CASE No. S23A0022 & S23A0023

IN THE

Supreme Court of Georgia

STATE OF GEORGIA

DERRICK LAMON SESSION,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Brief of Appellant Derrick Lamon Session

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JURISDICTIONAL STATEMENT

As a direct appeal from felony convictions involving a novel constitutional challenge to a Georgia statute, jurisdiction lies with this Court. Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1). Pursuant to Rule 19 of this Court, Session raised specific constitutional challenges via demurrer, argued them extensively in the trial, and obtained an adverse ruling on the grounds. V1.25-30; V2.34-35.

JUDGMENT APPEALED

This is Derrick Session's direct appeal of his convictions for Failure to Register as a Sex Offender. He was convicted at a bench trial on July 5, 2022, and timely filed his notice of appeal on August 1, 2022.

STATEMENT OF FACTS

Arising from a stipulated bench trial, the facts are straightforward. See V1.44-45. Derrick Session was born on March 1, 1978. On March 3, 1994, the Grand Jury for Franklin Parish, Louisiana, indicted Session for Aggravated Rape of four-year-old juvenile L.M.R. on January 14, 1994. Over a year later, on June 6, 1995, Session amended his plea of not guilty to guilty to Sexual Battery under R.S. 43:1. After accepting Session's plea, the trial court scheduled sentencing for August 15, and at that date, the trial court sentenced Session to ten years to serve at hard labor. After successfully completing his sentence, Session qualified for and received a first-offender pardon on January 19, 2004, pursuant to R.S. 15:572.

After moving to Paulding County from Texas on April 4, 2017, Session

registered with the Paulding County Sheriff's Office. On March 1, 2019, Session completed his Paulding County Sheriff's Office Georgia Sex Offender Registration Form, listing an address in Dallas, Georgia. On March 12, 2019, a detective with the Paulding Sheriff's Office conducted a residence check at the provided address, and was told that Session was not living there. Session had moved to a new address in Kennesaw and had not updated his Registry information. Session was arrested on March 12, for Failure to Register. (Case no. S23A0022.)

On March 4, 2020, Session came to the Paulding County Sheriff's Office to re-update. Because he did not update 72 hours prior to his birthday, Session was arrested on another Failure to Register charge. (Case no. S23A0023.)

After indictment, arraignment, and discovery, Session filed a general demurrer/plea-in-bar on May 10, 2022. V1.25-30. Upon agreement by the parties, the State and Session entered into a bench trial on stipulated facts, whereupon Session argued the grounds in his demurrer. See V2. The trial court denied Session's demurrers, including the constitutional arguments, and based on the record before it, convicted Session on all counts. V2.35. The Court imposed an aggregate sentence of 20-do-5 on Session's two cases, with the serve time suspended upon Session's payment of a $6,000 fine within six months of sentencing. V2.40. From the conviction, Session timely appealed. V1.1.

ENUMERATION OF ERRORS

1. **The Trial Court Erred in Convicting Session because the Registry Statute did not Apply to Him.**[1]

2. **The Trial Court Erred in Convicting Session because the Registry Violates the Fourteenth Amendment as Applied to Him.**[2]

3. **The Sex Offender Registry Violates the Georgia Constitution's Expanded Protection Prohibiting Legislation Regulating Social Status.**[3]

ARGUMENT

Derrick Session is not required to register in Georgia. The Registry statute, O.C.G.A. §42-1-12 ["Registry"], does not apply to Session as a statutory matter because he was not under sentence when he entered Georgia, and because he qualified for the misdemeanor exception. Alternatively, Session is nevertheless not required to register because his registration violates his right to travel and to equal protection. Finally, Session's convictions should be reversed because as applied to him, the Registry violates Georgia's social-status-of-citizen constitutional provision.

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[1] Preserved as a matter of law, see O.C.G.A. §5-6-36(a).

[2] Preserved through filing, arguing, and obtaining adverse ruling on general demurrer specifically raising constitutional argument. See V1.28-29; V2.16-18, 34-35.

[3] Preserved through filing, arguing, and obtaining adverse ruling on general demurrer specifically raising constitutional argument. See V1.29; V2.19-20, 35.

1. The Trial Court Erred in Convicting Session because the Registry Statute did not Apply to Him.

Session is not required to register because his Louisiana registration requirement ended before he moved to Georgia. Moreover, because the crime to which he pled guilty in Louisiana would constitute a misdemeanor in Georgia, the misdemeanor exception applies to Session.

(a) The Registry requires comparing the foreign conviction's elements with similar Georgia statutes in effect at the time of the crime.

To determine whether the foreign conviction qualifies someone for registration in Georgia, courts start with the text itself. More specifically, courts focus on the foreign crime's elements—"conduct, mental fault, plus attendant circumstances and specified result when required by the definition of a crime"—rather than "any underlying or 'brute' facts that were not necessarily resolved by the entry of [a] plea." *Daddario v. State*, 307 Ga. 179, 185 (2019) (citation omitted); *Nordahl v. State*, 306 Ga. 15, 22 n.12 (2019). This comes from the Registry statute itself, which focuses its requirements on those people with "convictions" arising from the commission of any "offense under [Georgia law] or any *offense* under" federal law or another state's. O.C.G.A. §42-1-12(a)(9)(A) (emphasis supplied). As this Court has said, a statute's discussion of "convictions" for "crimes," with no mention of "conduct," indicates the intent to employ an elements-only approach. *Nordahl*, 306 Ga. at 19.

That the legislature explicitly focused on the "same or similar elements" for dangerous sexual offenses does not contradict this, either, since the legislature explicitly identified the Georgia offenses that constitute dangerous sexual offenses. See O.C.G.A. §42-1-12(a)(10)(A). The alternative would create an ambiguity, wherein someone convicted in another jurisdiction with different names for the crimes could avoid registration. See, e.g., Miss. Code Ann. §97-3-71 (criminalizing "an assault with intent to forcibly ravish any female of previous chaste character"); O.C.G.A. §42-1-12(a)(10)(A)(i) (listing Aggravated Assault with Intent to Rape as dangerous sexual offense). For criminal offenses against minor victims, however, the General Assembly identified seven categories of crimes that warrant registration in Georgia, so that the Registry has plenty of options for element comparison. Thus, the Registry statute requires comparing elements to enumerated categories.

Having answered "what," now comes the "when." Generally, courts interpret criminal statutes according to its terms at the time of the crime. *Fleming v. State*, 271 Ga. 587, 589 (1999). So when comparing a foreign statute to a Georgia analog, courts are to examine the foreign statute's elements in light of Georgia law at the time of the crime's occurrence. See *State v. Kuntz*, 100 P.3d 26, 28 n.2 (Ariz. App. 2004). To hold otherwise would run the risk of a foreign legislature subsequently expanding or contracting the predicate statute's reach, thereby not only engineering possible non-delegation concerns, but also creating the risk of unintended criminal

liability for those in Georgia. But see *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022) ("The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'") (quoting *The Federalist* no. 39, p.245 (C. Rossiter ed. 1961) (J. Madison)). Accordingly, courts focus on the Georgia law at the time of the predicate offense's occurrence.

(b) Statutorily, the Registry does not apply to Session because his Louisiana registration requirement had ended and his conviction would be a misdemeanor in Georgia.

The Registry does not require Derrick Session to register in Georgia for two reasons. First, Louisiana no longer required Session to register when he moved to Georgia. Second, Session's predicate offense, Sexual Battery, is a misdemeanor in Georgia, thereby falling within the misdemeanor exception.

(i) Session's registration requirement lifted in 2014.

As the State argued in the trial court, it claims Session must register because Louisiana required him to register. This misunderstands Louisiana law, which ended Session's registration requirement ten years after his sentence completed. As a result, Session was not "required to register under…the laws of another state" because Louisiana did not require him to do so anymore. O.C.G.A. §42-1-12 (e)(6).

Enacted in 1992, Louisiana's Registry initially required those within its purview to register for ten years after the date of conviction or release from custody, whichever was later. See 1992 La. Acts, No. 388; La. Rev. Stat. 15:544(A) (1992)

("L.R.S."). Sexual battery qualified for registration, and a convicted sex offender's "duty to register and give notice terminate[d] at the expiration of ten years" from first registering. L.R.S. 15:542(E) (1992); see L.R.S. 15:542(E) (1992) (including L.R.S. 14:43.1 (sexual battery) as a registrable offense). Upon his sentence's completion in 2004, then, Session's ten-year clock started ticking, ending in 2014. By the time he moved to Georgia, Session was not required to register in Louisiana anymore because ten years had passed, Session was registered, and he had not "again become subject to" it during that time. L.R.S. 15:544(A) (1992).

