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

JOHN DOE,

Plaintiff,

v. CASE NO. 4:16cv459-RH/CAS

RICK SWEARINGEN, COMMISSIONER FLORIDA DEPARTMENT OF LAW ENFORCEMENT,

Defendant.

_____/

ORDER GRANTING SUMMARY JUDGMENT

A state has a compelling interest in preventing sexual assaults. To that end, a state may require a convicted sex offender to register, may publicly disclose a sex offender's residence and other private information, and may impose additional requirements that for others would violate the Constitution. Even so, a state's authority in this area is not unlimited; a state must have a rational basis for its registration requirements.

This case presents an exceedingly narrow issue: may Florida require a person to publicly register based on a crime committed in Connecticut, even

though Florida would not require registration at all if the crime had been committed in Florida, and even though Connecticut would not require public registration if the person lived in Connecticut. The answer is no—when neither Florida nor Connecticut has determined that this crime warrants public registration, the person cannot be required to publicly register.

I

In 1993, the plaintiff John Doe pleaded guilty in Connecticut to sexual assault. He was sentenced to probation. He now says this was a plea of convenience—that he was not in fact guilty. But he pleaded guilty, was convicted and sentenced, and the conviction has not been set aside. This order treats Mr. Doe as a person who in fact committed a sexual assault and was properly convicted. In requiring registration, a state may treat a conviction as conclusive; it need not entertain protestations of innocence. Mr. Doe does not dispute this.

Connecticut did not require sex-offender registration in 1993 but enacted a registration requirement that took effect on October 1, 1998. *See* Conn. Gen. Stat. § 54-250, et seq. The requirement applies to some offenses—including Mr. Doe's—that occurred prior to the effective date. If Mr. Doe lived in Connecticut, he would be required to register. But Connecticut makes available a procedure under which access to an offender's registration can be limited to law enforcement personnel; the information is not publicly available. Mr. Doe invoked that

procedure and obtained a court order limiting access to his registration. If he lived in Connecticut, he would be required to keep his registration current, but there would be no public access to the registration.

Mr. Doe completed his probation without incident and moved to Florida in 1996. Florida had no sex-offender registry at that time but enacted a registration statute that took effect on October 1, 1997. *See* Fla. Stat. § 943.0435. The statute applies to offenders who, for purposes of this case, can be divided into two categories.

First, the statute requires registration by persons convicted of specified Florida offenses and similar offenses committed elsewhere. *Id*. § 943.0435(1)(h)1.a. Mr. Doe's sexual-assault conviction qualifies. But this requirement does not apply to an offender who committed the crime and was released from sanctions before October 1, 1997. *Id*. § 943.0435(1)(h)1.a.(II). So the requirement does not apply to Mr. Doe.

Second, the statute requires registration by any person who resides in Florida and who has been designated as a sex offender in another jurisdiction—usually as a result of conviction of a sexual offense in that jurisdiction—and is either required to register in that jurisdiction or would be required to register if the person resided there. *Id*. § 943.0435(1)(h)1.b. This requirement applies to Mr. Doe because he would be required to register if he lived in Connecticut.

II

Mr. Doe filed this action against the Commissioner of the Florida Department of Law Enforcement—the state official responsible for maintaining the Florida registry. Mr. Doe asserts that the Florida registration requirement is unconstitutional as applied to him. He seeks declaratory and injunctive relief.

The Commissioner has moved for summary judgment. Both sides agree that the case presents a question of law that should be resolved one way or the other on the Commissioner's motion. *See* Fed. R. Civ. P. 56(f) (allowing summary judgment for either side after appropriate notice). The motion has been fully briefed and orally argued and is ripe for a decision.

III

The constitutionality of sex-offender registries is settled. *See, e.g.*, *Smith v. Doe I*, 538 U.S. 84 (2003) (holding a state registry constitutional even as applied to offenses committed before the registry was created). But registration provisions, like other state laws, must comply with the Fourteenth Amendment's Equal Protection Clause. Registration requirements ordinarily are subject to rational-basis review, not strict scrutiny. *See, e.g.*, *Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005).

There was a time when the Supreme Court seemed to treated strict scrutiny and rational basis as exhaustive categories of equal-protection review. A leading

commentator said that in some situations the first category was "'strict' in theory and fatal in fact" while the second called for "minimal scrutiny in theory and virtually none in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). But the Supreme Court has more recently applied intermediate scrutiny in many circumstances, and rational-basis review no longer means virtually no review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996). ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) (striking down, for lack of a rational basis, an ordinance requiring permits for group-care facilities for the mentally handicapped but no others); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985) ("This discrimination on the basis of residence is not supported by any identifiable state interest.").

To be sure, when lines must be drawn—as often they must—precision is sometimes not feasible and usually not required. "Defining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim . . . be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter

for legislative, rather than judicial, consideration." *FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 315-16 (1993) (internal quotation marks omitted).

