UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

ARTHUR DOE, *et al*.,

Plaintiffs,

v.

JIM HOOD, Attorney General of the State of Mississippi, *et al*,

Defendants.

Case No. 3:16-cv-00789-CWR-FKB

CLASS ACTION

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

More than a decade after the Supreme Court declared so-called "sodomy" crimes facially unconstitutional under the Fourteenth Amendment, Mississippi continues to require individuals with sodomy convictions to register as sex offenders, with onerous consequent restrictions on their liberties. This action seeks to remedy this systematic violation of constitutional rights.

Mississippi has required registration for its sodomy law, titled "Unnatural Intercourse," Miss. Code Ann. § 97-29-59, since the inception of the Mississippi Sex Offender Registry (MSOR). *See generally* Miss. Code. Ann. §§ 45-33-21 *et seq*. As alleged in the Complaint, Mississippi subjects individuals with Unnatural Intercourse convictions to overwhelming restrictions on their daily lives and liberties. These restrictions, which are common to the proposed class, include: 1) displaying individuals' pictures and personal information on a state-run, publicly-accessible sex offender registry website; 2) forcing individuals to appear before and (re-)register with state officials every ninety days; 3) commanding individuals to report to the state any address where the individual stays for more than seven consecutive nights; 4) mandating individuals disclose their "sex offender" status to potential employers and certain volunteer organizations; 5) mandating disclosure to the state of any online username or identity; and 6) restricting individuals' access to their own children's schools, including the simple acts of attending parent-teacher conferences or merely dropping off or picking up one's own children from school. This list is nowhere near exhaustive; a full accounting of the liberty restrictions imposed by inclusion on the MSOR take up a substantial number of pages of the Mississippi Code. *See* Miss. Code Ann. §§ 45-33-25 through 45-33-34.

Plaintiffs seek certification of a class of current and future individuals subjected the MSOR pursuant to Mississippi's Unnatural Intercourse statute—whether because of convictions under the Unnatural Intercourse statute itself, or out-of-state convictions that are registrable only because they are treated by Mississippi as analogous to its Unnatural Intercourse statute.

Litigation of the claims asserted in this action involve numerous questions of law and fact common to the class, the core issue being whether Defendants subjecting individuals with Unnatural Intercourse convictions or out-of-state equivalents to the MSOR violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Plaintiffs readily meet the four requirements of Fed. R. Civ. P. 23(a). The class members are so numerous that joinder of their claims is impracticable (numerosity); there is a common requirement that individuals with Unnatural Intercourse convictions or out-of-state equivalents register with the MSOR (commonality); the named Plaintiffs have claims typical of individuals required to register for Unnatural Intercourse convictions or out-of-state equivalents (typicality); and the named Plaintiffs will vigorously represent the proposed class and have chosen counsel who can adequately represent the proposed class (adequacy). In addition, Plaintiffs seek only injunctive and declaratory relief, and the case is appropriate for certification under Fed. R. Civ. P. 23(b)(2)—because defendants have acted or refused to act on grounds applicable to the class as a whole—and (b)(1)(A)—because the prosecution of separate actions by individual class members would create real risk of inconsistent or varying adjudications.

Actions to enforce the civil rights are precisely the types of actions that are appropriate for class treatment. This case challenges a system-wide registration requirement. Plaintiffs seek to enjoin defendants from continuing to enforce the MSOR against the class as whole. For these reasons, Plaintiffs respectfully request that the Court grant their motion for class certification.

FACTUAL BACKGROUND

I. The State Enacts the Sex Offender Registry.

The origins of the MSOR can be traced to 1987, when the state passed Miss. Code Ann. § 45-31-1 *et seq*. (1987), the "Sex Offense Criminal History Record Information Act." That statute empowered the state Attorney General to record information of people with convictions for certain crimes (including the "crime" of engaging in oral and anal sex), share that information with employers, and collect information from other states about these individuals.

