UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

STEPHANIE ASHLEY HARPER,

Plaintiff,

vs. **Case No. 4:21-cv-85-RH-MJF**

MARK GLASS,

Defendant.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. Rule 56, plaintiff moves for summary judgment on her ex post facto, substantive due process, and right to travel claims against the requirement to make multiple in-person reports within 48 hours to 1 or 2 different agencies about spending 3 days in the aggregate per year at a location other than her permanent residence, § 943.0435(4)(a) & (7), Florida Statutes (2023); and her First Amendment/compelled speech claim against the requirement to always carry a state-issued identification card displaying her status as a sex offender. §§ 943.0435(3)(b), 322.141(3)(b), Florida Statutes (2023).

Statement of Facts

I. The 3-day Travel Restriction

People registered pursuant to § 943.0435(1)(h)I.a, (I),(II), and residing in Florida must make between 2 and 4 in-person reports within a 48-hour period about a temporary residence, defined as a stay of 3 or more days in the aggregate per calendar year at a single location. § 775.21(2)(n), Fla. Stat. (2023).

If a registrant changes her temporary or permanent residence, defined in § 775.21(2)(n) as 3 or more consecutive days at the same location, § 943.0435(4)(a) requires her to report in person to a DHSMV office to "secure or update" her license with the new address within 48 hours of the change. If unable to "secure or update"

her license at the DHSMV, she must report the change to the sheriff's office within the same 48-hour interval with proof that she tried first at the DHSMV.

If the temporary residence is in Florida, she must report in the visited county within 48 hours after the third day, first to the DHSMV and, if unable to "secure or update" her license, to the sheriff within the same 48 hours. § 943.0435(4)(a). She must report to her home county within 48 hours of her return, first to the DHSMV and, if unable to "secure or update" her license, to the sheriff within the same 48 hours.

§ 943.0435(7) requires that, within 48 hours before a registrant departs for an out-of-state temporary residence, she must report in person to the sheriff's office. Under § 943.0435(4)(a), she must report the change from the temporary to permanent residence first to the DHSMV, then, if unable to "secure or update" her license, within the same 48 hours to the sheriff with proof that she tried first at the DHSMV.

Failure to report a temporary residence is a third-degree felony punishable by a mandatory-minimum term of 6 months GPS-monitored community control and a 5-year maximum prison sentence. § 943.0435(9)(a), (b).

A. Order of partial dismissal

In its Order (ECF-22), this Court noted various irrational aspects of the 3-day rule:

- A registrant can travel for months without reporting, so long as she remains no more than 2 days at any one location. *Id*. at 8;
- She can report the first 3-day stay out-of-state, without having to report subsequent out-of-state destinations, a "bizarre result." *Id.* at 8;
- If she intends to stay at a Hampton Inn for 3 separate nights in a year, must she report before the first trip, the third, all three, or when she first knew she might go three times? *Id.* at 9;
- If staying at a different Hampton for one of these trips avoids her having to report any of them, "what is the point?" *Id.* at 9.

Observing that "`a rational connection to a nonpunitive purpose'" is a "`most significant' factor in ex post facto analysis" (ECF-22:7) (citing *Smith v. Doe*, 538 U.S. 84, 97, 102 (2003), this Court concluded that "[t]here is no obvious rational, nonpunitive purpose for" the 3-day rule, *id*. at 9, while acknowledging FDLE might "[p]erhaps" come up with a "legitimate purpose." *Id.* at 10.

Plaintiff conducted extensive discovery to find a "legitimate purpose" for the 3-day rule as did plaintiffs in a similar case filed 3 years earlier in the Southern District of Florida.[1] No legitimate law enforcement purpose has emerged from the

[1] *See Does v. Swearingen*, No. 1:18-cv-24145-Williams (S.D. Fla). Plaintiff previously alerted the Court to the pendency of the similar Southern District case (ECF-48). To avoid duplication of discovery efforts, the parties here agreed that

thousands of pages of FDLE disclosures and depositions generated in these two cases.

What emerged instead was defendant's own opposition to the 3-day rule before it was even enacted because of its adverse impact on law enforcement, and his repeated efforts since to persuade the legislature to amend the 3-day rule to allow online travel reporting in the interests of public safety.

B. The official reason for the 3-day rule

The 3-day rule was not a response to complaints about the inadequacy of the former 5-day travel rule in protecting the public. Its catalyst was a single county, Miami-Dade, which had been sued by registrants alleging that the county's residence restriction rendered them homeless. *Doe #4 v. Miami-Dade County, Fl.,* No. 1:14-cv-23933-PCH, 2018 WL 10780510 (S.D. Fla., Dec. 18, 2018). The county asserted that many registrants claiming transient status were actually residing in homes within the zone of prohibition. *Id.* at *10. The County Board of Commissioners passed resolutions proposing that the legislature amend § 775.21(2)(n), by reducing the definition of temporary residence from 5 days to 3 to facilitate surveillance of registrants claiming transient status; and § 943.0435(9)(b), to include a minimum-

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discovery in the Southern District case would be admissible in this case. *See* ECF-27:4; Fed. R. Civ. P. 32 (a)(8).

mandatory sentence of 6 months GPS-monitored community control to facilitate tracking transients' true locations (Ex-3).

