No. 21-10644-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE, et al.,

Appellants,

v.

RICHARD SWEARINGEN,

Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

INITIAL BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Doe v. Swearingen
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Appellants file this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

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Doe 1, John	Appellant (Plaintiff below)
Doe 7, John	Appellant (Plaintiff below)
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Swearingen, Richard	Appellee (Defendant below)
Torres, Hon. Edwin	United States Magistrate Judge
Weaver, Shane	Attorney for Appellee
Williams, Hon. Kathleen	United States District Judge

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 11th Cir. R. 34-2, Appellants respectfully request oral argument in this case. The issues herein are complex, and furthermore, one of the arguments in this case presents a conflict among the district circuits whether the continuing violation doctrine applies to restrictions and requirements in sex offender registration statutes that have undergone decades of amendments.

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STATEMENT OF JURISDICTION

This is an appeal in a civil action brought by Appellants, Jane Doe (Next Friend to John Doe 6), John Doe 1, and John Doe 7 pursuant to a 42 U.S.C. §1983 via a complaint filed on October 8, 2018, in the United States District Court for the Southern District of Florida. DE:1. The complaint was amended twice, with the Second Amended Complaint, raising federal and state constitutional violations, being the operative complaint considered by the district court. DE:102. The district court entered its order granting Appellee's motion to dismiss on November 23, 2020, doing so with prejudice. DE:201. The district court entered final judgment on that same date. DE:202. On December 21, 2020, Appellants filed a timely motion to alter or amend the judgement pursuant to Fed. R. Civ. P. 59(e). DE:203. The motion to alter or amend was denied on February 1, 2021. DE:212. A timely notice of appeal was filed. DE:213.

This Court has jurisdiction over Appellant's appeal pursuant to 28 U.S.C. §1291.

This appeal is from a final order or judgment that disposes of all the claims presented to the district court.

STATEMENT OF THE ISSUES

Whether the district court erred in refusing to apply the continuing violation doctrine to plaintiffs' claims against the cumulative effects of 21 years' worth of

increasingly restrictive and mutually-aggravating amendments to FSORNA 2018, where they alleged enactment and enforcement during the limitations period of an amendment that is particularly onerous in context with earlier amendments, and where their claims were not based on the original requirement to register or any other single discrete act?

Whether the district court erred in dismissing the federal and state constitutional claims in plaintiffs' Second Amended Complaint with prejudice, without granting leave to amend with the proposed Third Amended Complaint?

COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

Introduction

This appeal arises from the district court's dismissal with prejudice of plaintiffs' as-applied and facial constitutional challenges to Florida's 2018 Sex Offender Registration Act (hereinafter "FSORNA 2018"), §943.0435 (2018) as set forth in their Second Amended Complaint. DE:102. Plaintiffs, whose offenses were committed before the statute's original version was enacted in 1997, are all registered pursuant to the act.[1] They sought declaratory and injunctive relief, not

[1] Due to well-documented harassment, ostracism and vigilantism against registrants and their families, the plaintiffs have been permitted to proceed anonymously. DE:9, 13, 22, 25, 41, 44, 46, 52, 119, 168, 178, 193. In dismissing the case, the district court ruled that the anonymity order "shall remain in place" unless otherwise ordered. DE:202 at 1.

monetary damages. The district court acknowledged that (1) plaintiffs were not challenging the act as first enacted but rather cumulative effects from "'decades of amendments [that] markedly changed the Florida Sex Offender Statute,'" that (2) "the Eleventh Circuit has not addressed the[se] numerous amendments," and that (3) numerous cases issued while this case was pending "highlight the evolving nature of the issues in this case and various courts' reconsideration of issues previously foreclosed by precedent." DE:201 at 3, n.1; 7-8, n.8. Nevertheless, the district court refused to apply the continuing violation doctrine, dismissing both the federal and state constitutional challenges in the Second Amended Complaint as time-barred because plaintiffs had not filed it "long ago," DE:201 at 3, presumably within the limitations period after the statute's original enactment in 1997.

Plaintiffs' original complaint was filed four months after enactment of the 2018 amendments to the statute. DE:1. That complaint made allegations and claims specific to those amendments, in the context of the statute as a whole. DE:48.[2] After dismissal of the Second Amended Complaint with prejudice, plaintiffs submitted a Third Amended Complaint that sought to address the district court's concerns by restricting plaintiffs' allegations and claims to the 2018 amendments only, and by

[2]The two amended complaints added plaintiffs after former plaintiffs were voluntarily dismissed but otherwise remained substantially the same. John Doe 1 was an original plaintiff, DE:1, John Does 6 and 7 and Jane Doe were plaintiffs in the First Amended Complaint. DE:50.

adding a plaintiff first registered within the limitations period who would not be time-barred from making the older Does' other allegations and claims. DE:211-1. Although the parties had nearly completed discovery on the Second Amended Complaint, pursuant to the Court's Scheduling Orders, DE:203 at 8-10, and virtually all that discovery is applicable to the Third Amended Complaint, DE:211-1, the district court denied plaintiffs' request for leave to file it, on the self-evidently erroneous basis that they had not previously made allegations specific to the 2018 amendments, suggesting instead that they "do so in a new action." DE:212 at 2.

Plaintiffs' Second Amended Complaint

Plaintiffs are not claiming that the statute enacted in 1997 was unconstitutional or that they should not have been designated sex offenders, or that requiring them to register as such violated their rights. Plaintiffs have challenged, facially and as-applied to them, the statute enacted in 2018, comprising not only the amendments enacted in 2018 but also the cumulative impacts of 21 years' worth of other amendments. In describing FSORNA 2018, plaintiffs extensively compared it with the 1997 version, which they describe as a "useful police tool," DE:102 at ¶18, to showcase the extreme weight of the law's present burdens compared with the relatively trivial restrictions of the original.

The cumulative effects of FSORNA 2018 are not merely the sum of each amendment's impacts. Each new amendment aggravates the impacts of earlier

amendments. For example, a registrant in 1997 was required to make no more than a single in-person report: upon initial registration. Although he was required to report in person a change in permanent residence or the establishment of a temporary residence, the original statute defined "temporary residence" to mean **14 consecutive days from home with exemptions from reporting for vacation, emergency and other special circumstances**.[3] Subsequent amendments successively shortened intervals of non-reportable travel by redefining "temporary residence" to consist of fewer and fewer days.[4] Under FSORNA 2018, plaintiffs now may not leave home without making multiple in-person reports for more than **3 days in the aggregate per year with no exemptions**.[5] Worse yet, instead of having to report only to the DHSMV, plaintiffs must now make in-person reports of travel to **two different agencies within the same 48-hour interval** after return from travel: first to the DHSMV, then, if "unable to secure or update" a driver's license to reflect the temporary residence just vacated, to the sheriff with proof of the DHSMV

[3] §943.0435(2), (3) (1997).

[4] "Temporary residence" was redefined from 14 consecutive days with express exemptions, to 14 days in the aggregate a year or 4 days in the aggregate a month without express exemptions, §§943.0435(1)(c) & 775.21(2)(g) (1998); to 5 days in the aggregate per year without express exemption, §§943.0435(9)(c) & 775.21(2)(g) (2006); to 5 days in the aggregate per year expressly precluding exemption, §§943.0435(1)(c) & 775.21(2)(1) (2010).

[5] §§943.0435(1)(f); 775.21(2)(n) (2018).

attempt, both within 48 hours.[6] For out-of-state travel, the registrant must make these reports both before he leaves and after he returns.[7] As a result, a registrant must make one or two in-person reports of a 3-day in-state trip, and between three and four in-person reports of a 3-day out-of-state trip.

The impact of increasing the number of required travel-related in-person reports is aggravated by the increase in other in-person registration requirements, from one in total in 1997 to two per year for all registrants[8], to four per year for certain registrants, including John Does 6 and 7.[9] If an upcoming 3-day trip is known at the time of re-registration, it must be reported then as well.[10] The impact of increasing the number of required re-registration and travel-related in-person reports is aggravated by the steady increase in the amount of identifying information required to be disclosed in person within 48 hours and again at re-registration. DE:102 at ¶¶ 23-24. And the impact of having to make multiple in-person reports per year is aggravated by extending registration duration, from lifetime with

[6] §943.0435(4)(a) (2014).

[7] §§943.0435(4)(a), s & 775.21(2)(n)(2014); 943.0435(7)(a) (2018).

[8] §943.0435(1)(c), (3) (2005).

[9] §§943.0435(14)(a) (2005); 943.0435(14)(a), (b) (2007).

[10] §943.0435(2)(a)2.

eligibility for removal 20 years after release from prison[11], to lifetime with eligibility for removal 25 years after release from probation, and then only upon meeting stringent conditions, and only for some registrants.[12] Many registrants, such as John Does 6 and 7, are now permanently ineligible for removal. DE:102.