Eight years later, in 1995, Mississippi established the MSOR. Miss. Code Ann. § 45-33-21 *et seq*. In passing the MSOR, the legislature mandated registration for a series of sex offenses. Miss. Code Ann. § 45-33-23(h)(i-xxiv). Among these offenses was Mississippi's Unnatural Intercourse statute, Miss. Code Ann. § 97-29-59, which prohibits engagement in oral and anal sex, regardless of the circumstances. Miss. Code Ann. § 45-33-23(h)(xi). In addition, the registry law requires registration for "[a]ny other offense resulting in a conviction in another jurisdiction which, if committed in [Mississippi], would be deemed to be [a registrable sex offense] without regard to its designation elsewhere," Miss. Code Ann. § 45-33-23(h)(xx) – including Unnatural Intercourse.

II. The Supreme Court Rules Sodomy Prohibitions Unconstitutional.

In 2003, the United State Supreme Court struck down Texas's sodomy prohibition on due process grounds because the law "further[ed] *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added). In striking down the Texas law, the Court resoundingly declared that any criminal statute whose only element is the commission of oral or anal sex is unconstitutional and was not limited to Texas or to laws singling out same-sex couples. To the contrary,

Lawrence specifically overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and thus necessarily concluded that Georgia's general anti-sodomy law, which like Mississippi's law was applicable to both same-sex and different-sex couples, was also unconstitutional. *Lawrence*, 539 U.S. at 578. The Court's express invalidation of Texas's ban on sodomy between same-sex partners on due process rather than equal protection grounds also makes clear that all state statutes remaining in effect in the nation whose only element is the commission of oral or anal sex, including between different-sex partners, are invalid. *See MacDonald v. Moose*, 710 F.3d 154, 168 (4th Cir. 2013) (in facially striking down Virginia's sodomy prohibition, noting that by overruling of *Bowers*, *Lawrence* mandates that all similar sodomy prohibitions are facially unconstitutional), *cert. denied*, 134 S. Ct. 200 (2013).

III. Defendants Continue to Require Registration for Unnatural Intercourse Convictions.

Despite the Supreme Court's clear command, Mississippi continues to enforce its requirement that individuals with Unnatural Intercourse convictions be subjected to the MSOR. Unnatural Intercourse remains a registrable offense, Miss. Code Ann. § 44-33-23(h)(xi), and the state continues to require individuals with Unnatural Intercourse convictions to register. The state also continues to require individuals with purportedly analogous out-of-state convictions who move to Mississippi to register, apparently pursuant to Miss. Code Ann. § 45-33-23(h)(xxi)'s registration requirement for individuals convicted of an offense which, if committed in Mississippi, would be deemed Unnatural Intercourse. Defendants have steadfastly maintained their position that Unnatural Intercourse convictions remain registrable offenses even after Plaintiffs' counsel brought the unconstitutionality of such a requirement to their attention.

IV. The Proposed Class Representatives

A. Arthur Doe

Arthur Doe was convicted of Unnatural Intercourse, Miss. Code Ann. § 97-29-59 and has no other convictions that would trigger registration under the MSOR. Compl. ¶ 55.[1] He was required to start registering as a sex offender in 2008 and again in 2011, upon termination from probation for a non-violent, non-sex offense, as a result of this 1978 conviction. *Id*. ¶¶ 56-57.

B. Brenda Doe

Brenda Doe has a conviction under Louisiana's Crime Against Nature by Solicitation (CANS) statute, La. Rev. Stat. § 14:89(A)(2). *Id*. ¶ 60. While she was formerly required to register as a sex offender in Louisiana as a result of that conviction, the Louisiana legislature subsequently removed CANS convictions from the list of registrable offenses in Louisiana in 2011. *See* La. Sess. Law Rev. Act 223 (H.B. 141). In 2012, a federal court declared the statute's requirement that those with CANS convictions register as sex offenders unconstitutional. *Doe v. Jindal*, 851 F. Supp. 2d 995 (2012). In 2012, Brenda Doe became a named plaintiff in a subsequent class action lawsuit challenging the registry requirement for people with CANS convictions, *see Doe v. Caldwell*, 913 F. Supp. 2d 262 (E.D. La. 2012), and was removed from the Louisiana registry in 2013. She has no other convictions that require registration. Compl. ¶ 66. Despite her removal from the Louisiana registry and the fact that CANS convictions were no longer registrable offenses in Louisiana, Mississippi requires Brenda to register on the MSOR because it deems her CANS conviction to be an offense analogous to Mississippi's Unnatural Intercourse statute.

