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.

BRIEF FOR APPELLEE

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO. 4:18-CV-502-WS-MJF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee certifies that the following is a complete list of interested persons as required by Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1:

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ORAL ARGUMENT STATEMENT

Appellee respectfully submits that oral argument is unnecessary in this appeal. Appellant did not raise the issue presented below, and he has therefore waived it. Moreover, straightforward application of this Court's precedents resolves the question of whether the statute of limitations bars Appellant's suit; the answer does not depend on either a complicated question of law or any fact-intensive issues. And as discussed below, this case does not present any intra-circuit district-court split. The Alabama district court decision to which Appellant points involved a materially different state statute that imposed materially different obligations on registered sexual offenders.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's dismissal of McGroarty's amended complaint with prejudice. The district court had jurisdiction under 28 U.S. § 1331.

STATEMENT OF THE ISSUES

1. Whether McGroarty waived his argument that the continuing-violation doctrine applies by failing to raise it below.

2. Whether the continuing-violation doctrine, grounded in equity, applies even though McGroarty knew of the alleged violation before the four-year statute of limitations expired and failed to assert his rights at that time.

3. Whether the continuing consequences of McGroarty's sexual offender registration—namely, the dissemination of his publicly available registered information on the Florida Department of Law Enforcement's website—are continuing violations tolling the statute of limitations.

4. Whether McGroarty's constitutional challenge to the Florida Department of Law Enforcement's dissemination of his registered information (and not to any continuing registration obligation) accrued following *United States v. Nichols*, 136 S. Ct. 1113 (2016), in which the Court held that the federal Sexual Offender Registration and Notification Act does not require sexual offenders to update their registration in a state after they leave that state.

STATEMENT OF THE CASE

Procedural History

A. Appellant's criminal history as a sexual offender

Appellant Michael McGroarty was convicted in 2000 of three counts of lewd and lascivious acts upon a child under the age of 16 and one count of lewd or lascivious sexual battery upon a child under the age of 16. App. 85. The charges resulted from four separate incidents between 1998 and 2000. *Id.* Then, in 2001, McGroarty was convicted of another count of lewd or lascivious sexual battery upon a child under the age of 16. *Id.* That conviction resulted from McGroarty having unprotected sexual intercourse with a minor child for some two hours in a motel room, resulting in the minor child being impregnated and thereafter giving birth to McGroarty's illegitimate child. App. 85-86. At the time of these offenses, McGroarty was in his mid- to late-twenties. App. 87. McGroarty was sentenced to 10 years of probation, with his sentences running concurrently, and adjudication was withheld. App. 147.

B. Subsequent history

In 2004, McGroarty moved to California, and transferred his probation supervision to California. In 2012, he completed his probation, and received notice from the Florida Department of Corrections on March 14, 2012, that his probation supervision had been terminated. App. 147. That notice informed McGroarty of his

continuing sexual offender registration requirements under § 943.0435, Florida Statutes, including that he "must maintain registration for life." App. 150.

As a result of McGroarty's convictions and qualification as a "sexual offender" under § 943.0435, Florida Statutes, he is subject to registration as a sexual offender, and is included in the Florida Department of Law Enforcement's ("FDLE") database. App. 148. But because he is no longer a resident of Florida, he need not continue to update his registration or otherwise notify Florida law enforcement about his location or residence, unless he returns to Florida and meets the requirements to register a permanent, temporary, or transient residence. App. 91; *see* § 943.0435, Fla. Stat.

Under Section 943.043, FDLE maintains a public website displaying the information that McGroarty was required to provide FDLE, including his status as a "sexual offender," information about his "qualifying offenses," his photograph, date of birth, address, physical characteristics, his victim's gender, and whether the victim was a minor. App. 148. The statute does not provide for removal of this information when an offender leaves Florida, either temporarily or permanently. *Id.* As a result, Florida has continued to maintain McGroarty's information for the past fourteen years. *Id.*

C. Proceedings below

On November 1, 2018, McGroarty filed a complaint under 42 U.S.C. § 1983, against Richard Swearingen in his official capacity as Commissioner of the Florida Department of Law Enforcement ("FDLE"), seeking a declaration that, as applied, Section 943.0435 violates the United States and Florida Constitutions, and an injunction preventing Appellee from enforcing it against him. App. 8. A month later, he amended his complaint, but his amended complaint asserts the same causes of action and seeks the same relief. App. 45.