In addition, plaintiffs alleged that terms and phrases used in the travel-related reporting requirements are inherently vague: plaintiffs cannot be certain what they mean. DE:102 at ¶¶ 38-46. The multiplication of required travel-related in-person reports aggravates the vagueness problem: the more required reports, the more likely the prospect of inadvertent violation. The problem of vagueness is also aggravated by the elimination of *mens rea* for all but a first violation of the reporting requirements,[13] and by the minimum-mandatory punishment provision.[14]

The result of all these amendments cumulatively is that, under FSORNA 2018, plaintiffs cannot leave home for 3 days or more without having to make multiple in-person reports within 48-hour intervals, along with multiple in-person re-registration and identifying information reports, with virtually strict liability and a minimum-mandatory penalty in the event that any one of these reports is even one

[11] §943.0435(11) (1998).

[12] §943.0435(11)(a)1.(a-i), (a)3.

[13] §943.0435(9)(a). (2004).

[14] §943.0435(9)(b)1., 2., 3. (2018).

hour late, for the rest of their lives. Significantly, nowhere in the legislative history of any of these amendments is there any empirical basis to believe that they will reduce a registrant's risk of sexual reoffense or otherwise protect the public from sexual harm. DE:102 at ¶ 19 n.6.

The gravamen of plaintiffs' Second Amended Complaint is that the 2018 statute, with its staggering aggregation of 21 years' worth of mutually-exacerbating requirements and restrictions, is constitutionally unreasonable as applied to them. They had committed their offenses decades earlier and had never since been arrested or convicted of a substantive offense. DE:102 at ¶¶ 10, 13, 15. During the same decades, scientists had been conducting longitudinal empirical studies which ultimately concluded that registrants have a much lower recidivism risk upon release into the community than once believed, that a registrant who is offense-free in the community for decades poses virtually no risk of sexual reoffense, and that registration statutes do not reduce a registrant's already-low risk of sexual reoffense. DE:102 at ¶¶ 55-59. Indeed, only 5% of sex crimes are committed by registrants, the rest by people who have never been convicted of a sex crime. DE:102 at ¶ 58. Studies also showed that, due to ever-expanding notification,[15] both within and beyond the

[15] While the original statute provided for notification to any interested member of the public by toll-free telephone, law enforcement now saturates the registrant's community with automated emails and phone calls, door-knocking, distributing flyers, hanging posters, placing newspaper advertisements, as well as global

registrant's community, the families of registrants were ostracized and bullied, leading to high rates of depression and suicidality among their children. DE:102 at ¶ 60. On the other hand, there was no empirical evidence to support the efficacy of the statute's multiple amendments, including particularly the 2018 3-day rule. DE:102 at ¶ 19 n.6. Because after decades of law-abiding conduct, plaintiffs pose no risk of reoffense, requiring them to comply with ever-increasing statutory burdens, and subjecting them to ever-widening notification, hurts them and their families without benefiting the public. As applied to plaintiffs, the statute is therefore unreasonably restrictive, in violation of the ex post facto clause and their rights to substantive and procedural due process.

Each plaintiff made specific allegations about the impact of the 2018 amendment on them personally and on their families.

John Doe 1 alleged that, due to the 2018 redefinition of temporary residence, he and his wife, who delivered their stillborn daughter after 32 weeks of pregnancy, left the hospital after just two nights, to avoid his having to make multiple in-person reports of his "temporary residence" there. DE 102 at ¶ 68. He further alleged that the 2018 redefinition of temporary residence chilled him and his family from taking long weekend trips, something they used to enjoy before enactment of that

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notification through defendant's having google-indexed his sex offender website, DE:102 at ¶¶ 48-54, leading to increased incidents of harassment, ostracism and vigilantism, sometimes violent. DE:102 at ¶ 60.

amendment. DE 102 at ¶ 70. John Doe 7 alleged that the 2018 redefinition of "temporary residence" to 3 days in the aggregate per year caused him to forego short-term work- and family-related travel he would otherwise have undertaken due to the in-person reporting requirements. DE 102 at ¶¶ 96-97.

Next friend Jane Doe alleged that the 2018 amendment's creation of a minimum-mandatory sentence of GPS-monitored probation was particularly perilous for her brother, John Doe 6, who suffers from intellectual deficits (ID) diagnosed in early childhood, an IQ between 53 and 65, and low adaptive skills, particularly in processing what he hears and remembering it. Nor can he read or write. Therefore, he must rely on others, formerly his mother, now Jane Doe, to understand the statute's requirements and restrictions, and to supervise his compliance. DE 102 at ¶ 83. They may get it wrong: his mother's misunderstanding of the statute led to John Doe's arrest and prosecution in 2012. After pleading guilty, he was sentenced to supervision but violated the GPS-monitoring provision because he could not understand or remember how to handle the equipment, spending many months in jail, although the plea was later vacated based on the trial court's determination that his ID rendered him irremediably incompetent. DE 102 at ¶¶ 83-85. Like her mother, Jane Doe has difficulty understanding the statute. As a result, he is in danger of incarceration due to the 2018 imposition of a minimum-mandatory

penalty of GPS-monitored probation, a condition that he cannot meet. DE:102 at ¶ 86.

Each claim made by plaintiffs, which incorporates by reference all their allegations, relies on the statute's transformation by decades of amendments, particularly the 2018 amendment. In addition, plaintiffs' claims rely on the results of decades of empirical research, and their own demonstrably low risk after decades offense-free in the community.

Claim I asserts violation of the ex post facto clause. DE:102, ¶¶ 99-106. Relying on the United States Supreme Court's ex post facto multi-factor effects test,[16] plaintiffs alleged that:

- Decades of ever-amplifying notice has led to effects resembling traditional punishments such as shaming and community-wide banishment through harassment, ostracism, exclusion and vigilantism. DE:102, ¶ 101.

- Having to make multiple in-person reports per year within 48 hours of an ever-expanding number of reportable incidents, including short trips from home, constitutes an affirmative disability more severe than that imposed on probationers. DE:102, ¶ 102.

- Imposing the law's current burdens without regard to individual risk, which begins low, declines steeply over time offense-free in the community, and is readily ascertainable through individualized assessment instruments now widely in use around the world, promotes the purpose of punishment, not regulation. DE:102, ¶ 103.

- Because plaintiffs have lived offense-free in the community for decades and now pose no risk of reoffense, and the statute is ineffective in reducing whatever risk there is, the imposition of FSORNA 2018's heavy burdens

[16] *See Smith v. Doe*, 538 U.S. 84 (2003).

of FSORNA 2018 on plaintiffs is not rationally connected to a non-punitive purpose as applied to them. DE:102, ¶ 104.

- The "devastating lifetime impacts" on these plaintiffs of FSORNA 2018 (aside from subjecting them to a lifetime risk of arrest, prosecution and punishment for failing to comply with ever more severe restrictions and requirements), combined with its failure to employ individualized assessments render the statutory scheme excessive in relation to a non-penal purpose. DE:102, ¶ 105.

Plaintiffs' facial ex post facto challenge is, by definition, to the 2018 version, not to the 1997 version to which it bears no resemblance, and which no longer exists. The as-applied challenge is to the statute as written now as applied to plaintiffs as they are now in light of what we know now about their current risk to reoffend.

Claim II alleges an Eighth Amendment violation: Because "plaintiffs completed their sentences many years ago, have not since reoffended, and ascertainably represent no material risk of reoffense," condemning them to a lifetime of increasingly punitive restrictions and requirements, exacerbated by the 2018 amendments, constitutes cruel and unusual punishment, DE:102, ¶¶ 107-08, not a claim plaintiffs could have made about the 1997 version, which they described as "a useful police tool." DE:102, ¶ 18.

Claim III (A) alleges that the statute's virtual absence of a *mens rea* requirement violates the procedural due process prohibition against strict liability offenses (except when the penalty is slight and the regulated conduct is inherently or potentially harmful), by imposing penalties ranging from the 2018 minimum-

mandatory sentence of 6 months' GPS-monitored probation to five years in prison, for innocent harmless conduct. DE:102, ¶¶ 109-112. As described above, the strict liability provision has become ever more menacing with each new requirement and restriction of inherently innocent harmless conduct, such as one unavoidably belated report of a 3-day trip from home.

Claim III(B) alleges vagueness of the travel-related reporting requirements, DE102, ¶¶ 113-115, a problem that intensified with the 2018 redefinition of "temporary residence," which prohibits travel for as few as three days without having to make multiple in-person reports within 48 hours. Like the strict liability provision, the vagueness problem has become more acute with the proliferation of travel-related in-person reporting requirements, each additional requirement increasing the odds of inadvertent violation.

