THE STATE OF NEW HAMPSHIRE

John Doe

v.

State of New Hampshire

Case No. 2013-0496

BRIEF OF THE APPELLANT, JOHN DOE

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QUESTIONS PRESENTED FOR REVIEW[1]

I. Did the trial court err in ruling that RSA Ch. 651-B, "Registration of Criminal Offenders," as applied to Appellant, did not violate the prohibition against *ex post facto* laws guaranteed by Part I, Article 23 of the New Hampshire Constitution?

II. Did the trial court err in ruling that RSA Ch. 651-B, as applied to Appellant, did not violate his right to procedural due process as guaranteed by Part I, Article 15 of the New Hampshire Constitution?

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Part I, Article 15: **[Right of Accused.]** No subject shall be ... deprived of his property, immunities, or privileges ... or deprived of his life, liberty, or estate, but by ... the law of the land ....

Part I, Article 23:**[Retrospective Laws Prohibited.]** Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or *the* punishment of offenses.

RSA 651-B is the governing statute. Provisions with particular relevance to this appeal are set forth *infra* at 11-13.

STATEMENT OF THE CASE

This case was commenced by petition for declaratory judgment in October 2011. Appellant seeks a ruling that RSA Ch. 651-B (the "Act"), is unconstitutional as applied to him because it violated the prohibition against *ex post facto* laws and the due process clause of the New Hampshire Constitution. In January 2012, the state filed an answer denying the relief sought by Appellant. After limited discovery, the parties each moved for summary judgment. After holding a hearing in April 2013, the trial court granted the state's motion. It ruled that RSA Ch. 651-B, as applied to Appellant, did not violate the *ex post facto* clause, nor did it deny him due process.

Appellant thereafter timely filed this appeal.

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[1] Appellant does not appeal the trial court's ruling that RSA Ch. 651-B violates his right to substantive due process. See Notice of Appeal part 13, question 11).

STATEMENT OF THE FACTS

In November 1987, Appellant pled guilty to two indictments. They alleged in 1983 and 1984 he engaged in sexual penetration with a female member of his household who was between 13 and 16 years of age. Appellant was sentenced to 2½ to 5 years at the New Hampshire State Prison, deferred for two years. He was placed on probation for 4 years and ordered to complete sex offender counseling. Appellant attended weekly counseling sessions with Dr. Paul Shagoury for two years. In August 1990, his motion to terminate probation was granted. Appendix ("App.") at 72 (Affidavit of John Doe ("Doe Aff.") at ¶¶3)-5)).

As of August 1990, Appellant was a felon but there were no other restraints upon his liberty beyond those every citizen must respect. For all intents and purposes, he presented no differently than any other citizen, except he was obliged to disclose his felony record to the same extent as any other felon. He was a free person, subject to no special or additional governmental restraint, subject to no governmental intrusion upon his privacy.

In 1992, the legislature enacted the original version of the Act. App. at 40-44 (*Laws* 1992, *ch.* 213). It required sexual offenders to register with the department of safety, division of state police; report annually to local law enforcement their mailing address and place of residence; and give notice of any change of address within 10 days. The information provided was *confidential* and restricted to law enforcement personnel. The original version of the Act was not retroactive and applied only to sexual offenders convicted on or after January 1, 1993.

In 1993, the legislature made the Act retroactive. It applied "to any sexual offender, irrespective of the date of conviction of the offense, who ... completed his sentence not more than six years before the effective date of this act." App. at 46-47 (*Laws* 1993, *ch.* 135:1,III). As a consequence, the Act applied to Appellant. No longer was he free of any governmental restraints or intrusions. Rather, he

was a sex offender, required to register and report his whereabouts to law enforcement. It was required to keep his information confidential. In 1993, Appellant received no notice he was subject to the Act.

Although Appellant was required to register and report as a sex offender on January 1, 1994, he remained unaware of this requirement until he was informed by the Manchester Police Department in 2004. App. at 73 (Doe Aff. at ¶6)). Since 2004, Appellant has met all registrations and reporting requirements. Id.

At the end of the 2005, Appellant made plans to reside with his son in a duplex apartment on Morton Street in Manchester. Neighbors learned of his plans and that he was a convicted sex offender. In January 2006, they sent an anonymous flyer to his son's landlord and circulated it to: "Attention Morton st residents." In part, the flyer stated that the landlord "has no concern for the children of this neighborhood," and he "and his sex offender buddy's [should live] away from children." App. at 73 and 80 (Doe Aff. at ¶7) and Exhibit 1). Appellant did not move in with his son. Id.

Later in 2006, Appellant was admitted to Elliot Hospital after having collapsed at a family function. He was diagnosed with a ruptured abdominal aortic aneurysm and remained hospitalized until early December that year. Upon discharge, Appellant was admitted to Genesis Healthcare, in Bedford, New Hampshire, where he received rehabilitative services. Today, Appellant is 100% disabled and unable to work. He suffers from "dropsy foot," and finds it difficult to walk without a cane. He often uses a scooter when going places in fair weather. App. at 73 (Doe Aff. at ¶¶ 8)-10)).

Since the end of 2006, Appellant, largely through the assistance of his sister, has attempted to find appropriate housing.[2] Because of his physical limitations he needs to live on the first floor or in an

[2] App. at 49-61 ("Chronology of Events," prepared by Appellant's sister to document her efforts to find housing for him).

apartment building with an elevator. That said, there always remains the possibility that those where he would like to reside could learn from the state police website that Appellant is a registered sex offender and pressure a prospective landlord, or Appellant, himself, not to move in or to leave, as happened in January 2006.

Having the foregoing in mind, Appellant's sister tried to find an apartment in public housing. Initially she was told that Appellant would qualify for housing at the Manchester Housing and Redevelopment Authority because of his low income and disability. App. at 49 (December 14, 2006 entry). But in July 2007, she was informed that Appellant was ineligible because he is under a lifetime requirement to register as a sex offender. App. at 61. *See* 42 U.S.C. §13663 (prohibiting admission to public housing of "an individual who is subject to a lifetime registration requirement under a State sex offender registration program").

As a result, today Appellant resides in a small one-room apartment in a boarding house in Manchester. It serves as his bedroom, living room and kitchenette. He shares a bathroom with others who room at the boarding house. Appellant's monthly rent is $555.00, almost half of his monthly Social Security Disability income of $1250.00. App. at 74 (Doe Aff. at ¶12)).

Appellant's doctors have told him he would benefit from congregate living offered at the Manchester Housing and Redevelopment Authority. But he has been too embarrassed to tell them he is not eligible for public housing because of his lifetime registration requirement. App. at 75 (Doe Aff. at ¶14)).

