UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
No. 1:18-CIV-24145-WILLIAMS/TORRES

JOHN DOES et al.,

Plaintiffs,

vs.

MARK GLASS,

Defendant.

____________________________________/

RESPONSE TO DEFENDANT'S MOTION TO DISMISS THIRD AMENDED COMPLAINT

Plaintiffs, through undersigned counsel, respond to Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint as follows:

1. **Plaintiffs' factual allegations suffice to state their as-applied claims**.

Defendant argues that plaintiffs' factual allegations are insufficient to state an as-applied cause of action with respect to their alleged low risk to reoffend. DE 255:2, 9-11. In particular, defendant complains of a paucity of detail in the Third Amended Complaint (hereinafter "TAC") to describe plaintiffs' decades-old qualifying offenses. Not so. The TAC alleges that John Doe 1 "committed his qualifying offense against his sister in 1989-90 when both were minors." TAC at ¶ 36. What, defendant demands, was the age difference between them, how many times did he touch her and where? DE 255:10. What, defendant demands, was John Doe 6's participation in the attempted kidnapping if, as plaintiffs allege at TAC ¶ at 42, it was his co-defendant that actually grabbed the victim and dragged her toward the car? DE 255:10. According to defendant, "[w]ithout those needed facts ... [n]either Plaintiff has provided any plausible facts that they represent little-to-no risk to reoffend." *Id*. at 11. In addition, defendant deprecates plaintiffs' omission to supply a bibliography of sources underlying their empirical proffer, at TAC ¶¶ 31-35: "[D]efendant, and this Court, [are] at a disadvantage" with respect to the validity of plaintiffs' scientific proffer about their low risk to reoffend, in the absence of "titles, authors, dates, sources," etc. *Id*.

Defendant demands far more than Fed. R. Civ. P. Rule 8(2) requires: a "short and plain statement of the claim." Plaintiffs have alleged that, in the decades since their qualifying offenses, they have never committed another qualifying offense, and that given the scientific evidence about the true rate of sexual reoffense, coupled with the effects of time free in the community without reoffense, they are actuarially and clinically at *de minimis* risk of reoffense. TAC at ¶¶ 8, 9, 31-35, 40, 44. Plaintiffs are not required to furnish studies or expert affidavits to prove the truth of these factual allegations. S*ee Gallivan v. United States,* 943 F.3d 291, 293 (6th Cir. 2019). The factual allegations must be taken as true and granted the benefit of all plausible inferences even if unsupported by documentary evidence. *Edwards v. Prime, Inc*., 602 F.3d 1276, 1291 (11th Cir. 2020).

Plaintiffs further note that although they are not required to furnish documentary evidence, they have already furnished defendant with all the information he now claims to lack, following years of discovery preceding dismissal of the Second Amended Complaint. *See* DE 203:8-10 (describing extent of pre-dismissal discovery undertaken by the parties). The function of a complaint is to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Defendant has received considerably more notice of plaintiffs' claims than he is due under Rule 8(2).

2. Plaintiffs' claim regarding the unconstitutionality of the in-person reporting requirement under former § 943.0435(4)(a) for intra-state travel is moot. Their claim against the in-person reporting requirement for inter-state travel is not.

Signed by the Governor on June 10, 2025, after plaintiffs filed the TAC, and effective October 1, 2025, an amendment to § 943.0435(4)(a), Fla. Stat. adopted Judge Robert Hinkle's order from the Northern District of Florida allowing online reporting of in-state travel by sexual offenders and predators. *See Harper v. Glass,* 4:21-CV-00085-RH (DE:129). That order struck only the requirement under § 943.0435(4)(a) for dual in-person reporting to the DHSMV and to the sheriff's office "within 48 hours after" establishing an **in-state** temporary residence, and required defendant to provide online access, as an alternative to in-person reporting for **in-state** temporary residences in Florida. *Id.* 23. Judge Hinkle upheld as constitutional the in-person reporting requirement for "out-of-state travel, governed instead by § 943.0435(7), which requires an in-person report of out-of-state travel in advance, not within "48 hours after." *Id.* at 21. Plaintiffs' second claim, TAC at ¶¶ 57-58, alleges that this provision violates plaintiffs' substantive due process rights. This claim will be discussed in section 4 of this Response.