Claim IV (A) alleges violation of plaintiffs' state and federal constitutional rights to travel and movement, as the result of the 2018 amendments' redefinition of temporary residence and creation of a minimum mandatory penalty combined with the vagueness of the travel-related restrictions and the virtual absence of a *mens rea* element. In particular, the 2018 requirement to make multiple in-person reports for as few as 3 days in the aggregate per year violates these fundamental rights as applied to plaintiffs, who now pose no risk of reoffense. DE:102, ¶¶ 116-118.

Claim IV (B) addresses the violation of the plaintiffs' constitutional guarantee against stigma-plus. DE:102, ¶¶ 119-122. Plaintiffs alleged that the ever-expanding reach of notification has resulted in global stigma, and that the lifetime threat of the 2018 imposition of mandatory punishment for an ever-expanding number of unwitting missteps constitutes stigma plus, which could not survive heightened scrutiny as applied to them, people who pose no risk of reoffense today and whose children will be forced to endure their fathers' stigma as well as the restrictions on their fathers' lives. DE:102, ¶¶ 119-122.

Claim IV (C) states that FSORNA 2018, which rests on false assumptions about risk, and has no efficacy in mitigating whatever risk there may be, is now an engulfing regimen of requirements and restrictions, each on pain of virtually strict liability felony prosecution and the 2018 minimum-mandatory sentence, which is irrational as applied to plaintiffs in view of their own easily-ascertainable lack of risk. DE:102, ¶¶ 123-24.

Claim IV (D) alleges that the statute was based on the irrebuttable presumption of high and intractable risk that is now easily rebuttable both categorically and individually, following decades of empirical evidence and the development of reliable individualized testing instruments now in nearly-universal use. DE:102, ¶¶ 125-27. Because the United States Supreme Court has limited the doctrine to infringements on fundamental rights, and because the 2018 amendment

severely infringes on the fundamental right to travel, the irrebuttable presumption violates the plaintiffs' procedural and substantive due process rights.

Claim V involves plaintiffs' state constitutional right to disclosural privacy, a fundamental right invoking strict scrutiny. Ever-expanding notification has resulted in ostracism, harassment and vigilantism without benefiting public safety in view of plaintiffs' lack of risk, and the inefficacy of notification in preventing sexual harm. The 2018 requirement to publicly disclose long-weekend travel destinations represents an exacerbating intrusion on the right to disclosural privacy. DE:102, ¶¶ 128-29.

Defendant filed a motion to dismiss the Second Amended Complaint, raising the same points he had raised against the original and First Amended Complaint, in particular, the affirmative defense of statute of limitations. DE:10, DE:56, DE:103. Plaintiffs consistently responded to defendant's motions that the continuing violation doctrine applied to extend the statute of limitations where, as here, the conduct alleged to be unconstitutional has continued to the present, citing case law from other federal courts, including in this district,[17] which applied the continuing violation doctrine to cases like this one. DE:21 DE:66, DE:109.

[17] *Doe 1 v. Marshall*, 367 F.Supp.3d 1310, 1338 (M.D. Ala. 2019); *McGuire v. Marshall*, -- F.Supp.3d --, 2021 WL 67912 at *21-22 (M.D. Ala. Jan. 7, 2021); and *Doe et al. v. Miami-Dade County, Florida*, No. 1:14-cv-239933, slip op. at 24-

Defendant moved repeatedly to stay discovery or for entry of a protective order until the district court ruled on his motion to dismiss.[18] Although plaintiffs initially joined defendant in moving for a stay, DE:38, they subsequently opposed it because the impacts of the 2018 amendments were causing them increasing hardship.[19] The district court repeatedly denied these motions,[20] explaining that "[u]pon 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 supplied). DE:86 at 2.

As a result, all parties worked hard to meet the deadlines set forth in various Scheduling Orders, propounding and responding to multiple sets of interrogatories and requests for production, exchanging privilege logs, thousands of pages of documents, more than a dozen reports and rebuttals by experts each charging hundreds of dollars an hour, and taking sixteen depositions, most of them of experts, with virtually all depositions taking between six and seven hours to complete. The

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27 (S.D. Fla. Dec. 18, 2018) (applying continuing violation doctrine in registrant's challenge to housing ban).

[18] DE:38, DE:45, DE:57, DE:67, DE:81, DE:83.

[19] DE:47 at ¶ 6; DE:61 at ¶ 9; DE84.

[20] DE:43, DE:49, DE:86, DE:82, DE:87.

parties were close to completing all discovery by the time the district court dismissed the case with prejudice. DE:203 at 8-10.

Dismissal with Prejudice of Second Amended Complaint

On October 20, 2020, this Court decided *McGroarty v. Swearingen*, 977 F. 3d 1302 (11th Cir. 2020), which held that the continuing violation doctrine did not apply to extend the statute of limitations for an out-of-state registrant who challenged his continued inclusion on Florida's sex offender website after he had moved from the state in 2004. Analyzing plaintiff's claim, this Court determined that it accrued at the moment in time when he learned that the state would keep his name on the website even after he left the state – a single discrete act which plaintiff conceded was never repeated.

One month later, after hearing oral argument on the statute of limitations issue only, the district court dismissed plaintiffs' case with prejudice, relying on *McGroarty* and two earlier cases that defendant had previously cited in his motions to dismiss: *Meggison v. Bailey*, No. 6:13-CV-794-ORL-37, 2013 WL 6283700 (M.D. Fla. Dec. 4, 2013), aff'd, 575 F. App'x 885 (11th Cir. 2014) and *Center For Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006), both of which dealt with claims like McGroarty's based on a single discrete act – the breach of a plea agreement and failure to meet a deadline, respectively. DE:201.

Tellingly, while characterizing plaintiffs' complaint as arising from a single discrete act, the district court did not state what that act was or when it occurred, evidently adopting the defendant's argument that the single act occurred "'long ago,'" when "'the allegedly wrongful enforcement of the registration requirements occurred.'" DE:201 at 3, 7.

As previously noted, the district court acknowledged that (1) plaintiffs were not challenging the statute as first enacted but rather the cumulative effects from "'decades of amendments [that] markedly changed the Florida Sex Offender Statute,'" that (2) "the Eleventh Circuit has not addressed the[se] numerous amendments," and that (3) numerous cases issued while this case was pending "highlight the evolving nature of the issues in this case and various courts' reconsideration of issues previously foreclosed by precedent," DE:201 at 3 n.1; 7-8, n.8. In other words, the district court acknowledged that decades of amendments in combination with decades of empirical research had persuaded other courts to revisit prior rulings that had affirmed less onerous versions of registration statutes, and that this Court has not as yet ruled on such a case.

In dismissing the complaint with prejudice, the district court declared that, since plaintiffs had already amended their complaint twice without remedying the statute of limitations issue raised by defendant "in previous motions to dismiss," further amendment would not be "appropriate." DE:201 at 8. This was

notwithstanding the district court's earlier determination that the statute of limitations defense, which would have been dispositive, was "not so clearly meritorious" as to warrant even a stay of discovery. The district court's dismissal order also did not differentiate between plaintiffs' federal and state constitutional claims, presumably including both in the dismissal with prejudice.

Refusal to Allow Third Amended Complaint

Although the district court recognized defendant's apparent concession that plaintiffs' claims against the 2018 amendments were timely, DE:201 at 4 n.2,[21] it complained that plaintiffs' "challenges and alleged injuries" were not "tailored specifically to amendments enacted within the limitations period." DE:201 at 4. This is self-evidently erroneous: as set forth above, each Doe made allegations specifically tailored to the 2018 amendment, and their claims for facial and as-applied relief relied on restrictions arising specifically from the 2018 amendment.

Plaintiffs then sought leave to file a Third Amended Complaint.[22] The Third Amended Complaint, DE:211-1, took pains to satisfy both the defendant's position that plaintiffs could challenge only those amendments enacted within the limitations

[21] The dismissal order states: "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. . .'" DE:201 at 4 n.2 (citing DE:125).

[22] The Third Amended Complaint was submitted in connection with plaintiffs' motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). DE:211-1.

period and the district court's position that the Second Amended Complaint had not been sufficiently "tailored specifically to amendments enacted during the limitations period." Each of the previous Does assiduously avoided any allegations about any amendment except the 2018 provisions, which they challenged as violating their ex post facto and travel rights, seeking an injunction only against applying that amendment to them. DE:211-1, ¶¶ 66-69, 70-74, 75-79, 88-94, 103-05. They added a plaintiff, Jane Doe 2, who had been required to register for the first time less than 4 years before. Her allegations, none of which are time-barred under the district court's reasoning, regarded the impact of the statute as a whole on her and her family, including in particular the 2018 amendment. *Id.,* ¶¶ 80-87. She posed a negligible risk of sexual reoffense, based on the same empirical allegations as those contained in the Second Amended Complaint, the fact that she had completed sex offender counseling, and the fact that only 1.8% of women registrants sexually reoffend within 5 years after release from prison. DE:211-1, ¶¶ 14, 58-61. She raised the claims that the district court time-barred the other Does from raising; strict liability, vagueness, stigma plus, substantive due process (rational relationship), irrebuttable presumption and state constitutional claims. DE:211-1, ¶¶ 95-99, 100-116.

