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

REPLY BRIEF OF APPELLANTS

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Jane Doe, et al., v. Swearingen, No. 21-10644

CERTIFICATE OF INTERESTED PERSONSAND CORPORATE DISCLOSURE STATEMENT

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.

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

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I

Introduction

In Issue I, Appellants assert that the district court erred in refusing to apply the continuing violation doctrine to their claims. *See* Initial Brief ("IB") at 24-38. Appellee's Answer Brief ("AB") devotes fewer than four pages to the issue, citing three cases only, none of which deal with a case resembling plaintiffs' (AB at 11-14). Defendant fails to discuss any of the numerous cases cited by plaintiffs, including two within this Circuit, that apply the continuing violation doctrine to cases resembling plaintiffs'. And he never even *attempts* to dispute plaintiffs' argument that the cases relied upon by the district court are inapposite (IB at 33-37).

Instead of engaging with the actual question raised by plaintiffs in Issue I—whether the continuing violation doctrine extends the statute of limitations in this case—defendant devotes most of his brief to arguing that the statute of limitations bars plaintiffs from challenging the statute, *including* the 2018 amendments. Plaintiffs will address this part of the Answer Brief first, then will turn to defendant's meager arguments about the continuing violation doctrine.

Plaintiffs' Claims Against 2018 Amendments Were Timely

Defendant argues that any provision of the statute enacted more than 4 years before plaintiffs filed suit is immune from review, even if, as here**,** a recent

enactment is unconstitutionally onerous as the result of its necessary interaction with earlier provisions. This argument lacks merit.

Plaintiffs challenged the 2018 redefinition of temporary residence from 5 days to 3 days. This recent amendment interacts with earlier amendments requiring multiple in-person reports of a temporary residence within 48 hours before departure and after return: 1-2 for in-state travel, 2-4 for out-of-state travel. Second Amended Complaint ("SAC") ¶¶ 21-36. As such, the 2018 redefinition virtually bars registrants from taking long weekends away: the reporting offices, which are few and far-flung, keep limited days and hours, SAC ¶ 29; an hour too early or late on either side of a 3-day trip subjects the registrant to felony arrest and mandatory criminal punishment. Even without the threat of felony arrest, most people would be chilled from taking long weekends away if required to make multiple time-consuming in-person reports within 48 hours to distant offices with limited hours and days.

Yet defendant's position is that, because the *1998* travel reporting amendment required one in-person report of a trip lasting 14 consecutive days or more, with exemptions for vacation, emergency or other special circumstances, plaintiffs were on notice *in 1998* of the *2018* burden of which they now complain (AB at 9-10). Plaintiffs do not take the position that *any* restriction on registrant travel is unconstitutional, or that any previous amendment standing alone unconstitutionally

infringed on this fundamental right. But where, as here, preceding amendments bear upon and interact with the 2018 redefinition to convert a travel burden into a virtual bar, plaintiffs have made a timely right to travel claim.

Defendant maintains, however, that even if plaintiffs had a timely right to travel claim based on the 2018 amendments, they "do not contend here that their claims arose during the four-year statute of limitations period preceding the filing of their complaint (AB at 7). This is incorrect. As plaintiffs noted in their Initial Brief: "Plaintiffs' original complaint was filed four months after enactment of the 2018 amendments to the statute … That complaint made allegations and claims specific to those amendments …" (IB at 3). So too did their First and Second Amended Complaints (AB at 3, n.2).

Alternatively, defendant argues that even if plaintiffs had alleged that their complaint was timely with respect to the 2018 amendments, they failed to state a cause of action against them: "Whether or not they could have foreseen the 2018 amendments, not one of their causes of action is premised on those specific changes being unconstitutional" (AB at 14). This too is incorrect.

Plaintiffs referred to the "specific changes"—the redefinition of temporary residence and creation of a minimum mandatory sentence—throughout the SAC, ¶¶ 15, 19, 32, 36, 37, 38, 39, 40, 41, 45, 47, 68, 70, 86, 97, 102, 111, 117, 118. In particular, John Doe 1 stated that he and his wife, who had just delivered a stillborn

child in her eighth month of pregnancy, checked out of the hospital early to avoid his having to abandon her to make multiple in-person reports *in connection with his 3-day stay* there. SAC ¶68. He and his wife previously enjoyed taking long weekends away, but the requirement to make multiple in-person reports *in connection with a 3-day trip* was too costly in time and lost business to continue taking them. SAC ¶ 70. John Doe 7 also alleged that having to make multiple in-person reports *in connection with a 3-day trip* took too much time away from work to continue taking long weekends with his wife and child, or 3-day trips he used to make for business. SAC ¶97. John Doe 5 alleged that the 2018 amendment creating a mandatory minimum sentence of 6-months' GPS-monitored probation for violating the statute virtually ensures his future incarceration, because he cannot comply with GPS monitoring due to severe cognitive deficits and cannot understand the statute for the same reason. SAC ¶86.

