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United States District Court, S.D. Florida.

HUMAN RIGHTS DEFENSE CENTER, Plaintiff,
v.
Mark S. INCH, et al., Defendants.

CASE NO: 21-81391-CV-MIDDLEBROOKS

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Signed March 23, 2022

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Entered March 24, 2022

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ORDER ON MOTION TO DISMISS FIRST AMENDED COMPLAINT

Donald M. Middlebrooks, United States District Judge

***1** THIS CAUSE comes before the Court upon Defendants' Motion to Dismiss Plaintiff's First Amended and Supplemental Complaint (DE 42), filed on December 31, 2021. The Motion is fully briefed. (DE 49; DE 51). For the following reasons, the Motion is denied.

I. BACKGROUND

In its First Amended Complaint, Plaintiff Human Rights Defense Counsel ("Plaintiff" or "HRDC") alleges that the Florida Department of Corrections (the "FDOC" or "Department") and several of its officers (collectively, "Defendants") have violated its First and Fourteenth Amendment rights by arbitrarily censoring three of its publications. (DE 39 at 1–2). Plaintiff publishes *Prison Legal News*, a monthly journal of prison news and analysis, and *Criminal Legal News*, a monthly magazine about criminal justice and criminal legal developments, as well as the *Disciplinary Self-Help Litigation Manual*, a book that "helps prisoners exercise their legal rights when confronted with a disciplinary hearing." (*Id.* at ¶ 1). According to Plaintiff, "[a]ll three publications exist primarily to apprise prisoners of their rights" and all three "comprise political speech and social commentary." (*Id.* at ¶ 12).

As the basis for this action, Plaintiff represents that the FDOC "has consistently impounded the three publications in numerous of its facilities." (*Id.* at 13). In doing so, the FDOC has relied on regulatory provisions that prohibit "dangerously inflammatory" publications, as well as publications that promote certain types of services or encourage gambling. (*Id.* at ¶¶ 14–16); F.A.C. § 33-501.401(15)(i); F.A.C. § 33-501.401(15)(o); F.A.C. § 33-501.401(15)(e). This regulation, known as the "Admissible Reading Material Rule," has been the subject of earlier litigation between these parties. See *Prison Legal News v. Secretary, Florida Department of Corrections [PLN]*, 890 F.3d 954, 967 (11th Cir. 2018). Its purpose is to help increase prison security and public safety by screening all incoming publications for content that might enable prisoners to break prison rules and to impound any offending publications. See F.A.C. 33-501.401. But, according to Plaintiff, Defendants have "applied these provisions against Plaintiff arbitrarily and unnecessarily," "in most cases without sending notice to HRDC, and only twice justifying its decision," and, in doing so, have violated Plaintiff's First and Fourteenth Amendment rights. (DE 39 at ¶ 18).

Count One of Plaintiff's First Amended Complaint

alleges that Defendants' censorship of its publications violates the First and Fourteenth Amendments because the publications include political speech and the FDOC's censorship bears no connection with any legitimate state interest. (DE 39 at ¶¶ 54–68). Count Two alleges that F.A.C. § 33-501.401(15) is void for vagueness because it "allows the impoundment of materials in terms so vague as to necessitate that persons of common intelligence guess at their meanings and subsequently differ in the application." (*Id.* at ¶ 70). Count Three alleges that § 33-501.401(15) is unconstitutionally overbroad because "the only speech it censors threatens no legitimate state interest." (*Id.* at ¶ 80). Count Four alleges that Defendants have violated Plaintiff's procedural due process rights under the Fourteenth Amendment by failing to provide notice of impoundments to Plaintiff and an opportunity to be heard before rejecting its publications. (*Id.* at ¶ 90). Finally, Count Five alleges that Defendants have violated Plaintiff's substantive due process rights because their censorship of its publications constitutes arbitrary and irrational government behavior. (*Id.* at ¶ 100).

