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

REPLY BRIEF OF APPELLANT

Timothy P. Bosson
K. Craig Welkener, Jr.
BOSSON LEGAL GROUP PC
8300 Arlington Blvd.,
Suite B2
Fairfax, VA 22031
(571) 775-2529
tbosson@bossonlaw.com
cwelkener@bossonlaw.com

Counsel for Appellant

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INTRODUCTION

In Virginia, an 18 year-old, like Mr. Doe, who has ***sex*** with a 14 year-old commits a Tier I sex registry offense, but an 18 year old who ***proposes sex*** with a 14 year-old commits a Tier III offense. The distinction is irrational. VSP fails in its 47-page brief to provide one rational reason for this absurd distinction, making clear there is none.

ARGUMENT

I. DOE STATES AN EQUAL PROTECTION CLAIM

To avoid addressing the true issue at hand, VSP posits distractions, not arguments directed at the *sine qua non* of this case.

A. Mr. Doe Has Identified a Similarly Situated Class

"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." *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). Here, the classification at issue is the Registry's Romeo-and-Juliet provision. The classification is found in the Registry definitions itself, Va. Code § 9.1-902(A), not in either of the criminal statutes at issue. In defining a "Tier III offense," a violation of Va. Code § 18.63(A) only qualifies as a Tier III offense "where the perpetrator is more than five years older than the victim." Va. Code § 9.1-902(A). In the same section, however, the Registry fails to apply the identical Romeo-and-Juliet

provision to a violation of Va. Code § 18.2-370(A). The latter violation, therefore, always results in a Tier III offense. *Id.*

In this light, the similarly situated class is obvious: 18 or 19 year-old carnal knowledge offenders who are no "more than five years older" than their 13 or 14 year-old victim. The language of the statutes makes this necessarily the case. The indecent liberties statute only applies to adult perpetrators and to victims who are 14 and younger. Va. Code § 18.2-370. Accordingly, to be no more than "five years older than the victim" would require an 18 or 19 year-old perpetrator and a 13 or 14 year-old victim. Similarly, the carnal knowledge statute only applies to 13 or 14 year-old victims. Va. Code § 18.63. To be no more than "five years older" under 9.1-902(A), therefore, requires at most an 18 or 19 year-old perpetrator. *See id.*[1]

Instead of attacking Mr. Doe's legitimate class argument, VSP seeks to mischaracterize it. VSP initially argues that Mr. Doe is focused on individual "circumstances" rather than statutory offenses. Not so. For one thing, this suit is premised precisely on the Registry's irrational treatment of two offenses, indecent liberties vis-à-vis carnal knowledge. For another, comparing the seriousness of different offenses is exactly what the Registry's tiers are supposed to do. VSP

[1] Mr. Doe's opening brief may have confused the issue by primarily referring to 18 year-old perpetrators and 14 year-old victims, but the statutes clarify a slightly broader class, particularly since in calculating the age gap "the actual dates of birth of the child and the accused, respectively, shall be used." *See* Va. Code § 18.2-63.

cites *United States v. Berry*, noting the unremarkable concept that "more serious sex offenses are classified under tiers II and III." 814 F.3d 192, 195 (4th Cir. 2016); VSP Br. 19 (arguing the Registry has the same logic). *Berry*, however, supports Mr. Doe's argument that the "nature of [the] underlying offense" matters in deciding whether the offender is Tier I or Tier III. 814 F.3d at 195. For Equal Protection purposes it is important that Mr. Doe's statutory offense is less grave—and at worst has exactly the same "nature"—as Va. Code § 18.63(A).

