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.

Civil Case No. 16-cv-789-CWR-FKB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY AND ENTRY OF A SCHEDULING ORDER

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INTRODUCTION

Plaintiffs challenge their continued inclusion on the Mississippi Sex Offender Registry ("MSOR") pursuant to a statute that was rendered unconstitutional by the United States Supreme Court more than a dozen years ago in *Lawrence v. Texas*, 539 U.S. 558 (2003). Each of the named Plaintiffs has a conviction for Unnatural Intercourse or an out-of-state crime that the state considers to be an equivalent to Unnatural Intercourse. Each Plaintiff is forced by the State of Mississippi, by operation of the individual Defendants, to submit to the MSOR and its multitude of extreme restrictions on liberty under Mississippi's Unnatural Intercourse statute—an antiquated law passed to criminalize conduct traditionally associated with homosexuality. The Supreme Court pronounced loudly and clearly in 2003 that such laws facially violate the Fourteenth Amendment. Refusing to listen, Defendants continue to mandate that people convicted under the Unnatural Intercourse statute, and statutes Defendants deem to be out-of-state equivalents to the Unnatural Intercourse statue, submit to the MSOR's punishing restrictions. Plaintiffs bring suit on their own behalf and on behalf of a class of similarly situated individuals seeking equitable relief to end Defendants' years-long and continuing violation of their constitutional rights under *Lawrence*. They also allege an Equal Protection violation, because they are forced to register as sex offenders while individuals convicted under Mississippi's materially indistinguishable prostitution statute are not forced to do so.[1]

Plaintiff filed their facial challenge on October 7, 2016. Complaint, Dkt. #1. Twenty-seven days later, on November 3, 2016, plaintiffs moved this Court to certify the plaintiff class, Motion for Class Certification, Dkt. #20, and for summary judgment. Motion for Summary Judgment, Dkt. #15. On November 18, 2016—one court day before its opposition to Plaintiffs'

[1] Both claims are discussed at length in Plaintiffs' motion for summary judgment.

class certification and summary judgment motions were due—Defendants made a motion for discovery, arguing that Plaintiffs' motions were premature. Motion for Discovery and Entry of a Scheduling Order, Dkt. #25.

This is a straight-forward case. Supreme Court precedent *directly* on point controls the primary and dispositive issue, prohibiting Defendants' behavior. Defendants subject dozens of people to the MSOR pursuant to the unconstitutional scheme the Plaintiffs challenge. There is nothing for discovery to illuminate—especially nothing in the *Plaintiffs'* knowledge or possession. This Court should deny Defendants' motion for discovery and grant the Plaintiffs' motions for summary judgment and class certification.

ARGUMENT

Defendants contend that they require discovery to oppose Plaintiffs' motions for summary judgment and class certification. The Federal Rules of Civil Procedure, relevant precedent, and the circumstance of this case demonstrate that discovery is unnecessary.

I. No Discovery is Required to Determine a Motion for Summary Judgment on a Facial Challenge.

A. Moving for Summary Judgment on a Dispositive Question of Law Early in Litigation Promotes the Goals of the Federal Rules.

The stated purpose of the Federal Rules of Civil Procedure is to provide litigants with a "just, *speedy*, and *inexpensive* determination of every action and proceeding." Fed. R. Civ. P. 1 (emphases added). The Rules command that "the court and the parties" "construe[], administer[], and employ[]" the Rules to achieve that purpose. *Id*. This Court's Local Rules echo these goals. *See* L. U. Civ. R. 1(c) ("The underlying principle of the Rules is to make access to a fair and *efficient* court system available and *affordable* to all citizens." (emphases added)). Plaintiffs' motion for summary judgment on the facial invalidity of the Unnatural Intercourse statute and the

MSOR registration scheme pursuant to that statute is not premature and advances the purpose of a "just, speedy, and inexpensive determination" in this action. Fed. R. Civ. P. 1.

