Case 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 U.S. District Court
for the District of Colorado

The Honorable Judge Richard P. Matsch, Senior Judge
D.C. No. 13-cv-02406-RPM

DEFENDANT–APPELLANT'S REPLY BRIEF

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INTRODUCTION

The district court explicitly based its judgment on the actions of non-state actors and the experiences of non-parties; ignored binding, on-point case law that conclusively disposes of the Registrants' Eighth Amendment claims; justified its unprecedented substantive due process ruling using punitive damages principles that have no application here; and employed a federal procedural due process claim as a substitute for state-court appellate proceedings. The Registrants' Answer Brief invites this Court to walk down this very same path.

The Court should decline that invitation. Under settled law, the Colorado Sex Offender Registration Act (CSORA) is constitutional as applied to these Registrants. The district court's order to the contrary should be reversed.

ARGUMENT IN REPLY

I. To justify its unprecedented ruling, the district court improperly relied on the experiences of non-parties and alleged harms caused by non-state actors.

As the Director explained in his Opening Brief, two fundamental errors permeated the district court's decision. First, the court exceeded the jurisdictional limits of 42 U.S.C. § 1983 by imposing judgment on state officials for the conduct of non-state actors. Second, the court granted judgment in this as-applied case based on the experiences of individuals who are not parties to this proceeding. Op. Br. 28–34. The Registrants entirely ignore the first issue, addressing it nowhere in the Answer Brief. The second issue they mention only in a footnote. Ans. Br. 44 n.13. But these fundamental problems may not be so easily dismissed.

Section 1983 requires, as a jurisdictional matter, action done under color of state law. The district court's order explicitly and repeatedly relied upon the actions of non-state actors vis-à-vis the Registrants. *See, e.g.*, App. 706, 708, 723 (relying upon a private employer's practice of running background checks, which have nothing

to do with CSORA). The actions of non-state actors, however, cannot form the basis of a valid § 1983 claim. *See* Op. Br. 29–34; States Br. 19–23.

The Registrants ignore this issue, even though it is jurisdictional and dispositive. The Answer Brief does not attempt to explain how the district court could enter judgment on a § 1983 claim based on the actions of private individuals. For this reason alone, the district court's order must be reversed.

The district court improperly relied on the experiences of non-parties. This case presents an as-applied challenge only. It must therefore focus on the Registrants' own experiences and alleged injuries. The district court, however, explicitly and repeatedly relied on the experiences of non-parties to reach its conclusions. *See* Op. Br. 28–29, 31–32.

The Registrants contend that the court could properly consider non-parties' experiences "to corroborate the plaintiff's experience and provide the Court … with a broader understanding of how the statute *might be applied* to the plaintiff[s] and the kind of problem the

plaintiff[s] *may apprehend*." Ans. Br. 44 n.13 (emphasis added). But this only emphasizes the error. The Registrants are not arguing that they themselves suffered these alleged harms; they claim that they *might* be subject to these harms in the future. This is speculation. It has no bearing on the as-applied claim that CSORA has in fact deprived the Registrants of their constitutional rights.

Putting aside this speculation, the Registrants' contention that the district court merely used the non-party evidence to "corroborate" their experiences is belied by the district court's own words. App. 717 ("*As shown* by the experiences of these plaintiffs *and others who have testified* …." (emphasis added)), 720 ("All of these witnesses *further demonstrated* the significant and ubiquitous consequences faced by registered sex offenders and their families and associates." (emphasis added)). The district court's improper focus on the experiences of non-parties undermined all of its reasoning. This was a clear violation of the requirement that, in an as-applied challenge, particular plaintiffs must seek relief "only as to *them* and their *particular circumstances*." *Scherer*

v. U.S. Forest Serv., 653 F.3d 1241, 1243 (10th Cir. 2011) (emphasis added).

II. Binding precedent requires the conclusion that CSORA is neither "punishment" nor "cruel and unusual."

The district court erroneously concluded that CSORA was cruel and unusual punishment in violation of the Eighth Amendment, as discussed in the Director's Opening Brief. *See* Op. Br. 34–55. The Registrants' response invites this Court to ignore and overrule binding precedent. This Court should reject the Registrants' arguments and reverse the district court's Eighth Amendment ruling.

