IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JOHN DOE 1 et al.,

Plaintiffs,

v. CASE NO. 4:16cv501-RH/CAS

RICHARD L. SWEARINGEN, etc.,

Defendant.

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PRELIMINARY INJUNCTION

This case presents a constitutional challenge to a Florida statute requiring any convicted sex offender to register any "Internet identifier." Failing to register is a crime. Now before the court is a motion for a preliminary injunction barring enforcement of an amended definition of the term "Internet identifier." The definition is slated to take effect this week. The definition is hopelessly vague, chills speech protected by the First Amendment, and is far broader than necessary to serve the state's legitimate interest in deterring or solving online sex crimes. This order grants a preliminary injunction.

I

The plaintiffs have been convicted of qualifying sex offenses and thus are "sexual offenders" within the meaning of Florida Statutes § 943.0435(1)(a). They have complied with an unchallenged provision of Florida law requiring registration with the Florida Department of Law Enforcement. So the department has their names, physical addresses, and substantial additional information. This information is available to the public.

Florida Statutes § 943.0435(4)(e) provides: "A sexual offender shall register all electronic mail addresses and Internet identifiers with the department before using such electronic mail addresses and Internet identifiers." The requirement to register email addresses (as well as instant-message names) has been in place since 2007. The requirement to register internet identifiers was added in 2014 and has not been amended since that time. Information provided under these provisions is available to the public, *see* Fla. Stat. § 943.043(1)-(3), but the Department's nonrule policy is to provide to the public the name of the offender who registered an email address or internet identifier only in response to a formal public-records request. Law enforcement officers apparently have unrestricted access to the information.

In 2016 the Florida Legislature amended the definition of "Internet identifier." The prior definition provides: " 'Internet identifier' means all electronic

mail, chat, instant messenger, social networking, application software, or similar names used for Internet communication, but does not include a date of birth, social security number, or personal identification number (PIN).” Fla. Stat. § 775.21(2)(i).

The amended definition, slated to take effect on October 1, 2016, provides:

> “ ‘Internet identifier’ ” includes, but is not limited to, all website uniform resource locators (URLs) and application software, whether mobile or nonmobile, used for Internet communication, including anonymous communication, through electronic mail, chat, instant messages, social networking, social gaming, or other similar programs and all corresponding usernames, logins, screen names, and screen identifiers associated with each URL or application software. Internet identifier does not include a date of birth, Social Security number, or personal identification number (PIN), URL, or application software used for utility, banking, retail, or medical purposes.

Laws of Fla. ch. 2016-104 (amending Florida Statutes § 775.21(2)(i) and renumbering it as § 775.21(2)(j)).

II

The plaintiffs filed this action against the Commissioner of the Florida Department of Law Enforcement in his official capacity. The plaintiffs seek injunctive relief under 42 U.S.C. § 1983. They assert that the requirement to register all internet identifiers violates the First Amendment and that this is so under both the prior and amended definitions of that term. The plaintiffs also say the definition of an internet identifier is unconstitutionally vague.

The plaintiffs have moved for a preliminary injunction. The Commissioner reasonably understood the motion—as distinguished from the underlying complaint—as a challenge only to the amended definition, not the prior definition or underlying requirement to register. The Commissioner briefed the motion on that understanding. This order treats the preliminary-injunction motion as a challenge only to the amended definition.

The plaintiffs have testified that they do not understand what they must register, based on the amended definition, and that they will forgo speech on the internet if the statute takes effect. I credit the assertion.

III

As a prerequisite to a preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest. *See*, *e.g.*, *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

IV

The Supreme Court recently held a criminal statute void for vagueness, introducing the subject with this explanation:

> The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Johnson v. United States, 135 S. Ct. 2551, 2556-57 (2015).

The Commissioner says, though, that the plaintiffs assert a facial challenge to the Florida statute, and that a facial challenge can succeed only if a statute is unconstitutional in all its applications. Decisions abound that repeat that formulation. But even in its heyday, the formulation did not apply to First Amendment overbreadth challenges. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) ("[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973))). More importantly, in *Johnson*, the Supreme Court made clear that the formulation does not apply in a facial vagueness challenge to a criminal statute. The Court said:

> [A]lthough statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. [United States v.] L. Cohen Grocery Co., 255 U.S. [81,] 89 [(1921)]. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates v. Cincinnati*, 402 U.S. 611 (1971).

Johnson, 135 S. Ct. at 2560-61. The Court explicitly rejected the dissent's embrace of the same principle the Commissioner relies on here.

The state's amended definition of "Internet identifier" is hopelessly vague. The official who oversees the registry, and who apparently worked on drafting the amended definition, has testified that the amended definition applies only to "identifiers used for social or person-to-person communication." Coffee Decl., ECF No. 24-1 at 8. Further, the official says the reason for the amendment was to clarify that the registration requirement applies only to identifiers used for "social communication" and to websites and applications used for "social communication." *Id*. But that is not what the amended definition says. A narrowed definition that is not in a statute or properly adopted rule and that has not been adopted by a court does not save a vague statute, especially one that trenches on

First Amendment rights, that carries criminal sanctions, and that can be violated by inaction in the absence of any affirmative action at all.

In ordinary usage, an "internet identifier," as applied to an internet user, might well mean a login name or password. The Commissioner says the definition does not extend to passwords, an assertion the plaintiffs apparently accept, even though it is not obvious from the definition's language how passwords are excluded. In any event, if passwords are excluded, then, as a matter of ordinary usage, one might conclude an "internet identifier" is a login or other name used to access, or perhaps to communicate by means of, the internet.

