

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

AUDREY DOE, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 11-00388
	:	(MLCF) (ALC)
BOBBY JINDAL, et al.,	:	
	:	
Defendants.	:	
	:	
	:	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO MUNICIPAL DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 17 AND 12**

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PRELIMINARY STATEMENT

Plaintiffs bring this action anonymously to challenge the discriminatory and disproportionate punishment imposed for a conviction of Crime Against Nature by Solicitation (“CANS”) and the Registration of Sex Offenders, Sexually Violent Predators, and Child Predators statute (“Registry Law”). See Complaint (“Compl.”) n.1, ¶¶ 184-207.

In the Memorandum of Law in Support of Municipal Defendants’ Motion to Dismiss, dated May 17, 2011, (“Mun. Defs. MTD”), defendant Ronal W. Serpas adopts state defendants’ arguments that plaintiffs fail to state a claim upon which relief can be granted and submits no additional arguments supporting this contention. Mun. Defs. MTD at 4. Defendant Serpas also purports to reserve the right to pursue additional challenges to plaintiffs’ Complaint at an unspecified future time “if necessary.” Id. at 1, n.1. Plaintiffs respectfully submit that, barring jurisdictional challenges, defendant Serpas has waived any grounds for a motion to dismiss not raised in the instant motion. See Fed. R. Civ. P. 12. As detailed in plaintiffs’ Memorandum in Opposition to State Defendants’ Motion to Dismiss, dated June 1, 2011, plaintiffs have adequately stated claims under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Accordingly, defendant Serpas’ motion to dismiss should be denied.

Fearing retaliation by defendants, plaintiffs commenced this action anonymously. Compl. at 1, n.1, ¶¶ 184-207. As a result, defendant Serpas contends that plaintiffs have “failed to demonstrate that they are real parties in interest” and moves to dismiss plaintiffs’ claims in their entirety pursuant to Rules 17(a) and 12(b)(6) of the Federal Rules of Civil Procedure. Mun. Defs. MTD at 5. Defendant Serpas’ reliance on Rule 17 is entirely misplaced. There is no question that plaintiffs are the real parties in interest to this action, as they have plainly alleged that they have been charged and convicted of CANS and are subject to the Registry Law. Compl. ¶ 126.

Nor is disclosure of plaintiffs' identities warranted pursuant to Rule 10 of the Federal Rules of Civil Procedure. Plaintiffs have alleged sufficient facts to warrant anonymity at this stage in the litigation. Compl. at 1, n.1. State and municipal defendants exercise an extraordinary degree of control over plaintiffs' lives, such that a reasonable person would believe that defendants could retaliate. Virtually every court which has considered the question has explicitly listed challenges to governmental conduct among the circumstances militating in favor of permitting plaintiffs to proceed using pseudonyms. In the instant matter, this factor weighs particularly strongly in favor of such an approach, as defendants – including members of the New Orleans Police Department (“NOPD”) – exercise a significant degree of control over individuals who are required to register as sex offenders, and as such wield considerable power to retaliate against plaintiffs for exercising their right to access the courts in order to seek relief from enforcement of the statutory provisions at issue in this case.

Accordingly, disclosure of plaintiffs' identities is more appropriately addressed on a motion brought pursuant to Rule 26 of the Federal Rules of Civil Procedure. Indeed, defendant Serpas himself appears to concede that such a motion would provide the most appropriate procedural mechanism for addressing plaintiffs' anonymity. See Mun. Defs. MTD at 2-3.

STATEMENT OF FACTS

Until August 2010, and at all times relevant to plaintiffs' claims, CANS was a felony offense, carrying a sentence of incarceration of up to five years, with or without hard labor. La. Rev. Stat. (“R.S.”) § 14:89(B) (2009). Moreover, it required mandatory registration as a sex offender under the Registry Law. Id. § 15:542. By contrast, a conviction of Prostitution imposes no such registration requirement and carries substantially lighter penalties. Compl. ¶¶ 55-56.

The requirement that individuals convicted of CANS register as sex offenders for periods of fifteen years to life has profound consequences. Id. ¶¶ 78-82. The registry's myriad provisions and requirements significantly restrict plaintiffs' freedom of movement and association, and cause plaintiffs significant distress and financial hardship. Id. ¶¶ 75-116, 131-83; Id. Ex. A. They are enforced against plaintiffs by members of the NOPD's sex crimes unit as well as local Sheriffs and Louisiana State Police. Id. ¶¶ 109-111, 114, 120. In addition to being required to report regularly to the offices of the relevant units, individuals on the registry are subject to random and routine spot checks of their homes. Id. ¶ 120.

