UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

JOHN DOES, Nos. 1-5,

Plaintiffs,

v. **Case No. 18-cv-24145-KMW**

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

Defendant.
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PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COME NOW THE PLAINTIFFS, JOHN DOES, NOS. 1-5, by and through their undersigned counsel, and herein file their Response to the Defendant's Motion to Dismiss (DE:10). For the reasons set forth below, the Plaintiffs submit that the Defendant's motion should be denied.

I. Statute of Limitations

Preliminarily, FDLE maintains that Plaintiffs' Complaint against FSORNA 2018 should have been filed within four years of the 1997 enactment of its first iteration. FDLE characterizes the 20 years of amendments – exponentially increasing the volume of information to be disclosed and the number of required in-person reports; restricting employment, education, and travel; expanding the breadth and scope of notification; removing *mens rea;* and adding mandatory-minimums for violations – as "[p]resent consequences resulting from a discrete past act," the 1997 requirement to register (DE:3 at 5).

FDLE overlooks the "critical distinction" between one-time acts with consequences that continue into the present, which does not extend the limitations period, and the continuation of

violations into the present, which does. *See Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003) (claim accrued when plaintiff learned law would postpone his parole consideration: *"As of that time he knew, or should have known, all of the facts necessary to pursue a cause of action."*) (emphasis added). FDLE cites only one-time act cases like *Lovett*: *Smith v. Pate*, 741 Fed. Appx. 610 (11th Cir. 2018) (postponement of parole consideration); *Washington v. Texas Department of Criminal Justice*, 653 Fed.Appx. 370, 372 (5th Cir. 2016) (enrollment in compulsory sex offender treatment); *Ward v. Caulk*, 650 F. 2d 1144, 1147 (9th Cir. 1982) (letter denying promotion); *Rothe v. Sloan*, 2015 WL 3457894 (D. Colo., May 29, 2015) (claim that registration not required); and *Meggison v. Bailey*, 575 Fed.Appx. 865 (11th Cir. 2014) (claim that designation violated plea agreement). *Compare with Moore v. Olens*, 2013 WL 12097640 (N.D. Ga. 2013) (claim against designation time-barred, but claim against life-time GPS-monitoring raised continuing violation).

Plaintiffs do not complain about their designation or their obligation to register in 1997. Plaintiffs allege that FSORNA 2018 is unconstitutional because of the cumulative effects of its interlocking requirements, each amendment aggravating the impacts of the others, against a backdrop of inefficacy. *See* DE:1 at ¶¶ 1-5, 52-57, 92-118. This is a complaint of continuing violations that extend the statute of limitations. *See Doe v. Haslam*, 2017 WL 5187117 *11-14 (M.D. Tenn. November 9, 2017); *Doe v. Gwyn*, 2018 WL 1957788 *5-6 (E.D. Tenn. April 25, 2018); *Coates v. Snyder*, 2018 WL 3244010 (W.D. Mich., June 12, 2018); *Wallace v. New York*, 40 F.Supp.3d 278 (E.D.N.Y., 2014). Because the continuing nature of the alleged violations is clear from the face of the Complaint, FDLE's affirmative defense fails. *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872 (11th Cir. 2017).

II. Ex Post Facto

At the outset, Plaintiffs address FDLE's reliance on the 15-year old decision in *Smith v. Doe*, 538 U.S. 84 (2003), and *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005), which was based on *Smith*. At issue in *Smith* was a first-generation registration statute, requiring one-time in-person reporting of limited personal information with passive notice[1] through a website the public could access. *Smith* asked whether the relatively trivial burdens of such a statute were punitive under the ex post facto clause. Critical to its resolution of this "close" question, *Smith*, 538 U.S. at 107 (Souter, J., concurring), were its erroneous empirical assumptions about a prior offender's intransigent risk of re-offense and the efficacy of the statute in reducing it. *Id*. at 103-04.

In the years since *Smith* and *Moore*, multiple amendments have bloated Florida's registration statute beyond recognition, transforming it from the kind of minimally-intrusive measure upheld by *Smith* into an engulfing regime of restrictions and notifications burdening every aspect of a registrant's life. *See* DE:1 at ¶¶ 18-51. During the same period, social scientists have closely monitored the effects of registration on preventing crimes of a sexual nature, and found none. *See* DE:1 at ¶¶ 52-57. Neither *Smith* nor *Moore* stands for the proposition that *every* registration statute is *always* constitutional as applied to *every* registrant, regardless of the nature of its restrictions, the reliability of its premises, or the registrant's circumstances.

