No. 19-7346

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES PAUL DESPER,

Plaintiff-Appellant,

v.

HAROLD CLARKE, et al.,

Defendants-Appellees.

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

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December 9, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-7346 Caption: James Desper v. Harold Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

Harold Clarke and A. David Robinson
(name of party/amicus)

who is Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Toby J. Heytens Date: 8/27/2020

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INTRODUCTION

In 2014, the Virginia Department of Corrections (VDOC) adopted a policy prohibiting sex offenders convicted of crimes against minors from having in-person visits with minors unless the offender receives an exemption from a designated VDOC committee.

Plaintiff-appellant James Desper—a convicted sex offender with a history of mental health issues—twice unsuccessfully sought such an exemption to permit an in-person visit with his minor daughter. Desper alleges that by enforcing the sex offender visitation policy as to Desper, defendant-appellees (who are all VDOC officials) violated his First Amendment, due process, and equal protection rights. The district court properly rejected these claims and this Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Desper's federal claims under 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court dismissed Desper's complaint on January 29, 2019, see JA 304, Desper filed a motion to alter or amend the judgment on February 20, 2019, JA 305–21, and Desper filed a notice of appeal less than 30 days after that motion was resolved, JA 327–28. See Fed. R. App. P. 4(a)(1)(A) & (4)(A)(iv).

ISSUES PRESENTED

1. Whether VDOC's policy requiring sex offenders to obtain an exemption before visiting with minor children violates an inmate's freedom of assembly rights under the First Amendment.

2. Whether VDOC's policy requiring sex offenders to obtain an exemption before visiting with minor children violates due process principles.

3. Whether Desper's failure to obtain an exemption to the policy prohibiting sex offenders from visiting in-person with minor children deprives Desper equal protection of the laws.

STATEMENT

A. VDOC's sex offender visitation policy

VDOC "encourages visiting by family, friends, clergy, and other community representatives when visits do not pose a threat to others or violate any state or federal law." JA 31. At the same time, VDOC's operating procedures regarding visitation state that "visitation is a privilege, and the Facility Unit Head may restrict visiting privileges when necessary to ensure the security and good order of the facility." *Id.*

On March 1, 2014, VDOC instituted a policy prohibiting "[o]ffenders with any conviction requiring registration in the *Sex*

Offender and Crimes against Minors Registry" from "visit[ing] with any minor until granted a sex offender visitation exemption." JA 36 (Operating Procedure 851.1(IV)(C)(12)). Offenders with such convictions "will only be considered for an exemption to visit with their biological legally adopted, or step children." *Id.* (Operating Procedure 851.1(IV)(C)(12)(a)(i)). To be eligible for an exemption, an offender must have been charge-free for six months, and there cannot be a court order prohibiting or restricting the requested visitation. *Id.* (Operating Procedure 851.1(IV)(C)(12)(a)(ii), (iii)).

The process of requesting an exception requires both the offender and the parent or other guardian of the minor to complete a questionnaire. JA 36–37 (Operating Procedure 851.1(IV)(C)(12)(b)). The offender must submit a questionnaire to his case counselor discussing his offenses and the steps he has taken toward being accountable for his offensive conduct, as well as his relationship with the child and how visitation will be beneficial to the child. JA 53, Compl. Ex. 3 (Sex Offender Minor Visitation Questionnaires). The questionnaire prepared by the guardian asks about the guardian's knowledge of the offender's crimes, the child's relationship to the offender, their prior visits, the

child's interest in future visitation and potential benefits from it, and the guardian's concerns (if any) about the proposed visit. JA 54.

After both questionnaires have been received, the request is referred to an evaluator, who completes an assessment of the offender. JA 37 (Operating Procedure 851.1(IV)(C)(12)(b)(iv)). The assessment and both questionnaires are then sent to the Sex Offender Program Director. *Id.* (Operating Procedure 851.1(IV)(C)(12)(b)(vi)). The assessment and both questionnaires are then forwarded to the sex offender visitation committee, which reviews the exemption request and makes a recommendation to the operations administrator. *Id.* (Operating Procedure 851.1(IV)(C)(12)(b)(vii)). An offender who is denied a sex-offender visitation exemption may re-apply after one year. *Id.*

B. Desper's sex offenses and application for exemption under the sex offender visitation policy

1. On May 14, 2007, Desper and his wife took a 16-year-old girl to a residence, "proceeded to partially undress the child, . . . and then [Desper] removed his penis from his pants and put it up against the l6-year-old's face." JA 71, Compl. Ex. 6 (Tr. of Indecent Liberties Charge). After the girl "resisted and screamed . . . another man from another

room in the house came and made [Desper] and his wife stop what they were doing to the l6-year-old child." JA 71.

In September 2007, Desper was convicted of taking indecent liberties with a child in violation of Virginia Code § 18.2-370.1. JA 11, 62–74. Desper received a sentence of "five years in the penitentiary" with "three years and six months" suspended, which left "a year and a half" to serve. JA 73. Desper was placed "on active supervised probation with the Court for a period of three years" after his incarceration. *Id.* During that probation, Desper was to have "no contact of any kind unsupervised with any child under the age of eighteen years, male or female." *Id.* That conviction triggered an obligation for Desper to register as a sex offender under Virginia Code § 9.1-902.

Desper is currently incarcerated at the Augusta Correctional Center (JA 10) as a result of a different sexual offense. While still on probation in connection with his 2007 indecent liberties conviction, Desper was convicted of raping an 18-year-old girl who was mentally incapacitated. JA 53; JA 246.[1]

[1] See also *Desper v. Commonwealth*, No. 2116-10-3, 2011 WL 5346030 (Va. Ct. App. Nov. 8, 2011) (reflecting three counts of rape

2. In 2015, one year after implementation of the sex offender visitation policy, Desper's minor daughter was removed from the list of Desper's approved visitors. JA 294. The following year, Desper first submitted the paperwork seeking an exemption to see his then-11-year-old daughter. JA 11, 295. In his questionnaire, Desper refused to take responsibility for the facts underlying his rape conviction, insisting that, "[e]ven though I was convicted all the evidence shows that I did not commit a crime" and, although he was "accused of raping [the victim] by use of her mental incapacity," "mentally me and this girl is the same." JA 53.

