Brunn (Beau) W. Roysden III, No. 028698
Katlyn J. Divis, No. 035583
FUSION LAW, PLLC
7600 N. 15th St., Suite 150
Phoenix, Arizona 85020
(602) 315-7545
beau@fusion.law
kd@fusion.law

Attorneys for Intervenor-Defendants Speaker Montenegro[1] *and President Petersen*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John Doe,

Plaintiff,

v.

Jerry Sheridan et al.,

Defendants.

No. CV23-01938-PHX-SMM

INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[1] Speaker Montenegro has been automatically substituted for former Speaker Toma pursuant to Rule 25(d).

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INTRODUCTION

Pursuant to Rule 56(a), Intervenor-Defendants move for summary judgment on all counts in Doe's Complaint and on their defenses of waiver and issue preclusion.

ARGUMENT

I. Doe's Lifetime Probation Status Means Defendants Are Entitled to Judgment as a Matter of Law on Counts 1 and 2 (First Amendment and Due Process)

A. By Pleading Guilty, Doe Waived that Registering Online Identifiers Unconstitutionally Burdens Speech and Lifetime Registration Violates Due Process

Doe claims the Sheriff is infringing on his constitutional rights by 1) requiring him to register his online identifiers and 2) subjecting him to lifetime registration. However, the Sheriff is simply carrying out Doe's judicially imposed sentence of lifetime probation, which Doe agreed to when pleading guilty to [redacted]. Until Doe's probation is terminated or the terms of his probation modified, *see* A.R.S. § 13-901(E), Ariz. R. Crim. P. 27.3, the requirements of § 13-3821 and § 13-3822 are a function of his probation.

1. Waiver Applies to an Alleged Deprivation of Rights From a Plea

The Ninth Circuit applies waiver to the same type of claims that Doe asserts here, rendering such claims "meritless." *United States v. Daniels* involved an appeal by a criminal defendant challenging "several conditions of supervised release [that] restrict his access to computers and the internet." 541 F.3d 915, 924 (9th Cir. 2008). Daniels contended that "if imposed for an entire lifetime, [these] improperly restrict his First Amendment rights." *Id.* The court rejected this based on waiver: "As Daniels expressly agreed to the conditions knowing that a lifetime term of supervised release might be imposed, he has waived his right to challenge them. His First Amendment argument is therefore meritless." *Id.*

2. Doe Agreed to the Conditions He Challenges and a Broad Waiver

Here, Doe agreed to the very conditions that he challenges as violating his First Amendment and Due Process rights. He pled guilty and was convicted of [redacted]

[redacted].

Doe's plea agreement also contains a broad waiver. [redacted]

On the date of his sentencing, Doe signed his terms of probation [redacted]

[2] The Court can properly take judicial notice of documents from Doe's criminal case. *See* Fed. R. Evid. 201(b)(2); *see also United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) (the court can "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.").

[redacted] At the time of his crimes [redacted], as today, A.R.S. § 13-3821 required registering online identifiers. *See* SOF ¶25; 2007 Ariz. Sess. Laws ch. 84 (amending § 13-3821). Doe agreed to these lifetime probation terms as part of his plea. [redacted]

B. Waiver Aside, Judicial Review Is Deferential and Doe's Claims Fail

As explained above, this Court should apply waiver to Counts 1 and 2. But even if this Court were to review Doe's probation terms, such review is deferential given the fact that "'probation is a form of punishment,' and the court may impose conditions that are rehabilitative or punitive in nature." *Demarce v. Willrich*, 203 Ariz. 502, 505 ¶9 (Ct. App. 2002); *see also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) ("Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender….'").

