IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 22-2150

BRIAN HOPE, et al.,	)
	) Appeal from the United States District Court
Plaintiffs / Appellees,	) for the Southern District of Indiana
	)
v.	) Cause No. 1:16-cv-02865-RLY-TAB
	)
COMMISSIONER OF THE INDIANA DEPARTMENT OF CORRECTION, et al.,	) The Honorable Richard L. Young, Judge
	)
	)
	)
Defendants / Appellants.	)

BRIEF OF APPELLEES

Gavin M. Rose
Counsel of Record
Stevie J. Pactor
ACLU OF INDIANA
1031 E. Washington Street
Indianapolis, Indiana 46202
317/635-4059
<grose@aclu-in.org>
<spactor@aclu-in.org>

Attorneys for the appellees

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Cause No: No. 22-2150

Short Caption: Brian Hope, et al. v. Commissioner of the Indiana Dep't of Correction, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3): **Brian Hope, Gary Snider, Joseph Standish, Patrick Rice, Adam Bash, and Scott Rush**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: **ACLU of Indiana (Gavin M. Rose, Jan P. Mensz, and Stevie J. Pactor)**

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Gavin M. Rose Date: October 20, 2022

Attorney's Printed Name: **Gavin M. Rose**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(c): Yes **X**

Address: ACLU of Indiana, 1031 E. Washington St, Indianapolis, IN 46202
Phone Number: (317) 635-4059 Fax Number: (317) 635-4105
E-Mail Address: grose@aclu-in.org

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Cause No: No. 22-2150

Short Caption: Brian Hope, et al. v. Commissioner of the Indiana Dep't of Correction, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3): **Brian Hope, Gary Snider, Joseph Standish, Patrick Rice, Adam Bash, and Scott Rush**

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: **ACLU of Indiana (Gavin M. Rose, Jan P. Mensz, and Stevie J. Pactor)**

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Stevie J. Pactor Date: October 20, 2022

Attorney's Printed Name: **Stevie J. Pactor**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(c): No **X**

Address: ACLU of Indiana, 1031 E. Washington St, Indianapolis, IN 46202
Phone Number: (317) 635-4059 Fax Number: (317) 635-4105
E-Mail Address: spactor@aclu-in.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Indiana Statutes

Other State Statutes

Historical Statutes

Other Sources

JURISDICTIONAL STATEMENT

The jurisdictional summary in the appellants' brief (Br. of Appellants 2-3) is complete and correct.

STATEMENT OF THE ISSUES

Given constraints imposed by the *ex post facto* clause of its state constitution, *see Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), Indiana does not apply its Sex Offender Registration Act ("SORA"), Ind. Code § 11-8-8-1, *et seq.*, retroactively to persons who have never been required to register in another jurisdiction. However, for persons like the plaintiffs who were convicted of offenses before the enactment of SORA but who *have* been required to register elsewhere, that singular fact results in Indiana mandating their registration—potentially for the rest of their lives—and imposing a wide array of related burdens that impact virtually every aspect of their existence. This is so even if they relocated to Indiana long after their registration obligation in another state expired, even if they registered in another state for a single day or less, and regardless of the duration of their out-of-state registration requirement.

The result of this unique scheme is a long list of utter nonsense. Indiana does not require the registration of a so-called pre-SORA offender who relocates from Alaska or Maine (which do not apply their registration statutes retroactively) but does require the registration of someone who relocates from Texas or Kentucky (which do). A Lake County resident who commutes to Chicago for work will be required to register in

Indiana but his neighbor, who works in Gary, will not. The Indiana registration obligations of a pre-SORA offender who travels for a short vacation will depend not only on which state he visits but also on the amount of time he spends there. And so on.

None of this, of course, has absolutely anything to do with the purpose underlying SORA—public safety—and Indiana has never contended to the contrary. Instead, the only justification it advances that is actually tethered to its discriminatory classification is what it terms a "marginal burden" rationale borrowed from the Indiana Supreme Court's *ex post facto* jurisprudence: it believes that an individual who has registered in another jurisdiction will somehow feel the impact of SORA less severely than someone who has never registered elsewhere. But the burden occasioned by SORA is identical for both persons, for it is *the exact same statute* that would be enforced. And, if that were not enough—and it is—no court has recognized a legitimate state interest, cognizable under the Equal Protection Clause, in treating two persons differently based on nothing more than one person's connection to or treatment in a different state.

While this Court previously rejected the plaintiffs' right-to-travel and *ex post facto* claims, *see Hope v. Commissioner*, 9 F.4th 513 (7th Cir. 2021) (en banc), the issue remaining for resolution in the present appeal is whether the district court properly concluded that, even under low-level scrutiny, the unique distinction that Indiana has established between pre-SORA offenders who have previously registered in another jurisdiction and all other pre-SORA offenders is not rationally related to a legitimate government purpose

and is therefore violative of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. The Indiana Sex and Violent Offender Registry

The Indiana Sex and Violent Offender Registry ("registry") is jointly maintained by the Indiana Department of Correction ("DOC") and local sheriffs, *see* Ind. Code §§ 11-8-2-12.4, 11-8-2-13(b), 36-2-13-5.5, although the DOC is responsible for determining who is required to register and the length of the registration period (Dkt. 142-3 at 48 [¶¶ 1-2]).[1]

"Placement on the registry comes with a variety of obligations and restrictions; failure to comply can have criminal consequences." *Schepers v. Commissioner*, 691 F.3d 909, 911 (7th Cir. 2012). A person required to register under Indiana's Sex Offender Registration Act ("SORA"), Ind. Code § 11-8-8-1, *et seq.*, must report in person at least annually to the local sheriff's office where he resides (although, if he is employed or attends school in a different county, he must report to the sheriff's office in that county

---

[1] All record citations in this brief are made to the page number assigned by the district court's electric filing system ("Dkt.") as well as, where appropriate, to the appellants' Short Appendix ("S.A.").

Dkt. 142-3 is the most recent deposition of Brent Myers, the DOC's Director of Registration and Victims' Services who has thrice been deposed as the designate of the DOC pursuant to Federal Rule 30(b)(6) (*see* Dkts. 142-1 through 142-3). In order to ensure a clean record, Exhibit 2 to that deposition (Dkt. 142-3 at 48-51) is a document, prepared by the plaintiffs' attorney, titled "Factual Statements Concerning the Registration Policies of the Indiana Department of Correction." With the exception of portions of paragraph 3 of that exhibit, which required further elaboration, Mr. Myers confirmed that these statements were true and accurate statements concerning Indiana's registration policies. (Dkt. 142-3 at 13-15). This exhibit is therefore cited herein without further elaboration.

as well) in order to register and be photographed. *See* Ind. Code § 11-8-8-14(a). However, if the person qualifies under Indiana law as a "sexually violent predator"—a defined term that includes persons convicted of nine specified offenses as well as other persons, *see* Ind. Code § 35-38-1-7.5—then he must report to the local sheriff's office every ninety days. *See* Ind. Code § 11-8-8-14(b). And, if the person lives in transitional or temporary housing, or lacks a residence altogether, he must appear in person at least once every seven days. *See* Ind. Code § 11-8-8-12.

In addition to his photograph, a person required to register must provide a wide array of information, including his full name, date of birth, certain physical characteristics, social security number, driver's license number, vehicle description and license plate number, principal address, the name and address of any employer or educational institutional that the person attends, any electronic mail address, any instant messaging username, any social networking web site username, and "[a]ny other information required by the [DOC]." Ind. Code § 11-8-8-8(a). Most of this information is published on the publicly accessible registry, although some information (such as individuals' e-mail addresses) is maintained privately by the DOC. (Dkt. 142-1 at 12). If any of this information changes, an individual must report that change—in person—within seventy-two hours of the change. Ind. Code § 11-8-8-8(c). In order to verify an individual's residence, local law enforcement must personally visit each offender at least annually (and at least once every ninety days if the offender is a sexually violent

predator). Ind. Code § 11-8-8-13(a). Various other obligations or restrictions are also imposed on all persons required to register as sex or violent offenders: for instance, a person required to register must obtain and keep in his possession a valid driver's license or state-issued identification card, Ind. Code § 11-8-8-15, and he may not petition for a change of name, Ind. Code § 11-8-8-16.

In addition to these restrictions that apply to all sex or violent offenders, specific categories of offenders are subjected to additional restrictions. (Dkt. 142-1 at 6-7; Dkt. 142-2 at 7-8). A "sexually violent predator" must inform law enforcement whenever he plans to be absent from his home for more than 72 hours—including, of course, even a short vacation. Ind. Code § 11-8-8-18. A person who qualifies as an "offender against children" may not work or volunteer at, or reside within 1,000 feet of, school property, a youth program center, or a public park. Ind. Code §§ 35-42-4-10, 11. And a person who qualifies as a "serious sex offender" may not even *enter* school property. Ind. Code § 35-42-4-14.

