RECORD NO. 20-1951

In The

United States Court Of Appeals

For The Fourth Circuit

JOHN DOE,

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
AT NORFOLK

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 20-1951 Caption: John Doe v. Colonel Gary T. Settle

Pursuant to FRAP 26.1 and Local Rule 26.1,

John Doe
(name of party/amicus)

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

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

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐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, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ K. Craig Welkener Date: 10/1/2020

Counsel for: Appellant

Print to PDF for Filing

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Rules:

Constitutional Amendment:

STATEMENT OF JURISDICTION

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

The district court issued a Memorandum Opinion and final Order granting Appellee's Motion to Dismiss on August 17, 2020. J.A. 110. Appellant timely filed his Notice of Appeal on August 31, 2020. J.A. 128.

STATEMENT OF THE ISSUES

1) Whether the district court erred in summarily dismissing Mr. Doe's Equal Protection claim, where the Virginia Sex Offender Registry allows certain people convicted of carnal knowledge with a minor to petition for removal from the Registry after 15 years, but permanently denies that right to anyone convicted of indecent liberties with a minor;
2) Whether the district court erred in dismissing Mr. Doe's Eighth Amendment claim, ruling based on reasons that the parties never briefed; and
3) Whether the district court erred in dismissing Mr. Doe's substantive Due Process claim.
4) Whether the district court erred in dismissing Mr. Doe's Virginia constitution claims.

STATEMENT OF THE CASE

A. Facts

In late 2006, Appellant John Doe[1] began dating a younger girl in his high school. J.A. 6. Mr. Doe was 17, and his girlfriend was 14. *Id*. The young woman's family knew about the dating relationship and approved of it. *Id*. In April 2007, the pair had sex, approximately two months after Mr. Doe turned 18, and when the girlfriend was 98 days from turning 15. The Complaint describes the sex as "consensual," not to condone it as appropriate or legal, but in the factual sense recognized by Virginia law. *See* Va. Code § 18.2-63 (criminalizing carnal knowledge "without the use of force" with a 13- or 14-year-old minor, including one "a child … who consents"); *Buzzard v. Commonwealth*, 134 Va. 641, 651 (1922) ("in Virginia the age of consent is fifteen years. Under that age she cannot legally consent to the act, and constructive force is present, even though she does in fact consent. The statute in this State recognizes what may be termed a qualified consent between the ages of thirteen and fifteen, and graduates the punishment accordingly"). Mr. Doe was charged with indecent liberties (Va. Code § 18.2-370(A))—a class 5 felony. J.A. 6-7. On advice of counsel, he pled guilty. *Id.*

[1] Appellant uses a pseudonym as approved by the District Court. J.A. 2 at ECF No. 5.

Unbeknownst to Mr. Doe, his plea triggered Virginia Sex Offender Registry provisions making him a registered sex offender for life, with no possibility of removal. *Id*. at 6-8; Va. Code § 9.1-902.

The defining feature of life on the Registry is classification as a Tier III or Tier I offender (until this year, the relevant term for Tier III was "sexually violent").[2] Va. Code § 9.1-902(A). Many restrictions are tied to this distinction, the most important of which is *how long* a person remains on the Registry. After 15 years, those convicted of Tier I offenses can ordinarily petition their local circuit court "for removal of his name and all identifying information from the Registry." Va. Code § 9.1-910(A). Tier II offenders can do so after 25 years. *Id.* In contrast, those convicted of a Tier III offense must register for the rest of their lives, Va. Code § 9.1-908, and can never petition for removal. *Id*. at § 9.1-910(A).

Through the petition, Tier I registrants gain access to a public hearing, where a judge determines if the applicant "no longer poses a risk to public safety." Va. Code § 9.1-910(B). The hearing procedures require the following:

> The court shall obtain a copy of the petitioner's complete criminal history and registration, reregistration, and verification of registration information history from the Registry and then hold a hearing on the

[2] Until 2020, the Registry classified offenses as "sexually violent" or otherwise. 2019 Va. Code §§ 9.1-902, -908. This year, the Virginia legislature changed the term "sexually violent" to "Tier III," and introduced "Tier I" and "Tier II" terminology as well, without changing the corresponding duration of sex offender registration. *Compare id.* to Va. Code § 9.1-902; Va. Code § 9.1-908. A relatively smaller number of offenses are "Tier II."

