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

RANDY PENNINGTON, *et al.*, *Plaintiffs*, v. HAL TAYLOR, *et al.*, *Defendants.*	)	Case No. 2:19-cv-695-MHT-JTA

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants Hal Taylor, John Q. Hamm, Charles Ward, and Steve Marshall file this reply brief in support of their motion to dismiss Plaintiffs' First Amended Complaint.

A. Introduction

Plaintiffs received consideration of their juvenile status when the juvenile courts transferred their cases to criminal court for prosecution as adults, and when they failed to receive Youthful Offender status. ASORCNA relies on this process in classifying Pennington and Nicholes as adult sex offenders subject to lifetime registration based on their convictions for first-degree sex abuse and first-degree rape, both of which involved forcible compulsion. ASORCNA similarly relies on this process in requiring Stevens to register as an adult, but he can petition for complete removal under Alabama Code § 15-20A-24 because his sex offense presents less danger to the public. Plaintiffs' classification as sex offenders serves the important state interests of allowing Alabama citizens to know the whereabouts of sex offenders and take steps to protect themselves from the dangers of sex offender recidivism and preventing sex offender access to vulnerable populations, particularly children.

The Court can and should decide all claims in Defendants' favor at the motion to dismiss stage. The Court can decide the statute of limitations defense at this stage because Plaintiffs concede that their claims are time-barred unless the continuing violation doctrine applies, and that is a question of law for the Court. On the merits, Plaintiffs' ex post facto claim fails because, under binding precedent, ASORCNA is a nonpunitive civil regulation. But if ASORCNA is nonpunitive for ex post facto purposes, then Plaintiffs' Eighth Amendment claim fails to meet the pleading threshold of alleging a punishment of any sort. Plaintiffs' procedural due process claim fails under binding precedent because conviction of a sex offense entails all requisite process for a state to impose sex offender registration. Their equal protection claim fails because it is subject only to

rational basis review. A challenge to a statute subject to rational basis review can be dismissed at the pleading stage, since rational basis places no evidentiary burden on Defendants and requires only articulated justifications. Finally, Defendants' entitlement to sovereign immunity from Plaintiffs' state law claim can and must be decided at this stage, because immunity is a right not to be subjected to litigation beyond the point at which it is asserted. Plaintiffs' First Amended Complaint should be dismissed with prejudice at the motion to dismiss stage.

B. Argument

1. Plaintiffs Are Incorrect that Alleging Injury Under One Provision of ASORCNA Gives Them Standing to Challenge Every Provision of ASORCNA.

Defendants conceded that Plaintiffs arguably met their burden of pleading all elements of standing to challenge the following provisions of ASORCNA: (1) their classification as adult sex offenders based on their criminal convictions under §§ 15-20A-3(a), (b); (2) the limitation of relief from ASORCNA's requirements available to Pennington and Nicholes to only that in § 15-20A-23; (3) the relief from ASORCNA's requirements available to Stevens in §§ 15-20A-23 to 25; (4) the registration requirements, including quarterly in-person registration and the corresponding registration fee in §§ 15-20A-7, -10, -22; (5) community notification of Plaintiffs' sex offender status and their inclusion on ALEA's internet sex offender registry in §§ 15-20A-8, 21; and (6) some portions of the restrictions on residence locations in § 15-20A-11. *See* doc. 13 at 1; Doc. 14 at 21-22, 27.[1] Defendants argued that Plaintiffs failed to meet their burden of plausibly alleging all elements of standing as to all remaining provisions of ASORCNA. *See* doc. 14 at 21-27.

"The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]." *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 555, 561 (1992). Plaintiffs briefly address

[1] Citations to documents are to the ECF header number.

specific allegations of injuries intended to meet this burden. *See* doc. 25 at 20-21. They reference the stigma imposed by their sex offender status, Pennington's alleged inability to pick up his grandchildren from school and his demotion after his employer discovered his sex offender status, Stevens's alleged impairment of his ability to participate in his children's education and extracurricular activities, and Nicholes's alleged inability to work as a driver for his wife's company due to ASORCNA's travel notice requirement. *See id*. Nicholes's allegations that the travel notification requirements under Alabama Code § 15-20A-15 "make it difficult for him to be a driver" for his wife's company (doc. 12 ¶ 54) arguably pleads standing to challenge that provision, in addition to the provisions Defendants have already conceded above. But Plaintiffs otherwise fail to note specific allegations that grant them Article III standing to challenge any other provision of ASORCNA in their opposition.[2]

Instead, Plaintiffs argue that because they have alleged *some* concrete injuries from specific provisions of the statute, the imminent harm presented by the threat of criminal prosecution under ASORCNA "provides a sufficient basis on its own to challenge the statute *as a whole*." Doc. 25 at 21-22 (emphasis added). But it does not follow from allegations of a concrete injury under one

[2] Defendants have already noted Plaintiffs' allegations of stigma allege an injury resulting from the requirement that they register as sex offenders and appear on the internet sex offender registry. *See* doc. 14 at 21-22, 27. But Plaintiffs' opposition does not address Defendants' arguments as to the specific allegations of Pennington and Stevens. That is, Pennington fails to make plausible allegations that he is unable to pick up his grandchildren from school because ASORCNA expressly provides a procedure for doing so, and he fails to address this in his opposition. *See* doc. 14 at 23 (citing Alabama Code § 15-20A-17(b)). Pennington also does not address whether the "background check" resulting in his demotion was traceable to ASORCNA or the result of an independent criminal background check that resulted in the discovery of his felony conviction as an adult for first degree sex abuse, which is a matter of public record. *See* doc. 14 at 23. Stevens does not respond to Defendants' argument that his inability to attend his son's military graduation is fairly traceable to the United States military rather than Defendants. *See id.* at 25. The only other impairment he references to his relationship with his children traces back to "the stigma of his registration status," (doc. 12 ¶ 45), which is traceable to the registration and notification provisions of ASORCNA that Defendants have already conceded Plaintiffs have standing to challenge.

provision of a statute that a plaintiff has Article III standing to challenge *all* provisions of the statute. *See CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006) ("CAMP contends that . . . a plaintiff who has suffered injury under one provision of the [challenged ordinance] has standing to challenge the entire ordinance . . . This argument fails."). *CAMP* noted that the Supreme Court "reaffirmed the 'independent obligation' of federal courts to ensure a case or controversy exists as to each challenged provision even in a case where the plaintiffs established harm under one provision of the statute." *Id.* at 1273. Thus, the case-or-controversy requirement of Article III standing "require[s] a plaintiff to establish injury in fact as *to each provision . . . .*" *Id.* (emphasis added).