Most of plaintiffs' claims relied on these "specific changes." The requirement to make multiple in-person reports for as few as 3 days away is the heart of Claim IV(A): Right to Travel. SAC ¶¶117-18. The 3-day rule is expressly identified as an affirmative disability in Claim I: Ex Post Facto. SAC ¶102. The impacts of the minimum-mandatory sentence and the 3-day travel rule are expressly identified as significant factors in determining Claim III(A): Strict Liability. SAC ¶111. Both Claims II: Cruel and Unusual Punishment and IV(B): Stigma-Plus, incorporate

allegations about the 2018 amendments in discussing the punitive impacts of the 2018 statute. SAC ¶¶107-08, 119-22.

Next, defendant argues that, even if plaintiffs had timely made sufficient allegations against the 2018 amendments, they cannot thereby "revive" or "re-set the clock" on claims against statutory amendments preceding the limitations period (AB at 12, 13). Wrong again.

In *McGuire v. Marshall*, 2021 WL 67912 *21 (M.D. Ala. Jan. 7, 2021), plaintiffs who had litigated against earlier versions of the registration statute filed a lawsuit against the version enacted in 2017. The court had to determine the degree to which new litigation was barred by either res judicata or the applicable 2-year statute of limitations. The 2017 version required more detail in pre-travel reporting regarding the destination and its surroundings, upon penalty of felony prosecution, allegedly chilling plaintiffs "from taking spontaneous weekend trips." *Id*. at ** 13, 17.

The district court asked

> whether the 2017 amendments reset the clock on some of the provisions challenged in Plaintiffs' ex post facto claims. A cause of action for an ex post facto claim accrues when the punishment was imposed. [] Defendants claim that this punishment was imposed when one registers under ASORCNA. But that cannot be *per se* true without considering how the requirements imposed upon registrants have changed. Under Defendant's logic, the State could amend ASORCNA to require that prior registrants be put in stockades for an hour a day every

> week, and persons who registered more than two years prior would be unable to bring ex post facto challenges. Because all Plaintiffs registered for the first time more than two years before filing this suit, any claims to earlier versions of ASORCNA are barred, leaving only the question of whether the 2017 amendments impose any new punishments. . . .

Id. at *21.

As the court noted, even without applying the continuing violations doctrine, to the extent that the 2017 changes in travel reporting '**intersect'** or '**interact'** with the statute's main in-person reporting requirements, the latter are "challengeable" too." *Id*. at ** 17, 20, 22 (emphasis added).

Finally, defendant contends that plaintiffs are claiming for the first time on appeal 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' " (AB at 12, quoting IB at 37). Defendant's representation that plaintiffs did not make this claim in the SAC is belied not only by the district court's accurate representation of plaintiffs' claims[1] but also by the SAC itself:

> As a result of multiple amendments since 1997,

[1] *See* DE:201 at 3 (recognizing that 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'").

> registration now entails an engulfing number of mandatory conditions: in-person reporting on an ever-lengthening list of occasions within ever-shortening deadlines; to multiple law enforcement agencies; of a burgeoning amount of personal information; as well as any actual or intended changes to this information; regardless of the registrant's qualifying offense or risk to reoffend; for the rest of his life.

SAC ¶19. The SAC dealt extensively with the 2018 amendments as exemplifying this pattern. SAC ¶¶ 32-37, 47. Plaintiffs expressly alleged the adverse impacts on them of these amendments. SAC ¶¶ 68, 70, 86, 97. Plaintiffs also alleged their own low risk of re-offense. SAC ¶¶ 5, 71, 86, 87. Plaintiffs' as-applied constitutional claims incorporate these allegations by reference.

The Continuing Violation Doctrine Applies to All of Plaintiffs' Claims.

As noted above, defendant expends little energy arguing against application of the doctrine. He fails to distinguish any of the numerous cases cited by plaintiffs in support of its application here, and does not address plaintiffs' argument that the cases relied on by the district court are inapposite. He seemingly advances one point only: that the continuing violation doctrine applies only where a reasonably prudent plaintiff would have been *unable to determine* whether a violation occurred, *see Lee v. Eleventh Judicial Circuit of Florida*, 699 Fed.Appx. 897, 898 (11th Cir. 2017), and that plaintiffs should have been able to determine that a violation occurred on the date each amendment relevant to their complaint was enacted (AB at 11-12).

