



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN LAMBERTY,)	
)	
Defendant-Below,)	
Appellant,)	No. 232, 2014
)	
v.)	On Appeal from the
)	Superior Court of the
STATE OF DELAWARE,)	State of Delaware in and
)	for New Castle County
Plaintiff-Below,)	
Appellee.)	

STATE'S ANSWERING BRIEF

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

Scott D. Goodwin
Bar ID No. 4862
Deputy Attorney General
820 North French Street
7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-5097

Dated: August 18, 2014

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
NATURE AND STAGE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	3
STATEMENT OF FACTS	4
ARGUMENT	
I. LAMBERTY FAILS TO MEET HIS BURDEN OF SHOWING THAT 11 <i>DEL. C.</i> § 4120 <i>ET SEQ.</i>, AS APPLIED TO HOMELESS SEX OFFENDERS, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	6
II. LAMBERTY FAILS TO MEET HIS BURDEN OF SHOWING THAT 11 <i>DEL. C.</i> § 4121 <i>ET SEQ.</i> VIOLATES THE DELAWARE CONSTITUTIONAL DOCTRINES OF SEPARATION OF POWERS OR NON-DELEGATION	18
CONCLUSION.....	28

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Atlantis I Condominium Ass'n v. Bryson</i> , 403 A.2d 711 (Del. 1979).....	19-21
<i>Brennan v. Black</i> , 104 A.2d 777 (Del. 1954)	19
<i>Burrell v. State</i> , 953 A.2d 957 (Del. 2008).....	28
<i>Flamer v. State</i> , 953 A.2d 130 (Del. 2008)	26
<i>Grace v. State</i> , 658 A.2d 1011 (Del. 1995)	6, 18
<i>Helman v. State</i> , 784 A.2d 1058 (Del. 2001)	9, 16
<i>Hoff v. State</i> , 197 A. 75 (Del. Super. Ct. 1938).....	19
<i>Hughes v. State</i> , 653 A.2d 241 (Del. 1994).....	10
<i>In re Dep't of Natural Res. and Envtl. Control</i> , 401 A.2d 93 (Del. 1978).....	21, 23
<i>In re Request of Governor for an Advisory Opinion</i> , 12 A.3d 1104 (Del. 2009).....	19-20
<i>Joel v. City of Orlando</i> , 232 F.3d 1353 (11th Cir. 2000)	9
<i>Justice v. Gatchell</i> , 325 A.2d 97 (Del. 1974)	6, 9-10, 18
<i>Klein v. Nat'l Pressure Cooker Co.</i> , 64 A.2d 529 (Del. 1949)	6, 23
<i>Kreimer v. Bureau of Police for the Town of Morristown</i> , 958 F.2d 1242 (3d Cir. 1992).....	9
<i>Opinion of the Justices</i> , 425 A.2d 604 (Del. 1981)	6
<i>Opinions of the Justices</i> , 88 A.2d 128 (Del. 1952).....	19

<i>People v. Dowdy</i> , 802 N.W.2d 239 (Mich. 2011)	15
<i>Piper v. State</i> , 2011 WL 2360979 (Del. June 13, 2011)	8
<i>Ploof v. State</i> , 75 A.3d 811 (Del. 2013).....	26
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	8
<i>Prices Corner Liquors, Inc. v. Delaware ABC Comm’n</i> , 705 A.2d 571 (Del. 1998).....	9
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	9-10
<i>San Antonio Indep. School Dist. v. Rodriguez</i> , 411 U.S. 1 (1973)	8
<i>State v. Allmond</i> , 2 Houst. 612 (Del. Ct. Gen. Sess. 1856)	7
<i>State v. Braun</i> , 378 A.2d 640 (Del. Super. Ct. 1977)	20-21
<i>State v. Briggs</i> , 199 P.3d 935 (Utah 2008)	25
<i>State v. Brower</i> , 971 A.2d 102 (Del. 2009)	28
<i>State v. Brown</i> , 195 A.2d 379 (Del. 1963).....	7, 18
<i>State v. Chudnofsky</i> , 176 A.2d 605 (Del. Super. Ct. 1961).....	19
<i>State v. Durham</i> , 191 A.2d 646 (Del. Super. Ct. 1963).....	20-21, 23
<i>State v. Hobson</i> , 83 A.2d 846 (Del. 1951).....	7, 18
<i>State Highway Dept. v. Del. Power & Light Co.</i> , 167 A.2d 27 (Del. 1961).....	7
<i>Tigner v. Texas</i> , 310 U.S. 141 (1940).....	8
<i>Trustees of the New Castle Common v. Gordy</i> , 93 A.2d 509 (Del. 1952).....	19