Against this, two possible arguments emerge: First, that Louisiana now requires more than ten years on the registry for Session's offense; and second, that even though Session may have completed his Louisiana time, Texas required him to register, so Session had to register upon arriving in Georgia. Neither persuades.

First, the fact that Louisiana extended the Registry's length-of-time requirement does not automatically mean it applies to Session. True, the Louisiana Legislature in 2007 extended registration requirements for those convicted of Sexual Battery from ten years to fifteen. See 2007 La. Acts, No. 460, §2; L.R.S. 15:544(A) (1992) . But as recognized by the State's own authority, V2.27-28, in Louisiana, "the requirements of registration and notification are an essential part of a convicted sex offender's sentence." *State v. Moore*, 847 So.2d 53, 58 (La. Ct. App. 2003). Just as legislatures cannot revive cases already extinguished by the applicable statute of

limitations, so too are they barred from extending someone's sentence after the crime's occurrence. See *Stogner v. California*, 539 U.S. 607 (2003) (holding States violate Ex Post Facto Clause, U.S. CONST., Art. I, §10, cl.1, when they revive an already time-barred prosecution through extending statutes of limitation).

Second, the fact that Texas would require continued registration of Session does not extend Session's registration requirement in Georgia. Admittedly, the fact that Session was emigrating from Texas to Georgia, and Texas required him to register, would seem to count as a "nonresident who changes residence from another state…to Georgia who is required to register as a sexual offender under…the laws of another state[.]" O.C.G.A. §42-1-12(e)(6). But Georgia courts read statutory text in context, not isolation, *Deal v. Coleman*, 294 Ga. 170, 172 (2013); that context helps resolve the ambiguity. Sub-section (e)(6) discusses the situation when someone required to register in another state moves to Georgia; the second clause, however, helps ground the "laws of another state" language to the convicting State's laws. If someone committed a registrable offense in Georgia, leaves, and hopes to return, it does not matter if Texas, New York, California, or Florida would not require registration. The convicting state's laws control.

Buttressing this construction is the absurdity canon, which requires courts to consider "the results and consequences of any proposed construction and not so construe a statute as will result in unreasonable or absurd consequences not

contemplated by the legislature." *Staley v. State*, 284 Ga. 873, 873-74 (2009) (citation omitted). Here we have two options: either the convicting state's laws control, or the emigrating state's laws do. The second route, however, would adopt a construction that would mean that regardless of the convicting State's laws—regardless of Georgia law, even—if "the laws of another state" require registration, the person has to register, even though the other state has no claim on the person anymore, if ever. But as this Court recognized just after the second World War, "[t]he political jurisdiction of a State does not extend beyond its territorial limits[.]" *Davis v. Penn Mut. Life Ins. Co.*, 201 Ga. 821, 829 (1947). Even though some State would require Session to register does not mean he must register in Georgia. If the *convicting state* required registration, that follows the registrant.

(ii) The Georgia analog of Session's crime does not require registration under lenity principles.

Not only was Session not required to register by Louisiana when he arrived in Georgia, he did not qualify for registration under the Georgia statute because the Georgia analog for his crime is a misdemeanor. As in all criminal cases in Georgia, the issue revolves around the Registry's text. While generally courts interpret statutory language according to its ordinary meaning, where, as here, "a term is specifically defined in a law, we must apply that definition." *Interest of T.B.*, 313 Ga. 846, 853 (2022) (citation omitted).

By its terms, the Registry imposes its obligations upon eight classes of people,

the sixth of which the State claims applies to Session: someone not living in Georgia who moves here "who is required to register as a sexual offender under federal law, military law, tribal law, or the laws of another state or territory or who has been convicted in this state of a criminal offense against a victim who is a minor or any dangerous sexual offense[.]" O.C.G.A. §42-1-12(e)(6). "Sexual offender" is also defined as someone who has been convicted "under the laws of another state…of a criminal offense against a victim who is a minor." O.C.G.A. §42-1-12(a)(20)(B). With respect to convictions like Session's which occurred before July 2001, a "criminal offense against a victim who is a minor" includes "any criminal offense under [Georgia law] or any offense under federal law or the laws of another state or territory of the United States" which meets one of seven categories of crimes. O.C.G.A. §42-1-12(a)(9)(A). Critical to this case, however, is that "a conviction for a misdemeanor shall not be considered a criminal offense against a victim who is a minor," an exception which appeared to this Court "to be without limitation." *Id.* at (a)(9)(C); *Owens v. Urbina*, 296 Ga. 256, 258 (2014). This matters because courts generally construe criminal statutes narrowly, while any "exceptions to those statutes must be construed broadly." *N.L.R.B. v. Okla. Fixture Co.*, 332 F.3d 1284, 1287 n.5 (10th Cir. 2003) (en banc) (citing *United States v. Bass*, 404 U.S. 336 (1971)). Cf. *Riley v. State*, 305 Ga. 163, 167 (2019) (discussing in statute-of-limitations context the rule that "criminal limitations statutes are to be liberally

construed in favor of repose.") (citation omitted); *State v. Mills*, 268 Ga. 873, 874 (1998) (recognizing "the principle that criminal statutes must be strictly construed against the State and liberally in favor of human liberty.") (citation omitted).

As alleged in the indictments, the State contends Session must register based upon his 1995 conviction for Sexual Battery in Louisiana. At the time of the offense, Sexual Battery in Louisiana was defined as "the intentional engaging in any of the following acts…where the offender acts without the consent of the victim, or where the other person has not yet attained fifteen years of age and is at least three years younger than the offender: (1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender[.]" L.R.S. 14:43.1(A) (1991). From this emerges three specific elements: an *actus reus* of touching the victim's anus or genitals by the offender using any body part, a *mens rea* of general intent, and the attendant circumstance of lack of consent from someone able to do so. See *State in Interest of C.W.*, 541 So.2d 419, 421 (La. Ct. App. 1989) (discussing elements of sexual battery). The Louisiana statute mirrors Georgia's Sexual Battery provision, which criminalized anyone who "intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person." O.C.G.A. §16-6-22.1(b) (1990); see *id.* at (a) (1990) (defining "intimate parts" to include both anus and genitals). The two statutes require the same conduct (touching the "intimate parts"/"anus or genitals" of another), the

same general intent, and the same attendant circumstance of lack of consent. The only difference between the two is that while Louisiana thought Sexual Battery a crime punishable by "not more than ten years," Georgia thought it more a misdemeanor. L.R.S. 14:43.1(C) (1991); O.C.G.A. §16-6-22.1(c) (1990).[4]

When conduct is registrable because of felony status in one state, but misdemeanor status in the other, which determination controls? This Court has not said, so we turn to the statute. The Registry contains only two exemptions: "a conviction for a misdemeanor…and conduct which is adjudicated in juvenile court" do not trigger the Registry. O.C.G.A. §42-1-12(a)(9)(C). Session was not adjudicated in juvenile court, so the crux rests on whether Session has "a conviction for a misdemeanor" or not.

While the Registry defines "conviction," it does not define felony or misdemeanor. Title 16 does, however, define the two: a "felony" is "a crime punishable by death, by imprisonment for life, or by imprisonment for more than 12 months," while a "misdemeanor" is "any crime other than a felony." O.C.G.A. §16-1-3(5, 9). With plain language such as this, it seems apparent that Session had a conviction for a felony, not a misdemeanor, given the ten-year sentence. But this ignores the principle of law that criminal statutes "must be strictly construed against

[4] Because Sexual Battery against a Child Under 16 did not enter Georgia law until 2003, see Ga. L. 2003, Act 216, §1.1, Session's conduct cannot match to a statute not in existence at the crime's occurrence.

the State and liberally in favor of human liberty." *Mills*, 268 Ga. at 874 (citing *Knight v. State*, 243 Ga. 770, 775 (1979)).

Two possible constructions exist: either a conviction is for a misdemeanor is dependent upon the convicting state, or the receiving state's definitions control. The problem with both is that the misdemeanor exception is ambiguous, fatally so. Either option creates differential treatment by engineering situations where a similarly-situated person could be treated differently, based on the discrepancy between convicting and receiving state definitions.[5] This Court can avoid these constitutional concerns, however, by applying Lenity to hold that a misdemeanor conviction is one defined as a misdemeanor in either the convicting *or* receiving state. Adopting any alternative not only invites grave constitutional concerns, it flouts the well-settled principle that "[w]here the text of a law mandates punishment for the defendant's conduct in terms an ordinary person can understand, a court's job is to apply it as written. But where uncertainty exists, the law gives way to liberty." *Wooden v. United States*, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in judgment) (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)).

