UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12

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PRELIMINARY STATEMENT

At the conclusion of the August 10, 2011 oral argument concerning the pending motions to dismiss, the Court requested that the parties submit supplemental briefing on three issues relating to Plaintiffs' equal protection claim. See Minute Entry, dated August 10, 2011, Docket No. 55.

First, the Court asked the parties for a more detailed examination of the relevance of Eisenstadt v. Baird, 405 U.S. 438 (1972), and Vacco v. Quill, 521 U.S. 793 (1997), to the Court's equal protection analysis. Eisenstadt held that the State cannot have a legitimate interest in imposing a sanction on one group of people and not another when the "evil, as perceived by the State, [is] identical." 405 U.S. at 454. Thus, under Eisenstadt, Louisiana may not require those convicted of Crimes Against Nature by Solicitation (CANS) to register as sex offenders where those convicted under the solicitation provision of the Prostitution statute, which includes identical elements, have never been required to do so. Likewise, Vacco makes clear that the State may only create classifications in the criminal law where there is a rational, non-arbitrary reason for doing so. No such reason exists here.

Second, the Court asked the parties to brief the relevance here of prosecutorial discretion. While prosecutors have broad discretion to select from among presumptively constitutional statutes when determining how to charge a defendant, this discretion cannot validate an unconstitutional statute that is animated by invidious purpose. Plaintiffs have plausibly alleged that the CANS statute is rooted in moral animus against non-procreative sex acts associated with homosexuality, and that this is the only rationale for requiring that those convicted of CANS, but not Prostitution, register as sex offenders. Thus, the arbitrary and discriminatory sex offender registration requirement triggered by a CANS conviction cannot be justified by principles of prosecutorial discretion.

Finally, this Court asked the parties to explain the significance of the recent legislative amendments to the CANS law. As of August 15, 2011, individuals convicted of CANS will be treated identically to those convicted of Prostitution. See 2011 La. Sess. Law Serv. HB 141. That is, people convicted of CANS convictions will no longer be required to register as sex offenders. In equalizing the penalties between the two statutes, the Legislature has plainly recognized that the offenses are indistinguishable, thereby offering powerful corroboration of Plaintiffs' arguments to this effect. To require Plaintiffs to continue to register as sex offenders in the face of these amendments would be grossly inequitable. Where the State has never required registration for a Prostitution conviction, and will no longer require registration for a CANS conviction, it is simply unconscionable to single out those with old CANS convictions by forcing them to register as sex offenders.

ARGUMENT

I. Eisenstadt Establishes That There is No Legitimate Rationale for Requiring Individuals Convicted of CANS to Register as Sex Offenders Where a Prostitution Conviction Does Not Require Registration

Plaintiffs' equal protection claim turns on the fact that, where CANS and the solicitation provision of the Prostitution statute have identical elements and punish identical conduct, the State cannot possibly have a legitimate rationale for requiring those convicted of CANS, but not Prostitution, to register as sex offenders. See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12 (hereinafter "Pls.' Opp."), Point II(B).[1] As explained in Eisenstadt, where the State is targeting precisely the same conduct, it must do so equally – otherwise its actions are arbitrary and offend the Equal Protection Clause.

[1] Unless otherwise indicated, capitalized terms used herein have the same meaning as defined in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12.

The CANS statute and the solicitation provision of the Prostitution statute outlaw exactly the same conduct. The CANS statute includes no element or aggravating factor that the Prostitution statute does not. The primary difference between the two statutes is the punishments they impose. To illustrate, the elements of the two statutes are laid out below:

	Prostitution - Solicitation (La. Rev. Stat. § 14:82(A)(2))	**CANS (La. Rev. Stat. § 14:89.2(A))**
Element No. 1	Solicitation by one person of another	Solicitation of one human being of another
Element No. 2	With the intent to engage in indiscriminate sexual intercourse (oral, anal or vaginal intercourse)	With the intent to engage in unnatural carnal copulation (oral or anal intercourse)
Element No. 3	For compensation	For compensation

