

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

JOHN DOE 1, et al.,)	CASE NO: 23-cv-H-02-0089
)	
Plaintiffs,)	
)	
vs.)	
)	JUDGE: DAVID M. GORMLEY
CITY OF COLUMBUS, et al.,)	
)	
Defendants.)	
)	

**REPLY OF PLAINTIFFS' TO DEFENDANTS' MEMORANDUM CONTRA TO
MOTION FILED FEBRUARY 24, 2023.**

Introduction

Plaintiffs reply to the Defendants' Memorandum Contra ("Mem. Contra") to Plaintiffs' Motion for Leave to Proceed Pseudonymously filed on February 24, 2023. Plaintiffs brought this action to protect themselves from arrest and prosecution pursuant to an unlawful and unconstitutional law. Plaintiffs filed the Complaint pseudonymously to prevent the disclosure of their names and addresses to the very entities that would prosecute them. Despite ongoing threats from Defendant Klein that he will prosecute violators, such as the Plaintiffs, Defendants demand that the Plaintiffs reveal their names and addresses. This is intolerable, and Plaintiffs respectfully request that the Court grant their motion to proceed pseudonymously.

Law and Argument

I. Ohio recognizes the right of litigants to file a cause of action pseudonymously.

Defendants' Mem. Contra ignores the plain fact that "[t]he practice of proceeding under a pseudonym is well established in Ohio * * *." *Doe v. Bruner*, 12th Dist. Clinton No. CA2011-07-013, 2012-Ohio-761, ¶ 4. And Defendants ignore the Ohio Supreme Court's holding that a court

may excuse a plaintiff from self-identifying in certain situations. *State ex rel. Cincinnati Enquirer v. Shanahan*, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, ¶ 36.

Defendants demand that instead of proceeding pseudonymously, Plaintiffs should “simply disclose their identities to the court or to the defendants.” Mem. Contra at 3. Really? The Plaintiffs filed pseudonymously specifically to avoid disclosing their names to the Defendants—the very parties that have vowed to enforce the subject laws. And Defendants’ alternative suggestion of a protective order, *id.*, also fails to address this very concern. Plaintiffs’ motion to proceed pseudonymously is consistent with the Ohio Supreme Court’s pronouncements on this issue; Defendants’ disclosure demands are not.

II. Defendants do not attempt to counter the majority of the factors for determining whether to grant a motion to proceed pseudonymously.

Defendants claim that the Court has no jurisdiction to hear a case with anonymous plaintiffs, Mem. Contra at 3, but then contradictorily admit that the Ohio Supreme Court recognized courts do have such jurisdiction. Mem. Contra at 4–5. Defendants concede that the Court in *Shanahan* referenced “numerous factors that may be relevant * * *.” *Id.* at ¶ 36, citing *Doe v. Porter*, 370 F.3d558, 560–561 (6th Cir.2004); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2nd Cir.2008). Defendants do not contest the relevant factors to proceed pseudonymously. All of these factors militate in favor of Plaintiffs’ proceeding pseudonymously, evidenced by Defendants’ failure even to attempt to address many of them. Defendants apparently concede that

- the suit is challenging the actions of the government, not private parties;
- the Plaintiffs’ identities have been kept confidential; and

- because of the purely legal nature of the issues presented, there is an atypically weak public interest in knowing the litigants' identities.¹

Sealed Plaintiff at 190.

But Defendants speculate that “[f]or all we know, these Plaintiffs may not even exist, they may not reside in the City of Columbus, and they may not even own any of the magazines at issue in this case.” Mem. Contra at 4. But this speculation—contradicted by sworn affidavits and pleadings signed by four attorneys subject to Rule 11—is inadequate to overcome the legitimate need for anonymity. Defendants also assert that “[t]he City, as a Defendant, has every right to serve discovery upon and depose these Plaintiffs in order to test the veracity of their claims. Simply refusing to release their identity to anyone * * * deprives the City of its rights to conduct appropriate discovery.” As the Second Circuit noted, the court should consider “whether the nature of that prejudice (if any) differs at any particular stage of the litigation * * *.” *Sealed Plaintiff* at 190. If discovery ever becomes necessary, the parties can address that issue at that time. The present issue is if the Court can address the legal issues presented in the Complaint with the Plaintiffs appearing pseudonymously. Releasing Plaintiffs’ names will not aid Defendants in defending the challenged code provisions.

