

EXHIBIT 2

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III
AT NASHVILLE**

Mr. Kaminski visited Tennessee from August 8-18, 2022. (Kaminski AR 00041) He notified appropriate authorities in New York prior to departure and registered with the Memphis Police Department on the Tennessee Sex Offender Registry (“SOR”) upon arrival to Tennessee. (Kaminski AR 00006-8; Complaint, p.1-2).

After he returned to New York, he requested termination from the Tennessee SOR. (Kaminski AR 00033-49). Because Petitioner Kaminski’s offense of conviction was classified as a violent sexual offense under Tennessee Sex Offender Verification and Tracking Act (“the Act”), the TBI denied his request for termination on the basis that he is required to remain on Tennessee’s SOR for life. (*Id.*) Petitioner subsequently filed a timely appeal of the TBI’s denial of his termination request. (Complaint, p.1).

LEGAL STANDARD

The Uniform Administrative Procedures Act (“UAPA”) applies to the review of TBI denials of requests for termination of registration under SOR. Tenn. Code Ann. § 40-39-207(g)(1); *see also Miller v. Gwyn*, 2018 WL 2332050, at *2 (Tenn. Ct. App. May 23, 2018), no perm. app. filed; *see also Clark v. Gwyn*, 2019 WL 1568666, at *3 (Tenn. Ct. App. Apr. 11, 2019). “The review shall be conducted by the court without a jury and shall be confined to the record.” Tenn. Code Ann. § 4-5-322(g). Judicial review of an administrative agency’s decision under the UAPA is narrow and deferential. *StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 668 (Tenn. 2016). “The [UAPA] makes clear that a reviewing court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Id.* at 669. “Findings, inferences, conclusions or decisions” of an agency may only be reversed or modified if they are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) arbitrary or capricious or characterized by abuse of discretion or clearly

unwarranted exercise of discretion; or
(5)(A) unsupported by evidence that is both substantial and material in light of the entire record.

Tenn. Code Ann. 4-5-322(h)(1)-(5). “This narrow standard of review... reflects the general principle that courts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise.” *StarLink Logistics, Inc.*, 494 S.W.3d at 669. “Courts do not review questions of fact de novo and, therefore, do not second-guess the agency as to the weight of the evidence . . . even if the evidence could support a different result.” *Id.* Courts only examine “an agency’s factual findings to determine whether they are supported by substantial and material evidence in the record.” *Clark*, 2019 WL 1568666, at *3.

An administrative decision “is arbitrary or capricious when there is no substantial and material evidence supporting the decision.” *StarLink Logistics Inc.*, 494 S.W.3d at 669. Substantial and material evidence is “less than a preponderance of the evidence” and “more than a ‘scintilla or glimmer’ of evidence.” *Id.* (quoting *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988)). A decision that amounts to a clear error in judgment can be arbitrary or capricious, but where there is room for two options, “a decision is not arbitrary or capricious if it is made honestly and upon due consideration.” *StarLink Logistics Inc.*, 494 S.W.3d at 669-70 (quoting *Bowers v. Pollution Control Hearings Bd.*, 13 P.3d 1076, 1083 (Wash. 2000)). “The ‘arbitrary or capricious’ standard is a limited scope of review, and a court will not overturn a decision of an agency acting within its area of expertise and within the exercise of its judgment solely because the court disagrees with an agency’s ultimate conclusion.” *Id.* at 670.

When interpreting a statute during review of an administrative agency’s decision, a court should carry out the legislature’s intent and intended scope. *Coleman v. Olson*, 551 S.W.3d 686,

694 (Tenn. 2018). It is essential that a court not “alter or amend statutes or substitute [the court’s] policy judgment for that of the Legislature.” *Id.* (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013)). To determine legislative intent, a court must discern the words’ “natural and ordinary meaning in the context in which they appear and in light of the statute’s general purpose.” *Id.* (quoting *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012). When this meaning is clear and unambiguous, the statute must be enforced as written. *Id.*

ANALYSIS

PETITIONER MUST REMAIN ON THE TENNESSEE SOR FOR LIFE BECAUSE HE ESTABLISHED A PHYSICAL PRESENCE IN TENNESSEE AND HIS NEW YORK OFFENSE IS A QUALIFYING CONVICTION.

