12-15261

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LITMON, JR.,

Plaintiff-Appellant,

v.

KAMALA D. HARRIS, Attorney General of California,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:10-cv-03894-EMC
The Honorable Edward M. Chen, Judge

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INTRODUCTION

Appellant David Litmon challenges a California statute requiring that sexually violent predators register in person every ninety days to verify their address and employer. Cal. Penal Code § 290.012(b). In 1999, Litmon was adjudicated a sexually violent predator, meaning that he has "a diagnosed mental disorder that makes [him] a danger to the health and safety of others in that it is likely that [he] will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600. Since his release from civil commitment, he has been required to register in person at his local police station every ninety days. According to Litmon, the registration requirement interferes with his ability to obtain employment as a truck driver. He argues that the registration requirement violates the Equal Protection Clause of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment.

The district court's orders granting motions to dismiss Litmon's initial, first amended, and second amended complaints are correct and should be affirmed. As an initial matter, there is no question that Litmon has been adjudicated a sexually violent predator and is subject to the in-person registration requirement in section 290.012. The original determination that

Litmon is a sexually violent predator was affirmed on appeal and remains undisturbed.

The district court correctly applied rational basis review to overrule Litmon's equal protection challenge to section 290.012. Sexually violent predators are not a suspect class, and no fundamental liberty interest is at stake. The statute allows Litmon flexibility to re-register any time within the ninety days following his previous registration and in any event does not so reduce his freedom of movement or of employment as to implicate his due process rights. The fact that he may have to wait at the police station for a few hours to comply with his registration requirement similarly does not implicate a fundamental liberty interest that would trigger strict scrutiny. Rational basis review applies, and it is well-settled law that it is rational for states to treat sexually violent predators differently from other mentally disordered offenders. Finally, it is settled law that California's registration requirements are not punitive in nature, and thus do not implicate the Double Jeopardy Clause.

As the district court recognized, California's in-person registration requirement serves vital public safety interests by ensuring that law enforcement officials know the residence and employer of California's most serious criminal offenders, offenders that all states have recognized present

some of the highest rates of recidivism. California's decision to treat sexually violent predators differently from other felons recognizes the heinous nature of their crimes and helps law enforcement prevent them from reoffending. The district court's decision upholding these requirements should be affirmed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a) arising from Litmon's federal claims under 42 U.S.C. § 1983. The district court entered final judgment rejecting Litmon's claims on January 25, 2012, and Litmon timely appealed. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Litmon is required to register every ninety days pursuant to California Penal Code, section 290.012(b).

2. Whether California's distinction between sexually violent predators and other mentally disordered offenders violates the Equal Protection Clause.

3. Whether California's registration requirement violates the Double Jeopardy Clause.[1]

STATEMENT OF THE CASE

This suit arises out of California's reporting requirements for individuals who have been previously adjudicated to be sexually violent predators. Litmon alleges that in 1982 he was convicted "of certain sex crimes" that resulted in a 34-year prison sentence. Excerpts of Record (ER) 157. Prior to his release, he was twice adjudicated a sexually violent predator (SVP) pursuant to California Welfare and Institutions Code section 6600 *et seq*., which was enacted after his convictions. *Id*.

Litmon is required to register with the chief of police in the city in which he resides because of his sex crime convictions. Cal. Penal Code § 290(b). In addition, as an adjudicated SVP , Litmon is required to verify his address every ninety days pursuant to section 290.012(b). That section provides:

[1] Although double jeopardy is not an issue listed in his answer to question 5 of his informal brief, Litmon's citations to *Smith v. Doe*, 538 U.S. 84 (2003) and *Kansas v. Hendricks*, 521 U.S. 346 (1997) suggest he intends to pursue this issue on appeal. Accordingly, out of an abundance of caution, the Attorney General has briefed this issue. Should Litmon raise any other issues not directly mentioned in his statement of issues, the Attorney General may request the Court's permission to file a supplemental brief.

> In addition, every person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, shall, after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice.

An SVP must be adjudicated to have a "a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600. The Department of Justice (the Department) requires that an SVP must verify his or her address in person. ER 157.

