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

Civil Action No. 13-cv-2406-RPM

DAVID MILLARD,
EUGENE KNIGHT, and
ARTURO VEGA,

Plaintiffs,

v.

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

Defendant.

DEFENDANT'S CLOSING ARGUMENT BRIEF

Defendant Michael Rankin, by and through the Colorado Attorney General, respectfully submits the following Closing Argument Brief, stating as follows:

I. Introduction

Pursuant to the Orders in this case, Plaintiffs are bringing their claims not as a facial attack on the sex offender registry statute, but as an as-applied challenged. In an as-applied challenge to a statute, the Plaintiffs "seek to vindicate their own rights based on their own [particular] circumstances." *Scherer v. United States Forest Service*, 653 F.3d 1241, 1245 (10th Cir. 2011). The claim is not that the statute is unconstitutional, but rather that its application to "a particular person under particular circumstances deprived that person of a constitutional right." *Citizens United v. Gessler*, 773 F.3d 200, 220 (10th Cir. 2014)(dissenting opinion, citing to *Fed. Elec. Comm'n v. MCFL*, 107 S.Ct. 616 (1986); *United States v. Huet*, 665 F.3d 588, 600-01 (3d. Cir. 2012). An as-applied challenge is limited to testing the application of a statute to the facts of a plaintiff's

concrete case. *Scherer v. Forest Service*, 653 F.3d at 1243 *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007). The standard is not a speculative evaluation of what a particular plaintiff may apprehend as a potential problem. In an as-applied challenge, the applicable law is the same as that applied in a facial challenge.

Plaintiffs in this case bring a claim under the Eighth Amendment, claiming that that the Colorado Sex Offender Registration Act, as applied to their individual circumstances, is in violation of the Eighth Amendment of the Constitution. In proving an Eighth Amendment violation, it is incumbent on the Plaintiffs to prove that the statute or regulation is applied in a manner that rises to the level of being punishment. In reviewing whether a regulation or statue rises to the level of punishment, courts will ask: (1) does the law inflict what has been regarded as punishment, (2) does it impose an affirmative disability or restraint, (3) does it promote the traditional aims of punishment, and (4) does it have a rational connection to a non-punitive purpose, and; 5) is it excessive with respect to this purpose." *Smith v. Doe*, 538 U.S. 84, 97 (2003), citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

The statutory registration requirement has been determined in Colorado to be not punitive, as it's considered to be a civil, non-punitive law. *United States v. Davis*, 352 F. App'x 270, 272 (10th Cir. 2009). The U.S. Supreme Court has similarly determined that an Alaska sex offender registration act or requirement is not punitive in nature, but rather nonpunitive because the requirement "has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Smith v. Doe*, 538 U.S. at 102-3. Stigma from registration and Internet posting of information "results not from public display for ridicule and shaming

but from the dissemination of accurate information about a criminal record." *Id.* at 98-99. Notice of a criminal conviction subjects the offender to public shame. "The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id*.; *See also, Shaw v. Patton*, 823 F. 3d 556, 564 (10th Cir. 2016). Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation. Public release of information is necessary to enable the public to take the precautions they deem necessary before dealing with the registrant. Additionally, the Tenth Circuit has determined that reporting requirements and residency restrictions do not rise to the level of punishment or banishment necessary to support a claim for a constitutional violation. *See*, *Shaw v. Patton*, 823 F. 3d 556 (10th Cir. 2016). Plaintiffs cannot satisfy the requirements to show that the registration requirement has led to shaming or banishment in violation of the Constitution.

Plaintiff's also bring a claim under the Fourteenth Amendment, claiming that a publicly accessible website which allows the public to view limited information regarding registered sex offenders is a violation of their right to privacy. Privacy rights are only found in a limited number of settings, particularly marriage, procreation, contraception, family relationships, and child rearing and education. *Paul v. Davis*, 424 U.S. 693 (1976). Courts do not readily expand the zone of constitutionally protected liberty interests. *Washington v. Glucksberg*, 521 U.S. 701, 720 (1997). Courts have not expanded the zone of privacy to include the privacy rights of sex offenders. In the absence of a fundamental right of privacy, the Court must consider whether the Act's registration requirement has a reasonable relation to a legitimate government interest.

