

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

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

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Plaintiffs respectfully submit this memorandum of law in support of their motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment against Defendants.

PRELIMINARY STATEMENT

In Louisiana, the solicitation of oral or anal sex for compensation can be prosecuted under two statutes: the Crime Against Nature by Solicitation statute (“CANS”) and the solicitation provision of the Prostitution statute. The two statutes are nearly identical: they include the same elements, require proof of the same intent, and target the same acts. CANS includes no aggravating factor or additional element that does not appear in the Prostitution statute. As a result, individuals charged and convicted under the two statutes are not just similarly situated, they are identically situated. The only difference is that the solicitation provision of the Prostitution statute also prohibits the solicitation of vaginal sex for compensation, whereas CANS does not.

Yet the consequences of a conviction under the two statutes are dramatically different for people convicted prior to August 15, 2011. Until that date, a second or subsequent CANS conviction required registration as a sex offender for fifteen years to life under the Registration of Sex Offenders, Sexually Violent Predators, and Child Predators statute (the “Registry Law”). Before August 15, 2010, a single CANS conviction required sex offender registration. No number of Prostitution convictions has ever required registration.

In September 2011, this Court ruled that Plaintiffs, all of whom were convicted of CANS prior to August 15, 2011, and continue to be required to register as sex offenders solely due to that conviction, made plausible allegations that their rights under the Equal Protection Clause of

the Constitution have been violated as a result of this differential treatment. Plaintiffs are now entitled to summary judgment.

There can be no genuine dispute that individuals convicted of CANS are subject to a classification: though they are situated identically to individuals convicted under the solicitation provision of the Prostitution statute, they alone have been forced to register as sex offenders. As Eisenstadt v. Baird, 405 U.S. 438 (1972), makes clear, there can be no genuine dispute that the classification at issue bears no rational relationship to a legitimate governmental interest. Where the Prostitution statute covers identical conduct yet imposes no registration requirement, no rational basis can exist for the disparate consequences imposed on individuals convicted under CANS as a matter of law. For example, neither of Defendants' purported rationales – public safety or morality – is sufficient to justify the classification. Public safety cannot validate the registration requirement because the Legislature decided that a Prostitution conviction for identical conduct does not warrant registration. Morality alone cannot serve as the governmental interest where, as here, the State is targeting precisely the same conduct under both statutes.

No further inquiry is necessary. The questions presented in this case are purely legal. Because Plaintiffs have established a violation of the Equal Protection Clause as a matter of law, summary judgment should be granted in their favor.

ARGUMENT

SUMMARY JUDGMENT STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted where the moving party “shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Once the moving party has shown that there is an absence of evidence to support the non-moving party's

case, the non-movant must “set forth specific facts showing that there is a genuine issue for trial.” Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986); see also Washington v. Allstate Ins. Co., 901 F.2d 1281, 1285 (5th Cir. 1990). To defeat a motion for summary judgment, the non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts”; it “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)). The non-movant cannot resist summary judgment through “unsubstantiated assertions, improbable inferences, and unsupported speculation,” Brown v. City of Houston, 337 F.3d 539, 541 (5th Cir. 2003), nor through affidavits amounting to “self-serving statements.” Pitts v. Shell Oil Co., 463 F.2d 331, 335 (5th Cir. 1972). If the non-movant fails to make a sufficient showing with respect to an element upon which it “bear[s] the burden of proof at trial[,] . . . the moving party is ‘entitled to a judgment as a matter of law.’” Marathon Fin. Ins., Inc., RRG v. Ford Motor Co., 591 F.3d 458, 466-67 (5th Cir. 2009) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

Moreover, Rule 56 of the Federal Rules of Civil Procedure “does not require that any discovery take place before summary judgment can be granted.” Washington, 901 F.2d at 1285. Summary judgment is appropriate when discovery “is not likely to produce the facts needed . . . to withstand [the] motion for summary judgment.” Id.; see also Barbados Beverages v. Antilles Lloyd, Civ. A. No. 90-3330, 1990 WL 223026, at *3 (E.D. La. Dec. 21, 1990) (Feldman, J.) (granting summary judgment without discovery); Resolution Trust Corp. v. Madison St., Civ. A. No. 89-4212, 1990 WL 130621, at *2 (E.D. La. Aug. 31, 1990) (Feldman, J.) (granting summary judgment prior to the close of discovery). A facial challenge to a statute “do[es] not depend upon the development of a ‘complex and voluminous’ factual record,” and therefore is