<i>Turnbull v. Fink</i> , 668 A.2d 1370 (Del. 1995).....	10
<i>Valencia v. Blue Hen Conf.</i> , 476 F. Supp. 809 (D. Del. 1979).....	10
<i>Valencia v. Blue Hen Conf.</i> , 615 F.2d 1355 (3d Cir. 1980)	10
<i>Wainwright v. State</i> , 504 A.2d 1096 (Del. 1986)	26-27

Statutes

DEL. CODE ANN. tit. 11, § 4120	1, 6-7, 11-13, 22-25, 27
DEL. CODE ANN. tit. 11, § 4120A	11, 14-15, 21
DEL. CODE ANN. tit. 11, § 4121	8, 13-15, 17, 22-23
DEL. CODE ANN. tit. 11, § 4332	25

Supreme Court Rules

DEL. SUPR. CT. R. 8.....	26
--------------------------	----

Other

DELAWARE SEX OFFENDER CENTRAL REGISTRY.....	13
DELAWARE STATE POLICE—STATE BUREAU OF IDENTIFICATION	24

NATURE AND STAGE OF PROCEEDINGS

Delaware State Police arrested Juan Lamberty on January 22, 2013. (D.I. 1). On February 18, 2013, a New Castle County grand jury indicted Lamberty on the single charge of failure to reregister as a sex offender.¹ (D.I. 2). On April 16, 2013, Lamberty filed a motion to dismiss the indictment. (D.I. 10). The State filed a response in opposition on April 24, 2013. (D.I. 11). The Superior Court ordered additional briefing on the motion to dismiss (D.I. 15), and set trial for September 10, 2013. (D.I. 13). Lamberty filed an opening brief in support of his motion to dismiss on May 29, 2013 (D.I. 18), the State filed its answering brief in opposition to Lamberty's motion on June 26, 2013 (D.I. 20), and Lamberty filed his reply brief on July 30, 2013. (D.I. 21).

On August 27, 2013, Lamberty's counsel requested that the September 10, 2013 trial date be continued because Lamberty had moved to Ohio; the Superior Court denied the continuance request on August 29, 2013. (D.I. 23). Lamberty failed to appear for trial and the court issued a *capias*. (*Id.*). After the *capias* was returned on March 13, 2014, Lamberty was held on bail pending trial. (D.I. 25, 26, 27). On April 9, 2014, the

¹ 11 *Del. C.* § 4120(k).

Superior Court denied Lamberty's motion to dismiss (D.I. 34), issuing its order the following day. (D.I. 37; A88-93; Ex. A to Op. Brf.).

Lamberty waived his right to a jury trial. (D.I. 35; A96-97). On April 10, 2014, after a one-day bench trial, the Superior Court found Lamberty guilty of failure to reregister as a sex offender. (D.I. 36). The court immediately sentenced Lamberty to 35 days at supervision level V with credit for 25 days previously served, suspended after 25 days with no probation to follow. (*Id.*; A141; Ex. B to Op. Brf.)

On July 16, 2014, Lamberty filed his opening brief, appealing his conviction. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. The Appellant has failed to overcome the registration statute's strong presumption of constitutionality on Equal Protection grounds by showing, clearly and convincingly, that the statute's homeless distinction is patently arbitrary.

II. DENIED. The Appellant has failed to overcome the registration statute's strong presumption of constitutionality on separation of powers grounds by showing, clearly and convincingly, that the statute's grant of discretion to the Superintendent of the Delaware State Police is so devoid of standards as to create a constitutional infirmity.

STATEMENT OF FACTS

On March 23, 2004, Juan Lamberty, having both placed his penis in the mouth of a four-year-old boy and placed his own mouth on the boy's penis,² pled guilty to rape in the fourth degree in case ID No. 0307015184. As a result of that conviction, Lamberty was required to register as a Tier II sex offender. Lamberty was aware of those registration requirements, having pled guilty on October 21, 2010 to failure to register as a sex offender (Delaware Superior Court Case ID No. 0912005345, D.I. 9).

On November 27, 2012, Lamberty appeared in person to register as a sex offender. (A120). At that time, Lamberty registered as homeless in the city of Wilmington, and acknowledged his duty to register every 30 days. (A104).

Sometime after December 31, 2012, Detective Jerel W. Morton of the Delaware State Police became aware that Lamberty had failed to reregister, and issued a warrant on or about January 9, 2013. (A101-02). After Delaware State Police took Lamberty into custody, Morton Mirandized him and asked why he had failed to reregister. (A102-03). Lamberty told Morton "he understood he was supposed to come in to verify . . . every 30

² Because Lamberty pled guilty to fourth degree rape, these facts are drawn from the arrest warrant and affidavit of probable cause, sworn on July 21, 2003, *State v. Juan E. Lamberty, Jr.*, ID No. 0307015184, Justice of the Peace Court No. 20.

days” but “decided not to come in” because “he didn’t have money to come in to register.” (A103-04). Lamberty told Morton he was “staying off and on at his sister-in-law’s house.” (A104).