Against this, Session anticipates the State to respond that Session's conduct more accurately fits Child Molestation, not Sexual Battery, prompting registration. The State argued this position at the trial court, basing its conclusion on the fact that

[5] See Part 2(b), *infra*.

"Louisiana does not have a child molestation statute," as well as the sentencing judge's comments, V2.24—a point on which the trial court agreed with the State. V2.32. One problem: this is an incorrect statement of Louisiana law.

For starters, Louisiana not only has a child molestation statute, they have two different kinds: Molestation of a Juvenile and Indecent Behavior with a Juvenile. See L.R.S. 14:81 (1995); L.R.S. 14:81.2 (1995). While the former required the actor to utilize coercive means and the latter did not, both required the commission of "any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen…with the intention of arousing or gratifying the sexual desires of either person." *Id.* The only difference between Louisiana's Indecent Behavior with a Juvenile and Georgia's Child Molestation is that Louisiana's required that the offender be "over the age of seventeen" at the time of the crime, which Session was not. R.S. 14:81(A) (1995).[6] So even though the Georgia prosecutor and Georgia judge thought Session's crime was Child Molestation, the State of Louisiana disagrees, as shown by the Louisiana Court of Appeals holding that Sexual Battery and Indecent Liberties with a Juvenile were *not* identical the same year Session plead. See *State v. Taylor*, 663 So.2d 336, 339 (La. Ct. App. 1995). Since Session did not plead to that crime, the State and trial court were wrong.

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[6] The Louisiana Legislature would eliminate the age requirement in 1997, see 1997 La. Acts, No. 743, §1.

More fundamentally, grave concerns arise when prosecutors and judges look at a decades-old conviction and determine that what happened does not matter based solely on their disagreement with the outcome. Beyond the general alarm at such a proposition, specific cases like this demonstrate precisely why hindsight has no place. The State and the trial court both concluded that Session must register because his conduct was analogous to Child Molestation, despite Louisiana law not only providing for a Child Molestation analog, but also *explicitly saying the two were not equivalent*. Trying to determine what prompted the Louisiana prosecutor to reduce the charge is a fool's errand on this record; we know nothing about the strength of the State's evidence, about any legal issues that could trigger reversal, about anything at all that factored into the calculus. Trying to divine the prosecutor's reasons in this case is as fruitful an effort as attempting to understand a jury's inconsistent verdict.

Construing the misdemeanor exception broadly in favor of human liberty, the Registry statute does not apply to Session because his conduct was a misdemeanor in Georgia. Thus, his convictions should be reversed.

2. The Trial Court Erred in Convicting Session because the Registry Violates the Fourteenth Amendment as applied to Him.

If the Registry statute applies to Session, then the Registry is unconstitutional. By imposing disabilities on Session that someone who committed the same crime in Georgia would not receive, the Registry violates Session's right to be treated the

same as native Georgians. Additionally, the Registry violates Session's equal protection rights by treating him differently from a similarly-situated person convicted of the same offense in Georgia.

The Fourteenth Amendment demands that States cannot "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State…deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV §1. The Privileges or Immunities Clause protects the "right to travel," included in which is "the right of a citizen of one State to enter and to leave another State…, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Similarly, equal protection mandates freedom from "arbitrary government classification" by requiring that the law treat similarly situated persons alike. *Nicely v. State*, 291 Ga. 788, 792 (2012) (citation omitted). Though closely intertwined, Session's Privileges or Immunities argument and Equal Protection argument remain distinct: "Equal protection and right to travel claims require independent analyses—even when the basis for the claims is identical." *Hope v. Comm'r, Ind. Dep't of Corr.*, 9 F.4th 513, 528 (7th Cir. 2021) (en banc) ("*Hope II*"). For right-to-travel claims are subject to strict-scrutiny review, meaning the "government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Carson v. Makin*, 142 S. Ct. 1987,

1997 (2022) (citations and quotation marks omitted); see *Saenz*, 526 U.S. at 504 ("Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens"). Equal protection, on the other hand, requires only a rational basis, meaning the challenged law must be "rationally related to a legitimate state interest." *Nicely*, 291 Ga. at 792.

(a) As applied to Session, the Registry violates his right to travel.

The Registry imposes disabilities on Session for a conviction that, if occurring simultaneously in Georgia, would not require registration. The only reason for the differential treatment is because Louisiana punished Session for a felony, even though the same crime in Georgia at the time was only a high and aggravated misdemeanor. "But since the right to travel embraces the citizen's right to be treated equally in h[is] new State of residence," the Registry violates the Privileges or Immunities Clause as applied to Session.

The Registry imposes its obligations on those convicted of a criminal offense against a minor victim, a dangerous sexual offense, or those required to register under O.C.G.A. §42-1-12(e). O.C.G.A. §42-1-12(a)(20). Sub-section (e) details eight types of people who must register; the State claims Session falls into the sixth. If you are required to register as a sexual offender under the laws of another state, you must register. If you were convicted of a registrable offense in this State, you

must register. But the statute is silent about what to do when the person is coming from a state that would require registration for an offense on which Georgia would not. Therein lies the rub.

Consider Session's Georgia doppelganger, Adam. Born in Georgia in 1978, Adam was arrested at 15 for Rape, but pleaded guilty to Sexual Battery in 1995, served his sentence, and completed it. Identical to Session except to state of conviction. Under Georgia law, Adam would not have to register. Thus, someone who committed the same acts, pled guilty to the same crime, but did so in Georgia would not be saddled with registration—even if they moved to a jurisdiction requiring registration and then moved back to Georgia. See O.C.G.A. §42-1-12(e)(6); *State v. Davis*, 303 Ga. 684, 690-93 (2018) (finding registration "is a legal consequence of the underlying criminal offense and a disability imposed by law"). Simply put, the Registry assigns different obligations to Georgians "based not on what they have done but where they have been. It is relying on another state's handling of a particular criminal history to determine how that individual will be treated in [Georgia]." *Hope II*, 9 F.4th at 536 (Rovner, J., dissenting).

This is *precisely* what the Privileges or Immunities Clause says cannot happen: "the very sort of multi-tiered state citizenship that the [U.S.] Supreme Court's right-to-travel cases prohibit." *Hope v. Comm'r, Ind. Dep't of Corr.*, 984 F.3d 532, 546 (7th Cir.), vacated on re-hearing en banc, op. vacated, 9 F.3d 513 (7th

Cir. 2021) ("*Hope I*"). By delegating the registration decision to another state, the Georgia Registry discriminates against all those convicted elsewhere for offenses not registrable in Georgia. Of course, no one disagrees that the General Assembly has a compelling interest in protecting Georgians from sex offenses. Yet to satisfy strict scrutiny, the State must demonstrate that the means it employs to vindicate that interest are not only "necessary," but "narrowly tailored" to achieving that interest. How can "singling out only newer citizens with a history of sex offenses to the exclusion of more longstanding citizens with the same criminal history" further that interest? *Hope I*, 984 F.3d at 547. Simple: it cannot. The Registry discriminates against Session because he committed a crime in Louisiana, not Georgia. But residence at the time of the crime's commission "is a wholly arbitrary basis on which to distinguish among present [Georgia] registrants[.]" *Williams v. Vermont*, 472 U.S. 14, 23 (1985). If the Registry imposes disabilities upon Session that the fictitious Meeting would not, and States cannot "favor established residents over new residents based on the view that the State may take care of 'its own,'" then the Registry violates Session's right to travel. *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985). States can and do reach different conclusions on what triggers registration. The Constitution only bars them from applying "a different set of rules to a citizen who has relocated from a jurisdiction that answered the questions differently." *Hope II*, 9 F.4th at 545 (Rovner, J., dissenting).

(b) The Registry violates Session's equal protection rights

No rational basis exists for treating Session differently than a Georgian convicted of sexual battery. Similar though analytically distinct from the Privileges or Immunities Clause analysis,[7] equal protection challenges in criminal statutes require a two-step inquiry. First, the challenger bears the burden of demonstrating their similarity to another person in the class that receive different treatment. *State v. Holland*, 308 Ga. 412, 415-16 (2020). If met, then the claimant must prove the law bears no rational basis, meaning it is not "based on rational distinctions and bears [no] direct and real relation to the legitimate object or purpose of the legislation." *Love v. State*, 271 Ga. 398, 400 (2) (1999) (citation and punctuation omitted).

(i) Session is similarly situated to other persons convicted of sexual battery in 1995.

