RECORD NO. 19-1953

In The

United States Court Of Appeals

For The Fourth Circuit

HESTER PRYNNE,

Plaintiff – Appellant,

v.

COLONEL GARY T. SETTLE,
in his official capacity as Superintendent of the Virginia Department of State Police,

Defendant – Appellee,

and

GOVERNOR RALPH S. NORTHAM,
in his official capacity as Governor of the Commonwealth of Virginia.

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1953 Caption: Hester Prynne v. Colonel Gary T. Settle

Pursuant to FRAP 26.1 and Local Rule 26.1,

Hester Prynne*
(name of party/amicus)

*Pseudonym used by permission of the district court

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Timothy P. Bosson Date: 9/17/2019

Counsel for: Appellant Hester Prynne

CERTIFICATE OF SERVICE

****

I certify that on 9/17/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Addresses not applicable -- all parties are registered CM/ECF users.

/s/ Timothy P. Bosson
(signature)

9/17/2019
(date)

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 based on Ms. Prynne's constitutional claims, and supplemental jurisdiction under 28 U.S.C. § 1367 for her state law claim involving the same case and controversy. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The district court issued a Memorandum Opinion and final Order granting Appellee's Motion to Dismiss on August 16, 2019. J.A. 216. Appellant timely filed her Notice of Appeal on August 29, 2017. J.A. 217-218.

STATEMENT OF THE ISSUES

1) Whether the district court erred in dismissing Ms. Prynne's federal Ex Post Facto challenge to her lifetime subjection to the Virginia sex offender registry, where the district court did not apply the Supreme Court's seven-factor test for assessing whether a statute is punitive in effect and Ms. Prynne alleged facts sufficient to satisfy that test.

2) Whether the trial court erred in dismissing Ms. Prynne's Due Process claims where the Virginia sex offender registry substantially interferes with Ms. Prynne's fundamental rights to (1) travel, (2) work, (3) parent, and (4) maintain reasonable expectations of privacy, and (5) the statute lacks a rational basis as applied to Ms. Prynne.

STATEMENT OF THE CASE

A. Procedural History

Hester Prynne[1] filed this suit against Colonel Gary T. Settle,[2] as Superintendent of the Virginia Department of State Police ("VSP"), on March 20, 2019, seeking equitable relief under 42 U.S.C. § 1983 from her lifelong sentence to "violent" status on the Virginia Sex Offender Registry and its disabilities, restrictions, and requirements. Joint Appendix ("J.A.") 32. Ms. Prynne alleged a violation of the U.S. Constitution's Ex Post Facto Clause and six violations of the Due Process Clause, as well as a violation of the Virginia Constitution's Ex Post Facto clause. *Id*.

The VSP moved to dismiss the Complaint on April 16, 2019. J.A. 156. By final order entered on August 16, 2019, the district court dismissed Ms. Prynne's federal claims against the VSP for failure to state a claim and "decline[d] to exercise its supplemental jurisdiction" over her state law claim. J.A. 216. This appeal followed.

B. Facts

When Hester Prynne pled guilty, no sex offender registry existed at all. Registration was not part of her criminal sentence, and Ms. Prynne received early

[1] Appellant uses a pseudonym as approved by the District Court. J.A. 181.
[2] Ms. Prynne also initially sued Governor Ralph Northam but voluntarily dismissed him as a party before the Court ruled on the Motion to Dismiss.

release from probation for good behavior, living a model life ever since. J.A. 7 (¶ 3). But today, over 25 years later, Ms. Prynne's punishment continues. Without due process or any kind of hearing even, the requirements and disabilities premised on her conviction have increased dramatically.

In 1993, Ms. Prynne had a sexual encounter with a 15-year old male in the home where she served as a nanny for two younger children. J.A. 10 (¶ 17). The offense "involved no force on her part," physical or otherwise, as the male pressured Ms. Prynne and she eventually relented. J.A. 26 (¶¶ 17-18, 133). She was charged with taking indecent liberties with a child in a custodial or supervisory relationship under Va. Code § 18.2-370.1. J.A. 10 (¶ 17). "To avoid any time in jail, Ms. Prynne pled guilty in January 1994." *Id*. (¶ 18). She received a suspended three-year sentence and four years of probation beginning in February 1994. *Id.* Ms. Prynne's sentence did not mention or require sex offender registration. *Id*. (¶ 19).

Later that year, the Virginia General Assembly created the Virginia Sex Offender and Crimes Against Minors Registry (the "Registry"). Va. Code Ann. § 19.2-298.1(B) (1994); J.A. 10-11 (¶¶ 21-22). Because Ms. Prynne was "under community supervision," the law applied to her retroactively. *See* Va. Code Ann. § 9.1-901(A). She was forced to register.

This inclusion was fateful, as the burdens of Registry status have multiplied over time. Originally, "[t]he Registry was primarily accessible to law-enforcement

only, and not publicly available." J.A. 11 (¶ 23). But Virginia soon amended the Registry in 1998, making it "publicly available by means of the Internet." J.A. 12 (¶ 30). At first, anyone on the Registry could petition for removal at any time. J.A. 11 (¶ 23). But in 1997, "Virginia amended the Registry to forbid petitions for removal during the first 10 years of registration;" meaning, Ms. Prynne could not seek removal until 2005. *Id*. (¶ 26). In 2001, four years before Ms. Prynne could seek removal, Virginia again amended the Registry, and classified a single violation of Va. Code § 18.2-370.1 as a "sexually violent offense"; triggering a lifetime sentence on the Registry. J.A. 12 (¶ 31); *see also* Va. Code Ann § 9.1-902(E) (the modern statute).

Thus, Ms. Prynne has now been classified as a "violent" offender subject to life on the Registry. Va. Code Ann. §§ 9.1-902; 9.1-908, 9.1-910; J.A. 10, 12-13 (¶¶ 17, 31-35). The law applies this "violent" description to Ms. Prynne personally, not just to her offense. Va. Code Ann. § 16.1-228(6) (calling her "a violent sex offender"). The online Registry itself lists Ms. Prynne as "Violent: Yes." J.A. 12 (¶ 35, n. 2). It is a crime to leave a child alone with her. J.A. 13 (¶ 36); VA Code Ann. § 16.1-228. Failure to register is a Class 6 felony for "violent" sex offenders, rather than a Class 1 misdemeanor. *Id*. (¶¶ 39-40). And the web of restrictions and requirements applicable to sex offenders apply with increased rigor to those considered "violent."

