No. 19-10537-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL McGROARTY,

Appellant,

v.

RICHARD SWEARINGEN,
In his official capacity as Commissioner of the
Florida Department of Law Enforcement,

Appellee.

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

Civil Case No. 4:18-cv-00502-WS-MJF

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant hereby discloses the following persons and entities pursuant to 11th Cir. R. 26.1-1:

Interested Persons

1. Fitz, Ann Marie, Counsel for Plaintiff-Appellant

2. McGroarty, Michael, Plaintiff-Appellant

3. Olivella, Miguel A., Jr., Counsel for Defendant

4. Stafford, Hon. William H., Senior United States District Court Judge

5. Swearingen, Richard, in his official capacity as Commissioner of the Florida Department of Law Enforcement, Defendant-Appellee

7. Wenger, Edward Mark, Counsel for Appellee

Interested Entities

1. Florida Department of Law Enforcement

2. Florida Attorney General's Office

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this case pursuant to Federal Rule of Appellate Procedure 34(a) and 11th Cir. R. 34-3. The issue presented herein is an issue of first impression in this Court and the dispositive matter has not been authoritatively decided, to wit: Whether the violation of McGroarty's fundamental rights caused by the continuous public online dissemination of his photograph and personal information pursuant to Fl. Stat. §943.0435 invokes the continuing-violation doctrine for statute of limitation purposes?

The Northern District of Florida's decision in this case is in direct conflict with the Middle District of Alabama's decision in *Doe v. Marshall*, case no. 2:15-cv-606 (February 11, 2019), presenting a district split within the Eleventh Circuit that will be resolved by the Court's decision in the case at bar. Although the facts and legal arguments are adequately presented in the briefs and record, the decisional process would be significantly aided by oral argument.

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STATEMENT OF JURISDICTION

This is a direct appeal from the district court's dismissal of McGroarty's Amended Complaint [Doc. 6] with prejudice on statute of limitations grounds. [Doc. 9]. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

McGroarty's Notice of Appeal was timely filed pursuant to F.R.A.P. 4(a)(1)(A) on February 11, 2019. [Doc. 11]. According to the Briefing Notice, McGroarty's brief was due on or before March 25, 2019. An extension for filing the brief to April 26, 2019 was granted via email on March 11, 2019; therefore, this brief is timely filed.

STATEMENT OF THE ISSUE

1. Whether the violation of McGroarty's fundamental rights caused by the continuous public online dissemination of his photograph and personal information pursuant to Fl. Stat. §943.0435 invokes the continuing-violation doctrine for statute of limitation purposes?

STATEMENT OF THE CASE

A. Course of the Proceedings.

On November 1, 2018, McGroarty filed his Verified Complaint for Declaratory and Injunctive Relief [Doc. 1], commencing this action brought under 42 U.S.C. §1983 that challenges the constitutionality of the application of Fla. Stat.

§943.0435 to him. An Amended Verified Complaint was filed on December 10, 2018, that corrected one sentence within the statement of facts. [Doc. 6 at 3, ¶6]. All allegations stated in the original Complaint remain the same. Specifically, McGroarty asserted three claims for relief: (1) the violation of substantive due process rights based on the deprivation of liberty interests; (2) the violation of substantive due process rights based on the fundamental right to travel; and, (3) the violation of substantive due process rights under Florida law. [Doc. 6 at 30-33].

On December 27, 2018, Appellee Swearingen, the Commissioner of the Florida Department of Law Enforcement ("FDLE"), by and through the Florida Attorney General's Office (hereinafter collectively referred to as "the State"), filed a responsive Rule 12(b) Motion to Dismiss. [Doc. 7]. In pertinent part, the State moved to dismiss on statute of limitations grounds, arguing:

