

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CIVIL CASE NO. 9:18-cv-81738-DMM

**MATTHEW 25 MINISTRIES, INC.,
A Florida Not-For-Profit Corporation,**

Plaintiff,

v.

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

Defendant.

_____ /

PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS

The Plaintiff, MATTHEW 25 MINISTRIES, Inc., by and through its undersigned counsel, hereby files its Response to Defendant’s Motion to Dismiss (D.E. 18, hereafter “Motion”) Plaintiff’s Amended Complaint (D.E. 13, hereafter “Complaint”). For the reasons set forth below, the Plaintiff submits that the Defendant’s Motion should be denied.

Preliminarily, Plaintiff feels compelled to correct two significant distortions in Defendant’s Motion. First, Defendant’s assertion that the challenged Registration Statutes are merely “inconvenient” and Second, that the challenged portion of the Statutes reflect a “substantial government interest in public safety”. Plaintiff challenges requirements that are not just

inconvenient to comply with, but are *impossible* to comply with in many circumstances. Also, the requested relief has no bearing on public safety. It would be in the interest of public safety for Registrants to have an available method to register information when necessary, than to have none.

In the introductory paragraphs of Defendant's Motion, he states that Plaintiff challenges the *in-person* requirements because registration is at "inconvenient hours or require[s] a long drive" (see D.E. 18, at page 6). Yes, requiring individuals to report frequently *in person*, above and beyond regular monthly, quarterly or six month re-registration, often having to take time off work, travel to multiple locations (such as the Sheriff and also DHSMV), be subjected to pat down searches, wait in long lines and pay fees, is inconvenient, but it does not end there. In fact, in too many circumstances registration is impossible to comply with because the Registration Statutes require *in person* registration within (as defined by FDLE to mean 'at most', not 'at least') 48 hours of certain events, but fail to account for the fact that most registration locations are closed for periods of more than 48 hours at a time.

Defendant's Motion then states, "Even if, *arguendo*, the in-person registration requirements actually did affect registrants' right to petition, it would merely be incidental and insufficient to state a claim given the substantial government interest in public safety the statutes are designed to protect." (*Id.*, at page 16). Throughout his motion, Defendant's arguments and all his cited case law imply that Plaintiff is challenging the underlying requirement to register certain information. This action does not challenge the requirement to register items such as temporary vacation, business travel or renting a vehicle, just the method of registering these events. Defendant and the public would have access to the very same information whether it is furnished to Defendant by phone, by fax, by email, or through an online portal as it would have had the information been provided *in person*.

I. Plaintiff's Complaint Survives a Motion to Dismiss

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court “must accept all well-pleaded facts in the Complaint as true and view them in the light most favorable to the plaintiff.” *Castro v Secretary of Homeland Security*, 472 F.3d 1334, 1336 (11th Cir. 2006). A motion to dismiss should be denied unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In the instant case, Plaintiff, a non-profit organization comprised of Persons Required to Register as Sexual Offenders (“Registrants”), on behalf of its members and Registrants in the State of Florida, challenges a component of Florida Statutes §943.0435 and §775.21 (the “Registration Statutes”) that require *in-person* registration of certain information within 48 hours (above and beyond the regular monthly, bi-annual, quarterly or monthly *in person* registration) under the threat of a third degree felony carrying a minimum mandatory sentence, where it is *impossible* to comply with the Registration Statutes in many such circumstances.

Plaintiff has plead, with specificity, that its members and all Registrants in Florida (1) suffered an injury in fact, namely, (a) a violation of ex post facto laws; (b) a violation of their right to petition government; (c) a violation of their rights to travel; and (d) a violation of their right to be free from deprivations of liberty without due process of law. And (2) that those violations are fairly traceable to the challenged conduct of the Defendant, namely the enforcement of the *in person* component of the Registration Statutes. And (3) that the violations are likely to be redressed by a favorable judicial decision, namely in the granting of the relief requested in its Complaint.

Plaintiff has plead harms that are not merely speculative, but that are factual and imminent. Plaintiff's challenge is the most efficient way to adjudicate the controversy because all members of Plaintiff and all Registrants' claims share the same commonality.

