IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RANDY PENNINGTON, *et al.*	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:19-cv-695-MHT-SMD
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants Hal Taylor, John Q. Hamm, Charles Ward, and Steve Marshall, sued in their official capacities, file this brief in support of their motion to dismiss.

A. Introduction

Plaintiffs assert that it is unconstitutional to apply the requirements of the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA"), Alabama Code §§ 15-20A-1 *et seq.*, to them based on their convictions for sex offenses committed as teenagers. But their status as minors was considered twice in their criminal prosecutions: first, when the juvenile court transferred Plaintiffs' cases to criminal court for prosecution as adults; and second, when the criminal court denied them (or Plaintiffs waived their right to seek) Youthful Offender status.

Although Plaintiffs are considered adult sex offenders under ASORCNA, they are each treated differently based on their underlying convictions. Plaintiff Herbert Stevens was convicted of second degree rape for conduct occurring when he was 17 and his victim—now his wife—was 14. Because Stevens's victim was less than five years younger than him, he can file a simple petition in state court for relief from all of ASORCNA's requirements. He has failed to do so.

Plaintiffs Pennington and Nicholes are required to register as adult sex offenders for life—and rightfully so. Pennington, at 16-years-old, pleaded guilty to first degree sexual abuse after being indicted for first degree rape by forcible compulsion of a 16-year-old girl. Nicholes, at 17-years-old, was convicted of kidnapping and raping a 16-year-old girl at gunpoint.

ASORCNA is a nonpunitive civil regulatory scheme designed to prevent sex offender recidivism and protect the public. ASORCNA treats juvenile sex offenders and adult sex offenders categorically differently. But it treats offenders as adults when the underlying criminal process deems them competent to be prosecuted as adults. Ultimately, when ASORCNA treats registrants convicted of sex offenses as adults for conduct committed while teenagers, it has a reason to do so.

B. Facts

1. The Court May Consider Certain Information Contained in Certified Copies of Records of Plaintiffs' Sex Offense Convictions and Their Internet Sex Offender Registrations at the Motion to Dismiss Stage

Defendants have submitted certified copies of Plaintiffs' sex offense convictions and copies of their internet sex offender registration information in support of their motion to dismiss for the limited purpose of establishing: (1) the nature of the sex offense subjecting Plaintiffs to registration under ASORCNA; (2) Plaintiffs' age at the time of the sex offense; (3) whether Plaintiffs were adjudicated as juvenile delinquents, granted Youthful Offender status, or convicted as adults; and (4) the contents of the registration information on the public registry website maintained by ALEA that constitutes Plaintiffs' alleged injury.[1]

[1] Each Plaintiff in this case had his juvenile court case transferred to criminal court for prosecution as an adult and either waived his right to apply for Youthful Offender status or had his application for Youthful Offender status denied. Under Alabama law, when a juvenile court case is transferred

On a Rule 12(b)(6) motion to dismiss, the Court must accept as true the allegations in Plaintiffs' complaint unless they are legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, the Court may take the records submitted by Defendants for the purposes enumerated above into account in ruling on Defendants' motion to dismiss without converting their motion into a motion for summary judgment on a variety of grounds.[2] In addition, the Court may consider these records on a Rule 12(b)(1) motion to dismiss to the extent they are relevant to a "factual attack" on subject matter jurisdiction. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990). Because "[s]tanding is a jurisdictional inquiry," *ACLU of Fla., Inc. v. Dixie County*, 690 F.3d 1244, 1247 (11th Cir. 2012), the Court's subject matter jurisdiction is limited to only those provisions of ASORCNA that Plaintiffs have standing to challenge. ASORCNA's application to Plaintiffs, and hence their standing to challenge any provision of ASORCNA, depends on the nature of their underlying criminal convictions, *i.e.*, whether they were adjudicated as juvenile delinquents, granted Youthful Offender status, or convicted as adults. Because

to criminal court for prosecution, the records of the criminal court proceedings are public records and do not fall under the confidentiality provisions regarding juvenile court records. *See* Ala. Att'y Gen. Op. 96-00138; Ala. Att'y Gen. Op. 82-00189 ("It is the opinion of this office that when a child is transferred to criminal court for prosecution, the records with regard to the case against him in criminal court are open to public inspection to the extent an adult's criminal records would be."). (The Alabama Code sections referenced in the 1982 opinion have changed so that Section 12-15-34 is now Section 12-15-203, Section 12-15-34.1 is now Section 12-15-204, and Section 12-15-101 is now Section 12-15-134). Accordingly, Defendants have filed with the Court only records of Plaintiffs' criminal court cases, and the victims' names have been redacted from these records as well as all information required by Middle District of Alabama Local Rule 5.2.

[2] A court may take judicial notice of another court proceeding for the purpose of recognizing the judicial acts that the orders of the other court represent and the subject matter of the litigation. *See United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). A court may consider matters of public record in ruling on a motion to dismiss. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999). Finally, the Court may take notice of Plaintiffs' underlying criminal convictions *and* online sex offender registration information because these are central to their claims and the records of these proceedings cannot be challenged. *See SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010).

ASORCNA's application to Plaintiffs is determined by the status of their sex offenses, Plaintiffs' records establishing that status are also relevant to whether Plaintiffs state a claim upon which relief can be granted.

In addition, any allegation by Plaintiffs suggesting they did not actually commit the sex offenses for which they were convicted cannot be taken as true as a matter of law and can form no basis for relief from ASORCNA's requirements. For instance, Pennington's allegation that he was charged with rape "for engaging in *consensual* sex with a married sixteen-year-old girl," (doc. 12 ¶ 16) (emphasis added), is not entitled to be taken as true even on a motion to dismiss; nor are the similar allegations of Stevens and Nicholes (doc. 12 ¶¶ 37, 49). *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

A plaintiff cannot seek a judgment under 42 U.S.C. § 1983 that "would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. To assert a claim "for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." *Id.* at 486–87. Plaintiffs here cannot do so, and so they are barred by *Heck* from implying they are not guilty of sex offenses. *See Brown v. Coleman*, 439 F. App'x 794, 794–95 (11th Cir. 2011) (affirming dismissal under *Heck* of § 1983 challenge to sex offender based on allegations that the state failed to prove venue at his underlying criminal trial for aggravated child molestation and "did not investigate the validity of his underlying conviction before classifying him as a sex offender.").

2. Allegations and Facts Regarding Each Plaintiff

Plaintiff Randy Pennington alleges he was charged with rape in 1983 when he was 16 years old. Doc. 12 ¶ 16. Fayette County court records show that on November 10, 1983, Pennington's charge for first degree rape was ordered transferred from the juvenile court to the district court for criminal prosecution as an adult. Doc. 13-1 at 30.[3] A Fayette County grand jury indicted Pennington for first degree rape of a female by forcible compulsion in violation of Alabama Code §§ 13A-6-61 in February 1984. *Id.* at 28. On April 9, 1984, Pennington appeared in circuit court with counsel and pleaded guilty to sex abuse in the first degree. *Id.* at 16-24; Doc. 12 ¶ 16. Pennington received a sentence of one year in the county jail and three years on probation. *Id.* The circuit court denied Pennington's petition for Youthful Offender status when it accepted the guilty plea and imposed the sentence. *Id.* at 19. Pennington's probation was revoked in 1986 after he was charged with burglary and theft. Doc. 12 ¶ 17; Doc. 13-1 at 5.

Pennington's sex offender registration information is provided on a website maintained by ALEA pursuant to Alabama Code §§ 15-20A-8(a). Doc. 13-2 at 2.[4] The registry contains a physical description of Pennington along with a photograph and describes his sex offense as sexual abuse in the first degree under Alabama Code §§ 13A-6-66, with the victim being a 16-year-old female. *Id*. Under that code section, "[a] person commits the crime of sexual abuse in the first degree if he or she . . . [s]ubjects another person to sexual contact by forcible compulsion."[5] Ala. Code §§ 13A-6-66(a)(1).

[3] Citations to court records and other exhibits are to the ECF header numbers.

[4] A link to ALEA's sex offender registry is available at alea.gov/online-services. Plaintiff Pennington and Nicholes's sex offender registrations submitted as exhibits to this motion were accessed October 8, 2019. Plaintiff Stevens is not on ALEA's registered sex offender website.

[5] Pennington was indicted for first degree rape involving forcible compulsion, and pleaded guilty to first degree sexual abuse, which necessarily includes an admission of the element of use of

Pennington alleges a variety of effects of "SORNA" after serving his sentence for his 1986 probation revocation, beginning with his arrest in 2006 and subsequent guilty plea in 2008 for failing to register his address. Doc. 12 ¶¶ 19–21.[6] Pennington alleges that after he pleaded guilty to a violation of the CNA's residency restrictions in 2008, he was ordered to leave his noncompliant address. Doc. 12 ¶¶ 21–22. He alleges that he experienced a variety of difficulties finding compliant housing between 2008 and 2009. *Id.* ¶¶ 21–29. Pennington currently resides at an ASORCNA-compliant address in Jefferson County, Alabama with his adult wife and adult son. *Id.* ¶ 36. Pennington alleges he "is unable to pick up his grandchildren from school or attend their school events because of his registration status" and that the principal of their school was made aware of his status by a false report from an anonymous caller. *Id.* ¶¶ 30–31. Although Pennington alleges he has "faced employment consequences as a result of his status as a registered sex offender," he goes on to allege he "has worked for Southern Distributors, an auto parts distributor, for more than thirty years," and has "worked his way up from being a delivery driver to Purchasing Manager," despite being subject to Alabama's sex offender registration laws since their enactment in 1996. *Id.* ¶ 33. He alleges that in summer of 2019 Southern Distributors was sold to a larger

forcible compulsion. *See Russell v. State*, 428 So. 2d 131, 134 (Ala. 1982) ("A guilty plea is an admission of all the elements of the offense charged.").

[6] Alabama's sex offender registration and notification laws began in 1996 with the Community Notification Act ("CNA"). *See* Ala. Act No. 96-793. The 1996 act was repealed in its entirety and reenacted in 1999. *See* Ala. Act No. 99-572. The 1999 version of the Community Notification Act was amended in 2000, 2001, and 2005. *See* Ala. Acts Nos. 2000-728; 2001-1127; 2005-301. Effective July 1, 2011, the Community Notification Act was expressly repealed and replaced with ASORCNA. *See* Ala. Act No. 2011-640 § 49. For a summary of the legislative history of Alabama's sex offender registration laws, *see Burt v. State*, 149 So. 3d 1110, 1111 (Ala. Crim. App. 2013); *State v. Adams*, 91 So. 3d 724, 732 n.7 (Ala. Crim. App. 2010). While Plaintiffs have been subject to Alabama's sex offender registration laws prior to ASORCNA's July 1, 2011 effective date, their complaint can be read as alleging that all of their injuries dating back to the late 1990s resulted from a single statute, "SORNA." This is incorrect.

company that discovered he was a sex offender after conducting "background checks on all employees." *Id.* ¶ 33. But he does not allege whether this discovery was the result of ASORCNA's reporting and notification requirements or rather because his felony sexual abuse conviction is a matter of public record, independent of ASORCNA, revealed during a criminal background check. Pennington alleges that, as a result, he was demoted from a management position to an entry-level position. *Id.* ¶ 33. Pennington also alleges he no longer attends church because he was "ostracized" from several churches after the congregations learned of his registration status. *Id.* ¶ 35.

