UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MANUEL DELGADO, JASON ALFORD and BASSEL HATOUM, on behalf of themselves and others similarly situated,

Plaintiffs,

v. **CASE NO.: 4:16-cv-00501-RH-CAS**

RICHARD L. SWEARINGEN, COMMISSIONER OF THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT,

Defendant.
_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant, Rick Swearingen, sued in his official capacity as Commissioner of the Florida Department of Law Enforcement ("FDLE"), hereby moves for summary judgment in his favor. Attached in support are the Amended Declarations of Mary Coffee ("Am. Coffee Decl.") and Chad Hoffman ("Am. Hoffman Decl.").

Plaintiffs, registered sexual offenders, seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 with respect to recently-amended statutory provisions

that they collectively refer to as "the Internet identifier provision." The First Verified Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") raises two counts. The first count alleges facial and as applied violations of the First Amendment, and the second count alleges facial and as applied violations of the Fourteenth Amendment's Due Process Clause.

As shown below in the Incorporated Memorandum of Law, summary judgment should be entered in Defendant's favor because: (1) the challenged provision is not overly broad and does not prevent sexual offenders from engaging in any speech whatsoever; (2) the provision does not objectively chill sexual offenders' online speech or burden their online anonymity; (3) the provision is not unconstitutionally vague; and (4) the threat of any injury to Plaintiffs is so subjective and farfetched as to render them without standing to pursue their claims.

Statement of Facts

Plaintiffs challenge the 2017 legislative amendments to what they collectively refer to as Florida's "Internet identifier provision," found in subsections 943.0435(4)(e)(1) and 775.21(6)(g)5.a, Florida Statutes, which require sexual offenders and sexual predators to register their email addresses and Internet identifiers with FDLE within 48 hours after their use. DE 67, ¶ 26. The term "Internet identifier provision" is similarly used herein.

Sexual offenders and sexual predators are required to register and then update specified types of information with their local sheriff's office. Fla. Stat. §§ 775.21(6)(a), 943.0435(2). Such information includes their names, dates of birth, social security numbers, tattoos or other identifying marks, addresses, vehicle descriptions, employment, telephone numbers, Internet identifiers, email addresses, and descriptions of their crimes. Fla. Stat. §§ 775.21(6)(a)1., 943.0435(2).

Internet identifiers and email addresses may be provided either online with FDLE or in person at the registrant's local sheriff's office. Fla. Stat. §§ 943.0435(4)(e)(1), 775.21(6)(g)5.a. Under current Florida law, all email addresses and Internet identifiers "and each corresponding website or application software name" must be registered within 48 hours after its use. *Id*.

The term "Internet identifier" is defined to mean "any designation, moniker, screen name, username, or other name used for self-identification to send or receive social Internet communication." Fla. Stat. § 775.21(2)(j). Thus, the term keys on the sending or receiving of social Internet communications. *See* Am. Coffee Decl., ¶¶ 16, 17. The term expressly excludes "date of birth, social security number, personal identification number (PIN), or password." Fla. Stat. § 775.21(2)(j).

The term "social Internet communication" is specifically defined to mean:

> any communication through a commercial networking website as defined in s. 943.0437, or application software. The term does not include any of the following:
>
> 1. Communication for which the primary purpose is the

> facilitation of commercial transactions involving goods or services;
>
> 2. Communication on an Internet website for which the primary purpose of the website is the dissemination of news; or
>
> 3. Communication with a governmental entity.

Fla. Stat. § 775.21(2)(m). Thus, the provision in defining "social Internet communication" looks to two means of communication: (1) through a commercial networking website or (2) through application software. For clarification purposes, each of these terms is specifically defined.

Section 943.0437(1), Florida Statutes, defines "commercial networking website" to mean

> a commercially operated Internet website that allows users to create web pages or profiles that provide information about themselves and are available publicly to other users and that offers a mechanism for communication with other users, such as a forum, chat room, electronic mail, or instant messenger.

Id. Thus, the term's focus is on methods for social interactions among users.

Likewise, the term "application software" is defined in section 775.21(2)(m), Florida Statutes, to mean

> any computer program designed to run a mobile device such as a smartphone or tablet computer, that allows users to create web pages or profiles that provide information about themselves and are available publicly to other users, and that offers a mechanism for communication with others through a forum, a chatroom, electronic mail, or an instant messenger.

Id. As with "commercial networking website," the focus of the term "application software" is on methods for social interaction with others.

Consistently, the need to register Internet identifiers would not arise if the website or application software used by the sexual offender does not allow users to create web pages or profiles. This follows because the term "social Internet communication" applies only to "commercial social networking websites" and "application software," as noted, and because the definition of each of these terms specifies that, to trigger the registration requirement, the website or application software must "allow[] users to create web pages or profiles that provide information about themselves ….." Fla. Stat. §§ 775.21(2)(m), 943.0437(1). Thus, if a sexual offender is only allowed to post comments, and cannot also create a web page or profile, he need not register the Internet identifier that he used to post his comment.

