No. 18-11620

In the United States Court of Appeals for the Fifth Circuit

JOHN DOES 1-7, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff – Appellant,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; STEVEN MCCRAW, COLONEL, DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY,
Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division

BRIEF FOR DEFENDANTS-APPELLEES

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No. 18-11620

JOHN DOES 1-7, individually and on behalf of all others similarly situated,
Plaintiff – Appellant,

v.

GREG ABBOTT, Governor of the State of Texas; STEVEN McCRAW, Colonel, Director of the Texas Department of Public Safety,
Defendants – Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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John Does 1-7

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Statement Regarding Oral Argument

Oral argument should not be necessary. Because the district court dismissed this suit on Rule 12(b) motions, the record on appeal is short. Also, the plaintiffs-appellants have narrowed the scope of this appeal to only four of their claims. And three of those claims (the ex post facto claim, the double-jeopardy claim, and the cruel-and-unusual-punishment claim) share an initial legal issue: whether the Texas Sex Offender Registration Program is punitive and therefore subject to constitutional constraints on criminal laws. As explained below, the Court has already addressed that issue multiple times, albeit in unpublished decisions, and consistently concluded that the Program is *not* punitive. The remaining claim on appeal—that the Program violates procedural due process—has also been addressed before and is foreclosed by circuit precedent. Because the record is slight and the limited ground covered by this appeal is well-plowed, defendants-appellees do not believe that oral argument would significantly aid the Court's decisional process.

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INTRODUCTION

The Texas Sex Offender Registration Program, originally enacted in 1991, serves important public-safety purposes by monitoring sex offenders who live, work, and attend school in Texas and by conveying relevant information about them to law enforcement and citizens. Because the Program achieves those goals in part by imposing conditions and obligations on sex offenders themselves, offenders have frequently challenged the Program in court. The kitchen-sink attack on the Program's constitutionality brought by John Does 1-7 in this case is the latest such effort.

In a thorough memorandum opinion, the district court correctly dismissed the Does' suit for failing to state any claims upon which relief may be granted. Although the Does have narrowed the scope of their case on appeal by contesting the dismissal of only a few claims, that newfound focus should not yield a different outcome. As the district court recognized, circuit precedent forecloses the Does' procedural due process claim: because Program registration is based on the outcome of some prior adversarial proceeding, no further process is due before the Program's conditions are imposed. And as the district court also noted, this Court, in unpublished decisions, has repeatedly rejected the premise of the Does' remaining claims—that the Program is a punitive statute subject to constitutional limits on criminal laws. Nothing in the Does' operative pleading or opening brief warrants reconsideration of those conclusions. The Court should affirm the district court's judgment.

Statement of Jurisdiction

The Does' allegation of putative claims under 42 U.S.C. § 1983, ROA.41, 88-93, gave the district court subject-matter jurisdiction under 28 U.S.C. § 1331. The district court's final judgment that the Does take nothing is subject to appeal under 28 U.S.C. § 1291. ROA.450. The Does timely filed their notice of appeal. ROA.450 (November 19, 2018, final judgment); ROA.453 (December 18, 2018, first amended notice of appeal); *see* Fed. R. App. P. 4(a)(1)(A).

Issues Presented

The Does sued under 42 U.S.C. § 1983 alleging that the Texas Sex Offender Registration Program is unconstitutional. The issues presented on appeal are whether dismissal was required because:

1. the Does failed to state a facially plausible claim that the Program violates registrants' procedural due process rights;
2. the Does failed to state facially plausible claims that the Program violates the Ex Post Facto, Cruel and Unusual Punishments, and Double Jeopardy Clauses; and
3. none of the Does stated as-applied challenges to the Program under the Ex Post Facto Clause.

STATEMENT OF THE CASE

I. The Texas Sex Offender Registration Program

A. History of the Program

1. Enactment and amendments

Texas enacted the Sex Offender Registration Program in 1991. Act of May 26, 1991, 72d Leg., R.S., ch. 572, 1991 Tex. Gen. Laws 2029 (then codified at former Tex. Rev. Civ. Stat. art. 6252-13c.1); *Reynolds v. State*, 423 S.W.3d 377, 379 (Tex. Crim. App. 2014). The Texas Legislature designed the Program "to advance public safety objectives" by "facilitating law enforcement's monitoring of sex offenders" and "alerting members of the public who may be in an especially vulnerable situation to take appropriate precautions which could deter or prevent further crimes." *In re M.A.H.*, 20 S.W.3d 860, 863 (Tex. App.—Fort Worth 2000, no pet.) (per curiam) (op. on reh'g). Texas must maintain the Program as a condition of receiving full federal funding under the Omnibus Crime Control and Safe Streets Act of 1968. 34 U.S.C. § 20927(a).

The Legislature has amended the Program in every regular legislative session since 1991. Among those changes, the Legislature recodified the Program in its current location in chapter 62 of the Texas Code of Criminal Procedure in 1997. Act of June 1, 1997, 75th Leg., R.S., ch. 668, § 1, 1997 Tex. Gen. Laws 2253, 2253; *Reynolds*, 423 S.W.3d at 379. And in 2005, the Legislature substantially reorganized the Program to "establish[] a better, more user-friendly framework." Sen. Research Ctr., Bill Analysis, at 1, Tex. C.S.H.B. 867, 79th Leg., R.S. (2005); *see* Act of May 26, 2005, 79th Leg., R.S., ch. 1008, 2005 Tex. Gen. Laws 3385.

2. Retroactive application

Since the Program's enactment, the Legislature has incrementally extended its reach. Initially, the Program applied only to persons with "a reportable conviction or adjudication occurring on or after September 1, 1991." Act of May 26, 1991, 72d Leg., R.S., ch. 572, § 1, 1991 Tex. Gen. Laws 2029, 2030 (then codified at former Tex. Rev. Civ. Stat. art. 6252-13c.1, § 8(a)); *see Reynolds*, 423 S.W.3d at 379. The 1997 amendments made the Program apply retroactively to persons with "a reportable conviction or adjudication occurring on or after September 1, 1970," but only if the person was in prison or on some form of supervised release (such as parole or probation) on or after September 1, 1997. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 668, §§ 1, 11, 1997 Tex. Gen. Laws 2253, 2260-61, 2264 (formerly codified in part at Tex. Code Crim. Proc. art. 62.11); *see Reynolds*, 423 S.W.3d at 379. And in 2005, the Legislature expanded the Program's retroactive application to every person with a "reportable conviction or adjudication occurring on or after September 1, 1970." Act of May 26, 2005, 79th Leg., R.S., ch. 1008, § 1.01, 2005 Tex. Gen. Laws 3385, 3388, 3410 (codified at Tex. Code Crim. Proc. art. 62.002(a)); *Reynolds*, 423 S.W.3d at 379, 382 (explaining that the 2005 act repealed the "savings clause" that had previously limited the Program's retroactive application to persons in prison or on release after September 1, 1997).

B. Registration requirements

1. Who must register

A person must register with the Program if that person (1) has a "reportable conviction or adjudication" (including a deferred adjudication); (2) is required to

register as a condition of being released on parole, mandatory supervision, or community supervision; or (3) is an "extrajurisdictional registrant." Tex. Code Crim. Proc. arts. 62.051(a), .052(a). A "reportable conviction or adjudication" is one based on an offense listed in the statute, such as sexual assault, compelling prostitution, or possession or promotion of child pornography. *Id.* art. 62.001(5). An "extrajurisdictional registrant" is a person required to register as a sex offender under federal law, the Uniform Code of Military Justice, or the laws of another state or country for an offense that would not otherwise require registration in the Program. *Id.* art. 62.001(10).

2. When and with whom a person registers

A Program registrant must register promptly with a designated law enforcement authority. That "primary registration authority" is typically a police chief or sheriff in the municipality or county where the registrant lives or intends to live for more than a week, unless the registrant lives out of state and only works or attends school in Texas. *Id.* arts. 62.004, .0045, .051(a), .152-.153. "Promptly" means not later than the later of (1) the seventh day after the registrant arrives in the municipality or county or (2) the first day that the primary registration authority's policy allows registration. *Id.* art. 62.051(a).

3. What registration entails

Registration involves providing certain identifying information. The registrant must report his or her full name, aliases, and online identifiers (e.g., email addresses and social network user names); physical characteristics, such as sex, race, height, weight, hair color, and eye color; date of birth; and social security and driver's license

numbers. *Id.* arts. 62.001(12); 62.051(c)(1), (1-b), (7). Also, the registrant must supply a recent color photograph and full set of fingerprints. *Id.* art. 62.051(c)(2). Registrants convicted of certain human-trafficking offenses must furnish descriptions of any vehicles they own. *Id.* art. 62.051(c)(8).