Plaintiff Herbert Stevens was charged with second degree rape in 1997 for conduct that occurred when he was 17 and his victim, now his wife with whom he has three children, was 14. Doc. 12 ¶ 37; Doc. 13-3 at 3; Doc. 13-4 at 5. His criminal case records show that Stevens was "certified as an adult" on January 6, 1997, and his case was transferred from the juvenile court to the Etowah County Circuit Court for prosecution as an adult. Doc. 13-3 at 3; Doc. 13-4 at 5. An Etowah County Grand Jury indicted Stevens for second degree rape in March 1997 because his victim was less than 16 years old and more than 12 years old when Stevens was at least 16 years old and at least two years older than the victim in violation of Alabama Code §§ 13A-6-62. Doc. 13-3 at 6. The Case Action Summary shows that in April 1997 Stevens applied for Youthful Offender status, and in May 1997 the circuit court denied his application for Youthful Offender status. Doc. 13-3 at 3; Doc. 13-4 at 5.[7] Stevens pleaded guilty to second degree rape as charged in

[7] Because the handwritten entry on May 28, 1997, indicating that the circuit court denied Stevens's Youthful Offender application is difficult to read, Defendants have included an electronic version of the Case Action Summary obtained from Alacourt. The electronic Case Action Summary has an entry for May 28, 1997, stating "Defendant Youthful Offender Disapproved." The Court may take judicial notice of the electronic version of the Case Action Summary, which is included only for Stevens's case, for ease of reference. *See Keith v. DeKalb County*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (taking judicial notice of records of a plaintiff's criminal history from Georgia state court's online judicial system).

the indictment on September 8, 1997 and was sentenced to five years in prison, which would be converted to probation after Stevens completed boot camp. Doc. 13-3 at 8-12; Doc. 13-4 at 6; Doc. 12 ¶ 37. Stevens was released in 1998 and subject to the CNA at that time. Doc. 12 ¶ 38.

Stevens alleges that upon release in 1998 he had "difficulty finding a job due, in part, to his felony and sex offender status," and that this led to his conviction nine years later in 2007 for possession and distribution of marijuana. Doc. 12 ¶ 39. He received a 15-year sentence and was paroled in 2013. *Id.* Stevens was arrested in 2014 and subsequently convicted for failing to comply with ASORCNA's quarterly in-person reporting requirements. *Id.* ¶ 40.

Stevens's sex offender registration information is not provided on ALEA's sex offender information website.[8] Stevens alleges in conclusory fashion he and his family have "lived in a number of counties and [have] experienced stress in their attempts to comply with SORNA." Doc. 12 ¶ 43. Stevens alleges with specificity that when he was in prison, his wife moved the family to a public housing complex, but that he was prohibited from moving in with them upon release "due to his SORNA status and felony conviction," so he lived at a separate location. *Id.* Stevens alleges he and his family then moved to a home in Gadsden owned by his employer, but thereafter "an organization that serves children who are victims of abuse[] moved into the building adjacent to the Gadsden home." *Id.* ¶ 44. Stevens alleges he and his family "became concerned about the stability of their housing situation because of its proximity to children" and that he was "advised" that "it would be easier simply to move to another location." *Id.* Stevens currently lives at an ASORCNA-compliant address in Altoona, Alabama. *Id.* ¶ 46. Stevens alleges ASORCNA "interferes with his ability to participate in his children's lives" because the United States military

[8] On information and belief, Defendants understand this to be due to an administrative oversight. Accordingly, Defendants do not contest Stevens's standing to challenge his inclusion on ALEA's sex offender information website, even though he is not currently listed.

refused to allow him to attend his son's graduation, and that Stevens does not list himself as a parent to his children with their schools or participate in other activities due to "fear that the stigma of his registration status will be imposed upon his children." *Id.* ¶ 45. Stevens alleges being subject to registration as a sex offender is "horrible and embarrassing." *Id.* ¶ 48.

Plaintiff Oliver Nicholes alleges he "was charged" for kidnapping and rape in the first degree in Baldwin County, Alabama in 1981. Doc. 12 ¶ 49. Court records show that in April 1981, a Baldwin County grand jury indicted Nicholes for first degree kidnapping of a female victim "with the intent to inflict physical injury upon her, or to violate or abuse her sexually" under Alabama Code §§ 13A-6-43 and for first degree rape by forcible compulsion of the same victim under Alabama Code §§ 13A-6-61. Doc. 13-5 at 6, 30. These offenses occurred on March 8, 1981, when Nicholes was 17 and the victim was 16. *Id.* at 1, 26, 6, 30; Doc. 12 ¶ 49. Nicholes's juvenile court case was transferred for prosecution as an adult in criminal court, and he was represented by counsel when he was advised of his rights to seek application for Youthful Offender status and advised the court he did not wish to apply for Youthful Offender status. *Id.* at 2, 26. A Baldwin County jury convicted Nicholes on both the first degree kidnapping and first degree rape charges, and he was sentenced to 40 years for the rape conviction and life imprisonment for the kidnapping conviction. *Id.* at 4, 28, 42; Doc. 12 ¶ 49; *see also Nicholes v. State*, 444 So. 2d 896 (Ala. Crim. App. 1984); *Nicholes v. State*, 409 So. 2d 454 (Ala. Crim. App. 1981).

Nicholes's sex offender registration information is provided on a website maintained by ALEA pursuant to Alabama Code §§ 15-20A-8(a). Doc. 13-6 at 2. The registry contains a physical description of Nicholes along with a photograph and describes his offenses as first degree kidnapping of a minor and first degree rape. *Id*. Under the "Comments," section of Nicholes's registration it states, "Kidnapped two female juveniles and Raped one at gunpoint, convicted in

Baldwin County, Al." *Id.*; *see also Nicholes*, 409 So. 2d at 454 ("In the late afternoon of the eighth of March, 1981, Laura and Leslie were abducted while walking home along Highway 98 near the Grand Hotel in Baldwin County.").[9]

Nicholes alleges that six months prior to his release on parole in 1998, the community to which he was planning to return received notice of his sex offender status under the CNA. Doc. 12 ¶ 50. He alleges that upon his return, he "faced an unwelcome reception" and "felt that he was unwanted in his neighborhood, so he moved to a new location." *Id.* ¶ 51. He alleges that because his new residence was 1,998 feet from a school and "SORNA" "required him to stay at least two thousand feet from schools, he had to move yet again." *Id.* He worked as the owner of a "barber and beauty salon" in or around 2002 and had approximately seven employees. *Id.* ¶ 52. Nicholes alleges he was arrested for traffic offenses in approximately 2014 and was sent back to prison for a parole violation. *Id.* ¶ 53. He was released in 2016 and worked as a licensed barber. *Id.* ¶ 54. He alleges his wife started a healthcare company in 2017 that transports individuals to their health appointments, but that he assists with administrative and mechanical work for the healthcare company rather than work as a driver because of "travel restrictions under SORNA." *Id.* Nicholes alleges that when his son was a child he "was prohibited from attending any events at his school, or even picking up his son from school." *Id.* ¶ 55. Nicholes's son is now an adult and has completed college. *Id.* Nicholes alleges that although he attends church, he and his family do not attend Sunday school "because of the proximity of children in the school-like setting." *Id.* ¶ 56. He also

[9] Nicholes alleges that "he has maintained that he was wrongfully convicted." Doc. 12 ¶ 49. For the reasons stated in Section B.1., *supra*, *Heck* bars Nicholes from basing any claim for relief from his sex offender registration requirements on this allegation because it would necessarily imply the invalidity of his conviction or sentence. He was convicted and his sentence was affirmed on appeal in two separate opinions of the Alabama Court of Criminal Appeals.

alleges that "dealing with the SORNA requirements is 'mentally and physically stressful' and 'devastating and terrifying,' . . . [and] his 'livelihood was taken away from him'" and he "worries that people will not accept him." *Id.* ¶ 57.

3. Juvenile Sex Offenders, Youthful Offender Sex Offenders, and Adult Sex Offenders Under ASORCNA

Plaintiffs challenge their registration under ASORCNA on the basis that they committed their underlying sex offenses as "children." *See, e.g.*, Doc. 12 ¶¶ 1–2. Plaintiffs' challenges based on their convictions as 16- and 17-year-olds require analyzing Alabama law regarding criminal prosecutions of minors, the corresponding distinctions ASORCNA imposes, and how these apply to Plaintiffs. *See* Ala. Code §§ 15-20A-3 (determining applicability of ASORCNA to sex offenders based on their status as adult, juvenile, or youthful offender sex offenders). Alabama law in effect and applied to Plaintiffs at the time of their convictions demonstrates that Plaintiffs received consideration of their status as minors in relation to the offenses with which they were charged: (1) when the juvenile court made the decision to transfer their cases to criminal court for prosecution as adults; and (2) when the criminal court considered and denied Plaintiffs Pennington's and Stevens's applications for Youthful Offender status (Nicholes, through counsel, waived his right to seek such status). After receiving this consideration, Plaintiffs were convicted of their sex offenses as adults in criminal court.

Juvenile proceedings are governed by the Alabama Juvenile Justice Act, Alabama Code § 12-15-101 *et seq.* That act defines "adult" as an individual 19 years of age or older, and "child" as an individual under the age of 18. Ala. Code § 12-15-102(1), (3). Juvenile courts "exercise exclusive original jurisdiction of juvenile court proceedings in which a child is alleged to have committed a delinquent act . . . ." Ala. Code § 12-15-114(a). An adjudication of delinquency in a juvenile court proceeding is "not considered to be a conviction" and cannot be admissible in a

future proceeding, subject to limited exceptions. *See* Ala. Code § 12-15-220. However, a juvenile court proceeding may be transferred to the circuit or district court for criminal prosecution on motion of a prosecutor if the child was 14 or more years of age at the time of the conduct charged under certain circumstances. *See* Ala. Code § 12-15-203.

The juvenile court transfer statute has been amended several times. Of relevance to this suit are the transfer statutes in effect at the time Pennington's case was transferred in 1983, Stevens's in 1996, and Nicholes's in 1981. The juvenile court transfer statute in effect and applied to Plaintiffs Pennington and Nicholes in the 1980s was as follows:

> Transfer to criminal court.—
>
> (a) The prosecutor may before a hearing on the petition on its merits, and following consultation with probation services, file a motion requesting the court to transfer the child for criminal prosecution, if:
>
> (1) the child was 14 or more years of age at the time of the conduct charged, and is alleged to have committed an act which would constitute a felony if committed by an adult; or
>
> (2) the child is 14 or more years of age and is already under commitment to an agency, department or institution as a delinquent.
>
> (b) The court shall conduct a hearing on all such motions for the purpose of determining whether it is in the best interest of the child or the public to grant the motion. If the court so finds and there are no reasonable grounds to believe he is committable to an institution or agency for the mentally retarded or mentally ill, it shall order the case transferred for criminal prosecution.
>
> (c) When there are grounds to believe that the child is committable to an institution or agency for the mentally retarded or mentally ill, the court shall proceed as provided in section 5-136.
>
> (d) Evidence of the following and other relevant factors shall be considered in determining whether the motion shall be granted:
>
> (1) the nature of the present alleged offense;

> (2) the extent and nature of the child's prior delinquency record;
>
> (3) the nature of past treatment efforts and the nature of the child's response to such efforts;
>
> (4) demeanor;
>
> (5) the extent and nature of the child's physical and mental maturity;
>
> (6) the interests of the community and of the child requiring that the child be placed under legal restraint or discipline.
>
> (e) Prior to a hearing on the motion by the prosecutor, a study and report to the court, in writing, relevant to the factors in subsection (d) shall be made by probation services.
>
> (f) When a person is transferred for criminal prosecution, the court shall set forth in writing its reasons for granting the motion which shall include a finding of probable cause for believing the allegations are true and correct.