A few months after his arrest for failing to reregister, Lamberty moved to Ohio and registered there. (A109-10, 114-15).

I. **LAMBERTY FAILS TO MEET HIS BURDEN OF SHOWING THAT 11 DEL. C. § 4120 ET SEQ., AS APPLIED TO HOMELESS SEX OFFENDERS, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.**

Question Presented

Whether the appellant has met his burden of showing, clearly and convincingly, that 11 *Del. C.* § 4120 *et seq.* (the “registration statute”), as applied to homeless sex offenders, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Standard and Scope of Review

While Constitutional claims are subject to *de novo* review,³ Delaware also affords legislative enactments a strong presumption of constitutionality.⁴ Legislative acts should not be disturbed except in clear cases, and then only upon weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt.⁵ Courts have “no concern”

³ *Grace v. State*, 658 A.2d 1011, 1015 (Del. 1995).

⁴ *See Opinion of the Justices*, 425 A.2d 604, 605-06 (Del. 1981) (citing *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974)).

⁵ *Klein v. Nat’l Pressure Cooker Co.*, 64 A.2d 529, 532 (Del. 1949).

with the “wisdom or policy” of a legislative enactment.⁶ Rather, every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor; and if the question of the reasonable necessity for regulation is fairly debatable, legislative judgment must be allowed to control.⁷ There is a strong presumption of constitutionality attending a legislative enactment which, unless the evidence of unconstitutionality is clear and convincing, the court will be reluctant to ignore.⁸ One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity.⁹

Merits of the Argument

Lamberty contends that, because he is homeless, he faces a more onerous reporting burden than a sex offender who has a fixed residence. Pursuant to 11 *Del. C.* § 4120(g)(2), a person designated as a Tier II sex offender is generally required to verify all registration information by registering in person at locations designated by the Superintendent of the Delaware State Police (the “Superintendent”) every six months. However,

⁶ *State v. Hobson*, 83 A.2d 846, 855 (Del. 1951) (citing *State v. Allmond*, 2 Houst. 612, 633 (Del. Ct. Gen. Sess. 1856).

⁷ *Hobson*, 83 A.2d at 856.

⁸ *State Highway Dept. v. Del. Power & Light Co.*, 167 A.2d 27, 31 (Del. 1961).

⁹ *State v. Brown*, 195 A.2d 379 (Del. 1963). *See also Justice*, 325 A.2d at 102.

under 11 *Del. C.* § 4121(k)(2), a Tier II sex offender who, like Lamberty, registers as “homeless” shall verify their registration information by appearing in person every 30 days following the date of completion of the initial registration form.”¹⁰ Lamberty asserts that this more frequent reporting requirement for homeless sex offenders (the “homeless designation”) violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The homeless designation is constitutional.

The Equal Protection Clause commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” This provision creates no substantive rights.¹¹ Instead, the clause embodies a general rule that States must treat like cases alike, but may treat unlike cases accordingly.¹² The United States Supreme Court has affirmed that if a legislative classification or distinction “neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational

¹⁰ See *Piper v. State*, 2011 WL 2360979, at *1 (Del. June 13, 2011) (affirming conviction for failure of homeless Tier II sex offender to register every 30 days).

¹¹ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

¹² *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

relation to some legitimate end.”¹³ Lamberty has not attempted to argue that the reporting requirement burdens a fundamental right. Although he eventually implies that homeless sex offenders constitute a “discrete and insular minority” (Op. Brf. 14), Lamberty never expressly identifies homelessness as a suspect classification, nor has the United States Supreme Court ever recognized that status as such.¹⁴ Because the classification is not based upon race, color, religion, ancestry or other “inherently suspect” classification requiring a more strict scrutiny, the homeless designation enjoys a presumption of reasonableness and constitutionality.¹⁵

To overturn the reporting statute on equal protection grounds, Lamberty has the burden of showing a lack of rational justification for the classification created by the statute, and the burden “appears to be a heavy one.”¹⁶ Under the rational basis standard, statutory classifications will be set

¹³ *Romer v. Evans*, 517 U.S. 620, 631 (1996). *Accord Prices Corner Liquors, Inc. v. Delaware ABC Comm’n*, 705 A.2d 571 (Del. 1998) (holding that, unless a statutory classification involves a fundamental right or draws distinctions based on a suspect classification, the constitutionality of the statute is presumed and the classification need only relate rationally to a legitimate state interest).