Additionally, the registrant must provide contact information. For example, the registrant must give a home address and any home, work, and cellular telephone numbers. *Id.* art. 62.051(c)(1-a), (1-b). Information about any employment or school enrollment is also required, including any licenses that the registrant holds or seeks. *Id.* art. 62.051(c)(5), (6).

Finally, the registrant must disclose information about his or her underlying offense. That information includes the type of offense; the victim's age; the date of conviction; the punishment received; and whether the registrant is currently discharged, paroled, or released on probation or supervision. *Id.* art. 62.051(c)(3), (4).

This registration information is relayed to a central database maintained by the Texas Department of Public Safety. *Id.* art. 62.005(a). The information is classified as public, with a few exceptions. *Id.* art. 62.005(b). The non-public information includes the registrant's social security and driver's license numbers; telephone numbers; online identifiers; and employer's name, address, and telephone number. *Id.* art. 62.005(b)(1), (2). Any information that would identify the victim of the registrant's offense and any additional information required by the Department is also not public. *Id.* art. 62.005(b)(2), (3).

C. Risk-level designations

Under the 1999 and 2005 amendments, each Program registrant is assigned a numeric "risk level" that reflects the registrant's relative danger to the community and the likelihood that the registrant will engage in criminal sexual conduct. *Id.* arts. 62.007(c); 62.053(a), (c). For persons without an assigned risk level, the Program registry lists their risk levels as "unknown" or "not reported." A registrant's risk level is recorded in the Department's central database and is public information. *Id.* arts. 62.005(a), (b); 62.007(g).

The risk level is determined using a "sex offender screening tool" adopted by the Risk Assessment Review Committee of the Texas Department of Criminal Justice. *Id.* art. 62.007(a), (b). The screening tool must be based on existing screening tools or other tools recommended by the Texas Council on Sex Offender Treatment and use an objective point system to evaluate registrants. *Id.* art. 62.007(b)(1), (c).

The screening tool places a registrant in one of three risk levels:

> Level One (low): the registrant "poses a low danger to the community and will not likely engage in criminal sexual conduct"
>
> Level Two (moderate): the registrant "poses a moderate danger to the community and might continue to engage in criminal sexual conduct"
>
> Level Three (high): the registrant "poses a serious danger to the community and will continue to engage in criminal sexual conduct"

Id. art. 62.007(c)(1)-(3). The Committee, a court, or a state corrections agency may override a risk level if it believes that the assigned level does not accurately predict the risk to the community. *Id.* art 62.007(d).

D. Reporting requirements

1. Periodic verification of information

A Program registrant must periodically report in person to his or her primary registration authority to verify the registrant's information. *Id.* arts. 62.058(a), .202. Most registrants report only once per year. *Id.* art. 62.058(a). But registrants with two or more "sexually violent offenses" must verify their information every 90 days. *Id.* And registrants who were civilly committed as sexually violent predators but do not reside at a civil commitment center must verify their information every 30 days. *Id.* art. 62.202(a)(2).

2. Address changes

A registrant also must report any change of address within or outside of Texas.

If the registrant moves within Texas, the registrant must report the move in person to both the registrant's existing primary registration authority and the local law enforcement authority of the municipality or county of the new residence, which becomes the new primary registration authority. *Id.* arts. 62.004, .005, .055(a). The existing primary registration authority must receive notice at least seven days in advance of the move, and the new primary registration authority must receive notice no later than seven days after the move (unless its policy prescribes a later reporting date). *Id.* art. 62.055(a). The registrant also must provide proof of identity and residence to the new primary registration authority. *Id.*

If the registrant moves outside of Texas, similar reporting obligations apply. As to the existing primary registration authority, the registrant must fulfill the same reporting requirements for a move within Texas. *Id.* And, no later than ten days after

the move, the registrant must register with the law enforcement agency designated by the Department to receive registration information in that state. *Id.* art. 62.055(c).

3. Changes in other information

In addition to notifying the relevant authorities of address changes, a registrant must report any change in name, physical health, job status, education status, or online identifier. *Id.* arts. 62.0551(a), .057(b). These changes, too, must be reported to the primary registration authority within seven days unless the authority's policy prescribes a later date. *Id.* arts. 62.0551(a), .057(b).

4. Visiting schools and other locations

Program registrants who enter school premises during standard operating hours must notify school administrators of their presence and registration status. *Id.* art. 62.064(b). The school may provide a chaperone to accompany any registrant on school property. *Id.*

When a registrant visits a municipality or county where he or she is not registered for more than 48 consecutive hours on at least three occasions during any month, the registrant must report those visits to local law enforcement before the end of that month. *Id.* art. 62.059(a). The report must include the registrant's registration information, the place where the registrant stayed, and a statement about whether the registrant will return. *Id.* arts. 62.051(c), .059(b).

E. Other requirements

A Program registrant must hold either a driver's license, a commercial driver's license, or a personal identification certificate, unless the registrant lives at a civil commitment center. *Id.* arts. 62.060, .2021.

Registrants with a reportable conviction or adjudication of a sexually violent offense in which the court found that the victim was under the age of 14 may not offer or accept work operating a bus, providing a taxicab or limousine service, operating an amusement ride, or providing any type of service in another person's residence without supervision. *Id.* art. 62.063(b).

F. Duration of Registration

Generally, the duty to maintain Program registration ends ten years after the later of (1) the court's dismissal of criminal proceedings and discharge of the registrant, (2) the registrant's release from prison, or (3) the registrant's discharge from community supervision. *Id.* art. 62.101(b), (c)(2). The same ten-year duty applies following the disposition of a case in which registration was based on a juvenile's adjudication of delinquent conduct. *Id.* art. 62.101(c)(1).

But there are exceptions to the general ten-year rule. Reportable convictions and adjudications for the most serious offenses require registration for life. *See id.* art. 62.101(a). Those offenses include sexually violent offenses, offenses related to the prostitution of trafficked persons, sex offenses related to trafficked children, prohibited sexual conduct (e.g., incest), compelling prostitution, possession or promotion of child pornography, and obscenity involving images of children. *Id.* Indecency with a child by exposure and unlawful restraint or kidnapping of a child normally fall under the ten-year rule, but they require lifetime registration if the person has or receives another reportable conviction or adjudication as an adult. *Id.*

A registrant who has a single reportable conviction or adjudication for a Texas offense, and who must register for longer than the minimum period mandated by

federal law for that offense, may move for early termination of the duty to register. *Id.* arts. 62.402(a)-(b), .403(b), .404(a).[1] Before seeking deregistration, the registrant must obtain an individualized assessment of the risks that the registrant will receive another reportable conviction or adjudication and will pose a continuing danger to the community. *Id.* arts. 62.403(a)-(b), .404(a). This assessment differs from the assessment by which risk levels are assigned; here, the Council on Sex Offender Treatment evaluates the offense and gives an eligible registrant a list of approved counselors who can conduct the assessment. *See id.* art. 62.403. The court uses the assessment in deciding whether to end the duty to register. *Id.* arts. 62.404(b)(2), .405.[2]

II. Proceedings in the District Court

A. The complaint

1. The parties

Plaintiffs John Does 1-7 alleged that they are currently registered with the Program based on criminal convictions that occurred before the 2017 amendments to

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[1] Federal law requires sex offenders to register for periods of 15 years to life, depending on the offense, in jurisdictions where they live, work, and attend school. 34 U.S.C. §§ 20911(1)-(4), 20913, 20915(a). Certain offenders may reduce those periods by maintaining clean records during registration. *Id.* § 20915(b).

[2] The Does erroneously conflate this early-termination option with the option for certain young adult sex offenders to seek *exemption* from registration. *See* Does' Br. 14. The latter provision allows a court to exempt an eligible person from registration at *any time* after sentencing or being placed on deferred adjudication community supervision. Tex. Code Crim. Proc. art. 62.301(a). The exemption may apply when the conviction or adjudication was based solely on the ages of the offender and victim, the victim was at least 15 years old, and the offender was no more than four years older than the victim. *Id.* arts. 42.017; 42A.105(c); 62.301(b), (c).

the law went into effect. ROA.40, 42-47. Their first amended complaint (the operative complaint for purposes of this appeal) included allegations about 70 other Program registrants, but they were not designated as plaintiffs. ROA.47-70 (describing other "John Does" numbered non-sequentially from 9 to 152).[3]

The Does brought this suit individually and on behalf of a putative class of all current Program registrants. ROA.40, 87-88. The Does later filed a motion for class certification, ROA.238-46, which the district court denied without prejudice, ROA.3 (docket entry 13). The court reasoned that the motion was premature because an answer or other responsive pleading had not yet been filed. ROA.3 (docket entry 13).

The Does sued Greg Abbott, in his official capacity as Governor of the State of Texas, and Steven McCraw, in his official capacity as Director of the Texas Department of Public Safety. ROA.70.

2. The claims

The Does brought ten claims under 42 U.S.C. § 1983 challenging the constitutionality of the Program. ROA.41, 89-93. Only four of those challenges are relevant to this appeal. Does' Br. 2.

