Case No. 17-1333

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID MILLARD, EUGENE KNIGHT, and ARTURO VEGA,

Plaintiffs–Appellees,

v.

MICHAEL RANKIN, Director of the Colorado Bureau of Investigation, in his official capacity,

Defendant–Appellant.

On Appeal from the U.S. District Court
for the District of Colorado

The Honorable Judge Richard P. Matsch, Senior Judge
D.C. No. 13-cv-02406-RPM

DEFENDANT–APPELLANT'S OPENING BRIEF

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Filed March 26, 2018

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GLOSSARY

App.	Appellant's Appendix
CSORA	Colorado Sex Offender Registration Act, COLO. REV. STAT. §§ 16-22-101 to -115
CBI	Colorado Bureau of Investigation
DPS	Denver Public School System
SORNA	Sex Offender Registration and Notification Act, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 101–155, 120 Stat. 587

PRIOR OR RELATED APPEALS

Under 10th Circuit Rule 28.2(C)(1), Appellant states that there are no prior or related appeals.

JURISDICTION

The district court asserted jurisdiction under 28 U.S.C. § 1331. On August 31, 2017, the district court entered final judgment against the Director of the Colorado Bureau of Investigation ("CBI") following a trial to the court. *See generally* App. 736–37, 857–1085, 1086–1204, 1205–48. CBI filed a timely Notice of Appeal on September 20, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Colorado, like every other State, has a sex offender registry. Compared to some other States—including those within this Circuit—Colorado's registry framework is moderate; it imposes no substantive restrictions, such as limits on where sex offenders may live or work. Instead, it requires only the disclosure of certain information that is then shared with law enforcement and, to a more limited degree, published on the Internet or available to the public upon request.

The current version of Colorado's registry statute—the Colorado Sex Offender Registration Act ("CSORA—has been in effect for 16

years. During that time, no court has held that any portion of it violates the constitution; indeed, this Court has upheld similar or more restrictive registry statutes, including one that imposes more frequent reporting requirements and limits where offenders may live.

Nonetheless, the district court below concluded that CSORA, as applied to three sex offenders, inflicts cruel and unusual punishment and violates procedural and substantive due process protections. The court did so in contravention of binding, on-point precedent from this Court and the Supreme Court. And it did so based on the experiences of non-parties and the conduct of non-state actors, contrary to the limits of this as-applied action under 42 U.S.C. § 1983. As one Colorado district court recently observed, the ruling below "cuts against a majority of not only Colorado, but also United States Supreme Court precedent." Attachment 2 at 4 (*People v. Dubelman*, No. 2017CR628 (Colo. Dist. Ct. (Arapahoe) Feb. 26, 2018)). This Court should reverse, consistent with established law.

ISSUES ON APPEAL

1. Did the district court err when, in this as-applied challenge to state conduct, it entered judgment against CBI based on the alleged harm suffered by non-parties and the conduct of non-state actors?

2. Did the district court contravene established, binding precedent in concluding that CSORA inflicts (i) punishment that is (ii) cruel and unusual under the Eighth Amendment?

3. Did the district court err in concluding that Registrant Vega's right to procedural due process was infringed and the Registrants' right to substantive due process was violated?

STATEMENT OF THE CASE AND FACTS

I. Sex offender registration laws have been enacted throughout the country to satisfy federal requirements.

Laws creating sex offender registries have existed throughout the United States since the early 1990s, spurred by tragic events like the high-profile sexual assault and murder of a seven-year-old named Megan, who was victimized by a neighbor with an undisclosed history of sex offenses. *Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016); *Smith v. Doe*, 538 U.S. 84, 89 (2003). With this and other tragedies in

mind, Congress entered the field in 1994, requiring States, as a condition of receiving certain federal funds, to establish sex offender registries meeting minimum requirements. *Smith*, 538 U.S. at 89–90. By 1996, every State had enacted "Megan's Laws." *Id.* at 90.

In 2006, Congress updated federal registry requirements through the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, §§ 101–155, 120 Stat. 587 (2006). Intended "to protect the public from sex offenders," SORNA created a nationwide registry to supplement state-level registries. 34 U.S.C. §§ 20901, 20921. SORNA continues to require States to create their own registries as a condition of federal funding. 34 U.S.C. § 20297(a). But SORNA also requires States—and registrants themselves—to provide sex offender information to the federal government. *See* 34 U.S.C. §§ 20913(c), 20914, 20918 . Registrants must update this information in person at least annually or when their information changes. *See* 34 U.S.C. §§ 20913(c), 20918.

To comply with SORNA, State registry websites must make certain information available to the public, and that information must

be searchable by zip code or geographic area. 34 U.S.C. § 20920(a). These publicly available databases must include "a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address." 34 U.S.C. § 20920(f). The warning must further state that "any such action could result in civil or criminal penalties." *Id.*

The United States Supreme Court has considered the constitutionality of the kind of registration and public notification requirements typically found in state laws and in SORNA. In 2003, the Court held that public disclosure of information such as "name, aliases, address, photograph, physical description, … place of employment, date of birth, crime for which convicted, [and] date of conviction" does not amount to "punishment" under the constitution. *Smith*, 538 U.S. at 91, 105–06. Acknowledging that public disclosure of an offender's criminal history can "have a lasting and painful impact," the Court nonetheless emphasized that this type of information is "already a matter of public record," and disclosure allows "members of the public [to] take the

precautions they deem necessary." *Id.* at 101. "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Id.* at 99.

II. Colorado, in compliance with federal law, enacted CSORA to aid law enforcement officials in investigating sex crimes and to protect the community.

Colorado has had a sex offender registry in some form since 1991. *See* 1991 COLO. SESS. LAWS, ch. 69. The State's current sex offender registry law, CSORA, was enacted in 2002. 2002 COLO. SESS. LAWS, ch. 297. Through CSORA, Colorado complies with federal sex offender registry requirements.[1]

Compared to other state sex offender registry statutes, CSORA's requirements are less restrictive. CSORA does not impose limitations

[1] Colorado has "substantially implemented" the federal requirements of SORNA, making the State eligible for federal funds. *See* Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, SORNA Implementation Status, https://www.smart.gov/sorna-map.htm (last visited Mar. 26, 2018) (select Colorado to see its compliance status).

on what public places an offender may visit, where an offender may live, or what employment an offender may seek. Other state statutes impose those types of restrictions, and some have been subject to successful constitutional challenges. *E.g.*, ALA. CODE §§ 15-20A-11, 13, 17 (restricting where sex offenders may live and work, and where they may go); CAL. PENAL CODE §§ 626.81 (restricting offenders' presence at schools), 3053.8 (restricting certain offenders' presence at public parks); *see In re Taylor*, 343 P.3d 867 (Cal. 2015).

In contrast, while CSORA has been the subject of numerous constitutional challenges over its 16-year history, it has never, until the decision below, been held to violate the constitution in whole or in part. *E.g.*, *People in the Interest of J.O.*, 383 P.3d 69, 74–75 (Colo. App. 2015) (declining "to depart from Colorado cases holding that sex offender registration under [CSORA] … does not constitute punishment" and noting that those cases "comport with the position of the Supreme Court").

CSORA creates a three-part framework: registration by offenders with local law enforcement; compilation of a sex offender registry by

CBI to facilitate information-sharing among law enforcement; and limited public disclosure of some, but not all, information contained in the registry. Each part of the framework is described below.

Offender Registration. Like its counterparts in other States, CSORA requires sex offenders to register with local law enforcement agencies and disclose certain information about themselves. COLO. REV. STAT. §§ 16-22-108, 109(1).[2] This includes the offender's name (including legal names and aliases), date of birth, address, and place of employment. Order at 3 (citing COLO. REV. STAT. § 16-22-109(1)). Registrants are also photographed. COLO. REV. STAT. § 16-22-108(6).[3] Most registrants must register annually, but quarterly registration is required for sexually violent predators and those convicted of other particularly serious offenses. COLO. REV. STAT. § 16-22-108(1)(b), (d).

[2] Unless otherwise indicated, all statutory citations in this brief are to the current, 2018 version of the Colorado Revised Statutes, which is materially the same as the version in effect when this case was filed.

[3] Offenders convicted of certain child sex crimes must also provide e-mail addresses and instant-messaging and chat room identities before using those addresses or identities. COLO. REV. STAT. § 16-22-108(2.5).

Offenders must also update their information if it changes. COLO. REV. STAT. § 16-22-108(3).

The Registry. The local law enforcement agency that receives information from a registered offender must transmit the information to CBI, which is responsible for maintaining the Colorado Sex Offender Registry ("Registry"). COLO. REV. STAT. §§ 16-22-109(3) & -110(1). The information in the Registry is available to state and federal criminal justice agencies. COLO. REV. STAT. §§ 16-22-110 & -112. It includes the offender's name, registration status, and date of birth; a description of the relevant crimes of unlawful sexual behavior for which the offender was convicted; whether the offender is a sexually violent predator; and information about the offender's modus operandi. COLO. REV. STAT. § 16-22-110(2). The Registry is used to facilitate the exchange of information among law enforcement officials. *See* COLO. REV. STAT. § 16-22-110(3)(b). For example, CBI works with the Department of Revenue, the custodian of driver license records, to "cross validat[e] … a registrant's known names and known addresses" and report discrepancies "to each local law enforcement agency that has

jurisdiction over the location of the person's last-known residences." COLO. REV. STAT. § 16-22-110(3)(a).

Public Disclosure. Some, but not all, of the information in the Registry is made publicly available under CSORA and in compliance with SORNA. CBI maintains a public website that can be searched using a person's name or by geographic area. COLO. REV. STAT. § 16-22-111(1); App. 866 (Tr. 10:22–11:1) The website does not include information about registrants whose offenses were misdemeanors, nor does it contain information about registrants who committed their only triggering offenses while juveniles, even if they were later convicted of failure to register as an adult. *See* COLO. REV. STAT. § 16-22-111(1)(a)–(d); App. 901 (Tr. 45:17–23), App. 913 (57:5–16). Consistent with SORNA, the website specifically warns members of the public against misuse of the information it makes available: "Any action taken by you towards a registered sex offender, including vandalism of property, verbal or written threats of harm or physical assault against this person, his or her family or employer can result in your arrest and prosecution." App. 1405.

For offenders who are included on the website, the following information is made available: name, address, physical description, date of birth, the offenses that require the person to register, the offender designation (*i.e.*, why the person is on the website), and a photograph. COLO. REV. STAT. § 16-22-111(1.5); App. 917 (Tr. 61:15–23); s*ee, e.g.*, App. 1411–12 The Supreme Court has held that the widespread disclosure of each of these categories of information is constitutional and does not amount to "punishment." *Smith*, 538 U.S. at 91, 105–06.

In addition to searching the website, the public can also request a list of registered offenders directly from CBI. COLO. REV. STAT. § 16-22-110(6); App. 918–19 (Tr. 62:15–63:22). This list includes similar information and includes juvenile offenders and those with misdemeanor convictions. COLO. REV. STAT. § 16-22-110(6)(f); App. 920 (Tr. 64:12–24), 940 (Tr. 84:13–18).

The Registry is not the only way for the public to learn about a person's status as a sex offender. Individuals—including, for example, employers or landlords—can request a background check, which includes a person's full criminal history, with the exception of juvenile

records. *See* App. 957–58 (Tr. 101:19–102:5); *see also* App. 1270–71 (Registrant Vega's criminal history report).

III. After a bench trial, the court below became the first to conclude that CSORA violates the constitution.

This lawsuit was brought by seven registered sex offenders. By the time of trial, all but three had dropped out of the case for various reasons (one, for example, had been arrested). *See* App. 404–05.

The three remaining plaintiffs ("Registrants") sought injunctive and declaratory relief against CBI under 42 U.S.C. § 1983. App. 198–200. They claimed that CBI, by complying with CSORA, imposed disabilities on them and caused them harm. This as-applied claim asserted that CSORA (1) constituted "disproportionate and/or cruel and unusual punishment in violation of the Eighth Amendment" and (2) violated the Registrants' substantive due process rights. App. 621;[4] App. 764 (Tr. 2:2) (noting that this case is an as-applied challenge).

[4] This description of claims comes from the pre-trial order. The pleadings changed significantly during the litigation, and this order best represents what the Registrants intended to claim. *See, e.g.*, App. 18–32, 33–50, 138–61, 1535–49, (regarding changes to pleadings)

Although the order below rested in part on a finding that one Registrant's procedural due process rights were violated, the Registrants never formally alleged a procedural due process claim. *See* App. 198–200; App. 621.[5]

The district court held a three-day bench trial, after which the parties submitted written closing arguments. Based on these proceedings, the court entered judgment against CBI.

A. The Registrants' evidence of harm was based on actions of non-state actors and on the experiences of non-parties.

At trial, the Registrants presented two general categories of evidence: testimony regarding their own experience as sex offenders and testimony from non-parties who themselves are sex offenders or have relationships with them.

[5] In written closings, the Registrants criticized how two Colorado state magistrates interpreted CSORA when ruling on Registrant Vega's petitions to deregister. App. 656–57. But the Registrants never stated that they were raising a procedural due process claim.

1. The Registrants' experiences as sex offenders.

The Registrants testified regarding the challenges they have faced in their personal lives. This evidence showed that the Registrants' negative experiences involved private or local officials over whom CBI has no authority. For example, several episodes the Registrants described in their testimony had nothing to do with the Registry or CSORA at all, but with employer background checks or a local school district policy that has been upheld against legal challenge.

David Millard. David Millard pleaded guilty to sexual assault in the second degree in 1999. App. 966 (Tr. 110:2–4). At the time, sexual assault in the second degree involved the knowing infliction of sexual penetration or sexual intrusion on a victim, where the circumstances indicated a lack of consent. *See* COLO. REV. STAT. § 18-3-403 (1999). Millard completed his sentence in 2007. Because of the seriousness of his crime, he is required to register four times a year. In October 2017, however, he became eligible to petition to deregister. Order at 7; App. 968–69 (Tr. 112:22–113:5). A limited amount of information regarding

Millard is available on the CBI's public website, consistent with SORNA and CSORA. App. 1411–12.

Millard has been employed with the same employer since 2003. Order at 8. In 2015, Millard's employer chose to move him to a different work location, not because of any legal obligation under CSORA, but because his status as a sex offender had become known among the employees of the previous location. Order at 8–9. His employer has advised him that he would lose his job if knowledge about his status becomes known at the new store. Order at 9.

For a period of time, Millard experienced difficulties finding housing, not because CSORA limited where he could live, but because private individuals chose not to rent to him. Order at 9–10. He attributed some of these difficulties to his appearance in a television news story about felons (not just sex offenders) living at apartment complexes that did not perform background checks on tenants. Order at 9. He has since purchased a home. *See* Order at 10. Private individuals have chosen not to associate with him after learning of his conviction.

Id. Some individuals have engaged in criminal behavior against Millard, including keying and burglarizing his car. *Id.*

Eugene Knight. Eugene Knight pleaded guilty to attempted sexual assault on a child in 2007. Order at 11; *see also* App. 1410 at 2.[6] His victim was a three- or four-year old family member. *See* App. 1036 (Tr. 180:14–18). Knight completed his sentence in mid-2011. Order at 12. He is required to register annually but will be eligible to petition for deregistration in 2021. Order at 12. A limited amount of information about Knight appears on CBI's public website, consistent with SORNA and CSORA. App. 1409–10.

The district court did not find that Knight experienced difficulties finding housing. *See generally* Order at 10–14. Regarding his

[6] In preparing for trial, Knight discovered that the description of his convictions on the CBI website was incorrect. App. 1018 (Tr. 162:1–7). It listed two counts of sexual assault on a child, which reflected his original charges instead of his conviction. Order at 11; App. 1410. That error has since been corrected. COLO. BUREAU OF INVESTIGATION, "Registrant Details: Eugene A. Knight," https://apps.colorado.gov/apps/dps/sor/search-agreement.jsf (last visited Mar. 26, 2018) (agree to the terms of use and search for "Eugene Knight").

employment, Knight is a full-time parent because it did not make economic sense for him to work outside the home. Order at 13. He previously applied for a position with The Home Depot, but his application was rejected because "a background check came back 'red-flagged.'" Order at 13.

Knight's children attend Denver Public Schools ("DPS"). Order at 13. DPS's internal policies—not CSORA—prohibit Knight from appearing on school property without permission; he must pick his children up at the sidewalk outside the school. *Id.* at 13–14. Knight previously sued DPS in federal court over this restriction and lost. *See generally* App. 300–15.

Arturo Vega. Arturo Vega was adjudicated delinquent because he pleaded guilty to one count of third-degree sexual assault involving four separate victims; the conduct occurred around 1998 when he was 13. Order at 14; App. 1516 (Tr. 20:2–11); App. 1060 (Tr. 204:14–15 (regarding Vega's age to establish year of offense). Through the plea, he admitted to engaging in sexual contact with knowledge that his victims could not consent. COLO. REV. STAT. § 18-3-404 (1998).

No information regarding Vega appears on CBI's public-facing website, but a person who requests the list of registrants from CBI would receive some information regarding Vega. A criminal history search for Vega would disclose "alcohol-related driving charges," a conviction for failing to register as a sex offender, and arrests for "assault and threat, disturbing the peace, damaged property" and failure to register as a sex offender. Order at 15 n. 5; App. 1269–73.

Vega must register annually. COLO. REV. STAT. § 16-22-108(1)(b). But he is currently able to petition to deregister. He has attempted to do so twice, without success, and did not appeal. Order at 15.[7]

Vega has not experienced difficulties finding housing. *See generally* Order at 14–18. He has also "maintained employment" with a furniture installation contractor. *Id.* at 15. However, he has been asked to leave some job sites or has been unable to participate in certain projects where the job site requires background checks. *Id.* The evidence failed to establish that these difficulties were because of any sex-

[7] Further information about Vega's attempts to deregister is set forth in Part III of the Argument, below.

offense-related convictions as opposed to other criminal charges that a background check would discover. *Id.* at 15.