Next, VSP looks for a distinction in the two criminal statutes, pointing out that minors can commit carnal knowledge, but not indecent liberties. This is a distinction without a difference, though, since Mr. Doe is only addressing offenses by **non-minors**. Va. Code § 18.2-370 ("Any person 18 years of age or over"). The focus of Equal Protection analysis is always on whether the government's discrimination is rationally related to the purpose at hand. *E.g. Baxstrom*, 383 U.S. 111; *Skinner v. Oklahoma*, 316 U.S. 535, 542 (1942); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972). Here, the discrimination expressly favors 18 and 19 year-old carnal knowledge offenders, and disfavors indecent liberty offenders of the same age. Pointing out that offenders of other ages exist simply does not address the discrimination.[2]

[2]Minor violators of the carnal knowledge statute are addressed by Va. Code § 18.2-63 subsection (B), rather than subsection (A), making this observation even less relevant to the Registry's Romeo and Juliet provision, which is addressed only to

Similarly, VSP points out that carnal knowledge only applies to 13 and 14 year-old victims, while indecent liberties protects anyone 14 or younger. VSP Br. 24. Again, this is another distinction without a difference. The comparison class is 13 or 14 year-old victims and 18 or 19 year-old perpetrators, Va. Code §§ 9.1-902, 18.2-370, 18.2-63, and the pertinent question is whether the two classes are similarly situated with respect to "the evil, as perceived by the State." *Eisenstadt*, 405 U.S. at 454-55. Bringing up 2-year-old or 12-year-old victims has no relevance to the case *sub judice*.

VSP also points out the statutes criminalize different acts. But the Registry affords Romeo and Juliet protection to offenders who commit "attempted" carnal knowledge, Va. Code § 9.1-902(A), which is almost indistinguishable from indecent liberties. *Cf.* Va. Code §18.2-370 *with* §18.2-63. And to the extent different acts *are* involved, that favors Mr. Doe, since carnal knowledge is more serious. Carnal knowledge outlaws "sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration" with a 13 or 14 year-old minor. Va. Code § 18.2-63(A). But indecent liberties only outlaws "propos[ing]" such acts, indecent exposure, and "invit[ing]" a minor to any place for those purposes. Va. Code § 18.2-370(A). As the D.C. Circuit has found, "[t]he government may not . . . impose[] a lesser restriction on those convicted of crimes

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subsection (A).

that differ only in being more serious." *FOP v. United States*, 152 F.3d 998, 1004 (D.C. Circ. 1998) *reversed on federalism grounds in FOP v. United States*, 173 F.3d 898, 904 (D.C. Circ. 1999) (grounds not available to VSP here); *see also In re Z.B.*, 757 N.W.2d 595, 600 (S.D. 2008) (same).

Furthermore, it would be factually impossible to commit carnal knowledge without also committing an indecent liberty. *Cf.* Va. Code § 18.2-63 *with* Va. Code § 18.2-370(A). This greater scope versus lesser scope dynamic—with the lesser crime being subjected to harsher sex offender registry implications—is exactly what led the court in *Doe v. Jindal* to find two classes of offenders similarly situated. *Doe v. Jindal*, No. 11-388, 2011 U.S. Dist. LEXIS 100408, at *5, *33 (E.D. La. Sep. 7, 2011) (reasoning that "the sex acts of the Prostitution statute consume all of the acts of the Crime Against Nature by Solicitation statute," where the former outlaws solicitation of oral, anal, or vaginal sexual intercourse, while the latter applies only to the first two acts).

In another example, the South Dakota Supreme Court struck down a sex offender registry's unequal treatment of juveniles under the federal (and state) Equal Protection Clause. *In re Z.B.*, 757 N.W.2d at 600. In that case, the registry offered adult offenders the ability to be removed from the registry under certain circumstances, while denying that same right to juveniles. *Id.* Given the more serious nature of an adult offense, the government could give no rational basis for

treating juvenile offenses more harshly. *Id.* In rejecting the almost identical argument being made by the VSP here, the court found, "[while t]he State alleges that the legitimate legislative purpose is the general policy behind the sex offender registry list -- public protection from sex offenders[], it does not provide any rational basis why juveniles are treated differently and more harshly under the sex offender registration scheme." *Id*.

No, the underlying acts involved in carnal knowledge and indecent liberties, where not identical, are certainly similarly situated for Registry purposes. And all of the VSP arguments to the contrary are merely distractions from that inescapable parallel. VSP's real contention is simply that those convicted of different crimes cannot be similarly situated. But that argument is flatly contradicted by case law.

