UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN DOE *et al*.,

Plaintiffs,

vs.

Case No. 1:18-CV-24145-KMW

RICHARD L. SWEARINGEN,

Defendant.
_____/

MOTION TO ALTER OR AMEND ORDER AND JUDGMENT AND/OR FOR RELIEF FROM ORDER AND JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

COME NOW THE PLAINTIFFS, by and through their undersigned counsel, and herein move the Court, pursuant to Fed. R. Civ. P. 59(e), to alter or amend its Order and Judgment entered November 23, 2020 (DE:201, 202), and/or for relief from that Order and Judgment pursuant to Fed. R. Civ. P. 60(b)(1), (b)(6). In support thereof, Plaintiffs state as follows:

I. Statement of Facts

1. On November 23, 2020, the Court issued an Order granting Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint; Plaintiffs' claims were dismissed **with prejudice** and Final Judgment was entered in favor of Defendant (DE:201, 202). Pursuant to Fed. R. Civ. P. 59(e),[1] Plaintiffs move the court to alter or amend its decision in light of the foregoing facts and legal authorities; they also seek relief from the Order and Final Judgment pursuant to Fed. R. Civ. P. 60(b)(1), (b)(6) due to "exceptional circumstances" and because "absent such relief, an extreme

[1] Fed. R. Civ. P. 59(e) provides that a motion to alter or amend may be filed within 28 days after entry of judgment. In Plaintiffs case, the Order and Final Judgment were entered on November 23, 2020 (DE:201, 202). The instant motion is timely filed.

and unexpected hardship will result."[2] *Martinair Holland N.V. v. Benihana, Inc.*, 780 Fed. Appx. 772, 776 (11th Cir. 2019) (quoting *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984)).

2. For the reasons set forth below, Plaintiffs move the Court to reconsider its dismissal with prejudice on statute of limitations grounds without granting leave to amend their complaint. Plaintiffs should be allowed to seek leave to amend their complaint by limiting their challenges to amendments to the statute within 4 years of the original complaint and/or to add plaintiffs who were placed on the registry less than 4 years ago in order to challenge the statute on its face and as applied to them. In accordance with the Court's numerous orders that left no mistake that it expected discovery to be done notwithstanding the pendency of a motion to dismiss alleging, *inter alia*, a statute of limitations defense that would bar the suit in its entirety, the parties conducted extensive discovery, at great expense in both time and money. Amending the complaint would allow that discovery to remain relevant. All of the depositions taken by the parties (with the

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[2] Under Fed. R. Civ. P. 60, a party must make a motion within a reasonable time for a court to "relieve [the] party or its legal representative from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b), (c). The court may grant relief under Rule 60(b) for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

exception perhaps of one, Dr. Eric Imhof, whose reports and conclusions were based on personal testing of the Does themselves), elicited information relevant to facial and as-applied challenges by anyone on the registry less than 4 years. The completed discovery is also relevant to challenges by the current Does to amendments enacted within 4 years of the complaint. Adding newer registrants to represent these other challenges, given the extensive discovery already completed in support of these challenges, would also conserve judicial resources.

A. Introduction: relevant pleadings and discovery

3. Plaintiffs first set out a brief chronology of the case along with the nature of the **extensive** discovery that was undertaken and **nearly completed** when the Court entered its order on November 23, 2020. This information puts their arguments for relief from the Order and Final Judgment into sharper context and illustrates why, at a minimum, relief from that part of the Order dismissing their complaint with prejudice is warranted and why Plaintiffs should be given an opportunity to seek leave of Court to amend their complaint.

1. Initial complaint, twice amended; stay of proceedings rejected over and over

4. On October 18, 2018, Plaintiffs—five John Does—filed a complaint seeking declaratory and injunctive relief alleging that § 943.0435, Fla. Stat. (2018) was unconstitutional, both facially and as applied to Plaintiffs; the complaint was served on Defendant on October 23, 2018 (DE:1, 6).[3] Less than a month later, the Defendant moved to dismiss the complaint,[4]

[3] Not long after filing their complaint, Plaintiffs sought leave to proceed anonymously (DE:9). The anonymity issue was extensively litigated by the parties for almost a year (DE:9, 13, 22, 25, 41, 44, 46, 52, 58, 105, 119, 168, 178, 193). Although dismissing the case, the Court did rule that the anonymity protective order "shall remain in place" unless otherwise ordered (DE:202 at 1).

[4] Defendant raised a statute of limitations argument to press its case for dismissal of the complaint, briefly arguing that "[p]resent consequences resulting from a discrete past act do not extend a statute of limitations" (DE:10 at 5). Plaintiffs countered this argument in their response, not only

generating a response by Plaintiffs and a Reply by the Defendant (DE:21, 30). On February 1, 2019, **Plaintiffs** moved for an oral argument on the **Defendant's motion** because, in their view, it would "benefit the Court in analyzing their claims and in assessing the merit (or lack thereof) of the grounds asserted in the Defendant's motion to dismiss them (DE:31 at 2). Defendant opposed argument on his own motion as "unnecessary" (DE:33).

5. The Court did not rule on the Defendant's fully briefed motion to dismiss nor did it grant (or deny) oral argument; rather, it issued an order requiring the parties to file a Joint Conference Report and Joint Proposed Scheduling Order by May 1, 2019 (DE:37). Before the Joint Conference Report and Joint Proposed Scheduling Order were due to be filed, the Defendant filed an agreed motion to stay the proceedings, including the Joint Conference Report and Joint Proposed Scheduling Order, "until such time as the Motion to Dismiss has been adjudicated" (DE:38 at 1). *See also id*. at 4 ("The parties agree that for the sake of efficiency and preserving party and judicial resources, these proceedings, including the upcoming joint conference report and joint proposed scheduling order, should be stayed pending adjudication of the Motion to Dismiss"). Notwithstanding their agreed position to stay the proceedings pending adjudication of Defendant's Motion to Dismiss, the parties filed the proposed Joint Scheduling Report on May 1, 2019 because the Court had not ruled on the Defendant's motion (DE:39). On May 16, 2019, the

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citing cases to support their position but also pointing out that the Defendant was relying solely on cases addressing one-time acts with consequences that continue into the present—which does not extend the limitations period—and the continuation of violations into the present, which does (DE:21 at 1-2) (citing cases). Defendant's Reply acknowledged Plaintiffs' arguments but contended that cases from other circuits had "more permissive" standards for evaluating whether "continuing violations" could extend a statute of limitations (DE:30 at 1). One case not addressed by the parties at that time—*McGroarty v. Swearingen*, 977 F.3d 1302 (11th Cir. 2020)—was not yet decided, having issued only weeks before the oral argument on Defendant's motion to dismiss.

Court issued a Scheduling Order,[5] later denying the Defendant's Agreed Motion to Stay as moot (DE:43).

6. The Defendant sought reconsideration of the Court's denial of his motion to stay proceedings, clarifying that the stay he was seeking was not limited to just the submission of the Joint Scheduling Report and Scheduling Order but rather for "*all* proceedings" (including discovery) until his motion to dismiss was adjudicated (DE:45 at 3-5).[6] However, Plaintiffs did not join in or agree to the Defendant's motion for reconsideration of the denial of the stay (DE:45 at 3). They explained that they had agreed to Defendant's initial motion for stay because they believed the Court's order for the Joint Conference Report and Scheduling Order "may have issued automatically based on the date the complaint was docketed"; but, as they noted, it was equally likely that the Court "intended the case to proceed notwithstanding the pendency of the motion to dismiss (DE:47 at 2). In Plaintiffs' view, the Court's denial of the stay "resolv[ed] any doubt . . . that this Court intended for the case to proceed, notwithstanding pendency of the motion to dismiss" (DE:47 at 2). Accordingly, Plaintiffs informed the Court that, in compliance with the Scheduling Order issued over a month earlier, they were not only submitting their motion for leave

[5] The initial Scheduling Order set forth, *inter alia*, deadlines for exchange of names and addresses of fact witnesses (May 30, 2019), for motions to amend pleadings or join parties (July 1, 2019), for disclosure of experts, expert witness summaries and reports by both Plaintiffs and Defendant (March 2, 2020; April 1, 2020), for exchange of rebuttal expert summaries and reports (May 15, 2020), and for the completion of discovery (May 29, 2020).

[6] Specifically, Defendant alerted the Court that "[d]iscovery in this case will be substantial and costly," that the parties "requested and received a two-week trial period due to the number of expected witnesses—including the various Plaintiffs, their family members and their expert witnesses," and that Plaintiffs "have recently expressed their intent to amend the Complaint to add more claims and possibly more plaintiffs" (DE:45 at 5). Defendant implored the Court for a stay because "discovery and litigation costs to Florida's taxpayers should be avoided until the Court has at least determined if the case will proceed" (*Id.*).

to amend the complaint along with a copy of the First Amended Complaint, but that they had also spent "considerable time drafting discovery requests relevant to their allegations and anticipated defenses" (DE:47 at 3). On the same day as they filed their opposition to the Defendant's request to reconsider the denial of the stay of all proceedings, the Plaintiffs sought and were subsequently granted leave to file the First Amended Complaint (DE:48),[7] and in light of the filing of the First Amended Complaint, the Court denied as moot the Defendant's motion for reconsideration of the denial of the stay, his motion to dismiss the initial complaint, and Plaintiffs' motion for oral argument (DE:49).

7. The Defendant moved to dismiss the First Amended Complaint (DE:56)[8] and, on July 17, 2019, renewed his motion to stay all proceedings,[9] including discovery, which as Defendant noted, was already underway with the service by Plaintiffs of interrogatories (DE:57 at 7-8; DE:67). Plaintiffs opposed any delay in the case, particularly with discovery, noting that the punitive impacts of registration and notification had intensified since the filing of the initial complaint, and that "the vagueness and ambiguity of the travel-related restrictions continue to chill Plaintiffs from fully exercising their fundamental right to travel, especially in view of the 2018

[7] The First Amended Complaint added two plaintiffs along with a "next friend" for one of them, facial challenges to existing claims, words and phrases from the statute in support of the extant vagueness claim, and a state law constitutional claim (DE:48 at 3).

[8] The Defendant again raised a statute of limitations defense, essentially reproducing the same brief argument about the "continuing violation" principle from his earlier motion to dismiss (DE:56 at 6-7). Plaintiffs responded again to Defendant's abbreviated arguments (DE:66 at 3-4), and again requested oral argument (DE:63). The Defendant replied, once again opposing oral argument on his own motion to dismiss as "unnecessary" (DE:72; DE:74 at 2). The Court later scheduled argument for January 8, 2020 (DE:98), but the Defendant sought to reschedule based on a scheduling conflict, a request that was ultimately mooted by the filing of a Second Amended Complaint (DE:101).

