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.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEE

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November 12, 2019

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

COLONEL GARY T. SETTLE, in his official capacity as Superintendent of the Virginia Department
(name of party/amicus)

of State Police

who is Appellee, 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/ Michelle S. Kallen Date: 11/8/2019

Counsel for: Defendant-Appellee

CERTIFICATE OF SERVICE

****

I certify that on 11/8/2019 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:

/s/ Michelle S. Kallen (signature) 11/8/2019 (date)

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INTRODUCTION

Following the sexual assault and murder of a seven-year-old girl by a neighbor who—unknown to the girl's family—had a record of sexually assaulting children, every State, the District of Columbia, and the Federal Government enacted laws requiring registration of sex offenders and community notification. *Smith v. Doe*, 538 U.S. 84, 89–90 (2003). In this case, a Virginia sex offender using the alias "Hester Prynne" challenges the constitutionality of the Commonwealth's sex offender registry and corresponding statutes.

Plaintiff first argues that the requirements set forth in Virginia law constitute retroactive punishment forbidden by the Ex Post Facto Clause of the United States Constitution. The Supreme Court rejected that argument in connection with Alaska's sex offender registry, and this Court has already rejected it in connection with Virginia's.

Prynne argues that the challenged Virginia law violates her substantive due process rights to parent, travel, work, and privacy. The district court properly rejected the arguments that were made to it and no others are properly before this Court.

The dismissal of plaintiff's complaint should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over plaintiff's federal claims under 28 U.S.C. § 1331 and over her state law claim under 28 U.S.C. § 1367. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court dismissed plaintiff's complaint on August 16, 2019, see JA 216, and plaintiff filed a notice of appeal on August 29, 2019, see JA 217, less than 30 days later. See Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

1. Whether application of certain provisions of Virginia's Sex Offender and Crimes Against Minors Registry Act to plaintiff violates the Ex Post Facto Clause.

2. Whether Virginia's Sex Offender and Crimes Against Minors Registry Act violates plaintiff's substantive due process rights.

STATEMENT

1. Plaintiff appears to have been in her mid-20s when she had sexual intercourse with a 15-year-old boy in the home where she worked as a nanny. JA 7, 161.[1] In January 1994, plaintiff pleaded guilty to the felony offense of taking indecent liberties with a child by person in custodial or supervisory relationship, in violation of Virginia Code § 18.2-370.1.

2. Several months after plaintiff's guilty plea, the Virginia legislature enacted the Sex Offender and Crimes Against Minors Registry Act (Sex Offender Registry Act or Act), Va. Code Ann. § 9.1-900 *et seq.* See JA 196. The original statute required registration by every person who was "under community supervision on July 1, 1994, for a felony conviction covered by this section." JA 196 (quoting former Va. Code Ann. § 19.2-298.1(B) (1994)). Because plaintiff's offense was a covered felony and she was on probation as of July 1, 1994, plaintiff was required to register. JA 197.

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[1] Before the district court, plaintiff admitted that she was 26 years old at the time of her guilty plea. JA 161 n.4. The complaint alleges that plaintiff was charged in 1993 and pleaded guilty in January 1994. JA 10. The basis of the district court's statement that plaintiff was 21-years-old at the time of the offense, see JA 196, is unclear.

As the district court explained, the Act has been amended a number of times over the years. JA 197–98. A 2001 amendment classified plaintiff's crime as a "sexually violent offense," which "meant that she would be required to register . . . for life and would not be permitted to petition for removal from the registry." JA 198. It also meant that, "by statute, [p]laintiff's page on the [registry itself] must indicate that her offense was 'Violent.'" *Id.*

3. In 2019, plaintiff filed suit in federal district court, arguing that the Act's application to her violated the Ex Post Facto Clauses of the federal and state constitutions and the Due Process Clause of the federal constitution. JA 26–30.[2] The complaint was not styled as a class action and sought relief only to plaintiff as an individual. JA 30–31.

4. Defendant Gary Settle—the Superintendent of the Virginia Department of State Police—moved to dismiss for failure to state a

[2] Plaintiff had filed a similar suit in state court more than a decade earlier but ceased prosecuting the case after the Virginia Supreme Court issued an opinion rejecting a variety of substantive and procedural due process challenges to Virginia's registry. See Mem. in Supp. of Defts.' Mot. to Dismiss at 3 (ECF 20); *McCabe v. Commonwealth*, 650 S.E.2d 508 (Va. 2007).

claim on which relief could be granted.[3] JA 195. The district court granted that motion and dismissed plaintiff's complaint. JA 195–215.

a. *Ex Post Facto Clause*. Applying the two-step analysis set forth in *Smith v. Doe*, 538 U.S. 84 (2003), the district court first asked "whether the legislature intended to impose punishment," JA 203, and answered that question "no." JA 204–05. The court observed that the Virginia legislature had "includ[ed] a legislative statement that the [registry's] purpose is 'to assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders'" and had "primarily plac[ed] [the Act] in Title 9.1 of the Virginia Code which deals with 'Commonwealth Public Safety.'" JA 204 (quoting Va. Code Ann. § 9.1-900).

Because the Virginia legislature had not intended the Act to be punitive, the district court explained that the second part of *Smith*'s analysis required "'the clearest proof' that the . . . Act and related regulations have a punitive effect." JA 205 (quoting *Smith*, 538 U.S. at 92). The court recited the seven "helpful guideposts" set forth in *Smith*,

[3] Although the complaint also named Virginia's Governor as a defendant, the parties jointly stipulated to his dismissal, see JA 184, and the district court treated the motion "as if it were filed solely by Colonel Settle." JA 195 n.1.

JA 203, and carefully examined the aspects of the Act that plaintiff claimed were punitive in nature. See JA 206–09.

The court first rejected plaintiff's argument that the Act's notification requirements are "akin to the historic punishment of shaming," repeating the Supreme Court's observation that "'[o]ur system does not treat dissemination of truthful information in observance of a legitimate governmental objective as punishment'" and emphasizing that the Act's "limited notification" procedures do "not alert the entire community to a registrant's status as historic shaming activities would have." JA 206 (quoting *Smith*, 538 U.S. at 98). The court next concluded that it need not assess the effects of the Act's restrictions "on where certain registrants may live" or loiter, noting that those restrictions "do not apply retroactively" and thus do not reach offenders (like plaintiff) who were convicted of offenses that occurred before July 1, 2006. JA 207. Examining the Act's various reporting requirements, the court concluded that they "are merely portions of a remedial statutory regime and the sort of inconvenience that attends any registration regime." JA 208. The court also emphasized that the Act creates "a process to have the [reporting] burden lightened that

[p]laintiff may avail herself of, if she has yet to do so." JA 208 (citing Va. Code Ann. § 9.1-909).

Because "the majority of the elements of the . . . Act that [p]laintiff challenges do not have punitive effect and those which might are not retroactively applied," the district court concluded, "the Ex Post Facto Clause of the United States Constitution is not offended." JA 209.

b. *Due Process*. The court began by noting that plaintiff disclaimed any procedural due process claim and "state[d] that her claim is one for violations of substantive due process." JA 209. The court noted that plaintiff alleged that the Act violated four specific fundamental rights—"the right to travel," "the right to work," the right to parent," and "the right to privacy"—and that the Act "further violates her due process rights as it is not rationally related to a legitimate state interest and is a harsh and oppressive retroactive civil law." JA 209.