Desper was evaluated by a mental health professional, JA 295, but was not granted an exemption, JA 11–12. In 2017, Desper again sought an exemption and was again evaluated by a different mental

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after Desper had intercourse with a mentally incapacitated 18-year-old girl, who had an IQ of 60 and the overall mental capacity of an eight-year-old child); JA 131, Robinson Affidavit (Desper "is currently serving a combined sentence of 19 years for 3 counts of Forcible Rape of a Victim of Mental Incapacity/Helplessness, Failure to Register as a Violent Sex Offender, a probation violation on an underlying conviction for Indecent Liberties with a Child, a probation violation on a underlying conviction for Credit Card Larceny, and a probation violation on an underlying conviction for Credit Card Forgery"); JA 136–37.

health professional. JA 12, 299–300. That request was denied as well. *Id.* Desper alleged that he was given no notice of the denial and that his mother was told by a VDOC official that "there was no specific reason why the visitation was disapproved." JA 12, 300.

C. This lawsuit

1. In 2017, Desper filed suit, naming as defendants Harold W. Clarke (VDOC's Director), A. David Robinson (Chief of Corrections Operations for VDOC), unnamed members of the sex offender visitation committee, an unnamed director of the sex offender program, and an unnamed corrections operation administrator as defendants. JA 10. As relevant here, the complaint alleged claims under the First Amendment, the Due Process Clause, and the Equal Protection Clauses of the United States Constitution. JA 9, 12; see Desper Br. 10 n.2 (acknowledging that Desper is no longer pursuing a claim under the Ex Post Facto Clause); JA 257 (same). Desper sought declaratory and injunctive relief, as well as punitive damages. JA 12.

2. Before the defendants had responded to the complaint, Desper propounded discovery requests, moved for summary judgment, and sought a preliminary injunction. JA 88–98. The defendants moved

to dismiss, JA 102–14, and also opposed Desper's motions for summary judgment and for a preliminary injunction, JA 115–30.

The following month, Desper sought leave to file an amended complaint, which the district court granted. JA 268–74, 304. The amended complaint named two additional defendants (Maria Stransky, Sex Offender Program Director and Marie Vargo, Corrections Operations Administrator) and also included unnamed members of the sex offender visitation committee. JA 288. As with his initial complaint, Desper sought declaratory and injunctive relief, and punitive damages. JA 300–02.

While the defendants' motion to dismiss was still pending, Desper moved to compel discovery. JA 244–45. The district court denied that motion as premature, stating that Desper "may file an addition motion to compel the requested discovery[] if the court denies the defendants' pending motion to dismiss." JA 275.

3. The district court granted the defendants' motion to dismiss and denied Desper's motions for summary judgment and for a preliminary injunction. JA 276–87, 304.

a. Beginning with Desper's First Amendment claim, the district court emphasized that "[n]either the Supreme Court nor the United States Court of Appeals for the Fourth Circuit has recognized a clearly established constitutional right to visitation while in prison." JA 280. Indeed, the court noted that "controlling case law in the Fourth Circuit holds that 'there is no constitutional right to prison visitation, either for prisoners or visitors' under the Freedom of Association Clause of the First Amendment." *Id.* (quoting *White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1997), aff'd 588 F.2d 913 (4th Cir. 1978)).

The district court then examined the four factors set out in *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) and in *Turner v. Safley*, 482 U.S. 78, 89–91 (1987), to conclude "the VDOC visitation regulation similarly withstands [Desper's] § 1983 challenge." JA 280–81. The regulation's requirement that Desper undergo an assessment before being able to visit with minors, the district court determined, "was reasonably related to [his daughter's] safety, given Desper's admitted history of mental health problems and sex offenses with teenagers." JA 281. The court also noted that "the denials of visitation were not permanent," that "[o]ver time in his treatment program, the safety

assessment may change," and that Desper retained other means of communicating with his daughter, including "speak[ing] with her on the telephone, correspond[ing] with her through letters, and convey[ing] messages to her through [Desper's mother] or other family members who visit him." *Id.* Deferring "to the professional judgment of prison administrators," the district court concluded that allowing Desper to forgo the visitation procedure would raise security concerns and it noted "Desper has not proposed any ready alternative to the existing regulation that would further the same interests to the same extent." JA 282.

b. The district court concluded that "VDOC'S decision to change its visitation policies did not implicate Desper's constitutional rights" under the Due Process Clause. JA 283. The district court noted that the policy itself "does not create an expectation that Desper, as a sex offender, can continue visitation with [his daughter] while she is a minor" because "the policy *prohibits* sex offenders from visitation with their minor children until they undergo the safety assessment and obtain an exemption." JA 284. The district court also concluded that the policy does not impose an atypical and significant hardship compared to

ordinary circumstances of prison life because "Desper can maintain his relationship with [his daughter] while she is a minor through other available means of communication and can reapply every year for an exemption." *Id.*

c. The district court concluded that Desper's equal protection claim failed for two reasons. First, because the challenged policy applied to all sex offenders, "Desper ha[d] not shown that he was treated differently than other sex offenders confined in VDOC prisons." JA 285. Second, the grant of an exception is based on an individualized evaluation and Desper "cannot show that he is similarly situated in all relevant respects to other sex offenders who *have* been granted exemptions to visit with their minor children." *Id.*

d. Given its holding on the motion to dismiss, the district court denied Desper's motion for preliminary injunctive relief and summarily dismissed Desper's claims against Stransky and Vargo under § 1915A(b)(1). JA 286. The court also dismissed the claims against the Doe defendants because Desper failed to provide the court with their names by the court-assigned deadline. JA 287; see also JA 304.

SUMMARY OF ARGUMENT

Desper asserts that VDOC's sex offender visitation policy violates the First Amendment, the due process clause, and the equal protection clause. The district court properly rejected each of those claims.