A. The Registrants' argument that CSORA is "punitive" ignores *Shaw* and *Femedeer*, which are binding in the Tenth Circuit, as well as the Supreme Court's holding in *Smith v. Doe*.

As the Opening Brief discussed, CSORA is not materially different from other registry schemes that this Court and the Supreme Court determined were not punishment—indeed, CSORA is *less* restrictive than many registry statutes. Op. Br. 34–55 (discussing *Smith v. Doe*, 538 U.S. 84 (2003); *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016); and

Femedeer v. Huan, 227 F.3d 1244 (10th Cir. 2000)). Given this binding precedent, the Court must reverse the district court's conclusion that CSORA is punishment for purposes of the Eighth Amendment.

The Registrants, however, ask this Court to ignore these cases and conclude that CSORA is punishment. Although the Registrants briefly argue that the *Smith* factors support their claim,[1] they point to no differences between CSORA and the registry statute in *Smith* that would justify concluding that CSORA is punishment when *Smith*'s statute was not. *See* Ans. Br. 47. They also fail to distinguish or discuss

[1] The Registrants argue, for the first time, that the Colorado General Assembly *intended* CSORA to inflict punishment. Ans. Br. 44–46. This is contrary to their position below. *See* App. 716–17 ("Plaintiffs do not dispute the legislative statements of intent in C.R.S. §§ 16-22-110(6) and 16-22-112(1)."). In any event, this argument is baseless. The General Assembly specifically disclaimed any punitive intent. COLO. REV. STAT. § 16-22-110(6)(a). The Registrants' argument that CSORA's "obvious purpose" is to make registrants' lives "hellish" because CSORA can accomplish its purpose only if every Coloradan memorizes every registrant's name and face is wrong. Ans. Br. 45–46. CSORA's non-punitive purpose is to empower Coloradans to make themselves aware of registrants in their communities, with whom they and their children are likely to regularly interact. CSORA—like many similar registry laws across the country—is calibrated to serve that purpose.

Shaw and *Femedeer* in any significant way—indeed, the Answer Brief does not mention or cite *Femedeer* even once.

The Registrants claim that this existing, binding precedent focuses too narrowly on the principle of "governmental participation"—a necessary element of a cruel-and-unusual punishment claim. Ans. Br. 47. They argue that CSORA creates an "entire registrant-hostile ecosystem," making it unnecessary to consider government participation. *See* Ans. Br. 47–48.

But *Smith* considered and rejected precisely this approach. There, the Court noted that inclusion on a public registry "may cause adverse consequences … running from mild personal embarrassment to social ostracism." *Smith*, 538 U.S. at 99. Yet neither this nor "the attendant humiliation" of having registry information posted on the Internet were sufficient to make that similar registry statute "punishment." *Id.* And because *Smith* already rejected this analysis, evidence regarding how members of the public have reacted to the Registrants have no bearing on whether CSORA, "in its necessary operation," meets any of the seven factors from *Smith*. *Id.* at 97; *contra* Ans. Br. 49.

The Registrants' argument also fails to understand that the Eighth Amendment limits only the *government's* power to impose unconstitutional punishments. *See Whitley v. Albers*, 475 U.S. 312, 318 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). Thus, there is nothing inappropriate about focusing on "government participation."

Smith, *Shaw*, and *Femedeer* remain binding case law in this jurisdiction. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) ("The precedent of prior panels which this court must follow includes not only the very narrow holdings of these prior cases, but also the reasoning underlying these holdings, particularly when such reasoning articulates a point of law."). The district court erred in choosing to ignore these cases, and the Registrants err in asking this Court to do the same. The district court's conclusion that CSORA is punishment should be reversed.

B. Even assuming that CSORA amounts to "punishment," it is neither "cruel" nor "unusual," and the Registrants do not argue otherwise.

To prevail on their Eighth Amendment claim, the Registrants must—in addition to demonstrating that CSORA is punitive—establish that CSORA is "cruel and unusual." Under binding case law, however, CSORA is neither cruel nor unusual. Far more serious and burdensome punishments have passed constitutional muster for far lesser offenses than those committed by the Registrants, as this Court has recognized. *See* Op. Br. at 55–57 (discussing *Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347 (10th Cir. 2017)).

The Registrants effectively concede the point. Their Answer Brief does not defend the district court's conclusion that CSORA is "cruel and unusual," nor does it attempt to distinguish *Carney*. This Court should reverse the district court's decision and hold that CSORA is not cruel and unusual under existing law.