As required by the Act, Appellant must report, in person, four times a year to the Manchester Police Department. He is unable to walk the approximately one mile to the police station. If the

weather is good he uses his scooter. If not, he must incur the expense of a taxi or bus. Given his physical limitations, this is a difficult requirement for Appellant to fulfill. App. at 75 (Doe Aff. at ¶15)).

When Appellant began reporting to the police department in 2004, he did so in a private room. Today it is a humiliating experience because he reports and provides the required information in the public lobby of the police station. Anyone in the lobby can overhear what he says. App. at 75-76 (Doe Aff. at ¶16)). And each time Appellant reports he is required to complete a two-page "Offender Registration Information" form. App. at 77 and 82 (Doe Aff. at ¶17) and Exhibit 2). Page 2 of the form states it is available to the public.

In addition to the quarterly reports to the Manchester Police Department, two times a year at least one officer in uniform goes to the boarding house to verify that Appellant continues to reside there. These visits can be intrusive because the officer or officers appear at his door unannounced. Occasionally an officer will look through Appellant's window. These police verifications cause Appellant anxiety because he is afraid the officer will appear on one of the rare occasions when Appellant has a guest. App. at 77 (Doe Aff. at ¶19)).

Appellant's name, address, photograph, criminal history, age, weight and height are all listed on the division of state police website. Since anyone can view the website, he is embarrassed, feels shame and fears that people in the neighborhood will find out he is a sex offender and "harass me or worse." App. at 77 (Doe Aff. at ¶18)).

Since committing the sexual offenses involving his daughter in 1983 and 1984, and his successful completion of sex offender counseling in 1990, Appellant has not committed a sexual offense. App. at 77 (Doe Aff. at ¶20)).

Additional facts relevant to Appellant's constitutional challenge are set forth in the Argument section of this brief.

SUMMARY OF THE ARGUMENT

The original version of the Act became effective in 1992, almost six years after Appellant pled guilty and was sentenced in 1987. He completed his sentence in 1990. Two years later the legislature amended the Act to make it retroactive. It applied to Appellant. The initial provisions of the Act required a sex offender to provide law enforcement with his name, address and place of residence, which information law enforcement was required to keep confidential. But since then the legislature has amended the Act on multiple occasions to the point where today, as applied to Appellant, it is unconstitutional.

First, compliance with the Act's many redundant annual, semi-annual and quarterly registration and reporting requirements imposes significant restraints and intrusions on Appellant, giving the Act a punitive effect. Underscoring that punitive effect, Appellant must register for his lifetime; his picture and personal information appear on the division of state police "Registration of Criminal Offenders" website; yet the Act contains no mechanism by which Appellant can show he is unlikely to reoffend and have his information removed from the website and kept confidential. For these reasons the Act violates the prohibition against *ex post facto* laws guaranteed by Part 1, Article 23.

Second, compliance with the Act's registration and reporting requirements unreasonably interferes with Appellant's right to privacy, right to be "let alone," and right to be free of reputational and social stigma. Appellant had no notice of the Act when he pled guilty in 1987. More importantly, he has never been afforded the opportunity, nor under the Act will he ever be afforded the opportunity, to show he is unlikely to reoffend. As applied to Appellant, the Act does not conform to the

community's sense of "fair play" and "fundamental fairness." It violates his right to procedural due process guaranteed by Part I, Article 15.

ARGUMENT

I. Standard of Review

The standard of review in an appeal from a trial court order granting summary judgment has been stated by the Court on many occasions:

> When reviewing a trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the nonmoving party. If our review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision. We review the trial court's application of the law to the facts *de novo* (emphasis original).

Town of Peterborough v. MacDowell Inc., 157 N. H. 1, 5 (2008)(quoting *Lacasse v. Spaulding Youth Center*, 154 N.H. 246, 248 (2006)); *accord*, *White v. Asplundh Tree Expert Co.*, 151 N.H. 544, 547 (2004)(internal citation omitted). Here, the parties agreed there were no material facts in dispute and filed cross motions for summary judgment. The trial court erred in denying Appellant's motion. The court should reverse the trial court and enter judgment for Appellant.

II. The Act As Applied to Appellant Violates Article I, Part 23 of the New Hampshire Constitution

A. Introduction

Article I, Part 23 of the New Hampshire Constitution reads:

> **[Retrospective Laws Prohibited.]** Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or *the punishment of offenses* (emphasis added).

In *State v. Reynolds*, 138 N.H. 519, 521 (1994), the Court stated that "[t]he latter portion of this article, concerning retrospective application of penal laws, is a prohibition against *ex post facto* laws." It drew from the early case of *Woart v. Winnick*, 3 N.H. 473, 474 (1826), to reaffirm that an *ex post facto* law is one that "changes the punishment and inflicts greater punishment, than the law annexed to the crime when committed...." *Reynolds*, 138 N.H. at 521. The Court continues to use this standard today. *State v. Matthews*, 157 H. H. 415, 418 (2008). It is why the Act violates the *ex post facto* clause; it inflicts greater punishment than when Appellant pled guilty and was sentenced in 1987.

When a law is challenged as violating a provision of the New Hampshire Constitution, one that is similar to a provision of the United States Constitution, the Court will "rely on the State Constitution" and refer to federal law "'only as an aid to our analysis.'" *Petition of Hamel*, 137 N.H. 488, 490 (1993)(citation omitted). Moreover, the Court's responsibility goes beyond determining how the issue would be decided under the federal constitution. In *State v. Ball*, 124 N.H. 226 (1983), where the issue was the protection against unreasonable searches and seizures afforded by Part I, Article 19, the Court stated:

> When State constitutional issues have been raised, this court has *a responsibility to make an independent determination of the protections afforded under the New Hampshire Constitution.* If we ignore this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people (emphasis added).
>
> * * *
>
> While the role of the Federal Constitution is to provide the minimum level of national protection of fundamental rights, our court has stated that it has *the power to interpret the New Hampshire Constitution as more protective of individual rights* than the parallel provisions of the United States Constitution. (citations omitted).

124 N.H. at 231-232; *accord*, *State v. Veale* 158 N.H. 632, 638 (2009).

B. *State v. Costello*, 138 N.H. 587 (1994).

After the Act was made retroactive in 1993, the first challenge came one year later. The defendant had been convicted of a sexual offense in 1991 and in 1993 failed to register as a sex offender after being advised to do so by a probation officer. *State v. Costello*, 138 N.H. 587 (1994). He was charged with failing to register, and he moved to dismiss the charge because it violated the *ex post facto* clause. He argued that the burden of registration "constitutes greater punishment for his crime than existed at the time he committed it." 138 N.H. at 589.