1. Desper's First Amendment claim rests on the assertion that the Freedom of Association Clause confers a right for an incarcerated offender to have in-person visits with his minor child. Neither the Supreme Court nor this Court has held that incarcerated individuals have a constitutional guarantee of in-person visitation. Indeed, the Supreme Court has emphasized that "freedom of association is among the rights least compatible with incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

Even if the challenged policy implicated a freedom of association right that survives incarceration, moreover, the district court properly held that VDOC's sex offender visitation policy survives constitutional challenge. As the district court correctly held: (1) the policy has a valid, rational connection to the legitimate governmental interest of protecting children; (2) sex offenders who are unable to have in-person visits with their minor children have alternative means to maintain

their relationships (including telephone calls and letters); (3) permitting sex offenders in-person access to visit with minor children raises security concerns that would drain prison resources; and (4) Desper failed to identify any ready alternatives.

2. Both Desper's due process theories also fail. As to procedural due process, Desper has not established a constitutionally protected liberty interest that survives his incarceration. Neither the Constitution nor the VDOC sex offender visitation policy creates such an interest, and an inability to have in-person visits with minor children is not an atypical and significant hardship in relation to the ordinary incidents of prison life. To the extent Desper was due any process, moreover, the sex offender visitation exemption procedures would satisfy them. And as to substantive due process, Desper cannot demonstrate that denying him an exemption to the sex offender visitation policy "shocks-the-conscience" and was intended to injure in some way unjustifiable by any government interest.

3. Desper's equal protection claim fails because Desper failed to establish that he was treated differently from others with whom he is similarly situated. To the extent that other sex offenders received

exemptions, Desper has not shown that such a difference in treatment was the result of intentional or purposeful discrimination. And, in any event, the sex offender visitation committee's decision to deny Desper an exemption while granting an exemption to other sex offenders comfortably survives rational basis review.

STANDARD OF REVIEW

This Court reviews a dismissal under Rule 12(b)(6) de novo. *Ott v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 658 (4th Cir. 2018). "To survive a 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Although courts "accept as true [a plaintiff's] allegations for which there is sufficient factual matter to render them plausible on [their] face," they "do not . . . apply the same presumption of truth to conclusory statements and legal conclusions." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (internal quotation marks and citations omitted).

ARGUMENT

The Supreme "Court has long recognized that lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (internal quotation marks and citation omitted). Here, Desper challenges a policy prohibiting incarcerated sex offenders from having in-person visits with minors unless granted an exemption. As the district court correctly held, that policy does not violate Desper's rights under the First Amendment, the Due Process Clause, or the Equal Protection Clause.[2]

I. VDOC's sex offender visitation policy does not violate the First Amendment

The parent-child relationship is undoubtedly important. Indeed, that is one reason why VDOC policy "encourages visiting by family

[2] Although the complaint sought punitive damages (along with declaratory and injunctive relief), JA 12, Desper makes no showing of eligibility for punitive damages. Indeed, Desper's opening brief fails to discuss any of the individual defendants, let alone establish that any of the defendants' conduct was "motivated by evil motive or intent," or "involve[d] reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

[members] . . . when visits do not pose a threat to others or violate any state or federal law." JA 31.

At the same time, however, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (internal quotation marks and citations omitted). In particular, "freedom of association is among the rights least compatible with incarceration," *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), because "[t]he concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution," *Jones*, 433 U.S. at 126.

Desper's First Amendment claim fails for two reasons. *First*, Desper has not established that convicted sex offenders have any freestanding constitutional right to in-person visitation with minor children that survives incarceration. *Second*, even if such a right existed, the challenged policy would comfortably survive constitutional scrutiny.

A. The challenged policy does not implicate any constitutionally protected First Amendment right that survives incarceration

1. "It is important at the outset to define the question before [the Court]." *Renico v. Lett*, 559 U.S. 766, 772 (2010). No matter how many times his appellate brief insists otherwise, Desper's complaint did not plausibly allege that he faced "complete denial of visitation with his daughter," Desper Br. 40, that he was "indefinitely" deprived his right to parent, *e.g.*, Desper Br. 2, or that he was denied an exemption "arbitrarily," *e.g.*, *id.*

Instead, the complaint states a prima facie case that Desper did not receive an exemption after the mental health evaluations and that he was not told the precise reason why he was not selected for an exemption.[3] Considering the broad deference accorded to prison officials, Desper is not entitled to the presumption that prison officials lacked a proper reason for denying the exemption. See *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) (courts "should not be too ready to

[3] For the same reason, the allegations in the complaint that Desper was not granted the exemption for in-person visitation with a minor likewise does not establish that prison officials "disregard[ed]" or failed to abide by "the demands of the exemption process." Desper Br. 39.

exercise oversight and put aside the judgment of prison administrators").

Nor was the district court required to read the complaint as plausibly alleging that the denial of an exemption was arbitrary. This Court has emphasized that, even in pro se cases, it does not "require the district courts to anticipate all arguments that clever counsel may present in some appellate future," which would both "strain judicial resources" and "transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

2. The only question raised in this case, therefore, is whether Desper has a constitutionally protected right to in-person visitation with his minor child. Desper cites no cases establishing such a right. To the contrary, this Court has repeatedly *rejected* such arguments. See *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (stating that a prison inmate "has no constitutional right to physical contact with his family"); see also *Propps v. West Virginia Dep't of Corr.*, 166 F.3d 333 (4th Cir. 1998) (unpublished table decision) ("there is no constitutional

right to visitation"); *Wright v. Vitale*, 937 F.2d 604 (4th Cir. 1991) (unpublished table decision) ("visitation is a privilege and not a constitutional right"); *Mauldin v. Rice*, 833 F.2d 1005 (4th Cir. 1987) (unpublished table decision) ("it is clear that [an inmate] does not have a constitutional right to visitation, contact or otherwise"); *White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977) ("This court concludes that there is no constitutional right to prison visitation, either for prisoners or visitors."), aff'd, 588 F.2d 913, 914 (4th Cir. 1978) (per curiam) (concluding that the district court's decision "is correct").