II. Indiana's application of SORA to persons whose offenses were committed before those offenses required registration in Indiana

A. Indiana's policies concerning the retroactive application of SORA

In *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), the Indiana Supreme Court held that the *ex post facto* clause of the Indiana Constitution prohibited the application of SORA to an individual whose offense predated the enactment of that statute. *Id.* at 384. In compliance with that decision, therefore, throughout this litigation Indiana has not

required persons to register who committed Indiana offenses at a time when they did not require registration under SORA and who thereafter remained in the state. (Dkt. 142-1 at 18-19, 27; Dkt. 142-2 at 13; Dkt. 142-3 at 16, 48 [¶ 3]). However, over the course of these proceedings, it has not adopted a consistent position with respect to which pre-SORA offenders it *does* require to register. In its current form, Indiana only requires the registration of these persons if they first have been required to register in another state. (Dkt. 142-3 at 49 [¶ 4]). This results from the application of what the parties have termed the "other jurisdiction" provision of Indiana law, which provides that the term "sex or violent offender" includes "a person who is required to register as a sex or violent offender in any jurisdiction." *See* Ind. Code § 11-8-8-5(b)(1).[2]

---

[2] Earlier in this litigation, the parties also addressed the application of the so-called "substantial equivalency" provision of Indiana law, Ind. Code § 1-1-2-4(b)(3), which provides that any reference in the Indiana Code to an Indiana conviction includes a conviction for "[a] substantially similar offense committed in another jurisdiction." In the previous appeal in this case, the panel underscored that *Wallace* "prevents [Indiana] from requiring new (or returning) residents . . . to register under the substantial equivalency [statute] alone." *Hope v. Commissioner*, 984 F.3d 532, 538 (7th Cir.), *vacated by grant of reh'g en banc* (7th Cir. Mar. 12, 2021). And, consistent with Indiana's representations, the *en banc* court understood that a pre-SORA offender's obligation to register in Indiana turns on "whether [he] is subject to an existing registration obligation." *Hope v. Commissioner* ("*Hope II*"), 9 F.4th 513, 525 (7th Cir. 2021) (en banc).

Nonetheless, on remand the DOC's Rule 30(b)(6) designate identified a class of pre-SORA offenders required to register even though they had never incurred an out-of-state obligation: persons (a) convicted in a state other than Indiana (b) of an offense that qualifies as the "substantial equivalent" to a registrable offense in Indiana (c) who were convicted at a time when their state-of-conviction had a registry statute, *whether or not* the offense of which they were convicted actually required registration in that state. (Dkt. 142-3 at 17-18 [A: "If another state had a registry system, but chose not to require an individual to register and it was prior to July of 1994, then we would look at the equivalency of that offense if the individual chose to relocate to Indiana." Q: "And if the offense is substantially equivalent to an Indiana offense, then you would

Although Indiana acknowledges that it took a different position earlier in this litigation, it has now determined that that the "other jurisdiction" provision will be applied retroactively to persons who only registered in another state before that statute took effect on July 1, 2006 (and even to individuals who relocated to Indiana before that date). (Dkt. 142-3 at 30-31). It also requires registration whether or not an individual's out-of-state obligation expired prior to the date that he began to reside, work, or attend

---

require that they register in Indiana?" A: "Yes."]). An example will drive the point home. The first iteration of registration statutes in several states—such as Arizona (1951), California (1944), Nevada (1961), and Ohio (1963)—appeared more than half a century ago. *See* N.Y. Div. of Crim. Justice Servs., Office of Justice Sys. Analysis, *Retroactive Application of Sex Offender Registry Statutes: 1995 Survey of the States* (July 1995), at 5-6 (available at https://www.ojp.gov/pdffiles1/Digitization/156875NCJRS.pdf) (last visited Oct. 7, 2022). Under the policies to which the DOC testified on remand, Indiana would require the registration of a pre-SORA offender convicted in any of these states whose offense took place in, say, 1970, even if the person was not required to register by his state of conviction and regardless of when he relocated to Indiana, so long as the offense of which he was convicted is deemed the "substantial equivalent" of an offense currently identified as a registrable offense in Indiana. (Dkt. 142-3 at 17-18, 21-22). As applied to the plaintiffs, the record therefore reveals that Gary Snider (convicted in Michigan of a 1988 offense), Patrick Rice (convicted in Illinois of a 1989 offense), and Scott Rush (convicted in Florida of a 1992 offense) would all be required to register in Indiana *regardless of whether* they had ever registered in another jurisdiction. *See* Fla. Stat. § 775.13 (1957) (as amended 1983); Ill. Rev. Stat. Ch. 38, para. 222, *et seq.* (1986) (recodified at 730 ILCS 150); Mich. Comp. Laws § 28.721, *et seq.* (1995).

On summary judgment, the district court concluded that the only issue before it on remand was "whether the State violates the Equal Protection Clause by distinguishing between pre-SORA offenders 'based solely on whether the offender has an out-of-state registration obligation,'" and it therefore refused to address this latest alteration to Indiana's policies. (Dkt. 152 at 6 n.2 [S.A. 8] [quoting *Hope II*, 9 F.4th at 529]). On appeal, Indiana does not attempt to justify the application of SORA to the plaintiffs on any grounds other than their previous out-of-state registration. While the attempt on remand to modify its policies (thirteen years after *Wallace* and six years into this litigation) certainly underscores Indiana's inability to maintain a consistent position—or even a position consistent with the representations that it made to this Court in its previous appeal—given the abandonment of any reliance on the "substantial equivalency" provision this issue is not addressed further.

school in Indiana. (*Id.* at 49 [¶ 5]). For instance, for an individual who had a ten-year registration requirement in Illinois before relocating to Indiana, if the DOC determines that the "substantial equivalent" of his offense requires lifetime registration in Indiana, he will be required to register for the rest of his life even if he relocated to Indiana after his ten-year-registration requirement in Illinois expired. (*Id.*). And, Indiana requires that person's registration regardless of how long he had been required to register in a state other than Indiana and requires that person to register under SORA even if he had only been required to register in a state other than Indiana for a single day or less. (*Id.* at 49 [¶ 6]). Indeed, Indiana requires him to register under SORA regardless of whether he relocated to Indiana directly from the state that required his registration. (*Id.* at 50 [¶ 7]). In other words, the DOC will require the registration of an individual who (a) was required to register in State A, (b) then relocated to State B, which did not require his registration, and (c) then relocated to Indiana directly from State B. (*Id.*).

When the DOC determines that a pre-SORA offender is required to register in Indiana, it requires that person to register for either the period of time of his out-of-state registration requirement or the period of time established by Indiana Code § 11-8-8-19, whichever is longer. (*Id.* at 50 [¶ 8]). By way of example, if an individual who relocates to Indiana has a 25-year registration obligation in another state but qualifies as a lifetime registrant under Indiana Code § 11-8-8-19, the individual will be required to register for the remainder of his life. (*Id.*). On the other hand, if an individual who relocates to

Indiana has a 25-year registration obligation in another state but would qualify as a 10-year registrant under Indiana Code § 11-8-8-19, the individual will be required to register for 25 years. (*Id.*). And, of course, when Indiana determines that a pre-SORA offender is required to register, the legal obligations and/or restraints imposed on that person as a result of his registration are determined by Indiana law rather than by the law of a state to which the person was previously connected. (*Id.* at 50 [¶ 9]).

B. The asserted justifications for Indiana's policies

Like the contours of its actual policies, Indiana's asserted justifications for these policies have shifted throughout this litigation. Prior to the earlier appeal in this case, the DOC was candid in admitting that it has no understanding of any interest served by the differential treatment at issue in this litigation (Dkt. 100-2 at 31-32), and agreed that sex offenders, like anyone else, might travel between states for any number of innocent reasons (*id.* at 33). On appeal, Indiana contended that its differential treatment served the state interest in "strik[ing] a reasonable balance between the State's compelling interest in protecting Hoosiers from high-recidivism-risk offenders on the one hand and the important constitutional principles of fair notice on the other." (Dkt. 142-3 at 113-14).

Despite also testifying that Indiana required some pre-SORA offenders to register even though they have never been required to register elsewhere (*see supra* at 6-7 n.2), the DOC's Rule 30(b)(6) designate acknowledged on remand that this statement in Indiana's appellate briefing summarized the state interest that the DOC contends to be applicable.

(*Id.* at 37-38). In briefing, however, Indiana "expressly disclaim[ed] any interest in fair notice by itself." (Dkt. 152 at 13 n.6 [S.A. 15] [citing Dkt. 149 at 11]).

III. The application of SORA to the plaintiffs

A. The plaintiffs' decades-old sex offenses, their out-of-state registration obligations, and their arrival in Indiana

Each of the plaintiffs was convicted of a sex offense that was committed prior to the enactment of Indiana's SORA. Brian Hope (1993), Joseph Standish (1995), and Scott Rush (1992) were all charged with and ultimately convicted of offenses that were committed in the early 1990s. (Dkt. 142-4 at 1 [¶ 3]; Dkt. 142-6 at 1 [¶ 1]; Dkt. 142-9 at 1 [¶ 2]). Patrick Rice's offense took place in 1989. (Dkt. 142-7 at 1 [¶ 2]). Gary Snider continues to deny liability for his offense; at trial, his alleged victim did not have a precise recollection of when the offense took place, but Mr. Snider believes that she testified that it occurred during the first half of 1988. (Dkt. 142-5 at 1 [¶ 2]). And Adam Bash's offense occurred in the mid-1980s, when he was in his early teens or even younger. (Dkt. 142-8 at 1 [¶ 2]). With the exception of Brian Hope—who was convicted of his offense in Porter County, Indiana (Dkt. 142-4 at 1 [¶ 3])—each of the plaintiffs' convictions took place out of state. (Dkt. 142-5 at 1 [¶ 2] [Snider – Michigan]; Dkt. 142-6 at 1 [¶ 2] [Standish – Michigan]; Dkt. 142-7 at 1 [¶ 2] [Rice – Illinois]; Dkt. 142-8 at 1 [¶ 2] [Bash – Kentucky]; Dkt. 142-9 at 1 [¶ 2] [Rush – Florida]).