The Court began its analysis setting forth the standard enunciated in the *Reynolds* case: whether the Act "changes the punishment and inflicts greater punishment, than the law annexed to the crime when committed." 138, N.H. at 589. It then turned to the Act's two requirements: a sex offender was required to register with the department of safety and to report his current address to local law enforcement. *Id.* at 590. The latter forwarded the information to the state police for entry into its "LENS" system. *Id.* The "information ... [was] held confidentially within the law enforcement community." *Id.*

The *Costello* court held that "on its face the statute does not purport to be punitive but is merely regulatory, providing a means for law enforcement agencies in this State to share information regarding the whereabouts of convicted sexual offenders." *Id.* at 590. The Act's regulatory intent, according to the court, was supported by the 1992 legislative history. Then, a senator stated that the bill "is designed to assist police in keeping track of known sexual offenders ...." *Id.*

C. Post- *Costello* Amendments to the Act

Since *Costello*, the legislature has amended the Act at least eleven times. Almost every time it did so it added more requirements that made compliance more onerous and more intrusive. As a result, today the Act goes far beyond what is necessary "to assist police in keeping track of known sexual offenders." *Costello* at 590.

The first wholesale change to the Act came in 1996. The legislature repealed RSA 632-A:11-:19 and replaced it with RSA Ch. 651-B. App. at 63-68. The most significant change was the elimination of the *confidential* status of the information a sex offender provided to law enforcement. It was authorized to give the information to "schools, youth groups, day care centers, [and] libraries," sex offender's (i) name, address and photograph, (ii) the offense for which the offender was convicted, (iii) the method of approach used by the offender, and (iv) profiles of previous victims. App. at 65 (RSA 651-B:7). But that authority was paired a sex offender right to prohibit law enforcement from providing the information to community organizations upon a showing that "the risk of reoffending is low." App. at 65-67 (RSA 651-B:7).

The next significant change came in 1998 when the legislature eliminated all restrictions on public access to information about sex offenders. App. at 70-71. Section 7 of the Act was repealed and replaced with a new section that required the department of safety to maintain a list of all individuals subject to the Act's registration requirement. The list included each sex offenders (i) name and address, (ii) the offense for which the individual was convicted, (iii) the date of the conviction and court, including any other convictions, (iv) the individual's photograph or physical description, (v) information on the profile of the victim or victims and (vi) the individual's method of approach. The list was available to "*interested members of the public*. Id.

In addition and if not more importantly, the legislature eliminated a sex offender's right to prohibit public disclosure of the information included on the department of safety's list. The legislative history is silent on why this safeguard was eliminated from the Act. As a result the list could include some people who had been convicted of a sexual offence but who posed little, if any, risk of reoffending and, therefore, little risk to the public. Further, by being over-inclusive the list potentially could cause undue public fear, not to mention the harm to the registrant through shame and humiliation.

In 2002, the legislature made the list of sex offenders immeasurably more accessible to the public. It required the department of safety to post the list it was required to maintain on sex offenders on its "official public internet access site."

From 2006 through 2010, the legislature continued to impose new requirements on sex offenders which on there face have little, if any, relationship to any purported regulatory purpose. Today, Appellant is obligated to report the following information to the department of safety:

> (1) Offender's name, alias, age, race, sex, date of birth, height, weight, hair and eye color, and any other relevant physical description.
> (2) Address of any permanent residence and address of any temporary residence, within the state or out-of-state.
> (3) The offense for which the individual is required to register and the text of the provision of law defining the offense, and any other sex offense for which [he] ... has been convicted.
> (4) The date and court of the adjudication on the offense for which the individual is registered.
> (5) Outstanding arrest warrants, and the information listed in subparagraphs (a)(1)-(3), for any sexual offender or offender against children who has not complied with the obligation to register under this chapter.
> (6) Criminal history of the offender, including the date of all convictions and the status of parole, probation, or supervised release, and registration status.
> (7) A photograph of the individual.
> (8) The address of any place where the individual is or will be a student.

RSA 651-B:7,III. The state police is required to post that information about Appellant on its website.[3] The website is to be "available to the public in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user." The website may include "additional search parameters as determined by the department." RSA 651-B:7,IV(a).

Under the Act, the department of safety has the authority to require Appellant at each semi-annual registration to submit:

> (a) A photograph taken by the law enforcement agency each time the person is required to report to the law enforcement agency under this section.
> (b) A DNA sample, if such sample has not already been provided.
> (c) A set of major case prints, including fingerprints and palm prints of the offender.
> (d) A photocopy of a valid driver's license or identification card issued to the offender.
> The consent of the registrant shall not be necessary to obtain this information. Such information may be used in the performance of any valid law enforcement function."

RSA 651-B:3,III and RSA 651-B:4,IV.

Beyond having to comply with the foregoing requirements, Appellant is subject to the department of safety, semi-annually, verifying:

> ... *in person*, the address at which the offender resides or by sending a letter by certified non-forwarding mail to the offender. The address verification shall occur prior to the offender's birthday and again prior to the offender's 6-month semi-annual registration. The address verification shall remind the offender of the obligation to register in person. The offender shall sign the address verification and return it to the officer, if the address verification was made in person, or to the department within 10 business days of receipt.

RSA 651-B:3,III.

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[3] In addition, if the information is available, the web site is to include: (i) information on the profile of the victim of the individual's offense, and (ii) The method of approach utilized by the individual. RSA 651-B:7,III(b).

Moreover, Appellant must "*report in person quarterly*" to the Manchester Police Department "within 5 business days after each anniversary of the offender's date of birth *and every 3 months thereafter.*" RSA 651-B:4,I(a)(emphasis added). Each times Petitioner reports he must provide the police department with the following information:

> (a) Name and any aliases.
> (b) Address of any permanent residence and address of any current temporary residence, within the state or out-of-state, and mailing address. A post office box shall not be provided in lieu of a physical residential address. If the offender cannot provide a definite address, he or she shall provide information about all places where he or she habitually lives.
> (c) Name, address, and date of any employment or schooling. For purposes of this section, the term "employment" includes volunteer work or work without remuneration. If the offender does not have a fixed place of work, he or she shall provide information about all places he or she generally works, and any regular routes of travel.
> (d) Any professional licenses or certifications that authorize the offender to engage in an occupation or carry out a trade or business.
> (e) Make, model, color, and license plate or registration number and state of registration of any vehicle, watercraft, or aircraft owned or regularly operated by the offender, and the place or places where such vehicles, watercraft, or aircraft are regularly kept.
> (f) Date of birth, including any alias date of birth used by the offender.
> (g) Social security number.
> (h) Physical description to include identifying marks such as scars and tattoos.
> (i) Telephone numbers for both fixed location and cell phones.
> (j) Passport, travel, and immigration documents.
> (k) The name, address, and phone number of any landlord, if the offender resides in rental property.

