UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:18-CIV-24145-WILLIAMS/TORRES

JOHN DOE, *et al*,

Plaintiffs,

vs.

RICHARD L. SWEARINGEN,

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

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Introduction. Defendant moves to dismiss on the basis of *Smith v. Doe*, 538 U.S. 84 (2003). At issue in *Smith* was Alaska's 1994 registration statute, requiring one-time in-person reporting of limited personal information with "passive"[1] notice through a website or toll-free phone. *Smith* asked whether the law's relatively light burdens were punitive under the ex post facto clause. Critical to its resolution of this "close"[2] question were two erroneous empirical assumptions: (1) people with qualifying convictions pose a high risk of reoffense, and (2) imposing light burdens would reduce that risk.

Decades of amendments to Florida's 1997 registration statute, which was much like Alaska's, have transformed it into an engulfing regime of restrictions and aggressive notification: multiple in-person reports per year about mundane events, like a 3-day trip from home, or a family member's short-term vehicle rental, on pain of felony prosecution and mandatory punishment; global notification through Google-indexing FDLE's website and branding driver's licenses; community saturation through automated emails and phone calls, posted signs and flyers, door-knocking and decals (DE:102 ¶¶ 3, 19-37, 48-54, 60). Decades of empirical research has established that the vast majority of people with qualifying convictions pose a small risk of reoffense, which steeply declines over time; and that registration statutes do not reduce this risk. In fact, the vast majority of sex crime arrests (95%) involve people *who are not on the registry* – family members or others already known to the victim (DE:102 ¶¶ 55-59).

Smith does not stand for the proposition that every registration statute is always constitutional as applied to every registrant, regardless of the extent of its restrictions, the reliability of its premises, or the individual registrant's circumstances. Federal courts are "under

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[1] *Smith v. Doe,* 538 U.S. 84, 105 (2003).
[2] *Smith,* 538 U.S. at 107 (Souter, J., concurring in judgment).

no constitutional obligation to blind themselves to reality." *Vega v. Lantz*, 596 F.3d 77, 85 (2d Cir. 2010). Yet Defendant encourages this Court to blind itself to empirical evidence about the inefficacy of registration statutes and to the real-world burdens of FSORNA 2018 because of *Smith.* Constitutional law is anchored in empirical reality.[3] 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.[4]

Standard of Review. When evaluating a motion to dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(6), the court must take "the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiffs." *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

Aggressive Notification. Defendant complains that this phrase is "meaningless" or "non-existent" and, *if* it exists, is someone else's fault (DE:103 at 3-4). He asserts that notice is "provided passively" as it was in 1998, when the public had to seek out a website or call a toll-free number to learn whether someone had committed a qualifying offense (DE:103 at 3). Not so. Defendant subsequently Google-indexed the website, making notification proactive: any person who googles a registrant's name for any purpose immediately sees the label "sex offender" over a law enforcement photo; learns the nature, location, disposition and gender of the victim of the

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[3] *See Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (empirical evidence that segregation caused psychological damage to black children); *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("new-established medical fact" that, during first trimester, "mortality in abortion may be less than mortality in normal childbirth"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-77 (1989) (statistical evidence to determine constitutionality of affirmative action); *Maryland v. Craig*, 497 U.S. 836, 855, 857 (1990) ("growing body" of academic literature to hold that child victims could testify outside alleged abuser's presence); *Hall v. Florida*, 134 S.Ct. 1986, 1990, 1995 (2014) (mental health professionals to determine that IQ is not a fixed number).

[4] *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" and stigma of conviction due to registration statutes).

qualifying offense; and is informed of his home address, the marks on his body, the vehicles used by him and his family (DE:102 ¶¶ 3, 51). While irrelevant for most search purposes, this website information is at best profoundly stigmatizing (DE:102 ¶¶ 3, 10-11, 64, 66, 69, 71, 73-77, 79, 81-82, 85, 89, 90-93, 95, 98); at worst, it helps vigilantes target registrants and their families (DE:102 ¶¶ 3, 10, 11, 108, 129).

Moreover, the statute expressly authorizes community notification by local police as furthering "the governmental interests of public safety," §943.0435(12), and encourages aggressive notification by conferring immunity from civil liability and a presumption of good faith for any forms of warning the police undertake. § 943.0435(10) (DE:102 ¶ 49).

Alternatively, Defendant submits that the public's virulent response to aggressive notification is "independent conduct" for which he bears no blame (DE:103 at 3). This is a dodge. Widespread notification foreseeably results in vigilantism. Indeed, when amending the statute to require disclosure of registrants' email addresses, the Florida Senate debated whether to include a public admonition against using these addresses to threaten registrants:

> Because you know, Mr. Chairman, if this bill weren't to pass, I'm afraid that people like me, if I knew somebody who did something like this to a child, I may end up in jail.
>
> Chairman: Mm, don't put that on the record.
>
> Senator: Well, I'm serious. Now it's on the record.
>
> Chairman: The judges are in the room [Laughter]
> Senator: I may hurt you. May want to hurt you.[5]

[5] Fla. S. Comm. on Crim. and Civil Just. Approp., tape recording of proceedings (Feb. 22, 2007; 10:28:03-10:28:20) (available at Florida State Archives Tallahassee, Fla.) (Sen Argenziano, re Senate Bill 1004, "relating to Cybercrimes Against Children Act of 2007"). Ultimately the Legislature opted not to warn the public against sending threatening emails to registrants. Fla. S. Comm. On Crim. And Civil Just. Approp., SB 1004 (2—7) Staff Analysis p. 7 (Feb. 23, 2007) (available at https://archive.flsenate.gov posted 2/26/07).

Like the Florida Legislature, state and federal courts have noted that aggressive notification leads to harassment and vigilantism.[6]

Statute of Limitations. Much like the Alaska statute at issue in *Smith*, Florida's 1997 FSORNA imposed few requirements: one initial in-person report, another on renewal of a driver's license, another if changing permanent residence. Defendant submits that, because the 1997 version required at least one in-person report, Plaintiffs are too late to challenge the in-person reporting requirement (DE:103 at 4-5), even if, due to the exponential increase in the number of events to be reported in person, it now results in more than 20 in-person reports each year[7] (DE:102 ¶¶ 80).

