IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MELISSA BROWN,

Plaintiff,

v.

NELSON SMITH, in his official capacity as Commissioner of the Virginia Department of Behavioral Health and Developmental Services,

Defendant.

Civil Case No. 1:24-cv-477

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF EXHIBITS

36	Department presentation: "Barrier crimes for DBHDS Facilities, Licensed Providers, and CSBs" (June 14, 2021)
37	Declaration of Public Health Emergency re addiction in the Commonwealth of Virginia
38	Substance Abuse Services Council annual report (2022)
39	Senate Doc. No. 25, 2006: "Interim Report of the Impact of Barrier Crime Laws on Social Service and Health Care Employers"
40	Report of the Joint Commission on Health Care: "Addiction Relapse Prevention Programs in the Commonwealth"
41	Substance Abuse Services Council annual report (2021)
42	Office of Recovery Services webpage
43	Department presentation: "Overview of Barrier Crimes Requirements for DBHDS Facilities, Licensed Providers and CSBs" (Nov. 17, 2020)
44	Department presentation: "Understanding the Barrier Crimes and the Complexity of the Roll it Plays in the Reduction of the Human Services Workforce"
45	Joint Subcommittee to Study Barrier Crimes and Criminal History Records Checks meeting summary
46	Executive Order 36: "Stand Tall – Stay Strong – Succeed Together Reentry Initiative"
47	Video: "Increasing Workforce Capacity by Eliminating Barrier Crimes for Peer Support"
48	Video: "Barrier Crimes Roundtable"
49	Video: "Barrier Crimes Townhall"
50	Department profile for Melissa

TABLE OF WITNESSES

Witness	*Form of testimony*	*Relevance*
Melissa Brown	Declaration	Plaintiff
Charles Adcock	Declaration	CEO of FCCR, Melissa's first rehab center
Dana Brown	Declaration	CEO of Zoe Freedom Center, rehab center where Melissa volunteers
Rudy Carey	Declaration	Former counselor at FCCR; current counselor at Mainspring, where Melissa now works
Jimmy Christmas	Declaration	Screener for Virginia Department of Behavioral Health and Developmental Services screening process
Yitzy Halon	Declaration	CEO of Mainspring
Megan Kurlychek, Ph.D.	Report	Professor of Criminology
Stacy Pendleton	Deposition	Former Department Chief Human Resources Officer
Malinda Roberts	Deposition	Department Background Investigations Supervisor
Judi Schmidt	Declaration	Melissa's direct supervisor at FCCR
Mark Taylor	Declaration	Current counselor

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

INTRODUCTION

This motion for summary judgment comes in an as-applied constitutional challenge to Virginia's barrier law, which bans the plaintiff, Melissa Brown, from working in substance-abuse counseling. Six months ago, the Commonwealth moved to dismiss, arguing that under the rational-basis test, it had every right to ban Melissa because of her twenty-three-year-old criminal record. The Court, however, disagreed. Explaining that "rational-basis review … must mean something beyond absolute deference to the legislature," the Court held that, "taking all of the factual allegations … as true," "the Complaint makes a plausible allegation of the irrationality of the barrier law." ECF 18 ("MTD Op.") at 16–17.

That resolves this motion for summary judgment. Discovery has since shown that, except for a few insignificant deviations, every material allegation is true. If anything, discovery has shown that the irrationality is even worse than Melissa alleged. The Court should thus grant her summary judgment.

Because the Court held a hearing in this case as recently as mid-September, the next section provides only a short reminder of the background and the proceedings so far. The brief then goes directly into Melissa's argument, relying on the undisputed facts. A full listing of undisputed facts, as required by Local Rule 56(B), follows at the end.

BACKGROUND

I. Melissa Brown is banned from working by her old criminal history.

At heart, Melissa Brown's life is a story of redemption. After a difficult childhood, Melissa became addicted to drugs in her twenties. Brown Decl. ¶¶ 3–6. That addiction spiraled, and she began stealing to fund it. *Id.* ¶ 7. Her conduct from 2000 to 2001 thus led to a serious criminal record. *Id.* ¶¶ 7, 12. The nadir came on July 20, 2001, when Melissa was twenty-seven. *Id.* ¶ 8. Amid a dayslong binge and desperate to buy more drugs, she stole the pocketbook of a

woman from a Food Lion shopping cart and used it to withdraw $2,200 from the bank. *Id.* ¶¶ 8–9. The next summer, she pleaded guilty to credit-card fraud and, as relevant here, robbery. Ex. 1 (sentencing order). For the robbery, out of a total sentence of ten years, six years and five months were suspended, so she was sentenced to an active term of three years and seven months. *Id.* But because the robbery violated her probation for an earlier theft, she served eight years in prison, until she was released in July 2010. Brown Decl. ¶ 12; Ex. 2. A nominal "good behavior" condition of her suspended sentence does not expire for a few more years (because it reaches for twenty years after her release from prison), Ex. 1, but Melissa was released from probation more than a dozen years ago, and that was the end of her involvement with the criminal-justice system, Brown Decl. ¶ 30; Ex. 2; Ex. 3.

For Melissa, that was a whole other life. Sober since 2002, in a different, loving marriage, and connected with her children and grandchildren, Melissa has become another person—one dedicated to helping others overcome drug abuse, just as she has. *E.g.*, Brown Decl. ¶¶ 2, 15–16. That is why, in 2014, she applied for a job as a supervised substance-abuse counselor at an outpatient opioid-treatment center in Fredericksburg called FCCR. *Id.* ¶ 20.

Enter the barrier law. In Virginia, people with any of roughly 176 convictions are banned, usually for life, from working in "direct care" positions in facilities licensed by Virginia's Department of Behavioral Health and Developmental Services, which includes most substance-abuse treatment centers. *See* Va. Code §§ 37.2-416.1 (barrier law); 37.2-403; 37.2-405 (licensure requirement); *see also* Ex. 4 (Department's list of barrier crimes); Christmas Decl. ¶ 9. The barrier crimes—ranging from treason and murder to setting off smoke bombs and "carelessly"

setting fire to a field—include robbery,[1] and FCCR was licensed by the Department, Adcock Decl. ¶ 2. So Melissa underwent a background check, and, based solely on her robbery conviction, the Department wrote a letter explaining that Melissa was "not eligible for employment pursuant to Va. Code § 37.2-416."[2] Ex. 5; Ex. 6 at 4–5 (admission that there was no other reason); *see also* Roberts Tr. 30:14–18. At the time, however, the barrier law clearly applied only to formal *employment*,[3] so the Department supervisor who administers the law told FCCR that it could hire people with barrier convictions as independent contractors, Roberts Tr. 96:8–21; Adcock Decl. ¶ 10. Which it did. Melissa worked at FCCR as a counselor until 2018, and, for her last few months, she was promoted to clinical supervisor. *E.g.*, Brown Decl. ¶¶ 21–23. *See also* Exs. 7 (job description); 6 at 10–11 (admissions that these were direct-care positions).

But when a new company called Pinnacle bought FCCR, it concluded that Melissa was legally barred. *See* Ex. 8; Brown Decl. ¶ 24. Rather than fire a valuable employee, however, it instead transferred her to a marketing role. Brown Decl. ¶ 25. Melissa has remained in the industry ever since. *Id.* Today, she works near Quantico as the Chief Growth Officer at a licensed inpatient facility called Mainspring (having just been promoted from Vice President of

[1] See the barrier law at Va. Code § 37.2-416.1(B), which incorporates the list of barrier crimes at § 19.2-392.02, which includes §§ 18.2-481 (treason), 18.2-32 (murder), 18.2-87.1 (setting off smoke bombs in public), 18.2-88 (carelessly damaging property by fire), and 18.2-58 (robbery).

[2] The challenged barrier law, which is now broken out for *adult* substance-abuse and mental-health facilities only, Va. Code § 37.2-416.1, used to be an umbrella law that applied to all Department-licensed facilities, *see id.* § 37.2-416 (through June 30, 2023).

[3] *Compare* Va. Code § 37.2-416.1(B) (prohibiting "[h]ir[ing] for compensated employment" and "[a]llow[ing] any person under contract … to serve in a direct care position") *with id.* § 37.2-416 (as effective from July 1, 2012, through June 30, 2016) (containing only the "hire for compensated employment" prohibition). *See also* Roberts Tr. 97:7–98:1.

Marketing and Operations). *Id.* ¶¶ 2, 25; *see also* Ex. 9 (recent job description). She would share her own history of overcoming addiction by providing substance-abuse counseling there if she could, and she would potentially supervise other counselors too if the barrier law didn't also ban her from first-order supervision of direct-care workers. Va. Code § 37.2-416.1(A) (defining "Direct care position" to include "immediately supervising a person in a position described"); *see also* Roberts Tr. 23:23–24:10; 27:14–24. Her current CEO would trust her to craft the direct-care responsibilities that she would take on. Halon Decl. ¶ 11. But she remains barred because of a criminal record dating to early in the second Bush administration. Ex. 10 (2023 ineligibility letter); Ex. 6 at 2–3 (admission); *see also* Roberts Tr. 32:16–21.

II. Melissa challenges the ban as irrational.

In March 2024, Melissa brought this suit, challenging the barrier law, as applied to her, as violating the Equal Protection and Due Process clauses. The Commonwealth promptly responded with the rational-basis test. Moving to dismiss, it argued that the applicable standard, rational-basis review, is "a paradigm of judicial restraint." ECF 12 at 16–20. Boiled down, its argument was that:

> [r]obbery is an egregious felony against person and property, and may itself be associated with substance abuse. Virginia rationally views such a criminal history as having a negative relation to the objectives of, and sensitivities inherent in, the provision of planned, individualized interventions through direct care to vulnerable individuals suffering with substance abuse. It is allowed to set that rule categorically.

