No. 25-2333

In the

United States Court of Appeals
for the Fourth Circuit

MELISSA BROWN,

Plaintiff–Appellee,

v.

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

Defendant–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

APPELLEE'S BRIEF

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February 2, 2026

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STATEMENT OF THE ISSUE

Under Virginia Code § 37.2-416.1, people with certain criminal histories are barred from working as substance-abuse counselors for the rest of their lives. Plaintiff–Appellee is subject to this barrier because she committed a robbery twenty-five years ago. The issue is whether applying the barrier to her is rational today.

INTRODUCTION

This case is a constitutional challenge to Virginia's "barrier law," which prevents people with any of 176 convictions from working as substance-abuse counselors, usually for life. The Appellee, Melissa Brown, is one of them: barred forever because she stole a woman's purse twenty-five years ago. The district court held that applying the barrier to Melissa is irrational and thus a violation of the Equal Protection Clause. The opening brief more or less explained that.

But there are quite a few things the opening brief left out. It didn't mention that, in the Commonwealth's own words, the law blocks "qualified applicants" with "invaluable" experience. It didn't mention that Melissa, despite her conviction, has been deemed fit to work by the Commonwealth itself. Nor did it mention the wall of precedent holding similar bans unconstitutional. Reading the opening brief, you'd have no idea that the state supervisor who oversees the law testified that applying it here is—and we quote—"crazy."

The record goes on. The law is an outlier, uncommonly harsh in Virginia and, in application, almost unknown in the rest of the country. As the district court examined, it has a nonsensical exception for

grandfathered offenders, and it bars people whose convictions are decades old while doing nothing to employees who commit offenses on the job. (The latter flaw by itself has been enough to show unconstitutionality at the Seventh Circuit.) Undisputed social science supports Melissa. And on top of all that, the ban has no meaningful nexus to what she wants to do. Melissa *already* works around people addicted to drugs. All the barrier does is prevent her from helping them get better.

On this record, the district court's ruling was modest. It did not declare the law unconstitutional on its face. It did not even order the state to lift the barrier. All the court held was that, given how the law applies to this one person, the state must allow her into an individualized screening program it already has—one that, incidentally, is already open to burglars.

No one disputes that the Commonwealth has wide latitude to regulate the professions. But the very idea of latitude means there are still lines the Commonwealth cannot cross. The Court should affirm.

STATEMENT OF THE CASE

I. Virginia bars Melissa Brown from working because of a twenty-five-year-old crime.

Because this is an as-applied challenge, we begin with the Plaintiff, Melissa Brown.

Melissa became addicted to drugs after a difficult childhood. JA1187, JA517. The addiction spiraled, and she began stealing to fund it. JA1187, JA518. Her conduct from 2000 to 2001 thus led to a serious criminal record. JA1187, JA518-519. The low point came on July 20, 2001, when Melissa was twenty-seven. Amid a dayslong binge and desperate for money to buy more drugs, she stole the pocketbook of a woman from a Food Lion shopping cart, drove away, and used it to withdraw $2,200 from the bank. JA59, JA672, JA518.[1]

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[1] It is immaterial, but the Commonwealth is wrong to say that Melissa "dragged" the woman "alongside [Melissa's] car." *See, e.g.*, Br. 8. Melissa testified here that no force was involved, JA718, JA518, and the victim's contemporaneous account was not of dragging but that she "held onto [her purse] for about ten feet but then let go." JA807. That's what the district court generously assumed for summary judgment, JA1187, and even that was inadmissible hearsay. *See United States v. Burruss,* 418 F.2d 677, 678 (4th Cir. 1969) (explaining that a victim's reported account is hearsay); *Md. Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991) (explaining that inadmissible "hearsay … cannot be considered on a motion for summary judgment").

The next year, Melissa pleaded guilty to credit-card fraud and, as relevant here, robbery. JA1187, JA801-803. For the robbery, out of a total sentence of ten years, six years and five months were suspended, so the active sentence was three years and seven months. JA1187, JA74-75. But because the robbery violated her probation for an earlier theft, she served eight years in prison, until she was released in July 2010. JA60, JA1003, JA519.[2] A nominal "good behavior" condition of her suspended sentence does not expire for a few more years (because it covers a full two decades after her release from prison), JA75, JA525-526, but Melissa was released from probation fourteen years ago, and that was the end of her involvement with the criminal-justice system, JA1188, JA60, JA78-81, JA525, JA1003.

For Melissa, that was a whole other life. Sober since 2002, in a different, loving marriage, and connected with her children and

[2] Our citations sometimes contrast Melissa's statement of undisputed material facts, JA59-63, with the Commonwealth's response, JA1002-1007. Under E.D. Va. L.R. 56(B), the failure to substantively contest a fact in a SUMF is sufficient to admit it. *See Kanu v. Garland*, 672 F. Supp. 3d 108, 112 n.2 (E.D. Va. 2023); *DeLorme Publ'g Co. v. BriarTek IP, Inc.*, 60 F. Supp. 3d 652, 662-63 (E.D. Va. 2014), *aff'd*, 622 F. App'x 912 (Fed. Cir. 2015).

grandchildren, Melissa has become another person—one dedicated to helping others overcome drug abuse, just as she has. JA516-517, JA520. That is why, in 2014, she applied for a job as a supervised substance-abuse counselor at an outpatient opioid-treatment center in Fredericksburg, Virginia, called FCCR. JA1188, JA521.

Enter the barrier law. In Virginia, people with any of 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; *see also* JA1191, JA83-88, JA544-545. The barrier crimes—ranging from treason and murder to setting off smoke bombs and "carelessly" setting fire to a field—include robbery,[3] and FCCR was licensed by the Department, JA528. So Melissa underwent a background check, and, based solely on her robbery conviction, the Department concluded that Melissa was "not eligible for employment."

[3] See the barrier law, Va. Code § 37.2-416.1(B), which incorporates the list of barrier crimes, § 19.2-392.02, which includes §§ 18.2-481 (treason), 18.2-32 (murder), 18.2-87.1 (smoke bombs), 18.2-88 (careless fire), and 18.2-58 (robbery).

JA90, JA618, JA95-96, JA60, JA1003. At the time, however, the barrier law appeared to apply only to formal employment, so the Department supervisor who administers the law told FCCR that it could hire people with barrier convictions as independent contractors, JA639-641, JA530. Which it did. Melissa worked at FCCR as a counselor until 2018, and, for her last few months, she was promoted to clinical supervisor. JA1188-1189, JA116-118, JA853-854. As the district court would later put it, "[a]ll the evidence … reflects that [Melissa] excelled in her direct care position." JA1189.

But when a new company bought FCCR, it concluded that Melissa was legally barred and told her she could no longer provide direct care. JA1189, JA522-523. Melissa was "in shock" when, "just like that, it was all taken away." JA522-523. Rather than fire a valuable employee, however, the new company transferred her to a marketing role. JA1189, JA862-863, JA523. Melissa has remained in the treatment field ever since. JA60, JA1003, JA523. Today, she works as the Chief Growth Officer at a licensed Virginia inpatient facility called Mainspring. JA1187, JA1189, JA516-517.

Melissa, however, still "deeply miss[es] being … in a clinical setting," because "nothing is more satisfying than directly working with clients." JA523-524. It's what "help[s] provide [her] life purpose." JA517, JA1187. She would share her own history of overcoming addiction in counseling if she could, JA61, JA1004, JA524, and she would likely supervise other counselors, too, JA524, JA552, if the barrier law didn't also ban her from first-order supervision of direct-care workers, Va. Code § 37.2-416.1(A); *see also* JA1190, JA615-616. But she remains barred because of a crime dating to early in the second Bush administration.

II. The district court holds the barrier law irrational.

In March 2024, with no other way to do the work she loves, Melissa brought this suit, challenging the barrier law's application to her under the Equal Protection and Due Process clauses of the Fourteenth Amendment.[4] Among other things, she highlighted that

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[4] Melissa also claimed that the barrier law violates her rights under the amendment's Privileges or Immunities Clause. JA19-20. Although that claim is foreclosed by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), Melissa preserves it given the "overwhelming consensus among leading constitutional scholars" that *Slaughter-House* is "egregiously

while robbery and most other barrier crimes result in a lifetime ban, twenty-five crimes, including common-law burglary, are "screenable," meaning that a person with that conviction can work after a finding of rehabilitation (and after checking other boxes). Va. Code § 37.2-416.1(D)-(F) (including burglary under § 18.2-89 and other crimes); *see also* JA9. The Commonwealth promptly moved to dismiss under the rational-basis test. The district court denied that motion, reasoning that even rational-basis review has limits—that it "must mean something beyond absolute deference to the legislature; otherwise it is not review at all." D. Ct. Doc. 18, at 16.

