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

RANDY PENNINGTON, HERBERT STEVENS, & OLIVER NICHOLES, **Plaintiffs,** **vs.** **HAL TAYLOR, Secretary of Alabama Law Enforcement Agency; JOHN Q. HAMM, Director of State Bureau of Investigation; CHARLES WARD, Director of Department of Public Safety; and STEVE MARSHALL, Attorney General of Alabama, all in their official capacities.** **Defendants.**	**Civil Action No. 2:19-cv-00695**

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs Randy Pennington, Oliver Nicholes, and Herbert Stevens (collectively "Plaintiffs") hereby submit this brief in opposition to the Motion to Dismiss the First Amended Complaint filed by Defendants Hal Taylor, John Q. Hamm, Charles Ward, and Steve Marshall (collectively "Defendants"). Plaintiffs have standing to bring this suit against each Defendant challenging the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA").[1] They timely and sufficiently pled federal constitutional claims under the Ex Post Facto Clause and the Eighth Amendment, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They also sufficiently pled a claim under the Alabama Constitution, for which this Court has jurisdiction. For the reasons discussed below, Defendants' motion should be denied.

II. STATEMENT OF FACTS

ASORCNA imposes lifetime registration and notification requirements and a panoply of restrictions on children who are charged and convicted as adults for sex offenses. *See* Doc. 12, ¶ 1, 63-77 (summarizing ASORCNA provisions). The

[1] Plaintiffs used the acronym "SORNA" in their First Amended Complaint to refer to this statute. *See generally* Doc. 12. In the interest of consistency with Defendants' brief, Plaintiffs hereinafter use the acronym "ASORCNA."

legislature's stated purpose for enacting ASORCNA was to enhance public safety and reduce recidivism. *Id.* ¶ 93 (citing Ala. Code § 15-20A-2(1)).

ASORCNA requires individuals to report to local law enforcement every three months, provide extensive personal information, and have much of this information posted to a public sex offender registry website. *Id.* ¶ 66 (citing Ala. Code §§ 15-20A-7, 15-20A-8(a), 15-20A-10(f), 15-20A-22(a)). Communities are directly notified if a "sex offender" lives in their general vicinity. *Id.* ¶ 67 (citing Ala. Code § 15-20A-21). In addition to these registration and notification requirements, ASORCNA places severe limitations on where individuals may reside, work, or "loiter," and how they may travel or enter school property. *Id.* ¶¶ 68-71, 73-75 (citing Ala. Code §§ 15-20A-11, 15-20A-13, 15-20A-15, 15-20A-17). Individuals subject to ASORCNA must have identification designating them as a sex offender. *See id.* ¶ 76 (citing Ala. Code § 15-20A-18(b)).

Plaintiffs are three of approximately 250 Alabama residents who were charged and convicted as adults for sex offenses committed when they were under age eighteen, were incarcerated, and are subject to ASORCNA's lifetime regulations. *Id.* ¶ 6. These regulations have caused lost employment opportunities; lost housing; limitations on familial interactions; diminished opportunities for

religious worship; and severe mental distress, embarrassment, and stigmatization for Plaintiffs. *Id.*

In 1983, at sixteen years of age, Mr. Pennington was charged as an adult with rape. *Id.* ¶ 16. He pled guilty to first degree sex abuse and was sentenced to one year imprisonment and three years of probation.[2] *Id.* While he had three subsequent criminal offenses, two of which were for registration violations, he never committed another sexual offense. *See id.* ¶¶ 17-21, 26. Since his conviction, Mr. Pennington and his family have suffered from having to live apart from each other, financial strain, loss of property, interference with their familial interactions, and depression because of Mr. Pennington's status as a sex offender. *Id.* ¶¶ 17-35. Mr. Pennington even attempted suicide after his second conviction for a registration violation. *Id.* ¶ 27. In addition, he has lost job opportunities and suffered a demotion at his current employment because of ASORCNA's restrictions. *Id.* ¶¶ 33-34.

[2] Defendants object to Plaintiffs' characterization of Mr. Pennington's offense as "consensual sex," citing it is an improper claim under 42 U.S.C. § 1983 because it is a challenge to an unconstitutional conviction. *See* Doc. 14 at 6. (When ECF pagination conflicts with internal pagination, Plaintiffs refer to the ECF pagination.) However, Plaintiffs have not alleged an unconstitutional conviction under *Heck v. Humphrey*, 512 U.S. 477 (1994). Rather, Plaintiffs challenge ASORCNA as it applies to them.

In 1996, at the age of seventeen, Mr. Stevens was charged and convicted as an adult of rape in the second degree for dating his now-wife, who was fifteen years old at the time. *Id.* ¶ 37. In 2014, the father of three was convicted of failing to comply with ASORCNA's registration requirement. *Id.* ¶ 40. During the intervening years, he had difficulty finding a job due, in part, to his sex offender status and engaged in illegal activity as a result. *Id.* ¶ 39. Since his original conviction, Mr. Stevens and his family have suffered from having to live apart from each other, financial strain, loss of housing, interference with familial interactions, and diminished ability to participate in religious worship as a result of his sex offender status. *Id.* ¶¶ 39, 43-47. He has worked off and on for one employer since 2000, though he sought additional work. *See id.* ¶ 39, 44. Additionally he currently has a long commute to work from a rural location because of his effort to comply with ASORCNA's residential restrictions. *Id.* ¶¶ 44, 46.

In 1981, at the age of seventeen, Mr. Nicholes was charged and convicted as an adult of kidnapping and rape in the first degree. *Id.* ¶ 49. He was sentenced to forty years for rape and life imprisonment for kidnapping and was released on parole in 1998. *Id.* ¶¶ 49-50. A 2014 traffic stop sent him back to prison on a parole violation. *Id.* ¶ 53. Aside from these convictions, Mr. Nicholes never committed another crime. *See id.* ¶¶ 49-57; Doc. 13-6. After his original convictions, Mr.

Nicholes experienced difficulty finding permanent employment. *Id.* ¶ 54. He owned and operated a barbershop and salon for several years but lost the business after being incarcerated for the parole violation. *Id.* ¶¶ 52-53. After his 2016 release, Mr. Nicholes joined his wife's assisted transport company. *Id.* ¶ 54. Because of the difficulty in navigating ASORCNA's travel restrictions, he limits himself to administrative and mechanical work. *Id*. Mr. Nicholes and his family have suffered from financial strain, loss of homes, interference with familial interactions, and diminished ability to worship because of his status as a registered sex offender. *See id.* ¶¶ 51, 53-56.

Generally, studies show that sex offender registration statutes like ASORCNA have little impact on enhancing public safety and reducing recidivism, especially among children prosecuted for sex offenses. *See id.* ¶¶ 93-94, 98 (citing studies). More than thirty published studies reveal sexual recidivism rates for children who have committed sex offenses are low. *Id.* ¶ 94 (citing studies). The recidivism rate is lower for these children than for adults who commit sex offenses. *Id.* ¶ 96 (citing studies). If recidivism occurs, it happens in the first few years following the original sex offense. *Id.* ¶ 95 (citing study). Multiple studies also confirm that children sexually offend for different reasons than adults; children tend to be motivated by impulsivity and sexual curiosity rather than predation. *See id*. ¶ 96 (citing studies).

With developmental maturation, a better understanding of sexuality, and decreased impulsivity, only a small fraction of children who have committed sex offenses will continue sexually inappropriate behavior in adulthood. *Id.* ¶ 97 (citing studies).

ASORCNA provides few avenues for relief from its requirements for individuals convicted in the adult criminal justice system. A limited subset of individuals subject to ASORCNA can petition for relief from some of its requirements. *Id.* ¶¶ 78-82 (citing Ala. Code §§ 15-20A-16(d), 15-20A-24, 15-20A-25). Due to their limited applicability and procedural hurdles, these provisions provide illusory relief to Plaintiffs. *See id.* ¶ 83.

On September 19, 2019, Plaintiffs filed suit against Defendants in their official capacities, alleging that ASORCNA violates the U.S. Constitution, specifically the Eighth Amendment's prohibition on cruel and unusual punishment, the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the Ex Post Facto Clause, as well as the right to reputation under the Alabama Constitution. Doc. 1. Plaintiffs filed their First Amended Complaint on October 15, 2019. Doc. 12. Defendants filed their Motion to Dismiss on October 18, 2019. Docs. 13, 14.

III. STANDARD OF REVIEW

The Defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 13 at 1. Where standing is challenged based

on the face of the complaint, the standards under Rule 12(b)(1) and (6) are analogous: "the court must consider the allegations in the plaintiff's complaint as true," and "[t]he court is required merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1233 (11th Cir. 2008) (internal quotation marks omitted). In addition, the court must "construe[] the factual allegations in the complaint in the light most favorable to the plaintiff." *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1206 (11th Cir. 2012).

IV. ARGUMENT

Defendants' motion raises five primary arguments based on: (1) standing; (2) statute of limitations; (3) Eleventh Amendment immunity as to Director Ward; (4) failure to state a claim; and (5) Eleventh Amendment immunity as to Plaintiffs' state constitutional claim. Plaintiffs address each of these in turn.

A. Plaintiffs Have Standing To Challenge ASORCNA

Each Plaintiff possesses standing to challenge ASORCNA in its entirety in federal court. To establish Article III standing, a plaintiff must satisfy three elements. First, he must have suffered an injury in fact— a legally cognizable interest which is concrete and particularized, as well as actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, his injury must be causally connected

to the conduct complained of, with his injury "fairly . . . traceable to the challenged action of the defendant." *Id.* (internal brackets omitted) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Third, there must be a likelihood that a favorable decision from the court will redress his injury. *Id.* at 561. At the motion to dismiss stage, general allegations of injury resulting from the defendant's conduct may suffice. *Bischoff v. Osceola Cty.*, 222 F.3d 874, 878 (11th Cir. 2000). Plaintiffs satisfy these requirements.

First, Plaintiffs sufficiently alleged that they have suffered from both actual and imminent harms. *See generally* Doc. 12, ¶¶ 2, 6, 16-57, 77 (alleging Plaintiffs' experiences living under ASORCNA's restrictions).[3] ASORCNA subjects each Plaintiff to the continuous shame and stigma of being identified publicly as a sex offender. *Id.* ¶ 6. Each has experienced significant mental distress as a result of

[3] Plaintiffs have alleged decades' worth of continuous hardship from having to comply with ASORCNA as well as its predecessor sex offender registration statutes to show the cumulative harm caused by being subjected to Alabama's extensive restrictions for sex offenders. Because ASORCNA was an extension of these prior statutes, these allegations are relevant for the Court to consider. However, even if the Court were to focus solely on allegations of harm since the 2011 enactment of ASORCNA, these harms, in combination with Plaintiffs' allegations of imminent injury, are sufficient to establish standing. To the extent the Court concludes that these allegations of harm are insufficient, Plaintiffs request that the Court grant leave to amend so that Plaintiffs may offer additional facts showing how they have been harmed by ASORCNA.

having to comply with ASORCNA. *Id.* Each Plaintiff has experienced a variety of other hardships as well. For example, ASORCNA's restrictions deter Mr. Pennington from picking up his grandchildren from school or attending school events. *Id.* ¶ 30. He was demoted at work after his new employer discovered his status as a registered sex offender and he faced barriers in seeking employment elsewhere because of this status. *Id.* ¶¶ 33-34. ASORCNA's restrictions deter Mr. Stevens from getting involved in his children's education and extracurricular activities. *Id.* ¶ 45. ASORCNA's travel restrictions deterred Mr. Nicholes from pursuing work as a driver. *Id.* ¶ 54; *cf. McGuire v. Strange*, 83 F. Supp. 3d 1231, 1244 (M.D. Ala. 2015), *appeal filed*, Nos. 15-10958, 15-11020, 15-11142, 15-11401 (concluding that plaintiff had standing to challenge ASORCNA's travel restrictions because travel was deterred by the restrictions and corresponding risk of conviction). Additionally, ASORCNA's requirements have interfered with Plaintiffs' fundamental right to practice religion. Doc. 12, ¶¶ 35, 47, 56. And Mr. Pennington and Mr. Stevens have been prosecuted for registration violations. *Id.* ¶¶ 20-21, 26-27, 40-41.