The VSP has permanently assigned a sex offender investigative officer to Ms. Prynne's case. J.A. 16 (¶¶ 55-56). The officer may come to her home or workplace at any time to physically verify her residence and must do so at least twice a year. *Id*.; Va. Code Ann. § 9.1-907(C). "These random … checks can occur at any time and are an embarrassing part of life as a registrant." J.A. 16 (¶ 56). Ms. Prynne also has to appear in-person whenever she "changes her address, car, or employment information, to update her Registry information." *Id.* (¶ 57). Every two years, Ms. Prynne must appear in-person to update her Registry photograph. *Id*. Every year, she must complete the re-registration process, and *every 90 days*, she must submit a new set of fingerprints. *Id.* (¶¶ 58-59). The VSP collect a laundry list of Ms. Prynne's other data at various intervals, some of which it stores, and some of which it broadcasts publicly. J.A. 14-15 (¶¶ 48-50). She has three days to inform authorities if her employment, address, car, or educational information changes, and *only 30 minutes* to inform them if she gets a new email address or Internet identifier. J.A. 15 (¶¶ 51-53). All of this information is sent to Ms. Prynne's personally-assigned investigative officer.

In-person reporting and a public sex offender profile are only the beginning. Virginia also has a web of restrictions that prevent Ms. Prynne from parenting or being close to children, including a prohibition on being on the property of any school or daycare while it is operating. *E.g,* J.A. 16-17 (¶¶ 60-65). International

travel is nearly impossible, since Ms. Prynne must inform international authorities of her plans via state and federal intermediaries (her passport has been stamped "sex offender"), and most countries deny registrants entry upon arrival without prior notice. J.A. 17-18 (¶¶ 68-69, 75). Interstate travel is often prohibitively difficult as well, since many states tie their own registration requirements to whether the individual is required to register in their home state. If Ms. Prynne is present in another state for *more than one day*, her Virginia Registry status may trigger an obligation to register, creating a permanent and public profile in another state. J.A. 18 (¶¶ 70-74). With her employer's name and work address listed on the Registry, getting and keeping a job is tremendously difficult; several types of occupations are legally off-limits, and discrimination against registrants is legal, easy, and typical. J.A. 19 (¶¶ 76-81).

The Registry has restricted every aspect of Ms. Prynne's life. Ms. Prynne has lost housing opportunities, (J.A. 20 (¶¶ 87-91)) and suffered vigilantism in her neighborhood. J.A. 22 (¶ 105). She has lost the ability to fully participate in religious and community life (J.A. 21 (¶¶ 96-98)), and the ability to raise children. J.A. 20-21 (¶¶ 92-95). She was fired from her job at a Big Four accounting firm and has been turned down for others as well. J.A. 21 (¶¶ 96-98).

The Registry has all the factual indicators of punishment. J.A. 23-25 (¶¶ 110-24).

The Registry inflicts what has been regarded as punishment in American history and tradition: a modern version of public shaming, banishment, and the personal accountability of a parole officer. J.A. 22-23 (¶¶ 109-111). It involves affirmative disabilities and restraints. J.A. 13-19, 23 (¶¶ 41-85, 112). And the Registry promotes three quintessential purposes of punishment—incapacitation, retribution, and deterrence—but not the fourth: rehabilitation. J.A. 23 (¶ 113). It incapacitates by limiting a registrants' anonymity, interaction with children and allowing criminal justice authorities and the general public to have intimate knowledge of the registrant's location and personal data. *Id*. It exacts retribution by imposing a life-strangling web of disabilities, commands, and restrictions based only on the registrant's former conviction. *Id*. And it deters the public from committing sex crimes, by imposing on convicted sex offenders a life of restrictions and ostracism. *Id*.

In fact, research shows that the Registry "accomplishes only punitive purposes," and "has no discernable positive effect on recidivism." J.A. 23-25 (¶¶ 114-124) (emphasis added); J.A. 40-155. A peer-reviewed study of Virginia and 14 other states concluded that "rather than reducing recidivism, notification laws [like the Registry] may well have *increased* (and almost certainly have *not* reduced) the frequency of sex crimes committed by convicted sex offenders." J.A. 89, 92 (emphasis in original). After all, "publicity can lead to negative consequences for

sex offenders, including loss of employment, housing, or social ties; harassment; and psychological costs such as increased stress, loneliness, and depression." J.A. 46. "Offense-based registries—like Virginia's—are not effective" in accomplishing non-punitive purposes. J.A. 25 (¶ 120).

Ms. Prynne is now publicly labelled "Violent: Yes" on the Registry website. Her Registry sentence is for life—despite a blameless, law-abiding record of changed character. Without trial or due process, the Registry has branded Ms. Prynne forever.

SUMMARY OF ARGUMENT

No one condones sex offenses. Ms. Prynne joins the public and the law in agreeing that "many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties," including criminal punishment. *Snyder*, 834 F.3d at 705. But the proper time for meting out punishment is at sentencing, not afterwards.

> As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice. Such lawmaking has "been, in all ages, [a] favorite and most formidable instrument[] of tyranny."

Id. at 706 (quoting *The Federalist No. 84*, at 444 (Alexander Hamilton) (The Gideon ed., George W. Carey & James McClellan eds., Liberty Fund 2001)).

In *Smith v. Doe*, the Supreme Court set the standard for evaluating Ex Post Facto challenges to sex offender regulations. 538 U.S. 84 (2003). The district court failed to apply the seven-factor test from *Smith*, ignoring six of the factors. And under the correct test, Ms. Prynne prevails.

Unlike the first-generation Alaska statute the Supreme Court considered in *Smith*, which simply required registration and dissemination of already public information, Virginia's Registry contains exactly the sort of commands and restrictions that the *Smith* Court itself would have found an Ex Post Facto violation: onerous face-to-face reporting, bans on entering schools or being close to children, disqualifications from various professions, and a life-long categorization in Virginia's most severe category of sex offenders, "sexually violent" offenders. Research has shown that Virginia's blunt, offense-based Registry does not accomplish its core non-punitive purpose of protecting the public. Instead, the Registry actually *exacerbates* recidivism by cutting people off from jobs, housing, relationships, and the just rewards of any rehabilitation, thus accomplishing only the classic purposes of criminal punishment: incapacitation, general deterrence, and retribution.

Taking Ms. Prynne's fact allegations as true, the Registry (1) inflicts what "has been regarded in our history and traditions as a punishment," (2) "imposes [] affirmative disabilit[ies] [and] restraint[s]," (3) "promotes the traditional aims of

punishment," (4) lacks a "rational connection to a non-punitive purpose," (5) "is excessive with respect to [any non-punitive] purpose," (6) applies, in the main, "only on a finding of scienter," and (7) applies to conduct that "is already a crime." *See Smith*, 538 U.S. at 97, 105. The Registry therefore squarely violates the Ex Post Facto Clause, the Constitutional bulwark against "the violent acts which might grow out of the feelings of the moment … those sudden and strong passions to which men are exposed." *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

The Registry also violates the Due Process Clause. As applied to Ms. Prynne, its provisions cannot survive strict scrutiny since the Registry violates Ms. Prynne's fundamental rights to travel, work, parent, and preserve a reasonable expectation of privacy. And more tellingly, the Registry as a whole—with its extensive liberty deprivations—fails a rational basis review, since it requires Ms. Prynne to register for life even though she is not a danger, and the Registry itself *exacerbates* rather than reduces recidivism.