Rule 56 permits plaintiffs to move for summary judgment early in litigation. In its original version, Rule 56(a) required a party to wait until after the service of a responsive pleading before moving for summary judgment. *See, e.g., Begnaud v. White*, 170 F.2d 323, 325 (6th Cir. 1948). In 1948, Rule 56(a) was amended to allow a plaintiff to file for summary judgment after 20 days of initiating suit or after service of a defendant's motion for summary judgment. *See, e.g., Coregis Ins. Co. v. McCollum*, 961 F. Supp. 1572, 1576-77 (M.D. Fla. 1997) (plaintiff's MSJ filed more than 20 days after filing was not premature, even though it preceded defendant's answer); *Holzman v. Richardson*, 361 F. Supp. 544, 547-48 (E.D.N.Y. 1973) (motion served 21 days after initiating suit was not premature despite the fact that defendant United States had 60 days to file a responsive pleading). The 1948 rule operated for more than six decades, until its revision with the 2009 amendments. Those amendments abolished Rule 56(a)'s waiting period completely, setting forth in Rule 56(c)(1) that any party could move for summary judgment at any time (including at commencement of the litigation), but no later than 30 days after the close of all discovery absent a local rule to the contrary. Fed. R. Civ. P. 56(c)(1)(A) (2009). The most recent amendments in 2010 kept the substance of the 2009 amendments but moved them to subsection (b). Fed. R. Civ. P. 56(b) ("Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery."). This Court has no Local Rule superseding Rule 56(b).

Plaintiffs' motion for summary judgment would not have been premature under *any* version of Rule 56, as it came after Defendants' Answer, but it clearly was not premature under the

operative version of the rule, which permits a motion for summary judgment "*at any time*" prior to 30 days after the close of discovery. Fed. R. Civ. P. 56(b).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). When a summary judgment motion can eliminate the need for further proceedings, it is in the interest of all litigants and the Court to reach the issues presented by the motion and avoid further time-consuming and costly litigation.

As established in Plaintiffs' opening brief, the cases of this Circuit affirming the rule that summary judgment can be granted in the absence of discovery are legion.[2] *See also Mendez v. Poitevent*, 823 F.3d 326, 336 (5th Cir. 2016) ("Rule 56 does not require that any discovery take place before summary judgment can be granted." (quoting *Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 756 (5th Cir. 2005)).

In short, the Federal Rules anticipate and permit early motions for summary judgment in appropriate cases. As demonstrated below, one area where early summary judgment motions are particularly appropriate are facial challenges to the constitutionality of statutes or regulations. It would be counter to the Rule's purpose of providing efficient and inexpensive resolution to delay

[2] *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, Dkt. #16 ("Plaintiffs MSJ"), at 9-10 (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990) (Rule 56 "does not require that any discovery take place before summary judgment can be granted"); *id.* (summary judgment appropriate when discovery "is not likely to produce the facts needed . . . to withstand [the] motion for summary judgment"); *Am. Gen. Life Ins. Co. v. Hannah*, Civ. A. No. l:12-CV-00087-GHD-DAS, 2012 LEXIS 174494, at *4 (N.D. Miss. Dec. 10, 2012) (Davidson, J.) (granting summary judgment without discovery); *Arnoult v. CL Med. SARL*, Civ. A. No. 1:14-CV-271-KS-MTP, 2015 LEXIS 125843, at *26 (S.D. Miss. Sept. 21, 2015) (Starrett, J.) (granting summary judgment prior to the close of discovery)).

ruling on Plaintiffs' motion for summary judgment to conduct lengthy and expensive discovery where it will not aid in the resolution of the issues.

B. Discovery is Not Necessary or Appropriate on a Facial Constitutional Challenge.

Because "[d]iscovery is not a prerequisite to the disposition of a motion for summary judgment," *Skiba v. Jacobs Entm't Inc.*, 587 Fed. Appx. 136, 138 (5th Cir. 2014) (per curiam) (citing *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990)), Rule 56(d) allows a "party who contends that additional discovery is required prior to summary judgment [to] file a motion for a continuance … together with an affidavit or declaration showing, for specified reasons, that []he cannot present facts essential to justify his opposition." *Id*. "The party seeking additional discovery must first demonstrate how that discovery will create a genuine issue of material fact." *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 963 (5th Cir. 2009) (internal quotation omitted). Vague assertions that discovery will reveal unspecified facts are insufficient. *See Am. Family Life Assur. Co. of Columbus v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013). The party seeking a continuance is required to "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id*. The decision to grant or deny a 56(d) motion is committed to the sound discretion of the trial court. *See Saavedra v. Murphy Oil USA, Inc.*, 930 F.2d 1104, 1107 (5th Cir. 1991).