1. Courts Review Probation Terms that Affect Fundamental Rights Under the Deferential "Reasonable Conditions" Test

This Court recently identified *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988), as controlling authority for the proposition that "when fundamental rights are affected, '[t]he test for validity of probation conditions is whether the conditions are primarily designed to meet the ends of rehabilitation and protection of the public,'" and "probation conditions are narrowly drawn when they 'protect the public from a situation that might lead to a repetition of the same crime.'" *Savage v. Shinn*, No. CV-21-8279, 2022 WL 18215832, at *6 (D. Ariz. Dec. 14, 2022), *report and recommendation adopted*, 2023 WL 142916 (D. Ariz. Jan. 10, 2023); *see also Ferry v. Doohan*, No. 3:18-CV-1891, 2020 WL 2858005, at *4 (D. Or. May 31, 2020) (stating same and granting dismissal of § 1983 action challenging post-prison supervision conditions under First Amendment).

This is in accord with *Doe v. Harris*, which involved a First Amendment challenge to California's requirement to register online identifiers. 772 F.3d 563 (9th Cir. 2014). That case was brought by plaintiffs who were "not prisoners, parolees, or probationers," and the

court stated it is "important" to understand the status of the plaintiff challenging a sex-offender registration requirement "'on a continuum of possible punishments.'" *Id.* at 570, 572. For probationers, "the government may still 'impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.'" *Id.* at 571 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)); *see also Loritz v. Dumanis*, No. 2:06-CV-00735, 2007 WL 2788608, at *1 (D. Nev. Sept. 21, 2007) (What Plaintiff "classifies as a prior restraint [on speech] is actually a special condition of his probation.").

The reasonable conditions test is met when a "probation condition has a reasonable nexus with the twin goals of probation, rehabilitation and protection of the public." *Terrigno*, 838 F.2d at 374; *see also Knights*, 534 U.S. at 119 (Court "may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."). "In assessing the governmental interest side of the balance, it must be remembered that 'the very assumption of the institution of probation'" is that the probationer "is more likely than the ordinary citizen to violate the law.'" *Knights*, 534 U.S. at 120. And one appropriate governmental interest is facilitating the probationer's successful "reintegration into society." *United States v. King*, 736 F.3d 805, 809 (9th Cir. 2013).

2. Registering Online Identifiers and Lifetime Probation Are Both "Reasonable Conditions" for Doe

Based on issue preclusion or undisputed facts, there is a sufficient nexus between Doe's crimes and the probation terms requiring him to register his online identifiers. District Courts apply issue preclusion to § 1983 challenges to probation terms that are challenged and upheld in state court. *See Tye v. County of Orange*, No. 18-CV-544, 2020 WL 2372994, at *11-*12 (C.D. Cal. Jan. 14, 2020) (applying issue preclusion to challenge to cost of probation terms), *report and recommendation adopted*, 2020 WL 2374941 (C.D. Cal. Feb. 12, 2020). Moreover, issue preclusion applies under Arizona law (which applies here) "when a fact 'was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter

and actually did litigate it' and the fact 'was essential to the prior judgment.'" *Crosby-Garbotz v. Fell*, 246 Ariz. 54, 57 ¶11 (2019).

[redacted] Thus, issue preclusion bars Doe's claim.

Alternatively, this Court should hold as a matter of law that requiring the registration of online identifiers bears "a reasonable nexus with … rehabilitation and protection of the public," *Terrigno*, 838 F.2d at 374, for individuals convicted of [redacted] While it does not necessarily involve the use of computers or the internet, it is undoubtedly very serious and harmful conduct. For an individual who has pled guilty to attempting to engage in this type of behavior, there is a reasonable nexus to

protecting the public to require the individual to register his or her online identifiers with law enforcement.

Lifetime probation is also a reasonable condition as a matter of law. The Ninth Circuit has held that "[a] life term of supervised release is particularly appropriate for sex offenders given their high rate of recidivism." *United States v. Williams*, 636 F.3d 1229, 1233 (9th Cir. 2011). In *Goodwin v. United States*, the District Court relied on *Williams* to grant the government's motion to dismiss a challenge that "a lifetime of supervised release" was unconstitutionally disproportionate. No. 1:18-CR-00072, 2022 WL 1422849, at *6 (D. Idaho May 5, 2022).

