**No. 19-7346**

# United States Court of Appeals
## FOR THE FOURTH CIRCUIT

**JAMES PAUL DESPER,**
Plaintiff - Appellant,

**v.**

**HAROLD CLARKE, *et al.*,**
Defendants - Appellees.

**Appeal from the United States District Court for the Western District of Virginia**

# BRIEF OF APPELLANT


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## STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Mr. Desper's complaint alleged First Amendment, due process, and equal protection violations pursuant to 42 U.S.C. § 1983. The district court entered a final order granting Defendants' motion to dismiss on January 29, 2019. JA304. Mr. Desper timely filed a Rule 59(e) motion to alter or amend the judgment on February 20, 2019. JA305, JA321 (certificate of service). The district court entered an order denying that motion on September 11, 2019. JA326. Mr. Desper then timely filed his notice of appeal from those orders six days later, when he deposited his notice in the prison mail system. JA327–28; *see* Fed. R. App. P. 4(a)(4)(A)(iv), 4(c). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

I. Whether Mr. Desper's allegations that prison officials indefinitely denied him all visitation with his minor daughter for no specific reason stated a plausible claim for a violation of his right to intimate familial association under the First Amendment.

II. Whether Mr. Desper's allegations that prison officials arbitrarily infringed on his parent-child relationship by denying him all visitation with his minor daughter while giving him no opportunity to learn or challenge their reasons for doing so stated a plausible claim under the Fourteenth Amendment's Due Process Clause.

III. Whether Mr. Desper's allegations that prison officials permitted visitation between similarly situated individuals and their minor children, while denying him the same opportunity, stated a plausible claim for a violation of his rights under the Equal Protection Clause.

## STATEMENT OF THE CASE

This case implicates a father's right to remain an engaged parent while incarcerated. Virginia Department of Corrections (VDOC) officials have denied Appellant James Paul Desper visitation with his minor daughter for almost five years and for "no specific reason." JA297, JA300. Mr. Desper sued these officials under 42 U.S.C. § 1983, seeking declaratory and injunctive relief, as well as punitive damages, for this arbitrary, prolonged, and indefinite denial of visitation with his child. *See* JA300–01.

### I. Factual History

Mr. Desper is father to his fourteen-year-old daughter, K.D. JA101, JA296. He is the only parent active in K.D.'s life. JA54, JA101. Although Mr. Desper is currently incarcerated at Augusta Correctional Center in Craigsville, Virginia, he wishes to participate in K.D.'s care and assist in her upbringing. *See* JA53, JA291. Mr. Desper is, in K.D.'s words, "very very important" to her. JA101. She loves him and wants to see him. *Id.* In turn, he wants her "to know that she's loved." *See* JA53.

Through more than six years of regular, in-person visits, Mr. Desper and K.D. maintained their relationship as she grew—until

around December 2015, when VDOC officials, without any stated justification, began denying Mr. Desper further parent-child visitation. *See* JA297, JA300. They have prevented him from seeing his daughter for nearly five years since. JA297.

### A. VDOC Officials Begin Denying Mr. Desper Visitation with K.D.

From the beginning of Mr. Desper's incarceration in September 2009, K.D. visited him regularly. *See* JA297. In March 2014, VDOC officials amended a provision of the regulations governing Mr. Desper and K.D.'s visitation. *See* JA31, JA36, JA294. The amendment provided that:

> [o]ffenders with any conviction requiring registration in the *Sex Offender and Crimes against Minors Registry* will not be allowed to visit with any minor until granted a sex offender visitation exemption. (Minors currently approved for such visits on the effective date of this operating procedure may be allowed to continue visiting pending review for an exemption.)

JA36. Because Mr. Desper had been required to register after pleading guilty to a charge of indecent liberties with a sixteen-year-old when he was twenty-three, the amended regulation presumptively prohibited him from further visits with K.D. without an exemption. *See* JA67, JA71–72,

JA298; *see also* JA53 (acknowledging additional conviction for sexual offense involving an adult of limited mental capacity).

But for nearly two years after the amended regulation became effective, VDOC officials allowed K.D. to visit her father, though he had not yet applied for an exemption. *See* JA294–95, JA297. During these visits, Mr. Desper and K.D. were allowed to see each other and to share an embrace or a brief kiss at the beginning and end of each visit. *See* JA40. Mr. Desper's mother, who is K.D.'s grandmother and legal guardian,[1] noted the benefits to K.D. of time spent with her father, describing K.D.'s trips to see him as "very good visits." JA54.

VDOC officials first began enforcing the amended provision against Mr. Desper around December 2015. *See* JA294. Without advance notice, they removed K.D. from Mr. Desper's visitors list. *See* JA294–95. Since then, VDOC officials have not allowed Mr. Desper and K.D. to see each other and have, without explanation, denied each of his applications for an exemption. *See* JA297, JA300. K.D., who is now fourteen, last saw her father when she was nine years old. *See* JA101, JA297.

[1] Mr. Desper's mother has custody of K.D, but Mr. Desper has retained his parental rights. JA58, JA296.

### B. Mr. Desper First Applies for an Exemption.

Mr. Desper began the multi-step exemption application process in March 2016, shortly after VDOC officials terminated visitation with his daughter. *See* JA295. As a threshold matter, Mr. Desper satisfied the three eligibility requirements set out in the amended regulation: that the applicant be free of disciplinary charges for more than six months; that the minor visitor be the applicant's biological, legally adopted, or step-child; and that there be no court order restricting visitation. *See* JA36, JA53, JA294–96. Mr. Desper was therefore entitled to proceed through the application process. This process required the completion of two questionnaires and a mental status evaluation, after which a regularly convened Sex Offender Visitation Committee was required to make a recommendation and send it to the Corrections Operations Administrator for approval. JA36–37.

