

DISTRICT COURT, NINETEENTH JUDICIAL DISTRICT

Court Address: Weld County Courthouse
901 9th Ave.
Greeley, CO 80631

In re Search of Amalia's Translation and Tax Service;

and

Amalia Cerrillo,

Luis Noriega, on behalf of himself and as class representative,

John Doe, on behalf of himself and as class representative,

Frank Doe, on behalf of himself and as class representative,

Robert Doe, on behalf of himself and as class representative

Plaintiffs

v.

Kenneth R. Buck, in his official capacity as District Attorney
for the Nineteenth Judicial District;

John Cooke, in his official capacity as Weld County Sheriff

Defendants.

▲ COURT USE ONLY ▲

Case No. _____

Div. _____

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PLAINTIFFS' MOTION TO PROCEED UNDER PSEUDONYMS

Plaintiffs John Doe, Frank Doe and Robert Doe (collectively, the "Doe Plaintiffs"), by and through their attorneys, respectfully move this Court for an Order permitting them to proceed in this civil action under pseudonym. As grounds for their motion, the Doe Plaintiffs state as follows:

C.R.C.P. 121 § 1-15(8) Certification: This motion is filed in connection with PLAINTIFFS' MOTION FOR RETURN OF PROPERTY PURSUANT TO COLO.R.CRIM.P. 41(E) AND FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION. The duty to confer is inapplicable at this stage of the proceedings. As soon as practicable, Plaintiffs' counsel will confer with Defendants' counsel regarding the relief sought in this motion. After conferral, Plaintiffs' counsel will file a separate certificate advising the Court as to Defendants' position regarding the relief sought by the Doe Plaintiffs in this motion.

INTRODUCTION

1. The Doe Plaintiffs are persons whose confidential and private information was seized from Plaintiff Amalia Cerrillo and retained by the Defendants. The Doe Plaintiffs allege that Defendants' acts violate their constitutional rights, and they seek prospective relief and relief under Colo.R.Crim.P. 41(e).

2. The Doe Plaintiffs wish to proceed anonymously due to their legitimate belief and fear that if their identities are revealed, they and their families, including their minor children, will suffer serious retaliatory mental and physical harm.

3. This action turns primarily on questions of law and of undisputed facts regarding Defendants' search and seizure of taxpayer files maintained at Ms. Cerrillo's office. The Doe Plaintiffs were not present at the search, and knowledge of their actual identities is not necessary to adjudicate the claims or defenses in this case. Therefore, the Doe Plaintiffs' request to proceed under pseudonym will cause no prejudice or unfairness to the Defendants.

4. Thus, the balance of interests weighs heavily in favor of permitting the Doe Plaintiffs to proceed anonymously.

ARGUMENT

5. The Colorado and federal courts have long permitted plaintiffs to proceed anonymously where there are significant privacy interests or threats of harm implicated by the public disclosure of a plaintiff's name. *E.g. Evans v. Romer*, 854 P.2d 1270 (Colo. 1993)

(plaintiff “Jane Doe”); *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. Ct. App. 1998); *Plyer v. Doe*, 457 U.S. 202 (1982); *Roe v. Wade*, 410 U.S. 113 (1973).

6. In *Doe v. Heitler*, 26 P.3d 539, 541 (Colo. App. 2001), the court explained that a plaintiff may proceed under pseudonym whenever she “has a substantial privacy right that outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings.” (citing *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981) (internal quotation marks omitted)).

7. The *Heitler* court identified a non-exhaustive list of factors relevant to this inquiry. Of importance to this case are: a) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties; b) whether the action is against a governmental or a private party; and c) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. *Id.* at 541 (citing *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993)); *Doe v. Shakur*, 164 F.R.D. 359 (S.D.N.Y. 1996). All of these factors weigh heavily in favor of permitting the Doe Plaintiffs to proceed anonymously.