particularly amenable to adjudication on summary judgment without discovery. Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493 (1987)) (affirming grant of summary judgment and noting that further discovery was unnecessary to adjudicate a facial challenge to an ordinance); see also Doughten v. State Farm Mut. Auto Ins. Co., No. 01-10269, 2002 WL 261522, at *2 (5th Cir. Feb. 6, 2002) (“Courts should resolve disputed legal issues at summary judgment. . . .”); 10A Charles Alan Wright et al., Federal Practice and Procedure § 2725 (3d ed. 2011) (“[I]f the only issues that are presented involve the legal construction of statutes or legislative history or the legal sufficiency of certain documents, summary judgment would be proper.”).

I. THERE IS NO GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO PLAINTIFFS’ EQUAL PROTECTION CLAIM

A state may not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Equal protection 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); see also John Corp. v. City of Houston, 214 F.3d 573, 577 (5th Cir. 2000); Stefanoff v. Hays Cnty., Tex., 154 F.3d 523, 525-26 (5th Cir. 1998). At a minimum, the Equal Protection Clause demands that any distinction among classes of persons be “rationally related to a legitimate state interest.” Cleburne, 473 U.S. at 440 (citation omitted); see also Eisenstadt, 405 U.S. at 447 (noting that the classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation”) (internal quotation marks and citation omitted). Plaintiffs have demonstrated that there can be no genuine dispute of material fact that the differential consequences imposed for a CANS conviction create a classification, and that such classification bears no rational relation to a legitimate state interest.

A. There Can Be No Genuine Dispute that a Classification Exists

There can be no genuine dispute that a classification exists between those convicted under CANS and those convicted under the solicitation provision of the Prostitution statute. All the evidence needed to establish this fact appears on the face of three statutes: CANS, the solicitation provision of the Prostitution statute, and the Registry Law. CANS and the solicitation provision of the Prostitution statute include the same elements, require proof of the same intent, and outlaw identical conduct. Both statutes target solicitation with the intent to engage in oral or anal intercourse.¹ Compare La. Rev. Stat. § 14:89.2(A) with La. Rev. Stat. § 14:82(A)(2). The CANS statute includes no element or aggravating factor that the Prostitution statute does not. Id. To illustrate, the elements of the two statutes are set forth 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

Individuals charged and convicted under the two statutes are thus identically situated. As this Court has recognized, “the statutory text, the Louisiana Supreme Court’s pronouncements, and common sense” establish that no additional conduct is encompassed by the CANS statute

¹ 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 intercourse. See, e.g., State v. Smith, 766 So.2d 501, 504-05 (La. 2000) (citing State v. Phillips, 365 So.2d 1304, 1305-06 (La. 1978)) (defining unnatural carnal copulation as oral or anal intercourse); see also State v. Vicknair, 52 La. Ann. 1921, 1925 (La. 1900) (same); State v. Long, 133 La. 580, 582-83 (La. 1913) (same); State v. Murry, 136 La. 253, 257-59 (La. 1914) (same). The only difference between the two statutes is that the Prostitution statute also encompasses solicitation of vaginal intercourse.

that is not encompassed by the Prostitution statute. Order and Reasons at 23 (Dkt. #59) (denying Defendants' motion to dismiss Plaintiffs' equal protection claim). Yet the consequences of a conviction under the two statutes are starkly disparate, and thus CANS "works to treat similarly situated individuals differently." John Corp., 214 F.3d at 577; see also People v. Hofsheier, 129 P.3d 29, 41 (Cal. 2006) (finding that persons convicted of oral copulation with minors and persons convicted of sexual intercourse with minors are similarly situated for equal protection purposes).