Session meets the first step because he is similarly situated to the class of persons convicted of sexual battery in 1995. Generally under Georgia law, "criminal defendants are similarly situated if they are charged with the same crime." *Holland*, 308 Ga. at 416 (emphasis deleted; citation omitted). Here, the issue is not that Session is being treated dissimilarly from people charged with Failure to Register, but rather that Session is being treated dissimilarly from people with the same predicate offense as he who need not register in Georgia.

[7] See *Hope II*, 9 F.3d at 528 (explaining different analyses).

If someone from another state moves to Georgia and they have a qualifying foreign conviction, they must register. O.C.G.A. §42-1-12(e)(6). But if someone commits an offense in Georgia, moves to another state that requires registration, but then moves *back* to Georgia, they only need to register if the Georgia crime constitutes a criminal offense against a minor victim. *Ibid.* Thus, the statute distinguishes between persons with foreign convictions versus domestic. The very fact that Session is *not* similarly situated to other people in Georgia convicted of Sexual Battery in 1995 is the equal protection issue: he is charged for a crime that a Georgian would not be.

(ii) The Registry's means are not rationally related to achieving its legitimate goal.

No rational basis supports the Registry's distinction. Importantly, Session is not contending the Registry lacks a legitimate end; it is plain beyond peradventure that sex offender registries have a valid purpose in society.[8] The issue is the means the Registry employs to achieve that purpose: designing a statutory scheme where

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[8] See, e.g., *Doe v. Penn. Bd. of Prob.& Parole*, 513 F.3d 95, 108 (3d Cir. 2008) ("We readily agree that [a state] protecting its citizens from sex offenses committed by repeat offenders is a legitimate state interest."); *Hope v. Comm'r, Ind. Dep't of Corr.*, No. 1:16-cv-02865-RLY-TAB, 2022 WL 2387633, *1 (S.D. Ind. May 31, 2022), appeal filed, No. 22-2150 (Jun. 30, 2022) ("*Hope III*") (noting that "Indiana's interest in protecting the public from high-recidivism-risk offenders is unquestionably legitimate"); *Hendricks v. Jones ex rel. State*, 349 P.3d 531, 536 (Okla. 2013) ("We find protecting its citizens from sex offenders is a legitimate state interest.")

someone who moves to Georgia would have to register for a crime that a native Georgian would not. And although rational basis is the most lenient level of review, it "does not ensure an automatic win." *Hope II*, 9 F.4th at 529 (en banc). While there are legitimate purposes to the Registry, the State must nevertheless guarantee the line drawn actually "bears a *direct relation*" to the legislation's purpose. *Ciak v. State*, 278 Ga. 27, 28 (2004) (emphasis supplied).

No such relation exists here to explain why a sexual batterer must register or not depending upon whether they were convicted in Georgia or elsewhere for the same offense. There is no issue here "about the enforceability of another state's judgment or the comity that [Georgia] must afford that judgment," since Session's sentence expired years ago. *Hope II*, 9 F.4th at 537 (Rovner, J., dissenting). The Registry's explicit purpose is to protect Georgians from the "extreme threat to public safety" sex offenders pose by requiring them to register "and that members of the community and the public be notified of a sexual offender's presence." Ga. L. 2006, Act 571, §1. See *Rodriguez v. State*, 284 Ga. 803, 804 (2009) ("There is no better source that such a legislative expression of an act's purpose [in the Act itself] to which a court may go for the purpose of finding the legislature's meaning of an act passed by it.") (citation and quotation marks omitted). How, though, can Session be an "extreme threat to public safety" while a similarly-situated Georgian is not?

This Court already rejected a similar distinction in *Ciak v. State*, 278 Ga. 27

(2004). There, Georgia's window-tint law distinguished between vehicles registered in Georgia versus elsewhere. Recognizing the legislative purpose of window tint laws rested in public safety, as well as the "self-evident" proposition that "non-residents can be as dangerous to police officers as residents," the *Ciak* Court saw "no rational connection between the residence of the driver of a vehicle and the goal of improving law enforcement officer safety during traffic stops." *Id.* at 28. Bearing no direct relation to the legislative purpose, this Court ruled the window-tint statute unconstitutional on equal protection grounds. *Id.* at 29.

The same analysis applies here. If the Registry's purpose is to protect the public from sex offenders, then saying Session must register but a Georgia sexual batterer does not is arbitrary. When Pennsylvania's registry gave in-state sex offenders a hearing to determine whether community notification was warranted, but did not give the same to out-of-state sex offenders, the Third Circuit readily struck down the distinction as violating equal protection. *Penn. Bd. of Prob. & Parole*, 513 F.3d at 112. When the City of Albuquerque created a municipal registry that treated registrants differently based on whether their predicate conviction was foreign or domestic, New Mexico's judiciary rejected it on equal protection grounds. *ACLU of N.M. v. City of Albuquerque*, 137 P.3d 1215, 1226-27 (N.M. App. 2006). And when confronted with its registry making the same in-state vs. out-of-state distinction, the Oklahoma Supreme Court struck it down. *Hendricks*, 349 P.3d at 536. To it,

discriminating between "categories of sex offenders based on factors such as type of offense and risk of recidivism is logical, whereas discrimination based on the jurisdiction in which the conviction occurred has no rational basis for protecting the public." *Hendricks*, 349 P.3d at 536. Even in *Hope III*, the District Court recognized the fact that "identical offenses happen to be committed in states with differing registration requirements does not change the fact that the offenders pose the same level of danger to [Georgians]. And protecting [Georgians], after all, is the whole point of the registration system." *Hope III*, (slip op.) at *9.

From this emerges a straightforward rule: Requiring someone to register for an out-of-state offense that, had they committed the same offense in Georgia would not require registration, violates equal protection. Consider just a few examples to illustrate how this rule makes sense:

- Delaware requires those juveniles adjudicated delinquent in Family Court register as sex offenders; Georgia does not.[9] A Delaware juvenile moves to Georgia. Must he register?
- Although Georgia's Romeo and Juliet laws create a four-year age window, Mississippi's is three.[10] A high school senior in Biloxi has sex with his freshman

[9] *Compare* 11 Del. C. §4123 (requiring registration for certain juveniles adjudicated for sex offenses) with O.C.G.A. §42-1-12(a)(9)(C), (a)(10)(C) (excluding "conduct which is adjudicated in juvenile court" from definition of criminal offense against a victim who is a minor and dangerous sexual offense).

[10] *Compare* O.C.G.A. §16-6-3(c) (within four years is a misdemeanor) with

girlfriend; he just turned eighteen, she almost fifteen, separated by three years and change. The senior is prosecuted and convicted of felony Statutory Rape. Upon moving to Georgia, does he have to register?

- Georgia's Indecent Exposure law aggravates to felony status upon the third or subsequent conviction, but California aggravates on the second or subsequent.[11] After a second conviction, a California man moves to Georgia. Must he register?

With only a few examples, the Registry's problem snaps into glaring focus. Georgia claims that first-time sexual batterers need not register because their predicate is not sufficiently serious to warrant monitoring. To justify this disparity by claiming it necessary to promote public safety not only demeans and disregards Equal Protection's plain mandate, it denigrates Georgia's status as a co-equal sovereign to Louisiana. That Louisiana thinks a crime warrants felony punishment is entirely its prerogative. Claiming that Louisiana's views better support the penological goal, so they should supersede Georgia's own, spits on Georgia's inviolable sovereignty.

Because the Registry's application to Session but not similarly-situated Georgians is not rationally related to the Registry's public safety goal, it violates equal protection.

Miss. Code Ann. §97-3-65(3)(a) (more than three years is a felony).

[11] *Compare* O.C.G.A. §16-6-8(c) with Cal. Pen. Code §314.

3. The Sex Offender Registry Violates the Georgia Constitution's Expanded Protection Prohibiting Legislation Regulating Social Status.

Georgia's constitution prohibits any legislation addressing the social status of a citizen. Historically a patently racist provision, this paragraph's meaning changed in 1983 when Georgia amended its equal protection clause. Interpreted in its new light, the constitutional prohibition aims to bar the State from legislatively condemning the least among us to second-class citizenship. Since the Sex Offender Registry—as applied to those who have already completed their sentences—effectively turns Georgians into outcasts, the Registry violates that prohibition.

From its self-incrimination provision covering incriminating acts as well as testimony,[12] to its pioneering the fundamental right of privacy six decades before the U.S. Supreme Court,[13] Georgia has a long history of providing greater safeguards in its constitution than the United States. See *Elliott v. State*, 305 Ga. 179, 188 (2019). Part of this willingness comes from Georgia's constitutional history, with ten fundamental charters since Independence. *Elliott*, 305 Ga. at 182 n.3. Unlike the federal document, entombed in amber, Georgia has been able to refresh and renew its organic law throughout the years, allowing the People to expand it as the times

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[12] Compare *Olevik v. State*, 302 Ga. 228, 240 (2017) with *United States v. Hubbell*, 530 U.S. 27, 34 (2000).