In *Skinner v. Oklahoma,* the Supreme Court found that in the context of sterilizing three-time offenders, those convicted of larceny were similarly situated to those who committed embezzlement. 316 U.S. at 538-39. The Court noted that the acts involved are typically different. *See id.* (contrasting "a clerk who appropriates over $20 from his employer's till and a stranger who steals the same amount," and again "A person who enters a chicken coop and steals chickens" with one who "is a bailee of the property and fraudulently appropriates it"). Nevertheless, the Court looked to the substance of the two crimes—unlawful taking—and concluded that "the nature of the two crimes is intrinsically the same." *Id.* at 539.

The Third Circuit has applied that same substance-based reasoning to sex offense cases. In a factually similar case, the Third Circuit struck down a provision of the Pennsylvania sex offender registry that applied unequally to out-of-state offenders. The regulation provided only in-state offenders the benefit of a civil hearing to assess their dangerousness. *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 108 (3d Cir. 2008). Even though registrants were convicted of different crimes and different jurisdictions imposed the conviction and sentence, the Third Circuit made the common-sense judgment that in-state and out-of-state offenders were similarly situated. *See id.*

Even those who committed no crime at all can be similarly situated to criminal offenders. *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966); *see also Cady*, 405 U.S. at 508. In this line of cases, this Circuit has found those criminally charged but acquitted by reason of insanity to be similarly situated to those *not* criminally charged. *Dorsey v. Solomon*, 604 F.2d 271, 274 (4th Cir. 1979). The bottom line is that courts look to the "the purpose for which the classification is made" to determine whether two classes are similarly situated, not to whether the classes are identical. *Baxstrom*, 383 U.S. at 111.

VSP relies heavily on sentencing cases, but they are manifestly inapplicable. "The circuits unanimously agree that disparate sentences [even] among co-defendants is an impermissible ground for departure" under the federal sentencing

guidelines. *United States v. Withers*, 100 F.3d 1142, 1149 n.3 (4th Cir. 1996). There are numerous reasons why even co-defendants who committed identical acts under identical statutes might receive different sentences, such as "act[ing] as a confidential informant" or proceeding to trial. *United States v. Perkins*, 108 F.3d 512, 515-16 (4th Cir. 1997). Sentences may vary even more when different offenses are at issue. *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011). All of the cases VSP cites in opposition to "comparing people who committed different offenses" are therefore inapplicable, because all arise in the sentencing context. *See* VSP Br. 27 (citing *Hughes*, among many others).

By contrast, when considering collateral consequences courts routinely consider disparate treatment applied to similar criminal offenses. *Skinner*, 316 U.S. at 538-39 (sterilization); *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d at 108 (sex offender dangerousness hearings); *Doe v. Jindal*, No. 11-388, 2011 U.S. Dist. LEXIS 100408, at *33 (sex offender registration). Courts will apply this logic even when the comparison group has not been convicted of a crime at all. *Baxstrom*, 383 U.S. at 110 (civil commitment); *Cady*, 405 U.S. at 508 (same); *Dorsey*, 604 F.2d at 274 (same).

Tellingly, VSP concedes in a footnote that "[t]o state an equal protection claim, an aggravated sex offender must 'show[] that he is being treated differently than other aggravated sex offenders.'" VSP Br. 28 n. 13 (citing *Carney v.*

Oklahoma Dep't of Pub. Safety, 875 F.3d 1347, 1353 (10th Cir. 2017). That logic squarely applies here. Under Virginia law, carnal knowledge and indecent liberties both qualify as Tier III offenses. Va. Code § 9.1-902(A). But Mr. Doe is treated differently than those convicted of carnal knowledge, even though he was no "more than five years older that the victim." *Id.*[3] The two classes are similarly situated for Registry purposes, and this disparate treatment violates his constitutional right to equal protection of the law.

B. There is No Rational Basis for The Registry's Discrimination

Unsurprisingly, Virginia offers no rationale at all for the Registry's distinct treatment of the two crimes. On its face, it is absurd, akin to giving a categorical lifetime Registry sentence to *attempted* rapists while permitting *actual* rapists to petition a circuit court for a removal hearing after 15 years. That is exactly how the Registry treats indecent liberties vis-à-vis carnal knowledge.