[9] This was the Defendant's *third* attempt to seek a stay of discovery, having been twice rebuffed by the Court while his motion to dismiss the initial complaint was pending.

amendment providing a minimum-mandatory sentence for even unwitting registration violations" (DE:61 at 5). The Court did not rule on Defendant's renewed motion for stay until October 16, 2019 (three months after the Defendant's motion was filed), rejecting once again his attempt to delay discovery and, in so doing, sending the clearest signal yet that it intended for discovery to proceed and that the Plaintiffs' First Amended Complaint may survive, in some part, the Defendant's motion to dismiss (DE:86 at 2) ("Upon a cursory review of Defendant's motion to dismiss, Plaintiffs' response, and Defendant's reply, **the Court 'cannot conclude that the [m]otion to [d]ismiss is so clearly meritorious that all discovery should be stayed during its pendency'**" (citation omitted) (emphasis added)). Discovery thereupon continued, unimpeded at least by any further motions to stay.[10]

8. Reinforced by the Court's Order rejecting the Defendant's latest attempt to stay discovery, Plaintiffs sought leave to file a Second Amended Complaint to add a new Plaintiff who was relatively younger than some of the existing Plaintiffs, some of whom had been in ill health (DE:100). Leave was granted (DE:100), resulting in another motion to dismiss, response, and reply (DE:103, 109, 125), along with another request by Plaintiffs for oral argument (DE:111). The Defendant's argument about the "continuing violation" doctrine as a basis for dismissal did not change in any meaningful fashion from earlier iterations, consisting of a few paragraphs and citation to essentially the same previously cited cases (DE:103 at 6-7).

[10] Shortly before the entry of this Order, the Magistrate rejected Defendant's attempt to seek a protective order against Plaintiffs' interrogatories, noting that his "renewed motion to stay was filed some time ago but a stay was not entered. Under the Court's Rules, it is clear that absent such an Order discovery should proceed as contemplated by the Rules. Defendant cannot unilaterally obtain a stay when one was not entered" (DE:82). Undeterred, the Defendant then moved for a protective order against Plaintiffs' requests for production, a motion that was ultimately denied as moot after the Court denied Defendant's renewed motion for stay and he sought an extension of time to respond to the requests for production (DE:83, 87).

9. The Court did not rule on Defendant's motion to dismiss and accordingly, during the ensuing months, the parties continued conducting extensive discovery, detailed below.[11] On September 28, 2020, the Court scheduled oral argument for November (DE:167), and on November 17, 2020, the Court heard oral argument on the Defendant's motion to dismiss (Attachment A). Six days later the Court entered its order granting the motion to dismiss the Second Amended Complaint with prejudice, resting its decision largely on *McGroarty v. Swearingen*, 977 F.3d 1302 (11th Cir. 2020), a case just decided on October 20, 2020 (DE:201, 202). The other case law cited in the Court's Order of dismissal was in existence at the time of Defendant's two prior motions to dismiss, and formed part of the record reviewed by the Court when it rejected the notion that the Defendant's dismissal motion was "so clearly meritorious that all discovery should be stayed during its pendency" (DE:86 at 2).

2. Extensive discovery undertaken by both parties

10. In accordance with the Federal Rules of Civil Procedure, the deadlines set forth in the Scheduling Orders (and amendments thereto), and the repeated orders from both the Court and the Magistrate that discovery in this case was to be ongoing and not stayed for any reason, including the pendency of motions to dismiss, the parties have, since the filing of the initial Scheduling Order, undertaken extensive, painstaking, time-consuming, and expensive discovery.

11. Discovery was initiated by Plaintiffs' service of interrogatories on the Defendant in June 2019, followed by the first set of what would be service by Plaintiffs on Defendant of seven sets of Requests for Production over the course of the months and as other discovery was being turned over. In turn, in April 2020, the Defendant served Plaintiffs with seven sets of

[11] The initial Joint Scheduling Order was amended as the case progressed (DE:141, 153), and the parties were nearing the end of discovery by the cut-off date of December 18, 2020 (DE:177) when the Court dismissed the case with prejudice on November 23, 2020.

interrogatories (one for each plaintiff at that time), each set with 24 interrogatories (with the exception of the set for Jane Doe, which contained 26 interrogatories). On that same date, the Defendant served Plaintiffs with seven sets of requests for production (one for each plaintiff at that time), each set with over 20 requests for various types of records. In the course of complying with their discovery obligations, the parties extensively communicated by phone and email in order to explain, amend, or limit their requests, and otherwise assisted each other to the best of their ability in order to ensure complete and timely compliance. Privilege logs were created and exchanged, as required by the Federal Rules of Civil Procedure and the Local Rules for the Southern District of Florida. Thousands of pages of records (some having to be redacted) were disclosed by each party to the other as a result of the discovery process in this case**,** a process which was ongoing up until recently; for example, on November 2, 2020, Defendant provided a response to Plaintiffs' seventh request for production, and on November 5, 2020, Defendant provided additional documents responsive to Plaintiffs' first request for production, a request served over a year earlier. In other words, the parties were complying with their discovery obligations knowing that the Court had, on **numerous** occasions, indicated in **unmistakably clear language** that discovery was to be conducted notwithstanding the pendency of the Defendant's motion to dismiss.

12. In addition to interrogatories and requests for production, the parties also exchanged lay and expert witness disclosures per the Joint Scheduling Order. In conformity with their obligations under the Scheduling Order, the Plaintiffs, on March 2, 2020, provided Defendant with the expert reports of: James J. Prescott (87 page report); Jill Levenson (51 page report); Kelly M. Socia (37 page report); Eric A. Imhof (4 reports, one for each plaintiff, each approximately 15 pages); Merry S. Haber (48 page report); and R. Karl Hansen (155 page report). On April 1, 2020,

Plaintiffs served Defendant with the expert report of David Post (27 page report).[12] On May 15, 2020, Defendant served Plaintiffs with the expert reports of Richard McCleary (46 page report) and Matt DeLisi (66 page report); on May 17, 2020, Defendant served the expert report of Terry Thomas (8 page report). And Plaintiffs thereafter served on Defendant the rebuttal reports by James J. Prescott (113 page report), Andrew J.R. Harris (69 page report), Kelly M. Socia (59 page report), Nick Petersen (44 page report), and Jill Levenson (18 page report). As with the documentary discovery, the parties were complying with their discovery obligations regarding experts, exchanging almost a thousand pages of summaries, reports, and CVs, again because the Court had, on numerous occasions, indicated in unmistakably clear language that discovery was to be conducted notwithstanding the pendency of the Defendant's motion to dismiss.

13. Finally, the parties took numerous depositions[13] in light of the Court's prior rulings regarding their ongoing obligation to conduct (and complete) discovery by the cut-off deadline; and, prior to the entry of the dismissal order, the parties were scheduling the remaining depositions because the discovery deadline was quickly approaching. To date, Plaintiffs have deposed the Defendant's experts (McCleary, DeLisi, and Thomas), along with witnesses Mary Coffee, Chad Hoffman, Jeremy Gordon, Joseph Hornsby, and Robert Moon. Defendant has deposed the following of Plaintiffs' experts: R. Karl Hansen, James J. Prescott, Jill Levenson, Kelly Socia, David Post, and Eric A. Imhof. Defendant also deposed Jane Doe.

II. Statement of Law

[12] Plaintiffs did seek, and obtain, an extension of time for submitting this one additional expert report to Defendant (DE:120, 132).

[13] Most of the depositions took between six and seven hours to complete. The experts charged hundreds of dollars an hour both for preparation and deposition time. Due to the length of the depositions, the transcripts were costly.

A. The Court should reconsider its statute of limitations dismissal

The Court determined that Plaintiffs' claims were "time barred" under Eleventh Circuit precedent, rejecting application to their allegations of the "continuing violation" theory principally on the basis of the just-decided case of *McGroarty v. Swearingen*, 977 F.3d 1302 (11th Cir. 2020) (DE:201 at 3-4). But while the Eleventh Circuit did address and reject the "continuing violation" theory as extending a statute of limitations in that case, *McGroarty* is ultimately distinguishable because it is not a case, like Plaintiffs' case, which involves an allegation of "continuing violations" of the Florida Sex Offender Registry Statute. The Court should reconsider its rejection of the "continuing violations" doctrine to remedy what Plaintiffs submit is clear error and to avoid a manifest injustice.

At issue in *McGroarty* was a dispute "whether the injury that underlies McGroarty's claims is time-barred or exempt from that requirement [of a four-year statute of limitations commencing when the cause of action accrues] through the continuing violation doctrine." *Id*. at 1307. McGroarty was convicted of Florida offenses in 2001 and 2002, offenses which required him to register on Florida's sex offender registry. *Id.* at 1305. He later moved to California in 2004, and, in 2012, to North Carolina, where he remained at the time of his lawsuit. Also in 2012, McGroarty successfully completed probation for his Florida offenses and was notified of "continuing registration obligations in Florida." *Id.* But because he no longer resided in Florida, "he was not required to update his registration there and [was] not subject to penalties for failing to do so." *Id*.

In 2018—fourteen years after moving from Florida to California—McGroarty sued FDLE, alleging substantive due process violations, because FDLE's website continued to maintain information about him, along with his photograph, on its online database, and had done so for 14 years since he moved to California. *Id.* In other words, the *only* act alleged by McGroarty was

FDLE's ongoing publication of his name and other information on the online database. In fact, McGroarty had "no continuing registration requirements in Florida." *Id*. at 1307. Because he did not bring suit until 2018, McGroarty argued that "the continued display of his information on Florida's sex offender registry is a continuing violation because he continuously suffers the injury of having his information published, which interferes with his daily life." *Id*. (footnote omitted). FLDE, on the other hand, argued that McGroarty's claims were time barred because his "injury" occurred in 2004, when he alleged his personal information was first posted online, and thus his 2018 suit was filed outside of the statute of limitations; FDLE also argued that the "continuing violation" theory did not apply to McGroarty's allegations because he "**has not challenged an ongoing obligation to do anything. Rather, he alleges only passive effects from a one-time act that occurred in 2004.**" *Id*. at 1308 n.6 (emphasis added).

The Eleventh Circuit did not hold that the "continuing violations" theory could never extend a statute of limitations; in fact, it reaffirmed the legal underpinnings of the theory[14] but held that McGroarty's circumstances failed to "appreciate the limits of" the doctrine because "he has alleged a continuing harm (which does not extend the limitations period), not a continuing violation (which may extend the period)." *Id*. at 1307-08.[15] And because McGroarty "concedes that he has no continuing obligations to update his registration under the Florida statute," the Eleventh Circuit saw no need to even examine the statute at issue, which it would normally do "to

[14] *See McGroarty*, 977 F.3d at 1307 ("The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period") (citing *Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006)).