Significantly, Florida's new Internet identifier provision does not call for the divulgence of passwords or any other means that would enable FDLE or the public to access the contents of sexual offenders' private communications. *See* Fla. Stat. § 775.21(2)(j); Am. Coffee Decl., ¶ 32.

Because the statutory provision keys on social interactions, no registration of Internet identifiers is required if the visited website's primary purpose is the dissemination of news, or if the primary purpose of the user's communication is a commercial transaction involving goods or services, or if the communication is with a governmental entity. *See* Fla Stat. § 775.21(2)(m).

The Internet identifier requirement was implemented to serve multiple

purposes, which include use as a safety tool for the public in identifying sexual offenders they may be in communication with via online or similar electronic means, and use as an important investigative tool to help FDLE quickly identify individuals who may have been in contact with a missing child or other vulnerable person. Am. Coffee Decl., ¶ 12; Am. Hoffman Decl., ¶¶ 12-27.

Individuals who prey on children are turning to the Internet to commit their sexual offenses. Am. Coffee Decl., ¶ 28 & Ex. B. FDLE is aware of numerous examples of sexual offense convictions of registered sexual offenders and sexual predators who completed their sentences for non-Internet related sexual offenses, but then used the Internet to commit new sexual crimes. *Id.*; Am. Hoffman Decl., ¶ 22.

The names of sexual offenders and sexual predators and their sexual crimes are in the registry's data bank. Am. Coffee Decl., ¶¶ 8, 10. A person can go to the FDLE website and input a name to determine if that person is a registered sexual offender or sexual predator, information about his sexual crime(s), and his registered address. But the website does not advise him of the name of the registrant. Am. Coffee Decl., ¶ 33. While the registrant's name could be obtained via a public records request, no such request has been made under any iteration of the Internet identifier provision. Am. Coffee Decl., ¶¶ 35, 36.

The online registration process of Internet identifiers is not time-consuming. Registered sexual offenders or predators can easily bookmark FDLE's registration page, and then copy and paste pertinent Internet identifiers for registration purposes, to save time. An FDLE employee registered an Internet identifier in less than one minute after she accessed the FDLE website's registration page. Am. Coffee Decl., ¶ 30. Once an Internet identifier has been registered, it need not be registered again. *Id.* at ¶ 31.

Incorporated Memorandum of Law

I. SUMMARY JUDGMENT STANDARDS OF REVIEW.

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 (11th Cir. 2009). The moving party can show entitlement to judgment as a matter of law where depositions, answers to interrogatories, admissions, and affidavits show no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Id*. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986);

Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial on the dispositive matters for which it carries the burden of proof. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The party opposing summary judgment must rely on more than conclusory statements or allegations unsupported by specific facts. *Evers v. Gen Motors Corp*., 770 F.2d 984, 986 (11th Cir. 1985) (internal citation omitted).

II. THE IMPORTANCE OF CONTEXT IN INTERPRETING STATUTES.

When a statute's constitutionality is questioned, the reviewing court is obligated to interpret the law, if possible, to avoid the constitutional problem. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Skilling v. United States*, 561 U.S. 358, 406 (2010) (internal quotation omitted) (emphasis omitted).

In *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010), the Eleventh Circuit, in interpreting a criminal statute, stated:

> To determine the meaning of a statute, we look first to the text of the statute itself. If the statutory text is unambiguous, the statute should be enforced as written, and no need exists for further inquiry. "[W]e should not interpret a statute in a manner inconsistent with the plain language of the statute, unless doing so would lead to an absurd result." If language is ambiguous, legislative history can be helpful to determine

> congressional intent. "**Statutory construction** … **is a holistic endeavor**," and **we cannot read a single word or provision of the statute in isolation**.

Id. at 1352 (emphasis added; citations omitted). There, the Court, in assessing whether the broad definition of "sex offense" in the Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16901 *et seq.*, ("SORNA") excludes a violation of 18 U.S.C. § 1470, held that **"[defendant's] reading of the definition** of sex offense in SORNA **is unduly narrow**. **Taken as a whole**, the statute does not suggest an intent to exclude certain offenses but rather to expand the scope of offenses that meet the statutory criteria." *Id.* (emphasis added).

Similarly, in *United States v. Slaughter*, 708 F.3d 1208 (11th Cir. 2013), the Eleventh Circuit, in reviewing a conviction under a challenged statute, stated:

> When interpreting a statute, the starting point is the language of the statute itself. In conducting this interpretation, we analyze the language of the provision at issue, **the specific context in which that language is used**, **and the broader context of the statute as a whole**. … But if having conducted this examination "an ambiguity in the language of the statute [remains] …, then we look to the legislative history for additional guidance as to Congress's intent."