ARGUMENT

Standard of Review

The Fourth Circuit reviews a district court's Rule 12(b)(6) dismissal *de novo*, "accept[ing] the factual allegations in the complaint as true and construe[ing] them in the light most favorable to the nonmoving party." *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145 (4th Cir. 2018). To survive such a motion, "a complaint

must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A complaint should not be dismissed as long as it provides sufficient detail about the claim to show that the plaintiff has a more-than-conceivable chance of success on the merits." *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 511 (4th Cir. 2015) (brackets and internal quotation marks omitted).

Discussion

I. THE DISTRICT COURT ERRED IN DISMISSING MS. PRYNNE'S VALID EX POST FACTO CLAIM

Under the Ex Post Facto Clause, "punishment may never be retroactively imposed or increased." *Snyder*, 834 F.3d at 705. Ms. Prynne's lifetime Registry sentence is undisputedly retroactive. The only remaining question is whether it is punitive. At the motion to dismiss stage, Ms. Prynne's allegations alone make clear the answer is "Yes."

To determine whether "a sex offender registration and notification law constitutes retroactive punishment forbidden by the Ex Post Facto Clause," the first step is to ask "[i]f the intention of the legislature was to impose punishment." 538 U.S. at 92. If so, "that ends the inquiry." *Id*.[3] But if the legislature intended "a

[3] To preserve the issue for Supreme Court review, Ms. Prynne contends that the intent of the Virginia General Assembly in classifying her and her offense as

regulatory scheme that is civil and nonpunitive," courts "must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Id*. (citations and quotation marks omitted). "In analyzing the effects" of sex offender registration, federal courts use the "seven [*Mendoza-Martinez*] factors … as a useful framework." *Smith*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)). Those factors ask "whether, in its necessary operation," the law:

> [1] has been regarded in our history and traditions as a punishment;
> [2] imposes an affirmative disability or restraint;
> [3] promotes the traditional aims of punishment;
> [4] has a rational connection to a nonpunitive purpose;
> [5] … is excessive with respect to this purpose …
> [6] comes into play only on a finding of scienter[;] and
> [7] whether the behavior to which it applies is already a crime.

Id. at 97, 105.

A. The District Court Failed to Apply The Binding Supreme Court Standard

Although the district court recited the language of *Smith*, its subsequent analysis failed to apply it. Instead, the district court focused exclusively on the first

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"sexually violent" was punitive. This is evidenced by the legislature's extreme disregard for registrant's rights or ability to rehabilitate, the lifetime Registry sentence imposed, and the Registry's close connection to the criminal code and to law enforcement. Even the legislature's Registry-wide statement of intent is focused on deterrence and incapacitation—which are well-established goals of punishment and consistent with punitive intent.

factor: whether the Registry resembled "the historic punishment of shaming" or "banishment." J.A. 206-08. After finding—without reference to any particular factor (though perhaps in comparison to probation and parole)—that the Registry's reporting "requirements are merely portions of a remedial statutory regime" (J.A. 208-09), the district court simply concluded that the Registry's retroactive provisions "do not have punitive effect." J.A. 209.

In other words, the district court ignored the six remaining factors laid out in *Smith*.

For this reason alone, the district court's decision should be reversed and remanded. *Smith* made clear that the seven factors are a "useful framework[…,] guideposts," each of which should be given at least slight "weight." *Smith* at 97, 105. A district court should not lightly throw them out. In so doing, the district court ignored not only the binding law but Ms. Prynne's powerful factual claims under each factor. *Compare Nat'l Assoc. for Rational Sexual Offense Laws v. Stein*, 2019 U.S. Dist. LEXIS 126617, *33-35 (M.D.N.C. July 2019) (listing the plaintiffs' allegations and applying *Smith*'s test to find a plausible Ex Post Facto violation).

B. Under the Correct Standard, Ms. Prynne States a Valid Claim

As courts around the country are now recognizing —from Oklahoma to Maine, and Michigan to Alaska—a registry like Virginia's is punitive under *Smith*'s framework.

i. The Registry Imposes What Has Historically Been Recognized As Punishment

The first *Mendoza-Martinez* factor asks whether the statute imposes something historically recognized as punishment. Here, the Registry's effects resemble three recognized punishments: probation and parole, banishment, and public shaming.

First, the Registry's in-person reporting requirements resemble the criminal punishment of probation or parole. As with parolees, registrants have a law-enforcement officer personally assigned to their case, monitoring compliance with the law. J.A. 16 (¶ 56). As with parolees, the law requires registrants to report face-to-face to this officer regularly, including *within three days* of any change in address, name, employment information, or "vehicle … registration information." Va. Code Ann. §§ 9.1-903, 904. Registrants must also report in person if they enroll or leave "any postsecondary school, trade or professional institution, or institution of higher education." Va. Code Ann. § 9.1-906. Similar to parolees, Registry status—because it is linked to sex offender registration duties in other states and at the federal level—makes international travel nearly impossible, while interstate travel is "prohibitively difficult." J.A. 17-18 (¶¶ 68-75). And like parolees, registrants who "fail[] to comply" with any of these duties are subject to arrest and imprisonment. Va. Code Ann. §§ 9.1-907; 18.2-472.1(A)-(B) (first infraction is a "Class 6 felony" for those

convicted of "sexually violent" offenses, with stiffer penalties for subsequent violations).

The Supreme Court in *Smith* found that the probation/parole comparison had "some force," but ultimately rejected it, noting that Alaska's registry did not require in-person reporting, and allowed "offenders … to move where they wish and to live and work as other citizens, with no supervision." 538 U.S. at 101. Not so in Virginia. Virginia permanently appoints individual State Police officers to supervise each registrant who is not already *actually* being supervised by a literal probation/parole officer. J.A. 22-23 (¶¶ 109, 111). Because of requirements linked to Registry status, registrants' ability to travel is dramatically curtailed. Occupations related to public transportation or children are generally barred. J.A. 19 (¶¶ 77-79). The Registry mandates extensive in-person reporting (Va. Code §§ 9.1-903, 904, and 906) and commands the VSP—or the Department of Corrections, if a registrant is on actual probation or parole—to "physically verify" the registrant's information semi-annually, including home and work addresses. Va. Code Ann. § 9.1-907(C)-(D). If a registrant so much as gets a new email address, social media account, or utility log-in, he must notify the appropriate agency "either in person or electronically … *within 30 minutes*." Va. Code Ann. § 9.1-903(G) (emphasis added).

This is Orwellian-level supervision. Federal courts have always recognized that the restraints of probation and parole constitute punishment, and the Registry closely

resembles that historic sanction. *Korematsu v. United States*, 319 U.S. 432, 435 (1943); *United States v. Bynoe*, 562 F.2d 126, 128 (1st Cir. 1977) (citing *Korematsu*).