[1] Evidentiary support related to the named Plaintiffs' factual allegations is provided in Declaration of Alexis Agathocleous in Support of Plaintiffs' Motion for Summary Judgment, filed contemporaneously with this motion.

C. Carol Doe

Like Plaintiff Brenda Doe, Carol Doe has a Louisiana conviction under the CANS statute, which initially required her to register in Louisiana before that requirement was struck down. *Id*. ¶ 73. She was required to register under the MSOR due to her CANS conviction when she moved to Mississippi. *Id*. ¶ 74. She has no other convictions that would trigger registration with the MSOR. *Id*. ¶ 73.

D. Diana Doe

Like Plaintiffs Brenda and Carol Doe, Diana Doe is also registered as a sex offender in Mississippi (but not Louisiana) solely as a result of a Louisiana CANS conviction. *Id*. ¶ 81. She has no other convictions that would trigger registration with the MSOR. *Id*.

E. Elizabeth Doe

Like Plaintiffs Brenda, Carol, and Diana Doe, Elizabeth Doe is also forced to register as a sex offender in Mississippi (but not Louisiana) solely as a result of her convictions under Louisiana's CANS statute.. *Id*. ¶ 87. She has no other convictions that would trigger registration with the MSOR. *Id*.

ARGUMENT

Plaintiffs here seek to certify a class consisting of all of all current and future individuals subjected the MSOR for Unnatural Intercourse convictions or convictions considered to be out-of-state equivalents. This proposed class meets the requirements of Rule 23(a) and 23(b)(2) and (b)(1)(A).

I. Legal Standards Governing Motions for Class Certification

Plaintiffs seek class certification to ensure that any relief obtained extends to all individuals subjected to registration pursuant to an unconstitutional statute and registration requirement.

Class certification is appropriate for Plaintiffs' strictly equitable claims for relief because plaintiffs "satisfy Rule 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007)). Members of a class seeking certification under Rule 23(a) must demonstrate that:

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"],
> (2) there are questions of law or fact common to the class ["commonality"],
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and
> (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"].

Fed. R. Civ. P. 23(a). Plaintiffs seek certification under Rule 23(b)(2), which further requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2), and, alternatively, under Rule 23(b)(1)(A), making class treatment appropriate where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class[.]" Fed. R. Civ. P. 23(b)(1)(A).

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey International*, 452 F.2d 424, 427 (5th Cir. 1971)); *see also In re Catfish Antitrust Litigation*, 826 F. Supp. 1019, 1033 (N.D. Miss. 1993) ("In ruling upon a motion for class

certification, the substantive allegations contained in plaintiffs' complaint are accepted as true.") (citing cases).

In cases like this where the procedural requirements are met, the Court should grant class certification. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) ("By its terms [Fed. R. Civ. P. 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action").

Plaintiffs satisfy the criteria of Rules 23(a), 23(b)(2) (and, alternatively, 23(b)(1)(A)), and class certification is warranted.

II. Plaintiffs Meet the Requirements of Rule 23(a).

A. Numerosity Is Satisfied Because Joinder is Impracticable.

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). To demonstrate numerosity, Plaintiffs need not allege the exact number and identity of the class members, but must only establish that joinder is impracticable enough through "'some evidence or reasonable estimate of the number of purported class members.'" *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 868 (5th Cir. 2000) (quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981)). A plaintiff's burden is met by making a reasonable approximation as to the class size. *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000).

While impracticability of joinder is generally presumed at 40 class members based on size alone, *see generally Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members"), courts regularly certify classes consisting of between thirty and forty members. *See, e.g.*, *Phillips v. Joint Legislative Committee on Performance and Expenditure of the State of Mississippi*, 637 F.2d 1014, 1022 (5th Cir. 1981)

(33 class members); *Choice Inc. of Texas v. Graham*, 2005 U.S. Dist. LEXIS 11585 at *8 (E.D. La. June 3, 2005) (35 class members); *Hill v. Butterworth*, 170 F.R.D. 509, 513 (N.D. Fla. 1997) (30 class members). In *Phillips*, the Fifth Circuit noted, in assessing a putative class of 33 members, that "[t]he problem . . . is not simply to say whether 33 class members are enough or too few to satisfy Rule 23(a)(1). Ample case law can be cited to show that smaller classes have been certified and larger ones denied certification for lack of numerosity." 637 F.2d at 1022. Instead, the Court emphasized, "[t]he proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Id.*; *see also General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations."). In addition to sheer numbers, courts typically look to factors including the geographical dispersion of the class, judicial economy of avoiding multiple actions, whether plaintiffs seek damages or merely equitable relief, the ease of identifying class members, fear of retaliation in bringing an individual claim, and the financial resources of the class members. *Zeidman*, 651 F.2d at 1038; ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 3.12 (5th ed.).

