

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CRAIG VICTOR COLEMAN,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Jacob Wetterling Act of 1994, Congress required all states to enumerate certain offenses in their sex offender registration statutes or else forfeit 10% of that state's share of federal funding for criminal justice. For that reason alone, Arizona added the crime of unlawful imprisonment to its list of offenses requiring registration.

Craig Coleman was charged with kidnapping with a sexual motivation for briefly grabbing the wrist of a little girl who was in the presence of her mother. The jury found him guilty of the lesser-included offense of unlawful imprisonment, requiring only momentary restraint, and it specifically rejected the finding that he committed the offense with a sexual motivation. Nonetheless, because of the mandatory registration requirement in the statute, he must now register as a sex offender.

The question presented is:

Do the Substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit a state from requiring sex offender registration for an offense that bears no rational relationship to the protection of the community?

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PETITION FOR WRIT OF CERTIORARI

Craig Victor Coleman respectfully petitions for a writ of certiorari to review the Arizona Court of Appeals' opinion dated November 22, 2016, which held that requiring persons to register as sex offenders for committing the relatively minor and nonsexual offense of unlawful imprisonment of a child does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

This Court has repeatedly held that “the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people,” and “government, of course, need not simply stand by and allow these evils to occur.” *Packingham v. North Carolina*, __ U.S. __, __, 137 S. Ct. 1730, 1736 (2017) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002)). For this reason, sex offender registries, even those that require public notification of an offender's residential address, have been found to be rationally related to a legitimate governmental interest by the state courts that have addressed the issue.

Coleman's case, however, stretches the rational basis test to its breaking point. Restricting the liberties of a person convicted of unlawful imprisonment is not rationally related to protecting children from sexual

abuse when the jury did not find that the defendant acted with sexual motivation. The *Coleman* court may have been correct in stating that “ensuring [Arizona’s] registration scheme is not underinclusive is rationally related to the state’s legitimate interest in protecting its communities and aiding law enforcement” and that “a perfect fit is not required,” 385 P.3d 420 425 (Ariz. Ct. App. 2016) (internal quotations omitted, alteration in original). But that does not license legislatures to create a sex offender registration list so overexpansive that it defies reason.

OPINIONS BELOW

The Arizona Court of Appeals’ opinion dated November 22, 2016, is reported at 385 P.3d 420 (Ariz. Ct. App. 2016). Appendix 2-12. The Arizona Supreme Court’s order denying discretionary review dated September 12, 2017, is not reported. Appendix 13.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on November 22, 2016. Appendix 2-12. The Arizona Supreme Court entered its order denying discretionary review on September 12, 2017. Appendix 13. The issues raised herein were raised before the Arizona

courts as issues of federal constitutional law. Appendix 2-12. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

Article I, section 8, cl. 1 of the United States Constitution provides as follows:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Arizona Court of Appeals stated the facts of the case as follows:

In September 2012, C.B. was holding her three-year-old daughter, H.T., when Coleman entered her backyard, “grabbed the baby’s arm” and tried to pull her away from C.B. Coleman punched C.B. in the face, causing her to fall down and on top of H.T. He punched C.B. again and then ran away.

Coleman was charged with kidnapping and aggravated assault as to H.T., aggravated assault causing temporary and substantial disfigurement as to C.B., and burglary. A jury found him guilty of unlawful imprisonment of a minor under fifteen as a lesser-included offense of kidnapping, but found the state did not prove it was committed with sexual motivation beyond a reasonable doubt. The jury also found him guilty of aggravated assault of a minor under fifteen, of assault of C.B. as a lesser-included offense of the aggravated assault, and of burglary.

The trial court sentenced Coleman to concurrent prison terms, the longest of which is 2.5 years. It also ordered him to register pursuant to § 13-3821(A)(1) for a period of ten years. § 13-3821(A)(1), (M).

Coleman, 385 P.3d at 422. The 2.5-year sentence was for burglary; the sentences for unlawful imprisonment and aggravated assault of a minor were each one year,¹ and the sentence for misdemeanor assault was time served. **Appendix X**.

