IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, et al. **PLAINTIFFS**

VS. **CAUSE NO: 3:16-cv-789**

JIM HOOD, Attorney General
of the State Of Mississippi, et al. **DEFENDANTS**

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO PROCEED UNDER PSEUDONYMS AND TO FILE DOCUMENTS UNDER SEAL

COME NOW Defendants, sued in their official capacities only, and submit this Memorandum in Opposition to Plaintiffs' Motion to Proceed Under Pseudonyms and to File Documents Under Seal, stating as follows, to-wit:

BACKGROUND

In this civil rights action filed pursuant to 42 U.S.C. § 1983, Plaintiffs seek a declaration that Mississippi's unnatural intercourse statute, Miss. Code Ann. § 97-29-59, is unconstitutional on its face "as it relates to activity between human beings," pursuant to *Lawrence v. Texas*, 539 U.S. 558 (2003); a declaration that the Mississippi Sex Offenders Registration Law, Miss. Code Ann. §§ 45-23-21, *et seq.*, is unconstitutional "insofar as it requires individuals convicted of [u]nnatural [i]ntercourse involving activity between human beings to register as sex offenders"; and an injunction requiring the Defendants to permanently remove them from the Mississippi Sex Offender Registry ("MSOR"). Compl. at 1-2, 27-28 [Doc. 1]. Moreover, Plaintiffs seek to certify a class consisting of all individuals required to register as sex offenders in Mississippi based "solely or in part" for an unnatural intercourse conviction involving "[sexual] activity between human beings[.]" Compl. at 27 [Doc. 1].

Plaintiffs have filed a Motion for Class Certification and a Motion for Summary Judgment.

Plaintiffs request the following relief in their Motion for Summary Judgment:

> [E]njoining enforcement of the registration requirement, requiring removal of Plaintiffs and class members from the registry, expunging all records signaling Plaintiffs' and class members past inclusion in the registry, and declaring that enforcement of the Unnatural Intercourse statute is unconstitutional."

Pls.' Motion for S.J. at 1-2 [Doc. 15]. In support of their Motion for Summary Judgment, Plaintiffs have submitted a declaration of one of their attorneys which purports to demonstrate that they have standing to maintain this action because they are sex offenders registered on the MSOR based on a single unnatural intercourse conviction. *See* Declaration of Alexis Agathocleous [Doc. 17. Attached to the declaration are documents which appear to be sex offender registry profiles of the named Plaintiffs, as well as a small number of court documents allegedly related to the convictions for which the named Plaintiffs are required to register as sex offenders. *See id.* However, all of the information which could be used to identify the named Plaintiffs has been redacted on the declaration and the attached documents. *See id.* None of the attached documents are certified or authenticated. *See* Defs.' Motion for Disc. and Entry of Sched. Order [Doc. 25]; *see also* Memo. in Supp. [Doc. 26]; Declaration of Paul E. Barnes [Doc. 27].

In conjunction with these Motions, Plaintiffs also filed a Motion to Proceed Under Pseudonyms and to File Documents Under Seal. [Doc. 18]. Plaintiffs move the Court for an order allowing them to litigate this case under pseudonyms and to file the declaration and supporting documents in unredacted form under seal. [Doc. 18]. Plaintiffs contend that the declaration and supporting documents are only being filed so that the Court can "satisfy itself that each Plaintiff has standing." [*Id.* at 2]. However, they claim that the disclosure of their identities is "unnecessary to the adjudication of the motion for summary judgment pending before the Court." [*Id.*]. Accordingly, they ask that access to the sealed documents containing their identifying information

be limited to the Court, or, in the alternative, to the Court and to counsel for Defendants. Pls.' Memo. in Supp. of Pseudo. at 11 [Doc. 19].