In addition to these actual harms, Plaintiffs also have alleged that they suffer from imminent harm—namely, the threat of criminal prosecution for any violation of ASORCNA, *id.* ¶ 77—which provides a sufficient basis on its own to challenge

the statute as a whole. "An allegation of future injury may suffice [for the injury requirement] if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). The credible threat of prosecution for the violation of a law is sufficient to establish standing to challenge that law. *See Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300, 1316-17 (M.D. Ala. 2016) (concluding that abortion clinic owner had standing to challenge certain abortion regulations based on allegations of a credible threat of prosecution). Plaintiffs must comply with all of ASORCNA's restrictions. Doc. 12, ¶¶ 1, 6. As in *Reproductive Health Services* where the plaintiff's conduct was regulated by the challenged statute, there is "no reason to doubt" that Defendants will continue to enforce ASORCNA against Plaintiffs. 204 F. Supp. 3d at 1316. There are no automatic exemptions from ASORCNA simply because of a change in circumstances. *Id*. ¶¶ 78, 80-83. Any failure to comply would subject Plaintiffs to criminal prosecution. *Id.* ¶ 77. Thus, this Court should reject Defendants' arguments that current compliance with ASORCNA defeats Plaintiffs' standing. *See* Doc. 14 at 23-27.

Second, Plaintiffs have sufficiently linked their actual harms and imminent threat of criminal prosecution to Defendants. Each injury discussed above is

"directly traceable to the passage of" ASORCNA. *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1260 (11th Cir. 2012). In addition, establishing a "realistic danger of sustaining direct injury as a result of the defendants' enforcement of the [a]ct is fairly traceable to the operation of the statute." *Reprod. Health Servs.*, 204 F. Supp. 3d at 1318. Plaintiffs' injuries are traceable to each Defendant because Defendants are charged with the implementation and enforcement of ASORCNA's provisions.[4] *See* Doc. 12, ¶¶ 58-61.

Finally, a favorable decision by this Court will redress Plaintiffs' injuries. Should the Court grant the relief requested in the First Amended Complaint, the Plaintiffs can expect their actual injuries and any threat of prosecution under ASORCNA to cease. *Id.* ¶¶ 122, 128, 135, 147, 155, 162. Accordingly, Plaintiffs have standing to challenge ASORCNA.

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[4] Defendants argue in the context of their sovereign immunity argument that Plaintiffs fail to allege an injury that is traceable to or redressable by Director Ward. Doc. 14 at 28. To the extent that this is a challenge to Plaintiffs' standing with respect to Director Ward, it fails. Plaintiffs have sufficiently shown, for purposes of the pleadings stage, that Plaintiffs must comply with ASORCNA's driver's license requirements, that Director Ward is charged with overseeing driver's licenses in Alabama, that the State has made clear its intent to enforce the ASORCNA provision, and that Plaintiffs are at-risk of criminal prosecution for violating the driver's license requirements. *See* Doc. 12, ¶¶ 60, 76-77.

B. Plaintiffs' Claims Are Timely Under The Continuing Violation Doctrine

Defendants' argument that Plaintiffs' claims are untimely, Doc. 14 at 29-32, should be rejected. Every day, Plaintiffs are subject to and must conform their conduct to ASORCNA's restrictions. Doc. 12, ¶ 77. Any failure to comply invites the threat of criminal prosecution. *Id*. As a result, Plaintiffs suffer new injuries each day such that the continuing violation doctrine applies.

Claims brought under § 1983 in Alabama are subject to a two-year statute of limitations. Ala. Code § 6-2-38(*l*); *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). The statute of limitations generally "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)). However, the continuing violation doctrine permits plaintiffs to sue on otherwise time-barred claims when additional violations occur within the statutory period. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006).

This Court should follow the approach recently taken in *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019), a constitutional challenge to ASORCNA

brought by several registered adults. When considering whether the plaintiffs' claims were time-barred, the Court observed that "not all injuries are equal. Sometimes, there is one discrete point at which the injury occurs. Other times, however, the injury happens over and over again. When the injury occurs determines when the statute of limitations starts running." *Id.* at 1338. If the plaintiffs' claims that ASORCNA was unconstitutional were true, then "ASORCNA afflicts a fresh injury each day that Plaintiffs are subject to the law." *Id.* The Court concluded that the plaintiffs' claims were timely. Not only had they suffered injuries within two years of suing, they continued to suffer their injuries:

> Plaintiffs have an ongoing duty to report their internet activity. They must repeatedly show their branded identification to random strangers. They are forever barred from living with their nieces and nephews. They are bound in perpetuity by allegedly vague laws. Thus, each new day is a new injury. And so far as the law is enforced, Plaintiffs will suffer new injuries.

Id.

Like the plaintiffs in *Marshall*, Plaintiffs here are continuously regulated by ASORCNA. They have an "ongoing duty" to report in person to local law enforcement and pay a registration fee every three months. *See* Doc. 12, ¶ 66 (citing Ala Code. §§ 15-20A-10(f), 15-20A-22(a)). They have an "ongoing duty" to possess identification cards that brand them as sex offenders. *See id.* ¶ 76 (citing Ala. Code § 15-20A-18(b)). They are "bound in perpetuity" to remain on the public sex

offender registry. *See id.* ¶ 66 (citing Ala. Code § 15-20A-8(a)). They also are "bound in perpetuity" to report certain travel to local law enforcement. *See id.* ¶ 71 (citing Ala. Code § 15-20A-15). They are "forever barred" from residing or working in certain areas. *See id.* ¶¶ 68 (citing Ala. Code § 15-20A-11), 73 (citing Ala. Code § 15-20A-13). And they are subject to these and other restrictions under the threat of criminal prosecution and imprisonment for one to ten years for any violation. *See id.* ¶ 77 (citing Ala. Code §§ 13A-5-6(a)(3), 15-20A-10(j), 15-20A-11(j), 15-20A-12(f), 15-20A-13(g), 15-20A-14(e), 15-20A-15(h), 15-20A-16(f), 15-20A-17(c), 15-20A-18(f)).

Defendants incorrectly argue that cases distinguished by the *Marshall* Court apply to Plaintiffs' claims "because they challenge registration as such." Doc. 14 at 32. To the contrary, the cases distinguished by the *Marshall* Court did not apply to *Marshall*—and do not apply here—because "[i]n those cases, the plaintiffs alleged that they were not sex offenders but were wrongly registered as offenders." *Marshall*, 367 F. Supp. 3d at 1339 (discussing *Moore v. Fed. Bureau of Prisons*, 553 F. App'x 888, 890 (11th Cir. 2014) (per curiam); *Meggison v. Bailey*, 575 F. App'x 865, 867 (11th Cir. 2014) (per curiam)). Here, Plaintiffs do not challenge their prior convictions but rather the constitutionality of ASORCNA. As the Court found, "the

injury caused by wrongful registration is not the same injury caused by the constant deprivation of fundamental rights." *Id.*

Other cases cited by Defendants are also inapplicable. Those cases involved plaintiffs who alleged they were subject to a wrong that occurred at a discrete point in time outside the limitations period. Doc. 14 at 30-31 (citing *McNair*, 515 F.3d at 1173-74; *Brown*, 335 F.3d at 1261-62; *Lovett v. Ray*, 327 F.3d 1181, 1182-83 (11th Cir. 2003); *DeYoung v. Owens*, 646 F.3d 1319, 1323-25 (11th Cir. 2011); *Michael v. Parsons*, 569 F.2d 853, 853-54 (5th Cir. 1978); *Braden v. Tex. A&M Univ. Sys.*, 636 F.2d 90, 93-94 (5th Cir. Unit A Feb. 1981) (per curiam)). Conversely, Plaintiffs must continuously take affirmative steps, and are continuously restricted in their movements and activities, to comply with ASORCNA's requirements. Thus, their claims are timely.

C. Defendant Charles Ward Is Not Entitled To Immunity

This Court should reject Defendants' argument that Director Ward is entitled to sovereign immunity. *See* Doc. 14 at 28-29. In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that government officials who "are clothed with some duty in regard to the enforcement of the laws of the state" and who threaten to enforce an unconstitutional act may be enjoined from such action, *id.* at 155-56. *Ex parte Young* applies if a court, after conducting a "straightforward inquiry,"

determines that the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in judgment)).

Plaintiffs sufficiently alleged ongoing constitutional violations for which Director Ward should be held liable in his official capacity. Plaintiffs alleged ongoing constitutional harm stemming from ASORCNA, of which the driver's license restrictions are a part. *See* Doc. 12, ¶ 76 (citing Ala. Code § 15-20A-18). More specifically, Plaintiffs showed that, although this Court recently declared the driver's license restrictions unconstitutional as applied under the First Amendment, *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1324-27 (M.D. Ala. 2019), the State intends to create and enforce an alternative sex offender designation on a statewide basis, Defs' Mot. to Alter or Amend J. ¶¶ 3-5, *Doe 1 v. Marshall*, No. 15-606 (M.D. Ala. Mar. 11, 2019), ECF No. 168; *see also Doe 1 v. Marshall*, No. 15-606 (M.D. Ala. Mar. 15, 2019), ECF No. 173 (denying motion to alter or amend judgment); Doc. 12, ¶ 76. Director Ward leads the Department of Public Safety and therefore is charged with overseeing driver's licenses within the state. *See* Doc. 12, ¶ 60. Accordingly, Plaintiffs' harms in being subject to ASORCNA's driver's license

provisions directly tie to Director Ward. The Eleventh Circuit made clear: "Personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is required is that the official be responsible for the challenged action." *Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988). Thus, Defendants' argument that Plaintiffs "fail to allege any injury fairly traceable to Defendant Charles Ward or redressable by him," Doc. 14 at 28, should be rejected.

