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

BRIEF OF APPELLEE

MARK R. HERRING
Attorney General

MICHAEL A. JAGELS
Acting Deputy Attorney General

HOLLI REEVES WOOD
Assistant Attorney General

TOBY J. HEYTENS
Solicitor General

MICHELLE S. KALLEN
MARTINE E. CICCONI
Deputy Solicitors General

JESSICA MERRY SAMUELS
Assistant Solicitor General

KENDALL T. BURCHARD
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile
Counsel for Appellee

November 30, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- 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.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1951 Caption: John Doe v. Gary Settle

Pursuant to FRAP 26.1 and Local Rule 26.1,

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

Department of State Police

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

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

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐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/ Michelle Shane Kallen Date: 10/5/2020

Counsel for: Defendant - Appellee

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INTRODUCTION

Plaintiff-appellant John Doe pleaded guilty to taking indecent liberties with a child in violation of Virginia law, a crime that occurs when an adult exposes himself or entices, allures, or persuades any child under the age of 15 to commit a sexual act. Conviction of that crime triggers registration for Virginia's sex offender registry and is classified as a Tier III offense (the most serious category of offense). Doe—who alleges that he did not know of those consequences when he pleaded guilty—now claims that the required registration violates his rights under the Equal Protection Clause, the Eighth Amendment, and substantive due process principles. The district court properly rejected those claims and this Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Doe's federal claims under 28 U.S.C. § 1331 and over his state law claim under 28 U.S.C. § 1367. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court dismissed Doe's complaint on August 17, 2020, see JA 127, and Doe filed a notice of appeal less than 30 days later. See JA 128, Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

1. Whether Virginia's Sex Offender and Crimes Against Minors Registry Act (Act) violates the Equal Protection Clause by classifying all convictions for taking indecent liberties with a child as a Tier III offense.

2. Whether the Act subjects registrants to cruel and unusual punishment in violation of the Eighth Amendment.

3. Whether the Act violates substantive due process principles by classifying all violations of Virginia's prohibition on taking indecent liberties with a child as a Tier III offense.

STATEMENT

A. The Virginia Sex Offender and Crimes Against Minors Registry Act

Like most other States, Virginia creates a registry of sex offenders to "assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat offenders and to protect children from becoming victims of criminal offenders by helping to prevent such individuals from being allowed to work directly with children." Va. Code Ann. § 9.1-900. The requirements of Virginia's registry are set forth in the Sex Offender and Crimes Against Minors

Registry Act (Act), Va. Code Ann. § 9.1-900 *et seq.* Placement on Virginia's sex offender registry and the applicable registry requirements arise from the offense for which an offender was convicted. §§ 9.1-901, 9.1-902. Offenses triggering registration are categorized into one of three tiers, with Tier III designating the most serious convictions. § 9.1-902.[1]

1. Every person who is required to register must do so within three days of release from confinement or suspension of their sentence. Va. Code Ann. § 9.1-903. Registrants are photographed, submit fingerprints and samples for a DNA databank, and provide identifying information (including internet identifiers, employment information, and vehicle information) and proof of Virginia residence. § 9.1-903(B)–(C). The public-facing portion of the registry available over the Internet includes the registrant's name, photograph, aliases, age, current address, current work address, date and locality of conviction and a

[1] Earlier iterations of the Act labeled the most severe offenses "sexually violent offenses." The current three-tier structure took effect on July 1, 2020, after briefing had concluded on defendant's motion to dismiss.

description of the offense, and whether the registrant has been convicted of a Tier III offense. See §§ 9.1-911, 913.

Virginia law prohibits individuals required to register under the Act from serving in certain roles that entail working closely with children or other vulnerable populations. Individuals required to register under the Act may not serve as teachers or ride-share drivers, are generally ineligible to use a commercial driver's license to transport children,[2] and are ineligible to adopt children, see Va. Code Ann. §§ 22.1-296.1, 46.2-2099.49, 63.2-1205.1. JA 12.

2. Registrants are required to update their information at various points. For example, they must provide such an update within three days following a change of name, residence, employment, or vehicle registration. Va. Code Ann. §§ 9.1-903(D)–(F). Within 30

[2] Individuals required to register under the Act are ineligible for a Type-S commercial driver license, which authorizes drivers to operate a school bus carrying 16 or more passengers. Va. Code Ann. §§ 46.2-341.9; 46.2-341.16(B)(5). Individuals required to register under the Act may obtain a Virginia commercial driver's license to drive a Type P vehicle—a commercial license authorizing the driver to operate a vehicle carrying passengers—but the driver's license includes a restriction prohibiting the license holder from operating a commercial vehicle to transport children to or from activities sponsored by a school or daycare facility. §§ 46.2-341.9; 46.2-341.16(B)(2).

minutes of changing internet identifies (including email), they must register the new information—either electronically or in-person. § 9.1-903(G). At least ten days before moving to a new address outside the Commonwealth, registrants must register with the local law-enforcement agency where they previously registered. § 9.1-903(D).[3] Photographs are updated every two years. § 9.1-903(H).

Registrants must also periodically verify their registration information. Offenders convicted of a Tier III offense must do so every three months. Va. Code Ann. § 9.1-904(B). The Department of State Police makes available to registrants an address verification form; that form includes a statement in bold print explaining that failure to comply with the verification required is punishable under Virginia Code § 18.2-472.1. See Va. Code Ann. § 9.1-904.[4]

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[3] Contrary to the suggestion in Doe's complaint, the Act does not restrict registrants' travel. See JA 13 (alleging that the Act makes "[t]raveling as a registered sex offender . . . prohibitively difficult"). Rather, the Act provides that registrants must register with the local law-enforcement agency where they previously registered at least ten days before *moving* outside the Commonwealth. Va. Code Ann. § 9.1-903(D).

[4] An offender who was convicted of a Tier III offense who knowingly fails to register or who knowingly provide false information is guilty of a Class 6 felony. See Va. Code Ann. § 18.2-472.1(B). A person

3. The Act provides mechanisms for some offenders to be removed from the registry and for all offenders to reduce the frequency (if any) of the required verifications. Those convicted of a single Tier I or Tier II offense may petition a circuit court for removal from the registry. Va. Code Ann. § 9.1-910(A) (providing that those convicted of a single Tier I offense may petition for removal after 15 years and that those convicted of a single Tier II offense may petition for removal after 25 years). Although offenders convicted of a Tier III offense must register for life, see § 9.1-908, such offenders may petition a circuit court for relief from the requirement to verify registration information four times each year. § 9.1-909.[5] If the petition is granted, the verification requirement is reduced to once a year. *Id.*

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who has been convicted of Tier I or Tier II offenses who knowingly fails to register or who knowingly provides false information is guilty of a Class 1 misdemeanor. § 18.2-472.1(A). A person who has been convicted of a Tier III offense and is subsequently convicted under § 18.2-472.1 must thereafter verify their registration information every month. § 9.1-904(B)(2).