Glucksberg at 722. Courts have found that registration and notification requirements are rationally-related to the legitimate government interest of public safety in both the ex post facto context (*Smith v. Doe*, 538 U.S. at 89) and in the Due Process Clause context (*Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1,4 (2003). Juveniles have a right of privacy, however that right of privacy does not extend to criminal sexual conduct. *Aid for Women v. Foulston*, 441 F.3d 1101, 1116, 18 (10th Cir. 2006). Injury to reputation, even if defamatory, does not constitute deprivation of a liberty interest. *Conn. v. Doe* at 4, 6-8. Plaintiff's claim that their privacy rights have been violated must also fail.

In the Order denying the Motion for Summary Judgment, the Court indicated that the Fourteenth Amendment claim relates to not just privacy interests, but also a liberty interest the Plaintiff's may hold under the Fourteenth Amendment. Plaintiffs asserted they have been "branded with a scarlet letter" leading to humiliation, harassment, ostracism, loss of employment, and loss of housing. Courts have applied the stigma plus test, which will determine if, in addition to the stigma or defamation, there has been some "alteration in legal status [which] would implicate a liberty interest." *Brown v. Montoya*, 662 F.3d 1152, 1167 (10th Cir. 2011). The "stigma-plus" analysis requires the Plaintiff demonstrate: (1) the government made a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she asserts is false, and (2) the plaintiff experienced some governmentally imposed burden that 'significantly altered [his or] her status as a matter of law. *Id*. Plaintiffs cannot satisfy this standard. Plaintiffs cannot satisfy the "stigma-plus" test and this claim is also without merit.

II. CBI and the Colorado Sex Offender Registry Act

Each Plaintiff is statutorily required to register on the Colorado Sex Offender Registry due to sex offenses for which they were convicted. It is the express statement of the General Assembly that the purpose of the Colorado Sex Offender Registry Act statute is to provide public with information about persons convicted of unlawful sexual behavior and allow the public to protect themselves and their children. C.R.S. § 16-22-112(1). The specific stated purpose, as presented by he Colorado General Assembly, is void of any intent to "inflict retribution or additional punishment on any person convicted of unlawful sexual behavior" by providing information about registered sex offenders to the public. *§§* 16-22-110(6)(e) and 16-22-112(1), C.R.S.

The purpose of the SORA, as testified to by CBI Director Michael Rankin is: (1) to enhance public safety, (2) to serve as a deterrent through the effect of having the information available to the public, with the goal of deterring the individual from re-offending, (3) to serve as a tool to assist local law enforcement with their investigative duties in a manner similar to the purpose served by review of criminal backgrounds and histories, and (4) to serve as a assistive device to facilitate public assistance in local law enforcement investigations. These activities support the stated purpose as provided by the General Assembly "to promote public safety and intelligence sharing across different criminal justice land law enforcement agencies." *2002 Colo. Sess. Laws, page 1157; Senate Bill 02-0101*.

In this case, the Director of CBI, Michael Rankin, is the named Defendant. The role of the CBI in relation to the SORA is to: (1) create and maintain the sex offender registry, (2) create the necessary forms for registering, which CBI makes available to

the public and local law enforcement through direct contact with CBI or through accessing the public website, and (3) serve as custodian of records received electronically pursuant to the following procedure. CBI is merely the custodian of the sex offender registry and the related information regarding the registrants. The CBI may receive information directly from the Court following an order related to a conviction for a sex offense or may receive information by electronic transmission through the Colorado Crime Information Center (CCIC) or the National Crime Information Center (NCIC). Upon the entering of an Order of a Court or upon an individual's release from the Colorado Department of Corrections, the individual is given notice to register with the local law enforcement in the jurisdiction of their residence. If an offender required to register transfers from Colorado to another state, CBI will notify the receiving state through NCIC that individual is moving. CBI may receive information in a similar manner if an individual required to register relocates from another state to Colorado.