2. Non-party evidence.

Although the Registrants postured this case exclusively as an as-applied challenge, *see* App. 758 (Tr. 19:1–3), the district court allowed individuals other than the Registrants to testify regarding their own experiences—either as sex offenders or as having had relationships with sex offenders. Counsel for CBI objected to this evidence repeatedly, both before and during trial, explaining that it exceeded the permissible scope of an as-applied challenge. *See* App. 631 (indicating CBI's intent to move to exclude testimony as beyond the scope of the Registrants' as-applied challenge); App. 680; App. 826 (stating that the court would allow non-plaintiffs to testify over CBI's objection); App. 842 (Tr. 3:5–14); App. 1081 (Tr. 225:5–19); App. 1088 (Tr. 232:4–14, Tr. 233:10–16), 1120–21 (Tr. 264:24–265:7), 1160 (Tr. 304:2–14), 1183 (Tr. 327:4–23). The court admitted the evidence despite CBI's repeated objections.

Like the evidence pertaining to the Registrants, the non-party evidence again related to negative experiences that were caused by

private or local officials over whom CBI has no authority. *E.g.*, App. 1169–70 (Tr. 313:7–314:24) (regarding the reaction of one individual's neighbors after learning a registrant had moved in with her), 1191–93 (Tr. 335:20–337:21) (regarding actions taken by a parochial school employer).

B. The district court—relying on out-of-jurisdiction case law, third-party evidence, and the actions of non-state actors—held that CBI violated the Registrants' constitutional rights.

After trial, the district court entered judgment against CBI, holding that CBI's compliance with CSORA amounted to "cruel and unusual punishment" under the Eighth Amendment and violated the Registrants' substantive and procedural due process rights.

Eighth Amendment. In analyzing the Eighth Amendment issue, the district court dismissed the precedential value of *Smith v. Doe*, the leading Supreme Court case on the constitutional validity of sex offender registries. Order at 19–24. In the district court's view, the majority opinion in *Smith* "ring[s] hollow," and was the result of short-sightedness on the part of "Justice Kennedy[ ] … and his colleagues"

regarding the effects of sex offender registries. Order at 24. The district court also downplayed this Court's most recent published case on the subject—*Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016). The district court found *Shaw* of little relevance because *Shaw* was "limited to [the plaintiff's] circumstances." Order at 23. The district court also disregarded the many Colorado state court cases upholding CSORA, concluding that "the issue has not been determined in Colorado." Order at 22 (internal quotation marks omitted).

Rather than relying on *Smith*, *Shaw*, or Colorado precedent on CSORA itself, the district court instead found persuasive the dissent in *Smith* and several out-of-jurisdiction cases, which it relied upon repeatedly throughout its order. Order at 21, 22, 25, 27, 30, 32, 33. Yet, as the district court acknowledged, these cases "involved statutes that ha[ve] varying provisions not identical with [CSORA]," including statutes that, unlike CSORA, impose restrictions on where sex offenders may live. Order at 22 n.7.

The court also explicitly relied on "the experience of others who have testified"—that is, it relied on the experiences of non-parties.

Order at 24. One non-party, for example, testified about a local residency restriction that is not at issue in this case, over which CBI has no authority, and which has been upheld by the Colorado Supreme Court as a valid exercise of municipal regulatory authority. Order at 26 (citing *Ryals v. City of Englewood*, 364 P.3d 900 (Colo. 2016)).

Based on this case law and non-party evidence, the district court held that, by complying with CSORA's registration and publication framework, CBI inflicts cruel and unusual punishment on the Registrants in violation of the Eighth Amendment.

Procedural Due Process. The district also held that one Registrant, Vega, was entitled to judgment based on a procedural due process theory that he failed to raise in any version of the complaints in this case and failed to set forth in the pretrial order. *See* App. 198–99; App. 621. According to the district court, Vega's procedural due process rights were violated because the state magistrates who adjudicated his petitions to deregister committed legal errors. Order at 37–38.

As the district court acknowledged, however, Vega "did not appeal" either of the denials of his two separate petitions to deregister.

Order at 15. The state court system therefore has not been given the opportunity to determine whether the denials of Vega's petitions were in fact based on any legal errors. The district court nonetheless held that Vega had been subject to a "Kafka-esque procedure" and "was not afforded due process." Order at 38.

Substantive Due Process. In ruling on the Registrant's substantive due process claim, the district court cited not a single case on the subject of the validity of sex offender registries. Instead, it relied on a line of cases that imposes constitutional restraints on the size of civil punitive damages awards. Order at 40. As the district court acknowledged, "[t]his line of cases was not cited in the arguments of counsel." Order at 40 n.12. The district court nonetheless held that CBI, through its compliance with CSORA, "enter[ed] a 'zone of arbitrariness'" under this case law and therefore "violate[d] the due process guarantee of the Fourteenth Amendment." Order at 40–41.

Relief Ordered. Despite finding violations of the Eighth Amendment and the Due Process Clause—that is, despite finding that Registrants have been punished in a cruel and unusual manner and

have been deprived fundamental liberties—the district court held that the Registrants had not submitted any evidence of three of the four factors justifying an injunction, including irreparable harm. Order at 41. The court thus granted declaratory relief only. *Id.*

STANDARD OF REVIEW

In this appeal, CBI challenges the legal rulings the district court entered after a bench trial. "'In an appeal from a bench trial, [this Court] reviews the district court's … legal conclusions *de novo*.'" *Lippoldt v. Cole*, 468 F.3d 1204, 1211 (10th Cir. 2006) (quoting *Keys Youth Servs. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir. 2001)). *De novo* review is also appropriate because this case challenges the constitutionality of a state statute, CSORA. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972 (10th Cir. 2005). There is a strong presumption that CSORA is constitutional. *Gillmor v. Thomas*, 490 F.3d 791, 798 (10th Cir. 2007).

Because this is an as-applied challenge, any judgment against CBI must be based on the Registrant's own experiences. The relevant

inquiry is thus limited to determining whether CSORA's application "to the particular circumstances of the plaintiff's case violates the Constitution." *United States v. Carel*, 668 F.3d 1211, 1218 (10th Cir. 2011); *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007) (in an as-applied challenge, limiting review to "the facts of a plaintiff's concrete case").

SUMMARY OF THE ARGUMENT

I. This is an as-applied challenge under 42 U.S.C. § 1983. Consequently, the district court was required to base its judgment on the circumstances of the Registrants themselves and was prohibited from imposing liability on CBI based on the conduct of non-state actors. Yet the district court explicitly imposed judgment based on "the experience of others"—that is, individuals who are not parties to this case. Order at 24. And it explicitly relied on the conduct of non-state actors, such as private employers and local school districts, over which CBI has no control or authority. *E.g.*, Order at 26. These errors

exceeded the permissible scope of this proceeding and violated a jurisdictional requisite of § 1983.

II. CSORA is a non-punitive statute intended to promote public safety; it is not punishment, nor is it cruel and unusual. It therefore complies with the Eighth Amendment.

In concluding otherwise, the district court either entirely ignored, or simply failed to heed, on-point precedent holding that registration statutes similar to CSORA are non-punitive. It also misapplied the seven-factor test used to determine whether sex offender registry statutes are not punitive. All but one of those seven factors indicate that CSORA is non-punitive; the remaining factor is, according the Supreme Court, of little weight.

The district court likewise erred in concluding that CSORA is cruel and unusual. A recent decision by this Court demonstrates that sex offender registries are not the sort of "grossly disproportionate" impositions that offend the Eighth Amendment.

III. The district court's procedural and substantive due process holdings were erroneous.

Regarding procedural due process, the district court lacked jurisdiction under the *Rooker-Feldman* doctrine to act as an appellate tribunal to review the denials of Vega's deregistration petitions. As the district court itself acknowledged, Vega could have appealed those denials in state court but failed to. In any event, the magistrates who denied his petitions did not act arbitrarily or capriciously in violation of the Fourteenth Amendment.

CSORA does not violate substantive due process. The district court concluded that CSORA is rationally related to a legitimate government purpose, and this should have ended the inquiry. Instead, the district court relied on inapposite case law governing civil punitive damages awards to find that CSORA is within a "zone of arbitrariness." Under the governing standards, CSORA is not unconstitutionally arbitrary. And the Registrants' claims based on liberty and privacy interests fail under established law.

ARGUMENT

I. The district court's judgment on the Eighth Amendment and substantive due process claims exceeded the permissible scope of an as-applied challenge and violated a jurisdictional requirement of § 1983.

Because this is an as-applied case brought under 42 U.S.C. § 1983, two basic legal requirements apply. First, any judgment must be based on the Registrants' own circumstances, not the circumstances of others who may be subject to CSORA. Second, as a jurisdictional matter under § 1983, the Registrants may seek relief only for *state* conduct, not the conduct of non-state actors. The district court's judgment on the Eighth Amendment and substantive due process claims,[8] Order at 19–36, 38–41, contravened both of these requirements.

The Permissible Scope of an As-Applied Challenge. As CBI pointed out repeatedly below, *e.g.*, App. 665, 680, this is an as-applied case in which the Registrants may seek relief "only as to them and their

[8] The district court's judgment as to Vega's procedural due process claim suffered other legal and jurisdictional defects, discussed below in Part III.B of the Argument.

particular circumstances." *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011). The district court agreed that this case has been postured as an as-applied challenge. Order at 18.

The Registrants' decision to raise only an as-applied claim dictates the permissible scope of this proceeding. "The nature of a challenge depends on how the *plaintiffs* elect to proceed …." *Carel*, 668 F.3d at 1217 (quoting *Scherer*, 653 U.S. at 1245) (emphasis in original). Because this is an as-applied case, the district court could not enter judgment based on the circumstances of other putative plaintiffs who may themselves have potential constitutional claims. *Id*. at 1217 ("Because we construe [this] as an as-applied challenge, … we express *no opinion* concerning whether [SORNA] might violate the Constitution as it applies to *other federal sex offenders*." (emphasis added)).

The § 1983 "Color of State Law" Requirement. Separately, a plaintiff seeking to recover under § 1983 "must show that the alleged deprivation [he suffered] was committed by a person acting under color of state law." *Hall v. Witteman*, 584 F.3d 859, 864 (10th Cir. 2009) (quoting *West v. Atkins,* 487 U.S. 42, 48 (1988)). This "color of state law"

requirement is "'a jurisdictional requisite for a § 1983 action.'" *Jojola v. Chavez,* 55 F.3d 488, 492 (10th Cir. 1995) (quoting *Polk County v. Dodson,* 454 U.S. 312, 315 (1981)); *see also Cox v. Hellerstein*, 685 F.2d 1098, 1099 (9th Cir. 1982) (stating that failure to satisfy the "color of state law" element of § 1983 creates a "fatal jurisdictional defect").

Section 1983 is jurisdictionally limited in this manner to "'avoid[ ] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442, 1447 (10th Cir. 1995) (quoting *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 936 (1982)). "[P]rivate conduct that is not fairly attributable to the State is simply not actionable under § 1983, however discriminatory or wrongful the conduct is." *Jojola,* 55 F.3d at 492 (citations and internal quotation marks omitted).

The claims in this case arise exclusively under § 1983. Indeed, § 1983 is the sole basis for relief listed in every version of the complaint. App. 1547–48, App. 29–31, App. 47–49, App. 158–61, App. 198–200. Thus, the Registrants could obtain judgment only to the extent they suffered constitutional deprivations by persons acting "under color of

state law." CBI raised this argument below, explaining that "[a]ny negative effects Plaintiffs have experienced … are not related to the manner in which … CBI [has] applied the statute or managed the sex offender registry." App. 684.

The District Court's Order. The district court's order disregarded the two basic legal requirements described above. It was based explicitly on (1) the alleged harms experienced by non-parties and (2) the actions of non-state individuals and entities.

First, the order relied heavily on "the experience of *others*." Order at 24 (emphasis added). For example, the court cited the testimony of a city official who described a local ordinance that CBI has no authority over and no role in administering. *Id.* at 26. That ordinance imposes residency restrictions, but none of the Registrants were subject to it. *See* App. 682; *see generally* App. 965–1079 (Tr. 109:7–223:21) (Registrants' trial testimony). Another non-party testified that she was subject to negative treatment when she allowed a non-plaintiff sex offender to live with her. Order at 27. And still another witness, the spouse of a non-plaintiff sex offender, testified to her own negative experiences. *Id.* at

27. Basing the judgment below on the circumstances of these non-parties violated the permissible scope of this as-applied challenge. *Scherer*, 653 F.3d at 1243.

Second, the district court failed to assign any legal significance to the fact that the Registrants' and non-parties' alleged harms were the result of actions by non-state actors, not CBI. The district court specifically found that CSORA imposed "punishment" under the Eighth Amendment "*not by the state*, but by … fellow citizens." Order at 24 (emphasis added); *see also* Order at 18, 34, 41. Similarly, the district court concluded that the Registrants' right to substantive due process was violated because of private actions that went "beyond [any punishments] imposed through the courts." Order at 41.

For example, the Registrants were subject to background checks by employers and landlords. Order at 8, 9, 13, 15. But neither CBI nor CSORA requires background checks, and in any event, a background check discloses an offender's criminal history regardless of what appears in the Registry. *See* App. 957–58 (Tr. 101:19–102:5); *see also* App. 1269–71 (Registrant Vega's criminal history report). And while

Knight was subject to a policy imposed by a local school district that prohibits sex offenders on school grounds, Order at 13–14, CBI has no responsibility for this policy, CSORA does not require it, and Knight challenged the policy in court and lost. *See* App. 300–02; *see also* App. 1039 (Tr. 183:20–22). The non-parties' experiences were likewise the result of the conduct of non-state actors; for example, one non-party's testimony was based on the actions of "a Roman Catholic archdiocese." Order at 27.

None of these actions, whether specific to the Registrants or to the non-party witnesses, was committed by persons acting under color of state law. CSORA does not restrict where the Registrants may live or work, nor does it require that employers or landlords conduct background checks or consult the Registry. If the district court is correct, and the public's reaction to a criminal conviction makes the State's publication of the conviction actionable under § 1983, it is unclear how any conviction could be published. *Cf. Smith*, 538 U.S. at 101 ("[T]hese consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a

matter of public record. The State makes the facts … accessible so *members of the public* can take the precautions they deem necessary ….” (emphasis added)). The district court, by holding CBI liable for private conduct, violated a basic “jurisdictional requisite” of § 1983. *Jojola*, 55 F.3d at 492.

II. The district court contravened established Supreme Court and Tenth Circuit precedent in concluding that CSORA violates the Eighth Amendment.

The Eighth Amendment prohibits “cruel and unusual punishments.” U.S. CONST., amend. VIII. This prohibition contains two conjunctive legal elements: first, the deprivation at issue must qualify as “punishment”; second, the “punishment” must rise to the level of being “cruel and unusual.” *See Carney v. Okla. Dep’t of Public Safety*, 875 F.3d 1347, 1352 (10th Cir. 2017). These elements are not easy to satisfy. The Eighth Amendment proscribes only “inherently barbaric punishments” such as torture and punishments that are “grossly disproportionate.” *United States v. Gurule*, 461 F.3d 1238, 1247 (10th Cir. 2006).

Below, the district court concluded that CSORA imposed a criminal "punishment" and that this punishment was "cruel and unusual." It did so by (1) failing to follow binding precedent from both the Supreme Court and this Circuit, which has held that sex offender registry laws similar to, or more stringent than, CSORA are non-punitive; (2) misapplying the factors that determine whether a law is punitive; and (3) ignoring recent, on-point case law establishing that sex offender registries more stringent than CSORA are not "cruel and unusual." Order at 19–36. This Court should accordingly reverse under a *de novo* standard of review. *Shaw*, 823 F.3d at 562 (in an appeal from a bench trial, reviewing *de novo* whether a sex offender registry amounted to punishment).

A. Binding precedent establishes that sex offender registry requirements identical to, or more onerous than, CSORA do not constitute "punishment."

The test for whether a law imposes a "punishment" is well established and proceeds in two steps.[9] The first looks to the legislature's espoused intent: did the legislature intend to impose punishment? *Smith*, 538 U.S. at 92. Here, the district court correctly found that the intent of CSORA is not punitive. App. 716; *see also* COLO. REV. STAT. §§ 16-22-110(6)(a) & -112(1) (expressing CSORA's non-punitive intent).

The second step in the "punishment" analysis is to determine "whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Smith*, 538 U.S. at 92 (citation omitted) (alterations in *Smith*). Out of deference to state

[9] The test for "punishment" under the Eighth Amendment is identical to the test for "punishment" under the *ex post facto* clause. *State v. Petersen-Beard*, 377 P.3d 1127, 1130–31 (Kan. 2016) (collecting federal cases). Thus, precedent under the *ex post facto* clause—*Smith*, for example—is relevant here. *See United States v. Under Seal*, 709 F.3d 257, 263–66 (4th Cir. 2013).

legislatures, "'only the *clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" *Id.* (citation omitted) (emphasis added).

This "effects" analysis is governed by a range of considerations, often called the "*Mendoza-Martinez*" factors. *See Smith*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). The Tenth Circuit has twice exhaustively applied this factor-based test to state sex offender registry acts. In both cases, the Court determined that the acts were not punitive.

In *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000), the Court reviewed Utah's sex offender registry, which required disclosure of a variety of information that was then posted online. *Id.* at 1247–48. Only one *Mendoza-Martinez* factor (whether the behavior was already a crime) "even somewhat suggest[ed] that the Internet notification scheme constitute[d] criminal punishment"; the Court therefore held that Utah's statute was non-punitive. *Id.* at 1249–53.