¹⁴ *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1269 n.36 (3d Cir. 1992).

¹⁵ *Justice*, 325 A.2d at 102.

¹⁶ *Helman v. State*, 784 A.2d 1058, 1074-75 (Del. 2001).

aside “only if no grounds can be conceived to justify them,”¹⁷ and a classification “will *not* be set aside if *any* state of facts reasonably may be conceived to justify it.”¹⁸ Indeed, the standard does not even require the statute’s rational basis to be expressly stated.¹⁹ If a law “can be said to advance a legitimate governmental interest,” courts must sustain it under this constitutional standard “even if the law seems unwise or works to the disadvantage of a particular group,” or even if “the rationale for it seems tenuous.”²⁰ In sum, Lamberty cannot show that the reporting requirement is “so unreasonable as to be discriminatory and unconstitutional” unless he can establish, clearly, convincingly, and beyond doubt, that the homelessness distinction is “patently arbitrary.”²¹ This he cannot do.

General Purposes of the Registration Statute

While Lamberty isolates and downplays “stranger danger” as an insufficient justification for the registration mandate (Op. Brf. 12-13), he ignores the many other governmental purposes furthered by accurate, up-to-

¹⁷ *Turnbull v. Fink*, 668 A.2d 1370, 1379 (Del. 1995) (citations omitted).

¹⁸ *Justice*, 325 A.2d at 102 (emphasis added).

¹⁹ *Valencia v. Blue Hen Conf.*, 476 F. Supp. 809, 827 (D. Del. 1979), *aff’d*, 615 F.2d 1355 (3d Cir. 1980).

²⁰ *Romer*, 517 U.S. at 632.

²¹ *Hughes v. State*, 653 A.2d 241, 248 (Del. 1994).

date sex offender registration information. This Court need look no further than the registration statute itself to know the legislative purposes behind the sex offender registry. Acknowledging that “some sex offenders are extremely habituated and that there is no known cure for the propensity to commit sexual abuse,”²² the General Assembly affirmatively declared that “the comprehensive *evaluation, identification, classification, treatment, and continued monitoring of sex offenders* who are subject to the supervision of the criminal justice system is necessary in order to work toward the reduction of recidivism by such offenders.”²³ The registration statute provides for “methods of intervention for sex offenders”—including “behavior management, monitoring, and treatment”—which are “appropriate to the needs of the particular offender” while giving overarching priority to the safety of “victims and potential victims.”²⁴ Thus, the registration statute serves several purposes above and beyond the protection of future victims from strangers, including the protection of past victims from their abusers, and treatment for the sex offenders themselves.

In furtherance of, and in addition to, these general purposes, the registration statute establishes several mechanisms for storing and

²² 11 *Del. C.* § 4120A(d)(1).

²³ 11 *Del. C.* § 4120A(a) (emphasis added).

²⁴ 11 *Del. C.* § 4120A(d)(1).

disseminating sex offender registration information to further the governmental interests of preventing crime and aiding ongoing criminal investigations. Upon an offender's initial registration, the registration statute directs the Superintendent to "notify the chief law-enforcement officer having jurisdiction over the sex offender's residence, place of employment, and/or study."²⁵ To ensure that registration information remains accurate and up-to-date, the registration statute requires: (1) that all offenders reregister within three business days upon any change in "the sex offender's own name, residence address or place of employment and/[or] study";²⁶ and (2) that, within three business days of receiving a reregistration, the Superintendent relay such change in information to "the chief law enforcement officer having jurisdiction over the sex offender's prior residence, place of employment or study and the chief law enforcement officer having jurisdiction over the offender's new residence, or place of employment or study."²⁷ The registration statute also directs that all sex offender registration information "shall be entered into a database of registered sex offenders which shall be developed and maintained by

²⁵ 11 *Del. C.* § 4120(d)(1).

²⁶ 11 *Del. C.* § 4120(f)(1).

²⁷ 11 *Del. C.* § 4120(f)(2).

DELJIS [the Delaware Criminal Justice Information System],”²⁸ and provides that any registration or reregistration information collected by the Superintendent “shall be promptly forwarded to the Federal Bureau of Investigation.”²⁹

Finally, 11 *Del. C.* § 4121 anticipates that registration information may be used through various “community notification” methods “devised specifically to notify members of the public who are likely to encounter a sex offender,” and made available to governmental agencies, public officials and members of the general public.³⁰ The registration statute also provides for “searchable records available to the public” which “include the last verified addresses for the offender” and which the Superintendent is directed to maintain and update “as often as practicable.”³¹ Significantly, upon a sex offender’s release, discharge or parole, the registration statute authorizes the Attorney General to use any reasonable means to provide notice to the

²⁸ 11 *Del. C.* § 4120(d)(1).

