UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:18-CV-24145-KMW

JOHN DOES, Nos. 1-5,

Plaintiffs,

vs.

RICHARD L. SWEARINGEN, in his
Official capacity as Commissioner of
the Florida Department of Law Enforcement,

Defendant.
_______________________________________/

DEFENDANT'S MOTION TO DISMISS

Defendant RICHARD L. SWEARINGEN, in his official capacity as Commissioner for the Florida Department of Law Enforcement ("FDLE"), by and through his undersigned counsel, files his Motion to Dismiss Plaintiffs' Complaint and in support thereof states as follows:

1. Plaintiffs have all been adjudicated sex offenders and required to register under Fla. Stat. § 943.0435. They filed this 42 U.S.C. § 1983 action against FDLE, which is responsible for administering the statute.[1]

2. Among other things, Plaintiffs allege that having to register as sex offenders has caused neighbors to harass them, loved ones to shun them and employers to reject them. Although these alleged injuries derive not from any provision of the statute itself but from the independent actions of third parties, Plaintiffs nonetheless challenge the statute as unconstitutional. They allege the statute's registration requirements violate the *ex post facto* clause, the Eighth Amendment, and the procedural and substantive due process clauses of the Fourteenth Amendment.

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[1] Plaintiffs refer to the statute as the "Florida Sex Offender Registration Law" or "FSORNA," an apparent derivation of the federal Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C.A. § 2250(a)(2). The Florida statute does not have a title and has not been recognized by either the name or acronym given it to it in the Complaint. FDLE declines to use that nomenclature and will instead refer to Fla. Stat. § 943.0435 either by its section number or as "the statute."

3. FDLE now moves to dismiss the action. First, Plaintiffs' claims are time-barred because the registration requirements they challenge were in place years if not decades before their limitations period ran out. Second, in some instances they have failed to state a claim, while in most others their claims are precluded by binding Supreme Court and Eleventh Circuit precedent.
4. Although leave to amend may be given ordinarily when a complaint is dismissed, it need not given here because amendment would be futile.

MEMORANDUM OF LAW

I. Motion to Dismiss Standard

Fed. R. Civ. P. 8(a) requires a "short and plain statement of the facts" in order to "give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." While a Complaint does not need detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Factual allegations "must be enough to raise a right to relief above the speculative level." Id.

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must allege facts sufficient to state a facially plausible claim for relief. Id. at 547. A claim is facially plausible if the plaintiff pleads facts allowing the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). This plausibility standard requires more than a "sheer possibility" that a defendant has acted unlawfully. Id. An "unadorned, the-defendant-unlawfully-harmed-me accusation" will not suffice. Id. Nor will "'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Twombly at 557) (emphasis in original).

On a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the Court "is not confined by the facts contained in the four corners of the complaint—it may consider facts and need *not* assume the truthfulness of the complaint." Americopters, LLC v. F.A.A., 441 F.3d 726, 732 n.4 (9th Cir. 2006) (emphasis in original). See also Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990). A motion to dismiss may be granted on an affirmative defense when the defense appears on the face of the Complaint. Jacobs v. Estefan, 531 F. App'x 1004, 1005 (11th Cir. 2013); Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1277 (11th Cir. 2004).

II. Statute of Limitations

The statute of limitations for § 1983 claims is determined by a state's residual personal injury statute. Owens v. Okure, 488 U.S. 235, 249-250 (1989). In Florida, that is four years. Fla. Stat. § 95.11(3)(p). A § 1983 claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." Corn v. City of Lauderdale Lakes, 904 F.2d 585, 588 (11th Cir. 1990). Although Plaintiffs spend much of the Complaint chronicling the differences between the 1997 and 2018 versions of Fla. Stat. § 943.0435, the actual registration requirements giving rise to their claims have been in place as early as the statute's original enactment in 1997. Their four-year limitations period has expired by years if not decades. Copies of the original and all amended versions of § 943.0435 are attached as Exhibit A, though many amendments were not substantive.