II. Plaintiff Does Have Standing to Bring this Action

As stated in the Complaint, "It has long been settled that an organization has standing to sue to redress injuries suffered by its members without a showing of injury to the association itself and without a statute explicitly permitting associational standing." *Doe v. Stincer*, 175 F. 3d 879 (11th Cir. 1999). "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth v. Seldin*, 422 U.S. at 511 (1975).

"The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable..., the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.* (*emphasis added*).

Plaintiff can satisfy all three requirements set forth in *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977), namely; (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

All (not merely *any*) Registrants who live in Miracle Village as well as tens of thousands of Registrants who live in the State of Florida are suffering immediate or threatened injury as a

result of the *in person* component of the Registration Statute of the sort that would make out a justiciable case had they each brought suit individually.

As to whether this case is germane to Plaintiff's purpose; Miracle Village has been featured in numerous news outlets¹ worldwide as the illustration of the consequences of Florida's registration laws. Second to the now disbanded Julia Tuttle Causeway, it is perhaps the most widely known community of Registrants in the world. The interests the Complaint seeks to protect are not just germane to its purpose, but are central to its purpose.

Finally, the Complaint alleges harms that affect all Registrants and does not make the individual participation of each injured party indispensable. The harms are apparent in the text of the Registration Statutes and the hours and addresses of the registration locations.²

Defendant further alleges that "the residents of Miracle [Village] have no alleged role in Plaintiff's operation, management or decision making. They simply live at Plaintiff's property, or perhaps participate in its prison aftercare program." (D.E. 18 at page 6) That is false. Plaintiff's Complaint cites (D.E. 13 at ¶9) its Wikipedia page³, which explains "It receives 10–20 applications a week, but only accepts 1 in 20; residents participate in the selection process." Residents go through a screening process and then participate in its internal affairs by selecting who else they will let into the community (see Declaration of Ted Rodarm attached as EXHIBIT A). As such, the organization does have the "indicia of membership", which requires a measure of control over the organization's management and operation.

¹ See, for example: <https://www.dailymail.co.uk/femail/article-5276339/Inside-isolated-community-dubbed-Miracle-Village.html>, or <https://www.thesun.co.uk/news/5357850/miracle-village-florida-paedophiles-sex-offenders/>, or <https://www.bbc.com/news/magazine-23063492>, or <https://www.themercury.com.au/news/world/floridas-miracle-village-a-refuge-for-sex-offenders/video/b8e0902836587144d2d1a0569e039a47?nk=ced016964dd07e531a6c188b786a8051-1549832311>

² <https://offender.fdle.state.fl.us/offender/Documents/REREGISTRATIONLOCATIONS.pdf>

³ [https://en.wikipedia.org/wiki/Miracle_Village_\(community\)](https://en.wikipedia.org/wiki/Miracle_Village_(community))

With respect to causation, Defendant cannot disclaim responsibility for the Constitutional infirmities complained of. Defendant states, “Simply put, FDLE does not control county sheriffs or DHSMV offices. Sheriffs are constitutional officers and are part of the judiciary branch. The DHSMV is an entirely separate executive agency. FDLE is not the general overseer of sheriffs or other executive agencies. It does not set their office locations or hours of operation.” (D.E. 18, at page 10).

In actuality, Defendant is *the* agency charged by Florida Statute with administering the registry⁴ and has the authority to implement policies and requirements for compliance with the registry. Defendant could, if it so chose and as its Mission Statement claims, “provid[e] services in partnership with local state, and federal criminal justice agencies”⁵ that would ensure facilities are available 24/7 so that Registrants can comply with the Registration Statutes. It does not.

The Defendant itself issued the memo dated April 12, 2018 (attached as Exhibit C to the Complaint), which demonstrates it had knowledge that “this increased reporting requirement [contained in the 2018 change to the Registration Statute] may necessitate a modification in the hours the agency provides registration services” making compliance such that it would *necessitate* separate agencies being open more days or hours. The FDLE could also provide Registrants alternative means to comply with the Registration Statute, such as those suggested in the Complaint. It does not.

⁴ 943.02 (1) “Department” means the Department of Law Enforcement. 943.0435 Sexual offenders required to register with the department

⁵ <http://www.fdle.state.fl.us/>

III. Plaintiff's Claims Are Not Time Barred

Plaintiff's claims are not time barred. The catalyst for bringing this action is the 2018 version of the registration statute which implemented increased reporting requirements and a minimum mandatory sentence for violation of the Registration Statutes.