Plaintiffs cannot carry their burden of pleading standing to challenge ASORCNA "*in its entirety*" (doc. 25 at 19) by simply alleging they are subject to prosecution for violating its requirements. *See* doc. 25 at 21-22. First, many provisions of ASORCNA are clearly inapplicable to Plaintiffs, such as those applicable to sex offenders currently in custody (Ala. Code § 15-20A-9), homeless sex offenders (§ 15-20A-12), sex offenders relocating from out of state (§ 15-20A-14), sexually violent predators subject to electronic monitoring (§§ 15-20A-19, -20), sex offenders adjudicated as juvenile delinquents or youthful offenders (§§ 15-20A-26 – 35), etc.

Second, even for the applicable provisions, Plaintiffs bear the burden of alleging all elements of standing for *each provision* they wish to challenge. *See CAMP*, 451 F.3d at 1269-74; *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1243-44 (M.D. Ala. 2015) (analyzing which provisions of ASORCNA plaintiff had standing to challenge based on evidence of injuries caused by specific provisions presented at trial); *see also 31 Foster Children v. Bush*, 329 F.3d 1255, 1263-68 (11th Cir. 2003) (analyzing at the pleading stage the standing of eleven plaintiffs individually to challenge a statute for each constitutional claim asserted). They must allege more than that they

are *subject to* these provisions—they must allege an actual or imminent injury concrete and particular injury, fairly traceable to Defendants, and redressable by them. *See CAMP*, 451 F.3d at 1269-70, 1273.

The only substantive response to Defendants' argument on standing is Plaintiffs' reference to Nicholes's alleged injuries from ASORCNA's travel notification requirements under § 15-20A-15. *See* doc. 25 at 21 (citing doc. 12 ¶ 54). With the addition of this provision, Plaintiffs have failed to carry their burden of alleging standing to challenge any provision of ASORCNA other than those enumerated in Defendants' motion to dismiss. Doc. 13 at 1. Defendants' motion to dismiss is thus due to be granted to the extent Plaintiffs request a declaratory judgment that ASORCNA is unconstitutionally applied to Plaintiffs and unenforceable *in its entirety*. *See* doc. 12 at 45.[3]

2. Defendant Charles Ward is Entitled to Sovereign Immunity Because the *Ex parte Young* Exception Requires Not Just a Connection to the Enforcement of a Law to Which Plaintiffs Are Subject But a Connection to an *Unconstitutional* Enforcement of a State Law.

Plaintiffs seek prospective relief from Defendant Charles Ward based solely on his alleged enforcement of the provision in ASORCNA requiring sex offenders to carry an identification "bearing a designation that enables law enforcement officers to identify the [holder] as a sex offender." Doc. 12 ¶ 60; Ala. Code § 15-20A-18(b). Defendants argued that Plaintiffs failed to plead a claim for prospective relief against Defendant Charles Ward that fell within the exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), since "Plaintiffs do not make *a*

[3] Apparently construing Defendants' argument to be that Plaintiffs entirely lack standing to challenge ASORCNA, Plaintiffs request leave to amend their complaint in a footnote. *See* doc. 25 at 20 n.3. Since Defendants do not argue Plaintiffs lack standing entirely, the request is moot. Further, the request should be denied as procedurally improper as Plaintiffs do not request leave to amend by motion with a copy of the proposed amended complaint attached or set forth the substance of the allegations they wish to add. *See Crawford's Auto Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 6974428, at *7, __ F.3d __ (11th Cir. Dec. 20, 2019).

single allegation of injury based on the possession of an Alabama driver license or identification card designating them to law enforcement officers as sex offenders." Doc. 14 at 28.

Plaintiffs respond with a citation to a *single paragraph* in their amended complaint that alleges: "A child tried as an adult and convicted of a sex offense must obtain a license or identification card bearing a designation of the individual as a sex offender." Doc. 25 at 28 (citing Doc. 12 ¶ 76) (footnote omitted). Plaintiffs further reference in a footnote court filings from another case in which Defendants represented that they no longer enforced ASORCNA's identification requirement by placing "CRIMINAL SEX OFFENDER" on the face of driver licenses but had replaced this designation with "a code composed of letters and numbers in the same black font as other information appearing on a license or identification card." *See Doe 1 v. Marshall*, 2:15-cv-606-WKW, ECF Doc. 163 at 3. But no Plaintiff alleges a concrete and particular *injury* resulting from the requirement that they carry identification designating them as sex offenders to law enforcement officers by an alphanumeric code.

The *Ex parte Young* exception to sovereign immunity requires a showing that the State official is "'responsible for' a challenged action and have 'some connection' to the *unconstitutional act at issue*." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (quoting *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988)) (emphasis added). This is because the exception to sovereign immunity for suits for prospective relief against State officials is based on the theory that an act that violates the United States Constitution is without authority and an injunction preventing such conduct is not against a state in its sovereign capacity:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to

> enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Ex parte Young, 209 U.S. 123, 159-60.

Although Defendant Ward enforces Alabama Code § 15-20A-18, and Plaintiffs are subject to it, their response fails to point to any allegation of an *unconstitutional act* caused by Ward's enforcement of the sex offender identification requirement. This is fatal to their claim against Ward under *Ex parte Young*. Plaintiffs reference the Court's opinion holding unconstitutional the "CRIMINAL SEX OFFENDER" designation in *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1324-27 (M.D. Ala. 2019), and enjoining its enforcement. But the plaintiffs in that case asserted that this designation unconstitutionally compelled speech under the First Amendment to the United States Constitution, *i.e.*, they alleged the specific manner in which the State official enforced § 15-20A-18 was unconstitutional. *Id.* Plaintiffs make no such constitutional claim here. Nor do they allege in any concrete or factual way injuries resulting from the coded sex offender designation on their license. Since Plaintiffs fail to allege any *unconstitutional* enforcement of Alabama Code § 15-20A-18 by Defendant Ward, as did the plaintiffs in *Doe 1*, then their claims do not trigger the *Ex parte Young* exception to sovereign immunity. Defendant Ward is entitled to dismissal from this suit on sovereign immunity grounds.

3. Plaintiffs Concede Their Claims Are Barred by the Statute of Limitations Unless the Continuing Violation Doctrine Applies, and the Continuing Violation Analysis in *Doe 1* Does Not Apply to Plaintiffs' Claims Here.

Plaintiffs do not dispute that their complaint was filed after the two-year statute of limitations period for a claim under 42 U.S.C. § 1983 in Alabama had run. Doc. 25 at 24-27. As sole grounds to avoid dismissal of their amended complaint on statute of limitations grounds, Plaintiffs argue that the continuing violation doctrine applied in *Doe 1* applies to their claims here. *Id.* But because the continuing violation exception to the statute of limitations applied in *Doe 1* does not apply to Plaintiffs' claims in this case, their claims are time-barred.