II. Alternatively, Lifetime Registration Does Not Violate Due Process (Count 2)

Alternatively, Defendants should be granted summary judgment as to Doe's due process claim because the Legislature had a legitimate purpose in enacting the statutory lifetime registration requirement—public safety, crime prevention, and assisting law enforcement in solving crimes—and the law promotes that purpose.

Doe concedes that Arizona's law does not restrict a fundamental right and therefore this Court should apply rational-basis review when evaluating this claim. *See* Dkt. 34-1 at 4; *see also United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004). A law survives rational basis review as long as it has a legitimate purpose and promotes that purpose. *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018).

Arizona's law, which, in most circumstances, requires sex offenders to register for life, serves the legitimate purpose of protecting the public. Specifically, when the Legislature enacted the sex offender registry in 1995, it found:

> Some sex offenders pose a high risk of engaging in sex offenses after being released from imprisonment or commitment and that protecting the public from sex offenders is a paramount governmental interest .... The release of information about sexual predators to public agencies and, under limited circumstances, to the public will further the government's interests of public safety[.]

SOF ¶24; 1995 Ariz. Sess. Laws ch. 257, § 10 (1st Reg. Sess.); *see also State v. Trujillo*, 248 Ariz. 473, 478-79 ¶28 (2020). The express legislative findings evidence a government "objective to forestall future incidents of sexual abuse by notifying those who may well encounter a potential recidivist[.]" *Trujillo*, 248 Ariz. at 478 ¶28.

The Ninth Circuit has previously concluded that Arizona's law, as well as similar laws, serve the legitimate purpose of protecting the public. *See Clark v. Ryan*, 836 F.3d 1013, 1018 (9th Cir. 2016) ("Arizona's registration statute clearly has a legitimate nonpunitive purpose of public safety advanced by alerting the public to the risk of sex offenders." (cleaned up)); *Tandeske*, 361 F.3d at 597; *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (the government has a "compelling interests in public safety").

The registry protects public safety by ensuring that law enforcement has up-to-date information regarding the likely physical location of sex offenders. *See Trujillo*, 248 Ariz. at 478 ¶27 ("Arizona's registration statutes provide law enforcement with 'a valuable tool' in locating sex offenders by giving them 'a current record of the identity and location of' such offenders."). The registry provides a mechanism for the public to ascertain whether there are any convicted sex offenders residing near them and their families (including minor children), so that they can avoid contact and keep a watchful eye if they so choose. The community notification and internet registry provisions also advance this purpose by making offender information "accessible" to the public so they "can take the precautions they deem necessary" for their own safety. *Smith v. Doe*, 538 U.S. 84, 101 (2003).

Because of the "high risk of engaging in sex offenses after being released from imprisonment," SOF ¶24; 1995 Ariz. Sess. Laws ch. 257, § 10, "[i]t is not irrational" for the Arizona Legislature to conclude that requiring sex offenders to register and, in most cases, remain on the registry for life will "deter recidivism and promote public safety." *See Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014); *see also Williams*, 636 F.3d at 1233 ("A life term of supervised release is particularly appropriate for sex offenders given their high rate of recidivism.").

III. Reporting Requirements Related to Two Residences and Online Identifiers Are Not Unconstitutionally Vague (Count 3)

Further, Defendants should be granted summary judgment as to Doe's vagueness claim because Arizona's reporting requirements provide fair notice of what an offender, including Doe, must do to comply with the law.

A law survives a vagueness challenge if it "provides a person of ordinary intelligence fair notice of what is prohibited, or is [not] so standardless that it authorizes or encourages seriously discriminatory enforcement." *Maldonado v. Morales*, 556 F.3d 1037, 1045 (9th Cir. 2009) (cleaned up). But "'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *Holder v. Humanitarian L. Project*, 561 U.S. 1, 19 (2010). Thus, to prevail on a vagueness challenge, "the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Vill. Of Hoffman Est. v. Flipside Hoffman Ests., Inc.*, 455 U.S. 489, 495 n.7 (1982) (internal quotation marks omitted).