The court rejected each of plaintiff's arguments. Quoting a 2014 decision of this Court, the district court observed that "[s]trict scrutiny applies only when laws significantly interfere with a fundamental right," JA 209 (quoting *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014)), and it found such interference lacking here.

The court concluded that the travel notification requirements "do not implicate the fundamental right of interstate travel." JA 211; see also *id.* (noting that "[t]he right to international travel has not been deemed a fundamental right" (citing *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978)). The court noted that "nothing in the . . . Act precludes [p]laintiff or any other offender from leaving the Commonwealth." *Id.* The court further concluded that "[t]he notification and registration laws of other states may not be raised here as Virginia has no say in them and any effect on [p]laintiff is merely attendant to her registrant status." *Id.*

Turning to plaintiff's right to work claim, the district court observed that "[t]he Supreme 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.'" JA 212 (quoting *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999)). Acknowledging that the Act bars plaintiff from holding certain jobs, the court concluded that "all of the professions cited by [p]laintiff allow individuals to potentially be in

unsupervised and isolated locations with other individuals, some of whom may be potential victims," thus implicating the Act's interest in preventing sex offenders "from engaging in professions where there is a significant risk of recidivism." *Id.* And to the extent plaintiff alleged adverse treatment by private employers, the district court noted that such effects were "neither mandated nor regulated by the Commonwealth and [were] thus . . . inappropriate to be raised in this case." JA 213.

As to the right to parent, the district court concluded that plaintiff "has not experienced a constitutional injury" because "all of the issues raised are prospective as she does not have children." JA 214. The court also noted that, were plaintiff to become a parent, Virginia law contains "remedial procedures . . . to cure the majority of" "the potential harms [p]laintiff complains of." *Id.*

The district court also rejected plaintiff's assertion that the Act violated her right to privacy. The court determined that plaintiff had suffered "no constitutional injury" to that right because the Act "do[es] nothing more than amalgamate information that is already public and dispense it to the public." JA 214. The court also determined that "the

notification requirements are rationally related to the goal of protecting the public and preventing future sexual offenses." JA 214–15.

In sum, the district court rejected plaintiff's due process challenge to the Sex Offender Registry Act because the Act "is rationally related to the legitimate government goals of protecting the public and reducing recidivism and does not place undue burden on [p]laintiff." JA 215.[4]

SUMMARY OF ARGUMENT

Plaintiff contends that retroactive application of certain provisions of Virginia's Sex Offender Registry Act violates the Ex Post Facto Clause and that the Act also violates her substantive due process rights. As the district court correctly concluded, both challenges fail.

1. Plaintiff's ex post facto challenge fails because the Ex Post Facto Clause applies only to retroactive *punishments*, and the challenged Act is neither punitive in intent or effect. The district court correctly concluded that Virginia's legislature intended to enact a regulatory scheme that is civil and nonpunitive, and plaintiff does not

[4] Having dismissed plaintiff's federal claims, the district court declined to exercise supplemental jurisdiction over plaintiff's state constitutional claim and thus dismissed that claim without prejudice. JA 215. Plaintiff does not challenge that holding; indeed, other than a brief mention in the procedural history, plaintiff's brief does not reference any provision of the Virginia Constitution.

meaningfully contest that holding. As to effects, plaintiff "cannot show, much less by the clearest proof, that the effects of the law negate [Virginia's] intention to establish a civil regulatory scheme." *Smith v. Doe*, 538 U.S. 84, 105 (2003).

2. Plaintiff's substantive due process claims fail as well. As the district court correctly held, the "Act is rationally related to the legitimate government goals of protecting the public and reducing recidivism," JA 215, and does not "significantly interfere with a fundamental right," JA 209 (quoting *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014)). Plaintiff's insistence that "strict scrutiny automatically applies to *any* interference with a fundamental right," "without regard to the level of interference," Plaintiff Br. 27–28, misreads the Supreme Court decision on which plaintiff relies, is inconsistent with this Court's precedent, and could subject a wide spectrum of routine governmental regulation (for example, marriage license and fee requirements) to searching and potentially fatal judicial scrutiny. Finally, a number of plaintiff's wide array of discrete arguments were never presented to or passed on by the district court or are otherwise non-justiciable.

STANDARD OF REVIEW

This Court reviews a dismissal under Rule 12(b)(6) *de novo*. See *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315, 320 (4th Cir. 2012). "To survive a motion to dismiss, 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) (quotation marks omitted). Courts must "accept all well-pleaded material facts as true and draw all inferences in the plaintiff's favor." *Schneider v. Donaldson Funeral Home, P.A.*, 733 Fed. Appx. 641, 645 (2018). The Court does not, however, "apply the same presumption of truth to conclusory statements and legal conclusions." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quotation marks omitted).

ARGUMENT

I. Virginia's Sex Offender Registry Act does not violate the Ex Post Facto Clause

The Supreme Court, this Court, and numerous sister circuits have repeatedly rejected ex post facto challenges to laws establishing sex offender registries. There is no warrant for a different result here.

Plaintiff insists that her challenge is different because those cases involved "first-generation" sex offender registry statutes. Plaintiff Br. 9.

But this Court has already concluded—in an opinion that postdated *all* of the later changes to the Virginia registry that plaintiff emphasizes in her brief—that the very same statute plaintiff challenges here "*does not violate the Ex Post Facto Clause*." *Ballard v. FBI*, 102 Fed. Appx. 828, 829 (4th Cir. 2004) (emphasis added); see Plaintiff Br. 3–4 (discussing changes made in 1997, 1998, and 2001). To be sure, this Court's decision in *Ballard* was unpublished and thus is not binding here. But nor does it stand alone. Indeed, in 2013, this Court issued a published decision concluding that the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.*, "is a non-punitive, civil regulatory scheme, both in purpose and effect." *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013).

A. The Virginia legislature did not intend to impose punishment

1. The United States Constitution provides that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,'" the Supreme Court has long held "that the constitutional prohibition on *ex post facto* laws applies *only to penal statutes* which disadvantage the offender affected by them." *Collins v.*

Youngblood, 497 U.S. 37, 41 (1990) (last emphasis added) (citing *Calder v. Bull*, 3 U.S. 386 (1798)). The threshold question in every ex post facto case, therefore, is whether the challenged law imposes "punishment." *Smith v. Doe*, 538 U.S. 84, 92 (2003).

In *Smith,* the Supreme Court established a two-step analysis for determining whether a sex offender registry statute imposes punishment for ex post facto purposes. Because "[w]hether a statutory scheme is civil or criminal is first of all a question of statutory construction," the threshold inquiry is "whether the legislature meant the statute to establish 'civil' proceedings." *Smith*, 538 U.S. at 92 (internal quotation marks and citation omitted). "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," 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.'" *Id.* (internal quotation marks, brackets, and citation omitted).

2. Plaintiff makes no meaningful legal argument under the first step of the *Smith* analysis. Addressing the issue only in a three-

sentence footnote devoid of any citations—a footnote included "[t]o preserve the issue for Supreme Court review"—plaintiff "contends that the intent of the Virginia General Assembly by classifying her and her offense as 'sexuallyviolent' was punitive." Plaintiff Br. 11–12 n.3. Under this Court's precedent, such a discussion appears insufficient to preserve the point. See *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307 (4th Cir. 2017) (stating that "[a] party waives an argument on appeal by failing to present it in its opening brief or by failing to develop its argument, even if its opening brief takes a passing shot at the issue" (internal quotation marks, brackets, and citation omitted)).