Defendants cited cases establishing that Plaintiffs' ex post facto, cruel and unusual punishment, procedural due process, and equal protection claims were time-barred, as well as cases that specifically declined to apply the continuing violation doctrine to challenges to sex offender registration. *See* doc. 14 at 30-32. The Court in *Doe 1* distinguished these sex offender registration cases and held that the continuing violation doctrine applied to afflict new injuries based on the specific claims in that case, namely, void-for-vagueness, overbreadth, familial association, and compelled speech. *Doe 1*, 367 F. Supp. 3d at 1338–39. The Court acknowledged the cases cited by Defendants "held [the registrants'] injur[ies] accrued when they learned that they had been wrongly registered" and "that an *ex post facto* challenge to a sex-offender registration requirement accrued when the alleged *ex post facto* punishment was imposed—that is, when the plaintiff registered." *Id.* at 1339. The Court characterized these cases as "challeng[ing] registration itself." *Id.* By contrast, the plaintiffs in *Doe 1* sought only limited relief from certain requirements of ASORCNA. *Id.*

Here, Plaintiffs clearly "challenge[] registration itself," *Doe 1*, 367 F. Supp. 3d at 1339, because they seek an order removing them from all requirements of ASORCNA. *See* doc. 12 at

45. Plaintiffs attempt to recharacterize their claims to avoid the statute of limitations by arguing "Plaintiffs do not challenge their prior convictions but rather the constitutionality of ASORCNA." Doc. 25 at 26. But the distinction drawn in *Doe 1* was between seeking removal from all registration requirements versus seeking removal from only limited provisions that inflict recurring injuries. *See Doe 1*, 367 F. Supp. 3d at 1338-39. And the claims raised in *Meggison v. Bailey*, 575 F. App'x 865 (11th Cir. 2014), and *Moore v. Fed. Bureau of Prisons*, 553 F. App'x 888 (11th Cir. 2014) were based on constitutional challenges to the sex offender registration requirements, not any challenge to their prior convictions. *See Meggison*, 575 F. App'x at 867 ("Here, the act Meggison contends violated his due-process rights was his classification as a sex offender subject to Florida's registration requirements. This classification will continue to have effects on Meggison into the future, but a new act has not occurred every time Meggison feels one of those continuing effects."); *Moore*, 553 F. App'x at 890 (noting that the plaintiff filed suit "claiming that his federal constitutional rights were violated" and declining to find a continuing violation because "that doctrine is limited to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred.") (internal quotation and citation omitted).

Because Plaintiffs became subject to ASORCNA and *all* its requirements at a discrete point in time, and because they seek relief from *all* its requirements, the continuing violation exception in *Doe 1* does not apply. For the same reason, Plaintiffs' attempt to distinguish the binding case law on statute of limitations cited by Defendants fails. *See* doc. 25 at 27.[4] Each and every one of

[4] The ex post facto challenges to the frequency of parole consideration in *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259 (11th Cir. 2003), and *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003) are particularly on point. The plaintiffs in both cases received notice that their parole would be reconsidered only every eight years rather than every three years pursuant to a new rule change. *See Brown*, 335 F.3d at 1260; *Lovett*, 327 F.3d at 1182. Even though all future reconsiderations of parole would occur with less frequency, both *Brown* and *Lovett* declined to apply the continuing violation doctrine to the inmates' ex post facto claims. *Brown*, 335 F.3d at 1261-62; *Lovett*, 327

their claims is barred by the statute of limitations, and their amended complaint should be dismissed.

4. Plaintiffs' Ex Post Facto Claims Fail as a Matter of Law Under Binding Precedent Notwithstanding the Fact that they Were Convicted as Adults for Sex Crimes Committed as Teenagers.

Plaintiffs begin by summarily dismissing the two most applicable ex post facto cases of binding precedent on the grounds that the sex offender registration statutes considered in those cases did not contain every restriction that ASORCNA contains. *See* doc. 25 at 32 (citing *Smith v. Doe*, 538 U.S. 84 (2003) and *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011)). But they ignore Defendants' argument that, to the extent ASORCNA's requirements are identical to those of the statutes considered in *Smith* and *W.B.H.*, they fail to state an ex post facto challenge *as to those provisions*. *See* doc. 14 at 39. This means that Plaintiffs' fail to state an ex post facto claim based on ASORCNA's lifetime registration and internet notification requirements and quarterly, in-person reporting requirements expressly held constitutional in those cases. *See Smith*, 538 U.S. at 105-06; *W.B.H.*, 664 F.3d at 857.[5] Plaintiffs cannot ignore binding precedent establishing these requirements are plainly enforceable against them.

Defendants have already acknowledged that *Smith* and *W.B.H.* did not consider two of the *physical* limitations ASORCNA places on sex offenders that Plaintiffs have standing to challenge:

F.3d at 1183. The court in *Brown* also rejected an additional argument that each time a parole reconsideration hearing was set constituted a "distinct and separate injury." *Brown*, 335 F.3d at 1261-62. *Brown* and *Lovett* clearly establish that Plaintiffs' ex post facto claim is time-barred.

[5] Plaintiffs do not address Defendants' argument that Pennington and Nicholes are similarly situated to the registrant in *W.B.H.* because they were 16 and 17, respectively, when they pleaded guilty to sex offenses using forcible compulsion and, *unlike* the registrant in *W.B.H.*, they were denied Youthful Offender status or waived their right to seek it. Doc. 14 at 35-39. Stevens is not similarly situated because his conviction was for statutory rape of a victim over 13 and less than five years younger than him, but he can seek complete removal from ASORCNA's requirements by filing a petition in state court. *See* Ala. Code § 15-20A-24.

the residence and employment restrictions in Alabama Code §§ 15-20A-11, 15-20A-13. *See* doc. 14 at 39. In light of Plaintiffs' arguments regarding standing, Defendants now add Nicholes's challenge to ASORCNA's travel notification requirement in Alabama Code § 15-20A-15 to the ex post facto claim. But the Court addressed ASORCNA's residence and employment restrictions in *McGuire* and held these additional restrictions did not violate the Ex Post Facto Clause. *See McGuire*, 83 F. Supp. 3d at 1265, 1267-70. It found ASORCNA was ex post facto only in subjecting the plaintiff, who was *homeless*, to *weekly* in-person reporting requirements with *both* the City of Montgomery *and* Montgomery County and in requiring homeless registrants to complete travel "permit" applications with both the city and the county. *Id.* at 1270.

