No. 17-1333

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID MILLARD, EUGENE KNIGHT, AND ARTURO VEGA,
Plaintiffs-Appellees,

v.

MICHAEL RANKIN, DIRECTOR OF THE COLORADO BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Richard P. Matsch, Senior Judge
District Court No. 13-cv-02406-RPM

Appellees' Answer Brief

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Introduction

Through the Colorado Sex Offender Registration Act, Colorado set up a system of grouping together disparate individuals who have been judicially linked to a vast range of statutorily defined "unlawful sexual behavior," and serving up these villainized individuals to the public for their just deserts. SORA labels these individuals "sex offenders," collects their names, addresses, height, weight, identifying characteristics, crimes and photographs of their faces, and commands the publication of this information to the fearful public.

Speaking for the Supreme Court, Justice Kennedy wrote in *Lawrence v. Texas*—decided the same term as *Smith v. Doe*[1]—"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places" and "[i]n our tradition the State is not omnipresent in the home."[2] The requirement of sex offender registration for individuals convicted under the Texas sodomy law *sub judice*, he said, "underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition."[3]

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[1]538 U.S. 84 (2003).

[2]539 U.S. 558, 562 (2003).

[3]*Id.* at 576.

This case asks whether liberty protects persons not from direct governmental intrusions into their homes but from "consequential" governmental intrusions into the most fundamental facets of their lives in a way more pernicious than in *Lawrence*: collecting and publishing to the public the personal, identifying and home information of three socially stigmatized criminal defendants who have been returned to a society openly hostile to their presence.

Issues Presented for Review

1. Whether the Sex Offender Registration Act, as applied to Plaintiffs, violates the right to substantive due process guaranteed by the Fourteenth Amendment because it erects an unconstitutional irrebuttable presumption that they will reoffend and because its punitive effects are "grossly excessive" in relation to the State's interest in public safety.

2. Whether the State deprived Plaintiff Vega of procedural due process, guaranteed by the Fourteenth Amendment, by refusing to terminate his registration obligation unless he produced evidence the State destroyed and unless he proved he was unlikely to reoffend.

3. Whether the Colorado Sex Offender Registration Act, as applied to the Plaintiffs, violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Statement of the Case

Colorado Sex Offender Registration Act ("SORA"). SORA[4] creates a detailed, comprehensive registration system identifying an extraordinary range of individuals in the criminal justice system, and potentially for the rest of their lives: marking them with a "sex offender" label, tracking them, and publicizing potentially for life via the Internet their personal information, including a photograph of their faces and the addresses to their home.

SORA lists more than thirty misdemeanor and felony sex offenses[5]—which SORA collectively refers to as "unlawful sexual behavior," § 16-22-102(9)—that will trigger sex offender registration. Registration is required if a person is (a) convicted of any of the offenses, (b) convicted of an offense in which "the underlying factual basis involves" any of the offenses, and (c) released from the custody of the state department of corrections after serving a sentence for any of the offenses or an offenses with the requisite "underlying factual basis." § 16-22-103(1)-(2).

Children are not exempt from the registration requirement: any child adjudicated delinquent based on committing "any act that *may* constitute unlawful

[4]C.R.S. §§ 16-22-101 to -113 (2017).

[5]*See, e.g.*, § 16-22-102(9).

sexual behavior," i.e., the more than thirty offenses, must register. § 16-22-103(3). The legislature made one exception. A court may exempt a person from registration under section 16-22-103(3) upon determining that registration "would be unfairly punitive" and other statutory factors are met. § 16-22-103(5)(a).

Registration as a sex offender. A new registrant must register with her local law enforcement agency within five days of release from incarceration. § 16-22-108(a)(I). The timing of reregistration on an annual basis is linked to the sex offender's birthday—reregistration must occur within five days of her birthday. § 16-22-108(1)(b). If an individual is designated a "sexually violent predator" or was convicted of certain unlawful sexual behavior, she must register quarterly for the remainder of her life. § 16-22-108(1)(d).

Failure to register or otherwise comply with SORA is a crime. §§ 16-22-103(6); § 18-3-412.5(2) to -412.5(3), C.R.S. (2017).

Information required of sex offenders. A registrant must provide on a Colorado Bureau of Investigation-approved form her name, birth date, address, place of employment, all names previously used, the identity of any school she is attending, her vehicle's identification number and, for certain registrants, e-mail addresses. *See* § 16-22-109(1). She must also provide at each registration a current photograph and complete set of fingerprints. § 16-22-108(6). The CBI maintains

this information in a statewide central registry of sex offenders. *See* §§ 16-22-109(3) & -110(1).

Disclosure of sex offenders' personal information. SORA requires the CBI to provide the registrants' information to the public. First, the CBI must post on the Internet a list of persons convicted of certain sex offenses. § 16-22-111(1). The list must contain at least these registrants' names, addresses, physical descriptions, and offenses they were convicted of. *Id.* The physical description must include at least the person's sex, height, weight, identifying characteristics, and a photograph of the person. *Id.* SORA permits but does not require the CBI to post on the Internet each sex offender registrant who was convicted of a single unlawful sexual behavior felony. § 16-22-111(1.5). The CBI has chosen to include such sex offenders. A914.

Second, the CBI must provide upon request a list of persons on the sex offender registry. The list is required to include "at a minimum" the following information: the registrant's name, address, aliases, birth date, photograph, and the offense of conviction requiring her to register. § 16-22-110(6)(c) & (f).

The CBI's practice of disclosing information via the Internet and public request for a sex offender list distinguishes (a) between registrants whose unlawful sexual behavior was adjudicated when they were children ("juvenile-delinquency

registrants"), and registrants who were convicted of unlawful sexual behavior as adults, and (b) between misdemeanor unlawful sexual behavior and felony unlawful sexual behavior.

The CBI does not distribute via the Internet, the personal information of juvenile-delinquency registrants or registrants convicted of misdemeanors. A883. The CBI does distribute via the sex offender registry list the personal information of juvenile-delinquency registrants or registrants convicted of misdemeanors. A882-883, 937-38. That is to say, a person upon request could obtain from the CBI the same information about a juvenile-delinquency registrant the same personal information he could obtain from the CBI about a registrant convicted of felony sex offenses. *See id.*

Since the creation of the sex offender registry and the CBI's publication and disclosure of personal information of the registrants, businesses have emerged that republish on the Internet the personal information of the registrants. A732-33. There are no regulations or other limitations on republication. A887.