Id. at 18 (citations omitted). Melissa responded with 20 cases that had held bans like the barrier law unconstitutional.[4] Some of those bans applied to people convicted of robbery; others applied

[4] ECF 15 (citing *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977) (per curiam), *aff'd by an equally divided Court*, 434 U.S. 356 (1978); *Perrine v. Mun. Ct.*, 488 P.2d 648 (Cal. 1971); *Chunn v. State ex rel. Miss. Dep't of Ins.*, 156 So. 3d 884 (Miss. 2015); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Fields v. Dep't of Early Learning*, 434 P.3d 999 (Wash. 2019); *Lewis v. Ala. Dep't of Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993); *Kindem v. City of Alameda*, 502 F.

to people convicted of worse.[5] Many involved purportedly sensitive fields.[6] Even so, and even under the rational-basis test, courts have ruled for plaintiffs again and again. Ultimately, that is because the rational-basis test is not "toothless." ECF 15 at 7 (quoting *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002)); *see also Fauconier v. Clarke*, 966 F.3d 265, 277–79 (4th Cir. 2020) (valid rational-basis claim); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 667 (4th Cir. 1989) (summary judgment granted to rational-basis plaintiff); *Harrison v. Austin*, 597 F. Supp. 3d 884 (E.D. Va. 2022) (same).

Based on those cases, the Court rejected the Commonwealth's arguments and held that Melissa had stated a claim. "[R]ational-basis review," the Court held, "must mean something beyond absolute deference to the legislature; otherwise it is not review at all." MTD Op. 16. The Court thus sent the case to discovery so that "[a] more complete record" could "allow the parties to flesh out their arguments at summary judgment." *Id.* at 17.

Supp. 1108 (N.D. Cal. 1980); *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974); *Harris v. Ky. Bd. of Barbering*, No. 74-399 (W.D. Ky. June 13, 1975) (available at ECF 16-1); *Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986); *Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978); *Brewer v. Dep't of Motor Vehicles*, 93 Cal. App. 3d 358 (1979); *Cronin v. O'Leary*, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001); *Tanner v. De Sapio*, 150 N.Y.S.2d 640 (N.Y. Sup. Ct. 1956); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Commw. Ct. 2015) (en banc); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (en banc); *Warren Cnty. Hum. Servs. v. State Civ. Serv. Comm'n,* 844 A.2d 70 (Pa. Commw. Ct. 2004)).

[5] For robbery, see *Miller*, 547 F.2d at 1316; *Fields*, 434 P.3d at 1001; *Nixon*, 839 A.2d at 283 n.9; *Cronin*, 2001 WL 919969, at *7. For worse, *see, e.g.*, *Johnson*, 59 A.3d at 13–14 (manslaughter); *Furst*, 631 F. Supp. at 1331–32 (same); *Miller*, 547 F.2d at 1316 (*armed* robbery); *Nixon*, 839 A.2d at 283 n.9 (same).

[6] *E.g.*, *Fields*, 434 P.3d at 1001 (childcare); *Nixon*, 839 A.2d at 280 n.4 (eldercare); *Johnson*, 59 A.3d at 14 (schools); *Cronin*, 2001 WL 919969, at *2 (health care); *Pentco*, 474 F. Supp. at 1003 (massage).

ARGUMENT

Which Melissa now does. At this stage, the rule is that "[s]ummary judgment is appropriate where there is no dispute of material fact and judgment is proper as a matter of law." *Smith v. Schlage Lock Co.*, 986 F.3d 482, 486 (4th Cir. 2021). And that is exactly what discovery has shown. Applying the barrier law to Melissa is constitutional only if there is some "rational connection with [her] fitness or capacity to practice" substance-abuse counseling, or to supervise counselors. *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957). But, by now, the undisputed record is overwhelming. No rational person could believe that Melissa's criminal record from twenty-three years ago has anything to do with her fitness to practice today.

The next sections explain why. Part I shows that there is no genuine dispute about Melissa's rehabilitation. Part II shows that the barrier law is so full of exceptions as to be irrationally underinclusive. Part III shows that the law is extraordinarily harsh. Part IV explains the uncontested social science supporting Melissa. Part V shows the disconnect between Melissa's criminal record and the work she wants to do. Finally, Part VI shows that the barrier law is undisputedly—and irrationally—counterproductive. In line with the motion-to-dismiss denial, the argument is presented through the lens of Equal Protection. MTD Op. 8–17. But because the law bans Melissa from the work of her choice, its irrationality also establishes a violation of the Due Process Clause. *Id.* at 17–18; *see also* Brown Decl. ¶ 26; Christmas Decl. ¶ 9.

I. Melissa's rehabilitation is beyond rational debate.

Start with the "ideal" of the criminal-justice system: rehabilitation. *Graham v. Florida*, 560 U.S. 48, 71, 73–74 (2010). Melissa is a "completely different person" from the woman who committed a robbery in 2001. Brown Decl. ¶ 33. Indeed, no one could rationally think otherwise.

Yet that rehabilitation means nothing next to the barrier law's lifelong sweep. *See* MTD Op. 11–14 (discussing *Fields*, 434 P.3d at 1001–03; *Barletta*, 973 F. Supp. 2d at 139).

Twenty-three years ago, Melissa was a waitress in a bar with no sense of self-worth. Brown Decl. ¶ 6. She was high all the time, and she stole to feed her addiction. *Id.* ¶¶ 6–7. Since then, she has accepted responsibility for her mistakes. *Id.* ¶ 33. She paid restitution to the robbery victim, served her sentence, and completed probation. *Id.* ¶¶ 12, 14, 30; *see also* Exs. 1 (restitution); 2 (release); 11 (probation). She has apologized, or tried to apologize, to everyone she hurt. Brown Decl. ¶ 14. She has not used illegal drugs since early 2002, and she has not been arrested or charged with any more crimes. *Id.* ¶¶ 11, 30; *see also* Ex. 12 (clean drug screening from 2023).[7]

That would be the minimum, but the undisputed record goes much farther. Overwhelming evidence proves that Melissa simply is not who she used to be.

Start with her incarceration, when she tutored inmates seeking GEDs. Brown Decl. ¶ 13. After release, she tried to improve conditions, testifying in a special DOJ hearing about rape and other staff misconduct in prison. *Id.* ¶ 16; *see also* Ex. 15 at 36–68 (testimony). In 2015, she even went back in—offered as "a shining example of what education and determination can accomplish"—to speak to graduating inmates. Ex. 16; *see also* Brown Decl. ¶ 30. (A bit of her speech: "If you think that your felony convictions will hold you back from your dreams[,] I am here to tell you that you are wrong." Ex. 17.)

Or take education. Three and a half years after Melissa was out, she graduated from the University of Mary Washington, *cum laude*, with a bachelor's degree in psychology. Ex. 18. She

[7] The Department has stipulated that records produced by two of Melissa's employers, Mainspring and Pinnacle, as well as from the Virginia Board of Counseling, are excepted from the rule against hearsay. Exs. 13, 14; *see also* Fed. R. Evid. 803(6), (8).

took eight more courses at a community college after that, earning As in every one of them. Ex. 19. One of her undergraduate professors would later recommend her as maybe "the best I've seen" at mentoring children with incarcerated parents. Ex. 20.

Most of all, take her work. She studied substance-abuse education for four-hundred hours, Ex. 21, while working, for about two years, as a case manager at a halfway house for women returning from incarceration, Brown Decl. ¶ 19. In 2014, she became a trainee substance-abuse counselor. By mid-2016, she had completed 2,000 hours of supervised counseling. Ex. 21. In another two years, she was promoted to clinical supervisor, "manag[ing] and provid[ing] leadership for all clinical staff members as well as the overall clinical operations of the program." Ex. 7; Brown Decl. ¶ 23. When the barrier law forced her out, she stayed in the field as best she could, working for another six years doing outreach (and getting certified along the way by the American Society for Addiction Medicine). Brown Decl. ¶¶ 22, 25; *see also* Ex. 22. Today she works at a different rehab center as the Chief Growth Officer. Brown Decl. ¶ 25. She volunteers her free time by leading a non-clinical group at Zoe Freedom Center, a faith-based non-profit rehab facility that is not licensed by the Department. *Id.* ¶ 26; Dana Decl. ¶¶ 2, 4, 6; Ex. 6 at 18 (admission that Zoe is not licensed). (She has also volunteered at Rappahannock Area Against Sexual Assault and for a class teaching life skills to the homeless. Brown Decl. ¶ 27.)

Unsurprisingly, uncontradicted evidence shows that Melissa is an asset to the field. Even when she was not working in direct care, her performance reviews at Pinnacle included observations such as "Melissa works tirelessly to ensure patients find the right treatment program. She is passionate and dedicated ...." Ex. 23 at 5. Her supervisor there wrote to the Department to object to the barrier law because "her talent, compassionate approach, and education are being underutilized." Ex. 8. As for direct care, the owner of FCCR testifies that

Melissa, even starting out, was a "solid clinician" with "unquestionable integrity." Adcock Decl. ¶ 11. Her direct supervisor, who observed her firsthand every day for the four years before the barrier law forced her out, testifies that Melissa is "one of the finest people I know" and that she "worked as hard as anyone in this field." Schmidt Decl. ¶¶ 9–10; *see also* Ex. 24. (Moreover: "her being let go was horrible … it was appalling to see that taken away from her and her clients. Our team was broken." Schmidt Decl. ¶ 9.). Melissa's former FCCR co-worker testifies to her "hard-working nature," "her counseling aptitude," and "her dedication." Carey Decl. ¶ 13. The owner of Zoe, the nonprofit where she volunteers, testifies that "many women … are able to walk free from addiction today because of Melissa's contribution to their lives." Dana Decl. ¶ 6. And her current boss at Mainspring testifies that she is a "tremendously powerful resource" and that banning her from direct care is "a huge disservice to Mainspring's clientele." Halon Decl. ¶¶ 9–11. *See also Johnson*, 59 A.3d at 24–25 (noting "exemplary" work record).