[15] The Eleventh Circuit noted that McGroarty "specifically disavowed the argument that a new violation occurred each time the FDLE updated their website or re-posted information" and thus it did "not address whether re-posting information online could be a new injury that restarts the statute of limitations." *McGroarty*, 977 F.3d at 1307 n.5.

determine if an injury is continuous in nature." *Id.* at 1307 n.4. Rather, it examined the case law defining the "continuing violations" doctrine, rejecting its application it to the circumstances of McGroarty's case.

The Eleventh Circuit in *McGroarty* did not, as this Court stated at oral argument, have "the opportunity to *review the scheme and said this is the ongoing requirement*" (Att. A at 30) (emphasis added). In fact, the Eleventh Circuit disavowed examination of the statute because McGroarty was not alleging a "continuing" obligation to do anything. *McGroarty*, 977 F.3d at 1307 n.4 ("As [McGroarty] concedes that he has no continuing obligations to update his registration under the Florida statute, however, the statute itself does not aid our inquiry. Thus, we examine our case law"). Rather, the Eleventh Circuit determined that "[t]he initial publication of McGroarty's information online was a 'one-time' act, even though McGroarty is experiencing 'present consequences' of that action." *Id*. at 1308 (citation omitted). Plaintiffs respectfully disagree that the result in *McGroarty* is what controls here; in fact, its analysis supports a rejection of Defendant's statute of limitations defense when the allegations in the complaint, along with examination of the statute's amendments, are viewed in the context of the "continuing violations" doctrine. It is not a doctrine to be applied in a wooden fashion.[16] *See, e.g. Havens v. Realty Corp.*

[16] Wooden application of the Court's statute of limitations ruling in Plaintiffs' case would preclude any ex post facto challenge to Florida's registration statute. No registrant in Florida could have prevailed on an ex post facto challenge brought within 4 years of the statute's enactment because, at that point, the impacts were not punitive. The point of Plaintiffs' suit was to demonstrate how the impacts increased gradually, every 2 years or so, until the accretion constituted an affirmative and disabling restraint and until research scientists concluded that the statute lacks utility. For example, having to make an in-person report within 48 hours once or twice a year would not necessarily be considered punitive, especially given the unchallenged assumption of categorically high risk to reoffend. It was not until the in-person reporting requirements began to multiply, with new identifying information that had to be reported in person, and shorter trips that had to be reported in person, that the impacts became heavy enough to be considered punitive. Thus, although Plaintiffs knew they were required to register 20 years ago, they had no way of foreseeing the punitive scaffolding that would be erected on the non-punitive foundation. This is the basis of

v. Coleman, 455 U.S. 363, 380 (1982) (noting that "wooden application" of statute of limitations in Section 812(a) of the Fair Housing Act of 1968 "would ignor[e] the continuing nature of the alleged violation [and] only undermin[e] the broad remedial intent of Congress embodied in the Act").

Should the Court disagree with their interpretation of *McGroarty* and its inapplicability to their case, Plaintiffs nonetheless submit that relief from the Court's decision to dismiss their complaint with prejudice, disallowing any further amendment, is warranted, as they explain in the following section of this memorandum.

B. The Court should reconsider its dismissal with prejudice and allow Plaintiffs to seek leave to amend their complaint

Pursuant to Fed. R. Civ. P. 59(e) and/or 60(b), Plaintiffs seek to alter or amend the Court's judgment—and/or seek relief therefrom—with respect to its dismissal of this action **with prejudice** (DE:201 at 8). The Court determined that further amendment to the complaint would not be "appropriate" because "Plaintiff has filed three complaints in this matter" and "Defendant has raised its statute of limitations argument in previous motions to dismiss" (DE:201 at 8). Respectfully, the Court misapplied the applicable legal standards in dismissing this action **with** (as opposed to **without**) prejudice—thereby preventing Plaintiffs from seeking leave to amend the complaint—and in failing to make the requisite findings to justify dismissal without prejudice.

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their argument that the "continuing violation" doctrine applies here, but this Court's ruling precludes challenge to any additional amendments after the statute of limitations for initial registration requirement.

Furthermore, most newly registered people are on probation, typically long term. Because probation itself entails multiple restrictions on liberty. It is doubtful a probationer's challenge to the statute would be ripe.

Under Fed. R. Civ. P. 15(a), a court should "freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should as the rules require be 'freely given.'" *Loggerhead Turtle v. County Council of Volusia County, Florida*, 148 F.3d 1231, 1255 (11th Cir. 1998) (quoting *Forman v. Davis*, 371 U.S. 178, 182 (1962)). While a court has authority under Fed. R. Civ. P. 41(b) to dismiss an action for a variety of reasons such as failure to comply with a court's local rules,[17] no justification for dismissing Plaintiffs' Second Amended Complaint is found in the rules. Certainly, the Court's Order cited no rule or other legal authority to support of dismissal with prejudice. *But see World Thrust Films v. Int'l Family Entm't, Inc*., 41 F.3d 1454, 1456 (11th Cir. 1995) (because dismissal with prejudice "is considered a drastic sanction, a district court may only implement it, as a last resort, when (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice"). Appellate courts "rigidly require the district courts to make these findings precisely because the sanction of dismissal with prejudice is so unsparing. . . . " *Betty K. Agencies, Ltd. V. M/V Monada*, 432 F.3d 1333, 1339 (11th Cir. 2005) (quotations and citation omitted).

[17] *See* Fed. R. Civ. P. 41(b) ("**Involuntary Dismissal; Effect**. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits").

The Court ruled that a further amendment to the complaint would not be "appropriate" (DE:201 at 8); but Plaintiffs are unaware of an "appropriateness" standard in disallowing amendment to a complaint, irrespective of whether leave to amend is requested pre- or post-judgment.[18] Rather, the legal standard for assessing whether a complaint should be dismissed with or without prejudice (assuming no breach of local rules, bad faith, or undue delay) is based on futility of any possible amendment. *Riddick v. United States*, 2020 WL 6156593 at *5 (11th Cir. Oct. 21, 2020) (district court erred in dismissing *pro se* plaintiff's complaint with prejudice, noting that (1) complaint "might be curable" if amended; (2) "it cannot be said that any attempt to amend would necessarily be futile"; and (3) district court "made no finding" that an amendment "would be futile").

Here, the Court's Order did not make the requisite (or really any) findings to justify dismissal with prejudice, thus preventing Plaintiffs from seeking leave to amend their complaint in light of the Court's statute of limitations ruling. Given that ruling, Plaintiffs should be permitted to seek leave to amend the complaint as to the Does already part of the suit and limit their

[18]The instant motion is not the vehicle by which Plaintiffs are required (or even permitted) to submit an actual amended complaint for the Court's review or otherwise establish that an amended complaint meets the standards of Fed. R. Civ. P. 15(a) because, given the Court's ruling, Plaintiffs are "barred from amending [their] complaint as a matter of course or with the court's leave under the standards in Fed. R. Civ. P. 15(a)." *Lopez v. De Vito*, 824 Fed. Appx. 683, 687 (11th Cir. 2020). *Accord Jacobs v. Tempur-Pedic Int'l. Inc.*, 626 F.3d 1327, 1344-45 (11th Cir. 2010) (emphasis in original) (explaining that Rule 15(a), which governs amendments of pleadings *before* trial, "has no application *after* judgment is entered"); *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006) ("[Rule] 15(a) has no application once the district court has dismissed the complaint and entered final judgment for the defendant") (citing *Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1556 (11th Cir. 1984); and Wright, Miller & Kane, *Federal Practice and Procedure*, § 1489)). In other words, "[p]ost-judgment, the [P]laintiff[s] may seek leave to amend [only] **if [they] are granted relief under Rule 59(e) or 60(b)(6)**." *Atkins*, 470 F.3d at 1361 n.22 (emphasis added) (citing *Czeremcha*, 724 F.2d at 1556; *Ahmed v. Dragovich*, 297 F.3d 201, 207-09 (3d Cir. 2002); *Lindauer v. Rogers*, 91 F.3d 1355, 1356 (9th Cir. 1996); *Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 597 n.1 (5th Cir. 1981)).

challenges to amendments to the statute within 4 years of the filing of the original complaint, and also to add plaintiffs to the suit who were placed on the registry less than 4 years ago in order to challenge the statute on its face and as applied to them.[19] Indeed, Defendant's counsel at oral argument appeared to concede that the current John Does could narrow their complaint to address amendments passed within 4 years of their initial complaint (Att. A at 7-8) ("Now if the Court were not to agree with that argument, we are in a situation like we are in the reply where the plaintiffs argue that it is a continuing violation and we say in response well even if that were true – that is not our position it is sort of an alternative position – but even if that were true **that at best would limit them only to arguments within – claims within the last four years**") (emphasis added); *id*. at 20-21 ("THE COURT: . . . But what I think I hear you telling me is that it does not matter what the Legislature says—it could say an hour—but it is part of this statutory scheme that everyone has upheld, and even if you bring a lawsuit within four years of that amendment you are not going to prevail. MR. WEAVER: I don't know if I have ever said—I think I may have said something to the contrary. I mean, if the Legislature could literally do whatever it wants to people I think, again, **under the Statute of Limitations argument that would probably be a hard sell**") (emphasis added).

The prospect of a possible future amendment to the complaint was brought up at the oral argument by the Court and addressed by Plaintiffs' counsel. *See* Att. A at 23-24 ("So my question

[19] Plaintiffs' counsel are screening potential plaintiffs and would be prepared to amend the complaint if given leave to do so. Given the Court's dismissal with prejudice, however, they cannot do so absent the grant of relief pursuant to Rule 59(e) and/or Rule 60(b). *See Atkins v. McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006) ("[p]ost-judgment, the [P]laintiff[s] may seek leave to amend [only] if [they] are granted relief under Rule 59(e) or 60(b)(6)") (citations omitted).

is, is there any room for one final amendment with regard to a person who is directing their arguments to the 2018 Amendment or in the last four years has been required to register? Even though the law I think is fairly clear in this Circuit about the operation of these statutes. Because unless you an articulate for me what that amended complaint would look like I think it would be a futility"). The Court later observed that it understood "the argument that the amendment in 2018 raised Constitutional issues that have been identified by plaintiffs for redress" but that from the Court's perspective the "problem is that this complaint **as it is presented to me** does not limit itself to that" because it did not focus on "the harm to a particular Juvenile, a particular couple looking for housing, a particular plaintiff in this case asking for redress within the parameters of the cases that I have read given by the 11th Circuit. I appreciate your argument that those cases do not undermine your position on the continuing violation, I just don't agree with it" (Att. A at 41) (emphasis added). In response, Plaintiffs' counsel asked if the Court would consider further briefing, an option the Court said it would take "under advisement" but that if it were to ask for additional briefing "what it would be about is something I don't think you are willing to pursue," that is, "an amendment that would tailor itself to injuries within the four year period that I discussed and that FDLE has raised" (Att. A at 42). *See also id.* ("But again, this is the only avenue of continuation that I had thought—whether an amendment could bring us within a Statute of Limitations argument such that we would go forward on the merits"). Plaintiffs' counsel, while not ceding the legal issue regarding the statute of limitations, expressed interest in amending the complaint, to which the Court said: "I will take that under advisement" (Att. A at 47-48).