The Registry's restrictions are also reminiscent of public shaming. In colonial America, "[h]umiliated offenders were required to stand in public with signs cataloguing their offenses, [a] murderer might be branded with an 'M,' and a thief with a 'T.'" *Smith*, 538 U.S. at 97-98 (citations and quotation marks omitted). This created "permanent stigmas, which in effect cast the person out of the community." *Id*. at 98. The Registry performs an eerily similar shaming function: registrants are permanently on-view electronically, with their offense hanging like a sign below their recent photograph. Unlike the registry in *Smith*, which primarily republished available crime data, Virginia's Registry itself generates new data for public consumption, including this inscription for Ms. Prynne: "Violent: Yes." This classification is false, not appealable, and it places Ms. Prynne in the most restricted Registry tier. J.A. 13-14 (¶¶ 42-46).

The Registry also displays other non-public data, from the petty (Ms. Prynne's height and weight) to the life-altering (her home and work addresses, and the name of her employer). What citizen - from hair stylist to sanitation worker to attorney - would not cower before the prospect of having these data points publicly linked to their alleged worst act? And like branding in the colonial era, Ms. Prynne must face this ignominy for the rest of her life.

The Registry's practical effect is a form of banishment. Ms. Prynne cannot enter schools, daycares, or churches with daycare facilities while they are in operation. Public transportation jobs are off limits, and she cannot be left alone with a child no matter the circumstances. She has lost housing opportunities and jobs. She is permanently stigmatized by law and cannot effectively rejoin polite society.

Because the Registry resembles the historic punishments of probation and parole, banishment, and public shaming, this factor heavily weighs in Ms. Prynne's favor.

ii. The Registry Imposes Affirmative Disabilities and Restraints

The Registry also affirmatively restrains and disables Ms. Prynne's conduct. Unlike the registry in *Smith*, Virginia's Registry imposes extensive in-person reporting requirements, when information from email addresses to place of employment change. It creates a laundry list of public transportation and childcare-related jobs that Ms. Prynne cannot hold. J.A. 14 (¶¶ 77-79). And it banishes Ms. Prynne from schools, churches and daycares. These restrictions are direct restraints on conduct, and so this factor weighs in favor of finding the Registry punitive.

iii. The Registry Promotes the Traditional Aims of Punishment

As the Sixth Circuit explained in *Snyder*, the Registry "advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence." 834 F.3d at 704. The core purpose of the Registry is incapacitation:

preventing recidivism by restricting conduct and alerting the public to danger, thus ostensibly preventing registrants' opportunities to re-offend. The Registry also advances both specific and general deterrence: specific, because a registrant's every move is tracked and monitored with the threat of imprisonment for non-compliance and general, because no person would want the restricted, shamed life of a registrant. *See Smith*, 538 U.S. at 102 (accepting Alaska's concession that the law may have a deterrent effect).

But the Registry is also retributive. At the most basic level, "it inflicts painful requirements and restrictions based on commission of a crime." J.A. 18 (¶ 113). And the harshness of its restrictions–especially for a "sexually violent" offense—cannot be altered based on a showing of decreased risk. In other words, the Registry tailors the punishment to the crime. Although the *Smith* Court dismissed this consideration as "reasonably related to the danger of recidivism" (538 U.S. at 102), the fact that a law has both a deterrent and a retributive aspect does not eliminate one or the other. In other words, the Registry is premised on culpable conduct: the core focus of retribution. *See Smith*, 538 U.S. at 113 (Stevens, J., dissenting) ("In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.")

Notably, the Registry makes absolutely no provision for rehabilitation, a fourth traditional purpose of punishment.[4] At least as to "violent" offenders, the Registry applies for life; the clearest proof of trustworthiness cannot change it. This disregard for the well-being of registrants themselves is a particularly telling sign the Registry is intended to be punitive.[5] Through the Ex Post Facto Clause, the American people sought to "shield themselves" against "the violent acts which might grow out of the feelings of the moment." *Fletcher*, 10 U.S. at 138. Social anger and fear towards sex offenders is understandable and, to some offenders, is appropriate. But that very status as one of the community's most marginalized groups makes registrants a likely target for ex post facto oppression. The Registry's disregard for rehabilitation is telling.

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[4] As Founding Father Benjamin Rush wrote in 1787, "The design of punishment is said to be, 1st, to reform the person who suffers it… ." Essays, literary, moral & philosophical by Benjamin Rush, M.D., 1746-1813, available at https://quod.lib.umich.edu/e/evans/N25938.0001.001/1:7.6?rgn=div2;view=fulltext (last visited October 4, 2019). The very word "penitentiary" suggests the Christian practice of penitence," and "a merciful and forgiving God [who] might welcome reformation." Lynch, Jack; Cruel and Unusual: Prisons and Prison Reform, Colonial Williamsburg Journal, Summer 2011, available at https://www.history.org/Foundation/journal/Summer11/prison.cfm (last visited October 4, 2019). And the modern term "corrections" retains the same focus on rehabilitating the offender's conduct.

[5] *See Smith*, 538 U.S. at 117 (Ginsberg, J., dissenting) ("meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation").

Because the Registry advances incapacitation, deterrence, and retribution, but not rehabilitation, this factor weighs in favor of Ms. Prynne as well.

iv. The Registry Is Not Rationally Related to a Non-Punitive Purpose

The stated purpose of the Registry is:

> [T]o assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders and to protect children from becoming victims of criminal offenders by helping to prevent such individuals from being allowed to work directly with children.

Va. Code Ann. § 9.1-900. In short, the goal is to protect the public from sex offender recidivism. While protecting the public is a core goal of criminal punishment—deterrence, incapacitation, and rehabilitation all prevent future crimes—it is well-established that public health and safety, standing alone, is a non-punitive purpose. *Smith*, 538 at 93-94.

Unfortunately, the Registry itself is not rationally related to that end.

The Sixth Circuit recognized in 2016 that "recent empirical studies" cast "significant doubt" on *Smith*'s claim that "[t]he risk of recidivism posed by sex offenders is frightening and high." *Snyder*, 834 F.3d at 704 (quoting *Smith*, 538 U.S. at 103). "One study suggests that sex offenders … are actually less likely to recidivate than other sorts of criminals." *Id*. (citation omitted). This is particularly true of older, female registrants like Ms. Prynne. J.A. 25 (¶ 121).

The Complaint alleges—with research to back up the point—that the Registry actually *increases* recidivism. J.A. 24-25 (¶¶ 115-121). Blunt, offense-based registries like Virginia's impose extreme costs on registrants, without testing or course-correcting based on the actual risk of re-offending. The result is that sex offenders experience "negative consequences … including loss of employment, housing, or social ties; harassment; and psychological costs such as increased stress, loneliness, and depression." J.A. 24 (¶ 117) (quoting J.J. Prescott & Jonah E. Rockoff, *Do Sex offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 161 (2011) (available at J.A. 41-85)). This obviously boosts general deterrence, because the public sees the stigma and costs of Registry status. J.A. 25 (¶ 122). But for those *already* on the Registry, restricting legal paths (jobs, schools, housing, and relationships) increases the "relative utility of criminal behavior." J.A. 24 (¶ 118). This "peer-reviewed study, which analyzed data from 15 states [including Virginia] over approximately ten years, provides compelling evidence that rather than reducing recidivism, notification laws may well have increased (and almost certainly have not reduced) the frequency of sex crimes committed by convicted sex offenders." *Id.* (¶ 119).