Appellee moved to dismiss, arguing that McGroarty lacked standing; that he failed to satisfy the requirements for injunctive relief; that he failed to state a claim upon which relief could be granted; and because the statute of limitations for suits brought under Section 1983 in Florida bars this suit. App. 82.

The district court granted Appellee's motion, and dismissed McGroarty's complaint with prejudice. App. 146. In doing so, the court held only that McGroarty's claims are barred by the four-year statute of limitations and did not address Appellee's other arguments. App. 150-151. The court explained that McGroarty's "cause of action was complete" when he was released from the Florida Department of Corrections' probation supervision in 2012, because at that time "[h]e knew . . . that he was subject to the lifetime sexual offender registration requirements of § 943.0435." App. 150. He was "aware of the alleged violation and

the facts supporting it at that time," so "the statute of limitations began to run at that time." App. 151. Thus, the court held that because he did not file this lawsuit until 2018—six years after his cause of action accrued—the four-year statute of limitations bars this suit.

This appeal followed.

Standard of Review

This Court "review[s] *de novo* the district court's interpretation and application of the statute of limitations." *Brown v. Georgia Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 n. 2 (11th Cir. 2003).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed McGroarty's suit as barred by the applicable four-year statute of limitations. McGroarty's cause of action accrued in 2012; he was aware of all of the facts underlying that cause of action in 2012; and yet he filed this suit in 2018.

McGroarty now argues for the first time on appeal that the continuing-violation doctrine should apply to circumvent the statute of limitations. He waived that argument by not presenting it below. And even if he had raised it, that doctrine does not apply in cases, like this case, where the plaintiff knew of all of the facts underlying his cause of action during the statute of limitations period. What is more, unlike other cases where plaintiffs' rights are violated on a continuing basis, the

alleged violations of his rights are only the effects of FDLE's one-time act of placing his registered information on its website; the doctrine therefore does not apply. Finally, *United States v. Nichols*, 136 S. Ct. 1113 (2016), which dealt only with the requirements of the federal sexual offender registration statute, is irrelevant to this case.

ARGUMENT

THE STATUTE OF LIMITATIONS BARS THIS ACTION BECAUSE MCGROARTY'S CAUSE OF ACTION ACCRUED IN 2012, AND THE CONTINUING-VIOLATION DOCTRINE DOES NOT APPLY.

McGroarty's suit is barred by the four-year statute of limitations because his cause of action accrued when he was notified of his lifetime sexual offender registration and the continued dissemination of his registered information on FDLE's website in 2012, when he was living outside of Florida and after he completed his probation. Moreover, McGroarty did not argue below that the continuing-violation doctrine applies; he was aware of the facts underlying his claim in 2012; and he suffers only the consequences of a single alleged violation rather than a continuing violation. Finally, McGroarty's claim did not accrue after *United States v. Nichols*, 136 S. Ct. 1113 (2016), a federal statutory interpretation case that has no bearing on his cause of action.

A. McGroarty's cause of action accrued in 2012, and is thus time-barred.

Section 1983 claims are governed by the forum state's residual personal-injury statute of limitations. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999). In Florida, this means that plaintiffs must file Section 1983 claims arising in Florida within four years of the allegedly unconstitutional or illegal act. *Id.* Determining when a plaintiff's cause of action accrues is governed by federal standards. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990).

"A claim accrues under § 1983—as a matter of federal law—when 'the plaintiff knows or has reason to know that he has been injured' and by whom." *McGinley v. Mauriello*, 682 F. App'x 868, 871 (11th Cir. 2017) (quoting *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987)). A plaintiff has reason to know that he has been injured when "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." *Id.*

McGroarty alleges that § 943.0435 is unconstitutional as applied to him, and seeks to enjoin Appellee from maintaining and disseminating his registered information on FDLE's website.[1] Yet he has known the facts supporting his cause

[1] McGroarty is not required to update his registration or otherwise notify Florida law enforcement about his location or residence, unless he returns to Florida and meets the requirements to register a permanent, temporary, or transient residence. App. 91; *see* § 943.0435, Fla. Stat.

of action since at least March 14, 2012, when he "received notification of the termination of his supervision from the Florida Department of Corrections," and was notified of "the requirement that he 'must maintain registration for life.'" App. 48, 150. At that time, FDLE was statutorily authorized to maintain his registered information on its website, which, as McGroarty acknowledges, it had been doing since 2004. § 943.043, Fla. Stat.; App. 28.