RSA 651-B:4,III. Appellant also must notify the Manchester Police Department of a change of residence within 5 days. RSA 651-B:5,I

D. The Trial Court Erred in Ruling That Even Though the Legislature Had Not Expressed an Intent as to the Purpose of the Act, It Would Defer to Those Statement Indicating an Intent That the Act Have a Regulatory Purpose.

The trial court analyzed whether the Act violated the *ex post facto* clause under the two-part inquiry used in *Smith v. Doe*, 538 U.S. 84, 92 (2003). There, in ruling that the Alaska Sex Offender Registration Act did not violate the federal *ex post facto* clause, the court stated:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"

538 U.S. at 92 (citation omitted). The court continued:

> Because we "ordinarily defer to the legislature's *stated intent*," (citation omitted), "'only the *clearest proof*' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty (emphasis added).

Id. (citation omitted); *accord*, *State v. Matthews*, 137 N.H. 23, 26 (1993)(adopting the same two-part inquiry).

As to the legislature's intent, the trial court stated that the text of the Act does not express "whether the legislature intended the Act to be civil or punitive in effect." Add. at 13. While acknowledging that the legislature placed the Act in the Criminal Code, which "indicated a non-civil purpose," the court did not view that placement controlling and examined the legislative history to ascertain the legislature's intent. Id.

In *Smith*, the court stated that "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Smith*, 538 U.S. at 94. Because in *Smith* the "notification provisions of the Act" were in the civil code and the "registration provisions" in the criminal procedure code, the court stated that the "partial codification of the Act in the state's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive." *Id.* at 95.

In contrast, here the legislature placed the Act only in the Criminal Code. The Act, "Registration of Criminal Offenders," is preceded by RSA Ch. 651, "Sentences," and RSA Ch. 651-A, "Furlough of Prisoners," and followed by RSA Ch. 651-C, "DNA Testing of Criminal Offenders," and RSA Ch. 651-D, "Post-Conviction DNA Testing. The Criminal Code begins with RSA Ch. 625, "Preliminary." RSA

625:1 states: "This title shall be known as the Criminal Code." RSA 625:3 reads: "The rule that criminal statutes are to be strictly construed does not apply to this code. All provisions of this code shall be construed according to the fair import of their terms and to promote justice." Although not conclusive, placement of the Act suggests a punitive legislative intent.[4]

The legislative history of the Act spans a 19 year period, 1992 through 2010. But the trial court discussed only the history of amendments made during the 1996, 2002, 2006, and 2008 sessions. It began with a statement by Senator Pignatelli in 2002, which, it said, "suggests a punitive purpose .... Add. at 14. Turning to what is stated were the "most recent amendments to the Act" in 2008,[5] the court noted a statement by Representative Dokmo: "'[t]his bill doesn't just make the penalties tougher ... it [tries to] make it easier for offenders to remain compliant.'" Id. And the court mentioned Representative Hammond's "concerns that the amendments were 'listing a large number of people who are not going to offend again," adding [m]y concern is not only for [the sex offenders'] safety and harassment ... There's no leeway to ferret out who really is [dangerous] and isn't." Id. The court stated that the amendments "were made simultaneously and through the same bill as amendments to other portions of the criminal code regarding sex offenders and their sentences." Id. According to the court, "[t]hese circumstances indicate some punitive intention behind the legislature's actions." Id.

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[4] The *Smith* court stated the "enforcement procedures ... are probative of legislative intent. " *Smith*, 538 U.S. at 95. RSA 651-B:9 sets forth the penalties for violating the Act. A negligent violation is a misdemeanor, and a knowing violation is a class B felony. RSA 651-B:9,I and II. Either penalty gives the Act a deterrent effect. *See* RSA 651:2,II(b) and (c), III, IV(a).

[5] The court was mistaken. There were amendments made during the 2009 and 2010 sessions. *See L.* 2009, *ch.* 306; *L.* 2010, *ch.* 78

Without explaining why it went back and considered earlier amendments to the Act, the court discussed statements made by Representative Sytek in 1996, Representative Knowles in 2002,[6] and Governor Lynch and Attorney General Ayotte in 2006. Id. at 14-15.[7] It concluded that their statements "demonstrate that the legislature intended the Act's purpose to be the maintenance of a registry that serves to keep track of sex offenders' whereabouts and identifications for the benefit of both citizens and law enforcement." Id. at 15-16. That said, the court failed to discuss why the legislature required sex offenders to report *in person* and *quarterly* to local law enforcement, each time reporting the same comprehensive set of information. See RSA 651-B:4 discussed *supra* at 13.

Given its limited review of the Act's 19-year legislative history, the trial court ruled:

> Based on all of these circumstances, and where there is *no express statement* from the legislature concerning the intent of the Act, the Court *defers* to those statements indicating that the intended for the Act to have a regulatory purpose (emphasis added).

Add. at 16.[8]

This ruling was error. It contradicts not only what the *Smith* court stated – "we 'ordinarily defer to the legislature's *stated intent*,'" *Smith*, 538 U.S. at 92 (emphasis added) – it cannot even be squared with the trial court's own statement that it "must ordinarily defer to the legislature's *stated intent*." Add. at 12 (emphasis added). Because it ruled the legislature had *expressed* no intent regarding the purpose of the Act, the trial court, in addressing the second inquiry under *Smith* – whether the statutory scheme is

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[6] In part, Representative Knowles stated: "We wanted to keep this narrow ... so that we are protecting the parents of the children by their ... knowing where the offenders against children are located within their community." Id. His desire for the narrowness of the registry cannot be squared with the later 2008 amendments to the Act that caused Representative Hammond to be concerned that the Act covered "people who are not going to offend again." Id. at 14.

[7] As officers of the Executive Branch, their statements are not proof of how the legislature viewed the 2006 amendment.

[8] In concluding its discussion of the *ex post facto* issue, the trial court reiterated that the legislative history provides no "clear answer as to the stated intent of the Act." Add. at 28.

"'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil'" – further erred by requiring the "clearest proof" of a punitive effect. Id. at 28-29.

E. Even If the Legislature Intended the Purpose of the Act to be Regulatory, the Trial Court Erred in Ruling that the Act's Statutory Scheme Is Not "So Punitive Either in Purpose or Effect as to Negate" the Legislature's Intent.