> [McGroarty] concedes in his Verified Amended Complaint that he was registered as a sexual offender in Florida after his convictions in 2001 and 2002. Thereafter, he expressly alleges that he, "…successfully completed probation on January 28, 2012 ***and received notification of the termination of his supervision from the Florida Department of Corrections on March 12, 2012.***" (DE6, Page 4 Emphasis added).
>
> Consequently, as of March 12, 2012, [McGroarty] was free from any obligations resulting from his Florida sexual offender convictions except the civil and regulatory reporting requirements triggered only by: a) a return to the state; and b) meeting the residency requirements for more than three days. Further, as of March 12, 2012, [McGroarty] was fully and expressly aware that his registration and personal information remained on the FDLE website, that he was still

> registered as a sexual offender in Florida, and that his personal information was subject to dissemination.
>
> Thus, as of March 12, 2012, [McGroarty] had a fully accrued, complete and present cause of action; he either had express knowledge of the injury that formed the basis for his claim or was reasonably aware of it; and he was free to litigate it. In other words, the statute of [l]imitations began to run on March 12, 2012.
>
> [McGroarty] then waited over six and one half (6 ½) years to initiate this litigation in late 2018. That is well beyond the applicable four-year statute of limitations, the statute of limitations has thus expired on [McGroarty's] claim(s), and this matter should be dismissed with prejudice.

[Doc. 7 at 34-35].

McGroarty filed his response on December 30, 2018, responding in pertinent part:

> At that time [when McGroarty received notification of his continuing sex offender registration requirements under Fla. Stat. §943.0435], Florida law dictated that the registration requirements of §943.0435 were ***continuing in nature for statute of limitations purposes*** for the following reasons:
>
> First, the express statutory language creates a continuing duty to register, which evinces an intent to treat failure to register as a continuing offense. Second, the Legislature has expressly recognized that sex offenders present an ongoing danger to society. Third, failure to register meets the traditional definition of a continuing crime, which is commonly defined as an offense marked by a continuing duty in the defendant to do an act which he fails to do. Fourth, to hold otherwise would produce an absurd result not reasonably contemplated by the Legislature and one which eviscerated the statute. Fifth, making failure to register a continuing offense recognizes the fact that convicted sex offenders often have a transitory lifestyle or deliberately attempt to keep their movements secret and thus avoids the problem of proving when the offender moved.

[Doc. 8 at 23] (*citing Lieble v. State*, 933 So.2d 119, 121 (Fla. 5th DCA 2006)) (emphasis added).

McGroarty's argument continues that the Supreme Court's decision in *Nichols v. United States*, 136 S.Ct. 1113 (2016), which established precedent that, under federal law, a sex offender is not required to update his registration in a State in which he no longer resides, thereby eliminating the possibility of a criminal penalty for failing to register and supporting the proposition that Florida does not maintain personal jurisdiction over McGroarty for the continued dissemination of his personal information on FDLE's public online registry case. Because federal law determines when a cause of action accrues and the statute of limitations begins to run for a §1983 claim, *see, e.g., Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991), McGroarty drew the conclusion that his §1983 claim accrued when the *Nichols* decision was promulgated in 2016.

On January 14, 2019, the district court entered judgment granting the State's Motion to Dismiss on statute of limitations grounds and dismissing McGroarty's Amended Complaint in its entirety as untimely, with prejudice, upon the finding that,

> [McGroarty] knew, when he was released from FDC supervision in March of 2012, that he was subject to the lifetime sexual offender registration requirements of §943.0435. McCroarty's [sic] cause of action was complete at that time; McCroarty [sic] was aware of the alleged violation and the facts supporting it at that time; and the

> statute of limitations began to run at that time. That §943.0435 will continue to have effects on McCroarty [sic] into the future does not extend the limitations period.

[Doc. 9 at 5-6] (*citing Meggison v. Bailey*, 575 F. App'x 865 (11th Cir. 2014) (unpublished)).

On February 11, 2019, McGroarty filed his Notice of Appeal. [Doc. 11].