Plaintiffs' Claim I for an *ex post facto* violation alleges the statute should not be applied to them because it postdates their offenses and is punitive in nature. (D.E. 1 at ¶ 90.) They would have known of this alleged injury in 1997, when they first had to register following the statute's enactment. Their Claim II for an Eighth Amendment violation alleges it is cruel and unusual punishment to subject them to the statute's requirements "until they die" when they "were already sentenced to

prison and/or probation to presumptively proportional sentencing guidelines." (Id. at ¶ 98.) They have been subject to the statute since 1997, and the lifelong duration was added in 1998.

Their Claim III for procedural due process violations begins by alleging that the statute imposes "strict liability" for violations. (D.E. 1 at ¶¶ 18, 43, 101.) As will be addressed below, this is factually incorrect, but for statute of limitation purposes it is also time-barred. The language they quote to support this allegation—§ 943.0435(9)(d) in the 2018 version—has existed since 2004, when it was added as subsection (9)(c).

In Plaintiffs' Count IV for substantive due process violation, they assert several vagueness challenges to the definition of "temporary residence" in § 943.0435(1)(f), which incorporates the definition used in § 775.21(2)(n). (D.E. 1 at ¶ 37.) They claim not to know the meaning of the words "day," "place" and "destination." (Id. at ¶ 38-39.) The definition of "temporary residence" has been incorporated into § 943.0435 from § 775.21 since 1998, and the latter has used both the words "place" and "destination" since 2010. Plaintiffs also challenge the term "within 48 hours" as used for the in-person reporting requirements of § 943.0435(2)(a)2 and (4)(a). (D.E. 1 at ¶ 40.) Offenders have been required to report changes of address in person "within 48 hours" at both the sheriff's office and driver's license office since the statute's enactment in 1997, when it was part of subsections (2) and (3). Plaintiffs similarly challenge the term "within 48 hours" as used in the reporting requirement for an out-of-state temporary address in § 943.0435(7). (D.E. 1 at ¶ 41.) That language has existed in subsection (7) since 1998.

Plaintiffs conclude the Complaint with several substantive due process claims. They allege the in-person reporting requirements violate their fundamental right to travel. (D.E. 1 at ¶ 107-08.) As stated above, those requirements have existed since 1998. Next, they allege the statute creates a "stigma plus," has no rational relationship to a legitimate government interest and creates an

irrebuttable presumption of recidivism. (Id. at ¶¶ 109-118.) Those claims all accrued upon their initial registration following the statute's enactment in 1997.

Even if Plaintiffs' alleged injuries under the statute are ongoing, that does not extend their limitations period. The injuries all originate from their registration as sex offenders in 1997 and would not exist otherwise. Present consequences resulting from a discrete past act do not extend a statute of limitations. Allegations of "continuing *injury*" are not allegations of "wrongful continuing *conduct*." Washington v. Tex. Dep't of Criminal Justice, 653 F. App'x 370, 372 (5th Cir. 2016) (emphasis in original); Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1982) ("A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation."). As a result, Plaintiffs could not attempt to claim that each negative social interaction or each trip to a sheriff's office to update their information extends their limitations period. Smith v. Pate, 2018 WL 3238913, at *2 (11th Cir. 2018) (limitations period for challenge to amended parole guidelines began with their initial application; subsequent applications did not extent period); Meggison v. Bailey, 575 F. App'x 865, 867 (11th Cir. 2014) (while plaintiff's classification under § 943.0435 will "continue to have effects," limitations period for challenge to statute accrued with initial classification, not "every time [he] feels one of those continuing effects").

Likewise, Plaintiffs cannot assert that their limitations period is extended each time the Legislature amends § 943.0435 or modifies the registration requirements. The consequence of "complying with updated requirements" is still caused by the original act of registering as a sex offender. Meggison v. Bailey, 2013 WL 6283700, at *3 (M.D. Fla. 2013), aff'd, 575 F. App'x 865 (11th Cir. 2014). See also Rothe v. Sloan, 2015 WL 3457894, at *2 (D. Colo. 2015) (allegation that "latest sex offender registry regime is substantially more punitive than prior statutes" does not extend limitations period).

