UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	*	**CIVIL ACTION**
AUDREY DOE, ET AL	*	
	*	**No. 11-388 "F" (5)**
VERSUS	*	
	*	**JUDGE FELDMAN**
BOBBY JINDAL, ET AL	*	
	*	**MAG. JUDGE CHASEZ**

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COURT ORDERED POST-HEARING SUPPLEMENTAL MEMORANDUM BY THE STATE DEFENDANTS

NOW INTO COURT, through undersigned counsel, come defendants Bobby Jindal, in his official capacity as Governor of the State of Louisiana, James D. "Buddy" Caldwell, in his official capacity as Attorney General of the State of Louisiana, James M. LeBlanc, in his official capacity as Secretary of the Louisiana Department of Public Safety and Corrections (DPSC), Colonel Michael D. Edmonson, in his official capacity as Superintendent of the DPSC, Office of State Police, Charles Dupuy, in his official capacity as Deputy Superintendent of the DPSC, Office of State Police,[1] Eugenie C. Powers, in her official capacity as Director of the DPSC, Division of Probation and Parole, Barry Matheny, in his official capacity as Assistant Director of the DPSC, Division of Probation and Parole, and Nick Gautreaux, in his official capacity as Commissioner of the DPSC, Office of Motor Vehicles,[2] respectfully submitting the instant post-hearing supplemental memorandum in accordance with the order of this Honorable Court.

This Honorable Court requested additional briefing, within five (5) business days of August 10, 2011, on three issues related to plaintiffs' claim that they have suffered a violation of

[1] Plaintiffs originally named Jim Mitchell as deputy superintendent. Charles Dupuy replaced Jim Mitchell following his retirement.

[2] Kay Hodges retired. Nick Gautreaux is now the Commissioner of the DPSC, Office of Motor Vehicles.

the Equal Protection Clause: (1) prosecutorial discretion, (2) applicability to this matter of Eisenstadt v. Baird, 405 U.S. 438 (1972) and Vacco v. Quill, 521 U.S. 793 (1997), and (3) in light of Eisenstadt, Vacco and other precedent, whether the effective date of Act 223 of the 2011 Regular Session of the Louisiana Legislature (which removed Crimes Against Nature by Solicitation from the list of offenses subject to sex offender registry requirements) created an Equal Protection issue and whether such an equal protection claim is cognizable under 42 U.S.C. §1983 in this case. Each issue will be addressed in turn.

I. Prosecutorial Discretion.

The plaintiffs allege that the existence of two statutes, prostitution (La. R.S. 14:82) and Crimes Against Nature by Solicitation (La. R.S. 14:89.2), provide arresting officers and prosecutors the ability to discriminate because they have the discretion to choose between the misdemeanor and felony when deciding how to charge a defendant. Generally, the plaintiffs allege their equal protection rights were violated because each was prosecuted for Crimes Against Nature by Solicitation rather than for Prostitution.[3]

A prosecutor's discretion is subject to constitutional limitations that district courts can enforce. Wade v. U.S., 504 U.S. 181, 185, 112 S.Ct. 1840, 1843 (1992). "The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" U. S. v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 2205 (1979) (*quoting* Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962)). Thus, the Supreme Court has "long recognized that when an act violates more than one

[3] Please note: the plaintiffs in this case are not challenging the constitutionality of the CANS statute or any constitutional implications arising from the existence of both the CANS and Prostitution statutes. Rather, plaintiffs are challenging the fact that, due to their convictions for Crimes Against Nature, they must register as sex offenders. Any issue of prosecutorial discretion and the potential for abuse of that discretion is wholly irrelevant to the relief they request – that they be removed from the sex offender registry.

criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." Batchelder, 442 U.S. at 123-124 (*citing* United States v. Beacon Brass Co., 344 U.S. 43, 45-46, 73 S.Ct. 77, 79, 97 L.Ed. 61 (1952); Rosenberg v. United States, 346 U.S. 273, 294, 73 S.Ct. 1152, 1163, 97 L.Ed. 1607 (1953) (Clark, J., concurring, joined by five Members of the Court); Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962) (additional citations omitted)).

"Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a 'background presumption,' that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." U.S. v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486 (1996) (*citing* United States v. Mezzanatto, 513 U.S. 196, 203, 115 S.Ct. 797, 803, 130 L.Ed.2d 697 (1995)). "The presumption of regularity" supports prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Id.* (*quoting* United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)).