*2 After reading Defendants' Motion to Dismiss and Plaintiff's Response, it is hard to believe that the Parties are discussing the same Complaint. Defendants contend that the First Amended Complaint is fatally deficient in several respects—that it is an impermissible shotgun pleading, that it is foreclosed by binding Eleventh Circuit precedent in *Prison Legal News* with respect to both the First Amendment and Fourteenth Amendment claims, and, in any event, that the Defendants are entitled to sovereign and qualified immunity. (See DE 42). Defendants further contend that punitive damages are not available, and that Plaintiff's claim with respect to § 33-501.401(15)(o) is not yet ripe because the amendments to that regulation have not been officially adopted.

Plaintiff, on the other hand, contends that the allegations at issue here are based on a different application of a different regulation than the former lawsuit, and that *Prison Legal News* therefore does not bar any of the claims presented. To the contrary, Plaintiff argues that *Prison Legal News* helps its position because, in that case, the Eleventh Circuit held that Defendants must provide Plaintiff with notice of impoundments, and Defendants have not done so here. Based on this precedent, Plaintiff argues that Defendants are not entitled to qualified immunity because their conduct violated a clearly established federal right and that sovereign immunity is not appropriate because the First Amended Complaint does not seek damages against any official in his official capacity. In addition, Plaintiff alleges that punitive damages are available because it has alleged facts to support a finding that Defendants' conduct was willful

and malicious, and that its claim with respect to § 33.501-401(15)(o) is ripe because Defendants have already begun impounding its publications based on a single non-prominent advertisement.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the allegations in a complaint. See Fed. R. Civ. P. 12(b)(6). In assessing legal sufficiency, courts are bound to apply the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). That is, "a complaint must ... contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and accept as true all of the plaintiff's factual allegations. See *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). However, pleadings that "are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. "[A] formulaic recitation of the elements of a cause of action will not do[.]" *Twombly*, 550 U.S. at 555 (citation omitted). "Factual allegations must be enough to raise [the plaintiff's] right to relief above the speculative level[.]" *Id.* (citation omitted).

III. DISCUSSION

In the present Motion to Dismiss, Defendants argue that Plaintiff's First Amended Complaint should be dismissed under several different theories, each of which is addressed in turn below.

A. Shotgun Pleading

Defendants first move to dismiss Plaintiff's First Amended Complaint as an impermissible shotgun pleading. The Eleventh Circuit has identified four types of

shotgun pleadings: (1) complaints that incorporate the allegations of previous counts without specifying which allegations support the present count; (2) complaints “replete with conclusory, vague, and immaterial facts”; (3) complaints that collapse multiple causes of action into a single count; and (4) the assertion of multiple defendants without specifying which defendant is responsible for which claim. *Weiland v. Palm Beach County Sheriff’s Office*, 792 F.3d 1313 (11th Cir. 2015). According to Defendants’ Motion, Plaintiff’s Amended Complaint “contain[s] multiple counts where each count adopts the initial fifty-three paragraphs,” falling into the first category, “contain[s] immaterial or vague factual allegations that are not connected to a particular cause of action,” falling into the second category, and “fails to specify what acts defendants allegedly committed to constitute a violation of Plaintiff’s constitutional rights,” falling into the fourth category. (DE 42 at 2). As a result of these deficiencies, Defendants contend that they are “forced to guess as to the factual basis for many of Plaintiff’s claims.” (*Id.* at 3).

***3** I am not persuaded that Plaintiff’s First Amended Complaint is a “quintessential shotgun pleading,” as Defendants suggest. With respect to the first category, Plaintiff’s First Amended Complaint appears to identify the specific allegations that are relevant to each Count. For example, Count One references paragraphs 22, 23, 25 as relevant to Defendants Inch and Colon and the *Disciplinary Self-Help Litigation Manual* and paragraphs 25 through 29 as relevant to those Defendants and *Prison Legal News*. (See DE 39 at ¶¶ 56, 59). Likewise, Count Four specifically refers to paragraphs 24, 29, 30, 22, 23, 24, and 53. (See *id.* at ¶¶ 86–94). Thus, this does not appear to be a situation in which “a failure to more precisely parcel out and identify the facts relevant to each claim materially increase[s] the burden of understanding the factual allegations underlying each count.” *Weiland*, 792 F.3d at 1324. It is true that Plaintiff’s Amended Complaint incorporates the initial allegations into each count. (DE 39 at ¶¶ 54, 69, 78, 85, 98). But this *Weiland* allows. 792 F.3d at 1324.