Plaintiffs have not staked out an intractable position against amending the complaint in light of the concerns raised by the Court; indeed, the record bears out the opposite. Plaintiffs' counsel never clearly indicated she did not wish to amend; she merely expressed confidence in her

reading of the applicable law about the statute of limitations, as she was entitled to do. *See Woldeab v. Dekalb County Board of Education*, 885 F.3d 1289, 1291 (11th Cir. 2018) ("Here, the district court abused its discretion in dismissing Woldeab's case with prejudice because he never 'clearly indicated' he did not want to amend, and because a more carefully crafted complaint might be able to state a claim. The Board argues Woldeab indicated his unwillingness to amend his complaint by failing to respond to the motion to dismiss and by failing to amend after the R&R. However, Woldeab was not required to accept the Board's argument in its motion to dismiss as true") (citing *Santiago v. Wood*, 904 F.2d 673, 676 (11th Cir. 1990) (stating that a plaintiff is not required to consider an opponent's arguments as properly stating the law)). Again, the Plaintiffs never expressed an unwillingness to amend, or agreed that an amendment would be futile. They were awaiting a ruling on the motion to dismiss and a determination by the Court on their request for further briefing or whether the Court would allow further amendment, both issues that the Court indicated it was taking under advisement.

To the extent that the Court does not disturb its ruling as to the statute of limitations, Plaintiffs submit that the Court should grant relief under Rules 59(e)/60(b), vacate the dismissal with prejudice, and allow them to seek leave to amend the complaint to bring it within the parameters set out by the Court (and even by the Defendant) during oral argument.[20] The parties have, pursuant to the unmistakable and numerous rulings by the Court that this case would not be stayed despite the pendency of the motion to dismiss, undergone extensive, time-consuming, and expensive discovery at this point, all of which would remain relevant to a future amended

[20] *See also* DE:201 at 4 n.2 ("As Plaintiffs filed this action on October 18, 2018, Defendant maintains that to the extent Plaintiffs can challenge amendments, they are limited 'to the amendments passed in 2015 or later because they last 2014 amendment became effective on October 1, 2014 (17 days beyond the limitation period)'" (citing DE:125).

complaint that allows the current John Does to narrow their challenges to amendments passed within 4 years of their initial complaint, and allows the addition of John Does registered within the last 4 years. Plaintiffs respectfully ask the Court to reconsider its dismissal with prejudice and allow them to seek leave to amend their complaint.

WHEREFORE, based on the foregoing, Plaintiffs move the Court to alter or amend its Order and Final Judgment of November 21, 2020 pursuant to Fed. R. Civ. P. 59(e), and or seek relief from that order and Final Judgment pursuant to Fed. R Civ. P. 60(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, December 21, 2020, 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.

By: *Todd G. Scher*
TODD G. SCHER

10:26

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NUMBER 18-24145-CV-KMW

JOHN Doe, **7, et al.**

Plaintiffs

vs.

Richard L. Swearingen,

Defendant

TELEPHONIC ORAL ARGUMENT 11-17-2020
BEFORE THE HONORABLE KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: VALERIE JONAS, ESQ.
TODD G. SCHER, ESQ.

FOR THE DEFENDANT: SHANE WEAVER, ESQ.
ROBERT GREGG, ESQ.

REPORTED BY: PATRICIA SANDERS, RPR
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10:30 **THE COURT: The Court calls Case No. 18-24145; Does versus Swearingen.**

Counsel, if you would please state your appearances for the record; starting first with the plaintiff.

MS. JONAS: Good morning, Your Honor, Valerie Jonas and Todd Scher for the plaintiffs.

THE COURT: Good morning.

MR. WEAVER: Good morning, Your Honor, Shane Weaver and Robert Gregg for the defendant FDLE.

THE COURT: Good morning. All right. Are there any other counsel on the line on behalf of any of the parties?

Before we begin this morning let me give counsel a few tips about virtual court. Since we are not gathered together in person and Ms. Sanders cannot see you, her job is made even more difficult, so I ask that each time you speak you identify yourself.

I would also ask that you speak slowly and clearly so that Ms. Sanders can get down everything that is said for the record.

I don't know that there is anyone else on the line, but if there is I would just remind everyone that these proceedings cannot be recorded or live streamed under various penalties.

All right. I believe that is the sum total of my public service announcements.

But slowly and clearly, speaking as loudly as you can, that is the most important and salient advice for everyone this morning.

All right. We are here today on the defendant's motion to dismiss. I will give both sides a chance to give me some argument on their position.

But before that I want to give a brief history of the case; and I have a few questions that might give the parties some direction. Then I will turn it over to you; you being the lawyers.

The initial complaint in this matter was filed in October of 2018. We are looking now -- the operative complaint is the second amended complaint; which is the third complaint filed in this case.

Originally the plaintiffs were six, maybe seven registrants on the Sex Offender Registry. These offenses were committed before even the first version of that Registration law was enacted in 1997.

So let me start with that. From my review John Doe number one is proceeding; he finished his probationary period in 1995.

John Doe 3 filed a notice of voluntary dismissal, as did John Doe 5 and John Doe 6. The older sister of John Doe 6, his next friend, is proceeding.

10:34 And the only other question is as to John Doe 7, who requested to be withdrawn without prejudice before the filing of the amended complaint.

So, is he proceeding in this action? And I direct that to counsel for the plaintiffs?

MS. JONAS: Yes, Judge, he is. I don't recall that he had ever withdrawn before.

He is certainly proceeding now.

THE COURT: Well, on August 14, 2019 apparently he requested to be withdrawn without prejudice. So it would be John Doe 1, the next friend of John Doe 6 and John Doe 7?

MS. JONAS: Correct.

THE COURT: And these plaintiffs advance various claims: An ex post facto claim, an Eight Amendment claim; both a substantive and procedural due process 14th Amendment claim, facially and as applied, and a State Constitutional right to privacy claim.

The State has answered in large part by saying that the claims are time barred because of the four-year Statute of Limitations. They cite various cases from the 11th Circuit.

And the State challenged the continuing violation doctrine, which the plaintiff has articulated, as why the claims are not time barred.

The State goes on to say even were the claims not time barred they are precluded under the existing 11th Circuit

precedence, the Edelman case saying that the Sexual Offender Act is non punitive and does not violate ex post facto.

And then the McGroarty case -- and I don't know whether I am pronouncing that correctly -- states that the Statute of Limitations of four years is applicable to prohibit matters going forward.

I think in a nutshell that is the parties' position. If I am incorrect I will give the parties an opportunity to correct my recitation.

I will turn to the defendant since it is their motion. But before I do, on page four of your reply, which is docket entry 125, you seem to state that there is an avenue to challenge the statute.

In that a plaintiff who came within the limitation period -- that being the four years related to the 2018 Amendment -- could bring a challenge with regard to the impact of that amendment.

Either you were required to register within four years -- I guess of today -- sometime between 2016 and 2020; or if you were one of these plaintiffs you could file an action only with regard to the 2018 Amendment and its alleged Constitutional impact upon you.

Am I correct in that, that is your position?

MR. WEAVER: Good morning, again, Judge.

So, yes, in a way -- but I would clarify that the part that you are reading is sort of an even if situation.

Because it is a reply -- so we took the plaintiffs' argument that was in their response and said even if that were your argument this would still be the issue.

THE COURT: I ask because it seems that the State acknowledges that there could be an amendment.

So the plaintiff posited what you clearly thought to be not in the realm of possibility -- but the plaintiff posited the idea that, okay, tomorrow there could be an amendment that says you have six hours to get somewhere to report or you have two hours.

Something that drastic or that dramatic if you were within the Statute of Limitations period you could, in fact, raise a challenge.

I am not saying it would be well taken, I am not saying you would prevail, but you could raise the challenge.

MR. WEAVER: The position we stated within our motion to dismiss -- depending on what the Court is willing to do -- there are two different takes on that.

The first is what was stated in Meggison v. Bailey, the Middle District Florida case, which was affirmed by 11th Circuit where the Court states that the responsibility to comply with the updated requirements -- meaning you are going to see statutes amended over time...

10:40 THE COURT REPORTER: I'm sorry, Judge.

10:40 THE COURT: Counsel, if you would please slow down. So you are referring to Meggison. As I see Meggison, the 11th Circuit said that the cause of action accrued at the moment FDLE required Meggison to register.

10:40 I am not exactly sure when that is, but that seemed to be when the Judges started his four-year clock.

10:41 MR. WEAVER: Yes, Judge. I was referring to the Lower Court decision -- the one that you just referenced -- the one that affirmed that.

10:41 The Lower Court decision actually has explicit language in there that requires to comply with updated requirements -- is itself -- stems from the One Time Act of being put on a Registry.

10:41 I think we cited another case for that as well -- I think out of the District of Colorado. The Court could take that position -- it is in our motion to dismiss.

10:41 That would be our main contention is that being put on the Registry on a certain date if the statute is amended later on -- it is still a part of the original alleged violation of being put on a Registry.

10:41 Now if the Court were not to agree with that argument, we are in a situation like we are in the reply where the plaintiffs argue that it is a continuing violation and we say in response well even if that were true -- that is not our

position it is sort of an alternative position -- but even if that were true that at best would still limit them only to arguments within -- claims within the last four years.

So whatever it might be it would have to be something that does not pre-date the four year window and is not just some kind of a tweak to the statute that gives life to an otherwise barred claim.

It would have to be something that, you know, would be substantially new or different or whatever the case might be.

So that would be the alternative argument we would offer to the Court if, again, it did not agree with the rationale of Meggison...

(INCOMPREHENSIBLE FOR THE RECORD)

THE COURT REPORTER: Judge.

THE COURT: Slow down, slow down.

MR. WEAVER: There the continued effect of the registration all flows from the original act of being put on it.

THE COURT: Right. You don't suggest that because of the 1997 language in the Registry that there could never be a situation where an amendment would be immune to challenge because it is just part of this legislative scheme overall.

