IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL NEWDOW, *et al.*, **Plaintiffs,** **v.** **HON. JOHN ROBERTS, JR., *et al.*,** **Defendants.**	**Civil Action No. 1:08-cv-02248-RBW**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER ALLOWING PSEUDONYMS, DECLARATIONS AND ADDRESSES TO BE FILED UNDER SEAL

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BACKGROUND

Local Rule LCvR 5.1(e) states, in pertinent part, "The first filing by or on behalf of a party shall have in the caption the name and full residence address of the party." Due to the nature of this litigation, Plaintiffs respectfully request permission to file the name and address of the key child plaintiff in this action (henceforth "DoeChild") under seal. Additionally, because information that would readily identify DoeChild is contained in the Declarations of DoeChild and the Declarations of DoeChild's parent (henceforth "DoeParent"), Plaintiffs respectfully request permission to file those Declarations under seal as well. Finally, because of the danger to all the individual plaintiffs, permission to provide the residence addresses of all individual parties under seal is also requested. Although it is the danger to the individual plaintiffs that has led to this request, a general sense of fairness suggests it is appropriate to broaden the request to also include the residence addresses of the individual defendants.

This lawsuit involves a challenge to the endorsement of Monotheism at presidential inaugural ceremonies. Simply filing the lawsuit has already produced controversy,[1] and history teaches that "[r]eligious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause."[2] Unfortunately, such "acrimony and irreconcilable hatreds" (which were largely the impetus for the Constitution's religion clauses) can lead to physical and mental harm. It is for that reason that this Protective Order is being sought.

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[1] Exhibit A provides but a small sampling of the email messages already obtained as a result of the filing of the Complaint.

[2] George Washington, Letter to Sir Edward Newenham, June 22, 1792. In *The writings of George Washington* from the original manuscript sources, Electronic Text Center, University of Virginia Library. Accessed on January 4, 2009 at http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi32.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=69&division=div1.

LAW AND ARGUMENT

I. Legal Authority Exists for the Court to Grant the Requested Relief

As an initial matter, it should be noted that District Courts have authority and discretion to enter protective orders to control discovery and protect the rights of parties. Doe v. Porter, 370 F.3d 558, 560-561 (6th Cir. 2004) (upholding lower court's grant of protective order allowing the use of pseudonyms in challenge to religious instruction in schools); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (reversing lower court's denial of protective order allowing for pseudonyms). As the Fourth Circuit has noted:

> The decision whether to permit parties to proceed anonymously at trial is one of many involving management of the trial process that for obvious reasons are committed in the first instance to trial court discretion. This implies, among other things, that though the general presumption of openness of judicial proceedings applies to party anonymity as a limited form of closure, it operates only as a presumption and not as an absolute, unreviewable license to deny. The rule rather is that under appropriate circumstances anonymity may, as a matter of discretion, be permitted.

James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993). Thus, there exists legal support for the Court to provide the relief herein requested.

II. Case Law Supports Granting the Requested Relief

a. Filings with Pseudonyms

Although "[t]he Supreme Court and the D.C. Court of Appeals have not expressly condoned this practice; ... from time to time they have permitted pseudonymous litigation to proceed without comment. See, e.g., Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); Doe v. Sullivan, 291 U.S. App. D.C. 111, 938 F.2d 1370, 1374 (D.C. Cir. 1991)." Qualis v. Rumsfeld, 228 F.R.D.8, 10 (D.D.C. 2005). The case law regarding pseudonymous filings, therefore, will be reviewed here.

"Judicial proceedings are supposed to be open … in order to enable the proceedings to be monitored by the public. The concealment of a party's name impedes public access to the facts of the case, which include the parties' identity." Doe v. City of Chicago, 360 F.3d 667, 669 (7th Cir. 2004).[3] Nonetheless, "[t]he presumption that parties' identities are public information, and the possible prejudice to the opposing party from concealment, can be rebutted by showing that the harm to the plaintiff … exceeds the likely harm from concealment." Id. In other words:

> In cases where the plaintiffs have demonstrated a need for anonymity, the district court should use its powers to manage pretrial proceedings, see Fed. R. Civ. P. 16(b), and to issue protective orders limiting disclosure of the party's name, see Fed. R. Civ. P. 26(c), to preserve the party's anonymity to the greatest extent possible without prejudicing the opposing party's ability to litigate the case.