Failure to comply with registry requirements is a separate offense under La. R.S. § 15:542.1.4. A first violation of the registration requirements – even if by no fault of the registrant – is subject to a term of incarceration of up to two to ten years at hard labor, without benefit of parole, probation or suspension of sentence, a fine of up to one thousand dollars, or both. Id. § 15:542.1.4(A)(1). A second or subsequent offense – even if minor – carries a term of imprisonment at hard labor of five to twenty years, without benefit of parole, probation, or suspension of sentence, a fine of up to three thousand dollars, or both. Id. § 15:542.1.4(A)(2). A first offense of failure to pay the annual registration fee, regardless of whether such failure results from indigency, is punishable by a term of imprisonment of up to six months, a fine of up to five hundred dollars, or both, while a second or subsequent offense carries the harsh penalties associated with other failures to abide by registration requirements. Id. § 15:542.1.4(A)(3).

ARGUMENT

A. **Dismissal of Plaintiffs' Claims Under Rule 17 of the Federal Rules of Civil Procedure Is Improper**

Municipal defendants adopt in their entirety state defendants' arguments relating to plaintiffs proceeding anonymously, and go on to add that plaintiffs' action should be dismissed in its entirety pursuant to Rule 17 of the Federal Rules of Civil Procedure.

Defendants erroneously rely on Rule 17 to argue that plaintiffs' anonymity amounts to a failure to establish standing as real parties in interest. But plaintiffs' anonymity is irrelevant to this question. Rule 17 merely requires that an action be brought in the name of the real party in interest. In other words, it demands that individuals directly harmed by the challenged action – rather than third parties – bring suit. According to the Advisory Committee Notes, “the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.” Fed. R. Civ. P. 17, Notes of Advisory Committee on 1966 Amendments; see also Miss. Dep't of Transp. v. Signal Int'l, LLC (In re: Signal Int'l, LLC), 579 F.3d 478, 487 (5th Cir. 2009) (stating that the purpose of Rule 17 is “to assure a defendant that a judgment will be final and that res judicata will protect it from having to twice defend an action”); Gogolin & Stelter v. Karn's Auto Imps., Inc., 886 F.2d 100, 105 (5th Cir. 1989).

Plaintiffs are plainly real parties in interest. They have indisputably pled that they have been charged and convicted under the CANS statute, are subject to the Registry Law, Compl. ¶ 126, and are therefore entitled to enforce their constitutional rights with respect thereto. See In re: Signal Int'l LLC, 579 F.3d 478 at 487 (defining a real party in interest as “the person holding the substantive right sought to be enforced”). Moreover, because plaintiffs seek only injunctive relief, the preclusive effect of any ruling in this case will benefit any individual entitled to bring

these claims. Accordingly, municipal defendants' reliance on Rule 17 is misplaced,¹ and plaintiffs' claims should not be dismissed.²

B. Disclosure of Plaintiffs' Identities to Defendants is Not Required under Rule 10 of the Federal Rules of Civil Procedure

The majority of courts that have adjudicated the question of plaintiff anonymity have done so pursuant to Rule 10(a) of the Federal Rules of Civil Procedure, which requires that a complaint contain, among other things, the names of the parties. See, e.g., Doe v. Stegall, 653 F.2d 180, 185; Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067 (9th Cir. 2000). This requirement is premised on a presumption of public access to information concerning proceedings in federal courts. See Stegall, 653 F.2d at 185. However,

the public right to scrutinize governmental functioning is not so completely impaired by a grant of anonymity to a party as it is by the closure of the trial itself . . . [C]rucial interests served by open trials are not inevitably compromised by allowing a party to proceed anonymously.

Id.

In the vast majority of cases denying plaintiffs the right to proceed anonymously pursuant to Rule 10(a), private defendants have argued that disclosure of a plaintiff's identity to the public was necessary because defendants faced economic harm and damage to their reputation due to the plaintiff's allegations. See, e.g., S. Methodist Univ. Ass'n of Women Law Students v.