A. Disclosure of The Doe Plaintiffs' Identity Poses a Risk of Retaliatory Physical or Mental Harm.

8. Disclosure of the Doe Plaintiffs' identities poses a significant and real threat of mental and physical retaliation against them and their families. Many members of the Greeley and Weld County communities have stated their position on the issue of immigration in a respectful and non-threatening manner. Other community members, however, have chosen aggressive and hostile means of communicating their disagreement with the presence of immigrants in Weld County.¹ Even members of the Weld County District Court have acknowledged recently that immigration has become a highly-charged issue in the community. *See Weld County DA in Court to Explain Warrants' Merit*, KWGN TV (December 29, 2008) (“‘Using the term immigration these days is akin to yelling shark at a beach. It's going to garner attention,’ [Weld County District Court Judge] Hartmann said.”). *See also Ousted Greeley Mayor Says Immigration Anger Blindsided Him*, Colorado Confidential (November 16, 2007) (describing Weld County as “a case study of the social conflict and ethnic divisions sown by what has become a bitter national debate”).²

¹ One need only read internet comments posted in response to the Greeley Tribune articles related to Operation Number Games and other immigration issues to get a sense of this hostility.

² The Defendants' actions are contributing to the intense and aggressive nature of the debate in Weld County:

Tuesday's immigration forum arranged by Weld County District Attorney Ken Buck was orchestrated to play on the worst fears of residents anxious about changes to their community ... On the one hand, Buck has repeatedly

9. In this uniquely antagonistic and hostile setting, this factor by itself merits permitting the Doe Plaintiffs to proceed anonymously. *See Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (affirming order granting plaintiffs leave to proceed anonymously to shield them from “considerable harassment”); *Stegall*, 653 F.2d at 186 (affirming order granting anonymity when “Does may expect extensive harassment and perhaps even violent reprisals if identities are disclosed to a ... community hostile to the viewpoint reflected in plaintiffs’ complaint”); *Doe v. Barrow*, 219 F.R.D. 189 (N.D. Ga. 2003) (plaintiffs fear of retaliation against themselves and their family sufficient to permit plaintiffs to proceed anonymously).

10. In the specific context of hostility related to immigration status, courts have allowed plaintiffs to pursue civil actions anonymously. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1071 1073 (9th Cir. 1999) (reversing district court’s denial of leave to proceed anonymously when immigrants faced “deportation, arrest and imprisonment”); *Lozano v. City of Hazelton*, 496 F.Supp.2d 477, 507-515 (M.D. Pa. 2007) (shielding identities of undocumented immigrants who would be “intense targets of anti-immigrant and anti-Latino sentiment,” and finding that anonymity serves “public’s interest in testing the constitutionality of such ordinances”).

11. As the court in *Lozano* explained, allowing plaintiffs who cannot safely reveal their identity to participate anonymously often advances society’s interest in testing the legitimacy of government action:

A venerable principle of constitutional law holds that all persons in the United States have rights under the Fourteenth Amendment to the United States Constitution, whether they are citizens or not. . . The Doe plaintiffs’ interest in this case is in vindicating rights they claim are guaranteed them under the Constitution, and those rights exist whatever their status under the nation’s immigration laws.

Id. at 514 (citing *Plyer v. Doe*, 457 U.S. 202 (1982), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

acknowledged publicly that only a small fraction of illegal immigrants commit crimes — beyond their unauthorized entry into this country. On the other, he attempted to whip up a crowd of 600 that gathered at an auditorium Tuesday night by flashing a slide show of photos of Hispanic men and the crimes they’ve committed. It was accompanied by an “ominous soundtrack,” according to a Rocky Mountain News story. Coupled with a Weld County Sheriff’s Color Guard presentation and a recitation of the Pledge of Allegiance, the mood was cast for an us-versus-them event.

Fears Exploited at Immigrant Forum: Weld County DA Ken Buck Attempted to Whip Up a Crowd of 600 Mostly White Residents by Calling Out The Crimes of Illegals, Denver Post (September 20, 2007).