> petition at which the applicant and any interested persons may present witnesses and other evidence. The Commonwealth shall be made a party to any action under this section. **If, after such hearing, the court is satisfied that such person no longer poses a risk to public safety, the court shall grant the petition.** In the event the petition is not granted, the person shall wait at least 24 months from the date of the denial to file a new petition for removal from the Registry.

Id. (emphasis added).

The Registry classifies Mr. Doe as a Tier III offender.

When the age gap between the offender and the victim is less than "five years," the Registry normally does not consider sex with a 13- or 14-year-old "without the use of force" to be a "Tier III" offense. Va. Code § 9.1-902 ("a violation of [or] attempted violation of … subsection A of Section 18.2-63 [carnal knowledge] where the perpetrator is more than five years older than the victim" is a Tier III offense, otherwise it is Tier I). For a 17- or 18-year-old offender with a long life ahead of them, this provision for teenage acts dramatically reduces the Registry's automatic collateral consequences. Provisions of this type, across the country, are known as "close in age exemptions," or Romeo and Juliet laws, referencing the Shakespearian play. But the Registry has not applied the same logic to the lesser offense of indecent liberties—which outlaws indecent exposure or proposing sex to a minor 14 years old or younger. Va. Code § 18.2-370(A); Va. Code § 9.1-902(E). For the offense of indecent liberties, the Registry classifies all offenders, irrevocably,

as Tier III, with no Romeo-and-Juliet rule. Va. Code § 9.1-902(E) ("Tier III" offense means a violation of [or] attempted violation of …Section 18.2-370.").

This lifelong Registry sentence has tremendous consequences. Because Mr. Doe pled guilty to the less serious offense of indecent liberties, the Registry places him with its most dangerous category, along with murderers and rapists. Va. Code § 9.1-902(E). The Registry ensures that Mr. Doe's "Tier III" label is public, Va. Code § 9.1-911; Va. Code § 16.1-228, and the public Registry website says "Violent Offender" and "Tier III: Yes" with a current photograph of Mr. Doe's face. Instead of re-registering annually, Tier III offenders must re-register at least quarterly. Va. Code § 9.1-904; J.A. 8 (Compl. ¶ 30). Mr. Doe, in fact, is required to re-register every single month. J.A. 9 (Compl. ¶ 38). As a result of his "Tier III" designation, Mr. Doe cannot enter school grounds or daycares, or "loiter" within 100 feet thereof. Va. Code § 18.2-370.5; Va. Code § 18.2-370.2.

Mr. Doe has been on the Registry for over 13 years and is in his early 30s. J.A. 5 (Compl. ¶ 4). Because of his "Tier III" designation, he will be subject to the Registry's onerous restrictions and requirements for the rest of his life. As the Complaint explains in detail, the Registry requires Mr. Doe to keep vast amounts of personal data updated with Virginia State Police, J.A. 10-11 (Compl. ¶¶ 41-45). Most of the information is not otherwise public, including Mr. Doe's employer name

and address, home address, age, height, and weight—all of which are facts that ordinary citizens can keep private if they desire.

Many of the restrictions are onerous, and require in-person accountability. "Mr. Doe reports to a sex offender investigative officer who is permanently assigned to his specific case." *Id.* ¶ 45. "This officer can visit Mr. Doe's residence for an in-person meeting at any time, but usually does so approximately twice per year, every six months or so. These random home checks can occur at any time and become an embarrassing part of life." *Id.* ¶ 48. "If Mr. Doe changes his address, car, or employment information, he must report in-person to update this information." J.A. 11 (Compl. ¶ 49). "If Mr. Doe obtains a new email address or Internet "identity information," he must inform authorities within 30 minutes, either in-person or electronically." J.A. 11 (Compl. ¶ 45) (quoting Va. Code § 9.1-909). Perhaps the worst part is simply the fact that Mr. Doe's face appears on the sex offender Registry, along with his "Violent" designation and the name and address of any employer—devastating his employment opportunities. *Id.* ¶ 52.