The Second Circuit also identified as a factor whether “identification presents harms and the likely severity of those harms, including whether ‘the injury litigated against would be incurred as a result of the disclosure of the plaintiff’s identity.’” *Sealed Plaintiff* at 190 (internal citations omitted). Defendants also acknowledge that under *Shanahan*, a plaintiff may proceed anonymously if he or she has a “fear of retaliation” resulting from the filing of the lawsuit.

¹ Defendants confusingly claimed in their memorandum contra Plaintiffs’ motion for an injunction that Plaintiffs have not made factual allegations that they own 30-round magazines despite the fact that both the Complaint and Plaintiffs’ attached affidavits explicitly stating such. See Post-Hrg. Br. & Mem. Contra of Defs. to Pls.’ Mot. for TRO & Prelim. Inj. filed February 16, 2023, at 9. Yet, Defendants seemingly agree that the case revolves around “the purely legal nature of the issues presented.” *Id.*

Shanahan, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089, at ¶ 37. These are two distinct—but similar—factors, either of which can be used to allow Plaintiffs to proceed pseudonymously. Both apply here.

Defendants assert that as a result of the amendments to the relevant code provisions, the Plaintiffs we will not be harmed if they are identified. Supposedly they need not fear arrest and prosecution because they would not be prosecuted until July 1, 2023. Mem. Contra at 5. Of course, that is nonsensical—if Plaintiffs disclose their names now, Defendants will have their names in July and Plaintiffs will be subject to prosecution at that time.

In the same vein, in *Shanahan*, the court followed the Ninth Circuit’s factors that courts should consider when there is a threat of retaliation. *Shanahan* at ¶ 38. Those factors are: “(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party’s fears, and (3) the anonymous party’s vulnerability to such retaliation.” *Id.*, quoting *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir.2000) (internal quotation marks omitted).

Here, the harm is severe—it is a mandatory six-month incarceration and a \$1,500 fine. Columbus City Code 2323.32, Compl. Ex. A at 5–6. It is exceptionally reasonable for the Plaintiffs to fear prosecution because Defendants have submitted evidence of the ordinance being enforced. Prelim. Inj. Hr’g Defs.’ Ex. 3. Because of Plaintiffs’ affidavits admitting to possessing 30-round magazines within the city, the release of their names and addresses makes them especially vulnerable to prosecution by the city. Further, the Defendants have threatened to enforce the law—both before and after the passage of the February 28, 2023, amendment.

Defendants’ claim that the new “immunity from prosecution” provision removes any threatened harm to Plaintiffs is incorrect on several levels. First, this provision does not stop the immediate enforcement of code section 2323.191 (the safe storage provision) and related code

sections 2303.05 and .14. Second, it does not stop the city from enforcing 2323.32 (the magazine ban) right now. The Defendants may still arrest and prosecute Plaintiffs or others at any moment. The new part of Columbus City Code 2323.23 precludes prosecution of persons who “acquired or possessed a large capacity magazine prior to December 5, 2022 * * *.” This still allows Defendants to arrest—right now—persons caught with 30-round magazines. The issue in any prosecution would be if the arrestee acquired the magazines prior to December 5, 2022.

Third, Defendants have made their intent to prosecute clear. At the preliminary injunction hearing, Defendants presented evidence that they were enforcing the challenged safe storage provision. Plaintiffs are challenging this provision because it is relevant to at least one Plaintiff. *See* Am. Compl. Ex. G. Further, after passing the new ordinance on February 28, 2023, a spokesman for Defendant Klein stated, “we’re requesting the drafted changes after seeing *how the ordinances are* and could be practically applied and *enforced*.” (Emphasis added.) Mark Ferenchik, *Council: Owners of large gun magazines in Columbus have until July 1 to sell or move them*, The Columbus Dispatch (Feb. 28, 2023), <https://www.dispatch.com/story/news/local/2023/02/28/owners-of-large-gun-magazines-in-columbus-have-until-july-to-dump-them/69950080007/>.