3. In any event, the district court correctly held that plaintiff failed to satisfy the first step of the *Smith* analysis. JA 204–05. The Supreme Court has emphasized that "considerable deference must be accorded to the intent as the legislature has stated it." *Smith*, 538 U.S. at 93. And here, as in *Smith*, the state legislature "expressed the objective of the law in the statutory text itself," *id.* at 93, by "including a legislative statement that the [Act's] purpose is 'to assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders.'" JA 204 (quoting Va. Code Ann.

§ 9.1-900); see *Smith*, 538 U.S. at 93 (holding that a statement of purpose that relied upon "protecting the public from sex offenders" showed non-punitive legislative intent). So too as in *Smith*, the "formal attributes of [the] legislative enactment" at issue here—specifically "the manner of its codification"—also demonstrate a non-punitive intent. *Id.* Compare *Smith*, 538 U.S. at 94 (stating that the fact that the notification provisions of the challenged Alaska law were "codified in the State's 'Health, Safety, and Housing Code'" "confirm[ed]" the Court's "conclusion that the statute was intended as a nonpunitive regulatory measure"), with JA 204 (concluding that the Virginia legislature "evinced its intent to make the [Act] a civil regime by primarily placing it in Title 9.1 of the Virginia Code which deals with 'Commonwealth Public Safety.'").[5]

[5] Indeed, the district court's analysis on this point essentially tracked the reasoning of the district court in *Ballard v. Chief of F.B.I.*, No. CIV.A. 7:03CV00354, 2004 WL 190425, at *3 (W.D. Va. Jan. 20, 2004), which this Court later summarily affirmed in an unpublished opinion. See *Ballard v. Chief of F.B.I.*, 102 Fed. Appx. 828, 829 (4th Cir. 2004); accord *Kitze v. Commonwealth*, 475 S.E.2d 830, 832 (Va. App. 1996) (concluding "that the General Assembly intended to facilitate law enforcement and protection of children" and that "[t]here was no intent to inflict greater punishment on the convicted sex offender" (internal quotation marks, brackets, and citation omitted)).

B. There is no "clearest proof" that the Virginia Sex Offender Registry Act is punitive in its effects

Because courts "ordinarily defer to the legislature's stated intent, only *the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (internal quotation marks and citation omitted) (emphasis added). As the district court correctly held, plaintiff made no such showing here. JA 205–09.

1. The district court did not "fail to apply" the *Mendoza-Martinez* factors

Plaintiff faults the district court for "fail[ing] to apply" seven factors set forth by the Supreme Court for analyzing ex post facto challenges and suggests that this Court should reverse for that reason alone. Plaintiff Br. 12–13. That argument should be rejected for numerous reasons.

For one thing, plaintiff cannot plausibly claim that the district court was unaware of or mistaken about the relevant factors, because the court specifically listed them in its opinion as "[t]he factors to be considered." JA 204 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). Plaintiff cites no authority for the proposition that a district court should be reversed when it does not rigidly analyze and

separately discuss each factor of a non-exhaustive, multi-factor balancing test, and courts routinely reject such suggestions.[6] Imposing such a requirement would be particularly inappropriate where, as here, the Supreme Court has specifically described the factors in question as "neither exhaustive nor dispositive" but simply "useful guideposts." *Smith*, 538 U.S. at 97 (citations omitted). Indeed, in *Smith* itself, the Supreme Court devoted significantly different amounts of attention to various factors, describing one as "most significant" and two others as carrying "little weight in [that] case." *Id.* at 102, 105 (citation omitted).[7]

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[6] See generally *United States v. Richart*, 662 F.3d 1037, 1049 (8th Cir. 2011) (stating that the court does "not require a district court to categorically rehearse each of the section 3553(a) factors . . . when it imposes a sentence as long as it is clear that they were considered. Nor have we required district courts to make specific findings on the record about each § 3553(a) factor") (internal quotation marks and citation omitted); *United States v. Saxena*, 229 F.3d 1, 11 (1st Cir. 2000) (holding that a statute setting forth factors for determining incidence and amount of a fine "does not require a sentencing court to follow a rigid format, utter magic words, or employ a mechanical formula. As long as the court gives consideration to the factors discussed in section 3572(a), the statute is satisfied").

[7] The same is true of the Sixth Circuit decision on which plaintiff principally relies. In that opinion, the court of appeals did not even list two of the seven *Mendoza-Martinez* factors. See *Does #1-5 v. Snyder*, 834 F.3d 696, 701 (6th Cir. 2016).

In any event, the district court correctly concluded that the *Mendoza-Martinez* factors favor the conclusion that the effects of the Virginia Sex Offender Registry Act do not negate the General Assembly's intent to establish a civil regulatory scheme. The court concluded that registration requirements have not been regarded in our history and traditions as punishments (JA 206–08), have a rational connection to a non-punitive purpose (JA 208), and do not impose an affirmative disability or restraint (JA 208–09). The district court thus properly focused on the overarching purpose of the seven factors, which is to assess whether the law "is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *Smith*, 538 U.S. at 92 (internal quotation marks and citation omitted); see *id.* at 97 (describing the *Mendoza-Martinez* factors as a "useful framework" for "analyzing the effects" of a challenge act).[8]

2. The *Mendoza-Martinez* factors do not overcome the presumption that the Act is not punitive

[8] A remand would be particularly unwarranted here because all of the relevant arguments were made before the district court and this Court's review is (and would continue to be) *de novo* following any remand.

The purpose of the *Mendoza-Martinez* factors is to determine "whether *the statutory scheme* is so punitive" as "to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (emphasis added) (internal punctuation omitted); see *id.* at 97 (describing *Mendoza-Martinez* factors as useful for analyzing "the regulatory scheme"). Yet rather than look at "the statutory scheme" as a whole as dictated by *Smith*, plaintiff's ex post facto challenge picks out individual requirements within select subsections of the statutory framework and argues that those specific provisions transform what has been denominated a civil remedy into a criminal penalty. See, *e.g.,* Plaintiff Br. 14 (arguing that "the Registry's in-person reporting requirements resemble the criminal punishment of probation or parole"). In any event, although this Court need not evaluate every *Mendoza-Martinez* factor to affirm, an examination of each highlights why plaintiff has not shown by "the clearest proof" that the effects of Virginia's Sex Offender Registry Act are "so punitive either in purpose or effect as to negate [the State's]

intention to deem it civil." *Smith*, 538 U.S. at 92 (internal quotation marks and citation omitted).[9]

Rational Connection to a Nonpunitive Purpose

In *Smith*, the Supreme Court emphasized that the challenged "Act's rational connection to a nonpunitive purpose [was] a [m]ost significant factor in [its] determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102 (internal quotation marks and citation omitted). The same is true here.

