UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WARREN MARCOUX,

Plaintiff,

v. **CASE NO.: 4:21-cv-00288-AW-MAF**

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

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT

Pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P., Defendant, Richard Swearingen, sued in his official capacity as the Commissioner of the Florida Department of Law Enforcement ("FDLE"), moves to dismiss Plaintiff's Verified Complaint ("Complaint" or "ECF 1").

I. Background and Basis for Dismissal

Plaintiff is registered in Florida as a sexual offender. ECF 1, ¶ 3. He seeks removal of his information in the Florida sexual offender registry and the dissemination of that information to the public. ECF 1, ¶ 20. Towards that end,

Plaintiff challenges Florida's statutory sexual offender registration requirements in section 943.0435, Florida Statutes. ECF 1, ¶¶ 85-87, 92.

The Complaint alleges the "action arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983." ECF 1, ¶ 1. More specifically under the U.S. Constitution, it alleges violations of substantive and procedural due process. ECF 1, ¶¶ 82-83. The Complaint also alleges claims arising under Florida Constitution's Rights to Privacy, Article 1, § 23, and Due Process Clause, Article 1, § 9." ECF 1, ¶ 2. Plaintiff seeks a declaration that section 943.0435 is unconstitutional as applied to him "and others similarly situated," and an injunction against its enforcement. ECF 1, p. 20.

The Complaint fails to state a claim upon which relief can be granted. Neither Count 1 nor Count 2 is plainly stated, contrary to the requirements of Rule 8(a). Defendant cannot tell which portions of the lengthy section 943.0435 ("Statute") are being challenged, and are sought to be declared unconstitutional and enjoined. Whichever portions of the Statute that Plaintiff challenges must be identified front and center, and tied to each claim. But Plaintiff did not do that.

Additional problems arise as to Counts 1 and 2 which cannot be cured. Count 1 alleges substantive, procedural, and stigma-plus claims under the Due Process Clauses of the U.S. and Florida Constitutions. Section 943.0435 has been upheld by this Court and the Eleventh Circuit, including against similar substantive, procedural

and stigma-plus due process claims. Those precedents are controlling and require dismissal.

And Plaintiff cannot raise any claim under the Florida Constitution. Both counts allege violations of the Florida Constitution. Count 1 alleges due process claims under Article I, § 9 of the Florida Constitution, as well as under the U.S. Constitution. Count 2 alleges a violation of the right to privacy protection afforded in Article I, § 23 of the Florida Constitution. Under the Eleventh Amendment, this Court lacks subject matter jurisdiction over claims based on state law, including state constitutions.

Further as to the Florida Constitution claims alleged in Counts 1 and 2, a state official cannot be sued under Section 1983 for alleged violations of a state constitution. Section 1983 only provides relief for violations of federal law and the United States Constitution.

Count 2 also must be dismissed because sex offender registration information is a matter of public record in Florida and Article I, § 23 of the Florida Constitution expressly states that its right to privacy does not apply to public records.

Neither Counts 1 nor 2 can be remedied to overcome these substantive grounds for dismissal. Counts 1 and 2 must be dismissed with prejudice.

II. MEMORANDUM OF LAW

A. Standards of Review.

The court must accept all factual allegations in a complaint as true and take them in the light most favorable to the non-movant. *Camm v. Scott*, 834 F. Supp. 2d 1342, 1346 (M.D. Fla. 2011) (internal citations omitted). At the motion to dismiss stage, courts should: "(1) eliminate any allegations in the complaint that are merely legal conclusions; and (2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Lenbro Holding, Inc. v. Falic*, 503 F. App'x 906, 909 (11th Cir. 2013) (internal citations omitted). Allegations that are entitled to no assumption of truth include "[l]egal conclusions without adequate factual support" or "[f]ormulaic recitations of the elements of a claim." *Id.* A complaint's allegations must "plausibly suggest that the [plaintiff] has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff's complaint should be dismissed." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Dismissal is also warranted under Rule 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue precluding relief. *Camm*, 834 F. Supp. 2d at 1346 (citing *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)).

If a more carefully drafted complaint cannot state a claim and any amendment would be futile, dismissal with prejudice is proper. *See Cavero v. One W. Bank FSB*,

617 F. Appx. 928, 930 (11th Cir. 2015) (citing *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007)).

B. Failure to State a Claim Upon Which Relief Can Be Granted- Counts 1 and 2.

1. Pleading Deficiencies

Fed. R. Civ. P. 8(a)(2) requires that a plaintiff's complaint contain a "short and plain statement … showing that the pleader is entitled to relief," and it also obligates a plaintiff to allege more that [just] "labels and conclusions, or, a formulaic recitation of the elements of a cause of action …." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555). This means a complainant cannot raise naked assertions devoid of factual amplification. *See Iqbal*, 556 U.S. at 678. A claim is "plausible on its face," and may survive a motion to dismiss, only if its factual content is enough to allow the court reasonably to infer the defendant's liability. *See Iqbal*, 556 U.S. at 678.

"Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679 (citation omitted). Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has not shown that the pleader is entitled to relief. *Id*.

Defendant is uncertain which statutory provisions Plaintiff is challenging. Section 943.0435 has fourteen sections and numerous subsections. Although a few

paragraphs of the Complaint cite to several subsections of section 943.0435 (ECF 1, ¶¶ 42, 43, and 47), many more paragraphs cite to the entire statute (ECF 1, ¶¶ 45, 61, 63-65, 70. 73, 74, 77, 78, 80, 85-87, 92, p. 20). Moreover, the specific allegations under each count and the request for relief only cite to the entire section 943.0435. It cannot be determined for which sections and subsections of the Statute Plaintiff seeks a declaratory judgment and an injunction.

Nevertheless, as shown below, Counts 1 and 2 cannot be amended to state a claim that entitles Plaintiff to relief.

2. Count 1 fails to state a due process claim upon which relief can be granted.

a. Substantive Due Process

Plaintiff claims that Defendant violated his substantive due process rights under the U.S. and Florida Constitutions by arbitrarily and unreasonably interfering with his rights to life, liberty and property by maintaining his sexual offender registration information and publicly disseminating it online through the FDLE sex offender website. ECF 1, p. 17 (title), ¶ 82. He further alleges, incorrectly, that the applicable standard of review is strict scrutiny. ECF 1, ¶ 57. As shown below, due process review of the Statute is subject to rational basis review, which the Eleventh Circuit already has found supports the Statute. Thus, this claim is foreclosed by binding precedent and must be dismissed as a matter of

law.

