CASE NO. 25-1892

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JANE DOES, et al.,

Plaintiffs-Appellants,

v.

DAVID FLANNIGAN, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Missouri
No. 2:21-CV-04102-BP

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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The present appeal involves a voluminous record documenting and explaining the personal experiences of Appellants as well as the testimony of multiple expert witnesses. Despite that record evidence being central to the claims in this case, the Patrol does not meaningfully address it. Instead, the Patrol begins its brief to this Court by complaining about Appellants' presentation of it. Patrol Br. at 3. The Patrol says, for instance, that Appellants' statement "overlooks a crucial aspect of the district court's decision" because the district court found that the neglected RFAs were not material to the disposition of Appellants' claims. Patrol Br. at 6. It is suggested that Appellants did not overlook that aspect of the district court's decision, as that's the very reason Appellants are seeking relief from this Court. See App Br. at 25, 51. Rather than dispute Appellants' evidence, they follow the district court's lead and urge that none of it—the experience of family members, the expert evidence, or the conclusions drawn from the RFAs—matters.

The evidence Appellants provided to the district court does matter, and it does for two reasons. First, it matters to the Supreme Court. It mattered in 2003 in *Smith v. Doe*, 538 U.S. 84, 102 (2003) (e.g., noting, based on the evidence the Court had at the time, the length of registration was reasonably related to the risk of recidivism). It continues to matter in 2025, in cases like *Free Speech Coalition v. Paxton*, 606 U.S. 461, (2025); App. Br. at 33; *United States v. Skrmetti*, 605 U.S. 495, 523 (2025) (upholding challenged law on

rational basis, noting that it responded to the state of available evidence, and contrasting *City of Cleburn v. Cleburne Living Center*, 473 U.S. 432 (1985)); *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing [] that those facts have ceased to exist.") While Appellants' unchallenged and conclusively established evidence is sufficient to render the non-punitive purposes of the law pretextual, *see Pyler v. Doe*, 457 U.S. 202, 224, 230 (1982) (law "can hardly be considered rational unless it furthers some substantial goal of the State" and finding that "[n]o such showing was made" by the government), the district court decided–as the Patrol argues – that the evidence is irrelevant. That is erroneous.

More broadly, as Appellants have suggested, App. Br. at 4, 51, this case is about protecting the public – which is the Patrol's job, and undoubtedly one that they take seriously, so the evidence should matter to them as well.[1] The evidence here, amassed from decades of scientific inquiry, is that SORA does not serve a public safety function, or, if it

[1] The Patrol relies on several cases, including *United States v. Kebodeaux*, 570 U.S. 387 (2013) for the proposition that SORA is "rationally related to a legitimate government interest in protecting the public," Patrol Br. at 39, but *Kebodeaux* and other cases rely on *Smith* for that proposition. *Id.* at 395. If the Patrol is asserting that the evidentiary assumptions made by the *Smith* Court are relevant to the question of the rational relationship of a non-punitive objective, they do not address how record evidence that has amassed in the ensuing decades that contradicts those assumptions is not similarly relevant.

does, it serves a public safety function in the same sense and to the same degree that criminal punishment does.

None of this is to say that punishment is improper. Indeed, it is necessary, and all crimes, including sex offenses, can and do inflict tremendous harm. Punishment, whatever might be said about its imperfections, is our way of accounting for that harm. But this case involves the constitutional rights of Appellants. If Missourians decide (or, have decided) that the appropriate penalty for the commission of any one of a number of enumerated offenses is a lifetime of punishment for one's self, one's spouse, and one's children, irrespective of the underlying facts of the case, or remorse, or rehabilitation, or public safety benefit, then that is certainly within the purview of the Missouri legislature. But under our constitutional order, there are certain constitutional protections that are afforded to even and especially the despised. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). This Court should take the step to grant Appellants the constitutional protections they seek.

