Case No. 15-10958-A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL A. McGUIRE,
Plaintiff-Appellant,

v.

LUTHER STRANGE, Attorney General, State of Alabama, *et al.*,
Defendants-Cross Appellants.

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

PLAINTIFF-APPELLANT'S PRINCIPAL BRIEF

J. Mitch McGuire (MCG044)
McGuire & Associates, LLC
31 Clayton Street
Montgomery, Alabama 36104
(334) 517-1000
jmcguire@mandabusinesslaw.com

Phil Telfeyan
Equal Justice Under Law
916 G Street, Suite 701
Washington, D.C., 20001
(202) 505-2058
ptelfeyan@equaljusticeunderlaw.org
Attorneys for Michael McGuire

Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, undersigned counsel for Plaintiff-Appellant Michael A. McGuire certifies that the following listed persons and parties have an interest in the outcome of this case:

1. Luther Strange, Defendant-Appellee, Attorney General of Alabama;
2. John Richardson, Defendant-Appellee, Director, Alabama Department of Public Safety;
3. Derrick Cunningham, Defendant-Appellee, Sheriff, Montgomery County Sheriff's Office;
4. Todd Strange, Mayor, City of Montgomery, Alabama;
5. Andrew L. Brasher, Office of the Alabama Attorney General;
6. William G. Parker, Office of the Alabama Attorney General;
7. James W. Davis, Office of the Alabama Attorney General;
8. Laura E. Howell, Office of the Alabama Attorney General;
9. Winfield J. Sinclair, Office of the Alabama Attorney General;
10. Thomas T. Gallion, III, Haskell Slaughter & Gallion, LLC, Attorney for Defendants Cunningham and Montgomery County, Alabama Sheriff's Office;
11. Constance C. Walker, Haskell Slaughter & Gallion, LLC, Attorney for

Defendants Cunningham and Montgomery County, Alabama Sheriff's Office;

12. Charles McDowell Crook, Jr., Haskell Slaughter & Gallion, LLC, Attorney for Defendants Cunningham and Montgomery County, Alabama Sheriff's Office;

13. Tyrone C. Means, Thomas Means Gillis & Seay, PC, Attorney for Defendants Cunningham and Montgomery County, Alabama Sheriff's Office;

14. Joseph Haran Lowe, Attorney for the Alabama Department of Public Safety;

15. Frank McCollum, Attorney for the Alabama Department of Public Safety;

16. Stacy Reed, Montgomery, Alabama City Attorney's Office;

17. Joseph M. McGuire, Attorney for Michael A. McGuire, Plaintiff-Appellant;

18. Phil Telfeyan, Attorney for Michael A. McGuire, Plaintiff-Appellant;

19. Honorable William Keith Watkins, Chief United States District Judge, Middle District of Alabama;

20. Michael A. McGuire, Plaintiff-Appellant.

/s/ J. Mitch McGuire */s/ Phil Telfeyan*
Attorneys for Plaintiff-Appellant

Statement Regarding Oral Argument

Plaintiff-Appellant respectfully requests that oral argument be permitted in this case. Plaintiff-Appellant's challenge to Alabama's sex-offender restrictions raises a novel and substantial legal question: Is it possible for any set of sex-offender restrictions to exceed the prohibition of the *Ex Post Facto* Clause and, if so, did Alabama violate this provision when it enacted ""the most comprehensive, debilitating sex-offender scheme in the land." Opinion, p. 2. This fundamental question is one of first impression not only in this Circuit, but across the country. Indeed, "Alabama's scheme goes miles beyond the minimum federal requirements of the Sex Offender Registration Act ('SORNA'), recently reviewed in this Circuit in *United States v. W.B.H.*" *Id.* at p. 29. Alabama's pervasive and debilitating restrictions are so unique that "no court has ever been faced with analyzing *in toto* the general effects of a scheme this expansive." *Id.* Due to the novelty and importance of the issues, Plaintiff-Appellant respectfully submits that oral argument is necessary to ensure the highest level of advocacy by all parties in this case, in order to give this Court maximum opportunity for the highest level of consideration.

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Statement of Subject-Matter and Appellate Jurisdiction

Plaintiff-Appellant challenges Alabama's sex-offender scheme as violating the *Ex Post Facto* Clause of the United States Constitution, seeking declaratory and injunctive relief to that effect. The district court properly exercised subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 2201. This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

On February 5, 2015, the district court entered judgment partially in favor of Plaintiff-Appellant and partially in favor of Defendants-Cross Appellants. On March 6, 2015 — 29 days later — Plaintiff-Appellant timely filed his notice of appeal. On March 10, 2015, Defendant-Cross Appellant Luther Strange timely filed his notice of cross-appeal.

I. Introduction

The Alabama Sex Offender Registration and Community Notification Act, Ala. Code §§ 15-20A-1 *et seq.*, ("ASORCNA") retroactively applies a set of restrictions that is unmatched across the country, so punitive in its cumulative effects that it violates the *Ex Post Facto* Clause of the United States Constitution. It goes miles beyond the sex-offender schemes of 49 other states and exceeds beyond measure the regime approved by the Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003). ASORCNA has caused Plaintiff-Appellant, Michael McGuire, to be homeless by banishing him from his mom's home, his wife's home, and over 80% of the housing stock in Montgomery. ASORCNA contributes to, if not directly causes, the homelessness of perhaps dozens of registrants across the state; it contributes to, if not directly causes, a 50% unemployment rate (over eight times the statewide average) amongst registrants. ASORCNA imposes direct barriers on intra- and interstate travel, publicly brands all registrants, and creates crushingly burdensome reporting obligations. No other state comes close to the combined debilitating effects of ASORCNA. Under the United States Constitution, such extreme punishment cannot be applied retroactively.

II. Statement of the Issues

This case is about whether "the most comprehensive, debilitating sex-offender scheme in the land" violates the *ex post facto* prohibition in the United

States Constitution by retroactively punishing individuals like Plaintiff-Appellant, whose only crime was more than 30 years ago. Opinion, pp. 1–2. Because no state's sex-offender scheme is as comprehensive or debilitating as Alabama's, this case raises the fundamental question of whether *any* set of restrictions on former sex offenders violates the *Ex Post Facto* Clause; if any set of restrictions does, ASORCNA does as well, for no set is as extreme or as punitive as ASORCNA.

III. Statement of the Case

A. Procedural History

Mr. McGuire filed his complaint challenging the constitutionality of ASORCNA on December 2, 2011, alleging violations of the Due Process and *Ex Post Facto* Clauses, among others. *Id.* at 3. After extensive briefing on motions to dismiss, the district court allowed Mr. McGuire's *ex post facto* claim to proceed while dismissing his due process and other claims. *Id.* at 4. Beginning on March 31, 2014, the district court held a four-day bench trial to consider evidence and argument regarding whether the ASCORCNA's debilitating effects and limitless retroactivity violate the *ex post facto* provision. *Id.* On February 5, 2015, the district court entered partial judgment in favor of Mr. McGuire, declaring ASORCNA's dual registration and travel provisions unconstitutional but upholding many of the most debilitating aspects of ASORCNA, including the zone of exclusion created by its residency and employment restrictions. *Id.* at 66.

B. Statement of Facts

Mr. McGuire was born in 1954 in Montgomery, Alabama, where he graduated from high school in 1971. *Id.* at 1. After graduation, Mr. McGuire left Alabama to pursue a multi-decade career as a jazz musician and a hair stylist. *Id.* In 2010 — at 57 years old — Mr. McGuire returned with his wife to Montgomery to take care of his aging mother and be close to other relatives. *Id.* "Unbeknownst to Mr. McGuire, his arrival coincided with the 2011 promulgation of the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA")." *Id.*

Thirty years ago (in 1985), when Mr. McGuire was 30, he raped and assaulted his then-romantic partner. *Id.* Mr. McGuire's romantic partner was 30 years old at the time of the offense, and the two had been in a committed relationship for five years at the time. *Id.* Twenty-nine years ago (in 1986), Mr. McGuire was convicted of that offense. *Id.* More than twenty-five years ago (by 1990), after completing three years in prison and a fourth year on parole, Mr. McGuire had completed his sentence and fully repaid his debt to society — at least as the laws of the time then dictated. *Id.* Now 60 years old, Mr. McGuire has not committed another crime either before or since his offense 30 years ago. *Id.*

For the first 57 years of his life — including more than 20 years after he had repaid his debt to society — Mr. McGuire had never been required to register as a sex offender. *Id.* at 2. Because of the effects of ASORCNA, "Mr. McGuire now

lives homeless and unemployed under a bridge in his hometown," *id.*, and two other homeless registrants also live in Montgomery. *Id.* at 8. Even though Mr. McGuire can afford to pay rent (on a home in which his wife lives), ASORCNA's residency restrictions have forced him to live under a bridge. *Id.* at 1, 9–10.