"The constitution does not require the federal courts to act like Galileo's Inquisition and enjoin consideration of new academic research, and the knowledge gained therefrom, simply because such research provides a new understanding of how to give effect to our long established governing principles." *Common Cause v. Rucho*, 318 F.Supp.3d 777, 858 (M.D.N.C. 2018).

[1] *Smith*, 538 U.S. at 106.

FDLE's position resembles Galileo's Inquisition, urging this Court to not consider empirical evidence about the demonstrable inefficacy of registration statutes, the true re-offense rate of those with prior convictions, or the actual weight of FSORNA 2018's burdens because of *Smith*. Court decisions must be based on the facts at hand.[2] When subsequent evidence establishes that a court relied on false premises, or that it failed to appreciate the true consequences of legislative action, it must reevaluate its holding.[3] Federal and state courts reviewing second generation registration statutes are doing that now.

An ex post facto challenge—like the one raised by Plaintiffs—examines the weight of a law's punitive impacts in relation to its public purpose, using a multi-factor test: do they resemble traditional punishment, impose an affirmative disability, promote traditional aims of punishment, have a rational connection to a non-penal purpose, or are excessive with respect to this purpose. *Smith,* 538 U.S. at 97. Second generation registration statutes have far more

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[2] *See Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (relying on empirical evidence that segregation caused psychological damage to black children); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (relying on "now-established medical fact" that, during first trimester, "mortality in abortion may be less than mortality in normal childbirth"); *Stenberg v. Carhart,* 530 U.S. 914 (2000) (relying on new medical evidence to strike partial birth abortion ban during second trimester); *Craig v. Boren*, 429 U.S. 190, 214 (1976) (relying on empirical data to strike law prohibiting beer sales to males under 21 and females under 18); *Hodgson v. Minnesota*, 497 U.S. 417, 441 (1990) (relying on findings by 90% of judges adjudicating teen abortion petitions that dual parental notification yielded no positive effects); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-77 (1989) (relying on statistical evidence to determine constitutionality of affirmative action); *Maryland v. Craig*, 497 U.S. 836, 855, 857 (1990) (relying on "growing body of academic literature documenting the psychological trauma suffered by child abuse victims" from testifying in abuser's presence); *Hall v. Florida*, 134 S.Ct. 1986, 1990, 1995 (2014) (relying on "professionals who design, administer, and interpret IQ tests [who] have agreed, for years now, that IQ test scores should be read not as a single fixed number [70] but as a range).

[3] *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 567, 572, 576-77 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) based on "academic writings" exposing error in *Bowers*' "historical premises," declining number of states with similar laws, state courts' rejection of *Bowers* under state constitutions, and stigma of conviction due to registration statutes).

punitive impacts than the one upheld in *Smith*, and empirical evidence has established the *inefficacy* of such statutes to protect the public. *See* DE:1 at ¶¶ 52-56.

As a result, federal and state courts throughout the country have been striking second-generation registration statutes under the ex post facto clause. *See Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016) (citing multiple in-person reports, housing and work restrictions as neither "minor or indirect," like those in *Smith*, as well as "significant doubt" about *Smith's* empirical assumptions, including efficacy of statute in achieving its purpose); *Doe and Doe #2 v. Haslam*, 2017 WL 5187117 *20 (M.D. Tenn. 2017) ("available evidence regarding…the efficacy and necessity of registration and monitoring regimes has not been frozen in amber since the regimes were adopted. *Snyder* unambiguously holds that these fact-dependent issues are relevant to the determination of whether a state's scheme should be considered civil or punitive in purpose and effect."); *Millard, et al. v. Rankin*, 265 F.Supp.3d 1211, 1120, 1126-29 (D.Colo. 2017) (noting *Smith*'s inability to "foresee the development of private commercial websites exploiting the information made available to them" through the registry); *United States v. Wass*, 2018 WL 3341180 (E.D.N.C., July 6, 2018) (noting greater restrictiveness and broader public notification than in *Smith*); *State v. Letalien*, 985 A.2d 4, 23-24 (Me. 2009) (striking statute after twice previously upholding it, based on heavier burdens and absence of empirical evidence regarding regulation's efficacy in reducing risk); *Doe v. State*, 167 N.H. 382, 111 S.E.3d 1077, 1084, 1091-92, 1101-02 (N.H. 2015) (striking statute after previously upholding it, noting "significant[ ] differen[ce] from the act we considered twenty years ago," including multiple in-person reports, aggregate effects of notification on housing, employment and vigilantism, and absence of legislative findings to support multiple amendments); *Comm. v. Muniz*, 164 A.3d 1189, 1216 (Pa. 2017) (*Smith* unable to foresee "world-wide dissemination of" registrant's