Defendants fail their burden of showing that discovery will create a genuine issue of material fact on Plaintiffs' motion because the question at issue is the *facial* validity of the statutes at issue. Facial challenges to the constitutionality of statutes or regulations often involve pure questions of law appropriate for resolution on summary judgment. *See, e.g., Heffron v. Interna-*

tional Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

In fact, the great majority of well-known facial constitutional challenges—including many of the landmark decision of the Supreme Court this decade—have been decided without discovery. The challenge to the constitutionality of the Affordable Care Act, *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), was decided on a summary judgment motion that came only days after the district court's ruling on a motion to dismiss. *Florida v. United States HHS*, 780 F. Supp. 2d 1256, 1265 (N.D. Fla. 2011). Similarly, the challenge to the contraception mandate in the Affordable Care Act, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), was decided on an appeal from a preliminary injunction motion, without either party conducting discovery. *Id.* at 2765. Both of the Supreme Court's major Second Amendment decisions striking down municipal firearm prohibitions lacked discovery. *See District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (affirming ruling from Court of Appeal reversing district court's order granting motion to dismiss and ordering district court to enter summary judgment for plaintiff); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (reviewed a motion to dismiss, *see NRA of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009)). The Supreme Court also struck down 2 U.S.C. § 441b as facially incompatible with the First Amendment in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), without discovery on review of an order on plaintiff's motion for a preliminary injunction and a defendant's cross motion for summary judgment. *Id.* at 888. *See also Davis v. Federal Election Com'n*, 554 U.S. 724 (2008) (reaching the constitutional issue and declaring the "Millionaire's Amendment" to the Bipartisan Campaign Reform Act to be unconstitutional despite the lower court's rejection of FEC's conten-

tion that it needed substantial discovery)[3]; 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.").

This issue was addressed head on in the recent facial challenge to Section 4 of the Voting Rights Act's preclearance requirement, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). There (as here), the plaintiffs made a facial constitutional challenge to a statute and moved for summary judgment in the district court "shortly after filing its complaint." *Shelby County v. Holder*, 270 F.R.D. 16, 17 (D.D.C. 2010). Like here, the defendant "ask[ed] the Court to deny the motion as premature, or in the alternative to grant discovery pursuant to Federal Rule of Civil Procedure 56(f) [now Rule 56(d)]." *Id*. Defendants sought discovery as to the plaintiff-County's standing and the constitutionality of the Voting Rights Act. *Id*. at 18. On standing, the court found there was "no reason to doubt" the standing of a County that was covered by the jurisdiction of the preclearance requirement, and noted that the defendants could not articulate a reason why an entity subjected to Section 4's requirements would not have standing to challenge it. *Id*. As to the merits question, the court surveyed relevant precedent and ruled that discovery on the constitutionality of the statute is "unwarranted." *Id* at 19-21. In fact, the court found not only that discovery was unwarranted, but that in determining the constitutionality of the statute the court was *prohibited* from looking at material beyond that in the legislative record. *Id*. at 20 ("No authority requires or permits the Court to undertake such a massive factual inquiry, extending well beyond

[3] This is only a sampling from well-known cases in the Supreme Court. The rule nevertheless operates at all levels. *See, e.g., Allno Enterprises, Inc. v. Baltimore County, MD*, 10 Fed. Appx. 197, 203-04 (4th Cir. 2001); *Act Now to Stop War and End Racism Coalition v. District of Columbia*, 286 F.R.D. 117, 131 & n.7 (D.D.C. 2012); *National Paint & Coatings Ass'n v. City of Chicago*, 147 F.R.D. 184, 185 (N.D. Ill. 1993).

the record on which Congress relied in extending the VRA in 2006."). The court concluded by noting that "at oral argument the Court asked if any counsel — who collectively have a very broad experience — could identify a case in which the Supreme Court decided the facial constitutionality of an act of Congress based on facts unique to the specific plaintiff bringing the lawsuit. None could. Yet that is the discovery the government and defendant-intervenors seek here." *Id*. On certiorari, the Supreme Court reached the constitutional issue and abrogated Section 4's preclearance requirement despite the district court's restrictions on discovery. *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

This case is on all fours with *Shelby County*. As with the County's standing to litigate the constitutionality of the Section 4 preclearance procedure it was subjected to, Plaintiffs here are subjected to the MSOR on account of their Unnatural Intercourse convictions or convictions Defendants deem equivalents. There is "no reason to doubt" that they have standing to argue the statutes are facially invalid under *Lawrence*. Similarly, there is nothing in Plaintiffs' possession or knowledge that would illuminate the constitutionality of the MSOR's application to Unnatural Intercourse convictions, the constitutionality of the Unnatural Intercourse statute itself, or the rational basis of subjecting individuals with convictions under the Unnatural Intercourse statute (or out-of-state equivalents) to the registry where individuals with convictions under the materially-indistinguishable prostitution are not required to register. Nor would consideration of any information in the Plaintiffs' knowledge or possession be properly considered in making the constitutional determination.

