No. 15-10958

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL A. MCGUIRE,
Plaintiffs-Appellant (Cross-Appellee),

v.

LUTHER STRANGE, Attorney General for the State of Alabama, et al.,
Defendants-Appellees (Cross-Appellants).

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:11-cv-1027-WKW-CSC

APPELLEE/CROSS-APPELLANT STATE OFFICIALS' REPLY BRIEF

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[1] On May 14, 2015, the Court entered an order dismissing Sheriff Cunningham's cross-appeal for want of prosecution with respect to his filing- and docketing-fee obligations. Sheriff Cunningham has moved to reinstate his cross-appeal; he therefore joins this reply brief subject to his cross-appeal being reinstated.

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REPLY BRIEF

In his response and reply brief, McGuire does not directly mention the two minor provisions of ASORCNA that the District Court invalidated as "excessive" under the Ex Post Facto Clause. But he nevertheless makes numerous arguments that warrant a response in the context of this cross-appeal. That is because, at bottom, McGuire rests his case on a false and boundless view of what constitutes "punishment" for ex post facto purposes. This fundamental error infects McGuire's analysis of the ASORCNA requirements presently at issue—that sex offenders report to two law enforcement agencies for homeless check-in and travel permits—as much as it infects his analysis of any other ASORCNA component.

Before proceeding, it is worth noting just a few of the ways McGuire's most recent filing further undermines his credibility before this Court. For example, McGuire persists in asserting that he has never hurt a child and that his only sex crime was against an adult over 30 years ago, even though the District Court declined to find these things. *See, e.g.*, McGuire Resp. & Reply Br. at 1, 8, 20, 21; *cf.* Defs.' Opening Br. at 15-16. He wrongly claims that the defendants' "only attempted support" for the phenomenon of crossover offending comes from Dr. McCleary, when the defendants in fact documented it through law enforcement testimony and at least two academic studies as well. McGuire Resp. & Reply Br. at 18; *cf.* Defs.' Opening Br. at 49. He continues to misrepresent the content of

ASORCNA; for example, nothing in ASORCNA prohibits offenders from enjoying "Christmas dinner" with family. McGuire Resp. & Reply Br. at 8. And, as he did in his principal brief, McGuire never once mentions the "'clearest proof'" standard applicable to his claim. *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1147 (2003) (quoting *Hudson v. United States*, 522 U.S. 93, 100, 118 S. Ct. 488, 493 (1997)).

Beyond these and similar errors, McGuire now mischaracterizes the defendants' positions on appeal. The defendants have never "claim[ed]," for example, "that [ASORCNA's] effects do not matter." *Id.* at 25. Nor have they "conced[ed] that ASORCNA grants law enforcement the ability to deny travel permits." *Id.* at 20, 31.

Suffice it to say, McGuire's filings are not reliable indicators of the record, ASORCNA's content, controlling precedent, or now, even, the arguments he must overcome.

This brief proceeds in three parts. First, it sets the record straight on various big-picture doctrinal matters. Then, it reiterates why ASORCNA's *apparent* intent is clearly nonpunitive. Finally, it concludes by demonstrating why McGuire has not shown, much less by the clearest proof, that the dual reporting requirements' *actual* intent is any different.

I. McGuire ignores established constraints on judicial review under the Ex Post Facto Clause.

Many of the errors in McGuire's response and reply brief occur at the doctrinal level. In particular, McGuire's approach would violate each of the five threshold principles set out in the defendants' opening brief.

A. McGuire ignores the dispositive status of the Legislature's nonpunitive intent.

Claiming that ASORCNA can violate the Ex Post Facto Clause "*regardless of intent,*" McGuire has now abandoned even his superficial acknowledgement that the punishment question boils down to legislative intent. McGuire Resp. & Reply Br. at 25 (emphasis in original); *cf.* Defs.' Opening Br. at 26. As an initial matter, McGuire does not address the numerous Supreme Court cases equating punishment with a legislative desire to punish. *See* Defs.' Opening Br. at 26 n.3. He instead advocates for an expansive and unprecedented application of the second step in the punishment analysis. To understand this, recall that in determining whether a provision is punitive, the Court employs a two-step analysis, looking first and foremost to an act's formal attributes but also, to a very limited extent, to the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963).