Both Gary Snider and Patrick Rice relocated to Indiana the day that they were released from prison in their states-of-conviction. (Dkt. 142-5 at 2 [¶ 4]; Dkt. 142-7 at 2

[¶¶ 7-8]). Mr. Snider was married during his incarceration and he and his then-wife drove directly from the prison in Jackson, Michigan from which he was released to Huntington County, Indiana—a little over two hours away—where his wife lived because of her work. (Dkt. 142-5 at 2 [¶ 4]). He does not believe that they even stopped for gas or to use the restroom while they were still in Michigan. (*Id.*). Nonetheless, Michigan required that Mr. Snider register as a sex offender with correctional officials during his period of incarceration and he did so: at no point was he required to register in Michigan other than while incarcerated. (*Id.* at 1-2 [¶¶ 3, 5]). Although Mr. Rice was not required to register in Illinois while he was incarcerated, upon his release from prison he was informed that he was required to promptly register as a sex offender under Illinois law. (Dkt. 142-7 at 2 [¶ 7]). The day that he was released from prison, he therefore registered in Danville, Illinois, where he informed officials that he intended to move to Madison County, Indiana (where his sister lived) that day. (*Id.*). His out-of-state registration thus only lasted for a few hours. (*Id.* at 2 [¶¶ 7-8]).

Brian Hope and Adam Bash both took more circuitous routes before landing in Indiana. Nearly a decade after his 1996 conviction for an Indiana offense, Mr. Hope relocated for a period of time first to California (where he was not required to register) and then to Texas (where he was). (Dkt. 142-4 at 1-2 [¶¶ 5-7]). He then returned to Indiana in 2013 to help care for his grandfather, who had become seriously ill, as well as for other personal reasons. (Dkt. 40-1 at 8 [Interr. No. 7]). Upon Mr. Bash's release from

a Kentucky prison in 1998, he did not have any strong connections to Kentucky and so he moved to Cincinnati, Ohio, where he was required to register. (Dkt. 142-8 at 2 [¶ 5]). He remained in Cincinnati for only a few months, however, before relocating to Indiana in 1999 or 2000. (*Id.* at 2 [¶¶ 5-6]).

Joseph Standish and Scott Rush both registered in their states of conviction for lengthier periods of time. Following his 1996 conviction, Mr. Standish registered in Michigan until he relocated to Allen County, Indiana in 2013 because his wife obtained a job there. (Dkt. 142-6 at 1-2 [¶¶ 3-5]). And, after his 1995 release from prison, Mr. Rush registered in Florida for more than twenty years—including a period of supervised release—until, in 2017, his employer decided to close its Florida office where he worked and offered him a transfer (which he accepted) to its office in Huntington County, Indiana. (Dkt. 142-9 at 1-2 [¶¶ 2-6]).

The period of time that each of the plaintiffs was required to register in other states varies widely: had Mr. Bash (ten years in Ohio) or Mr. Rush (twenty years in Florida) remained in the states that required their registration, their period of registration would already have expired (Dkt. 142-8 at 2 [¶ 5]; Dkt. 142-9 at 1 [¶ 2]); Mr. Snider's Michigan registration obligation would have expired in 2028 and Mr. Rice's Illinois obligation would have expired in 2027 (Dkt. 142-5 at 2 [¶ 3]; Dkt. 142-7 at 2 [¶ 7]); and Mr. Hope and Mr. Standish were both subject to lifetime registration obligations elsewhere (Dkt. 142-4 at 2 [¶ 6-7]; Dkt. 142-6 at 2 [¶ 4]). At this point, all six plaintiffs have fully served their

sentences resulting from their convictions for a sex offense, which ranged from a period of probation to imprisonment. (Dkt. 142-4 at 1 [¶ 4] [probation only]; Dkt. 142-5 at 1 [¶ 3] [incarceration until 2003]; Dkt. 142-6 at 1 [¶ 3] [less than a year in jail followed by a period of probation]; Dkt. 142-7 at 1-2 [¶¶ 2, 5] [incarceration until 2017]; Dkt. 142-8 at 1-2 [¶ 4] [incarceration in psychiatric facility until 1998]; Dkt. 142-9 at 1 [¶ 2] [incarceration until 1995]).

And, as is to be expected given the age of their offenses, many of the plaintiffs are now well beyond middle age: at the time of the summary-judgment briefing in this cause, Mr. Snider was 69 years old (Dkt. 142-5 at 4 [¶ 15]), and Mr. Standish, Mr. Rice, and Mr. Rush were all in their mid-to-late fifties (Dkt. 142-6 at 1 [¶ 1]; Dkt. 142-7 at 8; Dkt. 142-9 at 1 [¶ 1]).

B. The immense burdens imposed on the plaintiffs by virtue of their registration obligations

Indiana has determined that each of the plaintiffs must register for the remainder of his life. (Dkt. 142-4 at 2 [¶ 8]; Dkt. 142-5 at 2-3 [¶ 7]; Dkt. 142-6 at 2 [¶ 7]; Dkt. 142-7 at 2 [¶ 8]; Dkt. 142-8 at 3 [¶ 9]; Dkt. 142-9 at 2 [¶ 8]). It has also classified all six plaintiffs as "offenders against children" (Ind. Code § 35-42-4-11) and "serious sex offenders" (Ind. Code § 35-42-4-14) under Indiana law; four of the six plaintiffs—all but Mr. Hope and Mr. Bash—have also been classified as "sexually violent predators" (Ind. Code § 35-38-1-7.5). (Dkt. 142-4 at 3 [¶ 15]; Dkt. 142-5 at 3 [¶ 10]; Dkt. 142-6 at 3 [¶ 11]; Dkt. 142-7 at 5 [¶ 19]; Dkt. 142-8 at 3 [¶ 13]; Dkt. 142-9 at 3 [¶ 11]).

The registration process itself can be time-intensive (Dkt. 142-4 at 3 [¶ 12]; Dkt. 142-5 at 3 [¶ 11]; Dkt. 142-6 at 3 [¶ 12]; Dkt. 142-7 at 5 [¶ 20]; Dkt. 142-9 at 3 [¶ 13]) and must be repeated by each plaintiff, at a minimum, either quarterly or annually. *See* Ind. Code § 11-8-8-14(a), (b). For Mr. Rice and Mr. Rush, both of whom live some distance from the county sheriff's office, the process is uniquely burdensome: Mr. Rice does not own reliable transportation and so would be required to rely on his ability to find a ride (which can be difficult as it obviously depends on other people's schedules) and Mr. Rush would be required to take an entire day off of work in order to register. (Dkt. 142-7 at 5 [¶ 20]; Dkt. 142-9 at 3 [¶ 13]). In the past, Mr. Hope was homeless and so was required to register weekly, *see* Ind. Code § 11-8-8-12(b)(2), and to do so he devoted several hours to walking to the county sheriff's office, even in inclement weather, and to the registration process itself. (Dkt. 142-4 at 3 [¶ 12]).

As statutorily defined "serious sex offenders," each of the plaintiffs is also subject to Indiana's ban on even *entering* school property. *See* Ind. Code § 35-42-4-14. This has in the past—and will in the future if their registration is again required—dramatically impacted the plaintiffs' abilities to support their children. Mr. Standish, Mr. Bash, and Mr. Rush all have school-age children with a wide array of activities at the school—from parent-teacher conferences to school plays and other extra-curricular events—that they would like to be able to attend. (Dkt. 142-6 at 3 [¶ 13]; Dkt. 142-8 at 6 [¶ 20]; Dkt. 142-9 at 4 [¶¶ 14-17]). Indeed, Mr. Bash's son has an individualized education program (IEP)

through his school due to his disabilities, which requires Mr. Bash to visit the school every couple of months to discuss his son's needs. (Dkt. 142-8 at 6 [¶ 20]). He has full physical and legal custody of his son as his son's mother is not a part of their lives. (*Id.*). Mr. Rush's oldest daughter also had an IEP when she attended school, which, prior to the preliminary-injunction in this case, resulted in meetings concerning her needs taking place in the absence of her parents. (Dkt. 142-9 at 4 [¶ 15]).

The prohibition on entering school property, of course, is not the only burden occasioned by the plaintiffs' registration. Indiana law authorizes counties to adopt an ordinance requiring sex offenders to pay "an annual sex or violent offender registration fee" of no more than $50.00 as well as an "address change fee" of up to $5.00. *See* Ind. Code § 36-2-13-5.6. Each of the plaintiffs' counties of residence has adopted such an ordinance and the plaintiffs have therefore been assessed these fees—repeatedly. (Dkt. 142-5 at 2-3 [¶ 7]; Dkt. 142-6 at 2 [¶ 8]; Dkt. 142-7 at 2-5 [¶¶ 9, 15, 21]; Dkt. 142-8 at 3-4 [¶ 14]; Dkt. 142-9 at 3 [¶ 12]). They are also subject to Indiana's prohibition on residing within 1,000 feet of certain facilities. *See* Ind. Code § 35-42-4-11. In the past, Mr. Hope was informed that he could not stay in a homeless shelter because the shelter happened to be 800 feet away from a park "as the crow flies." (Dkt. 142-4 at 4 [¶ 16]). Mr. Snider was at one point required to actually move away from his wife—a requirement that was obviously devastating—because their house was located within 1,000 feet of a daycare. (Dkt. 142-5 at 3 [¶ 12]). And when Mr. Rice and Mr. Bash moved to Delaware County

their options for housing were limited because of this restriction. (Dkt. 142-7 at 5-6 [¶ 22]; Dkt. 142-8 at 5-6 [¶ 19]).