As plaintiffs informed the district court, virtually all of the extensive and costly discovery conducted by the parties prior to dismissal is relevant to the Third Amended Complaint, which incorporated much of the information already

discovered, and made the same empirical allegations. DE:211-1, ¶¶ 32, 46, 47, 58-60, 98, 105. Therefore, the extensive and costly expert discovery was fully applicable to this complaint as well. The defendant had already conducted sweeping discovery on the original Does,[23] except for deposing them, and had deposed all but two of plaintiffs' experts. DE:169. All he had left to do for the Third Amended Complaint was to investigate and conduct discovery on the one new plaintiff, depose the plaintiffs, the remaining two experts and some remaining lay witnesses.

Yet the district court denied plaintiffs' Rule 59(e) motion seeking leave to file the Third Amended Complaint because they had not addressed the statute of limitations defense in earlier amendments. Further, it characterized their claims against the 2018 amendment as "not previously presented," DE:212 at 2, despite the specific claims against the 2018 amendment in their Second Amended Complaint. Finally, it suggested that if plaintiffs wished to continue their challenge to FSORNA 2018, "they may do so in a new action." DE:212 at 2.

Plaintiffs now timely appeal from the district court's dismissal order, its order denying the Rule 59(e) motion, including its denial of leave to amend with the Third Amended Complaint, and its dismissal with prejudice of even their state constitutional challenges.

[23] For example, defendant had served and received responses to approximately 25 interrogatories and 25 requests for production *on each plaintiff*. DE:203 at 8-10.

STANDARD OF REVIEW

(Issue I) The decision whether to apply the continuing violation doctrine is reviewed *de novo*. *Foudy v. Indian River County Sheriff's Office*, 645 F.3d 1117, 1122 (11th Cir. 2017).

(Issue II) This Court reviews the district court's refusal to allow plaintiffs leave to amend their complaint for abuse of discretion. *See City of Miami v. Bank of America Corp*., 800 F.3d 1262, 1271 (11th Cir. 2015). However, the Court reviews *de novo* the legal conclusions reached by the district court that provided the basis of the dismissal with prejudice. *Id*. (citing *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264 (11th Cir. 2011)).

SUMMARY OF THE ARGUMENT

I. Plaintiffs alleged that, as applied to them, defendant engaged in an unconstitutional practice of enforcing increasingly restrictive and mutually-agrravating amendments to FSORNA 2018 in spite of empirical evidence that (1) enforcement of the statute does not reduce registrants' risk of reoffense, (2) plaintiffs ascertainably no risk of reoffense, and (3) the increasingly heavy burdens of the statute cause severe injury to registrants and their families. Plaintiffs alleged in particular that the amendments enacted in 2018, in the context of previously-enacted amendments, unlawfully required them to make multiple in-person reports within 48 hours for a few as 3 days away from home with virtually strict liability and a

minimum-mandatory sentence during the limitations period. Plaintiffs did not allege that initially requiring them to register under the 1997 statute was unconstitutional, or that any single act independently violated their constitutional rights. Instead, they complained of the cumulative effects of 21 years' worth of amendments. Therefore, the district court erroneously refused to apply the continuing violation doctrine to their claims, mischaracterizing them as arising from one discrete act and erroneously relying on cases based on one discrete act, to dismiss their claims with prejudice as time-barred.

II. If the district court did not err in failing to apply the continuing violation doctrine, it erred in refusing to permit plaintiffs to amend their complaint to limit plaintiffs' claims to the impacts of the 2018 amendments as applied to them, and to add a newly-registered plaintiff who would not be time-barred under the district court's reasoning from raising all of the original plaintiffs' claims, where (1) the parties had nearly completed discovery on the dismissed complaint, (2) the discovery was fully applicable to a proposed amended complaint, (3) plaintiffs did not know of the procedural bar until the district court's dismissal order, and (4) plaintiffs proffered an amended complaint that corrected the "defect."

ARGUMENT AND CITATION OF AUTHORITY

I

The district court erred in refusing to apply the continuing violation doctrine to plaintiffs' claims. The Second Amended Complaint unquestionably establishes that plaintiffs' claims were not based on one discrete act but rather on the enforcement of increasingly restrictive and mutually-aggravating amendments to FSORNA 2018 during the limitations period.

A. Continuing violation doctrine defined

Statutes of limitations are intended to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). When a constitutional violation continues into the limitations period, repose concerns recede. As a result, the United States Supreme Court has consistently held, in a myriad of contexts, that the continuing violation doctrine applies to extend the statute of limitations where plaintiffs have alleged an illegal or unconstitutional practice, as long as the practice continues during the limitations period.[24] This

[24] *See, e.g., National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114-15 (2002); *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., 392 U.S. 481, 502 n.15 (1968) ("[W]e are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover."); *Havens Realty Corporation v. Coleman*, 455 U.S. 363, 380-81 (1982) ("[W]here a plaintiff, pursuant to the FHA, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed [within

Circuit has adhered to this rule,[25] applying it to claims raised under 42 U.S.C. §1983.[26]

The term "practice," for the purpose of the continuing violation doctrine, typically consists of "numerous discrete acts," "any one of which may not alone be actionable" because "such claims are based on the cumulative effect of individual acts" committed "over a series of days or perhaps years …" *National Railroad. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 115 (2002); *see also O'Connor v.*

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the limitations period] of the last asserted occurrence of that practice."); *Lewis v. Chicago*, 560 U.S. 205, 214 (2010) (a claim is timely when a prior unlawful policy is implemented "down the road" but within the limitations period).

[25] *See, e.g., Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980) (binding on the Eleventh Circuit, *Bonner v. Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (continuing violation doctrine applied to Title VII claim if plaintiff alleged that discriminatory practice continued during the limitations period); *Beavers v. American Cast Iron Pipe Co*., 975 F.2d 792, 796-97 (11th Cir. 1992) (relying on *Gonzalez v. Firestone Tire & Rubber Co.*, *id.*, to apply continuing violation doctrine to plaintiffs' disparate impact challenge to company policy of denying medical and dental coverage to some of employees' children; lack of coverage was not "merely the residual effect of a single discriminatory act occurring . . . [at some] discrete point in time. Rather, it is the direct result of ongoing policy actively maintained by [the company]."); *City of Miami v. Bank of America Corporation*, 800 F.3d 1262, 1284-86 (11th Cir. 2015) (continuing violation doctrine applied to FHA claim that bank engaged in longstanding practice of discriminatory lending as long as City can identify FHA violation during limitations period; although "[t]he predatory qualities of the loans have taken slightly different forms over time," "[t]he fact that the burdensome terms have not remained perfectly uniform does not make the allegedly unlawful practice any less 'continuing.'") (vacated and remanded on different grounds by *Bank of America Corp. v. City of Miami*, 137 S.Ct. 1296 (2017)).

[26] *Robinson v. United States*, 327 Fed. Appx. 816, 818 (11th Cir. 2007).

City of Newark, 440 F.3d 125, 128 (3rd Cir. 2006) (continuing violation doctrine applies when claim "is based on the **cumulative effect of a thousand cuts**, rather than on any particular action taken by the defendant") (emphasis supplied).

The continuing violation doctrine does not apply where plaintiffs' complaint is based not on a practice but instead on **one discrete act** outside the limitations period, even if the consequences of that act continue to the present.[27] The doctrine does not apply "[i]f an event should have alerted a reasonable plaintiff to assert his rights," *Lee v. Eleventh Judicial Circuit of Florida*, 699 Fed.Appx. 897, 898 (2017), such as a termination or refusal to hire. *Morgan*, 536 U.S. at 114-15. It applies only "to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation occurred." *Lee,* 699 Fed.Appx. at 89.

B. Careful evaluation of claim required to determine applicability of continuing violation doctrine

[27] *See, e.g., Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 423 (1960) ("[T]he continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity and has no continuing independent basis."); *McNair v. Allen*, 515 F.3d 1168, 1174-75 (11th Cir. 2008) (continuing violation did not apply where death row inmate had "a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief" upon notice of new execution protocol); *Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334-35 (11th Cir. 2006) (where defendant had deadline by which he was required to act, his failure to do so after the deadline was not a continuing violation, but rather continuing consequences of a one-time act circumscribed by the date of the deadline).

Without careful evaluation of the nature of a claim, a court cannot determine whether the continuing violation doctrine applies. *See, e.g., Morgan*, 536 U.S. at 114-15 (applying continuing violation doctrine to "hostile work environment" claim, which is "based on the cumulative effect of individual acts" but not to "discrete" easily-identifiable acts such as termination). Courts are cautioned against "wooden application" of statutes of limitations, while "ignor[ing] the continuing nature of the alleged violation," in derogation of the "broad remedial intent" embodied in the law being violated. *Havens Realty Corp.*, 455 U.S. at 380.

