IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STEPHANIE HARPER,

Plaintiff,

v. CASE NO. 4:21-cv-85-RH-MJF

MARK GLASS[1],

Defendant.
_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, Commissioner Mark Glass (Commissioner), of the Florida Department of Law Enforcement (FDLE), moves for summary judgment, because Florida Statute §943.0435, Florida's sex-offender statute, is constitutional facially and as-applied to Plaintiff.

INRODUCTION

This lawsuit challenges Florida's Sexual Offender Registration and Notification Act, section 943.0435, Fla. Stat. (FSORNA). As the Court noted in its Order Dismissing the Complaint in Part (MTD Order), "[t]he constitutionality of sex-offender registries is settled." citing *Smith v. Doe,* 538 U.S. 84 (2003); *Doe v.*

[1] Mark Glass, the current commissioner of Florida Department of Law Enforcement as of August 23, 2022, replaces Rick Swearingen as defendant pursuant to Fed. R. Civ. P. 25(d).

Moore, 410 F.3d 1337 (11th Cir. 2005); and *Lindsey v. Swearingen,* No. 4:21cv465-RH-MAF (N.D. Fla. Jan. 24, 2022) [ECF No. 22 at 6]. This case concerns two FSORNA amendments that (1) revised the definition of a temporary residence for reporting purposes; and (2) added a mandatory minimum term of community control when a registrant is convicted of a FSORNA violation and does not receive a prison sentence. [ECF No. 22 at7]. Defendant is entitled to summary judgment because neither amendment changes the settled constitutionality of FSORNA.

STATEMENT OF FACTS

1. Beginning in 1994, the federal government enacted a series of laws establishing requirements and guidelines to track sexual offenders and provide public information about their presence. (Exhibit A: Office of Program Policy Analysis and Government Accountability (OPPAGA) Report No. 21-10 at 1).[2] The Sex Offender Registration and Notification Act (SORNA), provides minimum national standards for state sex offender registration and notification laws. These minimum national standards include "the immediate exchange of information, requirements for website registries, and community notification." (Exhibit A at 4) States that fail to comply with this federal law receive reduced federal funding. 34 U.S.C. §20927. In 1997, Florida enacted

[2] The OPPAGA Report is admissible under Fed. R. Evid. 803(8) because it is required to be published by § 943.0435.

FSORNA that meets and/or exceeds federal requirements and thus Florida is substantially compliant with SORNA. (Exhibit A at 4), *See* Public Safety Information Act. Ch. 97-299, § 8, Laws of Fla.

2. The express intent of FSORNA is as a nonpunitive statute for public safety:

> The Legislature finds that sexual offenders, especially those who have committed offenses against minors, often pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is a paramount government interest. Sexual offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Releasing information concerning sexual offenders to law enforcement agencies and to persons who request such information, and the release of such information to the public by a law enforcement agency or public agency, will further the governmental interests of public safety. The designation of a person as a sexual offender is not a sentence or a punishment but is simply the status of the offender which is the result of a conviction for having committed certain crimes.

§943.0435(12)

3. Since section 943.0435's inception in 1997, all "qualified" registrants must "secure [or] renew a Florida's driver's license or secure an identification card." §943.0435(3)(a) Fla. Stat. (1997). In 2007, the Legislature added §322.141(3) Fla. Stat. requiring sexual offenders who are required to register have "§943.0435, F.S." on his/her driver's license or identification card.

4. There are nine states that require demarcation on a sexual offender's driver's license or state identification card identifying the registrant as a sexual offender. [3]

5. FDLE's primary responsibility with respect to FSORNA is to establish and maintain an electronic database of individuals who are required to register as sexual offenders in Florida. *See,* § 943.0435, Fla. Stat. (FDLE "may notify the public through the Internet of any information regarding sexual predators and sexual offenders which is not confidential and exempt from public disclosure under s. 119.07(1) and s. 24(a), Art. I of the State Constitution"); (Exhibit C: Faulkner Declaration at 2, ¶3)

6. Local sheriff's offices and/or Florida Department of Highway Safety and Motor Vehicles ("DHSMV") are responsible for obtaining the information prescribed by FSORNA from registrants and timely provide that information to FDLE. *See* §§ 943.0435(2)(a), (2)(c), (4)(a), (4)(b), (7), (14).

7. FSORNA imposes registration requirements on sexual offenders. While FDLE provides general information and training to local law enforcement agencies, it has no supervisory authority over these agencies and does not provide them with any guidance regarding the interpretation of any provision

[3] Alabama Code 15-20A-18, Arizona Statute 13-3821(J), Delaware Code §2718(e)(f), Florida Statute §322.141, Kansas Statute §8-1325a, Mississippi 63-1-35 (3), Oklahoma Statute §47-6-111v1E1, Tennessee Code 55-50-353 and West Virginia code §17B-2-3.

of FSORNA. (Exhibit C at 2, ¶4; Exhibit D: Gordon Declaration at 2, ¶5) Instead, FDLE defers to each local law enforcement agency to interpret, implement, and enforce the reporting requirements for their jurisdiction and to provide that information to FDLE, which ensures that information is on the registry.[4] §§ 943.0435(2)(a), (2)(c), (4)(a), (4)(b), (7), (14); *See,* (Exhibit A at 14-17; Exhibit E: Faulkner Deposition 39:18-19; Chapter 97-299 Senate Bill No. 958 at 3)

8. FDLE has a small unit of four inspectors and one supervisor who assist local law enforcement with investigations as needed and collaborate with local law enforcement to ensure registrants are complying with FSORNA by providing accurate and timely information for the registry. (Exhibit D at 2, ¶3) (Exhibit F: Gordon Deposition 66:12-17; 167:15-19, 22-25) (Exhibit G: Hoffman Deposition 74:15-23, 75:4-7, 82-57, 82:8-25, 83:1-7)

9. Arrests do not occur unless the registrant willfully intended to violate FSORNA, has been notified, and fails/refuses to comply. (Exhibit F 65:18-23; 167:1-4, 8-11; 190:13-17, 25; 191:1-6,16-19; 290:21-23; 292:19-24; Exhibit I- Condy Declaration at 3, ¶11)

[4] Local sheriff's offices and/or Florida Department of Highway Safety and Motor Vehicles ("DHSMV") are responsible for obtaining the information prescribed by FSORNA from the required registrants and provide them timely to FDLE. *See* §§ 943.0435(2)(a), (2)(c), (4)(a), (4)(b), (7), (14).