The Prostitution statute explicitly defines "sexual intercourse" as "anal, oral, or vaginal sexual intercourse." La. Rev. Stat. § 14:82(B). For over a century, the Louisiana Supreme Court has defined "unnatural carnal copulation" as oral or anal sex. See, e.g., State v. Vicknair, 52 La. Ann. 1921, 1925 (La. 1900) (defining crime against nature as anal or oral sex); see also State v. Long, 133 La. 580, 582-83 (La. 1913) (same); see also State v. Murry, 136 La. 253, 257-59 (La. 1914) (same). The only difference between the two statutes is that Prostitution also encompasses solicitation of vaginal intercourse. The conduct targeted by the State under the two statutes is, therefore, identical. Yet the State decided to classify persons convicted under one differently than persons convicted under the other.

Eisenstadt explains that such differential treatment of similarly situated individuals violates the Equal Protection Clause. In Eisenstadt, the Supreme Court struck down a Massachusetts law that prohibited the distribution of contraception to unmarried persons. 405 U.S. at 443. Married persons, by contrast, were allowed access to contraception. Id. at 440-41. The Court rejected various purported governmental rationales for treating married and unmarried

individuals differently, holding that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." Id. at 453 (emphasis supplied). In so doing, the Court explained: "In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious." Id. at 454 (emphasis supplied). In other words, where the State, for whatever reason, has not asserted an interest in prohibiting married persons from using contraception, it cannot, consistent with the Equal Protection Clause, assert such an interest with respect to unmarried people. As the Court concluded:

> [N]othing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. (citing Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949)).

Eisenstadt thus explains exactly why the State may not require individuals convicted of CANS to register as sex offenders where it has not required the same of those convicted of Prostitution. The two statutes include the same elements. They prohibit the same criminal conduct. The targeted "evil, as perceived by the state, [is] identical." Id. Requiring people convicted of CANS, but not Prostitution, to register as sex offenders is precisely the kind of invidious underinclusion that Eisenstadt prohibits. Where the State has never asserted an interest in registering those convicted of Prostitution as sex offenders, it simply cannot legitimately claim such an interest with respect to those convicted of CANS. This would be true for any set of facts, but is particularly so when the only discernible reason for treating the two offenses is rooted in illicit moral animus, see id. at 450 (rejecting various rationales for statute that was cast "in terms of morals"); Pls.' Opp. Point II(B)(3); see also Lawrence v. Texas, 539 U.S. 558, 577

(2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law[.]").

In People v. Hofsheier, 129 P.3d 29 (Cal. 2006), the California Supreme Court applied the same analysis in an analogous situation. In California, an individual convicted of voluntary oral copulation with a 16-year-old was required to register as a sex offender, while an individual convicted of voluntary sexual intercourse with a 16-year-old was not. Id. at 33-34. The court held that this violated the Equal Protection Clause, reasoning that the Legislature could not have a rational reason to conclude "that persons who are convicted of voluntary oral copulation with adolescents 16 to 17 years old, as opposed to those who are convicted of voluntary intercourse with adolescents in that same age group" can be classified differently under the law, because such persons are similarly situated in terms of the nature of their misconduct. Id. at 41. The same analysis applies with even greater force in the present case, because the conduct targeted by the Prostitution and CANS statutes is the same, not similar.

Furthermore, Eisenstadt also supports Plaintiffs' argument that the CANS provision is rooted solely in invidious animus. The Court in Eisenstadt rejected the argument that an independent rationale – public health – was the objective of the contraception law at issue in that case, declaring that "[i]f that was the Legislature's goal, [the contraception law at issue] is not required" in light of the laws already in effect. Eisenstadt, 405 U.S. at 452. This logic applies with equal force here. The Prostitution statute, amended in 1977, was enacted to protect the "health and safety of the general public." State v. Forrest, 439 So. 2d 404, 407 (La. 1983). Thus, in 1982 when Louisiana adopted the CANS provision, Compl. ¶ 2, public safety could not have been the purpose of the statute as Defendants suggest, MTD at 14-15, as the state already had a statute in place that was enacted for public safety purposes which criminalized the exact

same conduct. Thus, as in Eisenstadt, CANS was "not required" to achieve public safety objectives, and public safety was clearly not the purpose of the statute. The sole purpose was to express moral disapproval of non-procreative sex acts associated with homosexuality.