III. Claim I – Ex Post Facto Law

Although Plaintiffs' claims are all time-barred, they are substantively defective as well. In Claim I, Plaintiffs allege that Fla. Stat. § 943.0435 violates the *ex post facto* clause because their qualifying offenses predate its enactment and because it is "penal in effect if not intent." (Id. at ¶ 190.) Article I, § 10 of the United States Constitution provides that no state shall pass any *ex post facto* law. Although a state cannot pass *ex post facto* laws, it is free to make "reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." Smith v. Doe, 538 U.S. 84, 103 (2003).

The question of whether sex-offender registration laws—including Florida's—constitute *ex post facto* laws has already been decided in FDLE's favor by the Supreme Court and the Eleventh Circuit. In Smith, the Supreme Court examined Alaska's sex offender registration law to determine if it constituted a prohibited *ex post facto* punishment:

> The framework for our inquiry, however, is well established. We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" Because we "ordinarily defer to the legislature's stated intent," "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."

Id. at 92 (internal citations omitted).

The Smith Court found that Alaska's law did not establish criminal proceedings on its face because neither its language nor purpose established anything other than an intent to assist public safety. Id. at 93. The law did not create "anything other than a civil … scheme designed to protect the public from harm." Id. (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

To determine whether the law's effect was so punitive as to negate the legislature's stated intent, the Court evaluated it based on a seven-factor test. Under the most relevant factors, the Court found that "dissemination of truthful information" about a criminal record "in furtherance of a legitimate governmental objective" does not constitute punishment, Smith at 99; that the law imposes no physical restraint and does not restrain sex offenders from changing jobs or residences, Id. at 100; that the law had a legitimate nonpunitive purpose of public safety that was not a sham or pretext, Id. at 102-03; and that the law was not excessive because "the regulatory means chosen" were "reasonable in light of the nonpunitive objective." Id. at 105.

Under Smith, sex offender registration laws such as Florida's that create a civil regulatory scheme do not constitute *ex post facto* laws. This alone should be sufficient to defeat Plaintiffs' claim. Plaintiffs' Complaint acknowledges Smith by listing the seven factors considered in that case, but they allege those factors support the opposite result, even though the Alaska and Florida statutes have the same civil regulatory purpose and effect. Yet the Court need not rely only on Smith because the Eleventh Circuit has upheld Fla. Stat. § 943.0435 itself from *ex post facto* challenges.

In Houston v. Williams, 547 F.3d 1357, 1364 (11th Cir. 2008), the Circuit found that the statute "is not punitive, but rather regulatory, and therefore does not violate the *ex post facto* clause." The Circuit reiterated this several years later in United States v. Carver, 422 F. App'x 796, 803 (11th Cir. 2011), stating that the statute "does not violate the *ex post facto* prohibition because it is nonpunitive." See also Anderson v. Sec'y, Dep't of Corr., 2011 WL 2517217, at *4 (M.D. Fla. 2011) (rejecting *ex post facto* claim because provisions of § 943.0435 "are primarily devoted to procedural issues such as enumerating the specific information a sex offender must provide, and creating procedures to ensure information is disseminated"); Delaney v. Florida, 2011 WL 1211468, at *2 n.2 (M.D. Fla. 2011), report and rec. adopted, 2011 WL 1211464 (M.D. Fla. 2011) (Supreme Court

in Smith "appears to have foreclosed" *ex post facto* challenges "with respect to sex offender registration statutes").

These federal decisions are joined by Florida appellate court decisions finding that § 943.0435 is not an *ex post facto* law because it is regulatory and procedural in nature. Givens v. State, 851 So. 2d 813, 814-15 (Fla. 2d DCA 2003); Freeland v. State, 832 So. 2d 923, 923 (Fla. 1st DCA 2002); Simmons v. State, 753 So. 2d 762, 763 (Fla. 4th DCA 2000). Federal courts should defer to state courts' interpretation of state statutes. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000); Missouri v. Hunter, 459 U.S. 359, 368 (1983).