And then there is the best evidence of all: the Commonwealth's own undisputed view of Melissa's rehabilitation. In 2015, Governor McAuliffe found it "appropriate" to "restor[e] her right to vote, hold public office, serve on a jury, and to be a notary public." Ex. 3; Brown Decl. ¶ 30. And the next year, Virginia certified her as qualified *to be a substance-abuse counselor*. Ex. 6 at 14 (admission). Despite authority to deny that certification because of a felony conviction, 18 Va. Admin. Code 115-30-150(1), the Board of Counseling certified her anyway, Exs. 25, 26. Indeed, Melissa breezed through the criminal-history review. Apparently because she "present[ed] a history of substance use disorder with evidence of continued abstinence and recovery," the Board did not even send her to the committee that evaluates applicants' criminal histories. Ex. 13 at 1 & attachment. Instead, the Board approved her straightaway, and she remains certified by the Commonwealth as fit to provide substance-abuse counseling. *See also*

Pendleton Tr. 26:24–27:14 (former Department Chief Human Resources Officer testifying that certifications can qualify people for direct-care positions).

Put simply, there is no dispute about Melissa's rehabilitation. No rational person—not even the Commonwealth itself—sees her as posing some special risk by working in direct care.[8]

II. The law is riddled with exceptions.

A second reason the barrier law is irrational is that it is shot through with exceptions. The rational-basis test of course allows laws *some* latitude to be underinclusive, but this goes well beyond that. There are at least three glaring exceptions, any one of which could support an Equal Protection claim by itself. In combination, they show that it just is not rational to exclude Melissa from working in direct care.

A. Screenings

First, there is the "screening" regime. While robbery and most other barrier crimes result in a lifetime ban, twenty-three crimes, including some forms of burglary, are "screenable." For those crimes, when a person is five years out of the justice system (and meets other factors), that person can work if "a screening assessment" by a Department-approved provider shows "that the criminal behavior was substantially related to the applicant's substance abuse or mental illness and that the person has been successfully rehabilitated and is not a risk to individuals receiving services." Va. Code § 37.2-416.1(D)–(F); *see also* Ex. 27 at 8–9 (listing most screenable crimes); Ex. 28 at VA_001974–75 (another list). But there is no rhyme or reason to it.

[8] Because Melissa's rehabilitation concerns her as a person, and not her robbery conviction particularly, it is one of several reasons a fact dispute about her criminal record is immaterial. Twenty-four years ago, there was an incident during Melissa's divorce in which she picked up her children from school even though they were in the legal custody of her then-husband. The Commonwealth may argue that she was convicted of misdemeanor parental abduction, but the Department has never tried to bar her because of that incident, Ex. 6 at 4–6, 8–9 (admissions), and, in any event, she is entirely rehabilitated today.

Ultimately, the process means the Department easily recognizes rehabilitation in some people and arbitrarily ignores it in others. Which crimes are screenable is, to borrow the Court's word, "puzzling":

> Reckless endangerment by throwing objects from two stories or higher is screenable; recklessly driving a boat while under the influence is not. Hazing in a fraternity is screenable; hazing in a gang is not. Brandishing a firearm in most places is screenable; brandishing a BB gun at school is not. Threatening a teacher is screenable; threatening the Governor is not.

MTD Op. 14–15 (citations omitted). Similarly, there is no rule that screenable crimes be less serious than non-screenable ones. *Contra* Ex. 29 at 5 (Commonwealth claiming that seriousness justifies the inconsistency). As the Court noted, Melissa's robbery, which would be a level six felony today, is not screenable, while a higher, level three burglary is. MTD Op. 14. And more broadly, no serious person thinks that shining a laser pointer at a police officer (lifetime ban) is worse than wife-beating (screenable), or that negligently setting fire to a field (non-screenable) is somehow worse than distributing date-rape drugs (screenable). *Compare generally* Ex. 4 (list of all barrier crimes) *with* Ex. 27 at 8–9 (list of screenable crimes). Bizarrely—if there were some concern about a nexus with drugs—the system allows screening *only if* the crime was due to drug abuse (or another mental-health problem). Meaning that someone who recklessly drives a boat is banned for life, someone who recklessly endangers others by throwing objects from two stories is screenable if he did it because he was high, and someone who recklessly endangers others by throwing objects because he was an impulsive teenager is back to being banned for life. Roberts Tr. 59:6–15.[9] None of it makes sense.

[9] Moreover, misdemeanor assault and a few simple drug crimes do not even require screening. They simply stop being barriers after four years. Va. Code § 37.2-416.1(C). *See also* MTD Op. 14.

But for those lucky enough to undergo screening, things look much rosier than they do for Melissa. For those applicants, the Department has a short checklist. Ex. 30. Then the screenings cover such factors as "A complete mental health/substance use history," "Treatment history," and "Recovery Status." Ex. 31 at 2–3; *see also* Roberts Tr. 39:10–14 (agreeing that the Department has approved the form of screenings).[10] All this lasts an hour, maybe ninety minutes. Christmas Decl. ¶ 12; Carey Decl. ¶ 19; Taylor Decl. ¶ 9. Last year, these short screenings had a *ninety-six* percent pass rate. Ex. 32 at 2; *see also* Roberts Tr. 64:21–23. Indeed, it is even undisputed that someone like Melissa would pass: both a screener and the supervisor who administers the law testify that someone like her would very likely be found rehabilitated. *See* Christmas Decl. ¶ 14; Roberts Tr. 56:18–57:8. But, based on arbitrary distinctions, the Department isn't even allowed to look.[11]

This regime means that Melissa can show that she is irrationally distinguished not just from theoretical comparators like "someone convicted of burglary" but even from specific people whom the Commonwealth is allowing to work right now. For instance, the Department has identified three people convicted of burglary who are currently allowed to work in direct-care positions. Ex. 34; Ex. 35 at 16–17. How does blessing them while banning Melissa rationally advance a state interest? The Commonwealth's answer has only ever been generic invocations of "protection" and "character and fitness." Ex. 29 at 2–4. When pressed, though, the Commonwealth has never said what, exactly, it thinks Melissa is going to do if she is allowed

[10] A "typical" writeup, Roberts Tr. 54:9–13, is in Ex. 33 at VA_001802–09. *See also id.* at VA_001796–98 (discussing screening factors); Roberts Tr. 52:22–53:2 (confirming that such screenings are sufficient).

[11] Before 2020, dozens of people were screened without the Department even reviewing the results. Roberts Tr. 48:5–9, 49:3–8. Since the Department has started reviewing the screenings, it has never overridden a screener's decision. *Id*. at 45:7–19.

back into direct care. But if the idea is that she will commit another theft, then why let someone like Mark Taylor work, when he committed a felony burglary, breaking into a store to steal a TV that he could sell to buy drugs? Taylor Decl. ¶ 5. If the idea is violence, why ban Melissa (who is a five-foot-two grandmother, Brown Decl. ¶ 28), when Rudy Carey can counsel at the same facility, and he is a former high-school football player convicted of battering a police officer? Carey Decl. ¶¶ 2, 8–9.

The answer, of course, is not that these people are wrongly included, but that Melissa is wrongly excluded. Mr. Taylor committed the burglary in 1996 because he was caught up in the crack epidemic. He got clean in 2001, had his civil rights restored in 2008, and has since gotten certified as a substance-abuse counselor. Taylor Decl. ¶¶ 2–6. Mr. Carey was trying to escape arrest while in the throes of addiction twenty-two years ago, but he too got clean and was eventually even pardoned by Governor Youngkin. Carey Decl. ¶¶ 10, 18.[12] The Commonwealth rightly recognizes these people as examples of rehabilitation. But, under its arbitrary screening laws, it irrationally denies that same recognition to Melissa.

B. Grandfathering

A second reason the barrier law is irrationally underinclusive is its grandfathering clause, which allows greater freedom for people with barrier convictions who were already working in direct care before the law was passed. Va. Code § 37.2-416.1(A); *see also* Roberts Tr. 71:23–72:9 ("So if someone were working for one of our providers … prior to July 1st, 1999, the individual would be considered grandfathered-in, because they could not be held accountable for a law that did not exist … when they were hired."). In discovery, the Commonwealth essentially refused to

[12] A pardon would not help Melissa, however. Roberts Tr. 61:18–24.

explain what, if anything, justified this exception, Ex. 29 at 7–8, but presumably the Legislature thought that some people with criminal records *could* work in direct care. There just needed to be evidence—like work history—showing them fit.

This Court and others, though, have already recognized the irrationality. MTD Op. 9, 16, "[I]f convicted criminals who had been working" before July 1999 "were capable of essentially rehabilitating themselves so as to qualify them … there should be no reason why other convicted criminals were not, and are not, also capable of doing the same." *Nixon*, 839 A.2d at 289–90 (holding criminal-history ban on working with "the elderly, disabled, and infirm" irrational because of grandfathering clause); *see also Peake*, 132 A.3d at 506 (extending ruling). At the risk of stating the obvious, human nature hasn't changed since 1999.