information, or "[o]nline shaming" leading to ostracism); *Starkey v. Oklahoma Dept. of Corrections*, 305 P.3d 1004, 1030-31 (Ok. 2013) (noting its statute was far more burdensome than that in *Smith*).[4]

FDLE clings to earlier Eleventh Circuit cases, *see* DE:10 at 7-8, but all were decided in a vacuum of empirical evidence based on the findings in *Smith,* as if they were "frozen in amber." *U.S. v. W.B.H.*, 664 F.3d 848, 852-53, 855-56, 858-59 (11th Cir. 2011) ("Because *Doe* held that the regulatory scheme of the Alaska statute is not excessive in relation to its non-punitive purpose, *it necessarily follows* that SORNA's is not either.") (emphasis added); *U.S. v. Carver*, 422 Fed.Appx. 796 (11th Cir. 2011) (finding "rational basis"); *Anderson v. Secretary, Dept. of Corrections*, 2011 WL 2517217 *3-4 (M.D. Fla., June 23, 2011) (rejecting ex post facto habeas claim based on empirical assumptions in *Smith*).

While the Eleventh Circuit has yet to rule on the constitutionality of a second-generation registration statute in light of an empirical record like that proffered by Plaintiffs, last year it indicated how it might view such evidence. In *Doe v. Miami-Dade County, Florida*, 846 F.3d 1180, 1185-86 n.6 (11th Cit. 2017), the Court vacated dismissal of an ex post facto challenge to a housing ban where Plaintiffs had alleged its demonstrable inefficacy in preventing re-offense, giving rise to "a plausible claim for relief." Furthermore, an ex post facto challenge to Alabama's

[4] For similar reasons, the following courts struck sex offender residence and zoning restrictions under the ex post facto clause: *Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) (striking residence restriction where state opposed plaintiffs' empirical evidence only with appeal to common sense and logic); *Hoffman v. Village of Pleasant Prairie*, 249 F.Supp.3d 951, 960 (E.D.Wis. 2017) (striking residence restriction where defendant met plaintiffs' statistical case with "broad evidence-free assumption"); *Evenstad v. City of West St. Paul, et al.*, No. 17-407-JRT-DTS (D.Minn. 2018) (striking restriction based in part on plaintiffs' evidence of inefficacy). *Compare with Does v. Miami-Dade County, Florida*, Case No. 1:14-cv-23933-PCH, at ** 9-16 (S.D. Fla. Dec. 18, 2018) (ex post facto challenge to residence restriction denied where plaintiffs and defendant each presented empirical evidence about recidivism and inefficacy, and judge found defendant's more persuasive).

registration statute, based on empirical evidence similar to that proffered by Plaintiffs, has been pending in the Eleventh Circuit for three years. *McGuire v. Strange*, Case No.15-10958 (11th Cir.). Plaintiffs have therefore stated a plausible claim for relief under the ex post facto clause.

III. Cruel and Unusual Punishment

FDLE argues that, even if this Court determines that the statute is punitive under the ex post facto clause, it is not cruel and unusual under the Eighth Amendment (DE:10 at 9). For one thing, FDLE maintains that harassment, ostracism and vigilantism resulting from aggressive notification do not constitute punishment for the purpose of this claim. But FDLE overlooks that, unlike *Chrenko v. Riley*, 5560 F. App'x 832 (11th Cir. 2014), Plaintiffs' claim here is based on *the aggregate impacts of all of the statute's interlocking requirements*, not just the notification provisions. In any event, "*stare decisis* does not compel adherence to an Eighth Amendment decision whose 'underpinnings' have been eroded by subsequent development. . ." *Hurst v. Florida*, 136 S.Ct. 616, 624 (2016) (overruling *Spaziano v. Florida*, 468 U.S. 447 and *Hildwin v. Florida*, 490 U.S. 638, where "[t]ime and case law have washed away [their] logic.").[5]

