UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SANDRA RODRÍGUEZ-COTTO; RAFELLI GONZÁLEZ-COTTO,

Plaintiffs,

v.

HON. PEDRO R. PIERLUISI URRUTIA, Governor of Puerto Rico; DOMINGO EMANUELLI-HERNÁNDEZ, Secretary of Department of Justice of Puerto Rico; ALEXIS TORRES RÍOS, Secretary of Puerto Rico Department of Public Safety; ANTONIO LÓPEZ FIGUEROA, Puerto Rico Police Commissioner, all in their official capacities,

Defendants.

Civil Action No.: 3:20-01235-PAD

PLAINTIFFS' RESPONSE TO MOTION FOR RECONSIDERATION

On March 31, 2023, this Court issued an Opinion and Order holding that Article 5.14(a) of the Law of the Puerto Rico Department of Public Safety, Law No. 20 of 2017, 25 L.P.R.A. § 3654(a), violates the First Amendment and permanently enjoining its enforcement. Op. and Order, Dkt. No. 92.[1] On April 28, 2023, Defendants filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). Mot. for Recons., Dkt. No. 97. Pursuant to the Court's Order, Dkt. No. 98, Plaintiffs submit this response brief.

Federal Rule of Civil Procedure 59(e) authorizes parties to file a motion to alter or amend a judgment within 28 days after judgment is entered. Reconsideration of a final judgment is "an

[1] The Court amended the Opinion and Order in non-material respects on April 3, 2023. Errata Sheet, Dkt. No. 94.

extraordinary remedy which should be used sparingly." *Palmer v. Champion Mortg.*, 465 F.3d. 24, 30 (1st Cir. 2006) (quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)). "A motion for reconsideration under Rule 59(e) should be granted only if the district court's decision 'evidenced a manifest error of law, if there is newly discovered evidence, or in certain other narrow situations.'" *Disaster Sols., LLC v. City of Santa Isabel*, 21 F.4th 1, 7 (1st Cir. 2021) (quoting *Biltcliffe v. CitiMortgage, Inc.*, 772 F.3d 925, 930 (1st Cir. 2014)). A motion for reconsideration "is not a place 'for a party to undo its own procedural failures' and a party should not be allowed to 'advance arguments that could and should have been presented to the district court prior to judgment.'" *Id.* (quoting *Iverson v. City of Bos.*, 452 F.3d 94, 104 (1st Cir. 2006)). And "[u]nless the court has misapprehended some material fact or point of law, [a motion for reconsideration] is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected." *Palmer*, 465 F.3d at 30.

Defendants raise three arguments in support of reconsideration. The first two arguments—that Plaintiffs lack standing, and that Article 5.14(a) passes First Amendment muster because it includes a knowledge requirement and because it survives intermediate scrutiny—were considered at length, and rejected, in this Court's Opinion and Order. Defendants' third argument is equally misplaced. They contend that the Court erred in consolidating Plaintiffs' request for preliminary injunctive relief with their request for permanent injunctive relief. However, the Court provided clear and unambiguous notice of its intention to consolidate the proceedings, and it offered the parties an opportunity to request special procedures and/or file supplemental briefs. Defendants expressly declined those opportunities, and they did not object when the Court formally consolidated the preliminary and permanent injunction proceedings on July 21, 2022. Defendants cannot now complain that they were unjustly surprised merely because the Court ruled in

Plaintiffs' favor. Because Defendants have not identified any manifest error of law or newly discovered evidence that would materially alter the outcome of this case, the Court should deny their motion for reconsideration.

ARGUMENT

I. Plaintiffs have standing to challenge Article 5.14(a).

First, Defendants fault the Court's conclusion that Plaintiffs have standing to bring this pre-enforcement challenge to Article 5.14(a). Defendants argue that Plaintiffs' intended speech does not arguably violate the statute—and that Plaintiffs therefore face no credible threat of prosecution under the statute—because Article 5.14(a) is limited to knowingly false speech, and Plaintiffs "maintain that their intended speech is not knowingly false." Mot. for Recons. 5–6. This argument was fully aired in the parties' briefs on Plaintiffs' renewed motion for preliminary injunction.[2]