Plaintiffs' claims arise under 42 U.S.C. §1983, a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," including those "guaranteed by the Fourteenth Amendment: that every person within the United States is entitled to equal protection of the laws and to those 'fundamental principles of liberty and justice' that are contained in the Bill of Rights and 'lie at the base of all our civil and political institutions.'" *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Under §1983, plaintiffs have alleged violations of "fundamental principles of liberty" that "lie at the base of all our civil and political institutions," as embodied in the ex post facto clause, the due process clauses, and the rights to freedom of movement and travel.

For the purpose of a §1983 claim, the Supreme Court chose the forum state's statute of limitations for common law torts, which is typically longer than other

limitations periods, reasoning that this would "minimiz[e] the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by §1983." *Id*. at 279. The statute of limitations for a common law tort in Florida is 4 years from the date the cause of action accrues. *Chappell v. Rich*, 340 F.3d 1279, 1283 (11th Cir. 2003).

Unlike the limitations period, accrual is a question of federal law. *Foudy*, 845 F.3d at 1124. A cause of action under §1983 accrues when the plaintiff has "a complete and present cause of action." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citations and internal quotations omitted); *Foudy*, 845 F.3d at 1123 (accrual of §1983 claims is governed by the "complete and present cause of action" rule, not the discovery rule) – "that is, when the last element constituting the cause of action occur[s]." *Merle Wood & Associates, Inc. v. Trinity Yachts, LLC*, 714 F.2d 1234, 1237 (11th Cir. 2013). The cause of action ends, for the purpose of the limitations period, when exposure to the claimed violation ends. *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013); *Robinson v. United States*, 327 Fed.Appx. at 818. For example, FSORNA 2018 now requires plaintiffs to make multiple in-person reports per year within 48 hours of banal events such as leaving for and returning from a 3-day trip from home, with virtually strict liability and a minimum-mandatory sentence. While no one requirement may alone be actionable, plaintiffs' claims address the cumulative effect today of multiple mutually-aggravating requirements enacted after

the original statute, including particularly the 2018 amendments. In such cases, "obviously the filing clock cannot begin running with the first act, because at that point the plaintiff has no claim; nor can a claim expire as to that first act because the full course of conduct is . . . **the cumulative effect of a thousand cuts**," *O'Connor*, 440 F.3d at 128, in which no one cut sufficed for notice of the injuries claimed.

Furthermore, a cause of action does not accrue so as to trigger the statute of limitations period until it is ripe. *Alabama v. U.S.*, 630 F.Supp.2d 1320, 1327 (S.D. Ala. 2008). A cause of action is not ripe for adjudication "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Harris*, 564 F.3d at 1308. In particular, "[a]n as-applied challenge … addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. Because such a challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider." *Id.*

Nor would a facial attack on an unconstitutional statute necessarily be time-barred if that statute were enacted outside the limitations period. For example, if an amendment unlawfully authorized random searches of registrants' homes, a registrant who did not file suit within the limitations period of his first search should not be barred from doing so within the limitations period of a second search. Otherwise, the government would have absolute immunity when it applies an

unlawful policy more than once, if the second violation occurs after the limitations period expired for the first violation.

C. The district court mischaracterized plaintiffs' allegations as involving one discrete act, leading it to woodenly apply the statute of limitations

1. The Second Amended Complaint's actual allegations

The Second Amended Complaint clearly demonstrates that plaintiffs' claims have nothing to do with the initial requirement to register or any other singular discrete act but rather the cumulative effects today of subsequent mutually-exacerbating amendments in the context of subsequent empirical developments as applied to them. The district court overlooked, *inter alia*:

- Plaintiffs alleged that the minimalist requirements of the 1997 statute had metastasized through decades of amendments into an engulfing regimen of empirically unsupported restrictions and requirements that characterize FSORNA 2018. DE:102 at 10-27;

- Plaintiffs alleged that decades of empirical research now establish that, despite the animating assumption in 1997 that registrants pose a high risk of reoffense, their risk is relatively low upon release from incarceration, and becomes much lower over time offense-free in the community. DE:102, ¶¶ 53-58;

- Plaintiffs alleged that decades of empirical research have concluded that registration statutes have no impact on a registrant's risk of reoffense, while producing catastrophic impacts on the registrant and his family, particularly his children. DE:102, ¶¶ 59-62;

- Plaintiffs alleged that decades of their own law-abiding lives in the community, during which they engaged in productive work and created families, have left them demonstrably risk-free. DE:102, ¶¶ 63-72, 83-86, 87-98;

- Plaintiffs alleged that, in light of these developments, FSORNA 2018, with its requirements to make multiple in-person reports, particularly in connection with short-term travel, its vague language, strict liability and minimum-mandatory sentence is unreasonably restrictive as applied to them. DE:102, ¶¶ 65, 86, 96, 97;

- Plaintiffs alleged individual adverse impacts to them specific to the 2018 amendments, which were enacted and enforced during the limitations period. DE:102, ¶¶ 65, 68, 70, 86, 96-97.

As noted *supra*, plaintiffs had no complaint – and no cause of action – when the statute was first enacted. Plaintiffs could not have foreseen the "**cumulative effect of a thousand cuts**," *O'Connor,* 440 F.3d at 128 (emphasis added) – the steady accretion of burdens resulting from 21 years of amendments leading to today's requirement for multiple in-person reports without exemption for as few as 3 days from home, let alone the imposition of a minimum-mandatory sentence for inadvertent failure to make such a report within 48 hours. They could not have foreseen the global notification of status enabled by the internet and the corresponding rise of nationwide vigilantism against registrants. They could not have foreseen the robust scientific proof that their recidivism rate was not high to begin with, that it declined over time offense-free in the community, and that registration statutes do not reduce whatever risk they had. Yet these developments are at the core of their claims. All were seemingly overlooked by the district court.

Courts around the country have recognized the salience of these and other developments in granting relief from registration requirements for plaintiffs with

remote convictions.[28] Furthermore, courts around the country, including three in district courts in this circuit, have applied the continuing violation doctrine to cases like this one.[29]

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[28] *Prynne v. Settle*, -- Fed.Appx --, 2021 WL 717054 *5-7 (4th Cir. 2021) (reversing dismissal of ex post facto challenge to current version, which requires multiple in-person reports and results in exclusion from schools and churches based on empirical evidence of inefficacy and plaintiff's lack of risk to reoffend); *Does v. Wadsden*, 892 F.3d 784, 891 (9th Cir. 2020) (in reversing dismissal of ex post facto challenge to registry, Court emphasized need to "consider the effects of SORR's regulatory scheme, as amended and in its entirety, in determining whether it runs afoul of the Constitution."); *Does #1-5 v. Snyder*, 834 F.3d 696, 703-05 (6th Cir. 2016) (in light of heavy burdens, including multiple in-person reports, and empirical evidence of low recidivism generally, law's inefficacy in reducing it, and subversion of public safety goal through imposition of destabilizing impacts, statute violated ex post facto clause); *Piasecki v. Court of Common Pleas, Bucks Cty., Pa.*, 917 F.3d 161, 170 (3d Cir. 2019) (multiple in-person reports for "banal tasks" like moving vehicle or taking short trip, coupled with felony prosecution and substantial prison term, constitutes custody for habeas purposes); *Doe v. Rausch*, 382 F.Supp.3d 783 (E.D. Tenn. 2019) (*Rausch I*) (no rational relationship for purpose of ex post facto analysis where legislature relied on "popular stereotypes" rather than actual efficacy or individualized assessment); *Doe v. Rausch*, 461 F.Supp.3d 747, 768-69 (E.D. Tenn. 2020) (*Rausch II*) (unconstitutional as applied to lifetime registrant, in absence of individualized risk assessment, given at least two dozen restrictive amendments); *Hoffman v. Village of Pleasant Prairie*, 249 F.Supp.3d 951, 960 (E.D. Wis. 2017) (without evidence of efficacy or high risk, housing ban lacked rational relationship to non-punitive purpose under multi-factor effects test); *Nat'l Assoc. For Rational Sexual Offense Laws, et al. v. Stein, et al.*, No. 1:17-CV-53, 2019 WL 3429120, at *12-14 (M.D.N.C. July 20, 2019) (multiple in-person reports for people at little risk to reoffend is punitive); *Doe#1 v. Lee*, -- F.Supp.3d --, 2021 WL 428967 *13 (M.D. Tenn. Feb. 8, 2021) (granting summary judgment to ex post facto claim against "combined, cumulative lifetime impacts of all of [SORA's] requirements"); *Reid v. Lee, et al.*, 476 F.Supp.3d 684, 708 (M.D. Tenn. Aug. 5, 2020) (preliminary injunction granted where amended restrictions interfered with ability to work and parent in absence of evidence of efficacy); *State v. Letalien*, 985 A.2d 4, 23-24 (Me. 2009) (striking statute after having previously upheld it, based on heavier burdens