Empirical evidence of inefficacy has, indeed, "washed away the logic" of FSORNA 2018, bloated as it is with mindlessly punishing impacts. So too does the recent case of *Packingham v. North Carolina*, __ U.S. __, 137 S.Ct. 1730, 1737 (2017), which struck an internet ban, noting "[e]ven convicted criminals – and in some instances especially convicted criminals" might legitimately benefit from internet use, "particularly if they seek to reform and to pursue lawful and rewarding" lives. This insight – that it is counter-productive to obstruct re-entry by persons with prior convictions – explains why some courts deem these impacts punitive

[5] *See also Atkins v. Virginia*, 536 U.S. 304, 308 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989), based on subsequent deliberations by "the American public, legislators, scholars, and judges").

under both the ex post facto clause and the Eighth Amendment. *Millard v. Rankin*, 265 F.Supp.3d 1211, 1226 (D.C. Colo. 2017) (characterizing public hostility resulting from aggressive notification as disproportionate punishment); *State v. Letalien*, 985 A.2d at 23-24 ("For the public, the substantiality of the risk every registrant poses is suggested by the government's initiative in establishing the registration, verification, and community notification requirements in the first place."); *Doe v. State*, 111 A.3d 1077, 1096 (N.H. 2015) ("broad dissemination stigmatizes registrants and can lead to. . .vigilante justice"); *Comm. v. Muniz*, 164 A.3d 1189, 1213, 1216 (Pa. 2017) (unlike "primitive technology" at time of *Smith*, "[n]ow there is world-wide dissemination of the information," leading to ostracism). Plaintiffs have stated a plausible claim for relief.

IV. Strict Liability

Plaintiffs are challenging § 943.0435(9)(d), which eliminated the defense of lack of notice after a first arrest or information, as violating their procedural due process right to notice regarding subsequent violations. *See* DE:1 at ¶¶ 99-102. FDLE's assertion that this provision, added in 1998 and affirmed as construed in *State v. Giorgetti*, 868 So.2d 512 (Fla. 2004), includes a *mens rea* requirement, is incorrect (DE:10 at 9-10).

Giorgetti, 817 So.2d 417, 419, nn. 2 & 3 (Fla. 4th DCA 2002), reviewed the 2000 version of FSORNA, which was *silent about scienter*. 868 So. 2d at 515. Relying on the "presumption in favor of a guilty knowledge element absent an express provision to the contrary," and the constitutional requirement of notice of an affirmative duty punishable by significant prison time, the Florida Supreme Court *implied* a *scienter* requirement, in order to avoid striking the statute as violating procedural due process. 868 So. 2d at 515, 517-18. In doing so, the Court relied on the "controlling" case of *Lambert v. California*, 355 U.S. 225, 229-30, 240 (1957), for its holding that *mens rea* is required in a felony statute punishing passive failure to comply with an

affirmative obligation. *Giorgetti,* 868 So. 2d at 516-518. Therefore, *Giorgetti* did *not* "reject[ ] the same argument Plaintiffs make here" (DE:10 at 10), because the statute at that time *contained no limitation on the right to notice.*

The strict liability provision in § 943.0435(9)(d) was added, as § 943.0435(9)(c), *after Giorgetti*. It defines notice as the arrest or service of an information for a *first* failure to register, and expressly eliminates the defense of notice in any subsequent prosecution.[6] The legislature thereby repudiated *Giorgetti* as applied to all but a first alleged violation. A court cannot imply a *mens rea* requirement from a statute that expressly eliminates it.

For the reasons set forth in *Lambert* and *Giorgetti*, FSORNA 2018's express elimination of a *scienter* requirement for passive failure to meet affirmative obligations on pain of felony prosecution and prison violates Plaintiffs' rights to procedural due process.