VDOC is far from alone in restricting sex offenders' ability to obtain in-person visits with children. To the contrary, numerous other States have such policies, see Addendum (listing similar policies from six other States), and multiple sister circuits have rejected similar arguments that prisoners have a constitutionally protected right to in-person visitation. See, *e.g.*, *Samford v. Dretke*, 562 F.3d 674, 682 (5th Cir. 2009) (per curiam) (removal of prisoner's children from the approved visitors list did not violate his constitutional rights); *Berry v. Brady*, 192 F.3d 504, 508 (5th Cir. 1999) (a prisoner "has no constitutional right to visitation privileges"); *Ware v. Morrison*, 276

F.3d 385, 387–88 (8th Cir. 2002) (inmate "had no constitutionally protected interest implicated by the suspension of his visitation privileges"); *Dunn v. Castro*, 621 F.3d 1196, 1203 (9th Cir. 2010) (right of prisoner to receive in-person visits from child not clearly established).[4]

B. Even if the challenged policy implicated an existing First Amendment right, it would survive constitutional scrutiny

"[F]our factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: [1] whether the regulation has a valid, rational connection to a legitimate governmental interest; [2] whether alternative means are open to inmates to exercise the

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[4] See also *Wirsching v. Colorado,* 360 F.3d 1191 (10th Cir. 2004) (upholding prison regulation that prohibited sex offender from receiving any visits from his children so long as he refused to participate in a treatment program); *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994) ("inmates do not have an absolute right to visitation, such privileges being subject to the prison authorities' discretion provided that the visitation policies meet legitimate penological objectives"); *Smith v. Coughlin*, 748 F.2d 783, 788 (2d Cir. 1984) (upholding prison regulation that prohibited contact visits from family); *Ramos v. Lamm*, 639 F.2d 559, 580, n.26 (10th Cir. 1980) ("the weight of present authority clearly establishes that there is no constitutional right to contact visitation"); *Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978) ("As for contact visits, we can discover no constitutional guarantee that such visits may take place.").

asserted right; [3] what impact an accommodation of the right would have on guards and inmates and prison resources; and [4] whether there are ready alternatives to the regulation." *Overton*, 539 U.S. at 132 (quoting *Turner v. Safley*, 482 U.S. 78, 89–91 (1987)). As the district court correctly held, the policy at issue comfortably survives scrutiny under that standard.

1. Rational connection to legitimate government interest

a. When applying the first *Turner* factor, courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132. "The burden . . . is not on the State to prove the validity of prison regulations." *Id.* Rather, the burden is "on the prisoner to disprove it." *Id.* Desper has not met his burden to disprove the validity of the policy.

Desper does not—and could not—deny that "[p]rotecting children from harm is [] a legitimate goal." *Overton*, 539 U.S. at 133.[5] As in *Overton*, VDOC's policy of requiring sex offenders to complete a questionnaire and to pass a mental health evaluation before being permitted to visit in-person with children "bear[s] a rational relation to [V]DOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury." *Id.* "The regulation[] promote[s] internal security, perhaps the most legitimate of penological goals by reducing the total number of visitors and by limiting the disruption caused by children in particular." *Id.* (citations omitted).

b. Desper's contrary arguments are without merit.

i. Desper first insists that "*application* of [the] policy *to [Desper] and his daughter"* lacks a "a rational connection to a legitimate government interest." Desper Br. 26 (emphasis added). That is not how rational basis review works.

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[5] Desper also does not dispute that that the regulation "operate[s] in a neutral fashion, without regard to the content of the expression." *Turner*, 482 U.S. at 90. Indeed, as the face of the policy reflects, it applies to all sex offenders and makes no reference to the content of the expression.

This Court has been clear that "concern for a particularized situation *is not grounds* for voiding a regulation designed to deal with thousands of cases." *Wilson v. Lyng*, 856 F.2d 630, 633 (4th Cir. 1988) (internal quotation marks and citation omitted) (emphasis added). The reason is straightforward: "regulation necessarily involve[s] inclusion and exclusion along general lines that may affect particular individuals in ways that seem arbitrary or unfair." *Id.* Rational basis review thus applies to the policy as a whole, not whether the court believes the policy makes sense in light of Desper's particular circumstances. See *Turner*, 482 U.S. at 89–90 (framing inquiry as whether "the logical connection between *the regulation* and *the asserted goal* is so remote as to render the policy arbitrary or irrational." (emphasis added)).

ii. Desper's assertions that this Court should delve into whether VDOC's "general justifications . . . apply to every inmate who must register as a sex offender" or whether "VDOC applied th[e challenged] regulations arbitrarily in his specific case," Desper Br. 27, are similarly flawed. For one thing, those arguments sound much more in due process than the First Amendment. See Part II, *infra.* They are also inconsistent with the repeated admonitions of the Supreme Court

and this Court that "the rational basis standard of review [is] a paradigm of judicial restraint," *Van Der Linde Housing, Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290, 293 (4th Cir. 2007) (citation omitted), that accords "wide-ranging deference to . . . the decisions of prison administrators," *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977).

2. Existence of alternative means

The Supreme Court has specifically recognized when "inmates may communicate with persons outside the prison by letter and telephone," they have "alternative means of associating with those prohibited from visiting." *Overton*, 539 U.S. at 135; see also *Pell v. Procunier*, 417 U.S. 817, 824 (1974) ("communication by mail" is a sufficient "alternative means of communication" to prison inmates who cannot communicate through face-to-face interactions (alterations and citation omitted)). Nothing about the challenged policy prevents Desper from speaking with his daughter over the telephone, communicating with her by letter, or by "sending messages through those who are

allowed to visit," like Desper's mother. *Overton*, 539 U.S. at 135.[6] These options all provide "alternative avenue[s] of communication between prison inmates" (like Desper) "and persons outside the prison" (like Desper's daughter). *Pell*, 417 U.S. at 825.

Desper responds that phone calls and letters are insufficient because "Desper and his daughter cannot adequately sustain and nurture their filial bond without any opportunity for spontaneous and non-verbal communication." Desper Br. 28. But the Supreme Court specifically rejected the precise argument that "alternatives [like phone calls, letters, and messages through other visitors] are not sufficient." *Overton*, 539 U.S. at 135. As the Court explained, "[a]lternatives to visitation need not be ideal, . . . they need only be available." *Id.*; see also *Wirsching v. Colorado*, 360 F.3d 1191, 1200–01 (10th Cir. 2004) ("[p]rison officials are simply not required, as a matter of constitutional law, to provide [a prisoner] with the 'best method' of raising his child"

[6] In fact, VDOC Operating Procedures specifically state that "[a]ll offenders housed in DOC facilities shall be permitted to correspond with families, friends, attorneys, courts, and other public officials and organizations." JA 200 (Operating Procedure 803.1(V)(A)(1)). VDOC also provides a telephone system that allows offenders to communicate with outside individuals verbally. JA 218–25 (Operating Procedure 803.3).

and "allow[ing a prisoner] to contact his children by letter and telephone" is an "alternative means of exercising the [parental] right").[7] As in *Overton* and *Wirsching*, given "the alternative channels of communication that are open to prison inmates," it cannot be said "that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional." *Pell*, 417 U.S. at 827–28 (footnote omitted).