Plaintiffs' ex post facto challenges to ASORCNA's residence, employment, and travel notification requirements fail as a matter of law under *McGuire*. *McGuire* held the travel requirements then in effect were ex post facto only as to homeless registrants, *McGuire*, 83 F. Supp. 3d at 1270-71, and no Plaintiff here alleges he is homeless. Further, the travel restrictions challenged in *McGuire* were amended by the legislature in response to that case to be substantially less restrictive.[6] Plaintiffs in this suit all allege they reside with their families at ASORCNA-compliant addresses, and that they are employed. If the homeless sex offender in *McGuire* could

[6] The legislature amended Alabama Code § 15-20A-15 in 2015 to eliminate the requirement that registrants notify both the city police department and county sheriff of their intent to travel, and changed this reporting requirement to only the sheriff. *See* Ala. Act 2015-463 § 1. In 2017, the legislature further amended § 15-20A-15 to replace the travel "permit" requirement with a travel *notification* requirement and removed the ability of a sheriff to deny travel. *See* Ala. Act 2017-414 § 5. ASORCNA now requires only that a sex offender complete a travel notification document at the sheriff's office of the sex offender's county of residence within three business days before traveling outside the offender's county of residence for three or more consecutive days. Ala. Code § 15-20A-15(a). International travel requires 21 days' notice or notice within three business days for emergency travel. Ala. Code § 15-20A-15(c). The requirement in place is thus less restrictive than the travel permit requirement successfully challenged in *McGuire*. *See McGuire*, 83 F. Supp. 3d at 1269.

not prevail on his ex post facto claim, then Plaintiffs here certainly cannot. *Cf. Doe v. Miami-Dade County*, 846 F.3d 1180, 1185 (11th Cir. 2017) (holding that plaintiffs stated a claim sufficient to survive a motion to dismiss on ex post facto challenge to residence restrictions because they alleged that a 2,500 residence restriction directly rendered them *homeless*). Nicholes alleges that ASORCNA's travel notification requirements "make it difficult for him to be a driver" with his wife's company, and that he must perform other duties instead. Doc. 12 ¶ 54. This allegation fails to allege an affirmative disability giving rise to an ex post facto claim since travel notification for registrants who are not homeless is constitutional under *McGuire*. Thus, Plaintiffs fail to state an ex post facto claim under *Smith*, *W.B.H.*, and *McGuire*.

Rather than engage with binding precedent, Plaintiffs rely heavily on the Sixth Circuit's decision in *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016). Doc. 25 at 32-36. The statute held unconstitutional in *Snyder* restricted sex offenders from living, working, or loitering within 1,000 feet of a school. *Snyder*, 834 F.3d at 698. These physical restrictions went beyond the registration, reporting, and notification requirements of the statutes considered in *Smith* and *W.B.H.* and thus resembled ASORCNA to this extent. But as Defendants have already noted (doc. 14 at 41), two other circuits have held that 2,000-foot restrictions on sex offenders living near schools was not an ex post facto violation. *See Shaw v. Patton*, 823 F.3d 556, 570-71, 576-77 (10th Cir. 2016); *Doe v. Miller*, 405 F.3d 700, 722-23 (8th Cir. 2005). Not only is *Snyder* non-binding, it is not the majority view among federal circuits and provides no basis for invalidating ASORCNA's residence and employment restrictions.

Plaintiffs purport to base their ex post facto claim, as well as their other claims, on the requirement that they register as adult sex offenders based on sex offenses they committed as teenagers. But the bulk of their ex post facto argument is spent on factors that apply generally and

are already settled under *Smith*, *W.B.H.*, and *McGuire*. The few arguments they make specific to offenders required to register based on convictions as adults for crimes committed while teenagers were unambiguously rejected in *W.B.H.*.

Plaintiffs argue that their registration as adult sex offenders is excessive in relation to ASORCNA's nonpunitive purpose because teenage offenders are less mature and culpable when they commit their crimes, teenage offenders have a lower recidivism rate than adult offenders, teenage offenders will be subject to registration longer, and the vague statement that ASORCNA "sets people up to fail." Doc. 25 at 39-40. Plaintiffs cite Eighth Amendment cases on cruel and unusual punishment for support, but these cases are inapplicable because they involve *punishments* imposed by the state on teenagers. *Id.* Whether ASORCNA is punitive is the very thing Plaintiffs bear the burden of proving by "*only the clearest proof*." *W.B.H.*, 664 F.3d at 854 (quoting *Smith*, 538 U.S. at 92).

Plaintiffs' arguments on the diminished culpability of teenage offenders and lower recidivism rates were considered and rejected in *W.B.H.*, a binding case actually addressing an ex post facto challenge to sex offender registration brought by a youthful offender:

> W.B.H. tries to distinguish *Doe*'s holding on the excessiveness question based on the fact that he was convicted as a youthful offender when he was eighteen years old. He argues that those who commit sex offenses when they are young have a lower rate of recidivism than those who do so as adults, and as a result, a long-term registry requirement for former juvenile offenders is unnecessary to protect the community. But when it comes to answering the excessiveness question, the Supreme Court has warned against 'determining whether the legislature has made the best choice possible,' which is what W.B.H.'s argument would require. *Besides, a lower rate of recidivism is not the same thing as no recidivism. Even if those who commit sex crimes as adults do have a higher recidivism rate, that does not mean registration requirements covering younger sex offenders are excessive*.

> W.B.H. also argues that SORNA's registration requirements are excessive because they will lead to youthful offenders being ostracized for crimes that may have been the result of their undeveloped, adolescent nature. *We are not convinced that rape is a crime that results from an undeveloped, adolescent nature. Nor are we convinced that any collateral effects, such as ostracism of youthful rapists, when considered in light of the intended public safety benefits, make the regulatory scheme excessive in light of its non-punitive purpose*.

Id. (internal citation omitted) (quoting *Smith*, 538 U.S. at 105) (emphasis added). Thus, even assuming Plaintiffs' allegations about diminished culpability and lower recidivism are true, as the Court must on a motion to dismiss, these allegations are insufficient to state an ex post facto claim under *W.B.H.*.

5. Because ASORCNA is a Nonpunitive Civil Regulation for Ex Post Facto Purposes, Plaintiffs' Eighth Amendment Claim Fails on the Threshold Issue of Whether ASORCNA Punishes Them and the Eighth Amendment Cases Cited by Plaintiffs Are Inapplicable.