10. As amended in 2018, FSORNA defines a " '[t]emporary residence' means a place where the person abides, lodges, or resides, including, but not limited to, vacation, business, or personal travel destinations in or out of this state, for a period of 3 or more days in the aggregate during any calendar year and which is not the person's permanent address . . . ." Ch. 2018-105, § 1, Laws of Fla. Prior to the amendment that period of time was 5 or more days. *Id.*[5]

11. To be useful, registrants' information must be accurate and updated expeditiously so the public is aware and can keep themselves safe. (Exhibit C at 3 ¶8; Exhibit D at 2, ¶4; Exhibit G 112:7-9; Exhibit I at 2, ¶¶5-7).

12. The 2018 amendments added a minimum mandatory term of community control for persons convicted of a FSORNA violation, but not imprisoned. Ch. 2018-105 at § 2.[6]

13. No Florida registrant with a permanent registered address has ever been arrested or convicted for failing to report a temporary address. (Exhibit F 62:20-23; Exhibit F at 62, 20:23; Exhibit I at 3, ¶11; Exhibit I at 3, ¶11).

14. Lieutenant Geoffrey C. Condy ("Lt. Condy") has been employed by the Lafayette County Sheriff's Office since 2003 and, since 2013, his

[5] The definition of "temporary residence" is found in § 775.21(2) which applies to sexual predators. The definition is incorporated into FSORNA. §943.0435(1)(f).

[6] The minimum term is 6 months for a first offense, 1 year for a second, and 2 years for a third or subsequent conviction. *Id.*

responsibilities include FSORNA compliance and oversight of the county's registrants. (Exhibit I at 1 ¶2; Exhibit J: Condy Deposition 12:1-21; 30:21-25; 31:19-21; 69:9-16)

15. In Lafayette County, where Defendant resides, a registrant who has a temporary address that he/she travels to frequently, can report that address and as long as it remains on his/her registry, he/she will not have to make in-person reports of subsequent trips to that temporary address. (Exhibit I at 2, ¶7) This is the practice in other jurisdictions as well. (Exhibit D at 2, ¶7; Exhibit F at 60:17-23)

16. Plaintiff was provided the option of registering any address she would like to visit often and having it remain on her registry as a second address to avoid having to go and register each time she wants to visit that location. (Exhibit F 60:17-23; Exhibit I at 2, ¶8).

17. Because Plaintiff never traveled, she never registered a second address. *See* (Exhibit K 101:10-11).

18. Since the enactment of the 2018 amendments there has been a 13% reduction in sex offender convictions for FSORNA violations. In fiscal year 2017-2018, 1,253 offenders were convicted of offenses related to FSORNA violations. (Exhibit A at 15 n31; Exhibit C-1) . Whereas during fiscal year 2020-2021, 954 sex offenders were convicted of violating FSORNA. (Exhibit A at 15)

While the drop in 2020 may be attributed to COVID, the flexibility and efforts made by law enforcement during this period to ensure compliance without an arrest is also readily observable. (Exhibit A at 15).

19. According to Lt. Condy, from 2015 through 2022 there have only been two arrests in Lafayette County for FSORNA violations, both involving failure to report a change in permanent residence. Before being arrested, each registrant was contacted by law enforcement and given multiple opportunities to comply with the law. (Exhibit I at 3, ¶11; Exhibit J 27:5-25; 28:1-4; 84:19-25; 85:1; 91:7-21).

20. Plaintiff, a college graduate with a degree in law enforcement, pled guilty on February 6, 2017, to unlawful sexual activity with minors, in violation of section 794.05, Florida Statutes, and is therefore a sexual offender under Florida law. §943.0435(1)(h)(1)(a)(I); [ECF No. 33, at ¶¶9, 35];[7] (Exhibit K: Harper Deposition 11:5-10; Exhibit L: Findings Pursuant to Florida Statute 943.0435).

21. As part of her plea agreement, Plaintiff agreed to register as a sexual offender for life and to the reporting requirements of FSORNA, including registering any day in her birth month (May) and six months after her birth month

[7] Consent is immaterial since Plaintiff was 24 years old and her victim was 16 years old at the time of genital penetration and violation of §794.05 (1).

(November) plus any other required update. §943.0435(2)(4)(6)-(8)(11)(14). (Exhibit I at 4 ¶13; Exhibit K 45:3-10, 12:11-25, 13:1-2; Exhibit M: Offer of Plea; Exhibit N: Order of Sex Offender Probation; Exhibit O: Notice of Sexual Predator and Sexual Offender Obligations)

22. Plaintiff's plea offer stated she "may [be] subject to some form of **electronic monitoring** now **or in the future** for the duration of my probation **or longer**." (Exhibit M at 4-5, ¶(7)(g)) (emphasis added)

23. Plaintiff spent most of her adult life in Lafayette County and currently lives about four miles from the sheriff's office where she is required to register and reregister in accordance with FSORNA. (Exhibit I at 4, ¶14)

24. Lt. Condy's main objective with FSORNA is to ensure a sexual offender's location is known and provided to FDLE for public notification on the registry. (Exhibit I at 1, ¶5)

25. Lt. Condy receives emails from FDLE regarding statutory changes and notifications for any registrant who missed his/her required registration. (Exhibit J 21:19-22)

26. To ensure compliance, Lt. Condy or his deputies conduct address verifications, contact registrants who miss their registration and coordinate with them to come in and register, as well as assisting them resolve any other

issues. (Exhibit I at 2-3, ¶¶7-9, 15-18a-c; Exhibit J 12:5-17; 81:6-19; Exhibit K 74:15-23; 75:4-7; 81:22-57; 82:8-25; 83:1-7; 201:10-18)