In spite of this, the State, through its Registry Law, decided to treat persons convicted under CANS differently than persons convicted under the Prostitution statute. Until August 15, 2011, in addition to higher fines and longer periods of incarceration, a CANS conviction required registration as a sex offender for fifteen years to life upon a second or subsequent conviction. See La. Rev. Stat. §§ 14:89.2(C), 15:541. Until August 15, 2010, even a single CANS conviction required registration. See La. Rev. Stat. § 15:541(24)(a) (2009). By contrast, no number of Prostitution convictions has ever required registration. See La. Rev. Stat. § 15:541 (2011). Imposition of this requirement on individuals convicted under CANS is not a distinction without consequence; it involves payment of annual registration fees, La. Rev. Stat. § 15:542(D), extensive community notification obligations, La. Rev. Stat. § 15:542.1, the requirement that registrants carry a driver's license and state-issued identification card that prominently feature the words "sex offender" in bright orange capital letters, La. Rev. Stat. § 40:1321(J), and adherence to separate evacuation protocols in the event of an emergency. La. Rev. Stat. § 15:543.2. Identically-situated individuals are treated dramatically differently.²

² Though the Legislature recently determined that the two offenses must be treated identically going forward, see 2011 La. Sess. Law Serv. Act 223 (H.B. 141) (West), the recent

The rule of Vacco v. Quill, 521 U.S. 793 (1997), “that States must treat like cases alike,” requires a finding that the registration requirement imposed on individuals convicted of CANS, but not Prostitution, creates an impermissible classification. Id. at 799. Because the classification at issue can readily be discerned from the face of CANS, the Prostitution statute, and the Registry Law, there is no genuine issue of fact regarding the existence of a classification, and summary judgment is appropriate. See Hang On, 65 F.3d at 1253; 10A Charles Alan Wright et al., Federal Practice and Procedure § 2725 (3d ed. 2011).

B. There Can Be No Genuine Dispute that the Classification Bears No Rational Relation to a Legitimate State Interest

There can also be no genuine dispute that the classification at issue serves no legitimate governmental purpose. Where CANS and the solicitation provision of the Prostitution statute share identical elements and punish identical conduct, the State cannot possibly advance any legitimate rationale for requiring those convicted of CANS, but not Prostitution, to register as sex offenders. 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. See 405 U.S. at 454.

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. The Court explained: “In

amendments are not retroactive, and identically-situated individuals continue to be treated differently under these laws.

each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.” Id. at 454. In other words, where the State, for whatever reason, had not asserted an interest in prohibiting married persons from using contraception, it could not, 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, as a matter of law, 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 and prohibit the same criminal conduct. The targeted “evil, as perceived by the state, [is] identical.” Id. 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 is precisely the kind of invidious underinclusion that Eisenstadt prohibits. This would be true for any set of facts, but is particularly so when the only discernible reason for treating the two offenses differently is rooted in illicit moral animus. See 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. . . .”).

Defendants have advanced two rationales for the disparate treatment under CANS and the Prostitution statute: public safety and morality. See Defendants’ Memorandum of Law in Support of their Motion to Dismiss (“Defs.’ MTD”) at 14-15. Given the pronouncement in

Eisenstadt, neither is sufficient as a matter of law, and they simply serve to illustrate why there can be no legitimate rationale for the classification.

1. Public Safety Cannot Be the Rationale for the Disparate Treatment Under CANS and the Prostitution Statute

Defendants argue that the requirement that people convicted of CANS register as sex offenders was enacted as a public safety measure. See Defs.’ MTD at 14-15. This argument fails as a matter of law and logic. Public safety considerations cannot possibly justify the registration requirement because the Legislature decided that a Prostitution conviction for identical conduct does not warrant sex offender registration. See Eisenstadt, 405 U.S. at 454. When CANS went into effect, Louisiana had already enacted the Prostitution statute to protect the “health and safety of the general public.” State v. Forrest, 439 So. 2d 404, 407 (La. 1983). Because CANS – like the contraceptive law in Eisenstadt – was “not required” to achieve public safety objectives (which were already addressed by the solicitation provision of the Prostitution statute covering the exact same conduct), it follows that public safety cannot serve as the rationale for the statute. See Eisenstadt, 405 U.S. at 452 (rejecting the argument that public health was the objective of the contraceptive law because “[i]f that was the Legislature’s goal, [the contraception law at issue] is not required,” in light of laws already in effect). Therefore, public safety is not a legitimate rationale for the differential treatment at issue here.

