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, in his official capacity as
Director of the Colorado Bureau of Investigation, Defendant/Appellant

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO IN
Civil Action No. 13–cv–02406–RPM

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS IN SUPPORT OF PETITIONERS/APPELLEES

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

The National Association for Rational Sexual Offense Laws ("NARSOL") is a national nonprofit organization exclusively dedicated to advocating for rational, evidence-based sexual offense prevention policies that minimize unnecessary collateral consequences while maintaining a focus on public safety. NARSOL funds and promotes research into sexual offense recidivism, maintains and aggregates data on recidivism and the efficacy of sexual offense registries, participates where appropriate in litigation related to sex offender registry law, and hosts conferences throughout the United States focusing on fact-based reform of sexual offense legislation.

NARSOL's interest in this case is to provide the Court an objective analysis of the impact of Colorado sentencing policy reflected in C.R.S. §§ 16–22–101, *et seq*, commonly referred to as "SORA." Because the statute, as implemented, poses long-term adverse consequence to those offenders whose post-conviction, or post-registration, conduct has resulted in no continuing threat to public safety, NARSOL finds that there are serious due process considerations in the dissemination of information to the public that compromise the potential for registrants to live as productive citizens in their communities.

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[1] No counsel for a party authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Counsel for Appellees Millard, *et al*, and the Colorado Attorney General consented to this filing on July 24, 2018.

ARGUMENT

The rationale underlying Colorado's statutory regulation requiring registration of individuals convicted of qualifying sexual offenses rests, in significant part, on the perceived need to afford the public information concerning convicted sex offenders in order to prevent future criminal activities including those involving children in the community. The District Court concluded that the legislative intent in adoption of the regulatory scheme, "SORA," was not constitutionally flawed by an improper interest in imposing punishment on offenders beyond that authorized by the criminal law upon conviction for violation of state sexual offense statutes. *Millard v. Rankin*, 265 F.Supp.3d 12ll, 1226 (D. Col. 2017).

The court found, however, that the *effects* of the registration scheme transformed the scheme into one which is punitive. *Id.* And in this evaluation the District Court is undoubtedly correct, in part because the structure of the regulatory scheme invites precisely the type of abuse that the legislature cautioned against in Section 16-22-110(6)(a). There, the legislature initially explained that the purpose of registration under the statute was ensuring the safety of the public:

> (6)(a) 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).

In Section 16-22-112(1), the General Assembly reiterated its general policy position, offering the rationale for public dissemination of data specific to the registrant that conviction for a sexual offense warrants a reduction in the offender's expectation of personal privacy:

> (1) 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.* (emphasis added).

This provision, however, offers no further explanation as to how public disclosure of offender data is actually designed to "allow [members of the public] to protect themselves and their children from these persons." *Id.*

Reviewing SORA, the District Court found that the statutory registration scheme adopted by the General Assembly did not reflect an impermissible intent to use registration and dissemination of information about registrants to impose additional retribution upon offenders. *Millard*, 265 F.Supp.3d at 1226. The Court's finding with respect to legislative intent is consistent with the legislature's declaration of policy found in Section 16-22-110(6)(a):

> 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*. (emphasis added).

This language parallels that included in Section 16-22-112(1):

> 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*. (emphasis added).

What is particularly important about the statute is that the General Assembly not only explained the need for registration and publication or dissemination of registrant data for the express purpose of public protection, it affirmatively included the disclaimer concerning inappropriate use of the data to "inflict retribution or additional punishment" upon registering offenders.

I.

> THE RECORD REFLECTS THAT THE NAMED PLAINTIFFS IN THIS ACTION HAVE BEEN EXPOSED TO "RETRIBUTION OR ADDITIONAL PUNISHMENT" AS ANTICIPATED BY THE OF POLICY STATEMENT SET FORTH IN SORA.

While the expression of public policy in the statute reflects concern that misuse of registration data through its dissemination not result in "retribution or additional punishment" directed at SORA registrants, the operation of the registration scheme in practice has failed to protect against the detrimental effects anticipated by the statement of legislative policy. The District Court analyzed the

evidence adduced in support of the individual plaintiff's position in light of the framework for resolution of constitutional changes utilized by the Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003).