Kidnapping and unlawful imprisonment both require restraint of another person, even for a brief moment. Ariz. Rev. Stat. §§ 13-1303(A), 13-1304(A). The distinguishing element between the offenses, which the jury found not proven in Coleman’s case, is an “intent to inflict death,

¹ Class 6 felonies are eligible for misdemeanor designation at sentencing, and prosecutors have discretion to charge them as misdemeanors. Ariz. Rev. Stat. § 13-604.

physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony.” § 13-1304(A)(3); **Appendix X**.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an ideal opportunity to answer a question that has caused significant disarray among the States: Whether there is any limitation at all on a government’s ability to require its citizens to register as sex offenders. Congress used its spending power to pass the Jacob Wetterling Act of 1994 (“JWA”), which required states to pass far more expansive sex offender registration statutes under pain of forfeiting 10% of its federal funding for criminal justice. Violent Crime Control and Law Enforcement Act of 1994, PL 103–322, 108 Stat 1796, sec. 170101. The current federal statute maintains this mandate. *See* 42 U.S.C. § 16925(a). The JWA specified which offenses must be included in mandatory sex offender registration statutes, and the list includes false imprisonment of a minor. *Id.* Arizona complied with the JWA by amending Ariz. Rev. Stat. § 13-3821(A) to include mandatory sex offender registration for those convicted of unlawful imprisonment of a minor under eighteen years of age. As will be shown herein, not only has JWA

failed to attain anywhere close to full participation, but those state courts that have confronted this question are sharply divided on the question presented in this petition.

I. State Courts are Intractably Divided on the Question of Whether State Legislation Enacted to Comply with the Jacob Wetterling Act Violates the Fourteenth Amendment Rights of Persons Convicted of Unlawful Imprisonment of a Minor.

Other jurisdictions faced with similar constitutional challenges have found it significant that the statute at issue applies only to crimes with a sexual motive, and these jurisdictions have held unconstitutional statutes that include offenses such as unlawful imprisonment without sexual motivation as being overinclusive in their registration requirements. In *State v. Small*, 833 N.E.2d 774, 782–83 (Ohio Ct. App. 2005), the court held that “absent evidence that defendant committed the kidnaping of the minor victim with sexual motivation,” denominating defendant a “sexually oriented offender lacked a rational basis under substantive due process” (internal quotation marks omitted). In *Raines v. State*, 805 So.2d 999, 1003 (Fla. Dist. Ct. App. 2001), the court stated that inclusion of a person convicted of false imprisonment, with no concomitant sexual component in the definition of a sex offender, violated

equal protection because it was overinclusive. *See also Doe v. Moore*, 410 F.3d 1337, 1340 n.1 (11th Cir. 2005) (acknowledging *Raines*, “When a person is convicted of kidnaping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, there must be a sexual component shown in addition to the predicate offense before designating that person as a sex offender.”). And, in *ACLU of NM v. City of Albuquerque*, 137 P.3d 1215, 1226 (N.M. Ct. App. 2006), the court held, “The inclusion of kidnaping and false imprisonment as convictions requiring registration as a sex offender is not rationally related to the legitimate interest of the City in protecting victims or potential victims of sex offenders. There is no ‘firm legal rationale’ for including offenses with no sexual motivation as ‘sex offenses.’”

The *Coleman* court recognized these authorities, but created a distinction in that the registration statutes in those other states specifically refer to “sexual offender,” “sexually oriented offense,” or “sex offense,” whereas that term appears nowhere in the text of Ariz. Rev. Stat. § 13-3821 et. seq. *Coleman*, 385 P.3d at 425. This is wrong for two reasons. First, while the term “sex offender” does not appear in the text of the various sections of law, Arizona Revised Statutes, Title 13, Chapter

38, Article 3 is entitled: “Registration of Sex Offenders and Offender Monitoring.” Second, the Arizona Department of Public Safety and the Pima County Sheriff’s Department websites both use the term “sex offender.”²

The court opted instead to follow contrary authority from jurisdictions that upheld statutes against this challenge. *Coleman*, 385 P.3d at 425-26 (citing *State v. Smith*, 780 N.W.2d 90 (Wisc. 2010); *People v. Knox*, 12 N.Y.3d 60, 875 N.Y.S.2d 828, 903 N.E.2d 1149 (2009); *Rainer v. State*, 690 S.E.2d 827 (Ga. 2010); *People v. Johnson*, 870 N.E.2d 415 (Ill. 2007); *Moffitt v. Commonwealth*, 360 S.W.3d 247 (Ky. Ct. App. 2012); *People v. Bosca*, 871 N.W.2d 307 (Mich. Ct. App. 2015)). Those cases are not persuasive.