In analyzing whether the Act had a punitive effect, the trial court used the same framework as the *Smith* court, the seven factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). *Smith*, 538 U.S. at 97.[9] Those factors are:

> (1) Whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Add. at 17. The court observed that the *Smith* court found factors (1), (2), (4), (6) and (7) the "most relevant" in analyzing the Alaska law's "necessary operation. Id. at 17; *Smith*, 538 U.S. at 97. Nevertheless, the trial court evaluated the Act against each factor. It concluded that while "the question is a close one," it agreed with what Justice Souter stated in his concurrence in *Smith*: even though "substantial evidence does not affirmatively show with any clarity that the [Alaska] Act is valid," what "tips the scale ... is the presumption of constitutionality normally accorded a State's law." App. at 29; *Smith*, 538 U.S. at 110 (Souter, J., concurring). So, too, the trial court:

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[9] The *Smith* court noted that the seven factors were a useful framework that had "migrated into our *ex post facto* case law from double jeopardy jurisprudence. This Court, too, has used the seven factors to determine whether a statute is "so punitive in form and effect as to negate the legislature's intent and render it criminal punishment for double jeopardy purposes." *See*, e.g., *State v. Drewry*, 142 N.H. 705, 708-709 (1996).

> Without the clearest proof and, more importantly, bearing in mind the presumption that a State's laws are constitutional, this Court cannot find that the Act has a punitive effect. Therefore, as applied to the Petitioner, it does not violate the Ex Post Facto Clause of the New Hampshire Constitution.

Add. at 29. Appellant respectfully disagrees. In its "necessary operation," the Act, at a minimum, imposes affirmative restraints, is retributive and is excessive in relation to its regulatory purpose.

1. *An affirmative disability or restraint*

The trial court found that the Act imposes affirmative restraints on Appellant by requiring *lifetime* (1) registration with the department of safety, (2) *quarterly in person* reporting to the Manchester Police Department, and (3) authorizing the police department to verify, *in person*, Appellant's residence. Add. at 19. The court discussed *State v. Letalien,* 985 A. 2d. 4 (Me. 2009), where the Supreme Judicial Court of Maine reached the same conclusion:

> Here, however, quarterly, in-person verification of identity and location of home, school, and employment at a local police station, including finger-printing and the submission of a photograph for the remainder of one's life, is undoubtedly a form of significant supervision by the State. In this respect, SORNA of 1999 imposed a disability or restraint that is neither minor nor indirect.

Id., *see* RSA 651-B:4,III (requiring Appellant to provide the same type of information as SORNA of 1999 each time he reports to the Police Department). The trial court was correct. The first factor "weighs in favor of a finding that, as applied to the Petitioner, the Act violates the ... prohibition against ex post facto laws. Add. at 20.

2. *Historically regarded as punishment*

The trial court agreed with the reasoning in *Smith*, which concluded that the second factor weighed against a finding of punishment. App. at 21. The *Smith* court rejected the argument that listing

an offender's name on the Internet is like the colonial punishment of shaming whereby "[h]umilated offenders were required 'to stand in public with signs cataloging their offenses.'" *Smith*, 538 U.S. at 97. Instead, it stated that the "purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id.* at 99. But unlike Appellant and others listed on the state police website, the list in *Smith* was restricted to only those "sex offenders adjudged to be injurious." *Id.* at 93. Here, the legislative history demonstrates that the state police website does not "ferret out who really is [dangerous] and isn't." App. at 14 (quoting Representative Hammond). As a consequence, that Appellant appears on the website carries the clear implication that he remains a danger to the public.[10] This causes him "great embarrassment and shame" and makes him fear that his neighbors will find out he is on the list and "harass me or worst." Add. at 77 (Doe Aff. at ¶18)).

In addition, the record here is significantly different than the record in *Smith,* which "contains no evidence that the Act has lead to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through of routine background checks by employers and landlords." *Smith*, 538 U.S. at 100. The record before the Court establishes that Appellant is not eligible for public housing because the 2008 amendment to the Act in 2008 made him a "Tier III offender," meaning he must be registered for life. *See L.* 2008, *ch.* 334:2 and 4 (codified in RSA 651-B:1,VIII and RSA 651-B:6,I)).[11]

The trial court erred in its reliance on *Smith*. The Act, as applied to Appellant, operates "to inflict public disgrace" and humiliation, just like colonial punishment. *Smith*, 538 U.S. 97.

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[10] While it is true that "dissemination of truthful information [Appellant's criminal record] in furtherance of a legitimate governmental objective [is not punishment," *Smith*, 538 U.S. at 98, disseminating information that falsely implies Appellant is a danger to the public is not. In fact, it is actionable.

[11] Notably, the Chapter 334 also amended other provisions of the Criminal Code suggesting the legislature considered the amendments to the Act *penal*.

3. *Finding of scienter*

The *Smith* court did not discuss *scienter*, and those courts that have discussed it have stated it has a weak punitive effect. *Doe v. Alaska*, 189 P.3rd. 999, 1013 (Alaska 2008); *Wallace v. Indiana*, 905 N.E. 2d. 371, 381 (Ind. 2009). The trial court agreed. After noting that Appellant's conviction required a finding of *scienter*, it said: "At best, the factor barely tips the scale in favor of a finding that the Act violates the *ex post facto* clause, at the least, it does not tip the balance in either direction." Add. at 21.

4. *Promoting traditional aims of punishment-retribution and deterrence*

The trial court noted that the *Doe* and *Wallace* courts found that their sex registration laws "promoted retribution" because only those convicted of sex offenses were required to register. Add. at 22. In contrast, the trial court stated that the Act includes those "charged with one of the enumerated offences," but not convicted "by reason of insanity" or "adjudicate[ed] a juvenile." Id. The court also relied on *Smith*, which ruled that the Alaska act was not retributive because the "length of the reporting requirement...is reasonably related to the danger of recidivism, and this is consistent with the regulatory objectives." Id. at 23 (quoting *Smith*, 538 U.S. at 102).

What the trial court overlooked is that unlike those who had to report in *Smith*, who had been "adjudged to be dangerous," *Smith*. 538 U.S. at 93, the Appellant has no opportunity to demonstrate he presents no danger of reoffending. The legislature took that right away when it amended the Act in 1998. See *supra* at ___.[12] What the *Wallace* court stated on this point in striking down its sexual registration law, applies with equal force here:

> It appears to us that through aggressive notification of their crimes, the Act exposes registrants to profound humiliation and community-wide ostracism. Further the

[12] Not only did the legislature eliminate that right it also might information about sex offenders available to interested members of the public. See *supra* at __.

> practical effect of this dissemination is that it often subjects offenders to "vigilante justice" which may include lost employment opportunities, housing discrimination, threats, and violence.

Wallace v Indiana, 905 N.E.2d at 380. Continuing, it ruled that the law had a "deterrent effect" and "promote[d] 'community condemnation of the offender' ... traditional aims of punishment." *Id.* at 382.

The trial court found "this factor to weigh in favor of a finding that the Act is non-punitive in its effect." Add. at 24. That was error; the Act has a retributive effect on Appellant.

