

In The
**United States Court Of Appeals
For The Tenth Circuit**

RAY NEAL CARNEY (State Prisoner: # 613606)

Plaintiff – Appellant,

v.

OKLAHOMA DEPARTMENT OF PUBLIC SAFETY,
Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA AT OKLAHOMA CITY
IN CASE NO. 5:16-cv-00484-R, HON. DAVID L. RUSSELL

BRIEF OF *AMICI CURIAE*

**NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS AND
OK VOICES IN SUPPORT OF APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

No amici have parent corporations or are publicly held corporations.

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STATEMENTS REQUIRED BY FRAP 29(a)(4)(D)-(E)

The National Association for Rational Sexual Offense Laws (“NARSOL”) is a national nonprofit membership organization exclusively dedicated to advocating for rational, evidence-based sex offense laws and registry policies. NARSOL is dedicated to defending the constitutional rights of American citizens and families who suffer damaging collateral consequences as a result of sexual offense laws. NARSOL holds conferences across the United States each year to promote effective public safety policies and empirically-based sexual offense legislation. NARSOL’s interest in this case is to provide a practical perspective on the harmful impact of Oklahoma's driver's license branding requirement when balanced against the State's unfounded claims about re-offense and recidivism rates among registrants who have successfully completed their sentences.

OK VOICES is a statewide nonprofit affiliate of NARSOL in Oklahoma that advocates for the civil rights of individuals convicted of sex-related offenses through education, legislation, and litigation. OK VOICES works in collaboration with other civil rights organizations as an independent and autonomous entity to advocate on behalf of nearly 8,000 citizens who have been registered as sex offenders by the State of Oklahoma for up to a lifetime.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no party's counsel authored this brief in whole or in part, and that no party or person contributed money towards the preparation or filing of this brief.

All parties have consented to the filing of this amicus brief.

ARGUMENT

Since their origin in the mid-1990s, sex offender registry laws have morphed to include mandatory, public, often lifetime registration and reporting requirements, along with housing, occupational, and mere presence restrictions that impose extensive direct and indirect restraints on all registrants regardless of their actual level of dangerousness. There is now general consensus among researchers that these laws not only fail to protect the public, but actually exacerbate genuine risk factors for recidivism and thereby increase the chance of future criminal activity. When registry laws infringe on First Amendment or other constitutional rights, they should be struck down. *See, e.g.,* Amy Howe, *Argument analysis: Justices skeptical about social media restrictions for sex offenders*, SCOTUSBlog (Feb. 27, 2017, 1:11 PM), <http://www.scotusblog.com/2017/02/argument-analysis-justices-skeptical-social-media-restrictions-sex-offenders/> (summarizing oral argument in *Packingham v. North Carolina*, Supreme Court Case No. 15-1194). The provision at issue here, 47 Okla. Stat. § 6-111(E)(1) (the "Statute"), is one such law.

I. Mr. Carney's Constitutional Challenge To The Statute Should Proceed.

Amici fully agree with the arguments set out in Mr. Carney's *pro se* brief and in the supplemental brief filed by his court-appointed counsel. Amici wish to bring three additional points to the Court's attention, in support of Mr. Carney and others affected by the State's driver's license branding requirement. First, the Statute, like other overly restrictive registry laws, stems from misconceptions about sex offender recidivism rates. The general belief that sex offenders have high recidivism rates is not based on scientific research. Second, the Statute prevents sex offenders who have completed their sentences from successfully reintegrating into society, because it brands them as outcasts. With this State-issued branding, offenders face difficulty finding employment, finding housing, and otherwise navigating their daily lives. Third, the branding requirement is unnecessarily cruel, because the State's alleged purpose for the branding requirement is already met in other ways or could be furthered on driver's licenses by less hurtful means.

A. The Statute is based on misconceptions about recidivism rates.

The Statute and other overly restrictive registry requirements rest on a mistaken perception that sex offenders as a class have high recidivism rates. The average member of the public believes that 75% of sex offenders will reoffend. Jill S. Levenson, et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 *Analyses of Soc. Issues & Pub. Pol'y* 1, 17 (2007). Indeed,

the public's "bias and stigma surrounding the type of crime committed--sexual offenses--is what fuels our legislation." Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 Temp. Pol. & Civ. Rts. L. Rev. 1, 1 (2012). This general perception about recidivism, however, is not supported by research.

In fact, "sex offenders have lower overall recidivism rates than non-sex offenders." Roger Przybylski, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Recidivism of Adult Sexual Offenders 1-2* (2015), <https://goo.gl/bJ3nx2>. Most studies conclude that recidivism rates for sex offenders are the lowest of any offense group, except homicide. *See, e.g.*, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Sex Offender Management Assessment and Planning Initiative* xiii (2014).