As a first step, Mr. Desper completed a sex offender questionnaire. *See* JA36. In his questionnaire, Mr. Desper explained the benefits of visitation as "maintain[ing] [a] father/daughter relationship." JA53. He added that visitation would allow K.D. "to know that she's loved," and enable him to "participate in [K.D.'s] care" and "make decisions regarding

[his] daughter." *Id.* Mr. Desper also listed steps he was taking toward accountability. *See id.* He explained that he had "signed [up] to take [T]hinking for a Change," a rehabilitation-oriented program at the facility, and had inquired about educational programming geared toward people convicted of sex offenses but was told his facility did not offer it. *Id.*

Mr. Desper's mother, as K.D.'s legal guardian, completed the next step of the application process, a guardian questionnaire. *See* JA37, JA297. She described K.D.'s past visits with her father as "very good" with "no problems." JA54. Explaining the benefit of visitation, she wrote that K.D. "needs to see her father" and "likes coming to see him." *Id.* She added that K.D. "[d]oesn't have [a] mother in her life." *Id.* She listed no concerns about visitation between Mr. Desper and K.D. *See id.*

Once both questionnaires were submitted, Mr. Desper underwent the required mental status evaluation. JA295. He then awaited VDOC's decision.

### C. VDOC Officials Deny Mr. Desper's First Application Without Explanation.

In mid-June 2016, VDOC officials denied Mr. Desper's first exemption application. *See* JA60, JA297. They did not notify him of their decision. *See* JA297. Consequently, Mr. Desper wrote to VDOC in January 2017 to inquire about the status of his application. *See* JA76, JA298. He explained that he had not heard anything about his application and had not seen K.D. in over a year. JA76. He added that he had been told that his application would "take no more than 6 months and that [he] would be contacted directly." *Id.*

In late February 2017, ten months after Mr. Desper submitted his application and eight months after VDOC officials denied it, VDOC emailed Mr. Desper's mother notice of the denial. *See* JA82, JA297. The notice informed her that VDOC had denied visitation for K.D. and Mr. Desper and that she could resubmit application forms in June 2017, a year after the initial denial. *See* JA82.

Mr. Desper followed up with another letter to VDOC. JA78, JA298. He explained that VDOC had not informed him that his application was denied until VDOC emailed his mother. JA78. Citing VDOC's visitation regulations, Mr. Desper asked that VDOC respond to his letter with the

"reasons why" it had denied him visitation with K.D. *See id.* He received no response. JA299.

### D. Mr. Desper Again Applies for an Exemption, and VDOC Officials Again Deny His Application Without Explanation.

Mr. Desper again applied for an exemption as soon as he was permitted to do so, in June 2017. *See* JA299. Following another mental health evaluation, VDOC officials denied his second exemption application. JA300. Again, he received no notice of the denial. *Id.* Mr. Desper's mother later called VDOC and was informed that "there was no specific reason why the visitation was disapproved." *Id.*

A week after Mr. Desper submitted his second exemption application, in mid-June 2017, he sent VDOC a third letter. *See* JA80, JA299. He once again sought an explanation for the denial of his initial application, writing that he had twice contacted VDOC with the same request but had received no response. JA80. He explained that he had yet to learn the reasons his application was denied. *See id.* Once again, Mr. Desper received no response. JA299.

After continued silence from VDOC officials, K.D. independently expressed her sadness and frustration over being barred from seeing her

father. *See* JA101. She wrote, "I have not seen my father in over 2 years and [I] am very upset. . . . I miss my dad." *Id.* After explaining that her grandparents were taking care of her, K.D. pleaded, "please let me see him." *Id.* She concluded by sharing how deeply she loves her father and stating, "my dad is very very important to me and he is important in my life." *Id.*

## II. Procedural History

On December 6, 2017, Mr. Desper, proceeding pro se, filed a complaint under 42 U.S.C. § 1983, alleging violations of his First Amendment, due process, and equal protection rights.[2] *See generally* JA9–13. The complaint alleged that VDOC officials arbitrarily removed K.D. from his visitation list, repeatedly denied his requests for visitation without explanation, and threatened his ability to maintain a relationship with his child. *See* JA10–12, JA53.

Mr. Desper then began expeditiously to litigate his case. First, he asked the district court to appoint counsel because the case involved "complex legal issues" and "he did not have the ability or the resources to

[2] Mr. Desper's original complaint also included a claim under the Ex Post Facto Clause, but he no longer pursues this claim. *See* JA12, JA290.

investigate all the facts." JA83–84. The district court denied his motion the same day he filed it. JA87. Next, Mr. Desper filed multiple discovery requests seeking, among other things, any reasons VDOC had for denying him visitation with K.D. *See* JA88–93. On the same day, Mr. Desper also filed motions for a preliminary injunction and summary judgment. JA95–98.

Defendants moved to dismiss for failure to state a claim. JA104. First, they argued that inmates have no First Amendment right to visitation and that, even if Mr. Desper had such a right, VDOC's regulations were supported by legitimate safety and rehabilitation interests. JA108–09. Next, Defendants argued that neither the Due Process Clause nor VDOC regulations grant Mr. Desper a constitutionally protected liberty interest in visits with his child. JA110–11. Finally, Defendants argued that Mr. Desper failed to allege differential treatment or intentional discrimination and therefore had not stated an equal protection claim. JA111–12.

In response to Mr. Desper's summary judgment motion, Defendants reiterated these arguments and included an affidavit from VDOC's Chief of Corrections and, under seal, Mr. Desper's 2016 and 2017 Sex Offender

Visitation Evaluations. JA115–16. Defendants suggested the district court could consider these materials and convert their motion to dismiss into a cross-motion for summary judgment.[3] *See* JA116.