Defendant acknowledges that it is "not until **facts** supportive of the cause of

action are or should be apparent to a reasonably prudent person similarly situated" that the limitations period begins (AB at 11) (citation omitted) (emphasis supplied). His mistake is his conclusion that the **only facts** relevant to a cause of action against the statute are the enactment of its constituent amendments: "Appellants appear to argue that the facts underlying those causes of action (the statutory provisions they challenge) were not apparent to them" (AB at 13).

Defendant's sole point fails because facts other than an amendment's enactment are critical to plaintiffs' causes of action, which were not apparent upon enactment of constituent amendments: for example, a recent change in decades of case law, including in this Circuit, uniformly rejecting challenges to those amendments; decades of longitudinal empirical research concluding that registrants have a low recidivism rate which diminishes significantly over time offense-free in the community, that registration statutes are ineffective in reducing it, and that the destabilizing impacts of these statutes in the long term on both registrants and their families subvert the stated goals of the laws; and the cumulative impact of decades of restrictive amendments.

Case Law

Until quite recently, there were no federal cases to support a cause of action against FSORNA by plaintiffs. In particular, this Circuit had ruled against every registrant who ever challenged the constitutionality of the statute under any theory,

including most of the theories set forth in the SAC.[2]

In 2016, the Sixth Circuit struck a registration statute on ex post facto grounds based on empirical evidence of inefficacy and the onerous impacts of recent amendments in combination with earlier ones. *Does #1-5 v. Snyder*, 834 F.3d 696, 703-05 (6th Cir. 2016). In 2017, this Court reversed the dismissal of an ex post facto challenge to a residence restriction, based in part on plaintiffs' empirical proffer of inefficacy. *Doe 4 v. Miami-Dade County, Florida,* 846 F.3d 1180, 1185-86 (11th Cir. 2017). Since then, three other federal circuit courts[3] and district courts around the country, including in this Circuit, have been striking registration statutes, as applied, for the same reasons. *See* IB at nn. 28 & 29.

These developments represented a sea change in the applicable circuit law: a lawsuit such as plaintiffs'—relying upon both empirical evidence and the cumulative impacts of decades of amendments—can now be meritorious rather than legally

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[2] *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005); *Houston v. Williams*, 547 F.3d 1357 (11th Cir. 2008); *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009); *United States v. Carver*, 422 Fed.App'x 796, 801 (11th Cir. 2011); *United States v. W.B.H.*, 664 F.3d 848 (11th Cir. 2011); *Windwalker v. Governor of Alabama,* 579 Fed.App'x 769 (11th Cir. 2014); *Waldman v. Conway*, 781 F.2d 1283 (11th Cir. 2017); *Addleman v. Fla. Attorney Gen.*, 749 Fed.App'x 956 (2019).

[3] *Does v. Wasden*, 982 Fed.3d 784 (9th Cir. 2020); *Prynne v. Settle*, 848 Fed.Appx 93 (4th Cir. 2021). *And see Piasecki v. Court of Common Pleas, Bucks Cty., Pa.*, 917 F.3d 161 (3d Cir. 2019)(striking frequent travel reporting requirements as constituting custody).

infirm. As the district court noted, this Court has not yet ruled on such a case (DE:201 at 8 n.4).

Empirical Evidence

Just last month the American Law Institute (ALI) adopted a revision to the Model Penal Code (MPC) for Sexual Assault and Related Offenses[4] based on decades of empirical research into the efficacy of registration statutes in reducing sexual reoffense: "**[A]ll the available evidence**" -- which the ALI characterizes as "**extensive**" and "**unequivocal**" -- "indicates that these special [registration] burdens do not reduce the incidence of these offenses," but "actually undermine public safety, the exact opposite of what lawmakers and the public so confidently assume they accomplish." § 213.11, pp. 486-88.[5] (emphasis supplied). The revision further noted:

[4] American Law Institute, Model Penal Code Tentative Draft No. 5 (May 4, 2021) (approved with amendments, Annual Meeting June 2021), § 213.11H(1)(a), (b), pp. 487-88, 491, 636. Although the "tentative draft" awaits final approval before publication, that process does not, under Institute rules, alter the substance of the approved draft.