Ala. Act No. 1975-1205 § 5-129. The 1996 version of the statute under which Stevens' case was transferred from juvenile court to criminal court is substantially the same as that now codified at Alabama Code § 12-15-203. *See* Alabama Act No. 1996-571 § 1. The 1996 transfer statute did not limit transfers to crimes that would be felonies if committed by an adult and expressly added that "[a] child who is transferred to criminal court for criminal prosecution shall be tried as an adult for the offense charged and all lesser included offenses of the offense charged." *Id.*

Despite these changes, the transfer procedure that was applied to Pennington and Nicholes in the 1980s and to Stevens in the 1990s was substantially the same and considered the same factors. *See, e.g.*, *Gulledge v. State*, 419 So. 2d 219, 219–22 (Ala. 1982) (affirming decision to transfer juvenile case to criminal court for prosecution as adult under 1975 transfer statute); *Brown v. State*, 353 So. 2d 1384 (Ala. 1977) (same); *J.F.B. v. State*, 729 So. 2d 355, 356-58 (Ala. Crim. App. 1998) (affirming decision to transfer juvenile case to criminal court for prosecution as adult

under 1996 transfer statute). A juvenile court's decision to transfer a juvenile case for criminal prosecution as an adult is divided into a probable cause phase and a dispositional phase. *J.F.B.*, 729 So. 2d at 356. "During the probable cause phase, the juvenile court determines whether there is probable cause to believe that the juvenile committed the alleged crime." *J.S.A. v. State*, 615 So. 2d 1288, 1290 (Ala. Crim. App. 1993). "During the dispositional phase, the juvenile court determines whether it is in the best interest of the child or the public to transfer the child to the circuit court to stand trial as an adult." *Id.* The juvenile court makes this determination by applying the circumstances of the offense to the six statutory factors in the transfer statute.[10] *J.F.B.*, 729 So. 2d at 357. In 1991, the Alabama Court of Criminal Appeals held that the juvenile court must find that its decision to transfer the case for criminal prosecution is supported by clear and convincing evidence. *O.M. v. State*, 595 So. 2d 514, 526 (Ala. Crim. App. 1991). Thus, each Plaintiff received consideration of his minor status in relation to the offense by the juvenile court in making the decision to transfer his cases to circuit court for prosecution as an adult.[11]

A juvenile offender whose case is transferred to criminal court for prosecution as an adult may still seek Youthful Offender status. *See* Ala. Code § 15-19-1 *et seq.* A criminal court must inform a "person charged with a crime which was committed in his or her minority but was not disposed of in juvenile court and which involves moral turpitude or is subject to a sentence of commitment for one year or more" of his right to be tried as a Youthful Offender. Ala. Code § 15-

[10] The six statutory factors guiding the juvenile court's decision have remained the same in all versions of the statute.

[11] In 1994, the legislature amended the transfer statute to remove juvenile court jurisdiction for offenses committed by a person 16 or older at the time of the conduct charged with a Class A felony. *See* Ala. Act 1994-481 (now codified at Alabama Code § 12-15-204). Because Pennington and Nicholes were both 16 or older at the time of the offenses and were charged with Class A felonies, had they been charged under the current statute, they would have been automatically tried as adults in criminal court without receiving the transfer hearing their records show that they did in fact receive.

19-1(a). "In Alabama, the proceedings under the Youthful Offender Act are not criminal in nature and are used to protect persons in a specified age group, who would otherwise be tried as adults, from the harsh consequences of the criminal adjudicatory process." *Baldwin v. State*, 456 So. 2d 117, 123 (Ala. Crim. App. 1983). The Supreme Court of Alabama has stated:

> The Youthful Offender Act is intended to extricate persons below twenty-one years of age from the harshness of criminal prosecution and conviction. It is designed to provide them with the benefits of an informal, confidential, rehabilitative system. A determination that one is a youthful offender (1) does not disqualify the youth from public office or public employment, (2) does not operate as a forfeiture of any right or privilege, (3) does not make him ineligible to receive any license granted by public authority, and (4) shall not be deemed a conviction of crime; and (5) the record shall not be open to public inspection except upon permission of the court.

Raines v. State, 317 So. 2d 559, 363 (Ala. 1975); *see also* Ala. Code § 15-19-7. The Youthful Offender Act places an affirmative duty upon the criminal court to apprise an accused youthful offender of the benefits of the act. *See Clemmons v. State*, 321 So. 2d 238, 242 (Ala. 1975). However, once the court provides this notice, the decision to grant the applicant Youthful Offender status is committed to the sound discretion of the court after making an appropriate investigation. *Morgan v. State*, 363 So. 2d 1013, 1015 (Ala. Crim. App. 1978). Here, Pennington and Stevens applied for and were denied Youthful Offender status, and Nicholes was advised of his right to seek Youthful Offender status and, through counsel, waived this right. *See* Doc 13-1 at 19; Doc. 13-3 at 3; 13-4 at 5; 13-5 at 2, 26.

The convictions subjecting Plaintiffs to registration under ASORCNA are felony adult criminal convictions. Each Plaintiff's case was transferred from the juvenile court to criminal court for prosecution, and each Plaintiff either waived his right to seek Youthful Offender status or was denied it after application. Alabama statutory provisions classifying adjudications as juvenile delinquents or Youthful Offenders as non-criminal and providing for confidentiality of records of

such proceedings thus *do not* apply to Plaintiffs' convictions in this case. *See* Ala. Code §§ 12-15-133; 12-15-134; 12-15-220; 15-19-7(b), (c); *see also* Ala. Att'y Gen. Op. 96-00138 ("Once a charge of delinquency is transferred for criminal prosecution under [former Code] Section 12-15-34, the records relating to the charge are a matter of public record and can be disseminated by the ACJIC."); Ala. Att'y Gen. Op. 82-00189 ("It is the opinion of this office that when a child is transferred to criminal court for prosecution, the records with regard to the case against him in criminal court are open to public inspection to the extent an adult's criminal records would be."). As set out in the next section, ASORCNA correspondingly attaches the same regulatory consequences to their sex offense convictions as it would to an adult, although it treats Stevens differently from Pennington and Nicholes by allowing him to petition for relief based on the nature of his statutory rape conviction.

4. Plaintiffs Are Classified as Adult Sex Offenders Under ASORCNA

Because Plaintiffs were convicted as adults in criminal court, they fall under ASORCNA's definition of "adult sex offender" as "[a] person convicted of a sex offense" and are thus subject to ASORCNA's restrictions as adult sex offenders. Ala. Code § 15-20A-4(1); *see also* Ala. Code § 15-20A-4(11), (33) (providing separate classifications for those adjudicated juvenile or youthful offenders sex offenders). ASORCNA applies categorically differently to sex offenders depending on whether they were adjudicated as juvenile delinquents or youthful offenders or convicted as adults. *See* Ala. Code § 15-20A-3.

Adult sex offenders convicted of a sex offense as defined in Alabama Code § 15-20A-5 are subject to registration for life regardless of when his or her crimes were committed or his or her duty to register arose. Ala. Code §§ 15-20A-3(a), (b). However, even the adult sex offender provisions of ASORCNA do not apply to all Plaintiffs the same way. Plaintiff Stevens may file a

petition in state court for relief from all ASORCNA requirements because his crime was second degree rape. Ala. Code § 15-20A-24(a)(1). The state court may grant his petition if Stevens proves by clear and convincing evidence that: (1) his crime did not involve force and was a crime only due to the age of the victim; (2) the victim was 13 years of age or older; and (3) Stevens was less than five years older than the victim. *See* Ala. Code § 15-20A-24(b); *see also* Doc. 12 ¶¶ 37.

This statutory provision applies retroactively to sex offenses committed prior to July 1, 2011, unless the petitioner was adjudicated or convicted of a previous sex offense or sex offense subsequent to the sex offense requiring registration or has any pending criminal charges for any sex offense. Ala. Code § 15-20A-24(k), (*l*). Stevens does not allege that this form of statutory relief is unavailable to him or why he has not sought this remedy. Due to the severity of Plaintiffs Pennington's and Nicholes's sex offenses, both of which involved forcible compulsion, the only form of relief from ASORCNA's restrictions is a health exception to its residency restrictions. *See* Ala. Code § 15-20A-23. [12]

A juvenile sex offender adjudicated delinquent of a sex offense under § 15-20A-5 on or after July 1, 2011, is subject to ASORCNA's requirements for the duration set out in § 15-20A-28. *Id.* § 15-20A-3(d). That section subjects juvenile offenders to ASORCNA's separate provisions regarding juvenile sex offender registration and notification for only 10 years, *unless* they were adjudicated delinquent for first degree rape, first degree sodomy, first degree sexual abuse, or sexual torture. Ala. Code § 15-20A-28(a), (c). Juveniles adjudicated delinquent for those serious sex offenses are subject to lifetime registration and notification under ASORCNA but may petition for release from its requirements 25 years after their release for the subject sex offense

[12] Independently from this form of complete relief, Stevens may petition for relief from the 2,000-foot geographic employment restrictions. *See* Ala. Code § 15-20A-25. Again, due to the severity of Pennington's and Nicholes's sex offenses, they are not eligible for this relief.

under § 15-20A-34. Ala. Code § 15-20A-28(b). Juvenile sex offenders adjudicated delinquent for a sex offense contained in § 15-20A-5 prior to July 1, 2011, are subject to registration as juveniles for 10 years from the last date of release for the qualifying sex offense and subject to notification *if* notification was previously ordered by the sentencing juvenile court. *See* Ala. Code § 15-20A-3(d). Juvenile sex offenders are subject to completely separate—and diminished—registration and notification requirements compared to adult sex offenders. *See* Ala. Code §§ 15-20A-26 to 15-20A-34 (setting out juvenile sex offender registration and notification requirements).

A youthful offender adjudicated as a youthful offender of a sex offense under § 15-20A-5 on or after July 1, 2011, is subject to ASORCNA's *juvenile offender* requirements *if* the offender was less than 18 at the time of the offense and had not previously been adjudicated or convicted of a sex offense. *See* Ala. Code §§ 15-20A-3(f), 15-20A-35. Otherwise, a youthful offender sex offender is treated as an adult sex offender. Ala. Code § 15-20A-35. A youthful offender adjudicated for a qualifying sex offense prior to July 1, 2011, with no previous adjudication for a sex offense is subject to registration as a juvenile for 10 years from the last date of release for the qualifying sex offense and subject to notification *if* notification was previously ordered by the sentencing juvenile court. Ala. Code §§ 15-20A-3(f)(1), (d). A youthful offender sex offender with an offense prior to July 1, 2011, with a previous adjudication for a sex offense is treated as an adult sex offender and is subject to lifetime registration. Ala. Code. 15-20A-3(f)(2).

ASORCNA treats juvenile sex offenders, youthful offender sex offenders, and adult sex offenders categorically different with respect to its registration and notification requirements. *Compare* Ala. Code §§ 15-20A-9 to -25 (setting out registration, notification, residence, employment, and identification requirements for adult sex offenders as well as available means of seeking relief from these requirements), *with* Ala. Code §§ 15-20A-26 to -35 (setting out

diminished requirements for juvenile and youthful offenders). If Plaintiffs had not been determined to be sufficiently mature to stand trial as adults by the juvenile courts and denied Youthful Offender status, they would not currently be registered sex offenders pursuant to the 10-year expiration for retroactive application to juvenile and youthful offender registrants. *See* Ala. Code §§ 15-20A-3(d), (f)(1). Because they received a judicial determination that they should be tried as adults, they are subject to registration as adult sex offenders under ASORCNA. However, the resolution of their constitutional challenges turns on what provisions of ASORCNA they have standing to challenge, the consideration they received when they were required to be tried as adults, and the reasons why ASORCNA classifies them as adults.