On May 24, 2018, Mr. Desper moved to compel discovery, having waited over three months for Defendants to respond to his discovery requests. JA244–45. But the district court denied his motion as premature in light of Defendants' pending motion to dismiss. JA275. The same day, Mr. Desper filed another motion for appointment of counsel, which the district court again promptly denied. JA266–67. Mr. Desper also filed an amended complaint further describing how VDOC's actions impacted his relationship with his daughter. *See* JA290, JA299; *see also* JA268–74 (refiling the complaint two months later, because he "ha[d] not been notified whether or not the amended complaint ha[d] been denied or served on the defendants").

[3] Mr. Desper objected to Defendants' motion to seal because "these documents are his own evaluation[] reports. And [they include] personal information about him he already knows." JA 241–42.

Seven months later, the district court granted Mr. Desper's motion to amend and Defendants' motion to dismiss.[4] JA276, JA287. The district court stated that it had not considered "any of th[e] matters outside the pleadings," including the documents Defendants had submitted in response to Mr. Desper's motion for summary judgment. JA279.

First, the district court expressed doubt that the First Amendment protects any right to visitation. JA280. But it held that even if the First Amendment does protect such a right, VDOC's regulations are reasonably related to "the state's interest in protecting children from sexual misconduct and in promoting sex offender treatment success." JA281–82. As for due process, the district court held that neither the Due Process Clause nor VDOC's regulations create a protected liberty interest. JA 283–84. Finally, the district court held that Mr. Desper failed to state an equal protection claim because he had not adequately alleged that he was similarly situated to other individuals who had been granted exemptions. JA284–85.

[4] The court also denied Mr. Desper's motion for summary judgment. JA283.

Mr. Desper timely moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). *See generally* JA 305–21. He argued that the district court's refusal to appoint counsel or grant discovery had barred him from the information he needed to prove his case. *See* JA310–13. The district court denied his motion, concluding that its prior dismissal of Mr. Desper's complaint did not represent a clear error of law or manifest injustice. *See* JA323–24. Mr. Desper filed a timely notice of appeal, *see* JA327, and this Court appointed undersigned counsel.

## SUMMARY OF THE ARGUMENT

Mr. Desper's complaint plausibly showed that Defendants violated his rights under three separate constitutional provisions by arbitrarily denying him visitation with his minor daughter, K.D. The same principle is at the heart of each claim: Prison officials cannot indefinitely deny parent-child visitation for "no specific reason." *See* JA300.

Mr. Desper's well-pleaded complaint plausibly established that Defendants violated his intimate familial association rights under the First Amendment by arbitrarily denying him visitation with K.D. Defendants permitted Mr. Desper to see, speak with, and embrace K.D. for more than four years before amending their regulations to require Mr. Desper to apply for an exemption to continue visiting with her. Even after that, they continued to permit K.D. to visit Mr. Desper for nearly two years without voicing any concerns. But then, after a total of more than six incident-free years, they abruptly removed K.D. from Mr. Desper's visitors list. Mr. Desper twice applied for an exemption, but Defendants denied his requests for no specific reason. This arbitrary, extended ban on all visitation between Mr. Desper and K.D. threatens their

constitutionally protected parent-child relationship without any stated penological justification.

Mr. Desper's complaint also plausibly showed violations of his substantive and procedural due process rights. Acting arbitrarily, and without providing even minimally adequate process, Defendants deprived Mr. Desper of his protected liberty interest in his daughter's companionship, care, and upbringing. They furnished no reason why they abruptly removed K.D. from Mr. Desper's visitors list, and they afforded him no genuine pathway back to visitation with her.

Mr. Desper also stated a plausible claim for a "class of one" equal protection violation by alleging that Defendants permitted individuals with "similar or worse criminal histor[ies] than [his]" to continue visiting with their minor children. *See* JA290. No legitimate penological interest justified Defendants' inconsistent application of their visitation policy.

All three of Mr. Desper's well-pleaded claims require fact-specific analysis on a fully developed record. These claims were prematurely dismissed below. This Court should now right that wrong by reversing and remanding for further proceedings to allow Mr. Desper an opportunity to prove his allegations that Defendants have arbitrarily

denied him any chance to see his minor daughter for nearly five years and counting.

## ARGUMENT

Mr. Desper has not seen his daughter since December 2015 because of Defendants' arbitrary decision to deny them visitation with one another. His complaint states plausible claims that Defendants violated his rights under (I) the First Amendment, (II) the Fourteenth Amendment's Due Process Clause, and (III) the Equal Protection Clause. Prison officials cannot deprive a parent—even one incarcerated for a sex offense—from visitation with his or her minor child without a legitimate penological interest. To do so violates the Constitution.

This Court reviews de novo the grant of a motion to dismiss. *See King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016). Dismissal is inappropriate unless, after accepting all well-pleaded allegations in the complaint as true and drawing all reasonable factual inferences in Mr. Desper's favor, this Court concludes that Mr. Desper has not stated a plausible claim to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). And this Court "must be especially solicitous of the wrongs alleged" in a pro se civil rights complaint like Mr. Desper's. *See Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (internal quotation marks omitted).

## I. Mr. Desper's Complaint Stated a Plausible First Amendment Claim by Alleging that Defendants Arbitrarily Prevented Him from Seeing His Minor Daughter.

Mr. Desper seeks protection over "the most fundamental family relationship"—the parent-child bond—against Defendants' arbitrary and indefinite ban on visitation with K.D. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996). Mr. Desper's First Amendment right to association with his minor daughter affords some opportunity for visitation unless prison officials have a legitimate penological interest to deny all visitation. They do not.