The first question to address is whether there is a fundamental interest at stake. Fundamental rights are protected by the substantive due process from certain types of state actions. *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (citation omitted). Fundamental rights are those which are guaranteed by the Bill of Rights, and "certain 'liberty' and privacy interests implicit in the due process clause and the penumbra of constitutional rights." *Id*. (citation omitted). Substantive due process does not protect a broad category of liberty and privacy interests. *Id*. at 1343-44 (citation omitted). Plaintiff's claims of a protected liberty interest to pursue his profession and a privacy interest under substantive due process (ECF 1, ¶ 60, 69) do not fall within any recognized special liberty or privacy interests. *Id*. at 1344. Sexual offender registration statutes also do not implicate any fundamental rights. *Id*. at 1435. And as shown below in sections B 2-3 and C, Plaintiff's claim under the Right to Privacy provision of the Florida Constitution cannot be used to bootstrap a fundamental right because it must be dismissed with prejudice for various reasons, including lack of subject matter jurisdiction.

Because the Statute does not implicate a fundamental right, it is reviewed under the rational basis standard to determine whether it is "rationally related to legitimate governmental interests." *Id*. at 1345. Rational basis is a highly

deferential standard, and a court will find a statute unconstitutional in only the most exceptional circumstances. *Id*.

The Statute already has been expressly found to meet the rational basis standard. In *Doe v. Moore*, the Eleventh Circuit agreed with the state's argument that the Statute protects the public from sexual abuse because the public can use the registry to determine whether there are sexual offenders in their neighborhoods, make an individualized risk assessment, and take any appropriate precautions. *Id*. at 1345. Because the Statute is rationally related to the legitimate government interest of protecting citizens from criminal activity, the Statute was found to not violate substantive due process. *See id*. at 1345-46. This precedent is so firmly established that it supports a motion to dismiss in this district. *See, e.g., Does v. Swearingen,* 4:19cv467-RH-MJF, Order Dismissing the Second Amended Complaint with Prejudice, p. 3 (N. D. Fla. Nov. 5, 2020). Exhibit "A."

The precedent in *Doe v. Moore* also was applied by this Court to an out-of-state registered sexual offender who had moved away from Florida and argued there was no rational basis as applied to him. *Farmer v. Swearingen*, 4:15cv00335, Order on Cross-Motions for Summary Judgment, pp. 9, 12-13 (N. D. Fla. July 6, 2016). Ex. "A." The *Farmer* Court found several reasons to support keeping a sexual offender registrant on the FDLE registrant and website: "aiding victims, concerned citizens, potential employers and law enforcement officers in their

efforts keep track of the known whereabouts of sex offenders-a legitimate government purpose." *Id*. at p. 12. The Court also found "the policy of permanently maintaining registered offenders on the website is rationally related to the legitimate public purpose of making public records widely available and easily accessible." *Id.* at 14.

Florida appellate courts also have rejected substantive due process challenges to the Statute. In *Garcia v. State*, 909 So. 2d 971 (Fla. 3d DCA 2005) the Third District Court of Appeal expressly adopted the analysis of the Eleventh Circuit in *Doe v. Moore* and rejected a substantive due process challenge to section 943.0435. The Fourth and Fifth District Court of Appeal also expressly applied *Doe v. Moore* and rejected substantive due process challenges to the analogous section 775.21 ("The Florida Sexual Predators Act"). *Hanson v. State*, 905 So. 2d 1036 (Fla. 5th DCA 2005); *Butler v. State*, 923 So. 2d 566, 568 (Fla. 4th DCA 2006). In *Butler,* the Fourth District also rejected a substantive due process claim grounded in the right of privacy, citing *Reyes v. State*, 854 So. 2d 816 (Fla. 4th DCA 2003). *Id*. at 568.

The Eleventh Circuit also applied the same analysis in upholding sexual offender registration laws in other jurisdictions. *United States v. Ambert*, 561 F.3d 1202, 1208-09 (11th Cir. 2009) (analogous federal SORNA not violative of substantive due process); *Waldman v. Conway*, 871 F.3d 1283, 1292-93 (11th Cir.

2017) (analogous Alabama statute not violative of substantive due process).

Plaintiff also argues that section 943.0435 is invalid because it contains an "irrebuttable presumption of dangerousness that does not serve its stated goals." ECF 1, ¶¶ 78-79. This is yet another claim foreclosed by Supreme Court and Eleventh Circuit precedent. In *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court held that a sexual offender was not entitled to a hearing to prove he was not currently dangerous before having to register under Connecticut's statute. Whether the offender was currently dangerous was "of no consequence" because the law's requirements "turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. No other fact is relevant to the disclosure of registrants' information." *Id.* at 7 (internal citation omitted). In *Moore*, the Eleventh Circuit relied on *Connecticut Department of Public Safety* to hold that section 943.0435 does not create an irrebuttable presumption because it "does not turn on the dangerousness of the offender, merely the fact that he or she was convicted." *Moore*, 410 F.3d at 1342 n.3. The risk of recidivism is simply not relevant to offenders' registration under the statute. *Conn. Dep't of Public Safety* at 8; *Moore* at 1343 n.3.

Based on the reasoning and holdings in the above cited cases, Plaintiff's substantive due process claim must be dismissed with prejudice.

b. Procedural Due Process

Plaintiff also alleges that Defendant violates his procedural due process rights by"maintaining his sexual offender registration information and publicly disseminating it on the FDLE sex offender website without providing notice and an opportunity to be heard on whether he is dangerous or poses a threat to the citizens of Florida." ECF 1, ¶ 83. This claim has been foreclosed by Supreme Court precedent, and must be dismissed as a matter of law.

The procedural component of the Due Process Clause guarantees that a state will not deprive a person of life, liberty, or property without notice and a meaningful hearing opportunity. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citations omitted). The question of whether a state may enact a sexual offender registry that is publicly disseminated without providing sexual offenders a hearing on their current dangerousness already has been answered in the affirmative by the Supreme Court in *Conn. Dep't of Pub. Safety*, 538 U.S. at1 7-8. That is because due process does not require a hearing to allow a sexual offender to establish a fact that is not material to the registration statute. *See id*. at 7. In Connecticut, the requirement for a sexual offender to register is based solely on the fact of his conviction, "a fact that a convicted offender already had a procedurally safeguarded opportunity to contest." *Id*. (citations omitted). No further hearing was required before registry inclusion.

Florida registration requirement also is based on the fact of conviction alone *See* § 943.0435(1) and (11), Fla. Stat. Florida appellate courts already have adopted the reasoning in *Conn. Dept' of Pub. Safety* in rejecting claims that due process requires a preregistration hearing. In *Garcia v. State*, the Third District, affirming the circuit court's dismissal of procedural and substantive due process claims under section 943.0435, stated:

> Garcia claims that the Act denies him procedural due process because the registration requirements of section 943.0435 fail to provide for a hearing to determine whether he presents a danger to the public sufficient to require registration. We disagree. The Florida Supreme Court has already rejected an identical claim with respect to the registration requirements of the Florida Sexual Predator Act, a resolution we believe to be equally applicable here.