27. It is not unusual for registrants to miss their month to register. (Exhibit I at 3, ¶9; Exhibit J 23:2-15)

28. When there is a registration issue Lt. Condy first confirms the information with his staff and, if the registrant has not contacted them, Lt. Condy then makes several attempts to contact the registrant and coordinate with him/her to come in and register. (Exhibit I at 3, ¶9; Exhibit J 12:8-21; 23:2-13; 74:4-19; 81:1-19) After several attempts, if the registrant cannot be located or refuses to register as required, Lt. Condy discusses the matter with the Sheriff and the State Attorney to determine if any action should be taken. (Exhibit I at 3, ¶11; Exhibit J 36:23-25; 37:1-7; 53:18-24; 70:10-16)

29. This is consistent with practices observed in other jurisdictions. (Exhibit A at 14-15; Exhibit D at 2, ¶7)

30. Plaintiff's initial registration with the sexual offender registry was on February 8, 2017, in Lafayette County. (Exhibit H: FDLE Sexual Predator/Offender Registration Form)

31. Plaintiff always had a specific point of contact with her local law enforcement agency, including Lt. Condy, who help her make appointments and remind her to register when needed. (Exhibit I at 4, ¶¶15-16; Exhibit K 14:7-10, 18-

20, 60:5-23; 61:1-6)

32. Whenever Plaintiff registers or reregisters, she calls her point of contact beforehand and confirms the date and time is available—if unavailable, a new date and time is scheduled. (Exhibit K 57:7-16; 60:5-23)

33. Lt. Condy even provided Plaintiff his personal cellular number and encourages her to call him directly if she ever needs assistance. (Exhibit I at 4, ¶17; Exhibit J 26:20-25; 27:1-4)

34. Plaintiff never experienced a problem registering because the office was not open. (Exhibit K 58:12-16)

35. Plaintiff claims her confusion about FSORNA's travel requirements prevents her from traveling because she does not want to be arrested for violating those provisions. (Exhibit K 101:10-11)

36. Plaintiff never expressed any interest in traveling to Lt. Condy or to anyone else at the Sheriff's office. Additionally, Plaintiff never contacted anyone with FDLE or any other state agency or local law enforcement agency, including Lt. Condy, seeking assistance in traveling or requesting to have the requirements to remain in compliance with FSORNA while traveling explained to her. (Exhibit I at 4, ¶17; Exhibit K 77:8-11; 78:10-15; 87:12-15; Exhibit B at 5, ¶10)

37. Plaintiff is aware that prior to being arrested for any violation of FSORNA she would be contacted and provided with an opportunity to register. (Exhibit K 58:17-25; 59:1-20; Exhibit J 22:12-15; 81:8-19; 93:12-19)

38. Plaintiff failed to register three times but was not arrested; once when she lived with her mother for "8 months to a year;" when she returned to Lafayette County and did not timely register her new address; and again, in November 2022. (Exhibit I at 4-5, ¶18a-c; Exhibit K 9:16-18;10:17-19; 57:7-16; 58:17-23; 59:1-20; Exhibit J 53:12-25; 70:10-16; 73:19-25; 93:12-19)

39. Whenever Plaintiff violated FSORNA, Lt. Condy contacted her and provided her ample time to register. (Exhibit I at 4-5, ¶18a-c; Exhibit K 58:17-25; 59:1-20; Exhibit J 22:12-14; 81:8-19; 93:12-19)

40. Plaintiff was never arrested for violating FSORNA. (Exhibit I at 4-5, ¶18a-c; Exhibit K 58:17-23; 59:1-20; 78:16-23; Exhibit B at 2, ¶4).

41. Markings on a driver's license or ID assist those who are responsible for the public safety and/or the welfare of children to quickly identify any individual who poses a threat, which is critical in the field or during emergencies when there is no access to electronic means of identification and verification. (Exhibit D at 2, ¶8; Exhibit F 29:5-10; Exhibit I at 5, ¶19).

42. The only instance where the Plaintiff's driver's license the marking came up was when Plaintiff was at work and several employees showed each other

their driver licenses. (Exhibit K 63:21–64:3). Plaintiff was asked why the marking was there, and she replied that she did not know. *Id.* at 64:4–5. No one asked any further questions and no one treated her any differently. *Id.* at 64:6–8.

MEMORANDUM OF LAW

A. Summary Judgment Standard

A motion for summary judgment should be granted when there is no genuine issue of material fact entitling the moving party to a judgment as a matter of law. Fed. R. Civ. P. 56(a). While all reasonable doubts regarding the facts should be resolved in favor of the non-moving party, "mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England,* 432 F.3d 1321, 1326 (11th Cir. 2005).

B. The MTD Order

Per the MTD Order, only three counts remain: (1) Ex Post Facto (Claim I); (2) Substantive Due Process – Right to Travel (Claim II(A));[8] and First Amendment/Compelled Speech (Claim III). [ECF No. 22 at 11]; [ECF No. 33 ¶¶45, 53, 59]. The scope of the remaining counts were narrowed to consideration of 2018 amendments to FSORNA that (1) decreased from five days to three the time at a

[8] Claim II(B), titled "No Rational Relationship as Applied to [Defendant]," is not a separate cause of action—it is simply part of the substantive due process argument.

single location that constitutes a temporary residence must be reported (§ 943.0435(1)(f)); and (2) added a mandatory minimum term of community control when a registrant is convicted of a FSORNA violation and does not receive a prison sentence (§ 943.0435(9)(a), (b)).[9] [ECF No. 22 at 7].

C. Rational Basis Review—Legitimate Government Interest

This Court determined this matter is subject to a rational basis review. [ECF No. 22 at 7]. Under rational basis review, a statute will be upheld where it is found to be rationally related to a legitimate government interest. *Moore* at 1345. This standard of review "is 'highly deferential' and [courts will] hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances." *Id.* (citing *Williams v. Pryor,* 240 F.3d 944, 948 (11th Cir.2001).

