UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

JANE DOE,

Plaintiff,

vs. **Case No. 4:21-cv-85-RH-MJF**

RICHARD L. SWEARINGEN,

Defendant.
_____/

MOTION FOR RECONSIDERATION OF, TO ALTER OR AMEND, OR FOR RELIEF FROM ORDER DATED FEBRUARY 8, 2022

COMES NOW THE PLAINTIFF, JANE DOE, by and through the undersigned counsel, and, pursuant to Fed. R. Civ. P. 59(e) and/or 60(b), moves the Court for reconsideration of, to alter or amend, and/or for relief from, the Court's Order of February 8, 2022, dismissing with prejudice her claim of vagueness (Claim 2B) (ECF-22).

The Court denied Defendant's motion to dismiss Plaintiff's claims that the 2018 amendments (reducing reportable travel from 5 days in the aggregate per year to 3 days in the aggregate per year and imposing a mandatory minimum sentence for violations of § 943.0435) violated her constitutional ex post facto rights (Claim I),

travel rights (Claim 3A), and substantive due process rights (Claim 3C). The Court dismissed with prejudice her vagueness claim (Claim 2B) (ECF-22 at 11).[1]

The Court determined that the dismissed claims, including Claim 2B, "are foreclosed by" *Smith v. Doe*, 538 U.S. 84 (2003), *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005), *Lindsey v. Swearingen*, No. 4:21cv465-RH-MAF (N.D. Fla. Jan. 24, 2022) (unpublished order), and "other decisions" (ECF-22 at 6). Plaintiff's vagueness claim is not foreclosed by these cases, by any cases cited in the motion to dismiss (ECF-13 at 20-26), or by any other cases she can find. As this Court noted, "[c]hallenges to the new provisions are not foreclosed by decisions that did not address them" (ECF-22 at 7). Similarly, a new challenge to older provisions should not be foreclosed by decisions that did not address them.

Under the statute at issue, a registrant is required to make between 2 and 4 in-person reports within 48 hours of leaving or returning from a 3-day trip away from home: at least 1-2 in-person reports of in-state travel; at least 2-4 in-person reports of out-of-state travel (ECF-1 at ¶¶ 31-32). As noted in Plaintiff's response to Defendant's motion to dismiss, "[b]ecause the reporting interval is defined in hours, but the reportable event in days, *no one reading the statute can be certain when the 48-hour interval begins or ends*, yet an hour wrong in either direction is a felony"

[1] The Court also dismissed her strict liability claim (Claim 2A), stigma-plus claim (Claim 3B) and irrebuttable presumption claim (Claim 3D). This motion does not address the dismissal of these claims.

punishable by a minimum-mandatory sentence (ECF-18 at 23) (emphasis in original).

Claim 2B of Plaintiff's complaint alleged that the statutory words and phrases that govern the requirement to make multiple in-person reports of travel – 1 day (at what hour does it start and end?), 48 hours (consecutive hours or 2 business days?), within 48 hours before (when does the 48 hours begin with respect to the first day of travel?), within 48 hours after (when does the 48 hours end with respect to the third day of travel?), secure or update driver's license (must she get a new driver's license reflecting the address of the vacated temporary residence?) – are vague (ECF-1 at ¶¶ 35-41). Plaintiff alleged that:

- She does not know what these words and phrases mean (ECF-1 at ¶¶ 43, 82);
- Countless other registrants have asked Defendant over the years what they mean but he refuses to tell them (ECF-1 at ¶ 42);
- Defendant's own employees define them inconsistently (*e.g.*, 48 hours = 48 consecutive hours v. 48 hours = 2 business days) (*id.*);
- Defendant provides no guidance to local law enforcement agencies about the meanings of these words and phrases (*id.*);
- Local law enforcement agencies interpret and apply them inconsistently (*id.*).

Disregarding Plaintiffs' detailed allegations,[2] Defendant countered in his motion to dismiss that the challenged words and phrases could be understood by anyone with a dictionary and a dab of common sense (ECF-13 at 21). Yet, while asserting on one page that 48 hours means 48 consecutive hours "and cannot mean anything else" (ECF-13 at 22), he elsewhere cited *Griffin v. State*, 969 So. 2d 1161 (Fla. 1st DCA 2007), see ECF-13 at 19, which defines 48 hours as used in the statute to mean 2 business days. Further, he maintained that "day" as used for 3-day travel means "the first day is excluded" (ECF-13 at 22).