In a Statute of a Limitations context I am not asking for the substantive argument, I am just saying in a Statute of Limitations context the point of reference for the State is the

10:44 2018 Amendment. And that is the only viable -- if there is --
10:44 avenue for a party to challenge or if in the last four years
10:44 they became subjected to the requirements of the Registry.
10:44 Again, I am not saying that they would prevail in
10:44 light of the case law. I am just trying to winnow and focus on
10:44 what the limitation period is.
10:44 MR. WEAVER: I cited the Meggison language because
10:44 that is language on this specific question -- and it was
10:45 affirmed -- candidly I think it would be a difficult position
10:45 to state that the Legislature could do literally whatever it
10:45 wants with a statute.
10:45 And that would all trace back to the 1997 original
10:45 enactment. I don't know if I would go that far. I think what
10:45 they have done is not particularly drastic or something that
10:45 would change the character of the statute so much that we are
10:45 in that situation.
10:45 I would agree that while the language for Meggison is
10:45 there, and it is affirmed, in practicality that -- you know,
10:45 depending on the situation could be problematic.
10:45 THE COURT: And that brings me to my other question --
10:45 which I don't know that necessarily is really germane to our
10:45 discussion; but it might be.
10:46 At docket entry 125 -- and maybe the reply as well --
10:46 basically the State suggests that the hypotheticals that the
10:46 plaintiff posits really are not compelling.

10:46 **And if indeed they were an issue -- closed sheriff's offices I guess is one of them -- that the plaintiffs should sue those offices where they are supposed to show up to personally report a change of residence.**

10:47 **So we have the pandemic -- which is of course why we are doing this by phone -- I was just wondering how that is working in a pandemic.**

10:47 **So, you must show up in person, in a pandemic, to an office which may or may not be understaffed or suffering from issues of personnel because of the pandemic.**

10:47 **Is it the State's position that, well, that's the problem of that individual sheriff and you would have to go and sue them.**

10:47 **MR. WEAVER: Well, it's actually a more foundational issue than that. FDLE, first of all, does not register any one.**

10:48 **Second of all, the statute itself says nothing about hours of operation or sheriff's office location; it just says register at this place.**

10:48 **So, what we have been shouting from the roof top from the start of the case is that a lot of the things that the plaintiffs are alleging about registering -- the sheriff's offices, where the offices are, how late they are open, things that police officers or sheriff's deputies are doing --**

10:48 None of that is a part of the statute. And that is not FDLE -- those are different entities -- FDLE does not supervise the registration.

10:48 You know, the police department and the sheriff's office does not check with FDLE for it.

10:48 FDLE just warehouses the information and puts it on the Registry. So that is their role when it comes to registration.

10:49 FDLE does not write policies on this is how you must manage it during the pandemic. It is not a part of the statute and it is not what FDLE does.

10:49 My understanding is that all sheriffs -- at least the ones that we are made aware of -- have altered their process in some fashion. Some of them are not requiring them to come into the building. I believe that they are temporarily doing more online registration.

10:49 THE COURT: Slow down, counsel.

10:49 MR. WEAVER: Just to go back to the statute -- the fact that the Legislature did not anticipate a once in a century pandemic does not have any bearing on whether the statute is Constitutional.

10:49 It would at most bear on if someone were arrested for a violation because of something pandemic related. Let's say they tried to register and they could not because of some limitation on hours or personnel because of the pandemic.

10:50 **Again, that would be at the local level. Either something in defense of a criminal action or -- which we hope would not be the case -- or some type of action against the sheriff's office if they were not making themselves available.**

10:50 **Again, none of that is in the statute. As far as we know the sheriff's offices are doing their best to accommodate people in these extremely unprecedented and trying times.**

10:50 **THE COURT: So your position is that FDLE does not monitor nor implement the adherence to temporary residence requirements in the statute?**

10:50 **That is a locally generated function?**

10:51 **MR. WEAVER: Is Your Honor referring to registering information -- or let's someone does not register their information and there is a law enforcement action against them?**

10:51 **THE COURT: Well, either. The 2018 Amendment, which we're now focused on, Statute of Limitations, redefined that temporary residence period from five days to three days; and you have to report in person.**

10:51 **So you are saying that does not have anything to do with FDLE? FDLE just registers you as a sex offender, and if you are carted away to a hospital because you have Covid, you cannot tell anyone where you are, you violate the registration hopefully no one would bring such a silly criminal matter to any Judge's attention, but that is just how it goes, that would be local having nothing to do with FDLE?**

10:52 **MR. WEAVER: If I could just clarify one thing. It's not that it would be a silly thing to do.**

10:52 **The Florida Supreme Court has read in a scienter requirement -- there is a mens rea -- you have to have a knowing violation.**

10:52 **THE COURT: So, for example, the Supreme Court has said if there is a hurricane and you cannot -- if all the phone lines are down and no one can get to a car or get out of an area because of construction then there is not a violation?**

10:52 **MR. WEAVER: I guess with the caveat we have to know all of the circumstances.**

10:53 **Let's say that it happened exactly like that; where someone physically and literally could not register because of an illness or an unexpected office closure or something like that then our understanding of the statute and the Giorgetti case -- which is the Florida Supreme Court case that I am referencing -- that would require a knowledge element for failing to register.**

10:53 **Not an impossibility...**

10:53 **(INCOMPREHENSIBLE FOR THE RECORD)**

10:53 **Now, there is some confusion on this issue generated by the complaint. Because it keeps referring to a strict liability situation. It uses that term over and over.**

10:53 **And what they are referring to is -- I think it is subsection 9(b), which was passed after Giorgetti.**

10:53 **The Legislature narrowed that case slightly. It says**
10:54 **that if you are arrested once for failing to register, you can**
10:54 **use the defense of not knowing that you were supposed to**
10:54 **register -- you can use that once -- but if you're registered**
10:54 **again for failing to register (sic) you can't use it twice.**
10:54 **That subsection 9(b) would not apply to a situation**
10:54 **where you could not register because of office closures, acts**
10:54 **of God, illnesses or what have you.**
10:54 **Keep in mind that the Legislature after Giorgetti --**
10:54 **they could have amended the statute -- if they really wanted to**
10:54 **get rid of the scienter requirement that the Florida Supreme**
10:54 **Court read into the statute they could have made that a pretty**
10:54 **sweeping amendment, but they did not.**
10:54 **They have one specific limitation on -- if you are**
10:54 **arrested once and you claim you did not have knowledge you are**
10:54 **then required to register, and if you are arrested again for**
10:55 **failing to register you can't claim again that I did not know.**
10:55 **So the situation that we're talking about here such as**
10:55 **a Covid related illness -- it should not come up because you**
10:55 **presume every law enforcement officer in the State is going to**
10:55 **know what the elements of an offense are.**
10:55 **I guess you can always say you can't guarantee what**
10:55 **every single law enforcement officer in the State of Florida**
10:55 **will do, but I think it is safe to assume they would follow the**
10:55 **law.**

And that they would not be arresting people for a violation -- I don't know what they would do -- arrest or drag people out of a hospital?

That would be silly I suppose.

THE COURT: I suppose that would be silly, yes, of course.

10:56 **But you are saying that FDLE does not govern -- local law enforcement, sheriff's offices, police departments, those are the centers of this activity?**

MR. WEAVER: If I may just to qualify -- because I do not want to lead Your Honor down the wrong path. As far as registering information that is not FDLE, that is only local law enforcement.

However, FDLE does have a handful -- four or five -- of investigators who handle some types of registration violations. That's obviously only a handful of people for the State of Florida.

It's not anywhere near the scope of what local law enforcement is doing. I just wanted to make sure -- I don't want the Court to think that I am saying that FDLE could never arrest anyone for failing to register because they can and they do.

Again, it is limited as compared to every sheriff's office in the State of Florida.

10:57 **THE COURT: Again, while maybe not directly on point here, but you can understand why people who are in this position, living under extremely rigid limitations, would be concerned because of a hurricane or because of Covid.**

Especially in light of the period -- the collapse of three days and a mandatory minimum kicking in -- you could see how they would be concerned.

So inasmuch as FDLE does have people that can investigate and arrest, can you assuage the concerns of the Court by saying we understand these hypotheticals and we have guidelines or some internal protocols where, no, we are not going to go to a hospital and scoop you up?

And, yes, if Miami Beach were a lake for four days, we will not come get you because you did not show up in person?

Is there any such guidance.

MR. WEAVER: There are a couple things, Your Honor. First, I do want to clarify -- the plaintiffs use three days throughout the complaint -- you have to register three days -- three days.

It is not actually three days. Three days is what establishes temporary residence. If you are at a residence that is not your permanent residence.

Let's say a resort -- you are there for three days and over the course of the year -- it does not have to be consecutive, just three days, once you meet the three days you

10:59 then have 48 hours to register. So it's actually three days
10:59 plus 48 hours.
10:59 I just want to clarify it is more than just the way it
10:59 is portrayed as just three days -- you get there and before you
10:59 know it you have to register.
10:59 You do get 48 hours more than that.
10:59 THE COURT: Yes, but the three days -- the collapsing
10:59 of time -- we have gone from two weeks to three days.
10:59 Where, you know, we did not get hit by the hurricane,
11:00 but we got a storm that flooded Brickell for three days.
11:00 You can see the concern about this window that keeps
11:00 getting shortened. That is why I asked if you have some type
11:00 of guidance or memo or something that would assuage people's
11:00 concerns.
11:00 MR. WEAVER: Well, the question would be whether the
11:00 law enforcement officer understands the elements of an offense
11:01 before he arrests someone.
11:01 There are any number of statutes that have a knowledge
11:01 requirement. There might perhaps be a rogue officer -- or maybe
11:01 someone that does not know what they are doing -- but we have
11:01 to presume that law enforcement officers do understand the
11:01 particular elements of a crime before they arrest people.
11:01 THE COURT: Right; because we provide them all kinds
11:01 of training about search and search incident to arrest.
11:01

This is a civil registration, which the case law is pretty clear on -- it is not punitive -- it is a hybrid in that the violation does lead to a criminal offense.

So one would hope, again, that there would be some training, some process, some protocol, something, as these amendments are enacted.

So that is my question, counsel, do you know of any such any training?

MR. WEAVER: We of course don't know everything they do. If a law is passed and these officers are now responsible for enforcing it -- that puts us in sort of a difficult situation -- although there is some interaction with other law enforcement departments of course.

But as far as knowing how they train their officers or what materials they produce I don't see how FDLE could -- we would not have any kind of a guidebook on that.

And that would be something that you would need to sue those entities on if they are not enforcing it properly.

There is also the question of a State Attorney who is sworn as a member of the Bar -- sworn to uphold the law -- obviously they should be reading Florida cases and Florida law and understand how it works.