The most comprehensive recidivism study, conducted in 2003 and published by the Department of Justice, compared the re-arrest rates of non-sex offenders with sex offenders during a three-year period. Patrick A. Langan, et al., Bureau of Justice Statistics, Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), <https://goo.gl/nLe1BA>. In analyzing data from fifteen states, the researchers found that the overall re-arrest rate of sex offenders was far lower than that of non-sex offenders. *Id.* at 2, 24. In fact, it was 25% lower. *Id.*

In addition, sex offenders are unlikely to commit another sexual offense. The DOJ study computed the re-arrest rates of sex offenders and non-sex offenders who were arrested for a sexual offense after being released from prison. From the sex offender group, 5.3% were arrested for a new sexual offense after being released from prison; and from the non-sex offender group, 1.3% were arrested for a sexual offense after being released. *Id.* Taken together, out of the total number of individuals who were arrested for a sexual offense, only 13% were prior sex offenders. *See id.*

In another meta-analysis involving ten different studies, two researchers concluded that the sexual offender recidivism rate five years post-release was only 14%. Andrew J.R. Harris & R. Karl Hanson, Sex Offender Recidivism: A Simple Question 14 (2004), <http://www.static99.org/pdfdocs/harrisandhanson2004simpleq.pdf>. This recidivism rate accounted for both convictions and new charges. *Id.* at 7. Thus, two of the most comprehensive sexual recidivism studies reached similar conclusions: sexual recidivism rates are significantly lower than the general public's, and lawmakers', perceptions.

The results of these two comprehensive studies are consistent with the findings of several state-sponsored studies. The following table catalogs these state-sponsored studies and provides the percentage of released sex offenders who were convicted of (or who returned to prison for) committing a new sex offense within the study's follow-up period.

<u>Study</u>	<u>New Sex Offense</u>	<u>Follow-up Period</u>	<u>Measure</u>
2003 Study ¹	3.5%	3 years	Reconviction
Connecticut ²	2.7%	5 years	Reconviction
Indiana ³	2.2%	3 years	Return to Prison
Michigan ⁴	3.1%	4 years	Return to Prison
Minnesota ⁵	5.7%	3 years	Reconviction
New York ⁶	1.7%	3 years	Return to Prison
Washington ⁷	2.7%	5 years	Reconviction

Again, these studies show that the percentage of sex offenders who commit new sex offenses is significantly lower than public perception.

¹ Langan, *et al.*, *supra*.

² Criminal Justice & Policy Planning Div., State of Conn., *Recidivism Among Sex Offenders in Connecticut* 4 (2012), <https://goo.gl/ZUcj0T>.

³ Indiana Dep’t of Corr., *Recidivism Rates Compared: 2005 – 2007*, at 21–22 (2009), <https://goo.gl/17NwK7>.

⁴ Citizens Alliance on Prisons & Public Safety, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy? A Study of Prisoner Release and Recidivism in Michigan* 21 (2009), <https://goo.gl/ZRdEOM>.

⁵ Minn. Dep’t of Corr., *Sex Offender Recidivism in Minnesota* 21 (2007), <https://goo.gl/cXqYDR>.

⁶ State of New York, Dep’t of Corr. & Cmty. Supervision, *2010 Inmate Releases: Three Year Post Release Follow-Up* 46–47 (2014), <https://goo.gl/cC9EIQ>.

⁷ Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Recidivism Rates* 2 (2005), <https://goo.gl/LRLQGi>.

In short, while the general public believes that three-quarters of sexual offenders will reoffend, research shows that this assumption is wildly inaccurate. Misconceptions and fear about sex offender recidivism should not overcome “the growing amount of information and statistically-reliable data signifying a generally low risk of re-offense.” Perlin, *supra*, at 1.

B. The Statute’s branding requirement thwarts reintegration into society.

Next, instead of advancing public safety, the Statute undermines the successful reintegration of sex offenders into society. Many studies have indicated that successful reentry initiatives actively reduce recidivism rates. Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, Congressional Research Service 1 (Jan. 12, 2015), <https://fas.org/sgp/crs/misc/RL34287.pdf>. Sex offenders are less likely to sexually reoffend when they are “presented with opportunities for employment” and “provided with the resources to access stable housing, establish pro-social support networks, [and] create intimate relationships.” Gwenda M. Willis, Jill S. Levenson & Tony Ward, *Desistance and Attitudes Towards Sex Offenders: Facilitation or Hindrance?*, 25 J. Fam. Violence 545, 545 (2010). Successful reentry into these basic aspects of everyday life is essential to “anchor a released offender in a community and reduce recidivism” rates. Michael L. Perlin,

Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration, 22 Temp. Pol. & Civ. Rts. L. Rev. 1, 26 (2012).