ASORCNA prohibits Mr. McGuire from living with his aging mother (for whom he moved back to Montgomery to take care of), other relatives in the area (who would gladly have him), and even his own wife (who would love to live with her husband), because all these people live within the enormous zone of exclusion created by ASORCNA's residency restrictions. *Id.* Montgomery law enforcement agents told Mr. McGuire that he could not live in fifty to sixty other homes in the city but they are "non-compliant." *Id.* at 10. As found by the district court, "conservatively, 80 percent of the city's housing stock was not ASORCNA-compliant, thereby creating a large, residential 'zone of exclusion.'" *Id.* Even for homes that are not within ASORCNA's zone of exclusion, many are occupied (*i.e.*, not available for sale or rent) and many others are prohibitively expensive. *Id.*

In addition to the debilitating fact that more than 80% of housing in Montgomery falls within ASORCNA's zone of exclusion, ASORCNA compounds the problem further because the "precise extent of the zone of exclusion is an ever-moving target, changing almost daily with the ebb and flow of real estate transactions." *Id.* As a result, the district court correctly held that "[a]ccurately

accounting for housing availability for sex offenders is, in short, an unresolvable nightmare for law enforcement. For registrants, who bear the burden of locating such housing under the penalty of several felony offenses should they make the wrong decision, keeping track is impossible, period." *Id.*

In addition to causing Mr. McGuire to be homeless, ASORCNA has prevented him from taking gainful employment: "Before moving to Alabama in 2010, Mr. McGuire was employed as a hair stylist and musician. Since moving to Alabama, ASORCNA has prevented Mr. McGuire from accepting or applying for a number of jobs, including music-related engagements." *Id.* at 11. "Indeed, under ASORCNA, approximately 85 percent of jobs in the city are barred to offenders (creating an employment 'zone of exclusion')." *Id.* at 11 n.7. ASORCNA's enormous zone of exclusion has contributed to — if not directly caused — 50% of registrants in Montgomery to be unemployed (well above the statewide average). *Id.* As the district court correctly held, ASORCNA directly impedes Mr. McGuire's ability to earn income: "There is no question that Mr. McGuire's musical employment has been and will continue to be negatively impacted by ASORCNA. In particular, Mr. McGuire proved that he continues to turn down musical performances because the performances are scheduled in venues located in non-compliant areas." *Id.* at 16.

ASORCNA does not stop at causing Mr. McGuire's homelessness and

unemployment; it also impedes his ability to travel. *Id.* at 11. ("Mr. McGuire has also had to limit his travel – a hobby he enjoyed prior to moving to Alabama – because of the three-day travel permit requirement. Applying for the permit requires registration at two jurisdictions for all in-town offenders, homeless or not."). Moreover, ASORCNA brands all registrants' drivers licenses with red-lettering (ALL CAPS) imprint: "CRIMINAL SEX OFFENDER." *Id.* at 33. As the district court found, the "red-lettered labelling of registrant driver's licenses is no doubt an aggressive provision. Mr. McGuire illustrated how the required red lettering on his driver's license leads to shame and embarrassment in ordinary, everyday encounters with the public . . . . In fact, the only other red lettering that appears on an Alabama driver's license is the State's name." *Id.* at 33–34. On top of all this, ASORCNA requires Mr. McGuire to register 112 times per year — a requirement vastly exceeding that of every other state in the country. *Id.* 28–29.

The district court's factual findings illustrate one thing: ASORCNA ruins the lives of registrants, even individuals like Mr. McGuire, who has never hurt a child and whose only crime was against an adult more than 30 years ago. Mr. McGuire will never be relieved of ASORCNA's onerous effects because ASORCNA includes no meaningful relief provisions, even for individuals like Mr. McGuire who pose no threat to anyone, let alone children: "If he is not determined to be 'terminally ill or permanently immobile,' Ala. Code § 15-20A-23(a), Mr.

McGuire will continue to be subject to all these restrictions until he is 90 or 100 years old." *Id.* at 61 n.38.

"Mr. McGuire is not merely subject to isolated provisions; rather, his life is controlled by each of ASORCNA's components operating in unison." *Id.* at 58. "In fact, for the rest of his life, he is subject to the most comprehensive, debilitating sex-offender scheme in the land, one that includes not only most of the restrictive features used by various other jurisdictions, but also unique additional requirements and restrictions nonexistent elsewhere, at least in this form." *Id.* at 2.

C. Standard of Review

Although Plaintiff-Appellant does not challenge any of the district court's factual findings, this Court reviews such findings for clear error; legal conclusions and the application of law to fact (*i.e.*, "mixed questions of law and fact") are reviewed *de novo*. *See, e.g.*, *Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 765 (11th Cir. 2003) ("We review the district court's findings of fact for clear error and its legal conclusions and mixed questions of law and fact de novo.").

In the *ex post facto* context, whether a law punishes individuals for past crimes is a legal question reviewed *de novo*. *See Smith v. Doe*, 538 U.S. 84, 92 (2003) ("Whether a statutory scheme is civil or criminal is first of all a question of statutory construction.") (internal quotation marks omitted). This Court's determination (or lack thereof) as to legislative intent creates three options for

further analysis: (1) If this Court finds that the Alabama legislature intended ASORCNA to impose punishment, "that ends the inquiry" and ASORCNA must be declared unconstitutional. *Id.* (2) If this Court cannot determine whether the Alabama legislature intended ASORCNA to be punitive or non-punitive, this Court can "neutrally evaluate the Act's purposes and effects" to determine the penal nature of the statute. *Id.* at 115 (Ginsburg, J., dissenting). (3) If this Court concludes that the legislature only intended ASORCNA to be non-punitive, this Court must examine the whether the purposes and effects of ASORCNA can be shown by the "clearest proof" to be punitive. *Id.* at 92.

IV. Summary of Argument

ASORCNA is "the most comprehensive, debilitating sex-offender scheme in the land," Opinion, p. 2, and because it is limitlessly retroactive, it violates the *Ex Post Facto* Clause. No other state has even attempted to impose the extremely debilitating effects embodied in ASORCNA; ASORCNA goes miles beyond the comparatively minor schemes approved by this Court and the Supreme Court; and numerous state and federal courts have stricken down sex-offender restrictions that are even less debilitating.

Seven categories of restrictions under ASORCNA are severely punitive, with no connection at all to protecting children. These seven categories — which represent almost all of ASORCNA's effects — include residency restrictions,

employment restrictions, travel restrictions, public branding and shaming, overbearing registration requirements, 115 felony provisions, and lifetime application paired with no meaningful relief provisions or offense-based delineation. The result of this scheme leaves registrants like Mr. McGuire homeless and unemployed, unable to live with his own wife and having to turn down paying work because it is within ASORCNA's enormous zones of exclusion. Despite the overwhelmingly punitive effects, there is no benefit to the statute; ASORCNA allows homeless, unemployed registrants to spend all day near schools, as long as they return to their bridge to sleep at night. ASORCNA's punitive provisions apply even to offenders like Mr. McGuire, whose only crime was 30 years and who has never hurt a child in his life.

ASORCNA's comprehensive regime of punitive effects is unmatched across the country; no other state applies such a severe combination of punitive provisions to sex offenders as a class. The statute's provisions satisfy each of the *Mendoza-Martinez* guideposts for assessing a violation of the *Ex Post Facto* Clause.

Given these severely punitive effects with no connection to public safety, it is clear that the legislature's intent was punitive, for the legislature can be presumed to have intended the natural and probable consequences of its actions. It is common sense, confirmed by academic research, that denying housing and employment only increases risk to public safety. It is common sense that

restricting travel, branding someone with a marker to the community, and applying onerous registration requirements are all factors that harm an individual's reintegration into society. The Alabama legislature can be presumed to have intended these punitive consequences, as they are the natural and probable consequences of its actions.

ASORCNA's debilitating and punitive effects go beyond that of any scheme reviewed by any court across the country, including numerous restrictions that have been stricken down by state and federal courts. For all of the reasons argued herein, the district court's opinion should be reversed in part with instructions to declare ASORCNA unconstitutional in its entirety.

V. ASORCNA Violates the *Ex Post Facto* Clause of the United States Constitution

ASORCNA's punitive effects are profound: the statute made Mr. McGuire homeless (along with dozens of other registrants in Alabama), forced Mr. McGuire to decline employment as a musician (and contributed to a 50% unemployment rate amongst registrants), infringed on Mr. McGuire's fundamental right to travel, humiliated Mr. McGuire by branding his driver's license with the words "CRIMINAL SEX OFFENDER," and severely burdened Mr. McGuire by requiring a minimum of 112 registrations per year. These and other facts — found by the district court and discussed more fully below — show that ASORCNA's cumulative effects are so punitive that they violate the *Ex Post Facto* Clause of the

United States Constitution. U.S. Const. art. I, § 10, cl. 1.