Requesting removal from the registry. Registration on the sex offender registry is for life unless the registrant is eligible to petition to deregister and does so successfully. Some sex offender registrants are ineligible to deregister and must register for "the remainder of their natural lives." § 16-22-113(3). All other

registrants are or may become eligible to petition to deregister. If the registrant's unlawful sexual behavior for which she was required to register was a class 1, 2 or 3 felony and if she has not subsequently been convicted of another unlawful sexual behavior, she may petition a court to deregister twenty years after her discharge from incarceration or release from the jurisdiction of the court presiding over the offense. § 16-22-113(1)(a). For lower level felonies, the registrant may petition after ten years from discharge or release if she has not subsequently been convicted of another unlawful sexual behavior. § 16-22-113(1)(b).

A person on the registry because of a juvenile adjudication may petition after "the successful completion of and discharge from a juvenile sentence" if he has not been subsequently convicted for unlawful sexual behavior. § 16-22-113(1)(e). In determining whether to grant the petition "the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior." *Id.*

Plaintiff Millard. Millard was convicted of second degree sexual assault under section 18-3-403 nineteen years ago, in 1999. A172, 202. He was sentenced to eight years' probation and ninety days of jail. He completed offense-specific treatment and completed his sentence in October 2007. He has no other arrests or offenses. A966-68.

Millard has registered quarterly with the sex offender registry for the last seventeen years—forty times since completing his sentence. A969, 979. He is required to register "for the remainder of [his] natural li[fe]," § 16-22-113(3)(b)(I).[6] His listing on the registry has harmed him repeatedly.

For fourteen years Millard has been working at Albertsons, a large national grocery store chain. He constantly feared his employer and others would learn he was listed on the sex offender registry. A971-73, A978.

In 2014 a customer obtained registry information, including a photograph, from the Internet that Millard was listed on the registry. The customer notified Millard's boss at the grocery store, saying he was "concerned." Millard was moved to a different store. Later a co-employee later discovered he was a registrant and told other employees. *See* A975-77.

Millard was told the store cannot "take the repercussions of people knowing [of his sex-offender registration] because it would spread so fast "I would have to

[6]The district court incorrectly said Millard was convicted of second degree sexual assault on a "minor" and is eligible to petition to be removed from the sex offender registry in 2017. A700. Millard's offense involved his 18-year-old daughter, who accused him of forcible sexual assault. He and his daughter met with a therapist in 2013 to address the incident. A336. Millard is subject to sex offender registration for the rest of his natural life because he was convicted as an adult in 1999 of second degree sexual assault. *See* § 16-22-113(3)(b)(I).

leave the store"; "they will not [replace] me again, [sic] I will lose my job." He "worr[ies] . . . every day" that other store customers will learn he is a registrant on the sex offender registry. "There are advocates out there that do not like sex offenders . . . ." A978.

Millard conducted a Google search in 2014 and was "shocked" to see the information published about him. His name as a sex-offender registrant "popped up like a Christmas tree" on five to seven web sites, which published information about his offense, his address, and the scars on his arm. A973-74. An Internet search produces numerous hits, each of which is associated with a company that republishes current personal and home information from the registry. A993, A1254-55. One website published information about his conviction "that was totally wrong." A974.

Because he is listed on the registry Millard has been living a stressful and anxious life, experiencing harm and fear and constantly anticipating "retaliation"—that others will harm him and his family and that he will lose his job. *E.g.*, A975. In 2009 when he could not find a place to live, "I had to live with my mother for a while [sic]." Once when he left his mother's house two individuals walking by said, "there's that F'ing sex offender." Someone keyed his car. On another occasion someone broke into his car. A980.

In 2006 he was asleep in the early morning hours when he heard multiple gunshots behind his apartment. He did not know whether the gunfire was directed at him. However, "when you are a registered sex offender, you don't know. I mean, you just—you—you—you watch your back." He was afraid. "I feel there's a lot of people out there that don't like sex offenders and they think you are a child molester, . . . and they want to cause harm and they want to torment you or terrorize you and hurt you in any way." A980-81.

He fears physical harm from being listed in the sex offender registry; so he confines himself to his home. "I'm always in the house. I stay in the house. I go to work and I go home. I don't go out. I don't go out in my yard. I don't do anything." He does not socialize. "[I]t's not worth it. You know, it's easier just to stay home. It's easier to be a hermit sometimes." If he must go somewhere other than work "I go at nighttime, I don't go out in the daytime and I always wear a baseball cap." A982.

In 2005 Channel 7 News broadcast its "investigation" into the presence at Millard's apartment complex of multiple persons whose names, addresses, physical appearances, offenses of conviction and photographs could be found in the sex offense registry. *See* Supp.A9A (DVD); A983-84. Millard "happened to watch the news that night and saw [his] name pop up on the screen" as one of the registrants

identified in 7News' "investigation" into "sex offenders" purportedly gathered and living together among other members of the community. A984; Supp.A9A (DVD).

On its website Channel 7 News published an associated article. It began by telling a story about a "sexual predator's" decision to "move[] into" a local neighborhood. The article reported that the "sheriff" organized "everyone"—including "parents"—in the neighborhood to tell them about the "predator":

> No parent wants to move into a neighborhood full of sex offenders, but our 7News investigation found that parents asking the right questions may still get the wrong information.
>
> When [a] convicted sexual predator . . . moved into a Highlands Ranch neighborhood, the sheriff's department sent letters and organized a meeting, making sure everyone knew his name, his criminal history and where he now lives.
>
> "There's kids always playing out in their yards. I am concerned for their safety," said parent Linda Wasem.

A1274.

The story reported that although various apartment complexes allegedly conducted criminal background checks and barred persons with felonies from

renting there,[7] the "public" sex offender registry records "tell a different story," "Three sex offenders" resided at the Highline Terrace Apartment complex in southeast Denver. "[N]ine registered sex offenders" resided at the Rob Roy Apartments. "Six registered sex offenders" resided at the Summit Ridge Apartments," where Millard resided. A984, 1274-75.

"[P]erhaps the most troubling information," 7News reported, came from the Cherry Grove Apartments, to which it "sent in a mom and her 5-month old [sic] daughter along with a 7News investigator." A1275. The "mom" told the leasing agent her 5-month-old daughter's safety "is my No. 1 priority." In response the agent said felons are not permitted to live there. "But once again," 7News reported, the sex offender registry records "show 18 registered sex offenders." A1276. After disclosing this fact to a Cherry Grove mother, whose "two children play there every day," the mother said: "I am shocked right now. I don't know what to think or what to say. . . . I don't feel safe with the children being around here." A1276.

[7]Millard resided at one of the complexes. When he applied to be a tenant, he provided full and truthful information; he never was asked whether he had a felony conviction; he never was told there would be a background check. A984.

Following the broadcast Millard was "horrified" and "scared." A986. The apartment complex manager soon afterward posted a letter on his door ordering him to leave "within 30 days." A986.