2. Morality Cannot Be the Rationale for the Disparate Treatment

Nor can Defendants’ other alleged rationale for the disparate treatment under CANS and the Prostitution statute – namely, morality – serve as a legitimate state interest. See Defs.’ MTD at 12-15. In Eisenstadt, the Supreme Court rejected various purported governmental rationales for the distinction, including public health and the deterrence of premarital sex. Left with morality as the only possible justification, the Court found that “whatever the rights of the

individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike.” Eisenstadt, 405 U.S. at 453. In other words, morality could never justify a regulation that treated similarly-situated groups differently because “[i]n each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.” Id. at 454; see also Lawrence, 539 U.S. 558 at 582 (O’Connor, J., concurring) (“[W]e have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”); Romer v. Evans, 517 U.S. at 620, 634 (1996)(noting that a “bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”) (citation omitted).

These principles have been consistently applied in equal protection cases analyzing statutes that punish similarly-situated individuals differently. As this Court observed, the Supreme Court held as early as 1942 that imposing different restrictions on those who committed the same type of offense violates the Equal Protection Clause. See Order and Reasons at 24, n.20 (Dkt. #59) (denying Defendants’ motion to dismiss Plaintiffs’ equal protection claim) (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-42 (1942) (“When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. . . . The equal protection clause would . . . be a formula of empty words if such conspicuously artificial lines could be drawn.”)).

In an analogous situation, the California Supreme Court applied this same analysis. See People v. Hofsheier, 129 P.3d 29, 38-42 (Cal. 2006). 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 basis 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. This analysis applies with even greater force in the present case, because the conduct targeted by the Prostitution and CANS statutes is not similar, but the same. The inquiry can thus end here.³

As a matter of law, there can be no legitimate purpose for the registration provision at stake here. The State cannot have an interest in requiring those convicted of CANS, but not Prostitution, to register as sex offenders. Accordingly, Plaintiffs have demonstrated that there can be no genuine dispute that requiring those convicted of CANS to register as sex offenders does not serve a legitimate state interest. Thus, Defendants are unable to make a “showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 317-18 (“[A] complete failure of

³ Additionally, Plaintiffs have demonstrated that the CANS statute, and the greater punishment associated with a CANS conviction, is rooted only in moral animus towards non-procreative sex acts traditionally associated with homosexuality. There is no question of material fact with respect to this point because, in the course of declaring sodomy statutes unconstitutional, the Supreme Court has already held that “early American sodomy laws . . . sought to prohibit non-procreative sexual activity,” and that the purpose of such statutes in the “last third of the 20th century” was to target and penalize homosexuality. *Lawrence*, 539 U.S. at 568, 570. It is a matter of public record that the CANS statute was adopted in 1982, precisely in this latter context, and singled out solicitation of oral or anal sex for much harsher penalties than those already imposed for the same conduct under the existing Prostitution statute. *See* 1982 La. Sess. Law Serv. Act 703 (H.B. 853). The Supreme Court has held on multiple occasions that moral animus of this kind is not a legitimate governmental rationale that can justify a discriminatory law of this nature. *See, e.g., Eisenstadt*, 405 U.S. at 443; *Lawrence*, 539 U.S. at 577-78 (“[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 prohibiting the practice.”).

proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."'). The question of whether a legitimate governmental purpose underlies the different treatment of identically situated individuals convicted under the CANS and Prostitution statutes is purely legal in nature, and ripe for summary judgment. See Anderson, 477 U.S. at 250 (stating that summary judgment should be granted "if the moving party is entitled to judgment as a matter of law"); see also 10A Charles Alan Wright et al., Federal Practice and Procedure § 2725 (3d ed. 2011) ("[W]hen the only issues to be decided in the case are issues of law, summary judgment may be granted. . . .").

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

Based upon the face of the relevant statutes, there is no genuine dispute that a classification exists between individuals convicted under CANS and those convicted under the solicitation provision of the Prostitution statute and that no legitimate purpose exists for the classification at issue. Therefore, Plaintiffs are entitled to judgment as a matter of law that such a distinction is arbitrary and bears no rational relationship to a legitimate governmental interest. See, e.g., W.H. Scott Constr. Co., Inc. v. City of Jackson, 199 F.3d 206, 220 (5th Cir. 1999) (affirming district court's grant of summary judgment to plaintiffs in their equal protection challenge).

CONCLUSION

For the reasons stated above, Plaintiffs have established a violation of the Equal Protection Clause as a matter of law, and summary judgment should be granted in their favor.

DATED: October 31, 2011

Respectfully submitted,

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