No. 16-1898

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

A.W., et al.,
Plaintiffs-Appellees,

v.

PAUL WOOD, et al.,
Defendants-Appellants.

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
(Hon. Richard G. Kopf, Senior U.S. District Judge; No. 8:14cv256)

BRIEF OF APPELLANTS DOUG PETERSON, COLONEL BRADLEY RICE, PAUL WOOD, AND GENE MAHON

Submitted June 23, 2016, by:

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellees filed this 42 U.S.C. § 1983 and 28 U.S.C. § 2201 action against Appellants Nebraska Attorney General Doug Peterson, Nebraska State Patrol Colonel Bradley Rice, Red Willow County Attorney Paul Wood, and Red Willow County Sheriff Gene Mahon, in their official capacities, (hereinafter "State") seeking a declaration that Neb. Rev. Stat. § 29-4003(1)(a)(iv), as applied to Appellee A.W., is unconstitutional, and a permanent injunction preventing the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against A.W.

Appellees asserted the Nebraska Sex Offender Registration Act (hereinafter "SORA") does not apply to A.W, and the application of SORA's public registration requirement, if applied to A.W., will (1) subject him to cruel and unusual punishment; (2) deny him equal protection; (3) deprive him of the right to substantive due process; and (4) violate the privileges and immunities clause. The State asserted SORA does apply to A.W. and does not violate his constitutional rights.

By Memorandum and Order dated March 21, 2016, the district court found SORA does not apply to A.W. and enjoined the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellees. This holding was in error. Judgment pursuant to the Memorandum and Order was entered March 21, 2016.

The State proposes 20 minutes of oral argument, equally divided.

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JURISDICTIONAL STATEMENT

Appellees' claims arose under 42 U.S.C. § 1983 and alleged violations of Appellee A.W.'s rights under the Constitution of the United States. The district court therefore possessed subject matter jurisdiction to hear Appellees' claims under 28 U.S.C. § 1331. Following a joint stipulation of facts and cross-motions for summary judgment the district court entered a Memorandum and Order on March 21, 2016, finding SORA does not apply to A.W. and enjoined the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellees. Judgment pursuant to the Memorandum and Order was entered March 21, 2016. The State filed a timely notice of appeal on April 8, 2016. This Court possesses jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The first issue presented on appeal is whether the district court erred in determining that Neb. Rev. Stat. § 29-4003(1)(a)(iv) does not apply to Appellees, and in granting Appellees' motion for summary judgment, entering judgment in favor of Appellees and enjoining Appellants from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellees. Pursuant to 8th Cir. R. 28A(i)(2), the most apposite authorities are:

1. Neb. Rev. Stat. § 29-4003(1)(a)(iv)
2. *Skaggs v. Neb. State Patrol*, 282 Neb. 154 (Neb. 2011)
3. *David v. Tanksley*, 218 F.3d 928 (8th Cir. 2000)
4. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 795 (Neb. 1997)

The second issue presented on appeal is whether the district court erred in denying the State's cross-motion for summary judgment on Appellees' equal protection, substantive due process, privileges and immunities clause, and cruel and unusual punishment claims. Pursuant to 8th Cir. R. 28A(i)(2), the most apposite authorities are:

1. *Nyari v. Napolitano*, 562 F.3d 916 (8th Cir. 2009)
2. *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010)
3. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005)
4. *Smith v. Doe*, 538 U.S. 84 (2003)

STATEMENT OF THE CASE

Appellees filed this 42 U.S.C. § 1983 and 28 U.S.C. § 2201 action against the State of Nebraska, Nebraska State Patrol, and Appellants Nebraska Attorney General Doug Peterson, Nebraska State Patrol Colonel Bradley Rice, Red Willow County Attorney Paul Wood, and Red Willow County Sheriff Gene Mahon, in their official capacities, seeking a declaration that Neb. Rev. Stat. § 29-4003(1)(a)(iv), as applied to A.W., is unconstitutional, and a permanent injunction preventing the State from enforcing Neb. Rev. Stat. § 29-4003(1)(a)(iv) against Appellee A.W. J.A. 23-31.