After leaving Millard could not find housing. He lived with his mother for three years. A987. He filled out more than 200 rental applications. "I always got no, no, no every time." A987.

Although Millard owns his own home now the consequences of being on the sex offender registry continue to disrupt his life in his home and impair his ability to live peaceably in his community. When he first moved into his home the neighbors "were really cordial." A989.

Then came the Denver Police Department's sex offender unit's numerous, purposefully conspicuous and loud visits to this home. For example, shortly before testifying in the trial of this case the DPD unit twice visited his home; because he was not home, each time the DPD officers affixed onto his front door a bright neon notice for Millard to call the unit; it was directed to: Registered Sex Offender. A989. On one occasion when an officer from the unit said he had posted the notice on his front door, Millard asked his boss for permission to go home and remove the notice. "I was scared that one of my neighbors would see it." A990. On another occasion an officer from the unit banged loudly on Millard's door and loudly

announced—within earshot of neighbors— "we're here to . . . do a home check for sex offenders." A990-91. Millard was "totally mortified." A991. At his previous residence in an apartment the DPD unit officers affixed the same notices to his apartment door. "[A]nybody that walked by could see it." A992.

After these incidents the neighbors at the apartment gave Millard "the cold shoulder." A992. The neighbors at his current home "don't talk to me. They don't associate with me anymore." A989.

Plaintiff Knight. Knight is married and is the "full-time father around the clock every single day" of two young children. *See* A1020-22.

In 2005, when he was 18 years old, his sister in law accused him of trying to put his finger in her 3-year-old's vagina. A271. Knight maintained his innocence but in 2007, to avoid a potential life sentence under Colorado's sex offender laws he took an *Alford* plea to attempted sexual assault on a child. A462, 704-05, 1010. Attempted sexual assault on a child is a class 5 felony. *See* §§ 18-2-101(4) & 18-3-405(2).

Knight was sentenced to ninety days jail and eight years supervised probation. A1010. His probation was revoked after he was unable to continue paying for offense-specific treatment. A463-64, 1010. He was resentenced to two years imprisonment. After he was paroled his therapist opined Knight did not "fit

the criteria of a criminal-minded individual" and "didn't understand why [Knight] was there." In 2011 he was discharged from parole. A1013. Since his parole he has not been accused of any other sex offense or sexually inappropriate conduct. A1012-14.

Knight registered as a sex offender. A1015. Because he was discharged in 2011 he is eligible to petition to deregister in 2021. A705; *see* § 16-22-113(1)(b).

Since service of his sentence, Knight has been accused only once—mistakenly—of a crime. A705. In 2013 Knight was living with his father in law. Police officers went to the residence to verify his location; someone—perhaps a friend of his father in law—answered the door and said he did not know Knight, i.e., could not verify his residence. Knight was later arrested for failure to register. After bonding out and two court appearances the judge dismissed the charge. A1015-16.

Although his offense was attempted sexual assault on a child, the registry incorrectly listed his offense as "sexual assault on a child." A602-03; A1017. Private businesses republishing the registry, such as KidsLiveSafe, have republished the same incorrect information. *See* A1267; *see generally* 1256-1268. KidsLiveSafe notifies via email persons on its advertisement list if any person on

the SORA registry is living nearby. In large color print the email warns of "a risk of Sex Offender activity in your area":

From: **Sex Offender Map – Kids Live Safe** UCMOHY85Y9@neinformation.uk
Subject: eddiephilatelic: Child Predator Alert in your area
Date: August 26, 2016 at 3:58 PM
To: eddiephilatelic@hotmail.com

NEIGHBORHOOD SAFETY WARNING!!!

You are receiving this email because there may be a risk of Sex Offender activity in your area.

If you would like to know **who they are, where they live,** and **how you can protect your family** from sexual predators,
please click here.

Note: the website you are about to access contains actual sex offender information. Please use extreme caution when utilizing this service.

Learning the truth about who lives near your family can be shocking and disturbing. By proceeding you agree to utilize Kids Live Safe solely for informational purposes and to protect your children and loved ones.

I Understand and Want to Proceed >>

This is a Kids Live Safe advertisement. To unsubscribe, write to us at the address below or Click here. Kids Live Safe is not a Government Agency or in any way associated with the Government.
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A1252.

Knight picked up and dropped off his children from school; in 2014 his daughter attended first grade and his son attended preschool. Dropping them off

involved walking his son into class and "wav[ing] him good-bye." Picking them up required Knight to walk into school and sign a form. A1020-23.

In fall 2014 the school principal told Knight that "[e]ffective immediately" he was barred from stepping foot on the grounds of the school "and all other [Denver Public School] schools and facilities." The reason given was his "status as a registered sex offender." A1278. The school sent Knight a formal letter stating that this sex offender registry "status . . . is in violation of" a school district policy prohibiting "disruption of teaching or administrative operations, and the creation of an unsafe/threatening environment for . . . students and staff members." A1278. The principal admitted Knight had not done anything to violate the policy. A1233-34. The ban has continued each year. A1026, 1238. Under the ban he is not permitted to go to school concerts, parent-teacher conferences or sporting events. A1050-51. Knight's daughter has expressed concern or anxiety, asking often why he is not permitted to enter the school. A1024-25.

Plaintiff Vega. Vega has a family and has worked in the same field for many years. A1452-53, 1456.

When he was 13 years old he was accused of inappropriately touching several of his peers. A1478, 1506. The incident occurred so long ago that Vega remembers only hugging and kissing a classmate at a park. A1470. He remembers having

arguments but no sexual contact with other neighborhood children who accused him of inappropriate touching. A1471. Nonetheless at that time three to four children accused Vega of trying to "hug them or touch them inappropriately, whether it was touching their breasts, touching their crotch over their pants, or attempting to touch them in that manner." A1479. With two of the children the contact was over the clothes. A1478. A judge hearing Vega's 2012 deregistration petition said police reports indicated that the 13-year-old Vega "tried to touch" the girl's breasts but "it's unclear to me whether or not he actually did that." A1479.

When Vega was 15 he pleaded guilty and was adjudicated delinquent of third degree sexual assault, § 18-3-404, a class 4 felony. A707, 1055, 1531. He was sentenced to probation. A707. His probation later was revoked and he was sentenced to serve two years at the Division of Youth Corrections Lookout Mountain facility. He attended and completed sex offender treatment as required. A707, 1057, 1468. He was released in May/June 2000 and on parole for about a year during which he attended sex offender therapy. A707, 1058. He successfully completed parole. A1058, 1421-23.

