

**IN THE UNITED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**

**STEPHEN BASHAM, PHILIP KASO,
RODERICK PATTON, individually and
on behalf of all those similarly situated,**

Plaintiffs,

**Civil Action No. 2:26-cv-00408
Hon. Thomas E. Johnston**

v.

**JAMES L. MITCHELL, in his
official capacity as Superintendent
of West Virginia State Police,**

Defendant.

**DEFENDANT JAMES L. MITCHELL'S MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

“Sex offenders are a serious threat in this Nation.” *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality op.). They frequently target our most vulnerable populations and are more prone to recidivism than any other kind of offender. Thus, West Virginia, “like every other State,” has put in place laws “designed to protect its communities from sex offenders.” *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003). Those laws include a State Police-operated sex offender registry.

Plaintiffs Stephen Basham, Philip Kaso, and Roderick Patton are convicted sex offenders who, for the second time, challenge West Virginia’s response to the threat posed by convicted sex offenders. Because courts routinely uphold sex offender registries, Plaintiffs comb the scheme in search of complaints. But they’re running out of targets. Although their first suit failed, Plaintiffs again challenge the Legislature’s chosen method of funding the registry: the \$125 annual Registry Fee.

This time, Plaintiffs allege that the Registry Fee is a violation of the Constitution’s Ex Post Facto Clause. But during their first run at the fee, Plaintiffs expressly disclaimed this argument and made it clear that they don’t actually believe the Registry Fee presents ex post facto concerns. Plaintiffs were right the first time.

Though they protect the public, sex offender registries come at a price. Their maintenance demands substantial man-hours from State Police officers, which costs the agency financially. The Legislature is also concerned that State Police officers experience a significant mental toll from their work on the registry. Faced with these costs, the Legislature determined that requiring sex offenders to reimburse the State Police presented a way to offset the burden—which those offenders made necessary—of protecting the public from sex offenders.

Thus, the Registry Fee is not punitive. Rather, as the Legislature said, it is a regulatory

measure designed to protect the public. The fee merely recoups some of the expenses the State incurs from operating the registry. This reimbursement does not violate the Ex Post Facto Clause, and Plaintiffs cannot shoulder the burden to show otherwise. The Court should dismiss the Complaint.

STATEMENT

Like all States, West Virginia's Legislature has enacted a Sex Offender Registration Act. *See* W. VA. CODE §§ 15-12-1 et seq. The Legislature did so to "assist law-enforcement agencies' efforts to protect the public from sex offenders." *Id.* § 15-12-1a(a). This, the Legislature said, is a "compelling and necessary public interest." *Id.* § 15-12-1a(b). The Act does this by "requiring sex offenders to register with the State Police" and by "making certain information about" those offenders "available to the public." *Id.* § 15-12-1a(a). And public safety is the only goal as it was "not the intent of the Legislature" that the Act "be used to inflict retribution or additional punishment" on convicted sex offenders. *Id.* Rather, the Act's provisions are "regulatory in nature and not penal." *Id.*

The Act's primary requirement is, of course, that any person convicted of various enumerated sex crimes must "register in person at the West Virginia State Police detachment" in their home county. W. VA. CODE § 15-12-2(d). The registration process is lengthy. The State Police must obtain from the registrant various personal information including name, social security number, address, and so on. *Id.* The police also must take a "full-face photograph of the registrant;" document a "brief description of the crime or crimes for which the registrant was convicted;" take the "registrant's fingerprints and palm prints;" and photocopy numerous documents including the registrant's driver's license, passport, immigration documents, and any professional licensing information. *Id.* § 15-12-2(d)(4)-(6), (d)(10)-(12).

The State Police also maintain the registry. For instance, the agency is responsible for

documenting any changes in registry information from a registrant. W. VA. CODE § 15-12-3. This includes changes to any of the information received at intake—residence, employment, and the like. *See id.* Registrants must also notify the State Police when they intend to move out of State so that the agency can “notify law-enforcement officials” in the registrant’s new jurisdiction. *Id.* § 15-12-7. Similarly, the Act tasks the State Police with releasing information on the registry when the agency receives “any notification” to do so, including from the FBI, school districts, religious organizations, and the like. *See id.* § 15-12-5(a)(1)-(7). Finally, the State Police must “maintain and make available to the public at least quarterly the list of all persons who are required to register for life” under the Act. *Id.* § 15-12-5(b)(2).