In other words, "[o]ffense-based registries—like Virginia's—are not effective." J.A. 25 (¶ 120). The only sex offender registries that saw detectible "reductions in sex crime recidivism" were in Minnesota and Washington state: both

of which "use risk assessment instruments to classify offenders, and [] limit public notification only to those who pose the greatest threat to community safety." *Id*. By contrast, offense-based registries "significantly dilute[]" the "ability to identify sexually dangerous persons." *Id*. There is no evidence indicating that the Registry actually decreases recidivism, and the evidence instead points towards increased recidivism.

Ms. Prynne acknowledges the Supreme Court's admonition that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103. But this is not a question of fit. A law that does *the opposite* of its stated goal, making the public *more* vulnerable to crime, is not rationally related to that purpose. At the motion to dismiss stage, these allegations must be accepted as true, and every reasonable inference drawn in Ms. Prynne's favor. *Rockville Cars, LLC*, 891 F.3d at 145. Virginia considers recidivism a nail and uses a hammer to attack it. But if recidivism is an un-opened ketchup packet, a hammer is simply not a rational tool for the job. Ms. Prynne's factual allegations—viewed in the light most favorable to her, as the law requires—establish that the Registry's approach to recidivism is not rational.

Because the Registry is not rationally related to its stated nonpunitive purpose, this factor weighs in Ms. Prynne's favor.

v. The Registry Is Excessive With Respect to Any Non-Punitive Purpose

Smith explains that "[t]he excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." 538 U.S. at 105. As explained above, the offense-based Registry is unreasonable simply because it does not reduce recidivism and increases it instead. For this reason alone, the excessiveness factor weighs in Ms. Prynne's favor.

But the permanence and extreme nature of the Registry further demonstrate its excessiveness.

The Registry mandates lifetime registration for every offender whose offense is considered "sexually violent." Va. Code Ann. § 9.1-908. It does not matter that Ms. Prynne is completely rehabilitated, happily married, and has been a model citizen for 25 years. J.A. 3 (¶ 3). It does not matter if she becomes a paraplegic, or otherwise physically incapacitated. It will not matter when she turns 80, or 90. Permanence is excessive.

And the Registry's extreme intrusiveness makes the permanence even more excessive. It does not serve public safety that Ms. Prynne must appear in-person to update her employer, address, or new car—the same information could be conveyed by mail or electronically. It does not serve public safety that registrants may not

even *enter* a school or daycare property, with no exceptions for attending church, going to vote, or performing one's job (i.e., purposes that do not involve close contact with children). It does not serve public safety to publicly list the *name* of a registrant's employer on top of the employer's *address*: the only additional effect is to discourage the employment of sex offenders. It does not serve public safety to publish Ms. Prynne's weight. It does not serve public safety to require a new set of fingerprints every 90 days—those are not changing! And it does not benefit public safety to call *everyone* "convicted" of a "sexually violent" offense "Violent" for the rest of their lives.

Because the Registry exacerbates recidivism rather than reduce it, and its sanctions are permanent and overly intrusive, this factor also weighs in Ms. Prynne's favor.

vi. The Registry Is Largely Imposed Only After a Finding of Scienter

The Registry applies exclusively to those who have committed crimes. Va. Code Ann. § 9.1-901. All crimes require a finding of scienter, as even strict liability offenses require that the physical act in question be intentionally performed. *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015); citing, *Morissette v. United States*, 342 U.S. 246, 250 (1952). The Registry also sweeps up those who committed a listed crime but are found "not guilty by reason of insanity." Va. Code Ann. § 9.1-901(B). But notably, the Registry does not apply to anyone who factually committed

a Registry offense, but escapes conviction due to an illegal search, by pleading to a non-Registry offense, or for any other reason. This is so even if the offense is later established in a civil forum. *Id*. Because the overwhelming majority of (if not all) people on the Registry are there because of a conviction, this factor weighs in Ms. Prynne's favor.

vii. The Registry Applies Exclusively to Already-Criminalized Conduct

The final *Mendoza-Martinez* factor is "whether the behavior to which [the law] applies is already a crime." *Smith*, 538 U.S. at 105. This is certainly the case for the Registry: it applies exclusively to conduct covered by a list of crimes. Va. Code Ann. § 9.1-902; *see also id*. § 9.1-901. The Supreme Court gave this factor "little weight," calling it a "necessary beginning point" to address recidivism. Nevertheless, this factor weighs in Ms. Prynne's favor.

viii. The Registry's Overall Effect is Punitive

Taking each factor into account, the Registry's effect is clearly punitive. It imposes sanctions that everyday citizens and historians alike recognize as equivalent to probation/parole and public shaming. It imposes affirmative restraints: in-person appearances, property bans, and occupational bars. It promotes general deterrence, incapacitation, and rehabilitation, but not specific deterrence. Instead it *exacerbates* recidivism, with a blunt approach that ignores actual risk or rehabilitation, and

burdens every registrant with a tyrannical, life-strangling web of commands. All this for conduct already defined as criminal.

Numerous courts post-*Smith* have recognized that modern sex offender registration—with its life-altering label, reporting requirements, and web of invasive rules and disabilities—is punitive. *Snyder*, 834 F.3d at 704 (6th Cir. 2016) (finding Michigan's Registry punitive in effect); *Doe v. Miami-Dade Cty.*, 846 F.3d 1180, 1186 (11th Cir. 2017) (finding "County's residency restriction is so punitive in effect as to violate the ex post facto clause[]"); *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *State v. Letalien*, 985 A.2d 4 (Maine 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013); *Starkey v. Okla. Dep't of Corr*., 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). Federal district courts in the Fourth Circuit have agreed as well. *Stein*, 2019 U.S. Dist. LEXIS 126617 at *33-35 (M.D.N.C. July 2019) (North Carolina registry); *Wass*, 2018 U.S. Dist. LEXIS 112257, at *9 (E.D.N.C. July 2018) (federal registry).

The reasoning of *Stein* and *Snyder* is particularly instructive. As noted in *Snyder*, *Smith* does not "writ[e] a blank check to states to do whatever they please in this arena." *Snyder*, 834 F.3d at 705. Instead, the inquiry is fact intensive, and focused on the law's actual effects. *Id*.; *Smith*, 538 U.S. at 97. At the motion to dismiss stage, when a plaintiff squarely alleges detailed facts satisfying *Smith*'s

factors, courts must simply accept those "allegations as true" and find a valid Ex Post Facto claim has been pled. *Stein*, 2019 U.S. Dist. LEXIS 126617 at *33-35; *Miami-Dade Cty*., 846 F.3d at 1186 ("Our role in reviewing the grant of a 12(b)(6) motion merely is to determine whether the plaintiffs…alleged sufficient facts to raise plausible claims that the County's residency restriction is so punitive in effect that it violates the ex post facto clause[].") *Smith* imposes a fact-intensive test, and a motion to dismiss is no place to resolve such a claim.