> In order to show a violation of his equal protection rights, therefore, a defendant must demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law.

Armstrong, 517 U.S. at 464-465 (*quoting* Yick Wo v. Hopkins, 118 U.S. 356, 373, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1886)).

Plaintiffs claim they were prosecuted under CANS rather than the prostitution statute because of the particular sex act(s) solicited. Each plaintiff either pled guilty or was convicted of

the charge. In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* (*quoting* Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978)).

> [T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced.

Batchelder, 442 U.S. at 125 (internal citations omitted). Considering the foregoing, the fact that CANS carried heightened penalties and a registry requirement does not, by itself, give rise to a violation of the Equal Protection Clause. Rather, as noted above, the defendant charged with the crime must prove that his or her prosecution was motivated by "an unjustifiable standard such as race, religion, or other arbitrary classification." Batchelder, *supra*. However, a selective prosecution claim is not cognizable under §1983.

The plaintiffs claim their equal protection rights were violated in their original criminal proceedings. They claim the prosecutors unconstitutionally charged each plaintiff with Crimes Against Nature rather than with Prostitution. "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." U.S. v. Armstrong, 517 U.S. 456,

463, 116 S.Ct. 1480, 1486 (1996). Clearly, the proper respondent to a claim for selective prosecution is the prosecutor himself. However, prosecutors are entitled to absolute immunity from suit under 42 U.S.C. §1983 (regardless of the relief requested) for this exact type of exercise of discretion.

> A half-century ago Chief Judge Learned Hand explained that a prosecutor's absolute immunity reflects "a balance" of "evils." *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A.2 1949). "[I]t has been thought in the end better," he said, "to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Ibid.* In *Imbler* [*v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)], this Court considered prosecutorial actions that are "intimately associated with the judicial phase of the criminal process." *Id.*, at 430, 96 S.Ct. 984. And, referring to Chief Judge Hand's views, it held that prosecutors are absolutely immune from liability in §1983 lawsuits brought under such circumstances. *Id.*, at 428, 96 S.Ct. 984. [...]
>
> In the years since *Imbler*, we have held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, *Burns* [*v. Reed*, 500 U.S. 478, 492, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)] [...]

Van de Kamp v. Goldstein, 129 S.Ct. 855, 859 -861 (2009). Considering the well-established law on absolute prosecutorial immunity, had any prosecutor been sued in the instant lawsuit, he would have been entitled to dismissal of all selective prosecution claims.

Furthermore, a finding that the prosecutors acted unconstitutionally in their charging decisions would effectively vacate the plaintiffs' convictions. "When 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' §1983 is not an available remedy." Skinner v. Switzer, 131 S.Ct. 1289, 1298 (2011) (*quoting* Heck v. Humphrey, 512 U.S. 477, 487, 114 S.Ct. 2364 (1994)).

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Wallace v. Kato, 549 U.S. 384, 392, 127 S.Ct. 1091, 1097 (2007) (*quoting* Heck, 512 U.S. at 486-487). In this case, plaintiffs claim they should have been charged with prostitution rather than with Crimes Against Nature. Any relief based upon a finding that it was unconstitutional to charge them with Crimes Against Nature implies the invalidity of the plaintiffs' convictions. Therefore, absent a termination in plaintiffs' favor of their Crimes Against Nature convictions, the Supreme Court's decision in Heck bars all §1983 claims of selective prosecution.

II. The Supreme Court's decisions in *Eisenstadt* and *Vacco* support the defendants' claim that plaintiffs have not stated a cognizable equal protection violation.

This Honorable Court requested supplemental briefing on the applicability of two United States Supreme Court cases, Eisenstadt v. Baird, 405 U.S. 438 (1972), and Vacco v. Quill, 521 U.S. 793 (1997), on the issue of whether defendants have articulated an equal protection claim.