B. Procedural History

Mr. Doe filed this suit against Colonel Gary T. Settle, as Superintendent of the Virginia Department of State Police ("VSP"), on April 13, 2020, seeking equitable relief under 42 U.S.C. § 1983 from his lifelong sentence to "violent" status

on the Virginia Sex Offender Registry and its disabilities, restrictions, and requirements. Joint Appendix ("J.A.") 4. Mr. Doe alleged violations of the U.S. Constitution's Equal Protection Clause, the Virginia Constitution, and other federal constitutional violations. *Id*.

The VSP moved to dismiss the Complaint on May 27, 2020. J.A. 2. By final order entered on August 17, 2020, the district court dismissed Mr. Doe's federal claims against the VSP for failure to state a claim and "decline[d] to exercise jurisdiction" over his state law claims. J.A. 126. This appeal followed.

SUMMARY OF ARGUMENT

The district court summarily dismissed Plaintiff's Equal Protection claim, simply refusing to compare the punishment of two crimes. But Plaintiff's claim is *not* challenging his criminal sentence, but the collateral consequences of the Registry, and its unequal grant of a judicial hearing to determine "risk to public safety." Under binding Supreme Court precedent, including *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), *Baxstrom v. Herold*, 383 U.S. 107, 110-112 (1966), and *Humphrey v. Cady*, 405 U.S. 504, 512 (1972), Plaintiff's Equal Protection claim is valid, and should prevail. In addition, the district court properly found that the Registry may be punitive, but failed to apply Eighth Amendment jurisprudence in determining that the Registry was not cruel and unusual.

Since Doe's substantive Due Process and Virginia constitutional claims were dismissed for these same reasons, that dismissal was also improper.

ARGUMENT

A. Standard of Review

The Fourth Circuit reviews a district court's Rule 12(b)(6) dismissal *de novo*, "accept[ing] the factual allegations in the complaint as true and constru[ing] them in the light most favorable to the nonmoving party." *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145 (4th Cir. 2018). To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A complaint should not be dismissed as long as it provides sufficient detail about the claim to show that the plaintiff has a more-than-conceivable chance of success on the merits." *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 511 (4th Cir. 2015) (brackets and internal quotation marks omitted).

B. Discussion

I. THE DISTRICT COURT ERRED IN DISMISSING MR. DOE'S VALID EQUAL PROTECTION CLAIM

After reciting standard Equal Protection doctrine, the District court summarily rejected Doe's Equal Protection claim, refusing to even compare Plaintiff's Registry status against the Registry status of those convicted of carnal knowledge. J.A. 115.

Instead, the Court dismissed the claim that the two classes are similarly situated as a "red herring" and "structurally flawed," reasoning that "any comparison … between the punishment for [one] crime and the punishment for other crimes is misguided." *Id.* In doing so, the Court (A) misconstrued Mr. Doe's Complaint as an attack on Virginia criminal law rather than the Registry, and (B) ignored—without even a citation—dispositive Supreme Court precedent that applies standard Equal Protection analysis to the collateral consequences of a criminal conviction. Under the analysis mandated by *Skinner*, *Baxstrom,* and *Cady*, Doe's Equal Protection claim is not only valid—it should prevail.

A. Equal Protection Standards

Under the Equal Protection Clause, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "To succeed, plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). "Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id*. "The general rule is that legislation is presumed to be valid and will

be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," unless a fundamental right or suspect class is at issue. *City of Cleburne*, 473 U.S. at 440.[3]

Of course, challenging a criminal *sentence* based on Equal Protection grounds is difficult indeed. "A district court is not required to consider the sentences of codefendants, and it is well settled that codefendants and even coconspirators may be sentenced differently for the same offense." *United States v. Pierce*, 409 F.3d 228, 235 (4th Cir. 2005) (citations omitted). "[E]ven if disparate treatment of those similarly situated could be found, such a classification will be sustained if it is rationally related to a legitimate governmental interest." *United States v. Roberts*, 915 F.2d 889, 892 (4th Cir. 1990).