IV. Claim II – Eighth Amendment

Plaintiffs allege that Fla. Stat. § 943.0435 constitutes cruel and unusual punishment because it "heaps punitive impacts" on top of their sentences, "producing financial and housing instability, violent vigilantism and social death." (D.E. 1 at ¶ 98.) A punishment is cruel and unusual if it is grossly disproportionate to the severity of a crime. Rummel v. Estelle, 445 U.S. 263, 271 (1980). Outside of capital punishment, successful Eighth Amendment challenges to the proportionality of a sentence are "exceedingly rare." Id. at 272.

The Eighth Amendment "does not protect an individual from detrimental effects of nonpenal, regulatory statutes." Gotchman v. New Hampshire, 2010 WL 4226576, at *3 (D.N.H. 2010), report and rec. adopted, 2010 WL 4226579 (D.N.H. 2010). As set out above, § 943.0435 is a nonpenal, regulatory statute that does not constitute punishment to begin with, therefore it cannot constitute "cruel and unusual" punishment. United States v. Under Seal, 709 F.3d 257, 263-64 (4th Cir. 2013); Doe v. Miller, 405 F.3d 700, 723 n.6 (8th Cir. 2005); Cutshall v. Sundquist, 193 F.3d 466, 478 (6th Cir. 1999).

If, *arguendo*, that were not the case, the claim would still fail because the Eleventh Circuit has rejected Plaintiffs' argument that harassment resulting from a registration statute constitutes cruel and unusual punishment. In Chrenko v. Riley, 5560 F. App'x 832 (11th Cir. 2014), a sex offender alleged that the notification requirements under Alabama's registration statute violated his Eighth Amendment rights "because it is cruel and unusual punishment to require him to notify the public of his sex offender status and, consequently, endure harassment from a hostile public." Id. at 833. The Eleventh Circuit held that this alleged harassment does not satisfy the "high threshold" for cruel and unusual punishment. Id. at 835. See also United States v. Juvenile Male, 670 F.3d 999, 1010 (9th Cir. 2012) (Although SORNA "may have the effect of exposing juvenile defendants and their families to potential shame and humiliation for acts committed while still an adolescence the statute does not meet the high standard of cruel and unusual punishment.").

V. Claim III - Fourteenth Amendment – Procedural Due Process

A. Strict Liability

Plaintiffs make several procedural due process claims under the Fourteenth Amendment, the first of which is that Fla. Stat. § 943.0435 imposes liability for "inadvertent and unknowing" violations. (D.E. 1 at ¶ 101.) They draw this conclusion from subsection (9)(d), which states that after a first arrest for violating the statute, lack of notice may not be used as a defense to any subsequent violation.

Plaintiffs are incorrect on this point. The Florida Supreme Court has held that knowledge is a required element for a violation of § 943.0435, rejecting the argument that strict liability should apply instead. In State v. Giorgetti, 868 So. 2d 512 (Fla. 2004), the Florida Supreme Court found that because "scienter is often necessary to comport with due process requirements, we ascribe the

Legislature with having intended to include such a requirement." Id. at 518. The Giorgetti Court concluded that "the sexual offender registration statutes include a requirement that the alleged offender knows of the obligation to register and maintain current addresses." Id. at 520. See also Newell v. State, 875 So. 2d 747, 748 (Fla. 2d DCA 2004) ("Concerning substantive due process, Newell argues that section 934.0435 improperly lacks any requirement of guilty knowledge, scienter, or mens rea. The Florida Supreme Court rejected this argument" in Giorgetti.).

In reaching its conclusion, the Giorgetti Court rejected the same argument Plaintiffs make here, that a registration violation is a strict liability crime. 868 So. 2d at 518-19. The provision Plaintiffs cite as the basis for their allegation, § 943.0435(9)(d), was added in 1998 as subsection (9)(c) and was in the version reviewed by the Giorgetti Court. Although the provision prohibits lack of notice as a defense to subsequent violations, Plaintiffs are conflating this with the elimination of *all* defenses. The statute does no such thing. See, e.g., Barnes v. State, 108 So. 3d 700 (Fla. 1st DCA 2013) (reversing conviction for § 943.0435 violation where judge failed to give jury instruction on defense that offender was twice turned away from driver's license office when trying to register); Griffin v. State, 969 So. 2d 1161 (Fla. 1st DCA 2007) (reversing conviction for § 943.0435 violation where offender could not register by deadline due to Hurricane Katrina closing driver's license offices).