Again, this irrationality means that Melissa can compare herself to specific people. The owner of her first rehab center, Charles Adcock, was convicted in 1981 of felony cocaine distribution. That was before the barrier law, so he could still start in direct care in 1985. When the barrier law was enacted in 1999, he could not only keep working, but also soon run an entire rehab facility. Adcock Decl. ¶¶ 4–7. Even James Christmas—one of only three people conducting the screenings that the Department uses to assess fitness—broke into a house one night to score money for drugs *and was himself convicted of felony burglary*. Christmas Decl. ¶ 6; *see also* Roberts Tr. 38:13–23; *id.* at 89:20–24.

Again, that's not to say that Mr. Adcock or Mr. Christmas should have been barred: Virginia certified both as substance-abuse counselors *and* licensed them as clinical social workers. Adcock Decl. ¶ 6; Christmas Decl. ¶ 4. It is just irrational not to extend the same recognition to Melissa.

C. Ongoing care

Finally, there is a third exception. The barrier law does not even require employers like Melissa's to fire existing direct-care employees who commit a barrier crime. It instead says only that "no provider shall … [*h*]*ire*" a person with a barrier conviction. Va. Code § 37.2-416.1(B)(1) (emphasis added). (This differs from the law for contractors, for whom, inexplicably, the ban *is* ongoing. *Id.* § 37.2-416.1(B)(2) (contractor with barrier conviction cannot "serve").) It is undisputed that the Department has no "mechanism to detect whether someone who's already employed in a direct care position in a department-licensed facility commits a barrier crime after that person is hired." Roberts Tr. 34:6–12; *see also id.* at 36:6–13.

This is exactly the inconsistency that led the Seventh Circuit to invalidate a Chicago ordinance that banned people ever convicted of armed robbery (and other crimes) from obtaining taxi licenses. Under that ordinance, "someone who already h[eld] a license [was] permitted to retain it[] although convicted of armed robbery only yesterday." *Miller*, 547 F.2d at 1316. The Seventh Circuit thus concluded that "[a]n applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other." *Id*. The same is true here. Melissa is banned forever, while a counselor who robs a patient right now faces no automatic consequence from the barrier law. *See also Lewis*, 861 F. Supp. at 827–28.

III. The law is extraordinarily harsh.

Despite its many exceptions, for those it does affect, the barrier law is also "unusually 'onerous' as compared to other laws relating to disqualification." *Fields*, 434 P.3d at 1005; *see also* MTD Op. 15; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding restriction invalid as applied when "the record d[id] not reveal any rational basis for" restricting the plaintiff more than various comparators). In the appendix below, we have catalogued the

corresponding laws of all fifty states on substance-abuse counseling, and as far as we have been able to tell, the only other states that automatically impose a lifelong ban for unarmed robbery are Idaho and Washington—and Washington's state supreme court has held a similar ban unconstitutional on almost identical facts. *See generally Fields*, 434 P.3d at 999. Forty-seven states see no need for lifetime bans, and Virginia doesn't know any real-world justification for the disparity. It admits that it "lacks information whether Virginia or other states have greater or fewer amounts of problems associated with the provision of direct care." Ex. 35 at 5.

Even in Virginia, the barrier law stands out for its rigidity. In medicine and law, traditionally the most regulated professions, Melissa could be allowed to practice because neither has a flat ban for robbery. Va. Code § 54.1-2930 (doctors); 18 Va. Admin. Code 35-10-30 (lawyers). Psychiatrists are a particularly good example. Like substance-abuse counselors, they deal with mental health. But they treat even worse conditions, require far more training, and hand out controlled substances. And there's no flat ban. What real-world difference justifies that seemingly backward regulation? Again, the Department has only ever invoked generic ideas of "protection" and "character and fitness." Ex. 29 at 2–4. But if it's about theft, why not a flat ban for lawyers, who hold client funds? If it's about assault, why not for pediatricians and gynecologists? If it's something to do with encouraging rather than discouraging drug use, what about psychiatrists, who actually give out drugs? Without an answer, courts recognize this kind of rare inflexibility as irrational. *See Fussenich*, 440 F. Supp. at 1080 (striking down felony ban for private detectives and security guards in part because there were "no automatic exclusions of felons from the practice of law or medicine"); *Fields*, 434 P.3d at 1005.[13]

[13] Another position without lifetime bans is celebrated lawmaker. *See, e.g.*, Jahd Khalil, *Don Scott becomes first Black speaker in Virginia Legislature's 400-year history*, NPR (Jan. 10, 2024) (noting Speaker's eight-year incarceration for drug-related felony), *available at*

Indeed, for most Virginia occupations, Melissa's criminal history would be presumptively irrelevant. The usual rule is that convictions, standing alone, are grounds for denial only when they "directly relate[]" to the occupation. Va. Code § 54.1-204(A). Even then, the state still must assess "[t]he nature and seriousness of the crime," "[t]he amount of time that has elapsed," "[e]vidence of the person's rehabilitation," and six other individualized factors. *Id.* § 54.1-204(B). The lack of a flat robbery ban for other important professions, including (just as examples) pharmacy and engineering, further shows that it is irrational to ban Melissa from substance-abuse counseling. *See* Va. Code §§ 54.1-204, 54.1-3316(11); 18 Va. Admin. Code 10-20-10; *Fussenich*, 440 F. Supp. at 1080 ("Finally, the irrationality of the enactment becomes most pronounced when it is compared with another … statute … which prohibits state agencies … from rejecting applications for licenses 'solely because of a prior conviction of a crime.'").

Glaringly, Virginia does not even have a barrier law for other kinds of counselors. Neither psychologists, nor independent professional counselors, nor marriage and family therapists are subject to one. *See* 18 Va. Admin. Code 115-20-140(A)(1); 18 Va. Admin. Code 125-20-160(1), (8); 18 Va. Admin. Code 115-50-120(A)(1). So if Melissa wanted to work in a private office helping people have a better relationship with a spouse or overcome a gambling addiction, her criminal history would receive individualized consideration. (And it would pass, as the Board of Counseling has already found.) But because she wants to work in a rehab center helping people have a better relationship with alcohol or overcome an opioid addiction, she is barred from working forever.

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https://www.npr.org/2024/01/10/1223953846/don-scott-becomes-first-black-speaker-in-virginia-legislatures-400-year-history. *See Butts*, 381 F. Supp. at 581 (striking down felony ban for civil-service positions in part because it did not apply to positions like treasurer and city manager).

It just does not make sense. No one is saying that the rational-basis test requires laws to be perfect. But wild and inexplicable inconsistencies are something else.

IV. Undisputed social science supports Melissa.

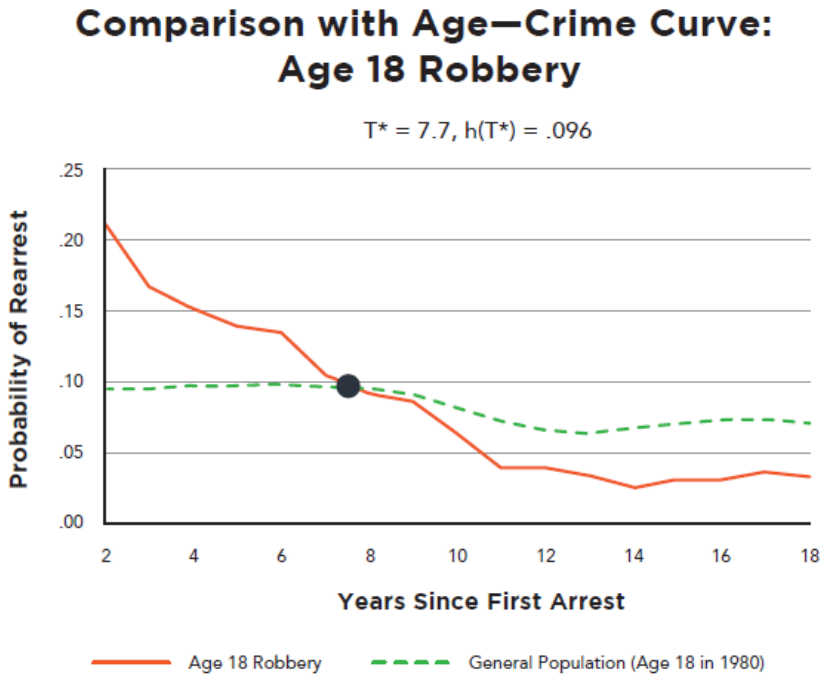
The disconnect between the law and its purported goal is only widened by the unrebutted expert testimony. Undisputed social science confirms what Melissa's and others' stories suggest: old convictions are not probative.[14]

Dr. Megan Kurlychek is a criminologist and one of the leading experts on recidivism and desistance from crime. She is a full professor, has been published in (and has edited) the major criminal-justice journals, and has been a fellow at the DOJ's Bureau of Justice Statistics. Her expert opinions have never been excluded under *Daubert* (or otherwise found unreliable). *See also Hartford Courant Co. v. Carroll*, 474 F. Supp. 3d 483, 493–94 (D. Conn. 2020) (finding Dr. Kurlychek qualified). And she published the first major criminological research directly addressing the predictive value of older criminal records. Expert Report 1–2.