Bills codifying the resolutions were introduced during the 2018 legislative session, HB 1301 and SB 1226, as targeting the problem of monitoring transient registrants (Ex-44). FDLE warned that accommodating registration every 3 days could affect as much as 37% of sheriffs' offices: many did not have 3 or more consecutive reporting days, some as few as 1 or 2 days a week; and almost 32% of registrants resided in counties with limited reporting hours (Ex-4:5). The bills allocated no funding to meet increased staffing needs (*Id*.). And there were "[o]ther potential impacts": to the Florida Department of Corrections due to the "increased minimum mandatory penalties"; to the sheriffs' offices "in terms of increased evidentiary support for failure to register (FTR) cases"; and to prosecutors in terms of "an increase in the number of FTR cases" (*Id*.).

No studies were conducted to show that the bills would improve public safety, either by reducing the risk of a registrant's reoffense, or by notifying the community of the registrant's fleeting residence (*Id*. at 2). A public records request to the legislative archives revealed only opposition, not support for the bills (Ex-5). They went into effect on July 1, 2018.

C. Effects of the 3-day travel rule on public safety

Before the 2018 amendments, a registrant was required to report travel of 5 days or more in the aggregate per calendar year. The amendments thus affect only travel for 3 to 4 days: shorter trips need not be reported and longer trips already required reporting.

Neither plaintiff's expert Dr. Socia nor defense expert Dr. McCleary could find evidence anywhere suggesting the efficacy of the 3-day travel restrictions in protecting the public through reducing registrant reoffense or reducing sex crimes overall (Ex-6:5-6; Ex-7:6). FDLE can produce no empirical evidence that redefining temporary residence from 5 to 3 days reduces registrant reoffense for in-state or out-of-state travel (Ex-8:1-2).[2]

Nor is there even a conceivable public benefit. For in-state travel, a registrant is not required to report a 3-day temporary residence until the 48-hour period commencing **after she has left**. DHSMV "shall forward" the information to FDLE (but provides no deadline for doing so), § 943.0435(4)(a), and the sheriff shall "promptly" transmit the information to FDLE (but does not define "promptly"). § 943.0435(7). FDLE "usually" takes one business day to input information received about temporary residences into the registry (Ex-6:9 n.3). Even if the sheriffs, DHSMV and FDLE immediately posted the temporary address on FDLE's public

[2] *See also* Ex-17:200 and Ex-15:56.

website, and even if the public happened to check the website at that very moment, the registrant's temporary community would not know she had been there until **after she had left**. Similarly, public notification that she had returned to her permanent residence would not benefit a community that never knew she had left. Regarding a 3-day out-of-state temporary residence under § 943.0435(7), prior notice to the visited state does not protect Floridians, nor does it protect citizens of the visited state after 3 days have elapsed.

Furthermore, a registrant can travel in-state indefinitely without reporting so long as she stays no more than 2 days at any one location and can travel out-of-state indefinitely without reporting locations subsequent to her first 3-day stay.

Finally, Dr. Socia opines that the 3-day rule impedes registrants' successful community reintegration (Ex-6:20-21, 23-25), an opinion McCleary describes as "non-controversial" (Ex-7:62). This undermines rather than protects public safety (Ex-6:20-25).

D. Effects of the 3-day rule on law enforcement

The legislature apparently did not appropriate funds to increase sheriffs' staffing to accommodate the 3-day reporting requirement (Ex-9:75). Most offices continue to keep limited hours and days for that purpose (Ex-10:14) and are "significant[ly] burden[ed]" by the increase in in-person reporting (Ex-11:1).

The 3-day rule may not even have improved monitoring of transient registrants. 89% of sheriffs report continuing difficulties in monitoring transients (Ex-10:6-7).

E. Effects of the 3-day rule on registrants

Dr. Socia reports a wide range of adverse impacts on registrants resulting from the 3-day restrictions.[3] First, limited DHSMV or sheriffs' schedules may obstruct travel or preclude compliance (Ex-6:11, 13-14). Although DHSMV is open 5 days a week during business hours, it can take weeks or months to get an appointment (Ex-6:21, Ex-39); a registrant without an appointment may have to spend hours before "securing or updating" her driver's license (Ex-6:11). If the sheriff's office is closed during the 48-hour period after a registrant receives news of an out-of-state family or work emergency, she must delay her departure, possibly for days, until it opens. If the sheriff or DMV is closed during the 48-hour period after a registrant establishes a temporary residence, she may have to delay her return until it opens. If the sheriff or DMV is closed during the 48-hour period after her return, she has violated the statute. These are not hypothetical problems: FDLE has produced numerous documents reflecting registrants' inability to comply with the statute due to office closures (Ex-12).

[3] The registrants submitting declarations to Dr. Socia have been listed by plaintiff as trial witnesses. *See, e.g.* Ex-48.

Even if the sheriff's office is open within the 48-hour deadlines, travel time to and from the DHSMV or sheriff as well as wait time while there can consume a half day on both ends of a 3-day trip, deterring registrants like plaintiff, who may lose time and wages from work (Ex-6:13-14, 21). Registrants may also have to pay a fee to DHSMV and/or the sheriff to report the temporary residence, *see* § 943.0435(3)(b), (4)(a); Ex-10:14, a "deterrent to timely compliance" (Ex-13:10). Some registrants are required to wait hours outside the sheriff's office for long periods of time before reporting, which is particularly burdensome for those with disabilities (Ex-6:12-13).