Instead, Defendants assert that the Unnatural Intercourse statute is *facially* constitutional, that *Lawrence v. Texas* only prohibits certain as-applied applications of the statute, that the determination of Plaintiffs' motion for summary judgment is dependent upon whether or not the

facts of the Plaintiffs' individual convictions fall within or beyond those circumstances, and that Defendants need to discovery to make that determination. This argument puts the cart before the horse by ignoring the fact that Plaintiffs bring their motion on the *facial invalidity* theory. The facts underlying the Plaintiffs' individual convictions may be relevant if the Court determines the Unnatural Intercourse statute is facially valid and survives *Lawrence*. But that is a determination, and the discovery necessary to reach it, need only be reached if the Court denies Plaintiffs' summary judgment motion on the facial validity of the statute. If the statute is facially invalid, and does not have constitutional applications (beyond bestiality), the individual circumstances of Plaintiffs' convictions can have no bearing on the outcome of this litigation—it is enough that they are subjected to the MSOR for an Unnatural Intercourse conviction or an out-of-state crime that Defendants consider analogous.

This is true not only for Plaintiffs' claim of facial invalidity under substantive due process post-*Lawrence*, but also for Plaintiffs' claim of facial invalidity under Equal Protection. Plaintiffs' second cause of action asserts that Defendants' enforcement of the MSOR with respect to those with Unnatural Intercourse or equivalent out-of-state convictions, while not requiring registration for materially indistinguishable offenses, has no rational relationship to a legitimate governmental interest. Compl. ¶ 109. As explained in Plaintiffs' Motion for Summary Judgement, even though the Louisiana Crime Against Nature by Solicitation (CANS) and Mississippi Prostitution statutes include the *same* elements, require proof of the *same* intent, outlaws *identical* conduct, individuals charged and convicted under the two statutes are thus identically situated, Defendants require individuals with CANS convictions to register while those with prostitution convictions are excused from registration. Ps' MSJ at 22-24. The Eastern District of Louisiana ruled on this exact issue on summary judgment with no discovery, *see Doe v. Jindal*,

851 F. Supp. 2d 995 (E.D. La. 2012), and in doing so rejected the same argument Defendants advance here that the plaintiffs were required to demonstrate facts of the individual circumstances of their convictions. *Id*. at 1008 ("The defendants also urge that the plaintiffs are not similarly situated to prostitutes because they have submitted no evidence regarding the underlying circumstances of their convictions. That argument conveniently ignores that the straightforward comparison for the plaintiffs, for Equal Protection purposes, is with those convicted of solicitation of Prostitution."). The text of the statutes alone provides all that is necessary for this court to make a determination of whether a rational basis exists for Defendants to command registration for those with Louisiana CANS convictions while excusing those with identical convictions under the Mississippi Prostitution statute.

For the reasons articulated in Plaintiffs' opening brief in support of their motion for summary judgment, and below, the Mississippi Unnatural Intercourse statute was facially invalidated by *Lawrence v. Texas*, it has no constitutional applications beyond bestiality, registration under the statute had no rational basis, and as a consequence, Defendants' requirement that individuals register with the MSOR pursuant to an unconstitutional statute is itself unconstitutional.

II. Defendants Failsto Demonstrate that Certification-Related Discovery Is Necessary to Determine Plaintiffs' Motion for Class Certification.