²⁹ 11 *Del. C.* § 4120(l).

³⁰ 11 *Del. C.* § 4121(a)(1).

³¹ 11 *Del. C.* § 4121(a)(3). The FAQ section of Delaware’s searchable sex offender registry states that both the “registry and the state’s public website are updated daily.” DELAWARE SEX OFFENDER CENTRAL REGISTRY, <http://sexoffender.dsp.delaware.gov> (last visited Aug. 14, 2014).

victim or victims of the crimes for which the offender was convicted,³² including notice of the offender’s place of anticipated future residence, school and/or employment.³³ As with the other, aforementioned purposes of the registration statute, the efficacy of these community notification mechanisms depends upon the freshness and accuracy of the underlying registration information.

Homelessness a rational distinction

Given the registration statute’s aforementioned purposes, a homeless person is not similarly situated with a person who has a permanent residence. Members of the public—including past victims—can more easily ascertain the whereabouts of a sex offender who has a known residence than one who has no fixed address. Likewise, police and other governmental agencies can more easily provide the “continuing monitoring process” and “continuum of treatment programs”³⁴ envisioned by the registration statute to a sex offender who has a fixed address than to one who either cannot maintain, or fails to disclose, any consistent whereabouts. Thus, a sex offender who seeks to avoid monitoring has an incentive to report himself as

³² 11 *Del. C.* § 4121(h).

³³ 11 *Del. C.* § 4121(f).

³⁴ 11 *Del. C.* § 4120A(d)(2).

homeless. The legislature has made a rational choice to require sex offenders who are homeless to register with authorities more frequently than those with a residence. To do otherwise would create a disincentive for sex offenders to report their whereabouts.³⁵ To cite one notable example, the Michigan Supreme Court cited a 62% increase in sex offenders claiming homelessness following an appellate court decision removing homeless persons from sex offender reporting requirements.³⁶ The homeless designation serves the registration statute's stated and implicit purposes by incentivizing sex offenders to both seek and disclose a permanent residence.

Moreover, even in those cases where a homeless sex offender, "after the exercise of due diligence," genuinely cannot secure an anticipated place of future residence,³⁷ the homeless reporting requirement serves governmental purposes by providing an alternative mechanism for the "continued monitoring"³⁸ of, or other regular contact with, such offenders. By definition, homeless sex offenders do not have a fixed residence where governmental agencies may expect to find them on a consistent basis.

³⁵ See *People v. Dowdy*, 802 N.W.2d 239, 250 (Mich. 2011).

³⁶ *Id.* at 250 n.54.

³⁷ 11 *Del. C.* § 4121(k).

³⁸ 11 *Del. C.* § 4120A(a).

Lacking a reliable method of initiating contact, the registration statute reasonably compensates by requiring homeless offenders to initiate regular contact themselves. Thus, the additional burden placed on homeless registrants is neither arbitrary, irrational, nor punitive, but merely places on more transient sex offenders—the people most able to verify their own whereabouts—the responsibility to do so.

Although Lamberty understandably disagrees with the practical, “unintended consequence” of such a reporting requirement (Op. Brf. 7-9), his policy arguments do not and cannot address his actual burden of showing that the homeless designation fails the rational relationship test. For example, Lamberty suggests that the State could reduce the difficulties of reregistration by “allowing an offender to appear at his or her local police station,” by using video conferencing, or “by utilizing probation officers to effectuate interim appearance with an offender.” (Op. Brf. 13-14). While undoubtedly fair policy arguments, the appropriate place to make these arguments is the legislature, not this Court. “Courts are not super-legislatures and it is not a proper judicial function to decide what is or is not wise legislative policy.”³⁹ The legislature’s decision to vest sex offender reporting with the State Police was not an unconstitutional choice that would

³⁹ *Helman*, 784 A.2d at 1068.

permit this Court to invalidate the reporting statute generally or the homeless designation in particular. Having elected to attack the homeless reporting requirement on equal protection grounds, Lamberty is constrained by the heavy burdens, presumptions, and judicial deference afforded to non-suspect classifications. His arguments, that the locations the Superintendent chose as reporting sites are not the most convenient, fail to clearly prove that the homeless designation, carefully delineated in 11 *Del. C.* § 4121(k), is so devoid of *any* rational basis as to be “patently arbitrary.” Absent such a clear showing, he cannot overcome the registration statute’s strong presumption of constitutionality.

II. LAMBERTY FAILS TO MEET HIS BURDEN OF SHOWING THAT 11 DEL. C. § 4121 ET SEQ. VIOLATES THE DELAWARE CONSTITUTIONAL DOCTRINES OF SEPARATION OF POWERS OR NON-DELEGATION.

