CASE NO. 15-6106

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUSTON SHAW,

Plaintiff/Appellant,

v.

ROBERT PATTON, in his official capacity as DIRECTOR OF THE OKLAHOMA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants/Appellees.

DEFENDANT/APPELLEE ROBERT PATTON'S RESPONSE BRIEF

ORAL ARGUMENT IS REQUESTED

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APPELLEE ROBERT PATTON'S RESPONSE BRIEF

Defendant/Appellee Robert Patton respectfully submits this Brief in response to Plaintiff/Appellant Juston Shaw's Opening Brief

PRIOR OR RELATED APPEALS (LOCAL RULE 28.2(C)(1) STATEMENT)

Pursuant to 10th Cir. R. 28.2(C)(1), Defendant/Appellee Robert Patton is not aware of any prior or related appeals.

STATEMENT OF JURISDICTION

Plaintiff brought this action under 42 U.S.C. § 1983 and Article 1, Section 10 of the United States Constitution. Plaintiff made an additional claim before the District Court under the Fourteenth Amendment to the United States Constitution, but it is not at issue in this appeal. The District Court exercised jurisdiction on both claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court possesses

jurisdiction to review the final judgment of the District Court, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly concluded that the Oklahoma Sex Offender Registration Act ("OSORA"), as-applied to Juston Shaw, does not violate the *Ex Post Facto* Clause, U.S. CONST. art. I, § 10—following a vast majority of state and federal jurisdictions that have rejected similar challenges—because OSORA does not impose punishment upon Shaw, but rather furthers the Oklahoma Legislature's clear intent that it is designed to be a civil, nonpunitive, regulatory scheme.

2. Regardless of the district court's reasoning that OSORA is nonpunitive as-applied to Shaw, did the district court err in concluding that OSORA was being retroactively applied to Shaw in light of the Oklahoma Supreme Court's decision in *Starkey v. Okla. Dep't of Corrs.*, 305 P.3d 1004 (Okla. 2013), which made the procedural determination that OSORA does not apply to an out-of-state resident with a sex crime conviction until the person enters Oklahoma with the intent to remain?

STATEMENT OF THE CASE

I. Relevant Facts

Shaw was convicted of sexual assault in violation of Section 22.011(a)(2) of the Texas Code of Criminal Procedure in 1998 for having sexual intercourse with a 14-year-old girl. *Aplt. App*. at 37. He pleaded guilty to that crime. *Id.* at 84. After serving a two-year prison sentence, Shaw was released. *Id.* at 85. Coincidentally, the version of the Texas registration statute in effect at the time of his conviction on February 2, 1998, required lifetime registration.[1] He initially testified that he moved from Texas to California in approximately 2002, *id.* at 85—likely to slough off the lifetime registration in Texas. Later, Shaw admitted to living in Albuquerque, New Mexico, where he was required to register, but claimed that he "forgot" about living there. *Id.* at 114:18-20. After accumulating some legal trouble in Albuquerque, *see id.* at 114-15, he moved to California. From California, Shaw moved to Louisiana before finally settling in Oklahoma in 2009. *Id.* at 87-88. There, he completely failed to register under Oklahoma law until the end of 2012

[1] Act of Sept. 1, 1997, ch. 668, 1997 Tex. Sess. Law Serv. (West) (codified at Tex. Code Crim. Proc. Ann. art. 62.12 (West 1997)), *renumbered by* Act of Sept. 1, 2005, ch. 1008, 2005 Tex. Sess. Law Serv. (West) (codified at Tex. Code Crim. Proc. Ann. art. 62.101 (West 2005)). Specifically, the 1997 version required lifetime registration for a person convicted of a "sexually violent offense." *Id.* art. 62.12(a). "Sexually violent offense" is defined as sexual assault in violation of art. 22.011 committed by a person over the age of 17. *Id.* art. 62.01(6)(A).

when he was informed of his duty to do so by Detective Tim Blanton with the Midwest City Police Department. *Id.* at 88-89.

Based on Shaw's Texas conviction, the Oklahoma Department of Corrections ("ODOC") determined Shaw's registration period to be lifetime. *See id.* at 103; *see also id.* at 21. Even on the date of the filing of this brief the Texas Department of Public Safety also has Shaw listed as a lifetime registrant based on Texas law,[2] which is contrary to his assertion that in California "he transferred and discharged his final registration obligations from the punishment originally imposed upon him as a result of his plea and conviction," *Aplt. App*. at 10. Below, Shaw sought to be completely removed from the OSORA registry. *Id.* at 15.

Shaw lived at a residence on a street named Country Club in the area where Oklahoma City, OK borders Choctaw, OK. *Id.* at 94:18-19. He ended up moving from that location because the owner "sold the property and the mobile home." *Id.* at 94:21-22. After, he "lived . . . on the outskirts of Moore[, OK]." *Id.* at 94:23-25. That property was damaged by a tornado. *Id.* at 95:1-2. Next, he lived at "Lake Liberty out in Guthrie[, OK]." *Id.* at 95:5-6. Shaw got into trouble at Lake Liberty, *id.* at 95:9-11, and had to serve eight months in the Logan County Jail, *id.* at 96:1-

[2] Juston Eric Shaw, Texas Dep't of Pub. Safety Sex Offender Registry, https://www.txdps.state.tx.us/administration/crime_records/pages/sexoffender.htm (follow "Sex Offender Search" hyperlink; follow "Registrant Name" hyperlink; then select box after reading "Caveats," and select "Continue" hyperlink"; then search "Last Name" for "Shaw" and search "First Name" for "Juston"; then follow "Search" hyperlink; then follow "Shaw, Juston Eric" hyperlink).

2. Shaw moved to his current address, 633 S.E. 28th Street, Oklahoma City, OK 73129, after he was released from Logan County Jail and after he was already registering under OSORA, although he claims he was told by unnamed probation officers that he did not have to register. *Id.* at 96:1-20. Thus, he created his current residency problem. Other than his present address, only one other address where Shaw lived was noncompliant. *See id.* at 185:5-15, 187:8-15, 227:10-14, 228:17-20.

Testimony from a representative with the Oklahoma City Department ("OCPD"), Lawana Hamrick, revealed that there are approximately 1,000 sex offenders registered in Oklahoma City. *Aplt. App*. at 176:21-23. Of those 1,000, approximately 800 have qualifying addresses that do not violate the residency restriction. *Id.* at 176:24 to 177:1. That is, 80% of sex offenders in Oklahoma City have a qualifying address. With respect to Shaw's 28th Street address, there are approximately 60-70 offenders with a qualifying address living within a two-mile radius of Shaw. *Id.* at 176:1-14. Shaw's probation officer with ODOC, Meredith Edge, testified that her caseload consists of approximately 80 sex offenders. *Id.* at 193:21 to 194:11, 195:12-13. Out of the 80 sex offenders in her caseload, 18 are considered transient, *id.* at 196:23 to 197:2, meaning they do not have a qualifying address. ODOC's mapping system (which is different than OCPD's) revealed 13 offenders with qualifying addresses within a one-mile radius of Shaw. *Id.* at 221:21

to 222:10. When viewed at three and five miles, an error message shows that too many results exist. *Id.* at 222:11-18.

Shaw is a residential home contractor, *Aplt. App*. at 115:18-20, and has never worked for a company that did work on schools, *id.* at 117:5-13, 118:4-6. He testified that he has no training to work with children. *Id.* at 118:2-3.