The *Ex Post Facto* Clause prohibits increasing the punishment for criminal acts after they are committed. *See Calder v. Bull*, 3 U.S. 386, 390 (1798); *see also Collins v. Youngblood*, 497 U.S. 37, 38 (1990). Under Supreme Court precedent, this Court must engage in a two-part inquiry to determine whether a statutory scheme violates the *Ex Post Facto* Clause, examining both legislative intent and any punitive effects. *See Smith v. Doe*, 538 U.S. 84, 92 (2003). If the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil," it violates the *Ex Post Facto* Clause. *Id.* (bracket in original). Importantly, although the Supreme Court has noted five guideposts that may be helpful in an *ex post facto* analysis, *id.* at 97, the five guideposts are "neither exhaustive nor dispositive" and "[n]o one factor should be controlling as they 'may often point in different directions.'" *Hudson v. United States*, 522 U.S. 93, 101 (1997) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). The fundamental inquiry — regardless of the guideposts — is whether the effects of the challenged statute are punitive.

ASORCNA's unconstitutionality is shown by (A) the excessively debilitating nature of the scheme as a whole, (B) the statute's debilitating and punitive effects and (C) the legislature's punitive intent, as made plain by the natural and probable consequences of ASORCNA.

A. ASORCNA's Excessively Debilitating Nature Is Highlighted by Less Severe Restrictions that Have Been Stricken Down by Courts Across the Country

ASORCNA is the most restrictive and debilitating sex-offender scheme every devised by any legislature. *Id.* at 2. The only sex-offender scheme condoned by the Supreme Court lacks virtually all of the punitive and debilitating features shown by ASORCNA. *See Smith v. Doe*, 538 U.S. 84, 90 ("The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system."). Moreover, "Alabama's scheme goes miles beyond the minimum federal requirements of the Sex Offender Registration Act ('SORNA'), recently reviewed in this Circuit in *United States v. W.B.H.* *See* 664 F.3d 848 (11th Cir. 2011)." Opinion, p. 29. Alabama's scheme is beyond the pale, and well beyond what any other state has attempted to do. *Id.* ("[N]o court has ever been faced with analyzing *in toto* the general effects of a scheme this expansive."). The district court summarized ASORCNA thusly:

> To put it bluntly, it is the most comprehensive scheme, by far, in the United States. It is unique and novel in scope. No other state combines in-person registration, community notification, driver's license branding, residency restrictions, employment restrictions, travel restrictions, association with related children restrictions, weekly registration for the homeless, dual registration for all offenders in municipalities, and dual weekly registration for all homeless offenders in municipalities (totaling up to 112 in-person registrations per year), undergirded by 115 felonious ways to violate the statutory scheme, life application, retroactive to infinity or eternity (whichever first occurs), and all of it (except very limited exceptions for relatively minor offenses) without risk assessments for general sex offenders.

Id. at 28–29. To illustrate ASORCNA's uniquely debilitating effects, the district court also added:

> Only 13 other states restrict residency . . . , only 15 other states restrict employment . . . , and only 9 restrict both residency and employment. No other state requires dual reporting to both the sheriff and the police department, and only one other state (Tennessee) contains travel restrictions. Only five other states are infinitely retroactive combined with lifetime application, meaning that the vast majority of states have some limit as to how far back or how far forward their provisions apply. Put together, there is not a single state that matches the cumulative and punitive effects of Alabama's ASORCNA – in fact, none even comes close.

Id. at 29 n.18 (internal quotation marks omitted); *see also id.* at 60 ("[N]o other state has a scheme whereby sex offenders are retroactively regulated for life through residency, employment, and travel restrictions."). Although this Court and the Supreme Court have condoned limited sex-offender schemes, those cases involve nothing near the set of restrictions created by ASORCNA. *Id.* at 58 ("[B]oth *Smith* and *W.B.H.* were dealing with schemes with only a fraction of the features embodied in ASORCNA.").

Despite the fact that ASORCNA is unmatched and unparalleled across the country, numerous federal courts have stricken down restrictions even less severe than Alabama's. *See, e.g.*, *United States v. Medina*, 779 F.3d 55, 63 (1st Cir. 2015) (striking down restrictions on a sex offender viewing pornography); *United States v. McLaurin*, 731 F.3d 258, 264 (2d Cir. 2013) (striking down PSG testing for a

former sex offender who was charged for violating SORNA after failing to register more than ten years from the date of his sexual offense); *United States v. Weber*, 451 F.3d 552, 563 (9th Cir. 2006) (striking down PSG testing requirements as not reasonably necessary and involving a greater deprivation of liberty than reasonably necessary); *United States v. Tipton*, No. 3:91-CR-52, 2014 WL 5089888, at *4 (E.D. Tenn. Oct. 9, 2014) (striking down requirement for a sexual evaluation twenty-two years after the original conviction) (not reported); *United States v. Behren*, No. 04-CR-00341, 2014 WL 4214608, at *5 (D. Colo. Aug. 26, 2014) (striking down requirements for a complete sexual history that would present a risk of self-incrimination) (not reported); *American Civil Liberties Union of Nevada v. Cortez Maso*, 719 F. Supp. 2d 1258 (D. Nev. 2008); *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007) (not reported);.

In addition to the numerous federal courts that have rejected sex-offender restrictions less severe than ASORCNA, countless state courts have done so as well, including invalidating residency and registration provision less debilitating than ASORCNA. *See, e.g., In re Taylor*, 343 P.3d 867, 879 (Cal. 2015) (striking down 2,000-foot residency restrictions because they "cannot survive even the more deferential rational basis standard of constitutional review"); *Riley v. New Jersey State Parole Bd.*, 98 A.3d 544, 559 (N.J. 2014) (invalidating registration requirements for a twenty-four hour GPS monitoring device for former sex

offenders); *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *Hevner v. State*, 919 N.E.2d 109 (Ind. 2010); *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. 2010); *State v. Simnick*, 779 N.W.2d 335 (Neb. 2010); *Com. v. Baker*, 295 S.W.3d 437 (Ky. 2009); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. State*, 189 P.3d 999 (Alaska 2008) (striking down registration and notification provisions as violating the state's *ex post facto* protection); *ACLU of NM v. City of Albuquerque*, 137 P.3d 1215, 1229 (N.M. Ct. App. 2006) (invalidating restrictions on sex offenders being left alone with children as well as striking down restrictions that required DNA samples and dental imprints from registrants).

B. ASORCNA's Debilitating Effects Are so Punitive that They Override Any Putative Civil Intent

The debilitating effects of ASORCNA are so punitive that they override any purported civil intent. ASORCNA's punitive effects are most vividly displayed in seven categories of restraints in the statutory scheme: (i) residency restrictions, (ii) employment restrictions, (iii) travel restrictions, (iv) branding of driver's licenses, (v) excessive reporting requirements, (vi) 115 Class C felonies, and (vii) lifetime application and limitless retroactivity without offense-based delineation.

i. ASORCNA's Residency Restrictions Have Severely Punitive Effects with No Benefit to Public Safety

ASORCNA's residency restrictions have only punitive effect, with no

rational connection or benefit to public safety. Under ASORCNA, registrants are banned from living within 2,000 feet of a school, daycare, or home daycare and also prevented from living with any children, even nieces and nephews (excepting direct offspring and grandchildren). Ala. Code § 15-20A-11(a), (d). These direct restraints apply regardless of when a registrant's crime was committed and regardless of whether the crime involved a child or adult. Ala. Code § 15-20A-3(a). Thus, even Mr. McGuire — whose only crime was 30 years ago against a 30-year-old woman — cannot live with the brother and nieces who would gladly have him, despite the fact that Mr. McGuire has never hurt a child in his life. *See* Opinion, pp. 1, 9–10, 46.

ASORCNA's "grandfather clause" is extremely limited, making an exception only for individuals who establish a residence before a nearby school or daycare comes into existence. Ala. Code § 15-20A-11(c). Thus, the "grandfather clause" does not protect individuals who established a residence before ASORCNA's enactment — only those who establish a residence before a school or daycare comes into existence. As an example, if a school is opened in 1949, an individual purchases a nearby house in 1950, he commits a sex offense in 1951 (50 years before ASORCNA), and he becomes subject to ASORCNA in 2011, the "grandfather clause" offers no protection and the homeowner is required to move.