VSP begins by alluding to differences in the "nature of the prohibited conduct" as a basis for the discrimination. VSP Br. 14. They fail to even acknowledge that carnal knowledge is the more serious offense under Virginia law. *See* Va. Code § 18.2-63(A); Va. Code § 18.2-370(A); Va. Code § 18.2-10(d)). And

[3] To the extent VSP implies that Mr. Doe must identify specific named individuals who fall within the similarly situated class, they fail to cite even one case in support. If such specificity is required, Mr. Doe should be allowed to re-plead or obtain discovery.

they offer not a single authority for the suggestion that it is rational to treat more serious offenses with a lighter hand. VSP Br. 14; *see In re Z.B.*, 757 N.W.2d at 600. The only case cited in this section of VSP's brief is a passing attempt to distinguish *Baxstrom*[4], claiming an unspecified "conceivable basis" for the Registry distinguishing between indecent liberties and carnal knowledge. *Id.* n. 14. No such basis exists.

Next, VSP alludes to "differences in the classes of potential offenders and victims." *Id.* But as explained above, these differences have nothing to do with the Romeo and Juliet protection at issue. The class at issue is compelled by comparison of the two statute's treatment under the Registry: 18 and 19 year-old offenders no more than five years older than their respective victim. This is a classic Equal Protection violation, shielded only by VSP's non-responsive excuses.

II. DOE STATES AN EIGHTH AMENDMENT CLAIM

A. Mr. Doe Has Preserved His Eighth Amendment Claim

On Cruel and Unusual Punishment, VSP tries to avoid the merits by claiming that Mr. Doe has somehow not preserved on appeal his argument that the Registry is punitive. But that contention is absurd. In the first place, the district court did not rest its decision on whether the Registry is punitive, instead "agree[ing] that the

[4] VSP offers nary a mention of the Fourth Circuit's subsequent application of *Baxstrom* in *Dorsey*, or the Supreme Court's application in *Cady*. *Id.* n. 14.

locational restrictions on Plaintiff's ability to live and loiter may be punitive" and resolving the Eighth Amendment claim on other grounds. J.A. 119-120. Thus, Mr. Doe was not obligated to appeal this portion of the ruling, since "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). And in any event, Mr. Doe's opening brief makes a detailed argument for why the Registry is punitive in Sections III(A) and (B) thereof. Doe Br. 22-23. The argument lays out the applicable test and controlling case law, *id.*, explaining with examples how modern sex offender registries like Virginia's are "something altogether different from and more troubling than Alaska's first-generation registry law," *Doe v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), and giving citations to the complaint and case law for why "all seven of the fact-intensive Doe factors point to the Registry being punitive" particularly with "detailed factual allegations that exactly track the applicable test." Doe Br. 23. It is specious to assert waiver on this record. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (finding waiver only because "these arguments do not appear anywhere in [the] opening brief").

B. The Registry Is Punitive as Applied

As the opening brief pointed out, the complaint has detailed allegations that "exactly track the applicable test." Doe Br. 23.

The first question under the intent-effects test is whether Virginia intended to punish. *Smith*, 538 U.S. at 92. "Several aspects of the Registry point to its punitive purpose, including the law's application only to those convicted of crimes, [and] the fact that the state's criminal justice system administers and enforces it . . . ." J.A. 15 (cited in Doe Br. at 23). VSP argues that the statute's declaration of purpose and placement in Virginia's Code argue in favor of non-punitive purpose. But the Registry was originally enacted under title 19.2, the "Criminal Procedure" title, and specifically within Chapter 18, dealing with "Sentence, Judgment [and] Execution of Sentence." *See* Former Va. Code §§ 19.2-298.1 et seq. After the Supreme Court's decision in *Smith*, the Registry was moved to Title 9.1, and the statement of intent adopted. 2003 Va. ALS 584. This move is not good evidence for Virginia, because the Registry has since become only more restrictive of offenders' everyday life choices, not less. *See* Va. Code § 9.1-903 to § 9.1-923. These facts may bespeak a legislative intent to avoid the "punitive" label, but *Smith* rejected a formulaic reliance on labels, looking beyond stated objectives to "the manner of [] codification [and] the enforcement procedures it establishes." *Smith*, 538 U.S. at 95. Here, Virginia's Registry is administered by the State Police—or the Department of Corrections, if the offender is still incarcerated—with detailed in-person verification and reporting requirements. Va. Code §§ 9.1-903, 9.1-907. Because the Registry's purpose is punitive, that ends the punitive inquiry.