The Court held that "while plaintiffs have indicated that they do not intend to utter false statements, they do not have to assert otherwise to establish standing." Am. Op. and Order 12, Dkt. No. 94-1. As the Court pointed out, a plaintiff may establish pre-enforcement standing by showing that their constitutionally protected speech is "arguably proscribed or at least arguably regulated" by the challenged policies. *Id.* at 13 (citing *Speech First, Inc. v. Fenves*, 979 F.3d 319, 332 n.10 (5th Cir. 2020)). And "reasonable speakers can accidentally engage in false speech and legitimately fear prosecution for an inadvertent inaccuracy based on an accusation that the false reporting was intentional." *Id.* at 14. The Court cited the Supreme Court's decisions in *Susan B.*

[2] *See* Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 11–13, Dkt. No. 50; Resp. in Opp. to Renewed Mot. for Prelim. Inj. 7–8, Dkt. No. 62; Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 4–5, Dkt. No. 70; Sur-Reply to Pls. "Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj." 6–8, Dkt. No. 74.

Anthony List v. Driehaus, 573 U.S. 149, 163 (2014) [*SBA List I*], and *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 (1979), which held that the plaintiffs had standing to challenge statutes that prohibited maliciously false or deceptive statements, even though the plaintiffs did not intend to propagate untruths. *See* Am. Op. and Order 12. The Court also cited lower court cases reaching similar conclusions. *Id.* at 13–14 (discussing *281 Care Comm. v. Arneson*, 638 F.3d 621, 628–631 (8th Cir. 2011) [*281 Care Comm. I*], and *Frese v. MacDonald*, 425 F.Supp.3d 64, 76 (D.N.H. 2019)). *See also Frese v. Formella*, 53 F.4th 1, 5 n.2 (1st Cir. 2022) (agreeing with the district court that plaintiff had standing to challenge New Hampshire's criminal defamation statute, which prohibits knowingly false and defamatory statements), *petition for cert. filed*, No. 22-939.

The Court also held that Plaintiffs face a credible threat of prosecution under Article 5.14(a), given: "the statute's recent origin," Am. Op. and Order 18 (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973)); the fact that "the Government has not disclaimed any intention to enforce it and is actively vouchsafing for its constitutionality," *id.* (citing *New Hampshire Right to Life Pol. Action Committee v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996)); and the fact that "the universe of potential complainants is not restricted to state officials constrained by explicit guidelines or ethical obligations," *id.* (citing *SBA List I*, 573 U.S. at 164).

Defendants do not address any of these points, nor do they cite any new authorities contradicting the Court's reasoning. They merely repeat their previous argument "that there can be no credible threat of prosecution, as long as [Plaintiffs] maintain that their intended speech is not knowingly false." Mot. for Recons. 5–6. This Court rejected that argument for the reasons discussed above. Defendants have not shown that the Court's standing analysis rested on a manifest error of law.

II. Article 5.14(a) violates the First Amendment.

Defendants also take issue with this Court's holding that Article 5.14(a) violates the First Amendment. Defendants first argue that laws criminalizing false speech are constitutional so long as they include an "actual malice" requirement. Mot. for Recons. 7. This argument was addressed at length in the parties' briefs regarding Plaintiffs' renewed preliminary injunction motion.[3] The Court held that Article 5.14(a)'s "knowingly false" *mens rea* requirement does not obviate First Amendment concerns, because even "[l]ies are considered speech not categorically excluded from First Amendment protection." Am. Op. and Order 23.

The Court based this conclusion on its careful reading of *United States v. Alvarez*, 567 U.S. 709 (2012), which struck down a law criminalizing lies about military honors. *See id.* at 23–28. Defendants contend that *Alvarez* did not produce a clear First Amendment framework for assessing the constitutionality of laws regulating false speech. *See* Mot. for Recons. 10. But while the Justices divided over particulars, the Court "*unanimously* rejected the 'categorical rule . . . that false statements receive no First Amendment protection.'" *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 472 (6th Cir. 2016) [*SBA List II*] (emphasis added) (omission in original) (quoting *Alvarez*, 567 U.S. at 719 (plurality opinion)). *See also 281 Care Comm. v. Arneson*, 766 F.3d 774, 783 (8th Cir. 2014) [*281 Care Comm. II*] ("Despite the disagreement over the level of scrutiny to apply, however, all six Justices in [the] *Alvarez* [majority] agreed that false statements do not represent a category of speech altogether exempt from First Amendment protection.").