A. The Class Certification Determination is Timely.

Class certification is appropriate at an "early practicable time" after the filing of a class action complaint. Fed. R. Civ. P. 23(c)(1)(A). While no local rule of this district mandates a specific timeframe for plaintiffs to move to certify classes, numerous other districts interpret Rule 23 to require plaintiffs to move for certification within 90 days of filing the complaint or of service, *see* N.D. Tex. L.R. 23.2 (90 days after filing); N.D. Ga. L.R. 23.1(B) (same); C.D. Cal. L.R. 23-3 (90 days after service). A plaintiff's failure to seek certification within these early

timeframes often results in waiver. *See, e.g., Harper v. American Airline, Inc.*, 2009 WL 4858050, *4 (N.D. Tex. 2009) (denying class certification motion for missing local rule's 90-day deadline); *Watson v. Schwarzenegger*, 347 Fed. Appx. 282, 284-85 (9th Cir. 2009) (affirming district court's denial of class certification motion for missing local rule's deadline).

These timeframes often result in plaintiffs moving to certify a class soon after service of process on defendants, *see* Fed. R. Civ. P. 4(m) (90 days to serve a complaint), before a defendant answers, *see* Fed. R. Civ. P. 12(a)(1)(A)(i) (21 days to file responsive pleading), or while the parties are briefing or awaiting hearing or ruling on a motion to dismiss, *see id.*, and frequently before a Rule 16 or Rule 26 conference.

In short, Rule 23's "early practicable time" requirement dictates the class certification decision happen early in the litigation process. Plaintiffs' motion for certification is timely and is not premature.[4]

B. Defendants Fail to Identify How Certification-Related Discovery Would Rebut Plaintiffs' Rule 23 Showing and Fail to Provide Arguments That Rule 23 Is Not Satisfied Here.

Defendants oppose certification and seek certification-related discovery to determine the exact nature of the individual Plaintiffs' convictions under the Unnatural Intercourse statute. Defendants' request for discovery is predicated on their contention that *Lawrence v. Texas*, 539 U.S. 558 (2003), did not facially invalidate Mississippi's Unnatural Intercourse statute but, instead, merely prevented the state from enforcing the statute in a certain subset of limited circum-

[4] Defendants' claim, based on an unpublished decision from the Western District of North Carolina (*Carver v. Velocity Exp. Corp.*, No. 1:07CV407, 2008 WL 1766629, *2 (W.D. N.C. Apr. 14, 2008), that the certification determination should wait until the close of discovery, *see* Defendants' Brief in Support of Motion for Discovery, Dkt. #26, at 9, conflicts with Rule 23 and the decisions of in virtually all districts and circuits. It even conflicts with the State's own authority—which states the correct rule—quoted on the next page of their brief. *Id.* at 10 (quoting *Bertrand v. Maram*, 495 F.3d 452, 455 (7th Cir. 2007) ("Class-action status must be granted (or denied) early . . . to clarify who will be bound by the decision.")).

stances that would only allow as-applied challenges to individual convictions. *See* Defendants' Memo In Support of Motion for Discovery, Dkt. #26, at 2-7.

Plaintiffs concede that if the Court determines that the Unnatural Intercourse statute is facially valid as to sexual activity between human beings[5] under both Substantive Due Process and Equal Protection, and that the legality of each plaintiffs' and class members' registration is dependent on the individualized circumstances of each person's conviction, typicality and commonality determination may require certification-related discovery. But if the statute is facially invalid, as Plaintiffs have alleged and contended, *see* Compl. ¶¶ 2, 4-5, 44, 102, 112, Plaintiffs' MSJ at 1, 4-5, 10-14, typicality and commonality are established virtually a priori—the Plaintiffs and class share the common question of the validity of subjecting people to the MSOR pursuant to an unconstitutional statute, and the Plaintiffs, as individual subjected to the MSOR pursuant the Unnatural Intercourse statute, would have claims typical to those of the class.

The Court should reject Defendants' attempt to define the class at an improper level of generality. If the class mechanism demanded such a strict and granular approach, it would hardly serve any function because no set of plaintiffs could share common questions. For example, if Linda Brown, a girl in the third grade at one of number of elementary schools in Topeka, Kansas, sought class certification in an action challenging a district-wide policy of racial segregation, defendants opposing certification could attempt to reduce her claim to a level of specificity that would make her appear distinct from the broader class. Those defendants could try to limit the class, for instance, to only third graders, or only students at Brown's elementary school, or only girls, or any combination of the three. This would be an improper means of evaluating the class. The proper level of generality for certification is that level at which the harm operates. *See gen-*

[5] The Unnatural Intercourse statute also prohibits bestiality. Plaintiffs do not challenge the validity of the bestiality prohibition.