In arguing Director Ward's immunity, Defendants incorrectly rely on the Eleventh Circuit's decision in *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003). The plaintiffs in *Women's Emergency Network* challenged the State of Florida's authorization of certain specialty license plates and the state's use of funds generated from the sale of those license plates. *Id.* at 940. The Eleventh Circuit held that the Florida governor was an improper defendant because (1) the governor's "only connection" to the challenged statute was that he, along with several members of the cabinet, were responsible for the department that administered the license plates and distributed the resulting funds, and (2) "[a] governor's 'general executive power' is not a basis for jurisdiction in most circumstances." *Id.* at 949. Neither reason applies here. Director Ward *is* the head of the Department of Public Safety, the subdivision of the Alabama Law Enforcement Agency tasked with administering

driver's licenses and enforcing ASORCNA's driver's license restrictions. Doc. 12, ¶ 60. His connection to the enforcement of ASORCNA goes beyond the attenuated connection alleged between a governor and the challenged statutes in *Women's Emergency Network*. Therefore, Director Ward is a proper defendant in this action.

D. Plaintiffs Sufficiently Stated Claims Under The U.S. And Alabama Constitutions

1. Plaintiffs Stated A Claim Under The Ex Post Facto Clause By Alleging ASORCNA Is Punitive In Purpose Or Effect As Applied To Children Tried As Adults

ASORCNA retroactively imposes on individuals who were children at the time of their offenses mandatory lifetime registration requirements as well as myriad other restrictions that, taken as a whole, are punitive in purpose or effect in violation of the Ex Post Facto Clause of the U.S. Constitution.

The Ex Post Facto Clause "forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-26 (1867)). The prohibition applies to criminal laws, not civil laws. *United States v. W.B.H.*, 664 F.3d 848, 852 (11th Cir. 2011) (citing *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997)). When considering whether a retroactive statute is

prohibited by the Ex Post Facto Clause, a court will follow the analysis established by the Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003):

> We must ascertain whether the legislature meant the statute to establish 'civil' proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'

Id. at 92 (internal quotation marks and citations omitted).

In analyzing whether a statutory scheme is punitive in purpose or effect, a court will consider several factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The *Mendoza-Martinez* factors most relevant to this analysis are "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith*, 538 U.S. at 97. Although "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *id.* at 92, a court need not find that all these *Mendoza-Martinez* factors weigh in favor of finding the statutory scheme punitive. These factors "are neither exhaustive nor dispositive, but are useful guideposts." *Id.* at 97 (internal citations and quotation marks omitted). Despite the Alabama legislature's intention that ASORCNA is a

civil regime, *see* Ala. Code § 15-20A-2, and this Court's ruling that ASORCNA as a whole is not so punitive in purpose or effect as applied to an adult offender, *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1269 (M.D. Ala. 2015), *appeal filed*, Nos. 15-10958, 15-11020, 15-11142, 15-11401, Plaintiffs sufficiently alleged that the statute as a whole is punitive in purpose or effect as applied to children.

As an initial matter, Defendants significantly rely on the Supreme Court's decision reviewing the Alaska sex offender registration statute in *Smith v. Doe* and the Eleventh Circuit's decision regarding the federal sex offender registration statute in *United States v. W.B.H. See* Doc. 14 at 33-41. This reliance is misplaced, as ASORCNA is more analogous to the Michigan sex offender registration statute struck down by the Sixth Circuit in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016). Neither the federal nor Alaska's sex offender registration statutes were nearly as restrictive as ASORCNA. Alaska's statute included "nothing more than reporting requirements," *Snyder*, 834 F.3d at 703; *see Smith*, 538 U.S. at 90-91 (summarizing Alaska's provisions), which required individuals to register as a sex offender and annually verify the submitted information, *Smith*, 538 U.S. at 90-91. The federal statute likewise imposed only reporting requirements. *W.B.H.*, 664 F.3d at 851-52 (summarizing provisions).

The Sixth Circuit's rationale for declaring the Michigan statute unconstitutional under the Ex Post Facto Clause is instructive:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA [Michigan Sex Offenders Registration Act] brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.

Snyder, 834 F.3d at 705; *see also id.* at 706 ("As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice."). The Sixth Circuit's rationale for finding the Michigan statute unconstitutional applies with even stronger force to the more-restrictive ASORCNA regime. Plaintiffs will address each of the *Mendoza-Martinez* factors in turn.

a. ASORCNA Imposes Affirmative Disabilities Or Restraints

To determine whether a statute imposes an affirmative disability or restraint, a court will "inquire how the effects of the [a]ct are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 99-100. The cumulative restraints imposed on children who are convicted as adults under ASORCNA include significant direct and indirect restraints that damage the well-being of registrants and sabotage their ability to re-enter society and be productive citizens.

ASORCNA is "the most comprehensive, debilitating sex-offender scheme in the land, one that includes not only most of the restrictive features used by various other jurisdictions, but also unique additional requirements and restrictions nonexistent elsewhere, at least in this form." *McGuire*, 83 F. Supp. 3d at 1236. And while ASORCNA's regime is similar to the Michigan sex offender registration statute struck down by the Sixth Circuit in *Snyder*, it is even more restrictive. In addition to reporting requirements, the Michigan statute restricted individuals from "living, working, or 'loitering' within 1,000 feet of a school." *Snyder*, 834 F.3d at 698 (footnote omitted). ASORCNA takes these residential, work, and loitering restrictions several steps further. For instance, an individual may not reside within two thousand feet of a school, childcare facility, resident camp facility, or any property on which his or her former victim or an immediate family member of the

victim resides. Ala. Code § 15-20A-11(a)-(b). An individual may not work or volunteer at any school, childcare facility, business or organization that provides services primarily to children, or amusement or water park. *Id.* § 15-20A-13(a). Nor can such an individual work or volunteer "within 2,000 feet of the property on which a school or childcare facility is located." *Id.* § 15-20A-13(b). An individual subject to ASORCNA also may not "loiter on or within 500 feet of the property line of any property on which there is a school, childcare facility, playground, park, athletic field or facility, school bus stop, college or university, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors," *id.* § 15-20A-17(a)—places that are often ubiquitous and places that, in combination with each other, heavily restrict individuals' movements. In addition to these residential, employment, and loitering restrictions, individuals also must get pre-approval for travel, *id.* § 15-20A-15, among other restrictions. Finally, Michigan's regime separated individuals into three tiers based on their convictions, *Snyder*, 834 F.3d at 698, while ASORCNA subjects all covered individuals to the same system of restrictions for a lifetime, Ala. Code § 15-20A-3(b).

This Court already recognized that the provisions challenged in *McGuire*—namely, the residency, employment, and travel restrictions and the in-person registration requirements—impose affirmative disabilities or restraints. *McGuire*, 83

F. Supp. 3d at 1258. Taken as a whole, ASORCNA imposes extraordinary affirmative disabilities or restraints on registered individuals. *See id.* at 1251 ("[T]o put it bluntly, it is the most comprehensive scheme, by far, in the United States."); *cf. Doe v. Miami-Dade County*, 846 F.3d 1180, 1185 (11th Cir. 2017) (concluding that complaint sufficiently alleged that a Florida county ordinance prohibiting sex offenders from residing within 2,500 feet from any school was "a direct restraint on [the plaintiffs'] freedom to select or change residences"); *Snyder*, 834 F.3d at 703 (concluding that Michigan's regulation of where sex offender "registrants may live, work, or 'loiter'" "put significant restraints on how registrants may live their lives," as did the facts that registrants must appear in person and, in some cases, register for life). When applied to individuals who were children at the time of their offense, the effect and consequences of those restrictions are even more severe.

In addition to imposing direct restraints, ASORCNA imposes substantial secondary disabilities or restraints that have had palpable and, at times, devastating effects on Plaintiffs' ability to function and participate in society. The hardship of complying with ASORCNA has caused severe mental distress. Doc. 12, ¶ 6. Mr. Nicholes, for example, described his experience as "mentally and physically stressful" and "devastating and terrifying." *Id.* ¶ 57. All Plaintiffs have suffered from

stigma in their communities due to their status as registered sex offenders. *See, e.g.*, *id.* ¶¶ 35, 47-48, 51, 56.

Plaintiffs alleged significant housing instability and financial strain that resulted from ASORCNA compliance. *See, e.g.*, *id.* ¶ 29. For example, Mr. Stevens could not live in the same public housing complex as his family. *Id.* ¶ 43. Plaintiffs also have faced difficulty in finding and maintaining employment as a result of having to comply with ASORCNA. *See id.* ¶¶ 32-34, 54.

All Plaintiffs alleged that being subject to ASORCNA has caused them to restrict their day-to-day movements to avoid possible penalties and to reduce further stigmatization of their families. *See id.* ¶¶ 30, 45 (avoiding picking up children or grandchildren from school and school activities); *id.* ¶¶ 35, 47, 56 (avoiding church activities or isolating themselves from other people at church).

Plaintiffs' experiences are consistent with studies that show that subjecting a child to sex offender registration directly impacts the child's social and psychological well-being and creates obstacles to participating in daily life. *See id.* ¶ 104 (citing studies). Registration also uniquely stigmatizes youth and can harm their self-image and development. *See id.* ¶¶ 105-07 (citing studies). Children who must register as sex offenders also face consequences in their relationships and extracurricular activities, and violence or threats of violence connected to their sex

offender status. *See id.* ¶¶ 108-10 (citing studies). Although these effects are not statutorily imposed by ASORCNA, they flow directly and inevitably from the duty to register and the imposition of the sex offender label. Subjecting children who were tried as adults to a lifetime of ASORCNA's direct and indirect restraints affects these offenders in far more grievous ways than a criminal conviction alone.

b. The Lifetime Imposition Of ASORCNA's Restrictions On Children Tried As Adults Is Excessive

The focus of the excessiveness inquiry is on "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. When considering whether ASORCNA is excessive with respect to its purpose, the Court should look to the statute as a whole. *See id.* at 104; *W.B.H.*, 664 F.3d at 859-60; *McGuire*, 83 F. Supp. 3d at 1267 ("The Legislature passed ASORCNA as a comprehensive scheme, so it is logical to consider the effects of that scheme in sum. Accordingly, consideration of ASORCNA's effects is not limited to the discrete effects of individual provisions as if they are operating in a vacuum.").

As discussed above, ASORCNA restricts virtually every facet of life. *See supra* Sections II, IV(D)(1)(a). Its exceedingly onerous and complicated requirements would be difficult for even mature and well-educated citizens to follow. "These provisions are, especially when considered *in toto*, in excess of every other scheme operating across the country, and such a stark comparison highlights

areas where ASORCNA's effects have a very real potential to exceed their nonpunitive benefits." *McGuire*, 83 F. Supp. 3d at 1268; *see also id.* (comparing ASORCNA to other state sex offender regulations). Although the Court eventually concluded that the *McGuire* plaintiff failed to carry his burden of showing that ASORCNA is clearly excessive as applied to an adult offender, *id.* at 1269, Plaintiffs sufficiently alleged that the statutory regime is excessive as applied to children tried as adults for several reasons.

First, Plaintiffs cited well-established case law that confirms children fundamentally differ from adults in maturity and culpability, and therefore are less deserving of being subject to a lifetime of ASORCNA's restrictions. *See* Doc. 12, ¶¶ 84-88. The Supreme Court has long recognized that criminal penalties for youth must be determined in light of the developmental differences between youth and adults. *See Miller v. Alabama*, 567 U.S. 460, 471-80 (2012); *Graham v. Florida*, 560 U.S. 48, 67-69 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988). This argument is more fully discussed below in the context of the Eighth Amendment. *See infra* Section IV(D)(2).