Garcia, 909 So. 2d at 971-72.

The above mentioned opinion that the *Garcia* Court referred to is *Milks v. State*, 894 So. 3d 924 (Fla. 2005), in which the Florida Supreme Court rejected a procedural due process challenge to section 775.21, Florida Statutes, the Florida Sexual Predator Act ("Act"). There, the Court swept aside arguments that the Act does not provide "any procedure for determining in individual cases whether or not a person with an Act-qualifying conviction actually presents a danger to the community that would justify the imposition of the Act's requirements, particularly the Act's registration and public-notification requirements." Relying on the United

States Supreme Court's rejection of an identical challenge to Connecticut's sexual offender law in *Conn. Dep't of Public Safety*, the Florida Supreme Court stated: "[W]e see no reason why the same result is not mandated here." *Milks*, 894 So. 2d at 926. The Court went on to note that the "only material fact … is the fact of a previous conviction"; that the registration and public-notification requirements "flow from the fact of a previous conviction"; and that procedural due process protections relating to the sex-crime conviction applied to the conviction itself rather than to the registration statute. *Id*. at 928. "That is all that due process requires." *Id.* [1]

Consistently, in *Newell v. State*, 875 So. 2d 747 (Fla. 2d DCA 2004), the Second District, addressing section 943.0435, stated:

> Procedural due process challenges to section 943.0435 have been previously rejected by this court and other district courts of appeal. *See Givens v. State*, 851 So. 2d 813 (Fla. 2d DCA 2003); *Dejesus v. State*, 8672 So. 2d 847 (Fla. 4th DCA 2003); *Johnson v. State*, 795 So. 2d 82 (Fla. 5th DCA 2001). Accordingly, we conclude that the trial court did not err by denying Newell's motion to dismiss as to procedural due process.

Newell, 875 So. 2d at 748. *Cf. Conn. Dep't of Pub. Safety*, 538 U.S. at 7-8 (upholding similar Connecticut sexual offender registration statute against claims of

[1] With respect to registration requirements, there is no significant difference between sections 775.21 and 943.0435, Florida Statutes. *See Butler v. State*, 923 So. 2d 566, 568 (Fla. 4th DCA 2006) (registration restrictions of sexual offender and sexual predator statutes "are mainly the same").

procedural due process violations); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009) (affirming conviction for violating requirements of federal SORNA, and rejecting procedural due process claim that no hearing had been held to establish sexual offender's dangerousness or recidivism risk); *Waldman v. Conway*, 871 F.3d 1283, 1290-92 (11th Cir. 2017) (affirming dismissal of procedural due process claim under Alabama's analogous sexual offender statute and rejecting arguments that the statute triggered post-release conditions and changed the conditions of sexual offender's confinement).

Dismissal is proper. In granting a recent motion to dismiss, this Court applied the Supreme Court precedent in *Conn. Dep't of Pub. Safety* to procedural due process claims by sexual offender registrants challenging the Statute. *See Does v. Swearingen,* 4:19cv467-RH-MJF, Order Dismissing the Second Amended Complaint with Prejudice, pp. 3-4 (N. D. Fla. Nov. 5, 2020) (Citations omitted) Ex. "B."

The same reasoning that led all these courts to reject procedural due process claims as a matter of law dictates the same result here. It is indisputable that under Florida law the questions of whether a sexual offender is likely to re-offend or is currently dangerous are of no consequence in light of the fact that registration is required only by the fact of conviction. Accordingly, there is no procedural due process protection for a preregistration hearing. This claim cannot be amended to

state a claim under procedural due process and must be dismissed with prejudice.

c. Stigma-Plus

Under his due process claim, Plaintiff further alleges that he has been deprived of a liberty interest by Defendant's making "stigmatizing charges" that foreclose employment opportunities. ECF 1, ¶ 84. This claim is fatally deficient and cannot be amended to state an actionable claim because it fails to establish a key foundational element of "stigma-plus": Defamation.

"Stigma-plus" is a specific type of claim, not just a general term for a serious stigmatization. The claim exists because reputational damage by the government does not ordinarily establish a substantive due process violation in and of itself. *Behrens v. Regier*, 422 F.3d 1255, 1259 (11th Cir. 2005). To establish a violation, a plaintiff must satisfy the "stigma-plus" test, meaning he must "establish the fact of the defamation 'plus' the violation of some more tangible interest." *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1302 (11th Cir. 2001). That requires a plaintiff to state a common-law defamation claim, as well as a further injury tied to a constitutionally recognized property or liberty interest. *Rehberg v. Paulk,* 611 F.3d 828, 852 (11th Cir. 2010), *aff'd,* 566 U.S. 356 (2012).

A defamation claim in Florida requires the negligent, unprivileged publication of a false and defamatory statement to a third party. *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 845 (Fla. 4th DCA 2002); *see also Connelly v.*

Comptroller of the Currency, 876 F. 2d 12109, 1215 (5th Cir. 1989) (stigma-plus claim requires that stigma be caused "by a *false* communication") (emphasis added). Plaintiff's claim that he is stigmatized because the public has knowledge of his offense through the FDLE website is defeated because factually true information was released: Plaintiff's conviction as a sexual offender. *See Doe 1-7 v. Abbott*, 945 F.3d 307, 313(5th Cir. 2019) (rejecting sexual offenders' stigma-plus claim because being required to register or assigned a risk level is not based on false assertion of fact). A plaintiff who cannot establish defamation, cannot establish a stigma-plus claim. *See Smith v. City of Unadilla*, 510 F. Supp. 2d 1335, 1347 (M.D. Ga. 2007); *see also Mills v. City of Phoenix City, Ala.*, 2012 WL 2887933, at *5 (M.D. Ala. 2012) ("Mills' stigma-plus claim must fail because she cannot prove defamation").

Moreover, any publication of Plaintiff's status through the registry could not give rise to a Florida claim for defamation because FDLE is absolutely privileged when making statements in connection with its official duty to administer the registry. *Hauser v. Urchisin*, 231 So. 2d 6, 8 (Fla. 1970.) Finally, Plaintiff cannot meet the infringement component of a stigma-plus claim. He has not identified any direct infringement by Defendant, only the secondary harm of employment opportunities. ECF 84, ¶ 84. Such alleged harms by third parties are not constitutionally cognizable injuries. *See Abbott,* 945 F.3d at 313.

Because Plaintiff is in fact a convicted sexual offender and cannot show

defamation, this claim cannot be amended to be actionable and it must be dismissed with prejudice.