C. Argument

1. Plaintiffs Lack Standing to Challenge Any Provision of ASORCNA Other than Their Classification as Adult Sex Offenders, the Limitations on the Relief They May Seek from ASORCNA's Requirements, the Registration and In-Person Reporting Requirements, the Community Notification and Internet Sex Offender Registry Requirements, and Some Portions of the Restrictions on Residence Locations

Although Plaintiffs allege a laundry list of restrictions under ASORCNA, doc. 12 ¶¶ 62–83, they have standing to challenge only those provisions of ASORCNA for which they plausibly allege the elements of standing on an individual basis. Plaintiffs' factual allegations establish, at most, standing to challenge the following provisions, or portions of these provisions, of ASORCNA: (1) their classification as adult sex offenders based on their criminal convictions under §§ 15-20A-3(a), (b); (2) the limitation of relief from ASORCNA's requirements available to Pennington and Nicholes to only that in § 15-20A-23; (3) the relief from ASORCNA's requirements available to Stevens in §§ 15-20A-23 to 25; (4) the registration requirements, including quarterly in-person registration and the corresponding registration fee in §§ 15-20A-7, 10, 22; (5) community notification of Plaintiffs' sex offender status and their inclusion on ALEA's

internet sex offender registry in §§ 15-20A-8, 21; and (6) some portions of the restrictions on residence locations in § 15-20A-11. For all other provisions of ASORCNA, Plaintiffs fail to allege the elements of standing.

Article III of the Constitution limits the jurisdiction of federal courts to the consideration of "Cases" or "Controversies." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (quoting U.S. Const. Art. III § 2). Because Article III confers federal court jurisdiction only on cases or controversies, a federal court lacks subject matter jurisdiction over a complaint that fails to make plausible allegations of standing. *Id.* "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 555, 561 (1992). The "irreducible constitutional minimum of standing contains three elements": (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical;"' (2) "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 560–61 (citations omitted).

As *Lujan*'s language makes clear, "an injury in fact must be both concrete *and* particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id.* (internal quotation and citation omitted). "A 'concrete' injury must be *'de facto'*; that is, it must actually exist." *Id.* Plaintiffs must assert their own injuries and may not challenge portions of ASORCNA based on potential applications of third parties. *See Knight v. State of Ala.*, 14 F.3d 1534, 1554 (11th Cir.

1994). When the complaint is stripped of its generalized grievances, Plaintiffs' allegations as to their actual injuries under ASORCNA are thin.

Pennington alleges he was arrested under ASORCNA's predecessor, the CNA, for failing to register his home address in 2006 and again in 2009 for failing to register his home address and a motor vehicle. Doc. 12 ¶¶ 20–21, 26. He currently lives at an ASORCNA-compliant address with his wife and adult son. *Id.* ¶ 36. He alleges he is unable to pick up his grandchildren from school "because of his registration status," *Id.* ¶ 30, but this is not fairly traceable to ASORCNA. While ASORCNA prevents registrants convicted of sex offenses involving minors from loitering on school property, it allows them to go onto school property for a legitimate purpose as long as the offender makes prior arrangements with the principal. *See* Ala. Code § 15-20A-17(a), (b). Pennington also alleges "employment consequences" from ASORCNA even though he was employed with the same company for 30 years and rose to a management position. *Id.* ¶ 32. He alleges with particularity only that he was demoted in 2019 after a "background check[]" from his new employer revealed he was a sex offender. *Id.* ¶ 33. But Pennington's felony sex offense is a public record that would be revealed in a background check and is neither fairly traceable to ASORCNA nor redressable by Defendants. Pennington also alleges that ASORCNA interferes with his ability to practice his religion, but his lack of church attendance is due to alleged "ostracism" based on his registration status and not because ASORCNA restricts where he may attend church. *Id.* ¶ 35. Thus, at most, Pennington has standing to challenge his obligation to report his residential address and motor vehicles based on his prior arrest. *See* Ala. Code §§ 15-20A-7(a); 15-20A-10(b), (c), (f).

The only concrete and particular injury alleged by Stevens is his conviction in 2014 for failing to comply with ASORCNA's quarterly, in-person reporting requirements under Alabama

Code § 15-20A-10. Doc. 12 ¶ 40. Stevens alleges that he had "difficulty finding a job due, in part, to his felony and sex offender status," and that this caused his 2007 drug conviction. *Id.* ¶ 39. But ASORCNA was not in effect at this time, and he fails to allege whether any employment restrictions under the CNA, rather than his status as a convicted felon, caused his employment troubles. He alleges he was unable to move in with his family in a public housing complex "due to his SORNA status and felony conviction." *Id.* ¶ 43. However, this alleged injury is neither fairly traceable to Defendants nor redressable by them because federal law governing federally assisted housing creates these restrictions, not ASORCNA, and Stevens's felony marijuana conviction also likely independently disqualified him from public housing. *See* 42 U.S.C. § 13661(c) (stating owner of federally assisted housing may deny application for an applicant who was "during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related . . . criminal activity"); *id.* § 13663(a) (stating "an owner of federally assisted housing shall prohibit admission to such housing for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.").

Stevens alleges more housing problems when he and his family moved to Gadsden, but thereafter "an organization that serves children who are victims of abuse[]" moved next door and he and his family were "advised" to move to another location. Doc. 12 ¶ 44. This allegation is not fairly traceable to ASORCNA because ASORCNA contains a grandfather provision that preserves an address's compliant status regardless of changes to nearby property that occur after the sex offender establishes residency at a previously compliant address. *See* Ala. Code § 15-20A-11(c). He currently lives at an ASORCNA-compliant address with his family, which results only in a "long commute[]." Doc. 12 ¶ 46. Stevens alleges that ASORCNA "interferes with his ability to

participate in his children's lives" because the United States military refused to allow him to attend his son's graduation—again, a consequence not fairly traceable to either ASORCNA or Defendants. Stevens alleges he does not list himself as a parent to his children with their schools or participate in other activities due to "fear that the stigma of his registration status will be imposed upon his children," and alleges being subject to registration is "horrible and embarrassing." *Id.* ¶¶ 4, 48. Thus, Stevens alleges no injuries actually traceable to ASORCNA other than an arrest for violating its in-person reporting requirements and stigma resulting from his inclusion on a public sex offender registry. Stevens also does not allege why, if ASORCNA is so burdensome, he has not petitioned for relief from ASORCNA's requirements under Alabama Code § 15-20A-24, as he is eligible to do so.

Plaintiff Nicholes alleges that after his parole in 1998 for kidnapping and raping a 16-year-old girl at gunpoint, the community to which he was planning to return received notice of his sex offender status under the CNA, and he "faced an unwelcome reception" and "felt that he was unwanted in his neighborhood, so he moved to a new location." Doc. 12 ¶¶ 49–51. He alleges that at some unspecified date, his new residence was 1,998 feet from a school and because "SORNA" "required him to stay at least two thousand feet from schools, he had to move yet again." *Id.* ¶ 51.[13]

[13] As with the other Plaintiffs, Nicholes makes allegations about "SORNA" as if he was referring to a single statute. The CNA was enacted in 1996, and it prohibited sex offenders from residing "within *1,000* feet of any public school, private school, day care center, or any other child care facility." Ala. Act No. 96-793 § 3(b) (emphasis added). The 1,000-foot restriction was retained when the CNA was repealed and reenacted in 1999. *See* Ala. Act No. 99-572 § 3 (enacting former Alabama Code § 15-20-26(a) prohibiting sex offenders from residing within 1,000 feet of a school). In 2000, the legislature amended the CNA to extend the 1,000-foot prohibition on sex offenders residing near schools to 2,000 feet. *See* Ala. Act No. 2000-728 § 1 (amending former Alabama Code § 15-20-26(a) to create 2,000-foot rule). ASORCNA, which is the statute in effect as of July 1, 2011, and from which Plaintiffs currently seek declaratory and injunctive relief, maintains the 2,000-foot prohibition. *See* Ala. Code § 15-20A-11(a). Thus, Nicholes cannot plausibly allege any Alabama law prevented him from living within 1,998 feet of a school after his release in 1998 but prior to 2000.

Nicholes worked as the owner of a "barber and beauty salon" in or around 2002 and had approximately seven employees. *Id.* ¶ 52. But he was arrested for a traffic offense in approximately 2014 and was sent back to prison for a parole violation—all of which is completely unrelated to ASORCNA or Defendants. He was released in 2016 and worked as a licensed barber. *Id.* ¶ 54. He alleges his wife started a healthcare company in 2017 that transports individuals to their health appointments, but that he assists with administrative and mechanical work for the healthcare company rather than work as a driver because of "travel restrictions under SORNA." *Id.* He alleges in conclusory fashion that prior to this, he was rejected for other positions "because of the restrictions imposed by SORNA." *Id.*

Nicholes alleges that when his son was a child, he "was prohibited from attending any events at his school, or even picking up his son from school." *Id.* ¶ 55. Again, this allegation is not fairly traceable to ASORCNA because ASORCNA does not prevent sex offenders from picking up their children at school so long as they make prior arrangements with the principal and do not stay on school property beyond this purpose. *See* Ala. Code § 15-20A-17. At any rate, Nicholes cannot seek relief for any provision of ASORCNA purportedly interfering with his ability to pick up his child from school because his son is now an adult and has completed college. Doc. 12 ¶ 55. Any such injury is no longer redressable.

Nicholes's remaining allegations are that ASORCNA interferes with his ability to worship at church because he does not attend Sunday school "because of the proximity of children in the school-like setting" and that church members isolate themselves from Nicholes because of his registration status. Doc. 12 ¶ 56. But ASORCNA does not prevent Nicholes from attending Sunday school, because a Sunday school class with children does not make his church a "childcare facility" or "school" within ASORCNA's definition of these terms, and even if they were, ASORCNA does

not prevent him from being nearby. *See* Ala. Code § 15-20A-4(3), (24). Thus, only the stigma imposed by his registration status that allegedly interferes with his church attendance is fairly traceable to ASORCNA. As to stigma, he alleges generally that "dealing with the SORNA requirements is 'mentally and physically stressful' and 'devastating and terrifying,' . . . [that] his 'livelihood was taken away from him,'" and that he "worries that people will not accept him." *Id.* ¶ 57. Thus, the only current burden Nicholes alleges ASORCNA places on him is that he is employed for his wife's company doing administrative and mechanical work rather than working as a driver and the stigma resulting from his public registration status.

In sum, all Plaintiffs allege some form of mental distress from having to register under ASORCNA. Pennington alleges an injury resulting from failure to comply with ASORCNA's requirements to register his residence and vehicles. Stevens alleges an injury resulting from his failure to comply with ASORCNA's quarterly, in-person reporting requirements. Plaintiffs allege no further injuries that are fairly traceable to ASORCNA or to Defendants or that are redressable by any judgment against them. All Plaintiffs are currently residing at ASORCNA-compliant addresses with their families. As to employment, Pennington alleges he was demoted after a "background check" revealed he was a sex offender, but does not trace this specifically to ASORCNA rather than the public record of his criminal conviction. Stevens alleges nothing more than that he has a long commute to work. Nicholes lost his barber shop, but that was due to having his parole revoked after he committed a traffic offense, not to any of ASORCNA's requirements. He is currently employed but alleges his is restricted in *some* of the tasks he can perform for his wife's company. Thus, aside from appearing on a public registry and having to comply with certain registration requirements, Plaintiffs do not allege any more than a *de minimis* burden to their ability to maintain employment, housing, and families.