3. Plaintiffs have sufficiently alleged a claim for strict liability for registrants with first arrests.

In defending against this claim, defendant alludes only to one isolated sentence of § 943.0435(9)(d): "A sexual offender charged with the crime of failure to register who asserts, or intends to assert, a lack of notice of the duty to register as a defense to a charge of failure to register shall immediately register as required by this section," arguing its logical validity, DE 255:5, while ignoring the sentence at the heart of this claim: **"A sexual offender who is charged with a subsequent failure to register may not assert the defense of a lack of notice of the duty to register."** *Id.* (emphasis added). Plaintiffs claim that the elimination of a notice requirement for a subsequent violation renders it a strict liability crime for subsequent failures, in violation of the due process clause.

The bolded sentence above creates an irrebuttable presumption of actual knowledge of all reporting requirements for the lifetime of any registrant who was ever arrested, no matter how remote the arrest, and no matter how numerous the amendments enacted since. The Eleventh

Circuit expressly recognized the harshness of this amendment's impact in *Doe as Next Friend of Doe #6 v. Swearingen*, 51 F.4th 1295, 1299, 1300-01 (11th Cir. 2022). It noted the never-ending accretion of reporting requirements over the decades since the statute's enactment, as a result of increasing the number of reregistration requirements, multiplying the number of reportable events, and extending the duration of registration from 20 years to life, but that **"a registrant is limited to asserting a defense of lack of notice one time; that defense is unavailable in future prosecutions,"** citing § 943.0435 (9)(d). (emphasis added). 51 F.4th at 1300-01.

Defendant makes several frivolous arguments for dismissal, which plaintiffs address in turn.

a) Due process compels a *mens rea* requirement for violations of § 943.0435.

Defendant asserts that, "[a]s a point of fact, a statute is not unconstitutional just because it lacks a *mens rea* requirement." DE 255:4-5. As a point of law, however, a felony statute that dispenses with a *mens rea* requirement and imposes severe sanctions for inherently innocent conduct, such as a passive failure to meet an affirmative obligation, is unconstitutional. *Lambert v. People of the State of California*, 355 U.S. 225 (1957); *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004).

In *Lambert*, the ordinance at issue required registration by all adjudicated felons upon pain of severe criminal sanctions, but without an express notice element. 355 U.S. at 226-27. The Supreme Court held that where a serious felony consists only of the passive failure to comply with an affirmative obligation, due process requires notice: "**We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary** . . . Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. *Id*. at 229-230 (emphasis added).

State v. Giorgetti, supra, applied the reasoning in *Lambert* to § 943.0435, Fla. Stat., which was then silent about *mens rea*, answering in the affirmative this certified question: **"Does the crime created by the sexual offender registration statutes require the State to prove knowledge of the registration requirement by the offender as an element of the crime?"** *Giorgetti*, 868 So.2d at 513 (emphasis added). Registrant Giorgetti failed to report a change of residence, saying he did not know about the requirement. *Id*. at 514. The trial judge instructed the jury that the state was not required to prove knowledge, and the defendant was convicted. *Id*. As in *Lambert*, Giorgetti's offense consisted of a wholly passive failure to meet an affirmative obligation. The state argued that this was a strict liability offense "with no intent or *mens rea* requirement." *Id*. at 518. The Florida Supreme Court rejected this argument, relying on *Lambert* to imply a knowledge requirement "absent an express provision to the contrary." Id. at 515. "**An express provision dispensing with guilty knowledge will always control, of course, since in that instance the Legislature will have made its intent clear.**" *Id.* at 516 (emphasis added).