CBI's role also includes training local law enforcement regarding the sex offender registry, CCIC, and NCIC, conducting eight training sessions per year for local law enforcement, fielding calls from the public regarding the sex offender registry, and interacting with federal law enforcement and with the SMART (Sex Offender Apprehension, Registration and Tracking Office), which is the federal office charged with administering the Adam Walsh Act. It should be further noted that the Colorado Sex Offender Registry Act is in line with related federal laws, leading to Colorado being one of the states determined to be in substantial compliance with the Adam Walsh Act.

Pursuant to its statutory requirements under the Colorado Sex Offender Registration Act, CBI was required to create a public website in order to allow the public

access to limited information registered sex offenders in Colorado. On the publicly accessible website, those seeking information must initiate the search by accessing the website. No juvenile offenders appear on the website. The information available is limited to a registrant's: name, current address, recent photograph, county of residence, date of birth, scars, marks, tattoos, and information regarding their conviction. This information is received from local law enforcement agencies and auto-populates the website with the information provided and any updates or changes. The only additional information listed is whether he individual falls into one or more of four statutorily required classes: (1) whether the registrant is a sexually violent predator, (2) whether the registrant has multiple sex offense convictions, (3) the felony conviction requiring registration, and (4) whether the individual has been convicted of failure to register. The limited information available on the website is necessary to allow the public to protect itself and does not rise to the level of an Eighth or Fourteenth Amendment Constitutional violation.

The CBI also maintains a list of those required to register on the sex offender registry. The list does not include a picture of the registrant and is available to the public only by a request to the agency through a specific form available on the CBI website. The list can be requested on a search by state, zip code, county or city and lists just the basic information of those individuals on the sex offender registry, including juveniles and misdemeanors. The Sex Offender Registry itself contains more information about the individual registrant, including vehicle information and email addresses. However, the registry is only available to law enforcement personnel, with no public accessibility. Once an individual is required to register as a result of a sex

offense, he or she must notify local law enforcement of any changes to personal information within 5 business days. Additionally, after a statutorily determined number of years, certain registrants have the statutory ability to petition the sentencing court to be removed from the registry and be relieved of the registration requirement. The Sex Offender Registry is separate and distinct from an individual's criminal background history, which is also maintained by CBI and will contain an individual's complete criminal history, with the exception of those crimes committed while a juvenile. Of the areas in which CBI maintains information pertaining to those required to be on the sex offender registry, only the website and the list are available to the public, with the website being the only resource available without requiring a request directly to CBI.

Contrary to Plaintiffs' claims, there is no Constitutional violation present with the Colorado Sex Offender Registration Act, as the purpose is for public safety and to protect children and is designed in a manner that is reasonably related to achieving that purpose. CBI is charged with the application of statute and is required to be in substantial compliance with the related federal act in order to avoid a financial penalty in the form of a restriction on certain federal funds. As noted during trial, Colorado is in substantial compliance with the federal legislation and there is neither a facial violation of the Constitution, nor violation when reviewed in the context of Plaintiffs' as applied challenge.

III. Plaintiffs

a. David Millard

In reviewing whether the Colorado Sex Offender Registration Act is constitutional as applied to the Plaintiffs in this matter, the Court is to review the effect of the statute