II. Procedural History

Shaw filed his Complaint alleging violations of the *Ex Post Facto* Clause; the Privileges and Immunities Clause of Article IV, Section 2; and the Equal Protection Clause of the Fourteenth Amendment. *Aplt. App*. at 14-15. He sued Robert Patton, the Director of ODOC, and Bill Citty, the Chief of OCPD. *Id.* at 9. Shaw stipulated to dismissal of all claims against Citty. *Id.* at 3. A motion to dismiss was filed by Patton, and all of Shaw's claims were dismissed with the exception of the *Ex Post Facto* claim. *See id.*

After Shaw's deposition, Patton filed a motion for summary judgment. *Id.* at 4. It was denied and the parties proceeded toward trial. *Id.* at 5. A non-jury trial was held before the district court on April 30, 2015. *Id.* at 6. The district court entered its order and judgment on May 13, 2015. *Id.* at 7. Shaw timely appealed. *See id.*

III. District Court Ruling after Bench Trial

The district court, after earlier concluding that OSORA was being retroactively applied to Shaw, *Aplt. App.* at 54 n.14, employed the two-step test from *Smith v. Doe*, 538 U.S. 84 (2003) to determine whether OSORA "may fairly be characterized as penal, imposing a retroactive punishment, or whether it may be categorized as a civil and nonpunitive regulatory scheme," *Aplt. App*. at 54. The test in *Smith* asks: (1) whether the intent of the legislature was to impose punishment; and (2) if the legislature's intent was to create a nonpunitive statute, whether the statute's effects are so punitive in nature as to deem its intent null and void. *Id.* at 54-55 (citing *Smith*, 538 U.S. at 92).

The district court noted that Shaw had conceded "'that there is insufficient evidence . . . . to conclude that the Oklahoma Legislature subjectively intended []SORA to be a punitive statute.'" *Aplt. App.* at 56 (alteration in original). Instead, it analyzed the factors found in step two of the *Smith* test based on the evidence presented at trial. *Id.*

As to the first factor, the district court found that any stigma attached to the registration is based on the "'dissemination of accurate information about a criminal record[.]'" *Aplt. App.* at 58 (alteration in original) (citing *Smith*, 538 U.S. at 98). It found that the publication of information "enhance[s] public awareness about the presence of sex offenders in the community." *Id.* In that same vein, it

held that "'[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.'" *Id.* at 58-59 (footnotes omitted). And although Shaw has continued to argue on appeal that the words "SEX OFFENDER" appear on driver's licenses, *see Appellant's Br.* at 22-23,[3] the district court concluded that that argument was "without merit," *Aplt. App.* at 59 n.27. Considering the traditional definition of banishment, the district court rejected Shaw's contention that the residency restrictions imposed by OSORA are akin to banishment, instead finding its adverse effects do not override "any legislative intent to create a civil, nonpunitive scheme." *Id.* at 60. It did find, however, that "to [a] . . . limited extent" the in-person reporting requirements are similar to probation, which has been traditionally regarded as punishment. *Id.* at 61.

Next, looking at the second factor, the district court considered "whether [O]SORA subjects Shaw to 'an affirmative disability or restraint[.]'" *Id.* When viewing the "buffer zones" and employment restrictions as a whole, the district court concluded any adverse effect did not overcome legislative intent. *Id.* at 62. Like the Alaska Sex Offender Registration Act ("ASORA") at issue in *Smith*, the district court noted that OSORA "does not forbid sex offenders from changing residences; it only obligates them to report any contemplated change in address

[3] Patton's citations to Shaw's brief are references to the page number provided by the Court's ECF system.

and to select a compliant address." *Id.* As to the employment restrictions, it stated, "[OSORA] does not . . . result in complete loss of livelihood, and it does not forbid change." *Id.* at 63. The district court found this factor weighed against Shaw. *Id.*

With the third factor, the district court considered whether OSORA promotes the traditional aims of punishment: retribution and deterrence. *Id.* at 63-64. Recalling Shaw's earlier concession that "'deterrence[] is not particularly probative,'" the district court turned to "its retributive impact." *Id.* at 64 (alteration in original). Noting Shaw's arguments that OSORA is about retribution because it makes no distinction based on risk of re-offense, the district court held that the absence of this distinction "does not mandate a finding that its effects are punitive in nature." *Id.* at 65. Ultimately, following the rationale of *Smith*, the district court found that the length of registration is reasonably related to the risk of recidivism. *Id.* at 66. This factor thus weighed against Shaw.

In short order the district court found that the fourth factor also weighed against Shaw. It held, "[O]SORA, like ASORA, 'has a legitimate nonpunitive purpose of "public safety, which is advanced by alerting the public to the risk of sex offenders in their communities."'" *Id.* This factor is most significant in the "'determination that the statute's effects are not punitive,'" and was "not strenuously argued otherwise." *Id.*

The fifth and last factor—excessiveness—tasked the district court with deciding whether "'the regulatory means chosen are reasonable in light of the nonpunitive purpose'"—not "'whether the [Oklahoma] [L]egislature has made the best choice possible to address the problem it seeks to remedy.'" *Id.* at 67 (alteration in original). Recognizing prior U.S. Supreme Court caselaw discussing "'the high rate of recidivism among convicted sex offenders and their dangerousness as a class,'" *id.*, the district court opined, "there has been no credible showing that the level assignments and/or the corresponding lengths of reporting requirements are not either reasonably related to the dangers of recidivism . . . or consistent with [O]SORA's objectives of regulating offenders' interaction with society," *id.* at 68.

In conclusion, and in consideration of all the evidence presented at trial, the district court made its decision: "Shaw has not satisfied his 'heavy burden[]' . . . to 'show . . . by the clearest proof, that the effects of . . . [SORA] negate [the Oklahoma Legislature's] intention to establish a civil regulatory scheme.'" *Id.* at 69 (second and third alteration in original). Accordingly, it entered judgment in favor of ODOC. *Id.*; *see also id.* at 70.

SUMMARY OF THE ARGUMENT

This case is, and has always been, an as-applied challenge by Shaw to the effects of OSORA on him. At times in his briefing he conflates the notion of an as-

applied challenge with a facial one—often arguing provisions of OSORA that either do not apply to him based on the date of his entry into the state or do not apply to him based on specific facts elicited at trial. Thus, the ultimate question is whether OSORA violates Shaw's rights under the *Ex Post Facto* Clause—not whether OSORA is unconstitutional in some theoretical sense against all individuals or a particular class of individuals.

As agreed upon by counsel at the district court, the intent-effects test in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), applies in this case. Because Shaw has conceded the argument that the Oklahoma Legislature designed a civil, nonpunitive, regulatory scheme, the second step of the test is used to determine whether the law's effects are so punitive as to override the legislature's intent to create a civil statute. The factors for the Court's consideration are whether the law:

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; and
5. is excessive with respect to this purpose.

538 U.S. at 97. "'[O]nly *the clearest proof*' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997) (emphasis added).

The features of OSORA do not resemble traditional punishment. Shaw is not subjected to shaming *because* of the act itself; rather, any "attendant humiliation is but a collateral consequence of a valid regulation.'" *Smith*, 538 U.S. at 99. As for banishment, Shaw has not shown that he has been forced to quit a place or removed completely from the community. In addition, testimony revealed that the majority of sex offenders in Oklahoma City find qualifying residences. By finding the in-person reporting requirements akin to probation, which is punishment, the district court erred because the reporting requirements are not punishment—their purpose is to verify where the offender lives.