SORA requires a person convicted of third degree sexual assault to register. § 16-22-102(9)(c). Vega did not understand the sex offender registration requirements. A707. No one told him he could be on the registry for the rest of his

life. A1056. Shortly after completion of his juvenile sentence Vega was charged with misdemeanor failure to register as a sex offender. He was convicted and fined. A708. Because the sex offense requiring him to register was a juvenile adjudication, Vega does not appear on the CBI website publishing information about those listed in the registry. But his registration information—including his name, address, and physical description, e.g., scars, marks and tattoos—is on the list of sex offenders that any member of the public can request from the CBI. A708.

Vega wants to be excluded from the sex offender registry because he believes the registry prevents him from securing a good job and housing. A1066. He is "tired of dealing with something that I did when I was a juvenile that I regret." A1067. He petitioned in 2006 and 2012 to deregister. Both petitions were denied. A708.

At his hearing on his 2006 petition Vega testified: While at Lookout Mountain he completed sex offender treatment; he was paroled for one year; during his parole he successfully completed offense-specific sexual therapy; neither his commitment nor his parole was extended; as an adult he has never been charged or convicted of unlawful sexual behavior; he works full-time and additionally works 10-40 hours overtime each week. A1421-23.

The district court made these findings: the registry "makes things more difficult for you throughout your life"; Vega proved he had no subsequent convictions for unlawful sexual behavior or related offenses and had completed his juvenile sentence since his discharge eight years earlier; this track record "does give the Court some reason to believe that there isn't as great of a likelihood that you will have subsequent convictions"; no Department of Youth Corrections information is available because "they have purged their records." A1440-41.

In denying the petition the court said its "biggest concern" was it did not "know enough at this point in time. And to allow you to remove yourself from the registration at this point in time is—would be too much of a leap of blind faith at this point in time." A1441. While acknowledging Vega testified he had successfully completed treatment, the court noted he could not remember where the treatment took place. "If you don't know where it was, I'm not as convinced that you learned a lot from them and that you were successful in completion of that." A1441. The court noted Vega could not remember what he "learned in treatment . . . . [Y]ou were not able to articulate those things to my satisfaction." A1441-42.

At the hearing on the 2012 petition, Vega told the court he wanted to put behind him his juvenile actions and "stay . . . positive, working, trying to support my family"; he has had a difficult time getting a job because of his inclusion in the

sex offender registry; "it's hard to take care of my family when it's hard to get a job." A1453, 1455. Vega again testified he completed treatment, was told by his treatment provider he had completed treatment, and had not reoffended; the parole board had information he had complied with treatment. A1467-68.

The court found "it's clear" Vega met the eligibility requirements for petitioning to deregister. A1490. "The sticking point," the court said, is whether it could find "he successfully completed offense specific treatment." A1490. "[T]he problem that I have is we don't have any records." A1491. The court acknowledged the State "purged all of their records after four years. And so, because of that . . . there are no records that exist to indicate that Vega had, in fact, completed offense specific treatment." A1491.

Nonetheless the court found Vega failed to establish he completed treatment. It based the finding on Vega's inability to "recall the victims or any specific details" of the offense and is "adamantly denying that he had sexual contact with any of these people despite the fact that he pled guilty." A1492. "And so, I find . . . that not only is he in denial, he is not admitting, but there is a lack of his ability to articulate what was learned in treatment." A1493. The court concluded Vega failed to prove "by a preponderance of the evidence that you have

completed treatment." A1494. The court suggested Vega obtain another sex offender assessment stating he was unlikely to offend." A1494.

Summary of the Argument

1. SORA imposes on each Plaintiff an irrebuttable presumption that he is a risk to commit another sex offense and therefore must suffer the consequences, punitive and otherwise, of incusion in the sex offender registry. For Millard the game is over since SORA prescribes that he must register until he dies. For Knight SORA imposes an irrebuttable presumption for a ten-year period during which no evidence could justify his removal from the registry. SORA imposed these irrebuttable presumptions upon Millard and Knight based solely on their sex-offense convictions, without any individualized determination about their risk to re-offend. While Vega is eligible to petition to de-register he nonetheless faces a *de facto* irrebuttable presumption: the state courts under SORA have required him to produce evidence from his juvenile detention that the State destroyed years ago.

2. Vega was deprived of his right to procedural due process. Applying SORA, the Colorado courts required Vega to prove he had completed treatment while in juvenile detention, the records concerning which the State had destroyed years earlier, and imposed upon him the burden he was unlikely to reoffend rather than require the State to prove he was likely to reoffend.

3. SORA violates the Cruel and Unusual Punishments Clause by creating a system that postconviction punishes persons who were convicted of sex offenses and who thereafter completed their sentences. The punishment takes two forms. These persons, under no criminal-law disability, are commanded to appear regularly—at least once a year on their birthdays—before police to surrender their personal information, including their photographs. SORA then disseminates to the public these persons' personal information, including their photographs and home addresses, effectively conscripting a hostile public to shame, shun, ostracize and harass them.

Argument

I. The district court correctly concluded that SORA deprives Plaintiffs of substantive due process.

The United States Constitution guarantees that no state will deprive any individual of due process of law. U.S. CONST. amend. XIV. Apart from the procedural protections afforded by the due procession clause, the Fourteenth Amendment also contains a substantive component. *Planned Parenthood v. Casey*,

505 U.S. 833, 846-47 (1992). The district court below properly concluded SORA violated Plaintiffs' substantive due process rights.[8]

A. SORA violates Millard's right to substantive due process because it creates a mandatory registration system that irrebuttably presumes he is likely to reoffend.

SORA violates substantive due process because it creates a mandatory system of registration that irrebuttably presumes Millard is likely to reoffend. *See Stanley v. Illinois*, 405 U.S. 645, 650 (1972) (striking down an irrebuttable presumption requiring that children of unwed fathers became wards of the State upon the death of the mother); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 119–21 (1989) (describing when an irrebuttable presumption violates substantive due process).

Colorado law does not allow individualized assessments to determine a registrant's risk of reoffending before requiring registration. Nor does it allow registrants like Millard to offer evidence that, whatever their risk of reoffending when released from custody, it has changed over time. It instead irrebuttably presumes that those who commit designated offenses present a high re-offense risk for the rest of their life.

[8]This Court can affirm on any ground supported by the record and the law. *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1150 (10th Cir. 2008).

The State claims the purpose of its registry and website postings is not punishment but public safety because they identify persons who pose a heightened risk so that members of the public may protect themselves from those persons. Yet the State refuses to consider any evidence of whether those it requires to register in fact pose a heightened risk. Instead, Colorado law erects an irrebuttable presumption of risk that, in cases like Millard's, continues for the rest of his life without regard to what the registrant has done—and not done—in the decades following the single act triggering this presumption. Nothing the registrant does can affect the presumption and his registration status. Colorado's irrebuttable presumption of risk thus flies in the face of the single most well-established finding in criminology: The likelihood a released felon will re-offend declines with each year after release he remains offense-free. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 Criminology 327 (2009).[9]

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[9]This now classic study, funded by the Department of Justice, followed 88,000 individuals arrested in New York in 1980. *Id.* at 335.