First, the Does claimed that the Program violates their rights to procedural due process. ROA.89 (Count I). They alleged that the Program's use of risk levels to

[3] On appeal, the Does assert that all "John Does" described in the first amended complaint are plaintiffs. Does' Br. 3. The allegations in that pleading indicate otherwise. ROA.40 (twice referring to "Plaintiffs, John Does #1-7"); *compare* ROA.42-46 (referring to John Does 1-7 individually as "Plaintiff"), *with* ROA.47-69 (referring to John Does 9-152 individually as "Mr. Doe" and not as "Plaintiff"). Regardless, the party status of the other John Does is not material to resolution of this appeal.

classify registrants into tiers of present dangerousness stigmatizes them, but does so without affording them hearings or individualized assessments of their circumstances. ROA.89.

The Does also asserted three claims based on the premise that the Program is a form of punishment. They claimed that the Program violates the Ex Post Facto Clause because it retroactively increases the punishment of persons who were convicted and sentenced before the law or its amendments were enacted. ROA.91-92 (Count VII). They further alleged that the Program violates the Cruel and Unusual Punishments Clause because actions taken by the public against Program registrants result in an excessive punishment. ROA.92 (Count VIII). And they asserted that the Program violates the Double Jeopardy Clause by imposing additional punishment on persons who have completed their sentences. ROA.92 (Count IX).

B. The motion to dismiss

In response to the first amended complaint, Abbott and McCraw jointly filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ROA.263-310.

1. The 12(b)(1) grounds

Abbott sought dismissal of all claims against him for lack of jurisdiction. ROA.276-79.

Abbott argued that the Does lacked standing to sue him because they had not alleged any injury that was traceable to his actions or was likely to be redressed by a judgment against him. ROA.276-77. Instead, the Does were suing him solely because of his status as Texas's chief executive officer. ROA.277.

For similar reasons, Abbott explained, sovereign immunity barred the Does' claims against him. ROA.277-79. He noted that the Does' suit against him in his official capacity was deemed a suit against the State, which is immune from suit. ROA.277-78. And, Abbott argued, the *Ex parte Young* exception to immunity could not apply to him because he had no specific role in the Program's enforcement. ROA.278-79.

2. The 12(b)(6) grounds

Abbott and McCraw sought dismissal of all the Does' claims for failure to state a claim upon which relief may be granted. ROA.291-309.

Among the claims preserved for this appeal, Abbott and McCraw sought dismissal of the procedural due process claim for two principal reasons. First, under *Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010), a person convicted of a sex offense is not entitled to additional process before being subjected to sex-offender conditions. ROA.294-95. And second, the Does had failed to state a claim for any other infringement of their interests that would trigger due-process protections. ROA.295-97.

On the ex post facto, cruel-and-unusual-punishment, and double-jeopardy claims, Abbott and McCraw argued that the Program does not implicate those constitutional checks on *criminal* laws because, under the reasoning of *Smith v. Doe*, 538 U.S. 84 (2003), the Program is not punitive. ROA.279-88, 292-94. In *Smith*, the Supreme Court held that Alaska's sex-offender-registration scheme was not punitive and, therefore, did not violate the Ex Post Facto Clause. 538 U.S. at 105-06. Because the Program materially resembles that Alaska law, Abbott and McCraw urged, it is

likewise not punitive and, therefore, does not violate the constitutional mandates that the Does invoked here. ROA.292-94.

C. The district court's order granting the motion to dismiss

The district court granted Abbott and McCraw's motion and dismissed all the Does' claims with prejudice. ROA.421-49.

The district court agreed that the Does lacked standing to bring their claims against Abbott. ROA.427-30. Because the Does did not identify any specific act by Abbott related to enforcing the Program, but instead sued Abbott based only on his general duty as Governor to enforce the laws, the court held that the Does' allegations did not satisfy the traceability element of standing. ROA.429-30.

The district court also agreed that the Does failed to state a claim for violation of procedural due process. ROA.436-38. Because the Does conceded that their risk levels were based solely on their convictions, the court found *Meza* controlling. ROA.437. That is, because the Does presumably had received due process in their criminal proceedings, and those proceedings were the only reason they were in the Program, they were not entitled to any further process. ROA.437 (citing *Meza*, 607 F.3d at 401-02). The court added that this Court had previously rejected similar due-process challenges to the Program in two unpublished decisions. ROA.437-38 (citing *Hollier v. Watson*, 605 F. App'x 255, 258 & n.12 (5th Cir. 2015) (per curiam); *King v. McCraw*, 559 F. App'x 278, 283 (5th Cir. 2014) (per curiam)).

The district court further held that the Does failed to state claims for violations of the Ex Post Facto, Cruel and Unusual Punishments, or Double Jeopardy Clauses.

ROA.431-36. The court reasoned that, under the Supreme Court's analytical framework in *Smith*, the Program is not punitive in intent or effect. ROA.432-36. Specifically, the court found persuasive this Court's unpublished decisions holding that the Program is not punitive under *Smith*. ROA.434-35 (citing *King*, 559 F. App'x at 281; *Hayes v. Texas*, 370 F. App'x 508, 509 (5th Cir. 2010) (per curiam); *Hall v. Att'y Gen. of Tex.*, 266 F. App'x 355, 356 (5th Cir. 2008) (per curiam); *Herron v. Cockrell*, 78 F. App'x 429, 430 (5th Cir. 2003) (per curiam)). The court also conducted its own *Smith* analysis and determined that, while some of the Program's requirements are "more burdensome" than the Alaska law reviewed in *Smith*, the Program remains a "nonpunitive civil scheme." ROA.434-36.

Having dismissed these claims as well as the Does' remaining claims with prejudice, the court rendered a final judgment that the Does take nothing. ROA.450.

SUMMARY OF THE ARGUMENT

I. The Does did not state a facially plausible procedural due process claim based on the Program's assignment of risk levels without individualized assessments. The Court has held that, when an individual is convicted of a sex offense, no further process is due before imposing sex-offender conditions. Because Program registrants were convicted or adjudicated for sex offenses, or their registrations were based on the outcomes of prior adversarial proceedings, they were not entitled to additional process before being subjected to the condition of a risk-level designation.

The Does also failed to state a facially plausible due-process claim because they did not sufficiently allege the elements of the "stigma plus" theory on which their

claim was based. Under that theory, the "stigma" must result from the government's concrete misrepresentations of fact accusing the plaintiff of wrongdoing. But the risk-level assessments that the Does complain about are only opinions or predictions of Program registrants' relative danger to their communities. The "plus" must involve the government's deprivation of a protected interest apart from the stigmatizing damage to the plaintiff's reputation. But here, the only deprivations alleged by the Does were the denial of housing and employment opportunities by *third parties* reacting to information on the Program's offender registry. That was insufficient.

II. The Does did not state facially plausible claims for violations of the Ex Post Facto, Cruel and Unusual Punishments, or Double Jeopardy Clauses. The Does agree that the plausibility of all three claims turns on whether the Program is "punitive in effect" under the analytical framework established by the Supreme Court in *Smith*. There, the relevant considerations overwhelmingly favored a finding that Alaska's sex-offender-registration statute was not punitive in effect. Much of *Smith*'s analysis applies to sex-offender-registration statutes in general and is controlling here. And to the extent that the analysis rested on specific features of Alaska law, Texas's Program is materially similar and should likewise be deemed nonpunitive. In unpublished decisions, this Court has repeatedly reached that conclusion, as have several district courts in this circuit and the Texas Court of Criminal Appeals.

The Does cannot save these claims by recasting them as as-applied challenges to the Program. In the district court, the Does acquiesced in Abbott and McCraw's characterization of their claims as facial challenges. And, regardless, the Does did not plead facts that could support as-applied claims.

III. Because the Does have abandoned their remaining claims on appeal, as well as all claims they asserted against Abbott, the judgment dismissing those claims should be affirmed.

Standard of Review

The Court reviews a district court's dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) de novo. *Christiana Trust v. Riddle*, 911 F.3d 799, 802 (5th Cir. 2018).

Argument

Dismissal of a complaint is proper when it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under that rule, a plaintiff must allege sufficient facts, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff cannot meet that pleading burden with "[t]hreadbare recitals of the elements of a cause of action." *Id.* Nor can the plaintiff rely on "conclusory allegations, unwarranted factual inferences, or legal conclusions." *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010) (citations and quotation marks omitted).

As explained below, the Does' claims do not withstand scrutiny under those standards. The district court's judgment dismissing the Does' claims was correct and should be affirmed.

I. The Does Failed to State a Facially Plausible Claim for a Procedural Due Process Violation.

The Does alleged that the Program violates registrants' procedural due process rights by assigning publicly available risk levels to them without affording them hearings or individualized assessments of their circumstances. ROA.89. Those allegations failed to state a facially plausible claim for two independent reasons: (1) under controlling circuit precedent, a person convicted of a sex offense is not entitled to additional process before sex-offender conditions are imposed; and (2) the Does did not allege a "stigma plus" deprivation of interests that would trigger due-process protections.