Therefore, Eisenstadt demonstrates that there is no legitimate purpose for the CANS provision and that the State cannot have an interest in requiring those convicted of CANS, but not Prostitution, to register as sex offenders. Such a distinction is arbitrary and thus violates the Equal Protection Clause.

II. The Ruling in Vacco Requires a Finding that Identical Conduct Must Be Treated Identically

In Vacco v. Quill, 521 U.S. 793 (1997), the Supreme Court relied on the "general rule that States must treat like cases alike but may treat unlike cases accordingly," when upholding a New York statute banning physician-assisted suicide. Id. at 799-800. The rule of Vacco requires a finding that the registration requirement for those convicted of CANS, but not Prostitution, violates the Equal Protection Clause.

In New York, it is a crime to aid another to commit or attempt suicide, but patients may refuse lifesaving medical treatment. Id. at 796-97. In Vacco, a group of doctors mounted an equal protection challenge to the statute, arguing that, in light of the fact that patients may refuse treatment, doctors should be allowed to prescribe lethal medication to terminally ill patients. Id. at 797. The Court denied the challenge, finding the distinction between refusing lifesaving medical treatment and assisting suicide – "a distinction widely recognized and endorsed in the medical profession and in our legal traditions" – to be common, logical and neither arbitrary nor irrational. Id. at 800-01, 807. Specifically, the Court found that the two practices were rationally distinguishable with regard to causation and intent. Id. at 801-03 ("The law has long used actors' intent or purpose to distinguish between two acts that may have the same result . . . . Put

differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their unintended but foreseen consequences."). In terms of causation, "when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication." Id. at 801. In terms of intent, the Court found that a physician who withdraws medical treatment may "intend[] . . . to respect his patient's wishes"; a doctor who administers lethal medication, by contrast, intends to kill that patient. Id. at 801-02.

Thus, the Court found that patient and doctor were not similarly situated, because the withdrawal of treatment was markedly and rationally distinguishable from administering a lethal drug. The acts differ, the intent differs, and thus the two practices could be treated differently under the law consistent with the Equal Protection Clause. There is no such rational distinction between individuals convicted of CANS and those convicted of Prostitution. Their acts are the same, and their intent is the same. Compare La. Rev. Stat. § 14:82(A)(2) with La. Rev. Stat. § 14:89.2(A); see also supra Point I. They are identically situated. Recognizing this, the Legislature has determined that they must be treated identically going forward. See 2011 La. Sess. Law Serv. HB 141 (equalizing all penalties between Prostitution and CANS).

Moreover, Defendants have identified no such rational distinction between those convicted under La. Rev. Stat. § 14:82(A)(2) and La. Rev. Stat. § 14:89.2(A) that would justify registering the latter, but not the former, as sex offenders. Indeed, the only distinction between the statutes, as Plaintiffs have plausibly alleged, is that while the CANS statute is specifically rooted in a history of moral disapproval of non-procreative sex acts associated with homosexuality, the Prostitution statute is not. See Pls.' Opp. Point II(B)(3). This cannot serve as a legitimate rationale for drawing such a distinction. Id.; see also Lawrence, 539 U.S. at 582

(O'Connor, J., concurring) ("[W]e have never held that moral disapproval, without any other asserted stated interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."). Thus, Vacco addressed a situation quite distinct from the one at bar. Nevertheless, the rule set forth and applied therein bolsters Plaintiffs' contention that the statutory scheme at issue here violates the Equal Protection Clause.

