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
No. 13-cv-02406-RPM (Matsch, J.)

BRIEF OF THE STATES OF OKLAHOMA, KANSAS, NEW MEXICO, UTAH, AND WYOMING AS AMICI CURIAE

Mike Hunter
Attorney General of Oklahoma

Derek Schmidt
Attorney General of Kansas

Hector Balderas
Attorney General of New Mexico

Sean D. Reyes
Attorney General of Utah

Peter K. Michael
Attorney General of Wyoming

Mithun Mansinghani*
Solicitor General

Michael K. Velchik
Assistant Solicitor General

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 522-4392

*Counsel of record for *amici* the States of Oklahoma, Kansas, New Mexico, Utah, and Wyoming

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The States of Oklahoma, Kansas, New Mexico, Utah, and Wyoming have a significant interest in preventing sex offenders from committing additional sex crimes within their borders. Like Colorado, each of the States in the Tenth Circuit have endeavored to reintroduce convicted sex offenders into society, while at the same time protecting others in the community, especially children, through notification and registry systems. Colorado Sex Offender Registration Act ("SORA"), C.R.S. §§ 16-22-101, *et seq.*; K.S.A. §§ 22-4901, *et seq.*; N.M. Stat. Ann. §§ 29-11A-1, *et seq.*; Okla. Stat. tit. 57, § 581, *et seq.*; Utah Code Ann. §§ 77-41-101, *et seq.*; Wyo. Stat. Ann. §§ 7-19-301, *et seq.* Undoing the registry in just one State compromises the integrity of the uniform registry system Congress has attempted to establish through coordination with the States, *see Reynolds v. United States*, 565 U.S. 432, 435 (2012), creating opportunities for unregistered sex offenders to commit new crimes in adjacent jurisdictions, *see, e.g.*, *Nichols v. United States*, 136 S. Ct. 1113 (2016). And preventing States from operating their registries jeopardizes their ability to obtain federal funding that Congress has conditioned upon the implementation of a robust sex offender registry system. *See* 34 U.S.C. § 20927(a).

ARGUMENT

I. Sex offender registries advance a compelling public interest.

Aside from murder, sex crimes have long been treated by our society as the most serious and horrific crimes a person can commit. This is not simply a function of irrational animus against sex-offenders. Rather, it is a recognition that few other acts against another human being cause such immense and lasting damage, all while tearing at the fabric of our culture. This violation of a person's inherent dignity is a denial of another's humanity, a message broadcasted to the world that the victim is merely a nonconsensual instrumentality of the offender's desire. And the long-term harm caused by sex crimes is compounded exponentially when the victims are children.

As a result, States have a compelling interest and a moral obligation to prevent the future commission of sex crimes. Those most likely to commit sex crimes are convicted sex offenders. Decades of research have shown that convicted sex offenders are more likely to commit sex crimes than any other group. The federal government and the States have come to a consensus that the best, most cost-effective, and least intrusive way to minimize the risk created by reintroducing convicted sex offenders into society is to disseminate already-public information about sex offenders to citizens through sex offender registries. This balances the need to empower the public to protect themselves and their children while allowing the maximum amount of liberty to released sex offenders that public safety will permit.

A. Sex crimes pose unique threats to the citizenry and convicted sex offenders are more likely than others to commit these crimes.

As a class, convicted sex offenders present significant risks to public safety that are known to exist, even though difficult to detect on an individualized basis. These risks are heightened by the combination of three factors: the gravity of the potential harm, the low probability of detecting a repeat offense, and the relatively high rates of recidivism by sex offenders.

First, the Supreme Court has recognized that "[s]ex offenders are a serious threat in this Nation" and "the victims of sexual assault are most often juveniles." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion)). Courts have univocally stated that "[t]he sexual exploitation and abuse of children are unspeakably horrendous crimes." *United States v. Williams*, 636 F.3d 1229, 1234 (9th Cir. 2011); *cf. Kennedy v. Louisiana*, 554 U.S. 407, 467 (2008) (Alito, J., dissenting) (describing sexual assaults on minors as the "epitome of moral depravity").