2. Defendant Charles Ward is Entitled to Sovereign Immunity Because Plaintiffs Make No Allegations of Injuries Resulting from the Sex Offender Identification Requirement They Allege He Enforces

Plaintiffs name Charles Ward as a Defendant in this suit under the exception to sovereign immunity set out in *Ex parte Young*, 209 U.S. 123 (1908), on the grounds that he "is the Director of the Department of Public Safety and oversees driver's licenses." Doc. 12 ¶ 60. ASORCNA requires all adult sex offenders to obtain and always have in his possession a driver license or identification card issued by ALEA "bearing a designation that enables law enforcement officers to identify the licensee as a sex offender." Ala. Code § 15-20A-18(b).[14] Plaintiffs do not make *a single allegation* of injury based on the possession of an Alabama driver license or identification card designating them to law enforcement officers as sex offenders. As a result, they fail to allege any injury fairly traceable to Defendant Charles Ward or redressable by him. For the same reasons, he lacks any connection to the enforcement of provisions of ASORCNA unrelated to its identification requirements. *Ex parte Young* "permit[s] suits against state officers only when those officers are 'responsible for' a challenged action and have 'some connection' to the unconstitutional act at issue." *Women's Emerg. Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (citing *Luckey v. Harris*, 860 F.2d 1012, 1015–16 (11th Cir. 1988)). A state official's general executive authority is not enough to confer jurisdiction, especially where state law confers more specific enforcement powers to another official. *Id.* at 949–50 (dismissing suit against governor

[14] Until February 2019, ALEA implemented this requirement by printing "CRIMINAL SEX OFFENDER" in red letters on the face of driver licenses and identification cards. *See Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1321 (M.D. Ala. 2019). After the Court in *Doe 1* declared this method of implementing ASORCNA unconstitutional, ALEA has since replaced the "CRIMINAL SEX OFFENDER" designation with a code. *Doe 1*, 367 F. Supp. 3d at 1324–26. Plaintiffs make no allegations of injury resulting from their identifications designating them as sex offenders, whether before or after ALEA ceased enforcement of the "CRIMINAL SEX OFFENDER" designation.

challenging the constitutionality of statute authorizing specialty license plates). Thus, Plaintiffs' claims as to Defendant Ward fail to meet the exception to sovereign immunity under *Ex parte Young*, entitling Defendant Ward to sovereign immunity and dismissal from this suit.

3. Because the Face of Plaintiffs' Amended Complaint Conclusively Establishes They Knew or Should Have Known They Were Subject to ASORCNA's Requirements as of Its Effective Date of July 1, 2011, Their Claims Are Barred by the Statute of Limitations

Plaintiffs have all known they were subject to Alabama's sex offender registration laws well before ASORCNA's effective date of July 1, 2011, and allege injuries resulting from ASORCNA after its requirements applied to them. Yet, they waited until September 19, 2019, to file suit. Their claims are barred by the statute of limitations, and this suit is due to be dismissed with prejudice.

"All constitutional claims brought under § 1983 are tort actions, subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). In Alabama, the applicable statute of limitations for a § 1983 claim is the two-year limitation set out in § 6-2-8(*l*) of the Alabama Code. *See Jones v. Prueit & Mauldin*, 876 F.2d 1480, 1483 (11th Cir. 1989) (*en banc*). For purposes of a § 1983 claim, "the statute of limitations begins to run from the date 'the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (quoting *Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996)). "Thus Section 1983 actions do not accrue until the plaintiff knows *or has reason to know* that he has been injured." *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) (emphasis added).

"A Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate if it is apparent from the face of the complaint that the claim is time-barred." *Gonsalvez v. Celebrity Cruises, Inc.*,

750 F.3d 1195, 1197 (11th Cir. 2013) (internal quotation and citation omitted). It is apparent from the face of Plaintiffs' complaint (and, in addition, from judicially noticeable documents) that they knew or should have known that they were subject to ASORCNA's requirements as of its effective date of July 1, 2011. In fact, Plaintiffs were well aware of these requirements because they were subject to many of the same requirements under ASORCNA's predecessor, the CNA. Pennington alleges he was prosecuted for failing to comply with the CNA's registration requirements in 2006 and 2009. Doc. 12 ¶¶ 20–21, 26. Stevens was convicted in 2014 for failing to comply with ASORCNA's quarterly, in-person reporting requirements. *Id.* ¶ 40. Nicholes alleges he was subject to the community notification requirements of the CNA upon his release from prison in 1998, and that he has had to move due to the 2,000-foot restriction on residences near schools. *Id.* ¶¶ 50–51. He was subject to ASORCNA when his parole was revoked in 2014 and was subject to it again upon his release in 2016. *Id.* ¶¶ 53–54. He also alleges a past injury based on ASORCNA's provision preventing sex offenders convicted of offenses with minors from loitering near schools. *Id.* ¶ 55. Since all Plaintiffs were previously subject to the CNA and subsequently to ASORCNA as of its effective date of July 1, 2011, they were required to file suit by July 1, 2013. Their claims in this case thus fall well outside the statute of limitations.

The Court's rejection of the State's statute of limitations argument in *Doe 1* is not to the contrary. *See Doe 1*, 367 F. Supp. 3d at 1338–39. It is black letter law in this circuit that Eighth Amendment claims accrue when the plaintiff knew or should have known that he was subject to cruel and unusual punishment. *See McNair*, 515 F.3d at 1173–74, 1177 (holding inmate's cruel and unusual punishment challenge to method of execution was time barred because it accrued when he selected lethal injection as the method *even though he was continuously subject to that method* before he filed suit more than two years later). It is black letter law in this circuit that ex

post facto claims accrue when the plaintiff knew or should have known he was subject to a retroactive punishment *and* that the "continuing violation" doctrine does not apply to toll such claims. *See Brown*, 335 F.3d at 1261–62 (holding inmate's ex post facto challenge to change in frequency of his parole consideration was barred by statute of limitations); *Lovett v. Ray*, 327 F.3d 1181, 1182–83 (11th Cir. 2003) (same). Plaintiffs' equal protection and procedural due process claims likewise accrued on July 1, 2011, when they became subject to ASORCNA's requirements based on their convictions as minors without receiving notice and an opportunity to be heard on whether they should be required to register. *See DeYoung v. Owens*, 646 F.3d 1319, 1323–25 (11th Cir. 2011) (holding inmate's equal protection challenge to method of execution was time-barred); *Michael v. Parsons*, 569 F.2d 853, 853–54 (5th Cir. 1978) (holding police officer's procedural due process claim accrued when he was terminated without due process and was time barred since it was filed more than two years later)[15]; *see also Braden v. Tex. A&M Univ. Sys.*, 636 F.2d 90, 93–94 (5th Cir. Unit A Feb. 1981) (per curiam).

Case law applying these principals to constitutional challenges to sex offender registration requirements pursuant to § 1983 make clear that a plaintiff's cause of action accrues when the plaintiff becomes subject to the registration requirements *and* that the continuing violation doctrine does not indefinitely toll the limitations period. *See Meggison v. Bailey*, 575 F. App'x 865, 867 (11th Cir. 2014); *Moore v. Fed. Bureau of Prisons*, 553 F. App'x 888, 890 (11th Cir. 2014); *Smelcher v. Ala. Att'y Gen.*, No. 1:18-cv-1099, 2019 WL 142323, at *4 (N.D. Ala. Jan. 9, 2019); *Mims v. Bentley*, No. 7:15-cv-119, 2015 WL 5736829, at *2 (N.D. Ala. Oct. 1, 2015). Although the Court in *Doe 1* distinguished these cases, it expressly acknowledged that these cases held ex

[15] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (adopting as binding precedent decisions of the Fifth Circuit Court of Appeals decided on or before September 30, 1981).

post facto challenges to sex offender registration accrued when the plaintiffs registered as sex offenders and otherwise applied to claims of "wrongful registration." *Doe 1*, 367 F. Supp. 3d at 1338–39. Thus, they apply to Plaintiffs' claims *here* because they challenge registration as such, and so does these cases' rejection of the "continuing violation" doctrine to ex post facto and other "wrongful registration" claims brought by registered sex offenders. *See Meggison*, 575 F. App'x at 867 (holding continuing violation doctrine did not toll statute of limitations even though plaintiff's registration as a sex offender would continue to have effects on him in the future); *Moore*, 553 F. App'x at 890 (declining to apply continuing violation doctrine to sex offender's challenge to registration requirements). Plaintiffs' claims are time-barred.

4. Plaintiffs Fail to State a Claim for Relief on the Merits

Regardless of whether jurisdictional issues and the statute of limitations bar Plaintiffs' claims, those claims still fail as a matter of law on the merits. In the interest of efficiency, Defendants begin their analysis of Plaintiffs' claims on the merits with the ex post facto challenge in the Second Cause of Action because this analysis creates the foundation for analyzing Plaintiffs' First Cause of Action. If ASORCNA is nonpunitive for ex post facto purposes, then Plaintiffs' First Cause of Action for a violation of their right to be free from cruel and unusual punishment under the Eighth Amendment necessarily fails because a punishment can be cruel and unusual only if it is, first, a *punishment*. The principal issue in this suit is whether requiring Plaintiffs to register under ASORCNA for sex offenses committed as minors operates as a retroactive punishment. If the answer is "no," then Defendants are entitled to dismissal of both the ex post facto and the cruel and unusual punishment claims. Plaintiffs' equal protection claim fails because ASORCNA easily satisfies rational basis review, and their procedural due process claims fail because they do not request notice or an opportunity to be heard on anything relevant to

ASORCNA's requirements. Their state law claim is barred by sovereign immunity and otherwise fails to state a claim.

a. Plaintiffs' Ex Post Facto Claim Fails Because Their Registration for Adult Criminal Convictions for Crimes Committed as Teenagers Does Not Convert an Otherwise Nonpunitive Civil Restraint into a Retroactive Punishment

ASORCNA's retroactive application to Plaintiffs does not violate the Ex Post Facto Clause because it is a civil restraint, not a punishment. The Supreme Court held that an Alaska statute retroactively applied to require registration of criminal sex offenders and to provide certain registration information to the public on the internet did not violate the Ex Post Facto Clause in *Smith v. Doe*, 538 U.S. 84, 91–106 (2003). Under the ex post facto analysis set out in *Smith*, a court first looks to whether a legislature intended the statute to impose a punishment or to establish a civil regulation. *Smith*, 538 U.S. at 92. "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* But if the intent of the legislature was "to enact a regulatory scheme that is civil and nonpunitive," then a court proceeds to inquire "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation and citation omitted).

In determining whether a civil restraint is punitive in its purpose or effect, a court considers "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; [5] or is excessive with respect to this purpose." *Id.* at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). Because a court must "ordinarily defer to the legislature's stated intent, *only the clearest proof* will suffice to override the legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92 (internal quotation and citation

omitted) (emphasis added); *see also United States v. W.B.H.*, 664 F.3d 848, 854 (11th Cir. 2011) (emphasizing *Smith*'s "only clearest proof" burden in considering ex post facto challenge to federal sex offender registration statute).