[13] See, e.g., *King v. State*, 272 Ga. 788, 789 (2000); *Powell v. State*, 270 Ga. 327, 329 (1998); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905).

change,[14] or ratify what protections continue to endure.[15] From this flexibility comes a unique provision that distinguishes Georgia in constitutional law: the prohibition against legislation touching the social status of the citizen.

(a) Paragraph XXV's original public meaning changed in 1983 with Paragraph II's adopting the equal protection clause.

Enshrined in our organic law since 1868, the Georgia Constitution provides that "[t]he social status of a citizen shall never be the subject of legislation." Ga. Const. 1868, Art. I, Sec. XI. See Ga. Const. 1983, Art. I, Sec. I, Para. XXV; Ga. Const. 1976, Art. I, Sec. I, Para. XXII; Ga. Const. 1945, Art. I, Sec. I, Para. XVIII; Ga. Const. 1877, Art. I, Sec. I, Para. XVIII. Though historically rooted in post-Civil War racism, Paragraph XXV's meaning changed in 1983 when Georgia incorporated federal equal protection law into Paragraph II. Viewed from a renewed perspective unshackled by its unseemly past, Paragraph XXV forbids the General Assembly from dividing Georgians into "good" camps and "bad" camps.

As this Court has made plain in the last few years, Georgia's courts interpret

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[14] See Ga. Const. 1983, Art. I, Sec. I, Para. XXI ("Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime."); Walter McElreath, *A Treatise on the Constitution of Georgia* §1108, Historical Note (Atlanta: Harrison Co. 1912 (2020 reprint)) (discussing how because Georgia's Cruel and Unusual Punishment Clause did not cover them, Paragraph XXI was added to expand "the class of crimes which the enlightened humanity of the present day regards as, in fact, cruel.")

[15] See Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) ("The right to trial by jury shall remain inviolate"); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733 (1) (2010) (discussing provision's continuation from earliest years).

its constitution "according to the original public meaning of its text[.]"*Olevik*, 302 Ga. at 235. Where a provision found in a prior constitution is subsequently adopted into its successor, courts presume a provision retained without material change from prior constitutions carries forward its original public meaning that it held "at the time it first entered a Georgia Constitution, absent some indication to the contrary." *Elliott*, 305 Ga. at 183. Since Paragraph XXV has remained unchanged textually since its adoption, to understand Paragraph XXV's scope requires starting with its first appearance. And because "great regard ought to be paid" to the interpretation placed upon constitutional text "by the sages of the law who presided at the time, or shortly after its passage," definitive constructions from this Court immediately after a provision's ratification prove instructive on the text's meaning. *Ezekiel v. Dixon*, 3 Ga. 146, 153 (1847). See *Olevik*, 302 Ga. at 239 (discussing in context of Paragraph XVI how a case decided "just two years" after its adoption "is thus critical to the understanding" of the provision's scope).

(i) Paragraph XXV's original public meaning in 1868

Despite its age, Paragraph XXV is one of Georgia's least-cited or interpreted provisions. Some of this Court's cases from the 1990s suggest in passing that this provision is "based upon the principle that an individual's standing in society is irrelevant to the even-handed administration of justice." *Turner v. State*, 268 Ga. 213, 218 (1997) (Sears, J., concurring) (citing *Livingston v. State*, 262 Ga. 402, 404

n.5 (1994)). But cursory comments 125 years after a provision's adoption—even when from this Court—provide little guidance upon the text's original public meaning. Instead, the best case for illumination is one issued a year after Paragraph XXV's first appearance, *Scott v. State*, 39 Ga. 321 (1869).

Scott is a relic of Georgia's less-than-savory past. The defendant in *Scott* was a black woman charged with living out of wedlock with a white man. *Scott*, 39 Ga. at 322. After her conviction, she appealed to this Court, arguing that Paragraph XXV prohibited the General Assembly from legislating who could marry whom. The *Scott* Court confronted a single question for resolution: "Have white persons and persons of color the right, under the Constitution and Laws of Georgia, to intermarry, and live together in this State as man and wife?" *Id.* at 323. Answering in the negative, the *Scott* Court ruled that Paragraph XXV served to "exclude from the halls of the Legislature" any laws seeking to prohibit racial discrimination. *Id.* at 325. To the Court, Paragraph XXV neither created nor attempted to enforce "moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can." *Id.* at 326.

Only a few Georgia opinions would cite *Scott* in the next century, all in racially discriminatory cases. See, e.g., *Dillon v. Dillon*, 60 Ga. 204, 207 & 209 (1878) (referencing *Scott* as cited by husband's counsel in divorce proceeding where he tried to invalidate the marriage by claiming his wife was black); *Wolfe v. Ga. Ry.*

& Electric Co., 2 Ga. App. 499 (3), 58 S.E. 899, 902 (1907) (referring to "the difference in race" discussed in *Scott* to reverse dismissal in a defamation case where the plaintiff alleged that the conductor called him black when he was white). See also *In re Hobbs*, 12 F. Cas. 262, 263 (C.C.N.D. Ga. 1871) (discussing *Scott* and its holding); *Georgia v. Tutty*, 41 F. 753, 756-57 (C.C.S.D. Ga. 1890) (same). The leading treatise in Georgia constitutional law confirmed this odious interpretation of Paragraph XXV in 1912: "The Code, at the time of the Constitution of 1868, prohibiting the marriage relation between white persons and persons of African descent, the adoption of that constitution containing the foregoing paragraph, put it beyond the power of the legislature to repeal such prohibition law and render such marriages legal." McElreath, *supra*, at §1119. Thus, Paragraph XXV's original public meaning meant to constitutionally prohibit the General Assembly from ever authorizing interracial marriage, a meaning which was subsequently re-incorporated into the 1877, 1945, and 1976 Constitutions.

(ii) Paragraph II's 1983 amendment.

Everything changed in 1983. That year, Georgia adopted its current constitution, after an arduous process in reforming the charter. One change occurred in Paragraph II: Historically providing that "[p]rotection to person and property is the paramount duty of government and shall be impartial and complete," the Framers added a second sentence to it, guaranteeing that "[n]o person shall be denied the

equal protection of the laws." Ga. Const. 1983, Art. I, Sec. I, Para. II; compare Ga. Const. 1976, Art. I, Sec. II, Para. III (no equal protection clause). Materially identical to the federal equal protection clause,[16] Paragraph II's second sentence radically altered the scope of both itself and Paragraph XXV.

(A) Prior to 1983, Paragraph II had been interpreted as Georgia's "equal protection clause" by this Court.

First appearing in the "Declaration of Fundamental Principles"—Confederate Georgia's state constitutional Bill of Rights, see McElreath, at §100, p.134—the constitutional language provided: "Protection to person and property is the duty of Government; and a Government which knowingly and persistently denies, or withholds from the governed such protection, when within its power, releases from the obligation of obedience." Ga. Const. 1861, Art. I, Sec. III. But "[a]s the Constitution of 1861 fell with the era which made it," Paragraph II underwent a series of revisions. McElreath, at §100, p.135. First, in 1865, it was trimmed down to only "Protection to person and property is the duty of government." Ga. Const. 1865, Art. I, Sec. I. Three years later, it grew to include that this protection was "the paramount duty" of government; further, it required the protection to be "impartial and complete." Ga. Const. 1868, Art. I, Sec. I. This stuck, lasting over 100 years and three constitutions. See Ga. Const. 1877, Art. I, Sec. I, Para. II; Ga. Const. 1945, Art.

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[16] See U.S. CONST., amend. XIV §1.

I, Sec. I, Para. II; Ga. Const. 1976, Art. I, Sec. II, Para. III. Not until 1983 would the Equal Protection Clause join the text in its first appearance since the 1868 Constitution. *See* Ga. Const. 1868, Art. I, Sec. II.

Starting in 1906, however, this Court interpreted Paragraph II's "impartial and complete" language as simply "stat[ing] in other language the same principle laid down" in the federal Equal Protection Clause. *Ga. R. & Banking Co. v. Wright*, 125 Ga. 589 (12), 54 S.E. 52, 57 (1906), rev'd on other grounds, 207 U.S. 127 (1907).[17] This principle held true for over 75 years, involving interpretations of three constitutions.[18] Had the 1983 Constitution contained the same language as previous constitutions, this consistent and unbroken interpretation of case law would create an almost unchallengeable presumption of continuity. But it did not, instead adding to the provision that "[n]o person shall be denied the equal protection of the laws." Here we find a conflict: if the first sentence had been consistently interpreted as being Georgia's "equal protection" clause, but then the 1983 Constitution added the federal clause's exact language, what did that do to the original text?