B. Vagueness in the Definition of a Temporary Residence

Plaintiffs' second procedural due process claim raises several vagueness challenges pertaining to the definition of a "temporary residence" within Fla. Stat. § 943.0435. The definition comes from Fla. Stat. § 775.21(1)(n) and is incorporated through § 943.0435(1)(f). It defines a temporary residence as one where a person abides, lodges or resides "for 3 or more consecutive days."

Under the vagueness doctrine, statutory language should be sufficiently understood by the "ordinary person exercising ordinary common sense" Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973). It must be "reasonably clear" to avoid arbitrary and discriminatory enforcement. Chad v. City of Ft. Lauderdale, 66 F. Supp. 2d 1242, 1244 (N.D. Fla. 1998). "Reasonably clear" does not require a law to "be so crystal clear as to preclude every single vagary or difference of opinion regarding enforcement under any scenario." Chad at 1244. After all, courts "can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Vagueness analysis does not involve "straining to inject doubt as to the meaning of words when no doubt would be felt by the normal reader." United States v. Powell, 423 U.S. 87, 93 (1975). Nor does a court need to "satisfy those intent on finding fault at any cost." Broadrick at 608.

Plaintiffs have not established that they themselves are attempting to establish temporary residences and have personally run afoul of the challenged words. Rather, they claim confusion over those everyday words for the purpose of obtaining answers to various hypotheticals. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is 'surely valid in the vast majority of its intended applications.'" Hill v. Colorado, 530 U.S. 703, 733 (2000) (quoting United States v. Raines, 362 U.S. 17, 23 (1960).

1. The Meaning of "Day"

Plaintiffs' first vagueness challenges alleges it is unclear whether the word "day" within § 775.21(1)(n) and § 943.0435(1)(f) means a "full 24-hour day or a specific date." (D.E. 1 at ¶ 38.) They ask whether a hotel arrival at 11:50 p.m. on May 1 would mean that May 1 is the first day, or that the first day ends 24 hours after the arrival. (Id.) This hypothetical shows that Plaintiffs are not actually raising any question as to the meaning of the word "day," but as to how Florida law generally

computes the time in which an action must be done. That computational question is not governed by the word "day," or by § 943.0435 at all.

In any event, a statute's words are not vague if they can be ascertained through "judicial decisions, common laws, dictionaries, and the words themselves because they possess a common and generally accepted meaning." United States v. Eckhardt, 466 F.3d 938, 944 (11th Cir. 2006) (quoting United States v. Bowker, 372 F.3d 365, 381 (6th Cir. 2004)); United States v. Panfil, 338 F.3d 1299, 1301 (11th Cir. 2003) (statutory terms not vague where they have "plain and ordinary meanings"). Despite Plaintiffs' allegation that the word "day" is vague, a "day" has a common and generally accepted meaning. "The general rule is that when the word 'day' is used it means calendar day which includes the entire day from midnight to midnight." State v. Sheets, 338 N.W. 2d 886, 887 (Iowa 1983). See also Burgo v. Gen. Dynamics Corp., 122 F.3d 140, 143 (2d Cir. 1997) ("A day is the period of time during which the earth makes on revolution on its axis, the average length of this interval being 24 hours.") (citing Merriam-Webster's Collegiate Dictionary 294 (10th ed. 1997)); S. Tr. Ins. Co. v. First Fed. Sav. & Loan Ass'n of Summerville, 310 S.E. 2d 712, 713 (Ga. Ct. App. 1983) (when not qualified, the word "day" means calendar day "consisting of 24 hours from midnight to midnight"). A day is an indivisible unit; the law does not recognize fractions of a day. Lapeyre v. United States, 84 U.S. 191, 198 (1872); Maxwell v. Jacksonville Loan & Imp. Co., 34 So. 255, 264 (Fla. 1903).