### A. Mr. Desper's Constitutionally Protected Parental Association Rights Include Some Opportunity for Visitation with K.D. Consistent with Legitimate Penological Aims.

A fundamental aspect of Mr. Desper's constitutionally protected right to freedom of association is "the formation and preservation" of his relationship with K.D., which "by [its] nature, involve[s] deep attachments and commitments." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984); *see also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

Multiple circuits have recognized that, "[e]ven inside the prison walls," parent-child relationships, like Mr. Desper's relationship with K.D., "deserv[e] some [constitutional] protection." *See Wirsching v. Colorado*, 360 F.3d 1191, 1201 (10th Cir. 2004); *see also Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010) ("The relationship between a father [and his daughter], even in prison, merits some degree of protection."); *Easterling v. Thurmer*, 880 F.3d 319, 323 & n.6 (7th Cir. 2018) (joining the "weight of authority" recognizing that an incarcerated parent states a valid constitutional claim by alleging that a ban on visitation with his minor child has no legitimate justification). This Court, however, has yet to "define the boundaries" of an incarcerated parent's intimate familial association rights. *Williams v. Ozmint*, 716 F.3d 801, 808 (4th Cir. 2013).

Here, Mr. Desper asks this Court to follow the "weight of authority" in recognizing that he holds a narrow First Amendment right to some opportunity to visit with his minor daughter, unless prison officials have a legitimate penological justification to deny all visitation. *See Easterling*, 880 F.3d at 323 n.6 (citing cases applying *Overton v. Bazzetta,* 539 U.S. 126 (2003)). And his allegations illustrate why he and K.D.

require visitation, subject to the prison's guidelines, in order to preserve their constitutionally protected father-daughter relationship. *See* JA53.

Mr. Desper cannot adequately "care [for] and nurture" his daughter without some form of visitation. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As K.D.'s only active legal and biological parent, he seeks to help "make decisions regarding [his] daughter." JA53–54. And Mr. Desper, like most parents, strives to help his child develop into a mature and socially responsible citizen. *Cf. Franz v. United States*, 707 F.2d 582, 601 (D.C. Cir. 1983) (noting that "cutting off [a child's physical] access to a parent will . . . in some measure reduce [the child's] ability to absorb any system of values").

Mr. Desper's ability to share expressions and gestures with K.D. during visitation is critical for her "to know that she's loved," and for him to confirm that she is emotionally, physically, and mentally healthy. JA53. In a conversation with her father, K.D.'s raised brows, widened eyes, or hesitant smile may allow her to communicate fears or concerns about her life that are difficult to convey with words alone. And visitation provides Mr. Desper an opportunity to react to her unspoken fears or concerns. Visitation is particularly important for Mr. Desper and his

daughter because of the inherent challenges Mr. Desper's incarceration places on their ability to maintain their relationship. *Cf. Franz*, 707 F.2d at 601 (explaining that emotional attachment in a parent-child relationship can intensify where there is a disruption in the normal family home). And the absence of K.D.'s mother in her life only magnifies these considerations.

Defendants' indefinite ban on visitation has already damaged Mr. Desper's relationship with K.D. He alleges that there has been a "drastic change in [his daughter's] demeanor and attitude for the worse since she has not been allowed to visit [him]." JA297. And it has been "very upset[ting]" for K.D. not to see her father because his physical presence plays a "very important [role] in [her] life." JA101; *cf. Franz*, 707 F.2d at 602 (noting that lack of visitation with a parent cuts deeply into the emotional interests of both parent and child).[5]

[5] Restrictive visitation conditions threaten the First Amendment and due process rights not only of incarcerated parents but also of their children. *See, e.g.*, Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. Crim. L. & Criminology 77, 80 (2013) (noting the importance of parent-child visitation in incarceration).

Defendants have left Mr. Desper and K.D. with no sense of when they will again share eye contact, a smile, a shrug, a tear, or even a spontaneous conversation. *Cf. Overton*, 539 U.S. at 134 (reasoning that continual reinstatement of temporary visitation prohibition could act as de facto permanent ban). And sustained inability to engage in this type of communication, so essential to intimate familial association, threatens Mr. Desper and K.D.'s parent-child relationship. *See Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (stressing the importance of the "emotional attachments" arising out of the "familial relationship").

In suggesting that an incarcerated parent has no constitutional right to be free of arbitrary restrictions on visitation with his minor daughter, the district court relied on cases that support no such proposition. JA280–81. Both *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975), and *White v. Keller*, 438 F. Supp. 110 (D. Md. 1977), *aff'd*, 588 F.2d 913 (4th Cir. 1978), predate the Supreme Court's refusal in *Overton* to "define [an inmate's] right of association" or address how intimate familial association relates to a visitation claim. 539 U.S. at 131–33 (examining regulations that specifically allowed visitation not only with

one's children but also with one's siblings and grandchildren); *see also Williams*, 716 F.3d at 808 (citing *Overton* in remarking that this Circuit has not defined the scope of incarcerated individuals' associational rights).

Both *Oxendine* and *White* are distinguishable in any event. In *Oxendine*, this Court rejected a plaintiff's claim that he had a constitutional right to "physical contact" with his family at the summary-judgment stage. 509 F.2d at 1407. In *White*, this Court summarily affirmed a district court's grant of summary judgment against a class of inmates who had claimed that a prison's 90-day suspension of visitation privileges, imposed as punishment for particular disciplinary offenses, should be subjected to strict scrutiny. 438 F. Supp. at 118; *see Williams*, 716 F.3d at 806 n.7. Unlike the plaintiffs in *Oxendine* and *White*, Mr. Desper has had no opportunity to develop a factual record, has been denied visitation with his daughter indefinitely for no specific reason rather than as a temporary disciplinary sanction, and has sought protection against Defendants' arbitrary decision to fully extinguish *all* forms of visitation with his minor daughter.