Nor does Plaintiff’s Amended Complaint fail to specify which Defendants are responsible for each claim. Count One, for example, alleges that Defendants Inch and Doe 7 “oversaw the failure to deliver copies of *The Habeas Citebook: Ineffective Assistance of Counsel (Second Edition)* and *Jailhouse Lawyers: Prisoners Defendants Prisoners v. the U.S.A.* on September 23, 2021,” that Defendants Inch and Colon “oversaw the impoundment and failure to deliver the *Disciplinary Self-Help Litigation Manual* at the Everglades Correctional Institution, the Santa Rose Correctional Institution, the Lake Correctional

Institution, and the Century Correctional Institution,” and that Defendant Micha Neal “affirmed the impoundment of the *Disciplinary Self-Help Litigation Manual* at the Santa Rosa Correctional Institution.” (DE 39 at ¶¶ 55–57). Count Four, too, refers to specific impoundments of Plaintiff’s publications and attributes them to FDOC’s policies as overseen by Defendants Dixon and Colon. (*Id.* at ¶¶ 86–95).

I am also unpersuaded by Defendants’ argument that the Amended Complaint “contain[s] immaterial and vague factual allegations” that renders it a shotgun pleading. The Complaint includes a sufficient factual basis to apprise Defendants of the charges against them, and that is all that is required at this stage.

B. First Amendment Claims (Count One)

Count One of Plaintiff’s Amended Complaint alleges that Defendants have violated Plaintiff’s First Amendment free speech rights by unjustifiably censoring their publications—including political speech—due to their “disagreement with the content of those publications.” (DE 39 at ¶¶ 54–68). Defendants move to dismiss this Count on the ground that they were acting pursuant to F.A.C. § 33-501.401(15), and that that provision passes the four-factor test set out in *Turner v. Safley*, 482 U.S. 78 (1987) and is therefore a valid prison regulation. (DE 42 at 5).

“ ‘Prison walls do not form a barrier separating prison inmates’—and publishers attempting to access those inmates, like Plaintiff here—‘from the protections of the Constitution.’” *Id.* at 964. However, because “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government,” those rights are more limited in the prison context. *Turner*, 482 U.S. at 84–85; see also *Lawson v. Singletary*, 85 F.3d 502, 509 (11th Cir. 1996) (noting the “more limited nature of ... First Amendment rights” in the penal context). “Where a state penal system is involved, federal courts have ... additional reason to accord deference to the appropriate penal authorities.” *Id.* at 85.

To balance judicial deference with “the need to protect constitutional rights,” the *Turner* Court held that a prison regulation affecting constitutional rights is valid as long as “it is reasonably related to legitimate penological interests.” *Id.* at 85, 89. And to determine whether a regulation is reasonable, courts consider: “(1) whether

there is a ‘valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it’; (2) whether the publisher has alternative means to exercise its right of access to its inmate subscribers; (3) what ‘impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally’; and (4) whether [the publisher] ‘can point to ... alternative[s] that fully accommodate[] [its] rights at *de minimis* cost to valid penological interests.’” *Prison Legal News* 890 F.3d at 967 (11th Cir. 2018) (quoting *Turner*, 482 U.S. at 89).

