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' PRINCIPAL BRIEF

Luther Strange
Attorney General

Andrew L. Brasher
Solicitor General

William G. Parker, Jr.
Laura E. Howell
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
wparker@ago.state.al.us
lhowell@ago.state.al.us

Counsel for Alabama Attorney General Luther Strange

J. Haran Lowe, Jr.
F. Tim McCollum
Assistant Attorneys General

STATE OF ALABAMA
DEPARTMENT OF PUBLIC SAFETY
301 S. Ripley Street
Montgomery, AL 36104
(334) 242-4392
haran.lowe@dps.alabama.gov
tim.mccollum@dps.alabama.gov

Counsel for Alabama Dep't of Public Safety Director John Richardson

[additional counsel listed on back of cover]

Thomas T. Gallion, III

HASKELL SLAUGHTER & GALLION, LLC
8 Commerce Street, Suite 1200
Montgomery, AL 36104
(334) 265-8573
ttg@hsg-law.com

Tyrone C. Means

MEANS GILLIS LAW, LLC
P.O. Box 5058
Montgomery, AL 36103
(334) 270-1033
tcmeans@meansgillislaw.com

Counsel for Montgomery County Sheriff Derrick Cunningham

CERTIFICATE OF INTERESTED PERSONS

The Appellee/Cross-Appellant State Officials certify the following list of persons and entities as persons and entities required to be disclosed under Eleventh Circuit Rule 26.1-1 *in addition to* those listed in McGuire's principal brief:

1. Alabama Department of Public Safety/Alabama Law Enforcement Agency
2. Brown, John E. - Defendant
3. City of Montgomery - Defendant
4. City of Montgomery Police Department - Defendant
5. Clements, Lindsey - Defendant
6. Coody, Charles S. - United States Magistrate Judge
7. Duckett, R.L. - Defendant
8. Equal Justice Under Law - Firm of Plaintiff's counsel (Phil Telfeyan)
9. Faulk, Elizabeth Peyton - Plaintiff's counsel
10. Finley, Ernest - Defendant
11. Haskell Slaughter & Gallion, LLC - Firm of Defendants' counsel (Crook, Gallion and Walker)
12. Gordon, R.B. - Defendant
13. Holder, Eric - Defendant
14. LaChance, T.A. - Defendant
15. McCall, Hugh B. - Defendant

16. McGuire & Associates, LLC - Firm of Plaintiff's counsel (Joseph M. McGuire)

17. Marshall, D.T. - Defendant

18. Means Gillis Law LLC - Firm of counsel for Defendant (Tyrone Means)

19. Montgomery County Sheriff's Department - Defendant

20. Office of the Alabama Attorney General

21. Murphy, Kevin J. - Defendant

22. Parker, William G., Jr. - Defendants' counsel

23. Paulk, Jason Cole - Defendants' counsel

24. Payne, Joshua K. - Defendants' counsel

25. Persky, Leigh - Defendant

26. Savell, A.L - Defendant

27. Smyczek, Peter J. - Defendants' counsel

28. The Law Offices of E. Peyton Faulk, LLC - Firm of Plaintiff's counsel (E. Peyton Faulk)

29. United States Department of Justice - Defendant

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case. The question presented is whether Alabama's sex offender laws are tantamount to "punishment," such that it violates the Ex Post Facto Clause to enforce them against sex offenders convicted before the laws' passage. As explained in this brief, this is a question for which there is no shortage of controlling and persuasive precedent—much of which McGuire simply does not engage. And all of that precedent points in favor of the law's validity. Indeed, just a few months ago, a panel of this Court unanimously upheld Alabama's law against an identical challenge in an unpublished opinion without oral argument. Although that disposition is not binding here, it demonstrates that, at the end of the day, this case is a straightforward one.

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitutional Provisions

Cases

Statutes

Other Authority

Rules

* indicates authorities on which the appellees/cross-appellants principally rely.

INTRODUCTION

This case concerns the validity of the Alabama Sex Offender Registration and Community Notification Act, or ASORCNA. In enacting ASORCNA, the Alabama Legislature passed a carefully written law designed to protect the public (and especially children) from repeat sex offenses—while at the same time avoiding undue burdens on those persons previously convicted of a sex offense.

One such sex offender, Michael McGuire, challenges ASORCNA, claiming that the law retroactively increases his punishment in violation of the Ex Post Facto Clause. But he does so only by ignoring reality. He ignores the nuances of ASORCNA. He ignores the facts of his case. He ignores the admissions of his hand-selected experts. And he ignores the constraints of governing precedent.

With a couple of exceptions, the District Court upheld ASORCNA as a valid exercise of Alabama's power to promote public safety among its citizens. This Court should follow suit, concluding that no part of ASORCNA amounts to punishment and thus upholding ASORCNA in its entirety.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

McGuire's jurisdictional statement is correct, but omits facts relevant to the cross-appeals of Alabama Department of Public Safety Director John Richardson and Montgomery County Sheriff Derrick Cunningham. Director Richardson timely noticed his appeal on March 18, 2015—12 days after McGuire noticed his. *Com-*

pare doc. 305 (Richardson notice of appeal) *with* doc. 287 (McGuire notice). And Sheriff Cunningham timely noticed his appeal on March 19, 2015—13 days after McGuire noticed his. *See* doc. 310 (Cunningham notice).[1]

STATEMENT OF THE ISSUES

For both the appeal and the cross-appeal, the primary issue is this: Does ASORCNA constitute "punishment" for purposes of the Ex Post Facto Clause where, among other factors indicating the law's validity:

- the Alabama Legislature undisputedly indicated its preference that ASORCNA be considered nonpunitive;
- no part of ASORCNA resembles historical forms of punishment;
- no part of ASORCNA promotes the traditional aims of punishment; and
- every part of ASORCNA bears a rational connection to the Legislature's nonpunitive goal of promoting public safety?

This primary question incorporates the subsidiary issue of whether the District Court erred by requiring the defendants to litigate McGuire's Ex Post Facto claim at trial rather than granting their motions to dismiss, for judgment on the pleadings, for summary judgment, or for judgment on partial findings.

[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 intends to move to reinstate his cross-appeal; he therefore joins Part III of this brief's argument section subject to his cross-appeal being reinstated. Sheriff Cunningham joins all other parts of this brief as appellee in McGuire's appeal.

STATEMENT OF THE CASE

This case is about whether Alabama's sex-offender regulations constitute "punishment" of the sex offenders who are subject to them. If they do, then they violate the Ex Post Facto Clause as to any offenders who were convicted before the regulations became law. But if they do not—that is, if they merely constitute nonpunitive public-safety regulations—then they validly apply to all sex offenders, regardless of conviction date.

This question proves ultimately to be a straightforward one given the Supreme Court's long-established ex post facto doctrine. But before answering it, the Court should familiarize itself with the potential threat convicted sex offenders pose to public safety, the precise contents of ASORCNA, and the facts of the present case. McGuire's opening brief ignores or obfuscates all three of these things.

A. Sex-offender recidivism threatens public safety.

First, McGuire wholly ignores that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32, 122 S. Ct. 2017, 2024 (2002) (plurality opinion). The threat's seriousness stems partly from the fact that "the victims of sexual assault are most often juveniles." *Id.* at 32, 122 S. Ct. at 2024. But it is also the case that "convicted sex offenders . . . are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33, 122 S.

Ct. at 2024. (Indeed, McGuire's own experts admitted that studies support this proposition. *See* doc. 249 at 118:1-4 (Dr. Letourneau); *see* doc. 250 at 11:20-12:1 (Dr. Prescott).) For these reasons, the Supreme Court has acknowledged "grave concerns" about the "dangerousness" sex offenders pose "as a class." *Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 1153 (2003).

This concern about sex-offender recidivism is nothing new. Alabama, for example, has regulated convicted sex offenders for almost fifty years. A 1960's-era law applied to offenders convicted "generally" of "any act of sexual perversion," including certain enumerated offenses like rape and "indecent molestation of children." Ala. Act No. 1967-507, § 1 (doc. 255-1). County sheriffs placed these offenders on state and local registries. *See id.* §§ 2-3. But at that time, only "duly constituted law enforcement officers or agencies" could access this information. *Id.* § 3.

By the mid-1990s, however, it became clear that mere registration laws were not enough. At that time, a series of sex crimes by previous offenders made headlines across the country. One of these involved Megan Kanka, "a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim's family, had prior convictions for sex offenses against children." *Smith*, 538 U.S. at 89, 123 S. Ct. at 1145. Other disturbing incidents—at least other incidents that were well-publicized—involved Polly Klaas, who at 12

years old "was abducted, sexually assaulted, and murdered in 1993 by a career offender in California"; Jacob Wetterling, who at 11 years old "was abducted in 1989 in Minnesota" and presumably murdered; Christy Ann Fornoff, who at 13 years old "was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona"; Amie Zyla, who at 8 years old "was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin"; and Jimmy Ryce, who at 9 years old "was kidnapped and murdered in Florida on September 11, 1995." 42 U.S.C. § 16901(1), (8), (9), (11), & (12).

Incidents such as these prompted swift legislative action. At the time of Megan Kanka's murder, Congress already had passed Spending Clause legislation to induce States to bring their registration laws up to minimum federal standards. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994). But in 1996, it added a community-notification component to those standards. *See* Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996). By that year, "every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law." *Smith*, 538 U.S. at 90, 123 S. Ct. at 1145. That year, for example, is when Alabama enacted the original version of its Alabama Community Notification Act. *See* Ala. Act No. 1996-793 (doc. 255-2). The ACNA updated the registration requirement, added (prospective-only) residency restrictions, and required

law enforcement to distribute community notification flyers to a sex offender's neighbors. *See* Ala. Act No. 1996-793, §§ 2, 3.

The ensuing decade revealed the need for further reforms. For one thing, the drumbeat of sensational sex crimes against children did not relent. *See* 42 U.S.C. § 16901(4) (Jetseta Gage, 2005); *id.* § 16901(5) (Dru Sjodin, 2003); *id.* § 16901(6) (Jessica Lunsford, 2005); *id.* § 16901(7) (Sarah Lunde, 2005); *id.* § 16901(10) (Alexandra Nicole Zapp, 2002); *id.* § 16901(13) (Carlie Brucia, 2004); *id.* § 16901(14) (Amanda Brown, 1998); *id.* § 16901(15) (Elizabeth Smart, 2002); *id.* § 16901(16) (Molly Bish, 2000); *id.* § 16901(17) (Samantha Runnion, 2002). But beyond that, there was a need to clarify, both for administrative and policy reasons, the scope and operation of the law. All together, the Legislature amended the ACNA about once every two or three years for the next decade. *See* Ala. Act No. 1998-489 (doc. 255-3); Ala. Act No. 1999-572 (doc. 255-4); Ala. Act No. 2000-728 (doc. 255-5); Ala. Act No. 2001-1127 (doc. 255-6); Ala. Act No. 2005-301 (doc. 255-7); Ala. Act No. 2009-558 (doc. 255-8); & Ala. Act No. 2009-619 (doc. 255-9).