Regardless of the constitutionally-acceptable legislative intent found by the Court in the adoption of SORA, the facts it found showed that the registration and publication scheme was, in certain cases, being used to "inflict retribution or additional punishment" upon registrants. These instances of unauthorized "retribution or additional punishment" directed against individual registrants have been instigated by members of the public, accessing information provided to the public through the registration and dissemination through publication of personal information of those individual registrants. The Court found:

- Plaintiff Millard was originally sentenced to serve a 90-day jail sentence and eight year term of probation for his only offense requiring registration and has no record of re-offending. He has been subjected to threatened loss of employment from his job held for 14 years and exposure by local media compromising his ability to obtain personal housing that required rental of properties when property managers were contacted by media sources regarding rental policies for convicted felons. His residence has been targeted by Denver police, who have placed brightly colored tags on his front door identifying him as a "registered sex offender" and who have confronted him in the "earshot" of his

neighbors, disclosing his status, in checking his residence. The Court noted: "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." *Millard*, 265 F.Supp.3d at 1217-18.

- Plaintiff Knight, a full-time father, has been barred from his children's school and school activities solely because of his status as a registrant, despite having no history of subsequent sexual offenses or misconduct following his initial conviction, and discharge from parole. He was originally sentenced to a 90 day jail term and eight years of probation, but was revoked and served an additional two-year term because his inability to pay for court-ordered sexual-offender treatment resulted in failure to comply. *Millard*, 265 F.Supp.3d at 1219-20.

- Plaintiff Vega faced unwarranted complications in his efforts to seek de-registration as provided for by SORA because his registration was based upon a violation committed while a juvenile. Despite completing required remedial programs and having committed no subsequent offenses following his discharge of his sentence on parole, he was unable to convince the state trial court that he no longer constituted a threat to re-offend, being required to carry the burden of proof, and without statutory notice of the precise requirements for meeting that burden. *Millard*, 265 F.Supp.3d at 1221-22. The Court found that Vega had established a procedural due process violation. *Id.*, at 1232.

The District Court also heard testimony from witnesses supporting the plaintiffs' claims and generally relating to the experiences of SORA registrants which it noted was uncontroverted, concluding:

> [W]ithout 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.

Millard, 265 F.Supp.3d at 1222-23.

The District Court relied on these "effects" of SORA as a basis for finding in each case that they overrode the lack of punitive intent in the registration/dissemination scheme it also found in reviewing the statute. It concluded, based on the evidence presented:

> 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.

Millard, 265 F.Supp.3d at 1229. The Court's finding that SORA, as applied, violates the rights of individual offenders to be free from additional punishment, including punitive measures imposed by the public or private individuals or entities, is supported by its factual findings.

II.

THE COLORADO SORA SCHEME FAILS TO PROVIDE ADEQUATE PROTECTION OR RELIEF FOR OFFENDERS CONSISTENT WITH ITS RECOGNITION OF THE POTENTIAL FOR MISUSE TO *INFLICT RETRIBUTION OR ADDITIONAL PUNISHMENT* UPON OFFENDER REGISTRANTS.

The starting point for consideration of constitutional objections to the operation of a sexual offender registration statute is *Smith v. Doe*, 538 U.S. 84 (2003), where the Court rejected due process and *ex post facto* challenges to the Alaska statute which, like Colorado's, had both registration and publication components. *Id*., at 90. The Court upheld the statutory scheme, finding that the adverse effects to registrants from the process did not constitute intended additional "punishment," which would have rendered it subject to invalidation as an *ex post facto* law. *Id*., at 92-93. Instead, it found that the regulatory scheme was consistent with the stated policy supporting its operation:

> Here, the Alaska Legislature expressed the objective of the law in the statutory text itself. The legislature found that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. 1994 Alaska Sess. Laws ch. 41, § 1. The legislature further determined that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety."

Id., at 93. This threshold approach in resolving constitutional attacks has been consistently to uphold registration schemes, based on the finding that the

overriding public safety purpose of registration outweighs the adverse consequences of registration on registrants.