[5] In addition, any person who is required to register (including those convicted of Tier III offenses) may petition for relief from the requirement to reregister or verify their registration information based on a physical condition that makes them incapable of reoffending and verifying their registration information. Va. Code Ann. § 9.1-909(B).

B. Procedural history

1. In July 2007, Doe pleaded guilty to feloniously taking indecent liberties with a child in violation of Virginia Code § 18.2-370, after having sex with a 14-year-old girl. Doe was 18 years old at the time of the offense. JA 6.

Doe's conviction triggered consequences under various provisions of Virginia law. First, "as part of his sentence," Doe was prohibited from loitering within 100 feet of a location he knows or has reason to believe is a school or child daycare program. Va. Code Ann. § 18.2-370.2(B). Second, because Doe's violation of Virginia Code § 18.2-370 was a Tier III offense, see Va. Code Ann. § 9.1-902, Doe was required to register as a sex offender under the Act. Third, Doe's conviction also triggered Virginia Code § 18.2-370.5, which prohibits those convicted of Tier III offenses from entering school property during certain times.[6] Doe alleges that neither his defense counsel nor the state trial court that accepted Doe's plea informed him that a conviction under § 18.2-370

[6] The prohibition on entering school property does not apply when the person enters school property to vote, is a student enrolled at the school, or has been granted an exception permitting them to enter the school. Va. Code Ann. §§ 18.2-370.5(B), (C).

would trigger a requirement to register under the Act, and, had he known that a guilty plea would trigger registration requirements, he would not have pleaded guilty. JA 7.

In 2017, after failing to meet his registration obligations, Doe pleaded guilty to violating Virginia Code § 18.2-472.1(A).[7] JA 9. Because of this additional conviction, Doe was required to reregister monthly instead of quarterly. JA 9.

2. In April 2020, Doe filed suit against Colonel Gary Settle, the Superintendent of the Virginia Department of State Police, in the Eastern District of Virginia. JA 4–29. The complaint contained six causes of action.

Count I alleged a violation of the Equal Protection Clause based on alleged unequal treatment between those convicted of indecent liberties under Virginia Code § 18.2-370 and those convicted of carnal knowledge of a child between the ages of 13 and 15 under Virginia Code

[7] Doe was charged with violating § 18.2-472.1(B), which pertains to those convicted of a Tier III offense, but he pleaded guilty to violating § 18.2-472.1(A), which states "[a]ny person subject to Chapter 9 (§ 9.1-900 *et seq.)* of Title 9.1, other than a person convicted of a Tier III offense or murder as defined in § 9.1-902, who knowingly fails to register, reregister, or verify his registration information . . . is guilty of a Class 1 misdemeanor."

§ 18.2-63. JA 18–20. As relief on that count, Doe sought a declaratory judgment, an injunction prohibiting Colonel Settle from classifying Doe's offense as "sexually violent" for registry purposes, an order vacating and expunging Doe's conviction for failure to meet his registration obligations, and costs and fees. JA 20.

Count II alleged a violation of the Eighth Amendment's prohibition on cruel and unusual punishments. JA 20–22. As relief on that count, Doe sought a declaratory judgement, a permanent injunction "disallowing the defendants from enforcing the Registry against Mr. Doe," an order vacating and expunging Doe's conviction for failure to meet his registration obligations, and costs and fees. JA 21–22.

Count III alleged a violation of the Virginia Constitution and sought a declaratory judgment, a permanent injunction prohibiting classification of Doe's offense as "sexually violent" under Virginia Code § 9.1-902, and an order vacating and expunging Doe's conviction for failure to meet his registration obligations. JA 22–23.

Count IV alleged a violation of federal substantive due process principles. In connection with that claim, Doe asserted that there

was no rational basis for categorizing violations of Virginia's prohibition against taking indecent liberties with children as "violent" for registry purposes while classifying certain violations of the carnal knowledge statute as not "violent" for registry purposes. JA 23–24. Doe also initially asserted violations of his rights to travel, work, privacy, and parent. JA 24–25. In connection with Count IV, Doe sought declaratory relief, an injunction restraining Colonel Settle from requiring Doe to submit to the registry, and costs and fees. JA 25.

Counts V and VI were based on alleged conduct by Doe's lawyer at the time of his 2007 guilty plea. JA 26, 28. On both counts, Doe sought declaratory relief, an order vacating and expunging Doe's 2007 and 2017 convictions, and costs and fees. JA 26–28.

3. Colonel Settle moved to dismiss. JA 30–61. Doe opposed the motion but stated that he would no longer pursue the parts of Count IV alleging violations of the rights to travel, privacy, and parent. JA 82.

4. The district court granted the motion and dismissed Doe's complaint in its entirety. JA 110–26. As a threshold matter, the district court noted that, even though "the Complaint uniformly refers to the sexual intercourse that occurred between [Doe] and the 14-year-old girl

as 'consensual,' . . . a child under 16 years old *cannot consent* to sex under Virginia law." JA 113 (emphasis added) (citing Va. Code Ann. § 18.2-63(A)).

a. The district court perceived "no basis" for Doe's equal protection claim (Count I) because "Virginia law does not irrationally discriminate against 18-year-olds; rather, Virginia law and the Registry apply the *same standard* to every Virginia adult convicted of indecent liberties." JA 116.