So even if you had an officer -- this is hypothetical -- if you had an officer that somehow screwed up and did not realize that a person who physically could not register that

11:04 that does not constitute a violation -- even if he tried to
11:04 arrest that person then any prosecutor should understand what
11:04 the elements are -- you know, even if you have an officer that
11:04 goes rogue or whatever.
11:04 This is outside of what FDLE does.
11:04 If I could point out one thing, Your Honor, in the
11:04 complaint whenever the five days to three days change comes up,
11:04 it is in the context of the right to travel.
11:04 In the second amended complaint paragraphs 15, 32, 33,
11:04 36, 70, 97 each of those references the lowering of the five
11:04 days to three days.
11:04 When the paragraphs do that it says it affects our
11:05 ability to travel -- it makes us unsure if we should travel --
11:05 they focus pretty specifically on the five days to three days
11:05 being an element of a right to travel.
11:05 And I don't see that as being a sort of all purpose
11:05 general claim. I guess they could have alleged it that way,
11:05 but they chose to allege it in the context of the right to
11:05 travel.
11:05 THE COURT: I guess maybe I am not following -- yes,
11:05 the plaintiffs have raised this as a right to travel because if
11:06 they don't do it within the bounds of the statute then they are
11:06 going to be arrested.
11:06 So, the specter of that is what is driving this train.
11:06 I don't know how you divorce one from the other.

MR. WEAVER: The difference would be when we are talking about the right to travel -- that is under Doe v. Moore where the 11th Circuit specifically rejected a right to travel claim.

So in focusing on the right to travel then you are getting to the framework that the 11th Circuit used in Doe v. Moore where it said just because you have to register does not mean you cannot travel.

THE COURT: Right.

MR. WEAVER: It does not say you cannot pass within -- you cannot travel within a thousand feet of a school zone or enter this other state or whatever the case might be.

If you are dealing with a right to travel then you are even -- as a plaintiff -- in worse shape because that is very much squarely on point with what Doe v. Moore already said.

THE COURT: I think that is the point; the Legislature has diminished the time. I circle back to the start of this where I said hypothetically if it goes to six hours, do we have a Constitutional violation.

But what I think I hear you telling me is that it does not matter what the Legislature says -- it could say an hour -- but it is a part of this statutory scheme that everyone has upheld, and even if you bring a lawsuit within four years of that amendment you are not going to prevail.

11:09 **MR. WEAVER: I don't know if I have ever said -- I think I may have said something to the contrary. I mean, if the Legislature could literally do whatever it wants to people I think, again, under the Statute of Limitation argument that would probably be a hard sell.**

11:09 **What I'm saying is the three days -- if your only frame of reference is a statute passed in 1997 when it was the Legislature's first crack at this.**

11:09 **(INCOMPREHENSIBLE FOR THE RECORD)**

11:09 **You know, the things that were amended in the 22 years since then, it's been a gradual shift from that two weeks.**

11:09 **So where we are today, the three days, is the three days to establish temporary residence -- less than the 48 hours to actually register -- it is really not out of line with registration requirements.**

11:10 **If you run down the list of statutes -- some require you to report before you leave -- Georgia is 72 hours.**

11:10 **Idaho is two working days. Illinois is three days. Indiana is 72 hours. None of these statutes have been overturned.**

11:10 **If you run down the list of registration statutes you will see that ours is not only not out of line with what other states are doing; it is more generous or gives more days than some other states do.**

11:10 **And those have not fallen -- so if the comparison is between 1997 and today, that should not be, you know, what shapes the Court's decision.**

11:11 **And so, you know, besides the obvious fact that it would be time barred -- the question is, does three days plus 48 hours somehow take the statute out of the realm of all the other decisions on the right to travel or anything else that the Court has upheld.**

11:11 **It is still the same report information. It does not say you can't travel. You can go where ever. You have to just find the DHSMV where you are vacationing -- using that as the hypothetical -- so the temporary address you would report to the DHSMV, not a sheriff's office.**

11:11 **So, again, it is not saying you can't go or that there is some prohibition -- it just says if you are going to stay long enough to trigger the three day requirement then within the 48 hours after that just go to the DHSMV wherever you are.**

11:12 **I understand maybe it is a burden and maybe that's not how you want to spend part of your day if you are on a trip, but that is a consequence of the crime that put you on the Registry.**

11:12 **Which the 11th Circuit in Moore recognized -- that inconveniences or burdens, even, on travel do not violate the right to travel.**

11:12 **THE COURT: Okay. Let me turn to the plaintiff now. I understand your argument of the continuing violation because of the -- as you characterize it -- second generation of issues that the amended statute sets forth.**

And in several instances you discuss the fact that both the 11th Circuit and several District Court decisions do not directly address the amendment.

But the fact remains that the 11th Circuit has spoken in both McGroarty and Biddleton and the case counsel just referenced.

And they have said it is a four year Statute of Limitations, there is no continuing violation; and this is the law in the 11th Circuit.

And so despite what you may think about the statutory scheme and how it is affecting your client base, that is the law. You have not given me any distinction or argument that takes this group of plaintiffs outside of that.

So my question is, is there any room for one final amendment with regard to a person who is directing their arguments to the 2018 Amendment or in the last four years has been required to register?

Even though the law I think is fairly clear in this Circuit about the operation of these statutes.

Because unless you can articulate for me what that amended complaint would look like I think it would be a

11:15 **futility.**

11:15 **MS. JONAS: If I may just argue with respect to the law in the Circuit. McGroarty, which was issued of course after the pleading in this case, is wholly distinguishable.**

11:15 **What the 11th Circuit does is it makes a distinction between one time act and continuing violation. In McGroarty the one time act alleged was putting this out of state man on the Florida Registry.**

11:16 **The Court found that the plaintiff was not required to do anything else after that. He had no requirement to follow any Florida requirements. Therefore, he was not continuing to do anything.**

11:16 **The plaintiff took the position, as the 11th Circuit recognized in its recent opinion, that FDLE did nothing more after putting him on the Registry in 2004.**

11:16 **It expressly disavows an interpretation that would have said FDLE continues to update or maintain or republish or does anything beyond what it did in 2004.**

11:16 **That was the position of the plaintiff. The position of the plaintiff made it clear that McGroarty was dealing with a one time act.**

11:16 **The 11th Circuit recognizes the distinction between cases involving one time acts and continuing violations. Every case cited by FDLE in its pleading deals with a one time act...**

01:25 THE COURT REPORTER: Judge.

01:25 THE COURT: Yes, your voice is going in and out, and you are breaking up. So if you would please slow down and try to speak directly into the phone.

11:17 As to the one time act -- the one time act was being required to be put on the Registry. The amendments have come over the years, and your clients have not challenged them even though they were subjected to them.

11:17 And the case law is clear as to the Statute of Limitations. You are apples and oranges on the continuing violation.

11:17 You have shown me no cases in this Circuit which would allow John Doe 1, next of friend to John Doe and John Doe 7 to do anything except, again, address the 2018 Amendment.

11:18 MS. JONAS: I have actually pointed to two cases in this Circuit, Your Honor, that have applied the continuing violations doctrine with respect to laws that were passed before the four year Statute of Limitations.

11:18 One was done in the Southern District of Florida, Does versus Miami Dade County, in which the County said that the County's residence restriction which was passed in 2005 and then I think amended in 2010 -- that the plaintiffs were allowed to challenge not withstanding the fact that they were outside of the four year limit because it continued to have effects on them.

11:18 **THE COURT: You don't think that the decision in Doe**
11:19 **is in any way affected by McGroarty? You think that is just a**
11:19 **one off?**
11:19 **And also in Doe they remanded back, and John Doe 1 and**
11:19 **2 withdrew. And ultimately Judge Huck ruled against all of the**
11:19 **parties in that case.**
11:19 **So, I am confused as to how, again, the disposition as**
11:19 **to a Dade County ordinance is somehow dispositive of the**
11:19 **Florida Sex Registry law which has been reviewed multiple times**
11:20 **by the 11th Circuit on multiple theories, multiple arguments**
11:20 **and in each instance the 11th says we uphold.**
11:20 **MS. JONAS: Well if Your Honor is talking about the**
11:20 **Statute of Limitations issue I would point to another District**
11:20 **Court case from 2015, John Doe 1 versus Marshall.**
11:20 **And it held that any speech restriction in the**
11:20 **ordinance -- which was the requirement to put sex offender on**
11:20 **your driver's license -- that was actually considered to be**
11:20 **compelled speech under the 1st Amendment.**
11:20 **Was a continuing violation and was not tied to the**
11:20 **date of that amendment.**
11:20 **THE COURT: Okay.**
11:20 **MS. JONAS: So those are two cases within the District,**
11:20 **and only one deals with the registration statute, and that is**
11:21 **the case out of Alabama.**

11:21 But what's interesting about the case in Alabama -- John Doe 1 versus Marshall issued from the Northern District of Alabama exactly one month after they issued Smeltzer versus Attorney General of Alabama.

And that was a claim against the Registration Statute which was dismissed based on Meggison -- Smeltzer -- but then it was one month later that the Court issued Doe versus Marshall.

And it construed Smeltzer as making a challenge to registration ab initio; which is what happened in Meggison. That was a one time act case.

The complaint in Meggison is not that he has to comply with the registration requirement, but that he should never have been designated as a sex offender to begin with because it breached it plea agreement.

That was a one time act -- the unlawful requirement to register -- given the plea agreement. And McGroarty is clearly a one time act.

Because all the plaintiff challenged was the initial posting of McGroarty's name on Florida's Registry.

There was one case FDLE mentioned out of Colorado; that was in Rose versus Sloan; which is cited. But Colorado -- the 10th Circuit unlike the 11th Circuit does not apply continuing violation doctrine to Constitutional claims; and the 11th Circuit does.

11:22 **Every single case that FDLE has cited has been a one time act case. And in Gonzalez versus Swearingen -- that claim there was that he was illegally classified as a sex offender from the beginning.**

11:22 **And that is a very different case, Your Honor. We are not challenging our initial classification as sex offenders; we are challenging our lifetime exposure to severe penal sanctions for innocent, harmless conduct that has been prohibited by the statute.**

11:23 **Now we have three days -- and I don't think that FDLE would say that reducing it to two days represents any kind of a violation -- or even to one day.**

11:23 **And one thing, Your Honor, I would like to say just to correct something that FDLE said about the other State statutes -- either in terms of the amount of time they are allowed for a temporary residence or the amount of time they are allowed to update.**

11:23 **And Alaska is the worst; you have the next working day. In Arizona, 72 hours, but that includes the concept of business days.**

11:24 **Arkansas, three business days. California, five business days. Colorado, five business days. Connecticut, three days without weekends and holidays.**

11:24 **Three business days for Delaware. Florida is 48 hours. Georgia is 72 hours.**

11:24 **Hawaii is three business days. Idaho, two working days...**

11:24 **THE COURT: And I need to know all of this because?**

11:24 **MS. JONAS: Your Honor, FDLE misrepresented the comparative nature of Florida's restrictions.**

11:24 **In fact, there are only one or two of these that have hours in them. One of those is on review in front of a Circuit Court. And every other one is in terms of business days -- including the Federal SORNA which gives you three business days. And that makes sense.**

11:25 **In fact if you look at the Florida Statute...**

11:25 **(INCOMPREHENSIBLE FOR THE RECORD)**

11:25 **The sheriff's themselves are given two working days to provide by e-mail information to FDLE.**

11:25 **In the same statute that says 48 hours. So the 48 hours -- although counsel would say it has been in the statute forever -- 48 hours becomes more and more and more difficult the more and more occasions you have for reporting.**

11:25 **And just about every year since the statute has passed the number of occasions for in person 48 hours reporting has exploded.**

11:25 **THE COURT: I understand that, counsel, I really do. What I don't understand is your argument because I don't see the case that allows me to look at this as a totality of the circumstances situation; or as you say a second generation**

11:26 continuing violation. I do not see the case that allows me to do that. I don't think that Meggison is as limited as you state.