¹ Even if Rule 17 were applicable in this instance, outright dismissal of the action sought by municipal defendants would not be warranted. See FED. R. CIV. P. 17(a)(3).

² Nor would dismissal be warranted pursuant to Rule 10 of the Federal Rules of Civil Procedure. To the extent state defendants' reliance on Doe v. Deschamps, 64 F.R.D. 652 (D. Mont. 1974), and Coe v. U.S. Dist. Court of Colo., 676 F.2d 411 (10th Cir. 1982), suggests their position that plaintiffs' use of pseudonyms deprives the Court of jurisdiction over the matter, this is flatly contradicted by controlling precedent. The Fifth Circuit has held that plaintiffs may proceed anonymously to vindicate their constitutional rights. See Doe v. Stegall, 653 F.2d 180, 181 (5th Cir. 1981) ("[W]e hold that the district court has jurisdiction of this suit and must allow plaintiffs to proceed under fictitious names.").

Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979). Here, by contrast, state and municipal defendants – public officers – have offered no basis for objecting to plaintiffs’ identities being protected from disclosure to the public.³ Where plaintiffs challenge the constitutional, statutory, or regulatory validity of government activity, there is no alleged harm to defendants’ “reputation” or economic interests and therefore, there is no countervailing public interest in disclosure of plaintiffs’ names. See id. Accordingly, Rule 10(a) offers no support for state and municipal defendants’ contention that plaintiffs must disclose their names to defendants.

C. Plaintiffs Have Alleged Facts Sufficient to Justify Permitting Them to Proceed Anonymously at This Stage of the Litigation

Plaintiffs have alleged sufficient facts justifying proceeding anonymously. Plaintiffs set forth ample allegations concerning the extraordinary degree of control state and municipal defendants exercise over their lives, as well as the grave potential consequences of retaliation for bringing suit, including loss of liberty. See Compl. at 1, n.1, ¶¶ 74-103, 120. The Complaint details the multiple avenues by which defendants exercise such control, their wide discretion in enforcing the Registry Law, and the potentially dire consequences of any alleged failure to comply with the minutiae of the Registry Law’s requirements, which include, but are not limited to, long periods of incarceration. Id. ¶¶ 76-106; see also Does I Thru XXIII, 214 F.3d at 1069 (concluding that retaliation threatened against plaintiffs, coupled with their highly vulnerable status, outweighed any prejudice to defendants or public interest in favor of open judicial proceedings). Individual law enforcement agencies and officers, including employees of

³ Indeed, state defendants unequivocally state that they do not object to plaintiffs proceeding anonymously in the pleadings and do not contest plaintiffs’ efforts to protect their identities from the public. State Defendants’ Motion to Dismiss, dated June 1, 2011 (“State Defs. MTD”) at 18. State defendants’ arguments, which municipal defendants adopt in their entirety, Mun. Defs. MTD at 4, are limited to objecting to plaintiffs’ efforts to remain anonymous with respect to defendants at later stages in the litigation. State Defs. MTD at 18.

defendant Serpas and the NOPD, exercise considerable discretion in determining the frequency and intensity of such enforcement actions, as well as when deciding whether an individual is in violation of registration requirements and whether to refer him or her for prosecution for failure to comply with registry requirements. As a result, individual plaintiffs – as well as their family members, loved ones, friends and roommates – are highly vulnerable to retaliatory enforcement actions by government officials, including municipal defendants, for even minor or technical violations of the complex web of registration requirements, even despite their best efforts to remain compliant. See Compl. ¶¶ 103, 166. Such enforcement actions have potentially devastating consequences for plaintiffs, up to and including loss of liberty for substantial terms of incarceration at hard labor without the possibility of relief.