While this Court was considering Defendant's motion to dismiss, a bill was introduced in the current legislative session to define "day," as used in travel-related registrant reporting, to exclude the first day, and to include even a single hour of the following day.[3] *See* SB 1932, ll. 160-71 (Attachment A). Similarly, the pending bill would define "within 48 hours" to mean "at least 48 hours." *See* SB 1932, ll. 1537-38.

[2] Her allegations must be taken as true for purposes of a motion to dismiss. *See Devengoechea v. Bolivarian Republic of Venezuela,* 889 F.3d 1213, 1220 (11th Cir, 2018) ("On a motion to dismiss, the factual allegations in the complaint are taken as true, even if they are subject to dispute").

[3] This means that any address the registrant visits for as little as an hour on 4 days a year – the home of a relative, friend, ailing neighbor – must be reported in-person and maintained in a public record as a "temporary residence."

Defendant presumably knew of the concerns about the statute's vagueness that led to the introduction of the bill clarifying the language: the bill's relevant provisions appear to be responsive to this litigation and to a similar claim against him in another recent case.[4] If the travel-related words and phrases were as clear as Defendant has maintained before this Court, there would be no need to attempt to amend the statute to define them. The proposed bill is a virtual admission of vagueness.

In its Order, this Court questioned the meanings of some of the same words and phrases Plaintiff alleged to be vague in her complaint. For example, Plaintiff's complaint asked whether a "registrant traveling on a 6-day out-of-state business trip, with 3 days in Boston and 3 in Chicago, [must] return to Florida for in-person reporting after the 3 days in Boston and before flying to Chicago? Or does the statute require in-person reporting only after returning from Chicago, even if that means more than 48 hours after the registrant has vacated her temporary residence in Boston for a temporary residence in Chicago?" (ECF-1 at ¶ 38). This Court asks a similar question: "[I]f [John] intends to stay three days at a Hampton followed by three days at a Courtyard, … he *apparently* needs to report only his intended stay at the

[4] As noted in the Complaint (ECF-1 at 19 n.27), a similar bill intended to clarify the travel-related reporting requirements was introduced in the 2021 Florida legislative session, after the plaintiffs in *Does v. Swearingen*, No. 18-cv-24145-KMW (S.D. Fla) (dismissed on statute of limitations grounds), raised the same claim. *See* ECF-1 at ¶ 42.

Hampton, not the Courtyard," a "*bizarre result, even though not spelled out in the statute* ..." (ECF-22 at 8) (emphasis added).

The Court's Order describes the situation as "*even more muddled*" when a registrant changes plans after leaving (ECF-22 at 8) (emphasis added). "Suppose John plans to stay two days each at the Hampton, Courtyard, and Sheraton, but gets to Atlanta and likes the Hampton's location, not the Courtyard's, and so stays four days at the Hampton. Must he go back home to report in person to the sheriff's office before staying the third night at the Hampton, lest he commit a third-degree felony?" (ECF-22 at 8-9). Plaintiff posed a similar question in her Complaint: "If she provided the hotel address for a temporary out-of-state residence, but the hotel is over-booked or crawling with bed bugs, [is she] guilty of changing her temporary residence without reporting it in person." (ECF-1 at ¶ 33).

This Court also asks the question when to report a "temporary residence" if it consists of 3 separate days in the aggregate per year at the same location: "Suppose John goes to Atlanta for one day in February, another day in June, and another day in October, and stays each time at the Hampton. The Hampton is plainly a "temporary residence" that must be reported in person at the sheriff's office. But when is John required to register? Before the first trip, or the third, or all three? When he knew or anticipated he might go three times?" (ECF-22 at 9). Plaintiff, too, asked on which day the 3-day period begins, at what time each day begins and ends, and

at what time the 48-hour reporting period for the trip begins and ends (ECF-1 at ¶ 42).

These questions are critical: there is only one sheriff's office per county, and they keep limited hours and days for making in-person reports (ECF-1 at ¶ 25). In Jane Doe's case, the sheriff's office is open for travel-related reporting only 2 days a week (ECF-1 at ¶ 69). As a result, timely-in-person reporting will often be impossible, depending upon how the local sheriff defines "48 hours" and at what point in the 3-day travel period he believes the interval starts and ends.

This Court concluded that, at this stage of the proceedings, "[t]here no obvious rational, nonpunitive purpose for requiring an in-person report of a three-day trip, let alone three one-day trips" (ECF-22 at 9). Whether the in-person reporting period is three days or one day or five days, the vagueness of the travel-related in-person reporting requirements will continue to infringe upon Plaintiff's right to travel and freedom of movement unless this Court reconsiders its dismissal of Claim 2B.