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[17] As an original matter, this may be incorrect, since the 1868 Constitution contained an explicit equal protection clause. See Ga. Const. 1868, Art. I, Sec. II. But it is a moot point today, given Paragraph II's longstanding, consistent construction. See *Elliott*, 305 Ga. at 184-87.

[18] See, e.g., *McDaniel v. Thomas*, 248 Ga. 632, 646 (1981); *G.W. v. State*, 233 Ga. 274, 275 (1974); *Dansby v. Dansby*, 222 Ga. 118, 121 (2) (1966); *Dorsey v. City of Atlanta*, 216 Ga. 778, 781 (1961); *Geele v. State*, 202 Ga. 381, 385-86 (1947); *Hines v. Etheridge*, 173 Ga. 870 (1931); *Gray v. McLendon*, 134 Ga. 224 (1910).

(B) *Grissom v. Gleason* and its erroneous annihilation of the People's adopted text.

This Court confronted the conundrum in 1992 in *Grissom v. Gleason*, 262 Ga. 374 (1992). Although its specific holding does not matter for this case, the analysis in *Grissom* does: By a bare majority, this Court concluded that the People adding the equal protection clause to Paragraph II did not alter the constitutional meaning in any way. *Id.* at 376. How is that possible? Upon review, the *Grissom* majority rested its decision on erroneous case law—and worse, legislative history. Because it ignored the original public meaning of Paragraph II and obliterated constitutional text, this Court should disapprove of *Grissom* to the degree it holds Paragraph II is co-extensive with the Fourteenth Amendment's Equal Protection Clause.

(1) The *Grissom* majority's holding rests on outdated case law and legislative history.

Grissom gutted Paragraph II, making half of it dead letter. For support, the majority cited two cases, *Horton v. Hinely* and *Ambles v. State*. *Grissom*, 262 Ga. at 376 (citing *Horton v. Hinely*, 261 Ga. 863, 864 (1992); *Ambles v. State*, 259 Ga. 406 (1989)). Neither support its holding. Instead, both cases rely upon pre-1983 precedent to interpret the new Paragraph II, without referencing the textual change. See *Horton*, 261 Ga. at 865 (citing *Barrett v. Carter*, 248 Ga. 389, 390 (1981)); *Ambles*, 259 Ga. at 407 (citing *McDaniel*, 248 Ga. at 646). One case *did* discuss it: In *Denton v. Con-Way Southern Exp., Inc.*, this Court found that if it construed "the

first and second sentence of [Paragraph II as] merely express[ing] the same right, then the first sentence becomes 'inoperative,' 'idle,' and 'nugatory.'" *Denton v. Con-Way S. Express, Inc.*, 261 Ga. 41, 45 (1991) (quoting *Wellborn v. Estes*, 70 Ga. 390, 403 (1883)), disapproved by *Grissom*, 262 Ga. at 376. Although *Denton* "refuse[d] to obliterate an entire sentence in our Bill of Rights," the *Grissom* Court disagreed, overruling *Denton* and calling it "an aberration in this [C]ourt's interpretation of the equal protection provision." *Denton*, 261 Ga. at 45; *Grissom*, 262 Ga. at 376.

Prompting strong disagreement from Justices Benham and Sears-Collins, both joined by Presiding Justice Bell, the *Grissom* majority also relied heavily upon "the legislative history of the 1983 Constitution" to read out an entire sentence of Georgia's Bill of Rights. *Id.* at 376-77. See *id.* at 378-79 (Benham, J., concurring specially); *id.* at 384 (Sears-Collins, J., concurring specially). But if legislative history is impermissible when interpreting a statute, it approaches sacrilege when interpreting a constitution. See *Olevik*, 302 Ga. at 238-39.[19] The People of Georgia adopted the 1983 Constitution, and "passing comments of an individual drafter do not control the meaning of the constitutional text[.]"*Barrow v. Raffensperger*, 308

[19] It is especially heinous in Georgia's case since none of the Select Committee on Constitutional Revision's papers are publicly available. For whatever worth the Convention debates may contain in interpreting the federal charter, at least *those* materials are widely available online and in print. See, e.g., James Madison, *Notes on the Debates in the Federal Convention* (1787), available at https://avalon.law.yale.edu/subject_menus/debcont.asp (last visited Aug. 19, 2022).

Ga. 660, 676 n.16 (2020). The text does. When the People amend constitutional language to create a significant change from prior Georgia Constitutions, courts *must* give that change effect. *Id.* at 672.

Consider the change in Georgia's "right to the courts" provision. In 1976, Georgia guaranteed that "[n]o person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." Ga. Const. 1976, Art. I, Sec. I, Para. IX. This Court interpreted the text as providing the accused the right to counsel, to self-representation, and the right to "actively participate in the trial as co-counsel." *Nelms v. Georgian Manor Condominium Ass'n, Inc.*, 253 Ga. 410, 413 n.7 (1984) (citing *Burney v. State*, 244 Ga. 33 (1979)). But the 1983 Constitution deleted the "or both" language, which this Court subsequently interpreted as meaning that "a person no longer has the right to represent himself and also be represented by an attorney." *Cargill v. State*, 255 Ga. 616, 622-23 (1986), overruled in part on other grounds, *Manzano v. State*, 282 Ga. 557, 560 (2007). If deleting two words between 1976 and 1983 abrogated any right to hybrid representation, adding an entirely new sentence must have *some* effect.

Courts construe statutes in order to harmonize all parts, rendering none mere surplusage. *Kennedy v. Carlton*, 294 Ga. 576, 578 (2014). This rule reaches overriding importance when applied to written constitutions like Georgia's, since "the people will be presumed to have expressed themselves in careful and measured

terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication." *Estes*, 70 Ga. at 397. Accord *Park v. Candler*, 114 Ga. 466 (1902) ("[W]e are considering words used by the framers of a constitution. To them credit must not only be given for care in the use of language, but also of a full knowledge of the proper and correct meaning of the words which they employ."); *Sisters of Mercy v. Lane Cnty.*, 261 P. 694, 698 (Or. 1927) ("[A] Constitution is an instrument of such high and solemn import that every section, clause, and word thereof is to be regarded as though it were welded in place.") (citation omitted). Since *Grissom* ignored the importance of constitutional text, relied upon erroneous case law, and embraced legislative history to jettison a hundred-year-old-plus piece of Georgia's constitutional history, it was wrong.

(2) *Grissom* should be disapproved.

This Court should disapprove of *Grissom* because *stare decisis* does not support its insupportably narrow view of Paragraph II. While *stare decisis* promotes important principles, that does not make it "an inexorable command." *Olevik*, 302 Ga. at 244 (citation and quotation marks omitted). Although *stare decisis* considerations are at their zenith "in the context of statutory interpretation, where [courts'] incorrect decisions are more easily corrected by the democratic process," it is "less compelling" in constitutional settings given the difficulty "for the democratic process to correct or alter [this Court's] interpretation of the Constitution than [an]

interpretation of a statute or regulation." *State v. Jackson*, 287 Ga. 646, 658 (2010); *Smith v. Baptiste*, 287 Ga. 23, 30 (2010) (Nahmias, J., concurring specially). Instead, courts apply a four-factor test "that considers 'the age of the precedent, the reliance interests at stake, the workability of the decision, and, *most importantly*, the soundness of its reasoning.'" *Duke v. State*, 306 Ga. 171, 184 (2019) (emphasis in original) (quoting *Jackson*, 287 Ga. at 658). For constitutional precedent, the reasoning's soundness "becomes even more critical. The more wrong a prior precedent got the Constitution, the less room there is for the other factors to preserve it." *Olevik*, 302 Ga. at 245.

All four factors weigh in disapproving *Grissom*. Its unsound reasoning has already been addressed; the other three all support disapproval. First, *Grissom* is only thirty years old, younger than other precedents this Court has overruled. See *State v. Turnquest*, 305 Ga. 759, 774 (2019) (collecting cases which overruled precedents as old as forty-five years). Second, little reliance interests are at stake, since substantial reliance interests are "most common with rulings involving contract and property rights." *Savage v. State*, 297 Ga. 627, 641 (2015). Even if someone has some interest in maintaining this disparity, this sort of reliance interest does not "outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." *Olevik*, 302 Ga. at 246 (citation omitted). Finally, no workability concerns exist currently, since *Grissom*'s interpretation has

been chained to the federal equal protection clause. Thus, this Court should disapprove *Grissom* and its erroneous hamstringing of Paragraph II.