Applying these principles here, the question is whether the Florida Legislature could have had a rational basis for drawing this line where it did—for requiring public registration for a person who committed an offense in another state, even though a person who committed the same offense at the same time in Florida would not be required to register, and even though the state where the offense was committed would not require public registration even if the person lived there.

It is no answer to say, as the Commissioner says in defense of this case, that sex offenders pose a substantial risk of recidivism and that registration reduces the risk. This order assumes this is true, and in any event it is a judgment the Florida Legislature was entitled to make. But the risk is no greater for a person who committed a sexual assault in Connecticut in 1993 than for a person who committed an identical sexual assault in Florida in 1993. The risk of recidivism—the danger to the public—provides no rational basis for treating identical Connecticut and Florida offenders differently.

The Commissioner has not proffered a purported rational basis for the Florida register-here-if-register-there requirement. Only two possible bases come to mind.

First, administrative convenience can provide a rational basis for drawing a line. Florida surely has an interest in requiring registration for residents who committed out-of-state offenses, just as it has an interest in requiring registration for in-state offenses. It is easy enough to specify the Florida statutes whose violation triggers the registration requirement. And so the triggering Florida statutes are cited in the Florida registration statute. But it is considerably more difficult to specify the triggering statutes of other states. To ease the administrative burden—to avoid the requirement to analyze and compare another state's statutes in every case—it makes sense to provide that any statute that requires registration in another state requires analogous registration in Florida.

Even so, this provides a rational basis only for *analogous* registration in Florida—for requiring public registration for a Florida resident who must publicly register in another state. When a person must publicly register in another state, or would be required to do so if the person lived there, the other state's legislature has determined that public registration will serve a purpose. Imposing the analogous requirement in Florida will mean that some people will be required to register even though the Florida Legislature has not made the same judgment. But the Florida Legislature could rationally conclude that the gain in administrative convenience makes it appropriate to defer to the other legislature's judgment—to require registration that, in the other legislature's view, serves a purpose.

This rationale extends only as far as the other legislature's judgment. When the other state exempts a person from public registration, administrative convenience provides no rational basis for requiring public registration in Florida. At least insofar as shown by this record, Florida can readily determine not just whether a person must register in another state, but also whether the person must register *publicly*. Administrative convenience supports requiring analogous registration in Florida, but nothing more. Mr. Doe is not required to publicly register in Connecticut, and would not be required to do so if he lived there. Administrative convenience provides no rational basis for requiring him to publicly register in Florida.

To be sure, Florida does not have a private registry of the kind Connecticut has. Creating a private registry applicable only to offenders who register in other states privately but not publicly would impose an administrative burden—a burden the Florida Legislature could rationally choose to avoid. But this does not provide a rational basis for requiring Mr. Doe to register publicly in Florida. First, the Florida Legislature has determined that registration ordinarily should not be required for a person who committed a sexual assault when Mr. Doe did and was sentenced as he was. Forgoing registration for Mr. Doe will pose no greater public risk than forgoing registration for individuals who committed the same offense in Florida at the same time and received the same sentence. Second, at least insofar as

shown by this record, law enforcement personnel in Florida will have access to Mr. Doe's Connecticut registration; they will have at least as much, and apparently more, information than would be available had Mr. Doe committed his offense in Florida.

The second possible basis for the register-here-if-register-there provision is to prevent Florida from becoming a haven for sex offenders—a haven for individuals who would be required to register in their home states but wish to avoid the requirement by moving to Florida. This might present its own set of issues—there is a constitutional right to travel among the states. But the posited state interest in not becoming a haven for sex offenders is substantial. This order assumes that imposing the same registration requirement here as is imposed in an offender's home state does not violate the right to travel or any other constitutional provision.

Again, though, this rationale extends only to imposing in Florida the same registration requirement as is imposed elsewhere. There is no risk that an offender will move to Florida to avoid public registration if the offender is not required to publicly register in the offender's home state. Moreover, imposing a greater registration requirement on an out-of-state offender than is imposed in either the offender's home state or in Florida on an identically situated in-state offender does

implicate the right to travel. In any event, in the absence of a rational basis, the register-here-if-register-there requirement violates the Equal Protection Clause.

Neither side has cited any case from any jurisdiction addressing this precise issue. Cases addressing similar issues are consistent, or at least not inconsistent, with this result.

Perhaps the closest case is *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 95 (3d Cir. 2008). Pennsylvania had a community-notification provision that applied to in-state sex offenders only if individually adjudicated to be "sexually violent predators." But the community-notification requirement applied to all out-of-state sex offenders who were on probation in Pennsylvania; an individualized determination was not available. Concluding that there was no rational basis for this disparate treatment of in-state and out-of-state offenders, the Third Circuit held that the failure to make individualized determinations available to out-of-state offenders violated the Equal Protection Clause. Here, as there, a state statute lacks a rational basis for making unavailable to the plaintiff the same individualized opportunity to avoid a sex-offender requirement as is available to similarly situated others. Here, as there, applying the statute to the plaintiff violates the Equal Protection Clause.