The State Police perform these tasks for each individual on the registry for as long as they are registered. W. VA. CODE § 15-12-4(a). For one-time, nonviolent offenders, that duration is ten years “since the person was released from prison, jail,” or other official restraint. *See id.* § 15-12-4(a)(1). For repeat offenders, sexually violent offenders, offenders with multiple victims, and offenders whose crimes involved children, that duration is for life. *Id.* § 15-12-4(a)(2).

To support the State Police’s work, the Legislature required registrants to pay a \$125 annual fee. *See* W. VA. CODE § 15-12-2(o). This flat fee applies as long as an offender is required to register and does not vary by severity of crime or other factors. *Id.* Failure to pay the fee is not a crime or violation of supervised release. *Id.* § 15-12-2(p). Instead, the missed payments are applied as a judgment lien against the registrant. *Id.* The fee’s proceeds go toward “mental health services” for the State Police and to “other use[s] essential to the general operations of the State Police,” such as maintaining the registry. *Id.*

In October 2025, Plaintiffs first challenged the Registry Fee. *See Kaso v. Mitchell*, No. 25-cv-00603, 2026 WL 1216929 (S.D. W. Va. May 4, 2026). They alleged that the fee was an

excessive fine under the Eighth Amendment and that it violated the Fourteenth Amendment’s Due Process Clause. *Id.* at *2-3. But the court granted Defendant’s motion to dismiss and found that Plaintiffs failed to state a claim upon which relief could be granted. *Id.* at *5-6. The court dismissed the case without prejudice. *Id.* at *6. Plaintiffs did not appeal.

Now, Plaintiffs once again challenge the fee.

SUMMARY OF THE ARGUMENT

The Registry Fee does not violate the Constitution’s Ex Post Facto Clause. In fact, the clause doesn’t apply at all because the Registry Fee is not punitive. Instead, the fee supports the registry itself and serves the same valid governmental purpose expressed in the statute: public safety. Because the statute plainly says as much, Plaintiffs need the “clearest proof” to prevail. They have none.

By supporting the State Police in their operations, the Registry Fee mitigates the costs of operating the sex offender registry. And through funding for mental health treatment, the fee offsets the Legislature’s concerns about the traumatic effects caused by sexual crimes and maintaining the registry. Plaintiffs can take issue with the exact manner in which the Legislature achieves those goals, but that disagreement doesn’t render the fee punitive or unconstitutional.

The Court should dismiss the Complaint with prejudice.

STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss tests the “legal sufficiency of a complaint.” *Francis v. Giacomelli*, 588 F.3d 186, 189 (4th Cir. 2009). Under this standard, the Court must “accept as true all well-pleaded facts ... and construe them in the light most favorable to the plaintiff.” *Matherly v. Andrews*, 859 F.3d 264, 274 (4th Cir. 2017). But the Court need not “accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *E. Shore Mkts. v. J.D. Assocs. Ltd. P’ship*, 213 F.3d 175, 180 (4th Cir. 2000). Additionally, “[t]hreadbare recitals of the elements

of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, to survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In other words, this “plausibility standard requires a plaintiff to demonstrate more than ‘a sheer possibility that a defendant has acted unlawfully.’” *Francis*, 588 F.3d at 193 (quoting *Iqbal*, 556 U.S. at 678).

ARGUMENT

The Complaint alleges that the Registry Fee violates the Constitution’s Ex Post Facto Clause “by retroactively imposing a punitive fine on individuals whose underlying offenses were committed before” the fee’s enactment. Am. Compl. ¶ 2 (citing U.S. CONST., art. I, § 10, cl. 1). In making this argument, Plaintiffs perform an about-face: in their first challenge to the Registry Fee, Plaintiffs explained that they brought an excessive fines claim because the Registry Fee can “violate the Excessive Fines Clause even if it does not implicate ex post facto concerns.” Pls.’ Mem. in Opposition to Def.’s Mot. to Dismiss at 11, *Kaso v. Mitchell*, No. 25-cv-00603 (S.D. W. Va. Dec. 16, 2025), ECF No. 11 (*Kaso* Response). Indeed, Plaintiffs specifically disclaimed any ex post facto concerns, noting that they “do not bring” an “ex post facto claim.” *Id.* And they later agreed that “registration requirements” like the Registry Fee “have been described as ‘civil’ for Ex Post Facto or related purposes,” but said that fact wasn’t relevant to “whether a lien-enforced annual monetary assessment constitutes a ‘fine’ within the meaning of the Excessive Fines Clause.” Pls.’ Reply in Support of Mot. for Prelim. Inj. at 7, *Kaso v. Mitchell*, No. 25-cv-00603 (S.D. W. Va. Mar. 5, 2026), ECF No. 24.