B. Statement of Facts.

In December 2001 and January 2002, McGroarty plead guilty to violations of Fla. Stat. §§800.04(3), 800.04(4), and 800.04(5) for sexual activity with one minor in Sumter and Pinellas Counties, Florida. He was sentenced to 10 years of probation, with the sentences to run concurrently and adjudication withheld, which he successfully completed in early 2012. At the time of sentencing, McGroarty was 27 years old; he is currently 44 years old.

In 2004, McGroarty moved from Florida to California and transferred his probation supervision to California through the Interstate Compact for Adult Offender Supervision. When his probation was transferred, his sex offender reporting requirements also transferred to California. Accordingly, McGroarty reported his address and other personal information to California authorities who, in-turn, reported the information to Florida. At that time, McGroarty's photograph and personal information were listed on the online sex offender registries for both states.

McGroarty was notified by letter dated March 14, 2012 from the Florida Department of Corrections that his term of supervision had ended but that he must maintain his Florida sex offender registration for life and that if he changed his residence to another state, he must comply with any registration requirements in the new state of residence.

In or about October 2012, McGroarty moved from California to North Carolina. He complied with all requirements regarding notification of his change of address to North Carolina. However, because North Carolina does not recognize the withhold of adjudication as a conviction, McGroarty is not considered to be a "sex offender" and is not required to register as such under North Carolina law. Nevertheless, he checks in with the sex offender registration unit in his county of residence on a yearly basis to confirm that there have been no changes in the law and to ensure his continued compliance.

Upon his relocation to North Carolina, McGroarty was removed from California's online sex offender registry. This was an automatic removal once California authorities were notified of his change of address. McGroarty has not been physically present within the State of Florida since he moved in 2004 but Florida has continued to disseminate his photograph and outdated personal information through the FDLE online public website for the past 15 years even

though Florida lost personal jurisdiction over McGroarty when he was released from supervision.

Pursuant to §943.0435 and as conceded by the State, McGroarty, as an out-of-state resident, is not required to continue updating his registration or otherwise notify any Florida law enforcement authority of his status or whereabouts unless or until he returns to Florida and meets the requirements to register a permanent, temporary, or transient residence.

D. Standard of Review.

This Court reviews *de novo* a district court's interpretation and application of a statute of limitations. *Baker v. Birmingham Bd. of Educ.*, 531 F.3d 1336, 1337 (11th Cir. 2008).

SUMMARY OF THE ARGUMENT

The issue presented for consideration herein is whether the violation of McGroarty's fundamental rights caused by the continuous public online dissemination of McGroarty's photograph and personal information pursuant to Fl. Stat. §943.0435 invokes the continuing-violation doctrine for statute of limitation purposes. The injury in the case at bar is an example of an injury that happens over and over again, invoking the continuing-violation doctrine, and the district court erred in dismissing McGroarty's Amended Complaint as untimely. *Meggison v. Bailey,* which the district court relied on to dismiss the

Amended Complaint, is factually distinguishable from the case at bar and, even if the continuous-violation doctrine does not apply, the cause of action in this case accrued with the U.S. Supreme Court's decision in *Nichols v. United States*.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Violation of McGroarty's Fundamental Rights Caused by the Continuous Public Online Dissemination of his Photograph and Personal Information Pursuant to Fl. Stat. §943.0435 Invokes the Continuing-Violation Doctrine for Statute of Limitation Purposes and the District Court Erred in Dismissing McGroarty's Amended Complaint as Untimely.

A plaintiff must commence a 42 U.S.C. §1983 claim arising in Florida within four years of when the cause of action accrues. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999). Federal law determines the date on which the cause of action accrues and the statute of limitations begins to run, and the statute of limitations for a §1983 action begins to run from the date "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) (quotation omitted).

"But not all injuries are equal. Sometimes there is one discrete point at which the injury occurs. Other times, however, the injury happens over and over again. When the injury occurs determines when the statute of limitations starts running." *Doe v. Marshall*, case no. 2:15-CV-606 (M. D. Ala. Feb. 11, 2019) at 46.

A. The injury in the case at bar is an example of an injury that happens over and over again, invoking the continuing-violation doctrine.