Following the State's partial motion to dismiss, the district court dismissed all claims against the State of Nebraska and the Nebraska State Patrol without prejudice and dismissed Appellees' Fifth Amendment and procedural due process claims with prejudice. J.A. 65. Appellees' remaining claims alleged Neb. Rev. Stat. § 29-4003(1)(a)(iv) does not apply to A.W, and the application of SORA's public registration

requirement, if applied to A.W., will (1) subject him to cruel and unusual punishment; (2) deny him equal protection; (3) deprive him of the right to substantive due process; and (4) violate the privileges and immunities clause. J.A. 402.

A joint stipulation of facts was entered, the record was undisputed and cross-motions for summary judgment were submitted. J.A. 401. Those undisputed facts show that A.W. is required to register as a sex offender in the State of Minnesota and did register as a sex offender in Minnesota. J.A. 74-75, 401. Appellees moved to Nebraska and agreed to abide by the sex offender laws of Nebraska. J.A. 79, 89. The parties stipulated A.W. entered Nebraska after January 1, 1997. J.A. 74.

The undisputed facts also show that Neb. Rev. Stat. § 29-4003(1)(a)(iv) is not just applied to out-of-state juveniles, but also to Nebraska resident juveniles, who enter the State of Nebraska and are required to register in another jurisdiction. J.A. 95. Further, the Nebraska State Patrol's application of Neb. Rev. Stat. § 29-4003(1)(a)(iv) is not based on how long a person has resided in Nebraska or if the person resided in Nebraska prior to entering the State as described in Neb. Rev. Stat. § 29-4003(1)(a)(iv). J.A. 95. Finally, Appellees did not provide any facts showing A.W.'s interstate movement was impaired or any facts to override the Legislature's intent that SORA be a civil regulatory system.

By Memorandum and Order dated March 21, 2016, the district court found SORA does not apply to A.W. and enjoined the State from enforcing Neb. Rev. Stat. §

29-4003(1)(a)(iv) against Appellees. Judgment pursuant to the Order was entered March 21, 2016. The State filed a timely notice of appeal on April 8, 2016.

SUMMARY OF THE ARGUMENT

Appellee A.W. was adjudicated delinquent in Minnesota because of criminal sexual conduct in the first degree, ordered to comply with Minnesota's sex offender registration statute, and registered in Minnesota. J.A. 74-75. Appellees moved to Nebraska and agreed to abide by the sex offender laws of Nebraska. J.A. 79, 89. Those laws apply to A.W. Appellees' case is based on their underlying policy disagreement with the Nebraska Legislature's constitutionally sound decision to establish a single public registry, instead of two separate registries, one public and one non-public. Appellees want the court to judicially create a two registry system that the Legislature did not create itself.

In aid of their attempt to revise Nebraska law by judicial means, Appellees raised varied constitutional challenges to the public notification requirement of SORA and the district court erred in finding in their favor. Appellees' equal protection claim fails because SORA is applied to all juveniles who enter the State of Nebraska and are required to register in another jurisdiction and the State has a rational basis for its registration requirement. Appellees' substantive due process and privileges and immunities clause claims fail because the public notification requirement does not implicate a fundamental right, is rationally related to a legitimate governmental purpose, and does not violate Appellees' right to travel. Finally, Appellees' cruel and unusual

punishment claim fails because SORA is a civil regulatory regime and Appellees cannot show any proof to override the Legislature's intent that SORA be a civil regulatory regime.

STANDARD OF REVIEW

A district court's conclusions of law are reviewed *de novo*. *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). A district court's interpretation of state law is reviewed *de novo*. *David v. Tanksley*, 218 F.3d 928, 930 (8th Cir. 2000).