*4 The Department must show “more than a formalistic logical connection between [the impoundments] and a penological objective.” *Beards v. Banks*, 548 U.S. 521, 535 (2006) (plurality opinion). However, courts owe “‘wide-ranging’ and ‘substantial’ deference to the decisions of prison administrators because of the ‘complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems.’” *Prison Legal News*, 890 F.3d at 965 (quoting *Al-Amin v. Smith*, 511 F.3d 1317, 1328 (11th Cir. 2008)); see also *Pope v. Hightower*, 101 F.3d 1382, 1384 n.2 (11th Cir. 1996) (“Federal courts must scrupulously respect the limits on their role by not thrusting themselves into prison administration; prison administrators must be permitted to exercise discretion within the bounds of constitutional requirements.”).

In *Prison Legal News*, the Eleventh Circuit applied this standard to a case very similar to the case presented here, though in a different procedural posture. There, *Prison Legal News*, one of Plaintiff’s magazines, sued the Florida Department of Corrections, alleging that the impoundment of its magazines violated the First and Fourteenth Amendments—the same constitutional allegations at issue in this case. 890 F.3d 954. The case proceeded to a bench trial and the district judge in the Northern District of Florida entered judgment in favor of the Department on Plaintiff’s First Amendment claim and in favor of HRDC on the due process claim. See *id.* Both sides cross-appealed. As to the First Amendment claim, the Eleventh Circuit, applying the four-factor test set forth in *Turner*, concluded that all four factors weighed in favor of upholding the regulation. Defendants argue that, because the Eleventh Circuit upheld the regulation in that case, Plaintiff’s case cannot survive Defendants’ Motion to Dismiss here.

Defendants’ Motion relies heavily on the Eleventh Circuit’s analysis in *Prison Legal News*, so I will address those arguments for the sake of completeness. But the

impact of that decision is not what Defendants purport. The fact that the Eleventh Circuit upheld the regulation on the merits in that case does not mean that Plaintiff’s claim here is foreclosed just because it involves the same regulation, albeit a different provision. Defendants seem to be suggesting that based on the holding of *Prison Legal News*, they are entitled to immediate judgment in their favor, when the focus ought to be on whether the allegations in Plaintiff’s First Amended Complaint are sufficient to state a claim for relief. See *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (explaining that when reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, accept as true all of the plaintiff’s factual allegations, and determine whether the plaintiff has stated a claim for relief).

The First Amended Complaint on its face alleges a valid First Amendment claim. Plaintiff alleges that Defendants’ policies and its implementation bear no rational relationship to a penological interest, that Defendants’ impoundments have no security or safety justification, and that Plaintiff’s publications would have no adverse impact on prison operations. (DE 39 at ¶ 46). Plaintiff further alleges that Defendants have engaged in content-based discrimination against Plaintiff’s publications, and that its censorship has been arbitrary and unjustified. (*Id.* at ¶¶ 43, 64). This is sufficient to state a claim under binding Eleventh Circuit law. See *Turner*, 482 U.S. at 85. I therefore seriously question whether I need to consider anything beyond this.

*5 For the sake of fully addressing Defendants’ Motion, though, I turn now to the import of the Eleventh Circuit’s analysis in *Prison Legal News*. In that case, the Eleventh Circuit weighed the four *Turner* factors and concluded that Defendants’ application of the regulation to *Prison Legal News* based on the facts of that case was reasonable. But there are differences here. First, the first *Turner* factor “requires the Department to show that there is a ‘rational connection’ between its decision to impound [Plaintiff’s] publications” and its interests in prison security and public safety.” *Id.* at 967–68. With respect to this factor, the Eleventh Circuit concluded “[t]here is plenty of evidence that preventing inmates from viewing **prominent or prevalent ads for prohibited services** will reduce the possibility that they will use those services.” *Id.* at 968–69 (emphasis added). But here, Plaintiff’s Complaint includes allegations that Defendants have censored some issues of their publication based on the presence of a *single ad*, even if not prominent or prevalent. (DE 39 at ¶¶ 28, 31–33). Through discovery, it may become clear that Defendants had a rational basis for

impounding the publications at issue in this case. But, viewing all the facts in the light most favorable to Plaintiff, *Prison Legal News* does not foreclose the possibility that Plaintiff will be able to make a compelling argument to the contrary, especially in light of Defendants' earlier litigation position that it would *not* impound publications based on a single suspect ad, which it has now allegedly begun to do.