Id. at 1214 (emphasis added; citations omitted). The Court, after examining the specific context of the challenged language, then "turn[ed] to the broader context provided by other sections of the statute for further guidance[,]" *id.* at 1215, and concluded that, "[v]iewed together, the text, structure and purpose of the statute make plain the meaning of [the challenged statute's] text…[,]" *id.* at 1216.

III. THE FLORIDA STATUTES AT ISSUE AND THEIR BROADER CONTEXT.

The Florida Legislature, in enacting the requirement that sexual offenders register with FDLE, set down in statute:

> 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.

Fla. Stat. § 943.0435(12).

Thus, Florida, in the exercise of its police power, has determined that protecting the public from sexual offenders is a "paramount" government interest, and that an important way of providing that protection is through releasing information concerning sexual offenders to members of the public who request it.

Consistent with these considerations, Florida has established a public registry of sexual offenders, administered by FDLE. *See* Fla. Stat. § 943.0435. Pursuant to section 943.0435, sexual offenders have numerous reporting obligations, so that the FDLE and law enforcement can keep track of their whereabouts, their current

physical appearance, and more.

In addition, the Legislature has passed many other statutes addressing myriad concerns regarding sexual offenders and the need to protect the public from them. The General Index to the 2016 Florida Statutes contains some seven columns of references to such statutory provisions, spread over four pages.

Included among those statutory provisions are requirements that registered sexual offenders provide Internet identifiers and email addresses to FDLE.

The current version of the Internet identifier provision, which went into effect on June 27, 2017, requires that all registrants "register all electronic mail addresses and Internet identifiers, and each Internet identifier's corresponding website homepage or application software name, with the department through the department's online system or in person at the sheriff's office within 48 hours after using such electronic mail addresses and Internet identifiers." §§ Fla. Stat. 943.0435(4)(e)(1), 775.21(6)(g)5.a.

The definition is designed to be as comprehensive, informative, and effective as possible in light of current and evolving technology and terms. But the definition expressly excludes passwords and other means that would enable FDLE or the public to access the contents of sexual offenders' private communications. The definition also excludes personal information such as date of birth, Social Security number, and PINs.

The Internet identifier provision was implemented to serve multiple purposes, which include "use as a safety tool for the public in identifying sexual offenders they may be in communication with via online or similar electronic means, and also as an important investigative tool to help quickly identify individuals who may have been in contact with a missing child or other vulnerable persons." Am. Coffee Decl., ¶ 12. Indeed, the requirement to register Internet identifiers has enabled FDLE to investigate and solve crimes involving the use of social media on the Internet, Am. Hoffman Decl., ¶ 19, and has proven to be "an essential tool in aiding in the investigation of many sexually motivated crimes, specifically solicitation of a minor through on-line communication, missing persons cases where the missing person was communicating with an individual on-line, and child pornography which has been emailed to or by an internet identifier registered to a sex offender." *Id*. at ¶ 21.

The context of the registration provisions makes clear that they relate solely to actual online communications by a registered sexual offender with another person. Thus, visiting or browsing would not be included. Moreover, their context—and their very description as "Internet identifiers"—clarifies that it is only identifiers which the public would see during an online communication with a registered sexual offender that must be registered.

IV. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 1 (FIRST AMENDMENT FREE SPEECH CLAIM).

A. Intermediate standard of scrutiny should apply.

Plaintiffs contend that the Internet identifier provision is a content-based restriction that must withstand strict scrutiny review. DE 67, ¶ 85. To the contrary, pertinent case law firmly establishes that sexual offender registration requirements are content-neutral and are subject to no more than intermediate scrutiny.

The Supreme Court recently defined content-based laws as those "that target speech based on its communicative content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). If a law is triggered only because a certain topic is discussed or a particular idea is expressed, the law targets speech. *See id*. at 2227. As the Court noted in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986), a measure designed not to "suppress the expression of unpopular views" but rather to control the "secondary" effects of speech will generally be deemed content-neutral. The main inquiry "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). If a content-neutral regulation imposes only an incidental burden on speech, intermediate scrutiny will apply instead of strict scrutiny because the restriction "poses a less substantial risk of certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994). A regulation on time, place, or manner is subject to intermediate scrutiny. *Ward*, 491

U.S. at 791.

Applying intermediate review here is consistent with rulings in several cases dealing with challenges to various Internet identifier provisions enacted in other States. *See, e.g.: Doe v. Shurtleff*, 628 F.3d 1217, 1223 (10th Cir. 2010); *Doe v. Harris*, 772 F.3d 563, 576 (9th Cir. 2014); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1093, 1107-08 (D. Neb. 2012); *White v. Baker*, 696 F. Supp. 2d 1289, 1307-08 (N.D. Ga. 2012); *People v. Minnis*, 67 N.E.3d 276, 288 (Ill. 2016). Intermediate scrutiny also was applied to laws that go so far as to bar sexual offenders from accessing certain social media websites. *See, e.g., Doe v. Marion Cty.*, 705 F.3d 694, 698 (7th Cir. 2013); *cf. Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (finding that the ban on certain social media website access to registrants was unconstitutional under the intermediate scrutiny standard, while not ruling on which standard controlled in that case).