First, *Knox* was recently distinguished by the New York Appellate Division, which specifically noted that the adoption of the JWA was to

² See Arizona Department of Public Safety, “Sex Offender Compliance,” http://www.azdps.gov/services/sex_offender/ (last accessed January 9, 2018) (using the term “sex offender”); Pima County Sheriff’s Department, http://www.sheriffalerts.com/cap_main.php?office=55056 (“Our Department is pleased to provide OffenderWatch® for the citizens of Pima County. OffenderWatch® is the nation's leading registered sex offender management and community notification tool with hundreds of leading agencies in dozens of states utilizing it.”).

protect the community from “sex offenders,” and thus an out-of-state conviction for first-degree murder was not registerable in New York. *People v. Diaz*, 150 A.D.3d 60, 63-66, 50 N.Y.S.3d 388, 390-92 (2017). As for the three state supreme court opinions cited above, two were decided over strong dissents. *Smith*, 780 N.W.2d at 111 (Bradley, J., dissenting) (“The majority holds its analysis up as ‘a paradigm of judicial restraint.’ To the contrary, I conclude that it has abdicated its responsibility. The majority fails to provide meaningful review, thus depriving citizens of the touchstone of due process protection of the individual against arbitrary action of the government.”); *Rainer*, 690 S.E.2d at 831 (Hunstein, C.J., dissenting) (“A statutory scheme that treats all such kidnappings and false imprisonments as sexual offenses, creating an ‘error rate’ of over 50 percent, is clearly not rational.”).

The third, *Johnson*, was a peculiar case where the court denied the defendant’s as-applied challenge to a statute that the state legislature had already amended retroactively, leading three dissenting justices to find the matter moot. 870 N.E.2d at 426 (Burke, J., dissenting). Notably, the change in Illinois’ legislation supports Coleman’s argument because unlawful imprisonment and kidnapping now are only registerable

offenses if sexually motivated. *See* 730 Ill. Comp. Stat. Ann. 150/2(B)(1.5).

Many states have not had opportunity to answer this question because only 24 states currently comply with the JWA's mandate to include false imprisonment³ in their respective lists of offenses requiring registration.⁴ Although Ohio, Florida, and New Mexico initially included

³ Some jurisdictions follow the Model Penal Code ("MPC") and punish "felonious restraint" as a more serious offense than false imprisonment. *See* MPC §§ 212.1, 212.2, 212.3; N.C. Gen. Stat. § 14-43.3; 18 Pa. Const. Stat. Ann. § 2902 (called unlawful restraint). For purposes of this petition, "false imprisonment" and "unlawful imprisonment" refer to the offense of unlawfully restraining another person, without more.