b) In expressly dispensing with *mens rea* for subsequent offenses, the Florida Legislature imposed strict liability upon them

Within months after *Giorgetti* issued, the Florida Legislature adopted "an express provision to the contrary," § (9)(c) [now (d)], which dispensed with the knowledge requirement imposed by *Giorgetti* for any but a first violation, and dispensed with the affirmative defense of lack of knowledge. The question raised in this case is whether due process requires a *mens rea* element where elderly or disabled registrants may lack the capacity to remember; where the reporting requirements are unclear, TAC, ¶¶ 23-28; where sheriffs impose requirements incorrectly, *see Harper Order*, at 16; where defendant's own witness/agents interpret the requirements inconsistently, *see Harper Order*, at 10-11, 16; where the statutory requirements and terms are so often amended, *see* TAC ¶¶ 2, 14-19; *Doe as Next Friend of Doe #6*, 541 F.4th at 1300-1301; and where enhanced penalty for third-degree felony includes mandatory minimum terms of community control with electronic monitoring ranging from six months to two years. *See* § 943.0435(9)(b)1.,2.,3.

Defendant argues that the elimination of a *mens rea* requirement does not make the statute one of strict liability, because plaintiffs can raise other defenses, such as impossibility or necessity. DE 255:6. The cases he cites do not support this proposition.[1] In any case, it is the elimination of *mens rea*, not every other conceivable defense, that defines strict liability. *See Staples v. United States*, 511 U.S. 600, 606 (1994) ("[W]e have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his

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[1] Defendant cites *Boltri v. State*, 178 So.3d 483 (Fla. 4th DCA 2015) and *Bozeman v. State*, 714 So. 2d 570 (Fla. 1st DCA 1998) in making this argument. Neither case supports it. Defendant quotes dicta from *Boltri* that "there may be forces outside an individual's control which may hinder an individual's timely registration or reregistration." DE 255:6. *Boltri* cites a single case to support this proposition, *Griffin v. State*, 969 So. 2d 1161 (Fla. 1st DCA 2007). The *Griffin* Court reversed the conviction of a registrant who reported more than 48 hours after changing his residence, because Hurricane Katrina had shuttered the reporting office, by finding that the term "48 hours" as used in the statute means two business days: **"[O]therwise, the State could prove a violation of § 943.0435(4)(a) by showing that an offender changed his address on Friday after 5:00 p.m. but failed to register in person ... until Monday at 8:00 a.m., despite evidence that no driver's license office was open for business during the intervening weekend."** 969 So. 2d at 1162 (emphasis added). The Court found defendant's report the day the office reopened to be timely because it occurred within two business days of the move. The Court did not recognize a defense of impossibility. *Bozeman* concerns a statute prohibiting driving while license suspended, § 322.34, which applies a rebuttable presumption of knowledge arising from a previous citation. § 322.34(2)(c). The *Bozeman* Court recognized the defense of necessity, where the defendant's unrebutted testimony was that he was forced to take the wheel because the driver was dangerously drunk. The defense of necessity can be raised only where "the defendant reasonably believed that his action was necessary to avoid an imminent threat of death or serious bodily injury to himself or others." *Id*. at 572. It is difficult to imagine its application in a failure to register case.

conduct illegal."); *Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008) (death penalty statute for child rape, where mistake of age is not a defense, imposes strict liability).