But applying Equal Protection protections to the laws creating *collateral consequences* for a criminal conviction is a different matter, and well-established principles prohibit irrational discrimination. *Skinner v. Oklahoma*, 316 U.S. at 541 ("Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination."); *Cady*, 405 U.S. at 512 ("the prisoner's criminal record might be

[3] The Registry is a tremendous deprivation of liberty, violating Mr. Doe's fundamental right to work, among others. J.A. 80-82; J.A. 4-25. But the invidious discrimination against Romeo and Juliet offenders convicted of indecent liberties cannot survive strict scrutiny *or* rational basis review.

a relevant factor in evaluating his mental condition … it could not, however, justify depriving him of a jury determination on the basic question whether he was mentally ill and an appropriate subject for some kind of compulsory treatment.") (*citing Baxstrom*, 383 U.S. at 110-112).

B. The District Court Misconstrued Doe's Complaint

Mr. Doe's Equal Protection claim is emphatically *not* challenging the criminal penalties for indecent liberties or carnal knowledge, or any aspect of his original sentence. *See* J.A. 19 (Compl. ¶ 106) ("carnal knowledge is more serious than … indecent liberties, both in Virginia law and in common sense") (emphasis added). After all, "[c]arnal knowledge outlaws consensual sexual intercourse, while indecent liberties outlaws not only consensual sex itself, but also mere proposals to have sex or engage in intimate acts." *Id*. J.A.19 (Compl. ¶ 107). The Complaint takes no issue with Virginia's criminal law.

The district court appears to have misunderstood Doe's Equal Protection claim as a disfavored attack on a criminal sentence. For example, it is not true that "[t]he Complaint challenges the constitutionality of the Virginia indecent liberties statute." *See* J.A. 111. At the very crux of its reasoning, the court refused any comparison between "different crimes" at all, reasoning that "any comparison … between the punishment for [one] crime and the punishment for other crimes is

misguided." J.A. 115 (citing *Vanderwall v. Commonwealth of Va.*, No. 1:05cv1341, 2006 U.S. Dist. LEXIS 96149, at *23-24 (E.D. Va. Aug. 9, 2006)).

Having rejected any comparison between crimes at all, the Court proceeded to attack an argument the Complaint never made. Instead of comparing the Registry's removal hearing for some convicted of carnal knowledge to the irrevocable Registry sentence for those convicted indecent liberties, the opinion focused exclusively on indecent liberties, finding fault with an imagined claim that "Virginia law … irrationally discriminate[s] against 18-year-olds" convicted of indecent liberties in favor of those who are older. J.A. 116. The court then found no Equal Protection violation because "Virginia law and the Registry apply the same standard to every [] adult convicted of indecent liberties," and "the basic purpose of the Act [is] protecting the public from *any adult* … convicted of soliciting sex from a child under … 15." J.A.

Appellant is unable to recognize his Complaint in the opinion's analysis. If Mr. Doe's Equal Protection claim succeeds, Virginia's criminal law and his criminal sentence would remain unchanged. And Mr. Doe makes no claim that an 18-year-old, convicted of indecent liberties, should be compared to those who committed the same offense when older. The key issue is whether a rational basis exists for the Registry's harsh collateral consequences—lifelong Tier III status—for those convicted of indecent liberties with a Romeo-and-Juliet age gap, when the Registry

allows a petition for removal remedy for those convicted of carnal knowledge, in factually identical circumstances.

Crucially, the district court also held "as a matter of law" that it was improper to refer to "the sexual intercourse culminated in [Doe's] offense of conviction" as "consensual." J.A. 113. The court cited Va. Code § 18.2-63(A), for the proposition that "a child under 16 cannot consent" in under Virginia law. *Id.* But this holding ignored the crucial nuance that Virginia law does recognize in these circumstances. As the Virginia Supreme Court put it, "this State recognizes what may be termed a qualified consent between the ages of thirteen and fifteen, and graduates the punishment accordingly." *Buzzard*, 134 Va. at 651. For example, Va. Code § 18.2-63 criminalizes carnal knowledge "without the use of force" with a 13- or 14-year-old victim, in contrast with Va. Code § 18.2-61 (rape), which criminalizes sexual intercourse "against the complaining witness's will, by force" or "with a child under age 13 as the victim." In fact, that very statute has lower penalties when "a child thirteen years of age or older but under fifteen years of age … consents to sexual intercourse and the accused is a minor." Va. Code § 18.2-63(B) (emphasis added).

