

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

EMMA DOE et al.,	:	
	:	Civil Case No. 12-1670
	Plaintiffs,	:
	:	Section F
v.	:	
	:	Judge Martin L. C. Feldman
JAMES D. CALDWELL et al.,	:	
	:	Mag. Judge Alma L. Chasez
	Defendants.	:
	:	

**PLAINTIFFS' CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR CLASS CERTIFICATION AND MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Defendants have filed a Reply Memorandum in Support of their Motion to Dismiss (“Reply”), but have failed to file responses addressing the merits of Plaintiffs’ Motion for Class Certification and Plaintiffs’ Motion for Summary Judgment. In their “responses” to plaintiffs’ motions, defendants assert that they are entitled to defer argument on the merits until after the Court rules on their claim to Eleventh Amendment immunity. Defendants thus take the position that they can unilaterally, without leave of Court, ignore the controlling scheduling Order in this case on the conclusory assertion that this Court does not have subject matter jurisdiction over the claims in this case.

Not surprisingly, defendants offer no support for the proposition that merely filing a motion to dismiss on immunity grounds permits a party to ignore court orders regarding litigation of the case. Although in some cases an immunity claim or other affirmative defense that challenges subject matter jurisdiction will, if valid, require dismissal of the action, that fact hardly justifies the party’s failure to timely respond to motions as ordered by the Court. Indeed,

defendants' current litigation posture is inconsistent with their original Motion to Dismiss where defendants made a number of merits arguments. Notably, the Eleventh Amendment defense was not only the last to be briefed, but presented arguments quite different than those made in the Defendants' Reply Memorandum of Law.¹ Moreover, defendants made no argument that the Eleventh Amendment issues be resolved first or to the exclusion of other issues.

To be sure, defendants may elect to rely only on their Eleventh Amendment defense, but they cannot without leave of court bifurcate the proceedings in this manner. Defendants have therefore effectively forfeited their opportunity to further respond to plaintiffs' arguments in support of their motion for summary judgment and class certification. The Court should consider the issues presented by the Motions for Class Certification and for Summary Judgment fully briefed, and should proceed to decide these Motions on the merits.

II. Argument

As to the merits, it is clear that defendants' assertion of Eleventh Amendment immunity cannot bar the relief plaintiffs seek. Defendants appear to be claiming in their Reply that they are immune from suit on the ground that the plaintiffs are no longer required to register as sex offenders and therefore there is no basis for this Court to order any relief against state officials. Defendants are wrong on every aspect of their argument.

First, to the extent that defendants argue that statutory changes in Louisiana have relieved plaintiffs and the class of their registration obligations set forth in La. R.S. 15:541 *et seq.*

¹ In their motion to dismiss, defendants argued only that the relief requested was not "prospective" in nature and therefore barred *Ex Parte Young* relief. See Memorandum of Law in Support of Motion to Dismiss (Docket #29-1) at 13-14. As plaintiffs have noted, this argument was specifically rejected in *Doe I* and controlling Fifth Circuit precedent precluded defendants' assertions. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Docket #31), at 14-15. Defendants have chosen not to reply on this specific issue and instead have created a new Eleventh Amendment theory that fares no better, as described below.

(“Registry Law”) as a result of theirs CANS convictions, they are quite mistaken. The amendments to the Registry Law were prospective only, leaving in place the law as it stood at the time *Doe I* was decided with respect to plaintiffs and class members, all of whom were convicted of CANS prior to August 15, 2011. *See* Complaint (Docket #1) at ¶¶ 32, 33, 50, 56-58, 61, 71, 72. Accordingly, individuals convicted of CANS, but not Prostitution, prior to August 15, 2011 *continue* to be subject to an automatic and mandatory sex offender registration requirement, and to severe penalties for failure to comply with these requirements. *See id.* at ¶¶ 36, 43, 47, 48. Plaintiffs’ challenge to the Registry Law as it is *currently* being applied to individuals convicted pursuant to La. R.S. 14:89(A)(2) and La. R.S. 14:89.2 (A) prior to August 15, 2011, is plainly justiciable.

Second, as has been shown in plaintiffs’ Opposition to Defendants’ Motion to Dismiss and plaintiffs’ Motions for Class Certification and for Summary Judgment, Act 402 fails to correct or fully remedy the constitutional violations identified by this Court in *Doe I*. Act 402 does not require the immediate or mandatory termination of plaintiffs’ obligations under the Registry Law; to the contrary, the contingent relief provided by the Act requires the registrant to affirmatively seek relief from a requirement already deemed unconstitutional by this Court from a state court and to bear the costs and burden of proof in such proceedings. On this issue, defendants implicitly concede that plaintiffs cannot constitutionally be subject to the Registry Law as a result of a CANS conviction. That being so, the failure of Act 402 to provide immediate, mandatory and automatic relief without further burdens on the plaintiff class renders its provisions insufficient to remedy the Equal Protection violation.