The *Smith* Court looked not only to the legislative intent in creating the registration and publication scheme, but to the effects upon registrants resulting from the operation of the statute in determining whether the effects rendered the scheme punitive, thus resulting in an *ex post facto* violation in being imposed upon offenders whose offenses pre-dated adoption of the statute. *Id*., at 91-92. The Court emphasized the high burden imposed for challengers arguing that a statute is rendered punitive based on its collateral effects in order to override the legislative reference to it as civil, in nature. In making the determination, the *Smith* Court relied on the framework adopted in *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 168–169 (1963), focusing its consideration on the following five factors:

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

It ultimately concluded that the statute's rational connection to the nonpunitive purpose advanced by the legislature—protection of the public by disclosure of information relating to offenders—was a most significant factor in determining that its effects are not punitive. Consequently, the Alaska registration scheme did not run afoul of the *ex post facto* prohibition. *Id.* at 102-03.

Significantly, Justice Kennedy's opinion for the *Smith* Court references a commonly-held proposition that that sex offenders are particularly likely to re-offend when compared to offenders, generally, and thus, that the registration/publication scheme properly reflected a legitimate legislative concern: "The risk of recidivism posed by sex offenders is 'frightening and high,'" citing *McKune v. Lile,* 536 U.S. 24, 34 (2002). *Id*., at 103. Yet, this proposition is not uncontroverted, with some studies reporting that recidivism among sex offenders is overstated,[2] and Justice Kennedy's reference has specifically been called into question.[3]

Although SORA reflects the General Assembly's stated purpose in providing protection against re-offending by convicted sex offenders, the statute

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[2] *See, e.g*., Avnet News.com., *Sex Offender Fact Based Research Statistics* (May 4, 2018), https://www.avnetnews.net/newsletters/sex-offender-recidivism-fact-based-research-statistics/ (cataloguing studies reporting differing results and conclusions on rates of sex offender recidivism); *see also*, U.S. Dept. of Justice, *Sex Offender Management and Planning Initiative*, at https://smart.gov/SOMAPI/sec1/ch5_recidivism.html (noting: "Recidivism is difficult to measure, particularly involving sex offenders. The surreptitious nature of sex crimes, the fact that few sex offenses are reported to authorities, *and variation in the ways researchers calculate recidivism rates all contribute to the problem. This has no doubt contributed to the lack of consensus among researchers regarding the proper interpretation of some research findings and the validity of certain conclusions."* (emphasis added).

[3] Ira Mark Ellman and Tara Ellman, *"'Frightening and High'; The Supreme Court's Crucial Mistake About Sex Crime Statistics*," 30 CONSTITUTIONAL COMMENTARY 495, 496 (2015) (criticizing use of sexual offender recidivist data in *McKune v. Lile* and Justice Kennedy's "frightening and high" *McKune* characterization in the following year in *Smith*).

does not provide adequate protection or relief from the unauthorized improper effects of public or private use of registrant data[4] to inflict retribution of additional punishment upon registrants. In this instance, the State has recognized the potential for misuse which has, in fact, materialized with respect to the evidence presented on behalf of the named plaintiffs. This misuse, amounting to vigilantism in extreme cases, extends beyond SORA's goal of protecting the public from re-offending, and has been documented in evidence before the District Court:

> 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 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*

[4] For example, registrant data may be accessed by the public from official sources, *see* Colorado Bureau of Investigation "Colorado Convicted Sex Offender Search," at https://apps.colorado.gov/apps/dps/sor/; or by searching for registrant residences by ZIP code by accessing a non-governmental site at: https://www.kidslivesafe.com/signup/default02.php?c=19&scn=adwordsKLS&sca=master&gclid=EAIaIQobChMIp-b6oo-f3AIVBLXACh2YxQ34EAAYAiAAEgLPW_D_BwE&vid=3d9d71f8962a44ebb82cecc54b184c9d or search by registrant name and last known location:https://www.publicrecordsreviews.com/Sexual-Offender-Records?gclid=EAIaIQobChMIp-b6oo-f3AIVBLXACh2YxQ34EAAYAyAAEgKftvD_BwE

> *actions other than the potential for prosecution if their actions would be a crime.*

Millard, 265 F.Supp.3d at 1235 (emphasis added). As the Court noted, SORA does not require any individualized finding as to a registrant's propensity to re-offend, or permit the registrant to seek de-registration prior to the mandatory minimum period of inclusion on the registry, except in the case of juvenile offenders. The District Court explained:

> 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.