On top of these legal restrictions, the plaintiffs and their families have routinely experienced ostracism and harassment when they were required to register as sex offenders. For example, Mr. Standish explains that laser pointers were shined through the living room windows of his family home, neighbors repeatedly urged him to move, and he was prohibited by his son's scout leader from dropping his son at the same location where other children are dropped (a requirement that his son was forced to explain to friends). (Dkt. 142-6 at 3-4 [¶¶ 14-15]). Several plaintiffs have also been denied employment for which they were qualified (Dkt. 142-4 at 3 [¶ 13]; Dkt. 142-6 at 3-4 [¶ 14]; Dkt. 142-7 at 6 [¶ 23]), and Mr. Snider has been forced to close a small business into which he had devoted substantial time and energy because he knew that he would be unable to maintain a customer base while he was on the registry (Dkt. 142-5 at 4 [¶ 13]).

The most telling evidence, however, is a success story: after the district court's preliminary injunction relieved him of his registration obligation, Mr. Hope—who was homeless and jobless at the time this case was initiated—was able to secure employment and, as a result, a home. (Dkt. 142-4 at 3 [¶¶ 13-14]).

IV. Procedural history

In the earlier appeal in this case, this Court held that the enforcement of the "other jurisdiction" requirement against the plaintiffs—and thus their obligation to register

under SORA—"neither violates [their] right to travel nor constitutes an impermissible ex post facto law." *Hope v. Commissioner* ("*Hope II*"), 9 F.4th 513, 534 (7th Cir. 2021) (en banc). However, it remanded the plaintiffs' equal-protection claim to the district court to determine in the first instance whether the enforcement of SORA against the plaintiffs "satisfies rational basis review." *Id.* at 529; *see also id.* at 534-35.

Following limited discovery on remand, the parties each sought summary judgment. (Dkts. 142 & 144). The only justification advanced by Indiana for requiring the plaintiffs to register when similarly situated persons who had never registered elsewhere would be relieved of this obligation was its interest "in maintaining a complete and accurate registration system to protect the public from high-recidivism-risk sex offenders and in closing any loophole due to relocation." (Dkt. 145 at 9). Confronting the fact that this interest does not even distinguish between the plaintiffs and their similarly situated counterparts, Indiana contended simply that "[i]t is fully permissible for the Indiana General Assembly to legislate around constitutional pronouncements." (*Id.* at 13). In so doing, it did not acknowledge this Court's observation that "two similarly situated Indiana offenders may have vastly different legal obligations simply because one of them has an out-of-state registration obligation" and that the equal-protection question revolved around "whether Indiana's differential treatment on this basis is rationally related to a legitimate government purpose." *Hope II*, 9 F.4th at 529.

On May 31, 2022, the district court again entered summary judgment in favor of

the plaintiffs. (Dkt. 152 [S.A. 3-23]). Following this Court's instructions that SORA must be considered "as modified by the Indiana Supreme Court's constitutional overlay" and that the question to be answered is whether "Indiana's *differential treatment* [based on out of state registration]" satisfies low-level scrutiny (Dkt. 152 at 13 [S.A. 15] [quoting *Hope II*, 9 F.4th at 529] [emphasis and alteration in original]), the district court highlighted several examples demonstrating that the discriminatory classification is not remotely tethered to any permissible government objective (*id.* at 15-18 [S.A. 17-20]). "[T]his is one of those rare cases," said the court, "where the State's legitimate purposes are not rationally related to the law's differential treatment of similarly situated individuals." (*Id.* at 19 [S.A. 21]).

Final judgment in the plaintiffs' favor was entered the same day. (Dkt. 153 [S.A. 1-2]).

SUMMARY OF THE ARGUMENT

Only one issue remains in this case: whether Indiana's attempt to distinguish between pre-SORA offenders based on whether they registered in another state is rationally related to a legitimate government objective. *See Hope v. Commissioner* ("*Hope II*"), 9 F.4th 513, 529 (7th Cir. 2021) (en banc). In its since-vacated decision, a panel of this Court has already concluded that the lines Indiana has drawn are "not even rational." *Hope v. Commissioner*, 984 F.3d 532, 547 (7th Cir.), *vacated by grant of reh'g en banc* (7th Cir. Mar. 12, 2021). Although certainly not binding at present, this conclusion stands on solid

footing. As the *en banc* court observed, Indiana's policies provide that "two lifelong Indiana residents, both with pre-SORA convictions, will be treated differently if one commutes into Chicago for work." *Hope II*, 9 F.4th at 529. They provide that an individual who relocates to Indiana from Maine (where registration obligations are not retroactive) will be relieved of any registration obligation whereas someone who relocates from Kentucky (where they are retroactive) will be required to register, potentially for the rest of his life. And they provide that the registration obligation of a lifelong Hoosier who travels for a short vacation will depend not only on where he goes but also on how long he stays there. None of this is rational.

In an attempt to justify the unjustifiable, Indiana first advances interests "in public safety and preventing loopholes." (Br. of Appellants 21). It does not, however, contend—nor could it—that the plaintiffs and other pre-SORA offenders who have registered elsewhere are any more dangerous than pre-SORA offenders who have not. This is conclusive of Indiana's public-safety rationale, for "[t]he Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (internal citation omitted). In its *en banc* decision, this Court was clear that Indiana's task on remand was to demonstrate that its "differential treatment [between the two groups of pre-SORA offenders] is rationally related to a legitimate government purpose." *Hope II*, 9 F.4th at 529. Indiana's reliance

on a public-safety rationale ignores this directive.

Apparently recognizing the fatal flaw in its public-safety argument, Indiana pivots to propose what it terms a "marginal burden" interest, which it borrows from the Indiana Supreme Court's wholly distinct analysis of the state constitution's *ex post facto* clause. *See, e.g.*, *Ammons v. State*, 50 N.E.3d 143, 145 (Ind. 2016) (per curiam). By this, it apparently intends only to underscore that the plaintiffs, unlike other pre-SORA offenders, have been required to register in another jurisdiction. The most glaring flaw in Indiana's marginal-burden argument is that it is not actually connected to a legitimate government interest at all: it is simply another way of *describing* the classification that has been established. Indiana does not appear to recognize the circularity of its argument.

This issue aside, however, there is no "marginal burden" at all: but for the classification Indiana has created, each of the plaintiffs would be burdened by SORA in precisely the same way as an identically situated individual who never registered out of state—for Indiana would be applying the *same exact statute*. If that were not enough, no court has recognized a legitimate state interest in treating persons differently based only on how other states have treated them. If accepted, Indiana's justification would seem to not only create an end-run around the Supreme Court's right-to-travel precedents, *see, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 500-03 (1999), but also allow for any state to treat its own residents in fifty different ways based on nothing more than the other states with which they have interacted. Indiana's marginal-burden interest is no interest at all.

STANDARD OF REVIEW

This Court "review[s] a district court's grant of summary judgment *de novo*." *Golla v. Office of Chief Judge of Cook Cnty.*, 875 F.3d 404, 407 (7th Cir. 2017) (citation omitted). "The question on a motion for summary judgment is whether the moving party has shown there is 'no genuine dispute as to any material fact,' and is entitled to summary judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). When a case is decided on cross-motions for summary judgment this Court will "construe all facts and draw[] all reasonable inferences in favor of the party against whom the motion under consideration was filed." *Hess v. Board of Trs. of S. Ill. Univ.*, 839 F.3d 668, 673 (7th Cir. 2016) (citations omitted).

ARGUMENT

The remaining issue to be resolved in this case is narrow: whether a "legitimate government purpose" justifies Indiana's requirement that the plaintiffs register as sex offenders—for the rest of their lives—when they would be relieved of any such obligation entirely if they had been convicted of the exact same offense at the exact same time but had never been required to register in another jurisdiction. *See Hope v. Commissioner* ("*Hope II*"), 9 F.4th 513, 529 (7th Cir. 2021) (en banc); *see also, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (reiterating the familiar standard for equal-protection claims where neither a suspect class nor a fundamental right is at issue). Low-level scrutiny is doubtless deferential to the government but, as this Court reiterated in its *en*

banc decision, it "does not ensure an automatic win." *Hope II*, 9 F.4th at 529. Indeed, there is no shortage of cases where the Supreme Court has invalidated government classifications under this standard. *See Romer v. Evans*, 517 U.S. 620, 626-35 (1996); *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cnty.*, 488 U.S. 336, 344-46 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985); *Plyler v. Doe*, 457 U.S. 202, 223-30 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973). Indiana's arguments to the contrary notwithstanding, the discriminatory classification that it has established between pre-SORA offenders who have registered out-of-state and those who have not simply cannot be justified by reference to any permissible objective.