Defendants argued that "[i]f ASORCNA is nonpunitive for ex post facto purposes, then Plaintiffs' First Cause of Action for a violation of their right to be free from cruel and unusual punishment under the Eighth Amendment necessarily fails because a punishment can be cruel and unusual only if it is, first, a *punishment*." Doc. 14 at 32; *see also id.* at 41-42. Plaintiffs agree. *See* doc. 25 at 51-52 ("As a threshold matter, for the reasons stated above [regarding the ex post facto claim], 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.") (citing *Smith v. Doe*, 538 U.S. 84, 97 (2003), *United States v. Under Seal*, 709 F.3d 257, 263-66 (4th Cir. 2013)). The parties thus do not dispute that if ASORCNA is nonpunitive as applied to Plaintiffs for ex post facto purposes, then Plaintiffs' Eighth Amendment claim in the First Cause of Action fails as a matter of law.

Defendants cited cases from other circuits in which the courts rejected Eighth Amendment cruel and unusual punishment challenges by juvenile registrants to the federal sex offender registration statute by applying the *Mendoza-Martinez* factors from ex post facto precedent to conclude registration did not impose a *punishment* on the juvenile offenders. *See* doc. 14 at 42 (citing *Under Seal*, 709 F.3d at 263-66 and *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012)). Plaintiffs attempt to distinguish these cases on the same grounds they attempt to distinguish *Smith* and *W.B.H.*, namely, that the registration statutes considered in those cases did not contain all the restrictions ASORCNA contains. *See* doc. 25 at 52. But they are applicable to the extent that ASORCNA contains identical requirements as the federal statute considered in those cases.

More importantly, *Under Seal* demonstrates the proper *analysis* for an Eighth Amendment cruel and unusual punishment claim against sex offender registration based on retroactive application for a juvenile offense, which is the claim Plaintiffs assert in this case. It disposed of the Eighth Amendment challenge by finding it was a nonpunitive, civil regulatory scheme under the ex post facto analysis in *Mendoza-Martinez*. *See Under Seal*, 709 F.3d at 264-66; *see also Juvenile Male*, 670 F.3d at 1010 ("[A]t least two circuits have held that SORNA's registration requirement is not even a punitive measure, let along cruel and unusual punishment."). Thus, for the same reasons Defendants argue that Plaintiffs' ex post facto claim fails, *supra* Section 2, their Eighth Amendment claim necessarily fails.

Plaintiffs cite two lines of Eighth Amendment Supreme Court cases regarding cruel and unusual punishments for juvenile offenders and state "Defendants ignore these cases entirely." Doc. 25 at 51. But Defendants ignored these cases entirely because they are entirely inapplicable. Plaintiffs rely on *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2010),

and *Roper v. Simmons*, 543 U.S. 551 (2005), in support of their Eighth Amendment claim. *See* doc. 25 at 50-51, 53-55. As Plaintiffs note, these cases "mandate that youthfulness must be considered at the *sentencing* phase, separate from the liability or transfer phase." Doc. 25 at 57.

But when Plaintiffs became subject to ASORCNA by operation of law on July 1, 2011, they were not "sentenced," but rather became subject to a nonpunitive civil regulation. Therefore, *Miller*'s requirement that a court consider a juvenile's maturity before sentencing the juvenile to life without parole is inapplicable at the point at which a juvenile offender becomes subject to sex offender registration at the conclusion of any criminal sentence. Defendants thus justifiably ignore the inapplicable cases of *Miller*, *Graham*, and *Roper*, as did the Fourth and Ninth Circuits in holding sex offender registration for juvenile offenders was not cruel and unusual. *See Under Seal*, 709 F.3d at 263-66; *Juvenile Male*, 670 F.3d at 1010; *see also People ex rel. Birkett v. Konetski*, 909 N.E.2d 783, 799 (Ill. 2009) (holding *Roper* inapplicable to challenge to juvenile sex offender registration because registration was not a punishment since "imposition of the registration requirement is not a direct action by the State to inflict punishment.").

The applicable case regarding sex offender registration for juvenile offenses remains *W.B.H.* Under that case, the discretionary decision of the juvenile courts to transfer Plaintiffs' cases to criminal court for prosecution as adults is relevant to whether ASORCNA is nonpunitive, even if the juvenile courts' discretionary judgment would be insufficient for the mandatory imposition of a life sentence under *Miller*. The juvenile courts' determination that Plaintiffs were sufficiently mature to stand trial as adults means the results of their criminal convictions are public records. This lack of confidentiality shows there is no "affirmative disability" from public registration, since they are not deprived of the benefit of confidentiality in their records as they would be if they were adjudicated delinquent. Plaintiffs thus have even *less* of an argument that registration is

punitive than the *W.B.H.* registrant granted Youthful Offender status. *See W.B.H.*, 664 F.3d at 858 ("The only youthful offender benefit that is affected by SORNA's registration requirements is any remaining confidentiality concerning the crime and conviction, but the disclosure of that information is not enough to make registration punitive.").

Miller, *Graham*, and *Roper* are a red herring. Because Plaintiffs' registration is not a punishment for ex post facto purposes, they are necessarily not subject to cruel and unusual punishment under the Eighth Amendment, and this claim fails as a matter of law.

6. Plaintiffs' Equal Protection Claim Is Subject to Rational Basis Review Because ASORCNA Does Not Burden Their Fundamental Rights, and ASORCNA Satisfies Rational Basis Review.

Plaintiffs' Equal Protection Claim in the Third Cause of Action, as pleaded in the First Amended Complaint, does not allege ASORCNA implicates a suspect class or burdens a fundamental right. *See* doc. 12 ¶¶ 129-35. Rather, Plaintiffs allege ASORCNA fails to satisfy rational basis review based on its classification of "those eligible for relief and those not eligible for relief," and "those tried as juveniles and those tried as adults." *Id.* ¶¶ 131-33. Defendants moved to dismiss on the grounds that Plaintiffs did not even allege any basis for heightened scrutiny and that, even if they did, such allegations would be futile because ASORCNA neither involves a suspect class nor burdens a fundamental right. *See* doc. 14 at 45. Plaintiffs now argue in their opposition brief that ASORCNA burdens their fundamental rights to worship, to travel, and their right to privacy "which includes the rights to child rearing, directing a child's education, and family integrity," and that ASORCNA accordingly fails to satisfy strict scrutiny. Doc. 25 at 77.

Plaintiffs' argument that sex offender registration burdens these fundamental rights has already been tried and found wanting. *See Doe v. Moore*, 410 F.3d 1337, 1342-46 (11th Cir. 2005). The Florida sex offenders in that case, as do Plaintiffs here, alleged that registration burdened

fundamental "liberty and privacy interests," specifically "their rights to family association, to be free of threats to their persons and members of their immediate families, to be free of interference with their religious practices, to find and/or keep any housing, and to a fundamental right to find and/or keep any employment." *Moore*, 410 F.3d at 1343 (internal quotation omitted). Also like Plaintiffs here, the *Moore* plaintiffs alleged sex offender registration burdened their fundamental right to travel. *See Moore*, 410 F.3d at 1348-49. The Eleventh Circuit faithfully applied the Supreme Court's fundamental rights analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997), to conclude that sex offender registration did not implicate a fundamental right under the Due Process Clause of the Fourteenth Amendment. *See Moore*, 410 F.3d at 1342-45.