A court must presume the Legislature knows the plain and ordinary meaning of the words it uses in statutes. Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64, 66 (Fla. 1963). See also United States v. Forest Hills Garden E. Condo. Ass'n, Inc., 990 F. Supp. 2d 1344, 1347 (S.D. Fla. 2014) (courts presume "the Legislature 'said what it meant and meant what it said'") (quoting Rine v. Imagitas, Inc., 590 F.3d 1215, 1222 (11th Cir. 2009)). If the Legislature wanted to couch a temporary residence in terms of 24-hour blocks and not calendar days, it would have done so—

as it did in numerous other parts of the statute. For example, § 943.0435(2)(a)1, (b)3 and (4)(a) all require reporting "within 48 hours," while § 943.0435(b)2 uses *both* hours and days ("within 48 hours," "every 30 days").

2. The Meaning of "Place" and "Destination"

Plaintiffs' second vagueness challenge is to the words "place" and "destination" as used in the definition of a temporary residence. They express confusion over whether a place or destination is a "specific address" or a "general location." (D.E. 1 at ¶ 39.) They hypothetically ask whether an offender could travel to New York City, stay "no more than two days each at several hotels" and not have to report any new temporary residence. (D.E. 1 at ¶ 39.)

The words "place" and "destination" are common words with plain and ordinary meanings found within any dictionary, but aside from that, their meaning with regard to a temporary residence is clear from their usage within § 943.0435. The words are used in conjunction with registration requirements that specify what address information must be provided. Offenders are required to report the "address of any temporary residence within the state or out of state, including a rural route address and a post office box." Fla. Stat. § 943.0435(2)(b). A post office box may not be used "in lieu of a physical residential address." Id. For an out-of-state temporary residence, an offender must provide "the address, municipality, county, state, and country of intended residence." Fla. Stat. § 943.0435(7). If the residence is a motor vehicle, motor home, mobile home, manufactured home, vessel or houseboat, they must provide the identifying information listed in § 943.0435(2)(b)1.

These provisions establish that a temporary residence requires a street address or vehicle/vessel identifying information. A "general location" such as "New York City" or "New York" or "the Northeast" would not suffice. Accordingly, if an offender's stay at any one hotel under

Plaintiffs' hotel-hopping scenario is too brief to cross the temporary residence threshold, then clearly it would not meet the definition of a temporary residence.[2]

3. In-Person Reporting Between Legs of a Business Trip

Plaintiff's third vagueness challenge is based on the requirement that offenders report in-person within 48 hours of any change to a temporary residence. (D.E. 1 at ¶ 40.) They pose yet another hypothetical, asking whether they would have to fly home to report in-person between legs of an out-of-state business trip if both legs would cross the temporary residence threshold. (Id.)

There is no support for that interpretation. Under § 943.0435(7), offenders are required to report an intended out-of-state residence within 48 hours of departure. But once they have already *left* the state, there is no statutory obligation to continuously return home each time they establish subsequent out-of-state residences.[3] Plaintiffs' misreading of the statute does not make it ambiguous.

4. The Meaning of "Within"

Plaintiff's fourth and final vagueness challenge inexplicably asks whether the term "within 48 hours" as stated in § 943.0435(7) actually means "within" or "at least." (D.E. 1 at ¶ 41.) Those are two obviously different terms and the Legislature did not confuse them. Brooks, 148 So. 2d at 66. If that is not self-evident, the Legislature knew to use both terms throughout the statute, including within subsection (7) itself. See, e.g., Fla. Stat. §§ 943.0435(2)(a)1 ("within 48 hours"); 943.0435(7) ("within 48 hours"; "at least 21 days"); 943.0435(11)(a)1 ("at least 21 days"); 943.0435(11)(a)3 ("at least 3 weeks"); 943.0435(14)(c)4 ("within 3 weeks"); 943.0435(14)(d) ("within 2 working days"). Plaintiffs cannot claim ambiguity by suggesting that a commonly known word means something else entirely.

[2] While at those hotels, the offender may be subject to other jurisdictions' registration requirements instead.
[3] Again, the offender may be subject to those jurisdictions' registration requirements instead.

VI. Claim III - Fourteenth Amendment – Substantive Due Process

Plaintiffs raise several substantive due process claims, including violation of the right to travel, "stigma plus," lack of a rational relationship and creation of an irrebuttable presumption. However, the same conduct giving rise to these alleged due process violations is covered by other Amendments: Plaintiffs already alleged that the statute in its entirety violates their Eighth Amendment rights, and their vagueness challenge also invokes the right to travel.