If VDOC continues to deny visitation until K.D. is an adult, Mr. Desper will not have seen his daughter from age nine to age eighteen—a formative phase of her life. He and K.D., by then, may have lost their ability to meaningfully connect by understanding and engaging with each other's expressions and gestures.

### B. Mr. Desper Alleged Sufficient Facts to Show that Defendants Have No Legitimate Penological Justification for Indefinitely Denying All Visitation with His Minor Daughter.

Mr. Desper's complaint meets "the low bar of the motion-to-dismiss stage" by plausibly establishing that VDOC's indefinite ban on visitation with K.D. has no legitimate justification. *See Jehovah v. Clarke*, 798 F.3d 169, 180 (4th Cir. 2015). In considering whether VDOC's refusal to grant Mr. Desper an exemption is reasonably related to a "legitimate penological interest," this Court considers four factors set out in *Turner v. Safley*, 482 U.S. 78, 89–91 (1987). And Mr. Desper can prevail on his challenge by showing that even just one or two of these factors weigh sufficiently in his favor. *See, e.g.*, *Turner*, 482 U.S. at 89–90 (identifying the first factor as potentially dispositive); *Jehovah*, 798 F.3d at 179–80 (holding that complaint survived motion to dismiss based on the first and fourth factors).

But here all four factors weigh in Mr. Desper's favor because: (1) VDOC's prolonged refusal to allow K.D. to visit her father has no "valid, rational connection" to any legitimate government interest; (2) he has no "alternative means of exercising [his associational] right[s]"; (3) allowing K.D. to visit her father will have little or no impact "on guards and other inmates, and on the allocation of prison resources generally"; and (4) VDOC's visitation policy accommodates alternative visitation formats that VDOC has not made available to Mr. Desper. *See Turner*, 482 U.S. at 89–90 (internal quotation marks omitted).

First, Mr. Desper's allegations establish that VDOC's application of its policy to him and his daughter has no rational connection to a legitimate government interest because he "constitute[s] no threat whatsoever to his own [daughter]." *See Wirsching*, 360 F.3d at 1200. K.D. had "very good visits" with Mr. Desper with "no problems" between 2009 and 2015. JA54. After VDOC amended the visitation regulations, Defendants permitted K.D. to visit her father for nearly two years before arbitrarily "remov[ing] [her] from his visitors list without notice" and "for no specific reason." JA294–95, JA300. These facts plausibly establish

that VDOC's abrupt and sustained termination of Mr. Desper's visitation with his child was arbitrary.

The district court's observation that VDOC's visitation regulations serve a generalized "interest in protecting children from sexual misconduct and in promoting sex offender treatment success," JA281, is irrelevant to Mr. Desper's claim that VDOC applied those regulations arbitrarily in his specific case. VDOC itself seems to recognize that these general justifications do not apply to every inmate who must register as a sex offender, as its regulations provide for exemptions on a case-by-case basis. *See* JA36. Mr. Desper followed this process—twice—but VDOC has yet to articulate any "rational connection" between the general purpose of the visitation policy and its refusal to grant Mr. Desper an exemption that would allow him to resume visitation with his daughter. The district court cited no record evidence—let alone any allegation in Mr. Desper's complaint—to support its speculation that VDOC's continuous denials of Mr. Desper's visitation requests were attributable to Mr. Desper's mental health history and prior sexual offenses. *See* JA281; *see also Wilcox v. Brown*, 877 F.3d 161, 169 (4th Cir. 2017) ("[I]t is not the courts' role to

simply invent possible objectives that [d]efendants have not even claimed were the basis for [the application of] their policy.").

Second, Mr. Desper states that visitation with K.D. is essential to preserve their intimate parent-child associational rights; alternative means do not suffice. Mr. Desper and his daughter cannot adequately sustain and nurture their filial bond without any opportunity for spontaneous and non-verbal communication. *See supra* Section I.A (explaining why K.D. requires face-to-face visitation with her father); *see Overton*, 539 U.S. at 135. Phone calls and letters do not provide this.

Third, Mr. Desper states that VDOC routinely accommodates visits between inmates, including some who have a worse criminal history than his, and their minor children without an adverse impact on the "guards, other inmates, the allocation of prison resources, and the safety of visitors." *See Overton*, 539 U.S. at 135; JA290. And there is no suggestion that any impropriety or disruption occurred during the six-plus years of "very good" visits between K.D. and her father. *See* JA54, JA297. At the very least, the district court erred by accepting VDOC's assertion that an accommodation would be disruptive "absent specific findings." *See Shakur v. Schriro*, 514 F.3d 878, 887 (9th Cir. 2008) (concluding that this

*Turner* factor is indeterminate "[w]ithout more detailed findings"); *see also Lovelace v. Lee,* 472 F.3d 174, 200 (4th Cir. 2006) (vacating summary judgment in favor of defendants when district court did not evaluate plaintiff's claims under *Turner* factors).

Fourth, Mr. Desper identifies "some obvious regulatory alternative[s] that [may] fully accommodate[]" his need to maintain his relationship with K.D. through visitation. *Overton*, 539 U.S. at 136. Mr. Desper attached to his complaint a prison visitation policy that refers to both non-contact and video visitation, neither of which VDOC has offered him. JA45–46, JA49–50; *see Jehovah*, 798 F.3d at 180 (inferring an "obvious, easy alternative" from the plaintiff's complaint). But Mr. Desper requires discovery to "offer[] evidence as to the feasibility and minimum institutional effect of a less restrictive visitation policy" in the event that VDOC establishes a legitimate basis for placing *some* special restrictions on his visitation with K.D. *Cf. Wirsching*, 360 F.3d at 1201 (acknowledging such evidence would have made the case a closer call).