Question Presented

Whether the appellant has met his burden of overcoming the strong presumptive validity of 11 *Del. C.* § 4121 *et seq.* by showing, clearly and convincingly, that the statute’s grant of discretion is so devoid of standards as to create a constitutionally infirmity.

Standard and Scope of Review

Constitutional claims are subject to *de novo* review.⁴⁰ As mentioned in the previous section, every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor.⁴¹ One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity.⁴²

Merits of the Argument

Lamberty broadly claims that 11 *Del. C.* § 4121 *et seq.* constitutes an impermissible delegation of legislative power by vesting “unfettered”

⁴⁰ *Grace*, 658 A.2d at 1015.

⁴¹ *Hobson*, 83 A.2d at 856.

⁴² *Brown*, 195 A.2d 379. *See also Justice*, 325 A.2d at 102.

authority to the Superintendent, claiming that the statute “is void of any standards to guide the Superintendent’s discretion.” (Op. Brf. 15). However, the particulars of Lamberty’s argument reveal that his true complaint is much more limited in scope, asserting only that the General Assembly improperly delegated responsibility to the Superintendent with respect to the selection of verification sites. This complaint fails to establish any constitutional infirmity sufficient to invalidate the statute.

Although the separation of powers doctrine broadly stands for the proposition that “a function inherently legislative may not be delegated to the executive or to the judiciary,” the doctrine “does not obtain in full force [in Delaware] as it does in some of the states.”⁴³ Delaware courts have long upheld the delegation of legislative authority to agencies,⁴⁴ noting that “at times, the General Assembly may better achieve its legislative goals by deferring to an administrative agency’s greater skill and knowledge.”⁴⁵ The

⁴³ *Brennan v. Black*, 104 A.2d 777, 781 (Del. 1954) (citing *Opinions of the Justices*, 88 A.2d 128 (Del. 1952); *Trustees of the New Castle Common v. Gordy*, 93 A.2d 509 (Del. 1952)).

⁴⁴ *State v. Chudnofsky*, 176 A.2d 605, 607 (Del. Super. Ct. 1961) (“The Constitution of Delaware does not deny to the Legislature the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards while leaving to selected agencies [...] the power to make subordinate rules within prescribed limits.”)

⁴⁵ *In re Request of Governor for an Advisory Opinion*, 12 A.3d 1104, 1110 (Del. 2009). See also *Atlantis I Condominium Ass’n v. Bryson*, 403 A.2d 711, 713 (Del. 1979); *Hoff v. State*, 197 A. 75 (Del. Super. Ct. 1938).

limits of the legislature’s power to delegate are clear—“Generally, a statute or ordinance vesting discretion in administrative officials without fixing any adequate standards for their guidance is an unconstitutional delegation of legislative power.”⁴⁶ In turn, “[u]nder some circumstances, legislation which vests discretion in administrative officials without defining the terms and conditions under which such discretion may be exercised has been found to be an unconstitutional delegation of legislative power.”⁴⁷ However, while “adequate safeguards and standards to guide discretion must be found in or be inferable from the statute, [...] the standards *need not be minutely detailed*, and *the whole ordinance may be looked into* [...] for purposes of deciding whether there are standards and if they are sufficient.”⁴⁸

The proscription against granting unbridled discretion to a delegated agency is specifically inapplicable, however, “where the discretion to be exercised relates to police regulation for the protection of public morals, health, safety, or general welfare, and it is impracticable, to fix standards

⁴⁶ *Atlantis I*, 403 A.2d at 713 (citing *State v. Durham*, 191 A.2d 646, 649 (Del. Super. Ct. 1963)).

⁴⁷ *State v. Braun*, 378 A.2d 640, 644 (Del. Super. Ct. 1977).

⁴⁸ *Atlantis I*, 403 A.2d at 713 (emphasis added) (quoting *Durham*, 191 A.2d at 649-50). See also *Request of Governor*, 12 A.3d at 1110 (“The General Assembly need not spell out every detail concerning the administration of a law.”).

without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will.”⁴⁹ Under those circumstances, “the delegation of legislative authority may be cast in general terms.”⁵⁰

That the enforcement of the sex offender registration statutes “relates to police regulation for the protection of public morals, health, safety, or general welfare” cannot reasonably be contested. Thus, to succeed in his challenge, Lamberty must establish: (1) that the legislature insufficiently defined the terms and conditions under which the Superintendent was to perform his duties; and (2) if so, that the statute cannot reasonably be construed to contain any reasonable implied standards. Because the police purposes of the registration statute—including to protect the public from dangerous individuals particularly prone to recidivism⁵¹—are clear and the provisions set forth in the statute are sufficient to guide the Superintendent in exercising his discretion, the registration statute is not constitutionally infirm.