⁴ In addition to Arizona, the other state statutes requiring registration for unlawful imprisonment are: Ark. Code Ann. §§ 12-12-903(13)(A)(i)(q)-(r), 12-12-905; Ga. Code Ann. § 42-1-12(a)(9)(B)(i)-(ii); Haw. Rev. Stat. §§ 846E-1, 846E-2; Iowa Code Ann. §§ 692A.102(b)(5), 692A.103(1); Kan. Stat. Ann. §§ 22-4902(e)(1)(F)-(H), 22-4906(a)(1)(K); Ky. Rev. Stat. Ann. §§ 17.500(3)(a)(1)-(2), 17.510; Me. Rev. Stat. Ann. tit. 34-A, §§ 11203(6)(B), 11203(6A), 11222; Mo. Rev. Stat. § 589.400.1(2); Mont. Code Ann. §§ 46-23-502(9)(a), 46-23-504; Neb. Rev. Stat. §§ 29-4003(1)(a)(i)(B), 28-315; Nev. Rev. Stat. §§ 179D.0357(1)-(2), 179D.441; N.H. Rev. Stat. Ann. §§ 651-B:1-VII(a), 651-B:2; N.J. Stat. Ann. § 2C:7-2.b(2); N.Y. Correct. Law §§ 168-a(2), 168-f; N.C. Gen. Stat. §§ 14-208.6(1m), 14-208.7 ("felonious restraint" requires asportation); N.D. Cent. Code § 12.1-32-15.1(a); 42 Pa. Const. Stat. Ann. § 9799.14; R.I. Gen. Laws §§ 11-37.1-2(e)(1), 11-37.1-3; Tenn. Code Ann. §§ 40-39-202(20)(A)(v), 40-39-203; Tex. Code Crim. Proc. Ann. §§ 62.001(5)(E), 62.051; ; W. Va. Code Ann. § 15-12-2(b)(5); Wisc. Stat. Ann. §§ 301.45(1d)(b), 940.30; Wyo. Stat. Ann. §§ 7-19-301(a)(iv)(A)-(C), 7-19-302.

false imprisonment and kidnapping, those states' courts struck down their provisions as unconstitutional. On the other hand, twenty-three states (including Ohio, Florida, and New Mexico) and the District of Columbia require registration for a kidnapping conviction in compliance with JWA but not for unlawful imprisonment without sexual motivation.⁵ Four states do not require registration even for kidnapping.⁶

Because there is a clear and intractable split of authority on this issue, this Court should grant review to decide the issue.

⁵ In addition to Florida, New Mexico, and Ohio, the other state statutes requiring registration for kidnapping but not for unlawful imprisonment without sexual motivation are: Ala. Code § 15-20A-5(15)-(16) (unlawful imprisonment “if the victim of the offense is a minor, and the record of adjudication or conviction reflects the intent of the unlawful imprisonment was to abuse the minor sexually”); Alaska Stat. § 12.63.010(a); Conn. Gen. Stat. §§ 54-250(2)(B), 54-251; D.C. Code §§ 22-4001(8)(C), 22-4014; Idaho Code Ann. §§ 18.8304(1)(a), 18.8307; 730 Ill. Comp. Stat. Ann. 150/2(B)(1.5); Ind. Code Ann. §§ 11-8-8-5(a)(11), 11-8-8-7; La. Rev. Stat. Ann. §§ 15:541(12)(a), 15:542; Md. Code Crim. Pro. §§ 11-701(q)(1)(iii), 3-502; Mass. Gen. Laws Ann. ch. 6, §§ 178C, 178E; Mich. Comp. Laws Ann. §§ 28.722(e)(vi), 28.723; Minn. Stat. § 243.166(1b)(a)(1)(ii); Miss. Code Ann. § 45-33-23(h)(i), 45-33-25; Or. Rev. Stat. §§ 163A.005(5)(L), (p), 163A.040; S.C. Code Ann. § 23-3-430(C)(16); S.D. Codified Laws §§ 22-24B-1(8), 22-24B-2; Utah Code Ann. §§ 77-41-105(3)(c)(i), 77-41-106(4); 13 Vt. Stat. Ann. §§ 5401(10)(B)(ii), 5402; Va. Code Ann. §§ 9.1-902(B)(2), 18.2-47(A); Wash. Rev. Code Ann. § 9A.44.130.

⁶ Cal. Penal Code § 290; Col. Rev. Stat. Ann. § 16-22-103; 11 Del. Code Ann. § 4121(a)(4)(a); 57 Okl. St. Ann. § 582(A).

II. The Substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment Prohibit Limitless Inclusions to the Sex Offender Registries.

A. Standard for Reviewing Facial and As-Applied Challenges to a Statute Alleging Violation of the Fourteenth Amendment.

In *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003), the Court addressed whether procedural due process entitled sex offenders to a pre-deprivation hearing prior to being listed on Connecticut's sex-offender registry. Under Connecticut's statutory scheme, "individuals included within the registry are included solely by virtue of their conviction record and state law." *Id.* at 7. Because the registration requirement arose automatically based only on the offender's conviction for a particular crime, the Court reasoned that, under the Connecticut statute, due process did not entitle sex offenders to a pre-deprivation hearing. *Id.* The Court further explained that, under similar statutory schemes, challenges based on one's inclusion on registries "must ultimately be analyzed' in terms of substantive, not procedural, due process." *Id.* at 8 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989)).