Outside of the First Amendment or other exceptional circumstances, a party asserting a vagueness challenge must "sustain an as-applied [ ] challenge" before the court will consider facial vagueness. *Kashem v. Barr*, 941 F.3d 358, 375 (9th Cir. 2019). A party raising a facial vagueness challenge confronts "a heavy burden" as "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998).

A. The Annual Registration Requirement Is Not Vague

Section 13-3821(J)'s annual registration requirement begins on the person's "initial registration" and requires the person to report annually to the "sheriff of the county in which the person is registered" to confirm information. *See* JSOF ¶21. A person initially registers in the county in which he intends to reside. *See* A.R.S. § 13-3821(A), (B). "Is registered" refers to the immediately prior annual registration under § 13-3821(J) that is being updated, and "sheriff" refers to the sheriff where the person completed that registration. To comply

with the statute then, a person would need to complete his annual registration with the sheriff he previously registered with unless, in the interim, he has moved from that county. *See* A.R.S. § 13-3822(A); *see* Part III(B), *infra*.

For example, if the person has a residence in both Maricopa County and Pima County and initially intends to reside at his Pima residence, he would report to the Pima County Sheriff's Office for his initial registration and would complete his annual registration with the Pima County Sheriff's Office unless he moves to his Maricopa residence during the year and so informs the Pima County Sheriff. *See* Part III(B), *infra*.

B. The Requirement To Register When Moving To/From A Person's Residence Or To A Different County Is Not Vague

This requirement reads:

> Within seventy-two hours, excluding weekends and legal holidays, after moving to or from the person's residence or to a different county or after changing the person's name or address, a person who is required to register under this article shall inform the sheriff in person and in writing of the person's new residences and whether the residence or residences are temporary or permanent....

A.R.S. § 13-3822(A); JSOF ¶24. If an offender decides to move residences, either within the same county or to a different county, this section requires the offender inform the sheriff of the county of his original residence. The key term here is "moving." In common understanding, moving occurs when someone changes their primary residence. *See Move*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/move (defining "move" as "to change one's residence or location").

Arizona courts apply the canon that when the legislature uses different terms it intends a different meaning. *See State v. Harm*, 236 Ariz. 402, 407 ¶19 (App. 2015). Given the requirements of § 13-3821(A) ("entering and remaining") and § 13-3821(I)(6)(c) ("has more than one residence"), § 13-3822(A) must apply in different circumstances—specifically, if an offender is changing residences.

Then, if an offender is changing residences but remaining in the same county, he is required to inform the sheriff of that county accordingly. If he is changing his residence by

moving to a new county, he must inform the sheriff of the old county from which he is moving. This is clear because under § 13-3821(A), a person must already register with the sheriff in the new county after he is entering and remaining for 72 hours. The point is to give the old sheriff notice that the person has moved either within or out of the county. The Legislature can rationally require this so that a sheriff would have up to date records of the offender's current address within his jurisdiction, can notify local police departments, and so law enforcement does not expend resources tracking down a sex offender if the sex offender has moved away. Note that Doe signed, as part of his plea agreement, [redacted] This is consistent with the statute.

C. The Requirement To Register Every 90 Days When A Person Has Two Residences Is Not Vague

A person that has two or more residences is required to register "not less than every ninety days with the sheriff in whose jurisdiction the person is physically present" under § 13-3821(I)(6)(c). A person can comply with the 90-day requirement and register in only one county as long as he is physically present in that county at least every 90 days, and when physically present, registers there. If in between the 90-day intervals the person physically enters another county, he is not required to register under this provision. Instead, the person would be governed by the 72-hour provision. *See* Part III(D), *infra*.

Returning to the previous example, if a person registered in Pima County and remained there for the full 90 days, he would need to register again in Pima County. If on the eightieth day after registering he travels to his other residence in Maricopa County, on the eighty-third day he would be required to register under the 72-hour provision. A.R.S. § 13-3821(A). If he was still at his Maricopa residence on the ninetieth day, he would need to register with the Maricopa sheriff to comply with § 13-3821(I)(6)(c). If he returned to his Pima residence on or before the ninetieth day, he would register with the Pima sheriff. Compliance with the 90-day provision is thus in the control of registered sex offenders.