While there are admittedly some places Shaw cannot live, there is nothing that actually prevents him from changing residences; he only has to select a qualifying address. The same is true for any job restraints, although testimony at trial revealed that none of the job restrictions apply to Shaw. Any restraints imposed on Shaw are not nearly as restrictive as the involuntary civil commitment scheme at issue in *Kansas v. Hendricks*, 521 U.S. 346 (1997), which was found to be nonpunitive by the Court based on the statute's purpose, *id.* at 363.

OSORA's purpose is to protect the public safety. OKLA. STAT. tit. 57, § 581(B) (Supp. 2009).[4] Shaw has conceded that the traditional aim of punishment, deterrence, is not particularly probative. *Appellant's Br.* at 28. And while he continues to argue that the length of reporting requirements is not tied to any individual assessment of future risk, there is nothing that requires him to be given an individualized risk assessment. No evidence was offered to prove that OSORA is more about retribution than about protecting public safety.

Even the Oklahoma Supreme Court has conceded that OSORA is rationally related to the legitimate government interest of public safety.

Considering OSORA's stated purpose, the features of the law are not excessive. The law may not be a perfect fit, but it does not have to be. The levels are tied to the severity of the crime, which in turn ensures those individuals will be subject to it longer.

Because all five factors weigh against Shaw, this Court should affirm the decision of the district court in denying Shaw declaratory and injunctive relief. Alternatively, this Court could affirm for an alternate reason—OSORA is not being retroactively applied to Shaw because he was a lifetime registrant in Texas

[4] Based on the parties' stipulation that Shaw entered into Oklahoma in 2009, *Aplt. App*. at 37, Patton has cited to the 2009 version of the Oklahoma Statutes unless otherwise indicated.

and did not enter Oklahoma until 2009 and thus was not subject to the law until then.

ARGUMENT

I. OSORA, AS-APPLIED TO SHAW, IS A CIVIL, NONPUNITIVE, REGULATORY SCHEME AND DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

The *Ex Post Facto* Clause provides: "No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . ." U.S. CONST. art. I, § 10, cl. 1. It is "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 504 (1995). A law that violates the clause thus must be both retroactive and penal. *See Weaver v. Graham*, 450 U.S. 24, 29 (1981). In ruling on Patton's motion for summary judgment, the district court determined that OSORA was being retroactively applied to Shaw. *Aplt. App.* at 54 n.14.

Once it is determined that a law is being retroactively applied, a two-step test is used to judge whether the application of the law violates the *Ex Post Facto* Clause by imposing punishment: (1) whether the intent of the legislature was to impose punishment; and (2) if the legislature's intent was to create a nonpunitive statute, then the statute still must be examined to see if its effects are so punitive in nature as to deem its intent null and void. *Smith*, 538 U.S. at 92. "'[O]nly *the clearest proof*' will suffice to override legislative intent and transform what has

been denominated a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 100 (emphasis added).

Before the district court, Shaw conceded "'that there is insufficient evidence . . . . to conclude that the Oklahoma Legislature subjectively intended []SORA to be a punitive statute.'" *Aplt. App*. at 56 (alteration in original); *see also Starkey*, 305 P.3d at 1020 (assuming OSORA "was intended to be a civil regulatory scheme"). The same is true on appeal, *Appellant's Br*. at 21, thus the controlling analysis is the effect of OSORA on Shaw.

Reviewing the effects of OSORA for punitive effect places a "heavy burden" on Shaw in seeking to override the legislature's stated intent. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). There are "limited circumstances" where a litigant will be able to do so. *Id.* This is because "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). In *Smith*, the U.S. Supreme Court analyzed the following factors,[5] which it said were "useful guideposts," to determine ASORA's effects: whether the law "[1] has been regarded in our history

[5] There are actually seven factors in the *Mendoza-Martinez* analysis, but the Court in *Smith* gave little weight to two—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—because ASORA, like OSORA, applied "to past conduct, which was, and is, a crime." 538 U.S. at 105.

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." 538 U.S. at 97.

With Shaw's concession that OSORA was not intended to be punitive, a review of the effects of the law, as-applied to Shaw, shows that its effects do not override the Oklahoma Legislature's stated intent that the law is nonpunitive.

A. OSORA does not Resemble Traditional Forms of Punishment.

Because sex offender registration statutes are fairly new, they do not contain attributes that have "been regarded in the Nation's history and traditions as a punishment." *Smith*, 538 U.S. at 86. Shaw claims that OSORA resembles three traditional forms of punishment: shaming, banishment, and probation. *Appellant's Br*. at 22. The district court addressed all three arguments. *Aplt. App.* at 57-61. Nothing about OSORA, however, looks like a traditional form of punishment.

Analyzing ASORA, the Court found traditional forms of punishment such as "whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public." *Smith*, 538 U.S. at 98. Even for those forms of punishment that did not have a physical component, it found, "involved more than the dissemination of public information. They either held the person up before his fellow citizens for face-to-face shaming or *expelled him from*

the community." *Id.* (emphasis added). OSORA, like ASORA, disseminates "accurate information about a criminal record, most of which is already public." *Id.* Indeed, the reason Shaw began registering in 2012 is because a neighbor searched his name online and found he was registered in Texas and New Mexico. *Aplt. App.* at 185:2-17, 228:3-8, 17-23; *see Smith*, 538 U.S. at 100 (dismissing as conjecture that registration will cause greater harm because landlords and employers can simply do criminal background checks). In contrast to shaming punishments, OSORA "does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Smith*, 538 U.S. at 99.

The fact that this information is available on ODOC's website does not change the calculus. *Smith* expressly rejected that making the information available on the Internet transformed it into a punishment. *Id.* Rather, since the principal goal is to inform the public for its own safety, and not to humiliate the offender, any humiliation is only a "collateral consequence of a valid regulation." *Id.* "The process [of going online] is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id.* Much like Oklahoma, the following information was made available to the public under ASORA: the sex offender's name, aliases, address, photograph, physical description, date of birth, crime for

which convicted, date of conviction, and place and court of conviction.[6] *Compare id.* at 91, *with* OKLA. STAT. tit. 57, § 584(F) (Supp. 2008) (granting ODOC authority to make sex offender registration information available through Internet access), *and* Juston Erick Shaw's ODOC Sex Offender Registry Profile, http://sors.doc.state.ok.us/svor/f?p=105:1: (check box stating "I have read the Web Site Caveats and agree to the terms."; then follow "Submit" hyperlink; then search "First Name" for "Juston" and "Last Name" for "Shaw"; then follow "Search" hyperlink; then follow "Detail" hyperlink).

Shaw's argument that his driver's license must be surrendered or that it displays the words "SEX OFFENDER" is without merit, *see Appellant's Br.* at 22-23, and the district court noted as much, *Aplt. App*. at 59 n.27. First, the relevant provisions of the Highway Safety Code governing driver licenses, OKLA. STAT. tit. 47, §§ 6-105.3, 6-111, 6-115 (Supp. 2013), are contained in Title 47, which is wholly separate from OSORA. The Commissioner of Public Safety, and not Patton, is the only individual against whom an injunction could have been sought with regard to this alleged restriction. *See* OKLA. STAT. tit. 47, § 2-108(A) (Supp. 2013) ("The Commissioner is hereby vested with the power and is charged with

[6] Additional information available to the public under ASORA, which is not available on ODOC's website, included license and identification numbers of motor vehicles, places of employment, length and conditions of sentence, and a statement whether the sex offender was in compliance with his or her registration requirements. *Smith*, 538 U.S. at 91.

the duty of observing, administering, and enforcing the provisions of this title and of all laws regulating the operation of vehicles or the use of the highways, the enforcement and administration of which are now or hereafter vested in the Department."); Oklahoma Department of Public Safety, https://www.dps.state.ok.us/Commissioner.html (last visited September 16, 2015) (describing duties and responsibilities of DPS). Second, the words "SEX OFFENDER" only appear on the licenses of those individuals determined to be "aggravated or habitual," OKLA. STAT. tit 47, § 6-111(D)(1). Shaw has not been designated either and therefore is not required to have those words on his driver license, regardless of his claim that someone told him otherwise, *Aplt. App.* at 108:4-8. And finally, at the time of trial he still did not have a driver's license. *Id.* at 107:20-21. Instead, he had a Louisiana identification card. *Id.* at 107:22-23.