Second, the low recidivism rate for youth makes the automatic imposition of ASORCNA without regard to an individual's risk of recidivism excessive with

respect to its stated purpose of increasing public safety. *See supra* Section II (citing studies).

Third, children tried as adults will generally be subject to ASORCNA in excess of what adults will be subject to. Life-without-parole sentences are especially harsh when imposed on youth because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham*, 560 U.S. at 70. Similarly, a child convicted as an adult will on average serve more years and a greater percentage of his life subject to ASORCNA's regime than an adult offender. Registered children, unlike adults, will cross the bridge into adulthood already saddled with the stain of a sex offender label, compromising their ability to live stable, productive lives.

Finally, ASORCNA sets people up to fail, as over the course of a lifetime, maintaining the stringent reporting requirements becomes increasingly difficult. It is hardly surprising that an individual will fail to comply at some point with ASORCNA's onerous requirements. *Cf.* Doc. 12, ¶¶ 19-21, 26, 40 (noting Plaintiffs' past registration and residency violations).

c. ASORCNA Lacks A Rational Connection To A Nonpunitive Purpose

Although a "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance," *Smith*, 538 U.S. at 103,

"sufficient imprecision between the challenged provisions and the nonpunitive purpose may ultimately 'suggest that the Act's nonpunitive purpose is a sham or mere pretext,'" *McGuire*, 83 F. Supp. 3d at 1264 (quoting *Smith*, 538 U.S. at 103) (additional internal quotation marks omitted). As applied to children tried as adults, ASORCNA is not rationally related to its stated purpose of enhancing public safety by reducing the "danger of recidivism," Ala. Code § 15-20A-2(1), because it fails to consider the lower recidivism rate for children and frustrates its stated aim of protecting the public.

First, as discussed above, ASORCNA ignores that children are less likely to recidivate than adults and generally have low recidivism rates. *See supra* Section II (citing studies); *cf. Snyder*, 834 F.3d at 704-05 (reviewing studies showing that sex offenders are less likely to recidivate than other offenders, that "offense-based public registration has, at best, no impact on recidivism," and that such laws could actually increase recidivism).

Second, by excessively restricting individuals' abilities to participate and function in society, ASORCNA frustrates its own stated aim of protecting the public. The Eleventh Circuit found a similar argument persuasive in a challenge to a local sex offender residency restriction. *See Miami-Dade Cty.*, 846 F.3d at 1186 (concluding that the plaintiff sufficiently alleged that the ordinance in question "not

only fail[ed] to advance, but also directly undermine[d], the goal of public safety"). In that case, the plaintiffs alleged that the "only demonstrated means of effectively managing reentry and recidivism of former sexual offenders are targeted treatment, along with maintaining supportive, stable environments that provide access to housing, employment, and transportation, rather than by making categorical assumptions about groups of former sexual offenders." *Id.* (quotation marks and brackets omitted). The plaintiffs, who were homeless, "also alleged that the transience and homelessness that the residency restriction causes undermine sexual offenders' abilities to successfully re-enter society and increase the risk of recidivism by making it more difficult for [p]laintiffs and others to secure residences, receive treatment, and obtain and maintain employment." *Id.* (internal quotation marks and brackets omitted). The court concluded that the plaintiffs plausibly alleged that the residency restrictions violated the Ex Post Facto Clause. *Id.*

Similarly, Plaintiffs alleged that sex offender registration statutes like ASORCNA do not reduce recidivism and do not increase public safety. Doc. 12, ¶¶ 93-103. Plaintiffs also alleged how ASORCNA has frustrated their efforts to live stable, productive lives. For example, Plaintiffs alleged how they have each struggled to secure steady employment. *See, e.g.*, *id.* ¶¶ 53-54. In addition, Plaintiffs alleged how ASORCNA prevented them from having stable homes with their

families. *See, e.g.*, *id.* ¶¶ 6, 43-44. Thus, Plaintiffs have adequately pled that the significant financial, employment, and housing hardships caused by ASORCNA are counter to its stated aims of protecting public safety.

d. ASORCNA's Requirements Mirror The Traditional Definition Of Punishment

While sex offender registration "is not identical to any traditional punishments, it meets the general definition of punishment, has much in common with banishment and public shaming, and has a number of similarities to parole/probation." *Snyder*, 834 F.3d at 703 (regarding Michigan's sex offender registration statute). The Sixth Circuit reasoned that:

> [T]hough [the statute] has no direct ancestors in our history and traditions, its restrictions do meet the general, and widely accepted, definition of punishment offered by legal philosopher H.L.A. Hart: (1) it involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed.

Id. at 701 (citing H.L.A. Hart, *Punishment and Responsibility* 4-5 (1968)). These same observations apply equally to ASORCNA's regime, which also resembles banishment, shaming, and parole or probation.

i. *Banishment*

Plaintiffs have plausibly shown how ASORCNA's restrictions resemble banishment. *See, e.g.*, Doc. 12, ¶¶ 30, 35, 43-44, 46-47, 56. Plaintiffs need not show that ASORCNA's restrictions operate as a complete banishment from society. A showing of burdensome geographical restrictions was sufficient for the Sixth Circuit to conclude that Michigan's statute "resemble[d], in some respects at least, the ancient punishment of banishment." *Snyder*, 834 F.3d at 701. The Sixth Circuit concluded that, while the Michigan statute did not "make a registrant 'dead in law [and] entirely cut off from society,'" *id.* (quoting 1 William Blackstone, Commentaries *132) (alteration in original), "its geographical restrictions [we]re nevertheless very burdensome, especially in densely populated areas," *id. McGuire*, which predated *Snyder*, improperly concluded that ASORCNA does not resemble banishment simply because "[t]here is no complete exile." 83 F. Supp. 3d at 1253. Plaintiffs are prepared to show more detailed information about the zones of exclusion imposed by ASORCNA as the *Snyder* plaintiffs did. *See Snyder*, 834 F.3d at 702 (showing map with areas of exclusion). At this stage, however, Plaintiffs' allegations are sufficient to show that they have been burdened by geographical restrictions akin to banishment. *See, e.g.*, Doc. 12, ¶¶ 30, 35, 43-44, 46-47, 56.

ii. *Shaming*

ASORCNA's restrictions and requirements also resemble the traditional punishment of shaming. In *Snyder*, the Sixth Circuit concluded that the Michigan statute resembled shaming because it "ascribes and publishes tier classifications corresponding to the state's estimation of present dangerousness without providing for any individualized assessment," does not permit an appeal of the designations, and applies designations "even to those whose offenses would not ordinarily be considered sex offenses." *Snyder*, 834 F.3d at 702-03. In some cases, the Michigan system disclosed otherwise nonpublic information, *id.* at 703, whereas the Alaska statute considered in *Smith* republished information already publicly available, *id.* at 702; *see Smith*, 538 U.S. at 98 (discussing how Alaska statute did not resemble shaming because it did not "involve[] more than the dissemination of information").

Here, there is an even stronger basis to conclude that ASORCNA imposes shaming. Like Michigan's statute, ASORCNA also discloses information that is not otherwise public, including an individual's residential address and photograph. *Compare Snyder*, 834 F.3d at 697-98, *with* Ala. Code § 15-20A-8(a). Unlike Michigan's statute, however, ASORCNA does not have a tiered classification system or individualized assessment to assess future dangerousness. *Anyone* convicted of any of the broad array of sex offenses subject to ASORCNA is automatically subject to ASORCNA and held up to the public as a sex offender for

the rest of his or her life. *See* Ala. Code §§ 15-20A-3, 15-20A-5. The fact that there is no "face-to-face shaming," *McGuire*, 83 F. Supp. 3d at 1254 (quoting *Smith*, 538 U.S. at 98), does not preclude a finding that ASORCNA shames individuals like Plaintiffs. A regime need not be limited to historic, pre-Internet forms of shaming in order to be recognized for what it is—shaming.

iii. *Parole And Probation*

The limitations and burdens imposed by ASORCNA are similar to the traditional punishments of parole and probation for a variety of reasons. First, they share a similar stated purpose—to promote public safety. *See, e.g.*, Ala. Code § 15-22-26(a) (noting that prisoner shall be released on parole "only if the Board of Pardons and Paroles is of the opinion that the prisoner meets criteria and guidelines established by the board to determine a prisoner's fitness for parole and to ensure public safety"); *id.* § 15-20A-2(1) (noting ASORCNA's purpose to advance public safety). Second, a basic assumption underlying parole, probation, and ASORCNA is that the individual requires supervision. Indeed, ASORCNA seeks "constant contact between sex offenders and law enforcement." *Id.* § 15-20A-2(1). Third, it is common for parole and probation to include a variety of requirements, as ASORCNA does. *See, e.g.*, *id.* § 15-22-52 (listing examples of permissible conditions of probation). Fourth, parole and probation, as well as ASORCNA, all

impose obligations to report, followed by penalties for any failure to comply. *See, e.g.*, *id.* § 15-22-54. Although this Court concluded in *McGuire* that ASORCNA is not sufficiently similar to parole or probation, the Court improperly disregarded these similarities. *See* 83 F. Supp. 3d at 1255-56.

The *Smith* Court concluded that the Alaska sex offender registration statute was not parallel to probation or supervised release, in part because "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *Smith*, 538 U.S. at 101. That is certainly not the case in Alabama, where ASORCNA imposes extensive residential and work restrictions, *see* Ala. Code §§ 15-20A-11, 15-20A-13.

Since *Smith*, numerous courts have determined that other sex offender registration statutes are akin to parole or probation. The Sixth Circuit concluded that the Michigan statute—which, as discussed above, was more onerous than Alaska's statute—"resemble[d] the punishment of parole/probation" because "registrants are subject to numerous restrictions on where they can live and work," "they must report in person," "[f]ailure to comply can be punished by imprisonment," and "the basic mechanism and effects [of parole or probation and the statute] have a great deal in common." *Snyder*, 834 F.3d at 703. Other courts have reached similar conclusions. *See, e.g.*, *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 139 (Md. Ct.

App. 2013) (concluding the Maryland sex offender registration statute's "restrictions and obligations have the same practical effect as placing [the plaintiff] on probation or parole"); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1126 (D. Neb. 2012) (concluding that the "impact of these statutes [that impose Internet restrictions and monitoring on sex offenders] is to impose what is essentially a long-term, and, in some cases, a life-term, period of 'supervised release' that would be right at home in a typical federal judge's *criminal sentence* for a sex offense"); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (concluding the Indiana sex offender registration statute's "registration and reporting provisions are comparable to conditions of supervised probation or parole"). The registration schemes in Michigan, Maryland, Nebraska, and Indiana were all less severe than ASORCNA. *Compare* Ala. Code § 15-20A-1 *et seq.*, *with Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d at 123-24; *Nebraska*, 898 F. Supp. 2d at 1093-95; *Wallace*, 905 N.E.2d at 374-77.

e. ASORCNA Promotes Traditional Aims Of Punishment

ASORCNA advances the traditional punitive goals of incapacitation and retribution.[5] First, the statute's "very goal is incapacitation insofar as it seeks to keep

[5] ASORCNA also seeks to advance deterrence of future crimes. *See* Ala. Code § 15-20A-2(1) (finding that "[r]egistration and notification laws . . . serve to deter sex offenders from future crimes through frequent in-person registration"). However, the existence of registration as a punishment does not deter first-time juvenile sex

sex offenders away from opportunities to reoffend." *Snyder*, 834 F.3d at 704; *see* Ala. Code § 15-20A-2(5) (noting that "[e]mployment and residence restrictions, together with monitoring and tracking," were intended to further "the primary governmental interest of protecting vulnerable populations, particularly children").