In enacting the Internet identifier provision, the Florida Legislature has not suggested any preferential treatment or disagreement with respect to any particular content of speech. That sexual offenders must register their Internet identifiers has nothing to do with restricting the content of any speech on their part. The fact that speech which is primarily commercial need not be registered does not indicate a content-based preference or disagreement that restricts "social" speech. Messages are not screened and no type of speech is prohibited, unlike the laws challenged in

Doe v. Marion Cty. or *Packingham v. North Carolina.* Florida's Internet identifier provision merely regulates the "place" and "manner" of speech, to wit, the Internet and email. In so doing, it places no limitation on what a registrant may say, or to whom, when, or where he may say it.

B. The Internet Identifier Provision Is Narrowly Tailored and Leaves Ample Alternative Channels of Communication.

Under intermediate scrutiny, the challenged law must "be narrowly tailored to serve a significant governmental interest" and also "leave open ample alternative channels for communication of information." *Ward*, 491 U.S. at 791 (internal quotation omitted). It does not matter whether the governmental interest can be served by a less-restrictive alternative. *Id*. at 798. "To satisfy this standard, a regulation need not be the least-restrictive means of advancing the Government's interests." *Turner Broad. Sys. Inc.*, 512 U.S at 622.

1. The Internet identifier provision is not overly broad and it leaves open ample alternative channels of communication.

States have some, albeit limited, ability to regulate speech. "[T]he right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). A law is unconstitutionally overbroad under the First Amendment if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation omitted).

A State has a substantial government interest in reducing crime to protect the public. *See City of Los Angeles v. Alameda Brooks, Inc.*, 535 U.S. 425, 435 (2002). Florida's requirement for registered sex offenders to provide Internet identifiers and make that information available to the public and law enforcement serves substantial government interests, as noted *supra*. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring) (citing *McKune v. Lile*, 536 U.S. 24, 33 (2002) (plurality opinion)).

The requirements for sexual offenders to register their Internet identifiers and email addresses are analogous to other registration requirements for photographs, telephone numbers, and physical addresses in subsections 943.0435(2)(b) and 775.21(6)(a)1., Florida Statutes. The Internet identifier provision "updates" the types of communication possibilities that a sexual offender may have, including his virtual identities using aliases, and also keeps astride of developments in mainstream technologies that a sexual offender may use to facilitate sexual offenses.

The Internet identifier provision is not constitutionally overbroad while achieving its purposes. It is limited to requiring registration of Internet identifiers for when a sexual offender engages in actual online communications, not passive uses such as browsing, and it does not ban any type of online uses. It also is limited to social Internet communications. And the 2017 law specifically excludes

communications with a governmental entity, or where the communication's primary purpose is to facilitate a commercial transaction for goods or services, or where the website is for the dissemination of news. Fla. Stat. § 775.21(2)(m).

As for the communications that require Internet identifier registration, there is only a minimal, secondary impact—if any—on free speech, and none in advance of engaging in speech. The FDLE website allows registrants easily to register their Internet identifiers. The added online step of registering with FDLE takes less than a minute. If a sexual offender uses that same identifier again at a registered corresponding online website or application, he need not register it again. And under the 2017 law, the registration can be done up to 48 hours after the Internet identifier or email address is first used. A sexual offender need not interrupt his train of thought or online session in order to register.

Moreover, the discovery that a registered sexual offender's Internet identifier is associated with a person listed on the sex offender registry causes no harm to the person. His prior conviction already is a matter of public record. *See Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996) (internal citations omitted). Plaintiffs' sexual offenses subject them to inclusion in the sex offender registry. *See* Fla. Stat. §943.0435(1)(h). The public is entitled to know if a person is in the registry. *See* Fla. Stat. § 943.043.

The claim that sexual offenders are deterred from speaking online because of

the fear of exposure of their identities is too speculative to support Plaintiffs' First Amendment challenge. The Amended Complaint is devoid of allegations of a single instance where a sexual offender's identity was exposed through the registration of an Internet identifier or email address. If a sexual offender wants his online voice to be anonymous, he need not use his real name in his Internet identifier or email address. He can choose to be anonymous while in contact with his online audience just as he can choose to be anonymous when speaking with another person on the telephone or in person, even though the registry includes his current photograph and telephone number.

Moreover, according to FDLE, nobody has requested disclosure of the identity behind a registered Internet identifier or email address. FDLE has taken steps to protect Plaintiffs' right to anonymous speech. No red flag pops up reading "registered sexual offender" when a sexual offender uses the Internet. In the context of a posted comment on a website such as that of a newspaper, it is farfetched to suppose that a viewer would even bother to visit FDLE's website (as compared to any other State's comparable website) to check whether the Internet identifiers of the comment's poster are associated with a registered sexual offender listed on Florida's registry.