The court acknowledged that, "[b]ased on the facts in the Complaint," it appears that Doe's underlying conduct had *also* violated Virginia's prohibition on carnal knowledge of a child—which applies when the victim is between the ages of 13 and 15 and can (unlike taking indecent liberties with a child) be committed by a minor. JA 113. The court explained, however, that the Virginia legislature had a clear and "justifiable" purpose in "protecting the public from *any adult* who has previously been convicted of soliciting sex from a child under the age of 15." JA 115. By placing adults convicted of indecent liberties in the most serious category for registry purposes, "the Virginia legislature provided a rational method of achieving this legitimate goal in the form of

lifetime registration." *Id.* Acknowledging that "the Act is a blunt instrument that does not distinguish between the age differences of every perpetrator and the child victim," the court reasoned that "it cannot be said that imposing lifetime registration requirements for adults convicted of soliciting sex from children under 15 is irrational." *Id.*

The district court also rejected Doe's effort to compare his situation to that of "a hypothetical 18-year-old defendant who engages in prohibited sex with a 14-year-old, but is not convicted of indecent liberties and subjected to a [Tier III] designation in the Registry." JA 115. The court explained that "the indecent liberties statute and the carnal knowledge statute are different crimes with different elements." *Id.*

b. The district court next rejected Doe's cruel and unusual punishments claim (Count II). Citing *Smith v. Doe*, 538 U.S. 84, 86 (2003), and *Ballard v. F.B.I., Chief*, 102 Fed. Appx. 828, 829 (4th Cir. 2004), the court concluded that the Act is not punitive and that Doe's "generalized attack on the Registry provides no basis for an Eighth Amendment Claim." JA 119.

c. The district court also rejected Doe's substantive due process claim predicated on a right to work (Count IV) because "(1) the right to employment in a particular profession does not exist; (2) the restrictions on employment provided by the Act and the Registry are reasonable; and (3) [Doe's] status as an individual subject to the Registry does not prevent him from working." JA 122.

d. Finally, the district court rejected Doe's claims involving his lawyer's conflict in connection with the 2007 guilty plea (Counts V and VI). The court concluded that Doe was "seek[ing] to circumvent the proper procedure to advance collateral attacks on state convictions by filing claims under § 1983 nearly a decade after [Doe's] three-year window to file a timely habeas claim" had closed. JA 125.

e. Having dismissed all of the federal claims, the district court declined to exercise jurisdiction over the remaining Virginia state constitutional claim (Count III). JA 125–26.

SUMMARY OF ARGUMENT

Doe's challenge has narrowed substantially on appeal. At this point, Doe attacks the district court's dismissal of just three portions of his original six-count complaint: the equal protection claim (Count I);

the cruel and unusual punishments claim (Count II); and Doe's claim that the Act violates substantive due process because it is not rationally related to a legitimate government purpose (Count IV). The district court's dismissal of those claims was correct and should be affirmed.

1. Doe's equal protection claim fails for two reasons: (a) Doe has not identified a similarly situated person who was treated differently; and (b) the Act survives rational basis review in any event. Doe's effort to compare himself to a hypothetical offender convicted of a different crime fails because Doe is not similarly situated to someone who was convicted of a different crime. In any event, the Act survives rational basis review because classifying all offenses of taking indecent liberties with a minor as a Tier III offense is well within the legislature's purview and is rationally related to the Act's goal of protecting the public.

2. Doe's Eighth Amendment claim fails because the Act does not impose punishment, much less a cruel and unusual one. This Court and the Virginia Court of Appeals have specifically rejected the argument that the Act imposes punishment; and this Court and the United States Supreme Court have both rejected the argument that

similar sex offender registries impose punishment. The Act's lifetime registration requirements are similar to those in the federal Sex Offender Registration and Notification Act—which this Court recently upheld against an Eighth Amendment challenge—and is similar to the requirements in numerous other States.

3. Doe's sole remaining substantive due process claim—that there is no rational basis for the Act's classification of all violations of Virginia Code § 18.2-370 as a Tier III offense—fails because the Act survives the deferential rational basis review.

STANDARD OF REVIEW

This Court reviews a dismissal under Rule 12(b)(6) de novo. *Ott v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 658 (4th Cir. 2018).[8] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). Although courts "accept as true [a plaintiff's] allegations for which there is sufficient factual matter to

[8] The motion to dismiss was brought under both Rule 12(b)(6) and 12(b)(1). The district court's dismissal was under Rule 12(b)(6). JA 111–12.

render them plausible on [their] face," they "do not . . . apply the same presumption of truth to conclusory statements and legal conclusions." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quotation marks and citations omitted).

ARGUMENT

Doe's claims have narrowed significantly since he filed his complaint. Before the district court, Doe abandoned the portions of Count IV that were based on alleged violations of the rights to travel, privacy, and parent, see JA 82, and he has further abandoned the part that was based on alleged violations of the right to work by failing to brief the issue before this Court. See Doe Br. 25 (contending only that the district court erred in rejecting Doe's substantive due process challenge under "rational basis review").[9] Doe has likewise abandoned the claims based on his attorney's conduct at the time of his 2007 guilty

[9] Doe's breezy assertion in a footnote that the Act "violat[es] Mr. Doe's fundamental right to work, among others," Doe Br. 10, is insufficient to preserve a claim that the district court erred in not applying strict scrutiny. See, *e.g.*, *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307 (4th Cir. 2017) ("[a] party waives an argument on appeal by . . . failing to develop its argument, even if its opening brief takes a passing shot at the issue" (internal quotation marks, brackets, and citation omitted)).

plea (Counts V and VI) by failing to raise them before this court. See *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013) ("contentions not raised in the argument section of the opening brief are abandoned"). And Doe's only argument that the district court erred in declining to exercise supplemental jurisdiction over his state law claims (Count III) is that the court had previously erred in dismissing all of his federal claims. See Doe Br. 25.

Accordingly, there are only three issues on appeal: (1) Doe's equal protection claim (Count I); (2) Doe's cruel and unusual punishment claim (Count II); and (3) the portion of Doe's substantive due process claim asserting that the Act fails rational basis review (Count IV). The district court properly rejected those arguments, and this Court should affirm.

I. The district court properly dismissed Doe's equal protection claim

The Fourteenth Amendment forbids a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "does not proscribe most forms of unequal treatment, because lawmaking by its nature requires that legislatures classify, and classifications by their

nature advantage some and disadvantage others." *Van Der Linde Hous., Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290, 293 (4th Cir. 2007) (internal quotation marks, citation, and alteration omitted). For that reason, "[i]f a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, [courts] will uphold it so long as it bears a rational relation to some legitimate end." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (internal quotation marks, citation, and alteration omitted).

Doe's equal protection claim fails for two reasons. First, Doe does not identify a similarly situated person who the Act treated differently. Second, he does not establish that the Act fails rational basis review.

A. Doe is not similarly situated to people who were convicted of different crimes

"[A] plaintiff challenging a state statute on an equal protection basis 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." *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017) (en banc) (internal quotation marks and citation omitted). As the district court correctly recognized, Doe cannot satisfy that requirement because his proposed

comparator is a person who was convicted of a different crime. Specifically, Doe argues that the Act violates the Equal Protection Clause "by providing a petition for removal hearing to Romeo-and-Juliet carnal knowledge violators" while "withholding it from indecent liberty violators in otherwise identical circumstances." Doe Br. 21 (emphasis removed). But that is not how the Act works, and it is not how equal protection law works either.