3. Impact on others

Under the third *Turner* factor, courts look at "the impact that accommodation of the asserted associational right would have on guards, other inmates, the allocation of prison resources, and the safety of visitors." *Overton*, 539 U.S. at 135. And the Supreme Court has already recognized that "[i]ncreasing the number of child visitors" to convicted sex offenders "would have more than a negligible effect on the goals served by the regulation." *Id.* at 136.

Desper insists that "VDOC routinely accommodates visits between [other] inmates . . . and their minor children without an adverse impact

[7] Desper himself expressly relies on *Wirsching* as persuasive authority in this case. Desper Br. 20 (quoting *Wirsching*).

on the guards, other inmates, the allocation of prison resources, and the safety of visitors." Desper Br. 28 (internal quotation marks and citation omitted). The Tenth Circuit rejected that very argument in *Wirsching*, concluding that the inmate's argument that "because the general prison population is allowed visitation with children, [the inmate's] request would impose no significant additional burden on the [prison] officials" was "insufficient to overcome the deference we afford prison officials in these matters." 360 F.3d at 1201. The same is true here.

Although the Court has not confronted this precise question, it has cautioned that "[f]ederal judicial micromanagement of state prison administration risks unforeseen and counterproductive consequences." *Braun v. Maynard*, 652 F.3d 557, 563 (4th Cir. 2011) (citations omitted). For that reason, the Court "afford[s] prison administrators latitude in dealing with this volatile environment and the risks it poses to the health and safety both of prison staff and of the inmates themselves." *Id.* Desper's assertion that VDOC accommodates in-person visitations involving inmates who have not been convicted of sex offenses with minors or sex-offenders who have been granted an exemption does not

overcome the deference afforded to prison administrators in regulating prison visits.

4. Absence of ready alternatives

"*Turner* does not impose a least-restrictive-alternative test, but asks instead whether *the prisoner* has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton*, 539 U.S. at 136 (emphasis added). The district court correctly held that Desper failed to meet his burden on that point, emphasizing that "Desper has not proposed *any* ready alternative to the existing regulation that would further the same interests to the same extent." JA 282 (emphasis added).

Attempting to paper over that omission on appeal, Desper insists that a visitation policy appended as an exhibit to the complaint referred to "non-contact and video visitation" and that the reference in VDOC's policy was in fact Desper "point[ing] to some obvious regulatory alternative[s]." *Overton*, 539 U.S. at 136; see Desper Br. 29 (citing JA 45–46, 49–50). But Desper never directed the district court's attention to those portions of his 77-page initial filing, and he cannot point to

these alternatives for the first time on appeal. See, *e.g.*, *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered."). "The district court certainly did not err in failing to independently discover [these alternatives] among [Desper's] numerous pleadings." *Brock v. Carroll*, 107 F.3d 241, 243 n.3 (4th Cir. 1997).[8]

II. The sex-offender visitation policy does not violate sex-offenders' due process rights

Although Desper's complaint does not specify whether his due process claim sounds in substantive or procedural due process, see JA 289–90, Desper raises both theories on appeal, Desper Br. 31, 35. Neither theory states a claim.

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[8] *Weller v. Department of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 391 (4th Cir. 1990) ("The 'special judicial solicitude' with which a district court should view such pro se complaints does not transform the court into an advocate. Only those questions which are squarely presented to a court may properly be addressed."); see also *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) ("In the light of hindsight . . . and with the benefit of counsel on appeal, issues may be brought before this [C]ourt that were never fairly presented below."); *Williams v. Ozmint*, 716 F.3d 801, 811 (4th Cir. 2013) (the district court required to do no more than "discern[] the expressed intent of the litigant").

A. Procedural due process

"To state a procedural due process violation, [Desper] must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). Desper does neither.

1. Desper has not established a protected liberty interest

Desper does not assert that the sex offender visitation policy deprives him of "life" or "property" within the meaning of the Due Process Clause. The only question, therefore, is whether it implicates a constitutionally protected liberty interest.

"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." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted). Desper asserts that he "had a basis for a protected liberty interest in the Due Process Clause, or alternatively, in VDOC regulations." Desper Br. 35. Neither the Constitution nor VDOC regulations confer on Desper a liberty interest in in-person visitation.

a. Because Desper is incarcerated pursuant to a lawful judgment, it is not enough that he identify a restriction that would implicate a constitutionally protected liberty interest if imposed on a free individual. The reason is simple: The Supreme Court has repeatedly emphasized that "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Instead, Desper must demonstrate that the challenged restriction imposes an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

The problem for Desper is that the Supreme Court has specifically held "[t]he denial of prison access to a particular visitor 'is *well within* the terms of confinement ordinarily contemplated by a prison sentence,' and therefore *is not* independently protected by the Due Process Clause." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 468 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (emphasis added)); see also *Sandin*, 515 U.S. at 480. This Court has likewise rejected the conclusion that an inmate had "clearly establishe[d] a constitutional

right to visitation in prison grounded in the First, Eighth, or Fourteenth Amendments," *Williams v. Ozmint*, 716 F.3d 801, 806 (4th Cir. 2013), and a sister circuit has noted that it was aware "of *no circuit court* that has found an implicit due process right to prison visitation." *Bazzetta v. McGinnis*, 430 F.3d 795, 804 (6th Cir. 2005).

Desper attempts to evade this lack of support for his position by citing cases from outside the prison context to emphasize the general constitutional protection of the parent-child relationship. See Desper Br. 36–37 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Jordan by Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994)). This case, however, does not require the Court to decide whether, even during his incarceration, Desper "retains important elements of his liberty interest in this parent-child relationship, including his interest in maintaining the relationship" with her. Desper Br. 37. As previously explained, the challenged policy preserves numerous ways for Desper to maintain a relationship with his minor daughter during his current incarceration and the Supreme Court has specifically held that those alternatives

satisfy any applicable First Amendment scrutiny.[9] The question here is whether the Constitution grants Desper a liberty interest to *in-person visitation* with his daughter. It does not.