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[9] Although plaintiff asserts that "[n]umerous courts post-*Smith* have recognized that modern sex offender registration . . . is punitive," Plaintiff Br. 26, many of the cited cases are simply not relevant here. For example, *Doe v. Miami-Dade Cty.*, 846 F.3d 1180 (11th Cir. 2017), involved a challenge to Florida's residency restrictions. As the district court noted, however, plaintiff is not subject to any residency restrictions, see JA 207–08, and plaintiff does not challenge any residency restrictions on appeal. See note 13, *infra*. At least two of the state cases plaintiff cites involved state constitutional challenges, and one of them *expressly disagreed* with the Supreme Court's analysis in *Smith*. See *Doe v. State*, 189 P.3d 999, 1007, 1010 (Alaska 2008); see also *Doe v. Department of Pub. Safety & Corr. Servs.*, 430 Md. 535, 547 (2013) (expressly declining to reach ex post facto challenge under Federal Constitution). Still others involved statutes that were far more cumbersome than Virginia's or required registration by those convicted of offenses far different from plaintiff's. See *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1025 (Okla. 2013) (law requiring the words "Sex Offender" on driver's licenses and mandating offenders who owned homes within a prohibited area to vacate their properties); *Commonwealth v. Muniz*, 164 A.3d 1189, 1218 (Pa. 2017) (law that covered "those convicted of offenses that do not specifically relate to a sexual act"), cert. denied, 138 S. Ct. 925 (2018).

Plaintiff admits, as she must, that "public health and safety . . . is non-punitive purpose." Plaintiff Br. 20. But plaintiff insists that the Virginia Sex Offender Registry Act is "not rationally related to that purpose" because it actually "makes the public more vulnerable to crime." *Id.* at 22. These "factual allegations," plaintiff maintains, "must be accepted as true" at this stage and entitle this suit to proceed so that the district court can (presumably) determine whether the challenged Act *actually* improves public safety. Plaintiff Br. 22.

That is not how rational-basis review works—in the ex post facto context or anywhere else. Under the rational-basis standard, the question is what a reasonable legislature "*could conclude*" rather than what a court might find after reviewing the relevant literature and resolving a battle of the experts. *Smith*, 538 U.S. at 103 (emphasis added). Under that deferential standard of review, the question is whether "there is a *plausible* policy reason for" the legislature's decision, whether "the legislative facts on which the [challenged policy] is apparently based *rationally may have been considered to be true* by the governmental decisionmaker," and whether "the relationship of the [policy] to its goal is *not so attenuated* as to render the [policy] arbitrary

or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (citations omitted) (emphasis added).

Both the Supreme Court and this Court have *already* held that a State "could conclude that a conviction for a sex offense provides evidence of a substantial risk of recidivism," *Smith*, 538 U.S. at 103, and that "notifying the public to the risk of sex offenders in their community" "has a rational connection to a legitimate, non-punitive purpose—public safety." *Under Seal*, 709 F.3d at 265. Accord *McKune v. Lile*, 536 U.S. 24, 33 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.").[10] And, as the district court noted, prohibiting those who have committed sex offenses against minors from working at a daycare or as a teacher is plainly rationally related to protecting children. JA 212–13. To the extent new research may suggest that sex offender registries are less effective at reducing

[10] The Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, reports that the five-year rate of sexual recidivism for all sex offenders is 14, and the 20-year rate of the same is 27%. See Sex Offender Management and Assessment Initiative 112 (Mar. 2017), http://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

recidivism that previously thought (or even counterproductive), that is an argument for legislative modification, not judicial invalidation.

History and Tradition

The Supreme Court has emphasized that the reason courts consult history and tradition in ex post facto analysis is "because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97. As a threshold matter, therefore, the fact that "sex offender registration and notification statutes are of fairly recent origin . . . suggests that [the Virginia Act] was not meant as a punitive measure, or, at least, that it d[oes] not involve a traditional means of punishing." *Id.* (internal punctuation omitted). And, in *Smith* itself, the Supreme Court ultimately concluded that this factor cut against the party challenging Alaska's sex offender registry. *Id.* at 97–99.

Plaintiff contends that this Act warrants a different result, analogizing Virginia's Sex Offender Registry Act to the traditional punishments of banishment and public shaming and the modern ones of probation and parole. Plaintiff Br. 14. The district court properly

rejected the versions of this argument that were made below, JA 205–09, and this Court should too.

As the Supreme Court has already explained, "[a]ny initial resemblance" between modern sex offender registries and "early punishments is . . . misleading." *Smith*, 538 U.S. at 98. Punishments like "public shaming, humiliation, and banishment, involved more than the dissemination of information." *Id.* Rather, those punishments "either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Id.* By contrast, like the Alaska statute at issue in *Smith*, any stigma arising from Virginia's Sex Offender Registry Act "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." *Id.* And the Supreme Court could not have been more clear in *Smith* that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment" and that the presence of modern technology such as the internet "does not alter [that] conclusion." *Id.* at 98–99; see *id.* at 99 (explaining that "[w]idespread public access is necessary for the efficacy of the scheme,

and the attendant humiliation is but a collateral consequence of a valid regulation").

Plaintiff argues that "[t]he Registry's practical effect is a form of banishment" because registered sex offenders cannot enter certain locations or work in certain jobs. Plaintiff Br. 17. But, "[t]he common feature of banishment, throughout the ages, has been *the complete expulsion* of an offender from a community," *Shaw v. Patton*, 823 F.3d 556, 566 (10th Cir. 2016) (emphasis added),[11] and plaintiff has not been expelled from any community. As the district court noted, plaintiff is not subject to any residence or loitering restrictions. See JA 207–08. Plaintiff is unable to enter certain locations or work in certain jobs. But that does not distinguish plaintiff from various other categories of people (for example, minors) and it does not amount to banishment. See *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (Iowa sex offender statute did not "expel" offenders from their communities and was thus

[11] Accord *Smith*, 538 U.S. at 98 (noting that those who were banished "could neither return to their original community nor, reputation tarnished, be admitted easily into a new one"); see also Corey Rayburn Yung, *Banishment by A Thousand Laws: Residency Restrictions on Sex Offenders*, 85 Wash. U.L. Rev. 101, 107 (2007) ("Banishment in its early form was the expulsion of a person from a community or sovereign area.").

not akin to banishment); *Shaw v. Patton*, 823 F.3d 556, 567 (10th Cir. 2016) (upholding Oklahoma's Sex Offender Registration Act and reasoning that an offender's "inability to inhabit [certain] areas might substantially affect his residential choices, but this impediment—regardless of its severity—does not constitute expulsion from a community").

Before this Court, plaintiff argues that the Act's "*in-person* reporting requirements resemble the criminal punishment of probation or parole." Plaintiff Br. 14 (emphasis added). But plaintiff made no such argument below. In plaintiff's complaint, the only reference to probation and parole referred to "regular in-person checks, residence verifications, fingerprint and photograph updates, reporting of electronic identifiers, and other incidents of constant accountability." JA 23. The only reference to "probation" in plaintiff's opposition to the motion to dismiss involves her underlying criminal conviction, see JA 159, and the only use of "parole" comes in an oblique reference to "the personal accountability of a parole officer," JA 171. Not surprisingly, the district court never considered any ex post facto argument directed at the Act's in-person reporting requirements. Accordingly, no such claim has been

preserved for appellate review. See *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

In any event, plaintiff cites no cases where a court has found a sex offender registry punitive because it has aspects similar to parole. In fact, the Supreme Court specifically rejected such an argument in *Smith*. See 538 U.S. at 101–102. And although the Court ultimately determined that Alaska's sex offender statute did not require in-person updates, see *id.* at 101, the Court never said that the history and tradition factor would necessarily have been satisfied if the act had done so.[12] Unlike probation, which historically involved a "deferred sentence" based on the underlying offense, see generally *Mempa v. Rhay*, 389 U.S. 128, 136–37 (1967), Virginia's reporting requirements are regulatory obligations separate from the underlying conviction. Finally, plaintiff's own complaint alleges that a Virginia state trial court "recently granted relief" from at least one of the Act's in-person reporting requirements. JA 16 n.3.