Second, ASORCNA punishes children by exacting retribution for past crimes. Every individual who is tried as an adult and convicted of a sex offense must automatically face the lifetime consequences of being subject to ASORCNA after conviction. Ala. Code §§ 15-20A-3(a)-(b). ASORCNA does not take into account the facts or circumstances of the underlying offense, or the individual's risk of recidivism, before subjecting him or her to its oppressive regime. Rather, ASORCNA imposes a lifetime of registering as a sex offender and complying with a web of restrictions based on conviction alone. *Cf. Snyder*, 834 F.3d at 704 (concluding that Michigan's sex offender registration statute was "retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community"); *see also infra* Section IV(D)(2)(c).

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crimes, Doc. 12, ¶ 98 (citing study), and therefore ASORCNA does not *promote* deterrence.

Because ASORCNA imposes a lifetime of restrictions on all children tried as adults and convicted of certain offenses, regardless of the facts supporting the conviction or the risk that the child will recidivate, the Supreme Court's reasoning in *Smith* regarding the non-retributive effect of Alaska's registration law is inapposite. *See Smith*, 538 U.S. at 102. There, the Supreme Court found that the Alaska law did not have a retributive effect because the law divided the predicate offenses into different tiers imposing different registration requirements based on the expected danger of recidivism. *Id*. In contrast, ASORCNA has only one category of registration for children tried as adults—life. Ala. Code § 15-20A-3(b).

2. Plaintiffs Stated A Claim Under The Eighth Amendment By Alleging The Mandatory, Lifetime Imposition Of ASORCNA's Punitive Regime Is Unconstitutional As Applied To Children Tried As Adults

ASORCNA violates the Eighth Amendment because the mandatory and lifelong imposition of its many restrictions is disproportionate punishment as applied to children tried as adults. "The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). This right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the

offender and the offense." *Id.* (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 560).

The case at hand implicates two lines of Supreme Court precedent concerning proportionate punishment. "The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 470 (citing *Graham v. Florida*, 560 U.S. 48, 60-61 (2010)). In the second line of cases, the Supreme Court has prohibited the mandatory imposition of certain punishments—in particular the death penalty and life without parole—"requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing." *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978)). The two lines converged in *Miller*, in which the Supreme Court held that the mandatory imposition of life without parole for juveniles violates the Eighth Amendment. *Id.* The two lines converge in the instant case as well, yet Defendants ignore these cases entirely. Doc. 14 at 41-44.

a. ASORCNA Is Punitive For Purposes Of The Eighth Amendment

As a threshold matter, for the reasons stated above in Section IV(D)(1), Plaintiffs sufficiently alleged that ASORCNA is punitive. The analysis of whether a statute is punitive in purpose or effect in the context of the Ex Post Facto Clause also

applies in the Eighth Amendment context. *See Smith v. Doe*, 538 U.S. 84, 97 (2003) (noting that *Mendoza-Martinez* factors migrated from, among other areas, Eighth Amendment jurisprudence); *see also United States v. Under Seal*, 709 F.3d 257, 263-66 (4th Cir. 2013) (applying *Smith* framework to Eighth Amendment claim).

Defendants rely on numerous cases rejecting Eighth Amendment challenges to sex offender registration statutes, Doc. 14 at 42-44, but those cases involved statutes significantly less punitive than ASORCNA. For instance, Defendants cite to *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), and *United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012), both cases challenging the federal sex offender registration statute as applied to juveniles. Doc. 14 at 42. The federal statute, which was limited to reporting requirements, *see United States v. W.B.H.*, 664 F.3d 848, 851-52 (11th Cir. 2011), is not nearly as restrictive as ASORCNA. Defendants also rely on *Holland v. Governor of Ga.*, 781 F. App'x 941 (2019) (per curiam), a pro se challenge to Georgia's sex offender registration statute. Doc. 14 at 42. However, Georgia's statute, like the federal statute, imposes registration and information-collection requirements but does not include the other stringent restrictions found in ASORCNA. *Holland*, 781 F. App'x at 945.

Defendants also rely on *Chrenko v. Riley*, 560 F. App'x 832 (11th Cir. 2014), which they characterize as a "challenge to ASORCNA," Doc. 14 at 43, but which

actually was a challenge to ASORCNA's predecessor, the Alabama Community Notification Act ("ACNA"), 560 F. App'x at 833. The plaintiff's Eighth Amendment challenge to ACNA was based on the harassment he faced because of the statute, not the restrictions themselves. *Id.* Even if the case were a challenge to ACNA's restrictions, ASORCNA is more restrictive than ACNA. For example, ASORCNA added travel restrictions that did not exist in ACNA. *Compare* Ala. Community Notification Act, *Ala. Act No.* 2005-301 (repealed July 1, 2011), *with* Ala. Sex Offender Registration and Community Notification Act, *Ala. Act No.* 2011-640 § 15. This Court observed that "ASORCNA's revisions to the ACNA were so extensive and far-reaching as to relegate the prior statute to mere irrelevance." *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1271 (M.D. Ala. 2015), *appeal filed*, Nos. 15-10958, 15-11020, 15-11142, 15-11401. ASORCNA is punitive for purposes of the Eighth Amendment, and Defendants fail to show otherwise.

b. The Lifetime Imposition Of ASORCNA's Restrictions Is A Disproportionate Punishment For Children Convicted As Adults

Plaintiffs' reduced culpability, Doc. 12, ¶¶ 3-5, 87-88, bars subjecting them to ASORCNA for the rest of their lives. When considering the constitutionality of mandatory life-without-parole sentences for juveniles in *Miller*, the Supreme Court explained:

> *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham*, 560 U.S., at 68, 130 S.Ct., at 2026. Those cases relied on three significant gaps between juveniles and adults. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570, 125 S.Ct. 1183.

Miller, 567 U.S. at 471. The Supreme Court has recognized that, even outside the contexts of death penalty and life-without-parole sentencing, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, 560 U.S. at 76. The same rationales that undergirded the Supreme Court's decisions in *Roper*, *Graham*, and *Miller* apply to adults and children in the context of ASORCNA. *See supra* Section II (citing studies).

For children, a lifetime of being subject to ASORCNA is a particularly harsh punishment. As the Supreme Court of Ohio explained:

> For juveniles, the length of the punishment is extraordinary, and it is imposed at an age at which the character of the offender is not yet fixed. Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the

> juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth.

In re C.P., 967 N.E.2d 729, 741-42 (Ohio 2012). A lifetime punishment is significantly longer when imposed on a child than on an adult. *See Miller*, 567 U.S. at 474-75; *Graham*, 560 U.S. at 70; *supra* Section IV(D)(1)(b).

As the Ohio Supreme Court aptly reasoned, it is difficult to overstate the ruinous consequences that lifetime sex offender registration can have on a person's life and livelihood. The stigma associated with being labeled as a sex offender as a child will endure throughout that child's lifetime. Unlike other offenses, sex offenses are announced to the world. Doc. 12, ¶¶ 66-67. ASORCNA robs Plaintiffs of the ability to move to a new community with a good reputation. *Id.* Mr. Stevens has stated that his sex offender registration status has held him back his whole life, *id.* ¶ 48, and Mr. Nicholes has stated that dealing with ASORCNA has been "devastating and terrifying," *id.* ¶ 57.

c. ASORCNA Is Imposed Without Consideration Of The Characteristics Of The Defendant Or Circumstances Of The Offense

A child tried as an adult is automatically subject to ASORCNA following a conviction for any one of a broad array of sex offenses. Ala. Code §§ 15-20A-3(a), 15-20A-5. ASORCNA violates the Eighth Amendment because it is mandatory. This argument draws upon Eighth Amendment jurisprudence prohibiting the death penalty and the mandatory imposition of life without parole for juveniles. *Miller*, 567 U.S. at 470; *see also Sumner v. Shuman*, 483 U.S. 66, 74 (1987). Such a mandatory scheme forecloses the court from considering youthful attributes or individual circumstance and imposes registration without an evaluation of risk.

Although the application of ASORCNA in juvenile court requires a risk assessment and hearing prior to subjecting juveniles adjudicated delinquent to its myriad provisions, *see* Ala. Code §§ 15-20A-2(2), 15-20A-26(b), 15-20A-26(d), this process is not available to youth who are tried as adults. Rather, no individualized determination of the person's risk or the likelihood that they will reoffend is undertaken. This Court has concluded, "[T]he older someone gets, and the longer they go without committing a new crime, the less likely they are to reoffend. At a certain point, most individuals convicted of a sexual offense will be no more likely to commit another sexual offense than the rate of spontaneous 'out-of-the-blue'

sexual offenses in the general population." *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1330 (M.D. Ala. 2019) (internal quotation marks and footnote omitted). Yet the "failure to account for risk is a problem throughout ASORCNA." *Id.* That is, for children who are convicted as adults, ASORCNA fails to assess their risk of recidivism prior to subjecting them to a lifetime of restrictions.

Defendants' argument that the proportionality of ASORCNA "must be evaluated in relation to the juvenile courts' decisions to transfer [Plaintiffs'] cases and the criminal courts' decisions to deny them Youthful Offender status," Doc. 14 at 43-44, fails. Defendants ignore the Supreme Court's mandate that youthfulness must be considered at the sentencing phase, separate from the liability or transfer phase. Indeed, *Miller* and *Graham* involved minors who were tried as adults. *See Miller*, 567 U.S. at 466, 468-69; *Graham*, 560 U.S. at 53. The Supreme Court firmly rejected the argument that individualized circumstances were adequately considered for purposes of the Eighth Amendment in deciding whether to try a juvenile as an adult. *Miller*, 567 U.S. at 489 ("[T]he discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment."); *Graham*, 560 U.S. at 75-76.