After discovery, the parties cross-moved for summary judgment. Largely accepting Melissa's arguments, the court found that the barrier law irrationally distinguishes between Melissa and three groups of people allowed to work as substance-abuse counselors: burglars who can work after they pass the individualized screening, counselors who commit barrier crimes while already employed, and grandfathered offenders. JA1206-1213. Rather than enjoin the law's application

wrong." *See McDonald v. City of Chicago*, 561 U.S. 742, 756-57 (2010) (noting argument of amici professors).

outright, however, the court ordered only that the "defendant … provide [Melissa] with [the] individualized screening assessment." JA1214.[5]

This appeal followed. The Commonwealth's three arguments are that Melissa is not similarly situated to the district court's three comparators, Br. 14-23; that, even if she is, there are still rational reasons to ban *her* forever, *id.* 23-37; and that Melissa is ineligible for the screening regardless, *id.* 37-39. The usual summary-judgment standard applies, Br. 11-12, and, under it, "a scintilla of evidence" from the Commonwealth is not enough, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Similarly, "[u]nsupported speculation is not sufficient to defeat … summary judgment." *Smith v. Schlage Lock Co.*, 986 F.3d 482, 486 (4th Cir. 2021). The Court may, of course, "affirm …

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[5] Although the court's opinion and judgment both name "the defendant," JA1214, D. Ct. Doc. 65, the court's separate order originally enjoined the Department rather than its commissioner, Defendant Nelson Smith, JA1215. *See Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012) (Kavanaugh, J.) (explaining that there's no functional difference, but legal "fiction" requires naming the official). The court later corrected the order to name the Defendant. JA1218. The Commonwealth briefly suggests that the correction could occur only in this Court, Br. 3 n.1, but the Commonwealth is wrong under *Lytle v. Griffith*, 240 F.3d 404, 407 n.2 (4th Cir. 2001), which addresses this exact issue.

on any basis fairly supported by the record." *Jessup v. Barnes Grp., Inc.*, 23 F.4th 360, 368 (4th Cir. 2022) (cleaned up).

SUMMARY OF THE ARGUMENT

This appeal is about three ideas.

First, the rational-basis test is what it claims to be. A test. It is not a sham in which the government always wins. Plaintiffs can and do prevail based on what the evidence shows. That includes in cases on whether a job restriction is rational as applied to a particular person, and it specifically includes cases about employment restrictions based on criminal history. The Seventh Circuit, state supreme courts, and many others have held these laws unconstitutional. They say so even for serious crimes and even for sensitive fields.

Second, on whether applying the barrier is rational, the Commonwealth misses the forest for the trees. It argues that each of the district court's grounds was insufficient in isolation. But even if that were true, it would not be enough to show that this Court should reverse. Rather, for the law to apply constitutionally, there "must [be] a rational connection with … fitness or capacity to practice," specifically in barring Melissa, on the record as a whole. *Schware v. Bd. of Bar*

Exam'rs of N.M., 353 U.S. 232, 239 (1957). Overwhelming and undisputed evidence shows that there is not.

Third, the Department's technical objections fail. Its argument that Melissa did not show similarly situated comparators fails for several reasons, including that the Court can just affirm under the Due Process Clause. Melissa's good-behavior condition, which has zero real-world effect, is the kind of "scintilla" that courts ignore. Finally, a purported conviction for abduction, which the Commonwealth could not even establish, is also irrelevant. That argument, if anything, proves just how extreme the law is.

ARGUMENT

I. Plaintiffs win under rational-basis review, including in challenges to criminal-history bans.

A. Plaintiffs can win rational-basis cases.

Start with first principles. Rational-basis review is deferential, but it still "places limitations on states." *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 706-07 (4th Cir. 1999). Plaintiffs can and do win

under it. Examples from the Supreme Court, from this Court, and from the other circuits are easy to find.[6]

Under this standard, courts reject laws when "the State's interest is not in any way served," *Zobel*, 457 U.S. at 62; or when the benefit is "wholly insubstantial in light of the costs," *Plyler*, 457 U.S. at 230; or

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[6] *E.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-38 (1973);

Fauconier v. Clarke, 966 F.3d 265, 277-79 (4th Cir. 2020); *King v. Rubenstein*, 825 F.3d 206, 221-22 (4th Cir. 2016); *Willis v. Town of Marshall*, 426 F.3d 251, 263-64 (4th Cir. 2005); *Morrison v. Garraghty*, 239 F.3d 648, 655, 659-61 (4th Cir. 2001); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 664-67 (4th Cir. 1989); *Marks v. City of Chesapeake*, 883 F.2d 308, 311-12 (4th Cir. 1989); *Phan v. Virginia*, 806 F.2d 516, 521-23 (4th Cir. 1986); *Long v. Robinson*, 436 F.2d 1116, 1117-18 (4th Cir. 1971);

Vaquería Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 482-84 (1st Cir. 2009); *Fortress Bible Church v. Feiner*, 694 F.3d 208, 221-24 (2d Cir. 2012); *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 107-12 (3d Cir. 2008); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221-27 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220, 223-29 (6th Cir. 2002); *Cruz v. Town of Cicero*, 275 F.3d 579, 586-87 (7th Cir. 2001); *Mathers v. Wright*, 636 F.3d 396, 399-402 (8th Cir. 2011); *Merrifield v. Lockyer*, 547 F.3d 978, 988-92 (9th Cir. 2008); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183-84 (10th Cir. 2009).

The Supreme Court invoked *Cleburne* and *Romer* as good law just last term. *See United States v. Skrmetti*, 605 U.S. 495, 509-10, 523 (2025).

when the law is based on "vague, undifferentiated fears," *Cleburne*, 473 U.S. at 449. That is true even given the broad language with which courts sometimes describe the test. *See* Br. 23-24.

At bottom, whether a state of facts is *reasonably* conceivable turns on the evidence. "[P]laintiffs may … negate a seemingly plausible basis for [a] law by adducing evidence of irrationality." *St. Joseph Abbey*, 712 F.3d at 223. Put another way, "plaintiffs [may] rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590-91 (9th Cir. 2008). This Court has thus remanded specifically for expansion of the record "all to the end that [a] theoretical rational justification may be proved or disproved." *Phan*, 806 F.2d at 522-23.

Most relevantly, this Circuit has already decided a rational-basis case about a Virginia restriction on the ability to work: *Fauconier v. Clarke,* 966 F.3d 265, 277-79 (4th Cir. 2020). Fauconier was an inmate who had "performed various jobs while in prison, despite suffering from … a neuromuscular disease." *Id.* at 270. He worked "'competently' and without any accommodation." *Id.* Even so, he was later disqualified from

all prison jobs because of a blanket rule limiting anyone with a neuromuscular disease. *Id.* at 271-72. He sued, the district court dismissed, and then this Court reversed. It is "at least plausible," the Court explained, that Virginia's "policy of categorically restricting inmates with [a specific] medical status from 'all jobs' was not rationally connected to its interest in protecting inmate health and welfare." *Id.* at 279. This Court specifically recognized that "categorical exclusion … from employment [could be] insufficiently calibrated" when there was reason to believe the plaintiff could "in fact satisfactorily perform" various jobs. *Id.* at 278-79.

If Fauconier had a viable rational-basis claim, then so does Melissa. Again, the test does not require that the government get a perfect score. But when a law really is irrational, the government can and does fail.

B. Plaintiffs successfully challenge criminal-history bans.

Particularly as to these kinds of criminal-history bans, courts have said so again and again and again. State high courts, federal district courts, and even the Seventh Circuit in a directly on-point case have all found them unconstitutional—including in health care, eldercare,

childcare, education, and other potentially sensitive fields. That includes bans related to

- **Taxi driving**, *Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977) (armed robbery and other crimes)[7];
- **Bail-bonding**, *Chunn v. State ex rel. Miss. Dep't of Ins.*, 156 So. 3d 884 (Miss. 2015) (any felony);
- **Childcare**, *Fields v. Dep't of Early Learning*, 434 P.3d 999 (Wash. 2019) (attempted robbery and other crimes);
- **Precious metals**, *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013) (any felony);
- **Private security**, *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977) (any felony);
- **Civil service**, *Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986) (any felony); *Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980) (any felony); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (any felony);
- **Massage**, *Myrick v. Bd. of Pierce County Comm'rs*, 677 P.2d 140 (Wash. 1984) (sex offenses and others); *Hilbers v. Municipality of Anchorage*, 611 P.2d 31 (Alaska 1980) (same); *Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978) (any two felonies within five years or any sex crime within five years);
- **Public towing**, *Lewis v. Ala. Dep't of Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993) (misdemeanors of moral turpitude); *Gregg v. Lawson*, 732 F. Supp. 849 (E.D. Tenn. 1989) (any felony) (denying motion to dismiss);

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[7] *Per curiam and affirmed by an equally divided Court*, 434 U.S. 356 (1978).

- **Eldercare**, *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (various crimes including armed robbery); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Commw. Ct. 2015) (en banc) (same);

- **Bookselling**, *Perrine v. Mun. Ct.*, 488 P.2d 648 (Cal. 1971) (certain sexual and violent crimes);

- **College teaching**, *Newland v. Bd. of Governors*, 566 P.2d 254 (Cal. 1977) (certain sex crimes);

- **Schools**, *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (en banc) (felony homicide); *Megraw v. Sch. Dist. of Cheltenham Twp.*, 2018 WL 2012130 (Pa. Commw. Ct. May 1, 2018) (lying to buy a gun); *Croll v. Harrisburg Sch. Dist.*, 2012 WL 8668130, at *7 (Pa. Commw. Ct. Dec. 13, 2012) (en banc) (corruption of a minor) (denying MTD); *Jones v. Penn Delco Sch. Dist.*, 2012 WL 8668277 (Pa. Commw. Ct. Dec. 13, 2012) (en banc) (felony drug offense) (denying MTD);

- **Child-protective services**, *Warren Cnty. Hum. Servs. v. State Civ. Serv. Comm'n,* 844 A.2d 70 (Pa. Commw. Ct. 2004) (aggravated assault);

- **Cosmetology**, *Haveman v. Bureau of Pro. & Occupational Affs.*, 238 A.3d 567 (Pa. Commw. Ct. 2020) (en banc) (crimes of moral turpitude); *Tanner v. De Sapio*, 150 N.Y.S.2d 640 (N.Y. Sup. Ct. 1956) (grand larceny);

- **Unsupervised health and human services**, *Cronin v. O'Leary*, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001) (manslaughter and armed robbery);

- **Car sales**, *Brewer v. Dep't of Motor Vehicles*, 93 Cal. App. 3d 358 (1979) (crimes of moral turpitude);

- **Barbering**, *Harris v. Ky. Bd. of Barbering*, No. 74-399 (W.D. Ky. June 13, 1975)[8] (any felony); and

- **Radiology**, *Shimose v. Haw. Health Sys. Corp.*, 345 P.3d 145 (Haw. 2015) (drug possession with intent) (statutory rational-basis ruling denying MSJ).