Millard, 265 F.Supp.3d at 1230 (emphasis added). The Court concluded:

> Application of unalterable registration requirements and time periods with no possibility of considering their individual circumstances is *arbitrary and excessive*.

Id. at 1230 (emphasis added). Thus, the public safety rationale for imposition of the registration scheme is not consistent with a procedure that is designed to

identify those offenders likely to re-offend and who would, as a consequence, actually pose the threat to public safety offered as a rationale for registration and publication of registrant personal data.

Moreover, none of these plaintiffs had committed sexual offenses that would logically point to any propensity to re-offend in light of the sentences imposed. Both Millard and Knight were sentenced to serve 90-day jail sentences and eight year probationary sentences; neither was ever revoked based on commission of a subsequent offense. *Millard*, 265 F.Supp.3d at 1217 and 1279-20, respectively. Vega, a juvenile offender, was sentenced to serve a probated sentence. *Id*. at 1220-21. While both Plaintiffs Knight and Vega failed to comply with court-imposed obligations imposed in sentencing and were required to serve periods of incarceration, their failures involved technical violations and not re-offending, and both otherwise discharged their probated sentences. The relatively light sentences imposed in each of these individual's cases leading to registration—90 day jail time and eight year probations—demonstrate that they had not been found to be threats to re-offend; otherwise, state trial court's would undoubtedly have imposed greater terms of incarceration in an effort to protect the public.

The Court found that although the SORA's stated intent, protection for the public brings it within the ambit of acceptable legislative *intent* under *Smith v. Doe*, the effects of the operation of the statutory scheme are punitive, "negating the

legislative intent," and that "[t]hese punitive effects are sufficient to overcome the stated regulatory, non-punitive intent of the Act." *Id*. at 1231. It noted that the *Smith* Court reported that there was "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. In contrast, the District Court found the evidence demonstrated that the plaintiffs in this case had each suffered such disadvantages.

With respect to Plaintiffs Millard and Knight, the District Court found that the effects not observed in *Smith* had occurred as data disclosed pursuant to the SORA registration/publication protocol had been used to threaten employment or housing disadvantages. Moreover, the punitive effects of the publication of registrant data impact not only the registrant directly, but their family members and others in the community, as it noted the impact of dissemination of personal information has upon "liberty interests in living, working, associating with their families and friends, and circulating in society without the burdens imposed by SORA."[5] *Millard*, 265 F.Supp.3d at 1234.

While a facial constitutional challenge to SORA might fail under the rational basis test based on the Court's framework in *Smith v. Doe*, the District Court held

[5] For impact of offender registration on registrants' families, *see* Jill S. Levenson and Richard Tewksbury, *Collateral damage: Family members of registered sex offenders*, 34 American Journal of Criminal Justice 54-68 (2009), at https://www.csaprimaryprevention.org/files/Levenson%202009.pdf.

only that the Colorado SORA is unconstitutional as applied to the plaintiffs. The District Court, thus, limited its weighing of the statute's "intent" and its "effects" in applying the test approved for review of claims that focus on unconstitutional effects or consequences of statutes not facially defective. *See e.g., Bodie v. Connecticut*, 401 U.S. 371, 379 (1971); *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 331 (2010); and *McCullen v. Coakley*, 134 S.Ct. 2518, 2534 (2014) (all recognizing "as applied" challenges).

SORA recognizes the potential misuse of registration data disclosed by the statute. Registrants should have a reasonable expectation for some appropriate degree of protection from that misuse in which individuals or private entities *weaponize* information collected pursuant to the registration requirements to harass, intimidate, or punish registrants by interfering with employment or residence. But the SORA statute provides no specific protection from vigilante acts in which personal data required to be disclosed by registrants, which is then published and available for access by individuals under circumstances not authorized by law or to be used for unauthorized purposes.