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[12] Indeed, plaintiff's argument on this point appears to be drawing on a dissenting opinion in *Smith* rather than the majority. See 538 U.S. at 115 (Ginsburg, J., dissenting).

Affirmative Disability or Restraint

Plaintiff argues that the Act's job restrictions, restrictions on entering school or daycare property, and in-person reporting impose affirmative disabilities and restraints. Plaintiff Br. 17.[13] Not so.

Plaintiff lacks standing to contest that the job restrictions and those restrictions do not impose affirmative disabilities or restraints in any event. Plaintiff has not alleged any legally cognizable injury as a result of the job restrictions because she does not allege that she applied for any of the public transportation or childcare related jobs at issue in the Act. See generally *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (to establish injury in fact, plaintiff must have already suffered a legally cognizable injury or that he faces "a realistic danger of sustaining a direct injury as a result of the [challenged] statute's operation or enforcement"). In addition, the Supreme Court has held that a lifelong bar on work in a particular industry does not

[13] Although the Act also imposes limitations on where certain sex offenders may linger, the district court concluded that it "need not address" those restrictions "because they do not apply retroactively." JA 207. Plaintiff does not contest that holding on appeal and has thus abandoned any argument on that point. *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013) ("contentions not raised in the argument section of the opening brief are abandoned").

constitute an affirmative disability or restraint that is considered punitive. See *Smith*, 538 U.S. at 100 (citing *Hudson v. United States,* 522 U.S. 93, 104 (1997), and *De Veau v. Braisted*, 363 U.S. 144, 160 (1960)).

This Court's decision in *Doe v. Virginia Dep't of State Police*, 713 F.3d 745 (4th Cir. 2013) (*Doe v. VSP*), establishes that plaintiff likewise lacks standing to challenge the restrictions on entering school or daycare properties. As the district court noted (and as this Court noted in *Doe v. VSP*), Virginia law contains procedures that would allow plaintiff to apply to have those restrictions limited. See JA 214 (citing Va. Code Ann. § 18.2-370.5(C)); *Doe v. VSP*, 713 F.3d at 756. Plaintiff, however, does not allege that she ever attempted to use those procedures. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing the[] elements" of standing.). And, under this Court's decision in *Doe v. VSP*—which also involved an attempted constitutional challenge to provisions of Virginia law limiting sex offenders' ability to access certain property—plaintiff's failure to do so means she lacks standing to challenge those provisions. See *Doe v. VSP*,

713 F.3d at 756 (stating that because Doe "has not yet tried to petition a Virginia circuit court, the Board, or any church," the Court "ha[d] no way of knowing whether she will ultimately be unable to enter [a] school or a church of her faith," thus making it "purely speculative whether action by this court would have any effect on her ability to enter school or church property"); see also Part II(B), *infra* (discussing *Doe v. VSP* in greater detail).[14]

As to the in-person reporting requirement: This Court has already held that being required "to appear periodically in person to verify [one's] information and submit to a photograph . . . *is not an affirmative disability or restraint.*" *Under Seal*, 709 F.3d at 265 (emphasis added). "Appearing in person may be more inconvenient, but requiring it is not

[14] The Act does not specifically prohibit sex offenders from attending church, and plaintiff has not alleged that she has been specifically restricted from church properties. Instead, the complaint alleges that "[b]ecause of these laws, [plaintiff] *feels* unable to attend many in-person church services." JA 17 (emphasis added). But even if one read the prohibition on entering property "when such property is *solely* being used by a public or private elementary or secondary school for a school-related or school-sponsored activity" to encompass churches with daycare facilities, see Va. Code Ann. § 18.3-370.5(A)(iii) (emphasis added), plaintiff could still seek permission to enter such property. See Va. Code Ann. § 18.3-370.5(C). For that reason, any restriction on plaintiff's ability to access certain properties "do not affect her with finality, as she has not taken any of the steps necessary to access those properties." *Doe v. VSP*, 713 F.3d at 754.

punitive." *Id.* (citation omitted). [15] Indeed, "[r]egistration is frequently part of civil regulation, including car licensing, social security applications, and registering for selective service." *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012). What is more, plaintiff's complaint specifically states that a Virginia state court "recently granted [her] relief from" from the at least one of the Act's in-person registration

[15] Numerous courts have likewise held that in-person reporting requirements are not punitive. See *Shaw v. Patton*, 823 F.3d 556, 570 (10th Cir. 2016) (Oklahoma's "in-person reporting requirements do not constitute an affirmative disability or restraint that is considered punitive"); *United States v. W.B.H.*, 664 F.3d 848, 857 (11th Cir. 2011) ("Appearing in person may be more inconvenient, but requiring it is not punitive."); *Hatton v Bonner*, 356 F.3d 955, 964 (9th Cir. 2004) (California statute's requirement of in-person reporting "is simply not enough to turn [the California statute] into an affirmative disability or restraint"); *Litmon v. Harris*, 768 F.3d 1237, 1243 (9th Cir. 2014) (upholding California's in-person quarterly reporting for offenders adjudicated to be sexually violent predators); *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1056–57 (9th Cir. 2012) (upholding Nevada's quarterly in-person reporting); *Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014) (holding that a requirement of quarterly in-person reporting is not punitive). In contrast, the Sixth Circuit concluded that Michigan's sex offender registration statute imposed an affirmative disability or restraint where the statute both imposed regulations on "where registrants may live, work, and 'loiter'" and required "all registrants to appear in person 'immediately' to update information such as new vehicles or 'internet identifiers.'" *Does #1-5 v. Snyder*, 834 F.3d 696, 698, 703 (6th Cir. 2016).

requirements," "allowing [plaintiff to use] a mailed-in form" instead. JA 16 n.3.[16]

Promoting Traditional Aims of Punishment

Plaintiff argues that Virginia's Sex Offender Registry Act promotes traditional aims of punishment because it "prevent[s] registrants' opportunities to re-offend," "advances both specific and general deterrence," and "inflicts painful requirements and restrictions based on commission of a crime." Plaintiff Br. 18.

As plaintiff comes close to admitting by stating that the Supreme Court "dismissed this consideration" in *Smith* and her overt reliance on one of the *Smith* dissents, Plaintiff Br. 18, the Supreme Court has already rejected those precise arguments because they "prove[] too much," *Smith*, 538 U.S. at 102. "Any number of governmental programs might deter crime without imposing punishment," and holding "that the mere presence of a deterrent purpose renders such sanctions 'criminal' would severely undermine the Government's ability to engage in

[16] The complaint does not clearly specify whether this relief was granted as to the requirement to "appear every two years in person to reregister" or to the requirement to "submit a new set of fingerprints every 90 days." JA 16.

effective regulation." *Id.* (internal quotation marks, ellipses, and citation omitted). *Smith* also rejected another argument plaintiff renews here: "that the Act's registration obligations were retributive because the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." *Id.* (internal quotation marks and citation omitted); accord *Under Seal*, 709 F.3d at 265 (likewise concluding that "SORNA does not promote the traditional aims of punishment, such as retribution and deterrence").[17]

Excessiveness with Respect to Non-Punitive Purposes

Plaintiff argues that the Act's "permanence and extreme nature. . . demonstrate its excessiveness." Plaintiff Br. 23. Neither contention has merit.