under the "concrete facts of the particular plaintiffs." Plaintiff David Millard alleged that he has experienced feeling like a pariah and suffered from loneliness, as well as had difficulty finding employment. However, the evidence shows that Mr. Millard has been employed at the same place of employment for approximately 14 years, rising up the ladder from lower level employment to greater levels of responsibility. He disclosed to his employer the requirement to register early during his term of employment and remained employed many years later when the Albertson's Human Resources department inquired into his requirement to register. Mr. Millard also claimed that a Channel 7 news report caused him to lose his place of residence because of his status as a registered sex offender. However, the video of the news report, presented at trial, reflected that the purpose of the report was not to identify, frighten or harass registered sex offenders living in these locations, but rather to focus on the concerns of the members of the public living near those who had felony and criminal records. *Pl. Ex. 9, 9A*. Heard in multiple portions of the video were assertions that no criminals or individuals with felonies were allowed to reside on the premises. *Id*. Registered sex offenders were under the larger umbrella of individuals with felonies convictions. *Id*. The focus was on those who have committed crimes, not just registered sex offenders, and does not support that Mr. Millard was branded with a scarlet letter, ostracized, or outcast. Similarly, Mr. Millard asserted that during subsequent efforts to find housing, prospective residential properties inquired about his criminal background or performed background searches, such inquiries going beyond the narrow scope of his requirement to register on the sex offender registry.

Mr. Millard also testified that he heard gunshots in the alley near his house. However, Mr. Millard only guessed that he was the intended target and his testimony does not support that the gunshots were directed at him because of his status as a registered sex offender, beyond his mere suspicion or speculation. Mr. Millard similarly speculated that his car had been broken into and vandalized due to the registration requirement and that interactions with local law enforcement led his neighbors to view him differently. Lastly, Mr. Millard alleged that searches under GOOGLE led to private websites providing the public with incorrect information. However, the evidence provided at trial supports that the related searches led to government websites and a private website, which directed traffic back to a federal government site. While Mr. Millard is to be commended for completing his sentence and for holding the work ethic that allowed him to maintain employment for such an extended period of time, the requirement that he register on the sex offender registry is not punishment, an invasion of privacy, or a loss of liberty such that he can support his claim of a constitutional violation.

b. Eugene Knight

The crux of Plaintiff Eugene Knight's claim is that he is limited from entering upon Denver Public School property due to a school-imposed restriction. Mr. Knight asserts that he is required to drop off and pick up his children outside of their elementary school and is not allowed inside of the school building or on school property. The restriction was imposed in September, 2014 when his youngest child was three-years old and placed in Early Childhood Education courses at Palmer Elementary School. *Def. Ex. H-K*. It should be noted that Mr. Knight's sex offense for which he must register was

against a child of this very age. School officials met with Mr. Knight and his wife and determined that pursuant to School District policy, a safety plan should be in place. *Def. Ex. H, I*. Under this plan, Mr. Knight was able to drop off and pick up his children approximately 20 feet from the front door. *Id*. Mr. Knight was also informed in the notification letter that he was entitled to an appeal process, a process which Mr. Knight decided to forego and instead filed a subsequently dismissed civil lawsuit in U.S. District Court. *Def. Ex. H-K*. Mr. Knight could still participate in his children's education and communicate with teachers and school officials if he so desired. *Id*. Mr. Knight also testified that he received subsequent identical letters to the letter he received in September, 2014, each letter affording him the same opportunity to participate in his children's education and the same opportunity to appeal the safety plan, if he so desired.

Mr. Knight also alleged that he had difficulty finding employment due to the sex offender registration requirement. At the time of trial, Mr. Knight was unemployed and making a choice to remain so due to costs, testifying that working was "more of a burden than a benefit." He also speculated that he had been denied employment at Home Depot due to the registration requirement, contrarily testifying that the prospective employer had not inquired about the requirement to register, but rather conducting a background check to inquire into felonies and Mr. Knight's criminal background.

Limiting the ability of an individual convicted of a sex offense committed upon a child from entering the property of an elementary school is rationally related to the interest in protecting children, which is the purpose of the sex offender registry statute.