On August 31, 2010, Litmon filed his initial complaint in which he alleged two separate claims under 42 U.S.C. § 1983. ER 156. First, Litmon claimed that the Department's in-person registration requirement violates the Due Process Clause, both because the in-person registration requirement was not authorized by California law, and because it prevents him from pursuing his chosen occupation as a truck driver. ER 159. Second, he claimed that because the in-person registration requirement was imposed after he was sentenced for sex crimes, it violates the Double Jeopardy Clause. *Id.* Litmon sought an injunction prohibiting the Department from requiring him to register in-person. *Id.*

On November 10, 2011, the Attorney General[2] filed a motion to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). At a January 4, 2011 hearing on that motion, the district court ordered the Attorney General to submit a letter brief addressing (1) Litmon's contention at the hearing that his SVP status had been vacated by a 2008 decision of the California Court of Appeal; and (2) whether section 290.012 requires Litmon to re-register precisely on the ninetieth day following his last registration, or rather permits him to register any time within that ninety-day period. ER 153. After considering the Attorney General's letter brief, the court granted the motion to dismiss. In a corrected decision issued on March 15, 2012, the court ruled that California law authorized the Department to require SVPs to register in person every ninety days, since section 290.012 provides that SVPs must verify their residence and employment once every days "in a manner established by the Department of Justice." ER 76–77. The court concluded that because the statute permits Litmon the flexibility to register at any time of his choosing within the ninety day window from his last registration, any liberty interest he might

[2] When this case was filed, Edmund G. Brown Jr. was the Attorney General of California. On January 3, 2011, Kamala D. Harris was sworn in as the Attorney General of California and was automatically substituted as the defendant pursuant to Federal Rule of Civil Procedure 25(d).

have in a career as a truck driver was not implicated by the in-person registration requirement. ER 79. The court further ruled that the registration requirement for SVPs was non-punitive in nature, and thus did not implicate the Double Jeopardy Clause. ER 84.[3] Finally, the court rejected Litmon's contention that he had never been adjudicated an SVP. ER 74–75.

In his Second Amended Complaint,[4] Litmon alleged that because individuals who are considered mentally disordered offenders under California Penal Code section 2960, *et seq*., are not required to register every ninety days, section 290.012 impermissibly discriminates against SVPs such as Litmon in violation of the Equal Protection Clause. ER 56. Similarly, he alleged that since individuals who have been adjudicated mentally

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[3] Although the district court entered final judgment on March 14, 2011, Litmon filed a Motion for Leave to File a First Amended Complaint on March 16, 2011. (Docket # 22.) The court interpreted the motion as a motion to amend the judgment, which it allowed to the extent Litmon sought to add a cause of action under the Fourteenth Amendment. (Docket # 23.) Litmon subsequently filed a Notice of Appeal of the district court's March 15, 2011 entry of judgment (Docket # 26), which he withdrew after the district court indicated it could not rule on Litmon's new claim under the Fourteenth Amendment while the appeal was pending. (Docket # 29, 30.) The district court then set aside the judgment and allowed Litmon to file his amended complaint. (Docket # 31.)

[4] The First Amended Complaint, which stated a cause of action against Governor Brown, was also dismissed with leave to amend. ER 59. Litmon does not appear to challenge the district court's ruling dismissing Governor Brown.

disordered sex offenders, Cal. Penal Code § 6500, *et seq*., do not have to register every ninety days, it violates equal protection to require SVPs to do so. *Id.*

The Attorney General moved to dismiss the Second Amended Complaint, which the district court granted on January 25, 2012. The court concluded that because the in-person registration requirement did not affect a suspect class or implicate a fundamental right or liberty interest, rational basis review applied. ER 16. Applying that standard, the court determined that there is a rational basis for distinguishing SVPs—who have a high risk of recidivism—from other types of mentally disordered offenders. ER 17. The court also considered Litmon's claim (advanced at the hearing but not included in his complaint) that the Department's requirement that SVPs provide information not expressly required by section 290.012 violated his substantive due process rights. The court rejected that claim, concluding that any extra time spent answering those questions did not implicate a liberty interest, and that even if there were a cognizable liberty interest, any deprivation did not rise to the level of a substantive due process violation. ER 21.

SUMMARY OF ARGUMENT

Under section 290.012, "every person who has ever been adjudicated a sexually violent predator" is required to register no less than once every ninety days. The argument that Litmon has never been adjudicated an SVP is mistaken. While the California Court of Appeal vacated his *recommitment* as an SVP, Litmon's original adjudication as an SVP was affirmed on appeal and remains undisturbed. As the district court concluded, Litmon has been finally adjudicated an SVP, and must register in person every ninety days as required by section 290.012 and as implemented by the Department.