D. The Requirement To Register When Entering And Remaining In Another County For At Least 72 Hours Is Not Vague

The law is also clear on registering when travelling between counties. It imposes a bright line 72-hour requirement that triggers registration, and it provides an additional 72 hours, excluding weekends or holidays, to comply. A.R.S. § 13-3821(A). After entering and physically spending 72 hours in a county, the person has an additional 72 hours, excluding weekends or holidays to go to the sheriff's office and register. If a person spends less than 72 hours in the county at one time, then the person would not trigger the requirement.

E. The Requirement For Websites "Intended To Be Used" Is Not Vague

Section 13-3821(P) requires a person to register any

> required online identifier and the name of any website or internet communication service where the identifier is being used or is intended to be used with the sheriff from and after December 31, 2007, regardless of whether the person was required to register an identifier at the time of the person's initial registration under this section.

A.R.S. § 13-3821(P); JSOF ¶30. Doe's complaint challenges the "intended to be used" language as vague, but it is not vague in context.

The primary purpose of this subsection is to make clear that the registration requirement for online identifiers applies to those (unlike Doe) whose conviction predates the effective date of the requirement. *See* 2007 Ariz. Sess. Laws ch. 84, § 4 (1st Reg. Sess.) (effective date of December 31, 2007). The actual mechanics of the timing of registering are governed by § 13-3822(C), which was enacted in the same session law. *See* JSOF ¶32. The Court must therefore harmonize these two provisions when interpreting what "intended to be used" means. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 210 ¶16 (Ct. App. 2008) (vagueness claim "fails if any logical construction can be placed on the language that harmonizes [allegedly conflicting] provisions"); *see also Sempre Ltd. P'ship v. Maricopa County*, 225 Ariz. 106, 109 ¶12 (Ct. App. 2010) ("When interpreting multiple statutory sections that were enacted simultaneously, 'the duty to harmonize them is particularly acute.'" (citation omitted)).

After harmonizing these two statutes, it is clear that "intended to be used" refers to "mak[ing] any change to any required online identifier, and before any use of a changed or new required online identifier to communicate on the internet." A.R.S. § 13-3822(C). A "change" could include establishing a new online identifier or modifying an existing one.

For example, assume John Doe, a registered sex offender, wishes to open a Facebook account with the username "John Doe." To comply with this requirement, Doe must inform the sheriff that he intends to use the user name "John Doe" on Facebook before he actually uses the account. Doe could comply with the statute by notifying the sheriff of the intent to use "John Doe" on Facebook either before Doe creates the account or after creating the account but before using the account. This is consistent with the current procedures of Defendant Sheridan who provides an online form to register online identifiers. SOF ¶23; https://www.mcso.org/i-want-to/update-offender-registration-information.

IV. The Reporting Requirements Do Not Constitute Cruel and Unusual Punishment (Count 4)

Defendants should also be granted summary judgment as to Doe's Eighth Amendment claim because Arizona's registration requirements are a civil, nonpunitive regulatory scheme and nothing in them is so punitive in its purpose or effect as to transform the Legislature's intent. Thus, Arizona's laws are not punishment pursuant to the Eighth Amendment.

Any alleged deprivation cannot violate the prohibition against "cruel and unusual punishment" unless it first qualifies as punishment. *See Doe v. Garland*, 17 F.4th 941, 947 (9th Cir. 2021). To determine if a law equates to punishment, courts employ the same two-step test outlined by the Supreme Court in *Smith v. Doe*, 538 U.S. 84. *Garland*, 17 F.4th at 948. Under that test, the court must first determine if the Legislature intended to "enact a regulatory scheme that is civil and nonpunitive," and if so, the court will then "examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Smith*, 538 U.S. at 92 (cleaned up).

