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Tenth Circuit Upholds Constitutionality of Sex Offender Registry

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In *Millard v. Camper*, — F.3d — , 2020 WL 4875290 (10th Cir. 2020), the Tenth Circuit reversed an unprecedented ruling in which the district court had held Colorado's sex offender registration act to be unconstitutional on multiple grounds. Following both Supreme Court and Tenth Circuit precedent, the circuit court rejected plaintiffs' as-applied constitutional challenges based on cruel and unusual punishment and substantive due process. The court also overturned the lower court's ruling that one plaintiff had been deprived of procedural due process by state courts, because the federal district court lacked appellate jurisdiction under the *Rooker-Feldman* doctrine to hear a challenge to those state-court decisions.

History of Federal and State Sex Offender Registries

States began adopting sex-offender registries in the 1990s in response to high-profile sexual assaults and murders by persons with prior histories of sex offenses. *Id.* at *1. In 1994, Congress conditioned certain federal funding on states enacting such laws. “By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of” a sex-offender registry. *Id.* (quoting *Smith v. Doe*, 538 U.S. 84, 90 (2003)). In 2006, Congress adopted the Sex Offender Registration and Notification Act (SORNA), in which it created a nationwide sex-offender registry and required states and registrants to provide registry information to the federal government.

Colorado has had a sex-offender registry since 1991. *Id.* at *2. In 2002, the state legislature adopted the Colorado Sex Offender Registration Act (CSORA), which complies with SORNA. CSORA has three basic elements: (1) sex offenders must register with local law enforcement; (2) the Colorado Bureau of Investigation (CBI) compiles a sex-offender registry; and (3) CBI allows limited public disclosure of some information contained in the registry. *Id.* Offenders must register if, among other things, they are convicted of any of 30-plus felonies or misdemeanors, or of an offense in which the “underlying factual basis involves” any of those 30-plus offenses. *Id.* (citation omitted). Most registrants must register annually, but those convicted of especially serious offenses must register quarterly. Though juveniles must register, if they satisfy certain criteria, they can petition for deregistration.

Under CSORA, the CBI must make some registrant information publicly available. On request, it must issue a list of persons on the registry, which must include their names and aliases, birth date, photo, and offense. CBI also maintains a website searchable by name and geographic area. Third-

party businesses republish registrants' personal information on the Internet, and the information can be republished with no limitation or regulation.

Plaintiffs' Claims and the District Court's Rulings

Plaintiffs, three convicted sex offenders subject to CSORA's registration mandate, sued under 42 U.S.C. § 1983, claiming that CSORA's registration requirements violated the Eighth Amendment's prohibition against cruel and unusual punishment, and their Fourteenth Amendment right to substantive due process. *Id.* at *3. One plaintiff, who was convicted as a juvenile, contended that two state-court magistrates violated his right to procedural due process by denying his deregistration petitions. *Id.* at *3, 9.

After a bench trial, the district court ruled that CSORA constituted cruel and unusual punishment, and thus, violated the Eighth Amendment as applied to plaintiffs, and also violated their substantive due process rights. *Id.* at *4 (citing *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1231–32, 1235 (D. Colo. 2017)). The court also ruled that the state courts violated the juvenile offender's procedural due process rights. *Id.* (citing *Millard*, 265 F. Supp. 3d at 1233).

The Tenth Circuit's Eighth Amendment Analysis

In addressing the Eighth Amendment claim, the circuit court focused on whether CSORA's registration requirement constituted “punishment.” *Id.* This turns on whether the legislature intended to punish, and if not, whether there is the “clearest proof” that the law's punitive effects negate the legislature's intent. *Id.* (quoting *Smith*, 538 U.S. at 92). The court noted that it had twice, and the Supreme Court had once, ruled that sex offender registration requirements in other states were not punishment, and it reached the same conclusion here. *Id.*

The court observed that the Colorado General Assembly did not intend any punishment. The legislature had explicitly declared that CSORA was not “to be used to inflict retribution or additional punishment on any person,” but rather to address “the public's need to adequately protect themselves and their children” from those with prior sexual convictions. *Id.* (quoting Colo. Rev. Stat. §16-22-110(6)(a)).