The FDLE website is set up to confirm only whether an entered email address or Internet identifier belongs to a registered sexual offender. If the inquirer wishes

to find out the name of that sexual offender, she must take the extra affirmative step of submitting a public records request. But that has not happened. Thus, as a practical matter, the potential for a sexual offender's online anonymity being revealed is vanishingly small. Plaintiffs have provided no evidence that any of their Internet identifier registrations ever led another person to seek out information to ascertain any of their identities. As discussed *infra*, this highly unlikely scenario does not render the Internet identifier provision unconstitutionally "chilling" of sexual offenders' right to anonymous speech.

The slight risk of an anonymous speaker's identity being revealed and the very short amount of time that it takes to register online are minimal considerations, and both are substantially outweighed by the benefits of Internet identifier registration, as shown in Defendant's supporting declarations. Those benefits include affording a parent the opportunity to ascertain whether his child is engaged in online communications with a person who is a registered sexual offender. The parent need only input that person's Internet identifier in the FDLE website. If a positive result is obtained, the parent may then take steps to terminate future such communications in order to protect the child.

The same peace-of-mind benefit from avoiding unwanted Internet contacts can be gained by adults as well as children. Online dating sites are commonplace today. If a person is communicating with someone she intends to engage with

socially in a live setting, she can utilize the FDLE website to determine whether the "stranger" is a registered sexual offender.

Sexual offenders also have ample and unrestricted alternative channels for communications under the challenged statutes. The Internet identifier provisions do not prohibit any Internet usage. Unlike some States than ban sexual offenders from using certain Internet formats, Florida does not foreclose sexual offenders from full use of the Internet. Over-inclusiveness was a constitutional flaw in an Indiana law that prohibited certain sex offenders from "knowingly or intentionally us[ing]: a social networking web site" or "an instant messaging or chat room program" that "the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program." *Doe v. Marion Cty.*, 705 F.3d 694, 699-700 (7th Cir. 2013). The North Carolina law at issue in *Packingham* prohibited sexual offenders from accessing commercial social networking websites that they know allow minors to be members, or from creating or maintaining their own webpages on commercial social media networking websites. *Packingham*, 137 S. Ct. at 1731. In Florida, a registered sexual offender is not barred from any type of Internet use. He only must register his Internet identifier or email address within 48 hours after its first use for social interaction.

Indeed, the 2017 registration laws do not even require registration in connection with all online usages. There are exceptions for communications with a

governmental entity, where the communication's primary purpose is a commercial transaction, and for communication on websites for which the primary purpose is the dissemination of news.

Sexual offenders also still have use of non-Internet modes of social communication that are not subject to the registration requirements. The Internet identifier provision does not apply to communications that are conveyed in person, in writing, or by telephone.

2. The Internet identifier provision does not unconstitutionally chill online speech or burden sexual offenders' online anonymity.

Plaintiffs challenge laws that merely require the registration of email addresses and Internet identifiers. The collection of that information does not violate the First Amendment. Although the Supreme Court had found instances where speech was chilled on other grounds, it has held that no chilling effect "arise[s] merely from the individual's knowledge that a governmental agency was engaged in certain [information-gathering] activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

And even though a sexual offender has a First Amendment interest in not being compelled to disclose his real identity to his audience, he has no First

Amendment right to compel the State to conceal his identity from the public. The State must balance the compelling interests of disclosure to the public with the sexual offender's desire to remain anonymous. *See Church of Am. Knights of the Ku Klux Kln v. Kirk*, 356. F.3d 197, 209 (2d Cir. 2004) (finding an anti-mask law not unconstitutional even if it deters Ku Klux Klan members from exercising their First Amendment rights through participating in rallies because "the individual's right to speech must always be balanced against the state's interest in safety.").

The Internet identifier provision's registration requirement also does not unduly burden or chill the exercise of free speech. Plaintiffs have not shown that the act of registering takes an onerous amount of time or effort. The mere requirement for a sexual offender to register Internet identifiers does not block his access to that Internet channel. It merely adds a simple step that must be taken only the first time that an identifier is used. The act of inputting that new information took an FDLE employee just eight seconds. Even that minimal duration could have been reduced by copying and pasting the Internet identifier when registering it, which was not done by Ms. Coffee during her timing test. The burden of initially registering an Internet identifier is minimal, and because it is not required until 48 hours later it does not even amount to a minor "speed bump" on the road to engaging in online communications. It bears repeating that once an Internet identifier has been furnished to FDLE, it need not be furnished again.