Weighing these factors in light of the facts of the putative class favors a finding of numerosity. While only Defendants possess information necessary to determine the exact size of the class, a "reasonable estimate of the number of purported class members.'" *Pederson*, 213 F.3d at 868, establishes numerosity. At least twelve living[2] people are listed in the MSOR solely for UI convictions, and several others are registered for UI convictions as well as other registration-triggering offenses. *See* Exh. A (Declaration of Alexis Agathocleous in Support of Plain-

[2] The MSOR website continues to display information for at least one deceased person with a UI conviction. Agathocleous Decl. ¶ 4.

tiffs' Motion for Class Certification) ("Agathocleous Decl.") ¶ 4. At least fourteen additional people are listed in the MSOR solely for out-of-state convictions that Mississippi treats as analogous to convictions under the UI statute. *Id.* ¶ 5.

The state also list dozens of people pursuant to "45-33-23(g)(xvii) . . . [a]ny other offense committed in another jurisdiction for which registration is required in that jurisdiction" without specifically listing the offense from another jurisdiction. *Id.* ¶ 7. Any number of those individuals may be registered for out-of-state crimes equivalent to the UI statute. Moreover, numerous others are registered for "attempt" to commit one of a range of offenses under Mississippi law, including Unnatural Intercourse, without identifying the specific offense. *Id.*

In addition, nearly nine hundred individuals were registered in Louisiana pursuant to convictions for CANS (and no other offenses)—all of whom have been relieved of registration requirements in Louisiana but would be required to register if they relocated to Mississippi. *Id.* ¶ 8. According the U.S. Census Bureau, more than 7,000 people relocated from Louisiana to Mississippi in 2014 alone, with more people relocating from Louisiana than from any other state save Tennessee. *See* United State Census Bureau, Migration/Geographic Mobility, State-to-State Migration Flows (2014), *available at* https://www2.census.gov/programs-surveys/demo/tables/geographic-mobility/2014/state-to-state-migration/State_to_State_Migrations_Table_2014.xls. The proposed class consists of these hundreds of individuals who may be subjected to Defendants' unconstitutional registration scheme in the future, thus easily establishing numerosity.

Other factors also make joinder impracticable here. As the Fifth Circuit has noted, "district courts must not focus on sheer numbers alone but must instead focus 'on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors.'"

Pederson, 213 F.3d at 868 n.11 (quoting *Phillips*, 637 F.2d at 1022). Although not all factors need to be present, weighing them in light of the facts here favors a finding of numerosity.

The geographic diversity of the proposed class members "weighs heavily in favor of class treatment." *In re Dynegy Inc. Secs. Litig.*, 226 F.R.D. 263, 286 (S.D. Tex. 2004); *see also In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 910 F. Supp. 2d 891, 915 (E.D. La. 2012) *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (geographic dispersity of the class decreases the practicability of joinder). A review of the MSOR shows that the proposed class members are dispersed throughout the state (and future class members include individuals residing in other states with convictions Mississippi deems an out-of-state equivalent to Unnatural Intercourse). Agathocleous Decl. ¶ 6. Moreover, registration requirements create difficulties for named plaintiffs and proposed class members to obtain stable housing, with such instability making it likely that class members suffer from homelessness or transient housing situations. *See, e.g.*, HUMAN RIGHTS WATCH, NO EASY ANSWERS 81-85, 92-97 (2007) (detailing employment and housing difficulties for registered sex offenders), available at: https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf; *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 624 (5th Cir. 1999) (transient nature of employment supported a finding that joinder was impractical). Thus, geographic diversity of the class members favors a finding of impracticability of joinder.