As of 2012, therefore, McGroarty knew (1) that FDLE was authorized to maintain his registered information on its website due to his status as a registered sexual offender, and (2) that he was required to maintain that registration for life. Thus, in 2012, he knew "the facts which would support a cause of action": that FDLE would continue to maintain his registered information on its website for the rest of his life (absent a change in his status as a sexual offender), and his cause of action was complete at that time. *Mullinax*, 817 F.2d at 716. Because it is undisputed that the applicable statute of limitations is four years, this lawsuit—filed in 2018—is time-barred.

B. The continuing-violation doctrine does not apply.

McGroarty argues on appeal that his suit is not barred by the statute of limitations because "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." Br.

15. "The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006). For several reasons, the continuing-violation doctrine does not apply here.

1. McGroarty has waived this argument, as he did not raise it below. "It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal." *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009); *see Johnson v. United States*, 340 F.3d 1219, 1228 n.8 (11th Cir. 2003) ("Arguments not raised in the district court are waived.").

McGroarty did not assert below that the continuing-violation doctrine applies, let alone "squarely" assert it. *Bryant*, 575 F.3d at 1308. In fact, the words "continuing violation" do not even appear in his opposition to Appellee motion to dismiss. Instead, he argued only that "[i]t wasn't until 2016 when the Supreme Court's precedential decision in *United States v. Nichols*, 136 S. Ct. 1113 (2016) . . . that the claims presented in the case at bar accrued." App 141.[2] Arguing that his cause of action accrued in 2016 and arguing that his cause of action falls under the continuing-violation doctrine are two distinct theories, and he did not argue the latter

[2] As discussed below, that argument is meritless.

theory below even in the alternative.[3] *See OPIS Mgmt. Res., LLC v. Sec'y, Fla. Agency for Health Care Admin.*, 713 F.3d 1291, 1298 (11th Cir. 2013) (refusing to address "specific argument advanced on appeal" because it "was not sufficiently raised before the district court"). Because McGroarty "failed to raise this issue in the district court," this Court "need not address" it. *Crawford v. Comm'r Of Soc. Sec.*, 363 F.3d 1155, 1161 (11th Cir. 2004).[4]

2. Setting aside that McGroarty has waived this argument, the argument is meritless. As a threshold matter, the continuing-violation doctrine does not apply here because McGroarty was aware in 2012 that FDLE would continue to disseminate his registered information. "The continuing violation doctrine is premised on 'the equitable notion that the statute of limitations ought not to begin to

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[3] McGroarty's quotation below (App. 141) of *Lieble v. State*, 933 So. 2d 119, 121 (Fla. 5th DCA 2006), for the proposition that the registration requirement imposes a continuing *duty* on sexual offenders to register, did not sufficiently preserve the argument. He did not argue that this continuing registration duty constituted a continuing violation that would allow him to avoid the four-year statute of limitations under the continuing-violation doctrine; he argued only that his claim accrued after *Nichols* was decided.

[4] The district court's opinion on the motion to dismiss contains the following sentence: "That § 943.0435 will continue to have effects on Mc[G]roarty into the future does not extend the limitations period." App. 151. That the district court may have opined, however briefly, on the continuing-violation doctrine reflects only the fact that Appellee argued that the doctrine does *not* apply. McGroarty did not respond to that argument in his opposition or contend that it *does* apply; therefore, he did not preserve it. *See McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999) (refusing to address argument not raised in opposition to motion for summary judgment).

run until facts supportive of the cause of action are or should be apparent to a reasonably prudent person similarly situated.'" *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001) (quoting *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993)). Thus, this Court has "limited the application of the continuing violation doctrine to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred." *Hamilton*, 453 F.3d at 1335.[5] "If an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine." *Hipp*, 252 F.3d at 1222 (quoting *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1415 n.6 (10th Cir. 1993)).