Additionally, the experiences of Mr. Knight do not rise to the level of punishment, as he is able to participate in the education of his children, has declined the opportunity to communicate with school officials and appeal the safety plan, and is presently unemployed for reasons that are unrelated to his requirement to register on the sex offender registry.

c. Arturo Vega

Plaintiff Arturo Vega is required to register due to a conviction he received while a juvenile. Because his conviction was entered when he was a juvenile, Mr. Vega does not appear on the publicly accessible CBI website. Therefore, any privacy claim by Mr. Vega is without merit. Also without merit is Mr. Vega's claim that he has been denied or rejected from employment due to the requirement that he register on the sex offender registry. Mr. Vega has only stated that he was unable to work certain government jobs due to required background checks, which would also show other convictions in Mr. Vega's criminal history. *Pl. Ex. 6*. However, despite the inability to work certain government jobs, he remained employed with the same company and was able to work non-government jobs.

The primary claim asserted by Mr. Vega is his claim that despite his efforts, he is unable to satisfy the statutory requirements to petition for and be released from the requirement to register on the sex offender registry. Pursuant to C.R.S. § 16-22-113, a juvenile may petition for de-listing with the District Court in the jurisdiction in which he or she was convicted and sentenced. Mr. Vega has filed such a petition on two occasions in Jefferson County District Court, leading to hearings on both occasions and a second re-hearing following the second petition. *Def. Ex. L-N*.

In reviewing a petition to de-list from the sex offender registry, the reviewing Court must determine whether the petitioning individual successfully completed and discharged the underlying sentence and whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior. C.R.S. § 16-22-113(1)(e). The Court has discretion and will take into consideration recommendations from the individual's probation or parole officer, the prosecuting attorney from the jurisdiction of the underlying conviction, the presentence report from the underlying criminal matter, and testimony of the victim. *Id*. Jefferson County District Attorney Peter Weir testified at trial that the role of the District Attorney is to make a recommendation to the Court, which the Court may or may not follow. Such petitions are reviewed by the Prosecutor's Office on a case-by-case basis with no policy of blanket opposition to the petition. A petition is addressed by the Prosecutor's office taking into consideration a number of different elements, including the nature of the underlying conviction, victim impact statements, and treatment history of the petitioner. In the event of a denial, the petitioner may file a petition for review with the District Court and then proceed to the Court of Appeals, if necessary. The statute provides for a hearing and review process at the District Court level and is outside the scope of CBI's purview. In fact, CBI's only role is to provide the forms for de-listing and to process court orders to discontinue an individual from being listed on the registry, a number estimated by Kristie Mahler of CBI in her testimony at trial to be 20-60 orders per month.

In Mr. Vega's case, he first petitioned the Court to de-list in 2006. *Def. Ex. L*. A hearing was held in which opposition was presented. *Id*. Mr. Vega asserted he had completed treatment but could not prove so because the treatment documents from his

juvenile case had been destroyed. The Court allowed Mr. Vega to testify, after which the Court determined that it could not find that Mr. Vega had completed and discharged his sentence because part of his sentence was to complete sex offender treatment. In the absence of documentation, the Court took into account Mr. Vega's testimony at the hearing and determined, in its discretion, the Mr. Vega appeared to be minimizing, could not remember the names or number of victims, and took two years to complete a sentence which could have been terminated earlier if Mr. Vega had successfully completed sex offender treatment while in juvenile detention. *Id*. Mr. Vega failed to appeal the Court's decision denying his petition.

A similar result took place when Mr. Vega petitioned in 2012. *Def. Ex. M, N*. Again, the Court applied the statute and took into consideration the opposition from the prosecuting entity in Mr. Vega's underlying criminal conviction. In the absence of documentation from any treatment provider to support that Mr. Vega completed his required sex offender treatment, the Court again received testimony from Mr. Vega to discuss the treatment he received and the underlying allegations of his crime. Again, the Court was not convinced Mr. Vega had completed treatment because he appeared to minimize the allegations. Mr. Vega was advised to complete offense specific sex offender treatment and come back to Court. Mr. Vega submitted for an evaluation that determined that he was not a risk to commit another sex offense, however the Court still could not determine whether Mr. Vega had completed offense specific treatment as when serving his underlying sentence. As a result, the Court denied his petition because the Magistrate could not determine that Mr. Vega had successfully completed and discharged his underlying sentence. *Def. Ex. N, O*.