The 1997 version, with its slight impacts and presumed relationship to crime prevention, was like carrying a light backpack on a road to public safety. Decades of amendments stuffed the backpack with bricks. Decades of validated peer-reviewed studies prove the road goes nowhere. But if a registrant stumbles under his staggering load on the road to nowhere, he is subject to felony arrest, prosecution and a 5-year prison sentence for the rest of his life. According to Defendant, even if subsequent amendments require registrants to make 2 in-person reports a day, they cannot

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[6] *Doe v. Department of Public Safety*, No. S-16748, 2019 WL 2480282 *9 (Alaska June 14, 2019) ("Sex offenders are among the most despised people in our society. Widespread publication of their convictions and personal details subjects them to community scorn and leaves them vulnerable to harassment and economic and physical reprisals"); *Millard v. Rankin*, 265 F.Spp.3d 1211, 1231 (D. Colo., August 31, 2017) (widespread notification "subjects registrants to effective banishment and shunning in the form of limitation of their ability to live and work without fear of arbitrary and capricious eviction, harassment, job relocation or firing, significant restriction on familial association, and actual and potential physical and mental abuse by members of the public."); *E.B. v. Verniero*, 119 F.3d 1073, 1102 (3d Cir. 1997) ("violence and threats . . . happen with sufficient frequency and publicity that registrants justifiably live in fear of them.").

[7] Requiring registrants to make in-person reports of changes to burgeoning amount of information (DE:102 at 24), greatly increased the number of in-person reports. Similarly, the redefinition of temporary residence from 14 consecutive days with significant exemptions to its present 3 days in the aggregate with no exemptions multiplied the number of required in-person reports.

complain because they failed to do so within 4 years of the 1997 version under Florida's 4-year statute of limitations.

While correctly citing state law for the length of the limitations period, Defendant overlooks federal law governing time of accrual, in particular the "critical distinction" in this Circuit 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.[8] Defendant cites only one-time act cases like *Meggison v. Bailey*, 575 Fed.App'x 865 (11th Cir. 2003) (DE:103 at 6-7), in which plaintiff complained that his designation as a sex offender violated his plea agreement, a claim that accrued upon notice of the designation and was not extended by the continuing consequences of the designation.[9]

Plaintiffs do not challenge their designation. They challenge the constitutionality of second-generation registration burdens and the continuing threat of imprisonment for failing to meet them. In such cases, courts around the country, including in this Circuit, apply the continuing violations doctrine to extend the statute of limitations.[10]

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[8] *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003); *Robinson v. U.S.*, 327 Fed.App'x 816 *9 (11th Cir. 2007) ("When the violation alleged involves continuing injury, the cause of action accrues, and the limitations period begins to run, at the time unlawful conduct ceases.").

[9] Defendant's other one-time act cases are inapposite. *See Washington v. Tex. Dep't of Criminal Justice*, 653 F. App'x 370, 372 (5th Cir. 2016) (challenge by non-registrant to participation in sex offender treatment accrued upon notice of requirement); *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1982) (claim of discrimination in failing to promote employee accrued upon notice of non-promotion); *Porter v. Ray*, 461 F.3d 1315, 1324 (11th Cir. 2006) (claim against new rule that inmates must serve more than one-third of their sentences accrued upon notice of rule); *Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1134-35 (11th Cir. 2006) (failure to designate critical wildlife habitat accrued upon statutory deadline for doing so); and *Rothe v. Sloan*, 2015 WL 3457894, at *2 (D. Colo. 2015) (continuing violations doctrine, not adopted by the 10th Circuit, did not extend filing time beyond notice of requirement to registerter).

[10] *See Nat'l Assoc. For Rational Sexual Offense Laws, et al. v. Stein, et al.*, No. 1:17CV53, 2019 WL 342120, at *9 (M.D.N.C. July 30, 2019); *John Doe 1 et al. v. Marshall*, No. 2:15-cv-606, 2019 WL 53905, *45-48; *Doe v. Haslam*, Nos. 3:16-cv-02862, 3:17-cv-002642017, WL 5187117 *11-14 (M.D. Tenn. Nov. 9, 2017); *Doe v. Gwyn*, No. 3:17-cv-504, 2018 WL 1957788 *5-6 (E.D.

Facial v. As-Applied Challenges. Defendant inaccurately maintains there is no difference between Plaintiffs' as-applied and facial challenges (DE:103 at 2 n.1). A facial challenge requires Plaintiffs to show that a law is *invalid in all applications*, *U.S. v. Salerno*, 481 U.S. 739, 746 (1987), while an as-applied challenge "focuses only on the *particular challenged application*. . ." *Rubinstein v. Florida Bar*, 72 F.Supp.3d 1298, 1309 (S.D.Fla. 2016) (emphasis added); *Reno v. Flores*, 507 U.S. 292, 300 (1993) (an as-applied challenge is limited to review of how a law has been "applied in a particular instance."). The distinction between the two "goes to the breadth of the remedy employed by the Court, not what must be pleaded in the complaint." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 330 (2010). Courts around the country have been granting as-applied challenges to registration statutes.[11]

CLAIM I: Ex Post Facto. Defendant's position is that FSORNA 2018 is not punitive because of *Smith v. Doe* and *Doe v. Moore*, 410 F. 3d 1337 (11th Cir. 2005), which applied *Smith* to deny an ex post facto challenge to an early FSORNA version. Since then, the Eleventh Circuit has reflexively upheld amended versions based on *Smith* and *Moore*, without examining the actual

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Tenn. April 25, 2018); *Coates v. Snyder*, No. 1:17-cv-1064, 2018 WL 3244010 (W.D. Mich. June 12,2 2018); *Wallace v. New York*, 40 F.Supp.3d 278 (E.D. N.Y. 2014). *And see Doe et al. v. Miami-Dade County, Florida*, No. 1:14-cv-23933, slip op. at 24-27 (S.D. Fla. Dec. 18, 2018) (doctrine applied to extend statute of limitations on ex post facto challenge to county housing ban).