Similarly, in *Hendricks v. Jones*, 349 P.3d 531 (Okla. 2013), the Oklahoma Supreme Court struck down a statute that required registration by out-of-state but

not in-state sex offenders convicted before a specified date. The circumstances were different but the underlying principle is applicable here: treating out-of-state offenders more harshly than in-state offenders, without a rational basis, violates the Equal Protection Clause.

To be sure, courts have sometimes upheld register-here-if-register-there requirements—but only when at least one of the states would require the registration at issue for an offender who committed the offense and lived in that state.

Examples include cases on which the Commissioner places principal reliance: *Miller v. State*, 971 So. 2d 951 (Fla. 5th DCA 2007), and *McCoy v. State*, 935 So. 2d 1278 (Fla. 4th DCA 2006). In *Miller*, an offender who committed an offense in another state was required to register in that state and therefore was required to register in Florida. Unlike here, the offender's registration in the other state was public—so he was subjected to the same requirement in Florida as he faced in the other state. In *McCoy*, an offender who committed an offense in another state would have been required to publicly register if he lived there—so he was subjected to the same requirement in Florida as he would have faced in the other state.

Other cases are similar. *See Castaneira v. Potteiger*, 621 F. App'x 116 (3d Cir. 2015) (upholding Pennsylvania's enforcement of a 1000-foot residency

restriction attached to a Georgia conviction under the Interstate Parole Compact); *Doe v. Jindal*, No. 15-1283, 2015 WL 7300506 (E.D. La. Nov. 18, 2015) (upholding Louisiana's imposition of a lifetime registration requirement because the Alabama sentencing court imposed that requirement, even though Louisiana law would impose a shorter registration requirement); *Creekmore v. Att'y Gen. of Tex.*, 341 F. Supp. 2d 648 (E.D. Tex. 2004) (upholding a Texas law requiring registration if the Uniform Code of Military Justice requires it); *Oulman v. Setter*, No. A13-2389, 2014 WL 3801870 (Minn. Ct. App. Aug. 4, 2014) (upholding a Minnesota law requiring registration of a Colorado offense because Colorado requires lifetime registration, even though Minnesota law would require registration for only 10 years if the offense had been committed in Minnesota).

These decisions speak not at all to the issue in Mr. Doe's case: whether Florida can require *public* registration based on another state's requirement for *nonpublic* registration. The parties have cited no case addressing this situation.

The bottom line is this. States may require sex offenders to register, even based on offenses committed before there was a registration requirement. States may make the registrations public. The Florida Legislature could have decided that any offender who committed a sexual assault in 1993 and was off probation in 1996, before creation of the Florida registry, would be required to register and that the registration would be public. But the Florida Legislature did not make that

decision. It decided, instead, that such an offender would *not* be required to register, unless another state—usually the state where the offense was committed—made a different judgment. The Connecticut Legislature could have decided that any offender who committed a sexual assault in 1993 and was off probation in 1996, before creation of the Connecticut registry, would be required to publicly register, but the Connecticut Legislature, like the Florida Legislature, did not make that decision. The Connecticut Legislature decided, instead, that such an offender would be required to register but that access to the registration would be limited to law enforcement personnel if a court so ruled based on specified standards.

A Connecticut court ruled that Mr. Doe met those standards. In these circumstances—that is, for a person meeting the Connecticut standards who committed the same offense at the same time and received the same sentence—no legislature, no court, and no other governmental authority, in either Connecticut or Florida, has decided that public registration should be required. There is no rational basis for requiring Mr. Doe to register publicly when a similarly situated person who committed the same crime at the same time and received the same sentence—but who committed the crime in Florida or committed the crime in Connecticut and stayed there—would not be required to register publicly. Treating Mr. Doe

differently than those otherwise-identically-situated offenders violates the Equal Protection Clause.

IV

For these reasons,

IT IS ORDERED:

1. Summary judgment is granted for the plaintiff John Doe.

2. It is declared that the requirement for public registration under Florida Statutes § 943.0435 is unconstitutional as applied to Mr. Doe.

3. The defendant Rick Swearingen, in his capacity as Commissioner of the Florida Department of Law Enforcement, must take no action to enforce the requirement for public registration under Florida Statutes § 943.0435 against Mr. Doe.

4. This injunction binds the Commissioner and his officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

5. The clerk must enter judgment including the terms set out in paragraphs 2, 3, and 4.

SO ORDERED on November 15, 2017.

s/Robert L. Hinkle
United States District Judge