Scores of registrants have emailed FDLE seeking clarification of ambiguous travel-related provisions in order to avoid arrest (Ex-14; Ex-6:15-17). [4] Even FDLE witnesses whose job is to interpret, implement and train law enforcement officers in the statute's application disagree about the provision's meanings: "48 hours," "within 48 hours,"; "secure or update" a license; "day"; what day is the first for the purpose of the 3-day restriction; the time on the third day that the 48-hour reporting interval begins (Ex-40). FDLE guidelines for law enforcement agencies do not

[4] This Court dismissed plaintiff's vagueness challenge to the travel-related language (ECF-22:7, 11). But language so ambiguous that law enforcement agencies understand and apply it inconsistently burdens travel even if not unconstitutionally vague.

define these terms (Ex-1; Ex-18). Instead, individual sheriffs apply them "as they understand them" (Ex-8:3). Defendant acknowledges that sheriffs interpret them inconsistently.[5] Defendant advises the registrants who reach out to him to ask the local sheriff or consult a lawyer,[6] a costly measure to avoid committing a felony. A recent survey of Florida sheriffs[7] reveals radical inconsistency in their understanding of the following travel-related words and phrases: (1) on which day of a 3-day trip does a registrant's 48-hour reporting interval begin (Ex-2:7); whether a registrant is required to report in-person on return from an in-state or out-of-state temporary residence, *id*. at 7-9; the first day of a 3-day stay, *id*. at 10; the meaning of "day" (*Id*.).

Furthermore, even personnel within each sheriff's office may interpret and apply the restrictions inconsistently: standard operating procedures obtained from sheriffs' offices through public records act requests reflect virtually no guidance to personnel on the interpretation or application of these terms (*see, e.g.* Ex-20).

Thus, the onus is on the registrant to learn: 1) how law enforcement personnel in counties of both permanent and temporary residence interpret the travel-related restrictions, and 2) the schedule of each reporting office, under threat of felony

[5] Ex-15:144; Ex-17:79, 101, 126; Ex-9:35, 39, 41, 44, 50.

[6] Ex-19; Ex-15:142.

[7] Of the 67 sheriffs' offices state-wide, 28 participated in the survey, or 41.8%, a rate consistent with other phone surveys of law enforcement agencies (Ex-2:6).

prosecution and imprisonment. The threat is not idle. Between January 1, 2008, and October 7, 2019, almost 20,000 registrants were arrested for violating the statute; almost 12,000 were convicted (Ex-21).

There are 50 ways to violate the statute (Ex-15:174). The travel restrictions are a minefield of potential violations: reporting an in-state or out-of-state temporary residence or return to either DHSMV or the sheriff's office an hour too early or an hour too late or without proof of trying first at the DHSMV; violating the provisions due to misunderstanding them, or to office closures, or to unforeseen exigencies in the course of travel, like flight delays or illness.[8] The result of these burdens is that registrants forego travel they would otherwise undertake to visit sick family members, attend family funerals, make business trips, seek medical care for family members from distant doctors or clinics, go camping, fishing or hunting, and/or repair properties located in other counties (Ex-6:11, 13-17, 22-23; Ex-22:8).

Significantly, emergency evacuation orders due to hurricanes or other natural disasters compel travel at a time that sheriffs' offices are closed for reporting (Ex-

[8] Even a false arrest for violating the travel restrictions has severe consequences: lifetime ineligibility for release from the registry for those otherwise eligible after 25 years. § 943.0435(11)(a)1. *See* Ex-41, reflecting arrest for not having reported to both DHSMV and sheriff before out-of-state trip, not required under § 943.0435(7).

6:15-17)[9]. Although individual deputies may refrain from arresting an evacuee for failure to timely report her temporary residence, the statute makes no provision for emergencies. Registrants are advised to befriend a local deputy who may cut them slack in the event of non-compliance due to emergencies or unanticipated travel setbacks (Ex-16:151-57, 204-07; Ex-23:60-62).

The support of family and friends is crucial to returning citizens, facilitating their successful community re-entry. Conversely, impediments to such support created by travel restrictions undermine the purpose of the registration statute to protect the public from registrant reoffense (Ex-6:25; Ex-24:42).

F. Effects of 3-day travel rule on plaintiff

Plaintiff's extended family—mother, sisters, nieces, and nephews–live more than 100 miles away in Columbia County (Ex-22:8; Ex-25:74). Although she phones or texts them frequently (Ex-24:31), she seldom visits because of the 3-day travel rule, and then only for the day, which works out to approximately 3 hours total, given driving time (Ex-25:74, 93; Ex-22:15). Working full-time, sometimes at two jobs, she finds it difficult and expensive to make multiple in-person reports of family visits to the tax assessor's office, which charges $35.00 for updates (Ex-26:14, 47), and

[9] As noted earlier, FDLE produced dozens of emails from registrants who were unable to report due to office closures or natural disasters (Ex-12).

the sheriff (Ex-22:8).[10] Plaintiff has missed or cut short visits with close out-of-state friends because of the multiple in-person reporting requirements and lack of reporting hours (Ex-22:9).

Plaintiff is also deterred from visiting due to uncertainty about the language of the travel restrictions, as construed by law enforcement in both Lafayette and Columbia counties (Ex-25:74-75, 101; Ex-22:8). She cannot trust Deputy Condy's advice because he has repeatedly enforced the county's sex offender residence restriction against her, even though it plainly does not apply to people like her whose victim is 16 or older (Ex-25:75, 83, 89-92; Ex-43).