ARGUMENT

I. This Case Does Not Present Exceptional Circumstances That Warrant Allowing Plaintiffs To Litigate Under Pseudonyms.

A. Balancing Test for Determining Whether Plaintiffs' Asserted Need For Anonymity Outweighs the Strong Constitutional Presumption in Favor of Open Judicial Proceedings

There is no provision in the Federal Rules of Civil Procedure that permits plaintiffs to use pseudonyms when initiating litigation. To the contrary, Rule 10 provides that the "title of the complaint must name all the parties." Fed. R. Civ. P. 10(a). "Public access to th[e] [names of the parties] is more than a customary procedural formality." *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981). "First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." *Id.* (citation omitted); *see Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) (explaining that requiring the disclosure of all parties' names "protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties"). Nevertheless, the Fifth Circuit has recognized that there are "exceptional cases" in which "the normal practice of disclosing the parties' identities yields to a policy of protecting privacy in a very private matter." *Stegall*, 653 F.2d at 185 (internal quotation marks and citations omitted). Such cases typically "involve[] . . . matters of a sensitive and highly personal nature, such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families[.]" *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979) (internal quotation marks, citations, and footnotes omitted).

The determination of whether a particular party should be allowed to litigate a case under a

fictitious name "requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Stegall*, 653 F.2d at 186. In *Wynne and Jaffe*, the Fifth Circuit identified three characteristics found in most, if not all, cases where anonymity was deemed appropriate:

> (1) plaintiffs seeking anonymity were suing to challenge governmental activity;
>
> (2) prosecution of the suit compelled plaintiffs to disclose information "of the utmost intimacy;" and
>
> (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution.

Stegall, 653 F.2d at 185 (quoting *Wynne and Jaffe*, 599 F.2d at 712-13). Although the Court subsequently disavowed any intent to adopt "a rigid, three-step test for the propriety of party anonymity," it made clear that the three factors "deserve considerable weight in the balance pitting privacy concerns against the presumption of openness of judicial proceedings." *Stegall*, 653 F.2d at 185-86.

For example, in *Stegall* the Fifth Circuit held that a mother and her two children who had filed a suit challenging the constitutionality of prayer in Mississippi public schools should have been allowed to prosecute their lawsuit under pseudonyms. *Id.* at 181, 186. The Court analyzed the three factors enumerated in *Wynne and Jaffe*, but also gave considerable weight to the evidence in the record[1] "indicat[ing] that the [plaintiffs could] . . . expect extensive harassment and perhaps even violent reprisals if their identities [we]re disclosed to a Rankin County community hostile to the[ir] viewpoint," as well as the fact that the plaintiffs were children. *Id.* at 186.

Here, the named Plaintiffs are challenging government activity – the constitutionality of

[1] The plaintiffs submitted evidence showing actual "threats of violence generated" by the filing of the lawsuit. *Stegall*, 653 F.2d at 186 & n.6.

their continued inclusion on the MSOR. However, this factor is not dispositive, since "in only a very few cases challenging governmental activity can anonymity be justified." *Stegall*, 653 F.2d at 186. Accordingly, the Court must balance the other factors (namely, whether denying Plaintiffs' request to proceed anonymously would result in the disclosure of private information or potentially jeopardize the Plaintiffs' safety) "against the customary practice of judicial openness." *Id.* As explained below, Plaintiffs have failed to show that the remaining factors weigh in favor of anonymity and have failed to demonstrate how their asserted need for anonymity outweighs the public's interest in open legal proceedings, as well as the public's right to know the identities of the sex offenders who will be removed from the MSOR if Plaintiffs' proposed class is certified and they prevail on their claims.

B. The Public Has a Right to Know the Plaintiffs' Identities and the Identities of Every Member of the Putative Class.

Sex offender registration and notification systems, such as MSOR, serve two very important public safety purposes. First, they provide valuable information to law enforcement agencies about the whereabouts of sex offenders after they are released into the community. Information concerning the location of sex offenders aids in the investigation of sex crimes and the apprehension of perpetrators. Second, they give citizens the ability to take precautionary measures to protect themselves and their families from registered sex offenders, as well as to report suspicious activity by registered sex offenders to the authorities.