Just a few of these cases are enough to show that the Court should affirm. Consider *Chunn v. State*, 156 So. 3d 884 (Miss. 2015). There, a Mississippi law prohibited people with any felony conviction from working as bail-bond agents. The Supreme Court of Mississippi did not decide whether "the State has a legitimate interest in prohibiting *some* felons from engaging in this profession." *Id.* at 886. Rather, the court found the ban irrational under the federal Equal Protection Clause *as applied* to someone with only a thirty-three-year-old felony conviction for drug possession. *Id.* The state offered about as much justification as the Commonwealth does here,[9] and the court thought that justification

[8] *Available at* D. Ct. Doc. 16-1.

[9] *Compare Chunn*, 156 So. 3d at 886 ("By virtue of a felony conviction, a person does lose some of the trust of society. The Mississippi Legislature, in all its wisdom, decided to protect the bail agent process, which is an important part of the judicial process, by restricting from its practice persons who have been convicted of a felony crime.") *with* Br. 24-25 ("The General Assembly rationally may decide that criminal acts, especially violent ones like Brown's robbery, call into question an individual's moral character and trustworthiness. These are traits that

too weak for the government to extinguish a person's "God-given, constitutional liberty to engage in a profession," *id.* at 889. "Because the statute fail[ed] to account for the differences in particular felonies and the relationship between particular felonies and fitness to hold a bail-agent license; and because it ha[d] no time limits for when the felony was committed, [the court] conclude[d] that the statute … violate[d] the Equal Protection Clause" as applied to Chunn. *Id.*

Or consider *Fields v. Department of Early Learning*, 434 P.3d 999 (Wash. 2019), a case with facts almost identical to this one's. At age 22, a drug-addicted Christal Fields tried "to snatch a purse to help pay for her drug habit," leading to a conviction for attempted robbery. *Id.* at 1001. Twenty-five years later, she had "turned her life around," and, because of an error in the state's background-check system, worked at a daycare. *Id.* When the error was discovered, she received a notice of disqualification: state law had a list of "50 types of permanently disqualifying convictions, one of which [was] '[r]obbery.'" *Id.* at 1001,

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a legislature may consider important when regulating who may care for vulnerable patients.").

1003. But, as the Washington Supreme Court explained, Fields's "sole disqualifying conviction occurred long ago under circumstances that no longer exist." *Id.* at 1005. It noted that her attempted robbery did not involve violence. And it noted that although she was banned from working in daycares, the law inexplicably did *not* ban her from providing foster care. *Id*. at 1005-06 (citation omitted). Like *Chunn*, *Fields* did not hold that the state could *never* disqualify someone with one of the listed convictions. Rather, there was likely no "rational basis for doing so" in "the particular circumstances presented by Fields's case." *Id*. at 1004.[10]

Or consider *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (en banc). In the 1980s, Arthur Johnson was convicted of voluntary manslaughter. *He killed someone*. But two decades later, he was working for a school "counsel[ing] young fathers" in an "exemplary fashion." *Id.* at 14. When a list of disqualifying convictions became effective in 2011, the school was forced to fire him.

[10] The court couched its holding in terms of procedural due process, but the analysis would have been very similar under substantive due process. *Fields*, 434 P.3d at 1008-09 (McCloud, J., concurring).

Id. at 15. So he sued, arguing the ban was irrational as applied to him. *Id*. at 22. The state countered that the ban "further[ed] the important public interest in regulating the employment qualifications of school employees and the important public safety purpose of maintaining a safe school environment for students." *Id*. But the court disagreed, holding that, while those interests are obviously important, banning Johnson for a thirty-year-old crime did not further them. *Id*. at 24-25. "[H]is remote conviction d[id] not reflect upon his present abilities to perform the duties of his position," and the state had not provided "a sufficient reason to explain why the crime of which Johnson was convicted nearly 30 years ago [was] at all predictive of future behavior." *Id*.

Again, these cases are just a sample. As-applied challenges to work restrictions can be won, and they can be won under the rational-basis test. So the question becomes this: could a rational person really believe that Virginians addicted to drugs will be safer if they can't talk about their problems with Melissa?

II. Applying the barrier law to Melissa is irrational.

The answer, unequivocally, is "no." There are at least eight reasons the ban is irrational as applied here, and, as the district court put it, "each cut[s] away at the rationality" of the law. JA1206. The cases just cited regularly find bans irrational because of just one or two of them.[11] To affirm here, all the Court need hold is that all of them in combination render the barrier law irrational as applied to Melissa. Which, indeed, it is.

A. The law ignores rehabilitation.

Most simply, Melissa is a "completely different person" from the woman who committed a robbery in 2001. JA526. It would be irrational to think otherwise. *See, e.g.*, *Fields*, 434 P.3d at 1001-03; *Barletta*, 973 F. Supp. 2d at 139; *Fussenich*, 440 F. Supp. at 1080.

Twenty-three years ago, Melissa had no sense of self-worth. JA516-517. She was high all the time, and she stole to feed her addiction. JA1187, JA516-517. Since then, she has accepted

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[11] *See, e.g.*, *Barletta v. Rilling,* 973 F. Supp. 2d 132, 137 (D. Conn. 2013) (turning on lack of individualized assessment); *Chunn*, 156 So. 3d at 886-89 (overbreadth and length of ban); *Fields*, 434 P.3d at 1004-06 (primarily nature and age of crime, comparative harshness); *Nixon*, 839 A.3d at 288-90 (grandfathering only).

responsibility for her mistakes. JA526. She paid restitution to the robbery victim, served her sentence, and completed probation. JA60, JA1002-1003, JA78-79, JA128. She has apologized, or tried to apologize, to everyone she hurt. JA520. She has not used illegal drugs since early 2002, and she has not been arrested or charged with any more crimes. JA1188, JA519, JA525; *see also* JA130.

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

Take her incarceration, during which she tutored inmates seeking GEDs. JA1188, JA519. After release, Melissa tried to improve prison conditions, testifying in a special DOJ hearing about rape and other staff misconduct. JA520; *see also* JA179-211 (her testimony). In 2015, she even went back in to speak to graduating inmates, offered as "a shining example of what education and determination can accomplish." JA213; *see also* JA525. (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." JA219.)

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. JA1188, JA222. She took eight more courses at a community college after that, earning As in every one of them. JA1188, JA227. One of her undergraduate professors would later recommend her as maybe "the best I've seen" at mentoring children with incarcerated parents. JA231.

Most of all, take her work. Melissa studied substance abuse for four-hundred hours, JA234, while working, for about two years, as a case manager at a halfway house for women returning from incarceration, JA521. In 2014, she became a trainee substance-abuse counselor. JA1188, JA657. By mid-2016, she had completed two thousand hours of supervised counseling. JA234. 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." JA116; JA1189, JA679. When the barrier law forced her out, she stayed in the field as best she could, working for another six years doing outreach. JA1189, JA522-523. Today she works at a different rehab center as the Chief Growth Officer. JA1187,

JA1008, JA523. She volunteers her free time by leading a group at Zoe Freedom Center, a faith-based non-profit rehab facility (that is not licensed by the Department, and where her work does not amount to "direct care"). JA1189, JA523-524, JA531-533, JA109. She has also volunteered at Rappahannock Area Against Sexual Assault and by teaching a life-skills class to the homeless. JA524.

Unsurprisingly, uncontradicted evidence shows that Melissa is an asset to the field. Even when she was not working in direct care, her performance reviews included observations such as "Melissa works tirelessly to ensure patients find the right treatment program. She is passionate and dedicated . . . ." JA243. One supervisor wrote to the Commonwealth to object to the barrier law because "her talent, compassionate approach, and education are being underutilized." JA120. As for direct care, the owner of FCCR testified that Melissa, even starting out, was a "solid clinician" with "unquestionable integrity." JA530. Her direct supervisor, who observed her firsthand every day for the four years before the barrier law forced her out, testified that Melissa is "one of the finest people I know" and that she "worked as hard as anyone in this field." JA658; *see also* JA245.

(Moreover: "her being let go was horrible … it was appalling to see that taken away from her and her clients. Our team was broken." JA658.). Melissa's former FCCR co-worker testified to her "hard-working nature," "her counseling aptitude," and "her dedication." JA538-539. The owner of Zoe, the nonprofit where she volunteers, testified that "many women … are able to walk free from addiction today because of Melissa's contribution to their lives." JA532-533. And her current boss testified that she is a "tremendously powerful resource" and that banning her from direct care is "a huge disservice to [our] clientele." JA551-552. *See also Johnson*, 59 A.3d at 24-25 (noting "exemplary" work record); *Fields*, 434 P.3d at 1005.