As set forth above, judicial review of a denial of a termination request by the TBI is available under the UAPA, Tenn. Code Ann. §§ 4-5-101 to -325. *Clark*, 2019 WL 1568666, at *3. This Court is only permitted to review the TBI’s “[f]indings, inferences, conclusions or decisions.” Tenn. Code Ann. § 4-5-322(h). Likewise, this Court’s review “shall be confined to the record.” Tenn. Code Ann. § 4-5-322(g). Accordingly, the record shows that Petitioner Kaminski’s New York offense would be classified as “a violent sexual offense if committed in this state.” Tenn. Code Ann. § 40-39-202(1). Additionally, because he is registered on the New York Sex Offender Registry, he must register in Tennessee upon establishing a physical presence in Tennessee. *See* Tenn. Code Ann. § 40-39-203(a)(2). An individual who must register with SOR for life has no means for termination from the list, regardless of where they reside. *See generally*, Tenn. Code Ann. §§ 40-39-201-218. Finally, all other claims are barred because they are original claims that may not be raised “in conjunction with an action that is appellate in nature, such as judicial review.” *Universal Outdoor, Inc. v. Tennessee Dep’t of Transp.*, No. M2006-02212-COA-R3-CV, 2008 WL 4367555, at 9 (Tenn. Ct. App. Sept 24, 2008).

PETITIONER'S NEW YORK OFFENSE IS A VIOLENT SEXUAL OFFENSE.

Mr. Kaminski's New York offense is a "violent sexual offense" as defined by the Act. Tenn. Code Ann. § 40-39-207(g)(2)(B). Furthermore, while a New York court has determined not to designate him as a violent sexual offender, the new classification that he has been granted has no bearing on the type of offense for which he was convicted of, nor on the fact that he remains on New York's Sex Offender's Registry.

An "offense committed in another jurisdiction that would be classified as a sexual offense or a violent sexual offense if committed in this state shall be considered a conviction." Tenn. Code Ann. § 40-39-202(1). A violent sexual offender is a person who has been convicted of "committing a violent sexual offense or has another qualifying conviction." Tenn. Code Ann. § 40-39-202(30). A violent sexual offense is "the commission of any act that constitutes the criminal offense" of, but not limited to, the following: "aggravated rape", "rape", "aggravated sexual battery." Tenn. Code Ann. § 40-39-202(31); *see generally*, Tenn. Code Ann. § 40-39-202(31)(A)-(AA).

In 1980, Petitioner was convicted of rape in the first degree with the use of force in New York. (Kaminski AR 00002-3). Under New York Penal law, a person is guilty of rape in the first degree "when he or she engages in sexual intercourse with another person: (1) By forcible compulsion." N.Y. Penal Law § 130.35(1) (1979). Sexual intercourse "occurs upon any penetration, however slight." N.Y. Penal Law § 130.00(1) (1979). Forcible compulsion "means to compel by either: (a) use of physical force; or (b) a threat, express or implied." N.Y. Penal Law §§ 130.00(8)(a)-(b) (1979).

If Petitioner had committed the offense in Tennessee, he would have been convicted of a violent sexual offense because his offense would have been classified as "rape." In Tennessee, rape is the unlawful sexual penetration of a victim by the defendant . . . accompanied by . . . force or coercion." Tenn. Code Ann. §§ 39-13-503(a)-(a)(1). Sexual penetration means "sexual

intercourse” or “any other intrusion, however slight.” Tenn. Code Ann. § 39-13-501(7). Coercion means “threat of kidnapping, extortion, force or violence to be performed immediately or in the future.” Tenn. Code Ann. § 39-13-501(1).

Consequently, Tennessee’s definition of rape and New York’s definition of rape in the first degree are one and the same. Because Petitioner Kaminski’s conviction of rape in the first degree would be considered rape in Tennessee, and rape is considered a violent sexual offense in Tennessee, his New York conviction is considered a violent sexual offense under Tennessee law.

Finally, Petitioner argues that due to protection provided by *Doe v. Pataki*, the change in the level of classification under New York law must be carried over, also relying on *Lingle v. State*, because the court held that the other state’s determination carried over. *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998), *Lingle v. State*, 164 Ohio St.3d 340 (2020). However, that case is an Ohio Supreme Court case and is not binding on this court. Furthermore, the court in *Lingle v. State*, was determining how a trial court should assess an offender’s classification when they move to Ohio. *Id.* Specifically, when an offender, who was previously required to register for life in another state, upon moving to Ohio alleges his classification in the previous state would not be similar in Ohio. *Id.* at 342. The *Lingle* court further held that a trial court must “examine *why* the out-of-state offender was required to register for life and whether that reason is substantially similar to a classification as a sexual predator in Ohio.” *Id.* at 350 (emphasis added). Thus, *Lingle* not binding on this court, but it also does not support Petitioner’s argument that Tennessee is required to carry over New York’s determination.

