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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Plaintiffs commenced this action seeking relief from mandatory and continuing sex offender registration requirements unconstitutionally imposed pursuant to convictions under Louisiana's Crime Against Nature by Solicitation statute ("CANS"), La. Rev. Stat. Ann. § 14:89(A)(2) or 14:89.2(A). This Court recently ruled that requiring sex offender registration of individuals convicted under CANS violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012).

By this Motion, the plaintiffs request certification of a class of all persons subjected to sex offender registration pursuant to a CANS conviction under § 14:89(A)(2) or § 14:89.2(A). Class certification is plainly warranted. The class members are so numerous that joinder of their claims is impracticable. There are questions of law and fact common to the class, and the plaintiffs' claims are typical of those of the proposed class members. The plaintiffs will adequately represent the claims of the class, and the defendants have acted, or refused to act, on grounds generally applicable to the class.

II. BACKGROUND

A. Factual and Procedural History

This Court recently determined that requiring persons convicted under CANS to register as sex offenders, when persons convicted of *the same conduct* under the solicitation provision of Louisiana's prostitution statute, La. Rev. Stat. Ann. § 14:82, are not required to register, violates the Equal Protection Clause of the Fourteenth Amendment. *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012).

As this Court found in *Doe v. Jindal*, both CANS and the prostitution statute criminalize identical conduct, the solicitation of oral or anal sex for compensation, and require proof of identical elements. Despite the fact that the statutes penalize the same conduct, the consequences of a conviction under CANS are far more significant than the consequences of a conviction under the prostitution statute. Thus, a first conviction under the solicitation provision of the prostitution statute is a misdemeanor, and such prostitution convictions have never required registration as a sex offender. However, until recently, even first-time CANS convictions were felonies, and CANS convictions resulted in mandatory and ongoing sex offender registration. In legislation effective August 15, 2010, the Louisiana legislature eliminated the felony designation and the registration requirement for first-time CANS convictions but maintained the registration requirement for second or subsequent CANS convictions. In legislation effective August 15, 2011, the legislature eliminated the requirement for second or subsequent CANS convictions, and fully aligned the CANS penalties with those of the solicitation provisions of the prostitution statute. But because the 2010 and 2011 amendments are not retroactive, persons convicted under CANS prior to August 15, 2011 are still required to register as sex offenders and still subjected to the onerous mandates of the registry law. *Doe*, 851 F. Supp. 2d at 999-1000. *See* Registration

of Sex Offenders, Sexually Violent Offenders, and Child Predators, La. Rev. Stat. Ann. §§ 15:540-15:553; Class Action Compl. ¶¶ 34-49, ECF No. 1 (hereinafter "Complaint").

B. Plaintiffs and the Proposed Class

Plaintiffs Emma Doe, Brenda Doe, Bayard Doe, and Ruth Doe are all subject to mandatory and continuing sex offender registration as a result of pre-August 15, 2011 CANS convictions. The plaintiffs seek declaratory and injunctive relief from this unconstitutional registration requirement for themselves and all those similarly subject to it. Accordingly, the plaintiffs seek to certify a class of:

> all persons who were convicted under the Louisiana Crime Against Nature by Solicitation Statute, La. Rev. Stat. Ann. § 14:89(A)(2) or 14:89.2(A), for solicitation of oral or anal sex for compensation prior to August 15, 2011 and, as a result, have been or will be subject to sex offender registration requirements under Louisiana's Registration of Sex Offender Law, La. Rev. Stat. Ann. §§ 15:540-15:553.

C. Defendants

The defendants are State of Louisiana officials, all sued in their official capacity, with final authority over various aspects of the administration, maintenance, implementation, and enforcement of Louisiana's registry law, La. Rev. Stat. Ann. §§ 15:540-15:553, and its sex offender registry components. The defendants here were also defendants in *Doe v. Jindal* and were subject to the Court's injunctive relief in that case.

III. ARGUMENT

A. The Standard for Class Certification

Class certification is appropriate for the plaintiffs' claims for declaratory and injunctive relief. "To obtain class certification, parties must satisfy Rule 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (quoting *Maldonado v. Ochsner Clinic Found.*, 493

F.3d 521, 523 (5th Cir. 2007)). Members of a class seeking certification under Rule 23(a) must demonstrate that:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The plaintiffs seek certification under Rule 23(b)(2), which further requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The plaintiffs satisfy the criteria of Rules 23(a) and 23(b)(2), and class certification is warranted.