Finally, Defendants argue that the ability to petition for relief from ASORCNA makes it less punitive. Doc. 14 at 44. Even though some individuals

may petition for relief from ASORCNA, the relief is illusory as few people subject to ASORCNA would qualify to apply for such relief. *See* Doc. 12, ¶¶ 78-83. ASORCNA limits eligibility for relief to four specific sex offenses. *Id.* ¶ 78. This means it is unavailable to most individuals, considering at least 150 offenses in Alabama, plus a myriad of criminal offenses from other jurisdictions, trigger ASORCNA's regulations. *See id.* § 15-20A-5.[6] Defendants' argument as it specifically relates to Mr. Stevens's eligibility to petition for relief from ASORCNA's regime similarly fails because Mr. Stevens was placed on the registry under a mandatory sex offender registration scheme, without consideration of his age and the circumstances of his offense at the time of sentencing, prior to being subject to ASORCNA. Moreover, a petition for relief does not guarantee removal from the registry. *See* Ala. Code § 15-20A-24(h)-(j). The existence of an opportunity to petition for relief cannot erase the essential punitive nature of the requirements,

[6] Ala. Code §§ 15-20A-5(1)-(32) lists thirty-seven discrete sex offenses. Subsection 15-20A-5(33) lists approximately thirteen older sex offenses no longer in force but still subject to ASORCNA. Subsection 15-20A-5(34) expands this multitude of qualifying offenses to "any solicitation, attempt, or conspiracy to commit any of the offenses listed in subdivisions (1) to (33), inclusive." Subsections 15-20A-5(35)-(41) provide catch-all provisions for sex offenses from other jurisdictions as well as Alabama offenses that contain elements of sexual motivation or an underlying sex offense.

any more than parole eligibility strips away the punitive nature of a criminal sentence of incarceration.

3. Plaintiffs Stated Claims That ASORCNA Violates Their Federal Due Process Rights

Plaintiffs sufficiently pled two Fourteenth Amendment procedural due process claims against Defendants. First, ASORCNA denies children adequate due process because it infringes upon their liberty interests and imposes an irrebuttable presumption of dangerousness without a meaningful opportunity to be heard. Second, Plaintiffs have endured harm to their reputations, which provides an additional basis to conclude that ASORCNA violates their due process rights.

a. The Automatic Imposition Of ASORCNA Violates Due Process When Imposed On Plaintiffs For Their Childhood Conduct

Prior to being deprived of any liberty or property interests, individuals are constitutionally guaranteed procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). Notice and a hearing are fundamental components of due process when a person's liberty interest is at stake in a legal proceeding. *See id.* Due process also requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 333. The right to notice and a hearing is also critical when a statute imposes an irrebuttable presumption about an individual. *See Vlandis*

v. Kline, 412 U.S. 441, 446 (1973); *Martin v. Houston*, 176 F. Supp. 3d 1286, 1305 (M.D. Ala. 2016) (noting that irrebuttable presumptions, still a viable doctrine in the context of procedural due process claims, "deny a benefit to or place a burden on an individual without giving that individual an opportunity to rebut a finding essential to the ultimate outcome of the statutory calculus").

To determine whether a due process violation occurred, courts consider three factors: (1) whether there is a private interest affected by the government's action; (2) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the government's interest in the regulation, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

i. *Plaintiffs Sufficiently Alleged Several Private Interests Affected By ASORCNA*

To determine whether due process requirements apply, the interest must be within the Fourteenth Amendment's protection of liberty and property. *Behrens v. Regier*, 422 F.3d 1255, 1259 (11th Cir. 2005). Plaintiffs have sufficiently alleged deprivations of their right to worship, right to travel, right to privacy, right to seek employment, and right to establish a residence caused by ASORCNA.

First, ASORCNA alters Plaintiffs' fundamental right to worship. "The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Within the First Amendment's guarantee of free exercise of religion lies a fundamental right to worship at a place of one's choice. *See id.* (noting that the "freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law").

Plaintiffs sufficiently alleged that ASORCNA has interfered with their right to worship. For example, as a direct result of community members finding out about Mr. Pennington's registration status, he and Mrs. Pennington were ostracized from their church community. Doc. 12, ¶ 35. They no longer seek to join a church in order to avoid further stigmatization and pain. *Id*. Mr. Nicholes and Mr. Stevens have limited their worship and participation at church because of the proximity to children. *Id.* ¶¶ 47, 56. When they do attend church, they isolate themselves from other worshippers due to the stigma associated with their sex offender status. *See id.*

Second, ASORCNA alters Plaintiffs' fundamental right to travel. *See United States v. Guest*, 383 U.S. 745, 758 (1966) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution."); *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1244 (M.D. Ala. 2015), *appeal filed*, Nos.

15-10958, 15-11020, 15-11142, 15-11401 (concluding that plaintiff had standing to challenge ASORCNA's travel permit requirement because it deterred his fundamental right to travel). Plaintiffs demonstrated how ASORCNA's restrictive travel restrictions have affected their lives. *See* Doc. 12, ¶¶ 71-72 (citing Ala. Code § 15-20A-15). Because of these restrictions, Mr. Nicholes has been deterred from working as a driver for his wife's company. *See id.* ¶ 54.

Third, ASORCNA alters Plaintiffs' right to privacy. "[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution," in part under the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113, 152 (1973). The right to privacy includes "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Registration under ASORCNA deprives Plaintiffs of a legitimate privacy interest in their home address. The law mandates disclosure of Plaintiffs' home address to the public through the Internet. *See* Ala. Code § 15-20A-8(a). It is true, of course, that home addresses are sometimes available in telephone directories, voter registration lists, and other public records. But "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994). The Eleventh

Circuit has repeatedly held that individuals have "an important privacy interest in their home address." *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam).

The right to privacy also involves "the interest in independence in making certain kinds of important decisions," *Whalen*, 429 U.S. at 599-600, including decisions regarding family relationships and child rearing, *id.* at 600 n.26 (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing that right to family integrity is a well-established liberty interest requiring constitutional protection of procedural due process); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (same). When this Court declared that the right to family integrity is distinctly altered by a person's inclusion in a central registry of child abusers, it reasoned that "[h]aving indicated dispositions (true) on the central registry makes it highly unlikely that [the plaintiffs] will be permitted to volunteer and participate [in schools and organizations catering to children] to the fullest measure contemplated by this country's notions of liberty and family integrity." *Thomas v. Buckner*, No. 2:11–CV–245–WKW, 2012 WL 3978671, at *6 (M.D. Ala. Sept. 11, 2012). Likewise, Plaintiffs' right to family integrity is distinctly altered because ASORCNA's restrictions make it more difficult for them to participate in their children's lives. They may not, for example, "loiter on or within 500 feet of the

property line of any property on which there is a school, childcare facility, playground, park, athletic field or facility, school bus stop, college or university, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors." Doc. 12, ¶ 74 (quoting Ala. Code § 15- 20A-17(a)). In addition, they must notify the principal before entering school property, "immediately report[]" to the principal upon entering the property and comply with other procedures while on the property. Ala. Code § 15-20A-17(b). Mr. Pennington is unable to pick up his grandchildren from school or attend school events because of his registration status and fear of the stigma associated with his status being imposed on the grandchildren. Doc. 12, ¶ 30. Similarly, Mr. Stevens is not listed as a parent for his younger children at their schools and avoids getting involved in their extracurricular activities for fear that the stigma of his status will be imposed on them. *Id.* ¶ 45.

Fourth, ASORCNA alters Plaintiffs' rights to seek employment. The right to pursue employment of one's choosing rests within the liberties guaranteed by the Fourteenth Amendment. *See Dent v. West Virginia*, 129 U.S. 114, 121 (1889). A statutory impediment to seek specific employment is a significant deprivation of a protected interest. *See Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (concluding that including the plaintiff on the central list of perpetrators of child

abuse "place[d] a tangible burden on her employment prospects" because employers would be reluctant to hire her). Such an impediment includes being demoted or rejected from a job due to information on a sexual abuser registry. *See Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1297 (11th Cir. 2003).

Plaintiffs face significant work restrictions because of ASORCNA. They may not maintain employment or volunteer at any school, childcare facility, business or organization that provides services primarily to children, or any amusement or water park. Doc. 12, ¶ 73 (citing Ala. Code § 15-20A-13(a)). Nor can they maintain employment or volunteer within 2,000 feet of a school or childcare facility. *Id.* (citing Ala. Code § 15-20A-13(b)). These provisions significantly limit their options for where to seek employment.

Plaintiffs have also faced impediments to maintaining and seeking employment because of the way people have perceived them due to their registration status. *See, e.g., id.* ¶¶ 33-34 54. Mr. Pennington, for example, was demoted from his management position when the company that acquired his prior employer found out about his registration status. *Id.* ¶ 33. As this Court recognized in the context of reviewing ASORCNA's predecessor statute, ACNA:

> There can be little doubt that prospective employers . . . will think twice before doing business with an individual deemed to be a likely recidivist and a danger to his community, and, because the Act allows government officials to notify communities . . . , it is likely that at least

> some of these prospective business partners will become aware of the State's warning.

Doe v. Pryor, 61 F. Supp. 2d 1224, 1232 (M.D. Ala. 1999) (Thompson, J.). On this basis, the Court concluded that the plaintiff was likely to succeed in showing that ACNA "will foreclose his freedom to take advantage of . . . employment opportunities well beyond those expressly forbidden." *Id.*; *cf. Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989) (concluding that public disclosure of police officer's assault of an individual during an arrest was stigmatizing information sufficient to implicate liberty interest under the Due Process Clause).

Finally, ASORCNA alters Plaintiffs' right to establish a residence. The right to establish a home is a liberty interest protected by the Due Process Clause. *Meyer*, 262 U.S. at 399. ASORCNA places onerous restrictions on where Plaintiffs can live. *See* Doc. 12, ¶¶ 68-69 (citing Ala. Code § 15-20A-11). As a direct consequence of Alabama's restrictions on where convicted sex offenders may reside, Plaintiffs have struggled to maintain stable housing over the years. *See, e.g.*, *id.* ¶¶ 6, 22-26, 43-44, 51. In *Doe v. Pryor*, this Court held that restrictions on where convicted sex offenders could reside constituted deprivations of the plaintiff's liberty interest. 61 F. Supp. 2d at 1231-32; *see also id.* at 1232 (concluding, as it did in the employment context discussed above, that the plaintiff was likely to succeed in showing that

ACNA would "foreclose his freedom to take advantage of housing . . . opportunities well beyond those expressly forbidden").

ii. *Plaintiffs Sufficiently Alleged That ASORCNA Deprives Them of Liberty Interests Without Adequate Process*

When considering the risk of an erroneous deprivation of the liberty interest through ASORCNA's existing procedures, and the probable value, if any, of additional or substitute procedural safeguards, the balance favors Plaintiffs. ASORCNA imposes a broad array of requirements based solely on an individual's conviction. This mandatory punishment provides no opportunity to be heard at a meaningful time or in a meaningful manner. Although the Supreme Court's decision in *Miller v. Alabama* was in the context of a mandatory life-without-parole sentence, the Court emphasized the need for individualized consideration of age and other mitigating factors in sentencing youth. "[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," the Court explained. *Miller v. Alabama*, 567 U.S. 460, 476 (2012). A mandatory adult penalty like that imposed by ASORCNA on Plaintiffs, who were children at the time of their offenses, fails to account for the individualized characteristics of youth or their individualized circumstances.