The court then applied the Supreme Court's five-factor test to determine whether CSORA's effects negated this express intent. *Id.* at *5 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). This test comprises whether the statutory scheme “[1] resembles traditional forms of punishment, [2] imposes an affirmative disability or restraint, [3] promotes the traditional aims of punishment, [4] has a rational connection to a nonpunitive purpose, or [5] is excessive with respect to this purpose.” *Id.* (brackets supplied). The court concluded that all five factors weighed against finding that CSORA inflicted punishment.

First, the circuit court disagreed with the district court, which had concluded that CSORA's requirements resembled three types of traditional

punishment—public shaming, banishment, and parole and probation. *Id.* It reasoned that Colorado was not shaming by putting plaintiffs on display but disseminating accurate information about criminal records. It disagreed that the state was banishing plaintiffs by erecting obstacles to finding homes and jobs, when the court had previously upheld Oklahoma's much more onerous residency restrictions. *Id.* (citing *Shaw v. Patton*, 823 F.3d 556, 559, 568 (10th Cir. 2016)). And it concluded that the reporting requirements did not amount to probation, when they fell short of the much more active role law enforcement plays in probationers' lives.

Second, the court ruled that CSORA did not impose an affirmative disability or restraint. It noted that it had rejected this argument in *Shaw*, where Oklahoma had similar reporting requirements and much more onerous residency restrictions. *Id.* at *6 (citing *Shaw*, 823 F.3d at 569, 571).

Third, the court disagreed that the statute promoted the traditional aims of punishment. The district court had held that the statute promoted retribution and deterrence. But, relying on *Smith*, the circuit court explained that deterrence alone is not enough to render a statutory scheme criminal in nature. *Id.* (citing *Smith*, 538 U.S. at 102). Citing the same discussion in *Smith*, the court added that tying the length of a reporting requirement to the nature of an offense was not retributive but was reasonably related to the risk of recidivism. *Id.*

Fourth, the court agreed with the district court that CSORA was rationally related to a non-punitive purpose: public safety. *Finally*, and relatedly, the court opined that the statute was not excessive in its non-punitive purpose. The lower court had concluded that CSORA was excessive, because it required persons to divulge substantial personal information over a long time, without any individual risk assessment or opportunity to ease the requirements based on evidence of rehabilitation. *Id.* But the circuit court observed that in *Smith*, the Supreme Court had rejected similar reasoning, and in *Shaw*, the court itself had, again, approved more stringent requirements. *Id.* at *7.

Substantive Due Process

The Tenth Circuit next determined that CSORA did not violate substantive due process. The district court ruled that it did, because the statute allows the public to arbitrarily, and without notice, “inflict punishments beyond those imposed through the courts.” *Id.* (quoting *Millard*, 265 F. Supp 3d at 1235). Separately, plaintiffs contended that CSORA creates an irrebuttable presumption that a registered sex offender will reoffend.

The circuit court began by holding that CSORA did not violate any fundamental right. *Id.* at *8. It thus framed the substantive due process issue as “whether CSORA is rationally related to a legitimate government interest.” *Id.* The court found this test was “easily” met, because there was a “rational connection” between the statute and “the government's interest in public safety.” *Id.* It added that substantive due process protects persons from government action but not public action. *Id.* And it rejected plaintiffs' separate argument because they failed to connect the claimed “irrebuttable

presumption” to any fundamental right. *Id.*

The 'Rooker-Feldman' Doctrine

Finally, the court made short work of the juvenile offender's procedural due process claim. That plaintiff alleged that two Colorado magistrates had denied him due process in rejecting his deregistration petitions, because they had applied the wrong legal standard. *Id.* at *9. But the Tenth Circuit explained that the *Rooker-Feldman* doctrine “precludes lower federal courts from exercising appellate jurisdiction over state-court judgments.” *Id.* And a plaintiff cannot circumvent the doctrine by couching his request for appellate review of a state-court judgment as a due-process claim. The court thus vacated the district court's judgment for lack of jurisdiction. *Id.*

Stephen Masciocchi and Jessica Smith are attorneys at Holland & Hart specializing in complex commercial litigation. Steve assists clients with federal and state appeals and class actions in high-stakes trial and appellate litigation. Jessica has substantial appellate experience and leads the firm's religious institutions and First Amendment practice.

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