The first step in the fundamental rights analysis is to form a "careful description of the asserted right." *Moore*, 410 F.3d at 1343 (internal quotation and citation omitted). Under this step, "in order to trigger substantive due process protection the [sex offender registration scheme] must either directly or unduly burden the fundamental rights claimed" by the registrants. *Id.* at 1344. The court rejected the registrants' broad characterization of their asserted rights and instead "use[d] the Sex Offender Act itself to define the scope of the claimed fundamental right," to find "the right at issue here is the right of a person, convicted of 'sexual offenses,' to refuse subsequent registration of his or her personal information with Florida law enforcement and prevent publication of this information on Florida's Sexual Offender/Predator website." *Id.*

After a court carefully describes the asserted right directly or unduly burdened by sex offender registration, the second step is to ask whether the right is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 1344 (internal quotation and citation omitted). The court had no trouble concluding the carefully-described asserted rights were not deeply rooted

in this Nation's history and tradition since "a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy." *Id.* at 1345.

Plaintiffs' claims to broadly-described rights to worship, travel, and privacy fail under the analysis in *Moore*. First, to provide a "careful description" of Plaintiffs' asserted rights, "we use [ASORCNA] itself to define the scope of the claimed fundamental right," *Moore*, 410 F.3d at 1344, and, specifically, why ASORCNA classifies Plaintiffs as adult sex offenders. Plaintiffs' juvenile court cases for conduct committed at 16 or 17 years of age were transferred to criminal court under a transfer statute applicable to conduct committed at 14 or older and requiring consideration of six factors to determine whether the juvenile should stand trial as an adult. Doc. 14 at 14-15.[7] The juvenile courts determined Plaintiffs should stand trial as adults and transferred their cases to criminal court, and the criminal court judges denied Plaintiffs Youthful Offender status, or they waived their right to seek such status. Plaintiffs were each convicted of felony sex offenses in criminal court, and their adult criminal proceedings are matters of public record unprotected by the confidentiality of juvenile and Youthful Offender proceedings. *See* doc. 14 at 17-18. If they had been adjudicated as delinquent or granted Youthful Offender status, they would not currently be registered sex offenders because ASORCNA places a 10-year limit on retroactive application to juvenile and youthful offender registrants. *See* Ala. Code §§ 15-20A-3(d), (f)(1).

Adapting Plaintiffs' circumstances to the formulation of the right in *Moore*, the "right at issue here is the right of a person, convicted of "sexual offenses," [committed while at least 14 years of age and transferred to criminal court for prosecution as an adult pursuant to Alabama's

[7] Plaintiffs do not dispute Defendants' explanation of the process by which their juvenile cases were transferred under the statutes in effect at the time.

juvenile transfer statute and who do not receive Youthful Offender status] to refuse subsequent registration of his or her personal information with [Alabama] law enforcement and prevent publication of this information on [ALEA's] website." *Moore,* 410 F.3d at 1344. Because Plaintiffs' adult criminal convictions are matters of public record unprotected by the confidentiality regarding juvenile or youthful offender proceedings, their asserted right is no more rooted in history and tradition than the right in *Moore* since "a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy." *Id.* at 1345.

Moore's substantive due process analysis applies to *all* ASORCNA restrictions Plaintiffs have standing to challenge, in addition to the registration and notification requirements considered in *Moore*. *See Waldman v. Conway*, 871 F.3d 1283, 1292 (11th Cir. 2017) (characterizing *Moore*'s holding broadly as follows: "We have already determined that sex offender registration laws do not infringe upon fundamental rights . . . ."); *United States v. Ambert*, 561 F.3d 1202, 1208-09 (11th Cir. 2009) (applying *Moore* to reject substantive due process challenge to sex offender registration without individualized risk assessment or opportunity to challenge prior conviction); *Windwalker v. Gov. of Ala.*, 579 F. App'x 769, 774 (11th Cir. 2014) (affirming dismissal of substantive due process challenge to ASORCNA under *Moore* "*notwithstanding differences between the sex-offender statute at issue in Doe and the one at issue here*.") (emphasis added); *Doe v. Strange*, 2:15-cv-606-WKW, 2016 WL 1079153, at *12-13 (M.D. Ala. Mar. 18, 2016) (applying *Moore* to conclude on a motion to dismiss that ASORCNA's 2,000-foot residence restriction "does not infringe upon Plaintiffs' fundamental right to familial association."); *McGuire v. City of Montgomery*, 2:11-cv-1027-WKW, 2013 WL 1336882, at *9-11 (M.D. Ala. Mar. 29, 2013) (applying *Moore* to conclude on a motion to dismiss that ASORCNA did not violate sex

offender's fundamental rights to travel, marry and carry on familial relationships, and to be free from affirmative stigma). And *Moore* rejected the registrants' assertion of a violation of their fundamental right to travel as a separate count, and this bars Plaintiffs' claim for a violation of their right to travel here. *See Moore*, 410 F.3d at 1348-49; *Ambert*, 561 F.3d at 1209-10 (holding federal sex offender registration requirements did not violate right to travel).

After concluding sex offender registration did not burden any fundamental right, *Moore* stated that Florida's registration law must satisfy only rational basis review, and that it easily met this standard. *See Moore*, 410 F.3d at 1345-46. The rational relation to a legitimate government interest articulated by Florida in *Moore* is equally applicable to ASORCNA, namely "to determine whether any sex offenders live in [one's] neighborhood, make an individual assessment of the risk, and take any precautions appropriate under the circumstances." *Id.* at 1345. *Compare* Ala. Code § 15-20A-2(1) (stating that registration and notification "inform[] the public of the presence of sex offenders in the community, thereby enabling the public to take action to protect themselves."); *with Moore*, 410 F.3d at 1345 ("It has long been the interest of government to protect its citizens from criminal activity and we find no exceptional circumstances in this case to invalidate the law.").

Plaintiffs state, "Defendants argue, without any support, that because Plaintiffs were convicted as adults, they have increased likelihoods of sexually reoffending." Doc. 25 at 79 (citing Doc. 14 at 47). They argue Defendants "ignore extensive research that individuals who commit sex offenses when they are children have an extremely low risk of recidivism." *Id.* But these arguments have merit only if *Defendants* bear the burden, under strict scrutiny, of providing research to rebut the studies cited in Plaintiffs' amended complaint and entitled to the presumption of truth for the purposes of a motion to dismiss. But because rational basis review applies,

Defendants bear no burden evidentiary burden, and it is *Plaintiffs* who "have the burden to negative every conceivable basis which might support" their registration as adult sex offenders. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993); *see also id.* at 315 (stating that a state's justification for "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."); *Windwalker*, 579 F. App'x at 774 (affirming 12(b)(6) dismissal of equal protection challenge to ASORCNA subject to rational basis review).