Where another Amendment provides "an explicit textual source of protection" against government behavior, that Amendment must govern the claims, "not the more generalized notion of 'substantive due process.'" Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). See also United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) (when a claim is "covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process"). Plaintiffs' substantive due process claims are duplicative of their Eighth Amendment and procedural due process claims and should be dismissed. Scott v. Myrick, 2017 WL 6271471, at *6 (D. Or. 2017), report and rec. adopted, 2017 WL 6271465 (D. Or. 2017) (plaintiff may not "double down" by alleging substantive due process violation where it "relies on the same conduct and alleges the same injury as his claim for an Eighth Amendment violation"); Adair v. Hunter, 236 F. Supp. 3d 1034, 1045-46 (E.D. Tenn. 2017) (dismissing substantive due process claim where same conduct allegedly violated procedural due process clause); Sutton v. State of Ind., 1991 WL 222074, at *10 (N.D. Ind. 1991) (plaintiff "cannot bring separate, independent claims under § 1983 based on the assertion that the same conduct violated his rights" under both Eighth Amendment and substantive due process).

Additionally, to the extent Plaintiffs' claim rests on any alleged non-reputational injuries such as rejection, harassment or violence by the third parties described in the Complaint—neighbors, romantic partners, employers, family members, unknown assailants, bank loan officers, Disney, Royal Caribbean, etc.—those independent actions would not support a due process claim. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." DeShaney v. Winnebago Cty. Dep't of Soc. Servs, 489 U.S. 189, 195 (1989). Aside from these overall defects, there are other reasons to dismiss each substantive due process claim.

A. Right to Travel

Plaintiffs allege their constitutional right to travel has been violated by the shortening of the residency definition over time to the current 3 days. (D.E. 1 at ¶ 108.)[4] This claim is foreclosed by the Eleventh Circuit's decision in Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005).

In Moore, the Circuit affirmed the dismissal of sex offenders' claim that Fla. Stat. § 943.0435 violates their right to travel. Like the Plaintiffs here, the offenders in Moore could not show that the statute actually prevents them from entering or leaving a state, only that it makes it more "inconvenient to travel." Id. at 1348. Yet "mere burdens on a person's ability to travel from state to state are not necessarily a violation of their right to travel." Id. at 1348. The Circuit held that while the statute's registration requirements may be burdensome, they are not "unreasonable by constitutional standards, especially in light of the reasoning behind such legislation." Id. Otherwise, "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

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[4] They also repeat their incorrect allegation of strict liability, which has been previously addressed.

enforcement." Id. at 1348-49. Moore governs this claim. Plaintiffs' obligation to report a temporary residence within 3 days does not violate their right to travel.

B. "Stigma Plus"

Plaintiffs allege that the fact of having to register under § 943.0435 imposes a "stigma plus" by imposing a social stigma and depriving them of safety, security, and economic and housing opportunities. (D.E. 1 at ¶ 111-12.) This claim is defective because it fails to establish a key foundational element of "stigma plus": defamation.

Reputational damage by the government does not establish a substantive due process violation in and of itself. Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005). To state a claim, a plaintiff must satisfy the "stigma plus" test, meaning they must "establish the fact of the defamation 'plus' the violation of some more tangible interest." Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1302 (11th Cir. 2001). That requires a plaintiff to state a common-law defamation claim, as well as further injury tied to a constitutionally recognized property or liberty interest. Rehberg v. Paulk, 611 F.3d 828, 852 (11th Cir. 2010), aff'd, 566 U.S. 356 (2012). A plaintiff who cannot establish defamation cannot establish "stigma plus." Mills v. City of Phenix City, Ala., 2012 WL 2887933, at *5 (M.D. Ala. 2012) ("Mills's stigma-plus claim must fail because she cannot prove defamation.").