Studies provide empirical support for this universal acknowledgment. Child sexual abuse not only leads to emotional problems such as depression, nightmares, suicidal attempts, and fear of men, but also to employment problems, including the inability to look for work, frequent job changes, and loss of employment. Md. Abdul Whoab & Sanzida Akhter, *The effects of childhood sexual abuse on children's psychology and employment*, 5 PROCEDIA SOCIAL & BEHAVIORAL SCIENCES 144 (2010). Child sexual

abuse not only has documented effects on the assaulted child well into adulthood, Joanna C. Young et al., *Long-term effects of child abuse and neglect on emotion processing in adulthood*, 38 CHILD ABUSE & NEGLECT 1369 (2014), it even has effects on children in the succeeding generation. Ron Roberts et al., *The effects of child sexual abuse in later family life; mental health, parenting and adjustment of offspring*, 28 CHILD ABUSE & NEGLECT 525 (2004). "Considering the tremendous physical and psychological impact sex crimes have upon the victims as well as their harmful societal effects, concerns of recidivism certainly warrant legislatures' attention." *Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000).

Second, sex crimes are notoriously difficult to detect and are significantly underreported to authorities. *See, e.g.*, *AZ v. Shinseki*, 731 F.3d 1303, 1312-14 (Fed. Cir. 2013) (indicating that only 11 percent of sexual assaults involving service members are reported to relevant authorities). A nationwide study based on interviews with children and their caretakers found that 70 percent of child sexual assaults reported in the interviews had not been reported to the police. David Finkelhor et al., *Sexually Assaulted Children: National Estimates & Characteristics*, JUVENILE JUSTICE BULLETIN 8 (Aug. 2008). Another study found that 86 percent of sex crimes against adolescents go unreported to police or any other authority. U.S. Dep't of Justice, Office of Justice Programs, Youth Victimization; Prevalence and Implications 6 (April 2003); *see also* National Research Council, *Estimating the Incidence of Rape and Sexual Assault* 36-38 (Candace Kruttschnitt, William D. Kalsbeek & Carol C. House, eds. 2014). More generally, it is believed that

only 15.8 to 35 percent of all sexual assaults are reported to the police. Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010*, BUREAU OF JUSTICE STATISTICS (2013), https://www.bjs.gov/content/pub/pdf/ fvsv9410.pdf; Wolitzky-Taylor et al., *Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women's Study Replication*, 26 J. OF INTERPERSONAL VIOLENCE 4 (2010). In light of this chronic underreporting, it is imperative that law enforcement, employers, parents, and teachers be able to identify and monitor those most likely to commit such crimes. It is equally important to avoid assuming that a convicted sex offender does not pose a risk of recidivating simply because authorities have not yet discovered any subsequent sex crime.

Third, numerous courts have recognized that sex offenders exhibit unusually high rates of recidivism.[1] Studies confirm that "compared to non-sex offenders, released sex offenders [are] more likely to be arrested for a sex crime." *Kebodeaux*, 570 U.S. at 396. Sexual recidivism rates overall "are four times higher for sex offenders compared to non-sex offenders." Patrick A. Langan et al., *Recidivism of Sex Offenders Released From*

[1] *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 103 (2003) (noting "the high rate of recidivism among convicted sex offenders and their dangerousness as a class"); *McKune*, 536 U.S. at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be arrested for a new rape or sexual assault") (citing U.S. Dep't of Justice statistics); *see also, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387, 395 (2013); *Williams*, 636 F.3d at 1234; *Johnson v. Terhune*, 184 Fed. App'x 622, 624 (9th Cir. 2006); *Hobbs v. Cty. of Westchester*, 397 F.3d 133, 153 (2d Cir. 2005); *United States v. Apodaca*, 641 F.3d 1077, 1085-86 (9th Cir. 2011) (Fletcher, J., concurring).

Prison in 1994, BUREAU OF JUSTICE STATISTICS (2003), https://www.bjs.gov/content/pub/pdf/rsorp94.pdf. Recidivism rates also vary by offense. For example, those convicted of molesting boys exhibited a recidivism rate of 35% over 15 years, while convicted rapists exhibited a rate of 24% over the same time period. A.J.R. Harris & R.K. Hanson, *Sex Offender Recidivism: A Simple Question*, PUBLIC SAFETY CANADA (2004). Courts have endorsed studies that reported recidivism rates of sex offenders at upwards of 40% to 52%. *McGuire v. Strange*, 83 F. Supp.3d 1231, 1259-60 (M.D. Ala. 2015); *see also State v. Burr*, 598 N.W.2d 147, 154-55 (N.D. 1999) (citing numbers ranging from 30% to 80%). Indeed, "[t]he compulsive nature of such criminal activity is recognized in Rules 414 and 415 of the Federal Rules of Evidence, which in contrast to the rules governing cases involving other crimes allow evidence of the defendant's other crimes, or acts, of sexual molestation of children to be introduced in evidence in a criminal or civil case in which the defendant is accused of such molestation." *Belleau v. Wall*, 811 F.3d 929, 933 (7th Cir. 2016).