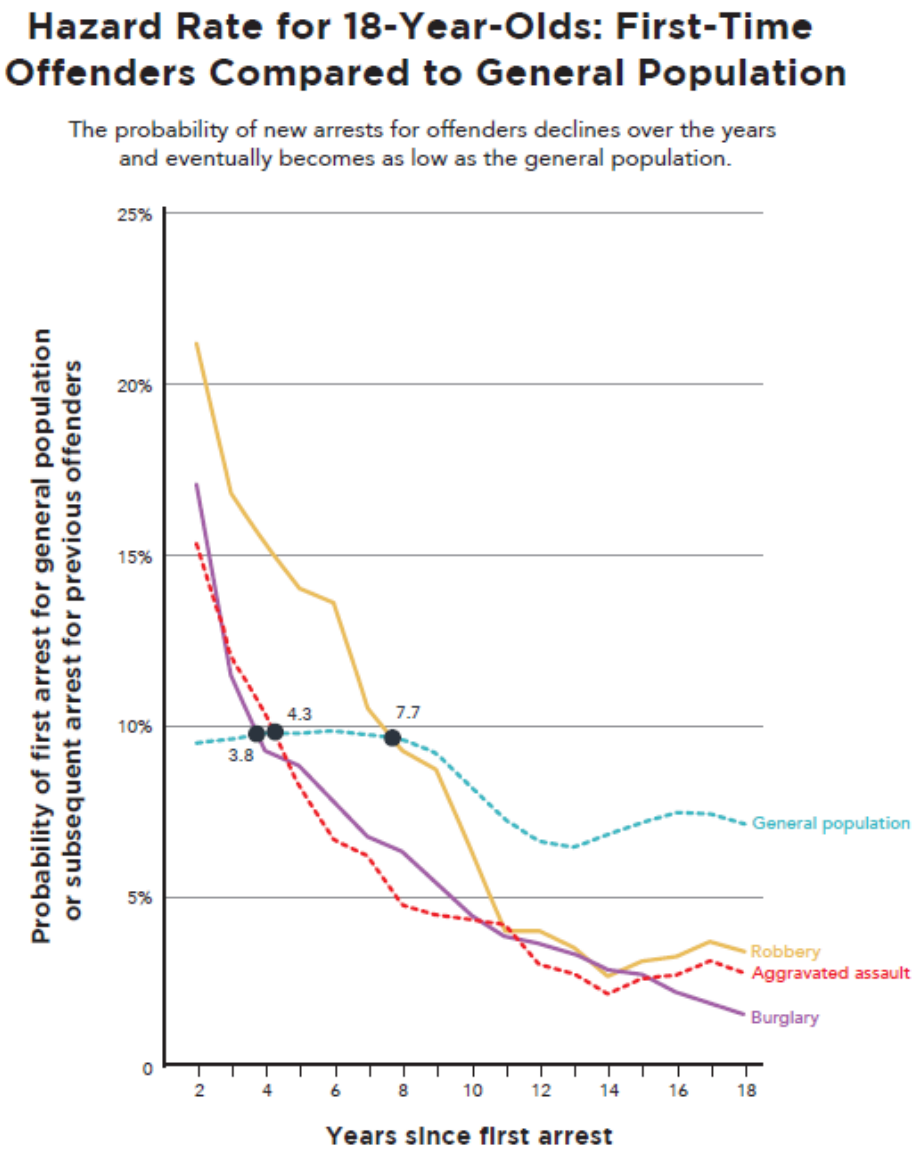
Her testimony? "The academic research on desistance clearly shows that conviction records older than seven to ten years are not predictive of future offending. That is, an individual with an old criminal record, even if convicted, even for a serious crime, bears no more probability of committing a new offense than a member of the general public with no criminal background." *Id.* at 2. The Department, disclosing no expert of its own, has not even tried to rebut this evidence.

[14] Courts agree. *See, e.g.*, *Johnson*, 59 A.3d at 22 ("Where, as here, nearly twenty years has expired since the convictions and the record reveals that the individual has held this position of responsibility for twelve years without any allegation of impropriety, it is ludicrous to contend that these prior acts provide any basis to evaluate his present character."); *Chunn*, 156 So. 3d at 889; *Fields*, 434 P.3d at 1005.

And even if it had, Dr. Kurlychek's expert opinion is not teetering on some lone article. Rather, her testimony is based on multiple lines of criminological research, each comprising multiple, replicated studies. Although only a summary can fit here, most importantly, six studies examining, together, the criminal histories of well over 100,000 people have all concluded that "the time passed since the last offense" is "one of the best indicators that an individual will remain crime-free." *Id.* at 2–3. Those studies, to quote a few, have findings like "after approximately 7 years there is little to no distinguishable difference in risk of future offending" and "a ten-year conviction free period … is the time that statistically, ex-offenders become like non-offenders." *Id.* at 2–4. One such study specifically finds that people with first convictions of robbery at age eighteen take just under eight years before they have the same risk of arrest as a member of the public of the same age:



Expert Report Ex. 2. Indeed, the study makes clear that robbery has a comparable risk decay—returning to background levels well before ten years—as two comparable *screenable* crimes, assault and burglary:



Expert Report Ex. 4.

This conclusion is bolstered by research showing that reoffending, if it will happen at all, usually occurs quickly, mostly likely within the first three to five years. A particular example is a report from the DOJ finding that, of all people who would be re-arrested after release from prison, eighty-three percent had already been re-arrested by the end of the first year. Expert Report 4–5. The Department, for its part, has cited the same study to the Legislature, agreeing

that "recidivism rates decline by year after arrest" and that "only 1% are re-arrested in the 9th year after initial arrest." Ex. 36 at VA_001817.

Finally, there is the sociological fact that most short-term offenders at worst age out of crime. As one journal article put it, "there is almost nobody over the age of 50 who presents a significant risk of offending." Expert Report 5–6.

All this means that, if anything, a woman in her fifties like Melissa, even with a decades-old criminal record, is almost certainly *less* likely to commit a crime than a young man with no criminal record who is unaffected by the barrier law. *Id.* at 4. Perhaps it is common sense that a grandmother that age presents no meaningful risk of crime. But the record now proves that too. *See Wilkins v. Austin*, 2024 WL 3874873, at *13 (E.D. Va. Aug. 20, 2024) ("[A]ny understanding … that could justify this ban is outmoded and at odds with current science."). Again, this evidence is not just undisputed. The Commonwealth has not even tried to dispute it. It seems to agree with it.

V. The ban turns on an irrelevant crime.

The undisputed record next shows that there is no nexus between robbery and substance-abuse counseling (let alone *supervising* substance-abuse counseling). *See* MTD Op. 13–14; *Chunn*, 156 So. 3d at 889; *Barletta*, 973 F. Supp. 2d at 138–39. That's not to dispute that Melissa's robbery conviction was serious. The point is just that, as with mishandling a boat, damaging a sprinkler in a juvenile correctional facility,[15] and the many, many other convictions that lead to a lifetime ban, there is only some generalized concern about the person's character, not record facts about the relationship between the crime and the job. *See* Ex. 29 at 5–7 (answer

[15] *See* Va. Code § 19.2-392.02 (citing § 18.2-477.2, which cites § 53.1-203); *see also Chunn*, 156 So. 3d at 886 (expressing skepticism of a similar ban when it covered "manslaughter for overloading a boat").

to interrogatory asking how crimes are related to substance-abuse counseling amounting to (our paraphrase) "the Legislature picked them").[16] It is an argument that, taken to its conclusion, would mean the Commonwealth could bar Melissa from almost any job. *See King v. Bureau of Prof'l & Occ. Affairs*, 195 A.3d 315, 330 (Pa. Commw. Ct. 2018) (en banc) (rejecting similar "flawed" reasoning because the state's "speculative concerns … would be equally present in other commercial establishments").

Consider two key facts about Mainspring, where Melissa would provide direct care. First, its residents are undisputedly *not* vulnerable. They are physically normal adults, who play pickup basketball during breaks, not children or nursing-home residents. Halon Decl. ¶ 14; Brown Decl. ¶ 28. Second, Melissa already works there. She has keys to the entire building, including the residential areas. She can go whenever she wants and be around whomever she wants. Halon Decl. ¶ 15; Brown Decl. ¶ 28. She just cannot talk about overcoming addiction.

From the other direction, nothing about the facts of the robbery suggests a connection to direct care. Melissa did not rob a client, and she did not exploit her job. She stole a purse from a stranger in a parking lot because she was high and wanted more drugs. To a clear-eyed observer of the criminal-justice system, the robbery could have just as easily been grand "larceny from the person of another," which is not a barrier crime.[17] Nothing about the robbery was connected to direct care—again, let alone to *supervising* direct care. *Fields*, 434 P.3d at 1006 (noting that

[16] The Legislature could create some kind of nexus requirement if it wanted because it has done so for domestic abusers. That offense, alone in the barrier law, stops being a barrier after ten years "unless the person committed the offense while employed in a direct care position." Va. Code § 37.2-416.1(G).

[17] *See* Va. Code § 19.2-392.02 (*not* citing § 18.2-95). *See also Barletta*, 973 F. Supp. 2d at 139 (noting "the fortuity of plea bargaining … the quality of legal counsel, the exercise of prosecutorial discretion, and the proclivities of different judges"); *Fields*, 434 P.3d at 1005–06 (noting that grabbing a purse "barely" meets the elements of robbery).

thirty-year-old attempted-robbery offense of plaintiff who wanted to work with children "did not involve any children in any way").