The Florida Legislature expressly stated the legitimate government interest underlying FSORNA: to provide "protection of the public from sexual offenders" which "is a paramount government interest." Statement of Facts ("SoF"), ¶2. Accordingly, "[r]eleasing information concerning sexual offenders to law enforcement agencies and to persons who request such information, and the release of such information to the public by a law enforcement agency or public agency, will further the governmental interests of public safety." *Id.* Thus, the deferential rational basis standard applies.

[9] The language in §943.0435(9)(a) has been in the statute since its 1997 inception.

D. *Ex Post Facto* Does Not Apply to a Reasonable, Civil, Nonpunitive Statute

1. Legal Framework

The *ex post facto* prohibition of retroactivity only applies to laws imposing punishment, and not to a statutory scheme that is civil and regulatory in nature. *McGuire v. Marshall,* 50 F.4th 986, 1001 (11th Cir. 2022); *see Smith,* 538 U.S. at 92. A law is not punitive if the legislature intended to establish civil proceedings, and the statutory scheme is not so punitive in purpose or effect as to negate the state's intention to deem it civil. *Id.*

In *McGuire*—a challenge to the Alabama Sex Offender Registration and Community Notification Act ("ASCORCNA")—the Eleventh Circuit discussed the legal framework for evaluating *ex post facto* claims. *Id.* at 1003-1005. The court held "an *ex post facto* claim cannot be treated as an as-applied challenge." *Id.* at 1004 (citing *Selig v. Young,* 531 U.S. 250, 262-63 (2001)). The court observed such claims do not fit the framework used to review facial or quasi-facial challenges. *Id.* Rather than decide on a framework, the Eleventh Circuit noted the Supreme Court, in reviewing a sex offender statute for *ex post facto* purposes "considered the effects of the registration and notification provisions as they were generally felt by those who were subject to them." *Id.* at 1004-1005 (citing *Smith v. Doe,* 538 U.S. 84, 100 (2003)). The *McGuire* court confirmed "a plaintiff has a heavy burden when seeking to override a legislative expression of intent that a challenged provision is civil, and

only the clearest proof will suffice to meet that burden." *Id.* at 1005 (cleaned up).

2. The Florida Legislature Intended to Create a Civil, Nonpunitive Scheme

To prove §943.0435(1)(f) and §943.0435(9)(b) are intended to be punitive and not regulatory, Plaintiff must meet the two-prong test set forth in *Smith*, 538 U.S. at 92. Specifically, that (1) the legislative intent and (2) the purpose or effects of these amendments is to punish—not to create a civil, nonpunitive scheme. *Id.* This is a "heavy burden." *McGuire* at 1005. Deference must be given to the stated legislative intent and "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith* at 93-94.

The Court should apply the "intent-effects test." *McGuire* at 1005. The *McGuire* plaintiff failed this test by failing to demonstrate ASCORCNA had punitive intent, despite its stated legislative intent to "protect vulnerable populations, particularly children." *Id.* The *McGuire* court concluded the Alabama legislature intended the legislation to be nonpunitive by "expressly disavowing an intent to punish sex offenders and setting forth public-safety-related goals for the statutory scheme." *McGuire* at 1006; *see Smith* at 93. A civil law is "not punishment even though it may bear harshly upon one affected." *Fleming v. Nestor*, 363 U.S. 603, 614 (1960). Further "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Smith* at 96. "[C]ivil regimes

may impose criminal penalties for criminal violations of their regulatory requirements." *United States v W.B.H*, 664 F.3d848, 852 (2011). Courts must look to the plain language of the statute—the legislature's stated purpose. *Smith* at 92. If the stated purpose is public safety, plaintiff bears a heavy burden to override legislative intent. *Smith* at 93-94.

Florida's legislative intent is protecting the public from sexual offenders—"a paramount government interest." SoF, ¶2; *see Smith* at 102–03. To be useful, registrants' information must be accurate and updated expeditiously so the public is aware and keep themselves safe. SoF, ¶11. Registration requirements, community control, and the continued existence of this information on state and national registries enable law enforcement and the public to always ascertain a sex offender's status and whereabouts enabling the public to keep themselves safe. *Id.* Accordingly, there is a legitimate government interest, rational basis review is appropriate, and Plaintiff bears a heavy burden to override the legislature's intent.

3. Plaintiff Cannot Show the Amendments are Sufficiently Punitive to Override the Legislature's Intent

This Court should use the same quasi-facial applied in *McGuire* to assess the constitutionality and application of ASCORCNA. *McGuire* at 1003. After determining the statute was a civil scheme, the Eleventh Circuit applied the *Mendoza-Martinez* factors and held plaintiff could not demonstrate ASCORCNA's reporting requirements—which are more burdensome and harsher than FSORNA—

(1) resembled traditional punishment, (2) imposed an affirmative disability or restraint, (3) furthered traditional goals of punishment, or (4) was not rationally related to a nonpunitive purpose that was not excessive. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963) *See also Smith v. Doe,* 538 U.S. 84,86 (2002). The legislative intent "to protect the public and most importantly [to] promote child safety [and] not to punish registrants" is constitutional and regulatory. *Smith* at 86; *McGuire* at 1005, 1023*; see* Ala. Code §15-20A-2(5).

As discussed above, FSORNA as amended is a civil scheme and not punitive. The Eleventh Circuit has consistently applied *Smith* and held that FSORNA is not an *ex post facto* law. *See, e.g., Houston v. Williams,* 547 F.3d 1357, 1364 (11th Cir. 2008) ("[FSORNA] is not punitive, but rather regulatory, and therefore does not violate the ex post facto clause."); *United States v. Carver,* 422 F. App'x 796, 803 (11th Cir. 2011) (same); *Addleman v. Fla. Attorney Gen.,* 749 F. App'x 956, 957 (11th Cir. 2019) (FSORNA registration requirement is nonpunitive). Since the purpose is not punitive, the *Mendoza* factors must be applied.