The residency restrictions imposed by OSORA are akin to the traditional punishment of banishment, claims Shaw. *Appellant's Br*. 23. Under that section of OSORA, no one who is a registered sex offender can "reside, either temporarily or permanently, within a two-thousand-foot radius of any public or private school site, educational institution, . . . a [public] playground or park . . ., or [a] licensed child care center . . . ." OKLA. STAT. tit. 57, § 590(A) (Supp. 2009). Thus, while there are admittedly some places where Shaw cannot live, OSORA does protect the rights of existing property owners. *See id.* ("Establishment of a day care center or

park in the vicinity of the residence of a registered sex offender will not require the relocation of the sex offender or the sale of the property. . . . Nothing in this provision shall require any person to sell or otherwise dispose of any real estate or home acquired or owned prior to the conviction of the person as a sex offender.”). Shaw testified that he has lived at multiple locations that were OSORA-compliant. He did not move to his current address, 633 S.E. 28th Street, Oklahoma City, OK 73129, until after he was released from Logan County Jail and after he was already registering under OSORA, although he claims he was told by unnamed probation officers that he did not have to register. *Id.* at 96:1-20. Thus, he created his current residency problem.

Testimony on this issue at trial was revealing. Hamrick, who works in the Sex Offender Registration Unit for OCPD, *Aplt. App*. at 151:7-11, testified that there are approximately 1,000 sex offenders registered in Oklahoma City, *id.* at 176:21-23. Of those 1,000, approximately 800 have qualifying addresses. *Id.* at 176:24 to 177:1. That is, 80% of sex offenders in Oklahoma City have a qualifying address. With respect to Shaw’s 28th Street address, Hamrick found there were approximately 60-70 offenders with a qualifying address that lived within a two-mile radius of Shaw. *Id.* at 176:1-14. Edge, Shaw’s probation officer with ODOC, testified that she has a caseload of approximately 80 sex offenders. *Id.* at 193:21 to 194:11, 195:12-13. Out of the 80 sex offenders in her caseload, she said 18 were

considered transient, *id.* at 196:23 to 197:2, meaning they did not have a qualifying address. Without knowing the reason for the 18's transient status, 77.5% have qualifying residences. And finally, Lisa Sunday, who is the coordinator for the Sex and Violent Offender Registry Unit at ODOC, *id.* at 206:5-7, testified that using ODOC's mapping system (which is different than OCPD's) revealed 13 offenders with qualifying addresses within a one-mile radius of Shaw, *id.* at 221:21 to 222:10. When she tried to view the results for three and five miles, respectively, she received an error message "to the effect that there were too many results," which meant there were too many offenders to show up on the map. *Id.* at 222:11-18.

"Exile" or "banishment" is defined as "[e]xpulsion from a country, esp. from the country of one's origin or long-time residence; banishment." Black's Law Dictionary 489 (Abr. 8th ed.). The U.S. Supreme Court has defined it as "'punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life.'" *Doe v. Miller*, 405 F.3d 700, 719 (citing *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting)). Thus, traditionally, banishment involved complete removal from a community. *Smith*, 538 U.S. at 98. The Eighth Circuit in *Miller* agreed, reasoning that Iowa's residency restriction does not "expel" offenders, and that it "is unlike banishment in important respects, and we do not believe it is of a type that is

traditionally punitive." 405 F.3d at 719-20. Shaw's only authority to the contrary is a Supreme Court of Kentucky decision interpreting both the U.S. Constitution and the Kentucky Constitution; a decision that was recognized by one of its members as "[v]irtually alone among appellate courts to consider the issue . . . ." *Kentucky v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009) (Abramson, J., dissenting).

Shaw testified that he had lived in at least three qualifying residences. His current address was off-limits when he moved there. Testimony from various law enforcement officials at trial revealed that 80% of sex offenders in Oklahoma City have a qualifying address, and that approximately 60-70 sex offenders live within two miles of Shaw and have qualifying addresses. It is clear that he has not been subjected to "banishment" in the traditional sense, as the district court properly held, *Aplt. App*. at 60-61.

OSORA's periodic registration requirement does not make it punishment. That type of reporting and the updating of personal information do not have a punitive restraining effect. *Smith*, 538 U.S. at 102. There is a legitimate purpose behind the periodic reporting requirements: to ensure that the addresses of registrants are kept up-to-date. Otherwise, law enforcement would have a difficult time in protecting the "public safety" if the offenders could provide a false or phony address prior to moving in next to a school. Likewise, citizens would not

have current information on those offenders living near them if they were inclined to research the issue.

True, Shaw currently has to register every 7 days. *Aplt. App.* at 100:1-3; *see also* OKLA. STAT. tit. 57, § 584(E) (Supp. 2009). But that is his own fault because he moved into a house that was non-compliant with OSORA after he was already registering. If he was not transient, Shaw would only have to register once every quarter. OKLA. STAT. tit. 57, § 584(A)(5). Here, the district court erred in holding that the in-person reporting requirements weighed in favor of Shaw. *Aplt. App.* at 61. Again, the in-person reporting requirements serve the purpose of validating where the offender actually lives. This requirement is not "significant governmental supervision," *Aplt. App.* at 61, and is not like the discussions he's required to have with his probation officer, *id.* at 204:17 to 205:3. Shaw testified that he only has to fill out a form when he reports in-person, *Aplt. App*. at 122:3-7, and nothing more.

This first factor weighs decidedly against Shaw.

1. The district court erred in allowing the OCPD map to be admitted into evidence.

At trial, Shaw was asked about a "map or diagram" at OCPD depicting where he can and cannot live. *Aplt. App*. at 104:22-25. The map that was admitted into evidence was described by Shaw as being "similar" to the one he had seen at OCPD. *Id.* at 105:6-12. Counsel for Patton timely objected to the admissibility of

the map on the basis of relevancy and hearsay but was overruled. *Id.* at 105:20-22; 106:24 to 107:1. While the map presented on appeal is a color copy, *id.* at 270, both the one presented to counsel for Patton during discovery and the one presented at trial were black and white. Regardless, the district court does not appear to have cited to the map in its order. *See generally Aplt. App.* at 46-69.

Evidentiary rulings are reviewed for abuse of discretion. *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 860 (10th Cir. 2005). Hearsay is defined as a statement, offered by a declarant, not made at the trial (out-of-court), which is offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Maps are contemplated as potentially falling within the hearsay rule. *See United States v. Emmons*, 24 F.3d 1210, 1217 (10th Cir. 1994) (rejecting hearsay objection to map because it was not offered for the truth of the matter asserted). Although the business records exception would have been Shaw's likely response, *see* Fed. R. Evid. 803(6), the exception only applies "if authenticated by a person through whom the exhibits could be admitted into evidence," *IBP, Inc. v. Mercantile Bank*, 6 F.Supp.2d 1258, 1263 (D. Kan. 1998), although the actual author need not be produced, *FDIC v. Staudinger*, 797 F.2d 908, 910 (10th Cir. 1986). The requirements of that exception require the document to have been: (1) "'prepared in the normal course of business; (2) have been made at or near the time of the events it records; . . . (3) be based on the personal knowledge of the entrant

or of an informant who had a business duty to transmit the information to the entrant;' and (4) not have involved sources, methods, or circumstances indicating a lack of trustworthiness." *United States v. Gwathney*, 465 F.3d 1133, 1140-41 (10th Cir. 2006).

