

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

FALLS CHURCH MEDICAL CENTER, LLC *et al.*,

Plaintiffs,

v.

M. NORMAN OLIVER, *et al.*,

Defendants.

CASE NO: 3:18-cv-428-HEH

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A
PROTECTIVE ORDER FOR DR. JANE DOE TO PROCEED UNDER PSEUDONYM**

As described in the Complaint, Plaintiffs challenge certain abortion restrictions in the Commonwealth of Virginia under the Fourth and Fourteenth Amendments of the United States Constitution. Dr. Jane Doe is a physician licensed to practice medicine in Virginia who is trained to and currently provides abortion care. In joining this lawsuit, Dr. Doe seeks to bring claims on behalf of herself and her patients. However, because abortion providers and advocates are often targets of harassment, intimidation, and violence, she reasonably fears disclosing her identity in the public realm.

Accordingly, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Dr. Doe respectfully moves this Court for a protective order placing her identity under seal and permitting her to proceed in this litigation using a pseudonym.¹ Defendants represented by the Office of the Attorney General neither oppose nor consent to the motion.²

¹ If the proposed Protective Order is entered, Plaintiffs will disclose Dr. Doe's identity under seal to the Court and to Defendants to allow them to prepare a defense and propound discovery.

² Over several days, counsel for Plaintiffs made multiple good faith efforts to confer with Defendant Robert Tracci, who failed to respond to any correspondence.

BRIEF STATEMENT OF FACTS

This is a declaratory judgment and permanent injunction action by (i) Falls Church Medical Center, LLC d/b/a Falls Church Healthcare Center; (ii) Whole Woman’s Health Alliance; (iii) All Women’s Richmond, Inc. d/b/a A Capital Women’s Health Clinic; and (iv) Virginia League for Planned Parenthood, each on behalf of its patients, physicians, and staff, to declare unconstitutional the Licensing Statute, Va. Code Ann. § 32.1-127(B)(1); the entirety of the Licensing Regulations, 12 Va. Admin. Code § 5-412 *et seq.*; the Hospital Requirement, Va. Code Ann. § 18.2-73; the Physician-Only Law, Va. Code Ann. § 18.2-72; and the Two-Trip Mandatory Delay Law, Va. Code Ann. § 18.2-76, in conjunction with the Criminalization Laws, on their face and/or as applied and enforced by Defendants, and to enjoin Defendants from enforcing them. Dr. Jane Doe, on behalf of herself and her patients, seeks to join this action under pseudonym.

DISCUSSION

Courts in the Fourth Circuit have recognized that there are “compelling concerns relating to personal privacy or confidentiality [that] may warrant some degree of anonymity in judicial proceedings, including use of pseudonym.” *Doe v. Public Citizen*, 749 F.3d 246, 273 (4th Cir. 2014). In determining whether to allow a party to proceed under a pseudonym, a court must balance “the party’s stated interest in anonymity against the public’s interest in openness and any prejudice that anonymity would pose to the opposing party.” *Id.* at 274. To assist with this inquiry, the Fourth Circuit has identified the following non-exhaustive list of relevant factors: “(1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; (3) the ages of the persons whose

privacy interests are sought to be protected; (4) whether the action is against a governmental or private party; and (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.” *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993).

Applying these factors, district courts in the Fourth Circuit have allowed the use of pseudonyms to protect an individual’s identity. *See, e.g., Doe v. The Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d 583, 593 (E.D. Va. 2016) (allowing pseudonym where plaintiff was accused of sexual misconduct); *Nelson v. Green*, No. 3:06cv00070, 2007 WL 984127 (W.D. Va. Mar. 28, 2007) (allowing pseudonyms for plaintiff and his family members where plaintiff sued state agency for constitutional violations and malicious prosecution based on an allegation that plaintiff sexually abused his daughter); *Yacovelli v. Moeser*, No. 1:02cv596, 2004 WL 1144183, *6-9 (M.D.N.C. May 20, 2004) (allowing students to proceed by pseudonym in a challenge to University’s orientation program under the Establishment Clause and the Free Exercise Clause).

In this case, four of the five *Jacobson* factors weigh heavily in favor of allowing Dr. Doe to proceed under a pseudonym, and the remaining factor is inapplicable.³

I. Abortion is a Highly Personal and Sensitive Matter.

The first *Jacobson* factor—whether plaintiffs seek to proceed anonymously to “preserve privacy in a matter of sensitive and highly personal nature”—weighs in favor of allowing Dr. Doe to proceed anonymously. Plaintiffs and Dr. Doe challenge abortion statutes and regulations on behalf of their patients seeking abortions—a highly sensitive and personal reproductive decision. Abortion is the type of personal intimate subject matter that courts typically accept as justifying

³ The third factor in *Jacobson*, the age of the person seeking privacy protections, does not weigh for or against allowing Dr. Doe to proceed under pseudonym because all parties to this case are adults.

anonymity for litigating parties. *See, e.g., Doe v. Merten*, 219 F.R.D. 387, 392 (E.D. Va. 2004); *see also id.* n.16 (listing cases).