Smith upheld Alaska's registration statute under the *Mendoza-Martinez* factors. First, the registration and publication of sex offenders' information was not akin to the traditional punishment of public shaming because "the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Smith*, 538 U.S. at 98. "Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Id.* Nor did the greater geographic reach of the internet in publishing this truthful information convert the law into a form of punishment. *Id.*at 99. Second, the affirmative disabilities or restraints imposed by the law were only "minor and indirect," because they did not impose any physical restraint on where sex offenders could live or work and the indirect burdens imposed on housing and employment were no different than what would "have otherwise occurred through the use of routine background checks by employers and landlords." *Id.* at 100. Nor did criminal prosecution for failure to comply with reporting requirements impose a punitive disability or restraint because such a prosecution "is a proceeding separate from the individual's original offense." *Id.* at 101–02. Third, the law's deterrent purpose and lifetime reporting requirements for serious sex offenses did not promote the traditional aims of punishment with enough force to convert the law into a punishment. *Id.* at 102. On the fourth and "most significant" factor—the statute's rational connection to a nonpunitive purpose—the Court held that the statute was rationally related to the nonpunitive purpose of preventing sex offender recidivism by alerting the public to the risk of sex offenders in their community. *Id.* at 102–03. And finally, because "[a]

statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance," the Court found it reasonable to require registration based solely on the conviction of specified sex offenses and to require lifetime registration for serious sex offenses. *Id.* at 103–04; *see also id.* at 103 ("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.").

In *W.B.H.*, the Eleventh Circuit applied *Smith* to conclude that the federal Sex Offender Registration and Notification Act ("SORNA")[16] did not impose an ex post facto punishment, and extended *Smith*'s holding in two significant ways. *W.B.H.*, 664 F.3d at 856–57, 860. First, *W.B.H.* rejected the registrant's argument that his adjudication as a Youthful Offender under Alabama law for committing first degree rape at 18 converted his sex offender registration from a civil regulation to a punishment. *Id.* at 860 Second, it concluded that SORNA's quarterly, in-person reporting requirements did not impose an affirmative disability or restraint. *Id.* at 856–57.

W.B.H.'s consideration of the registrant's Youthful Offender status applies with equal force to Plaintiffs here. The federal SORNA statute considered in that case requires sex offender registration for "certain juvenile adjudications" if "the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense" *See W.B.H.*, 664 F.3d at 852 (citing 42 U.S.C. § 16911(8) (now codified at 34 U.S.C. § 20911(8))). 18 U.S.C. § 2241(a) describes aggravated sexual abuse by force or threat as knowingly causing another person to engage in a sexual act "by using force against that other

[16] SORNA was formerly located at 42 U.S.C. § 16901 *et seq.* but is now located at 34 U.S.C. § 20901 *et seq.*

person" or by threat of death, serious injury, or kidnapping. Because Pennington and Nicholes were 16 and 17, respectively, and pleaded guilty to offenses using forcible compulsion, the threat of force, or kidnapping, they are similarly situated to the registrant in *W.B.H.* Stevens is not similarly situated because his conviction was for statutory rape of a victim over 13 and less than five years younger than him, but he is accordingly eligible to seek relief from ASORCNA's requirements. *See* Ala. Code § 15-20A-24.

The registrant in *W.B.H.* attempted to distinguish *Smith* based on his Youthful Offender adjudication, but the court rejected these attempts in ways that apply to Plaintiffs' claims in this case. First, W.B.H. argued that, unlike in *Smith*, "records involving criminal offenses committed by Alabama youthful offenders are not made public, so disseminating information about them must be punitive." *W.B.H.*, 664 F.3d at 856. The court found that "[t]he only things wrong with that syllogism are its factual premise and its legal premise." *Id.* Alabama law permits records of a youthful offender to be inspected in its discretion and, more importantly, even if such records "were to be permanently sealed under state law, dissemination of that truthful information in a SORNA registry would be 'in furtherance of a legitimate governmental objective.'" *Id.* at 856 (quoting *Smith*, 538 U.S. at 98).

Here, Plaintiffs have even less of an argument than the argument deemed insufficient by the court in *W.B.H.* because W.B.H. was actually granted Youthful Offender status and entitled to partial confidentiality of his records under state law. But Plaintiffs' juvenile cases (which remain confidential under Alabama Code §§ 12-15-133) were ordered transferred to criminal court for prosecution as adults, and they were each *denied* Youthful Offender status (or waived the right to apply for such status). The records of Plaintiffs' criminal convictions as adults are public records,

and thus disclosure of their sex offenses on a public registry does not inflict a punishment any more than that of the adult registrants considered in *Smith* or that of the youthful offender in *W.B.H.*

Second, W.B.H. argued that registration imposed affirmative disabilities not present in *Smith* because it deprived him of the benefits of the Youthful Offender Act. *Id.* at 857–58. But the court found that the only youthful offender benefit it deprived him of was confidentiality concerning the crime and conviction, "but the disclosure of that information is not enough to make registration punitive." *Id.* at 858. Again, Plaintiffs have even less of an argument than W.B.H. because the juvenile and criminal courts deemed them sufficiently mature to be tried as adults under the transfer statute and denied Youthful Offender status, and their criminal records are not confidential as was the offender's in *W.B.H.*

Third, SORNA's regulatory scheme was rationally related to prevent sexual offender recidivism because "[a]s to youthful offenders in particular, the registration requirements apply only to those who commit the most serious crimes and only if the offender was at least 14 years old at the time he committed the crime." *Id.* at 858. Similarly, the statute that resulted in the transfer of Plaintiffs' juvenile court cases to criminal court applied only to offenders at least 14 years old at the time of the offense, was limited to felonies at the time it was applied to Pennington and Nicholes, and required an individualized consideration of statutory factors relevant to the offender's maturity in relation to the charged crime. *See* Ala. Act No. 1975-1205 § 5-129; Ala. Act No. 1996-571 § 1. Pennington's and Nicholes's convictions were for sex offenses that were the equivalent of "aggravated sexual abuse" under the federal SORNA provision for juveniles. Stevens's sex offense was not, but ASORCNA allows him to petition for relief from its requirements as a result.

Fourth, and most central to Plaintiffs' complaint here, W.B.H. argued that registration under SORNA was excessive because "those who commit sex offenses when they are young have a lower rate of recidivism than those who do so as adults, and as a result, a long-term registry requirement for former juvenile offenders is unnecessary to protect the community." *Id.* at 860. The court rejected this argument on grounds that clearly apply to Pennington and Nicholes given the seriousness of their offenses:

> But when it comes to answering the excessiveness question, the Supreme Court has warned against 'determining whether the legislature has made the best choice possible,' which is what W.B.H.'s argument would require. Besides, a lower rate of recidivism is not the same thing as no recidivism. Even if those who commit sex crimes as adults do have a higher recidivism rate, that does not mean registration requirements covering younger sex offenders are excessive.
>
> W.B.H. also argues that SORNA's registration requirements are excessive because they will lead to youthful offenders being ostracized for crimes that may have been the result of their undeveloped, adolescent nature. *We are not convinced that rape is a crime that results from an undeveloped, adolescent nature*. Nor are we convinced that any collateral effects, such as ostracism of youthful rapists, when considered in light of the intended public safety benefits, make the regulatory scheme excessive in light of its non-punitive purpose.

Id. (internal citation omitted) (quoting *Smith*, 538 U.S. at 105) (emphasis added).

Similarly, the allegations Plaintiffs make regarding recidivism for juvenile sex offenders, *see* doc. 12 ¶¶ 84–113, even when taken as true for the purposes of a motion to dismiss, are insufficient as a matter of law to make their registration under ASORCNA excessive in relation to its regulatory purpose. ASORCNA attaches lifetime registration requirements to Pennington and Nicholes because they committed their offenses at 16 and 17 and used forcible compulsion—in Nicholes's case kidnapping and raping a girl at gunpoint. Because Stevens's crime was due only to the age of the victim, and she was over 13 and he was less than five years older than her when

the crime was committed, ASORCNA allows him to seek relief from all its requirements. *See* Ala. Code § 15-20A-24. The regulatory consequences ASORCNA imposes on these different offenses is not excessive in light of the importance of protecting the public from the dangers of sex offender recidivism.

Thus, to the extent that ASORCNA's requirements are identical to those of the statutes considered in *Smith* and *W.B.H.*, ASORCNA does not violate the Ex Post Facto Clause, notwithstanding Plaintiffs' adult criminal convictions for sex offenses committed as teenagers. Plaintiffs thus fail to state a claim for the lifetime registration and internet notification requirements held constitutional in *Smith*, as well as the additional quarterly in-person reporting requirement under SORNA considered in *W.B.H. See Smith*, 538 U.S. at 105–06; *W.B.H.*, 664 F.3d at 857 ("Appearing in person may be more inconvenient, but requiring it is not punitive."). This elimination leaves only those restrictions of ASORCNA that Plaintiffs have alleged standing to challenge that were not addressed in *Smith* or *W.B.H.* For the reasons set out in Section C.1. *supra*, as to Plaintiffs' standing, even the most generous reading of Plaintiffs' complaint shows that they have alleged standing to challenge, at most, ASORCNA's residence and employment restrictions. *See* Ala. Code §§ 15-20A-11, 15-20A-13.

ASORCNA's residence and employment restrictions are unlike the registration and notification requirements considered in *Smith* and *W.B.H.* under the "affirmative disabilities" factor of the ex post facto analysis because they place physical limitations on where sex offenders can live and work. *Cf. Smith*, 538 U.S. at 100 ("The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences."); *W.B.H.*, 664 F.3d at 857 ("Offenders who register under SORNA are not subject to any physical restraints."). But the residence and employment restrictions were upheld by this Court in an ex post facto challenge in

McGuire v. Strange, 83 F. Supp. 3d 1231 (M.D. Ala. 2015);[17] *see also Windwalker v. Gov. of Ala.*, 579 F. App'x 769, 771–73 (11th Cir. 2014) (upholding ASORCNA's "restrictions on sex offenders' proximity to vulnerable victims" from ex post facto challenge). The Court in *McGuire* concluded that the plaintiff failed to meet his burden of providing "only the clearest proof" that ASORCNA was so punitive in effect that it negated the legislature's nonpunitive intent. *McGuire*, 83 F. Supp. 3d at 1240–41, 1258–59, 1269. In short, the plaintiff failed to show that these restrictions did not rationally relate to the aim of public safety or excessive in relation to the statute's nonpunitive intent. *Id.* at 1265, 1268.

As *W.B.H.* demonstrates, nothing about Plaintiffs' convictions as teenagers is relevant to the analysis of the *Mendoza-Martinez* factors. Because *McGuire* upheld all other requirements of ASORCNA that Plaintiffs have standing to challenge on ex post facto grounds, Plaintiffs' challenge to those provisions fail under the persuasive precedent of that case and of *Windwalker*. Indeed, Plaintiffs here do not even plausibly allege that any provision of ASORCNA operates as an affirmative disability or restraint, such as that of the homeless sex offender who could not live with his wife in *McGuire*. *Cf. Doe v. Miami-Dade County*, 846 F.3d 1180, 1185 (11th Cir. 2017) (holding that plaintiffs stated a claim sufficient to survive a motion to dismiss on ex post facto challenge to residence restrictions because they alleged the affirmative restraint that the ordinance rendered them homeless as a direct result). By contrast, Plaintiffs are currently residing in compliant addresses with their families. *See* Doc. 12 ¶¶ 36, 46.[18] All Plaintiffs are currently

[17] The parties in *McGuire* cross-appealed, and the case was orally argued in the Eleventh Circuit Court of Appeals in January 2016. The parties are still awaiting a decision from the court.