As discussed below, ASORCNA's residency restrictions (a) have severely

punitive effects and (b) do nothing to benefit public safety.

a. ASORCNA's Residency Restrictions Have Severely Punitive Effects

ASORCNA's residency restrictions are self-evidently the kind of "affirmative restraint" the Supreme Court has recognized as running afoul of the *ex post facto* provision. *Smith*, 538 U.S. at 99–100 (recognizing the constitutional infirmities of statutes that cause physical restrictions). These restrictions create an enormous zone of banishment, encompassing downtown, midtown, and nearly the entire populated area of the city of Montgomery. Trial Exhibit 64, Wagner Affidavit, at Fig. 3. The practical effect of ASORCNA's 2,000-foot rule excludes registrants from over 80% of the housing stock in Montgomery. Opinion, p. 10. There is nothing minor or indirect about ASORCNA's zone of banishment; it effectively bars residents from virtually all residential areas. This single provision is so punitive in its impact that it caused Mr. McGuire — and likely dozens of others across the state — to become homeless.

As Mr. Wagner's map shows, entire portions of Montgomery, including all of downtown, all of midtown, and countless other neighborhoods, are entirely off-limits to registrants. Trial Exhibit 64, Wagner Affidavit, at Fig. 3. Of the few remaining habitable areas that are not excluded by ASORCNA, many of them are extravagantly expensive and many others are not available for purchase or rent. Opinion, p. 10 ("It is undisputed, however, that much of the City's housing is not

available for sale or rent at any one time, and Mr. McGuire's expert testified that some of the available housing stock is in expensive neighborhoods and some is in undeveloped rural areas."). The enormity of ASORCNA's zone of exclusion left Mr. McGuire to check approximately 60 homes; each and every address was restricted. *Id.*

ASORCNA is exactly the type of law that, as described by the Supreme Court, falls within the traditional forms of punishment. ASORCNA's residency restrictions "in effect cast the person out of the community." *Smith v. Doe*, 538 U.S. 84, 98 (2003). A law that cuts off over 80% of the housing stock, forcing individuals like Mr. McGuire to sleep under a bridge rather than in the home he pays rent for his wife to live in, clearly results in excessively punitive effects. The record conclusively establishes that ASORCNA caused Mr. McGuire's homelessness. Mr. McGuire can afford to pay rent on a home, and he does so. *Id.* at 10. Mr. McGuire searched laboriously for a compliant address, checking approximately 60 different residences, only to be told each time that he could not live at any of the addresses he researched. *Id.* Mr. McGuire is not someone who can be blamed for his homelessness. But for ASORCNA's direct restraints, Mr. McGuire would be living with his wife in the home he pays rent for.

A law that causes even one person to be homeless is an unconscionable affront to the protections in the Constitution. The evidence in the record shows

that Mr. McGuire's experience is unfortunately not unique. There are at least three homeless registrants in Montgomery and perhaps dozens more statewide. *Id.* at 9.

b. ASORCNA's Residency Restrictions Do Nothing to Benefit Public Safety

The excessively punitive effects of ASORCNA's residency restrictions are not counterbalanced by any benefit to public safety, because ASORCNA's provisions have no rational connection to any putative civil purpose. The supposed purpose of the residency restrictions is to protect children, and yet, the residency restrictions apply to individuals like Mr. McGuire who have never harmed any child, ever. The district court recognized the irrational features of ASORCNA:

> [T]he residency and employment restrictions do not prohibit registrants from spending virtually unlimited amounts of time day or night within the restricted zones. While a registrant would be barred from sleeping at a residence within 2,000 feet of a school, nothing in ASORCNA would make it a crime for the registrant to spend all of his or her waking, daytime hours at that same residence, purportedly while school children would be nearby. Moreover, ASORCNA does not differentiate between registrants who committed sexual offenses against children and those who committed offenses against adults. All registrants are restricted from working or living within 2,000 feet of schools and daycares regardless of whether they have ever been convicted of a crime against a child. And no one has attempted to rationalize why, in view of the public safety rationale, Mr. McGuire and married registrants like him may spend two consecutive nights, not to exceed nine a month, in a restricted residence with a spouse.

Id. at 53. ASORCNA prohibits Mr. McGuire from sleeping at a friend's house across the street from a high school. Nonetheless, ASORCNA allows Mr. McGuire to spend every day at that same house, during the day, hanging out with

his friend. Mr. McGuire can share meals, play cards, and have conversation with his friend during the daytime, right across the street from the high school. He can do this day after day, without limit, all year long, as long as he does not sleep there. This completely irrational system keeps Mr. McGuire away from schools at night, when schools are closed and kids are at home, but allows Mr. McGuire to hang out during the daytime, when schools are open and kids are there.

The irrationality of ASORCNA prevents Mr. McGuire from living with his mom, brother, or wife — all supposedly to protect children — even though Mr. McGuire is no risk to any child and even though Mr. McGuire has never hurt any child at any time in his life. To heighten the irrationality, allowing family and other pro-social relationships would actually benefit public safety; instead, ASORCNA does the opposite.

Academic research unequivocally demonstrates that creating unstable housing conditions does nothing to protect public safety. In fact, as Dr. Prescott — Mr. McGuire's unchallenged expert — testified, creating unstable housing conditions actually leads to an increased risk of crime. Trial Exhibit 62, Prescott Affidavit. No reason or logic supports the homelessness caused by ASORCNA; no protection of children or public safety results. The scientific community confirms what is already common sense: taking away housing creates more of a risk of crime, not less. Dr. Prescott's expert conclusions show that laws like ASORCNA

— which create unreliable and unstable residency prospects — actually increase crime and hurt public safety. *Id.*

A law that tells someone whose only crime was 30 years ago — someone who has an immeasurably low, practically non-existent risk of ever committing another crime again — that he must live under a bridge rather than with his wife is not only irrational, illogical, and excessively punitive. It is absurd.

ii. ASORCNA's Employment Restrictions Have Severely Punitive Effects with No Benefit to Public Safety

Like its residency restrictions, ASORCNA's employment restrictions are severely punitive with no benefit to public safety. Under ASORCNA, registrants are banned from applying for, accepting, or maintaining employment within 2,000 feet of a school or daycare (including home daycares). *See* Ala. Code § 15-20A-13(a). Although ASORCNA includes a narrowly limited "grandfather clause," *see id.* § 15-20A-13(d), ASORCNA still prohibits "maintain[ing] employment" under the following circumstances, if there was a school or daycare within 2,000 feet of the job when it was accepted:

- a current registrant cannot maintain a job that she or he accepted before the effective date of ASORCNA, even though ASORCNA was not valid when she or he accepted the job;
- a current registrant cannot maintain a job that she or he accepted before registering under ASORCNA, even though she or he was not a registrant when she or he accepted the job;
- a current registrant cannot maintain a job that she or he accepted before being convicted of a relevant offense, even though she or he was not even required to register when she or he accepted the job.

In each of these examples, the employee would unlawfully be "maintain[ing] employment" and would therefore be guilty of a Class C felony. Ala. Code § 15-20A-13(g). The reason for this conclusion is that the "grandfather clause" only exempts situations where the school or daycare opened after the employee accepted the job. As a result, the so-called "grandfather clause" does nothing to protect an individual who has been working in the same job since 1970, for example, and who later comes under the provisions in ASORCNA in 2011 — if the job happened to be 1,999 feet from a school that opened in 1969.

As discussed below, ASORCNA's employment restrictions (a) have severely punitive effects and (b) do nothing to benefit public safety.

a. ASORCNA's Employment Restrictions Have Severely Punitive Effects

ASORCNA's employment restrictions are an "affirmative restraint" on any registrant's ability to find employment. The restraint is so severe that "under ASORCNA, approximately 85 percent of jobs in the city are barred to offenders (creating an employment 'zone of exclusion')." Opinion, p. 11 n.7. Unsurprisingly, ASORCNA has resulted in an unemployment rate amongst registrants of 50%, more than eight times Alabama's statewide average of 6.1%. *Id.* Although Defendants argue that other factors may contribute to registrants' difficulty finding jobs, just like registrants' difficulty finding homes, ASORCNA is

clearly a causal factor. *See id.* at 42 n.27 ("The decrease in employment opportunities mentioned here is a general effect arising from the explicit text of the statute — an effect that is necessarily faced by all offenders."); *id.* at 43 ("[E]very registrant has had the number of potential employers diminished based on nothing more than geographic proximity.").

Under clearly established Supreme Court precedent, employment restrictions like ASORCNA's raise grave constitutional concerns. "Without doubt," the Constitution protects the "right of the individual . . . to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Truax v. Raich*, 239 U.S. 33, 42–43 (1915) (recognizing that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment). To be constitutional, regulations on employment must be related to "the applicant's fitness or capacity to practice" the profession. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). Restrictions based on criminal history should take into account the nature and age of the offense. *Id.* at 241–243. Unlike other forms of occupational debarment, which have been upheld when limited to specific professions, *see Smith*, 538 U.S. at 100, ASORCNA bars registrants from any employment that falls inside its massive zone of exclusion.