In sum, when all reasonable inferences are drawn in Mr. Desper's favor, his complaint plausibly establishes that VDOC banned all visitation between him and his child without any legitimate penological

interest. *See Easterling*, 880 F.3d at 322–23 (reasoning that an arbitrary ban on visitation between a child and a parent convicted of a prior sexual offense risks running afoul of *Turner*). Over the last five years, Mr. Desper has repeatedly applied for an exemption under VDOC's policy and has persistently asked VDOC to explain its repeated denials. JA297–300. VDOC's only response: "there [is] no specific reason" why he cannot see his daughter. JA300.

## II. Defendants Deprived Mr. Desper of a Protected Due Process Liberty Interest in His Parent-Child Relationship by Arbitrarily and Indefinitely Preventing Him from Visiting with His Daughter.

The Due Process Clause protects Mr. Desper's liberty interest in his daughter's companionship, care, and upbringing. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972). That interest encompasses the visitation necessary to maintain the important attributes of his parent-child relationship with K.D. while incarcerated and cannot be infringed absent adequate process or powerful countervailing interests. *See supra* Section I.A (explaining why visitation is required to preserve parent-child relationship); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care,

. . . and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" (citation omitted)); *see also Turner*, 482 U.S. at 84 (including "the protections of due process" among constitutional rights retained by prison inmates).

Mr. Desper stated a plausible claim for violations of both substantive and procedural due process by alleging sufficient facts to show that Defendants (A) arbitrarily infringed his fundamental parental rights and (B) harmed his protected liberty interest in the visitation he and K.D. required to maintain their parent-child relationship, without affording him even minimally adequate process.

### A. Defendants Violated Mr. Desper's Substantive Due Process Rights by Arbitrarily Infringing His Fundamental Parental Rights.

Mr. Desper plausibly showed that Defendants arbitrarily infringed his substantive due process right to parent-child companionship, care, and upbringing when they applied their regulations to deny him any visitation with his daughter for "no specific reason" after six years of visitation without incident. *See* JA300. Substantive due process bars conscience-shocking or arbitrary government actions regardless of the

procedure used to implement them. *See Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990). Such due process protections, especially against arbitrary state action toward individuals, extend past the prison gate. *See Wolff v. McDonnell*, 418 U.S. 539, 556, 558 (1974).

Mr. Desper alleged sufficient facts to state a plausible substantive due process claim because he showed that: (a) Defendants' indefinite bar on visitation was arbitrary, and (b) that bar threatened his fundamental and carefully described parent-child liberty interest. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (establishing conscience-shocking or fatally arbitrary behavior by governmental officer as a threshold question); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (requiring that asserted substantive due process right be both fundamental and carefully described).

First, Mr. Desper alleged sufficient facts to show that Defendants' indefinite denial of visitation with his daughter was "fatally arbitrary in the constitutional sense." *Hawkins*, 195 F.3d at 742 (equating conscience-shocking and fatally arbitrary action). To the extent Defendants had any "specific" or "legitimate" reason for denying Mr. Desper visitation, that

reason is not apparent from the pleadings. *See* JA300–01; *Lewis*, 523 U.S. at 850 (recognizing that substantive due process claims require "an exact analysis of circumstances"). That point alone should have precluded dismissal. *See King*, 825 F.3d at 222 (reasoning that prison officials may override a fundamental liberty interest only when their actions are reasonably related to legitimate penological interests).

The prolonged, indefinite visitation restriction Defendants imposed here is all the more arbitrary because it far exceeds restrictions VDOC imposes when specific security concerns *are* identified. *See Hawkins*, 195 F.3d at 742 ("As a first step in assessing . . . the executive act at issue . . . we should look to see whether any benchmarks can be found in the way executive officials . . . generally have responded to comparable situations."). Under VDOC regulations, restrictions or suspensions of an inmate's visitation occur primarily when he is convicted for a felony or misdemeanor that took place during a visit or for escape-related offenses. *See* JA48. Even in those cases, the restriction or suspension is "not to exceed 2 years." *Id.* Yet Mr. Desper's complaint indicates no past misbehavior whatsoever during visits, and he has not been allowed to see his daughter in well *over* two years. *See* JA294, JA297. Mr. Desper's

allegation that Defendants had "no specific reason" for imposing this indefinite bar plausibly establishes fatally arbitrary governmental action. JA300; *Easterling*, 880 F.3d at 322–23 (recognizing that "a prisoner—even a sex offender—who alleges that a permanent ban on visits with his minor children has no legitimate justification" may state a substantive due process claim).

Second, Mr. Desper's complaint plausibly established that Defendants' arbitrary actions threatened a carefully described, fundamental liberty interest in the visitation necessary to maintain his parent-child relationship with K.D. Far from seeking "unfettered visitation," as the district court mistakenly inferred, JA283 (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460–61 (1989)), Mr. Desper sought only such visitation as would allow him—subject to the ordinary conditions VDOC places on parent-child visitation—to maintain his parent-child relationship with K.D., participate in her care, and make decisions regarding her upbringing. *See* JA40, JA53; *see Lehr v. Robertson*, 463 U.S. 248, 261–62 (1983) (reasoning that, when a father demonstrates commitment to responsibilities of parenthood, "his interest in personal contact with his child acquires substantial protection under

the due process clause"); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (describing parents' liberty interest in the care and control of their children as "perhaps the oldest of the fundamental liberty interests recognized by this Court" and relying on "extensive precedent" to conclude that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right[s] of parents").