I. As this Court's since-vacated panel decision already held and the *en banc* decision strongly implied, the classification established by Indiana is utterly irrational

In its since-vacated decision, the panel majority concluded not only that the lines Indiana has drawn are subject to (and fail) heightened scrutiny but also that these lines are "not even rational." *Hope v. Commissioner* ("*Hope I*"), 984 F.3d 532, 547 (7th Cir.), *vacated by grant of reh'g en banc* (7th Cir. Mar. 12, 2021). Although this conclusion is certainly not controlling at present, neither the panel dissent nor the *en banc* majority reached the merits of the plaintiffs' equal-protection claim under low-level scrutiny, and the panel's decision therefore represents the only instance in which this claim has been reached by this Court. Its conclusion stands on solid footing.

Indeed, even the *en banc* majority, while rejecting both the plaintiffs' right-to-travel

claim and their *ex post facto* claim, appeared to express skepticism that Indiana's classification passes muster even under low-level scrutiny:

> SORA, as modified by the Indiana Supreme Court's constitutional overlay, creates two classes of pre-SORA offenders—those who must register in Indiana, and those who are free from that requirement. Indiana distinguishes between the two groups based solely on whether the pre-SORA offender had a registration obligation in another state. For example: two lifelong Indiana residents, both with pre-SORA convictions, will be treated differently if one commutes into Chicago for work—and so is subject to Illinois's reporting requirements—while the other never leaves Indiana. The distinction holds true for offenders who attend school in another state or who have lived in another state imposing registration obligations on them. In short, two similarly situated Indiana offenders may have vastly different legal obligations simply because one of them has an out-of-state registration obligation.

Hope II, 9 F.4th at 529. The *en banc* majority, as noted, ultimately did not reach the merits of the plaintiffs' equal-protection claim. But it certainly got to the heart of the problem: in its post-*Wallace* attempt to require the registration of as many persons as possible, Indiana has created a discriminatory classification that is not remotely tethered to the purpose of sex-offender registration in the first instance.

Take, for instance, two out-of-state offenders convicted before the enactment of SORA of the exact same offense, who thereafter relocate to Indiana at the exact same time. One of them, convicted in Alaska or Maine—which do not apply their registration statutes retroactively, *see Doe v. State*, 189 P.3d 999 (Alaska 2008); *State v. Letalien*, 985 A.2d 4 (Me. 2009)—need not register in Indiana. The other, convicted in New York or Georgia—which do apply their statutes retroactively—must register for the rest of his

life. But what is the difference between these two persons? There is none: they have the exact same criminal history and have relocated to Indiana on the exact same date.

Or take the example provided by this Court, sitting *en banc*, of two pre-SORA offenders who live in Indiana. The individual who commutes to Illinois for work will be required to register—in Indiana—provided that he works in Illinois for at least ten days. *See* 730 ILCS 150/2(G). If the same person commutes to work in Michigan, he will be required to register in Indiana even if he quits his job the same day that he is hired, for Michigan's registration requirement is triggered by the mere fact of employment without any regard for the duration of employment. *See* Mich. Comp. Laws § 28.723(1). But the person can safely work in Gary or Valparaiso without creating for himself a registration obligation. What possible state interest allows for the differential treatment of these persons? Again, they have the exact same criminal history and now also have the exact same residential history.

Now imagine two Hoosiers who decide to commute to Chicago—one for work and the other to attend school—but who, for whatever reason, quit those endeavors within a week. As noted, the individual who worked temporarily in Illinois has not established an out-of-state registration obligation, and therefore need not register in Indiana, insofar as he worked for fewer than ten days. *See* 730 ILCS 150/2(G). But Illinois requires the registration of a student no matter how long he enrolls in school there, *see* 730 ILCS 150/2(F), and so the Indiana resident who commuted to briefly attend an out-

of-state school will suddenly find himself required to register as a sex offender, potentially for the rest of his life. But how can *Indiana* contend that it has any interest whatsoever in distinguishing between these two individuals?

Or take a lifelong Hoosier who travels temporarily for vacation. If a pre-SORA offender visits Alabama, Florida, or Kansas, he will be required to register upon his return to Indiana—potentially for the rest of his life—if his vacation lasts as few as three days. *See* Ala. Code § 15-20A-4(20); Fla. Stat. § 775.21(k), (n); Kan. Stat. § 22-4902(j). He may safely visit Hawaii for up to nine days before triggering a registration requirement. *See* Haw. Stat. § 846E-2(a). But he can travel indefinitely to Colorado (which defines residency in terms of an intent to establish permanent domicile), *see* Colo. Rev. Stat. § 16-22-105(3)), Alaska (which does not apply its registration statutes retroactively), or Fort Wayne (which is not out-of-state at all) without fearing that his vacation will cause the lifelong imposition of Indiana's burdensome registration obligations and other restrictions. What possible interest is served by this distinction? Indiana's interests in compelling an individual to register as a sex offender are not remotely tethered to where that individual chooses to take his vacation.

None of these examples is far-fetched, and similar examples, specifically referencing the plaintiffs themselves, abound. Indiana would not require that Brian Hope register if, instead of relocating temporarily to Texas, he had moved for a period of time to Maryland before returning to Indiana, *see Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62

A.3d 123, 137-43 (Md. 2013) (registration statute not applied retroactively)—nor, of course, would it require his registration if he had simply remained in Indiana. It would not require that the other plaintiffs register if, instead of Michigan, Illinois, and Florida, they had been convicted either in Indiana itself or in any of the seven states that do not apply their registration statutes retroactively. *See* U.S. Dep't of Justice, *Sex Offender Registration and Notification in the United States: Retroactive Application & Ex Post Facto Considerations* (Mar. 2019) at 2-3 & n.9 (available at https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/5-retroactive-application.pdf) (last visited Oct. 7, 2022). Indeed, Gary Snider would not be required to register if he had been convicted in a state that only required persons to register upon their release from incarceration—for he was in Michigan only for a couple of hours after his release and the only time that he registered in that state was during his time in prison. Similarly, Patrick Rice would be relieved of an Indiana registration obligation if Illinois had not required that he register *immediately* upon his release for he, too, moved to Indiana the day that he left prison.

Apparently recognizing the irrationality of the lines it has drawn, Indiana criticizes the district court's reliance on the plaintiffs' own experiences and what it terms "other edge cases." (Br. of Appellants 32). Most Chicagoans would doubtless be surprised to learn that a Lake County resident commuting to the city for work represents some sort of aberration. (*See* Dkt. 152 at 16 [S.A. 18] [reciting this Court's provision of this example]). Certainly low-level scrutiny requires this Court to examine the nature of the classification

that Indiana has created and does not require a perfect means-ends fit. But, despite Indiana's assertion to the contrary, neither the plaintiffs' experiences nor the experiences of persons who choose to relocate or who travel (or travel to or from particular states) for work, school, or vacation represent "edge" cases. To the contrary, they are common, everyday occurrences that go to the very heart of the challenged classification.

The interests that Indiana contends to be advanced by its discriminatory registration scheme are addressed immediately below. Given the holding of the panel and the language employed by this Court in its *en banc* decision, however, these asserted interests must be viewed with a jaundiced eye.

II. The interests advanced by Indiana do not come close to carrying the day

Truth be told, Indiana's attempts to justify the unjustifiable are difficult to follow. The district court understood Indiana's asserted interest to be in "register[ing] all sex offenders"—a public-safety rationale—with the recognition that it cannot do so insofar as "it must comply with the Indiana Supreme Court's [*ex post facto*] decisions." (Dkt. 152 at 13 n.6 [S.A. 15]). Indiana's initial reference on appeal to its interests in "public safety and preventing loopholes" (Br. of Appellants 21) certainly appears to confirm the district court's understanding, although it also attempts to articulate an interest, borrowed from the Indiana Supreme Court's *ex post facto* jurisprudence, related to the supposedly differential burden felt by an offender who has previously registered elsewhere (*id.* at 22-26). It is far from clear that Indiana believes that this so-called "marginal burden"

justification represents a government objective distinct from its public-safety and loophole-prevention interests. Regardless of how its asserted interests are viewed, its arguments are wholly without merit.

A. Indiana's public-safety rationale does not even attempt to distinguish between pre-SORA offenders who have registered in another jurisdiction and those who have not, and it therefore cannot justify the lines that Indiana has drawn

1. Even under rational-basis review, a discriminatory classification must be justified by a government interest actually related to that classification

In its earlier *en banc* decision, this Court left the district court—and the parties—with a simple task:

> The plaintiffs may still challenge Indiana's application of SORA to them because it treats them differently than similarly situated Indiana offenders. SORA, as modified by the Indiana Supreme Court's constitutional overlay, creates two classes of pre-SORA offenders—those who must register in Indiana, and those who are free from that requirement. . . . The question is whether Indiana's differential treatment . . . is rationally related to a legitimate government purpose.

Hope II, 9 F.4th at 529. Despite the simplicity of this directive, much of Indiana's brief has absolutely nothing to do with any "legitimate government purpose" that even attempts to explain the "differential treatment" meted out to the plaintiffs simply because they have registered in another jurisdiction. Instead, it complains at length about the threat posed by sex offenders in general and underscores the desire of the DOC and its attorneys to require the registration of as many persons as possible. This Court, however, was clear that, even under low-level scrutiny, any government interest alleged to support Indiana's

classification must actually relate to the *differences* between the two groups. Indiana's reliance on a public-safety rationale simply ignores this issue.

