

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

ARTHUR DOE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 3:16-cv-00789-CWR-FKB

CLASS ACTION

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION TO PROCEED UNDER PSEUDONYMS
AND TO FILE DOCUMENTS UNDER SEAL**

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PRELIMINARY STATEMENT

Plaintiffs seek to proceed under pseudonyms and to submit identifying information under seal in order to protect themselves against the threats of retaliation, harassment, intimidation, and even physical assault that are widely acknowledged to accompany dissemination of the identities of registered sex offenders. Granting Plaintiffs' motion would not change their status or remove them from Mississippi's Sex Offender Registry, which is accessible online to any member of the public. Nor would it interfere with Defendants' ability to litigate their case or the public's understanding of the core constitutional questions at issue. The balancing test that courts use to routinely grant pseudonymity weighs strongly in favor of Plaintiffs here.

Defendants' opposition to Plaintiffs' motion boils down to two essential points. First, Defendants analyze each factor in the balancing test in isolation, minimizing the harms Plaintiffs face from exposure and exaggerating the prejudice to Defendants should Plaintiffs' identities be protected. Second, Defendants effectively argue that Plaintiffs, already stigmatized by their placement on the registry, should be further exposed and effectively penalized for seeking to vindicate their Fourteenth Amendment rights. Both these arguments must fail, the first because it does not comport with decades of legal precedent, and the second because it seeks to undermine the ability of vulnerable litigants to seek the protection of the courts in constitutional cases.

For similar reasons, Defendants' argument against the sealing of Plaintiffs' identifying information, submitted in support of their Motion for Summary Judgment, cannot outweigh Plaintiffs' need for confidentiality. Plaintiffs' Motion for Summary Judgment is premised entirely on two purely legal questions: whether Mississippi's Unnatural Intercourse statute violates the Due Process Clause under *Lawrence v. Texas*, and whether Mississippi's classification of Unnatural Intercourse convictions and purportedly-equivalent out-of-state

convictions as sex offenses violates the Equal Protection Clause. Plaintiffs' identifying information, submitted solely for the purpose of demonstrating standing, has no bearing on the core legal questions posed by Plaintiffs' motion, and Defendants are fully able to mount a defense without it.

ARGUMENT

I. The Balance of Factors Strongly Favors Permitting Plaintiffs Who Bring Constitutional Claims Against the Government and Who Face Harm if Exposed as Litigants to Proceed Under Pseudonyms.

The balancing analysis developed by the Fifth Circuit and fellow appellate courts have strongly favored the granting of pseudonyms in cases where, as here, Plaintiffs challenge governmental activity through claims that are purely legal in nature and where they face harm if exposed as litigants. *See e.g., Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981); *Sealed Plaintiff v. Sealed Defendant No. 1*, 537 F.3d 185, 190 (2d Cir. 2008); *Lozano v. City of Hazleton*, 620 F.3d 170, 195 (3d Cir. 2010), *vacated and remanded on other grounds*, 563 U.S. 1030 (2012), *earlier findings and conclusions restated on remand*, 724 F.3d 297 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014). Courts do not view each factor in isolation, but rather evaluate a range of factors, frequently and even routinely permitting those who seek to challenge their placement on sex offender registries to proceed under pseudonyms. *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012) (using pseudonyms in near-identical equal protection challenge to placement on sex offender registry); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1115 n.1 (10th Cir. 2012) (noting that registered sex offender was permitted to bring suit under a pseudonym because "he fears retaliation"); *Doe v. Harris*, 640 F.3d 972, 973 n.1 (9th Cir. 2011) (allowing plaintiff-appellee "to proceed under a pseudonym because drawing public attention to his status as a sex offender is precisely the consequence that he seeks to avoid by bringing this suit"). *See also Doe v.*

Cooper, 2016 U.S. App. LEXIS 21412, *5-8 (4th Cir. Nov. 30, 2016) (using pseudonyms for plaintiffs in First Amendment case striking down specific restrictions in the sex offender registration law); *Doe v. Otte*, 259 F.3d 979, 983 (9th Cir. 2001), *rev'd on other grounds*, *Smith v. Doe*, 583 U.S. 84 (2003) (noting reversal of district court's denial of permission to use pseudonyms in challenge to sex offender registry).

Rather than evaluating the balance of factors as a whole, Defendants view each factor in isolation, inflating the purported prejudice to the public if Plaintiffs' identities are protected and minimizing the harms Plaintiffs face if exposed as litigants. Defendants' position, if accepted, would deter potential litigants from seeking vindication in the courts on meritorious constitutional claims, an unacceptable result that would harm the public interest. *See Lozano*, 620 F.3d at 195 (noting harm to public if parties were deterred from bringing cases "clarifying constitutional rights" at the price of being publically identified).

A. The Public's Interest is Not Furthered by Knowledge of the Plaintiffs' Identities as Litigants Challenging State Action.