Plaintiff's challenge fails the *Mendoza* factors, as shown below. She cannot overcome the stated nonpunitive purpose of public safety and this civil statutory scheme because the challenged amendments and their effects (1) have not been regarded in our history and traditions as a punishment, (2) do not impose an affirmative disability or restraint, (3) do not promote the traditional aims of

punishment, and (4) they have **a rational connection to a nonpunitive purpose** that is not excessive with respect to their purpose—protecting the public through timely and accurate notification. *Smith* at 97, *See also Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963). Florida's legislative intent is similar to Alabama's—public safety—but FSORNA provides more time to report and lesser consequences for violations than ASCORCNA. SoF, ¶2; *see* Ala. Code §§15-20A-15(a)(b),15-20A-4(9). Therefore, since ASCORCNA is constitutional and nonpunitive because it promotes public safety, this Court should find Florida's amendments to FSORNA are constitutional, nonpunitive, and aligned with the legislative intent of public safety.

i. Resemblance to Traditional Punishment

FSORNA's amendments do not resemble traditional punishment. The amendments enhance public safety by reducing the time to report temporary address changes because it leads to more temporary addresses being reported by registrants, thus increasing the temporary address information available to the public and law enforcement agencies. Similarly, the mandatory requirement of community control for a registrant who knowingly violates FSORNA and is not imprisoned also enhances public safety by ensuring a registrant's whereabouts is known through community control when that registrant violates FSORNA. These least restrictive

means keeps the public safe without imprisoning registrants. The amendments align with FSORNA's statutory scheme and nonpunitive purpose.

The *McGuire* court rejected plaintiff's arguments that Alabama's requirement to report in person prior to any travel for three or more consecutive days resembled traditional punishment and likened it to probation or parole, as well as arguing it restricted spontaneous travel. *McGuire* at 1020; Ala. Code §§15-20A-4(9), 15-20A-15(a). The court found these provisions were not punitive and merely notification requirements that furthered the legislative purpose of public safety. *Id.* The court also rejected plaintiff's argument that Alabama's pre-travel requirement to disclose a registrant's travel plans prevented a registrant's ability to stay at a different hotel or in a different town without triggering a felony violation. *McGuire* at 1021.

The FSORNA amendment provides more reporting time and leeway than ASCORCNA in *McGuire.* Florida requires a registrant to report within "48 hours **after**" a temporary address change for three or more days, which allows more flexibility than Alabama requiring registrants report in-person "**before** leaving his county of residence for **three or more consecutive days**" and disclose dates of travel, intended destination, and temporary lodging information. (emphasis added) §§15-20A-15(a)(b), 15-20A-4(9) Ala. Code (2022). Additionally, in Alabama any knowingly violation of those provisions can result in up to 10 years' imprisonment," §§15-20A-15(h), 13A-5-6 (a)(3), whereas FSORNA violations can only result in a

maximum penalty 5 years imprisonment and provides a non-imprisonment alternative of community control. Fla. Stat. §943.0435(9)(b). Since Florida's legislative intent is the same as Alabama's[10] and Alabama's more stringent provisions did not resemble traditional punishment, Florida's amendments also do not resemble traditional punishment. *McGuire* at 1005.

Plaintiff cannot show traditional punishment as as-applied to her. Plaintiff was provided the option of registering a secondary address she could visit often, which would remain on her registry so she would not need to register whenever visiting the secondary address. SoF ¶¶16–17. Plaintiff never reported a second address. SoF, ¶17. Despite her purported fears about traveling, she never attempted to travel and never sought guidance on travel from any law enforcement, including her law enforcement point-of-contact or Lt. Condy. SoF, ¶¶16–17, 36. Plaintiff was never arrested for violating FSORNA. SoF, ¶40. In fact, there is no evidence that anyone in Florida with a registered permanent address has been arrested for violating the travel reporting requirements. SoF, ¶18. From 2015 through 2022 there have only been two arrests in Layfette County for noncompliance with FSORNA, and neither arrest was related to travel. SoF, ¶19. Since the amendments' enactment, overall arrests statewide decreased. SoF, ¶18.

[10] Alabama's legislative intent was "to protect the public and most importantly [to] promote child safety [and] not to punish registrants" Ala. Code §15-20A-2(5)

The record evidence demonstrates FSORNA does not impose punishment, but instead promotes public safety by obtaining timely and accurate reporting of a sex offender's whereabouts so the public can protect themselves. The entire purpose of these amendments is to prevent incarceration through reporting.

ii. Affirmative Disability or Restraint

As amended, FSORNA does not "impose an affirmative disability or restraint" on Plaintiff. Without a physical restraint of activity or affirmative disability, the amendments are not punitive. *Smith* at 99-100. Even in instances when an affirmative disability or restraint is imposed, that does not in itself make the amendment punitive. *Kansas v. Hendricks*, 521 U.S.346, 363 (1997). Rather the Court needs to evaluate "the degree of the restraint involved in light of the legislature's countervailing nonpunitive purpose…whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose." *McGuire* at 1011.

Requiring a sex offender to notify Florida officials when changing permanent or temporary addresses does not violate the offenders right to travel. *Doe v. Moore* 410 F.3d 1337, 1348 (11th Cir. 2005)[11]. While the *Moore* court recognized the notification process may be burdensome, it was not unconstitutional due to the

[11] At the time, a temporary residence was a place where the person routinely for 4 or more nonconsecutive days in any month and is not the person's permanent residence. *Moore* at 1348 n.8, *quoting* Fla. Stat. §775.21(2)(g).

state's "strong interest in preventing future sexual offenses and alerting local law enforcement and citizens to the whereabouts of those that could reoffend." *Id.* "Without such a requirement, sex offenders could legally subvert the purpose of the statute by temporarily traveling to other jurisdictions for long periods of time and committing sex offenses without having to notify law enforcement." *Id.* While an in-person reporting requirement may be "inconvenient," it is not prohibitive to changing residences, travel, or changes in appearances because it only requires for these things to be reported. *McGuire* at 1018. Accordingly, the *McGuire* court found ASORCNA's requirement for registrants to report in-person **prior** to traveling three or more days did not impose a burden that rose to the level of "an affirmative disability or restraint" *McGuire* at 1018, 1021.