III. CSORA satisfies the substantive due process doctrine.

In their Answer Brief, the Registrants advance new arguments, never raised below, for why CSORA violates substantive due process. At the same time, they also urge this Court to adopt the district court's erroneous incorporation of inapposite punitive damages case law. But as the Director previously explained—and the district court found—CSORA is rationally related to a legitimate government interest. CSORA thus does not violate substantive due process.[2]

A. Millard and Knight identify no fundamental right that would trigger heightened scrutiny under the "irrebuttable presumption" line of case law.

Millard and Knight argue for the first time that CSORA violates their right to substantive due process because it establishes an "irrebuttable presumption" that they are likely to reoffend without

[2] As noted in the Opening Brief (and left unrebutted by the Registrants) there is no need to engage in an independent substantive due process analysis; the proper standard is whether CSORA is cruel and unusual punishment under the Eighth Amendment. *See* Op. Br. 66 n.21.

providing an individualized hearing. Ans. Br. 24–29. They argue that without an individualized hearing, the fit between the State's public-safety goals and the means it uses to accomplish those goals (i.e., CSORA) is constitutionally deficient. *See* Ans. Br. 28.[3]

The flaw in this argument is that Millard and Knight have failed to identify a substantive right that entitles them to heightened substantive due process protections. Instead, they cite cases involving an entirely different subject—parental rights. *See* Ans. Br. 24, 26. *Stanley v. Illinois*, for example, involved a parent's right to raise his children, which the Court described as "cognizable and substantial" after reviewing the historical respect for parental rights in the Court's jurisprudence. 405 U.S. 645, 651–52 (1972). Meanwhile, *Michael H. v. Gerald D.* involved a presumption against recognizing paternity by an unwed father regarding a child born to a married couple. 491 U.S. 110 (1989). Although that case involved putative parental rights, the

[3] The Director agrees that Millard must register for life, contrary to the finding in the district court's order, which was repeated in the Director's Opening Brief. App. 700; Op. Br. 14. This does not affect the Director's arguments.

plurality upheld an "irrebuttable presumption" because the putative father identified no specific right subject to heightened constitutional protection. *Id.* at 121, 128–29.

Millard and Knight struggle to fit themselves into the mold of these obviously inapplicable cases. Seizing on a brief comment from Justice O'Connor's concurrence in *Lawrence v. Texas*, they claim to have a "substantial and cognizable interest in not being subject to lifetime sex offender registration and all its attendant burdens." Ans. Br. 26 (citing *Lawrence v. Texas*, 539 U.S. 558, 581 (2003) (O'Connor, J. concurring)). But a passing mention in a concurrence is not how courts identify rights subject to heightened protection. Instead, the question is whether the right (which must be carefully described) is "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

Millard and Knight identify no case concluding that compliance with a sex offender registry scheme similar to CSORA implicates a

"deeply rooted" fundamental right. The case law supports the opposite conclusion: sex offender registries do not trigger heightened substantive due process protection. *See, e.g.*, *Litmon v. Harris*, 768 F.3d 1237, 1241–42 (9th Cir. 2014); *Doe v. Moore*, 410 F.3d 1337, 1342–45 (11th Cir. 2005); *Does v. Munoz*, 507 F.3d 961, 964–66 (6th Cir. 2007).

Thus, *Stanley* and similar cases discussing irrebuttable presumptions have no application here. *Weinberger v. Salfi*, 422 U.S. 749, 770–72 (1975) (limiting *Stanley* and similar cases to rights that enjoy a "constitutionally protected status"). Instead, the State need only show a rational relationship to a legitimate government interest. *Id.* at 772; *see also Glucksberg*, 521 U.S. at 728 (holding that when a fundamental right is not at issue, a law need only be "rationally related to legitimate government interests").