Defendants mistakenly assert that the First Circuit's decision in *Frese* contradicts this conclusion. Mot. for Recons. 7. *Frese* addressed First Amendment and vagueness challenges to

[3] *See* Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 20; Response in Opp. to Renewed Mot. for Prelim. Inj. 21–24; Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 14–15; Sur-Reply to Pls. "Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj." 11.

New Hampshire's criminal defamation statute, which proscribes knowingly false and defamatory statements. 53 F.4th at 4 (citing N.H. Rev. Stat. § 644:11(I)). The First Circuit held that the Supreme Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964), "precludes Frese's First Amendment attack on Section 644:11," reasoning that *Garrison* authorized states to criminalize defamation of public officials "so long as the statements were made with actual malice." *Frese*, 53 F.4th at 6 (internal quotation marks omitted) (quoting *Garrison*, 379 U.S. at 67). However, defamation is one of the longstanding, narrowly defined exceptions to the First Amendment. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010). The actual malice requirement "exists to allow more speech, not less" by "limit[ing] liability *even in defamation cases* where the law permits recovery for tortious wrongs." *Alvarez*, 567 U.S. at 719–20 (plurality opinion) (emphasis added). Defendants' attempt to expand *Frese* and *Garrison* to encompass *nondefamatory* speech "inverts the rationale" for the actual malice requirement, and impermissibly "expands liability in a different, far greater realm of discourse and expression," by empowering the government to prosecute all manner of putatively false speech any time it alleges actual malice. *Alvarez*, 567 U.S. at 719. *Alvarez* decisively rejected this proposition.

Defendants alternatively argue that the Court erred in holding that the statute fails intermediate First Amendment scrutiny. Mot. for Recons. 13–14.[4] This issue, too, was addressed

[4] Defendants dispute the Court's holding that the statute is subject to strict scrutiny because it is impermissibly content based. Mot. for Recons. 13 (citing Op. and Order 29). Defendants do not address the Court's authorities showing that, in *Alvarez*'s wake, lower courts have tended to apply strict scrutiny to restrictions on knowingly false speech. Am. Op. and Order 28 n.16 (citing *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1210 (D. Utah 2017); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 Vand. L. Rev. 1435, 1482 (2015) (collecting cases)). *See also 281 Care Comm. II*, 786 F.3d at 784; *SBA List II*, 814 F.3d at 473. In any event, the Court also held that Article 5.14(a) fails even intermediate scrutiny, so it need not address this issue further.

in the parties' briefs on Plaintiffs' renewed preliminary injunction motion.[5] Defendants' motion for reconsideration adds nothing to their prior arguments.

Defendants insist that the Court "should have given significant weight" to the government's interest in "protect[ing] the integrity of government processes and maintain[ing] the general good repute and dignity of government service itself." Mot. for Recons. 13. Contrary to Defendants' assertion, however, the Court directly addressed this issue in its decision. Am. Op. and Order 39–41. As the Court explained, *Alvarez* acknowledged that these important governmental interests sustain laws that narrowly prohibit the impersonation of government officials, because of the specific harms associated with "creating 'doubt in the public's mind about who speaks for the government and thus whether purported government officials can be trusted.'" *Id.* at 40 n.28 (quoting Helen Norton, *Lies and the Constitution*, 2012 Sup. Ct. Rev. 161, 195 (2012)). "These are harms directly tied to those prohibitions, not harms isolated from them." *Id.* Indeed, the government "could not, consistently with the First Amendment, mandate or require expression from the public to, *inter alia*, maintain the general good repute of government." *Id. See also Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (stating that "the Constitution does not tolerate in any form" the "spectre of prosecutions for libel on government" (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–76, 290–92 (1964))).