Additionally, the New York court refrained from designating Petitioner as a “violent sexual offender” not because it concluded he should have no designation, but because they refused to “neither consider nor render a determination” as to a designation. (Kaminski AR 00058). The

court order was a redetermination of the classification of Petitioner as a “level-two” classification, which refers to the offender’s “risk of re-offense” and not to the classification of the offense at the time of Petitioner’s conviction in 1980. *Doe v. Pataki*, 120 F.3d 1263 (1997); (Kaminski AR 00059). Petitioner’s re-classification has no bearing on the Petitioner’s 1980 conviction, which is what is used under the Act to determine registration requirements for SOR in Tennessee. *See* Tenn. Code Ann. § 40-39-202(1). Thus, the status of Petitioner’s conviction as a violent sexual offense has not changed.

PETITIONER ESTABLISHED A PHYSICAL PRESENCE IN TENNESSEE.

Petitioner Kaminski established a physical presence in Tennessee when he remained in Memphis, Tennessee for more than 48 hours. Regardless of an offender’s date of conviction... an offender whose contact with this state is sufficient to satisfy the requirements... is required to register as any form of sexual offender... if the person was required to register as any form of sexual offender... in another jurisdiction prior to the offender’s presences in this state.” Tenn. Code Ann. § 40-39-203(a)(2). Upon entry into the State, Petitioner was required to register “[w]ithin forty-eight (48) hours of establishing or changing a primary or secondary residence, establishing a physical presence at a particular location... in this state.” Tenn. Code Ann. § 40-39-203(a)(1).

Because he is a registered sex offender in the state of New York, Petitioner was required to register, as he did, in Tennessee, because he “established a physical presence... in this state” within “forty-eight (48) hours.” Tenn. Code Ann. § 40-39-203(a)(1)-(2). Petitioner argues that his primary residence is in New York not Tennessee, and that therefore presents a problem with the registration requirement. However, the statute does not require only that the offender establish or change his primary residence, but also if he changes or establishes a secondary residence in

Tennessee, or if he “establish[es] a physical presence at a particular location” in the state of Tennessee.

Establishing a physical presence does not require residency or an intent to establish residency. The Act distinguishes between an offender from out of state who “established a primary or secondary residence within this state *or* has established a physical presence at a particular location.” Tenn. Code Ann. § 40-39-203(c). The statute specifically refers to “primary or secondary residence” apart from “establishing a physical presence,” “establishing a physical presence” does not turn on residency. *Id.* Under Tennessee’s SOR, Petitioner established a physical presence in the state of Tennessee when he stayed in Tennessee from August 8, 2022 to August 18, 2022. (Kaminski AR00041). Petitioner correctly registered within 48 hours of establishing a presence in Tennessee.

PETITIONER MUST REMAIN ON THE REGISTRY FOR LIFE.

Petitioner Kaminski must remain on the registry for life because his conviction is classified as a violent sexual offense. An offender “required to register under this part shall continue to comply with registration, verification and tracking requirements for the life of that offender, if that offender... has been convicted of a violent sexual offense.” Tenn. Code Ann. § 40-39-207(g)(2),(g)(C). The only avenue for termination of registration requirements belongs to offenders who only have one conviction for sexual offenses and do not have a conviction for violent sexual offense(s). See generally, Tenn. Code Ann. § 40-39-207.

Under the Act, persons convicted of a violent sexual offense must remain on the registry for life. Thus, there is no avenue for terminating Petitioner Kaminski’s registration under Tennessee law because Petitioner was convicted of a violent sexual offense.

Mr. Kaminski argues that because he left the state and his primary residence is in New York, his registration must be terminated. However, that is not the law in Tennessee. According

to the Act, he must remain on Tennessee's SOR for life regardless of where he resides once a presence has been established in the State. Moreover, the Act anticipates that an offender may leave the state, and it requires such an offender to update the registering agency in Tennessee of his or her new address and does not provide for removal from the registry. Tenn. Code Ann. § 40-39-203(a)(3). Furthermore, within forty-eight hours of a "change in any other information given to the registering agency by the offender... must report the change to the registering agency." Tenn. Code Ann. § 40-39-203(a)(4). Therefore, the Act anticipates offenders living out of the state and requires such offenders to not only remain on the registry but also to keep it up to date.