Doe v. Advanced Textile Corp., 214 F.3d 1058, 1069 (9th Cir. 2000).

The United States Supreme Court has permitted pseudonymous filings in precisely this type of religion-based litigation. Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (parents individually and as "next friends" to their children challenged prayers at public high school football games).[4] As noted in Doe v. Stegall, "religion is perhaps the quintessentially private matter, [disclosures about which] have invited an opprobrium analogous to the infamy associated with criminal behavior." 653 F.2d at 186.

Pseudonymous filings have been deemed appropriate even when there are no children involved, and the plaintiffs are adults. Brown v. Secretary of Health & Human Servs., 46 F.3d 102, 105 (n.5) (1st Cir. 1995) (where "[t]he district court granted named plaintiffs leave to use

[3] But see Center for National Security Studies v. U.S. Department of Justice, 356 U.S. App. D.C. 333, 350-51 (D.C. Cir. 2003) (suggesting that the right of public access to trials has not been extended beyond criminal proceedings).

[4] Subsequently, the high Court decided a case involving a pseudonymous filing where the justification appears to be nowhere near as compelling as in the instant action. In *City of San Diego v. Roe*, 543 U.S. 77 (2004), a police officer who was terminated from his job because of sexually explicit videotapes he had made was permitted to file pseudonymously.

pseudonyms in order to protect their privacy," apparently due solely to the plaintiffs having low income, necessitating AFDC benefits.) When children are involved, the need for protection is obviously greater. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995).

In this Circuit, at least one Court has used five factors to determine if pseudonymous proceedings should be permitted. John Doe #1 v. Von Eschenbach, 2007 U.S. Dist. LEXIS 46310 (D.D.C. June 27, 2007). Those factors will be discussed sequentially here.

i. The Justification is Not Merely to Avoid Annoyance and Criticism

The first factor pertains to the claimed justification for anonymity. If it is the mere annoyance and criticism that often accompanies court cases, the justification will be deemed insufficient for infringing upon the public interest in open proceedings. Here, the justification is preventing actual harm. Thus, this factor falls in Plaintiffs' favor.

ii. There is a Real Risk of Retaliatory Harm

The second factor looks at whether or not there is a real risk of retaliatory harm. That this factor is also in Plaintiffs' favor is demonstrated unequivocally in a book that details the harms suffered by "Religious Minorities and Dissenters" in this country.[5] The stories are frightening. For instance, the Herdahls were a Lutheran family in a Southern Baptist Mississippi town. When the Herdahl children did not participate in "decidedly Southern Baptist" public school prayers, they were harassed by "[b]oth teachers and students." When the family filed suit to stop this clearly unlawful practice, "the harassment got even worse. Her family received bomb threats. She received a death threat, and the name calling and ridicule worsened."[6]

A second story concerned individuals in Alabama. The Herrings were "a Jewish family whose children had been subjected to severe religious discrimination and harassment in school."

[5] Ravitch FS. *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters.* (Northeastern University Press: Boston, 2001).
[6] Id., at 8-9.

The children "were physically assaulted by classmates because of their religion; swastikas were drawn on their lockers, bookbags, and jackets; and they were regularly taunted by the other children." The mother, in a sworn statement to the Court, stated:

> Every day that I send my children to Pike County schools, I wonder if I am sending them into a war zone. … The consequences of the school environment on my children's psyches are devastating. My children are growing up believing that America is a caste society and they are untouchables – except for the purpose of getting beaten up. One child suffered "serious nightmares."[7]

"Rachel Bauchman, a Jewish high school student, objected to overtly religious songs, which were sung at high school graduations by the high school choir of which she was a member. … Rachel obtained a court order prohibiting the graduation songs. However, at the urging of parents and some students, the choir performed one of the religious songs anyway. … When Rachel and her mother got up to leave – Rachel in tears – parents and students in the audience jeered and spat on them."[8]

Like to Plaintiffs here, Joann Bell filed a federal lawsuit to stop government-sponsored prayer. As detailed in Exhibit B:

> After I filed the lawsuit, my family and I received numerous threatening telephone calls and letters. These threats promised physical harm and even death to my family members and me as a result of my involvement as a plaintiff in the lawsuit. Many of the telephone calls told me that our home would be burned. I could not even perform such simple tasks as shopping for groceries in the community without being confronted by other persons about the lawsuit.

