UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF FLORIDA
MIAMI DIVISION

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

JOHN DOES*, et al.*,

Plaintiffs,

v.

MARK GLASS,

Defendant.

_____/

REPLY IN SUPPORT OF MOTION TO DISMISS FILED BY DEFENDANT

Defendant files this Reply in support of his Motion to Dismiss Plaintiffs' Third Amended Complaint (TAC). [D.E. No. 255]. In his Motion, Defendant states that Plaintiffs have failed to state a claim for an as-applied challenge, that the statute does not violate procedural due process and substantive due process, and that Plaintiffs' claims have been mooted by prior claim resolution.

In their Response to Defendant's Motion to Dismiss, Plaintiffs concede that the unconstitutionality of the in-person reporting requirement for in-state travel is moot. Further, Plaintiffs have not rebutted Defendant's position that the statute's out-of-state reporting requirement does not violate Plaintiffs' substantive due process. Additionally, Plaintiffs have failed to state a claim for an as-applied constitutional challenge to the statute based on procedural due process (strict liability) and procedural due process (no rational relationship) violations as to § 943.0435(9)(d) because they have no standing to do so, because the statute is not a strict liability statute and finally, Plaintiffs have failed to state any claim due to a lack of supportive or plausible facts. Based on the

foregoing, Defendant's Motion to Dismiss should be granted with prejudice, as Plaintiffs have had numerous opportunities to amend.

I. Plaintiffs lack standing to make an as-applied challenge as to § 943.0435 (9)(d).

"Standing cannot be waived or conceded by the parties, and it may be raised (even by the court *sua sponte*) at any stage of the case." *A&M Gerber Chiropractic LLC v. Geico General Insurance Company*, 925 F.3d 1205, 1210 (11th Cir. 2019). The question now is whether Plaintiffs are "entitled to have the court decide the merits of the dispute or of particular issues." *Id.* The answer is no. Plaintiffs must show "at an irreducible minimum, that at the time the complaint was filed, [they had] suffered some actual or threatened injury resulting from the defendant's conduct, that the injury fairly can be traced to the challenged action, and that the injury is likely to be redressed by a favorable court disposition." *Id*. Plaintiffs cannot show that here.

Plaintiffs have made this as-applied challenge to the constitutionality of Florida Statute § 943.0435, claiming that the language of Florida Statute § 943.0435 (9)(d) makes this statute a strict liability statute.

Florida Statute § 943.0435 (9)(d) states as follows:

> (d) An arrest on charges of failure to register when the offender has been provided and advised of his or her statutory obligations to register under subsection (2), the service of an information or a complaint for a violation of this section, or an arraignment on charges for a violation of this section constitutes actual notice of the duty to register. A sexual offender's failure to immediately register as required by this section following such arrest, service, or arraignment constitutes grounds for a subsequent charge of failure to register. 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. 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. Registration following such arrest, service, or arraignment is not a defense and does not relieve the sexual offender of criminal liability for the failure to register.

F.S. § 943.0435 (9)(d).

This section of the statute explicitly refers to subsection (2) of the same statute, which provides that a sex offender's "failure to immediately register as required by this section…constitutes grounds for a subsequent charge of failure to register." *Id.* Plaintiffs overlook that the subsection

addresses "initial registration." In subsection (2) of Fla. Stat. § 943.0435, and we find this language:

> (2) Upon initial registration, a sexual offender shall:
> (a) Report in person at the sheriff's office:
> 1. In the county in which the offender establishes or maintains a permanent, temporary, or transient residence within 48 hours after:
> a. Establishing permanent, temporary, or transient residence in this state; or
> b. Being released from the custody, control, or supervision of the Department of Corrections or from the custody of a contractor-operated correctional facility; or
> 2. In the county where he or she was convicted within 48 hours after being convicted for a qualifying offense for registration under this section if the offender is not in the custody or control of, or under the supervision of, the Department of Corrections, or is not in the custody of a contractor-operated correctional facility.

F.S. § 943.0435 (2).

In 2017, subsection (2) was changed to add the language "[u]pon initial registration." See *Laws of Florida*, 2017-170, p.11. The plain meaning of the word "initial", makes it clear that subsection (2) is referring to the *first time* a sex offender must register. This establishes that § 943.0435 (9)(d) applies only to the failure to complete the initial registration. This is further supported by the language of subsection § 943.0435 (9)(a), which addresses all other types of registration.