Following the most recent denial, Mr. Vega became involved in this present U.S. District Court matter. The proper course of action would have been to appeal the existing order or complete offense specific treatment and submit the proper petition for review by a Magistrate with the Jefferson County District Court. The statutory requirements Mr. Vega must comply with to successfully petition for de-listing do not rise to the level of punishment and do not place an undue burden on him or any other petitioner seeking relief from the requirement to register. In the absence of documentation supporting that he successfully completed sex offender treatment, Mr. Vega was given the opportunity to testify and also informed that the Court would consider subsequent documentation, including subsequent completion of offense specific sex offender treatment. *Def. Ex. L-O*. Additionally, there is available an appeal process, which would have been the proper course of action for Mr. Vega instead of pursuing a Constitutional claim in U.S. District Court. Mr. Vega should have appealed the matter to allow the proper Court to determine if the Magistrate abused his discretion. Mr. Vega took advantage of none of the available options and his claim against Mr. Rankin and the CBI is without merit, as the process followed does not rise to the level of punishment.

4. Donald Morris (Former Plaintiff)

Donald Morris was dismissed from this matter because he moved from the State of Colorado and is no longer required to register on the Colorado sex offender registry. Defendant objected to inclusion of his testimony because Mr. Morris is no longer required to register and is, therefore, not in a similar circumstance as Mr. Millard, Mr. Knight or Mr. Vega. Even with the Court's admission of his deposition testimony, Mr.

Morris' experiences do not rise to the level of punishment to support the existence of a constitutional violation.

Mr. Morris' primary claims center on an alleged assault and later relocation from his residence. However, Mr. Morris testified that he is not sure how the alleged assailant determined that he is a registered sex offender. Mr. Morris also testified that he moved because the landlord increased the rent in his apartment complex, a cost increase that was imposed upon all residents, both sex offenders and non-sex offenders. This runs contrary to his claim that he moved due to the requirement that he comply with the sex offender registry and diminishes the merit of his moot claim.

IV. Non-Plaintiffs

In the Court's Order denying Defendant's Motion for Summary Judgment, the Court indicated that "evidence [from non-Plaintiffs] of the experiences of people in sufficiently similar circumstances to those of the plaintiffs may be admissible to show the potential adverse consequences of registration requirements and the reasonableness and credibility of the plaintiffs' concerns." Doc. 70, p. 9. Defendant's object to the consideration of testimony of non-Defendants when the Court reviews the effect of a statute on the particular Plaintiffs in an as-applied challenge.

1. Sabine Flannery and Jurgita Meyer

Sabine Flannery and Jurgita Meyer testified at trial of alleged discrimination and harmful effects faced as a result of being a friend and a wife of sex offenders required to register as sex offenders. The testimony of each of these individuals should not be considered when evaluating the as-applied challenge of the Plaintiffs because neither witness has knowledge of the particular circumstances affecting the particular plaintiffs. Furthermore, neither is a sex offender required to register on the registry. Therefore,

their testimony is reflective of their experiences as individuals in relationships with sex offenders, but not of an individual who is actually on the sex offender registry.

Ms. Meyer is married to John Meyer, who is required to register as a sex offender. Ms. Meyer was employed at a Catholic school and alleged she was terminated from employment because her husband was required to register as a sex offender. Ms. Meyer testified that in 2008, someone at the school became aware of her husband's presence on the sex offender registry. She then testified that in 2011, her contract for employment was not renewed. The timeframe from alleged discovery of her husband's presence on the sex offender registry to the point at which her contract was not extended is three years, placing the connection between the events as remote and speculative. Furthermore, her testimony speaks only to her experiences and not the experiences of the Plaintiffs in this matter, her husband, or any other sex offender who could possibly be considered to be similarly situated to the named Plaintiffs.