The difficulty for members of the proposed class to bring individual suits further supports a finding that joinder is impracticable in the instant case. Members of the proposed class may not know that their rights have been violated, or that legal redress might be available to them. *Allen v. Holiday Universal*, 249 F.R.D. 166, 172, n. 3 (E.D. Pa. 2008) ("in many class actions, class members do not know that they have been injured, or do not consider themselves to have suf-

fered an injury, because they do not know that the defendant's action is illegal"). Many also lack adequate means and resources to retain counsel or otherwise seek relief from the unconstitutional registration requirement. In addition, a dual stigma attaches to each class member: the first, the lingering stigma attached to being convicted of a crime designed by the state to express disgust with homosexuality, *see Lawrence*, 539 at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); the second, the stigma of being a registered sex offender. These stigmas further impede members of the proposed class from bringing their own individual lawsuits.

Finally, the fact that Plaintiffs assert claims only for declaratory and injunctive relief for violations of their constitutional rights further supports finding impracticability of joinder. *Jones v. Diamond*, 519 F.2d 1090, 1099 (5th Cir. 1975) ("Rule 23(a) must be read liberally in the context of civil rights suits"). "Smaller classes are less objectionable where the plaintiff is seeking injunctive relief on behalf of future class members as well as past and present members." *J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009) (quoting *Jones*, 519 F.2d at 1100 (reversing denial of class certification of 48 current members where decision would impact persons in the future)). Thus, this factor also favors finding of impracticability of joinder.

These factors adversely affect the ability of class members to file and prosecute individual claims, making a class action the only effective and appropriate means of ensuring vindication of the rights of all members of the proposed class. The class clearly establishes numerosity.

B. Commonality is Satisfied Because Defendants Require Registration on a Class-wide Basis.

Rule 23(a)(2) requires a properly-maintained class action involve common issues of law and fact. "The test for commonality is not demanding." *James v. City of Dallas, Tex.,* 254 F.3d

551, 570 (5th Cir. 2001) (quoting *Mullen*, 186 F.3d at 625); *see also Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) ("[T]he threshold of 'commonality' is not high.").

"To satisfy the commonality requirement under Rule 23(a)(2), class members must raise at least one contention that is central to the validity of each class member's claims." *In re Deepwater Horizon*, 739 F.3d at 810. This "requires that all of the class member[s'] claims depend on a common issue of law or fact whose resolution 'will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke.'" *M.D. ex rel. Stukenberg*, 675 F.3d at 840 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

Only one common question of law or fact is required: "The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is 'at least one issue whose resolution will affect all or a significant number of the putative class members.'" *James*, 254 F.3d at 570 (quoting *Forbush*, 994 F.2d at 1106). "[T]he fact that some of the [p]laintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality." *Id.*

Civil rights lawsuits for equitable relief that challenge a statute or a system-wide policy or practice that affect all class members "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed.); *see also Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 193 (W.D. Tex. 1998) (commonality met in civil right lawsuit seeking equitable relief against government entity for discriminatory policies and practices). Class actions seeking strictly equitable relief avoid the common hurdle of commonality involving an individualized inquiry to determine damage awards.

Here, Plaintiffs easily meet the commonality requirement. The central and dispositive question of law common to all proposed class members is whether Defendants' imposition of mandatory sex offender registration requirements on individuals convicted of Mississippi's Unnatural Intercourse statute or convictions considered to be out-of-state equivalents violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This common question of law and fact is at the heart of each putative class member's claims; indeed, its resolution will dispose of the claims in their entirety. Because the putative class members share the central legal and factual issues in this action, commonality is certainly met.

C. Typicality is Satisfied Because Plaintiffs' Claim that Defendants Require Registration under an Unconstitutional Statute is the Same Misconduct Challenged by the Class.

Rule 23(a)(3)'s typicality requirement "focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Lightbourn v. Cnty. of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997) (citing *Flanagan v. Ahearn (In re Asbestos Litig.)*, 90 F.3d 963, 976 (5th Cir. 1996)). The test for typicality "is not demanding," *Mullen*, 186 F.3d at 625, and "does not require a complete identity of claims." *James*, 254 F.3d at 571 (quoting 5 James Wm. Moore *et al*., Moore's Federal Practice ¶ 23.24[4] (3d ed.)), *abrogated on other grounds by M.D. ex rel. Stukenberg*, 675 F.3d at 839-40. Rather, typicality looks to "whether the class representative's claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *Id*.