5. *Behavior is already a crime*

Following the *Smith* court, which gave this factor little weight, the trial court ruled that the "fifth factor does not play a large role in the court's decision. Add. at 24. Other court have disagreed and ruled the fifth factor supports the conclusion of a "punitive effect." *Starkey v. Oklahoma Department of Corrections*, 305 P.3d 1004, 1028 (Okla. 2013); *Wallace v. State*, 905 N.E. 2d at 382; *Doe v. State*, 189 P.3d at 1015.

In this case, the Court should follow the reasoning of the *Letalien* court. It drew upon the concern expressed by Justice Souter in his concurrence in *Smith*, a concern that describes Appellant's situation precisely:

> The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

State v. Letalien, 985 A.2d at 21-22 (quoting *Smith*, 538 U.S. at 109 (Souter, J., concurring)). The *Letalien* court stated that because registration under its law "only applies to offenders who were convicted of specific crimes, does not arise on individualized assessment of an offender's

risk of recidivism, and cannot be waived based on proof the offender poses little or no risk," demonstrates the law "is punitive in effect in this respect." 985 A.2d at 22. Here, too, the Act sweeps too wide and does not provide any mechanism for Appellant to show he is at no risk or low risk of reoffending.

Appellant submits the fifth factor weighs in favor of the Act's punitive effect.

6. *Alternative purpose*

Appellant does not dispute that as applied to those sex offenders who present a risk of reoffending, the Act's registration requirement has a reasonable alternative purpose that is not non-punitive. Registration permits the public to know whether *such* sex offenders live in their communities. As the trial court stated, the registry "alert[s] the public to the risk of sex offenders in their community." Add. at 24 (quoting *Smith,* 538 U.S. at 105) According to the *Smith* court: "The Act's rational connection to a non-punitive purpose is a '[m]ost significant' factor in our determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102. But that statement cannot be divorced from the fact that registration was limited t only those "adjudged to be dangerous." *Id* at 93. For this reason, the weight to be given to the sixth factor must be discounted.

7. *Excessive in relation to the alternative purpose*

The trial court began its discussion of the seventh factor by asking whether "in light of the regulatory purpose "the means to the state's interest in public safety are excessive." Add. at 25. The means chosen by the legislature are excessive. The broad sweep of the Act stands on the same footing as the laws struck down in *Doe* and *Letalien*, which the trial court acknowledged. Add. at 25-26. As the *Wallace* court stated:

> Indeed we think it significant for this excessiveness inquiry that the Act provides *no mechanism by which a registered sex offender can petition the court for relief* from the

> obligation of continued registration and disclosure. Offenders cannot shorten their registration or notification period, even on the clearest proof of rehabilitation(emphasis added).

905 N.E.2d at 384 (noting "a number of courts give the greatest weight to [the seventh] factor." *Id.* at 383); *See also, Starkey*, 305 P.3d at 1030).

Addressing the facts before it, the trial court stated:

> Although the Petitioner has not reoffended in almost 30 years, the trial court suspended his deferred sentence and granted his motion to terminate his probation more than 20 years ago, and he now suffers from a permanent disability that prevents from moving around without a cane or a scooter, the Petitioner has no recourse to demonstrate that he is not longer a danger to the public at large. Previously under the Act, the Petitioner could have at least petitioned the Court to keep his information confidential and only in the possession of law enforcement. RSA 651-B:7, III(c)(1996). The legislature eliminated this safeguard from the Act in 1998. *See* RSA 651-B:7, IV (1998).
>
> This change was significant because from the public's perspective, "the substantiality of the risk every registrant poses is suggested by the government's initiative in establishing the registration, verification, and community notification requirements in the first place." (citation omitted.) "All registrants, including those who have successfully rehabilitated, will naturally be viewed as potentially dangerous persons by their neighbors, co-workers, and the larger community." (citation omitted).

Add. at 26. Notwithstanding this acknowledgement and the implicit recognition of the Act's punitive effect on Appellant, the court, after noting the *Smith* court's statement that the federal *ex post facto clause* did not "require individual determination of their dangerousness," concluded that the seventh factor "remains neutral." Add. at 28. That determination is wrong. The Act is excessive and, as the trial court conceded has caused the community to view Appellant as dangerous. App. at 80.

Appellant submits that the clear weight of the seven factors is decisively in favor of the Act's punitive effect on Appellant. The trial court erred in ruling to the contrary. The Act violates Part I, Article 23 of the New Hampshire constitution. The Court should so hold.

III. The Act, As Applied to Appellant, Violates Procedural Due Process Guaranteed By Part I, Article 15 Of The New Hampshire Constitution.

The trial court erred in ruling that the Act does not violate Appellant's right to procedural due process.

Part I, Article 15 provides, in relevant part: "No subject shall be ... deprived of his property, immunities, or privileges ... or deprived of his life, liberty, or estate, but by ... the law of the land ...." "The ultimate standard for judging a due process claim is the notion of fundamental fairness." *Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320 (2004). "Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play." *Id.* at 320. There are two inquiries for analyzing a procedural due process claim: (1) whether the person has a legally-protected interest entitling him to due process protection; and (2) if such an interest exists, what process is due. *State v. Veale*, 158 N.H. 632, 637-39 (2009).

The heart of Appellant's challenge is that he was never notified that as a consequence of his 1987 guilty plea he would be subject to the Act for the rest of his life with no opportunity whatsoever to demonstrate he should not be covered by it or have his information be held confidential.

A. The Act Implicates Appellant's Legally-Protected Liberty Interests

The Act interferes with three independent legally-protected interests held by Appellant: (1) his right to privacy; (2) his right to be let alone and free from unreasonable governmental intrusions ; and (3) his right to be free from reputational and social stigma.

1. *Right To Privacy*

The trial court assumed that the Act implicated Appellant's legally-protected right to privacy, though it never stated what this right encompassed. Add. at 31. New Hampshire has long recognized

that the right to privacy protects against "public disclosure of private facts and publicity which places the plaintiff in a false light in the public eye." *Hamberger v. Eastman*, 106 N.H. 107, 110 (1964)(noting that the right to privacy protects "four different interests ... [which] have almost nothing in common except that each presents an interference with the right of the plaintiff 'to be let alone." *Id.* at 110 (emphasis added)(citation omitted), In *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Justice Brandeis, in dissent, stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, *the right to be let alone- the most comprehensive of rights and the right most valued by civilized men* (emphasis added).