[5] The MPC provisions restrict notification to law enforcement with warnings against using the information to harass or injure registrants, § 2123.I1H.(1)(b)(iv) & (v), pp. 492, 636-68; require individualized risk determinations, § 213.1II.(4), (5), p. 492; reduce duration of registration duties, §§ 213.1IF9(1), (2), (3), J.(4), pp. 491, 634, 639, reduce registration duties by permitting remote updates, § 213.I1E.(2)(c), (d), p. 491; reduce failure to register offenses from felonies to misdemeanors, § 213.I1G(1), p. 635, and create an affirmative defense of impossibility, §§ 213.I1F(2), pp. 635-36.

> The aim of these laws is to ease public fear, reduce recidivism and enable concerned citizens to take steps for self-protection. Yet extensive research demonstrates that these gains have not materialized. To the contrary, there is clear evidence, widely acknowledged by professionals in the field, that these laws are seriously counter-productive…The crucial point is simply that registration, public access, community notification, residency restrictions, and other special burdens do not have the anticipated effect.

Id. at 485-86.

The ALI regularly informs decisions by this Court and the United States Supreme Court, as revealed through any case engine search. In contrast, the Florida Legislature has never claimed, let alone cited, evidence to establish the efficacy of the statute or any of its constituent amendments. SAC at n.6. Until recently, federal courts simply adopted the "findings" of *Smith v. Doe,* 538 U.S. 84, 102-103, 105, 107 (2003) that registrants were highly likely to reoffend and that the minor inconveniences of Alaska's first registration statute were effective in reducing this risk. *Id.* at 102-103, 105, 107.

The empirical evidence, the basis for almost every federal court opinion granting relief from a registration statute, is the context for most of plaintiffs' claims. Their ex post facto claim (I) relies on this evidence in analyzing whether the statute has a rational relationship to its goal or is excessive with respect to it. SAC ¶104-105. Their right to travel claim, IV(A), which places the burden on defendant to show that infringement is necessary to serve a compelling state interest, is anchored

in the empirical evidence about recidivism and inefficacy. SAC ¶118. The same is true of the stigma-plus claim IV(B), SAC ¶122, and the state constitutional right to privacy claim (V). SAC ¶129. Plaintiffs' irrebuttable presumption claim, IV(D), rests squarely on the empirical evidence about recidivism and inefficacy: the presumption is categorically wrong, is easily rebutted, and does not protect the public. SAC ¶125-126. Like the rational relationship factors in ex post facto analysis, Plaintiffs' substantive due process/rational relationship claim, IV(C), is based on the empirical evidence about recidivism and inefficacy. SAC ¶124.

Empirical evidence about inefficacy and recidivism is a basis for relief in most if not all cases striking registration laws. *See* IB at 32-33, n. 28;[6] *see also Powell v. Keel*, — S.E. 2nd —, 2021 WL 2346055 at *5 (S.C. June 9, 2021). Put another way, it is a **fact** supporting plaintiffs' claims that was not foreseeable when they were first required to register.

Cumulative weight of decades of increasingly restrictive amendments.

The SAC makes a lengthy detailed comparison between the impacts of the 1997 statute and the 2018 version. SAC ¶ ¶17-36, 46-54. Every claim made by plaintiffs rests on the cumulative impacts of the decades-long accretion of requirements and restrictions embodied in the 2018 statute. The ex post facto claim

[6] Plaintiffs erroneously cited the second case in footnote 28. It should read *Does v. Wasden*, 982 Fed.3d 784, 791-92 (9th Cir. 2020).

(I) is based on the punitive effects of the 2018 statute, not the 1997 version, which required little of registrants and provided limited notice to the public. This is true of the eighth amendment claim (II) as well. Each substantive due process claim (right to travel and movement, stigma-plus, irrebuttable presumption, rational relationship) requires a balancing test between the cumulative impacts of decades of amendments and the empirical evidence about recidivism and inefficacy.

While the travel-related language alleged to be vague has been part of the statute since at least 2010 (AB at 8-9), the adverse impacts of the vagueness problem have increased with every additional travel-related report and every constricting redefinition of temporary residence. The more reports required, the more opportunity for mistaking the meanings of the travel-related words and phrases, the greater the vulnerability to arrest. Indeed, plaintiffs alleged that the vagueness of the travel-related language, in combination with the 2018 amendments, chilled them from taking 3-day trips. SAC ¶ ¶ 70, 97.