Although courts have sometimes referred to this second step as the "effects" prong, they clearly do not envision a freewheeling excursion into the alleged sever-

ity of a given sanction. Indeed, "the severity of a sanction is not determinative of its character as 'punishment.'" *Flemming v. Nestor*, 363 U.S. 603, 616 n.9, 80 S. Ct. 1367, 1375 n.9 (1960); *see also Dep't of Rev. v. Kurth Ranch*, 511 U.S. 767,777 n.14, 114 S. Ct. 1937, 1945 n.14 (1994). Instead, consider the purpose of the *Mendoza-Martinez* factors—e.g., whether the sanction has been regarded historically as punishment, whether it promotes the traditional aims of punishment, or whether it bears a rational connection to a nonpunitive purpose. These are not "effects" at all. Or at least they are not the kind of effects McGuire has in mind. They are instead tools for discerning a legislature's true intent—just as the defendants have posited. Courts look to historical forms of punishment, for example, not because of their severity but "because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97, 123 S. Ct. at 1149.

McGuire's sleight of hand on this seemingly abstract threshold question might appear harmless. But the point is not academic. Under McGuire's open-ended approach based on ASORCNA's alleged severity, *any* regulation imposing burdens on convicted criminals would be subject to invalidation. But that, obviously, is not how the Ex Post Facto Clause is supposed to work. *See Trop v. Dulles*, 356 U.S. 86, 96-97, 78 S. Ct. 596 (1958) (plurality opinion).

B. McGuire ignores the near-controlling status of the Legislature's *stated* intent.

McGuire correspondingly fails to recognize that legislative "intent" turns predominantly on the legislature's "'*stated* intent'"—i.e., the legislature's "declared objective." *Smith*, 538 U.S. at 92, 93, 123 S. Ct. at 1147 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 2082 (1997)) (emphasis added). The defendants previously set out four reasons for "ascribing near-dispositive status to a legislature's stated nonpunitive purpose"—in other words, for enforcing the clearest-proof standard. Defs.' Opening Br. at 28. But McGuire's response and reply brief, like his principal brief, does not so much as mention the clearest-proof standard. He certainly does not counter the reasons for scrupulously enforcing it. Instead, McGuire's approach is to subtly redefine the first step of the analysis altogether.

In McGuire's view, the first step of the analysis looks at "intent" (very broadly defined) while the second step looks at the provision's subjective severity. *See, e.g.*, McGuire Resp. & Reply Br. at 13-14. But as explained above, the first step is in fact about the legislature's *apparent* intent, while the *Mendoza-Martinez* factors are about the legislature's *actual* intent. That McGuire is distorting the first step is clear from the ways the Supreme Court has described it: The first step is what makes the punishment question "'first of all a question of statutory construction.'" *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147 (quoting *Hendricks*, 521 U.S. at

361, 117 S. Ct. at 2081). The first step turns on the challenged law's "text and its structure," its "formal attributes," and whether the legislature "'indicated either expressly or impliedly a preference for one label or the other.'" *Id.* at 92-94 (quoting *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493). And the first step discerns the legislature's "manifest intent" by looking to "the face of the statute." *Hendricks*, 521 U.S. at 361, 117 S. Ct. at 2082. Thus, for purposes of the first step, it is simply inappropriate to look at ASORCNA's alleged uniqueness, its alleged irrationality, or its alleged ineffectiveness, all as McGuire suggests. *See, e.g.*, McGuire Resp. & Reply Br. at 5-11, 14-19. To the contrary, "a single line" in ASORCNA articulating a nonpunitive purpose can be very important—indeed, it can be decisive—on the first step of the punishment analysis. *Id.* at 4. And this is especially true when, as here, that single line is combined with the other formal indicators of the Legislature's preference that ASORCNA be regarded as nonpunitive. *See* Defs.' Opening Br. at 39-41.

C. McGuire disregards the rule that ASORCNA must be evaluated only "on its face."

Next, McGuire would violate the principle that ASORCNA must be judged, for purposes of the punishment analysis, only "'on its face.'" *Hudson*, 522 U.S. at 101, 118 S. Ct. at 494 (quoting *Mendoza-Martinez*, 372 U.S. at 169, 83 S. Ct. at 568); *see also* Defs.' Opening Br. at 31-34. This principle is perhaps less relevant

to the defendants' cross-appeal because McGuire does not claim any unique hardship from these provisions. After all, now that he has joined virtually all other Montgomery County sex offenders in finding housing, he is not required to check in weekly at all, let alone at two law enforcement agencies. *See* Defs.' Opening Br. at 16. And McGuire has never sought to travel, so he likewise can claim no unique disadvantage from the requirement of dual reporting for that purpose. Doc. 251 at 46:24-49:20 (testimony of Michael McGuire). Even so, McGuire persists in attacking a three-day advance-notice requirement for travel permits that simply does not appear on face of ASORCNA. *See, e.g.*, McGuire Resp. & Reply Br. at 21, 31. This is a direct violation of *Hudson*, and McGuire never attempts to argue otherwise.