[11] *See e.g. Hope v. Comm. Of Indiana Dep't of Corr.*, No. 1:16-cv-02865, slip. op. at 25-35 (S.D. Ind. July 19, 2019) (striking statute as applied to plaintiffs with remote convictions and severe individual impacts); *Doe v. Rausch*, 382 F.Supp.3d 783, 797-800 (E.D. Tenn. 2019) (punitive as applied, in absence of individualized assessment or empirical evidence of efficacy); *Millard, et al. v. Rankin*, 265 F.Supp.3d 1211, 1120, 1126-29 (D. Colo. 2017) (aggressive notification punitive as applied to low-risk plaintiffs who established housing and employment impacts, vandalism and threats of violence); *Doe v. State*, 167 N.H. 382, 402, 111 A.3d 1077, 1094 (2015) (striking statute as applied to registrant who had not reoffended in 30 years). *See also North Carolina v. Grady*, No. 179A14-3 at **14, 28, 48-52; 54-56 (N.C. Aug. 16, 2019) (striking lifetime GPS-monitoring under Fourth Amendment as applied to a low-risk category of registrants, noting Smith's statements about registrant risk "are not evidence"). *See also Does v. Miami-Dade County, Florida*, at *44 n. 35 (while facial challenge failed, as-applied challenge on behalf of an elderly homeless registrant might have prevailed).

weight of the additional impacts or revisiting the empirical assumptions undergirding *Smith* and *Moore.*[12] Nor has the Eleventh Circuit considered an as-applied challenge to the statute reduces the plaintiffs' burden of proof.[13]

This Court "cannot merely assume that assembling a factual record is unnecessary" because prior challenges have been unsuccessful; rather, "available evidence regarding for example, the efficacy and necessity of registration and monitoring regimes has not been frozen in amber since the regimes were adopted . . . [T]hese fact-dependent issues are relevant to the determination of whether a state's scheme should be considered civil or punitive. . ." *Doe and Doe #2 v. Haslam*, Nos. 3:16-cv-02862, 3:17-cv-00264, 2017 WL 5187117, at *20 (M.D. Tenn. Nov. 9, 2017).

Smith itself compels a dynamic approach to ex post facto analysis based on the law's actual impacts and efficacy. The Court adopted the five-factor test[14] from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to determine whether Alaska's registration regime *as it existed at*

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[12] *U.S. v. W.B.H.*, 664 F.3d 848, 852-53 (11th Cir. 2011) ("Because [*Smith*] 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); *Addleman v. Fla. Attorney Gen.*, 749 Fed.App'x. 956, 958 (11th Cir. 2019) ("Alaska's [act]. . .like Florida's act,. . .does not violate the Ex Post Facto clause," citing *Smith*); *Anderson v. Secretary, Dept. of Corr.*, 2011 WL 2517217, at *3-4 (M.D. Fla., June 23, 2011) (rejecting ex post facto claim based on empirical assumptions in *Smith*).

[13] These cases all involved facial ex post facto claims: *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005); *Houston v. Williams*, 547 F.3d 1357 (11th Cir. 2008); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009); *United States v. Carver*, 422 Fed.App'x 796, 801 (11th Cir. 2011); *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011); *Delaney v. Florida*, No. 8:11-cv-57-T-33MAP, 2011 WL 1211468 (M.D. Fla. March 14, 2011); *Windwalker v. Governor of Alabama*, 579 Fed.App'x 769 (11th Cir. 2014); *Waldman v. Conway*, 871 F.3d 1283 (11th Cir. 2017); *Addleman v. Fla. Attorney Gen.*, 749 Fed.App'x 956 (11th Cir. 2019). The sole outlier is *McKee v. Swearingen*, No. 1:18-cv-77-MW-GRJ, 2018 WL 3217644, at *1 (N.D. Fla. June 22, 2018), in which a pro se litigant released from civil commitment alleged only that FSORNA "tortures him."

[14] *Mendoza-Martinez* lists 7 factors, but the *Smith* Court gave little weight to 2: whether the law is imposed only on finding scienter; and whether it applies to conduct that is already a crime. *Smith*, 538 U.S. at 105.

that time was punitive in effect: (1) Did it resemble historical or traditional punishments? No, the website functioned more like an archive of criminal records than like the colonial punishment of shaming. 538 U.S. at 98-99; (2) Did it create an affirmative disability or restraint? Yes, but only "minor and indirect": reporting was by mail, and there was no record of impacts on housing, employment, or violence against registrants. 538 U.S. at 86, 101. (3) Did it promote the traditional aims of punishment, deterrence and retribution? Yes, deterrence; but because this is true of most civil regulations, the factor was given little weight. 538 U.S. at 102-03; (4) Did it have a rational relationship to a non-punitive purpose, the "most significant factor"? Yes, public notice was assumed to promote public safety, 538 U.S. at 107, because registrants were categorically assumed to pose a "frightening and high" risk of reoffense. 538 U.S. at 102-03. (5) If so, was it excessive with respect to this purpose? No, treating registrants categorically rather than individually, for the purpose of imposing a light burden, is not excessive given the categorical assumption about risk. 538 U.S. 87. The Court resolved this "close" case in favor of the state. 538 U.S. at 105, 115-16.

This is not a close case. Courts applying the *Mendoza-Martinez* factors to second generation registration statutes are striking them under the ex post facto clause, particularly as applied.[15] (1) Google-indexing the website, saturating a registrant's community with notice, and branding his license resembles the historical punishment of shaming.[16] Requiring multiple in-

[15] *See infra* n. 11, *Coppolino v. Noonan*, 102 A.3d 1254, 1259; and *Does #1-5 v. Snyder*, 834 F.3d at 696.