In contrast, in *Connecticut Department of Public Safety v. Doe,* 538 U.S. 1 (2003), the statute upheld by the Court expressly addressed misuse of registrant information:

> The statute requires DPS to compile the information gathered from registrants and publicize it. In particular, the law requires DPS to post

> a sex offender registry on an Internet Website and to make the registry available to the public in certain state offices. §§ 54-257, 54-258. Whether made available in an office or via the Internet, the registry must be accompanied by the following warning: " 'Any person who uses information in this registry to injure, harass or commit a criminal act against any person included in the registry or any other person is subject to criminal prosecution.' " § 54-258a.

Id. at 4 (referencing CONN. GEN. STAT. §§ 54-251 *et. seq*.). Instead, the Colorado registration/publication statute provides this notice to those accessing the database:

> The Colorado sex offender registry includes only those persons who have been required by law to register and who are in compliance with the sex offender registration laws. Persons should not rely solely on the sex offender registry as a safeguard against perpetrators of sexual assault in their communities. The crime for which a person is convicted may not accurately reflect the level of risk.

COLO. REV. STAT. §§ 16-22-110(8) and 16-22-122(5). SORA thus warns against the possibility that the registry may not identify perpetrators not listed, or assuming that the level of risk of a potential offender is limited by the prior offense. The statute includes no warning against misuse of data to protect registrants against misuse of registry information.

However, the publication of registrant data under the auspices of the Colorado Bureau of Investigation does include the following admonition on its website:

> 6. The following information is provided as an awareness tool so that you can adequately protect yourself and your children from these individuals. *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*. (emphasis added).[6]

The website requires users accessing registrant data to agree to accept CBI's stated conditions for use, including reading the admonition included in ¶ 6, but does not affirm that misuse will result in criminal prosecution, but only that misuse could constitute criminal violations. SORA provides no protection or relief with respect to misuse by private individuals or entities accessing data from other websites. *See* "Colorado Convicted Sex Offender Search," *supra*, n. 4.

The registration scheme imposes a lifetime registration obligation with removal from the registry only after lengthy periods calculated by the culpability reflected in the degree or level of the sexual offense for which the registrant has been convicted. Further, it includes no system of assessment for determining which offenders are likely to offend. Nor does the statute provide a procedural framework ensuring that registrants having served the mandatory minimum registration periods of five, ten or twenty years have reasonable expectation of actually meeting the unstated standards for release from the registration obligation.

SORA effectively imposes a life sentence on every registrant unable to

[6] CBI Sex Offender Registry, "Public Notice & User Agreement; Public Notice Disclaimer," at https://apps.colorado.gov/apps/dps/sor/search-agreement.jsf

demonstrate the difficult burden of disproving their propensity to re-offend,[7] since even proof that the registrant has not re-offended will not necessarily meet the expectations of trial courts charged with making de-registration decisions. As the District Court noted:

> 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).

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[7] COLO. REV. STAT. § 16-22-113, the statutory provision governing de-registration was amended by the General Assembly in 2018 to include the following language in subsection (f):

> (f) If there is objection to the petition by the district attorney or victim, the court shall conduct a hearing on the petition. *The court may grant the petition if the course finds* the petitioner has not subsequently been convicted of unlawful sexual behavior or of any other offense, the underlying basis of which involved unlawful sexual behavior, the waiting time period described in subsection (1) of this section has expired, *and the petitioner is not likely to commit a subsequent offense of or involving unlawful sexual behavior.* In determining whether to grant the petition, the court shall consider any treatment records provided pursuant to subsection (b)(2) of this section, any written or oral statement of the victim of the offense for which the petition was required to register, and any other relevant information presented by the petitioner or district attorney. (emphasis added)

2018 COLO. LEGIS. SERV. CH. 143 (S.B. 18-026). Thus, for de-registration proceedings commenced after the effective date of the amendment, August 8, 2018, or ninety-days after adjournment of the General Assembly, the burden is placed on the registrant to disprove the likelihood of re-offending.

Millard, 265 F.Supp.3d at 1221. *Carbajal* conceded the lack of uniform standards upon which a registrant can reasonably rely in seeking de-registration, regardless of evidence demonstrating the registrant's rehabilitation and re-integration in the community of law-abiding individuals.