1. Placement on (and classification under) Virginia's sex offender registry does not depend on a particular offender's "circumstances." Doe Br. 21. Rather, like under the federal Sex Offender Registry and Notification Act, 34 U.S.C. § 20901 *et seq.* (SORNA), an offender's classification level under Virginia law is based on the statutory *offense* for which they were convicted. Like SORNA, the act "classifies sex offenders into three tiers depending on the nature of their underlying sex offense." *United States v. Berry*, 814 F.3d 192, 195 (4th Cir. 2016). And, as under SORNA, "sex offenders who have

committed more serious sex offenses are classified" by the Act "under tiers II and III." *Id.*; see Va. Code Ann. § 9.1-902.[10]

2. Doe was convicted of violating Virginia Code § 18.2-370, which is titled "[t]aking indecent liberties with children." Only legal adults can violate that provision, and only children aged 14 years or younger can be victims of it. See § 18.2-370(A) (referring to "[a]ny person 18 years or age or over" and "any child under the age of 15 years"). Just as importantly, *every* person who is convicted of that crime is required to register under the Act and is categorized under Tier III. See Va. Code Ann. § 9.1-902, definition of "Tier III offense" & subdiv. 1 (defining "Tier III offense" as including "a violation of" "§ 18.2-370").

3. Doe does not argue—and could not argue—that he has been treated differently from any other person who is convicted of the same offense for which he was convicted (taking indecent liberties with children). Instead, Doe insists that he has been denied the equal

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[10] Numerous other States adopt similar "categorical" offense-based tiering in their sex offender registries. See, *e.g.*, Md. Code Ann., Crim. Proc. §§ 11-701(o)–(q); Nev. Rev. Stat. Ann. §§ 179D.113, 179D.115, 179D.117; Del. Code Ann. tit. 11, § 4121(d); N.H. Rev. Stat. Ann. §§ 651-B:1(VIII)–(X); Ohio Rev. Code Ann. §§ 2950.01(E)–(G); Iowa Code Ann. § 692A.102; Mo. Ann. Stat. §§ 589.414(5)–(7); Miss. Code. Ann. §§ 45-33-47(2)(b)–(d); Mich. Comp. Laws Ann. §§ 28.722(r)–(w).

protection of the laws because the Act treats him differently than it would treat a hypothetical person who committed similar *acts* but was convicted of a different *offense*. The district court properly rejected that argument.

a. Doe compares his treatment to a hypothetical 18-year-old offender who is convicted solely of the offense of "carnal knowledge" under Virginia Code § 18.2-63 in a situation where the victim (like Doe's victim) was 14 years old. See Doe Br. 18. Whereas the offense for which Doe was convicted (indecent liberties) is limited solely to adults and includes any victim who is 14 years old or younger, the carnal knowledge offense applies only to victims who are 13 or 14 years old, with penalties that vary based on whether the victim "consents" and the age difference between the perpetrator and the victim. See Va. Code Ann. §§ 18.2-63(A)–(C). A hypothetical 18-year-old offender who was convicted solely of a carnal knowledge offense involving a "consenting" 14-year-old victim would be classified by the Act under Tier I,[11] and

[11] The Act classifies violation of Virginia Code § 18.2-63 as a Tier I offense "unless registration is required pursuant to subdivision 1 of the definition of Tier III offense." Va. Code Ann. § 9.1-902(A), def. of "Tier I offense," subdiv. 1. The definition of Tier III offense, in turn, includes

thus would be subject to less stringent requirements under the Act than those (like Doe) who were convicted of a Tier III offense. And that fact, says Doe, means that the Act violates his equal protection rights.

b. That claim fails for numerous reasons. Most fundamentally, there is nothing "arbitrary" about either the Virginia General Assembly's decision to make registration obligations under the Act turn on the specific *offense* for which a person was convicted, see note 10, *supra* (collecting other laws that follow the same approach), or its decision to impose different levels of obligations on offenders (like Doe) who are convicted of violating Virginia Code § 18.2-370(A) and (some of) those who are convicted of violating Virginia Code § 18.2-63. See note 11, *supra* (explaining that some offenders convicted of violating Virginia Code § 18.2-63 are, like those convicted of violating Virginia Code § 370(A), classified under Tier III). The reason is straightforward: the

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only violations of "subdivision A of § 18.2-63 where the perpetrator is more than five years older than the victim" or "the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications." Va. Code Ann. § 9.1-902(A), definition of "Tier III offense," subdivs. 1 & 2.

two crimes involve different defendants, different acts, and different victims.

First, the two crimes Doe seeks to compare involve different categories of defendants. As the district court emphasized, *only* legal adults can be convicted of violating the indecent liberties statute. See JA 116; accord Va. Code Ann. § 18.2-370(A) ("Any person 18 years of age or over . . ."). In contrast, people who are themselves minors can be convicted of violating the carnal knowledge statute, which looks solely to the age of the victim and the difference in age between the offender and the victim. See Va. Code Ann. § 18.2-63.

Second, the two crimes prohibit different acts. Whereas Virginia Code § 18.2-63 prohibits "carnally know[ing]" certain children, the indecent-liberties statute covers a wider array of conduct, including "*propos[ing]*" that a child "feel or fondle [the offender's] sexual or genital parts . . . or *propos[ing]* that [the offender] feel or fondle" the child's sexual or genital parts, § 18.2-370(A)(3) (emphasis added), or "*entic[ing], allur[ing], persuad[ing], or invit[ing]* any such child to enter any vehicle, room, house, or other place" for the purpose of committing a sexual act, § 18.2-370(A)(5) (emphasis added).

Third, and most important, the two offenses that Doe seeks to compare involve different sets of victims. Whereas Virginia Code § 18.2-63(A)'s ban on carnal knowledge is specifically limited to victims "thirteen years of age or older but under fifteen years of age," the offense for which Doe was convicted (Virginia Code § 18.2-370(A)) prohibits certain conduct with respect to *any child* who is younger than 15. Unlike the carnal knowledge statute (under which Doe was not convicted), the crime for which Doe was convicted prohibits taking indecent liberties with a two-year-old just as it prohibits taking indecent liberties with a 14-year-old.[12] For all of these reasons, Doe "is not similarly situated to the *theoretical* defendant who commits a violation of [Virginia Code § 18.2-63's ban on carnal knowledge of children between 13 and 15 years of age] because they commit separate crimes encompassing different elements." *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011).