Plaintiffs are identically situated to the plaintiffs in *Doe I* as they continue to be subject to sex offender registration requirements based solely on a CANS conviction under either La. R.S.

14:89(A)(2) or 14:89.2. Thus, the Court’s equitable powers under *Ex Parte Young* doctrine are as broad as they were in *Doe I* since state officials are continuing to engage in unconstitutional conduct by requiring plaintiffs and class members to register as sex offenders. Plaintiffs are entitled to the same relief as the plaintiffs in *Doe I*: immediate removal from the registry and elimination of ongoing registration requirements.²

In this context, the argument that the State’s sovereign immunity “will be violated if this Court finds that the process enacted by the State legislature was wrong,” Reply at 6, rebuts an argument plaintiffs have not made. Plaintiffs do not argue that Act 402 is “wrong;” rather, plaintiffs have shown that Act 402 does not provide the relief sufficient to remedy the continuing existence of the constitutional injury identified by the Court in *Doe I*. See Plaintiffs’ Memorandum of Law in Support of Motion for Summary Judgment (Docket #31) at 4-6. Quite clearly, if a state law aimed at curing a constitutional violation in the state’s statutory scheme is insufficient to fully and immediately remedy the constitutional infirmity, a federal court is empowered to issue appropriate relief.

Third, defendants’ claim that sovereign immunity is implicated because individuals who solicited minors might be released from the sex offender registry is also precluded by reason of *Doe I*. The specter of child predators being freed from the registration requirement is literally a figment of the defendants’ imagination. “The Court has no duty to indulge such patent hypothetical speculation.” *Doe v. Jindal*, 851 F. Supp. 2d 995, 1008 (E.D. La. 2012). This issue

² The fact that plaintiffs in *Doe I* proceeded anonymously is irrelevant to this analysis. Defendants are well aware that the Court’s holding in *Doe I* extends to any individual required to register as a sex offender solely as a result of a conviction pursuant La. R.S. 14:89(A)(2) and La. R.S. 14:89.2(A). The names of individuals so designated are clearly at Defendants’ disposal. Extending the relief mandated by the Court’s holding in *Doe I* to these individuals therefore does not necessitate requiring these individuals to affirmatively come forward to identify themselves by name.

was briefed in *Doe I*, see Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 5, 16, *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) (No. 11 Civ. 388); Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, at 2-4, 8, *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) (No. 11 Civ. 388), and this Court ruled that the underlying facts of a conviction are irrelevant to the equal protection analysis. *Doe*, 851 F. Supp. 2d at 1008 ("That argument [that underlying circumstances are relevant] conveniently ignores that the straightforward comparison for the plaintiffs, for Equal Protection purposes, is with those convicted of solicitation of Prostitution."). As noted in *Doe I*, the age of the person solicited is not an element of a CANS offense, just as it is not an element of a solicitation offense under the Prostitution statute. Accordingly, creating a classification requiring individuals convicted under CANS, but not those convicted under the solicitation provision of the Prostitution statute, to prove that the individual solicited was not a minor in order to avoid a registration requirement would be also violate the Equal Protection Clause.

Equally flawed in this regard is the defendants' discussion of statutes which punish more serious offenses, including inducement of a minor into *offering* sexual acts for compensation or engaging in an obscene act. See Reply (Docket #45) at 15-16. As these statutes punish conduct quite different from that punishable under CANS (La. R.S. 14:89(A)(2) or La. R.S. 14:89.2(A)), which provides the sole basis for plaintiffs' continuing duty to register, they are irrelevant.

The Judgment in *Doe I* did address the issue of minors, but only to make clear that the Court's Order did not extend to individuals convicted under La. R.S. 14:89.2(C). Indeed, in *Doe I*, plaintiffs agreed to accommodate the State's concerns regarding persons convicted of offering minors sex in exchange for compensation by expressly excluding them from the proposed judgment. And in the current case, the plaintiff class includes only individuals convicted under

La. R.S. 14:89(A)(2) or 14:89.2. Thus, as in *Doe I*, to the extent that an individual would be required to register based on a conviction pursuant to any other statutory provision involving minors or other more serious conduct, that obligation would continue.

III. Conclusion

This Court should grant Plaintiffs' Motions for Class Certification and for Summary Judgment based on the record and pleadings filed to date.

DATED: November 13, 2012

Respectfully submitted,

/s/Alexis Agathocleous

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