[16] *Pennsylvania v. Moore*, -- A.3d --, 2019 PA Super 320 at * 4-6 (PA Super 2019) (Internet dissemination violates ex post facto clause, because it resembles public shaming and the public may use the information "solely for gratuitous purposes," constituting affirmative restraint); *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); *Millard et al. v. Rankin*, 265 F.Supp.3d 1111, 1120, 1126-29 (D.Colo. 2017) (noting Sixth Court's inability to "foresee the development of private commercial websites exploiting the information available to them"; punitive as applied to low-risk plaintiffs who established housing and employment impacts, vandalism and threats of violence); *United States v. Wass*, No. 7:18-CR-45-BO, 2018 WL

person reports "within 48 hours" of trivial changes, each consuming hours, on pain of felony prosecution and prison, resembles probation and parole.[17] (2) Multiple in-person reports, adverse impacts on housing and employment, and ostracism and violence constitute an affirmative disability or restraint.[18] (3) The statute does promote retribution, but the factor has little weight.[19] (4) The law is not rationally related to the non-punitive purpose of reducing registrant reoffense: the legislature has never cited empirical evidence to support its many amendments (DE:102 at n.5), while plaintiffs have proffered empirical evidence of inefficacy[20] (DE:102 ¶¶ 55-59. 5). Assuming

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3341180, at *4-5 (E.D.N.C. July 6, 2018) ("[T]he purpose of the notification here is to elicit a reaction from the public who is notified, and that reaction is punitive in nature and effect." The government is 'selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.'" (citation omitted), *appeal filed*, Aug. 3, 2018, Case No. 18-4547; *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1084, 1091-02, 1101-02 (2015) (noting severe impacts of widespread notification).

[17] *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016) (in-person reporting resembles parole); *Doe v. Rausch*, 382 F.Supp.3d at 796 (in-person reporting resembles probation); *Coppolino v. Noonan*, 102 A.3d 1254, 1278 (Pa. Cmwlth. Ct. 2014) (registration more restrictive than parole, because parolee "does not have to appear in person to update information").

[18] *Does #1-5 v. Snyder*, 834 F.3d 696, 744-45 (6th Ci. 2016) (making multiple in-person reports, *inter alia*, neither "minor nor indirect"); *Nat'l Assoc. For Rational Sexual Offense Laws, et al. v. Stein, et al.*, No. 1:17CV53, 2019 WL 3429120, at *12-14 (M.D.N.C. July 30, 2019) (multiple in-person reports for people at little risk to reoffend is punitive); *Doe v. State*, 111 A.3d at 1094-95 (quarterly in-person reporting an affirmative disability); *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009) (same); *Starkey v. Oklahoma Dept. of Corrections*, 395 P.3d 1004, 1022 (Okla. 2013) (in-person reporting and verification not "minor and indirect"). *And see Piasecki v. Court of Common Pleas, Bucks Cty., Pa.*, 917 F.3d 161, 170 (3d Cir. 2019) (multiple in-person reports for "banal tasks" like moving vehicle or taking short trip, coupled with felony prosecution and substantial prison term, constitutes custody for habeas purposes).

[19] *Does #1-5 v. Snyder*, 834 F.3d at 704 ("SORA advances all the traditional aims of punishment. . .Its very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend. It is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community"); *Doe v. Rausch*, 372 F.Supp.3d at 797 (retributive because "based solely on "plaintiff's offense at conviction and not on any present assessment of his potential to reoffend. . .").

[20] *Does v. Snyder*, 834 F.3d at 704-05 (no rational relationship to public safety, given empirical evidence of low recidivism rate, law's inefficacy in reducing it, and subversion of goal through imposition of destabilizing impacts); *Hope v. Comm. Of Indiana Dep't of Corr., supra*, slip op. at

arguendo a rational relationship to a non-punitive purpose, the statute is excessive, imposing staggering lifetime consequences on people like Plaintiffs who demonstrably pose no risk,[21] in a state that relies on risk assessments in many other contexts.[22] Having once or even twice upheld registration statutes against ex post facto challenges, some courts have since stricken them in light of ever-increasing impacts and empirical evidence of inefficacy.[23]

Defendant cites *Does 1-7 v. Abbott*, 945 F.3d 307 (5th Cir. 2019), where the Fifth Circuit reevaluated a Texas registration statute and declined again to find it punitive. This case is readily distinguishable. Florida's statute is far more punitive. Texas assigns risk tiers, which distinguish

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32-33 (no rational relationship between SORA, which increases registrant crime through technical violations, and child safety, given "very low" reoffense rate); *Doe v. Rausch*, 382 F.Supp.3d 783, 798 (E.D. Tenn. 2019) (no rational relationship as applied to plaintiff where legislature relied on 'popular stereotypes' rather than actual efficacy or individualized assessment); *State v. Letalien*, 985A.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"). *See also In re Taylor*, 60 Cal. 4th 1019, 1042, 343 P.3d 867, 882 (Cal. 2015) (striking housing ban under substantive due process clause as applied to parolees because ban rendered them homeless, which interfered with monitoring and supervision, subverting stated goal of ban); *Hoffman v. Village of Pleasant Prairie*, 249 F.Supp.3d 951, 960 (E.D. Wis. 2017) (without evidence of efficacy or high risk, housing ban lacked rational relationship to non-punitive purpose).

[21] *See Does #1-5 v. Snyder,* 834 F.3d at 705 (excessive in absence of evidence that restrictions, particularly multiple in-person reports, are counterbalanced by any public benefit); *Doe v. Rausch*, 382 F.Supp.3d at 799 (in absence of evidence of efficacy or basis to believe plaintiff will remain a risk for life, statute excessive*); Millard v. Rankin*, 265 F.Supp.3d at 1230 ("[t]hese sweeping registration and disclosure requirements – in the name of public safety but not linked to a finding that public safety is at risk in a particular case – are excessive. . .").

[22] *See* §§ 948.30 (1)(e), risk assessments to determine child visitation by registrants on probation; 948.30(h), risk assessments to determine whether probationers may have access to Internet, and 948.061, relying on risk assessment to see if registrants pose a high risk of reoffense, for purpose of intensive monitoring.

[23] *State v. Letalien*, 985 A.2d 4, 23-24 (Me. 2009) (striking statute after having previously upheld it, based on heavier burdens and absence of evidence of efficacy); *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1084, 1091-92, 1101-02 (2015) (striking statute as applied to registrant who had not reoffended in 30 years, having previously upheld it, noting "significant[ ] differen[ce] from the act we considered twenty years ago" in absence of legislative findings to support changes); *Doe v. Rausch*, 372 F.Supp. 2d at 794-95 (revisiting constitutionality of registration statute after Sixth Circuit had upheld it twice).

for the public between those at low, medium or high risk of reoffense.[24] Most Texas registrants are eligible for release after 10 years based on individual risk assessments,[25] and have much lighter travel burdens.[26] Moreover, the Texas plaintiffs never alleged evidence of low risk and inefficacy, *Does 1-7 v. Abbott*, No. 3:18-cv-00629-B (filed June 6, 2018), and raised only a facial, not an as-applied, challenge. 954 F.3d at 310 n.3.