I. SORA Constitutes Punishment

a. The District Court Erred in its *Mendoza-Martinez* Analysis

While the Supreme Court has afforded little guidance to how the *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) factors are to be analyzed, or how each factor is to be weighed, *see* Rosen-Zvi & Fisher, *Overcoming Procedural Boundaries*, 94 Va. L. Rev.

79, 126 (2008), Appellants contend that the district court got its *Mendoza-Martinez* analysis wrong on all prongs it addressed, App. 273-279, R. Doc. 240 at 6-12, chiefly because of its refusal to consider the record Appellants presented to it. The district court's treatment of the experiences of family members—whether considered independently or as direct effects on those family members required to register—is one aspect of Appellants' argument.

On that point, the Patrol is correct that there is no authority of which Appellants are aware that says courts must consider the effects of a law on one's spouse and children. Patrol Br. at 32. But that is not Appellants' argument. Appellants do not assert, either, that the "unfortunate" effects of a law on spouses' and children are "determinative" of the punishment question, Patrol Br. at 33, but assert only that they are relevant in the same sense those effects were relevant to the founders in banning Corruption of the Blood, and as direct effects on those Appellants required to register. App. Br. at 30, n.9.[2] In short, the Patrol mischaracterizes Appellants' argument here: it is not, as they set out, whether a court

[2] The Patrol says it is unclear whether the claims are as-applied or facial. Patrol Br. at 16. Appellants brought their claims as both facial and as-applied, see App. 77, R. Doc. 48. But the label used by a litigant "is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010). What matters more is the remedy that is employed by the Court. To be sure, much of the evidence that Appellants have brought extends well beyond their individual circumstances—e.g., demonstrating that SORA is untethered from a nonpunitive objective—which are relevant to the constitutional inquiry of whether or not SORA constitutes punishment under the *Mendoza-Martinez* factors.

must consider effects on family members, Patrol Br. at 1, but whether a court is *prohibited* from doing so. While the Patrol argues it is "not so" that the district court read this phantom prohibition into *Smith* and the *Mendoza-Martinez* factors, Patrol Br. at 32, they fail to explain how that is the case.

Moving to the factors themselves, SORA is comparable to a practice historically regarded as punishment. The Patrol, following the district court's lead, makes little attempt to dispute Appellants argument that SORA in 2025 is a very different creature than SORA was in 2003, in light of both legal and technological changes, aside from citing to other cases saying that SORA does not mandate that people "stand in public with a sign describing your crime" as used to be the case with public shaming punishments. Patrol Br. at 20. But neither the district court nor the Patrol makes an effort to dispute the Supreme Court's recognition that the town square is now an online space, nor that these technological changes are relevant to the constitutional analysis. App. Br. at 7-9, 33-35. The key word here is comparable, not identical. When the record evidence is considered, even if SORA was not comparable with historical shaming punishments in 2003, it is now, given the evolution in technology and our collective reliance on it.

In seeking to distinguish SORA from historical shaming punishments, the Patrol further argues that "SORA simply disseminates criminal-record information," but this ignores both the text of the law and the factual record. Patrol Br. at 21. SORA disseminates

a copious amount of information that is not available in historical criminal record data, App. 177-182, R. Doc. 48-4, is accessible through advanced tracking and mapping capabilities and categorizes individuals as "compliant" or "non-compliant", App. 185-187, R. Doc. 48-4, and is information which is mandated to be provided and kept scrupulously up-to-date by Appellants. All of this, distinct from neutral and historical criminal record data, implies that Appellants are presently dangerous.

The Patrol argues that SORA is unlike traditional criminal supervision because it does "not include mandatory terms and conditions." Patrol Br. at 22. As Appellants have explained, however, the many reporting requirements they must scrupulously observe are, indeed, mandatory because failing to adhere to them results in a felony prosecution. App. Br. at 19-20. While there are distinctions between traditional criminal supervision and SORA, those distinctions largely serve to make SORA more, not less, punitive. *See Does v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016) ("many of the Plaintiffs have averred that SORA's requirements are more intrusive and difficult to comply with than those they faced when on probation") Even though Appellants do not have a supervising officer, they must still regularly (and often, App. Br. at 13-21) report in-person to law enforcement or face consequences. That those consequences emanate from a police officer as opposed to a probation officer is a difference, to be sure, but it is unclear how that difference matters insofar as the constitutional analysis is concerned.