A. Sex Offender Reporting Requirements Have Repeatedly Been Held Not To Constitute Punishment

"*Smith* suggests that sex-offender registry statutes are generally not punitive." *Does 1-7 v. Abbott*, 945 F.3d 307, 314 (5th Cir. 2019) (citing *Smith*, 538 U.S. at 105). This is consistent with the holdings of most courts that have addressed this question—including those that have addressed Arizona's laws specifically. *See Clark*, 836 F.3d at 1016; *Doe v. Mayes* ("*Mayes*"), No. CV-24-02259, 2024 WL 4870503, at *11 (D. Ariz. Nov. 22, 2024); *Greer v. Arizona*, No. CV-13-0166, 2013 WL 2896866, at *3-*4 (D. Ariz. June 13, 2013); *Trujillo*, 248 Ariz. at 484-85 ¶64.[3]

B. The Reporting Requirements of A.R.S. §§ 13-3821 and 13-3822 Are in Line with Those that Have Been Upheld

The Ninth Circuit has already held that Arizona's law is nonpunitive. *See Clark*, 836 F.3d at 1016 ("'The legislature furnished ample indication that it intended to protect communities, not punish sex offenders' through the registration requirements."). Doe has not—and cannot—claim that the portions of Arizona's law he challenges have been so amended since being upheld by the Ninth Circuit in 2016 that they have transformed from a nonpunitive regulatory scheme into a form of punishment.

Since then, the only substantive amendments to Arizona's reporting law occurred in 2021 and 2024, S.B. 1305 and S.B. 1404 respectively. This Court has already held that the changes that occurred through S.B. 1404 were nonpunitive, and those are the subject of a separate pending lawsuit. *See Mayes*, 2024 WL 4870503 at *11. Thus, Doe's only

[3] For other statutes, *see Smith*, 538 U.S. at 105-06 (Alaska's SORA is nonpunitive); *Litmon*, 768 F.3d at 1242-43 (California's in-person registration requirement is nonpunitive); *United States v. Elkins*, 683 F.3d 1039, 1041 (9th Cir. 2012) (federal SORA is nonpunitive); *ACLU v. Masto*, 670 F.3d 1046, 1050 (9th Cir. 2012) (certain requirements in Nevada's SORA are nonpunitive); *Nat'l Ass'n for Rational Sexual Offense Ls. v. Stein*, 112 F.4th 196, 200 (4th Cir. 2024) (North Carolina's SORA is nonpunitive); *Doe v. Settle*, 24 F.4th 932, 953 (4th Cir. 2022) (Virginia's SORA is nonpunitive); *Abbott*, 945 F.3d at 314-15 (Texas's SORA is nonpunitive); *Hope v. Comm'r of Ind. Dep't of Corr.*, 9 F.4th 513, 530 (7th Cir. 2021) (Indiana's SORA is nonpunitive); *Millard v. Camper*, 971 F.3d 1174, 1181 (10th Cir. 2020) (Colorado's SORA is nonpunitive); *Shaw v. Patton*, 823 F.3d 556, 577 (10th Cir. 2016) (Oklahoma's SORA is nonpunitive); *McGuire v. Marshall*, 50 F.4th 986, 991 (11th Cir. 2022) (Florida's SORA is nonpunitive); *Windwalker v. Governor of Ala.*, 579 Fed. Appx. 769, 771 (11th Cir. 2014) (Alabama's SORA is nonpunitive); *Anderson v. Holder*, 647 F.3d 1165, 1169 (D.C. Cir. 2011) (Washington D.C.'s SORA is nonpunitive).

remaining challenge is to S.B. 1305. Doe seems to take issue with two portions of S.B. 1305: (1) "the time periods for registration and for reporting changes in registration information pursuant to [A.R.S.] §§ 13-3821 and 13-3822" and "statutory amendments" that "require[] him to register every ninety days even though his two residences are both permanent." *See* Dkt. 1 ¶¶111-13.

Contrary to Doe's assertion that the Legislature implemented the requirement that offenders with multiple residences must register every 90 days in 2021, that has been the requirement since 2012. *Compare* 2012 Ariz. Legis. Serv. ch. 23 § 1 (2d Reg. Sess.) (H.B. 2019) *with* 2021 Ariz. Legis. Serv. ch. 444 § 1 (1st Reg. Sess.) (S.B. 1305).