The next factor the Eleventh Circuit considered in *Prison Legal News* was "whether there are alternative means" available to exercise its right of access to inmate subscribers." *Id.* at 973. The Eleventh Circuit concluded that this factor was a "close call" but that because Plaintiff could send magazines other than *Prison Legal News* to Florida inmates, it had alternative means available. *Id.* But here, where Plaintiff has alleged that Defendant has impounded *not only Prison Legal News* but also other publications including *Criminal Legal News* and *Disciplinary Self-Help Litigation Manual*, I am unable to conclude at this stage that this factor continues to weigh in favor of Defendants. Based on these differences, I am not persuaded by Defendants' argument that *Prison Legal News* necessarily means that Defendants' application of the regulation in this case was reasonably related to legitimate penological interests, and Defendants' Motion is denied as to these claims.

C. Vagueness and Overbreadth Claims (Counts Two and Three)

The Due Process Clause forbids government regulation that "fails to provide a person of ordinary intelligence fair notice of what is prohibited[] or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.*; see also *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

The First Amended Complaint alleges that F.A.C. § 33-501.401(15) violates these principles because it neither adequately informs publishers which publications are allowed nor prevents the FDOC from enforcing it in an arbitrary or discriminatory way. (DE 39 at ¶ 70; DE 49 at 12). Defendants argue that these claims must be dismissed

because (1) they are precluded under *res judicata* by Plaintiff's previous lawsuit, *Prison Legal News*; and (2) the regulations are reasonable under the *Turner* standard and therefore not vague or overbroad. (DE 42 at 11–12).

Defendant's *Turner* argument fails for the same reasons already discussed above—that is, because there are differences in the application of the regulation at issue in this case and in *Prison Legal News* that change the *Turner* balancing test in a way that make dismissal inappropriate at this time. Nor am I persuaded that Defendant's *res judicata* argument warrants dismissal. First, Plaintiff's First Amended Complaint concerns impoundments that occurred *after* the previous lawsuit was filed in 2011. *Res judicata* "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327–28 (2016) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presented complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."). And when constitutional rights are at issue "even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought without violating the doctrine of claim preclusion." *Whole Woman's Health*, 136 S. Ct. at 2307.

*6 In addition to the fact that the First Amended Complaint is directed at conduct that occurred after the Complaint in the first lawsuit was filed, I note that this action also addresses different publications—not just *Prison Legal News*—and that it concerns the application of a different section of F.A.C.—namely, § 33-501.401(15) instead of § 33-501.401(3). As such, this case does not "aris[e] from the same transaction" as the earlier lawsuit and the application of claim preclusion is inappropriate.

D. Due Process Claims (Counts Four and Five)

1. Procedural Due Process (Count Four)

Count Four of the First Amended Complaint alleges that Defendants violated Plaintiff's Fourteenth Amendment right to procedural due process by failing to provide Plaintiff with notice and an opportunity to be heard about the impoundment of various issues of its magazines and

books. (DE 39 at ¶¶ 85–97). In *Prison Legal News*, the Eleventh Circuit held that Plaintiff “must receive notice and an opportunity to be heard each time the Department impounds an issue of the magazine.” 890 F.3d at 976 (citations omitted).

Defendants appear to be arguing that I should ignore Plaintiff’s allegations and take their word for it that Plaintiff actually did receive notice: “[r]egardless of Plaintiff’s allegations, Plaintiff nonetheless received notice and cannot demonstrate any prejudice as a result.” But this is a Motion to Dismiss, and I must accept Plaintiff’s allegations as true. Defendant also argues that because F.A.C. §§ 3-501.401(22) and (23) provides post-deprivation remedies for Plaintiff, “there can be no procedural due process violation unless the state fails to provide the opportunity to redress the situation after the fact.” (DE 42 at 16 (quoting *Tinney v. Shores*, 77 F.3d 378, 382 n.1 (11th Cir. 1996))). But here, Plaintiff has alleged that “FDOC has frequently refused to entertain appeals of impoundments,” suggesting that Plaintiff *has* attempted to obtain relief through post-deprivation remedies and has been unable to do so. Thus, Plaintiff has adequately pled a denial of its procedural due process right.