In any event, vagueness is itself a continuing violation: "[Plaintiffs] are bound in perpetuity by allegedly vague laws. Thus, each new day is a new injury," so long as the law is enforced against them. *Doe 1 v. Marshall*, 367 F.Supp.3d 1310, 1337-38 (M.D. Ala. 2019). The district court noted that this Court in *Hillcrest Prop., LLC v. Pasco Cty.*, 754 F.3d 1279, 1283 (11th Cir. 2014) had cited with approval *Kuhnle Brothers v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997), which held that a

right to travel claim accrues every day an unconstitutional law is in effect. *Doe I v. Marshall*, 367 F.Supp. 3d at 1338. *See also Wallace v. New York*, 40 F.Supp.3d 278 (E.D.N.Y. 2014) ("continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations"); *Maldonado v. Harris*, 370 F.3d 945, 955-56 (9th Cir. 2004) (first amendment challenge to statute regulating outdoor advertising not time-barred: "continuing enforcement of the statute" permitted plaintiff "to raise a facial challenge to the statute at any time."); *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 664 (4th Cir. 1989) ("The continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations."). Thus, continued enforcement of a vague law is a continuing violation.

Plaintiffs were all young men when first required to register. They are now married; two have minor children. They could not have foreseen when they first registered that increasingly aggressive notification of their status would not only subject them to violence but would also blight the lives of their wives and children. SAC ¶60. They could not have foreseen that 1998's requirement to make a single in-person report of a two-week stay in one location would metastasize into 2018's requirement of multiple in-person reports for as few as 3 days away.

Defendant insists that the continuing violation doctrine does not apply in cases where recent amendments, in combination with more remote restrictions, have made a registration statute more punitive: "Appellants cite no authority whatsoever that

has applied this novel, straw-breaking-the-camel's-back theory of how the continuing violation doctrine could apply in the context of statutory amendments" (AB at 13). To the contrary, plaintiffs have cited numerous cases in which courts granted relief to people with remote convictions based on the cumulative impacts of remote and recent statutory amendments,[7] including cases applying the continuing violation doctrine.[8]

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[7] *Prynne v. Settle*, 848 Fed.Appx 93, 97 (4th Cir. 2021) (reversing dismissal of ex post facto challenge by registrant with remote conviction to current statute, as amended to include multiple in-person reports, based on empirical evidence of inefficacy and plaintiff's low risk of reoffense); *Does #1-5 v. Snyder*, 834 F.3d 696, 703-05 (6th Cir. 2016) (striking statute as applied to registrants with remote convictions in light of intervening amendments increasing required number of in-person reports, and imposing housing restriction, in context of empirical evidence of inefficacy); *Doe v. Rausch*, 461 F.Supp.3d 747, 768-69 (E.D. Tenn. 2020) (striking lifetime registration as applied, in light of at least two dozen restrictive amendments enacted since passage: "[T]he Court must consider the imposition of all of SORVTA's requirements which have grown since SORVTA's enactment. Consequently the Court must consider the combined, cumulative lifetime impact of all of SORVTA's requirements on plaintiff."); *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"); *State v. Letalien*, 985 A.2d 4, 23-24 (Me. 2009) (striking statute after having previously upheld it based on heavy burdens of recent amendments and lack of evidence of efficacy); *Doe v. State*, 167 NH. 382, 111 A.3d 1077, 1084, 1096 (N.H. 2015) (striking statute after having previously upheld it based on recent amendments increasing the number of in-person reports and widening notification in absence of findings to support changes).

[8] *Doe 1 v. Marshall*, 367 F.Supp.3d 1310, 1338-39 (M.D. Ala. 2019) (applying continuing violation doctrine to review recent and remote statutory amendments to registration law); *Doe v. Haslam*, 2017 WL 5187117 **10-14 (M.D. Tenn. Nov. 9, 2017) (applying continuing violation doctrine to statute that had been "repeatedly revised to increase its restrictions and requirements, and to make more information

This Circuit has adopted the continuing violation doctrine.[9] The doctrine does not apply to cases involving one-time acts with continuing consequences. The district court relied only upon one-time-act cases: the breach of a plea agreement,[10] an erroneous registration designation,[11] and failure to meet a deadline.[12] As noted *supra*, defendant fails to address these cases or even attempts to distinguish them from this one.

II

Introduction

Issue II challenges the district court's dismissal of the SAC with prejudice. Defendant's principal argument is that plaintiffs were not diligent and did not meet the "good cause" standard for amending their complaint after the deadline set forth

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about sex offenders publicly available," including recent statutory amendments); *Doe v. Gwyn*, 2018 WL 1957788 **at 5-6 (E.D. Tenn. April 25, 2018) (applying continuing violation doctrine to review both recent and remote statutory amendments); *Wallace v. New York*, 40 F.Supp.3d 278, 302-04 (E.D.N.Y. 2014) (same).