Law enforcement officers' extensive control over plaintiffs' lives creates conditions ripe for retaliation should individual plaintiffs' identities become known to state and municipal defendants. See *Does I Thru XXIII*, 214 F. 3d at 1071 (stating that plaintiffs only need to demonstrate that a reasonable person would believe defendants might carry out retaliatory threats). State and municipal defendants retain considerable discretion with respect to when and against whom to institute enforcement proceedings for failure to comply with sex offender registration requirements, and on what basis, giving them additional power to single plaintiffs out for discriminatory and retaliatory enforcement actions to exact retribution for challenging governmental action.⁴ In cases where retaliatory governmental action may include exposure to

⁴ In this respect, plaintiffs ask this Court to take judicial notice of the recent report by the U.S. Department of Justice detailing widespread and pervasive corruption in the New Orleans Police Department, U.S. Dep't of Justice, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (Mar. 16, 2011), as well as recent cases in which NOPD officers were convicted of offering false evidence in prostitution-related cases. *2 NOPD officers fired for improper prostitution arrests*, TIMES PICAYUNE (Mar. 29, 2011), available at http://www.nola.com/crime/index.ssf/2011/03/2_nopd_officers_fired_for_impr.html.

criminal prosecutions or deportations, courts have routinely granted plaintiffs permission to proceed anonymously to protect them from such actions. See id.

D. Plaintiffs’ Identities Are Immaterial to Resolution of the Motions Before the Court and the Question of Disclosure of Plaintiffs’ Identities May be Properly Decided Pursuant to Rule 26 of the Federal Rules of Civil Procedure

Access to plaintiffs’ names is not necessary for state and municipal defendants to defend against their legal claims. Plaintiffs challenge the constitutionality of the penalties associated with a CANS conviction on their face and seek only injunctive relief prohibiting state and municipal defendants from imposing and enforcing such penalties. See Compl. ¶ 192. Contrary to state defendants’ suggestion, State Defs. MTD at 20, plaintiffs seek no compensatory damages. See Compl. ¶ 18. Factual allegations concerning the individual effects of these penalties are therefore immaterial to plaintiffs’ claims and are offered only to provide background to the constitutional violations alleged. The questions presented in this case are purely legal: either the challenged penalties are constitutional, or they are not. See, e.g., Doe, II v. Alaska, 122 F. 3d 1070 (9th Cir. 1997) (upholding pseudonymous filing when “[t]he issues raised are purely legal and do not depend on identifying the specific plaintiffs”); Doe v. Evans, 202 F.R.D. 173, 175 (E.D. Pa. 2001) (stating that the question of “whether, because of the purely legal nature of the issues presented . . . there is an atypically weak public interest in knowing the litigants’ identities” is relevant to the determination of whether plaintiffs should be permitted to proceed anonymously). Accordingly, plaintiffs’ identities are immaterial to resolution of the motions now before the Court.

In a different procedural posture – namely, on a motion brought pursuant to Rule 26 of the Federal Rules of Civil Procedure – plaintiffs could elaborate further with respect to the factual basis for their well-founded fears of retaliation by defendants, develop the legal basis for

granting them continued permission to proceed anonymously, and point the Court to precedent in which other courts have implemented creative solutions to protect the anonymity of parties and witnesses in the context of discovery and trial. Proceeding in this manner would allow the Court to carefully balance the interests at stake.⁵ See, e.g., Does I Thru XXIII, 214 F. 3d at 1068-69 (“The court must also determine the precise prejudice at each stage of the proceedings to the opposing party, and whether proceedings may be structured so as to mitigate . . . prejudice. . . . [T]he balance . . . may change as the litigation progresses [and] the district court should use its powers to manage pretrial proceedings, and to issue protective orders limiting disclosure of the party’s name, to preserve the party’s anonymity to the greatest extent possible without prejudicing the opposing party’s ability to litigate the case. It may never be necessary, however, to disclose the anonymous parties’ identities to nonparties to the suit.”) (citations omitted).

In sum, defendants have challenged plaintiffs’ anonymity neither under the relevant federal rule, nor at the appropriate stage in the litigation. Such a request can be made upon a proper motion brought pursuant to Rule 26. See, e.g., Stegall, 653 F.2d at 182 (motion for a protective order); S. Methodist Univ. Ass’n of Women Law Students, 599 F.2d at 710 (motion for a protective order and motion to compel). Thus, dismissal of this action for failure to reveal plaintiffs’ names to defendants is not warranted, and there is no basis for requiring plaintiffs to provide their names to defendants.

⁵ Defendants’ assertion that disclosure of plaintiffs’ identities is necessary to grant the relief requested does not affect this careful calculus. Should defendants stipulate to removing plaintiffs’ names from the State Sex Offender and Child Predator Registry, or should this Court order them to do so, plaintiffs agree to disclose their identities at that time.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss should be denied.

Dated: New York, NY
June 14, 2011

Respectfully submitted,

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