Substantive due process prevents the government from engaging in arbitrary, wrongful actions "regardless of the fairness of the procedures

used to implement them.” *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It functions to shield citizens from unrestrained and arbitrary government acts lacking a “reasonable justification in the service of a legitimate governmental objective.” *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

“The touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). A substantive due process challenge may be facial or “as applied.” A facial challenge to a statute may be sustained only if the challenger demonstrates that there is no application of the statute that is constitutional. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). A statute also may be challenged on the ground that it is unconstitutional “as applied” to the challenger, notwithstanding that some applications of the statute may be constitutionally sound. *See Troxel v. Granville*, 530 U.S. 57, 73 (2000). If a fundamental right is not involved, the test is whether “the statute is rationally related to a legitimate state interest.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Similarly, if there is no fundamental right or suspect classification involved, legislation that creates a classification that bears no rational

relation to legitimate state interests offends the Equal Protection Clause.

Romer v. Evans, 517 U.S. 620, 631, 635 (1996).⁷

The classification at issue here is of persons convicted of offenses that lack a sexual element or motivation who are being combined with persons convicted of offenses that have a sexual element or motivation for purposes of sex offender registration. In either due process or equal protection analysis, when the rational-basis analysis is used, “a legislature that creates these categories need not ‘actually articulate at any time the purpose or rationale supporting its classification.’” *Heller v.*

⁷ Arizona courts regularly apply an incorrect burden of proof on the challenger. In this case, the Arizona Court of Appeals stated that “Coleman must show ‘beyond a reasonable doubt [the statute is] wholly unrelated to any legitimate legislative goal.’” *Coleman*, 385 P.3d at 423 (quoting *Martin v. Reinstein*, 987 P.2d 779, 796 (Ariz. Ct. App. 1999)). *Martin, id.*, in turn, credits *Heller v. Doe*, 509 U.S. 312, 320, 324 (1993), as providing that standard. But *Heller* only uses the phrase “beyond a reasonable doubt” in discussion of the burden of proof for conviction in a criminal trial as opposed to that needed for civil commitment. Instead, *Heller* states that “a classification ‘must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Id.* at 320 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). In fact, the Arizona Supreme Court has explained that *Martin*’s language “incorrectly states the standard” when considering the constitutionality of a statute and “therefore disapprove[d] the use of the ‘beyond a reasonable doubt’ standard for making constitutionality determinations.” *Gallardo v. State*, 336 P.3d 717, 720 (Ariz. 2014).

Doe, 509 U.S. 312, 320 (1993) (citations omitted). Instead, a statute “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.*

Arizona courts have held that “conceptually, the review of due process and equal protection claims is similar.” *Church v. Rawson Drug & Sundry Co.*, 842 P.2d 1355, 1361 (Ariz. Ct. App. 1992) (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 93 (1978)). This Court recently explained the interplay between the two clauses:

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

Obergefell v. Hodges, __ U.S. __, __, 135 S. Ct. 2584, 2602-03 (2015) (citing

M.L.B. v. S.L.J., 519 U.S. 102, 120-21 (1997), and *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)).

B. Arizona's History with Sex Offender Registration Demonstrates that the Legislature Only Complied with the Jacob Wetterling Act Because of the Threat of Withholding Federal Funds. This is not a Legitimate Purpose for Imposing the Onerous Restrictions of Sex Offender Registration for Offenses that Lack Sexual Motivation. The Registration Requirement Therefore Does Not Pass the Rational-Basis Test.