Defendants' denial of Mr. Desper's fundamental parental right to the visitation that had successfully nurtured his relationship with his daughter for years was unsupported by any specific reason. Their repeated refusals to provide Mr. Desper with any explanation for the denial and failure to afford him any genuine path to relief constituted fatally arbitrary state action in violation of substantive due process.

### B. Defendants Violated Mr. Desper's Procedural Due Process Rights by Infringing His Liberty Interest in Maintaining His Parent-Child Relationship Through Visitation with K.D. Without Affording Him Minimally Adequate Process.

Mr. Desper also stated a plausible procedural due process claim. His complaint plausibly showed that: (1) he had a basis for a protected liberty interest in the Due Process Clause, or alternatively, in VDOC regulations, *see Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty

interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies."), and (2) Defendants failed to afford him minimally adequate process, *see Smith v. Collins*, 964 F.3d 266, 274 (4th Cir. 2020) (requiring protected liberty interest and inadequate process to state procedural due process claim).

### 1. Mr. Desper Has a Protected Liberty Interest in the Visitation He Seeks.

Mr. Desper plausibly stated a liberty interest under the Due Process Clause in fostering parent-child companionship, care, and upbringing through visitation with K.D. This constitutionally derived liberty interest is grounded in Supreme Court and Fourth Circuit precedent and retained while he is incarcerated. In addition, Mr. Desper plausibly showed an alternative basis for a liberty interest in VDOC's visitation regulations.

The Supreme Court and this Court have recognized that the Due Process Clause specially protects many attributes of the parent-child relationship, like the one between Mr. Desper and K.D. *See Stanley*, 405 U.S. at 651 (describing "undeniabl[e]" deference required by "the interest of a parent in the companionship, care, . . . and management of his or her

children"); *Jordan by Jordan v. Jackson*, 15 F.3d 333, 342–43 (4th Cir. 1994) (describing parent-child relationships as "in a word, sacrosanct" and "inviolable except for the most compelling reasons").

And despite "the limitations imposed by prison life," Mr. Desper retains important elements of his liberty interest in this parent-child relationship, including his interest in maintaining the relationship through some form of visitation with his daughter. *See Turner*, 482 U.S. at 95–96; *Overton*, 539 U.S. at 137 (expressing constitutional concern over lengthy or arbitrary restrictions on family visitation); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.").

The Supreme Court's treatment of the fundamental right to marry in the prison context provides a close analogy. In *Turner*, the Court struck down a prison regulation that created a presumptive prohibition on inmate marriage. *See* 482 U.S at 96–97. The Court reasoned that an inmate retains all those constitutional rights "not inconsistent with his status as a prisoner" or with "legitimate penological objectives" and

concluded that certain "important and significant" attributes of marriage satisfied these requirements. *Id.* at 95–96.

Just as marriage expresses emotional support and commitment, 482 U.S at 95–96, Mr. Desper seeks to express emotional support and commitment to K.D by "maintain[ing] [their] father/daughter relationship," *see* JA53. Just as marriage represents an "expression of personal dedication," 482 U.S. at 96, Mr. Desper seeks to express his personal dedication to K.D. by "participat[ing] in her care" and "mak[ing] decisions regarding" her upbringing, *see* JA53. And just as spouses expect their marital relationships to survive and progress beyond prison walls, *see* 482 U.S. at 96, Mr. Desper hopes that the opportunity for him to remain present for K.D. through her teenage years would allow their relationship to survive and progress following his July 2026 release date.

As in *Turner*, then, the Due Process Clause protects aspects of Mr. Desper's "important and significant" relationship with K.D. despite his incarceration. *See Turner*, 482 U.S. 96. And those protected aspects include the ability to visit with K.D. *See supra* Section I.A. Mr. Desper's need to nurture his parent-child relationship through visitation is "not inconsistent with his status as a prisoner." *See Turner*, 482 U.S. at 95.

And Mr. Desper has plausibly demonstrated that Defendants have no "legitimate penological objectives" for cutting him off from all forms of visitation. *See id.*; *supra* Section I.B.

Moreover, VDOC's visitation regulations provide Mr. Desper an alternate basis for a protected liberty interest. By mandating regular review of exemption applications and encouraging family visitation absent safety concerns, the regulations limit official discretion to withhold visitation. And by disregarding the demands of the exemption process here, Defendants imposed atypical and significant hardship on Mr. Desper relative to the ordinary incidents of prison life.

First, the regulations' explicitly mandatory language creates a basis for a parent's interest in avoiding an indefinite ban on visitation with his minor child, absent some particularized justification. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462–63 (1989). Regulations that mandate periodic review of restrictive conditions of confinement can establish an interest in avoiding those conditions. *See, e.g.*, *Incumaa v. Stirling*, 791 F.3d 517, 527 (4th Cir. 2015). Here, VDOC's visitation regulations mandate review of the restrictions placed on Mr. Desper's visitation by providing that a Sex Offender Visitation Committee "*will*

meet at least quarterly to review requests for . . . exemptions." JA37 (emphasis added). Furthermore, the regulations plausibly suggest criteria to guide such review, including that family visits must "not pose a threat to others or violate any state or federal law." JA31. Mr. Desper thus had a basis in state regulations for an expectation that his visitation would not be indefinitely barred absent some legitimate safety-related concern. And to the extent that other criteria guided the Committee's review, Mr. Desper's well-pleaded complaint entitled him to the discovery that would reveal them.