2. District court's failure to carefully review plaintiffs' allegations led it to mischaracterize them as arising from one discrete act, and to erroneously rely on inapposite one act cases

Because the district court failed to carefully evaluate the nature of plaintiffs' facial and as-applied claims, it resorted to cases brought by other registrants raising completely **different** claims against the statute, claims that arose from **one discrete act**: *McGroarty v. Swearingen*, 977 F.3d 1302, 1307 (11th Cir. 2020); *Meggison v. Bailey*, 2013 WL 6283700 (M.D. Fla. Dec. 4, 2013), *aff'd*, 575 F. App'x 885 (11th

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and absence of evidence of efficacy); *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1084, 1096 (N.H. 2015) (striking statute after having previously upheld it, noting "significant[ ] differen[ce] from the act we considered twenty years ago," including multiple in-person reports and broad dissemination in absence of legislative findings to support changes); *Starkey v. Oklahoma Dept. of Corrections*, 395 P.3d 1004, 1022 (Okla. 2013) (noting impact of multiple in-person reporting requirements on punitive effect); *Comm. v. Muniz*, 164 A.3d 1189, 1216 (Pa. 2017) (noting *Smith v. Doe* unable to foresee "world-wide dissemination of" registrant's information, or "[o]nline shaming" leading to ostracism); *Cmwealth v. Torsilieri*, 232 A.3d 567, 585-88 (Pa. 2020) (remanding for evidentiary hearing on empirical evidence regarding risk and efficacy in challenge to irrefutable presumption of high risk).

[29] *John Doe 1 et al. v. Marshall*, 2019 WL 53905, at *45-48; *McGuire v. Marshall*, -- F.Supp.3d --, 2021 WL 67912 at *21-22 (M.D.Ala. Jan. 7, 2021); *Doe et al. v. Miami-Dade County, Florida*, No. 1:14-cv-239933, slip op. at 24-27 (S.D. Fla. Dec. 18, 2018)(applying continuing violation doctrine in registrant's challenge to housing ban); *Nat'l Assoc. For Rational Sexual Offense Laws, et al. v. Stein, et al.*, 2019 WL 3429120, at *9 (M.D. N.C. July 30, 2019); *Doe v. Haslam*, Nos. 3:16-cv-02862, 3:17-cv-00264, 2017 WL 5187117 *11-14 (M.D. Tenn. Nov. 9, 2017); *Doe v. Haslam*, 2017 WL 4782853 at *6 (E.D. Tenn. Oct. 23, 2017) (vacating dismissal where plaintiff alleged severe individual impacts for life without individualized assessment); *Doe v. Gwyn*, No. 3:17-cv-504, 2018 WL 1957788, *5-6 (E.D. Tenn. April 25, 2018); *Coates v. Snyder*, No. 1:17-cv-1064, 2018 WL 3244010 (W.D. Mich. June 12, 2018); *Wallace v. New York*, 40 F.Supp.3d 278 (E.D.N.Y. 2014).

Cir. 2014), and *Gonzalez v. Swearingen*, No. 8:15-CV-1617-T-27MAP, 2015 WL 13741739 (M.D. Fla. Dec. 1, 2015).

In *McGroarty*, plaintiff committed his qualifying offense in Florida, and complied with the registration statute until he moved out of the state in 2004. He filed suit in 2018 claiming that the continued maintenance and dissemination of his personal information on FDLE's sex offender website violated his right to substantive due process. *McGroarty*, 977 F.3d at 1305. Carefully evaluating the nature of his claim, this Court noted that (1) McGroarty had no continuing obligations under the registration statute, and that (2) he had "specifically disavowed the argument that a new violation occurred each time the FDLE updated their website or re-posted information." *Id.* at 1305, 1307 nn. 4 and 5. Therefore, McGroarty had alleged "a continuing harm" but not a "continuing violation." *Id*. at 1307-08. The publication of his information after he left the state "was a 'one time' act" which gave rise to a complete cause of action. *Id*. at 1308. In contrast, as they alleged, plaintiffs here are required to comply with the statute every day of their lives at perennial risk of arrest, prosecution and punishment for even inadvertent failures to comply with its ever-increasing restrictions and requirements. In other words, this is a "continuing violation" case. Plaintiffs alleged all of these factors in the Second Amended Complaint, but the district court did not carefully evaluate them,

leading it to rely on *McGroarty*, an inapposite case, in dismissing the case with prejudice.

The single claim raised in *Meggison v. Bailey, supra*, was that he was wrongfully required to register as a sexual offender where doing so deprived him of the benefit of his plea bargain in violation of his fifth and fourteenth amendment rights. DE:109 at 6; 203-1 at 27. Meggison knew of the alleged violation as soon as he was notified to register: he signed the notice under protest, filed a petition for writ of mandamus in state court, and a separate action there. 2013 WL 6283700, at *1. When the state court action was dismissed, he sued in federal court. *Id*. The district court in *Meggison* characterized the claim as arising from a one-time act, "his *classification* as a sex offender under the registration statute." *Id*. at *3 (emphasis supplied). This was the act that breached his plea agreement; the reporting requirements were merely consequences of the breach. *Id*.[30] *See also Hearn et al. v.*

[30] The *Meggison* district court relied upon similar one-time act cases in reaching this conclusion: *McDay v. Paterson*, No. 09 Civ. 500(PKG)(GWG), 2010 WL 4456995, at *5 (S.D.N.Y. Nov. 1, 2010) (cause of action accrued when plaintiff, who challenged his classification level, signed a registration form under protest); *Romero v. Lander*, 461 F. App'x 661, 667 (10th Cir. 2002) (plaintiff challenged classification as sex offender on ground that prior conviction did not qualify); *Tippett v. Foster*, No. 3-10-CV-0744-B, 2010 WL 289119, at *2 (N.D. Tex. June 16, 2010) (plaintiff challenged requirement to register on ground that prior conviction did not qualify); *Ingram v. Sothern*, No. 07-CV-216-BR, 2008 WL 2787767, at *5 (D. Or. July 14, 2008) (plaintiff challenged requirement to register in different state, a claim that was time-barred as a one-time act; the court did not dismiss plaintiff's other challenge to the conditions of registration, which were ongoing).

McGraw, -- Fed. Appx. --, 2021 WL 1440025 (5th Cir. April 15, 2021) (continuing violation doctrine did not apply to claim that requirement to register breached a 20-year-old plea agreement). As their Second Amended Complaint made clear, plaintiffs' case does not involve a challenge to their initial classification as sex offenders or to their original requirement to register.

In *Gonzalez v. Swearingen, supra*, the plaintiff's claim was that he was falsely classified as a sex offender, a claim that accrued when he was advised of the classification. 2015 WL 13741739, at *1. *See also Moore v. Lappin*, 2009 WL 3336082 (N.D. Fla. Oct. 15, 2009) (claim that offense at conviction did not qualify for registration accrued when plaintiff learned of requirement); *Moore v. Olens,* 2013 WL 12097640 (N.D. Ga. Nov. 18, 2013) (claim that plaintiff was erroneously designated as sexually violent predator accrued on notice, but continuing violation doctrine applied to eighth amendment claim related to lifetime ankle-monitoring resulting from designation). Plaintiffs here made no allegation that they were wrongly, or falsely, classified as sex offenders.

Here, plaintiffs' claims are of a completely different nature. They do not complain that they were wrongfully required to register in breach of a plea agreement, or that their designation was erroneous, or that the statute was originally unconstitutional. Indeed, under *Smith v. Doe*, *supra*, and *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005), which upheld statutes similar to FSORNA's original version,

they had no viable cause of action at that time. Plaintiffs themselves alleged that the original statute "was a useful tool for the police to investigate sex crimes and for the public to take precautions around those who had committed them." DE:102, ¶ 18.

While the district court faults plaintiffs for having failed to allege "that they have been unable to determine a violation occurred" over the course of 21 years' worth of amendments, DE:201 at 5, tellingly it fails to identify the **one discrete act** that *should* have put plaintiffs on notice of their claims, merely citing with approval defendant's suggestion that, whatever the act was, it "accrued long ago" "at the time Plaintiffs would have known of the alleged injuries" DE:201 at 3 (citing DE:103). Plaintiffs can find no pleading requirement to allege inability "to determine a violation occurred" in order for the continuing violation doctrine to apply, only that the doctrine applies when they cannot make this determination. They have alleged that the 2018 amendments, in the context of a decades-long aggregation of mutually-exacerbating amendments, have produced an engulfing regimen of restrictions and requirements that unconstitutionally impose increasingly heavy burdens on people who demonstrably pose no danger to the public. In other words, there is not one discrete act that produced this result any more than one discrete act produces a hostile work environment. In both situations, while a single act may not alone

support a claim, additional exacerbating acts establish an unlawful pattern. That is precisely why the continuing violation doctrine applies. *Lee*, 699 Fed.Appx. at 898.