California's decision to require SVPs—but not other mentally disordered offenders—to register every ninety days does not violate the Equal Protection Clause of the Fourteenth Amendment. SVPs are not a suspect class, and the registration requirements do not implicate a fundamental liberty interest. Accordingly, rational basis review applies to Litmon's equal protection claims. Litmon argues that the in-person registration requirement prevents him from obtaining work as a truck driver because he may not be in California on the ninetieth day after his last registration, but this too is mistaken. Section 290.012 permits him to register any time within the ninety days following his previous registration.

In any event, requiring that he be in California four days each year to register in person does not interfere with Litmon's ability to obtain employment in a way that rises to the level of a Fourteenth Amendment violation. Finally, the fact that Litmon may have to wait at the police station for an officer to take his information does not deprive him of liberty, much less trigger strict scrutiny.

Because they are more likely to reoffend than other types of mentally disordered criminals, there is a rational basis for requiring SVPs to register more often. Thus, while mentally disordered offenders (who have a severe mental disorder that contributed to the commission of crime) may share characteristics with SVPs, the Legislature may rationally distinguish between the two. In any event, any over- or under-inclusiveness is permissible under rational basis review.

Finally, because the registration requirements in section 290.012 are non-punitive in nature, the Double Jeopardy Clause is not implicated. This Court has concluded that other registration requirements of California law are not punitive and do not violate the Double Jeopardy Clause. *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004). And as the district court correctly found, the California Legislature did not intend section 290.012 to be punitive in nature, but rather intended it to protect the public health, safety,

and welfare. None of the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) suggest that section 290.012 is punitive in fact. Accordingly, Litmon failed to state a claim under the Double Jeopardy Clause.

STANDARD OF REVIEW

This Court reviews de novo the district court's orders dismissing Litmon's claims for failure to state a claim. *See Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004). Under Federal Rule of Civil Procedure 12(b)(6), a suit may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In considering a motion to dismiss, the court must assume the truth of all factual allegations and must "construe them in the light most favorable to the nonmoving party." *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002). Courts will not assume that plaintiffs "can prove facts which [they have] not alleged, or that the defendants have violated . . . laws in ways that have not been alleged." *Associated Gen. Contractors of CA, Inc. v. CA State Council of Carpenters*, 459 U.S. 519, 526 (1983).

ARGUMENT

I. LITMON HAS BEEN ADJUDICATED A SEXUALLY VIOLENT PREDATOR AND MUST REGISTER EVERY NINETY DAYS PURSUANT TO CALIFORNIA PENAL CODE SECTION 290.012(b)

Litmon was finally adjudicated an SVP in a decision that was affirmed on appeal, so he must register every ninety days pursuant to section 290.012, which provides:

> every person who has *ever been adjudicated* a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, shall, after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice.

Cal. Penal Code §230.012(b) (emphasis added). Although not asserted in any of his complaints, Litmon argued in the district court that the California Court of Appeal vacated his SVP commitment, and that accordingly he was not required to register pursuant to section 290.012. This contention is incorrect.

Instead, in a detailed decision issued in 2002, the California Court of Appeal *affirmed* Litmon's original SVP commitment pursuant to former Welfare and Institutions Code section 6604. *People v. Litmon*, 2002 Cal. App. Unpub. LEXIS 8195 (August 26, 2002), review denied Nov. 15, 2002,

cert. denied *Litmon v. California*, 538 U.S. 983 (March 28, 2003).[5] Thus, Litmon was finally adjudicated an SVP. As a person who has "ever been adjudicated a sexually violent predator" he must register every ninety days pursuant to section 290.012, even though the civil commitment is not ongoing.

It was not this original commitment, but Litmon's subsequent *recommitment* proceedings that the California Court of Appeal vacated. The fate of the recommitment proceedings, however, does not call into question Litmon's original SVP adjudication .