Sex offenses are reprehensible for a reason, and crime deserves punishment. But the proper time for punishment is at sentencing, and the Registry violates this basic constitutional protection.

II. THE DISTRICT COURT ERRED IN DISMISSING MS. PRYNNE'S VALID DUE PROCESS CLAIMS

The complaint also pleads violations of the Due Process clause, detailing how the Registry curtails four fundamental rights, and lacks a rational basis, particularly as applied to Ms. Prynne. J.A. 27-30.

Again, the district court failed to apply the proper test. Under the Supreme Court's substantive Due Process jurisprudence, strict scrutiny automatically applies to *any* interference with a fundamental right. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015). The district court's reliance on *Bostic v. Schaefer* (760 F.3d 352, 377 (4th Cir. 2014)) for the proposition that "[s]trict scrutiny applies only when laws 'significantly

interfere' with a fundamental right" is patently misplaced. J.A. 209.. *Bostic* relied exclusively on *Zablocki v. Redhail* (434 U.S. 374, 386-87 (1978)) - both marriage cases - but *Zablocki*'s "significant interference" test has been explicitly modified by the Supreme Court.

The Supreme Court stated this principle most clearly in *Glucksberg* – a physician suicide case – holding that "the Fourteenth Amendment forbids the government to infringe … fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 521 U.S. at 721 (citation and internal quotation marks omitted); see, also, *Reno v. Flores*, 507 U.S. 292, 302 (1993) and *Obergefell*, 135 S. Ct. at 2602-05 (dispensing with any reference to "significant interference").

In short, strict scrutiny applies to all fundamental rights without regard to the level of interference. Pitched battles, therefore, ensue over whether the right actually in question is fundamental. *See Obergefell*, 135 S. Ct. 2584, 2602; *D.B. v. Cardall*, 826 F.3d 721, 740-41 (4th Cir. 2016). Other than the right to travel, however, the district court failed to articulate whether the rights asserted by Ms. Prynne were fundamental. And for all claims, including the right to travel, the court wholly failed to apply the correct strict scrutiny analysis.[6]

[6] This was perhaps because the VSP's motion to dismiss failed to address whether the rights asserted were fundamental; instead, only the Court raised any strict scrutiny arguments below.

The court's inattentive approach was even worse for Ms. Prynne's final two claims. The heart of these claims is that the Registry's lifetime "violent" label lacks a rational basis *as applied to Ms. Prynne*: a reformed, non-violent offender. J.A. 26-27, 29 (¶¶ 132-137, 155). The district court just ignores these claims altogether, despite listing them in the procedural history.[7]

For the reasons that follow, the complaint alleges five valid Due Process claims under binding constitutional law.

A. The Registry Violates Ms. Prynne's Fundamental Right to Travel

It is well-established that the right to interstate travel is a fundamental right. *United States v. Guest*, 383 U.S. 745, 757 (1966); *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978) ("the constitutional right to interstate travel [has been] recognized by this Court for over 100 years"); *Mohamed v. Holder*, 266 F. Supp. 3d 868, 877 (E.D. Va. 2017). The district court acknowledged this but reasoned that the Registry did "not implicate" the right, because the tremendous disincentives to travel are imposed by "other states." J.A. 211. Therefore, the court reasoned, these arguments "may not be raised here as Virginia has no say in them." *Id*. As a factual matter, the court is simply wrong.

[7] Below, Ms. Prynne pled Counts II(E) and II(F) as separate counts, challenging the Registry's irrationality in the former, and its retroactivity in the latter. J.A. 29-30 (¶¶ 154-158). While this is permissible (*United States v. Carlton* (512 U.S. 26, 31 (1994)), the rational basis standard applies to both so she addresses the claims in a single section here.

It is Virginia who has placed Ms. Prynne on the Registry—a decision that automatically triggers sex offender restrictions in states around the country, such as Pennsylvania and Maryland.[8] J.A. 18 (¶ 71). In some States, those on the Virginia Registry must register within less than 24 (Alaska) or 48 (Florida) hours of arriving in the other state. J.A. 18 (¶ 72) (Alaska Stat. § 12.63.010; Fla. Stat. § 943.0435).

Moreover, the Virginia Registry commands not only that Ms. Prynne report an out-of-state move "10 days prior to [her] change of residence" but also that "the State Police shall notify the designated law-enforcement agency of that state" of Ms. Prynne's move. Va. Code Ann. § 9.1-903(D) (emphasis added). The VSP must also report to other states if Ms. Prynne gains employment in another state, (§ 9.1-903(E)) or even owns a vehicle there. *Id*. at (F). Thus, Virginia intentionally reaches out to any state where Ms. Prynne has any significant presence to jump-start the sex offender measures there. This is an affirmative and substantial interference that "significantly discourages" Ms. Prynne from travelling, given the oppressive nature of sex offender registration nationwide. *Zablocki*, 434 U.S. at 387 n.12.

Because interstate travel is a fundamental right, strict scrutiny applies, and the law will be struck down unless it is "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721; *Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999); *Mohamed v. Holder*, 266 F. Supp. 3d 868, 877 (E.D. Va. 2017). And, as

[8] States to which Ms. Prynne would like to travel and stay with family.

the Supreme Court recently added in *Obergefell* and is most apt in this case, courts must also consider "any history and tradition of animus that motivates the legislative restriction on the freedom." *Obergefell*, 135 S. Ct. at 2598. The Registry, as applied to Ms. Prynne, fails this test.

Ms. Prynne is completely rehabilitated. *See, e.g.* J.A. 7 (¶ 3). She has lived a "model" life since her conviction and "is happily married." *Id.* The possibility of her committing another sex crime is effectively zero, making her inclusion on the Registry irrational, and certainly not narrowly tailored. *Id*. (¶ 121) ("Using offense-based categories makes even less sense in cases like Ms. Prynne's—a female, over-50 registrant—since female registrants are less likely to re-offend than male registrants, and recidivism rates decline with age.") Even if *some* period of registration would have been narrowly tailored, it no longer makes any sense for Ms. Prynne, who is 25 years removed from her conviction. Ms. Prynne should not be on the Registry at all, nor subject to its restrictions on interstate travel.