III. Principles of Prosecutorial Discretion Do Not and Cannot Salvage the Constitutionality of the CANS Statute

It is axiomatic that there must be a legitimate governmental rationale underlying any law or legal sanction. See, e.g., Daniels v. Williams, 474 U.S. 327, 331 (1986) (addressing the "traditional and common-sense notion" that the Constitution's protection of liberty is "'intended to secure the individual from the arbitrary exercise of the powers of government'") (citing Hurtado v. California, 110 U.S. 516, 527 (1884)). Against this backdrop, prosecutors have broad discretion with respect to when and how to charge those who violate presumptively constitutional statutes. See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996). They may choose between statutes that criminalize overlapping conduct, so long as those charging decisions are consistent with anti-discrimination principles and are "subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114-15, 124-25 (1979) (referring to "constitutional constraints"); see also Wayte v. United States, 470 U.S. 598, 608 (1985).

The tradition of prosecutorial discretion, however, presumes that the statutes that prosecutors choose to enforce are constitutionally sound: the statutes must be supported by a legitimate governmental interest, must not impose arbitrary sanctions, and must not be animated solely by discriminatory intent. In other words, prosecutors may deploy a number of tools when enforcing the law, but the tool they use must not be unconstitutional.

Thus, the equal protection analysis here is unaffected by principles of prosecutorial discretion. The fact that prosecutors have discretion to choose between overlapping constitutionally-sound statutes cannot salvage a statute that has no legitimate purpose, but rather is animated by invidious purpose. See Pls.' Opp. Point II; see also supra Point I. Notably, the equal protection challenge presented in this case does not turn on whether or not prosecutors have made a discriminatory charging decision when they choose to charge someone with CANS as opposed to Prostitution.[2] It is the statutory scheme itself, not the charging decision, that violates equal protection principles.

Moreover, Plaintiffs have also plausibly alleged that the only rationale underlying that distinction is one that offends the Constitution: moral disapproval of non-procreative sex acts associated with homosexuality. See Pls.' Opp. Point II(B)(3); see also Lawrence, 539 U.S. at 577 ("the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law"). That distinction renders the law imposing sex offender registration for a CANS conviction, but not a Prostitution conviction, unconstitutional.

Defendants argue that the "State's ability to charge a crime under multiple statutes carrying differing legal effects cannot violate the Equal Protection Clause." Defendants' Reply Memorandum in Support of Motion to Dismiss, filed July 20, 2011, at 6. Defendants offer Louisiana's first and second degree murder statutes as an example: an individual who intentionally kills a person in an armed robbery, they posit, is chargeable under either statute, and

[2] While Plaintiffs have alleged that police and prosecutors have virtually unfettered discretion to arrest and charge individuals under either the Prostitution or CANS statutes, without apparent reason or guidance, see Compl. ¶ 53, Plaintiffs do not advance a selective enforcement theory of equal protection. Id. ¶¶ 184-89. This unfettered discretion does, however, create a situation ripe for abuse. See Brief of Amici Curiae (Docket No. 39), Section III ("While this arbitrary and unfair difference affects both LGBT people and non-LGBT people, the government's power to charge a person under CANS – a statute that originates from animus toward sex acts traditionally associated with homosexuality – is highly susceptible to anti-LGBT bias.").

can be punished more harshly under the first degree murder statute, without raising an equal protection concern. Id. But Defendants' example proves too much.

As Defendants concede, first degree murder "requires an additional element or aggravating factor." Id. In order to secure a first degree murder conviction, a prosecutor in Louisiana must establish something more than a prosecutor seeking to secure a second degree murder conviction. Compare La. Rev. Stat. § 14:30 (describing elements of first degree murder) with La. Rev. Stat. § 14:30.1 (describing elements of second degree murder). Additional elements or aggravating factors, of course, constitute a perfectly rationale reason for the Legislature to authorize different punishments under the two statutes. So long as a prosecutor does not selectively and discriminatorily apply those two statutes in a manner that offends the Constitution, those charging decisions are similarly legitimate. See, e.g., Armstrong, 517 U.S. at 463. As explained supra, the same cannot be said of the CANS and Prostitution statutes, where the only possible rationale underlying the distinction is rooted in discrimination, rather than the legitimate distinction of additional elements or aggravating factors. Defendants' arguments are therefore unavailing, and principles of prosecutorial discretion thus do not, and cannot, salvage the irrational, arbitrary and unconstitutional difference in how CANS and Prostitution are treated.

