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

RANDY PENNINGTON, HERBERT STEVENS, and OLIVER NICHOLES, Plaintiffs, v. HAL TAYLOR, in his official capacity as Secretary of the Alabama Law Enforcement Agency; *et al.*, Defendants.	)	Civil Action No. 2:19-cv-695-MHT-JTA

DEFENDANTS' NOTICE OF RECENT, RELEVANT AUTHORITY

Defendants—ALEA Secretary Hal Taylor, Director of the State Bureau of Investigation Chris Inabinett,[1] Director of the Department of Public Safety Colonel Jimmy Helms,[2] and Attorney General Steve Marshall, each of whom is sued in his official capacity—hereby give notice of two published decisions recently issued by the Eleventh Circuit Court of Appeals that may impact this Court's resolution of the Defendants' pending motion to dismiss (Doc. 13).

***McGuire v. Marshall*, 50 F.4th 986 (11th Cir. 2022) (per curiam).**

In *McGuire v. Marshall*, the Eleventh Circuit rejected *ex post facto* challenges to certain provisions of the Alabama Sex Offender Registration and Community Notification Act (ASORCNA). 50 F.4th 986 (11th Cir. 2022) (per curiam).[3] Specifically, the Eleventh Circuit rejected *ex post facto* challenges to the residency, employment, homelessness registration, travel

[1] Director Inabinett succeeded John Q. Hamm as Director of the Department of Public Safety and is thus automatically substituted as a defendant in this official capacity suit. FED. R. CIV. P. 25(d).
[2] Colonel Helms succeeded Charles Ward as Director of the Department of Public Safety and is thus automatically substituted as a defendant in this official capacity suit. FED. R. CIV. P. 25(d).
[3] The decision also found that other challenged provisions of the law had since been amended, which mooted challenges to those provisions. *Id.* at 991 n.2, 999-1000.

notification, and community notification provisions. *Id.* at 1007-24. Analyzing both the text of ASORCNA for its purpose and the *Mendoza-Martinez* factors[4] for its effects, the Eleventh Circuit concluded that ASORCNA was neither intended to impose punishment nor did it impose punishment in effect. *Id.* at 1005, 1007-24. In so doing, *McGuire* relied heavily on the same cases the Defendants here relied upon: *Smith v. Doe*, 538 U.S. 84 (2003), and *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011). *Compare McGuire*, 50 F.4th at 1007-24, *with* Doc. 14 at 33-41; Doc. 26 at 12-16.

Significantly, the Eleventh Circuit repeatedly found that the challenged restrictions bore a *rational* relationship to a nonpunitive purpose, and it found the challenged restrictions not excessive *vis-à-vis* that purpose. *Id.* at 1007-24. The Court reiterated that "a rational relationship to a nonpunitive purpose" is "a most—if not *the* most—significant factor[,]" *id.* at 1013, and turned to that factor, along with excessiveness, again and again in upholding the challenged provisions, *id.* at 1007-24. By contrast, the factors of "whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime" bore "little weight" and did not merit discussion. *Id.* at 1003 n.22 (internal citations and quotation marks omitted).

McGuire strongly supports dismissal of Plaintiffs' *ex post facto* and Eighth Amendment claims because it rejects the premise of those claims—that ASORCNA imposes punishment. Indeed, *McGuire* recognizes that ASORCNA is a civil, regulatory scheme designed to prevent sex offender recidivism and protect the public. Moreover, the *McGuire* Court's discussion of the rational purposes supporting ASORCNA further undermines Plaintiffs' Equal Protection claim, which is subject only to rational basis review, for reasons argued in the briefing.

[4] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

***Doe as Next Friend of Doe #6 v. Swearingen*, 51 F.4th 1295 (11th Cir. 2022).**

In *Doe as Next Friend of Doe #6 v. Swearingen*, the Eleventh Circuit considered the application of the statute of limitations to Florida's sex offender statutes. 51 F.4th 1295 (11th Cir. 2022). In its analysis, the *Doe* Court recognized the difference between a continuing violation and a continuing harm, while pointing out that sometimes a violation is not continuing but repeated. *Id.* at 1305-06; *see also Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994) (discussing repeated violations). "Repeated similar violations are not the same as a single violation of an ongoing nature. When a discrete violation gives rise to a new cause of action, then each new violation begins a new statute of limitations period as to that particular event. Accordingly, [the Court has] held that, when a defendant takes separate and discrete acts that repeatedly violate the law, the continuing violation doctrine does not apply. Instead, a plaintiff may seek to remedy the discrete violations that occurred within the limitations period." *Doe*, 51 F.4th at 1305-06 (internal citations and quotation marks omitted). To determine which of the plaintiffs' claims were barred by the statute of limitations and which were not, the *Doe* Court undertook "an injury-by-injury and claim-by-claim analysis of the plaintiffs' operative complaint." *Id.* at 1306.