While similar to ASORCNA, FSORNA provides registrants with more time to report, more leeway, and fewer reporting requirements than ASORCNA. While Florida registrants are required to notify within 48 hours **after** travel of three days, registrants are not prohibited from notifying law enforcement prior to travel if that is more convenient. Fla. Stat. §953.0435. Additionally, Florida registrants can register a second address they travel to often. SoF, ¶17. This allows registrants to travel to the second address without notifying law enforcement. *Id.* Per *McGuire,* the reporting requirement is thus not an affirmative disability or restraint.

Similarly, the amendments' community control requirement is not an affirmative disability or restraint. FSORNA imposes a mandatory minimum of 6 months of community control for noncompliant registrants who are not imprisoned. Though non-compliance can result in an arrest, community control provides an alternative to imprisonment while still protecting the public with expeditiously compiled, accurate whereabouts of registrants. SoF, ¶11. Law enforcement only arrests registrants for non-compliance after providing them with several opportunities to comply. SoF, ¶¶9, 28, 38–39. Whenever Plaintiff violated FSORNA, law enforcement allowed her the chance to comply rather than being arrested. SoF, ¶¶38–39. Overall arrests for FSORNA violations declined since the amendments' enactment. SoF, ¶¶18–19. Community control is a least-restrictive alternative to imprisonment that protects the public with non-compliant registrants' whereabouts. No affirmative deterrent or restraint exists.

iii. Traditional Goals of Punishment

FSORNA's goal is public safety—not punishment. Specifically, the record disproves any punitive intent. "A statute is retributive if it is intended to express condemnation for a crime and to restore moral balance." *McGuire* at 1012.

Florida's stated intent of protecting the public from sex offenders who "often pose a high risk of engaging in sexual offenses," is analogous to Alaska's and Alabama's legislative intent for registration requirements of sex offenders. The

McGuire court acknowledged "[a]lthough Alabama imposes the restrictions on registrants as a class without making individualized risk assessments," the *ex post facto* clause did not apply. *McGuire* at 1013. The court also found having a deterrent effect is insufficient to transform a civil scheme to punitive intent. *McGuire* at 1021. "Any number of governmental programs might deter crime without imposing punishment." *Smith* at 102. "To hold that the mere presence of a deterrent purpose renders such sanctions criminal would severely undermine the Government's ability to engage in effective regulation." *Id.* Although the *Smith* court acknowledged Alaska's registration and notification statute had a deterrent effect, it found that effect was insufficient to override the legislature's intent to enact a civil scheme. *Smith* at 102.

Plaintiff cannot demonstrate the amendments have such a strong or retributive effect that renders them punitive. Florida's legislature determined public safety is furthered through a sexual offender registry dependent upon accurate and timely information. SoF, ¶2. The amendments ensure registrants' information is provided more expeditiously, increasing the number of registrations, and providing more timely information to protect the public. SoF, ¶11. While Plaintiff purports the amendments deterred her from traveling, she never sought any guidance on traveling. SoF, ¶¶17, 36. Furthermore, she was never arrested for non-compliance and provided opportunities to comply. SoF, ¶¶38–40. As discussed above, no arrests

ever occurred from travel violations, the amendments decreased arrests statewide and in Lafayette County, and community control provides an alternative to imprisonment. Even if a deterrent effect existed, it would be nonpunitive because the amendments are rationally connected to public safety and non-excessive, as discussed below.

iv. Rational Connection to Nonpunitive Purpose that is not Excessive

As noted in the MTD Order, the "the most significant" factor in the *ex post facto* analysis is whether the legislature's stated purpose is rationally connected to a nonpunitive purpose.[ECF No. 22 at 7]; *Smith* at 97, 102; *see also Waldman v. Conway*, 871 F.3d 1283, 1294 (11th Cir. 2017). The *McGuire* court upheld the more-restrictive ASCORCNA because it was rationally connected to a nonpunitive purpose and was not excessive. *Smith* at 105; *McGuire* at 1021. Specifically, the *McGuire* court determined that "it was rational for the Alabama legislature to conclude that sex offenders pose a risk of committing future sex crimes." *Id.* at 1014. The court also held the reporting requirements were rationally connected to a nonpunitive purpose, and that the notification requirements were not excessive because the registrant had "some flexibility (within three days)" to provide notice. *McGuire* at 1021. A restriction is not excessive if the State chooses a reasonable means to achieve its nonpunitive objective. *Smith* at 105.

Florida's legislature concluded that sexual offenders often pose a high risk of engaging in sexual offenses against children. §943.0435(12). This is a rational conclusion. *McGuire* at 1014. Amending the reporting requirements from five days to three days enhances public safety by providing the registrant's current information more expeditiously to the public. Further, Florida registrants have the option of registering before **or** after travel, granting more flexibility than ASCORCNA. *McGuire* at 1021. This is rationally related to the legislature's stated objective of promoting public safety by timely providing information that enables the community to protect themselves. *McGuire* at 1019. Hence, Florida's amendments are rationally connected to a nonpunitive purpose—public safety—and are not excessive.

Similarly, the amended consequences of noncompliance with FSORNA are rationally connected to a nonpunitive purpose and are not excessive. The purpose of the minimum mandatory provisions of community control is for public safety and only applies to registrants who do not comply with FSORNA and are not imprisoned. Imposing community control informs the public and law enforcement of registrants' whereabouts, thereby providing public safety without necessitating incarceration. This is reasonably related to public safety and non-punitive. Further, this is not excessive. There are no known arrests for violating any FSRONA travel requirements, the amendments reduced the number of convictions statewide and for Lafayette County, and improved functionality for law enforcement. SoF, ¶¶13, 18–

19. Further, Plaintiff was never arrested for FSORNA noncompliance. SoF, ¶¶38–40. These findings support that the amendments are rationally connected to a nonpunitive purpose and are not excessive. Accordingly, the *ex post facto* clause does not apply.