Indeed, this Court has already rejected the notion that the undeniable importance of the parent-child relationship requires permitting in-person visits between parents and children. Although this Court does not appear to have considered the specific question of whether an incarcerated prisoner has a constitutionally protected liberty interest in-person visitation with his children, it has already rejected a due process challenge to a regulation that prevented incarcerated prisoners from obtaining in-person visitation with their *parents*. This Court's published opinion in *White v. Keller*, 588 F.2d 913 (4th Cir. 1978) (per curiam), affirmed as "correct" a district court's holding that "[t]o the extent that the right to physical association is grounded in 'liberty,' it is obvious from the language of the fifth and

[9] This fact stands in stark contrast to *Turner* where the challenged policy prohibited altogether most opportunities for marriage. *Turner*, 482 U.S. at 82 (challenged marriage regulation "permit[ted] an inmate to marry only with the permission of the superintendent of the prison, and provide[d] that such approval should be given only 'when there are compelling reasons [such as pregnancy or birth of illegitimate child] to do so'").

fourteenth amendments that the state may wholly deprive one of it upon a criminal conviction." *White v. Keller*, 438 F. Supp. 110, 116 (D. Md. 1977). The same is true here.

b. Nor do VDOC regulations create a constitutionally protected liberty interest in Desper's ability to obtain in-person visitation with his minor daughter.

i. Far from "limit[ing] official discretion to withhold visitation," Desper Br. 39, VDOC's sex offender visitation policy plainly states 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." JA 36 (Operating Procedure 851.1(IV)(C)(12)) (emphasis added). This language creates an initial status quo that no visitation with minor children is permitted. What is more, the first paragraph of the entire visitation policy emphasizes that "[o]ffender visitation is a privilege" and may be restricted "to ensure the security and good order of the facility." JA 31.

The VDOC operating procedures are simply "not worded in such a way that an inmate could reasonably expect to enforce them against the

prison officials." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 465 (1989). To the contrary, much like the regulation at issue in *Thompson*, the VDOC's sex offender visitation policy does not use "'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion." *Id.* at 463 (quoting *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). And, like the policy in *Thompson*, VDOC's sex offender visitor policy does not "force[] a conclusion that the State has created a liberty interest." *Id.*; accord *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 525 (11th Cir. 1994) (even prison regulation stating that "visiting privileges *shall* ordinarily be extended to [certain] friends and associates . . . unless such visits could reasonably create a threat to the security and good order of the institution" did not "create a protected liberty interest in visitation privileges" (emphasis added)).[10] "[W]hen," as here "a state policy

[10] To the extent Desper implies that he has a liberty interest under an earlier VDOC policy, this Court has been clear that "inmates do not have a protected liberty interest in the *procedures themselves,* only in the subject matter to which they are directed" and "[t]he procedures may be changed at the will of prison officials so long as they afford that process which is due under the Due Process Clause of the Fourteenth Amendment." *Ewell v. Murray*, 11 F.3d 482, 488 (4th Cir. 1993).

expressly and unambiguously disclaims a particular expectation, an inmate cannot allege a liberty interest in that expectation." *Prieto*, 780 F.3d at 252.[11]

ii. The problems for the argument that Desper has a constitutionally protected liberty interest derived from VDOC regulations do not stop there. Even if those regulations had created some legitimate expectation in in-person visitation with minors, the denial of that expectation would only implicate the Due Process Clause if its deprivation "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. Here too, Desper's arguments fall short.

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[11] Even if VDOC's prison regulations did afford sex offenders some sort of right to visitation—and they do not—a prison official's failure to abide by a procedural regulation does not, in and of itself, create a due process violation. "[T]o hold that a state violates the Due Process Clause every time it violates a state-created rule regulating the deprivation of a property [or liberty] interest would contravene the well recognized need for flexibility in the application of due process doctrine." *Riccio v. County of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. 1990). For that reason, it well-established that "the mere fact that a state agency violates its own procedures does not *ipso facto* mean that it has contravened federal due process requirements." *Garraghty v. Commonwealth of Va., Dep't of Corr.*, 52 F.3d 1274, 1285 (4th Cir. 1995) (internal quotation marks and citation omitted).

Desper begins his argument on this point by suggesting the wrong baseline—specifically, the fact that the previous policy had allowed in-person visitation with his minor daughter. See Desper Br. 40 (arguing "denial of visitation with his daughter after allowing him regular visitation with her for more than six years was both atypical and significant"). But the appropriate baseline for determining whether a condition is an atypical and significant hardship in relation to the ordinary incidents of prison life is not the prior policy. Nor is the appropriate baseline the policy as it pertains to non-sex offenders. "[L]ike any other inmate," Desper "can only be *deprived* of that to which he is entitled. Thus, in determining whether a deprivation imposes a significant or atypical hardship on him, the court must use as its benchmark the incidents of prison life to which he is entitled." *Prieto*, 780 F.3d at 254.

Here, the sex offender visitor policy applies to Desper because of his conviction of a sex offense involving a minor. As the benchmark for the incidents of prison life to which Desper is entitled, that policy's default is that sex offenders are *not* entitled to in-person visitation with

minors, see pp. 3–4, *supra*, and thus deprivation of in-person visitation is not significant or atypical for a sex offender like Desper.[12]

2. Desper received any process that was due

The previous Section explained that Desper's procedural due process claim fails because application of the VDOC sex offender visitation policy did not implicate any constitutionally protected liberty interest. But Desper's procedural due process claim also fails for a second, independent reason: VDOC's procedures satisfied any constitutional requirements that may have attached.

Courts assess the adequacy of the procedures by balancing three factors: (a) the private interest affected by the government action; (b) the risk of erroneous deprivation through the procedures used and the probable value, if any, of alternative or additional procedures; and (c) the State's interest, including the function involved and the fiscal and administrative burdens of added safeguards. See *Lovelace v. Lee*, 472 F.3d 174, 202 (4th Cir. 2006); *Mathews v. Eldridge*, 424 U.S. 319,

[12] Desper also errs in categorizing his experience as an "indefinite denial of a parent's visitation with his minor child." Desper Br. 40. This case simply involves Desper's inability to obtain an exemption under the sex offender visitation policy on two occasions. JA 11–12.