To be clear: there is no doubt that Indiana has an interest in requiring the registration of persons at high risk for recidivism. It is for this reason that "[t]reating sex offenders differently than others not convicted of these crimes is rationally related to a legitimate state objective." *Wirsching v. Colorado*, 360 F.3d 1191, 1205 (10th Cir. 2004). But this purported interest is not remotely tethered to the lines that Indiana has drawn, for the interest in preventing recidivism is just as substantial for sex offenders that Indiana does not require to register. After all, Mr. Hope did not become more dangerous because he relocated to another state for a period of time; Mr. Rice did not become more dangerous because he registered in Illinois for a single day before relocating to Indiana; Mr. Rush did not become more dangerous because his employer closed its Florida office and transferred him to Indiana; a Lake County resident does not become more dangerous because he commutes to Chicago for work; and a lifelong Hoosier does not become more dangerous because he chooses to vacation in Arizona rather than Maine. Indiana does not contend to the contrary, and this apparent recognition is fatal to its attempt to justify the plaintiffs' registration on this basis.

This Court's unequivocal observation that "[t]he question is whether Indiana's differential treatment . . . is rationally related to a legitimate government purpose," *Hope II*, 9 F.4th at 529, is hardly a surprising proposition, for both case law and common sense

are clear that, even under low-level scrutiny, a state interest must actually relate to the classification at issue. *See, e.g., U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) ("Under traditional equal protection analysis, a legislative classification must be sustained[] if *the classification itself* is rationally related to a legitimate government interest.") (emphasis added) (citing cases); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) ("The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."). Addressing an equal-protection challenge materially indistinguishable from this case, the Third Circuit thus observed as follows: "We readily agree that protecting [Pennsylvania's] citizens from sex offenses committed by repeat offenders is a legitimate state interest. The question, however, is whether the Commonwealth's denial of equivalent process to both in-state and out-of-state parolees is rationally related to its security concerns." *Doe v. Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 108 (3d Cir. 2008).

To say the least, if a state could justify a discriminatory classification by advancing an interest unrelated to the classification itself, the constitutional guarantee of equal protection would ring hollow.

2. It does not matter that the discriminatory classification at issue in this case has been created, in part, by the Indiana Supreme Court's interpretation of the state constitution's *ex post facto* clause

Indiana relies, however, on its desire to "close" any loopholes created by the

Indiana Supreme Court in *Wallace* and its progeny. As the district court recognized, this interest is not distinct from its public-safety rationale, for "'[c]losing loopholes' is just a means of ensuring the registry is as complete and accurate as possible, which itself is just a means of ensuring the registry works as intended," and, as such, this asserted interest "does not explain why offenders who are equally likely to pose a danger to the public are subject to vastly different legal obligations." (Dkt. 152 at 17-18 [S.A. 19-20]). Nonetheless, Indiana attempts to evade the very nature of an equal-protection challenge by emphasizing that its hands have been tied by constraints imposed by *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009). (*See* Br. of Appellants 22-26).

The panel in the earlier appeal, in language certainly not rejected *en banc*, underscored the fallacy in Indiana's attempts to distinguish between a statutory classification and one resulting (in part) from the judicial interpretation of a state's constitution:

> Part of this confusion [occasioned by Indiana's shifting policies] stems from the odd manner in which Indiana describes the operation of SORA. It refers to the statutory requirements of SORA as one aspect of the law, and then distinguishes the statutory law from the rulings by the Indiana Supreme Court invalidating certain applications of those laws. This, however, is not how we ordinarily describe operative state law. For example, in 2003, the U.S. Supreme Court declared unconstitutional the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. *Lawrence v. Texas*, 539 U.S. 558 (2003). Despite this ruling, the Texas statute that makes it a crime if a person "engages in deviate sexual intercourse with another individual of the same sex" remains on the books in Texas to this day. See Tx. Penal Code § 21.06. Yet no one ought to write a brief which describes same sex behavior as illegal in Texas under the statute but allowed by the Supreme Court's interpretation of the

> Constitution. Legislatively enacted laws, modified by case law, together as a whole become the law of the land and we do not continue to refer to the statutory law of Texas separately from the law of Texas as limited, clarified, or modified by the judiciary.

Hope I, 984 F.3d at 537-38. Even this Court's *en banc* decision described the "feature" underlying the plaintiffs' claims as the fact that Indiana case law "has the peculiar effect of permitting the State to treat similarly situated offenders differently based on whether an offender had an out-of-state registration obligation," *Hope II*, 9 F.4th at 519, and, in remanding the plaintiffs' equal-protection claim to the district court, described the "two classes of pre-SORA offenders" created by "SORA, as modified by the Indiana Supreme Court's constitutional overlay," *id.* at 529.

Imagine if the discrimination at issue here did not result from the Indiana Constitution and SORA acting in tandem but instead resulted exclusively from the Indiana General Assembly's determination that persons who have registered in another jurisdiction should be treated differently. Presumably Indiana would not attempt to justify this differential treatment on the basis of a desire to "close loopholes" by requiring the registration of a greater number of persons, for that desire does not explain *why* the lines were drawn where they were. But this Court was clear that the analysis does not change simply based on how a state establishes a discriminatory classification.

Indiana's lengthy argument that "[a] constitutionally required exemption" somehow immunizes its classifications from meaningful equal-protection review is thus wholly off-base. This bottom line is that a government-imposed classification is

unconstitutional whether the classification is created by a state-constitutional provision, a statutory enactment, a non-codified policy, or a combination of the three: just as a state constitutional provision that transgresses the U.S. Constitution must be invalidated (and it must, *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 626-36 (1996)) and a state statutory provision that transgresses the U.S. Constitution must be invalidated (and it must, *see, e.g.*, *Lawrence*, 539 U.S. at 564-79), Indiana cannot evade constitutional norms simply because the state constitution and a state statute act in tandem to create the violation of the plaintiffs' rights. In its earlier decisions, this Court left no doubt on that front.

3. Indiana's reliance on its ability, under rational-basis review, to legislate incrementally is off-base

Apparently recognizing that it has no reason to believe that the plaintiffs present a greater threat to public safety than do persons who never registered in another jurisdiction, Indiana falls back on an assertion that rational-basis review allows it to legislate "incrementally" by addressing only one aspect of a perceived problem. (Br. of Appellants 31-33). In the context of describing its loophole-prevention rationale, it relatedly asserts that rational-basis review "tolerates overinclusive classifications, underinclusive [classifications], and other imperfect means-ends fits." (*Id.* at 23 [quoting *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1010 (7th Cir. 2019)] [alteration in original]). If these propositions meant what Indiana apparently believes they do, where low-level scrutiny applies states would seemingly be relieved from the need to advance *any* interest actually connected to classifications they create.

Obviously this is contrary to this Court's *en banc* decision in this very case, *see Hope II*, 9 F.4th at 529 ("The question is whether Indiana's differential treatment . . . is rationally related to a legitimate government purpose."), and it is difficult to perceive how Indiana's argument would not "ensure an automatic win" when this Court was clear that low-level scrutiny does no such thing, *id.* Not surprisingly, its arguments are without merit.

Indiana's "one step at a time" approach traces its origins to the Supreme Court's decision in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). *See, e.g.*, *FCC v. Beach Commc'ns*, 508 U.S. 307, 316 (1993) (citing *Lee Optical*). In establishing the permissibility of this approach, the Court in *Lee Optical* observed as follows:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

348 U.S. at 489. Sixteen years later, however, after reiterating the permissibility of *Lee Optical*'s "one step at a time" approach in another challenge under low-level scrutiny, the Court was unequivocal in holding that, even under this approach, "[t]he applicable measure . . . must be the traditional one: Is the distinction drawn by the statutes invidious and without rational basis?" *Schilb v. Kuebel*, 404 U.S. 357, 364-65 (1971). Put another way: under *Lee Optical* (and *Beach Communications*) Indiana may require the registration of sex offenders but not of others who have committed serious crimes based on a perceived distinction either in the likelihood of recidivism or in the dangers posed by a particular offense. In that instance, it is public safety in general that represents the

"perceived problem" that may be approached "incrementally." *Beach Commc'ns*, 508 U.S. at 316. Neither *Lee Optical* nor *Beach Communications*—nor any other case relying on similar principles—gives Indiana carte blanche to draw whatever lines it wants without even attempting a justification for the particular lines that have been drawn.