[9] *Knight v. Columbus, Ga.*, 19 F.3d 579, 580-81 (11th Cir. 1994). *See* also *Hillcrest Prop., LLC. v. Pasco Cty.*, citing *Kuhnle Brothers v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) with approval.

[10] *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).

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

[12] *Center for Biologial Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006).

in the Scheduling Order, *see* Fed. R. Civ. P. 16(b). Appellee does not contend that the district court found that plaintiffs lacked diligence and good cause to amend because, in fact, it did not. Instead, the district court determined that "[a]s Defendant has raised its statute of limitations argument in previous motions to dismiss, and as Plaintiff has filed three complaints in this matter, the Court does not find further amendment appropriate" (DE:201 at 8).[13] Because the district court's order lacked any meaningful explanation underlying its dismissal with prejudice, defendant is forced to speculate about what the district court found and what the opaque "appropriateness" standard must mean.

Defendant's brief does make a candid—and dispositive—concession with regard to plaintiffs' diligence; for the first time on appeal, defendant acknowledges that plaintiffs ***were reasonable*** in their reliance on the district court's denial of the stay of discovery and its concomitant preliminary finding that "they were likely to prevail on the statute-of-limitations issue," even if they were later proven incorrect (AB at 19). As explained more fully *infra*, this recognition should be deemed a concession of diligence, and the district court's dismissal with prejudice should be vacated because plaintiffs have established good cause for their request for leave to amend with a proposed Third Amended Complaint ("TAC").

[13] In denying plaintiffs' motion to alter or amend, the district court likewise did not elucidate on its reasoning for denying leave to amend (DE:212 at 2).

Diligence, Not Hindsight

Defendant's hypothesis about the analysis the district court must have undertaken goes like this: because defendant had previously challenged the initial complaint on statute of limitations grounds and plaintiffs amended their complaint twice without "curing that fatal defect,"[14] they were not diligent and therefore they failed to establish good cause to amend with the proposed TAC they submitted below.[15] But defendant's hypothetical scenario improperly views diligence as a context-less concept, and not a legal principle that must account for the facts and circumstances *at the time the parties confront them, not with the benefit of 20/20 hindsight*.

"[D]iligence does not require perfect hindsight." *United States v. McRae*, 702 F.3d 806, 841 (11th Cir. 2012). It is a concept ill-suited to black and white definition;

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[14] It bears mentioning that defendant's position below was that the complaint was barred by the statute of limitations and thus un-fixable no matter how it was amended. *See* DE:208 at 17 n.3 ("Relatedly, Plaintiffs imply that FDLE agreed they could proceed with claims based on amendments enacted within the past four years. . . . FDLE's position has always been that all claims are time-barred as that is supported by *Meggison*"); *id*. at 18 ("Given that the date of Plaintiffs' designation would not have changed, this analysis would still apply to an amended pleading"). Defendant appears to have abandoned this argument on appeal.

[15] In their Initial Brief, plaintiffs explained that the district court "mischaracterized" their proposed TAC "as raising 'challenges not previously presented'" (IB at 54 n.32) (quoting DE:212 at 2). Defendant baldly concludes that the district court was "correct" in its characterization but does not explain how or why (AB at 22).

there is no legal "test" to determine if someone is diligent. Black's Law Dictionary defines "diligence" as, *inter alia*, the "attention and care required from a person *in a given situation*." Black's Law Dictionary (11th ed. 2019) (emphasis added). In other words, it is a concept that must account for the situation as it *was at the time the events are occurring*; the conditions *at the time* serve as the guideposts for analyzing someone's diligence. *See, e.g., Aron v. United States*, 291 F.3d 708, 712 (11th Cir 2002) ("the due diligence inquiry is an individualized one" that must account for the circumstances of a particular case).

Furthermore, due, or reasonable, diligence, does not require a party "to undertake repeated exercises of futility or to exhaust every imaginable option," or to "ignore the reality" of the circumstances of each case, *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000); rather, it requires a party to act reasonably. *Aron, supra; see also Holland v. Florida*, 560 U.S. 631, 653 (2010) (diligence required for equitable tolling of statute of limitations in a §2254 proceeding is "'reasonable diligence' . . . not 'maximum feasible diligence.'") (citations omitted). The requirement that the moving party act with "the requisite diligence" does not mean that courts demand "perfect diligence" because "hindsight is often '20/20.'" *In re Papst Licensing GMBH & Co. KG Patent Litigation*, 279 F.Supp.3d 28, 34-35 (D.C. Aug. 24, 2017).

Appellee's Concession

The district court did not divulge its reasoning for its denial with prejudice except to conclude that a further amendment would not be "appropriate." Defendant attempts to convert the court's silence into a more fulsome order in order to establish that the plaintiffs were not diligent and thus lacked good cause to amend their complaint. Defendant's efforts are unavailing.