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." JA 81, JA1188. The next year, the Commonwealth certified her as fit *to be a substance-abuse counselor*. JA1188, JA105. Despite authority to deny that certification because of a felony conviction, 18 Va. Admin. Code 115-30-150(1), the Virginia Board of Counseling certified her anyway, JA1188,

JA249. The Board did not even send her to the committee that evaluates applicants' criminal histories. JA132, JA135. Instead, the Board approved her straightaway, JA133, JA522, and, to this day, she remains certified by the Commonwealth as fit to provide substance-abuse counseling. JA1188, JA522, JA247.

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

B. It hurts people who need help.

Second, this Court "cannot ignore the" barrier law's "significant social costs." *Plyler*, 457 U.S. at 221.

Addiction in Virginia is a declared "public health emergency." JA1205, JA370-371. The founder of the non-profit, Zoe, testified that "it is often very difficult to get people into … licensed facilities." JA533. Melissa's first supervisor similarly testified 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." JA659. Melissa's current employer opened a facility late because of "trouble in finding qualified counselors." JA552. And at

times, the CEO added, "our inpatient facility has not been able to serve the full number of clients for whom we have beds (74) because we cannot find enough qualified counselors." JA552; *see also* JA530.

Even so, the Commonwealth has continued to keep the barrier law in the way. It saw the connection as early as 2006. JA401 ("difficulty obtaining a qualified workforce"), JA406. It saw it again in 2019. JA447 ("affect[s] substantial numbers of job applicants"). And again in 2021. JA468 ("barrier crimes … particularly relevant at a time where there is a huge workforce shortage"), JA1205. Its own slides acknowledge that the law blocks "qualified applicants who can provide valuable services," many of whose experiences are "invaluable." JA366, JA1205; *see also* JA380 ("extremely capable individuals"). "[A] lot" of them, like Melissa, are licensed outright, and yet the barrier law still blocks four hundred applicants each year for convictions that are more than twenty years old. JA268, JA1205. *See also Fussenich*, 440 F. Supp. at 1080 ("We believe … that many qualified ex-felons are being deprived of employment due to the broad sweep of the statute."). As the district court concluded, "it is evident that Virginia's barrier law … significantly

hamper[s] the Department's efforts to combat Virginia's addiction crisis." JA1205.

According to the Commonwealth's slides, "everyone hopes" this will change. JA257, JA613-614; *see generally* JA476-507, JA599-601, JA509-513. This is why the Commonwealth's relevant Chief Human Resources Officer could deplore that

> [e]very 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 the 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.

JA604 (re-transcribed).[12] Indeed, the testimony of the Commonwealth supervisor who has enforced the barrier law for its entire twenty-seven-

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[12] The video recording this and two others like it have been uploaded as part of the record. Dkt. 18, 20. The videos are also available at

https://www.youtube.com/watch?v=MovJW3P2wxg (quotation at 07:25)
https://www.youtube.com/watch?v=L80bgMZrSyo
https://www.youtube.com/watch?v=J8B3_-Lvc7s

See also JA605, JA642.

year history couldn't have been clearer. She testified that applying the law to someone like Melissa is "crazy." JA651.

"Crazy" is a synonym for "irrational."

C. It is riddled with exceptions.

The list goes on. Even as robbery and most other barrier crimes result in a lifetime ban, twenty-five crimes, including common-law 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 private 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); *also compare* JA258-259 (listing most screenable crimes) *and* JA275-276 (another list of screenable crimes) *with* JA83-88 (list of *all* barrier crimes); *see also* JA1191-1193.

But there's no rational explanation for which crimes are screenable. Reckless endangerment by throwing objects is; recklessly

driving a boat under the influence is not.[13] Brandishing a firearm usually is; brandishing a BB gun at school is not.[14] A natural question would be whether it's the less serious crimes, but no. In Virginia, felonies range in increasing seriousness from Class 6 to, effectively, Class 2. (Class 1 is only aggravated murder.) *See* Va. Code §§ 18.2-9, 18.2-10. Yet as the district court explained (and as the Commonwealth below did not dispute), Virginia today would treat Melissa's unscreenable robbery as Class 6, the lowest level. JA1206, Va. Code § 18.2-58(B)(4). Meanwhile, burglary, a similar but higher, Class 3 felony, is screenable. Va. Code § 37.2-416.1(D) (indirectly citing § 18.2-89). According to the Commonwealth's own taxonomy there are more than a dozen screenable crimes besides burglary that rank at least as seriously as Melissa's robbery.[15] Some of them—like distributing

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[13] *Compare* Va Code § 37.2-416.1(D) (allowing screening for convictions under § 18.2-51.3), *with id.* § 37.2-416.1(B)(1) (prohibiting convictions under § 18.2-51.5).

[14] *Id.* § 37.2-416.1(D) (limiting screening of crimes under § 18.2-282 to misdemeanors).

[15] Those crimes are reckless endangerment by throwing objects from two stories or higher (class 6 felony), making death threats (usually class 6), breaking and entering with intent to commit a misdemeanor (at least class 6), possession of burglarious tools (class 5), home

date-rape drugs—are much worse. Somehow, shining a laser pointer at a police officer will get you a lifetime ban; manufacturing fentanyl around kids is screenable. *Cf. Newland*, 566 P.2d at 258-59 (holding irrational ban that applied to misdemeanants but not felons).

So is the difference violence? That's what the Commonwealth says: that Melissa's robbery isn't screenable because, unlike burglary, it was "confrontational, dangerous, and committed directly against a person." Br. 28. But that's also not it. Set aside that burglary is often "confrontational" and "dangerous." Beating your wife is violent, and that's screenable. Va. Code § 37.2-416.1(D) (listing § 18.2-57.2). So, after

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cultivation of fifty or more marijuana plants (at least class 6), transporting drugs into the Commonwealth (ungraded but around class 2 or 3), manufacturing methamphetamine or fentanyl around a minor (ungraded but around class 2 or 3), distributing methamphetamine (ungraded but at least around class 2 or 3), distributing more than an ounce of marijuana (at least class 5), distributing anabolic steroids (ungraded but around class 5), distributing roofies (ungraded but around class 2 or 3), distributing a different date-rape drug (class 3), distributing drugs to younger minors (ungraded but around class 2 or 3), distributing drugs near sensitive places (ungraded felony around class 6), maintaining a drug establishment for the second time (class 6), maintaining a fortified drug house (class 5), and aiding in unlawfully procuring prescription drugs for the second time (class 6). Va. Code § 37.2-416.1(D).

a pardon, is assaulting a police officer. *Id.* at -(E) (listing § 18.2-57). After four years, simple assault doesn't even need a screening. *Id.* at -(C) (listing § 18.2-57).

So maybe the screenable crimes are the ones with no relationship to direct care? But that's not it either. The Commonwealth could have created an explicit nexus requirement, but it did for only one random crime. As just discussed, assault on a family member is usually screenable, but if "the person" did not "commit[] the offense while employed in a direct care position," after ten years it expires as a barrier entirely—no screening needed. Va. Code § 37.2-416.1(G). Neither robbery nor literally anything else has that same regime: screenable if it was committed while employed, but time-limited if the person had no connection to direct care.

If not an explicit nexus, is it at least some implicit connection to direct care? Superficially, drug crimes might relate to caring for drug addicts and thus not be screenable. But that's still not the rule. Like simple assault, distribution of many drugs (ranging from class 1 misdemeanor to felony around class 2 or 3) and obtaining drugs by fraud (class 6 felony) both expire as barriers after four years, *id.* § 37.2-

416.1(C). And, again, the system allows screening *only if* the crime was due to drug abuse (or another mental-health problem). Meaning that our reckless boat driver is banned for life, and our reckless object thrower is screenable *if* he did it because he was intoxicated, but someone who recklessly throws objects because he was an impulsive teenager is back to being banned for life. JA633. None of this regime makes sense. And, other than an easily disproven hypothesis about violence, the Commonwealth has never even tried to explain it. *See Barletta*, 973 F. Supp. 2d at 138-39 (invalidating ban on precious-metals trading on its face because "[m]any, if not most" of the offenses included "have no tendency whatsoever to predict unsuitability for licensure based on the interests that the State claim[ed]").

Yet for those whose crimes happen to be screenable, things look much rosier than they do for Melissa. For those applicants, the Department has a short checklist. JA298. Then the screenings cover such factors as "A complete mental health/substance use history," "Treatment history," and "Recovery Status." JA301-302; *see also* JA317-319, JA628-629, JA323-330, JA630, JA624, JA61, JA1005-1006. All this lasts an hour, maybe ninety minutes. JA62, JA1005-1006, JA545,

JA540, JA663. The standard for "successfully rehabilitated" (on which there is a whole presentation in the record) appears to be as simple as being five years removed from the criminal-justice system and that the applicant "displays no indication of a substance use disorder at this time." *See* JA 329-330; *see also* JA313-322, JA301-302. In 2023 (the most recent year for which the record has numbers), these short screenings had a *ninety-six* percent pass rate. JA62, JA1005-1006, JA305, JA635.

As to someone specifically like Melissa, the result would be the same. Both a screener and the supervisor who administers the law testified that someone like her would very likely be found rehabilitated. *See* JA1199, JA546-547, JA631-632. The district court's unchallenged view was that if the "factors were applied to [Melissa], it is hard to imagine that she would not pass." JA1199.[16]

This means that Melissa can show that she is irrationally distinguished not just from abstract comparators like burglars but even

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[16] And even if she wouldn't, the irrational denial of "equal footing" for screening is an Equal Protection violation in itself. *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

from specific people. For instance, discovery revealed three burglars who are currently allowed to work in direct-care positions. JA62, JA1006, JA332, JA350. Nothing in the record supports blessing them while banning Melissa. The Commonwealth says "violence," but then why ban Melissa (who is a five-foot-two grandmother, JA524), when Rudy Carey can counsel at the same facility, and he is a former high-school football player convicted of battering a police officer? JA536-538. The Commonwealth's reply might pivot back to theft. But 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? JA662-663. And why isn't felony "grand larceny from the person of another"—a crime that sounds an awful lot like what Melissa did, except that the law treats it *worse* than unarmed robbery—not on the barrier list at all? *See* Va. Code § 19.2-392.02(A) (covering § 18.2-58(B)(4) (non-forcible robbery punishable under § 18.2-10 by 5 years) but not citing § 18.2-95 (grand larceny punishable by 20)).