D. Conclusion

The district court failed to carefully review plaintiffs' allegations, causing it to reject application of the continuing violation doctrine and dismiss the Second Amended Complaint. This Court should reverse the district court's dismissal on statute of limitations grounds and remand this matter to the district court for its consideration of the remaining issues raised below.

II

The district court erred in dismissing plaintiffs' Second Amended Complaint with prejudice, including the state constitutional challenge raised therein. It also erred in refusing to grant plaintiffs leave to file a Third Amended Complaint which was narrowly tailored to satisfy the district court's stated concerns about the timeliness of plaintiffs' allegations

Should this Court determine that the district court properly rejected the continuing violation doctrine to dismiss the plaintiffs' Second Amended Complaint on statute of limitations grounds, the district court nonetheless erred in dismissing it *with prejudice,* including the state law claims raised therein. It also erred in denying plaintiff's motion pursuant to Fed. R. Civ. P. 59(e) and their request for leave to file a proposed Third Amended Complaint. DE:211-1.

Dismissal of a complaint with prejudice "is considered a drastic sanction" that a court may implement only as a "last resort" and under stringently delineated

circumstances. *World Thrust Films v. Int'l Family Entm't, Inc*., 41 F.3d 1454, 1456 (11th Cir. 1995). For example, a court may dismiss a complaint with prejudice 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." *Id*. Additionally, a court may dismiss a complaint with prejudice if it determines that a further amendment would be futile because "the complaint as amended [would] still [be] subject to dismissal." *Crawford's Auto Center, Inc. v. State Farm Mutual Automobile Insurance Co*., 945 F.3d 1150, 1163 (11th Cir. 2019) (quoting *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999)). 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).

Appellants engaged in no pattern of delay much less any contemptuous or contumacious conduct to justify a dismissal with prejudice,[31] and the district court

[31] Cases upholding dismissals with prejudice on these grounds primarily involve improper "shotgun pleadings" where the plaintiff fails—or refuses—to amend the pleading despite court instruction to do so and how. *See, e.g*. *Barmapov v. Amuial*, 986 F.3d 1321, 1323-26 (11th Cir. 2021) (affirming dismissal with prejudice of second amended complaint where district court dismissed first amended complaint after explaining why it was a shotgun pleading and giving plaintiff "a chance to try again"; plaintiff failed to heed instructions and filed a second amended complaint determined to be a "rambling, dizzying array of nearly incomprehensible

did not justify its dismissal with prejudice on these grounds. Nor did the district court make any specific finding that a further amendment to the Second Amended Complaint would be futile. In fact, in denying plaintiffs' Rule 59(e) motion, the district court seemingly found to the contrary: in refusing to grant plaintiffs leave to file the Third Amended Complaint, allegations of which were narrowed to accommodate the district court's rejection of the continuing violation doctrine, the district court suggested that plaintiffs could *file a new action* if they wished to continue to challenge FSORNA 2018. DE:212 at 2 ("To the extent Plaintiffs now seek to present claims by parties not previously before the Court, or claims challenging requirements created by specific amendments to the Florida Sex Offender Registration Law that are within the statute of limitations—challenges not

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pleading" and "rife with immaterial factual allegations"); *Whitchurch v. Elarbee Thompson Wilson & Sapp, LLP*, 814 Fed. Appx. 547, 548-49 (11th Cir. 2020) (affirming in part dismissal with prejudice of second amended complaint; district court determined that first amended complaint was a shotgun pleading and ordered plaintiff to file a second amended complaint, describing to plaintiff "the problems in her amended complaint" and "what needed to be corrected"; however, plaintiff did not file a second amended complaint even after requesting and obtaining an extension of time to do so; rather, she filed an interlocutory appeal, twice requested clarification, and moved for the recusal of the district court judge); *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1292-94 (11th Cir. 2018) (affirming dismissal of second amended complaint on "shotgun pleading" grounds when district court had given plaintiff's counsel an opportunity to replead along with "a thorough set of directions on how to remedy the errors" in the first amended complaint; however, second amended complaint "did not improve"). In this case there has never been a suggestion by either the defendant or the district court that plaintiffs' complaint or its amendments were shotgun pleadings.

previously presented—they may do so in a new action").[32] In other words, the district court did not find the Third Amended Complaint to be futile. Rather, by informing plaintiffs that they were free to file "a new action," the district court signaled that the "deficiencies" it found in the Second Amended Complaint *were curable*,[33] -- to be presented in "a new action" -- a determination ostensibly at odds with a determination of futility. *Riddick v. United States*, 832 Fed.Appx. 607, 614 (11th Cir. 2020) (district court erred in dismissing 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"); *Estate of Faull by Jacobus v. McAfee*, 727 Fed.

[32]The district court mischaracterized the Third Amended Complaint as raising "challenges not previously presented." DE:212 at 2. In the Second Amended Complaint, each individual plaintiff made allegations specifically tailored to the 2018 amendment, and plaintiffs' claims for facial and as-applied relief relied on restrictions arising specifically from the 2018 amendment. In the Third Amended Complaint, each of the previous Does avoided any allegations about any amendment except the 2018 provisions, which they challenged as violating their ex post facto and travel rights, seeking an injunction only against applying that amendment to them. DE:211-1, ¶¶ 66-69, 70-74, 75-79, 88-94, 103-05. With the exception of adding a new party, Jane Doe 2, who had been required to register for the first time less than 4 years before, the other plaintiffs in the Third Amended Complaint were the same as in the Second Amended Complaint.

[33]The district court's dismissal order noted defendant's seeming acknowledgement of non-futility: "[a]s 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. . .'" DE:201 at 4 n.2.

Appx. 548, 551 & n.2 (11th Cir. 2018) (reversing denial of request for leave to file proposed third amended complaint because it "stated a plausible claim for relief" and thus "cured the prior deficiencies" despite the fact that district court had denied leave to amend due to plaintiff's "repeated failure" to cure deficiencies identified by the court in previous complaints).

The *only* reason articulated by the district court's order dismissing the Second Amended Complaint with prejudice was that further amendment to the complaint would not be "appropriate" because "Plaintiff[s] ha[ve] filed three complaints in this matter" and "Defendant has raised its statute of limitations argument in previous motions to dismiss" (DE:201 at 8). This justification fails to consider the actual course of proceedings in this case—proceedings overseen and guided by the district court's orders regarding discovery and its stated skepticism about the relative strength of defendant's statute of limitations defense.

It is true, as the district court observed, that plaintiffs twice amended their initial complaint.[34] It is also true, as the district court observed, that when plaintiffs

[34]The two amended complaints added plaintiffs after former plaintiffs were voluntarily dismissed but otherwise remained substantially the same. John Doe 1 was an original plaintiff, DE:1, John Does 6 and 7 and Jane Doe were plaintiffs in the First Amended Complaint. DE:50. At no time had the district court indicated to plaintiffs that the First Amended Complaint was fatally defective in some manner and thus subject to dismissal for that reason. That would have put plaintiffs on notice of a potential defect to cure in a Second Amended Complaint.

twice amended the initial complaint, they were aware that the defendant was seeking dismissal based, in part, on the argument that the continuing violation doctrine did not apply. But a genuine disagreement between the parties on the legal theory applicable to the timeliness of a complaint (here, the continuing violation doctrine) is hardly a fatal "pleading defect," much less one that would put reasonable plaintiffs on notice of a looming dismissal because of a dispositive pleading deficiency or defect. Defendant never alleged that plaintiffs failed to plead a requisite element of a tort,[35] or complained that their complaint was a "shotgun pleading" that plaintiffs were refusing to correct notwithstanding instructions from the court how to remedy the pleading,[36] or argued that plaintiffs should not be allowed further amendment

[35] *See e.g. Fernau v. Enchante Beauty Products, Inc.*, 2021 WL 628277 at *9 (11th Cir. Feb. 18, 2021) (affirming dismissal with prejudice of a third amended complaint where "plaintiffs were put on notice of their failure to properly plead reliance [in support of their fraud claims] by the defendant's motion pointing out that deficiency and by the magistrate judge's report and recommendation agreeing with the defendants' arguments.").

[36] *See, e.g. Jackson v. Bank of America, N.A.,* 898 F.3d 1348, 1358 (11th Cir. 2018) (record supported dismissal with prejudice of an amended complaint where defendant had moved for a more definite statement as to the initial complaint because it could not formulate an intelligent answer, explaining with specificity the complaint's deficits; plaintiffs did not oppose defendant's motion, which "operated as an acknowledgement of these defects"; plaintiffs filed an amended complaint "afflicted with the same deficits, attempting halfheartedly to cure only one of the pleading's many ailments by naming which counts pertained to each Defendant").

due to unreasonable delay or because they retained new attorneys.[37] Rather, the *sole* jurisdictional basis for the dismissal sought by defendant was that the continuing violation doctrine did not apply in plaintiffs' case—a legal conclusion *only the district court can make*.[38] That plaintiffs disagreed with defendant's interpretation of the law does not translate into a "pleading defect" that they stubbornly refused to "fix."