The need for reform, of course, was not limited to Alabama. For example, in 2006, Congress passed the Sex Offender Registration and Notification Act (SORNA). *See* Pub. L. No. 109-248, §§ 101 *et seq.*, 120 Stat. 587, 590 (2006), *codified at* 42 U.S.C. §§ 16901 *et seq.* As further Spending Clause legislation,

SORNA sought to systemize throughout the United States the frequency and duration of registration requirements, the precise information to be collected from sex offenders, and the means of community notification. *See* 42 U.S.C. §§ 16913, 16914, 16915, 16916, 16918, & 16921; *Reynolds v. United States*, ___ U.S. ___, 132 S. Ct. 975, 978 (2012). In so doing, SORNA sought to mitigate a plague of "loopholes and deficiencies" in state sex-offender regulations that had resulted in an estimated 100,000 sex offenders becoming "missing" or "lost" from authorities. H.R. Rep. No. 109-218, pt. 1, at 20, 26 (2005).

B. ASORCNA sensibly responds to the sex-offender threat.

ASORCNA represents Alabama's response to the threat of sex-offender recidivism. And more specifically, this 2011 statute represents a refinement of prior Alabama law based on the state and federal statutory developments discussed above. This brief's appendix describes in detail the differences between ASORCNA and its immediate statutory predecessor. But for present purposes, it is worth noting that "the legislature *actually lowered the burden placed on a sex offender*" in important respects. *Burt v. State*, 149 So. 3d 1110, 1116 (Ala. Crim. App. 2013) (emphasis in original). McGuire's opening brief misses this key point, and numerous others, entirely.

Like its predecessors, ASORCNA regulates sex offenders for the sake of public safety. *See generally* Ala. Code § 15-20A-2 (legislative findings). Relevant

here, it applies to any adult convicted of an enumerated sex offense, "without regard to when his or her crime or crimes were committed." *Id.* § 15-20A-3(a); *see also id.* § 15-20A-5 (list of predicate sex offenses). The portion of the law regulating adult offenders has three principal components: (1) registration; (2) community notification; and (3) restrictions on sex offenders' proximity to vulnerable potential victims. The law also contains important limitations designed to minimize the burden on sex offenders. Although one would not know it from McGuire's brief, the Alabama Legislature expressly "declare[d] its intent . . . not to punish sex offenders but to protect the public and, most importantly, promote child safety." *Id.* § 15-20A-2(5).

Registration. The registration component "deter[s] sex offenders from [committing] future crimes" by "maintain[ing] constant contact between sex offenders and law enforcement." *Id.* § 15-20A-2(1). This gives law enforcement officers a leg up on monitoring sex offenders and "priceless tools to aid them in their investigations." *Id.* Registration also facilitates the community-notification aspects of the law. *See id.* Accordingly, four times a year (or upon relevant changes in circumstance), a sex offender must report in person to law enforcement authorities—both city and county, if applicable—in each county where he resides. *See id.* § 15-20A-10. Once there, he must furnish certain information that would help someone

locate or identify him. *See id.* § 15-20A-7(a)(1)-(17) (required registration information).

Given their "need to be monitored more frequently," *id.* § 15-20A-2(3), homeless sex offenders—*i.e.*, those who cannot or will not identify a "fixed residence"—must complete an abbreviated check-in process every seven days. *See id.* § 15-20A-12(b), (d); *cf. State v. Adams*, 91 So. 3d 724, 742-44 (Ala. Crim. App. 2010) (surveying similar provisions in other States). For this task, homeless sex offenders, too, must report to both city and county law enforcement if they live in a city. *See* Ala. Code §§ 15-20A-12(a), -4(13). Importantly, the additional registration requirement for homeless offenders lasts only while an offender is "homeless" as defined by ASORCNA. Thus, the vast majority of sex offenders (including, now, McGuire, *see* Section C, *infra*) need register nowhere near the "112 times per year" McGuire touts in his brief. McGuire Opening Br. at 6; *see also id.* at 10, 34, 36.

To help "defray the costs of sex offender registration, verification, and notification," registering sex offenders must presumptively pay a $10 registration fee at each quarterly registration. Ala. Code § 15-20A-22(a). But this registration fee is subject to two relevant caveats. First, indigent sex offenders may obtain a waiver of the fee, such that they do not have to pay it at all while they are indigent. *See id.* § 15-20A-22(c). Although McGuire apparently benefits from this provision (*see*

doc. 283 at 9), his opening brief fails to mention it. *Cf.* McGuire Opening Br. at 34, 36, 37. Second, the registration fee is due only at the "registering agenc[ies] where the adult sex offender *resides*." Ala. Code § 15-20A-22(a)-(b) (emphasis added). It is thus incorrect to say, as McGuire did in the District Court, that an offender could be liable for a "potential annual assessment of $240" for living, working, and going to school in different counties. Doc. 283 at 39 & n.24.

To make the registration requirement effective, ASORCNA also accounts for sex offenders' right to travel. Specifically, sex offenders who wish to travel for three or more consecutive days must report their plans to local law enforcement in their county of residence (again, both city and county law enforcement, if applicable), and "complete a travel permit form." Ala. Code § 15-20A-15(a)-(b); *see also id.* at § 15-20A-4(13). Contrary to the suggestion in McGuire's brief, there is an open question whether ASORCNA actually grants law enforcement discretion to deny permission as the term "travel permit" might imply.[2] *Cf.* McGuire Opening Br. at 27. And ASORCNA certainly does not by its terms impose the three-day advance notice requirement McGuire emphasizes. *Cf. id.* at 26, 27, 44; Ala. Code

[2] Although ASORCNA's travel provision speaks of a "travel permit," the law specifies only one circumstance in which a permit may be denied—*i.e.*, where the offender refuses to acknowledge his "duties . . . regarding travel." Ala. Code § 15-20A-15(d). In addition, the only ways to violate this provision are to (1) knowingly fail to check in with law enforcement (whether before departure or upon return) or (2) knowingly fail to complete a travel permit form. *See generally id.*

§ 15-20A-15(a) (allowing offenders to report "immediately" prior to departure). These details aside, ASORCNA's travel provision enables sharing of the sex offenders' information with law enforcement authorities at the offender's destination. *See id.* § 15-20A-15(e). It also enables law enforcement to keep records of a sex offender's travel patterns. *See id.* § 15-20A-15(g).

Offenders who fail to fulfill their registration-related duties are subject to a Class C felony conviction. *See, e.g.*, §15-20A-10(j), -5(h).

Community Notification. Releasing information about sex offenders' identity and location "enable[s] [members of] the public to take action to protect themselves." *Id.* § 15-20A-2(1). In that way, it "furthers the primary governmental interest of protecting vulnerable populations, particularly children." *Id.* § 15-20A-2(5).

ASORCNA accomplishes these goals in three ways. First, local law enforcement authorities must distribute "community notification flyers" to neighbors, schools, and childcare facilities within a certain radius of a sex offender's residence. *See id.* § 15-20A-21(a)-(b). (They may also notify the community using other means. *See id.* § 15-20A-21(b)-(c).) Second, the Alabama Department of Public Safety must publish certain information about each sex offender on a searchable public website, along with "links to sex offender safety and education resources." *Id.* § 15-20A-8(f). And third, subject to Class C felony liability, sex of-

fenders are required to carry a valid driver's license or identification card "bear[ing] a designation that enables law enforcement officers to identify the licensee as a sex offender." *Id.* § 15-20A-18(c). The Department of Public Safety has implemented this requirement by printing "CRIMINAL SEX OFFENDER" on affected licenses. Doc. 283 at 11. But importantly, ASORCNA does not itself require this particular designation. *Cf.* McGuire Opening Br. at 6, 10, 30, 44, 48, 49.

Proximity Restrictions. Finally, ASORCNA contains proximity restrictions. These "also further" Alabama's interest in "protecting vulnerable populations, particularly children." *Id.* § 15-20A-2(5). Accordingly, certain sex offenders may not live or work within 2,000 feet of a school or childcare facility. *See id.* §§ 15-20A-11(a) (residency), -13(b) (employment). They also cannot live with unrelated minors (subject to certain exceptions), *see id.* § 15-20A-11(d), or within 2,000 feet of their victim, *see id.* § 15-20A-11(b). Nor may sex offenders whose offense "involv[ed] a child" (or minor) work (or loiter) within 500 feet of any facility whose principal purpose is to care for, educate, or entertain minors. *See id.* §§15-20A-13(c), -17. These latter provisions, in particular, undermine the District Court's belief that ASORCNA's employment restrictions "apply with equal force regardless of whether the registrant's former victim was a minor." Doc. 283 at 5 n.3.

As with ASORCNA's travel provision, and (again) contrary to McGuire's assumptions, there are open questions of state law relevant to these proximity restrictions, particularly the employment restrictions. It is unclear, for example, whether "apply[ing]" for employment includes "sending out resumes." McGuire Opening Br. at 38. The Alabama courts have not yet answered such questions.

As with the registration requirements, a violation of the proximity restrictions exposes the offender to a felony prosecution. *See id.* §§ 15-20A-11(h), -13(g).

Limitations. In important ways, ASORCNA rejects an inflexible approach to fighting sex-offender recidivism. For example, there are three ways to obtain relief from some or all of ASORCNA's requirements. One might be called the "Romeo-and-Juliet" exception. It allows a sex offender to obtain relief from all of the law's requirements if convicted of a second-degree offense that did not involve force, that was only a crime due to the age of the victim, and where the victim and offender were no more than 4 years apart in age at the time of the offense. *See* Ala. Code § 15-20A-24(a), (b). Similarly, terminally ill or permanently immobile offenders may obtain relief from the residency restrictions. *See id.* § 15-20A-23(a). And any sex offender not convicted of a first-degree offense or one involving a child may petition for relief from the employment restrictions. *See id.* § 15-20A-

25. McGuire scarcely mentions these relief provisions in his account of ASORCNA. *Cf.* McGuire Opening Br. at 6-7, 40-42.

Beyond these relief provisions, other provisions similarly limit ASORCNA's reach. Most notably, subsequent changes to property within 2,000 feet of a sex offender's registered address cannot trigger a violation of the residency or employment restrictions. *See id.* §§ 15-20A-11(c), -13(d). In addition, the residency restrictions do not apply retroactively at all: They are inapplicable to offenders who maintain a residence they had established prior to ASORCNA's enactment, so long as they have not been subsequently "release[d]" or "convict[ed]." *See id.* § 15-20A-11(a). McGuire denies this aspect of ASORCNA. *See* McGuire Opening Br. at 6. But he does so only by ignoring the principle of Alabama law that statutory terms like "maintain residence after release or conviction" are presumed to apply prospectively absent a clear textual indication to the contrary. Ala. Code § 15-20A-11(a); *see also, e.g.*, *Ala. Ins. Guar. Ass'n v. Mercy Med. Ass'n*, 120 So. 3d 1063, 1068 (Ala. 2013) (presumption of prospective application).

In addition, law enforcement officials are barred from disclosing certain personal information gathered from sex offenders during registration. *See* Ala. Code § 15-20A-8(b). And the public registry website must warn visitors not to use sex-offender information to "unlawfully injure, harass, or commit a crime against any

person named in the registry." *Id.* § 15-20A-8(h). "Any such action," the website must warn, "may result in civil or criminal penalties." *Id.*

Finally, as the District Court observed, a sex offender may not accidentally violate ASORCNA, even despite ASORCNA's failure to overtly say as much. *See* doc. 283 at 7 n.5 (citing *Sullens v. State*, 878 So. 2d 1216, 1221 (Ala. Crim. App. 2003). On appeal, McGuire appears to have dropped his formal argument to the contrary. But he continues to at least imply that an offender may accidentally violate the statute. *See* McGuire Opening Br. at 5, 38, 39, 40. To the extent he does, McGuire is misreading Alabama law.