ALL OTHER CLAIMS ARE DISMISSED BECAUSE THEY ARE ORIGINAL CLAIMS AND MAY NOT BE BROUGHT ALONGSIDE JUDICIAL REVIEW OF AN AGENCY'S DECISION.

All other claims raised by Petitioner Kaminski in his complaint must be dismissed because they are original action claims and may not be brought alongside the judicial review of the TBI's decision. "A direct or original action cannot be brought in conjunction with an action that is appellate in nature, such as judicial review under the APA." *Universal Outdoor, Inc. v. Tennessee Dep't of Transp.*, No. M2006-02212-COA-R3-CV, 2008 WL 43675555, at *9 (Tenn. Ct. App. Sept. 24, 2008). "[J]oining appellate jurisdiction and original jurisdiction in one hearing will lead to procedural chaos bogged down in a quagmire of legal conflicts with reasoned law sinking in the quicksands of confusion." *Goodwin v. Metropolitan Bd. of Health*, 656 S.W.2d 383, 386-87 (Tenn. Ct. App. 1983). "Thus, when presented with both an action for judicial review and an original action, courts typically dismiss the original action. *See, e.g., Groves*, 2018 Tenn. App. LEXIS 703, 2018 WL 6288170, at *5 (affirming dismissal of original claim because the appellant 'impermissibly attempted to join a declaratory judgment action with his petition for judicial review')." *Poursaied v. Tenn. Bd. of Nursing*, 643 S.W.3d 157, 165; *see also Tenn. Envtl. Council v. Water Quality Control Bd.*, 250 S.W.3d 44, 58 (Tenn. Ct. App. 2007) (concluding

that the appellant's claim for breach of contract must be dismissed because it was an improper attempt to join a new cause of action to an action for judicial review of an administrative decision).

The subject petition before this Court is one for judicial review of the TBI's decision not to terminate Petitioner's registration on Tennessee's SOR, which is appellate by nature. *Universal Outdoor, Inc.*, 2008 WL 43675555, at *9. All other claims by Petitioner Kaminski were not raised when he initially sought to terminate his registration from Tennessee's SOR. In "Point One" Petitioner raises claims against Memphis Police Sergeant, Darrin Seitz, about information that was told to Petitioner by Officer Seitz that was incorrect or false. In "Point Two," Petitioner raises claims about incomplete procedure at the time Petitioner completed registration for the Tennessee SOR at the Memphis Police Department. In "Point Four," Petitioner claims privacy issue regarding documents that were prepared at the time of his registration. These claims are original actions by nature that were not raised when Petitioner sought to be terminated from the SOR, and thus it is improper to join them in this an action for judicial review.

Furthermore, although he has alleged constitutional claims including due process, equal protection, and ex post facto, each of these claims are likewise original causes of action. (Plaintiff's Brief, p.7-13). This Court's review at this juncture is limited. Courts review an agency's "[f]indings, inferences, conclusions or decisions" to determine whether there are "violation[s] of constitutional or statutory provisions" in the agency's decision. Tenn. Code Ann. § 4-5-322(h)(1). Petitioner's constitutional claims do not relate to the TBI's "findings, inferences, conclusions or decisions" in refusing to terminate Petitioner's registration from SOR. TBI's actions were likewise not arbitrary nor capricious because, as previously discussed, Petitioner's offense is considered a violent sexual offense as per the Act and must remain on the registry for life. Petitioner's

Constitutional claims are outside the purview of the TBI's actions and findings of fact because they relate not to the TBI's decision not to terminate Petitioner from Tennessee's SOR, but to the Constitutionality of the Act itself and the SOR. Thus, they are original claims of action that are improperly raised alongside a petition for judicial review.

Consequently, all other claims must be dismissed because they are original causes of action that are improperly raised alongside a petition for judicial review of the TBI's decision not to terminate Petitioner's registration.

CONCLUSION

Based upon the foregoing facts of record and law, the Petitioner Kaminski is required under Tennessee's SOR to remain on the registry for life. It is **ORDERED** that the decision of the TBI is **AFFIRMED**. Furthermore, it is **ORDERED** that the original action claims are **DISMISSED** without prejudice for lack of jurisdiction. Costs are taxed to Petitioner.

IT IS SO ORDERED.

s/T'Ashea L. Myles
T'ASHEA L. MYLES, CHANCELLOR
CHANCERY COURT, PART III

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