ASORCNA also imposes an irrebuttable presumption of dangerousness and risks the loss of many liberty interests for children convicted as adults without giving them a meaningful opportunity to challenge this presumption. This is despite the fact that the overwhelming majority will never re-offend. *See supra* Section II (citing studies). ASORCNA does not afford adequate procedures for courts to determine whether children who are convicted as adults pose ongoing dangers to Alabama communities or whether they are likely to recidivate. *See* Doc. 12, ¶¶ 78-83 (citing Ala. Code §§ 15-20A-16(d), 15-20A-24, 15-20A-25). Contrary to Defendants' assertion, these factors are "relevant to their duty to register under ASORCNA," Doc. 14 at 50, because determining a child's risk to the community would provide guidance on whether subjecting the child to ASORCNA's restrictions advances the State's stated purpose of reducing recidivism. Granting additional procedural safeguards—like those afforded youth adjudicated as juveniles, Ala. Code § 15-20A-26—would provide children who are convicted as adults with a meaningful opportunity to be heard before being subjected to a lifetime of ASORCNA's restrictions. The juvenile court risk assessment is a reasonable alternative means of ascertaining whether an individual is at-risk of recidivating such that he should be subjected to ASORCNA's restrictions. Viewed against the uncontroverted research that young people have low rates of recidivism, *see supra* Section II (citing studies),

such a process would have permitted Plaintiffs to demonstrate their low risk of re-offense.

State courts reviewing sex offender registration schemes have determined that this lack of process is grounds for striking down the registration statute. In *In re J.B.*, the Pennsylvania Supreme Court struck down the registration statute as applied to juveniles because it "improperly brand[ed] all juvenile offenders' reputations with an indelible mark of a dangerous recidivist, even though the irrebuttable presumption linking adjudication of specified offenses with a high likelihood of recidivating is not universally true." *In re J.B.*, 107 A.3d 1, 19 (Pa. 2014) (internal quotation marks omitted). Likewise, an Ohio court found that automatically subjecting certain juveniles to sex offender registration and notification requirements at adjudication violated due process because it disregarded their ability to rehabilitate. *See In re W.Z.*, 957 N.E.2d 367, 376-80 (Ohio Ct. App. 2011). The court reasoned that these individuals were likely to be in juvenile placement receiving treatment until they were twenty-one years old and, at that time, an assessment could determine their likelihood of re-offense. *Id.* at 377. By imposing registration and notification at adjudication "without any other findings or support of the likelihood of recidivism, a child who commits a one-time mistake is automatically, irrebuttably, and permanently presumed to be beyond redemption or rehabilitation." *Id*.

Moreover, the cases Defendants rely on are distinguishable from the instant case. In *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court held that the Connecticut sex offender registration statute, which provided no hearing on the issue of future dangerousness prior to imposing the registration requirement on convicted sex offenders, did not violate procedural due process, *id.* at 3. The Eleventh Circuit reached a similar conclusion with respect to Florida's sex offender registration statute in *Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005), and with respect to the federal sex offender registration statute in *United States v. Ambert*, 561 F.3d 1202, 1208 (11th Cir. 2009). The plaintiffs in those cases, however, only challenged the public sex offender registry requirements. *See Conn. Dep't of Pub. Safety*, 538 U.S. at 1163; *Ambert*, 561 F.3d at 1208; *Moore*, 410 F.3d at 1340-41. Plaintiffs in the instant case, on the other hand, challenge ASORCNA's entire regime of restrictions, including but not limited to the public registry provisions. As discussed above, these restrictions affect virtually every facet of life. *See supra* Sections II; IV(D)(1)(a). Imposing additional safeguards prior to subjecting children to ASORCNA's web of onerous restrictions is constitutionally required.

iii. *Plaintiffs Sufficiently Alleged That The Government's Interest Does Not Outweigh The Private Interests*

The final factor to consider in the due process analysis is the public interest. "This includes the administrative burden and other societal costs that would be associated with requiring" additional procedural safeguards. *Mathews*, 424 U.S. at 347. Plaintiffs acknowledge that the State has a legitimate interest in reducing the "danger of recidivism." Ala. Code § 15-20A-2(1). The burden to provide additional procedural safeguards prior to imposing a lifetime's worth of restrictions on children convicted as adults under ASORCNA would not be prohibitively substantial. Although this Court recognized that the extent of the added burden of providing additional procedures to determine whether the plaintiff in *Pryor* should be subject to ACNA was "not clear" at the preliminary-injunction stage, the Court "[did] not anticipate any additional or substitute procedures to be unduly costly." *Pryor*, 61 F. Supp. 2d at 1234. The same rationale applies to the instant case. The Court should permit Plaintiffs' due process claim to proceed to ascertain the extent of the burden that would be imposed by any additional procedures—particularly where the government already has such a procedure in place in juvenile court.

b. ASORCNA Violates Plaintiffs' Due Process Rights Under The Stigma-Plus Test Established By *Paul v. Davis*

In addition to sufficiently alleging due process violations under the *Mathews* test, Plaintiffs also sufficiently alleged that ASORCNA is a deprivation of their liberty interests based on defamation or stigmatization by the government. "Where

a person's good name, reputation, honor, or integrity is at stake [b]ecause of what the government is doing to him, notice and an opportunity to be heard are essential." *Paul*, 424 U.S. at 708 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). To succeed in establishing that due process protections should apply under the "stigma-plus" framework established in *Paul v. Davis*, "a plaintiff claiming a deprivation based on defamation by the government must establish the fact of the defamation 'plus' the violation of some more tangible interest." *Behrens*, 422 F.3d at 1259-60 (quoting *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1302 (11th Cir. 2001)); *Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1436 (11th Cir. 1998) (noting that this standard "requires a plaintiff to show that the government official's conduct deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation"). In considering what satisfies the "plus" prong of this analysis, the *Paul* Court looked to whether state action had "distinctly altered or extinguished" "a right or status previously recognized by state law." *Paul*, 424 U.S. at 711. Plaintiffs have sufficiently alleged that the stigmatization caused by ASORCNA, in conjunction with the harm to other liberty interests and constitutionally inadequate process discussed above, has deprived them of due process.

i. *ASORCNA Stigmatizes Children Convicted And Registered As Adult Sex Offenders*

Defendants do not dispute—nor could they—that ASORCNA stigmatizes Plaintiffs; indeed, this is a central objective of ASORCNA. Plaintiffs demonstrated how registering as a sex offender, being exposed in their community as a sex offender, and having to comply with ASORCNA's restrictions has stigmatized them. *See, e.g.*, Doc. 12, ¶¶ 6, 30-31, 33, 35, 42-45, 47-48, 54, 56-57. Subjecting youth to lifetime registration—including the quarterly reminder that he or she is a "sex offender" and the constant possibility of arrest arising solely as a consequence of ASORCNA's requirements—uniquely stigmatizes youth. *Id.* ¶ 105 (citing study). The label will imbue the child with the reputation of a "sex offender" likely to reoffend throughout his formative years and continuing through adulthood. *Id.* ¶ 150. For children, who register for longer periods of time than their adult counterparts, the stigma is even more pronounced. *See supra* Section IV(D)(1)(b). This stigma is further enhanced because, although his age will increase on the registry, his victim's age will not. Thus, as time passes, the perception will be that he is an adult offender with a child victim—even though he committed his offense when he was a child. Doc. 12, ¶ 88.

Cases in this circuit provide a strong basis for concluding that Plaintiffs have sufficiently pled the stigma prong of the test. Defendants incorrectly state that this Court has rejected a procedural due process challenge to ASORCNA of the "stigma-

plus" variety. Doc. 14 at 50 (citing *Doe 1 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)). *Doe 1 v. Marshall* did not include a stigma-plus claim. 2018 WL 1321034, at *6. And in *McGuire v. City of Montgomery*, the Court rejected the plaintiff's argument regarding stigmatization in the context of a substantive due process claim. 2013 WL 1336882, at *11. However, this Court issued a preliminary injunction in part by concluding that a stigma-plus challenge to ASORCNA's predecessor statute was likely to succeed. *See Pryor*, 61 F. Supp. 2d at 1229-34. The Court concluded that community notification regarding a sex offense "will inflict a greater stigma than would result from conviction alone." *Id.* at 1231. The Court reasoned that "[n]otification will clearly brand the plaintiff as a 'criminal sex offender' within the meaning of the Community Notification Act—a 'badge of infamy' that he will have to wear for at least 25 years—and strongly implies that he is a likely recidivist and a danger to his community." *Id.* On this basis, the Court concluded that the plaintiff was "likely to pass the first part of the stigma-plus test." *Id.* Here, not only are Plaintiffs subject to the same "badge of infamy" as criminal sex offenders, they will be subject to it for the rest of their lives—providing an even stronger basis to conclude that the first part of the test has been established. *Cf. Behrens*, 422 F.3d at

1260 (expressing "no doubt" that being labeled as a "verified" child abuser was stigmatizing).

ii. *ASORCNA Additionally Alters Other Protected Interests*

Courts have reviewed the "plus" factor to determine whether due process protections apply and have found that different interests invoke this safeguard. As discussed above, ASORCNA distinctly alters Plaintiffs' federal rights to worship, travel, seek employment, and establish a residence, as well as their right to privacy. *See supra* Section IV(D)(3)(a)(i). These rights also are protected under Alabama law. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (holding that fundamental right to marry protected by the Fourteenth Amendment must be recognized by states); *see also Ex parte E.R.G. & D.W.G.*, 73 So. 3d 634, 637 (Ala. 2011) (recognizing that parents have fundamental due-process rights to custody and control of children); *Macon v. Huntsville Utils.*, 613 So. 2d 318, 320 (Ala. 1992) (noting that the right to seek employment is a property right); *Smith v. Doss*, 37 So. 2d 118, 120 (Ala. 1948) (recognizing that right to privacy includes right to be free from "unwarranted publicity" or "unwarranted appropriation or exploitation"); *Ashworth v. Brown*, 198 So. 135, 136 (Ala. 1940) ("Religious freedom is fundamental in this country."); *City of Mobile v. Rouse*, 173 So. 266 (Ala. 1937) (recognizing liberty right to establish a home). Furthermore, ASORCNA infringes

on the right to reputation—a right recognized and protected by Article I, Section 13 of the State Constitution. *See infra* Section IV(D)(5).