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[17] Even one of the main decisions on which plaintiff relies concluded that this factor warranted "little weight" in a challenge to Michigan's sex offender registry. See *Does #1-5 v. Snyder*, 834 F.3d 696, 698, 704 (6th Cir. 2016). In addition, numerous other courts of appeals—including the Sixth Circuit—have concluded that the restrictions imposed by various other sex offender registration statutes "are not of a type that we have traditionally considered as a punishment." *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007); accord *Shaw v. Patton*, 823 F.3d 556, 571–72 (10th Cir. 2016) (Oklahoma); *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1057 (9th Cir. 2012) (Nevada); *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005) (Iowa); *Hatton v. Bonner*, 356 F.3d 955, 965 (9th Cir. 2004) (California).

Numerous courts—including the Supreme Court—have upheld sex offender registration laws that require lifetime registration. See *Smith*, 538 U.S. at 90 (noting that Alaska law required certain offenders to "register for life"); see also *Parks*, 698 F.3d at 5–6; *United States v. W.B.H.*, 664 F.3d 848, 852 (11th Cir. 2011).[18] As the Supreme Court explained in *Smith*, "[e]mpirical research on child molesters, for instance, has shown that, '[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release.'" *Smith*, 538 U.S. at 104 (quoting National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997)).

Plaintiff's challenge to the Act's "extreme intrusiveness" fares no better. Plaintiff Br. 23.[19] The Supreme Court has emphasized that

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[18] Accord *R.W. v. Sanders*, 168 S.W.3d 65, 67 (Mo. 2005); *State v. Worm*, 680 N.W.2d 151, 163 (Neb. 2004); *State v. Petersen-Beard*, 377 P.3d 1127, 1129 (Kan. 2016) (lifetime registration not punitive under Eighth Amendment); *Commonwealth v. Lee*, 594 Pa. 266, 301, 935 A.2d 865, 886 (2007) (lifetime registration, notification, and counseling requirements for sexually violent predators do not constitute a penalty).

[19] Plaintiff errs in asserting 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." Plaintiff Br. 23–24. For one

"[t]he excessiveness inquiry of [its] *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." *Smith*, 538 U.S. at 105. Instead, "[t]he question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* Here, as in *Smith*, the challenging party has not shown by the clearest proof that the regulatory means chosen by the Virginia legislature in the Act are unreasonable in light of the objective to maintain public health and safety.

Scienter / Triggering Behavior Is Already A Crime

The Supreme Court stated that both of these factors were "of little weight" in considering an ex post facto challenge to Alaska's sex offender registry, *Smith*, 538 U.S. at 105, and the same is true here.

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thing, the Act *specifically provides* an exception for voting. See Va. Code Ann. § 18.2-370.5(B) ("The provisions of clauses (i) and (iii) of subsection A shall not apply to such adult if . . . he is a lawfully registered and qualified voter, and is coming upon such property solely for purposes of casting his vote"). And, as discussed previously, Virginia law also specifically permits sex offenders to petition for an exception for this provision. Va. Code Ann. § 18.2-370.5(B). Plaintiff's ability to petition for an exception stand in contrast to the plaintiffs before the Sixth Circuit in *Snyder*, where the restrictions in fact kept plaintiffs from watching their children participate in school plays or school sports teams. *Does #1-5 v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016).

Nearly all criminal convictions require scienter, see generally *Morissette v. United States*, 342 U.S. 246 (1952), and "the fact that the Act's requirements are triggered by a criminal conviction is common to all regulatory disabilities that result from a prior conviction." *Doe v. Pataki*, 120 F.3d 1263, 1281 (2d Cir. 1997), *as amended on denial of reh'g* (Sept. 25, 1997). For that reason, numerous other courts have held that the scienter and already criminalized conduct factors do not weigh in favor of finding sex offender registries punitive. See *Clark v. Ryan*, 836 F.3d 1013, 1019 (9th Cir. 2016); *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1057 (9th Cir. 2012); *Femedeer v. Haun*, 227 F.3d 1244, 1252 (10th Cir. 2000); *Cutshall v. Sundquist*, 193 F.3d 466, 475 (6th Cir. 1999).[20]

* * *

[20] Plaintiff's observation that the Act "also sweeps up those who committed a listed crime but are found 'not guilty by reason of insanity,'" Plaintiff's Br. 24 (quoting Va. Code § 9.1-901(B)), is both undeveloped and not well taken because plaintiff is not such a person. See JA 10 (stating that plaintiff "pleaded guilty"). In any event, the Act's inclusion of some people who were not convicted of a crime actually *undercuts* plaintiff's scienter argument because it underscores that "the registration requirement is not triggered *only* on a finding of scienter." *Hatton v. Bonner*, 356 F.3d 955, 965 (9th Cir. 2004); see *Artway v. Attorney Gen. of State of N.J.*, 81 F.3d 1235, 1263 (3d Cir. 1996) (same).

As in *Smith*, an "examination of the Act's effects leads to the determination that [plaintiff] cannot show, much less by clearest proof, that the effects of the law negate [Virginia's] intention to establish a civil regulatory scheme." *Smith*, 538 U.S. at 105. For that reason, "[t]he Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause." *Id.* at 105–06.

II. Virginia's Sex Offender Registry Act does not violate plaintiff's due process rights

Plaintiff reconfirms that her due process challenge is solely of the substantive variety. See Plaintiff Br. 27; accord JA 209. For that reason, the complaint's repeated statement that Virginia law "does not provide any individualized consideration before restricting" plaintiff's ability to do certain things, see JA 28–29 (¶¶ 140, 144, 148, 152) is not relevant because procedural "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003). In contrast, substantive due process "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." *Washington v. Glucksberg*, 521 U.S. 702, 721

(1997) (some emphasis added; internal quotation marks and citation omitted).

Plaintiff misreads *Glucksberg* as holding that "strict scrutiny automatically applies to *any* interference with a fundamental right" and "without regard to the level of interference." Plaintiff Br. 27–28. For one thing, read in context, the relevant language from *Glucksberg* is clearly distinguishing between substantive and procedural due process rather than stating the sweeping (and far different) proposition plaintiff ascribes to it. See *Glucksberg*, 521 U.S. at 719 (commencing discussion by distinguishing between procedural and substantive due process). And, at any rate, this Court specifically reaffirmed—almost 17 years after *Glucksberg*— that "[s]trict scrutiny applies *only* when laws *significantly interfere* with a fundamental right." *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014) (emphasis added) (internal quotation marks and citation omitted), cert denied *sub nom Rainey v. Bostic*, 135 S. Ct. 286 (2014).[21]

[21] Besides being binding precedent, the *Bostic* principle simply must be right. Numerous laws could be viewed as "interfering" with well-established fundamental rights in some sense. After all, even the right to marry (which is not at issue here) generally requires: (a) a marriage license, (b) payment of a fee, and (c) a form of identification.