Defendants argue that the public has a compelling interest in knowing the identities of the Plaintiffs as a matter of "public safety." Defendants' Memorandum in Opposition to Plaintiffs' Motion to Proceed Under Pseudonyms and to File Documents Under Seal ("Defs' Opp. Mem."), Dkt. #28, at 5. Permitting Plaintiffs to proceed as "Doe" litigants does not remove them from the Mississippi Sex Offender Registry ("MSOR"). Plaintiffs will remain on the MSOR during the pendency of the litigation. Granting Plaintiffs the right to proceed under pseudonyms would not prevent any member of the public from accessing information available online about individual plaintiffs or any member of the putative class. All it would do is avoid double exposure of Plaintiffs as a consequence of seeking to vindicate their rights.

In fact, if the Court finds that it is unconstitutional to register Plaintiffs for Unnatural Intercourse or purportedly-equivalent convictions, the public's interest will be served by Plaintiffs' ability to pursue the litigation in relative safety, and the public will have lost nothing by not knowing the names of individuals who should never have been on the MSOR at all. Mississippi's Sex Offender Registration Law already requires public access to an online registry as well as extensive additional public notification requirements. Defendants have articulated no reason why the public has an interest in disseminating Plaintiffs' identities not as sex offenders, but as individuals challenging the constitutionality of government action.

Indeed, Defendants acknowledge that the purely legal nature of a challenge to government activity is a factor in determining whether to permit pseudonyms. But they wrongly state that Plaintiffs' motion must be denied because it is "based on this factor alone." Defs. Opp. Mem. at 11. This mischaracterizes Plaintiffs' motion, which set forth a number of factors favoring pseudonymity, including the public's interest in clarification of constitutional questions and the harm faced by Plaintiffs if exposed as litigants. *See* Plaintiffs' Motion to Proceed Under Pseudonyms and to File Documents Under Seal ("Pls.' Mem. in Supp. of Pseudo."), Dkt. #19, at 6-10.

Further, Defendants suggest that their ability to litigate this case effectively hinges on Plaintiffs' public exposure, and that any limitations on the dissemination of Plaintiffs' identities would preclude them from "using that information in defense of this suit." Defs. Opp. Mem. at 12. While it is unclear why the use of pseudonyms in public filings, in and of itself, would inhibit Defendants' investigation, it is true that Plaintiffs have argued in their Motion for Summary Judgment, Dkt. #16, that this case can be resolved based on analysis of the texts of the relevant statutes and a showing of Plaintiffs' standing. The factual information Defendants seek would

become appropriate only if the Court rules that *Lawrence v. Texas* did not invalidate the Unnatural Intercourse statute on its face and that Equal Protection principles require an examination of facts beyond the differential treatment imposed by the Mississippi Sex Offender Registration Law.

B. Plaintiffs Face Particular Harm if Doubly Exposed as Litigants, and the Harm They Allege is Neither Speculative Nor Trivial.

Defendants argue that Plaintiffs have no reason to proceed under pseudonyms because their identities are already exposed on the publicly-accessible MSOR, because they have not alleged a specific threat of harm, and because any harm they do allege is trivial or speculative. Defs' Opp. Mem. at 7-10. These arguments are meritless.

Defendants fail to address the cases cited by Plaintiffs, including cases in the Fifth Circuit affecting some of the very same plaintiffs in this action, demonstrating that courts frequently and even routinely grant litigants challenging sex offender registration the right to proceed under pseudonyms. *See* Pls. Mem. in Supp. of Pseudo. at 9. Instead, they list a handful of cases that come to the opposite conclusion, quoting at length only *Mueller v. Raemisch*, 740 F.3d 1128 (7th Cir. 2014). Defs. Opp. Mem. at 7, 10. In *Mueller*, the Seventh Circuit denied pseudonymity to litigants challenging their placement on the Wisconsin sex offender registry *after* they had moved out of the state. In contrast, Plaintiffs here all continue to reside in Mississippi, primarily in small communities where the notoriety of a lawsuit could spark hostility and retaliation of a far greater magnitude than they currently endure. Exposure of one's identity as a litigant in a constitutional challenge is not equivalent to placement of one's status as a sex offender on a searchable public website along with hundreds of others. The act of coming forward to challenge the constitutionality of Mississippi's registration scheme will invite greater attention, and by

extension, “exponentially” likelier threats of harm, if Plaintiffs’ identities are not protected. *Lozano*, 620 F.3d at 195.

That harm is far more than speculative or trivial; Plaintiffs do not fear that they will be “publicly criticized for filing this lawsuit” or subject to “ridicule,” as Defendants have it, Defs’ Opp. Mem. at 9, but that they could be subject to significant threats, hostility, and even assault. All Plaintiffs allege denial of opportunities to participate in family and community life, as well as significant shame and humiliation as a result of registration, and at least one Plaintiff has been subject to “loss of housing and physical assault” when exposed as a registrant. Compl. ¶ 58. As Plaintiffs point out, Pls. Mem. in Supp. of Pseudo. at 9, the targeting of individuals identified as sex offenders “happen[s] with sufficient frequency and publicity that registrants justifiably live in fear of them.” *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997). Human rights organizations have accumulated extensive documentation of severe attacks and threats to registrants when exposed, including arson, assault, and murder. *See, e.g.*, HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 86-92 (2007), available at <https://www.hrw.org/reports/2007/us0907/> (last accessed Nov. 30, 2016).