The Internet identifier registration obligation also does not have a chilling effect on anonymous online speech. A registered sexual offender is not forced to reveal his identity to those he communicates with before using the Internet. He only must register the identifiers, and he does that with FDLE, not his audience. When he registers with FDLE, he does not also register the content of his intended expression. As shown above, when a sexual offender registers his Internet identifiers, that act of registration does not make it likely that his identity will be revealed. While the possibility exists that a public records request could lead to discovery of his identity as the furnisher of Internet identifiers to FDLE, that scenario has not happened, and there is no reason to suppose that it ever would. In the real world, the requirement that Internet identifiers be provided to FDLE simply does not give rise a reasonable fear that a sexual offender's online anonymity would thereby be lost. Here, Plaintiffs' claimed fears of being chilled by the 2017 provision are irrational, lack objective basis, and fall far short of the level of imminent threat that has led to holdings of unconstitutionality (as shown *infra* in connection with standing).

C. <u>The Internet identifier provision is not unconstitutionally vague</u>.

The Amended Complaint alleges five statutory terms of the challenged Internet identifier provision to be unconstitutionally vague. As shown below in Argument V, adopted herein, the meaning of those terms is readily ascertainable

by a registered sexual offender of ordinary intelligence in determining his registration obligations in connection with his use of the Internet. As a consequence, the provision is not unconstitutionally vague.

V. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON COUNT 2 (DUE PROCESS VAGUENESS CLAIM).

Count 2 contends that the Internet identifier provision violates the Due Process Clause because it is void for vagueness on its face and as applied to Plaintiffs. DE 67, pp. 38-39. The Amended Complaint specifically alleges that the following five terms in the current laws are unconstitutionally vague: "primary purpose" (DE 67, ¶¶ 35, 64); "profile" (DE 67, ¶¶ 36, 80); "commercially operated social networking website" (DE 67, ¶ 36); "commercially operated" (DE 67, ¶¶ 35, 80); and "communication" (DE 67, ¶ 80). The Amended Complaint does not identify any other terms that Plaintiffs contend to be vague. No vagueness allegations were leveled against the definition of "email address" or the requirement to register email addresses within 48 hours of usage.

A. The Void for Vagueness Doctrine.

"The degree of vagueness that the Constitution tolerates ... depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The failure to register an Internet identifier or email address is a third-degree felony. Fla. Stat. §§ 943.0435(9)(a) & (14)-+-(c)(4), 775.21(10)(a). Under the Due Process Clause, "the void-for-vagueness doctrine

requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted); *see also United States v. Tobin,* 676 F.3d 1264, 1278 (11th Cir. 2012). "Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. Duran,* 596 F.3d 1283, 1290 (11th Cir. 2010) (quoting *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (internal quotation marks omitted)).

The void for vagueness doctrine does not require that a penal statute envision all possible hypotheticals and "close cases." *Doe v. Nebraska*, 898 F. Supp. 2d at 1123 (citing *United States v. Williams*, 553 U.S. 293, 305-06 (2008)). Close cases can be envisioned under any statute, and the mere fact that a close case can be imagined is not a basis to strike a statute for vagueness. *Williams*, 553 U.S. at 305-06.

B. <u>The Internet identifier provision is not unconstitutionally vague</u>.

As the attached declarations of Mary Coffee and Chad Hoffman show, ordinary persons are quite capable of understanding the challenged terms.

As noted above, Plaintiffs contend that five terms used in the Internet identifier provision are vague and confusing as to what needs to be registered. As

shown below, these claims of uncertainty are exaggerated and not well-founded.

Specifically, the vagueness allegations focus on the definition of "social Internet communication" and terms associated with that definition. The definition reads:

> "Social Internet communication" means any communication through a commercial social networking website as defined in § 943.0437, or application software. The term does not include any of the following:
>
> 1. Communication for which the primary purpose is the facilitation of commercial transactions involving goods or services;
> 2. Communication on an Internet website for which the primary purpose of the website is the dissemination of news; or
> 3. Communication with a governmental entity.

Fla. Stat. § 775.21(2)(m); *see also* Fla. Stat. § 943.0435(1)(e) (incorporating the definition from §775.21).

The referenced statutory definition of "commercial social networking website" provides:

> For the purpose of this section, the term "commercial social networking website" means a commercially operated Internet website that allows users to create web pages or profiles that provide information about themselves and are available publicly or to other users and that offers a mechanism for communication with other users, such as a forum, chat room, electronic mail, or instant messenger.

Fla. Stat. §943.0437(1).

The five claims of vagueness concern these definitions. Viewed in context,

the definitions easily pass muster against Plaintiffs' assault.

Primary purpose. The term "primary purpose," as used in two of the registration exceptions, is a lay term that it readily understood by the average person. An Arizona appellate court aptly summarized its constitutional clarity:

> The word primary is a nontechnical word that is understood by the ordinary person. See Brennan v. Harrison County, Mississippi, 505 F.2d 901, 903 (5th Cir. 1975) (there is no legal obscurity in the meaning of the words "primary" or "primarily"). The phrase "primary purpose" is not scientifically precise. Nevertheless, it has been held that there is no legal obscurity in the meaning of the words "primary" or "primarily". Brennan v. Harrison County, Mississippi, 505 F.2d 901, 903 (5th Cir. 1975). In various contexts "primarily" has been held to mean "of first importance," "principally," "essentially," or "fundamentally." See also Webster's Third New International Dictionary of the English Language (1969). "Primary purpose" has been defined as "'that which is first in intention; which is fundamental.'" Pacific Northwest Alloys, Inc. v. State, 49 Wash.2d 702, 705, 306 P.2d 197, 199 (1957), quoting Black's Law Dictionary (4th ed. 1951).