335 (1976). The policy challenged here sets forth a detailed procedure for a sex-offender to apply for an exemption and thus obtain in-person visitation privileges with a minor child. See JA 36–37.

Desper does not argue that the policy in and of itself is inadequate; instead, he faults the sex offender visitation committee for "den[ying] his exemption application without furnishing factual bases for its determination." Desper Br. 42. But nothing in the policy requires officials to furnish sex-offenders with a reason for not granting sex offenders an exemption to the policy. And although Desper repeatedly asserts that the denial of his applications was "arbitrary," the complaint contains no plausible factual basis to support that assertion. To the contrary, as the district court pointed out, Desper himself "submit[ted] evidence indicating that he has had extensive mental health issues," JA 278,[13] and the dates of Desper's convictions reflect that Desper was still

[13] See, *e.g.*, JA 53 (Desper asserting that he has the same mental incapacity as his victim [who was 18-years-old, but had the mental capacity of an eight-year-old child]); *id.* (noting "I've been signed to take thinking for a change for a couple year[s] but they haven't put me in there yet"); JA 57 (child protective order to protect Desper's daughter from Desper and Ann Marie Desper); JA 56 (noting Desper participated in a psychological evaluation that "did not offer a particularly optimistic prognosis of [his] ability effectively to parent this child").

on probation for his indecent liberties offense when he raped a teenager with mental incapacities. JA 73; see also note 1, *supra*.

B. Substantive due process

In *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999), this Court explained that the substantive due process analysis differs depending on whether the challenged action is executive or legislative. If executive, the "threshold question whether that act was, under the circumstances, 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id.* at 741 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). If the challenged action was legislative, the Court asks "whether the claimed violation was to one of 'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.'" *Hawkins*, 195 F.3d at 747 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

Desper does not specify whether he believes the sex offender visitation committee's denial of an exemption to Desper was an executive or legislative action. Instead, he suggests he experienced a violation of his substantive due process rights under either theory. See Desper Br. 32 (asserting the bar on visitation was "arbitrary" and

"threatened his fundamental and carefully described parent-child liberty interest"). Those arguments are without merit.

1. As discussed in Part II(A)(1), *supra*, Desper has not demonstrated a deprivation of a constitutionally protected liberty interest in in-person visitation with his daughter. Any substantive due process theory premised on a legislative action thus fails.

2. Desper likewise does not establish that twice declining his application for an exemption to the sex offender visitation policy "shocks-the-conscience" under an executive action theory.

The shocks-the-conscience test "derives ultimately from the touchstone of due process which is protection of the individual against arbitrary action of government." *Hawkins*, 195 F.3d at 742 (internal quotation marks, alteration, and citations omitted). Desper's two-levels-of-hearsay allegation that his mother spoke to someone from VDOC who "said that there was no specific reason why the visitation was disapproved," JA 300, does not establish that the committee's decision to not grant Desper an exemption was arbitrary in the constitutional sense. See *Rucker v. Harford Cnty., Md.*, 946 F.2d 278, 281 (4th Cir. 1991) ("residual protections of 'substantive due process' . . . run only to

state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.").[14]

In any event, even had Desper established a constitutionally "arbitrary" denial, he must show conduct "intended to injure in some way *unjustifiable by any government interest.*" *Hawkins*, 195 F.3d at 742. Desper points to nothing showing that the sex offender visitation committee intended to injure Desper in any way at all (let alone in a way unjustified by Desper's history of mental health problems, see Part II(A)(2), *supra*, or by Desper's multiple offenses involving teenagers). Nor does he establish that such action is unjustified by the government interest in protecting children. See Part I, *supra*.

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[14] Accepting Desper's argument that the district court necessarily erred in granting the motion to dismiss because VDOC's reason for denying Desper an exemption under the policy is not "apparent from the pleadings," Desper Br. 33, would allow an inmate to avoid a motion to dismiss by strategically leaving out the committee's reason for denying an exemption from the pleadings. And Desper's comparison to escape related offenses, see *id.*, is unhelpful because the concern underlying the policy is not that sex offenders with a history of sexually abusing children are more likely to escape when they visit with children. The concern is that sex offenders with a history of sexually abusing children may sexually abuse a child during an in-person visit.

To the extent Desper claims that the sex offender visitation committee should have specified the reason for denying Desper an exemption, Desper Br. 31, such conduct is certainly not "more blameworthy than simple negligence, which never can support a claim of substantive due process violation by executive act," *Hawkins*, 195 F.3d at 742. As in *Hawkins*, nothing in the sex offender visitation committee's denial of an exemption to Desper "suggests any element of vindictiveness or of power exercised simply to oppress." *Id.* at 746.

Finally, this case should not be a vehicle to expand the concept of substantive due process to encompass a sex offender's right to in-person visitation with minors. Both this Court and the Supreme Court have cautioned courts to be "reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended" "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of judges." *Hawkins*, 195 F.3d at 738 (quoting *Glucksberg*, 521 U.S. at 720).

III. Denying Desper an exemption did not violate Desper's equal protection rights

The Equal Protection Clause "does not forbid classifications. It simply keeps governmental decision[-]makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). For that reason, "[t]o succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). "Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.* "[W]hile a prisoner does not forfeit his constitutional right to equal protection by the fact he has been convicted of a crime and imprisoned, prisoner claims under the equal protection clause . . . must still be analyzed in light of the special security and management concerns in the prison system." *Id.* at 655.

Desper's equal protection claim fails for three reasons: (1) Desper has not shown that he was "treated differently from others with whom he is similarly situated," *Morrison*, 239 F.3d at 654; (2) Desper failed to

show that any "unequal treatment was the result of intentional or purposeful discrimination," *id.*; and (3) the sex offender visitation committee's decision to deny Desper an exemption survives rational basis review.