B. The Registry Violates Ms. Prynne's Fundamental Right to Work

The Registry—by publishing registrants' employer name and address and banning occupations—strikes at the heart of the fundamental right "to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) ("the Fourteenth Amendment's Due Process Clause includes some generalized due process right to

choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation.") Moreover, a protected liberty interest should be found in a "stigma-plus" claim, where a party alleges "both a stigmatic statement and a 'state action that 'distinctly altered or extinguished' his legal status." *Evans v. Chalmers*, 703 F.3d 636, 654 (4th Cir. 2012); quoting, *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 315 (4th Cir. 2012) (quoting, *Paul v. Davis*, 424 U.S. 693 (1976)); see, also, *Brown v. Montoya*, 662 F.3d 1152, 1167-68 (10th Cir. 2011) (applying *Paul* to wrongful sex offender registration). Because this right is fundamental, strict scrutiny applies.

The district court did not question that a fundamental right to employment exists, but limited its analysis to the fact that Ms. Prynne is barred from various childcare and public transportation occupations and has experienced private employment discrimination "neither mandated nor regulated by the Commonwealth." J.A. 213. The court's analysis ignores the most destructive restriction on employment that the Registry imposes: exposing *the employer* of sex offenders to the same public exposure as the offender themselves. *See* J.A. 14 (¶ 49). The Internet contains registrants' work address and "other information as the State Police may from time to time determine is necessary to preserve public safety," including the name of the employer. *Id*. And VSP agents visit registrants' workplaces in-person to comply with the Registry's command that they "physically

verify" the registrant's information—another blow to employment and the rewards of rehabilitation. Va. Code Ann. § 9.1-907(C); J.A. 16 (¶ 55;

Moreover, by wrongly labelling Ms. Prynne a "violent sex offender" on the Registry the Commonwealth regularly and repeatedly publishes a "stigmatic statement" about Ms. Prynne. *Evans*, 703 F.3d at 654. This wrongful, repeated determination has led to Ms. Prynne still being on the Registry lo these many years and has cost her employment both because she's still on the Registry and because it incorrectly categorizes her as "violent." J.A. 19, 22, 28 (¶¶ 80-81, 103, 143-145). By so doing, the Commonwealth's actions have "distinctly altered or extinguished" her legal status in employment. *Id*.

Considered as a whole, the Registry makes quality employment almost prohibitively difficult to find. As the Complaint alleges, this systematic marginalization of registrants from the workforce operates to increase recidivism, rather than reduce it. It has deprived Ms. Prynne of numerous jobs and forced her to self-employment. These restrictions are particularly irrational for a person who embodies no risk of recidivism.

This is precisely the sort of claim that discovery would elucidate, but the district court ended all discussion. Because Ms. Prynne has stated a valid claim, reversal is warranted.

C. The Registry Violates Ms. Prynne's Fundamental Right to Parent

Due Process also protects the fundamental right of individuals to "bring up children." *Meyer*, 262 U.S. at 399. The Constitution recognizes not only "the interest of parents in the care, custody, and control of their [existing] children," (*Troxel v. Granville*, 530 U.S. 57, 65 (2000)) ("perhaps the oldest of the fundamental liberty interests"), but also the right of potential parents to decide if and when to have children of their own. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental … The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. … There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (contraception). The Registry has dramatically restricted and will continue to restrict Ms. Prynne's ability to exercise this fundamental right. Though not as invasive as physical sterilization—the Registry has legally sterilized Ms. Prynne, whose only hope for motherhood is non-physical.

In 1942, the Supreme Court's decision in *Skinner* effectively ended forced physical sterilization.[9] The Court "emphas[ized] that strict scrutiny of the

[9] Overturning *Buck v. Bell*, a case where the Court sickeningly quipped "Three generations of imbeciles is enough…[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." 274 U.S. 200, 205 (1927).

classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, *invidious discriminations are made against groups or types of individuals* in violation of the constitutional guaranty of just and equal laws." 316 U.S. at 541 (emphasis added).

There is perhaps no group in America who faces more invidious discrimination than sex offenders. The federal government has collaborated with all 50 states to create registries for their constant monitoring. Public fear and enforced marginalization is their lot and restrictions on their lives seemingly know no bounds.

But Ms. Prynne is not like other sex offenders. Removing her ability to raise children certainly cannot pass strict scrutiny. And even if her right to parent is not "fundamental," the application of the Registry to her cannot survive rational basis review.

As the Complaint alleges, the Registry has permanently foreclosed Ms. Prynne's ability to have children. The Registry intimidated Ms. Prynne into not having biological children with her husband, and she has never been able to pursue parental rights with her step-children.[10] J.A. 20-21 (¶¶ 93-95). Registrants cannot enter any of the communal areas where children are cared for—from schools to buses to daycares—and Ms. Prynne knows it well. But more importantly, the Registry

[10] The week of publishing this brief, Ms. Prynne celebrated the birth of a step-granddaughter. Making this issue particularly poignant.

currently and *affirmatively* bars Ms. Prynne from obtaining *any* parental rights through adoption, foster care, and even through marriage to a spouse with existing children, making it a misdemeanor to so much as leave a child alone with "a violent sex offender." VA Code Ann. § 18.2-371 (misdemeanor); Va. Code Ann. § 16.1-228(6) (defining "Abused or neglected child"); Va. Code Ann. § 63.2-1205.1 (banning adoption by "violent" sex offenders). There are no procedures for Ms. Prynne to challenge these laws or her Registry status.

The district court found that Ms. Prynne had "not experienced a constitutional injury" because "all of the issues raised are prospective as she does not have children," and "there are procedures in place to remedy the potential harms." J.A. 214. Not so. Ms. Prynne's forced legal sterility is an injury in fact: (1) "concrete and particularized," (2) "actual or imminent," and (3) "fairly … traceable to the challenged action." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As of today, the Registry forever bars Ms. Prynne from having children, and no ad hoc petition to enter a school will change that. This is precisely the sort of "substantive rule" that courts always consider "ripe for review." *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001) (citation omitted) (overruled in irrelevant part, as noted in *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 n.2 (4th Cir. 2012)).

As applied to Ms. Prynne, these restrictions cannot survive any level of review. Banning violent sex offenders from obtaining parental rights may make sense *in general*, at least as a broad-brush generalization. But Ms. Prynne, who was never violent or predatory, committed her alleged crime over 25 years ago. More than that, she is completely rehabilitated:

> Since her conviction, Ms. Prynne has been a model citizen. She volunteered at church and went to counseling. She obtained early release from probation, for good behavior. She worked at one of the Big Four accounting firms, forging a distinguished career in gender and disability inclusion initiatives, employee engagement, and corporate responsibility [before an undeserved termination due to her Registry status]. She is happily married to a licensed minister.

J.A. 7 (¶ 6). But under the Registry, none of this matters. "Even upon the clearest proof that Ms. Prynne is not dangerous, there is no mechanism in the statute that would allow her to have her registration obligations eliminated or reduced." J.A. 13 (¶ 38).

In short, the Registry amounts to a current, permanent ban on motherhood for Ms. Prynne: a decision that cannot even pass rational basis review, much less strict scrutiny.