Then, on March 8, 2023, Defendant Klein again threatened enforcement against violators, including the Plaintiffs, asserting that “[w]e’ll enforce [the magazine ban] by seeing it on site [sic].” Mark Ferenchik and Eric Lagatta, *Columbus gun owners wary of city’s new ammunition restriction*, The Columbus Dispatch (Mar. 8, 2023), <https://www.dispatch.com/story/news/local/2023/03/08/columbus-gun-owners-wary-of-citys-new-ammunition-restriction/69958312007/>. If the Plaintiffs’ names are disclosed as Defendants’

request, Plaintiffs' admissions are a more obvious display of violation of the magazine ban than someone walking down the street and the "police see[ing] those types of gun magazines." *Id.*

In stark contrast to the facts here, in *Shanahan*, the court denied permission to proceed pseudonymously because (1) M.R. had not been threatened, (2) M.R.'s name had previously been released; (3) that there was no causal connection between the filing of the lawsuit and the threatened harm; and (4) M.R. did not show that his concerns were reasonable. *Shanahan*, 166 Ohio St.3d 382, 2022-Ohio-448, 185 N.E.3d 1089 at ¶¶ 37–42. For all of these reasons previously discussed, this case is completely different.

The foregoing demonstrates that the Plaintiffs need to protect their identities—not from third parties as in *Shanahan*—but from the Defendants themselves.

III. Pseudonymous filing is not a jurisdictional issue.

Defendants have argued that this court does not have subject matter jurisdiction to entertain this action because Plaintiffs filed pseudonymously. Mem. Contra. at 3. But Defendants contradict this statement by citing multiple cases where the courts have allowed actions to proceed pseudonymously. *See, e.g.*, Defs.' Mot. to Dismiss at 6–7. And Defendants contradict their own claims by stating that "Plaintiffs of course are free to dismiss this lawsuit and refile it appropriately under pseudonyms on or after July 1st, if they wish to do so." Mem. Contra at 7.

Defendants rely solely on federal case law interpreting federal jurisdiction for their lack of jurisdiction claim. *Id.* at 3, relying on *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 636 (6th Cir.2005). Even so, Defendants misquote the case. In reality, *Marsh* specifically stated, "Plaintiffs are permitted to proceed under pseudonyms" upon a proper showing. *Id.* at 636 (citing *Porter*, 370 F.3d at 560). Similarly, Defendants' other cited case explained that "courts have permitted a plaintiff to proceed using a fictitious name where there are significant privacy interests

or threats of physical harm implicated by the disclosure of the plaintiff's name.” *Nat’l Commodity & Barter Ass’n, Nat’l Commodity Exch. v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir.1989).

This court has jurisdiction over all claims except those specifically prohibited by the legislature, and the General Assembly has not prohibited pseudonymous filings. Defendants’ jurisdiction claims are baseless.

Defendants also claim that Plaintiffs should have sought leave prior to filing anonymously. *Id.* at 4. Even if it were possible for Plaintiffs to seek leave prior to filing their Complaint,² Defendants provide no legal support for the contention that the subject motion was untimely. In any event, Defendants’ arguments are moot. On March 10, 2023, Plaintiffs filed their Amended Complaint. The Amended Complaint was filed after the subject motion. As such, any alleged timeliness issue is moot. *See, e.g., Hughes v. Portage Cnty.*, 11th Dist. Portage No. 2020-P-0012, 2020-Ohio-6809, ¶ 17–25 (finding that trial court erred when denying motion for leave to amend where amended complaint would cure allegations raised in motion to dismiss); *Barnes v. Beachwood*, 8th Dist. Cuyahoga No. 87100, 2006-Ohio-3948, ¶ 11 (finding motion to dismiss moot because of timely filed amended complaint).

IV. Conclusion

Accordingly, Plaintiffs’ request for leave to proceed pseudonymously should be granted.

Respectfully submitted,

/s/ David C. Tryon

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² Defendants’ fail to explain how a plaintiff can file a motion in a case that has yet to be filed. Before filing a motion there must be a complaint followed by the Clerk of Courts assigning a case number. Only after a case is filed, can a party submit a motion for the court to take action. Defendants’ assertion is contrary to the practice of this court.

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing Reply of Plaintiffs' to Defendants' Memorandum Contra to Motion Filed February 24, 2023 has been served by operation of this Court's electronic filing system this 17th day of March 2023.

/s/ David C. Tryon

David C. Tryon