This is in addition to the data "suggest[ing] that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually less likely to recidivate than other sorts of criminals." *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (citing Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003)).

The constitutionality of an irrebuttable presumption turns on "the adequacy of the 'fit' between the classification and the policy that the classification serves." *See Michael H.*, 491 U.S. at 121. For example, in *Stanley* , the Court struck down an Illinois law providing that children of unwed fathers became wards of the State upon the death of the mother. 405 U.S. at 646. Even though "due process of law does not require a hearing 'in every conceivable case of government impairment of private interest,'" *id.* at 650 (internal quotations omitted), the Court nevertheless held that the State must prove, at a hearing, a widowed father's unfitness as a parent before it could interfere with his "cognizable and substantial" interest in retaining custody of his children, *id.* at 652.

The same logic applies here. Millard has a substantial and cognizable interest in not being subject to lifetime sex offender registration and all its attendant burdens. *See Lawrence v. Texas*, 539 U.S. 558, 581 (2003) (recognizing constitutional significance of requiring sex offender registration).

In turn, the State cannot constitutionall require Millard to register as a sex offender until he dies absent evidence that he is likely to reoffend. *See Does #1-5*, 834 F.3d at 704-05 (applying the *Ex Post Facto* clause and holding that offense-based public registration is not rationally related to non-punitive purpose in the absence of an individualized assessment of re-offense risk). There is no such

evidence here, however, because Millard was not afforded an individualized assessment or hearing to determine his risk of recidivism and, in fact, he has not committed another sex offense since his original conviction. Colorado law, as applied to Millard, simply and irrebuttably presumes he is a substantial threat to reoffend for as long as he is breathing.

To be sure, this irrebuttable presumption is not based on any empirical data regarding re-offense rates. In fact, recent studies cast "significant doubt" on the statement in *Smith v. Doe* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Id.* at 704 (quoting *Smith v. Doe*, 538 U.S. 84, 103 (2003)). What's more, whatever risk Millard might have posed upon his release, that risk is orders of magnitude less now than it was then. *See* Blumstein & Kiminori, *supra*, at 327. And yet SORA will never allow Millard an opportunity to make this showing to a court. It will forever and always tag Millard as a threat to the community.

The State defends its irrebuttable presumption by claiming it serves the interest of "public safety." Op.Br. 26; *see* § 16-22-110(6). But the question here is not the legitimacy of the State's interest in public safety; it is "whether the means used to achieve these ends are constitutionally defensible." 405 U.S. at 652. To paraphrase *Stanley*, "What is the state interest in [requiring lifetime registration] without a hearing designed to determine whether [the individual is likely to

reoffend]?" *Id.* It is the connection between means and ends—"the adequacy of the fit," *Michael H*, 491 U.S. at 121—that dooms SORA.

Like the Colorado law at issue in *Romer v. Evans*, SORA is "at once too narrow and too broad." 517 U.S. 620, 633 (1996). The statute identifies Millard by a single trait (a certain sex offense conviction) and it imposes upon him a broad and permanent disability (registration). It does so without ever requiring the State to prove any likelihood, much less a reasonable likelihood, that Millard is likely to reoffend—of course, he has not reoffended—and moreover, it forever deprives him of an opportunity to show his risk of reoffending is not what the State baselessly claims it is. The State's conclusory assertion of an interest in "public safety" cannot justify requiring Millard to register as a sex offender for the rest of his life.

For these reasons, there is an inadequate "fit" between Colorado's offense-based system of mandatory lifetime registration and its stated goal of ensuring public safety. As applied to Millard, SORA's irrebuttable presumption violates substantive due process.

B. SORA violates substantive due process as applied to Knight because it irrebuttably presumes he is likely to reoffend for ten years absent an individualized assessment or hearing regarding his re-offense risk.

Although Knight is not required to register as a sex offender for life, SORA is still unconstitutional as applied to him because it irrebuttably presumes he is likely

to reoffend for ten years and only then does it allow him to overcome that presumption. § 16-22-113(1)(b); *cf. People v. Atencio*, 219 P.3d 1080, 1081 (Colo. App. 2009).

SORA unconstitutionally subjects Knight to a ten-year irrebuttable presumption based on nothing more than his crime of conviction. § 16-22-113(1)(b). At his two sentencing hearings, the district court was permitted to consider all relevant factors and evidence in determining the length and conditions of his probation and the length of his DOC sentence. The court was not permitted, however, to consider any evidence or argument regarding his registration requirement, its necessity, or its duration. Absent any individualized consideration, SORA simply and categorically erected an irrebuttable presumption that, for ten years, Knight was likely to reoffend.

Obviously that presumption proved to be incorrect. And for all the reasons given above, that presumption is empirically and legally unsound. *See* Argument I.A. As in *Stanley*, the State's presumption is inadequately tied to its stated purpose. *See Stanley*, 405 U.S. at 650-52. It violates the Fourteenth Amendment.

C. SORA violates substantive due process as applied to Vega, who was a juvenile at the time of his offense.

Colorado's presumption also violates the substantive due process rights of Vega, a juvenile at the time of his offense. As recognized by the Supreme Court, juveniles have less culpability than adults. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). "As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Graham v. Florida*, 560 U.S. 48, 68 (2010) (internal quotations omitted). In addition, "studies suggest that many of those who commit sexual offenses as juveniles do so as a result of impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation." *In re J.B.*, 107 A.3d 1, 17 (Pa. 2014).

For this reason, numerous courts have struck down registration requirements for juvenile offenders. *E.g.*, *State in Interest of C.K.*, 182 A.3d 917, 934-36 (N.J. 2018) (holding that due process is violated by an irrebuttable lifetime presumption that juvenile sex offenders are likely to reoffend); *In re J.B.*, 107 A.3d at 14-20 (same). This Court should do the same, even though Vega is now eligible to petition to discontinue his registration obligation. *See In re C.P.*, 967 N.E.2d 729, 748 (Ohio 2012) (holding that due process is violated by requiring juveniles to

register as sex offenders for a minimum of twenty-five years). After all, Vega may be required to register for life so long as the state courts continue to insist he produce evidence that the State has destroyed. *See* Argument II.B. Based on the rulings of the courts that have considered and denied his petitions, Vega is subject to a *de facto* and unconstitutional irrebuttable presumption that he will reoffend.