B. The Proposed Plaintiff Class Meets All the Requirements of Rule 23(a).

1. The Class is So Numerous that Joinder is Impracticable.

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all class members would be impracticable." Fed. R. Civ. P. 23(a)(1). "To satisfy the numerosity prong, 'a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members.'" *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (quoting *Zeidman v. J. Ray McDermott & Co., Inc.,* 651 F.2d 1030, 1038 (5th Cir. 1981)). A class of "100 to 150 members[] is within the range that generally satisfies the numerosity requirement." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed. 1992) (suggesting that any class consisting of more than forty members "should raise a presumption that joinder is impracticable")).

The numerosity prerequisite is easily satisfied here. There are approximately 484 individuals statewide who must register as a sex offender as a result of a pre-August 15, 2011 CANS conviction. Compl., ¶ 17. The sheer size of this proposed class makes joinder impracticable. *See Mullen*, 186 F.3d at 624 (finding class of 100-150 persons sufficient to satisfy numerosity requirement); *Boykin v. Georgia-Pac. Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983) ("Therefore, a class of 317 individuals remains. Certainly, a class of this magnitude is large enough to meet the numerosity requirement."); *Morrow v. Washington*, 277 F.R.D. 172 (E.D. Tex. 2011) (finding proposed class of 136 persons sufficient to satisfy numerosity requirement); *McMiller v. Bird & Son, Inc.*, 68 F.R.D. 339, 341 (W.D. La. 1975) (finding a class of 121 persons sufficient to meet numerosity requirement).

Other factors make joinder impracticable as well. As the Fifth Circuit has noted, "district courts must not focus on sheer numbers alone but must instead focus 'on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors.'" *Pederson*, 213 F.3d at 868 n. 11 (quoting *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1022 (5th Cir. 1981)). Courts may also consider "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

In this case, the nearly five hundred persons in the proposed class are dispersed geographically throughout the state of Louisiana. Compl. ¶ 17. Second, many members of the proposed class may not know that their rights have been violated, or that legal redress might be available, as this Court's ruling in *Doe v. Jindal* may not have been made known to them. *Id.* Third, many lack adequate means and resources to retain counsel or otherwise seek relief from

the unconstitutional registration requirement.[1] *Id.* These factors adversely affect the ability of class members to file and prosecute individual claims, making a class action the only effective and appropriate means of ensuring vindication of the rights of *all* members of the proposed class. For these reasons, the numerosity requirement of Rule 23(a)(1) is satisfied.

2. There are Common Questions of Law and Fact.

In order to satisfy commonality, "Rule 23(a)(2) requires that all of the class member's claims depend on a common issue of law or fact whose resolution 'will *resolve* an issue that *is central to the validity* of each one of the [class member's] claims in one stroke.'" *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012) (quoting *Wal-Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S. Ct. 2541, 2551 (2011)).

Here, the commonality requirement is easily met. The declaratory and injunctive relief sought by the plaintiffs implicates questions of law and fact common to the proposed class which are "central to the validity" of each proposed class member's claims. In *Doe v. Jindal*, this Court found that Louisiana has created two classifications of individuals who are similarly situated because they were convicted of identical conduct: one group has been convicted under the

[1] On May 31, 2012, Governor Jindal signed H.B. 566 into law as Act 402. Effective August 1, 2012, this legislation provides a process whereby people who believe they were wrongfully required to register as sex offenders may individually petition the court of conviction to have their names removed from the registry. 2012 La. Acts 402.

As explained in Plaintiff's Memorandum of Law in Response to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment, Act 402 is insufficient for several reasons. First, the law does not include those required to register because of a second or subsequent CANS conviction between August 15, 2010 and August 15, 2011. Second, the burden of remedying the unconstitutional action should not fall on those persons harmed by the unconstitutional action but on the state, which took and continues to take the unconstitutional action. Third, forcing people to individually petition a court to remove their names from the registry exposes them to unfair negative publicity and public reproach. Finally, many individuals who would benefit from this relief cannot afford lawyer's fees and, further, it is unfair to require payment to remedy unconstitutional action.

prostitution statute, and the other under the CANS statute. But, only one group is subject to mandatory sex offender registration – those convicted under the CANS statute. *Doe*, 851 F. Supp.2d at 998-99. Louisiana has legislatively eliminated the sex offender registration requirements for all those convicted under the CANS statute after August 15, 2011. However, this legislation was not retroactive, and individuals convicted under CANS prior to August 15, 2011 are still required to register as sex offenders. *Id.* at 1001. Seeing "no rational relation to any legitimate government objective" in requiring individuals convicted under the CANS statute to register as sex offenders, this Court ruled that the imposition of the registration requirement upon the plaintiffs in that case, who all had pre-August 15, 2011 CANS convictions and thus were still required to register, violated the Fourteenth Amendment's Equal Protection Clause. *Id.* at 1007.