In any case, Condy concedes he does not understand the travel restrictions – when a 3-day stay begins or when a 48-hour interval begins, or whether a post-return in-person report is required; he relies on FDLE's manual, which he acknowledges doesn't say (Ex-26:45-48, 49-51, 58-63, 70). Unsurprisingly, no registrant in his county has reported a temporary residence since the 2018 amendments went into

[10] Deputy Geoff Condy testified that, adding the hours kept by his office and the jail, a registrant can report any time between 8 am and 5 pm Monday through Friday, unless there is a holiday or the person taking reports—the only person at the jail who can access the FDLE database—is not there (Ex-26:67-68, 77, 92). His testimony is contradicted by FDLE's own schedule reflecting that his office designates only two days a week for registrant reporting, and by information provided to plaintiff (Ex-25:95-97; Ex-42). Plaintiff testified that she has on some occasions attempted to report only to be told to return later that day or on a different day and has had to schedule appointments to report (Ex-25:57, 60; Ex-22:9).

effect (Ex-26:31). Although he describes himself as "easy-going" and "lenient" (*id*. at 53, 62), plaintiff, as a mother of three, cannot risk her liberty in reliance on Condy's self-regard (Ex-25:75).

Plaintiff would see her family more but for the 3-day rule, and is grateful for having grown up among aunts, cousins, and grandparents (Ex-25:93-94). Her "kids deserve that" (*Id*.). Impeding plaintiff's ability to be among her family undermines successful community reintegration (Ex-24:42; Ex-6:20-21, 23-25).

G. FDLE's opposition to the current 3-day rule

In each of the last 3 years, FDLE has proposed that the legislature amend the statute to allow for online, rather than in-person, reporting of residential changes, just as registrants report other updates online, through a DHSMV portal that already exists for this purpose. FDLE has explained that this measure would both **relieve a "significant burden," on sheriffs** (Ex-27:1), and **"streamline[ ]" notification** to law enforcement and the public (Ex-28:2-3), which would **"improve public safety in Florida"** (Ex-29:1; Ex-30:3; Ex-31:2; Ex-32:4). FDLE has also (and repeatedly) proposed an amendment to clarify that the first day a person stays at a place "is excluded" from the 3-day count, and "[e]ach day following the first day is counted" (Ex-32:8; Ex-28:4; Ex-33:2). It further proposed changing the phrase "within 48 hours" to "at least 48 hours," because the current language **"lacks clarity as to when the calculation [of 3 days] begins,"** and as to when the 48-hour notice provision

begins and ends (Ex-32:8; Ex-31:2-3; Ex-11:1; Ex-28:3; Ex-27:1). The proposed language would **"minimize misinterpretation by registrants and local sheriff's offices"** (Ex-29:1; Ex-27:1; Ex-11:1).

No criminal justice stakeholder–the Sheriffs' Association, the Prosecuting Attorneys' Association, the Police Chiefs' Association, the Department of Corrections, the DHSMV, or the Department of Criminal Justice–has expressed any opposition to FDLE's proposals (Ex-9:76, 88-89, 91, 93, 98, 106). Heather Faulkner, who is FDLE's legislative liaison, has heard no criticism about the proposals from members of the legislature (*Id*. at 77, 80, 107, 111). Faulkner acknowledges that online reporting of residential changes would reduce the "critical monetary impact" of the 2018 amendments and does not know why FDLE's proposals did not pass (*Id.* at 96, 113). Faulkner has already provided the proposals to FDLE's legislative affairs staff for the 2023 session but does not know whether this litigation will prevent their introduction (*Id*. at 117-19).

One bill introduced during the 2023 legislative session illustrates the stakes of plaintiff's motion: SB 714/HB 833 would redefine "temporary residence" to include a 24-hour stay at a hotel, motel, or other vacation rental (Ex-34:13). FDLE has opposed this as burdensome for registrants and law enforcement, and without benefit to public safety (Ex-35:16). If enacted, the amendment virtually precludes registrants from taking road trips for either business or pleasure. Nothing now

prevents the legislature from redefining temporary residence to include a 24-hour stay with friends and family, or even an hours-long visit.

II. Branded Identification Requirement

§ 322.141(3)(b), Fla. Stat. requires that registrants always carry a driver's license or other state-issued identification card bearing the number of the registration statute on the face of the card.

A. Effects on public safety

According to defendant, branding state-issued identification with the registrant's status "allows officers to quickly identify the status of a person they encounter to ascertain when there is the reasonable suspicion to request additional checks based on circumstances that may have escaped detection but for the marking" (Ex-46:11), for example, by looking for children or toys in the car (Ex-15:48-49). Further, he contends the "marking also assists facilities that require heightened security and identification to enter their premises due to vulnerable populations (such as hospitals, daycare centers, schools, nursing homes and hospices)" (Ex-46:11), by assisting such facilities to bar registrants from entry (Ex-16:160). He is unaware of any empirical basis to believe that branding registrants' identification protects vulnerable people from registrant reoffense (Ex-8:3). His witness could produce no examples of Florida registrants committing sex crimes in premises housing vulnerable populations (Ex-16:303-19). Registrants are already prohibited

from entering schools without first notifying a school official of their status, purpose, and arrival time. § 856.022(4)(b)1.-3.

With respect to facilitating police identification of registrants, 95% of traffic stops involve a warrant check using mobile data computers (MDCs) to search NCIC and FCIC, which include convictions for sex crimes (Ex-16:47, 50, 64; Ex-23:39-40, 48-49). The DAVID database flags registrants' records (Ex-18:32, 88). Running a tag through FDLE's website reveals within seconds whether it belongs to a registrant (Ex-6:18; Ex-36:58). If a police officer is not in a patrol unit, he can get the same information from dispatch, the teletype service, the FDLE website, or the internet within minutes (Ex-23:40-41). Furthermore, the bar code on the back of a registrant's license indicates her status (Ex-6:17). Defendant has produced no admissible evidence that branding a registrant's driver's license has ever assisted police in investigating, preventing, or solving a sex crime. Deputy Condy does not know whether branding registrants' licenses protects the citizens of his county (Ex-26:39). Drs. Socia and McCleary agree there is no evidence that a branded state-issued identification reduces recidivism by registrants or otherwise prevents sex crimes (Ex-6:5; Ex-7:6).