Of course, the point 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 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. JA661-662. He passed a screening in ninety minutes. JA663. 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 pardoned. JA537-538, JA540.[17] He passed his screening in an hour. JA540. The Commonwealth rightly recognizes these people as examples of rehabilitation. Yet under its arbitrary screening laws, it irrationally denies that same recognition to Melissa.

D. It treats employed counselors differently.

Indeed, the barrier law does not even require employers like Melissa's to fire existing direct-care employees if they 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 is exactly the inconsistency that led the Seventh Circuit, in *Miller v. Carter*, 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

[17] A pardon would not help Melissa. JA60, JA1003-1004, JA634.

[was] permitted to retain it[] although convicted of armed robbery only yesterday." *Miller*, 547 F.2d at 1316. The Seventh Circuit thus concluded that

> allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is per se likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. An 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. That applies here. *See also Lewis*, 831 F. Supp. at 827-28.

In its opening brief, the Commonwealth argues that the relevant authority on this is not *Miller* but *Tsoras v. Manchin*, a case about a West Virginia law that rendered a plaintiff convicted of multiple gambling-related offenses ineligible for a gaming license. Br. 32, 34-35. (citing 431 F. App'x 251 (4th Cir. 2011)). Mostly the Commonwealth just states that *Miller*, "a decades-old, out-of-circuit holding" is not binding. Br. 34. But of course neither is *Tsoras*, an unpublished opinion with three relevant sentences. *Miller* (at 1316) analyzed and rejected the "track record" argument in *Tsoras*, and the district court was right to think *Miller* "highly persuasive," JA1210.

Again, this irrational distinction from employed counselors is just one tree in the forest. A reversal will mean a split with the Seventh Circuit; affirmance does not require agreement. The question is not whether the *Miller* problem alone makes the law irrational, but whether every flaw together does.

E. It allows grandfathering.

The same is true of the next problem the district court recognized: a questionable grandfather clause, which exempts people with barrier convictions who were already working in direct care before the law was passed in 1999. Va. Code § 37.2-416.1(A); *see also* JA1194, JA636-637. The fundamental idea of the barrier (according to the opening brief) is that "criminal acts … call into question an individual's moral character and trustworthiness." Br. 24-25. But "if 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; *see also Peake*, 132 A.3d at 506. For that reason alone, the Supreme Court of Pennsylvania has struck down an analogous law for nursing homes—

even though the law purported to protect "the elderly, disabled, and infirm," and even though a plaintiff had been convicted of a crime as serious as armed robbery. 839 A.2d at 288, 283 n.9.

As with the screenings, this irrationality means that Melissa can compare herself to specific, identified 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 facility. JA62, JA1006, JA528-529. Even James Christmas—one of only three people conducting the screenings that the Department trusts to assess rehabilitation—broke into a house one night to score money for drugs *and was himself convicted of felony burglary*. JA62, JA1006, JA543-544; *see also* JA623, JA638. Again, that's not to say that Mr. Adcock or Mr. Christmas should be barred: Virginia certified both as substance-abuse counselors. JA529, JA543. It is just irrational not to extend the same recognition to Melissa.

On appeal, the Commonwealth counters that "[t]he Supreme Court has explained that grandfather clauses grounded in reliance

interests survive an equal protection analysis." Br. 35. But if the Commonwealth means that categorically, it's wrong. Both before *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and after, statutes have failed rational-basis review because of grandfather clauses.[18] So the question can't be whether these clauses are *always* permissible. It's whether one is permissible when the theory is that people with criminal records can never be trusted again. That's what this law is supposedly about: the safety of vulnerable people, not who gets scarce space to sell food in the French Quarter. And, "[s]o far as the public *safety* is concerned, it can make no possible difference that the business was being carried on at the time of the passage of the ordinance." *Standard Oil Co. of N.J. v. City of Charlottesville*, 42 F.2d 88, 93 (4th Cir. 1930) (emphasis added) (allowing newcomer because of irrational grandfathering); *see also Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) ("[A]n ordinance which forbids one person to carry on a business on the ground that it is

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[18] *E.g.*, *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 531-32 (6th Cir. 1998); *Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087, 1098-99 (3d Cir. 1981).

dangerous to the community, and allows another person to carry on the same business simply because he happens to be engaged in it at the time of the passage of the ordinance, is unreasonable."). Cases upholding grandfather clauses in other contexts thus do not trump the cases about grandfather clauses in criminal-history bans. *See Nixon*, 839 A.2d at 289-90; *Peake*, 132 A.3d at 521. Those cases say an exception this big shows irrationality by itself. And, here, it's just one aspect of Melissa's claims.

F. It is bizarrely harsh.

Despite these 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 Cleburne*, 473 U.S. at 448 (holding restriction invalid as applied when "the record d[id] not reveal any rational basis for" restricting the plaintiff more than various comparators). Below, we catalogued the corresponding laws of all fifty states on substance-abuse counseling, and as far as we could 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.

JA1204, JA65-72; *see also Fields*, 434 P.3d at 1001. Forty-seven states see no need for lifetime bans, and the Commonwealth could provide no real-world justification for the disparity. *See* JA62, JA1006, JA338.

Even in Virginia, the barrier stands out as draconian. 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. Again, neither the record nor even speculation justifies these distinctions. If the barrier law is about theft, there should be a flat ban for lawyers, who hold client funds. If assault, then pediatricians and gynecologists. If it's something to do with drug abuse, then psychiatrists, who actually give out drugs. Without an explanation, courts recognize this kind of selective rigidity 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.

Indeed, for most Virginia occupations, Melissa's criminal history would be presumptively irrelevant. Under a broad, general licensing statute, 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. *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.'").

What's more, 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 overcome a drug addiction, she is barred from working forever. *See Haveman*, 238 A.3d at 577-79 (holding irrational "good moral character" requirement that applied to cosmetologists but not barbers).

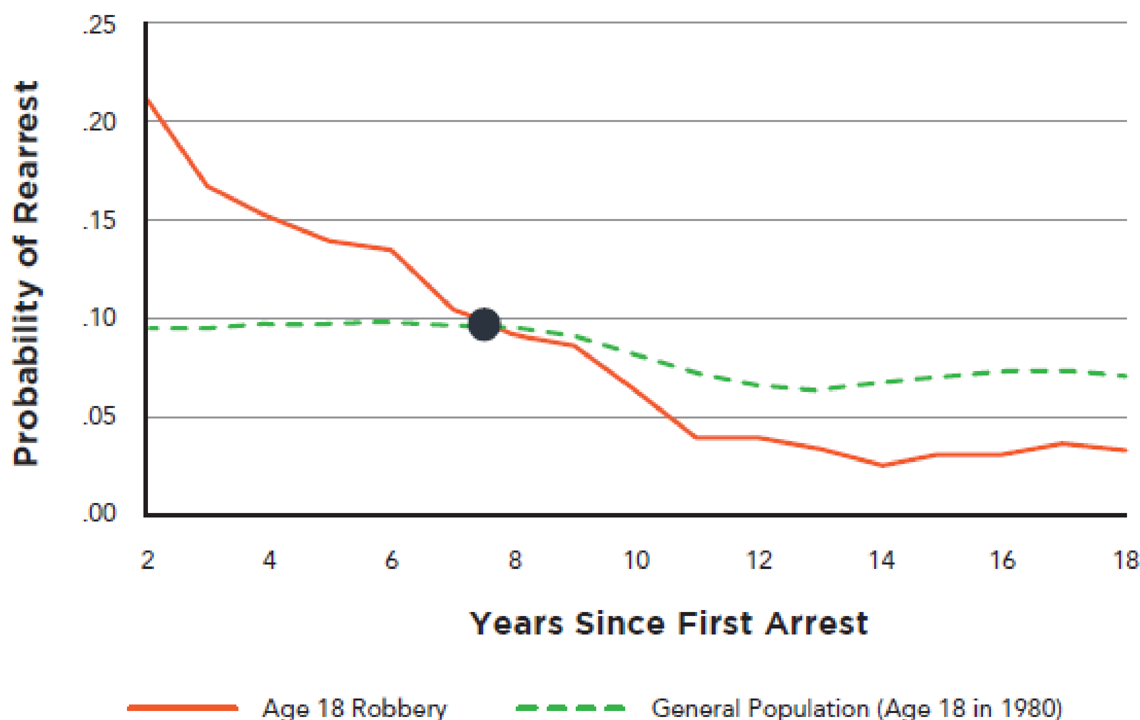
The Constitution doesn't ask that legislation be perfect. But glaring inconsistencies are something else.

G. It ignores undisputed science.

The disconnect between the law and its goal is only widened by unanimous, unrebutted social science. As explained below by one of the leading experts on recidivism, "academic research … 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." JA558.

This testimony was based on multiple lines of criminological research, each comprising multiple, replicated studies. 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." JA558-559. 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:



JA566. Indeed, the study makes clear that robbery has a risk decay—returning to background levels well before ten years—comparable to those for assault and burglary, both of which are screenable. JA568.