ARGUMENT

I. SORA APPLIES TO A.W.

SORA, specifically Neb. Rev. Stat. § 29-4003(1)(a)(iv), applies to A.W. Presented with cross-motions for summary judgment based on a joint set of stipulated facts, the district court erred in determining that Neb. Rev. Stat. § 29-4003(1)(a)(iv) does not apply to Appellees and erred in enjoining the State from enforcing that statute against Appellees.

SORA applies to "any person who on or after January 1, 1997, [e]nters the state and is required to register as a sex offender under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States." Neb. Rev. Stat. § 29-4003(1)(a)(iv); *see Skaggs v. Neb. State Patrol*, 282 Neb. 154, 158 (Neb. 2011) (interpreting this "plain, direct, and unambiguous" statutory language). The undisputed evidence showed that A.W. is (1) required to register as a sex offender in another state and (2) entered Nebraska after January 1, 1997. Accordingly, SORA applies to A.W.

First, the undisputed facts show that A.W. is required to register as a sex offender in the State of Minnesota and did register as a sex offender in Minnesota. J.A. 74-75, 401. The district court agreed "there is no evidence to show that he was not 'required to register . . . under the laws of [Minnesota]' as of the date of the juvenile court adjudication." J.A. 408. Under Nebraska law, "[a] sex offender registrant's actual registration under another jurisdiction's law is conclusive evidence that the registrant was 'required' to register within the meaning of § 29–4003(1)(a)(iv)." *Skaggs*, 282 Neb. at 160. Accordingly, A.W. was required to register within the meaning of § 29–4003(1)(a)(iv).

Second, the parties stipulated A.W. entered Nebraska after January 1, 1997, J.A. 74, and the district court agreed. J.A. 408. Under Nebraska law, "[e]nters" in subdivision (1)(a)(iv) is to be given its plain and ordinary meaning. *Skaggs*, 282 Neb. at 159 (rejecting residency as a consideration under the statute and rejecting attempt to characterize return to Nebraska as "re-entry" as opposed to "entry"). Accordingly, A.W. entered Nebraska after January 1, 1997, within the meaning of § 29–4003(1)(a)(iv). Based on these stipulated facts, and the plain, direct, and unambiguous statutory language of Neb. Rev. Stat. § 29-4003(1)(a)(iv), SORA applies to A.W.

When interpreting Nebraska law, the district court was bound by the decisions of the Nebraska Supreme Court, including *Skaggs*, and its duty was to "ascertain and apply" Nebraska law, "not to formulate the legal mind of the state." *David v. Tanksley*, 218 F.3d 928, 930 (8th Cir. 2000). "When it has spoken, its pronouncement is to be

accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940). Yet, the district court accepted Appellees' invitation to parse A.W.'s undisputed Minnesota sex offender registration, create its own definition of "sex offender" based on a conviction requirement not present in § 29-4003(1)(a)(iv), and infer policy objectives the Nebraska Legislature rejected.

Ultimately, at the heart of Appellees' case is their underlying policy disagreement with the Legislature's decision to establish a single public registry, instead of two separate registries, one public and one non-public. In essence, Appellees asked the district court to judicially create a two registry system that the Legislature did not create itself. Policy determinations on whether Nebraska should create a two registry system or whether application of the statute should be contingent on a juvenile's age are best left to the Legislature.[1]

On March 18, 2009, when considering changes to SORA that eventually became law as part of LB 285, the Superintendent for the Nebraska State Patrol specifically told the Legislature's Judiciary Committee on two occasions that under current law juveniles

[1] "Nebraska has chosen to publicize the names of anyone who must register as a sex offender, and not just some of those persons. SORNA does the same thing, but it gives states an option to exempt certain offenders. Nebraska has elected not to use that option, and there is nothing unconstitutional about such a choice." *Doe v. Nebraska*, 2009 WL 5184328, at *6 (D. Neb. Dec. 30, 2009).