Moreover, Dr. Doe is specifically concerned with her own safety, as well as the safety of her family members, because of the politically charged nature of abortion and the provision of the abortion. *See Doe Decl.* ¶¶ 3-4. Openly disclosing, by name, that she is an abortion provider would reveal personal beliefs and practices of a sensitive and highly personal nature. *See Doe Decl.* ¶¶ 1-2.

II. Disclosing Dr. Doe's Identity Will Place Her at Risk of Retaliatory Harm.

The second *Jacobson* factor—risk of retaliatory harm—also weighs in favor of allowing Dr. Doe to proceed anonymously. Dr. Doe is not merely concerned that her participation in this lawsuit will result in annoyance or criticism, but rather has a reasonable fear of harassment, intimidation, and physical harm to herself and members of her family if her identity is disclosed. *Id.* ¶¶ 3-7; *see also Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). This fear is based on a history of harassment, intimidation, and violence against abortion providers in Virginia and across the United States.⁴ *Doe Decl.* ¶¶ 5-6. At least four physicians who provided abortion care have been killed since 1993: Dr. David Gunn of Pensacola, Florida (1993); Dr. John Britton of Pensacola, Florida (1994); Dr. Barnett Slepian of Amherst, New York (1998); and Dr. George Tiller of Wichita, Kansas (2009).⁵ In November 2015, an intruder entered a Planned Parenthood clinic in Colorado Springs, Colorado, and shot twelve people, killing three of them.⁶ A national survey of

⁴ *See Nat'l Abortion Federation, Violence and Disruption Statistics* (2017), <https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf>.

⁵ *See NARAL Pro-Choice Am. Found., Anti-Choice Violence and Intimidation*, 5-7 (Jan. 1, 2010), <https://www.prochoiceamerica.org/wp-content/uploads/2017/01/1.-Anti-Choice-Violence-and-Intimidation.pdf>.

⁶ *See id.* at 5, 7; Sarah Kaplan, 'I'm a Warrior for the Babies' Planned Parenthood Suspect Declares in Court, *Wash. Post* (Dec. 10, 2015),

319 abortion clinics found that nearly 30 percent of respondent clinics' doctors and clinic staff had their photographs, home addresses, and personal information included on leaflets distributed by anti-abortion protestors, and approximately 14 percent of respondent clinics reported that information and pictures of their physicians had been posted on the internet by anti-abortion groups.⁷

Virginia itself has a long history of violence against providers of abortion care. Virginia clinics have experienced arson, pipe bombings, clinic blockades, pervasive vandalism and harassment, as well as an incident in which an anti-abortion extremist opened fire on a Norfolk, Virginia clinic with a semi-automatic weapon.⁸ More recently, in May 2017, Plaintiff Falls Church Medical Center had to evacuate its facility after trespassers set off fireworks in its building elevator and left notes indicating a bomb had been placed in the facility.⁹ Doe Decl. ¶ 6. Recent incidents

https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/im-a-warrior-for-the-babies-planned-parenthood-suspect-declares-in-court/?utm_term=.6178a5a44307.

⁷ Feminist Majority Found., *2016 National Clinic Violence Survey*, 7 (Feb. 2017), <http://www.feminist.org/anti-abortion-violence/images/2016-national-clinic-violence-survey.pdf>.

⁸ *Abortion Clinic Attacks*, Wash. Post (Jan. 6, 1985),

https://www.washingtonpost.com/archive/politics/1985/01/06/abortion-clinic-attacks/31d0ba24-474a-469c-b12e-e627f0e30a18/?utm_term=.2ddb3ad65785 (reporting arson and pipe bombings in Virginia abortion clinics between 1982 and 1983); Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. Times (Nov. 29, 2015),

<https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html> (reporting that John Salvi, who shot and killed two receptionists and injured five other people at two abortion clinics in suburban Boston in December 1994, was arrested days later in Norfolk, Virginia, moments after opening fire at an abortion clinic there); *Nat'l Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489–90 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), judgment *rev'd in part*, vacated in part *sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (describing pervasive trespassing, harassment, vandalism, and blockades by anti-abortion protestors against abortion clinics in Northern Virginia).

⁹ Jody Fellows, *Police Investigate 2nd Bomb Threat at F.C. Office Building*, Falls Church News-Press (May 9, 2017), <https://fcnp.com/2017/05/09/police-investigate-2nd-bomb-threat-f-c-office-building/>.

of trespassing at another Virginia clinic have been identified as part of a nationwide increase in anti-abortion harassment, vandalism, and violence.¹⁰

The risk of retaliation against Dr. Doe and her family is sufficiently severe to rise to the level of an extraordinary circumstance supporting the use of a pseudonym. Abortion providers and women seeking abortions are often the targets of harassment, intimidation, and violence. Courts routinely enter protective orders to safeguard the identities of such individuals who fear for their safety and well-being. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1350-51 (M.D. Ala. 2014) (describing, in case where abortion providers proceeded under pseudonym, how those who “consider performing abortions are warned, explicitly or by example, of the negative consequences past abortion doctors have faced for providing abortions in a particular community”). Dr. Doe’s fear of retaliation against both herself and her family for her participation in this lawsuit is objective, reasonable, and weighs heavily in favor of allowing her to proceed under pseudonym.