And these dangers only compound with time. "Contrary to conventional wisdom, most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release." *Smith*, 538 U.S. at 104 (citation omitted). Thus, while 5.3% of sex offenders commit another sex crime within three years and 6.5% reoffend within five years, 24% of convicted sex offenders commit another sex crime within 15 years. Langan et al. (2003); L.L. Sample & T.M. Bray, *Are sex offenders dangerous?*, 3 CRIM. & PUB. POL'Y 59 (2003). Similarly, 35% of convicted child molesters

commit another sex offense within 15 years, and 52% reoffend within 25 years. A.J.R. Harris & R.K. Hanson (2004); R.K. Hanson et al., *A comparison of child molesters and non-sexual criminals: Risk predictors and long-term recidivism*, 32 J. OF RESEARCH IN CRIME & DELINQUENCY 325 (1995); R.A. Prentky et al., *Recidivism rates among child molesters and rapists: A methodological analysis*, 21 L. & HUMAN BEHAVIOR 635 (1997).

And of course all of these numbers are *underestimates*. Because sex offenses are so often underreported, *see supra* 6-7, it is likely that many sex offenders who *do* recidivate are not caught the second (or third, or fourth, or fifth) time. Thus, "[i]f only 20 percent of child molestations result in an arrest, [a] 3 percent recidivism figure implies that as many as 15 percent of child molesters released from prison molest again. That's a high rate when one considers the heavy punishment they face if caught recidivating, and thus is further evidence of the compulsive nature of their criminal activity." *Belleau*, 811 F.3d at 934. The bottom line is that child molesters, rapists, and sex offenders overall "are far more likely than non-sex offenders to recidivate sexually." Roger Przybylski, *Adult Sex Offender Recidivism*, Sex Offender Management Assessment & Planning Initiative, https://www.smart.gov/ SOMAPI/sec1/ch5_recidivism.html.[2]

[2] Even assuming that "psychiatric professionals are not in complete harmony" on recidivism risks, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes . . . . [W]hen a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (citations omitted).

* * *

As explained below, this combination of factors has prompted citizens in every State to squarely address the risk of sex crimes created by releasing convicted sex offenders into the general population. Moreover, this Court and myriad others have upheld these statutes because they "bear[] a rational relationship to the legitimate state interest of monitoring the reintroduction into society of sex offenders for purposes of public safety." *Lustgarden v. Gunter*, 966 F.2d 552, 556 (10th Cir. 1992).

B. Sex offender registries are the oldest, most common, most cost-effective, and least restrictive regulation that addresses sex offender recidivism.

For decades, States have used sex offender registries to guard against the risks posed by sex offender recidivism. Like most States, Colorado's website allows parents and employers to access already-public information that would otherwise be tedious to find. And this registry system is significantly *less* restrictive than other measures that have been deemed non-punitive and constitutional. As a result, the Supreme Court, this Court, and state courts routinely uphold registries like Colorado's against constitutional attacks.

1. History of sex offender registries.

Sex offender registries have a well-established pedigree. In 1937, Florida became the first State to create a sex offender registry. Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008). In 1947, California became the first state to implement a

state-wide registry for all sex offenders. *Id.* at 5. By 1989, twelve States had operating sex offender registries. Then, a series of high profile crimes by convicted sex offenders brought national attention to the issue. *See* 34 U.S.C. § 20901 (listing 17 examples from 1989 to 2002). Perhaps most famous is the case of 7-year-old Megan Kanka; her neighbor—who had two previous convictions for sexually assaulting young girls—kidnapped, raped, and strangled her to death. Megan's parents were unaware that the man living across the street was a convicted pedophile—and they continue to believe that their daughter would still be alive today if they had access to this information. *See* 34 U.S.C. § 21501; *see also Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016); Daniel M. Filler, *Making the Case for Megan's Law*, 76 IND. L.J. 315, 315-17 (2001).

In 1994, Congress responded by enacting the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994), named after an 11-year-old boy who was abducted at gunpoint and murdered. *Smith*, 538 U.S. at 89. This statute used the federal spending power to encourage States to adopt sex offender registration laws. *See Kebodeaux*, 570 U.S. at 391. "By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of" a sex offender registry. *Smith*, 538 U.S. at 90.

