVRs did not appear confrontational to the offenders, and thus ensure that offenders did not feel threatened. (JA-409-410).

Further, subjective fears on the part of an individual that they would be subject to penalties for not consenting to a search are not sufficient to establish that an individual was coerced into cooperating. Florida v. Jimeno, 500 U.S. 248 (1991); Southerland v. Garcia, 2010 WL 5173711 at * 7 (E.D.N.Y. 2010). "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." I.N.S. v. Delgado, 466 U.S. 210, 216 (1984).

The Supreme Court has construed the objective standard in a rigorous fashion. For example, in Michigan v. Chesternut, 486 U.S. 567 (1975) officers noticed an interaction between the defendant and another individual. Police pursued the defendant as he left the interaction. Id. at 569. The individual, seeing the police

pursuit, began to run and subsequently discarded narcotics from his pocket. Id. After his arrest, he claimed that the police seized him within the meaning of the Fourth Amendment by pursuing him. Id. The Supreme Court disagreed, holding that merely being pursued by police "would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Id.

Similarly, in Florida v. Bostick, 501 U.S. 429 (1991), an individual boarded a bus from Miami to Atlanta. Two officers boarded the bus in Fort Lauderdale, and asked to view the defendant's ticket and identification. Id. at 431. The officers then asked to search the defendant's luggage, where they found narcotics. Id. at 432. The defendant subsequently claimed that he had been unreasonably seized by the officers as due to the cramped confines of the bus he was not free to terminate the encounter. Id. The Supreme Court held that, despite the presence of police officers looming over plaintiff on the bus, a reasonable person would have concluded that they were free to terminate the encounter. Id. at 439.

Thus, even if plaintiff had a subjective belief that compliance was mandatory, his claim still fails as such a belief would not be objectively reasonable under the circumstances. Hudson v. New York City, 271 F.3d 62, 68 (2d Cir. 2001). Here, plaintiff cannot establish that a reasonable person would conclude that they were compelled to cooperate.

The testimony in this case is undisputed on this point. Officer Hernandez, head of the Special Victims section of the SCPD, testified that the verifications were voluntary; no offender was ever penalized for failing to cooperate with a verification attempt. (JA-265). Similarly, Detective Sergeant Giordano testified that offenders who inquired were told that they did not need to comply with the verifications. (JA-297-298). Likewise, PFML RVRs were instructed that offenders were not required to cooperate, and that they should withdraw should an offender indicate they did not wish to participate with the verification. (JA-414).

In fact, many convicted sex offenders chose not to cooperate with the verifications. During the first year of the program, forty-two (42) sex offenders refused to cooperate with PFML. (JA-1118). These individuals, having received the same form letter that plaintiff had received, concluded that they were not required to cooperate with the verification. Indeed, plaintiff and his lawyers reached the same conclusion, even going so far as to send a letter to the County stating their belief that the verifications were voluntary. (JA-1301). Thus, a reasonable person having received the letter sent by the SCPD would have concluded that the in-home verifications were voluntary.

POINT IV

THE LOWER COURT IMPROPERLY HELD PFML WAS A STATE ACTOR

The Lower Court incorrectly found that PFML was a state actor for purposes of Fourth Amendment analysis. In so doing, the court improperly applied the joint action and state function tests.

A. PFML was not a state actor under the Joint Action or Close Nexus test.

In order to establish that a private entity is a state actor under the "close nexus" test, a plaintiff must prove that "[t]he State has so far insinuated itself into a position of interdependence with [the organization] that it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). "The decisive factor is the degree of control that the government exercises over the private party's activities." (JA-2501-2502) [citing Grogan v. Blooming Grove Volunteer Ambulance Corps., 768 F.3d 259, 269 (2d Cir. 2014)]. Here, the record shows that PFML acted independently of the SCPD.

In finding that PFML was a state actor under the joint action test, the lower court found 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." (JA-2502). In making this finding, the lower court misapplied the law.

The record is clear that PFML maintained complete control over the verification program. The County had no input in the hiring or training of RVRs. (JA-411-412). The SCPD did not provide any guidelines as to how address verifications were to be conducted. (JA-272-273). In fact, the SCPD was unaware of the procedures used by PFML in conducting the address verifications. (JA-273). PFML determined which offenders would be verified on any given day based on logistical considerations. (JA-416). The SCPD never requested that PFML verify any particular individual. (JA-420).

Further, once a verification was completed, PFML took no part in any further SCPD actions. If a verification attempt revealed a possible mistaken address, PFML would refer the matter to the SCPD and then PFML's involvement was concluded. (JA-1252-1253). PFML was not involved in any subsequent investigations. (JA-1028). PFML would not even make suggestions to the SCPD regarding how to use the information gathered by PFML. (JA-1253). The SCPD did not provide updates to PFML as far as whether or not any actions were taken as a result of information provided by PFML. (JA-1253).

Plaintiff argues that, because the SCPD could remove registrants from the schedule that demonstrates the requisite control over the program to establish that

PFML is a state actor. Plaintiff's Brief at p. 21. In truth, the SCPD removed offenders from the list where the SCPD was either contemplating or engaging in an investigation or other action. (JA-416). Thus, the removal of names from the list was necessary in order to ensure that PFML did not interfere with SCPD business.

Likewise, the Hernandez letter cited by the lower court and by plaintiff, is insufficient to make PFML a state actor. The lower court found that the letter "created the appearance of a joint action." (JA-2502). However, the "appearance of a joint action" is not the standard. Rather, in order for a private entity to be a state actor under the joint action test, the state must be "entwined with in [the complained of program's] management or control." Brentwood Acad. v. Tenn. Secondary Sch. Athletics Ass'n, 531 U.S. 288, 295 (2001). As the SCPD was not involved in the day to day management of the verification program, PFML is not a state actor under the joint action test.

B. PFML was not a state actor under the Public Function test.

The lower court also erred in finding that PFML was a state actor pursuant to the public function test. In order to establish that a private entity is a state actor under the "public function" test, a plaintiff must prove that the private entity is exercising "powers traditionally **exclusively** reserved to the state." Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255 (2d Cir. 2008)[emphasis supplied].

The lower court relied on evidence that "prior to the contract with PFML, SCPD detectives performed address verifications of registered sex offenders" to find PFML was a state actor under the public function test. (JA-2504-2505). However, the standard is not whether the state had ever performed the task, but whether it was traditionally and exclusively the province of the state. For this reason, the Supreme Court found that a private school was not a state actor. Rendell-Baker v. Kohn, 457 U.S. 830, 831-832 (1982), despite the state having performed the task for a significant amount of time. Likewise, in Sybalski, this Court found that care for the mentally ill was not a public function, specifically because public treatment for mental illness did not begin in New York until 1842. Sybalski, 546 F.3d at 260. Thus, this Court reasoned, the care for the mentally ill was not traditionally and exclusively a state function.

In light of this standard, the address verifications cannot be considered a public function. SORA was not enacted until 1995. Prior to that date, there was no public monitoring of convicted sex offenders. Further, under SORA, the registry contained numerous inaccuracies due to the lack of verifications, leading to numerous public complaints. (JA-357). This is because there was no program of systematic verifications prior to the contract between PFML and the SCPD. As such, address verification could not have been the exclusive or traditional province of the state.

CONCLUSION

In view of the foregoing, Defendant-Appellee Parents for Megan's Law(PFML) requests that the order of the District Court dismissing all claims be affirmed, with costs.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,115 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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