A defamation claim in Florida requires the negligent, unprivileged publication of a false and defamatory statement to a third party. Mile Marker, Inc. v. Petersen Publ'g, L.L.C., 811 So. 2d 841, 845 (Fla. 4th DCA 2002). There is not a single allegation in the Complaint that FDLE published any false information. To the contrary, the only information at issue is the indisputably truthful fact of Plaintiffs' conviction and registration as sex offenders. Plaintiffs are not claiming they were falsely labeled as sex offenders, only that public knowledge of their offenses has stigmatized them. This

does not state a cause of action for defamation. Moreover, any publication of Plaintiffs' sex-offender status could not be defamatory because it is absolutely privileged in connection with FDLE's official governmental duty to administer the statute. Hauser v. Urchisin, 231 So. 2d 6, 8 (Fla. 1970). Plaintiffs cannot establish defamation and therefore cannot establish "stigma plus."

C. **No Rational Relationship**

Plaintiffs' third substantive due process claim is that Fla. Stat. § 943.0435 has no rational relationship to a permissible legislative objective because it is unreasonable and "anchored in false assumptions" about the risk of recidivism. (D.E. 1 at ¶ 115.) In only arguing a rational basis standard, Plaintiffs are presumably aware that no fundamental rights are at issue. In Moore, the Eleventh Circuit held that § 943.0435 does not implicate a sex offender's fundamental rights: A "state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy," no matter if that person "may be shunned" by those who discover the offense. 410 F.3d at 1345.

In the absence of any fundamental right, a statute is reviewed under the "highly deferential" rational basis standard, which requires that it be upheld except under the "most exceptional circumstances." Id. The Moore Court held that § 943.0435 satisfies this standard because the statute (which it referred to as the "Sex Offender Act") has a rational relationship to Florida's legitimate governmental interests:

> Here, the state articulates its reasoning for the Sex Offender Act as "protect[ing] the public from sexual abuse." Appellee's Br. at 32. The state argues that the public can use the registration "to determine whether any sex offenders live in their neighborhood, make an individual assessment of the risk, and take any precautions appropriate under the circumstances." *Id.* at 33. We agree with the state that the Sex Offender Act meets the rational basis standard. It has long been in the interest of government to protect its citizens from criminal activity and we find no exceptional circumstances in this case to invalidate the law. We join with other courts, see,

> e.g., Gunderson, 339 F.3d at 643–44, in holding that the Sex Offender Act is rationally related to a legitimate government interest. Thus, Appellants' substantive due process argument fails.

Id. at 1345-46. Plaintiffs' claim that the statute lacks a rational basis has been foreclosed by the Eleventh Circuit and must be dismissed.

D. Irrebuttable Presumption

Similar to their rational basis claim, Plaintiffs' final substantive due process claim is that Fla. Stat. § 943.0435 is invalid because it "irrebuttably presumes" a high rate of recividism. (D.E. 1 at ¶ 117.) Yet again, Plaintiffs raise a claim that has been rejected by the Supreme Court and Eleventh Circuit. In Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003), the Supreme Court held that a sex offender was not entitled to a hearing to prove he was not currently dangerous before being subjected to Connecticut's registration statute. Whether the offender was currently dangerous was "of no consequence" under the law because its requirements "turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. No other fact is relevant to the disclosure of registrants' information." Id. at 7 (internal citation omitted).

In Moore, the Eleventh Circuit relied on Connecticut Department of Public Safety to find that § 943.0435 does not create an irrebuttable presumption because it "does not turn on the dangerousness of the offender, merely the fact that he or she was convicted." 410 F.3d at at 1342 n.3. For due process purposes it does not matter whether Plaintiffs believe they are unlikely to re-offend. All that matters is that they have been adjudicated as sex offenders under the statute.

VII. Dismissal Should Be With Prejudice

While leave to amend may be given ordinarily, it may be denied where amendment of the Complaint would be futile. Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262-63 (11th Cir. 2004). Dismissal in this case should be with prejudice because amendment would be futile. No amendment could revive a statute of limitations that expired years ago, nor evade the binding Supreme Court and Eleventh Circuit precedent on these claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed via CM/ECF and served upon Valerie Jonas, Esq., at valeriejonas77@gmail.com and Todd Gerald Scher, Esq., at tscher@msn.com on November 21, 2018.

Respectfully Submitted,

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