D. McGuire's approach would wrongly ascribe controlling weight to *Mendoza-Martinez*'s excessiveness factor.

Next is McGuire's continued mistake of "elevat[ing] a single [*Mendoza-Martinez*] factor—whether [ASORCNA] appear[s] excessive in relation to its nonpunitive purposes—to dispositive status." *Hudson*, 522 U.S. at 101, 118 S. Ct. at 494. This is a pervasive mistake of McGuire's, and it is especially relevant to the cross-appeal because it is the principal error the District Court committed in invalidating the dual reporting requirements. McGuire's response is clever: Seizing on the Supreme Court's admonition that the *Mendoza-Martinez* factors are not dispos-

itive, *see Smith*, 538 U.S. at 94, 123 S. Ct. at 1148, he asserts that he need only focus on the ultimate question—i.e., "whether ASORCNA is punitive." McGuire Resp. & Reply Br. at 26. But this response is also circular, for it ignores that the *Mendoza-Martinez* factors are the Supreme Court's chosen *means* of answering that ultimate question. His response, moreover, is at odds with his other arguments about ASORCNA's alleged severity, its alleged uniqueness, and its alleged ineffectiveness—all of which are obviously excessiveness arguments. McGuire's tack on this issue furthermore reveals just how limitless his view of the Ex Post Facto Clause is.

E. McGuire ignores the presumption of validity to which ASORCNA is entitled.

Finally, McGuire makes no account for the presumption of validity to which ASORCNA is entitled. As the defendants previously explained, a key part of this presumption is federal courts' willingness to assume an interpretation of ASORCNA that avoids constitutional problems when considering a facial, pre-enforcement challenge such as this. *See* Defs.' Opening Br. at 37-38. On this point, McGuire is correct that the constitutional avoidance doctrine comes into play only when a statute contains ambiguous provisions. *See* McGuire Resp. & Reply Br. at 22-23. But he is incorrect that "no ambiguity exists within ASORCNA." *Id.* at 23. Relevant to the cross-appeal, for example, there is an open question regarding the

extent to which ASORCNA's travel provision actually "impedes" offenders' travel options. There are good reasons to believe that this provision merely requires *notice* of a sex offender's travel plans. *See* Defs.' Opening Br. at 10 n.2. But without explanation, McGuire simply ignores these reasons, choosing instead to advance the most burdensome possible reading of ASORCNA. The Court, however, cannot take this path. At this juncture, the Court must assume the best about ASORCNA and the state-court judges who will interpret it.

II. The Legislature's *apparent* intent in enacting ASORCNA was nonpunitive.

Once McGuire's doctrinal errors are set aside, this case becomes easy. That is because the Alabama Legislature's apparent intent in enacting ASORCNA is so clearly nonpunitive. As all agree, the Legislature expressly stated that "its intent" in enacting certain sex-offender requirements was "not to punish sex offenders but to protect the public and, most importantly, promote child safety." Ala. Code § 15-20A-2(5). The statute also contains grandfather clauses, relief provisions, and other protections for sex offenders, as well as other provisions indicating a nonpunitive intent. *See* Defs.' Opening Br. at 39-40. Thus, ASORCNA's structure confirms what the Legislature's "stated intent" should definitively establish—that under the first (and near-controlling) step of the punishment question, ASORCNA's apparent intent is nonpunitive.

For purposes of *his* appeal, McGuire waived any contrary arguments by failing to include them in his principal brief. But even now, McGuire does not meaningfully dispute the civil nature of the formal attributes described in the preceding paragraph. He instead focuses much of his first-step argument to issues such as ASORNCA's alleged uniqueness, its alleged severity, and alleged ineffectiveness. As explained above, all of these matters are simply irrelevant to the apparent-intent step of the analysis.

McGuire does offer some arguments that are relevant to the Legislature's apparent intent, but they are unpersuasive. For example, he argues that ASORCNA's codification "within Alabama's Code of Criminal Procedure" demonstrates a punitive intent. McGuire Resp. & Reply Br. at 11-12. The District Court explained why, "as in *Smith*, the codification of ASORCNA within the criminal procedure code 'is not sufficient to support a conclusion that the legislative intent was punitive.'" Doc. 283 at 22 (quoting *Smith*, 538 U.S. at 95, 123 S. Ct. at 1148). But it bears noting that any codification argument is particularly unsuitable in the case of ASORCNA. Nothing in ASORCNA says anything about the manner of its codification. And in Alabama, it is "[t]he Code commissioner"—not the Legislature—who "determines the appropriate location in the Code to place recent enactments." *Magee v. Boyd*, ___ So. 3d ___, Nos. 1130987, 1131020, & 1131021, 2015 WL 867926, at *11 (Ala. Mar. 2, 2015). In other words, ASORCNA could

have been codified entirely within the State's criminal code, but that fact would say nothing about the Legislature's apparent intent.