The continuing violation doctrine allows a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period. *Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006). To determine whether the continuing violation doctrine applies, the text of the relevant statute must be considered. *See Nat. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108-09 (2002).

There is no Eleventh Circuit precedent determining whether the continuing violation doctrine applies to sex offender registration statutes; however, there *are* precedents that have addressed the scope of the continuing violation doctrine as it applies to different statutes. For example, this Court has distinguished between the continuing effects of a discrete violation and continuing violations in discrimination cases: "In determining whether a discriminatory employment practice constitutes a continuing violation, this Circuit distinguishes between the present consequence of a one-time violation, which does not extend the limitations period, and the continuation of that violation into the present, which does." *City of Hialeah v. Rojas*, 311 F.3d 1096, 1101 (11th Cir.2002) (quotations omitted); *see also Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir.2003).

That distinction has recently been used by the Middle District of Alabama to apply the continuing-violation doctrine to Alabama's sex offender registration

statute ("ASORCNA"). On February 11, 2019 (the same day McGroarty filed his Notice of Appeal), the district court issued a Memorandum Opinion and Order declaring Alabama's sex offender registration law unconstitutional in *Doe v. Marshall*, case no. 2:15-CV-606 (M.D. Ala. Feb. 11, 2019). In *Marshall*, five plaintiffs challenged the constitutionality of ASORCNA pursuant to 42 U.S.C. §1983 on numerous grounds. The defendant raised a statute of limitations defense similar to the defense raised in this case. The *Marshall* Court, however, determined that for purposes of the statute of limitations, the violation of fundamental rights caused by lifetime sex offender registration requirements is a *continuing injury* that accrues on a daily basis:

> Plaintiffs claim that ASORCNA is unconstitutionally vague and violated their fundamental rights. If that is true, then ASORCNA afflicts a fresh injury each day that Plaintiffs are subject to the law . . ..
>
> Plaintiffs have an ongoing duty to report their internet activity. They must repeatedly show their branded identification to random strangers. They are forever barred from living with their nieces and nephews. They are bound in perpetuity by allegedly vague laws. Thus, each new day is a new injury. And so far as the law is enforced, Plaintiffs will suffer new injuries.

Marshall at 46-47 (*citing Maldonado v. Harris*, 370 F.3d 945, 956 (9th Cir. 2004)).

The instant case is likewise an example of when the injury happens over and over again, invoking the continuing-violation doctrine. McGroarty may not have to report to local authorities or update his registration, but his image and personal

information are publicly disseminated online on a continuous and daily basis by the FDLE. The public dissemination of his information has impacted his ability to find employment, make friends, socialize with neighbors, attend church, and otherwise infringes on his liberty interests.

And while infringement of liberty interests alone may not fall into the category of a violation of fundamental rights, the continuous public dissemination of McGroarty's photograph and personal information also deprives him of his fundamental right to travel as asserted in Count II of the Amended Complaint. [Doc. 6 at 26-30, 31-32]. The "right to travel" embraces at least three different components. "It protects the right of a citizen of one state to enter and to leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state." *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

At issue in this case is the third aspect of the right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. This right to travel is expressly protected by the text of the Constitution in the opening words of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

> shall abridge the privileges and immunities of citizens of the United States; . . .

U.S. Const. amend. XIV, § 1; *see also Saenz*, 526 U.S. at 502-03.

McGroarty became a permanent resident of North Carolina in 2012 and has the fundamental right to be treated like every other citizen of North Carolina, *i.e.*, to have the privileges and immunities provided unabridged under the laws of the State of North Carolina. Under North Carolina law, McGroarty is not recognized as a "sex offender" and yet his image and personal information is disseminated online with the designation of "Sexual Offender" pursuant to Florida law.