IV. The Fact That the Legislature Has Equalized All Penalties Between Prostitution and CANS Confirms That the Offenses are Identical and Therefore Must Be Treated as Such

Although the solicitation provision of the Prostitution statute and the CANS statute share identical elements and punish identical conduct, see supra Point I, the two offenses have been punished in dramatically different ways for years. See Compl. ¶¶ 55-56. Going forward, the Legislature has eliminated all differences in how the statutes are treated. Compare La. Rev. Stat. § 14:82(C) (laying forth penalties for a Prostitution conviction) with 2011 La. Sess. Law Serv.

HB 141 (imposing exactly the same penalties for a CANS conviction as for a Prostitution conviction from August 15, 2011 onwards). This legislative amendment establishes two things: first, that for purposes of equal protection analysis, CANS and Prostitution are indistinguishable offenses; and second, it is grossly inequitable to treat those convicted before August 15, 2011 one way, and those convicted after that date another.[3]

The recent amendments to the CANS statute evince the Legislature's view that the two statutes include the same elements and warrant the same punishment. The State has never required sex offender registration for a Prostitution conviction and has never asserted that it has an interest in doing so. See Compl. ¶¶ 55, 59. It has now taken the same position with respect to CANS. The Legislature's recognition that Prostitution and CANS must be treated with parity is powerful corroboration of the basis for Plaintiffs' equal protection argument: the statutes are identical; there is no legitimate interest in treating them differently; and the only rationale underlying the distinction is one that cannot pass constitutional muster.

This is true not only as a constitutional matter, but also as an equitable one. It is unconscionable that two individuals, arrested and charged on the same day, at the same location, under the same circumstances, for the exact same conduct, but under two different statutes that include the same elements, could be treated so drastically differently – one as a sex offender, one not. See Compl. ¶¶ 50, 53. Now that the Legislature has abandoned this irrational and unconstitutional distinction, it is equally untenable that someone convicted on Sunday, August 14, 2011 of CANS must register as a sex offender for fifteen years to life, but someone convicted

[3] Plaintiffs' claims do not rest on a contention that the change in law creates an impermissible classification between those convicted prior to August 15, 2011 and those convicted subsequent to that date. See Doe, XIV v. Mich. Dep't of State Police et al., 490 F.3d 491 (6th Cir. 2007) (holding that where there was a legitimate State purpose for the original registration requirement, a change in law does not create an impermissible classification). There was no legitimate purpose for requiring individuals convicted of CANS to register as sex offenders before the change in law, and there is still no basis for doing so now.

on Tuesday, August 16, 2011 will not be required to do so. The equities weigh strongly in favor of removing the registration requirement across the board.

Defendants acknowledged at oral argument that the sole explanation for perpetuating this injustice is the purported administrative cost of identifying the limited number of people registered solely because of a CANS conviction – estimated at a mere $37,000 in a fiscal note appended to the recently passed legislation. See Legislative Fiscal Office, Fiscal Note on HB 141, dated May 6, 2011, available at http://www.legis.state.la.us/billdata/streamdocument.asp?did=745409. But administrative costs are no answer to a constitutional violation. See, e.g., Frazier v. Manson, 703 F.2d 30, 35 (2d. Cir. 1983) ("The constitutional imperatives of the Equal Protection Clause cannot be satisfied by mere conjecture as to administrative inconvenience."). The Legislature has made significant headway in correcting this unconstitutional anomaly, and constitutional dignity requires that this relief be extended to those who must continue to register as sex offenders solely as a result of CANS conviction.

CONCLUSION

For the reasons stated above, in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, and stated at oral argument, Defendants' Motions to Dismiss should be denied.

DATED: August 17, 2011

Respectfully submitted,

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