[18] Nicholes alleges that he moved to a residence only to find out afterwards that it was within 2,000 feet of a school. Doc. 1 ¶ 51. ASORCNA was amended in 2017 to add a process for obtaining preapproval from local law enforcement that a residence is compliant *before* moving there. *See* Ala. Code § 15-20A-11(g); Ala. Act 2017-414.

employed. Pennington alleges that he was demoted after his new employer discovered he was a sex offender, but this was likely due to a background check, and at most due to ASORCNA's registration and notification requirements—which are unquestionably constitutional under *Smith* and *W.B.H.*—not the physical restrictions on where he can work. Doc. 12 ¶ 33. Stevens alleges only that living at a compliant address requires him to drive a long commute to work. *Id.* ¶ 46. Nicholes is currently employed with his wife's healthcare company, although he performs administrative and mechanical work rather than work as a driver. *Id.* ¶ 54.

Thus, Plaintiffs' allege only *de minimis* restrictions from ASORCNA's residence and employment regulations and nothing that even approaches the level of an affirmative disability or restraint. And these allegations are not enough to overcome *McGuire*'s holding that, even if they could allege an affirmative disability, the rational relation to nonpunitive purposes and overall relation to the statute's nonpunitive intent defeats the ex post facto claim. *See also Shaw v. Patton*, 823 F.3d 556, 570–71, 576–77 (10th Cir. 2016) (holding that a 2,000-foot prohibition on sex offenders residing near schools was a civil restraint and not an ex post facto punishment); *Doe v. Miller*, 405 F.3d 700, 722–23 (8th Cir. 2005) (same). Because an ex post facto challenge's "clearest proof" standard applies at the pleading stage, *see Waldman v. Conway*, 871 F.3d 1283, 1294 (11th Cir. 2017), Plaintiffs fail to state a claim on the merits of their ex post facto challenge.

b. Because ASORCNA is a Nonpunitive Civil Regulation for Ex Post Facto Purposes, the Eighth Amendment Claim Against Cruel and Unusual Punishments Necessarily Fails

The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. That amendment prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983). As the text of the Eighth

Amendment makes clear, it protects only against cruel and unusual *punishments*. If ASORCNA is a nonpunitive civil regulation rather than a punishment, as Defendants argue as to Plaintiffs' ex post facto claim, then it necessarily cannot constitute *cruel and unusual punishment* in violation of the Eighth Amendment. *See United States v. Under Seal*, 709 F.3d 257, 263–66 (4th Cir. 2013); *see also Holland v. Gov. of Ga.*, No. 18-13445, 2019 WL 3716396, at *3 (11th Cir. Aug. 7, 2019) (per curiam) (holding that plaintiff failed to state a valid Eighth Amendment claim challenging sex offender registration statutes "similar to the registration statutes that the Supreme Court and this Court have determined to be civil and regulatory in nature, rather than punitive." (first citing *Smith*, 538 U.S. at 93; and then citing *W.B.H.*, 664 F.3d at 860))

In *Under Seal*, the Fourth Circuit applied the *Mendoza-Martinez* factors and "clearest proof" standard to a juvenile sex offender's challenge to SORNA's registration requirements on Eighth Amendment grounds. *See Id.* The court concluded that because SORNA's requirements as applied to a juvenile sex offender were a nonpunitive civil regulation, the registrant's Eighth Amendment claim failed. *Id.* at 266. *See also United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012) (rejecting Eighth Amendment challenge to SORNA by juvenile sex offender and noting "at least two other circuits have held that SORNA's registration requirement is not even a punitive measure, let alone cruel and unusual punishment.") (citing *United States v. May*, 535 F.3d 912, 920 (8th Cir. 2008), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432, 450-51 (2012), and *United States v. Young*, 585 F.3d 199, 204-05 (5th Cir. 2009)). Plaintiffs' First Cause of Action for a violation of their Eighth Amendment rights should thus be dismissed because ASORCNA is nonpunitive, much less a cruel and unusual punishment.

In addition, the Eleventh Circuit, albeit in an unreported decision, rejected an Eighth Amendment challenge to ASORCNA independently of the question of whether it was a nonpunitive civil regulation as follows:

> "In non-capital cases, the Eighth Amendment encompasses, at most, only a narrow proportionality principle," *United States v. Raad*, 406 F.3d 1322, 1323 (11th Cir. 2005), and "it forbids only extreme sentences that are grossly disproportionate to the crime." *United States v. Farley*, 607 F.3d 1294, 1341 (11th Cir. 2010). That is a difficult standard to meet, and the harassment that Chrenko allegedly suffered because of the ACNA does not satisfy the high threshold for cruel and unusual punishment. *See, e.g.*, *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012) (holding that the federal sex offender registration law did not violate the Eighth Amendment given that "[t]he bar for cruel and unusual punishment is high"); *see also Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L.Ed.2d 836 (1991) (plurality opinion); *Hutto v. Davis*, 454 U.S. 370, 102 S. Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam). Accordingly, the defendants were entitled to summary judgment on Chrenko's § 1983 claim alleging a violation of his Eighth Amendment rights.

Chrenko v. Riley, 560 F. App'x 832, 834–35 (11th Cir. 2014); *see also Spencer v. Bentley*, No. 7:12-cv-1832, 2015 WL 788848, at *7–8 (N.D. Ala. Feb. 24, 2015) (dismissing cruel and unusual punishment challenge to ASORCNA). Thus, even assuming ASORCNA's nonpunitive, regulatory status was not dispositive of Plaintiffs' Eighth Amendment claim, Plaintiffs have failed to allege that, even if their registration is construed as a punishment, it is cruel and unusual as applied in each case.

The proportionality of the regulatory consequences ASORCNA places on Plaintiffs must be evaluated in relation to the juvenile courts' decisions to transfer their cases and the criminal courts' decisions to deny them Youthful Offender status under each Plaintiff's individual circumstances. Plaintiffs would not currently be registered sex offenders *at all* if the juvenile courts had not decided to transfer their cases or the criminal court had granted them Youthful Offender

status and they had no prior adjudications for sex offenses. *See* Ala. Code § 15-20A-3(d), (f)(1). The statute in effect at the time authorized the transfer of Pennington's and Nicholes's juvenile cases only because they were over 14 at the time of the offense and were charged with a crime that would be a felony if committed by an adult. They were convicted of felony sex offenses committed at 16 and 17 years of age that involved the use of forcible compulsion. Due to their maturity, and the severity of the offense charged, ASORCNA incorporates the juvenile courts' determinations that Pennington and Nicholes should be classified as adult sex offenders to protect the public from their potential recidivism. The regulatory consequences ASORCNA places on them under these circumstances is not an "extreme sentence[]" that is "grossly disproportional" to the crime. *Chrenko*, 560 F. App'x at 835; *see also W.B.H.*, 664 F.3d at 860 ("We are not convinced that rape is a crime that results from an undeveloped, adolescent nature."); *Juvenile Male*, 670 F.3d at 1010 ("The requirement that juveniles register in a sex offender database for at least 25 years because they committed the equivalent of aggravated sexual abuse is not a disproportionate punishment."). The juvenile court determined Stevens should be tried in criminal court as an adult, but because his crime was due only to the age of the victim and he was no more than five years older than her at the time of the offense, ASORCNA places a proportionally lower consequence on him by allowing him to petition for removal from its requirements. *See* Ala. Code § 15-20A-24. Thus, even assuming ASORCNA is analyzed as a punishment for Eighth Amendment purposes, it is not a cruel and unusual punishment as applied to Plaintiffs.

c. Plaintiffs' Equal Protection Claim is Subject to Rational Basis Review, and ASORCNA Satisfies This Level of Scrutiny

Plaintiffs' Third Cause of Action alleges that ASORCNA violates their equal protection rights under the Fourteenth Amendment by creating arbitrary classifications that are not rationally related to any legitimate government purpose. Doc. 12 ¶¶ 129–35. Plaintiffs do not allege that

ASORCNA burdens a fundamental right or implicates a suspect class, and thus concede that their equal protection claim is subject to rational basis review. *Id.* ¶ 130, 132–33. Plaintiffs allege that ASORCNA creates unconstitutionally arbitrary classifications even under this level of scrutiny by classifying sex offenders as those eligible for relief and those not eligible for relief and by dividing minors into only the categories of those tried as juveniles and those tried as adults. *Id.* ¶¶ 131, 133. But both the actual distinctions that ASORCNA draws for those entitled to relief and its classification of offenders who committed their crimes as teenagers easily satisfy rational basis review.

An equal protection claim not involving a suspect class or a burden on a fundamental right is subject to rational basis review. *See Houston v. Williams*, 547 F.3d 1357, 1363 (11th Cir. 2008). Sex offenders are not a suspect class. *See id.*; *Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005) (holding that sex offenders and subclassifications of sex offenders under Florida registration statute did not implicate a suspect class). Plaintiffs do not allege that ASORCNA burdens any fundamental right, and any such allegation would be futile. *See Doe v. Moore*, 410 F.3d at 1343–45 (holding sex offenders subject to registration failed to state a claim for any burden to their fundamental rights to "family association, to be free of threats to their persons and members of their immediate families, to be free of interference with their religious practices, to find and/or keep any housing, and to a fundamental right to find and/or keep any employment."). Therefore, Plaintiffs' equal protection claim is subject to rational basis review.

A statute subject to rational basis review bears a "strong presumption of validity," and "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993) (internal quotations and citations omitted). In order to prevail under rational basis

review, a statutory classification need only be rationally related to a legitimate government purpose. *See Doe v. Moore*, 410 F.3d at 1346. A statutory classification subject to rational basis review must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns*, 508 U.S. at 307. A legislature need not even articulate its reasons for enacting a statute, and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315. The justification asserted for "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* "These restraints on judicial review have added force *where the legislature must necessarily engage in a process of line-drawing*." *Id.* (internal quotation and citation omitted) (emphasis added).

ASORCNA's classifications of sex offenders eligible for relief and those not eligible for relief and its classification of teenage sex offenders as adults, juveniles, or youthful offenders satisfy rational basis. These classifications are rationally related to ASORCNA's legitimate government purpose of protecting the public from sex offender recidivism by conditioning eligibility for relief on the severity of the underlying sex offense. ASORCNA contains express legislative findings that its intent is to protect the public from sex offender recidivism and an acknowledgment that juvenile sex offenders should be treated differently. *See* Ala. Code § 15-20A-2(2) ("Juvenile sex offenders adjudicated delinquent of the most serious offenses who pose a greater threat should be subject to more stringent requirements."); *see also Windwalker*, 579 F. App'x at 774 ("Windwalker cannot state a rational-basis equal protection claim, especially given ASORCNA's expressly incorporated legislative findings articulating several reasonable bases for enacting the law.").

Juvenile sex offenders are subject to lifetime registration only for first degree rape, sodomy, sexual abuse and sexual torture committed when over 14, and even these offenders may petition for relief after 25 years. Ala. Code § 15-20A-28(a). Otherwise, juvenile sex offenders are subject to ASORCNA for only 10 years. *Id.* § 15-20A-28(c). Juvenile sex offenders are subject to diminished registration requirements and residence and employment restrictions and are subject to a three-tiered notification system depending on a court's risk assessment. *See* Ala. Code §§ 15-20A-27, 15-20A-30 to -31. Youthful offenders are subject to the diminished requirements of juveniles if they were adjudicated as a youthful offender and were under 18 at the time of the offense and had no prior adjudication of a sex offense. Ala. Code § 15-20A-35. Thus, ASORCNA's diminished requirements for juvenile and youthful offender registrants considers their relative lack of maturity. Its limitation on lifetime reporting for only serious offenses committed by offenders over 14 rationally relates the severity of sex offenses by relatively mature offenders to increased risk of recidivism, and hence the need to protect the public for a longer period of time.