I think the 11th Circuit had the opportunity to review the scheme and said this is the ongoing requirement -- I don't know what that was.

(SIMULTANEOUSLY SPEAKING).

THE COURT: No, no, do not interrupt me while I am speaking.

Really, this is difficult enough.

MS. JONAS: I apologize.

THE COURT: The language that talks about the fact that there's -- every time someone feels one of the effects of requirements, new or old, does not give rise to a cause of action.

And I know you disagree, but what is your best case for the proposition that you are advancing that the plaintiffs here before this Court can proceed on a continuing violation theory?

MS. JONAS: Well, Lovett versus Ray from the 11th Circuit expressly recognizes the continuing violation doctrine.

THE COURT: Is that in a Sex Offender Registry context?

MS. JONAS: No. The only ones the Court has ruled on in this Circuit has to do with the one time act of posting

11:27 **McGroarty's name on the Florida Registry with an expressed**
11:28 **disavowal of any other act by him or by the State.**
11:28 **And Meggison -- I know that I have a different reading**
11:28 **than Your Honor does. The cases that are good would involve I**
11:28 **believe the Does versus Miami Dade County.**
11:28 **Although as Your Honor said, that is about an**
11:28 **ordinance, but the principle is exactly the same. A law was**
11:28 **passed more than four years before the claims were brought.**
11:28 **But the Court expressly found it was a continuing violation.**
11:28 **And also Doe 1 versus Marshall out of the Northern**
11:28 **District of Alabama.**
11:28 **In addition, plaintiffs cite a number of positive**
11:28 **cases that involve exactly this situation; in addition to**
11:28 **Marshall.**
11:28 **And those, Your Honor, are the National Association**
11:28 **for Rational Sex Offense Laws from the Middle District of North**
11:28 **Carolina.**
11:29 **Two cases in the Middle District of Tennessee; one**
11:29 **from the Eastern District of Tennessee -- one from the Western**
11:29 **District of Michigan -- and another from the Eastern District**
11:29 **of New York.**
11:29 **In which the continuing violation doctrine was applied**
11:29 **to extend the Statute of Limitations for exactly the kind of**
11:29 **impacts we are talking about here.**

11:29 With that, Your Honor, I wanted to move on to another issue. I don't know that I have anything else to say about the Statute of Limitations other than what is contained within the pleadings.

11:29 I don't know if you wanted me to address the points made by FDLE or go in the order of issues.

11:30 THE COURT: Well, I did not intend for this to be much longer than the time we have spent already.

11:30 MS. JONAS: If I could briefly address some of the things that were stated by FDLE.

11:30 THE COURT: Sure.

11:30 MS. JONAS: For example, FDLE claims that it has no responsibility for the sheriff's office. I wanted to direct the Court's attention to section 14(c) of the Registry Statute that says the following:

11:30 "The sheriff's office may determine appropriate terms and dates for reporting by the sexual offender."

11:30 And FDLE is very aware of all of the schedules that the sheriff's offices post; and the posted schedules are not weekends and evenings.

11:30 Also FDLE has represented today that it does not provide any guidelines to the sheriffs or the local law enforcement officers about how to interpret things like impossibility or inability.

11:31 **FDLE does produce a large set of guidelines for local law enforcement officers. The last one came out in 2019; and it says nothing at all about the issues.**

11:31 **There are, however, people within FDLE who do training on implementation of the Registration Statute. And they do not train on issues of intent or impossibility.**

11:31 **That has been established. All agree that it is up to the individual sheriff's office to determine whether or not to arrest someone under circumstances such as the ones you have referenced -- about pandemic or a hurricane or a flood.**

11:32 **Every law enforcement agency has its own discretion without any guidance or guidelines from FDLE; although it does give guidelines and guidance in other areas.**

11:32 **And indeed, Your Honor, requests that are made to FDLE by registrants and their families about, you know, what to do in the event of this impossibility or what to do in the event of this difficulty -- or, you know, what to do if you are incapacitated...**

11:32 **THE COURT: Again, you have to slow down.**

11:32 **MS. JONAS: My apologies, Your Honor.**

11:32 **And their advice is retain counsel or ask the local sheriff. What they say is that the local sheriff has the discretion to determine whether somebody has personal incapacity or any other kind of difficulty in meeting a 48 hour deadline.**

11:32 **There are no cases in Florida which suggest that impossibility is a defense; not one.**

11:32 **The Florida Supreme Court case dealt only with whether or not there was a notice requirement in the statute and found that, yes, there is a requirement of actual notice.**

11:33 **At which point the Florida Legislature amended the statute (INDISCERNIBLE) to provide that, well, if you get arrested once that is all the notice you are entitled to for the rest of your life on the statute.**

11:33 **You will never be able to bring up lack of notice or lack of knowledge if you have ever been arrested one time no matter how many amendments or how complicated they may be. So, that has been established.**

11:33 **And there is no guidance whatsoever with respect to mens rea or intent.**

11:34 **As to Your Honor's example of the hospital -- I would hope as well that a police officer would not be so silly as to arrest a client for being in a hospital and not being able to report it.**

11:34 **However it strikes me -- and my client -- as an ever present possibility because there is nothing in the statute that forbids it; nothing.**

11:34 **THE COURT: Right. But we are talking about the 2018 Amendment. We are talking about a vagueness as to the 2018 Amendment.**

11:34 Which, again, would take us within the four year Statute of Limitations. But that is not what I understand your complaint to be about.

MS. JONAS: Are you asking about the vagueness? Is that what Your Honor is asking?

THE COURT: No. I am asking about a limited focus of your argument. If your argument is that there is a vagueness because of the situations we've talked about, and the failure to have any guidelines, and perhaps some evidence from past amendments that shows the difficulty with individual offices trying to implement them.

Again, it is tied to the 2018 Amendment. I am still not at one with your continuing violation argument.

MS. JONAS: I understand that. I believe that our vagueness challenge or our right to travel challenge -- and certainly the right to travel challenge is much stronger since the 2018 Amendment.

Certain issues like the 48 hours and days. And the biggest problem in terms of even facial vagueness -- and this is something that becomes a problem for the individual only as these number of events to report increases and only as the amount of time away decreases.

The biggest problem with the statute in terms of vagueness is -- before we get to vagueness as applied -- is use of 48 hours to report events; especially those that are defined

11:36 by day or temporary residence or...

(INCOMPREHENSIBLE FOR THE RECORD)

THE COURT REPORTER: Counsel, please slow down.

... because we don't know when the 48 hours begins or ends. Counsel says, for example, well, you don't have to report a three day visit until after the third day.

Well, when after the third day? What time does that start? Does it start on the third day beginning with the first hour that I get there?

And by the way, the people who do enforce the statute at FDLE disagree among themselves and with Mr. Swearingen on the meaning of terms such as what is 48 hours, what is within 48 hours before, what is within 48 hours after?

If Your Honor looks at docket entry 193, pages five through six, you will see that it is a mutually inconsistent definition to these term -- and leave it up to law enforcement officers to define it as they might.

THE COURT: Wasn't this a problem when it was 14 days or five days?

MS. JONAS: Not as much -- I will tell you why.

THE COURT: Not as much. But, again, those were decades ago, those amendments. They can't be swept up into an argument about a 2018 Amendment unless you are saying they have been having this issue all along, this is evidence that they still don't understand how to enforce this amendment, which is

11:38 problematic because of events and also the mandatory minimum. But that is not the argument or the allegations I've got here. That seems to be another lawsuit, but not the one I have.

MS. JONAS: What would be another lawsuit -- the vagueness one, for example?

THE COURT: Well, the one tied to the 2018 Amendment.

MS. JONAS: Your Honor, I would just say that we have other allegations there that can't simply be cut short -- I don't think -- by Statute of Limitations problems.

For example, if a statute is vague, if it is facially vague or vague as applied, I don't know how the fact that, well, that language was used in 1998 cuts it off forever from analysis for vagueness given the procedural due process and given the importance of this particular statute.

THE COURT: Is there somebody within the lawsuit within the past four years that has been required to conform to the statute and is raising this argument?

MS. JONAS: Yes. That would be John Doe 1 and 7.

THE COURT: John Doe 1, his probation ended in '95, he has been subjected to this statute for decades.

I am asking in the last four years.

MS. JONAS: Both John Doe 1 and 7 -- if you review the pleadings on the motion to extend anonymity -- have themselves come up against the problem of the meaning of 48 hours in connection with events that happened to them within the last

four years. But they did not know what it means. FDLE acknowledges that -- well, I don't see how it could fail to acknowledge it -- its own witnesses disagree on what 48 hours means; whether it is two business days or whether it is 48 consecutive hours. They disagree.

So my client does not know whether -- two of my clients, Does 1 and 7, do not know whether they violated the Registration Statute given the 48 hour requirement.

THE COURT: Wasn't the 48 hour requirement part of the statute back in '97?

MS. JONAS: I don't know if it was 1997 -- certainly it would have been by '98.

THE COURT: Okay.

MS. JONAS: So fourteen days -- under Doe versus Moore in 2005, which was looking at the 2004 statute, people would say fine, I am going for 13 days.

But when you are talking now about three days then they really can't say that. They just don't go because of the 48 hours and because of the three days.

For example, if you go some place for only three days, you only want a long weekend -- counsel says, well, it's not so bad because you have 48 hours within which to report -- but not if you are driving back.

Why should you have to report a place that you are leaving on the third day? It does not make any sense.