In 1996, Congress directed the U.S. Attorney General to establish a national database through which the Federal Bureau of Investigation could track certain sex offenders; it also directed state authorities to disseminate information contained in their

sex offender registries. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996); Pam Lyncher Sex Offender Tracking and Identification Act of 1996, Pub. L. 104-236, 110 Stat. 3093 (1996). Federal sex offender statutes were then amended by the Jacob Wetterling Improvements Act, Pub. L. No. 105-119, 111 Stat. 2441 (1997).

In 2006, Congress transitioned toward a comprehensive set of federal standards to govern state sex offender registration and notification programs by promulgating the Sex Offender Registration and Notification Act ("SORNA"), part of the Adam Walsh Child Protection & Safety Act. Pub. L. No. 109-248, §§ 102-155, 120 Stat. 587 (2006). This was meant "to make more uniform what had remained 'a patchwork of federal and 50 individual state registration systems,' with 'loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost.'" *Nichols*, 136 S. Ct. at 1119. It conditioned federal funding to States on their substantial implementation of certain requirements, 34 U.S.C. § 20927(a), including the dissemination of certain information on internet sites. 23 U.S.C § 20920.[3]

[3] Other federal statutes regulating sex crimes include: Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, 114 Stat. 1537 (2000); Keeping the Internet Devoid of Predators Act (KIDS Act), Pub. L. No. 110-400, 122 Stat. 4224 (2008); Military Sex Offender Reporting Act, Pub. L. No. 114-22, 129 Stat. 258 (2015); and the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 23 (2016); *see also Doe v. Kerry*, No. 16-cv-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016) (upholding International Megan's Law under the First and Fifth Amendments and Ex Post Facto Clause).

Without sex offender registries, it is more difficult for members of the general public to identify sex offenders in their neighborhood—as Megan Kanka's parents discovered too late. Although the information is often already public, the registry laws serve a vital function: the registry "makes the document search more efficient, cost effective, and convenient for the citizenry." *Smith*, 538 U.S. at 99.

2. Sex offender registries have consistently been upheld by courts and are significantly less restrictive than other regulations that have also been upheld.

Both the Supreme Court and this Court have repeatedly upheld sex offender registries and similar legislative measures against constitutional challenges.[4] State courts within the Tenth Circuit have also upheld registry laws as constitutional numerous times.[5]

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[4] *See, e.g.*, *United States v. Kebodeaux*, 570 U.S. 387 (2013); *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347 (10th Cir. 2017); *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016); *United States v. Neel*, 641 Fed. App'x 782, 794 (10th Cir. 2016); *United States v. White*, 782 F.3d 1118 (10th Cir. 2015); *Doe v. Shurtleff*, 628 F.3d 1217 (10th Cir. 2010); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2010); *United States v. Davis*, 352 Fed. App'x 270 (10th Cir. 2009); *United States v. Lawrance*, 548 F.3d 1329 (10th Cir. 2008); *Herrera v William*, 99 Fed. App'x 188 (10th Cir. 2004); *Lustgarden v. Gunter*, 966 F.2d 552, 555 (10th Cir. 1992); *see also United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013) (SORNA's registration requirements as applied to juvenile did not violate Eighth Amendment); *Gautier v. Jones*, 2009 WL 1444533, at *7 (W.D. Okla. May 20, 2009), *rev'd on other grounds* 364 Fed. App'x 422 (10th Cir. 2010) (upholding Oklahoma's SORA).

[5] *See People v. Sowell*, 327 P.3d 273 (Colo. Ct. App. 2011); *State v. Petersen-Beard*, 377 P.3d 1127 (Kan. 2016); *State v. Druktenis*, 86 P.3d 1050 (N.M. Ct. App. 2004); *Reed v. State*, 373 P.3d 118 (Okla. Ct. Crim. App. 2016); *State v. Briggs*, 199 P.3d 935 (Utah 2008); *Vaughn v. State*, 391 P.3d 1086 (Wyo. 2017); *Synder v. State*, 912 P.2d 1127 (Wyo. 1996).

Moreover, courts have upheld other measures to combat sex offender recidivism that are substantially more restrictive and more intrusive than online registries. For example, when Kansas authorized civil commitment of certain sex offenders who were deemed to pose a significant threat to public safety if released, the Supreme Court upheld this law, recognizing that the important public safety concerns outweighed the offender's substantial liberty interest. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997); *see also United States v. Comstock*, 560 U.S. 126 (2010); *Kansas v. Crane*, 534 U.S. 407 (2002); *Seling v. Young*, 531 U.S. 250 (2001). Similarly, Wisconsin requires certain sex offenders to wear a GPS monitor on their ankle—all day, every day, for the rest of their lives—to maximize the offender's freedom of movement while minimizing the risk that he reoffends without detection. The Seventh Circuit upheld the law, relying on studies that demonstrated the significant risks sex offenders pose to the community. *Belleau v. Wall*, 811 F.3d 929, 933-34 (7th Cir. 2016).