The expert's conclusion also relied on research showing that any reoffending usually occurs quickly, within the first five years. JA560-561. 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.

JA560-561. The Department, for its part, has itself cited this report, agreeing that "recidivism rates decline by year after arrest" and that "only 1% are re-arrested in the 9th year after initial arrest." JA361. On top of 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." JA561-562; *see also* JA63, JA1006.

All this means that 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. JA560. Perhaps it is self-evident that a grandmother her age presents no meaningful risk. But the record also proves it, and that matters in rational-basis cases. *See, e.g.*, *Johnson*, 59 A.3d at 22 ("Where, as here, nearly twenty years has expired since the convictions … 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; *see also, e.g.*, *Dias*, 567 F.3d at 1183 (sustaining rational-basis claim entirely because of "the state of science in 2009");

St. Joseph Abbey, 712 F.3d at 225 (holding law irrational in part because of factfinding by federal agency).

H. It turns on irrelevant conduct.

Finally, the undisputed record also shows that there is no nexus between robbery and substance-abuse counseling (let alone *supervising* substance-abuse counseling). *See 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,[19] 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.

Consider two key facts about where Melissa works. First, courts strike down these laws even when the relevant group is vulnerable, and Mainspring's residents undisputedly are *not*. They are physically normal adults, who play pickup basketball during breaks, not children

[19] *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").

or nursing-home residents. JA552. Second, Melissa already works there. She has keys to the entire building, including the residents' rooms. She can go whenever she wants, be around whomever she wants, and talk about whatever she wants. JA524, JA552. She just cannot talk about individualized ways to overcome 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. *See Fields*, 434 P.3d at 1006 (noting that 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.[20]

Ultimately, nothing connects this specific crime to this specific job. We propounded an interrogatory about this below, and the Commonwealth's answer was clear: the crimes connected to direct care

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

are the ones the Legislature picks. *See* JA290-292. Which means the Commonwealth's argument has no limit. If it is rational to ban Melissa from substance-abuse counseling based on say-so, then it is rational to ban her from anything with one-on-one meetings, or "corner grocery or convenience stores," or from working entirely. *King v. Bureau of Pro. & Occupational Affs.*, 195 A.3d 315, 329-30 (Pa. Commw. Ct. 2018) (en banc). Really, it is just an argument that, twenty-five years later, Melissa can't be trusted around other people. *But see id.* (rejecting this "flawed" reasoning). That's what this case comes down to, and it isn't rational at all.

III. The Commonwealth's technical arguments are also wrong.

In the face of this overwhelming evidence, the Commonwealth raises three technical concerns (although the latter two only barely): that the district court's ruling fails for lack of a similarly situated comparator, that Melissa is ineligible for screening because of her good-behavior condition, and that she is ineligible because of a purported conviction for parental abduction. None of this changes the result.

A. The "similarly situated" argument fails.

i. The Court can affirm under the Due Process Clause.

To begin, the Court does not need to reach anything about similarity as a matter of Equal Protection because it can just affirm on the alternative ground of the Due Process Clause. *See, e.g.*, *Kindem*, 502 F. Supp. at 1113-14; *Gregg*, 732 F. Supp. at 855; *Fields*, 434 P.3d at 1008-09 (McCloud, J., concurring). In a paragraph at the end of its opinion, the district court concluded without explanation that Melissa had "not identified a protected liberty interest under the Due Process Clause." JA1213. But, at the same time, the court acknowledged that "the Fourteenth Amendment's Due Process Clause includes some generalized … right to choose one's field of private employment." JA1213 (quoting language tracing to *Conn v. Gabbert*, 526 U.S. 286, 292 (1999)).

That is the liberty interest Melissa asserts. It is blackletter law that this interest exists: the "liberty" guaranteed by the Fourteenth Amendment includes the right "to engage in any of the common occupations of life." *Conn*, 526 U.S. at 291; *see also Schware*, 353 U.S. at 238-39. That means that the Due Process Clause is in play when state

action either "formally or automatically excludes [the plaintiff] from … employment opportunities" or "does not have this *binding* effect, but nevertheless has the *broad* effect of largely precluding [the plaintiff] from pursuing her chosen career." *Kartseva v. Dep't of State*, 37 F.3d 1524, 1528 (D.C. Cir. 1994); *Shirvinski v. U.S. Coast Guard,* 673 F.3d 308, 315-16 (4th Cir. 2012) (adopting this test).[21] That is exactly what the district court found. "[T]he barrier law practically blocks [Melissa] from most direct care positions because these positions are largely unavailable outside Department-licensed facilities." JA1213; *see also* JA524 ("Overwhelmingly, such clinical roles exist only in facilities subject to the Department's barrier law."). This fact was not disputed at

[21] *See also, e.g.*, *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 991, 996-98 (9th Cir. 2007) (sustaining Due Process claim when plaintiff was left with "very few opportunities"), *aff'd on other grounds*, 553 U.S. 591 (2008); *Donato v. Plainview–Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630-31 (2d Cir. 1996) (same if government "effectively put a significant roadblock in [the plaintiff's] continued ability to practice"); *cf. Caperton v. Va. Dep't of Transp.,* 684 F. App'x 322, 324 (4th Cir. 2017) (holding that a fired snowplow driver had not adequately alleged that he was "largely preclud[ed] … from pursing his chosen career" when he provided no examples of businesses that wouldn't hire him).

summary judgment,[22] and it is all this Court needs to consider Melissa's Due Process claim.[23]

ii. There is no separate "similarly situated" test.

If, however, the Court reaches the Equal Protection Clause, it should not perform a separate "similarly situated" review. *Contra* Br. 14-16. That would be an analytic mistake, albeit one that has been made before. "The Equal Protection Clause … is essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439. So when there's clearly unequal treatment, as with a statutory classification, "similarly situated" is the only question left. It's not that you decide whether two groups are similar and then, still, whether they're rationally distinguishable. It's that *whether* there is a rational basis for distinguishing between groups *determines* whether they're similar. As the Supreme Court has put it, "a classification must

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[22] *Compare* JA61 *with* JA1002-04 *given* E.D. Va. L.R. 56(B).

[23] The Commonwealth has a footnote implying that Melissa needed to cross appeal, *see* Br. 10 n.2, but the Commonwealth is wrong because this is just an alternative ground for affirmance. *E.g.*, *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 115 F.4th 266, 283-84 (4th Cir. 2024).

be reasonable, not arbitrary, … *so that* all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (cleaned up and emphasis added).

And most judges of this Court agree. In *Kadel v. Folwell*, the *en banc* Court couldn't have been clearer that "[t]here is no similarly situated threshold inquiry." 100 F.4th 122, 155 (2024). Rather, "the similarly situated inquiry is 'one and the same as the equal protection merits inquiry.'" *Id.* at 154.[24]

To be sure, the situation is more complicated because *Kadel* has been vacated, 145 S. Ct. 2838 (2025), so it's not binding, only persuasive. And, yes, there are cases that do speak of similarity as a threshold question. *See* Br. 14-16. But at the same time, the Court also

[24] Quoting Giovanna Shay, *Similarly Situated*, 18 Geo. Mason L. Rev. 581, 598 (2011), which discusses this issue at length. Judge Sykes (joined by judges Easterbrook and Flaum) has also explained that this idea comes from class-of-one cases and should not extend to statutory classifications, for which "[t]he *only* demand [of] the Equal-Protection Clause … is that [they] be rational." *See Monarch Beverage Co. v. Cook*, 861 F.3d 678, 681-83 (7th Cir. 2017) (emphasis added). The prison-work case, *Fauconier*, employs this distinction, discussing similarly situated comparators for Fauconier's claim about unequal *enforcement*, but the lack of a rational explanation for his claim about unreasonable *classification*. 966 F.3d at 278-79.

recently held in *B.P.J.* that similarity is *not* a threshold question.[25] To our knowledge, that is the only Fourth Circuit decision besides *Kadel* in which this issue was briefed and analyzed, and it remains good law.[26]

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[25] *Compare B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 568 n.2 (4th Cir. 2025) (Judge Agee, dissenting in part: "the Court cannot determine that any discrimination has occurred until it determines with whom B.P.J. is similarly situated") *with id.* at 556 (panel opinion's response: "Because the challenged policy facially discriminated based on sex, the Court applied intermediate scrutiny without first asking whether … men and women are similarly situated when it comes to attending a physically rigorous military-style academy."), *cert. granted*, 146 S. Ct. 57 (2025).

[26] If resolving this means adventuring down the rabbit hole of orderliness, many cases in this Circuit predating the ones in the Commonwealth's brief treat the questions of "similarly situated" and "rational basis" as equivalent, either by conflating the analyses or stating that the Equal Protection Clause asks exactly one question. *See, e.g.*, *United States v. Timms*, 664 F.3d 436, 447-49 (4th Cir. 2012) (holding that a statute did not distinguish between similarly situated groups *because* there was a rational reason to treat them differently); *Moss v. Clark*, 886 F.2d 686, 690, 691-92 (4th Cir. 1989) (asking whether two groups "are in fact so similarly situated that different treatment of them defies rational explanation"); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995) (explaining that "[i]f the classification utilized is explicitly stated on the face of a statute … then the equal protection analysis requires us to determine whether an appropriate relationship exists between the legislative purpose and the classification adopted to achieve that purpose"); *Allen v. Bergland*, 661 F.2d 1001, 1007 (4th Cir. 1981) (explaining that when "there is no question [of] a separate classification … , the relevant inquiry is whether that classification is rationally related to a legitimate governmental interest").