The legislative history following the Florida Supreme Court's decision in *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), offers an instructive contrast with that following *Giorgetti*. In *Chicone*, the Florida Supreme Court implied a knowledge requirement to § 893.13, Florida Statutes, which prohibits possession of illegal substances, and was then silent about the *mens rea* requirement. Because *scienter* is typically required in criminal statutes, and because the penalties under chapter 893 are severe, the *Chicone* Court observed that the Legislature "would have spoken more clearly" if it had intended to dispense with proof of guilty knowledge. *Chicone*, 684 So. 2d at 741, 743. As was the case following *Giorgetti*, the Florida Legislature amended the statute precisely in order to speak more clearly. § 893.101 states that the *Chicone* holding was "contrary to legislative intent," that knowledge of the illicit nature of a controlled substance is not an element of the offense, but that it does provide an affirmative defense which, once asserted, gives rise to a "permissive presumption" of knowledge. It was the availability of the affirmative defense that kept the amended statute from imposing strict liability. *See State v. Adkins,* 96 So. 3d 412, 422 (Fla. 2012) ("Any concern that entirely innocent conduct will be punished with a criminal sanction under chapter 893 is obviated by the statutory provision that allows a defendant to raise the affirmative defense of an absence of knowledge ..."); *State v. Washington*, 114 So. 3d 182, 187 (Fla. 3rd DCA 2012) (§ 893.13 is not a strict liability crime "because, although *scienter*, or '*mens rea*,' is not an element of these offenses, the statute provides that the defendant's lack of knowledge may be raised as an affirmative defense ... For a strict liability offense, lack of knowledge is not an available defense"); *Flagg v. State*, 74 So. 3d 138, 141 (Fla. 1st DCA 2011) ("[B]ecause lack of knowledge is not a defense to a true strict liability crime, the availability of the affirmative defense in § 893.101 undermines the essential premise ... that the offenses in § 893.13 are strict liability crimes that may not be constitutionally punished as felonies.") (footnote omitted).

Where the post-*Chicone* amendment avoided strict liability through provision of an affirmative defense, the post-*Giorgetti* amendment imposed strict liability for subsequent offenses by expressly precluding the affirmative defense of lack of knowledge. Where the post-*Chicone* amendment created a permissive presumption of knowledge of the illicit nature of the substance, based on knowing possession, (9)(d) creates an unrebuttable presumption, based on a prior arrest, that the registrant actually knows that any subsequent failure to report is illegal. In the context of a registration statute, this unrebuttable presumption violates due process.

Commonwealth v. Corbett, 101 Mass. App. Ct. 355 (2022), provides another instructive contrast. In *Corbett*, the trial judge excluded expert evidence of the defendant's mental incapacity to remember his registration obligations. *Id.* at 357. On appeal, the Commonwealth argued that actual knowledge was irrelevant to the offense as long as "the defendant at some point had actual notice of his registration obligation ... proof of actual notice conclusively demonstrates the knowingly element." *Id.* at 360. The appeals court rejected this argument: the concept of "'knowingly ... fail[ing]' requires a consciousness of action that goes beyond merely receiving notice at some point in the past ... Rather, **to 'knowingly' fail to act requires that the defendant have the ability to perceive – to remember – that he has an obligation to act as of the time of the crime.**" *Id.* at 360-61 (emphasis added).

The Court explained that proof of actual notice may be sufficient to establish the knowingly element, but that barriers to actual knowledge -- "for example, Alzheimer's disease, dementia, or amnesia – would be relevant to a fact finder's evaluation whether a defendant knowingly failed to meet his obligations." *Id.* at 361. *See also People v. Sorden,* 36 Cal. 4th 65, 72-73 (2005) ("a defendant charged with violation of [the sex offender registration statute] may present substantial evidence that, because of an involuntary condition – temporary or permanent, physical or mental – he lacked actual knowledge of his duty to register ...”; such evidence might negate element of willfulness, provided mental condition is sufficient to “nullify[ ] knowledge of one’s registration obligations.”).

Under the Florida statute, however, the prior arrest creates an irrebuttable presumption of actual knowledge. So evidence of involuntary barriers to knowledge would be inadmissible in defending John Doe 6, or other registrants with severe memory deficits, such as those who are aged. He has already been arrested twice for registration violations. TAC, ¶ 41. If convicted again, he will face a mandatory minimum penalty of two years of community control with electronic monitoring and a maximum sentence of 5 years in prison. §§ 943.0435(9)(a), (b)3.; 775.082(3)(e), Fla. Stat. He has already spent months in jail for unwitting violations of technical probation conditions imposed after a guilty plea to violating the statute. TAC, ¶ 41.