Yes, the Registration Statutes were implemented in 1997 but originally, they contained a *mens rea* requirement (whereas it is now strict liability) and in 1997 defined a "temporary address" as 14 days in the aggregate per year. The 2018 version of the Registration Statute changed that definition to only three (3) days and added a mandatory minimum sentence. This change in the Registration Statute, which was implemented less than one year ago, significantly increased the requirements and legal jeopardy Registrants are in for violation of the Registration Statutes.

Even if Defendant argues that the Statute of Limitations has run out because the 1997 Registration Statutes contained an *in person* registration requirement, "not all injuries are equal. Sometimes, there is one discrete point at which the injury occurs. Other times, however, the injury happens over and over again... Plaintiffs claim that [the Alabama registration statute]... violates their fundamental rights. If that is true, then ASORCNA afflicts a fresh injury each day that Plaintiffs are subject to the law. In *Kuhnle Brothers v. County of Geauga*, for example, the Sixth Circuit held that a claim for the deprivation of the right to travel accrues every day while the unconstitutional law is in effect. 103 F.3d 516, 522 (6th Cir. 1997); see *Hillcrest Prop., LLC v. Pasco Cty.*, 754 F.3d 1279, 1283 (11th Cir. 2014) (citing *Kuhnle* with approval). And in *Beavers v. American Cast Iron Pipe Co.*, the Eleventh Circuit held that each week in which a discriminatory insurance policy was in effect constituted a new Title VII violation. 975 F.2d 792, 798 (11th Cir. 1992)." *Does v. Marshall*, 2019 WL 539055 (M.D. Ala. Feb. 11, 2019)

Finally, the Defendant has better access to the FDLE registry information than anyone and

can easily confirm that there are Registrants at Miracle Village who have only initially registered within the past four years. As stated hereinabove, it is sufficient that the members *or any one of them*, are suffering immediate or threatened injury for the claims to proceed.

IV. Plaintiff's *Ex Post Facto* Claims Are Not Foreclosed by Precedent.

The Defendant states that Plaintiff's *ex post facto* claims have been foreclosed by Supreme Court and Eleventh Circuit precedent (citing *Smith v. Doe*, 538 U.S. 84, 103 (2003) and its progeny).

The instant case is distinct from *Smith v. Doe* and that distinction can be expressly extracted from the *Smith* decision itself. The Supreme Court in *Smith* upheld the Constitutionality of the Alaska registry, finding, "*The Alaska statute, on its face, does not require these updates to be made in person. And, as respondents conceded at the oral argument before us, the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act.*" *Id.* At 101. Here, the Plaintiff *specifically* challenges the requirement that certain updates be made *in person*.

The instant case is also distinguished from the 11th Circuit precedent on *in person* registration. Unlike the Alabama statute at issue in *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011), the Florida Statute is not merely inconvenient to comply with, but in many circumstances is *impossible* to comply with.

Further, as stated in the Complaint, here the Plaintiff is not challenging the regular *in person* re-registration for which Persons Required to Register must report *in person* every month, six months or ninety days, but the EXTRA in person reporting they must comply with due to free choices such as changing vehicles, vacation or business travel or even involuntary choices, such

as a cohabitant changing vehicles or emergency situations, such as evacuation for a natural disaster, hospitalization or emergency travel, which can easily be reported online or by telephone and supply the State with the exact same information they would provide in person. (D.E. 13, at ¶ 55)

V. The In-Person Registration Requirements Implicate the Right to Petition

To borrow from Shakespeare's Hamlet, Defendant's argument merely serves to 'hoist with his own petard'. Defendant states, "Plaintiff could allege that registrants' freedom of association is violated because they may wish to travel to a club meeting; that their freedom of religion is violated because they may wish to travel to a worship service; that their right to privacy is violated because they may wish to travel to have an abortion...", (D.E. 18, at page 15) all of which could be valid, however, in the instant case, the Plaintiff has plead that, "its members and other Persons Required to Register frequently travel to Tallahassee or other parts of the state, other states or even internationally in order to advocate for reform of sex offender laws." (D.E. 13, at ¶10) As such, the right to petition, which is germane to Plaintiff and other Registrants, is violated by the *in person* registration requirement which prevents them from doing so.