In the second case, *Shaw v. Patton*—decided just two years ago—this Court considered Oklahoma's registry act. That act is more

restrictive than CSORA: it includes weekly, in-person reporting by certain offenders and restricts where offenders may live. *Shaw*, 823 F.3d at 559–60, 563 n.11. Reviewing the "most relevant" factors from *Smith*, the Court concluded that Oklahoma's law is also non-punitive. *Id.* at 563–77.[10]

Applied here, *Femedeer* and *Shaw*—as well as the Supreme Court's analysis in *Smith*—point to only one legal conclusion: CSORA is not punitive. The following table summarizes each provision of CSORA at issue here and lists relevant precedent establishing that a similar or more onerous provision is non-punitive:

[10] In two other unpublished cases, the Court held that SORNA and New Mexico's registry act are non-punitive. *United States v. Davis*, 352 Fed. App'x 270, 272 (10th Cir. 2009) (unpublished) (relying on established precedent to hold that SORNA does not violate the Eighth Amendment); *Herrera v. Williams*, 99 Fed. App'x 188, 190 (10th Cir. 2004) (unpublished) (concluding that "sex offender registry laws … impose only *civil* burdens upon sex offenders and do not implicate *criminal* punishments" (emphasis in original)).

CSORA Provision	Binding Case Holding Similar or More Burdensome Provision Non-punitive
Publication of offender's name: COLO. REV. STAT. §§ 16-22-110(6)(f) & -111(1)	*Smith* *Shaw* *Femedeer*
Publication of address: COLO. REV. STAT. §§ 16-22-110(6)(f) & -111(1)	*Smith* *Shaw* *Femedeer*
Publication of physical description: COLO. REV. STAT. § 16-22-111(1)	*Smith* *Shaw* *Femedeer*
Publication of photograph: COLO. REV. STAT. §§ 16-22-110(6)(f) & -111(1)	*Smith* *Shaw* *Femedeer*
Publication of date of birth: COLO. REV. STAT. §§ 16-22-110(6)(f)	*Smith* *Shaw*
Publication of triggering offense: COLO. REV. STAT. §§ 16-22-110(6)(f) & -111(1)	*Smith* *Shaw*
Regular in-person reporting: COLO. REV. STAT. § 16-22-108(1) & (2)	*Shaw*

The district court, however, failed to follow this established law. It did not cite *Femedeer* at all. And it concluded that it was not bound by

Shaw because *Shaw* was an as-applied case. Order at 23.[11] Instead, the district court relied on extra-jurisdictional decisions and the dissenting opinions in *Smith*. *See, e.g.*, Order at 25 (citing various inapposite cases).[12]

As one Colorado court recently recognized, the district court's opinion "cuts against a majority of not only Colorado, but also United States Supreme Court precedent." Attachment 2 at 4. The district court's aberrant ruling under the Eighth Amendment must be reversed.

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[11] This's Court's decisions are binding on the district courts of this Circuit not just for their "narrow holdings" but also for "the reasoning underlying these holdings." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

[12] Even the district court acknowledged that the out-of-jurisdiction cases on which it relied have limited relevance. Order at 22, n.7. Most were decided under state constitutional provisions, not federal law. *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Doe v. State*, 111 A.3d 1077 (N.H. 2015); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013). And several involved registry laws more burdensome than CSORA. *E.g.*, *Does v. Snyder*, 834 F.3d 696, 698 (6th Cir. 2016) (reviewing a law prohibiting registrants from living, working, and loitering within 1,000 feet of a school). This Court has explicitly rejected the analysis in at least one of these cases. *Shaw*, 823 F.3d at 562–63 (rejecting the analysis in *Starkey*).

B. The district court's analysis of the seven *Mendoza-Martinez* factors, resulting in its conclusion that CSORA is "punitive," was legally erroneous.

Because it ignored on-point, binding precedent, the district court misapplied several of the *Mendoza-Martinez* factors and ultimately arrived at an incorrect conclusion about the constitutionality of CSORA. A proper application of the *Mendoza-Martinez* factors establishes that CSORA is not punitive.

In *Smith*, the Supreme Court identified the *Mendoza-Martinez* factors that are "most relevant" when reviewing a sex offender registry: whether the regulatory scheme (1) is rationally connected to a non-punitive purpose; (2) has historically been regarded as punishment; (3) imposes an affirmative disability or restraint; (4) promotes retribution and deterrence, the traditional aims of punishment; and (5) is excessive in relation to its non-punitive purpose. 538 U.S. at 97. Two final factors—which receive little weight—ask whether the regulation is triggered only upon a finding of scienter and whether the

behavior to which the regulation applies is already a crime. *Id.* at 105. Each of these factors is discussed below.

1. Rational relation to a non-punitive purpose.

Whether a registry statute has a "'rational connection to a non-punitive purpose'" is the "'most significant factor'" under *Mendoza-Martinez*. *Shaw*, 823 F.3d at 573 (quoting *Smith*, 538 U.S. at 102). The district court correctly concluded that CSORA's registration requirements have a rational connection to CSORA's public safety purpose. Order at 31. This was consistent with the CBI Director's testimony that the sex offender registry information "can be very valuable and has proven dispositive in investigations, for example in missing children [cases]." App. 891–95 (Tr. 35:11–39:24).

2. Resemblance to traditional forms of punishment.

The district court concluded that CSORA is similar to shaming, banishment, and parole and probation. Order at 25–27. These conclusions were contrary to binding case law.

Shaming. In *Smith*, the Supreme Court rejected the idea that disclosure of information on a sex offender registry is similar to the colonial punishment of "shaming." *Smith*, 538 U.S. at 98–99. Such comparisons are, in the words of the Supreme Court and this Court, "misleading" and "inapt." *Id.* at 98; *Femedeer*, 227 F.3d at 1250; *see also Shaw*, 823 F.3d at 563 n.11. This is because shaming requires more than making information available to the public. *Smith*, 538 U.S. at 98; *Femedeer*, 227 F.3d at 1250–51. Instead, shaming occurs when the government itself "[holds] the person up before his fellow citizens … face-to-face." *Smith*, 538 U.S. at 98.

CSORA does not fit this description. Like the Alaska registry in *Smith* and Utah's registry in *Femedeer*, it merely makes information available to individuals who look for it. *Smith*, 538 U.S. at 99; *Femedeer*, 227 F.3d at 1251. And as the Supreme Court noted regarding the Alaska registry, Colorado's sex offender website "does not provide the public with the means to shame the offender by, say, posting comments underneath his record." *Smith*, 538 U.S. at 99. CSORA is not similar to shaming.

Banishment. Unlike CSORA, some state sex offender statutes include residency restrictions. For example, Oklahoma prohibits offenders from "living within 2,000 feet of a school, playground, park, or child care center." *Shaw*, 823 F.3d at 559. Yet even these restrictions do not resemble the punishment of "banishment" because although they prevent offenders from "liv[ing] in some areas," they do not "expel[offenders] from a community." *Id.* at 568.

The same reasoning applies here, but with even greater force. CSORA contains no residency restrictions, does not limit where a person can work, and does not limit where a person can be present. CSORA has not "expelled" the Registrants from a community. *Id.* It therefore does not resemble banishment.

Parole and Probation. The district court, relying on the out-of-circuit case *Does v. Snyder*, concluded that CSORA resembles parole and probation because it requires "frequent in-person reporting [*i.e.*, quarterly or annually], enforced by potential criminal punishment." Order at 27 (citing *Snyder*, 834 F.3d at 703). This conclusion is inconsistent with the law of this Circuit.

In *Shaw*, the Court considered a statute that was more onerous than CSORA: it required the plaintiff to report to law enforcement *weekly*. 823 F.3d at 568. The Court nonetheless rejected a comparison to probation, recognizing that probation involves far more than reporting. *Id.* at 564. Specifically, probation typically involves intrusive supervision that amounts to the State taking an "active role in [the] probationer's life"; the imposition of "multiple conditions" such as "written consent from a probation officer if the probationer moved or changed jobs"; and a deferred sentence of imprisonment that can be immediately reinstated if one of the conditions of probation is violated. *Id.* at 564–65.

CSORA does not have these attributes. As applied to the Registrants, CSORA imposed either a quarterly (Millard) or annual (Knight and Vega) in-person reporting requirement. But the Registrants were not supervised by an officer that took an active role in

their lives.[13] CSORA did not impose conditions on their conduct. And CSORA's registration requirement is not part of a deferred sentence that can be reinstated. Failure to register instead "is a proceeding separate from the … original offense." *Id*. at 566 (quoting *Smith*, 538 U.S. at 102). CSORA therefore does not resemble parole or probation.[14]

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[13] Some evidence mentioned efforts by local law enforcement agencies to verify Millard's residency. App. 989 (Tr. 133:11–22). But those efforts do not amount to "active involvement" under *Shaw* and, in any event, they were not carried out by CBI nor required by CSORA.

[14] One difference between the Oklahoma statute in *Shaw* and CSORA merits discussion. CSORA requires, in some circumstances, disclosure of Internet identifiers (*e.g.*, chatroom screen names) before a registrant may use them. COLO. REV. STAT. § 16-22-108(2.5)(a). Neither Vega nor Knight is subject to this requirement, making it irrelevant to their challenges. Millard, however, disclosed this information to CBI through an apparent misunderstanding. App. 943–44 (Tr. 87:8–88:12), 969–70 (Tr. 113:24–114:24). Because CSORA does not require Millard to report this information, it is not properly part of the constitutional analysis. But even if the Court considers the requirement, it does not transform CSORA into a form of parole or probation. Contrary to the district court's conclusions, the requirement to report online screen names is nothing like the severe Internet restrictions at issue in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). *See* Order at 28–29. That case involved a flat prohibition against offenders accessing broad swaths of the internet. 137 S. Ct. at 1733–34. It was this "severe restriction" that was unconstitutional; not a reporting requirement. *Compare* Order at 28 (quoting *Packingham*, 137 S. Ct. at 1737) *with Packingham*, 137 S. Ct. at 1738.

3. Imposition of an affirmative disability or restraint.

The district court concluded that CSORA imposes an affirmative disability or restraint in two ways: by requiring the Registrants to regularly report in person and by imposing what in the district court's view are "restraints on Plaintiffs' abilities to … freely live their lives." Order at 29–30. These conclusions were incorrect.

In-Person Reporting. In-person reporting does not make CSORA punitive. This Circuit has concluded (in line with many other circuits) that "reporting requirements [even reporting requirements more onerous than CSORA's] are not considered punitive." *See Shaw*, 823 F.3d at 568–70 (collecting cases from the First, Second, Fourth, Ninth, and Eleventh Circuits).

Other Restrictions. As with the statute in *Smith*, CSORA "imposes no physical restraint." *Smith*, 538 U.S. at 100. It "does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *See id.*; *see also Femedeer*, 227 F.3d at 1250.

The Registrants did testify to difficulties they experienced because of their criminal histories. But those difficulties were not the result of CSORA itself. Millard experienced difficulty finding housing, but this was the result of private individuals choosing not to rent to him, not a statutory residency restriction. Order at 9–10. Vega was not permitted to work at certain job sites, but this was due to decisions that property owners or his employer made, not a requirement of CSORA (and those decisions were based on background checks, which exist apart from CSORA and are not related to the Registry). Order at 15; App. 1061–64 (Tr. 205:9–208:13). A local school district policy prevented Knight from entering school property, but this policy was created by a separate local government entity (over which Knight sued and lost); it is not a policy of CBI or a requirement of CSORA. Order at 13; App. 300–15.[15]

As the Supreme Court recognized, being convicted of a sex-related offense can have "a lasting and painful impact on the convicted sex

[15] The district court also considered the experiences of non-parties. As explained above in Part I of the Argument, doing so exceeded the scope of this as-applied challenge.

offender." *Smith*, 538 U.S. at 101. But that impact is the result of "the fact of conviction, already a matter of public record." *Id.* Publishing that fact on a registry does not amount to an "affirmative disability or restraint" under the constitution. *Id.* at 99 (quoting *Mendoza-Martinez*, 372 U.S. at 168).

4. Promotion of the traditional aims of punishment.

The district court concluded that CSORA promotes deterrence and retribution—two traditional aims of punishment—to such an extent that CSORA must be considered punitive. The district court again erred.

Deterrence. "Any number of governmental programs might deter crime without imposing punishment." *Smith*, 538 U.S. at 102. Thus, the fact that a statute may have a deterrent effect does not necessarily mean it amounts to criminal punishment. *Id.*; *Shaw*, 823 F.3d at 571 (collecting cases and holding that "[d]eterrence is not unique to punishment, for any civil regulation likely has some deterrent effect"). In *Smith*, the State conceded that Alaska's registry "might deter future

crimes," but the Court rejected the argument that this deterrent impact made the registry punitive. 538 U.S. at 102. Similarly, this Circuit concluded—with respect to a statutory framework more burdensome than CSORA—that a registry imposing weekly reporting requirements and a residency restriction did not have a "sufficiently strong deterrent effect to render the Oklahoma statute punitive." *Shaw*, 823 F.3d at 571.

Here, CBI's Director agreed that "[t]here's … a deterrent effect of having [the registry information] available." App. 866 (Tr. 10:7–8). The Director was "hopeful that [an offender's inclusion on the Registry] would, in part, and probably lots of other reasons, would prevent them from re-offending." App. 871 (Tr. 15:18–24). Under *Smith* and *Shaw*, these statements fall far short of the evidence necessary to prove that CSORA promotes deterrence to such an extent that it is punitive. Yet the district court relied on these statements without even mentioning *Smith* and *Shaw*. Order at 30–31. The district court's failure to heed precedent requires reversal. As in *Smith* and *Shaw*, CSORA does not promote deterrence to such an extent that it must be considered punitive.

Retribution. The district court concluded that CSORA is retributive because it imposes a registration requirement based on "a past action … and not on an individualized assessment of an offender's level of dangerousness." Order at 3. But "[f]or a statute to be so retributive that it constitutes punishment, [the offender] must show that the statute's effect lacks a reasonable relationship to non-punitive objectives." *Shaw*, 823 F.3d at 572 (citing *Smith*, 538 U.S. at 102). In *Shaw*, this Court held that an in-person reporting requirement was "rationally designed to promote public safety," and it held that even a residency restriction—which CSORA does not impose—is a reasonable means of reducing recidivism "by minimizing temptations and opportunities for sex offenders to prey on children." *Id.* at 572–73.

That CSORA, like other registry statutes, bases its registration requirements on past offenses does not change the analysis. The registration requirement in *Smith*, for example, was based on "the extent of the wrongdoing, not … the extent of the risk posed," yet that registry act was not considered to promote retribution. 538 U.S. at 102. The same was true in *Shaw*, where the reporting and residency

requirement were "applied categorically without regard for his individualized risk to the public." 823 F.3d at 571–72.

The district court made no attempt to explain how CSORA materially differed from the registries in *Smith* and *Shaw* such that CSORA promotes retribution while those registries did not. Given that *Shaw* considered a more restrictive statute but still found the statute non-punitive, no such distinction exists.

5. Excessiveness in relation to a non-punitive purpose.

The district court held that CSORA's registration and disclosure requirements are "excessive" because they are "not linked to a finding that public safety is at risk in a particular case." Order at 32. But States may create sex offender registry rules that apply categorically. *Shaw*, 823 F.3d at 575; *see also Smith*, 538 U.S. at 103–04. It is only when a State imposes "particularly harsh disabilities or restraints" that an individualized assessment is necessary. *Shaw*, 823 F.3d at 575.

A regular reporting requirement is not such a harsh disability that it requires an individualized assessment. *Id.* at 576. In *Shaw*, the

offender was required to report on a weekly basis because he was transient. *Id.* Despite this categorical rule, and despite the more onerous weekly reporting requirement, this Court concluded the requirement was reasonable "in light of the statute's non-punitive purpose of protecting public safety." *Id.*

The same is true here. Indeed, even the district court acknowledged that "there is at least some rational connection between sex offender registration requirements similar to Colorado's and the avowed regulatory purpose of public safety." Order at 31.

6. Requirement of scienter.

Whether CSORA's obligations are triggered by a finding of scienter is of little relevance. *See Smith*, 538 U.S. at 1154. But even if relevant, this factor weighs against finding CSORA punitive. The district court erred in reaching the opposite conclusion because it examined the underlying criminal offenses. *See* Order at 32–33. As *Femedeer* explained, the correct analysis is whether CSORA—on its face—contains a scienter requirement, not whether the underlying offenses have a scienter requirement. 227 F.3d at 1251–52. Like the

registry act in *Femedeer*, CSORA contains no scienter requirement itself; it applies to any person who is convicted under particular criminal statutes. *Compare id. with* COLO. REV. STAT. §§ 16-22-102(9) & -103.

7. Application to conduct that is already a crime.

As with the scienter factor, the final factor—whether CSORA applies to behavior that is already a crime—is of little relevance to the punishment analysis. *See Smith*, 538 U.S. at 105. To the limited extent this factor affects the analysis, it weighs in favor of treating CSORA as punitive, because CSORA is triggered by a criminal conviction.

* * *

The above discussion demonstrates that, of the seven *Mendoza-Martinez* factors, six—including the five most relevant ones—weigh against treating CSORA as punitive. The only factor that weighs in favor of treating CSORA as punitive (whether CSORA applies to conduct that is already a crime) is "of little weight." *Id*. This lone strike against CSORA falls far short of the "clearest proof" necessary to deem

it punitive under *Mendoza-Martinez*. *Id*. at 92. The district court, in concluding otherwise, contravened established precedent.