Of the four categories of claims, the *Doe* Court dispatched two easily. It found that plaintiffs' "injuries . . . expressly related to the threatened enforcement of provisions added to the registry law in 2018" were timely filed because the injuries newly arose in 2018 or later, and plaintiffs filed within Florida's four-year statute of limitations. *Id.* at 1307.[5] And it found the plaintiffs' counts premised on allegations "that they have been injured by their very classification as sex offenders"—including an Eighth Amendment claim and a substantive due process challenge to a so-called "'irrebuttable presumption' of dangerousness"—to be barred by the statute of

[5] Unlike Plaintiffs here, whose September 19, 2019 complaint came more than two years (per Alabama's statute of limitations) after the effective date of ASORCNA's 2017 amendments.

limitations as "nothing more than the lingering effects of the plaintiffs' initial designation as sex offenders." *Id.* at 1310. That is, harms may have continued but injuries did not; accordingly, the statute of limitations barred these claims.

Plaintiffs' asserted reputational injuries and injuries in registering, re-registering, and reporting required more attention. *Id.* at 1307–09. The Court "agree[d] that these claims arose before the limitations period" because the plaintiffs had long been subject to the registry law. *Id.* However, the Court concluded that these claims were saved by the continuing violations doctrine because of the defendant's ongoing enforcement actions. *Id.*

The *Doe* Court also discussed the equitable nature of the continuing violations doctrine. The Court repeated existing law that "'[i]f an event or series of events should have alerted a reasonable person to act to assert his rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine.'" *Id.* at 1308 (quoting *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006) (per curiam)). The *Doe* Court then broke with prior precedent by instead saying that, where the defendant failed to show prejudice, equity would *not* prevent the application of the continuing violations doctrine. *Doe*, 51 F.4th at 1308 & n.3. The Court cited no precedent for its assertion that "[t]he equitable analysis under the continuing violation doctrine is similar" to the *laches* analysis. *Id.* And, indeed, in violation of the prior precedent rule,[6] ignored precedent invoking equity to deny application of the continuing violation

[6] "Under [the] prior panel precedent rule, [a panel is] bound to follow a prior panel's holding unless and until it is overruled or undermined to the point of abrogation by an opinion of the Supreme Court or of [the Eleventh Circuit] sitting en banc. The prior panel precedent rule applies regardless of whether the later panel believes the prior panel's opinion to be correct, and there is no exception to the rule where the prior panel failed to consider arguments raised before a later panel." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019); *see also United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.").

doctrine where events simply "should have alerted a reasonable person to act to assert his or her rights at the time of the violation." *Ctr. for Biological Diversity*, 453 F.3d at 1335 (alternative holding[7] based on equity without considering prejudice to the defendant); *see also Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1220, 1222 (11th Cir. 2001) (per curiam); *Roberts v. Gadsden Mem'l Hosp.*, 850 F.2d 1549, 1550-51 (11th Cir. 1988).

Doe is a difficult case that breaks with prior precedent in its application of the continuing violations doctrine, but, at the end of the day, it does not change the correct result here. Plaintiffs' claims are grounded in their challenge to the very fact that they are classified as sex offenders and subject to the requirements of ASORCNA despite the age at which they committed their crimes. *See e.g.*, Doc. 12 ¶¶ 63-113 (general allegations premised on age and thereafter incorporated into each Cause of Action). This is akin to the final set of claims considered in *Doe* wherein the plaintiffs similarly challenged the very fact of registration. *See Doe*, 51 F.4th at 1310.

Separately, *Doe* also *sua sponte* "note[d] that the Eleventh Amendment prohibits federal courts from intruding on state sovereignty by instructing state officials on how to comply with state law," *Doe*, 51 F.4th at 1303 n.1, which supports dismissal of Plaintiffs' Sixth Cause of Action asserting a violation of the Alabama Constitution.

Respectfully submitted,

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[7] "[A]lternative holdings are binding precedent." *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1164 (11th Cir. 2008).

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CERTIFICATE OF SERVICE

I hereby certify that, on November 22, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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