In enacting the Mississippi Sex Offenders Registration Law, the Mississippi legislature declared that the information on the MSOR is public information intended to protect public safety:

> Comprehensive registration and periodic address verification will provide law enforcement with additional information critical to preventing sexual victimization and to resolving promptly incidents involving sexual abuse and exploitation. It will allow law enforcement agencies to alert the public when

> necessary for the continued protection of the community. . . .[T]he Legislature finds that releasing such information about criminal sex offenders to the general public will further the primary governmental interest of protecting vulnerable populations and, in some instances the public, from potential harm.
>
> Therefore, the state's policy is to assist local law enforcement agencies' efforts to protect their communities by requiring criminal sex offenders to register, to record their addresses of residence, to be photographed and fingerprinted, and to authorize the release of necessary and relevant information about criminal sex offenders to the public as provided in this chapter . . . .

Miss. Code. Ann. § 45-33-21.

Given that the names of the Plaintiffs, their addresses, and the offenses for which they are registered are already available to the public through the MSOR, and given that this information is publicly disseminated in order to protect others from harm, the public has a compelling interest in knowing the identities of the Plaintiffs and that they are asking this Court to order the Defendants remove their names from the MSOR. Further, the public is also entitled to know the identity of every member of the proposed class Plaintiffs seek to have removed from the MSOR. If Plaintiffs are given permission to proceed anonymously, the identity of every member of the putative class who would be removed from the MSOR if Plaintiffs prevail will be shielded from the public.

This is particularly troubling because the putative class includes all persons registered "solely or in part" for an unnatural intercourse conviction involving "[sexual] activity between human beings." *See* Compl. at 27 [Doc. 1]. As the Defendants have explained, the class proposed by Plaintiffs undoubtedly includes offenders who have engaged in sex acts with minors, as well as forcible, coercive, and other non-consensual sex acts. *See* Defs.' Mem in Supp. of Mot. for Disc. and Entry of Sched. Order at 7 [Doc. 26]; *see also Miller v. State*, 636 So. 2d 391, 393 (Miss. 1994) (affirming unnatural intercourse conviction of adult defendant who fondled and performed oral sex on 17-year-old after illegally serving him with alcohol). Given the potential public safety

ramifications of the relief sought by Plaintiffs, this Court should not keep the public in the dark and allow this action to proceed under a cloak of secrecy and anonymity.

C. Plaintiffs Have No Privacy Interest at Stake in This Litigation, Since Their Status as Sex Offenders and A Significant Portion of Their Personal Information are Publicly Available on the MSOR.

As Plaintiffs allege in the Complaint, "[t]he information that offenders are required to report upon registration is encyclopedic in nature." Compl. at ¶ 25 [Doc. 1]. The list of information includes current and former names; age, sex, height, hair, and eye color; current temporary and permanent addresses; offense history; and a photograph. *Id.*; *see* Miss. Code Ann. § 45-33-25(2)(a-aa). A large quantity of this information is made available to the public through the MSOR website. *See* Miss. Code. Ann. § 45-33-49(4)(a)-(b); Mississippi Sex Offender Registry (available at http://state.sor.dps.ms.gov/). Moreover, members of the public can obtain information available on the MSOR website by mail, telephone or email. *See* Mississippi Sex Offender Registry website, "Conditions of Use." Regardless, the convictions which have placed Plaintiffs on the MSOR are a matter of public record.