Here, the claims of the named Plaintiffs and of the putative class are identical. The named Plaintiffs are each continuously subjected to Mississippi's mandatory sex offender registration statute for violations of Mississippi's Unnatural Intercourse statute or convictions considered to

be out-of-state equivalents. All of the proposed class members are subject to the same registration requirements pursuant to exactly the same unconstitutional Unnatural Intercourse statute.

Plaintiffs' requested declaratory and injunctive remedies would therefore benefit all members of the proposed class, and there is no danger that the named Plaintiffs would seek or be afforded relief different from or prejudicial to unnamed class members. Thus, if members of the proposed class were to bring parallel individual actions, they would no doubt invoke legal and remedial theories identical to those advanced by the named Plaintiffs. *See Lightbourn*, 118 F.3d at 426. As a result, the typicality requirement of Rule 23(a)(3) is satisfied.

D. The Class is Adequately Represented by the Named Plaintiffs and Class Counsel.

The final requirement of Rule 23(a) is that the representative parties will fairly and adequately protect the interests of the class. "Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001). In the adequacy inquiry, courts examine "[1] the zeal and competence of the representative[s'] counsel and . . . [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees[.]" *Id.* (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) (citations omitted)). The Fifth Circuit has explained that, in this adequacy analysis, "[d]ifferences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625-26 (internal citation omitted) (emphasis added). Indeed, the Rule 23(a)(4) adequacy inquiry is also intended to "uncover[] 'conflicts of interest between the named plaintiffs and the class they seek to represent.'"

Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 314-15 (5th Cir. 2007) (quoting *Berger*, 257 F.3d at 479-80).

As set forth above in the discussion of the commonality and typicality requirements, the named Plaintiffs share the same interests of declaratory and injunctive relief as the proposed class members. None of the named Plaintiffs is currently seeking damages as a result of Defendants' unlawful conduct, and there is no basis on which to argue that their interests are antagonistic to those of the class. On the contrary, the interests of the named Plaintiffs coincide with those of the class: all suffer from mandatory sex offender registration and the equitable relief from registration will benefit all members of the proposed class. Furthermore, plaintiff Brenda Doe has already demonstrated her willingness and ability to represent a class in *Doe v. Caldwell*, a certified class action involving a challenge similar to the one here, successfully challenging the inclusion of all individuals with CANS conviction on Louisiana's sex offender registry. Compl. ¶ 65.

The putative class is represented by the highly experienced legal team with extensive experience in civil rights and class action litigation, including class action litigation related to constitutional challenges to aspects of sex offender registration statutes. Attorneys Alexis Agathocleous and Ghita Schwarz of the Center for Constitutional Rights have extensive civil rights litigation experience, and their office has demonstrated its willingness to zealously represent the plaintiffs and the proposed class in their successful litigation of *Doe v. Jindal* and *Doe v. Caldwell*, which together resulted in the removal of hundreds of people with CANS convictions from the Louisiana sex offender registry. Agathocleous Decl. ¶¶ 8-14. Robert McDuff and Jacob Howard at McDuff & Byrd have litigated complex civil rights and class action matters for decades, including arguing four cases before the United States Supreme Court and multiple cases before the Mississippi Supreme Court. *See* Exh. B (Declaration of Robert McDuff in Support of

Plaintiffs' Motion for Class Certification), ¶¶ 3-5. Matthew Strugar has been appointed class counsel in numerous civil rights actions. *See* Exh. C (Declaration of Matthew Strugar in Support of Plaintiffs' Motion for Class Certification), ¶¶ 3-8. The lawyers for the proposed class are uniquely qualified to provide the highest level of experience, knowledge, competence, and skill in prosecuting Plaintiffs' and class members' claims, and have demonstrated their willingness to vigorously represent Plaintiffs and the proposed class.

The named Plaintiffs have a strong interest in achieving the relief requested in the Complaint, they have no conflicts with members of the proposed class, and they will fairly and adequately protect the interests of the class. Like each member of the proposed class, all of the named Plaintiffs have been, and continue to be, subject to mandatory sex offender registration on the basis of a conviction for Mississippi's Unnatural Intercourse statute or statutes considered to be out-of-state equivalents, and therefore all named Plaintiffs have a substantial incentive to gain the requested relief. For these reasons, the requirements of Rule 23(a)(4) are met.