B. Effects on registrants

Registrants report a variety of adverse impacts from being forced to display their status on their drivers' licenses: rude treatment from customer service

personnel; banning from gated enclaves in which they might otherwise have obtained employment; fear of emotional or physical violence as the result of being forced to disclose their status during quotidian interactions with members of the public who have no need to know (Ex-6:19-20).

These effects are unsurprising: the public reacts to registrants with revulsion and desire to harm. As a result, many Florida registrants have suffered harassment and criminality from people who learn their status (Ex-37). A driver's license is the document most commonly required to prove identity during face-to-face transactions with the public. Divulging registrant status during personal encounters engenders public hostility at risk to public safety: ostracism and exclusion impede re-entry and rehabilitation (Ex-6:22-23).

Branding with a statute number may seem less stigmatizing than the phrase "sexual offender," but if the public knows what the brand means, the public will have the same "knee-jerk reaction" it has to the label "sex offender" (Ex-36:61-63). If the public does not know what it means, it serves no purpose (*Id*. at 71-72).

C. Effects on plaintiff

Plaintiff has experienced harassment, property damage and lost employment resulting from public knowledge of her status (Ex-25:16, 22-24, 30-33, 36-39). Having her driver's license scanned before entering her children's schools immediately reveals her status to any student or employee who scans it, some

conveying alarm before summoning an armed officer to escort her onto the premises (*Id*. at 61-63, 69-70, 94-95). Co-workers once asked about the brand on her driver's license, but she did not tell them what it meant (*Id*. at 63-64).

The statute number now appears in purple on her driver's license. In the 2023 legislative session, a bill has been introduced to require that all identifying data on a registrant's driver's license, including her status, be displayed in red–like Hester Prynne's 'A' (Ex-38). More ominously, an amendment to a related bill was introduced on April 26, 2023, requiring that vehicles belonging to registrants and those who reside with them for 5 days or more, *see* §§ 775.21(2)(p), 943.0435(1)(i), display fluorescent green license plates, making registrants and their family members even more susceptible to becoming targets for harassment and vigilantism everywhere they go. *See* Ex-47.

Statement of the Law

I. The 3-day Travel Restriction

The 3-day travel restriction violates the ex post facto clause because it was enacted after the date of plaintiff's qualifying offense and is punitive in effect; the substantive due process clause, because it is not rationally related to a legitimate public purpose; and the fundamental right to freedom of travel and movement, because it is not narrowly tailored to serve a compelling government purpose.

Key to all three claims is whether the law is rationally related to its purpose. Therefore, plaintiff begins with a recitation of the undisputed facts material to this determination.

- The expressed purpose of the 3-day rule and the minimum-mandatory sentence is to facilitate tracking of transient registrants, but **only 5.8% of registrants residing in Florida claim transient status**. *See* Ex-3; Ex-10:6,8; Ex-44.
- **The public is not notified of an in-state 3-day residence until the registrant has left**, because reporting is not required until 48 hours after the 3 days have elapsed.
- **A registrant may travel indefinitely without reporting** so long as she stays no more than 2 days in any one location or reports just the first 3 days of an out-of-state visit.
- **No research evidence** supports the efficacy for public safety of redefining temporary residence from 5 to 3 days. *See* Ex-6:5-6; Ex-7:6.
- **Impeding registrant travel impedes successful re-integration,** risking public safety. *See* Ex-6:20-21, 23-25; Ex-7:62.
- **No support for the redefinition, only opposition,** was found in the legislative archives. *See* Ex-5.

- **Defendant himself opposed the 3-day rule** because sheriffs' schedules cannot accommodate in-person reporting of 3-day stays within 48-hour intervals. *See* Ex-4.
- **Defendant has repeatedly proposed online travel reporting as benefiting public safety**, by accelerating notification of a registrant's whereabouts and easing strain on sheriffs. *See* Ex-27; Ex-28; Ex-29; Ex-30; Ex-31; Ex-32. The statute already allows online reports of changes to other information and the capacity exists for online reports of residential changes. § 943.0435(4)(e)2.
- **No criminal justice stakeholders have opposed online reporting** of temporary residences. Nor have any of the legislators. *See* Ex-9:76-77, 80, 88-89, 91, 93, 98, 106-07, 111.

Relevant to both the ex post facto and freedom of travel and movement claims are the burdens of the 3-day rule on registrants. These are the undisputed facts material to analysis of burdens:

- **Spending hours, losing wages, and paying fees making in-person reports** to one or two different agencies on each end of a 3-day trip. *See* Ex-6:11, 13-14, 21; Ex-10:14; Ex-13:11; Ex-22:9; Ex-39.
- **Having only 48 hours to make multiple in-person reports,** which can preclude travel entirely given limited reporting hours.
- **Having to report locations visited only 3 days in the aggregate per year.**

- **Fear of unforeseen travel exigencies** causing inadvertent violations, given constrained *mens rea*. *See* Ex-6:11, 13-17, 22-23; Ex-22:8.
- **Fear of arrest through misunderstanding travel restrictions,** construed inconsistently by law enforcement officers. *See* Ex-25:74-75, 77-78, 101-02; Ex-22:8-9; Ex-6:17.