Generally speaking, successful reintegration is a “challenging endeavor” for any former convict, as the transition of individuals from prison back into their communities is “a practice that has long been fraught with systemic challenges.” Dr. Kurt Bumby, Tom Talbot & Madeline Carter, *Managing the Challenges of Sex Offender Reentry*, Center for Sex Offender Management (CSOM), U.S. Dep’t of Justice 1 (2007), http://www.csom.org/pubs/reentry_brief.pdf. As for sex offenders, there are “several unique dynamics and barriers which make the transition even more difficult.” *Id.* Here, the Statute acts as a barrier to effective reintegration. The license branding requirement has been equated with a “scarlet letter” by the Oklahoma Supreme Court, *Starkey v. Okla. Dep’t of Corr.*, 305 P.3d 1004, 1025 (Okla. 2013). Even after a sex offender completes his sentence, the branded driver’s license detrimentally impacts the offender’s subsequent attempts to rebuild his life. *See* Michael J. Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 Drake L. Rev. 711, 715 (2005).

A significant barrier to sex offenders effectively reentering society is their inability to secure employment and affordable housing. Bumby, Talbot & Carter, *supra*, at 2. If offenders cannot find housing or employment, then “homelessness

and joblessness can increase sex offender recidivism.” Keri B. Burchfield & William Mingus, *Sex Offender Reintegration: Consequences of the Local Neighborhood Context*, 39 Am. J. Crim. Just. 109, 112 (2014). Thus, to effectively reduce the already low recidivism rates of sex offenders, policies should aim to assist them in finding meaningful employment and securing affordable housing. The Statute does the opposite. The Oklahoma Supreme Court has recognized that “showing one’s driver’s license is frequently necessary . . . when applying for credit [and] obtaining a job.” *Starkey*, 305 P.3d at 1025. It is easy to imagine the detrimental effect that a license with the label “sex offender” conspicuously brandished on it has. In fact, many potential employers and landlords admit that they “refuse to hire or rent to a sex offender because they do not like, or do not trust, sex offenders.” Burchfield & Mingus, *supra*, at 111.

In the employment context, “[m]any employers are reluctant to hire sex offenders because of the stigma that follows them.” Eric Seleznow, *Time to Work: Managing the Employment of Sex Offenders Under Community Supervision*, Center for Sex Offender Management, U.S. Dep’t of Justice 1 (2002), <http://www.csom.org/pubs/timetowork.pdf>. Across the United States, “registrants may be denied jobs based on their offender status.” Elizabeth R. Platt, *Gangsters to Greyhounds: The Past, Present and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 762 (2013).

Amicus NARSOL recently contacted a group of affected Oklahoma citizens regarding the impact of the Statute. Regarding the Statute's impact on finding employment, John Doe 1 explained that whenever he applies for a job, he is asked to show his driver's license. When the potential employers "see 'sex offender' on my license, they won't hire me." John Doe 2 recounted a similar experience. When applying for a job at a car dealership, he was asked for his driver's license so that the employer could make a copy. As the dealership's employees made a copy of his license, he overheard them discussing his status as a sex offender. Needless to say, he did get the job and was not even given an interview, despite excellent qualifications. John Doe 3 also experienced problems in obtaining employment. After he applied for two different jobs, both prospective employers referred to him as "one of those" and refused to hire him. Based on these experiences, the Statute clearly presents a formidable obstacle to full-time employment—one of the prerequisites of successful reintegration.

Even if registrants are able to secure meaningful employment, they struggle to remain employed once their offense history is revealed. A 2008 study "found that fifty-two percent of Tier II and Tier III sex offender registrants in New Jersey reported having lost jobs as a result of community notification." Platt, *supra*, at 762. There is little—if any—protection for registrants from employment discrimination, because "many states offer no remedy against

employment discrimination based on prior convictions.” *Id.* A licensing requirement that forever brandishes individuals with the “sex offender” label results in employers failing to retain them as employees. With the likelihood of stable employment decreased, the possibility of recidivism consequently increases.

As with employment, the Statute restricts a sex offender registrant from securing housing because showing one’s driver’s license is often a requirement when renting an apartment or seeking financing for a home. Oftentimes, registrants “face housing discrimination by landlords and harassment from neighbors, forcing many to live in shelters or be rendered homeless.” *Id.* A recent study revealed that “35% of registered sex offenders reported having to leave their residence because their landlords or communities discovered their offender status.” Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and The Sex Offense Registry*, 2 Themis J. Just. Studies & For. Science 69 (2014), <http://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1014&context=themis>. The driver’s license branding may prevent a sex offender from securing even temporary housing, as “[s]ome public housing entities and homeless shelters have established exclusionary rules pertaining specifically to sex offenders.” Bumby, Talbot & Carter, *supra*, at 10. The Statute thus leads to housing

discrimination and a rising rate of homelessness among sex offenders. *See* Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 Am. J. Crim. L. 263, 268 (2011).