C. As a factual matter, McGuire overstates the burdens ASORCNA imposes on him and other sex offenders.

Just as McGuire omits key points about the content of ASORCNA, so, too, does he provide a one-sided view of the facts he proved at trial. Many of these facts are irrelevant in a proper ex post facto analysis. But they nevertheless underscore that McGuire is exaggerating the extent of ASORCNA's burdens. Consider McGuire's claims concerning his personal risk of re-offending, sex-offender housing, sex-offender employment, and the state of academic recidivism research.

McGuire's recidivism risk. McGuire repeatedly claims that he has not committed any other crime besides his 1985 rape—and that he has never hurt a child in his life. *See, e.g.*, McGuire Opening Br. at 3, 6, 9, 16, 20, 21, 29, 41, 50.

But that is not what McGuire proved—how *could* one prove something like that?—and it is certainly not what the District Court found. *See* doc. 283 at 1 (correctly stating that McGuire has only one *conviction*). McGuire's overstatement is especially important in light of the defendants' unchallenged expert testimony regarding the vast underreporting of sex crimes in the United States. *See* doc. 251 at 131:25-132:13, 139:6-142:4, 142:2-4 (trial transcript, vol. III); Trial Ex. 77 at 15-17 (McCleary Report). Similarly, not even McGuire's own experts testified that McGuire "poses no risk" of recidivism, as he now appears to claim. McGuire Opening Br. at 42 (emphasis added); *cf.* doc. 283 at 50.

Housing. McGuire is again overstating things when he claims that ASORCNA "caused" him to be homeless—or that ASORCNA "forced" him to live under a bridge. McGuire Opening Br. at 1, 3-4, 5, 9, 10, 17, 18, 21, 41-42, 43, 45, 50. First, it is now undisputed in the District Court that McGuire stopped registering as homeless a few months after trial concluded in this case. *Compare* doc. 334 at 9 *with* doc. 345 at 4 n.4. But even had McGuire not found housing, there would still be no basis for McGuire's assertions on this point. At trial, he proved only that he was *then* homeless and that he had checked some 50-60 (unspecified) addresses for ASORCNA compliance. As Montgomery Police Department's sex-offender coordinator testified, many factors have affected the housing of the sex offenders with whom she has interacted. Doc. 250 at 149:2-7 (trial transcript, vol.

II; Detective LaChance). Perhaps for that reason, the District Court declined to embrace McGuire's view in this regard. *See* doc. 283 at 2 (correctly declining to find that ASORCNA caused McGuire's homelessness).

Along these lines, McGuire fails, more generally, to account for the fact that the vast majority of sex offenders find ASORCNA-compliant housing. The District Court found that only 3 out of roughly 500 sex offenders in Montgomery County were homeless at the time of trial. Doc. 283 at 8, 9. That represents a housing rate in Montgomery County of 99.4%. In light of these facts, and the absence of other supporting facts, the District Court clearly erred by stating that housing availability presents "an unresolvable nightmare for law enforcement." Doc. 283 at 10.

Employment. McGuire likewise paints an unduly dim view of sex offenders' employment prospects. He repeatedly asserts that Montgomery County sex offenders suffer from an unemployment rate of 50%. McGuire Opening Br. at 1, 5, 9, 10, 22. But as the District Court noted, and as local law enforcement testified, the 50% figure does not account for sex offenders who are simply not looking for work. *See* doc. 283 at 11 n.7; doc. 250 at 204:16-205:12 (Detective LaChance); *id.* at 221:16-205:12 (Lt. Persky). McGuire, moreover, presented no evidence concerning the employment rate of other (non-sex-offender) former felons. So it is impossible to tell on this record whether sex offenders face a unique employment disadvantage

among felons. *Cf. Smith*, 538 U.S. at 100-101, 123 S. Ct. at 1151 (noting that convicted felons face employment difficulties regardless of sex-offender regulations).

Consistent with that point, it is not true that ASORCNA has prevented McGuire from finding employment. *Cf.* McGuire Opening Br. at 3-4, 5-6, 9, 10, 41, 50. ASORCNA may well have prevented McGuire from doing the exact job he wants in the exact place he wants. But ASORCNA alone has not kept McGuire wholly out of a job.

Recidivism research. McGuire implies that "[a]cademic research unequivocally demonstrates" the ineffectiveness of ASORCNA or that sex offenders are less likely to recidivate than other types of offenders. McGuire Opening Br. at 20; *see also id.* at 9, 20, 25, 33, 43, 45, 48, 49. But, as will be demonstrated more fully below, the District Court found the opposite: "In the end, Mr. McGuire proved only one thing by the clearest proof regarding recidivism [research], namely, that nothing is clear." Doc. 283 at 44.

D. The district court rejected most of McGuire's claims.

In two major installments, the District Court rejected virtually all of McGuire's claims. First, it disposed of most of his claims at the Rule 12(b)(6) motions-to-dismiss stage. In particular, the District Court dismissed McGuire's procedural due process claim (doc. 112 at 20-23), his right-to-travel claim (*id.* at 24-26); his familial-association substantive due process claim (*id.* at 26-27); his claim that

ASORCNA violates substantive due process by affirmatively stigmatizing him (*id.* at 27-28); his claim under the Full Faith and Credit Clause (*id.* at 29); his equal protection claim (*id.* at 29-31); at least two Fourth Amendment claims (*id.* at 31-34); several claims that failed the notice-pleading standard (*id.* at 34-36); and state law claims for false imprisonment, outrage, and negligence (*id.* at 36-40). On appeal, McGuire challenges none of these holdings.

Second, in its final opinion, the District Court upheld virtually all of ASORCNA against McGuire's remaining ex post facto claim. It first concluded that "the Alabama Legislature clearly expressed its nonpunitive intent" in enacting ASORCNA. Doc. 283 at 22. It then asked whether McGuire had established ASORCNA as punishment by the "'clearest proof.'" *See id.* at 23 (quoting *United States v. W.B.H.*, 664 F.3d 848, 855 (11th Cir. 2011)). Despite some disagreements with the defendants on *how* to analyze this question, the District Court still concluded that McGuire had generally not done so. Among other things, it concluded that "no ASORCNA provision is sufficiently analogous to an early form of punishment." Doc. 283 at 39-40. It concluded that McGuire "did not meet his high burden required to establish that ASORCNA promotes the traditional aims of punishment." *Id.* at 45. And it concluded that McGuire "fail[ed] to prove that ASORCNA's provisions do not have rational connections to the scheme's stated nonpunitive purpose." *Id.* at 57.

Notwithstanding all of these points, the District Court nevertheless concluded that two minor components of ASORCNA do constitute punishment. These are the "dual" homeless registration and travel-check-in requirements—*i.e.*, the requirement that certain offenders must report to both city and county law enforcement offices for these purposes. Notwithstanding all of its prior reasoning, the District Court held that these requirements are "affirmative disabilities or restraints excessive to their stated nonpunitive intent." *Id.* at 63. It thus declared these requirements to be ex post facto laws insofar as they apply to an offender like McGuire, whose conviction predated their enactment. *See id.* at 66.

STANDARD OF REVIEW

"[A]pplication of the Ex Post Facto Clause is a legal question subject to de novo review." *Doe v. Bredesen*, 507 F.3d 998, 1002 (6th Cir. 2007). This is because courts are supposed to "look only to 'the statute on its face' to determine whether a penalty is criminal in nature." *Hudson v. United States*, 522 U.S. 93, 104, 118 S. Ct. 488, 496 (1997) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S. Ct. 554, 568 (1963)). But even if the District Court properly looked beyond the face of ASORCNA to decide the punishment question, de novo review is still appropriate because the question is a mixed one of law and fact. *See* McGuire Opening Br. at 7.

To the extent facts are relevant, this Court should reverse where the District Court's factual findings were clearly erroneous. *United States v. Albury*, 782 F.3d 1285, 1291-92 (11th Cir. 2015).

SUMMARY OF THE ARGUMENT

In evaluating whether ASORCNA imposes "punishment" on sex offenders, the Court should keep in mind five limiting principles. First, the analysis turns entirely on whether the Legislature *intended* to enact a punitive law. Second, the Legislature's *stated* nonpunitive purpose is entitled to near-dispositive status. Third, facts relating to McGuire as an individual, or to law enforcement's chosen means of enforcing ASORCNA, are irrelevant because the punishment question "must be considered in relation to [ASORCNA] on its face." *Hudson v. United States*, 522 U.S. at 101, 118 S. Ct. at 494 (internal quotation marks, citation omitted). Fourth, courts must not ascribe controlling weight to any one *Mendoza-Martinez* factor (and particularly not, as McGuire urges, a law's purported "excessiveness"). *See id.* And fifth, as with all facial challenges to a state law, the Court must construe ASORCNA to avoid constitutional problems wherever possible. McGuire's approach violates all five of these principles.

Against this backdrop, it is clear that ASORCNA does not amount to punishment for ex post facto purposes. For one thing, the Alabama Legislature expressly declared its intent in ASORCNA "not to punish sex offenders but to protect

the public." Ala. Code § 15-20A-2(5). Moreover, ASORCNA's entire structure and the circumstances surrounding its passage confirm this.

In light of the Legislature's expressed nonpunitive intent, McGuire had to provide the "clearest proof," on the face of the statute, of a punitive goal. But he did not do this—and nor could any other sex offender. McGuire makes no attempt to overcome key differences between ASORCNA and historical forms of punishment. He likewise makes no attempt to explain how ASORCNA in fact promotes deterrence or retribution—*i.e.*, the traditional aims of punishment. Although ASORCNA does impose some affirmative disabilities, those disabilities do not, under controlling precedent, dictate the conclusion that ASORCNA is punitive. What is more, every provision of ASORCNA bears at least a rational connection to the legislature's public-safety goals. And no part of ASORCNA—including its general provisions—renders ASORCNA meaningfully excessive.

The District Court did err in invalidating the dual homeless-registration and dual travel-permit provisions of ASORCNA. With respect to these provisions, the District Court ignored the Legislature's stated intent, as well as the fact that virtually every relevant factor points to their validity. The District Court instead invalidated these provisions based almost exclusively on their purported excessiveness. Such a finding is incompatible with the Supreme Court's instruction in *Hudson* not to elevate that factor to dispositive status.

ARGUMENT

ASORCNA does not violate the Ex Post Facto Clause. Judges Marcus, Wilson, and Anderson were right to unanimously uphold ASORCNA against this precise challenge in an unpublished opinion just last year. *See Windwalker v. Governor of Ala.*, 579 Fed. App'x 769 (11th Cir. 2014). Indeed, they were correct to affirm the Rule 12(b)(6) dismissal of such a claim without leave to amend. *See id.* at 771, 775. The following three sections explain why the Court should reach that same result in this case. The first explains how to analyze McGuire's ex post facto claim. The second two apply this methodology to the present case: Secion II explains why the District Court was correct to uphold virtually all of ASORCNA, while Section III explains why the District Court was incorrect as to the two provisions it invalidated.

I. Relevant here, the Ex Post Facto Clause narrowly forbids only state laws clearly intended to impose retroactive punishment.