2. Substantive Due Process (Count Five)

Count Five alleges that Defendants violated Plaintiff’s substantive due process rights by “arbitrarily censor[ing] three publications ... frequently ... with no explanation at all. (DE 39 at ¶ 2). Plaintiff further alleges that these violations occurred despite “judicial reprimand of the precise deprivations that Defendants have engaged in for years.” (DE 49 at 17; DE 39 at ¶ 50). A plaintiff’s substantive due process rights are violated when they are deprived of a legal right in a manner that is “characterized as arbitrary or conscience shocking, in a constitutional sense.” *Morefield v. Smith*, 404 F. App’x 443, 445 (11th Cir. 2010) (citing *Collin v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992)).

Defendants’ argument in favor of dismissal of this Count is brief: they argue only that “[t]o the extent that Plaintiff presents a substantive due process claim that the Department’s impoundment of publications is unconstitutional, Plaintiff fails to state a claim as this question has already been addressed by the Eleventh Circuit.” (DE 42 at 17). As support, Defendants once again turn to *Prison Legal News* and specifically the Court’s holding with respect to the first *Turner* factor that that “there is a rational connection between its

impoundments of *Prison Legal News* based on the magazine’s ad content and prison security and public safety interests.” 890 F.3d at 972. As discussed above, though, this lawsuit involves different impoundments of both *Prison Legal News* and other of Plaintiff’s publications, and this argument therefore fails. Moreover, Defendants have cited no cases in support of applying the *Turner* standard to a substantive due process claim. The First Amended Complaint plainly alleges that Defendants violated Plaintiff’s due process rights by arbitrarily censoring their publications. This is sufficient to survive at the motion to dismiss stage.

E. Venue

*7 Defendants also argue that some of HRDC’s claims should be brought in the Northern District of Florida because they involve violations of a previous injunction issued in that district (DE 42 at 17–18). It is true that “injunctions are enforced through the district court’s civil contempt power” and “[i]f a party contends that another party is violating an injunction, the aggrieved party should move the court for an order to show cause why the other party should not be held in civil contempt.” *Thomas v. Blue Cross and Blue Shield Ass’n*, 594 F.3d 823, 829 (11th Cir. 2010) (internal citations omitted). And I agree that, were Plaintiff bringing a lawsuit for violations of the Northern District’s injunction, such a lawsuit must be brought in the Northern District. But that does not appear to be the lawsuit that Plaintiff is attempting to bring. While Plaintiff does mention the Northern District injunction twice in the First Amended Complaint,² the focus of Plaintiff’s First Amended Complaint is on allegations that Defendants have engaged in new unlawful conduct. Rather than an attempt to allege claims arising from violations of the injunction, it appears that Plaintiff referenced the earlier injunction to emphasize that Defendants knew that their conduct violated its rights rather than to seek relief under the terms of the injunction itself.

Moreover, venue is appropriate in this District. Under Federal Rule of Civil Procedure 12(b)(3), venue is proper in a district where any defendant resides or where “a substantial part of the events or omissions giving rise to the claim occurred.” *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003). The First Amended Complaint alleges that Defendant Jose Colon is the head of a facility located within this district. (DE 39 at ¶ 4). It also alleges that “a substantial part of the events or omissions giving rise to the claim occurred in this district,” and that at least five prisons in this district have

censored Plaintiff's publications. (DE 39 at ¶¶ 4, 10, 22, 29).