V. Right to Travel

FDLE argues that the Eleventh Circuit's decision in *Doe v. Moore*, 410 F.3d 1337, 1348-49 (11th Cir. 2005), which held FSORNA's 2003 version did not violate the fundamental right to travel, precludes this challenge to FSORNA 2018 (DE:10 at 16). FDLE adherence to *Moore* ignores the burdens added since that case was decided, *see* DE:1 at ¶¶ 32-36 and attached Appendix, which outline amendments to the various provisions burdening travel. The travel

[6] "An arrest on charges of failure to register when the offender has been provided and advised of his or her statutory obligations to register under subsection (2), the service of an information or a complaint for a violation of this section, or an arraignment on charges for a violation of this section constitutes actual notice of the duty to register. A sexual offender's failure to immediately register as required by this section following such arrest, service, or arraignment constitute grounds for a subsequent charge of failure to register. A sexual offender charged with the crime of failure to register who asserts, or intends to assert, a lack of notice of the duty to register as a defense to a charge of failure to register shall immediately register as required by this section. *A sexual offender who is charged with a subsequent failure to register may not assert the defense of a lack of notice of the duty to register.*" § 943.0435(9)(d) (emphasis added).

burdens arise from a combination of the provisions defining "temporary residence" and requiring in-person reports about it, in conjunction with the provisions decreasing the state's burden of proof and increasing the penalties for failure. The 2003 version required a single in-person report after return from a temporary residence, then defined as 14 days in the aggregate per year or 4 days in the aggregate per month. There was a *mens rea* element and no mandatory punishment.

Under FSORNA 2018, plaintiffs cannot travel anywhere for 3 days in the aggregate per year without having to report multiple times: 2 or 4 times at re-registration if the travel plan is then known; 1 or 2 times on return, both within 48 hours (first to DHSMV first; then, if "unable" to "secure or update" driver's license, to the sheriff with proof of failed DHSMV effort); and 1 time, within 48 hours, before out-of-state travel. If they unknowingly fail to make any of these multiple reports on time, they are strictly liable, and subject to mandatory-minimum penalties for a third-degree felony for the rest of their lives.

FDLE also ignores the implications of Plaintiffs' empirical evidence for the government's heavy burden to justify infringement of this fundamental right. *Moore* relied upon the *Smith* Court's erroneous empirical assumptions in characterizing relatively minor travel restrictions as "burdensome" but "reasonable." 410 F.3d at 1348-49. But the current restrictions are both crushing and illogical, violating Plaintiffs' fundamental right to travel.

Furthermore, the impacts of the travel restrictions must be understood in the context of the facts on the ground. There is only one sheriff's office per county. *See* DE:1 at ¶ 28. Those who live or work far from that office may spend hours traveling to make the report. *See* DE:1 at ¶¶ 28, 62, 72, 79, 87. Furthermore, the offices are open for reporting during limited hours on limited work days, with changing schedules that vary across counties. *See* DE:1 at ¶ 28. The reports must be made within 48 hours before leaving and after returning. FDLE construes

"within" to mean "at most" not "at least" (DE:10 at 14). Therefore, the report may not be made more than 48 hours before or after. An interstate traveler may have to cancel his trip if the sheriff's office is not open during the 48-hour time block preceding his planned departure. Similarly, a returning interstate and intrastate traveler must manage to make the report to DHSMV and, if necessary, to the sheriff no more than 48 hours after returning, even if he returns more than 48 hours before those offices open for in-person reports. FDLE's interpretation imposes a staggering burden on both interstate and intrastate travel, forcing registrants to schedule trips based on the vagaries of their sheriff's schedule. Otherwise, the traveler has committed a third-degree felony punishable by a minimum-mandatory 6 months GPS-monitored probation and a maximum of 5 years in prison.[7]

These burdens are aggravated by FDLE's definition of "day." *See* infra pp. 13-14. For interstate travel, the registrant must report "within 48 hours before the date" he intends to leave. § 943.0435(7). Does "date" mean "day"? If so, according to FDLE, it means midnight to midnight. Must the registrant report 48 hours "at most" before 12:01 a.m. of the day he plans to leave? Finally, what conceivable purpose is served by precluding the conscientious registrant from reporting travel plans *more than* 48 hours before leaving the state? Under this interpretation, a registrant reporting 49 hours before leaving is as culpable as one who makes no report at all.

[7] As FDLE points out (DE:10 at 10), two cases from Florida's First District Court of Appeal appear to recognize the affirmative defense of impossibility to a registration violation charge. *See Barnes v. State*, 108 So.3d 700 (Fla. 1st DCA 2013); and *Griffin v. State*, 969 So.2d 1161 (Fla. 1st DCA 2007). It is doubtful that registrants and sheriffs have read these cases. Therefore, registrants like Plaintiff John Doe 1 will forego travel for fear of violating this provision, see DE:1 at ¶ 66, and sheriffs will arrest registrants on the basis of the provision's absolute terms.