Again, this is not to argue that Melissa's conviction wasn't serious. It was. But she is not an embezzling accountant.[18]

VI. The law is undisputedly counterproductive.

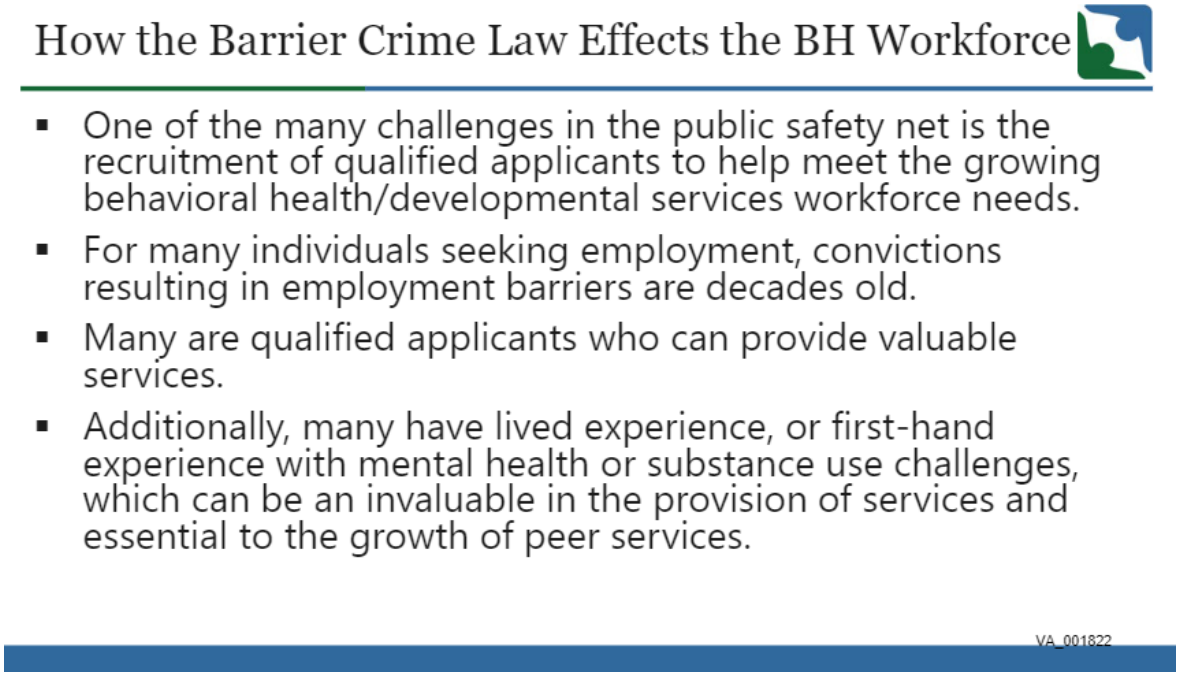
Finally, there is perhaps the worst irrationality in applying the barrier law to Melissa: it hurts more than just her. Melissa herself, despite the constitutional violations, has a good job and a loving family. She is, in the grand scheme of things, fine. But someone addicted to drugs today is not. Those people, the ones the law purportedly protects, are the ones the law prevents from getting help from someone like Melissa. *See Wilkins*, 2024 WL 3874873, at *18 (holding policy irrational in part because it "contribute[d] to the ongoing stigma surrounding HIV-positive individuals while actively hampering the military's own recruitment goals").

In its answer, the Commonwealth offered its own phrasing that "substance abuse is a serious matter of behavioral health affecting many." ECF 23 ¶ 69. That is an understatement. Addiction is a declared "public health emergency." Ex. 37 (official declaration). And Virginia needs more people working to fix it because there is a shortage of qualified counselors. The founder of the non-profit, Zoe, testifies that "it is often very difficult to get people into … licensed facilities." Dana Decl. ¶ 8. Melissa's first supervisor similarly observes that "my personal caseload quantity is at near-record levels because our facility recently lost two counselors, and applications to fill those vacant positions have been very slow." Schmidt Decl. ¶ 11. Melissa's current employer opened a facility late because of "trouble in finding qualified

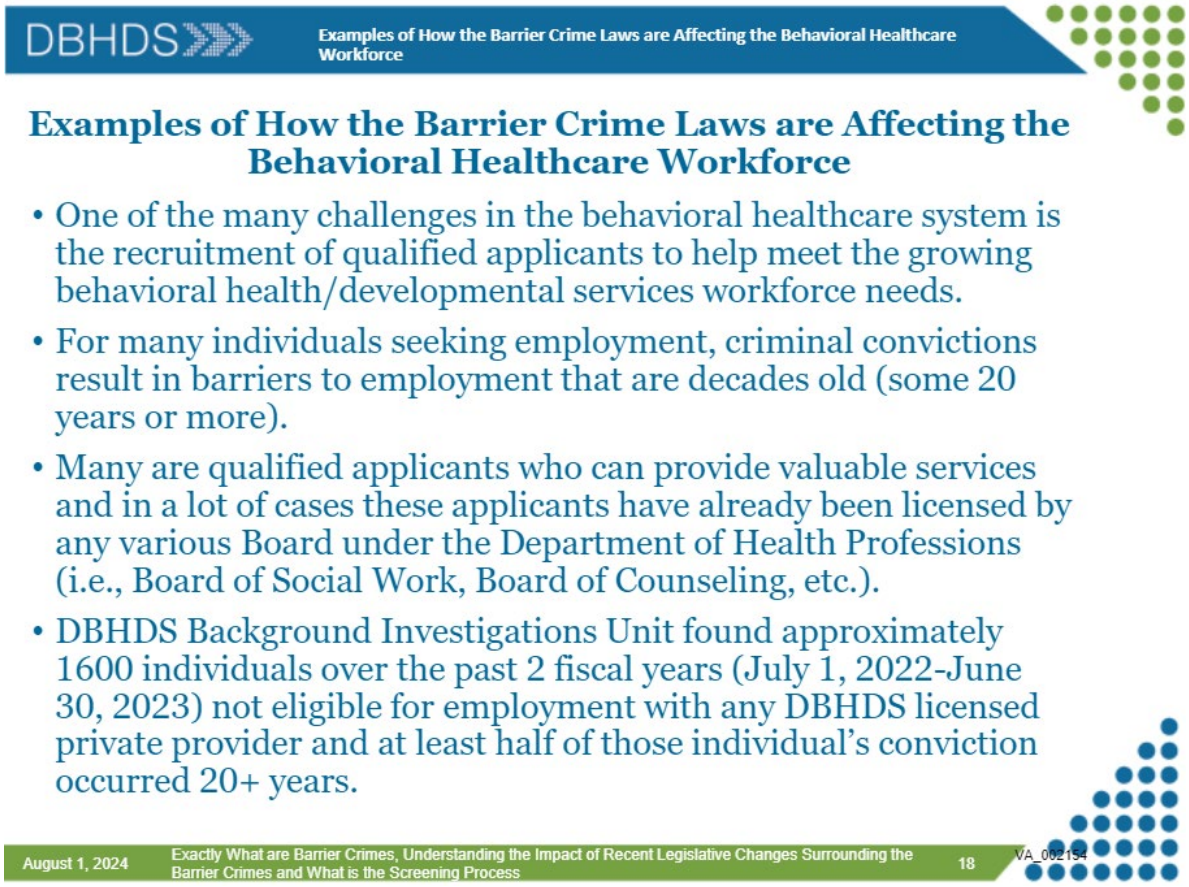
[18] There is no automatic ban for embezzling accountants. Va. Code §§ 54.1-4409.1(C), 54.1-4413.4(B)(7).

counselors." Halon Decl. ¶ 12. And often, the CEO adds, "our inpatient facility does not serve the full number of clients for whom we have beds (74) because we cannot find enough qualified counselors." *Id.*; *see also* Adcock Decl. ¶ 12.

Even so, the Commonwealth has continued to keep the barrier law standing in the way. It admits that people with criminal records can still be "extremely capable individuals with lived experience." Ex. 38 at VA_001838 (report of the state Substance Abuse Services Council). It saw the connection as early as 2006. Ex. 39 at VA_000201 ("difficulty obtaining a qualified workforce"), '206. It saw it again in 2019. Ex. 40 at VA_001110–11 ("affect[s] substantial numbers of job applicants"). And again in 2021. Ex. 41 at VA_0001844 ("barrier crimes … particularly relevant at a time where there is a huge workforce shortage"), '1846. It has a whole office employing people who have escaped drugs to help others do the same. Ex. 42. Its *own slides* speak to blocking applicants with "invaluable" experience:



Ex. 36 at VA_001822. They reveal shocking statistics:



Ex. 27 at VA_002154. Plus the kicker that "everyone hopes" the barrier law will change. *Id.* at VA_002143; *see also* Exs. 43, 44, 45; Pendleton Tr. 17:12–19:9 (confirming truth of first slide just pictured); Roberts Tr. 19:14–20:5 (second slide); Ex. 46 (Executive Order encouraging re-entry). This is why the Department's then-Chief Human Resources Officer could deplore in her official capacity (and later confirm at deposition) that:

> Every time that we have to send out a not-eligible letter to our providers, we get calls and we hear the stories, and that is very difficult. And we really right now don't have an opportunity outside of general assembly and groups like this really lobbying to affect change so that we can enhance the workforce. And really there's so many cascading impacts to these barrier crimes, and we see it on a daily basis. My staff … gets those calls every day. And so we hear those stories. And, really, we just think that this is a systemwide, statewide workforce issue. And reform needs to happen that we support.

Pendleton Tr. at 53:5–19 (punctuation re-transcribed); *id.* at 57:2–6 (confirming under oath) *id.* at 50:21–51:1 (official capacity).[19] Indeed, if there is one word, at the end of all this, to summarize the barrier law's application to Melissa, it likewise comes from the Department. In deposition, the Department supervisor who has enforced the barrier law for its entire twenty-five-year history testified that applying the law in circumstances like these is—direct quote—"crazy." Roberts Tr. at 127:9–16.

Which is just another way of saying irrational.

