

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

RANDY PENNINGTON, HERBERT )  
STEVENS, AND OLIVER )  
NICHOLAS, )

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

**PLAINTIFFS’ RESPONSE TO NOTICE OF  
RECENT, RELEVANT AUTHORITY**

Plaintiffs—Randy Pennington, Herbert Stevens, and Oliver Nicholes<sup>1</sup>—submit the foregoing response to Defendants’ Notice of Recent, Relevant Authority, filed on November 22, 2022. Defendants allege that *McGuire v. Marshall* and *Doe as Next Friend of Doe #6 v. Swearingen* impact this Court’s resolution of Defendants’ pending Motion to Dismiss, filed October 18, 2019. Plaintiffs submit this reply to emphasize that their claims remain intact following the Eleventh Circuit opinions in *McGuire v. Marshall* and *Doe as Next Friend of Doe #6 v. Swearingen*.

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<sup>1</sup> On December 13, 2022 Plaintiffs filed an unopposed motion to dismiss Mr. Nicholes as plaintiff in this suit.

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

In *McGuire v. Marshall*, the Eleventh Circuit emphasized that its analysis focused on the application of ASORCNA to individuals who were over the age of eighteen at the time of the offense. 50 F.4th 986, 994 n.11 (11th Cir. 2022) (“Because Mr. McGuire committed his offense as an adult, we have no occasion to address the restrictions that Alabama imposes on juvenile sex offenders.”). In the instant case, Plaintiffs were under the age of majority at the time of the offenses that led to their registration. Doc. 12, ¶¶ 16 (Mr. Pennington was sixteen at the time of the offense that led to his registration), 37 (Mr. Stevens was seventeen at the time of the offense that led to his registration), 49 (Mr. Nicholes was seventeen at the time of the offense that led to his registration). While Plaintiffs were tried in adult court, their status as minors at the time of the offenses is central to their claims and makes their case distinguishable from *McGuire*. See Doc. 12, ¶¶ 84–92.

While the Eleventh Circuit determined that the provisions of ASORCNA that Mr. McGuire challenged are not punitive as applied to adults, see *McGuire*, 50 F.4th at 1016, 1019–21, 1024, this does not foreclose Plaintiffs’ *ex post facto* and Eighth Amendment claims. The punitive impact of registration is amplified for children. See Doc. 12, ¶¶ 104–13. Children are branded as sex offenders despite being less culpable for their actions; face significant barriers to education, employment, and housing before ever setting out on their adult lives; and are more likely to experience

physical and sexual violence and severe emotional distress. *See* Doc. 12, ¶¶ 84–88, 104–13; Doc. 25 at 24–28, 31–36, 38–43.

Further, the Eleventh Circuit emphasized that “a most—if not *the* most—significant factor” in the *ex post facto* analysis is whether the restrictions created by ASORCNA “lack a rational relationship to a nonpunitive purpose.” *McGuire*, 50 F.4th at 1013 (citing *Smith v. Doe*, 538 U.S. 84, 102 (2003)). In its constitutional analysis, the Eleventh Circuit found that ASORCNA and the residency and employment restrictions were rational based on “the ‘evidence in *this* record.’” *Id.* at 1014 (emphasis added). This does not foreclose such a finding on a *different* evidentiary record—particularly one focused on individuals who were children at the time of the offenses leading to registration. *See* Doc. 12, ¶¶ 93–103; Doc. 25 at 28–31 (identifying the inconsistency between the aims of ASORCNA and registering children as sex offenders).

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

The Eleventh Circuit’s decision in *Doe as Next Friend of Doe #6 v. Swearingen* strengthens the application of the continuing violations doctrine to Plaintiffs’ claims. In *Doe*, the Eleventh Circuit reasoned that “[t]he statute of limitations for a constitutional challenge to a statute is triggered by injury.” 51 F.4th 1295, 1304 (11th Cir. 2022). It further reasoned that “a law inflicting a ‘continuing and accumulating harm’ on a plaintiff ‘actively deprive[s]’ that plaintiff of his ‘asserted constitutional

rights every day that it remain[s] in effect.” *Id.* at 1305 (quoting *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997)).

The Eleventh Circuit reasoned that the plaintiffs’ *ex post facto*, stigma-plus substantive due process, and Florida constitutional right to privacy claims were within the continuing violations doctrine for three reasons: 1) ongoing enforcement and notification actions by law enforcement; 2) plaintiffs’ continuing obligation to report in person multiple times a year; and 3) the ongoing threat of punishment if the plaintiffs failed to comply with the law. *See id.* at 1307–09. The Eleventh Circuit further reasoned that the defendant in *Doe* failed to identify “any prejudice arising from the plaintiffs’ delay” in filing suit. *Id.* at 1308, 09. Plaintiffs here are similarly subject to enforcement and notification by law enforcement, continuing obligations to report, and an ongoing threat of punishment if they fail to comply with any aspect of ASORCNA, *see* Doc. 12, ¶¶ 62–77, 136–158, and Defendants have not asserted any prejudice resulting from Plaintiffs’ delay in filing suit. Accordingly, Plaintiffs’ *ex post facto*, substantive due process, and Alabama constitutional claims fall within the continuing violations doctrine. *See* Doc. 25 at 12–15.

While the Eleventh Circuit in *Doe* determined that the plaintiffs’ Eighth Amendment and irrebuttable presumption due process claims under the Fourteenth Amendment accrued at the time the plaintiffs were placed on the registry and were not preserved under the continuing violations doctrine, *see Doe*, 51 F.4th at 1310,

Plaintiffs' claims here are distinguishable. In *Doe*, the plaintiffs argued their injuries under the Eighth Amendment and Due Process Clause of the Fourteenth Amendment arose because Florida required them to register initially without any individualized risk assessment. *Id.* Here, Plaintiffs' Eighth Amendment claim arises not only from their original classification as sex offenders but also from consequences attendant to their registration under ASORCNA. *See* Doc. 12, ¶¶ 114–22 (identifying the initial and ongoing impacts of registration). The injury asserted in Plaintiffs' irrebuttable presumption claim is not only the initial classification but also Alabama's failure to provide any "meaningful opportunity to challenge th[e] presumption" of dangerousness. Doc. 12, ¶ 142. Moreover, the procedure fails to comport with Supreme Court precedent recognizing the importance of individualized consideration before subjecting children to lifelong consequences. Doc. 12, ¶¶ 1–5.

As the Eleventh Circuit found the *Doe* plaintiffs' substantive due process right to travel claim was filed within the statute of limitations, it had no reason to evaluate those claims under the continuing violation doctrine. *See Doe*, 51 F.4th at 1307. Accordingly, *Doe* does not affect this Court's analysis of Plaintiffs' analogous claim in the instant case. *See* Doc. 25 at 12–15 (discussing the application of Plaintiffs' claims under the continuing violations doctrine). Finally, while the *Doe* Court briefly mentions the Eleventh Amendment's prohibitions on federal courts intruding on state sovereignty, it did not rule on this issue, instead leaving it for determination on

remand. *Doe*, 51 F.4th at 1303 n.1; *see also* Doc. 25 at 73–74 (discussing the impact of the Eleventh Amendment on Plaintiffs’ Alabama constitutional claims in the instant case).

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that, on December 13th, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following:

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