Plaintiffs were right the first time. The Ex Post Facto Clause bars legislatures from “retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts.” *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). Thus, the clause “pertain[s] exclusively to penal

statutes.” *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997). The Registry Fee is not a penal statute.

Determining whether a statute is punitive involves a “two-part test.” *See United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013). At step one, courts “ascertain whether the legislature meant the statute to” be civil and nonpunitive. *Hendricks*, 521 U.S. at 361. “If the intention of the legislature was to impose punishment, that ends the inquiry.” *Smith v. Doe*, 538 U.S. 84, 92 (2003). But if “the intention was to enact a regulatory scheme that is civil and nonpunitive,” courts then look at the statutory scheme’s effect. *Id.* Step two then requires the plaintiff to demonstrate that a scheme’s effect is “so punitive either in purpose or effect as to negate [the legislature’s] intention to deem it civil.” *Id.* (cleaned up). The plaintiff’s burden at step two is steep: “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* (cleaned up).

Under this two-part framework, the Supreme Court has confirmed that sex offender registries constitute valid regulatory programs not subject to the Ex Post Facto Clause. *See Smith*, 538 U.S. at 102. Likewise, the Court has found that “[t]here is nothing contrary to the Constitution” about States charging fees that “meet the expense incident to the administration” of a regulation. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941). Applying these principles, the Seventh Circuit (the only circuit court to review a challenge to registry fees) upheld Wisconsin’s registry fee, explaining that the fee wasn’t punitive but instead “compensate[d] the state for the expense of maintaining the sex offender registry.” *Mueller v. Raemisch*, 740 F.3d 1128, 1135 (7th Cir. 2014).

Like the fee in *Mueller*, West Virginia’s Registry Fee isn’t punitive. The Legislature plainly intended the fee to be nonpunitive, and Plaintiffs fail to muster the “clearest proof” that the statute’s effects are so overwhelmingly punitive that they defeat the Legislature’s expressed intent. So the Ex Post Facto Clause doesn’t apply, and the Court should dismiss the Complaint.

A. The Legislature intended the Registry Fee to be a nonpunitive civil regulation.

Ascertaining the Legislature’s intent “is first of all a question of statutory construction.” *Hendricks*, 521 U.S. at 361. To see if the Registry Fee is punitive or nonpunitive, the Court must ask “whether the legislature ... indicated either expressly or impliedly a preference for one label or the other.” *Hudson v. United States*, 522 U.S. 93, 99 (1997) (cleaned up). The answer to that question involves both “the statute’s text and its structure.” *Smith*, 538 U.S. at 92. In this analysis, courts “ordinarily defer to the legislature’s stated intent.” *Hendricks*, 521 U.S. at 361. Indeed, “considerable deference must be accorded to the intent as the legislature has stated it.” *Smith*, 538 U.S. at 93. And that’s on top of the “presumption of constitutionality” that the Registry Fee, “like any other” enactment, enjoys. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). Thus, Plaintiffs face a staggering burden, and the Complaint cannot meet it.

Here, the Legislature’s “intention is written right into the code.” *Doe v. Settle*, 24 F.4th 932, 946 (4th Cir. 2022). West Virginia Code § 15-12-1a(a) declares that the “intent of this article,” which includes the Registry Fee, is “to assist law-enforcement agencies’ efforts to protect the public from sex offenders by requiring sex offenders to register with the State Police.” Further, the Legislature specifically disclaimed any intent to “inflict retribution or additional punishment” and instead made clear that the “article is intended to be regulatory in nature and not penal.” *Id.*

The Legislature’s declarations make this a cut-and-dried case for legislative intent. The Supreme Court has already held that a statement of purpose declaring that a law “protect[s] the public from sex offenders” evinces a nonpunitive legislative intent. *Smith*, 538 U.S. at 93. And “considerable deference must be accorded to the intent as the legislature has stated it.” *Id.* at 93. Because the Legislature here clearly intended the Registry Fee to be a civil measure, it “cannot be read as expressing a punitive intent.” *Settle*, 24 F.4th at 947.