The course of proceedings below gives further context to why plaintiffs were not on "notice" of a fatal "pleading defect" in their complaint. Instead of ruling on defendant's fully-briefed motion to dismiss the initial complaint, the district court issued an Order requiring the parties to file a Joint Conference Report and a Joint Proposed Scheduling Order, DE:37, reasonably signaling to plaintiffs that their case was not doomed to early dismissal due to a fatal and dispositive "defect." Furthermore, after plaintiffs filed their first amended complaint and defendant again moved to stay discovery, the district court waited 3 months before denying

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[37] *See, e.g. Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319-20 (11th Cir. 1999) (affirming denial of leave to amend complaint because forty months had passed since the filing of the initial counterclaim, the new counts would require proof of different facts, and the only apparent reason for the new claims was Weaver's retention of new counsel; moreover, Weaver unduly delayed by offering the amendment on the eve of trial without explanation for the delay).

[38] As noted in Argument I, an Alabama federal district court recently agreed with plaintiffs' interpretation of the continuing violation doctrine, distinguishing the case before it from one-act cases like *Meggison*. *McGuire v. Marshall*, -- F.Supp.3d --, 2021 WL 67912 at *21-22 (M.D. Ala. Jan. 7, 2021).

defendant's motion in an order transmitting the clearest signal yet that plaintiffs' first amended complaint might survive the motion to dismiss:

> 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'***.

DE:86 at 2 (emphasis added) (citation omitted).

This is the backdrop against which the district court determined that plaintiffs should have earlier sought leave to amend their complaint. Plaintiffs had every reason to believe that their case may survive dismissal because the district court found that defendant's motion to dismiss was "not so clearly meritorious" as to warrant a stay of discovery.[39] Plaintiffs' actions must be evaluated contextually, and what better justification could exist for a reasonable belief by plaintiffs that their amended complaint as constructed did not suffer from a fatal statute of limitations "defect" than a finding by the district court that defendant's motion was not "so clearly meritorious" as to warrant a stay of discovery? Plaintiffs hardly sat "idly by

[39] Plaintiffs can hardly be faulted for their good faith reliance on the district court's open skepticism about the strength of the defendant's motion to dismiss the plaintiffs' Amended Complaint. If the Amended Complaint was so clearly barred by the statute of limitations, the district would have abused its discretion in not staying discovery during the pendency of the defendant's motion to dismiss. *Chudasama v. Mazda Motor Corp*., 123 F.3d 1353, 1367-68 (11th Cir. 1997). Yet it did not enter a stay, signaling its intention for discovery to continue. And continue it did, for more than a year after the district court denied the defendant's motion for a stay.

as [they] awaited the district court's determination of" the defendant's motion to dismiss. *Wagner v. Daewoo Heavy Industries America Corp*., 314 F.3d 541, 543 (11th Cir. 2002) (en banc). Rather, they continued with the discovery, complying with each of the deadlines set by the district court.

Likewise, plaintiffs were never put on notice that the complaint lacked sufficient factual allegations to "move [their] claims across the plausibility threshold" or suffered from an irremediable "yawning gap." *Adams v. City of Indianapolis*, 742 F. 3d 720, 734 (7th Cir. 2014). Nor is this a case where plaintiffs were placed on notice *by the district court* that their allegations failed to state a legal claim or that they needed to remedy the pleading's allegations regarding its timeliness.[40] Rather, plaintiffs quite reasonably proceeded in reliance on the finding by the district court that the defendant's motion to dismiss was "not so clearly meritorious" as to warrant a stay of discovery.

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[40] *See, e.g. Eiber Radiology, Inc. v. Toshiba America Medical Systems, Inc*., 673 Fed. App'x. 925, 930 (11th Cir. 2016) (emphasis added) (affirming dismissal with prejudice and denial of leave to file a second amended complaint where plaintiff and counsel were afforded "ample opportunity" to conform to the court's "specific instructions" to clarify precise nature of the lawsuit; plaintiff "squandered" the opportunity by filing a "minimally augmented Amended Complaint" that did not address court's stated concerns); *Jaramillo v. Maoz, Inc*., 2020 WL 5750098 (S.D. Fla. Sept. 25, 2020) (finding no good cause to amend where Plaintiffs' complaint had been dismissed by Magistrate Judge, who advised Plaintiff "that her initial pleading on enterprise coverage was insufficient" and amended complaint "again failed to plead facts to support the existence of such coverage").

To summarize, this case was proceeding *at the direction of and with oversight by* the district court and the Magistrate Judge. Until the oral argument on defendant's motion to dismiss, there had been no indication whatsoever that the district court harbored serious concerns about the timeliness of the complaint; in fact the record establishes the contrary. When for the first time the court articulated those concerns and dismissed the Second Amended Complaint,[41] plaintiffs promptly sought leave

[41] The prospect of a possible future amendment was first brought up by the district court *six days* before the dismissal order was entered, at the oral argument on defendant's motion to dismiss. The district court asked plaintiffs' counsel if there was "room for one final amendment" to the complaint that was narrowly tailored to the 2018 amendment. DE:203-1 at 23-24 ("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 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." DE:203-1 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." DE:203-1 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

to amend via Rule 59(e), submitting a Third Amended Complaint tailored to conform to the court's ruling. Yet rather than analyze whether plaintiffs had established cause to grant leave to file the Third Amended Complaint, the district court mischaracterized its contents and suggested plaintiffs file "a new case" if they wished to vindicate their rights. In so doing, the district court seemingly overlooked the fact that plaintiffs had never been afforded an opportunity to amend in light of the district court's rejection of the continuing violation doctrine, and the fact that the parties engaged in extensive and expensive discovery it had sanctioned, overseen, and refused to stay based on its previous finding that defendant's motion to dismiss was "not so clearly meritorious" as to warrant a stay.

Finally, Appellants note that the district court's failure to carefully review the allegations contained in their Second Amended Complaint, *see* Argument I, seemingly led it to dismiss with prejudice not only plaintiffs' federal constitutional claims *but also their discrete state-based challenge*. DE:102 at ¶¶ 128-29. In dismissing the entire Second Amended Complaint, the district court did not segregate the state constitutional claim from its global dismissal with prejudice,

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issue regarding the statute of limitations, affirmatively expressed interest in amending the complaint in light of the district court's stated concerns, to which the Court said: "I will take that under advisement." DE:203-1 at 47-48. Less than a week after the oral argument, the district court dismissed the Second Amended Complaint with prejudice.

which is error. *See, e.g*. *Whitchurch v. Elarbee Thompson Wilson & Sapp, LLP*, 814 Fed. Appx. 547, 549-50 (11th Cir. 2020) ("when a district court dismisses the claims in a complaint with prejudice on shotgun pleading (and therefore non-merits) grounds, it should dismiss any state law claims without prejudice so they can be refiled in state court. . . . That is so even if the plaintiff was given the chance to amend to state law claims and failed to do so."); *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296-97 (11th Cir. 2018) (affirming district court's dismissal of second amended complaint because it was a "shotgun pleading" with exception of state law claims, which should have been dismissed "without prejudice as to refiling in state court" particularly "where, as here, the dismissal occurs without any analysis of the merits of the state claims;" Court remands to district court "for the limited purpose of clarifying the order in this respect.").

Accordingly, the district court's order dismissing the Second Amended Complaint should be reversed, as should its refusal to grant plaintiffs leave to file the Third Amended Complaint requested in their Rule 59(e) motion. This case should be remanded with instructions that the district court treat the Third Amended Complaint as the operative complaint in this matter. The Court should also vacate the district court's order insofar as it dismisses plaintiffs' state constitutional claim with prejudice, and remand for the limited purpose of clarifying its dismissal order in this respect.

CONCLUSION

Based on the foregoing arguments and authorities, Appellants submit that the lower court erred in dismissing their Second Amended Complaint with prejudice on statute of limitations grounds, in denying them leave to file the Third Amended Complaint they submitted, and in dismissing their state constitutional claim with prejudice as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to FRAP 32 (g)(1), that the foregoing complies with the type-volume limitation as set forth in FRAP 32 (a)(7)(B)(i), excluding the parts of the document exempted by FRAP 32 (f). This document contains 12,882 words and is typed in Times Roman 14-point font and prepared in a proportionally spaced typeface using Microsoft Word.

/s/ Todd G. Scher
TODD G. SCHER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been electronically filed on April 26, 2021, with the Eleventh Circuit Court of Appeals, and opposing counsel will receive service of this Brief via the CM-ECF system.

/s/ Todd G. Scher
TODD G. SCHER