As to the map, the declarant is Detective Jason Bussert. *Aplt. App.* at 270. He was not listed as a witness in the Final Pretrial Report, *id.* at 42-44, and did not testify at trial. The statement at issue is two-fold: the information conveyed by the map itself, *id.* at 270, and the statements made by Shaw as to what the map showed, *id.* at 105:16-19; 106:3-11. Specifically, Shaw testified that the map "tells you where you can go, where you can't go, where you can live, where you can't live, where you can hang out, where you can't hang out." *Id.* at 106:5-7. While Shaw's testimony was in-court, the information conveyed by the map was not. And, based on Shaw's testimony concerning the map, it was clearly offered to prove the truth of the matter asserted in the statement—that the buffer zones depicted in the map tell you where you can and cannot live in Oklahoma City.

The map is dated 2010. *Id.* at 270. No one from OCPD testified that they actually prepared the map and it was not authenticated by a person from OCPD. Although authenticity was stipulated to, *id.* at 106:20-21, hearsay was a different objection. Based on the map's status as hearsay, and the fact that no one from

OCPD qualified it as a business record, the district court abused its discretion in admitting the map.

B. Any Affirmative Disability or Restraint that may affect Shaw does not Transform OSORA into Punishment.

Shaw's main complaint about OSORA being an affirmative disability or restraint is tied to his argument that the residency restriction is similar to "banishment." He claims that many residences are off-limits to him, and that OSORA also imposes certain job restrictions. Neither of these restrictions imposes a punishment on Shaw, especially in light of evidence presented at trial that he ignores.

The mere fact that Shaw might not be able to live in every part of Oklahoma City does not transform OSORA into a punitive statute. Many individuals cannot live where they may otherwise like because of zoning ordinances or socioeconomic factors. Shaw's argument that Section 590.1 prohibits him from residing with other sex offenders appears quite speculative given he is married and no testimony was offered at trial that he had tried or desired to live with another sex offender. *Aplt. App*. at 49 n.4.

The court in *Gautier v. Jones* analyzed this 2,000-feet restriction, which has been in effect since November 1, 2003, and found that it was nonpunitive. No. CIV-08-445-C, 2009 WL 1444533, at *8, (W.D. Okla. May 20, 2009), *rev'd on other grounds*, 364 F. App'x 422 (10th Cir. 2010). The cases relied on by the court

in *Gautier* are quite persuasive, and, at least with respect to the U.S. Supreme Court case, *Kansas v. Hendricks*, 521 U.S. 346 (1997), binding for the proposition that state action, even if an affirmative disability or restraint, is not necessarily punitive in light of the legislature's stated goals, *id.* at 363. In *Kansas*, the offender challenged his civil commitment on double jeopardy and ex post facto grounds. *Id.* at 350. At issue was a law that allowed for the involuntary civil commitment of "sexually violent predators." *Id.* at 351. Even though the commitment scheme was undoubtedly a disability and restraint on the offenders subject to it, the Court found that it was not punishment because it was rationally related to the "legitimate nonpunitive objective—protecting the public from mentally unstable offenders." *Id.* at 363. If completely taking away one's liberty under a civil regulatory scheme designed to protect the public is nonpunitive, how can a 2,000-feet residency restriction be considered punitive? A few courts have addressed this specific issue.

Both the court in *Gautier* and the court in *Graham v. Henry*, No. 06 CV 381 TCK FHM, 2006 WL 2645130 (N.D. Okla. Sept. 14, 2006), addressed the punitive nature of the 2,000-feet residency restriction and found that it was nonpunitive. While the court in *Graham* addressed it under a double jeopardy challenge, the test is the same. *See* 2006 WL 2645130, at *3-5. Both courts relied on the Eighth Circuit's decision in *Miller*, 405 F.3d 700. There, a challenge was brought under the *Ex Post Facto* Clause to Iowa's residency restriction. *Id.* at 705. Similar to

OSORA, Iowa's statute exempted certain individuals that already owned their property. *Compare id.*, *with* OKLA. STAT. tit. 57, § 590(A). In analyzing the residency restriction under the affirmative disability or restraint factor of *Mendoza-Martinez*, the court found that periodic reporting is not punitive, and that while the residency restriction was more disabling than the law at issue in *Smith*, an affirmative disability or restraint does not automatically transform the law into a punishment. *Miller*, 405 F.3d at 720-21.

Finding the reasoning in both *Mendoza-Martinez* and *Miller* persuasive, the court held, "Oklahoma's residency restriction, like Iowa's, cannot be considered more disabling than civil commitment even though it imposes an affirmative disability or restraint." *Gautier*, 2009 WL 1444533, at *8. The record in *Gautier* does not reveal whether the plaintiff owned a home. In *Graham*, however, the plaintiff's wife solely owned the residence where she lived. 2006 WL 2645130, at *2 n.5. Like the plaintiff in *Graham*, Shaw was aware that he could not live within 2,000 feet of a school when he moved to 633 S.E. 28th Street. *Compare id.* n.7 ("Plaintiff was accordingly aware that he was unable to live in his wife's new residence at the time he married her."), *with Aplt. App*. at 96:1-20 (stating that he moved to the house at 633 S.E. 28th Street in December 2013 after he was released from Logan County Jail, which was over a year after he began registering). The *Graham* court, analyzing the residency restriction under *Miller*, found the plaintiff

was unlikely to succeed on the merits in proving the residency restriction was so punitive as to negate the Legislature's stated intent to create a civil scheme. 2006 WL 2645130, at *5; *see also Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1017 (8th Cir. 2006) (finding Arkansas's 2,000-feet residency restriction nonpunitive).

With respect to Shaw's allegations that his work opportunities have been limited, some clarification is needed. It is true that OSORA restricts registrants from working with or providing "services to children" or from working "on school premises . . . ." OKLA. STAT. tit. 57, § 589(A) (Supp. 2008). Shaw, however, testified that he is a residential home contractor, *Aplt. App.* at 115:18-20, and admitted on cross-examination that the places he had previously worked did not work on schools, *id.* at 117:5-13, 118:4-6. He also testified that he has no training to work with children. *Id.* at 118:2-3.

The district court noted that "Shaw further testified that he is unable to build or remodel residential homes since most subdivisions and housing additions have playgrounds and parks." *Aplt. App*. at 63; *see also id.* at 93:19-22. Shaw also testified that he is a chef by second trade, and that he could not work at any establishment that employed teenagers. *Id.* at 63; *see also id.* at 108:20-23. But Shaw's testimony was misleading. There is no restriction in OSORA that prohibits Shaw or any other sex offender from working on houses in subdivisions with parks

or playgrounds. The residency restriction only prevents someone from *residing* within 2,000 feet of a park or playground. OKLA. STAT. tit. 57, § 590(A); *see also* Op. Okla. Att'y Gen. No. 2005-36, ¶¶ 12-13, 2005 WL 3075854, at *4-5 (analyzing this specific provision). Similarly, there is no restriction in OSORA preventing Shaw or any other sex offender from working at a fast food business that employs teenagers. The employment restriction prevents offenders from working in schools. OKLA. STAT. tit. 57, § 589(A); *see also Starkey*, 305 P.3d at 1035 n.8 ("Registered sex offenders . . . may [not] work in schools . . . .").