SORA further imposes significant disabilities and restraints on Appellants. The Patrol argues that SORA does not inflict affirmative disabilities and restraints because some Appellants have a home, and have gainful employment. Patrol Br. at 25. That some Appellants were lucky and tenacious enough to be able to support themselves does not then mean SORA did not impose disabilities and restraints on them as it is unknown what their earning potential would have been had they never been required to register under SORA. Indeed, the record before the Court shows this, as some of those Appellants testified to myriad lost opportunities because of SORA. App. Br. at 13-21. The Patrol, as the district court did, relies on *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016), Patrol Br. at 26, but *Shaw* involved a very limited factual record where the only real disability or restraint that was experienced by Mr. Shaw was being forced to relocate from his home. *See* Appellant's Brief, *Shaw v. Patton*, No. 15-6106 at 8-12 (10th Cir. August 24, 2015).

SORA further does not have a rational connection with a non-punitive purpose and is excessive in relation to the purported non-punitive purposes advanced by the Patrol and adopted by the district court. The purported public safety purposes relied on by the district court and advanced by the Patrol here are laudable, but at odds with the unchallenged evidence here, which neither the Patrol nor the district court grappled with, instead simply declaring they believe evidence of whether or not SORA accomplishes a public safety objective to be irrelevant to the inquiry. Patrol Br. at 28.

The Patrol and the district court further assert that the in-person reporting requirements were also rationally related to a public safety objective, notwithstanding their acknowledgement that Smith did not involve an in-person requirement and instead allowed updates through the mail. Patrol Br. at 26, 30. The asserted justifications for repeated and time-consuming in-person appearances relate to the accuracy of information provided by someone required to comply with SORA (notwithstanding that this information is further verified, in-person, by law enforcement appearing at Appellants' homes.) But that is simply a restatement of the position that SORA itself is connected with a public safety function. If Appellants' evidence is to be credited, and SORA does not advance a public safety purpose, then what non-punitive objective is served by ensuring the accuracy of information mandated to be collected and broadcast by SORA? The Patrol does not address that question.

SORA is further excessive with respect to its purported connection to a non-punitive goal because its application to many thousands of individuals who pose no more of a risk of committing a crime than any other member of the community "serve[s] no public protection function." App. 105, R. Doc. 48-1 at 3. SORA does this by way of its

lifetime operation, and the assumptions it makes about risk while, simultaneously, being indifferent to whether those assumptions are true.[3]

Finally, while the Patrol states that Appellants must make their case by "the clearest proof,"[4] Patrol Br. at 19, the Patrol has no evidence that rebuts Appellants' case. They do not address the myriad effects that Appellants have put into the record that are directly traceable to the operation of SORA, including the attempted suicide of Minor S.C.L.R. II and armed vigilantes appearing at the home of John Doe XII, other than to refer to them as "unfortunate." Patrol Br. at 33. They argue Jane Doe I's chronic exclusion from the

[3] The Patrol misstates the nature of what Appellants agreed with in the district court, which is in harmony with the evidence adduced by Appellants. Patrol Br. at 8. To be sure, some people convicted of sex offenses are lifelong threats to re-offend. Patrol Br. at 9. They commit additional offenses, and are reincarcerated, or are civilly committed – a process which, unlike SORA, does involve an inquiry into risk. They are a small minority of people who are convicted of sex offenses. App. 126-127, R. Doc. 48-1. Yet even individuals who are considered to be high risk become no riskier than any other member of the community after twenty years, meaning that lifelong SORA obligations can serve no public safety benefit. There was, however, no such concession made with respect to the efficacy of SORA at meeting the question of risk, Patrol Br. at 9, n.2, as the Patrol's admissions aside, that evidence went wholly unchallenged by the Patrol's expert. App. 556, R. Doc. 234.