CLAIM II: Cruel and Unusual Punishment. Defendant does not deny that, if deemed punitive, FSORNA 2018 would violate the Eighth Amendment. He asserts that the Eleventh Circuit has thus far found it to be non-punitive (DE:102 at 9), citing *Chrenko v. Riley*, 560 F. App'x 832 (11th Cir. 2014), *id.*, which held that notification alone does not violate the Eighth Amendment. But Plaintiffs' claims are based on the aggregate impacts of *all* of the statute's interlocking requirements, not just the notification provisions. *See Doe v. State*, 111 A.3d at 1094 (to determine punitiveness, court "must consider the effect of all the provisions and their cumulative impact upon the defendant's rights") (internal quotation marks and citations omitted). Defendant does not address the requirement to make multiple in-person reports on pain of felony prosecution. *See Piasecki v. Court of Common Pleas, Bucks Cty., Pa.*, 917 F.3d 161, 170 n.13 (3d Cir. 2019), finding this requirement to constitute custody for habeas relief. Nor does he address whether the aggregate impacts are cruel and unusual as applied to Plaintiffs, who completed their sentences decades ago, have not since reoffended, and represent no risk of doing so. Anyone can

[24] Tex. Code Crim. Proc. art. 62.404, 62.405, see Texas Offenses Tiered Under the Federal Adam Walsh Act at https://records.txdps.state.tx.us/Sex Offender/.
[25] Tex. Code Crim. Proc. Art. 62-403, 62.405.
[26] *See* Tex. Code. Crim. Pro. Art. 62.051 (a)(1), (2), defining residence as a place where someone resides for more than seven days, requiring report 7 days after date of arrival or first date local law enforcement will allow; "temporary residence" is defined as the place person stays after leaving one permanent residence and before moving into intended residence, 62.051(h)(1), (2). Registrants must report a "regularly visit[ed] location," defined as a place the registrant stays for 48 consecutive hours three times in a month. 62.059(a).

see that these notification requirements are needlessly cruel as applied to persons who served their time and have long been leading law-abiding lives. But the term "sex offender" provokes the emotion of disgust which bypasses reason, making any degree of suffering seem like just desserts. FSORNA 2018 represents the triumph of passion over reason.

"*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 prior cases where "[t]ime and case law have washed away [their] logic.").[27] The amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citation omitted). But "public perception of standards of decency . . . is not conclusive. *Id.* The "'basic concept underlying the Eighth Amendment'" was to ensure that punishment "'accord with the dignity of man.'" *Id.* (citation omitted). The relentless pile-on of punishing burdens, in spite of their inefficacy and inflammatory effect, is like flogging a spent horse, violating the "the dignity of man" and the Eighth Amendment.[28]

Claim III(A): Strict Liability Upon Second Arrest. Defendant argues "[a] statute is not unconstitutional merely because it lacks a *mens rea* requirement" (DE:103 at 10). This is not

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

[28] *See Millard v. Rankin*, 265 F.Supp.3d at 120-21 (aggressive notification "is telling the public – DANGER – STAY AWAY. How is the public to react to this warning?. . .The fear that pervades the public reaction to sex offenders. . .generates reactions that are cruel and in disregard of any objective assessment of the individual's actual proclivity to commit new sex offenses"); *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 at 1096 (broad dissemination "stigmatizes registrants and can lead to. . .vigilante justice"); *Comm. v. Muniz*, 164 A.3d 1189, 1213, 1216 (unlike "primitive technology" at time of *Smith*, "[n]ow there is worldwide dissemination of the information," leading to ostracism).

Plaintiffs' allegation; rather, they allege that the due process clause forbids felony prosecution and significant prison time for innocent failure to meet an affirmative obligation (DE:102 ¶¶ 109-12), under *Lambert v. California*, 355 U.S. 225, 229-30, 240 (1957), which held that due process requires a *mens rea* element in a statute criminalizing passive failure to comply with an affirmative obligation as a felony subject to significant prison time, and *State v. Giorgetti*, 868 So.2d 512, 519-20 (Fla. 2004), relying on *Lambert* for its holding that due process requires an inference of *mens rea* in the registration statute, which was silent at the time about this element. §943.0435(9)(d) was the Legislature's attempt to limit *Giorgetti* by expressly eliminating notice as a defense for people like Doe 6 who have already been arrested under the statute.[29]

Defendant takes the mystifying position that *Giorgetti* is fully applicable notwithstanding the 2004 amendment, reciting Florida cases that subsequently relied on *Giorgetti* to require a *mens rea* element (DE:103 at 10-11). But none of those cases involve registrants like Doe 6, who has been arrested before (DE:102 ¶¶ 13, 83). If, due to his severe cognitive deficits, he unwittingly fails to comply with some upcoming legislative refinement, *e.g.*, an amendment redefining temporary residence from 3 days to 2, he will be defenseless.

Doe 6 will not be alone in this predicament. Because the registration requirement lasts for life, *all registrants* will fall prey to cognitive or physical inability to comply with the increasingly rigorous requirements.[30] Defendant posits they can raise an impossibility defense which might prevail on appeal, after their arrest, prosecution and imprisonment (DE:102 at 10-11). This is a

[29] Fla. S. Judiciary Comm., CS/SB 2054 (2004) Staff Analysis, pp. 4, 5-6 (April 19, 2004) available at https://www.flsenate.gov/Session/Bill/2004/2054/Analyses/20042054SJU_2004s2054.ju.pdf

[30] Indeed, Doe 2, who was voluntarily dismissed, had a prior arrest and recently had a stroke (DE:1 ¶11, DE:96). If he were not now in Israel being cared for by his family, he would be here vulnerable to arrest for failing to make timely in-person reports.

feeble remedy for a criminal statute that omits the elements of knowledge or intent,[31] leaving police free to exercise their own discretion whom to arrest (DE:9 ¶6, DE:58 ¶9). *Compare with* Colo. §16-22-113(2.5), allowing for removal for physical or cognitive disability; and Ga. §42-1-19(a)(1), (c)(1) and Va. §9.1-909(b), allowing for removal for physical disability.