Defendant's arguments that Registrants can avoid the *in-person* registration requirement, by "return[ing] before the statutory reporting thresholds are triggered—for example, a one-day trip" or "contacting a legislator by telephone, letter or e-mail; submitting written complaints or testimony; or otherwise airing their grievances in some way other than appearing in-person in a remote county" (D.E. 18, at page 17) is offensive. It's tantamount to suggesting African Americans could have phoned in to the 1963 March on Washington.

VI. The In-Person Registration Requirements Violate the Right to Travel

The Defendant's adherence to *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005), which held

the 2003 version of the Registration Statute did not violate the fundamental right to travel, ignores the substantial burdens added in the fifteen (15) years since that case was decided. The 2003 version of the Registration Statutes required a single in-person report after return from a temporary residence, which was 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 minimum punishment.

The 2018 version of the Registration Statute requires in person notification within 48 hours before establishing a temporary residence, which as is now defined as three (3) days in the aggregate per year. Failure to report subjects the Registrant to a mandatory minimum of six months' probation with GPS monitoring and a maximum of 5 years in prison.

If a sheriff's office is not open during the 48-hour time period preceding a planned departure for more than 2 days, a Registrant cannot travel without exposure to a third-degree felony. Requiring notice be made *in person*, the Registration Statutes force Registrants to schedule travel according to the Sheriff's or DHSMV's office hours.

Where travel for more than 2 days cannot be planned (as in the case of a family emergency or natural disaster) the Registrant will have to wait what might be days for the registration location to open, so that they can attend to the emergency, otherwise they will be committing a registration violation.⁶

The Registration Statutes do not merely "burden" Plaintiff's fundamental right to travel but *restrict* it. Registrants in Glades, Gulf, Hamilton, Hernando, Highlands, Lafayette, Liberty, Manatee, Pinellas, St. Johns, and Sumter Counties cannot depart for travel of more than 2 days spontaneously (or for an emergency) on a Friday, Saturday, Sunday or Monday and cannot depart at all for a trip of more than two days on Sunday or Monday because their registration locations

⁶ Even if a Registrant is ultimately acquitted for a registration violation on the affirmative defense of impossibility, the mere arrest would preclude their eventual opportunity to petition for removal under F.S. 943.0435(11).

are closed Friday, Saturday, Sunday and Monday.⁷

As stated in the Complaint, if a registrant living at Matthew 25 Ministries needs to travel to New York for a family emergency that occurred on Friday after 3:45 PM, he will be unable to leave until Monday morning at the earliest, because he will otherwise be unable to comply with F.S. 943.0435(7), which requires him to report interstate travel at the Sheriff's office, in person, within 48 hours. (D.E. 13, at ¶ 34)

Only "the gravest imminent danger to the public safety" allows government to restrict citizens' freedom of movement *Kent v. Dulles*, 357 US 116 (1958). Defendant can argue that in their minds a travelling Registrant poses a grave and imminent danger, but as stated in the Complaint, "[i]n person reporting of the very same information which can otherwise be reported online, in writing or by telephone, will not prevent sex offenses or otherwise promote public safety. (D.E. 13, at ¶ 68)

VII. The In-Person Registration Requirements Violate Due Process

Plaintiff's Due Process count is not a rehash or "double dip" of their travel count. Included in the Registration Statutes is the requirement that vehicles owned (or vehicles owned by a cohabitant) be registered *in person*. Plaintiff argues that "To meet the frequent *in person* registrations, many residents of Matthew 25 Ministries must take time off work since the registration location in Palm Beach County is only open weekdays and during work hours." (D.E. 13, at ¶ 46). Registrants must work to provide for their families. Registrants also have a right to privacy and to be free from unreasonable searches by the government, yet registration locations in Duval require Registrants to be frisked.

⁷ <https://offender.fdle.state.fl.us/offender/Documents/REREGISTRATIONLOCATIONS.pdf>

Due Process is a safeguard from arbitrary denial of life, liberty, or property. Due process requires that the government not be unfair to the people. It is unfair to make a person chose between a family emergency and a mandatory minimum sentence. It is cruel to suggest that they can comply with the restriction by visiting a dying loved one for a “day trip”. It is inhumane to make a person chose between evacuating during a hurricane and facing five years in prison. But that is what the challenged requirement does.