Florida's online sex offender registry is not limited to the confines of the jurisdictional borders of Florida: a simple Google search of the term "Michael McGroarty" returns the FDLE profile and his image at the top of the first page of results and provides the description "**Michael Mcgroarty** is registered as a Sexual Offender" without even clicking on the link. Therefore, the application of Florida's sex offender registration law, Fla. Stat. §943.0435, to McGroarty and the continuous dissemination of his photograph and personal information prohibits him from enjoying the right to be treated like every other citizen of the State of North Carolina, where he is not considered a sex offender. Like *Marshall*, this violation of McGroarty's fundamental right to travel is a continuing injury that accrues on a daily basis and invokes the continuing-violation doctrine for statute of limitations purposes.

Moreover, considering the text of §943.0435, it is clear that the continuing-violation doctrine applies. In *Lieble v. State of Florida*, 933 So.2d 119 (Fla. 5th DCA 2006), Florida's Fifth District Court of Appeals considered the statutory construction of §943.0435(2)(a), which requires a sex offender to register within forty-eight hours after establishing a permanent or temporary residence in the state, and to re-register within forty-eight hours of any change of address, to determine whether the defendant's failure to register constituted a crime that was continuing in nature for statute of limitations purposes. The *Lieble* Court found that,

> Pursuant to the requirement in section 775.15(3) that a legislative purpose to prohibit a continuing course of conduct "plainly appear" in order to construe this crime as continuing in nature, the trial court found that the legislative purposes and comprehensive provisions of section 943.0435 "compel the conclusion" that the Legislature intended to treat this crime as continuing in nature. In support of this finding, the court noted that section 943.0435, Florida Statutes (2005), requires sexual offenders to report after establishing or changing a name, a residence, employment or enrollment at an institution of higher learning. See §§943.0435(2)(a), (2)(b), (4)(b), and (7), Fla. Stat. (2005). The court also noted the express statutory requirement that sexual offenders must maintain registration with the department for life. §943.0435(11). Finally, the court noted the Legislature's express finding that sexual offenders pose a high risk of engaging in sexual offenses after being released from custody and that protecting the public from sexual offenders is a "paramount government interest." §943.0435(12). We agree with the trial court that these provisions support the conclusion that the Legislature intended to make failure to register as a sex offender a continuing crime.

Id., 933 So.2d at 120.

Federal courts have also considered whether criminal offenses involving a failure to act are continuing offenses, albeit with differing conclusions. A violation of the federal Sex Offender Registration Notification Act ("SORNA") is a continuing offense; it commences when the defendant first fails to register and continues until the defendant is either arrested or registers. *United States v. Peitrantonio*, 637 F.3d 865, 870 (8th Cir. 2011); *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008), *reversed on other grounds sub nom, Carr v. United States*, 130 S. Ct. 47 (2009) ("The Act creates a continuing offense in the sense of an offense that can be committed over a length of time. If the convicted sex offender does not register by the end of the third day after he changes his residence, he has violated the Act, and the violation continues until he does register, just as a prisoner given a two-week furlough is guilty of escape if he does not appear by the end of the two weeks, and thus can be prosecuted immediately but his violation continues as long as he remains at large."); *United States v. Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008), *abrogated on other grounds by Reynolds v. United States*, 132 S. Ct. 975 (2012) ("An interpretation of the sex offender registration requirement that defines it in any way other than as a continuing offense would result in absurdity.")

Thus, from the text of §943.0435, it "plainly appears" that the registration requirements, including the dissemination of McGroarty's photograph and personal

information, is continuing in nature. It is clear from the language of §943.0435 that the statutory intent behind the sex offender registration statute is to impose a continuing duty upon the "sex offender" to comply with the requirements of the law. One of those continuing requirements is to be publicly labeled a "Sexual Offender" and have the individual's photograph and personal information disseminated online. An individual subject to §943.0435 may not have to take any affirmative steps to disseminate his/her information because FDLE ensures compliance by publishing that information through their website, but the duty upon the sex offender to be branded a "Sexual Offender" along with the online dissemination their photograph and personal information continues indefinitely. Accordingly, the violation of McGroarty's fundamental right to travel caused by the sex offender registration requirements of §943.0435 – specifically, the continuous online dissemination of his photograph and personal information – is a continuing injury that accrues on a daily basis, invoking the continuing-violation doctrine for statute of limitations purposes.