2. Failure to State a Claim Under Section 1983, Counts 1 (Florida Constitution) and 2.

Plaintiff's claims under the Florida Constitution are: (1) Count 1 to the extent that Plaintiff alleges substantive and procedural due process violations under Article I, section 9 the Florida Constitution in addition to a similar claim under the U.S. Constitution; and (2) Count 2, which alleges a Right to Privacy violation under Article 1, section 23 of the Florida Constitution. But section 1983 cannot provide Plaintiff any relief for their claims under the Florida Constitution in Counts 1 and 2. Section 1983 reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

42 U.S.C. § 1983 (emphasis added).

Section 1983 provides relief only for violations of federal law and the United States Constitution. It does not create a remedy for every wrong committed under the color of state law, but only wrongs that deprive a plaintiff of a federal right. *See*

Paul v. Davis, 424 U.S. 693, 698–99 (1976). It is not a vehicle for relief from violations of rights secured by state constitutions, as alleged in Counts 1 and 2.

3. Count 2 also fails to state a claim upon which relief can be granted because the Florida Constitution's Right to Privacy Provision does not apply to public records.

Count 2 is also subject to dismissal with prejudice because the Right to Provision does not apply to Plaintiff's online registration information that discloses his status as a sexual offender.

Art. I, § 23 of the Florida Constitution provides:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Art. I, § 23, Fla. Const.

Because of the specific wording in the second sentence of this provision, the Florida Supreme Court has held that Article I, Section 23 "does not provide a right to privacy in public records." *Michel v. Douglas,* 464 So. 2d 545, 546 (Fla. 1985); s*ee also Post–Newsweek Stations, Fla. v. Doe,* 612 So. 2d 549, 552 (Fla. 1992) (finding that Art. I, § 23 does not "protect names and addresses contained in public records."); *Forsberg v. Housing Auth. of City of Miami Beach,* 455 So. 2d 373 (Fla.1984) (holding that "... section 23 specifically does not apply to public records ..."). FDLE's online registry is statutorily deemed to be a public record. §

943.043(1), Fla. Stat. And the fact of Plaintiff's conviction is also a matter of public record because convictions are recorded in the courts.

Florida's public records laws are based on a broad state constitutional right of the public to access records maintained by state and local units of government. *See* Art. I, § 24(a), Fla. Const. Florida statutes implement this right. "It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person." § 119.01, Fla. Stat. Thus, when a sex offender registers his statutorily required information, that information becomes a public record pursuant to Section 119.07(1), Florida Statutes, unless the Legislature provides an exemption. Section 119.071, Florida Statutes includes public records exemptions, none of which applies here. Thus, the fact that Plaintiff was convicted of a sexual offense is information that is accessible to the public and therefore is not protected by Article 1, Section 23.

And no special protection should be carved out for Plaintiff's online registration information. Florida's right to privacy does not "provide an absolute guarantee against all governmental intrusion into the private life of an individual." *Fla. Bd. of Bar Examiners re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983). That right "will yield to compelling governmental interests." *Windfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985). Registration of sexual offenders is one such compelling governmental interest. Florida's appellate

courts have held that the State has a compelling interest in protecting the public by informing them of sexual offenders' whereabouts, and that making this information available through the registry is the least intrusive means of accomplishing that purpose. *Moore v. State*, 880 So. 2d 826, 827-28 (Fla. 1st DCA 2004); *Reyes v. State*, 854 So. 2d 816, 818-19 (Fla. 4th DCA 2003); *Johnson v. State*, 795 So. 2d 82, 87-89 (Fla. 5th DCA 2000), as clarified, (Feb. 2, 2001). Federal courts should defer to state courts' interpretation of their own statutes. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983).

C. Because of Eleventh Amendment immunity, this Court lacks subject matter jurisdiction over the claims in Counts 1 and 2 that are raised under the Florida Constitution.

This Court has no jurisdiction over Plaintiff's claims under the Florida Constitution in Count 1 to the extent that Plaintiff alleges due process violations under Article I, section 9 of the Florida Constitution and in Count 2, which alleges a Right to Privacy violation under Article 1, section 23 of the Florida Constitution.

The Eleventh Amendment bars lawsuits in federal court against a nonconsenting State by its citizens. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). A State's waiver of its sovereign immunity must be "unequivocally expressed." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (internal citations omitted). For state consent under Florida law, the Florida

Constitution requires that general law provide for any suit against the State for all liabilities. Art. X, §13, Fla. Const. The Florida Legislature therefore has the exclusive authority to waive sovereign immunity. *See Tague v. Fla. Fish and Wildlife Conservation Comm'n*, 390 F. Supp. 2d 1195, 1207-08 (M.D. Fla. 2005) (citing *Davis v. Watson*, 318 So. 2d 169, 170 (Fla. 4th DCA 1975)). The State of Florida has not waived its right to be sued in federal court for claims arising under alleged violations of the state constitution. *See Gamble v. Fla. Dep't of Health and Rehab. Services*, 779 F.2d 1509, 1514-15 (11th Cir. 1986) (finding that the waiver of the State of Florida's sovereign immunity was limited to traditional torts and did not apply to constitutional torts).

The United States Supreme Court has held that the Eleventh Amendment prohibits a federal district court from ordering state officials to conform their conduct to state law. *Pennhurst,* 465 U.S. at 121.[2] That ruling in *Pennhurst* applies to requests for declaratory relief based upon state law violations. *See Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991) (holding that "…issuance of a federal declaratory judgment as a step toward a state [court] damage or injunctive remedy would operate as an end-run around *Pennhurst* that is equally

[2] We need not address the "ultra vires" exception to the Eleventh Amendment briefly touched upon in *Pennhurst*, 465 U.S. at 116-17, n.11, because Plaintiff alleges that Defendant Swearingen is a defendant because he implements the challenged Florida registration requirements and acted under "color of state law" when he violated his rights under the Florida Constitution. ECF 1, ¶¶ 8-10.

forbidden by the Eleventh Amendment."). *Pennhurst* also bars prospective injunctive relief based on violations of a state constitution. *See Vasquez v. Rackauckas*, 734 F.3d 1025, 1041 (9th Cir. 2013) (finding a plaintiff's claims for injunctive relief based on violations of the California Constitution were barred under *Pennhurst*).

The protection of the Eleventh Amendment extends to state officials sued in federal court in their official capacity on the basis of state law when the sought relief has an impact on the state. *Moore*, 410 F.3d at 1349 (citing *Pennhurst*, 465 U.S. at 117) (holding that the Eleventh Amendment bars any claim for injunctive relief based on state law against a state or against a state officer). In *Moore*, the Eleventh Circuit declined to decide whether the Florida Sex Offender Act violates Florida's separation of powers doctrine because that is an issue of state law as to which sovereign immunity was not waived by the State of Florida. *Id*. A similar result must be reached here. Defendant Swearingen, sued in his official capacity as the Commissioner of FDLE, is entitled to Eleventh Amendment immunity for allegations in Counts 1 and 2 that Florida's sexual offender registration statute violates the Florida Constitution.