The Act's registration and reporting requirements violate Appellant's right to privacy. They impact virtually every aspect of his life, in particular where he can live, and cannot; where and when he can travel; and what personal and humiliating information about him is literally a "mouse click" away for the millions of people throughout the world that have access to the Internet. RSA 651-B:7,III (Appellant's name, address, age, weight, scars, criminal history and photograph). Disclosure of Appellant's address is no minor matter. The Court has held that the a person's address is a "conduit into the sanctuary of the home." *Brent v. Paquette*, 132 N.H. 415, 427 (1989) (under the Right-to-Know law, disclosure would be an invasion of privacy); *accord*, *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106, 110 (2005) (a "discernable interest exists in the ability to retreat to the seclusion of one's home and to avoid enforced disclosure of one's [name and] address). Moreover:

> Notification poses significant risks to the privacy and safety of offenders. Because of the stigma attached to the label 'sex offender,' and because of a frightened community's potentially extreme reactions, it is important to

> acknowledge the dangers created by notification. Two such dangers are improper notification and vigilantism.

J. Small, Who Are The People In Your Neighborhood? Due Process, Public Protection, And Sex Offender Notification Laws, 74 *N.Y.U.L. Rev.* 1451, 1465 (1999). For Appellant, this type of community reaction is not a hypothetical risk. App. at 73 and 80 (Doe Aff. at ¶7) and Exhibit 1)).

2. *Right to be let alone*

The trial court erred in ruling that Appellant had no right to be free from governmental regulation. Add. at 30-31. At the outset Appellant acknowledges the he could have stated his argument more clearly to the trial court. Appellant's right to be let alone – the right that ties the four different rights the *Hamberger* court recognized – protects him from governmental intrusions and requirements that go above and beyond what a reasonable person can expect in a free society. Those intrusions and requirement are set out in some detail in RSA 651-B:3, 4, 5, 6 and 7, and *supra* at 11-13. If the purpose of the Act is to enable law enforcement and the public to know where Appellant resides, surely the Act's redundant and multiple impositions are unreasonable. As the Massachusetts Supreme Judicial Court stated:

> Registration – the requirement that a citizen regularly report to the police for an extended term of years – engages serious liberty interests, and presents an 'importantly distinct kind of constitutional danger.' It is 'a continuing, intrusive, and humiliating regulation of the person himself.'

Doe v. Att'y Gen., 715 N.E.2d 37, 43 (Mass. 1999) (citation omitted). [13] The Act interferes unreasonably with Appellant's right to be let alone.

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[13] *See, e.g., State v. Norman*, 808 N.W.2d 48, 62 (Neb. 2012); *State v. Guidry*, 96 P.3d 242, 249 (Haw. 2004); *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994)); *Noble v. Board of Parole & Post-Prison Supervision*, 964 P.2d 990, 995-96 (Or. 1998); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998).

3. *Right To Be Free From Reputational And Social Stigma.*

Although the trial court stated that Appellant claimed the Act implicated "his right to his good name and reputation and freedom from community condemnation, Add. at 30, it never addressed whether the Act, in fact, did. Nowhere in its discussion of the second factor of the due process analysis did the court do anything more than discuss *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003) which it found "instructive." Id. at 31. Left out of the court's analysis completely was any discussion of *In re Bagley*, 128 N.H. 275 (1986), and *State v. Veale*, 158 N.H. 632 (2009).

In re Bagley involved a report of child neglect made by the Division of Children and Youth Services pursuant to RSA Ch. 169-C. Even though the Division concluded the report was "founded, problem resolved,"[14] the Bagleys' names were placed in a *confidential* registry of alleged child abusers maintained by the Division. Under the statute, the Bagleys were "not entitled to notice of the report," nor did they have a "statutory right to challenge it." 128 N. H. at 281.[15]

The Bagleys argued that the Division's action had implicated their "'natural, essential and inherent rights'" as parents, but the Court disagreed. 128 N.H. at 283. Nevertheless, it recognized that the Bagleys' "asserted interest" may "merit constitutional protection." *Id.* at 284. It stated:

> The general rule is that a person's liberty may be impaired when governmental action seriously damages his standing and associations in the community. We have recognized that the stigmatization that attends certain governmental determinations may amount to a deprivation of constitutionally protected liberty.

[14] A "founded" report is one in which "there is 'probable cause' to believe ... [a] child ... is abused or neglected;" "problem resolved" means the Division "decided no further action was warranted. *Bagley*, 128 N.H. at 280 and 282.

[15] Like Appellant's situation here, under an earlier version of the statute the subject of a report had the right to receive a copy of the report, to challenge it, and to have the report removed from the registry. *Bagley,* 128 N.H. at 281.

Id. at 284 (internal citation omitted). Moreover, despite the registry's confidential status, by placing their names in the registry the Division:

> has in effect labeled [them] as neglectful parents" ... [and] "probable perpetrators of an incident of child neglect" ... [and] "exposed the Bagleys to 'public opprobrium' and 'may have damaged their standing in the community'" ... At the moment the division entered the record of its investigation on the central registry, the Bagleys lives became a little more complicated and a little less free.

Id. at 284 (citation omitted). The Division's action constituted "an official adjudication of status of potentially injurious consequences and thus deprived the Bagleys of their 'liberty' within the meaning of part I, article 15 ...." *Id.* at 285.

Turning to the second part of the analysis, the *Bagley* court held:

> In the future, when the division determines that a report of child abuse or neglect is "founded, but resolved," the division must provide written notice to the person determined to be the perpetrator ... of his right of access to the information stored by the division, as well as his right to challenge the determination in an administrative hearing ... [and] [i]f the determination is upheld ... a written statement of the reasons for the decision to uphold.

Id. at 287. If due process affords a parent the right to challenge a found report of child abuse or neglect placed in a confidential registry, it should afford Appellant a right to challenge his placement on the state police website as a sex offender.

Similarly, in *State v. Veale*, the Court ruled that "reputational stigma can, by itself, constitute a deprivation of liberty deserving due process." 158 N.H. at 639. At issue, was whether the defendant had a liberty interest in not being labeled legally incompetent to stand trial. The Court spoke clearly:

> An official branding of legal incompetence unquestionably entails some degree of social stigma ... This stigma may harm the defendant's own self-conception .. and adversely affect a variety of liberty and property interests.

Id. at 641.[16] But unlike the *Bagley* case, the Court held that the procedures already in place – including examinations by "two medical experts" to determine whether the defendant "met the legal standard for competency;" evaluation of their testimony by "an impartial judicial fact finder ... with the assistance of counsel ... detailed written findings and rulings;" a "hearing ... before any finding of incompetency was entered" – "taken together, sufficiently protect the defendant's reputational interest by ensuring a reliable competency determination." *Id.* at 642-643.

Whether labeling a person "incompetent to stand trial" carries more or less social stigma or more or less potential for social ostracism than labeling someone a "sex offender," may be a debatable point. But what is not debatable is that in either case the label implicates the person's liberty interest.

B. The Act Deprives Appellant of Due Process

Turning to the second part of the due process analysis, the trial court ruled that "the procedures in place afforded the requisite safeguards." Add. at 31. It stated that Appellant had advance two reasons to support his position that "there is a risk of erroneous deprivation of his protected interests, but it rejected each of them.