B. *Meggison v. Bailey* is distinguishable from the case at bar and the district court's reliance on it to dismiss McGroarty Amended Complaint is misplaced.

In its decision to dismiss McGroarty's Amended Complaint as untimely, the district court relied on the holding in *Meggison v. Bailey*, 575 F. App'x 865 (11th

Cir. 2014) (unpublished)). [Doc. 9 at 6]. However, *Meggison* is distinguishable from the case at bar and the district court's reliance on it is misplaced.

In *Meggison*, the defendant pled guilty to molesting his step-daughter in 1990, prior to the enactment of Florida's sex-offender registration laws which occurred in 1997. The FDLE sent the defendant notification on October 27, 2005 that he was required to register as a sex offender. The defendant filed a §1983 action in 2013 arguing that enforcement of the registration laws against him violated his constitutional right to substantive due process. The case was dismissed by the district court as time barred and, on appeal, the defendant argued that the claim was timely under the continuing-violation doctrine because of a state court-ordered stay over FDLE's enforcement of the registration requirements against the defendant.

The *Meggison* Court rejected the continuing-violation argument, stating,

> The continuing-violation doctrine extends the limitations period for a violation that continues from the past into the present. *Knight v. Columbus, Ga.*, 19 F.3d 579, 580-81 (11th Cir. 1994). We must contrast that scenario from a scenario in which a discrete, one-time violation in the past continues to have effects into the future without itself remaining ongoing. *Id*. Here, the act [the defendant] contends violated his due-process rights was his classification as a sex offender subject to Florida's registration requirements. This classification will continue to have effects on [the defendant] in the future, but a new act has not occurred every time [the defendant] feels one of those continuing effects. (citation and quotation omitted). For this reason, the continuing-violation doctrine does not apply to [the defendant's] claim, and the district court did not err in dismissing his claim as untimely.

Meggison, 575 F. App'x at 867.

In other words, the injury the defendant in *Meggison* asserted occurred at one discrete point in time, *i.e.*, when he was classified as a sex offender subject to Florida's registration requirements. McGroarty, on the other hand, does not dispute that his guilty plea classified him as a "sexual offender" for §943.0435 purposes, nor does he challenge that classification. Instead, McGroarty challenges the continuous public online dissemination of his photograph and personal information that violates his fundamental rights over and over again.

The circumstances of McGroarty's case are analogous to those in *Marshall*, discussed *supra*. The Middle District of Alabama explicitly distinguished the continuing constitutional injury in *Marshall* from the discrete injury asserted in *Meggison,* rendering the holding in *Meggison* inapplicable to the fact pattern in the case at bar:

> This in no way conflicts with the Eleventh Circuit's pronouncements in *Moore v. Bureau of Prisons,* 553 F. App'x 888 (11th Cir. 2014) (per curiam) and *Meggison v. Bailey,* 575 F. App'x 865 (11th Cir. 2014) (per curiam). In those cases, the plaintiffs alleged that they were not sex offenders but were wrongly registered as offenders. The Eleventh Circuit held their injury accrued when they learned that they had been wrongly registered. (citations omitted). . . .
>
> But the injury caused by wrongful registration is not the same injury caused by the constant deprivation of fundamental rights. Yes, registration triggers ongoing obligations, but the plaintiffs in *Moore* [and] *Meggison* . . . challenged registration itself. That is different from claiming that certain restrictions on everyday activities violate

> [the Constitution]. . . . Plaintiffs here are repeatedly compelled to speak and forced to report internet use. They suffered those injuries within two years of suing (and continue to suffer them), so their claims are timely.

Marshall at 47-48.

C. Even if the continuous-violation doctrine does not apply, the cause of action accrued with the U.S. Supreme Court's decision in *United States v. Nichols*.