Mr. McGuire is a talented musician who has the opportunity to participate in

paid performances, but because many venues are in restricted areas, Mr. McGuire is unable to take the jobs he is offered. Opinion, p. 16 ("There is no question that Mr. McGuire's musical employment has been and will continue to be negatively impacted by ASORCNA. In particular, Mr. McGuire proved that he continues to turn down musical performances because the performances are scheduled in venues located in non-compliant areas."). The same effects are suffered by any registrant who seeks self-employment based on individual skills or contract employment, such as day labor, within ASORCNA's vast zones of exclusion. ASORCNA directly prevents employment otherwise available to Mr. McGuire and other registrants.

Already excluded from living almost anywhere in Montgomery, ASORCNA's employment restrictions are an affirmative restraint that effectively results in complete banishment from the City of Montgomery. Someone like Mr. McGuire, who was born in Montgomery, graduated high school in Montgomery, and returned to Montgomery to care for his aging mother, is banished from taking practically any jobs in the city that is his home.

b. ASORCNA's Employment Restrictions Do Nothing to Benefit Public Safety

The severely punitive effects of ASORCNA's employment restrictions are not coupled with any benefit to public safety. The completely irrational scheme created by ASORCNA actually creates a higher risk of crime and therefore

threatens public safety, doing nothing whatsoever to protect children.

The irrationality of ASORCNA's employment restrictions can be illustrated by an example. For instance, Mr. McGuire is free to be at his friend's house across the street from a high school, during the day, when kids are there. He can hang out on the porch with nothing to do. But if Mr. McGuire's friend wants to pay Mr. McGuire to mow the lawn, fix the roof, or paint the living room inside, ASORCNA makes any such activity off-limits. Common sense tells us that a person such as Mr. McGuire would be busier painting the living room than just hanging out on the porch. And yet, irrationally, ASORCNA permits Mr. McGuire to sit around, unpaid, with nothing to do, while prohibiting Mr. McGuire from taking gainful, socially productive employment.

Nothing about ASORCNA's employment provisions makes any sense. Dr. Prescott underscored what is uncontroversial in the academic community and intuitively obvious to laypeople: removing job opportunities creates an increased risk of crime, not a decrease. Trial Exhibit 62, Prescott Affidavit. Exacerbating unemployment does not protect children or public safety; it creates a higher threat of criminal activity. *Id.* For this reason, Dr. Prescott's expert, peer-reviewed, empirical research concluded that laws like ASORCNA — which create barriers to employment — have a socially harmful impact when it comes to crime and recidivism.

iii. ASORCNA's Travel Restrictions Have Severely Punitive Effects with No Benefit to Public Safety

Like its residency and employment restrictions, ASORCNA's travel restrictions create onerously punitive effects without any connection to public safety. ASORCNA's restrictions require registrants to apply for and receive two permits — one from the sheriff's office and one from the police department — before leaving the county for more than two nights. Ala. Code § 15-20A-15(a). The Alabama Department of Public Safety, charged with enforcing ASORCNA's provisions, publishes the travel permits, which on their face require at least three days' notice to acquire the permit. Opinion, p. 11. In other words, if a registrant plans a three-day weekend (*i.e.*, Friday through Sunday) in another county or state, she or he must obtain two permits by Tuesday before traveling. As discussed below, ASORCNA's employment restrictions (a) have excessively punitive effects and (b) do nothing to benefit public safety.

a. ASORCNA's Travel Restrictions Have Severely Punitive Effects

ASORCNA's travel restrictions are so severe that they infringe on every registrants' constitutionally protected right to travel. The fundamental right to travel is an undeniable aspect of our constitutional framework. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be

free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."); *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) ("[T]he Constitution protects a right to travel locally through public spaces and roadways."); *Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir.1990) (recognizing that the Constitution "protects the right to travel freely within a single state"); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (holding that "the right to move freely about one's own neighborhood or town" is a fundamental liberty interest protected by the Due Process Clause).

ASORCNA restricts travel in two ways: first, it creates an impediment to all travel by requiring a permit from two agencies, and second, it creates an absolute bar to all spontaneous travel by making it a felony to travel without getting a permit at least three days in advance. Regarding the impediment to all travel, the statute stands in the way of each and every registrant's freedom to travel by requiring in-person permission from law enforcement. Opinion, p. 42 ("ASORCNA's requirement that an offender seek a permit before traveling restrains him or her from traveling spontaneously. These are direct, non-minor restraints and disabilities felt by those subject to them.").

Merely imposing a barrier to travel — even without prohibiting travel outright — violates a fundamental right. *See, e.g.*, *Jones v. Helms*, 452 U.S. 412,

419 (1981) ("[A] State may neither tax nor penalize a citizen for exercising his right to leave one State and enter another."); *Crandall v. Nevada*, 73 U.S. 35 (1867) (holding that a state cannot impose a tax on residents who desire to leave the state or on nonresidents passing through). If Alabama required every citizen to obtain a permit before traveling, it would clearly be unconstitutional; this fact highlights that Alabama's attempt to require a permit from registrants is punitive. Alabama is punishing registrants with a requirement that violates otherwise fundamental rights.

Restrictions on the right to travel are so punitive that courts only uphold them as part of punishment for individuals still on parole, probation, or supervised release. *See, e.g., United States v. Knights*, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.") (internal quotation marks omitted). But courts are quick to limit such restrictions to the period of punishment, holding that travel restrictions beyond the probationary period are unconstitutional. *See, e.g., Williams v. Wisconsin*, 336 F.3d 576, 581 (7th Cir. 2003) ("[P]arolees . . . have no right to control where they live in the United States; the right to travel is extinguished *for the entire balance of their sentences*.") (emphasis added); *United States v. Tortora*, 994 F.2d 79, 82 (2d Cir. 1993) (striking down restriction on international travel that extended beyond period of probation). Travel restrictions

are limited to the terms of probation because they are part of the punishment for a crime; extending travel restrictions beyond the term of punishment, as ASORCNA does, is therefore punitive.

b. ASORCNA's Travel Restrictions Do Nothing to Benefit Public Safety

Despite causing unconstitutionally punitive infringements on the fundamental right to travel, ASORCNA's travel restrictions offer no countervailing benefit to public safety or protection of children. Like all of the provisions discussed in this brief, ASORCNA's travel restrictions are not even tied to the type of offense committed. So, for example, Mr. McGuire is required to get two permits, three days in advance of travel, even though he has never committed any kind of crime — sexual or otherwise — against a minor, and even though he has not committed any crime at all in the past 30 years. The expert testimony of Dr. Prentky reveals that Mr. McGuire is extraordinarily unlikely to commit any crime at any point in the future, Trial Exhibit 63, Prentky Affidavit; the state has no rational reason to think that one-time offenders who have been offense-free for decades are likely to recidivate; and yet, even registrants like Mr. McGuire must apply for two travel permits three days in advance of traveling.

Courts are loathe to apply lifetime restrictions of the sort ASORCNA attempts, recognizing that such restrictions should be limited to the period of punishment or probation, and that such restrictions should be based on specific

factual findings. *See, e.g., United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006) ("But a court may not categorically impose such a condition [restricting a fundamental right] in every child pornography case that comes before it; since the relevant statutory and constitutional considerations look to whether the condition is more restrictive than what is needed to satisfy the governmental interest in a specific case, the district court must decide whether to impose such a condition based on specific facts.") Irrationally, ASORCNA imposes its restrictions for all time and with no specific factual assessment. A restriction so disconnected from reason or facts does not bear a rational connection to any supposedly civil intent.

iv. ASORCNA's Branding Requirements Have Severely Punitive Effects with No Benefit to Public Safety

Along with ASORCNA's punitive residency, employment, and travel restrictions, the statute's branding requirement punishes past offenders while doing nothing to benefit public safety. ASORCNA requires that the front of every registrant's driver's license be branded with the words "CRIMINAL SEX OFFENDER" in all capital, red letters. Opinion, p. 33 ("The red-lettered labelling of registrant driver's licenses is no doubt an aggressive provision. Mr. McGuire illustrated how the required red lettering on his driver's license leads to shame and embarrassment in ordinary, everyday encounters with the public."). Other than the state's name, "CRIMINAL SEX OFFENDER" are the only words branded in red on the driver's license. *Id.* at 34.

a. ASORCNA's Branding Requirements Have Severely Punitive Effects

ASORCNA's branding results in public embarrassment, humiliation, and shaming. A driver's license is used on a daily basis in all variety of activity, from shopping to visiting a library to buying bus tickets to banking to renting a car. The use of red lettering only serves to highlight for the public a designation of a registrant's past crime. This form of public shaming is exactly the category of effects the Supreme Court has stated can run afoul of the Constitution by "stag[ing] a direct confrontation between the offender and the public" resulting in "face-to-face shaming." *Smith v. Doe*, 538 U.S. 84, 98 (2003). The ubiquitous and required use of a driver's license in daily life, coupled with the red-letter branding of "CRIMINAL SEX OFFENDER," effectively "forc[es] an offender to appear in public with some visible badge of past criminality" — precisely the result the Supreme Court has recognized as punitive. *Id.* at 99. Indeed, because registrants must carry their driver's license every day for the rest of their life, the branding creates the kind of "permanent stigma" the Supreme Court has warned can violate the *Ex Post Facto* Clause. *Id.* at 98.

b. ASORCNA's Branding Requirements Do Nothing to Benefit Public Safety

While ASORCNA's branding requirements result in public shaming, they serve no non-punitive function. It cannot be denied that the vast majority of uses

of a driver's license involve interactions with the public; indeed, a driver's license is required by any cashier accepting a credit or debit card for payment. Even in the rare situations when a law enforcement officer is looking at a registrant's driver's license, that officer can simply confirm the registrants' past crimes by checking their computer or calling dispatch. And even if some rationalization could be given connecting ASORCNA's branding to public safety, any possible benefit would be entirely achieved by printing the past criminal history on the back of the license. Law enforcement officers in Alabama are certainly trained well enough to observe a designation printed on the back of a driver's license — where other restrictions and designations are printed. Law enforcement officers in Alabama are trained well enough to observe a designation that is not printed in red or in all capital letters. Such factors would avoid the public shaming ASORCNA creates while retaining any supposed benefit.