Defendants' argument is that ASORCNA's classification of Plaintiffs as adult sex offenders, with more stringent requirements than for juvenile or youthful offender registrants, reasonably relies on the individualized considerations of a teenager's maturity and potential culpability by the juvenile court in transferring the case and the criminal court in denying Youthful Offender status. ASORCNA may rationally attach more stringent regulatory consequences to teenage sex offenders determined by the judicial system to be sufficiently mature and morally responsible to stand trial as adults. Plaintiffs' empirical studies are insufficient to meet their burden of demonstrating ASORCNA's classification of them as categorically more dangerous bears no conceivable relation to the legitimate government interest of protecting the public from sex offender recidivism. *See W.B.H.*, 664 F.3d at 860 ("Besides, a lower rate of recidivism is not the same thing as no recidivism."); *Smith*, 538 U.S. at 103 (stating a state may make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."); *see also Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 824-26 (11th Cir. 2004) (holding unrebutted social science research was still insufficient to meet the plaintiffs' burden on rational basis because the state could articulate conceivable rational

reasons "for choosing not to alter its statutory scheme in response to this recent social science research."). As a result, Defendants are entitled to dismissal of Plaintiffs' equal protection claim.

7. Plaintiffs Fail to Provide Any Reason Why Their Procedural Due Process Claims Should Not Be Dismissed Under *Connecticut Department of Public Safety v. Doe*.

Defendants moved to dismiss Plaintiffs' procedural due process claims in the Fourth and Fifth Causes of Action on the grounds that registration solely on the basis of conviction of a sex offense does not violate procedural due process because the conviction supplies sufficient due process for the imposition of sex offender registration. *See* doc. 14 at 48-50 (citing *Conn. Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003)). Plaintiffs fail to explain why *Connecticut DPS* does not foreclose their procedural due process claims.

Plaintiffs begin by acknowledging they have asserted "two Fourteenth Amendment procedural due process claims," (doc. 25 at 59), but then argue that registration under ASORCNA violates their *fundamental* rights to worship, travel, privacy, to seek employment, and to establish a residence. *See* doc. 25 at 60-67. But "[a] violation of *substantive* due process occurs when an individual's fundamental rights are infringed, *regardless of the fairness of the procedure*." *Waldman*, 871 F.3d at 1292 (emphasis added) (citing *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (*en banc*)). "The Fourteenth Amendment forbids the government from infringing fundamental liberty interests *at all*, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* To the extent Plaintiffs improperly attempt to amend their complaint by arguing ASORCNA violates their *substantive* due process rights, these arguments fail for the discussed, *supra* Section 6, as to why ASORCNA does not burden any fundamental right with respect to Plaintiffs' equal protection claims.

Plaintiffs' *procedural* due process claims are based upon the alleged deprivation of a liberty interest to be free from an "irrebutable presumption" of dangerousness and to be free from "stigma

plus" resulting from being labeled as a sex offender. *See* doc. 12 ¶¶ 136-55; Doc. 25 at 68, 71-75. The gravamen of Plaintiffs' procedural due process complaint is that "ASORCNA imposes a broad array of requirements based solely on an individual's conviction." Doc. 25 at 67. But this is precisely why Plaintiffs' procedural due process claims fail: Plaintiffs do not plead that they wish to be heard on any issue relevant to their duty to register under ASORCNA. *Connecticut DPS* clearly establishes that "even assuming, *arguendo*, that [a registrant] has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material" to his duty to register. *Connecticut DPS*, 538 U.S. at 7. Where the duty to register "turn[s] on an offender's conviction alone," the offender "has already had a procedurally safeguarded opportunity to contest" the conviction and thus may be required to register as a sex offender. *Id.*; *see also Ambert*, 561 F.3d at 1208; *Moore*, 410 F.3d at 1342 n.3.

Plaintiffs unsuccessfully attempt to distinguish *Connecticut DPS* on the grounds that they challenge more restrictions than the public sex offender registry requirements challenged in *Connecticut DPS*, *Moore*, and *Ambert*. Doc. 25 at 70. But this is irrelevant. The Court in *Connecticut DPS* assumed for the sake of argument that registration as a sex offender would deprive a registrant of a constitutionally-protected liberty interest. *See Connecticut DPS*, 538 U.S. at 7 (stating "[w]e find it unnecessary to reach th[e] question" of whether the registrant sufficiently established a stigma-plus deprivation). Rather, the question is: does the statute consider anything other than conviction for a sex offense in imposing registration requirements? If the answer is yes, then the procedural due process claim fails as a matter of law, as the Fifth Circuit recently held. *See Does 1-7 v. Abbott*, 945 F.3d 307, 312 (5th Cir. 2019) ("Even assuming for the sake of argument that a convicted sex offender has a liberty interest in being free from registration as such, it is settled that conviction or similar adjudication of a sex offense supplies sufficient due process

for the imposition of sex offender conditions, including registration.") (citing *Connecticut DPS*, 538 U.S. at 6-8).[8]

Finally, Plaintiffs argue their "stigma plus" claim does not fail under *Connecticut DPS* because this Court allowed such a challenge in *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999). Doc. 25 at 73-74. But the procedural due process challenge in *Pryor* was to a previous sex offender registration statute no longer in effect under which an official in the Alabama Department of Public Safety had sole discretion to determine whether a conviction from another jurisdiction was sufficiently comparable to an Alabama sex crime to require registration. *See Pryor*, 61 F. Supp. 2d at 1229. The plaintiff there *did* seek to be heard on an issue relevant to whether he had to register as a sex offender, namely, whether his federal conviction for child pornography had similar elements to Alabama's child pornography law. *See id.* at 1233-34. But the Community Notification Act has been repealed, and ASORCNA now imposes registration solely due to conviction of an enumerated set of sex offenses, which makes it materially similar to the statutes in *Connecticut DPS*, *Moore*, and *Ambert*. *See* Ala. Code §§ 15-20A-3(a), 15-20A-5. Finally, *Pryor* is distinguishable for the obvious fact that it was decided before *Connecticut DPS*. *See Windwalker v. Bentley*, 925 F. Supp. 2d 1265, 1268 (N.D. Ala. 2013), aff'd sub nom. *Windwalker v. Gov. of Ala.*, 579 F. App'x 769 (11th Cir. 2014) (stating that *Connecticut DPS*'s holding trumped the plaintiff's reliance on *Pryor*).[9]

[8] Defendants did not cite this case in their initial brief because it had not yet been decided.