[12] Because the indecent liberties statute protects a broader (and younger) class of victims than the carnal knowledge statute, Doe's assertion that the former defines a "lesser" offense, Doe Br. 4, is inaccurate.

c. Doe's contrary arguments are based on cases that are wildly inapposite, non-controlling, or both. For example, Doe relies on an 80-year-old Supreme Court decision holding that an Oklahoma law that required sterilization of offenders who committed larceny but not embezzlement flunked "strict scrutiny." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see Doe Br. 14–15. But as the district court explained—and Doe does not challenge—any classification at issue here would be subject only to "the rational basis standard." JA 114; accord Doe Br. 12 (describing "[t]he key issue" as "whether a rational basis exists" for the Act's classifications). And, as previously explained, there is nothing "irrational" about the legislative scheme being challenged here.

Just as important, accepting Doe's interpretation of *Skinner* would expand that case beyond recognition. *Skinner* was not a broad invitation for courts to rethink the wisdom of legislative classifications. Quite the opposite—the *Skinner* Court specifically emphasized that, "[u]nder our constitutional system," States "may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience" and "need not provide abstract symmetry." *Skinner*, 316 U.S. at 539–40 (internal quotation marks and citation

omitted). The Supreme Court has also specifically cautioned, post-*Skinner*, that "a court is not free" under the Equal Protection Clause "to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures." *Parham v. Hughes*, 441 U.S. 347, 351 (1979).

Although sex offender registries have now existed for decades, Doe cites only a single lonely decision that has ever applied *Skinner*'s logic to such registries—an unpublished federal district court opinion from Louisiana. See Doe Br. 15–16 (discussing *Doe v. Jindal*, No. CIV.A. 11-388, 2011 WL 3925042 (E.D. La. Sept. 7, 2011) (*Jindal*)). That case, moreover, is plainly distinguishable: Unlike the crimes Doe seeks to compare here, the crimes at issue in *Jindal* "ha[d] *identical* elements and punish[ed] *identical* conduct." *Jindal*, 2011 WL 3925042, at *7 (emphasis added).

In contrast, the Sixth Circuit has specifically rejected the kind of expansive reading of *Skinner* that Doe urges here in rejecting a constitutional challenge to a classification in a sex offender registry statute that was based on when an offender was charged. See *Doe v. Michigan Dep't of State Police*, 490 F.3d 491, 503 (6th Cir. 2007). What

is more, appellate courts across the country have (without necessarily discussing *Skinner*) rejected precisely the move that Doe attempts here: creating equal protection claims based on comparing people who committed different offenses. See *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) (offender "is not similarly situated to the *theoretical* defendant who commits a violation of [a different code provision] because they commit separate crimes encompassing different elements"); *United States v. Monroe*, 943 F.2d 1007, 1017 (9th Cir. 1991) (comparators "were not 'similarly situated,' as they were not found guilty of the same offenses"); *Delaney v. Gladden*, 397 F.2d 17, 19 (9th Cir. 1968) ("[N]o circumstance is presented which could give rise to an equal protection problem because . . . the two statutes define different offenses."); *United States v. Love*, 17 Fed. Appx. 942, 949 (10th Cir. 2001) (when "each defendant [] was sentenced for different crimes," "none of the defendants were similarly situated with the other defendants").[13]

[13] See also *Carney v. Oklahoma Dep't of Pub. Safety*, 875 F.3d 1347, 1353 (10th Cir. 2017) ("Aggravated sex offenders"—those who have been convicted of the most serious offenses, including child sexual abuse, child sexual exploitation, rape, or lewd or indecent proposals or

B. Any "classification" is rationally related to a legitimate state interest

For the reasons just stated, Doe's equal protection claim fails at the first step of the analysis because Doe has not established that he was treated differently than someone who is similarly situated. In any event, any possible classification would comfortably survive rational basis review.

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acts with a child under the age of 16—are "not similarly situated to ordinary sex offenders and others that are required to enroll in public registries." To state an equal protection claim, an aggravated sex offender must "show[] that he is being treated differently than other aggravated sex offenders."); accord *Abebe v. Mukasey*, 554 F.3d 1203, 1212 (9th Cir. 2009) ("two aliens who have been charged with removal on different statutory grounds are not similarly situated . . . [e]ach charge will carry different consequences, but a defendant cannot contest the charges actually brought against him by arguing that the government could have charged him with a different offense under a different statutory provision"); *Elie v. Holder*, 443 Fed. Appx. 635, 637–38 (2d Cir. 2011) ("While one who falsely represents herself as a U.S. citizen is not necessarily a more serious criminal offender than one who engages in activity described [in a different statutory provision], their disparate treatment under the [Immigration and Nationality Act] does not raise equal protection concerns because the two individuals are not similarly situated."); *Waddell v. Department of Correction*, 680 F.3d 384, 390 n.5 (4th Cir. 2012) (rational basis existed "for treating [one prisoner] differently than certain other state prisoners" because the prisoner who was treated differently "was convicted of a different crime" than the comparator prisoners) (discussing *Jones v. Keller*, 698 S.E.2d 49 (N.C. 2010)).

1. The Supreme Court has repeatedly made clear that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived [and] that accommodate competing concerns both public and private." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

For those reasons, "a court generally presumes that [a] statute is valid and will reject the challenge if the classification drawn by the statute is rationally related to a legitimate state interest." *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017) (en banc) (quotation marks and citation omitted). "[A] state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Under the rational basis standard, an equal protection claim fails "if there is any

reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

2. Doe comes nowhere close to meeting his "heavy burden of negating every conceivable basis which might reasonably support the challenged classification." *Van Der Linde*, 507 F.3d at 293.

a. As previously explained, the difference in tier treatment of *all* indecent liberties offenses from *some* carnal knowledge offenses is, at minimum, rational given the differences between those offenses: differences involving both the nature of the prohibited conduct and, even more importantly, differences in the classes of potential offenders and victims. See pp. 23–24, *supra*. Nothing more is required under rational basis review.[14]

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[14] *Baxstrom v. Herold*, 383 U.S. 107 (1966), has nothing to do with this case. In *Baxstrom*, the Supreme Court concluded that "[f]or purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111–12. Here, in contrast, there is, at minimum a "conceivable basis" for distinguishing between those convicted of taking indecent liberties of a child in violation of Virginia Code § 18.2-370 and those convicted of carnal knowledge under Virginia Code § 18.2-63(A).

b. Doe insists that "[t]he 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." Doe Br. 12–13. That is not how rational basis review works.