In view of the fact that Plaintiffs are publicly identified on the MSOR as sex offenders, a considerable amount of their personal information is readily accessible on the MSOR website, and that their convictions are public records, they cannot tenably claim that requiring them to litigate this case under their real names will "disclose information of the utmost intimacy." *Stegall*, 653 F.2d at 185. Plaintiffs are effectively attempting to convince this Court that it should keep information that is already in the public domain confidential. This defies logic. Indeed, numerous courts have refused to allow sex offenders challenging the constitutionality of registration laws to prosecute their claims anonymously for this very reason. *See, e.g.*, *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) ("While we appreciate Appellee's interest in attempting to prevent

disclosure of his status as a sex offender, such disclosure has presumably already occurred in the underlying conviction."); *Gibson v. Pollard*, 2014 WL 11392978, at *1 (E.D. Wis. Apr. 29, 2014) (denying request to proceed anonymously because plaintiff was a "perpetrator rather than a victim of sexual abuse, and the nature of his conviction is a matter of public record"); *Roe v. Heil*, 2011 WL 3924962, at *4 (D. Colo. Sept. 7, 2011) ("[T]he Court presumes that the disclosure of Plaintiff's status as a convicted sex offender has already occurred as a result of the underlying conviction and accompanying proceedings, thus countering Plaintiff's assertion that the disclosure of his identity in this civil lawsuit would prejudice his wife."); *Gautier v. Dep't of Corr. of Okla.*, 2008 WL 1925066, at *1 (W.D. Okla. Apr. 29, 2008) (same).

Plaintiffs argue that the "intense stigma, humiliation, and the public opprobrium" associated with registering and being publicly identified as a sex offender "justifies a grant of pseudonymity." Pls.' Memo. in Supp. of Pseudo. at 8 [Doc. 19]. However, allowing Plaintiffs to proceed pseudonymously will not affect any stigma that may attach as a result of their identification as sex offenders on the MSOR one iota because they will remain on the registry at least until the conclusion of this suit. In sum, because Plaintiffs are seeking to protect information that is currently in the public domain and can be easily accessed by any member of the public, this factor weighs heavily in favor of denying anonymity to Plaintiffs.

D. Plaintiffs Have Failed to Prove that Disclosure of Their Identities as Registered Sex Offenders Challenging the Constitutionality of the Unnatural Intercourse Statute and Their Inclusion on the MSOR Will Create a Risk of Retaliatory Harm.

Plaintiffs argue that the "fact that [they] are already required to register in Mississippi does not undermine their position" because "they attract no particular publicity unless neighbors or acquaintances take affirmative steps to research their status." Pls.' Memo. in Supp. of Pseudo. at 9

[Doc. 19]. They further claim that if they are "exposed as litigants in the instant case," it "would result in an exponentially greater risk of harassment." *Id.* at 10 (citation omitted). Plaintiffs do not specify what form this harassment might take, but they nevertheless claim that the Court should allow them to litigate this case under fictitious names based on this vague risk of harassment. This argument does not justify the entry of an order granting Plaintiffs or putative class members anonymity throughout the course of this litigation.

First, the Fifth Circuit has held that "[t]he threat of hostile public reaction to a lawsuit, standing alone, will only with great rarity warrant public anonymity." *Stegall*, 653 F.2d at 186. Thus, if Plaintiffs are concerned that they will be publicly criticized for filing this lawsuit, that is an insufficient to warrant non-disclosure of Plaintiff's identities in connection with this case. *See Doe v. Hallock*, 119 F.R.D. 640, 644 (S.D. Miss. 1987) ("That the plaintiff may suffer some embarrassment or economic harm is not enough [to justify anonymity]. There must be a strong social interest in concealing the identity of the plaintiff.") (quotation marks and citation omitted).

Second, the notion that Plaintiffs will be subject to a much greater risk of harassment if their real names are listed on the caption of the lawsuit and used during the litigation of the case is undercut by their argument that merely being placed on the MSOR stigmatizes them and makes them a target of public ridicule. *See* Pls.' Memo. in Supp. of Pseudo. at 8 [Doc. 19]. The Seventh Circuit rejected a similar argument made by a convicted sex offender attacking the constitutionality of a registration law:

> In support of their request for permission to litigate pseudonymously the plaintiffs state that they "and their families had experienced shunning and harassment after they were publicly listed as registered sex offenders." But in tension with that submission they argue that the existing sources of information about their sex offender status "are simply not comparable to the notoriety that would arise from being a named plaintiff in a lawsuit challenging sex offender laws." No doubt a sex offender's filing a suit challenging a sex offender law attracts