Arizona's first sex offender registration statute appeared in 1951. See 1951 Ariz. Sess. Laws, ch. 105, § 1. "Lawmakers then repealed § 13-3821 in 1978, with the result that our state was without a registration statute for over five years." *State v. Henry*, 228 P.3d 900, 904 (Ariz. Ct. App. 2010). It was reenacted in 1983, see 1983 Ariz. Sess. Laws, ch. 202, § 13, but this statute, consistent with Arizona's history, limited registration to sexual offenses contained in Titles 14 and 35.1 of the Arizona Revised Statutes.

The current version of Ariz. Rev. Stat. § 13-3821(A)(1)-(2), adding unlawful imprisonment and kidnapping to the list of enumerated offenses, was enacted by the Arizona Legislature in response to the JWA. See 1998 Ariz. Sess. Laws, Ch. 291, § 2; see also *Coleman*, 385 P.3d at 423. The legislative history shows that the sole motivation for Arizona's

decision to comply with the JWA was to avoid losing federal funds. The Arizona State Senate's Fact Sheet for S.B. 1333 states, as Background, that the bill would "bring our statutes in compliance with the federal Jacob Wetterling Act in order not to jeopardize federal funding to affected state programs."⁸ Thus, there is no evidence that Arizona enacted the statute to protect the public. To the extent that Congress (and by extension, the Arizona Legislature) believed that unlawful imprisonment sometimes leads to sexual offenses, Arizona already punishes that conduct as kidnapping and requires sex offender registration for those convicted of such conduct.

The receipt of federal funding is not a legitimate purpose justifying the substantial burdens imposed on the registrant, which include frequent reporting and possible notification of neighbors and employers and even the community at large. *See Fushek v. State*, 183 P.3d 536, 542-43 (Ariz. 2008) (detailing burdens and community notification attendant to sex offender registration). Indeed, Congressional mandates regarding how states handle their police powers are generally viewed with

⁸ See <https://www.azleg.gov/legtext/43leg/2r/summary/s.1333fr.jud.htm>.

suspicion:

“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed.

Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012).

It is true that “[i]ncident to [Congress’ spending] power, Congress may attach conditions on the receipt of federal funds,” though “[t]he spending power is of course not unlimited.” *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). But, this Court’s “cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). Here the federal interest in preventing sexual crimes against children is not served by including unlawful imprisonment because Arizona’s kidnapping statute already covers restraint with sexual motivation.

The issue in this Petition is not the exercise of the federal spending power, but the rationality of Arizona’s response to Congress’ threatened

denial of funds if Arizona did not enact a statute requiring the registration of those convicted of unlawful imprisonment of children. Here Coleman challenges the statute because there is no evidence to suggest that Arizona enacted the expansive sex offender registration statute with the protection of children in mind. Unlike *Dole*, where some states challenged the Congressional act in question, in this case, Arizona is complicit in the denial of due process and equal protection to citizens such as Coleman.

Another distinction between the Congressional mandate for states to raise the age for public consumption of alcohol to twenty-one years that was at issue in *Dole* and the JWA at issue here is the universal compliance with the former and the lack thereof regarding the latter. After more than two decades, only twenty-four states (excluding Florida, New Mexico, and Ohio) have complied with JWA's mandate that those convicted of false imprisonment be required to register as sex offenders. When only a minority of states implements the JWA's mandate to require sex offender registration for unlawful imprisonment, it is apparent that strict adherence was not required to keep funding. Because JWA's mandate was not universally adopted, Arizona's inclusion of unlawful

imprisonment lacks a legitimate state interest and therefore creates a classification for purposes of the Equal Protection Clause.

C. Because Unlawful Imprisonment in Arizona is not a Serious Offense, There is no Rational Basis for Requiring Sex Offender Registration Absent a Finding of Sexual Motivation.

As noted above, a statute passes the rational-basis test if it is rationally related to any legitimate state interest, even if that interest was not articulated by the legislature that enacted it. As defined in Arizona, unlawful imprisonment is a minor offense unless it involves sexual motivation, and for this reason, such a rational basis is lacking.