“Other formal attributes” of the Registry Fee provide even more evidence of the fee’s nonpunitive nature. *Smith*, 538 U.S. at 94. For instance, the fee is not housed in West Virginia’s criminal code, indicating the Legislature did not view it as criminal. *Cf. id.* at 95 (explaining that even a registry’s “partial codification ... in the State’s criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive”). Further, the fee is in Chapter 15, a civil chapter dedicated to “Public Safety.” *See id.* at 93-94 (explaining that “public safety” is a “nonpunitive purpose”). These features “confirm[] [the] conclusion that the statute was intended as a nonpunitive regulatory measure.” *Id.* at 94.

Ultimately, “[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil ... scheme designed to protect the public from harm.” *Hendricks*, 521 U.S. at 361. Indeed, Plaintiffs outright concede that the statute isn’t punitive, admitting that “[b]y a plain reading of the statute ... the monies collected ... are primarily intended to generate general revenue for the” State Police. Am. Compl. ¶ 21. That intention is a plainly nonpunitive purpose. Plaintiffs thus cannot carry their burden of demonstrating the Legislature meant something different from what it said. The Court should follow the normal path and “defer to the legislature’s stated intent.” *Hendricks*, 521 U.S. at 361.

B. Plaintiffs lack the clearest proof that the Registry Fee is so punitive that it negates the Legislature’s stated intent.

Plaintiffs’ failure to disprove the Legislature’s intent forces them into an uphill battle. At this point, they “can prevail only by showing that the [Registry Fee’s] punitive effect is so overwhelming that it negates the State’s nonpunitive intentions.” *Nat’l Ass’n. for Rational Sexual Offense Laws v. Stein*, 112 F.4th 196, 205 (4th Cir. 2024) (cleaned up). And “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Hudson*, 522 U.S. at 100 (cleaned up). This “heavy burden,”

Hendricks, 521 U.S. at 361, requires Plaintiffs to demonstrate that the Registry Fee has an excessive punitive effect based on five factors that ask whether the fee (1) lacks “a rational connection to a nonpunitive purpose; (2) is excessive with respect to its purposes; (3) has been regarded in our history and traditions as punishment; (4) imposes an affirmative disability or restraint; and (5) promotes the traditional aims of punishment.” *Stein*, 112 F.4th at 205 (citing the relevant factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)); *see also Smith*, 538 U.S. at 97. The Registry Fee bears little resemblance to any of these punitive features, a far cry from the “clearest proof” of them. Plaintiffs therefore lose on this score, too.

First, the Registry Fee has a “rational connection to a nonpunitive purpose.” *Smith*, 538 U.S. at 97. Although this factor “is not demanding,” *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005), the Registry Fee would meet it at any standard. The fee directly supports the State Police, the agency that operates West Virginia’s sex offender registry. The registry serves the public safety. *See W. VA. CODE § 15-12-1a*. “Public safety is a quintessentially legitimate justification,” and compensating the agency responsible for operating the registry is “no doubt connected to that goal.” *Settle*, 24 F.4th at 948.

The statute’s two uses of the Registry Fee’s proceeds don’t change the analysis. The State Police are the agency “authorized to utilize the funds collected from these annual fees.” *W. VA. CODE § 15-12-2(p)*. The agency can spend the funds in two ways: (1) “to enhance mental health services for current and former employees of the West Virginia State Police” and (2) “for any other use essential to the general operations of the State Police.” *Id.* Both uses align with the Registry Fee’s legislative purpose of promoting public safety.

The need for funding is obvious: even critics of sex offender registries have recognized that registries are “incredibly expensive to maintain.” Cheryl W. Thompson, *Sex Offender*