Over two hundred years have passed since the framers forbade States from enacting laws that "inflict[] a greater punishment[] than the law annexed to [a] crime[] when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The result is a substantial body of Supreme Court precedent interpreting that prohibition—and limiting it, such that the Clause does not unduly interfere with the States' police powers. Relevant here, whether a law "can fairly be designated punishment

for past acts," turns exclusively on a legislature's intent in enacting it. *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S. Ct. 1146, 1155 (1960) (plurality opinion). On that question, courts "ordinarily defer to [a] legislature's stated intent." *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147. And to the extent they go beyond that stated intent, courts evaluate a challenged statute only "on its face." *Hudson*, 522 U.S. at 100, 118 S. Ct. at 493. Even then, courts do not ascribe controlling weight to a law's alleged excessiveness. *See id.* at 101, 118 S. Ct. at 494. Nor, consistent with a robust presumption of constitutionality, do they entertain speculative or provocative readings of a challenged law. *See Flemming v. Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 1376 (1960). As explained below, McGuire's theory ignores or misapplies each of these principles.

A. The key question is whether the Legislature intended to punish rather than regulate.

First, the "punishment" question boils down to legislative intent. As the District Court explained, this entails a two-step analysis. In the first step, courts looks to the statutory text and structure to determine whether the legislature "'either expressly or impliedly [indicated] a preference for one label or the other.'" *Smith*, 538 U.S. at 93 (quoting *Hudson*, 522 U.S. at 99, 118 S. Ct. at 493). "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* at 92, 538 U.S. at 1147. "If, however, the [apparent] intention was to enact a regulatory

scheme that is civil and nonpunitive, [the Court] must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.'" *Id.*, 123 S. Ct. at 1147 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 2082 (1997) (some quotation marks omitted)).

This second step involves consideration of the so-called *Mendoza-Martinez* factors for deciding the punishment question as it arises "in various constitutional contexts." *Smith*, 538 U.S. at 97, 123 S. Ct. at 1149 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963)). In *Smith*, the Court identified the "most relevant" factors for evaluating a sex-offender scheme as whether, "in its necessary operation," the scheme: (1) "has been regarded in our history and traditions as a punishment"; (2) "imposes an affirmative disability or restraint"; (3) "promotes the traditional aims of punishment"; (4) "has a rational connection to a nonpunitive purpose"; or (5) "is excessive with respect to this purpose." *Id.* at 97, 123 S. Ct. at 1149. These factors are "'neither exhaustive nor dispositive,'" but because courts "'ordinarily defer to the legislature's stated intent,' . . . '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" *Id.* at 92, 97, 123 S. Ct. at 1147, 1149 (quoting *United States v. Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 2641 (1980)).

There is more to say about applying this framework. But for now, the key point is the centrality of legislative intent. The Supreme Court has reiterated this point in numerous contexts over the years.[3] Indeed, the Supreme Court made this precise point in the early days of the Nation when it first construed the Ex Post Facto Clause: "With very few exceptions," the early Court observed, "the advocates of [ex post facto laws in British history] were stimulated by ambition, or *personal resentment*, and *vindictive malice*." *Calder*, 3 U.S. (3 Dall.) at 389 (emphasis added).

Although McGuire superficially acknowledges this principle, he ignores its ability to limit and confine judicial review. On McGuire's view, the *Mendoza-Martinez* factors become a freestanding means of invalidating otherwise valid state statutes. But properly understood, these factors are confined, in Justice Kennedy's words, to exposing apparent legislative intent that is in fact "sham or mere pre-

[3] *See, e.g.*, *Hendricks*, 521 U.S. 369, 117 S. Ct. at 2072 (concluding, after analyzing the *Mendoza-Martinez* factors, that "we cannot say that [the Kansas Legislature] acted with punitive intent"); *Flemming*, 363 U.S. at 614, 80 S. Ct. at 1374-75 ("The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity . . . ." (quoting *De Veau*, 363 U.S. at 160, 80 S. Ct. at 1155)); *Trop v. Dulles*, 356 U.S. 86, 96, 78 S. Ct. 590, 595 (1958) (plurality) ("[i]n deciding whether or not a law is penal, [the Supreme] Court has generally based its determination upon the purpose of the statute."); *Helwig v. United States*, 188 U.S. 605, 613, 23 S. Ct. 427, 430 (1903) ("If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will."); *accord Smith*, 538 U.S. at 92, 123 S. Ct. at 1147.

text." *Hendricks*, 521 U.S. at 371, 117 S. Ct. at 2087 (Kennedy, J., concurring). Put differently, it is other provisions of the Constitution—not the Ex Post Facto Clause—that "protect individuals from sanctions which are downright irrational" (or which lack an appropriate "fit" between means and ends). *Hudson*, 522 U.S. at 103, 118 S. Ct. at 495 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S. Ct. 461 (1955)). ASORCNA must accordingly be judged on its own terms to determine whether "personal resentment" or "vindictive malice" motivated its passage.

B. The Legislature's stated nonpunitive purpose is essentially dispositive.

From the recognition that the punishment question turns on legislative intent, it follows that a legislature's *apparent* nonpunitive purpose should virtually control the analysis. And indeed that is the case. The Supreme Court has held that "'[o]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147 (quoting *Hudson*, 522 U.S. at 100, 118 S. Ct. at 493); *see also United States v. W.B.H.*, 664 F.3d 848, 858 (11th Cir. 2011). Someone in McGuire's shoes thus bears a "heavy burden," and the requisite "clearest proof" will exist only in "limited circumstances." *Hendricks*, 521 U.S. at 361, 117 S. Ct. at 2081; *see also W.B.H.*, 664 F.3d at 858.

At least four reasons justify ascribing near-dispositive status to a legislature's stated nonpunitive purpose under the clearest-proof standard. First, deferring to the Legislature's stated intent is the best way to honor the Supreme Court's demanding precedents in this area. Beyond its express instructions (recited in the preceding paragraph), the Court has upheld an array of laws enacted with nonpunitive intent, "despite the often-severe effects such regulation has had on the persons subject to it." *Flemming*, 363 U.S. at 616, 80 S. Ct. at 1375 (footnote omitted). For example, the Court has approved laws that:

- retroactively cancelled accrued social security benefits to aliens deported for membership in the Communist Party, *see Flemming*, 363 U.S. at 604-05, 80 S. Ct. at 1369-70;

- retroactively barred convicted felons from working in a chosen profession, *see Hawker v. New York*, 170 U.S. 189, 18 S. Ct. 573 (1898) (state law banning felons from practicing medicine), and *De Veau*, 363 U.S. at 160, 80 S. Ct. at 1155 (state law banning felons from working as officers or agents of a waterfront union);

- retroactively mandated deportation for conduct before the law's passage—even though deportation is "at times the equivalent of banishment or exile," *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 376 (1948), *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S. Ct. 512 (1952) (deportation for past membership in Communist Party); and

- retroactively permitted indefinite civil commitment of dangerous sex offenders, *see Hendricks*, 521 U.S. at 363, 117 S. Ct. at 2082-83.

Each of these measures is at least as severe as ASORCNA from the perspective of someone subject to it. Yet, the Supreme Court rejected ex post facto challenges against them based on the legislature's apparent, nonpunitive purpose.

Second, deference to the Legislature's stated intent is required given the well-known difficulties of attempting to uncover a legislature's "true motive" from something other than the text of the statute. As the Supreme Court explained when it first articulated the clearest-proof standard, "[j]udicial inquiries into Congressional motives are at best a hazardous matter." *Flemming*, 363 U.S. at 617, 80 S. Ct. at 1376. "[W]hen that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Id.*

Third, deference is required by the strong presumption of constitutionality to which ASORCNA is entitled. Again, the Supreme Court emphasized this point when first articulating the "clearest proof" standard: "the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it." *Id.*

Finally, it would be futile in a sense *not* to credit the Legislature's evident purpose. A plurality of the Supreme Court has ascribed "controlling" weight to the legislature's "evident purpose" because "*any* statute decreeing some adversity as a consequence of certain conduct may have both a penal and nonpenal effect." *Trop*, 356 U.S. at 96, 78 S. Ct. at 596 (plurality opinion) (emphasis added). Consider the sanction of indefinite confinement of dangerous sex offenders. It is difficult to imagine a sanction less like punishment "in effect." Yet the Supreme Court upheld

this measure in the context of Kansas' civil-commitment scheme. *See Hendricks*, 521 U.S. at 361, 117 S. Ct. at 2081. In cases such as that, the legislature's evident intent is necessarily dispositive.

McGuire's approach, of course, disregards this principle. McGuire does not dispute that the Alabama Legislature expressed its preference that ASORCNA be regarded as nonpunitive. But despite this concession, he does not once mention the clearest-proof standard in the argument section of his brief. *See* McGuire Opening Br. at 8-50. This mistake is also evident in McGuire's argument that "the Legislature can be presumed to have intended the natural and probable consequences of its actions." *See id.* at 47-49. This argument is an open invitation to substitute his "effects" arguments—many of which are themselves unmoored from precedent—for the traditional (and required) focus on a Legislature's expressed intent. In similar fashion, McGuire's fanciful issue statement, asking whether "any set" of sex-offender restrictions constitutes punishment, carries a whiff of this particular error. *See, e.g.*, *id.* at 2. This Court should not accept McGuire's invitation to err on such a basic principle of ex post facto doctrine. It should instead appropriately defer to the Alabama Legislature's expressed intent that ASORCNA be regarded as nonpunitive.

C. Courts must evaluate a law challenged under the Ex Post Facto Clause only "on its face."

The Supreme Court has similarly held that the punishment question is "'is first of all a question of statutory construction.'" *Hendricks*, 521 U.S. at 361, 117 S. Ct. at 2081 (quoting *Allen v. Illinois*, 478 U.S. 364, 368, 106 S. Ct. 2988, 2992 (1986)). Importantly, this proposition is not limited to the first step of the analysis. To the contrary, the *Mendoza-Martinez* factors, too, "'must be considered in relation to the statute 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). This point led the Supreme Court in *Hudson* to overrule one of its prior decisions that had assessed "'the actual sanctions imposed.'" *Id.* (quoting *United States v. Halper*, 490 U.S. 435, 447, 109 S. Ct. 1892, 1901 (1989)). And as several Justices have explained, it is this point that confirms the punishment issue to be a purely legal one: Any other approach would directly contravene the Supreme Court's contrary holding in *Hudson*, offend principles of federalism, and prove unworkable in practice. *See Seling v. Young*, 531 U.S. 250, 267-70, 121 S. Ct. 727, 737-39 (2001) (Scalia, J., joined by Souter. J., concurring); *id.* at 273-74, 121 S. Ct. at 740-41 (Thomas, J., concurring).

Given this Court's duty to apply *Hudson*, the Court should follow the lead of numerous other courts and uphold ASORCNA's validity as a legal matter without

reference to any "fact" testimony presented at trial.[4] But even if the Court declines to take precisely this step, the rule that the *Mendoza-Martinez* factors must be evaluated only by reference to the "face" of the challenged statute still applies in two important ways.