By ignoring circumstances in which a 13- or 14-year-old can give "qualified consent," *Buzzard*, 134 Va. at 651, the district court ignored the heart of this case. That is Mr. Doe's story. J.A. 86 ("both the defendant and [victim] admitted to having

consensual sex"). Virginia criminal law accounts for these circumstances. On the Registry, sexual intercourse "without the use of force"—when the perpetrator is 17 or 18, and the victim 13 or 14—is only a Tier I offense. But the Registry refuses that protection to indecent liberties.

C. The District Court Ignored Dispositive Supreme Court Precedent

Strikingly, the district court's opinion offers not a single citation to the Supreme Court's decision in *Skinner*.

In *Skinner*, the Supreme Court compared the two crimes of embezzlement and larceny under Oklahoma law, assessing whether a collateral consequence—in that instance, sterilization—was rationally applied to larceny but not embezzlement. 316 U.S. at 538-39. Although the Court found that the two criminal statutes may technically punish different acts, *id.* ("A clerk who appropriates over $ 20 from his employer's till … and a stranger who steals the same amount are thus both guilty of felonies"), that did not end the Equal Protection analysis. Rather, the Court looked to substance: "the nature of the two crimes is intrinsically the same," especially because "the line between them follows close distinctions." *Id*. at 539.

The High Court then reviewed a full litany of Equal Protection cautions, noting the State's ample police power to draw inexact distinctions, especially in criminal sentencing. *Id.* at 540 ("if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal

question would be raised.") But because of the civil law's unequal impact on fundamentally similar crimes, *Skinner* found an Equal Protection violation. The Court reasoned:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination.

316 U.S. at 541.

This logic squarely applies to irrational imposition of sex offender registration. Applying *Skinner* and other Supreme Court cases, a district court found in *Doe v. Jindal* that Louisiana law violated Equal Protection where those convicted of soliciting prostitution were not subject to sex offender registration, while those convicted of soliciting a "crime against nature" were so subject. 851 F. Supp. 2d 995, 1009 (E.D. La. 2012). Notably, even though soliciting prostitution carried "longer prison sentences and stricter fines"—just as here—the district court found that those convicted of the latter crime were similarly situated to those convicted of the former, *Id*. at 993 n. 3, 997, because the statutes "punish, as to [plaintiffs], identical conduct." *Id*. at 1007. The court granted summary judgment on the Equal Protection claim, with implications only for Louisiana's sex offender registry, not

the underlying statutes. *Id*. at 1002 (relief sought); 1009 (granting summary judgment). The same logic applies here.

Just as in *Skinner* and *Doe v. Jindal*, Mr. Doe is not challenging the criminal penalties for indecent liberties or carnal knowledge. Instead, he is challenging the unequal application of a civil sanction: lifelong sex offender Registry status. As in *Skinner*, the "quality of offense" in Mr. Doe's case is "intrinsically the same" as carnal knowledge. *See Skinner*, 316 U.S. at 541. The Complaint makes clear that Mr. Doe's crime *was* the crime of carnal knowledge; he just happened to plead guilty to the lesser offense of indecent liberties. J.A. 4, 19 ("In Mr. Doe's circumstance, the elements of the two offenses are identical"); *see also* J.A. 86 (stipulated offense facts).