Registries Often Fail Those They Are Designed To Protect, NPR (Oct. 21, 2020, 10:52 a.m.), <https://tinyurl.com/bv4ucpjs>. West Virginia’s legislators pointed to these costs when discussing the need for the Registry Fee. *See, e.g.*, Charles Young, *Bill would charge sex offenders to cover cost of mental health care for West Virginia State Troopers*, WVNEWS (Mar. 20, 2025), <https://tinyurl.com/5fmnkkp5> (explaining that the Registry Fee would help offset registry costs like “overtime” needed to “verify [registrants’] addresses, the information they provided, as well as a post office box”). And the State Police operate the registry under the general budget, not a dedicated fund. *See, e.g.*, S.B. 250, 2026 Reg. Sess. 73-74 (W. Va. 2026). So when the Registry Fee goes into the State Police’s general fund, the fee is reimbursing funds used to operate the registry. *Contra* Am. Compl. ¶ 21 (claiming that “[n]o monies are used to defray the costs associated with” the registry). Thus, the Registry Fee is a method of “defraying the cost of the implementation, operation, and maintenance of the” sex offender registry. *See, e.g., In re DNA Ex Post Facto Issues*, 561 F.3d 294, 301 (4th Cir. 2009).

The fee’s defraying purpose is why the fee only applies while an offender is actually required to register. *See* W. VA. CODE § 15-12-4 (describing which offenders must register for 10 years and which for life). It’s also why the fee isn’t scaled to the severity of a registrant’s crime, which would be expected if the fee were meant to be punitive. *Cf. Graham v. Florida*, 560 U.S. 48, 59 (2010) (describing the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense”). Put simply, “[t]he state provides a service to the law-abiding public by maintaining a sex offender registry, but there would be no service and hence no expense were there no sex offenders.” *Mueller*, 740 F.3d at 1135. Because “they are responsible for the expense, there is nothing punitive about requiring them to defray it.” *Id.*

On the mental health use, appropriate mental health treatment for the State Police serves the

public safety by ensuring officers can properly execute their duties, including in registry maintenance. *Cf. Jones v. Murray*, 962 F.2d 302, 309 (4th Cir. 1992) (concluding that a statute requiring incarcerated felons provide blood samples was not punitive when its purpose was to establish a data bank to “aid future law enforcement”); *see also In re DNA*, 561 F.3d at 299 (describing as “not punitive” a statute requiring DNA samples from inmates when that requirement was “for law enforcement purposes and for humanitarian and nonlaw enforcement purposes”). As with all first responders, the State Police officers who work on the registry risk “occupational hazards” such as “post-traumatic stress disorder” from “expos[ure] ... to traumatic events during the course of their employment.” W. VA. CODE § 23-4-1f(c). Indeed, mental health is especially crucial for those who work on the registry. Observers have noted that “[s]ome sex offenders commit additional sex crimes after failing to tell police their whereabouts,” so “[m]istakes in the registries can have dire consequences.” Thompson, *supra*. And when those consequences occur, victims often blame law enforcement. *See, e.g., id.* (describing how “law enforcement fail [victims] by not keeping track of offenders who don’t register and abscond”). Thus, the “consequences for victims,” along with the “expectations [from] the community” make maintaining the registry an “essential and challenging job.” Kindalin B. Masters & Mark R. Kebbell, *Police Officers’ Perceptions of a Sex Offender Registration Scheme: Identifying and Responding to Risk*, 26 PSYCHIATRY PSYCH. & L. 396, 410 (2019).

Unfortunately, the Legislature can’t prevent sex crimes entirely, so these harmful stressors aren’t going anywhere. But it can fund officer treatments at the expense of those who make the registry necessary in the first place. Plaintiffs even previously agreed that “[t]he need to support officer mental health is unquestionable.” *Kaso* Response at 8. Thus, they conceded that “[o]fficer mental-health needs may be a valid budgetary concern.” *Id.* at 10. Plaintiffs’ main issue with

directing the fee toward mental health was just their belief that it didn't have a "*reasonable* relationship to the cost of the service it purportedly supports." *Id.* at 7 (emphasis added). So Plaintiffs don't truly believe that there's no *rational* connection at all; they simply think the Registry Fee isn't the best way to address the Legislature's stated concerns of mental health and police funding.

But the Legislature isn't required to make "the best choice possible to address the problem it seeks to remedy." *Smith*, 538 U.S. at 105. In fact, the Legislature is free to legislate "based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). So although Plaintiffs might not like the exact manner of the mental-health use, the Legislature didn't act irrationally by determining that working with sex offenders causes the State Police to need psychiatric care to ensure they're able to promote public safety. *See, e.g., Jaffe v. Redmond*, 518 U.S. 1, 11 (1996) (affirming the confidentiality of treatment conversations between a police officer and therapist, explaining that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance"). After all, because "police officer[s]" are "responsible for public safety," ensuring their "well-being"—"both physically and mentally"—is a "particularly compelling interest" that's "essential not only to [their own] safety but to the public at large." *Kurtzhals v. Cnty. of Dunn*, 969 F.3d 725, 731 (7th Cir. 2020) (cleaned up).