[4] It should be noted that the "clearest proof" standard was originally intended as an invocation of the generally applicable principle that laws are afforded a presumption of constitutionality. *See E.B. v. Verniro*, 119 F.3d 1077, 1128 (3d Cir. 1997). ("I warn against placing too much emphasis on the meaning of "clearest proof." [] [T]he standard is intended as a kind of warning to the federal courts to give legislatures the benefit of the doubt. It is thus consistent with familiar canons of statutory interpretation and constitutional adjudication stating that legislatures are rational bodies that intend to function within their powers to enact lawful measures.")

workforce was due to her "criminal offense," Patrol Br. at 25, when she has no reportable conviction, and was most recently rejected as a candidate for employment due expressly to her placement on Missouri's SORA. App. 1320, R. Doc. 233. The evidence that was excluded by the trial court further emphasizes that effects on children and spouses are traceable to the operation of SORA, not convictions. App. 1328-1335, R. Doc. 233. The expert evidence is that while all people who are convicted of a crime experience stigmatization, that is (unsurprisingly) severely exacerbated in the context of a system that—contrary to historical criminal record information—requires constant updates to information such as the home one shares with one's family members under a banner that implies (or sometimes outright states) they are a danger. App. 164, R. Doc. 48-2 at 9.; App. 1169, R. Doc. 233; App. 177-182, R. Doc 48-4. Notwithstanding the observation that the original meaning of the "clearest proof" standard was to mandate that Appellants meet an exacting burden, *see* Note 4, *supra*, they have met it here.

b. SORA Violates the Eighth Amendment

The Patrol does not address a few issues with respect to the claim that SORA, as it currently operates, also violates the Eighth Amendment. Namely, Appellants have already been punished, and SORA improperly punishes them again and again, in perpetuity. Appellants do not deny that they were convicted of serious offenses insofar as the title or class of the offense is concerned, Patrol Br. at 37, but SORA—unlike a sentencing judge—

is wholly agnostic of the underlying facts of any particular case, and is stacked atop the criminal sentence that was imposed by a judicial officer familiar with those facts. Five of the Appellants were given non-custodial sentences, App. Br. at 13-21, yet even in those cases, where imprisonment was not warranted, SORA nevertheless imposes a lifetime punishment for one's self and one's family. Further, unlike with traditional criminal punishment, SORA does not even purport to serve any corrective or rehabilitative function.

If SORA doesn't do the one thing it *does* purport to do—serve a public safety function—then the only fair conclusion is that it exists for a purely retributive function, or to inflict pain for the sake of itself. *Baze v. Rees*, 553 U.S. 35, 48 (2008); *see also Weems v. United States,* 217 U.S. 349, 366 (1910) (striking down life surveillance as disproportionate, noting "[h]is prison bars are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime (sic) forever kept within the voice and view of the criminal magistrate, not being able to change his domicil (sic) without giving notice to the 'authority immediately in charge of his surveillance[.]'"). SORA is further wholly unlike anything in our rather robust arsenal of punishments, it is an international outlier, and its closest analog was banned in the main body of the Constitution. App. Br. at 30, n.9. For these reasons, it violates the Eighth Amendment.

II. The Trial Court Erred in Granting Judgment on the Pleadings with Respect to the Due Process & Equal Protection Claims

The dismissal of Appellants' Due Process and Equal Protection Claims was erroneous even under a relaxed rational basis test for the reasons set out in Appellants opening brief – chiefly, that the district court did not take Appellants' assertions as true, as it was required to do that that stage. App. Br. at 38-39. However, Appellants have also urged (and asked the district court, and now ask this Court) to employ a more heightened form of rational basis review that the Supreme Court has employed when considering class-based legislation grounded in animosity. *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 535-537 (1973).