Wherever this "one step at a time" principle has been relied upon to justify a discriminatory classification, courts have still required a rational basis capable of justifying the classification. Thus, in *Beach Communications*, even after observing that a problem might be approached incrementally, the Supreme Court examined the asserted government interests in requiring that only certain communications facilities be franchised and concluded that the lines the government had drawn were supported by "at least two possible bases." *See* 508 U.S. at 317. In *Lee Optical*—in which the Court upheld a requirement prohibiting certain types of advertisement by opticians but exempting from that prohibition sellers of ready-to-wear glasses "where the selection of the glasses is at the discretion of the purchaser"—the Court similarly justified the distinction on the grounds that "the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch." 348 U.S. at 488-89 & n.2. And in *Maguire v. Thompson*, 957 F.2d 374 (7th Cir. 1992), which appears to be this Court's leading case applying the "one step at a time" approach, the court upheld an Illinois statute requiring persons holding only a degree in "naprapathy" to gain further education in an approved medical field before they are eligible for state

licensure. *Id.* at 375-76. While reciting the "one step at a time" language of *Lee Optical*, however, this Court upheld the statute only after concluding that it rationally distinguished between naprapaths and others insofar as "[i]t would . . . be rational for a legislature to conclude that the training offered in a school of naprapathy would in fact be inadequate for proper medical diagnosis and treatment." *Id.* at 377.[3]

Contrary to Indiana's apparent contention, "[t]he Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (internal citation omitted). Certainly low-level scrutiny does not require Indiana to draw with mathematical precision, *see, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 484 (1970), but it also does not allow it to rely on an interest *unrelated* to the classification it has established. That, again, is all that Indiana offers. Neither its public-safety interest nor its related loophole-prevention interest even

---

[3] This Court's decision in *St. Joan Antida High School Inc. v. Milwaukee Public School District*, 919 F.3d 1003 (7th Cir. 2019)—the case principally relied upon by Indiana—adds nothing. After concluding that multiple rational bases permitted Wisconsin to make more expansive transportation offerings to public-school students than to private-school ones, this Court hypothesized a state that offered "more generous grant terms to companies with fewer than fifty employees" as a means of promoting the "success of its small-business sector." *Id.* at 1011. Although Indiana quotes from the Court's observation that rational-basis review would not "require the state to persuade us why a company with, say, two-hundred employees would not also benefit from more grant money" (Br. of Appellants 31 [quoting *St. Joan*, 919 F.3d at 1011]), it is not clear what it hopes to gain from this. The point of the hypothetical is that the existence of an obvious rational basis for the classification—promoting small businesses—is not negated by the fact that other businesses might also have "strong claims to favored treatment" for other reasons. *Id.* (alteration and citation omitted). Neither this case nor its hypothetical absolves Indiana from the need to advance a legitimate basis for its discrimination.

attempts to distinguish the class of pre-SORA offenders such as the plaintiffs who must register in Indiana from the class of those relieved entirely of these obligations despite the fact that they may have committed the same exact offense at the same exact time.

B. The "marginal burden" rationale relied on by the Indiana Supreme Court in its *ex post facto* jurisprudence does not provide a legitimate justification for Indiana's discriminatory classification

The closest that Indiana comes to advancing an interest actually connected to the lines it has drawn is its recitation of what it terms the "marginal burden" rationale relied upon by the Indiana Supreme Court in its *ex post facto* jurisprudence. (Br. of Appellants 23-24 [citing, *inter alia*, *Ammons v. State*, 50 N.E.3d 143, 145 (Ind. 2016) (per curiam)]).[4] The nature of this supposed interest is somewhat lost in Indiana's briefing but deserves to be stated explicitly: it is asserting an interest in treating persons differently—*in Indiana*—simply because at one point those persons have been subject to the laws of another state. Indiana, however, expends so much effort attempting to distinguish the plaintiffs from similarly situated Hoosiers who need not register that it never actually connects its marginal-burden rationale to a legitimate government interest. Its argument fails.

1. Indiana's marginal-burden justification is not a legitimate government interest at all

[4] While not using the phrase "marginal burden," the Indiana Supreme Court concluded in *Ammons* that, under the entirely different analysis required by the state constitution's *ex post facto* clause, "statutes requiring an Indiana resident to register [a]re non-punitive in intent and effects when applied to an offender already required to register in another jurisdiction." 50 N.E.3d at 144-45; *see also Tyson v. State*, 51 N.E.3d 88, 92-96 (Ind. 2016); *State v. Zerbe*, 50 N.E.3d 368, 369-71 (Ind. 2016).

No court has ever recognized that, without more, one state has an interest in distinguishing between citizens based on their connection to another state. Indiana's asserted justification is, of course, entirely divorced from the purpose of sex-offender registration in general (that is, public safety) and, indeed, it is impossible to perceive a government objective at all. "Marginal burden" is a method, not an interest; it is a way of *describing* what Indiana has done, not *justifying* it. This does not suffice.

The only reason that Indiana believes that the "burden" imposed by SORA is lesser for someone who has registered elsewhere—and greater for someone who has not—is that it does not require the registration of the latter individual. Indiana says that Brian Hope may justifiably be required to register, for instance, because the fact that he registered in Texas for a short period of time means that his lifetime obligation in Indiana somehow becomes less harsh. But, even were that otherwise true, the only reason the requirement is less harsh than it would be had he never left Indiana (and thus never registered elsewhere) is that Indiana itself does not apply SORA to a lifelong Hoosier. The same is equally true for each of the other plaintiffs: the only reason Indiana believes that they are affected differently by the enforcement of SORA than they would be if they had never registered out of state is that, if they had never registered out of state, Indiana would not enforce SORA against them. In other words, while this fundamental fact is lost in its briefing, Indiana is contending that it can require the registration of pre-SORA offenders who have registered in another state *because* those individuals have been

subjected to registration requirements in another state. It does not appear to recognize the circularity of its argument. This alone is enough to reject its marginal-burden rationale.

Even were that not the case, however, Indiana's argument fails. It is, after all, attempting to enforce *Indiana* law, not the law of any other state. In the absence of the discriminatory classification itself, each of the plaintiffs would be burdened by SORA in precisely the same way as an identically situated individual who never registered out of state—for Indiana would be applying the *same exact statute*. There can be no marginal-burden justification when the burden imposed by SORA is identical.

If Indiana enforced a different speed limit against a person connected to Vermont (where the speed limit on interstate highways may be as low as 55 mph) than it did against a person connected to South Dakota (where the speed limit is 80 mph) on the grounds that one person is "used to" driving slower and so will feel any restrictions less acutely, *see* Nat'l Motorists Ass'n, *State Speed Limit Chart*, *at* https://ww2.motorists.org/issues/speed-limits/state-chart (last visited Oct. 9, 2022), this Court would no doubt have little trouble concluding that the differential treatment fails even rational-basis review. This is because the purpose served by traffic regulation—public safety—is the same for both persons even if their previous states took different approaches to address the same problem. Or what if Indiana exempted persons who had recently visited Colorado from its prohibition on marijuana possession, Ind. Code § 35-48-4-11, on the grounds that the

statute would be particularly onerous for these persons? Again, the constitutional challenge would no doubt be swift.

Indeed, were Indiana's marginal-burden rationale accepted, not only would it seemingly allow a state to treat its own residents in fifty different ways (more once the District of Columbia and the territories are included)—*on any issue*—based on nothing more than the laws of various states with which they have interacted, but it would create an end-run around established right-to-travel precedents that could be endlessly exploited. The Supreme Court "long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). To be sure, the vast majority of the Court's right-to-travel jurisprudence has revolved around either discrimination between residents and nonresidents or discrimination between newer residents and older residents. *See Saenz v. Roe*, 526 U.S. 489, 500-03 (1999). But it is naïve to suggest, as Indiana does implicitly, that a different result would have issued in these cases if the states had been a little more creative in the lines they drew.

Suppose, for instance, that California—which in *Saenz* had imposed a durational residency requirement for the receipt of TANF benefits—had instead limited the amount of benefits it would pay to a Californian who had recently received any benefits from

another state (whether or not he resided in that state). This hypothetical statute would not be subject to heightened scrutiny insofar as it "may affect newer residents disproportionately, but it does not discriminate based on residency," *Hope II*, 9 F.4th at 523, and under Indiana's theory the differences between someone who had recently received benefits elsewhere and someone who had not would be sufficient to justify the statute under low-level scrutiny. Certainly the Supreme Court in *Saenz* and similar cases did not intend to leave the door open for such gamesmanship.

In at least two of the Supreme Court's right-to-travel precedents, challenged statutes were invalidated under low-level scrutiny. *See Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618-23 (1985); *Zobel v. Williams*, 457 U.S. 55, 58-65 (1982). And without relying on the right to travel at all, *Williams v. Vermont*, 472 U.S. 14 (1985)—in which the Court held unconstitutional a Vermont scheme for the imposition of vehicular use taxes that depended in part on an individual's residence at the time that a tax was previously paid to another state—reached the same result. To be sure, the statutory distinction in *Williams* was based on residence. But that played no role in the Court's invalidation of the scheme:

> Having registered a car in Vermont they are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont's roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each.

Id. at 23-24. Substitute references to sex-offender registration for references to vehicular

registration, and references to public safety for references to road maintenance, and you have this case. Previous residence—or employment or school attendance—in another state requiring the registration of pre-SORA offenders is a "wholly arbitrary basis" for Indiana to attempt to distinguish among sex offenders. *Id.* at 23.

There are countless reasons that one person might be affected by *any* statute in a different manner than his neighbor. But that fact, standing alone, does not allow the government to treat the two otherwise-identical persons differently. The bottom line is that treating persons differently based on how other states have treated them is not, in and of itself, a legitimate government interest. Indiana's assertion to contrary has no merit.

2. Even if Indiana's marginal-burden justification were a permissible end, Indiana's enforcement of SORA is not rational

Even were Indiana's marginal-burden rationale a legitimate interest, that interest is even advanced by the lines that Indiana has drawn.

Gary Snider (who registered in Michigan only during his period of incarceration and did not even stop for gas in that state after his release [Dkt. 142-5 at 2 {¶¶ 4-5}]) and Patrick Rice (who registered in Illinois for only a few hours before relocating to Indiana [Dkt. 142-7 at 2 {¶¶ 7-8}]) barely felt the impact of their out-of-state registration before being subjected to Indiana's SORA for the rest of their lives. Indiana also requires a pre-SORA offender to register if his out-of-state obligation expired decades ago (Dkt. 142-3 at 49 [¶ 5]), if he relocated to Indiana when he was nearing the expiration of his out-of-

state obligation, or if he only registered in another state during the course of a short vacation or a brief employment (*id.* at 49 [¶ 6]). At the same time, absent an out-of-state obligation, Indiana does not require Indiana offenders not on supervised release to register even though they may have done so while on probation or parole (such that continued registration would impose only a "marginal burden" for these persons). (*Id.* at 48-49 [¶¶ 3-4]).