erally William Rubenstein et al., NEWBERG ON CLASS ACTIONS ("NEWBERG"), § 2.6 ("Standing to litigate what? The relationship between the class representatives' claims and those of absent class members"). If all of Topeka's schools are segregated, arguing that Brown's claim should be analyzed separately from those of a sixth grade boy at another school "is to create disjuncture where none exists." *Id.*

Here, the harm operates at the level of the Unnatural Intercourse statute. There can be no debate that the MSOR requires registration for everyone convicted of an Unnatural Intercourse conviction. Miss. Code Ann. § 45-33-23(h)(xi). This requirement operates state-wide and without any consideration of the particularized circumstances of any individual conviction. Under Mississippi's registry law, the fact of an Unnatural Intercourse conviction or its purported out-of-state equivalent, with nothing else, triggers sex offender registration. Miss. Code Ann. §§ 45-33-23(h)(xi), (xxi), 45-33-25(1)(a).[6] Plaintiffs challenge the validity of the Unnatural Intercourse statute and its application through the MSOR. As with Linda Brown's allegations of district-wide harm in the above example, the proper level of generality here is the level at which the harm works—state-wide, to all convicted of Unnatural Intercourse and made it register with the MSOR. The individual circumstances of the Plaintiffs' convictions can do nothing to change this fact.

Certification related discovery is even less necessary in a challenge involving an issue of law, such as the facial validity of a statute than it is in other class certification contexts. *See, e.g.*,

[6] In fact, the *entire* MSOR operates at the level of statutes. The circumstances or narratives of individual registrants or defendants are irrelevant under the scheme the MSOR created. An individual who is convicted of or pleads guilty to rape, Miss. Code Ann. § 97-3-65, must register. Miss. Code Ann. §§ 45-33-23(h)(ii). An individual with who is indicted for the same charge on similar or even worse facts, but who accepts a plea to aggravated assault, Miss. Code. Ann. § 97-3-7(2), is not required to register. *See* Miss. Code Ann. §§ 45-33-23(h). The statute under which guilt is rendered is the *only* factor that the MSOR deems worthy of consideration.

Manual for Complex Lit. § 21.14 ("Precertification Discovery") (4th ed. 2004) ("Discovery may not be necessary, however, when claims for relief rest on readily available and undisputed facts or raise only issues of law (such a challenge to the legality of a statute or regulation)."); NEWBERG § 7.16 ("When certification-related discovery is necessary") (identifying "Legal disputes" as one of "two key circumstances" where certification-related discovery is likely to be unnecessary). Such is the case here.

Defendants fail to provide any particularity regarding what information they would seek in certification-related discovery that would be necessary to oppose Plaintiffs' motion, and therefore fail to meet their burden of showing certification-related discovery is necessary. It is difficult to even conceive what this information might be.

In the normal course, requests for certification-related discovery are made by plaintiffs, who seek to develop facts related to the number of people subjected to a certain wage and hour policy, for instance, or the nature of putative class members' harms (a gender pay differential, for instance) to determine whether a question is common and the individual plaintiffs' claims are typical. Here, too, Defendants have better access to the information relevant to the Rule 23 factors than the individual Plaintiffs do.

As to numerosity, it is Defendants who subject individuals with Unnatural Intercourse convictions to the MSOR and collects their information, not Plaintiffs. Plaintiffs only estimated the scope of the class by combing the state's own publicly-accessible database, which itself is opaque in ways that would lead to Defendants having far better access to determine (or contest) the size of the putative class currently registered for Unnatural Intercourse or convictions the state deems to be equivalent. The scope of the class of people who could be subjected to such unlawful registration in the future is a function of publicly-accessible Census information com-

bined with the number of people with Crimes Against Nature by Solicitation convictions in Louisiana. Defendants' counsel have access to this information without certification-related discovery the same way that Plaintiffs' counsel did. The individual Plaintiffs will certainly be unable to enlighten Defendants on the scope of its own registration scheme.

The commonality and typicality determinations return to the question of the level of generality to define the class. If, as Plaintiffs advocate, the class includes all people subjected to the MSOR for non-bestiality Unnatural Intercourse convictions or crimes Defendants consider to be out-of-state equivalents, there is little certification-related discovery can offer. Plaintiffs are each subjected to the MSOR for non-bestiality Unnatural Intercourse convictions or a crime Defendants consider to be an out-of-state equivalent to Unnatural Intercourse.