In 2012, the Legislature amended A.R.S. § 13-3821(I) to read:

> If the person *has more than one residence or* does not have an address or a permanent place of residence, the person shall provide a description and physical location of any temporary residence and shall register as a transient not less than every ninety days with the sheriff in whose jurisdiction the transient is physically present.

SOF ¶26; JSOF ¶23; 2012 Ariz. Legis. Serv. ch. 23 § 1 (added language emphasized). The Sponsor of H.B. 2019, Rep. Robson, explained that this amendment was a response to a situation where a sex offender had two residences, one in Yavapai County and one in Maricopa County, registered in Yavapai but not Maricopa, and then lived in Maricopa. SOF ¶27; H. Jud. Committee, Jan. 19, 2012 at 2:35, https://www.azleg.gov/videoplayer/?eventID=2012011220. [4] Thus, H.B. 2019 required offenders with multiple permanent addresses to register every 90 days. The 2021 change merely broke the existing requirement into multiple sentences. 2021 Ariz. Legis. Serv. ch. 444 § 1. Consequently, the requirement to register every 90 days because of multiple addresses was already in effect prior to *Clark*.

Doe also challenges the change in timing for him to report to the sheriff of an Arizona county he enters. Prior to 2021, offenders could enter a county for up to 10 days without

[4] The Court can take judicial notice of Arizona's laws' legislative history. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice.").

being required to inform that county's sheriff. *See* JSOF ¶43. Offenders now must report after spending 72-hours in the county. *See* SOF ¶28; 2021 Ariz. Sess. Laws ch. 444 § 1.

Looking to the first step of the *Smith* test, nothing in S.B. 1305 evidences the Legislature intended to do anything other than to "enact a regulatory scheme that is civil and nonpunitive." *Smith*, 538 U.S. at 92. None of S.B. 1305's "language or labels indicat[ed] [this] new requirement[] [is] criminal in nature," and it did "not impose any new penalties showing a desire to transform Arizona's regulatory scheme into one designed to punish." *See Mayes*, 2024 WL 4870503 at *4. Instead, the requirement that offenders report within 72-hours after entering and remaining in an Arizona county for 72-hours furthers the legitimate nonpunitive purpose of "provid[ing] law enforcement with 'a valuable tool' in locating sex offenders by giving them 'a current record of the identity and location' of such offenders." *Trujillo*, 248 Ariz. at 478 ¶27.

Turning to *Smith*'s second step, Doe "faces a 'heavy burden' in seeking to reclassify the registration statutes as punitive." *Trujillo*, 248 Ariz. at 479 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). "To satisfy this burden, [Doe] must provide 'the clearest proof' that the registration scheme is 'so punitive either in purpose or effect' that it negates the legislature's intent to classify these statutes as 'civil.'" *Id.* There are five "useful guideposts" courts apply to analyze the effects of a state's registration scheme. *Smith*, 538 U.S. at 97. These factors examine whether the requirements: (1) have been historically regarded as punishment; (2) impose an affirmative restraint or disability; (3) promote the traditional goals of punishment; (4) have a "rational connection to a nonpunitive purpose"; and (5) are excessive with respect to their nonpunitive purpose. *Id.*

When analyzing the first factor in *Smith*, the Supreme Court directly compared founding-era punishments against modern registration laws. *See id.* at 98-99. It is clear when comparing the requirement to register within 72 hours after entering and remaining in an Arizona county for more than 72 hours with founding era punishments like public shaming, humiliation, branding, and whipping that this registration requirement is not

historically regarded as punishment. And other courts have held similarly. *See id.*; *Mayes*, 2024 WL 4870503 at *6; *Trujillo*, 248 Ariz. at 481 ¶39.