Nor do ASORCNA's other formal attributes change the result. In conclusory fashion, McGuire invokes ASORCNA's alleged "volume and complexity" as suggesting punitive intent. McGuire Resp. & Reply Br. at 13. But unlike McGuire, the defendants walked the Court through ASORCNA's substance and demonstrated how much of this purported volume and complexity stems from the statute's inclusion of protections for the sex offenders it regulates. Defs.' Opening Br. at 39-41. McGuire similarly complains that ASORCNA is enforced through provisions imposing felony criminal liability on violators. But if that aspect of a sex-offender regulation were indicative of punitive intent, then the *Smith* Court would surely have said so given that the Alaska scheme at issue there was "enforced by criminal penalties." 538 U.S. at 96, 118 S. Ct. at 1149. Indeed, the *Smith* Court held, albeit in a slightly different context, that "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Id.* Thus, the felony provisions do not indicate a punitive apparent intent and ASORCNA is presumptively nonpunitive.

III. McGuire has not shown that the dual reporting requirements were *actually* intended as punishment.

In light of ASORCNA's clear *apparent* nonpunitive intent, it was McGuire's "heavy burden," sustainable only in "limited circumstances," to demonstrate an *actual* punitive intent by the "clearest proof." *Hendricks*, 521 U.S. at 361, 117 S. Ct. at 2082. But just as he failed to do this for ASORCNA's main components, he failed to do so for the dual reporting requirements as well. The Supreme Court has *never* found a law enacted with apparent nonpunitive intent to violate the Ex Post Facto Clause based on the *Mendoza-Martinez* factors. *See, e.g.*, Andrew J. Gottman, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause*, 56 Wash. & Lee L. Rev. 591, 644 (1999). For the reasons explained below and previously, it would not do so in this case either.

To begin, it is highly significant that McGuire failed even to mention the dual reporting requirements in his response and reply brief. By failing to do this, McGuire appears to have waived any argument against ASORCNA's severability. *Cf.* doc. 283 at 64-65 (holding that ASORCNA is severable). And he certainly has waived his opportunity to argue against the defendants' position that the dual reporting requirements must be evaluated independently. The defendants previously argued that the dual reporting requirements did not themselves amount to punishment under the controlling, two-step analysis. *See* Defs.' Opening Br. at 54-55. That is, given the Legislature's apparent nonpunitive intent, the dual reporting re-

quirements cannot constitute punishment *merely* because they impose some nominal "restraint" and are, in one district judge's view, "excessive" (which is not true in any event). McGuire does not argue otherwise; thus, the defendants are entitled to reversal in their cross-appeal.

Even if ASORCNA could be said to stand or fall as a whole, McGuire has still not carried his heavy burden of demonstrating by the clearest proof that ASORCNA is the product of illicit punitive intent. The defendants have previously explained why McGuire cannot carry his heavy burden based on ASORCNA's supposed irrationality, severity, or ineffectiveness. *See* Defs.' Opening Br. at 46-50. But it remains to rebut McGuire's claim that ASORCNA is somehow uniquely burdensome. *See, e.g.*, McGuire Resp. & Reply Br. at 5-7.

Any comparison of ASORCNA to other sex-offender regulations is at most an argument under *Mendoza-Martinez*'s excessiveness factor, which, as explained before, is of quite limited utility to McGuire as an ex post facto plaintiff. But the point for now is that ASORCNA is not unique. Virtually every component of ASORCNA has an analogue in another State's sex-offender scheme; for example:

- All States require registration of sex offenders. *See, e.g.*, *Smith*, 538 U.S. at 90, 123 S. Ct. at 1145.
- All States compliant with the federal SORNA law require *in-person* registration of sex offenders. *See, e.g.*, *United States v. W.B.H.*, 664 F.3d 848, 852, 855 (11th Cir. 2011).

- Other States require in-person *weekly* registration for sex offenders who cannot or will not identify a place of residence to law enforcement. *See, e.g.*, *State v. Adams*, 91 So. 3d 724, 743 (Ala. Crim. App. 2010) (discussing weekly-registration statutes for homeless sex offenders from Illinois, Indiana, and Washington).

- Other States require sex offenders to register their movement with law enforcement when they travel. *See, e.g.*, *Doe v. Moore*, 410 F.3d 1337, 1348-49 (11th Cir. 2005).