CSORA satisfies this rational-relationship standard. Following trial, the district court found, "There is a rational relationship between the registration requirements and the legislative purpose of giving members of the public the opportunity to protect themselves and their

children from sex offenses." App. 734. This is unsurprising, given that the Registrants had failed to argue otherwise. *See id.*[4]

The conclusion that CSORA satisfies the rational-relationship test is also consistent with established precedent, including *Smith v. Doe*. *See, e.g.*, 538 U.S. at 102–03. There, the Alaska statute similarly based the length of time an offender must register on the type and number of offenses and included the potential for lifetime registration. *Id.* at 102; *see* ALASKA STAT. § 12.63.020(a)(1) (2000). The Court had little difficulty

[4] The Registrants and various amici discuss studies that both support and question the use of sex offender registries generally. *See, e.g.*, Ans. Br. 32–33; States Br. 3–8; Scholars Br. 4; NARSOL Br. 8–10. The Registrants belatedly attempt to use the studies that support their position to undermine the district court's conclusion regarding CSORA's rational relationship to public safety. Ans. Br. 25, 27. The Registrants' new, extra-record factual arguments should be rejected. *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1240 n.1 (10th Cir. 2017) ("It is well-established that parties cannot build a new record on appeal."). Regardless, even crediting current disagreement over the efficacy of sex offender registries, it is in policy areas like this one that the State has particularly wide latitude to legislate. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (holding that the legislature has wide latitude in making policy on questions involving scientific debate).

concluding that the statute was reasonably related to the State's legitimate interests. *Smith*, 538 U.S. at 102.

Millard and Knight have failed to identify any right that enjoys heightened protections such that CSORA imposes an impermissible irrebuttable presumption. The appropriate test is whether CSORA is rationally related to a legitimate government interest—a test it clearly satisfies.

B. Case law regarding juvenile reporting requirements from other States is inapposite.

Relying on out-of-state cases, Vega argues that his substantive due process rights were violated because he was a juvenile at the time of his offense. Ans. Br. 30–31. He is incorrect.

The out-of-state cases are all distinguishable because they involved the automatic imposition of either lifetime registration without the opportunity to deregister or registration for 25 years before eligibility to deregister. *In re C.K.*, 182 A.3d 917, 918–19 (N.J. 2018) (lifetime registration); *In re C.P.*, 967 N.E.2d 729, 737 (Ohio 2012) (registration for 25 years before eligibility to deregister); *In re J.B.*, 107

A.3d 1, 3–4 (Pa. 2014) (registration for 25 years before eligibility to deregister). CSORA, however, allowed Vega to seek deregistration "after the successful completion of and discharge from a juvenile sentence or disposition" without any additional waiting period. COLO. REV. STAT. § 16-22-113(1)(e).

Vega argues that this difference is immaterial. Ans. Br. 30–31. But in the context of due process, the difference is fundamental. Unlike each of the offenders in the out-of-state cases who either would never receive a hearing or only receive a hearing after 25 years, Vega has already received three hearings on his requests to deregister. *See* App. 1416, 1445, 1497.

Vega argues that he may as well be subject to a lifetime registration requirement because he does not have records showing his successful completion of offense-specific treatment. Ans. Br. 31. As discussed below, however, Vega has never been subject to a requirement that he cannot deregister unless he produces specific records. *See* Part IV.B.3 of the Argument, below.

Vega is presently entitled to petition to deregister unlike the juveniles in the cases he cites. The holdings in those cases are inapposite. Vega's right to substantive due process has not been violated.

C. Constitutional limits on monetary punitive damages awards are irrelevant to this case and, in any event, CSORA is not "grossly excessive."

The Supreme Court has held that punitive damages awards violate substantive due process when they are "grossly excessive." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). Unprompted by either side, the district court erroneously imported this case law into its analysis, App. 733 & n.12, and the Registrants urge the same arguments on this Court. Ans. Br. 31.

Gore has no application here. *Gore* required the Supreme Court to determine if a punitive damages award was unconstitutional. The Court expressed two concerns: (1) whether the punitive damages award was so excessive that fair notice of the sanction was absent; and (2) whether

the damages award was a reasonable means of advancing "the State's legitimate interests in punishment and deterrence." *Id.* at 568, 574–75.

As to the first concern, CSORA is a state statute, not a matter of juror or court discretion. The Registrants cannot reasonably claim that they lacked fair notice of what CSORA would require.