Defendants-Cross Appellants must concede that past criminal history on a driver's license does nothing to protect public safety. Indeed, no other criminal history is printed on the driver's license. An individual can have prior convictions for driving while intoxicated, or prior convictions for homicide, robbery, and many other violent crimes. No such convictions are branded on the driver's license. No rational explanation can be given for why law enforcement needs to know that someone has once committed a sexual offense.

The branding on the driver's license is so vague as to provide law enforcement with no meaningful information. The branding does nothing to differentiate one-time offenders from repeat offenders; it does nothing to differentiate those who have never hurt a child from those whose offenses were against children; it does nothing to differentiate those whose only crime was 30 years ago from those who committed a crime last year; it does nothing to differentiate misdemeanants from felony offenders. The branding "CRIMINAL SEX OFFENDER" would go on the license of someone whose only crime was a misdemeanor 70 years ago. Such a branding cannot even be called "information," for it imparts no information whatsoever.

There is no factual, academic, or scientific basis to believe that former sex offenders are any more likely to recidivate than other criminals. In fact, the peer-reviewed academic literature supports the opposite conclusion: sex offenders are less likely to commit future offenses. *See* Opinion, p. 54 n.35; *see also id.* at 45 ("In fact, sex offenders were less likely than non-sex offenders to be rearrested for any offense.") (quoting Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 Buff. L. Rev. 1, 57–58 (2010)). It is therefore of no benefit, and even misleading, to highlight with red branding that a registrant is a "CRIMINAL SEX OFFENDER." Even in the rare instance where a law enforcement officer is unable to confirm prior

convictions via computer or dispatch, the branded driver's license is not making the public any safer.

v. ASORCNA's Reporting Requirements Have Severely Punitive Effects with No Benefit to Public Safety

ASORCNA's reporting requirements are unreasonably and excessively punitive without doing anything to protect children or the public. ASORCNA requires all registrants in the City of Montgomery, for example, to register a minimum of eight times per year at a minimum of $80 in fees. Ala. Code § 15-20A-10, 22. Registrants must report to the sheriff's department a minimum of four times per year and four additional times to the police department; each report is accompanied by a mandatory $10 fee. Ala. Code § 15-20A-4(13), 22. This minimum of eight yearly registrations increases by two every time a registrant changes residences, changes jobs, changes physical appearance, or travels (for three or more days), because all such actions require an additional reporting to both the sheriff's and police departments. Ala. Code § 15-20A-10. On top of all these registration requirements, homeless registrants must also report twice per week, amounting to a minimum of 112 registrations per year. Ala. Code § 15-20A-12(b).

Redundant registrations are increased if a registrants lives, works, and goes to school in different counties, because ASORCNA requires sex offenders to register in-person four times per year, in each county and city of required registration. Ala. Code § 15-20A-10. In theory, this could be as much as eight

times per year for the city and county where a registrant lives, another eight times for the city and county of schooling, and another eight times for the city and county of employment, for a total of 24 registrations per year.

Each registration is accompanied by paperwork. Weekly registration involves a three-page form at the sheriff's department and a completely redundant, identical three-page form at the police department. Redundancy is the rule for quarterly registrations as well; registrants must fill out a twelve-page form at the sheriff's department, identical in substance to the twelve-page form at the police department. Opinion, pp. 7–8.

a. ASORCNA's Reporting Requirements Have Severely Punitive Effects

ASORCNA's reporting requirements create an excessive burden for all registrants, including fees amounting to fines and duplicative forms with no function. For homeless registrants, the punitive effects of ASORCNA are extreme.

Being forced to visit two different agencies for a total of eight times per year puts registrants in nearly constant risk of direct confrontations with the public. Reporting at both the sheriff's department and police department takes place in lobbies accessible by the public where members of the public have interacted with registrants. This kind of public confrontation is exactly the sort of effect recognized by the Supreme Court as punitive. *Smith v. Doe*, 538 U.S. 84, 98 (2003).

The punitive burden created by dual reporting is far from trivial. Registrants have to travel five miles between the two agencies. Opinion, p. 11. Registrants without a car have to rely on others for transportation, or they have to walk the five miles between the sheriff's office and the police department. *Id.*

These punitive effects are even more pronounced for homeless registrants. Mr. McGuire has to register two times per week in addition to the eight quarterly registrations per year, resulting in a total of 112 registrations every year. Ala. Code § 15-20A-12(b). These duplicative and redundant registrations serve no other purpose than embarrassment, humiliation, and shaming — Mr. McGuire recalled examples of having to walk five miles from his bridge to the sheriff's department, five more miles to the police department, and ten more miles back to his bridge. *Id.*

b. ASORCNA's Reporting Requirements Do Nothing to Benefit Public Safety

ASORCNA's reporting requirements have no rational connection to public safety. The Department of Public Safety has easy, electronic access to both the sheriff's and police departments. The sheriff's and police departments have easy, electronic access to each other. Either the sheriff's office or the Department of Public Safety can just as easily send the information to the police department. Instead, registrants have to drive or walk five miles to the police department to fill out completely redundant forms and pay another $10 fee. The irrationality of the

mandatory dual reporting is highlighted by registrants who live in areas where there is only a county (i.e., no city); there is no reason to believe that such registrants, who only report to a county agencies, somehow are any greater threat to public safety than those like Mr. McGuire who have to submit completely redundant reports to city and county. Those who only register at their county prove that dual registration serves no purpose.

Also lacking is any explanation of how a minimum of $80 in fines can possibly make the public safer, especially for registrants such as Mr. McGuire, who finished paying their debt to society over 25 years ago. Ala. Code § 15-20A-22. Because the $80 in fines increases every time a registrant moves or changes jobs, their true financial burden increases without any corresponding benefit to the public. Like all of ASORCNA's provisions, the fines apply for life, meaning that they can amount to thousands of dollars in aggregate as a registrant ages.

Because the eight quarterly registrations and 104 weekly registrations impose a punitive burden without any benefit to public safety, they are excessive.

vi. ASORCNA's 115 Class C Felonies Have Severely Punitive Effects with No Benefit to Public Safety

Of ASORCNA's 48 provisions, virtually every one is punishable as a Class C felony, and many create multiple felonies. The cumulative result is the creation of 115 felonies, including felonies for violation of all five of the categories discussed above. Opinion, p. 7 ("A violation of ASORCNA's requirements

potentially subjects the offender to one of 115 Class C felonies, 82 of which are applicable to Mr. McGuire. See, e.g., id. § 15-20A-15(h). Class C felonies in Alabama carry a sentence from one to ten years. Id. § 13A-5-6.”). It is a felony for a registrant to apply for a job that happens to be within 2,000 feet of a home daycare. Ala. Code §§ 15-20A-13(a). This draconian provision punishes registrants, preventing them from sending out resumes or applications to multiple jobs during a job hunt unless they have cleared each and every location in advance. The burden is particularly heavy given that the statute penalizes applying for a job, not just accepting a job. This example, in concert with 115 total felonies, illustrates a statutory scheme defined by constant threat of felony imprisonment. The result is 115 new felonies with (a) severely punitive effects and (b) no benefit to public safety.

a. ASORCNA’s 115 Class C Felonies Have Severely Punitive Effects

The punitive effects of ASORCNA’s overbearing felony structure are made most vivid by the sheer volume of felonies. All five categories discussed above (along with many more) include Class C felony provisions. For example, it is a felony for a registrant to forget to carry the branded driver’s license, even for one minute. Ala. Code § 15-20A-18(a), (f). Suppose Mr. McGuire, for example, was having lunch at his wife’s house and wanted to run to the corner store to buy a bottle of water. Even if Mr. McGuire intended to pay cash, and even if Mr.