The two offenses are certainly similar. Under Va. Code § 18.2-63(A), Virginia outlaws carnal knowledge—"sexual intercourse" or "any sexual bodily connection," *Shull v. Commonwealth*, 431 S.E.2d 924, 925 (Va. Ct. App. 1993)—between an adult and a 13- or a 14-year-old child. Under indecent liberties, Va. Code § 18.2-370(A), Virginia outlaws *proposing* such acts with a child 14-years-old or younger. Obviously, there is substantial overlap in the statutes when the victim is 13 or 14. Simple statutory analysis confirms that every violation of Va. Code § 18.2-63(A)—sexual contact "without the use of force"—also necessarily violates the

indecent liberties statute.[4] After all, Virginia jurisprudence suggests that indecent liberties is equivalent to attempted carnal knowledge, *Rainey v. Commonwealth*, 169 Va. 892, 894, 193 S.E. 501, 501-02 (1937). And given the "similarity of purpose and subject matter" between the two statutes, *Jones v. Commonwealth*, No. 1151-19-2, 2020 Va. App. LEXIS 164, at *6 (Va. Ct. App. June 2, 2020), and "the underlying conduct" at issue on Mr. Doe's facts, *see id*, Virginia case law suggests that Va. Code § 19.2-231 would permit a prosecutor to amend a charge of carnal knowledge to a charge of indecent liberties, because the "nature and character" of the two offenses are the same. *Jackson v. Commonwealth*, No. 0385-11-1, 2012 Va. App. LEXIS 224, at *4 (Va. Ct. App. July 10, 2012); *Pulliam v. Commonwealth*, 688 S.E.2d 910, 914 (Va. Ct. App. 2010).

As in *Skinner*, and perhaps even more so, the state can offer no justification for the Registry treating Doe's offense more strictly than carnal knowledge. Carnal knowledge is the more serious offense: a class 4 felony, with a minimum of two years' incarceration and $100,000 in potential fines, instead of the one-year minimum (and up to $2,500 in fines) associated with indecent liberties. J.A. 19 (Compl. ¶ 108); Va. Code § 18.2-63(A); Va. Code § 18.2-370(A); and Va. Code §

[4] Indecent liberties includes indecent exposure of the perpetrator or "propose[d]" indecent exposure of the victim, Va. Code § 18.2-370(A)(1), or proposing sexual contact. *Id*. at § 18.2-370(A)(3)-(5).

18.2-10(d)). The animating fear of a statute outlawing indecent liberties with a minor is the prevention of carnal knowledge—the greater harm.

The only conceivable basis that Virginia offers for limiting the Registry's Romeo-and-Juliet logic to carnal knowledge (the Court ventured none) is that indecent liberties also applies to victims under 13, while carnal knowledge does not. JA 90. But that argument is simply irrelevant. It completely fails to deal with the overlapping class implicated by this case (perpetrators with 14-year-old victims), and ignores the logic of the Romeo-and-Juliet provision itself—the decreased seriousness of a four-year age gap, which could never apply to any victim of indecent liberties younger than 14. Va. Code § 18.2-370 (indecent liberties limited to "[a]ny person 18 years of age or over"). There is literally no rational reason why the Registry should guarantee only a 15-year Registry sentence for 18-year-old carnal knowledge violators—with a hearing to allow an opportunity to show rehabilitation—but require an irrevocable lifetime Registry sentence for 18-year-old indecent liberties violators, when the victim in both cases was 14. It is completely irrational.

An even stronger example is found in the *Baxstrom* line of cases.

As in *Skinner* and the instant case, *Baxstrom* examined an Equal Protection challenge to a civil penalty, as applied to a class of people convicted of crimes. But unlike *Skinner*, *Baxstrom* compared the rights afforded to *the general population*

against the rights afforded to convicted people, and nevertheless found that the two groups were similarly situated. New York law provided a jury trial right for most civil commitment decisions, but not for people with expiring criminal sentences. 383 U.S. 107, 110-112 (1966). Tellingly, the Court refused to accept the fact of criminal conviction as an adequate basis for the discrimination, reasoning that "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Id*. at 111 (emphasis added). Unlike the district court in this case, which justified lifelong registration for indecent liberties in the abstract without reference to carnal knowledge, J.A. 116, the Supreme Court did not trouble itself with analyzing a hypothetical system in which no citizen was afforded a jury trial, instead indicting the constitutionality of the existing scheme. "[T]he State, having made this substantial review proceeding generally available … may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Baxstrom*, 383 U.S. at 111; *see also Cady*, 405 U.S. at 508 (adding, with particular relevance to this case, that "[t]he equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other."); *Dorsey v. Solomon*, 604 F.2d 271, 274 (4th Cir. 1979) (applying

Baxstrom to strike down a Maryland law allowing civil commitment for those acquitted by reason of insanity, but allowing a hearing before civil commitment for others).