F. Immunity

1. Sovereign Immunity

Defendants argue that "all official capacity claims for damages must be dismissed" under the doctrine of sovereign immunity. (DE 42 at 18–19). But the First Amended Complaint appears only to seek an award of "nominal and compensatory damages against those Defendants *sued in their individual capacities*." (DE 39 at 22; *see also* DE 39 at ¶ 3 (suing Mark Inch in his individual capacity for damages and costs and in his official capacity for only injunctive and declaratory relief); DE 39 at ¶ 4 (same as to Jose Colon); DE 39 at ¶ 5 (same as to Micha Neal)) (emphasis added). Thus, there do not appear to be any claims to dismiss on this basis.

2. Qualified Immunity

Defendants also argue that the government official Defendants are protected under the doctrine of qualified immunity. Under the doctrine of qualified immunity, "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Determining whether to apply the doctrine involves a two-pronged inquiry. *See Tolan v. Cotton*, 572 U.S. 650, 655 (2014). The first prong asks whether the conduct in question "violated a federal right," and the second prong "asks whether the right in question was 'clearly established' at the time of the violation." *Id.* at 656. "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To survive a qualified immunity defense, a plaintiff must establish both elements. *Jones v. Fransen*, 857 F.3d 843, 851 (11th Cir. 2017).

Here, Defendants argue that "controlling caselaw in

Prison Legal News, 890 F.3d 954, shields all Defendants against Plaintiff's constitutional claims" because "Plaintiff has alleged no facts, nor can they, that would pierce the protective covering of qualified immunity." (DE 42 at 22). Defendants base this argument on the fact that "[t]he Department of Corrections followed controlling law by impounding publications that contain advertisements or prohibited materials in a prison setting" and that "Plaintiff does not allege an action committed by Defendants to impute individual liability or any action by Defendants which is contrary to existing law." (*Id.*).

*8 Plaintiff argues that the First Amended Complaint alleges that each Defendant sued personally oversaw constitutional violations. (*See* DE 39 at ¶¶ 23, 29, 55, 56). Plaintiff, too, cites to *Prison Legal News* in support and specifically to its holding that FDOC's failure to provide notice of the impoundments of Plaintiff's publications violated due process. *See* 890 F.3d at 977 ("The Department asserts that PLN should find the mailroom workers who are responsible for the failure to provide notice and sue them. No ... The buck stops with the Secretary.") (citing Fla. Stat. § 20.315(3)); *see also* Fla. Stat. § 20.315(3). In light of this precedent, I conclude that Defendants were on notice that impounding Plaintiff's publications without prior notice violated Plaintiff's clearly established constitutional rights. Therefore, Defendants are not now shielded by the doctrine of qualified immunity.

3. Individual Liability

Defendants also argue that Defendants Inch and Colon "cannot be held individually responsible for the alleged failure to follow Department rules by individual officers, where they have no personal involvement in impoundments." (DE 42 at 9). Plaintiff argues that supervising officials *can* be held individually liable for a constitutional violation where there is a "causal connection between his actions and the constitutional violation that his subordinates commit." *Am. Fed'n of Labor v. City of Miami*, 637 F.3d 1178, 1190 (11th Cir. 2011). It is not required that an official "personally participate[d]" in the constitutional violation for the official to be held liable. *Id.* A "casual connection" exists when: "1) a 'history of widespread abuse' puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; and 2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act

unlawfully and failed to stop them from doing so.” *Valdes v. Crosby*, 450 F.3d 1231, 1237 (11th Cir. 2006) (citing *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003)). Additionally, a causal connection can be established if a supervisor “has the ability to prevent or stop a known constitutional violation by exercising his supervisory authority and he fails to do so.” *Am. Fed’n of Labor*, 637 F.3d at 1190 (citing *Keating v. City of Miami*, 598 F.3d 753, 765 (11th Cir. 2010)).