States' sex offender registries are substantially less intrusive than all of these measures. Unlike civil commitment, an online registry imposes no restrictions on the offender's freedom of movement. *Cf. Belleau*, 811 F.3d at 932 ("Having to wear a GPS anklet monitor is less restrictive, and less invasive of privacy, than being in jail or prison, or for that matter civilly committed."). Unlike a GPS monitor, a registry does not track an offender's every movement. When someone accesses Colorado's online registry, "[t]he process is more analogous to a visit to an official archive than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality."

Smith, 538 U.S. at 99. Indeed, an online registry is the least restrictive means of protecting the public from the risks associated with reintroducing sex offenders back into society—short of releasing them back into society *carte blanche*.

Most recently, this Court in *Carney v. Oklahoma Department of Public Safety* upheld an Oklahoma law that required aggravated sex offenders "to acquire a driver's license that indicates he is a sex offender." 875 F.3d 1347, 1350 (10th Cir. 2017) (citing Okla. Stat. tit. 47, § 6-111(e)(1) (2017)). In his brief, Mr. Carney alleged that, as a result of this requirement, he would suffer "emotional, psychological, and potentially physical pain," would be "driven from his Oklahoma City community and . . . ostracized from many aspects of civil society," and would suffer "humiliation . . . when cashing a check, picking up prescriptions, obtaining medical care, boarding a plane, renting a vehicle, and making most everyday purchase in many stores." *Carney v. Okla. Dep't of Pub. Safety*, No. 16-6276, Aplt. Br. at 12 (10th Cir. Nov. 7, 2016). This Court nonetheless rejected his argument that the drivers' license requirement amounts to public shaming in violation of the Eighth Amendment. *Carney*, 875 F.3d at 1352. And thankfully so: this requirement has likely already saved lives.

Consider the case of Michael Slatton, who had sexually battered a 58-year-old woman in 2005 and, as result, had to carry a driver's license indicating that he was a sex offender. In 2014 he kidnapped an 8-year-old girl from a Tulsa playground and raped her multiple times. During the abduction, Slatton stopped at a store where he bought coloring books and crayons. When the store clerk saw that Slatton was a sex offender,

he connected this to Slatton's suspicious behavior and purchases, as well as a recent Amber alert, then called the police who were then able to apprehend Slatton. He is currently serving a 120-year prison sentence for kidnapping, first-degree rape of a victim younger than 14, and child abuse by injury—among other counts.[6]

II. The decision below erroneously ignored the empirical and legal bases supporting the use of sex offender registries.

Despite the voluminous, binding precedent upholding the constitutionality of sex offender registries, the district court below held that required registration was unconstitutional as applied to the Plaintiffs in this case. In addition to the arguments advanced by Appellants, the district court's decision was flawed because it: (1) concluded that Plaintiffs as individuals did not pose a risk of future harm only by ignoring the vast empirical data that sex offenders as a class impose such a risk; (2) flouted binding precedent by attempting to divine through dicta that this precedent had been abrogated; (3) based its decision on the actions of private parties, contravening the longstanding principle that the Constitution governs only state action; and (4)

[6] Samantha Vincent, *Claremore sentenced to 120 years in kidnapping, rape of 7-year-old Tulsa girl*, TULSA WORLD (Apr. 27, 2016), *available at* http://www.tulsaworld.com/news/courts/claremore-man-sentenced-to-years-in-kidnapping-rape-of-/article_d2617fba-836e-5e48-baa4-0919dd35e071.html; Lori Fullbright, *Oklahoma Requires Aggravated Sex Offenders To have It Printed On License*, NEWSON6 (May 6, 2014), *available at* http://www.newson6.com/story/25447223/oklahoma-requires-aggravated-sex-offenders-to-have-it-printed-on-license.

expanded the Eighth Amendment beyond anything ever contemplated by this Court or the U.S. Supreme Court.

A. The district court ignored the legislative findings and empirical evidence that sex offenders, including Plaintiffs, as a class pose a risk to the community of future sex offenses.