Moreover, as the Court noted, laws "forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech." Am. Op. and Order 41 (quoting *Alvarez*, 567 U.S. at 735 (Breyer, J., concurring in the judgment) (emphasis in original)). "Unlike with false impersonation, Article 5.14(a) focuses not on acts, but on speech." *Id.* Although Defendants

[5] *See* Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 21–26; Response in Opp. to Renewed Mot. for Prelim. Inj. 25–29; Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 9–15; Sur-Reply to Pls. "Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj." 11–14.

maintain that this Court erred in treating Article 5.14(a) as a restriction on speech, rather than conduct, they do not supply any relevant authority for this argument. *See* Mot. for Recons. 14.[6]

Defendants further maintain that Article 5.14(a) is constitutional under *Alvarez* because, unlike the Stolen Valor Act, it is addressed to speech on matters of significant public concern where it may be difficult to identify falsehoods. *See* Mot. for Recons. 10–11. But as the Court recognized, these factors cut decisively *against* granting the government sweeping powers to prosecute broadly defined falsehoods, including those outlawed by Article 5.14(a), given the serious risk of partisan overreach inherent in such authority. Am. Op. and Order 42–43 & n.30. *See Alvarez*, 567 U.S. at 731–32 (Breyer, J., concurring in the judgment) (agreeing with the dissent that laws restricting "false statements about easily verifiable facts" that do not touch on matters of public concern or controversy are more likely to trigger intermediate, rather than strict, scrutiny); *accord id*. at 740, 751–52 (Alito, J. dissenting).

Applying intermediate scrutiny, the Court observed that "the Government did not prove why counter-speech in the form of increased transparency, would fail to accomplish its interests." Am. Op. and Order 32. Defendants now complain that they were denied an opportunity to submit evidence showing the ineffectiveness of transparency as an alternative to censorship. *See* Mot. for

[6] Defendants erroneously state that in *United States v. Bonin*, 932 F.3d 523, 536 (7th Cir. 2019), the Seventh Circuit "upheld a similar provision that criminalized false alarms during a state of emergency, recogniz[ing] that such laws serve a legitimate government interest in maintaining public safety and order." Mot. for Recons. 9. Not so. *Bonin* held that 18 U.S.C. § 912 does not violate the First Amendment, because it prohibits the overt act of fraudulently impersonating a government officer. 932 F.3d at 536 (citing *Alvarez*, 567 U.S. at 721); *accord United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048–49 (9th Cir. 2014). Defendants also continue to cite the Ninth Circuit's decision in *United States v. Perelman*, 695 F.3d 866, 871–72 (9th Cir. 2012), for the proposition that intermediate scrutiny applies to statutes prohibiting the wearing of false military medals. Mot. for Recons. 13–14. As Plaintiffs have previously pointed out, however, *Perelman* was expressly overruled in *United States v. Swisher*, 811 F.3d 299, 318 (9th Cir. 2016) (en banc). Reply Mem. in Supp. of Pls. Renewed Motion for Prelim. Inj. 11 n.3.

Recons. 11 & n.8. However, Defendants neglected to submit this evidence in the preliminary injunction briefing or in supplemental briefing in response to the Court's consolidation order, and even now they have not proffered any evidence to substantiate their assertion.

In any event, Defendants offer no response to the Court's holding that Article 5.14(a) fails narrow tailoring. As the Court concluded, Article 5.14(a) is underinclusive because it does not restrict knowingly false assurances during an emergency, even though such assurances pose similar risks to public safety, Am. Op. and Order 35–37, and overinclusive because it does not define what constitutes a "false alarm" and does not require the government to show that imminent harm was foreseeable, *id.* at 37–39 (contrasting Article 5.14(a) with 18 U.S.C. § 1038(a) and 47 C.F.R. § 73.1217). Even standing alone, these features are sufficient to sustain the Court's holding that Article 5.14(a) fails intermediate First Amendment scrutiny.

III. The Court did not violate Defendants' due process rights in consolidating preliminary and permanent injunction proceedings.

Finally, Defendants argue that the Court violated their due process rights by consolidating the preliminary and permanent injunction proceedings and entering judgment without affording them an opportunity to submit evidence supporting Article 5.14(a)'s constitutionality. Mot. for Recons. 14–19. Federal Rule of Civil Procedure 65(a)(2) empowers courts to consolidate preliminary and permanent injunction proceedings, so long as they provide "(i) 'clear and unambiguous notice' of the consolidation and (ii) an opportunity to be heard." *VAMOS, Concertación Ciudadana, Inc. v. Puerto Rico*, 494 F. Supp. 3d 104, 125 n.7 (D.P.R. 2020).