As this Court has explained, "concern for a particularized situation *is not grounds* for voiding a regulation designed to deal with thousands of cases." *Wilson v. Lyng*, 856 F.2d 630, 633 (4th Cir. 1988) (internal quotation marks and citation omitted) (emphasis added). The reason is straightforward: "Legislation and regulation necessarily involve inclusion and exclusion along general lines that may affect particular individuals in ways that seem arbitrary or unfair." *Id.* "Absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Van Der Linde*, 507 F.3d at 294 (internal quotation marks and citations omitted).

Applying these principles, the Sixth Circuit upheld a sex offender classification even though "[t]he result [wa]s that two youths who committed exactly the same Romeo-and-Juliet offense on exactly the same day are treated differently if one was charged on September 30, 2004 and the other on October 1, 2004." *Doe v. Michigan Dep't of State Police*, 490 F.3d 491, 504 (6th Cir. 2007). As that court explained, "[t]his kind of line-drawing . . . is the province of the legislature." *Id.* And the sort of "scope-of-coverage provisions" about which Doe complains here are simply "unavoidable components of most economic or social legislation." *Beach Commc'ns*, 508 U.S. at 316.

II. The Act does not impose cruel and unusual punishment

The Eighth Amendment forbids "cruel and unusual punishments." U.S. Const. amend. VIII. That standard is "a difficult one to satisfy," *Miller v. Leathers*, 885 F.2d 151, 153 (4th Cir. 1989), *on reh'g*, 913 F.2d 1085 (4th Cir. 1990), and Doe falls well short of meeting it. The Act does not impose "punishment[]," much less a "cruel and unusual" one.

A. The duty to register is not a "punishment"

This Court has previously held that, in determining whether a sex offender registry imposes "punishment" within the meaning of the

Eighth Amendment, a court should "utilize the two-part test set forth by the Supreme Court in *Smith v. Doe* [538 U.S. 84 (2003)]." *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013).[15] Because "[w]hether a statutory scheme is civil or criminal is first of all a question of statutory construction," the threshold inquiry is "whether the legislature meant the statute to establish 'civil' proceedings." *Smith*, 538 U.S. at 92 (internal quotation marks and citation omitted). "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," a court "examine[s] whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.'" *Id.* (internal quotation marks, brackets, and citation omitted).

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[15] *Smith* itself involved a challenge under the Ex Post Facto Clause rather than the Cruel and Unusual Punishments Clause. See *Smith*, 538 U.S. at 89. Because the Ex Post Facto Clause applies "only to penal statutes which disadvantage the offender affected by them," *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), the threshold question in every Ex Post Facto Clause challenge is the same as in every Cruel and Unusual Punishments Clause challenge: whether the law in question imposes "punishment." *Smith*, 538 U.S. at 92; see *Does 1-7 v. Abbott*, 945 F.3d 307, 313 n.9 (5th Cir. 2019) (stating that *Smith*'s analytical framework "applies with equal force" in the Eighth Amendment context).

This Court has repeatedly rejected claims that requiring a person who has been convicted of a qualifying sex-related offense to register constitutes punishment under the *Smith* analysis. In *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013), this Court rejected an Eighth Amendment challenge to SORNA, concluding that it "is a non-punitive, civil regulatory scheme, both in purpose and effect." See also *United States v. Wass*, 954 F.3d 184, 192–93 (4th Cir. 2020) (reiterating this conclusion in the context of an Ex Post Facto Clause challenge). This Court has also reached the same conclusion about the very Act challenged here, albeit in a non-precedential opinion. See *Ballard v. F.B.I., Chief*, 102 Fed. Appx. 828, 829 (4th Cir. 2004).[16] There is no reason for a different result here.

1. Virginia's legislature sought to create a civil scheme with the Act

a. Doe's opening brief sets forth no argument that Virginia's legislature *intended* to create a criminal scheme. Doe, therefore, has

[16] In October 2020, this Court heard oral argument in a case (brought by the same counsel here) alleging that the Act imposes retroactive punishment in violation of the Ex Post Facto Clause to the United States Constitution. That case, *Prynne v. Settle*, No. 19-1953, will directly bear on many of the arguments Doe raises here.

waived any argument under the first part of the *Smith* test. See *Holness*, 706 F.3d at 592 ("contentions not raised in the argument section of the opening brief are abandoned").

b. In any event, the Supreme Court has emphasized that "considerable deference must be accorded to the intent as the legislature has stated it." *Smith*, 538 U.S. at 93. And here, as in *Smith*, the State legislature "expressed the objective of the law in the statutory text itself," *id.* at 93, by including a legislative statement that the Act's purpose is "to assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders." Va. Code Ann. § 9.1-900; see *Smith*, 538 U.S. at 93 (holding that a statement of purpose that relied upon "protecting the public from sex offenders" showed non-punitive legislative intent). So too as in *Smith*, the "formal attributes of [the] legislative enactment" at issue here—specifically "the manner of its codification"—also demonstrate a non-punitive intent. *Smith*, 538 U.S. at 94. Virginia's legislature evinced its intent to make the Act a civil framework by primarily placing it in Title 9.1 of the Virginia Code which deals with Commonwealth Public Safety.

See *Ballard v. Chief of F.B.I.*, No. CIV.A. 7:03CV00354, 2004 WL 190425, at *3 (W.D. Va. Jan. 20, 2004) (making the same point).

2. There is no "clearest proof" that the Act is punitive in its effects

Because courts "ordinarily defer to the legislature's stated intent, only *the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92 (internal quotation marks and citation omitted) (emphasis added). Doe's one-page argument on this point, see Doe Br. 22–23, falls well short of carrying that heavy burden.