ASORCNA subjects adult sex offenders to registration for life. *See* Ala. Code § 15-20A-3(b). In classifying teenagers convicted as adults as adult sex offenders, ASORCNA reasonably relies on the individualized consideration of the teenager's maturity and potential culpability by the juvenile court in transferring the case and the criminal court in denying Youthful Offender status. ASORCNA justifiably classifies these teenage offenders as adults because they pose a more serious risk of recidivism and are subject to more stringent requirements. The default rule of lifetime registration for the serious sex offenses enumerated in § 15-20A-5 embodies a reasonable legislative judgment that such an offender poses a high enough risk of recidivism to warrant protecting the public through ASORCNA's requirements. *See Smith*, 538 U.S. at 103 (stating a

state may make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."); *Doe v. Moore*, 410 F.3d at 1347 ("The increased reporting requirements based on evidence of increased recidivism among a class of felons is rationally related to the state's interest in protecting its citizens from criminal activity.").

In allowing Stevens to petition for relief, but not Pennington or Nicholes, ASORCNA draws another rational distinction. Stevens's crime did not involve forcible compulsion and was a crime due only to the age of a victim who was 13 or older and no more than five years younger than Stevens. Ala. Code § 15-20A-24(a), (b). ASORCNA classifies Stevens as less dangerous than Pennington, who pleaded guilty to sex abuse by forcible compulsion, and Nicholes, who was convicted of kidnapping and raping a girl at gunpoint. This makes sense. Pennington and Nicholes are reasonably limited in the relief available to them due to a legislative judgment that offenses such as theirs pose an increased risk to the public. Thus, ASORCNA's classifications satisfy rational basis review and Plaintiffs' equal protection claim fails as a matter of law.

d. Plaintiffs' Procedural Due Process Claims Fail Because Their Obligation to Register Turns Solely on the Fact of Their Conviction and They Do Not Assert a Right to a Hearing on Any Fact Relevant to Their Obligations Under ASORCNA

Plaintiffs assert two varieties of procedural due process claims in the Fourth and Fifth Causes of Action. Doc. 12 ¶¶ 136—55. The first asserts a violation of their procedural due process right to notice and an opportunity to be heard on the issue of whether they are dangerous before being required to register based on their convictions as teenagers, thus creating an unconstitutional "irrebutable presumption" they are dangerous. *Id.* ¶¶ 140-44. The second asserts a violation of their right to notice and an opportunity to be heard on whether they should be required to register as adults before stigmatizing them as sex offenders. *Id.* ¶¶ 149-52. But because Plaintiffs received a procedurally safeguarded opportunity to contest their convictions as adults in their underlying

criminal cases, and because they seek an opportunity to be heard on issues that are irrelevant to their obligation to register as adult sex offenders under ASORCNA, their claims fail under binding precedent. *See Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1, 608 (2003); *United States v. Ambert*, 561 F.3d 1202, 1208 (11th Cir. 2009); *Moore*, 410 F.3d at 1342 n.3.

In *Connecticut DPS*, the Supreme Court held that even assuming a registrant had a liberty interest in not being placed on a sex offender registry, he had no procedural due process right to notice and an opportunity to be heard on the issue of whether he was currently dangerous before being required to register. *Connecticut DPS*, 538 U.S. at 6-7. This was because the requirement to register under the statute, as under ASORCNA, "turn[ed] on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." *Id.* at 7. Thus, "the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence" under the statute. *Id.* "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Id.* at 8. If they cannot, their claims fail as a matter of law. *Id.* Just as the registrant in *Connecticut DPS* could make no such showing since his duty to register arose solely from the fact of his conviction, so too can Plaintiffs make no such showing here.

The Eleventh Circuit applied *Connecticut DPS*'s holding to the plaintiffs' "irrebutable presumption" argument in *Moore*. *See Moore*, 410 F.3d at 1342 n.3. Because the Florida statute "does not turn on the dangerousness of the offender, [but] merely the fact that he or she was convicted," the court rejected the plaintiffs' argument that it subjected them to an irrebutable presumption of dangerousness. *Id.* The court again rejected a procedural due process challenge in *Ambert*. *See Ambert*, 561 F.3d at 1208 ("The fact Ambert seeks to prove, that he is neither dangerous nor likely to be a repeat offender, is of no moment under SORNA, because the reporting

requirements likewise turn on the offender's conviction alone—a fact that he had a procedurally safeguarded opportunity to contest.").

Whether the liberty interests they assert are the right to be free from an "irrebutable presumption" or a "stigma plus" interest, their claims fail for the more fundamental reason set out in *Connecticut DPS*. This Court has applied *Connecticut DPS* to reject procedural due process challenges to ASORCNA of both the "irrebutable presumption" and "stigma plus" varieties. *See Doe v. Marshall*, No. 2:15-cv-606, 2018 WL 1321034, at *8-9 (M.D. Ala. Mar. 14, 2018); *McGuire v. City of Montgomery*, No. 2:11-cv-1027, 2013 WL 1336882, at *8-9 (M.D. Ala. Mar. 29, 2013). It should do so again here. Nor does anything about the fact of Plaintiffs' convictions as teenagers alter *Connecticut DPS*'s application. They had a "procedurally safeguarded opportunity to contest" the transfer of their juvenile court cases to criminal court and the denial of their applications for Youthful Offender status. *Connecticut DPS*, 538 U.S. at 7. These courts determined Plaintiffs were mature enough to be tried as adults in criminal court, and ASORCNA thus categorizes them as adult sex offenders based solely on the fact of their convictions as adults. Plaintiffs do not seek to prove anything relevant to their duty to register under ASORCNA, and their procedural due process claims in the Fourth and Fifth Causes of action are due to be dismissed.

e. The Court Lacks Jurisdiction to Order Defendants to Comply with the Alabama Constitution and the Sixth Cause of Action Also Fails on the Merits

This Court lacks jurisdiction over Plaintiffs' Sixth Cause of Action premised on Defendants' alleged violations of state law under the Alabama Constitution of 1901. The states enjoy immunity from private suits as a "fundamental aspect" of their sovereignty. *Alden v. Maine*, 527 U.S. 706, 713 (1999). The Eleventh Amendment and the Supreme Court have clarified that this immunity extends to suits commenced against a state both by citizens of other states, U.S.

Const. amend. XI, and by the state's own citizens. *Hans v. Louisiana*, 134 U.S. 1, 14–15 (1890). Three narrow exceptions to state sovereign immunity exist: (1) Congress may abrogate a state's immunity using Section Five of the Fourteenth Amendment; (2) a state may consent to suit; and (3) a private party may seek prospective equitable relief to enjoin a state official from violating the U.S. Constitution or federal law. *Carr v. City of Florence*, 916 F.2d 1521, 1524–25, 1524 n.2 (11th Cir. 1990) (first citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985), and then citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 102 (1984)). Outside of these narrow exceptions, federal courts lack jurisdiction to hear claims by private parties against the states. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

Federal courts cannot hear claims against state officials for alleged violations of state law. *Pennhurst*, 465 U.S. at 121. Sovereign immunity bars such claims, no matter the form of relief sought, as nothing more than claims against the state itself. *Id.*; *see also Alexander v. Chattahoochee Valley Cmty. Coll.*, 325 F. Supp. 2d 1274, 1295 (M.D. Ala. 2004) ("Federal courts do not have jurisdiction to order state officials to comply with state law.") Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. Further, neither pendent jurisdiction, *id.* at 121, nor the supplemental jurisdiction granted by 28 U.S.C. § 1367 override the protections of sovereign immunity. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541–42 (2002). Plaintiffs cannot "boost the claim over the sovereign-immunity bar" with "conclusory allegations that the same conduct that violates state law also violates the U.S. Constitution." *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1204 (11th Cir. 2019).

Plaintiffs' claim for an alleged violation of their right to reputation under the Alabama Constitution is due to be dismissed for lack of jurisdiction. Sovereign immunity bars this claim

because it does not fall into any of the exceptions discussed above: (1) Congress has not abrogated state sovereign immunity in § 1983 claims, *Edelman v. Jordan*, 415 U.S. 651, 672 (1979); (2) Alabama does not consent to suit in federal court, Ala. Const. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity"); and (3) claims for state law violations are not claims for violations of the U.S. Constitution or federal law. Plaintiffs may not seek an injunction from this Court to compel Alabama officials to execute Alabama law—in this case article I, section 13 of the Alabama Constitution—in a particular manner. *See Pennhurst*, 465 U.S. at 106. Sovereign immunity bars such claims regardless of whether this Court has jurisdiction over any of Plaintiffs' other claims. The Eleventh Circuit held a similar argument was barred by *Pennhurst* in *Moore*. *See Moore*, 410 F.3d at 1349 (holding claim that sex offender registration violated the separation of powers under Florida's constitution was barred by Eleventh Amendment immunity under *Pennhurst*). Plaintiffs' Sixth Cause of Action is thus due to be dismissed for lack of jurisdiction.

Alternatively, the claim should be dismissed on the merits. Article I, section thirteen of the Alabama Constitution of 1901 provides in full: "[T]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Alabama cases interpreting section thirteen present three primary lines of jurisprudence. The first line deals with access to the courts. *See, e.g.*, *Fox v. Hunt*, 619 So. 2d 1364, 1367 (Ala. 1993) (upholding civil jury trial fee); *Ex parte Pollard*, 40 Ala. 77, 93 (1866) (upholding legislation requiring two terms of court to elapse after the summons before going to trial). The second line considers the power of the legislature to limit the ability of a plaintiff to bring suit for previously vested rights. *See, e.g.*, *Baugher v. Beaver Constr. Co.*, 791 So. 2d 932, 934–37 (Ala. 2000)

(holding that statute of repose does not violate section thirteen when plaintiffs' cause of action accrued after statute's effective date). The last deals with the availability of remedies for common-law injuries. *See, e.g.*, *Shelton v. Green*, 261 So. 3d 295, 297–99 (Ala. 2017) (holding that survival statute did not violate section thirteen by not providing for the survival of unfiled tort claims after purported plaintiff's death).

Plaintiffs' challenge falls under this third line of jurisprudence. This line corresponds to the second clause of section thirteen: "that every person, for an injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law." ALA. CONST. art. I, § 13, cl. 2. The Alabama Supreme Court recognized that this clause "preserves the *right to a remedy* for an injury." *Pickett v. Matthews*, 192 So. 261, 263 (Ala. 1939) (emphasis added). It does not, however, grant rights to "lands, goods, person, or reputation." ALA. CONST. art. I, § 13, cl. 2. To the extent that such rights exist, they derive from the common law and thus yield to the power of the legislature. *See Pickett*, 192 So. at 264–65. Reputation is instead protected by the availability of the tort of defamation. A cause of action for defamation requires a false statement. *Dolgencorp, LLC v. Spence*, 224 So. 3d 173, 186 (Ala. 2016) (listing the elements of defamation). "Truthful statements cannot, as a matter of law, have a defamatory meaning." *Ex parte Bole*, 103 So. 3d 40, 51 (Ala. 2012) (citing *McCaig v. Talladega Publ'g Co.*, 544 So. 2d 875, 879 (Ala. 1989)). Because Plaintiffs' sex offender registrations disclose only truthful information about their criminal convictions, which are public records under State law, they fail to state a claim for defamation.

D. Conclusion

For the reasons stated above, Plaintiffs' First Amended Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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