At the time of Litmon's original commitment, SVPs were committed for a period of two years, after which prosecutors were required to initiate recommitment proceedings to extend the commitment for another two-year term. Accordingly, on April 24, 2002, prosecutors sought to extend Litmon's original two-year civil commitment for another two-year term, which would run from May 2, 2002 until May 2, 2004. *See People v. Litmon*, 76 Cal. Rptr. 3d 122, 127 (Cal. Ct. App. 2008). A probable cause hearing, however, was not held until November 7, 2003, and the trial itself

[5] A copy of this unpublished disposition was filed in the district court and is included in the Excerpts of Record for the Court's convenience. ER 121.

was not heard until September 7, 2005. *Id*. at 128. While the first recommitment petition was pending, prosecutors filed a second recommitment petition to run from May 2, 2004 to May 2, 2006; a third was filed on September 29, 2005 to run through May 2, 2008. *Id*. These three petitions were consolidated. *Id*. at 128.

During the pendency of the consolidated recommitment petitions, the California Legislature amended the Sexually Violent Predator Act to provide for indeterminate commitment for SVPs, and the voters of California approved Proposition 83, which also required indeterminate terms of commitment. *See* 2006 Cal Stat. 2665–66; Cal. Const., art. II, § 10(a). Accordingly, the prosecutor moved to retroactively impose an indefinite term under these new provisions. *People v. Litmon*, 76 Cal. Rptr. 3d at 131. The superior court granted the motion. *Id*.

The California Court of Appeal, however, concluded that the numerous delays in bringing the recommitment proceedings to trial violated Litmon's due process rights. The court held that procedural due process required a trial in advance of the commitment term, not after the term had already begun (or had already ended). *People v. Litmon,* 76 Cal. Rptr. 3d at 137. As a result of the numerous delays, the court concluded that the superior court should have granted Litmon's motion to dismiss the consolidated petitions.

Id. at 141. Moreover, the court concluded that the newly enacted provisions providing for indefinite commitment could not be applied retroactively to Litmon, and overturned the order imposing an indeterminate term of commitment as an SVP. *Id*. at 412.

At no time did the Court of Appeal call into question Litmon's *original* SVP commitment, which it had affirmed in 2002. Nor could it have done so, because that judgment was final. Rather, the court invalidated just the indefinite commitment and on remand directed that the superior court "dismiss the *consolidated recommitment petitions* that sought to *extend* appellant's commitment as an SVP until May 2, 2008." *People v. Litmon*, 76 Cal. Rptr. 3d at 412–13 (emphasis added). Thus, the district court correctly found that Litmon was properly adjudicated an SVP, a decision it reaffirmed in an order denying Litmon's motion for reconsideration. ER 48.

II. THERE IS A RATIONAL BASIS FOR REQUIRING SEXUALLY VIOLENT PREDATORS, BUT NOT OTHER MENTALLY DISORDERED CRIMINALS, TO REGISTER EVERY NINETY DAYS

A. The District Court Correctly Applied Rational Basis Review to the Distinction Drawn By Section 290.012.

The standards governing equal protection challenges are well settled. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage,"

rational basis review applies. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A law passes rational basis scrutiny if it is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). "Under rational basis review, the state actor has no obligation to produce evidence to sustain the rationality of a statutory classification; rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Johnson v. Rancho Santiago Community College Dist.*, 623 F.3d 1011, 1031 (9th Cir. 2010) (internal citations omitted). A statute "does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Rather, the constitutional test requires only that the statute, as a general matter, serve a legitimate governmental purpose. *Russell v. Hug*, 275 F.3d 812, 820 (9th Cir. 2002).

Litmon has not identified a liberty interest that would trigger strict scrutiny. The in-person registration requirement does not involve a suspect class, nor does it implicate a fundamental right. *Cf. Carty v. Nelson*, 426 F.3d 1064, 1075 n.5 (9th Cir. 2005) (applying rational basis review in equal protection challenge to Cal. Welf & Inst. Code § 6600(a)(3). Convicted felons, and sex offenders specifically, are not a suspect class, as the district

court correctly concluded. Op. at 3 (citing *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001) ("sex offenders are not a suspect class"). Litmon has failed to identify any suspect class of which he is a part.