The facts supporting McGroarty's cause of action would not merely have been apparent to a reasonably prudent plaintiff in 2012; they were actually apparent to McGroarty himself. He knew that he would be subject to continued registration as a sexual offender, and he knew that FDLE was therefore authorized to maintain his registered information on its website. Indeed, he does not allege or argue that he did not know the facts underlying his cause of action in 2012. As a result, FDLE's 2012

[5] *See also Rager v. Augustine*, 760 F. App'x 947, 951 (11th Cir. 2019) (continuing-violation doctrine did not apply because plaintiff "was aware that he incurred harm at the time each harmful act took place"); *Lee v. Eleventh Jud. Cir. of Fla.*, 699 F. App'x 897, 898 (11th Cir. 2017) (continuing-violation doctrine did not apply because a reasonably prudent plaintiff would have been aware of the alleged violation within the statute of limitations).

letter notifying him of his registration obligations alerted him that he should act to assert his alleged rights, and he thus "cannot [now] rely on the continuing violation doctrine." *Hipp*, 252 F.3d at 1222.

3. What is more, even if McGroarty could rely on the continuing-violation doctrine, that doctrine does not apply here. This Court has drawn "a clear analytical distinction between continuing violations and the continuing effects of a completed violation; the former extends the limitations period while the other does not." *McGinley*, 682 F. App'x at 872 (citing *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003)).

McGroarty alleges that the dissemination of his information on FDLE's public website violates his constitutional rights. In his view, FDLE violates the law continuously by refusing to remove that information from its website. But this case is analogous to *Lovett*. There, a prisoner challenged a change to Georgia's parole policy, but he did not challenge that policy within two years (the applicable limitations period) after being notified of the policy change. 327 F.3d at 1182-83. Even so, he argued that the continuing-violation doctrine applied. *Id.* at 1183. This Court rejected that theory, explaining that the defendants' act, "deciding not to consider Lovett for parole again until 2006," was "a one time act with continued consequences." *Id.*

Here, McGroarty did not challenge FDLE's decision to disseminate his public information, as an out-of-state resident who had completed his probation, after being notified of that decision in 2012. Just as Lovett could not challenge Georgia's continued refusal to consider him for parole outside of the limitations period, McGroarty cannot challenge FDLE's continued refusal to remove his registered information from its website outside the limitations period—both *Lovett* and this case involve only a "one time act with continued consequences." *Id.*

McGroarty also seeks to distinguish a case on which the district court relied, *Meggison v. Bailey*, 575 F. App'x 865 (11th Cir. 2014), where this Court rejected a sexual offender's continuing-violation argument. In that case, the sexual offender challenged his classification as a sexual offender. The Court explained that although this "classification will continue to have effects on [the sexual offender] into the future, . . . a new act has not occurred every time [he] feels one of those continuing effects." *Id.* at 867. McGroarty argues that *Meggison* is distinguishable because the plaintiff there was challenging the classification itself, while McGroarty challenges the dissemination of his information resulting from his classification as a sexual offender. Br. 17. This is a distinction without a difference: In *Meggison*, the alleged violation was the sexual offender classification. Here, the alleged violation is the dissemination of McGroarty's registered information despite his not living in Florida and his having completed parole. Both alleged violations occurred outside of the

statutory limitations period; both had continuing consequences (in fact, in *Meggison*, dissemination of his registered information would have been one of those consequences); and neither falls within the continuing-violation doctrine.

McGroarty next relies on *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. Feb. 19, 2019), but *Marshall* is distinguishable. In *Marshall*, the court held that a First Amendment challenge to Alabama's sexual offender statute fell under the continuing-violation doctrine. *Id.* at 1338. The challenged policies, much different from the dissemination McGroarty challenges here, required sexual offenders to "report their internet activity," to "repeatedly show their branded identification to random strangers," and it "forever barred [them] from living with their nieces and nephews." *Id.* Those affirmative requirements are materially different from FDLE's dissemination of McGroarty's registered information; indeed, Florida imposes no affirmative obligations or restrictions on McGroarty unless he returns to Florida and meets the requirements to register a permanent, temporary, or transient residence. App. 91; § 943.0435, Fla. Stat. Put differently, in *Marshall*, plaintiffs argued that Alabama unconstitutionally required them to take affirmative actions on a daily basis, each action a new injury; by contrast, Florida has not compelled McGroarty to do anything since he left the state.