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12. Many of the Doe Plaintiffs' fellow community members are virulently "hostile to the viewpoint reflected in plaintiffs' complaint." *See Stegall*, 653 F.2d at 186. There is no doubt that the Doe Plaintiffs, and perhaps also their employers, would be subject to "considerable harassment" and possibly even "violent reprisal" if their identities were revealed. *Id.* In addition to harassment directed at the Doe Plaintiffs themselves, they have a justifiable fear that their minor children may be targets of harassment. *See Jacobson*, 6 F3d. at 241 (parents allowed to proceed anonymously to prevent risk of harm to their children).

B. The Action Is Against The Government, Not A Private Party

13. The second factor identified by the court in *Heitler* also weighs in favor of granting anonymity, as the Plaintiffs in this case are suing the government, not private parties, in order to vindicate important constitutional rights. *See Shakur*, 164 F.R.D. at 361 n.1 ("Whether the defendant is a government entity or a private defendant is significant because governmental bodies do not share the concerns about reputation that private individuals have when they are publicly charged with wrongdoing.") (internal quotation marks omitted).

C. There Is No Unfairness to The Defendants or The Public in Allowing The Doe Plaintiffs to Proceed Anonymously.

14. Finally, allowing the Doe Plaintiffs to proceed anonymously will not cause any prejudice to the Defendants. In this action, the Doe Plaintiffs challenge the constitutionality of the seizure and retention of their confidential records from Ms. Cerrillo's tax preparation office. Adjudication of the claims will involve legal analysis of largely undisputed facts regarding the constitutionality of the search warrant and the nature and scope of the search. The Doe Plaintiffs were not present at the search, and their actual identities are not relevant to the claims or defenses in this case. *See Lozano*, 496 F. Supp. at 512 (case "will be decided largely by answering legal questions ... [and thus] does not turn on the particular facts of the plaintiffs' experience with the law"). Defendants will suffer no prejudice by not knowing the Doe Plaintiffs' true identities.³

15. In addition, the public's interest in the openness of the judicial proceedings can be fully and fairly satisfied by the fact that all other proceedings will be open to the public and to the media. *Barrow County*, 219 F.R.D. at 193 ("Plaintiff seeks only to keep his name private. The resolution of the underlying constitutional issue in this case ... will be decided in an open

³ Leave granted now to the Doe Plaintiffs to proceed anonymously can be revisited at any time during the proceedings if necessary. *E.g. Advanced Textile Corporation*, 214 F.3d at 1072 ("at some later point in the proceedings it may be necessary to reveal plaintiffs' identities to defendants" but finding no current prejudice).

and public forum."); *Doe v. Provident Life and Accident Insurance Company*, 176 F.R.D. 464 (E.D. Pa. 1997) ("Doe's use of a pseudonym will not interfere with the public's right or ability to follow the proceedings. Indeed, this Court intends to keep the proceeding open to the public while still maintaining the confidentiality of plaintiff's identity.").

16. In addition to seeking leave to proceed as named parties under pseudonym, the Doe Plaintiffs also request leave of the Court to file affidavits in support of this MOTION TO PROCEED UNDER PSEUDONYMS and in support of their MOTION FOR RETURN OF PROPERTY PURSUANT TO COLO.R.CRIM.P. 41(E) AND FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION under pseudonym.⁴ *See Choice, Inc. of TX v. Graham*, 226 F.R.D. 545, 548 (E.D. La. 2005) (court permitted "unidentified plaintiffs to sign the affidavits attached to the Petition for Injunction in pseudonyms").

CONCLUSION

17. The Doe Plaintiffs have "a substantial privacy right that outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings." *Heitler*, 26 P.3d at 541. The balance of interests clearly weighs in favor of permitting the Doe Plaintiffs to proceed anonymously.

WHEREFORE, the Doe Plaintiffs respectfully request an Order of the Court granting their Motion to Proceed under Pseudonyms.

⁴ Alternatively, if the Court directs, the Doe Plaintiffs can submit signed under their actual names to the Court for in camera review and/or under seal, subject to the protections and procedures of C.R.C.P. 121 § 1-5 and C.R.C.P. 26.

Respectfully submitted on January 26, 2009.

JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC

This document has been filed via Lexis/Nexis File & Serve in accordance with C.R.C.P. 121 and the original document and signature are maintained on file.

s/Elizabeth L. Harris

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