C. Even if CSORA were deemed punishment, which it is not, its requirements are not "cruel and unusual."

CSORA is a registration and notification scheme. Under the established precedent discussed above, it does not rise to the level of punishment. But even assuming CSORA amounts to punishment, it is not "cruel and unusual" in violation of the Eighth Amendment.[16]

Again, this Court's established case law is dispositive. Four months ago, the Court considered whether a more restrictive sex offender statute—which required registrants' driver licenses to feature

[16] The district court stated that CBI's closing argument below "d[id] not address the question whether, if sex offender registration is punishment, it is disproportionate or otherwise constitutionally unsound." Order at 34. But whether CSORA violates the Eighth Amendment—including whether it is "cruel and unusual"—was argued extensively, *see, e.g.*, App. 576–79, App. 666–67, and the district court issued substantial findings regarding both the punishment and cruel-and-unusual prongs. *See* Order at 19–36. Additionally, whether CSORA is cruel and unusual was argued explicitly on summary judgment, App. 576, and this appeal encompasses the district court's denial of summary judgment. *AdvantEdge Bus. Grp. v. Thomas E. Mestmaker & Assocs.*, 552 F.3d 1233, 1236–37 (10th Cir. 2009).

a notice identifying the license holder as a sex offender—constituted cruel and unusual punishment. *Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347 (10th Cir. 2017). The Court held that it did not.

The Court recognized that "punishment is cruel and unusual if it is 'grossly disproportionate to the severity of the crime.'" *Id.* at 1352 (quoting *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)). It then reviewed several Supreme Court cases concluding that the following sentences were not cruel and unusual:

- a life sentence for three theft-based felonies resulting in about $230 in losses;
- a 25-year sentence for stealing golf clubs;
- a life sentence for possessing 672 grams of cocaine; and
- a 40-year sentence for possessing nine grams of marijuana.

Id. In light of these decisions, the Court concluded that requiring a registrant's status to be included on his driver's license cannot be "cruel and unusual." *Id.*

Here, Millard pleaded guilty to second-degree sexual assault. Order at 7. Knight pleaded guilty to attempted sexual assault on a

child. Order at 11. Vega pleaded guilty to third-degree sexual assault involving four victims. Order at 14; *see* App. 1478 (Tr. 34:13–20). These were serious crimes. Under this Circuit's established precedent, requiring the Registrants to visit a law enforcement agency annually (Knight and Vega) or quarterly (Millard) to make a limited amount of information available to the public was not "grossly disproportionate." *Carney*, 875 F.3d at 1352.[17]

III. CSORA does not violate the Registrants' due process rights.

The district court held that CSORA violates both procedural and substantive due process protections. App. 729–34. Again, these

[17] While the analysis in this Part II of the Argument applies to all three Registrants, Vega's situation presents an additional issue: whether his deregistration proceedings resulted in cruel and unusual punishment. Order at 35–36. The district court concluded that those proceedings did constitute punishment because, in the district court's view, they imposed on Vega a requirement that he engage in additional offense-specific treatment. Order at 35–36. This conclusion was simply incorrect. *See* Part III.A.2 of the Argument, below. In any event, requiring Vega to file a petition to deregister and satisfy statutory requirements does not violate the Eighth Amendment.

conclusions were based on the failure to apply proper legal standards or failure to heed on-point precedent.

A. Vega's procedural due process claim fails because the district court lacked jurisdiction to consider it and Vega received the process to which he was entitled.

The district court concluded that Vega's procedural due process rights were violated because of how two separate Colorado magistrate judges interpreted and applied CSORA's deregistration provisions. Order at 36–38.[18] In coming to this conclusion, the district court effectively sat as an appellate tribunal, reviewing the proceedings of Colorado state courts and determining whether those courts properly applied state statutes and made correct factual findings.

[18] Vega never raised a procedural due process claim. It was not part of the complaint, nor was it included in the pre-trial description of his claims. App. 198–200; App. 621. His written closing alluded to the possibility of a procedural due process issue without specifying that he was making such a claim. App. 656–57. Even under modern "liberalized pleading rules," plaintiffs may not "wait until the last minute to ascertain and refine the theories on which they intend to build their case." *Green Country Food v. Bottling Grp.*, 371 F.3d 1275, 1279 (10th Cir. 2004).

This was error. The district court did not have jurisdiction to act as a court of appeals. And, in any event, the procedures the magistrates employed in Vega's deregistration proceedings were consistent with due process.

1. The district court lacked subject-matter jurisdiction to engage in appellate review of Vega's deregistration petitions.

A federal district court may not exercise appellate jurisdiction "over claims actually decided by a state court." *Mo's Express LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006) (internal quotation marks omitted). This rule, known as the *Rooker-Feldman* doctrine, takes its name from two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Both of those cases involved "state-court losers complaining of injuries caused by state-court judgments … and inviting district court review and rejection of those judgments." *Mo's Express*, 441 F.3d at 1234 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 284 (2005)). Federal district courts presented with these types of claims

lack subject-matter jurisdiction to adjudicate them. *Exxon Mobil*, 544 U.S. at 284.

Yet this is exactly the type of claim the district court entertained. Vega's claim, as described by the district court, was that the magistrates presiding over his deregistration petitions (1) misapplied state law and (2) erred as a matter of fact in concluding that Vega had not successfully completed offense-specific treatment. Order at 36–38. Based on these purported errors, Vega sought an order to "reverse or undo" the judgment of the state magistrates. *Mo's Express*, 441 F.3d at 1237. The district court lacked jurisdiction to do so. *Id.*

As even the district court acknowledged, Vega could have, but failed, to appeal the magistrates' deregistration decisions. Order at 15 ("[Vega's] petitions … were heard and denied by magistrates. He did not appeal."); App. 617 ("Vega could have appealed these denials under the Colorado Rules for Magistrates. He did not do so."). Vega did not dispute his right to appeal these judgments or his failure to do so. App. 1065 (Tr. 209:17–21), 1073–74 (Tr. 217:22–218:16). That makes this a "paradigm situation in which *Rooker-Feldman* precludes a federal

district court from proceeding. To grant [Vega] relief would require an inferior federal court to determine that the [Colorado] court's judgment was erroneous and would foreclose implementation of that judgment." *E.B. v. Verniero*, 119 F.3d 1077, 1090–91 (3d Cir. 1997); *see also Exxon Mobil*, 544 U.S. at 293 (quoting this passage from *Verniero*). *Rooker-Feldman* thus requires reversal of the district court's procedural due process holding.[19]

2. The state magistrates did not act in an arbitrary and capricious manner and thus did not violate Vega's procedural due process rights.

The district court concluded that the state magistrates misinterpreted CSORA's deregistration provisions by requiring Vega to prove he was not "likely to reoffend" and had completed required sex offender treatment. Order at 37. The district court also concluded that

[19] Separately, CBI is not responsible for alleged procedural due process violations it did not commit. CBI was not a party to Vega's deregistration proceedings and had no role in deciding whether Vega should be allowed to deregister. *See* Part I of the Argument, above.

there was no evidence supporting the magistrates' conclusion that Vega failed to "complete[ ] offense specific treatment." *Id*.

Attempts to turn purported state court errors into procedural due process claims are generally baseless. It is only "in rare circumstances [that] a determination of state law can be 'so arbitrary or capricious as to constitute an independent due process ... violation." *Cummings v. Sirmons*, 506 F.3d 1211, 1237 (10th Cir. 2007) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). The standard is necessarily high; if it were not, every party who believes a state court misinterpreted state law could bring a due process claim. The scenario here falls far short of the "arbitrary or capricious" standard.

First, it was not unreasonable for the magistrates to conclude that the petitioner, Vega, should bear the burden of demonstrating that he was not likely to reoffend. The statute requires a court to consider "whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior." *See* COLO. REV. STAT. § 16-22-113(1)(e). Vega was the one seeking relief; placing the burden on him was a reasonable interpretation of the statute, not an arbitrary or

capricious deprivation of his due process rights. *Cf. People v. Carbajal*, 312 P.3d 1183, 1190 (Colo. App. 2012) (explaining that the deregistration statute "leave[s] *to the discretion of the trial court* the ultimate decision of whether to grant a petition requesting discontinuation of sex offender registration, *as well as the factors to consider* in making that decision" (emphasis added)).

Second, it was not improper for the magistrates to condition Vega's ability to deregister on his successful completion of offense-specific treatment. Order at 37–38. The deregistration statute requires "the successful completion of and discharge from a juvenile sentence or disposition." COLO. REV. STAT. § 16-22-113(1)(e). The magistrate judge noted that Vega's sentence would have necessarily included offense-specific treatment, a point on which she was not challenged. *See* App. 1504 (Tr. 8:20–22), 1509–10 (Tr. 13:15–14:23). Thus, she concluded that to successfully complete his sentence he needed to successfully complete his offense-specific treatment. She was not imposing a new, additional requirement, as the district court appears to have believed. Order at 38. She was stating that for Vega to prove his "successful completion" of his

juvenile sentence, he needed to show successful completion of offense-specific treatment. That is a reasonable reading of the statute.[20]

Finally, all of the magistrates expressed concerns regarding Vega's possibility for reoffending based on the testimony and evidence that was presented to them. *See* App. 1438–43 (Tr. 23:21–28:2), 1484–95 (Tr. 40:19–51:10), 1515–26 (Tr. 19:15–30:7). At the most recent hearing, the magistrate was provided with an evaluation of Vega, and she noted a variety of concerns that evaluation raised. App. 1506–09 (Tr. 10:24–13:14). The magistrates did not arbitrarily and capriciously deny Vega's deregistration petition; they considered the information presented to them and made reasonable findings in their role as fact

[20] The district court was incorrect in stating that the magistrates required Vega to complete *additional* offense-specific treatment. Order at 38. Neither magistrate believed that Vega completed *any* offense-specific training. Their decisions were not arbitrary but anchored in evidence presented at the deregistration proceedings. App. 1441–42 (Tr. 26:19–27:19); App. 1486–89 (Tr. 42:16–45:12), 1490–93 (Tr. 46:18–49:14); App. 1521–23 (Tr. 25:9–27:9). The district court stated that Vega's "own unrebutted testimony" showed that he completed treatment, Order at 37, but that is contrary to the record, *e.g.*, App. 1492 (Tr. 48:8–22). And, again, that factual conclusion was reviewable on appeal to the state courts, and was therefore outside the district court's jurisdiction under *Rooker-Feldman*.

finder. There was no procedural due process violation. The district court's decision should be reversed.

B. The district court erred in finding a violation of the Registrants' substantive due process rights.

The Due Process Clause, in addition to governing procedural matters, encompasses "a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (internal citations and quotations omitted). But the substantive due process doctrine is limited. Unless the government has acted in an "egregious" manner or has infringed a "fundamental right," a challenged government action need only "be rationally related to legitimate government interests." *See id.* at 846; *Washington v. Glucksberg*, 521 U.S. 702, 719–21, 728 (1997).

The district court concluded that there is "a rational relationship between [CSORA's] registration requirements and the legislative purpose of giving members of the public the opportunity to protect themselves and their children from sex offenses." Order at 41. This

should have ended the substantive due process analysis because CSORA does not trigger heightened scrutiny. *See Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) ("[A] state's publication of truthful information [through a sex offender registry] does not infringe … fundamental constitutional rights …."); *Doe v. Tandeske*, 361 F.3d 594, 596–97 (9th Cir. 2004) (per curiam) ("[P]ersons who have been convicted of serious sex offenses do not have a fundamental right to be free from … registration and notification requirements ….").

Nonetheless, the district court held that CSORA "enter[s] [a] 'zone of arbitrariness' that violates the due process guarantee of the Fourteenth Amendment." Order at 40–41. The Registrants, meanwhile, argued that CSORA violates their rights to "liberty" and "privacy." Order at 39. Neither the district court's conclusion, nor the Registrants' arguments, have merit.[21]

[21] At the threshold, the district court erred in analyzing the Registrants' claims under substantive due process at all. The proper standard is whether CSORA constitutes "cruel and unusual punishment" under the Eighth Amendment. "Where a particular Amendment provides an explicit textual source of constitutional

Arbitrariness. The district court's substantive due process holding was grounded in the notion that CSORA involves a "zone of arbitrariness" because "the public has been given, commonly exercises, and has exercised against these plaintiffs the power to inflict punishments beyond those imposed through the courts, and to do so arbitrarily." Order at 41 (emphasis added). This conclusion was erroneous.

CSORA itself requires only registration and the publication of information. As the Registrants' own experiences demonstrate, this information can be obtained from sources apart from the Registry, including through background checks. Order at 15 & n.5. Of course the public may, based on this information, "take the precautions they deem necessary before dealing with [a] registrant," *Smith*, 538 U.S. at 101, but that does not make the publication itself arbitrary. "Dissemination of information about criminal activity has always held the potential for

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protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Lewis*, 523 U.S. at 842 (citation omitted).

substantial negative consequences for those involved in that activity. … [Yet] our law has always insisted on public indictment, public trial, and public imposition of sentence, all of which necessarily entail public dissemination of information ….” *Femedeer*, 227 F.3d at 1251 (quoting *Verniero*, 119 F.3d at 1099–1100).

Given the longstanding history of publicizing information about suspects and convicted criminals, there is little if any case law to support the district court’s substantive due process holding. Indeed, the district court did not cite a single case supporting the notion that sex offender registries implicate substantive due process. Instead, it cited a line of cases involving the excessiveness of civil punitive damages awards. This line of cases, the district court acknowledged, “was not cited in the arguments of counsel,” Order at 40 n.12, and it has never been used to evaluate the constitutionality of sex offender registries.

The proper standard for judging whether government conduct is “arbitrary” as a matter of substantive due process is the “shocks the conscience” test. *Lewis*, 523 U.S. at 846. “[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense.”

Id. Sex offender registries, however, exist in every State and at the federal level. They are imposed against those who, like the Registrants, have been adjudged guilty of serious crimes of substantial concern to law enforcement and the community. No case law supports the notion that sex offender registries like CSORA (which is more modest than other registry laws this Court itself has found constitutional) are "egregious" and "shock the conscience."

Liberty and Privacy. The Registrants' substantive due process claims are based on their rights to privacy and liberty. *See* Order at 39. Other courts have specifically rejected the argument that sex offender registries violate these rights. *Moore*, 410 F.3d at 1345; *Tandeske*, 361 F.3d at 596–97. It is unclear whether the district court credited these arguments. Order at 39–40. But on independent examination, the Registrants' claims are legally unsupported.

The Registrants' liberty claims fail because CSORA does not restrict where they may live and work, with whom they may associate, or how they interact with society. *Cf. Shaw*, 823 F.3d at 570 (holding that even a law restricting where sex offenders may live "does not

constitute an affirmative disability or restraint that is considered punitive"). Any other restrictions the Registrants rely upon were imposed by third parties on their own initiative and not as part of CSORA. *See* Part I of the Argument, above.

The Registrants' privacy claims fare no better. In *Paul v. Davis*, a local police department circulated a flyer of "active shoplifters" containing each subject's name and picture. 424 U.S. 693, 694–95 (1976). The Supreme Court rejected the contention that "the State may not publicize a record of an official act such as an arrest," because no case law "hold[s] this or anything like this." *Id.* at 713. Indeed, a person's criminal history—even when it has been expunged—is not so "highly personal or intimate" that it qualifies for protection under the substantive due process doctrine. *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995).

Knight's and Millard's convictions are matters of public record, rendering information about them outside the scope of a legitimate expectation of privacy. The same is true of Vega's conviction for failure to register. And regarding Vega's juvenile sex offense—which is not on

the CBI website but may be disclosed through a written request made directly to CBI, Order at 15—this Circuit has recognized that minors likely do "not have any privacy rights in their concededly criminal sexual conduct." *Aid for Women v. Foulston*, 441 F.3d 1101, 1117–18 (10th Cir. 2006).[22]

CONCLUSION

The district court's order should be reversed as a matter of law and remanded with direction to enter judgment for CBI.

STATEMENT REGARDING ORAL ARGUMENT

The district court's order, and the legal analysis embodied in it, undermines a statute Colorado enacted to protect its citizens and comply with a federal mandate. Given the importance of these issues and their complexity, counsel for CBI requests oral argument.

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[22] Additionally, Vega did not have a legitimate expectation of privacy in his juvenile sex offense because the registry statute in effect prior to his offense allowed public disclosure of juvenile adjudications. COLO. REV. STAT. § 18-3-412.5(1)(c), (6.5), (8) (1997); *see Nilson*, 45 F.3d at 372 ("[A] validly enacted law places citizens on notice that violations thereof do not fall within the realm of privacy.").

Respectfully submitted on March 26, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

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s/ *Frederick R. Yarger*
Dated: March 26, 2018

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I certify that with respect to this brief:

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s/ Amy Holston
Dated: March 26, 2018

CERTIFICATE OF SERVICE

This is to certify that I have electronically served the foregoing APPELLANT'S OPENING BRIEF upon all parties herein via CM/ECF on this 26th day of March, 2018, addressed as follows:

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ATTACHMENT 1:

Findings of Fact, Conclusions of Law, and Order for Entry of Judgment ("Order"), *Millard et al. v. Rankin*, No. 13-CV-02406-RPM (D. Colo. Aug. 31, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Richard P. Matsch, Senior District Judge

Civil Action No. 13-cv-02406-RPM

DAVID MILLARD,
EUGENE KNIGHT,
ARTURO VEGA,

Plaintiffs,
v.

MICHAEL RANKIN, in his official capacity as Director of the Colorado Bureau of Investigation,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER FOR ENTRY OF JUDGMENT

Plaintiffs are registered sex offenders under the Colorado Sex Offender Registration Act ("SORA"), C.R.S. §§ 16-22-101, *et seq.* In this civil action brought pursuant to 42 U.S.C. § 1983 they seek declaratory and injunctive relief, claiming that continuing enforcement of the requirements of SORA against them violates their rights under the Eighth and Fourteenth Amendments to the United States Constitution. Defendant is the Director of the Colorado Bureau of Investigation ("CBI"), the state agency responsible for maintaining the centralized registry of sex offenders and providing information on a state web site.