A. The Does' claim is foreclosed by controlling circuit precedent.

1. Under *Meza*, Program registrants are not due additional process before they are assigned risk levels.

"When an individual is convicted of a sex offense, no further process is due before imposing sex offender conditions." *Meza*, 607 F.3d at 401 (citing *Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003) ("*CDPS*"), and *Jennings v. Owens*, 602 F.3d 652 (5th Cir. 2010)). That is so because a person "'convicted of a sex crime in a prior adversarial setting, whether as the result of a bench trial, jury trial, or plea agreement, has received the minimum protections required by due process.'" *Id.* (quoting *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997)).

Although *Meza* concerned the imposition of sex-offender conditions under another Texas statute distinct from the Program, 607 F.3d at 395-96, this Court has applied *Meza* to reject procedural due process challenges to the Program as well. In *King*, the plaintiff, like the Does here, argued that the Program violated procedural

due process by classifying him as a sex offender "without notice or any individualized determination of his purported danger to the community." 559 F. App'x at 282. Citing the language from *Meza* quoted above, the Court held that the Program did not violate the plaintiff's procedural due process rights. *Id.* at 282-83. And in *Hollier*, the Court again cited *Meza* in affirming a Rule 12(b)(6) dismissal of a procedural due process challenge to the Program. 605 F. App'x at 258 & n.12. Although those unpublished decisions are not controlling precedent, the district court appropriately relied on them as persuasive authority in dismissing the Does' procedural due process claim. ROA.437-38; *see United States v. Gurrola*, 898 F.3d 524, 534 n.13 (5th Cir. 2018) (recognizing that unpublished opinions "are persuasive").

Apart from the persuasive force of *King* and *Hollier*, the district court's application of *Meza* was correct. The Does do not dispute that a Program registrant has been "convicted of a sex offense" under *Meza*. 607 F.3d at 401. That is so because registration is triggered by either (1) a reportable conviction or adjudication; (2) a condition of being released on parole, mandatory supervision, or community supervision—all of which follow some "'prior adversarial setting,'" *see id.* (quoting *Neal*, 131 F.3d at 831); or (3) registration as a sex offender in another jurisdiction, which resulted from a prior adversarial setting there. Tex. Code Crim. Proc. arts. 62.051(a), .052(a). And the assignment of a risk level is one of the "sex offender conditions" that the Program "impos[es]" on registrants. *Meza*, 607 F.3d at 401. Under *Meza*, then, the Does did not state a facially plausible procedural due process claim.

2. The Does' attempts to distinguish *Meza* are waived, are contrary to their own pleading, and are otherwise unavailing.

The Does contend that the district court erroneously relied on *CDPS*, *Meza*, and their progeny because they are not challenging a registration requirement based solely on a prior conviction or adjudication. Does' Br. 23-25, 27-28. Rather, they stress that they are challenging the Program's assignment of a risk level, which they say is "based on a registrant's prior conviction records using a 'sex offender screening tool' employing 'various factors' (albeit left unspecified in the statute) – without regard for a person's individual, current circumstances." Does' Br. 27-28. That argument fails for several reasons.

First, the argument is waived. In response to the motion to dismiss, the Does argued that *CDPS* was irrelevant only because the statute at issue there did not assign risk levels, and that *Meza* was irrelevant only because it "concerned conditions of federal probation or parole." ROA.376. The Does did *not* argue that this case is different because registrants' risk levels are based on facts other than their convictions. ROA.376. Having failed to make that argument in the district court, the Does may not assert it for the first time on appeal. *Raj v. La. State Univ.*, 714 F.3d 322, 330 (5th Cir. 2013) (holding that the plaintiff could not make an argument on appeal that could have been but was not made in response to a Rule 12(b)(6) motion).

Second, the Does affirmatively alleged in their complaint that their "[t]ier classifications are based solely on the offense(s) of conviction." ROA.74 (First Am. Compl. ¶ 116). The district court expressly relied on that allegation in holding that, under *CDPS* and *Meza*, the Does had not stated a facially plausible procedural due

process claim. ROA.437. Indeed, under the governing standard for Rule 12(b)(6) motions, the district court was required to accept that allegation as true. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although the Does now say that their allegation was "error," Does' Br. 13 n.32, 28, they cannot disavow their own complaint to obtain reversal of a Rule 12(b)(6) dismissal, *see Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001) (holding that "formal concession[s] in the pleadings" are "binding on the party making them").

Third, the Does' new argument does not save their claim from *Meza*'s controlling holding in any event. The Does now assert that "risk-level classifications are determined based on a registrant's *prior conviction records*," and not solely on the "prior conviction." Does' Br. 28 (emphasis added). Under *Meza*, that slight distinction makes no plausible difference for due-process purposes. By definition, "prior conviction records" come from some "'prior adversarial setting,'" which satisfies any due-process concerns. *Meza*, 607 F.3d at 401 (quoting *Neal*, 131 F.3d at 831).

And fourth, the Does' new argument rests on a misreading of the Program statutes. They claim that the existence of different risk levels makes the assignment of those levels a "contestable discretionary decision," a claim they believe is further "highlighted by the 'not reported' risk designation." Does' Br. 24. Not so. The

screening tool for assigning risk levels uses "an objective point system," not subjective discretion. Tex. Code Crim. Proc. art. 62.007(c).[4] And the "not reported" designation merely reflects that the Texas Legislature did not enact the provision requiring the assignment of risk levels to new registrants until 1999, not that officials are making discretionary choices whether to assign a level at all. ROA.284-85; *see* Act of May 29, 1999, 76th Leg., R.S., ch.1557, § 2, 1999 Tex. Gen. Laws 5354, 5356 (formerly codified at Tex. Code Crim. Proc. art. 62.035). The Does cannot escape *Meza*'s controlling force by misconstruing the statutes they are challenging.

3. The Does' remaining arguments are inapt.

Finally, the Does make two arguments that have no bearing on the procedural due process claim advanced in their complaint.

The Does complain that "there is no mechanism in the statute that would allow them (in all but two instances) to have their registration obligations eliminated or reduced." Does' Br. 24-25. But that charge goes to the obligation to remain registered as a sex offender altogether, not to the risk-level classifications that the Does targeted in their procedural due process claim. *See* ROA.89. And, again, because the

[4] A court or certain agencies may override a risk level generated by the screening tool in some circumstances, Tex. Code Crim. Proc. art. 62.007(d), but the Does' complaint did not challenge that exception or allege that it has ever been employed, to the Does' detriment or otherwise.

obligation to register is based on a prior reportable conviction or adjudication, no additional process is due. *CDPS*, 538 U.S. at 7-8; *Meza*, 607 F.3d at 401.[5]

The Does also cite the "Prescott Declaration" attached to their complaint for the proposition that it is "well-established that registration and notification laws, such as that of Texas, are predicated on a basic misunderstanding of the recidivism risk posed by sex offenders." Does' Br. 25. That broad swipe at the policy behind sex-offender registration in general says nothing about any allegedly unconstitutional procedural defects in the Program's assignment of risk levels, which was the subject of the Does' due-process claim. ROA.89. And even if it did, the Does' reliance on it is misplaced. Although the Does contend that their expert declarations must be accepted as true for Rule 12(b)(6) purposes because they are attached to their complaint, Does' Br. 21 n.41, that principle does not extend to the experts' opinions and conclusions that the Does cite here, *Varela v. Gonzales*, 773 F.3d 704, 709-10 (5th Cir. 2014) (per curiam); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 285-86 (5th Cir. 2006).

[5] Besides, the Does are wrong about the statute. As discussed above, the Does are mistakenly conflating the option to terminate registration early with the exemptions from registration available to certain young adult sex offenders. *See supra* p. 11, n.2. There *is* a mechanism to reduce or terminate registration obligations, at least to the extent that they exceed the minimum requirements of federal law. Tex. Code Crim. Proc. arts. 62.401-.408. To the extent the Does are complaining that they cannot avoid those federal minimums, that is not part of this lawsuit.

B. The Does did not sufficiently allege a "stigma plus" due-process claim.

The Does failed to state a facially plausible procedural due process claim for a second reason: although their claim was predicated on a "stigma plus" violation of registrants' due-process rights, ROA.89, their allegations were insufficient to support such a claim.