First, at a minimum, the rule means that the Court may not "evaluat[e] the civil nature of an Act by reference to the effect that Act has on a single individual." *Seling v. Young*, 531 U.S. at 262, 121 S. Ct. at734 (citing *Hudson*, 522 U.S. at 100, 118 S. Ct. at 493); *see also Dep't of Rev. v. Kurth Ranch*, 511 U.S. 767, 777 n.14, 114 S. Ct. 1937, 1945 n.14 (1994) ("whether a sanction constitutes punishment is not determined from the defendant's perspective"). This is a point the District Court got right. *See* doc. 283 at 26-28. Yet McGuire persists in disregarding it. He repeatedly relies on facts unique to his own personal experience with ASORCNA. *See* McGuire Opening Br. at 1, 9, 10, 16, 17, 18, 20, 23-24, 36, 41, 42, 44, 45. He

[4] Numerous courts have treated "application of the Ex Post Facto Clause [as] a legal question" and either dismissed or affirmed the dismissal of a claim similar to McGuire's—without holding a hearing or taking evidence. *Doe v. Bredesen*, 507 F.3d 998, 1002 (6th Cir. 2007); *see also Anderson v. Holder*, 647 F.3d 1165, 1168-73 (D.C. Cir. 2011); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006); *Windwalker v. Bentley*, 925 F. Supp. 2d 1265, 1269-70 (N.D. Ala. 2013), *aff'd* 579 Fed. App'x 769 (11th Cir. 2014); *Doe v. Snyder*, 932 F. Supp. 2d 803, 809-14 (E.D. Mich. 2013). This approach makes sense as a matter of the Constitution's text and structure because any Ex Post Facto violation is triggered upon "pass[age]" of a "Law"—before any facts even occur. U.S. Const. art. I, §10, cl. 1. Any facts needed in resolving such a claim, moreover, will necessarily be "legislative facts" of which the Court may take unfettered judicial notice. *See* Fed. R. Evid. 201, advisory committee note.

relies on fanciful hypothetical scenarios. *See id.* at 34-35 (imagining a sex offender who must register 24 times a year because he lives, works, and goes to school in three different counties).[5] And he disregards parts of ASORCNA that reveal the law's nonpunitive status simply because they may not apply to him. *See, e.g.*, *id.* at 6-7, 40-42 (ignoring, for example, the Romeo-and-Juliet and employment relief provisions).

Second, and relatedly, the *Hudson* rule means that it is irrelevant how law enforcement officials understand or implement ASORCNA. As Justices Scalia and Souter put it: "[H]arsh executive implementation cannot 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty,' . . . any more than compassionate executive implementation can transform a criminal penalty into a civil remedy." 531 U.S. at 269, 121 S. Ct. at 738 (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154, 76 S. Ct. 219, 222 (1956)). Even the *Seling* majority recognized that "[i]t is for the [state] courts" to "provide a remedy" if state actors are not "fulfill[ing] [their] statutory dut[ies]." *Id.* at 265, 121 S. Ct. at 735.

Yet McGuire violates this key ex post facto principle as well. With respect to the identification-card requirement, he does so by attacking the Department of Public Safety's chosen method of designating sex-offender status. *See* McGuire

[5] This scenario is actually not possible, because sex offenders must undergo quarterly registration only in the county where they live. *See* Ala. Code § 15-20A-10(f).

Opening Br. at 6, 10, 30, 44, 48. And with respect to the travel provision, he does so by attacking a three-day advance-notice requirement that appears nowhere on the face of ASORCNA. *See, e.g.*, *id.* at 6, 26. Citing *Smith v. Doe*'s reliance on administrative implementation of a sex-offender statute, the District Court sided with McGuire on this point. *See* doc. 283 at 25-26. But this holding plainly violates *Hudson*. And *Hudson*, of course, "remain[s] binding precedent until [the Supreme Court itself] see[s] fit to reconsider [it], regardless of whether subsequent cases have raised doubts about [its] continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53, 118 S. Ct. 1969, 1978 (1998).

Before proceeding, it bears reiterating that ASORCNA withstands ex post facto review in all respects even if the Court considers McGuire's specific situation or the specifics of ASORCNA's implementation. Indeed, the District Court essentially did just this. Nevertheless, the better view is that evidence beyond the "face" of ASORCNA is simply not relevant to whether it constitutes an "Ex Post Facto Law." U.S. Const. art. I, §10, cl. 1.

D. Courts must not give controlling weight to any single *Mendoza-Martinez* factor.

The Supreme Court's *Hudson* decision is not only about evaluating the *Mendoza-Martinez* factors on the "face" of a statute. In explaining its decision to overrule *United States v. Halper*, *Hudson* also fleshes out the Court's longstanding ad-

monition that these factors are "'neither exhaustive nor dispositive.'" *Smith*, 538 U.S. at 97, 123 S. Ct. at 1149 (quoting *Ward*, 448 U.S. at 249, 100 S. Ct. at 2645). Specifically, the *Hudson* Court held that it was error to "elevate[] a single [*Mendoza-Martinez*] factor"—there, the excessiveness factor—"to dispositive status." *Hudson*, 522 U.S. at 101, 118 S. Ct. at 494.

The key to understanding *Hudson*'s holding in this regard are the facts of *Halper*. Relying on the Double Jeopardy Clause, *Halper* invalidated a civil penalty a court had imposed on an individual, Halper, who previously was convicted of defrauding the government. The penalty itself was over 215% of the amount Halper had fraudulently obtained, and to the *Halper* Court that amount was "so 'overwhelmingly disproportionate' to the injury caused that it could not 'fairly be said *solely* to serve [the] remedial purpose' of compensating the Government for its loss." *Hudson*, 522 U.S. at 101, 118 S. Ct. at 494 (quoting *Halper*, 490 U.S. at 448-449, 109 S. Ct. at 1902). As previously mentioned, *Hudson* overruled *Halper* to the extent it had analyzed the "'actual sanctions imposed.'" *Id.* at 101, 118 S. Ct. at 494 (quoting *Halper*, 490 U.S. at 447, 118 S. Ct. at 1901). But *Hudson* also faulted *Halper* for "focus[ing] on whether the sanction . . . was so grossly disproportionate to the harm caused as to constitute 'punishment'." *Id.* "In so doing," the *Halper* Court had wrongly "elevated a single [*Mendoza-Martinez*] factor—whether the sanction appeared excessive in relation to its nonpunitive purposes—to dispositive

status." *Id.* This violated "[*Mendoza-Martinez*] itself" and amounted to a "significant departure" from the traditional mode of analysis. *Id.*

That McGuire would lead the Court to violate this principle should be abundantly clear from a perusal of his opening brief. Comparing ASORCNA to the federal SORNA statute or other states' statutes is purely an excessiveness argument. *See* McGuire Opening Br. at 12-13. McGuire's concern for ASORCNA's "cumulative effects" is likewise an excessiveness argument. *See id.* at 1, 10, 44. Indeed, the same thing can be said of all arguments McGuire makes based on cases interpreting a fundamental right—*i.e.*, where the proper analysis expressly turns on a closeness of fit between means and ends. *See, e.g.*, *id.* at 23, 26-29. But mostly, this is evident from McGuire's rhetorical approach. Consider the entire structure of his brief. Rather than addressing the *Mendoza-Martinez* factors in turn (as does virtually every judicial decision in this area), McGuire organizes his brief around discrete components of ASORCNA, thereby placing maximum emphasis on his complaints that, in his view, the law is excessive. Indeed, within this framework, the overwhelming majority of McGuire's arguments focus repetitively on that single factor. *See, e.g.*, McGuire Opening Br. at 19, 24, 29, 31, 36, 40, 42 (repeatedly arguing that ASORNCNA's provisions do not *benefit* public safety—rather than that they lack a "rational connection" to a nonpunitive goal). As will be reiterated below, the District Court also committed this error in relying almost exclusively on

the purported excessiveness of ASORCNA's dual homeless-registration and travel-check-in requirements. *See* doc. 283 at 63. Again, this Court should not depart from the Supreme Court's instructions in this area.

E. In evaluating the punishment question, ASORCNA is entitled to a strong presumption of constitutionality.

As a final doctrinal matter, it bears emphasizing that the presumption of constitutionality applies fully in resolving the punishment question. The Court made this clear when it first formulated the "clearest proof" standard:

> [T]he presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. '(I)t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.'

Flemming, 363 U.S. at 617, 80 S. Ct. at 1376 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)). This presumption entails not only a general posture of deference, but also a specific willingness to interpret a statute, where possible, in order to avoid constitutional rulings: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. at 1392, 1397 (1988).

As with the other general principles, McGuire violates this one in several significant ways. Perhaps the most obvious way he does so is simply by the provocative ways in which he has repeatedly described ASORCNA. He declares, without support, that ASORCNA contains a "branding" element (McGuire Opening Br. at 1, 6, 9, 10, 15, 30-34, 38-39, 44, 48, 49), and that it "banishes" sex offenders (*see id.* at 1, 17, 24, 43, 48), creating "exclusion zones" (*see id.* at 2, 4, 5, 9, 17, 18, 22, 23, 24, 39, 43,) which are "entirely off limits" to sex offenders (*id.* at 17). He also repeatedly takes an extravagantly uncharitable view of ASORCNA's effectiveness. In each case, the rhetoric is inconsistent with proper traditions of judicial review.

Beyond these preliminary points, there are other ways in which McGuire's approach disregards the presumption of constitutionality. There is a question, for example, about what it means to "apply" for a job under the employment restrictions. *See* Ala. Code § 15-20A-13(a). There is also a question whether local law enforcement possesses discretion to deny a "travel permit" outside of the bases prescribed in the statute. *See id.* § 15-20A-15. In each case (and any other similar cases), it is the Court's duty to strive to uphold ASORCNA, and not to lightly cast aside the Legislature's clear, apparent, nonpunitive intent. Yet McGuire asks the Court, wrongly, to approach the statute from the exact opposite persuasion. The Court should decline that invitation.

II. The District Court was right to uphold virtually all of ASORCNA against McGuire's ex post facto challenge.

Turning to the application of these principles, it is clear that the District Court reached the correct result insofar as it upheld virtually all of ASORCNA's provisions in this case. As Judges Marcus, Wilson, and Anderson concluded in *Windwalker*, the District Court correctly understood that McGuire had not demonstrated by the clearest proof that ASORCNA was actually motivated by a goal to punish.

A. The Alabama Legislature clearly expressed its preference that ASORCNA be regarded as a civil, nonpunitive public-safety scheme.

On the first prong of the Ex Post Facto analysis, "the Alabama Legislature clearly expressed its nonpunitive intent." Doc. 283 at 22. The District Court was right to reach that conclusion below, and there is no legitimate argument to the contrary. Indeed, on appeal, McGuire does not challenge this nearly dispositive conclusion.

McGuire is right not to do so. For one thing, the Legislature expressly declared that "its intent" in enacting ASORCNA "is not to punish sex offenders but to protect the public, and most importantly, promote child safety." Ala. Code § 15-20A-2(5). Under the Supreme Court's precedent, that statement alone should

be sufficient because the Court must "ordinarily defer to the legislature's stated intent." *Hendricks*, 521 U.S. at 361, 117 S. Ct. at 2082.

ASORCNA's entire structure, moreover, points to a civil, nonpunitive purpose. The law's protections—for the very sex offenders it regulates—underscore this point. ASORCNA offers at least three ways to obtain relief from its provisions. *See* Ala. Code §§ 15-20A-23 to -25. Plus, its residency restriction contains clauses protecting offenders maintaining a residence before ASORCNA's enactment and against subsequent changes in the property a sex offender's residence. *See id.* § 15-20A-11(a), (c). Plus, there are protections associated with the online public registry: Not all sex offender information is fair game for publication, and the site must warn its visitors not to use the information to harass or injure a sex offender. *See id.* §15-20A-8(b), (h).