Ms. Flannery testified that she was forced to leave her residence in Castle Rock because her neighbors discovered through a local law enforcement website that her friend, Herman Fareti, was a registered sex offender. She states that she was subsequently required to move from her residence due to perceived harassment. Again, she testifies to her experiences and not to the experiences of an individual who is required to register as a sex offender. Importantly, Ms. Flannery also testified that Mr. Fareti performed work at a number of residences in her neighborhood. This supports the very purpose of the sex offender registration statute and the CBI website, such purpose being public safety and the protection of children. Ms. Flannery's neighbors, as well as other citizens, should have the ability to know whether an individual they are

employing to work in and around their homes has a criminal background, is a registered sex offender, or is someone they feel could be a potential safety-risk for themselves or for their children.

2. Brian Brockhausen and Chrystal Toner

Non-Plaintiff Brian Brockhausen is presently a resident of Englewood, Colorado and is a Plaintiff in federal litigation in which multiple Plaintiffs are suing due to a local residency restriction prohibiting registered sex offenders from residing in certain Englewood locations. *See, Brockhausen, et al. v. City of Englewood, 16-CV-2090-RM-MJW*. It must be noted that at no point did Mr. Millard, Mr. Knight or Mr. Vega testify that the Englewood residency restriction limited their ability to secure housing. Therefore, any testimony regarding the effect of the Englewood restriction on either Mr. Brockhausen or Ms. Toner should not be considered by the Court. However, the Court, in the Order denying Defendant's Motion for Summary Judgment indicated that such a residency restriction may reflect that the sex offender registration statute is causing those required to register to be banished from their communities. Doc. 70. However, the evidence and testimony presented at trial do not support that the Englewood residency restriction has resulted in the banishment of any Plaintiff or non-Plaintiff in this matter.

The testimony of Mr. Brockhausen and Ms. Toner appears to assert that Mr. Brockhausen and Allen Toner, Ms. Toner's husband, have been banished from the City of Englewood due to the residency restriction. However, there was testimony at trial that despite the residency restriction, sex offenders, including Mr. Brockhausen and Mr. Toner, are still allowed to live in Englewood, as enforcement of the restriction is on hold,

and are able to work, attend parks, participate in civic events, travel and shop in Englewood. There has not been a complete expulsion from the community. This level of freedom and activity was sufficient to defeat a claim alleging banishment when a residency restriction was subjected to Court review. *Shaw v. Patton*, 823 F.3d 556, 567-568 (10th Cir. 2016); *followed by*, *Doe v. Miami-Dade Cnty*, 838 F.3d 1050 (11th Cir. Fla. 2016*); Doe v. Miami-Dade Cnty*, 2017 U.S. App. LEXIS, 1303 (11th Cir. Fla. Jan. 25, 2017). Additionally, Mr. Brockhausen testified regarding the community support he has received, running contrary to any claim that his status as a registered sex offender has led to shaming from the community. It should also be noted that Ms. Toner testified that the difficulty she and her husband were having with finding a new housing situation was the result of higher rents and finances, not some type of exclusion resulting from Mr. Toner's presence on the sex offender registry. Mr. Brockhausen and Ms. Toner are, therefore, not similarly situated to Mr. Millard, Mr. Knight or Mr. Vega and their testimony should not be considered by the Court.

V. Conclusion

It is Plaintiff's burden to prove by a preponderance of the evidence that the Colorado Sex Offender Registration Act has violated their Constitutional rights as-applied to each of their particular set of circumstances. Plaintiffs have not met that burden. Mr. Millard has worked at the same job for 14 years despite his employer's knowledge that he must register on the sex offender registry. Mr. Knight is still able to participate in his children's education despite the existence of a safety plan, to which he did not avail himself of the opportunity to appeal or communicate with school staff. Mr. Vega has attempted to de-list from the registry unsuccessfully. However, the reviewing

Court provided him with the opportunity to present testimony in the absence of the relevant documents and Mr. Vega neither followed up on the Court's recommendation to take offense specific treatment, nor exercised his appellate rights. Any negative effects Plaintiffs have experienced are related to the Sex Offender Registration Act by speculation only and are not related to the manner in which Mr. Rankin or the CBI have applied the statute or managed the sex offender registry, the related list, the publicly accessible website, and any of Plaintiff's personal information.