must register in Nebraska if they were required to register in another state. J.A. 137-38; J.A. 297, 301. Moreover, "[w]hen legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law." *State v. Schnabel*, 260 Neb. 618, 622 (Neb. 2000). Yet, even after an explanation of how current law was being applied, neither the Judiciary Committee nor the entire Legislature narrowed the application of (1)(a)(iv). Instead the Legislature expanded (1)(a)(iv) to include villages, towns, and cities. *See* Nebraska Laws 2009, LB 285. "Such action or inaction, as the case may be, on the part of the Legislature is persuasive and indicates a legislative intention to affirmatively reject [a statutory construction]." *Schultz v. Sch. Dist. of Dorchester in Saline Cty.*, 192 Neb. 492, 497 (Neb. 1974). "Where the Legislature does not enact an exception to a statutory rule, this court 'must assume that the Legislature intended to do what it did.'" *State ex rel. Wagner v. Gilbane Bldg.* Co., 276 Neb. 686, 695 (Neb. 2008) (quoting *Loewenstein v. Amateur Softball Assn.*, 227 Neb. 454, 458 (Neb. 1988)). But here, the district court did not.

In order to achieve their policy objective, conveyed to and rejected by the Legislature, Appellees asked the district court to read a nonexistent age requirement in to (1)(a)(iv). First, the district court incorrectly focused on Minnesota's policy determination to exclude juveniles adjudicated delinquent from consideration as "predatory offenders" solely for public notification purposes. J.A. 408-09. Failing to differentiate between the registration/notification distinctions in Minnesota law, the district court expanded the narrow policy exception for notification to broadly conclude

"A.W. is not required to register as a 'sex offender' under Minnesota law." J.A. 416. This was after finding in the previous paragraph that "A.W. is required to register under § 243.166.1b(a)(1) [Minnesota predatory offender registration statute]," J.A. 416, and after the parties stipulated A.W. was required to register as a predatory offender in Minnesota and did register. J.A. 74-75.

Second, the district court's "conviction" requirement does not exist in subsection (1)(a)(iv). "Statutory language is to be given its plain and ordinary meaning," and the court should not "resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *Skaggs*, 282 Neb. at 159. "It is not within the province of a court to read a meaning into a statute that is not there, or to read anything direct and plain out of a statute." *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 795, 566 (Neb. 1997). If the Legislature wanted to require a conviction for subsection (1)(a)(iv) to be applied, they could have done so. *See State v. Norman,* 282 Neb. 990, 1002 (Neb. 2012) (application of subsection (1)(b) to persons convicted of the listed offenses). Again, such inaction is persuasive and indicates a legislative intention to affirmatively reject such additional language. *See Schultz,* 192 Neb. 492.

Third, at Appellees' direction, J.A. 140-43, the district court placed undue import on Nebraska's failure to achieve "substantial compliance" under the Sex Offender Registration and Notification Act (hereinafter "SORNA"). J.A. 412, 415. However, not only is the federal government's determination that Nebraska has not substantially implemented SORNA irrelevant to the plain language of (1)(a)(iv), but that

determination was based on factors other than just juvenile registration. J.A. 79, 83. Regardless, Nebraska's failure to achieve substantial compliance, and subsequent lack of federal funding, does not change the plain meaning of (1)(a)(iv) and insert an age requirement.

The plain, direct, and unambiguous language of Neb. Rev. Stat. § 29-4003(1)(a)(iv), applies to juveniles like A.W. Accordingly, SORA applies to A.W.