Beyond these protections, there are other provisions that reflect a genuine public-safety purpose. A few that stand out are:

(1) the requirement that the website contain "links to sex offender safety and education resources," *id.* § 15-20A-8;

(2) the imposition of criminal liability not just on sex offenders who violate the employment restrictions but also on owners of child-related facilities who knowingly employ or accept volunteer services from an adult sex offender, *id.* § 15-20A-13(e); and

(3) the sheer detail employed to make effective those provisions concerning (a) the initial registration of offenders nearing release, *id.* §15-20A-9, and (b) the monitoring of homeless or traveling sex offenders, *id.* §§ 15-20A-12, -15.

In short, ASORCNA is not the work of state legislators "stimulated by . . . personal resentment"; such legislators would have produced a far more crudely written statute. *Calder*, 3 U.S. (3 Dall.) at 389.

Finally, the circumstances surrounding ASORCNA's enactment also support this Court's initial conclusion. As noted, passage of the federal Sex Offender Registration and Notification Act played a significant role in necessitating ASORCNA's passage, and the Legislature took that opportunity to actually reduce the burden on sex offenders in important ways. *See Burt*, 149 So. 3d at 1116; Appendix. In addition, in the years preceding ASORCNA's passage, scores of jurisdictions had enacted similar sex offender regulations that were deemed nonpunitive in intent. *See Anderson*, 647 F.3d at 1169 (collecting cases). There is no valid reason "to think that the [Legislature's] aim with [ASORCNA] was different from that of the many other legislatures that have passed similar laws." *Id.* In short, by enacting ASORCNA, the Alabama Legislature sought to solve an urgent and difficult social problem, not to lash out at an unpopular class.

B. McGuire failed to establish by the "clearest proof" that ASORCNA is effectively punitive.

Under the *Mendoza-Martinez* analysis, the District Court was also right to conclude that McGuire generally did not carry his "heavy burden" of demonstrating by the "clearest proof" that ASORCNA's stated purpose is a sham. Although

the statute creates some affirmative disabilities for sex offenders, none of the other *Mendoza-Martinez* factors supports McGuire's claim—especially when those factors are properly "considered in relation to the statute on its face." *Mendoza-Martinez*, 372 U.S. at 169, 83 S. Ct. at 568; *see also Hudson*, 522 U.S. at 100, 118 S. Ct. at 493.

Historical punishment. Although he primarily focuses on ASORCNA's purported "excessiveness," McGuire at least superficially compares ASORCNA to historical forms of punishment. He compares ASORCNA's proximity restrictions to banishment. *See* McGuire Opening Br. at 17, 18, 24, 43. He compares the registration and identification-card requirements to colonial public-shaming punishments. *See id.* at 31, 35, 43. He compares the $10 registration fee to a "fine." *Id.* at 36; *see also id.* at 44. And he compares the homeless weekly check-in requirement to parole. *See id.* at 44.

Whatever the similarities between ASORCNA and traditional means of punishment, McGuire's problem on appeal is quite basic: He does not even attempt to overcome the District Court's reasoning on this factor, which boils down to the "important variances [that] also exist between ASORCNA's provisions and historical punishments." Doc. 283 at 39. The Supreme Court has required an extremely close analogy to historical punishment—"so that the public will recognize [the challenged provision] as such," *Smith*, 538 U.S. at 97, 123 S. Ct. at 1149—and in

no instance does ASORCNA fit that bill. The decisions appearing in the District Court's opinion also persuasively drive home this point.[6] Ultimately, every one of ASORCNA's provisions "'are of fairly recent origin.'" *Smith*, 538 U.S. at 97, 123 S. Ct. at 1149 (quoting *Doe I v. Otte*, 259 F.3d 979, 989 (9th Cir. 2001)). This novelty "suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing." *Id.*

Affirmative Disability or Restraint. Although certain portions of ASORCNA can be described as imposing an "affirmative disability or restraint," they clearly do not do so in the way that phrase is "normally understood." *Hudson*, 522 U.S. at 104, 118 S. Ct. at 496. That is, ASORCNA does not impose the "'infamous punishment' of imprisonment." *Id.* (quoting *Flemming*, 363 U.S. at 617, 80 S. Ct. at 1376). As with Alaska's sex-offender statute, ASORCNA simply does not resemble that "paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100, 123 S. Ct. at 1151 (quoting *Hudson*, 522 U.S. at 104, 118 S. Ct. at 496).

[6] *See, e.g.*, *Smith*, 538 U.S. at 98, 123 S. Ct. at 1150-51 (differentiating community notification from historical, public-shaming punishments); *id.* at 101-02, 123 S. Ct. at 1152 (differentiating sex-offender registration from parole and probation punishments); *Mueller v. Raemisch*, 740 F.3d 1128, 1134 (7th Cir. 2014) (differentiating sex-offender registration fees from fines); *W.B.H.*, 664 F.3d at 857 (differentiating parole and probation); *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (differentiating residency restrictions from the historical practice of banishment).

More broadly, the right question here is less one of *whether* the law imposes an affirmative disability or restraint, and more one about *the extent* of any disability or restraint in light of the legislature's avowed nonpunitive purpose. As *Smith* noted, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." 538 U.S. at 100, 123 S. Ct. at 1151. Thus, sex-offender registration—including a requirement to keep law enforcement up-to-date on travel plans and any pertinent status changes—"do[es] not have a punitive restraining effect." *Miller*, 405 F.3d at 720 (citing *Smith*, 538 U.S. at 100, 123 S. Ct. at 1141). This is so even if the registration law requires in-person reporting: "Appearing in person may be more inconvenient, but requiring it is not punitive." *W.B.H.*, 664 F.3d at 857. This general principle is also why, at the other end of the spectrum, indefinite confinement or deportation can be held not to be punitive. *See Miller*, 405 F.3d at 720-21 (citing *Hendricks*, 521 U.S. at 363, 117 S. Ct. at 2083); *Harisiades*, 342 U.S. at 593-95, 72 S. Ct. at 520-22 (deportation). If the potential for indefinite confinement can be regarded as nonpunitive in effect, then the same must be true about of ASORCNA's various provisions.

In any event, there is no denying that ASORCNA imposes if not "direct" restraints, at least some affirmative disabilities. The problem for McGuire is that he overstates the extent of these affirmative disabilities in ways that reveal why they do not "inexorably lead to the conclusion that the government has imposed pun-

ishment." *Hendricks*, 521 U.S. at 363, 117 S. Ct. at 2083. On this front, three examples come to mind:

- It is simply incorrect to say that ASORCNA places all or part of the City of Montgomery "entirely off limits." McGuire Opening Br. at 17.

- Roughly 98% of sex offenders in Montgomery have found ASORCNA-compliant housing. *E.g.*, doc. 250 at 195:6-20; doc. 251 at 218:18-24. Although McGuire's mapping consultant believed that the burdens increase with population density, he admitted that he did not think ASORCNA's grandfather clauses were relevant to the analysis and that only 3 of Alabama's 6 largest cities (not to mention other cities) are denser than Montgomery. Doc. 249 at 75:24-76:3; *id.* at 46:18-24.

- It is wrong to say that the sex-offender unemployment rate is 50%. *See* McGuire Opening Br. at 5, 22. As both Detective LaChance and Lieutenant Persky testified, a substantial portion of sex offenders are not actively seeking work. *See* doc. 250 at 204:16-205:12 (LaChance); *id.* at 221:16-205:12 (Persky). Even so, McGuire presented no evidence that would allow the Court to compare sex offenders' employment prospects to those of other felons.

For similar reasons, the Eighth Circuit concluded that "this factor ultimately points us to the importance of [additional factors]: whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose." *Miller*, 405 F.3d at 721. This Court should follow the Eighth Circuit's lead. At a minimum, this factor does not support the conclusion that ASORCNA can be "so punitive either in purpose or effect" as to override the Legislature's stated intent that it be a civil regulatory statute. *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147 (quotation marks omitted).

Traditional Aims of Punishment. The District Court extensively analyzed whether ASORCNA meaningfully promotes deterrence or retribution and concluded that it did not. *See* doc. 283 at 44-52. On appeal, meanwhile, McGuire devotes a grand total of three sentences to this factor. And even then, he makes circular arguments that have *nothing to do* with these concepts:

> Turning to the third *Mendoza-Martinez* factor, ASORCNA's cumulative effects serve the "traditional aims of punishment—retribution and deterrence." *Smith*, 538 U.S. at [114]. Registrants like Mr. McGuire are punished in ways they never were before—even worse than parole. Mr. McGuire, for example, is forbidden from living with his own nieces, a punishment not in place while he was on parole. Ala. Code § 15-20A-11(d).

McGuire Opening Br. at 44-45. Such a scant treatment of this factor can hardly be considered "'address[ing] argument to the issues [McGuire] desires to have reviewed.'" *United States v. Davila*, 749 F.3d 982, 992 n.10 (11th Cir. 2014) (quoting *Fed. Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987)). McGuire has thus waived this argument. In any event, the District Court's analysis persuasively confirms that "this factor points to a finding that ASORCNA is nonpunitive." *See* doc. 283 at 44-52.

Rational Connection to a Nonpunitive Purpose. Between ASORCNA's legislative findings and the District Court's opinion below, each provision of the statute is readily traceable to the Legislature's goal of increasing public safety. In summary, these "rational connections" are as follows:

Provision	Rational Connection
Registration	Allows law enforcement to monitor sex offenders. *See* Ala. Code § 15-20A-2(1).
In-person quarterly registration	Promotes the accuracy of an offender's registration information and fosters a "recurring . . . relationship" between law enforcement and sex offenders. Doc. 283 at 55.
In-person weekly homeless registration	Does the same as in-person registration, but more frequently for a population that "need[s] to be monitored more frequently" due to their "mobility." Ala. Code § 15-20A-2(3).
Dual quarterly registration	"[I]ncreases contact with law enforcement." Doc. 283 at 57.
Travel check-in	"[E]ncourages personal contact with law enforcement." Doc. 283 at 56. "[P]rovides for continuity of contact between jurisdictions, which in turn provide for effective monitoring." *Id.*
Community notification (fliers & website)	"[C]reates better awareness and informs the public of the presence of sex offenders in the community, thereby enabling the public to take action to protect themselves." Ala. Code § 15-20A-2(1).
Identification requirement	"[I]mmediately alerts law-enforcement officials to the registrant's status without delay." Doc. 283 at 56.
Proximity restrictions (residence and employment)	"[L]imits the potential for isolated contact between offenders and vulnerable populations." Doc. 283 at 50. "[L]imits the potential for an offender to be alone in an area that could conceal criminal conduct." *Id.* at 55.
Felony liability for violations	"[E]ncourages compliance." Doc. 283 at 50.
Lifetime application without risk-based assessment	Avoids the high cost of wrong predictive judgments (whether individualized or categorical) about which previously convicted offenders will re-offend. *See Smith*, 538 U.S. at 103-04, 123 S. Ct. at 1153 (authorizing states to regulate sex offenders "as a class").

Indeed, McGuire's own experts provided concessions on this basic point. *See* doc. 249 at 118:5-9 (Dr. Letourneau); doc. 250 at 12:9-13:7, 14:12-15:6, 36:15-24,

36:7-15 (Dr. Prescott); *see also* doc. 251 at 152:17-25 (State's expert Dr. McCleary).