McGuire intended to use a vending machine, it would be a felony to leave his branded driver's license at his wife's house. *Id.* As another example, if any registrant fails to register for any one of potentially 112 registrations, it is a class C felony, even if that registrant had filled out identical forms at one of the two required agencies. Ala. Code § 15-20A-12(f).

The arbitrariness of ASORCNA's 115 felonies places registrants in an impossible position: they have no way of knowing if their actions constitute a felony or not. For example, because neither the sheriff's office nor the police department publishes a map of zones of exclusion, registrants lack a straightforward reference to know which employers are in compliant areas. The maze of compliance is further complicated by the ever-changing landscape of school, daycares, and home daycares that may open and close unpredictably and without public advertising. Opinion, p. 10 ("Accurately accounting for housing availability for sex offenders is, in short, an unresolvable nightmare for law enforcement. For registrants, who bear the burden of locating such housing under the penalty of several felony offenses should they make the wrong decision, keeping track is impossible, period.").

Prosecution and imprisonment for a felony violation is the most punitive effect conceivable in the criminal code. ASORCNA's 115 felonies highlight the excessively punitive effects of the statute as a whole.

b. ASORCNA's 115 Class C Felonies Do Nothing to Benefit Public Safety

As self-evidently punitive are ASORCNA's 115 felonies, so too do they lack any benefit to public safety. Imprisoning someone for forgetting to carry their branded driver's license on a trip to the corner store does not protect children; prosecuting someone as a felon for applying to a job they did not know was restricted has no benefit to the public. The only effect of the 115 felonies is to return registrants to prison, even after they have finished paying their debt to society. ASORCNA is so densely saturated with felonies that it can only be reasonably defined as a criminal statute.

vii. ASORCNA's Lifetime Application without Offense-Based Delineation Has Severely Punitive Effects with No Benefit to Public Safety

All of the provisions discussed above — like the vast majority of ASORCNA's provisions — apply to every registrant for life, without regard to how long ago the offense occurred, the nature of the offense, or almost any other factor. Ala. Code § 15-20A-3(a). Although a few provisions apply only to juvenile offenders until they reach the age of majority (at which point all of ASORCNA's general provisions apply for life, *see* Ala. Code § 15-20A-28(c); Ala. Code 15-20A-30(h)), all of the provisions regarding adult offenders apply for life, meaning that the only way to get off the registry is to earn a pardon or to die. Moreover, ASORCNA's only narrow exception is for those who are terminally ill

or permanently immobile. Ala. Code § 15-20A-23. This means that Mr. McGuire, a 60-year-old registrant whose only crime was 30 years ago, cannot get relief from ASORCNA's restrictions. *Id.* Someone who has never been a threat to any child and who whose only crime was 30 years ago is still prohibited from living or working within 2,000 feet of a school or daycare.

a. ASORCNA's Lifetime Application without Offense-Based Delineation Has Severely Punitive Effects

Since moving to Alabama, Mr. McGuire has constantly been punished by ASORCNA's punitive restrictions, despite having paid his debt to society over 25 years ago. Now 60 years old, Mr. McGuire was a free citizen for over twenty years in the Washington, D.C. metropolitan area. Opinion, p. 1–2. He was not restricted in where he could live, work, or travel, or what his driver's license displayed regarding his prior conviction. After moving to Alabama, Mr. McGuire has been forced to sleep under a bridge rather than with his loving family.

The fact that Mr. McGuire will never be relieved of ASORCNA's restrictions — no matter how old he gets and no matter how much time passes from his only crime — extends the punitive effects month after month and year after year. Every week Mr. McGuire is homeless, he is punished by ASORCNA. Every month Mr. McGuire has to turn down paying work, he is punished by ASORCNA. Every year he is denied residency with his wife, mom, or brother, he is punished by ASORCNA. ASORCNA forces an aging person to live under a

bridge, with absolutely no prospect for leniency. *Id.* at 61 n.38 ("If he is not determined to be 'terminally ill or permanently immobile,' Ala. Code § 15-20A-23(a), Mr. McGuire will continue to be subject to all these restrictions until he is 90 or 100 years old.").

Even though Mr. McGuire qualifies for disability assistance, *id.* at 11, ASORCNA provides no process for relief based on disability. No matter what diseases Mr. McGuire contracts sleeping under a bridge, unless Mr. McGuire becomes terminally ill or permanently immobile, he cannot seek leniency under ASORCNA. Ala. Code. § 15-20A-23–25.

b. ASORCNA's Lifetime Application without Offense-Based Delineation Does Nothing to Benefit Public Safety

Needless to say, applying excessively punitive provisions to someone who poses no risk to public safety cannot possibly benefit public safety, and so ASORCNA's lifetime application without any leniency or relief procedures fails to protect children or society. ASORCNA continues to apply even to a harmless individual like Mr. McGuire, who — now at 60 — is stuck without any process for obtaining relief under ASORCNA.

Rather than helping protect public safety, ASORCNA's lifetime application actually hurts public safety. ASORCNA causes individuals like Mr. McGuire, who is no threat to anyone and who has never been a threat to a child, to live under

a bridge because none out of the 60 residences he checked was compliant. For other offenders, ASORCNA increases instability in housing and employment, resulting in further homelessness and unemployment — certainly not positive factors when assessing public safety. Rather than protecting children, ASORCNA only hurts registrants, even those whose age, length of time after conviction, and lack of offenses against children would logically warrant relief from ASORCNA's many restrictions.

viii. ASORCNA's Provisions Satisfy Each Relevant *Mendoza-Martinez* Guidepost

As mentioned above, a mechanical application of the *Mendoza-Martinez* guideposts should not override the fundamental question of whether ASORCNA's effects are punitive and therefore in violation of the *Ex Post Facto* Clause. Nonetheless, the discussion above makes clear that all five *Mendoza-Martinez* guideposts point toward a holding that ASORCNA is excessively punitive in violation of the *Ex Post Facto* Clause.

Under the first *Mendoza-Martinez* factor, ASORCNA's effects are analogous to the "tradition[al] [forms of] punishment." *Smith*, 538 U.S. at 97. The statute's residency restrictions foreclose over 80% of the housing stock in Montgomery. Opinion, p. 10. ASORCNA's huge zone of exclusion has caused Mr. McGuire's homelessness. Combined with the employment restrictions, ASORCNA's residency restrictions banish Mr. McGuire from the community, and

the Supreme Court has recognized banishment as a traditional form of punishment. *Smith*, 538 U.S. at 98. Another traditional form of punishment comes in the public shaming of Mr. McGuire's branded driver's license, which results in no other outcome than to embarrass him on a daily basis during routine tasks like shopping or going to the bank. The red branding "CRIMINAL SEX OFFENDER" functions as the kind of "scarlet letter" that has been historically regarded as a form of punishment. *United States v. W.B.H.*, 644 F.3d 848, 855 (11th Cir. 2011). Finally, ASORCNA creates a regime more punitive than parole, requiring 112 registrations per year with a minimum of $80 in annual fines. *Cf. Smith*, 538 U.S. at 101–102.

Regarding the second *Mendoza-Martinez* factor, ASORCNA's residency, employment, and travel restrictions are each an "affirmative disability or restraint." *Smith*, 538 U.S. at 97. Indeed, these restrictions directly restrain Mr. McGuire's freedoms of finding a place to live, choosing a job, and traveling outside of the county. All spontaneous travel is prohibited, based on the travel permit's three-day rule. Ala. Code § 15-20A-15. Even ASORCNA's reporting requirements create an affirmative disability, forcing Mr. McGuire to walk or get a ride for 20 miles just to fill out duplicative forms. Opinion, p. 11.

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 97. 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).

Relating to the fourth *Mendoza-Martinez* factor. ASORCNA's provisions are not "rationally [] connected" to any non-punitive intent. *Smith*, 538 U.S. at 97. Indeed, the very premises on which ASORCNA is based are completely false. ASORNCA's preamble assumes that sex offenders have a high rate of recidivism, but this claim could not be further from the truth. *See* Ala. Code § 15-20A-2. Compared to other offenders, many sex offenders have an astonishingly low likelihood of re-offending. Opinion, p. 45. Similarly, ASORCNA's preamble assumes that the number of sex offenders is one the rise. This assertion, too, lacks any basis in fact or reason. ASORCNA's lack of any rational connection to the stated intent is most vivid in the lack of any benefit to protection of children. *See generally supra* Section V.B.

Finally, ASORCNA's punitive effects are "excessive in relation to [any purported civil] purpose." *Smith*, 538 U.S. at 97. A law that forces Mr. McGuire to sleep under a bridge and turn down gainful employment — while simultaneously allowing Mr. McGuire to spend his days at a friend's house near a high school (if he so chooses) — serves only to punish. No civil benefit results from ASORCNA; the severely punitive effects are excessive.