The Court's finding of a procedural due process violation with respect to the situation confronted by Plaintiff Vega properly rests on the lack of legislatively-determined standards affording notice to the registrant moving to be released from the register was predicated solely on the operation of SORA's effect upon him. The requirement imposed upon Vega by the state courts hearing his case and requiring him to prove by an arbitrarily-imposed standard that he essentially would not re-offend—posing the difficult proposition of proving a negative—was not authorized by the legislature in adopting SORA. *Millard*, 265 F.Supp.3d at 1222. The operation of the statute with respect to lack of standards for removal from the registry can be characterized as an *effect* tilting the application of SORA against a conclusion that the statutory scheme is not punitive in operation by imposing lifetime registration, while purporting to offer a means for de-registration. In finding that the operation of the statute resulted in a procedural due process violation in Plaintiff Vega's case, the District Court explained: "This Kafka-esque procedure, which was played out not once but twice, deprived Mr. Vega of his liberty without providing procedural due process." *Id.*, at 1232-33.

Based on the District Court's focus on the effects of SORA on individual registrants, it concluded that while the statutory scheme may be based on a legitimate intent on the General Assembly's part, it nevertheless fails because of the adverse effects suffered by the individual Plaintiffs before the Court. Thus, while SORA might survive a facial unconstitutionality challenge in light of *Smith v. Doe*, the punitive effects of the registration/publication scheme warrant relief for individuals who suffer from the retribution and additional punishment imposed by others as a result of disclosure of registrant information. The lack of protection or control over use of publicly-available personal data by persons or entities beyond the institutional authority of the State of Colorado renders individual registrants subject to impermissible acts of harassment or worse based on the status of registrants as convicted offenders. The Court acknowledged the reason for this threat to registrants who will never commit another offense:

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

Millard, 265 F.Supp.3d at 1226.

SORA itself recognizes the potential misuse of data collected and published pursuant to its regulatory scheme, the failure to adequately protect registrants or otherwise provide relief to those subjected to acts of retribution or additional

punishment disavowed by the General Assembly. It fails to protect against misuse of data by the public or private entities who act punitively to harass and intimidate registrants, while failing to afford registrants reliable means of de-registration that violate norms of procedural due process, including notice and a fair allocation of the burden of proof of likely of re-offending. Despite the implied threat of criminal prosecution of those misusing data reported on the registry included on the CBI offender website, it is clear that the admonition included there was inadequate to protect the named Plaintiffs in this case from harassment and intimidation resulting from misuse of registry data. Thus, the District Court's consideration of the constitutionality of SORA, as applied to the individual Plaintiffs, is wholly appropriate in the exercise of its jurisdiction.

CONCLUSION

The District Court's conclusions that SORA, in its operation, exposed the individual Plaintiffs to acts of a punitive nature violating their rights to substantive due process under the Fourteenth Amendment and protection against infliction of cruel and unusual punishment under the Eighth Amendment, as well as violation of Plaintiff Vega's right to procedural due process, are supported by evidence in the trial record. Its orders awarding declaratory relief should be upheld on appeal and the cause remanded for further proceedings on the matter of injunctive relief.

Respectfully submitted this 25th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

The Brief for Amicus Curiae National Association for Rational Sexual Offense Laws complies with the typeface requirements of Rule 32(a)(5), using Microsoft Office Excel 2007, and type-style requirements of Rule 32(a)(6), using Times New Roman, 14 pt., and contains 5,172 words.

/s/ J. Thomas Sullivan
J. Thomas Sullivan
Attorney for Amicus Curiae
July 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2018, I electronically filed the foregoing with the Clerk of Court using CM/ECF system, which shall send notification of such filing to counsel for all parties entitled to notice by electronic filing.

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NO. 17-1333

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ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO IN
Civil Action No. 13-cv-02406-RPM

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, NORTON 360 Automatic Renewal Service, updated 7/25/2018, and according to the program are free of viruses.

Respectfully submitted this 26th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2018, I electronically filed the foregoing with the Clerk of Court using CM/ECF system, which shall send notification of such filing to counsel for all parties entitled to notice by electronic filing.

/s/ J. Thomas Sullivan
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