Finally, Shaw claims that OSORA "directly restrains his available options of where to physically go in his day-to-day life." *Appellant's Br.* at 27. But the version of the statute he references that was in effect on the relevant date only prohibited loitering near parks if the victim was "under the age of thirteen (13) years." OKLA. STAT. tit. 21, § 1125(A) (Supp. 2008). It was stipulated that his victim was 14. *Aplt. App*. at 37.

In light of the testimony offered by law enforcement personnel that the majority of sex offenders they dealt with had qualifying residences, the district court found the "residency restrictions make finding housing difficult, but not impossible." *Aplt. App.* at 62. Like ASORA, it "does not forbid sex offenders from changing residences; it only obligates them to report any contemplated change in address and to select a compliant residence." *Id.* As to the employment restrictions,

the district court held OSORA "does not . . . result in complete loss of livelihood, and it does not forbid change." *Id.* at 63; *see also Smith*, 538 U.S. at 100 ("The Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive."). *Compare Smith*, 538 U.S. at 100 ("The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords."), *with Aplt. App.* at 121:23-24 ("And one of them, Tim Logan, he let me go when he found out that I was a registered sex offender.").

This factor also weighs against Shaw.

C. OSORA's Purpose is not Retribution.

The third *Mendoza-Martinez* factor looks at whether the statute promotes the traditional aims of punishment—deterrence and retribution. *Smith*, 538 U.S. at 102. The *Smith* Court warned that "[a]ny number of governmental programs might deter crime without imposing punishment. 'To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.'" *Id.* (quoting *Hudson*, 522 U.S. at 105). As with ASORA, it is possible that OSORA deters future crimes, but that effect does not render it punitive. *Smith*, 538 U.S. at 102; *see also Miller*, 405 F.3d at 720 (finding that while the law could have deterrent effects, that effect is

not strong evidence that the restriction is punitive); *Gautier*, 2009 WL 1444533, at *7 (finding that this factor does not render OSORA punitive in effect). Part of the law's purpose is to remove temptation and reduce opportunities to commit new crimes, not demonstrate "the negative consequences that will flow from committing a sex offense." *Miller*, 405 F.3d at 720. Shaw appears to have conceded this argument. *Appellant's Br.* at 28.

Instead, he has argued that the stronger effect of the law is retribution. *Id.* Similar to ASORA, the broad categories contained in OSORA—the "levels," OKLA. STAT. tit. 57, § 582.5(C)(1)-(3) (Supp. 2007)—"are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective," *Smith*, 538 U.S. at 102; *see also Miller*, 405 F.3d at 720 (holding any restraint or requirement is consistent with legislature's goal of protecting health and safety of children); OKLA. STAT. tit. 57, § 581(B) (defining purpose of OSORA as protecting public safety).

Shaw's argument that the scheme suffers because it does not make individualized determinations of dangerousness is foreclosed by another U.S. Supreme Court case. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (holding "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme"). In fact, the Court in *Smith* rejected this argument "even though the length of the [registration obligation] appears to be

measured by the extent of the wrongdoing, not by the extent of the risk posed." *Gautier*, 2009 WL 1444533, at *7 (quoting *Smith*, 538 U.S. at 102) (alteration in original) (internal quotation marks omitted). There simply was no evidence presented that the Oklahoma Legislature's purpose behind the statute is retribution. Its stated purpose is to protect the public safety from individuals that pose a high risk of re-offending after release from custody. OKLA. STAT. tit. 57, § 581(B). "It is well established that a statute is presumed constitutional and the party challenging it has the burden to establish its unconstitutionality beyond a reasonable doubt." *Eaton v. Jarvis Products Corp.*, 965 F.2d 922, 931 (10th Cir. 1992). This issue has been repeatedly litigated and, except for a very small minority of jurisdictions, has repeatedly been found constitutional.

Considering Shaw's retribution arguments below, the district court stated, "[t]hat [O]SORA does not make these distinctions does not mandate a finding that its effects are punitive in nature." *Aplt. App.* at 65. As with ASORA, the length of the reporting requirement is reasonably related to the danger of recidivism. *Smith*, 538 U.S. at 102. The "levels" in OSORA correspond to the seriousness of the offense committed, and take into account the dangerousness to the community and the chance that the offender will re-offend. OKLA. STAT. tit. 57, § 582.5(C)(1)-(3).

This factor too weighs against Shaw.

D. OSORA's Characteristics are Rationally Related to its Purpose—Public Safety.

Shaw begins by stating, "[t]his . . . factor may be the sole contender pushing for a non-punitive result." *Appellant's Br.* at 29. He claims the district court's determination that the law is a "civil regulatory statute should yield to the Oklahoma Supreme Court's construction of its own state law," *id.* at 40-41, but wants this Court to rule against the very decision he extols and find that OSORA is not rationally related to public safety, *id.* at 30-32. Again, this issue has been decided adverse to Shaw time and time again.

The U.S. Supreme Court found the rational relationship of ASORA's features to the nonpunitive purpose of public safety "a '[m]ost significant' factor in [its] . . . determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102. More recently, in *Starkey*, the Oklahoma Supreme Court reviewed the legislative findings that were added to OSORA in 1997 and determined there is a rational relationship to the legitimate governmental interest of public safety:

> The context of these findings is to protect the public from sex offender recidivism. These 1997 findings indicate a legitimate non-punitive purpose of public safety. The protection of its citizens is a basic obligation of state government. Our evaluation of the sixth *Mendoza–Martinez* factor concludes *[O]SORA does advance a non-punitive purpose of public safety*.

305 P.3d at 1028 (emphasis added). Finding "Shaw has not strenuously argued otherwise," the district court held, "there is a remedial purpose for [O]SORA's enactment . . . ." *Aplt. App*. at 66.

Thus, it is beyond debate that the features of OSORA are rationally related to the Oklahoma Legislature's stated goal of public safety. *Id.*; *see also Smith*, 538 U.S. at 102-03; *Miller*, 405 F.3d at 721 (finding statute rationally related to goal of protecting society against repeat sex offenders based on high risk of recidivism); *Gautier*, 2009 WL 1444533, at *8. A statute need not be narrowly drawn to achieve its goal, and it is not punitive simply because there is not a perfect fit. *Smith*, 538 U.S. at 103.

Shaw argues the testimony of Detective Tim Blanton supports his argument that OSORA is not rationally related to OSORA's goal of public safety. Detective Blanton, who no longer has any interaction with Shaw, is only one of at least 8,639 police officers in Oklahoma in only one of at least 481 law enforcement jurisdictions. Census of State and Local Law Enforcement Agencies, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics 15 (2011), http://www.bjs.gov/content/pub/pdf/csllea08.pdf. And simply because a small fraction of those offenders supervised by Shaw's probation officer may be homeless does not mean that it is not rationally related to its purpose. Patton has never argued that the statute is perfect.

Even the Oklahoma Supreme Court, which is in a very small minority of jurisdictions finding ex post facto problems with sex offender registrations, *Starkey*, 305 P.3d at 1037 (Winchester, J., dissenting), found that OSORA was rationally related to its nonpunitive purpose of public safety. Brief testimony at trial from two individuals does not exhibit "clear proof" otherwise.

This factor too weighs against Shaw.