State v. Jacobson, 588 P.2d 358, 364 (Ariz. Ct. App. 1978) (other portions *overruled by Levitz v. State*, 613 P.2d 1259, 1261 (Ariz. 1980)).

As for Plaintiffs' claim that they cannot tell "how or from whose perspective it will be determined whether a website serves the purposes," (DE 67, ¶ 35), a plain reading shows that the term "primary purpose" used in the news dissemination exception refers to the news source's website: "Communication on an Internet website for which **the primary purpose of the website** is the dissemination of news." Fla. Stat. § 775.21(2)(m)(2) (emphasis added).

In contrast, in the commercial transaction exception, which has a slightly different sentence structure, the plain meaning of the term "primary purpose" is that the **registrant**'s purpose, not the website's, is determinative of whether there is a need to register: "1. Communication for which the primary purpose is the facilitation of commercial transactions involving goods or services." Fla. Stat. § 775.21(2)(m)(1), Fla Stat. Thus, if a registrant sends or receives an email message to buy or sell an item listed in an online ad, the registrant need not register his email address. But if he sends or receives an email for a listing in a personal ad, he must register his email address.

Communication. The word "communication" is not a legalistic or technical term. It is a commonly used word that is understood by the ordinary person and needs no statutory definition. In its count noun usage, a "communication" has been defined as a letter or message containing information or news. English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/communication (last visited Sept. 15, 2017).

In the context of the Internet identifier provision, the term obviously refers to email or online messages. The definition of Internet identifier clarifies that the word "communication" used in the various registration statutes refers to whatever designation a registrant uses to send or receive social messages:

> "Internet identifier" means any designation, moniker, screen name, username, or other name **used for self-identification to send or**

> **receive social Internet communication**. Internet identifier does not include a date of birth, social security number, personal identification number (PIN), or password. A sexual offender's or sexual predator's use of an Internet identifier that discloses his or her date of birth, social security number, personal identification number (PIN), password, or other information that would reveal the identity of the sexual offender or sexual predator waives the disclosure exemption in this paragraph for such personal information.

Fla. Stat. §775.21(2)(j), Fla. Stat. (emphasis added).

If the registrant uses a website to serve as a conduit to communicate with others for a nonexempt purpose, he would register whatever Internet identifier he uses to refer to himself when communicating through the website, as well as that website's homepage or the application software name. Different persons can use the same Internet identifier on different websites, so it is important to pair an Internet identifier with its contextual website. Hoffman Decl., ¶ 17. If the registrant communicates with the other person via an email address that is first sent to the website which will disguise his email address and then forward it to the other person, both the disguised email address revealed to the intended audience and the website must be registered.

There is a similar need for a registrant to match his Internet identifier with its application software. The term "application software" is defined as meaning:

> … any computer program designed to run on a mobile device such as a smartphone or tablet computer, that allows users to create web pages or profiles that provide information about themselves and are available publicly or to other users, and that offers a mechanism for

> communication with other users through a forum, a chatroom, electronic mail, or an instant messenger.

Fla. Stat. §775.21(2)(m).

Profile. The term "profile" is self-defined as being information that a registrant provides about himself. Both statutory definitions that use the term "profiles" refer to "profiles that provide information about themselves." *See* Fla. Stat. §§ 943.0437(1), 775.21(2)(m). Such information may include a photograph and/or textual description of the registrant (or of his fictional "catfish" online persona). The definition does not set a quantitative information minimum or attempt a laundry list description of the numerous ways a person can describe himself online.[1]

Commercially operated. The term "commercially operated" is understandable to the ordinary person. A website is commercially operated if it is operated by a person, business, or organization that derives revenue from membership fees, advertising, or other sources related to the operation of the website. The definition does not exclude a non-profit organization simply because of its legal classification. If a nonprofit solicits or receives funds online, its website would be considered to be commercially operated.

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[1] *Cf. Packingham v. North Carolina*, an Internet identifier action in which Justice Alito, concurring, defines a "personal profile" as "a short description of the user," 137 S. Ct. at 1741, and in support references various dictionaries, *id.* at n.4.

Commercially operated social networking website. As noted above, section 943.0437(1) defines "commercial social networking website" to mean:

> a commercially operated Internet website that allows users to create web pages or profiles that provide information about themselves and are available publicly or to other users and that offers a mechanism for communication with other users, such as a forum, chat room, electronic mail, or instant messenger.

See also Am. Coffee Decl., ¶ 22. The salient terms included in this definition are readily understandable, as shown above. Taken together, the elements of this provision make it easy to comprehend and follow. Indeed, one would be hard-pressed to formulate a clearer and simpler definition.