Second, indefinite denial of a parent's visitation with his minor child absent a particularized justification imposes atypical and significant hardship relative to the ordinary incidents of prison life. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995). The atypical-and-significant-hardship inquiry is a "necessarily . . . fact specific" comparative exercise. *Incumaa*, 791 F.3d at 527 (quoting *Beverati*, *v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997)). And Mr. Desper alleged sufficient facts to plausibly show that Defendants' complete denial of visitation with his daughter after allowing him regular visitation with her for more than six years was both atypical and significant. *See supra* Section I.A (discussing the severe

consequences that prolonged deprivation of visitation can have on the parent-child relationship); Section II.A (discussing the arbitrary nature of the denial and its severity relative to ordinary visitation conditions at the facility).

### 2. Defendants Did Not Afford Mr. Desper Minimally Adequate Process when They Deprived Him of the Visitation Necessary to Maintain His Parent-Child Relationship Without Providing Any Reasons or Opportunity for Objection.

Mr. Desper's protected liberty interest required adequate due process protections to ensure that it was not arbitrarily abrogated. *See Wolff*, 418 U.S. at 556–57. Defendants did not afford such protections. The complaint plausibly showed that the three factors, derived from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), that this Court uses to assess adequacy of process all weighed in Mr. Desper's favor, including: (a) the significance of Mr. Desper's private interest in parent-child companionship, care, and upbringing; (b) the risk of erroneous deprivation of this interest; and (c) the Defendants' interests. *See, e.g.*, *Incumaa*, 791 F.3d at 532; *Smith*, 964 F.3d at 281–82 (vacating and remanding grant of summary judgment in favor of defendants with

instructions to allow for discovery before addressing adequacy of process under *Mathews*).

Mr. Desper had a compelling private interest in maintaining his relationship with his daughter through visitation. *See supra* Section II.B.1.

The risk of an erroneous deprivation of Mr. Desper's interest through VDOC visiting regulations was high. For example, in *Incumaa* the court found the risk of erroneous deprivation "exceedingly high" where a committee was entitled to decide the plaintiff's security classification without furnishing factual bases for its decision or enabling the plaintiff to contest them. 791 F.3d at 534–35. Here, after Defendants abruptly terminated Mr. Desper and K.D.'s visitation without notice, a committee denied his exemption application without furnishing factual bases for its determination or enabling Mr. Desper to contest any such factual bases. *See* JA37.

Finally, VDOC did not provide any support for its interest in refusing to furnish factual bases or allow an opportunity to respond. It provided "no specific reason" why its interest in that process should outweigh Mr. Desper's interest in a process sufficient to ensure that his

compelling private interest in visitation with his daughter would not be extinguished arbitrarily. JA300; *see Incumaa*, 791 F.3d at 535 (concluding that plaintiff's well-established right to learn and contest grounds for confinement decisions outweighed VDOC's interest in maintaining order and security in its state prisons).

## III. Mr. Desper's Complaint Stated a Plausible Equal Protection Claim Because He Sufficiently Alleged that He Was Treated More Harshly than Other Similarly Situated Inmates for No Specific Reason.

Mr. Desper stated a plausible "class of one" Equal Protection Clause claim because he alleged that Defendants have intentionally treated him differently from other similarly situated inmates without a rational basis for doing so. *See King*, 825 F.3d at 220 (citing *Willis v. Town of Marshall*, 426 F.3d 251, 263 (4th Cir. 2005)). Specifically, he alleged that VDOC permits "other sex offenders . . . to visit with their minor children and, on information and belief," that some of them "have similar or worse criminal histor[ies] than [his]." JA290; *see King*, 825 F.3d at 220–21 (holding that plaintiff stated a "class of one" claim when he alleged that prison officials forced him to remove his penile implants but did not require the same of other inmates subject to the same prison regulation).

Contrary to the district court's suggestion, Mr. Desper was not required to show at the pleading stage that he was similarly situated "in *all* relevant aspects" to individuals who have been granted an exemption under VDOC's regulations. *See* JA285 (emphasis added). To meet such a requirement, Mr. Desper would need access to VDOC's individualized assessments of other applicants, redacted as appropriate. Yet the district court denied discovery requests for precisely this type of information. JA88, JA93; *cf. Willis*, 426 F.3d at 263–64 (reversing a decision that precluded discovery when plaintiff "had no opportunity to demonstrate that others situated similarly . . . were not treated similarly" because making such a demonstration would involve "matter[s] wholly within the knowledge of the [defendants]").

Defendants did not attempt to justify Mr. Desper's disparate treatment. And the limited record at the pleadings stage contains no basis for determining whether they could. *See King*, 825 F.3d at 220–22 (applying *Turner* to hold that prison officials' disparate application of a facility-wide policy violated the Equal Protection Clause). Mr. Desper's well-pleaded equal protection claim entitles him to proceed to discovery.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Mr. Desper's action and remand for further proceedings.

## STATEMENT REGARDING ORAL ARGUMENT

Mr. Desper respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a). This Court has not defined the First Amendment, due process, and equal protection rights of incarcerated parents who seek to maintain relationships with their minor children through visitation. *See, e.g.*, *Williams v. Ozmint*, 716 F.3d 801, 808 (4th Cir. 2013) (declining to define boundaries of inmate's rights to intimate familial associational). Oral argument is especially important under the circumstances of this case, where Mr. Desper sought only the visitation a prison had afforded him and his minor daughter for six years but has since denied altogether for nearly five years without specific reason.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,071 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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## CERTIFICATE OF SERVICE

I, Nicolas Sansone, certify that on October 19, 2020, a copy of Appellant's Brief and Joint Appendix was served on counsel for Appellees via the Court's ECF system.

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