⁴⁹ *Atlantis I*, 403 A.2d at 713 (quoting *Durham*, 191 A.2d at 649)). See also *Braun*, 378 A.2d at 644 (“[Challenges to legislative delegation have] not prevailed where the statute can be reasonably construed in the light of surrounding circumstances and the stated purpose of the statute so as to contain reasonable implied standards for the protection of the general welfare.”).

⁵⁰ *In re Dep’t of Natural Res. and Env’tl. Control*, 401 A.2d 93, 95 (Del. 1978).

⁵¹ See 11 Del. C. § 4120A(a).

In enacting the registration statute, the legislature authorized “any agency responsible for complying with [the statute] [to] promulgate reasonable regulations, policies and procedures.”⁵² However, before allowing the Superintendent to promulgate the necessary regulations, the legislature provided a substantial amount of guidance on how the Superintendent was to carry out his duties. As the State argued below and as Lamberty himself admits,⁵³ subsections (b), (c), (d), and (f) of section 4120 of Title 11 impose standards specifying the time allotted for initial registration, the contents of registration forms to be developed by the Superintendent, and the actions required of the Superintendent upon receiving a new registration. Subsection 4120(l) directs the Superintendent to report the registration information to the FBI. Subsection 4121(a)(3) commands the Superintendent to provide records of registration in a manner searchable by the general public; the statute further specifies what information shall be included and what information shall be excluded. Moreover, subsection 4121(j) requires the Superintendent to create a complete register of all registered persons and make that register available, via DELJIS, to all law-enforcement agencies. Thus, Lamberty cannot

⁵² 11 *Del. C.* § 4120(i).

⁵³ *Compare* A65 with Op. Brf. 18.

credibly argue that the registration statute vested discretion in the Superintendent “without fixing any adequate standards for [his or her] guidance.”⁵⁴ Rather, Lamberty’s complaint is merely that the statute does not impose his own preferred standards in one specific area.⁵⁵ Because Delaware’s nondelegation doctrine does not require this level of specificity, Lamberty has not met his burden of overcoming the statute’s presumptive constitutionality by proving, “beyond doubt,” the statute’s invalidity.⁵⁶

In granting the Superintendent the discretion to specify the operational locations for verification, the legislature necessarily recognized “the flexibility necessary to enable the administrative officials to carry out the legislative will.”⁵⁷ The Superintendent’s designation of the official verification locations was manifestly reasonable.⁵⁸ The registration statute

⁵⁴ *Durham*, 191 A.2d at 649.

⁵⁵ *See* Op. Brf. 18-19.

⁵⁶ *Klein*, 64 A.2d at 532.

⁵⁷ *Durham*, 191 A.2d at 649.

⁵⁸ Although Lamberty argues that, “taken to its logical conclusion, nothing in the current statute prevents the Superintendent from designating **no** locations as available for in-person registration or verification” (Op. Brf. 17-18) (original emphasis), logic itself requires the opposite result. Because an administrative agency may not adopt regulations “inconsistent with the provisions of the enabling statute” (*Dep’t of Natural Res. and Env’tl. Control*, 401 A.2d at 96), the Superintendent must designate at least a minimum number of verification locations in order to remain consistent with the statutory mandate that offenders shall verify their registration information “in person at locations designated by the Superintendent.” 11 *Del. C.* § 4120(g); 11 *Del. C.* § 4121(k).

mandates that the extensive catalogue of registration information collected pursuant to subsection 4120(d) must be “kept in digitized form in an electronic database maintained by the designated Delaware Police facility responsible for registration.”⁵⁹ The State Bureau of Identification (SBI), the “central repository for criminal history information in the State of Delaware,” is headquartered at one of the designated verification locations (Blue Hen Corporate Center in Dover), and has an office at the other (Delaware State Police Troop 2 in New Castle County).⁶⁰ Both locations have the facilities necessary to handle the needs of registration *and* database maintenance required by the statute, and are readily accessible by car and public transportation.⁶¹

Furthermore, the legislature’s grant of authority to the Superintendent is consistent with other, similar grants of authority to other state agencies. For example, Chapter 43 of Title 11 grants far greater discretion to the Department of Correction, Bureau of Community Corrections, to adopt

⁵⁹ 11 *Del. C.* § 4120(d)(2).

⁶⁰ DELAWARE STATE POLICE—STATE BUREAU OF IDENTIFICATION, <http://dsp.delaware.gov/StateBureauofIdentification.shtml> (last visited Aug. 14, 2014).