Memorandum of Law

Fed. R. Civ. P. 59(e) provides for amendment to judgments.[5] Fed. R. Civ. P. Rule 60(b) provides for relief from final orders based on mistake or inadvertence.[6] Plaintiff invokes these rules in seeking relief from the Court's Order dismissing Claim 2B: that the words and phrases governing a registrant's travel from home are void for vagueness.

Plaintiff has alleged that the vagueness of these travel-related words and phrases chills the exercise of her fundamental rights to freedom of travel and movement (ECF-1 at ¶ 65). Long-standing United States Supreme Court case law prohibits vagueness in laws that impinge upon fundamental rights, such as the right to travel and freedom of movement, particularly as applied to unpopular groups. *See* ECF-18 at 20-21.

This Court's Order presumes that Plaintiff's vagueness claim has been adversely disposed of by controlling case law but it cites no cases that would foreclose Plaintiff's vagueness claim. Defendant has not cited any cases that would foreclose Plaintiff's vagueness claim. Plaintiff knows of no such cases. As such,

[5] Grounds for granting a Rule 59 motion include newly-discovered evidence or manifest errors of law or fact. *See Anderson v. Fla. Dep't of Envtl. Prot*., 567 Fed. App'x 679, 680 (11th Cir. 2014) (quoting *In re: Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999).

[6] Specifically, Rule 60 (b)(1) "encompasses mistakes in the application of the law[,]" including judicial mistakes. *Parks v. U.S. Life and Credit Corp*., 677 F,.2d 838, 840 (11th Cir. 1982).

dismissal of this claim based on prior controlling case law appears to be the result of inadvertence or mistake.

This conclusion is fortified by the fact that this Court addressed a similar claim in a different context, finding the use of the 48-hour phrase in connection with a specified day to warrant the issuance of a preliminary injunction based on vagueness. In *League of Women Voters of Florida v. Browning*, 863 F.Supp.2d 1155 (N.D. Fla. 2012), this Court reviewed § 97.0575(3)(a) (2011), which required voting rights organizations to deliver voter-registration applications to the Division of Elections or the local supervisor of elections "within 48 hours after the applicant completes it or the next business day if the appropriate office is closed for that 48-hour period." This Court asked:

> "Does 'closed for that 48-hour period' mean the entire 48-hour period? Surely not. So far as this record reflects, all of these offices close every night; there are no 24-hour voter-registration offices. Does 'closed for that 48-hour period' mean closed at the end of the 48-hour period? Nothing else makes sense, though if this is what the Legislature meant, it would have been easy enough to say it just this way.
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> ***
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> "If 'closed at the end of the 48-hour period' is what the statute means, it still imposes an onerous, perhaps virtually impossible burden, at least in some instances. If a voter-registration organization collects a voter-registration application at 8:03 a.m. on Saturday and the appropriate voter-registration office is closed for the weekend, reopening at 8:00 a.m. on Monday, must the organization deliver the application to the voter-registration office between 8:00 a.m. and 8:03 a.m. on Monday?"

Id. at 1161. The Court ultimately deemed the phrase to be "virtually unintelligible," granting a preliminary injunction based in part on vagueness, noting the danger to voting rights organizations "from failing to comply with provisions this difficult to parse." *Id*. at 1160.

Because the Court has found a similarly worded reporting interval to be void for vagueness, and there are no cases adverse to Plaintiff's claim, she suggests the Court inadvertently or mistakenly dismissed her claim on the basis that it was foreclosed by prior case law.

This conclusion is bolstered by the legislature's recent introduction of SB1932 to amend the statute by defining some of the travel-related words and phrases challenged by Plaintiff in her lawsuit. If the vagueness claim had been disposed of by current and controlling case law, the legislature would have no reason to propose clarification.

Conclusion

Based on the foregoing arguments and authorities, Plaintiff moves the Court to reconsider its order of dismissal with prejudice as to Claim 2B, to alter or amend its order, or to grant relief from its order pursuant to Fed. R. Civ. P. 59 (e) and/or 60 (b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, March 1, 2022, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notification for this case, including all opposing counsel.

/s/Valerie Jonas
VALERIE JONAS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Local Rule 7.1 (F), that this document contains 2,461 words, is typed in Times Roman 14-point font, and prepared in a

proportionally spaced typeface using Microsoft Word.

/s/Valerie Jonas
VALERIE JONAS