When Ms. Bell responded to a bomb threat at her children's school, "several school employees circled the car. One of the employees grabbed me by the hair of the head and battered my head against the frame of the car's door." After the family's home "was burned in a fire of

[7] Id., at 9-11.
[8] Id., at 11-12.

suspicious origin," the family moved from the school district "motivated by a grave concern for the safety of our family." Exhibit B.

iii. Children are Involved

Whether or not children are involved is the third factor. Here, DoeChild is a child.

iv. The Action is Against the Government

Von Eschenbach cited Yacovelli v. Moeser, 2004 U.S. Dist. LEXIS 9152 (May 20, 2004) for the proposition that "[w]hen a plaintiff challenges the government or government activity, courts are more likely to permit plaintiffs to proceed under a pseudonym." In the instant litigation, it is governmental activity that is being challenged.[9]

v. There is No Risk of Unfairness to the Defendants

The fifth and last factor is the degree of unfairness to Defendants. It is difficult to conceive of how Defendants will in any way be prejudiced by having the names and addresses of DoeChild and DoeParent filed under seal. Defendants will still have access to that information.

Another set of factors, similar to those used in Von Eschenbach, has been suggested by the Ninth Circuit. Holding "that a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity," Advanced Textile, 214 F.3d at 1068, suggested:

> [I]n cases where, as here, pseudonyms are used to shield the anonymous party from retaliation, the district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm, (2) the

[9] Although Defendants Warren and Lowery are private individuals when leading their congregations in prayer, they will be functioning as government agents when given access to the inaugural dais. "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans v. Newton, 382 U.S. 296, 299 (1966).

> reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to such retaliation.

Id. In the instant case, the evaluation of those factors demonstrates that need. Even the mildest threatened harm – harassment of children in the public schools – warrants the requested relief. Furthermore, as noted in the Declarations #2 of DoeChild and DoeParent, these particular individuals have themselves have already experienced such harms from past similar objections to government-sponsored religious activity. As DoeParent writes, the parent and child "received threats for months [and] feared for our lives." Declaration #2 of DoeParent, ¶ 17.

DoeParent concludes that if their names are "made public relative to this inaugural lawsuit, our lives could be threatened again, and the ramifications could be even more severe than they were before." Id., ¶ 20. As the attached Exhibits show, this is not an unwarranted concern. Thus, the second Advanced Textile criterion is met.

Finally, in terms of vulnerability, the history of what has transpired to DoeChild and DoeParent in the past, combined with the vitriol seen in Exhibit A and the incidents suffered by others (as previously listed, supra), shows that the Plaintiffs are vulnerable to real harm.

b. Filings with Pseudonyms

Plaintiffs have been unable to find case law specifically on point in regard to maintaining party residence addresses under seal. Perhaps the most apposite case law is found in L.S. Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, 40 (1999), where the Supreme Court held that there is no First Amendment right to arrestee addresses.

Plaintiffs recognize that the residence addresses of the individual plaintiffs are potentially accessible to the public due to the fact that their names are listed. However, the issue is one of the ease of access to that information. The danger to every plaintiff is similar to that just noted in

the analysis for pseudonymous filings. What Plaintiffs seek to accomplish with the requested Protective Order is to prevent some rash act by someone reading the Complaint, who happens to notice that he or she is near to one of the Plaintiffs, and who decides spontaneously to inflict serious injury.

The proposed ORDER provides Defendants with the information required by Local Rule LCvR 5.1(e). Discovery, if needed, can also be accomplished under the proposed ORDER, thus preserving Defendants' rights.

CONCLUSION

Good cause having been shown, Plaintiffs respectfully request that the Court preserve the anonymity of DoeChild by entering a Protective Order allowing the filing of the names and addresses of DoeChild and DoeParent, as well as their Declarations, under seal. Because similar concerns of personal harm exist for the remaining plaintiffs (should their addresses be readily accessible) Plaintiffs also request that the Court allow the individual parties to have their residence addresses filed under seal.

Respectfully submitted this 14th day of January, 2009,

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