Additionally, Arizona's 72-hour reporting requirement does not impose a disability or restraint on Doe as it does not prevent him "from pursuing certain activities, careers, or places to live." *Mayes*, 2024 WL 4870503 at *6. Indeed, it "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100. Doe is free to travel anywhere in Arizona, is not required to seek permission to travel, and is only required to notify the sheriff if he voluntarily chooses to enter and remain in a county for more than 72-hours. Thus, no affirmative disability is imposed. *Id.* at 101; *Mayes*, 2024 WL 4870503 at *7-*8.

Next, the 72-hour reporting requirement does not promote the traditional aims of punishment. "The Supreme Court in Smith downplayed the importance of this factor: 'To hold that the mere presence of a deterrent purpose renders ... sanctions criminal would severely undermine the Government's ability to engage in effective regulation.'" *Clark*, 836 F.3d at 1018 (quoting *Smith*, 538 U.S. at 102). Regardless, the 72-hour reporting requirement is consistent with the important regulatory objective of protecting the public by allowing law enforcement to be aware of the location of an offender. It does not promote the traditional aims of punishment which are generally regarded as deterrence and retribution. *See Mayes*, 2024 WL 4870503 at *8.

Whether the 72-hour reporting requirement has a "rational connection to a nonpunitive purpose is a most significant factor in [the] determination that [its] effects are not punitive." *Smith*, 538 U.S. at 102 (cleaned up). The challenged law "should not be 'deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aim it seeks to advance' …. [r]ather, the focus should be on the broader goals of the legislation at issue." *Mayes*, 2024 WL 4870503 at *9 (quoting *Smith*, 538 U.S. at 103). The 72-hour reporting requirement has a legitimate nonpunitive purpose of public safety which is advance by "provid[ing] law enforcement with 'a valuable tool' in locating sex offenders

by giving them 'a current record of the identity and location of' such offenders." *Trujillo*, 248 Ariz. at 478 ¶27; *Smith*, 538 U.S. at 103.

Finally, "[t]he excessiveness inquiry … is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy," but a determination of "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. As previously stated, Arizona's nonpunitive objective is public safety. Without reporting and notification requirements, like the 72-hour reporting requirement, there is no way for law enforcement, and in some cases the general public, to know the location of an offender. This "increased ability for law enforcement to locate a sex offender … means the [requirement] reasonably relates to public safety." *Mayes*, 2024 WL 4870503 at *10. Consequently, Arizona's registration and reporting requirements are not punitive, and summary judgment should be granted for Defendants.

V. Retroactive Application of Amendments to A.R.S. §§ 13-3821 and 13-3822 Does Not Violate the Ex Post Facto Clause (Count 5)

Finally, summary judgment as to Doe's ex post facto claim should be granted because Arizona's registration requirements are a civil, nonpunitive regulatory scheme and nothing in them is so punitive in its purpose or effect as to transform the Legislature's intent.

Doe only challenges the 90-day and 72-hour reporting requirements as violating the Ex Post Facto Clause, *see* Dkt 1 ¶¶ 110-15, and as explained above, *see* Part IV, *supra*, the 90-day reporting requirement for persons with multiple residences was added in 2012 before Doe committed his crime and is thus not properly subject to an ex post facto claim. Further, because the test for determining if a law constitutes punishment is the same in both an Ex Post Facto Clause and Eighth Amendment claim, *Garland*, 17 F.4th at 948, the requirement that Doe now report certain information after 72 hours instead of 10 days does not violate the Ex Post Facto Clause for all the reasons outlined above, *see* Part IV, *supra*.

CONCLUSION

This Court should grant summary judgment to Defendants on all counts in Doe's Complaint and on their defenses of waiver and issue preclusion.

RESPECTFULLY SUBMITTED this 28th day of April, 2025.

FUSION LAW, PLLC

By: */s/ Brunn (Beau) Roysden III*
Brunn (Beau) W. Roysden III
Katlyn J. Divis
7600 N. 15th St., Suite 150
Phoenix, Arizona 85020
beau@fusion.law
(602) 315-7545

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system as identified on the Notice of Electronic Filing.

/s/ Brunn (Beau) Roysden III
Brunn (Beau) Roysden III