After consideration of the evidence submitted at trial and the written arguments of counsel the Court now enters the following findings of fact, conclusions of law, and order.

The Colorado Sex Offender Registration Act

Registration Requirements

SORA requires a person convicted of unlawful sexual behavior or another offense, the underlying factual basis of which involves unlawful sexual behavior, to register with the state as a sex offender. C.R.S. § 16-22-103. SORA defines unlawful sexual behavior to include a wide range of offenses, and its registration requirements apply to both adult and juvenile offenders. *See City of Northglenn v. Ibarra*, 62 P.3d 151, 156-57 (Colo. 2003); *see also* C.R.S. § 16-22-102(3) (defining "conviction") and § 16-22-102(9) (defining "unlawful sexual behavior").

The Registration Process

A person required to register must register with the local law enforcement agency in each jurisdiction in which the person resides. C.R.S. § 16-22-108(1)(a)(I). Registration is required to be done in person at the person's local law enforcement agency by completing a standardized registration form and paying any registration fee imposed by the local law enforcement agency. C.R.S. § 16-22-108(7).

All persons required to register must reregister at least annually and any time they change addresses or names; certain specified offenders are required to reregister quarterly. C.R.S. § 16-22-108(1)(b), (c), and (d).[1] A person required to register who has been convicted of a "child sex crime" is further required to register "all e-mail addresses, instant-messaging identities, or chat room identities prior to using the address or identity," as well as any changes of such addresses or identities. C.R.S. § 16-22-108(2.5)(a) and (3)(g). "Child sex crime" encompasses many offenses; as relevant here, it includes sexual assault on a child as provided in C.R.S. § 18-3-405,

[1] Persons required to reregister on a quarterly basis include, among others, those guilty of certain felony sexual assaults and sexual assault on a child. C.R.S. § 16-22-108(d)(II).

as well as "criminal attempt, conspiracy, or solicitation to commit any of the specified acts." C.R.S. § 16-22-108(c).

Failure to comply with the registration requirements is a criminal offense. C.R.S. § 18-3-412.5.

A standardized form prescribed by the CBI is used for registration. C.R.S. § 16-22-109. By statute, information required by the form includes (but is not limited to) the registrant's name (including all legal names and aliases used), date of birth, address, and place of employment; and all e-mail addresses, instant-messaging identities, and chat room identities to be used by the person if the person is required to register that information pursuant to section 16-22-108(2.5) (persons convicted of "child sex crimes"). C.R.S. § 16-22-109(1).

The Sex Offender Registry and CBI's Authority to Release Registry Information

The CBI serves as official custodian of all registration forms and other documents associated with sex offender registration. It is required to maintain a statewide central registry—known as the sex offender registry—of persons required to register under SORA. C.R.S. § 16-22-110(1). The registry is required to provide certain information, at a minimum, to all criminal justice agencies with regard to all registered persons. C.R.S. § 16-22-110(2).

The CBI is also authorized to provide to members of the public, upon request and payment of any fees assessed for search, retrieval, and copying, "the name, address or addresses, and aliases of the registrant; the registrant's date of birth; a photograph of the registrant, if requested and readily available; and the conviction resulting in the registrant being required to register pursuant to this article." C.R.S. § 16-22-110(6)(f). The CBI may inform someone requesting a criminal history check whether the person being checked is on the sex offender

registry; members of the public may also request a list of all persons on the registry. C.R.S. § 16-22-110(b) and (c).

With respect to the public availability of such information, SORA states:

> The general assembly hereby recognizes the need to balance the expectations of persons convicted of offenses involving unlawful sexual behavior and the public's need to adequately protect themselves and their children from these persons, as expressed in section 16-22-112(1). The general assembly declares, however, that, in making information concerning persons convicted of offenses involving unlawful sexual behavior available to the public, it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

C.R.S. § 16-22-110(6).

The CBI's Internet Posting of Sex Offender Information

SORA also requires the CBI to post on the State of Colorado's internet homepage a link to "a list containing the names, addresses, and physical descriptions of certain persons and descriptions of the offenses committed by said persons." C.R.S. § 16-22-111(1). The "certain persons" whose information must be posted on the State's website include persons convicted of being sexually violent predators; persons convicted as an adult of two or more felony offenses involving unlawful sexual behavior; persons convicted of a crime of violence as defined in section C.R.S. § 18-1.3-406; and persons required to register because they were convicted of a felony as an adult, but who fail to register as required.[2]

For such persons, the physical description posted on the State's website "shall include, but need not be limited to, the person's sex, height, and weight, any identifying characteristics of

[2] Juvenile offenders do not appear on the website, even if they are later convicted of failure to register. However, juvenile offenders do appear on the list of registered sex offenders that members of the public may obtain from the CBI on request, as discussed above.

the person, and a digitized photograph or image of the person." C.R.S. § 16-22-111(1).

Section 16-22-111(1.5) further provides:

> In addition to the posting required by subsection (1) of this section, the CBI may post a link on the state of Colorado homepage on the internet to a list, including but not limited to the names, addresses, and physical descriptions of any person required to register pursuant to section 16-22-103, as a result of a conviction for a felony. A person's physical description shall include, but need not be limited to, the person's sex, height, weight, and any other identifying characteristics of the person.

Pursuant to C.R.S. § 16-22-111(2)(a), the CBI has authority to determine whether a person has failed to register as required, and if so, to post information concerning that person on the State's internet site. In addition, if a local law enforcement agency files criminal charges against a person for failure to register as a sex offender, that agency is required to notify the CBI, which is required to post the information concerning the person on the internet. C.R.S. § 16-22-111(2)(b).

Local Law Enforcement Agencies' Publication of Sex Offender Information

SORA also authorizes local law enforcement agencies to post on their websites certain information about registered sex offenders, if the offender falls within one of the categories described in § 16-22-112(2)(b). SORA disclaims any legislative intent to impose punishment through the public release of such information:

> The general assembly finds that persons convicted of offenses involving unlawful sexual behavior have a reduced expectation of privacy because of the public's interest in public safety. The general assembly further finds that the public must have access to information concerning persons convicted of offenses involving unlawful sexual behavior that is collected pursuant to this article to allow them to adequately protect themselves and their children from these persons. The general assembly declares, however, that, in making this information available to the public, as provided in this section and section 16-22-110(6), it is not the general assembly's intent that the information be used to inflict retribution or additional

> punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

C.R.S. § 16-22-112(1).

The Process for Removal of Information from the Registry and/or Internet

SORA allows some but not all registrants to petition for removal from the registry and/or have the CBI remove their information from the State's internet site. C.R.S. § 16-22-113. Certain persons required to register may file a petition with the court that issued the judgment for the conviction that required registration to discontinue that requirement or internet posting, or both. Such a petition may be filed after a period of five, ten, or twenty years after discharge from incarceration or other completion of all sentencing requirements; the length of the applicable period depends on the statutory classification of the sex offense for which the registrant was convicted. C.R.S. § 16-22-113(1)(a)–(c). Persons convicted of certain offenses are subject to SORA's registration requirements for the rest of their lives. C.R.S. § 16-22-113(3).[3]

As to juveniles, SORA provides procedures for a person to petition to discontinue the duty to register, to have the CBI discontinue posting on the internet, and also to be removed from the sex offender registry itself:

> (e) Except as otherwise provided in subparagraph (II) of paragraph (b) of subsection (1.3) of this section, if the person was younger than eighteen years of age at the time of commission of the offense, **after the successful completion of and discharge from a juvenile sentence or disposition**, and if the person prior to such time has not been subsequently convicted or has a pending prosecution for unlawful sexual behavior or for

[3] Persons subject to the lifetime registration requirement include, among others, those convicted of being a sexually violent predator; those convicted as adults of sexual assault on a child, sexual assault on a client by a psychotherapist, incest; and adults convicted of multiple sex offenses. *Id.*

> any other offense, the underlying factual basis of which involved unlawful sexual behavior and the court did not issue an order either continuing the duty to register or discontinuing the duty to register pursuant to paragraph (b) of subsection (1.3) of this section. Any person petitioning pursuant to this paragraph (e) may also petition for an order removing his or her name from the sex offender registry. **In determining whether to grant the order, the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior**. The court shall base its determination on recommendations from the person's probation or community parole officer, the person's treatment provider, and the prosecuting attorney for the jurisdiction in which the person was tried and on the recommendations included in the person's presentence investigation report. In addition, the court shall consider any written or oral testimony submitted by the victim of the offense for which the petitioner was required to register….

C.R.S. § 16-22-113(1)(e) (emphasis added).

Plaintiffs' Sex Offense Adjudications, Registration Requirements, and Evidence of Harm

David Millard

David Millard pleaded guilty to second degree sex assault on a minor in 1999, resulting in a sentence of 90 days jail work release and eight years probation. His plea agreement required him to register as a sex offender for ten years after completing probation. While on probation, he successfully completed sex offense specific treatment. His probation was never revoked or extended, and he completed his period of probation in October 2007. Since beginning his probation he has not been accused of committing any type of crime or engaging in any type of inappropriate sexual conduct. He is eligible to petition to be removed from the sex offender registry in October 2017.

Mr. Millard has registered as required since his conviction, and has never been charged with failure to register. Registration forms provided to him by his local law enforcement agency for the past two years have required—and he has provided—disclosure of his email addresses. Because Mr. Millard was convicted of a felony sex offense as an adult, his information appears

on the list of registered sex offenders that members of the public may obtain from the CBI on request; and that information as well as a photograph are on the CBI website.

Mr. Millard has worked for Albertsons for 14 years, since 2003. He disclosed on his employment application that he had a felony conviction and said that he would "explain in person," but he was not asked about his answer at that time and Albertsons did not do a background check. Because a requirement of his probation was to disclose his offense to his employer, he told his boss he was convicted in 1999 of second degree sexual assault. His boss did not ask for more details, but a condition of continued employment was that there be no problems and that no one find out about the conviction.

As a result, Mr. Millard has lived in fear of discovery and losing his job. That fear increased in approximately 2005, when according to Mr. Millard's testimony the publication of his sex offender status began to include a photograph, making his identity more accessible through the internet. He was not permitted to access the internet during his probationary period. After completing probation he Googled his name and was shocked to discover that multiple websites—both publicly-run and private, commercial sites—displayed his information, including his picture, the offense for which he was convicted, his address, and a description of body scars as further identification. One website had incorrect information about him that he was able to have removed, but only after approximately six months. The availability and extent of the public information caused Mr. Millard to live in fear of discovery, loss of his job, and retaliation through harm to himself or his family.

In 2015, a customer discovered Mr. Millard on a sex offender website and reported the discovery to Albertsons' human relations department, resulting in an internal investigation. A

fellow employee spread the information to other employees in the store. As a result, Mr. Millard was transferred to another store where the information had not become known. He has been specifically advised by his employer that he will lose his job if the information about him being a registered sex offender becomes known at the new store. Thus, even though his employer has been supportive, discovery by a customer or fellow employee is a constant concern for him given the ready availability of the information on the internet.

Mr. Millard has been forced to change residences. Shortly after his conviction, a representative of the Arapahoe County Sheriff's Department came to his apartment complex and informed the leasing office that Mr. Millard was a registered sex offender. He was not permitted to renew his lease and was required to move.

He was not asked about his background or sex offender status before he applied to move into his next apartment. In 2005, Channel 7, a Denver television station, ran an "investigative report" on a news program that filmed leasing agents saying no felons were tenants at certain apartment complexes, but admitting that they did not do background checks on rental applications. The reporter then identified felons who were living in the complex. The program placed a primary emphasis on sex offenders. Mr. Millard learned of the Channel 7 program when a fellow tenant asked him if he knew there were a lot of sex offenders at the complex, and told him about the Channel 7 program. Mr. Millard watched the Channel 7 News report and saw his name come on the screen among a list of sex offenders living at the complex. Shortly after the Channel 7 story aired, a letter was posted on his door requiring him to move from the complex within thirty days.

Mr. Millard moved into his mother's home, where he lived for several years. During that

period he filled out some 200 or more rental applications, without success. He finally found another apartment, which he obtained after fully disclosing and explaining his background and conviction.

Mr. Millard ultimately was able to purchase the house where he now lives. But he remains subject to periodic visits by Denver Police officers to confirm the accuracy of his registered address. If he is not home when they visit, they leave prominent, brightly-colored "registered sex offender" tags on his front door notifying him that he must contact the DPD.

On one occasion a DPD officer hung a tag on his door even though Mr. Millard had spoken with the officer by telephone and explained he was at work and would not be home at the time of the visit. Mr. Millard was so concerned about the risk of discovery that he asked for time off work to go home to remove the tag, which displeased his boss. In following up from that incident, two DPD officers came to his house, banged noisily on the door, and loudly told Mr. Millard, in front of and in earshot of watching neighbors, that they were there to do a sex offender home check. Mr. Millard's previously-cordial neighbors have since avoided him and become less friendly.

Mr. Millard's experiences from public awareness that he is a registered sex offender have left him in fear of retribution. On one occasion he walked out of his mother's house and two persons walking by remarked "there's that f-ing sex offender." His car was "keyed" and burglarized. Because of the fear and anxiety about his safety in public Mr. Millard does little more than go to work, isolating himself at his home.

Eugene Knight

Eugene Knight was charged with two counts of sexual assault on a child in 2006, based

on conduct occurring in September 2005 when he was eighteen years old. A plea bargain resulted in his conviction for attempted sexual assault on a child. He was sentenced to eight years supervised probation and a 90-day jail sentence. The conditions of his probation sentence required him to participate in offense-specific treatment at a contractor-owned sex offender treatment entity called Sexual Offender Resource Services. The treatment prescribed for him included requiring him to

undergo periodic polygraphs and other tests[4] as determined by his therapist. Because he could not afford to pay the costs of these tests, his probation was revoked and he was sentenced to two years imprisonment, including presentence confinement time. He was paroled in November 2009 and discharged from parole in April or May 2011. Mr. Knight's parole was never revoked. He is not eligible to petition to be removed from the sex offender registry until 2021.

Since his 2006 conviction, Mr. Knight has not been accused of any other sex offense or sexually inappropriate conduct. The only crime of which he has been accused since 2006 was a 2013 charge for failure to register as a sex offender. The charge was mistaken and was ultimately dismissed, but only after he endured the indignity, inconvenience, expense, and anxiety of being arrested, having to post bond, and making two court appearances over some two months.

Because Mr. Knight was convicted of a felony sex offense as an adult, his information appears on the list of registered sex offenders that members of the public may obtain from the CBI on request; and that information as well as a photograph are on the CBI website. Mr. Knight's information on the CBI's website and sex offender registry states that he was convicted of "sexual assault on a child" in violation of C.R.S. § 18-3-405, even though his conviction was for attempted sexual assault on a child. That error from the CBI website has been carried over to

[4] Mr. Knight testified that the polygraphs, which cost $250 to $300 per test, were required approximately quarterly, and that additional expenses included group and individual therapy sessions and a line of other tests that—purportedly—monitor and measure a man's sexual deviancy level. One such required test was the penile plethysmograph, which has been found to be so "exceptionally intrusive in nature and duration" as to implicate substantive due process concerns when imposed as a requirement of employment or supervised release. *See, e.g., U.S. v. Weber*, 451 F.3d 552, 562-69 (9th Cir. 2006). One judge opined that "the Orwellian procedure [is] always a violation of the personal dignity of which prisoners are not deprived." *Id.* at 570 (Noonan, J., concurring). Mr. Knight never underwent a plethysmograph and the validity of that requirement is not at issue in this case. That it was part of his required "treatment" nevertheless exemplifies the extent to which sex offenders are subject to extreme invasions of their personal liberty and privacy.

at least one privately-operated website.

Mr. Knight describes his family role as "full-time father." He has two children, who were in kindergarten and third grade at the time of this trial. He testified that he does not work outside the home because he has had difficulty finding a job that pays enough to offset the costs of child care. One job application, at Home Depot, was rejected because, he was told, a background check came back "red-flagged." He does not know whether this rejection was because of his sex offender status or because of other matters on his record. Because the mother of his children is employed full time, Mr. Knight cares for the children during the day and takes them to and from school.

In September 2014 Mr. Knight received a letter from the principal of his children's school informing him that she and Denver Public Schools (DPS) had become aware of his status as a registered sex offender, and that he "is in violation of Denver Public Schools Board of Education Policy KFA, which prohibits, among other things, disruption of teaching or administrative operations, and the creation of an unsafe/threatening environment for our students and staff members." The letter stated that effective immediately, and for the duration of the 2014-15 school year, Mr. Knight was barred from entering the grounds of his children's school and all other DPS schools and facilities. It informed him that for daily drop-off and pick-up he would be required to remain on the sidewalk outside the school, and the children would be accompanied to and from the school building by a paraprofessional. It also stated that if Mr. Knight failed to follow these directives, DPS security and/or the Denver Police Department would be asked to intervene. DPS sent similar letters to Mr. Knight for the 2015-16 and 2016-17 school years.

This exclusion from his children's school is solely because he is a registered sex offender. Neither DPS nor anyone else has ever accused Mr. Knight of any conduct allegedly disrupting school operations or creating an unsafe or threatening school environment. Other than one occasion, Mr. Knight has not been inside his children's school since receiving this letter. The arrangement allowed by the school has proven inconvenient and on numerous occasions the school has not lived up to its obligations to escort his children to him, resulting in ongoing difficulties for Mr. Knight and his children. The bar has also interfered with his ability to attend school events, and has caused concerns and confusion for his children about why he cannot go into their school building like other parents.

Arturo Vega

At age 15, Arturo Vega was adjudicated a juvenile offender for conduct occurring when he was 13 years old. He pleaded guilty to third degree sexual assault and was sentenced to probation with the condition that he reside in a juvenile treatment facility. He did not understand the sex offender registration requirements.