For that reason, plaintiff may not trigger strict scrutiny by simply invoking broad principles like the rights to "travel," "privacy," "work," or "motherhood." Instead, the question is whether plaintiff can establish that the Act "significantly interfere[s]" with those rights as the Supreme Court and other courts have understood them. *Bostic*, 760 F.3d at 377. As the district court correctly held, the answer is no. JA 209–15; accord *McCabe v. Commonwealth*, 650 S.E.2d 508, 512 (Va. 2007) (rejecting substantive due process challenge to Virginia's Sex Offender Registry Act).

A. Plaintiff's right to parent claims are non-justiciable, not properly presented, and fail on the merits

Plaintiff is and never has been legally prohibited from having children or raising children. Instead, as plaintiff acknowledges, her

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Yet, so far as we are aware, no court has ever held (or even suggested) that these well-established regulatory rules are subject to strict judicial scrutiny. In fact, the Supreme Court has expressly stated that "[not] every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). In contrast, the fact that the Supreme Court never mentioned a "significant interference" requirement in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), see Plaintiff Br. 28, is easily explained on the ground that the law in question completely foreclosed the plaintiff's ability to marry the partner of their choice.

complaint alleged that she chose not to have biological children and that her registry status had prevented her from "attend[ing] most of her step-daughter's school functions" and rendered her "unable to seek greater visitation or custody status with [her step-daughter] and [her husband's other children." JA 20; see Plaintiff Br. 35. But the claims plaintiff raised in district court are non-justiciable, and to the extent plaintiff seeks to shift gears now, those claims are not challenges to the Virginia Sex Offender Registry Act.

1. This Court has already rejected a similar substantive due process challenge for lack of standing where the complaining party never sought to avail herself of opt-out procedures under state law. In *Doe v. VSP*, an offender convicted of a sexually violent offense challenged the Act's provisions restricting her from "entering the grounds of a school or daycare without first gaining permission from a Virginia circuit court and the school board or the owner of the daycare." 713 F.3d at 750. These restrictions, the plaintiff alleged, "infringed upon her fundamental right to raise and educate her children." *Id.* at 752.

The Court held that the plaintiff lacked standing to raise her substantive due process claims because she had never sought to take advantage of the state procedures that may have allowed her to access the property in question. *Doe v. VSP*, 713 F.3d at 754–57. The Court explained that "[t]he injuries [plaintiff] alleges . . . stem from impediments the Virginia statute and the [relevant school board] policy place on her ability to access school and church property," but "because [plaintiff] has not yet attempted to undertake the requisite steps to access these properties, she cannot demonstrate that these claims are justiciable at this juncture." *Id.* at 750. Emphasizing that "principles of federalism and comity counsel in favor of providing at the least an opportunity for the processes provided for by Virginia's statute to address Doe's claims before intervening," *id.* at 753, the Court affirmed the district court's dismissal of the plaintiff's claims, *id.* at 750–51.

Like the plaintiff in *Doe v. VSP*, plaintiff sets forth no allegations that she attempted to undertake the requisite steps to access the relevant properties. See JA 214 (noting that "there are procedures in place to remedy the potential harms [p]laintiff complains of"); see also *Lujan*, 504 U.S. at 561 ("The party invoking federal jurisdiction bears

the burden of establishing the[] elements" of standing.). Plaintiff, therefore, "does not allege an injury in fact, because the harm she alleges is not 'actual or imminent,' but 'conjectural [and] hypothetical.'" *Doe v. VSP*, 713 F.3d at 754 (quoting *Lujan*, 504 U.S. at 560). The district court was thus correct in concluding that "[p]laintiff has not [yet] experienced a constitutional injury." JA 214.[22]

2. Plaintiff's right to parenthood challenges to the Act are also unripe for the reasons explained in *Doe v. VSP*. "As with standing, the party bringing the suit bears the burden of proving ripeness." *Doe v. VSP*, 713 F.3d at 758. "Because [plaintiff] has yet to petition a Virginia circuit court for permission to enter school or church property, all of her constitutional claims" involving the right to parent "are dependent on future uncertainties and thus not ripe for judicial decision." *Id.* at 758–59.

Plaintiff has not alleged that she "attempted to petition a Virginia circuit court, the [School] Board, or any church," and "it is far from clear whether she will ultimately be barred from entering these properties.

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[22] As in *Doe v. VSP*, plaintiff also fails to establish traceability or redressability with respect to the law's impact on her substantive due process right to parenthood. See 713 F.3d at 756.

Therefore, any injury to her substantive due process . . . rights she would suffer from not being able to enter a school or a church remains hypothetical." *Doe v. VSP*, 713 F.3d at 754.

3. Seeking to overcome these justiciability defects, plaintiff cites three Virginia statutes that (she claims) "*currently* and *affirmatively* bar[] [plaintiff] from obtaining *any* parental rights through adoption, foster care, and even through marriage to a spouse with existing children." Plaintiff Br. 36. There are several problems with that argument.

First, any such claims were not properly presented to the district court and the court never considered them. To be sure, plaintiff's complaint contains glancing references to the two non-definition provisions she cites before this Court. See, *e.g.*, JA 13 (¶ 36) (citing Va. Code Ann. § 18.2-371); JA 16 (¶ 60) (citing Va. Code Ann. § 63.2-1205.1). But the complaint did not seek to have either of those statutes declared unconstitutional, see JA 30–31 (prayer for relief); JA 6–7 (¶ 1) (defining "Registry"), plaintiff did not cite either of them in her response to the motion to dismiss, see JA 159–79, and the district court did not reference them either.

Second, the provisions that plaintiff belatedly seeks to challenge are not part of the statute she seeks to enjoin. The restrictions on adoption contained in Virginia Code Ann. § 63.2-1205.1 are not triggered by plaintiff's presence on the registry but rather by virtue of her "*ha[ving] been convicted of*" certain specified offenses, including "an offense requiring registration pursuant to § 9.1-902." (emphasis added). The same is true of the other two provisions plaintiff references, which, together, prohibit *other people* from "creat[ing] a substantial risk of physical or mental injury by knowingly leaving a child alone in the same dwelling" with a person who has been convicted of certain specified offenses "with whom the child is not related by blood or marriage"—whether or not the person in question actually has registered. Va. Code Ann. § 16.1-228 (definition of "*Abused or neglected child*"; cl. 5); see § 18.2-371 (substantive offense).

Finally, even if plaintiff had properly challenged the statutes in question, any such challenge would fail as a matter of law. Plaintiff cites no decision (and we are aware of none) recognizing a fundamental right to adopt children, much less to be alone with a child to whom one is not related by blood or marriage. Va. Code Ann. § 16.1-228 (definition

of "*Abused or neglected child*"; cl. 5). And even if even if such statutes could conceivably trigger strict scrutiny, they would satisfy it because of the compelling state interest in protecting minors from those (like plaintiff) who have previously abused them.

B. The Act does not violate plaintiff's right to travel

The district court recognized that "the right to interstate travel is a fundamental right." JA 211 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 105–06 (1971)).[23] But, as the court noted, nothing in the Virginia Sex Offender Registry Act "precludes [p]laintiff or any other offender from leaving the Commonwealth" or returning to it later. JA 211. Rather, plaintiff must simply give notification before traveling between States. JA 17.