D. As to all three Plaintiffs, SORA's punitive effect is "grossly excessive" in relation to the State's interest.

Even if SORA is not "punishment" for Eighth Amendment purposes, the scheme is still unconstitutional because its punitive effect is grossly excessive under the Fourteenth Amendment. U.S. CONST. amend. XIV; *see BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996) (holding that punitive damages violate the Fourteenth Amendment if they are "grossly excessive").

Courts across the country have held that sex offender registration schemes like Colorado's are punitive in effect. *Does #1-5*, 834 F.3d at 705 (applying *Ex Post Facto* Clause) (citing *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1030 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008)).

In the absence of an individualized assessment or hearing regarding the likelihood of reoffending, the stated purpose of SORA (public safety) is not

sufficiently related to the burdens it imposes as applied to Millard, Knight and Vega, none of whom has reoffended. Under SORA Millard will never be afforded an opportunity to overcome the presumption that he is likely to offend again. § 16-22-113(3)(b)(I). The State purported to offer Vega such an opportunity, but under SORA his hearing was nothing more than a sham. *See* Arguments II.B-II.C. Knight had to wait ten years before he was even eligible to petition to deregister. *See* § 16-22-113(1)(b).

As the district court found, the punitive effects of SORA are profound, common, and foreseeable. Millard, Knight and Vega have been refused housing and employment as a result of their status, and they have been targeted for harassment. In the words of the district court:

> plaintiffs have shown . . . that the public has been given, commonly exercises, and has exercised against these plaintiffs the power to inflict punishments beyond those imposed through the courts, and to do so arbitrarily and with no notice, no procedural protections and no limitations or parameters on their actions other than the potential for prosecution if their actions would be a crime.

A734.

The court's arbitrariness conclusion is especially obvious given the evidence "supporting a finding that offense-based public registration has, at best, no impact on recidivism." *Does #1-5*, 834 F.3d at 704. In fact, one study "concluded that laws such as [Colorado's] actually increase the risk of recidivism, probably because they

exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Id.* at 705 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 161 (2011)).

For these reasons, as the district court held, SORA's punitive effects are "grossly excessive" in relation to the State's legitimate interests, and it is therefore unconstitutionally arbitrary and grossly excessive as applied to Millard, Knight and Vega. *See BMW of N. Am.*, 517 U.S. at 568.

II. The district court correctly concluded Vega was deprived of his constitutional right to procedural due process.

The Fourteenth Amendment guarantees no State will deprive any individual of due process of law. At its core, it guarantees governmental processes are fundamentally fair. *In re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring).

"An alleged violation of the procedural due process . . . prompts a two-step inquiry: (1) whether the plaintiff has shown the deprivation of an interest in 'life, liberty, or property' and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with 'due process of law.'" *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012).

The Attorney General does not dispute Vega had a constitutionally protected liberty interest in receiving a fair process before the state courts. She

argues only that Vega received all the process he was due. *Id.* 58–65. This argument is contrary to the law and the record.

A. The Attorney General's argument misunderstands the burden of showing that a state-court process was fundamentally unfair where, as here, the process is an integral component of SORA.

The Attorney General's first misstep is the assertion that Vega can prevail on his procedural due process claim only if the conduct of the Colorado courts was "so arbitrary and capricious as to constitute an independent due process . . . violation." Op.Br. 62 (internal quotations omitted). She appears to believe state courts have wider latitude to disregard due process than other state actors.

That is not so. The Supreme Court long has recognized the viability of procedural due process claims directed toward the processes employed by state courts applying state laws. *E.g.*, *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). These cases establish that if the State creates a system entitling an individual to certain relief (here, removal from the sex offender registry upon satisfaction of certain conditions), that system must comport with due process. *See Elliott*, 675 F.3d at 1244 (due process is violated if "the procedures followed by the government . . . [do not] comport[] with 'due process of law'").

The district court correctly held that Colorado's system of petitioning for removal from the registry, as applied to Vega, violated due process. The right to

petition for removal from the sex offender registry is an integral part of SORA. § 16-22-113. For those not required to register for life, a petition to discontinue their registration obligation is the only means by which these individuals can free themselves from the obligation to register as a sex offender. *Id.* The petition process is therefore central to SORA. *See Griffin*, 351 U.S. at 18.

As applied to Vega's case, the procedures used by the state courts did not comport with due process. First, the courts improperly required him to proffer additional evidence that he completed sex offender treatment, even though (1) Vega testified without contradiction that he did so and (2) the State destroyed the only evidence that could corroborate his testimony. Second, the courts improperly placed upon Vega the burden of proving he was *unlikely* to reoffend when due process required the State to carry the burden of proving Vega was *likely* to reoffend.

B. The Colorado courts deprived Vega of procedural due process by requiring him to offer evidence beyond his uncontested evidence and evidence the State had destroyed.

Vega twice petitioned under section 16-22-113(1)(e) to discontinue his registration obligation and to remove his name from the sex offender registry. That statute imposes two conditions on individuals seeking to discontinue their registration obligation: (1) successful completion of and discharge from the juvenile

sentence or disposition; and (2) proof that the individual has not, or is not then charged with, a sex offense. *Id.* If those conditions are satisfied, "the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior." *Id.*

Each time Vega sought to discontinue his registration obligation, the state courts denied his request because they concluded that under SORA he had failed to prove he successfully completed sex offender treatment. This conclusion violated due process because successfully completing sex offender treatment is not a condition precedent to terminating a registration obligation under section 16-22-113. The statute requires only that a petitioner successfully complete and discharge his sentence and not reoffend. As the district court found,

> At the hearings on both of Vega's petitions in 2006 and 2012, it was not disputed that he had successfully completed his juvenile sentence and had been discharged from confinement at the Department of Youth Corrections and from his subsequent period of parole. It was also undisputed that Vega had committed no additional sex offenses.

A709. As interpreted by the courts SORA imposed an additional condition, contrary to due process, that effectively and completely deprived Vega of relief for which he was otherwise eligible. *See Griffin*, 351 U.S. at 15-18 (finding procedural due process violation when state law operated to effectively and completely deny individual of state-created process).

Regardless, Vega satisfied the arbitrary, additional condition. He testified unrebutted that he successfully completed sex offender treatment. Yet, applying SORA, neither court credited Vega's testimony. Stating they were complying with SORA, both demanded Vega produce "records" proving he successfully completed sex offender treatment. This was arbitrary and fundamentally unfair. Particularly was that so when the courts found that Vega could not produce his treatment records because they had been destroyed by the Department of Youth Corrections. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 884 (6th Cir. 2000) (finding a due process violation when missing records were central to the case and "could refute, confirm, or shed light" on the claims at issue). This Court, therefore, cannot assume the state courts reached the correct result, the very outcome procedural due process aims to ensure. *See Holdman*, 202 F.3d at 884.