Again, rather than address Appellants' contentions, head on, the Patrol relies on mischaracterization. Appellants do not, as the Patrol seems to indicate, bring a Procedural Due Process claim. Patrol Br. at 42-43. Nor is the argument that the trial court erred in refusing to employ strict scrutiny. Rather, given Appellants' claims (born out by the discovery in this case) the trial court erred in granting judgment on the pleadings when it was required to take Appellants' claims as true and failed to do so. App. Br. at 40.

On Equal Protection, the Patrol argues that the legislature evaluated risk with respect to its differential treatment of the tiers, but the differences have to be material to the statutory scheme. *Einstatdt v. Baird*, 405 U.S. 438, 447 (1972). Here, in light of the central logic of SORA and the de-registration process that exists for the minority of those

required to comply with it in Missouri, the difference that matters is *risk*, not moral severity of the offense. Patrol Br. at 43-44 (asserting the tiering scheme involved an assessment of risk).

The tiering scheme—and differential treatment for the opportunity for removal—was not, as the Patrol urges, driven by considerations of risk. What the General Assembly did is evaluate the perceived moral seriousness of classes of crimes, and assign those to tiers. But Appellants' evidence that was disregarded shows that moral seriousness of an offense has nothing to do with the risk of re-offense (and, indeed, conviction-based tiering schemes get it *backwards* – evidence supports the notion that people in lower conviction-based tiers are actually at greater risk of re-offense). App. 120, R. Doc. 48-1 at 18; App. 165-166, R. Doc. 48-3 at 12-11. The Patrol urges that "[m]ore heinous crimes logically pose a higher future risk," Patrol Br. at 44, and that proposition may have been a logical and "a reasonable estimation of [] risk" twenty or thirty years ago, but it isn't when one considers the evidence on this very record that they and the district court ignore based on a claim of irrelevance. As with the punishment claims, this posture urges the Court to simply take their word for it. With respect to tiering, because Missouri makes a deregistration process available to some who are subject to SORA, it cannot withhold it from others based on distinctions that are not material to the statutory scheme. *See Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

The Due Process and Equal Protection claims brought by Appellants should have merited a heightened rational basis review, given the undeniable legislative and public animosity that Appellants face. However, given the claims and the evidence adduced, even under the typical rational basis standard—which itself is not "toothless," *Mathews v. Lucas*, 472 U.S. 495, 510 (1976)—the court erred in dismissing the claims because it simply assumed Appellants' claims were incorrect at a stage when it was required to credit them.

III. Appellants Adequately Pled an Overbreadth Claim

The trial court erred in refusing to consider Appellants' overbreadth claim. The Patrol makes an error similar to the district court here, in that they assert that Appellants fail to "state what information is required by SORA is excessive," Patrol Br. at 53, but in doing so cite the very paragraph that does just that. App. Br. at 43-44. Further, The Patrol's argument that the overbreadth count was duplicative is belied by the fact that the trial court refused to consider the claim at all, as if it was duplicative, Appellants would not be making the argument before this Court. For these reasons, the trial court erred and failed to give due consideration to the arguments raised by Appellants that the provisions of Missouri law requiring reporting of internet identifiers is overly broad.

IV. The Provisions of Missouri Law Requiring Reporting of Internet Identifiers is Unconstitutionally Vague

The provisions of Missouri law that require those subject to SORA to report internet identifiers are vague – not simply limited to "other identity information." Patrol

Br. at 63. It is unknown what a "wireless communication device number" is, for example, given that the statute already seeks a "cell phone number." Do "instant message screen names" encompass transient IDs assigned to users for the purposes of a customer support chat? Does User ID encompass the account name one uses to log on to their own computer? Again, answers to these questions are unclear, which is apparent from the Patrol's testimony at trial. App. Br. at 48.