Throughout its opinion, the district court based its conclusions as to both the Eighth Amendment and Due Process claims on the notion that the registration system's "fundamental flaw" is the "disregard of any objective assessment of the *individual*'s actual proclivity to commit new sex offenses." Doc. 106 at 24-25 (emphasis added); *see also id.* at 18, 31-32. But this is an unrealistic understanding of the risks posed by sex offenders that ignores legislative findings, backed by the robust empirical evidence discussed above, that sex offenders as a class *are* far more likely to commit sex crimes than other citizens. *Compare* Colo. Stat. Ann. § 18-1.3-1001 ("The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision."), *with supra* 7-9 (detailing empirical evidence supporting this legislative finding). Thus, it is precisely *because* of their status as convicted sex offenders that we know Plaintiffs have a statistically high chance of recidivating. No evidence demonstrates that Plaintiffs are exceptions to this empirical fact.

That Plaintiffs have not yet been accused of committing further sex crimes does not put into doubt the fact that they pose a continuing danger to society. As discussed

above, the vast majority of sex crimes go unreported, *see supra* 6-7, so a lack of reporting as to Plaintiffs is evidence of nothing. Moreover, most instances of sex crime recidivism occurs many years after release, *see supra* 8-9, so the fact that Plaintiffs have not committed a sex crime *yet* does not indicate that they do not pose a continuing public safety issue. And the fact that Plaintiffs have not yet been caught committing another sex crime may only be evidence that the sex offender registry is *working*—it is allowing the public to remain vigilant when interacting with and living near Plaintiffs.

B. The district court impermissibly held that binding precedent had been abrogated *sub silentio* based on inapplicable dicta.

The district court recognized—as it must—that on-point precedent from both this Court and the U.S. Supreme Court foreclosed Plaintiffs' claims. *Smith v. Doe*, 538 U.S. 84 (2003); *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016); *United States v. White*, 782 F.3d 1118 (10th Cir. 2015); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2010); *United States v. Lawrance*, 548 F.3d 1329 (10th Cir. 2008); *see also supra* 13 n.4. But the district court impermissibly circumscribed this precedent by surmising that those cases have been implicitly overruled by other cases.

For example, the district court fixated on the recent decision in *Packingham v. North Carolina*, attempting to explore the mind of a single Justice based on dicta in that case. *See, e.g.*, Doc. 106 at 29 n.9 ("*Packingham* also reflects an apparent evolution in the mindset of Justice Kennedy, who authored the majority opinions in both *Smith v. Doe* and *Packingham*."). From such divination on judicial "evolution," the court below saw

"serious doubt on Justice Kennedy's conclusions in *Smith*," which upheld the constitutionality of sex offender registries as non-punishment. *Id.* But, far afield from the case at bar, *Packingham* struck down under the First Amendment an outright prohibition on an individual from accessing virtually any part of the internet. Here, Plaintiffs are at liberty to access the internet at all times (and no First Amendment claim has been brought). While some offenders are required to appraise law enforcement of their online personae, none of the Plaintiffs in this case are subject to that requirement. In any event, this Court explicitly upheld such a regulation in *Doe v. Shurtleff*, 628 F.3d 1217, 1220 (10th Cir. 2010) (reviewing Utah's SORA). The district court nowhere cites this case in its opinion.

Similarly, the district court claimed that Justice Kennedy's majority opinion in *Smith* "ring[s] hollow" because "[h]e and his colleagues did not foresee the development of private, commercial websites exploiting the information made available to them and the opportunities for 'investigative journalism,'" as well as "the ubiquitous influence of social media." Doc. 106 at 24. Putting aside the district court's assumption that the Justices were wholly incapable of conceiving of the power of the Internet and investigative journalism in 2003, the Supreme Court has repeatedly warned lower courts not to assume that its decisions have been abrogated *sub silentio* by subsequent developments: "it is th[at] Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)); *accord State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "If a precedent of th[at] Court

has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

The Court just last term made clear that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Bosse*, 137 S. Ct. at 2 (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998)); *accord Souryavong v. Lackawanna Cty.*, 872 F.3d 122, 129 (3d Cir. 2017); *Mayhew v. Town of Symrna*, 856 F.3d 456, 464 (6th Cir. 2017); *Navarro v. Encino Motorcars, LLC*, 845 F.3d 925, 935 (9th Cir. 2017). "The Supreme Court has not always been consistent in its decisions or in its instructions to lower courts. There are, however, some things the Court has been perfectly consistent about, and one of them is that it is that Court's prerogative alone to overrule one of its precedents." *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012); *see, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (admonishing lower courts against "conclud[ing the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent"). Because cases like *Smith v. Doe* are on point, binding precedent, it was not the prerogative the district court to read recent case law or societal changes as implicitly overruling *Smith*.