As the opening brief also argued, the effects of the Registry also show that the law is punitive in effect. Doe Br. 23. VSP suggests that this issue has already been decided in *Ballard* or perhaps in *Kitze v. Commonwealth*, 475 S.E.2d 830, 832–33 (Va. Ct. App. 1996), but those decisions are not binding and not persuasive. *Ballard* was unpublished and pro se, and he did not even raise the issue.[5] And *Kitze* applied the wrong test, never looking into punitive effects.[6] Since *Smith*, numerous courts have undertaken the fact-intensive inquiry into modern, state-level sex offender registries and found them punitive. *Snyder*, 834 F.3d at 704 (6th Cir. 2016) (Michigan's registry); *Doe v. State*, 189 P.3d 999 (Alaska 2008); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); *State v. Letalien*, 985 A.2d 4 (Maine 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa.

[5] *Ballard* was unpublished for many reasons, chief among them the plaintiff's poorly articulated claims. Mr. Ballard filed suit while serving time in Red Onion State Prison, appearing in forma pauperis and pro se. *Ballard v. Chief of F.B.I.*, Civil Action No. 7:03cv00354, 2004 U.S. Dist. LEXIS 1095, at *1 (W.D. Va. Jan. 20, 2004). His three claims ("Peonage," "Seizure," and "Fair Trial Violation") never mentioned ex post facto punishment, but the trial court liberally construed them as such even though Mr. Ballard received his sentence after the creation of the Registry. *Ballard*, 2004 U.S. Dist. LEXIS 1095 at *1, *3-4. In short, Ballard scarcely raised this constitutional issue at all, and his pleading failures should not decide Mr. Doe's well-pled allegations.

[6] Before *Smith*, a focus on the legislature's stated intent alone foreclosed challenges easily. In *Kitze*, the Court of Appeals of Virginia analyzed only the intent of the General Assembly in enacting the Registry, not the effects thereof. 23 Va. App. 213, 216-17 (1996).

2017); *see also Nat'l Ass'n for Rational Sexual Offense Laws v. Stein*, 2019 U.S. Dist. LEXIS 126617 at *33-35 (M.D.N.C. July 2019) (denying a motion to dismiss a claim that North Carolina's registry is punitive).

As Mr. Doe has explained, Virginia's Registry is punitive in effect as well. The Complaint details how Virginia's Registry is punitive under each of the *Mendoza-Martinez* factors. Doe Br. 23 (citing JA 15-18).

The first factor asks whether the statute imposes something historically recognized as punishment. Here, the Registry's effects resemble three recognized punishments: probation and parole, banishment, and public shaming. J.A. 15. As with parolees, registrants have a law-enforcement officer personally assigned to their case, monitoring compliance with the law. J.A. 10-11 (¶¶ 47-48), 15. As with parolees, the law requires registrants to report face-to-face to this officer regularly, including *within three days* of any change in address, name, employment information, or "vehicle … registration information." *Id;* Va. Code §§ 9.1-903, 904.

To rebut this, VSP tries to compare Virginia's Registry to the federal SORNA, citing this Court's decision in *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013). But Virginia's Registry is far more restrictive. It is Virginia's Registry—not SORNA—that personally assigns each registrant a State Police officer to visit homes and workplaces, monitor email addresses and screen names,

and supervise Registry compliance. JA 10-11, 15. It is Virginia's Registry, not SORNA, that bans sex offenders' physical presence at daycares and schools, and outlaws various jobs like driving for Uber. JA 5 (¶ 4) (defining "Registry"); Va. Code § 18.2-370.5; Va. Code § 46.2-2099.49(C)(1).

The laws are also different in kind. Virginia's Registry is primarily directed at sex offenders themselves, as an exercise of state police power. SORNA is primarily aimed at jurisdictions, 34 U.S.C. § 20912; 34 U.S.C. § 20913(d), as an exercise of federal Spending and Commerce Clause authority. 34 U.S.C. § 20927(a), (d) (state requirements to be construed only as "conditions required to avoid the reduction of Federal funding"). SORNA essentially pulls data from state registries to form a national registry, 34 U.S.C. § 20921, places that data online, 34 U.S.C. § 20922, and decreases federal funding if states do not "substantially comply." 34 U.S.C. § 20927(a), (d). *Under Seal* does not control the status of Virginia's Registry.