And Plaintiff cannot avoid Eleventh Amendment immunity by invoking supplemental jurisdiction, as he attempts to do (ECF 1, ¶ 4). Eleventh Amendment immunity also applies to a federal court's powers of supplemental jurisdiction. *See*

Doe v. Moore, 410 F.3d 1337, 1349 (11th Cir. 2005) (citing *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121); *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541-42 (2002) (holding that the supplemental jurisdiction statute, 28 U.S.C. § 1367, does not supply jurisdiction over state law claims against nonconsenting states).

D. CONCLUSION

For the reasons explained above, both counts must be dismissed in their entirety and because neither count can be amended to state a viable claim. the verified complaint must be dismissed with prejudice.

Respectfully Submitted,

ASHLEY MOODY
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

In accordance with Local Rule 7.1(F), the undersigned hereby certifies that the number of words in the above support memorandum which count toward the 8,000 word limit totals 5,447 words.

/s/ Karen A. Brodeen
KAREN A. BRODEEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the court using CM/ECF on this 25th day of August, 2021.

/s/ Karen A. Brodeen
Karen A. Brodeen

Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JOHN DOES,

Plaintiffs,

v. CASES NO. 4:19cv467-RH-MJF

RICK SWEARINGEN,
Commissioner of the Florida
Department of Law Enforcement,

Defendant.

_____/

ORDER DISMISSING THE SECOND AMENDED COMPLAINT WITH PREJUDICE

In this action the plaintiffs challenge the Florida sex-offender registration statute. Binding decisions of the Supreme Court and the United States Court of Appeals for the Eleventh Circuit are fatal to the plaintiffs' claims. This order grants the defendant's motion to dismiss the action with prejudice.

I

In the second amended complaint, 47 plaintiffs who have registered as sex offenders in Florida assert that the statute that requires registration, Florida Statutes § 943.0435, is unconstitutional on its face and as applied. The defendant is the

Commissioner of the Florida Department of Law Enforcement—the official who maintains the Florida sex-offender registry. The Commissioner has moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim on which relief can be granted.

II

Although the Commissioner asserts the action is not within the court's subject-matter jurisdiction, he submits no argument in support of the assertion. No colorable argument comes to mind. The plaintiffs assert a state statute violates the United States Constitution, and they seek relief under 42 U.S.C. § 1983. The action thus arises under the Constitution and laws of the United States and is within the court's arising-under jurisdiction. *See* 28 U.S.C. § 1331. The plaintiffs have named as the defendant the state official responsible for enforcing the challenged statute; this makes this a proper action under *Ex parte Young*, 209 U.S. 123 (1908).

III

To survive a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of a motion to dismiss, the complaint's factual allegations, though not its legal conclusions, must be

accepted as true. *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The plaintiffs have alleged that the registration requirement imposes a substantial burden on them and has harmful collateral consequences, including, for example, hindering their ability to find housing and employment. These allegations must be accepted as true, as they surely are. The plaintiffs say these burdens should not be visited on individuals who have been convicted of covered offenses but do not in fact pose a sufficient risk of recidivism.

The plaintiffs have failed, however, to come to grips with the governing law. The Supreme Court has held registration requirements constitutional. *See, e.g.*, *Smith v. Doe I*, 538 U.S. 84 (2003) (holding a state registry constitutional even as applied to offenses committed before the registry was created). The Eleventh Circuit has applied this ruling to the Florida statute at issue here. *See, e.g.*, *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005) (holding Florida's registry constitutional). The Florida statute's registration requirements have changed at the margins since *Doe v. Moore* was decided but not in ways that affect the issues here. And the plaintiffs have alleged nothing making their circumstances different from the typical sex-offender to whom the statute applies.

The plaintiffs also say the statute denies them due process because it is based on the view that they pose a risk of recidivism but affords them no opportunity to

contest that view. If the statute required registration only of individuals who pose a risk of recidivism, the plaintiffs would indeed be entitled to notice and an opportunity to be heard on the question of whether they pose a risk of recidivism. But that is not what the statute requires. The statute requires registration based only on the fact of conviction of a covered offense—a fact on which the plaintiffs were afforded due process in the underlying criminal case. *See, e.g.*, *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003); *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019).

The Due Process Clause does not afford a plaintiff a right to be heard on the legislative judgment that persons convicted of covered offenses present a risk of reoffending and thus should be required to register. *See, e.g.*, *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048-49 (11th Cir. 2020) (en banc). Instead, the Due Process Clause would afford a right to be heard only on the question whether the plaintiff was in fact convicted of a covered offense. The plaintiffs do not assert they were denied due process on the narrow question of whether they were in fact convicted of covered offenses—and by registering in the first place, they admitted it.

In sum, the plaintiffs have failed to state a claim on which relief can be granted.

IV

An alternative basis for dismissal of the claims of some but not all of the plaintiffs is the statute of limitations. Many of the plaintiffs were convicted and thus required to register as sex offenders more than four years ago. The statute of limitations for an action under 42 U.S.C. § 1983 in Florida is four years. *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999). The statute of limitations thus bars any challenge to requirements that were imposed on a plaintiff—and that the plaintiff knew about—more than four years ago. *See, e.g.*, *McGroarty v. Swearingen*, __ F.3d __, 2020 WL 6141003 (11th Cir. Oct. 20, 2020) (holding a challenge to the Florida sex-offender registration requirement barred by the statute of limitations).

V

The plaintiffs have had adequate opportunity to amend and have not asked for leave to amend further. Moreover, they have given no indication they could amend to allege facts that would avoid the holdings in the controlling cases cited above. Their claims fail not for inadequate pleading but because the claims cannot survive controlling decisions of the Supreme Court and Eleventh Circuit. This order dismisses the second amended complaint with prejudice and directs the clerk to enter judgment.

IT IS ORDERED:

1. The motion to dismiss, ECF No. 69, is granted.

2. The claims of the 47 plaintiffs named in the second amended complaint are dismissed with prejudice.

3. The clerk must enter judgment stating: "This action was resolved on a motion to dismiss. The claims of the 47 plaintiffs named in the second amended complaint are dismissed with prejudice. Any remaining claims of any other plaintiffs included in prior versions of the complaint are dismissed without prejudice."

4. The clerk must close the file.

SO ORDERED on November 5, 2020.

s/Robert L. Hinkle
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RICHARD ALAN FARMER,

***Plaintiff*,**

v. **Case No. 4:15cv335-MW/CAS**

RICHARD L. SWEARINGEN, IN HIS OFFICIAL CAPACITY, AND THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT,

***Defendants*.**
_____/

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Does a state's refusal to remove a registered sex offender who has subsequently moved out of the state from its sex offender website violate constitutional equal protection and due process? This Court finds that the answer is no.