But the amended definition is much broader than that, including, for example, a "uniform resource locator (URL)," at least in some circumstances. The Commissioner gives as an example of a URL that must be registered <facebook.com>. As a matter of ordinary usage, if asked to disclose one's own internet identifiers, nobody would list <facebook.com>. That may be an internet identifier of Facebook, Inc., but it is not, in ordinary usage, an "internet identifier" of the many individuals who have Facebook accounts.

There is nothing inherently wrong with a legislature adopting a definition of a term that is broader than ordinary usage. But here the definition begins by saying what the term "includes, but is not limited to." So the term is plainly broader than one might believe from ordinary usage. And the definition sets no outer limit,

because the term is expressly "not limited to" what the definition says. Having jettisoned the ordinary understanding and replaced it with an expressly unlimited description, the definition leaves a sex offender guessing at what must be disclosed.

More fundamentally, the definition, at least on many plausible readings, is hopelessly and unnecessarily broad in scope. Thousands of examples could be given. Two make the point.

Suppose John Doe, a registered sex offender, receives an email from a friend sending a link to a newspaper article—an article that might have been published in hard copy but that was also available online. This kind of thing happens thousands of times every day. Mr. Doe wishes to read the article. The article will have a URL. The Commissioner says the registration requirement applies to homepages, not to URLs for specific articles. This is so, the Commissioner says, because the statute refers only to "website" URLs. Perhaps "website" means "homepage," though that isn't what the statute says. In any event, Mr. Doe may not know the URL for the homepage and may not be able to get it without clicking on the link—a crime, because the statute requires registration *in advance*.

The Commissioner also says Mr. Doe need not register a URL in connection with the article because this is not a "person-to-person communication." As set out above, the amended definition is not limited to person-to-person communications.

And in the hypothetical, the article came by email from an actual person—a friend of Mr. Doe. The article's URL, or at least the newspaper homepage's URL, fits squarely within the amended definition of an internet identifier, at least on a reading that is plausible and indeed much truer to the text than the Commissioner's proposed reading.

The second example is this. Mr. Doe has a digital subscription to a newspaper. He gets an email every morning with the day's headlines, and he gets several more emails every day sending additional articles or reporting breaking news. He plainly must register at least the URL for the newspaper, if not the URL for every article the newspaper sends. But the State has absolutely no legitimate interest in requiring a sex offender to register the URL of the newspaper or articles the offender reads. And if Mr. Doe chooses one day to make a comment on an article, he must now figure out whether the same URL is in use, and he must make his identity available to the public. Unlike every other subscriber or member of the public, Mr. Doe cannot comment anonymously. *See White v. Baker*, 696 F. Supp. 2d 1289, 1313 (N.D. Ga. 2010) (holding that enforcement of a registration requirement would irreparably harm a registered sex offender "by chilling his First Amendment right to engage in anonymous free speech").

Other district courts have struck down registration requirements less vague and less hostile to First Amendment rights than the requirements required under

the Florida amended definition of internet identifier. *See, e.g.*, *Doe v. Harris*, 772 F.3d 563, 577-78 (9th Cir. 2014); *White*, 696 F. Supp. 2d at 1308-13. No purpose would be served by setting out the full First Amendment analysis in this order, especially in light of the need for a prompt ruling. The plaintiffs are likely to prevail on their challenge to the amended definition.

V

The other prerequisites to a preliminary injunction are easily met. The denial of a constitutional right often constitutes irreparable injury. This is especially so for a prior restraint on speech protected by the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."). Allowing a hopelessly vague registration requirement to remain on the books, and thus requiring an individual either to forgo protected speech or run the risk of criminal prosecution, would cause irreparable injury.

The Commissioner will suffer no injury from a preliminary injunction. The State has operated for two years with the existing definition of internet identifier. The Commissioner has proposed for the amended definition a narrow reading that is no broader than the existing definition. Indeed, the Commissioner says the amendment narrowed or at most clarified the existing definition. On that view, delaying any implementation of the amended definition while this litigation goes

forward will reduce registrations not at all. In any event, the balance of harms favors issuance of a preliminary injunction. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670-71 (2004) ("Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.").

Finally, a preliminary injunction will not be adverse to the public interest. The public interest is served when the Constitution is followed.

VI

In its zeal to amend the definition of internet identifier to ensure nothing was missed, the state has netted far more bycatch than targeted product. The state has no legitimate interest in knowing things like which newspapers or political sites a sex offender subscribes to. But under the amended definition of an internet identifier, at least on the most natural reading of the definition's very broad language, the offender would be required to disclose these things. The amended definition trenches on First Amendment rights and is unconstitutionally vague.

For these reasons,

IT IS ORDERED:

1. The preliminary-injunction motion, ECF No. 9, is granted.

2. The defendant Commissioner of the Florida Department of Law Enforcement must not take any action based on that part of Laws of Florida chapter 2016-104 that amended the definition of "Internet identifier" in Florida Statutes § 775.21(2)(i), which is to be renumbered as § 775.21(2)(j). This injunction does not preclude enforcement of the prior definition.

3. This injunction will remain in place until entry of a final judgment in this action or until otherwise ordered.

4. This injunction binds the Commissioner and his officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

5. This injunction is effective immediately but will lapse without further order on October 3, 2016, at 5:00 p.m., unless, by that time, the plaintiffs have given security in the amount of $500 to pay the costs and damages sustained by any party found to have been wrongfully enjoined.

SO ORDERED on September 27, 2016.

s/Robert L. Hinkle
United States District Judge