CONCLUSION

The Court should grant summary judgment to Melissa.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. All documents produced in this case are authentic. Exs. 13, 14.
2. Melissa Brown is a fifty-year-old grandmother living and working in Virginia. Brown Decl. ¶ 2.
3. After a difficult childhood, Melissa became addicted to drugs in her twenties. *Id.* ¶¶ 3–6. She began stealing to fund her addiction. *Id.* ¶ 7.
4. In July 2001, when Melissa was twenty-seven, amid a dayslong binge and desperate to buy more drugs, she grabbed the pocketbook of a woman in a Food Lion parking lot and used it to withdraw $2,200 from the bank. She was unarmed. *Id.* ¶¶ 8–9.
5. The next summer, she pleaded guilty to robbery. Ex. 1 (sentencing order).

[19] The video is in the record as Ex. 47, but the Court can also watch it at https://www.youtube.com/watch?v=MovJW3P2wxg. The quotation comes at 07:25. A similar video, also here as Ex. 48, is available at https://www.youtube.com/watch?v=L80bgMZrSyo. *See also* Roberts Tr. 115:2–7 (noting official capacity for Ms. Roberts). A third video, Ex. 49, is at https://www.youtube.com/watch?v=J8B3_-Lvc7s.

6. Melissa was sentenced to ten years' imprisonment, with six years and five months suspended. *Id.*
7. Melissa served about eight years in prison. Brown Decl. ¶ 12.
8. Melissa paid full restitution. *Id.*
9. Melissa was released from probation in 2012. *Id.* ¶ 30.
10. Melissa has had no further involvement with the criminal-justice system. *Id.*
11. In 2014, Melissa accepted a supervised substance-abuse counseling position at a Department-licensed facility. *Id.* at ¶¶ 20–21; Schmidt Decl. ¶ 3; Adcock Decl. ¶¶ 8–11.
12. Melissa worked there until 2018. In her last few months, she was promoted to Clinical Supervisor. Brown Decl. ¶ 23.
13. In 2018, Melissa's rehab facility (which was under new management) transferred her to a non-direct-care position because of the barrier law. *See* Ex. 8; Brown Decl. ¶ 24.
14. Melissa has remained in the addiction-recovery field ever since. Brown Decl. ¶ 25.
15. Melissa's current employer is licensed by the Department. *Id.* ¶ 2.
16. The Department administers the barrier law, Va. Code § 37.2-416.1, subject to the supervision and management of the defendant, Commissioner Smith. Ex. 6 at 2 (admission).
17. The Department has never found Melissa ineligible for any reason other than the robbery. Ex. 6 at 4–6, 8–9 (admissions); Ex. 50 (Department system screenshot listing only robbery).
18. The possibility of a pardon is irrelevant to the barrier law's application to Melissa. Roberts Tr. 61:18–24.

19. Because of her robbery conviction, Melissa remains ineligible to work in a direct-care position in a Department-licensed facility. Ex. 10 (2023 ineligibility letter); Ex. 6 at 2–3 (admission); *see also* Roberts Tr. 32:16–21.
20. The work Melissa wants to do is largely unavailable outside Department-licensed facilities, and Melissa does not want to work outside a Department-licensed facility. Brown Decl. ¶ 26; Christmas Decl. ¶ 9.
21. In prohibiting Melissa from working in a direct-care position in a Department-licensed facility, the Department is enforcing the law of Virginia. Roberts Tr. 32:6–33:16.
22. But for the application of the barrier law to her, Melissa would take on direct-care responsibilities. Halon Decl. ¶ 11; Brown Decl. ¶ 29.
23. The evidence of Melissa's rehabilitation is overwhelming. *See supra*, pp. 6–10.
24. In particular, Virginia certified Melissa as a substance-abuse counselor despite her criminal history. Exs. 6 at 14 (admission); 25; 26.
25. In particular, Melissa's civil rights have been restored. Ex. 3; Brown Decl. ¶ 30.
26. In particular, five witnesses testify to Melissa's skill at and dedication to counseling. Adcock Decl. ¶ 11; Schmidt Decl. ¶¶ 9–10; Carey Decl. ¶ 13; Dana Decl. ¶ 6; Halon Decl. ¶¶ 9–11.
27. The Department has approved the way people with screening-eligible barrier convictions are screened. Roberts Tr. 39:10–14.
28. Before 2020, dozens of people were screened without the Department reviewing the results. Roberts Tr. 48:5–9, 49:3–8. Since the Department has started reviewing the screenings, it has never overridden a screener's decision. *Id*. at 45:7–19.
29. Ex. 33 is "typical" of screening. *Id.* at 54:9–13, 52:22–53:2.

30. Screenings last around sixty to ninety minutes. Christmas Decl. ¶ 12; Carey Decl. ¶ 19; Taylor Decl. ¶ 9.

31. In 2023, the screenings had a ninety-six percent pass rate, with twenty-four of twenty-five applicants passing. Ex. 32 at 2; *see also* Roberts Tr. 64:21–23.

32. Melissa would very likely pass a screening, were her barrier crime eligible for screening. *See* Christmas Decl. ¶ 14; Roberts Tr. 56:18–57:8.

33. The Commonwealth can identify at least eleven people who have passed screenings who are eligible to work in direct-care positions. Three of them have been convicted of burglary. Ex. 34. *See also* Christmas Decl. ¶ 6 (a fourth person).

34. Mark Taylor was convicted of burglary for breaking into a store to steal a TV. He works in a direct-care position. Taylor Decl. ¶¶ 3–5.

35. Rudy Carey was convicted of assault and battery on a police officer. He works in a direct-care position in a Department-licensed facility. Carey Decl. ¶¶ 2, 8–9.

36. Charles Adcock was convicted of felony cocaine distribution. He was grandfathered into a direct-care position in a Department-licensed facility. Adcock Decl. ¶¶ 4–7.

37. James Christmas is one of only three screeners performing the screenings the Department uses to decide whether applicants for direct-care positions with certain convictions are rehabilitated. Christmas Decl. ¶ 6; *see also* Roberts Tr. 38:13–23; *id.* at 89:20–24. He also works (and has worked) in direct-care positions. Christmas Decl. ¶¶ 2, 8. He was convicted of felony burglary for breaking into a house at night. *Id.* ¶ 6.

38. The Commonwealth does not know "whether Virginia or other states have greater or fewer amounts of problems associated with the provision of direct care." Ex. 35 at 5.

39. Dr. Kurlychek's report is an accurate (and unrebutted) summary of the current state of social-science research on recidivism and desistance from crime.
40. People who will "fail" via a new crime do so quickly, usually within the first three to five years after the original event. Expert Report 1.
41. People with criminal records have a statistically indistinguishable chance of a new criminal event (compared to people with no criminal record) after a seven-to-ten-year period of being crime free. *Id.*
42. After a first offense of robbery at age eighteen, the risk of committing a robbery returns to the age-comparable risk of the general public in 7.7 years. *Id.* at 3.
43. For burglary, the time is 3.8 years. For aggravated assault, it is 4.3. *Id.* at Exhibits 3, 4.
44. There is almost nobody over the age of fifty who presents a significant risk of offending. *Id*. at 5.
45. An older former offender who has been crime-free for ten years almost certainly has a lower risk of offending than a man in his teens or twenties, even if that young man has never been arrested or convicted of a crime. *Id.* at 4.
46. Substance-abuse patients in adult treatment centers are not physically vulnerable. Halon Decl. ¶ 14; Brown Decl. ¶ 28.
47. Melissa has access to her entire licensed facility. Brown Decl. ¶ 28.
48. Melissa's robbery did not involve a client or any sort of direct-care work. *Id.* ¶¶ 8–9.
49. Drug abuse in Virginia is a declared "public health emergency." Ex. 37.
50. There is a shortage of qualified counselors. *See supra* pp. 23–25.
51. Many applicants for direct-care positions who have criminal convictions are qualified and have valuable experience. *See supra* pp. 24–25.

DATED this 18th day of October 2024.

Respectfully submitted,

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APPENDIX—SURVEY OF STATE BARRIER LAWS FOR UNARMED ROBBERY

State	*Permanent employment prohibition?*	*Citation(s)*	*Permanent licensing prohibition?*	*Citation(s)*
Alabama	No. Offense not included.	Ala. Code § 22-56-7(5)	No. Discretionary.	Ala. Code § 34-30-4(a)(1); Ala. Admin. Code r. 850-X-4-.03(3)1
Alaska	No. Waivers available.	Alaska Admin. Code tit. 7, §§ 10.905, 10.930	No. Discretionary. (Certification performed by private entity.)	https://akcertification.org/wp-content/uploads/documents/New-CDC-I-Application-2-28-17.pdf
Arizona	None apparent.	Ariz. Admin. Code § 9-10-1405	No. Discretionary.	Ariz. Admin. Code § 4-6-208
Arkansas	No. Time limit.	Ark. Code § 20-38-105(d)(2)	No. Waivers available.	Ark. Stat. § 17-3-102
California	None apparent.	Cal. Code Regs. tit. 9, § 10500 *et seq*.	None apparent.	Cal. Code Regs. Tit. 9, § 13000 *et seq*.