In this action, brought under 42 U.S.C. §1983, Plaintiff Richard Alan Farmer seeks declaratory and injunctive relief against The Florida Department of Law Enforcement ("FDLE") and FDLE Commissioner Richard L. Swearingen in his official capacity.[1]

[1] The FDLE and Swearingen, acting in his official capacity, are frequently referred to collectively in this order as "the FDLE."

Farmer was convicted of sex offenses in Alabama in 1992 and, pursuant to Florida law, registered in Florida as a sex offender after he moved to Florida. He has since moved out of Florida and is now a resident of the Bahamas. He asked the FDLE to remove him from the sex offender registry, but it refused to do so. Farmer has sued to compel it to remove him, arguing that its refusal to do so and the Florida statutes allowing it to so refuse violate his constitutional rights to due process and equal protection.

This Court has considered, without hearing, Plaintiff's Motion for Summary Judgment, ECF No. 30, and Defendants' Motion for Summary Judgment, ECF No. 31. After a thorough review of the record and the parties' filings, this Court finds as a matter of law that the FDLE's refusal to remove Farmer from the sex offender registry did not violate Farmer's due process or equal protection rights because the FDLE had a rational basis for its decision. The FDLE's motion for summary judgment is therefore granted, and Farmer's motion for summary judgment is denied.

I

This Court accepts the facts in the light most favorable to the non-movant. *See Galvez v. Bruce*, 552 F.3d 1238, 1239 (11th Cir. 2008). All reasonable doubts about the facts shall be resolved

in favor of the non-movant. *Id.* The standards governing cross-motions for summary judgment are the same, although the court must construe the motions independently, viewing the evidence presented by each moving party in the light most favorable to the non-movant. *Lozman v. City of Riviera Beach*, 39 F. Supp. 3d 1392, 1404 (S.D. Fla. 2014) (citations omitted).

A

Florida requires all "sexual offenders" who reside in Florida to register with their local sheriff's office and periodically provide current personal information. §943.0435(2), (3), (4), (14), Fla. Stat. (2015). The law requires registration by "permanent," "temporary," and "transient" residents, who collectively include individuals who are in Florida for five or more days in a given year. *Id.* §943.0435(1)(C) (cross-referencing §775.21). The FDLE makes information publicly available through the Internet. *Id.* §943.043.

A "sexual offender" is defined as, among other things, one who

> Establishes or maintains a residence in this state and who has not been designated as a sexual predator by a court of this state but who has been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction and was, as a re-

> sult of such designation, subjected to registration or community or public notification, or both, or would be if the person were a resident of that state or jurisdiction, without regard to whether the person otherwise meets the criteria for registration as a sexual offender.

Id. §943.0435(1)(a)1.b.

B

Plaintiff Richard Alan Farmer pled guilty to two counts of rape in the second degree and two counts of sodomy in the second degree in Alabama in 1992. ECF No. 32-1, at 8–9. He was required on account of his crimes to register for life as sex offender in Alabama. ECF No. 32-2, at 93.

After Farmer moved to Florida, he registered as a sex offender with the FDLE on October 15, 2009, listing a Destin, Florida, address as his primary residence. ECF No. 32-1, at 43–44, 123–28.[2]

On October 30, 2009, Farmer updated his information with the state of Florida, stating that his new address was in the Bahamas. *Id.* at 40–41, 117–22. In 2011 Farmer moved to the Bahamas.

[2] Farmer objected to inquiries regarding when he moved to Florida multiple times on Fifth Amendment grounds. *See, e.g.*, ECF No. 32-1, at 43–44. The particulars of Farmer's move are not relevant; it is only relevant that at some point Farmer was a resident of Florida and registered in Florida as a sex offender as required by Florida law.

Id. at 75.

When Farmer asked the FDLE to remove him from the sex offender registry website because he had moved to a different state, the FDLE refused to do so. ECF No. 33-2, at 6–9. The FDLE maintains that once Farmer moved to another jurisdiction, he was not under any further obligation to continue to update his registration until he established a new residence in Florida. *See* ECF No. 32-2, at 7; §943.0435(1)(c), Fla. Stat. (2015). However, it refused to remove his *existing* registration from its database or website.

Farmer filed suit pursuant to 42 U.S.C. §1983, asking this Court to declare that the FDLE's action in refusing to remove him from the website is unconstitutional and require the FDLE to so remove him. He alleges that the action violates substantive due process (Count I), procedural due process (Count II), and equal protection (Count III). He named both the FDLE and Richard L. Swearingen, in his official capacity as FDLE commissioner, as Defendants. This Court previously dismissed all claims against the FDLE. ECF No. 37.

Both sides now move for summary judgment.[3]

II

Farmer argues that the FDLE's refusal to remove him from the sex offender registry violates his rights under both the federal and Florida constitutions to both equal protection and substantive due process because the FDLE has no rational basis for its actions.[4] He challenges the constitutionality of §943.0435, Florida Statutes, as it has been applied to him by the FDLE.[5]

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[3] Defendant also filed a motion to dismiss, ECF No. 7. This Court granted the motion in part, ECF No. 37, but deferred ruling on the remainder of the motion. Because the motions for summary judgment are now ripe for review, the best course is to deny the motion as moot. This Court, in considering the cross motions for summary judgment, has reviewed the substance of the parties' briefs on the motion to dismiss.

[4] Neither party points to any meaningful distinction in federal and Florida constitutional law as they relate to Farmer's claims. This Court assumes, the absence of any suggestion to the contrary, that the standards are substantially identical.

[5] The odd procedural posture of this case is not lost on this Court. Farmer, in essence, seeks judicial review of a decision by the FDLE—a Florida agency. Florida statutes arguably do not, by their plain language, compel the FDLE to take the position that it has, nor has the FDLE promulgated any rule or other policy statement formally announcing its position. Normally, agency decisions are reviewable under applicable federal and state statutes providing for judicial review of such decisions. *See, e.g.*, §120.68, Fla. Stat. (2015). However, neither party has raised this issue.

A

The Equal Protection Clause requires the government to treat similarly situated persons in a similar manner. *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1305 (11th Cir. 2009). Equal protection jurisprudence is typically concerned with governmental classification and treatment that affects some discrete and identifiable group of citizens differently from other groups. *Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc.*, 682 F.3d 1293, 1296 (11th Cir. 2012). Where a plaintiff is not being treated differently on the basis of race or some other suspect classification, and if the law is not alleged to impinge any fundamental right, the law need only have a rational basis—the classification need only be rationally related to a legitimate government purpose. *Leib*, 558 F.3d at 1306 (11th Cir. 2009).[6]

In general, the substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are implicit in the concept of ordered liberty. *Lewis v. Brown*, 409 F.3d 1271, 1272 (11th Cir. 2005) (citations and quotations omitted). However, where an individual's state-created rights are

[6] Both sides appear to agree that no protected class or fundamental rights are implicated, and that rational basis review applies.

infringed by a "legislative act," the substantive component of the Due Process Clause generally protects him from arbitrary and irrational action by the government. *Id.* at 1273.[7] Substantive due process challenges to legislative acts that do not implicate fundamental rights are reviewed under the rational basis standard. *Kentner v. City of Sanibel*, 750 F.3d 1274, 1280 (11th Cir. 2014).