The requirement that an SVP register in person at his local police station every ninety days does not implicate a liberty interest. In the district court, Litmon argued that he wished to be employed as a truck driver, and that as a result he might not be present to register on the ninetieth day as required by section 290.012. ER 158. This mistakes the requirement. Section 290.012 simply requires that SVPs register *within* ninety days from their last registration, not precisely on the ninetieth day, a fact that is confirmed by the registration form itself. ER 29–30. Moreover, the Department's requirement that SVPs appear at a police station four times a year is at most a "brief interruption" in Litmon's ability to practice his chosen profession that is insufficient to implicate substantive due process. *See, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) ("[T]his Court has indicated that the liberty component of 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. [Citations.] These cases all deal with a

complete prohibition of the right to engage in a calling, and not the sort of brief interruption which occurred here.").

Nor does requiring SVPS to register in person at a police station implicate a protected liberty interest or trigger strict scrutiny. In the district court, Litmon argued that the registration requirement implicated a liberty interest because he was required to spend a few hours at a police station filling out the sex offender registration form every ninety days. The Department's sex offender registration form, however, shows that the process is not onerous. It simply requires local law enforcement to collect identifying information, all residential addresses, employer information, and information related to the registrant's vehicles. ER 29. The reverse side of the form requires that the registrant acknowledge the registration requirements imposed by California Penal Code section 290, *et seq.*, to ensure that he understands and complies with its provisions. ER 30. The registrant is also required to give his right thumbprint to ensure the person who is registering is actually the individual he claims to be. *Id.*

None of these requirements impact a registrant's fundamental rights, such as a constitutionally-recognized liberty interest. The Supreme Court has said that a liberty interest is '"not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the

common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'" *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Other examples of infringement of a protected liberty interest include transfer to a mental hospital, *Vitek v. Jones*, 445 U.S. 480, 493 (1980), involuntary administration of psychotropic drugs, *Washington v. Harper*, 494 U.S. 210, 221-22 (1990), and holding a disabled person in non-handicapped-accessible administrative segregation unit for two months, *Serrano v. Francis*, 345 F.3d 1071, 1078-79 (9th Cir. 2003).

While the concept of liberty is broad, it is not boundless, and it is not implicated here. *See Roth*, 408 U.S. at 572. Even if the process of collecting identifying information, address, employment, and vehicular information takes several hours, that is not a deprivation of liberty that would trigger strict scrutiny. While there may be a liberty interest in obtaining a driver's license, *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973), it does not violate due process to require a long wait in line at the Department of Motor Vehicles to get it. And though there is a protected interest in

access to the courts, the fact that one may have to wait for hours in a courtroom to be heard does not implicate fundamental liberties. Similarly, even though Litmon has a liberty interest in freedom from bodily restraint, requiring him to go to a police station (at a time of his choosing) even if he must stay there four or five hours to comply with the registration requirement does not violate that interest.[6] If Litmon were correct, then all individuals who are required to register annually as sex offenders would have an implicated liberty interest, and their claims would be analyzed under strict scrutiny. Courts, however, have consistently applied rational basis review to registration requirements such as those in section 290.012. *See Doe v. Moore*, 410 F.3d 1337, 1347-48 (11th Cir. 2005); *Cutshall v. Sundquist*, 193 F.3d 466, 483 (6th Cir. 1999); *Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1268 (3d Cir. 1996). Accordingly, the district court correctly applied rational basis review to Litmon's claims.

[6] The Attorney General assumes for the sake of the present pleading challenge, but does not concede, that it takes four or five hours to complete the SVP registration form. To the contrary, an examination of the form shows that it should take no more than one hour. ER 29–30.

B. It is Rational to Require Sexually Violent Predators, but Not Mentally Disordered Offenders, to Register In-Person Every Ninety Days.

The district court correctly concluded that there is a rational basis for imposing special registration requirements on SVPs. The Legislature's decision to impose on SVPs registration requirements not imposed on mentally disordered offenders ("MDOs") reflects the fact that MDOs encompass a larger class of felons, including individuals who the Legislature could reasonably believe are less of a threat to public safety.