> fresh attention to him, but even if the increment in notoriety is substantial we don't think he should be permitted to litigate anonymously. Secrecy in judicial proceedings, including concealment of parties' names, is disfavored. . . .
>
> The plaintiffs' complaint about the publicity that their status as sex offenders received in the states in which they now live, and of how that publicity had disrupted their personal and working lives, leaves us to wonder what additional harm the revelation of their being named plaintiffs in this case could do.
>
> What is true is that if the plaintiffs had prevailed and thus knocked out the registration provisions, access to information about them would shrink because an online search of the registry would no longer find their names, and so the benefits to them of litigating pseudonymously would be greater. But these would be private rather than social benefits . . . .

Mueller v. Raemisch, 740 F.3d 1128, 1135-36 (7th Cir. 2014). The same result is warranted here.

Third, Plaintiffs' claims of potential harm caused by disclosure of their identities in this case are speculative at best. They have not alleged, much less offered any evidence, that they have ever been harassed as a result of their registration with the MSOR. In the absence of any allegation or evidence that Plaintiffs have been harassed as a result of being on the registry, this Court lacks any factual basis on which to conclude that there would be a legitimate risk of retaliation against Plaintiffs for attempting to take their names off the registry if their identities were revealed in this litigation. In any event, even if the Court surmises that there may be some risk, it should not grant Plaintiffs' request for anonymity because there are adequate deterrents in place to virtually eliminate the risk of such misconduct. For example, Miss. Code Ann. § 45-33-51 makes it a misdemeanor to "willfully misuse[] public record information relating to a sex offender or sexual predator[.]" Accordingly, the likelihood that any person who learns of Plaintiffs' identities through this litigation will harass or retaliate against Plaintiffs because of this constitutional challenge to their registration can only be characterized as *de minimis*. For these reasons, this factor does not support Plaintiffs' request to proceed under pseudonyms.

E. Plaintiffs Are Not Entitled to Anonymity Based on Their Contention That Their Claims Are Purely Legal in Nature.

Plaintiffs' primary contention in support of their Motion is that because they are bringing a facial challenge to Mississippi's Unnatural Intercourse Statute, their identities are irrelevant to the merits of their claims, and therefore should not have to be disclosed. *See* Pls.' Memo. in Supp. of Pseudo. at 6-8 [Doc. 19]. Although it is true that other federal appellate courts have recognized that if a litigant's challenge to government activity is purely legal nature, that is one factor which counsels in favor of preventing disclosure of the litigant's identity, Plaintiffs have not cited a single case where a litigant was allowed to proceed anonymously based on this factor alone. *See id.* at 4-5. Thus, even if the Court finds that purely legal nature of Plaintiff's claims supports their request for pseudonymity, it should still deny the Motion because none of the other factors identified by the Fifth Circuit are met.

Regardless, Defendants vehemently disagree with Plaintiffs' position that *Lawrence v. Texas*, 539 U.S. 558 (2003), facially invalidated Mississippi's unnatural intercourse statute. *See* Defs.' Mem in supp. of Mot. for Disc. and Entry of Sched. Order at 4-8 [Doc. 26]. Defendants contend that *Lawrence* merely stands for the proposition that state unnatural intercourse/sodomy statutes are invalid to the extent they criminalize private, consensual, and non-commercial sexual activity between adults. *See Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its *intrusion into the personal and private life of the individual*.") (emphasis added). Thus, the unique facts and circumstances underlying each of the named Plaintiffs' convictions, and each of the putative class members' convictions, are relevant to the merits of their *Lawrence* claims. *See Marsh v. United States*, 2015 WL 5470236, at *8 (N.D.W. Va. Sept. 17, 2015) (refusing to invalidate habeas petitioner's federal conviction for failing to

register as a sex offender under *Lawrence*, where petitioner pled guilty to sodomy in Maryland for "engag[ing] in forcible anal intercourse with the victim, who was eighteen (18) years old, mildly to moderately mentally retarded, and legally blind") (internal quotation marks omitted).