In sum, it is apparent that Plaintiffs, having enjoyed some degree of success (at the preliminary injunction stage) in assailing the 2016 version of Florida's Internet identifier provision on the grounds of vagueness, have elected to regurgitate the same claims against the 2017 version, oblivious to the reality that the Florida Legislature has cured any and all prior deficiencies.

VI. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS.

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To demonstrate "the irreducible constitutional minimum of standing," a plaintiff must

show, *inter alia*, an "injury in fact"—i.e., one that is "concrete and particularized" and "actual or imminent," rather than simply "conjectural or hypothetical." *Id.*

In *Wilson v. State Bar of Georgia*, 132 F.3d 1422 (11th Cir. 1998), the Eleventh Circuit, affirming summary judgment dismissal of a pre-enforcement First Amendment and Due Process void-for-vagueness challenge to state bar rules, stated:

> "… A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable." *New Hampshire Right to Life [Political Action Comm.*, 99 F.3d 8, 14 (1st Cir. 1996)]; *see also ACLU [v. Florida Bar*, 999 F.2d 1486, 1492 & n.13 (11th Cir. 1993)]. While we agree with the First Circuit's admonition that the credible threat of prosecution standard "is quite forgiving," *New Hampshire Right to Life*, 99 F. 3d at 14, we hold that the disbarred attorneys have failed to meet it in this case.

Wilson, 132 F.3d at 1428. There, while the Georgia Bar had enacted rules that broadly restricted disbarred attorneys from any contact with certain categories of persons, the rules were amended to clarify that the restrictions pertained only to legal, not social, interactions. Consequently, the Eleventh Circuit held:

> In sum, **the disbarred attorneys' asserted belief that they have to forego the constitutionally protected speech** they pose in order to avoid sanctions under the amendments **is not objectively reasonable**. Accordingly, they have failed to show injury, and thus they lack standing to bring this anticipatory challenge.

Id. at 1429 (emphasis added). *See also Laird v. Tatum*, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm…."); *Doe v. Pryor*,

344 F.3d 1282, 1287 (11th Cir. 2003) ("The plaintiffs have alleged nothing more than a 'subjective fear that [they] may be prosecuted for engaging in expressive activity,' which we have held is not enough. … The complaint contains no allegations which will support a conclusion that their fear is objectively reasonable, and a fear of prosecution 'will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable.'") (citing *Wilson*).

In the case at bar, none of the Plaintiffs alleges that he has experienced harassment, retaliation, or threats of physical violence as a result of having registered an Internet identifier or email address. DE 67, *passim*.

Plaintiffs do not argue that they intend to violate Florida's 2017 Internet identifier provision. Rather, they contend that it is either so imprecise that they cannot obey it, or so broad that they should not obey it, or too threatening to their anonymity, and consequently they must engage in self-censorship by avoiding Internet usage. While this Court initially agreed, as to the 2016 iteration, that Plaintiffs' claims were likely to succeed, the same cannot be said of the 2017 version, for the reasons shown above. Like the Georgia Bar in *Wilson*, the Florida Legislature has changed the applicable provisions in significant ways that render them easily comprehensible and sufficiently narrow.

All that remains, then, is the contention that there is somehow too great a risk that someone on the other end of an online communication with a Plaintiff would go

to the trouble of: (1) ascertaining which State the anonymous Plaintiff resides in (likely a daunting if not impossible task); (2) then, having somehow determined that the anonymous Plaintiff resides in Florida, contact FDLE to ascertain whether the anonymous Plaintiff's Internet identifier is associated with someone on Florida's sex offender registry; and (3) then be savvy and motivated enough to invoke Florida's public records law to request that the identity of the Plaintiff be revealed. Not surprisingly, this scenario has never gone from the purely hypothetical to reality, nor is it likely that it ever will. Any fear on Plaintiffs' part that their online anonymity would be placed at risk under Florida's 2017 Internet identifier provision is not objectively reasonable.

Conclusion

For all the reasons stated above, Defendant respectfully requests that this Court enter summary judgment in his favor as to all claims.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I HEREBY CERTIFY that the foregoing, exclusive of caption, signature block, and certifications, contains 7,983 words.

/s/ Karen A. Brodeen
Karen A. Brodeen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the court using CM/ECF which sent conformed copies to Beth Weitzner, Esq. at beth.weitzner@att.net, Valerie Jonas, Esq., at valeriejonas77@gmail.com, Weitzner & Jonas, PA, and to Dante Pasquale Trevisani, Esq., at dtrevisani@floridajusticeinstitute.org, Erica Selig, Esq., at eselig@floridajusticeinstitute.org, and Randall Challen Berg, Esq., at rberg@floridajusticeinstitute.org, Florida Justice Institute, Inc., on this 18th day of September, 2017.

/s/ Karen A. Brodeen
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