The text of section 16-22-113(1)(e), on which the state courts relied, compounds this problem because it does not require the court even to consider evidence from the petitioner. Instead, the statute instructs that the court

> shall base its determination on recommendations from the person's probation or community parole officer, the person's treatment provider, and the prosecuting attorney for the jurisdiction in which the person was tried and on the recommendations included in the person's presentence investigation report. In addition, the court shall consider any written or oral testimony submitted by the victim of the offense for which the petitioner was required to register.

§ 16-22-113(1)(e).

C. SORA deprived Vega of procedural due process by placing upon him the burden of proving he was *unlikely* to reoffend.

Section 16-22-113 provides that "the court shall consider whether the person is *likely* to commit a subsequent offense of or involving unlawful sexual behavior" (emphasis supplied). The courts ruled this section required Vega to prove he was unlikely to offend. So applied to Vega, SORA violates procedural due process.

By the time of Vega's 2012 petition to deregister, fourteen years had passed since the conduct underlying his juvenile adjudication as a 13-year-old, during which time Vega had not committed a new sex offense. In that context it was not proper for SORA to require even more proof from Vega that he was unlikely to reoffend. Vega had done all he could possibly do to make that showing—he had not reoffended. Yet, the record makes clear that no amount of time free from reoffending would be enough under SORA, as applied to him, to show he was unlikely to reoffend. Such an insurmountable burden violated procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and *in a meaningful manner*.") (internal quotations omitted; emphasis supplied).

D. The *Rooker-Feldman* doctrine does not bar this Court's review.

The Attorney General argues the *Rooker-Feldman*[10] doctrine deprived the district court of jurisdiction because Vega was doing nothing more than seeking appellate review of a "claim[] actually decided by a state court." Op.Br. 59-61. This argument is meritless.

Consider first the scope of the doctrine. It exhibits the limited circumstances in which the Supreme Court's appellate jurisdiction over state-court judgments "precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). The doctrine is so narrow in scope that it "has been applied by [the Supreme] Court only twice, i.e., only in the two cases from which the doctrine takes its name." *Skinner v. Switzer*, 562 U.S. 521, 531 (2011). Properly understood, the doctrine is narrowly "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court

[10] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp.*, 544 U.S. at 284.

The doctrine does not apply here merely because because Vega's procedural due process claim calls into question the correctness of a state court decision. "If a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party. . . , then there is jurisdiction. . . ." *Id.* at 293 (internal quotations omitted). As recognized by this Court in *Mo's Express LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006), the primary case on which the Attorney General relies, a federal district court lacks subject matter jurisdiction only "over claims actually decided by a state court."

Vega's procedural due process claim was not "actually decided" by the state court.[11] Vega filed two petitions under state law to be relieved of his obligation to register as a sex offender. Both were denied. In neither proceeding did Vega raise a due process challenge to the procedure by which the courts adjudicated his petitions. Vega did not, in this federal proceeding, seek what is effectively appellate review of a claim "actually decided by a state court."

[11]Nor is it "inextricably intertwined" with his state court petitions, *see Feldman*, 460 U.S. at 482 n. 16, if only because it relies on state conduct (destruction of evidence) that was not challenged on a due process basis in the state courts.

To be sure, Vega's procedural due process claim "denies a legal conclusion that a state court has reached in a case to which he was a party." *See Exxon Mobil Corp.*, 544 U.S. at 293. In particular, Vega denies the propriety of the state court's decision to impose upon him the burden of persuasion and its refusal to accept as sufficient his uncontradicted testimony that he completed sex offender treatment. But that does not mean the federal district court lacked jurisdiction over his claim. Rather, because Vega presented a claim independent of that raised in state court (i.e., a procedural due process claim never raised or ruled upon in state court), the district court had subject matter jurisdiction over this claim.

The Attorney General's reliance on Vega's decision not to appeal either state court decision is red herring. That Vega did not appeal has nothing to do with the federal district court's subject matter jurisdiction. What matters is the nature of the claim at issue in the federal proceeding and whether that claim is independent of the previously resolved state court claim. *See Skinner*, 562 U.S. at 532 ("If a federal plaintiff 'present[s][an] independent claim,' it is not an impediment to the exercise of federal jurisdiction that the 'same or a related question' was earlier aired between the parties in state court."). Vega's decision not to appeal under state law is a jurisdictionally irrelevant smoke screen.

E. Vega adequately presented his procedural due process claim to the district court.

In a footnote, the Attorney General asserts Vega did not adequately present a procedural due process claim to the district court. Op.Br. 58 n.18. This is not a serious argument. Defense counsel argued Vega's right to procedural due process had been denied by the state's handling of his two petitions to de-register. *E.g.*, A98, 178, 413, 439-44, 656-57.[12] Most critically, the district court understood Vega to have raised a procedural due process challenge. A614-17, 729-31. It expressly denied summary judgment on the procedural due process claim, and later entered findings of fact and conclusions of law in Vega's favor. A614-17, A729-31. Conspicuously, although the Attorney General now claims to have been blindsided by Vega's procedural due process claim, the State never once argued, either in response to the summary judgment denial or the district court's final order, that this case did not involve a procedural due process claim. That failure belies any contention that Vega's right to procedural due process was not at issue in the district court.

[12] As the district court recognized, Vega specifically argued the state court wrongly imposed upon him the burden of proving he was unlikely to reoffend and wrongly refused to credit the undisputed evidence that he successfully completed sex offender treatment. A614-17. Those are the very bases upon which the court found a procedural due process violation. A729-31.

F. Vega properly named the CBI Director.

The Attorney General argues Vega's procedural due process claim was not properly brought against the CBI Director. Op.Br. 61 n.19. The Attorney General never raised such an objection below. Accordingly the issue has been procedurally defaulted. *See, e.g.*, *Lone Star Steel v. United Mine Workers of Am.*, 851 F.2d 1239, 1243 (10th Cir. 1988) ("Ordinarily, a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.").

Regardless the Director is properly a defendant. This lawsuit challenges the constitutionality of SORA as applied. The Director was sued in his official capacity; so the lawsuit was one between Plaintiffs and the State. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991). The State via the Director is well positioned to defend SORA, its application to Vega, and the State's responsibility for destroying the only evidence the state courts would accept as a condition precedent to granting his petition. Assuming this Court reaches the Attorney General's belated argument, it should reject it on the merits.