E. OSORA is not Excessive.

The final factor in the *Mendoza-Martinez* analysis looks to whether the requirements of the statute are excessive when considering the goal of the statute. *Smith*, 538 U.S. at 97. This inquiry is not whether Oklahoma has made the best choice, but whether its means are reasonable in light of the nonpunitive objective. *Id.* at 105. Similar to Oklahoma's stated purpose, *see* OKLA. STAT. tit. 57, § 581, the *Smith* Court determined ASORA's purpose was no doubt rationally related to the nonpunitive purpose of protecting the public. *Id.* at 103.

The Court rejected the argument that ASORA was excessive because it "applies to all convicted sex offenders without regard to their future dangerousness . . . ." *Id.* It stated that the legislature's findings were "consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class," *id.*, and that the risk of recidivism is "frightening and high," *id.* (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002)); *see also Miller*, 405

F.3d at 721; *Gautier*, 2009 WL at 1444533, at *9. The Court cited empirical research that some repeat offenses may not occur for 20 years following release and thus the duration of the reporting requirements were not excessive. *Id.* at 104.

"The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103. Risk assessments under the clause are not required, and the legislature is entitled to make laws of universal application. *Id.* at 104 (citing *De Veau v. Braisted*, 363 U.S. 144, 160 (1960); *Hawker v. New York*, 170 U.S. 189, 197 (1898)). "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." *Id.*; *see also Conn. Dep't of Pub. Safety*, 538 U.S. at 4 (individual determination of dangerousness not required under due process clause when statute does not take that into account).

Below, the district court considered the argument that OSORA does not make individualized determinations and held that Oklahoma's decision to legislate based on class, "rather than make individualized determinations of dangerousness," did not transform the statute into punishment. *Aplt. App.* at 68. Based on the facts of this case, the district court stated further, "there has been no credible showing that the level assignments and/or the corresponding lengths of reporting

requirements are not either reasonably related to the dangers of recidivism . . . or consistent with [O]SORA's objectives of regulating offenders' interaction with society." *Id.* The district court similarly rejected Shaw's arguments that the residency and work restrictions apply to all offenders thus making the statute punitive. *Id.* at 68-69. It further recognized that "a statute need not have 'a close or perfect fit with [its] . . . nonpunitive aims.'" *Id.* at 68 (alteration in original) (citing *Smith*, 538 U.S. at 103).

Taking into account all provisions of OSORA, and the fact that many do not even apply to Shaw (or only apply through fault of his own), he failed to show, "much less by the clearest proof, that the effects of the law negate [Oklahoma's] intention to establish a civil regulatory scheme." *Smith*, 538 U.S. at 104.

The district court properly denied Shaw declaratory and injunctive relief, and its opinion must be affirmed.

II. SHAW'S ARGUMENT THAT FINDING OSORA NONPUNITIVE IS IN CONTRAST TO A STATE COURT DECISION AND THE ADMINISTRATION OF THE LAW IS UNPERSUASIVE.

There is no denying that the Oklahoma Supreme Court in *Starkey* determined that the retroactive application of OSORA to offenders who had the finish line moved on them multiple times was punitive *under the Oklahoma Constitution*. 305 P.3d at 1030. It recognized, however, that the federal constitution provides the floor of constitutional rights, not the ceiling. *Id.* at 1021.

Shaw confuses two issues: a court's interpretation of how a specific law affects individuals subject to it with a federal court's deference to a definition or operation of a state statute. In *Terminiello v. City of Chicago*, the federal court deferred to the state court's definition of "the [state] statutory words 'breach of the peace' . . . ." 337 U.S. 1, 4 (1949). The question in *Hebert v. Louisiana* was whether a state court properly concluded that two state statutes were to be taken together when imposing the criminal defendant's sentence. 272 U.S. 312, 316 (1926). That construction, the Court said, was a "final decision of which rests with the courts of the state." *Id.* And finally, in *Kansas v. Hendricks*, the Court looked at the placement of Kansas's civil commitment provision in the probate code when giving deference to the legislature's intent to create a civil scheme, 521 U.S. at 361, which is similar to deferring to state definitions or state interpretations.

The Oklahoma Supreme Court in *Starkey* was not interpreting definitions under state law or how specific statutes applied to the offender. Rather, it was applying what it believed the pertinent facts to the U.S. Supreme Court's analysis in *Mendoza-Martinez*. *Starkey*, 305 P.3d at 1021-30. In reaching its decision it relied on the dissents in *Smith* and a few decisions from state supreme courts because it was not bound by the federal court decisions in its qualitative analysis of OSORA under the Oklahoma Constitution. If, for instance, the court in *Starkey* defined "residing" in a particular way, *see* OKLA. STAT. tit. 57, § 590(A), federal

courts would have to defer to that definition. But because it relied on dissents from *Smith* and state supreme court decisions, it did not automatically bind the federal courts to reach the same result.

No statutory definitions or methods of application are at issue in this case. The decision in *Starkey* is not binding on the federal courts. In fact, whether the effects of the law on Shaw are punitive is a "federal question[] which this Court will determine for itself." *Lindsey v. Washington*, 301 U.S. 397, 400 (1937).

Neither is the result different when considering which state agency oversees the registration process. In *Smith*, the Court held, "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." 538 U.S. at 94. There, the notification provisions were contained in Alaska's "Health, Safety, and Housing Code," while the registration provisions were contained in the criminal procedure code. *Id.* Still, the Court found this did not "support a conclusion that the legislative intent was punitive." *Id.* at 95. And just like Oklahoma, sex offenders in Alaska would register "either with the Department of Corrections . . . or with the local law enforcement authorities . . . ." *Id.* at 90.

OSORA is not found in the penal code; rather, it is in Title 57 of the Oklahoma Statutes, titled "Prisons and Reformatories," while the criminal law is largely contained in Titles 21 ("Crimes and Punishments") and 22 ("Criminal Procedure"). Regardless, it was likely a function of efficiency that placed the

responsibility for creating a registry in ODOC's hands. With the exception of out-of-state offenders, ODOC would already have a database of the offenders who are subject to the registry.

Shaw's arguments on this issue should be given no weight.

III. THE DISTRICT COURT ERRED IN FINDING THAT OSORA WAS BEING RETROACTIVELY APPLIED TO SHAW.

While the focus of the bench trial was to elicit facts that would show whether OSORA was punitive as-applied to Shaw, the first step in any *Ex Post Facto* analysis is to determine whether the law in question is being retroactively applied to the complainant. Below, based on the Oklahoma Supreme Court's decision in *Starkey*, Patton argued that OSORA was not being retroactively applied to Shaw. The district court disagreed with Patton throughout the pretrial briefing, and it ultimately found that OSORA was being retroactively applied to Shaw. Shaw, of course, does not take issue with this finding. But because the determination of OSORA's applicability is procedural in nature, the district court erred in this respect. *See Aplee. Supp. App.* at 21-23..

This Court has the discretion to affirm on any ground adequately supported by the record. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004); *see also Ute Distrib. Corp. v. Sec'y of Interior of U.S.*, 584 F.3d 1275, 1282 (10th Cir. 2009) (considering appellee's argument that district court erred in failing to grant its motion to dismiss). In exercising its discretion to affirm on alternative grounds,

this Court considers three factors: (1) whether the ground was fully briefed and argued in this Court and below; (2) whether the factual record has been developed; and (3) whether the decision would only be one of law. *Elkins*, 392 F.3d at 1162. Not only was this issue fully briefed below, Shaw has ample opportunity to brief it in a reply brief. *See Sadeghi v. I.N.S.*, 40 F.3d 1139, 1143 (10th Cir. 1994). The only facts needed by this Court are when the conviction occurred and when Shaw became subject to OSORA—both were stipulated at the district court. *See Aplt. App*. at 37. This Court would only be required to determine a legal question:

> Is a law that does not apply to an individual from State A until he enters State B being retroactively applied to him based on activity that occurred earlier in State A; in other words, can a punitive law (for the sake of this argument only) of State B have retroactive application to an individual from State A for activity that occurred in State A without running afoul of the Ex Post Facto Clause?