Here, the Registry Fee offsets police mental health issues stemming from work on cases like sexual offenses and maintaining the offender registry, which in turn advances public safety. It also defrays further future costs by reducing the likelihood that the State Police will need to pay for psychiatric treatment of a work-related mental health disorder. *See* W. VA. CODE § 23-4-1f. Plaintiffs are free to believe that there are better ways to recoup registry costs and promote public

safety, but the Registry Fee “is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” *Smith*, 538 U.S. at 103. The fee’s uses sufficiently align with the scheme’s purpose of promoting public safety that any “imprecision” Plaintiffs might “rely upon does not suggest that the [Registry Fee’s] nonpunitive purpose is a ‘sham or mere pretext.’” *Id.* (cleaned up) (rejecting an argument that a challenged regulation must be “narrowly drawn to accomplish the stated purpose”).

So Plaintiffs lack the “clearest proof” that there is no rational connection between the fee and public safety, a clearly nonpunitive purpose. This first and “most significant factor” favors the State. *Smith*, 538 U.S. at 102 (cleaned up). “[T]his is strong evidence that the [Registry Fee] is nonpunitive in effect.” *Settle*, 24 F.4th at 949.

Second, the Registry Fee is not “excessive with respect to [its] purpose.” *Smith*, 538 U.S. at 97. On this factor, courts do not second-guess the Legislature or ask “whether [it] has made the best choice possible to address the problem it seeks to remedy.” *Id.* at 105. Instead, the Legislature’s choice must only be “reasonable in light of the nonpunitive objective.” *Id.* Thus, “[t]his inquiry is reminiscent of the rational basis test.” *Settle*, 24 F.4th at 949; *see also Lyng v. Auto. Workers*, 485 U.S. 360, 370 (1988) (explaining that rational-basis review is “quite deferential” and carries a presumption of validity).

As discussed, the Registry Fee reimburses the State Police. As a result, the fee “furthers the nonpunitive goal of public safety.” *Settle*, 24 F.4th at 949. Compared to this goal, the fee here is not excessive. For one thing, West Virginia’s annual \$125 fee is similar to many other States with registry fees. *See, e.g.*, UTAH CODE ANN. § 53-29-304(8)(a)(i) (\$125 annually plus either (1) an additional “annual fee determined by the” Department of Corrections based on cost or (2) an additional \$25 annual fee to the “registering agency”); 730 ILL. COMP. STAT. 150/3(c)(6) (\$100

annually); WIS. ADMIN. CODE DOC § 332.19(3) (2008) (\$100 annually); IDAHO CODE ANN. § 18-8307(2) (\$80 annually); MASS. GEN. LAWS ANN. ch. 6, § 178Q (\$75 annually). As the Seventh Circuit said in upholding Wisconsin’s annual registry fee, this comparison to other States forecloses “an inference that [\$125] is so high that it must be a fine.” *Mueller*, 740 F.3d at 1134.

The Registry Fee is especially justified given that the “tasks involved in maintaining [a] sex offender registry” are “formidable.” *Mueller*, 740 F.3d at 1134. Based on public estimates, West Virginia has around 6,400 registrants. *See* Rob Gabriele, *Sex Offender Registry Statistics: 2024 Data for All 50 States*, SAFEHOME (Dec. 4, 2025), <https://tinyurl.com/4xcathvz>. If every one of those registrants paid the \$125 fee, the State would receive roughly \$800,000. Meanwhile past estimates put the State’s implementation and operation costs at just under \$3 million. *See What will it cost states to comply with the Sex Offender Registration and Notification Act?*, JUSTICE POLICY INST. (Aug. 2008), <https://tinyurl.com/29mhd9kk>. So even with perfect collection, the State would still spend more on the registry than the fee reimburses.

Plaintiffs “offer[] nothing to suggest that [\$125] is excessive considering” the costs of running a registry. *In re DNA*, 561 F.3d at 300. And a fee “that serves purely remedial purposes cannot be considered ‘excessive’ in any event.” *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993). Thus, the Registry Fee is not “unreasonably excessive as a matter of law,” and this factor aligns with the State. *Settle*, 24 F.4th at 949.