E. Substantive Due Process – Right to Travel

Plaintiff alleges the amendments infringe on her rights to interstate travel and to substantive due process. [ECF No. 33 at ¶ 53].[12] Defendant is entitled to a summary judgment on this claim because the amendments provide no cause to revisit settled Eleventh Circuit precedent squarely holding to the contrary.

"In the predominant case law, the right to [interstate] travel protects a person's right to enter and leave another state, the right to be treated fairly when temporarily present in another state, and the right to be treated the same as other citizens of that state when moving there permanently." *Moore,* 410 F.3d at 1348 (citing *Saenz v. Roe*, 526 U.S. 489, 499 (1999). In order to be held unconstitutional, a state statute must be found to unreasonably burden a plaintiff's right to interstate travel. *See Saenz,* 526 U.S. 499. Accordingly, "mere burdens on a person's ability to travel from state to state are not necessarily a violation of their right to travel." *Moore,* 410 F.3d at 1348.

[12] Claim II(A) of the Complaint also alleges "a fundamental state [constitutional] right to intrastate travel. *Id.* The Court dismissed Plaintiff's claims that were based on the Florida Constitution. [ECF No. 22 at 10]; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

As in *Moore,* Plaintiff alleges "that it is inconvenient to travel from [her] permanent residence because [FSORNA] requires [her] to notify Florida law enforcement in person when [she] change[s] permanent or temporary residences." *Moore,* 410 F.3d at 1348; *see* [ECF No. 33, ¶53]. The *Moore* court recognized the requirement was burdensome, but held it was not unreasonably burdensome because (1) the state's strong interest in protecting the public from sexual offenses and (2) without the requirement, "sex offenders could legally subvert the purpose of the statute by temporarily traveling to other jurisdictions for long periods of time and committing sex offenses without having to notify law enforcement." *Moore,* 410 F.3d at 1348–49.

Because of *Moore,* Plaintiff must demonstrate the "temporary address" amendments to FSORNA unreasonably burdens her right to interstate travel.[13] Additionally, it is noteworthy that at the time *Moore* was decided, the definition of "temporary residence" included "a place where the person routinely abides, lodges or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not the person's permanent residence, including any out-of-state address." *Id.* at 1348 n.8; § 775.21(1)(g), Fla. Stat. (2005 The *Moore* court cited this portion of the 2005 definition to uphold FSORNA against a right to travel challenge.)

[13] Plaintiff does not raise the addition of mandatory minimum terms of community control upon a FSORNA conviction as a basis of her right to travel challenge. [ECF No. 33, ¶¶53-55].

Id. Therefore, with respect to the applicability of *Moore* to this case, the redefinition of "temporary residence" is from 4 days to 3 days, rather than from 5 days to 3 days.

Per *Moore*, Plaintiff cannot show an unreasonable burden—only inconvenience. Plaintiff never reported—or even attempted to report—a temporary residence at any time, never attempted to travel, nor sought guidance regarding travel restrictions. SoF, ¶¶16–17, 35–36. Plaintiff's right to travel cannot be burdened where she takes no affirmative steps to travel.

In addition, Plaintiff has not presented anything that would justify a finding that the amendments facially violate the right to interstate travel. In addition to reasons set forth above pertaining to the as-applied challenge, Plaintiff fails to allege that there are "no set of circumstances [that] exists under which the [statute] could be valid," *McGuire,* 50 F.4th at 1003, much less present any evidence to support such a claim.

F. Claim II(B) – No Rational Relationship

Claim II(B) is not a separate cause of action and should be disregarded by the Court. Instead, it re-argues substantive due process based on a nonspecific constitutional right. Plaintiff merely states "[i]n the absence of a fundamental liberty interest, substantive due process requires that a statute bear a rational relationship to a permissible legislative objective, that it not be arbitrary, capricious or oppressive."

[ECF No. 33 at ¶57][14] As discussed above, the amendments clearly bear a rational relationship to a permissible legislative purpose: protecting the public from sexual offenders. Therefore, there is no unreasonable burden.

G. Claim III – First Amendment/Compelled Speech

Plaintiff alleges the requirement that a sex offender's driver license or state-issued ID card be marked on the front of the card with "943.0435, F.S.," violates her First Amendment Rights as compelled speech. [ECF No. 33, ¶62]; § 943.0435(3). Section 943.0435(3) requires all sex offenders obtain a driver license or ID card that complies with section 322.141(3). Section 322.141(3) requires driver licenses or ID cards issued to sex offenders contain the marking "943.0435, F.S." This marking is required not only for those required to register under section 943.0435, but also under section 944.607 "or subject to a similar designation under the laws of another jurisdiction." § 322.141(3)(b).

Neither the Supreme Court nor the Eleventh Circuit have weighed in on whether markings on a driver license constitutes compelled speech subject to strict scrutiny review. In *Doe v. Marshall*,, the court considered a challenge to Alabama's sex offender statute that required sex offenders carry a driver license or state issued ID card bearing the marking "CRIMINAL SEX OFFENDER" in bold red letters to

[14] Plaintiff includes a catch-all paragraph that purports to "repeat[] and reallege[] all preceding paragraphs before the Claims for Relief Section, as if fully set forth herein. *Id.* at ¶ 92. This does not transform Claim III(A) into a cognizable cause of action because the incorporated paragraphs (¶¶ 1-68) fail to identify any constitutional rights that may be implicated.