Defendant cavalierly dismisses this concern, pointing to the retrospective determination of John Doe 6’s incompetency to enter a plea to his second failure to register offense. DE 255:6. But incompetence is not a defense, but rather a bar to prosecution (assuming his lawyer even learns of it).[3] The assumption that it continues is always rebuttable following compliance with the procedural rules. *See* Fla. R. Crim. P. R. 3.210, 3.211; *Alexander v. State*, 380 So. 2d 1188, 1190 (Fla. 5th DCA 1980); *Sampson v. State*, 853 So. 2d 1116 (Fla. 4th DCA 2003). *See also, Stewart v. Commonwealth*, 79 Va. App. 79, 893 S.E. 2d 599 (2023) (court not bound by prior finding of

[3] As set forth in the TAC, at ¶ 42, John Doe 6’s former attorneys did not recognize his cognitive impairment. If the issue of his incompetency is not raised by counsel in a subsequent failure to report case, and if the defendant’s incompetency is not obvious to the trial judge, the trial or plea can proceed. *See Thomas v. State*, 274 So. 3d 1000 (Fla. 4th DCA 2019).

unrestorable incompetence). In any case, John Doe 6's prior determination of incompetence does not preclude his arrest and lengthy incarceration, *see* TAC, ¶ 41; if prosecuted, he is legally defenseless to establish lack of notice under (9)(d). *See Greenwald v. Cantrell*, 675 F. Supp. 3d 709, 714, 720 (E.D. La. 2023) (registrant with brain damage leading to memory loss and unrestorable incompetence was arrested and jailed numerous times for failure to comply; court agreeing with plaintiff's claim that "[a]rresting and imprisoning a woman with intellectual disabilities for failing to complete administrative tasks that her disability makes impossible, and for which the State cannot prosecute her, constitutes a substantive due process violation, because it deprives her of her fundamental right to liberty and 'shocks the conscience.'"). Subjecting John Doe 6 to repeated arrests for failing to register, notwithstanding his incompetence, violates his fundamental right to liberty and shocks the conscience.

c) Citations to *Giorgetti* after enactment of § 943.0435(9)(d) do not alter the provision's express terms.

Defendant argues that, notwithstanding the express elimination of the *mens rea* element in § 943.0435(9)(d), Florida courts continue to apply *Giorgetti* as if (9)(d) had never been enacted. DE 255:5-6. The cases cited by defendant do not support this argument: none reflect subsequent as opposed to first failure to register cases. *Dingman v. Cart Shield USA, LLC*, 2013 WL 3353835, *3 (S.D. Fla. July 3, 2013) (defendant's single conviction for failure to register required intent under *Giorgetti* but was not a dishonest act or false statement for purpose of admissibility under Fed. R. Evid. 609); *Owens v. State*, 94 So. 3d 688, 689-90 (Fla. 4th DCA 2012) (no indication this was a subsequent offense); *Smith v. State*, 968 So. 2d 1054, 1055 (Fla. 5th DCA 2007) (no indication this was a subsequent offense; knowledge not in issue).

Defendant ignores those Florida cases that **do** involve subsequent offenses, cases in which the defense of lack of knowledge is not allowed. *See, e.g., Horton v. State*, 943 So. 2d 1016, 1018

(Fla. 2nd DCA 2006) (in failure to register prosecution, where defendant had prior conviction for same, Court observed "Horton was not asserting, and **could not assert pursuant to § 943.0435(9)(c) [now (9)(d)] lack of notice as a defense ...**") (emphasis added).

d) Defense of lack of notice is the same as defense of lack of knowledge for purpose of (9)(d).