II. THE APPLICATION OF THE PUBLIC NOTIFICATION PROVISIONS OF SORA TO A.W. IS NOT UNCONSTITUTIONAL.

Since Neb. Rev. Stat. § 29-4003(1)(a)(iv) applies to A.W., the State urges this Court to resolve the remaining legal questions the district court declined to resolve. Because the State's appeal from the order denying its cross-motion for summary judgment is raised in tandem with the appeal of the order granting Appellees' cross-motion for summary judgment, and the record is undisputed, this Court may decide these issues without remand. *Nyari v. Napolitano*, 562 F.3d 916, 922 (8th Cir. 2009); *see Talley v. U.S. Postal Serv.,* 720 F.2d 505, 508 (8th Cir. 1983). Resolving this case here would conserve the resources of the parties and the judiciary and avoid remand of a matter in which further factual development is not required.

Those legal questions are whether SORA's *public* registration requirement, if applied to A.W., will (1) subject him to cruel and unusual punishment; (2) deny him equal protection; (3) deprive him of the right to substantive due process; and (4) violate the privileges and immunities clause of Article IV, Section 2, Clause 1 of the United

States Constitution. J.A. 402. For the following reasons, the State respectfully requests this Court enter an order directing that summary judgment be granted in favor of the State on these remaining legal questions.

A. SORA Is Applied To All Juveniles Who Enter The State Of Nebraska And Are Required To Register In Another Jurisdiction.

The application of SORA to A.W. does not violate equal protection. "The Equal Protection Clause of the Fourteenth Amendment ... is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Appellees contend that the "application of SORA to Plaintiff A.W. and not to resident juveniles or out-of-state juveniles entering from states without sex offender registration of juveniles" violates his right to equal protection. J.A. 30.

As an initial matter, the premise of Appellees' contention is factually wrong. SORA is not just applied to out-of-state juveniles, but also to Nebraska resident juveniles, who enter the State of Nebraska and are required to register in another jurisdiction. J.A. 95. This is because Neb. Rev. Stat. § 29-4003(1)(a)(iv) "has no residency requirement." *Skaggs*, 282 Neb. at 159. Consistent with *Skaggs,* the Nebraska State Patrol's application of Neb. Rev. Stat. § 29-4003(1)(a)(iv) is not based on how long a person has resided in Nebraska or if the person resided in Nebraska prior to entering the State as described in Neb. Rev. Stat. § 29-4003(1)(a)(iv). J.A. 95.

Here, similarly situated offenders are treated the same under Neb. Rev. Stat. § 29-4003(1)(a)(iv), *i.e.*, offenders who move to Nebraska, as well as offenders who have

been living in Nebraska, must register in Nebraska if they were required to register in another state. Since Appellees cannot show that Neb. Rev. Stat. § 29-4003(1)(a)(iv) treats A.W. differently from any other similarly-situated sexual offender, Appellees cannot prevail on their equal protection claim.

Even if the Court determines Nebraska juveniles with an out-of-state registration requirement are similar to Nebraska juveniles without an out-of-state registration requirement, since age is not a suspect class, rational basis review applies. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). A statute will be considered constitutional under rational basis review if there is "any reasonably conceivable state of facts that could provide a rational basis for" it. *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993).

Nebraska's law, which was passed in order to comply with SORNA, J.A. 78, fits within one of the underlying goals of Congress in enacting SORNA which was to "establish[ ] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. "In other words, Congress wanted to make sure sex offenders could not avoid all registration requirements just by moving to another state." *United States v. Guzman*, 591 F.3d 83, 90-91 (2d Cir. 2010), *as amended* (Jan. 8, 2010). Neb. Rev. Stat. § 29-4003(1)(a)(iv) advances that purpose and the purposes of alerting the public and public safety while giving comity to the other state's judgment. *See also Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010); Neb. Rev. Stat. § 29-4002 (SORA's legislative findings); *United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012).

Accordingly, since Appellees did not, and are unable to, identify anyone similarly situated to A.W. that has been treated differently, and Nebraska has a rational basis for requiring persons subject to out-of-state registration requirements to register in Nebraska, Appellees' equal protection claim fails.

B. The Application Of The Public Notification Provisions Of SORA To A.W. Do Not Violate A.W.'s Right To Substantive Due Process Or The Privileges And Immunities Clause.