enable law enforcement officers to identify the individual carrying it as a sex offender. 367 F. Supp. 3d 1310, 1321 (M.D. Ala. 2019). To determine if this was compelled speech, the court applied the four-part test from *Wooley v. Maynard,* 430 U.S. 705 (1977). "There must be (1) speech; (2) to which the plaintiff objects; (3) that is compelled; and (4) that is readily associated with the plaintiff." *Marshall,* 367 F.Supp.3d at1324 (citing *Cressman v. Thompson,* 798 F.3d 938, 949–51 (10th Cir. 2015). The court concluded the demarcation of "CRIMINAL SEX OFFENDER" was compelled speech. The court additionally found that while Alabama had "a compelling government interest in enabling law enforcement to identify a person as sex offender," the state did not use the least restrictive means of satisfying that interest. *Marshall,* 367 F.Supp.3d at 1324, 1326[15]. In concluding the challenged marking was not the least restrictive means, the court cited with approval Florida's driver license marking requirement as an example of "a more discrete label[]," or code. *Id.* at 1327 n.4. In response to *Marshall,* Alabama changed the required marking from "CRIMINAL SEX OFFENDER" to a code. *McGuire,* 50 F.4th at 994. As a result of this change, a subsequent challenge to the Alabama sex offender driver

[15] Of interest here, the district court in *Marshall* found that part 2 of the *Wooley* test was satisfied because the plaintiffs "vehemently denie[d]" that they were in fact "criminal sex offender[s]." *Id.* at 1325.

license was determined to be moot. *Id.* at 1000.

Under the *Wooley* test, Florida's driver license branding requirement is not compelled speech, because a Florida's code is not akin to the words "Live Free or Die" on a license plate as found in *Wooley,* nor is it akin to "CRIMINAL SEX OFFENDER" in bold red type. The code on Plaintiff's driver license simply indicates that she is subject to registration as a sex offender under section 934.0435, a fact Plaintiff does not, and cannot, dispute. She may object to certain provisions of FSORNA, but not the fact that she is required to register. Florida's marking requirement does not satisfy the *Wooley* test and is therefore not compelled speech.

However, were the Court to consider FSORNA's driver license branding requirement compelled speech, it easily satisfies the strict scrutiny test. The branding requirement is narrowly tailored to advance Florida's compelling interest through the least restrictive means. Unlike the Alabama requirement struck down in *Marshall,* Florida does not require driver licenses or ID cards to proclaim the bearer as a "Criminal Sex Offender." Instead, it merely requires the code "943.0435 F.S." Thus, Florida's requirement is similar to the current provision in the Alabama sex offender statute that was implicitly approved in *McGuire*. 50 F.4th at 1000.

It is undisputed that Florida has a compelling interest in protecting its citizens and residents from sex offenders. SoF, ¶2. This includes the compelling interest in enabling law enforcement and interested members of the public responsible for

protecting children or other vulnerable populations to identify an individual as a sex offender. *Id.*; *Marshall,* 367 F.Supp at 1326. It is not uncommon for information about an individual to be contained on a license along with other codes needed by government agencies. Markings on the driver's license or state identification card enable law enforcement officers, school officials, and others who are responsible for the public safety and/or the welfare of children and vulnerable populations to quickly identify any individual who may pose a threat to a child. SoF, ¶41. This is critical when law enforcement is working in the field or during emergencies when there is no access to electronic means of identification and verification. *Id.*

Plaintiff has not presented any evidence that any person identified—or could identify—her as a sex offender from the marking on her driver's license since she registered. In fact, the only instance where the question of the marking came up was when Plaintiff was at work and several employees showed each other their driver licenses. SoF, ¶42. Plaintiff was asked why the marking was there, and she replied that she did not know. *Id*. No one asked any further questions and no one treated her any differently. *Id*. Plaintiff has not provided any less restrictive measure that would achieve Florida's compelling interest. Therefore, the code on Florida's driver's license and ID is akin to the demarcations permitted in Alabama, Delaware, Kansas, Mississippi, Oklahoma, Tennessee, and West Virginia, and is constitutional.

CONCLUSION

This Court should grant Defendant's motion for summary judgment because the record proves that the 2018 amendments to Fla. Stat. §943.0435(1)(f) and §943.0435(9)(b) are constitutional. Specifically, Plaintiff cannot overcome the regulatory civil scheme and nonpunitive purpose of the statute: protecting the public from sex offenders. The record evidence shows the amendments (1) do not impose traditional punishment, (2) do not impose an affirmative disability or restraint, (3) do not promote the traditional aims of punishment, and (4) have a clearly rational connection to a nonpunitive purpose that is not excessive with respect to their purpose—to keep the public safe through timely and accurate notification on the registry.

Plaintiff's substantive due process claim fails because the record shows Plaintiff's right to travel was never violated. Plaintiff never attempted to register a temporary address, never took any affirmative steps to travel, and was never arrested. Instead, each time she was assisted by law enforcement and updated her information. Well-settled caselaw makes clear Plaintiff merely claims inconvenience, not an unreasonable burden on her right to travel.

Plaintiff's first amendment claim fails because the code on her driver's license is a least-restrictive means for law enforcement to identify sex offenders: a paramount government interest. The code is akin to those in other jurisdictions

whose codes have not been determined unconstitutional.

WHEREFORE, for the reasons set forth herein, Defendant Mark Glass, Commissioner of the Florida Department of Law Enforcement, respectfully requests that the Court grant Defendants motion for summary judgment.

Respectfully Submitted,

ASHLEY MOODY
FLORIDA ATTORNEY GENERAL

/s/ William H. Stafford III
William H. Stafford III, Esq.
Senior Assistant Attorney General
Florida Bar No. 70394
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
Telephone: 850-414-3785
William.Stafford@myfloridalegal.com
Counsel for Defendant Mark Glass

/s/Stacey Blume
Stacey Blume, Esq.
Assistant Attorney General
Florida Bar No. 173207
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301
Telephone: 954-712-4600
Facsimile: 954-527-3702
Stacey.Blume@myfloridalegal.com
Co-Counsel for Defendant Glass

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

I hereby certify that this Motion and incorporated Memorandum of Law contains 7,903 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2023, a true and correct copy of the foregoing was filed with the Clerk of the Court using CM/ECF, which will serve a Notice of Electronic Filing on Valerie Jonas, Esq., at valeriejonas77@gmail.com and Todd G. Scher, at tscher@msn.com.

/s/Stacey Blume
Stacey Blume, Esq.
Assistant Attorney General