Defendant declares that eliminating the defense of lack of notice "does not eliminate the required element of knowingly failing to report ..." DE 255:5. This is sophistry. Both the *Lambert* and *Giorgetti* courts use the concepts of notice and knowledge interchangeably. In *Lambert*, the Court assumed that, in the absence of notice, defendant had "no actual knowledge of the requirement that she register under this ordinance," which is constitutionally essential in a statute that imposes heavy penalties for wholly passive conduct. *Lambert*, 355 U.S. at 227-28. The *Giorgetti* Court summed up *Lambert* as holding "that where there is no notice of the duty to register, due process does not allow a conviction for failing to register," *Giorgetti*, 868 So. 2d at 517, then immediately quoted *Lambert,* 355 U.S. at 229-30: "'We believe that actual knowledge of the duty to register or proof of the probability of such knowledge ... are necessary before a conviction under the ordinance can stand.'" *Giorgetti*, 868 So. 2d at 517. The defense of lack of notice is equivalent to the defense of lack of knowledge in the context of registration statutes.

e) Jury Instruction cannot save unconstitutional statute

Finally, defendant argues that the statute is saved by the existence of a jury instruction that provides for a defense to a registration violation that results from misinformation or other interference by law enforcement officers, referring to Criminal Jury Instructions, Florida, Chapter 11.14. DE:255 at 6. First, as noted, strict liability does not mean that no defense is available, only that a *mens rea* defense is not available. Second, defendant may actually have intended to identify a different jury instruction[5] that provides for the element of knowledge in a prosecution under § 943.0435. If so, the jury instruction is not applicable to a subsequent rather than a first violation. Indeed, a prosecutor would likely object to its issuance in a trial for a subsequent violation, and would likely prevail. *See Horton*, 943 So. 2d at 1018.

Third, the fact that a jury instruction has been published offers no assurance that it is legally correct: "The Court's opinions authorizing the instructions for publication and use include the ... caveat ... [that] the Court expresses no opinion on the correctness of the instructions ..." *In re Amends. to Fla. Rules of Jud. Admin., Fla. Rules of Civ. Proc., & Fla. R of Crim. Proc.-Std. Jury Instrs.*, 407 So. 3d 1201, 1202 (Fla. 2020); *Pais v. Home Depot U.S.A., Inc.* (Case No. 21-20824-CIV-Goodman) 2023 WL 6294827, at *7 (S.D. Fla. Sept. 26, 2023) ("In addition, Plaintiffs' Motion erroneously treats the language from the standardized verdict form and jury instructions as *the* correct standard. Not even the Florida Supreme Court recognizes whether the standardized forms or instructions are necessarily correct as a matter of law ...").

For the purpose of a motion to dismiss under Fed. R. Civ. P. Rule 12(b), plaintiffs have adequately alleged that § 943.0435(9)(d) imposes strict liability for a subsequent offense, violating the due process clause on its face and as applied.

4. Plaintiffs have adequately alleged that the in-person as opposed to online reporting requirement for out-of-state travel violates substantive due process

As noted above, plaintiffs' substantive due process challenge to § 943.0435(7), governing reporting of out-of-state travel, is not moot. The only case cited by defendant that concerns the statute's restriction on travel is *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005), which upheld the

[5]*See* Florida Criminal Jury Instructions, No. 11.14 and subdivisions therein. Available at https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-11/#:~:text=11.14(i)%20Failure%20by%20a,943.0435(9)%2C%20Fla.

restriction against a substantive due process challenge. At the time of *Moore*, the statute imposed a reporting requirement only for travel in excess of 14 days per year, or 4 days a month. §§ 775.21(f), 943.0435(4)(a) & (7), Fla. Stat. (2005). The version of the travel restriction in *Moore* has changed radically over the years to require in-person reporting for as few as 3 days in one location in the aggregate per calendar year. *See Doe as Next Friend of Doe #6*, 51 F.4th at 1301, tracing the change. In addition, at the time of *Moore*, the statute presumably provided for only in-person reporting, not online reporting. *Harper v. Glass*, 4:21-cv-00085-RH, DE 129:23. Today's statute allows for online reporting of a wide range of changes to personal information: email addresses, Internet identifiers, telephone numbers, vehicles owned, employment, enrollment, volunteer work or employment at institutions of higher learning, § 943.0435(4)(e)1., 2., 3., **as well as intra-state travel**, for both sexual offenders and sexual predators. *See* Ch. 25-134, § 2 at 10-11, *Laws of Fla*. (effective date Oct. 1, 2025) (amending § 943.0435(4)(a), (e)3. & codifying (4)(a)1., 2.); § 1 at 4-5, *Laws of Fla., supra,* (amending § 775.21(6)(g)1.a., (b), 5.c).