> (9)(a) Except as otherwise specifically provided, a sexual offender who fails to register; who fails, after registration, to maintain, acquire, or renew a driver license or an identification card; who fails to provide required location information or change-of-name information; who fails to provide electronic mail addresses, Internet identifiers, and each Internet identifier's corresponding website homepage or application software name; who fails to provide all home telephone numbers and cellular telephone numbers; who fails to report any changes to employment information or changes in status at an institution of higher education; who fails to report any changes to vehicles owned, including the addition of new vehicles and changes to the make, model, color, vehicle identification number (VIN), and license tag numbers of previously reported vehicles; who fails to make a required report in connection with vacating a permanent residence; who fails to reregister as required; who fails to respond to any address verification correspondence from the department or from county or local law enforcement agencies within 3 weeks after the date of the correspondence; who knowingly provides false registration information by act or omission; or who otherwise fails, by act or omission, to comply with the requirements of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Each instance of a failure to register or report changes to the required information specified in this paragraph constitutes a separate offense.

Fla. Stat. § 943.0435 (9)(a).

Because Plaintiffs have asserted an as-applied challenge to this statute they are required to set forth facts on how this statute, as applied to their circumstances, is unconstitutional and of course, they must have standing. Since Plaintiffs have completed their initial registration and are registered sex offenders as presented in their TAC [DE 248], they are at no risk of being subject to § 943.0435 (9)(d). They have not alleged that they have been arrested, charged or prosecuted for failing to complete their *initial* registration. Since Plaintiffs cannot present a concrete injury, they fail to establish that they have standing to proceed on this claim.

II. Plaintiffs Respond that they have sufficiently made a claim for strict liability of § 943.0435 (9)(d), but the caselaw is clear that the statute provides due process, and the Courts will read a *mens rea* requirement into the statute.

In their response, Plaintiffs claim that the language of § 943.0435 (9)(d) makes § 943.0435 a strict liability statute, thus violating procedural due process. Plaintiffs cite an opinion issued in an earlier iteration of this TAC, *Doe as Next Friend of Doe #6 v. Swearingen*, 51 F.4th 1295 (11th Cir. 2022). DE No. 258, p.4. Plaintiffs claim that the Eleventh Circuit "noted the never-ending accretion of reporting requirements over the decades…but that 'a registrant is limited to asserting a defense of lack of notice one time; that defense is unavailable in future prosecutions,'" implying that the Court had found this intolerable. DE 258: 4. A reading of that opinion makes it clear that, first, the statement is just a reading of the statute in effect at that time. It is not a finding. The only issue on appeal before the Eleventh was the timeliness of the claim. Second, the statute cited in the opinion was the 2004 version of § 943.0435 (9)(d), not the 2024 version, which is the version of the statute at issue. Finally, and most importantly, the 2004 version of § 943.0435 did not contain the same language in Subsection (2) that the 2024 version contains. In 2004, Subsection (2) applied to all registration requirements. The 2004 language stated, "*A sex offender shall*" rather than, "*Upon initial registration*, a sex offender shall." F.S. § 943.0435 (2) (2004); Id. (2024). As stated above, in 2017 the legislature added the language to subsection (2). The change in the language of the statute

further clarifies that Fla. Stat. § 943.0435 (9)(d) (2024) applies only to the initial registration requirements.

Plaintiffs argue that for due process to be had, notice is required, and that notice is knowledge and therefore lack of notice is lack of knowledge. DE 258:11. Defendant agrees. Plaintiffs cite *Lambert v. People of the State of California*, 355 U.S. 225 (1957) in support of their claim. In *Lambert*, Plaintiff was charged with a felony for failure to register as a felon pursuant to California statute. *Id.* at 226. The Supreme Court found that the Plaintiff had no actual knowledge of the requirement to register and thus was denied due process. "[T]his appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent." *Id*. at 229. Florida Statute § 943.0435 (9)(d) provides an opportunity for a sex offender to comply with the law after a first violation is discovered and thus satisfying, as *Lambert* found, the due process requirement. The pertinent statute states that "an arrest on charges of failure to register *when the offender has been provided and advised of their statutory obligation to register* under subsection (2)…*constitutes actual notice of the duty to register*. (emphasis added). F.S. § 943.0435 (9)(d). A plain reading of statute demonstrates that an element of the crime is establishing actual knowledge of the requirement to register.

Despite Plaintiffs' claim, Defendant has never argued that the statute dispenses with the *mens rea* requirement. DE 258; 8. Defendant argues that *mens rea* is evident in the statute because the element of actual notice or knowledge remains. The *Georgetti* court defines *mens rea* as "guilty knowledge." *State v. Georgetti*, 868 So.2d 512, 515 (Fla. 2004). "[T]he Court has virtually created a presumption in favor of a guilty knowledge

element absent an express provision to the contrary." *Id*. at 515. There is no express provision in the statute that dispenses with the requirement of guilty knowledge in § 943.0435 (9)(d). Nothing in the statute negates the *mens rea* requirement. Despite its age, *Georgetti* still stands for imputing to the Legislature the intention to include *mens rea* as a requirement to Florida Statute § 943.0435. *Id*. at 518.