The remaining issue is whether CSORA reasonably advances a legitimate state interest: the same analysis that applies in all substantive due process cases. *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998). In *Gore*, the interest was punishment and deterrence because those are the interests punitive damages advance. *Gore*, 517 U.S. at 568; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages "are private fines levied … to punish reprehensible conduct and to deter its future occurrence"). Because it was focused on punishment and deterrence, *Gore* analyzed whether the damages were appropriate in light of (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive

damages to the actual harm suffered; and (3) sanctions for comparable misconduct. *Id.* at 575–84.[5]

But the state interest behind CSORA is different. It is expressly intended not to punish but to promote public safety—one of the government's primary roles. COLO. REV. STAT. §§ 16-22-110(6)(a) & -112(3.5); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power …."). CSORA need only be rationally related to that purpose to pass constitutional muster. It is. *See* Part III.A of the Argument, above; Op. Br. 65–71.

The Registrants disagree, arguing that "the stated purpose of SORA (public safety) is not sufficiently related to the burdens it

[5] That at least one of these factors cannot be applied here (ratio to harm suffered, measured by comparing compensatory and punitive damages amounts) only emphasizes the district court's error in relying on *Gore*. But even were the Court to attempt to apply *Gore*'s three-factor test, CSORA's reporting and publication scheme would easily satisfy it, given that the degree of reprehensibility is "[p]erhaps the most important indicium of reasonableness." *See Gore*, 517 U.S. at 575. Sex offenses like those at issue here—including offenses against minor victims—are highly reprehensible.

imposes as applied to [the Registrants]." Ans. Br. 31–32. But like the district court, the Registrants do not focus on the burdens CSORA actually imposes: i.e., the registration or publication requirements. *Compare* Ans. Br. 31–33, *with* App. 733–34. Neither requirement receives even a mention in the Registrants' "grossly excessive" argument. *See* Ans. Br. 31–33. Rather, they argue that CSORA violates substantive due process because of public reaction to learning someone is on the sex offender registry. Ans. Br. 32.

This focus is inappropriate, *see* Part I of the Argument, above. Indeed, the notion that substantive due process is violated when a person's criminal past is made public runs counter to the transparency that is a hallmark of the American justice system. *See Smith v. Doe*, 538 U.S. at 99.

CSORA is rationally related to a legitimate government interest. There is nothing about CSORA that renders it arbitrary or shocks the conscience. *See* Op. Br. 67–69; *see also Smith*, 538 U.S. at 103–04 (concluding Alaska's similar registry scheme was not "excessive in relation to its regulatory purpose" even though it applied to all sex

offenders without requiring individualized hearings on future dangerousness). The district court erred in concluding otherwise.

IV. Vega's procedural due process claim is meritless.

The district court erred in reviewing Vega's collateral attack on his state-court deregistration proceedings under the *Rooker-Feldman* doctrine. But even if Vega's claim could properly be heard, the district court again erred in concluding that Colorado's courts violated Vega's right to procedural due process.

A. Because Vega asked the district court to engage in an appellate review of his state court deregistration proceedings, the *Rooker-Feldman* doctrine bars his procedural due process claim.

Applying the *Rooker-Feldman* doctrine in this case requires a precise understanding of the district court's ruling.[6] The district court

[6] Because Vega did not specifically state a procedural due process claim below, *see* Op. Br. 58 n. 18, the scope of his claim must be understood through the district court's ruling. Vega lists several places in the record to argue that he preserved his claim. But most of these citations point to mere recitations of facts without any specific statement of a procedural due process claim. *See* App. 98, 178, 413, and 656–57. The closest Vega comes is Appendix 439–44, but the focus there

held that Vega had proven a procedural due process claim because the state courts misapplied CSORA in placing the burden of proof on him and reached factual conclusions the district court believed were unsupported by the evidence. App. 730–31.[7] The district court did not hold that placing the burden of proof on a registrant violates procedural due process.

This is a subtle but important distinction that Vega fails to appreciate and that sets this case apart from *Skinner v. Switzer*, 562

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was on the *initial* requirement that juveniles register, not the deregistration proceedings, which was the only basis on which the district court ultimately ruled. More importantly, Vega did not state a procedural due process claim in his pretrial description of the case, App. 621, nor did he specifically make such a claim in closing arguments. *See* App. 650–64, 688–93.

[7] Because it was the state courts that allegedly violated Vega's due process rights, the Director is an improper party. Vega argues otherwise, essentially claiming that the Director is responsible for all state actions because he is being sued in his official capacity. Ans. Br. 43. But as the case on which Vega relies points out, "Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, '*the entity's* policy or custom *must have played a part in the violation* of federal law.'" *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (emphasis added). The CBI played no part in any alleged procedural due process violation, making the Director an inappropriate defendant for purposes of Vega's procedural due process claim.