As a condition of parole, a prisoner may be designated an MDO and treated by the State Department of Mental Health, if it is determined that he has a "severe mental disorder"[7] that is not in remission or cannot be kept in remission without treatment, and that disorder was one of the causes of or an aggravating factor in the commission of the crime for which he was imprisoned. Cal. Penal Code §§ 2962(a) & (b). The statute lists criminal convictions that create eligibility for MDO status, including voluntary manslaughter, mayhem, robbery or carjacking with a dangerous weapon, rape, attempted murder, and many others. *Id.* § 2962(e)(2). At least one

[7] A severe mental disorder is defined as an illness or condition that "substantially impairs the person's thought, perception of reality, emotional process or judgment, or which grossly impairs behavior" or "an acute brain syndrome." Cal. Penal Code § 2962(a).

psychiatrist must conclude that by reason of the mental disorder, the individual "represents a substantial danger of physical harm to others." *Id*. § 2962(d)(1). If the psychiatrist finds these criteria to be met, the offender may request a de novo hearing before the Board of Parole Hearings as well as a trial by jury in which the state bears the burden of proof beyond a reasonable doubt. *Id*. § 2966. The offender may be released from custody if his mental disorder goes into remission; otherwise the state may continue to detain him for treatment in one-year increments, also subject to trial by jury. *Id*. §§ 2968, 2970, 2972.

Although there are some similarities between the criteria and procedures for an SVP determination and an MDO determination, there is one critical difference: MDOs may be convicted of a wide variety of crimes, but SVPs must have committed a violent sex offense. The question then is whether the Legislature had a rational basis for distinguishing between felons who commit violent sex crimes and those who commit other kinds of violent crimes. It undoubtedly did.

Legislatures in all fifty states have enacted statutes that treat violent sex offenders differently than other types of violent felons establishing registries, such as California's, that require sex offenders to register with law enforcement. *United States v. Crowder*, 656 F.3d 870, 875 (9th Cir. 2011).

These statutes reflect a general consensus that violent sex offenders are likely to commit another violent sex crime and must be monitored by law enforcement. As the Supreme Court has noted:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high."

Smith v. Doe, 538 U.S. 84, 103 (2003) (citations omitted). *See also Kansas v. Hendricks*, 521 U.S. 346, 351 (1997). These findings are in accord with those of the California's Legislature and voters in enacting the statutes governing SVPs. . ." 1995 Cal. Stat. 5921 ("a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders . . . are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence.)

These findings show that violent sex offenders pose a peculiar risk to public safety, which in turn is a rational basis for enacting registration requirements generally, and the ninety-day registration requirement applicable to SVPs in particular. Given the studies that show an increased rate of recidivism for violent sex offenders, the Legislature could rationally

impose different registration requirements on SVPs than it does on MDOs, who have not committed violent sex crimes. Indeed, courts have routinely rejected equal protections challenges to laws requiring registration of violent sex offenders on the grounds that registration is not required for other violent felons. *See, e.g., Doe v. Moore*, 410 F.3d 1337, 1347-48 (11th Cir. 2005); *Cutshall v. Sundquist*, 193 F.3d 466, 483 (6th Cir. 1999); *Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1268 (3d Cir. 1996). The same analysis should apply to the ninety-day in person registration requirement at issue here.

While it is true that some of the same underlying offenses may qualify an individual as either an SVP or an MDO, that does not make for an equal protection violation. First, *as a class*, the Legislature could conclude that MDOs are less likely to reoffend because many of them have committed crimes other than sex offenses. Second, while the MDO classification requires a finding that an offender represents "a substantial danger of physical harm to others," Cal. Penal Code § 2962(d), to be adjudicated an SVP, the offender must be found likely to engage in "sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600(a). As the district court found, "it is rational to require more rigorous monitoring of persons who have committed sexually violent offenses and who have a condition that

predisposes them to committing such offenses." ER 17. And of course, those MDOs who have been convicted of sex offenses are likewise required to register under other provisions of California's sex offender registry, just less frequently. *See* Cal. Penal Code § 290.012(a).

Further, under rational basis review, the Legislature is not required to attack all aspects of the problem being legislated:

> Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious.

McLaughlin v. Florida, 379 U.S. 184, 191 (1964). As the Ninth Circuit has held, "when enacting a statute, [the legislature] is free to select particular aspects of an overall problem it believes warrant legislative attention and to ignore others that may seem, even by objective standards, to be equally or more pressing." *Munoz v. Sullivan*, 930 F.2d 1400, 1406 (9th Cir. 1991). *See also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) ("[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . .") Simply because *some* MDOs have committed sex

offenses that might qualify them as an SVP if other criteria are also met, does not render invalid the Legislature's decision to more heavily regulate SVPs, who have *all* committed at least one violent sex offense, who have a diagnosed mental disorder, and who are *likely* to engage in sexually violent criminal behavior in the future.