III. SORA violates the Eighth Amendment's Cruel and Unusual Punishments Clause, as applied to Plaintiffs.

The district court concluded that SORA, as applied to each of the Plaintiffs, is unconstitutional. An as-applied challenge is limited to review of how a statute has

been applied in a particular instance.[13] *Reno v. Flores*, 507 U.S. 292, 300 (1993), *cited in Shaw v. Patton*, 823 F.3d 556, 560 (10th Cir. 2016).

Neither the United States Supreme Court nor this Court has considered an as-applied Eighth Amendment challenge to SORA. In *Smith v. Doe*,[14] the Supreme Court used a multi-factor inquiry to determine whether the Alaska sex offender registration requirement, as applied to the petitioners, was retroactive punishment prohibited by the *Ex Post Facto* Clause. That inquiry applied here establishes SORA violates the Eighth Amendment.

The central question is whether SORA is "so punitive either in purpose or effect as to negate [Colorado's] intention to deem it 'civil,'" *Smith*, 538 U.S at 92 (selected internal quotations omitted). In an "ordinar[y]" case "only the clearest proof" would override legislative intent and transform what the legislature has

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[13]There is no merit to the government's argument the district court erred in considering "the experience of *others*." Ans. Br. 31 (internal quotations omitted). While an as-applied challenge focuses on the impact of a statute as applied to a particular plaintiff, that hardly limits the relevant evidence to the direct impact on the plaintiff. Testimony from similarly situated individuals to whom the statute has been applied would be relevant for numerous reasons, e.g., to corroborate the plaintiff's experience and to provide the Court presiding over a bench trial with a broader understanding of how the statute might be applied to the plaintiff and the kind of problem the plaintiff may apprehend. The district court so ruled. *See* A1081, 1089.

[14]538 U.S. 84 (2003).

deemed a civil remedy into a criminal penalty. *Id.* (internal quotations omitted). When the evidence of legislative intent points in both the civil/remedial and criminal/punitive directions, there is no reason to apply this "heightened burden." *Id.* at 107 (Souter, J., concurring). SORA's legislative intent points in two directions. On one hand the legislature "declare[d]" that its intent was not that registry information "be used to inflict retribution or additional punishment" on any registrant. § 16-22-110(6)(a). On the other hand, the legislature explicitly admitted registration is "punitive" and can be "unfairly" so. *See* § 16-22-103(5)(a).

As suggested above in Argument I, there is an elephant in the sex offender registry room. The punitive purpose of the registry is palpable to the eye notwithstanding the legislative-declaration fig leaf of "no intent to inflict retribution or additional punishment." On the question whether the registry is intended to inflict punishment, no constitutional inquiry is needed. Common sense provides an easy answer.

There are 19,185 persons on the sex offender registry.[15] The idea of the registry is members of the public will commit to memory the address and face of one or more registrants as they jog their neighborhoods and shop at grocery

[15]https://apps.colorado.gov/apps/dps/sor/info-web.jsf (last accessed July 17, 2018).

stores—with or without their children—so they can "adequately protect themselves and their children from these persons," § 16-22-110(6)(a). It is a far-fetched idea. The obvious purpose is to further punish those convicted of sex offenses, to make their everyday lives hellish. It is telling Colorado makes no effort to distinguish among the sex offender defendants and the vast range of facts—some mitigating, some aggravating—that led each to be convicted.

Colorado does not know—it does not want to know—which person convicted of a sex offense is more, or less, likely to commit another sex offense. SORA is indifferent, for example, to whether Vega, who twenty years ago as a 13-year-old tried to touch a girl's breasts and whose only offense since was failure to register as a sex offender after he was discharged from juvenile parole, is likely to commit another sex offense. It leaves unregistered a broad range of newly and repeatedly convicted felons who have committed murder, assault and other crimes from which the public also would want to be "adequately protect[ed]." It requires no magical powers to see that SORA "uses past crime as the touchstone [for registration], probably sweeping in a significant number of people who pose no real threat to the community," thus revealing "that the ulterior purpose is to revisit past crimes, not prevent future ones," *Smith*, 538 U.S. at 109 (Souter, J., concurring).

Smith's constitutional framework leads to the same conclusion. The factors most relevant to whether a statutory scheme is so punitive in "effect," *id.* at 92 (internal quotations omitted), as to negate an expressed civil intention are whether it has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose. These factors "are neither exhaustive nor dispositive," *id.* at 97 (internal quotations omitted), of the question whether SORA is punitive in effect.

As discussed in detail in Judge Matsch's decision, with only one exception each of these factors weighs in favor of a conclusion that SORA is so punitive in effect that the general assembly's ulterior purpose to punish becomes plain. A717-26.

For example, as applied to Plaintiffs SORA has the "effect," 538 U.S. at 92, of public shaming, banishment, harassment, probation and parole. *Smith* and this Court in *ex post facto* cases have focused almost exclusively on governmental participation in these punitive effects. Such a narrow focus fails to take into account the entire registrant-hostile ecosystem SORA created. A key component to be sure is the imposition of numerous criminal law-familiar mandates. For example, every person convicted of a broad range of misdemeanor and felony unlawful sexual

behavior, on pain of committing the crime of failure to register, on their birthday and as often as quarterly must appear in person at police departments to supply highly personal information, including portraits and fingerprints; and must submit to residency "checks" or face the posting of neon-colored "sex offender" notices on their front doors.

But through SORA the general assembly created the other features of this ecosystem that it seeks to disavow: public shaming; banishment unique to sex offender-registrants, such as exclusion from public schools their children attend, apartment complexes, neighborhoods, and nearly entire cities; harassment at work and at home to the point that registrants lose and fear losing their jobs and homes. It is no answer for the defendant CBI Director to say that under SORA he merely makes available "public information." Of the thousands of individuals convicted of a wide range of crimes, including murder and assault, the state selects only one group—those convicted of unlawful sexual behavior—from which to collect and collate information to publish under a banner headline of "Sex Offender Registry." It is inconceivable the state was and is unaware the registry would have the effect of enlisting the public to shame, ostracize, harass and exclude from their communities the registrants, in short, to engage in the very behavior that the state could not without running afoul of the Cruel and Unusual Punishments Clause. There is no

room for the state to stand to disavow the effect on registrants of such a punitive statutory scheme.

Nor is it any answer for the CBI Director to rely on *Smith* and this Court's *Ex Post Facto* cases. *See* Op. Br. 37-38. Unlike in those cases Plaintiffs here adduced substantial, detailed evidence that as applied to them SORA produces punitive effects negating the general assembly's conclusory—and unpersuasive—declaration that the registry is a purely civil regulatory scheme to permit the public to "protect" itself.

Conclusion

For the foregoing reasons, the Court should affirm the district court's judgment.

July 18, 2018

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 12,983 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(III).

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