- Other States conduct at least some passive form of community notification. *See, e.g.*, *Smith*, 538 U.S. at 90-91, 123 S. Ct. at 1146.

- Other States conduct community notification via neighborhood fliers or other active means. *See, e.g.*, *Anderson v. Holder*, 647 F.3d 1165, 1168, 1173 (D.C. Cir. 2011).

- Other States maintain proximity restrictions such as residence and employment restrictions. *See, e.g.*, *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1013-14 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700, 704 (8th Cir. 2005).

- Other States require sex offenders to obtain identification cards denoting their sex-offender status. *See, e.g.*, *Smith v. State*, 84 So. 3d 487, 489 (La. 2012); *Easterling v. State*, 989 So. 2d 1285, 1286 (Fla. 1st D.C.A. 2008).

- Other States' sex-offender regulations have lifetime application without "risk-based" assessment. *See, e.g.*, *Moore*, 410 F.3d at 1341.

Indeed, it appears that the dual reporting requirements are the only ASORCNA component lacking an analogue. Thus, ASORCNA's provisions are not so "wildly" different from other States' sex-offender regulations as McGuire might imagine. McGuire Resp. & Reply Br. at 12.

The District Court credited McGuire's theory on this point, but it did so only by uncritically accepting McGuire's legal research. *See* doc. 283 at 29 n.18 (quot-

ing McGuire's post-trial brief). That was a mistake. For one thing, McGuire's research actually substantiates some similarities between ASORCNA and other States' policies. *See id.* (conceding that other States have proximity restrictions and lifetime application). But perhaps more problematic, McGuire's research contains errors. McGuire asserted that "'only one other state (Tennessee) contains travel restrictions,'" and the District Court accepted it. *Id.* But regardless of nomenclature, at least one other State (and in all likelihood, numerous other States) clearly have enacted mechanisms to stop sex offenders from "subvert[ing] the purpose of the [registration] statute by temporarily traveling to other jurisdictions." *Moore*, 410 F.3d at 1349. If McGuire's research is mistaken on this one narrow point, it is surely mistaken on other points as well. Finally, McGuire's research effort is, in an important sense, futile. McGuire and the District Court focused only on *state*-level sex-offender laws. But this ignores that much, and conceivably most, of the sex-offender policy in this country is set at the county or municipal levels. *See*, *e.g.*, *Wallace v. New York*, 40 F. Supp. 3d 278, 291-93 (E.D.N.Y. 2014) (reviewing county- and town-imposed residency restrictions distinct from state-imposed residency restrictions). It is thus impossible to truly compare ASORCNA with sex-offender policies sanctioned by other States.

Just as notable as the similarities between ASORCNA and other States' sex-offender regimes, is what Alabama has chosen *not* to enact. Nebraska criminalized

some sex offenders' use of certain websites and instant messaging programs. *See Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1093 (D. Neb. 2012). The City of Albuquerque prohibited sex offenders from entering its public libraries. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1115 (10th Cir. 2012). And Missouri made it illegal for sex offenders to go outdoors, turn on their outdoor lights, or hand out candy on Halloween. *See F.R. v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.3d 56, 58 (Mo. 2010) (en banc). Alabama has enacted none of these measures. In short, in enacting ASORCNA, the Alabama Legislature was not the out-of-control legislature McGuire has labored so hard to portray.

CONCLUSION

In the end, McGuire cannot escape the clear, nonpunitive intent evident on the face of ASORCNA. Indeed, that is precisely the holding of the unpublished *Windwalker* opinion, which specifically rejected the notion that "a more carefully drafted complaint might state a[n] [Ex Post Facto] claim" against ASORCNA. *Windwalker v. Gov. of Ala.*, 579 Fed. App'x 769, 775 (11th Cir. 2014). To conclude otherwise in this case would be to contravene Supreme Court precedent and to substitute judges' policy preferences for those of the Alabama Legislature. The Court should therefore affirm in part and reverse in part, declaring that no part of ASORCNA constitutes "punishment" for Ex Post Facto purposes.

Respectfully submitted this 1st day of July, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies within the applicable type-volume limitations. *See* Fed. R. App. P. 28.1(e)(2)(B). According to the word count feature in Microsoft Word 2007, this brief contains 3,748 words.

I also certify that this brief complies with the applicable type-style requirements. *See* Fed. R. App. P. 32(a)(5) & (6). I prepared this brief in proportionally spaced typeface using Microsoft Word 2007 in 14-point, Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 1, 2015, I filed the foregoing brief electronically using the Court's CM/ECF system, which will serve the following counsel:

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Within the next business day, I will also dispatch copies of this brief to Federal Express for delivery to the Court within three days.

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