The California Supreme Court's decision in *People v. McKee* does not alter this analysis. There, the court held that the state had not demonstrated justification for *indefinite detention* of SVPs, when MDOs were given a periodic review. 223 P.3d 1172 (2010). Although the court noted the concerns unique to sexually violent predators, it concluded that in the context of detention, independent judicial review was required:

> When a constitutional right, such as the right to liberty from involuntary confinement, is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether the legislative body has drawn reasonable inferences based on substantial evidence.

223 P.3d at 585-86. Because the lower courts had not required the state to make any sort of showing, the court remanded the case to allow the state an opportunity to justify the differential treatment of MDOs and SVPs. *Id*. at 586.

Importantly, however, the California Supreme Court in *McKee* applied a heightened standard of review because the case implicated prisoners' liberty interest to be free of involuntary confinement. Involuntary confinement, however, is not at issue in this case, so heightened scrutiny does not apply. Indeed, the California Supreme Court expressly *rejected* any effort to employ its analysis in the context of sex offender registration requirements:

> We emphasize that our holding in the present case does not mean that statutes pertaining to sexual offenders in general must be subject to heightened scrutiny. The lifetime registration requirements imposed by Penal Code section 290, for example, do not involve the loss of liberty. (See *Smith v. Doe, supra,* 538 U.S. at p. 100, 123 S.Ct. 1140.) Such regulatory statutes not involving affirmative disability or restraint, are subject to rational basis review, and the Legislature will be given wide latitude to decide who should be subject to registration requirements. (See *People v. Monroe* (1985) 168 Cal.App.3d 1205, 1215, 215 Cal.Rptr. 51.)

McKee, 223 P.3d at 589 n.14.

In short, the Legislature validly distinguished between MDOs and SVPs, who by definition committed a violent sex crime, because SVPs are more likely than MDOs to reoffend—a conclusion that has been reached by all fifty states and the federal government. *Crowder*, 656 F.3d at 875. Requiring SVPs to register with law enforcement every ninety days serves

important, and certainly legitimate, public safety interests. Differentiating between SVPs and MDOs does not violate equal protection.

C. Requiring Sexually Violent Predators, but Not Individuals Designated As Mentally Disordered Sex Offenders Under Prior Law, to Register In-Person Every Ninety Days Is Rational

The Legislature's different treatment of individuals civilly committed under the forerunner to the SVP Act, repealed 30 years ago, also does not violate the Equal Protection Clause. Under the Mentally Disordered Sex Offender ("MDSO") Act, MDSOs were civilly committed in lieu of a prison term, rather than after the term was completed. *McKee*, 223 P.3d at 578 (describing history of MDSO Act); former Cal. Welf. & Inst. Code § 6300 *et seq*. As an initial matter, the MDSO Act applied to anyone who was predisposed to commit *any* sex offense. Cal. Welf. & Inst. Code § 6300 (repealed 1981) (defining a mentally disordered sex offender as "any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others"). SVPs, on the other hand, are by definition likely to commit a *violent* sex offense. Cal. Welf & Inst. Code § 6600. As the district court recognized, the Legislature may rationally distinguish those

who are likely to commit violent sex offenses from those who are likely to commit a non-violent sex offense. ER 17–18.

Moreover, the MDSO Act was repealed more than thirty years ago, effective January 1, 1982. 1981 Cal. Stat. 3485. There may still be felons committed under that section who are alive, but the Legislature could rationally conclude that such individuals pose less of a threat than SVPs thirty years or more after they were committed. In any event, a statute "does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Beach Communications,* 508 U.S. at 321 (citation and quotation marks omitted). "Rather, the constitutional test requires only that the statute, *as a general matter*, serve a legitimate governmental purpose." *Doe v. U.S.*, 419 F.3d 1058, 1063 (9th Cir. 2005) (emphasis added). The fact that the Legislature did not sweep felons who were civilly committed thirty years ago within section 290.012's ninety-day registration requirement does not render it invalid under rational basis review, even if they would have qualified as SVPs under current law.