A. The 3-day rule violates the ex post facto clause

The ex post facto clause protects "`disfavored groups'" from retroactive punishments arising from the "`sudden and strong passions'" "`of the moment.'" *McGuire v. Marshall*, 50 F. 4th 986, 1001 (11th Cir. 2022) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810). If the legislative intent in enacting the 3-day restriction and minimum-mandatory sentence was to create a civil nonpunitive scheme, the provision may yet be "`so punitive in either purpose or effect as to negate [the legislature's] intention,'" under the multi-factor test from *Smith v. Doe*, 538 U.S. 84, 92 (2003) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980). Plaintiff must establish by the "clearest proof" that a provision intended to be nonpunitive is criminal in nature. *Id*.

The expressed intent of the 3-day rule and minimum-mandatory sentence is to facilitate tracking of transient registrants, a civil purpose. But they are punitive in effect.

In *McGuire*, *supra*, the Eleventh Circuit upheld a 3-day travel provision in Alabama's registration statute against an ex post facto challenge. 50 F. 4th at 1020-21. The Alabama statute differs from Florida's in ways that bear directly on the determination of punitiveness. In Alabama, a registrant reports where she will be **before** leaving her permanent residence for **3 consecutive days,** rather than after she has left a place she stayed in for 3 days in the aggregate per year; the reporting interval is **3 business days**, not 48 hours;[12] the report must be made to **one government agency,** not two; and **knowledge is required** to prove any violation, not just the first. The statutory differences are illustrated here:

[12] Only one other state has a 48-hour reporting interval without exemptions for weekends and holidays (Ex-45).

Travel Reporting

	Florida	**Alabama**
Definition of Temporary Residence	Residing at place other than permanent residence for 3 or more days in aggregate during any calendar year.[13]	Leaving county of residence for 3 or more consecutive days.[14]
Interval for Reporting	Within 48 hrs.[15]	Within 3 business days.[16]
Number of In-Person Reports (In-State)	2-4[17]	1[18]
Number of In-Person Reports (Out-of-State)	2-3[19]	1[20]
Location of Reports (In-State)	Driver's license office & sheriff's office.[21]	Sheriff's office.[22]
Location of Reports (Out-of-State)	Sheriff's office & driver's license office.[23]	Sheriff's office.[24]
Scienter	Defense of lack of notice of duty to register available only on 1st failure to register charge.[25]	["K]nowingly violates" essential to finding of guilt.[26]

[13] *See* § 775.21(2)(n), Fla. Stat. (2023), incorporated by reference in § 943.0435(1)(f), Fla. Stat. (2023).

[14] *See* § 15-20A-15 (a), Ala. Code (2022).

[15] After any change in permanent, temporary, or transient residence, *See* § 943.0435(4)(a), Fla. Stat. (2023); Before date intends to leave state, § 943.0435(7), Fla. Stat. (2023).

[16] The term "Immediately" in § 15-20A-15 (a), defined as "Within three business days" in § 15-20A-4 (9), Ala. Code (2022).

[17] *See* § 943.0435(4)(a), Fla. Stat. (2023).

[18] *See* § 15-20A-15 (a) & (f), Ala. Code (2022). Note that subsection (a) pertaining to leaving county of residence states report is to be made "in-person", whereas subsection (f) pertaining to returning to county of residence does not require reporting to be in-person.

[19] *See* § 943.0435(7), Fla. Stat. (2023), in-person to sheriff within 48 hours before date intends to leave.

[20] *See* n.18, *supra*.

[21] *See* §943.0435(4)(a), Fla. Stat. (2023).

[22] *See* § 15-20A-15 (a) & (f), Ala. Code (2022).

[23] *See* §§ 943.0435(7) & 943.0435(4), Fla. Stat. (2023), respectively.

[24] *See* § 15-20A-15 (a) & (f), Ala. Code (2022).

[25] *See* § 943.0435(9)(d) , Fla. Stat (2023).

[26] *See* §15-20A-15 (h), Ala. Code (2022).

The statutory distinctions in Florida's and Alabama's schemes produce critical differences in the statutes' "necessary operation" under the multi-factor test set out in *Smith v. Doe*, 538 U.S. at 97:

Regarded in our history and traditions as a punishment. Under Alabama's statute, registrants can travel at will without seeking permission, unlike probation and parole. *McGuire*, 50 F. 4th at 1021. In contrast, Florida registrants are at the mercy of revolving deputies' shifting rules and are advised to cultivate a "friendly" deputy to protect them from arrest. Control over travel by a single law enforcement officer resembles probation. Florida's 3-day rule is even more punitive than probation, because probation violations must be substantial and willful, *Del Valle v. State*, 80 So. 3d 999, 1021 (Fla. 2011), while violations of the 3-day rule may be trivial and unwitting.

Affirmative Disability or Restraint. *McGuire* emphasized that the revised statute required reporting to only one rather than two[27] offices in finding that the rule was not unduly restrictive. 50 F. 4th at 1026. In Florida, however, registrants must report to two different agencies within the same 48-hour period if the DHSMV office cannot process the report.

[27] A previous version of the statute required reporting to two separate offices before travel. *McGuire*, 50 F. 4th at 992 & n.4, 993-94.

McGuire acknowledged that the reporting requirement could prevent "spontaneous" travel plans. *Id*. at 1020. But because the reporting window is 3 business days, **Alabama registrants can always make a timely travel report**. In contrast, Florida's 48-hour reporting interval may preclude travel entirely given limited reporting hours in both government agencies, and may result in violations by those returning without an open 48-hour window.

Finally, Florida's travel-related language is ambiguous, resulting in registrants foregoing travel through fear of misunderstanding the rules, especially given the narrow *mens rea* element. In contrast, Alabama's travel restrictions are easy to read, and registrants cannot be punished for unknowing violations. *See* Ala. Code § 15-20A-15; *McGuire*, 50 F. 4th at 1021.