[9] The court in *Abbott* affirmed the dismissal of the plaintiffs' stigma-plus procedural due process claim on the additional grounds that requiring sex offenders to register did not involve a "false assertion of fact" and thus "no stigma" and that the plaintiffs could "identify no direct infringement on the part of the state, but only secondary harms resulting from their placement on the registry, such as housing and lending hardships." *Abbott*, 945 F.3d at 313.

Plaintiffs' procedural due process claims in the Fifth and Sixth Cause of Action should be dismissed.

8. Plaintiffs Provide No Grounds to Avoid Dismissal of Their State Law Claim.

Plaintiffs ask this Court to ignore binding Supreme Court precedent to hold that sovereign immunity does not bar their claim in Count 5. Doc. 25 at 85–86; *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). A federal court lacks jurisdiction to enjoin state officials to comply with state law. *Id.* Plaintiffs first fall back on the existence of pendent jurisdiction as overcoming this bar. *See* Doc. 25 at 73–74. That argument fails. *Pennhurst*, 465 U.S. at 121 (holding that "neither pendent jurisdiction nor any other basis of jurisdiction may override" sovereign immunity). Plaintiffs next imply that this Court should not follow Supreme Court precedent because of "policy considerations." Doc. 25 at 74. That argument also fails. Accordingly, Plaintiffs fail to rebut Defendants' explanation, *see* Doc. 14 at 49–51, that sovereign immunity bars Count 5 and it should be dismissed.

Even if the Court reaches the merits of Count 5, it fails for lack of a false statement. *See Dolgencorp, LLC v. Spence*, 224 So. 3d 173, 186 (Ala. 2016). "Truthful statements cannot, as a matter of law, have a defamatory meaning." *Ex parte Bole*, 103 So. 3d 40, 51 (Ala. 2012) (citing *McCaig v. Talladega Publ'g Co.*, 544 So. 2d 875, 879 (Ala. 1989)). Defendants cited each of these cases in their previous briefing, *see* Doc. 14 at 52, but Plaintiffs decline to respond to them. *See* Doc. 25 at 70–72. Plaintiffs concede that "applying the term 'sex offender'" to an individual "convicted of a sexual offense" is "a fact not in dispute." *Id.* at 71. Plaintiffs cite no authority for their proposition that one can commit defamation under Alabama law based on how a third party may interpret truthful information, *see* Doc. 71–72, because no such authority exists. Plaintiffs are

sex offenders. They concede such. Count 5 fails as a matter of law. *See Ex parte Bole*, 103 So. 3d at 51.

9. The Availability of a Petition for Removal from All of ASORCNA's Requirements Under Alabama Code § 15-20A-24 for Plaintiff Herbert Stevens Negates Any As-Applied Constitutional Challenge by Stevens.

In addition to the above arguments, Plaintiffs do not adequately address Defendants' argument that Plaintiff Herbert Stevens can file a simple petition in Etowah County Circuit Court to seek removal from all of ASORCNA's registration requirements because his conviction was for statutory rape not involving force. *See* doc. 14 at 17-18. Alabama Code § 15-20A-24 provides Stevens with an adequate, post-deprivation remedy that would allow him to seek complete relief from ASORCNA's requirements without the limitations before him in this Court as to Article III standing, statute of limitations, and the merits of each constitutional claim. In response, Stevens argues he should not have been placed on the registry in the first place and that "a petition for relief does not guarantee removal from the registry." Doc. 25 at 58 (citing Ala. Code § 15-20A-24(h)-(j)).

But the cited sections provide Stevens an opportunity to be heard on the very issue he claims violated his procedural due process rights when he first became subject to registration: the opportunity to receive individualized consideration on whether he poses a current danger. *See* Ala. Code § 15-20A-24(h). Stevens does not allege he cannot satisfy the criteria under § 15-20A-24, and he makes only the threadbare assertion that this section does not "guarantee" removal for so-called Romeo and Juliet situations. But as it applies to Stevens, the availability of relief under § 15-20A-24 complete negates the excessiveness prong of the ex post facto claim, makes his classification rational for equal protection purposes, and provides him with an adequate post-deprivation remedy sufficient to defeat his due process claim. *See McKinney*, 20 F.3d at 1557. And

instead of seeking a federal court order compelling State officials to follow state law in violation of their sovereign immunity, he should follow state law himself and file a simple petition for removal in Etowah County Circuit Court under § 15-20A-24. Stevens's claims should be dismissed for this reason, in addition to the reasons above.

10. The Court Can and Should Decide All Claims in Defendants' Favor at the Motion to Dismiss Stage.

The defenses raised in Defendants' motion to dismiss are purely legal in nature and should be decided in their favor on a motion to dismiss, as the Fifth Circuit's recent decision in *Abbott* illustrates. That decision affirmed a 12(b)(6) dismissal in favor of the State of Texas on similar claims. As *Abbott* succinctly stated: "Procedural due process challenges fail because conviction of a sex offense entails all requisite process for the state to impose sex-offender conditions," and "[*e*]*x post facto*, Eighth Amendment, and double jeopardy challenges do not cross the minimum pleading threshold because [Texas's sex offender registration statute] is nonpunitive." *Abbott*, 945 F.3d at 311. For similar reasons, Plaintiffs' procedural due process claim fails, and their ex post facto and Eighth Amendment claims fail since "[a] statute can violate the *Ex Post Facto* Clause, the Eighth Amendment, or the Double Jeopardy Clause only if the statute is punitive." *Id.* at 313; *see also id.* at 315 (holding that because the statute "is not punitive, we affirm the dismissal of the Does *ex post facto*, Eighth Amendment, and double jeopardy claims.").

The framework in *Abbott* applies to all of Plaintiffs' federal claims here except the equal protection claim. And the equal protection claim should be dismissed at the motion to dismiss stage because it is subject to rational basis review. Plaintiffs cannot meet their burden of pleading an equal protection claim subject to rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns*, 508 U.S. at 307. The Eleventh Circuit has affirmed the 12(b)(6) dismissal of an ASORCNA challenge

subject to rational basis review because the legislative findings of the statute articulate several justifications for its restrictions that are rationally related to legitimate government interests. *See Windwalker*, 579 F. App'x at 774. Finally, whether *Pennhurst* bars Plaintiffs' state law claim is a threshold issue of sovereign immunity that can and must be decided at this stage because "immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted." *Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017). This Court has authority to dismiss Plaintiffs' amended complaint with prejudice at this stage, and it should do so here.

D. Conclusion

For the reasons stated above, the Court should dismiss Plaintiffs' First Amended Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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