In Arizona, the crimes of kidnapping and unlawful imprisonment do not require asportation, only restraint. *See State v. Pickett*, 589 P.2d 16, 20 (Ariz. 1978) (citing *State v. Williams*, 526 P.2d 1244, 1246 (Ariz. 1974)) (not the distance, but the “unlawful compulsion to stay somewhere or go somewhere against the victim’s will,” constitutes kidnapping). The facts of Coleman’s case demonstrate that the restraint may even be momentary, and it may even be committed while the child is being held by a parent. Except for the standard of proof and other rights provided in criminal procedure (such as the right to counsel in a serious criminal case), there is no functional difference between the elements of the crime

of unlawful imprisonment, as defined in Ariz. Rev. Stat. § 13-1303(A), and those of the Arizona tort of false imprisonment. *See Swetnam v. F.W. Woolworth Co.*, 318 P.2d 364 (Ariz. 1957) (“The essential element of false imprisonment is the direct restraint of personal liberty or the freedom of locomotion. . . . There need not be actual force; the restraint may be from the fear of force as well as from force itself. Words alone are frequently sufficient to bring about the actual restraint of liberty.”).

Only eight months prior to filing the opinion in Coleman’s case, the same three-judge panel explained the history of the crime of unlawful imprisonment in *Kaniowsky v. Pima County Consol. Justice Court*, 371 P.3d 654 (Ariz. Ct. App. 2016). Initially, the court recognized that unlawful imprisonment was not jury triable based on the lack of seriousness of the offense. *Id.* at 656 (citing *Amancio v. Forster*, 993 P.2d 1059 (Ariz. Ct. App. 1999)). It then reasoned that the offense was entitled to a jury trial only because, at common law, unlawful imprisonment was an indictable, jury-eligible offense. *Id.* at 656, 659 (citing *Derendal v. Griffith*, 104 P.3d 147, 156 (Ariz. 2005), and Ariz. Const. art. II, § 23).

Unlawful imprisonment does become “serious,” on the other hand, when an allegation of sexual motivation is proven under Ariz. Rev. Stat.

§ 13-118, because that permits registration under § 13-3821(C) in the discretion of the sentencing court. *See Fushek*, 183 P.3d 536 (allegation of sexual motivation requires jury trial based on legislative determination of seriousness). Because “unlawful imprisonment” in Arizona is not “serious,” the requirement of registration for those convicted of unlawful imprisonment without a finding of sexual motivation is not rationally related to the legitimate interest of protecting children from sex offenders. Here, even if *arguendo* there was a rational basis for including unlawful imprisonment with sexual motivation, application of the statute to Coleman violated his substantive due process and equal protection rights because the jury acquitted Coleman of the allegations of sexual motivation.

Although Arizona “generally relied” on the MPC when revising its criminal code, it chose not to adopt certain provisions. *State v. Bowsher*, 242 P.3d 1055, 1056-57 (Ariz. 2010). Arizona did not adopt the creation of “felonious restraint,” instead choosing to define its own kidnapping statute as more akin to the MPC’s definition of felonious restraint. But by creating a special allegation for sexual motivation that, upon proof beyond a reasonable doubt to a jury, permits the sentencing court to

require registration, *see* Ariz. Rev. Stat. §§ 13-118 & 13-3821(C), Arizona found a way to track offenders whose crimes were less “serious” in terms of felony classification but nevertheless revealed a character for sexual predation. As § 13-118 was adopted in 1995, *see* 1995 Ariz. Sess. Laws, Ch. 257, § 1, Arizona’s compliance with the JWA by amending § 13-3821(A) to include unlawful imprisonment bore no rational relation to protecting communities from sex offenders.

The *Coleman* court, following its own precedent, reasoned that satisfaction of the rational-basis test requires nothing more than the Legislature having “significant interest in protecting its citizens.” 385 P.3d at 424 (quoting *Martin*, 987 P.2d at 798). In the case of JWA compliance, however, the Arizona Legislature did not even suggest, much less express a belief, that expansion of the list of registerable offenses bore any relationship to protecting the community from sex offenders. Even under the most forgiving of rational-basis standards, *see Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”), Arizona’s compliance with the JWA fails to provide a rational

basis for requiring sex offender registration by persons convicted of unlawful imprisonment without sexual motivation.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court accept review of the opinion of the Arizona Court of Appeals.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David J. Euchner", with a large, stylized flourish underneath.

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