These requirements significantly burden Plaintiffs' fundamental right to travel, which cannot be infringed "unless necessary to promote a compelling government interest."

> "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of the land uninhibited by statutes, rules, or regulations…[unless] necessary to promote a compelling government interest."

Shapiro v. Thompson, 394 U.S. 618, 629, 634 (1969); *see also California v. Aznovorian*, 439 U.S. 170, 176 (1978) ("The constitutional right to interstate travel is virtually unqualified"); *U.S. v. Guest*, 383 U.S. 745, 757-58 (1966) (citizens of U.S. "must have the right to pass and repass through every part of it without interruption"); *Evers v. Dwyer*, 358 U.S. 202 (1958) (recognizing fundamental right to travel claim against law restricting black riders to back of bus); *Cf. Korematsu v. United States*, 328 U.S. 214, 218 (1944) (only "the gravest imminent danger to the public safety" allows government to restrict citizens' freedom of movement), *abrogated by Trump v. Hawaii*, _ U.S. _, 138 S.Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided [and] has been overruled in the court of history.").

The state has an unquestionably compelling interest in protecting the public against crimes of a sexual nature. But it is not necessary, or even reasonable, to impose multiple in-person reporting requirements for a weekend away on registrants like Plaintiffs, who have not reoffended for decades. Even assuming compelling justification to require notice for such brief address changes, the State "had less drastic means" for obtaining it, *Aptheker v. Secretary of State*, 378 U.S. 500, 510 (1964), for example, by allowing reporting online, rather than in-person, as is the case for changes to email addresses and Internet identifiers. § 943.0435(14)(e)(2). Plaintiffs have stated a plausible basis for relief on this claim.

VI. Vagueness of Travel-Related Terms

Further impinging upon Plaintiffs' fundamental right to travel is the vagueness of the terms restricting it, in violation of procedural due process, which requires notice sufficient to inform the ordinary person of the conduct prohibited, and to prevent police and prosecutors from discriminatory or arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). The 2004 amendment imposing strict liability aggravates the vagueness problems. *See Colautti v. Franklin*, 439 U.S. 1225, 1229 (1982) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea*."). Furthermore, while vagueness may be tolerable in a law regulating business activities, it is unconstitutional where it chills the exercise of a fundamental right. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 164, 168-69 (1972) (vagueness of vagrancy law, designed to deter future crime by people "undesirable in the eyes of police and prosecutors" unconstitutionally chilled fundamental right to "wandering and strolling"); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (vague law chilling speech).

Although FDLE has made a stab at interpreting some of the terms at issue, it cannot save a vague statute through its own narrowing interpretation, because its interpretations do not bind state courts or local law enforcement. They furthermore conflict with other portions of the statute, the purpose of the statute and common sense. *Stenberg v. Carhart*, 530 U.S. 914, 940-44 (2000).

Day. FDLE submits that "day" means the block of time from midnight to midnight, DE:10 at 11. This means that an out-of-state traveler who leaves home on Friday night must make two or three in-person reports if he returns on Sunday morning. Specifically, if he leaves the state, he must report in-person 48 hours before leaving, § 943.0435(7); whether or not he leaves the state, he must report in-person on return, first to the DHSMV, then, if he cannot

"secure" or "update" his license, to the sheriff with proof of going to the DHSMV first, both reports to be made within 48 hours of return. § 943.0435(4)(a).[8]

For its interpretation of "day," FDLE relies, *inter alia*, on dictum based on a 115-year old "general rule" (DE:10 at 12) (citing *Maxwell v. Jacksonville Loan & Imp. Co.*, 45 Fla. 425, 454 (Fla. 1903)). But the *modern* definition of "day" is *any* 24-hour period, that is, the time it takes the earth to revolve around the sun.[9] Indeed, FDLE cites *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 143 (2d Cir. 1997), see DE:10 at 12, which relies on the same definition. A registrant who reads *Burgo* or the dictionary may be arrested by law enforcement officers who do not. This alone establishes the word's ambiguity.

Place and Destination. FDLE defines both words to mean the same thing – a street address (DE:10 at 13). This means an interstate traveler can hotel hop (for as long as he likes) without reporting provided he stays less than 3 days at any one hotel, while the 3-day interstate traveler must make multiple in-person reports even if he stays home for the rest of the year. This is an absurd result, undermining both the purpose of the travel restrictions and the provision requiring registrants to respond to address verification visits within 3 weeks. § 943.0435(14)(c)4.