Thus, the question is not whether requiring reporting of 3-day trips violates substantive due process, but whether requiring in-person reporting of 3-day out-of-state trips violates substantive due process where the state already provides for online reporting of a wide variety of personal information, including intra-state travel.

The case most relevant to this inquiry is one defendant failed to cite: *McGuire v. Marshall*, 50 F.4th 986, 1020-21 (11th Cir. 2022), which upheld a 3-day in-person in-state and out-of-state reporting requirement in Alabama's registration statute against an ex post facto challenge, which, like a substantive due process challenge, considers the relationship between a government's means and its legitimate ends.[6] There are significant differences between the Alabama restriction on travel and that of Florida such that *McGuire* does not control the result here.

First, the Florida statute requires reporting only with regard to the first 3 days of out-of-town travel, leaving the receiving state(s) unaware of a registrant's whereabouts after the third day, and leaving Florida residents unaware when the registrant will return. In contrast, the Alabama statute requires registrants to report their complete itinerary: those outside the registrant's county will know when he is present, those inside his county will know when he has returned. § 15-20A-15(a), (b), Ala. Code (2024).

Second, the Florida statute has eliminated the *mens rea* requirement for any travel-related violations by registrants ever arrested for violating the statute. § 943.0435(9)(d). The Alabama statute provides a knowledge element that greatly reduces the burden of travel-reporting on registrants. § 15-20A-15(h), Ala. Code (2024). *See Harper v. Glass*, DE 129:17 ("In-person reporting, rather than online or other reporting, imposes a substantial burden on registrants.").

Third, Florida requires in-person reporting for as few as 3 days in the aggregate. As Judge Hinkle pointed out in *Harper v. Glass*: "Three one-night stays in the same motel room, or perhaps in the same motel, within the same calendar year, even months apart, make the motel room the registrant's 'temporary residence.'" *Id*. at 5. This information is essentially useless to the community or law enforcement: a registrant who committed a sex crime during a one-night stay at a motel would be unlikely to report his temporary residence there, assuming he returned for a second and third night in the aggregate that year. *Id*. at 7. This provision can be entirely evaded by

[6] In ex post facto analysis, the rational relationship test is just one factor, albeit the most important, in determining punitiveness. *Smith v. Doe*, 538 U.S. 84, 102 (2003). It is the only factor in substantive due process analysis.

changing motel rooms or motels every 2 days, an alternative chosen by registrants to escape the in-person reporting burden. *Id*. at 11. In contrast, Alabama requires reporting of all locations whenever the registrant is away from his home for 3 or more consecutive days, *see* § 15-20A-15, Ala. Code (2022) and thus Alabama's requirement "could not be evaded by moving every other day." *Harper v. Glass*, DE 129:12.

Fourth and most significant is that FDLE, the chief law enforcement agency in the state, "has repeatedly asked the Florida Legislature to amend the statute to allow ... change of address information to be provided online." *Id*. at 18. These repeated requests express the agency's view that the public's welfare would be better served by online, rather than in-person reporting of travel.

In contrast, the Alabama legislature imposed the in-person reporting requirement "to promote public safety," finding that "reporting creates 'constant contact between sex offenders and law enforcement, providing law enforcement with priceless tools ...'" *McGuire*, 50 F.4th at 995; § 15-20A-2(1). In analyzing the rational relationship factor for the travel reporting requirement, the *McGuire* Court expressly relied upon the Attorney General's endorsement of this legislative finding in determining that the means were rationally related to a non-punitive purpose. *McGuire*, 50 F.4th at 1021.