III. This Action is Against the Government.

Under the next *Jacobson* factor, “[w]hen a plaintiff challenges the government or government activity, courts are more like[ly] to permit plaintiffs to proceed under a pseudonym than if an individual has been accused publicly of wrongdoing.” *Doe v. Alger*, 317 F.R.D. 37, 41 (W.D. Va. 2016) (quotation marks omitted). Furthermore, “the filing of an action challenging the constitutional validity of government activity generally involves no injury to the Government’s reputation, while an action against a private party can result in damage to the defendant’s

¹⁰ Associated Press, *Abortion clinic protests surged in 2017, report finds*, The Guardian (May 7, 2018), <https://www.theguardian.com/world/2018/may/07/abortion-clinic-protests-stats-2017-surge>.

reputation as well as economic harm.” *Merten*, 219 F.R.D. at 394 (internal quotation marks and citations omitted).

Here, Defendants are elected and appointed government officials charged with promulgating and enforcing laws challenged in this lawsuit, who face no injury to their reputation stemming from the litigation. Allowing Dr. Doe to proceed anonymously would be “an appropriately tailored means of protecting [Dr. Doe’s] interests without unduly restricting public access to the litigation materials.” *The Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d at 594. While the public’s interest in litigation is “especially compelling” when the defendants are government officials sued in an official capacity, *Public Citizen*, 749 F.3d at 274, protecting Dr. Doe’s identity does not deprive the public of its right to attend the proceedings or inspect the orders or opinions of the court on the underlying constitutional issue, *Doe v. Pittsylvania Cnty., Va.*, 844 F. Supp. 2d 724, 728 (W.D. Va. 2012) (citations omitted).

The use of pseudonyms in this case would strike an appropriate balance between ensuring that the public has access to the record and protecting Dr. Doe and her family from any retaliatory harm that might ensue from her public exposure as an abortion provider or her decision to assert her individual rights, and her patients’ constitutionally protected right to abortion, by participating in this lawsuit. This factor accordingly weighs in favor of allowing Dr. Doe to proceed anonymously.

IV. There is Little Risk of Unfairness to Defendants.

Under the final *Jacobson* factor, Defendants will not be prejudiced by this Court allowing Dr. Doe to proceed anonymously. Dr. Doe agrees to disclose her identity to the Court and to Defendants. She joins four other Plaintiffs—all of whom are proceeding without pseudonyms—in challenging the constitutionality of the Licensing Scheme, Physician-Only Law, Hospital

Requirement, and Mandatory Two-Trip Delay Law in conjunction with the Criminalization Laws, on their face and as enforced by Defendants. This challenge does not involve the personal conduct of any individual Defendant, only their actions as government officials charged with implementing and/or enforcing generally applicable statutes and regulations. Granting anonymity to Dr. Doe thus poses no risk of unfairness and prejudice to the Defendants.

V. If Anonymity Is Denied, Dr. Doe Should Be Allowed to Choose Between Disclosing Her Identity and Withdrawing from the Case.

This Court should permit Dr. Doe to proceed anonymously under the five-factor test outlined above. However, if the motion is denied, Dr. Doe should be allowed to voluntarily withdraw from the case rather than reveal her identity. Requiring Dr. Doe to disclose her identity without giving her the option to withdraw from the case would unfairly subject her to the very risks she seeks to avoid. *See Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005) (“[I]f the judge decides that anonymous litigation is inappropriate, the plaintiff should be allowed to dismiss the suit in lieu of revealing her name.”).

CONCLUSION

Dr. Doe reasonably fears threats and physical violence from anti-abortion advocates, Doe Decl. ¶¶ 3-7, and sufficiently meets the *Jacobson* factors to proceed under pseudonym. Pursuant to Pretrial Schedule A and Rules 15, 20, and 21 of the Federal Rules of Civil Procedure, Plaintiffs have moved to add an additional party—and the proposed plaintiff seeks to join this action pseudonymously. Given the substantial need to safeguard Dr. Doe’s privacy and the strong precedent for protecting the identity of abortion providers like Dr. Doe, the Court should grant this motion and allow her to proceed in this matter under pseudonym.

For the reasons stated above, Plaintiffs respectfully request that the Court enter the proposed protective order to safeguard Dr. Doe’s identity.

Dated: August 16, 2018

Respectfully submitted,

/s/ Gail M. Deady

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**Motion for Admission *Pro Hac Vice* to be filed.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2018, a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Protective Order for Dr. Jane Doe to Proceed under Pseudonym was served on counsel for Defendants represented by the Office of the Attorney General via the Eastern District of Virginia's Electronic Filing System, and mailed to Defendant Robert Tracci pursuant to Federal Rule of Civil Procedure 5(b).

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