VII. Irrebuttable Presumption

FDLE relies solely on *Doe v. Conn. Dept. of Public Safety*, 538 U.S. 1 (2003) (hereinafter "*CDPS*") to argue for dismissal of this claim (DE:10 at 19). *CDPS*, decided the same day as *Smith*, was animated by the same erroneous empirical assumptions. Yet empirical reality is

[8] Also vague is that sentence from § 943.0435(4)(a). What does it mean to "secure" or "update" a driver's license at DHSMV? Is the registrant required to get a new driver's license reflecting the temporary residence he already vacated?

[9] *See* https://en.wikipedia.org/wiki/day ("period of time during which the Earth completes one rotation with respect to the sun"); https://thelawdictionary.org/day/ ("period of time consisting of 24 hours and including the solar day and the night").

important to resolving this claim too: does the ultimate fact presumed rationally follow from the fact proved. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). If the generalization is accurate as applied to most group members, it may not be worth "the time and expense necessary to identify" the outliers. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 30 n.16 (1977).[10] But if the generalization does not apply in the majority of cases, it should be stricken as empirically unreasonable. *See Taylor v. Pennsylvania State Police of Com.*, 132 A.3d 590, 605-06 (Pa. 2016) (striking irrebuttable presumption of intractable risk as applied to juveniles in light of new empirical studies).

The dispositive factor in determining the constitutionality of an irrebuttable presumption is whether it infringes on a fundamental right. *Weinberger v. Salfi*, 422 U.S. 749, 768, 777 (1975). If it does, there must be a close fit "between the classification and the policy that the classification serves." *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

CDPS is thoroughly distinguishable from this case. The *CDPS* plaintiffs did not claim that the presumption was inaccurate as to most group members, only as to them, and they did not allege that the presumption infringed on a fundamental liberty interest. Plaintiffs here allege that the presumption greatly impairs their fundamental right to travel. They also proffer empirical evidence that the presumption is inaccurate as applied to most registrants and that it is readily rebutted. *See* DE:1 at ¶¶ 52-53. Deployment of an unrebuttable presumption that is inaccurate as applied to most of its targets and is easy to disprove violates due process where, as here, it

[10] *See also Coleman v. Thompson*, 501 U.S. 722 (1991) ("the justification for a conclusive presumption disappears when the application of the presumption will not reach the correct result most of the time."); *Recchi America Inc. v. Hall*, 692 So.2d 153 (Fla. 1997) (invalidating conclusive presumption due to "high potential for inaccuracy").

infringes on a fundamental right without advancing the government's goal. *Johnson v. Williams*, 568 U.S. 289, 301-302 (2013).

VIII. Rational Relationship

Assuming no fundamental or quasi-fundamental interest is infringed by the statute, it must nevertheless be rationally related to a legitimate government interest. "The process of making the determination of rationality is, by its nature, highly empirical. . ." *United States v. Gainey*, 380 U.S. 63, 67 (1965). A plaintiff may challenge professed rationality with "countervailing evidence," *Armour v. City of Indianapolis,* 132 S.Ct. 2073, 2082 (2012), and courts must consider the "countervailing costs" to the target of the statute. *Plyler v. Doe*, 447 U.S. 202, 223-24 (1982). Although rational relationship review is highly deferential, a state may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Where plaintiffs present "countervailing evidence" and evidence of "countervailing costs," courts have struck registration statutes as too attenuated from their asserted goal, under the ex post facto clause. *See, e.g., Does v. Snyder,* 834 F.3d at 99-100 (in view of empirical evidence establishing low recidivism rate, statute's inefficacy in meeting its goals, and subversion of those goals as by-product of impacts on housing, financial and social stability, no rational relationship to public safety); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (no empirical evidence presented to establish that "substantial majority of the registered offenders will pose a substantial risk of re-offending long after they have completed their sentences").

The Complaint proffers empirical evidence that the statute is not rationally related to its purpose, DE:1 at ¶¶ 52-56, while imposing punishing costs on them. DE:1 at ¶¶ 60-89. They have therefore stated a plausible substantive due process claim for relief.