Plaintiffs first note the **significant admission** in the defendant's brief: defendant acknowledges that, in light of the district court's denial of a stay of discovery, ***the plaintiffs could reasonably have determined that they were likely to prevail on the statute of limitations issue*** (even if they later turned out to be incorrect) (AB at 18 n.6). Defendant ***never*** acknowledged this below. This candid admission, consistent with the law relating to stays of discovery,[16] more than establishes the reasonableness of plaintiffs' actions (and thus their diligence) *when faced with the district court's order denying the motion to stay discovery.* In plaintiffs' view, defendant's about-face on the reasonableness of plaintiffs' reliance

[16] As plaintiffs noted in their Initial Brief and have consistently contended, their reliance on the district court's order denying the stay of discovery, premised on the standard set forth in *Chudasama v. Mazda Motor Corp*., 123 F.3d 1353 (11th Cir. 1997), was a reasonable basis for them to believe that they may survive the defendant's motion to dismiss, thus establishing their diligence and good cause for not seeking leave to amend on an earlier occasion. *See* IB at 45 n.39. It appears that defendant now agrees.

on the district court's denial of the stay of discovery ends the diligence and good cause inquiries. It is a concession of plaintiffs' reasonable and due diligence. And it undermines the defendant's unjustified accusation that plaintiffs' cavalierly blew past the deadline to amend their complaint and through discovery—spending hours and resources preparing and reviewing interrogatories, coordinating numerous experts' reports and rebuttal reports, preparing for and conducting hour upon hour of lay and expert witness depositions—"in hopes that the statute of limitations did not apply" (AB at 18).

Notwithstanding his concession, Defendant, citing *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1232 (11th Cir. 2008) (AB at 17), argues that plaintiffs are "wrong" to suggest that they *must* be placed on notice by the district court of a potential "fatal defect" in their complaint before attempting to cure it (AB at 18). Plaintiffs have made no argument that the court was required to issue a notification to them; but, in any event, *Oravec* is inapposite in almost every respect to plaintiffs' case.

Oravec involved a Copyright Act suit filed in 2004 against parties associated with two Trump properties in South Florida. Plaintiff, an architect, alleged that the defendants had infringed his copyrighted architectural designs in the design, development, and construction of these properties. *Id*. at 1220-21. After litigating for two years, the parties filed cross motions for summary judgment on a variety of

issues. *Id*. at 1222. At the first of three summary judgment hearings, the court expressed the view that Oravec could not prevail on claims pertaining to a March 2004 copyright because the construction of a building could not, as a matter of law, infringe the copyright of a pictorial, graphic, or sculptural (PGS) work. *Id.* In response to the court's concerns, Oravec filed a new series of copyright applications to properly register the March 2004 copyright as an architectural work and subsequently sought to amend his complaint "based on these new registrations." *Id*. At a second summary judgment hearing, the court denied Oravec's request for leave to amend because the registration certificates he just requested had yet to issue and the deadline for filing amendments had passed more than a year earlier. *Id*.

Nine days later, Oravec received the requested registration certificates and he moved the court to reconsider its denial of leave to amend. *Id*. at 1222-23. At the third summary judgment hearing, the court granted summary judgment in favor of defendants and rejected Oravec's request to amend his complaint. *Id*. at 1223. The denial was premised on a number of factors, including a specific finding made by the court that Oravec's "delay was unreasonable," that trial was six weeks away, and that Oravec had been on notice for months (since the filing of defendants' summary judgment motions) that there was a fatal documentary defect in the March 2004 copyright allegation. *Id*.

On appeal, the Court upheld the denial of leave to amend, concluding that

Oravec "did not show the requisite level of diligence" and rejecting his argument that he lacked "notice of the jurisdictional concern" regarding his failure to secure necessary and specific copyright documentation until the first summary judgment hearing. *Id*. at 1232. As the Court explained, the fact that Oravec or his counsel "misunderstood the scope of legal protections available for PGS works" and thus delayed in securing the proper copyright registration for architectural works "does not constitute good cause." *Id*.