Plaintiff cites no decision holding that sex offender registries impermissibly infringe the right to travel, and the courts that have addressed the issue have found no constitutional violation. See *Doe v. Moore*, 410 F.3d 1337, 1348 (11th Cir. 2005) ("mere burdens on a

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[23] In contrast, the district court noted that "[t]he right to international travel has not been deemed a fundamental right." JA 211 (citing *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978)). Plaintiff has not renewed any international travel challenge in her opening brief, thus waiving the issue. *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013).

person's ability to travel from state to state are not necessarily a violation of their right to travel"); *United States v. Shenandoah*, 595 F.3d 151, 162–63 (3d Cir. 2010) ("moving from one jurisdiction to another entails many registration requirements required by law which may cause some inconvenience, but which do not unduly infringe upon anyone's right to travel"), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012); *United States v. Byrd*, 419 Fed. Appx. 485, 491 (5th Cir. 2011) ("We join our sister circuits and hold that SORNA's registration requirements do not implicate the fundamental right to travel of convicted sex offenders[.]").[24]

Though reporting requirements associated with travel may be burdensome, they are not "unreasonable by constitutional standards, especially in light of the reasoning behind such registration." *Moore*, 410 F.3d at 1348. "The state has a strong interest in preventing future

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[24] To the extent plaintiff predicates her due process challenge on reporting requirements before out-of-state moves or employment in another State, see Plaintiff Br. 30, plaintiff has not alleged any imminent plans to move or begin employment in another state. Plaintiff, therefore, has no standing to challenge these portions of the Act. See *Babbitt*, 442 U.S. at 298 (holding that a plaintiff must show that he has already suffered a legally cognizable injury or that he faces "a realistic danger of sustaining a direct injury as a result of the [challenged] statute's operation or enforcement").

sexual offenses and alerting local law enforcement and citizens to the whereabouts of those that could reoffend." *Id.* at 1348–49. "Without such a requirement, sex offenders could legally subvert the purpose of the statute by temporarily traveling to other jurisdictions for long periods of time and committing sex offenses without having to notify law enforcement." *Id.* at 1349.

C. The Act does not violate any broad fundamental "right to work"

Unlike the rights to marry, parent, or interstate travel, "[t]he [Supreme] Court has never held that the 'right' to pursue a profession is a *fundamental* right, such that any state-sponsored barriers to entry would be subject to strict scrutiny." *Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014).[25] And although the 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," that "right . . . is nevertheless subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286,

[25] If strict scrutiny were triggered for any incidental burden to a broad "right to work," courts would have to strictly scrutinize routine burdens on working such as showing identification before beginning a job.

291–92 (1999). Indeed, the Supreme Court has recognized that "State provisions *disqualifying convicted felons from certain employments* important to the public interest also have a long history." *De Veau v. Braisted*, 363 U.S. 144, 159 (1960) (emphasis added).

As the district court explained, the Act does not prohibit plaintiff from "working"; it simply publicizes public information and precludes plaintiff from holding certain categories of job. JA 212. And, as the district court further explained, these limited legal restrictions on plaintiff's employment options are eminently "reasonable" given that "all of the professions cited by [p]laintiff allow individuals to potentially be in unsupervised and isolated locations with other individuals, some of whom may be potential victims." JA 212. Consistent with this reasoning, sister circuits have rejected the argument that sex offender registries impermissibly infringe on sex offenders' "right to work." *Windwalker v. Governor of Alabama*, 579 Fed. Appx. 769, 773 (11th Cir. 2014) (rejecting argument that Alabama sex offender registry act violates offenders "right to find and keep employment"); *Cutshall v.*

Sundquist, 193 F.3d 466, 480 (6th Cir. 1999) (sex offender registry act did not implicate constitutionally protected interest in employment).[26]

D. The Act does not unconstitutionally infringe on plaintiff's right to privacy

"The Constitution does not provide [a sex offender] with a right to keep h[er] registry information private, and the Act does not impose any restrictions on [her] personal rights that are fundamental or implicit in the concept of ordered liberty[.]" *Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999). "Although the Supreme Court has recognized "fundamental rights in regard to some special liberty and privacy interests, it has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection." *Doe v. Moore*, 410 F.3d 1337, 1343–44 (11th Cir. 2005). And the Supreme Court has been clear that "the interests in

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[26] For the first time on appeal, plaintiff contends that the "most destructive restriction on employment" is that the Act "expos[es] the employer of sex offenders to the same public exposure as the offender themselves." Plaintiff Br. 32. Plaintiff lacks standing to assert the constitutional rights of hypothetical employers, and the Supreme Court has already held that the decisions taken by private actors in response to the government's truthful dissemination of public information is not properly attributable to the government. See *Smith*, 538 U.S. at 101. In any event, "[b]ecause [plaintiff] did not make this argument below, it is waived." *Pornomo v. United States*, 814 F.3d 681, 686 (4th Cir. 2016).

privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975). Here, the challenged Act simply compiles and provides for dissemination of public information about sex offenders. See JA 14–15 (listing the information the Virginia registry makes public).

None of the cases plaintiff cites arose in the context of sex offender registries and numerous courts that have faced a due process challenge to such registries on privacy grounds have rejected the claim plaintiff brings here. See *Paul P. v. Verniero*, 170 F.3d 396, 405 (3d Cir. 1999) (concluding that "indirect effects which follow from plaintiffs' commission of a crime" and subsequent registration under a sex offender statute "are too substantially different from the government actions at issue in the prior cases to fall within the penumbra of constitutional privacy protection"); *A.A. ex rel. M.M. v. New Jersey*, 341 F.3d 206, 211–12 (3d Cir. 2003) ("a registrant's right to privacy in his or her home address gives way to the State's compelling interest to prevent sex offenses"); *Windwalker v. Governor of Alabama*, 579 Fed. Appx. 769, 773 (11th Cir. 2014) (rejecting argument that Alabama sex offender registry act violates offenders right to privacy); *Does v. Munoz*,

507 F.3d 961, 965 (6th Cir. 2007) (sex offenders "lack a fundamental right to privacy in information that is already public").[27] Simply put, "a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy." *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005); *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009) (same).[28]

* * *

Much of the appeal of plaintiff's arguments builds on the intuition that the crime to which she pleaded guilty should not have been

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[27] See also *United States v. Juvenile Male*, 670 F.3d 999, 1011–12 (9th Cir. 2012) (rejecting substantive due process challenge to the federal sex offender registry based on infringement to "right to lifetime confidentiality" and noting that "[s]everal other circuits have similarly rejected substantive due process challenges to sex offender registration, holding that sex offenders do not have a fundamental right to avoid publicity"); *Moore*, 410 F.3d at 1344 ("The circuit courts that have considered this substantive due process argument regarding sex offender registries have upheld such registration and publication requirements finding no constitutional infirmities.").

[28] To the extent plaintiff contends she has a distinct privacy right in not providing biometric data, see Plaintiff Br. 41, plaintiff cites no authority establishing a fundamental right to privacy for such data and her citation to Fourth Amendment cases are unhelpful because plaintiff does not bring a Fourth Amendment challenge. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (addressing reasonable expectation of privacy in the context of a Fourth Amendment challenge).

classified as violent.[29] "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character." *Hawker v. New York*, 170 U.S. 189, 197 (1898). "But the legislature has power . . . to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist." *Id.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

COLONEL GARY T. SETTLE,
in his official capacity as
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[29] Query whether this intuition would be as strong if the genders were reversed and a male caregiver in his mid-twenties had sexual intercourse with a 15-year-old girl.

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee agrees that oral argument may aid in the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 11,338 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

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