⁶¹ DART Routes 64 and 41 both stop near Troop 2. DART Route 107 stops directly in front of Blue Hen Corporate Center, with buses arriving and departing hourly.

standards and regulations applicable to probationers.⁶² Probation and Parole similarly requires in-person registration—of a far larger number of individuals—and does so without express legislative mandate. The legislature’s delegation of operational authority to decide on sex offender registration locations comports with its past practices, further showing that such delegation is not so clearly invalid as to overcome the registration statute’s strong presumption of constitutionality. In sum, the General Assembly did not unreasonably delegate its authority to the Superintendent because the delegating statute provided more than sufficient guidance to ensure that its legislative will was followed.⁶³

Finally, as a coda to his nondelegation argument, Lamberty briefly floats the possibility that, instead of striking down the registration statute on constitutional grounds, this Court could alternatively find that “the regulations imposed on homeless sex offenders are unreasonable as applied, in violation of 11 *Del. C.* § 4120(i).” (Op. Brf. 19). In essence, Lamberty has raised a new statutory construction argument dependent on the meaning

⁶² “The Department may adopt standards concerning the conditions of probation or suspension of sentence which the court may use in a given case.” 11 *Del. C.* § 4332(a). “The Department may adopt standards governing any program of house arrest for nonviolent offenders.” 11 *Del. C.* § 4332(b).

⁶³ *Cf. State v. Briggs*, 199 P.3d 935 (Utah 2008) (holding that the state legislature had not improperly delegated its authority where it empowered the Utah Department of Corrections to make and enforce rules and regulations governing sex offender registration).

of “reasonable” as used in the registration statute. Lamberty did not raise this argument below. Even if he had, his cursory mention of the issue in his opening brief, which fails to cite to a single case or authority in support of his argument, is insufficient to merit appellate review:

Under Supreme Court Rule 14, an appellant waives an argument if he does not argue its merits within the body of his opening brief. Our case law holds that the opening brief must *fully* state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error. If a party only casually mentions an issue, that cursory treatment is insufficient to preserve the issue for appeal. In order to develop a legal argument effectively, the opening brief must marshal the relevant facts and establish reversible error by demonstrating why the action at trial was contrary to either controlling precedent or persuasive decisional authority from other jurisdictions. If a party fails to cite any authority in support of a legal argument, we will deem that argument waived.⁶⁴

Even if Lamberty had not waived this statutory construction argument, the Court should decline to hear it because it was not fairly presented in Superior Court, but at best the Court would review the claim only for plain error.⁶⁵ Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to

⁶⁴ *Ploof v. State*, 75 A.3d 811, 822 (Del. 2013) (original emphasis) (internal quotations omitted). *See also Flamer v. State*, 953 A.2d 130, 134 (Del. 2008).

⁶⁵ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). *See also* DEL. SUPR. CT. R. 8 (“Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”).

jeopardize the fairness and integrity of the trial process.⁶⁶ Plain error review is “limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”⁶⁷ Lamberty fails to meet this high standard of review.

Lamberty argues that it is “simply unreasonable” for the Superintendent to expect “every sex offender in Delaware to verify their registration at two locations in the entire State.” (Op. Brf. 19). As mentioned above, the Superintendent’s designation of two SBI offices as verification locations is entirely reasonable given the registration and database maintenance requirements of the registration statute. Moreover, while the Superior Court, in denying Lamberty’s motion to dismiss, did not consider the question of whether the Superintendent’s regulations were “reasonable” under 11 *Del. C.* § 4120(i), it made the related factual finding that the designated reporting locations were objectively reasonable: “The Superintendent’s designation of the official verification locations was reasonable, as both facilities can handle vast administrative processes and are readily accessible to the public.” (A93). This finding, reached after

⁶⁶ *Wainwright*, 504 A.2d at 1100.

⁶⁷ *Id.*

substantial briefing by both parties (A9-86), was based on competent evidence and was not clearly erroneous.⁶⁸ Thus, Lamberty cannot show any “material defect” meriting reversal of his conviction under plain error.

CONCLUSION

Based on the authorities cited and the reasons stated herein, the judgment of the Superior Court should be affirmed.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/Scott D. Goodwin

Scott D. Goodwin
Bar ID No. 4862
Deputy Attorney General
820 North French Street
7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-5097

Dated: August 18, 2014

⁶⁸ *State v. Brower*, 971 A.2d 102, 107 (Del. 2009) (citing *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008)).

CERTIFICATE OF SERVICE

I, Scott D. Goodwin, Esquire, do hereby certify that on August 18, 2014, I have caused a copy of the State's Answering Brief to be electronically served, by Lexis-Nexis File & Serve, upon the following:

Santino Ceccotti, Esq.
820 North French Street
Wilmington, DE 19801
Attorney for Appellant

/s/ Scott D. Goodwin
Scott D. Goodwin (No. 4862)
Deputy Attorney General