U.S. 521 (2011), on which Vega relies. *See* Ans. Br. 39, 41. In *Skinner*, the plaintiff challenged a state statute that allowed post-conviction DNA testing in only limited circumstances. *Skinner*, 562 U.S. at 530. Skinner had twice attempted to take advantage of that statute, and the state courts denied both requests for failing to meet the statutory criteria. *Id.* at 528.

In his federal suit, Skinner made clear that he was not challenging the state courts' analysis of the state statute. *Id.* at 530. Rather, his claim was that the statute itself, as construed by the state courts, violated his right to procedural due process because he had an independent constitutional right to test the evidence. *Id.*

Thus, the *Rooker-Feldman* doctrine did not bar Skinner's suit because he was not challenging the state-court decisions themselves. *See id.* at 532–33. He was claiming that the statute itself violated his independent right to due process because it provided him with no path to post-conviction DNA testing. *Id.* at 532. This is the type of "independent claim" that *Skinner* refers to as being permissible under *Rooker-Feldman*. *See id.*

Skinner's claim stands in marked contrast to the claim at issue here. The district court ruled that Vega's right to procedural due process was violated because the state courts had reached incorrect factual conclusions and misapplied CSORA. *See* App. 730–31. This is not an independent claim, but a request that the federal court review the propriety of the state court proceedings. Indeed, it is difficult to understand how a due process claim based on a state court's allegedly erroneous findings of fact and legal conclusions could be anything other than a request that the federal district court engage in appellate review of the state-court decision. *Rooker-Feldman* therefore bars any such request.

Vega attempts to avoid this conclusion, noting that *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229 (10th Cir. 2006), stated that the *Rooker-Feldman* doctrine prevents a federal court only from reviewing claims "actually decided by a state court." *See* Ans. Br. 40 (citing *Mo's Express*, 441 F.3d at 1233). Thus, Vega argues, *Rooker-Feldman* cannot apply because the state courts never ruled on his procedural due process claim.

But as the case on which *Mo's Express* relies for that quote makes clear, the ultimate scope of *Rooker-Feldman* is that it "precludes a party losing in state court … from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002), *overruled in part on other grounds as recognized in Tal v. Hogan*, 453 F.3d 1244, 1256 n.10 (10th Cir. 2006) (internal quotation marks omitted). The Supreme Court has similarly described *Rooker-Feldman*'s scope. *See Exxon-Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (holding that *Rooker-Feldman* applies to "state-court losers complaining of injuries caused by state court judgments … and inviting district court review and rejection of those judgments").[8]

[8] The rule Vega proposes also makes no sense. Vega is arguing that so long as a plaintiff never raises a due process challenge in the state-court itself, then the federal courts are free to review the propriety of the state court's findings of fact and conclusions of law. *See* Ans. Br. 40–41. But if this is the case, then *Rooker-Feldman* merely penalizes the

Vega's claim fits squarely within this definition. He asserts that his right to procedural due process was violated *because the state courts misapplied CSORA and made incorrect factual findings*, and state-court judgments should be invalidated as a result. As part of that claim, the federal courts would necessarily be required to review issues "actually decided by a state court."

Vega's claim is a request for appellate review of his state-court decisions, in the guise of a federal claim—exactly what *Rooker-Feldman* prohibits. The district court thus lacked subject-matter jurisdiction to adjudicate it.

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conscientious litigant who brings an alleged error to the state court's attention. Vega's rule would perversely encourage parties to allow state-court errors to persist on the theory that those errors could then be reviewed in federal court through a procedural due process claim. Not only is this unreasonable, it would undermine the certainty and independence of the state-court system.

B. In any event, Vega's deregistration proceedings satisfied procedural due process.

The district court's procedural due process ruling was also incorrect on the merits. Vega failed to demonstrate that the magistrate judges who gave careful consideration to his evidence and arguments violated his right to procedural due process.[9]

1. Vega must satisfy a heavy burden to prove his procedural due process claim.

The federal courts have recognized that only in "rare circumstances" is a state court's determination of state law "'so arbitrary or capricious as to constitute an independent due process …

[9] That Vega's due process claim rests on the determination of magistrate judges only emphasizes the claim's flaws. Vega argues that Colorado's courts denied him due process by committing factual and legal errors. But he failed to use the process Colorado provides for correcting those sorts of errors by lower courts: filing an appeal. It is through the appellate process itself that Colorado reduces the risk of erroneous deprivations. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that the risk of erroneous deprivation is part of the flexible due process analysis). This alone undermines Vega's procedural due process claim.

violation.'" *Cummings v. Sirmons*, 506 F.3d 1211, 1237 (10th Cir. 2007) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).[10] Vega argues that this standard does not apply, but he again fails to appreciate material distinctions between his claim and the claims at issue in the cases he cites.