CLAIM III (B): Vagueness of travel-related terms. Contrary to Defendant's position (DE:103 at 11-12), Plaintiffs are not straining to produce abstruse hypotheticals supporting their vagueness challenge. As alleged in their complaint, they do not know the meanings of the travel-related terms, chilling their fundamental right to travel and leaving them vulnerable to discriminatory or arbitrary enforcement (DE:102 ¶¶70, 97, 115, 117). *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1349 (11th Cir. 2011). The vagueness problem is aggravated by the 2004 amendment imposing strict liability for a second offense. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("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*."); *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982)(same). Although Defendant has proffered meanings for the terms at issue, he cannot save a vague statute through his own narrowing interpretations. *Stenberg v. Carhart,* 530 U.S. 914, 940-44 (2000).

"Day." First, Defendant states that whatever "day" means, a 3-day stay, for the purpose of temporary residence, does not begin until day 2 of the trip, citing *McMillen v. Hamilton*, 48 So. 2d 162, 163 (Fla. 1950) (DE:103 at 12), a decades-old case stating that the four-year statute of

[31] *See* Florida Standard Jury Instruction 11.14 "Failure by A Sexual Offender to Comply With Registration Requirements" available at https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-11/. The instructions are silent about scienter as a defense in prosecutions for a second arrest. Whatever guidance the instruction may provide the jury, it does not guide the police.

limitations for torts excludes the day of the tort. *But see B.T.G. Furniture Corp. v. Coates*, 93 So. 3d 1151, 1155 (Fla. 4th DCA 2012) (first day included and last day excluded for purpose of serving offer of judgment); and *Pulido v. State*, 181 So.3d 1191, 1192 (Fla. 3d DCA 2015) (date of offense is first day for purpose of statute of limitations on criminal prosecution). Sheriffs unversed in tort law may compute days differently, leading to arbitrary enforcement.

Second, Defendant maintains that the word "day" is not vague because its meanings "can be ascertained" through dictionaries, case law and common law, citing two 1983 decisions from out-of-state courts, defining day as midnight to midnight (DE:103 at 13). But *Black's Law Dictionary* defines "day" as any period that includes a solar day and night, listing Defendant's definition second. https://thelawdictionary.org. Merriam Webster defines "day" to mean "the time of light between one day and the next" https://www.merriam-webster.com., as does https://www.dictionary.org.[32] A registrant who relies on the dictionary may be arrested by officers who rely on Defendant's 1983 out-of-state cases. Because registrants are required to make an in-person report within a period expressed in hours (48) before a "day" of departure or return, the definition of "day" is critical to determining whether the required 48-hour period has begun or elapsed.

"Place" and "Destination." Defendant has clarified that a registrant must provide the address of his (3-day) temporary residence (DE:103 at 13-14).

"Secure" or "update" license with DHSMV. Defendant has answered Plaintiffs' question: a registrant who has vacated his temporary residence must nevertheless "secure" a new

[32] *See also* https://en.wikipedia.org/wiki/day ("period of time during which the Earth completes one rotation with respect to the sun");
https://www.collinsdictionary.com/dictionary/english/day_1 ("a day is one of the seven twenty-four hour periods of time in a week").

driver's license reflecting the just-vacated address (DE:103 at 15). The registrant would then have to get a new driver's license reflecting his permanent address, because "a person may not have more than one valid driver license at any time." § 322.03 (1)(b). This is now an unambiguous but wildly unreasonable restriction on the fundamental right to travel, *see infra*.

"Within 48 hours." Plaintiffs raised the question whether "within 48 hours" for the purpose of in-person reporting before leaving and after arriving from a temporary residence means "at most" or "at least" 48 hours. Defendant has previously provided various definitions for the term: (1) "within 48 hours" does not mean "at least 48 hours" (DE:30 at 14); (2) there is "little discernible difference" between "at least" and "within" (DE:30 at10); and (3) "within 48 hours" means "*not less than* 48 hours" before leaving, as used in § 943.0435(7), and "*no fewer than* 48 hours" after returning, as used in § 943.0435(4)(a) (DE:103 at 15-16). It has thus taken Defendant three different pleadings in two different cases to arrive at two opposing definitions of "within 48 hours," depending on the provision in which it appears. No wonder Plaintiffs are confused.

Such ambiguities may be constitutionally tolerable in administrative laws regulating corporate behavior with minor fines, but they violate procedural due process in the context of a virtually strict-liability felony statute which chills the exercise of a fundamental right, *Colautti v. Franklin*, 439 U.S. at 391, 395, 401, such as the right to travel or freedom of movement.

CLAIM IV(A): Right to travel/Freedom of movement. Laws penalizing the exercise of the fundamental right to travel freely among the states are unconstitutional absent a showing that they are necessary to promote a compelling government interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974)*; United States v. Guest*, 383 U.S. 745, 757 (1966). Defendant submits that this Circuit does not recognize the fundamental right to intrastate travel, citing *Wright v. City of Jackson, Miss.*, 506

F.2d 900, 901-02 (5th Cir. 1975) (DE:103 at 18). But in *Pottinger v. City of Miami*, 810 F.Supp.2d 1551, 1579 (S.D. Fla. 1992), Judge Atkins observed that *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) recognized the constitutional right to freedom of movement, noting that some federal courts have applied the fundamental right to freedom of movement to find a fundamental right to intrastate travel. *See, e.g., King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) (it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.").[33] Furthermore, "actual deterrence of travel [is] not a requisite to finding a violation," noting that a durational residency requirement for benefits sufficed to establish a violation. *Pottinger*, 810 F.Supp. at 1579. Plaintiffs allege a violation of their fundamental rights to travel *and* freedom of movement based on the requirement of multiple in-person reports for as few as 3 days away from home.

Defendant submits that *Doe v. Moore*, which held that FSORNA 2003 did not violate the fundamental right to travel, precludes challenge to the 2018 version.[34] Travel restrictions result from a combination of the statute's definition of "temporary residence" and the requirement of in-person reporting within 48 hours before and/or after returning, in conjunction with strict felony liability and a minimum-mandatory sentence. The 2003 version required a single in-person report

[33] *See also Cole v. Housing Auth. Of the City of Newport, et al.*, 435 F.2d 807, 809 (1st Cir. 1970) (recognizing the right); *Johnson v. City of Cincinnati*, 310 F.3d 484, 506-09 (6th Cir. 2002) (same); *Lutz v. City of York*, 899 F.2d 255, 283 (3d Cir. 1990) (same). .