IX. Stigma-Plus

Federal courts, including the Eleventh Circuit, have acknowledged the severe stigma from the stereotype associated with the label "sex offender." *See Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) ("stigmatizing consequences of being labeled a sex offender"); *Kirby v. Siegelman*, 195 F.3d 1285, 1291 (11th Cir. 1999) (citing *Shimoda* to acknowledge "the stigmatizing effect of being classified as a sex offender"); *Schepers v. Commissioner, Indiana Dept. of Correction*, 691 F.3d 909, 914 (7th Cir. 2012) ("any kind of placement on the registry is stigmatizing").

Contrary to FDLE's characterization, a stigma-plus claim need not include an allegation of falsehood. *See Paul v. Davis*, 424 U.S. 693, 696 (1976) (plaintiff's claim of stigma based on flyer identifying him as "active shoplifter[ ]," where flyer was disseminated after his arrest for shoplifting and before dismissal of charge; claim failed in absence of "plus" evidence); and *Vitek v. Jones*, 445 U.S. 480, 488, 490-92 (1980) (validating claim of stigma plus based on prisoner's involuntary transfer to mental hospital, where plaintiff did not challenge veracity of classification). Indeed, the United States Supreme Court has acknowledged that stigma arises from the fact of having to register as a sex offender, even where someone has been convicted of a qualifying offense. *See Lawrence v. Texas,* 539 U.S. at 576 (noting stigma from registration as among reasons for decriminalizing sodomy). But whether or not an assertion of falsehood is necessary, Plaintiffs have alleged and will prove in court that FSORNA's declaration that registrants represent a high and long-lasting risk of sexual re-offense is both false in general and, specifically, as applied to them.

Plaintiffs have also alleged and will prove facts sufficient to satisfy the "plus" component of a stigma-plus claim: multiple in-person reports required for trivial or fleeting changes, on pain of strict liability felony prosecution; disabling impacts on housing and employment; chronic and

severe ostracism and vigilantism imperiling the safety and well-being of both the registrant and his family (DE:1 at ¶¶ 57-89). *See Wisconsin v. Constantineau*, 400 U.S. 433, 437-38 (1971) (invalidating posted ban of alcohol sale to persons determined to be hazards when drinking: "a person's good name, reputation, honor, or integrity is at stake"). Plaintiffs have thus stated a plausible claim for relief.

WHEREFORE, based on the foregoing, the Plaintiffs submit that the Defendant's Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, December 26, 2018, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notification for this case, including all opposing counsel.

/s/Todd G. Scher
Todd G. Scher
Fla. Bar No. 0899641

APPENDIX

A complete history of the salient statutory provisions best illustrates how each new amendment aggravated the impacts of all the others:

1997. Travel restricted by requiring report to DHSMV within 48 hours after any change in "temporary residence," a place plaintiff resided for 2 consecutive weeks, excluding vacation, emergency or other special circumstances. § 943.0435(2), (3) (1997).

1998. "Temporary residence" redefined as 14 days in aggregate per year, or 4 days in aggregate per month, with silence about exclusions. §§ 943.0435(1)(c); 775.21(2)(g) (1998). Duration made lifetime. § 943.0435(11) (1998).

2004. *Mens rea* excluded for all but first violation. § 943.0435(9)(c) (2004).

2005. All required to re-register in person 2 times a year. § 943.0435(14)(a) (2005).

2006. "Temporary residence" redefined from 14 days in aggregate per year, or 4 days in aggregate per month, to 5 days in aggregate per year. §§ 943.0435(1)(c); 775.21(2)(g) (2006).

2007. Some required to re-register in person 4 times a year. § 943.0435(14)(a), (b) (2007).

2010. "Temporary residence" redefined to expressly include travel for vacation, business, or personal reasons in 5-day aggregate calculation. §§ 943.0435(1)(c); 775.21(2)(l) (2010). Required to report dates of known future temporary residence within & out of state. § 943.0435(14)(c)1. (2010). Those with out-of-state temporary residences required to report 48 hours **before** leaving as well as on return. § 943.0435(7) (2010).

2014. All required to report on return from temporary residence first to DHSMV, then, if "unable to secure or update" driver's license, to sheriff, with proof of DHSMV attempt, both within 48 hours of return. § 943.0435(4)(a) (2014).

2018. "Temporary residence" redefined from 5 days to 3 days in the aggregate per year. §§ 943.0435(1)(f); 775.21(2)(n). (2018). Minimum mandatory sentences for any violation. § 943.0435(9)(b)1., 2., 3. (2018).