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

JANE DOE,

Plaintiff,

v. CASE NO. 4:21cv85-RH-MJF

RICHARD L. SWEARINGEN,

Defendant.
_____/

ORDER DISMISSING THE COMPLAINT IN PART

The plaintiff, a registered sex offender, asserts the Florida sex-offender-registry statute is unconstitutional on its face and as applied to the plaintiff. The defendant has moved to dismiss based on standing, ripeness, and failure to state a claim on which relief can be granted. This order dismisses the complaint in part.

I

The plaintiff was convicted in Florida state court of having sex with a 16-year-old. At the time of the offense, the plaintiff was 24. As required by Florida Statutes § 943.0435, the plaintiff registered as a sex offender.

In this action the plaintiff asserts ex post facto, procedural due process, substantive due process, and right-to-privacy claims. The complaint denominates

these as claims 1, 2, 3, and 5; there is no claim 4. The procedural due process claim has two parts: that the statute improperly imposes strict criminal liability (claim 2A) and that the statute's requirements for travel-related disclosures are unconstitutionally vague (claim 2B). The substantive due process claim has four parts: that the travel provisions violate both the federal and state constitutions (claim 3A); that the statute violates the stigma-plus doctrine (claim 3B, though erroneously labeled 4B); that the statute as applied to the plaintiff lacks a rational relationship to a legitimate state purpose (claim 3C); and that the statute improperly creates an irrebuttable presumption of dangerousness (claim 3D). The privacy claim arises only under state law—the Florida Constitution.

The federal claims arise under 42 U.S.C. § 1983. The defendant is the Commissioner of the Florida Department of Law Enforcement—the official responsible for maintaining the registry. The Commissioner is the proper defendant in a § 1983 action challenging the Florida registration requirement.

II

The defendant asserts the plaintiff lacks standing to pursue this action. At least for many of the plaintiff's claims, the assertion is incorrect.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Supreme Court said the "irreducible constitutional minimum of standing contains three

elements." First, the plaintiff "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. (internal quotation marks and citations omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id*. (internal quotation marks, ellipses, and brackets omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. (internal quotation marks omitted).

Here the plaintiff easily meets these requirements.

First, the plaintiff alleges the challenged registry statute imposes substantial burdens on the plaintiff herself—burdens that easily establish injury in fact. *See, e.g.*, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019) (holding that receipt of two or more unwanted phone calls constitutes an injury in fact sufficient to establish standing). Among other burdens, the registry statute as amended in 2018 provides that before a registered sex offender travels to a location for as little as three days, the offender must go in person to the sheriff's office—or for driver's license changes to the Department of Highway Safety and Motor

Vehicles—to report the address of the intended destination. Failure to do so is a criminal offense. This is a substantially greater burden than held sufficient in *Cordoba*.

The burden is concrete and particularized, and it is actual or imminent, not conjectural or hypothetical. Few among us do not occasionally travel for three days or more. And few among us would not find it burdensome to have to go the sheriff's office in advance to report our travel plans.

Second, there is a direct causal connection between the allegedly unconstitutional statute and the injury complained of. It is the registration statute—nothing more and nothing less—that imposes the in-person reporting requirement and other challenged burdens.

Third, it is likely, indeed certain, that if the plaintiff prevails on the merits, the injury will be redressed. An injunction precluding the defendant from enforcing the registry statute's unconstitutional provisions, if indeed there are any, will solve the problem.

For standing purposes, one must accept as true the plaintiff's position that the challenged provisions are unconstitutional. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975). To the extent the provisions affect the plaintiff herself—as many of the provisions do—the plaintiff has standing to challenge them.

III

The defendant also asserts the case is not ripe for adjudication. A case is ripe if it is "not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted)). There is nothing speculative about the plaintiff's assertion that the challenged provisions apply to her. She has already registered. She is required by the challenged provisions to keep her registration current and to periodically report in person.

To the extent the challenged provisions affect the plaintiff herself—as many of the provisions do—the action is ripe.

IV

To survive a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of a motion to dismiss, the complaint's factual allegations, though not its legal conclusions, must be accepted as true. *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A motion to dismiss is not the vehicle by which the truth of a plaintiff's factual allegations should be judged. Instead, it remains true, after *Twombly* and *Iqbal* as before, that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

V

The constitutionality of sex-offender registries is settled. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84 (2003) (holding a state registry constitutional even as applied to offenses committed before the registry was created); *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005) (upholding the Florida registry as it existed at that time); *Lindsey v. Swearingen*, No. 4:21cv465-RH-MAF (N.D. Fla. Jan. 24, 2022) (unpublished order).

Most of the plaintiff's claims are foreclosed by these and other decisions. As the cited decisions make clear, it is not unconstitutional for Florida to require registration based on a defendant's offense of conviction, without an individualized assessment of whether the defendant poses a risk of offending again. It is not unconstitutional for Florida to require registration for as long as Florida law now requires. The statute does not impose strict criminal liability or create an

impermissible irrebuttable presumption or run afoul of the stigma-plus doctrine. The statute is not unconstitutionally vague.