Just so here.

Virginia has created a substantive review proceeding, available to those who commit Mr. Doe's crime, but are convicted of carnal knowledge instead of indecent liberties: a petition for removal, and the associated "risk to public safety" hearing. Va. Code § 9.1-910(B). Having done so, the State "may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *See Baxstrom*, 383 U.S. at 111; *Dorsey*, 604 F.2d at 274. Because the Registry arbitrarily withholds this proceeding from Mr. Doe but grants it to those convicted of carnal knowledge in identical circumstances, the Equal Protection Clause has been violated.

As the same decisions make clear, criminal convictions can entail some rational distinctions, whether in "classification of crimes," *Skinner*, 316 U.S. at 540, or as a "relevant factor" in the state-provided hearing. *Cady*, 405 U.S. at 508. But when the fact of conviction cannot rationally justify the unequal collateral consequence at issue—sterilization in *Skinner* or withholding a jury trial before civil commitment in *Baxstrom* and *Cady*, the Equal Protection clause will not tolerate the arbitrary discrimination. In this instance, Virginia does well to consider carnal

knowledge a class 4 felony, with indecent liberties only a class 5 felony. But by providing a petition for removal hearing to Romeo-and-Juliet carnal knowledge violators, and withholding it from indecent liberty violators in otherwise *identical* circumstances, the Registry violates the core constitutional protection against arbitrary laws. There is no reason for this irrational distinction.

II. THE DISTRICT COURT ERRED IN DISMISSING MR. DOE'S EIGHTH AMENDMENT CLAIM

In dismissing Mr. Doe's claim that his lifelong Registry sentence constitutes cruel and unusual punishment under the Eighth Amendment to the Constitution, the district court conceded that some of the Registry's numerous restrictions "may constitute punishment," but still dismissed the claim for two odd reasons: (1) the potentially punitive provisions did not violate the Ex Post Facto Clause (which Mr. Doe never raised), and (2) the Registry was not "cruel and unusual" because the underlying convictions justified the more severe punishment of incarceration. J.A. 119-120.

That is not the proper Eighth Amendment analysis.

In fact, the Court dismissed the Eighth Amendment claim on grounds that the Defendant never urged, since both their opening and reply briefs focused exclusively on whether the Registry was punitive—not on whether its application to Doe was cruel and unusual. J.A. 41-44 (Opening Brief), 91-99 (Reply). Accordingly, Defendant waived this argument, and the district court's ruling unfairly denied

Plaintiff an opportunity to address the grounds for the decision. For these independent reasons, the Eighth Amendment decision should be reversed.

In any event, under the correct analysis, Mr. Doe's claim survives the motion to dismiss.

A. Eighth Amendment Standards

In applying the Eighth Amendment, "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). "[T]he bulk of Eighth Amendment jurisprudence concerns not whether a particular punishment is barbaric, but whether it is disproportionate to the crime." *In re C.P.*, 967 N.E.2d 729, 737 (Oh. 2012). In considering whether the Registry is punitive, courts look to the 7-factor test identified in *Smith*. *Smith v. Doe*, 538 U.S. 84, 92 (2003); *United States v. Under Seal*, 709 F.3d 257, 263-66 (4th Cir. 2013).