Promotes traditional aims of punishment. The presence of a deterrent effect does not make a statute punitive and, even if retributive, the provision is not punitive if it "has a rational connection to a nonpunitive purpose." *McGuire*, 50 F. 4th at 1021. Florida's travel restriction is retributive because it serves only to deter travel, a punitive goal.

Rationally related to a nonpunitive purpose, the "most significant" factor. *McGuire* found Alabama's travel rules rationally connected to the legitimate purpose of "[e]ncourag[ing] personal contact with law enforcement" and "[p]rovid[ing] for continuity of contact between jurisdictions." *Id.* at 1021. An

Alabama registrant cannot evade contact by staying only 2 days in any one location because she has to report all her whereabouts if leaving her permanent residence for 3 consecutive days or more, which serves the legitimate "continuity of contact" purpose.

The expressed purpose of Florida's registration statute—to protect the public through notification—is disserved by the 3-day rule. The public receives no notice of an in-state temporary residence until after the registrant leaves. The public receives no notice of a registrant's whereabouts if she stays no more than 2 days in any one location. Nor does law enforcement know where she is.

Defendant leads Florida's premiere law enforcement agency, which is expressly charged with implementing § 943.0435. His opposition to the current 3-day rule, on the basis of public safety, establishes its irrationality and effectively distinguishes this case from *McGuire*.

Excessive with respect to purpose. The 2018 amendments were introduced as intending to facilitate tracking transient registrants. Yet only 5.8% of Florida registrants are transient (Ex-10:6). Other statutory provisions apply only to transient registrants. *See* §§ 943.0435(4)(b)2.; 775.21(2)(o) (2023). There is no conceivable reason that the 2018 amendments were not likewise limited to transients. Thus the 3-day rule and the minimum-mandatory sentence are excessive with respect to the legislators' stated purpose.

FDLE asserted in *John Does v. Swearingen* that redefining temporary residence from 5 to 3 days was intended to protect both the public and registrants (Ex-46:12-13, 19-20). Its position now is that multiple in-person reports of a 3-day stay is effectually excessive: online reporting would better serve the public, while relieving undue burdens on law enforcement and registrants.

Alternatively, the legislature could adopt Alabama's reporting window of 3 business days, guaranteeing that registrants who want to travel will not be prevented from making a timely report; or could adopt Alabama's approach to *mens rea,* in which knowledge is an unconditional requirement.

The undisputed facts establish, by the clearest proof, that Florida's 3-day travel restriction lacks a rational relationship to its purpose or is excessive with respect to it, and that it affirmatively restrains registrants from travel due to the extremely narrow window for reporting to two different agencies, and fear of unwitting violation through unanticipated setbacks, office closures, or misunderstanding. As such, Florida's 3-day restriction violates the ex post facto clause.

B. Substantive due process: right to freedom of travel and movement

The right to travel freely throughout the United States is indisputably fundamental. *See Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J. concurring) (right to move freely from state to state is a "virtually unconditional"

personal right). So too is freedom of movement. *See Kent v. Dulles*, 357 U.S. 116, 126 (1958): "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. . .It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *See also Kolender v. Lawson,* 461 U.S. 352, 358 (1983) (striking anti-loitering statute on vagueness grounds, as "implicat[ing] … constitutional right to freedom of movement."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (right to come and go as one pleases "historically part of the amenities of life as we have known them"). As such, the government may not burden them without establishing a compelling public purpose that cannot be served through narrower means. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Aptheker v. Secretary of State, 378 U.S. 500 (1964) applied heightened scrutiny to determine whether a law barring Communist Party members from having passports violated the right to international travel. The government's compelling purpose was to protect national security. *Id*. at 509. But its means were not narrowly tailored by an individualized determination whether the party member was "likel[y]" to engage in suspicious activity, *id.* at 510; whether the member's destination was "security-sensitiv[e]," *id.* at 512; or whether she merely sought "to visit a sick relative, to receive medical treatment, or for any other wholly innocent purpose." *Id*. 511. Relying heavily on President Eisenhower's determination that national security

could "be adequately protected by means which … are more discriminately tailored," the Court concluded that the provision was unconstitutional on its face: "precision must be the touchstone of legislation so affecting basic freedoms." *Id*. at 514. *See also Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580-83 (S.D. Fla. 1992) (arresting homeless people without available shelter beds for sleeping in public parks violated right to travel: purpose to maintain parks more narrowly served by increasing shelter beds).

Florida's 3-day restriction heavily burdens travel and movement. In this case as in *Aptheker*, the executive branch has determined that these burdens are unnecessary to protect public safety. As in *Aptheker*, this determination should defeat an assertion of narrow tailoring, especially where, as here, that interest could be more effectively served through less restrictive alternatives: online reporting, as proposed by defendant; having a reporting interval of 3 business days, as in Alabama; or redefining temporary residence to add days.

Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005), upholding travel restrictions against a right to travel challenge, is easily distinguishable. The challenged statute required reporting of a temporary residence, then defined as **14 days in the aggregate per year**, or 4 days per month, **to one office, without mandatory punishment** for violation. §§ 775.21(f), 943.0435(4)(a) & (7), Fla. Stat. (2005). Under those provisions, a registrant could visit family 14 days a year or long

weekends every month without having to make a single in-person report. The Court found the provisions to be "burdensome" but "not unreasonable" with respect to public safety. *Id*. at 1348. In contrast, the current provisions are both extraordinarily burdensome and deeply unreasonable with respect to public safety.