Again, because the Court can affirm under the Due Process Clause, it need not venture into these brambles. If it does grasp them, the Supreme Court "has never used [similarity] as a threshold hurdle." *Kadel*, 100 F.4th at 155. This Court should not either.

iii. Melissa is similarly situated.

As a third option, this Court could simply assume that "similarly situated" is a separate test in statutory cases because Melissa would pass it in multiple ways. It would be a common-sense inquiry that looks to "all relevant factors," *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996), and at "everything in the record" to see whether a specific plaintiff is similarly situated in fact, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 609-10 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (holding transgender student in fact similar to boys); *see also Mathers,* 636 F.3d at 400.

Under that standard, the evidence would confirm, primarily, that Melissa is similarly situated to other qualified counselors without barrier convictions. Melissa has the skills to provide counseling and supervise counselors. She holds a bachelor's degree in psychology, she has the required training, she has done both jobs, and the

Commonwealth has certified her, despite her conviction, as fit. These are precisely the attributes that the Department's former Chief Human Resources Officer testified would make someone "qualified." JA602-603. For good measure, undisputed academic research confirms that people like Melissa have the same risk of crime as people without criminal records, and the Commonwealth itself says that people with criminal records "can provide valuable services." JA268; *see also* JA1205. Most of the cases about criminal-history bans are decided on this Equal Protection basis. *See, e.g.*, *Chunn*, 156 So. 3d at 889. So if there were a similarly situated prong, Melissa would meet it. (And a holding that she is dissimilar because of her conviction would mean that this whole body of law is secretly wrong.)

Even if the Court needed a more specific comparator, there would still be examples. The district court treated "the conduct underlying [Melissa's] conviction [as] of essentially the same nature" as a screenable crime, JA1203, and, as a matter of similarity, the

Commonwealth does not argue otherwise, Br. 16-23.[27] Again, that means there are specific, named people who testified to near-identical stories of crime and redemption. Melissa would be situated similarly to them, too.

These simple bases for affirmance mean the Court need not reach the specific questions of whether Melissa is similarly situated to grandfathered offenders and Currently Employed Offenders. *See* Br. 16-23. But even there, the Commonwealth has not carried its burden of persuasion. As for grandfathering, someone who committed a crime in July 2001 certainly seems like someone equally qualified who committed the same crime before "July 1, 1999." Va. Code § 37.2-416.1(A). The Commonwealth (at 20-21) proves our last point by using *rational-basis* cases to argue that grandfathered offenders are dissimilar, but as to *similarity*, it offers only one, out-of-circuit case, *Beeler v. Rounsavall*, 328 F.3d 813, 817 (5th Cir. 2003), which begged the question by holding that "[t]he Code's differential treatment of [the

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[27] The Commonwealth does argue that burglary and robbery are dissimilar facially, Br. 26-27, but that is irrelevant to Melissa's as-applied challenge.

different group] indicates that [they] were not similarly situated." That holding would mean not only that every court invalidating a grandfather clause goofed up, *see supra* p. 41, but also that *no* statute can *ever* treat similarly situated groups differently. Which is obviously wrong. As for Currently Employed Offenders, the Commonwealth invites a needless break with the Seventh Circuit. That court faced a similar ban and similar criminal history: seven years served for robbery. *Miller*, 547 F.2d at 1315. It held, *without* needing to analyze an exact hypothetical copy of the plaintiff, 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." *Id.* at 1315, 1316.

To sum up, the Commonwealth is wrong about similarity under any path the Court may take. The Court can affirm under the Due Process Clause without reaching Equal Protection, it can follow *Kadel* and *B.P.J.* and confirm that there is no separate "similarly situated" analysis, or it can assume that analysis exists because Melissa would meet it in multiple ways.

B. The good-behavior argument fails.

The Commonwealth also briefly argues that Melissa's being subject to a good-behavior condition until 2030 renders her ineligible for a screening. Br. 39. (The idea is that screening requires the applicant to be five years out from probation, Va. Code § 37.2-416.1(F)(1), and the good-behavior condition counts as "unsupervised probation," Br. 8-9.) This is hazy both as a matter of statutory interpretation and because Melissa's restoration of rights says that "it appears that all sentence obligations have been fulfilled," JA81. But even if it's true, it's beside the point. Because of the robbery, Melissa is *already* ineligible for screening as a statutory matter. So she's challenging the law's lifetime ban as a constitutional matter, regardless of whether the law bans her because of one aspect of her criminal history or multiple aspects. JA2, JA17-20, JA906-907, JA910-912. That's why the question is whether excluding her is rational.

On that question, the Commonwealth does not suggest that the good-behavior condition changes anything, and it doesn't. Melissa's sentencing court does not even have jurisdiction over the condition, *McFarland v. Commonwealth*, 574 S.E.2d 311, 313-14 (Va. Ct. App.

2002), which would mean it's a bizarre form of probation. Legally, all it means is that Melissa could go back to prison *if she is convicted of another crime*, which is true of anyone. *See* Va. Code § 19.2-306.1.

In the real world, Melissa has had no interactions with the criminal-justice system for fourteen years. JA128; *see also* JA525. The condition did not stop her from earning a sterling reputation, it did not stop the Commonwealth from restoring her rights, and it also did not stop the Commonwealth from certifying her as fit just four years into the term of good behavior. *See, e.g.*, JA551, JA81, JA249. There is no reason to believe the condition—the result of a sentencing decision in 2002—has any bearing on who Melissa is today. *See also* JA528-530 (describing a grandfathered offender who worked while under a good-behavior condition). Nor is there any reason to think that Melissa has more rehabilitation to do before 2030 or 2035, when, incidentally, the Commonwealth would still say she's banned for the rest of her life. This is a nonfactor.

C. The abduction argument fails.

Finally, the Commonwealth also has a paragraph arguing that Melissa is ineligible for screening because she was convicted of a

misdemeanor parental abduction. Br. 37-38. That argument doesn't matter for three reasons.

First, even as an eligibility question, there is no judgment of conviction in the record. Melissa offered her admissible recollections that the charge had been dismissed. *See* JA933, JA937, Fed. R. Evid. 803(5). Meanwhile, the Commonwealth's only evidence of conviction was the robbery prosecutor's statement that he *would* introduce the conviction, JA800, and the robbery presentence report's mention of it, JA809. Both are hearsay,[28] so the district court did not abuse its discretion by finding that this conviction had not been established, JA1188; *Whittaker v. Morgan State Univ.*, 524 F. App'x 58 (4th Cir. 2013). *See also* JA902-904 (further details).

Second, even if Melissa was convicted, misdemeanor parental abduction is not a barrier crime. It falls under subsection (D) of the

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[28] *See, e.g.*, *United States v. Lopez*, 219 F.3d 343, 347 (4th Cir. 2000) (noting that attorney statements are not evidence); *United States v. Smith*, 86 F.3d 1154, 1996 WL 293159, at *5-6 (4th Cir. 1996) (table) (acknowledging that probation officer's review of defendants' criminal histories was hearsay); *United States v. Frushon*, 10 F.3d 663, 666 (9th Cir. 1993) (noting, while discussing a list of prior convictions, that PSRs are "generally hearsay, even remote hearsay at the second and third remove").

relevant statute, and the abduction barrier crimes are limited to the more serious "violation[s] of subsection A or B," which are felony kidnapping and human trafficking. Va. Code § 19.2-392.02(A) (including § 18.2-47 only in part); *see also* JA908-910 (briefing this further). Again, though, statutory eligibility is irrelevant.

The bottom line is rationality, and although the Commonwealth does not discuss abduction in that respect, all this just underscores how irrational the barrier is. Twenty-six years ago, Melissa and her husband were getting divorced. She took her children home for *two hours*. If she committed a crime, it was a misdemeanor. She served no jail time. The conviction was not even important enough for the Commonwealth to keep a record to enforce the barrier. JA95-97, JA940-942, JA933, JA997-999. And yet, like setting off a smoke bomb in public, or shining a laser pointer at a police officer, this misdemeanor would be yet another conviction for which the law imposed a lifelong ban. Even though people with old convictions for assault or larceny get to work without impediment, and even though burglars get a screening that almost everyone passes. Even though there is a shortage of counselors. Even though the law blocks people with "invaluable" experience. Even

though applying it to Melissa is "crazy." The law would still withhold from Melissa the only thing the court ordered below: a *chance* to show she's rehabilitated.

CONCLUSION

There have to be limits. For decades, courts have said that there are. Under any constitutional standard, a law's justification "cannot be fantasy." *St. Joseph Abbey*, 712 F.3d at 223. Deep down, that's all the Commonwealth is offering: the fantasy that drug-addicted Virginians are safer without Melissa's help. No one, including the Commonwealth, actually believes that.

The Court shouldn't pretend to believe it either.

The judgment should be affirmed.

REQUEST FOR ORAL ARGUMENT

As this case involves a significant constitutional challenge set against a "complex statutory backdrop," JA1194, Appellee agrees that oral argument is warranted.

Respectfully submitted,

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ADDENDUM—VIRGINIA CODE § 37.2-416.1

Background checks required; adult substance abuse and mental health services

A. As used in this section:

"Direct care position" means any position that includes responsibility for (i) treatment, case management, health, safety, development, or well-being of an adult receiving substance abuse or mental health services or (ii) immediately supervising a person in a position described in this definition.