1. The Does' allegations did not satisfy this Court's requirements to state a "stigma plus" due-process violation.

a. "In a section 1983 cause of action asserting a due process violation, a plaintiff must first identify a life, liberty, or property interest protected by the Fourteenth Amendment and then identify a state action that resulted in a deprivation of that interest." *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). But the "infliction of a stigma on a person's reputation by a state official, without more, does not infringe upon a protected liberty interest" that implicates due-process guarantees. *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 710-11 (1976)). To state a due-process violation predicated on stigma, then, a plaintiff must "alleg[e] a stigma 'plus an infringement of some other interest.'" *Tebo v. Tebo*, 550 F.3d 492, 503 (5th Cir. 2008) (quoting *Blackburn*, 42 F.3d at 936). Courts have labeled this sort of due-process claim "stigma-plus." *Id.*

Under a "stigma-plus" theory, the stigma must result from the government's publication of speech about a person. *Id.* And the stigmatizing speech must consist of "'concrete, false factual assertions.'" *Id.* (quoting *Texas v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995) (per curiam)). Indeed, this Court has "found sufficient stigma only where a state actor has made concrete, *false* assertions of *wrongdoing on the part*

of the plaintiff." *Blackburn*, 42 F.3d at 936. Expressing an "opinion" is therefore insufficient. *Id.*; *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5th Cir. 1989).

The "plus" part of the theory requires the plaintiff to show that "the state 'sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law' or the federal constitution." *Tebo*, 550 F.3d at 503 (quoting *Thompson*, 70 F.3d at 392). The "plus" requirement is not satisfied by "damage [that] flows from injury caused by the defendant to a plaintiff's reputation." *Siegert v. Gilley*, 500 U.S. 226, 234 (1991).

b. Although the Does explicitly labeled their due-process claim a "stigma-plus" claim, ROA.89, their allegations did not state a facially plausible claim under that theory.

i. As to stigma, the Does alleged that registrants "are categorized into a tier of present dangerousness which stigmatizes as well as publicly and falsely identifies the Plaintiffs among the public as dangerous sex offenders without any real empirical support." ROA.89 (First Am. Compl. ¶ 274). That allegation was insufficient for several reasons.

To the extent the Does were complaining about being identified as sex offenders generally, those statements are true. The Program registry discloses a registrant's underlying offense that required registration, *see* Tex. Code Crim. Proc. art. 62.005(a)-(b), and the Does do not allege that the registry misidentifies those offenses or that those offenses do not trigger registration. Because the public identification of Program registrants as sex offenders is not false, those statements cannot

support a plausible "stigma-plus" due-process claim. *Tebo*, 550 F.3d at 503; *Blackburn*, 42 F.3d at 936.

To the extent the Does were complaining about registrants' assigned risk levels, those levels are not "concrete, false factual assertions" of "wrongdoing on the part of the plaintiff." *Tebo*, 550 F.3d at 503; *Blackburn*, 42 F.3d at 936. Rather, they reflect the Risk Assessment Review Committee's objective assessment of the danger that a registrant posed to the community at the time the registrant was sentenced or released from incarceration. Tex. Code Crim. Proc. arts. 62.007(c); 62.053(a), (c). Because an assessment of relative "dangerousness" is an opinion or prediction rather than a concrete representation of fact, the Program's publication of risk levels cannot support a "stigma-plus" due-process claim. *Blackburn*, 42 F.3d at 936; *Connelly*, 876 F.2d at 1215.

Regardless, the Does' conclusory allegation that the Program "falsely identifies the Plaintiffs among the public as dangerous sex offenders" was not sufficiently pleaded to survive dismissal under Rule 12(b)(6). ROA.89. When false representation is an element of the cause of action, a vague allegation that the defendant made such a representation without specifically identifying the statement and the reason it is substantively false does not clear the Rule 12(b)(6) threshold. *See Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 724 (5th Cir. 2013) (alleging that the defendant was "'using a false representation or deceptive means to collect a debt'" was "not sufficient to overcome dismissal under Rule 12(b)(6)"); *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 154 (5th Cir. 2010) (an allegation of falsity that

"is essentially nothing more than a conclusory statement of the element of the cause of action" "lacks sufficient specificity" to survive dismissal).

ii. On the "plus" element, the Does alleged only that the risk-level classifications have "an unquestionable impact upon their reputation as well as plaintiff's ability to gain employment and housing." ROA.89 (First Am. Compl. ¶ 279). That allegation also fell short.

The Does apparently were alleging that registrants' risk levels are motivating third parties to deny them jobs and housing. In response to the motion to dismiss, the Does confirmed that the thrust of their claim was that the assignment of risk levels "results in *private parties* depriving Plaintiffs of products and services." ROA.363 (emphasis added). But that sort of complaint fails as a matter of law. The "plus" must be the deprivation of a protected interest by the "state," not somebody else. *Tebo*, 550 F.3d at 503. Accordingly, "[n]either harm to reputation *nor the consequent impairment of future employment opportunities* are constitutionally cognizable injuries" for a "stigma-plus" claim. *Vander Zee v. Reno*, 73 F.3d 1365, 1369-70 (5th Cir. 1996) (citing *Siegert*, 500 U.S. at 233-35) (emphasis added) (affirming the Rule 12(b)(6) dismissal of a "stigma-plus" claim where the plaintiff's allegedly impaired ability to obtain employment was "the result of harm to his reputation rather than a result of any direct restrictions placed upon him").

Construing the Does' allegation about employment and housing to be directed at the Program itself would not save their claim. The Program's only housing restriction is that a registrant may not reside on a university or college campus unless the registrant's risk level is one and the institution approves. Tex. Code Crim. Proc.

art. 62.064. And the Program limits employment only for a narrow class of registrants: those convicted or adjudicated for a sexually violent offense in which the victim was younger than 14 may not offer or accept work operating a bus or amusement ride, providing a taxi or limousine service, or providing any service in another person's home without supervision. *Id.* art. 62.063(b). But the first amended complaint does not identify any registrant who wanted to live on campus or take one those jobs and was prohibited from doing so. Again, all the complaint avers is a general "impact" on registrants' "ability to gain employment and housing." ROA.89 (First Am. Compl. ¶ 279). Those are just the sort of "[t]hreadbare recitals of the elements of a cause of action" that fail to state a facially plausible claim. *Iqbal*, 556 U.S. at 678.

2. The Does' arguments that they have stated a "stigma-plus" due-process claim lack merit.

On appeal, the Does contend that their allegations satisfy both the "stigma" and "plus" prongs of their due-process claim. Does' Br. 25-27. They are mistaken.

a. The Does suggest that this Court has conclusively determined that public registration as a sex offender supplies the necessary "stigma." Does' Br. 25-26. That is incorrect. The three cases that the Does cite for that proposition all involved the recognition of a liberty interest when a person *who was not convicted of a sex offense* is required to register as a sex offender. *Meza*, 607 F.3d at 401; *United States v. Jimenez*, 275 F. App'x 433, 439 (5th Cir. 2008) (per curiam); *Coleman v. Dretke*, 409 F.3d 665, 669 (5th Cir. 2005) (per curiam). That interest is not implicated by the Does' suit. Indeed, the Court has expressly distinguished *Coleman* on this point because that decision "was not applying the Section 1983 stigma-plus test." *Tebo*, 550 F.3d at 504.

Meza and *Jimenez* also did not apply the "stigma-plus" test and are similarly inapposite.

b. On the "plus" prong, the Does try to salvage their insufficient allegation of a general "impact" on "employment and housing" by referring to allegations in the first amended complaint about the circumstances of a few specific John Does. Does' Br. 26-27. That effort fails. Those John Does alleged only that third parties, such as employers, landlords, and lenders, have reacted to their registration as sex offenders by denying them certain benefits and opportunities. ROA.42-47 (First Am. Compl. ¶¶ 12, 15, 16, 19). As discussed above, those are precisely the sort of consequential deprivations imposed by persons other than the State that do not satisfy the "plus" element. *Siegert*, 500 U.S. at 234; *Vander Zee*, 73 F.3d at 1369.

c. The Does also raise "the specter of felony prosecution" for failing to satisfy the Program's reporting requirements as a "plus." Does' Br. 26. That argument does not help the Does, for two reasons.

First, the Does did not plead that alleged deprivation as part of their due-process claim. They asserted only an impact on their employment and housing prospects. *See* ROA.89 (Count I).

Second, the reporting requirements are unrelated to the risk-level classifications targeted by the Does' "stigma plus" claim. Reporting is a condition of *registration*. *See, e.g.*, Tex. Code Crim. Proc. arts. 62.055, .0551, .057-.059. And registration, in turn, is based on having a reportable conviction or adjudication for a sex offense. *Id.* arts. 62.051(a), .052(a). Any variation in reporting requirements is likewise based on the nature of the underlying conviction. *E.g.*, *id.* art. 62.058(a) (registrants with two

or more "sexually violent offenses" must verify their information every 90 days). Accordingly, because the reporting duties are ultimately based solely on a reportable conviction or adjudication for a sex offense, to the extent those requirements and the threat of prosecution for violating them deprive registrants of a liberty interest, it is a deprivation for which they have already received all the process that is due. *CDPS*, 538 U.S. at 7-8; *Meza*, 607 F.3d at 401; *see supra* Part I.A.1.