The answer to this question turns on when a law is "retroactive," but it must also consider the Oklahoma Supreme Court's holding in *Starkey* that "[t]he correct date to apply [OSORA] is when . . . [Shaw] became subject to [O]SORA by entering and intending to be in Oklahoma after his conviction." 305 P.3d at 1031; *see also id*. (disagreeing that the correct version of the law to apply to registrant is the law in effect on the date of his conviction). Oklahoma law does not place a duty to register on sex offenders until they enter the state. OKLA. STAT. tit 57, §§ 582(B) (Supp. 2009), 583(B) (Supp. 2009); *Starkey*, 305 P.3d at 1031.

This holding by the Oklahoma Supreme Court as to *when* the law applies, which must be given deference, *see Terminiello*, 337 U.S. at 4, is binding on Shaw. Because he did not move to Oklahoma until 2009, the law did not apply to him until then. Multiple cases have reaffirmed this operative date:

Case	Conviction and Entry Date	Result
Starkey v. Okla. Dep't of Corrs., 305 P.3d 1004 (Okla. 2013)	October 12, 1998 (Texas); late 1998 (Oklahoma)	Court determined date of entry into the state—not date of conviction—was relevant date to apply OSORA, 305 P.3d at 1031.
Hendricks v. Jones, --- P.3d ---, 2013 WL 5201235 (Okla. Sept. 17, 2013)	1982 (California); August 2009 (Oklahoma)	Remanded to determine whether Hendricks was still serving a sentence or any form of probation or parole on November 1, 2005, 2013 WL 5201235, at *4.
Bollin v. Jones, --- P.3d ---, 2013 WL 5204134 (Okla. Sept. 17, 2013)	June 1, 1987 (Missouri); June 2004 (Oklahoma)	Injunction affirmed and Bollin removed from registry because law in effect at the time he entered the state (2004) did not require a person with a pre-OSORA conviction in another jurisdiction to register, 2013 WL 5204134, at *5.
Burk v. Okla. Dep't of Corrs., --- P.3d ---, 2013 WL 5476403 (Okla. Oct. 1,	April 20, 1999 (New Mexico); July 24, 2007 (record did not reflect entry, but he began registering on this date in	Remanded to determine date of entry into the state because law was changed April 26, 2004, to require registration from date of completion of

2013)	Oklahoma)	sentence as opposed to date of conviction, 2013 WL 5476403, at *3.
Cerniglia v. Okla. Dep't of Corrs., --- P.3d ---, 2013 WL 5470632 (Okla. Oct. 1, 2013)	April 30, 1999 (Oklahoma)	Law in effect at the time of her Oklahoma conviction governed her registration, which was 10 years from the date of her release from ODOC custody; her release date was May 2005, so she had to register until May 2015, 2013 WL 5470632, at *2.
Osburn v. Okla. Dep't of Corrs., 313 P.3d 926 (Okla. 2013)	June 22, 1998 (Oklahoma)	Affirming trial court's holding that Osburn did not have to register at all under OSORA because law in effect at the time of his conviction did not include the crime of indecent exposure, 313 P.3d at 929-30.
Luster v. Okla. Dep't of Corrs., 315 P.3d 386 (Okla. 2013)	April 22, 1992 (Texas); September 25, 2003 (began registering in Oklahoma)	Remanded to determine correct registration date of consolidated plaintiffs based on either date of Oklahoma conviction or entry (record was silent on individual plaintiffs' factual circumstances).

Ransdell v. Okla. Dep't of Corrs., 322 P.3d 1064 (Okla. 2013) (mem.)	record silent as to date of conviction;[7] 1999 (Oklahoma)	Reversed and remanded to apply SORA in effect at the time of his entry into the state.
Butler v. Jones, 321 P.3d 161 (Okla. 2013)	June 28, 2000 (Oklahoma)	Reversing permanent injunction against ODOC and requiring Butler to register based on date of plea under Oklahoma law, 321 P.3d at 168.

Shaw's argument is similar to one presented and rejected in Louisiana. *See State v. Clark*, 117 So.3d 1246 (La. 2013). The criminal defendant in *Clark* was convicted in Texas in 1995 when Texas law did not require him to register but Louisiana law would have required him to register for a period of 10 years. *Id.* at 1247-48. Before he moved to Louisiana, the registration period in Louisiana was changed from 10 years to 25 years. *Id.* at 1248. He had never lived in Louisiana or registered as sex offender prior to his entry into the state. *Id.* The criminal defendant contended that his duty to register in Louisiana had expired based on the prior version that required only 10 years of registration, which was in effect at the time of his conviction. *Id.* He was required to register for 25 years under the newer

[7] Although the decision was silent, counsel for Patton worked on the *Ransdell* case and can attest that his Oregon conviction occurred in 1992.

version of the statute, the state countered, because he did not enter into the state and was not subject Louisiana law until 2009. *Id.*

The Supreme Court of Louisiana agreed with the state because under a plain reading of the statute the defendant "was not 'a person required to register' in Louisiana until he established residence in [that] state." *Id.* at 1251. A contrary holding would "presum[e] the legislature intended to impose on a Texas resident (even assuming that it could do so extraterritorially) the duty to register as a sex offender in Louisiana immediately upon his release from prison in Texas before he or she had ever set foot in this state and without regard to whether the offender subsequently established residence in this state." *Id.* at 1250. This is similar to the holding in *Starkey.*

Although the district court disagreed, *Aplt. App*. at 54 n.14, it is difficult to see how a law can be retroactively applied to someone who moves states and is thus not subject to it until they move there. Just like Starkey, Shaw "voluntarily came to Oklahoma and therefore voluntarily subjected himself to [O]SORA after his conviction." *Starkey*, 305 P.3d at 1031. For example, if Shaw was not required to register for life under Texas law in 1999, and instead did not have to register at all, how can the Oklahoma Supreme Court's decision in *Starkey* be reconciled? Under *Starkey*, Shaw would have to register for life based on his 2009 entry into the state.

Like the statute at issue in *Clark*, OSORA did not place a duty on Shaw to register until he began residing in the state. *Compare* OKLA. STAT. tit. 57, § 582(A) (indicating OSORA applies to those residing in state), *and id.* § 583(B), *with Clark*, 117 So.3d at 1251. Both Oklahoma and Texas required registration in 1999, and both states required registration in 2009.

Based on this analysis, it does not appear that the law is being retroactively applied to Shaw. If not, then his ex post facto claim fails at its outset.

CONCLUSION

OSORA is a civil, nonpunitive regulatory scheme, and its effects on Shaw cannot negate by the clearest proof that it was intended to be anything but. The district court properly denied relief to Shaw, and its decision must be affirmed.

NECESSITY OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(i) and 10th Cir. R. 34.1, Defendant/Appellee Robert Patton concurs with Plaintiff/Appellant Juston Shaw that this case should be submitted for oral argument based on its potential implications on this heavily-litigated area of law.

Respectfully submitted,

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 11,302 words.

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Pursuant to the Tenth Circuit Court of Appeals' General Order on Electronic Submission of Documents (March 18, 2009), I hereby certify that:

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I certify that on this 28th day of September 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and transmitted the original and seven copies of the foregoing to the Clerk of the Court via U.S. Mail, postage prepaid and based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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