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

The Registry also affirmatively restrains and disables Mr. Doe's conduct. Unlike federal SORNA, or the registry in *Smith*, Virginia's Registry "prohibit[s]" Mr. Doe "from entering or being present" at schools or daycares, or "upon any property, public or private, during hours when such property is solely being used

. . . for a school-related or school-sponsored activity." *See* VA Code § 18.2-370.5. Unlike those statutes, which "leaves [registrants free to change jobs," *Under Seal*, 709 F.3d at 265, Virginia's Registry outlaws various jobs. Doe Br. 15 (citing JA 15). These are affirmative restraints, and VSP never mentions them. This factor weighs in favor of finding the Registry punitive.

As the Complaint alleges, the Registry "promotes each of the traditional aims of punishment: incapacitation, retribution, and deterrence," but not the fourth: rehabilitation. JA 15-16. While ostensibly aimed at reducing recidivism, *id.* ¶ 83, a "peer-reviewed study [that] assessed data from Virginia and 14 comparable states across ten years" indicates that the opposite is happening. *Id.* ¶¶ 85-86 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*?, 54 J.L. & Econ. 161, 161 (2011)). Facing this same empirical evidence in Michigan—since the study also included that state—the Sixth Circuit found that registry punitive, and questioned whether it was rationally related to protecting the public by reducing recidivism. *Snyder*, 834 F.3d at 704. This factor also favors Mr. Doe.

The next factor asks whether the Registry is excessive with respect to a non-punitive purpose. *Smith*, 538 U.S. at 97. That is certainly the case here. It does not serve public safety to publicly list the name of a registrant's employer on top of the employer's address: the only additional effect is to discourage the employment of

sex offenders. It does not serve public safety to require a new set of fingerprints every 90 days—those are not changing. And lifetime registration—by Virginia's own statutory logic—is certainly excessive with respect to Mr. Doe. This factor weighs in favor of the Registry being punitive.[7]

The big picture here is that the *Mendoza-Martinez* factors are fact-intensive, and the Complaint matches them with detailed, well-pled allegations. JA 15-18; Doe Br. 23. As even the district court concluded, the question of whether the Registry is punitive cannot be resolved at the motion to dismiss stage.

C. The Registry is Cruel and Unusual As Applied

As to the latter prong of Eighth Amendment analysis, the VSP does not even attempt to defend the two rationales that the district court provided for dismissal. Instead, they simply contend that lifetime registration is unremarkable for sex offender registries and has been upheld in other contexts. VSP Br. 44. But this argument ignores the as-applied nature of Eighth Amendment jurisprudence, and the class at issue here.

[7] The last two factors—whether the sanction applies after a finding of scienter, based on criminalized behavior—also favor Mr. Doe. The Registry applies exclusively to those who have committed crimes. Va. Code § 9.1-902. All crimes require a finding of scienter, as even strict liability offenses require that the physical act in question be intentionally performed. *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015). Therefore, these classic markers of punishment also weigh in Mr. Doe's favor.

The Registry's lifelong application to Mr. Doe is unusual nationally,[8] and even more tellingly, it is unusual in Virginia itself. Mr. Doe's offense is non-violent, according to how Virginia views such facts under Va. Code § 18.2-63(A), and § 9.1-902. Other Virginians who commit Mr. Doe's identical offense are considered Tier I and given a petition for removal remedy. Va. Code § 9.1-902(A) (Romeo and Juliet protection for carnal knowledge); JA 86 (Stipulation of Facts stating that "[b]oth . . . admitted to having consensual sex"). VSP's only counter argument is to repeat the unremarkable truism that the Registry is based on offenses, not particular acts as such. That does nothing to change the unusual nature of indecent liberty's irrevocable Registry sentence—as an offense—when a carnal knowledge conviction carries a Romeo and Juliet protection.

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). It flies in the face of that principle to make Mr. Doe dodder to report to his assigned state police officer when he turns 90, while more serious offenders can leave the Registry when rehabilitated at 33.