At this juncture, all that remains is to reiterate the significance of these points. Although no particular *Mendoza-Martinez* factor should be regarded as controlling, *Smith* reiterated that this particular one "is a '[m]ost significant' factor in our determination." 538 U.S. at 102, 123 S. Ct. at 1152 (quoting *United States v. Ursery*, 518 U.S. 267, 290, 116 S. Ct. 2135, 2148 (1996)). At the same time, this "most significant" factor does not require much—a mere rational connection, not a demonstrated benefit to society or anything else that McGuire would add to the analysis. At most, claims of that sort are properly addressed under the excessiveness factor, the next subject of this brief.

Excessiveness. All of this brings us to the final prong, excessiveness—the factor *Hudson* specifically warned against elevating to dispositive status. For the following reasons, McGuire cannot prevail on (or via) this factor either.

First, ASORCNA's general characteristics are not excessive. For example, ASORCNA is not excessive for failing to differentiate between offenders who victimized children and offenders who victimized adults. *Cf.* McGuire Opening Br. at 19, 20, 29, 33. In *Smith*, the Supreme Court upheld States' ability to regulate sex offenders "as a class." 538 U.S. at 103, 123 S. Ct. at 1153. But even absent *Smith*'s holding, ASORCNA's approach finds justification in the phenomenon of "crosso-

ver" offending. Crossover offending is the problem of recidivist sex offenders targeting multiple victim types across their criminal careers. The defendants' expert, Dr. Richard McCleary, gave unchallenged expert testimony about this phenomenon, *see* doc. 251 at 162:15-21, Trial Ex. 77 at 10 (McCleary Report), and local law enforcement officials cited anecdotal examples of sex offenders who had offended against different types of victims, *see* doc. 250 at 160:19-161:15 (Detective LaChance). *See also* doc. 166-3 at 1 (Kleban 2012); doc. 166-4 at 1 (Cann 2007).

ASORCNA is likewise not excessive based on its lifetime application and lack of risk assessment. *Cf.* McGuire Opening Br. at 40-43. Given the relief provisions (which do, in fact, involve individualized risk assessment), it is not entirely fair to criticize ASORCNA on these grounds. But again, and in any event, *Smith* directly approved of States' ability to regulate sex offenders categorically, as a class. *See* 538 U.S. at 103, 123 S. Ct. at 1153. More specifically, lifetime application is not excessive because "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release." *Smith*, 538 U.S. at 104, 123 S. Ct. at 1153 (internal quotation marks, citation omitted); *see also United States v. Irey*, 612 F.3d 1160, 1213-14 (11th Cir. 2010) (en banc) (listing numerous examples of sex offenders who recidivated in their 60s, 70s, and 80s); doc. 249 at 117:22-25 (admission by McGuire's expert Dr. Letourneau); doc. 166-2 (Langevin 2004). Similarly,

ASORCNA need not assess sex offenders' risk, whether on an individualized or categorical (offense-based) basis. Such assessment schemes do not account for the high cost of prediction errors. *See* doc. 251 at 164:2-4; Trial Ex. 77 at 31-33. And McGuire's expert even admitted that an offense-based classification scheme would be inadequate; in her view, apparently, only subjective, expensive, individualized assessment will do. *See* doc. 249 at 132:5-7 (Dr. Letourneau).

Second, no particular component of ASORCNA is excessive. For example, McGuire attacks the proximity restrictions for being too broad, and their relief provisions for being too narrow, but the District Court explained why these arguments miss the mark. *Compare* McGuire Opening Br. at 9, 19, 20, 25 *with* doc. 283 at 50-51, 54-55. Relying on Dr. Prescott's work, McGuire likewise argues that academic research "unequivocally demonstrates" that impeding sex offenders' housing and employment increases their risk of recidivism. *See id.* at 20, 25. But Dr. Prescott's study did not concern proximity restrictions. *See generally* Trial Ex. 77 at 33-41 (McCleary Report). And more importantly, the defendants produced studies detecting public-safety gains from such measures. *See* doc. 166-11 at 1 (Page 2012); Trial Ex. 77 at 29-31.

Citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752 (1957), McGuire contends that the employment restrictions, in particular, raise "grave constitutional concerns." McGuire Opening Br. at 23. But *Schware* consid-

ered a challenge to a particular application of a bar rule requiring "good moral character," *see id.* at 239, 77 S. Ct. at 756, not a facial challenge to any employment restriction "based on criminal history," McGuire Opening Br. at 23. *Schware*, moreover, did not condemn reliance on past offenses as a categorical matter, but rather did so in the particular context before the Court. *See* 353 U.S. at 247, 77 S. Ct. at 760. Finally, unlike the provision at issue in *Schware*, ASORCNA's employment restrictions regulate only the *place* an offender may work—not a particular job or profession itself.

The cases McGuire cites in opposition to ASORCNA's travel check-in requirement similarly fail to persuade. As an initial matter, this Court has already held that a similar Florida requirement "does not unreasonably burden [a sex offender's] right to travel." *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005). Beyond that, the cases McGuire cites involved more-intrusive travel *bans* (which were nevertheless upheld as part of a criminal sentence). *See Jones v. Helms*, 452 U.S. 412, 413, 101 S. Ct. 2434, 2437 (1981); *Williams v. Wisconsin*, 336 F.3d 576, 579 (7th Cir. 2003). Or, they did not involve the constitutional right to travel at all. *See United States v. Tortora*, 994 F.2d 79, 81 (2d Cir. 1993) (invalidating a travel ban because the district court lacked "statutory authority" to impose it).

Finally, McGuire has not demonstrated the identification-card requirement to be excessive. This is true even if the Court considers the Department of Public

Safety's chosen means of implementing this requirement. *Cf.* Section I.C, *supra*. The "CRIMINAL SEX OFFENDER" designation allows a law enforcement officer in the field to immediately know something important about a person they have encountered. And it does so without the officer having to worry about communications disruptions or delays in updating the sex-offender registry. Although McGuire says he would prefer a more discreet sex-offender designation, the defendants suspect that there is no such designation that would satisfy McGuire's crabbed view of the Ex Post Facto Clause. If so, it is McGuire's ex post facto theory, and not the identification-card requirement, which is excessive.

* * *

In his bid to overturn ASORCNA, McGuire unpersuasively cites numerous other cases beyond those mentioned above. Some, he says, demonstrate courts' willingness to strike down restrictions "even less severe than Alabama's." McGuire Opening Br. at 13. But these cases in fact involve *other* types of constitutional challenges to measures that far exceed any burdens imposed by ASORCNA—for example, penile plethysmograph (PPG) testing, a measure "substantially more invasive" than even cavity and strip searches. *United States v. Weber*, 451 F.3d 552, 563 (9th Cir. 2006) (citation and quotation marks omitted).[7] Other of his cases do

[7] McGuire's other cases involving PPG testing include *United States v. Medina*, 779 F.3d 55 (1st Cir. 2015), and *United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013). Still other cases that involve policies far more "severe" than those em-

involve ex post facto challenges to sex-offender regulations, but under "more protective" state constitutions. *Doe v. State*, 189 P.3d 999, 1005 (Alaska 2008).[8] The holdings and analysis in these cases are immune from Supreme Court review, thereby undermining any persuasive value they might have. *See Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476 (1983) (explaining that the Supreme Court will not review decisions based on independent, state-law grounds). Ultimately, McGuire has cited no decision that has invalidated similar state sex-offender policies based only on the federal Ex Post Facto Clause. And to the contrary, the mass of lower-court authority points entirely in favor of ASORCNA's validity. *See Anderson*, 647 F.3d at 1169 (collecting cases). This Court should join that body of decisional law and affirm the District Court to the extent it upheld ASORCNA.

---

bodied in ASORCNA (not to mention vastly different legal theories) include *United States v. Tipton*, No. 3:91-CR-52, 2014 WL 5089888 (E.D. Tenn. Oct. 9, 2014), and *United States v. Behren*, No. 04-CR-00341, 2014 WL 4214608 (D. Col. Aug. 26, 2014).

[8] *See also In re Taylor*, 346 P.3d 867, 879 (Cal. 2015); *Riley v. New Jersey State Parole Bd.*, 98 A.3d 544, 559 (N.J. 2014); *Starkey v. Oklahoma Dep't of Corrs.*, 305 P.3d 1004 (Okla. 2013); *Hevner v. State*, 919 N.E.2d 109 (Ind. 2010); *F.R v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.2d 56 (Mo. 2010); *State v. Simnick*, 779 N.W.2d 334 (Neb. 2010); *Com. v. Baker*, 295 S.W.3d 437 (Ky. 2009); *State v. Letalien*, 985 A.2d 4 (Me. 2009).

III. The District Court was wrong to invalidate ASORCNA's dual homeless registration and dual travel-reporting requirements.

Having explained why the District Court was right to uphold virtually all of ASORCNA as a civil, nonpunitive measure, it remains only to further explain why the District Court was wrong about the parts it invalidated.

As a preliminary matter, it is simply not the case that "[n]o credible reason" supports the dual homeless-registration or the dual travel-check-in requirement. Doc. 283 at 61. These requirements not only allow for increased contact between sex offenders and law enforcement; they also facilitate meaningful interagency collaboration. Consider a "homeless" sex offender who tells the Police Department that he will be residing at Homeless Shelter A but tells the Sheriff's Office that he will be camping at Campground B. When the relevant officers confer, they will catch the offender's lie. But absent ASORCNA's dual registration feature, such detective work becomes more difficult. (And having one agency fax or e-mail the registration information to the other will not solve this problem.) In concluding otherwise, it appears that the District Court simply overlooked relevant testimony from local law enforcement to this effect. *See* doc. 250 at 181:2-182:7 (Detective LaChance).

In light of this justification, the more fundamental point is that these provisions simply do not amount to "punishment" under established ex post facto doctrine. The District Court's near-dispositive conclusion that the Legislature pre-

ferred a nonpunitive label applies with full force to these provisions. These provisions likewise bear no resemblance to historical forms of punishment, self-evidently do not promote general deterrence or achieve retribution, and bear at least a rational connection to the Legislature's goal of public safety. This leaves, then, the District Court's conclusion that these provisions (a) create an affirmative disability or restraint and (b) are excessive to the Legislature's nonpunitive intent. *See* doc. 283 at 63. But for the reasons explained elsewhere in this brief, these grounds do not sufficiently support the conclusion that these provisions are punitive. Accordingly, this Court should reverse the District Court on this issue.

CONCLUSION

McGuire cannot escape the clear, nonpunitive intent evident on the face of ASORCNA. To conclude otherwise 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 18th day of May, 2015.