Mr. Vega's probation was revoked and he was sentenced to serve two years at the Division of Youth Corrections at Lookout Mountain where he was required to participate in sex offender treatment. He testified without contradiction—and therefore it is undisputed—that he did attend and complete treatment as required, including sex offender treatment and anger management classes. His sentence was not extended or modified because of any claimed failure to attend or complete treatment. Mr. Vega was released from Lookout Mountain in May or June 2000, and was on parole for approximately a year. He also attended required therapy while on parole.

Mr. Vega was convicted of a misdemeanor for failure to register in September 2001, for which he was fined, and he did then register as a juvenile sex offender. Because he was adjudicated a sex offender as a juvenile, he does not appear on the CBI website, but his registration information—including his name, address, and physical description including scars, marks and tattoos—is on the list of sex offenders that the public can obtain from the CBI. Although a criminal background check does not show Mr. Vega's underlying juvenile adjudication, his presence on the sex offender registry—for failure to register as a sex offender—does.

Mr. Vega has experienced employment difficulties. He has maintained employment with a furniture installation contractor, but during that employment he has been asked to leave and/or prevented from being able to work at certain government and other facilities that require background checks. There is no evidence establishing that any of these employment difficulties were specifically as a result of Mr. Vega's conviction for failure to register as a sex offender, rather than other charges that would also appear in a more general background check of Mr. Vega's record.[5]

Mr. Vega made two attempts to be removed from the sex offender registry by submitting petitions to the sentencing court pursuant to C.R.S. § 16-22-113(1)(e), set forth above. A statutory condition is the successful completion of and discharge from a juvenile sentence. *Id.* These petitions to the Jefferson County District Court in 2006 and 2012 were heard and denied by magistrates. He did not appeal.

SORA provides two conditions for granting a juvenile offender's petition: (1) "successful

[5] A background check for Mr. Vega would also show alcohol-related driving charges, assault and threat, disturbing the peace, and damaged property.

completion and discharge from a juvenile sentence or disposition" and (2) that he "has not been subsequently convicted or has a pending prosecution for unlawful sexual behavior or any other offense, the underlying factual basis of which involved unlawful sexual behavior." C.R.S. § 16-22-113(1)(e). It further states that "[i]n determining whether to grant the order, the court shall consider whether the person is **likely to commit** a subsequent offense of or involving unlawful sexual behavior…." C.R.S. § 16-22-113(1)(e) (emphasis added). The statute does not explicitly assign or define a burden of proof, nor does it establish a standard for the court to apply in determining whether to grant a petition to deregister. The Colorado Court of Appeals has observed that "the statute appears to leave to the discretion of the trial court the ultimate decision of whether to grant a petition requesting discontinuation of sex offender registration, as well as the factors to consider in making that decision." *People v. Carbajal*, 312 P.3d 1183, 1190 (Colo. App. 2012).

At the hearings on both of Mr. Vega's petitions in 2006 and 2012, it was not disputed that he had successfully completed his juvenile sentence and had been discharged from confinement at the Department of Youth Corrections and from his subsequent period of parole. It was also undisputed that Vega had committed no additional sex offenses.

In applying the statutory requirement that the court consider "whether the person is **likely** to commit a subsequent offense of or involving unlawful sexual behavior," the respective magistrates put the burden on Mr. Vega to prove, by a preponderance of the evidence, a negative: that he was **not likely** to commit such an offense. *See, e.g.*, Ex. L at 824:17-24 (magistrate stating that she did "not believe, based on your testimony today, that you have learned enough from your treatment that I can find even by a preponderance of the evidence that

you would be, at this point in time, unlikely to commit a subsequent offense….").

Both magistrates held that Mr. Vega had failed to submit specific information that is not required by statute and, in Mr. Vega's case, was—and always will be—impossible for him to provide. That is, both magistrates required proof not only of the statutory requirement that Mr. Vega had successfully completed his "sentence or disposition" (which was not in dispute) but also that he had "successfully" completed a program of sex offender treatment while serving his sentence. Mr. Vega testified at both hearings that he had completed such treatment. No contrary evidence was presented to either magistrate. Despite this undisputed testimony, both magistrates expressed skepticism about whether he had really completed treatment and whether it had been "successful" based on an undefined standard applied by the magistrate. *See, e.g., id.* at 0824:5-6.

In the June 2012 hearing, the magistrate made proof of successful completion of treatment a **condition** of the petition being granted, **in addition** to requiring Mr. Vega to prove he was not likely to commit another sex offense: "[Y]ou're going to have to show in some form or fashion, not only that you're not going to reoffend but that you successfully completed treatment and your sentence." Ex. M at 0911:7-9. In December 2012, the same magistrate again appeared to make proof of successful treatment an absolute condition of deregistration, even though that is not in the statute. Ex. N at 0964:3-4 ("[W]ithout being able to make that finding, I do not believe I can grant the petition for removal from registry."). The magistrate was informed that Mr. Vega's record at Lookout Mountain has been destroyed in conformity with a standard practice. She suggested that if Mr. Vega were to enroll in and successfully complete another course of offense specific treatment, that would likely change the outcome. *Id.* at 966:3-7. This at least implicitly added an additional term to Mr. Vega's sentence or disposition, even though

the evidence was undisputed that he had already completed it.

Non-Party Witnesses

At trial, Plaintiffs presented testimony from non-party witnesses concerning their experiences resulting from their or an acquaintance's appearance on the sex offender registry. This evidence was not rebutted. Such evidence of the actual adverse consequences of sex offender registration requirements is relevant to Plaintiffs' Eighth Amendment claim and the determination whether SORA's actual effects, as distinguished from its stated intent, are punitive. It also corroborates Plaintiffs' expressed fears and concerns about the potential consequences they face from public reaction to them as registered sex offenders.

It suffices to say, without recounting the details of their testimony here,[6] that these witnesses established that registered sex offenders and their families and friends face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public, directly resulting from their status as registered sex offenders, and regardless of any threat to public safety based on an objective determination of their specific offenses, circumstances, and personal attributes.

Analysis

Plaintiffs do not argue that SORA is facially invalid, but rather assert that SORA's sex offender registration requirements, as applied to them, violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment's requirements of procedural and substantive due process. *See United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) ("An as-applied challenge concedes that the statute may be

[6] Some of these witnesses' experiences are summarized below.

constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case").

I.Eighth Amendment

A. Punishment

Analysis of Plaintiffs' Eighth Amendment claim first requires the Court to determine whether SORA's sex offender registration requirements are "punishment" within the meaning of the prohibition of cruel and unusual punishments in the Eighth Amendment. Case law considering this issue has arisen almost entirely in the context of challenges to the retroactive application of sex offender registration requirements under federal or state prohibitions against ex post facto laws.

In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court employed an "intent-effects" analytical framework to determine whether Alaska's sex offender registration statute was punitive. The Court stated that it would first consider whether the legislative intent was to impose punishment; if so, "that ends the inquiry." *Id.* at 92. If the intent was to enact a statutory scheme that is civil and non-punitive, however, the Court stated that it must further examine whether the statutory scheme is so punitive in purpose or effect as to negate the legislative intention to deem it "civil." *Id.* In making the "effects" analysis, the Court considered five of the seven factors employed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963):

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose.

Smith v. Doe, 538 U.S. at 97. The two additional factors considered in *Kennedy* were [6] whether

the statute's requirements come into play only on a finding of scienter; and [7] whether the behavior to which it applies is already a crime. *Kennedy*, 372 U.S. at 168-69. The *Smith* Court held that the effects of the Alaska version of SORA were non-punitive, and therefore retroactive application of the law did not violate the Ex Post Facto Clause of the United States Constitution.

In the Ninth Circuit opinion that preceded *Smith v. Doe*, *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001), holding the Alaska statute punitive **in effect**, the court included the following paragraph:

> Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and {"pageset": "S9cc2 damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

Id. at 987-88.

In reversing in *Smith v. Doe*, Justice Kennedy for the majority wrote:

> ... These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.
>
> The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Smith v. Doe, 538 U.S. at 99. The Court also stated, in distinguishing the requirement of *Kansas v. Hendricks*, 521 U.S. 346 (1997), for an individual assessment of dangerousness, that in the

context of the Alaska sex offender statute the state could "dispense with individual predictions of future dangerousness and allow the public to assess the risk" based on the information provided about registrants' convictions. *Smith v. Doe*, 538 U.S. at 104.

In her dissent, Justice Ginsburg wrote:

> ... And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

Id. at 117 (footnote omitted). Citing to the respondents' brief she observed that John Doe I had completed a treatment program, had subsequently remarried, established a business and had been granted custody of a minor daughter on a court's determination that he had been successfully rehabilitated. *Id.* at 117. The case was decided in the district court on motions for summary judgment and apart from Justice Ginsburg's reference there is no explanation of what may have been evidentiary support for the parties' respective arguments.

Applying the same analytical framework to other states' laws or under state constitutional provisions, a number of courts have reached a conclusion different from the Supreme Court's in *Smith v. Doe*. The Alaska Supreme Court, considering the same statute before the Supreme Court in *Smith v. Doe*, held that the act was so punitive in purpose or effect as to overcome the legislature's civil intent, and therefore violated the Alaska Constitution. *Doe v. State*, 189 P.3d 999 (2008). *See also, e.g., Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan's sex offender registration act retroactively imposed punishment and therefore violated Ex Post Facto Clause of United States Constitution); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (retroactive application of Maine registration statute violated both Maine and United

States Constitutions' Ex Post Facto Clauses); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (effects of New Hampshire sex offender registration provisions were punitive; retroactive application violated New Hampshire Constitution); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013) (Oklahoma sex offender registration statute was punitive; retroactive application of its provisions violated the Oklahoma Constitution).[7]

Defendants assert that SORA has been "determined in Colorado" to be non-punitive, citing *U.S. v. Davis*, 352 Fed. App'x 270 (10th Cir. 2009) (unpublished). But *Davis*, a non-binding unpublished decision involving a case arising in Oklahoma, considered the federal Sex Offender Registration and Notification Act, 18 U.S.C. § 2250. *Id.* at 271-72. And although panels of the Colorado Court of Appeals have declined to find SORA's provisions to be punitive, those cases have not engaged in the "intent-effects" analysis used by the United States Supreme Court, and the Colorado Supreme Court has not addressed the question. *See, e.g., People in the Interest of J.O.*, 383 P.3d 69, 73-74 (Colo. App. 2015) (discussing non-punitive purpose of registration requirements, with no discussion of effects); *People v. Carbajal*, 312 P.3d at 1189 (same). Therefore the issue has not been "determined in Colorado."

In *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016), the court had an evidentiary record from a bench trial on the claim that application of the Oklahoma statute to the plaintiff who moved from Texas where he had been convicted of a sex offense was in violation of the Ex Post Facto clause. The appellate panel determined that there was no violation because it was not

[7] The Court recognizes that the decisions of these courts and others involved statutes that had varying provisions not identical with Colorado's SORA. Michigan's SORA, for example, considered in *Does v. Snyder*, included residency restrictions not appearing in Colorado's SORA. These courts' analysis of the relevant factors is nevertheless persuasive authority in analyzing whether SORA is punitive.

retroactive punishment. Only two provisions of the statute were considered: (1) the requirements for reporting, and (2) the restrictions on residency and loitering within 2,000 or 500 feet, respectively, of a school, playground, park or child care center. *Id.*, 823 F.3d at 559.

The plaintiff made an as-applied-to-him challenge so the court only considered those requirements as they affected him. *Id.* at 560-61. The appellate court's review of the district court's application of the intent-effects test was *de novo*. *Id.* The opinion was that these reporting and residency requirements did not sufficiently resemble banishment and probation. *Id.* at 563-65. It was different from probation in that there was no active supervision and mere reporting did not include other common requirements of probationary sentence. *Id.*

The court discussed banishment at some length, citing to a number of treatises describing banishment as it has been used historically. *Id.* at 566-68. The appellate judges viewed banishment as complete expulsion from a community, normally a geographical area. Shaw was only prohibited from residing in those areas within the geographical limits but he was free to enter the same areas. The court did not address loitering, holding that the argument had been forfeited by failing to present it to the district court. *Id.* at 577.

The *Shaw* opinion was narrowly drawn based on an evidentiary record. There were 26 endnotes. In note 11 the court rejected the contention that Shaw was being "shamed" by the disclosure of personal information on the internet by relying on Justice Kennedy's statement in *Smith*. *Id.* at 563 n.11. In the last note, the court said that because this was an as-applied challenge the court's conclusion is limited to Mr. Shaw's circumstances. *Id.* at 577 n.26.

Applying the analysis called for by the Supreme Court, this Court first concludes that the **intent** of SORA is non-punitive. Plaintiffs do not dispute the legislative statements of intent in

C.R.S. §§ 16-22-110(6) and 16-22-112(1).[8]

Weighing the factors considered in *Smith v. Doe* leads to the conclusion that SORA's **effects** on these Plaintiffs are plainly punitive, negating the legislative intent.

Justice Kennedy's words ring hollow that the state's website does not provide the public with means to shame the offender when considering the evidence in this case. He and his colleagues did not foresee the development of private, commercial websites exploiting the information made available to them and the opportunities for "investigative journalism" as that done by a Denver television station adversely affecting Eugene Knight. The justices did not foresee the ubiquitous influence of social media.

The Colorado General Assembly's disavowal of any punitive intent is an avoidance of any responsibility for the results of warning the public of the dangers to be expected from registered sex offenders. The register is telling the public— DANGER – STAY AWAY. How is the public to react to this warning? What is expected to be the means by which people are to protect themselves and their children?

As shown by the experience of these plaintiffs and the experience of others who have testified, the effect of publication of the information required to be provided by registration is to expose the registrants to punishments inflicted not by the state but by their fellow citizens.

The fear that pervades the public reaction to sex offenses—particularly as to children—generates reactions that are cruel and in disregard of any objective assessment of the

[8] As the Court has noted previously, the Colorado General Assembly implicitly recognized that registration is punitive to at least some degree: SORA permits courts to exempt a person who was younger than eighteen years of age at the time of the commission of the offense from the registration requirements if it determines that registration "would be unfairly punitive." C.R.S. § 16-22-103(5)(a) (emphasis added). The use of "unfairly" suggests that at least some level of punishment is intended—just not an "unfair" level. The Court cannot conclude, however, that this reference overcomes the expressly-stated non-punitive intent.

individual's actual proclivity to commit new sex offenses. The failure to make any individual assessment is a fundamental flaw in the system.

In setting out the factors to be considered in determining whether a sanction is penal or regulatory in nature, in *Kennedy v. Mendoza*-Martinez, Justice Goldberg noted that banishment was a weapon in the English legal arsenal for centuries, but that "it was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'" *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168 n.23 (citing 4 Blackstone's Commentaries *377 and quoting Maxey, Loss of Nationality: Individual Choice or Government Flat [*sic*–Fiat]?, 26 Albany L. Rev. 151, 164 (1962)).

Public shaming and banishment are forms of punishment that may be considered cruel and unusual under the Eighth Amendment. *See Smith v. Doe*, 538 U.S. at 109 (Souter, J., concurring). Other courts considering this factor have found that sex offender registry statutes are sufficiently analogous to shaming to warrant a finding that this factor weighs in favor of finding a punitive effect. *See, e.g., Does v. Snyder*, 834 F.3d at 701-03; *Doe v. State*, 189 P.3d at 1012; *Doe v. State*, 111 A.3d at 1097; *see also Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting). Further, as the Sixth Circuit observed, a sex offender registration act that requires regular reporting to law enforcement in person, for which failure to comply is a crime punishable by imprisonment, also resembles the punishment characteristics of parole or probation. *Does v. Snyder*, 834 F.3d at 703.

The observations of these other courts apply here. The record in this case reflects that maintaining the sex offender registry, requiring internet publication of information on the registry, and permitting republication of the information by private websites have effects that are

analogous to the historical punishment of shaming and further resemble and threaten to result in effective banishment. All three Plaintiffs have experienced these effects in varying degrees. Mr. Millard's experiences are particularly illustrative, where he has suffered the indignity of being unable to find housing despite hundreds of applications, has been forced to move because of a TV news story focusing on sex offenders in apartment housing, and, after finally managing to purchase his own home, has continued to suffer the indignity of loud public visits from the police and placement of bright markers on his door announcing his sex offender status to the neighborhood.

Other evidence shows that these experiences are not isolated or unusual and that Plaintiffs' experiences, fears, and anxieties are not exaggerated or imagined. One witness called by Plaintiffs, Richard Gillit, is an Englewood City Councilman. He testified about Englewood's efforts to enact and enforce municipal "distancing" requirements which, by prohibiting registered sex offenders from residing within a certain distance from schools, parks, and daycare centers, effectively bar registered sex offenders from living in most of the city. *See Ryals v. City of Englewood,* 364 P.3d 900 (Colo. 2016) (holding that Englewood's ordinance, which was estimated to make 99% of the city off-limits to qualifying sex offenders, is not preempted by state law). *See also id.*, 364 P.3d at 914-15 (Hood, J., concurring in part and dissenting in part; discussing the domino effect of upholding such local laws, giving "the remaining metro-area cities … every incentive to pass residency bans in order to prevent sex offenders from moving into their communities"). Mr. Gillit also testified about his own incorrect public reference to one registered sex offender as a "sexually violent predator" based on information he saw on a private website. This evidenced the random vulnerability of registered sex offenders to false

accusations, innuendo, and public humiliation based on either mistaken or intentional spreading of information and, given normal human foibles, misinformation.