Plaintiffs claim that *Giorgetti* cannot "alter the express terms" that apply after the enactment of § 943.0435 (9)(d). There is nothing to alter. The statute does have a *mens rea* element. The *Giorgetti* court's reasoning and holding still applies today to this statute. "Courts are obligated to construe statutes in a manner that avoids a holding that [it] may be unconstitutional." *Id.* at 518. On its face every act of the legislature is presumed constitutional, every doubt resolved in its favor and if there can be two interpretations, the one that leads to its constitutionality must be adopted. *Id.* The *Giorgetti* court concluded that "sexual offender registration statutes include a requirement that the alleged offender knows of the obligation to register[.]" *Id.* at 520. The court in *Smith v. State*, 968 So.2d 1054, (Fla. 5th DCA 2007), a case cited by Plaintiffs in their response, follows *Giorgetti's* reasoning when it states that *mens rea* is read into the statute. In following *Giorgetti*, the *Smith* court held that the statute contained a "general intent element…the term used to define requisite mens rea for a crime that has no stated mens rea[.]" The *Smith* court affirmed the conviction under the statute holding it did not require proof that the defendant subjectively intended to violate the governing statute. *Id.* at 1056. Plaintiffs also cite *Owens v. State*, 94 So. 3d. 688, (Fla. 4th DCA 2012). *Owens* also cites *Giorgetti* and states that "the state must prove that the defendant had actual knowledge of the duty to register[.]" *Id*. at 690 (cleaned up). Both cases were decided

after 2004, when the language of (9)(d) was already enacted [though found in §943.0435(9)(c) at the time] and before the section applied only to initial registration. Both *Owens* and *Smith* stand for the proposition that the state need not prove that the sex offender intended to violate the statute by not registering, but they must prove that the sex offender knew of the requirement to register.

Plaintiffs cite *Greenwald v. Cantrell*, 675 F.Supp 3d 709 (E.D. La. 2023), to support the claim that § 943.0435 (9)(d) leaves John Doe 6, who is purported to have cognitive or memory impairment, "legally defenseless". D.E. 258:9. Plaintiffs state that the court in *Greenwald* "agree[d] with the Plaintiff's claim that 'arresting and imprisoning a woman with intellectual disabilities for failing to complete administrative tasks that her disability made impossible…constitutes a substantive due process violation…because it shocks the conscience.'" D.E. 258:9. A reading of the *Greenwald* case demonstrates that this is not correct - the court in *Greenwald* did not agree with the above but rather "agree[d] that her substantive due process claim [was] not barred by the *Heck* [doctrine]". *Greenwald*, 675 at 720. The court did *not* state that arresting her as a woman with disabilities "shocked the conscience". Those were the Plaintiff's words, not the courts. *Id*. In fact, in *denying* the Plaintiff's procedural due process claim, the court stated:

> "…Plaintiff's competence to stand trial or ability to be prosecuted for failing to register as a sex offender is not relevant to Louisiana's SORNA requirements. Plaintiff is required to comply with SORNA because of her conviction for which she received due process. Plaintiff's arrests are not 'erroneous deprivations' from her interest in liberty where her status as a sex offender has been established through due process."
>
> *Id*. at 719.

Plaintiffs also cite *Horton v. State*, 943 So. 2d 1016 (Fla. 2nd DCA 2006) in support of their claim that Plaintiffs cannot put forth a defense of lack of notice or knowledge on a

subsequent offense. Defendant Horton did not dispute notice at his trial pursuant to the provision disallowing the defense on a subsequent charge. *Id.* To establish actual notice, Prosecutors introduced evidence of his prior conviction for failure to register. *Id.* Horton argued that there were other less prejudicial ways to establish actual notice besides his prior conviction for the same offense, such as submitting his signature on the form he signed acknowledging the registration and change of address requirement. *Id*. at 1017-1018. These facts undermine Plaintiffs' argument that knowledge is not a requirement. Despite Horton having a prior conviction for failure to register, Prosecutors still had to establish actual notice in order convict. This, as stated in the *Lambert* and *Giorgetti* courts, is *mens rea* and is sufficient to satisfy the due process requirement.

III. Plaintiffs failed to rebut in their response that Fla. Stat. § 943.0435 (7) is rationally related to a legitimate government interest and instead raise a new argument, thus attempting to impermissibly amend their TAC and thus concede the issue.