Here, the Court provided express notice of its intention to consolidate the proceedings and offered the parties the opportunity to request special measures and/or file supplementary briefs. Order, Dkt. No. 86. Defendants expressly declined to seek discovery or request an evidentiary hearing, stating in their motion in compliance with the Court's Order: "Defendants reaffirm their

position as stated in the Joint Motion in Compliance with Court Order filed on September 25, 2020, that is, that this Court can rule on Plaintiffs' renewed motion for preliminary injunction without the need for discovery or an evidentiary hearing (Docket No. 78). As of today, even under the possibility of consolidation, Defendants' posture remains the same." Mot. in Compliance with Ct. Order 2, Dkt. No. 88. Defendants also stated that "no special measures need be considered" and that "additional briefing is unnecessary." *Id.* at 3. On July 21, 2022, the Court entered an Order stating: "After providing notice of the court's intention to consolidate the preliminary injunction phase with the request for permanent injunctive relief, and considering the parties responses at Docket Nos. 87 and 88, the preliminary injunction phase is hereby consolidated with the request for permanent injunctive relief." Order, Dkt. No. 91. Defendants raised no objection.

Now, Defendants claim "the Court: (i) did not notify the parties of its intention to resolve the case on the merits; (ii) did not mention deadlines for dispositive motions[;] and, most importantly[,] (iii) did not mention that the Commonwealth needed to present evidence of a direct causal link connecting Article 5.14(a)'s prohibitions to the harm the Article attempts to assuage and that evidence to support the affirmation that a criminal prohibition against false warnings and alarms about the imminent occurrence of a catastrophe in Puerto Rico is necessary to advance the Government's asserted interest." Mot. for Recons. 17–18.

These complaints ring hollow. The Court's July 5, 2022, Order expressly stated that the Court intended to consolidate the preliminary and permanent injunction proceedings, plainly in contemplation of a dispositive merits ruling. *See* Order, Dkt. 86. *See also* Fed. R. Civ. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing."). Indeed, Defendants' motion in compliance "refer[red] this Court to their filings at Docket Nos. 62 and 74, which support their

contention that the injunction sought should be denied and the case dismissed." Mot. in Compliance with Court Order 2. *See Fenstermacher v. Philadelphia Nat. Bank*, 493 F.2d 333, 337 (3d Cir. 1974) ("By failing to object to the consolidation at any time and, further, seeking to use it for his benefit by actively soliciting final, equitable relief, [the plaintiff-appellant] acquiesced in the procedure followed in the district court."). Plaintiffs' preliminary injunction briefs pointed out that Defendants bear the evidentiary burden of justifying Article 5.14(a) under the First Amendment.[7] Defendants made no attempt to meet that burden. Even now, Defendants do not proffer any new evidence or arguments to support the statute; they merely retread the same ground covered in their preliminary injunction briefs.

Defendants also argue that they reserved their right to submit further merits briefing, because their motion in compliance suggested that the Court should "primarily adjudicate the standing issue" so that Defendants could "determine if further briefing regarding the merits of the case is necessary." Mot. for Recons. 17. But the Court was not obligated to acquiesce to Defendants' preferred disposition of the case. It afforded the parties notice of its intent to consolidate and an opportunity to be heard. Defendants expressly declined to seek discovery, request an evidentiary hearing, or file supplemental briefs. Furthermore, Defendants did not object when the Court subsequently declared that it had consolidated the preliminary and permanent injunction proceedings, even though the Court nowhere suggested that it would limit its review to standing. *See New England Anti-Vivisection Soc., Inc. v. U.S. Surgical Corp.*, 889 F.2d 1198, 1201 (1st Cir. 1989) (holding that plaintiff's initial arguments against consolidation were waived because it failed to object to the district court's subsequent clear and unambiguous notice of its

[7] *See* Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 20–21; Reply Mem. in Supp. of Pls. Renewed Mot. for Prelim. Inj. 11,13.

intent to consolidate). "There was no due process violation here. Notice was given and the opportunity to be heard was ample. If defendant[s] feels cheated, [they] should redirect [their] gaze inward. . . . A party cannot lay back, acquiesce in the merger of a preliminary hearing with a permanent one, and then protest the procedure for the first time after the case is decided adversely to it." *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for reconsideration.

I HEREBY CERTIFY that the undersigned attorney electronically filed the foregoing with the Clerk of the Court, which will send notification of such filing to the parties subscribing to the CM/ECF System.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 12th day of May 2023.

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