B. The Registry's Lifelong Application to Mr. Doe is Punitive

Just as the district court concluded, the Complaint states a valid claim that the Registry, as applied to him, is punitive. J.A. 119. Although the district court improperly assessed portions of the Registry piecemeal, without undertaking the holistic, factor-by-factor review required by *Smith*, 538 U.S. at 92, the district court did reach the right bottom line on whether the Registry's overwhelming, lifelong impact on Mr. Doe's life might be considered punitive. J.A. 119; *Doe v. Snyder*,

834 F.3d 696, 705 (6th Cir. 2016) ("A regulatory regime that severely restricts where people can live, work, and 'loiter,' that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by-at best-scant evidence that such restrictions serve the professed purpose of keeping [] communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law."). Here, all seven of the fact-intensive *Doe* factors point to the Registry being punitive, especially as applied to Mr. Doe. J.A. 15-18; *Doe v. Rausch*, 382 F. Supp. 3d 783, 799 (E.D. Tenn. 2019) ("the actual effect of lifetime compliance with the Act is punitive as it relates to Plaintiff. The Act has limited where he can live, work, gather with family, and travel without any individualized assessment of whether those restrictions are indeed necessary to protect the public from any future crimes he may commit.") The correct approach—when faced with detailed factual allegations that exactly track the applicable test—is to summarily deny a motion to dismiss. *Nat'l Assoc. for Rational Sexual Offense Laws v. Stein*, 2019 U.S. Dist. LEXIS 126617, *33-35 (M.D.N.C. 2019) (Biggs, J.).

C. The Registry's Lifelong Application to Mr. Doe is Cruel and Unusual

Nor can Virginia justify the Registry's lifelong sentence, as applied to Mr. Doe, as somehow not cruel or unusual. In fact, Virginia has never made this claim.

J.A. 41-44 (Mot. Dismiss Opening Brief), 91-99 (Reply). And the district court's only Eighth Amendment rationale was the claim that because incarceration was constitutional for plaintiff's offense, lifelong non-carceral punishment was as well. J.A. 120. This argument holds no water.

The touchstone of Eighth Amendment jurisprudence is whether the punishment is "graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). Applying this logic in *People v. Dipiazza*, the court expressly found that it is cruel and unusual punishment to force registration on an 18-year-old who had sex with a 14-year old, where state law ordinarily provided another remedy. 778 N.W.2d 264 (Mich. Ct. App. 2009). Here, Virginia has already determined that the appropriate Registry punishment for unforced sex—with a Romeo-and-Juliet age gap—is a minimum of 15 years, with an available petition for removal hearing, not life. Va. Code § 9.1-902.

Therefore, Mr. Doe's lifelong Registry sentence is the definition of cruel and unusual. It is unusual, because other 18-year-olds convicted of the exact same act ordinarily do not suffer his fate. And it is cruel, because it denies to Mr. Doe any chance at rehabilitation, while forcing him to shoulder forever the Registry's many, varied, crushing burdens. *See* J.A. 15-17 (Compl. ¶¶ 76-90); *Dipiazza*, 778 N.W.2d 264.

Accordingly, Plaintiff's Eight Amendment count states a valid claim for relief.

III. THE DISTRICT COURT ERRED IN DISMISSING MR. DOE'S SUBSTANTIVE DUE PROCESS CLAIM

The district court also dismissed Mr. Doe's substantive Due Process claim applying rational basis review, relying only on its Equal Protection reasoning. J.A. 120-121. For the reasons given under section I above, therefore, the district court's ruling should be reversed. After all, the Virginia legislature has *expressly* determined that the concerns animating the Registry only make Romeo-and-Juliet violations of carnal knowledge a non-violent, Tier I offense, with a petition for removal hearing. Va. Code § 9.1-902. As explained above, there is no rational reason to refuse that protection to Romeo-and-Juliet violations of the indecent liberties statute.

IV. THE DISTRICT COURT ERRED IN DISMISSING MR. DOE'S VIRGINIA CONSTITUTIONAL CLAIMS

The district court only declined to exercise supplemental jurisdiction of the Complaint's Virginia constitutional claims because it had dismissed all federal claims. J.A. 125-126. Thus, Mr. Doe asks this honorable Court to remand that decision for the district court's reconsideration in light of his valid federal claims.

CONCLUSION

For these reasons, Mr. Doe respectfully asks the Court to reverse the decision of the district court, deny the Motion to Dismiss, and remand for further proceedings.

ORAL ARGUMENT REQUEST

Because this case involves important constitutional questions, Appellant respectfully requests oral argument.

Respectfully submitted,

/s/

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