Defendants-Cross Appellants' continued reliance on *Smith* is inapposite. The *Smith* Court approved a much more limited statute, which only made registration information available online without actively spreading the information to the public. *See id.* at 97–99. Suffice it to say, the plethora of punitive provisions in ASORCNA go well beyond the passive dissemination condoned in *Smith*, reaching the very levels the *Smith* court flagged would not survive constitutional muster. The fact that *Smith*'s sharply divided (6–3) opinion dealt with none of the provisions at play in ASORCNA underscores the unique and extreme punishments ASORCNA creates. Indeed, "no court has ever been faced with analyzing *in toto* the general effects of a scheme this expansive," and "Alabama's scheme goes miles beyond the minimum federal requirements of the Sex Offender Registration Act ("SORNA")." Opinion, p. 9. *See also id.* at 58 ("both Smith and W.B.H. were dealing with schemes with only a fraction of the features embodied in ASORCNA.").

By striking down ASORCNA on *ex post facto* grounds, this Court will join numerous other federal and state courts which have found sex-offender registration laws unconstitutional. *See, e.g., American Civil Liberties Union of Nevada v. Cortez Maso*, 719 F. Supp. 2d 1258 (D. Nev. 2008); *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007) (not reported); *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *Hevner v. State*, 919

N.E.2d 109 (Ind. 2010); *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. 2010); *State v. Simnick*, 779 N.W.2d 335 (Neb. 2010); *Com. v. Baker*, 295 S.W.3d 437 (Ky. 2009); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. State*, 189 P.3d 999 (Alaska 2008).

C. ASORCNA's Debilitating and Punitive Effects Demonstrate that the Legislature's True Intent Was Punitive and Any Other Putative Intent Is Merely a Pretext

The legislature's punitive intent in enacting ASORCNA is made plain by (i) the natural and probable consequences of ASORCNA, which are entirely punitive and (ii) the lack of any rational connection to any non-punitive effect.

i. The Legislature Can Be Presumed to Have Intended the Natural and Probable Consequences of Its Actions

The Alabama legislature can be held to the same standards as any mature, rational entity. At least for competent adults, our legal system justifiably presumes that an individual intended the natural and probable consequences of her actions. *See, e.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 570, n.22 (1973) (Marshall, J., concurring) ("[P]erhaps the oldest rule of evidence — that a [person] is presumed to intend the natural and probable consequences of [her] acts — is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent."). Absent some showing of insanity or diminished capacity, we presume an individual intended the effects of her actions; in short, we presume a modicum of rationality.

The Alabama legislature, composed only of competent adults, can and should be held to the same standard as any other rational entity. When the Alabama legislature enacts a law, this Court can presume it intended the natural and probable consequences of its actions. Reason, logic, and common sense are not strangers to the Alabama legislature, and it can thus be held to have intended what reason, logic, and common sense show: entirely punitive effects of ASORCNA.

Any rational layperson understands that depriving someone of stable housing and stable employment only increases the risk of criminal acts; banishing someone from huge sections of a city does nothing to help reintegrate them into society; branding someone as a "CRIMINAL SEX OFFENDER" does not help normalize their behavior into law-abiding standards.

Given the overwhelmingly punitive effects of ASORCNA, any stated non-punitive intent is a "sham or mere pretext." *Smith v. Doe*, 538 U.S. 84, 103 (2003). Unlike the Alaska law upheld in *Smith*, ASORCNA is entirely codified in the Code of Criminal Procedure. *Compare id.* at 95 (discussing provisions included in Alaska's Health, Safety, and Housing Code) *with* Opinion, p. 21 (recognizing that all of ASORCNA is codified in the criminal procedure code). Moreover, ASORCA comes replete with 115 felony provisions, ensuring its enforcement by prosecutors, criminal courts, and eventually prisons. The legislature's actions

reveal only a punitive purpose.

ii. Nothing About ASORCNA Reasonably Supports Any Non-Punitive Effect, So There Is No Basis to Presume Any Non-Punitive Intent

Because nothing in ASORCNA has any rational or logical connection to a non-punitive effect, there is no legitimate basis to presume a non-punitive intent; any putative statements by the legislature are mere pretext. The Alabama legislature's lack of non-punitive intent is shown by the legislature's failure to consult any academic research on how to best promote public safety.

It is no secret that legislatures sometimes enact laws with punitive intent, and sex-offender laws are often enacted with punitive intent. *See, e.g.*, *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007) (not reported). If the Alabama legislature was concerned with public safety, it would not have enacted restrictions with transparently punitive effects, such as residency, employment, and travel restrictions, and it would not have required branding of driver's licenses or excessive, redundant registrations.

If the Alabama legislature was concerned with public safety, it could have consulted any of the numerous peer-reviewed, academic studies into the effects of sex-offender registration policies. It would have seen Dr. Prescott and Dr. Rockoff's study, which shows that laws impairing residency and employment opportunities cause an increase in crime and an increase in recidivism. Trial

Exhibit 62, Prescott Affidavit. There is no evidence to suggest that the Alabama legislature was concerned at all with how ASORCNA might affect public safety. Instead, the legislature was motivated by the facially and logically direct consequences of ASORCNA: punishing former sex offenders for their past crimes

VI. Conclusion

A law that causes even one person to be homeless is unacceptable. A law that causes perhaps dozens of people to be homeless is an outrage. A law that prevents someone from taking paying, socially productive work is an affront to a free society. A law that prevents someone from living with his wife, brother, or aging mom is irrational. A law that forces a person to sleep under a bridge is absurd.

A law that does all of these things on the basis of a single crime more than 30 years old is unconstitutional. Almost no state would even attempt such a blatant affront to the protections in the United States Constitution and, except for ASORCNA, no state has even come close. In light of the *Ex Post Facto* Clause, ASORCNA's cumulative and punitive effects simply cannot stand.

The district court below struck down parts of ASORCNA but did not go far enough. Plaintiff-Appellant respectfully requests that this Court reverse-in-part the ruling below by declaring all of ASORCNA punitive and therefore prohibited by the *Ex Post Facto* Clause of the United States Constitution.

Respectfully Submitted,

/s/ J. Mitch McGuire
J. Mitch McGuire (MCG044)
McGuire & Associates, LLC
31 Clayton Street
Montgomery, Alabama 36104
334-517-1000 (voice)
334-517-1327 (fax)
jmcguire@mandabusinesslaw.com

/s/ Phil Telfeyan
Phil Telfeyan
Equal Justice Under Law
916 G Street, Suite 701
Washington, D.C., 20001
202-505-2058
ptelfeyan@equaljusticeunderlaw.org

Attorneys for Plaintiff-Appellant

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Certificate of Compliance

Pursuant Federal Rule of Appellate Procedure 32(a), undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 11,948 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel further certifies brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ J. Mitch McGuire */s/ Phil Telfeyan*
Attorneys for Plaintiff-Appellant

Certificate of Service

I certify that on April 15, 2015, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notice of such filing to the following counsel:

Andrew Lynn Brasher (abrasher@ago.state.al.us)
Charles Mcdowell Crook, Jr. (cmc@hsg-law.com, tmp@hsg-law.com)
James William Davis (jimdavis@ago.state.al.us, sclemens@ago.state.al.us)
Elizabeth Peyton Faulk (peytonfaulk@epflaw.com, paralegal@epflaw.com)
Thomas T. Gallion, III, (ttg@hsg-law.com)
Laura Elizabeth Howell (lhowell@ago.state.al.us, sclemens@ago.state.al.us)
Joseph Haran Lowe, Jr. (haran.lowe@dps.alabama.gov, tracy.fogarty@dps.alabama.gov)
Frank Timothy McCollum (tim.mccollum@dps.alabama.gov, tracy.fogarty@dps.alabama.gov)
J. Mitchell McGuire (jmcguire@mandabusinesslaw.com, pjordan@mandabusinesslaw.com)
Tyrone Carlton Means (tcmeans@meansgillislaw.com, egbandy@meansgillislaw.com, erobinson@meansgillislaw.com, RFSimmons@tmgslaw.com, tgmeans@meansgillislaw.com)
William G. Parker, Jr. (Wparker@ago.state.al.us, sclemens@ago.state.al.us)
Jason Cole Paulk (jpaulk@montgomeryal.gov)
Stacy Lott Reed (sreed@montgomeryal.gov, dpercival@montgomeryal.gov, eanthony@montgomeryal.gov, mhill@montgomeryal.gov, relebash@montgomeryal.gov)
Winfield James Sinclair (wsinclair@ago.state.al.us, sclemens@ago.state.al.us)
Phil Telfeyan (phil@equaljusticeunderlaw.org)
Constance Caldwell Walker (ccw@hsg-law.com)

/s/ J. Mitch McGuire */s/ Phil Telfeyan*
Attorneys for Plaintiff-Appellant