The named plaintiffs and members of the proposed class in this action are in the same position as the plaintiffs in *Doe v. Jindal*: they are all subject to mandatory and continuing sex offender registration because of a pre-August 15, 2011 CANS conviction, and seek declaratory and injunctive relief from that registration. Therefore, the central and essential questions of fact common to the class are: (i) whether sex offender registration requirements are imposed pursuant to a conviction prior to August 15, 2011 under the CANS statute; and (ii) whether a CANS conviction is the sole basis for a mandatory registration requirement. The central and dispositive question of law common to all proposed class members is the application of this Court's previous finding that the imposition of a mandatory sex offender registration requirement upon those convicted under the CANS statute before August 15, 2011 violates the Fourteenth Amendment to the United States Constitution by depriving them of the equal protection of the laws. These common questions of law and fact are at the heart of each proposed class member's

claims; indeed, their resolution will dispose of the claims in their entirety. Accordingly, Rule 23(a)(2)'s commonality requirement is met.

3. The Claims of the Named Plaintiffs are Typical of Those of the Class.

Rule 23(a)(3)'s typicality requirement "focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997) (citing *Flanagan v. Ahearn (In re Asbestos Litig.),* 90 F.3d 963, 976 (5th Cir. 1996)). The test for typicality "is not demanding," *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999), and "does not require a complete identity of claims." *James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001) (quoting 5 James Wm. Moore et al., Moore's Federal Practice ¶ 23.24[4] (3d ed. 2000)), *abrogated on other grounds by M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 839-40 (5th Cir. 2012). Rather, typicality looks to "whether the class representative's claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id.*

Here, the claims of the named plaintiffs and of the proposed class are identical. All of the proposed class members are subject to the same mandatory and continuous sex offender registration requirement, unconstitutionally imposed on all of them because they all have pre-August 15, 2011 CANS convictions. Because this requirement is not imposed on those convicted of identical conduct under the prostitution statute, the plaintiffs, along with all members of the proposed class, share the claim that the imposition of this registration requirement violates the Fourteenth Amendment's Equal Protection Clause.

The plaintiffs' requested declaratory and injunctive remedies would therefore benefit all members of the proposed class, and there is no danger that the named plaintiffs would seek or be afforded relief different from or prejudicial to unnamed class members. Thus, if members of the proposed class were to bring parallel individual actions, they would no doubt invoke legal and remedial theories identical to those advanced by the named plaintiffs. *See Lightbourn*, 118 F.3d at 426. As a result, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Plaintiffs will Adequately Represent and Protect the Interests of the Class.

The final condition of Rule 23(a) requires that the named class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two." *Berger v. Compaq Computer Corp.,* 257 F.3d 475, 479 (5th Cir. 2001). In the adequacy inquiry, courts examine "[1] the zeal and competence of the representative[s'] counsel and . . . [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees[.]" *Id.* (citing *Horton v. Goose Creek Indep. Sch. Dist.,* 690 F.2d 470, 484 (5th Cir. 1982) (citations omitted)). The Fifth Circuit has explained that, in this adequacy analysis, "[d]ifferences between named plaintiffs and class members render the named plaintiffs inadequate representatives *only if* those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625-26 (internal citation omitted) (emphasis added). Indeed, the Rule 23(a)(4) adequacy inquiry is also intended to "uncover[] 'conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314-15 (5th Cir. 2007) (quoting *Berger*, 257 F.3d at 479-80).

Here, counsel for the plaintiffs know of no conflicts among or between members of the class, the named plaintiffs, or the attorneys in this action. Further, the named plaintiffs do not have any interests antagonistic to those of any other members of the proposed class. On the contrary, the interests of the named plaintiffs coincide with those of the class. All members of the class, including the plaintiffs, suffer from mandatory sex offender registration. As a result, the declarative and injunctive relief from that registration which the plaintiffs seek will benefit all members of the proposed class.