Another witness—not a registered sex offender herself—testified that she was subjected to harassment and shunning from her neighbors, in the form of letters, emails, personal visits, and Facebook posts, after she agreed to allow a registered sex offender to reside in her home. The pressure was so intense that it ultimately led her to sell her house and move, even though her acquaintance had moved out. A third witness, a teacher at a parochial school, testified to pressure she received from her employer—a Roman Catholic archdiocese—after a parent recognized and reported her as the **spouse** of a registered sex offender. Her husband had never been to the school, much less accused of any threatening conduct. Officials of the archdiocese, when meeting with this witness, questioned whether she should continue teaching there, and even questioned whether she should remain married to her husband. All of these witnesses further demonstrated the significant and ubiquitous consequences faced by registered sex offenders and their families and associates.

This Court also agrees with the Sixth Circuit's observations concerning SORA's resemblance to parole or probation in its requirements of frequent in-person reporting, enforced by potential criminal punishment. *See Does v. Snyder*, 834 F.3d at 703.

In addition, in Colorado certain offenders are required to disclose and register "all e-mail addresses, instant-messaging identities, or chat room identities prior to using the address or identity," as well as any changes of such addresses or identities. C.R.S. § 16-22-108(2.5)(a) and (3)(g). This furthers the ability of state and local authorities to monitor private aspects of a registered sex offender's life and, consequently, chills his or her ability to communicate freely.

Mr. Millard has been subjected to this requirement, even though there is no evidence that the crime for which he was convicted involved the use of the internet or social media, or that there is any objective danger of his doing so.

This is a significant incursion: the Supreme Court has recognized First Amendment protection of internet communications because cyberspace—the "vast democratic forums of the Internet"—and social media in particular, are "the most important places … for the exchange of views…." *Packingham v. North Carolina*, __ U.S. __, 137 S.Ct. 1730, 1735 (2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)). While *Packingham* involved a First Amendment challenge and this case does not, Justice Kennedy writing for the majority noted parenthetically that "the troubling fact that the law imposes **severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system** is … not an issue before the Court." *Id.*, 137 S.Ct. at 1737 (emphasis added). That observation is significant here.

SORA's registration requirement does not sweep as broadly in prohibiting the **use** of the internet and social media as the law struck down in *Packingham*, but it does something the North Carolina law did not. By requiring certain offenders to register email addresses and other internet identities, SORA provides law enforcement a supervisory tool to keep an eye out for registered sex offenders using email and social media. That is one more restrictive and intrusive provision that resembles the supervisory aspects of parole and probation, and complements and continues the state's comprehensive supervision of registered sex offenders even after they are released from the express provisions of their parole or probation. That aspect of SORA is a "severe restriction" like the provisions in *Packingham*. It also distinguishes SORA from the Alaska law

considered in *Smith v. Doe*, in which the Court concluded that the registration provisions were not similar to probation because they did not call for ongoing supervision.[9]

These similarities to historical forms of punishment weigh in favor of finding that SORA's effects are punitive.

SORA also imposes affirmative disabilities or restraints that are greater than those deemed "minor and indirect" by the Supreme Court in *Smith*. There, the Court expressly noted that the law under consideration did not have an in-person reporting requirement, and further stated that the record contained "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred." *Smith*, 538 U.S. at 100.

Here, Plaintiffs are subject to in-person reporting requirements for as long as they remain on the registry, and Mr. Vega's experience demonstrates that even the theoretical ability to petition to deregister can be illusory. Having to report to law enforcement every time one moves,

[9] *Packingham* also reflects an apparent evolution in the mindset of Justice Kennedy, who authored the majority opinions in both *Smith v. Doe* and *Packingham*. In *Smith*, decided in 2003, Justice Kennedy downplayed the punitive effect of statutory internet notification provisions, finding their "purpose and the principal effect" were "to inform the public for its own safety, not to humiliate the offender"; and that the internet simply makes a public records search "more efficient, cost effective, and convenient" for citizens. *Smith*, 538 U.S. at 99. In 2017, in addition to noting that restrictions on internet use are a "severe restriction," Justice Kennedy recognized that the internet and social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S.Ct. at 1737. That being the case, the power provided by the internet works both ways: not only to provide citizens a convenient and inexpensive means to identify and locate convicted sex offenders, but also to provide a citizen the means, if so inclined, to quickly and efficiently disseminate information about a sex offender to other members of the public with the intent to harass or humiliate. The record in this case casts serious doubt on Justice Kennedy's conclusions in *Smith* that the "principal effect" of putting sex offender data on the internet is merely informational, and not humiliation.

as well as at regular time intervals, is hardly a "minor or indirect" restraint, especially when failure to do so is punishable as a crime and also may subject the registrant to in-person home visits and public humiliation by over-zealous, malicious, or at least insensitive law enforcement personnel. The evidence in this case demonstrates that the very real restraints on Plaintiffs' abilities to live, work, accompany their children to school, and otherwise freely live their lives are not simply a result of the crimes they committed, but of their placement on the registry and publication of their status.

This factor weighs in favor of finding that SORA's effects are punitive. *See also Does v. Snyder*, 534 F.3d at 703-04; *Doe v. State*, 111 A.3d at 1094-95; *State v. Letalien*, 985 A.2d at 18; *Starkey*, 305 P.3d at 1022.

Another factor is whether SORA promotes traditional aims of punishment—"retribution and deterrence." *Mendoza-Martinez*, 372 U.S. at 168. SORA avows public safety as its purpose, disclaiming any intent to inflict "retribution or additional punishment." C.R.S. § 16-22-112(1). Defendant Rankin, however, acknowledged at trial as Director of the CBI that the registry has multiple purposes: to enhance public safety, to provide an investigative tool for law enforcement, and "there's also a deterrent effect of having the information available…." Trial Trans., 11/14/2016 at 10:7–8. He elaborated that this deterrent effect of the registry is both his own opinion and the official policy position of the CBI, and that the potential for deterrence applies to potential first-time offenders as well as potential re-offenders. *Id.* at 15:15–17:6. The CBI website also states that the registry's goals are "Citizen/Public Safety; Deterrence of sex offenders for committing similar crimes; and Investigative tool for law enforcement." CBI Sex Offender Registry website, "Goals of the Sex Offender Registry"; viewable at:

https://apps.colorado.gov/apps/dps/sor/information.jsf (accessed August 30, 2017). It is thus undisputed that the registry promotes deterrence, a traditional aim of punishment.

In addition, SORA requires offenders to register based only on their conviction for a past action, and based on a statutory classification of the offense and not on an individualized assessment of an offender's level of dangerousness. Such a scheme "begins to look far more like retribution for past offenses" than a public safety regulation. *Doe v. State*, 111 A.3d at 1094 (quoting *Com. v. Baker*, 295 S.W.2d 437, 444 (Ky. 2009)). It therefore "strains credulity to suppose that the Act's deterrent effect is not substantial, or that the Act does not promote community condemnation of the offender, both of which are included in the traditional aims of punishment." *Id.* (quoting *Wallace v. State*, 905 N.E.2d 371, 382 (Ind. 2009)).

This factor weighs in favor of finding that SORA's effects are punitive.

Courts considering whether there is a rational connection to a non-punitive purpose have uniformly determined that there is at least some rational connection between sex offender registration requirements similar to Colorado's and the avowed regulatory purpose of public safety. *See, e.g., Doe v. State*, 111 A.3d at 1099-1100; *Wallace*, 905 N.E.2d at 382-83. Plaintiffs here do not argue the contrary. This factor weighs against finding a punitive effect.

The Court is also to consider whether the registration scheme imposed by SORA "appears excessive in relation to the alternative purpose assigned," *Mendoza-Martinez*, 372 U.S. at 169; that is, "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105.

Colorado's law imposes quarterly or annual registration requirements, for five, ten, or twenty years before a petition to deregister may be filed, or for life with no chance to deregister.

These requirements are based on the statutory level of the offense for which a person is convicted. No consideration is given, before these requirements are imposed or at any time before deregistration is permitted, to an individual's relative level of risk to the community. There is no opportunity for an individual to shorten the length of his registration period or reduce the frequency of these requirements even if he is able to submit convincing evidence that he is completely rehabilitated and poses no danger to public safety. Likewise, the information made available to the public is based on the level of statutory offense for which one is convicted, again without any determination of a specific individual's potential risk. Similarly, SORA's requirements for disclosure and registration of internet identities are based solely on statutory classifications of an offender's conviction, and are not tied to past abuse of the internet.

These sweeping registration and disclosure requirements—in the name of public safety but not linked to a finding that public safety is at risk in a particular case—are excessive in relation to SORA's expressed public safety objective. *See Doe v. State,* 111 A.3d at 1100 ("If in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive."); *see also Wallace,* 905 N.E.2d at383-84; *Smith v. Doe*, 538 U.S. at 117 (Ginsburg, J., dissenting).

Consideration of SORA's application to Plaintiffs' particular experiences, as summarized above, demonstrates this point. Application of unalterable registration requirements and time periods with no possibility of considering their individual circumstances is arbitrary and excessive.

This factor favors treating SORA as punitive.

If a sanction is not linked to a showing of scienter, it is less likely to be intended as a

punishment. *Wallace*, 905 N.E.2d at 381. SORA's registration requirements apply to a variety of offenses, but most require a finding that the offender acted "knowingly." *See, e.g.*, C.R.S. §§ 18-3-402, -404, -405. Although not a significant factor, it weighs in favor of finding that SORA is punitive.

SORA also imposes its registration requirements for behavior that is already a crime. As Justice Souter stated in *Smith*,

> The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior {"pageset": "Sb5a7 convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Smith, 538 U.S. at 109 (Souter, J., concurring). Other courts have considered this factor and found it indicates a punitive effect. *See Doe v. State*, 189 P.3d at 1015; *Wallace*, 905 N.E.2d at 382; *Letalien*, 985 A.2d at 22; *Doe v. State*, 111 A.3d at 1099; *Starkey*, 305 P.3d at 1028. This Court agrees.

In summary, all but one of the seven factors weighs in favor of a conclusion that SORA's effects are punitive. These punitive effects are sufficient to overcome the stated regulatory, non-punitive intent of the Act.

B. Cruel and Unusual

Most cruel and unusual punishment cases—those not involving what is deemed to be an "inherently barbaric" punishment such as torture—consider whether a punishment is disproportionate to the crime. This approach is based on the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham v. Florida*, 560 U.S.

48, 59 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

Defendant's closing argument does not address the question whether, if sex offender registration is punishment, it is disproportionate or otherwise constitutionally unsound. Defendant asserts only that SORA's registration requirements are not punishment, and therefore do not fall within the Eighth Amendment's proscription against cruel and unusual punishment.

The registration requirements imposed by SORA, coupled with the actual and potential effects of being required to register, are not merely akin to historical punishments, as discussed above. As shown by the evidence in this case, SORA's requirements, as applied to Plaintiffs, subject them to additional punishment beyond their sentences through the pervasive misuse and dissemination of information published by the CBI. Defendant has offered no evidence that any Plaintiff presents an objective threat to society, such as a material risk of recidivism. Yet Plaintiffs have been and continue to be subjected to actual and potential dangers of ostracism and shaming; effective banishment and shunning in the form of limitations on their abilities to live and work without fear of arbitrary and capricious eviction, harassment, job relocation, and/or firing; significant restriction on familial association; and actual and potential physical and mental abuse by members of the public who for whatever reason become aware of their status as a registered sex offender. They are also subject to exposure by local law enforcement agencies making checks of their residences, as happened with Mr. Millard.

All of these are foreseeable consequences of the registry. Indeed, the CBI acknowledges the risk of public harassment and worse by placing a warning on its website that information

obtained there is not to be used for improper purposes.[10] Thus, a convicted offender is knowingly placed in peril of additional punishment, beyond that to which he has been sentenced pursuant to legal proceedings and due process, at the random whim and caprice of unknowable and unpredictable members of the public. This risk continues for the entire time a sex offender is on the registry, and perhaps even beyond that if he is fortunate enough to eventually deregister.

This ongoing imposition of a known and uncontrollable risk of public abuse of information from the sex offender registry, in the absence of any link to an objective risk to the public posed by each individual sex offender, has resulted in and continues to threaten Plaintiffs with punishment disproportionate to the offenses they committed. Where the nature of such punishment is by its nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense. SORA as applied to these Plaintiffs therefore violates the Eighth Amendment.

SORA as applied to Mr. Vega has resulted in unconstitutional disproportionate punishment for an additional reason. The requirement that Mr. Vega undergo offense specific treatment while in custody was part of the sentence imposed for his juvenile adjudication. As such, it was part of his punishment. The undisputed evidence, at the de-registration hearings in state court and in this Court, is that Mr. Vega completed that treatment as well as serving his entire sentence of confinement and parole. But the magistrates who heard both his petitions to de-register required him to submit evidence other than his uncontradicted testimony that he had

[10] The CBI website states: "The use of the sex offender registry information to harass, endanger, intimidate, threaten or in any way seek retribution on an offender through illegal channels is prohibited. Any person who engages or participates in such acts may be charged criminally." CBI website, "Public Notice and User Agreement"; viewable at: https://apps.colorado.gov/apps/dps/sor/search-agreement.jsf (accessed August 30, 2017).

completed treatment, even though the state had destroyed the only records by which Mr. Vega could meet this burden of proof. The state court's refusal to grant de-registration, absent either meeting this impossible burden or completing additional treatment, effectively gave Mr. Vega the choice of an adding additional treatment to his already-completed sentence, or remaining on the sex offender registry indefinitely. Imposing such punitive conditions was disproportionate to Mr. Vega's conviction.

I.Fourteenth Amendment

A. Procedural Due Process.

An alleged violation of the procedural due process required by the Fourteenth Amendment prompts a two-step inquiry: (1) whether the plaintiff has shown the deprivation of an interest in "life, liberty, or property" and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with "due process of law." *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012) (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

Mr. Vega has established a procedural due process violation. There is no legitimate dispute that being required to continue sex offender registration indefinitely is a deprivation of Mr. Vega's liberty. The procedures followed by the state in considering his petitions did not comport with basic principles of fundamental fairness—that is, they did not afford him due process.

SORA requires a court weighing a deregistration petition to "consider" whether it is "likely" that the petitioner will re-offend. The reasonable interpretation of this requirement is that the court, to deny a petition, must find that a subsequent sex offense is **likely**. Had the

legislature intended to place the burden on petitioners to prove a subsequent offense is **not** likely, it could easily have said so, but did not.[11] Further, it would make no sense for the statute to require the court to "consider" whether a petitioner is likely to re-offend, but nevertheless leave the court with unbridled discretion to deny a petition without finding that likelihood based on the evidence.

The magistrates hearing both petitions placed the burden on Mr. Vega to prove that another offense was **not** likely. They did so both in general and specifically by requiring him to prove, other than through his own testimony, that he had "successfully" (as defined by the magistrate) completed offense specific treatment. That burden is not consistent with the statute, imposed a vague and subjective standard, and further reversed the long-standing "usual and well known general rule … that the burden of proof lies upon him who substantially asserts the affirmative of an issue." *Gertner v. Limon Nat'l Bank.* 257 P. 247, 253 (Colo. 1927). This reversal of the burden of proof was plainly material, given the second magistrate's observation that it was a close case. *See* Ex. N at 963:17-20 (stating that "this is one of those cases that … I am on the fence on").

The magistrates compounded the unfairness by requiring Mr. Vega to prove this negative fact by providing evidence (beyond his own unrebutted testimony) that he had completed offense specific treatment, even though the state had destroyed the records by which Mr. Vega would have been able to make that proof. And finally, the magistrate in the 2012 hearing actually made

[11] Indeed, a recent amendment to § 16-22-113 demonstrates the legislature's ability to impose a burden of proof, in cases involving convictions arising from human trafficking. *See* C.R.S. § 16-22-113(1)(a.5) (effective September 1, 2017) (providing that a court "shall not issue an order discontinuing the petitioner's duty to register unless the petitioner has at least established by a preponderance of the evidence that at the time he or she committed the offense of human trafficking for sexual servitude, he or she had been trafficked by another person….").

proof of completion of treatment a **condition** of granting the petition, a condition that does not appear in the statute and that Mr. Vega could not meet. *See, e.g.*, Ex, M at 909:10-16; Ex. N at 964:1-4.

This Kafka-esque procedure, which was played out not once but twice, deprived Mr. Vega of his liberty without providing procedural due process. The unrefuted evidence was that Mr. Vega had discharged his sentence and had not been convicted of or have pending against him any other relevant pending prosecutions. Defendant in this case has not identified any evidence supporting a conclusion that Mr. Vega was "likely" to commit another sex offense, and neither magistrate made that finding. Other than the magistrates' subjective opinions that Mr. Vega did not appear to have learned sufficiently from his offense specific treatment, there was no evident basis to deny the petition. Accordingly, Mr. Vega was denied his liberty interest in being freed from the burdens of the restrictions imposed on registered sex offenders, even though he complied with all statutory requirements for deregistration. Therefore he was not afforded due process.

Mr. Millard and Mr. Knight have not argued or presented evidence supporting a claim that any procedures followed by the government deprived them of a protected liberty interest without due process of law.

B. Substantive Due Process.

The Due Process Clause "guarantees more than fair process." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 766 (10th Cir. 2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

All of the plaintiffs assert that the restrictions on their liberty imposed on them as

registered sex offenders constitute a violation of the "substantive due process" protection implicit in the Fourteenth Amendment. The Supreme Court has, at times, referred to that concept as constitutional protection against arbitrary governmental actions that are so contrary to the concept of individual autonomy, but has never clearly distinguished between procedural and substantive due process. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court distinguished between the abuse of executive power—requiring it to be that which "shocks the conscience"—and other action which is considered to be "fundamentally unfair." The fundamental right to be protected must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Seegmiller*, 528 F.3d at 767 (quoting *Chavez v. Martinez*, 538 U.S. 760, 775 (2003)).