The Supreme Court has identified seven factors that provide a "useful framework" in determining whether a statute has a punitive effect:

> (1) Whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Smith, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)); see also *Under Seal*, 709 F.3d at 263 (relying on

Mendoza-Martinez guideposts in rejecting Eighth Amendment challenge to SORNA).

a. Doe summarily asserts that "all seven of the fact-intensive [*Smith*] factors point to the Registry being punitive, especially as applied to Mr. Doe." Doe Br. 23. That claim "sound[s] more of *ipse dixit* than reasoned explanation," *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 (1985), and this Court's precedents make clear that is not enough to tee up an important constitutional question for appellate review. See *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (stating that "[a] party waives an argument by failing to present it in its opening brief *or* by failing to develop [its] argument—even if [its] brief takes a passing shot at the issue" (brackets in original; internal quotation marks and citation omitted) (emphasis added)).

b. Instead, Doe relies on a trio of non-binding decisions—two district court opinions and a case from the Sixth Circuit—that involved other States' laws to support his argument that *Virginia's* sex offender registry is punitive. Doe Br. at 22–23. But this Court has already affirmed a district court's conclusion that the very Act challenged in

this case "is indistinguishable from the Alaskan statute at issue in *Smith*" and that, "consequently, the Supreme Court analysis of the *Mendoza-Martinez* factors in *Smith* compels this court to find that the effect of the statute is not so punitive as to negate Virginia's intention." *Ballard*, No. CIV.A. 7:03CV00354, 2004 WL 190425, at *3, *aff'd sub nom.*, *Ballard*, 102 Fed. Appx. 828. The Virginia Court of Appeals has likewise squarely rejected the argument that the Act is punitive, expressly "hold[ing] that the sex offender registration requirement is *not* penal" and that "[w]hile registration might impose a burden on a convicted sex offender, registration is merely a remedial aspect of a sex offender's sentence." *Kitze v. Commonwealth*, 475 S.E.2d 830, 832–33 (Va. Ct. App. 1996). Doe has not shown—must less by the clearest proof—that, contrary to this Court's and the Virginia Court of Appeals's holdings, the effects of the Act are so punitive as to negate Virginia's legislature's intent to establish a civil regulatory framework.

c. In any event, the *Mendoza-Martinez* guideposts confirm the conclusion that the Virginia registry is not punitive. Just like SORNA, the Act "imposes no physical restraint, and so does not resemble the punishment of imprisonment . . . the paradigmatic affirmative disability

or restraint." *Under Seal*, 709 F.3d at 265. Like SORNA (and unlike parole), the Act "leaves [sex offenders] free to change jobs or residences, and registrants need not seek permission to do so." *Id.* (internal quotation marks and citations omitted).

Just like SORNA, the Act's "registration requirements have not been regarded in our national history and traditions as punishment." *Under Seal*, 709 F.3d at 265. As the Supreme Court explained in *Smith*, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith*, 538 U.S. at 98. Historic punishments like banishment or public shaming "either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Id.*[17] And unlike

[17] Consistent with this Court's reasoning in *Under Seal*, courts throughout the country have rejected attempts to compare sex offender registries to historic punishments. See *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (Iowa sex offender statute did not "expel" offenders from their communities and was thus not akin to banishment); *Shaw v. Patton*, 823 F.3d 556, 567 (10th Cir. 2016) (upholding Oklahoma's Sex Offender Registration Act and reasoning that an offender's "inability to inhabit [certain] areas might substantially affect his residential choices, but this impediment—regardless of its severity—does not constitute expulsion from a community"); *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007) (Tennessee's sex offender "registration, reporting, and surveillance components are not of a type that we have traditionally

probation, which historically involved a "deferred sentence" based on the underlying offense, see generally *Mempa v. Rhay*, 389 U.S. 128, 136–37 (1967), Virginia's reporting requirements are regulatory obligations separate from the underlying conviction.[18]

Consistent with this Court's reasoning in *Under Seal*, the Act "does not promote the traditional aims of punishment, such as retribution and deterrence." *Under Seal*, 709 F.3d at 265. As with SORNA, the Act "has a rational connection to a legitimate, non-punitive purpose—public safety—which is advanced by notifying the public to the risk of sex offenders in their community." *Id.* And the Act is not excessive with respect to that non-punitive purpose. Although lifetime registration may be onerous on offenders like Doe, numerous courts—

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considered as a punishment"); *Hatton v. Bonner*, 356 F.3d 955, 965 (9th Cir. 2004) (finding no evidence that an objective of California sex offender registration statute is to "shame, ridicule, or stigmatize sex offenders").

[18] Virginia's efforts to monitor sex offenders are consistent with numerous other States' laws. See, *e.g.*, Md. Code Ann., Crim. Proc. § 11-723 (permitting "supervision" of sex offenders, including "monitoring through global positioning satellite tracking or equivalent technology"); N.C. Gen. Stat. Ann. § 14-208.40 (satellite-based monitoring program for sex offenders); *State v. Trosclair*, 89 So. 3d 340, 343 (La. 2012) (discussing a provision of Louisiana law that "subjects [sex] offender to unannounced periodic visits by the officer").

including the Supreme Court—have upheld sex offender registration laws that require lifetime registration. See *Smith*, 538 U.S. at 90 (noting that Alaska law required certain offenders to "register for life"); see also *United States v. Parks*, 698 F.3d 1, 5–6 (1st Cir. 2012); *United States v. W.B.H.*, 664 F.3d 848, 852 (11th Cir. 2011).[19]

d. Doe's insistence that "the district court concluded [that] the Complaint states a valid claim that the Registry, as applied to him, is punitive," Doe Br. 22, is incorrect. Relying on the complaint's allegation "that [Doe] is subject to similar restrictions on his ability to live and loiter which were deemed punishments in *Snyder* and *Rausch*," the district court reasoned that even though "the locational restrictions on Plaintiff's ability to live and loiter *may* be punitive," "the provisions of the Act that restrict Plaintiffs ability to live and loiter are constitutional." JA 119 (emphasis added). The court also emphasized, however, that "laws simply requiring individuals to register *are not*

[19] Accord *R.W. v. Sanders*, 168 S.W.3d 65, 67 (Mo. 2005); *State v. Worm*, 680 N.W.2d 151, 163 (Neb. 2004); *State v. Petersen-Beard*, 377 P.3d 1127, 1129 (Kan. 2016); *Commonwealth v. Lee*, 935 A.2d 865, 886 (Pa. 2007).

punitive" and "Plaintiff's generalized attack on the Registry provides no basis for an Eighth Amendment Claim." JA 119 (emphasis added).[20]

Doe's claim that he is subject to restrictions similar to those at issue in *Snyder* and *Rausch* is inaccurate. Those cases involved loitering prohibitions that imposed distancing restrictions that were *ten times longer* than those in Virginia. Compare *Does #1-5 v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016) (Michigan law prohibited registrants "from living, working, or 'loitering' within 1,000 feet of a school") (footnote omitted); and *Doe v. Rausch*, 382 F. Supp. 3d 783, 789 (E.D. Tenn. 2019) (discussing Tenn. Code Ann. § 40-39-211(d)(1)(B), which prohibits sex offenders from "[s]tand[ing], sit[ing] idly, . . . or remain[ing] within one thousand feet (1,000') of the property line of any building owned or operated by any public school"); with Va. Code Ann. § 18.2-370.2(B) ("Every adult who is convicted of an offense prohibiting proximity to children when the offense occurred on or after July 1, 2000, shall as part of his sentence be forever prohibited from loitering *within 100 feet*

[20] Even if Doe had the better reading of what the district court concluded, this Court "may affirm on any ground supported by the record regardless of the ground on which the district court relied." *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014).

of the premises of any place he knows or has reason to know is a primary, secondary or high school." (emphasis added)).