[34] Defendant also cites *Addleman*, 794 Fed.App'x 956, 957 (11th Cir. 2019), dismissing a pro se litigant's claim that FSORNA "curtails his 'civil right of travel'" as "foreclosed by" *Moore*. *Addleman*, however, omits any reference to the increasing number of in-person reports resulting from the redefinition of temporary residence; and omits any mention of empirical evidence of inefficacy.

ain the aggregate per month, with a *mens rea* element and no mandatory punishment. Defendant ignores the amendments enacted since *Moore*, which, in the aggregate, imposed heavy burdens on travel, as reflected in the attached Appendix. Now Plaintiffs cannot now go to any location for 3 days in the aggregate per year without multiple in-person reports: 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; then, if "unable" to "secure or update" driver's license reflecting already-vacated temporary address, to the sheriff with proof of DHSMV effort); and 1 time, within 48 hours, before out-of-state travel. If they unknowingly or unintentionally fail to timely make one of these multiple in-person reports after a first arrest, they will be strictly liable and subject to felony prosecution and prison for the rest of their lives.

Defendant also ignores the implications of Plaintiffs' empirical evidence for the government's heavy burden to show that this infringement of a fundamental right was narrowly tailored to achieve its goal. Restrictions the *Moore* Court characterized as "burdensome" but "reasonable" are now both crushing and illogical, particularly as applied to Plaintiffs, whose qualifying offenses were committed decades ago, and who have never since reoffended, pose no risk of doing so, and need to travel for business and to maintain family ties.

Furthermore, the impacts of the travel restrictions must be understood in the context of the facts on the ground:[35] there is only one sheriff's office per county, so registrants living far from that office spend hours traveling to make the report; and the offices have limited days and hours for making these reports (DE:102 ¶¶ 31). Defendant breezily asserts that Plaintiffs have always had to make in-person reports for travel, that there has never been more than one sheriff's office

[35] *See Lorillard v. Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001) (pre-existing limitations imposed by local zoning restrictions considered in determining that Attorney General's proposed advertising restriction violated First Amendment).

per county, and that Defendant is not to blame for the hours kept by various sheriffs (DE:103 at 5-6). But the challenged statute exponentially increased the number of in-person reports required for travel, by redefining temporary residence from 14 consecutive days with exemptions for business, family and emergency travel, to 3 days in the aggregate per year without exemption. At the time of *Moore*, a reasonably active registrant would likely make no more than one travel-related report per year, a minor impact, while plaintiffs may make more than twenty, a crushing burden. *See Coppolino v. Noonan*, 102 A.3d 1254, 1278 (P. Cmwlth. Ct. 2014) (requirement of in-person report 72 hours before leaving for temporary residence, defined as 7 or more days, violated right to travel).

This fundamental right is further burdened by the strict time limits for making these reports. Under Defendant's present definition of "within 48 hours," a registrant who learns late Friday that his mother has been hospitalized out-of-state, cannot leave less than 48 hours after whatever time the following week the sheriff opens for in-person reports. And he must report no fewer than 48 hours after return, even if the Sheriff's office is closed during this interval, leaving him vulnerable to felony arrest. These strict time limits for reporting travel severely burden its exercise. *See Elhady et al. v. Kable et al.*, No. 1:16-cv-00375 at **4, 7, 18-25, 27-29 (E.D. Va., Sept. 4, 2019) (summary judgment granted for people placed on the government's air travel "watch list" for suspected terrorists, as violating fundamental right to travel, where broad dissemination of status to multiple law enforcement agencies resulted in delays, inconveniences, and additional screenings, both burdening and chilling "general right of free movement"); *compare with Abdi v. Wray*, 942 F.3d 1019, 1030-31 & n.3 (10th Cir. 2019) (distinguishing *Elhadi* where plaintiff alleged fewer burdens on travel and noting placement affected only air travel, not other modes of transportation).

CLAIM IV(B): Stigma-Plus. The term "sex offender" as used in FSORNA is someone who meets the following relevant criteria: conviction of an enumerated offense and expiration of sentence after October 1, 1997. The statute defines people meeting these criteria, particularly those whose victims were minors, as "often pos[ing] a high risk of engaging in a sexual offense even after release from incarceration or civil commitment. . ." § 943.0435(12). It is precisely that definition that makes the label "sex offender" stigmatizing.

Defendant's position that Plaintiffs cannot prevail because they meet the statutory criteria is reductive, overlooking the falsehood in the statute's definition of persons who meet the criteria. There is a scientific consensus that persons meeting the criteria do not "often pose a high risk of engaging in a sexual offense" after release (DE:102 at ¶¶ 56-57). Therefore, this definition of the label is false for the large majority of those who bear it and false as applied to the Plaintiffs (DE:102 at ¶¶ 11-12, 15, 71, 86-87). The label cannot be decoupled from its false statutory definition. Furthermore, meeting criteria for a highly stigmatizing label does not defeat this claim. *See Thomas v. Buckner*, 2012 WL 3978671 (M.D. Ala. Dec. 11, 2012), at *4 (meeting criteria of "indicated" child abuser for purpose of placement on registry did not preclude stigma-plus relief); and *Elhady et al. v. Kable et al.*, No. 1:16-cv-00375 at **4, 7, 18-25, 27-29 (E.D. Va., Sept. 4, 2019) (summary judgment granted for people placed on the government's "watch list" as suspected terrorists for purposes of air travel, as violating guarantee against stigma-plus, where broad dissemination of plaintiffs' status as suspected terrorists "would reasonably be expected to affect any interaction" in "even the most routine encounters with law enforcement officers"; government's indisputably compelling interest in preventing terrorist attacks could be more narrowly served).