The Plaintiffs and class members naturally share a common question of law—is the operation of the MSOR on the basis of an Unnatural Intercourse conviction constitutional? This test "is not demanding." *James v. City of Dallas, Tex.*, 254 F.3d 551, 570 (5th Cir. 2001). As Plaintiffs noted in their opening brief, 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.) (emphasis added).

The same holds for typicality. Typicality "focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of [the class]." *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)). Like commonality, test for typicality "is not demanding," *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620 (5th Cir. 1999) 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 v. Perry*, 675 F.3d 832 (5th Cir. 2012) 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.* The legal and remedial theories of the individual Plaintiffs and those of the class are identical, and those theories are readily apparent from the Complaint and Plaintiffs' existing motion. There is nothing that certification-related discovery could offer that could illuminate this question in any meaningful way.

Defendants also fail to offer any theory of potential conflict between the individual Plaintiffs and the class that could undermine adequacy here. 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). Such conflicts typically arise in circumstances where the individual plaintiffs and the class members seek different types of relief, *see Tefel v. Rent*, 972 F. Supp. 608, 617 (S.D. Fla. 1997) ("Where the named plaintiffs in a class action are seeking the same type of relief for themselves as they seek for class members, the adequacy of representation requirement … is satisfied."), or are affected by the alleged wrongdoing in "dramatically different ways." *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 315 (5th Cir. 2007). Here, all of the Plaintiffs seek identical relief and are affected by the unconstitutional scheme in identical ways vis-à-vis Defendants: they are made to register with the MSOR and undergo all of the restrictions on their liberty that registration entails. Neither Defendants' opposition to class certification nor

their motion for discovery even hypothesize such potential conflicts in this action, or what certification-related discovery it believes it needs to satisfy itself that no conflicts exist here.

Plaintiffs' certification motion can and should be decided on the law, the pleadings, and Plaintiffs' motion itself. Defendants have offered no justification for certification-related discovery and, as shown above, there is nothing such discovery could offer. Since Defendants fail to oppose Plaintiffs' motion on any grounds other than a request for discovery, Plaintiffs' motion should be granted for the reasons stated in Plaintiffs' opening brief.

C. The Plaintiffs' Article III Standing Is Not At Issue on a Class Certification Motion.

Defendants contention that it requires certification-related discovery to determine the standing of the individual Plaintiffs and the putative class, Memo in Support of Motion for Discovery and Entry of a Scheduling Order, Dkt. #26, at 10, reveals a misunderstanding of the nature of a class certification motion.

The question of a plaintiff's standing to maintain an action is a question of jurisdiction that operates separate and apart from the named plaintiff's "standing" to represent the class. The concept of Article III standing and the Rule 23(a) criteria "are in fact independent criteria. They spring from different sources and serve different functions." NEWBERG § 2.6 ("Standing to litigate what? The relationship between the class representatives' claims and those of absent class members"). If a defendant believes an individual plaintiff lacks standing to maintain an action, the proper procedure is to move to dismiss the complaint or obtain summary judgment, not to oppose class certification. Similarly, if the Court believes an individual plaintiff lacks Article II standing, "the proper procedure … is to dismiss the complaint, not to deny class certification" *Id.* The relationship between Article III standing and the plaintiff's representative capacity under

Rule 23 "is that the injury that a plaintiff suffers [under Article III] defines the scope of the controversy that she is entitled to litigate." *Id*.

Here, the individual Plaintiffs' injuries (and the class members' injuries) is mandatory registration under the MSOR and the crushing consequent disabilities that it imposes. While the Plaintiffs' underlying convictions and the fact of registration *themselves* prove the Plaintiffs' injuries here, any question regarding their Article III standing is properly addressed on the Plaintiffs' motion for summary judgment, not class certification. Instead, the "standing" inquiry for the individual Plaintiffs on the certification involves application of Rule 23—the commonality, typicality, and adequacy considerations addressed above. As a result, no discovery related to the standing of the Plaintiffs is necessary to determine the class certification motion.

Defendants' contention they need to address the standing of the *class members* misses the mark even further. The nature of a class action itself is that the individual plaintiffs stand in for the absent class members; class members need not come forward with evidence of their own injuries. "Indeed, if class members other than the named plaintiffs were required to submit evidence of their standing, then the core function of class actions, wherein named plaintiffs represent a passive group of class members, would be significantly compromised." NEWBERG, § 2.3 ("Individual standing of class representatives as prerequisite; individual standing of absent class members not measured").