Appellees allege the application of the public notification provisions of SORA to A.W. would violate A.W.'s right to substantive due process in violation of the United States Constitution and the Nebraska Constitution. J.A. 30. Appellees do not allege the registration requirement violates A.W.'s substantive due process rights. *Id.*

"To address Plaintiffs' substantive due process claim, the court 'must determine whether the registration statute implicates a fundamental right.' *Gunderson v. Hvass* 339 F.3d 639, 643 (8th Cir. 2003). 'If the statute implicates a fundamental right, the state must show a legitimate and compelling governmental interest for interfering with that right.' *Id.* 'If the statute does not implicate a fundamental right, [the court will] apply a less exacting standard of review under which the statute will stand as long as it is rationally related to a legitimate governmental purpose.' *Id.*" J.A. 63. Here, the statute does not implicate a fundamental right and the United States District Court for the District of Nebraska previously held that public notification for all registrants "does not implicate a fundamental right." *Doe v. Nebraska*, 734 F. Supp. 2d at 926.

Under rational basis, Appellees' claim fails because for the same reasons identified in *Doe v. Nebraska,* "Nebraska's registration and public notification requirements are rationally related to a legitimate governmental purpose." *Doe v. Nebraska*, 734 F.Supp.2d at 930. As part of SORA, the Legislature found "that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction" and "that state policy should assist efforts of local law enforcement agencies to protect their communities by requiring sex offenders to register with local law enforcement agencies as provided by the Sex Offender Registration Act." Neb. Rev. Stat. § 29-4002. Additionally, as the district court identified in *Doe v. Nebraska,* other substantive due process claims have been rejected by the Sixth and Eleventh Circuits by pointing to similar legislative findings. *See Doe v. Michigan Dep't of State Police*, 490 F.3d 491 (6th Cir. 2007); *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005). Under the highly deferential standard of rational basis, Appellees provide no reason to conclude that the rationale articulated in the statute itself does not satisfy the rational basis standard.

At one point Appellees claimed that the public notification provisions violate A.W.'s fundamental right to travel, J.A. 64, but appear to have abandoned this claim when they moved for summary judgment and responded to the State's motion. J.A. 148-54, 364-88. Even if the claim was not abandoned, whether considered under

substantive due process or the Privileges and Immunities Clause, the public notification provisions do not violate A.W.'s right to travel. As summarized by the Supreme Court, the right to interstate travel embraces at least three different components: "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Doe v. Miller*, 405 F.3d 700, 712 (8th Cir. 2005) (finding no substantive due process violation based on an alleged violation of the right to travel when reviewing Iowa's sex offender registry act).

On their face, SORA's public notification provisions impose no obstacle to entry into the State of Nebraska. Neb. Rev. Stat. § 29-4013. SORA's public notification provisions do not place any additional requirements on short-term visitors to the State of Nebraska. *Id.* "There is 'free ingress and regress to and from' [the State] for sex offenders, and the statute thus does not 'directly impair the exercise of the right to free interstate movement.'" *Doe v. Miller*, 405 F.3d at 712 (quoting *Saenz*, 526 U.S. at 501). Moreover, Appellees identified no facts supporting the first two components of the right to travel. A.W.'s own movement from Minnesota to Nebraska is sufficient evidence that the statute did not impose any obstacle to his entry in to Nebraska. J.A. 74. Further, for the reasons previously discussed under the equal protection analysis, Neb. Rev. Stat. § 29-4003(1)(a)(iv) does not treat nonresidents different than current

residents. The statute simply does not create any actual barrier to interstate travel and Appellees have not identified any.