Marshall is also distinguishable because plaintiffs challenged the statute under the First Amendment: As evidenced by its citation of *Maldonado v. Harris*,

370 F.3d 945, 956 (9th Cir. 2004), the *Marshall* court implicitly suggested that whether a statute of limitations for Section 1983 actions can bar facial challenges under the First Amendment presents a serious question. McGroarty, however, did not assert a First Amendment challenge. Indeed, McGroarty's theory—if accepted—would eliminate Section 1983's statute of limitations entirely for challenges to FDLE's public website. Under the view that FDLE violates the Fourteenth Amendment every day that it refuses to take down McGroarty's registered information, McGroarty could timely bring this suit 20 (or 50) years from now. This Court has never accepted such an expansive view of the continuing-violation doctrine.

C. *Nichols* is irrelevant.

McGroarty argues in the alternative that if the continuing-violation does not apply, his cause of action accrued upon the Supreme Court's decision in *United States v. Nichols*, 136 S. Ct. 1113 (2016). Not so.

In *Nichols*, the Supreme Court held that the federal Sex Offender Registration and Notification Act ("SORNA") does not require sexual offenders to update their registration in a state after they leave that state. *Id.* at 1118. Instead, it requires sexual offenders only to keep their registration current in states where they reside. *Id.* at 1117. But this case does not involve SORNA or any federal requirement that McGroarty update his registration. Indeed, he need *not* update his registration unless

he returns to Florida and meets the requirements to register a permanent, temporary, or transient residence. App. 91; § 943.0435, Fla. Stat.

Instead of challenging any requirement that he affirmatively update his sexual offender registration in Florida, McGroarty challenges Appellee's continued dissemination of his registered information on FDLE's website. The fact that federal law does not require him to update his registration in Florida now that he no longer lives there has no bearing on whether keeping his information on FDLE's website is unconstitutional. Nor does it bear on whether a *state* may require him to update his registration even though he does not reside in that state. In fact, the Court explained that its holding would not preclude states from imposing such requirements, noting that although federal law did not require Nichols to update his registration, "Nichols's failure to update his registration in Kansas violated state law." *Nichols*, 136 S. Ct. at 1119.

McGroarty himself reveals the irrelevancy of *Nichols* when he argues that, although before *Nichols* was decided, he was not required by state law to update his registration, "he could have theoretically been subject to federal criminal prosecution in Florida for failure to register or update his registration." Br. 20. Whether McGroarty could have been subject to federal prosecution is neither here nor there; he has not sued the federal government or sought to enjoin any federal

prosecution. And to suggest that Florida had any "power of enforcement" (Br. 20, 21) under *federal* law misperceives the nature of our federal framework.[6]

To sum up, McGroarty does not argue that he should not be required to update his registration now that he has moved out of state. Indeed, he is not required by state law to do so, and even if he were, *Nichols* merely held that *federal* law does not require sexual offenders to update their registration in a state once they move out of that state, while recognizing that *state* law may require it. *Id.* at 1119. Instead, he argues that it is unconstitutional for FDLE to disseminate his registered information now that he has moved out of state. *Nichols*—a straightforward case interpreting the text of a federal statute—says nothing about that constitutional question. Thus, McGroarty's claim did not accrue when *Nichols* was decided, and *Nichols* does not affect the statute of limitations here.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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[6] McGroarty's argument that "[w]ith the invalidation of" this (nonexistent) "enforcement power," his "adherence to the requirements of § 943.0435, including the public online dissemination of his photograph and personal information, became void" is a non-sequitur. Br. 20-21. Florida had no power to prosecute him for violations of federal law, and whether FDLE disseminates his personal information online does not depend on "his adherence to the requirements of § 943.0435" (Br. 20), but on the fact that McGroarty remains a registered sexual offender, whether or not he updates his registration.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 2019, I electronically filed the foregoing Brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

/s/ Christopher J. Baum
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