[8] JA 21 (¶ 117) ("even beyond Virginia, there is a growing consensus that subjecting nonviolent offenders convicted at a young age to lifelong, extreme sex offender restrictions violates evolving standards of decency in American society.") *See, e.g. People v. Dipiazza*, 778 N.W.2d 264 (Mich. Ct. App. 2009).

As for the obvious cruelty of the Registry's application here, VSP has nothing to say. Lifetime sex offender registration may be unremarkable in the abstract. But none of VSP's cited cases involve anything close to Virginia's statutory scheme, much less an offender whose exact offense was ordinarily granted a removal remedy, who instead received lifetime registration for a lesser conviction.[9] Mr. Doe has stated a valid Eighth Amendment claim.

III. MR. DOE STATES A SUBSTANTIVE DUE PROCESS CLAIM

"The touchstone of due process is the protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). VSP makes no effort to defend the arbitrary decision to extend Romeo and Juliet protection to carnal knowledge offenders, but not indecent liberty offenders. Instead, they ignore the incongruity and simply claim that Tier III status for all indecent liberties offenders might prevent recidivism. Def. Br. 46.

But where the "State itself has . . . provided a statutory right," it must account for the due process implications thereof. *Wolff*, 418 U.S. at 557 (finding a due process violation where a state provided inmates good time credits but withheld a hearing for revocation of credits); *State in Interest of C.K.*, 182 A.3d 917, 928 (N.J. 2018) (overruling a lifelong registry sentence for 14 to 17 year-old juveniles on

[9] *See Under Seal*, 709 F.3d at 263; *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012); *United States v. Diaz*, 967 F.3d 107, 111 (2d Cir. 2020).

substantive due process grounds). That principle applies here, where Virginia proposes to dramatically restrict some offenders' liberties for life, while providing others a removal hearing after 15 years.

Both in *Wolff* and *Interest of C.K.*, the statutory scheme identified its own internal reasoning, which provided courts with an objective dividing line to enforce. *Wolff*, 418 U.S. at 557 ("serious misbehavior"); *Interest of C.K*, 182 A.3d at 928 ("The underlying assumption of N.J.S.A. 2C:7-2(f) is that when a registrant, who has been offense-free for fifteen or more years, no longer poses a risk to the safety of the public, keeping him bound to the registration requirements no longer serves a remedial purpose.") In both cases, the courts found that a hearing was required by Due Process. *Wolff*, 418 U.S. at 557; *Interest of C.K*, *182* A.3d at 933-36 (providing access to a removal hearing, because "we conclude that N.J.S.A. 2C:7-2(g) violates the substantive due process rights of juvenile sex offenders.").

That same fact pattern—and logic—apply here. The Registry purports to classify "more serious sex offenses," as Tier III. Def. Br. 19 (quoting *Berry*, 814 F.3d at 195). By enacting Romeo and Juliet protection for carnal knowledge, Virginia has codified its reasoning that after "fifteen or more years," *see Interest of C.K*, *182* A.3d at 928, those who commit carnal knowledge pose a low enough risk of recidivism to warrant a removal hearing. Va. Code § 9.1-902. There is no reason

to treat the lesser offense of indecent liberties differently. Due Process thus requires a removal hearing to protect Mr. Doe's liberty interest.

Imagine if Virginia executed attempted murderers, but specifically exempted actual murderers. Defending the former without mentioning the latter is no rational defense. VSP fails to offer even one reason for the Registry's incongruous scheme, and none exist.

CONCLUSION

For these reasons, the decision of the district court should be reversed.

Respectfully submitted,

/s/

Timothy Bosson
K. Craig Welkener
BOSSON LEGAL GROUP, PC
8300 Arlington Blvd., Ste. B2
Fairfax, VA 22031

Counsel for Appellant

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K. Craig Welkener
BOSSON LEGAL GROUP, PC
8300 Arlington Blvd., Ste. B2
Fairfax, VA 22031

Counsel for Appellant

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/s/ *K. Craig Welkener*
K. Craig Welkener
BOSSON LEGAL GROUP, PC
8300 Arlington Blvd., Ste. B2
Fairfax, VA 22031

Counsel for Appellant