In the face of this level of harassment, intimidation and physical harm, the deterrent value of a provision in the Mississippi code making it a misdemeanor to “misuse” public record information against a sex offender is weak indeed. *See* Defs. Opp. Mem. at 10. Proceeding under pseudonyms will have no effect on their status as registrants or on public safety. Plaintiffs’ decision to come forward to vindicate their rights should not be penalized by exposure to amplified notoriety, threats of reprisal, humiliation, and opprobrium. They should be permitted to proceed under pseudonyms in public filings.

II. The Sealing of Plaintiffs' Declaration and Documentation In Support of Summary Judgment Will Not Prejudice Defendants or Harm the Public.

Defendants' objections to sealing the Agathocleous Declaration and supporting documentation must fail for many of the same reasons as their opposition to pseudonymity.

First, while it is true that documents at issue – evidence of Plaintiffs' convictions and screen captures of Plaintiffs' entries on the MSOR website – are already in the public record, those records are several among hundreds of entries on the MSOR website. Public release of these documents poses a threat of greater exposure and thus a greater likelihood of reprisal for Plaintiffs associated with this lawsuit. *See* (I) B., *supra*.

Second, Plaintiffs have clearly set forth documentary facts regarding the significant harm to which sex offenders are often subject, and alleged in their complaint that at least one Plaintiff had suffered physical assault as a result of exposure as a registrant. Compl. ¶ 58; Part (I) B., *supra*. Thus, Plaintiffs have demonstrated that there are “clear and compelling reasons” to justify sealing. Local Unif. Civ. R. 79(b).

Third, Defendants are not prejudiced in responding to Plaintiffs' Motions for Summary Judgment and Class Certification without Plaintiffs' identifying information. As set forth in more detail in Plaintiffs' Opposition to Defendants' Motion for Discovery (“Pls. Opp. to Disc.”), filed simultaneously with the present reply brief, summary judgment motions are appropriate and even favored in facial challenges to the constitutionality of statutes, and discovery is not required for resolution of the motion. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). In fact, facial challenges are typically resolved without discovery. *See* Pls' Opp. to Disc. at 6-8 (collecting cases). Plaintiffs' Motion for Summary Judgment argues that the court can resolve this case based on analysis of the texts of the relevant statutes and a showing of Plaintiffs' standing. Indeed, in *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012), the court in

the Eastern District of Louisiana granted plaintiffs summary judgment on near-identical Equal Protection claims without permitting discovery, ruling that the “underlying circumstances of their convictions” had no bearing on the impermissible classification created by Louisiana’s sex offender registration scheme. 851 F. Supp. 2d at 1008. Should Plaintiffs lose on summary judgment here, Defendants will have an opportunity to seek discovery because the case will turn on factual disputes. They will suffer no prejudice at all. Similarly, Defendants cannot show that the documents submitted in the Agathocleous Declaration are necessary for defending against class certification, particularly before the Court rules on Plaintiffs’ facial challenges. *See* Pls. Opp. to Disc. at 11-12 (pointing out that class discovery to determine typicality and commonality becomes necessary only if the Court rules that the Unnatural Intercourse statute and Mississippi’s classification of individuals with Unnatural Intercourse or equivalent convictions as sex offenders are facially valid).

Finally, Defendants argue that even Plaintiffs’ alternative proposal to share the unredacted Agathocleous Declaration and supporting documentation with Defendants’ counsel is “untenable and prejudicial,” because, again, they would be precluded from investigating “the named Plaintiffs’ backgrounds” and “criminal histories.” Defs. Opp. Mem. at 15-16. Plaintiffs propose this alternative to provide Defendants’ counsel with evidence demonstrating that Plaintiffs have standing to bring a facial challenge. But any further investigation is wholly irrelevant to Plaintiffs’ facial challenges or their arguments for summary judgment, and there is no prejudice to Defendants if they must wait to investigate until after the Court rules.

Plaintiffs’ motion to place select documents under permanent seal to be viewed by the Court *in camera*, or in the alternative, to be designated Attorneys’ Eyes Only and accessible only

by the Court and Defendants' counsel, is narrowly tailored and will cause Defendants no prejudice. Plaintiffs have met their burden for showing the need to file documents under seal.

CONCLUSION

For the foregoing reasons, and for those contained in their opening brief, Plaintiffs respectfully request that this Court grant this motion.

Dated: December 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Ghita Schwarz, Counsel for Plaintiffs, 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 1st of December, 2016.

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