The Vacco plaintiffs, physicians and terminally ill patients, challenged a law of the State of New York that made it a crime to aid another to commit or attempt suicide. Vacco, 521 U.S. at 796-97. The plaintiffs asserted that terminally ill patients maintained the right to refuse lifesaving medical treatment under the law, and that assisted suicide was substantially identical to the refusal of life-saving treatment. Therefore, they argued, the denial of a terminally ill patient's right to assisted suicide violated the Equal Protection Clause of the Fourteenth

Amendment. *Id.* The Court focused on the fact that each of the challenged laws applied equally to all persons:

> On their faces, neither New York's ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently from anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist suicide. Generally speaking, laws that apply evenhandedly to all "unquestionably comply" with the Equal Protection Clause.

Vacco, *521 U.S.* at 797-98 (emphasis in original, citations omitted). Ultimately, the Court found that there was a rational distinction (recognized in both medicine and the law) between assisting someone in ending his own life and complying with his right to refuse lifesaving medical treatment. *Id.* The Court therefore found that the statutes "easily satisf[ied] the requirement that a legislative classification bear a rational relation to some legitimate end." *Id.* at 809.

In this case, the law prior to August 15, 2011, required *all persons* convicted of a second violation of CANS to register as a sex offender based solely on their second conviction. There was no class of persons exempt from the requirement. As of August 15, the legislature changed the law such that *no person* convicted of CANS is required to register as a sex offender. The amended law does not treat one class of persons differently than another. In other words, both the original law and the amended law apply (or applied) evenhandedly to all and, as such, "unquestionably comply" with the Equal Protection Clause.

In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Supreme Court considered an Equal Protection challenge to a statute that made it a crime to distribute contraceptives to unmarried persons. The law challenged in Eisenstadt unequivocally applied to a particular group of people – unmarried people. At issue was whether there was "some ground of difference that rationally

explains the different treatment accorded married and unmarried persons" under the statute. Eisenstadt, 405 U.S. at 447. Ultimately the Court found that there was no valid rationale for the unequal treatment of similarly situated married and unmarried persons, and the statute therefore violated the Equal Protection clause of the Fourteenth Amendment.

In this case, as described above, the challenged statute – the *registration requirement* arising from a second CANS conviction – was neither written to target nor applied to a particular group or class of people. Everyone convicted of a second CANS offense was required to register. Because the registration requirement applied equally to all (i.e. no one was treated differently), there is no "ground of difference that rationally explains [any] different treatment." Eisenstadt, 405 U.S. at 447. Eisenstadt is inapplicable or, at the very least, unhelpful to the plaintiffs in their attempt to show an equal protection violation arising from the requirement that they register as sex offenders.

The case filed by the plaintiffs does not state a claim for an equal protection violation arising from the requirement that each register as a result of his conviction for Crimes Against Nature by Solicitation. However, in light of Act 223 of the Regular Session of the Louisiana Legislature, the law has changed. Now, there are two groups of people convicted of Crimes Against Nature by Solicitation – one required to comply with registration requirements, one not required to register at all. The equal protection issue that has been raised arises from the effective date of Act 223, August 15, 2011 is whether people convicted of CANS prior to August 15 and who are correspondingly required to register have an equal protection claim.

III. Plaintiffs have no equal protection claim based on their being treated differently than persons convicted of Crimes Against Nature by Solicitation after the effective date of Acts 2011, No. 223.

This Honorable Court requested supplemental briefing on the issue of whether defendants have articulated an equal protection claim based on unequal treatment of persons convicted of Crimes Against Nature by Solicitation ("CANS") before August 15, 2011, and those convicted of CANS after August 15, 2011. The August 15 date is significant, of course, because that was the effective date of Acts 2011, No. 223 ("Act 223"), which removed the registration requirements for persons convicted of CANS. Act 223 is prospective only, such that persons previously convicted of CANS are not relieved of their registration obligation. Acts 2011, No. 223, Section 3.

The first consideration for purposes of the Equal Protection Clause is whether plaintiffs have established any classification based on the date of conviction. It is clear that persons convicted of CANS before August 15, 2011, must remain on the sex offender registry and thus are treated differently than those convicted after August 15, 2011 and do not have to register. "The Equal Protection Clause of the Fourteenth Amendment ... is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). However, if a distinction drawn by a law does not involve a suspect class or a fundamental right, the "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest[.]" *Id*. at 440.

Moreover, a statutory scheme will be upheld under rational-basis review if there is "any reasonably conceivable state of facts that could provide a rational basis" to justify the scheme.

FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993). The Supreme Court has explained that under rational-basis review a legislative scheme is entitled to a "strong presumption of validity":

> On rational-basis review, a classification in a statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

Id. at 314-15 (*quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)) (other citations omitted). Although the rational basis test "is not a toothless one," a statutory scheme does carry a presumption of validity. Lyng v. International Union, United Auto., Aerospace and Agr., 485 U.S. 360, 370 (1988). "The burden on the plaintiffs under rational-basis review is therefore a heavy one." Doe v. Michigan Dept. of State Police, 490 F.3d 491, 504 (6th Cir. 2007).

The distinction between offenders whose convictions occurred prior to a certain date and those whose convictions occurred after that date is neither based on a suspect class nor does it involve fundamental rights. Thus, in the present context, rational-basis review is appropriate. *See Id.* at 503-04 (holding rational-basis review appropriate for an equal protection challenge to the prospective removal of certain offenders from a sex offender registration scheme).

The law establishes that a prospective change in criminal law does not, by itself, raise an equal protection claim. The distinction in question now is that Act 223 treats one offender differently from another class based on the date of conviction. "This kind of line-drawing, however, is the province of the legislature." *Id*. at 504 (*citing* Rummel v. Estelle, 445 U.S. 263, 275 (1980).

In the present case, the different treatment of persons convicted before and after the effective date of Act 223 is a necessary consequence of the legislature's freedom to change the law and the consequences for violating the law. Indeed, all statutes that extend or take away benefits must have a date in which they take effect. The Sixth Circuit recognized:

> State legislatures not infrequently modify their statutory schemes to the benefit of the accused or the convicted by, among other things, reducing applicable penalties, increasing the rate of accrual of good-time credits, or exempting a class of offenders from some previously applicable consequence of conviction. In many instances, the legislature confers such benefits prospectively, thereby creating two classes of offenders distinguishable by only the date of offense, conviction, plea, or sentencing.

Doe v. Mich. DPS, 490 F.3d at 504. Along these same lines, the Fifth Circuit has recognized that a change in the law may give rise to the unequal treatment of persons convicted before and after the change, but that there is no valid equal protection claim absent a showing of some invidious purpose behind the change in the law. The plaintiffs have not alleged any such purpose.

In Sonnier v. Quarterman, 476 F.3d 349 (5th Cir. 2007), a plaintiff convicted of capital murder alleged that a change in the law with regard to the prosecutor's burden of proof violated his right to equal protection insofar as it treated him differently than those persons convicted before the change in the law. The Court recognized that a change in the law cannot *ipso facto* give rise to an equal protection claim:

> [T]he Supreme Court has explained the widely-accepted rule that "the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time." *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505, 31 S.Ct. 490, 55 L.Ed. 561 (1911).

Sonnier, 476 So.2d at 369. The Louisiana Legislature's decision to prospectively eliminate the registration requirement for persons convicted of CANS after August 15, 2011, had no invidious purpose and, thus does not offend the Equal Protection Clause.

The Sixth Circuit, in Doe v. Michigan Dept. of State Police, considered an extremely similar situation to that presented herein. In Doe v. Mich., certain youthful offenders required to register as sex offenders challenged various aspects of the Michigan's sex offender registration laws. These offenders challenged a distinction created within Michigan law that offenders convicted of a particular category of sex offense prior to October 1, 2004, were required to register while those convicted of the same category of offense after that date were not required to register. *Id*. at 503. After first recognizing that rational-basis review was the proper standard, the Court concluded that the distinction based on the date of conviction was rationally related to a legitimate governmental interest:

> We conclude that the legislative classification created by the effective date of the 2004 amendments to the [sex offender registry] does not violate the Equal Protection Clause. "Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Constitution." … This court has previously concluded that the state's interests in protecting public safety and in aiding effective law enforcement are advanced by the [sex offender] registration requirements. The 2004 amendments continue to advance public safety goals while simultaneously "weeding out" those youthful trainees who have been deemed least likely to reoffend.

Id. at 505 (*quoting* New Orleans v. Dukes, 427 U.S. 297, 304 n.5 (1976)) (other citations omitted).

Additionally, the Sixth Circuit recognized, where equal protection challenges arise out of prospectively applicable statutes, Courts will generally uphold those statues. *See, e.g.*, Foster v.