Defendants are entitled to investigate and present those unique facts and circumstances in order to prevent the Plaintiffs from obtaining the extremely overbroad relief sought in their Complaint, which would result in the removal of sexual predators from the MSOR. In other words, while Plaintiffs may not believe their identities or the factual bases for their convictions should be considered by the Court, that does not mean Defendants should be precluded from using that information in defense of this suit. Consequently, Plaintiffs "ha[ve] not demonstrated that this is an exceptional case in which a compelling need exists to protect" their identities or those of the propose class members. *Hallock*, 119 F.R.D. at 644.

II. Plaintiffs Should Not Be Allowed to File Their Identifying Information Under Seal.

A. Standard for Filing Documents Under Seal.

"[T]he public has a common law right to inspect and copy judicial records." *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (citations omitted). The common law "establishes a presumption of public access to judicial records." *Id.* "The principle of public access to judicial records furthers not only the interests of the outside public, but also the integrity of the judicial system itself." *United States v. Holy Land Found. For Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010) (citation omitted). "The right to public access serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Id.*

"Although the common law right of access to judicial records is not absolute, the district

court's discretion to seal the record of judicial proceedings is to be exercised charily." *Van Waeyenberghe*, 990 F.2d at 848 (internal quotation marks and citation omitted). "In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure." *Id.* (citation omitted). One circumstance in which a court may grant a motion to seal is "where court files might . . . become a vehicle for improper purposes[.]" *Macias v. Aaron Rents, Inc.*, 288 F. App'x 913, 915 (5th Cir. 2008).

The Local Rules confirm that court records are "[p]resumptively in [the] public domain" and should be freely available. Loc. Unif. Civ. R. 79(a). To justify sealing a document, any order "must include particularized findings demonstrating that sealing is supported by clear and compelling reasons and is narrowly tailored to serve those reasons. Loc. Unif. Civ. R. 79(b).

B. Plaintiffs Have Failed to Show That Their Interests in Protecting Their Identities From Disclosure Outweigh the Public's Right of Access to Judicial Records.

The Court should deny Plaintiffs' request that they be permitted to redact all information that could lead to the discovery of the their true identities and file that information under seal for the same reasons it should deny them leave to proceed under pseudonyms. First, all of the identifying information they have asked to be sealed is publicly available on the MSOR or in the court records filed in their criminal cases. Plaintiffs have attached documents purporting to be their sex offender registry profiles from the MSOR public website and court records related to their underlying state court convictions to a redacted declaration of one of their attorneys submitted in support of their Motion for Summary Judgment. *See* Declaration of Alexis Agathocleous in Support of Plaintiffs' Motion for Summary Judgment [Doc. 17]. Because all of these documents are public records, there is no need to prevent this information from being disclosed to the public.

Second, contrary to Plaintiffs' claims, sealing publicly available information is not "necessary to protect [them] from the retaliation, stigma, humiliation and opprobrium[.]" Pls.' Memo. in Supp. of Pseudo. at 12 [Doc. 19]. Plaintiffs have offered no evidence, only conclusory and speculative assertions, that disclosure of their "names, identifying information, and status as sex offenders" in connection with this lawsuit would substantially increase the risk that they will be subject to retaliation. Therefore, they have not satisfied their burden of demonstrating that sealing is "supported by clear and compelling reasons" or that the relief requested by Plaintiffs is "narrowly tailored to serve those reasons." Local Unif. Civ. R. 79(b); *cf. United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir.1978) (the burden of showing the necessity of a protective order can be met only by a "particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements") (citations omitted).