On the other hand, the Florida Legislature's statement of purpose endorses the efficacy of disseminating information to the public, not the efficacy of frequent contacts between registrants and law enforcement in protecting the public from sexual reoffense. § 943.0435(12). This view of the legislature's intent is bolstered by its former requirement, stricken by Judge Hinkle, *see* *Harper*, DE 129:17, that registrants report travel to the DHSMV, where there are only civilian personnel; and, only if unable to report there, report to the sheriff. *Id.* at 21. Judge Hinkle noted that the "Florida Legislature has not endorsed any proffered rational basis for such an in-person reporting of [intra-state travel].” *Id*. at 20. Nor has the Attorney General, even now, proffered any rational basis for in-person rather than online reporting of inter-state travel. DE 255:7-10. Although substantive due process analysis is exceedingly deferential, *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), the defendant cannot gin up a “conceivable” rationale for the restriction that his very own agency has expressly and repeatedly repudiated. DE 255:7-10. Indeed, it is impossible to conceive a public safety rationale for in-person as opposed to online inter-state travel reporting that would not apply equally to intra-state travel reporting.

Fifth, as noted above, Florida already provides for online reporting of a wide range of personal information. Alabama does not provide a system for online reporting, possibly reflecting its view – as distinct from that in Florida – that “constant contact” between registrants and law enforcement officers is an important public safety tool.

Sixth, while not a factor expressly addressed in defendant’s motion, plaintiffs note that Judge Hinkle’s order in *Harper v. Glass* also repudiated the defendant’s argument for a rational basis in that case, that Florida would lose funding under federal SORNA for non-compliance. Specifically, Judge Hinkle concluded that due to the differences between FSORNA and federal SORNA’s definitional provisions, “[t]he concern about federal funding, because plainly unfounded, is not a rational basis to require in-person reporting of travel information.” *Harper v. Glass*, DE 129:19-20.

Nevertheless, Judge Hinkle rejected *Harper*’s challenge to the in-person pre-departure reporting requirement of inter-state travel, finding it to be more rational than the in-person after-the-fact reporting requirement of intra-state travel, as the latter did not give the visited community notice of the registrant’s presence until after he has left. DE 129:9-10, 12, 18, 21. Yet, his findings about the irrational burdens of intra-state travel apply with equal force to inter-state travel: (1) the requirement can be evaded by moving every two days, because the reporting requirement is tied not to "days away from home but to days away from home **in the same location**." *id*. at 10, 12 (emphasis in original); (2) in-person reporting, as opposed to online reporting, "imposes a substantial burden on registrants," *id*. at 17; (3) registrants already report in person two or four times a year for re-registration (as with John Doe 6, TAC ¶ 44), during which they must report all changes to personal information, **"so in-person reporting of travel provides little if any additional benefit to the state,"** *id*. (emphasis added); (4) "allowing a registrant to report travel information online – while continuing to require semiannual in-person reports for all registrants and in-person reports for all changes of address – would fully serve the state's interests and reduce the substantial – indeed, because there is no regulatory benefit, punitive – burden on registrants." *Id.* at 23.

Online reporting in advance of inter-state travel serves the same law enforcement purpose as in-person reporting, without the burden on registrants and law enforcement, and without the delay in public notice occasioned by the additional time it takes to report in person. There is no more reason to require in-person reporting of out-of-state travel than intra-state travel. Both serve the Legislature's stated purpose, to release information about registrants to law enforcement and the public in order to protect against reoffense by registrants. § 943.0435(12).

WHEREFORE AND BASED ON THE FOREGOING, plaintiffs submit that Defendant's Motion to Dismiss Third Amended Complaint is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, August 6, 2025, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notification for this case, including all opposing counsel.

s/*Todd G. Scher*
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