On the latter point, the Does misplace reliance on *State v. Samples*, 198 P.3d 803 (Mont. 2008). Does' Br. 27. In fact, that case proves McCraw's point. The Montana Supreme Court held that, under Montana law, the designation of a sex offender's risk level implicated a liberty interest for due-process purposes because "the designation leads to varying requirements for an offender." *Id.* at 808-09 (noting that the frequency with which registrants must verify their information "depends on their offense risk level"). By contrast, the court held that the requirement to report any change of address did not trigger additional due-process protections because "[t]his requirement does not vary based on offender level; all offenders must comply." *Id.* at 809. Under *Samples*, then, the Program's reporting requirements do not support the Does' due-process claim because they are based on registration and the underlying conviction of a sex offense, not on registrants' assigned risk levels.[6]

[6] The Does also misplace reliance on *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Does' Br. 27. In *Paul*, the Supreme Court clarified that *Constantineau* could not be read to mean that a government-caused stigma alone could deprive a person of procedural due process, and it confirmed that some additional deprivation—a "plus"—would be required. 424 U.S. at 707-09.

II. The Does Failed to State Facially Plausible Claims for Violation of the Ex Post Facto, Cruel and Unusual Punishments, or Double Jeopardy Clauses.

The Does also alleged that the Program violates three constitutional constraints on criminal laws. They claimed that the Program violates the Ex Post Facto Clause because it retroactively punishes persons who were convicted and sentenced before the Program or its amendments were enacted. ROA.91-92 (Count VII). They further alleged that the Program violates the Cruel and Unusual Punishments Clause because acts committed by the public against Program registrants create an excessive punishment. ROA.92 (Count VIII). And they asserted that the Program violates the Double Jeopardy Clause by imposing additional punishment on persons who have completed their criminal sentences. ROA.92 (Count IX).

The Does agree that these three claims all depend on the premise that the Program is a "punitive" statute and is therefore subject to constitutional limits on punishment. Does' Br. 29. The Does further agree that whether the Program is punitive is governed by the "intent–effects" test described by the Supreme Court in *Smith*, 538 U.S. at 92-106. Does' Br. 30-31. Under that test, a statute is punitive "[i]f the intention of the legislature was to impose punishment." *Smith*, 538 U.S. at 92; *accord United States v. Young*, 585 F.3d 199, 204 (5th Cir. 2009). But if the "the intention was to enact a regulatory scheme that is civil and nonpunitive," then 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*, 538 U.S. at 92 (citations and quotation marks omitted); *accord Young*, 585 F.3d at 204.

As in the district court, the Does do not claim that the Texas Legislature intended to impose a punishment by enacting the Program. *See* Does' Br. 31-32; ROA.432 (district court's observation that the Does "do not argue that the Texas Legislature intended for [the Program] to be punitive in nature"). Texas courts have confirmed that was not the Legislature's intent. *Ex parte Robinson*, 116 S.W.3d 794, 798 (Tex. Crim. App. 2003); *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002).

The upshot of the Does' concessions is that their ex post facto, cruel-and-unusual-punishment, and double-jeopardy claims all turn on whether the Program's effect is so punitive that it negates the Texas Legislature's intent to enact a civil scheme. *Smith*, 538 U.S. at 92; *Young*, 585 F.3d at 204. As discussed below, the Program is not punitive in effect under *Smith*, which defeats the facial plausibility of the Does' trio of punishment-based claims.

A. The Program is not punitive in effect.

To determine whether a regulatory statute is punitive in effect, *Smith* instructs courts to consider five relevant factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Smith*, 538 U.S. at 97; *Young*, 585 F.3d at 206. Those factors are whether the statute, in its "necessary operation," (1) "has been regarded in our history and traditions as a punishment"; (2) "imposes an affirmative disability or restraint"; (3) "promotes the traditional aims of punishment"; (4) "has a rational connection to a nonpunitive purpose"; and (5) "is excessive with respect to this purpose." *Smith*, 538 U.S. at 97; *accord Young*, 585 F.3d at 206. And while those factors are "neither exhaustive nor dispositive," they provide "useful guideposts" for the

effects inquiry. *Smith*, 538 U.S. at 97 (citations and quotation marks omitted). In considering the factors, "*only the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92 (emphasis added) (citations and quotation marks omitted).

Analyzing the *Mendoza-Martinez* factors, the district court did not find the "clearest proof" that the Program's effects are punitive. ROA.435-36. Accordingly, it correctly concluded that the Program "constitutes a nonpunitive civil scheme." ROA.436. In doing so, it joined numerous federal and state courts that have reached the same conclusion, including this Court. The Does' arguments on appeal provide no reason to disturb that coherent set of decisions.

1. The relevant *Mendoza-Martinez* factors show that the Program is not punitive in effect.

a. The Supreme Court's application of the relevant *Mendoza-Martinez* factors in *Smith* is instructive here because the Court was evaluating the alleged punitive effect of Alaska's sex-offender-registration program.

The Court first explained that the Alaska act did not substantively resemble any traditional punishment like banishment or shaming. 538 U.S. at 98-99. While public registration as a sex offender may cause a stigma, embarrassment, or even social ostracism, the Court observed that those effects resulted from "dissemination of accurate information about a criminal record, most of which is already public," rather than any "public display for ridicule and shaming." *Id.* at 98. Moreover, the publicity and resulting stigma were not "an integral part of the objective of the regulatory scheme"; rather, the "purpose and the principal effect of notification are to inform

the public for its own safety." *Id.* at 99. The Court added that the posting of registration information on the internet "does not alter our conclusion." *Id.*

Next, the Court rejected the notion that the Alaska act imposed an affirmative disability or restraint. *Id.* at 99-102. The act did not physically restrain registrants. *Id.* at 100. And the Court viewed the act's obligations as "less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive." *Id.* The Court also dismissed the alleged impairment of housing and employment prospects as a relevant disability, noting that landlords and employers can obtain public information about sex-offense convictions even without a registration law. *Id.* at 100-01. And registrants were generally free to move, live, and work where they wanted without being supervised, even though they had to inform authorities of certain changes in their status. *Id.* at 101.

The Court further concluded that the act did not sufficiently promote the traditional goals of punishment. *Id.* at 102. The mere possibility that the act would deter future crimes did not distinguish it from other nonpunitive statutes. *Id.* And the Court found no retributive purpose in basing the length of reporting obligations on the nature of the offense, noting that this approach was "reasonably related to the danger of recidivism" and, therefore, "consistent with the regulatory objective." *Id.*

The Court stressed that the act's "rational connection to a nonpunitive purpose" was the "most significant factor" demonstrating that the act's effects were not punitive. *Id.* (citation and quotation marks omitted). It explained that "the Act has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 102-03 (citation,

alteration, and quotation marks omitted). And the Court rebuffed the argument that the act lacked the necessary connection because it was not narrowly tailored, holding that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103.

Finally, the Court rejected the court of appeals' reasons for concluding that the act was excessive with respect to its public-safety purpose. *Id.* at 103-05. The Court found that, considering the degree of constraints imposed, it was not excessive to apply the act to sex offenders categorically without "individual determination[s] of their dangerousness." *Id.* at 104. The Court also found that the duration of reporting was not excessive, given Alaska's rational assessment of the substantial risk of recidivism over the long term. *Id.* And, again, the "wide dissemination" of registration information was not an excessive choice. *Id.* at 104-05.

In view of these factors, the Court concluded that the act's challengers "cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme." *Id.* at 105.

b. Under *Smith*, Texas's Program likewise must be considered nonpunitive. Much of the Supreme Court's analysis of the *Mendoza-Martinez* factors applies generally to most sex-offender-registration programs. And to the extent that the Court's analysis was grounded in specific features of Alaska's law, the Program is materially similar to that scheme.

Like the Alaska act, the Program does not substantively resemble any traditional punishment. The Program's purpose and principal effect are to inform the public for its own safety. *M.A.H.*, 20 S.W.3d at 863 (explaining the Program's "public safety

objectives"). And while public registration may lead to embarrassment or ostracism, that is not "an integral part of the objective of the regulatory scheme." *Smith*, 538 U.S. at 99.

The Program also does not generally impose affirmative disabilities or restraints. As discussed above, the Program's only housing restriction is that a registrant may not live on a university or college campus unless the registrant's risk level is one and the institution approves. Tex. Code Crim. Proc. art. 62.064. Other circuits have held that more restrictive residency limits do not render a sex-offender-registration scheme punitive. *E.g.*, *Shaw v. Patton*, 823 F.3d 556, 570-71 (10th Cir. 2016) (provision prohibiting residence within certain distance of any school, playground, park, or child care center); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006) (provision prohibiting residence within certain distance of any school or day-care facility). Also, the Program limits employment only for a narrow class of registrants for a handful of jobs: those convicted of a sexually violent offense in which the victim was younger than 14 may not offer or accept work operating a bus or amusement ride, providing a taxi or limousine service, or providing any service in another person's home without supervision. Tex. Code Crim. Proc. art. 62.063(b). And even then, "the sanctions of occupational debarment" are deemed "nonpunitive." *Smith*, 538 U.S. at 100. In any event, these limited barriers to certain housing and employment opportunities cannot make the entire Program punitive in nature.