Wash. State Bd. of Prison Terms & Parole, 878 F.2d 1233, 1235 (9th Cir.1989) (upholding prospective effect of lower sentencing ranges); Frazier v. Manson, 703 F.2d 30, 34-35 (2d Cir.1983) (upholding a statute prospectively increasing good-conduct credits that created comparatively longer prison terms for offenders sentenced before the effective date); Comerford v. Massachusetts, 233 F.2d 294, 295 (1st Cir.1956) (same); Colvin v. Estelle, 506 F.2d 747, 748 (5th Cir.1975) (upholding a prospectively reduced sentence for robbery by assault).

Furthermore, a legislative choice to reform a scheme gradually is entitled to great deference; "a statute is not invalid under the Constitution because it might have gone farther than it did." Dukes, 427 U.S. at 305 (quotation marks omitted). "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Id. at 303.

The distinction between persons convicted of CANS prior to August 15, 2011 and after August 15 derives from the legislature's decision to make Act 223 prospective only. Removal from the sex offender registry of a particular class of offenders is fraught with difficulties and possible negative consequences. As it relates to this particular scheme, crimes against nature and CANS were not always two separate statutory provisions. Prior to July 2010, CANS was part of LA. R.S. 14:89 and wholly contained within the crimes against nature statute. For purposes of defining a "sex offense," crimes against nature and CANS were indistinguishable. See LA. REV. STAT. § 15:541(24) (2010) (defining "sex offense").

Although two separate offenses existed under a single statute, for purposes of the registration, they were treated as simply a conviction for a violation of § 14:89 or "crimes against nature." The administrative consequence of the single statute is that all convictions for CANS

prior to 2010 are administratively indistinguishable from convictions for crimes against nature. This creates several administrative difficulties in purging the sex offender registry of those convicted of CANS.

Indeed, CANS and crimes against nature, while both formerly sex offenses, do not carry heavy prison sentences compared to other more serious sex offenses. Thus, they are a ripe vehicle for prosecutors to use to attain plea bargains in cases involving violent, minor victim, or otherwise more serious sex offenses where a prosecutor fears the possibility of an acquittal at trial. For instance, prosecutors could have relied on the statutory scheme and pled crimes involving minor victims (conduct more serious than that defined in the crimes against nature statutes) where the prosecutor was reticent to put a victim of tender years through the rigors of cross-examination. A prosecutor facing the possibility that a violent or predatory sex offender could walk if they chose to go to trial, could offer this defendant a plea pursuant to Alford v. North Carolina, 400 U.S. 25 (1970) to crimes against nature or CANS (after 2010). This enables the prosecutor to avoid the possibility of an acquittal and simultaneously triggers a duty to register as a sex offender on the part of the defendant.

In the foregoing example, the offender is unequivocally an individual the Legislature (and the public in general) want on the sex offender registry. As it appears on the sex offender registry, however, this offender is registered solely by virtue of a conviction for a violation of §14:89 as it existed prior to the revision. The bill of information, indictment or court minutes in most cases will not distinguish the particular sub-section violated. Moreover, if a plea agreement involves an Alford plea or a plea of *nolo contedere* (where no factual basis is entered into the record), years after this conviction, it would be difficult—if not impossible—for the State to

determine if this individual's offense actually involved facts constituting a violation of CANS, a more serious offense, or a CANS offense involving a minor victim. Identifying and verifying those individuals whose offense is solely the result of facts which constitute CANS is thus quite problematic.

Due to these difficulties, it is quite likely that purging the rolls of sex offenders claiming to have been guilty only of "solicitation" will result in the removal of bona fide predatory sex offenders from the registry.

IV. Conclusion.

The State Defendants respectfully submit the foregoing in support of their original contention that, regardless of the change in the law, plaintiffs have not suffered and are not suffering a violation of the Equal Protection Clause. The law was changed to remove the registration requirement for people convicted of Crimes Against Nature by Solicitation after August 15, 2011. Although this creates two distinct groups of CANS offenders, the law was clearly not changed for an invidious purpose. The State Defendants, thus, reurge their original prayer that the instant suit be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2011, I electronically filed the foregoing using the court's CM/ECF system which will provide a notice of electronic filing to All Counsel of Record. I further certify that all parties are represented by CM/ECF participants.

s/Phyllis E. Glazer
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