Colorado	None apparent.	2 Colo. Code Regs. § 502-1-21.160.2	No. Discretionary.	Colo Rev. Stat. §§ 12-245-214(3), 12-245-224(1)
Connecticut	None apparent.	Conn. Agencies Regs. § 19a-495-570(i)	No. Discretionary.	Conn. Gen. Stat. § 19a-14(a)(6)(E), (c)(18)
Delaware	None apparent.	Del. Code tit. 16, § 2207; 16-6001 Del. Admin. Code § 1.0 *et seq*.	No. Discretionary.	Del. Code tit. 24, § 3044(a)(6)
Florida	No. Waivers available.	Fla. Stat. §§ 397.4073, 435.07(1)(a)1	None apparent.	Fla. Stat. § 397.311(36)
Georgia	No. Discretionary or time limited, depending.	Ga. Comp. R. & Regs. 111-8-19-.10(7), 111-8-53-.09(8)(c)	No. Time limit.	Ga. Code § 43-10A-7(b)(16)-(17); https://gaca.org/certified-addiction-counselor-level-caci/
Hawaii	None apparent.	Haw. Code R. § 11-98-11	No. Discretionary.	Haw. Code R. § 11-177.1-20(c)
Idaho	Yes.	Idaho Admin. Code r. 16.05.06.210	Yes. (Certification performed by private entity.)	Idaho Admin. Code r. 16.07.17.200; https://www.ibadcc.org/_files/ugd/991aca_760e0418f67947a399df1fdbd2e7b9ef.pdf

Illinois	No. Time limit.	Ill. Admin. Code tit. 77, § 2060.313(a)(2)	No. Time limit. (Certification performed by private entity.)	Ill. Admin. Code tit. 77, pt. 2060.309(a)(1); Ill. Counseling Bd. Code of Ethics § 2.01.05, https://tinyurl.com/4r2h2s29
Indiana	None apparent.	440 Ind. Admin. Code 4.4-1-1 *et seq*.	No, if no weapon or injury.	Ind. Code §§ 25-23.6-10.5-1 *et seq*., 35-50-1-2(a)(14), 35-42-5-1(a)
Iowa	No. Discretionary.	Iowa Admin. Code r. 641-155.21(9)	No. Discretionary. (Certification performed by private entity.)	Iowa Admin. Code r. 641-155.21(8)b.(1)1; Iowa Board of Certification Code of Ethics, Principle IX.1, https://iowabc.org/wp-content/uploads/2021/12/Counselors-Aug.-2021.pdf
Kansas	None apparent.	Kan. Stat. Ann. § 65-4016	No. Discretionary.	Kan. Stat. Ann. § 65-6615
Kentucky	No. Offense not included.	908 Ky. Admin. Regs. 1:370, § 15	No. Time limit.	Ky. Rev. Stat. Ann. § 309.086
Louisiana	No. Offense not included.	La. Stat. Ann. § 1203.3	No. Waivers available.	La. Stat. Ann. § 3387.1(E)(5); La. Admin. Code tit. 46, § 703(A)(6)

Maine	No. Discretionary.	14-118 Me. Code R. ch. 5 § 12; Me. Stat. tit. 22, § 9054	No. Discretionary.	Me. Stat. tit. 32, § 6217-B
Maryland	No. Discretionary.	Md. Code Regs. 10.63.01.05	No. Discretionary.	Md. Code, Health Occ. Law § 17-509(10)
Massachusetts	No. Discretionary, then time limited.	105 Mass. Code Regs. 164.041; 101 Mass. Code Regs. 15.09	No. Discretionary.	Mass. Gen. Laws ch. 111J, § 6(2)
Michigan	None apparent.	Mich. Comp. Laws § 330.1260 *et seq*.; Mich. Comp. Laws § 333.6230 *et seq*.; Mich. Admin. Code r. 325.1301 *et seq*.	None apparent. (Certification performed by private entity.)	https://mcbap.com/wp-content/uploads/2024/09/Credential-Requirements-UPDATE-8-29-24.pdf
Minnesota	No. Time limit.	Minn. Stat. § 245C.15, subd. 2	No. Discretionary.	Minn. Stat. § 148F.09
Mississippi	No. Offense not included.	Miss. Code R. § 24-1:9.1.1 *et seq*.	No. Discretionary.	24 Miss. Code R. 3-14.1(B)(3)

Missouri	No. Waivers available.	Mo. Rev. Stat. § 630.170	No. Waivers available.	Mo. Code Regs. tit. 9, § 30-3.110; https://missouricb.com/credentials/; Mo. Rev. Stat. § 630.170
Montana	None apparent.	Mont. Admin. R. 37.27.101 *et seq*.	No. Discretionary.	Mont. Code Ann. § 37-39-202(2); Mont. Admin. R. 24.219.412, 24.101.406
Nebraska	No. Discretionary.	175 Neb. Admin. Code, ch. 18, § 006.03(G)	No. Discretionary.	Neb. Rev. Stat. § 38-178(5)
Nevada	None apparent.	Nev. Rev. Stat. § 449.121; Nev. Admin. Code § 449.019 *et seq*.	No. Discretionary.	Nev. Rev. Stat. § 641C.310(2); Nev. Admin. Code § 641C.215(4)
New Hampshire	No. Waivers available.	N.H. Code Admin. R. He-P 826.18(d), (f)	No. Waivers available.	N.H. Rev. Stat. Ann. § 330-C:15(I)(e)(4); N.H. Code Admin. R. Alc. 307.02(b)
New Jersey	No. Discretionary.	N.J. Admin Code §§ 10:161A-3.5, 10:161B-3.5	No. Discretionary.	N.J. Admin. Code § 13:34C-1.9
New Mexico	No. Waivers available.	N.M. Stat. § 29-17-5; N.M. Code R. § 8.370.5.10	No. Discretionary.	N.M. Stat. § 61-9A-26(A)(3)
New York	No. Discretionary.	N.Y. Comp. Codes R. & Regs. tit. 14, §§ 805.1, 805.7	No. Discretionary.	N.Y. Comp. Codes R. & Regs. tit. 14, §§ 853.5(c), 805.7

North Carolina	No. Discretionary.	N.C. Gen. Stat. § 122C-80	No. Discretionary.	N.C. Gen. Stat. §§ 90-113.40(a)(2), .44(a)(4); 21 N.C. Admin. Code 68.0606(a)
North Dakota	No. Only for treatment of minors.	N.D. Admin. Code 75-09.1-01-01 *et seq*.	No. Discretionary.	N.D. Cent. Code § 43-45-07.1(1)(e)
Ohio	No. Time limit.	Ohio Admin. Code 5122-30-31	No. Discretionary.	Ohio Rev. Code § 4758.30(A)(4)
Oklahoma	None apparent.	Okla. Admin. Code § 450:18-1-1 *et seq*.	No. Discretionary.	Okla. Stat. tit. 59, § 1881(A)(1)-(2)
Oregon	No. Discretionary (and maybe also time limited).	Or. Admin. R. 407-007-0281, 415-012-0067	None apparent. (Certification performed by private entity.)	https://www.mhacbo.org/en/
Pennsylvania	None apparent.	28 Pa. Code §§ 704.1 *et seq*., 709.26	No. Discretionary. (Certification performed by private entities.)	28 Pa. Code § 704.7; 18 Pa. Cons. Stat. § 9124(c); https://tinyurl.com/wax9cr3p (page 14)

Rhode Island	No. Waiver available, then time-limited.	212 R.I. Code R. § 10-00-1.21	No. Waivers available.	R.I. Gen. Laws §§ 5-69-8(b)(4), -10(7)
South Carolina	None apparent.	S.C. Code Regs. 61-93 § 500 *et seq*.	No. Discretionary.	S.C. Code Ann. §§ 40-1-140, 40-75-140, -130, -110(A)(2)
South Dakota	None apparent.	S.D. Admin. R. 67:61:05:08	No. Discretionary.	S.D. Codified Laws § 36-34-13.1
Tennessee	None apparent.	Tenn. Comp. R. & Regs. 0940-05-06-.04(2), 0940-05-45-.04; Tenn. Code Ann. § 33-2-1202	No. Discretionary.	Tenn. Comp. R. & Regs. 1200-30-01-.15(6)(h)
Texas	No. Discretionary.	26 Tx. Admin. Code § 564.601; Tx. Occ. Code §§ 53.022, 53.023	No. Waivers available.	Tx. Occ. Code § 504.255; 25 Tx. Admin. Code § 140.431(e)
Utah	No. Time limited or discretionary, depending.	Utah Code § 26B-2-120	No. Discretionary.	Utah Code §§ 58-60-108, 58-1-401(7); https://www.dopl.utah.gov/substance-use-disorder-counseling/criminal-history-guidelines/

Vermont	None apparent.	Vt. Admin. Code 13-140-063-1 *et seq*.	No. Discretionary.	Admin. Rules for Alcohol & Drug Counselors Part 9-2, https://tinyurl.com/4feb2fcn; Vt. Stat. Ann. tit. 26, § 3239; Vt. Stat. Ann. tit. 3, § 129(a)(10)
Virginia	Yes.	Va. Code § 37.2-416.1	No. Discretionary.	18 Va. Admin. Code § 115-30-150
Washington	Yes.	Wash. Admin. Code § 246-341-0420(17); Wash. Rev. Code § 43.43.842	No. Discretionary.	Wash. Rev. Code §§ 18.205.150, 18.130.055(1)(c)
West Virginia	No. Waivers available.	W. Va. Code R. § 64-11-9.2.5; W. Va. Code § 16B-15-5	None apparent.	W. Va. Code § 30-31-1 *et seq*.
Wisconsin	No. Offense not included.	Wis. Admin. Code § DHS 75.19(1); Wis. Stat. § 50.065(1)(e)1, (4m)(b)1, (5m); Wis. Admin. Code §§ DHS 12.06, 12.12	No. Discretionary.	Wis. Admin. Code § SPS 161.02(7); *see also* Wis. Stat. § 111.335
Wyoming	None apparent.	048.0077.5 Wyo. Code R. § 1 *et seq*.	No. Discretionary.	Wyo. Stat. Ann. § 33-38-106