11:42 **If the statute is fundamentally vague -- and vagueness except for First Amendment context -- is analyzed as applied.**

11:43 **So, it would seem given the as applied analysis of the vagueness challenge outside of the First Amendment context that it would necessarily involve applications to a person in the present.**

11:43 **THE COURT: All right. I am going to give you five more minutes and then turn to the State and then we are going to wrap this up.**

11:43 **MS. JONAS: One other thing I wanted to say. Counsel was bemoaning the fact that if a cop makes an arrest it would be rectified perhaps by the State Attorney.**

11:43 **I just wanted to point out to Your Honor that arrest alone is enough to render you ineligible for the rest of your life from relief from the Registry.**

11:43 **I would like to point out -- in response to something else that FDLE said, is that the three day requirement has been raised not just in the context of right to travel.**

11:44 **It is raised as one of the burdens under ex post facto analysis. Because it is more onerous than when it was fourteen days. So it is consistently analyzed in terms of the impact, and it is analyzed in terms of substantive due process.**

11:44 **And, Your Honor, I would like to briefly address the ex post facto issue.**

11:44 **THE COURT: If you can do it in your remaining four minutes.**

11:44 **MS. JONAS: I think I can. FDLE has insisted that this Court ignore empirical evidence regarding risks and inefficacy because the 11th has upheld restrictions in the absence of any such evidence.**

11:44 **The law is organic, it progresses, it changes. It overturns so called binding precedent on the basis of empirical evidence or facts on the ground.**

11:44 **For example, death penalty law. You cannot execute juveniles due to neurological and neuro-science advances. You can't execute people with cognitive deficit...**

11:45 **THE COURT: Slow down.**

11:45 **MS. JONAS: There is one other case I would like to point out which I think really does control disposition of the case on dismissal motion.**

11:45 **Just recently -- I'm sorry, in 2017 -- in Does versus Miami Dade County. The 11th Circuit vacated a dismissal where the registrant had alleged below that -- with reference to a housing ban -- that empirically it was subverting the purposes of the law because residential proximity was not a factor in the events; and that making people homeless subverted the law's stated goals.**

11:46 **So this is the only ex post facto case about the statute in this Circuit which deals with the empirical evidence**

and which is as applied. It distinguishes this case from every other ex post facto case that the Circuit has decided.

And FDLE's position that this Court is not allowed to consider empirical evidence in the context of an ex post facto challenge or any of these other changes is simply wrong.

And it ignores the fact that the law has to change when the facts change -- such as they have with respect to scientific knowledge from the defense -- and such as they have given the numerous amendments to the statute.

That is all I have. Thank you

THE COURT: Well, I started this discussion today, and I will end this discussion today, by saying that I understand the argument that the amendment in 2018 raised Constitutional issues that have been identified by plaintiffs for redress.

The problem is that this complaint as it is presented to me does not limit itself to that. And because it broadly sweeps generationally since 1997 I cannot focus -- as I think the Courts you mentioned were -- upon the harm to a particular Juvenile, a particular couple looking for housing, a particular plaintiff in this case asking for redress within the parameters of the cases that I have read given by the 11th Circuit.

I appreciate your argument that those cases do not undermine your position on the continuing violation, I just just don't agree with it.

11:49 **MS. JONAS: Would the Court consider the possibility of additional opportunity to just brief that issue?**

11:49 **THE COURT: I will take that under advisement. If I were to ask for any additional briefing, what it would be about is something I don't think you are willing to pursue.**

11:50 **And I understand that in light of your position, but that would be an amendment that would tailor itself to injuries within the four year period that I discussed and that FDLE has raised.**

11:50 **Since that is not consonant with your argument, I can see where that would not be something you wish to pursue.**

11:50 **But, again, that is the only avenue of continuation that I had thought -- whether or not an amendment could bring us within a Statutes of Limitation argument such that we would go forward to the merits.**

11:51 **Which understandably both sides have already said -- FDLE -- would not be availing. And as you have described as encompassing so much more than the amendment.**

11:51 **All right. Let me turn back to FDLE's lawyer for any final brief remarks.**

11:51 **MR. WEAVER: Thank you, Your Honor. I just wanted to point out a few things on the continuing violation doctrine, and then we'll move on.**

11:51 **The Does versus Miami Dade case -- if Your Honor will notice in the case for some reason the Judge reached outside of**

11:52 the 11th Circuit despite all of the Circuit's precedent on what
11:52 the continuing violation means and how it applies.
11:52 If the Court went and found a Sixth Circuit Court case
11:52 to support the continuing violation -- and the Sixth Circuit
11:52 Court definitely has a broader application of the continuing
11:52 violation doctrine; it is not even the same standard that we
11:52 use. They use it for many things; whereas the 11th Circuit it
11:52 is limited.
11:52 The continuing violation doctrine is not just a free
11:52 pass or a rain check to bring a claim whenever you want -- ten
11:52 years or 20 years after the fact -- simply because you believe
11:52 a violation is continuing.
11:52 The fundamental nature of it is that it is an
11:52 equitable doctrine meant to basically save people who might
11:52 have been time barred but may not have realized the elements of
11:52 their claim.
11:52 If you look at the McGroarty decision -- it is right
11:53 there in the middle -- sort of the hallmark is it does not
11:53 apply to anyone who knew or should have known that their cause
11:53 of action existed.
11:53 So I am not even sure how there would be a discussion
11:53 on this when plaintiffs couldn't pass that first step given it
11:53 has been -- they have been registering for decades.
11:53 You know, the idea that because they still have to
11:53 register makes it a continuing violation -- what that means is

11:53 that any one time action that has an effect in the future would
11:54 automatically be a continuing violation.
11:54 The only thing that would be considered under their
11:54 interpretation would be if I take a one time action that has an
11:54 effect then and there -- because otherwise if it says this is
11:54 going to be in effect for five years or ten years then they are
11:54 going to claim it is a continuing violation; which is not how
11:54 the doctrine works.
11:54 There are a couple other things if I might. I will
11:54 point out -- I am sure the Court is aware of their motion to
11:54 dismiss -- there is a long passage in the plaintiffs' response
11:54 where they are pulling in affidavits and evidence and other
11:54 things they have gathered from other parts of the case which is
11:54 not appropriate for this motion.
11:54 It is not appropriate to cite evidence and records
11:54 and introduce things -- testifying yourself as counsel on a
11:55 motion to dismiss.
11:55 THE COURT: Slow down.
11:55 MR. WEAVER: Also, plaintiffs' counsel says there is no
11:55 guidance -- we cited no guidance on whether there is an actual
11:55 mens rea requirement in the statute -- that is incorrect.
01:38 I mean, besides Giorgetti -- which is a Florida
11:55 Supreme Court case -- we cited six more cases reciting that
11:55 same point, including one out of this Court where they all say
11:55 that the Registration Statute has a mens rea requirement.

11:55 That is on page 10 and 11 of the motion to dismiss.

11:55 THE COURT: You are going to have to slow down. My court reporter needs to be able to take down what you are saying.

11:55 MR. WEAVER: I'm sorry -- I'm sorry.

11:57 THE COURT: All right. I take your meaning in not delving into these factual matters on the motion to dismiss.

11:58 MR. WEAVER: Just a last note if I might.

11:58 THE COURT: All right.

11:58 MR. WEAVER: As to the vagueness -- there is nothing special about a vagueness challenge where it gets an extended Statute of Limitations.

11:58 I mean, if you do not understand what 48 hours means -- which seems impossible to imagine -- if you literally do not understand what 48 hours means that is something you would have known when that law went into effect.

01:40 That means within four years you would have had to have brought your claim. As far as vagueness itself -- the terms that we are talking about are things the Court can determine.

11:58 I mean how you determine -- what is the three days what is 48 hours -- these are not things that are beyond the Court's ability to define if -- it is a big if -- if it is true the statute itself does not make it clear.

11:59 **The plain language is what the Court looks at first. If the Court were to agree that there is something confusing about 48 hours then the Court itself -- I mean, vagueness is determined -- or can be avoided simply by giving words their plain meaning as used in the common way or under the law if it were true -- if it was somehow vague.**

11:59 **To have sort of a -- a plaintiff come to court and throw up their hands and just say, well, I don't know what this means -- I mean, even if you had no plaintiff who understood what it means that would not make it vague.**

01:42 **Even if -- and this is completely hypothetical -- but even if you had every law enforcement officer in the State of Florida who did not know what it means -- if we are talking about a simple word or phrase that the Court can determine it would not matter because the Court is required to preserve a statute whenever possible.**

01:43 **Because striking something for vagueness is sort of a last resort. So all the Court needs to do is look at what the words mean and what they mean under the law.**

12:00 **So, it is not a legitimate vagueness challenge. Those claims should all be time barred. And if that is what we are talking about briefing -- I don't even think there is a point for doing that quite frankly.**

12:01 **So I don't think there is need for briefing or need for an amendment.**

12:01 **I think Your Honor was correct in saying these claims are time barred and if they are not time barred they are governed by...**

12:01 **(INCOMPREHENSIBLE FOR THE RECORD)**

12:01 **Thank you.**

12:01 **THE COURT: All right.**

12:01 **MS. JONAS: If I could address the last point about futility of the amendment.**

12:01 **THE COURT: I have another hearing that I need to prepare for; so if you can address it in three minutes.**

12:01 **MS. JONAS: If I were allowed to amend the complaint on the vagueness issue I would allege that the people presently at FDLE do not agree -- today at present -- do not agree about what this means.**

12:02 **And law enforcement officers on the local level are interpreting it differently from one another, and no one is giving any sort of notice to the registrants as to what their own interpretations are -- until they are arrested.**

01:47 **As discovery has progressed we have learned a lot about the way in which the vagueness problem functions today at every level of Government.**

12:02 **We would be prepared to at least amend that claim to allege present instances throughout the State of people not understanding what these terms mean.**

12:02 So, I think that would be important and it would explain to the Court how the vagueness is -- how the vagueness as applied to the plaintiffs today is within the Statute of Limitations.

12:03 If you look again at docket entry 193, pages five through six, you will see the profound level of disagreement among FDLE -- their highest ranking officers -- about what the phrases mean today.

12:03 And the unbridled discretion given to all local law enforcement officers to enforce them and interpret them the way they want. That goes to the heart of the vagueness problem, Your Honor.

12:03 It leaves us open to completely arbitrary action by law enforcement because each agent has the right to interpret it the way they wish without any guidance from FDLE.

12:04 So, Your Honor, I would like to amend the complaint at least on that issue.

12:04 THE COURT: All right. I will take that under advisement.

12:04 MS. JONAS: Thank you, Your Honor.

12:04 THE COURT: I would like to thank the parties for their presentations today. It is a difficult task for all obviously to have these arguments by phone.

12:04 But this is our "new normal" for the time being.

12:04

So, this has become my unofficial mantra. "Everyone please stay safe, practice social distancing, wear your masks. Try to enjoy the holidays as much as you can.

And we are adjourned.

- - -

C E R T I F I C A T E.

- - -

This proceeding occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of reporting remotely.

/S/PATRICIA SANDERS

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DATE FILED **PATRICIA SANDERS, RPR**

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