Oravec presented an entirely different set of circumstances than plaintiffs' case does. Here, the putative "defect" of which defendant complained in his motions to dismiss concerned the application of the continuing violation doctrine to plaintiffs' allegations. *See* Issue I, *supra*. It was not, as in *Oravec*, a notification to plaintiffs that their complaint lacked a particular "jurisdictional" concern, or a piece of evidence, or a document, or failed to plead an element of a tort, or *anything* tangible that could have, in fact, been "cured" or remedied by the plaintiffs.[17]

[17] Defendant's reliance on *Sosa v. Airprint Sys., Inc*., 133 F.3d 1417 (11th Cir. 1998) (per curiam), *Smith v Sch. Bd. of Orange Cty*, 487 F.3d 1361 (11th Cir. 2007), and *Southern Grouts and Mortars, Inc., v. 3M Company*, 575 F.3d 1235 (11th Cir. 2007), is similarly misplaced. These cases involved attempts to amend a complaint after the deadline set forth in the Scheduling Order, and address situations where courts denied leave to amend where, for example, the defendant had identified particular identifiable documents lacking in the complaint, or plaintiff alleged that discovery had revealed new claims but then failed to detail to the court what those claims were and what facts supported them, or plaintiff waited months after the deadline to amend to begin deposing witnesses; in one case, the court determined that leave to amend was properly denied where the plaintiff "left to chance a critical

Plaintiffs did not "misunderstand" anything about the legal basis of their statute of limitations argument (AB at 17). Rather, there was a good faith disagreement about the applicability of the continuing violation doctrine. Defendant not only acknowledges that it was reasonable for plaintiffs to infer that they were likely to succeed on the statute of limitations issue (AB at 19 n.6) but also asks this Court to remand the case to the district court "[i]f the Court concludes that the district court's statute-of-limitations analysis was erroneous" (AB at 14 n.3). In other words, according to defendant, the plaintiffs should have been on "notice" of a "defect" in their statute of limitations argument, an argument defendant acknowledges could be decided differently by this Court.

Plaintiffs quite reasonably proceeded not only in reliance on a finding by the district court that defendant's motion to dismiss was "not so clearly meritorious" to warrant a stay of discovery, but also on the legal significance of that determination. While it is true that "overall stays of discovery may be rarely granted, courts have held good cause to stay discovery exists wherein 'resolution of a preliminary motion may dispose of the entire action.'" *Nankivil v. Lockheed Martin Corp*., 216 F.R.D. 689, 692 (M.D. Fla. Feb. 4, 2003) (citations omitted). In situations where "truly case dispositive" defenses are raised, such as a statute of limitations defense, a stay of

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component of subject matter jurisdiction." *Sosa*, 133 F.3d at 1419. None of these cases remotely resembles plaintiffs'.

discovery is warranted in order to spare the parties of "the expense of engaging in [] discovery" until "this dispositive issue has been resolved." *Videojet Techonologies, Inc., v. Eagle Inks, Inc*., 2009 WL 3617806 *1 (M.D. Fla. 2009). *See also Deboskey v. Suntrust Mortgage, Inc*., 2017 WL 10425448 *2 (M.D. Fla. Jan. 12, 2017) (noting that court had granted stay of discovery because motions to dismiss "asserted bars to Plaintiff's claims such as statute of limitations" and harm to Plaintiff in granting a stay "would be minimal compared with Defendant's burden of providing discovery concerning causes of action that may be dismissed"); *Alfa Corporation v. Alpha Warranty Services, Inc*., 2021 WL 1083440 *1 (M.D. Ala. Mar. 19, 2021) (stay of discovery warranted where asserted defenses of statute of limitations and laches were "not wholly frivolous" and would be a "dispositive" ruling). In other words, the district court's denial of defendant's motion to stay was a legally significant stage in the proceedings that served to further encourage plaintiffs that they could likely survive the motion to dismiss stage. The district court would not have declined to stay this case with a truly dispositive motion to dismiss pending if there was such a fatal "defect" in plaintiffs' complaint.

Finally, defendant acknowledges that dismissal of a plaintiff's state-law claims "should generally be without prejudice" (AB at 22). However, he argues that this general rule applies only where a complaint is dismissed as a shotgun pleading or when all federal claims drop out of the case and the district court declines to

exercise supplemental jurisdiction over the state-law claim. In plaintiffs' case, defendant argues that the district court's dismissal constituted an "adjudication on the merits," and therefore the "general rule should yield when the district court dismisses a complaint on the merits" (*Id.*). Defendant cites to no cases to support this specific proposition, and the cases he does cite are inapposite. For example, *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990), stands for the uncontroversial proposition that a case disposed of by summary judgment constitutes a judgment on the merits. Appellants maintain that the state-law claims they raised below should not have been dismissed when the case was dismissed on statute of limitations grounds.

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), excluding the parts of the document exempted by FRAP 32 (f). This document contains 6,484 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 Reply Brief has been electronically filed on July 14, 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