C. The district court disregarded the longstanding state action requirement for constitutional claims by focusing primarily on private conduct.

The court below repeatedly adverted to the actions of private parties, *e.g.* Doc. 106 at 34-35, rather than the State of Colorado, in order to conclude that Colorado's registry was unconstitutional because "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." Doc. 106 at 41. Appellant in this case correctly argues that this analysis violates the jurisdictional requirements of Section 1983. *See* Aplt. Brief at 29-31; *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). It also runs against the broader case law requiring state action to make out a constitutional claim.

The Supreme Court has made clear that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cty. Dep't of Social Serv.*, 489 U.S. 189, 195 (1989)). While "[i]ndividuals do, indeed, have a right to be free from . . . from cruel and unusual punishment[, i]ndividuals . . . have no right to be free from the infliction of such harm by private actors." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996) (citing *DeShaney*, 489 U.S. at 196).

While courts may find that private parties' conduct constitutes state action under Section 1983 where private parties (a) are coerced by the State, (b) act in a public function, or (c) act in concert with the State to deprive someone of a constitutional right, *Wittner v. Banner Health*, 720 F.3d 770 775-81 (10th Cir. 2013), Plaintiffs have not argued and provide no evidence that the private conduct alleged here falls within any of these categories. *See also Pino v. Higgs*, 75 F.3d 1461, 1465-66 (10th Cir. 1996); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1142 (10th Cir. 1995); *Olson v. Carmack*, 641 Fed. App'x 822 (10th Cir. 2016); *Gross v. Samudio*, 630 Fed. App'x 772 (10th Cir. 2015).[7]

Outside these exceptions, State laws may only violate the Fourteenth Amendment where there is state action. *DeShaney*, 489 U.S. at 196 (The Fourteenth Amendment's "purpose was to protect the people from the State, not to ensure that the State protected them from each other."). Nevertheless, the court below created a watershed constitutional right by allowing conduct by private actors—even conduct that itself is illegal under state law—to transform an otherwise constitutional disclosure regulation into an unconstitutionally cruel and unusual punishment. Such legal alchemy the Constitution neither requires nor tolerates.

[7] Similarly, the State may become responsible for preventing such harms when it constrains the physical liberty of a citizen, but no such restraint is alleged here. *See Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992).

Here, the State is merely providing information regarding public safety to private actors—all of which would be revealed by routine background checks. *Cf. Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) ("Information readily available to the public is not protected by the constitutional right to privacy. Consequently, government disclosures of arrest records, judicial proceedings, and information contained in police reports do not implicate the right to privacy.") (citations omitted); *cf. also Aid for Women v. Foulston*, 441 F.3d 1101, 1118 (10th Cir. 2006). Publication of already-public information, regardless of public reaction, cannot violate the Constitution any more than publication of this Court's opinion would—which will forever notify the world of Plaintiff Millard's sex crimes even if he successfully petitions his information to be removed from the registry. Nor would public reaction to "our criminal law tradition [of] public indictment, public trial, and public imposition of sentence" constitute punishment. *Smith*, 538 U.S. at 98-99; *Femedeer*, 227 F.3d at 1251. Indeed, public trials are what the Constitution requires. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Chandler v. Florida*, 449 U.S. 560 (1981).

Again, the idea that such publication violates the Eighth and Fourteenth Amendments because of the reactions by third parties to that information conflicts with this Court's recent decision in *Carney v. Oklahoma Department of Public Safety*, 875 F.3d 1347, 1350 (10th Cir. 2017). Such arguments formed the core of Mr. Carney's claims. *See supra* 15 (quoting Carney's arguments); *see also Carney v. Okla. Dep't of Pub. Safety*, No.

16-6276, Aplt. Br. at 11 (10th Cir. Nov. 7, 2016) ("Mr. Carney presented comments made by an expert in the field that this practice would increase personal and property crimes against sex offenders . . . . Mr. Carney also made allegations that the branding of the term 'Sex Offender' on a driver license was a permanent stigma that had the effect of casting a person out of the community."). This Court properly rejected those arguments, as have other courts. *See, e.g.*, *Chrenko v. Riley*, 560 Fed. App'x 832, 834 (11th Cir. 2014); *cf. United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012). "Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [Plaintiffs] to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State . . . but by [private actors]." *DeShaney*, 489 U.S. at 202-03. In light of this Court's recent decision in *Carney*, the district court's opinion should be reversed.