In their response to the Motion to Dismiss, Plaintiffs raise for the first time that out-of-state travel is unconstitutional because online reporting is now permitted for intra-state travel. Plaintiffs state "[t]hus 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." D.E. 258:13. Unfortunately for Plaintiffs, the question posed in their Third Amended Complaint was *whether requiring reporting of 3-day trips violated substantive due process due to time frames and ambiguity*. DE No. 248: ¶ ¶ 20, 24, 26. Plaintiffs cannot surreptitiously amend the TAC in their Response. It is impermissible and further it is well settled that a complaint cannot be amended by briefs in opposition to a motion to

dismiss. *McKally v. Perez*, 87 F. Supp 3d 1310 at *1317, No. 14-CV-22630 (S.D. Fla. Feb. 6, 2015) (citing *Huls v. Llabona*, 437 Fed. Appx. 830, 832, n.5 (11th Cir. 2011) (stating that on appeal, Court would not consider argument first raised in response to Motion to Dismiss). Thus, having not rebutted Defendant's position in his Motion to Dismiss that the three-day rule bears a rational relationship to the legitimate government interest to keep the public safe from sex offenders, Plaintiffs conceded the claim. *Hartford Steam Boiler Inspection & Ins. Co. v. Brickellhouse Condo. Ass'n, Inc*., No. 16-CV-22236, 2016 WL 5661636, at *3 (S.D. Fla. Sept. 30, 2016) (determining plaintiff "implicitly concede[d]" point by arguing that a different abstention standard must be applied and failing to argue against defendant's expressed abstention argument in response to motion to dismiss).

IV. Plaintiffs have failed to plead facts sufficient to state a claim for relief that is plausible on its face and their as-applied challenge to Fla. Stat. § 943.0435 must be dismissed.

In their response, Plaintiffs state that the TAC satisfies the federal rules. In support of their rebuttal to Defendant's argument that they have failed to plead facts sufficient to state a claim for an as-applied challenge to the constitutionality of the statute, they cite a 6th Circuit case, *Gallivan v. US*, 943 F.3d 291, 293 (6th Cir. 2019). At issue in *Gallivan* was whether Plaintiff had to attach a medical affidavit to their Complaint for medical negligence, as required by an Ohio statute. Plaintiff had not attached an affidavit, and the opinion does not state that there was any allusion to the affidavit in the complaint. *Id.* Plaintiffs in this case cite an unnamed study to support their claim. In ruling that attaching the affidavit was not required, the court in *Gallivan* stated that "under Federal Rule of Civil Procedure 8 (a), which provides the general rules of pleadings, a complaint must include (1) a short and plain jurisdictional statement, (2) a short and plain statement of the claim, and (3) an explanation of the relief sought. That's it." *Id*. However, pursuant to Federal Rule of Civil

Procedure 12, a Complaint only survives a Motion to dismiss if it alleges facts sufficient to state a claim to relief that are plausible on their face. Fed.Rule Civ.Pro. 12. Defendant did not ask that the study be attached - Defendant stated that data from an unnamed study were insufficient to support a plausible claim because the data came from an unnamed source. Once the facts were introduced by Plaintiff, they were subject to the scrutiny of plausibility. The *Gallivan* scenario is not the same. Then as a last-ditch effort, Plaintiff states that Defendant need only search through discovery in a prior version of their Complaint to find a study. First, it is inappropriate for Plaintiffs to allude to discovery when addressing the Court. Second, this unnamed study is not before the Court. Finally, "when a Court rules on a 12(b)(6) motion to dismiss, it is limited to reviewing what is within the four corners of the plaintiff's complaint." *Bickley v. Caremark Rx, Inc*., 461 F. 3d. 1325, 1329, n. 7 (11th Cir. 2006). The only information provided to this court was data from an unnamed study that on its face, cannot plausibly support their claims.

Wherefore, the Defendant asks that this Honorable Court to grant the Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint based on the grounds that the Plaintiff lacks standing to bring forth their claims; that Plaintiffs concede that the constitutionality of the in-person reporting requirement for intra-state travel is moot; that Plaintiffs have not rebutted Defendant's position that the statute's out-of-state reporting requirement violates Plaintiffs' substantive due process and thus concede the matter; that Plaintiffs have not made a proper claim for strict liability and procedural due process violations as to § 943.0435(9)(d) because they have no standing to do so, and moreover, the statute is not a strict liability statute. Finally, Plaintiffs have failed to state a claim for an as-applied constitutional challenge. Based on the foregoing, Defendant's Motion to Dismiss should be granted with prejudice, as Plaintiffs have had numerous opportunities to amend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.1(b), I hereby certify that on September 17, 2025, I electronically filed a true and correct copy of the foregoing with the Clerk of Court and on all counsel or parties of record via CM/ECF.

/s/*Martha Hurtado*
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Chief Assistant Attorney General