"Hire for compensated employment" does not include (i) a promotion from one adult substance abuse or adult mental health treatment position to another such position within the same licensee licensed pursuant to this article or (ii) new employment in an adult substance abuse or adult mental health treatment position in another office or program licensed pursuant to this article if the person employed prior to July 1, 1999, in a licensed program had no convictions in the five years prior to the application date for employment. "Hire for compensated employment" includes (a) a promotion or transfer from an

adult substance abuse treatment position to any mental health or developmental services direct care position within the same licensee licensed pursuant to this article or (b) new employment in any mental health or developmental services direct care position in another office or program of the same licensee licensed pursuant to this article for which the person has previously worked in an adult substance abuse treatment position.

"Peer recovery specialist" means any person who has completed a peer recovery specialist training course approved by the Department of Behavioral Health and Developmental Services.

"Provider" means a provider who is licensed pursuant to this article and who provides substance abuse or mental health services to adults.

B. Every provider shall require (i) any applicant who accepts employment in any direct care position and (ii) any person under contract with the provider to serve in a direct care position to submit to fingerprinting and provide personal descriptive information to be forwarded through the Central Criminal Records Exchange to the

Federal Bureau of Investigation (FBI) for the purpose of obtaining national criminal history record information regarding the applicant. Except as otherwise provided in subsection C, D, E, or G, no provider shall:

1. Hire for compensated employment any person who has been convicted of (i) any offense set forth in clause (i), (ii), or (iii) of the definition of barrier crime in § 19.2-392.02 or (ii) any offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02 (a) in the five years prior to the application date for employment or (b) if such person continues on probation or parole or has failed to pay required court costs for such offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02; or

2. Allow any person under contract with the provider to serve in a direct care position who has been convicted of (i) any offense set forth in clause (i), (ii), or (iii) of the definition of barrier crime in § 19.2-392.02 or (ii) any offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02 (a) in the five years prior to the application date for employment or (b) if such person

continues on probation or parole or has failed to pay required court costs for such offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02.

The Central Criminal Records Exchange, upon receipt of an applicant's record or notification that no record exists, shall submit a report to the requesting authorized officer or director of a provider. If any applicant is denied employment because of information appearing on the criminal history record and the applicant disputes the information upon which the denial was based, the Central Criminal Records Exchange shall, upon written request, furnish to the applicant the procedures for obtaining a copy of the criminal history record from the FBI. The information provided to the authorized officer or director of a provider shall not be disseminated except as provided in this section.

C. Notwithstanding the provisions of subsection B, a provider may hire for compensated employment or permit any person under contract with the provider to serve in a direct care position or permit any person employed by a temporary agency that has entered into a contract with

the provider to provide direct care services on behalf of the provider at an adult substance abuse or mental health treatment program a person who was convicted of any misdemeanor violation of § 18.2-57 or any violation of § 18.2-248, 18.2-250, or 18.2-258.1, except an offense pursuant to subsection H1 or H2 of § 18.2-248, provided that such conviction occurred more than four years prior to the application date for employment.

D. Notwithstanding the provisions of subsection B, a provider may hire for compensated employment or permit any person under contract with the provider to serve in a direct care position or permit any person employed by a temporary agency that has entered into a contract with the provider to provide direct care services on behalf of the provider at adult substance abuse or adult mental health treatment programs a person who was convicted of any violation of § 18.2-51.3; any misdemeanor violation of § 18.2-56 or 18.2-56.1; any first offense misdemeanor violation of § 18.2-57.2; any violation of § 18.2-60, 18.2-89, 18.2-92, or 18.2-94; any misdemeanor violation of § 18.2-282, 18.2-346, or 18.2-346.01; any offense set forth in clause (iii) of the definition of barrier crime in § 19.2-392.02, except an offense pursuant to

subsections H1 and H2 of § 18.2-248; or any substantially similar offense under the laws of another jurisdiction, if the hiring provider determines, based upon a screening assessment, 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 based on his criminal history background and his substance abuse or mental illness history. In addition, where the employment at an adult substance abuse treatment program is as a peer recovery specialist, the provider may hire any person eligible under this subsection or who was convicted of any offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02 if the hiring provider determines, based upon a screening assessment, that the criminal behavior was substantially related to the person's substance abuse or mental illness and that the person has been successfully rehabilitated and is not a risk to individuals receiving services based on his criminal history background and his substance abuse or mental illness history.

E. Notwithstanding the provisions of subsection B, a provider may hire for compensated employment or permit any person under contract

with the provider to serve in a direct care position or permit any person employed by a temporary agency that has entered into a contract with the provider to provide direct care services on behalf of the provider at adult substance abuse treatment facilities a person who has been convicted of not more than one offense under subsection C of § 18.2-57, or any substantially similar offense under the laws of another jurisdiction, if (i) the person has been granted a simple pardon if the offense was a felony committed in Virginia, or the equivalent if the person was convicted under the laws of another jurisdiction; (ii) more than 10 years have elapsed since the conviction; and (iii) the hiring provider determines, based upon a screening assessment, that the criminal behavior was substantially related to the applicant's substance abuse and that the person has been successfully rehabilitated and is not a risk to individuals receiving services based on his criminal history background and his substance abuse history.

F. The hiring provider and a screening contractor designated by the Department shall screen applicants who meet the criteria set forth in subsections D and E to assess whether the applicants have been rehabilitated successfully and are not a risk to individuals receiving

services based on their criminal history backgrounds and substance abuse or mental illness histories. To be eligible for such screening, the applicant:

1. Shall have completed all prison or jail terms, shall not be under probation or parole supervision, shall have no pending charges in any locality, shall have paid all fines, restitution, and court costs for any prior convictions, and shall have been free of parole or probation for at least five years for all convictions; or

2. If the applicant is a peer recovery specialist, shall have completed all prison or jail terms, shall not be under probation or parole supervision, shall have no pending charges in any locality, and shall have been free of parole or probation for at least five years for all convictions.

In addition to any supplementary information the provider or screening contractor may require or the applicant may wish to present, the applicant shall provide to the screening contractor a statement from his most recent probation or parole officer, if any, outlining his period of supervision and a copy of any pre-sentencing or post-sentencing report

in connection with the felony conviction. The cost of this screening shall be paid by the applicant, unless the licensed provider decides to pay the cost.

G. Notwithstanding the provisions of subsection B, a provider may (i) hire for compensated employment, (ii) approve as a sponsored residential service provider, (iii) permit to enter into a shared living arrangement, or (iv) permit any person under contract with the provider to serve in a direct care position on behalf of the provider or permit any person employed by a temporary agency that has entered into a contract with the provider to provide direct care services on behalf of the provider persons who have been convicted of not more than one misdemeanor offense under § 18.2-57.2, or any substantially similar offense under the laws of another jurisdiction, if 10 years have elapsed following the conviction, unless the person committed the offense while employed in a direct care position. A provider may also approve a person as a sponsored residential service provider if (a) any adult living in the home of an applicant or (b) any person employed by the applicant to provide services in the home in which sponsored residential services are provided has been convicted of not more than one misdemeanor

offense under § 18.2-57.2, or any substantially similar offense under the laws of another jurisdiction, if 10 years have elapsed following the conviction, unless the person committed the offense while employed in a direct care position.

H. Every provider shall require, as a condition of employment, approval as a sponsored residential service provider, permission to enter into a shared living arrangement with a person receiving medical assistance services pursuant to a waiver, or permission for any person under contract with the provider to serve in a direct care position, written consent and personal information necessary to obtain a search of the registry of founded complaints of child abuse and neglect that is maintained by the Department of Social Services pursuant to § 63.2-1515.

I. The cost of obtaining the criminal history record and search of the child abuse and neglect registry record shall be borne by the applicant, unless the provider decides to pay the cost.

J. A person who complies in good faith with the provisions of this section shall not be liable for any civil damages for any act or omission

in the performance of duties under this section unless the act or omission was the result of gross negligence or willful misconduct.

K. Notwithstanding any other provision of law, a provider that provides services to individuals receiving services under the state plan for medical assistance services or any waiver thereto may disclose to the Department of Medical Assistance Services (i) whether a criminal history background check has been completed for a person described in subsection B for whom a criminal history background check is required and (ii) whether the person described in subsection B is eligible for employment, to provide sponsored residential services, to provide services in the home of a sponsored residential service provider, or to enter into a shared living arrangement with a person receiving medical assistance services pursuant to a waiver.

L. Any person employed by a temporary agency that has entered into a contract with a provider and who will serve in a direct care position on behalf of such provider shall undergo a background check that shall include:

1. A criminal history records check through the Central Criminal Records Exchange pursuant to § 19.2-389; and

2. A search of the central registry maintained pursuant to § 63.2-1515 for any founded complaint of child abuse and neglect.

Except as otherwise provided in subsection C, D, E, or G, no provider shall permit any person employed by a temporary agency that has entered into a contract with the provider to provide direct care services on behalf of the provider if that person has been convicted of (i) any offense set forth in clause (i), (ii), or (iii) of the definition of barrier crime in § 19.2-392.02 or (ii) any offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02 (a) in the five years prior to the application date for employment or (b) if such person continues on probation or parole or has failed to pay required court costs for such offense set forth in clause (iv) of the definition of barrier crime in § 19.2-392.02.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit because, according to Microsoft Word, the substance contains 12,840 words. A conservative manual count of the words in the chart on page 47 adds 45, for a total count of 12,885. *See* Fed. R. App. P. 32(a)(7)(B)(i), -(f). The brief complies with the type-style requirements because it was prepared in 14-point Century Schoolbook, which is proportionally spaced. *See* Fed. R. App. R. 32(a)(5).

/s/ Andrew Ward