Luther Strange
Attorney General

Andrew L. Brasher
Solicitor General

s/F. Tim McCollum
J. Haran Lowe, Jr.
F. Tim McCollum
Assistant Attorneys General

STATE OF ALABAMA
DEPARTMENT OF PUBLIC SAFETY
301 S. Ripley Street
Montgomery, AL 36104
(334) 242-4392
haran.lowe@dps.alabama.gov
tim.mccollum@dps.alabama.gov

Counsel for Alabama Dep't of Public Safety Director John Richardson

s/William G. Parker, Jr.
William G. Parker, Jr.
Laura E. Howell
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
wparker@ago.state.al.us
lhowell@ago.state.al.us

Counsel for Alabama Attorney General Luther Strange

[signature page continued]

s/Thomas T. Gallion, III
Thomas T. Gallion, III

HASKELL SLAUGHTER & GALLION, LLC
8 Commerce Street, Suite 1200
Montgomery, AL 36104
(334) 265-8573
ttg@hsg-law.com

Tyrone C. Means

MEANS GILLIS LAW, LLC
P.O. Box 5058
Montgomery, AL 36103
(334) 270-1033
tcmeans@meansgillislaw.com

Counsel for Montgomery County Sheriff Derrick Cunningham

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 13,333 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.

s/William G. Parker, Jr.
Counsel for Appellee/Cross-Appellant
Luther Strange

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 18, 2015, I filed the foregoing brief electronically using the Court's CM/ECF system, which will serve the following counsel:

J. Mitch McGuire
jmcguire@mandabusinesslaw.com

Phil Telfeyan
ptelfeyan@equaljusticeunderlaw.org

Thomas T. Gallion, III
ttg@hsg-law.com

Joseph Haran Lowe, Jr.
haran.lowe@dps.alabama.gov

Frank Timothy McCollum
tim.mccollum@dps.alabama.gov

Tyrone C. Means
tcmeans@meansgillislaw.com

Within the next business day, I will also dispatch copies of this brief to Federal Express for delivery to the Court within three days. I also uploaded an electronic copy of the brief to the Court's website.

s/William G. Parker, Jr.
Counsel for Appellee/Cross-Appellant
Luther Strange

APPENDIX: ACNA VS. ASORCNA

The table below compares the Alabama Community Notification Act, as it existed in 2010 in final amended form, with the Alabama Sex Offender Registration Community Notification Act, which took effect July 1, 2011. This table is not exhaustive. But these changes provide additional evidence of the Alabama Legislature's nonpunitive intent. In particular, they demonstrate how the Legislature "actually lowered the burden placed on a sex offender" in important respects. *Burt v. State*, 149 So. 3d 1110, 1116 (Ala. Crim. App. 2013) (emphasis omitted).

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
Legislative findings	Six paragraphs conveying that ACNA is a public-safety measure designed to protect the public from "the danger of recidivism posed by criminal sex offenders." §15-20-20.1	Same general ideas, but revised wording. §15-20A-2
Applicability	"Any adult criminal sex offender shall be subject to this article for life." §15-20-33(a)	Same, §15-20A-3(b). Clarifies that ASORCNA is applicable to every adult sex offender "without regard to when his or her crime or crimes were committed." §15-20A-3(a).
Definition of sex offense	Any of the following: ▪ enumerated Alabama sex offenses, §15-20-21(4)(a)-(j) ▪ solicitation, attempt, or conspiracy to commit the enumerated Alabama sex offenses, §15-20-21(4)(k) ▪ any crime committed outside	Adds: ▪ judicial override for juvenile sex offenders with respect to certain sex crimes, §15-20A-5(5), (9) ▪ first-offense exceptions to some or all ASORCNA components with respect to

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
	of Alabama which would constitute one of the enumerated Alabama sex offenses, §15-20-21(4)(l) ▪ any crime committed in any jurisdiction which "is in any way characterized or known as" one of 12 crimes, §15-20-21(4)(m)	certain sex crimes, §15-20A-5(5), (9) ▪ sexual-motivation requirement to certain offenses, §15-20A-5(39) ▪ new enumerated Alabama sex offenses, §15-20A-5(5), (9), (11), (15), (16), (21)-(30) ▪ historical analogues to currently codified Alabama sex offenses, §15-20A-5(31) ▪ any sex offense specified by federal SORNA statute, §15-20A-5(34) ▪ any crime committed in another jurisdiction that triggers registration in that jurisdiction, §15-20A-5(35) ▪ any offender determined in any jurisdiction to be a sex offender, §15-20A-5(36) ▪ any crime not listed wherein the underlying felony is an element of the offense and one of the Alabama enumerated sex offenses, §15-20A-5(38) ▪ any offense not listed which involved a sexual motivation, as determined pursuant to a new ASORCNA provision (§15-20A-6),§15-20A-5(39).
Registration (and address verification)	▪ Required offenders to notify sheriff and chief of police 30 days prior to any change of residence. §15-20-23(a)	▪ Eliminates requirements to notify law enforcement prior to change of residence or employment. *Cf.* §15-20A-

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
	▪ Required offenders to notify sheriff and chief of police 7 days prior to any change of employment. §15-20-23.1 ▪ Required DPS to mail a "non-forwardable verification form" twice annually to the address provided by the offender; offender had to report to sheriff or chief of police, who in turn would provide verification to DPS. §15-20-24(a), (c) ▪ Required offenders to register twice annually with sheriff or chief of police. §15-20-24(b)	10(b)-(e) (requiring registration within 3 days of pertinent changes) ▪ Eliminates address-verification procedure. ▪ Requires offenders to register quarterly with local law enforcement. §15-20A-10(f) ▪ Adds weekly reporting requirement for homeless sex offenders. §15-20A-12 ▪ Adds pre-travel reporting requirement for an offender who intends to "temporarily be away from his or her county of residence for a period of three or more consecutive days." §15-20A-15(a).
Required registration information	Per the definition of "community notification flyer," §15-20-21(3), all of the following: ▪ name ▪ actual living address ▪ sex ▪ date of birth ▪ complete physical description & current photograph ▪ statement of criminal sex offense, incl. certain details	Adds: ▪ new information required by federal SORNA legislation, e.g., §15-20A-7(a)(1), (3), (4), (5), (7), (8), (9), (12), (15), (16), (17) ▪ exception for certain information already collected but that has not changed since last registration, §15-20A-7(b)
Registration fees	▪ None.	▪ Adds $10 registration fee payable to each (residential) registering agency at quarterly registration—subject to installment payment plans or outright waiver based on inability to pay. §15-20A-22

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
Procedures for sex offenders nearing release from prison or entering the State	▪ As to incarcerated offenders, required pre-release verification of the "actual physical address" at which the offender intended to live; failure to provide a valid address constituted an offense—as well as forfeiture of any accrued correctional incentive time. §15-20-22(a)(1) ▪ As to incarcerated offenders, required notification of appropriate (in-state or out-of-state) officials of offender's post-release residence and employment plans. §15-20-22(a)(2), (3), & (4) ▪ Required incarcerated offender's DNA sample sent to Department of Forensic Sciences, §15-20-22(c) ▪ Required sex offenders entering the State to live, work, or go to school to register and undergo community notification. §15-20-25.1	▪ Eliminates pre-release verification of intended residential address. §15-20A-9 ▪ Sex offenders who are unable to provide a residential address prior to release are picked up by sheriff in the county of the offender's law sex-offense or ASORCNA conviction so that they may register as homeless in that county. §15-20A-9(4) ▪ Streamlines requirements for non-resident sex offenders. §15-20A-14
Community notification	▪ Required law enforcement to mail or deliver community notification flyers to addresses within a specified radius of the offender's residence. §15-20-25	▪ No material changes. §15-20A-21

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
Public registry website	Authorized methods of notifying the public, including "posting [sex-offender information] electronically, including the Internet," §15-20-25(b), but there was no express requirement to maintain a public website.	Adds requirement of DPS to maintain statewide, searchable public website containing an enumerated subset of the required registration information. §15-20A-8. The website must include: ▪ sex offender "safety and education" resources, ▪ instructions for correcting erroneous information, and ▪ a warning not to use information for unlawful ends.
Proximity restrictions	▪ Prohibited "establishment" of a residence, living accommodation, or employment within 2,000 feet of a school or child care facility. §15-20-26(a) ▪ Prohibited "establishment" of a residence within 1,000 feet of a former victim or former victim's immediate family member, or knowingly coming within 100 feet of a victim, or making harassing communications to victim or victim's immediate family member. §15-20-26(b),(d) ▪ Prohibited "establishment" of a residence with minor, absent a specified family relationship (subject to certain exceptions). §15-20-26(c) ▪ Prohibited sex offenders convicted of an offense "in-	▪ Residence and employment restrictions now reference provisions for obtaining relief. §15-20A-11(a), (b), §15-20A-13(b) (see "relief provisions" below) ▪ Residence restrictions add "maintain a residence after release or employment" to clarify that offenders who have re-offended cannot return to a pre-"established" residence. §15-20A-11(a), (b) ▪ Changes the residence restriction as to former victims from 1,000 feet to 2,000 feet. §15-20A-11(b) ▪ Adds an additional basis—that an offense involved "forcible compulsion" of a minor—for prohibiting sex offenders from residing with

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
	volving a child" from loitering or working within 500 feet of any business or facility having a "principal purpose of caring for, educating, or entertaining minors." §15-20-26(f), (g)	minor family members. §15-20A-11(d)(5) ▪ Standardizes means of taking the 2,000-foot measurement. §§15-20A-11(g) & -13(f)
Other proximity-related provisions	▪ Contained grandfather clause, such that changes to property within 2,000 feet of an offenders residence or employment would not trigger a violation, §15-20-26(e)	▪ Adds exemption for sex offenders who are institutionalized. §15-20A-11(f) ▪ Adds prohibition on owners and operators of childcare and related facilities from employing sex offenders. §15-20A-13(e)
Relief provisions	▪ None (for adult offenders).	▪ Authorizes courts to relieve sex offenders from registration and notification components if their offense (1) was second-degree rape, sodomy, sexual abuse, or sexual misconduct and (2) was only a crime due to the age of the victim, the victim was 13 or older at the time of the offense, and the offender was not more than for years older than the victim. §15-20A-24 ▪ Authorizes courts to relieve sex offenders who are "terminally ill or permanently immobile" from general residency restriction. §15-20A-23 ▪ Authorizes courts to relieve sex offenders from employ-

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
		ment restrictions if they were not convicted of certain, more-serious sex offenses. §15-20A-25
Identification cards	▪ Required resident sex offenders to obtain and possess a valid driver's license or DPS-issued ID card "bear[ing] a designation that enables law enforcement officers to identify the licensee as a criminal sex offender." §15-20-26.2 ▪ Provided no-cost ID cards for indigent sex offenders. §15-20-26.2(a)	▪ Adds requirement to relinquish driver's license or ID card not bearing the required sex-offender designation. §15-20A-18(d) ▪ Adds prohibition on "chang[ing] the form" of a driver's license or ID card bearing the required designation. §15-20A-18(e).
Sexually violent predators	▪ Authorized a court, at sentencing, to designate a sex offender as a "sexually violent predator. §15-20-25.3(a)-(b) ▪ Subjected sexually violent predators to electronic monitoring for a period of no less than 10 years from release. §15-20-25.3(f)	▪ Changed standard for "sexually violent predator" designation. §15-20A-19(b)
Name changes	▪ Prohibited sex offenders from changing their names unless incident to a change in marital status or religiously motivated. §15-20-36	▪ No change. §15-20A-36

Component	ACNA (as it stood in 2010)	ASORCNA (July 1, 2011)
Absconding	▪ None.	▪ Adds a provision prescribing procedures for law enforcement officials to follow in the event a sex offender fails to register. §15-20A-37
Escapes	▪ Required responsible corrections agencies to notify certain law enforcement officials within 24 hours of an escape. §15-20-32	▪ No material changes. §15-20A-38
Harboring sex offenders	▪ None.	▪ Adds a provision prohibiting the harboring, assisting, concealing, or withholding information about a sex offender in specified ways. §15-20A-39