But those differences are ultimately beside the point here. The relevant distancing requirements of Virginia law do not apply to Doe because he is on the sex offender registry—rather, they are *a "part of his sentence*" for being "convicted of an offense prohibiting proximity to children." Va. Code Ann. § 18.2-370.2(B) (emphasis added). The current case, however, does not involve the constitutionality of Doe's sentence because Doe has abandoned any collateral challenge to the underlying criminal proceedings. Cf. Doe Br. 9 (confirming that Doe's challenge is to "the Registry" rather than "an attack on Virginia criminal law").

B. Registration is not cruel and unusual

To the extent that the Act imposes any "punishment" on Doe, the district court held that it does "not offend the Eighth Amendment, particularly when considering Virginia may properly punish individuals convicted of indecent liberties with a sentence of incarceration." JA 120. There is no need for the Court to reach that question if the Court concludes that Doe has not properly preserved an Eighth Amendment challenge for appeal or that any such challenge fails because the Act

does not impose "punishment" in the first place. If the Court reaches the issue, however, it should affirm.

Doe argues that the Act's lifelong application to Doe is cruel and unusual. But SORNA, which this Court recently upheld in response to an Eighth Amendment challenge, *also* imposes a lifetime registration requirement on offenders who committed a Tier III sex offense. See 34 U.S.C. § 20915(a)(3); see also *Under Seal*, 709 F.3d at 263–66. Numerous other States likewise require certain sex offenders to register for life,[21] and multiple courts (including the Supreme Court in *Smith*) have upheld sex offender registration laws that require lifetime registration. See Part II(B), *supra*.

Doe argues that his circumstance is unique because "other 18-year-olds convicted of the exact same act ordinarily do not suffer his fate." Doe Br. 24. But, as explained in Part I(A), registration under Virginia law is not tied to a particular *act*, it is tied to a conviction for violating a particular statute. Doe pleaded guilty to taking indecent

[21] See, *e.g.*, Md. Code Ann., Crim. Proc. § 11-723; Ala. Code § 15-20A-3(b); Colo. Rev. Stat. Ann. § 16-22-108; Haw. Rev. Stat. Ann. § 846E-2(a); Neb. Rev. Stat. Ann. § 29-4005(1)(b); Tenn. Code Ann. § 40-39-207(g)(2); Wyo. Stat. Ann. § 7-19-304(a); Okla. Stat. Ann. tit. 57, § 584(O)(2).

liberties with a child in violation of Virginia Code § 18.2-370, and that offense is reasonably classified as a Tier III offense by the Act. The conclusion that Virginia's registry does not impose cruel and unusual punishment is consistent with the plethora of cases throughout the country rejecting similar challenges to sex offender registries. See *Under Seal*, 709 F.3d at 263; *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012) (rejecting challenge to SORNA); *United States v. Diaz*, 967 F.3d 107, 111 (2d Cir. 2020) (rejecting challenge to New York's sex offender registry).

III. Doe's substantive due process claims fail

Doe's only remaining substantive due process claim is that the Act's treatment of his offense fails rational basis scrutiny. See p. 16, *supra.* That claim is without merit.

The purpose of the Act is "to assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat sex offenders." Va. Code Ann. § 9.1-900. Doe does not dispute that this is a legitimate state purpose, and for good reason. Indeed, the Supreme Court has been clear that "[t]here is no doubt that preventing

danger to the community is a legitimate regulatory goal." *United States v. Salerno*, 481 U.S. 739, 747 (1987).

Classifying all convictions under Virginia Code § 18.2-370 for taking indecent liberties with a child as a Tier III offense serves the purpose of the Act. A legislature could reasonably conclude that a person found guilty of the acts described in § 18.2-370—exposing sexual or genital parts to a child, proposing that a child feel or fondle their own sexual or genital parts, proposing that the person feel or fondle the child's sexual or genital parts, or proposing or enticing a child to commit a sexual act—is sufficiently likely to reoffend over their life (no matter the relative age of the offender to the victim) such that requiring registration as a Tier III offense helps protect communities and families from repeat sex offenders. See, *e.g.*, *Smith*, 538 U.S. at 103 (stating that a State "could conclude that a conviction for a sex offense provides evidence of a substantial risk of recidivism"); *Under Seal*, 709 F.3d at 265 (concluding that "notifying the public to the risk of sex offenders in their community" "has a rational connection to a legitimate, non-punitive purpose—public safety"). Nothing more is required.

* * *

This Court made clear that "[t]he Supreme Court has described the rational basis standard of review as a paradigm of judicial restraint. It is emphatically not the function of the judiciary to sit as super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Van Der Linde*, 507 F.3d at 293 (internal quotation marks and citation omitted). The Court should reject Doe's invitation to substitute the Court's judgment on when and where to make such distinctions for that of the Virginia legislature.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

COLONEL GARY T. SETTLE,
in his official capacity as Superintendent
of the Virginia Department of State
Police

By: /s/
Michelle S. Kallen
Deputy Solicitor General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7704 – Telephone
(804) 371-0200 – Facsimile
mkallen@oag.state.va.us

MARK R. HERRING
Attorney General

MICHAEL A. JAGELS
Acting Deputy Attorney General

HOLLI REEVES WOOD
Assistant Attorney General

TOBY J. HEYTENS
Solicitor General

MARTINE E. CICCONI
Deputy Solicitor General

JESSICA M. SAMUELS
Assistant Solicitor General

KENDALL T. BURCHARD
John Marshall Fellow

STATEMENT REGARDING ORAL ARGUMENT

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

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with Fed. R. App. P. 32(a)(7)(B), because it contains 9,742 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ *Michelle S. Kallen*

Michelle S. Kallen

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Michelle S. Kallen*

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