It is difficult to think of a more degrading label than "sex offender," a stigmatizing label even for someone meeting the statutory criteria. *Lawrence v. Texas*, 539 U.S. at 576 (stigmatizing impact of registration among reasons for decriminalizing sodomy); *Kirby v. Siegelman*, 195 F.3d 1285, 1291 (11th Cir. 1999) (characterizing label as stigmatizing). Plaintiffs have sufficiently alleged stigma for the purpose of this claim. Defendant does not dispute their "plus" allegations, nor could he.

CLAIM IV(C): Rational Relationship Review. Assuming no constitutionally protected 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" of the law. *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 both "countervailing evidence" and evidence of "countervailing costs," courts strike registration statutes as lacking a rational relationship to the expressed purpose under ex post facto analysis, particularly as applied.[36]

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[36] *See Does v. Snyder*, 834 F.3d at 704-05 (no rational relationship to public safety, given evidence of low recidivism rate, statute's inefficacy in meeting its goals, and subversion of those goals through destabilizing impacts); *Doe v. Rausch*, 382 F.Supp.3d 783, 798 (E.D. Tenn. 2019) (no rational relationship as applied to Plaintiff where legislature relied on 'popular stereotypes' rather than actual efficacy or individualized assessment); *Hope v. Comm. of Indiana Dep't of Corr.*, *supra*, slip op. at 32-33 (no rational relationship given increase in registrant crime through technical violations and registrants' 'very low' sexual reoffense rate); *State v. Letalien*, 985A.2d

CLAIM IV(D): Irrebuttable Presumption. Defendant relies solely on *Doe v. Conn. Dept. of Public Safety*, 538 U.S. 1 (2003) ([*CDPS*]) to argue for dismissal of this claim, but *CDPS* was decided on procedural due process grounds and left open the question whether the irrebuttable presumption at issue violated substantive due process, facially or as-applied. *See* 538 U.S. at 8. Furthermore, *CDPS*, decided the same day as *Smith v. Doe,* was animated by the same erroneous empirical assumptions. Yet empirical reality is important to resolving this claim. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910). If cases not fitting the generalization are few, they may not "justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 50 n.16 (1977). But if the generalization does not apply in the majority of cases, it is empirically unreasonable and should be stricken. *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). *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."); *Johnson v. Williams*, 568 U.S. 289, 301 (2013) (same).

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).

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4 (Me. 2009) (no 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"). *See also In re Taylor*, 60 Cal. 4th 1019, 1042, 343 P.3d 867, 882 (Cal. 2015) (striking registrant housing ban under substantive due process clause as applied to parolees because ban rendered them homeless, which interfered with monitoring and supervision, subverting ban's stated goal); *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (striking internet ban under intermediate scrutiny, noting unreasonableness as applied to those who had completed their sentences trying to reintegrate into a society in which internet access was essential).

If so, the question is the "adequacy of the '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. There, the plaintiffs did not allege that the presumption infringed on a fundamental liberty interest, or that it was empirically unreasonable, just that they should have an opportunity to rebut it. Here, Plaintiffs allege that the presumption greatly impairs their fundamental right to travel and results in stigma-plus and have proffered empirical evidence that the presumption is inaccurate as applied to the large majority of registrants, including them, and that it is easily rebutted. Deployment of an unrebuttable presumption that is inaccurate as applied to most of its targets and is easy to disprove violates substantive due process facially and as-applied where, as here, it infringes on a fundamental right without adequately fitting the state's goal.

CLAIM V: Florida Right to Privacy. In *Doe v. Department of Public Safety*, No. S-16748, 2019 WL 2480282 **7-17 (Alaska, June 14, 2019), the Alaska Supreme Court held that internet publication of registrant information violates the state constitution's enumerated privacy right under its substantive due process provision, which requires strict scrutiny of government actions infringing on enumerated rights. The Court noted that internet publication of aggregated details of registrants' past crime and personal information "subjects them to community scorn and leaves them vulnerable to harassment and economic and physical reprisals," "rais[ing] legitimate privacy concerns." *Id.* at 10-11. Although the government has a compelling interest in protecting the public from sexual crimes, it failed to narrowly tailor publication to avoid inflicting "grievous harms" on registrants unlikely to commit new offenses. *Id.* at 12, 14. The Court declared internet publication of the past crime and personal information a violation of the State's privacy and

substantive due process provisions as applied to registrants who could prove they no longer pose a risk of reoffense. *Id*. at 12, 14-16.

Florida's Constitution likewise has an enumerated privacy provision, Art. I, § 23, which "is broader, more fundamental, and more highly guarded than any federal counterpart," "ensur[ing] that individuals are able to determine for themselves when, how and to what extent information about them is communicated to the public." *Weaver v. Myers*, 229 So. 3d 1118 (Fla. 2017) (internal quotation marks and citations omitted). Plaintiffs challenge aggressive notification of the aggregated details of their past crime and personal information under these provisions as applied to them, in the absence of opportunity to establish their low risk.

Defendant argues that the registry does not list identifying marks, contact information or vehicle information, insisting this information is made available only upon public record request (DE:103 at 21). If Defendant googled a registrant's name, he would immediately realize he is wrong. Furthermore, he cites to Florida cases that are fifteen to twenty years old, before Defendant google-indexed the registry, proactively notifying the public about this private information, and that are inapposite in other respects.[37] In view of the empirical evidence about the inefficacy of widespread notification in reducing reoffense, the government has less intrusive means available to serve its compelling interest in protecting children.

[37] *See Johnson v. State*, 795 So. 2d 82, 89-90 (Fla. 5th DCA 2000) (defendant abandoned his privacy claim); *Moore v. State*, 880 So. 2d 826 (Fla. 1st DCA 2004) (denying claim by sexual predator); *Reyes v. State*, 854 So. 2d 816 (Fla. 4th DCA 2003) (same).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed on January 30, 2020, 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.

By: *Todd G. Scher*
TODD G. SCHER

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. s. 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. s. 943.0435(1)(c); 775.21(2)(g) (1998). Duration made lifetime. s. 943.0435(11) (1998).

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

2005. All required to re-register in person 2 times a year. s. 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. s. 943.0435(1)(c); 775.21(2)(g) (2006).

2007. Some required to re-register in person 4 times a year. s. 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. s. 943.0435(1)(c); 775.21(2)(l) (2010). Required to report dates of known future temporary residence within & out of state. s. 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. s. 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. s. 943.0435(4)(a) (2014).

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