D. The Registry Violates Ms. Prynne's Fundamental Right to Privacy

Another liberty deprivation inflicted by the Registry is the severe invasion of Ms. Prynne's right to privacy. As the Fourth Circuit has recognized, the

constitutional right to privacy includes "the individual interest in avoiding disclosure of personal matters" that are "within an individual's reasonable expectations of confidentiality." *Walls v. Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990). "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Id*. This non-disclosure right, however, "is not absolute." *Id.* Where a person has a reasonable expectation of privacy, the government may overcome the right to privacy by demonstrating "that a compelling governmental interest in disclosure outweighs the individual's privacy interest." *Id*.

Recent Supreme Court cases have expanded the scope of reasonable privacy expectations in a digital age. In *United States v. Jones*, the high court held that attaching a GPS monitor to a suspect's car constituted a search under the Fourth Amendment. 565 U.S. 400, 403 (2012). Though the majority relied on the fact that a physical trespass had occurred, four justices would have reached the same conclusion "by asking whether respondent's reasonable expectations of privacy were violated." *Id*. at 419 (Alito, J., concurring). As Justice Sotomayor put it, "the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *Id.* at 416 (Sotomayor, J., concurring). She stressed—in an opinion joined by Justice Alito—that "[t]he net result … making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to

track—may alter the relationship between citizen and government in a way that is inimical to democratic society." *Id*. This call to focus on the net result of government monitoring was vindicated six years later.

In *Carpenter v. United States*, the Court used exactly that focus, and the doctrine of reasonable expectations of privacy—to resolve a case about whether the government executes a search when it accesses "historical cell phone records that provide a comprehensive chronicle of the user's past movements." 138 S. Ct. 2206, 2211 (2018). Chief Justice Roberts explained that "[p]rior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so for any extended period of time was difficult and costly and therefore rarely undertaken." *Carpenter*, 138 S. Ct. at 2217 (citation and internal quotation marks omitted). Because 2018 technology creates a comprehensive 5-year log of nearly every citizen's movements, the Court held that unbounded access to this data confounds "society's expectation … that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id*.

This same logic demonstrates that Registry deprives registrants—especially those with lifetime Registry requirements—of a reasonable expectation of privacy. As South Carolina's Supreme Court decided in 2012, even sex offenders enjoy a Due Process to avoid constant location monitoring, absent the constraints of

probation or parole. *State v. Dykes*, 398 S.C. 351, 366 (2012) (relying on the concurrences in *Jones,* without even the benefit of *Carpenter*).

Of course, *Dykes* had to deal with the decisions holding that "convicted sex offenders do not have a fundamental liberty interest to be free from registration requirements," as must Ms. Prynne. *Id.*; *compare Smith*, 538 U.S. at 89 ("stigma results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. The fact that Alaska posts offender information on the Internet does not alter this conclusion."). The difference, *Dykes* said, was not "the public availability of the information," but "that citizens have a right to be free from state monitoring of their every movement." *Id*.

That rationale certainly applies here. Unlike the registry in *Smith*, Virginia's registry requires Ms. Prynne to provide constant updates on a vast array of centrally compiled data, much of which is *not* public, including:

> "[A]ll aliases that he has used or under which he may have been known… his age, current address, and photograph… the name of any institution of higher education at which he is currently enrolled; and such other information as the State Police may from time to time determine is necessary to preserve public safety," VA Code § 9.1-913, "a sample of his blood, saliva, or tissue taken for DNA … electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use … fingerprints and palm prints … information regarding his place of employment, and … motor vehicle, watercraft

> and aircraft registration information for all motor vehicles, watercraft and aircraft owned by him," as well as other information. VA Code Ann. § 9.1-903.

J.A. 14-15 (¶¶ 49-50). In effect, Virginia monitors Ms. Prynne's residence, work, means of transportation, physical appearance, biometric data, and online presence. This is not simply "public information," already available through a search of dusty public filing cabinets. This is intrusive monitoring, for life.

But what particularly confounds a reasonable expectation of privacy is that the VSP turns around and publishes this mandatory, non-public data on the Internet—emblazoned with her photograph and her worst sin. By dint of the modern Internet (more available now than even a 2003 *Smith* Court could anticipate), Virginia has not only branded Ms. Prynne with a scarlet "VS" for "violent sex offender," but also required her to carry a sign with her home address and the name of any employer she can find. Anyone who learns her name, lives in her neighborhood, works in her zip code, or is simply curious can find her scarlet letter and all associated data at the push of a smart-screen. For the rest of her life. "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. at 2214 (2018). But this goes beyond even the colonial era's practice of branding.

As explained above, the government does have a legitimate interest in advancing public safety. But the Registry's privacy invasions do not advance that interest at all, especially for a rehabilitated, non-risk like Ms. Prynne. Accordingly, the lifetime Registry sentence before this Court is not reasonable or rational and cannot withstand any form of review.

E. The Registry Lacks a Rational Basis as Applied to Ms. Prynne

Even if this honorable Court concludes one-by-one that Ms. Prynne's rights to travel, work, parent, and maintain a reasonable expectation of privacy have not been violated, it cannot be denied that the Registry, as a whole, constitutes a tremendous deprivation of Ms. Prynne's liberties. And all deprivations of liberty must withstand the rational basis test. *Glucksberg*, 521 U.S. at 728.

Most egregiously, by classifying Ms. Prynne's offense as "sexually violent" and the woman herself as a "sexually violent offender," Virginia requires her to register for life. This single decision brings the entire weight of the Registry down on Ms. Prynne's head. With her rights curtailed, affirmative reporting imposed, and her life forever changed, rational basis review—at a minimum—applies.

And at least on the pleadings, the Registry does not have a prayer of passing that test. The basic purpose of the Registry is to advance public safety by preventing recidivism. Ms. Prynne does not contest the validity of this motive. But the Registry *does not prevent recidivism* (J.A. 24-25), and even if it did, *Ms. Prynne is not a*

recidivism risk. J.A. 7. The Registry's retroactive application to Ms. Prynne only further deepens the error.[11] These allegations—if proven—show that the Registry is irrational. And on a motion to dismiss, these facts must be assumed as true, and their validity disputed later. As applied to Ms. Prynne, a lifetime Registry sentence is arbitrary and capricious.

CONCLUSION

For these reasons, Ms. Prynne respectfully asks the Court to reverse the decision of the district court, deny VSP's Motion to Dismiss, and remand for further proceedings.

ORAL ARGUMENT REQUEST

Because this case involves important constitutional questions and complex legal concepts, Appellant respectfully requests oral argument.

Respectfully submitted,

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[11] The Supreme Court has rejected the idea "that what Congress can legislate prospectively it can legislate retrospectively." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Instead, "the retroactive application of the legislation" must be "justified by a rational legislative purpose." *United States v. Carlton*, 512 U.S. 26, 31 (1994). The irrationality of the Registry is exacerbated by the fact that it is retroactive: sweeping in individuals like Ms. Prynne who have had even more time to rehabilitate without a just cause hearing.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 15, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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