(C) Paragraph II incorporates federal equal protection law into Georgia, but that is not the limit of its application.

Looking at Paragraph II through fresh eyes, two things become apparent. First, by using substantively identical language in its second sentence, Paragraph II sought to incorporate federal equal protection law as it existed in 1982 into Georgia's constitution. Second, the first sentence of Paragraph II must have additional meaning for Georgia and its people. Although the latter is intriguing, it is not necessary to examine in order to resolve this argument. The former does all the heavy lifting.

Similar to statutes, where the People use language in Georgia's constitution taken from the federal document, the decisions by the U.S. Supreme Court interpreting that provision prove to be powerfully persuasive authority as to its meaning. *Elliott*, 305 Ga. at 187-88. See *Haley v. State*, 289 Ga. 515, 523 (2011). Further, it is the "understanding of the text by reasonable people familiar with its legal context" that matters. *Elliott*, 305 Ga. at 207. Thus, Paragraph II's second sentence can be reasonably construed as adopting federal equal protection law as it existed in 1982.

How does this affect Paragraph XXV? It jettisons the *Scott* case because of *Loving v. Virginia*, where the U.S. Supreme Court struck down anti-miscegenation laws like those *Scott* interpreted as untouchable, finding there could "be no doubt

that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Since the Fourteenth Amendment's core aimed at preventing "meaningful and unjustified official distinctions based on race," racial classifications are inherently suspect, subject to the most rigid scrutiny. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (citations and punctuation omitted). By 1983, the federal high court had consistently held under the federal Equal Protection Clause that "regardless of purported motivation," racial classifications were presumptively invalid. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (collecting cases). Thus, by incorporating federal equal protection law into Georgia's constitution, the People adopted this as the law of Georgia, enforceable in its own right without need to involve the Fourteenth Amendment.

(iii) Adopting the federal equal protection language rebuts the presumption of continuity for Paragraph XXV.

The Georgia Constitution cannot contradict itself; one provision cannot invalidate another. Just as courts' duty to harmonize statutes is a basic rule of construction, so too with constitutional provisions. *Goldberg v. State*, 282 Ga. 542, 546-47 (2007); accord *Brown v. Liberty Cnty.*, 271 Ga. 634, 635 (1999); *Gilbert v. Richardson*, 264 Ga. 744, 747-48 (3) (1994). Indeed, as no constitutional guarantee "enjoys preference, so none should suffer subordination or deletion." *Ullmann v. United States*, 350 U.S. 422, 428 (1956). And although constitutional text

definitively construed by this Court, subsequently re-adopted in successor constitutions, is entitled to a heavy presumption of continuity, this Court in *Elliott* stressed that this is a presumption only, capable of rebuttal by sufficient evidence. *Elliott*, 305 Ga. at 186 & n.6.

Here we find just such a rebuttal. Paragraph XXV was originally interpreted as a patently racist provision, specifically designed to remove from the General Assembly the power "to make laws, regulating the social status, so as to compel our people to meet the colored race on terms of social equality." *Scott*, 39 Ga. at 326 (emphasis deleted). It remained dormant since before World War I, quietly re-adopted in the 1877, 1945, and 1976 Constitutions. But by incorporating federal equal protection rights into the 1983 charter, the People of Georgia implicitly cast off the *Scott* Court's view, relegating it to the annals of history—whether in dusty tomes or dustbins, who could say. What is plain, however, is that Paragraph XXV entered Georgia's tenth constitution stripped of its archaic baggage, cut free by Paragraph II's embrace of the explicit equal protection guarantee.

(b) The Sex Offender Registry violates the prohibition against social status legislation by limiting where registrants can live, where they can go, and whom they can be around.

Construed in light of its revitalized meaning, Paragraph XXV undermines the Registry's constitutionality. The Registry saddles registrants with disabilities, like lifetime registration with onerous requirements, violations of which subject them to

decades of punishment. Interpreting "social status" in light of its original public meaning, Paragraph XXV prohibits the State from creating favored or disfavored classes of citizens. Given that the Registry impacts multiple constitutional rights, it serves to create a lower-tier citizen directly contrary to Paragraph XXV.

(i) The meaning of "social status" in 1982.

As discussed above, the original public meaning controls the text. Since the 1983 Constitution's amendment of Paragraph II disconnected Paragraph XXV from its antiquated roots, "the original public meaning of that Constitution[al provision] is the public meaning it had at the time of its ratification in 1982." *Elliott*, 305 Ga. at 181. To aid in understanding that meaning, courts often consult dictionaries from the era, since "a dictionary may provide the popular and common-sense meaning of terms" used. *Israel v. DeSantis*, 269 So.3d 491, 496 (Fla. 2019) (citation and punctuation omitted).

Focusing first on the noun rather than its modifier, "status" in 1982 was defined as the "legal relation of [an] individual to [the] rest of the community." Black's Law Dictionary 1264 (5th ed. 1979). See *Richards v. Cox*, 450 P.3d 1074, 1078 (I) (Utah 2019) (recognizing utility of Black's Law Dictionary in constitutional interpretation). It connotes the "rights, duties, capacities and incapacities which determine a person to a given class." Black's Law Dictionary 1264 (5th ed. 1979). The adjective "social" is defined as "relat[ing] to the way people live together or to

the rank a person has in society." Cambridge Dictionaries Online, *available at* https://dictionary.cambridge.org/us/dictionary/english/social (last visited August 22, 2022). Thus, someone's social status can be defined as someone's rights, duties, capacities, and incapacities in relation to how they live in society.

Even viewing "social status" in a 19th-century light, this notion holds true. Someone's "status" referred to their "state" or "condition," and "social" meant "relating to men living in society, or to the public as an aggregate body; as *social* interests or concerns; *social* pleasures; *social* benefits; *social* happiness; *social* duties." Webster's Complete Dictionary of the English Language 1290 (1880 ed.); *id.* at 1253 (emphasis in original). Put differently, social status referred to "the position that he holds with reference to the rights which are recognized and maintained by the law—in other words, his capacity for the exercise and enjoyment of legal rights." James Hadley, *Introduction to Roman Law* 106 (1881), reprinted in Black's Law Dictionary 1632 (10th ed. 2014). As much then as now, the prohibition against social status legislation can be interpreted as barring the legislature from creating preferred or reviled classes of citizens.

(ii) <u>The Registry's requirements implicate registrants' fundamental constitutional liberties.</u>

The Registry legislates registrants' social status. In enacting its wholesale revision of the Registry in 2006, the General Assembly made sure to state in its legislative findings that "[t]he designation of a person as a sexual offender is neither

a sentence nor a punishment but simply a regulatory mechanism and *status* resulting from the conviction of certain crimes." Ga. L. 2006, Act 571, §1 (emphasis supplied). The conditions imposed bear out the Registry's social impact: For those required to register, they must provide up-to-date information about their name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, fingerprints, and pictures. O.C.G.A. §42-1-12(a)(16)(A). They must disclose their residence—whether a home, mobile home, car, boat, or homeless. O.C.G.A. §42-1-12(a)(16)(B-F.1). If they can find work, they must disclose where and for whom, must describe any vehicles they have in detail, and if they are seeking higher education, they must say where. *Id.* at (a)(16)(G-J). Much of this information is made available to the public, and should any person fail in disclosing this information—whether sinister or stupid, through ill intent or ignorance—they risk up to thirty years in prison. O.C.G.A. §42-1-12(i)(3, 5); *id.* at (n).

Against these statutory requirements stands Georgians' constitutional rights. This Court has consistently held for almost a century that Georgia's Due Process Clause "entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference." *Jackson v. Raffensperger*, 308 Ga. 736, 740 (2) (2020); see Ga. Const. 1983, Art. I, Sec. I, Para. I. Indeed, for Georgians "[t]he right to work and make a living is one of the highest rights possessed by any citizen." *Jenkins v. Manry*, 216 Ga. 538, 540 (1961) (citation omitted). Yet under the

Registry, someone's right to work is infringed by the extensive limitations imposed based on where they would be employed. If a registrant—who, as a convicted felon, is already significantly limited by where they can find gainful employment[20]—can only find work at locations within 1,000 feet of prohibited areas, the Registry deprives them of that right to gainful employment.