Unlike Alaska's act, the Program does impose some periodic, in-person reporting requirements. *Compare id.* at 101, *with* Tex. Code Crim. Proc. arts. 62.055, .058, .202. But the Supreme Court did not hold that in-person reporting was a disability

or restraint that rendered a registration scheme punitive; it merely noted that the court of appeals had incorrectly believed that the act contained such a requirement. 538 U.S. at 101. Since *Smith*, many circuits have held that in-person reporting requirements do not constitute an affirmative disability or restraint indicative of a punitive statute. *See Shaw*, 823 F.3d at 568-70; *Doe v. Cuomo*, 755 F.3d 105, 112 (2d Cir. 2014); *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir. 2013); *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012); *United States v. W.B.H.*, 664 F.3d 848, 855 (11th Cir. 2011); *Hatton v. Bonner*, 356 F.3d 955, 964 (9th Cir. 2003).

The Supreme Court's conclusion that Alaska's act did not effectively promote the traditional goals of punishment applies with equal force to the Program. *See Smith*, 538 U.S. at 102. Any deterrent effect the Program has is incidental to punishment. *Id.* And, as with the Alaska act, the fact that the Program's reporting obligations vary with the nature of the offense does not demonstrate that those obligations are retributive. *Id.*

The Supreme Court's assessment of the Alaska act's "rational connection to a nonpunitive purpose" accurately describes Texas's Program as well. Like the Alaska act, Texas's Program "has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 102-03 (citation, alteration, and quotation marks omitted). And to the extent any of the Program's provisions "lack[] a close or perfect fit" with that goal, that sort of incongruity would not convert the Program to a punitive statute. *Id.* at 103.

Finally, as with the Alaska act, the Program's requirements are not excessive with respect to its public-safety purpose. The features of the Alaska act that the Supreme Court considered not to be impermissibly excessive are all part of the Program as well. *Id.* at 104-05. State officials do not initially conduct individualized determinations of registrants' dangerousness. *See* Tex. Code Crim. Proc. art. 62.007. The Program imposes lengthy reporting requirements only for registrants with the most serious offenses. *See id.* art. 62.101. And, with some exceptions, registrants' information is publicly available. *Id.* art. 62.005. Under *Smith*, then, the Program lacks any excessive burdens that would render it punitive.

c. The Supreme Court determined in *Smith* that the *Mendoza-Martinez* factors overwhelmingly favored a finding that the Alaska act was not punitive. *See Young*, 585 F.3d at 206 (noting that *Smith* "was not even a close call"). Because the Program is materially similar to that scheme, numerous courts have unsurprisingly concluded that the Program is also nonpunitive for purposes of constitutional limitations on punishment.

This Court has so held in a series of unpublished decisions. *Hollier*, 605 F. App'x at 258-59 & n.13; *King*, 559 F. App'x at 281; *Hayes*, 370 F. App'x at 509; *Hall*, 266 F. App'x at 356; *Herron*, 78 F. App'x at 430. All of these decisions except *Hollier* cited *Smith*, and all but *Herron* were issued after the Program's last major revision in 2005.

Several district courts within this circuit have followed suit, ruling that the Program is not punitive. *E.g.*, *Bellamy v. Collier*, No. 3:16-cv-2734-B (BH), 2018 WL 4214348, at *4 (N.D. Tex. July 23, 2018), *adopted*, 2018 WL 4207028 (N.D. Tex.

Sept. 4, 2018); *Moore v. Davis*, No. 7:17-cv-100-O-BP, 2018 WL 2164529, at *2 (N.D. Tex. Mar. 30, 2018), *adopted*, 2018 WL 2151595 (N.D. Tex. May 10, 2018); *Roberson v. Director, TDCJ-CID*, No. 6:16-cv-104, 2017 WL 2573856, at *3 (E.D. Tex. June 13, 2017), *cert. of appealability denied sub nom. Roberson v. Davis*, No. 17-40681, slip op. (5th Cir. Apr. 10, 2018); *Boswell v. Texas*, No. 6:16-cv-1088, 2017 WL 2416335, at *3 (E.D. Tex. June 2, 2017); *Hernandez v. Tisdale*, No. 4:12-cv-3387, 2015 WL 1220316, at *5 (S.D. Tex. Mar. 14, 2015); *Creekmore v. Att'y Gen. of Tex.*, 341 F. Supp. 2d 648, 660-63 (E.D. Tex. 2004).

And both before and after *Smith*, the Texas Court of Criminal Appeals concluded that the Program is not punitive. *Robinson*, 116 S.W.3d at 797-98 (citing *Smith*); *Rodriguez*, 93 S.W.3d at 79 (applying intent–effects test before *Smith*).

The district court was in good company in finding that the Program is not punitive in effect under *Smith*. ROA.431-36. Consistent with the substantial authority cited here, its decision should be affirmed.

2. The Does' arguments do not support a plausible claim that the Program is punitive in effect.

The Does ask the Court to look past *Smith* and the numerous decisions holding that the Program is not punitive under *Smith*, suggesting it should instead "follow the lead" of other courts construing other registration statutes to reach a different conclusion. Does' Br. 32-33, 39. The Court should decline the invitation.

a. The Does fault the district court for relying on this Court's unpublished decisions holding that the Program is not punitive. Does' Br. 39. But the Does' reasons for dismissing those cases are unavailing.

The Does first note that unpublished decisions are not precedential. Does' Br. 39. But that does not mean they are irrelevant; unpublished decisions are still "persuasive" authority. *Gurrola*, 898 F.3d at 534 n.13. And the district court understandably found those decisions persuasive because they relied on *Smith* in holding that the very statutory scheme at issue here is not punitive. ROA.435.

The Does also downplay the Court's unpublished decisions because they predate the 2017 amendments to the Program. Does' Br. 39. But the Does never identify any amendment that would have purportedly changed the analysis. The 2017 amendments were relatively minor. ROA.283 n.3. The most restrictive change was the prohibition of certain offenders living on a university or college campus. Tex. Code Crim. Proc. art. 62.064. As discussed above, that provision is far less restrictive than other residency requirements deemed to be nonpunitive. *See supra* Part II.A.1.b.

Finally, the Does criticize the depth of the analysis in the Court's unpublished decisions. Does' Br. 39. Deeper analysis was hardly necessary. As discussed above, *Smith*'s discussion of the relevant *Mendoza-Martinez* factors overwhelmingly showed that Alaska's law was not punitive, and that analysis largely maps onto Texas's Program. *See supra* Part II.A.1.a-b. No wonder, then, that the Court has since said relatively little beyond citing *Smith* when finding the Program nonpunitive. And, regardless, the district court conducted its own *Smith* analysis to confirm that the Program is not punitive. ROA.435-36.

b. The Does cite a series of recent decisions from other courts holding that other States' sex-offender-registration statutes are punitive. Does' Br. 32-33. But they offer virtually no discussion of those cases' reasoning or comparison of those

States' specific requirements to the Texas Program's provisions. Does' Br. 32-33. Instead, the Does only list three general categories of conditions that those courts "emphasized" in finding a punitive effect: in-person reporting, the lack of individualized assessment, and the dissemination of information on the internet. Does' Br. 32-33. Those features do not render the Texas Program punitive in effect.

As discussed above, many circuits have held that in-person reporting is not an affirmative disability or restraint indicative of a punitive statute. *See supra* Part II.A.1.b. Some courts have reasoned that in-person reporting is a considerably less harsh condition than "occupational debarment," which the Supreme Court described as "nonpunitive" in *Smith*, 538 U.S. at 100. *See Shaw*, 823 F.3d at 569; *Doe v. Cuomo*, 755 F.3d at 112; *Parks*, 698 F.3d at 6. Other courts have stressed the reasonable remedial purpose of helping law enforcement verify the location and appearance of offenders. *See Parks*, 698 F.3d at 6; *W.B.H.*, 664 F.3d at 854.