The Patrol relies on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) here. Patrol Br. at 59. As an initial matter, *Ward* was not a vagueness case, and did not involve a statute that imposed felony convictions. But more pertinently, while the Patrol argues that *their* interpretation of the statute is relevant to the constitutional issue, they never address Appellants' point that judicial deference to agency interpretation of vague statutes was abrogated in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), App. Br. at 45, n. 13, nor the error of law committed by the trial court in misconstruing the holding of *Reproductive Health Services of Planned Parenthood v. Nixon*, 428 F.3d 1139 (8th Cir. 2005) in finding their development of the form alleviated vagueness concerns. App. Br. at 47.

More important, the Patrol's brief highlights that they are still guessing. They say that they "cannot use the form to collect information that registrants are not required to report," Patrol. Br at 61, yet they collect a vast amount of information that is not

encompassed within their own interpretation of the law. For example, in the district court, their position was that IP addresses weren't required. Once it was learned in discovery that the Patrol actually does collect that information, IP addresses are now encompassed within the meaning of the statute for the purposes of this appeal. *Compare* Patrol Br. at 63 (noting the statute does encompass identifiers like IP addresses) and R. Doc. 134 at 47 (arguing that "a plain reading of § 43.651.1(4) directly rebuts Dr. Lageson's concerns; each of the examples [] are not ordinarily shared with other users"). The statute has not changed. The Patrol's "plain reading" has. A statute that imposes felony liability in the arena of speech which is readily susceptible to two mutually exclusive interpretations presents a paradigmatic vagueness problem, and while the Patrol, to their credit, acknowledges the "lack of judicial insight on the exact contours" of the criminal statute, Patrol Br. at 64, that will not suffice. The speech and freedom of Appellants should not depend on the shifting interpretations of law enforcement, yet that is the present reality for Appellants and nearly twenty thousand other Missourians. Thus, the trial court erred in rejecting Appellants' vagueness challenge.

V. The *Sua Sponte* Dismissal of Family Members was Erroneous

Appellants' argument that those individuals who are spouses and children of SORA registrants should not have been dismissed from the case *sua sponte* is distinct from the argument that their experiences also are relevant to the question of whether SORA

constitutes punishment. While Appellants were at least permitted to be heard by the district court on the latter argument, they were never permitted to be heard on the former. The Patrol erroneously conflates the two arguments. Patrol Br. at 66. The Patrol contends that spouses and children are not "subject to SORA," Patrol Br. at 67, and in a literal sense, they are right – they do not have to register themselves. But the case that Appellants brought contemplated that they are in fact subject to it in another sense that rises to a constitutional dimension. They are subject to its impacts, and bear its burdens. For example, when SORA resulted in the presence of armed vigilantes appearing at the home of John Doe XII, it was a home shared by his family. App. Br. at 21. When Minor S.C.L.R. II was harassed to the point of attempting suicide, it was with a photograph of her father that the Patrol published online. Appellants were not permitted to advance the arguments they contemplated and had urged since the beginning of the case. Because it was not "plainly apparent" that they could not prevail, *Smith v. Boyd,* 945 F.2d 1041 (8th Cir. 1991), the *sua sponte* dismissal was erroneous.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the ruling of the trial court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32 (a)(7)(B)(ii), counsel certifies that the foregoing Reply Brief of Plaintiffs-Appellants Jane Does, *et al.*, complies with the type volume limitations because it contains 4,495 words, per the word count feature of the software that was used to prepare the brief. Counsel further certifies that this brief was prepared using 14-point Garamond Premier Pro font, in compliance with Fed. R. App. Proc. 32(a)(5) and 32(a)(6). Pursuant to 8th Cir. R. 28A(h)(2), counsel certifies that the Reply Brief of Plaintiffs-Appellants' has been scanned for viruses and is virus-free.

/s/ Guy Hamilton-Smith

CERTIFICATE OF SERVICE

Counsel certifies that the foregoing Reply Brief of Plaintiffs-Appellants Jane Does, *et al*., was filed via the Court's CM/ECF system on this the 8th day of December, 2025 which will cause the same to be served on all parties in this action.

/s/ Guy Hamilton-Smith