Third, the Registry Fee doesn’t resemble “punishment” as that term has been understood “in our history and traditions.” *Smith*, 538 U.S. at 97. On this, courts compare the challenged statute to “historical punishments to consider whether the effects are the same.” *Settle*, 24 F.4th at 949. It’s settled that sex offender registries are not themselves akin to historical punishments. *See Smith*, 538 U.S. at 97-98. So the question here is whether a fee to support the State Police in

the operations and consequences of such a registry is “a means deemed punitive in our tradition” such that “the public w[ould] recognize it as such.” *Id.* at 97.

Though Plaintiffs are quick to call the Registry Fee a fine, a “[f]ee and fine are two quite different animals,” *Mueller*, 740 F.3d at 1133. While *fin*es have been used to advance punitive goals, *Alexander v. United States*, 509 U.S. 544, 558-59 (1993), *fees* serve nonpunitive, remedial goals. *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 342 (1998) (discussing “early monetary forfeitures” in our nation’s history that “were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government”). Here, the Registry Fee “further[s] broad remedial aims,” *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984)—namely, advancing public safety by reimbursing and providing mental health treatment for the State Police. Thus, the Registry Fee “serv[es] [a] remedial purpose[.]” and “do[es] not fall within the reach of the Eighth Amendment.” *Korany v. FDA*, 498 F.3d 272, 277 (4th Cir. 2007). The Registry Fee is a fee, so this factor favors the State.

Fourth, the Registry Fee does not subject Plaintiffs “to an affirmative disability or restraint.” *Under Seal*, 709 F.3d at 265. This factor requires more than “minor [or] indirect” restraints. *Smith*, 538 U.S. at 100. Instead, Plaintiffs must show “something more substantial.” *Settle*, 24 F.4th at 952. Yet far from substantial restraint, the Registry Fee “imposes *no* physical restraint, and so does not resemble the punishment of imprisonment[,] ... the paradigmatic affirmative disability or restraint.” *Smith*, 538 U.S. at 100 (emphasis added). Indeed, the fee in no way “restrain[s] activities sex offenders may pursue.” *Under Seal*, 709 F.3d at 265. Thus, this factor weighs in favor of the State.

Fifth and finally, the Registry Fee does not “promote[] the traditional aims of punishment—mainly retribution and deterrence.” *Stein*, 112 F.4th at 209. Courts “tend to give

this factor very little weight.” *Id.* (cleaned up). Still, the Registry Fee is “better understood as promoting public safety” instead of punishment. *Settle*, 24 F.4th at 952. To overcome that understanding, it’s not “sufficient to simply state how the law might further the goals of retribution and deterrence; to show punitive effect,” Plaintiffs must demonstrate “retribution and deterrence to be primary factors of the law.” *Id.* They cannot.

Starting with retribution, the “relatively small size of the fee ... indicates that it was not intended to have significant retributive” effect. *In re DNA*, 561 F.3d at 300. The fee also does not scale according to the severity of a registrant’s crimes like it would if it were retributive. *See Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (“Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.”). Further, the fee is “reasonably related to,” *Smith*, 538 U.S. at 102, the costs incurred by operating the registry—both in terms of man-hours and mental health toll. “[T]his is consistent with the regulatory objective” of promoting public safety, not retribution. *Id.*

And on deterrence, “[w]hile the threat of having to [pay the Registry Fee] may have a deterrent effect on would-be” sex offenders, that alone doesn’t mean it promotes such a goal. *Under Seal*, 709 F.3d at 265. Indeed, the Supreme Court has made clear that “[a]ny number of governmental programs might deter crime without imposing punishment.” *Smith*, 538 U.S. at 102. So “[t]o hold that the mere presence of a deterrent purpose renders such sanctions [punitive] would severely undermine the Government’s ability to engage in effective regulation.” *Hudson*, 522 U.S. at 105.

In short, the “wisps of deterrence and retribution” here are “not enough to show punitive intent.” *Settle*, 24 F.4th at 952. Thus, each of the five factors side with the State. Plaintiffs therefore can’t demonstrate the “clearest proof” of an “overwhelming” punitive effect that

“negates the State’s nonpunitive intentions.” *Stein*, 112 F.4th at 205 (cleaned up).

CONCLUSION

For these reasons, the Court should dismiss the Complaint with prejudice.

Respectfully submitted,

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