In addition to the harmful effects on employment and housing, the Statute harms registrants as they attempt to go about their daily lives. Perlin, *supra*, at 5. The Oklahoma Supreme Court has recognized that “showing one’s driver’s license is frequently necessary in face-to-face encounters when cashing a check, using a credit card, applying for credit, obtaining a job, entering some public buildings, and in air travel.” *Starkey*, 305 P.3d at 1025. The Court’s statement is entirely consistent with the responses provided to Amicus NARSOL about the impacts of the Statute. John Doe 4 explained that he is asked to show his driver’s license when writing a check, paying bills, filing police reports, securing public utilities, and even making everyday purchases at the grocery store. Jane Doe 1, a parent, stated that she is asked to show her identification when enrolling her children in school or taking her disabled son to doctors’ appointments. In all of these necessary day-to-day encounters, the Statute makes public disclosure of the individual’s status inevitable and shameful.

Many registrants have developed psychological issues because of the stigmatization that comes from their status. Schultz, *supra*, at 72. They deeply

“fear society’s reaction to their crimes and how those reactions will affect their lives.” *Id.* In describing the shame and judgment felt when showing his driver’s license, John Doe 5 stated that that people’s’ reactions to his identification make him feel “like a leper,” while John Doe 6 explained that people stare at him “as if [he] has the numbers 666 across [his] forehead.” Such feelings of discrimination and devaluation correlate with an overall likeliness to withdraw from the community. Schultz, *supra*, at 72. Furthermore, the psychological “stress and isolation these offenders then face can become potential emotional triggers for relapse.” Burchfield & Mingus, *supra*, at 111.

Thus, the Statute and others like it “can actually compromise public safety—rather than increase it—by exacerbating known risk factors for sex offenders,” including “housing and employment instability, loss of community supports, and increased hostility and resentment.” Bumby, Talbot & Carter, *supra*, at 10.

C. The Statute’s branding requirement is unnecessary and cruel.

Finally, the State’s argument that branding driver’s licenses serves to notify law enforcement and other authorities is meritless, for two reasons. First, stamping “sex offender” on driver’s licenses to provide notification to authorities is unnecessary. Oklahoma’s law enforcement officers and other authorities already have the ability to identify registrants readily. They register with the Department of Corrections and the local law enforcement agency with identifying information,

including driver's license numbers. 57 Okla. Stat. §§ 583-584 (2006). Before they are released from correctional institutions, their identifying information must be sent within seven days to the Department of Corrections and to the local law enforcement authorities where they will live, even if out of state. *Id.* § 582.2(A)(1)-(2). In addition, through local and National Crime Information Center ("NCIC") searches, authorities may identify any person arrested or charged with a sex offense, whether or they have registered or not. Thus, a law enforcement officer can run a criminal history check through local or NCIC channels to determine whether an arrested or detained individual is a convicted sex offender.

Second, even if driver's licenses might serve a legitimate notification purpose, there are alternatives that would do the trick without the cruelty of the Statute's branding requirement. Using a code or other designation on driver's licenses would satisfy the government's alleged notification purpose without shaming individuals when they must use their licenses for employment, housing, and other purposes. Delaware, for instance, uses the letter "Y" on a driver's license to designate whether someone is a convicted sex offender. 21 Del. Code § 2718(e). The Y is located on the back side of the license, along with designations for "corrective lenses" or "organ donor." This reasonable alternative meets the notification goal without harming a registrant's chance for successful integration back into society.

Therefore, another reason Mr. Carney’s constitutional challenge should proceed is because the Statute’s branding requirement is unnecessarily cruel. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 *Hastings L.J.* 1071, 1081 (2012) (“these laws have become excessively punitive and, consequently, are no longer rationally connected to their regulatory purpose”).

CONCLUSION

Amici ask this Court to reverse the lower court’s dismissal of Mr. Carney’s constitutional challenge to the Statute. The Statute is based on misconceptions rather than science, prevents reintegration into society, and is unnecessarily cruel.

Respectfully submitted this 8th day of May 2017.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because:

this brief contains 3,170 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 8, 2017

/s/ John J. Korzen

John J. Korzen

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, MCAFEE ANTI VIRUS, and according to the program are free of viruses.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 8, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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