Plaintiffs have not shown that the Colorado Sex Offender Registration Act rises to the level of punishment. In fact, the Tenth Circuit has already determined that the Act is considered to be a civil and non-punitive law. *See*, *United States v. Davis*, 352 F. App'x at 272. The U.S. Supreme Court made a similar determination regarding the Alaska sex offender registration statute because public safety is a legitimate non-punitive purpose promoted by notifying the public of the risk of sex offenders. *See Smith v. Doe*, 538 U.S. at 102-3. A similar decision was made in the Tenth Circuit regarding residency restrictions, in which the Court determined that an Oklahoma residency restriction was not punishment because it was not for the purpose of humiliating the individual and did not rise to the level of banishment, as it did not completely exclude the individual from the particular community. *See, Shaw v. Patton*, 823 F.3d at 567-568. Additionally, the posting of information on the CBI website does not rise to the level of shaming. *Smith v. Doe*, 538 U.S. at 102-3. The Colorado Sex Offender Act is not for the purpose of banishment or shaming, is for a non-punitive purpose, has a rational relation to a non-punitive purpose and is not punishment.

Similarly, Plaintiffs cannot show that the Sex Offender Registration Act violates their Due Process rights, either to privacy or to any liberty interest. The registration and notification requirements are rationally-related to a legitimate government interest in public safety. *See, Conn. Dep't of Pub. Safety v. Doe*, 538 U.S at 4. Additionally, Plaintiffs cannot satisfy the "stigma-plus" analysis, as they have not shown that the use of the Colorado SORA makes a statement that is derogatory and capable of being proved false, and that the SORA altered their status as a matter of law. *See, Brown v. Montoya*, 662 at 1167. Under controlling law, Plaintiffs claims are without merit.

Recent cases have addressed the Sex Offender Registration statutes in different states with varying results. However, they can be distinguished from Colorado's Act. For instance, in *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016), the Michigan Sex Offender Registration Act was determined to rise to the level of punishment. However, Michigan's Act banned registered sex offenders from living, working or loitering within 1000 feet of a school. *Id*. at 698. "Loiter" was defined as "to remain [in a place] for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." *Id*. Colorado's Act is distinguishable in that it contains no such broad, state-wide limitations on where registered sex offenders may live, work or be present. *See also, Vasquez v. Foxx*, 2016 U.S. Dist. LEXIS 170354, *17-18 (N.D. Ill. Dec. 9, 2016). Additionally, Michigan's Act required registrants to appear immediately to update changed information, such as new vehicles and internet identifiers. *Doe v. Snyder*, 834 F.3d at 698. On the contrary, Colorado's Act allows for 5 business days. C.R.S. § 16-22-108. Lastly, the Michigan Act created three tiers correlated to current dangerousness which were based solely on

the crime of conviction and not individual assessments of the individual. *Doe v. Snyder*, 834 F.3d at 702. The State then published the estimation of present dangerousness tier classifications, which may be based on offenses that would not normally be sex offenses, and offered no opportunity for appeal. *Id*. at 702-703. Colorado's Sex Offender Act carries no such non-appealable dangerousness classification and is easily distinguished from Michigan's Act. This case is also distinguishable from Plaintiffs' circumstances in this case because none of the three Plaintiffs claim that they have been adversely affected by any residency restriction in Colorado.

Accordingly, Defendant Michael Rankin, in his official capacity as the Director of the Colorado Bureau of Investigation, respectfully requests the Court enter judgment in his favor.

Respectfully submitted this 31st Day of January, 2017.

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CERTIFICATE OF SERVICE

This is to certify that I have electronically served the foregoing upon all parties herein via CM/ECF on this 31st day of January, 2017, addressed as follows:

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