Further, because the class is defined as individual subjected the MSOR for Unnatural Intercourse convictions or convictions Defendants deem are equivalents, the absent class members' registration injuries are already a necessary factor in class inclusion. Because inclusion in the class is predicated on this injury, Article III standing for the absent class members operates automatically.

D. Plaintiffs Ask the Court to Certify the Class Before or Simultaneously with Granting Summary Judgment.

Defendants contend that "if the Court were to rule on any of the legal issues presented by the Plaintiffs' motions prior to deciding whether to certify the class, such a ruling would not be binding on the absent class members, who could refile and reallege the same or similar claims against Defendants in another forum." Defendants' Brief in Support of Motion for Discovery, Dkt. #26, at 9-10. While that is the case in the general course, that is not necessarily the case on a facial challenge. If even a single plaintiff obtains a ruling that a statute is facially unconstitutional, the benefits of any such ruling should naturally inure to all affected by the statute. For instance, when Edith Windsor obtained a ruling that the Defense of Marriage Act was facially unconstitutional, *United States v. Windsor*, 133 S. Ct. 2675 (2013), the result was not simply that the federal government recognized Edith Windsor's marriage and adjusted her tax burden accordingly. It resulted in the federal government recognizing all same sex marriages from states that recognized such marriages. Similarly, when the Court struck down Section 4 of the Voting Rights Act, *Shelby County*, 133 S. Ct. 2612, the result was not that Shelby County, Alabama, alone escaped the Voting Rights Act's preclearance requirement—all covered jurisdictions did. A ruling by this Court that the Unnatural Intercourse statute is unconstitutional should result in all prospective class members being removed from the registry even absent class certification. While the ruling would arguably not be "binding" on Defendants with regard to nonparties in the most technical sense (they could not bring a motion to enforce the judgment, for instance), any continued enforcement of a scheme or statute that this Court held is facially unconstitutional would expose Defendants to a multiplicity of damages actions, at the very least.

So Defendants are incorrect to assert that "if the Court were to deny Plaintiffs' motion for class certification, it would streamline this case, leaving only the 'as applied' challenges of each

of the named Plaintiffs ripe for resolution." Defendants' Brief in Support of Motion for Discovery, Dkt. #26, at 10. Plaintiffs' facial challenge to the statute exists regardless of the outcome of the certification decision, and a favorable ruling can and should run to all members of the class even without certification.

Nevertheless, Plaintiffs' brief in support of their motion for class certification was clear that Plaintiffs seek certification prior to, or contemporaneously with, obtaining summary judgment.[7] Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, Dkt. #21, at 20-21. Certification prior to, or contemporarily with, summary judgment will allow Plaintiffs and Plaintiffs' counsel to oversee the process of enforcing the judgment as to each individual unconstitutionally subjected to Defendants' unconstitutional registration scheme. In this sense, Plaintiffs seek certification as a belt and suspenders approach to ensure that the harms of Defendants' unconstitutional enforcement of the Unnatural Intercourse statute and the related registration scheme are remedied for all whose constitutional rights have been violated by it. Even if the Court were to deny Plaintiffs' motion for summary judgment at this time, certification could facilitate settlement discussions, guide any discovery process, and prevent Defendants from seeking to moot this action by removing the individual Plaintiffs from the unconstitutional registration requirement while leaving the remaining prospective class members without relief.

[7] *See Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1032 (9th Cir. 2012) ("Simultaneously filing motions for summary judgment and class certification is certainly acceptable"); *Hunt v. Imperial Merchant Services, Inc.*, 560 F.3d 1137, 1139 (9th Cir. 2009) (affirming opinion where court granted class certification and summary judgment on same day); *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 352-53 (E.D.N.Y. 2011) (considering summary judgment and class certification motions brought simultaneously); *Cuzco v. Orion Builders, Inc.*, 262 F.R.D. 325, 327 (S.D.N.Y. 2009) (granting in part simultaneous class certification and summary judgment motions); *Vega v. Credit Bureau Enterprises*, 2005 WL 711657, *10 (E.D.N.Y. 2005) (granting simultaneous motions for class certification and summary judgment).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion for discovery.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Ghita Schwarz, Counsel for Plaintiffs, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

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