Vega relies on *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Griffin v. Illinois*, 351 U.S. 12 (1956), for the uncontroversial principle that processes employed by state courts have been held to violate due process. Ans. Br. 34. But neither case involved a claim like Vega's, in which purported errors in interpreting and applying state law form the basis of the alleged violation.

In *Griffin*, the plaintiffs claimed that their right to due process was violated because Illinois law did not provide free transcripts of criminal proceedings to indigent defendants pursuing an appeal. 351

[10] Of course, most cases stating any such claim would be barred by *Rooker-Feldman*. However, the heightened standard has been applied in federal habeas proceedings, where federal district courts have been specifically granted subject-matter jurisdiction to engage in a limited review of state-court proceedings. *See* 28 U.S.C. § 2254. That grant of jurisdiction does not encompass civil deregistration proceedings.

U.S. at 13–16. It was not that the Illinois courts had misinterpreted their own laws. Similarly, in *Evitts*, the issue was not the alleged misinterpretation of state law, but whether the defendant had a right to the effective assistance of counsel in an appeal. 469 U.S. at 388–91.

Vega attempts to fit his procedural due process claim within the context of *Griffin* and *Evitts*, but his claim is materially different. The district court ruled that Vega's right to procedural due process was violated because the state courts reached incorrect factual and legal conclusions. *See* App. 730–31 (asserting that the deregistration proceedings were conducted in a manner "not consistent with the [state] statute" and their outcome was contrary to "unrefuted evidence"). A procedural due process claim based on alleged misapplication of state law is held to a higher standard, which Vega cannot satisfy here.

2. Requiring a party seeking relief to carry the burden of proof does not violate due process.

The state courts required Vega to prove that he was entitled to deregistration under CSORA. Nothing about this conclusion violated procedural due process. The "ordinary default rule" is that the person

seeking to change the status quo bears the burden. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citing *inter alia* 2 J. STRONG, MCCORMICK ON EVIDENCE § 337, at 412 (5th ed. 1999). And many states place the burden on the registrant either explicitly or by requiring a court to find, by a preponderance of the evidence or more, that the registrant is unlikely to reoffend, a burden the registrant is clearly intended to meet. *See, e.g.*, ARK. CODE ANN. § 12-12-919(b)(2); DEL. CODE ANN. tit. 11, § 4121; HAW. REV. STAT. ANN. § 846E-10(f); IDAHO CODE ANN. § 18-8310(4)(c); S.D. CODIFIED LAWS § 22-24B-19; WASH. REV. CODE ANN. § 9A.44.142(4)(a).

Vega sought to change the status quo in the deregistration proceedings because he was seeking to be relieved of the registration requirement. There is no procedural due process violation in requiring that he bear the burden of demonstrating his entitlement to deregistration.

3. The state courts did not impose an unreasonable standard on Vega to prove his successful completion of offense-specific treatment.

Vega admits that, to be eligible to deregister, he must have successfully completed his juvenile sentence. Ans. Br. 35–36. But he claims that the state courts erred in requiring that he show successful completion of sex-offender treatment because CSORA does not specifically mention that criterion. Ans. Br. 36.

As one magistrate judge noted, however—and without contradiction—Vega's sentence required offense-specific treatment. *See* App. 1504 (Tr. 8:20–22), 1509–10 (Tr. 13:15–14:23). Thus, she concluded that to successfully complete his sentence, as CSORA requires for deregistration, he must also have successfully completed offense-specific treatment. This was not a new requirement but a reasonable interpretation of state law. *Contra* Ans. Br. 36.[11]

[11] Vega may now be arguing that requiring successful completion of offense-specific treatment is, in and of itself, a procedural due process violation. *See* Ans. Br. 36. Vega fails to explain his reasoning, but in any event, there is no reasonable argument that requiring successful

Moreover, the state courts did not impose an unreasonable standard on Vega to prove his successful completion of offense-specific treatment. While a certificate or other document could have conclusively answered the question, the courts did not rule that because there were no records, Vega could never be found to have successfully completed offense-specific treatment. *Contra* Ans. Br. 43 (characterizing Vega's treatment records as "the only evidence the state courts would accept as a condition precedent to granting his petition"); *see also* Ans. Br. 37 (claiming the courts "demanded Vega produce 'records'" to prove successful completion of treatment).