Here, the First Amended Complaint pleads facts that support Plaintiff’s argument that Defendants Colon and Inch, in their respective capacities as former Secretary of FDOC and Warden, had the “ability to prevent or stop a known constitutional violation by exercising [their] supervisory authority” and failed to do so. (See DE 39 at ¶¶ 3, 4, 22, 29, 60). It is worth emphasizing again that, at the motion to dismiss stage, I must focus on the sufficiency of Plaintiff’s allegations. Here, because Plaintiff has alleged facts that, accepted as true, attribute the allegedly unconstitutional policies at issue to Defendants Colon and Inch, Defendants’ Motion to Dismiss fails as to this argument, and it also fails with respect to Defendants’ argument that Defendant Colon is a redundant Defendant.

G. Punitive Damages

Plaintiff’s First Amended Complaint seeks “punitive damages for violating Plaintiff’s due process rights in violation of the injunction.” (DE 39 at 22). Defendants argue that Plaintiff “provides no factual allegations as to the culpability of any served or unserved Defendant that would support a punitive damage claim.” (DE 42 at 23). Additionally, Defendant argues that to the extent Plaintiff is attempting to bring a claim predicated on Defendants’ violation of the injunction in the Northern District of Florida, such a claim is properly brought in the Northern District, not the Southern District. (*Id.*).

*9 The purpose of punitive damages is to “punish the defendant for willful or malicious conduct and to deter others from similar behavior.” *Hoever v. Marks*, 993 F.3d 1353, 1358–69 (11th Cir. 2021). Plaintiff argues that by violating Plaintiff’s constitutional rights despite the fact that it had previously been enjoined from doing so, Defendants engaged in “willful or malicious” conduct that supports an award of punitive damages. Accepting Plaintiff’s allegations as true, Plaintiff has alleged facts that would support a conclusion that Defendants’ conduct was willful or malicious. Accordingly, I will not strike Plaintiff’s request for punitive damages.

H. Ripeness

Finally, Defendants briefly argue that “[t]o the extent that Plaintiff raises proposed claims challenging the language of the Department’s changes to F.A.C. § 33-501.401, those changes are still in the development stage of the administrative process and not yet final” and therefore such a challenge is not yet ripe. (DE 42 at 25). Plaintiff asserts that its challenge to the new rule is ripe because (1) the new rule is “on the verge of being adopted,” as Defendant Dixon has approved the proposed modification; and (2) Defendants’ actions and the positions they have taken in this litigation suggest that they are already applying the new policy, by impounding publications with only a single relevant advertisement. (DE 49 at 25).

“In assessing whether a dispute is concrete enough to be ripe,” courts “evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *Wollschlaeger v. Governor*, 848 F.3d 1293, 1304 (11th Cir. 2017) (citation omitted). A controversy is ripe for review where injury is “immediate or imminently threatened.” *Wilderness Soc. v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996). Here, Plaintiff has alleged that it has already been injured by the new rule because Defendants have impounded publications that only contain one relevant advertisement. (See DE 39 at ¶¶ 28, 31, 32, 33). Therefore, I find that Plaintiff has sufficiently alleged that injury is “immediate or imminently threatened” to make this controversy ripe for review. Moreover, I find that it is in the interest of judicial efficiency to consider this challenge at the same time as Plaintiff’s other challenges to the F.A.C. regulations and Defendants’ application of those regulations, as both are evaluated under the same framework.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that

(1) Defendant’s Motion to Dismiss (DE 42) is **DENIED**.

All Citations

Slip Copy, 2022 WL 19486385

Footnotes

¹ For the sake of brevity, I do not discuss the facts of each impoundment cited in Plaintiff's First Amended Complaint, which span from 2017 to 2021. While the impoundments vary in terms of the facility at issue and notice (or lack thereof) provided for the rejection of the publications, as relevant to this Motion the basic features are the same: that Defendants rejected Plaintiff's publications with either no or insufficient notice, and that they did so arbitrarily in violation of Plaintiff's First and Fourteenth Amendment rights.

² Indeed, Plaintiff is advised that to the extent these references indicate an intent to litigate violations of the Northern District injunction, such claims must be brought in the Northern District.

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