Moreover, Indiana's justification wholly ignores the wide variety of restraints and obligations imposed on registered sex offenders throughout the United States. An individual primarily concerned about a residency or employment restriction will be impacted by SORA no less severely when he relocates from a state that required him to register but did not impose these restrictions. An individual such as Adam Bash (who has a child with special needs [Dkt. 142-8 at 6 {¶ 20}]) might be primarily concerned about Indiana's restriction on entering school property, which likely did not exist in the state that previously required his registration.

Indiana's marginal-burden justification turns a blind eye to the veritable hodge-podge of sex-offender restrictions imposed in fifty different states. Even if this justification represented a legitimate government interest—and it does not—Indiana's means of achieving that interest remains irrational.

3. <u>To the extent that Indiana attempts to rely on a distinct "notice" rationale, its argument is clearly off-base</u>

Finally, Indiana briefly invokes the "notice" rationale that the district court

concluded it had "expressly disclaim[ed]." (Dkt. 152 at 13 n.6 [S.A. 15]). While Indiana takes issue with the district court's conclusion, it does not appear that it believes this to be an interest distinct from its marginal-burden justification. And, given its constant recalibration of who must register (and the statutory basis under which they must register), the irony of Indiana's invocation of a "notice" interest should not go unsaid. In any event, to the extent that Indiana is attempting to assert a distinct interest, its argument is again without merit.

Certainly a state might rationally conclude that a new statute should only apply prospectively: that is the holding of *United States v. Sanders*, 909 F.3d 895, 905 (7th Cir. 2018), and *McCann v. City of Chicago*, 968 F.2d 635, 638 (7th Cir. 1992), on which Indiana relies (Br. of Appellants 25-26). *See also Nordlinger v. Hahn*, 505 U.S. 1, 13-14 (1992). But that is not what Indiana has done. To the contrary, this case *only* concerns pre-SORA offenders and thus, by definition, neither the plaintiffs nor similarly situated persons relieved of registration obligations were "on notice" of SORA's requirements at the time of their offenses. And to the extent that Indiana believes that a notice interest allows it to look at the date a person establishes a connection to Indiana rather than the date of his offense—a dubious proposition in its own right, for a state has no interest in deterring citizens from establishing such a connection—this interest is again not remotely tethered to the lines it has drawn. After all, an individual who relocates to Indiana from Maine is every bit as "on notice" of the requirements of SORA as is someone who relocates from

Texas. An individual who accepts a new job is "on notice" of SORA at the time he does so whether that job is in Illinois, in Indiana, or elsewhere. So too with someone who travels for vacation. And, on the other side of the coin, Indiana has decided to apply the "other jurisdiction" provision retroactively to persons who relocated to the state before that provision took effect in 2006 and who were therefore *not* "on notice" that Indiana's requirements would be enforced against them when they moved here. Indiana ignores all of this.

For two persons who committed the exact same offense on the exact same date (and even in the exact same location), Indiana has created a system where one of those persons may be relieved of registration obligations entirely but the other will have to register for the rest of his life. And the difference has absolutely nothing to with the date SORA became effective (for Indiana is discriminating between pre-SORA offenders) or even the individual's awareness of SORA's requirements (for those requirements were on the book regardless of whether that individual had an out-of-state obligation). To the extent that Indiana attempts to assert a distinct "notice" interest, it errs.

III. Case law addressing similar classifications has uniformly concluded that these classifications fail even under low-level scrutiny

Despite the fact that Indiana has repeatedly moved the goalposts throughout this litigation, one constant remains: the lines that it has drawn are unique. Nonetheless, several other courts have addressed, under low-level scrutiny, the discriminatory application of registration statutes to persons based on their connection to various states.

This jurisprudence only confirms the utter irrationality of the Indiana's policies.

In *Hendricks v. Jones ex rel. Oklahoma Department of Corrections*, 349 P.3d 531 (Okla. 2013), the state court addressed the constitutionality of a registration scheme that applied retroactively to out-of-state offenders but applied only prospectively to in-state offenders. *Id.* at 532-33. Even under low-level scrutiny, the court had no difficulty concluding that discrimination between sex offenders based on their state of conviction:

> All other things being equal, such discrimination is not rationally related "to the goal of protecting the population from sex offenders. Discrimination against categories of sex offenders based on factors such as type of offense and risk of recidivism is logical, whereas discrimination based on the jurisdiction in which the conviction occurred has no rational basis for protecting the public.

Id. at 536; *see also Nitz v. State*, 394 P.3d 305, 309-11 (Okla Civ. App. 2017) (applying *Hendricks* to conclude that a statute allowing persons convicted in Oklahoma to petition for removal from the registry when they were convicted of a "Romeo and Juliet" offense, but not allowing persons convicted of a similar out-of-state offense to seek removal from the registry, violated equal protection). A near-identical result was reached in *ACLU of New Mexico v. City of Albuquerque*, 137 P.3d 1215 (N.M. Ct. App. 2006), in which the court invalidated a municipal ordinance that required the registration of out-of-state offenders temporarily in the city for work or school without requiring the registration of identically situated in-state offenders. *See id.* at 1226-27.

And in *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 95 (3d Cir. 2008), the Third Circuit addressed a Pennsylvania statute that subjected all out-of-state

offenders who transferred the supervision of their parole to Pennsylvania to "community notification"—that is, the dissemination of flyers concerning persons' sex-offender status by local law enforcement officers—but did not subject in-state offenders, convicted of the equivalent offense, to this requirement without a "comprehensive assessment procedure" to determine the risk posed by a particular offender. *See id.* at 100-02. After addressing four different asserted interests, the court rejected the discriminatory classification even under low-level scrutiny. *See id.* at 108-12. Concluded the court: "[W]e note that Pennsylvania's interest in protecting its citizens from sexually violent predators is certainly compelling. However, subjecting out-of-state sex offenders to community notification without providing equivalent procedural safeguards as given to in-state sex offenders is not rationally related to that goal." *Id.* at 112.[5]

To be sure, Indiana has not drawn a strict (and easily articulable) line between in-state and out-of-state offenders. But the lines that it has drawn are even less rational. It deploys the "other jurisdiction" provision of SORA to require the registration of pre-

[5] Indiana's only response to *Doe* is to contend that the Third Circuit's decision relied on the existence of an interstate compact that is not present here. (Br. of Appellants 34). As noted, the *Doe* court addressed four different asserted interests. The existence of an interstate compact was only relevant to two of those interests: because Pennsylvania had agreed to provide "the same procedures and standards" for out-of-state probations as it provided for in-state probationers, it could not argue that "it would be impossible to replicate the process it affords in-state offenders for out-of-state offenders" or that providing this process tax state resources by "increas[ing] costs and time devoted to such a task." 513 F.3d at 108-09. More importantly, however, Indiana misses the forest for the trees. Regardless of the outcome in that case, both the majority and dissent in *Doe* underscored that, even under rational-basis review, a state must *have* an interest in treating out-of-state probationers differently than in-state probationers. The mere connection to another state is not enough.

SORA offenders, regardless of their state of conviction, who establish at some point a connection to certain states (those requiring their registration) but not to others. If discriminating based on an out-of-state conviction is utterly irrational—and unconstitutional—then discriminating based on a more tenuous connection to another state certainly is. *Doe*, *Hendricks*, and *Albuquerque* all stand for the proposition that the state interests identified by Indiana cannot justify its differential treatment of certain pre-SORA offenders. Even under low-level scrutiny, Indiana's attempt to require the plaintiffs' registration violates equal protection.

CONCLUSION

Wallace v. State, 905 N.E.2d 371 (Ind. 2009), was decided more than thirteen years ago, and this case has thus far been pending for fully six years. Given this, one would perhaps have hoped that Indiana would long ago have resolved (a) who must register as a sex offender, (b) the statutory basis under which their registration is required, and (c) the government interest served by requiring their registration. Instead, the plaintiffs have been confronted throughout this litigation with a constantly evolving whirlwind of explanations, ultimately culminating in the district court's conclusion—not challenged by Indiana—that this Court had shut the door on further attempts to amend its policies. (Dkt. 152 at 6 n.2 [S.A. 8]). Although perhaps not conclusive under low-level scrutiny, Indiana's inability to advance a consistent theory of SORA's applicability to the plaintiffs is nonetheless powerful evidence that it is grasping at straws. Even under low-level

scrutiny, the classifications it has established are unconstitutional, and the district court must be affirmed.

/s/ Gavin M. Rose
Gavin M. Rose
Counsel of Record
Stevie J. Pactor
ACLU OF INDIANA
1031 E. Washington Street
Indianapolis, Indiana 46202
317/635-4059
<grose@aclu-in.org>
<spactor@aclu-in.org>

Attorneys for the appellees

CERTIFICATE OF WORD COUNT

I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 32(c) insofar as it contains 13,805 words, excluding the parts of the brief exempted by Appellate Rule 32(a)(7)(B)(iii).

/s/ Gavin M. Rose
Gavin M. Rose
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Service will be made on all ECF-registered counsel by operation of the Court's electronic system.

/s/ Gavin M. Rose
Gavin M. Rose
Attorney at Law