C. Substantive due process: rational relationship

Assuming no fundamental interest is infringed, a statute must nevertheless be rationally related to a legitimate government interest. A plaintiff may challenge professed rationality with countervailing evidence, *Armour v. City of Indianapolis,* 566 U.S. 673, 684-85 (2012), and courts must consider countervailing costs. *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982). A statute violates substantive due process if its "asserted goal is so attenuated as to render [it] arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 446 (1985).

At best, the 3-day travel restriction was intended to serve the goal of tracking transient registrants. But because it applies to the vast majority of non-transient registrants and deprives law enforcement and the public of timely notice of their whereabouts, it is arbitrary and irrational, violating substantive due process. *In re Taylor*, 60 Cal.4th 1019, 1036-38 (2015); *Does v. Snyder*, 834 F. 3d 696, 704-05 (6th Cir. 2016) (no rational relationship under ex post facto).

II. First Amendment/Compelled Speech

"The requirement that cards be carried and exhibited has always been regarded as one of the most objectionable features of proposed registration systems, for it is thought to be a feature that best lends itself to tyranny and intimidation." *Hines v. Davidowitz*, 312 U.S. 52, 71 n.32 (1941). Before the Civil War, free-born and emancipated African-Americans were forced to carry identification cards,[29] as were Chinese immigrants in the 1890s,[30] immigrants from "hostile nations" at the start of World War I,[31] virtually all non-citizens in the early days of World War II,[32] and "drug users" or people convicted of a drug offense leaving or entering the country between 1956 and 1979.[33],[34] Given this history, any requirement to carry branded identification should be met with suspicion.

First Amendment protection "`includes both the right to speak freely and the right to refrain from speaking at all,'" *McClendon v. Long*, 22 F. 4th 1330, 1336 (11th

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[29] *See e.g.*, Ch. 22 Va. Stat. 27 (1793), requiring the carrying of a document specifying "age, name, colour and stature, by whom and in what court the said negro or mulatto was emancipated; or that such negro or mulatto was born free."

[30] *See* Geary Act, ch. 60, § 6, 27 Sat. 25, 25 (1892).

[31] *See* Proclamation of Nov. 16, 1917, 40 Stat. 1716, 1716-18.

[32] *See* Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (1940).

[33] *See* 18 U.S.C. §§ 1401 to 1407 (1956).

[34] The above 5 citations were found in *Governmental Authority to Compel the Carrying of Stigmatizing Documents,* 19 Stanford Journal of Civil Rights & Civil Liberties __ (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4377635.

Cir. 2022), *quoting Wooley v. Maynard*, 430 U.S. 705, 714 (1977), in which the Supreme Court held that a state could not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Wooley*, 430 U.S. at 713. The compelled speech doctrine also applies to "purely factual, non-commercial speech." *McClendon*, 22 F. 4th at 1336.

McClendon considered whether a Georgia sheriff who placed signs in the yards of every registrant pre-Halloween, "without considering" whether any of them "pos[ed] an increased risk of recidivism," violated the compelled speech doctrine. *Id.* at 1333-34. The sheriff was unaware of any incidents in his county "involving registered sex offenders on Halloween," or indeed any registrant reoffending during the six years of his tenure. *Id*. at 1335. Applying strict scrutiny, the Court noted that the "warning signs must be a narrowly tailored means of serving a compelling state interest." *Id.* at 1338. In the absence of evidence that registrants posed a danger to children on Halloween, the signs were "not narrowly tailored enough" to serve the "compelling purpose of protecting children from sexual abuse." *Id*. at 1338.

The same reasoning has been applied to strike branded identification requirements. In *State v. Hill*, 341 So. 3d 539(La. 2020), the Louisiana Supreme Court applied strict scrutiny to a law forcing registrants to carry an identification card "branded" with a "sex offender" designation, concluding that the state had "not

adopted the least restrictive means of" alerting law enforcement to the holder's status because "[a] symbol, code, or a letter designation" would do so without "unnecessary disclosure to others during everyday tasks." *Id.* at 553. The Court noted that 41 other states did not require registrants to carry branded identification, *id.* at 542, suggesting the measure was not necessary to a compelling government interest. *See also Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1324-27 (M.D. Ala. 2019) (because using "a single letter that law enforcement would know but the general public would not know" was less restrictive than branding license with "criminal sex offender," statute violated compelled speech doctrine).

There is no record evidence here that the compelled speech is necessary to protect the public. FDLE could not identify a case in which branded identification prevented or contributed to solving a sex crime. Nor could it identify a case in which a registrant committed a sex crime in a facility housing vulnerable populations. Law enforcement officers can already quickly determine whether someone is a registrant through a variety of checks conducted routinely during traffic stops.

There is, however, evidence that being compelled to identify yourself as a registrant in face-to-face transactions with the public leads to cruelty, harassment, and exclusion. A less restrictive measure would be the bar code on the back (Ex-6:17), or a single letter on the front, notifying law enforcement without provoking

the public. Therefore, the requirement to brand drivers' licenses cannot survive strict scrutiny.

Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be granted on those claims identified herein.

Respectfully submitted,
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LOCAL RULES CERTIFICATION

Undersigned counsel certifies that the foregoing contains 7,606 words, excluding the case style, tables, and certifications.

/s/ Todd G. Scher
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2023, I electronically served the foregoing on William Stafford, Counsel for Defendant, at William.stafford@myfloridalegal.com; and Stacey Blume, Counsel for Defendant, at Stacey.Blume@myfloridalegal.com, Jacqueline.Scott@myfloridalegal.com, and Martine.Legagneur@myfloridalegal.com.

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