Thus for Farmer's equal protection and substantive due process claims, the same rational basis review applies.[8] The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve it. *Leib*, 558 F.3d at 1306. A state has no obligation to produce evidence to sustain the rationality of a regulatory classification; rather, a regulation is presumed constitutional, and the burden is on the one attacking the law to

[7] "Legislative acts . . . generally apply to larger segments of—if not all of—society; laws and broad-ranging executive regulations are the most common examples." *Lewis*, 409 F.3d at 1273 (citations and quotations omitted).

[8] The standard is "virtually identical" in both the substantive due process and equal protection contexts. *See In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989). *See also Cook v. Bennett*, 792 F.3d 1294, 1301 (11th Cir. 2015) ("Rational basis review in the context of equal protection is essentially equivalent to rational basis review in the context of due process.").

negate every conceivable basis that might support it, even if that basis has no foundation in the record. *Id.* A court must accept a legislature's generalizations even when there is an imperfect fit between means and ends. *Id.* A law need not be sensible to pass rational basis review; rather, it may be based on rational speculation unsupported by evidence or empirical data. *Cook v. Bennett*, 792 F.3d 1294, 1300 (11th Cir. 2015) (citations and quotations omitted). A legislative action survives rational basis review even if it seems unwise or if the rationale for it seems tenuous. *Id.* (citations and quotations omitted). Almost every legislative action subject to the very deferential rational basis scrutiny standard is found to be constitutional. *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001).

Other courts have routinely found that laws mandating sex offender registries, including §943.0435, survive rational basis review. *See, e.g.*, *Doe v. Moore*, 410 F.3d 1337, 1339–40 (11th Cir. 2005) (finding that "Florida's sex offender registration/notification scheme" meets the rational basis standard); *Miller v. State*, 971 So. 2d 951, 954–55 (Fla. 5th DCA 2007) (noting that Florida had a rational basis to include in its definition of "sexual offender" Florida residents who have been designated sexual offenders by another

state); *accord* 42 U.S.C. §16901 *et seq.* (establishing comprehensive national system for registration of sex offenders).

B

Farmer claims that as a non-resident of Florida, he is similarly situated to all other non-resident sex offenders. ECF No. 30, at 3. Farmer argues that "[t]he only distinction between [him] and [such] out-of-state sex offenders who are not registered in Florida is that [Farmer] once resided in Florida. [Farmer] having once resided in Florida is not a rational basis for treating [Farmer] differently [than] those out-of-state sex offenders registered in other states who are not registered in Florida." *Id.* In other words, Farmer argues that leaving his name on the registry is irrational given that Florida wouldn't list a sex offender in, say, Vermont who had never had a connection with Florida. The relevant class he belongs to under this theory is the class of people who once had to register as sex offenders in Florida who now live outside the state. The question, phrased in equal protection terms, is this: is there a rational basis for distinguishing between former residents of Florida—that, is people who once had to register as sex offenders in Florida—and people who have never had to register as sex offenders in Florida? In substantive due process terms, the question is

whether it makes any sense to leave sex offenders listed on the registry and website once they move out of the state.

This Court will assume for purposes of this analysis that FDLE's decision to leave Farmer on the registry flows from a legislative act—that is, the decision to leave offenders on the list after they move out of the state applies to all people in Farmer's position, and is a matter of policy. Regardless of whether Farmer's challenge to this policy is based on equal protection or substantive due process, the crucial inquiry is the same: does the FDLE have a rational basis for this policy?[9] This Court finds that it does, and Farmer's claims fail as a matter of law under the "highly deferential" rational basis review standard. *Williams*, 240 F.3d at 948.[10]

The FDLE asserts several bases that it argues rationally support its policy: (1) the policy maintains the completeness of the sex offender registry by keeping all offenders in the registry rather than relying on them to comply with registration requirements in

[9] Farmer frequently mentions that the FDLE's action is not authorized by §943.0435 since he is an out-of-state resident, but this distracts from his claim. Counts I and III allege that the FDLE's refusal to remove him from the sex offender registry denied him substantive due process and equal protection; that is the issue this Court will address.

[10] Because Farmer's claims fail on this ground, this Court need not address any of the parties' other arguments.

the future; (2) it assists law enforcement as an investigative tool to identify or rule out offenders; (3) it provides officers with information about persons with whom they come into contact, and knowing a person's sex offender status may be of assistance in assessing a situation; (4) it helps victims identify offenders and keep track of them in order to avoid future contact; (5) it informs persons, such as travelers, neighbors, and concerned citizens, who may come into contact with a sex offender about his sex offender history; (6) it supplies potential employers with information for background checks; (7) it maintains public safety by being part of a national sex offender registry and website; (8) promotes the public's right to public records. At least some of these reasons meet the low threshold required for a legislative act to be upheld as "rational" under the Constitution.

For example, maintaining a permanent database of all registered sex offenders is rationally related to aiding victims, concerned citizens, potential employers, and law enforcement officers in their efforts keep track of the known whereabouts of sex offenders—a legitimate government purpose. *See Doe*, 410 F.3d at 1347 (noting that the "increased reporting requirements" for sex offenders are "rationally related to the state's interest in protecting its

citizens from criminal activity"). This may prove especially important where, as in this case, the offender moves out of the country, as a citizen may not have access to the offender's known out-of-country address if the FDLE purged its website of offenders who had left the state.

The FDLE's actions also provide a continuing benefit to concerned citizens in Florida who may come into contact with Farmer and inquire about his sex offender status. It would be rational to think—even, as Farmer points out, in the absence of corroborative empirical evidence—that individuals who were once residents of Florida would be likely to return to Florida in the future and interact with other Florida citizens. Indeed, Farmer admits that he has visited Florida on several occasions since he ceased being a Florida resident. *See* ECF No. 32-5, at 4–5. Making sex offender registration information readily available to concerned citizens who come into contact with Farmer during his travels in Florida would, again, rationally promote the legitimate state interest of "protecting its citizens from criminal activity." *Doe*, 410 F.3d at 1347. And given that the FDLE could rationally believe that people like Farmer who once had to register in Florida are more likely to return here than sex offenders who have never had to register in

Florida, it makes sense for the FDLE to treat these two groups differently.

Likewise, the policy of permanently maintaining all registered offenders on the website is rationally related to the legitimate public purpose of making public records widely available and easily accessible. Even though there may be other, less intrusive means of making the records available, it is rational to believe that maintaining the records on a dedicated sex offender registry website will make them readily and easily accessible.