C. Defendants Are Entitled to Know the True Identities of the Named Plaintiffs.

Plaintiffs argue that they should be allowed to "file a redacted version of the Agathocleous Declaration and supporting documentation publically, with names and identifying information *withheld from* both the public and *the individual Defendants*." Pls.' Memo. in Supp. of Pseudo. at 12 [Doc. 19] (emphasis added). They claim that "[b]ecause this case involves a challenge to government agencies with multiply employees, there is a risk of even inadvertent dissemination of Plaintiffs' information if their names are disclosed to individual Defendants." *Id.* Further, they assert that there is "no narrower procedure that would provide Plaintiffs with the necessary protection." *Id.*

These arguments should be rejected out of hand. Defendants cannot possibly respond to Plaintiffs' pending Motions for Class Certification and Summary Judgment without knowing their real identities. Fundamental fairness and due process dictate that Defendants be afforded the

opportunity to investigate and assess (1) the named Plaintiffs's standing to challenge the constitutionality of Mississippi's unnatural intercourse statute; (2) the nature and underlying circumstances of Plaintiffs' convictions; (3) the material factual assertions in the Agathocleous Declaration and Plaintiffs' Motion for Summary Judgment and supporting Memorandum; and (4) Plaintiffs' ability to satisfy the Fed. R. Civ. P. 23's prerequisites for maintenance of a class action. Defendants will be completely deprived of the ability to conduct an independent investigation into the facts of this case without the disclosure of Plaintiff's identities.

Plaintiffs are basically arguing that Defendants should take the Agathocleous Declaration at face value and simply assume that they are currently registered with the MSOR and that their registration is based on a single unnatural intercourse conviction. Indeed, they assert that only the Court should be allowed to "satisfy itself that each Plaintiff has standing" to bring this suit. Pls.' Memo. in Supp. of Pseudo. at 12 [Doc. 19]. Plaintiffs' position is clearly untenable, and if accepted would result in extreme prejudice to the Defendants.

In the alternative, Plaintiffs suggest that the Court could limit disclosure of their identities to counsel for Defendants. *Id.* at 11. This restriction would be equally untenable and prejudicial. In order to conduct a reasonably adequate investigation into the named Plaintiffs' backgrounds, counsel for the Defendants would need to pull the named Plaintiffs' physical files and examine all other relevant materials maintained at the MSOR. Counsel for the Defendants would not be able to retrieve this information if they are prohibited from disclosing the identities of the named Plaintiffs to the individual Defendants and MSOR staff members. Moreover, counsel for the Defendants would also need to subpoena the named Plaintiffs' court records related to the registrable offenses in order to test the factual assertions made in the Agathocleous Declaration and Plaintiffs' Motion for Summary Judgment. If the identities of the named Plaintiffs are sealed,

counsel for the Defendants would be denied any opportunity to investigate the named Plaintiffs' criminal histories. Because this alternative procedure for preventing the disclosure of Plaintiffs' identities would make it impossible for the Defendants to conduct a proper investigation into the facts of the case and respond to the pending Motions, Plaintiffs' request to file all identifying information under seal should be denied.

CONCLUSION

Based on the foregoing, Plaintiffs have not met their heavy burden to justify permitting them to proceed in this case anonymously or for the filing of documents under seal. Therefore, Defendants respectfully request that the Court deny Plaintiffs' Motion to Proceed Under Pseudonyms and to File Documents Under Seal.

Respectfully submitted this the 21st day of November, 2016.

JIM HOOD, Attorney General of the State of Mississippi; ALBERT SANTA CRUZ, Commissioner of the Mississippi Department of Public Safety; CHARLIE HILL, Director of the Mississippi Sex Offender Registry; COLONEL CHRIS GILLARD, Chief of the Mississippi Highway Patrol; and LIEUTENANT COLONEL LARRY WAGGONER, Director of the Mississippi Bureau of Investigation

By: *s/Paul Barnes*

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Paul E. Barnes, Special Assistant Attorney General for the State of Mississippi, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

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THIS, the 21st day of November, 2016.

s/Paul Barnes
PAUL E. BARNES