Federal law determines the date on which the cause of action accrues and the statute of limitations begins to run, and the statute of limitations for a §1983 action begins to run from the date "the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) (quotation omitted); *see also Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996) (The general federal rule is that "the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Thus, a plaintiff must know or have reason to know (1) that he was injured, and (2) who inflicted the injury.).

In this case, as noted *supra*, McGroarty is not legally required to continue updating his registration or otherwise notify any Florida law enforcement authority of his status or whereabouts unless or until he returns to Florida and meets the requirements to register a permanent, temporary, or transient residence.

Accordingly, the criminal penalty provision of §943.0435(14)(c)(4), which provides,

> [a]n offender's failure to comply with any and all of Florida's registration requirements, including failing to report in person as required at the sheriff's office, subjects the offender to criminal prosecution of a third-degree felony offense punishable by up to 5 years in prison or more, depending on the offender's criminal history,

is unenforceable against McGroarty.

However, it is also a federal crime for a state sex offender who "travels in interstate or foreign commerce" to "knowingly fai[l] to register or update a registration as required by [the federal sex offender registration law]." 18 U.S.C. §2250(a)(3); *see Carr v. United States*, 560 U.S. 438, 446 & n.3 (2010). Accordingly, even though §943.0435(14)(c)(4) was unenforceable against McGroarty, he was still subject to the federal sex offender registration law ("SORNA"), which provides,

> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in *at least 1 jurisdiction involved* pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

34 U.S.C. §20913(c) (emphasis added). Subsection (a) requires sex offenders to register and keep the registration current in "each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. §20913(a).

The question of whether the state in which a sex offender formerly resided qualifies as an "involved" jurisdiction under 34 U.S.C. §20913(c) was not answered until the U.S. Supreme Court decision in *United States v. Nichols*, 136 S.Ct. 1113 (2016), where the Court held that this provision of SORNA does not require a sex offender to update his registration in a state where he used to reside. *Id*. at 1118. Pertinent to McGroarty, the Court specifically states, "Notably absent [from the text of 34 U.S.C. §20913(a)] is 'where the offender appears on a registry.'" *Id*.

Accordingly, even though §943.0435(14)(c)(4) is unenforceable against McGroarty as an out-of-state resident, he could have theoretically been subject to a federal criminal prosecution in Florida for failure to register or update his registration, even though North Carolina law does not recognize him as a "sex offender" nor require him to register. However, with the promulgation of *Nichols*, the federal criminal penalty provision was invalidated against McGroarty in the State of Florida, thereby removing any power of enforcement Florida had against McGroarty for failure to abide by the requirements of Florida's sex offender registration statute.

With the invalidation of any enforcement power Florida may have had against McGroarty, his adherence to the requirements of §943.0435, including the public online dissemination of his photograph and personal information, became

void. Accordingly, McGroarty's §1983 claims accrued with the *Nichols*, which is the moment in time when the facts which supported his cause of action were apparent or should have been apparent to a person with a reasonably prudent regard for his rights. Thus, even if the continuous-violation doctrine does not apply, the statute of limitations did not begin to run in this case until 2016 and McGroarty filed his action within the applicable 4-year period.

CONCLUSION

In conclusion, the district court erred in dismissing McGroarty's Amended Complaint in its entirety as untimely. For the reasons discussed herein, it is respectfully requested that this Court *reverse* the district court's dismissal and *remand* for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have this day served a true and correct copy of the foregoing **Brief of Appellant** upon the following:

Edward M. Wenger
Chief Deputy Solicitor General
Office of the Attorney General
State of Florida
107 West Gaines Street
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by depositing same in the United States Mail with sufficient postage affixed thereon.

Dated this 23rd day of April, 2019.

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1. Type-Volume

This document complies with the word limit of F.R.A.P. 32(a)(7)(B)(i) and 11th Cir. R. 22-2 because, excluding the parts of the document exempted by F.R.A.P. 32(f), this document contains 5,163 words.

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Dated this 23rd day of April, 2019.

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