Whether under strict scrutiny or even rational basis – the *in-person* component of the Registration Statutes cannot be left uncured because under any standard they don’t pass Constitutional muster. Defendant argues that it is “the interest of government to protect its citizens from criminal activity” (D.E. 18, at page 20). But if the Defendant wants to claim that “travelling sex offenders” are such a public safety concern, arguably it would be much safer if they didn’t have to travel in the general public to go to and from the Sheriff’s office and DHSMV to report this information.

Once again, Plaintiff reminds the court that this has absolutely nothing to do with public safety or protecting its citizens from criminal activity. Plaintiff does not challenge the requirement to register the underlying information – just the manner in which it is required to be registered, which is not the least restrictive manner of achieving the State’s “interest”, nor is there a rational connection between the means and goals of the frequent *in person* requirement at issue.

Plaintiff merely asks that the Defendant follow fair procedures by affording them the opportunity to report the required information in a reasonable and available manner. Especially before subjecting them to a third-degree felony.

WHEREFORE, Plaintiff prays this Honorable Court deny Defendant's Motion.

RESPECTFULLY SUBMITTED: February 18, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that undersigned counsel has electronically filed the foregoing Response to Defendant's Motion to Dismiss with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification and serve such filing upon Senior Assistant Attorney General, Shane Weaver, Esq on this 18th day of February, 2019.

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**MATTHEW 25 MINISTRIES, INC.,
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Plaintiff,

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of the Florida Department of Law
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Defendant.

**DECLARATION OF TED RODARM IN SUPPORT OF PLAINTIFF'S
RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

I, Ted Rodarm, pursuant to 28 U.S.C. §1749 declare the following:

Since 2016 I have served as the Executive Director of Matthew 25 Ministries, Inc., ("Matthew 25") the Plaintiff in the above-captioned case. I am also a person required to register as a sexual offender pursuant to Florida Statute 943.0435 and have lived at Matthew 25 (a/k/a City of Refuge, a/k/a Miracle Village) continuously since 2009.

I also serve as Chairman of the Palm Beach County Re-entry Task Force Sex Offender Subcommittee where several other individuals from Matthew 25 are also members. I serve on a similar subcommittee for Broward County. Matthew 25 Ministries is also a participant in the annual Palm Beach County Reentry Summit.¹

Matthew 25 is not-for-profit corporation. We provide housing, rehabilitation services and assistance to ex-offenders who are required to register. We provide understanding, support, fellowship, and personal experience in the hardships they are experiencing. All residents are

¹ <http://discover.pbcgov.org/publicsafety/justiceservices/Reentry/SexOffender.aspx> and <https://www.matthew25ministries.org/reentry-summit-2018/>

encouraged to find spiritual support and are offered fellowship in our community church.² Our published mission is “to provide a compassionate Christian community for ex-offenders who are willing to take responsibility for themselves and learn to make viable choices while striving for success. We do this by helping them to see their value as a person, affirm their self-worth, and assisting them in becoming productive members of society.”³

On location we have multiple shared residential units, a small, independent, non-denominational church and community areas. Offense-specific treatment (those required by state and federal probation) programs are also made available at our location.

While we have a Board of Directors, comprised of Dr. Michael Breznen, Dr. Tom Barrett, Jack Stabley, and Jim Parker, Ph.D, our day to day management and operations are performed by the members of Matthew 25. Before anyone is accepted into Matthew 25 they must undergo a selection process which involves the screening and approval of a majority of current members.

One of our most important functions is to advocate for change to policies that have been proven ineffective and contrary to empirical studies and best practices. We do this through participation in municipal, state and national task forces and organizations, networking at re-entry and criminal justice conferences and speaking with legislators and media outlets.

Because we are isolated in the middle of nowhere, our ability to travel to perform our advocacy work is pertinent to our mission.

Executed this 15TH day of February 2019 under penalty of perjury.



Ted Rodarm, as Executive Director
Matthew 25 Ministries, Inc.

² <https://www.guidestar.org/profile/65-0230073>

³ Id.