Similarly, our fundamental right to privacy—which is "far more extensive than that protected" by the federal Constitution, *King v. State*, 272 Ga. 788, 789 (2000) (citing *Powell v. State*, 270 Ga. 327, 330 (1998))—guarantees to all Georgians the "fundamental constitutional right to be 'let alone,'" so long as "they are not interfering with the rights of other individuals or the public." *In re J.M.*, 276 Ga. 88, 89 (2003) (citations omitted). Correlative to this right to be let alone are the individual's rights to "protection for the individual from unnecessary public scrutiny," to be "free from the publicizing of one's private affairs with which the public has no legitimate concern," and to define one's circle of intimacy. *Powell*, 270 Ga. at 330 (citations omitted); accord *In re J.M.*, 276 Ga. at 89. Yet the Registry scoffs at these concerns, freely publicizing much of its registrants' biographical

[20] See, e.g., Lucius Coulote & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POLICY INITIATIVE (Jul. 2018), available at https://www.prisonpolicy.org/reports/outofwork.html (last visited Aug. 19, 2022) (reviewing national data on convicts' employment rates and finding "that formerly incarcerated people are unemployed at a rate of over 27% — higher than the total U.S. unemployment rate during any historical period, including the Great Depression.").

information for all the world to view. But cf. *Pavesich*, 122 Ga. at 197 ("One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze.")

Only a few years ago, this Court confronted a similar issue about the Registry in *State v. Davis*. 303 Ga. 684 (2018). In *Davis*, this Court acknowledged several factors about registration which remain true: registrants must "provide a substantial amount of personal information" to their local sheriff, must comply with the Registry "until death," and must suffer their information being dispersed throughout the State. *Id.* at 690. The *Davis* Court also recognized how the Registry "negatively affect[s] such rights as 'the right of personal liberty'" through its impositions. *Id.* at 690 (quoting O.C.G.A. §1-2-6(a)(2)). Given that "the ability of an American citizen to live freely without reporting to the government his or her every movement is a defining characteristic of our constitutional republic," the Registry tramples upon that right as applied to defendants who have completed their underlying sentence. *Davis*, 303 Ga. at 690-91 (quotation omitted).

(iii) <u>Courts widely acknowledge that registries turn offenders into second-class citizens.</u>

Unsurprisingly, courts across the nation have recognized the arduous requirements of sex offender registries. The registries serve as an easy target for tough-on-crime tactics, subject to yearly tinkering by the legislature. For instance, Georgia's registry statute, O.C.G.A. §42-1-12, has been amended dozens of times

since its adoption in 1996, sometimes multiple times in one year. With a general felony conviction, of course, comes a host of collateral consequences, from the pedestrian—like recidivist punishment, see O.C.G.A. §17-10-7—to the fundamental, like the right to bear arms, serve on a jury, and participate in the political process. See O.C.G.A. §§16-11-131(b) (criminalizing a felon owning a firearm); 15-12-60(c)(1) (prohibiting felons from serving on a grand jury); 15-12-163 (b)(5) (petit jury); 21-2-216(b) (barring felons under sentence from voting). But nothing compares to the visceral animus society aims towards sex offenders.

The Registry does more than regulate probationers of certain crimes. It turns all those convicted into pariahs, subject to a nightmarish combination of a scarlet letter and Big Brother. Even other prisoners loathe sex offenders. See *Matherly v. Andrews*, 859 F.3d 264, 269 (4th Cir. 2017) (quoting statement in record that "in a prison setting a sex offender is the most despised type of inmate."); *Steele v. Cicchi*, 855 F.3d 494, 506 n.12 (3d Cir. 2017) (quoting jail sergeant's affidavit where he said that "child sex offenders are among the most hated members of the inmate population"). The Registry's effect, even if not its intent, "is to ostracize sex offenders as 'pariahs who do not belong in the community.'" *People v. Mosley*, 344 P.3d 788, 813 (Cal. 2015) (Liu, J., concurring in part and dissenting in part) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 473 (1985) (Marshall, J., concurring in part and dissenting in part)).

But sex offenders "are not second-class citizens. The Constitution protects their liberty and dignity just as it protects everyone else's." *Doe 1 v. Marshall*, 367 F. Supp.3d 1310, 1318 (M.D. Ala 2019). Here in Georgia, that Constitution prohibits legislation regulating the social status of a citizen. The Registry does exactly that to people who have completed their sentence, yet are still subject to continuous disclosure duties punishable by prison.

(iv) Distinguishing what would fall within Paragraph XXV's scope from what would not.

Should this Court grant Session's relief, recognizing that Paragraph XXV and the Registry collide in fundamental ways, it is important to note what such a holding would be. Session does not contend that the Registry is facially unconstitutional, since such a claim survives review only if "the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep." *Olevik*, 302 Ga. at 247 (citation omitted). Rather, Session argues that to the extent that the Registry imposes its burdens upon those who have already completed their sentences for the predicate crime, it violates Paragraph XXV. For the Registry affects more than just those on probation, where their "special status" as a probationer subjects their "private life and behavior [to regulation] by the State to an extent that would be completely untenable under ordinary circumstances." *Goode v. Nobles*, 271 Ga. 30, 31 (1999) (citation omitted). Indeed, since probation is "granted as a privilege, and not as a matter of right," the State may impose whatever reasonable terms it may

desire upon its probationers. *Johnson v. State*, 214 Ga. 818, 819 (1959); see *State v. Collett*, 232 Ga. 668, 670 (1974). But the Registry does not limit its scope to those currently serving; it engulfs all within its reach, even those who have already completed their sentences, who have paid their debt to society back in full. Cf. *Park v. State*, 305 Ga. 348, 354 (2019) ("It cannot be said that an individual who has completed the entirety of his or her criminal sentence, including his or her parole and/or probation requirements, would have the same diminished privacy expectations as an individual who is *still* serving his or her sentence.") (emphasis in original). To those who finished repaying that debt, the Registry continues to hang over them, a constant democlean sword of punishment lurking in a byzantine statute.

This is not a law like the prohibition against felons possessing firearms, which criminalizes those violators "not because of [their] *status* as a convicted felon, but because, having that status, [they] *act*[] to obtain and possess a firearm." *Shivers v. State*, 286 Ga. 422, 427-28 (2010) (Nahmias, J., concurring specially) (emphasis in original). There, the General Assembly enacted a prohibition keeping guns out of the hands of those who have demonstrated their untrustworthiness "to possess a firearm without becoming a threat to society." *Lewis v. United States*, 445 U.S. 55, 63 (1980). With registrants, though, the prohibition is against fundamental aspects of human existence: where they work, where they live, and where they seek the Divine. There, the felony occurs where the defendant acts by possessing a firearm;

here, it occurs where the defendant *fails* to act in compliance with a byzantine law.

Similarly, this case differs from situations where defendants are punished for failure to comply with dense legal regimes, like driver's licenses. In Georgia, drivers' licenses are "not an absolute right," but rather a privilege, one conditionally granted by the State in return for the driver's compliance with the regulatory scheme. *Nolen v. State*, 218 Ga. App. 819, 823 (1995) (whole court). But no law requires a person to obtain a driver's license; the prohibitions only activate when someone seeks to operate a motor vehicle on the public roads of this State. For registrants, though, "sex offender registration is both involuntary and an automatic consequence of certain criminal convictions." *Davis*, 303 Ga. at 691.

Lastly, this would not affect those crimes providing increased consequences for targeting specific law enforcement actors, like Obstruction or other violent crimes. See, e.g., O.C.G.A. §§16-10-24 (obstruction); 16-5-21(c) (aggravated assault on public safety officer); 16-11-37(e) (terroristic threats). In those cases, the crime is not aggravated because of the officer's status as law enforcement alone, but because the officer was engaged in official duties, or the crime was committed in retaliation against the government actor. In short, recognizing the Registry's impact and plain incompatibility with Paragraph XXV does not spell the death knell for law and order. It only requires the State not create disfavored classes based on unchangeable circumstances.

CONCLUSION

Derrick Session comes before this Court asking, not to be treated specially, or more favorably, or with special privileges. All he asks is this Court hold that he be treated as any Georgian would, with the full panoply of rights guaranteed by the Constitution.

Respectfully submitted this 24th day of August, 2022.

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IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

DERRICK LAMON SESSION *Appellant,*	|	
vs.	|	CASE No. S23A0022 & S23A0023
STATE OF GEORGIA *Appellee.*	|	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the Paulding County District Attorney's Office, by and through counsel, in the foregoing matter with a copy of **Brief of Appellant Derrick Lamon Session** by delivering a searchable PDF via e-mail to the following:

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I further certify there exists a prior agreement between Mr. Williams and myself to allow documents in a PDF format sent via e-mail to suffice for service.

This 24th day of August, 2022.

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