Farmer argues that the FDLE's justifications are undermined by the fact that he is no longer required to register in Florida, and his information is outdated and not useful to current website visitors. That may be the case, but maintaining the information on the website is still rationally related to the goal of providing a complete historical record of sex offenders that have registered in Florida, so that it be part of a national effort to close loopholes and track sex offenders. *Cf.* 42 U.S.C. §16901 *et seq*. And it is rational to believe that maintaining *some* record of sex offenders, even an outdated one, is more helpful to victims, concerned citizens, potential employers, and law enforcement agencies than *no* record. Indeed, the Department of Justice's website indexes sex

offenders registered in any state with the websites of all states in which they have registered; were a state to purge its website, the national record could become incomplete, making it difficult for a victim or concerned citizen to track and identify sex offenders. *See* ECF No. 32-3, at 9–10.[11]

Because there is at least one rational basis for the FDLE's policy, Farmer's substantive due process and equal protection claims fail as a matter of law. The FDLE's motion for summary judgment is granted, and Farmer's motion is denied, as to Counts I and III.

III

Count II of the Complaint alleges that the FDLE's actions violated Farmer's procedural due process rights. The FDLE argued in its motion for summary judgment, ECF No. 31, that Count II fails as a matter of law, and Farmer did not address Count II in his response, ECF No. 35.[12] Additionally, Farmer did not address

[11] This Court was quickly able to locate the Department of Justice's website, input "Richard Farmer" into the search database, and access Farmer's registry information on both the Florida and Alabama websites. *United States Department of Justice National Sex Offender Public Website*, https://www.nsopw.gov/en/Search; Fed. R. Evid. 201.

[12] Farmer appears to conflate substantive and procedural due process in his response, but he does not specifically address any of the FDLE's arguments relating to procedural due process.

Count II in his own motion for summary judgment, ECF No. 30, except to note that "Count II . . . would only have application were FDLE to take the position that its refusal to remove [him] from the Florida registry and FDLE website was fact specific to [him]. FDLE does not take that position." The only meaningful discussion Farmer makes of Count II is in his reply to the FDLE's response to his motion, ECF No. 38, which incorporates by reference his arguments from his response to the motion to dismiss, ECF No. 9. The gist of Farmer's argument is that continued listing on the registry implicates a liberty interest, and that upon moving out of the state he should have had an opportunity for a hearing at which "the State [would have had to] demonstrate a factual basis supporting a legitimate state interest for life registration of a non-resident." ECF No. 9, at 12.

Given that the FDLE has taken the position that its decision with respect to Farmer did not turn on his specific circumstances, but was rather a straightforward administration of a policy, it would appear that Farmer's procedural due process claim is doomed. The FDLE has decided that people should remain listed

on the registry and the website even after they leave the state, and Farmer does not contend that he was denied an opportunity to prove that he meets one of the statutory conditions for de-listing. But assuming for the moment that the FDLE *did* make a fact-specific determination as to Farmer, his procedural due process claim still fails.

In order to establish a procedural due process violation, a plaintiff must establish (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. *Matthews v. Town of Autaugaville*, 574 F. Supp. 2d 1237, 1242 (M.D. Ala. 2008) (citing *Foxy Lady, Inc. v. City of Atlanta,* 347 F.3d 1232, 1236 (11th Cir.2003)). Even assuming that the first two prongs are satisfied, Farmer wholly fails to allege or show any facts suggesting that he was not afforded constitutionally adequate process concerning the FDLE's decision not to remove him from the registry and website. Rather, the record suggests that after Farmer sent a letter asking the FDLE to remove him from the website, the FDLE thoroughly considered his request before making a decision to deny it, laying out and later clarifying its reasons for doing so. *See* ECF No. 33-2, at 6–9.

Farmer does not argue or allege or otherwise suggest that this process was not constitutionally adequate. *See Cotton v. Jackson*, 216 F.3d 1328, 1330–31 (11th Cir. 2000) ("[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under Section 1983 arise. . . . [Courts] look to whether the available state procedures were adequate to correct the alleged procedural deficiencies.") (citations and quotations omitted).

Furthermore, there's not even a deprivation of a liberty interest here that would require a hearing. It is true that in some cases, changed circumstances can turn what appears to be a continuing deprivation into an entirely new deprivation, triggering the need for more process. *See, e.g.*, *Walters v. Wolf*, 660 F.3d 307, 315 (8th Cir. 2011) (plaintiff entitled to hearing based on defendants' "refusal to return [his] handgun and ammunition after [a court] dismissed the unlawful-use-of-a-weapon charge . . ., or sometime thereafter when authorities deactivated the . . . warrant for [his] arrest"). But in those cases, the circumstances have so changed that the legal basis for the initial deprivation no longer exists. That is not the case here—it's not as if Farmer has been exonerated.

Farmer's complaint is really that the FDLE lacked a rational basis for its decision. *See* ECF No. 1 ¶ 31. But whether an action has a rational basis is irrelevant to a procedural due process inquiry, and in any event, for the reasons already explained, the FDLE *did* have a rational basis for its decision.

The FDLE's motion is therefore granted, and Farmer's motion is denied, as to Count II.

IV

Rational basis review is a "highly deferential" standard. *Williams*, 240 F.3d at 948. The government needs only point to "any reasonably conceivable state of facts that could provide a rational basis" in order for its decision to be upheld. *Doe*, 410 F.3d at 1337 (citations and quotations omitted). Laws that are "unwise," not "sensible," and based on "tenuous" rationales routinely survive review. *Cook*, 792 F.3d at 300 (citations and quotations omitted). So do laws that are "unfair." *See Cook v. Stewart*, 28 F. Supp. 3d 1207, 1215 (N.D. Fla. 2014).

This Court was not asked to decide whether the FDLE's refusal to remove Farmer's information from its sex offender registry and website even after he left the state was wise, or fair, or soundly reasoned, or good public policy. It was only asked to decide whether

it was rationally related to at least one conceivable legitimate government purpose. For the reasons stated, this Court finds that is was, and that the FDLE did not violate Farmer's rights to due process or equal protection.

Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment, ECF No. 30, is **DENIED.**
2. Defendants Swearingen and Florida Department of Law Enforcement's Motion for Summary Judgment, ECF No. 31, is **GRANTED**.
3. Defendants Richard L. Swearingen and Florida Department of Law Enforcement's Motion to Dismiss Complaint, ECF No. 7, to the extent that it was not addressed in this Court's March 15, 2016, Order, ECF No. 37, is **DENIED AS MOOT.**
4. The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff, stating "Plaintiff's claims are dismissed with prejudice."

5. The Clerk must close the file.

SO ORDERED on July 6, 2016.

s/Mark E. Walker
United States District Judge