III. Plaintiffs Meet the Requirements of Rule 23(b)(2) and (b)(1)(A).

In addition to the requirements of Rule 23(a), Plaintiffs must satisfy one of the requirements of Rule 23(b) in order to meet the class certification standard. *M.D. ex rel. Stukenberg*, 675 F.3d at 837. Plaintiffs seek certification pursuant to Rule 23(b)(2), which provides that a class action is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2), and, alternatively, Rule 23(b)(1)(A), which provides for class relief where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudica-

tions with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class[.]" Fed. R. Civ. P. 23(b)(1)(A)

A. Plaintiffs Satisfy Rule 23(b)(2) because They Challenge a Practice of Requiring Registration for Constitutionally Protected Activity.

The Supreme Court has recently observed that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what [Rule 23](b)(2) is meant to capture." *Wal-Mart*, 131 S. Ct. at 2557-58 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997)); *see also Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 993 (5th Cir. 1981) (Rule 23(b)(2) "was intended primarily to facilitate civil rights class actions, where the class representatives typically sought broad injunctive or declaratory relief against discriminatory practices") (citing Fed. R. Civ. P. 23 Advisory Committee's Note (1966)); *Jones*, 519 F.2d at 1100 ("the 23(b)(2) class action is an effective weapon for an across-the-board attack against systematic abuse. . . . Indeed, its usefulness in the civil rights area was foreseen by the drafters of the revised rule.").

In the Fifth Circuit, in order to proceed under Rule 23(b)(2), "class members must have been harmed in essentially the same way, . . . injunctive relief must predominate over monetary damage claims," and injunctive relief "must be specific." *Maldonado*, 493 F.3d at 524 (citing *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir. 2000)). Rule 23(b)(2) requires that a single injunction or declaratory judgment would provide relief to the entire class. *M.D. ex rel. Stukenberg*, 675 F.3d at 845.

Plaintiffs and class members share the same injury: they are unconstitutionally required to register as sex offenders for convictions for Mississippi's Unnatural Intercourse statute or statutes considered to be out-of-state equivalents. Plaintiffs do not seek monetary damages; rather, they seek precisely the kind of specific injunctive and declaratory relief the Fifth Circuit

requires for certification under Rule 23(b)(2)—a ruling that the Unnatural Intercourse statute is unconstitutional under *Lawrence v. Texas* and that the registration requirement violates the Plaintiffs' and proposed class members' rights under the Fourteenth Amendment, and injunctive relief requiring their removal from the sex offender registry and related records. Unique relief is not sought; each Plaintiff seeks only the same class-wide declaratory and injunctive remedies, which will provide relief to all proposed class members. Further, the Fifth Circuit's requirement that the injunctive relief that is sought under Rule 23(b)(2) be specific, *see Maldonado*, 493 F.3d at 524, is also satisfied in this case. The relief requested is targeted precisely to remedy the unconstitutional registration requirements faced by all class members, the class is sufficiently cohesive to allow the Court to issue an injunction that complies with Fed. R. Civ. P. 65(d), and the requested injunctive relief provides Defendants with specific and reasonable details regarding the acts required by them under an injunction. *See* Compl. at Prayer for Relief.

This action is also appropriate under Rule 23(b)(2), because class actions for declaratory for injunctive relief help to avoid mootness and facilitate enforcement of judgments. *See generally*, NEWBERG ON CLASS ACTIONS § 2:10. Absent certification of classes with unknown future members, enforcement problems could follow. Because Defendants' alleged conduct is applicable to the proposed class, making declaratory and injunctive relief appropriate as to the class as a whole, Plaintiffs satisfy the requirements of Rule 23(b)(2).