Instead, the state courts considered other evidence actually presented to them, which reflected whether Vega had successfully completed offense-specific treatment. And in ruling on his petitions, the courts recognized Vega's testimony but articulated specific reasons for concluding that Vega had not proven his successful completion of offense-specific treatment. *See* App. 1441–42 (Tr. 26:19–27:19); App.

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completion of offense-specific therapy before allowing an individual to deregister violates procedural due process.

1486–89 (Tr. 42:16–45:12), 1490–93 (Tr. 46:18–49:14); App. 1521–23 (Tr. 25:9–27:9). Vega focuses on the fact that records related to his treatment were no longer available to argue that he was denied due process. *See* Ans. Br. 37. Again, however, the records themselves were not the only source of evidence for Vega to demonstrate his eligibility to deregister.[12]

The state-court decisions did not impose an unreasonable standard on Vega to prove his successful completion of offense-specific therapy. Vega's right to procedural due process was not violated.

[12] *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000), on which Vega relies, is distinguishable on its facts. *See* Ans. Br. 37. That case involved a situation where an administrative agency lost the administrative record during the pendency of an appeal but still attempted to hold a party liable for paying certain employment-related benefits. 202 F.3d at 877–78, 883. The issue was similar to a spoliation claim. By contrast, the Division of Youth Correction was not a party to Vega's deregistration proceedings and there is no evidence that the proceedings were ongoing at the time the records become unavailable.

4. The state courts did not impose an insurmountable burden to prove a low-risk of re-offending.

CSORA requires courts to consider the likelihood that someone will re-offend when evaluating a deregistration petition. COLO. REV. STAT. § 16-22-113(1)(e). Vega argues that an "insurmountable burden" was placed on him to demonstrate that he was not likely to reoffend, amounting to the deprivation of an opportunity to be heard in a meaningful manner. Ans. Br. 38 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Vega appears to believe that the only proof he needed to present was fact that he had not re-offended. *Id.* He argues that requiring anything further was unconstitutional. *Id.*

Vega is incorrect. First, while a lack of additional offenses will generally be probative, Vega cites no authority for the principle that, as a matter of procedural due process, it is conclusive. Nor does it make sense for a lack of subsequent offenses to be determinative: any number of factors could affect a registrant's opportunity to reoffend and his likelihood of reoffending in the future. This includes the fact that CSORA provides the public with information they may have used to

reduce the opportunities for a registrant to reoffend. It would be inappropriate, therefore, to treat a lack of additional offenses while subject to CSORA's requirements as conclusive proof that a registrant is unlikely to re-offend once the registration and publication requirements are lifted.

Second, Vega's claim that he was not heard in a meaningful manner is baseless. The state courts were not dismissive of his arguments or his evidence. Instead, they gave careful and meaningful consideration to both and articulated specific concerns regarding Vega's likelihood for reoffending. *See* App. 1438–43 (Tr. 23:21–28:2), 1484–95 (Tr. 40:19–51:10), 1506–09 (Tr. 10:24–13:14), 1515–26 (Tr. 19:15–30:7). That Vega disagrees with the state courts' conclusions does not mean that he did not have an opportunity to be heard in a meaningful manner.

The state courts reasonably interpreted CSORA, provided Vega with a meaningful opportunity to be heard, and carefully considered Vega's arguments and evidence. Vega received the process he was due. The district court's conclusion to the contrary should be reversed.

CONCLUSION

The district court's order should be reversed, and this case should be remanded with directions to enter judgment for the Director.

Respectfully submitted on August 16, 2018.

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

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/s/ *Frederick R. Yarger*
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Dated: August 16, 2018

CERTIFICATE OF SERVICE

This is to certify that I have electronically served the foregoing Defendant-Appellant's Reply Brief upon all parties herein via CM/ECF on this 16th day of August, 2018, addressed as follows:

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