By contrast, the cases cited by the Does on this point are inapposite or unpersuasive. One suggested that a statute's in-person reporting requirement imposed an affirmative disability because there was no opportunity to terminate registration early. *Doe v. State*, 111 A.3d 1077, 1095 (N.H. 2015). But the Texas Program has an early-termination provision. Tex. Code Crim. Proc. arts. 62.401-.408. Several were decided under state constitutional provisions, not federal law. *Wallace v. State*, 905 N.E.2d 371, 377-78 (Ind. 2009); *Doe*, 111 A.3d at 1083; *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1021 (Okla. 2013). Another expressly noted its "departure" from this Court on the punitive nature of the federal sex-offender-registration statute. *Commonwealth v. Muniz*, 164 A.3d 1189, 1219 (Pa. 2017) (citing *Young*, 585 F.3d at 203-

06). And most of these courts mistakenly read *Smith* to have *relied on* the lack of in-person reporting to find the Alaska act nonpunitive. *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1229 (D. Colo. 2017), *appeal filed*, No. 17-1333 (10th Cir. Sept. 20, 2017); *Doe*, 111 A.3d at 1094; *Starkey*, 305 P.3d at 1022; *Muniz*, 164 A.3d at 1210. As discussed above, the Supreme Court merely corrected the court of appeals' mistaken belief that Alaska required in-person reporting; it did not affirmatively hold that the lack of such a requirement weighed in favor of the statute being nonpunitive. *See Smith*, 538 U.S. at 101.

Smith disposes of the other two concerns. The Supreme Court specifically held that regulating sex offenders "as a class," rather than requiring "individual determination of their dangerousness," does not make a registration statute "a punishment." 538 U.S. at 104. And the Court held that posting registrants' information on the internet made finding that information more efficient, convenient, and cost-effective, and that it did not amount to a form of punishment. *Id.* at 99.

c. The Does next rely on the Sixth Circuit's decision upholding an ex post facto challenge to Michigan's sex-offender-registration law in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016). Does' Br. 33-37. But the Michigan law is materially distinguishable from Texas's Program, and in other respects *Snyder*'s analysis cannot be squared with *Smith*.

In holding that Michigan's scheme resembled banishment, imposed an affirmative restraint, and was excessive relative to its purpose, the Sixth Circuit relied heavily on a restriction that prohibited registrants from living, working, or "loitering" within 1,000 feet of any school. 834 F.3d at 701-02, 703, 705. As discussed above, the

Program contains nothing like that school-zone requirement, and its limited restrictions on housing and employment apply only in a few narrow circumstances. *See supra* Part II.A.1.b.

The court also cited Michigan's requirement that registrants appear in person "immediately" to update information. 834 F.3d at 698, 703, 705. The Program has no such requirement. Registrants generally have a week to report address changes. Tex. Code Crim. Proc. art. 62.055(a). And changes in other information are not required to be made in person. *See id.* art. 62.057(b). To the extent that the court considered *any* in-person reporting requirement punitive, McCraw has already shown that to be a minority view among federal circuits. *See supra* Part II.A.1.b.

The court further reasoned that Michigan's tier classifications of dangerousness resembled a shaming punishment because, unlike the already-public information disclosed by Alaska in *Smith*, the tier designations were new information created and publicized under the registration scheme. 834 F.3d at 702. But *Smith*'s rejection of the shaming analogy was not grounded solely in the fact that Alaska was disseminating otherwise public information. The Supreme Court also noted that the publicity and resulting stigma were not an "integral" part of the law's objective; rather, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." 538 U.S. at 99. That is equally true of the assignment of publicly available risk levels under the Program.

Finally, the Sixth Circuit relied on "recent empirical studies" to justify its departure from *Smith* on whether Michigan's law was rationally related to a nonpuni-

tive purpose. 834 F.3d at 704-05. But in reviewing a statute for "rationality," "[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). In *Smith*, the Supreme Court held that Alaska's act "has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." 538 U.S. at 102-03 (citation and quotation marks omitted). That describes Texas's Program as well and is controlling here. *See Vasquez v. Foxx*, 895 F.3d 515, 522 (7th Cir. 2018) (holding that, even if one accepted the assertion that sex offenders "do not reoffend more than other criminals," that "would not establish that the nonpunitive aim of this [registration] statute is a sham"); *ACLU v. Masto*, 670 F.3d 1046, 1057 (9th Cir. 2012) (holding that, even if one accepted an expert's critique of the recidivism studies cited in *Smith*, "a recalibrated assessment of recidivism risk would not refute the legitimate public safety interest in monitoring sex-offender presence in the community").

d. The Does also contend that the Program is punitive because "private citizens" allegedly respond to registrants' placement on the Program registry by inflicting "punishment" on them. Does' Br. 37-38. That argument fails for two reasons.

First, the Supreme Court rebuffed the same argument in *Smith*. The Court held that, although public registration may result in "social ostracism" and the rejection of registrants by third parties such as employers and landlords, those collateral consequences do not render a registration scheme punitive. 538 U.S. at 99-100. Tellingly, the Does' main authority for this argument expressly disputed the soundness of *Smith*'s analysis and should therefore be disregarded. *Millard*, 265 F. Supp. 3d at

1226 (opining that "Justice Kennedy's words ring hollow" about the shaming effect of public registration); *see also Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Other circuits have correctly reasoned that negative reactions of third parties do not render a sex-offender-registration scheme punitive under *Smith*. *See, e.g.*, *Doe v. Cuomo*, 755 F.3d at 111; *W.B.H.*, 664 F.3d at 857-58.

And second, this sort of claim is jurisdictionally barred regardless. The Does brought their suit under section 1983. ROA.41. To state a claim under that statute, the plaintiff "must show that the alleged deprivation [of a federal right] was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). The "under color of state law" requirement is a jurisdictional prerequisite. *Polk County v. Dodson*, 454 U.S. 312, 315 (1981). Private persons, over whom the Department has no control, would not be acting "under color of state law" if they took adverse actions against Program registrants. To the contrary, the Registry warns users that "[a]nyone who uses any information on this website to injure, harass, or for any other unlawful purpose may be subject to criminal prosecution or civil liability." Tex. Dep't of Pub. Safety, Sex Offender Registry, https://records.txdps.state.tx.us/SexOffenderRegistry.

B. The Does did not assert as-applied ex post facto challenges.

The Does also fault the district court for construing their ex post facto claim as asserting only a facial challenge. Does' Br. 29-30. According to the Does, they "at least implicit[ly]" alleged that the Program also violated the Ex Post Facto Clause as

applied to two subclasses of Does: (1) those whose offenses pre-date the Program's 1991 enactment and were required to comply with the Program after completing their sentences; and (2) those whose registration obligations were extended from ten years to life under 1999 amendments to the Program. Does' Br. 29. The Court should reject that argument.

As a threshold matter, the argument is waived. The motion to dismiss urged that, with limited exceptions, the Does' claims must be viewed as facial challenges because their claims for relief broadly sought invalidation of the Program and their vague allegations did not provide notice of specific facts that formed the basis of any as-applied challenges. ROA.291. In response, the Does did not object to that characterization. *See* ROA.362-85. As to their ex post facto claim specifically, the Does argued only that "Chapter 62" imposed additional punishment on "Plaintiffs" in violation of the Ex Post Facto Clause. ROA.362, 374. And the Does effectively confirmed the facial nature of that claim by making as-applied arguments for *other* claims, such as their (now abandoned) "class of one" equal-protection claim for John Doe 3. ROA.384-85. The district court reasonably relied on the Does' failure to dispute McCraw's assessment when it construed the ex post facto claim to be a facial challenge. ROA.430 (citing the Does' response). The Does cannot argue for the first time on appeal that the claim encompassed "implicit" as-applied challenges as well. *Raj*, 714 F.3d at 330.

In any event, the Does did not sufficiently allege as-applied ex post facto claims. The Does' allegations did describe the two subclasses mentioned above. ROA.92

(First Am. Compl. ¶¶ 306-07). But those descriptions explained only that the Program or certain statutes apply to those groups retroactively—a necessary feature of any ex post facto claim. ROA.92. The Does did not allege that application of the Program to those groups specifically is punitive in any way that differs from its general application. *See Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014) (explaining that "[p]articularized facts" are an essential ingredient of any as-applied claim).

The Does' prayer for relief confirmed that they were not asserting as-applied claims. They sought a declaration that retroactive application of the Program *in general* violates the Ex Post Facto Clause and an injunction preventing retroactive enforcement of the Program "against the Plaintiffs," not as applied to any subclass of registrants. ROA.93. Accordingly, the district court did not err in construing the Does' ex post facto claim as a purely facial challenge. ROA.430.

III. The Judgment on the Does' Remaining Claims Should Be Affirmed.

Although the Does appealed the district court's judgment in its entirety, ROA.453, they have abandoned their claims against Abbott, Does' Br. 5 n.1, and the claims in Counts II-VI and X of the first amended complaint, Does' Br. 5 (limiting their appeal to the claims in Counts I and VII-IX). Accordingly, the dismissal of those claims should also be affirmed. *Powe v. Ennis*, 177 F.3d 393, 393 n.1 (5th Cir. 1999) (per curiam).

Conclusion

The Court should affirm the district court's judgment.

Respectfully submitted.

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No. 18-11620 John Does 1-7 v. Greg Abbott, et al
USDC No. 3:18-CV-629

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