B. Plaintiffs Satisfy Rule 23(b)(1)(A) because Separate Actions Risk Inconsistent or Varying Adjudications.

In the alternative, this case is also certifiable as a class action under Rule 23(b)(1)(A) because the prosecution of separate actions by individual class members would create a real risk of inconsistent or varying adjudications with respect to the rights of the individual class members, which would in turn establish incompatible standards of conduct for Defendants and other state

and local officials. Rule 23(b)(1)(A) generally involves cases where the defendants are required by law to treat the members of the class alike, *Amchem Products*, 521 U.S. at 614, and is designed to achieve a "unitary adjudication." Fed. R. Civ. P. 23 Advisory Committee's Note (1966). Class certification under 23(b)(1)(A) is appropriate when "the court finds that separate lawsuits could create inconsistent results that would establish incompatible standards of conduct for the party opposing the class." *Casa Orlando Apts. v. Fed. Nat. Mortg. Ass'n*, 624 F.3d 185, 197 (5th Cir. 2010). "A core example of the 23(b)(1)(A) case is the situation in which many individuals, all challenging a single government policy, bring separate suits for injunctive relief." NEWBERG ON CLASS ACTIONS § 4:11. Failure to certify a class here could lead to a multiplicity of actions by individuals with convictions for Mississippi's Unnatural Intercourse statute or statutes considered to be out-of-state equivalents, resulting in different conclusions about the constitutionality of this registration requirement and Defendants' attendant constitutional obligations and restrictions.

IV. The Court Should Certify the Class Contemporaneously with Granting Summary Judgment.

Plaintiffs seek class certification contemporaneously with moving for summary judgment because there is no genuine issue of material fact that Mississippi is violating the named Plaintiffs' and putative class's rights under the Fourteenth Amendment. "Bringing a class certification motion together with a Rule 56 motion is consistent with the Federal Rules of Civil Procedure … [and] is certainly acceptable." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1032 (9th Cir. 2012).

Plaintiffs respectfully request that the Court consider this motion for class certification prior to or simultaneously with Plaintiffs' motion for summary judgment so that relief, if any, will inure to the benefit of the plaintiff class and not only the named Plaintiffs. *See, e.g., Ramos*

v. SimplexGrinnell, 796 F. Supp. 2d 346, 352-53 (E.D.N.Y 2011) (explicitly considering plaintiffs' class certification motion first when considering simultaneous class certification and summary judgment motions).

V. Class Notice Is Not Required.

Mandatory notice requirements are inapplicable to Rule 23(b)(1) and (b)(2) class actions. Fed. R. Civ. P. 23(c)(2); *Casa Orlando Apts.*, 624 F.3d at 199 (5th Cir. 2010). *Accord Elliot v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977), *aff'd in relevant part, rev'd in part*, 442 U.S. 682 (1979); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336-37 (1st Cir. 1991); NEWBERG ON CLASS ACTIONS § 8:2.

Rule 23(c)(2)(A) gives the Court discretionary power to direct appropriate notice to the class but such notice is not generally necessary in a Rule 23(b)(2) class action. Rule 23(b)(2) "'seeks to redress what are really group as opposed to individual injuries. The uniformity of the injury across the class is what renders the notice and opt-out provisions of (b)(3) unnecessary.'" *Casa Orlando Apts.*, 624 F.3d at 198 (quoting *Bolin*, 231 F.3d at 975 n.22)). This is especially so where the named plaintiffs are adequate class representatives with experienced counsel. *See Elliot*, 564 F.2d at 1229 (notice not necessary for nationwide (b)(2) class where name plaintiffs are adequate representatives with experienced counsel). Moreover, because absent class members cannot opt out of a Rule 23(b)(2) class, the underlying reasons for notice in a (b)(3) class are not at issue. *See* Fed. R. Civ. P. 23 Advisory Committee's Note (2003).

Because the named Plaintiffs are adequate class representatives represented by experienced counsel, there is no need for notice here. Should Plaintiffs prevail on the merits of their claims, either on their contemporaneously filed motion for summary judgment or at another time,

the absent class members would be notified of their removal from the MSOR when they attempt to re-register, as they are required to do every 90 days. Miss. Code Ann. § 45-33-31(1)(b).[3]

Accordingly, Plaintiffs respectfully requests that this Court exercise its discretion to certify the class without requiring any notice to absent class members.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court certify the proposed class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

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Respectfully submitted,

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[3] Alternatively, should the Court decide that notice to the absent class members is appropriate, it should order Plaintiffs' counsel to confer with the Defendants' counsel to identify absent class members and submit a proposed notice to the Court.