4. Plaintiffs Stated A Claim That ASORCNA Violates The Federal Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution commands that all persons similarly situated should be treated alike under the law. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Classifications created by sex offender registration and notification statutes are susceptible to Equal Protection review. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 10 (2003) (J. Souter, concurring) ("The line drawn by the legislature between offenders who are sensibly considered eligible to seek discretionary relief from the courts and those who are not is, like all legislative choices affecting individual rights, open to challenge under the Equal Protection Clause."). ASORCNA exposes children convicted in the adult criminal justice system to significantly more burdensome registration and notification requirements than children adjudicated in juvenile court. Doc. 12, ¶¶ 1-2, 6, 63, 65-77. Plaintiffs sufficiently pled that this classification violates the Equal Protection Clause of the Fourteenth Amendment. Because ASORCNA interferes with Plaintiffs' fundamental rights, strict scrutiny applies. Alternatively, ASORCNA fails to even satisfy the rational basis test.

a. ASORCNA Fails Strict Scrutiny Because It Is Not Narrowly Tailored To Serve The Defendants' Compelling State Interests

When legislatively-created classifications burden fundamental rights or a suspect class, the strict scrutiny standard applies. *Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005). Under strict scrutiny, a statute must be narrowly tailored to serve a compelling state interest. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

First, ASORCNA impinges on Plaintiffs' fundamental rights. As detailed above, ASORCNA's classification between children adjudicated as juveniles and children convicted as adults impinges Plaintiffs' rights to worship and travel. *See supra* Section IV(D)(3)(a)(i); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Additionally, this classification implicates the right to privacy, which includes the rights to child rearing, directing a child's education, and family integrity. *See Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978); *Meyer*, 262 U.S. at 399; *supra* Section IV(D)(3)(a)(i). These rights are deemed fundamental in the equal protection context. *See Gary v. City of Warner Robins*, 311 F.3d 1334, 1338 (11th Cir. 2002) (recognizing that "right to 'maintain certain intimate human relationships'" and right to associate to engage in activities protected by the First Amendment are fundamental rights (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-

18 (1984))); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1172 (5th Cir. 1979) (listing privacy and travel among a non-exhaustive list of fundamental rights).[7]

Second, ASORCNA is not "narrowly tailored" to serve the compelling state interest in public safety. *See San Antonio Ind. Sch. Dist.*, 411 U.S. at 16-17. Protecting public safety and curtailing recidivism are compelling state interests. *Smith v. Doe*, 538 U.S. 84, 93; *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 108 (3d Cir. 2008); *see also* Ala. Code §§ 15-20A-2(1), 15-20A-2(2). However, ASORCNA's classification operates too broadly, impermissibly burdening Plaintiffs' fundamental rights in pursuit of these compelling interests.

The Alabama legislature expressly recognized that children who commit sex offenses differ from adults who commit sex offenses by creating two regulatory schemes within ASORCNA: one for children adjudicated in juvenile court and the other for convicted adults. *See* Doc. 12, ¶¶ 99-101; *compare* Ala. Code §§ 15-20A-9–15-20A-25 (adult ASORCNA provisions), *with id.* §§ 15-20A-2–15-20A-34 (juvenile ASORCNA provisions). Under ASORCNA, children adjudicated in juvenile court receive sex offender treatment followed by a risk assessment used "to

[7] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to 1981. *See Bonner v. City of Prichard*, 66 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

determine their level of risk to the community and the level of notification that should be provided to best protect the public." Ala. Code § 15-20A-2(2). ASORCNA limits its application to children adjudicated in juvenile court to a ten-year period in most cases. *See id.* § 15-20A-28(c). This is true as well for ASORCNA's community notification, residency restrictions, and employment restrictions. *Id.* §§ 15-20A-27–15-20A-31. Even children adjudicated of offenses subject to lifetime registration can petition the juvenile court after twenty-five years and be relieved of ASORCNA's requirements so long as they exhibit rehabilitation and pose no threat of re-offense. *See id.* §§ 15-20A-28(a)-(b), 15-20A-34. These procedural protections are not extended to similarly situated children who are tried in adult court.

The age-related considerations extended to children who are adjudicated in juvenile court align with extensive research. Defendants argue, without any support, that because Plaintiffs were convicted as adults, they have increased likelihoods of sexually reoffending. *See* Doc. 14 at 47. They ignore extensive research that individuals who commit sex offenses when they are children have an extremely low risk of recidivism. *See supra* Section II (citing studies). Plaintiffs' own history demonstrates this trend—none has sexually reoffended in the decades since their original convictions. Doc. 12, ¶¶ 16-57. In addition, there is no research supporting a difference in risk of recidivism posed by children prosecuted in adult court and

those adjudicated in juvenile court. *See id.* ¶ 100. Furthermore, sex offender registration and notification laws do not reduce a child's likelihood of recidivism. *Id.* ¶ 98 (citing study). Notwithstanding, ASORCNA imposes lifetime obligations on children convicted as adults, like Plaintiffs, burdening their fundamental rights in perpetuity.

For these reasons, subjecting Plaintiffs to ASORCNA's adult regulations is not sufficiently tailored to deter recidivism to survive strict scrutiny.

b. Alternatively, ASORCNA Fails Rational Basis Review Because Its Classifications Are Arbitrary

Even if this Court concludes that strict scrutiny does not apply and applies rational basis review, Plaintiffs have sufficiently alleged that ASORCNA's differential treatment of children tried in juvenile court versus similarly situated children tried in adult court violates the Equal Protection Clause. The rational basis test does not obligate courts to rubber stamp unconstitutional legislation; the State may not rely on "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne,* 473 U.S. at 446. ASORCNA fails the rational basis test because the statutory scheme's classification fails to rationally relate to the government's interests.

As discussed above, ASORCNA exposes children convicted as adults to significantly more burdensome requirements as compared to children adjudicated in

juvenile court. Defendants rely on *Doe v. Moore* to absolve this unequal treatment. Doc. 14 at 45-46. *Moore* questioned the validity of Florida's sex offender registration statute in part on how it imposed ten years of registration for children eighteen years of age or younger and lifetime registration for individuals ages nineteen and above. *Moore*, 410 F.3d at 1341, 1347-48. The Eleventh Circuit held this distinction did not violate the Equal Protection Clause under rational basis review because the differing registration requirements rationally related to Florida's legitimate interest in reducing registration burdens for offenders who were "less able to control their behavior than adults, but that they can be expected to gain more self-control and to act responsibly as they mature." *Id.* at 1347.

The court's rationale supports Plaintiffs' claim in the instant matter. ASORCNA ignores Plaintiffs' youth status at the times of their offenses and instead indiscriminately treats Plaintiffs as adult offenders. Even the *Moore* defendants presumed lifetime registration as an adult offender is inappropriate for children because youth pose less of a danger to communities. *Id.* Here, ASORCNA enshrines lifetime restrictions. *See* Ala. Code §§ 15-20A-2(1), 15-20A-2(2). Therefore, as applied to Plaintiffs who were children at the time of their offenses, ASORCNA is arbitrary and violates equal protection.

5. Plaintiffs Stated A Claim That ASORCNA Impinges On Their Right To Reputation Protected By The Alabama Constitution

a. ASORCNA Violates Plaintiffs' Right To Reputation Under The Alabama Constitution

In Alabama, the right to reputation is recognized and protected by due process. Ala. Const. art. I, § 13 ("every person, for an injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law"). The right to reputation, "unassailed by malicious slander, is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property." *Marion v. Davis*, 114 So. 357, 358-59 (Ala. 1927). Harm to reputation includes defamatory communication and the publication of that information. *Id*. A person's reputation cannot be abridged by the government without compliance with state constitutional standards of due process. *McCollum v. Birmingham Post Co.*, 65 So. 2d 689, 695 (Ala. 1953) ("This section of our constitution secures every citizen against arbitrary action of those in authority and places him (or her) within the protection of the law of the land, even as to reputation" (internal citation omitted)). ASORCNA violates Plaintiffs' due process rights by impeding their right to reputation because it communicates falsehoods about their likelihood of re-offense and dangerousness.

Plaintiffs sufficiently alleged that the label "sex offender" is a defamatory communication covered by the right to reputation. *See* Doc. 12, ¶¶ 139, 151, 156-

62. Under Alabama law, a defamatory comment is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Harris v. Sch. Annual Publ'g Co.*, 466 So. 2d 963, 964 (Ala. 1985) (quoting *Restatement (Second) of Torts* § 559 (1976)). Harm to reputation is not limited to the facts disclosed, but what the public may reasonably understand the communication to mean. Here, as shown in the First Amended Complaint and discussed throughout this brief, ASORCNA's harm to Plaintiffs' reputation is documented and profound.

The "sex offender" label "tends . . . to harm the reputation of another" because the label creates incorrect and dangerous public assumptions. Under ASORCNA, applying the term "sex offender" to a child does not merely indicate that the child was convicted of a sexual offense, a fact not in dispute, but also implies that the child is an ongoing threat. The public view of Plaintiffs—and all other individuals registered as "sex offenders" for crimes committed as children—is that they are dangerous, *see* Doc. 12, ¶ 104, which is inconsistent with the overwhelming research demonstrating low recidivism rates of children who sexually offend, *see supra* Section II (citing studies). The premise that a sex offender is at high risk of reoffending is central to ASORCNA's legislative purpose, as it is intended to allow

government entities and communities to prepare for—or avoid—presumed dangerous individuals. *See* Ala. Code § 15-20A-2(1).

Children who have been convicted of a sex offense in the adult system are, or will be, students, consumers, employees, parents, business owners, travelers, taxpayers, and community members. As Plaintiffs demonstrated, full participation in each of these roles is hampered by ASORCNA. As a result of the stigma from their communities finding out that they are registered sex offenders, Plaintiffs have withdrawn from routine, daily activities. *See, e.g.*, Doc. 12, ¶¶ 30, 35, 47, 56. Children who must register as sex offenders are often unable to maintain relationships and normal life activities. *See id.* ¶ 108 (citing studies). Plaintiffs extensively alleged how ASORCNA lowered their reputations in the estimation of their communities and how third parties have been deterred from associating with them as a result of ASORCNA branding them as "sex offenders." *See, e.g.*, *id.* ¶¶ 6, 35, 47, 56-57; *see also supra* Section II.

The harm to reputation by ASORCNA is amplified by the wide dissemination of an individual's sex offender registry information. *See* Doc. 12, ¶¶ 66-67. Mr. Stevens and Mr. Nicholes, for example, both alleged that their photographs were published throughout their communities upon their release from incarceration, *id.* ¶¶ 42, 50, which publicly branded them with a "badge of infamy," ensuring the wide

dissemination of the falsehood that they are dangerous, *see Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (Thompson, J.).

b. This Court May Exercise Jurisdiction Over Plaintiffs' State Constitutional Claim

Defendants argue that under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), this Court cannot hear Plaintiffs' claims against state officials for violations of state law. Doc. 14 at 51. They further argue that supplemental jurisdiction conferred by 28 U.S.C. § 1367 does not override the protections of sovereign immunity. *Id.* Defendants' arguments fail.

In *Pennhurst*, the Supreme Court reasoned that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the state itself." 465 U.S. at 117. Yet, a federal court may exercise pendent jurisdiction over a state claim when there is a claim "arising under (the) Constitution[] . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (internal quotation marks omitted). The state and federal claims must derive from a "common nucleus of operative fact." *Id.* When the federal issues have substantiality in the case, "there is power in federal courts to hear the whole." *Id. Gibbs* permits federal courts to hear pendent state claims in the

interest of judicial economy, efficiency, and convenience, when the case arises from a common nucleus of operative fact, which in this case are the restrictions and constitutional violations imposed by ASORCNA. While these policy considerations were not persuasive to the *Pennhurst* Court, Plaintiffs in the instant case are aggrieved individuals whose offenses were committed as children. To require children to bring federal and state claims as two separate lawsuits would have a chilling effect on litigation that is brought to enforce constitutional rights.

V. CONCLUSION

For the reasons discussed above, the Court should deny Defendants' Motion to Dismiss. If the Court grants any part of Defendants' motion, Plaintiffs request the Court grant leave to amend their complaint.

RESPECTFULLY SUBMITTED this 16th day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 16th day of December, 2019, filed the foregoing with the clerk of the court and electronically served the following:

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