As to the first reason – when "he was convicted and sentence," Appellant "had no notice that he would be placed on the registry" – the court ruled that argument "unavailing." Add. at 31. It reasoned that because it had had ruled there was no violation of the Ex Post Facto Clause ... the process afforded to the Petitioner is the same under the Act to any other individual despite the fact that he did not have to register until some time after his conviction and sentencing." Id. This was error. It conflates two

[16] The defendant in *Veale* pointed to a number of adverse consequences of a finding of incompetence, including "'the willingness of others to engage in commercial transactions'" with him. 158 N.H. at 641. Here, as discussed *supra* at 4, Appellant, as a lifetime registered sex offender, is ineligible for public housing in Manchester.

different constitutional principles, the prohibition against *ex post facto* punishment with procedural due process. In *State v. Guidry*, 96 P.3d 242, 253 (Haw. 2004), the court found that its state registration law did not violate the federal *ex post facto* clause, employing the same analysis as the court applied in *Smith*. Nevertheless, it held that law violated procedural due process because it provided no "opportunity to petition for release from the registration requirement [for] an offender who does not present a threat to society [but]may nonetheless be subject to lifetime registration." That is Appellant's situation.

The trial court rejected Appellant's second reason – the lack of any "procedure to allow him to demonstrate that he is not at a risk to reoffend." Add. at 31. It did so because "the Act does not require registration based on dangerousness. Rather, ... it is based on the fact of a conviction of a certain crime." Id. at 32. In disposing of Appellant's argument, the court relied on *Connecticut Department of Public Safety v. Doe*, *supra*. This was in error.

In *Doe,* a sex offender challenged the Connecticut act because it did not provide him with a hearing to determine "whether ... [he is] likely to be 'currently dangerous.'" 538 U.S. at 4. Like the New Hampshire registry, the Connecticut sex offender registry is "based on the fact of previous conviction, not the fact of current dangerousness." *Id.* For this reason, the court denied the challenge because "due process does not require the opportunity to prove a fact [current dangerousness] that is not material to the State's statutory scheme." *Id. Doe*, however, does not control Appellant's challenge for two reasons.

First, the court relied on the fact that the Connecticut registry contained a disclaimer on the first page of its website that states:

> [DPS] has not considered or assessed the specific risk of reoffence with regard to any individual prior to his or her inclusion within this registry, *and has made*

> *no determination that any individual included in the registry is currently dangerous.* Individuals included within the registry are included "solely by virtue of their conviction record and state law (emphasis added).

538 U.S. at 5. Nowhere on the state police website is there any similar disclaimer, let alone one that alerts the public that a sex offender, like Appellant, may not be "currently dangerous."[17]

Second, the court of appeals in *Doe* stated that the Connecticut law implicated a "liberty interest" because of its "stigmatization of respondent by 'implying' that he is 'currently dangerous.'" 538 U.S. at 6. The supreme court rejected that ruling. It stated that *Paul v. Davis*, 424 U.S. 693 (1976), "held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." 538 U.S. at 6-7. This Court, however, has not "adopted the analysis in *Paul v. Davis* ... under our State Constitution." *Veale*, 158 N.H. at 637. The *Veale* court went to state that "'we never have considered ourselves bound to adopt the federal interpretation,'" 158 N.H. at 638 (quoting *State v. Ball*, 124 N.H. at 233), concluding, as discussed *supra* at 29, "that reputational stigma, by itself, constitute a deprivation of liberty deserving due process." *Id.* at 639.

The trial court's reliance on the reasoning of *Doe* was error.

C. The Probable Value Of Additional Safeguards Is High, While Any Administrative Burden Is No Different Than Incurred in Providing Due Process to Other Citizens

The trial court ruled that "[t]he probable value of any additional or substitute safeguards is low." Add. at 32. Adopting the same reasoning as the *Doe* court, it stated that "the structure of the Act does

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[17] The disclaimer on the state police website begins: "WARNING – SEX OFFENDERS AGAINST CHILDREN: THE LAW." It goes on to state that that "[t]he list is made available for the purpose of protecting the public," which implies that those listed are dangerous sex offenders. See http://www.nh.gov/safety/divisions/nhsp/offenders/disclaimer.html (last visited Dec. 13, 2013).

not make dangerousness a relevant inquiry," even though it acknowledged that "the Act is sweeping in offenders that no longer pose a threat to society." Add. at 32. That recognition is precisely why Appellant is entitled to a hearing: so he can show he is not a threat.

Finally, the trial court stated that providing a hearing to a registrant who wished "to demonstrate his low-risk for reoffending would require evidentiary hearings and would require the use of the State's resources." Add. at 32-33. But it made no finding as to the extent of those resources because it had already concluded there was no "constitutional violation." Add. at 33.[18]

In *Bagley*, after the legislature took away the statutory right to notice and a hearing, the Court ruled that due process required not only that notice of a "founded, problem resolved" report be given to the "perpetrator," but that the perpetrator be afford an administrative hearing to challenge the report. In *Veale*, the court ruled that a comprehensive set of safeguards already existed to ensure "a reliable competency determination." Here, the record before the Court establishes that in 1996 when the legislature authorized law enforcement to disclose information about sex offenders to certain community organizations, it also provided sex offenders with the right to a hearing to show that his information should remain confidential. See *supra* at 10. Without explanation, the legislature eliminated that right in when it next amended the Act in 1998. Id.

Procedural due process ensures "fundamental fairness." Before a person is placed on a website list that is made available "for the purpose of protecting the public," fundamental fairness requires that the person be able to show whether he belongs on the list. What the Court said in *Bagley* in 1986 applies here as well in the government's zeal to protect the public:

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[18] Of course, whether there is a denial of procedural due process depends, in part, on the extent of the administrative burden of providing a hearing.

> The dangers presented by governmental possession and use of inaccurate information are greater than ever. The principles of due process are our most effective shield against these dangers. In our zeal to prevent the abuse and neglect of children we ought not to forget them

Bagley, 128 N.H. at 285.

Appellant submits the trial court erred. His right to procedural due process has been violated.

CONCLUSION

For the reasons stated in parts I and II of the Argument, Appellant submits the trial court erred in denying his motion for summary judgment. The Court should reverse the trial court and enter judgment for Appellant.

Appellant requests fifteen minutes for oral argument to be given by William L. Chapman.

JOHN DOE
By his Attorneys,

Dated: December 23, 2013

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CERTIFICATE OF SERVICE

I, William L. Chapman, Esq., hereby certify on this 23rd day of December, 2013, I mailed two copies of this brief and appendix to Karen A. Schlitzer, counsel for the State of New Hampshire.

William L. Chapman
William L. Chapman, Esq.

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