The members of the proposed class would be represented by counsel with extensive experience in civil rights and class action litigation. Attorneys William Quigley and Davida Finger of the Stuart H. Smith Law Clinic & Center for Social Justice at the Loyola University New Orleans College of Law, Alexis Agathocleous and Sunita Patel of the Center for Constitutional Rights, and Andrea J. Ritchie all have extensive civil rights litigation experience, and have demonstrated their willingness to zealously represent the plaintiffs and the proposed class in their successful litigation of *Doe v. Jindal*. David Rudovsky and Jonathan Feinberg of Kairys, Rudovsky, Messing & Feinberg LLP have litigated numerous complex civil rights and class action matters for decades; and Professor Seth Kreimer of the University of Pennsylvania Law School is a national expert in civil rights law. The lawyers for the proposed class are uniquely qualified to provide the highest level of experience, knowledge, competence, and skill in prosecuting the plaintiffs' and class members' claims, and have demonstrated their willingness to vigorously represent the plaintiffs and the proposed class.

The named plaintiffs have a strong interest in achieving the relief requested in the Complaint, they have no conflicts with members of the proposed class, and they will fairly and adequately protect the interests of the class. Like each member of the proposed class, all of the

named plaintiffs have been, and continue to be, subject to mandatory and continuous sex offender registration on the basis of a pre-August 15, 2011 CANS conviction, and therefore all named plaintiffs have a substantial incentive to gain the requested relief. For these reasons, the requirements of Rule 23(a)(4) are met.

C. The Proposed Class Meets the Requirements of Rule 23(b)(2).

In addition to the requirements of Rule 23(a), the plaintiffs must satisfy one of the requirements of Rule 23(b) in order to meet the class certification standard. *M.D. ex rel. Stukenberg*, 675 F.3d at 837. The plaintiffs seek certification pursuant to Rule 23(b)(2), which provides that a class action is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The Supreme Court has recently observed that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what [Rule 23](b)(2) is meant to capture." *Wal-Mart*, -- U.S. --, 131 S. Ct. 2541, 2557-58 (2011) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). *See Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 993 (5th Cir. 1981) (Rule 23(b)(2) "was intended primarily to facilitate civil rights class actions, where the class representatives typically sought broad injunctive or declaratory relief against discriminatory practices.") (citing Advisory Committee's Note, 39 F.R.D. 98, 102 (1966)); *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) ("the 23(b)(2) class action is an effective weapon for an across-the-board attack against systematic abuse. . . . Indeed, its usefulness in the civil rights area was foreseen by the drafters of the revised rule.") (citing Advisory Committee's Note, 39 F.R.D. 73, 102 (1966)*, disapproved of on other grounds*, *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978).

In the Fifth Circuit, in order to proceed under Rule 23(b)(2), "class members must have been harmed in essentially the same way, . . . injunctive relief must predominate over monetary damage claims," and that injunctive relief "must be specific." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (citing *Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 975 (5th Cir. 2000)). Rule 23(b)(2) requires that a single injunction or declaratory judgment would provide relief to the entire class. *M.D. ex rel. Stukenberg*, 675 F.3d at 845.

The plaintiffs and class members share an identical injury: they are unconstitutionally required to register as sex offenders as a result of a pre-August 15, 2011 CANS conviction. The plaintiffs do not seek monetary damages; rather, they seek precisely the kind of specific injunctive and declaratory relief the Fifth Circuit requires for certification under Rule 23(b)(2): an application of this Court's prior declaration that the sex registration requirement violates the plaintiffs' and proposed class members' rights under the Fourteenth Amendment, and injunctive relief requiring their removal from the sex offender registry and related records. Unique relief is not sought; each Plaintiff seeks only the *same* class-wide declaratory and injunctive remedies, which will provide relief to all proposed class members. Further, the Fifth Circuit's requirement that the injunctive relief that is sought under Rule 23(b)(2) be specific, *see Maldanado*, 493 F.3d at 524, is also satisfied in this case. While this issue is more suitable for consideration at the merits stage, it is clear from the Complaint that the relief requested is targeted precisely to remedy the unconstitutional registration requirements faced by all class members, that the class is sufficiently cohesive to allow the Court to issue an injunction that complies with Fed. R. Civ. P. 65(d), and that the requested injunctive relief provides the defendants with specific and reasonable details regarding the acts required by them under an injunction. Therefore, the requirements of Rule 23(b)(2) are met.

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant the plaintiffs' Motion and certify the plaintiffs' proposed class.

Dated: September 18, 2012

Respectfully submitted,

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