Finally, the court below falsely disparaged the Colorado public and non-state officials, characterizing them as irrational and arbitrary tormenters, in order to arrive at its conclusion that the Constitution was violated by their actions. *Amici* do not share such a low opinion of the people of Colorado. That a school has taken efforts to exclude from campus Plaintiff Knight—convicted of attempting to sexually assault a toddler—does not constitute cruelty or caprice, but rather is eminently reasonable given the sensitive location and the extremely high recidivism rates of child molesters. *See supra* 7-9. Even if such a result has "proven inconvenient" and "result[ed] in ongoing

difficulties for Mr. Knight," Doc. 106 at 14, these public responses to truthful information do not rise to the level of barbarism that the district court impugned upon Coloradans.

D. The district court's decision is contrary to the well-established precedent on cruel and unusual punishment.

"A punishment is cruel and unusual if it is 'grossly disproportionate to the severity of the crime.'" *Carney*, 875 F.3d at 1352 (quoting *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)). "The Supreme Court has upheld a life sentence for three theft-based felonies totaling a loss of about $230, . . . a 25-year sentence for stealing golf clubs, . . . a life sentence for possessing 672 grams of cocaine, . . . and a 40–year sentence for possessing nine grams of marijuana." *Id.* (citing *Rummel*, 445 U.S. at 265-66; *Ewing v. California*, 538 U.S. 11, 28 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991); *Hutto v. Davis*, 454 U.S. 370, 370 (1982)). In the domain of sex offenses, this Court has approvingly stated that an "80-year sentence for production of child pornography was not disproportionate to the crime because of the devastating consequences of sexual abuse of children." *Brown v. Dep't of Corr. Okla. State Penitentiary*, 597 Fed. App'x 960, 963-64 (10th Cir. 2014) (citing *United States v. Dowell*, 771 F.3d 162, 169 (4th Cir. 2014)). And in *Carney*, this Court upheld a law requiring certain sex offenders to carry a driver's license indicating their sex offender status. The regulation at issue here is much less harsh (or "disproportionate") than all these examples.

It is also implausible to argue that sex offender registries are "unusual" in any sense of the word, when such systems are implemented by every State, the federal government, and a large portion of both developed and developing countries. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Global Overview of Sex Offender Registration and Notification Systems*, at 1 (2016), *available at* https://ojp.gov/smart/pdfs/global-survey-2016-final.pdf. Indeed, the United States and other countries have begun coordinating a uniform international system to appraise relevant authorities whenever a registered sex offender travels from one country to another. *See, e.g.*, *Nichols*, 136 S. Ct. at 1119 (discussing International Megan's Law). Such widespread prevalence is fundamentally incompatible with the conclusion that registries are cruel and "unusual." *Cf. Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (surveying international prevalence of practice to determine whether it is cruel and unusual); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (same).

CONCLUSION

"Readers of this [court's] opinion who are parents of young children should ask themselves whether they should worry that there are people in their community who have 'only' a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts." *Belleau*, 11 F.3d at 933-34 (citations omitted). Colorado and the *amici* States believe parents have the right to know. The court below was wrong to second-guess

this policy choice. For the foregoing reasons, the judgment of the district court below should be reversed.

Respectfully submitted,

Mike Hunter
Attorney General of Oklahoma

Derek Schmidt
Attorney General of Kansas

Hector Balderas
Attorney General of New Mexico

Sean D. Reyes
Attorney General of Utah

Peter K. Michael
Attorney General of Wyoming

/s/ Mithun Mansinghani
Mithun Mansinghani*
Solicitor General
Michael K. Velchik
Assistant Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE 21st St.
Oklahoma City, OK 73105
405-522-4392
Mithun.Mansinghani@oag.ok.gov

*Counsel of record for *amici* the States of Oklahoma, Kansas, New Mexico, Utah, and Wyoming

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32 and Tenth Circuit R. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Garamond, 14-point. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,498 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Mithun Mansinghani
Mithun Mansinghani

CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS

Counsel certifies that with respect to the foregoing:

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Mithun Mansinghani

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I hereby certify that, on April 2, 2018 true and correct copy of the foregoing Brief of Amici Curiae was served via the Court's CM/ECF system on counsel of record for Appellant and Appellees.

/s/ Mithun Mansinghani
Mithun Mansinghani