In this case, Plaintiffs argue that SORA as applied to them deprives them of rights to privacy and liberty, including privacy expectations in the personal information about them that is made publicly available through SORA, but would not be available (either at all or as readily as is possible under SORA); and liberty interests in living, working, associating with their families and friends, and circulating in society without the burdens imposed by SORA. Mr. Vega extends this argument to the greater expectation of privacy a juvenile offender has in his records. He asserts that even though his juvenile adjudication for the underlying sex offense is not shown on his general criminal history that is publicly available, his adult conviction for failure to register is public, thus making his status as a sex offender public as well and defeating his right to privacy in his juvenile adjudication.

Plaintiffs contend that it is not merely the fact of registration and maintenance of the registry that deprives them of their privacy and liberty, but the widespread dissemination of their

personal information that is permitted and even encouraged through the CBI website and private entities who republish the information, which then has the common and foreseeable adverse consequences of such publication that—as shown by the record in this case and discussed above—are inflicted on registered sex offenders and those with whom they associate.

The cases concerning limitations on punitive damage awards by juries illustrate the difficulty in determining what may be a fundamentally unfair procedure in deprivation of property, violating substantive due process. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and cases cited therein.[12] But those cases do establish that infliction of punishment cannot be purely arbitrary. The Court recognized that even if procedures used for determining a punitive damages award may be reasonable and subject to judicial review, when an award can be fairly characterized as "grossly excessive" in relation to a state's interests in punishment and deterrence, it may "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.*, 517 U.S. at 568. Justice Breyer explained:

> This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion…. Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself….
>
> Legal standards need not be precise in order to satisfy this constitutional concern…. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior….

Id. at 587-88 (Breyer, J., concurring) (citations omitted).

Here, the plaintiffs have shown that the punitive aspects of Colorado's sex offender registration scheme enter the "zone of arbitrariness" that violates the due process guarantee of

[12] This line of cases was not cited in the arguments of counsel.

the Fourteenth Amendment. There is a rational relationship between the registration requirements and the legislative purpose of giving members of the public the opportunity to protect themselves and their children from sex offenses. But what the plaintiffs have shown is that the public has been given, commonly exercises, and has exercised against these plaintiffs the power to inflict punishments beyond those imposed through the courts, and to do so arbitrarily and with no notice, no procedural protections and no limitations or parameters on their actions other than the potential for prosecution if their actions would be a crime.

Relief

Plaintiffs' Fourth Amended Complaint seeks both declaratory relief and a permanent injunction prohibiting enforcement of SORA against them and dissemination of information regarding their registrations pursuant to SORA. The parties have not addressed the relief sought either at trial or in post-trial submissions.

A party seeking a permanent injunction must prove: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009). The trial court is vested with "necessarily broad" discretion in making this determination.

Plaintiffs have submitted no evidence or argument whatsoever to meet their burden of proof on factors (2) through (4), and Defendant has had no opportunity or reason to submit contrary evidence and arguments. Under these circumstances, permanent injunctive relief has no support in the record and only declaratory relief is appropriate.

Order

Based on the foregoing, it is

ORDERED that judgment shall enter declaring that the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101, *et seq.*, as applied to Plaintiffs David Millard, Eugene Knight, and Arturo Vega, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution; it is

FURTHER ORDERED that judgment shall enter declaring that the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101, *et seq.*, as applied to Plaintiff Arturo Vega, violates procedural due process requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; it is

FURTHER ORDERED that judgment shall enter declaring that the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101, *et seq.*, as applied to Plaintiffs David Millard, Eugene Knight, and Arturo Vega, violates substantive due process requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and it is

FURTHER ORDERED that Plaintiffs as prevailing parties shall be entitled to an award reasonable attorney's fees as part of the costs, to be determined by the Court pursuant to 42 U.S.C. § 1988(b).

Dated: August 31, 2017

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

ATTACHMENT 2:

Order Re: Motion to Dismiss, *People v. Dubelman*, No. 2017CR628 (Colo. Dist. Ct. (Arapahoe) Feb. 26, 2018)

DISTRICT COURT ARAPAHOE COUNTY, COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: February 26, 2018 2:21 PM CASE NUMBER: 2017CR628
PEOPLE OF THE STATE OF COLORADO **vs.** **ALAN DAVID DUBELMAN,** **Defendant.**	**▲ COURT USE ONLY ▲** **Case Number**: 2017CR628 **Division**: 309
ORDER RE: MOTION TO DISMISS	

Defendant filed a Motion to Dismiss ("Motion") on September 15, 2017. On October 6, 2017, the People filed their Response to the Motion to Dismiss ("Response"). The Court set the matter for a motions hearing and heard arguments concerning the Motion on January 3, 2018. Defense filed a supplemental motion on January 17, 2018, and the People did not respond to the supplemental motion. The Court, having considered the Motion, the Response, the supplemental motion, and the court file, hereby finds and orders as follows:

Dr. Dubelman was convicted of Second Degree Sexual Assault pursuant to C.R.S. § 18-3-403 in Adams County case 1993CR587, and his requirement to register as a sex offender stems from this conviction. C.R.S. § 16-22-103 requires that any person convicted of unlawful sexual behavior register as a sex offender, and C.R.S. § 16-22-108(1)(a)(1) requires that person to register with law enforcement in each jurisdiction which he or she resides. On March 3, 2017 the defendant was charged with two counts of Failure to Register as a Sex Offender pursuant to C.R.S. § 18-3-412.5(1)(b),(2) and C.R.S. § 18-3-412.5(1)(g)(2), both class 6 felonies.

LEGAL STANDARDS

Colorado law mandates that anyone convicted of an offense with an underlying factual basis of unlawful sexual behavior is required to register with the state as a sex offender. C.R.S. § 16-22-103. Anyone convicted of more than one sexual offense "shall be subject for the remainder of their natural lives to the registration requirements." C.R.S. § 16-22-113(3).

A statute is presumed to be constitutional, and to succeed in an as-applied challenge, "a defendant has the burden of establishing the unconstitutionality of a statute, as applied, beyond a reasonable doubt." *People v. DeWitt*, 275 P.3d 728, 731 (Colo. App. 2011) (quoting *People v. Gutierrez,* 622 P.2d 547, 555 (Colo. 1981)).

There are two types of due process protected by the Fourteenth Amendment of the United States Constitution. Procedural due process protects individuals in scenarios which state action occurs and requires notice and the opportunity for a hearing. *Copley v. Robinson*, 224 P.3d 431, 435 (Colo. App. 2009)("At a minimum, procedural due process requires notice and the opportunity for a meaningful hearing before an impartial tribunal.") To establish a violation of procedural due process, "one must first establish a constitutionally protected … interest that warrants due process protections." *M.S. v. People*, 303 P.3d 102, 107 (Colo. 2013) citing *Bd. Of Regents v. Roth*, 408 U.S. 564, 569 (1972). When considering a procedural due process challenge, courts embark on a two-part analysis. First, courts inquire into whether there is a deprivation of an interest in life liberty, or property. *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012). Next, the court asks whether the procedures followed by the government complied with due process of law. *Id.*

Substantive Due Process is also protected by the Fourteenth Amendment. In its substantive due process analysis, the court must first determine the appropriate level of judicial

scrutiny. If a fundamental right is involved, a "strict scrutiny" analysis is used, whereby the court determines if the action is narrowly tailored to serve a compelling governmental interest. *People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. App. 2003). If no fundamental right is implicated, the court engages in a "rational basis test" to "demonstrate that the legislation bears some reasonable relationship to a legitimate government interest. *Id.* The fundamental rights warranting a strict scrutiny analysis are:

The Eighth Amendment to the United States Constitution prohibits "punishment" that is both "cruel and unusual." U.S. Const. amend. XIII. If an act is not punishment, the Eighth Amendment does not apply. For an Eighth Amendment challenge to the Colorado Sex Offender Registration Act ("SORA"), the Court engages in a seven-part balancing test to determine whether the law is punitive or not. Courts consider:

> (1) Whether the sanction involves an affirmative disability or restraint;
> (2) Whether it has historically been regarded as 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.
>
> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *People v. Rowland*, 207 P.3d 890, 893 (Colo. App. 2009).

If a statute purports to be a civil remedy, "only the clearest proof" will override the legislative intent and deem the remedy a criminal sanction. *Hudson v. United States*, 522 U.S. 93, 100 (1997).

ANALYSIS

As a matter of first impression, the Court addresses *Millard v. Rankin*, 265 F.Supp.3d 1211 (10th Cir. 2017). While the District Court did find SORA unconstitutional as applied to

David Miller, Eugene Knight, and Arturo Vega on Eighth Amendment, substantive due process, and procedural due process grounds, this District Court opinion cuts against a majority of not only Colorado, but also United States Supreme Court precedent. While the case is illustrative, its current status on appeal leads the Court to place little persuasive weight in this as-yet final decision.

Moving on to the legal standards at play, the Court addresses Defendant's procedural due process challenge. While defendant alleges a violation of procedural due process in his motion, there is little argument presented concerning which process was violated. *Motion* at 10-13. He does reference that his conviction makes him "ineligible to deregister" and that he must "register for the remainder of his life." *Id.* at 12. Thus the Court construes the procedural due process argument to refer to Dr. Dubelman's inability to deregister.

In *People v. Sowell*, the Colorado Court of Appeals held that "the lifetime registration requirement applies to all persons required to register pursuant to [C.R.S §] 16-22-103." *People v. Sowell*, 327 P.3d 273, 276 (Colo. App. 2011). In *Sowell*, the Petitioner challenged his inability to deregister claiming that he detrimentally relied upon the statutory scheme present at the time of his conviction, which stated that he would be eligible to deregister ten years after his release from the court's jurisdiction. *Sowell*, 327 P.3d at 274. The Petitioner in *Sowell* bore several similarities to Dr. Dubelman: both were convicted before the 2001 statutory amendments precluding certain types of sex offenders from deregistering, and thus, at the time, both would have believed that they were eligible to deregister. *Id.* Due to the lack of argument provided to this Court, it is unable to discern whether Defendant makes a similar argument as that in *Sowell*, where a petitioner specifically alleged a violation of due process due to detrimental reliance on the old statutory scheme that allowed would have possibly allowed him to deregister.

On its face, the Court does not find the lifetime registration requirement to violate Dr. Dubelman's procedural due process rights. He was provided a hearing to deregister in 2012, even though the status of the law provided that he was ineligible to register. Moreover, courts have upheld the validity of the lifetime registration requirements. *People v. Tuffo*, 209 P.3d 1226 (Colo. App. 2009). Thus, without a specific allegation as to how procedural due process was violated, this Court is forced to agree with the People that because "the defendant would *never* be entitled to discontinuation, the question of what procedure is involved … is not relevant to this case." *Response* at 24.

Second, the Court addresses the defendant's substantive due process argument. Throughout is Motion, Defendant illuminates the ways in which SORA could possibly implicate a fundamental life liberty or property interest. Of note, he mentions that his information, such as his photograph, age, and address, are publicly available, employment restrictions suffered since he was forced to register, his targeting via a Channel 7 investigative report, and issues finding stable residence. *Motion* at 5-9. The defense further elaborated on these issues at the motions hearing held on January 3, 2018. Defendant was able to elaborate upon the hardships suffered after his placement on the Sex Offender Registry. He noted his trouble finding stable housing, including his inability to move into Palomino Park as a result of his inclusion on the registry. He detailed the number of unsuccessful job applications submitted for positions which he could have ably filled, and how even when the University of Denver was willing to offer him a position, such offer was rescinded upon the university's legal department learning about his past history. Additionally, he described his inability to continue tutoring after the release of the Channel 7 investigative report. At the close of testimony, this Court heard argument about how these secondary effects of registration affected Dr. Dubelman's liberty and privacy interests.

Colorado courts have noted that substantive due process "forbids the government from infringing upon a fundamental liberty interest, no matter what process is afforded, unless the infringement is narrowly tailored to serve a compelling state interest." *People v. Strean*, 74 P.3d 387, 394 (Colo. App. 2002). When addressing the standard of review applied to fundamental interests relating to SORA, courts have employed the rational basis test. See *Strean*, 74 P.3d at 394; *Oglethorpe*, 87 P.3d 129 (Colo. App. 2003). The Court finds the rational basis test to also be applicable here. While defendant's privacy rights are arguably implicated by the posting of his information, the Court notes that just because this information is available on the Colorado Bureau of Investigation website, as well as the National Sex Offender Registry, such information is readily available elsewhere. Defendant complains about the effects of the registry impeding his search for housing and employment; however, any criminal background check would also relay Defendant's conviction history to law enforcement or landlords. In today's digital age, the Court does not find that the registry is solely responsible for the troubles faced by Dr. Dubleman. Indeed, the evidence presented to the Court show that Dr. Dubleman's trouble are associated with the actions of a scorned lover, not to placement on the registry. Moreover, the United States Supreme Court has held that public dissemination of an individual's criminal record does not violate privacy rights protected by the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

Therefore, because the Court does not find the defendant's fundamental privacy interest to be implicated here, the rational basis evaluation is appropriate. Accordingly, the government must show that the registration and informational aspects contain a reasonable relationship to a legitimate governmental interest.

The legislature has provided that:

> [T]he majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision. The general assembly also finds that keeping all sex offenders in lifetime incarceration imposes an unacceptably high cost in both state dollars and loss of human potential. The general assembly further finds that some sex offenders respond well to treatment and can function as safe, responsible, and contributing members of society, so long as they receive treatment and supervision. The general assembly therefore declares that a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health, and welfare of the state.

C.R.S. § 18-1.3-1001.

The legislature has furthermore declared:

> The general assembly hereby recognizes the need to balance the expectations of persons convicted of offenses involving unlawful sexual behavior and the public's need to adequately protect themselves and their children from these persons … The assembly declares, however, that, in making information concerning persons convicted of offenses involving unlawful sexual behavior available to the public, it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

C.R.S. § 16-22-110(6)(a).

The General Assembly has clearly illuminated their purposes for enacting SORA and its public information component. By specifying the intent to aid a population with recidivist tendencies and explaining the public safety component of the internet posting, the legislature aptly described the Act's rational relationship to legitimate governmental interests. Therefore, as a rational basis exists, the substantive due process challenge fails.

Lastly, the Court addresses the Eighth Amendment challenge. Colorado appellate courts have repeatedly held that SORA does not constitute punishment. *People v. Rowland*, 207 P.3d 890 (Colo. App. 2009); *People v. Stead*, 66 P.3d 117, 120 (Colo. App. 2002); *Jamison v. People*, 988 P.2d 177 (Colo. App. 1999); *People v. Carbajal*, 312 P.3d 1183 (Colo. App. 2012).

Nonetheless, the Court will still apply the *Mendoza-Martinez* for the purposes of this case. Of the seven factors for the Court to consider, "no one factor is controlling." *Rowland*, 207 P.3d at 893.

First, the Court must consider whether there is an affirmative disability or restraint. Appellate courts have previously held that, "community notification does not impose an affirmative disability or restraint because it does not, on its face, restrict where an offender may live or work." *Rowland*, 207 P.3d at 893. This analysis from *Rowland* applies to this case. While the Court does acknowledge that Dr. Dubelman has been restricted from certain rental properties, this result is not solely attributable to the Sex Offender Registry. Any criminal background check likely would have yielded the same result. Accordingly, the Sex Offender Registry does not place an affirmative disability or restraint upon Defendant.

The next factor is whether the action involved has historically been regarded as punishment. As noted in *Stead*, "public dissemination of information about criminal history is not traditionally considered a punishment, despite the negative consequences for a defendant." 66 P.3d at 121. Also, the United States Supreme Court has reasoned that, "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." Here, the public safety component comprises such a legitimate governmental objective. Accordingly, the Court does not find the public dissemination implicated in Dr. Dubelman's case constitute a historical form of punishment.

The third factor is whether the purported punishment comes into play on a finding of scienter. While Dr. Dubelman's culpability for the two sexual assaults certainly serves as a predicate triggering the community notification requirements, "this factor, standing alone does not require treating a statute as punishment." *In re Cardwell*, 50 P.3d 897, 904 (Colo. 2002).

The Court next considers whether the statute's operation promotes the traditional aims of punishment, retribution, or deterrence. While internet posting may be viewed as akin to punishment due to the possible deterrent for other possible offenders. However, such deterrence does not by itself warrant SORA to be punitive. Indeed, deterrence may "serve civil as well as criminal goals." *United States v. Ursery*, 518 U.S. 267, 292 (1996).

The fifth factor involves whether the behavior to which SORA applies is already a crime. Indeed SORA only applies to those convicted of unlawful sexual behavior. Despite this fact, "the Supreme Court has de-emphasized this factor, point out that 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.'" *Rowland*, 207 P.3d at 894 quoting *United States v. Ward*, 448 U.S. 242, 250 (1980).

The sixth factor is whether the statute involved has an alternative purpose besides punishment. As referenced above, it is "not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior," but that the information be used for community safety purposes. C.R.S. § 16-22-110(6)(a). This alternative purpose has repeatedly been acknowledged and upheld in Colorado courts.

Lastly, the Court considers whether SORA is excessive in relation to the alternative purpose assigned. On balance, the internet posting and registration requirements do not outweigh the public safety concerns elucidated in the Act. While Dr. Dubelman has assuredly faced hurdles in his search for housing and employment, these secondary effects do not trump the valid public safety concerns raised in SORA.

Considered in sum, these factors do not weigh in favor of finding that the provisions of SORA constitute punishment in the context of the Eighth Amendment, and therefore, it cannot

be found to violate Defendant's rights.

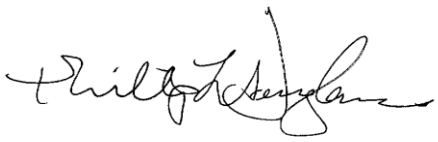
The defense bears the burden of showing that the statute is unconstitutional as applied beyond a reasonable doubt. Between the Motion and the hearing on the Motion, that burden has not been met.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

Dated and signed: February 26, 2018.

BY THE COURT:



Phillip L. Douglass
District Court Judge