This does not end the matter, however. The plaintiff is correct that statutory amendments since *Doe v. Moore* and similar decisions have ratcheted up the burdens imposed on offenders. *See, e.g.*, Fla. Stat. § 943.0435(1)(f) (decreasing from five days to three the time at a single location that constitutes a temporary residence that must be reported). Violations of the reporting requirements are third-degree felonies with minimum mandatory sentences. *See id.* § 943.0435(9)(a), (b).

Challenges to the new provisions are not foreclosed by decisions that did not address them. Even so, the same deferential standard of review applies. The new provisions, like the old, are subject to only rational-basis review, not strict scrutiny. *See Doe v. Moore*, 410 F.3d at 1346. And the new registry requirements do not run afoul of the Ex Post Facto Clause so long as they pass muster under *Smith v. Doe*, 538 U.S. at 97–106. A "most significant" factor in the ex post facto analysis is whether a challenged requirement has "a rational connection to a nonpunitive purpose." *Id* at 97, 102.

At the motion-to-dismiss stage, it cannot be held that the three-day temporary residence provision has "a rational connection to a nonpunitive purpose." Consider the provision's application to a Florida resident—we'll call

him John—who decides to visit Atlanta for six days. We'll assume, for the moment, that John knows in advance where he will stay in Atlanta, and that there will be no change of plans once he gets there. If John intends to stay two days at a Hampton, then two days at a Courtyard, then two days at a Sheraton, he can leave Florida without reporting his plans. But if he intends to stay three days at a Hampton followed by three days at a Courtyard, he must report his plans in person before he leaves Florida. *See* Fla. Stat. § 775.21(2)(n) (defining "temporary residence" as a place in or out of the state of Florida where a person vacations for three or more days in the aggregate during any calendar year). But he apparently needs to report only his intended stay at the Hampton, not the Courtyard. According to the defendant, this bizarre result is proper, even though not spelled out in the statute, because John is a Florida resident immediately before "moving" to the Hampton, but he is an Atlanta resident, by virtue of his three-night stay at the Hampton, before he moves to the Courtyard—and Florida has no interest in requiring Atlanta residents to report their moves within Georgia.

The situation becomes even more muddled when changes in plans are factored in. Suppose John plans to stay two days each at the Hampton, Courtyard, and Sheraton, but gets to Atlanta and likes the Hampton's location, not the Courtyard's, and so stays four days at the Hampton. Must he go back home to

report in person to the sheriff's office before staying the third night at the Hampton, lest he commit a third-degree felony? A rational, nonpunitive basis for any such requirement is not obvious.

Consider, too, the statute's aggregation of days from separate trips. Suppose John goes to Atlanta for one day in February, another day in June, and another day in October, and stays each time at the Hampton. The Hampton is plainly a "temporary residence" that must be reported in person at the sheriff's office. But when is John required to register? Before the first trip, or the third, or all three? When he knew or anticipated he might go three times? And if all John needs to do to avoid the registration requirement is to stay at a different Hampton in October, what is the point?

There is no obvious rational, nonpunitive purpose for requiring an in-person report of a three-day trip, let alone three one-day trips. The most obvious purposes for such a requirement are punishment and discouraging sex offenders from traveling at all. But punishment is an impermissible purpose when applied to an individual whose offense preceded enactment of the requirement. And the defendant has not asserted the purpose is to discourage travel—itself a constitutionally questionable purpose.

Perhaps law enforcement officers or others use the temporary-residence disclosures for a legitimate purpose. But that cannot be taken as true for purposes of the motion to dismiss. If the requirement's only purpose is punitive, its application to the plaintiff is unconstitutional.

In sum, the complaint fails to state a claim on which relief can be granted to the extent it challenges the same provisions unsuccessfully challenged in *Doe v. Moore*. The complaint also fails to state a claim based on procedural due process, improper strict criminal liability, vagueness, the stigma-plus doctrine, or an irrebuttable presumption. In other respects, though, the complaint states a claim on which relief can be granted.

VI

Two of the plaintiff's claims invoke the Florida Constitution. But the Eleventh Amendment bars any claim for injunctive relief based on state law against a state or against a state officer. The Supreme Court so held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984). This order dismisses the state-law claims on this basis without expressing a view on the merits one way or the other.

VII

For these reasons,

IT IS ORDERED:

1. The motion to dismiss, ECF No. 13, is granted in part.

2. Counts 2A, 2B, 3B, and 3D are dismissed with prejudice, and counts 1, 3A (to the extent based on federal law), and 3C are narrowed in accordance with this order.

3. Counts 3A (to the extent based on state law) and 5 are dismissed without prejudice based on the Eleventh Amendment.

4. I do *not* direct the entry of judgment under Federal Rule of Civil Procedure 54(b).

SO ORDERED on February 8, 2022.

s/Robert L. Hinkle
United States District Judge