1. Desper does not deny that he was subject to the same policies as every other sex offender who committed crimes against a minor. Instead, Desper alleges "[h]e was denied visitation with his daughter because he is a convicted sex offender, while other sex offenders get to visit with their minor children and, *on information and belief* some have similar or worse criminal histor[ies] than Mr. Desper." JA 290 (emphasis added).

That allegation does not establish that Desper was treated differently than similarly situated offenders. Even accepting that Desper's proposed comparators had "similar or worse criminal histor[ies] than Desper," JA 290, that is insufficient to make them "similarly situated" for equal protection purposes because Desper alleged nothing about those offender's mental health evaluations. And the mere fact that some convicted sex offenders have been permitted visitation with minors does not, in and of itself, establish disparate

treatment. See *Stojanovic v. Humphreys*, 309 Fed. Appx. 48, 52 (7th Cir. 2009) (rejecting equal protection claim when sex offender who was denied visitation with daughter and niece alleged he was treated differently than other sex offender because he did "not present[] any evidence of the specific crimes the other inmate committed or of that inmate's treatment history" and thus the plaintiff sex offender had "no triable case that the alleged unequal treatment was unrelated to the prison's interests in the security of the facility, visitor safety, and the prisoners' rehabilitation").

2. In any event, to prove that VDOC's sex offender visitation policy "has been administered or enforced discriminatorily, and so violates equal protection rights, [Desper] must show *more* than the fact that a benefit was denied to one person while conferred on another." *Townes v. Jarvis*, 577 F.3d 543, 552 (4th Cir. 2009) (internal quotation marks, citations, and alteration omitted) (emphasis added). Instead, Desper "must *also* allege that the state *intended* to discriminate against him." *Id.* (emphasis added).

Here, there is no well-pled allegation that any differential treatment "was the result of intentional or purposeful discrimination."

Morrison, 239 F.3d at 654. To the contrary, Desper's own filings reflect his struggles with mental health, see note 13, *supra*, which explain why the sex offender visitation committee would be concerned about Desper being granted an exemption to the sex offender visitation policy.

3. Desper's equal protection claim fails for a third reason: the decision to grant some sex offenders an exemption to the sex offender visitation policy while denying Desper that exemption survives rational basis review. Courts "generally presume[]" that a statute or regulation "is valid and will reject the challenge if the classification drawn by the statute is rationally related to a legitimate state interest." *Kolbe v. Hogan*, 849 F.3d 114, 146 (4th Cir. 2017) (en banc) (internal quotation marks and citation omitted). Under the rational basis standard, an equal protection claim fails "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Here, a "reasonably conceivable state of facts" providing a rational basis for granting some sex offenders an exemption while not granting Desper an exemption is that Desper's mental health evaluations reflected concerns that were not reflected in the other offenders' mental

health evaluations. Another "reasonably conceivable state of facts" that explains a difference in treatment is that the sex offenders who received the exemption did not have a history of mental health struggles similar to Desper.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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ADDENDUM

Examples of State policies restricting visits between minors and incarcerated sex offenders

1. **Pennsylvania**—Pa. DC-ADM 812(A)(4) provides:

> Any inmate who, as an adult or as a young adult offender, was ever convicted or adjudicated for a physical or sexual offense against a minor is prohibited from having a contact visit with any minor child. The Facility Manager may grant contact visits for such an inmate under special circumstances.

Pa. DC-ADM 812(A)(4) (Sept. 27, 2018), https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/812%20Inmate%20Visiting%20Privileges.pdf.

2. **Iowa**—Iowa Admin. Code r. 201-20.3(904)(4)(d) provides:

> A sex offender whose victim was a minor shall not be permitted to have any children on the incarcerated individual's visiting list until the incarcerated individual has completed the sex offender treatment program. After the incarcerated individual's completion of the treatment program, a minor victim of the incarcerated individual may be added to the incarcerated individual's visiting list only with the approval of the institutional treatment team and the victim and restorative justice administrator of the department.

Iowa Admin. Code r. 201-20.3(904)(4)(d).

3. **Texas**—Texas Department of Corrections Reference BP-03.85, Rule 3.1.2 provides in relevant part:

> An offender convicted and sentenced for current or prior crimes involving sexual offenses against children or offenses causing bodily injury to a child, during which the child victim was under the age of 17, is restricted from having contact visits with children under the age of 17. The offender may have a general visit with a child under the age of 17, only if the offender is the legally recognized parent of the

child and the child was not the victim of the sexual offense or bodily injury.

Tex. Dep't. of Criminal Justice, Offender Rules and Regulations for Visitation, Board Policy 03.85, Rule 3.1.2 (Nov. 2015), https://www.tdcj.texas.gov/documents/cid/Offender_Rules_and_Regulations_for_Visitation_English.pdf.

4. **Indiana**—Indiana Department of Corrections Rule XXI provides:

> Male and female offenders who have a current or prior sex offense adjudication and/or conviction involving a minor may be restricted from receiving visits from minors (i.e. persons under the age of 18 years of age excluding spouses who are not the offender's victim).

Ind. Dep't of Corr., Rule XXI (Oct. 1, 2016), https://www.in.gov/idoc/files/02-01-102-AP-Offender-Visitation-10-1-2016.pdf.

5. **Tennessee**—Tennessee Department of Corrections Policy Number 507.01 § VI(C)(1) provides:

> An offender with a current or previous conviction for a crime involving a sexual offense against a minor is restricted from having contact visits with children under the age of 18, except under [certain] guidelines[.]

Tenn. DOC Policy Number 507.01 § VI(C)(1) (May 15, 2020), https://www.tn.gov/content/dam/tn/correction/documents/507-01.pdf.

6. **New Hampshire**—New Hampshire Department of Corrections policy provides in relevant part:

> Contact with victims and visitation with minors is prohibited while in the [New Hampshire Department of Corrections' Sexual Offender Program] unless authorized by the treatment team.

N.H. Dep't of Corr., Time in Prison: Community Safety Opportunity for Change at 15, https://www.nh.gov/nhdoc/divisions/victim/documents/timeinprison.pdf.

STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellees agree that oral argument may aid in the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with Fed. R. App. P. 32(a)(7)(B), because it contains 9,311 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ *Michelle S. Kallen*

Michelle S. Kallen

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2020, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Michelle S. Kallen*

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