C. The Application Of The Public Notification Provisions Of SORA To A.W. Is Not Cruel And Unusual Punishment.

Appellees allege the application of the public notification provisions of SORA to A.W. would constitute cruel and unusual punishment in violation of the United States Constitution and the Nebraska Constitution. J.A. 29. Appellees do not allege the registration requirement constitutes cruel and unusual punishment. *Id.* Appellees do not challenge the application of SORNA to juveniles fourteen years of age and older. Ultimately, Appellees asked the court to determine that the application of the public notification provisions to an individual eleven years old at the time of his offense, but now fourteen years old, is cruel and unusual punishment even though SORNA and SORA have been determined to not constitute punishment. *See United States v. May*, 535 F.3d 912 (8th Cir.2008); *Doe v. Nebraska*, 734 F. Supp. 2d 882.

The application of the public notification provisions to A.W. do not violate the Eighth Amendment. The Nebraska Legislature set up the civil regulatory regime in SORA to comply with SORNA. J.A. 78; *Doe v. Nebraska,* 734 F. Supp. 2d 882. Similar to SORNA, the public notification provisions in SORA were enacted to protect the public from sex offenders. Indeed, the United States Attorney General stated "the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes." *Applicability of the Sex*

Offender Registration and Notification Act, 72 Fed. Reg. 8894-01, 8896 (published Feb. 27, 2007) (codified at 28 C.F.R. § 72.3 (2011)). Just like Alaska's act in *Smith*, "[n]othing on the statute's face suggests that the legislature sought to create anything other than a civil scheme designed to protect the public." *Smith v. Doe*, 538 U.S. 84, 85 (2003).

Further, Appellees cannot show any proof, let alone the "clearest proof," to override the Legislature's intent that SORA be a civil regulatory system. The Supreme Court has explained that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith v. Doe*, 538 U.S. at 92. Even without the clearest proof that the public notification provisions are punitive and not regulatory, Appellees want the court to engage in an analysis of the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). J.A. 370-71.

A review of the seven criteria set forth in *Kennedy v. Mendoza-Martinez* indicates that the public notification provisions: (1) do not impose an affirmative disability or restraint because offenders are not subject to physical restraints and may change residences, jobs, and student status without prior approval; (2) have not been historically viewed as punishment; (3) a finding of scienter is not an issue; (4) do not promote the traditional aims of punishment-retribution and deterrence; (5) the behavior the provisions apply to are not already a crime; (6) the notification provisions are rationally related to the purpose of alerting the public and public safety; and (7) are not excessive given the purpose of the provisions.

Rejecting similar claims, both the Fourth and Ninth Circuits have agreed that the application of the notification provisions in SORNA to juveniles is not cruel and unusual punishment. *United States v. Under Seal*, 709 F.3d 257, 262 (4th Cir. 2013) ("SORNA is a non-punitive, civil regulatory scheme, both in purpose and effect."); *United States v. Juvenile Male*, 670 F.3d at 1010 ("The bar for cruel and unusual punishment is high" and "SORNA's registration requirements [for juveniles] do not violate the Eighth Amendment."). In those cases the juveniles did not present the "clearest proof" that the effect of the regulation is in fact so punitive as to negate its civil intent. *Smith v. Doe*, 538 U.S. 84, 92 (2003) ("only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.").

In sum, "SORA's notification requirements do not constitute punishment," *Doe v. Nebraska*, 734 F. Supp. 2d at 922, and even under a review of the seven criteria set forth in *Kennedy v. Mendoza-Martinez*, Appellees cannot present the clearest proof that the effect of the regulation is so punitive as to negate its civil intent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and enter an order directing the district court to enter summary judgment in favor of Appellants.

Respectfully submitted June 23, 2016.

DOUG PETERSON, COLONEL BRADLEY RICE, PAUL WOOD, and GENE MAHON, Appellants.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4721 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to Microsoft Word.

Pursuant to 8th Cir. R. 28A(h), this brief and its accompanying addendum are virus-free.

By: *s/ Ryan S. Post*

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2016, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on Appellees' counsel of record.

By: *s/ Ryan S. Post*