III. Section 290.012's Registration Requirements Are Not Punitive and Do Not Implicate Double Jeopardy

Under well-settled law, California's registration requirements, including the requirement that an SVP register in person, are civil in nature and thus do not constitute double jeopardy. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. VI. In order for the Double Jeopardy Clause to be implicated, there must be a second criminal prosecution. *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997). Where, as here, the subsequent action is civil rather than criminal, it is non-punitive and an "essential element" of a claim under the Double Jeopardy Clause is absent. *Id.* "The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.' We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Id*. at 361 (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986)). If the legislature's intent was to establish a civil proceeding, a court "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.'" *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal citations omitted.). "[O]nly the clearest proof that a law is punitive based on substantial factors will be able

to overcome the legislative categorization." *United States v. Ward*, 448 U.S. 242, 249 (1980). To make that determination, courts rely on seven factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), as "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97.

Relying on *Smith v. Doe*, in which the United States Supreme Court concluded that Alaska's Sex Offender Registration Act was civil in nature, the Ninth Circuit has concluded that California's registration requirements are similarly non-punitive. *Hatton v. Bonner*, 356 F.3d 955 (9th Cir. 2004). In *Hatton*, the Ninth Circuit noted the regulatory, rather than punitive, intent behind the enactment of Penal Code section 290. "The registration of sex offenders . . . will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems that deal with these offenders." *Hatton*, 356 F.3d at 962. *See also People v. Castellanos*, 982 P.2d 211, 21 Cal.4th 785, 796 (1999) ("The sex offender registration requirement serves an important and proper remedial purpose, and it does

not appear that the Legislature intended the registration requirement to constitute punishment.").

Finding that the California Legislature's intent was regulatory rather than punitive, the Court in *Hatton* turned to the effects of the registration requirements and concluded that those effects were, as intended, non-punitive. Analyzing the first factor under *Mendoza-Martinez*, whether the statute imposes a disability or restraint, the Ninth Circuit concluded the statute was even less punitive than that approved in *Smith* because of the additional safeguards California places on the information received from registrants. *Hatton*, 356 F.3d at 963-64. Most importantly for present purposes, however, this Court concluded, as did the Supreme Court in *Smith*, that periodic updates such as are at issue in this case did not impose an affirmative disability or restraint. *Id*. at 964. That was so despite the fact that California law requires individuals to register in-person, distinguishing California law from the Alaska law at issue in *Smith*.

> It is true that, unlike the Alaska statute, § 290 requires Petitioner to register in person. Although this fact is important, when balanced against the other facts highlighted above, it is simply not enough to turn § 290 into an affirmative disability or restraint.

Id. With respect to the remainder of the *Mendoza-Martinez* factors, the Court in *Hatton* concluded they weighed in favor of the Legislature's non-punitive

intent in equal or greater measure than in *Smith*, and that the Ex Post Facto Clause does not apply. *Hatton*, 356 F.3d at 965.

As the district court recognized, this Court's holding in *Hatton* controls the resolution of Litmon's double jeopardy claim. The test for whether a statute is punitive is the same for the Ex Post Facto Clause and the Double Jeopardy Cause. *Russell*, 124 F.3d at 1086 n.6 ("In *Hendricks*, however, the Court used the same test for the double jeopardy and ex post facto clauses, *Hendricks*, 521 U.S. at ---- - ----, 117 S.Ct. at 2081-86, leading us to conclude that the test for punishment is the same for both clauses."). Since the reporting requirements contained in section 290.012 are not punitive, Litmon's double jeopardy claim fails as a matter of law. The district court's thorough and independent analysis of the seven *Mendoza* factors was sound, and the district court properly dismissed this claim.

CONCLUSION

This Court should affirm the decision of the district court.

Dated: June 18, 2012

Respectfully submitted,

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12-1526

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LITMON. JR.,

Plaintiff-Appellant,

v.

KAMALA D. HARRIS, Attorney General of California,

Defendant-Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: June 18, 2012

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 12-1526

I certify that: (check (x) appropriate option(s))

[ ] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains __7,163______ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

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June 18, 2012	s/ Daniel J. Powell
Dated	Daniel J. Powell Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **David Litmon v. Kamala Harris** No. **12-15261**

I hereby certify that on June 18, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE'S BRIEF

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On June 18, 2012, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

David Litmon, Jr.
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Union City, CA 94587

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 18, 2012, at San Francisco, California.

S. Chiang	s/ S. Chiang
Declarant	Signature

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